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VAT exemption for management of real estate funds?

<http://docs.bepartners.pro/news/EuGH-Schlussantrag.pdf>

The management of collective investment funds is VAT exempt in the EU as laid down in the EU VAT Directive. In the case “Fiscale Eenheid X” (C-595/13), the Dutch Supreme Court has referred to the Court of Justice of the European Union (CJEU) whether such exemption also applies to the management of real estate funds. On 20 May 2015, Advocate General Kokott delivered her opinion. According to Advocate General Kokott real estate funds should be regarded as collective investment funds if such funds are under a national or EU regulatory regime. As a result, property management services fall within the scope of the VAT exemption. Should the CJEU adopt this opinion, this would have an impact on the VAT treatment of asset management and property management services for real estate funds in the EU. Moreover, the German legislator will have to react.

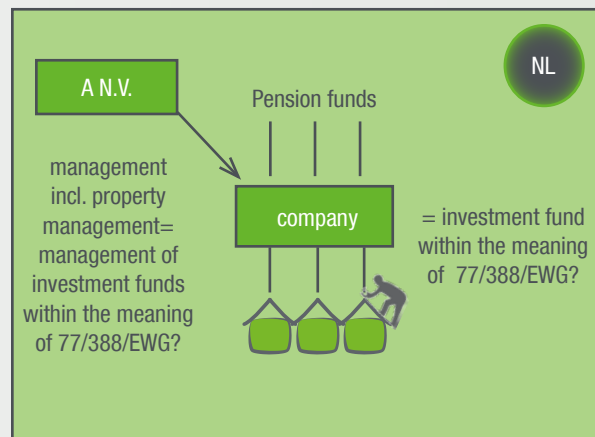
1. The Case

The CJEU is to rule on the following Dutch case: A Dutch public limited liability company (naamloze vennootschap, or N.V.) externally manages Dutch companies incorporated by several pension funds, which Dutch companies are involved in purchasing, selling and exploiting real estate properties. The external services i.a. consist of asset management and property management services.

2. Real estate funds as collective investment funds?

The CJEU has to decide under which circumstances real estate funds qualify as collective investment funds within the sense of the EU VAT Directive. In previous cases, the question referred to the CJEU was usually whether a certain investment vehicle had the essential characteristics of a collective investment fund, i.e. risk diversification and collective investment. In the current case, it has to be further determined if the underlying assets (here: real estate) are decisive for the qualification as a collective fund. According to the Advocate General Kokott, the nature of the assets is not relevant. Instead, she introduces a new criterion: only investment funds subject to special regulation, either under the Euro-

pean UCITS-Directive or AIFM-Directive or a special national regime, qualify as collective investment funds.



3. Property management services as tax-exempt management services for collective investment vehicles?

Furthermore, the CJEU has to decide if property management services are also within the scope of the tax-exempt management services for collective investment funds. Such property management services rendered in the case at hand include leasing, management of the existing leasing agreements as well as engaging in or supervising of property maintenance services. The purpose of the VAT exemption for management services of collective investment vehicles is to avoid putting investments in collective investment vehicles at a disadvantage in comparison with direct investments within the meaning of tax neutrality. The VAT exemption therefore includes all services, which are specific for managing a real estate fund, rendered by the fund manager. According to the Advocate General, this is the case when the services are necessary to maintain the investment assets entrusted to the manager and to realize profits. These services are not limited to the mere holding of the assets as well as the purchase and sale of the assets. With regard to real estate investments, property management in the form of an “actual exploitation



of the real estate” is necessary to generate return on such investments. Consequently, Advocate General Kokott concludes that property management services fall within the scope of the VAT exemption.

4. Consequences for the German and Luxembourgish practice

On the one hand, the German legislator need to react: Currently as set forth in the German VAT law, only the management of investment funds within the meaning of the German Investment Tax Act is VAT exempt. Closed real estate, private equity or infrastructure funds do not satisfy the qualification as an investment fund within the required sense. Management services rendered to such funds are subject to VAT in Germany. Nonetheless, such funds are subject to regulation under the German Investment Code (Kapitalanlagegesetzbuch). Denying a VAT exemption of management services rendered to such funds should no longer be valid following the Advocate General Kokott’s opinion. The German VAT exemption, in fact, needs to be extended and should apply either to the management of UCITs as well as alternative investment funds within the meaning of the German Investment Code, irrespective of whether such funds satisfy the requirement for investment funds within the meaning of the German Investment Tax Act.

On the other hand, fund service provider need to react: If the CJEU follows Advocate General Kokott’s opinion, fund service providers will have to review their existing service agreements and amend them in view of the new case law. Input VAT on services in connection with any potentially VAT exempt property management services will no longer be deductible. Whether such input VAT will be remunerated from the fund assets depends on the contractual arrangements. Outsourcing agreements with property managers should also be reviewed against the background of the CJEU decision.

Conversely, it has to be noted that if you would like to treat property management services as VAT exempt, provisional claims against the German VAT assessment may be advisable.

Luxembourg already amended its VAT law in 2013 allowing for all AIFs the same treatment as for the collective investment vehicles under the special laws of Luxembourg being subject to the supervision of the Commission de Surveillance du Secteur Financier.

Please note that the CJEU does not necessarily follow the Advocate General’s opinion. The outcome of the case has to be awaited. We will keep you informed!

be in touch:

Any questions? Please do not hesitate to contact us!



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