Independent financial advisers are subject to VAT, says Italian Tax Agency

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Contributed

The remarkable position of the Italian Revenue Agency about the application of VAT to financial services represents an important legal precedent across the European Union.

The case involved an Italian brokerage company (a so-called SIM; *società d'investimento mobiliare*"), assisted by a team of lawyers from Loconte & Partners.

The company offers services including individual portfolio management, financial advice and general consulting services.

The company filed a tax ruling in order to understand whether the investment advice offered to its clients should be considered as a VAT-exempt service or not, pointing out its total independence, during the performance of consulting services and financial advice, from third parties and other financial institutions involved (typically banks, funds or insurance companies).

The opinion of the Revenue Agency, that constitutes a turning point in the field of VAT applied to financial services, relies essentially on two key points: independence and impartiality of the brokerage company or the financial advisers.

Thus, if the advisers do not receive any remuneration or profits from third parties or from the financial operators involved (e.g. the bank where the asset managed is held), the services are to be considered subject to VAT, since they are completely unconnected from the final negotiation of the financial securities. Conversely, if the company is not in a position of independence with respect to third parties, in that case it will benefit from the VAT exemption regime.

On the other hand, the impartiality is also proved if the brokerage company does not act as a mediator between the client and the bank, so it does not carry out a trading activity.

As a matter of fact, the company which issued the tax ruling did not play an active role with reference to the contract between the

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client and financial institute, as it only gives customised recommendations related to financial instruments.

In the light of the above, the Revenue Agency stated that if the financial adviser has a direct and financial interest with reference to the contract between the client and the third party, then the fees received would be considered exempt from VAT. On the other hand, if the adviser is totally independent from the final contract, the remuneration received will be subject to VAT.

It worth specifying that Italian tax authority, through the Resolution no. 343/2008, already affirmed that there is no trading activity if the adviser is the sole interlocutor of its clients and there are no activities or contractual elements from which results that trading activities are carried out by the adviser or the brokerage company.

In fact, in accordance with EU Court of Justice sentences, the concept of "negotiation" means an activity carried out by a brokerage company, which is not a part of a contract related to the financial instrument and it is very different from the typical peculiarities of such contract (see cases C-235/00 and C-453/05).

Moreover, also the VAT Committee confirmed, with working paper no. 849/2015, that investment advices can be classified as a trading activities only if the financial adviser plays the role of a "mediator". In this way, it is possible to benefit from the VAT exemption scheme.

The innovative impact of the abovementioned interpretation of the Italian Revenue Agency implies the possibility of the investor and the owner of the financial instruments to verify the impartiality of his financial advisers.

Indeed, the hallmark – and the main role – of this kind of adviser (or brokerage company) is to ensure to the final client that they are providing neutral advice which is not connected to the relationship between the bank and the investor. The independence is also guaranteed by the fact that, from a practical point of view, when the investors finalise the trading activity recommended by the brokerage company they must involve the financial intermediary.

Therefore, in compliance with the requirements of Mifid II (which obliges intermediaries to give full evidence of the economic relationship between the client and the financial intermediary) and in order to guarantee transparency towards the clients, the financial advisers shall disclose VAT on fees to their clients if the service provided is truly independent. Consequently, the clients will clearly perceive the difference between an independent adviser and a restricted one.

Finally, it is remarkable how the position of the Revenue Agency, which – once again – follows the guidelines issued by EU and the European Court of Justice, constitutes a legal precedent for all the EU member countries, in order to apply the same ruling on the VAT regime for the financial advisory sector.

This article was prepared by Stefano Loconte, founder and managing partner of Loconte & Partners.

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