

Amendment of VAT policy statement: broader application of asset management exemption

On November 2, 2021, the updated Specific State Supervision Policy Statement of the Deputy Minister of Finance (hereinafter: Deputy Minister) was published. In this policy statement, the Deputy Minister elaborates on the qualification of 'specific state supervision'. This is one of the conditions stipulated by the European Court of Justice (hereinafter: CJEU) for the application of the VAT exemption for the management of special investment funds.

The updating of the original policy statement of March 22, 2019 was necessary due to Supreme Court case law from December 4, 2020, which entailed a broader interpretation of specific state supervision than that in the earlier policy statement.

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 Article 135(1)(g) EU VAT Directive (hereinafter: the VAT exemption):

1. The fund must be financed by more than one participant.
2. The contributed funds must be pooled for collective investment according to the principle of risk-spreading.
3. The investment risk must be borne by the participants.
4. Through their participation in the fund, each investor has a proportionate stake in the investments, but does not own the fund's investments as such.
5. The fund must be subject to specific state supervision.

The last condition was introduced by the CJEU in the Fiscal Unity X (C-595/13) case. It was confirmed by the Dutch Supreme Court in the Order for Reference issued in the Fiscal Unity X case on November 25, 2016. 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 the original policy statement of March 22, 2019, the Deputy Minister provided a framework for interpreting the condition for specific state supervision. According to this policy statement, if a fund complies with the condition for specific state supervision it must however still comply with the aforementioned conditions 1 through 4 in order to qualify as a special investment fund within the meaning of the VAT exemption. Please refer to our [tax alert](#) dated April 3, 2019 for more background to the original policy statement.

Proportionate stake in, but not ownership of, the investments themselves

Before addressing the update of the interpretation of the condition of specific state supervision, we note that the updated policy statement includes an additional condition for qualification as a special investment fund, which was not in the original policy statement. This concerns the fourth condition, which stipulates that each investor must have a proportionate stake in the investments through their participation in the fund, but does not own the fund's investments themselves.

This condition is derived from the considerations of the Supreme Court in its judgments of December 4, 2020, but as such has not been identified as a separate condition by the CJEU. As far as we are concerned, this condition is actually contained in the first three conditions mentioned above. In any case, we believe that the inclusion of this condition in the updated policy statement cannot have been intended as a specific Dutch limitation of the exemption. There is no room for this under EU law. It seems rather that the Deputy Minister wanted to confirm that the assets of a fund can be pooled in other ways than by issuing shares or units of participation. The Supreme Court considers it decisive that the participants are entitled to the (monetary) value of a proportionate part of the assets of the fund.

Broader interpretation of specific state supervision

As indicated, the reason for updating the policy statement is the Supreme Court's broader interpretation of the required specific state supervision on December 4, 2020. The policy statement supplements the cases of specific state supervision referred to in the original policy statement. We described those cases in our [tax alert](#) dated April 3, 2019.

The main question in the judgments rendered by the Supreme Court on December 4, 2020 was whether the VAT exemption for collective asset management can also be applied to an investment product offered by an asset manager under a license for individual asset management, whereby investments of individual investors are pooled on the basis of investment profiles. In that context, the question was also whether the requirement of specific state supervision had been met. We refer to our [tax alert](#) dated December 7, 2020 for more background to the Supreme Court judgments.

According to the Supreme Court, it is sufficient if the manager of a fund is under the supervision of the Authority for the Financial Markets (AFM), whereby it is irrelevant whether this supervision results from a license for collective asset management or a license for individual asset management. This broader interpretation is now explicitly laid down in the updated policy statement. A license as referred to in Section 2:96 of the Financial Supervision Act (*Wet op het financieel toezicht*) (MiFID II license) is sufficient in order to be subject to specific state supervision.

The updated policy statement addresses a number of specific situations concerning institutions and funds where, as a result of the broader interpretation by the Supreme Court, the condition of specific state supervision may be considered to have been met.

For example, the updated policy statement explicitly addresses the licensing obligation of banks. Banks are also allowed to provide investment services on the basis of their banking license. If a bank with a banking license acts as manager of a special investment fund, then the condition of specific state supervision is met.

The policy statement also confirms that the criterion of specific state supervision can be met in relation to investment funds exempt from corporate income tax, mutual funds and companies offering collateralized loan obligations, etc. if they fall within one of the categories of specific state supervision referred to in the policy statement. This confirmation enhances legal certainty. In this context, however, the policy statement

does explicitly state that conditions 1 through 4, as mentioned in the introduction, must also be met in order for the VAT exemption for management services to apply.

The policy statement does not contain an exhaustive description of all situations that occur in practice. We are thinking here, for example, of the situation in which the manager is established outside the Netherlands and is not required to have a license under the Financial Supervision Act, such as in the situation where the managed assets are invested in a foreign fund. The customer of the management services, established in the Netherlands, is then faced with the question of whether there is specific state supervision. For situations not explicitly referred to in the policy statement, it remains to be assessed on a case-by-case basis whether there is specific state supervision.

Practical consequences

The updated policy statement has retroactive effect to December 4, 2020, the date on which the Supreme Court rendered a broader interpretation of the condition of specific state supervision. The judgments and the updated policy statement are extremely important for the entire asset management market. There is now more scope to apply the VAT exemption for collective asset management than before December 4, 2020.

For your situation it is important to determine whether there is scope for applying the VAT exemption for collective asset management, both when you provide asset management services and when you purchase asset management services (possibly from abroad).

If you would like to exchange thoughts about the above, please feel free to contact the advisors of Meijburg & Co's Indirect Tax Financial Services Group or your usual tax advisor. Should you have any questions in relation to supervisory law, our colleagues at Meijburg Legal will be happy to help.

Meijburg & Co
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