

Are you entitled to a refund from HMRC?

Businesses which have set up separate pension funds for the benefit of their employees could be entitled to recover VAT incurred on investment services which was previously thought to be irrecoverable. Businesses should consider whether to file a protective claim with HMRC to maximise the potential refund.

If you decide to make a claim, Clifford Chance has put together a suite of template documentation for "plain vanilla" claims which you can adapt to meet your particular circumstances. If you would like to receive this documentation, please contact Alex Tostevin.

If you have any questions, we would be happy to discuss your circumstances with you.

Background

The ECJ has confirmed in PPG Holdings B.V. (C-26/12) ("PPG") that a VAT-registered business which has set up a pension fund as a legally and fiscally separate entity is entitled to recover (in line with the normal recovery rules) the VAT it has incurred on services relating to the management and operation of that fund provided that there is a "direct and immediate link" between such services and the business' taxable activities.

Doesn't this merely reaffirm existing principles?

In essence, yes, but the key is that HMRC's current published practice is that an employer can recover VAT incurred on only day-to-day management services relating to the pension fund (e.g. actuarial and administrative services) and not on investment services. This is because (broadly) HMRC considers that only the management services can be said to be received for the purposes of the employer's general business, whereas the investment services are received by the fund itself.

HMRC operates a simplification practice under which, where the fund is managed by a third party who issues a single invoice covering both management and investment services, the employer can generally treat 30% of the charges as relating to management services provided to it, with the remaining 70% treated as relating to the investment services provided to the fund. This allows the employer to recover up to 30% of the VAT.

HMRC's published practice is important because an employer's VAT recovery rate is often significantly higher than the VAT recovery position of its pension fund (which may not be able to recover any VAT at all) so for example, where the simplification practice has been adopted, a fully recoverable business as a whole typically suffers VAT leakage in relation to 70% of the charges.

The judgment of the ECJ in PPG means that HMRC's longstanding practice may be contrary to European VAT law and fund managers may be able to treat all their services as supplied to the employer for VAT purposes with the result that all VAT charged on such services is potentially recoverable by the employer.

Key points

- An employer may be able to recover 100% of the VAT incurred on all costs relating to pension funds (as a general overhead and in line with its partial exemption position if partially exempt) as opposed to just the VAT incurred in respect of the operational management costs.
- HMRC is likely to publish guidance reaffirming its longstanding view. This means that any litigation following on from PPG may be protracted. To this end, businesses should consider whether to file a protective claim now and stand it behind the "test" cases so as to avoid a claim becoming time-barred.
- Protective claims can be made going back four years.
- The claims with the highest prospect of success are those in a similar position to PPG (i.e. where the employer has directly contracted and paid for the services from the fund manager and the costs form part of the general costs of its business). This is a "plain vanilla" claim.
- If the pension fund has a better VAT recovery position than the employer, there is unlikely to be any benefit in making a protective claim.
- There may be opportunities to restructure existing contractual/invoicing arrangements to maximise VAT recovery going forwards.
- Depending on the circumstances, there may be a possibility to amend/update existing and open Wheels or Fleming claims to further maximise historical VAT recovery (i.e. beyond the last four years).

If you have any questions, we would be happy to discuss your circumstances with you.

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