KPMG Meijburg & Co Tax Lawyers

Advocate General at the CJEU in BlackRock VAT case: a single fund management service is, in principle, not partly VAT-exempt

On March 11, 2020 Advocate General ('AG') Pikamäe at the Court of Justice of the European Union ('CJEU') rendered his Opinion in the BlackRock Investment Management (UK) Limited case ('BlackRock', case no. C-231/19).

At issue in the case is whether a single service purchased by BlackRock can be split in such a way that part of the payment for that service is VAT-exempt under the exemption for the management of special investment funds, while the other part is treated as VAT-taxed. BlackRock argued that such a split must be made, and then on the basis of whether the purchased service is used for the management of a special investment fund (VAT-exempt) or for other funds that are not special investment funds (VAT-taxed).

The AG concluded that, in principle, a single service can only be subject to one VAT treatment and that the exemption for the management of special investment funds does not apply to the service purchased by BlackRock. This could be different if sufficient information is available to precisely and objectively determine which part of the payment relates to the VAT-exempt services.

1. Background and reference for a preliminary ruling

BlackRock is a member of a VAT group in the United Kingdom ('UK'), which includes a number of companies that operate as fund managers. BlackRock purchases services from a group company in the United States, BlackRock Financial Management Inc ('**BFMI**'). Because the service is purchased from outside the UK, the VAT on this service – if taxed – is reverse-charged to the VAT group in the UK.

BlackRock used that service both for special investment funds ('**SIFs**', management VAT-exempt) and for other investment funds ('**non-SIFs**', management taxed). BFMI's services qualify as 'management' and are performed via a software platform called Aladdin. The platform enables BlackRock portfolio managers to take decisions about financial transactions.

What the referring court actually wants to know is whether a single fund management service purchased and used for two purposes can be partly VAT-exempt, depending on the extent to which the service is used for the management of SIFs or non-SIFs.

2. The Advocate General's Opinion

AG Pikamäe concluded that, in principle, a single purchased fund management service cannot be partly VAT-exempt. He substantiated this as follows.

According to the referring court, it has been established that the service provided by BFMI to BlackRock is a single service. It has also been established that the service provided by BFMI can be regarded as management within the meaning of the exemption for the management of special investment funds.

The AG concluded that it is not possible to consider one of the elements of this service as the principal service and the other as the ancillary service. According to the AG, the elements of the service must be placed on the same footing.

The question that then remains is which VAT treatment this composite service should receive. BlackRock argued that part of the service is VAT-exempt and part VAT-taxed. According to BlackRock, the determination of the VAT-exempt and VAT-taxed part must be based on the value of the assets under management that BlackRock manages for various funds.

The AG rejects this view. Although there are two cases in which the CJEU ruled that a single supply is subject to two different VAT treatments (the Talacre Beach Caravan Sales (C-251/05) and Commission vs France (C-94/09) cases), the AG noted that these were exceptions to the general rule and that a single supply can only have one VAT treatment. The AG believes that this general rule was confirmed by the CJEU not so long ago in the Stadion Amsterdam judgment (C-463/16). According to the AG, the exception used by the CJEU in the two aforementioned cases cannot be applied in the present BlackRock case.

The AG noted that it would be contrary to the objective of the exemption for the management of special investment funds to allow the exemption to be applied in the present situation, because the service purchased by BlackRock in fact also partly consists of the management of non-SIFs. According to the AG, the text of the exemption for the management of special investment funds also does not permit the application of the exemption to be made dependent on the assets under management. Moreover, the AG believes that the tax treatment proposed by BlackRock would go against the nature of the VAT regime and make it unworkable.

BlackRock also referred to the CJEU Commission vs Luxembourg case (C-274/15) concerning the VAT exemption for cost-sharing groups, in which the CJEU ruled that under the VAT exemption for cost-sharing groups it *is* possible for *part* of a single service to be VAT-exempt. The AG concluded that a general rule determining that a single service can be VAT-exempt cannot however be inferred from this. Whether the VAT exemption for cost-sharing groups applies is dependent on, for example, the activities of the purchaser of that service. If a service is used for multiple activities, the service may be partly VAT-exempt. The exception at issue in that particular case was based on the specific wording of the VAT exemption for cost-sharing groups. According to the AG, the wording of the exemption for the management of special investment funds does not allow such a split.

Lastly, the AG emphasized that the exemption for the management of special investment funds could however apply to outsourced fund management in other situations, if detailed information could be used to precisely and objectively establish which services were specifically provided for SIFs. In that case, the exemption for the management of special investment funds can be applied to the services provided to SIFs. The AG believes that such information is not available in the present case and thus the exemption for the management of special investment funds cannot be applied.

3. Impact on Dutch practice

The AG's Opinion is probably disappointing for various market parties. The question is, of course, whether the CJEU will follow the AG's Opinion. The AG considers a split into a VAT-exempt and a VAT-taxed part conceivable where appropriate, i.e. where sufficient

information is available to precisely and objectively determine which part of the payment relates to the VAT-exempt services. When that is the case, is still unclear.

The AG does not address whether the IT services that BlackRock purchases can be regarded as management within the meaning of the exemption for the management of special investment funds. This is understandable in the present case, because the referring court accepted this as a fact (after extensive examination). That is a welcome confirmation, because in the Dutch practice is it often unclear which IT service could fall within the scope of a financial exemption. The practice would benefit from the CJEU showing support for this in its judgment.

Finally, we would like to point out that although this case dealt with the exemption for the management of special investment funds, the final judgment by the CJEU could also impact other types of composite services outside the financial sector. After all, the splitting issue also occurs in other sectors.

4. What can you do now?

Based on the Opinion, splitting a single service into a VAT-exempt and a VAT-taxed part does not appear to be straightforward because in the case at hand the AG feels the service as a whole cannot be VAT exempt. If sufficient information is available to precisely and objectively determine which part of the payment relates to the VAT-exempt services, then a split should be possible. We recommend critically evaluating how fund management services are contracted, administered and invoiced. On the basis of precise and objective information it may be possible to achieve a split. You could also look at whether there are separate services rather than a single service. After all, in the case of separate services, whether the VAT exemption applies can be determined per service. That is advantageous for the purchasers of such services, as they will generally not have a VAT recovery right or only a limited one.

If you would like to exchange thoughts on this Opinion, feel free to contact the advisors of Meijburg & Co's Indirect Tax Financial Services Group or your usual advisor.

Meijburg & Co
March 2020