

Financial Services VAT Alert*

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France

1. Monthly VAT recovery under French President's measures to boost the French economy

Businesses in a net repayment position should shortly obtain monthly VAT repayments, rather than quarterly.

The French President announced in a speech on 4 December 2008, a series of measures to boost the French economy and more specifically, measures regarding tax regulations.

Should these measures be implemented, French businesses (including banks and other financial institutions) will have the opportunity to recover excess VAT credits on a monthly basis with effect from 1 January 2009 (currently a refund can only be claimed on a quarterly basis and if the condition that the business would have been in credit for each month of the quarter is met).

A decree should be issued shortly and followed by guidance in respect of the administrative procedure.

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2. French authorities comment on the VAT treatment applicable to Islamic finance transactions

Businesses involved in Islamic financing in France should review the implications of the technical comments.

On 18 December 2008, the French authorities (General Division of the Treasury and the Economic Policy) delivered technical comments on the tax (including VAT) treatment applicable to Islamic finance transactions - specifically Murabaha (Shariah-compliant sales) and Sukuk (Shariah-compliant bonds). It is expected that these comments will be subject of tax rulings in the near future.

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Germany

3. Supreme Tax Court delivers decision in relation to the financial intermediary VAT exemption

Businesses providing and receiving financial or insurance intermediary services should consider the application of the VAT exemption in light of recent decisions/commentary from Germany in this respect.

Most recently (30 October 2008), the Court decided that the financial intermediary exemption is only applicable to negotiation in securities in respect of specific business transactions and is not a general VAT exemption for all services (for example, support, training, supervision).

The Court also commented in relation to services provided by insurance agents. The Court again stated that the VAT exemption applies to support, training and supervision of the insurance agents as long as the service provider can influence one of the contracting parties by having the ability to check every offer. Although not a binding decision, this is contrary to the 9 October 2008 decree of the Federal Ministry of Finance, which states that already a one-off review and approval of standard contracts and transactions is sufficient for the application of the exemption.

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4. Federal Ministry of Finance issues a decree on the VAT treatment of portfolio management services

Businesses which are currently treating portfolio management services in accordance with the current opinion of the Supreme Tax Court (but contrary to this recent decree) should disclose the differing VAT treatment to the tax authorities and, if necessary, take legal action.

The decree, issued on 9 December 2008, states that the supply of portfolio management services is taxable and the place of the supply is where the supplier has its place of business. The VAT exemption applicable to transactions in securities does not apply. The decree is contrary to a recent Court decision, which stated that portfolio management is taxable but where the recipient is established. In addition, in this particular case, as the portfolio included securities, the Court qualified the service in dispute as VAT exempt.

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5. Federal Ministry of Finance issues a decree on the VAT treatment of sale and leaseback transactions

Both, leasing companies and their customers should check the contractual frameworks of leasing transactions to avoid incorrect invoicing which might lead to significant VAT risks.

The decree, dated 4 December 2008, clarifies a judgement of the German court (9 February 2006), regarding the VAT treatment of sale-and-lease-back transactions in the case where the lessee first sells the leased goods to the lessor.

According to the decree, the sale qualifies as a supply of goods only where the right to dispose of the goods is also transferred to the lessor.

If, however, due to the circumstances of the specific case, the lessee retains the authority to dispose of these goods, then both the sale of goods to the lessor and the lease-back have to be considered as a mere financing service provided by the lessor.

The applicable qualification in this respect is determined by income tax and accounting principles. For example, where the lessor is obliged under contract to re-transfer the title of the leased goods at the end of the leasing period, the right of disposal remains with the lessee. If, however, a further agreement is required at the end of the lease period in respect of the re-transfer, the right to dispose should remain with the lessor during the lease term.

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The Netherlands

6. Dutch court denies VAT exemption for financial intermediary services

Whilst the case (as detailed below) is specific, businesses providing or receiving intermediary services in the Netherlands should be aware of the Dutch court's position in relation to the application of the exemption.

In its judgement, the Dutch Court of First Instance decided that the VAT exemption for intermediary services is not applicable to the taxpayer's activities, which consist of maintaining an internet platform with related sites on which consumers can purchase goods only by means of a credit card. The issuer of the card appointed an intermediary for the finalisation of requests and transactions relating to the card. The taxpayer forwarded name and address details of potential clients to the intermediary and in return received a commission from the intermediary for every new card consumer.

The court decided that the activities of the taxpayer were merely clerical formalities related to the card issuing contract and, as a result, the VAT exemption is not applicable.

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Poland

7. Polish court decides that Polish VAT regulations in respect of VAT recovery are not in line with the VAT Directive

If you do not recover VAT in Poland because the VAT recovery percentage would be less than 2%, immediate action should be taken to consider whether this VAT could now be recoverable.

Current Polish VAT regulations allow that, where a business is not entitled to recover VAT in full, it can recover a proportion of the VAT. However, the regulations state that, if this proportion is less than 2%, then no VAT can be recovered.

A decision of the Polish court in December 2008 states that the Polish VAT regulations in this respect are not in line with the VAT Directive .

This could present an excellent opportunity for additional VAT recovery where previously no VAT was recovered, as the recovery percentage was less than 2%.

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Spain

8. Monthly VAT recovery allowed under Spain's measures to improve the liquidity of Spanish businesses

Businesses meeting the requirements should consider requesting registration to the record of monthly refunds.

Measures put forward to improve business liquidity have been approved and one of these measures is the option to obtain monthly VAT refunds.

Registration requests should, generally, be submitted during the previous November for the registration to be effective from the following January. Once approved, registration to the record of monthly refunds will apply for a minimum period of 1 year. In addition, taxpayers will be obliged to file monthly VAT returns and supporting invoice ledgers by electronic means.

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United Kingdom

9. Pension fund management case to proceed before the VAT Tribunal

Pension funds and their managers and administrators should take urgent steps to review and protect their position in the light of this test litigation.

The Investment Management Association (IMA) has announced that the challenge to the taxation of the management of pension funds will now proceed before the UK VAT Tribunal. The IMA understands that the Tribunal has agreed that the appeal lodged jointly by the Wheels Common Investment Fund (WCIF) and the National Association of Pension Funds (NAPF) may now proceed as the test case, although three Ford pension schemes will be joined as co-appellants.

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