

VAT Alert

Fiscale Eenheid X – CJEU Judgment

The Court of Justice of the European Union (“CJEU”) has released its judgment in the case of *Fiscale Eenheid X* (Case C-595/13).

Two headline points from the judgment are as follows:

1. The exemption for the “*management of special investment funds as defined by Member States*” is not limited to the management of funds investing in securities. It can potentially extend to the management of any entity:
 - (a) which meets the “ATP tests” (e.g. containing the pooled capital of several investors who bear the investment risk); and
 - (b) where the Member State concerned has made that entity “*subject to specific State supervision*”.
2. For the purposes of the exemption, the scope of “management” does not include the property management of real estate investments.

This is a significant judgment, and will widen the scope of the fund management exemption.

Most immediately – in the case of UK funds investing in real estate, it means that services provided to those funds which do represent “management” (e.g. investment management services concerning the selection and disposal of real estate assets, together with fund-specific administration and accounting services) may be exempt from VAT, despite having previously been treated as taxable.

This may result in less VAT leakage in the case of funds investing in VAT-exempt real estate (e.g. residential property and unopted commercial property). More widely, it will have implications for other managers and funds where the assets being invested in are things other than securities.

Background and Judgment

Fiscale Eenheid X was a referral by the Dutch Supreme Court to the CJEU in 2013, concerning the VAT treatment of services supplied to three Dutch companies investing in real estate, which had issued “holdings” owned by third-party investors. The services included portfolio management, property management, financial administration services, directorship services and the management of investor relations.

In its judgment, the CJEU has largely followed the Opinion of Advocate General Kokott (“AG”), who recommended that collective investment vehicles investing in real estate could be treated as “special investment funds” for the purposes of the fund management exemption in Article 135(g) of the EU VAT Directive.

Applying the guidance of cases such as *Wheels Common Investment Fund* (C-424/1) and *ATP Pension Service* (C-464/12), the CJEU held that investment companies:

- which contained the pooled capital of several investors;
- where the capital was invested with a view to purchasing, owning, managing and selling immovable

property in order to derive a profit;

- where the profit would be distributed to the investors in the form of a dividend, and the investors would also benefit from an increase in the value of the assets (and hence, where the investors bore the risk connected with the management of those assets); and
- which were subject to State supervision,

could be regarded as “special investment funds”.

With regard to the definition of “management”, the CJEU has taken a slightly different view to the AG in relation to the actual management of real estate (“*immoveable property*”) assets. Such “property management” functions included the management of the leasing of that property and the monitoring of maintenance works.

For these functions, the CJEU decided that they were concerned with the “preserving and building up” of the real estate assets – which would be inherent in the management of **any** investment – not just an investment via a collective arrangement. The functions were therefore not specific to the management of a special investment fund (they “*went beyond the various activities connected with the collective investment of capital raised*”).

Impact and Next Steps

We are liaising with Deloitte in other Member States to understand the wider impact of this judgment. Although each EU Member State’s definition of a “special investment fund” has a particular local applicability (the UK’s interpretation is limited to specific fund vehicles, including authorised unit trusts and authorised open-ended invest companies), following the CJEU’s reasoning, the scope of the fund management exemption may be wider than that, encompassing other collective investment vehicles.

One big question arising from the judgment, which potentially remains open to interpretation, is how each Member State will define “*specific State supervision*”. Clearly, there are various regulatory bodies within the UK that are tasked with supervising the investment management, pension fund and wider financial services sectors. Therefore, HMRC guidance will be necessary to clarify this point.

From a UK perspective, the potential impact is likely to be on special investment funds and other equivalent collectives in the UK that invest in real estate and, by extension, even to other tangibles of appreciating value, e.g. gold, stamps, wine, perhaps also intellectual property. In contrast, for such collectives investing in exempt properties or tangibles the impact could be positive – with hitherto irrecoverable VAT incurred from suppliers potentially recoverable.

The *Fiscale Eenheid X* judgment should also be considered by funds with regard to bringing claims against suppliers for (now) irrecoverable VAT incurred over the last four years. Similarly, suppliers of services to funds investing in exempt investments should consider submitting protective claims to their local tax authority.

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

For more information in the meantime, please contact:

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