



VAT and pension schemes

A simple change to scheme rules is sufficient to establish the employer's entitlement to recover VAT on services to its pension scheme.

This is the new proposal the Association of Pension Lawyers (APL) has put to HMRC, which is now considering the idea.

If it agrees, employers, trustees and providers of services will be spared the time and cost of rearranging supply contracts.

In the short term, the APL's move is likely to prolong the current uncertainty about VAT recovery. It has asked HMRC to extend the current transitional period that allows long-standing invoicing arrangements to continue pending a final resolution.

APL approach

The APL argues that a new scheme rule is enough to establish the "direct and immediate link" between the employer's business and the cost of servicing the scheme that is required for VAT recovery.

The rule would say the employer and the trustees acknowledge the scheme is set up and run for the benefit of the employer's workforce. It would be wide enough to cover all services. See the box for the suggested wording.

APL's proposed scheme rule

"The Principal Employer and the Trustees acknowledge that the Scheme provides pension and/or other benefits to the beneficiaries of the Scheme which include employees and former employees of the current and former Participating Employers.

The Principal Employer acknowledges that the Trustees may procure, for the proper management and operation of the Scheme, and subject to the provisions of [this Deed/the Rules] and any statutory requirements, services relating to the management and operation of the Scheme (including the funding of the Scheme, the administration of the benefits payable under the Scheme and the management of the assets of the Scheme), for the purposes of providing those pension and/or other benefits on behalf of the current and former Participating Employers."

Tripartite contracts

A one-off rule amendment is a lot simpler than the "tripartite contract" approach HMRC has focused on in its Briefs over the last 18 months (most recently Brief 8 /2015 in March). Here the "direct and immediate link" is established by the employer becoming party to the contracts for the various supplies to the scheme alongside the trustees. One obligation it would have under the contract would be to pay for the services.

This approach faces legal difficulties and the practical drawback of the time and cost of negotiating amendments to, for all affected schemes, thousands of supply contracts.

Examples of unresolved legal issues include reconciling the approach with:

- pensions legislation like trustees' statutory duties to appoint certain advisers,
- general law issues like confidentiality, legal privilege and conflict of interest and
- constraints that some regulated professionals like actuaries and lawyers need to observe.

There is also the possibility HMRC might say only some elements of a service were for the employer's benefit and restrict VAT recovery accordingly.

Transitional period

As things stand, the transitional period for continuing the practice (based on VAT Notice 700/17) of invoicing the employer for services (bar investment) to the trustees is due to expire on 31 December 2015.

HMRC's last public statement (Brief 8) about its future intentions was:

"HMRC has received enquiries in respect of the impact of the PPG decision on VAT recoverability relating to:

- *other [i.e. other than investment management] types of service (such as legal, actuarial and accounting services),*
- *other [i.e. other than DB] types of pension scheme (such as defined contribution and hybrid),*
- *VAT Groups that include a corporate trustee and a sponsoring employer,*
- *trustees that charge employers to run their pension schemes.*

HMRC has been discussing these matters with interested parties and intends to provide further guidance in the summer [2015]."

Now the deadline has passed, the APL has asked HMRC to confirm what it intends to do about providing guidance on these points.

Also the APL has challenged HMRC's position that the tripartite approach only applies to DB schemes and not other types.

What do employers and trustees do now?

In current circumstances it is impossible to anticipate what HMRC's next step will be or when it might come.

VAT is chiefly an issue for employers and they should normally take the lead rather than the trustees. If an employer is minded to change the status quo, the trustees will normally have a role.

Employers should consider their options. In the current uncertainty, they all have pros and cons.

The position was already uncertain pending the guidance HMRC promised for the summer. Now the APL's proposal raises the possibility that HMRC's eventual position might be that a rule amendment will be sufficient for recovery, perhaps with tripartite contracts as an equally effective, if more complicated, alternative. Or the new proposal might be rejected. In any event, uncertainty will continue in the short term while HMRC considers its position.

HMRC's Briefs so far have concentrated on recovery in relation to investment management costs. They give sufficient guidance to make it thinkable to draft a tripartite contract that would satisfy them. There would be no guarantee, however, that it would be possible for an employer to agree terms with its trustees and the investment manager even if they are willing in principle to work towards such a contract. In a novel field, each party is likely to want legal advice, increasing the likelihood that agreement, if it is reached, might not be achieved by the end of the current transitional period (with some potential loss of recovery).

There is no HMRC guidance on tripartite contracts for advisory services like actuarial, financial and legal with their particular legal and regulatory issues. Negotiating against that background would be more difficult.

On the general principles set out in the Briefs, a contract for day-to-day scheme administration is one where a tripartite approach looks feasible in principle. On the whole there are fewer legal and regulatory issues here because the service naturally benefits employer and trustees, and the supplier does not generally give sensitive professional advice.

And, of course, all work on tripartite contracts could prove redundant if HMRC accepts the APL's suggestion.

The time and cost of tripartite contracts is likely to be an important consideration too.

Meanwhile, given the missed target for more HMRC guidance in the summer, an extension to the current transitional period looks reasonably likely, whatever final position HMRC reaches and whenever that is. Yet an extension is not certain.

Clarification from HMRC

The APL has received clarification that the current transitional period applies to *"transactions with a time of supply (i.e. the earlier of payment or invoice date) falling on or before the 31 December deadline or, in the case of continuous supplies of services, services provided prior to 1 January 2016 (even if they are invoiced / paid for after 31 December)"*. This means it is not necessary for invoices to be paid before the end of the period.

More information

If you would like more information, please get in touch with your usual contact in our pensions team or:



Richard Knight

Partner, Head of Pensions

+44 (0)117 939 2259

richard.knight@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

Burges Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burges Salmon entities, including details of their regulators, is set out in the 'Who we are' section of the Burges Salmon website at www.burges-salmon.com.

© Burges Salmon LLP 2015. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.