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BlackRock VAT case: no exemption for management services supplied for both SIFs and non-SIFs

On 11 March 2020, Advocate General Pikamäe (the "AG") of the Court of Justice of the European Union (the "CJEU") released his opinion in the BlackRock Investment Management (UK) Ltd case (C-231/19) concerning the VAT treatment of management services supplied by a third-party provider to a fund manager for the ultimate benefit of (i) special investment funds ("SIFs"), for which management is VAT exempt, and (ii) other funds ("non-SIFs"), for which management is not VAT exempt.

Background

BlackRock Investment Management (UK) Ltd ("BlackRock") was responsible for the management of (predominantly) non-SIFs, as well as SIFs. In order to perform this management activity, BlackRock used the services of BlackRock Financial Management Inc. in the US ("BFMI") through an IT platform known as Aladdin. Aladdin's functions span the entire investment cycle. UK VAT had been self-assessed on the whole remuneration paid to BFMI.

As a portion of the services received from BFMI went to SIFs, BlackRock claimed the application of the VAT exemption for that portion of the services used in the management of SIFs, requesting a refund of the VAT accordingly. Both requests were rejected by the UK tax authorities.

The case was finally brought before the CJEU with respect to the VAT exemption of the services of BFMI whereby a single service has a dual use implying two different VAT treatments.

AG's opinion

Prior to answering on the VAT treatment applicable, the AG recalled the notion of single supply and considered that the services provided by BFMI had to be regarded as a "single stream of information". Indeed, portfolio managers wish to have the underlying elements in combination (i.e. performance with risk analysis and monitoring, regulatory compliance monitoring or execution of trading decisions). Such combination could not, therefore, be split between a main and an ancillary service, and must be viewed as a single and indivisible supply.

The AG then addressed the question of the application of different VAT regimes to the elements of a single supply. This would imply that the tax base of such supply should be split depending on its ultimate use (i.e. for SIFs versus non-SIFs) and that the corresponding VAT treatment could be applied. According to BlackRock, such apportionment could be based on the volume of assets under management.

However, this position is not shared by the AG, who considers firstly that the application of a VAT exemption, even partially, to such single supply performed by BFMI for SIFs and non-SIFs would not be consistent with the objective of the VAT exemption for fund management services, which is to maintain a neutral VAT impact as regards the choice between direct investment in securities and investment through eligible undertakings (i.e. SIFs) by excluding the VAT cost.

Regarding the aforementioned apportionment, the criteria should be objective, transparent and foreseeable. This would require identifying some distinct characteristic within the supply that would enable an assessment of what portion of the services had been allocated to the management of SIFs. In the absence of any such identifiable characteristic, the alternative of using a pro rata amount calculated on the value of assets under management in order to estimate the services supplied for SIFs was rejected by the AG. Indeed, such a solution would lead to a continuously varying tax base which might have the effect of extending the VAT exemption to non-SIFs. In particular, the pro rata solution would not serve the above-mentioned objective of the VAT exemption.

Accordingly, the AG considers that services provided by BFMI for SIFs and non-SIFs constitute a single service for VAT purposes, which does not benefit from the VAT exemption for investment fund management services.

The AG also indicates that, if the third-party supplier were able to provide further data enabling a precise and objective identification of the services supplied specifically for the benefit of SIFs, the VAT exemption for investment fund management services could be applied. In this respect, a particular attention should be paid to the related agreements (remuneration clauses) and invoices which would support such identification, as well as to the data available at the level of the third-party supplier.

Once confirmed, it is anticipated that the outcome of this case law will, unsurprisingly, directly impact Luxembourg fund managers and their relations with third-party suppliers.

The release of the CJEU judgement in this context should therefore be closely followed.

The Arendt VAT team remains at your disposal should you require any further information in this respect.

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