



VAT exempt management of special investment funds: ECJ specifies requirements for “management services”

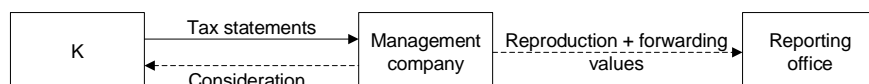
25 | 2021

1 Background

Sec. 4 no. 8 lit. h of the German VAT Act exempts the management of certain investment funds from VAT. The legal provision specifies two requirements: a) The nature of the supply must be management services, within the meaning of the provision. b) The services must relate to an investment fund that meets certain requirements (special investment fund). It is undisputed in the cases described below, that the investment fund meets the criteria of a special investment fund. However, it was for the ECJ to clarify whether the supplies of services rendered qualified as "management" of special investment funds. It is precisely this question that repeatedly leads to practical problems.

2 Facts

The ECJ jointly decided on two referred cases. In case C-58/20, “K” provided, for consideration, certain services for the calculation of the unitholders’ taxable income from the funds, such as tax statements, to various management companies. For this purpose, K used and relied on the calculation of the funds’ income as determined and provided by the management companies. K reproduced these values and then took into account specific investor-related characteristics, as well as other characteristics. As a result, K provided the investment management companies with the relevant calculations for the unitholders’ taxable income from the funds. The management companies reproduced these values without amending them and forwarded them to the reporting office in their own name and on their own responsibility.



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In case C-59/20, DBKAG, a management company, was granted the right to use software (SC software) by SC GmbH in return for the payment of a fee. The SC software performs calculations for the purposes of risk management and performance measurement and is specifically tailored to the activity of investment funds and the complex legal requirements in this area. As the SC software was run on DBKAG's technical infrastructure, DBKAG had to adapt its IT environment to the needs of the SC software and continuously enter market data.

3 ECJ decision

In its judgment, the ECJ dealt exclusively with the question as to whether the respective supply of services qualified as "management" of special investment funds, i.e. whether it can, by its nature, be deemed to be a supply of services within the scope of the VAT exemption. As in previous decisions, the ECJ applied two requirements for this purpose. On the one hand, the supply of services must, when viewed broadly, form a distinct whole. On the other hand, the supply of services must, in effect, fulfil the specific and essential functions of the management of special investment funds.

According to the ECJ, services, which are specific and essential for the management of special investment funds, can constitute a distinct whole, even if those services are not outsourced in their entirety. The ECJ derives this conclusion, *inter alia*, from its previous jurisprudence, according to which the provision of investment recommendations, which the investment fund is not required to follow, can be VAT exempt. Thus, the VAT exemption is not precluded by the fact that the management companies had to reproduce the reports calculated by K and forward them to the reporting office themselves. Nor is it precluded by the fact that the SC software used DBKAG's IT environment and that DBKAG had to provide market data on an ongoing basis.

Supplies of services are specific to and essential for the management of special investment funds if they are intrinsically connected to the activity characteristic of a management company. This includes portfolio management tasks (incl. the selection of assets), as well as supplies of administrative services (e.g. accounting services, preparation of statements for the distribution of income). By contrast, supplies of services inherent in any type of investment are not deemed specific (e.g. the actual management of the fund's property). Subsequently, the granting of rights to use software that exclusively serves the purposes of managing special investment funds may be deemed specific and essential. The tax calculation can be considered specific and essential if it relates to regulations that differ from the regulations for other types of investment funds.

4 Consequences for the practice

The ECJ has left it to the referring (Austrian) court to determine whether these two requirements are fulfilled in the individual cases. In this respect, a final decision remains to be made. Of particular importance, however, is the ECJ's finding that a supply of services can be VAT exempt, even if the task is not outsourced in its entirety. Until now, the ECJ had not stated this aspect with such clarity. However, this statement is important for many cases, as often final decisions still have to be made by the special investment fund or the relevant management company. In Germany, sec. 4.8.13 para. 16 to 21 of the German VAT Circular specify the supplies which, in the opinion of the tax authorities, can, due to their nature, be VAT exempt. For the most part, these provisions do not contradict the ECJ judgment. However, at least some of them are to be interpreted restrictively or are even to be amended. For example, not every supply of services rendered by means of a data processing system is necessarily subject to VAT. Furthermore, the ECJ's decision shows that the provision, according to which the "preparation of tax returns" cannot be VAT exempt, is not necessarily always correct.