



VAT update – management of private equity funds

The broader scope of the Belgian VAT exemption for the management of special investment funds offers opportunities for private equity funds

In 2016, the Belgian VAT exemption for the management of investment funds changed following the introduction of new rules for the Belgian Real Estate Investment Trust (B-REIT). However, this change has gone further as, under the new VAT provision, the management of all collective investment funds falling within the scope of the Alternative Investment Fund Management legislation (AIFM) will benefit from the VAT exemption. This development could have important consequences for the fund and private equity industry in Belgium.

As a reminder, the scope of the Belgian VAT exemption for management of special investment funds has been under scrutiny in recent years. Uncertainty had mainly been created by the adoption of the AIFM Directive into Belgian financial law in 2014, combined with the rather obscure wording of the VAT exemption. On a strict interpretation, the Belgian VAT exemption only applied to qualifying “collective investment funds” (i.e. UCITS (Act of 3 August 2012), special vehicles for the investment in receivables, OFP and B-REIT). This change would imply that the management of, for example, a Pricaf Privée could no longer be VAT exempt.

In an official decision of 30 March 2015, the Belgian VAT authorities, however, accepted that the VAT exemption would continue to apply for the management of all investment funds – not qualifying as UCITS - that were previously regulated by the Act of 3 August 2012, such as institutional Sicavs, Pricaf Privée and other regulated funds. This decision also explained that the Belgian VAT exemption should be adapted. In the meantime, the VAT authorities accepted a ‘stand-still’ period.

The Program Law of 3 August 2016 introduced the change in the Belgian VAT exemption’s wording. The new provision entered into force on 26 August 2016. Under this new wording, the Belgian VAT exemption for the management of special investment funds explicitly provides for a VAT exemption for the management of:

- Collective investment undertakings as meant in the Act of 3 August 2012 (UCITS) and special vehicles for the investment in receivables;
- **Collective investment undertakings as meant in the Act of 19 April 2014 on alternative investment funds and their manager;**
- B-REITS as meant in the Act of 12 May 2014;
- Pension funds as meant in the Act of 27 October 2006.

By referring to the AIFM Act, the VAT exemption’s scope has become broader, in our view, as it should apply now to the management of all “alternative collective investment funds”. The AIFM’s definition refers to: *collective investment undertakings, including investment compartments thereof, which raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and do not require authorisation pursuant to Article 5 of Directive 2009/65/EC (UCITS).*

BELGIAN VENTURE CAPITAL & PRIVATE EQUITY ASSOCIATION vzw/asbl

Head Office
Havenlaan 86C/419
1000 Brussel

T.: +32 (0)3 297 10 21
F.: +32 (0)3 297 10 23
E-mail: info@bva.be
www.bva.be

Postal Address
Kleine Beekstraat 16
2990 Wuustwezel



This link between the VAT exemption and the definition of collective investment fund in the AIFM Act and Directive is in our view in line with the Court of Justice of the European Union's case law (see *ATP Pension Fund* and *Fiscale Eenheid X* cases). According to the Court of Justice, the essential characteristic of a special investment fund is the pooling of funds of several beneficiaries, enabling the risk borne by those beneficiaries to be spread over a range of securities or other assets (like immovable property). The management of such investment funds can qualify under the VAT exemption provided that the Member State concerned has made those companies subject to specific State supervision (such as the applicable AIFM rules).

As a consequence, the management of private equity funds should now qualify under the VAT exemption in Belgium as far as the fund's activities qualify under the AIF definition. **In practice, this should in our view imply that the management of most private equity funds could benefit from the VAT exemption in Belgium.** This could significantly reduce management costs for private equity funds.

One could still argue that the VAT exemption could be denied if the manager were not to comply with all the AIFM obligations if the *de minimis* exemption for the management of smaller funds (100 million EUR) applies. In our view, such funds still qualify as "AIFs" and the managers of such funds still have to comply with certain formalities under the AIFM legislation (registration). Furthermore, the legislative preparatory works only refer to the previous *status quo*, implying that the scope of the VAT exemption would not be broadened at all. However, these distinctions are not made in the current wording of the Belgian VAT exemption. In our view, businesses should be able to rely on the text of the law. As far as the fund qualifies under the AIF definition "as meant" in the AIFM Act, the VAT exemption should in our view apply.

On the other hand, the management of pure holding companies should in our view remain out of scope of the VAT exemption as holding companies are explicitly excluded from the AIFM rules. The distinction between a holding company and a collective investment undertaking is not always clear. This should be assessed on a case by case basis, taking into account not only the AIFM impact but also the VAT exemption for management services.

In our view, all managers of private equity funds must review their current VAT status. This could also imply that previous invoicing should be adjusted (from the new Belgian VAT exemption's date of entry into force). On the other hand, this change could have an impact for the management company as it will, in principle, no longer be entitled to recover input VAT.

Furthermore, according to EU case law, the VAT exemption for the management of special investment funds also applies to outsourced services, as far as these services form a distinct whole and are specific to, and essential for, the management of special investment funds. Following this principle, it has been accepted that the VAT exemption covers investment advisory services and specific accounting/accounting information services. Therefore, any subcontractors of the management company and any companies providing specific advisory or accounting services to private equity funds should review their VAT position as well.



BELGIAN VENTURE CAPITAL &
PRIVATE EQUITY ASSOCIATION

Finally, it is currently unclear whether the VAT authorities will publish specific guidelines about this topic. Therefore, if management companies or service providers are required to change their VAT status under the new rules, we recommend discussing this with the authorities in advance to avoid issues in the future.

If you would like more information about this topic then please contact Stijn Vastmans – Head of Tiberghien’s VAT department.

stijn.vastmans@tiberghien.com

BELGIAN VENTURE CAPITAL & PRIVATE EQUITY ASSOCIATION vzw/asbl

Head Office
Havenlaan 86C/419
1000 Brussel

T.: +32 (0)3 297 10 21
F.: +32 (0)3 297 10 23
E-mail: info@bva.be
www.bva.be

Postal Address
Kleine Beekstraat 16
2990 Wuustwezel