

**Pensions law group –October 2020**

## Pension fund management services provided to defined benefit schemes not exempt from VAT

The decision in the case of *United Biscuits (Pensions Trustees) Ltd v Commissioners for HMRC*

The Court of Justice of the European Union (**CJEU**) has put an end to any suggestion that pension fund management services provided to occupational pension schemes are VAT exempt on the basis of an insurance exemption.

Whilst this decision reflects current HMRC practice and will therefore have limited impact going forwards, it will shut the door to trustees hoping to rely on this exemption to reclaim past VAT that they may have paid for these services. It also means the VAT treatment of pension fund management services provided to defined benefit schemes is likely to be different to that provided to defined contribution schemes.

### Background to the VAT treatment of pension fund management services

Under EU law "*insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents*" are **exempt from VAT** (Article 135(1)(a) Council Directive 2006/112/EC).

HMRC applied this exemption to pension fund management services that were provided by insurance companies, but not where the same or similar services were provided by non-insurers. From 1 April 2019, HMRC ceased to apply the VAT exemption to the provision of pension fund management services by insurance companies. Since this time, neither insurance nor non-insurance companies have been able to rely on the insurance VAT exemption.

So, if the policy has already changed such that the insurance exemption no longer applies to the provision of pension fund management services, why was there a need for further direction from the CJEU on the point?

### The United Biscuits case

The trustees and former trustees of the United Biscuits Pension Fund (the **Trustees**) received pension management services from both insurers and non-insurers. In line with the historic difference in treatment between insurers and non-insurers, the Trustees paid VAT to the non-insurers when they provided fund management services. They then sought to reclaim the VAT they had paid to the non-insurers from HMRC on the grounds that:

- the pension fund management services provided by non-insurers constituted "insurance transactions" and therefore fell within the VAT exemption under EU law; or
- the principle of fiscal neutrality (which requires supplies of goods or services that are identical or similar to be taxed in the same way) meant that, if the insurance exemption was available to insurers providing fund management services, it should also be available to non-insurers when providing the same services. As it was not, the trustees had a right to recover the VAT paid from HMRC.

The Court of Appeal referred the question of whether investment fund management services provided to a pension scheme could be regarded as an "insurance transaction", notwithstanding that the transaction itself did not provide any indemnity from risk as one would usually expect from the provision of insurance.

## Decision of the CJEU

The CJEU concluded that the insurance exemption from VAT should be interpreted strictly. One of the essentials of an "insurance transaction" was that the insurer must provide some indemnity from risk. In light of that, supplies of pension fund management services could not be regarded as "insurance" and not, therefore, entitled to benefit from the insurance VAT exemption.

## Impact of the decision?

Given that HMRC had already ceased to apply the VAT insurance exemption to pension fund management services from April 2019, this case does not mark a change in approach going forwards. However, it does validate HMRC's position and suggest that those who benefitted from the insurance exemption before the change in approach benefitted from a windfall.

The position is also now clear that trustees cannot seek any refund of past VAT paid in respect of pension fund management services on the basis of the insurance exemption.

The result is that the VAT treatment of pension fund management services is likely to be different depending on whether the scheme to which the services are being provided is defined benefit or defined contribution in nature. European case law has established that defined contribution pension schemes which meet the requisite conditions are special investment funds (**SIFs**). There is a VAT exemption for the management of SIFs. Pension fund management services provided to a defined contribution scheme that meets the conditions for a SIF will, therefore, be exempt from VAT. In contrast, the CJEU has ruled that defined benefit schemes fall outside this exemption. Defined contribution schemes are therefore likely to be able to rely on this additional VAT exemption, whereas defined benefit schemes are not.

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