



**TC02063**

**Appeal number: TC/2010/07176**

*VAT – EXEMPT SUPPLIES – finance - whether appellant supplied intermediary services or services of management and advice - held, advice ancillary and predominant supply of intermediary services - whether intermediary services in relation to item 6 (exempt) or item 9 (standard rated) – held, in relation to item 6 appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BLOOMSBURY WEALTH MANAGEMENT LLP                      Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S                      Respondents  
REVENUE AND CUSTOMS**

**TRIBUNAL:    JUDGE GREG SINFIELD  
                    PHILIP GILLET**

**Sitting in public in London on 4 May 2012**

**Mr Alan Pink of Alan Pink Tax for the Appellant**

**Mr Philip Rowe of HM Revenue and Customs for the Respondents**

## DECISION

### Introduction

1. This appeal concerns the VAT liability of services supplied by Bloomsbury Wealth Management LLP (“Bloomsbury”) to its clients. In January 2010, Bloomsbury made a claim, by way of voluntary disclosure, for repayment of £258,592.22 output tax which Bloomsbury said it had accounted for in error between 1 October 2005 and 30 September 2009. Bloomsbury had accounted for VAT at the standard rate on its services which it now considered should have been exempt intermediary services within item 5 of Group 5 of Schedule 9 to the VAT Act 1994 (“VATA”). HM Revenue and Customs (“HMRC”) rejected the claim in a letter dated 16 July 2010, subsequently confirmed on a review, on the ground that Bloomsbury's services were not within the exemption and were chargeable to VAT at the standard rate. Bloomsbury now appeals against that decision. The issue is whether the services supplied by Bloomsbury are intermediary services within item 5 of Group 5.

### Preliminary application to adjourn pending judgment of Court of Justice

2. Shortly before the hearing of the appeal, HMRC made a written application for the hearing to be adjourned pending the judgment of the Court of Justice of the European Union (“CJEU”) in *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11). Bloomsbury objected to the application. We heard the oral application at the start of the proceedings. HMRC stated that the decision of the CJEU in *Deutsche Bank* would effectively decide the outcome of Bloomsbury's appeal. The issue, described further below, is whether Bloomsbury supplies exempt intermediary services or taxable services of portfolio management. HMRC submitted that the first question in *Deutsche Bank* is directly relevant to Bloomsbury's appeal. The first question asks the CJEU whether individual portfolio management for individual investors is exempt from tax under Article 135(1)(f) (transactions in securities or the negotiation of such transactions) of Directive 2006/112/EC or whether the exemption only applies to the management of collective investment funds within Article 135(1)(g) of Directive 2006/112/EC. HMRC said that the Advocate General was due to deliver her Opinion on 8 May 2012. There was no date for the decision of the CJEU and HMRC acknowledged that it may not be delivered for some months.

3. Bloomsbury objected to the application to adjourn on grounds that it was much too late to make such an application and that the *Deutsche Bank* case was factually different from that of Bloomsbury. Bloomsbury pointed out that its appeal was already over two years old, the case had been postponed once before to allow the parties to try to reach agreement and an adjournment to await the decision of the CJEU in *Deutsche Bank* could delay the hearing for another six months or a year. Bloomsbury submitted that the *Deutsche Bank* case would not necessarily determine the outcome of Bloomsbury's appeal because it was not providing portfolio management or discretionary fund management services but introducing its clients to providers who issue securities to them.

4. We decided to refuse the application to adjourn the hearing until the CJEU had issued its judgment in *Deutsche Bank*. We considered that it was not sufficiently clear from the terms of the reference provided to us that the case would determine the issues in this appeal. From the brief terms of the reference and on our understanding of the issues in this appeal, it appeared that the *Deutsche Bank* case was concerned with the VAT treatment of the providers of fund management services whereas Bloomsbury's appeal concerned whether the services of introducing clients to such fund managers fell within the exemption for intermediary services. We also bore in mind that the adjournment could cause a significant further delay. If, having reviewed the Advocate General's Opinion, either party considers that the decision of the CJEU might show that our decision in this appeal contains any error of law then that party can apply for permission to appeal and request a stay of consideration whether to grant permission at that point.

### Relevant legislation and guidance

5. Section 31(1) VATA provides that supplies specified in Schedule 9 are exempt supplies. Items 5, 6 and 9 of Group 5 of Schedule 9 are relevant in this case. They provide as follows:

“5. The provision of intermediary services in relation to any transaction comprised in item ... 6 (whether or not any such transaction is finally concluded) by a person acting in an intermediary capacity.

6. The issue, transfer or receipt of, or any dealing with, any security or secondary security being

(a) shares, stocks, bonds, notes (other than promissory notes), debentures, debenture stock or shares in an oil royalty ...

(e) units or other documents conferring rights under any trust established for the purpose, or having the effect of providing, for persons having funds available for investment, facilities for the participation by them as beneficiaries under the trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever.

...

9. The management of—

(a) an authorised open-ended investment company; or

(b) an authorised unit trust scheme; or

(c) a Gibraltar collective investment scheme that is not an umbrella scheme; or

- (d) a sub-fund of any other Gibraltar collective investment scheme;  
or
  - (e) an individually recognised overseas scheme that is not an umbrella scheme; or
  - 5 (f) a sub-fund of any other individually recognised overseas scheme; or
  - (g) a recognised collective investment scheme authorised in a designated country or territory that is not an umbrella scheme; or
  - 10 (h) a sub-fund of any other recognised collective investment scheme authorised in a designated country or territory; or
  - (i) a recognised collective investment scheme constituted in another EEA state that is not an umbrella scheme; or
  - (j) a sub-fund of any other recognised collective investment scheme constituted in another EEA state.”
- 15 6. The relevant Notes to Group 5 are as follows:

“(5) For the purposes of item 5 “intermediary services” consist of bringing together, with a view to the provision of financial services –

- (a) persons who are or may be seeking to receive financial services,  
and
- 20 (b) persons who provide financial services,

together with (in the case of financial services falling within item 1 ...) the performance of work preparatory to the conclusion of contracts for the provision of those financial services, but do not include the supply of any market research, product design, advertising, promotional or similar  
25 services or the collection, collation and provision of information in connection with such activities.

(5A) For the purposes of item 5 a person is “acting in an intermediary capacity” wherever he is acting as an intermediary, or one of the intermediaries between

- 30 (a) a person who provides financial services, and
- (b) a person who is or may be seeking to receive financial services.

(5B) For the purposes of Notes (5) and (5A) “financial services” means the carrying out of any transaction falling within item 1, 2, 3, 4 or 6.”

7. HMRC's interpretation of the VAT liability of certain financial services is set out in VAT Notice 701/49 (November 2011). Section 9 of the Notice deals with supplies by intermediaries. Paragraph 9.1 describes an exempt supply of intermediary services and states as follows:

- 5 “A supplier of an exempt intermediary service is a person who:
- brings together a person seeking a financial service with a person who provides a financial service
  - stands between the parties to a contract and acts in an intermediary capacity, and
- 10 • undertakes work preparatory to the completion of a contract for the provision of financial services, whether or not it is completed.”

8. Paragraph 9.9 deals with the VAT liability of services supplied by Independent Financial Advisers. It states as follows:

“If you only provide advice your supply is taxable ....

15 If you act between your customer and the provider of a financial product, and you meet the criteria set out in paragraph 9.1, then your supply will be exempt.

If you provide both advice and you act between your customer and the provider of a financial product it is important to establish which of the two elements of your service predominates. Where your advice directly results in your customer taking out a financial product and you meet all the criteria for intermediary services in paragraph 9.1, the whole of your service – including the advice element – will be exempt. The advice is seen as ancillary to an exempt intermediary service. If you receive commission from the finance product provider, it is consideration for a separate exempt supply by you of intermediary services.

20

25

If, on the other hand, your advice far outweighs the work done to arrange a contract (for example, because a customer has received a general financial health-check, with advice covering a range of financial issues, but then only buys a minor product requiring minimal intermediation), the intermediary service is ancillary to the advice, and VAT is due on the whole supply.”

30

## **Facts**

9. Mr Jason Butler, a member of Bloomsbury Wealth, produced a witness statement. He gave oral evidence and was cross examined by Mr Rowe. In addition, we were provided with a bundle of correspondence and other documentation. We find the facts to be as follows.

35

10. Bloomsbury is an Independent Financial Adviser providing services in respect of financial investments to high net worth individuals. An individual who is considering whether to become a client of Bloomsbury will have an initial meeting with Mr Butler at which they will discuss the individual's financial circumstances, attitude to risk and needs in order to ascertain whether Bloomsbury's services are appropriate for them and the appropriate mix of investments. Bloomsbury provides high level advice to the client on asset allocation, types of assets and choice of fund managers. Bloomsbury does not provide portfolio management services and if it becomes clear at the initial meeting that is what the client wants then Mr Butler would advise the client to go elsewhere. The discussion will determine the appropriate investments in order to meet the client's aims. If the individual decides to become a client, Bloomsbury will arrange for the client's financial assets to be transferred to Pershing Securities, a third party nominee unconnected with Bloomsbury. The client gives Bloomsbury authority to communicate purchase instructions to Pershing. When the money is received by Pershing, it sends an electronic message to Bloomsbury and Bloomsbury then sends electronic instructions to Pershing to purchase units in a fund or funds appropriate to the client's circumstances and aims. Pershing acquires the investment products and holds them on behalf of the client. Pershing sends the client an annual custody report and six monthly investment performance reports (co-branded with Bloomsbury) although clients can also access that information at any time via their online account.

11. The investment products into which the client's money is transferred are collective investment funds in which the client receives units in Exchange Traded Funds, Open Ended Investment Companies or Unit Trusts. These products are provided by a small range of third party fund managers such as Dimensional Fund Advisors, BlackRock and Legal & General. Bloomsbury selects the funds through its internal risk committee. The principal fund manager recommended by Bloomsbury is Dimensional Fund Advisors. Mr Butler said that Bloomsbury did not make use of discretionary fund managers and used only passively managed, ie index tracking, investment vehicles.

12. After the investments have been acquired, Bloomsbury conducts a quarterly "rebalancing" of the portfolio to ensure that it meets the client's original stated wishes. The rebalancing exercise involves buying and selling units in the client's investment portfolio to achieve the appropriate balance of different investments. It was described by Mr Butler as an automatic process which owed nothing to discretion but simply gave effect to the plan agreed as part of the initial discussion. He said that it was an important part of what Bloomsbury provided to clients. The rebalancing does not involve the provision of any advice by Bloomsbury to the client. If a client wished to sell any investments then Bloomsbury would send an electronic instruction to Pershing to sell units. Pershing would enter into a transaction with the fund manager and receive cash for the units. Pershing would inform Bloomsbury that it had received cash and Bloomsbury would instruct Pershing to pay the cash to the client's bank account.

13. Bloomsbury charges its clients an initial fee and an annual fee, both of which are based on a percentage of the value of the assets transferred. The initial fee covers

Bloomsbury's costs of buying the investments in the funds. Bloomsbury does not accept commission from the fund managers and any received is offset against the annual fee due from the client.

### **Submissions of the parties**

5 14. Mr Rowe for HMRC put forward two arguments why Bloomsbury's services  
were not exempt. The first argument was that Bloomsbury's intermediary services  
related to item 9 of Group 5. Mr Rowe pointed out that Notes (5) and (5A) to Group  
10 5 define "intermediary services" and "acting in an intermediary capacity" by reference  
to financial services. Note (5B) defines "financial services" as transactions falling  
within item 1, 2, 3, 4 or 6 of Group 5. Mr Rowe submitted that the effect of Note  
(5B) is that only intermediary services relating to transactions falling within item 1, 2,  
3, 4 or 6 are exempt. He pointed out that Bloomsbury's clients' money was invested  
in Exchange Traded Funds, Open Ended Investment Companies or Unit Trusts which  
15 were all described within item 9. HMRC consider that a person who brings together a  
customer and a manager of a collective investment fund in item 9 cannot be exempt as  
an intermediary. Bloomsbury introduced its clients to managers of funds which fell  
within item 9 and it followed that such intermediary activity was excluded from  
exemption by Note (5B).

20 15. HMRC's second argument was that the elements of advice and management  
formed the predominant part of the supply by Bloomsbury and the intermediary  
element was ancillary so that the whole supply was chargeable to VAT at the standard  
rate. Mr Rowe referred to tables of work carried out by Bloomsbury for new and  
existing clients which were provided to HMRC in a letter dated 22 June 2010 from  
Mr Pink. The tables showed that out of 32 hours spent in relation to a new client,  
25 only five and a half hours related to the introduction of clients to the investment  
funds. In relation to the existing client, only three hours out of 18.5 hours related to  
negotiation and purchase of units. HMRC's case was that Bloomsbury provides  
continuous management of its clients' funds. Bloomsbury was mandated to buy and  
sell units on behalf of its clients but that was a small proportion of its service. The  
30 rebalancing of the clients' portfolios was no more than managing the portfolios.

35 16. Mr Pink for the Appellant submitted that the services supplied by Bloomsbury  
fell within the words of item 5 of Group 5 when read with the notes to the group. In  
order to fall within the exemption, there must be certain specified exempt transactions  
and Bloomsbury must act as an intermediary in relation to those transactions. In this  
case, Mr Pink said that Bloomsbury acted as an intermediary in relation to  
40 transactions in item 6 (a) and (e) of Group 5 (namely, the issue, transfer or any  
dealing with shares or units etc.). He submitted that the activities of Bloomsbury  
were within the guidance set out by HMRC in Notice 701/49 at paragraphs 9.9 and  
9.1. As set out in those paragraphs, Bloomsbury both provided advice and acted as an  
intermediary between the client and the provider of a financial product. The advice  
resulted in the customer investing in a financial product and Bloomsbury met all the  
criteria for intermediary services in paragraph 9.1 of the Notice. Bloomsbury did not  
act as an intermediary to arrange the provision of services of fund management within  
Item 9 of Group 5. The purpose of Item 9 was to exempt the management of specific

funds. Bloomsbury introduced clients to fund managers so that the clients could invest in the funds and not so that the clients could receive fund management services.

17. Mr Pink submitted that the advice given by Bloomsbury was ancillary to introducing clients to the fund managers. He referred to Mr Butler's evidence that  
5 where the client decided not to invest in funds chosen by Bloomsbury then there was no fee for the initial meeting and advice. Mr Pink acknowledged that the breakdown of time spent in the tables referred to by Mr Rowe was one measure of the relative predominance of elements of a supply but the charges made were another possible measure. Mr Pink referred us to the well-known case of *Card Protection Plan Ltd v*  
10 *Customs and Excise* (Case C-349/96) [1999] STC 270 which concerned the situation where there is a principal element and one or more ancillary elements. As the ECJ stated explicitly in paragraph 30 of the judgment:

15 “There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied.”

### **Discussion**

20 18. HMRC's primary argument was that Bloomsbury was providing introductory services but the introductions were to persons who did not provide financial services as defined by Note (5B). HMRC's submissions were based on the view that Bloomsbury was introducing its clients to providers of services of management of  
25 special investment funds exempted by Item 9 of Group 5. It is correct that the exemption for intermediary services is restricted to the bringing together of someone who provides services falling within Items 1, 2, 3, 4 or 6 of Group 5 and someone looking to receive such services. We consider, however, that HMRC are wrong to regard Bloomsbury's services as predominantly the introduction of clients to fund managers with a view to the clients receiving fund management services. On the  
30 evidence that we have seen, we consider that what the clients sought and what Bloomsbury provided was, initially, advice on the most appropriate investments for the client and, thereafter, implementation of that advice. In our view, Bloomsbury introduced clients to the fund managers and acted as an intermediary between the clients and the fund managers for the purpose of acquiring and maintaining the  
35 portfolio of investments on behalf of the clients. The fund managers also provided fund management services to Bloomsbury's clients but that was a necessary consequence of the fact that the clients held units in the funds. Although we did not hear any evidence from clients of Bloomsbury, we regard it as extremely unlikely that any client would have said that it engaged Bloomsbury so that it could be introduced  
40 to a fund manager. The evidence of Mr Butler and a client planning report showed that Bloomsbury acted between its clients and the fund managers to enable clients to acquire and dispose of units. Supplies of such units are supplies of services within Item 6 of Group 5.

19. HMRC's alternative argument was that Bloomsbury supplied services of wealth management and advice as well as intermediary services but that the intermediary services were ancillary to the principal supply of wealth management and advice. We do not accept that the division of time in the tables in Mr Pink's letter of 22 June 2010  
5 relied on by HMRC determines which elements are principal or ancillary although we accept that time can be a factor. In *Card Protection Plan*, the European Court of Justice placed great stress on the intention of the customer in determining whether elements are principal or ancillary. We have no doubt that clients considered the advice they received at the initial meeting to be an important part of the service  
10 provided by Bloomsbury. We consider that the fact that there was no fee for that advice if the client decided not to invest shows that it was not the most important part of the service to Bloomsbury or its clients. As referred to in the previous paragraph, the evidence showed that the focus of Bloomsbury's services was the creation and maintenance of a portfolio of units for its clients which is an exempt supply of  
15 intermediary services. In our view, the initial advice was an ancillary service to the principal supply of intermediary services relating to the acquisition, maintenance and disposal of the portfolio of units.

### **Decision**

20. In the light of all the evidence and for the reasons discussed above, we are  
20 satisfied that Bloomsbury provides exempt intermediary services to its clients. Accordingly, we allow the appeal.

21. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later  
25 than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

30

35 **Greg Sinfield**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 13 June 2012**