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FS VAT Briefing

8 September 2011

Agenda

New business models

- VAT (& related transfer pricing) challenges

VAT update

- Important case law developments
- EU developments
- Implementing regulations and impact on cross border supplies
- Proposed directive & regulations

Strategic issues facing the FS sector



Legal and operational structure

- Head office location
- Holding structure
- Booking location
- Branch v subsidiary
- Service model

Key Drivers of Change

- Regulation/Risk
- Capital
- Tax
- Cost reduction

Head office location/holding structure

Pressure on “havens”

Move to onshore locations

Regulatory developments:

- AIFMD
- Solvency II

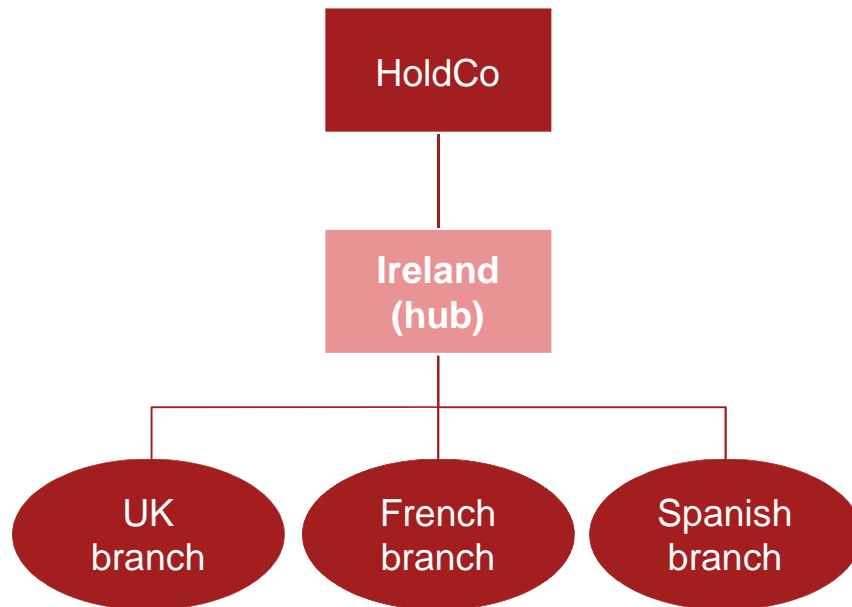
Booking location

- Bank levy a key driver
- Significant cost
- Non-EU headquartered banks
- Opportunity for Ireland

Branch vs subsidiary / entity reduction

- Key theme
- Regulatory developments
 - Solvency II
 - UCITS IV
- Capital efficiency
- Cost reduction

Moving to a branch structure – issues on conversion



Moving to a branch structure:

1. Run off existing subsidiary and renew business in branch
2. Portfolio transfer of business
3. Cross-border merger

Organising staff and services:

1. Move into the branch
2. Move into a local service entity
3. Move into the hub
4. Centralise in a shared service entity

The principal VAT challenges

VAT aspects of the restructuring

The risk = a VAT liability arising on any of the steps/transactions

One step back




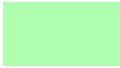
How to bridge the gap “Business 2011 – VAT 1977” ?

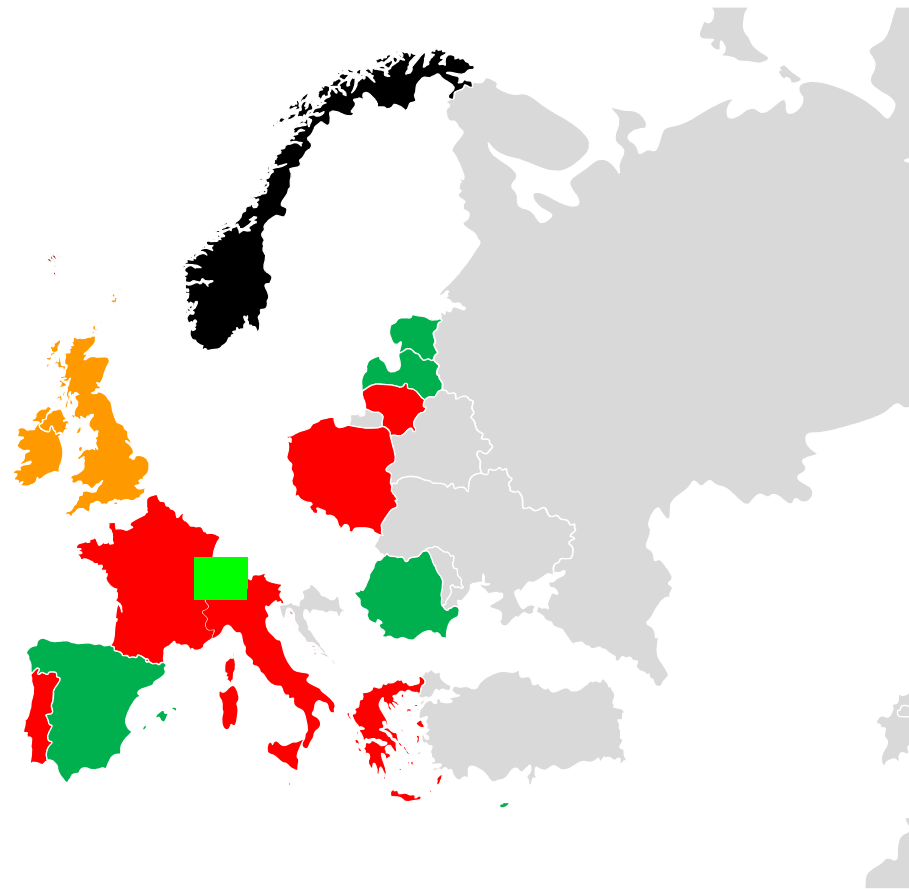
One Single Market but still 27 different VAT interpretations

Politics: Modernizing the EU VAT regime ruled by small member states

VAT grouping – under challenge

VAT Grouping - June 2011

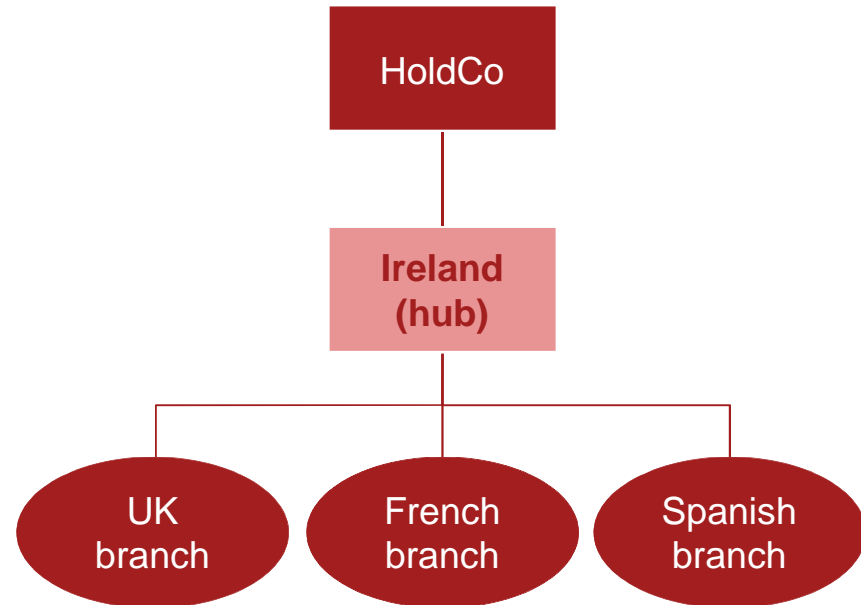
-  VAT Grouping
-  No VAT Grouping
-  VAT Grouping + Infringement
-  Non-EU with VAT Grouping



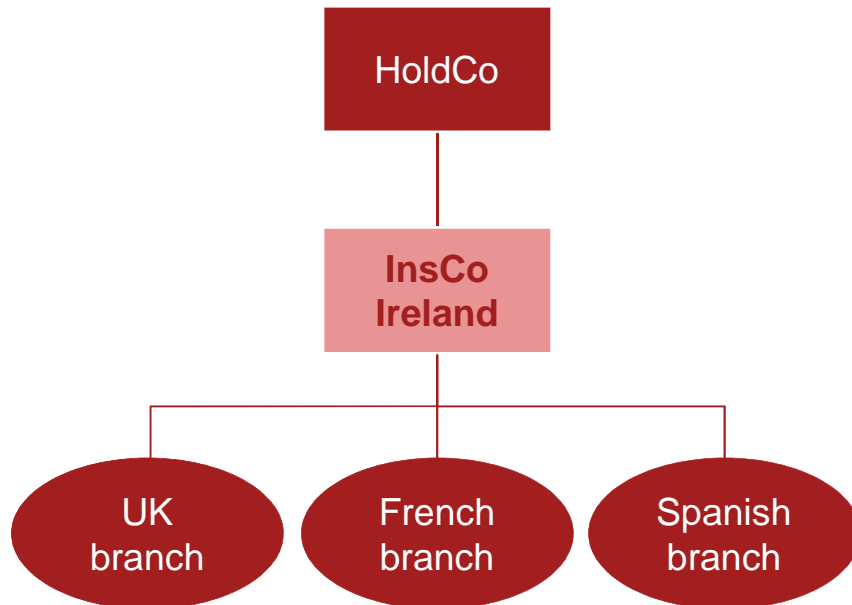
The principal VAT challenges

VAT aspects of the restructuring – where to start

- How to minimize VAT on intra-group transactions & services?
- No one size fits all! Strict, structured & step-by-step approach
 - Is there a supply and where does it take place?
 - Availability of Transfer of Business relief?
 - VAT Grouping
 - Country specific exemptions or reliefs?
- Every step should be assessed locally & carefully
- Inevitably a combination of 1 – 4 will arise



Moving to a branch structure- transfer of a portfolio



- “Swiss Re” ECJ case – but
- Is there a supply (e.g. payment made by transferor) and where does it take place?
- Availability of Transfer of Business relief?
- VAT Grouping – intra group transaction
- Country specific exemptions or reliefs?

Centralised functions – operating models

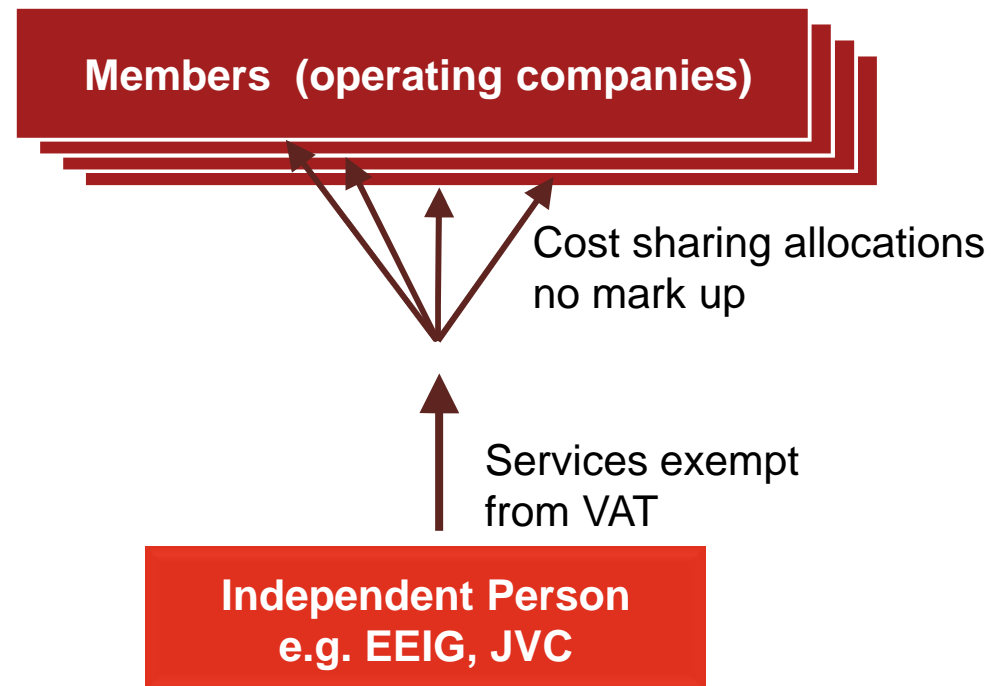


The key VAT challenges

Potential VAT liabilities on cross-charges

- How to assess the services by the SSC
 - One composite supply? Or separate services?
- Inconsistencies across the EU
 - Back office admin, lead-generation, claims handling
- X-Border compliance issues
- Limitations to the grouping relief
- Structured solutions
- HO/branch scenarios; Societas Europaea (SE); X-Border VAT grouping
- Cost sharing exemption; EEIG

Cost sharing exemption



Transfer Pricing Considerations On & Post Restructuring

Current Environment

Increased interest in TP from

- Tax authorities
- Regulators
- Non-executive directors

Driven by

- Tough economic climate/protectionism
- Regulatory change – focus on risk management

Recent OECD developments

- Business restructuring
- Attribution of profit to PEs

Business Restructuring Generally

“the cross-border redeployment... of functions, assets and/or risks”

(OECD)

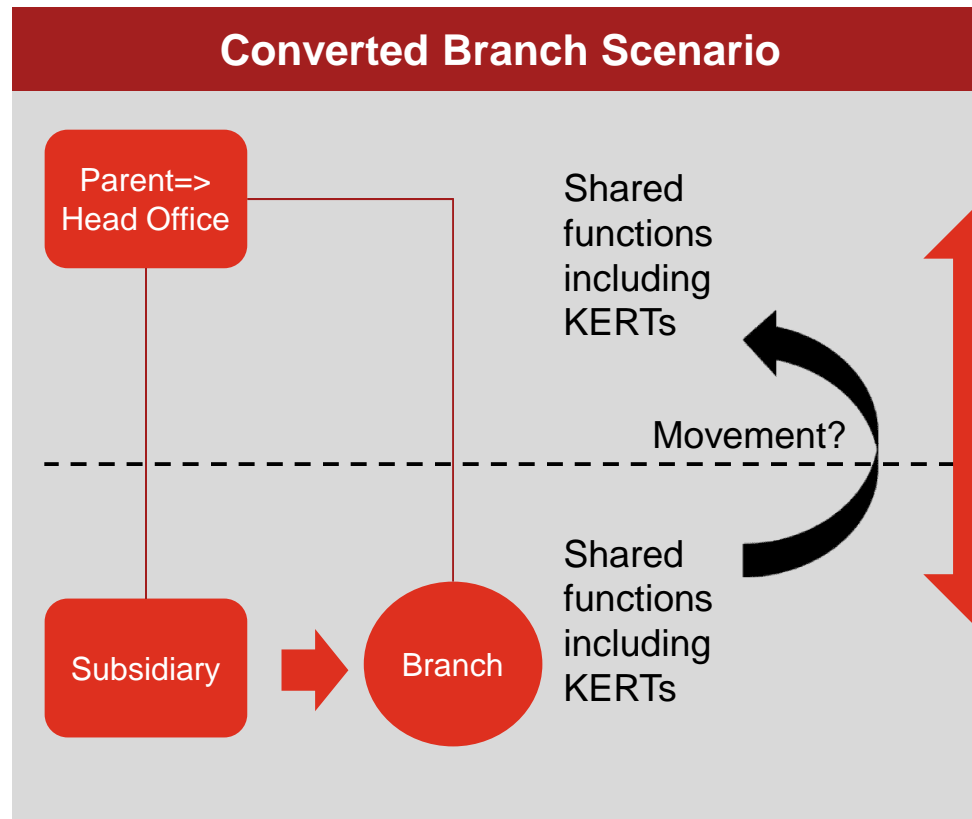
For example

- Centralising functions offshore
- Expanding into developing countries
- Legal entity rationalisation

Key considerations

- Transferring something of value?
- Termination/substantial renegotiation of contractual arrangements?
 - Would independents require compensation (or indemnification) in similar circumstances?
 - Arm's length compensation?
 - VAT & other tax implications?

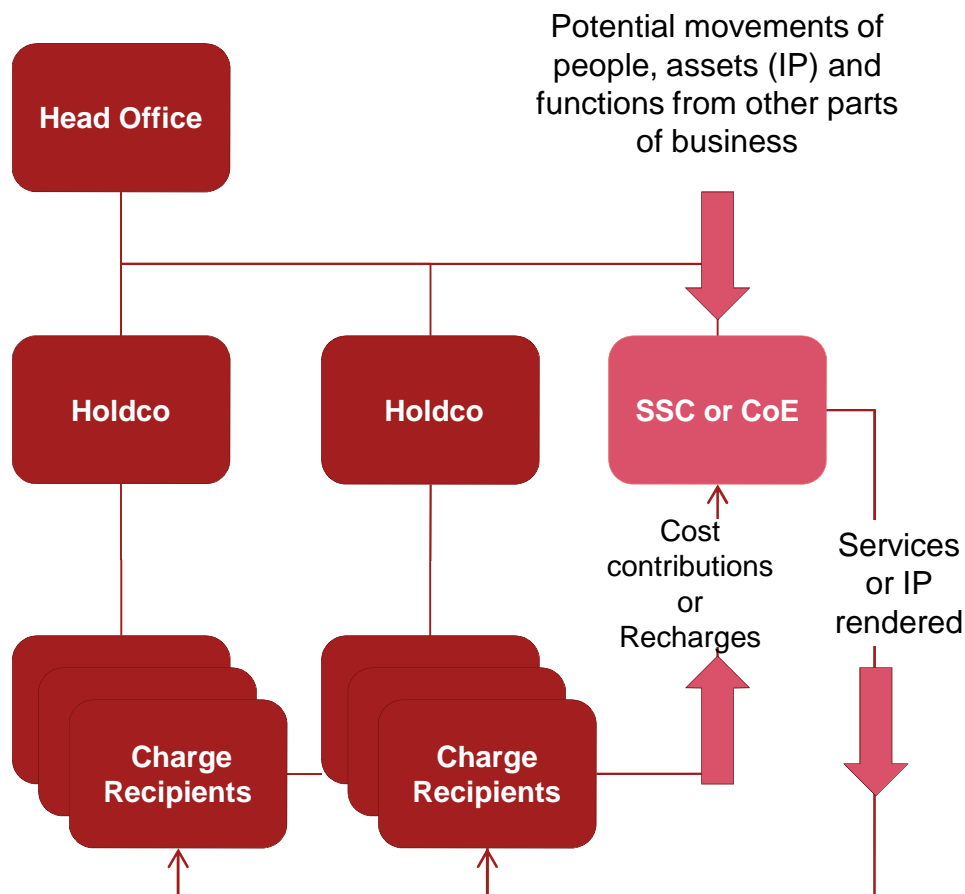
Business Restructuring: profit allocation



Key Considerations

1. Functional analysis no longer follows the **legal form**
2. Could lead to **different results** for branch performing same functions as sub
3. Moving taxable profits via conversion difficult without **clear movement of KERTs**
4. Impact of **regulatory change** on attribution of investment assets/income?
5. Increased focus by **tax authorities** on branch model
6. VAT implications

Centralised business functions



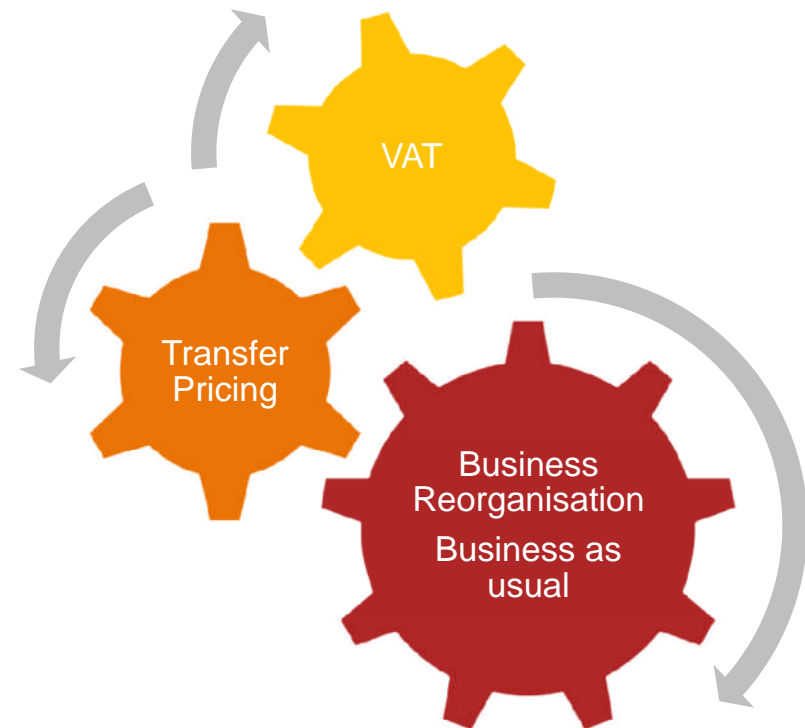
Key Considerations

- Determine what will be moved into the SSC and from where (high value v routine?)
- Consider post restructuring position – interplay with existing TP policies
- Ensure a consistent position between VAT and TP treatment of charges (including documentation)

Closing thoughts

- Significant regulatory change
- Economic climate/protectionism
- New markets/cost reduction
- Impact business models/structures
- Impact on TP models
- Opportunity to review TP model at structural level

VAT & TP go hand in hand



Council Implementing Regulation EU Financial Services review

Council regulation

- Council Regulation (amending Directive 2006/112/EC)
- Last Council Regulation 1777/2005 adopted a number of non-binding guidelines agreed by the VAT committee (1977-2003) which provided legal certainty.
- Regulation updated to take the recast Sixth Directive into account together with a number of other VAT Committee guidelines that have issued over the last number of years. (Effective from 1 July 2011)

Council regulation– what's it all about?

Regulation necessary to ensure uniform application of specific aspects of Directive 2006/112/EC in particular in respect of :

- Taxable persons
- Supplies of goods and services
- Place of taxable transactions
- Binding on all Member States which should ensure uniformity of treatment

Today's focus

- Establishments making/receiving supplies
- Fixed Establishments
- Article 192 (a) - Intervention

Concepts

- “Established”
 - place where essential decisions concerning the general management of the business are adopted and
 - where the functions of its central admin are carried out
- Factors which “shall” be considered in determining the above:
 - Registered office?
 - Business’ central admin?
 - Business management meets?
 - General policy determined?

Concepts

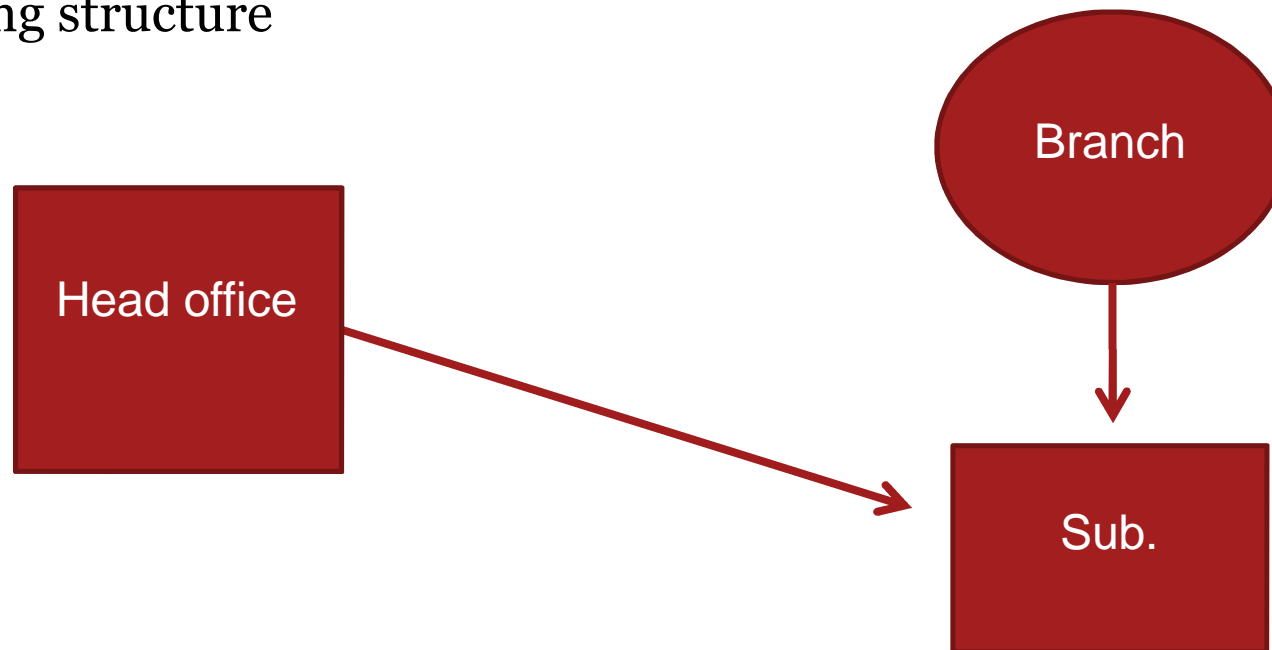
- Factors which “may” be considered
 - Where do the managers reside?
 - Where are general meetings held?
 - Where are admin/accounting docs held?
 - Where are the main bank accounts held?
 - Any other relevant factors?
- Mere postal address not enough
- May differ from the place which the activities of the taxable person are carried out.

***“Fixed Establishment (“FE”)*”**

- Any establishment of a minimum size with sufficient human and technical resources permanently present to enable it to either:
 - Receive/make use of services
 - Provide the services it supplies
- “Permanent address” and “usually resides” are also defined

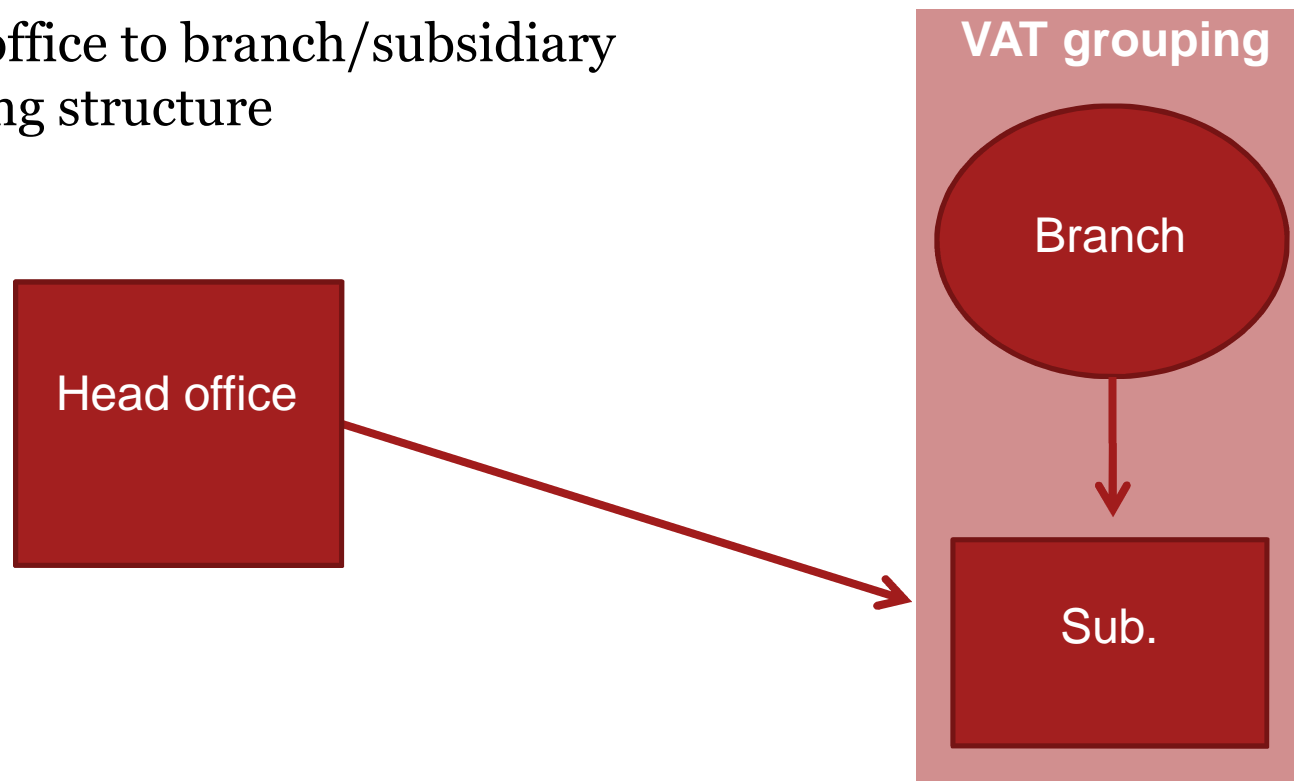
Article 192(a) - Intervention

Head office to branch/subsidiary
charging structure



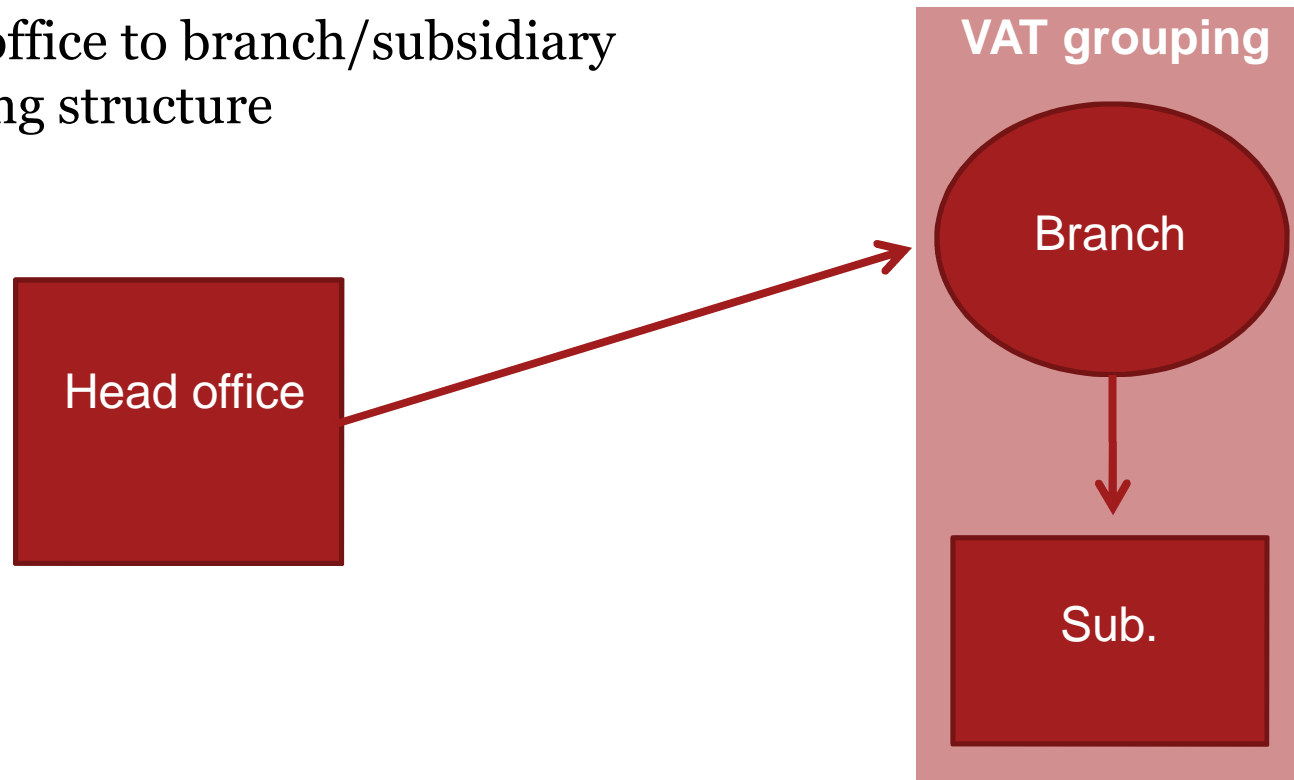
Article 192(a) - Intervention

Head office to branch/subsidiary
charging structure



Article 192(a) - Intervention

Head office to branch/subsidiary
charging structure



If branch doesn't intervene in the supply then the subsidiary has a potential reverse charge obligation

Article 192(a) – Intervention

- Article 192(a) deems an establishment of a supplier within a Member State not to be so established for VAT purposes where he (the supplier) makes a supply within that member State and the fixed establishment in that Member State does not intervene in that supply.
- A fixed establishment of a supplier in a Member State shall not be deemed to intervene in a supply unless the technical and human resources of that fixed establishment are used by the supplier to fulfil the supply.
- Where the resources of the fixed establishment are used only for administrative support tasks such as accounting, invoicing and collection of debt claims, they shall not be regarded as intervening. This is particularly important in the context of head office/branch/subsidiary cross-charging structures.

EU review of financial & insurance services

- Draft Directive and Regulation issued in November 2007
- Several iterations since then but no agreement reached yet
- Objective is to increase certainty for financial services providers and national tax administrations and to reduce the impact of hidden VAT in the costs of financial services providers

4 main areas remain unresolved:

- Transfers of insurance and reinsurance contracts;
- Investment funds;
- Outsourcing;
- Derivatives.

EU review of financial & insurance services

Some good and some not so good news in the latest proposals:

Good news

- Wide variety of funds (including pension funds) qualifying for exemption
- Credit rating services (Scope??)

Not so good news

- Claims settlement and collection of insurance premiums not exempt (in an outsourcing context)
- Oversight of funds by depositaries

Case law update for the financial services sector

European Court of Justice

- (J) AXA (C-175/09) 28 October 2010
- (J) T-Mobile (C-276/09) 2 December 2010
- (J) Weald Leasing (C-103/09) 22 December 2010
- (J) RBS (C-277/09) 22 December 2010
- (J) SEB (C-540/09) 10 March 2011
- (J) Nordea (C-350/10) 28 July 2011
- (O) GFKL (C-93/10) 14 July 2011

(J) Skandinaviska Enskilda Banken

- Underwriting a share issue
- Express exemption in Ireland and the UK
- Transactions in securities = exempt
- Irish submission – single exempt service including advisory and marketing services
- What if fully subscribed?
- Liable to create, alter or extinguish parties' rights and obligations in respect of securities
- Fiscal neutrality = exempt

Nordea Pankki Suomi Oyj (Swift services)

- SWIFT only responsible for proper transmission of financial messages
- No access to content of messages
- Given rise to changes of a legal and financial character?
- Extends to specific, essential aspects of the financial transactions?
- Merely technical aspects ≠ exempt

GFKL Financial Services AG (opinion)

- Sale of non-performing loans by bank
- Received €8m – face value €15.5m
- Does purchaser supply a service to the vendor?
- Must be more than a mere transfer of debts

GFKL Financial Services AG (cont.)

- “...Bank is receiving an advantage going beyond the payment of a price that reflects the current value of the debts. In other words, it is buying a service from GFKL and GFKL is providing such a service to the Bank”
- However “... GFKL is simply paying the market value of the portfolio and is not receiving any remuneration for its services”
- “ ...the profit made from speculating on defaulted debts should not constitute direct consideration for the inherent debt collection services”
- No supply by the purchaser for VAT purposes

GFKL Financial Services AG (cont.)

However if there is a supply of services for consideration...

- Debt collection – not exempt
- Single supply (not separate supply of credit)
- Consideration = actual margin made by the purchaser
- Consideration may be accrued over a period of time
- Judgement of the court awaited
- Conclusion- careful review of any transfer debts essential

ECJ referrals

Deutsche Bank AG (C-44/11)

- Discretionary portfolio management for individual investors

Wheels Common Investment Fund Trustees Ltd (& others)

- Management of occupational person schemes (DB) and common investment funds (pooled assets of OPS's)
- Definition of “special investment funds”

Gfbk Gesellschaft für Borsenkommunikation mbH (C-275/11)

- Management of ‘special investment funds’

ECJ referrals

DTZ Zadelhof vof (C-259/11)

- Estate agent negotiating the sale of shares in a property company

France

- Pro-rata deduction for Bank until foreign branches (EU and non-EU)

UK Tribunal case

Reed Employment Ltd

- Taxable amount for employment agency

CGI Group (Europe) Ltd

- Joint contracts of employment

Joiner Cummings

- Estate agent negotiation sale of units in a property unit trust (based in Jersey)

Paymex Ltd

- Negotiating and supervising settlement of debt (IVA's)

In conclusion . . .

- The importance of planning and not reacting
- The link between Transfer Pricing and VAT
- A lot happening in VAT at EU/ECJ level
- New rules for MNE's- location where services are supplied to and from
- Head office / branch structures and the interaction with grouping rules

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Thank you