

“Beyond the everyday world... lies the world of VAT, a kind of fiscal theme park in which factual and legal realities are suspended or inverted” (Lord Justice Sedley, Royal & Sun Alliance).

Trustees, employers and pensions industry professionals who have been following the *Wheels*¹ case are likely to end up sharing Lord Justice Sedley’s views. However, there are two other cases that will also impact on the outcome for pension plans: these are highlighted below. So, we may say that two out of the three horses on the VAT carousel are still going round.

In *Wheels*, the Court of Justice of the European Union (CJEU) was asked to consider whether a defined benefit pension plan is a special investment fund for VAT purposes allowing the investment managers of such pension plans to VAT exempt their fees. The CJEU answered that it is not a special investment fund. However, the pensions industry is likely to conclude that it still remains in the VAT fiscal theme park for the reasons discussed below.

What about money purchase plans?

The first point to note is that the *Wheels* decision was only given in the context of defined benefit pension plans and, in part, the judgment turned on the point that defined benefit plan members do not bear investment risk. This leaves open the question of whether defined contribution plans (and potentially Self Invested Personal Pensions) are distinguishable because their members carry the investment risk. An answer to this question may be provided, for defined contribution pension plans at least, in the *ATP*² case where the CJEU has been asked to consider whether the investment management exemption applies to such pension plans.

Could another form of VAT exemption apply?

Defined benefit plans and their fund managers may be forgiven for concluding that the VAT treatment of investment management services has been conclusively settled by *Wheels* and that *ATP* has no relevance to them. However, in *ATP* the CJEU has also been asked to consider whether the supply of investment management services to *any* pension plan is to be exempted under another head of VAT exemption, namely the exemption for payment processing. This reference appears to keep open the question of whether investment management services to any pension plan can be VAT exempted.

Who can reclaim the VAT?

The reason why VAT costs are an issue for pension plans generally is because they make predominantly VAT exempt supplies, meaning that there are restrictions on the amount of VAT that they can recover. It would be helpful if this reality could be “suspended or inverted” so that any management services are treated as received by a person with a better VAT recovery position (i.e. the employer). In the *PPG*³ case the CJEU has been asked to answer the important question of whether an employer company can treat *all* of the VAT costs incurred by its pension fund as part of its own VAT cost. If this argument is allowed, and VAT on management services is to be treated solely as employer VAT, this should increase the VAT recovery percentage, so long as the employer company has a better VAT recovery position than the associated pension plan.

Trustees, employers and pensions industry professionals may consider that the merry-go-round is in fact still turning in the fiscal theme park - *Wheels* has not brought about the desired closure on the VAT questions facing the industry after all!



1 *Wheels Common Investment Fund Trustees Ltd* (Case C-424/11)

2 *ATP PensionService A/S* (Case C-464/12)

3 *Fiscale eenheid PPG Holdings BV* (Case C-26/12)

Actions

1. Many pension plans have instructed their investment managers to make VAT recovery claims and to stay these claims pending the outcome of *Wheels*. Where the pension plan has an element of defined contribution benefit, *Wheels* does not resolve the position. Pension plans should consider amending their claims so that they are now deferred until *ATP* has reached a conclusion.
2. Employer companies that enjoy better VAT recovery than their associated pension plans may wish to consider making protective claims on the back of the decision in *PPG*.



Further information

For further information on the issues covered in this publication, or for assistance with VAT claims, please contact any of the partners listed or your usual contact in the Squire Sanders pensions team.

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