Pensions Bulletin 2013/32

1 August 2013

Dutch case delivers VAT bonus for scheme sponsors?

In a somewhat surprising judgment, the Court of Justice of the European Union (CJEU) has found in favour of a Dutch employer in a dispute with the Dutch tax authorities about the VAT treatment of its pension scheme administration and asset management fees.

PPG Holdings BV (the employer) had set up a pension scheme as a separate entity from itself (as required under Dutch law) and had gone on to engage contractors to provide scheme administration and fund management services. The employer had deducted the VAT on these invoices from its own VAT return but the Dutch tax authorities rejected this. The appeal went all the way to the CJEU and the employer won.

The CJEU ruled that EU VAT law must be interpreted as meaning that a taxable person (the employer in this case) who has set up a pension fund in the form of a legally and fiscally separate entity is entitled to deduct the VAT that person has paid on "services relating to the management and operation" of the fund provided that "the existence of a direct and immediate link is apparent from all the circumstances of the transactions in question".

Significantly, the CJEU stated that a direct and immediate link (between VAT incurred and VAT charged) can be held to occur where the costs of the pension services in question are part of the employer's general costs and are, as such, components of the price of goods or services supplied by the employer in its own business.

Comment

This judgment appears to challenge current VAT orthodoxy in the UK – under which an employer can reclaim VAT on scheme set up and on-going administration costs (including professional adviser fees), but not investment costs. It also seems to have turned the effect of the Wheels judgment on its head (see Pensions Bulletin 2013/11), although for different legal reasons.

It is also worth noting that, for the second time recently (see the TUPE case that we reported last week), the CJEU has gone against the opinion of its Advocate General. It is not clear whether this is a trend but it may be less safe than previously to assume that an Advocate General's opinion will usually be followed by the court.

This decision is potentially big news, with significant tax implications for UK scheme sponsors but we need to await HM Revenue & Customs' interpretation of this judgment.

And it's goodbye to D&B failure scores

After being a key component of the measurement of Pension Protection Fund (PPF) levies since the lifeboat fund was launched in 2005, the PPF has decided to replace Dun & Bradstreet (D&B) with Experian as its insolvency risk provider. The change will take place in the 2015/16 levy year. This coming levy year (2014/15) will be the last to feature D&B failure scores in the formula that the PPF uses to set its levy for PPF eligible schemes.

Insolvency risk, or failure scores, are one of the three main factors, alongside investment and underfunding risk, needed to calculate the levy.

In the run up to the change Experian is to work alongside the PPF to develop a bespoke model for calculating insolvency risk. To smooth the transition the intention is that schemes and sponsoring employers will have access to the new insolvency risk scores from early 2014.

Comment

After a somewhat shaky start, trustees and scheme sponsors will have become used to D&B failure scores and what makes them tick. With a different provider and a shiny new black box, there will be some concern that a comprehensive learning process will need to be undertaken in order for PPF levy failure score management to be effective.

And although early 2014 seems like plenty of warning for a system that is not to go live until the 2015/16 levy year, the reality given the levy calculation formula is that Experian's systems are likely to be influencing 2015/16 levies from as early as April 2014.

Scheme record-keeping survey poses compliance failure concern for Regulator

In the latest analysis of scheme record-keeping quality prepared for the Pensions Regulator it seems that many schemes are still falling short of achieving the required standards, despite steady improvements in some areas.

In 2010 the Pensions Regulator published guidance setting out targets for accurate record-keeping (see Pensions Bulletin 2010/23). Divided into "common data" and "conditional data", the guidance required all schemes:

- to have 100% of common data in place by 31 December 2012 (95% for data created before June 2010); and
- to set scheme-specific targets for the standards of conditional data.

Common data includes items such as name, date of birth and national insurance number, which are needed to identify scheme members. Conditional data, by contrast, is additional detailed data required for the scheme's administration, such as pensionable salary and contributions.

The survey reports mixed progress on achieving the common data goal with the largest improvements over the last 12 months in scores being in DB trust schemes (rising from 42% to 66% for those achieving a data score over 90%) and hybrid schemes (53% to 68%). By contrast the proportion of members in DC trust schemes achieving a score of over 90% has remained relatively static (51% to 56%) as has the proportion in workplace personal pension schemes (44% to 42%).

Turning to conditional data the survey paints a much poorer picture with only around 20% of members across all scheme types being in schemes achieving a conditional data score of more than 90% – workplace personal pension schemes being least likely to have undertaken the measurement. Reasons given for not yet complying include: being unaware of the requirement (52% of workplace personal pension schemes); not a priority (29% of large trust schemes); cost (50% of small trusts); and lack of time (35% of large trusts).

Towards the end of the year the Regulator intends to publish the results of a detailed record-keeping review it is undertaking to establish whether schemes have met the 2012 targets (see Pensions Bulletin 2013/10). It will also be updating its record-keeping guidance to reflect the main findings of the review.

Comment

The focus by a number of schemes on the common data targets is unsurprising and we should expect compliance on this score, certainly by the trust-based schemes, to continue to rise. But it has to be worrying that a number of schemes, which the survey findings suggest are concentrated in the workplace personal pensions and small trust-based sectors, are unable to demonstrate adequate data quality through the Regulator's metrics. The Regulator will come under pressure to act, especially given that the auto-enrolment process is beginning in earnest.

Regulator reports one million enrolled into qualifying pension schemes

In what promises to be an annual survey, the Pensions Regulator reports that by July over one million individuals had automatically enrolled into qualifying pension schemes and over 1,000 employers had successfully completed their registration process.

The survey, whose main focus is on the implementation and operation of automatic enrolment from October 2012 to the end of March 2013, reports that 83 employers completed registration (rising to 1,153 at 1 July 2013), but that 89 investigations had been opened by the Regulator into possible non-compliance by large employers, focusing on employer readiness (eg communicating with jobholders) in relation to their duties and helping employers to become compliant. However, the Regulator had not yet needed to use its powers to compel compliance.

By the end of March just over 300,000 individuals had been automatically enrolled, nearly all of whom were employed by large organisations, but this was only 14% of the workforce of all employers who staged – 57% were already active members of a qualifying scheme, 23% were not eligible or left employment after the staging date and 6% were provided with deferred entry (to a defined benefit or hybrid scheme).

51% of the 300,000 that were auto-enrolled joined defined contribution schemes, 33% joined defined benefit schemes, whilst 10% joined personal pension schemes and 6% joined hybrid schemes.

Comment

The dramatic rise in the number of employees auto-enrolled, from 300,000 in March to a million in July, shows the speed with which the auto-enrolment policy is now being implemented. It is too early yet though to say whether implementation will continue to proceed as successfully as it apparently has so far when only a thousand-odd of the largest employers, mainly in the public, financial and retail sectors, have gone through the process.

The Regulator estimates that when the process is complete in 2018, 1.35 million employers will have auto-enrolled their workforces. Whether or not the micro, small and medium employers (who will start to hit their staging dates in large numbers from next year) will be able to cope is the big unanswered question. It always was.

DWP delays changes to disclosure legislation until April 2014

The Department for Work and Pensions (DWP) is delaying the introduction of consolidated disclosure regulations by six months to 6 April 2014 rather than bring them into force from the expected date of 6 October 2013.

This is the most important point made in the DWP's response to the recent consultation it carried out about consolidating and harmonising the principal disclosure of information regulations for occupational and personal pension schemes (see Pensions Bulletin 2013/08). The DWP intends to lay the regulations as soon as possible after Parliament returns from its summer recess.

Other than this the DWP's report on the consultation outcome indicates that, although some changes will be made, the final regulations will not differ materially from the draft published in the spring as in general the proposals appear to have been well received.

Amended regulations have not been published at this time but the DWP:

- intends to increase the advance notice that members must be given where a "lifestyle" investment strategy is to be used from between 4 months and 2 years to between 5 and 15 years instead; and
- confirms that it was never the intention that the new regulations would require schemes to give members the choice of assumptions to be used for statutory money purchase illustrations (SMPIs) – this possible change had caused some concern when the consultation was published.

In response to the question about whether further consultation on a "principles based" approach should be carried out the DWP notes there appears to be no overwhelming desire to move to this and that opinion amongst respondents was divided, therefore no further action about this seems likely.

Comment

The promise to make the final regulations as soon as possible in the autumn but delay the date they start to apply until spring 2014 will be welcomed. Schemes should have several months to analyse any changes required by the new regulations before they need to be implemented – this will surely lead to better understanding and fewer errors under the new regime. Nevertheless when the final regulations appear they will need close scrutiny for any surprises.

As we have stated before there are many other disclosure requirements outside of these core regulations (see our own disclosure guide for more details) but the DWP *remains adamant that these other requirements should continue to sit in other legislation.*

Pensions Advisory Service anticipates rising demand for its services

In its latest annual review the Pensions Advisory Service (Tpas) has signalled that it expects demand for its services to increase as a result of auto-enrolment.

It expects that once small to medium employers have reached their staging dates it will receive more queries from employees affected by auto-enrolment. It also expects that a majority of the complaints it receives will relate to defined contribution schemes given that the vast majority of new pension savers are expected to be enrolled in them (46% of complaints accepted for investigation in 2012/13 related to DC schemes).

In 2012/13 a delay in paying benefits was the most common reason why someone complained about a DC scheme, with a third of such complaints being about delays. 30% of complaints about DC schemes were about a mistake or an overpayment. By contrast, for DB schemes, the most common reason why someone complained was because they had a dispute about what they thought was their entitlement.

Tpas also reported that in 2012/13:

- A significant number of queries concerned the nature of the investment choices on offer to pension scheme members and the risks involved, suggesting that some schemes may need to do more to help members understand their investment options.
- A number of queries concerned tax relief on pension contributions and more complex areas such as the annual and lifetime allowances and unauthorised payments.
- The number of queries concerning pension liberation fraud rose – whilst they remain relatively small, the nature of the queries suggests there is a considerable amount of confusion about the issue.

Cross-border schemes remain unfavoured

EIOPA, the European Insurance and Occupational Pensions Authority, has published a report on market developments in cross-border IORPs (Institutions for Occupational Retirement Provision), which shows that there was a slight decrease from 84 of such schemes in 2012 to 82 in 2013.

The number of home states (the countries in which the IORP has its registered office and/or its main administration) did not change compared to 2012 and remains nine. The number of host states (the countries whose social and labour law is relevant to the field of occupational pension) has decreased by three to 19. In general across the European Economic Area eleven countries are not in the list of host states.

Comment

The UK and Ireland continue to be the two countries between which there is significant cross-border pension provision– no less than 39 of the 82 cross-border schemes in this survey are Anglo-Irish. This is largely for historical reasons.

Ten years after Europe passed a Directive which in part sought to facilitate cross-border schemes there is still no major cross-border provision on the continent. Right now, the only thing that looks likely to increase the number of cross-border schemes is a "Yes" vote shortly after the 700th anniversary of the Battle of Bannockburn.

MPs echo concerns over Equitable Life compensation targets

The House of Commons Public Accounts Select Committee has published a report on the administration of the Equitable Life Payments Scheme, which supports concerns raised by the National Audit Office earlier this year (see Pensions Bulletin 2013/19) over the compensation targets set for the Scheme.

In particular, the Committee recommends bringing forward the Government's planned publicity of the March 2014 closure of the Scheme, and looking again at ways of identifying policyholders so as to ensure the maximum number can be fully compensated by then.

MPs urge Government to drive through Kay Review recommendations

The House of Commons Business, Innovation and Skills Select Committee has published a report urging the Government to get on with implementing the recommendations of the Kay Review of UK Equity Markets and Long-Term Decision Making.

The Government set out its plan to take forward the work of the Kay Review in its formal response last November (see Pensions Bulletin 2012/49). It also asked the Law Commission to review the fiduciary legal duties of pension trustees, investment managers and other financial intermediaries, including investment consultants, back in March (see Pensions Bulletin 2013/14).

The Select Committee, however, has warned that the cultural change advocated by Professor Kay will not happen without a catalyst; the 12 years of inaction following the Myners' Review being proof enough of that. It asks that the Government set measurable, accountable targets through which reform can be driven and measured.

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