
Employer's entitlement to deductibility of VAT incurred in the setting up and management of a pension fund for his or her employees: Revenue's position following the decision of the Court of Justice of the European Union in PPG (Case C-26/12)

This document should be read in conjunction with section 59 of the Value-Added Tax Consolidation Act 2010 (VATCA 2010)

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1 Introduction

This manual sets out an employer's entitlement to deductibility in respect of VAT incurred in the setting up and management of a pension fund for his or her employees following the decision of the Court of Justice of the European Union (CJEU) in *Fiscale eenheid PPG Holdings BV*¹ (PPG).

The case concerned whether PPG was entitled to deductibility in respect of VAT incurred on services paid by it for the purpose of the pension fund it set up in order to safeguard the pension rights of its employees.

2 Background

PPG set up a pension fund for its employees in the form of a legally and fiscally separate entity in order to meet its requirements under Dutch law to make provision of retirement pensions for its employees. PPG, through its subsidiary, contracted with various service providers for administration, asset management, auditing and consultancy services relating to the fund.

The costs of these services were invoiced to, and paid by, the PPG subsidiary but not passed on to the pension fund. PPG deducted the VAT in respect of these costs. The Dutch Administration were of the view that PPG could not be regarded as the recipient of the services which it transferred to the pension fund without invoicing any consideration, and therefore, not entitled to deduct VAT.

¹ C-26/12, *Fiscale eenheid PPG Holdings BV cs te Hoogzand versus Inspecteur van de . Belastingdienst/Noord/Kantoor Groningen*

3 Judgment of the CJEU

The CJEU observed that PPG acquired the services in question for the purpose of the administration of its employees' pensions and the management of the assets of the pension fund set up to safeguard those pensions. By setting up the fund, PPG complied with a legal obligation imposed on it as an employer, and, in so far as the costs of the services acquired by PPG in that connection form part of its general costs, they are, as such, component parts of the price of PPG's products. In those circumstances, it may be considered that the exclusive reason for the acquisition of the input services lies in the taxable person's taxable activities, and that there is a direct and immediate link.

The CJEU concluded that in such circumstances a taxable person is entitled to deduct the VAT it has paid on services relating to the management and operation of a pension fund it has set up for its employees, provided that the existence of a direct and immediate link is apparent from all the circumstances of the transactions in question.

4 Revenue position before the CJEU decision

Revenue has always accepted that the setting-up, administration and on-going management of a pension fund is part of an employer's business and VAT incurred on expenses in connection with these activities are deductible to the extent that the employer is engaged in taxable activities. In circumstances where the employer buys in these services and incurs the VAT costs, the costs are treated as ordinary business costs provided the employer is not reimbursed by the trustees².

VAT is not deductible in circumstances where the employer's expenses are subsequently reimbursed by the trustees of the scheme, or, where the expenses incurred relate to management of the assets of the fund.

² VAT is deductible to the extent of the employer's taxable activities, provided the VAT invoice is made out in the employer's name.

The fund itself was entitled to deductibility in respect of costs that relate to the management of the assets of the fund, to the extent they are deductible. In this regard, Revenue allowed the practice of disaggregation where separately identifiable activities were engaged in by the pension manager in carrying out the management function provided certain conditions were met³.

5 Revised Revenue position following the CJEU decision

As a consequence of the Judgment, Revenue accepts that the employer is entitled to deductibility in respect of costs incurred in the setting up, on-going management, administration and management of the assets of a pension scheme where the conditions set out below are met. This represents a change in Revenue practice, as previously the employer was not entitled to deduct expenses relating to the management of the assets of the fund. Due to the changes in the VAT treatment applying to expenses incurred by an employer in respect of the setting up and management of a pension fund, previous guidance in respect of disaggregation will no longer apply in these circumstances.

6 Conditions to be met by the taxable person

To be entitled to deductibility a taxable person must meet the following conditions.

- The costs of the input transaction must form part of the employer's general costs and must be, as such, components of the price of the taxable goods or services it supplies.
- The costs incurred must be invoiced to, and paid by, the employer and not passed on to the pension fund.
- The existence and extent of the right to deduction is determined in the light of the direct and immediate link with the employer's economic activity, and more precisely, its taxable activity.

7 Application of the conditions

Where the employer is reimbursed by the pension fund, the costs cannot be considered to be part of the employer's general overheads and cannot be, as such, components of the price of the goods or services supplied. Accordingly, the employer would not be entitled to deductibility in such circumstances.

³ This is on the basis that there is a legal management services agreement and that :-

- (i) the separate elements were clearly identified in the services agreement
- (ii) the basis for apportionment of the fee was realistic, and
- (iii) the activities in question were actually undertaken.

Where the employer receives taxable services and makes an onward supply of the services to the pension fund in exchange for consideration, the employer is required to charge VAT on the supplies. Where VAT is charged by the employer, it may be deductible by the trustees of the fund, to the extent that it is engaged in taxable activities.

In circumstances where the trustees of a fund contract for, and receive services, and are subsequently reimbursed by the employer, the employer is regarded as giving a gift or donation to the fund. Donations or gifts are not deemed to be consideration for a supply and are therefore outside the scope of VAT. Accordingly, the employer is not entitled to any deductibility in respect of the payment. The trustees may have partial recovery in respect of the expenses incurred, to the extent that the fund is engaged in taxable activities.

8 Retrospective application of the CJEU decision

The decision of the CJEU which has direct effect may be relied on for past VAT periods, subject to the 4 year time limit.

Employers that provided pension schemes for their employees and received supplies of services in respect of the management of the assets of the fund may have an entitlement to reclaim overpaid VAT. Where disaggregation was applied, adjustments may be required for any previously claimed inputs by the employer and the trustees of the pension fund.