

VAT and Financial Services Recent CJEU decisions (1)



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Recently decided VAT cases concerning the VAT exemption applicable to the 'management of special investment funds'

In terms of article 135(1)(g) of Directive 2006/112/EC ('the VAT Directive') EU Member States must exempt from VAT "*the management of special investment funds as defined by Member States*". The VAT Directive, however, does not provide a definition or any further clarification as regards what services constitute 'management' for the purposes of the said VAT exemption. Furthermore, it is not entirely clear how far the power of the Member States reaches to define which schemes qualify as 'special investment funds' and which do not. It should thus not come as a surprise that the Court of Justice of the European Union ('CJEU') frequently has been asked to fill the legislative gap and clarify the correct interpretation of the VAT exemption referred to above.

On 7 March 2013, the CJEU delivered its judgment in two VAT cases, the *GfBk* case (C-275/11) and the *Wheels* case (C-424/11), which particularly relate to the interpretation of the VAT exemption applicable to the management of special investment funds. This VAT Insight provides you with a summary of the cases, the questions dealt with and the decisions that were taken by the Court therein.

GfBk (C-275/11)

GfBk provided an Investment Management Company ('IMC') which managed a retail investment fund in the form of a special investment fund with recommendations concerning the purchase and sale of securities and, after checking that they did not infringe any statutory investment restriction, implemented them. GfBk however did not take the actual decision to invest, a function which rested with the IMC. The question that arose was whether (and if so, under what conditions) the advisory services provided by GfBk to the IMC fell within the concept of 'management of special investment funds' for the purposes of the exemption laid down in the VAT Directive.

According to the CJEU, in order to determine whether advisory services provided by a third party to an IMC concerning investment in transferable securities fall within the concept of 'management of special investment funds', it is necessary to examine whether the advisory service provided "*is intrinsically connected to the activity characteristic of an IMC, so that it has the effect of performing the specific and essential functions of management of a special investment fund*".

The Court assessed that services consisting in giving recommendations to an IMC to purchase and sell assets are intrinsically connected to the activity characteristic of the IMC, which consists in the collective investment in

transferable securities of capital raised from the public, and concluded that advisory services concerning investment in transferable securities, provided by a third party to an IMC which is the manager of a special investment fund, fall within the concept of 'management of special investment funds' for the purpose of the VAT exemption laid down in the VAT Directive, even if the third party has not acted on the basis of a mandate within the meaning of article 5g of the UCITS Directive.

In our understanding that the interpretation applied to date by the Malta VAT Department of item 3(6) of Part Two of the Fifth Schedule to the Malta VAT Act - which is the transposition into national law of the VAT exemption contained in article 135(1)(g) of the VAT Directive - does not differ from the interpretation given by the CJEU in its *GfBk* case outlined above, we do not expect this judgment to have substantial implications on the VAT treatment applied locally in relation to the management of investment schemes.

Wheels (C-424/11)

Wheels Common Investment Fund is a fund pooling the assets of a number of underlying Ford group pension schemes. Contributions to the schemes were made, on the one hand, by the members of the schemes, the employees, and, on the other hand, by the employer who paid an amount sufficient to ensure funding for the remaining cost of providing pension benefits. Fund managers were appointed to manage the assets. The question that arose was whether (and if so, under what conditions) assets of a retirement pension scheme, and the investment fund in which they are pooled, are a 'special investment fund' within the meaning of article 135(1)(g) of the VAT Directive so that the management services provided thereto may benefit from the VAT exemption.

The CJEU clarified that, whilst it is true that in article 135(1)(g) of the VAT Directive Member States are being given the task of defining the meaning of 'special investment funds', that power is however limited by the prohibition on undermining the very terms of the exemption and must be exercised in compliance with the objectives pursued by the VAT Directive and the principle of fiscal neutrality inherent in the common system of VAT.

As such, it had to be determined whether an investment fund in which the assets of a retirement pension scheme are pooled is identical to funds that constitute 'special investment funds' or is sufficiently comparable with the latter to be in competition with them. After assessing the characteristics of the retirement pension schemes at issue in the main proceedings, the Court concluded that, to the extent that the members of the schemes do not bear the risk arising from the management of the fund and the contributions which the employer pays into the schemes are a means by which he complies with his legal obligations towards his employees, the investment fund pooling the assets of the retirement pension schemes is not a 'special investment fund' so that the management thereof may not be exempted from VAT.

The concept of 'investment schemes' used in item 3(6) of Part Two of the Fifth Schedule to the Malta VAT Act (which, as mentioned above, is the transposition into national law of the VAT exemption contained in article 135(1)(g) of the VAT Directive) is defined in the VAT Act with reference to the concept of, *inter alia*, 'retirement schemes' as described under the Special Funds (Regulation) Act. Under that Act, retirement schemes comprise both defined benefit retirement schemes (i.e. schemes which have as their primary purpose that of providing for the payment of fixed or determinable retirement benefits) and defined contribution retirement schemes (i.e. schemes which have as their primary purpose that of providing for the payment of retirement benefits, which are established by reference to the contributions paid into such schemes, the accumulation of profits, gains and other income, after the deduction of expenses and losses in relation thereto).

As such, since in terms of Maltese VAT legislation defined benefit retirement schemes already benefit from the VAT exemption applicable to fund management, we do not expect the judgment of the CJEU in *Wheels* to have substantial implications on the VAT treatment applied locally in relation to the management of such schemes.

In this regard, please note however that there are two other cases pending before the CJEU in relation to VAT and pension fund management, the *Fiscale eenheid PPG Holdings BV ('PPG')* case (C-26/12) and the *ATP PensionService A/S ('ATP')* case (C-464/12), expected to be delivered later on this year. *ATP* in particular relates to the management of defined contribution retirement schemes, where the question asked is whether pension funds for such schemes are 'special investment funds' in terms of the VAT exemption contained in article 135(1)(g) of the VAT Directive, entitling ATP's services of managing such schemes to VAT exemption. Furthermore, the *ATP* case is considering another route to exemption – which is that some pension fund management services would represent "*transactions concerning payments, transfers*" in terms of the VAT exemption contained in article 135(1)(d) of the VAT Directive. In *PPG* the question is asked whether the pension fund concerned, of which the resulting proceeds are shared by the participants, constitutes a 'special investment fund' in terms of the relevant VAT exemption and whether an employer who has established such fund for the purpose of safeguarding the pension rights of his employees, as participants in the fund, may treat all of the VAT incurred in respect of the implementation of the pension provision and the operation of the pension fund as its own input tax (and potentially recover all of it).

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