

Case C-363/05

JP Morgan Fleming Claverhouse Investment Trust plc

and

The Association of Investment Trust Companies

v

The Commissioners of HM Revenue and Customs

(Reference for a preliminary ruling
from the VAT and Duties Tribunal, London)

(Sixth VAT Directive — Article 13B(d)(6) — Exemption — Special investment funds
— Meaning — Definition by the Member States — Discretion — Limits —
Closed-ended funds)

Opinion of Advocate General Kokott delivered on 1 March 2007 I - 5521

Judgment of the Court (Third Chamber), 28 June 2007 I - 5536

Summary of the Judgment

1. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Exemptions provided for in the Sixth Directive
(Council Directive 77/388, Art. 13B(d)(6))*

2. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Exemptions provided for in the Sixth Directive*
(Council Directive 77/388, Art. 13B(d)(6))
3. *Tax provisions — Harmonisation of laws — Turnover taxes — Common system of value added tax — Exemptions provided for in the Sixth Directive*
(Council Directive 77/388, Art. 13B(d)(6))

1. Article 13B(d)(6) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as meaning that the words 'special investment funds' in that provision are capable of including closed-ended investment funds, such as Investment Trust Companies.

which would preclude, a priori, their classification as special investment funds within the meaning of Article 13B(d)(6) of the Sixth Directive, along with open-ended funds.

An interpretation of Article 13B(d)(6) of the Sixth Directive exempting from VAT the management of open-ended funds, and not the management of closed-ended funds, would be contrary to the principle of fiscal neutrality on which, in particular, the common system of VAT established by the Sixth Directive is based, and which precludes economic operators carrying out the same transactions being treated differently in relation to the levying of VAT. Closed-ended funds present no relevant difference

The provisions of Directive 85/611 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended by Directive 2005/1, cannot be relied on to derive a restricted interpretation of the term 'special investment funds' from Article 13B(d)(6) of the Sixth Directive. Although it follows from the recitals in the preamble to and the terms of Directive 85/611 that its objective is to coordinate national legislation governing collective investment undertakings, the fact remains that, when the Sixth Directive was adopted, Community terminology in the field of

special investment funds was not yet harmonised, since Directive 85/611, Article 1(3) of which gives a Community definition of collective investment undertakings, was not adopted until 1985.

the levying of VAT on the management of special investment funds which are in competition with other special investment funds such as funds falling within the scope of Directive 85/611 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended by Directive 2005/1.

(see paras 29-32, 37, operative part 1)

(see para. 54, operative part 2)

2. Article 13B(d)(6) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as allowing Member States a discretion in defining the funds located on their territory which are covered by the notion of 'special investment funds' for the purposes of the exemption provided for by that provision. However, in the exercise of that power, the Member States must respect the objective pursued by that provision, which is to facilitate investment in securities for investors through investment undertakings, while guaranteeing the principle of fiscal neutrality from the point of view of

3. Article 13B(d)(6) of the Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes has direct effect, in that it can be relied on by a taxable person before a national court in order to challenge the application of national legislation alleged to be incompatible with that provision.

Article 13B(d)(6) of the Sixth Directive indicates sufficiently precisely and unconditionally that the management

of special investment funds must be exempted. The fact that that provision confirms the existence of a discretion for Member States is not such as to call that

interpretation into question if, according to objective evidence, the supply at issue meets the criteria for that exemption.

(see paras 59, 60, 62, operative part 3)