

BETWEEN:

- (1) **WHEELS COMMON INVESTMENT FUND TRUSTEES LIMITED**
- (2) **THE NATIONAL ASSOCIATION OF PENSION FUNDS LIMITED**
- (3) **FORD PENSION FUND TRUSTEES LIMITED**
- (4) **FORD SALARIED PENSION FUND TRUSTEES LIMITED**
- (5) **FORD PENSION SCHEME FOR SENIOR STAFF TRUSTEE LIMITED**
Appellants

-and-

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS
Respondents

**SCHEDULE TO THE ORDER FOR REFERENCE
TO THE
EUROPEAN COURT OF JUSTICE**

INTRODUCTION

1. This reference for a preliminary ruling has been made in the context of an appeal in the First Tier Tribunal (Tax Chamber) ("the Referring Court") against a decision of the Respondents contained in a letter dated 2 January 2008 ("the Contested Decision"). It concerns the meaning and effect of Article 135(1)(g) of Council Directive 2006/112/EC, formerly Article 13(B)(d)(6) of the Sixth VAT Directive, which exempts from value added tax ("VAT") "the management of special investment funds as defined by Member States" ("the Exemption").

THE BACKGROUND TO THE PROCEEDINGS BEFORE THE REFERRING COURT

2. At all material times, Capital International Limited ("CIL") provided fund management services to the First and Third to Fifth Appellants. In accordance with the provisions of

United Kingdom VAT legislation, it charged the First and Third to Fifth Appellants VAT on those services and accounted to the Respondents for that VAT.

3. In September 2007, after the Court of Justice ("the ECJ") delivered judgment in Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust Plc and another v Commissioners for HM Revenue and Customs* [2007] ECR 1-5517 ("*Claverhouse*"), CIL submitted to the Respondents a claim for the repayment of the VAT accounted for in respect of the supplies of fund management services to the First and Third to Fifth Appellants on the ground that the supply of those services was exempt from VAT pursuant to the Exemption. In accordance with the relevant national time limit, the claim related to amounts accounted for to the Respondents under VAT returns for the prescribed accounting periods ending 30 September 2004 to 30 June 2007.
4. By the Contested Decision, the Respondents rejected the claim, maintaining that the supplies in question were not exempt. As the recipients of the supplies in question and the persons who bore the burden of the VAT charged by CIL, the First and Third to Fifth Appellants appealed to the Referring Court against the Contested Decision. The Second Appellant was joined as an Appellant in the appeal in its capacity as the representative body for a very large number of pension funds in the United Kingdom.

THE ISSUE OF EU LAW BEFORE THE REFERRING COURT

5. It is not disputed before the Referring Court that the services supplied by CIL to the First and Third to Fifth Appellants are supplies of "management" within the meaning of the Exemption. The issue is whether or not those Appellants are "special investment funds" within the meaning of the Exemption.

THE PARTIES

A. The Appellants

6. The First Appellant is the trustee of the Wheels Common Investment Fund ("WCIF"), a common investment fund in which the assets of various occupational pension schemes, operated by a single employer or group of associated employers, are pooled for investment purposes. On establishment of the WCIF, the participating schemes' contribution of assets was pooled into eleven sub-funds being seven equity portfolios and four fixed income portfolios. Investment managers were appointed to manage each sub-fund.

7. The Third to Fifth Appellants are the trustees of the occupational pension schemes that participate in WCIF. Each scheme provides benefits on a defined benefit ("DB") basis, which is explained below, to a defined group of employees of Ford Motor Company Limited (hence they are known as "the Ford Schemes"). Those groups of employees are: salaried employees; hourly paid employees; and senior employees.
8. The Second Appellant is the representative body for a very large number of pension funds.

B. The Respondents

9. The Respondents ("HMRC") are the national authority responsible for the administration and collection of Value Added Tax ("VAT") in the United Kingdom.

LEGAL CONTEXT

A. Community Law

10. The English version of the Exemption exempts:

"the management of special investment funds as defined by Member States".

B. National Law

11. In the United Kingdom, Article 135(1)(g) of Council Directive 2006/112/EC was at the material time implemented by items 9 and 10 of Group 5 of Schedule 9 to the Value Added Tax Act 1994 ("VATA"). Those provisions exempted:

"9. The management of an authorised unit trust scheme or of a trust based scheme.

10. The management of the scheme property of an open-ended investment company".

12. Items 9 and 10 of Group 5 of Schedule 9 to VATA were substantially amended with effect from 1 October 2008 by the Value Added Tax (Finance) (No. 2) Order 2008 (SI 2008/2457) in order to take into account the judgment of the ECJ in *Claverhouse*. As a result of the amendment, the scope of Items 9 and 10 was broadened, such that those provisions now exempt: the management of authorised Open-Ended Investment

Companies (“OEICs”), Authorised Unit Trusts (“AUTs”) and closed-ended collective investment undertakings. The exemption also includes recognised overseas schemes, which can be summarised as being funds established outside the United Kingdom but which are approved by the UK Financial Services authority to market to the public in the United Kingdom.

13. The effect of Note 6 to Group 5 (as amended) provides, so far as is relevant, that: authorised OEICs, AUTs, and recognised overseas schemes are as defined in the Financial Services and Markets Act 2000 (“FMSA”); closed-ended collective investment undertakings are as defined in Note 6 itself.
14. The relevant sections of Part XVII FMSA referred to in this schedule are as follows:

“235 Collective investment schemes

- (1) *In this Part ‘collective investment scheme’ means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.*
- (2) *The arrangements must be such that the persons who are to participate (‘participants’) do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.*
- (3) *The arrangements must also have either or both of the following characteristics—*
 - (a) *the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;*
 - (b) *the property is managed as a whole by or on behalf of the operator of the scheme.*

236 *Open-ended investment companies*

- (1) *In this Part ‘an open-ended investment company’ means a collective investment scheme which satisfies both the property condition and the investment condition.*
- (2) *The property condition is that the property belongs beneficially to, and is managed by or on behalf of, a body corporate (‘BC’) having as its purpose the investment of its funds with the aim of—*
 - (a) *spreading investment risk; and*
 - (b) *giving its members the benefit of the results of the management of those funds by or on behalf of that body.*

237 *Other definitions*

- (3) *In this Part—*

‘an authorised unit trust scheme’ means a unit trust scheme which is authorised for the purposes of this Act by an authorisation order in force under section 243;

‘an authorised open-ended investment company’ means a body incorporated by virtue of regulations under section 262 in respect of which an authorisation order is in force under any provision made in such regulations by virtue of subsection (2)(1) of that section;

‘a recognised scheme’ means a scheme recognised under section 264, 270 or 272.” [i.e. recognised overseas schemes - see paragraph 12 above]

15. Pension fund management services provided by a regulated insurance company are a regulated class of insurance business under Paragraph VII of Part II of Schedule 1 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, and are exempt from VAT under Group 2 of Schedule 9 VATA

FACTUAL BACKGROUND

A. Occupational Pension Schemes

16. An occupational pension scheme (“OPS”) is a scheme established by an employer that is intended to provide pension benefits to the employer's employees. The main aim of an OPS is to provide an income on retirement. This is achieved by investing sums in the scheme to provide such benefits on retirement. In addition to providing an income on retirement, many occupational schemes provide other benefits such as death in service payments and ill-health pensions.
17. OPSs are arrangements, written under trust, for the provision of benefits on retirement or in certain other circumstances, for the employees and ex-employees of the employer or employers who participate in the OPS. Pension scheme assets comprise, in the first instance, contributions of the employer and usually the active members of the scheme which are then invested together to form a fund out of which pension and other benefits are paid to members on retirement or termination of service. Under national law, an employee is not obliged to join an OPS set up by the employer but in practice many employees do so (a large majority of the Ford employees entitled to join the Ford Schemes at issue in the present case have chosen to join them).
18. This appeal is concerned with OPSs which provide pension benefits on a “defined benefit” basis (“DB”), (i.e. the benefits are calculated by reference to a formula based on the member’s length of service with the employer and his salary). The salary element of that formula may be based on the member’s salary calculated either at or near the member's retirement (so-called “final salary” schemes) or over the course of the member's employment (so-called “career average” schemes). The Ford Schemes are all "final salary" schemes. DB OPSs can be contrasted with “defined contribution” (“DC”) or “money purchase” OPSs, where members are provided with such pension benefits as can be purchased with the assets which are referable to the member.
19. A shared feature of DB OPSs is that, whereas members usually make contributions of a fixed periodical amount (normally a percentage of their salaries), the employer is liable to pay contributions which are sufficient to fund the balance of the cost of providing the benefits, to the extent that the existing contributions are insufficient for that purpose. That “balance of cost” obligation, which was originally to be found in the governing trusts of the OPS, is now enshrined in domestic legislation, under Part 3 of the Pensions Act 2004. Domestic legislation also prevents employers from terminating a DB OPS without ensuring that all benefits are fully funded: s.75 of the Pensions Act 1995.

20. A principal distinction between DB and DC OPS is therefore that the employer in the former is unable to predict in advance what its liability to that scheme will be, as the benefits are defined, not by reference to the assets in the OPS fund, but by reference to the service and salary of the employer on retirement. By contrast, an employer of a DC OPS knows exactly where it stands at any point in time, as its funding obligations are limited to whatever contributions it has agreed to pay into the OPS. There is therefore no need for a “balance of cost” obligation in a DC OPS, as there is no possibility of a deficit.
21. If the assets of a DB OPS are greater than what is required to fund the benefits provided for under the scheme, the trustees of the scheme and/or the employer may, in accordance with the terms of the scheme and relevant provisions of national law, do any one or more of the following: (i) reduce the employer's contributions to the scheme; (ii) transfer all or a part of the benefit for the surplus to the employer; or (iii) improve the benefits to members under the scheme.
22. In the vast majority of DB OPS, contributions are made by both the employee members and the participating employers. The Ford Schemes require employee members to pay contributions which vary between 6% and 9% of pensionable pay.
23. Members of OPS have a statutory right to transfer their accrued retirement benefits from the OPS into an alternative retirement benefit arrangement, including arrangements that benefit from the Exemption: Chapter IV of Part IV of the Pension Schemes Act 1993.
24. Under national law, the employer's and employee's contributions to an OPS are not treated for income tax purposes as income of the employee. However, pension benefits received under the scheme are treated as income of the recipient.
25. Members of DB OPSs are sometimes able to make additional voluntary contributions ("AVCs") to OPS schemes in order to supplement their scale benefits. AVC facilities supplied by an OPS typically provide supplementary benefits on a DC basis, although they may provide supplementary benefits on a DB basis. On retirement (or earlier death), the proceeds of an employee's AVC fund are available to supplement the employee's regular benefits under the scheme in question. In the Ford Schemes, when an employee decides to make an AVC, the amount of the AVC is deducted from his income and paid directly by the employer to one of two insurance companies which

invest it: none of the supplies of fund management services that are the subject of the present appeals relate to those AVCs or the funds into which they are invested.

B. Pooled Investments

26. Pooled investment funds are collective investment schemes that pool investments to invest in a wide range of asset classes including cash deposits, shares, property or bonds. A pooled investment allows an individual investor to invest in a large portfolio of assets with other investors and entitles them to a share in the overall performance of the fund. One of the main advantages of collective investment is the reduction in investment risk. Also by spreading charges across all members of the pool the cost for each pool member is typically considerably reduced.

27. The main types of investment funds include:

(a) AUTs

Unit Trusts are vehicles set up under UK law for the investment in stock market investments and are constituted under trust law. Investors' money is "pooled" and invested across a wide spread of investments. As the trust is open-ended, it can issue new units to the Investment Manager who can sell to investors to meet demand. The investment fund is divided into units which represents investors' share of the "pool". Typically, two prices are published for a unit trust – the buying price and the selling price. Any investment management charge is normally reflected in the price.

(b) OEICs

An OEIC is similar to a unit trust in that investors' money is "pooled" in the same way to create a portfolio of assets. The main difference is that OEICs have a corporate structure and offer shares rather than units which are purchased at a price based on the value of the investments that the OEIC holds. Investors have a right to redeem their shares or sell their shares at any time at a price which is related to the current market value of the assets held by the fund.

In addition, there is only a single price published for the fund which reflects the underlying value of the investments in the fund. Unlike most unit trusts, the investment management charge is shown separately.

(c) Closed-Ended Investment Companies (“CEIC”)

A CEIC, such as an Investment Trust Company (“ITC”), is a pooled investment vehicle with a limited number of shares. Closed-end funds generally do not continuously offer their shares for sale. Rather, they sell a fixed number of shares at one time (in an initial public offering), after which the shares typically trade on a secondary market. The price of closed-end fund shares that trade on a secondary market after their initial public offering is determined by the market and may be greater or less than the shares’ net asset value.

Closed-end fund shares generally are not redeemable until the fund liquidates. That is, a closed-end fund is not required to buy its shares back from investors upon request. Some closed-end funds, offer to repurchase their shares at specified intervals.

Closed-end funds are permitted to invest in a greater number of ‘illiquid’ securities than mutual funds. An ‘illiquid’ security generally cannot be easily and quickly converted into cash.

THE ARGUMENTS OF THE PARTIES

A. THE APPELLANTS

28. The Appellants submit that, having regard to the wording and purpose of the Exemption, OPSs fall within the definition of "special investment funds". The notion of a collective investment fund is that of a fund in which a number of persons pool their investment, and which generates a single return from a spread of investments. OPSs meet that description. They constitute a vehicle for (or for the benefit of) employees and the employer or employers, each of which makes contributions to the fund and each of which bears, to a greater or lesser extent, an investment risk: those contributions generate a return for the OPS from a diversified portfolio of investments. That interpretation is confirmed by the current proposal for a Council Regulation laying down implementing measures for Directive 2006/112, "investment funds" covers

(amongst other things) "pension funds including private and public open pension funds with no restriction on membership and closed pension funds limited to certain categories of members" (see doc. 5908/11).

29. Member States do not have discretion to refuse to recognise, as a "special investment fund", a fund that falls within that description.
30. Further, DB OPSs such as the schemes here in question are similar to and therefore in competition with other collective investment vehicles to which the Exemption applies. Accordingly, it would be in breach of the principle of fiscal neutrality for them to be treated differently for VAT purposes.

B. HMRC

31. HMRC note that the Ford Schemes are all DB OPSs, so that it is only DB OPSs that are the subject of the present appeals: see paragraph 18 above. Benefits received by the employee under a DB OPS are a form of deferred pay.
32. HMRC submit that DB OPS are not "special investment funds", and are fundamentally different from funds recognised by the United Kingdom as being special investment funds ("Group 5 Funds").
33. In essence, that is because in a DB OPS such as the Ford Schemes, the amount of the benefits to which an employee is entitled depends, only, on the number of years of pensionable service and the employee's final pensionable pay. Those benefits are wholly disconnected from (a) the amount of contribution (if any) he has paid in; (b) the investment performance of the assets of the DB OPS; or (c) the management charges paid by the DB OPS. Given that disconnect between contributions (if any) and investment performance on the one hand and the amount of benefits, or deferred pay, received by the employee on the other, DB OPS cannot be regarded as a vehicle for investment by the employee.
34. In contrast, in a Group 5 Fund, the amounts the investor is entitled to receive are determined by the amounts invested, the investment performance of the fund, and any management charges/commission.
35. Further, DB OPS are not available to the public: they are employment-related benefits made available only to certain employees. In contrast, Group 5 Funds are available to the public.

36. HMRC rely, further, on a number of other fundamental differences between DB OPS and Group 5 Funds which will be set out in detail in the United Kingdom's written observations.
37. Since contributions made to DB OPS offer employees benefits that are entirely different from anything that they could obtain by investing a similar amount directly in securities, the levying of VAT on the management charges incurred by DB OPS does not prejudice the objective of avoiding distortion of the choice between direct investment and investment via DB OPS. Exclusion of DB OPS is thus consistent with the purpose of the Exemption. Further, the different VAT treatment of the supply of fund management services to DB OPS *vis-à-vis* the supply of fund management services to Group 5 Funds is consistent with the principle of fiscal neutrality. That is because - for the reasons set out above - DB OPS are not "*similar*" to Group 5 Funds.

THE QUESTIONS REFERRED

38. It was decided by the Court of Justice in *Claverhouse* that the Exemption has its own independent meaning in EU law and that it is sufficiently precise and unconditional to have direct effect. The question whether the Exemption extended to pooled investments such as pension funds was raised in *Claverhouse* (see paragraph 40 of the opinion of Advocate General), however it was not decided by the Court not being one of the questions referred (see paragraph 52 of the judgment).
39. This reference only covers pension funds under schemes providing defined benefits, however it is of wide importance in the United Kingdom and raises difficult issues on which the Referring Court requires the guidance of the Court of Justice.

Question 1

Are the words "special investment funds" in Article 13B(d)(6) of the Sixth VAT Directive and Article 135(1)(g) of Directive 2006/112 capable of including (i) an occupational pension scheme established by an employer that is intended to provide pension benefits to employees and/or (ii) a common investment fund in which the assets of several such pension schemes are pooled for investment purposes in circumstances where, in relation to the pension schemes in question:

- (a) the pension benefits receivable by a member are defined in advance in the legal documents creating the scheme (by reference to a formula based on the

length of the member's service with the employer and the member's salary) and not by reference to the value of the scheme assets;

- (b) the employer is obliged to make contributions to the scheme;
- (c) only employees of the employer can participate in the scheme and obtain pension benefits under it (a participant in the scheme is here referred to as a "member");
- (d) an employee is free to decide whether or not to be a member;
- (e) an employee who is a member is normally obliged to make contributions to the scheme based on a percentage of his salary;
- (f) the contributions of the employer and the members are pooled by the scheme trustee and are invested (generally in securities) in order to provide a fund out of which the benefits provided for in the scheme are paid to the members;
- (g) if the scheme assets are greater than what is required to fund the benefits provided for under the scheme, the trustee of the scheme and/or the employer may, in accordance with the terms of the scheme and relevant provisions of national law, do any one or combination of the following: (i) reduce the employer's contributions to the scheme; (ii) transfer all or a part of the benefit of the surplus to the employer; (iii) improve the benefits to members under the scheme;
- (h) if the scheme assets are less than what is required to fund the benefits provided for under the scheme, the employer is normally obliged to make up the deficit and, if the employer does not, or is unable to do so, the benefits received by members are reduced;
- (i) the scheme permits members to make additional voluntary contributions ("AVCs") which are not held by the scheme but are transferred to a third party for investment and the provision of additional benefits based on the performance of the investment made (such arrangements are not subject to VAT);

- (j) members have the right to transfer their accrued benefits under the scheme (valued by reference to the actuarial value of those benefits at the time of transfer) to other pension schemes;
- (k) the employer's and members' contributions to the scheme are not treated for the purposes of income tax levied by the Member State as income of the members;
- (l) pension benefits received by members under the scheme are treated for the purposes of income tax levied by the Member State as income of the members ; and
- (m) the employer, and not the members of the scheme, bears the cost of charges made for the management of the scheme?

Question 2

In the light of (i) the objective of the exemption in Article 13B(d)(6) of the Sixth VAT Directive and Article 135(1)(g) of Directive 2006/112, (ii) the principle of fiscal neutrality and (iii) the circumstances set out in Question 1 above:

- (a) is a Member State entitled to define, in national law, the funds that fall within the concept of "special investment funds" in such a way as to exclude funds of the type referred to in Question 1 above while including collective investment undertakings as defined in Directive 85/611, as amended?
- (b) to what extent (if at all) are the following relevant to the question whether or not a fund of the type referred to in Question 1 above is to be identified by a Member State in its national law as a "special investment fund":
 - (i) the features of the fund (set out in Question 1 above);
 - (ii) the degree to which the fund is "similar to and thus in competition with" investment vehicles that have already been identified by the Member State as "special investment funds"?

Question 3

If in answer to Question 2(b)(ii) above it is relevant to determine the degree to which the fund is "similar to and thus in competition with" investment vehicles that have

already been identified by the Member State as "special investment funds", is it necessary to consider the existence or extent of "competition" between the fund in question and those other investment vehicles as a separate question from the question of "similarity"?