



NEWS FLASH

## SWISS RE

### The sale of a portfolio of contracts is liable to VAT

### Impact for the insurance and the financial sector

On 22 October 2009, the European Court of Justice ruled<sup>1</sup> that the sale of a portfolio of insurance contracts to another company could not be considered as an insurance transaction and could thus not be VAT exempt. Consequently, VAT is due on such a transaction. For businesses which could only recover partly VAT, this is an additional cost. The impact of this decision could not be limited to the insurance sector. Any business which could not fully recover VAT on its costs should take care of this decision. It is the case of banks, asset managers, professional of the financial sector, etc.

#### Facts

A German reinsurance company, Swiss Re, sold to a Swiss insurance company a portfolio of 195 life reinsurance contracts. A negative value was agreed for the transfer of 18 of those 195 contracts, thus reducing the total cost of acquiring all of them. The German VAT administration claimed the VAT on transaction while Swiss Re opposed some arguments in order to make the transaction VAT free.

#### Ruling of the Court

Various questions were raised to the ECJ and the Court ruled as follow:

- Is the sale a supply of service?  
The ECJ answered that the transaction is effectively a supply of service and is therefore in the scope of VAT.

<sup>1</sup> C-242/08 of 22 October 2009

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- Where is deemed to be located this supply of service?  
In cross-border transactions, it is necessary to determine where the transaction is deemed to take place. The ECJ ruled that this supply of services is deemed to take place where the supplier is established, i.e. in Germany. This is the application of the main localisation rule. It is worth noted that, as from 1st January 2010, this rule will change and that such a cross-border transaction between businesses will be taxed at the place of the purchaser.
- Could the sale be exempt as an insurance service?  
The ECJ ruled that the sale of a portfolio or insurance contracts could not be considered as an insurance transaction and could thus not be VAT exempt. There is thus no extension of this exemption to related transactions which do not strictly constitute an insurance service defined as the fact to assume a risk in return for the prior payment of a premium.
- Could the sale be exempt as a financial service?  
Swiss Re claimed that the transaction could be exempt as a financial service, and more precisely as a “dealing” transaction or a transaction relating to debt. The ECJ ruled that the sale could not be exempt on this ground because these exemptions are aimed, *inter alia*, to avoid an increase in the cost of customer credit.

## Appreciation

Considering VAT principles and previous jurisprudence of the Court, the non-application of the exemption for insurance services is not a surprise and could be hardly criticised even if it implies additional VAT costs for businesses that can not fully recover VAT. It is thus, more than never, crucial to consider the VAT treatment of transactions and try to structure and manage transactions in an efficient and secure way. On the other hand, the non-application of the financial exemptions is maybe not so straightforward as assumed by the Court and should not be exaggerated. In particular, the interpretation of these exemptions can not jeopardize or ruin their existence.

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