

VAT: Revenue’s position on the “management of special investment funds” following the Court of Justice of the European Union decision in GfBk (Case C-275/11)

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Introduction

This manual sets out Revenue's position following the decision of the Court of Justice of the European Union (CJEU) in GfBk¹. The issue in dispute concerned the VAT treatment of investment advisory and information services outsourced by a fund manager to a third party.

Background

The services of GfBk were engaged by an investment management company (IMC) being the manager to a special investment fund to constantly monitor the fund and to make recommendations for the purchase or sale of assets. The CJEU was asked to consider whether, and under what conditions, advisory services concerning investment in transferable securities provided by a third party to an IMC fall within the concept of "management of special investment funds" for the purposes of the exemption laid down in Article 135(1)(g) of Directive 2006/112/EC (VAT Directive).

Judgment of the CJEU

The Court concluded that advisory services concerning investment in transferable securities, provided by a third party to an IMC which managed a special investment fund fall within the concept of "management of special investment funds" for the purposes of the exemption, as such an activity 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.

Updated Revenue position following the CJEU decision

Irish VAT law provides that the management of an undertaking specified in paragraph 6(2) of Schedule 1 of the VAT Consolidation Act 2010 as amended (VATCA 2010) is an exempt activity.

Paragraph 6(4) of Schedule 1 sets out that the "management" of a specified undertaking can consist of "any one or more of the 3 functions listed in Annex II of Directive No. 85/611/EEC of the European Parliament and Council (being the functions included in the activity of collective portfolio management) where the relevant function is supplied by the person who has responsibility for carrying out that function in respect of the undertaking".

The CJEU observed in GfBk that advisory and information services are not precluded from falling within the activity of "management" of a special investment fund by virtue of the fact that they are not specifically listed in Annex II to Directive 85/611 as amended since Article 5(2) of that Directive itself states that the list in the annex is "not exhaustive".

¹ GfBk Gesellschaft für Börsenkommunikation mbH v Finanzamt Bayreuth (Case C-275/11)

In order to determine whether services provided by a third party to an IMC fall within the concept of “management of special investment funds” for the purposes of the exemption, the CJEU pointed out that it is necessary to examine whether the 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 CJEU held that the making of recommendations by a third party to an IMC to purchase and sell assets falls within the exemption on the basis that it has the distinct characteristic of an activity of fund management.

As a consequence of the judgment Revenue accepts that investment advisory and information services and other non-specified services which meet each of the conditions below come within the activities of management for the purposes of the exemption at paragraph 6(2) of Schedule 1 of the VATCA 2010.

Conditions to be met

Having regard to CJEU jurisprudence, Revenue will consider the following in determining if services outsourced to a third party constitute the activities of “management” of a specified fund for the purposes of the exemption:

- The services must, viewed broadly, form a distinct whole, and be specific to, and essential for the management of special investment funds
- The services must be intrinsically connected to the activity characteristic of an investment management company, i.e. the services concerned must be eminently characteristic of the activities of a special investment fund
- Mere support or technical supplies, such as the making available of IT systems, provision of software, general legal and accountancy services, etc. are not covered by the scope of the exemption
- It is not essential that the outsourced services lead to a change in the legal or financial situation, rather the services should constitute “an outsourcing, in substantive terms, of the activity of management”.

Retrospective Application of the CJEU Decision

The decision of the CJEU, which has direct effect, may be relied on for past VAT periods, subject to the 4-year time limit for making claims. Adjustments should be made for any claimed inputs that relate to previously taxable income.

Where a fund, the trustees of a fund, or an investment management company, believe they have been wrongly charged VAT, they should contact their service provider to claim back the VAT overpaid.