Alleged tax damage due to a wrong product designation

Topic: **Stock exchange / securities account** Case number: **2020/28**

> The client, who resides in Germany, bought precious metal from the bank in 2008, which she sold in 2015 at a considerable profit. She believed that her precious metal was deposited with the bank in physical form. According to the client, gains from the sale of precious metal which was held in physical form are tax-free in Germany after a certain holding period.. After the sale, she had doubts as to whether it had actually been precious metal deposited in physical form or whether she had rather had a metal account which merely represented a compulsory delivery claim for the designated quantity of metal in commercial form. She contacted the bank which responded to her questions only with great delay and imprecisely. She decided to make a subsequent declaration of her profit and was confronted with a tax claim of over EUR 500’000, which she submitted to the bank together with a demand for compensation for her expenses. The bank denied any responsibility for the incident. In the Ombudsman proceedings, the bank offered to pay the client CHF 30’000. The client rejected this settlement proposal, which was also deemed insufficient by the Ombudsman, and decided to assert her claim in court.

In her submission to the Ombudsman, the client explained that her client advisor had assured her when she bought the precious metal that it was deposited in physical form. In addition, the bank had repeatedly used the term “deposit” in various documents and statements, which indicated a physical deposit. Finally, after the sale of the precious metal, the bank had provided the client with a tax statement for 2015 that was specifically tailored to her residence in Germany and did not include the precious metal gain. This had strengthened her impression that the precious metal had been deposited in physical form and that the profit from it was not subject to tax under German law. After she had doubts about the tax liability, she contacted the bank. Neither she nor her tax advisor had received any useful information within a reasonable period of time, so that she had had to call in a lawyer, which had caused her costs.

The client accused the bank of having purchased a different product for her than she had wanted and of having made false assurances in the process. She had also contributed to this not being noticed through her subsequent documentation. This had led to a tax claim and further consequential costs that would not have been incurred if the product had had the promised characteristics shown by the documentation. The Ombudsman decided to approach the bank and asked it to comment on the client’s allegations.

The bank denied that the client had ever been promised that the precious metal was deposited in physical form. The client had not been advised in any way in connection with the purchase of the precious metal. It was clear from the documents that the precious metal had been booked in account form and that she had only had a claim to delivery. The term “custody account” had only been used on the bank documents because the bank’s core system had originally not been able to represent a metal account as an account. The tax statement prepared for the client was for information purposes only and said nothing about the actual tax liability. Finally, as highly personal claims, tax claims could never constitute compensable damage in the legal sense anyway. The bank only acknowledged that it could have answered the client’s requests for information more promptly. After several exchanges of correspondence, it finally agreed to pay the client CHF 30’000 without acknowledging any legal obligation. This amount was to approximately cover the interest that the client had to pay due to the

late tax return, because the delay was caused by the fact that the profit was not listed in the bank's tax statement.

The Ombudsman informed the client of the settlement proposal, since there was no realistic chance that a more favourable solution could be reached within the Ombudsman procedure, in which no binding decisions can be made . However, he was of the opinion that in the present case further concessions by the bank would have been appropriate.

In the Ombudsman's view, the client would have had to prove her claim that the client advisor had given her binding confirmation when she bought the precious metal that it was deposited in physical form. Such proof would hardly have been possible after such a long time.

However, the receipts and statements that the bank had sent to the client actually seemed imprecise and contradictory to the Ombudsman. Some of the bank documents regularly referred to a custody account. For example, the debit notes from 2008 stated, on the occasion of the purchase of the precious metal, "to be booked in your custody account". Furthermore, a " custody account fee" was charged for an "open custody account" , and an "open custody account classic" was mentioned in the statement of assets. The Ombudsman found it understandable that these documents could give the impression that the precious metal was held in a custody account and that there was a (co-)ownership claim to the associated physical deposit.

On the other hand, the bank had also given the client documents in which the term "metal account" was mentioned. According to the document "Receipt of title" from 2008, there was a "delivery claim metal account" for a certain standard quantity of precious metal. The debit notes read: "We have debited you for the purchase of" "Ounces [precious metal X] delivery claim" (ticked selection). I would also have been possible to tick "[precious metal Y] to precious metal account" or "[precious metal Z] to precious metal account" on these forms. In the client report from 2009, the term "delivery claim" was also mentioned. In the custody account statement of 31 December 2008 and in the statement of assets as of 31 December 2014, the term "metal account" appeared.

The terms "custody account" and "metal account", which are clear in themselves, were obviously mixed up. In the Ombudsman's view, the customer could not be blamed for the fact that the reason for this lay in the bank's core system. The term "delivery claim" did not, in the Ombudsman's view, clearly indicate a metal account to a layman, as the bank claimed. Precious metal held in physical form, in which the customer has (co-)ownership, is also subject to a delivery claim. Furthermore, the Ombudsman found it surprising that the bank was not able to clarify the customer's questions in this regard within a reasonable period of time.

Furthermore, the Ombudsman could not follow the bank's view that the tax statement was for information purposes only and that the bank was not liable for any errors. According to the bank's letter accompanying the document, it contained, among other things, the list of profits and losses from private sales transactions. Such a service, which was specified to the tax law at the client's place of residence, must be precise. The fact that the taxable position was erroneously not mentioned in the tax report for 2015 entitled "Tax reporting Germany" was not disputed by the bank. Although this had not contributed to the entire tax loss, it had led to the late declaration of the profit to the tax office, which was the reason for the client's tax evasion and caused penalty interest, which the client comprehensibly documented. In the Ombudsman's view, the argument that she would have brought the profit to the attention of the tax office earlier if she had received a correct tax reporting, which would have meant that additional interest of just under EUR 30'000 (referred to as "interest on capital gains tax" in the tax assessment) would not have been incurred, could not be simply dismissed.

Finally, he did not share the bank's view that a tax claim could never constitute a compensable loss.

In principle, tax claims are personal and not compensable obligations. This principle is relevant when there is no causal link between the bank's misconduct and the tax claim. This is the case, for example, if a client has a tax liability due to his income and assets, but the tax authority only learns of the facts because of an indiscretion on the part of the bank. The bank's conduct in such a case only leads to the tax claim being discovered. The claim already existed, but could not be asserted due to lack of knowledge by the state. In such cases, the bank's liability was denied.

In principle, however, the Ombudsman is of the opinion that the general principles of the law on damages also apply to reductions in assets caused by tax obligations and related costs. According to these principles, there is a duty to pay damages if a breach of contract causes the other party to suffer an involuntary reduction in assets in an adequately causal manner. In the Ombudsman's view, conduct by a bank in breach of duty of care can therefore lead to liability under civil law if it results in tax consequences that would not otherwise have occurred.

Whether these conditions were fulfilled in the present case could not be clarified in the Ombudsman procedure, among other reasons because essential elements of the facts were disputed. The case contained some ambiguities and both parties had valid arguments for their positions. It would certainly have made sense to settle this dispute comparatively. However, the Ombudsman understood that the client did not agree to settle the dispute on the basis offered by the bank.