VAT and pension schemes - the saga continues


Chantal Thompson **and** Koert Bruins **explore the legal challenges regarding the application of VAT to pension schemes**

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VAT is an EU tax. Essentially, member states are required to ensure that all non-exempt goods and services are subject to VAT, which is payable by the ultimate recipient of the services. While the taxation principles are enshrined in the Principal VAT Directive, member states must enact national legislation to implement those principles.

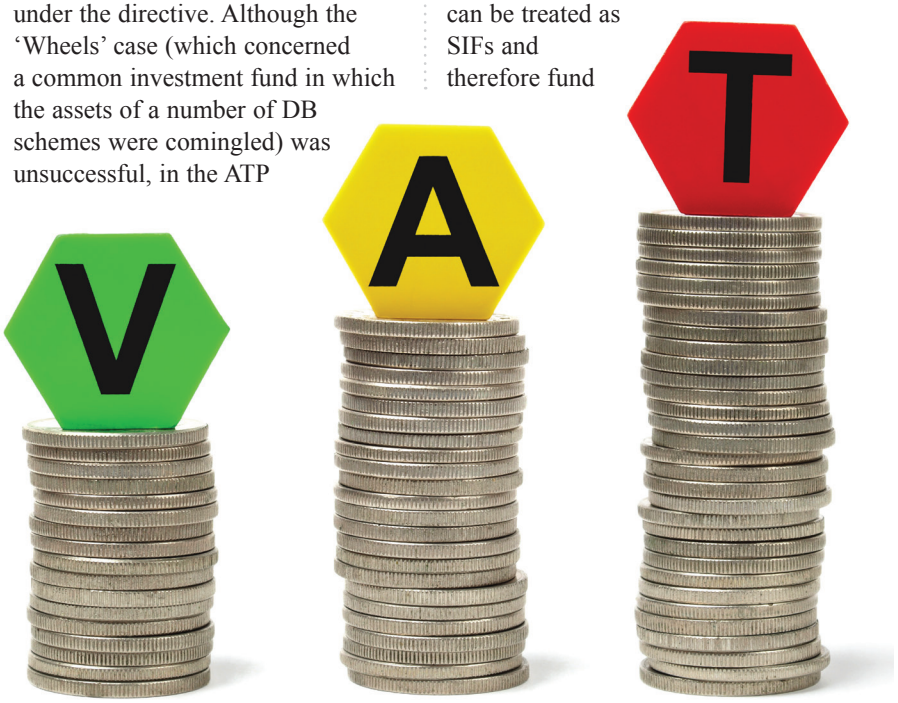
The VAT treatment of services supplied to pension schemes has been a tricky issue for a number of EU countries. In the UK, HMRC has issued a number of briefs in response to the changing legal position but has recently (on 5 September) confirmed that the transitional period has been extended until 31 December 2017 and therefore employers can continue to recover VAT by reference to current guidance (principally Notice 700/17) until then. In the Netherlands, there is much less written guidance for tax payers to rely on in this respect and tax authorities seem to approach the developments on a case-by-case basis.

Legal challenges

Over the years a number of legal arguments have been taken to the European Court of Justice (CJEU). These include whether VAT is chargeable in respect of services supplied to pension schemes and also whether it can be recovered as employer input tax.

ATP

The first set of arguments turns on the question of whether a pension scheme has the characteristics of a special investment fund (SIF), the supply of fund management services to which are exempt from VAT under the directive. Although the 'Wheels' case (which concerned a common investment fund in which the assets of a number of DB schemes were comingled) was unsuccessful, in the ATP case, decided in March 2013, a Danish provider of fund management services (including administration services) to defined contribution Danish pension arrangements did argue successfully that it was providing services to SIFs. This was because the pension arrangements in question met a number of characteristics, including that investment risk was born by the members. Since the date of this case, it has become more accepted that DC occupational schemes in the UK can be treated as SIFs and therefore fund



management services supplied to such schemes will not be subject to VAT. However, the question of what are fund management services is still being debated. Following Fiscale Eenheid X (C-595/13), it has become clear that fund management does not extend to management services relating to the assets held by SIFs if those services are required regardless of whether the assets are held by an individual investor or by a SIF. In the Netherlands, the final verdict of the Dutch Supreme Court, the referring court in the Fiscale Eenheid X case, is awaited with great interest for – hopefully – further guidance on the scope of the concept of 'fund management'.

PPG

The other principal argument, which culminated with the PPG case (decided in July 2013), has focused on the connection between the pension fund/pension fund trustees and the employer and the question of whether services supplied to the pension fund can be said to be supplied to the employer. This is an issue particularly in the United Kingdom and the Netherlands, where pension arrangements are legally separate from the sponsoring employer.

In the UK, HMRC, through various easements and concessions, has historically permitted VAT recovery by employers in respect of administration and management services supplied to pension schemes, though not in respect of 'pure' investment services. Prior to PPG, HMRC's requirements were not particularly onerous. There is a separate concession in place in relation to investment management charges, referred to as the 70/30 rule. Where there is a single invoice, HMRC permit 70 per cent of the VAT to be treated as relating to investment management activity and therefore not recoverable by the employer, whereas (provided the facts bear this out) 30 per cent can be treated as applying to administration services in respect of which VAT is recoverable. HMRC have recently announced that such concessionary treatment will continue until 31 December 2017.

Following the PPG case, which concerned a Dutch employer that paid all the costs of the services supplied to the pension scheme, including for investment management services (and had contracted with the suppliers directly), HMRC were concerned that the line they had previously taken in respect of the VAT recovery on investment management costs would no longer be tenable. Therefore, they proposed a requirement for more evidence that the employer is the recipient of the services; their solution being the tripartite agreement. This new approach would apply to all services, not just investment management services. Tripartite agreements, which have the employer as a party to the trustee and supplier services agreement, have been subject to much criticism by interested parties – questions of confidentiality and also the availability of corporation tax deduction make them unattractive.

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HMRC then produced revised draft guidance earlier this year suggesting that employers and trustees should look at onward charging agreements. This requires the trustees to register for VAT, pay the invoices themselves and onward charge them to the employer. Interestingly, in HMRC's view, only 50 per cent of VAT on investment management services can be on-supplied. This draft guidance has not yet been finalised.

In the years following the PPG case, Dutch occupational pension funds have (had to) become more independent from their sponsor and are therefore not always able to have the sponsor act as contracting party with service providers in the same manner as PPG. Onward charging arrangements can be a solution, but should be carefully implemented and even then they may still be challenged. In a Dutch VAT case pending before the Dutch Supreme Court, the tax inspector refused the refund of input VAT to the fund on the basis that the onward charge to the sponsor cannot be seen as a taxable transaction giving rise to a right to recover input VAT, but rather should be seen as non-taxable compensation for loss.

Conclusion

The VAT treatment of services supplied to pension schemes is still an open issue. Many employers have been considering which one (or more) of the various solutions, including tripartite agreements, onward charging agreements and VAT group registration may best suit their scheme, although have not necessarily reached a conclusion. While it may be advisable to take measures to safeguard the legal position whilst awaiting more certainty from VAT case law or policy, in the UK at least we have another year to find solutions before HMRC requirements change. ■