

## VAT Alert

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#### CJEU allows VAT exemption for management of defined contribution pension funds

*The European Court of Justice (CJEU) issued its decision in the ATP Pension Services A/S case regarding the VAT exemption for the management of special investment funds, as applicable to pension funds (CJEU, C-464/12, 13 March 2014, ATP Pension Service A/S). Contrary to an earlier ruling on defined benefits pension funds, the Court ruled in favour of the VAT exemption's application.*

#### VAT exemption for management of special investment funds

The European VAT directive exempts the management of special investment funds ('SIF') "as defined by the Member States". The scope of the VAT exemption has been clarified in a few recent judgments (amongst others C-424/11, *Wheels Common Investment Funds Trustees Ltd*), in which it became clear that Member States must define which investment funds qualify for VAT exemption, based on key characteristics rather than in a discretionary manner. On 13 March 2014, the CJEU ruled on the qualification of defined contribution pension funds in this respect.

#### Facts

ATP mainly carries out the following tasks on behalf of defined contribution pension schemes:

- administrative tasks consisting of, inter alia, the provision of information and specific advice to employers and employees (pension customers) in relation to the retirement schemes provided by the pension funds;
- system maintenance and development in relation to the platform from which ATP provides its services to pension funds;
- services related to payments into and out of pension funds.

The CJEU had to define if the pension funds qualified for the VAT exemption for special investment funds and if so, whether the services rendered by ATP could qualify as VAT exempt management services.

#### Judgment

In contrast to the earlier CJEU decision in the *Wheels* case, the Court ruled that a defined contribution pension scheme should be treated on a par with other collective investment schemes for the purposes of the VAT exemption. It disregarded a number of specific characteristics such as who makes contributions; how and when pensions are paid to the contributor; national income tax provision, etc. The Court retained the following three

key tests to determine whether a pension fund could qualify as a SIF for the purpose of applying the exemption, namely that the scheme:

- is funded by the persons to whom a retirement benefit is to be paid;
- that the savings are invested using a risk-spreading principle; and
- the customer (i.e. investor) bears the investment risk.

Furthermore, the Court ruled that the services rendered by ATP, which were more of an administrative nature than the traditional investment management services rendered to funds, could qualify for the VAT exemption. It gave a wide interpretation in this respect to the VAT exemptions for administrative fund management and for payment operations, allowing the process of setting up an account to be VAT exempt.

### **Implications for Belgian business**

The Belgian VAT legislation has been generous in its definition of SIF's, allowing amongst others a VAT exemption for the management of the so-called "OFP's" which are mainly used to house Belgian retirement funds. Furthermore, the scope of VAT exempt management services is quite broadly defined in the VAT authorities' Circular n° 22/2008.

This judgment reinforces such broad definition for the defined contribution pensions schemes organised as OFP's and provides opportunities for pension funds which may not have taken such form. The clarifications given by the Court on the type of services that can benefit from the exemption may allow pension funds as well as all SIFs to review the VAT treatment of the services they receive and further reduce their VAT cost.

### **What's next?**

These judgments are clearly far from ending the uncertainties surrounding the questions on investment funds and their VAT position. Another case was in fact referred by the Dutch Supreme Court to the European Court, this time focusing on the type of investments made by SIF's: can a fund that only invests in immovable property qualify as a SIF and receive VAT exempt (real estate) management services (CJEU, C-595/13, *Fiscale Eenheid X*).

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