

Real estate funds: VAT exemption for fund management services

Input newsletter

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On 9 December 2015, the Court of Justice of the European Union (CJEU) delivered its decision in the *Fiscale Eenheid X NV* case (C-595/13) regarding the criteria to be used to determine whether certain entities and services are eligible for exemption from VAT as being services of management of investment funds¹. In its decision, the Court only partly follows the conclusions of A.G. Kokott, as per her opinion released on 21 May 2015. This decision addresses the limits to the scope of the fund management exemption and may have a direct impact on how this VAT exemption is applied in practice.

1. Facts and questions referred to the Court

A Dutch supplier provided management services to three Dutch real estate investment companies held by pension funds, among other investors. The real estate companies' activities consisted of buying, selling and renting real estate assets.

The services provided by the supplier included:

- a) acting as manager of the companies;
- b) all executive tasks falling to the companies as a result of statutory requirements, company statutes, regulations and administrative decisions;
- c) management of the companies' assets, particularly their properties;
- d) financial reporting, data processing and internal audit;
- e) dispositions concerning the client's assets, including the purchase and sale of properties;
- f) acquisition of shareholders and/or members.

The Annex I to the agreement entered between the parties provided further details in respect of the property management services included in caption c) as follow:

- 1) supervision of the immovable property and its use and, to that end, maintenance of contact with tenants;
- 2) on behalf of the client, engagement of estate agents where properties are empty; assessment of tenants;
- 3) inspection of any premises due to become available and the compilation of reports on their condition;
- 4) rent collection ... and debt management; processing of rent allowances;
- 5) budgeting for and arranging major maintenance works as well as the technical assessment and supervision of the execution thereof ...;

- 6) arranging ordinary maintenance work and supervision thereof;
- 7) arranging ancillary supplies and services; monitoring the quality thereof and billing tenants for sums due in that respect;
- 8) administrative processing of all of the above; and
- 9) day-to-day legal matters; implementation of rent increases and extensions of tenancy agreements.

These “property management” services are referred by the Court as services covering the “ actual management of the immovable property”.

These services were invoiced without VAT on the basis that the supplier believed that they would qualify as the VAT-exempt management of investment funds. This position was challenged by the Dutch VAT authorities which considered that only the services under e) and f) could be considered as VAT exempt. In the course of the national case the Dutch Supreme Court decided to refer the case to the CJEU to ask whether:

- a) real estate funds specifically could be investment funds for the purposes of the VAT exemption; and
- b) in the event that real estate funds could be eligible, whether the services rendered by the supplier, particularly those which could be seen as the management of property itself, qualified as management of an investment fund.

2. Eligibility of real estate funds

In answer to the questions posed by the Dutch Supreme Court, the CJEU ruled that an entity set up by investors in order to invest in real estate could be considered as an investment fund for VAT purposes. Indeed, the Court viewed such funds as being sufficiently similar to funds investing in shares and securities to be considered as their direct competitors. In addition, the real estate funds at issue in this case met the investment fund risk spreading requirement, as it appeared from the hearings and the file submitted to the Court that the funds invested in different types of immovable property, both residential and commercial, as well as having invested in property in different geographical areas. The Court also introduced a new criterion for the qualification of a fund for the VAT exemption by stating that an eligible fund must be subject to “specific State supervision” without further defining or detailing the meaning of this term.

3. Services eligible for the VAT exemption

Contrary to the A.G., the Court ruled that the actual management of properties could not benefit from the VAT exemption. More precisely the Court reiterated that “(...) the specific activity of a special investment fund consists of the collective investment of capital raised (...)” and “includes, on the one hand, activities relating to the selection, purchase and sale of immovable property and, on the other, administration and accounting tasks (...)”.

The CJEU considers that the actual management of immovable property is not specific to the activities of funds as it “(...) is intended to preserve and build up the assets invested in, its objectives is not specific to the activity of an investment fund but is inherent in any type of investment”.

The Court also refers to its previous jurisprudence and restates that “mere material or technical supplies, such as the making available of a system of information technology (...)” could not benefit from the VAT exemption. As a consequence, the management of investments themselves, i.e. including selecting the investments, assisting with the sale of assets, and carrying out associated administrative and accounting tasks could benefit from the VAT exemption.

4. Comment

Under the Luxembourg VAT law, real estate funds have been since long considered as capable of being eligible investment funds for the purposes of the VAT exemption, therefore, the decision of the Court in this case is a welcome confirmation of this position.

Specifically property-related management services supplied to such real estate funds, however, were not generally accepted as being exempt from VAT, with the VAT Authorities drawing a (sometimes tenuous) distinction between the management of the investment of a fund in property and the management of the physical property itself. This position now also appears to be supported by the CJEU.

The outcome in this case should be considered, not only from a Luxembourg viewpoint, but also more widely in the EU. Given the fact that the place of supply of services closely related to property is where the property is located, such services would be in the scope of VAT of the country where the property is found. In our experience, only a limited number of funds owns properties actually located in Luxembourg, whereas a significant number own properties in Germany, France, the UK and elsewhere.

If you are likely to be affected, please do speak to us about what that impact might and how best we can help manage the impact. We will be hosting a webinar on Monday 14 December to discuss the judgement in more detail and its potential impacts across the UK, the Netherlands and Luxembourg. If you like to join us, [please do so here](#).

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