

VAT on services provided by depositary banks to investment fund managers: agreements to be updated

The agreements between depositary banks and investment fund managers should be updated in order to identify the exact amount of fees agreed for each single service provided and the related VAT treatment. This is the view of the Italian tax authorities (ITA) as exposed in their Resolution of April 6th 2018 No. 26/E.

Such clarification represents an opportunity to summarize the evolution of the Italian tax authorities' approach to the VAT treatment of the services rendered in the field of the investment funds' management.

In this respect, it is worth to remember that according to Article 10, paragraph 1, no. 1), Presidential Decree no. 633/1972, which implemented in Italy Article 135, paragraph 1, lett. g), Directive 2006/112/EC, "the management of special investment funds" is exempt from VAT.

With reference to the VAT treatment of the services related to the management of investment funds, the European Court of Justice in the Case C-169/04, Abbey National (confirmed by Cases C-275/11 and C-464/12) stated that:

- the concept of "management" of special investment funds has its own specific meaning in EU law;
- along with portfolio management, the VAT exemption also covers the services listed under the category "Administration" in Annex II of the EU Directive on Undertakings for Collective Investment in Transferable Securities (85/611/EEC, now 2009/65/EC) which includes: *(i)* legal and fund management accounting services; *(ii)* customer enquiries; *(iii)* valuation and pricing (including tax returns); *(iv)* regulatory compliance monitoring; *(v)* maintenance of unit-holder registers; *(vi)* distribution of income; *(vii)* unit issues and redemptions; *(viii)* contract settlements (including certificate dispatch); and *(ix)* record keeping
- the VAT exemption does not cover the functions of depositary which do not fall under the management of investment funds but under the control and supervision activities (such as those set out in Article 7 paragraphs 1 and 3 and Article 14 paragraph 1 and 3 of Directive 85/611);
- such VAT exemption may apply also to services performed by a third-party manager. However, to fall within the VAT exemption, the services supplied "must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions" of the management of the fund.

In the Resolution No. 114/E issued on November 29th 2001, the ITA clarified the scope of application of the VAT exemption related to the management services of investment funds and, to do that, made reference to the Abbey National case. In particular, they highlighted that in case of services rendered by a third-party manager such services "must, viewed broadly, form a distinct whole" so as to benefit from the VAT exemption. In addition, they clarified that in order to qualify the services as a "distinct whole" and not as autonomous, the analysis should be carried out on a case by case basis and the following circumstances must be taken into account: (i) a single agreement for different types of services provided; (ii) a single fee for different types of services provided and (iii) level of responsibility of the third-party manager not limited to the technical aspects of the services provided.

Based on the Abbey National Case which stated that the VAT exemption does not cover the functions of depositary which do not fall under the management of investment funds but under the control and supervision activities, the ITA examined the activities carried out by the depositary banks so as to identify which portion of the related single fee is subject to VAT. In the Resolution No. 97/E of December 17th 2013, Italian tax authorities, after a market research, identified the depositary's activities related to the management of investment funds and therefore exempt from VAT (e.g. maintenance of unit-holder register, accounting services, Net Asset Value calculation and administrative assistance) and the depositary's activities related to control and supervision which are subject to VAT. As a result of such analysis (2013 Analysis), the ITA concluded that 28.3% of the depositary's fee is related to control and supervision activities and therefore is subject to VAT.

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However, in the Resolution No. 26/E of April 6th 2018 the ITA affirmed that to identify which portion of the depositary's fees is subject to VAT, the 28.3% resulting from the 2013 Analysis does not apply any more. Indeed, following the Legislative Decree No. 71 of April 18th 2016, which implemented the Directive 2014/91/EU, depositary banks shall separately indicate the fees related to the Net Asset Value calculation. Since such activity, which is exempt from VAT, was included in the 2013 Analysis, the 28.3% is no longer adequate to quantify the portion of depositary's fees subject to VAT. Consequently, the ITA suggested to update the agreements currently in force between depositary banks and investment fund managers in order to specify the fees provided for each single service and to identify the related VAT treatment. In addition, they clarified that no penalties could be levied in relation to fiscal year 2017 due to the uncertainty of the discipline.

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