

Latest cases on VAT treatment of fund management



The latest CJEU cases on VAT exempt management of special investment funds

On 7th March 2013, the Court of Justice of the EU (CJEU) has released two long awaited judgements in relation to the VAT treatment of services connected with special investment funds.

Fund investment advisory services confirmed as VAT exempt services

In its judgement in the case C-275/11 *GfBk Gesellschaft für Börsenkommunikation mbH*, the CJEU confirmed that investment advisory services fall within the VAT exemption specified in Article 135 (1)(g) of the EU VAT Directive 2006/11/EC covering 'the management of special investment funds as defined by Member States'.

Facts of the case

GfBk, a German investment manager, undertook to advise one of its clients, a fund manager, on the management of the fund, to monitor the fund and to make, buy and sell recommendations within certain risk and investment parameters set by its client.

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The final responsibility to decide on the investments was retained by the client. The client effectively processed the recommendations, often within a few minutes of receiving them, after checking that they did not breach the investment restrictions. For its advice, GfBk was remunerated on the basis of a percentage calculated by reference to the average monthly value of the investment fund. In this context, questions were referred to the CJEU, asking whether the services of GfBk qualify for the VAT exemption.

Conclusions of the case

In its judgement the CJEU held that, despite being outsourced, advisory services concerning transferable securities, provided by a third party to an investment management company being the manager of a special investment fund fall within the exemption. This applies even if the third party has not acted on the basis of a mandate within the meaning of Article 5g of the UCITS Directive regulating investment funds. In its commentary, reference was made to the *Abbey National* case, C-169/04, which had extended the exemption to functions for administering collective investment undertakings such as those set out under the heading 'Administration' in Annex II of the UCITS Directive. The GfBk decision went further to clarify that the exemption applies to investment advisory services even if they are not considered as core services in the 'non-exhaustive' list of services in Annex II. This conclusion was based on the concept of intrinsic connection. In effect, although delegated to a third party, the provision of recommendations to a fund manager are deemed to be 'intrinsically connected to' the fund manager's activities and are consequently distinct, specific to, and essential for the management of special investment funds.

The judgement also includes commentary on the safeguard of the principle of fiscal neutrality and the level playing field between direct and indirect investment in securities and between in-house and outsourced investment advisory functions.

The scope of the fund management exemption might not have been uniformly applied across the EU. In Malta, the VAT Act exempts (without credit) the management of collective investment schemes as defined under the Investment Services Act and retirement schemes as defined under the Special Funds (Regulation) Act, provided that the services are limited to those activities that are specific to and essential for the core activity of the scheme. The interpretation accorded to this exemption is that the term 'management' includes administration services and services related to investment selection. Thus, in the local context, the GfBk case provides legal certainty to this interpretation and the much needed confirmation that investment advisory services (a 'non-core' service for the purposes of the UCITS Directive) are VAT exempt.

Management of defined benefit pension schemes falls outside the VAT exemption

The CJEU handed down another judgement concerning management of special investment funds, case C-424/11 *Wheels Common Investment Fund Trustees Ltd and Other*; this time on whether defined benefit occupational pension schemes fall within the term 'special investment funds'. *Wheels* is the trustee of a fund pooling for investment purposes the assets of occupational pension schemes established by the Ford Motor Company in order to meet its obligations under national legislation and collective agreements.

It was ruled that an investment fund pooling the assets of a retirement pension scheme is not a special investment fund where the members of the scheme do not bear the risk arising from the management of the fund and the contributions which the employer pays into the scheme are a means by which he complies with his legal obligations towards his employees. Accordingly the management of such schemes falls outside the scope of the VAT exemption.

Such schemes as the ones in question were differentiated from funds which undertake the investment in transferable securities on the following grounds:

- Unlike private investors in a collective investment fund, employees do not bear the investment risk;
- The employer contributions are made as a consequence of the legal obligation it has with his employees rather than for purely investment reasons; and
- A pension fund is not open to public investments but constitutes an employment-related benefit by employers to their employees.

In Malta, management services provided to retirement schemes as defined under the Special Funds (Regulation) Act are VAT exempt, without distinguishing between defined benefit and other schemes such as defined contribution schemes. Thus, the *Wheels* case could have a bearing on the scope of the current exemption in the VAT Act. Having said that, considering the limited (although increasing) number of pension schemes in Malta and the global shift away from defined benefit to defined contribution schemes, it is not expected that the *Wheels* case will have a significant local impact in practice.

Worth mentioning is that in October 2012, reference for a preliminary ruling was made by the Danish Court in the case of *ATP Pension Service A/S* (C-464/12) on whether, amongst others, the management services provided to a pension scheme with defined contribution characteristics qualify for VAT exemption. In the pending case *PPG Holdings BV* (C-26/12), questions were asked about the entitlement of employers to recover VAT on pension related costs. Whilst we await the outcome of these CJEU cases, more will be said on the VAT treatment of pension funds in the coming years and the local relevance of the debate grows as Malta continues to offer a flexible yet well-regulated framework for pension set-ups.

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