

vat's important

Brokering Financial Services: Swiss Federal Supreme Court finally decides on VAT-Qualification

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The Federal Administrative Court has already ruled several times on the VAT qualification of brokerage services for financial services (see our article of [November 2017](#)). The Federal Tax Administration (FTA) has lodged a complaint against this decision in order to set it aside. Now the time has come: The Federal Supreme Court has ruled and confirmed the opinion of the FTA in its ruling.

### Disputes over the interpretation of the intermediary concept

Since the new Swiss VAT Act came into force on 1 January 2010, the FTA has taken a new view on how the concept of intermediary can be seen in financial services. In contrast to previous practice, the FTA in its VAT brochure defines as brokerage services all those „activities of an intermediary acting in this capacity which consist of working towards the conclusion of a contract in the area of money and capital transactions between two parties“. A conclusion of a contract is not presupposed thereby at all.

This interpretation was remarkable in that, until 31 December 2009, the only mediation understood was the conclusion of contracts expressly in the name and for the account of third parties. Thus, only the remuneration from direct representation in the financial sector was to be qualified as exempt turnover. Accordingly, the intermediary had to act unambiguously (i) in the third party's name and (ii) for the third party's account.

### What does this mean for my company?

With the sensational judgement 2C\_943/2017 of the Federal Supreme Court a long lasting uncertainty in the field of VAT was finally eliminated. The Federal Supreme Court is of the opinion that, based on systematic and historical considerations, the existence of a tax-exempt mediation cannot be made dependent on the existence of a direct VAT representation. As far as the Federal Administrative Court accepts such, however, it violates federal law. A switching is therefore already present if a person works causally on the conclusion of a contract within the range of the money and capital traffic between two parties, without being itself party of the mediated contract and without having an interest of one's own in contents of the contract.



Due to the fact that the wording of the article of law remained unchanged in comparison with the law in force until 2009, the judgment of the Federal Supreme Court on the concept of mediation represented a change in practice. According to the Federal Supreme Court, such a change of practice can be justified by the fact that, among other things, the change of practice of the FTA has taken place in close consultation with the circles concerned, has triggered a lively debate there and, moreover, has been published (already in advance) in a publicly accessible manner. Accordingly, the idea of legal certainty does not stand in the way of the change of practice in the sense set out above.

The mediation service should be distinguished from the mere supply of customers, which is not directed towards a specific contract, but has in mind a large number of potential future contracts that have not yet been concretized. The supply of customers constitutes a service in the field of advertising or the procurement of information. The remuneration for that activity would be referred to as the ‚finder’s fee‘, which would not be exempt from VAT, irrespective of the form taken by the parties.

### What do I have to think about?

After years of uncertainty it is decided: The concept of mediator can now be defined quite broadly. Now all activities are covered by the concept of intermediary in financial services, which consists of working towards the conclusion of a contract in the area of the movement of money and capital between two parties. Such a „mediation position“ is likely to be reached quite quickly. We therefore recommend, on the basis of this judgment, that contracts be re-examined and that the following points, among others, be examined:

- Is there an intermediary position in the financial services sector?
- Is the mediation position desirable?
- Can the contracts be adjusted and VAT adjusted?
- Does the input tax have to be reduced? If so, how far back must this reduction be made?

We will be happy to assist you in assessing these complex questions and discuss with you the opportunities and risks arising from this judgement.

With best regards from your VAT team

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