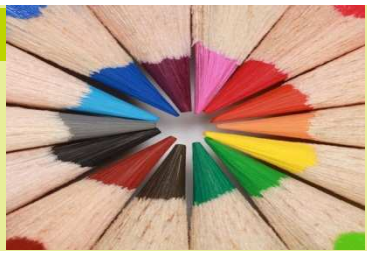
VAT recovery for pension schemes – making the most of your opportunities

November 2013 Pension briefing

HIGHLIGHTS

A number of high profile cases have raised the prospect that trustees and sponsoring employers of pension schemes may be able to recover VAT paid on investment services or that the provision of services should have been exempt from VAT. The amounts of money involved could be substantial. Claims may be time restricted so trustees should consider protecting their position by issuing protective claims. This process is usually straightforward and relatively inexpensive and, in some cases, may simply involve writing to HMRC.



RECOVERY OF VAT ON INVESTMENT SERVICES BY EMPLOYERS

Background

Historically, HMRC has taken the view that VAT incurred in respect of the management and administration of a pension scheme may potentially be reclaimed by the sponsoring employer of the scheme, while VAT incurred on investment activities may potentially be recovered by the trustee.

A recent judgment of the European Court of Justice (ECJ) in the Dutch case of *PPG Holdings* suggests that this distinction may be incorrect and that sponsoring employers should also be entitled to reclaim VAT incurred on their scheme's investment activities. This will be beneficial because employers usually have a higher rate of VAT recovery than scheme trustees.

Potential claims

While the application of the *PPG Holdings* case to the UK pensions environment is not yet clear (because HMRC has not yet published its views on this and there may need to be further litigation in the UK), there is an opportunity for employers to make claims to HMRC to reclaim the VAT incurred by their schemes on investment services. Given that claims may only go back four years, it may be advantageous to make a claim now rather than wait until the position in the UK has been settled, when some periods may have fallen out of time.

A claim may be made by writing to HMRC with details of the relevant VAT. A number of taxpayers are expected to make these claims, and we expect that HMRC will wait until its internal policy on the implications of the *PPG Holdings* case has been settled before responding to them. If HMRC decides that the case does not allow sponsoring employers to recover further VAT, then we expect a test case challenging this position to emerge. If your employer's claim is rejected, it can preserve its position by filing an appeal with the Tax Tribunal and applying to stand over the appeal pending the outcome of the test case.

RECOVERY OF VAT ON INVESTMENT SERVICES BY SCHEME TRUSTEES

Background

In the well-publicised *Wheels* case, the ECJ was asked to determine whether investment management services provided to defined benefit pension (DB) schemes were exempt from VAT. In a victory for HMRC, the ECJ decided that they were not exempt.

However, what is less well-known is that another case has been referred to the ECJ from Denmark called *ATP Pension Service*. This asks the ECJ the same question as in *Wheels* but in relation to defined contribution (DC) schemes. There are a number of material differences between DB and DC schemes which could lead to different VAT treatment for DC schemes. The case was recently heard by the ECJ, and a judgment can be expected before the middle of next year.

Potential claims

This presents an opportunity for DC schemes to ask their UK investment managers to submit claims to HMRC for the recovery of overpaid VAT and interest on their behalf going back four years (if the managers have not already done this). Such a claim may be made simply by writing to HMRC with details of the relevant VAT. However, if the trustee has received investment management services from overseas managers and accounted for VAT on these to HMRC directly, the trustee itself should make any claim to HMRC for repayment of the overpaid VAT and interest, rather than the manager.

If the claims are rejected then the managers or the trustee may preserve the claims pending the outcome of the *ATP* case by filing an appeal with the Tax Tribunal and then applying to stand over the appeal until *ATP* has been resolved. This could be done at reasonable cost and it would not be necessary to litigate the matter actively.

Given that claims for overpaid VAT may normally only go back four years, it is worthwhile making a claim now and then preserving this by making an appeal, rather than waiting to see the outcome of the *ATP* case before taking any action.

In addition, there is also an opportunity for scheme trustees to make claims directly to HMRC to recover the part of the overpaid VAT which, for technical reasons, the manager would be unable to recover even if the ECJ decides in *ATP* that the services should not have been VATable. This is on the basis of on-going litigation in the UK courts in the case of *Investment Trust Companies v HMRC*.

As above, these claims may only go back a limited number of years, and so it may be worthwhile making a claim now rather than waiting to see the outcome of the *ATP* and *Investment Trust Companies* cases before taking any action. This type of claim involves a slightly more complicated

procedure because it must be made by issuing a claim form in the High Court. However, as with appeals in the Tax Tribunal, such a claim would not need to be litigated actively and our experience is that it is usually possible to agree a stay of the claim with HMRC pending the resolution of the relevant lead case. A claim can therefore be made at reasonable cost.

OUR EXPERTISE

Issuing a claim can seem daunting but is often much more straightforward in practice, especially with the appropriate guidance. Our tax team includes experts in VAT who are experienced in advising trustees on the most appropriate way to protect their tax position. We can assist in determining what claims are available, making claims to HMRC and protecting those claims by filing appeals where necessary.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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