Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 20 May 2015[1]

**Case C-595/13**

**Staatssecretaris van Financiën**
**v**
**Fiscale Eenheid X NV cs(Request for a preliminary ruling**

**from the Hoge Raad der Nederlanden (Netherlands))**

(Tax legislation — Value added tax — Article 13B(d)(6) of Sixth Directive 77/388/EEC — Tax exemption for the management of special investment funds — Immovable property as the object of a special investment fund — Actual management of a property as management of the special investment fund)

## I – **Introduction**

1. For nearly 40 years, EU law on value added tax (VAT) has provided for a tax exemption for the management of common funds, which is an issue that has been the subject of proceedings before the Court of Justice on a number of occasions.[2] Only now, however, has the Court of Justice been presented, by means of the present reference for a preliminary ruling from the Netherlands, with the question as to whether and to what extent real estate funds — rather than merely securities funds — benefit from this exemption.

## II – **Legal context**

### A – *VAT law*

2. For the period relevant to the main proceedings, EU VAT law consisted of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment,[3] in the version in force in 1996 ('the Sixth Directive').

3. Under Article 2(1) of the Sixth Directive, inter alia 'services effected for consideration within the territory of the country by a taxable person acting as such' are to be subject to VAT.

1 — Original language: German.

2 — Judgments in *Abbey National* (C-169/04, EU:C:2006:289); *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391); *Deutsche Bank* (C-44/11, EU:C:2012:484); *GfBk* (C-275/11, EU:C:2013:141, paragraph 30); *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 19); and *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 43). See also Opinion of Advocate General Poiares Maduro in *BBL* (C-8/03, EU:C:2004:309), and Opinion of Advocate General Sharpston in *PPG Holdings* (C-26/12, EU:C:2013:254).

3 — OJ 1977 L 145, p. 1.

4. However, under Article 13B(d)(6) of the Sixth Directive, Member States are to exempt the following transactions from VAT:

‘6. management of special investment funds as defined by Member States’.

5. This provision corresponds to Article 135(1)(g) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, which is now in force.[4] The case-law of the Court of Justice concerning that directive may therefore also be taken into account in the present case.

6. Article 11(1)(i)(3) of the 1968 Netherlands Law on Turnover Tax (Wet op de omzetbelasting; ‘the Law on Turnover Tax’) provides that the management of assets assembled by common funds and investment companies for the purposes of collective investment is exempt from turnover tax.

B – *Supervisory law in respect of capital assets*

7. The scope of application of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS),[5] in the version in force in 1996 (‘the UCITS Directive’), is described in the sixth recital in the preamble thereto as follows:

‘Whereas the coordination of the laws of the Member States should be confined initially to collective investment undertakings other than of the closed-ended type which promote the sale of their units to the public in the Community and the sole object of which is investment in transferable securities …; whereas regulation of the collective investment undertakings not covered by the Directive poses a variety of problems which must be dealt with by means of other provisions, and such undertakings will accordingly be the subject of coordination at a later stage; …’

8. The subject-matter of Directive 2011/61/EU on Alternative Investment Fund Managers[6] (‘the AIFM Directive’) is, according to Article 1, as follows:

‘This Directive lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFMs) which manage and/or market alternative investment funds (AIFs) in the Union.’

9. Annex I to the AIFM Directive includes the following:

‘1. Investment management functions which an AIFM shall at least perform when managing an AIF:

(a) portfolio management;

(b) risk management.

4 — OJ 2006 L 347, p. 1.

5 — OJ 1985 L 375, p. 3. The directive has since been superseded by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32), which is not, however, applicable to the main proceedings *ratione temporis*.

6 — Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ 2011 L 174, p. 1).

2. Other functions that an AIFM may additionally perform in the course of the collective management of an AIF:

(a) Administration:

…

(b) Marketing;

(c) Activities related to the assets of AIFs, namely … facilities management, real estate administration activities … and …'

## III – **Main proceedings**

10. The main proceedings relate to the VAT debt owed by Fiscale Eenheid X NV cs ('X') for 1996.

11. X is a fiscal entity consisting of several companies that are together treated as a single taxable person in connection with payment of VAT. Also belonging to X is the company A Beheer NV ('A').

12. In 1996 A provided services to three companies which had been formed by several pension funds and which were involved in buying, selling and managing properties. Since these companies did not have any employees, A was contracted to perform the following tasks:

(a) acting as manager of the companies;

(b) all executive tasks falling to the companies as a result of statutory requirements, company statutes, regulations and administrative decisions;

(c) management of the companies' assets, particularly their properties;

(d) financial reporting, data processing and internal audit;

(e) dispositions concerning the client's assets, including the purchase and sale of properties;

(f) acquisition of shareholders and/or members.

13. X takes the view that all of the tasks carried out by A are covered by the tax exemption in respect of the management of capital assets provided for in Article 11(1)(i)(3) of the Law on Turnover Tax. By contrast, according to the tax authorities, only the purchase and sale of properties and the acquisition of new shareholders (points (e) and (f)) are exempt from taxation.

## IV – **Proceedings before the Court of Justice**

14. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), before which the case has been brought, considers the interpretation of EU law to be determinative in some respects, and on 21 November 2013 it accordingly referred the following questions to the Court of Justice pursuant to Article 267 TFEU:

'(1) Is Article 13B(d)(6) of the Sixth Directive to be interpreted as meaning that a company which has been set up by more than one investor for the sole purpose of investing the assembled assets in immovable property may be regarded as a special investment fund within the meaning of that provision?

(2) If the answer to Question 1 is in the affirmative: is Article 13B(d)(6) of the Sixth Directive to be interpreted as meaning that the term 'management' also covers the actual management of the company's immovable property, which the company has entrusted to a third party?'

15. In the proceedings before the Court of Justice, X, the Kingdom of the Netherlands, the Kingdom of Sweden and the European Commission submitted written observations in March 2014. They were joined at the hearing on 4 March 2015 by the United Kingdom of Great Britain and Northern Ireland.

## V – **Legal assessment**

16. The referring court requests a ruling on two questions concerning the tax exemption of the management of special investment funds under Article 13B(d)(6) of the Sixth Directive. The first question relates to the term 'special investment fund' (see A), the second, to the term 'management' (see B).

### A – *The first question referred: 'special investment fund'*

17. Pursuant to Article 13B(d)(6) of the Sixth Directive, the management 'of special investment funds as defined by Member States' is exempt from VAT. With its first question, the referring court essentially seeks to clarify whether such special investment funds may also consist of immovable property.

#### 1. The requirement of specific State supervision

18. Despite the power to define that is conferred on them by the wording of Article 13B(d)(6) of the Sixth Directive, Member States cannot answer this question on their own. This is because on the basis of our case-law — as was recently noted by Advocate General Cruz Villalón [7] — Member States have only limited discretion in defining 'special investment funds'.

19. In this regard, the Court of Justice has ruled that a Member State cannot select from among special investment funds those which are eligible for the exemption and those which are not; it can only define, in its domestic law, the funds which meet the definition of 'special investment funds'. [8]

20. Although at first glance, this statement is somewhat confusing, there is a simple explanation for it. There are in fact two different regulatory areas: on the one hand, VAT law and, on the other, State supervision of investment funds, or, as they are sometimes called in EU law, 'undertakings for collective investment'. [9]

21. As the Court of Justice has repeatedly emphasised in connection with the interpretation of the tax exemption in question, VAT law was harmonised prior to supervisory law. [10] Therefore, EU VAT law had to refer to national law if it sought to exempt from VAT the management of investment funds that are subject to specific State supervision. [11] Originally, only the Member States determined which

7 — See Opinion of Advocate General Cruz Villalón in *ATP PensionService* (C-464/12, EU:C:2013:840, points 34 to 36).

8 — Judgments in *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 17), and *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 41). See also judgment in *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraphs 41 to 43).

9 — Under Article 1(3) of the UCITS Directive, the term 'undertakings for collective investment' includes both dependent 'common funds' and independent 'investment companies', whereas the AIFM Directive uses the collective term 'investment funds'; see Articles 1 and 2(2)(b).

10 — See judgments in *Abbey National* (C-169/04, EU:C:2006:289, paragraph 55), and *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraph 32).

11 — See my Opinions in *Abbey National* (C-169/04, EU:C:2005:523, point 41), and *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:125, point 16).

investment funds were to be regulated by the State, and thus be subject to specific licensing and oversight rules, particularly for the purpose of protecting investors. It was these kinds of nationally regulated special investment funds that EU law made eligible for tax exemption pursuant to Article 13B(d)(6) of the Sixth Directive.

22. The Court of Justice has not yet ruled explicitly that the only assets that should benefit from the exemption are those that are subject to specific State supervision. However, this view is well founded in case-law.

23. Once specific State supervision of investment funds began to be regulated at EU level with the UCITS Directive, the Court of Justice limited the discretion of Member States to define special investment funds within the meaning of Article 13B(d)(6) of the Sixth Directive: Member States must classify funds that are regulated under the UCITS Directive as 'special investment funds'. [12] The power of Member States to define was thus overlaid by the harmonisation of supervisory law. [13]

24. As long as supervisory law is not regulated at EU level, however, Member States continue to have the power to define. This is because in the sixth recital of the UCITS Directive, the EU legislature stated that harmonisation should 'initially' concern only funds other than those that are closed-ended and which invest exclusively in transferable securities. For this reason, the Court of Justice was able to find that a closed-ended investment company State oversight of which is not regulated by EU law can nevertheless fall within the definition of a special investment fund pursuant to Article 13B(d)(6) of the Sixth Directive. [14]

25. For the case in question, that situation has not changed. This is because the more far-reaching harmonisation of supervisory law in respect of investment funds that was undertaken with the AIFM Directive has no bearing on the main proceedings, in which the legal situation as it was in 1996 must be taken into account.

26. Thus, on the basis of the legal situation that existed at that time, the meaning of the term 'special investment fund' as used in Article 13B(d)(6) of the Sixth Directive is determined both by EU law and by national law. In so far as EU law makes investment funds subject to specific State supervision by means of the UCITS Directive, they are special investment funds for the purposes of the tax exemption. Moreover, in so far as Member States provide for specific State supervision for other types of investment funds also, these too will generally benefit from the tax exemption.

27. It is also in this sense that our case-law is to be understood, according to which Member States are to regard as special investment funds those funds which, without being collective investment undertakings within the meaning of the UCITS Directive, at least display features that are sufficiently comparable for them to be in competition with such undertakings. [15] Such competition can essentially exist only between investment funds that are subject to specific State supervision. Only those kinds of investment funds can be subject to the same conditions of competition and appeal to the same circle of investors.

12 — Judgments in *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 23); and *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 46).

13 — See my Opinions in *Abbey National* (C-169/04, EU:C:2005:523, point 38), and *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:125, point 32).

14 — Judgment in *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraphs 34, 35 and 37).

15 — Judgments in *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 24), and *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 47).

28. The *ATP PensionService* judgment, in which the Court held that pension funds for occupational retirement provision may also fall within the scope of the term 'special investment funds',[16] is likewise in accord with the requirement of specific State supervision. This is because occupational retirement pension schemes are also generally subject to such supervision, as is apparent from Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision.[17]

29. Finally, limiting the scope of application of the tax exemption to investment funds that are subject to specific State supervision is also in keeping with the obligation to interpret tax-exemption terms strictly, which the Court of Justice has consistently reiterated in its case-law.[18] If the tax exemption were to extend to unregulated investment funds, its scope of application would be very broad indeed. In that case, for example, undertakings whose sole purpose is to hold shares in other companies could also be considered special investment funds, as correctly pointed out by the United Kingdom at the hearing.

30. For the purposes of the present case, it should be noted that an investment fund consisting entirely of immovable property is not covered by the EU supervisory law that was in effect in 1996. Pursuant to Article 1(1) and (2), first indent, the UCITS Directive is applicable only to investment funds consisting of transferable securities.

31. Consequently, an investment fund consisting of immovable property constitutes a special investment fund within the meaning of Article 13B(d)(6) of the Sixth Directive only if national law provides for specific State supervision of such an investment. Whether this is the case in the main proceedings cannot be determined from the information provided by the referring court and is for that court to examine.

2. Immovable property as a permissible special investment fund

32. Should the referring court determine that the three companies for which A provided various services were subject to specific State supervision, this raises the further question whether a special investment fund such as this is, by virtue of national supervisory law, also to be considered a special investment fund for the purposes of the tax exemption in Article 13B(d)(6) of the Sixth Directive.

33. This is because, in accordance with the case-law, there is a limit to the power of Member States to define. Classification as a 'special investment fund' under national supervisory law on the basis of specific regulation of an investment fund is, in and of itself, insufficient for the exemption to apply. Rather, it must also be a fund covered by the notion of 'special investment funds' within the meaning of Article 13B(d)(6) of the Sixth Directive and liable to be exempt in the light of the objective of that directive and the principle of fiscal neutrality.[19]

34. Thus, even if the business of the three companies for which A provided various services were subject to specific State supervision, it still might not qualify as a special investment fund within the meaning of Article 13B(d)(6) of the Sixth Directive on the basis that investment funds consisting of immovable property are not covered by the objective of that tax exemption.

16 — See judgment in *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 59).

17 — Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10).

18 — See, in particular, judgments in *Velker International Oil Company*, (C-185/89, EU:C:1990:262, paragraph 19); *Stockholm Lindöpark* (C-150/99, EU:C:2001:34, paragraph 25); and judgment in *Granton Advertising* (C-461/12, EU:C:2014:1745, paragraph 25).

19 — See judgment in *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraph 53); see also, to this effect, judgment in *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 42).

35. According to settled case-law, the tax exemption is intended to facilitate investment in securities through investment undertakings by excluding the cost of VAT, in that way ensuring that the common system of VAT is neutral as regards the choice between direct investment in securities and investment through collective investment undertakings. However, the Court of Justice expressly does not view this objective, which relates only to transferable securities, as exhaustive. [20]

36. The starting point for determining the objective of the tax exemption is the wording of Article 13B(d)(6) of the Sixth Directive. That provision refers to 'special investment funds' generally, not to a specific type of fund. Therefore, it is not evident that this tax exemption is intended to facilitate only investments in transferable securities and not other forms of investment as well.

37. The referring court is unsure, however, whether the objective of the tax exemption as defined by the Court of Justice can be met in the case of immovable property. This is because the Court of Justice has held that direct investments in immovable property are generally subject to VAT. The objection is undoubtedly based on the notion that, by contrast, direct investments in transferable securities are normally exempt from tax pursuant to Article 13B(d)(5) of the Sixth Directive. The referring court apparently considers that if direct investments in immovable property are in any event not tax-exempt, then the management of a property fund also should not be made exempt from VAT, in order that direct investments and investments in real estate funds are treated neutrally from a fiscal standpoint.

38. However, in terms of the objective of the tax exemption defined by the Court of Justice, the question whether the *purchase and sale* of an investment fund's assets is tax-exempt or taxable is irrelevant to the *management* of special investment funds. To ensure the equal treatment of direct investments and investments in special investment funds intended by Article 13B(d)(6) of the Sixth Directive, no additional VAT is levied on the *management* of special investment funds, which in the case of direct investments is carried out by investors themselves and which is thus automatically exempt from VAT. With regard to the purchase or sale of an investment fund's assets, direct investments and investments in special investment funds are generally treated equally in any event, since in both cases, whether VAT is due or not normally depends on the particular asset.

39. The objective of the tax exemption is thus achieved also in the case of investments in immovable property by exempting fund investments from additional VAT costs, which would not be incurred in the case of direct investments in immovable property. The fact that, until now, the Court of Justice has applied this objective only to transferable securities is related to the subject-matter of previous proceedings, as well as, possibly, to the fact that, for a long time, EU supervisory law applied only to transferable securities.

40. As is shown by the sixth recital, Article 19(1)(e) and Article 24 of the UCITS Directive, however, supervisory law generally recognises not only undertakings for collective investment in transferable securities but also other collective investment undertakings. Thus, investments in transferable securities are just one specific form of regulated investments. This is confirmed by the current AIFM Directive, which constitutes at EU level a further step in the harmonisation of specific State supervision of investment funds. The AIFM Directive also applies to real estate funds, as is clear from recital 34 in the preamble thereto.

20 — See judgments in *Abbey National* (C-169/04, EU:C:2006:289, paragraph 62); *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraph 45); *GfBk* (C-275/11, EU:C:2013:141, paragraph 30); *Wheels Common Investment Fund Trustees and Others* (C-424/11, EU:C:2013:144, paragraph 19); and *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 43).

41. It follows that including real estate funds in the tax exemption afforded by Article 13B(d)(6) of the Sixth Directive also prevents a breach of the principle of fiscal neutrality. This is because in so far as investment funds are subject to comparable specific State supervision, irrespective of whether they consist of transferable securities or immovable property, they also directly compete with each other. In both cases, investors are ultimately interested only in the return on their invested capital. However, according to settled case-law, the principle of fiscal neutrality precludes treating similar goods or services, which are thus in competition with each other, differently for VAT purposes. [21]

42. Finally, I also consider to be unfounded the Kingdom of Sweden's objection concerning the alleged lack of risk-spreading in a real estate fund. It is true that according to case-law a special investment fund must enable the risk borne by investors to be spread. [22] But even where a real estate fund by definition invests only in immovable property, this nevertheless results in risk-spreading. This is obviously the case where an investment is made in several properties, but it applies equally to a single large property, since here, for example, the vacancy risk is spread over a number of residential or commercial units. For similar reasons, special investment funds that consist of transferable securities may be limited to a specific sector without thereby losing their tax exemption.

43. As a result, real estate funds which national law has made subject to specific State supervision as special investment funds are thus also to be considered special investment funds for the purposes of the tax exemption in Article 13B(d)(6) of the Sixth Directive.

### 3. Conclusion

44. Accordingly, the answer to the first question referred should be that a company which has been set up by more than one investor for the sole purpose of investing the assembled assets in immovable property may be regarded as a special investment fund within the meaning of Article 13B(d)(6) of the Sixth Directive, provided that the Member State concerned has made it subject to specific State supervision.

## B – *The second question referred: 'management'*

45. The second question referred relates to the interpretation of the term 'management' for the purposes of the tax exemption in Article 13B(d)(6) of the Sixth Directive. The referring court asks whether this also covers the actual management of the property in a special investment fund where this has been delegated to a third party. According to the order for reference, actual management of the property includes, in particular, renting it out, managing existing tenancies and arranging for and overseeing maintenance work.

46. It is apparent from the grounds of the order for reference that the 'third party' is A. Since A assumed *all* management services for the three companies, including acting as their manager, the present case does not raise the question, which has been repeatedly addressed by the Court of Justice, as to the circumstances under which a third-party manager can provide *individual* management services free of tax as a subcontractor of the actual manager of a special investment fund. [23]

47. Thus, in the present case, the sole issue is what forms part of management for the purposes of the tax exemption. Does such management, as was discussed by the parties to the proceedings, cover only the purchase and sale of properties or also their actual management?

21 — See, in particular, judgments in *Commission* v *France* (C-481/98, EU:C:2001:237, paragraph 22); *Marks & Spencer* (C-309/06, EU:C:2008:211, paragraph 47); and *Pro Med Logistik* (C-454/12 and C-455/12, EU:C:2014:111, paragraph 52).

22 — Judgment in *ATP PensionService* (C-464/12, EU:C:2014:139, paragraphs 51 and 59).

23 — See judgments in *Abbey National* (C-169/04, EU:C:2006:289, paragraph 67); *GfBk* (C-275/11, EU:C:2013:141, paragraphs 20 and 21); and *ATP PensionService* (C-464/12, EU:C:2014:139, paragraphs 63 and 65).

48. As previously held by the Court of Justice, the determination of what is covered by management within the meaning of Article 13B(d)(6) of the Sixth Directive is governed exclusively by EU law. Member States have no discretion whatsoever. [24]

49. However, our case-law has not yet conclusively defined the term 'management'. The only certainty is that the transactions covered by that exemption must be 'specific' to the business of undertakings for collective investment. [25]

50. Evaluating what is 'specific' to the management of a special investment fund depends on the fund's object. The purpose of such a special investment fund is to preserve and increase assets. Therefore, what is specific to the management of such a fund is everything that a manager needs to do in order to be able to preserve the investment fund entrusted to him and generate income from it. To do this, he must properly manage the relevant assets. Defining what this consists of in detail depends on the asset concerned.

51. As regards immovable property, it is generally possible to preserve its value and generate income from it only if it is actually managed. Merely holding title to property does not normally result in any income.

52. If, on the other hand, a special investment fund holds shares in companies, the shareholder generally does not need to become personally involved in order to generate income. This is because the company's business is operated by its own managers.

53. In the case of securities funds that consist of equities, for example, proper management of the investment portfolio therefore consists only of the exercising of shareholder rights, such as voting. On the other hand, the shareholder is not entitled actually to manage the business of the company in which he owns shares. For this reason, the actual management of a property is not comparable to the actual management of the business of a company in which a securities fund holds shares, which specifically does not constitute 'management' for the purposes of the tax exemption in Article 13B(d)(6) of the Sixth Directive.

54. Thus, in the case of equities, the manager of a special investment fund can essentially limit himself to merely holding shares in companies in order to generate income, whereas in the case of immovable property, that is generally insufficient.

55. This view is confirmed in current EU supervisory law. For instance, point 2(c) of Annex I to the AIFM Directive provides that the functions that an AIF manager may additionally perform and which are thus subject to official supervision include, besides 'administration', 'facilities management' and 'real estate administration activities', that is to say, actual property management. With regard to special investment funds that fall within the purview of the UCITS Directive, the Court of Justice has also made reference to the activities description for unit trusts/common funds and investment companies contained in Annex II to the directive. According to case-law, the 'administration' activities listed in Annex II to the UCITS Directive are in any event specific, in the same way as portfolio management functions. [26] Even though the AIFM Directive, being later in time, is not applicable to the main proceedings, its provisions nevertheless show that actual property management is one of the 'specific' functions of a real estate fund.

24 — See judgment in *Abbey National* (C-169/04, EU:C:2006:289, paragraphs 40 to 43).

25 — Judgments in *Abbey National* (C-169/04, EU:C:2006:289, paragraph 63); *Deutsche Bank* (C-44/11, EU:C:2012:484, paragraph 31); and *ATP PensionService* (C-464/12, EU:C:2014:139, paragraph 65).

26 — Judgments in *GfBk* (C-275/11, EU:C:2013:141, paragraphs 22 and 25), and *ATP PensionService* (C-464/12, EU:C:2014:139, paragraphs 66 and 67). See also judgment in *Abbey National* (C-169/04, EU:C:2006:289, paragraph 64).

56. Ultimately, the fact that the management of a property for which a sole investor has engaged a third party is not exempt from VAT does not constitute an argument against the inclusion of property management in the concept of 'management'. Indeed, in the *GfBk* judgment, the Court of Justice rejected a comparable argument relating to advisory services for securities funds.[27] In the light of the objective of the tax exemption,[28] the issue is only one of comparing an investment in a real estate fund with a direct investment in a property, where the actual management is carried out by the investor himself and which likewise does not trigger VAT. The exemption of the actual management of the property by the manager of a real estate fund thus serves, in accordance with the objective of the tax exemption, to ensure neutrality with respect to the choice between direct investment in a property and investment in a real estate fund.

57. Thus, the answer to the second question referred should be that the term 'management' as used in Article 13B(d)(6) of the Sixth Directive also means actual management of the properties in a special investment fund.

## VI – **Conclusion**

58. In the light of the foregoing, I propose that the questions referred by the Hoge Raad der Nederlanden be answered as follows:

Article 13B(d)(6) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment is to be interpreted as meaning that

— a company which has been set up by more than one investor for the sole purpose of investing the assembled assets in immovable property may be regarded as a 'special investment fund', provided that the Member State concerned has made it subject to specific State supervision;

— 'management' of such a special investment fund also covers the actual management of property.

27 — See judgment in *GfBk* (C-275/11, EU:C:2013:141, paragraphs 29 and 30).

28 — See point 35 above.