

VAT and Financial Services Upcoming CJEU Decisions



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Pending VAT Cases Concerning the Financial Services Industry

The decisions of the Court of Justice of the European Union ('CJEU') in the sphere of VAT aim to provide clarification, guidance and certainty on how VAT rules have to be applied across the EU. This is particularly true for industries where VAT rules are complex and interpretations often vary across EU Member States. The Financial Services Industry is a case in point.

In 2012, the CJEU will have several opportunities to provide much needed clarification on a number of VAT issues important to the Financial Services Industry. Such clarifications, however, may significantly impact business operations.

The following table provides a list of upcoming CJEU judgements with a brief outline of the subject matter while further elaboration on each case can be found below.

Case Name	Case Number	Subject Matter
<i>Deutsche Bank</i>	C-44/11	Discretionary portfolio management for individual investors
<i>GfBk</i>	C-275/11	Advisory services for self-managed 'special investment funds'
<i>PPG Holdings</i>	C-26/12	Pension fund management fees
<i>Wheels</i>	C-424/11	Pension fund management fees (occupational defined benefit schemes)
<i>Ocean Finance</i>	C-653/11	Irrecoverable VAT mitigated via "offshoring"

Deutsche Bank (C-44/11)

This case concerns the supply of discretionary portfolio management services by Deutsche Bank to individual investors. Deutsche Bank managed client portfolios in accordance with a chosen strategy at its own discretion (including the execution of purchase and sale transactions in securities). In return for the services so provided, the investor paid an annual fee to Deutsche Bank equivalent to a percentage of the value of the assets under management.

Deutsche Bank and the German tax authorities disagree as to whether such services are exempt from VAT. The dispute was brought before the German Federal Tax Court which asked the CJEU to clarify whether the discretionary portfolio management services are to be treated as a single supply or whether the execution element thereof should be treated as a separate transaction. If the services form a single supply the CJEU is asked to confirm whether that supply is exempt or taxable for VAT purposes.

The recent Advocate General's opinion advised the CJEU to find that the provision of individual portfolio management services is a single, *taxable* supply. Whether the CJEU will follow this opinion remains to be seen.

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GfBk (C-275/11)

This case concerns the supply of advisory services by GfBk to a self-managed 'special investment fund'. GfBk advised the fund on the acquisition and sale of assets but did not take the actual decision to invest, a function which rested with the management of the fund.

The German Federal Tax Court is unsure whether the activities of GfBk are exempt from VAT and, in essence, has asked the CJEU to provide guidance on the conditions that need to be satisfied for such services to fall within the ambit of the exemption for fund management.

A decision by the CJEU stating that such services are not covered by a VAT exemption could mean an increase in irrecoverable input VAT costs and additional compliance obligations for both providers and recipients of such services. Stakeholders may also need to review and adapt their contracts covering such services to ensure that VAT is accounted for correctly.

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PPG Holdings (C-26/12)

This case concerns the VAT treatment of management services paid for by PPG Holdings BV ('PPG'). PPG, for the purpose of building up a pension for its employees, set up a separate company pension fund. PPG paid the pension premiums and incurred all costs on behalf of the company pension fund. The input VAT relating to these services was recovered by PPG in full, on the basis that the costs were incurred for its own benefit and qualified as its own operational expenses.

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The Dutch tax authorities, however, took the view that these costs were not incurred for the benefit of PPG, but for the benefit of the company pension fund, and therefore PPG was not entitled to recover the input VAT.

In view of the above, the Dutch High Court asked the CJEU whether a taxable person is allowed to recover input VAT on costs incurred for the benefit of the implementation of the pension provision and the operation of the pension fund.

The second question referred to the CJEU asks whether such pension fund classifies as a 'special investment fund', the management of which qualifies for VAT exemption. It will be interesting to see if the CJEU will take this opportunity to provide further guidance as regards the definition of 'special investment fund' for the purposes of the VAT exemption.

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Wheels (C-424/11)

This case concerns the VAT treatment of management services provided to funds set up as occupational defined benefit schemes. The question here is whether the UK tax authorities may exclude the management of defined benefit schemes from the exemption applicable to fund management on the basis that such schemes are not 'special investment funds'.

This case is likely to consider the extent to which defined benefit schemes are similar to (and thus in competition with) other funds already benefitting from the VAT exemption.

In terms of Maltese VAT legislation, occupational retirement schemes may already benefit from this VAT exemption. However, it would be interesting if the CJEU judgement clarifies the freedom that local tax authorities could have in restricting the scope of its application.

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Ocean Finance (C-653/11)

This case concerns an assessment raised by the UK tax authorities in response to arrangements (via an offshore subsidiary) to mitigate a substantial amount of irrecoverable input VAT on advertising costs connected with a loan broking business.

Amongst other things, the CJEU has been asked to clarify the weight that should be given to the contractual position when determining the VAT treatment of the services. Furthermore, the CJEU has been asked to provide guidance on whether the planning arrangement at issue is contrary to the purpose of the VAT Directive and, if so, how it should be re-categorised for VAT purposes.

The CJEU decision would help further clarify their earlier decision in *Halifax* (C-255/02).

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Deloitte Place
Mriehel Bypass, Mriehel
Malta BKR3000

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