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RENEWED JUDGEMENT ON THE PROVISION OF FINANCIAL SERVICES
Exempt or not exempt - this is (still) the question

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After 2014 (see our article in Expert Focus 2015/8), in its judgement delivered on 3rd October, the Federal Administrative Court once again ruled on VAT with regard to the provision of financial services. Accordingly, the mediation should be oriented as was customary until 2009 - by means of direct representation! A final decision on this case by the Federal Court would be desirable to finally have legal certainty.

Definition of mediation - valid until 31st December 2009

According to the old VAT law, mediation is exclusively understood as the conclusion of contracts in the name of and on the account of a third party. Thus, until 31st December 2009, only the remuneration from direct representation in the financial sector had to be classified as excluded turnover. According to this, the mediator had to clearly present themselves to be acting in the name of and on the account of a third party.

Definition of mediation - valid VAT law

On p14, in section 5.10.1 of their VAT-Sectors Info Document, the Swiss Federal Tax Administration (FTA) defines mediation services as “activities of an intermediary engaged in working towards the conclusion of a contract between two parties in the field of monetary and capital transactions.” Conclusion of the contract is not a requirement.

What does this mean for my company?

According to the FTA's current perception this has led to very broad interpretation among mediation services in the financial sector. It now no longer only covers direct representation (as was the case until 31st December 2009), it also includes any activity by a “mediator” that contributes towards conclusion of a contract, including such activities by persons that are neither a contracting party nor have any self-interest in the contract. Consequently, the current situation is very vague - not only for companies, but also for the FTA. Many discussions and uncertainties were inevitable, which among other things, proved to be true with this judgement.

Judgement of the Federal Administrative Court

In 2017, the Federal Administrative Court is also of the opinion (as in its previous judgement of 23rd October 2014 (see our article in Expert Focus 2015/8), that the present legal situation did not change under the current VAT law. Therefore, a tax exemption in accordance with Article 21, section 19, letter e of the VAT law requires that direct representation must be presented. Furthermore, the court expressly states that the FTA's opinion cannot be described as “in accordance with the statutory provision”.

As of 1st January 2010, the mediation of customer relationships not relating to a single sales transaction was not included in the FTA's expanded definition. These so-called finder's fees are still regarded as taxable services.

What do I have to think about?

The Federal Administrative Court's judgement affects the turnover from the mediation of securities, book-entry securities, derivatives and shares in companies. However, the VAT assessment regarding the taxability of the administration and custody of securities, rights and derivatives is not affected.

If the Federal Court should confirm this judgement, the definition from the old VAT law would apply once more. The FTA would therefore have to withdraw its own arbitrary extended interpretation accordingly. From a commercial point of view all transactions would have to be re-assessed in terms of value added tax; this includes the review of currently valid contracts as well as the evaluation of IT systems.

Given the current uncertainties in this area, we would even recommend that the VAT assessment for planned transactions in this area be individually confirmed by the FTA. Of course, we'll keep you up to date on this exciting discussion.

Best regards

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