[2018] UKUT 0415 (TCC)

Appeal number: UT/2017/0163

VAT – exemption for management of special investment funds (SIFs) – Article 135.1(g), Principal VAT Directive (2006/112/EC) – single supply of an integrated trading, portfolio management and risk reporting software application – whether "management" of SIFs – whether the consideration for the supply could be apportioned so as to be exempt in so far as used to manage SIFs and taxable in so far as used to manage non-SIFs – reference of apportionment issue to the CJEU

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BLACKROCK INVESTMENT MANAGEMENT (UK) LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MRS JUSTICE FALK
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 7 and 8 November 2018

Andrew Hitchmough QC and Laura Poots, instructed by Simmons & Simmons, for the Appellant

Raymond Hill, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is the appeal of the appellant, BlackRock Investment Management (UK) Limited ("BlackRock"), against the decision of the First-tier Tribunal ("the FTT") (Judge Guy Brannan), which was released on 15 August 2017 and is published under the neutral citation reference [2017] UKFTT 0633 (TC). The appeal concerns the application of Article 135.1(g) of the Principal VAT Directive ("the Directive")[1], which exempts supplies of the management of special investment funds ("SIFs"). SIFs are investment funds which, broadly speaking, are aimed at small investors.

2. BlackRock is the representative member of a VAT group that includes a number of fund management companies. In that capacity, BlackRock receives supplies of services, performed by and through a platform known as Aladdin, and uses those supplies in order to manage both SIFs and other investment funds ("non-SIFs"). It is common ground that the supply is a single supply of services received by BlackRock ("the Aladdin Services").

3. The broad issue is whether BlackRock is required to account for VAT under the reverse charge mechanism[2] on the supply of the Aladdin Services to it by BlackRock Financial Management Inc ("BFMI"), a US company in the same commercial group as BlackRock. Put shortly, BlackRock contends that the supplies of Aladdin Services received by it are exempt from VAT under Article 135.1(g) of the Directive, in so far as those services are used in the management of SIFs.

4. Before the FTT, there were two issues:

(a) The "Exemption Issue": whether the Aladdin Services amount to fund "management" within the meaning of that term for the purpose of Article 135.1(g).

(b) The "Apportionment Issue": if the Aladdin Services were supplies of "management", whether the consideration for those services could be apportioned in circumstances where they are used to manage both SIFs and non-SIFs.

5. On the Exemption Issue, the FTT decided that the Aladdin Services supplied were "management" and as such qualified in principle for exemption. But on the Apportionment Issue, the FTT concluded that, in circumstances where there was a single supply of the Aladdin Services which were used for the management of both SIFs and non-SIFs, the consideration for that supply could not be apportioned between the use by BlackRock to manage SIFs and non-SIFs. Accordingly, as it was

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[1] Council Directive 2006/112/EC

[2] It is common ground that, if the supply of the Aladdin Services is not within the exemption under Article 135.1(g) of the Directive, BlackRock is deemed to have made a taxable supply of those services by virtue of s 8 of the Value Added Tax Act 1994 ("VATA") and will be liable to account for VAT on that supply. Supplies that fall within the description of the exemptions in Schedule 9 VATA are excluded from the operation of s 8 (see s 8(4A)).

common ground that the majority of the funds managed by BlackRock using the Aladdin Services are non-SIFs (both in terms of number of funds and the value of the assets under management), the single supply of those services would be standard-rated (and the reverse charge would apply in respect of that supply). BlackRock's appeal to the FTT was therefore dismissed

6. With the permission of Judge Brannan, BlackRock has appealed to this Tribunal against the FTT's determination on the Apportionment Issue. By their response to BlackRock's notice of appeal, HMRC seek to challenge the FTT's conclusion on the Exemption Issue. In essence, HMRC's case on that issue is that the exemption only applies where all or substantially all of a particular function of fund management is outsourced, and that the Aladdin Services do not satisfy this requirement because no particular function is outsourced.

The law

7. The relevant provisions can be shortly stated. Article 135 of the Principal VAT Directive sets out a number of categories of transactions which Member States are obliged to exempt from VAT. Amongst those is Article 135.1(g):

> "the management of special investment funds as defined by Member States"

8. In UK domestic law, Article 135.1(g) has been implemented by a combination of s 31 VATA, which makes provision for supplies of goods or services of a description specified in Schedule 9 VATA to be exempt, and Items 9 and 10 of Group 5 of Schedule 9. Item 9 exempts the management of authorised open-ended investment companies, authorised unit trust schemes and certain non-UK collective investment schemes. Item 10 exempts the management of closed-ended collective investment undertakings, such as investment trust companies.

The facts

9. The FTT made extensive findings of fact, which it recorded at [18] – [117] of its decision. Its findings were based on an agreed statement of facts, documentary evidence, in particular the agreement under which the Aladdin Services were provided (the "Aladdin License and Services Agreement") dated 1 January 2010, and a witness statement and oral evidence from Mr Jonathan Kirby-Tibbits of BlackRock who, as part of his evidence gave the FTT what it described as a helpful demonstration of Aladdin at BlackRock's offices.

10. We can confine ourselves for the purpose of this appeal to the following summary of the facts.

11. BlackRock manages a range of different collective investment schemes which qualify as SIFs and a range of different collective investment schemes and other investment funds that do not so qualify (non-SIFs). The individuals responsible for managing the funds are the portfolio managers. Investment management follows a cycle of analysis, decision making, trade execution and post-trade settlement and

reconciliation. The portfolio managers monitor and analyse the exposure, performance and risk across the portfolio. The cash position of the fund is constantly monitored, as that could influence trading decisions. All of this is undertaken against the background of the applicable regulatory and product rules, as described below.

5 12. In general terms, Aladdin provides the portfolio managers with performance and risk analysis and monitoring to assist in the making of investment decisions, monitors regulatory compliance and enables the portfolio managers to implement trading decisions. Aladdin's functions span the whole of the investment cycle described above.

10 13. The Aladdin Services are provided by BFMI to BlackRock under the Aladdin License and Services Agreement. Under that agreement, BlackRock obtains from BFMI a licence for the Aladdin software together with "the benefit of the functionality comprised within the Aladdin Software, the hosting of the Aladdin Software and ancillary services". The Aladdin software was described in the
15 agreement in the following terms:

> "an integrated trading, portfolio management, and risk reporting software application, including improvements and new systems that may be developed from time to time, (the "Aladdin Software") to capture, execute, process and settle securities transactions and facilitate
> 20 securities trading, and to assist in portfolio management and construction, investment analysis, securities lending and other aspects of [BlackRock]'s business"

The functions of Aladdin

14. The FTT noted, at [200], that the sophistication and complexity of Aladdin was
25 difficult to convey in words and that the extent of Aladdin's capabilities only became fully apparent when the FTT had the benefit of the practical demonstration of the system. However, the FTT did make extensive findings in that regard. The following is only a short summary to provide the context for this decision. Reference should be made to the full findings of the FTT at [69] – [117] of its decision, which also
30 includes findings in relation to portfolio management within the BlackRock Group prior to the introduction of Aladdin.

(a) Portfolio analysis

15. At the start of each day, Aladdin produces an electronic report giving a "snapshot" of each fund (the Green Package). Among other things, this summarises
35 the portfolio and the risks and sectors to which it is exposed. It provides an analysis of the portfolio's performance, including the impact of specific assets on that performance.

16. Aladdin is able to identify the factors and investments affecting both the performance and risk levels within the portfolio on a real-time basis. Aladdin
40 continuously analyses and updates performance and risk levels throughout the day. This "performance attribution" analysis enables the portfolio managers to understand

why and how the performance of the particular portfolio is differing from its benchmark.

17. The information contained in Aladdin which is relevant to portfolio analysis comes from a number of sources. That includes third party information, such as pricing information, information entered by staff who are either employed by or who act on behalf of BFMI and information input by BlackRock itself.

(b) Trade modelling

18. If a portfolio manager decides to buy or sell investments, Aladdin can model the effect of the proposed trade. The ultimate decision in respect of the trade remains with the portfolio manager. Aladdin was not a substitute for the portfolio manager's experience.

(c) Compliance and risk modelling

19. SIFs are subject to regulatory rules which differ between jurisdictions. In addition, each SIF can have its own product rules, such as a prohibition on investing in tobacco companies. Any proposed trade will be run through Aladdin's "compliance engine" to determine whether it would breach any regulatory or product rules which apply to that SIF. Aladdin will identify any risk or compliance issues and may place a total block on the trade.

20. Aladdin also monitors the portfolios continuously for active compliance issues, those resulting from a trade by a portfolio manager, and passive compliance issues, those resulting from a movement in the market. Aladdin alerts the portfolio manager to any potential breach.

21. The data which is used by Aladdin with regard to compliance and risk modelling is programmed by the BlackRock Portfolio Compliance Group ("PCG"), which is a global BlackRock function with employees based worldwide. PCG is not part of Aladdin, and members of the PCG team are not employed by BFMI but are typically employed by the local investment management company in the relevant jurisdiction.

22. Although the introduction of Aladdin made it easier for portfolio managers to comply with the relevant regulatory and product rules, the ultimate responsibility for compliance remains with the portfolio manager. Aladdin is a tool which assists the portfolio manager (and the compliance and legal teams within BlackRock), but it does not take over the whole of the compliance function because each of the portfolio manager and the compliance and legal teams retain their functions in that regard.

(d) Corporate actions

23. A corporate action is an event initiated by the security issuer, such as a takeover or rights issue. Aladdin monitors these events and alerts the portfolio manager when a corporate action relates to a security within one of their portfolios. Aladdin

identifies the options available to the portfolio manger and whether any of those options might breach any regulatory or product rules. Aladdin will analyse the impact of the options (in the same way as for trade modelling). In the same way again, although Aladdin helps the portfolio manager to decide what action to take in relation to a corporate action, it has not taken over the whole of this function because the portfolio manager is also using his or her own judgment.

(e) Trading execution

24. It is the portfolio manager, using Aladdin combined with his or her own judgment, who ultimately decides which investments to buy and sell. Once a portfolio manager decides to make a trade, he or she uses Aladdin's trade execution tools to place the order. Aladdin communicates the order to one of BlackRock's dealing teams (which are not part of Aladdin) and tracks the progress of the order. The dealing teams have access to Aladdin, the information available to them being tailored to their role as dealers, and Aladdin enables them to execute trades in accordance with BlackRock's "best execution" policies, derived from the conduct of business requirements set out in guidance published by the Financial Conduct Authority.

25. As with the portfolio managers, Aladdin is a tool which informs the actions of the dealers; Aladdin does not take over the whole dealer function. For example, with a process known as "crossing" (where a sale order from a portfolio manager might be matched with a buy order from another portfolio manager), Aladdin would identify the opportunity, but it would be for the dealing team, exercising its own judgment, to decide whether to take up that opportunity.

(f) Post-trade portfolio administration

26. Trades are settled by a third-party custodian. Aladdin uses records of trades to reconcile cash and securities balances in real-time. This provides the portfolio manager with an accurate tool for keeping track of cash flow and enables the portfolio manager to make investment decisions based on accurate information. Aladdin also uses the information to produce income forecasts and net asset value calculations, which are in turn reconciled with the forecasts and calculations held by the custodians. Employees working for or on behalf of BFMI review and check the calculations and feed into the start of day reporting and performance attribution calculations. There are over 1,000 individuals engaged worldwide by BFMI for this purpose, as well as keeping the information on the BlackRock servers up to date and checking for anomalies and exceptions.

27. Aladdin did not take over the whole of the post-trade portfolio administration function. The services provided by Aladdin are supplemental to, and possibly duplicative of, those provided by the custodian. Aladdin provides portfolio managers with start of day and real-time intra-day positions. End of day net asset calculations and other reporting functions are carried out by third party accountants who maintain the official books of record for the funds.

Method of making the supplies of the Aladdin Services

28. As we have noted above, the Aladdin Services were provided under the Aladdin License and Services Agreement. BlackRock was provided with a licence to use the Aladdin platform, along with the benefit of the functionality of that platform. The functionality of the software is described in a Schedule to the Agreement as divided into five broad "trade processing and routing categories, plus a suite of supporting monitoring and reporting categories and ancillary improvements and bespoke enhancements".

29. BFMI is responsible for preparing the Aladdin database for the next business day, gathering new and updated third party data and integrating it into the BlackRock dedicated database server (where appropriate), and producing trade reports, risk reports and analysis. BFMI agrees to provide BlackRock with "a suite of portfolio and risk measurement reports based on [BFMI]'s standard reports for all assets maintained on the Aladdin System", and BFMI agrees to review the information contained within these reports on a daily basis.

30. Aladdin holds detailed information relating to every individual security that any BlackRock or other fund might hold; in other words, it holds detailed information on every security or financial instrument in what Mr Kirby-Tibbits described as "the investable universe". BFMI employees or persons acting on behalf of BFMI programme that information into Aladdin and keep it up to date. Those staff members also check exceptions highlighted by Aladdin.

31. BFMI employees review and check the post-administration calculations carried out by Aladdin. They identify any anomalies and, if they cannot be reconciled, refer them to the portfolio manager.

32. In summary, the Aladdin Services are a combination of hardware, software and human input. The hardware is comprised of BFMI's computer servers that store Aladdin's data system, the software is as described in the Schedule to the Aladdin License and Services Agreement referred to above, and the employees working on the reporting and portfolio administration services are part of Aladdin (in the sense that they provide Aladdin Services on behalf of BFMI). Some of Aladdin's functions are carried out automatically; others are prompted by employees of BlackRock accessing the system.

33. Other activities are carried out with the benefit of access to Aladdin, but are not supplanted by it. As we have described above, those include the ultimate responsibility of the portfolio manager for portfolio and risk analysis, the monitoring of the portfolio by the portfolio manager, the investment decisions of the portfolio manager, the compliance function within BlackRock and the ultimate responsibility for compliance with relevant regulatory and product rules which lies with the portfolio manager, the execution of trades carried out by BlackRock's dealing team, and elements of post-trade portfolio administration.

Our approach to the issues

34. Although this is BlackRock's appeal, and Mr Hill, for HMRC, urged us to consider first the issue that is the subject of that appeal, namely the Apportionment Issue, we do not consider that we are constrained by that fact to do so. Both the Apportionment Issue and the Exemption Issue are before us. It is necessary for BlackRock to succeed on both issues to obtain the tax effect it seeks. The Apportionment Issue can arise only in the context where the Aladdin Services would, if provided in relation to SIFs, be services of management of those SIFs and consequently exempt. The logical order in which to address those issues is therefore, as the FTT did, to consider first the Exemption Issue and then to address the Apportionment Issue.

The Exemption Issue

35. The scope and meaning of what is now Article 135.1(g) of the Principal VAT Directive has been considered in two judgments of the CJEU. The first is *Abbey National plc and another v Customs and Excise Commissioners* (Case C-169/04) [2006] STC 1136 ("*Abbey National*")[3], and the second is *GfBk Gesellschaft für Börsenkommunikation mbH v Finanzamt Bayreuth* (Case C-275/11) [2016] STC 1899 ("*GfBk*"). We shall consider those two cases below. But before doing so we should first refer to an earlier case in the CJEU, that of *Sparekassernes Datacenter (SDC) v Skatterministeriet* (Case C-2/95) [1997] STC 932 ("*SDC*").

SDC

36. SDC was an association in Denmark most of whose members were savings banks. SDC provided to its members and certain other customers, partly by electronic means, services comprising the execution of transfers, the provision of advice on and trade in securities, and the management of deposits, purchase contracts and loans. A typical service consisted of a number of components which, added together, made up a service which a bank or its customers wished to have performed.

37. The questions raised before the CJEU concerned whether those services were exempt under what is now Article 135.1(d) and (f) (formerly Article 13B(d)(3) and (5) of the Sixth Directive[4]). Those exemptions covered, at (3), "transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection and factoring", and at (5) "transactions, including negotiation, excluding management and safekeeping, in shares, interests in companies or associations, debentures and other securities …"

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[3] The *Abbey National* case was decided by the Court of Justice of the European Communities ("ECJ"). When we refer to the CJEU, that abbreviation should be taken as a reference to the Court of Justice of the European Union or to the ECJ as the case may be.

[4] EC Council Directive 77/388

38. The Court considered whether the exemptions in question depended either on the person effecting the transactions concerned or on the way in which those transactions were effected. The Court held, at [32], that the exemptions were defined according to the nature of the services and not according to the person supplying or receiving the services. Nor did the specific manner in which the service was performed, whether electronically, automatically or manually, affect the application of the exemption. Whilst the conditions for exemption would not be fulfilled if the service entailed only technical and electronic assistance to the person performing the essential, specific functions for the transactions within the exemption, whether that was the case followed not from the way in which the service was performed, but from the nature of the service (*SDC*, at [37]).

39. The questions before the Court included whether the exemption must be granted where a person either performs only part of a complete service or carries out only certain operations necessary for the supply of a complete financial service (*SDC*, at [60]). The Court rejected the argument, put forward by SDC, that it was not necessary for the services supplied to be complete services but that it was sufficient that the supply in question should be an element of a financial service in which various operators participate and which, taken as a whole, constitutes a complete service. The Court held, at [65], that the mere fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt.

40. The Court held, at [66], that in order to be characterised as exempt transactions within the exemptions in question, the services provided must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service as described by the relevant provisions. For "a transaction concerning transfers", the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation. An exempt supply under the Directive had to be distinguished from a mere physical or technical supply, such as making a data-handling system available to a bank. A particular question to be considered by the national court was whether the supplier's responsibility was restricted to technical aspects or whether it extended to the specific, essential aspects of the transactions.

41. As regards other services provided by SDC, the Court found, at [75], that services consisting of the making of financial information available to banks and other users could not be covered by the relevant provisions of the Directive. Article 13B(d)(5) could, however, apply to services related to trading in securities if those services were separate in character and specific to, and essential for, the exempt transactions. That was a question for determination by the national court. The Court also observed, at [76], that the same analysis applied to the management of deposits, purchase contracts and loans (the exemption for which had applied only up to 1 January 1991).

Abbey National

42. The interpretation of what was then Article 13B(d)(6) of the Sixth Directive (now Article 135.1(g) of the Principal VAT Directive) came before the CJEU in *Abbey National*, on a reference from the VAT and Duties Tribunal.

43. Companies in the Abbey National Group were the managers of a number of authorised unit trusts and open-ended investment companies. A third party provided depositary services to the managers. Another third party provided a raft of administration services delegated by the managers, including in particular computing the amount of income and the price of units or shares, the valuation of assets, accounting, the preparation of statements for the distribution of income, the provision of information and documentation for periodic accounts and tax, statistical and VAT returns and the preparation of income forecasts. Other administration services provided were data processing, fund reconciliation, calculation and recording of charges and expenses, recording of corporate events, distribution of daily sub-fund prices to the press, production of tax and VAT returns and returns to the Bank of England, calculation of distribution rates and yields, and answers to enquiries from the manager and/or the depositary.

44. The Court held first, at [43], rejecting a submission from the UK Government that the exemption conferred power on the Member States to define the activities covered by the term "management" of SIFs (as well as defining SIFs themselves), that the concept of "management" of SIFs in the exemption has its own independent meaning in Community law "whose content the Member States may not alter".

45. In considering the meaning of "management" in this context, the Court made the following findings:

(1) The relevant provision (now Article 135.1(g)) contains no definition of the term "management" (*Abbey National*, at [58]).

(2) The provision must therefore be interpreted in the light of the context in which it is used and of the aims and scheme of the Directive, having particular regard to the underlying purpose of the exemption which it establishes (*Abbey National*, at [59]).

(3) The exemptions are exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person, and as such they should be interpreted strictly[5] (*Abbey National*, at [60]).

(4) The purpose of the exemption of transactions connected with the management of SIFs is, particularly, to facilitate investment in securities for small investors by means of investment undertakings. The exemption is intended to ensure that the common system of VAT is fiscally neutral as regards

[5] We would add that, although a strict interpretation is required, it is equally established that such an interpretation should not be restrictive; it must not deprive the exemption of its intended effect (see *Skatteverket v PFC Clinic AB* (Case C-91/12) [2013] STC 1253, at [23]). The interpretation of the terms in question must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality.

the choice between direct investment in securities and investment through undertakings for collective investment (*Abbey National*, at [62]).

(5) As regards the services performed by a third-party manager in respect of the administrative management of the funds, the Court made the following findings:

(a) in line with the exemption for transactions considered in *SDC*, the management of SIFs in what is now Article 135.1(g) is defined according to the nature of the services provided and not according to the person supplying or receiving the service (*Abbey National*, at [66]);

(b) the wording of the exemption does not preclude the management of SIFs from being broken down into a number of separate services which may come within the meaning of "management of special investment funds", and which may benefit from the exemption under it, even where they are provided by a third-party manager (*Abbey National*, at [67]);

(c) it follows from the principle of fiscal neutrality that operators must be able to choose the form of organisation which, from the strictly commercial point of view, best suits them, without running the risk of having their operations excluded from the exemption (*Abbey National*, at [68]); and

(d) management services performed by a third-party manager do, generally, come within the scope of the exemption (*Abbey National*, at [69]). However, such services must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service of management of SIFs (*Abbey National*, at [70], referring to *SDC*). Mere material or technical supplies, such as the provision of an information technology system, are not covered by the exemption (*Abbey National*, at [71]).

46. The Court accordingly ruled that "the concept of 'management of special investment funds' referred to in [Article 135.1(g)] covers the services performed by a third-party manager in respect of the administrative management of the funds, if, viewed broadly, they form a distinct whole, and are specific to, and essential for, the management of those funds".

GfBk

47. *GfBk* concerned a supply of services by the taxable person, GfBk, whose business was the dissemination of information and recommendations relating to the stock market, the provision of advice relating to investment in financial instruments and the marketing of financial investments, to an investment management company which managed a SIF. GfBk undertook to advise the investment management company "in the management of the fund" and "constantly to monitor the fund and make recommendations for the purchase or sale of assets". GfBk also undertook to "pay heed to the principle for risk diversification, to statutory investment restrictions … and to investment conditions …".

48. The questions referred to the Court by the German Bundesgerichtshof (Federal Finance Court) essentially asked whether advisory services, as opposed to the performance of a management function (as had been the case in *Abbey National*), fell within the concept of "management of special investment funds" for the purpose of the exemption.

49. At [21], the Court noted the test as laid down in *Abbey National*, namely that management services provided by a third-party manager must, viewed broadly, form a distinct whole and be specific to, and essential for, the management of SIFs. The Court then, at [22], referred to the essential nature of a collective investment scheme and to the fact that functions specific to collective investment undertakings include functions for administering the funds, including those set out under the heading "Administration" in Annex II to Directive 85/611 ("the UCITS Directive") (as amended)[6]. On that basis, the Court held, at [23], that an advisory service provided by a third party would likewise fall within the exemption if it was "intrinsically connected to the activity characteristic of an [investment management company], so that it has the effect of performing the specific and essential functions of management of a special investment fund".

50. The Court then made some helpful observations in the context of the case before it:

(1) Services consisting in giving recommendations to an investment management company to purchase and sell assets are intrinsically connected to the activity characteristic of such a company, namely the collective investment in transferable securities of capital raised from the public (*GfBk*, at [24]).

(2) The fact that advisory and information services are not listed in Annex II to the UCITS Directive does not preclude those services from being included in the category of specific services falling within activities for "management" of a SIF; the list in that Annex is not exhaustive (*GfBk*, at [25]).

(3) The fact that advisory and information services provided by a third party do not alter the fund's legal and financial position does not preclude them from falling within the concept of management of a SIF (*GfBk*, at [26]).

(4) Having regard to the fact that in *Abbey National* it had been held that administration and accounting services, and not just those involving the selection and disposal of the assets under management, fell within the concept of management of a SIF, it is not important that it was for the investment management company to implement the recommendations provided by GfBk to purchase and sell assets, after checking that they complied with investment limits (*GfBk*, at [27]).

(5) The wording of the exemption does not in principle preclude the management of SIFs from being broken down into a number of separate services which may then fall within the meaning of "management of special

[6] This Annex was referred to in *Abbey National*, at [64], as illustrating administration functions that can fall within the exemption, and the Court cross-referred to this paragraph in *GfBk*.

investment funds" and may benefit from the exemption, even where they are provided by a third-party manager, so long as each of those services has the effect of performing the specific and essential functions of such management (*GfBk*, at [28]).

51. As regards fiscal neutrality, at [30] the Court rehearsed the purpose of the exemption as identified in *Abbey National*, at [62], being to ensure that the common system of VAT is neutral as regards the choice of direct investment in securities and investment through collective investment undertakings. On that basis, the Court reasoned, at [31], that if investment advice services provided by a third party were subject to VAT, that would have the effect of giving investment management companies with their own investment advisers (internal advice not giving rise to any supply) an advantage over such companies that outsourced such advisory services. That would offend the principle of neutrality, and would inhibit operators from being able to choose the most suitable form of organisation from a commercial perspective.

Discussion

52. In the context of this appeal, the judgments of the CJEU in *Abbey National* and *GfBk* establish some clear points of principle. First, and fundamentally, to fall within the meaning of the term "management of special investment funds" in Article 135.1(g) of the Principal VAT Directive, the services in question must form a distinct whole and be specific to, and essential for, the management of SIFs. The manner of provision of those services is immaterial; they may be provided physically or electronically, for example. They may be provided by a third-party provider to whom the provision of such services has been outsourced. However, the term does not include mere physical or technical supplies, which lack the necessary specificity and distinctiveness.

53. Although apt to describe the whole process of running a SIF, the term "management" in that context is not confined to cases where an operator, including a third-party operator, undertakes the whole process or, as described in this case, the whole of the investment management cycle. Separately identifiable services forming part only of that investment management cycle, and which have the necessary qualities of specificity and distinctiveness, are also encompassed within the term "management". It is not necessary, for example, for the services in question to be, or to include, the selection, purchase or disposal of the assets under management.

54. In principle, therefore, there are two elements which must be present if services are to be regarded as falling within Article 135.1(g): distinctiveness and specificity. Some guidance on how the test may be applied was given by the Court in *GfBk*, where at [23] the CJEU expressly approved the observations of the Advocate General (Cruz Villalón) at [27] and [31] of his Opinion:

> "27. That test[7] is not developed any further in *Abbey National* or in other judgments relating to other exemptions under art 13B(d) of the Sixth Directive. However, it is possible to extract from those judgments a number of criteria following the solution reached by the court in each case. Those criteria, capable of reflecting a rather more precise content of the rule of specificity and distinctness, are the following: the service provided by the third party must be intrinsically connected to the service provided by the management or investment company, and also have a significant degree of autonomy as regards its content. Furthermore, the outsourced service must be continuous or, at least, foreseeable over time. However, it does not appear to be relevant whether the outsourced service brings about a change in the legal or economic situation of the company which receives it.
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> …
>
> *(a) The intrinsic connection of the service to the activity of the fund*
>
> 31. The condition of specificity and comprehensiveness laid down in *Abbey National* refers to an intrinsic connection between a service and the activity carried out by a common fund. In short, it is a question of identifying those services that are typical of a common fund and single it out from other economic activities. To give a simple example, the computation of units and shares or a proposal to purchase or sell assets are activities typical of an investment fund but not of a construction company. Clearly, there is nothing to preclude a construction company from carrying on financial investment activities but these activities will not be characteristic or typical elements of, and in that sense specific to, the business of construction."

55. That express endorsement by the Court of the Advocate General's Opinion in *GfBk* extended no further than to the Advocate General's observations on the need to identify an intrinsic connection between the service and the activities of a SIF. That requirement could, we accept, be regarded as concerning the need for specificity only, and not that of distinctiveness. However, we take a different view. We do not consider that such a narrow approach would be correct having regard to the judgment of the Court in *GfBk* as a whole. The Court specifically endorsed the requirement established by *Abbey National* that the services must form a distinct whole "and" be specific to (and essential for) fund management: see [21] of the Court's judgment, referring to *Abbey National* at [70] – [72]. But we also do not regard the views expressed by the Advocate General, and approved by the Court, as having been intended to draw a bright-line distinction between the two elements of the test as expressed in *Abbey National* and *GfBk*. That is, in our view, apparent from [31] of the Opinion in *GfBk*, where the Advocate General refers to "specificity and comprehensiveness" and explains the need to identify the services in question and to single those services out from other economic activities. It is that identification of the services as typical of, or intrinsic to, the activities of a SIF, that marks out the service as having both the necessary quality of specificity and that of distinctiveness.

[7] A reference to the requirement for the services, viewed broadly, to form a distinct whole, fulfilling in effect the specific, essential functions of a service of management of SIFs.

56. In our judgment, the Court in *GfBk* recognised the scope of the Advocate General's observations when it referred, at [23], to the need to examine *both* the intrinsic connection of the services to an activity of the investment management company *and* whether the activity in question was characteristic of the investment management company in the context of the functions of management of a SIF. The Court found it unnecessary to elaborate further on what might be regarded, in a given case, as a "distinct whole".

57. As the Court did not consider it necessary to say any more on the meaning of a "distinct whole", we do not consider that it would be right for a national court or tribunal to attempt to do so, whether by reference to other parts, not expressly approved, of the Opinions of the Advocate Generals in *Abbey National* and *GfBk* or otherwise.

58. Although we had submissions from both Mr Hitchmough and Mr Hill on dictionary definitions of "distinct" in a number of languages, we did not find those submissions of any assistance in understanding the judgments of the CJEU. There is no question of any linguistic ambiguity affecting such an understanding. For that reason alone, resort to dictionary definitions is both unnecessary and unhelpful. Furthermore, in the same way that the term "management" has an autonomous meaning in EU law, so too must the manner in which that term has been construed by the Court be capable of universal application throughout the EU. Dictionary definitions tend to provide a range of meanings to illustrate the full spectrum of usage of a particular word, depending on the individual context. Resort to such definitions has the tendency to obscure rather than elucidate the meaning of a word when taken out of its particular context, particularly when resort is had to multiple language versions. We consider that the guidance provided by the CJEU as to the scope of the exemption should be applied according to its own terms.

59. Furthermore, although we were taken to a number of passages from the Opinions of Advocate General Kokott in *Abbey National* and Advocate General Cruz Villalón in *GfBk*, we regard those (with the exception of the specific paragraphs approved by the Court in *GfBk*) as having indicated no more than useful factors to be taken into account, depending on the circumstances of the case, in any analysis of whether a particular service falls within the scope of management of a SIF, and not as marking out any further principles. The Court in both cases did not see fit to lay down any further principles or provide more detailed guidance; it must therefore be taken to have considered that its judgments were sufficiently clear and comprehensive to enable the national courts to apply the exemption consistently across the EU.

60. Thus, although we had an interesting debate as to the extent to which the essential distinctiveness of a service may not be achieved if it is not sufficiently defined so as not to become blurred with other functions carried by the recipient of the service, a debate that was triggered by the observations of the Advocate General in *GfBk* at [36] - [37], we do not consider that this amounts to a separate test in principle. We accept that blurring of the nature described by the Advocate General, to the extent that it leads to a conclusion that the service is undifferentiated and thus deprived of its distinctive character, may well cause a service to fail to satisfy the

requirement that it be a "distinct whole". But in our judgment, having regard to the findings of the FTT, that circumstance does not arise in this case. The FTT found, at [201], that the roles and functions of the portfolio managers and Aladdin were distinct. The provision by way of the Aladdin Services of the information and analysis was a function which the portfolio managers did not themselves carry out. There was no "blurring". That, in our judgment, was a conclusion that was open to the FTT on the evidence. There is no basis on which that conclusion may be interfered with. Indeed, it is perfectly clear that there was on the facts no material duplication of the roles or the functions of the portfolio managers and Aladdin, or any such duplication in the roles or functions of Aladdin and the compliance and legal teams. The respective roles and functions of Aladdin and BlackRock were essentially complementary, but they were, as the FTT found, distinct from each other.

61. The FTT rejected, at [193], the submission for HMRC that all or substantially all of a particular function of investment fund management or administration had to be carried out in order for a service, or bundle of services, to be regarded as a distinct whole. The FTT relied on the observations of the Advocate General in *Abbey National*, at [101], that distinctiveness derives from the "inner coherence" of the operations outsourced. In that connection, the FTT considered that the Advocate General was "seeking to distinguish cases where the various services were interrelated ('inner coherence') from those where the services were an amalgam of unrelated and disparate services" (FTT, at [196]).

62. If the FTT was suggesting that meeting a test of inner coherence is a universal requirement for a service to be regarded as a distinct whole, we would respectfully disagree. The Advocate General was not, in the passage referred to, suggesting such a universal requirement, but she was indicating how elements of a service which, taken individually, might not themselves attain the necessary distinctive character, could nonetheless attain the requisite distinctiveness on account of their inner coherence with other outsourced operations forming part of the overall service. The example given by the Advocate General, at [101] of her Opinion, is of valuation which, if viewed individually and out of context, would lack the necessary distinctive character in relation to the management of a SIF. But when considered in the context of drawing up settlement documents and reports, themselves related to fund management, valuation would have an inner coherence with those activities and the service, viewed as a whole, would have the requisite distinctiveness.

63. There was no argument before the FTT that individual elements of the Aladdin Services should be excluded from the exemption because, taken individually, they lacked a distinctive character. Even if those services had been an amalgam of unrelated and disparate services, and had lacked inner coherence with each other, that would not have precluded each of those services being regarded, each in its own right and not with reference to any other, as a service of "management" of a SIF. It is clear from both *Abbey National* and *GfBk* that such services may be broken down into individual services. What is required is that either those individual services must themselves have the necessary distinctive character in their own right, or they must have an inner coherence with other services which do have such a distinctive character by reference to fund management activities.

64. In any event, we consider that the findings of the FTT, first, that the Aladdin Services, taken as a whole, had an inner coherence relative to fund management and, secondly, that there was no "blurring" of those services with activities of BlackRock which could cause those services to lose their distinctive character is decisive of the question whether those services formed a distinct whole. The FTT also decided, for the reasons it explained at [180]-[189], and HMRC did not seriously dispute, that the Aladdin Services were intrinsically connected to the activities characteristic of an investment fund and that they were specific and essential to the management of a SIF. In our judgment, those were findings that the FTT were entitled to make on the evidence, and we can discern no arguable error of law in the approach of the FTT or in its conclusions. Indeed, we consider that those conclusions were the only proper ones that could have been reached on the facts of this case.

65. It follows that, in common with the FTT, we do not accept the argument of HMRC that, in order to benefit from the exemption in Article 135.1(g), significant aspects of management and administration have to be outsourced and that each of those aspects needed to be sufficiently outsourced. That, essentially, was the basis upon which, in HMRC's response to BlackRock's notice of appeal, HMRC sought to argue that the FTT had made an error of law in deciding that the Aladdin Services formed a distinct whole. For the reasons we have explained, we do not agree.

Reference to the CJEU

66. In his skeleton argument, and in oral submissions to us, Mr Hill placed greatest emphasis on the submission that, if we were either to decide the Apportionment Issue in favour of BlackRock or conclude that a question in that respect should be referred to the CJEU, we should refer the Exemption Issue. Mr Hill relied in this respect on what he argued was a divergence of view as between the respective Advocates General in *Abbey National* and *GfBk* as a result of which he submitted the law on the scope of the exemption, in particular as regards the meaning of "distinct whole", was unclear.

67. As will have been apparent from our own analysis of the position, we do not agree. In our judgment, the existing case law of the CJEU does provide clear, comprehensible and comprehensive guidance on the applicable law and enables national courts and tribunals to apply that law to the facts of individual cases before them, including in cases where the facts are different from those in *Abbey National* and *GfBk*. As construed by the CJEU, the concept of "management of a special investment fund" is one that is readily applicable by the national courts and tribunals, and indeed by taxpayers and tax authorities alike. It requires no elaboration, and no further guidance is required in order for it to be applied to the facts of this case.

The Apportionment Issue

68. As we have found that the Aladdin Services are in principle capable of being exempted as services of management, if that management is of SIFs, the Apportionment Issue arises. It does so because the Aladdin Services are not, either exclusively or even predominantly, used for the management of SIFs within the

BlackRock group. They are instead used predominantly in the management of non-SIFs. It is common ground that, first, the supply of Aladdin Services is a single supply and secondly that, absent apportionment, that supply would be taxed according to its principal element, which on the facts of this case would be the element of management of non-SIFs; the supply would accordingly be standard-rated.[8]

69. The question is whether that single supply, which would otherwise be wholly standard-rated, may be apportioned into exempt and taxable elements, based on use, so that the Aladdin Services are exempt *to the extent that* they are used in the management of the SIFs. BlackRock's case is that, in order to give effect to the exemption, apportionment should be applied to the consideration for the Aladdin Services between the funds. They say that the apportionment is a relatively straightforward task, given that the fee for the Aladdin Services is, in the main, based pro rata on the value of assets under management. Apportionment would be consistent with the actual use of the Aladdin Services which, it is submitted, accords with the purpose of the exemption.

70. The FTT rejected that argument. Agreeing with HMRC, it found, at [232], that if apportionment were to be allowed in this case, it would also have to be allowed in relation to other composite supplies where the ancillary element was, viewed in isolation, an exempt supply. That the FTT regarded as a startling and novel proposition which would be contrary to the aim of the case law on composite supplies.

Discussion

71. We should first set out the scope of the Apportionment Issue before us. The starting point is the position which the parties agree will obtain if apportionment, in the sense contended for by BlackRock, is found to be inappropriate. It is that there is a single supply of management services, the VAT treatment of which is determined by reference to the predominant use to which those services are put by BlackRock. In this case, that predominant use is agreed to be the use in the management of non-SIFs, and in consequence the whole supply would, absent apportionment, be a taxable supply. (By parity of reasoning, if the predominant use had been for the management of SIFs, the whole supply would have been an exempt supply; that, however, is not this case.)

72. If Article 135.1(g) is to be interpreted as BlackRock contends it should be, so that the consideration for a single supply of management services is properly to be apportioned, it is also common ground that such an apportionment would effectively bifurcate that supply into two elements, ascertained by an appropriate method of apportionment of the consideration for the whole supply, such as by reference to funds under management, one of which (that attributable to SIFs) would be exempt and the other of which (that attributable to non-SIFs) would be taxable.

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[8] As that is common ground, it is not necessary for us to explore the principle ("the *CPP* principle") derived from *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270, which has that agreed effect.

73. We accept, and indeed it was also common ground, that as a general principle a single supply should be taxed at a single rate. It is not necessary to rehearse the *CPP* principle. It is sufficient to refer in that respect only to the recent judgment of the CJEU in *Stadion Amsterdam CV v Staatssecretaris van Financiën* (Case C-463/16) [2018] STC 530 where, in the context of a single supply, the principal element (a guided tour of the Amsterdam "Arena" stadium) was standard-rated and the ancillary element (a visit to the AFC Ajax museum within the stadium) would, if supplied separately, have been subject to a reduced rate.

74. The issue before the Court was the extent to which, if at all, certain case law of the CJEU, including *Talacre Beach Caravan Sales Ltd v Customs and Excise Commissioners* (Case C-251/05) [2006] STC 1671 and *European Commission v France* (Case C-94/09) [2012] STC 573 ("*French Undertakers*") could justify the application of different rates to the various elements of that single supply. In the context of other single supplies, outside the particular confines of those cases, such a proposition has been rejected by our own courts and tribunals, most notably in this Tribunal (Vos J, as he then was) in *Wm Morrison Supermarkets plc v Revenue and Customs Commissioners* [2013] STC 2176 and by the Court of Appeal in *Revenue and Customs Commissioners v Colaingrove Ltd* [2017] STC 1288. The FTT in this case also concluded that neither *Talacre Beach* nor *French Undertakers* could assist BlackRock.

75. On the facts of *Stadion Amsterdam*, the CJEU took the same view. The Court decided that, in the circumstances of that reference, an exception to the principle that an operation comprising several elements as a single supply will be subject to one and the same rate of VAT could not be derived from those cases. At [26], the Court repeated the familiar reasoning that to subject the various elements comprising a single supply to the various rates of VAT applicable to those elements would mean artificially splitting that supply and risk distorting the functioning of the VAT system. Accordingly, the Court ruled, at [36], that a single supply such as that in issue in the case, comprised of two distinct elements, one principal and one ancillary, which if they were supplied separately would be subject to different rates of VAT, must be taxed solely at the rate of VAT applicable to that single supply, that rate being determined according to the principal element, even if the price of each element forming the full price paid by a consumer in order to be able to receive that supply can be identified.

76. That principle is an important one, but it cannot of itself be determinative, particularly as regards the scope of an exemption. In our judgment, agreeing with Mr Hitchmough's submissions in this respect, the issue which arises on this appeal is not so much concerned with whether different rates can be applied to separate elements of a single supply, but about the construction of Article 135.1(g) itself. If that Article is to be properly construed so as to require apportionment of the consideration for the single supply on the basis of use, then it would be arguable that it would not be artificial to split the supply in that way; it would instead be in accordance with the Directive.

77. Although Mr Hitchmough impressively took us to a number of unrelated provisions of the Principal VAT Directive which had been identified as having some apportionment element, we did not find such a trawl helpful or of any assistance to BlackRock's case. If anything, it served only to emphasise the lack of any express wording of apportionment in Article 135.1(g) itself.

78. Mr Hitchmough's submissions were instead principally based on the recent judgment of the CJEU in *European Commission v Grand Duchy of Luxembourg* (Case C-274/15) ECLI:EU:C:2017:333, which was issued on 4 May 2017, shortly before the hearing before the FTT. That judgment was not referred to in the proceedings in the FTT and consequently it was not referred to by the FTT in its decision.

79. The *Luxembourg* case involved an action by the European Commission under Article 258 of the Treaty on the Functioning of the European Union for an alleged failure by Luxembourg to fulfil its obligations properly to transpose the exemption in Article 132.1(f) of the Principal VAT Directive into its domestic law. That Article provides for an exemption in the case of:

> "the supply of services by independent groups of persons, who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons, for the purpose of rendering their members the services directly necessary for the exercise of that activity, where those groups merely claim from their members exact reimbursement of their share of the joint expenses, provided that such exemption is not likely to cause distortion of competition"

That exemption is known in the UK as the cost-sharing exemption. An example, which was given by the Advocate General (Kokott) in her Opinion in *Luxembourg*, at [3], is of several doctors (providing exempt medical care services) sharing a receptionist.

80. Luxembourg introduced domestic legislation to give effect to this exemption, and in doing so treated group members who also carried on taxable activity as carrying on exempt activity provided that the annual turnover relating to taxable supplies did not exceed 30% (or in some cases 45%) of the annual turnover relating to all transactions, thereby giving the benefit of the exemption in full in such cases. The Commission's case was that this was incompatible with the general application of VAT at the standard rate on the supply of services under Article 2(1)(c) of the Directive and the terms of Article 132.1(f).

81. The Court agreed with the Commission. It reasoned, at [51], that according to the wording of Article 132.1(f), it did not provide for an exemption for the supply of services which were not directly necessary for the exercise of members' exempt activities or those in relation to which they were not taxable persons. Such a supply of services does not fall within the scope of the exemption (*Luxembourg*, at [52]).

82. Luxembourg contended that its law was designed to render workable in practice a regime which, it argued, was otherwise economically impracticable and would

deprive the exemption of its intended effect. It argued that where general costs were shared by members of a group which also had taxable activities, requiring a difference in the treatment of the VAT applicable to the services rendered by the group depending on whether they related to the part attributable to the members' taxable activities or that attributable to the members' exempt activities was unrealistic in the light of the practical and administrative difficulties and burdens engendered by such a requirement.

83. Those arguments were dismissed by the Court. It held, at [53], that the interpretation of Article 132.1(f) which it had determined at [51] – [52] did not result in the exemption being deprived of its intended effect. It said:

> "In particular, the application of that exemption is not restricted to groups whose members exercise exclusively an activity which is exempt from VAT or in relation to which they are not taxable persons. Accordingly, the services rendered by an IGP [independent group of persons] whose members also carry out taxable activities may qualify for that exemption, but only in so far as those services are directly necessary for those members' exempt activities or activities in relation to which they are not taxable persons."

84. Nor did the Court accept that this requirement would render the exemption almost inapplicable in practice. It said, at [54]:

> "… First, … the services supplied by an IGP to its members do not necessarily relate to their general costs and thus to the totality of their activities. Second, the Grand Duchy of Luxembourg has not shown why, if at all, it might be excessively difficult for the IGP to invoice its services excluding VAT, according to the share of its members' activities in their totality represented by the activities which are exempt from that tax or in relation to which they are not taxable persons."

85. As Mr Hill submitted, the use by the Court, at [53], of the phrase "in so far as" in reference to services directly necessary for exempt activities is apt equally to describe individual supplies of services which wholly relate to such activities as it is to refer to a part of a single service relating to both exempt and taxable activities. But the language employed by the Court at [54] is in our view more suggestive of a single supply of services relating to the totality of the members' activities, and an apportionment of that single supply in order to determine the respective exempt and taxable elements.

86. It is noteworthy that, in the *Luxembourg* case, no reference was made to the possible effect, if any, of the general rule that a single supply should have a single VAT treatment or the rules on composite supplies by which, for example, the VAT treatment of such supplies may be determined by the treatment applicable to the principal element of the supply. Nor was any reference made to the exceptions from that rule, such as were identified in *Talacre Beach* and *French Undertakers*, or the limitations on those exceptions as identified in *Stadion Amsterdam*. That, we consider, was because the *Luxembourg* case concerned infraction proceedings and was accordingly principally focused on the interpretation of the exemption in

question, and not on what the ultimate tax treatment of any particular composite supply containing elements within the exemption and elements outside it, and therefore taxable, might be.

87. That said, it is difficult to reconcile the Court's focus on interpretation with the way in which the Court expressed its conclusion on the practical application of the exemption in cases where the costs were general costs and the services were related to the totality of the members' activities, including both exempt and taxable activities. By referring to invoicing, the Court appears to have concluded that an apportionment of a single supply of services which related to both exempt and taxable activities by reference to the respective shares of those exempt and taxable activities in the totality would be the end result in terms of the tax treatment of the constituent elements of the supply, without regard to the principles applicable to composite supplies, such as the *CPP* principle. That would have the effect, potentially, of bifurcating a single supply which would otherwise, according to that principle, have a single tax treatment, whether exempt or taxable, into exempt and taxable elements according to some undefined method of apportionment.

88. That does, therefore, give us pause for thought. We accept, of course, that the *Luxembourg* case related to a different exemption to that which is the subject of this appeal. But if apportionment based on use has been accepted by the CJEU in order to determine the scope of one exemption, and consequently the extent to which a single supply may be treated in part as exempt and in part as taxable where otherwise conventional principles would have been expected to have determined a single tax treatment, it must be open to argument that such an apportionment would be capable of applying to other exemptions, especially those which depend, at least to an extent, on the use to which the particular supply of services is put. It is, in that regard, of some note that in *Luxembourg* one aspect of the CJEU's judgment was the finding that the application of the cost-sharing exemption was not confined to recipients who carried on wholly exempt activity. In the same way, the exemption in Article 135.1(g) is not confined to the provision of management services to recipients who manage only SIFs.

89. We turn therefore to BlackRock's arguments in support of the application of apportionment to Article 135.1(g). We do so on the basis, which we accept, that there is nothing in the Article itself which precludes such an apportionment. There is, as Mr Hitchmough submitted, nothing in the nature of the clear words used in Article 136, for example, to rule out apportionment: "Member States shall exempt the following transactions: (a) the supply of goods *used solely for an activity* exempted under Articles 132, 135 …" (emphasis supplied).

90. We accept also, as we have described above by reference to *Abbey National*, at [59], that an exemption falls to be interpreted "having particular regard to the underlying purpose of the exemption which it establishes". As the CJEU in *Abbey National* explained, at [62], the purpose of the exemption in Article 135.1(g) is:

> "… to facilitate investment in securities for small investors by means of investment undertakings. [The exemption] is intended to ensure that

> the common system of VAT is fiscally neutral as regards the choice between direct investment in securities and investment through undertakings for collective investment."

91. We are not ourselves convinced that a use-based apportionment can be regarded as promoting the purpose of the exemption even given the intention to ensure fiscal neutrality. Although the FTT, at [232], accepted that was the case, that was in the context of it concluding that apportionment would in theory also enable exemption to be applied to ancillary elements of other supplies. Whilst it may be correct that any exemption may be given effect to more precisely by its application to parts of a supply that would otherwise be treated as taxable under the composite supply rules, that does not in our view operate to promote the purpose of the exemption, which must itself be viewed in the context of the law on composite supplies which necessarily renders as taxable certain elements of a supply which would otherwise satisfy the requirements for exemption and as exempt elements of a supply which would otherwise not meet those requirements.

92. That context is explained by, for example, the judgment of the CJEU in *Purple Parking Ltd v Revenue and Customs Commissioners* (Case C-117/11) [2012] STC 1680, at [39], where in relation to the application of the principle of neutrality to a single supply analysis the Court explained that the treatment of several services as a single supply for the purposes of VAT necessarily leads to tax treatment different from that that those services would have received if they had been supplied separately. That different tax treatment, which follows from the fact that disparate elements, with different individual tax treatments, may form a single supply cannot, in our judgment, be regarded as inimical to the purpose of the exemption, even if it results in an exempt activity being subject to VAT.

93. As *Purple Parking* makes clear, at [39], fiscal neutrality cannot override the *CPP* principle. It is equally clear that fiscal neutrality cannot extend the scope of an exemption. As the CJEU explained in *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951, at [45]:

> "… that principle [of fiscal neutrality] cannot extend the scope of an exemption in the absence of clear wording to that effect. The principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions."

94. The Apportionment Issue does, however, involve a question of interpretation of Article 135.1(g). As we have explained above, when considering the Exemption Issue, and as the CJEU has observed in *Abbey National*, at [62], and *GfBk*, at [30], the purpose of the exemption is to ensure fiscal neutrality as between collective investments and direct investment. As a matter of construction, therefore, fiscal neutrality is an important factor to be considered in determining the Apportionment Issue.

95. We do not consider that the *Luxembourg* case provides any clear signposts to the resolution of the Apportionment Issue in this case. The views expressed by the CJEU on apportionment in relation to the cost-sharing exemption at issue in that case

were based on practicality and not on principle or purpose. That said, however, in the context of Article 135.1(g), we accept that the position is unclear. It is arguable, in our view, that an exemption, such as that for management of SIFs in Article 135.1(g), which is not restricted to services provided only to recipients managing SIFs, and depends on the use to which those services are put, is susceptible to a construction providing for a tax treatment based on a use-based apportionment in a way that other exemptions would not be.

96. We do not, on the other hand, consider that much is added to the argument by seeking to identify what Mr Hitchmough termed as "capricious" results which he argued would follow from a construction which did not permit apportionment. We accept that, if the tax treatment of the whole supply is determined by reference to the greater part of a fund manager's business, that would allow non-SIFs potentially to benefit from the exemption where those non-SIFs formed the smaller part of the fund manager's business, and that this could give rise to some manipulation designed to achieve that result. We also accept that there may be some difficulties, in certain marginal cases, in determining which element of management (of SIFs and non-SIFs) is predominant, and that such predominance could fluctuate over time. But these, we consider, are no more than the normal incidents of the composite supply rule, and do not determine the proper construction of Article 135.1(g).[9]

97. We therefore conclude that it is arguable that Article 135.1(g), properly construed, permits an apportionment of the consideration for a single supply of management services as between the use of those services for the management of SIFs and non-SIFs respectively, and that in consequence that single supply will effectively be bifurcated into two elements, one exempt and one taxable. It is, however, equally arguable that such an apportionment cannot apply, and that the single supply should be taxed according to its predominant or principal use, whether that is use in the management of SIFs or non-SIFs.

Reference to the CJEU

98. It will be apparent from the foregoing that we do not consider that we can with complete confidence determine the Apportionment Issue. We do not regard the case law of the CJEU, in particular in the light of the *Luxembourg* case, as clear. In those circumstances, we consider that in order to reach a decision in this appeal we should seek the guidance of the CJEU.

99. With the release of this decision we shall at the same time be issuing directions that the parties seek to agree, in the light of our own observations and having regard to a draft question we have put forward for consideration, both the question or questions to be referred to the CJEU and an accompanying schedule.

100. In the meantime, this appeal is stayed.

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[9] It is also the case that, whichever interpretation is correct, the supplier would require information from the recipient of the supply to determine the tax treatment in any situation where the supplier (rather than the recipient, as in this case) is responsible for accounting for any VAT.

MRS JUSTICE FALK
5 **UPPER TRIBUNAL JUDGE ROGER BERNER**

RELEASE DATE: 20 December 2018