

Recovering VAT on pension scheme investment management services: new hope?

A recent decision of the Court of Justice of the European Union (the “ECJ”) has raised fresh hopes that it may be possible to recover VAT paid on fees for investment management services provided to pension schemes.

Background

EU legislation essentially provides that a business should be able to recover VAT paid on services if those services are used for the purposes of the company’s economic activities (assuming that the business itself makes supplies which are subject to VAT). If the services are used partly for the company’s economic activities and partly for other purposes, the company is entitled to recover a proportion of the VAT.

Separately, the legislation provides that the management of “special investment funds” is exempt from VAT. Earlier this year, the ECJ held in the *Wheels* case that DB pension funds do not fall within the definition of “special investment fund”; so investment services provided to DB schemes are not exempt from VAT. (DC schemes might be exempt: in the forthcoming Danish *ATP* case, the ECJ will consider whether DC schemes fall within the definition of “special investment fund”.)

In the UK, HMRC currently allows employers to recover VAT paid on management services provided to their pension schemes, but not VAT paid on investment management services. Management services include collecting contributions and paying pensions, actuarial and legal advice, and accountancy and audit services. Investment management services include investment advice, professional trustee services, and custodian and brokerage charges. Where an invoice covers both management and investment management services, the employer is generally entitled to recover 30% of the VAT unless it can provide evidence to HMRC that it should be entitled to recover a higher proportion.

The PPG case – facts

PPG Holdings BV (“PPG”), a Dutch company, established a pension scheme to comply with an obligation under Dutch law to provide pension benefits for employees. The pension scheme was legally and fiscally separate from PPG.

A PPG subsidiary entered into agreements for third parties to provide management and investment management services to the pension scheme. The subsidiary paid the fees under those agreements and did not pass the cost on to the pension scheme. PPG deducted the VAT paid on those fees when calculating the VAT it was required to pay to the Dutch tax authorities. The Dutch tax authorities ordered PPG to pay over the deducted VAT. PPG appealed and, during the appeal proceedings, the Dutch court referred two questions to the ECJ:

- Was PPG entitled to deduct the VAT on the grounds that the management and investment management services were provided for the purposes of PPG’s economic activities?
- Did the pension scheme that PPG set up fall within the definition of “special investment fund”?

The PPG case – the decision

The ECJ held that PPG was entitled to deduct the VAT charged on both the management and the investment management services if there was a direct and immediate link between the services and the employer’s economic activities as a whole. The ECJ held that it was for the Dutch court to decide whether there was a direct and immediate link. In light of the *Wheels* decision, the ECJ did not need to answer the second question.

What might the PPG case mean for employers of UK pension schemes?

HMRC is expected to issue a statement setting out its policy on the recoverability of VAT paid on investment management services provided to pension schemes in light of the ECJ's decision. It is not yet known when the statement will be published. When holding that it was for the national court to decide whether there was a direct and immediate link between the services and the employer's economic activities, the ECJ gave little guidance on what it thought would demonstrate such a link. HMRC may wait to find out in the *ATP* case whether the ECJ rules that DC schemes are exempt from VAT on investment management services.

Pending publication of HMRC's policy statement, employers may wish to consider making a protective claim in respect of VAT paid over the last four years.

Where future supplies of services are concerned, there are steps which could be taken to possibly improve future VAT recovery, and we would be happy to discuss this with schemes and/or employers on an individual basis.

If you have any questions about this update, please get in touch with your usual Mayer Brown contact or:

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