

UPDATE

Foreign establishments soon to be excluded from Dutch VAT groups

Supplies between a head office and a fixed establishment are disregarded for the purpose of VAT. These establishments constitute a single taxable person for VAT. The Skandia America Corporation (hereafter referred to as: 'Skandia') and the Danske Bank judgement from the European Court (ECJ) of Justice caused quite a stir in the Dutch practice regarding the Dutch VAT group, in which foreign branches can be included in the VAT group as well. The Dutch State Secretary recently took the position that this is no longer possible. In this update we discuss the Skandia case, the Danske Bank case and the former Dutch view on Dutch cross-border VAT grouping.

European Court of Justice Skandia America Corporation

An important judgment regarding the relationship between a head office and a branch is the Skandia judgment. This case involved a head office located in the United States that provided services to its fixed establishment in Sweden that was part of a VAT group in Sweden. In this judgment, the ECJ ruled that services provided by the head office established in the United States to the Swedish fixed establishment (part of a VAT group in Sweden) constituted taxable supplies. Although the U.S. head office and the fixed establishment are part of one legal entity, there are two separate taxable persons for VAT. In fact, the Swedish VAT group is considered a different taxable person from the head office in the United States.

Dutch practice after Skandia

It follows from case law of the Dutch Supreme Court from 2002 that services between a foreign head office and a Dutch fixed establishment are not taxable in the Netherlands. This is because a foreign head office can be included in a Dutch VAT group. Supplies between members of the VAT group are

disregarded for VAT purposes. With the judgment in the Skandia case, the ECJ seems to be diametrically opposed to the reasoning of the Dutch Supreme Court. However, it should be borne in mind that the ECJ did not rule on the question of whether a foreign head office can be included in a VAT group. In Sweden a foreign head office could not be part of a Swedish VAT group.

For this reason, the Dutch State Secretary indicated in 2020 in the Decree 'Vaste inrichting' ('fixed establishment') that the Skandia judgment does not change anything to the Dutch VAT grouping practice.

European Court of Justice – Danske Bank

After the Danske Bank case, the question arose whether a service provided between a head office and a fixed establishment is subject to VAT if not the fixed establishment, but the head office is part of a VAT group. This question was presented to the ECJ in the Danske Bank case, which is also referred to as the 'reverse-Skandia case'.

The Danske Bank case involved a bank with a head office in Denmark that was part of a VAT group in Denmark. The head office incurred costs for an IT platform to manage its operations in different EU member states, including Sweden. The Swedish fixed establishment was not part of the VAT group. The question presented to the ECJ was whether the Swedish fixed establishment should be regarded as a separate taxable person as the Danish head office was part of a Danish VAT group. The ECJ ruled that the services provided by the Danish head office (part of a VAT group in Denmark) to its fixed establishment in Sweden constituted taxable supplies. A head office that is part of a VAT group constitutes one taxable person for VAT together with the other parts of that VAT group. If a foreign fixed establishment cannot be part of the VAT group because the VAT group is territorial restricted, this fixed establishment will be regarded as a separate taxable person. According to the ECJ, it does not matter whether the head office is located outside the EU, as was the situation in the Skandia case, or within the EU. Nor is it relevant whether the costs are external, as was the situation in the Skandia case, or internal.

Dutch practice after Danske Bank

After the Skandia and the Danske Bank case, several EU member states changed their view on cross-border VAT grouping. After the Danske Bank case, the agonising wait for an answer from the Dutch State Secretary came. And in July 2022 that answer was provided. According to the Dutch State Secretary, it follows from the Skandia case and the Danske Bank case that VAT grouping is territorially restricted. As a result, foreign establishments can no longer be included in a Dutch VAT group as of **January 1 2024**. At least we have some clarity now.

In our opinion the Dutch State Secretary is not forced to change the Dutch practice as described above as a result of the Skandia and Danske Bank case. We read the case law of the ECJ as a decision on a factual situation. In our opinion the ECJ ruled on the basis of the situation as presented to it. In our view, the ECJ has not ruled that a fixed establishment cannot be included in a VAT group. Therefore, it cannot be concluded from the judgements that the concept of VAT grouping is territorially restricted and that the Dutch practice therefore needs to be adjusted.

Anticipating on this major change to the Dutch VAT grouping regime as of 1 January 2024 we recommend you to already identify the way in which services are purchased and charged within the company and the possible VAT consequences of the change. It may be possible to modify your group structure to create a more beneficial VAT treatment, for example by having services purchased directly by the head office or by having services purchased partly by the head office and partly by the fixed establishment.

More information?

For more information, please contact one of our advisors.



Hendy van Hoof
Director Tax & Legal
E hendy.van.hoof@bdo.nl
T +31 (0)20 543 21 71



Ingmar Benschop
Senior Consultant Tax
E ingmar.benschop@bdo.nl
T +31 (0)20 363 43 30

Although this publication has been prepared and put together with due care, its wording is broad and the information contained in it is general in nature only. This publication does not offer recommendations for concrete situations. Readers are explicitly discouraged from acting, not acting or making decisions based on the information contained in this publication without having consulted an expert. For an advice geared to your specific situation, please contact BDO Accountancy, Tax & Legal B.V. or one of its advisers. BDO Accountancy, Tax & Legal B.V., its

affiliated parties and its advisers do not accept liability for any damages resulting from actions undertaken or not undertaken, or decisions made on the basis of the information contained in this publication.

BDO is a registered trademark owned by Stichting BDO, a foundation established under Dutch law, having its registered office in Amsterdam (The Netherlands).

In this publication 'BDO' is used to indicate the organisation which provides professional services in the field of accountancy, tax and advisory under the name 'BDO'.

BDO Accountancy, Tax & Legal B.V. also acts under the trade names: BDO Accountants, BDO Accountants & Belastingadviseurs, BDO Belastingadviseurs, BDO Global Outsourcing, BDO IT Audit & Security, BDO IT Security, BDO International Tax Services, BDO Outsourcing, BDO Retail

Accounting, BDO Tax, BDO Tax Consultants, BDO Tax & Legal, BDO Legal, IT Risk Assurance. BDO Accountancy, Tax & Legal B.V. is a member of BDO International Ltd, a UK company limited by guarantee, and forms part of the worldwide network of independent legal entities, each of which provides professional services under the name 'BDO'.

BDO is the brand name for the BDO network and for each of the BDO Member Firms.