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MEDIATION OF FINANCIAL SERVICES AS NEW/OLD DEFINITION FOR VAT?

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In October 2014 the Federal Administrative Court (BVGer, 13.10.2014, A-4913/2013) issued a judgement, which may have wide-ranging consequences for Swiss VAT: the expression "mediation" is to be interpreted as it was under the old VAT Law, which applied until 31 December 2009.

1. FINANCIAL SERVICES EXEMPT FROM VAT WITHOUT CREDIT

Article 21 Para. 19 of the Federal Law with regard to Value Added Tax (MWSTG; SR 641.20) defines the services without credit in the field of money and capital transactions. They include, for example, the granting of credits or turnovers in securities. Also exempt from the tax is the mediation of such services. But the VAT Law does not further define what is to be understood by mediation.

If the mediation is a service exempt from the tax without credit, VAT does not have to be settled on the relevant consideration. On the other hand the service provider is not entitled to the input tax deduction. Pursuant to Article 22 Para. 2 MWSTG the option is excluded for financial services exempt without credit.

2. DEFINITION OF MEDIATION UNDER THE OLD VAT BRANCHEN-INFO (UNTIL 31 DECEMBER 2009)

Pursuant to the VAT Branchen-Info No. 14 „Financial" on the old VAT Law valid until 31 December 2009, it was stated clearly in Section 5.10.1 that only the conclusion of contracts expressly in the name of and for account of third parties constituted mediation in the sense of the VAT law. This meant that only the consideration from a direct representation in the financial field qualified as a turnover exempt without credit, provided the service mediated was a service exempt without credit. In other words, only expressly acting (i) in the name of a third party and (ii) for the account of a third party qualified as a financial mediation service.

Further the old Branchen-Info stated that the „mediation" of client relationships, i.e. gaining and introducing clients did not fall under the definition of mediation in the sense of the old VAT Law. As examples the Branchen-Info listed the following activities, which were not to be qualified as mediation services:

- Making contacts
- Sale of a Goodwill
- Sale of address lists
- Participating in client events.

3. DEFINITION OF MEDIATION UNDER THE NEW VAT BRANCHEN-INFO (FROM 1 JANUARY 2010)

This interpretation has changed with the new VAT Law at 1 January 2010. The FTA has immensely extended the originally very narrow definition. According to VAT Branchen-Info 14, applicable since 1 January 2010, Section 5.10.1, mediation in the sense of Art. 21 Para. 2 Heading 19 litt. a-e MWSTG is now all „activities of an intermediary acting in this function, which consists in working towards the conclusion of a contract between two parties in the field of money and capital transactions". In addition the Branchen-Info states that conclusion of an actual contract is not a condition.

Thus, also in the new Branchen-Info, acting in the name of and for account of third parties is also equated with a mediation service. But it is no longer

the only criterion for the presence of a mediation service. The talk is only of an intermediary, who works towards the conclusion of the contract, without himself being a party to the contract and without having a personal interest in the contents of the contract. There is not even a condition that a contract is actually concluded. The intermediary mentioned only brings two people together and works on them so that they conclude a contract, whereby his contribution must have a certain relevance.

The distinction between a mediation service exempt without credit and a taxable service is therefore no longer as clear as it was under the old practice.

Under the new practice the mediation of a client relationship, which does not relate to a single turnover transaction, is not a mediation service. These so-called finder's fees continue to be taxable according to the nature of the service.

4. JUDGEMENT OF THE FEDERAL ADMINSTRATIVE COURT OF 23 OCTOBER 2014

On 23 October 2014, in its judgement A-4913/2013 the Federal Administrative Court ruled that the extended definition of mediation in force since 2010 does not comply with the law. The Federal Administrative Court's main argument is that the wording of the article in the old VAT Law (Art. 18 Heading 19 lit. a-e) is identical with Art. 21 Para. 2 Heading 19 lit. a-e in the VAT Law in force since 2010. In this connection the Federal Administrative Court states that the FTA has projected into the same wording a different interpretation, which was neither comprehensible nor justified.

In addition the Federal Administrative Court states that under prevailing Federal Court practice exceptions are in principle to be interpreted restrictively (cf. judgement 2C_196/2012 of 10 December 2012; 2C_711/2012 of 20 December 2012; 2C_399/2011 of 13 April 2012). The FTA's change of practice between 2009 and 2010 is clearly an extension of the meaning of the expression „mediation", which runs counter to the Federal Court judgements mentioned.

This judgement is not yet legally binding, but has been appealed by both parties to the Federal Court. For the time being, therefore, the definition of mediation according to the currently applicable Branchen-Info 14 is applicable.

5. RECOMMENDATIONS FOR ACTION

Should the Federal Court confirm the judgement of the lower court, the old practice would again apply: under the expression "mediation service exempt without credit" is understood only acting in the name of and on behalf of a third party. This means that it is necessary to investigate whether mediation services, which at present are qualified as services exempt without credit, will again qualify retroactively as taxable services. In the event of an actual confirmation of the judgement by the Federal Court and in order to ensure that all turnovers comply with the law, enterprises engaged in the financial area would have from a Swiss VAT perspective urgently to undertake the following actions:

- Analysis of all contracts with external consultants
- Review of the commissions and the related calculations
- Evaluation of all IT systems with respect to the possibly new VAT practice

In addition the question arises whether the past years might possibly have to be corrected. It is therefore clearly evident that obtaining a written confirmation (ruling) on the VAT treatment from the FTA on the qualification of mediation services would still be sensible and to be recommended.

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