

# GSTFS

Australian GST Developments  
in Financial Services

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## A new rulings regime is coming – for better or worse?

As announced as part of the May Federal Budget, the Government is proposing to amend the law with effect from 1 July 2010 to:

- include GST in the income tax rulings regime (however, there would be no oral rulings and the rules about the application to beneficiaries of rulings given to trustees would not extend to GST)
- enable a supplier and recipient to agree in writing to rely on each other's rulings in relation to the status of a supply between them. Notwithstanding this:
  - reliance would not extend to the supplier's inputs or to other supplies down the chain
  - it is proposed that the supplier and recipient would be bound to apply the ruling in the preparation of their BASs, but they may object to the other's rulings.

While the proposal to include GST in the income tax rulings regime may have some benefits, there are a number of potentially significant implications, including:

- The default period for private binding rulings would end one year after the ruling started to apply. Financial services suppliers, which rely on private rulings for the purposes of their apportionment methodology will need to consider the implications of this proposed time restriction.

- Only gazetted rulings will be 'public rulings' – other written advice produced by the Australian taxation Office (ATO), such as fact sheets, will be 'non-ruling advice'. Taxpayers will not be able to rely upon them in the same way as they currently can. Businesses will need to review the extent to which they currently rely on other written advice produced by the ATO.
- As is the case with income tax rulings, the explanation section of the ruling may be contained in an Appendix, which would not form part of the binding public ruling. It is envisaged that the amending legislation will contain transitional provisions to ensure that existing GST rulings are grandfathered in their entirety such that all explanations and examples (which may otherwise be contained in the Appendix) continue to be binding on the Commissioner. For example, it is

### Inside this issue...

A new rulings regime is coming  
– for better or worse?

ATO compliance plan for the financial  
services industry

Recent Australian developments

Apportionment tip

Cases & rulings update

International financial services VAT developments



important that financial services businesses continue to be able to rely on the examples given in GSTR 2006/3 to support their chosen apportionment methodology.

- It is unlikely that declaratory relief will be available to taxpayers seeking to challenge the ATO's views. Declaratory relief has been used in recent financial services GST litigation such as *Travelex*.

If Treasury's proposed 'principle-based' approach to defining financial supplies were adopted, unless the Commissioner releases clear guidance in the form of gazetted public rulings on how this legislation is to be interpreted and applied, a significant increase in requests for new and updated private binding rulings would be expected. However, as these ruling would expire in one year, this provides little comfort to financial service providers who may change or release new products frequently and who might prefer, for absolute certainty, to go through the process of gaining additional private binding rulings.

Overall, this result does not appear to reduce complexity and administration for taxpayers as was intended in the recent review of the GST administration and intended in the Budget announcements.

## ATO compliance plan for the financial services industry

As with the ATO compliance plan for 2008-9, there is a special focus on specific GST issues in the financial services industry.

The ATO notes that it is still finding cases during audits where large businesses have incorrectly treated acquisitions as either creditable acquisitions or acquisitions subject to apportionment. The ATO is concentrating on the following areas this year:

- Initial public offerings, capital raisings and share buy backs.
- Apportioning acquisitions that are directly connected with making input-taxed supplied.
- Securitisation and asset financing, including hire purchase.
- Subject to current litigation, costs incurred by credit card and charge card issuers, including acquisitions made under a loyalty reward program.

Most of these are not new issues – the GST treatment of Merger and Acquisition (M&A) costs has come up in previous Compliance Programs, and the question of apportionment is always the first on the ATO's hit

list for any financial services GST audit. Questions on hire purchase have also been coming up in ATO audits since the issue of the ATO Practice Statement on hire purchase agreements (PS LA 2008/1) in early 2008. Securitisation is also not a new area of review and recent settlements between the ATO and the tier 2 securitisation industry already demonstrate increased ATO focus in this area.

The inclusion of credit and charge cards in this year's Compliance Program raises the question exactly what is going to be audited. The ongoing litigation in *American Express*<sup>1</sup> means this area of GST law is far from settled. The continuing uncertainty that stems from the global financial crisis has tightened the ATO's view of compliance risk. Supported by significant resources, greater leverage of technology and increased information sharing between government agencies, the ATO has taken a significant step towards identifying and targeting tax risks. In particular, the ATO has invested significantly to expand its use of data and information matching, using information on asset transactions from state revenue offices, land titles

offices, share registries and other sources. The ATO has detected many inconsistencies between external information and what is reported on the BAS, and these will be tightly monitored this year. For large businesses, this means that the likelihood of getting a Computer Assisted Verification (CAV) audit has increased. Financial services businesses will need to be prepared for CAV type audits, which will require input from areas of the business other than the tax and finance functions.

As part of the ATO's ongoing aim to provide greater certainty in the large business sector, the Compliance Program also outlines the ATO's commitment to the Annual Compliance Agreements (ACAs). The ATO has already offered to work with the top 50 groups in Australia and plans to increase its coverage of annual compliance arrangements in 2009-10. Financial services businesses need to carefully weigh up the pros and cons of entering into an ACA with the ATO for GST and determine whether or not it would be beneficial.

<sup>1</sup> *American Express International Inc v Commissioner of Taxation* ([2009] FCA 683)

# Recent Australian developments

## Second Treasury consultation paper on changes to GST law

Treasury released a second discussion paper on 11 September 2009 on reforms to the administration of the GST. The key elements of the second consultation paper include:

- adjustments
- self-assessment, period of review, net amounts
- general law partnerships
- tax law partnerships
- bare trusts
- running balance account
- non-profit sub-entities
- payment of refunds of overpaid GST.

One of the key proposals is that there should be three separate adjustment regimes for the change in use of an acquisition, one for real property used for making supplies of residential rent and sales of residential property, one for change in the extent of private use of supplies, and one for inputs into other input taxed supplies – predominantly for the financial services industry.

For input taxed supplies such as financial supplies, no adjustment would be required unless the change in use varies by more than ten per cent (on a cumulative basis).

For acquisitions below \$20,000 no adjustment will be required; for acquisitions from \$20,000 to \$499,999 there will be two adjustment periods; and for acquisitions over \$500,000, there will be five adjustment periods. In addition, there will be an assumption that the change in extent of creditable purpose will be permanent.

The closing date for submissions on the second discussion paper is 9 October 2009.

## Incapacitated entities update

Following the PM Developments case in December 2008, the Tax Laws Amendment (2009 Measures No 5) Bill 2009 was introduced into Parliament on 16 September 2009 to restore the intention of the law relating to the GST consequences for representatives of incapacitated entities.

The Bill proposes to repeal Division 147 and insert new Division 58 into the GST Act to provide that any supply, acquisition or importation by a representative of an incapacitated entity in its representative capacity will be treated as a supply, acquisition or importation of the incapacitated entity (although the representative will still be required to undertake any related GST compliance obligations).

In addition, the measures ensure that the representative is responsible for certain GST consequences, which arise from a supply, acquisition or importation that falls within the scope of the representative's responsibility or authority for managing the incapacitated entity's affairs.

The Bill also contains a number of application and transitional provisions, which will seek to provide protection to representatives accounting for GST under Division 147. It is proposed that the main operative provisions will take effect from 1 July 2000 while the remainder of amendments will commence from the date of Royal Assent.

## Introduction of Tax Agent Services Act

The Tax Agent Services Bill 2008 was granted Royal Assent on 26 March 2009, becoming the Tax Agent Services Act 2009. Among the particular changes implemented, the Act:

- establishes a new national Tax Practitioners Board, which will replace the existing state based boards and will have responsibility for:
  - registering tax practitioners and tax agents
  - ensuring that tax practitioners maintain appropriate skills and knowledge
  - investigating complaints against registered practitioners, and
  - ensuring that unregistered persons do not hold themselves out to be registered tax practitioners.
- ensures that in addition to tax agents and their nominees, BAS service providers and their nominees will also need to be registered and governed in a similar way to tax agents (but will be authorised to provide a more limited range of BAS services)

- provides a Code of Professional Conduct that will govern the ethical and professional standards of registered tax practitioners (matters covered by the Code include honesty and integrity, independence, confidentiality, competency and professional indemnity insurance)
- provides a wider and more flexible range of disciplinary sanctions for breaches of the Code (replacing criminal penalties for misconduct with civil penalties and injunctions)
- provides ‘safe harbour’ relief to taxpayers from administrative penalties, which may ordinarily apply for making a false or misleading statement resulting in a shortfall amount, or for lodging a document late, provided the taxpayer has taken reasonable care to comply with their tax obligations by giving the tax practitioner the information necessary to complete their return on a timely basis.

The Act defines what a ‘tax agent service’ and a ‘BAS service’ is, and all service providers will need to review the services they provide to determine whether registration is required. For example, where the service relates to ascertaining liabilities, obligations or entitlements for an entity under

a taxation law administered by the Commissioner and the service is provided in circumstances where the entity could reasonably be expected to rely on the service to satisfy taxation obligations or liabilities, or claim entitlements under the taxation law, registration as a tax agent will be required in order to provide the service.

While the start date of this new regime has not yet been proclaimed, a 1 January 2010 start date would not be unexpected.

### Insurance snapshot

#### CTP

We have seen an increase in ATO audit activity in the insurance market in relation to Comprehensive Third Party Insurance (CTP). It is our experience that the ATO is applying the legislation very strictly and technically. The ATO is focusing on issues concerning Divisions 79 and 80 such as the premium selection test, ‘clearing house’ transactions and the application of the average ITC fraction.

#### Warranty insurance

In our experience, GST risks and opportunities can often be missed in the warranty insurance market. For both product based insurance (warranties)

or home building insurance, a close examination of claims process and payments to beneficiaries and/or third parties is extremely important in order to ensure the GST treatment of transactions is correct. Contractual arrangements are often complex and in some cases not properly understood by operational personnel.

#### Self insurance

While specialist insurance companies have given due attention to insurance issues and invested in GST controls to minimise risk, it is often the case that large corporations implement self insurance arrangements to manage costs and retain oversight of the insurance process (eg in workers’ compensation self insurance arrangements). Where insurance is not part of the core business it is important to recognise the GST complexities that arise in relation to insurance systems and processes, and to have adequate GST controls in place to ensure GST opportunities are identified and risks are mitigated.

#### Four year time limits

The only proposed change in the Federal Budget which was announced with immediate effect (12 May 2009) was to impose a

four year time limit for the period in which input tax credits may be claimed. Since the announcement, however, the draft legislation has still not been issued.

The proposal, which is outlined in further detail in the Treasury Discussion Paper issued on 12 May 2009 (the first discussion paper), is aimed at preserving the intended application of section 105-55 of Schedule 1 to the Taxation Administration Act 1953 and the mismatch with subsection 29-10(4) of the GST Act. Subsection 29-10(4) was a late inclusion into the GST Act, and it is not clear whether the drafters specifically included it with due consideration of the provisions of the Taxation Administration Act 1953.

Whilst this change puts taxpayers on all fours with the ATO, there may be instances where, for example, there is a long running dispute around the liability of a supply, which may result in the GST not being claimed within the four year time limit. Unless taxpayers file protective claims pending the outcome of litigation or disputes, GST will now not be recoverable outside the four year time limit.

## Apportionment tip

### When should you seek a ruling?

Apportionment, while by no means an exact science, it is an integral element to the success of any financial service provider. Financial service providers will often seek a private binding ruling confirming that their particular methodology is ‘fair and reasonable’ for the purposes of Divisions 11 and 70 of the GST Act. Increasingly the industry is finding that progress by the Commissioner in issuing such rulings is becoming significantly slower, with some rulings taking up to a year to produce. In the case of a financial service provider who, say, may be installing a new IT system or making fundamental changes to its business in this rapidly changing environment, the ATO’s timeline for issuing a ruling may not be practical, as decisions often need to be made much quicker than a response can be given. In such circumstances, financial service providers may question to what extent they can rely upon the Commissioner’s comments on apportionment in GSTR 2006/3 and GSTR 2008/1, and whether applying for a private ruling is worthwhile or necessary.

While a private binding ruling will give a taxpayer the ultimate form of protection in the case of an ATO audit (but only if the circumstances under which the ruling was sought continue to apply), the ability of taxpayers to self-assess under the GST regime is a critical element of the Government’s (and the Commissioner’s) approach to tax administration. Furthermore taxpayers can rely upon the Commissioner’s comments in public rulings and Fact Sheets, to the extent they apply to a taxpayer’s affairs (and provided taxpayers can demonstrate reliance).

Ultimately, the decision to apply for a private binding ruling will be driven by both the technical arguments as well as commercial drivers. Where, for example, a taxpayer’s affairs are relatively simple or uncontentious, documentation demonstrating the way in which taxpayers have relied on a stated position by the Commissioner may be sufficient to provide evidence that tax positions taken were not reckless, and a private ruling in this case may not be required.

## Cases & rulings update

### Full Federal Court hears Travelex appeal

The appeal against the Federal Court decision in *Travelex Ltd v Commissioner of Taxation* was recently heard before a bench of the Full Federal Court. Previously the Federal Court (single judge) found that the supply of foreign currency was not a supply in relation to rights, and the rights associated with foreign currency were merely incidental. It was held at first instance that, for the purposes of the GST Act, a supply that does not bind the parties in some way is not a supply made in relation to rights. The appeal by the taxpayer focused on the relationship between what is supplied (foreign currency) and the use of rights outside Australia. In particular, Travelex argued that the rights associated with foreign currency are not incidental to the supply of foreign currency and should be GST-free on the basis that the rights are for use outside Australia.

### Waverley Council and Commissioner of Taxation

This case concerns the GST treatment of a credit card administration fee charged by a local council. The

taxpayer took the unusual step of requesting an assessment and then objecting on the basis that it thought that it should be paying more GST than the Commissioner had assessed.

The taxpayer’s argument was that the credit card administration fee was itself an “Australian tax, fee or charge”, so the fact that it was not listed in the Division 81 Determination, meant that the taxpayer was bound to account for GST on the administration fee, regardless of the GST treatment of the underlying supply. The Tribunal rejected this view, finding in favour of the Commissioner that the credit card administration fee is not of itself an “Australian tax, fee or charge”, and is therefore correctly characterised as part of the payment of the underlying fee or charge. Accordingly, it should be treated in the same way as the underlying fee or charge of which it forms a part.

This case further highlights the difficulties which arise in classifying supplies made in connection with credit cards and payment systems, and in particular, the difficulties in identifying mixed or composite supplies.

## GSTR 2009/D1: Application of s11-15(5) to acquisitions relating to the provision of accounts

This draft ruling intends to clarify the application of subsection 11-15(5) of the GST Act (which is commonly referred to as the ‘borrowings rule’) to certain acquisitions made by Australian authorised deposit taking institutions (ADIs). The borrowing rule allows input tax credits to be claimed for acquisitions, which relate to making financial supplies consisting of a borrowing, and where the borrowing relates to making supplies, which are not input taxed.

The draft ruling establishes two important principles for financial supply providers. First, the Commissioner accepts the long established position that when a bank receives money for the account of a customer, it does so as borrower. Second, the draft ruling sets out a method of apportionment for financial supply providers to determine their entitlement to input tax credits pursuant to subsection 11-15(5).

In the draft ruling the Commissioner indicates that the amount deposited to a deposit account represents an amount borrowed by an ADI from the account holder, and the relevant financial supply is the provision of the deposit account which consists of a borrowing (Item 1 of GST Regulation 40-5.09(3)). While the Commissioner does mention that the

relevant financial supply could equally be Item 2 (or potentially other Items) this point is not addressed further in the draft ruling.

The Commissioner further seeks to limit the application of the draft ruling in a number of ways. Specifically, application of the draft ruling is limited to ‘deposit accounts’, which “generally have balances representing amounts owing by the ADI to the account holder” and the draft ruling does not apply to other types of accounts such as credit card accounts. This is on the basis that such accounts are normally in net debit balance, and deposits into credit card accounts correctly represent repayments. The draft ruling ignores circumstances where customers may retain net credit balances on credit card accounts, or where payment is made before the card due date. Given the comments in the recent Amex decision, it remains to be seen whether such accounts are truly within the scope of GST Regulation 40-5.09(3).

The Commissioner’s comments only apply to the extent that acquisitions are not solely related to deposit accounts that have credit balances. The draft ruling does not address the question as to the extent to which such acquisitions are for a creditable purpose, except in the context of indirect acquisitions.

The draft ruling is more prescriptive than other GST rulings (namely GSTR 2006/3 and GSTR 2008/1) in which the Commissioner goes to lengths to avoid directly articulating any specific apportionment method and relies only on the concept of ‘fair and reasonable’. In GSTR 2009/D1, the Commissioner considers not only the need for the method to be ‘fair and reasonable’, but sets out a method, which he accepts as fair and reasonable, marking an important shift in his approach to the GST administration for financial supply providers. To determine the extent of creditable purpose under subsection 11-15(5), the Commissioner will accept the following formula:

**R(CU)**

**R(total)**

where:

**R(CU)** = total revenue (including fees, a portion of the ADI’s interest rate spread and other revenue) derives from using the borrowed funds for non-input taxed purposes.

**R(total)** = total of all revenue (including fees, a portion of the ADI’s interest rate spread and other revenue) derives from the moneys held on deposit, including both from all use of the borrowed fund and all supplies made to the deposit-holder.

In doing so, the Commissioner recognises that the provision of the account by the ADI is not only a source of funds to the ADI, but also a vehicle to provide other services to the account-holder (eg ATM, telephone banking, cheque books), which must also be taken into account in determining the extent of creditable purpose. In this respect, the Commissioner suggests that these other services are separate input taxed supplies and not included as part of the single supply of the account to the account holder.

Importantly, the proposed formula incorporates a net interest component, which sits uncomfortably with other statements made by the Commissioner on the use of net interest in an apportionment context.

While the formula appears to provide more certainty, its application is likely to be problematic for most taxpayers as they may find it difficult (if not impossible) to determine the relevant components. In a number of cases simpler alternative methodologies may be available.

# International financial services VAT developments

## New Zealand

### [American Express Case – Impact in New Zealand](#)

The Federal Court of Australia recently held in the Amex case that certain late payment fees and default fees are not consideration for a supply of financial services under the GST legislation.

In New Zealand, various fees including late payment fees, 'break' fees, cancellation (termination) fees, compensation payments, and payments for property damage may be treated as outside the scope of GST, where they are compensation or damages for breach of contract. While the Amex decision has not changed the approach in New Zealand in this respect, it has brought this issue into focus.

For Australian businesses with New Zealand subsidiaries, there is an opportunity to reconsider the GST treatment of amounts charged where there has been either a contractual default, breach or cancellation. Treating fees of this nature as outside the scope of GST may result in cash benefits for both taxable and input taxed businesses as follows:

- Taxable businesses would not be required to account for GST on fees charged resulting in a cash saving.
- An increase in the GST recovery ratio for financial services suppliers as the fees would not be counted as input taxed supplies.

### [Mortgagee Sales in New Zealand – Alternative approach](#)

Section 179 of the Property Law Act 2007 introduces an alternative to the traditional mortgagee sale process in New Zealand in certain circumstances, by allowing a mortgagee to adopt and complete a sale and purchase agreement entered into by a mortgagor. In essence, this provides the mortgagee with virtually all the rights and powers in relation to the purchaser that the mortgagor would have had as vendor of the property. This raises the question as to whether the sale should be treated in the same way as a mortgagee sale for GST purposes and specifically, whether the mortgagee has an obligation to pay GST on the sale to the Inland Revenue Department (IRD).

This is a somewhat novel issue and there are differing views among practitioners and the IRD as to the GST implications flowing from a section 179 election. It is likely that the adoption of a contract under section 179 cannot result in a mortgagee sale because no new 'sale' is created by the adoption of an existing sale and purchase agreement. Therefore, the liability to account for GST remains with the mortgagor. This is a complex issue and it is recommended that any Australian businesses potentially affected by these provisions should seek professional advice.

## European Union

### [Update on proposed reforms for the VAT treatment of financial and insurance services](#)

Previously, the EU Commission submitted a proposed Council Directive and Regulation regarding the VAT treatment of financial and insurance services. The proposal included three sets of measures:

1. Modernisation of the definitions and rules governing exemption from VAT for financial and insurance service.

2. More general application of an option for taxation available to economic operators covering all financial and insurance services.
3. Introduction of a cross-border cost-sharing scheme for providers of insurance and financial services.

Some recent important developments include:

1. Definitions:
  - Guaranteeing of debts — export Credit Guarantees have been excluded from the exemption.
  - Financial transfers — payments made via mobile phone are now included in the exemption.
  - Transactions in financial derivatives — although member States are closer to agreement, the debate regarding the wording of the definition is ongoing.
  - Management of investment funds — amendments to the definition of investment funds to reflect the fact that there should be no difference in the VAT treatment between direct investment in securities or collective investments.



- Outsourcing — currently, there is no agreement on the definition of outsourcing, and it seems likely that discussions will be suspended until the core exemptions are agreed.

## 2. Option to tax:

- This is the subject of ongoing discussion, and a report from the European Banking Federation is expected shortly.

## 3. Cost sharing:

- Member States have responded negatively to the Cost Sharing proposals, mainly in respect of the scope (ie industry specific) and its alignment with the existing exemption for independent groups and with VAT grouping.

## European Commission issues a communication regarding the harmonisation of VAT grouping

The Commission has issued a communication, which sets out the principles which it considers should be part of a harmonised approach to VAT grouping. The principles set out do not vary a great deal from existing local VAT grouping rules however two points may be of particular concern in some countries.

The first is the requirement that only a taxable person may join a VAT group which creates problems for the inclusion of holding companies in a VAT group.

The second is the disallowance of VAT group treatment of transactions between a VAT group member in a Member State and other establishments of that VAT group member outside the Member State — ie transactions between a head office and branch which are outside the scope of VAT in accordance with the ECJ decision in FCE Bank plc.

A number of Member States already apply this second principle but this communication could push other Member States to follow. Notwithstanding, the communication has no formal standing and it is not clear if it will be officially adopted.

## Canada

### British Columbia tax harmonisation

The province of British Columbia intends to harmonise its provincial sales tax (PST) with the Federal goods and services tax (GST) on 1 July 2010. The new single sales tax rate (HST) for the British Columbia VAT (BCVAT) will be 12 per cent, instead of a five per cent Federal GST and seven per cent PST. The BCVAT will follow many of the underlying concepts of the GST and adopt many of the customisations introduced by Ontario.

## France

### VAT recovery opportunity for IT services supplied by a bank to its subsidiaries

The French tax authorities have confirmed that it is possible for a bank to recover 100 per cent of the VAT on costs directly attributable to IT services provided to its subsidiaries. The remaining input VAT is recoverable in accordance with the pro-rata calculation.

This is particularly relevant for banks which centralise their IT platform to avoid the additional VAT cost incurred in using external IT suppliers. The solution also means that it is no longer necessary to set up a specific subsidiary for providing IT services.

### Germany

#### [New provisions regarding VAT exemption of intermediary services](#)

The German Federal Ministry of Finance (FMF) issued a decree regarding the VAT treatment of intermediary services concerning financial and insurance services.

The decree provides that intermediary services should be interpreted in the same way for financial and insurance intermediary services. Furthermore, activities such as mentoring, monitoring and training of subordinated intermediaries may be VAT exempt provided the service provider has at least an indirect influence on the future parties of the contract by having the possibility to review each single contractual offer.

#### [Decision regarding the pro-rata calculation based on turnover](#)

The Regional Tax Court of Lower Saxony has held that the provision of the German VAT Act which provides that a pro-rata calculation based on turnover is allowed only in case no other method is possible breaches European Law. Taxpayers are entitled to directly refer to the VAT Directive in this respect. The VAT Directive states it

is possible to use other methods for certain parts of the business, however this must not lead to an exclusion of the general principle to use the turnover method as the standard method.

#### [Reduced input VAT deduction for holding companies](#)

The Lower Tax Court of Munich has confirmed that a holding company may have business and non-business activities for VAT purposes. Relevantly, the acquisition, holding or disposal of shares does not constitute a business activity for VAT purposes for a holding company. Consequently, input VAT that directly relates to these activities is not deductible and the VAT on costs, which cannot be directly attributed to the taxable or non-taxable activities is recoverable according to the value of taxable supplies.

This decision could put VAT recovery in relation to transaction costs for the acquisition and the sale of shares at risk, especially where a holding company provided only minor taxable services to its subsidiaries. The Lower Tax Court has rejected an appeal to the German Supreme Tax Court and an appeal against this rejection is pending.

### Poland

#### [New bill will have significant implications for the Polish FS sector](#)

The Polish Government has recently announced public consultation regarding a new Bill which introduces amendments to the VAT Act. If adopted, the Bill will have considerable impact on financial institutions in Poland as it intends to limit the importance of statistical classifications of goods and services in the VAT law. New definitions of ‘goods’ and ‘services’ will be considered, which will not refer to the statistical classifications. Consequently, many VAT exempt auxiliary financial services, currently exempt from VAT, may no longer be exempt from VAT.

### Switzerland

#### [Impacts of new VAT law for the financial services sector](#)

Switzerland will implement a new VAT law on 1 January 2010, aiming to simplify the administration of Swiss VAT. Furthermore, it creates opportunities for businesses, particularly in the financial sector, to reduce the costs of irrecoverable VAT. Under the new VAT Law, dividend

income will no longer be included in the pro-rata and so will not lead to a reduction in VAT recovery. Additionally, it will be possible to assign input VAT credits thereby allowing banks to offer new investment models for companies with large VAT credits.

### United Kingdom

#### [VAT Tribunal rules that ‘consultancy’ services supplied by UK bank to foreign head office were subject to UK VAT](#)

In a case concerning the place of supply of services provided by a UK bank to its Japanese parent, the VAT Tribunal has held that the services were not in the nature of consultancy. The services in this case were provided under a service level agreement (SLA) which described them as “management and corporate services”. While consulting services are essentially advisory in nature, the services supplied under the SLA were ongoing, involving decisions which were integral to the group’s management processes of control and strategy development. The decision will be of interest to all businesses supplying or receiving ‘management’ services cross-border. From 1 January

2010 the place of supply for all cross-border 'management' services between taxable persons will be the place where the recipient is established.

### VAT Upper Tribunal hears arguments on the payment of compound interest on VAT claims

The Upper Tribunal recently heard arguments in the 'Compound Interest Project', which concerns whether compound interest is payable on VAT claims under the VAT Act 1994. HM Revenue & Customs (HMRC) sought to resist compound interest on the basis that:

- where EC law requires payment of compound interest, English law provides an effective remedy by means of a High Court claim for restitution, and is not therefore required to provide a remedy via the Tribunal
- Section 78 of the VAT Act 1994 provides for simple interest only and cannot be construed so as to give taxpayers the right to compound interest
- HMRC's letters informing the Taxpayers of the payment of interest calculated on a simple basis constituted 'decisions' under the Tribunal Rules, and the Taxpayers' appeals are therefore time-barred under the 30 day rule.

This case will be of interest to all businesses that have overpaid or under-recovered VAT, and in particular, those which have claimed compound interest by means of the Tribunal and/or the High Court.

### AXA UK: Questions referred to ECJ on VAT treatment of payment processing

The case concerns the applicability of the VAT exemption in respect of monthly fees charged to dentists for operating a payment plan for the dentists' clients and whether the fees should be apportioned between taxable services and exempt payment processing.

The decision of the High Court, which is being appealed by the tax authorities, was in favour of the taxpayer that consideration in the form of monthly fees charged to dentists for operating a payment plan arrangement should be apportioned between exempt payment handling services and other taxable services. The questions referred deal only with the scope of the exemption and not the single versus multiple supplies issue in the case.

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