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Brokerage activities in the financial sector
Decision of the Federal Administrative Court A-5793/2022 of 18 June 2024

Author 1 christoph.drexl@primetax.ch
Author 2 zsuzsanna.serra@primetax.ch

Caution should be exercised when classifying the remuneration of financial intermediaries for VAT purposes, as even terms that are clearly defined in administrative practice can be interpreted very differently depending on the circumstances.

BACKGROUND

In the present dispute, the complainant acted as an asset manager. She received two types of compensation for her activities under an asset management agreement: On the one hand, she was paid the brokerage fees paid by the asset management clients plus brokerage fees from the bank; on the other hand, she received a monthly management fee. Under the brokerage agreements with two different banks, the complainant received remuneration or external asset management fees resulting from the activities recorded in the clients' accounts.

The question is how to qualify these fees for VAT purposes. Even if terms are listed and defined in black and white according to administrative practice, these terms (in this case charges) would have to be analysed precisely and placed in the correct context, otherwise the results would be completely different.

DECISION OF THE FEDERAL ADMINISTRATIVE COURT

A-5793/2022

In the present case, it is undisputed that the complainant acts as an asset manager and that the monthly management fee is subject to VAT at the standard rate. However, it is disputed whether the brokerage fees and external asset management fees are remuneration for a tax-exempt brokerage service or a taxable asset management service.

In case law and administrative practice, the view is held that the underlying transaction brokered is decisive for the categorisation of an intermediary activity. If the underlying transaction originates from the area exempt from tax, the remuneration for the brokerage is exempt from tax.

As an asset manager, the appellant offers both investment advice and execution for its clients and also receives separate and contractually agreed remuneration for these services. In the opinion of the complainant (based on point 6.1.6 of MBI 14 and on the previous case law of the Federal Supreme Court), **brokerage fees (called: Courtagen)** for execution are deemed to be exempt fees for trading in securities. Alternatively, the asset management service should be regarded as

an exempt ancillary service to the brokerage service, as the European Court of Justice (ECJ) has already ruled in a similar case (C-453/05, 21 June 2007).

The complainant is of the opinion that it provides **brokerage services** in accordance with administrative practice. Non-application of this administrative practice would violate the constitutionally guaranteed protection of legitimate expectations.

Brokerage is clearly defined in section 5.10.1 of MBI 14 and refers to the activity of an intermediary acting in this capacity, which consists of working towards the conclusion of a contract in the area of money and capital transactions between two parties without being a party to the brokered contract and without having a vested interest in the content of the contract. Brokerage must be carried out as an independent intermediary activity.

The FTA, on the other hand, considered the appellant's performance to be taxable asset management based on section 5.10.3 of MBI 14 and further believes that the financial contributions (retrocessions) represent a self-interest due to the obligation to deliver, which in turn would be contrary to exempt brokerage.

The Federal Supreme Court is of the opinion that the complainant's execution service is to be regarded as ancillary to the main service of investment advice or asset management, as this service would not make sense on its own. It merely serves as an instrument for utilising the complainant's main service under optimal conditions. This type of service has no independent purpose for clients. If there were no asset management mandates, no client would utilise the execution services alone, but would commission a bank to do so.

Although the appellant is convinced that brokerage fees cannot be listed separately as an ancillary service in administrative practice, the Federal Supreme Court finds that the same service may have to be assessed differently depending on the context. In this case, the execution service (ancillary service) only fulfils a purpose in the context of an asset management mandate (main service).

With regard to the protection of legitimate expectations, the Federal Supreme Court points out that Chapter 6.1 of MBI 14 cited by the complainant under the heading "General banking services" refers specifically to services offered by banks. Therefore, the protection of legitimate expectations cannot be invoked in this context.

CONCLUSION

This judgement illustrates the relevance of a precise determination of the underlying service in the context of an intermediary activity. In this regard, it should be noted that even the explanations and terminology used in administrative practice are only valid in their respective context.