

The European Court of Justice (ECJ) has delivered its judgement in the JP Morgan Fleming Claverhouse Investment Trust plc case (C-363/05).

We have set out a brief summary of the background to the case and the judgement delivered, for your information

Background

JP Morgan Fleming Claverhouse Investment Trust plc (“JP Morgan”), which is an investment trust company (“ITC”), and the Association of Investment Trust Companies challenged the UK VAT treatment of fees charged by a third party, JP Morgan Fleming Asset Management (UK) Limited, in relation to the management of its investment portfolios. The fees in question related to the provision of management services to JP Morgan. The UK’s view was that management services provided to ICT’s were taxable.

The relevant legislation is Article 135 (1)(g) of the Recast Sixth VAT Directive (formerly Article 13B(d)(6) of the Sixth VAT Directive), which provides for an exemption in respect of the:-

“management of special investment funds as defined by Member States”.

The following questions were asked in relation to the above exemption: -

1. Are the words “special investment funds” in Article 13B(d)(6) of the Sixth Directive capable of including closed-ended investment funds, such as ITCs.
2. If the answer to the first question is in the affirmative, does the phrase “as defined by Member States” in Article 13B(d)(6):
 - a. allow Member States to select certain of the “special investment funds” within their jurisdiction to benefit from the exemption of the supply of management services and exclude others from the exemption, or

- b. does it mean that the Member States are to identify those funds within their jurisdiction which fall within the definition of “special investment funds” and that the benefit of exemption should extend to all such funds.
3. If the answer to the second question is that Member States can select which “special investment funds” benefit from the exemption, how do the principles of fiscal neutrality, equal treatment and the prevention of distortion of competition affect the exercise of that discretion?
4. Does Article 13B(d)(6) have direct effect?

Judgement

The ECJ’s judgement is set out in brief below: -

1. Article 13B(d)(6) of Sixth Council Directive must be interpreted as meaning that the words ‘special investment funds’ in that provision are capable of including closed-ended investment funds, such as Investment Trust Companies.
2. Article 13B(d)(6) of Sixth Council Directive must be interpreted as meaning that it allows Member States a discretion in defining the funds located on their territory which are covered by the notion of ‘special investment funds’ for the purposes of the exemption provided for by that provision.

However, in the exercise of that power, the Member States must respect the objective pursued by that provision, which is to facilitate investment in securities for investors through investment

undertakings, while guaranteeing the principle of fiscal neutrality from the point of view of the levying of VAT on the management of special investment funds which are in competition with other special investment funds such as UCITS funds.

3. Article 13B(d)(6) of Sixth Directive has direct effect, in that it can be relied on by a taxable person before a national court in order to challenge the application of national legislation alleged to be incompatible with that provision.

Impact for the Irish investment management industry

The judgement is in line with the practice in Ireland, which treats the management of closed-ended funds as a VAT exempt activity, and is to be welcomed generally.

Furthermore, while the ECJ notes that it is not deciding whether the VAT exemption should apply to funds other than ITCs in this case, it makes it clear that what determines classification as a ‘special investment fund’ is the definition of that term in the context of the objectives of the EC Sixth VAT Directive and not distinctions of national law.

Time will tell if the UK Authority’s fears that the management exemption could become boundless, (e.g. pension funds), are well founded.

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