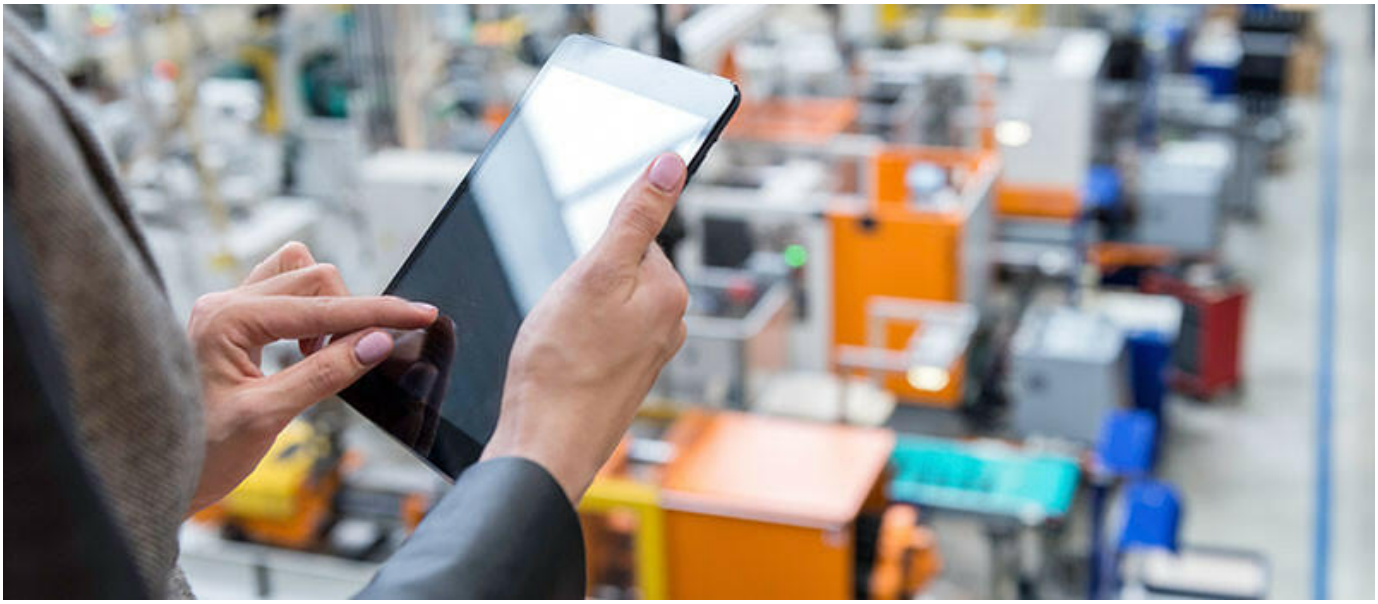
VAT groups with EU branches

Indirect Tax



24 May 2023

The CIOT is a member of the CFE Tax Advisers Europe, an association of European tax advisers with members from 26 European countries. Through this membership, the CIOT is able to input on European Commission consultations and contribute to pro-active submissions on VAT.

The CFE (taxadviserseurope.org) published and submitted its Opinion Statement on VAT groups (tinyurl.com/y7bev7rj) to the EU Institutions on 23 March, with the request that it would be helpful to have further guidance from the EC's VAT Committee on a number of areas in respect of VAT groups and supplies to overseas branches in other member states.

The document provides an in-depth technical look at the background from case law and the arising VAT issues for VAT groups with branches in other member states and includes commentary on the UK position. The Opinion Statement considers the key decisions of the Court of Justice of the European Union (CJEU) on this topic. These are *Skandia America Corp (USA)* (Case C-17/13), *Danske Bank* (Case C-812/149) and *FCE Bank plc*. (Case C-210/04).

Establishment only approach

In *Danske Bank*, the bank head office was established in Denmark, where the tax authorities only allow fixed establishments located in Denmark to join a VAT group; hence, termed the 'establishment only' approach. This meant that the bank's Swedish branch could not join and was considered a distinct entity from the Danish VAT group. Further, the Danish authorities deemed that VAT was due in Sweden on the supplies made by the head office to its branch.

In reaching its decision, the CJEU considered the extent that a tax authority in one member state must consider the rules relating to VAT groups in other member states. The conclusion was that these should be taken into account 'where appropriate'. Thus, the CJEU took into consideration the territorial boundaries applicable to the Danish VAT groups imposed by Danish law, which effectively meant the Swedish branch could not be considered to form part of the VAT group.

Whole entity approach

In *FCE Bank plc*, the CJEU found that no VAT was due on the supplies of services from the UK head office to its Italian branch, as the head office and the branch were not performing independent economic activities and the bank as a whole bore the risks and costs of the business; hence, termed the 'whole entity' approach.

The UK also supports the whole entity approach, as confirmed by VAT Act 1994 s 42A and Revenue & Customs Brief (RCB) 18/2015 (tinyurl.com/2e2buc22). This RCB sets out HMRC's position following the decision in Skand*ia*, which was that a whole entity approach applied unless the branch in another member state was in a VAT group with a local associated business. UK head offices or UK branches can still benefit from the *FCE Bank plc* judgment.

The CFE statement also raises the point that as the UK has left the EU, it is free to apply the whole entity approach to all member states should it wish to, as it no longer has to consider rules adopted in member states, suggesting that HMRC's guidance requires some updating.

It should be noted that the above two approaches may not be the only scenarios; some member states still do not allow VAT grouping or only have basic VAT grouping rules. The local VAT grouping rules may have also changed since HMRC published its

list in RCB 18/2015.

Conclusion

Any changes to the rules on VAT groups operating with cross-border branches would require legislative action by the Commission. The CFE calls for the EC to develop the concept of EU-wide VAT groupings, as the current establishment-only approach discourages the provision of cross-border services between the head office and local branches.

As noted in the CFE's Opinion Statement, HMRC's guidance will also require updating and the CIOT will take this forward with HMRC.

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