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CJEU confirms real estate investment funds subject to specific State supervision qualify as “special investment funds” but excludes actual property management from the VAT exemption

CJEU – C-595/13, Staatssecretaris van Financiën against Fiscale Eenheid X NV cs – Decision published on 9 December 2015.

Further to the article 267 of the Treaty of the Functioning of the European Union (hereafter “TFEU”), the Supreme Court of The Netherlands introduced a preliminary reference, asking the Court of Justice of the European Union (hereafter “the Court”) two questions regarding the application of the exemption laid down in article 135, 1, g) of the Council Directive 2006/112/EC with respect to the management of “special investment funds”.

The first question referred to the qualification of a company as a “special investment fund”, when its sole purpose is to carry out and manage investments in real estate. Provided the Court would have answered this question in the affirmative, it should also have confirmed, in the context of a second question, the scope of the term “management” as covering or not the actual exploitation of the company’s immovable properties.

In its judgment, the Court referred to previous decisions by recalling the purpose of the exemption, namely facilitating collective investment by excluding the cost of VAT, thereby ensuring the principle of fiscal neutrality as regards the choice between direct investment in securities and investment through collective undertakings.

The Court also recalled that the terms “special investment funds” should be the starting point for the discretion given to the Member States and should be interpreted with the objective to prevent discrepancies across them in the application of VAT to such investment vehicles. In this respect, collective investment undertakings within the meaning of the UCITS Directive and any other funds which display comparable features for them to be in competition with UCITS shall fall within the scope of the exemption.

As regards the first question, the Court took the view that the Member States’ power to define was overlaid by the coordination at European Union level of laws relating to the supervision of investments. Therefore, it considered that in order to display characteristics identical to those of UCITS to be in competition with them, special investment funds in the sense of the VAT Directive shall firstly be subject to a specific State supervision. This position, similar to the one recommended by the Advocate General, is not at all peculiar for Luxembourg VAT specialists as it follows, and broadly confirms, the approach taken for years by the Luxembourg lawmaker.

Secondly, the Court considered that in order to be eligible for the exemption, the investment fund shall display the other characteristics considered by the Court in previous cases, namely: the purchase of participation rights by investors, the investment performance related return and requirement that the risk is borne by the investors as well as the application of a risk-spreading principle. In this respect, the investment in a

single real estate asset, or in the same type of immovable properties located in the same geographical area could jeopardize the application of the VAT exemption to the management of the fund.

Thirdly, the Court held that the nature of the investment assets should not be considered as relevant to determine the qualification as special investment fund. Limiting the scope of the exemption to funds investing in transferrable securities would indeed be contrary to the principle of fiscal neutrality.

Consequently, the Court answered the first question by considering that real estate investment companies may be regarded as "special investment funds" within the meaning of the article 135, 1, g) of the Council Directive 2006/112/EC and therefore enjoy the benefit of a VAT exemption on the management services they receive provided the Member State concerned has made those companies subject to specific State supervision.

As regards the nature of the services qualifying as "management", the Court specified in its answer to the second question that the outsourced actual exploitation of a collective investment fund's real estate (including in the case at hand supervision of the property, engagement of estate agents and suppliers, rent collection, arrangement of maintenance, implementation of rent increases and extensions of tenancy agreements, etc.) should not be regarded as specific to the activity of a special investment fund and should consequently not benefit from the VAT exemption applicable to the management of such funds. Indeed, these services are aimed at preserving and building up the assets and are therefore inherent in any type of investment.

In this respect, the Court did not follow the opinion of the Advocate General Kokott.

However, it is worth noting that the Court considered that "specific" activities shall include those relating to the selection, purchase and sale of immovable property, in addition to administration and accounting tasks. These services, provided to a qualifying real estate fund might therefore benefit from the application of a VAT exemption.

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