

## Non-UK Public Service Pension Scheme Entitled to UK Tax Exemption on Rental Income

May 28, 2019

The UK First-Tier Tribunal Tax Chamber found that a German pension scheme was eligible for an income tax exemption in the UK even though it could not register as a public service pension scheme in the UK, because it had not been established by a UK legislative body. The law was held to be in breach of the EU principle of the freedom of movement of capital and is thus unlawful. The German pension scheme is therefore entitled to tax exemption without registration in the UK.

### The legal situation in the UK

Section 186 of the UK Finance Act 2004 provides for a tax exemption for registered pension schemes as follows:

*“(1) No liability to income tax arises in respect of -*

*(a) income derived from investments or deposits held for the purposes of a registered pension scheme ...”*

Section 154 Finance Act 2004 sets out which pension schemes may be registered. It provides as follows:

*“(1) An application to register a pension scheme may be made only if the pension scheme—*

*(a) is an occupational pension scheme, or*

*(b) has been established by a person with permission under the [Financial Services and Markets Act] 2000 to establish in the United Kingdom a personal pension scheme or a stakeholder pension scheme.*

*(2) But subsection (1) does not apply to a public service pension scheme.”*

The term “public service pension scheme” is defined in section 150 (3) UK Finance Act 2004 as a pension scheme -

*“(a) established by or under any enactment,*

*(b) approved by a relevant governmental or Parliamentary person or body, or*

*(c) specified in an order made by the Treasury.”*

### The appellant's case

The appellant was a German pension fund, a *Versorgungswerk*, which has been established under German law to provide retirement benefits for doctors practising in Germany. The German pension



#### Documents to be informed:

- [First-Tier Tribunal Decision from February 22, 2019](#)



fund was, via a German open-ended Spezialfonds, the ultimate beneficial owner of UK investment properties from which it received rental income. The German pension fund claimed to be tax-exempt for such income on the grounds that only pension funds enacted under UK law would be eligible to register for tax exemption and that this amounts to an unjustified restriction on the movement of capital and was unlawful.

Whereas Her Majesty's Revenue and Customs itself argued that section 150 (3) UK Finance Act 2004 should be construed so that "established by or under any enactment" should allow the registration of foreign pension funds established not under UK law but under foreign law. Her Majesty's Revenue and Customs argued that the Tribunal would be obliged to give effect to EU law by adopting a consistent interpretation and reading "any enactment" to include an enactment of an EU Member State so as to allow EU pension schemes to register to the extent that they met the registration requirements. It submitted that the conforming interpretation could easily be achieved by construing "any enactment" as including an enactment by a legislative body of an EU Member State.

However, such registration comes with burdensome UK reporting obligations and the appellant therefore did not want to register but claimed that since the UK law contravenes EU law, the German pension fund should be tax-exempt without registration.

### **The Tribunal's decision**

The Tribunal therefore had to decide whether the approach of Her Majesty's Revenue and Customs claiming that registration was available to non-UK public service schemes was correct interpretation consistent with EU laws. The judge found that the approach of Her Majesty's Revenue and Customs would go too far:

*"It is well-established that domestic legislation which contravenes EU law must, so far as possible, be interpreted consistently with EU law by reading in words or limiting the scope of the offending provision. Such a conforming interpretation must not, however, go against the grain of the legislation. I agree with Ms Shaw's [counsel of appellant] submissions on this point. Adopting HMRC's interpretation would dramatically increase the category of public service pension schemes and reduce the UK Government's ability to restrict the availability of relief from tax. In my view, any legislature anywhere in the world would go too far and cross the boundary between interpretation and amendment."*

### **Take aways**

Non-UK public service pension schemes, comparable to the UK public service pension schemes, are entitled to tax exemption on UK income. Non-UK public service pension schemes do not need to register and thereby are not subject to reporting obligations under UK law. This is because the UK law cannot be interpreted in a way to allow non-UK public service pension schemes to register and is therefore an unjustified restriction on the movement of capital and thus unlawful. Since the movement of capital is a fundamental freedom available not only to pension funds based in a EU Member State, non-EU pension funds should in our view be tax-exempt on the same merits.

For occupational pension funds the legal situation is different than for public service pension schemes. Occupational pension funds are defined in section 150 (5) UK Finance Act as follows:

*"In this Part "occupational pension scheme" means a pension scheme established by an employer or employers and having or capable of having effect so as to provide benefits to or in respect of any or all of the employees of (a) that employer or those employers, or (b) any other employer,..."*

Thus UK law does not require that occupational pension schemes be established under an enactment under UK law and therefore these might be entitled to registration. Of course, they would then be subject to the reporting obligations. However, the question remains the same, i.e. if UK legislation really intended to give non-UK occupational pension schemes such a relief from tax.



Non-UK public service pension schemes, however, can refer to the Tribunal decision and, if they had themselves registered in the past, can now discuss de-registration without any charges with HMRC without losing tax exempt status or, if not already registered, can claim tax exemption without such registration.

A great Tribunal decision with only one downside: the legal situation will change with a Brexit.



**be in touch: Any questions? Please do not hesitate to contact us!**



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