

VAT implications for insurers (and reinsurers) of the Swiss Re Germany - Advocate General's Opinion

VAT on portfolio transfers: are transfers exempt from VAT as "insurance transactions"?

On 13 May 2009, the Advocate General (Mengozzi) delivered his Opinion in the case of Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften (Case C-242/08). The case concerned the transfer (with the consent of the reinsureds) of 195 reinsurance contracts from Swiss Re Germany to another Swiss Re company in Switzerland. The Swiss company paid an amount to Swiss Re Germany calculated by deducting the negative value ascribed to 18 of the contracts from the positive value ascribed to the 177 other contracts. The issue was whether the transfer of reinsurance contracts from one reinsurer to another is an "insurance and reinsurance transaction" for VAT purposes and, therefore, exempt.

The Advocate General concluded that a sale of a portfolio of reinsurance contracts is not an exempt insurance and reinsurance transaction but is chargeable to VAT in the transferor's country (in this case, Germany). The Advocate General confirmed that the value of the supply in this case should be determined by viewing the transaction as a whole, rather than as a collection of separate supplies, and netting off the positive and negative values.

The most puzzling aspect of the case from a UK perspective is that the Advocate General did not consider whether an insurance portfolio transfer should be treated as a transfer of a going concern ("TOGC") and thus not a supply for VAT purposes. The questions referred by the national Court do not mention the TOGC provisions. This seems strange, as Germany has implemented those articles. Apparently the Court did not think that they could apply in this case. In the UK, our experience is that HMRC consider that insurance portfolio sales between persons in the UK should normally be treated as transfers of going concerns. Of course, the TOGC conditions must be met and this means that a transfer of an insurance business from a UK insurer to a non-EU insurer which is not registered for VAT in the UK would not qualify (see *Winterthur Swiss Insurance Company v HMRC* (2006) VAT 19411).

The consequences for UK insurers and reinsurers (and possibly those in other countries) could be very serious. If the Advocate General's opinion is followed by the ECJ, the Swiss Re case will mean that EU to EU and EU to non-EU portfolio transfers will be chargeable to VAT at the standard rate in the transferor's country under current (until the end of this year) VAT place of supply rules. Of course, that also means that a portfolio transfer from a non-EU country to an EU country will not attract any VAT (which is the current position as we understand it). The ECJ's judgment will declare how the law should always have been interpreted. It follows that HMRC could revisit past transactions and issue assessments for tax in those cases where there is no written ruling that VAT is not payable. From 1 January 2010, the new place of supply rules come into force and the place of supply for business to business transactions will be the country of the recipient of the supply. This means that on an EU to EU (or non-EU to EU) portfolio transfer, the transferee will account for VAT at the local rate. Conversely, there will be no VAT on a portfolio transfer to a non-EU transferee - but the transferor should be able to recover all of the VAT incurred in relation to the transfer (as opposed to part of the input VAT at the moment).

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