

# Tax alert

## Ireland

### CJEU judgment: VAT exemption for fund management services to DC pension funds

#### Contacts

If you require further information, please call your regular contact in EY or contact any of the following:

#### Dublin

Breen Cassidy (*Partner*)  
E: breen.cassidy@ie.ey.com  
T: +353 1 2212413  
F: +353 1 4750599

Donal O'Sullivan (*Partner*)  
E: donal.osullivan@ie.ey.com  
T: +353 1 2212455  
F: +353 1 4750599

Brian Keenan (*Director*)  
E: brian.keenan@ie.ey.com  
T: +353 1 2212487  
F: +353 1 4750599

Gavin O'Connor (*Director*)  
E: gavin.oconnor@ie.ey.com  
T: +353 1 2212278  
F: +353 1 4750599

#### Cork

Frank O'Neill (*Partner*)  
E: frank.oneill@ie.ey.com  
T: +353 21 4805700  
F: +353 21 4272465

#### Limerick

John Heffernan (*Partner*)  
E: john.heffernan@ie.ey.com  
T: +353 61 319988  
F: +353 61 319865

#### Waterford

Paul Fleming (*Director*)  
E: paul.fleming@ie.ey.com  
T: +353 51 872094  
F: +353 51 872392

#### New York (Irish Tax Desk)

Karl Doyle (*Senior Manager*)  
E: karl.doyle@ey.com  
T: +1 212 7738744  
F: +1 212 7736672

On 13 March 2014, the Court of Justice of the European Union (CJEU) released its judgment in the Danish case of ATP PensionService A/S (ATP)(C-464/12). The CJEU held that fund management services provided to defined contribution pension schemes are exempt from VAT. It also held that the creation of pension accounts and the crediting of sums to those accounts could constitute exempt transactions concerning payments and transfers.

The issue in dispute was whether a defined contribution pension scheme is a 'special investment fund' for the purposes of Article 13B(d)(6) of the Sixth Directive (now Article 135(1)(g) of the VAT Directive), the management of which qualifies for VAT exemption. The referral to the CJEU also asked whether the term 'management' in the aforementioned provision includes a pension payments service, and whether this service might otherwise qualify as a VAT exempt financial service under Article 13B(d)(3) of the Sixth Directive (now Article 135(1)(d) of the VAT Directive) as a transaction concerning deposit and current accounts, payments or transfers.

The judgment represents a significant change to the position in Ireland where defined contribution pension schemes have not, to date, with the exception of certain unit trust schemes, been regarded as special investment funds coming within the fund management exemption. Affected pension funds and fund managers who have not already done so should consider submitting claims for overpaid VAT to the Revenue Commissioners without delay.

#### Background

ATP provides services to pension funds, although it was not involved in the investment of the pension contributions. Its most important client, PensionDanmark, is an occupational pension scheme. It had previously been agreed with the Danish tax authorities that services connected to making payments out of pension accounts were exempt transactions concerning payments and transfers. The case was concerned with the other services carried out by ATP which the Danish tax authorities and the National Tax Tribunal considered to be taxable.



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These services consisted of:

1. Registration of employers liable to pay pension contributions.
2. Opening accounts in the pension scheme system at ATP for the benefit of employees.
3. Handling payments from employers so that the employer's total pension contribution could be paid into the pension fund account at a bank.
4. Regularly allocating the employer's total contributions to the individual employee's account on the basis of information received from the employer.
5. Recording missing payments.
6. Reporting to pension fund customers on contributions paid into pension schemes and sending out account statements.

The questions referred to the CJEU covered:

- Was a defined contribution pension scheme a 'special investment fund' within the meaning of the VAT Directives?
- If so, does the term 'management' cover the services provided by ATP (as referred to above)?
- Are any of the services provided by ATP exempt as transactions concerning payments or transfers, or deposit and current accounts?

The judgment

*Is a defined contribution pension scheme a 'special investment fund'?*

The CJEU reiterated that the discretion given to the Member States to define special investment funds was limited by the principle of fiscal neutrality. It broadly followed the approach taken by the Advocate General in identifying funds falling within the UCITS Directive as 'core' special investment funds. Any other types of funds with identical or sufficiently similar characteristics so that they were in competition with UCITS funds would also be special investment funds.

The Court held that the essential characteristic of a special investment fund is the pooling of assets so that the risk to the beneficiaries could be spread over a range of securities. This characteristic was met by defined contribution pension schemes. In this respect, the CJEU drew a clear distinction with defined benefit (i.e. final salary) pension schemes. As held in the previous CJEU judgment in *Wheels*, the risk in such funds lies with the employer, not the employee.

The CJEU concluded that defined contribution pension schemes were special investment funds and that the following factors were irrelevant: that contributions were paid by the employer; that contributions were based on collective agreements; that the funds could be paid out as lump sums or in instalments when the beneficiaries reached pension age; and that contributions were, to some extent, deductible for income tax purposes.

*Does the term 'management' cover the services provided by ATP?*

The CJEU noted that the Directive did not preclude the management of special investment funds from being broken down into a number of separate services, each of which could fall within the exemption. Exempt services of management were those which, viewed broadly, form a distinct whole and are specific to, and essential, for, the management of the funds.

As in its previous case law (*Abbey* and *GfBk*), the CJEU referred to the functions specific to UCITS including portfolio management, administration of the UCITS themselves, and the functions set out in Annex II of the UCITS Directive under the heading 'Administration'. These functions include computing income and the price of units and shares, valuation of assets, accounting, preparation of statements, provision of information and documentation for accounts and tax returns, and preparation of income forecasts.

Services performed by ATP related to the opening of accounts and the crediting of sums to those accounts transform the claim held by an employee against his employer to one held against the pension funds. Such services are essential to the management of a special investment fund and therefore fall within the exemption.

The CJEU stated that the other services performed by ATP (as referred to above) appeared to fall within the services listed at Annex II of the UCITS Directive and would therefore be exempt (although it stated that the final determination was a matter for the national court with all of the facts before it). In addition, as previously held in the *GfBk* case, the Court observed that the list provided in Annex II of the UCITS Directive detailing fund management services is not exhaustive.

*Are any of the services provided by ATP exempt as transactions concerning payments transfers or deposit and current accounts?*

The CJEU referred to its earlier case law on transfers. A transfer involves a change in the legal and financial situation existing between the person giving the order and the recipient, and between those persons and their banks. Exemption does not require any particular method of transfer and can be made by means of account entries where payer and payee have accounts at the same financial institution.

Applying this to the present case, the CJEU stated that the crediting of contributions into an employee's pension scheme accounts appeared to change the legal and financial position by transforming the beneficiary's claim against the employer into one against the pension fund (although again it was a matter for the national court to determine on the basis of the full facts).

On the basis of this answer, there was no need to consider whether ATP's services may be exempt as transactions concerning deposit and current accounts.

What is the impact for businesses?

The current VAT treatment in Ireland is contrary to the judgment in that Ireland treats services supplied to defined contribution pension schemes

(with the exception of certain unit trust schemes) as taxable. Further, the judgment provides additional guidance on the interpretation of the term 'management' in the context of special investment funds, and defined contribution pension schemes specifically. In this regard it should be noted that the ability to break down the management services into a number of separate arrangements to best serve the pension scheme from a commercial perspective should not compromise the application of the exemption. In respect of the services supplied by ATP, the Court noted in particular that services comprising opening pension accounts and crediting contributions paid were clearly essential to the management of a special investment fund.

In light of this judgment, we would encourage providers of services to defined contribution pension schemes to review the precise nature of the services supplied in order to consider whether the supply is capable of being regarded as 'management' and therefore exempt from VAT.

Providers of management services to defined contribution pension schemes who have not already submitted claims to Revenue for any overpaid VAT for the last four years should consider doing so without delay. It should be borne in mind however that additional VAT exempt income may result in a restriction of input VAT recovered to date and this should be factored into any claim. Employers with defined contribution pension schemes and/or pension funds and trustees with such schemes may wish to contact their providers to request a repayment of VAT overpaid in the past and exempt treatment going forward. There may also be circumstances where employers/funds can make claims directly against Revenue for part or all of the VAT incurred e.g. where the fund has self-accounted for VAT on a management service received from abroad.

#### The EU position

Different Member States treat the types of services covered by ATP in different ways. Funds and/or fund managers who consider that they may be impacted by such changes in other Member States may wish to take advice as to their position.

#### Further information

EY has a global indirect tax practice which is experienced in providing support in relation to technical VAT issues. If you feel that this judgment could have implications for your business, and you would like to discuss the position in more detail, please speak with your usual EY indirect tax contact or one of the contacts listed in this alert.

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