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Portfolio management services chargeable to VAT?

An ECJ advocate general has suggested the court hold the portfolio management services offered by banks to private customers are subject to VAT where the bank is resident, or in the state of residence of the customer if outside the EU.

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A German bank is in a dispute with its tax office over the VAT status of its portfolio management services to private clients. It sees the services as primarily VAT-free dealing in securities whilst the tax office sees them as consultancy led. The ECJ advocate general on the case has now published her opinion to the effect that the general service element predominates; hence the services are not exempt as dealing in securities. On the other hand they do rank as financial services from the point of view of place of performance. Thus when rendered to private clients outside the EU they are deemed performed at the residence of the client. Under current law, this means they are not taxable within the EU, but the EU bank supplying them is entitled to deduct input tax.

The advocate general accepts that the relevant provisions of the VAT Directive can be construed in different ways. The portfolio management here at issue was a service offered by the bank to wealthier private clients for a flat rate fee based on the value of the portfolio. Buying and selling was at the bank's discretion without specific reference to the client, though in pursuit of an agreed strategy. The fee charged was split into trading and custodial/advisory portions, though both portions were at standard rates applied to the same basis. The advocate general saw this and other possible splits as artificial, emphasising that the average client would see the management as a single service designed to maintain and, if possible, increase his wealth. From the same point of view, the primary element was the application of the experience and expertise of the bank's staff to decisions to buy or sell, or to wait for a more favourable moment. The actual transactions were a necessary routine function. This "consultancy" element of the service was sufficient to take it beyond pure trading, thus taking it beyond the exemption for trading in securities, not least in view of the principle of keeping exemptions to the general norm of standard rate taxation to a minimum.

On the other hand, the advocate general saw the portfolio management service as falling under the general definition of financial services within the context of the rules on the place of supply. Under the VAT Directive as it at present stands, portfolio management services for private customers resident within the EU are deemed performed at the place of the bank establishment where they are carried out. If the customer is resident outside the EU, the place of supply is his country of residence. In this latter case, the service is not taxable within the EU and the bank has an input tax deduction.

The ECJ case reference is C-44/11 Deutsche Bank, opinion of May 8, 2012.

Keywords

portfolio management services, securities dealings