

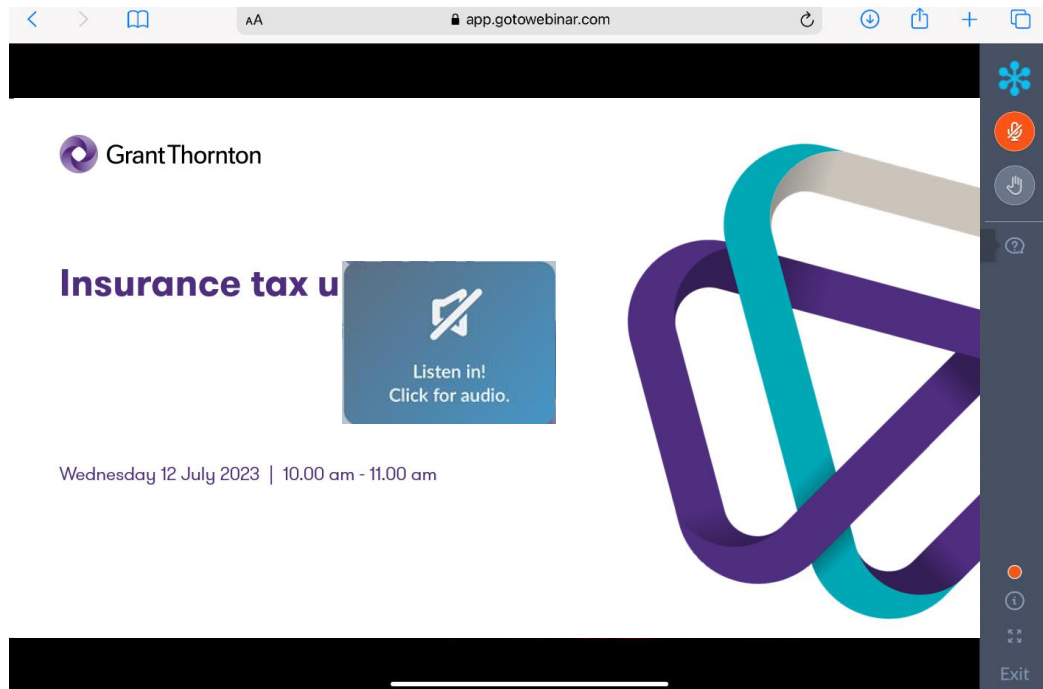


Insurance tax update

Wednesday 12 July 2023 | 10.00 am - 11.00 am



GoToWebinar Housekeeping: Attendee Participation



The screenshot shows a web browser window with the URL `app.gotowebinar.com`. The main content area displays the Grant Thornton logo, the text "Insurance tax u", and a blue button with a speaker icon and the text "Listen in! Click for audio.". Below this, it shows the date and time: "Wednesday 12 July 2023 | 10.00 am - 11.00 am". On the right side, there is a vertical controls panel with icons for a snowflake, a microphone, a hand, a question mark, a status indicator, and an "Exit" button.

Your Participation

Join audio:

- Click on 'Listen in! Click for audio' in order to join the call.

Submit questions and comments via the controls panel.

Note:

Today's presentation is being recorded and will be provided to all those registered for the event.

GoToWebinar Housekeeping: Time for Questions

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Your Participation

- Please continue to submit your text questions and comments using the controls panel.

For more information, please contact FSGEvents@uk.gt.com.

Introduction



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Agenda

1. Hot topics in Insurance VAT
2. Research & Development tax regime challenges – challenges and opportunities
3. Global minimum tax
4. An update on operational tax developments

01

Hot topics in Insurance VAT

VAT hot topics

General updates and HMRC approach

- Responsiveness and approach to PESH applications, VAT grouping applications, etc.
- Making Tax Digital (MTD) for VAT and digitalisation
- Continued attach on branch VAT registrations and fixed establishment criteria
- Notification of uncertain tax treatments

Case law updates

- Staysure (UKFTT) – HMRC challenge to exemption on insurance intermediary services provided via technology
- Ingenie (UKFTT) – Recoverability of VAT incurred on telematics goods
- HSBC (UK UTT) – Procedural review findings, litigation ongoing
- Zurich Insurance (Spanish National Audience) – A branch acting independently of its head office is a separate taxable person for VAT purposes
- Hotel La Tour (UKFTT) – Recoverability of VAT incurred on disposal costs
- Impact of CJEU decisions in Europe – Skandia, Aspiro, Morgan Stanley

Claims handling and the Staysure decision

A brief history of the case law

- Whilst insurance intermediary services are exempt from VAT in UK law, there have been several cases litigated in the UK and EU courts on the scope of the exemption.
 - **Case 1: Arthur Andersen & Co Accountants, 2005 [C-472/03]** — The CJEU found that to be an ‘insurance agent’, and therefore qualify for the insurance intermediary exemption, a provider must be instrumental in bringing together an insurer and prospective policyholders.
 - **Case 2: InsuranceWide/Trader Media Group, 2009 [A3/2009/1300]** — HMRC challenged exemption where access to an insurer’s or broker’s website is provided via a ‘click-through’ website. HMRC lost in the Court of Appeal and subsequently acknowledged that exemption will apply where a provider is doing more than acting as a ‘mere conduit’.
 - **Case 3: Aspiro SA, 2016 [C-40/15]** — Similarly to the Arthur Andersen decision, the CJEU ruled that claims handling services can only qualify for exemption where they are provided by an insurance agent/broker that brings together an insurer and prospective policyholders.
- To date, UK law, which currently exempts standalone claims handling services, has not been changed to reflect the CJEU’s decisions in Arthur Andersen and Aspiro. Therefore, it remains possible for exemption to be achieved in the UK where claims handling services are provided in an intermediary capacity, irrespective of whether the supplier brings together an insurer and prospective policyholders.

Claims handling and the Staysure decision

Staysure and the use of technology

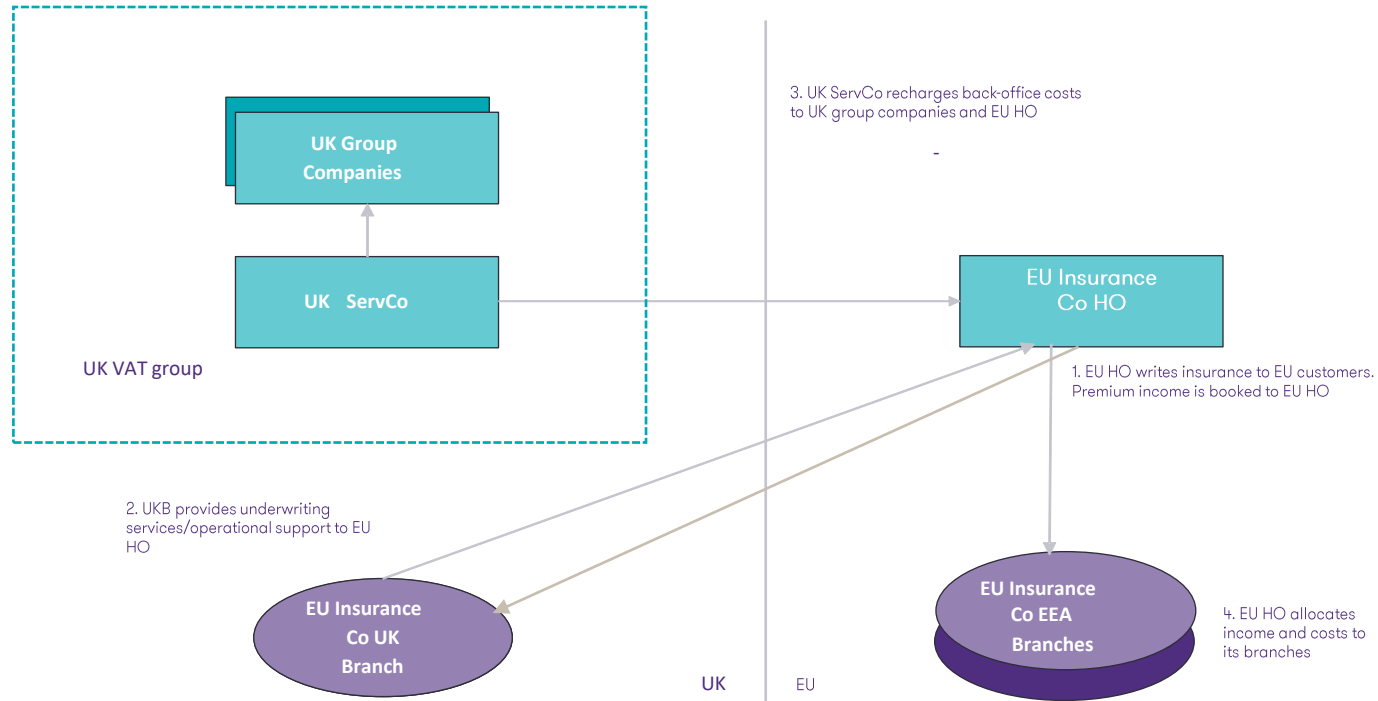
- Staysure, a UK insurance broker, sub-delegated services to Intervest, an affiliate based in Gibraltar. Intervest was contractually obliged to provide insurance leads to Staysure and was paid on a commission basis and only when a lead resulted in a successful sale. Intervest owned and operated Staysure's website, which contained a quote engine that filtered applicants on Staysure's behalf.
- HMRC argued that Intervest was not a qualifying sub-broker for the purposes of the insurance intermediary exemption and, therefore, reverse charge VAT was due on fees paid by Staysure, on the basis that Intervest's services are administrative and invisible to the policyholder.
- The FTT rejected HMRC's arguments and concluded that Intervest acted as a qualifying sub-broker. This FTT noted, regardless of (1) whether it presented itself as a sub-broker and (2) the manner in which the services are provided, Intervest carried out the essential functions of a sub-broker by generating leads and passing those leads to Staysure.
- This provides useful assurances that the use of technology to deliver a service should not impact the capability of that service to qualify for the insurance intermediary exemption.

Reflections

- Whilst HMRC may have lost in Staysure, HMRC's decision to take the case does indicate a willingness to challenge the use of technology to deliver insurance-related services and continue to retest the scope of the insurance intermediary exemption through challenges, assessments and litigation. As the insurance industry continues to develop new offerings and use new technology, we may be entering a new phase in the debate on the scope of the insurance intermediary exemption.

Branch Structures

Example branch structure



Underlying VAT principles: case law on establishments

Establishment making/receiving the supply

- From a VAT perspective, where an individual entity has multiple establishments, services provided to third-party customers are treated as being supplied from the establishment most closely connected to the supply.
- This will normally be the entity's Head Office (or 'business establishment'). However, through several cases, notably including Berkholz (C-168/84) and DFDS (C-260/95), an 'irrational result' test has been established, whereby taxpayers must consider whether treating services as being supplied from the entity's Head Office would create an irrational or inappropriate result.
- The Zurich Insurance Company case (C3/2006/1012/CHRVF) also notes that, when determining the place of supply of services, the location of the services' impact should be the primary indicator of where services are received.

Supplies between establishments

- Historically, in connection with the principles established in the FCE Bank case (C-210/04), supplies between establishments of the same legal entity were generally accepted to be disregarded for VAT purposes.
- However, the judgement in the Skandia case (C-7/13) in 2015 stated that charges received by a Swedish branch from its US Head Office were within the scope of VAT. This was on the basis that the Swedish branch was a member of a Swedish VAT group and, therefore, a separate taxable person to its US Head Office.
- As a consequence of Skandia and depending on the implementation of the case in the respective EU Member States, it is now often necessary to analyse intra-entity charges, which involves separating the activities conducted by each establishment in its own right and characterising those activities.
- This effectively involves treating establishments of the same legal entity as if they are separate legal entities. This can present practical challenges, given that this typically does not align with the legal, regulatory and accounting positions.

Underlying VAT principles: VAT grouping

VAT grouping of UK branches

- HMRC is currently taking the position that in order to be eligible for VAT grouping or, in some cases, obtaining a single VAT registration, a UK branch of an overseas company must make external (i.e., not intra-entity) supplies.
- Further, we note that one of the conditions for a UK branch to be eligible for VAT grouping is that the branch constitutes a 'fixed establishment' with sufficient human and technical resources to perform its activities.
- There is currently significant litigation ongoing on this topic, primarily in the banking sector.

HMRC Guidance

- It is not enough for the fixed establishment to merely receive supplies; it also needs to make supplies. This is based on CJEU decisions such as Planzer (C-73/06, para 54) and Welmory (C-605/12, para 59-63), which indicate that a fixed establishment must be capable of making supplies in the course of the company's business activity, not just capable of receiving supplies.

Underlying VAT principles: VAT recovery

UK VAT recovery on costs relating to support of overseas business areas

- Revenue and Customs Brief 22 (2015): changes to VAT regulations following judgment in the case of Le Credit Lyonnais [C-388/11]
- Regulation 102(1A) will be amended to make it clear that:
 - Where a sectorised method is used, each sector within it must reflect the use to which VAT-bearing costs are put in the business and in that sector, the structure of the business and the type of activity undertaken by that sector.
 - The value of supplies made from establishments outside the UK can only be taken into account in a sectorised method.

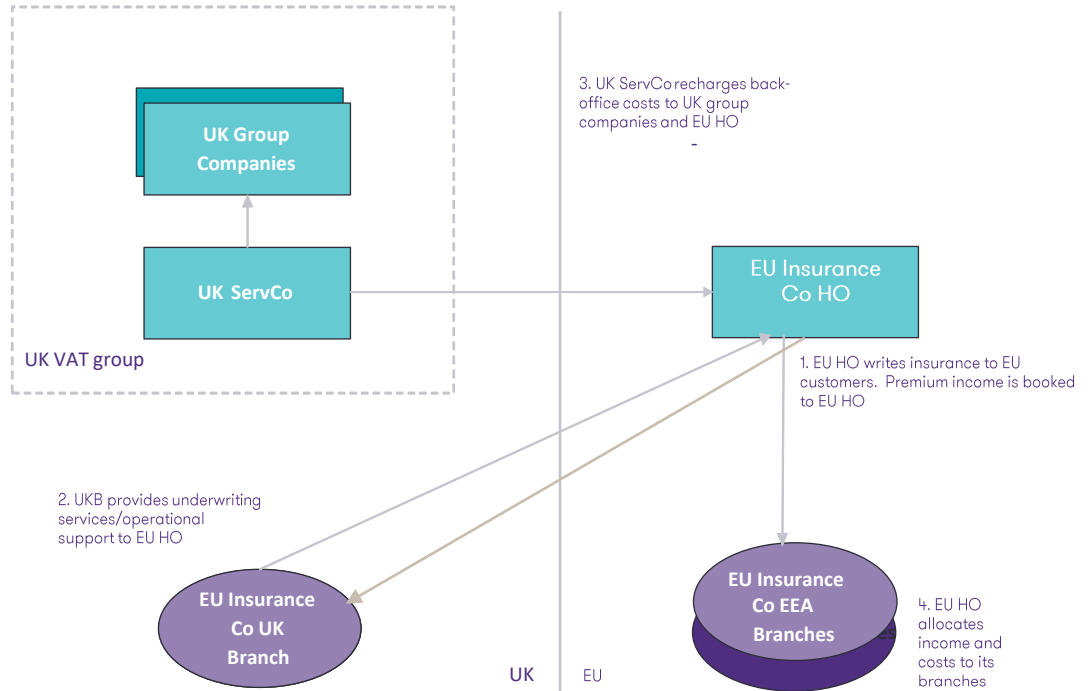
EU VAT recovery on costs relating to support of overseas business areas

- Morgan Stanley case [C-165/17]
- CJEU set out a two-step VAT recovery process for:
 - VAT that is used exclusively to support the head office.
 - ‘Mixed use’ VAT that supports the branch’s own business and the head offices.
- For the first pot of costs that are used exclusively to support the head office, the branch should ‘ring fence’ the relevant VAT amounts and determine VAT recovery by reference to the specific head office business area it supports.
- For the second pot — the general overhead or ‘mixed use’ costs — the branch would, on a simple reading of the judgment, need to undertake a calculation that includes the total turnover of the branch and the head office.

Example branch structure: VAT issues

VAT issues to consider

- Can UKB join the UK VAT group?
- What supplies does UKB make?
- How does UKB determine its entitlement to input VAT recovery?
- Can the reverse charge EU VAT cost on back-office charges from UK ServCo to EU HO be mitigated?
- Can intra-entity charges be disregarded or do they also give rise to a reverse charge VAT cost?



02

Research & Development tax regime challenges – challenges and opportunities

Changes effective from 1 April 2023



Headline rate changes

The gross RDEC rate will be increasing while the R&D tax relief rates for SMEs will be decreasing.



Extension to qualifying expenditure

Data licence and cloud computing services costs will become eligible cost categories with pure mathematics to be considered as a field of science.



Restriction to overseas activities

Expenditure on payments to subcontractors, externally provided workers and contributions to independent research will need to be UK expenditure or qualifying overseas expenditure.



Administrative changes

To minimise fraudulent claims, there will be a number of administrative changes introduced e.g., pre-notification of claims, along with the requirement to provide additional claim information through a prescribed form.

Headline rate changes

For expenditure incurred on or after 1 April 2023:

RDEC:

The gross RDEC rate will **increase from 13% to 20%**.

This will increase the net tax benefit for RDEC claimants to 15% from 10.53%.

This is based on the corporation tax main rate of 25% being applicable to the claimant company from 1 April 2023.

SME:

The R&D tax relief (additional deduction) for SMEs will decrease from 130% to 86%.

The SME payable credit rate which can be claimed for surrenderable losses will be decreased from 14.5% to 10% for most companies, however “R&D intensive” SMEs can claim a credit of 14.5%.

This will reduce the maximum payable credit for loss-making SMEs from 33.35% to 18.6% or 27% for “R&D intensive” SMEs.

Extension to qualifying expenditure

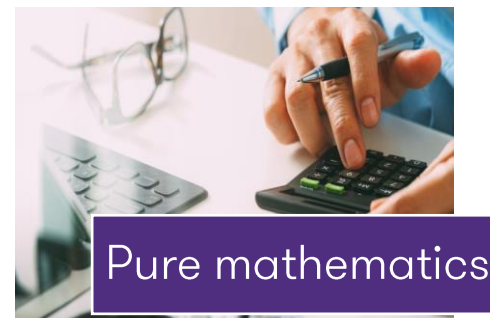
For accounting periods starting on or after 1 April 2023:



Some exclusions will apply to prevent R&D relief being claimed on recoupable costs, for example:

- if a business has a contractual right to sell data onwards and the initial inputs can still be identified.
- if the business has a contractual right to publish, share or otherwise communicate data with a third party, unless the communications are reasonably necessary for, or incidental to, the relevant R&D.
- qualifying indirect activities in relation to data licence and cloud computing services costs will be ineligible.

The DSIT guidelines were previously unclear whether activities relating to pure mathematics met the definition of R&D for tax purposes. The guidelines will now be updated to make it clear that pure mathematics does constitute a field of science.



Restriction to overseas activities

For **accounting periods starting** on or after 1 April 2024, expenditure on payments to subcontractors, EPWs and contributions to independent research will need to be UK expenditure or qualifying overseas expenditure (QOA). Prior to the 2023 Spring statement, the relevant date had been 1 April 2023.

QOA is qualifying expenditure on R&D undertaken outside of the UK.

Conditions for QOA to apply:

1. Conditions necessary for the R&D are not present in the UK.
2. Conditions are present in the location where the R&D is undertaken.
3. It would be 'wholly unreasonable' to replicate the conditions in the UK.

Examples of this may include:

- Geographical reasons such as deep ocean research or the study of active volcanoes.
- Legal and regulatory exemptions e.g. if clinical trials are not available in UK.
- The existence of laboratory facilities overseas which do not exist in the UK, where it would not be reasonable for the claimant to build such a facility in the UK.
- Conditions relating to cost or the availability of workers are specifically excluded.

Additional Information Form



All R&D claims submitted on or after 1 August 2023, including amended tax returns, will require an Additional Information Form to be submitted to be valid.

The final form is not yet available however examples of additional information that will need to be provided are expected to include:

- How costs are split between qualifying categories
- Amount of the above that is Qualifying Indirect Activities (QIAs)
- Amount of expenditure incurred on each project
- Technical details for up to ten projects
- Details of any agent who has advised the company on its R&D claim

Pre-Notification of claims



- A Claim Notification form will need to be submitted for **first time claimants** or **R&D claimants who have not made an R&D claim/claim notification in the previous three years** for an R&D claim to be valid.
- The earliest date that a Claim Notification form can be submitted is the first day of the accounting period to which the claim relates and the latest date is 6 months after the accounting period to which the claim relates.
- If an R&D claim is submitted before the 6 month Claim Notification deadline, the company will not have to submit a Claim Notification form.

Potential upcoming changes in 2024



On 13 January 2023, the Government launched a consultation to simplify the UK's R&D tax regime, drive innovation and grow the economy. The consultation closed on 13 March 2023 and effectively sets out proposals on how the two R&D schemes currently in place could be replaced by one single RDEC-style scheme for accounting periods starting on or after 1 April 2024. No final decision has been taken on whether a new single regime will be introduced but the Government maintains the option of introducing a new single regime from 1 April 2024.

Planning ahead

- Review your data and identify costs that will be eligible or potentially excluded. HMRC expect to see qualifying costs split by project
- Overseas R&D workers – Although effective from 1 April 2024, start to model the changes now to better predict future cashflow impact
- What sort of documentation is kept on file to substantiate the claims. The AIF now requires companies to write up to 10 project narratives per claimant entity
- Have you considered moving to real-time reporting and does your current data capture process enable you to achieve this?



03

Global minimum tax

What is the Global Minimum Tax (Pillar 2)

- Applies where consolidated revenues are EUR 750m a year or more
 - Apply GAAP of parent
 - Need to determine constituent entities
 - Can use entity figures used in consolidation if reasonable to do so
 - EUR 750m threshold is for two of the last four years
- Where adopted – minimum 15% tax rate per jurisdiction on that jurisdiction's GLOBE tax base
 - Identify covered taxes
 - Allocate covered taxes to each jurisdiction
 - Calculate GLOBE tax base

What is the Global Minimum Tax (Pillar 2)

- Income inclusion rule
 - New CFC-type tax in the parent entity's jurisdiction
- Undertaxed Payment Rule (UTPR)
 - Either disallow deductions or impose equivalent new tax to raise the global minimum tax in a subsidiary of the top parent company
- Domestic Minimum Top-up Tax (DMTT)
 - Being introduced in UK
 - 15% tax in Ireland
- Reporting requirements

What is the Global Minimum Tax (Pillar 2)

- Safe harbours
- Transitional rules
- Reporting requirements
- Copious OECD guidance
- Accounting:
 - IFRS and UK GAAP – no deferred tax recognised – disclosure requirements
 - US GAAP – expected to be an “alternative minimum tax”

04

Operational Tax Developments

EU withholding claims for life insurance businesses

1. Status of claims – successes and challenges
2. Case law developments (France, Netherlands)
3. Key themes
4. Opportunities

Other developments

1. EU FASTER proposal
2. US 1446(f) withholding
3. Changes to the Common Reporting Standard

Questions?



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