

## Transfers of Insurance and Reinsurance Contracts – VAT and Transfer Duty Treatment

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### VAT

The French tax authorities have published, on 26 January 2010, an advance tax ruling concerning the regime applicable to transfers of insurance and reinsurance contracts for VAT purposes. This ruling occurred following the issues raised by the decision of the European Court of Justice (ECJ) dated 22 October 2009 (case 242/08 Swiss Ré) in which the Community judge had found that a transfer for consideration of a portfolio of life reinsurance contracts is not a transaction likely to be entitled to VAT exemption pursuant to article 135, 1-a of the VAT Directive (provisions transposed into article 261 C, 2° of the French General Tax Code - GTC). The ECJ had also disallowed the financial nature of such a transaction and had therefore excluded a possible VAT exemption on the basis of paragraphs c and d of article 135, 1 of the VAT Directive (transposed into paragraphs b and c of article 261 C, 1° of the GTC).

In the 26 January 2010 ruling, the tax authorities acknowledged the decision of the Community judge and put aside a more liberal view of insurance transactions which had until now entailed the exemption of all transactions carried out by insurers and reinsurers in the framework of their regulated activities, including transactions involving the transfer of all or part of their contract portfolios.

However, while it expressly recognizes the taxable nature of these transactions, the tax authorities found a way, based on another provision of the VAT directive, to avoid penalizing an industry that is predominantly tax-exempt and would therefore be unable to recover any VAT that would become due pursuant to the portfolio transfer transactions. Indeed, article 19 of the Vat Directive allows Member States not to consider as “supply of goods” or “provision of services” transactions that constitute a transfer of a **universality of assets or part thereof** and following which the transferee is to be treated as the successor to the transferor. These transactions do not benefit from a VAT exemption strictly speaking but rather from a tax relief. This provision was transposed into internal law by article 257 bis of the GTC.

In this respect, the advance tax ruling states that “. . . *transfers of insurance or reinsurance contracts give rise to the transfer of both assets and liabilities, with the consequence that the transferee of said contracts assumes, with the consent of the insured persons, all the rights and obligations resulting therefrom. Hence, these transfers must be qualified as a partial transfer of a universality. . .*”, and draws the conclusion that

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such transactions may enjoy the VAT relief provided for under article 257 bis of the GTC.

Although necessary, this qualification as a "*partial transfer of a universality*" was nevertheless insufficient to operate against the application of VAT. Indeed, the VAT exemption under article 257 bis of the GTC is contingent upon the transferor and the transferee both being generally "liable" for VAT, i.e., their holding at least a partial entitlement to recovery of the VAT they incur. Yet, because the revenues of insurance and reinsurance operators are generally VAT exempted, and their VAT recovery rights depend on whether they have revenues subject to VAT, it may happen that insurance and reinsurance operators have no right to recovery at all, and therefore cannot thus be considered liable for VAT, even in part.

This difficulty seems to have been smoothed out by the French tax authorities, since the ruling merely asserts the application of the VAT relief provided by article 257 bis without requiring satisfaction of all the conditions laid down by said article. By this ruling, the authorities rendered to the insurance and reinsurance sector an exemption of which it had been deprived by the Community judge.

### **Transfer duty**

The transfer of a portfolio of insurance or reinsurance contracts, insofar as it gives rise to the transfer of clientele attached to such contracts, is a transaction that is generally subject to transfer duty at the proportional rate applicable to a transfer of a going concern or clientele, i.e., 3% on that part of the price comprised between Euro 23,000 and Euro 200,000, and 5% on that part of the price exceeding Euro 200,000. However, if the transfer of a portfolio of insurance contracts is expressly exempt from transfer duty in accordance with article 1065 of the GTC, there is not a specific provision that exempts transfers of reinsurance contracts.

Nevertheless, during the last few months, the tax authorities were solicited on several occasions by reinsurers with respect to contemplated transfers of contract portfolios and, as far as we know, the authorities acceded to their requests by extending the scope of exemption of article 1065 of the GTC to those transactions. These decisions thus allow for a uniform treatment of transfers of insurance and reinsurance contracts. It would now be advisable for such measures to be granted in favor of the entire profession and to be the subject, in the near future, of an advance tax ruling in order to finally clear up the uncertainty concerning the transfer duty treatment applicable to transfers of reinsurance contracts.

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