

VAT and Financial Services

Recent CJEU decisions (2)



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Opinion of the Advocate General (AG) in the *fiscale eenheid PPG Holdings BV* case related to pension fund management

In our previous VAT Insight we provided you with a summary of two VAT cases, the *GfBk* case (C-275/11) and the *Wheels* case (C-424/11), concerning the VAT exemption applicable to the 'management of special investment funds', decided upon by the Court of Justice of the European Union ('CJEU') on 7 March 2013.

In another case that is still pending before the CJEU - the *fiscale eenheid PPG Holdings BV* case (C-26/12) – which particularly relates to VAT and pension fund management, the AG has now delivered her Opinion. Whilst the CJEU in the majority of cases tends to follow the AG's Opinion, it remains of course to be seen whether the Court will do so in this particular case.

Facts

PPG Fiber Glass was part of the Netherlands tax grouping PPG Holdings BV ('PPG Holdings'). Netherlands' law required employers to make provision for retirement pensions for their employees. Any fund set up for that purpose was required by law to be separate from PPG for all legal purposes and thus, necessarily, for VAT purposes.

Therefore, the companies in PPG Holdings set up a fund (not forming part of the PPG Holdings tax group) into which they paid contributions. Pensions and financing costs were covered by those contributions and by investment income. The employees made no contributions. The fund was a defined-benefit scheme, that is to say, one in which the amount of benefits is determined by a pre-established formula and does not vary according to investment returns.

PPG Fiber Glass contracted with various service providers for administration, asset management, auditing and consultancy services to be provided to the fund. In its VAT returns, PPG Holdings deducted the VAT on all the amounts incurred for the purposes thereof from its output VAT. The Dutch tax authority however considered that they were not deductible and issued a reassessment.

Questions referred to the CJEU

- (1) Can a taxable person who, pursuant to national pensions legislation, has established a separate pension fund for the purpose of safeguarding the pension rights of his employees and former employees, as participants in the fund, deduct the tax which he [has paid] on the basis of services supplied to him in respect of the implementation of the pension provision and the operation of the pension fund, pursuant to Article 17 of [the Sixth Directive]?

- (2) Can a pension fund, established with the objective of providing a pension for the participants in the pension fund at the lowest possible cost, where assets are brought to and invested in the pension fund by or on behalf of the participants, and where the resulting proceeds are shared, be classified as a “special investment fund” within the terms of Article 13B[(d)]6 of [the Sixth Directive]?

AG’s Opinion

Unsurprisingly, the AG has followed the judgment of the CJEU in the *Wheels* case so that, in her opinion, the CJEU should confirm that the services in this case do not qualify for exemption.

In her response to the first question (about the deductibility of the VAT on payments made by PPG), the AG expressed sympathy for the view advanced by PPG and the Commission, that the costs are effectively “payroll costs” and hence form cost components of the activities of the group as a whole. However, she was persuaded by the contentions put forward by the Dutch tax authority (supported by the UK) and concluded that the Court should find that PPG was not entitled to deduct the VAT on services supplied to the separate pension fund in connection with its *management and operation* (on the basis that such services were acquired for the fund’s purposes of obtaining income from its investments, and were thus directly and immediately linked to the fund’s activity, and only indirectly and ultimately to that of PPG). The AG agreed however that PPG may be in a position to deduct VAT on any inputs acquired for the purposes of *setting up the fund, enrolling employees in the fund, ensuring that its own contributions are made in a timely manner, and so on*. Such activities fall within the sphere of PPG’s activity and not within that of the separate fund.

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