

October 2005

Intermediaries in financial transactions: an EU-wide survey of the VAT exemption

Given recent developments in Germany regarding the conditions under which services provided by intermediaries in financial transactions could be exempt from VAT, we have conducted a survey within the PwC Financial Services VAT Network in the EU in order to outline the main trends in this matter.

The German Federal Ministry of Finance has issued a decree dealing with the VAT exemption of financial intermediary services.

This decree follows a decision by the *German Federal Fiscal Court* and has stated that the decision is applicable to any intermediary services, which are VAT exempt under German VAT Law, except for the insurance brokers/agents (including building and loan association agents). The implications being, that the intermediary must have a direct contract with and be remunerated by one of the future parties of the contract in order to render a VAT-exempt intermediary service.

Currently, some efforts are made in Germany in order to obtain a revision of the VAT position of the VAT authority.

In this respect, we have thought that it could be interesting to have an overview of the 25 EU Member States' positions. Please find hereafter the results of this survey.

Background

The German Federal Ministry of Finance issued a decree dated December 13, 2004 regarding the application of the German Federal Fiscal Court decision dated October 9, 2003 (V-R-5/03) dealing with the VAT exemption of intermediary services.

The decision of October 9, 2003 concerned a sub-contractor, who carried out preparatory work relating to credit transactions for the account of an intermediary appointed by banks. A commission was paid by the intermediary to the sub-contractor in exchange for his services. The question raised was, if the retrocession paid could be seen as remuneration of a negotiation service within the meaning of sec 4 No 8.a of the German VAT law (Art. 13.B.d.1 of the 6th EU Directive). This article states that the granting and the negotiating of credit and management of credit by the person granting it shall be exempt. The decree ruled that there could only be a negotiation within the meaning of these articles, if the negotiation is carried out for one of the parties to the original contract and if there is a direct remuneration from one of the parties for the negotiation.

In the instance described above, the German Federal Fiscal Court argued that the sub-intermediaries did not have a direct relationship with one of the parties to the final transaction, but with another intermediary. Consequently, the Court took the position that in order to be eligible for the exemption, a direct contract for the service had to exist and therefore, the services rendered could not be exempt.

The decree of the Ministry of Finance dated December 13, 2004 implemented the decision and stated that it was applicable to any intermediary services, which are VAT exempt under German VAT Law (transactions in shares, bonds, other securities, debt, payment transactions, etc). This would imply that in order to render VAT-exempt intermediary services, the intermediary must have a direct contract with and be remunerated by one of the future parties to the contract. As a result, sub-intermediaries will no longer be able to render VAT-exempt intermediary services. Only insurance brokers/agents (including education and loan association agents) rendering services under sec 4 No 11 of the German VAT Law (Art 13.B.a of the 6th EU Directive) are not subject to these conditions. Indeed, the wording of the exemption for insurance services is slightly different from the other intermediary services and states that insurance and reinsurance transactions (including education and loan association agents), including related services performed by insurance brokers and insurance agents, are exempt from VAT. This provision thus includes intermediaries and does not refer to the concept of negotiation.

It is important to note that this decision will not be applicable retroactively. Indeed, the German tax authorities will not assess any VAT if the intermediary services under sec 4 No 8 b - g German VAT Act (Art 13.B.d No 2 - 5 of the 6th EU Directive) rendered prior to January 1, 2006 have been or are treated as VAT exempt even if there is no direct contract with and remuneration by one of the future parties to the contract.

In addition, it must be noted that a constitutional complaint has been lodged with the German Federal Constitutional Court, which accepted it recently.

As a result of this decree, German intermediaries may have to charge German VAT (16%) to their contracting partners, even if those are established in another country. The latter could only recover part of this VAT or none at all.

Summary of VAT treatment of sub-intermediary services in the European Union

In contrast to the German tax authorities, most authorities in the other Member States have not taken any official position with regard to this issue. Only the Danish, Greek and Portuguese authorities have issued an official opinion. In this regard, it is not surprising that the VAT treatment differs in the various Member States.

The Danish authorities have issued a circular stating that the exemption only applies if the intermediary has a contractual agreement with one of the parties. The Portuguese authorities on the other hand have officially stated that no contractual agreement will be needed in order to apply the exemption. In Greece, the authorities do not require a direct relationship for the exemption as intermediary to apply.

Although most Member States treat sub-intermediary services as exempt, there are slightly different approaches to the exemption. In this respect, most countries refer to CSC Financial Services case of the European Court of Justice (C-235/00), which ruled that, “*negotiation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation. It may consist, amongst other things, in pointing out suitable opportunities for the conclusion of such contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of the payments to be made by either side. The purpose of negotiation is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract*”.

The recent conclusions of the Advocate General on 8th September 2005 in the Abbey National case shed some interesting light on the issue as they relate to the scope of the VAT exemption for management services of investment funds. The Advocate General has clearly stated that the outsourcing of such services could also benefit from the VAT exemption if they meet the SDC case criteria, i.e. forming a distinct whole and being essential for and specific to the exempt services. This is a favourable element and the decision of the Court could have some impacts on the exemption for the chain of intermediaries.

Generally speaking, the service should be exempt as a result of the nature of the services performed by the intermediary. Five Member States consider that, based on the apparent view of the authorities, a direct link between the sub-intermediary and the final customer would be required in order for the service to be exempt. This rule would be applicable in Denmark, the Netherlands, Slovenia and, of course, Germany.

However, these are only indications in the countries where no official position exists. For instance, a direct link seems to be required in Slovenia even if, apparently, there are no two-level distribution structures in this country’s market and therefore the question does not arise. Furthermore, there are a lot of questions in the Netherlands regarding this issue and this remains unclear in the absence of any official guideline. Based on market practice, the tax authorities seem to require that the intermediary service is the one whereby the intermediary should have contact with both sides and should assist both sides in signing a contract. This would be close to the German position but without the requirement regarding the payment.

Finally, the UK authorities do not specifically deny the VAT exemption where there is a chain of intermediaries. In this respect, the UK law provides that a person may act in an intermediary capacity wherever he is acting as an intermediary, or one of the intermediaries. The other countries have no official position but based on some of the principles outlined above tend to consider that a chain of intermediaries could still render exempt services.

Considering the lack of uniformity in the VAT treatment in the Member States, it has been confirmed that the authorities seem likely to take a position in this matter in some Member States (Spain).

For now, one must await the outcome of the lobbying efforts made in Germany to try and get the German authority to revise its position. Meanwhile, considering the interest in this issue shown by the authorities, we would recommend monitoring any developments closely and remain at your entire disposal to assist you in this respect.

Detail countries' answers

Please find hereafter a brief summary of the VAT treatment applicable to intermediary services in all current Member States of the EU.

Austria

- No official guideline.
- In the industry practice, the VAT exemption is likely applied to sub-intermediary services.

Belgium

- No official guideline.
- In practice, no VAT applies to this kind of transaction.
- However, the VAT liability of (sub-) intermediary services is to be assessed on a case-by-case basis considering all factual and legal elements. Belgian VAT authorities refer to CSC case law.

Cyprus

- No official guideline.
- The VAT treatment is based on the nature of the services provided by the intermediary.
- The only position taken with regard to intermediary services by the Cypriot VAT authorities is that intermediaries comprise the introductory service of bringing together a person who wishes to buy securities to a person selling securities. This is considered an exempt supply, if carried out in Cyprus, even if intended securities transactions later fall through.

The Czech Republic

- No official guideline.
- From a practical viewpoint, taxpayers use the exemption even in circumstances when they do not have a direct relationship with the parties.

Denmark

- Circular n° 130 of November 12, 2003 published by the Danish Customs and Tax Authority. Denmark is one of the few countries where the authorities have actually taken a position with regard to the issue.
- The exemption for the intermediary service is interpreted as the intermediary having a contractual agreement with the issuer or the customer of the financial product.
- The Danish authorities' position is thus similar to that adopted in Germany but without the condition related to the payment by one of the parties.

Estonia

- No official guideline.
- In practice, the VAT exemption is likely to apply to sub-intermediary services.

Finland

- No official guideline.
- The exemption of intermediary services is interpreted rather broadly. If the intermediary acts on behalf of the client to unify the parties for entering into a contract, the service is usually exempt.

France

- No official guideline, only French case law.
- The mere sub-contracting of VAT-exempt intermediary services should be exempt since this should not change the VAT treatment.

Germany

- Decree of the Ministry of Finance dated December 13, 2004.
- Considering that the position of the German authorities is the reason for this survey, there is a quite strict framework with regards to this area in Germany.
- A direct contract and direct remuneration by one of the future parties to the contract is required to apply the exemption.

Greece

- In Greece, the authorities have taken a position with regard to this issue.
- The Greek authorities do not require a direct relationship to apply the exemption.

Hungary

- No official guideline.
- The exemption is applied based on the activity performed. Thus, whether this activity is subcontracted should have no impact on the VAT treatment.

Ireland

- No official guideline.
- In practice, the relationship between the parties and the services performed will be evaluated.
- In the case where there is a sub “agent” it has to be established if he is in fact an agent and also, what service he is providing.
- There could be a danger that the service provided by the sub-agent, is not, in reality, a VAT exempt service.

Italy

- No official guideline.
- Due to the lack of an official interpretation by the Italian Tax Authorities the matter is disputable.
- Where the sub-intermediary has a face-to-face contact with the client and is able to offer to him the purchase of “financial products” on behalf of the issuer, in principle the exemption could be applicable.

Latvia

- No official guideline.
- Services (including intermediary), which are associated with investments in capital and the holding, disposal and administration of securities, are VAT exempt in Latvia. In practice, the exemption will depend on the circumstances of the transactions.

Lithuania

- No official guideline.
- The current VAT treatment of chains of intermediaries, which provide VAT-exempt financial services, is that activities of all agents are VAT-exempt provided that they are not engaged in any additional value adding activities.

Luxembourg

- No official guideline.
- In practice, the exemption is applied to sub-intermediary services.

Malta

- No official guideline.
- The exemption would be based on whether or not the services would qualify in terms of the exemption in their own right, particularly whether such services are provided in terms of an insurance licence issued the local authorities.

Netherlands

- No official guideline.
- The Dutch tax authorities have the point of view that an intermediary service is a service whereby the intermediary should have contact with both sides and should assist both sides in signing a contract.

Poland

- No official guideline.
- Each transaction in the chain is to be analysed separately based on general rules.
- The VAT exemption for services of intermediaries in the financial sector is determined depending on the scope of activities performed and, as a rule, based on the statistical classification of the service.

Portugal

- The Portuguese authorities have taken a position in this respect.
- The opinion of the Tax Administration appears to accept an invoice as evidence of a contractual relationship, resulting in exemption of the intermediary service. However, due to some ambiguity in the terms of the opinion, a written contract between the principal and the intermediary is recommended.

Slovakia

- No official guideline.
- No direct contractual relationship is explicitly required by the Slovak VAT Act in order for mediation of the financial products to be VAT exempt.
- The Slovak VAT treatment of intermediary services does not depend on whether they are provided within a one- or a two-level agent structure.

Slovenia

- No official guideline.
- Two-level structures seem not being used in Slovenia.

Spain

- The Spanish authorities have taken a new position on the interpretation of the exemption for financial services.
- As from September 23, 2005, the term “negotiation” is to be interpreted in a broad sense and the criteria of CSC case have been implemented.
- The Spanish tax authorities have verbally (unofficial opinion) stated that they will probably admit the exemption only in the event that a direct relationship with both parties exists.
- The financial industry however consider that services in chains of intermediaries are exempt from VAT and is now expecting a ruling regarding this issue.

Sweden

- No official guideline.
- In practice the main factor is whether an intermediary can be deemed to be involved in the actual exempt transaction to such an extent that the service provided by the intermediary would also be exempt.
- In practice, the scope of the exemption is very limited.

UK

- No official guideline.
- The UK tax authorities do not specially deny VAT exemption where there is a chain of intermediaries. The UK law provides that a person may act in an intermediary capacity wherever he is acting as an intermediary, or one of the intermediaries.
- The VAT exemption applies to a person acting as an intermediary, or one of the intermediaries, between
 - a person who provides financial services, and
 - a person who is or may be seeking to receive financial services.

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