



# New development on VAT treatment of the transactions between Spanish branches and their head offices, FCE Bank Case

Tax Alert



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# New development on VAT treatment of the transactions between Spanish branches and their head offices, FCE Bank Case.

The Spanish National High Court has recently issued new decision, appeal no. [1163/2020](#) dated 22 February 2023, in which it analyzes VAT treatment of the services rendered by Spanish branch to its foreign Head office and the application of FCE Bank case.

## Background

A funds' distributor company of an international asset management group located in Bermuda has appointed a Luxembourg company belonging to the group as a sub-distributor of the funds in Europe. In turn, the Luxembourg company performs the funds' distribution business in different UE countries through its foreign branches, among others, through a branch in Spain.

The Spanish branch provides support services in the sub-distribution business of the investment funds in Spain carried out by its Luxembourg head office. These support services consist mainly in searching for Spanish financial intermediaries who can enter into the funds' distribution agreements with the Luxembourg company. The support services provided by the Spanish branch to its Luxembourg head office has been charged on cost plus margin basis and has been treated as not subject to Spanish VAT (considering that the branch was not independent from its Head Office and that transactions has been performed within the same legal entity).

The Spanish Tax Authorities have considered that the Spanish Branch:

- (i) has been providing services directly to the Bermudian distributor company rather than to its Luxembourg head office,
- (ii) the services should have been qualified as the marketing and promotion services not covered by the VAT exemption provided for the investment funds' distribution services, and
- (iii) should be subject and not exempt to the Spanish VAT under the use and enjoyment rule foreseen in Article 70.Dos of the Spanish VAT Law.

## Court's reasoning

The National High Court has challenged and rejected the performance and conclusions of the tax auditors that, apparently, have been supported by the Central

Economic-Administrative Court and the State Lawyer, considering that:

- In order to determine if Luxembourg Company has been carrying out the sub-distribution services to Bermudian company through its Spanish branch or, by contrast, directly with the support of the branch, the corresponding service level agreement should be analyzed. According to the Court, there is no indication that the sub-distribution services have not been performed by the Luxembourg company to the Bermudian distributor. Therefore, the Court has rejected that the sub-distribution services has been provided by the Spanish branch to Bermudian company.
- Under the relevant ECJ case-law (FCE Bank Case), in view of the initial presumption that the branch and the head office constitute a single taxable person, in case that the Tax Authorities deem that the branch is independent from its head office, the tax auditors should dully justify such an independence that in the case at hand has not been provided. The fact that the branch has sufficient human and material resources to perform the distribution activity independently is not relevant, the important matter is determine and demonstrate that the branch is carrying out an independent economic activity in the terms of FCE Bank Case (in particular, that it bears responsibilities and the economic risk arising from its business).

## Impact

Although the National High Court has not analyzed in detail the Spanish administrative interpretation of the FCE Bank case and the indicators used by the Spanish Tax Authorities to demonstrate the independence of branches from their head offices (see [KPMG Alert](#)), it is clear from the judgement that the Tax Authorities would be required to perform a proper independence analysis not being sufficient general statements on the structure, recourses and capabilities of the Spanish Branches to perform independent activity from the theoretical point of view and such an independent developing of activity should be justified.

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In our view, the above judgment, reinforces even more the need to analyze the VAT treatment applied to the transactions made between the branches and head-offices, the associated tax risks and the possibility to mitigate them by preparing a supporting analysis. The position of course would be different where the branch or the head-office form part of a VAT group on which the VAT position could be different.

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