

## EUROPEAN COURT OF JUSTICE HOLDS TAX AND SOFTWARE SERVICES SUPPLIED IN RELATION TO THE MANAGEMENT OF SPECIAL INVESTMENT FUNDS COULD BE EXEMPT FROM VAT

### EXECUTIVE SUMMARY

On 17 June 2021, the Court of Justice of the European Union (CJEU) released its decision in the joined cases of C-58/20 K and C-59/20 DBKAG. In its judgment, the CJEU has held that tax-related services and the granting of a right to use software are capable of falling under the VAT exemption for fund management when supplied in relation to special investment funds (SIFs) if they are intrinsically connected to the management of such funds and if they are provided exclusively for the purpose of managing such funds.

Entities involved in the fund management sector as providers or recipients of services should consider the implications of the judgment, both retrospectively and for supplies going forward.

### BACKGROUND

K provided various tax-related services in respect of SIFs, such as preparing of tax accounts. It calculated income at the fund level using data provided by management companies and custodian banks. To establish the correct tax treatment, K had to, for example, reflect rules specific to the different types of investors. Although the management entities were responsible for the SIFs tax filings, they typically filed returns using the data provided, without modifying it.

K treated its services as VAT exempt under the management of SIFs at Article 135(1)(g) of the VAT Directive. The Tax Authorities challenged this, arguing that tax services were not 'specific and essential' to the management of a SIF and, thus, could not qualify for exemption.

In the case of DBKAG, an Austrian fund manager, SC GmbH, a German company, granted a right to use software to carry out calculations essential to risk and performance management. The software (SC software) was customized to reflect the funds under management.

### IMPLICATIONS

The decision reflects the principles established in settled case-law (Abbey National and GFBK) and refers to the strict application of the VAT exemption.

The judgment might broaden the application of the exemption to particular tax and software services provided in certain circumstances in the context of fund management.

Businesses should review their arrangements to assess whether any services are potentially capable of qualifying for VAT exemption. It should be noted, however, that the judgment does not envisage that all tax or software services used by management companies can benefit from VAT exemption.

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SC GmbH was also responsible for making correct calculations of risk and performance indicators with the SC software only to be used in conjunction with other DBKAG software.

SC GmbH charged an ongoing royalty for its grant of a license. DBKAG considered that VAT was not due as the supply of the software was exempt on the basis that calculating risk and performance indicators was specific and essential for the management of SIFs. The Tax Authorities disagreed holding that the services were subject to VAT on the basis that SC GmbH only provided simple technical assistance.

### THE JUDGMENT

The CJEU stated that it is clear from settled case-law that VAT exemptions are to be interpreted strictly. However, businesses must be able to choose arrangements which suit them best, without running the risk of seeing their operations being excluded from the exemption.

Management services provided by a third-party manager fall, in principle, within the scope of Article 135(1)(g) but, to be classified as exempt transactions, the services provided by a third-party manager must form a distinct whole, intended to satisfy specific and essential functions of the management of SIFs.

In summary, the CJEU held that Article 135(1)(g) of the VAT Directive must be interpreted as meaning that the supply of services provided to fund managers, such as specific taxation services, are capable of qualifying for exemption, but only to the extent that the services have an intrinsic link with the management of SIFs and are required by law. Similarly, the CJEU found that the provision of a software license should fall under the exemption where it is used to perform calculations that are essential to the management of risk and calculation of yields, as required under local law or regulation in the context of fund management, and the software is used exclusively for the management of SIFs.