

Foreign statutory schemes – can they register as a registered pension scheme?

COMMENTARY BY [EMILY CAMPBELL](#), 24 NOVEMBER 2019

The regime for registered pension schemes, which was first established with effect from A-Day (6 April 2006), is renowned for a number of things. One of those things is the expansion of the categories of person who can establish a pension scheme. However, as a recent case shows, the legislation contains anomalies.

In *BAV-TMW-Globaler-Immobilien Spezialfonds v HMRC* [2019] UKFTT 0129 (Ch) (in which the author appeared for the Appellant taxpayer) the First Tier Tribunal (Tax Chamber) was concerned with an appeal by a German real estate investment fund (BTI) which, during the relevant period, held some investment property in the UK. BTI's ultimate beneficial owner is a German-resident pension fund (BÄV). BÄV is an incorporated pension scheme which provides retirement benefits for doctors, dentists and vets practising in Bavaria and certain other German federated states. It was established by the Bavarian Parliament in 1923 and is Germany's oldest and largest professional pension scheme.

Section 186 of the Finance Act 2004 provides that a registered pension scheme is exempt from income tax on its investment income. BÄV was not a registered pension scheme and BTI accounted for UK income tax on profits of the UK property business and subsequently claimed a repayment of tax for the 2009/2010 and 2010/2011 tax years on the basis that the tax charge was inconsistent with European law. The repayment was refused by HMRC (broadly on the grounds that BÄV could have registered and had no justification for its failure to do so) and this decision was appealed.

Section 154(1) of the Finance Act 2004 sets out a general rule as to which pension schemes may apply to be registered. These are occupational pension schemes (i.e. schemes established by an employer) or personal pension schemes (i.e. schemes established pursuant to FSMA). It was common ground that BÄV was not an occupational pension scheme or a personal pension scheme. However, section 154(2) disapplies section 154(1) to a "public service pension scheme". The question was therefore whether BÄV had been "established by or under any enactment" for the purposes of the definition of public service pension scheme in section 150(3). This in turn depended on whether "any enactment" might extend to a foreign enactment, such as a Gesetz of the Bavarian Parliament.

The Tribunal held that "any enactment" referred to an Act of the UK Parliament and did not include legislation passed by the Bavarian Parliament. Accordingly, BÄV was not a public service pension scheme and had not been eligible to be registered. As a consequence, as was accepted by HMRC, the legislation was overtly discriminatory and a breach of the prohibition of restrictions on the movement of capital in Article 63 TFEU. The appeal was therefore allowed.

The Tribunal, however, rejected an alternative argument by BTI that the requirement to register in order to achieve tax exemption on investment income was itself a restriction on movement of capital in that registration operated more onerously on non-UK registered pension schemes.

The upshot of the decision was that the Finance Act 2004 was incompatible with EU law in respect of the scope of the definition of "public service pension scheme". The Treasury has acted

swiftly to remedy this deficiency. The Finance Act 2004 (Specified Pension Schemes) Order 2019, SI 2019/1425, Regulation 2, provides that the following is included in the definition of "*public service pension scheme*", namely a pension scheme established by or under any enactment of a country or territory other than the UK or of any political subdivision of that country or territory. The Regulation came into force on 21 November 2019.

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