

## **VAT policy statement on specific state supervision of investment funds**

On April 1, 2019, the Deputy Minister of Finance (hereinafter: Deputy Minister) published the Specific State Supervision Policy Statement, effective April 2, 2019. In this policy statement the Deputy Minister elaborates on the qualification 'specific state supervision', which the Court of Justice of the European Union (hereinafter: CJEU) imposed as one of the conditions for applying the VAT exemption for the management of special investment funds (Article 135(1)(g) EU VAT Directive).

### **Introduction**

It can be concluded from CJEU case law that the following cumulative conditions must be met in order to qualify as a 'special investment fund' within the meaning of the VAT exemption:

- a) The fund must be financed by more than one participant;
- b) The contributed funds must be invested according to the principle of risk-spreading;
- c) The investment risk must be borne by the participants; and
- d) The fund must be subject to specific state supervision.

The last condition is relatively new and the CJEU introduced it for the first time in the [Fiscale Eenheid X \(C-595/13\)](#) case. In practice, this condition or limitation of the VAT exemption has raised many questions in the Netherlands. What type of state supervision is sufficient?

In this policy statement, the Deputy Minister provides a framework for interpreting 'specific state supervision'. We do note that, if a fund complies with the specific state supervision condition, it must still comply with the aforementioned conditions a), b) and c) in order to qualify as a 'special investment fund' within the meaning of the VAT exemption.

### **Approval for specific state supervision qualification**

The specific state supervision must apply to the (capital invested in the) fund. This can also be the case if the supervision takes place via the fund manager's license or license obligation. The policy statement therefore assumes that the following institutions are subject to specific state supervision:

- Undertakings for collective investment in transferable securities (hereinafter: UCITS) and investment institutions with a license obligation or whose manager has a license obligation under the Financial Supervision Act (*Wet op het financieel toezicht*; hereinafter: Wft)
- Investment funds falling under the registration regime (the 'light supervision') of the Wft;
- The 'unit funds' of insurers falling under the supervision of the Dutch central bank (*De Nederlandsche Bank*) and the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*) for insurers;

- Internal funds in a Master-Feeder investment arrangement that fall under the financial supervision of the feeder; and
- Pensions funds and the Dutch PPI's.

The policy statement explains each category in detail.

The Deputy Minister noted that the supervision of investment companies with a license for individual investment management does not qualify as specific state supervision within the meaning of the VAT exemption. Nor does individual investment management under a banking license qualify for the purposes of the VAT exemption, because there is no supervision of the investment fund. Of importance here is the fact that both the Amsterdam and the Arnhem-Leeuwarden Court of Appeals recently rendered a judgment in which they both ruled that a license for individual investment management is sufficient to meet the criterion of specific state supervision condition for the purpose of the VAT exemption. The judgment by the Amsterdam Court of Appeals is being appealed before the Supreme Court.

The status of exempt investment funds (*vrijgestelde beleggingsinstellingen*; hereinafter: VBIs) and mutual funds (*fondsen voor gemene rekening*; hereinafter: FGRs) is also still unclear. According to the policy statement, whether such funds have met the condition of specific state supervision for the purposes of the VAT exemption will have to be assessed on a case-by-case basis.

The policy statement also states that the pooled assets of two or more pension funds and/or other institutional investors ('asset pooling') must comply with the specific state supervision condition in order to apply the VAT exemption. The judgment in the Fiscale eenheid X case made the Deputy Minister's previous position - that pooled assets can take advantage of the VAT exemption - obsolete.

In anticipation of the Supreme Court judgment in the above case, we recommend that you critically consider whether, despite the policy statement, you can still take the position that the condition of specific state supervision has been met.

### **Grandfathering regime**

The transitional article with which the Alternative Investment Fund Managers Directive (AIFM Directive) was transposed into the Wft contains an exception for investment institutions with a license obligation that fall under the grandfathering regime. This means that managers that only managed one or more closed-end investment funds before July 22, 2013, and whereby additional investments were no longer made as at July 22, 2013, are excluded from the Wft licensing obligation. The Deputy Minister has given approval for the VAT exemption to be applied in such cases.

### **Specific state supervision in cross-border situations**

In situations where a fund is a VAT taxable person in the Netherlands and the manager is established outside the Netherlands, it will need to be assessed on the basis of

Dutch VAT rules whether the fund must pay Dutch VAT on the purchased services. The Dutch rules must be used to assess whether the manager of the fund is obliged to have a license under the Wft. The Deputy Minister refers here to the reporting obligation under Sections 2:70, 2:71 and 2:72 Wft for EU managers and the license obligation for non-EU managers pursuant to Section 2:65 or 2:69b Wft.

We would like to point out that a Dutch fund that does not qualify as a VAT taxable person should also apply the specific state supervision test if its manager is established outside the EU, in order to determine whether the fund should pay VAT on the purchased management services. The rules for actual use and enjoyment apply here. If the specific state supervision condition is not met (or the other conditions for being regarded as a 'special investment fund' are not met), the fund must, in principle, report the VAT on the management services purchased from the non-EU party, to the Dutch tax authorities itself (i.e. reverse charged).

### **Practical consequences**

The market has waited a long time for this policy statement, which has made clear for a number of funds that they are subject to the requirement of specific state supervision. We believe this clarification is more than welcome. In light of the proceedings on specific state supervision pending before the Supreme Court, it is advisable to consider, even if the condition of specific state supervision is not met on the basis of the policy statement, whether it is nevertheless possible to take the position that this condition has been met. This could be the case for certain FGRs and VBIs.

The policy statement does not contain any transitional rules and took effect on April 2. However, it follows from the Fiscale eenheid X judgment that the requirement of specific state supervision already applied before that date. We can imagine that some financial institutions will continue to apply the VAT exemption in anticipation of further clarification. If they do, they may be acting contrary to the Fiscal eenheid X judgment. Depending on the specific situation, it may be possible to invoke the principle of legitimate expectations. In any case, it is advisable to act quickly and to examine how the policy statement will affect your situation.

The tax advisors of Meijburg & Co's Indirect Tax Financial Services Group and the Indirect Tax Real Estate Group would be pleased to help you identify how this policy statement could potentially affect your business. Feel free to contact one of them or your regular contact for more information.

Meijburg & Co  
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