# TC06995

*INCOME TAX – section 186 Finance Act 2004 - relief from tax on income derived from investments held for purposes of registered pension scheme – whether German pension scheme deemed to be registered scheme or eligible to register – whether registration restriction on movement of capital contrary to Article 63 TFEU*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2017/06213**

**BETWEEN**

**BAV-TMW-GLOBALER-IMMOBILIEN SPEZIALFONDS** — **Appellant**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** — **Respondents**

**TRIBUNAL: JUDGE GREG SINFIELD**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 28 and 29 January 2019**

**Nicola Shaw QC and Emily Campbell, counsel, instructed by KPMG LLP, for the Appellant**

**Ravi S Mehta and Celia Rooney, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs**

## DECISION

### Introduction

1. This is an appeal by BAV-TMW-Globaler-Immobilien Spezialfonds ('BTI'). BTI is a German real estate investment fund which, during the relevant period held some investment property in the United Kingdom ('UK'). BTI's ultimate beneficial owner is Bayerische Ärtzeversorgung ('BÄV'), a German-resident pension fund. BÄV was established in 1923 by legislation passed by the Bavarian Parliament. BÄV invested in BTI via an investment fund, BÄV-Masterfonds ('Masterfund').

2. During the relevant period, BTI received rental income from two UK investment properties which it held for BÄV. As a matter of German law, both BTI and Masterfund are tax transparent so BÄV is entitled to the income from the UK investment property as it arises.

3. Section 186 of the Finance Act 2004 ('FA 2004') provides that a registered pension scheme is exempt from income tax on its investment income. BÄV, as an unregistered non-resident pension scheme, was subject to income tax on its UK investment income. BTI accounted for UK income tax on the profits of the UK property business.

4. In August 2013, BTI claimed a repayment of income tax of £625,961.20. The tax related to the investment properties which BTI accounted for in the tax years ending 5 April 2010 (£241,173.80) and 5 April 2011 (£384,787.40). BTI claimed that BÄV should be taxed in the same manner as a registered UK pension fund, with any investment income received being exempt from UK tax. The Respondents ('HMRC') refused the claim in closure notices, dated 14 November 2016. BTI now appeals against the closure notices.

### Evidence was

5. There were three witnesses for BTI, namely:

    (1) Andreas Weber, Managing Director Fund Administration at Pramerica Property Investment GmbH ('PPI').

    (2) Bettina Kempinger, Head of Real Estate Law at Bayerische Versorgungskammer ('BVK') who, during the period under appeal, Head of Department for Real Estate, Capital Investment and Tax Law at BVK.

    (3) Felix-Christian Angstmann, Head of Department for Capital Investment Law at BVK.

6. HMRC's only witness was Judith Goodall. Ms Goodall is part of the Technical Team in the Individuals Policy Directorate, which is part of Customer Strategy and Tax Design in HMRC.

7. All the witnesses provided witness statements that stood as their evidence in chief. HMRC did not challenge the evidence of Ms Kempinger and Mr Angstmann. Mr Weber was briefly cross-examined by Mr Mehta, who appeared with Ms Rooney for HMRC. Ms Shaw, who appeared with Ms Campbell for BTI, cross-examined Ms Goodall.

### Factual background

8. The parties produced a statement which contained facts agreed by both parties and, less helpfully, text which was inserted by each party even though it was not agreed by the other party and could not, therefore, form part of the statement of agreed facts. In fact, there was no disagreement between the parties as to the primary facts. Even when Mr Weber and Ms

Goodall were cross-examined, it seemed to me that the challenges were to expressions of opinion or interpretation rather than fact.

9. The relevant facts, as I understand them to be from the agreed parts of the statement of facts and the unchallenged witness evidence, are as follows.

10. BÄV is an incorporated pension scheme which provides retirement benefits for doctors, dentists and vets practising in Bavaria and certain other German federated states. BÄV was established by the Bavarian Parliament (the 'Bayerische Landtag') in 1923 and is Germany's oldest and largest professional pension scheme. It is mandatory for Bavarian medical professionals, who have and exercise the right to practise in Bavaria, to be members of BÄV and to make minimum contributions. Members may also make voluntary contributions up to a prescribed cap.

11. BÄV is administered by BVK. BVK is the central administrative body for occupational pension schemes established in Bavaria. BVK is part of the department of the Bavarian Ministry of the Interior and for Integration and has no separate legal personality. BVK is the largest public pension group in Germany. BVK is subject to the law governing the structured system of retirement schemes under public law, the *Gesetz über das öffentliche Versorgungswesen* and an implementing regulation, the *Verordnung zur Durchführung des Gesetzes über das öffentliche Versorgungswesen.*

12. BTI is an open-ended real estate investment fund established in Germany. The sole investor in BTI is BÄV. BÄV invested in BTI by purchasing units through the Masterfund, a fund established by BÄV for the purpose of pooling its real estate investments. BÄV is the sole investor in the Masterfund.

13. As a matter of German law, neither BTI nor the Masterfund have legal personality and cannot hold assets or contract in their own name. These activities are undertaken on their behalf by management companies. The assets of BTI were nominally held by PPI. The assets of the Masterfund, ie the units in BTI, were nominally held by Universal-Investment-Gesellschaft mBH. As a matter of German law, the management companies hold the assets for the account of BÄV.

14. In September 2007, BÄV applied to HMRC to become, and was registered as, a qualifying recognised overseas pension scheme ('QROPS') within the meaning of section 169(2) of the FA 2004.

15. During the relevant period, the net asset value of BÄV's UK-situated investments was less than 1.5% of its total investments. BTI's fund included two investment properties in the UK, namely 11 Pilgrim Street, London and 141 Bothwell Street, Glasgow, which generated rental income. Accordingly, BTI operated a "UK property business" within section 264 of the Income Tax (Trading and Other Income) Act 2005 ('ITTOIA'), the profits of which were chargeable to income tax pursuant to sections 268 and 269(1) ITTOIA. HMRC permitted rent to be paid to BTI without deduction of tax at source, pursuant to paragraph 17 of the Taxation of Income from Land (Non-Residents) Regulations 1995.

16. Subject to the payment of management fees, BÄV was entitled to the rental income from BTI's investment properties. As "the person receiving or entitled to the profits" of BTI's UK property business, BÄV was the person liable for income tax charged on those profits under section 271 ITTOIA. In fact, BTI accounted for UK income tax on the profits of the UK property business. BTI accounted for tax of £241,173.80 for the year ending 5 April 2010 and £384,787.40 for the year ending 5 April 2011. Because BTI accounted for income tax, BÄV

did not account for income tax on the same profits even though it was liable for the tax as the person receiving or entitled to the profits. As the income tax paid by BTI reduced the amounts distributable to BÄV (through the Masterfund) by way of returns on the investments, the economic burden of the tax was borne by BÄV.

17. For German tax purposes, BÄV was treated as receiving the income from BTI's investment properties as it arose. Under German law, BÄV qualified for exemption from German corporate income tax by virtue of its status as a "professional pension scheme" and by satisfying the relevant requirements which were that membership of BÄV was compulsory for all Bavarian medical practitioners and that contributions were capped. There was no requirement under German law to register for exemption.

18. Under German law, BÄV was required to submit its constitutional documents to the German tax authorities on request (in practice, made every three years) in order to check that the conditions for exemption are met. In addition, BÄV was subject to reporting requirements with the Bavarian Ministry of the Interior and for Integration which require BÄV to submit information annually including financial statements, an auditor's report, a report and other information including annual pension amounts, amounts denominated in foreign currencies and loans.

**Legislative Framework**

19. The key legislative provisions are as follows.

*Taxation of property income*

20. Section 268 of ITTOIA provides as follows:

> "Income tax is charged on the profits of a property business."

21. Article 6 of the United Kingdom/Federal Republic of Germany Double Taxation Convention provides that, where a resident of the UK or Germany derives income from property in the other country, that income may be taxed in the country where the property is located.

22. Section 269 ITTOIA is headed "Territorial scope of charge to tax" and provides relevantly as follows:

> "(1) Profits of a UK property business are chargeable to tax under this Chapter whether the business is carried on by a UK resident or a non-UK resident."

*Taxation of pension schemes*

23. Part 4 of the FA 2004 contains the statutory code for the taxation of pension schemes. The relevant provisions of Part 4 as they were at the relevant time are as follows.

24. Section 186 provides relevantly 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 …"

The effect of section 186 FA 2004 is to exempt from income tax any income derived from property held as an investment by a registered pension scheme.

25. Section 153 FA 2004 makes provision for the registration of pension schemes as follows:

> “(1) An application may be made to the Inland Revenue for a pension scheme to be registered.
>
> (2) The application –
>
> > (a) must contain any information which is reasonably required by the Inland Revenue in any form specified by the Board of Inland Revenue, and
> >
> > (b) must be accompanied by a declaration that the application is made by the scheme administrator … and any other declarations by the scheme administrator which are reasonably required by the Inland Revenue.
>
> (3) The declarations which the Inland Revenue may require to accompany an application for the registration of a pension scheme include, in particular, a declaration that the instruments or agreements by which it is constituted do not entitle any person to unauthorised payments …
>
> (4) On receipt of an application for a pension scheme to be registered the Inland Revenue must decide whether or not to register the pension scheme.
>
> (5) The Inland Revenue's decision must be to register the pension scheme unless it appears that –
>
> > (a) any information contained in the application is incorrect, or
> >
> > (b) any declaration accompanying it is false.
>
> …
>
> (9) Schedule 36 contains (in Part 1) provisions treating certain pension schemes in existence immediately before 6th April 2006 as registered pension schemes (and related provisions).”

26. Section 154 FA 2004 sets out which pension schemes may be registered. It provides, in so far as relevant, 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.
>
> …”

27. It was common ground that BÄV was not an occupational pension scheme within section 154(1)(a) because it was not established by an employer or employers for the benefit of employees as required by the definition in section 150(5). The parties also agreed that BÄV was not a pension scheme within section 154(1)(b) because it was not established by a person with permission under the Financial Services and Markets Act 2000 to establish a pension scheme in the UK.

28. Accordingly, BÄV was only able to register if it was a public service pension scheme for the purposes of section 154(2). The term “public service pension scheme” is defined in section 150(3) FA 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."

29. It was common ground that BÄV was not approved by a relevant governmental or Parliamentary person or body (which are defined in section 150(4) FA 2004 as UK persons and bodies) and it was not specified in any Treasury order. The parties agreed that BÄV could only be a public service pension scheme if it was "established by or under any enactment" as described in section 150(3)(a).

30. Schedule 36 to the FA 2004 contained transitional provisions and savings. Paragraph 1 of Schedule 36 relevantly provided for the deemed registration of pension schemes as follows:

> "(1) Any pension scheme which, immediately before 6th April 2006, is –
>
> …
>
> (c) a relevant statutory scheme, as defined in section 611A of ICTA …
>
> is to be treated as becoming a registered pension scheme on that date."

31. Section 611A of the Income and Corporation Taxes Act 1988 ('ICTA') provided:

> "(1) In this Chapter any reference to a relevant statutory scheme is to -
>
> (a) a statutory scheme established before 14th March 1989 … "

32. Section 612 ICTA defined "statutory scheme" as "a retirement benefits scheme established by or under any enactment".

*Free movement of capital*

33. Article 63 of the Treaty on the Functioning of the European Union ('TFEU'), formerly Article 56 of the EC Treaty which was in identical terms, provides as follows:

> "1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
>
> 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and third countries shall be prohibited."

34. It was common ground that Article 63 TFEU applies to investments in real estate situated in the UK by non-residents.

## Summary of issues

35. BTI's primary case was that the requirement for BÄV to register with HMRC in order to obtain an exemption from income tax under section 186 FA 2004 was an unjustified restriction on the movement of capital prohibited by Article 63 TFEU and thus unlawful. BTI contended that the requirement to register operated more harshly in the case of a non-resident pension scheme because it was harder for a non-resident pension scheme to meet the criteria for eligibility to register and the consequences of registration were more onerous. In relation to the latter point, BTI submitted that a non-resident pension scheme would be exposed to tax

charges and reporting obligations across the entirety of the scheme and not just in respect of relevant UK individuals or UK-situated assets which might have benefited from UK tax relief.

36. As a secondary argument, BTI contended that BÄV was not eligible to apply to be registered under section 153 FA 2004 because it was not a "public service pension scheme" for the purposes of section 154(2). Whether BÄV was a "public service pension scheme" for the purposes of section 154(2) turned on whether the words "any enactment" in section 150(3)(a) extend to legislation of the Bayerische Landtag or, as BTI submitted, are restricted to an Act of the UK Parliament. A subsidiary argument was that, if BÄV was established by or under any enactment then it was deemed to have been registered from 6 April 2006.

37. HMRC submitted that the issues in dispute were entirely hypothetical and unarguable because BÄV had never applied to register. HMRC further contended that, in any event, the requirement to register in order to obtain tax relief was not a restriction for the purpose of Article 63 TFEU. Even if the registration requirement did amount to a restriction for the purpose of Article 63, HMRC submitted that it was justified. In relation to BTI's secondary argument, HMRC contended that BÄV is a public service pension scheme and able to apply to be registered under section 153 FA 2004 because it was established by or under any enactment, namely an act of the Bayerische Landtag. Notwithstanding their view that "any enactment" in section 150(3)(a) should be construed as applying to legislation of the Bayerische Landtag, HMRC contended that those words in section 611A ICTA referred to UK legislation only.

38. I can deal with HMRC's first point quite quickly. I do not accept that the issues in the appeal can be described as hypothetical and unarguable simply because neither BTI nor BÄV had ever applied to be registered and HMRC had never sought to impose any burden on them. It seems to me that HMRC's submissions miss the point that this is an appeal against closure notices issued by HMRC in which they refused BTI's claim for repayment of income tax of £625,961.20. There is nothing hypothetical about the claim or the closure notices. BTI has a statutory right of appeal against the closure notices and the Tribunal has jurisdiction to determine the appeal.

39. I consider that the logical way to approach this appeal is by deciding whether BÄV was eligible to apply to be registered before considering whether the requirement to register was a restriction on the movement of capital contrary to Article 63 TFEU. If BÄV could not register then the question of whether the requirement to register breaches EU law does not arise. Accordingly, I deal with the issues in the appeal as follows:

(1) Was BÄV a "public service pension scheme"?

(a) What does "any enactment" in section 150(3)(a) FA 2004 mean?

(b) If "any enactment" does not include an act of the Bayerische Landtag, should section 150(3)(a) FA 2004 be construed to allow BÄV, as a non-resident pension scheme based in the EU, to register?

(2) If "any enactment" includes an act of the Bayerische Landtag, was BÄV deemed to be a registered pension scheme under section 153(9) and Schedule 36 FA 2004?

(3) If BÄV was able to register for the purposes of section 186 FA 2004, is registration a restriction on the movement of capital contrary to Article 63 TFEU?

(4) If registration is a restriction, is it justified and proportionate?

(5) If the restriction is not justified and proportionate then what is the appropriate remedy?

40. There is one possible further issue. Both parties submitted that the EU law, as they interpreted it, relevant to these issues is acte clair and there was no need to refer any questions to the CJEU. The parties' submissions on this point were somewhat undermined by the fact that each party took opposing views of the same EU law and contended that if I preferred the view of the other party then the issue must be referred to the CJEU. Of course, as is well known, I may only refer a question to the CJEU if I cannot resolve the issue with complete confidence (se *R v International Stock Exchange ex parte Else (1982) Ltd* [1993] QB 534 at 545) and it is necessary to resolve it in order to decide the appeal (see Article 267 of the TFEU).

**Was BÄV a "public service pension scheme"?**

*What does "any enactment" in section 150(3)(a) FA 2004 mean?*

41. In summary, BTI contended that "any enactment" in section 150(3)(a) FA 2004 means an Act of the UK Parliament and not an enactment of the legislative body of any other country. BÄV was established under legislation of the Bayerische Landtag and, accordingly, it was not eligible to register under section 153 FA 2004.

42. HMRC's case was that the words "any enactment" mean any enactment by any body or person authorised to legislate, whether at a national, regional or municipal level anywhere in the world. Therefore, having been established by legislation passed by the Bayerische Landtag, BÄV was a public service pension scheme within section 150(3)(a) FA 2004.

43. At the relevant time, Schedule 1 to the Interpretation Act 1978 provided that:

> "'Act' means an Act of Parliament.
>
> …
>
> 'Enactment' does not include an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament."

44. The definition of "enactment" was subsequently amended by paragraph 22(c) of Schedule 8 to the European Union (Withdrawal) Act 2018 to provide that it "includes any retained direct EU legislation". Ms Shaw submitted that the amendment implied that Parliament considered that, without it, the definition of enactment would not include legislation of the EU Parliament. She contended that the express inclusion of certain EU legislation showed that "enactment" did not include legislation made by foreign legislative bodies more generally. Ms Shaw explained that Acts of the Scottish Parliament were specifically carved out to exclude devolved matters. She submitted that it would be strange if the UK Parliament had decided to exclude Acts of the Scottish Parliament from the definition of "enactment" while including the legislative acts of every other country.

45. Ms Shaw also referred to Stroud's Judicial Dictionary of Words and Phrases which states that "enactment" means more than "Act". It also states that:

> "Statutes using the word often define its breadth so as to include some or all of the following: subordinate legislation, local legislation, private legislation, Orders in Council …, schemes confirmed by Parliament, and, recently, enactments of the Scottish Parliament and the Northern Ireland Assembly (the Welsh Assembly is generally exercising specific subordinate powers when it makes law)."

46. Ms Shaw also submitted that in the context of section 150(3)(a) FA 2004, it is unlikely that the UK Parliament intended to include any pension scheme established under any legislation of any foreign legislature when the whole thrust of the concept of public service pension schemes is that they are schemes established by the Government. That was made clear in the explanatory notes to clause 140 of the Finance Bill 2004, which became section 150 FA 2004. Paragraph 4 of the note explained:

> "Subsection (3) defines the term "public service pension scheme", and subsection (4) defines "a relevant governmental or Parliamentary person or body" by whom such a scheme may be approved. These schemes are established by Government, generally for categories of public sector employees."

47. Paragraph 8 of the explanatory note to clause 140 refers to three specific types of pension scheme as separately defined. One such type of scheme is public service pension schemes which are described as "schemes established by, or under, an enactment, or approved by relevant governmental or Parliamentary person or body or specified in an order made by the Treasury". The note then states that "[a]n example of a public service pension scheme would be the Police Pension Scheme".

48. The explanatory note for clause 144 of the Bill, which became section 154 FA 2004, states that:

> "Registered pension schemes may be established by employers and persons subject to specific financial regulation. There is provision to amend the range of persons by Treasury Order, and there is an exemption for public service schemes established by Government"

49. That note goes on to explain the reason for restricting who can establish pension schemes in paragraph 8 as follows:

> "Pension schemes have custody of very large sums of tax-relieved funds, on which many people are dependent for their income in retirement, and so it is right that there should be restrictions on who can establish schemes. However, it is recognised that there may be other categories of body who at some future time the Government may wish to entrust with the establishment of schemes. For this reason, the Treasury has a power to amend this section in order to enable other persons or bodies to establish schemes."

50. Ms Shaw said that it was clear from the explanatory notes that the purpose of the legislation was to enable the Government to retain control over who could establish registered pension schemes. She submitted that, in that context, it made no sense to define "public service pension scheme" so widely as to encompass a scheme established under any enactment by any legislative body anywhere in the world. That would mean that the Government had no effective control at all.

51. Ms Shaw also relied on the definition of "public service pension scheme" in section 1(1) of the Pension Schemes Act 1993 and section 1 of the Public Service Pensions Act 2013 while acknowledging that these are different statutes and not directly concerned with registration or tax.

52. HMRC's case was that "any enactment" in section 150(3)(a) FA 2004 includes legislation of countries other than the UK. Accordingly, a pension scheme established pursuant to foreign legislation was a public service pension scheme eligible to apply to be registered under section 153 FA 2004. Mr Mehta submitted that there was nothing in the words of section

150(3)(a) FA 2004 that expressly limited the meaning of "any enactment" to a UK enactment. He contended that the use of the word "any" in the provision suggested that it was intended to have a broad rather than a narrow construction. Mr Mehta accepted that section 150(3)(b) and (c) FA 2004 were, on their terms, solely focused on the UK. He submitted that the fact that the other subsections are specifically linked to the UK does not mean that section 150(3)(a) should have a UK connection. He contended that, rather than suggesting that section 150(3)(a) should be read in the same way, the absence of an express UK focus supported HMRC's case. Parliament could have chosen to make the link with the UK clear as it did in subsections (b) and (c) but it chose not to do so in subsection (a) which he maintained showed that it applied more widely. Mr Mehta contended that Parliament had deliberately left section 150(3)(a) open-ended. He submitted that, properly construed and taking account of the purpose of FA 2004 and its context, "any enactment" is wide enough and was in fact intended to cover foreign enactments.

53. Mr Mehta also relied on the terms of section 154(1) as originally enacted. It contemplated that a pension scheme that was not an occupational pension scheme could be established by someone resident in the EEA. Mr Mehta submitted that this provision informed the meaning of the word "enactment" in section 150(3)(a) as applying to legislation or other provisions made by bodies outside the United Kingdom. Mr Mehta contended that there was no obvious reason why section 150(3)(a) should be viewed narrowly or why Parliament would not wish to recognise the public interest in allowing foreign established pension schemes such as BÄV to be registered.

54. It is clear that "enactment" can mean different things (see Stroud above and Bennion, seventh edition, section 19.2). Bennion says that "enactment" is "commonly used to refer to an Act or part of an Act, and may cover delegated legislation." In Bennion, "Act" is used in the same sense as in Schedule 1 to the Interpretation Act 1978 and means an Act of the United Kingdom Parliament (see Bennion, seventh edition, section 2.1). However, Bennion observes that, in some contexts, "enactment" has been given a broader meaning to cover other kinds of instrument. As an example, the authors cite *R v Sissen* [2001] 1 WLR 902 in which EU Council Regulations were held to be enactments for the purposes of section 170(2) of the Customs and Excise Management Act 1979. That was, however, in circumstances where the directly applicable Regulations were given legal effect "without further enactment" by another enactment, namely the European Communities Act 1972. The facts of this case are very different from those of *Sissen* and I do not consider that it is any guide to the meaning of "any enactment" in section 150(3)(a) FA 2004.

55. It was common ground that the meaning of "any enactment" in section 150(3)(a) must be determined by reference to its context. I consider that the proper context is the surrounding provisions that also define what schemes qualify as a "public service pension scheme". There was no dispute that section 150(3)(b) and (c) describe schemes that are closely linked to the UK because, as Mr Mehta accepted, the governmental or Parliamentary person or body and the Treasury referred to in those subsections are all UK persons or bodies. I do not accept Mr Mehta's submission that the fact that section 150(3)(b) and (c) clearly refer to UK persons and bodies means that "any enactment" in section 150(a) must be read as including non-UK legislation. It seems to me to be more logical to assume that all the subsections were meant to be read together and that leads to the conclusion that section 150(3)(a) also requires a close link to the UK, namely that the enactment was made by a UK person or body. My view is reinforced by the fact that that construction is consistent with the general rule that "enactment" refers to an Act of the UK Parliament. Although that presumption can be rebutted, I cannot

see anything in section 150 or Chapter 2 of Part 4 of  A 2004 that supports a different interpretation of "enactment". Such a construction is also supported by the terms of the explanatory notes referred to by Ms Shaw. For those reasons, I have concluded that, applying the ordinary rules of construction, "any enactment" in section 150(3)(a) refers to an Act of the UK Parliament and does not include legislation passed by the Bayerische Landtag. Accordingly, BÄV was not a "public service pension scheme" for the purposes of section 154(2) and was thus not eligible to be registered under section 153.

*Should section 150(3)(a) FA 2004 be construed to allow BÄV to register?*

56. Mr Mehta accepted that if "any enactment" in section 150(3)(a) FA 2004 did not include foreign legislation and public service pension funds established in other Member States were thus unable to register, the legislation would be discriminatory and in breach of EU law on the free movement of capital. He submitted that, in those circumstances, 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. Mr Mehta 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.

57. Both parties agreed that the Court of Appeal's decision in *Vodafone 2 v HMRC* [2009] EWCA Civ 446 at [37] - [38] provided authoritative guidance on how courts and tribunals should apply the principle of consistent interpretation:

> "[37] … 'In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> (a) It is not constrained by conventional rules of construction (see *Pickstone* [1988] 2 All ER 803 at 817, [1989] AC 66 at 126 per Lord Oliver);
>
> (b) It does not require ambiguity in the legislative language (*Pickstone* [1988] 2 All ER 803 at 817, [1989] AC 66 at 126 per Lord Oliver; *Ghaidan* [2004] 3 All ER 411 at [32], [2004] 2 AC 557 at [32] per Lord Nicholls);
>
> (c) It is not an exercise in semantics or linguistics (see *Ghaidan* [2004] 3 All ER 411 at [31] and [35], [2004] 2 AC 557 at [31] and [35] per Lord Nicholls; per Lord Steyn at [48]–[49]; and Lord Rodger at [110]–[115]);
>
> (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (*Litster* [1989] 1 All ER 1134 at 1138, [1990] 1 AC 546 at 577 per Lord Oliver; *Ghaidan* [2004] 3 All ER 411 at [31], [2004] 2 AC 557 at [31] per Lord Nicholls);
>
> (e) It permits the implication of words necessary to comply with Community law obligations (see *Pickstone* [1988] 2 All ER 803 at 814–815, [1989] AC 66 at 120–121 per Lord Templeman; *Litster* [1990] 1 AC 546 at 577, [1989] 1 All ER 1134 at 1138 per Lord Oliver); and
>
> (f) The precise form of the words to be implied does not matter (*Pickstone* [1988] 2 All ER 803 at 807, [1989] AC 66 at 112 per Lord Keith; *Ghaidan* [2004] 3 All ER 411 at [122], [2004] 2 AC 557 at [122] per Lord Rodger; and *IDT Card Services Ireland Ltd* [2006] STC 1252 at [114] per Arden LJ).'

> [38] … 'The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
>
> > (a) The meaning should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed.' (*Ghaidan* [2004] 3 All ER 411 at [33], [2004] 2 AC 557 at [33] per Lord Nicholls; Dyson LJ in *EB Central Services* [2008] STC 2209 at [81]). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (See *Ghaidan* at [33] and [110]–[113] per Lord Nicholls and Lord Rodger respectively; Arden LJ in *IDT Card Services* at [82] and [113]) and
> >
> > (b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at [33]; Lord Rodger at [115]; Arden LJ in *IDT Card Services* at [113].)'"

58. Ms Shaw made three points in response. The first was that the appeal concerned whether or not BTI was entitled to relief from liability to tax on rental income under section 186 FA 2004. It was not an appeal against a refusal to register BÄV. If any section needed to be interpreted compatibly with EU law it was section 186 which, BTI contended, imposed an unlawful restriction on the free movement of capital when it made registration a condition of the relief. She contended that applying a conforming interpretation to sections 150 and 154 was no answer to BTI's claim for repayment of overpaid tax because registration cannot operate retrospectively.

59. Ms Shaw's second point was that the conforming interpretation proposed by HMRC did not 'go with the grain' of the legislation. She submitted that the grain of the legislation is to prescribe closely the pension schemes that are permitted to register and limit them to employer-established schemes, schemes approved under the Financial Services and Markets Act 2000 and schemes established under UK Acts of Parliament. Allowing pension schemes established under any foreign enactment would not be consistent with the grain of the legislation.

60. In reply, Ms Shaw submitted that it was not open to HMRC to blame BÄV for failing to register when, on the face of the legislation, it was ineligible to do so. She argued that the lawfulness of the requirement to register must first be assessed by reference to the actual terms of the legislation. It could not be right to apply a consistent interpretation to the statutory provisions before assessing whether they were contrary to EU law because if that were the correct approach then the answer in almost every case would be that there was no breach of EU law because the provisions in issue had to be read compatibly with EU law.

61. 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 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, interpreting "any enactment" in section 150(3)(a) FA 2004 to mean any enactment made by any legislature anywhere in the world would go too far and cross the boundary between interpretation and amendment.

62. For completeness, I should say that I am not persuaded by Ms Shaw's first and third points. As she rightly states, this is not an appeal against a refusal to register BTI or BÄV. However, the interpretation of section 150(3)(a) FA 2004 is an important and potentially determinative point in the appeal. I can see no reason why the principle of consistent interpretation should not apply to a necessary, if subsidiary, argument in those circumstances. I also consider that the purpose of the principle of consistent interpretation is to ensure that, as far as is possible, national legislation is interpreted and applied in conformity with a Member State's obligations under EU law. In this case, my view is that it is not possible to interpret section 150(3)(a) FA 2004 in the way contended for by HMRC.

*Conclusion on whether BÄV was a public service pension scheme*

63. In conclusion, I consider that BÄV did not qualify as a public service pension scheme for the purposes of section 154(2) FA 2004 because it was established by an enactment of a foreign legislative body, namely the Bayerische Landtag, and "any enactment" in section 150(3)(a) means an Act of the UK Parliament. The only pension schemes established outside the UK that are eligible to be registered are occupational pension schemes as defined in section 154(1)(a), ie employer-established pension schemes. All other categories of qualifying pension scheme must be connected with the UK because their eligibility to register depends on the scheme having been established or approved by a UK Act, order, body or person. Accordingly, BÄV was not eligible to apply to be registered under section 153 FA 2004.

64. HMRC accepted that if "any enactment" in section 150(3)(a) FA 2004 did not include foreign legislation and public service pension funds established in other Member States were thus unable to register, the legislation would be overtly discriminatory and in breach of the prohibition of restrictions on the movement of capital in Article 63 TFEU. Accordingly, BTI's appeal must be allowed on the ground that BÄV was not eligible to register under section 153 FA 2004 because "any enactment" in section 150(3)(a) is restricted to an Act of the UK Parliament.

**Was BAV deemed to be a registered pension scheme from 1 April 2006?**

65. Although it was not BTI's primary case, a point that was only really developed by Ms Shaw in submissions during the hearing was that, if HMRC were right, BÄV was deemed to be registered by section 153(9) of and Schedule 36 to FA 2004. Paragraph 1(c) of Schedule 36 to FA 2004 treats a relevant statutory scheme, as defined in section 611A ICTA, that was in existence immediately before 6 April 2006 as becoming a registered pension scheme on that date. Section 611A ICTA defines "relevant statutory scheme" to include a statutory scheme established before 14 March 1989. Section 612 defines "statutory scheme" as "a retirement benefits scheme established by or under any enactment".

66. Ms Shaw submitted that BÄV, which was founded in 1923 pursuant to legislation of the Bayerische Landtag, was a relevant statutory scheme that was in existence immediately before 6 April 2006 and thus was a registered pension scheme from that date. Ms Shaw said that if, as HMRC contended, "any enactment" in section 150(3)(a) FA 2004 means any enactment of any legislature anywhere in the world, then it must follow that BÄV was and remains a registered pension scheme. Accordingly, the rental income collected by BTI and accruing to BÄV was exempt from tax under section 186 and BTI's appeal must be allowed.

67. HMRC's case was that the same words used in different Acts do not automatically have the same meaning and it is necessary to examine them in their context. Mr Mehta did not

contest that ordinarily one assumes that the same words have the same meaning. He accepted that was well-established and not controversial. His contention was that the presumption that the same phrase has the same meaning in different Acts, or even in the same Act, may be rebutted. Mr Mehta submitted that "any enactment" in section 612 ICTA does not have the same meaning as the same words when they appear in section 150(3)(a) FA 2004, primarily because they are in different Acts and therefore the context of those words is entirely different. Mr Mehta took me to various sections of ICTA which he contended showed that the historic position under ICTA, including sections 611A and 612, was focused on UK-based schemes. He stated that this changed following the coming into force of the Maastricht Treaty in 1994 which introduced the free movement of capital provisions which did not apply at the time of ICTA.

68. Ms Shaw, in reply, said that no convincing explanation had been given as to why "any enactment" in FA 2004 should bear a different meaning to "any enactment" in ICTA. She submitted that the two Acts were linked as is clear from paragraph 1(1)(c) of Schedule 36 FA 2004 which expressly cross-refers to section 611A ICTA.

69. I am not persuaded that "any enactment" in section 612 ICTA and section 150(3)(a) FA 2004 mean different things. It is well-established that the text of a statute must be interpreted in context and that can lead to the conclusion that identical words in different provisions have different meanings. In this case, however, the context of the two provisions, section 612 ICTA and section 150(3)(a) FA 2004, is the same. Both provisions are concerned with pension (or retirement benefits) schemes. In that context, if Parliament intended that the same words or phrases were to be given different meanings, one restrictive and one general, then I would expect that to be made clear by express words. There are no such words in this case and I consider that the obvious inference to be drawn is that Parliament intended the same words to have the same meaning in both provisions.

70. I do not accept Mr Mehta's submission that the Maastricht Treaty justifies construing "any enactment" in the two provisions differently. The Treaty was not concerned with pensions schemes and, in fact, all restrictions on capital movements between persons (natural or legal) resident in Member States were removed by Council Directive 88/361/EEC which had to be implemented by Member States on 1 July 1990. In any event, the clear implication of HMRC's argument is that, until the relevant provisions of FA 2004 came into force on A-Day (5 April 2006), the UK was in breach of its obligations under the Maastricht Treaty. I consider that it is preferable, where possible, to construe section 612 ICTA (and thus the UK) as compliant with EU law.

71. I take the view that "any enactment" in section 612 ICTA and section 150(3)(a) FA 2004 mean the same thing. If, as I have found, "any enactment" in section 150(3)(a) is restricted to an Act of Parliament or similar UK legislation then the deeming provision in paragraph 1(1)(c) of Schedule 36 FA 2004 does not apply (however, BTI's appeal must be allowed for reasons given above). If I am wrong in that view and "any enactment" in section 150(3)(a) includes legislation of the Bayerische Landtag, then BÄV was and remains a registered pension scheme by virtue of the deeming provision and BTI's appeal must be allowed.

**Is registration a restriction on the movement of capital contrary to Article 63 TFEU?**

72. The question of whether registration is a restriction on the movement of capital contrary to Article 63 TFEU does not need to be resolved because I have already held that BTI's appeal

must be allowed no matter which meaning of "any enactment" in section 150(3)(a) FA 2004 is correct. However, because I heard argument on the point and in case this decision is appealed, I consider the remaining issues briefly.

73. There was no dispute that the acquisition of investment property (and the right to income deriving from it) in the UK by BÄV, via Masterfund and BTI, was a movement of capital within the scope of Article 63 TFEU. The parties also agreed on the law in relation to restrictions on capital which, as relevant to this appeal, may be summarised as follows. A restriction on the movement of capital is "any legislative measure which tends to dissuade or hinder investors resident in the Member State in question from investing their capital … in another Member State" - see *Coal Staff Superannuation Scheme Trustees Ltd v HMRC* [2018] UKUT 152 (TCC), [2018] 3 CMLR 35 ("*Coal Staff*") at [50] per Morgan J and Judge Berner. The Advocate General in Case C-319/02 *Proceedings brought by Manninen* [2005] Ch 236 ("*Manninen*") put it slightly differently when she said at [28] of her opinion "… a restriction is something which makes a cross-border movement of capital more difficult or less attractive, or is liable to deter or dissuade cross-border investments."

74. The Upper Tribunal in *Coal Staff* also held, at [51] that:

> "It is not necessary to establish that the relevant national provision has actually had the effect of leading persons or companies resident in the Member State in question to refrain from acquiring or holding the investments … It is sufficient that the provision be capable of restricting the exercise of the relevant freedom."

75. The threshold for establishing that a restriction exists is not high. The CJEU in Case C-9/02 *de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances de l'Industrie* [2004] ECR I-2409 at [43] held that a restriction is prohibited "even if [it is] of limited scope or minor importance".

76. It is well-established that both overt and covert discrimination on grounds of nationality (or residence) is prohibited (see Case C-250/95 *Futura Participations SA v Administrations des Contributions* [1997] ECR I-2471 ("*Futura*") at [19]). Assuming that BÄV was eligible to be registered under section 153 FA 2004, the discrimination alleged in this appeal would be covert against non-resident pension schemes because the requirements for registration are more difficult to comply with and the consequences of registration more onerous for a non-resident pension scheme, compared to UK-resident pension schemes. HMRC accepted that national measures that are covertly discriminatory may, in some circumstances, amount to an unjustified restriction of the free movement of capital.

77. The principal area of dispute was whether the consequences of registration would be more onerous for BÄV as a pension scheme established outside the UK than they were for a UK-resident pension scheme. In summary, BTI's overarching submission was that the consequences of registration for BÄV were significantly more onerous than the consequences for a UK-resident pension scheme. Thus, the requirement of registration as a condition of obtaining relief from tax under section 186 FA 2004 created a relevant difference in treatment which, although predicated solely on the basis of registration, discriminated between resident and non-resident pension schemes. Ms Shaw referred to a number of matters as showing that the consequences of registration weighed more heavily on non-UK resident pension schemes than on resident ones.

78. Ms Shaw explained that, under section 153(2)(b) and (3) FA 2004, HMRC may require the scheme administrator of a pension scheme that applies to be registered to make a declaration that the instruments or arrangements do not entitle any person to unauthorised payments as a condition of registration. Ms Shaw submitted that the requirement to make a declaration that no member of the scheme is entitled to unauthorised payments is not limited to relevant UK individuals who are members of the scheme. She contended that a scheme must make such a declaration in relation to all its members, including the ones who are not resident in the UK and had not benefited from any UK tax relief. This was more onerous for a non-resident pension scheme because it might have to make the declaration in relation to a great many (if not all) of its members in respect of whom it was irrelevant and in whom HMRC could have no interest because they were not UK resident. HMRC's position was that the declaration is only applicable to the extent that the members of the scheme are relevant UK individuals.

79. I cannot see why it is more onerous for a non-UK resident pension scheme to make that declaration than it is for a UK resident pension scheme. If Ms Shaw is right in saying that the declaration must be made in relation to all members, even those have never been relevant UK individuals and have never benefited from any UK tax relief, then that obligation would also apply to UK resident pension schemes that had members resident outside the UK who were not relevant UK individuals. If the required declaration only applies to the extent that members are relevant UK individuals then, again, both UK resident pension schemes and non-UK resident pension schemes would have to make declarations on the same basis. There is no discrimination on the basis of where the pension scheme was established or is resident. A non-UK resident pension scheme might well have more members who are not relevant UK individuals and who may be entitled to unauthorised payments without but that is just a feature of the scheme and its members; it does not, it seems to me, show that the obligation is relevantly more onerous for a non-UK resident pension scheme than for UK resident pension scheme even if HMRC decided, contrary to their stated position, that it applied to persons regardless of whether they were or were not relevant UK individuals.

80. Ms Shaw's main submission on this point was that the tax charges and reporting obligations that flow from registration were disproportionately onerous for a non-UK resident pension scheme.

81. There was no dispute (and, indeed, it formed part of Ms Goodall's evidence) that registered pension schemes, whether resident in the UK or elsewhere, were potentially subject to a variety of charges designed to prevent or discourage the over-funding of pension schemes and the making of unauthorised payments. These charges include the annual allowance charge and lifetime allowance charge which are designed to discourage the overfunding of pension schemes by imposing a charge when contributions to a scheme in any year or the value of a member's funds held in the scheme exceed certain limits prescribed in the legislation. There are also three charges, referred to generally as scheme chargeable payments, that arise where unauthorised payments and other transactions (eg excessive borrowing) occur. Specifically, the charges are the unauthorised payment charge, the unauthorised payment surcharge and the scheme sanction charge. If a scheme becomes liable to all three charges, the combined charge can be as high as 70% of the unauthorised payment. Ms Shaw submitted that, once registered, a pension scheme remains subject to the charges for as long as the scheme remains registered even if, as might be the case for a non-resident pension scheme, the scheme has divested itself of any UK-situated assets.

82. There is also a deregistration charge which arises when a registered pension scheme ceases to be registered. Only HMRC can deregister a pension scheme and section 157 FA 2004 provides, in effect, that HMRC can only do so for serious breaches of the rules. The deregistration charge is 40% of the aggregate of the sums held for the purposes of the pension scheme and the market value of any assets at that time. The person liable to pay the deregistration charge is the scheme administrator immediately before deregistration. Ms Shaw described the deregistration charge, fairly to my mind, as a penalty for serious breaches of the legislative requirements. Ms Shaw submitted that there was no territorial limit on the deregistration charge.

83. Ms Shaw submitted that the charges operated disproportionately in the case of non-resident pension schemes because the charges were not restricted to relevant UK individuals or to UK-situated assets but applied to individuals and to assets on which no UK tax relief had been enjoyed.

84. The reporting obligations for registered pension schemes are found in the Registered Pension Schemes (Provision of Information) Regulations 2006. Registered pension schemes are obliged to report unauthorised payments and other events. In addition, the scheme administrator of a registered scheme must file a scheme return, containing such information as HMRC require, annually. Compliance necessarily entails expenditure of time and cost. In relation to the reporting obligations, Ms Shaw submitted that the consequences of registration were plainly more onerous for a non-resident pension scheme compared to a UK-resident pension scheme because the consequences of registration apply across the scheme as a whole even where the non-resident pension scheme has only a limited nexus with the UK. For example, the reporting obligation would still apply notwithstanding the fact that only a small part, if any, of the contributions made to the scheme and the scheme assets would have benefited from UK tax relief. Ms Shaw contended that, in the case of a non-resident pension scheme, the reporting requirements were disproportionate because it must report any unauthorised payments to any member and provide its returns and accounts, with such other information as may be required, for the whole scheme even though, unlike a UK-resident scheme, it would have fewer, if any, relevant UK members and only limited UK assets.

85. In essence, BÄV's case was that the consequences of registration are more onerous for a pension scheme established outside the UK than they were for a UK-resident pension scheme because the tax charges and reporting obligations apply across the whole of the pension scheme without any territorial restriction limiting them to members or assets which had benefited from relief from UK tax. Ms Shaw submitted that the legislation applies to any registered pension scheme and is not territorially limited in its application. The obligations are expressed generally and apply to any registered pension scheme regardless of where it, its members or its assets are located. Ms Shaw said that the fact that the provisions applied extra territorially was shown by the provisions of Chapter 5A of Part 4 of FA 2004 which were introduced with effect from 9 March 2017 and introduced a territorial limitation on charges by providing that they only applied to UK relieved funds, ie funds which derived from assets that have benefited from relief from UK tax.

86. HMRC's response was that the legislation in relation to registered pension schemes was entirely neutral and treated all pension schemes equally irrespective of their residence. Specifically, in relation to the deregistration charge, Mr Mehta submitted that it would not be applied to non-resident registered pension schemes except to the extent that they have UK-

relevant individuals as members or hold UK assets. He further contended that, in any case, the deregistration charge was not a burden that dissuaded investment.

87. In relation to the reporting requirements, Mr Mehta submitted that the obligation only arose where a specified reportable event occurred during the relevant year. If no such event occurred then there was no need to report anything. Further, HMRC did not accept that the reporting requirements applied extra-territorially. HMRC's case was that, although all registered pension schemes were subject to the same administrative and reporting requirements, those schemes that were not UK-resident were only required to comply with the requirements in respect of UK relevant individuals. That case was based on the principle of territorial application of legislation. Mr Mehta submitted that the purpose of the changes to the legislation in 2017 was to clarify the law not introduce a new territorial restriction. He also relied on the fact that this was consistent HMRC's practice, as stated by Ms Goodall, of applying the presumption that UK legislation does not apply outside the territory of the UK. Finally, he referred me to enquiries by the European Commission in 2006 and 2013 in relation to the requirement for pension schemes to register. In both cases, the correspondence showed that the Commission was satisfied that there was no infringement of EU law. Mr Mehta accepted that the Commission's position was not determinative but said that it supported HMRC's case that the registration requirement was not a restriction on the movement of capital.

*Conclusion on whether registration is restriction on movement of capital contrary to Article 63 TFEU*

88. It is clear that, on its plain words, the provisions of the FA 2004 apply to registered pensions schemes whether or not they have members who are relevant UK individuals or any UK-situated assets. HMRC did not suggest otherwise. I was not shown any authority that established that the tax charges and reporting obligations imposed by the FA 2004 were subject to any territorial restriction nor do I consider that one can be implied. I was referred to passages in *Clark v Oceanic Contractors Inc* [1983] STC 35 and *Agassi v Robinson* [2006] STC 1056 which only serve to underline the difficulty of determining when the principle of territoriality is applicable in the context of tax as well as the relatively limited scope of the principle. I can see no reason why the provisions in the FA 2004 should be taken to be limited in their application so as to exclude non-UK pension schemes that had registered from liability to the tax charges and having to comply with the reporting obligations.

89. At the very least, I consider that there is a high degree of uncertainty about the applicability and scope of the principle of territoriality in relation to non-resident pension schemes registered under section 153 FA 2004. As Ms Shaw submitted, I think that it is reasonably arguable that any non-resident pension scheme that chose to register would, by the fact of its registration, have established the necessary nexus to the UK and be subject to the consequences that flowed from registration under UK law.

90. It seemed to me that HMRC also considered that the applicability of the principle was uncertain because they stated in their guidance in the Registered Pension Scheme Manual (emphasis supplied):

> "… charges under Part 4 will *normally* only apply to overseas resident individuals if they were active members of the scheme while being a relevant UK individual. So, effectively, members of registered pension schemes will

> not *normally* be chargeable if they have never been UK resident and have never benefited from UK tax relief on contributions to the scheme"."

91. At the hearing, Mr Mehta submitted that "normally" was just intended to cater for a range of situations and it did not introduce a lack of clarity. I pointed out to Mr Mehta that the use of the word "normally" twice in the paragraph indicated that there were situations where a tax charge might arise but when it then failed to specify, or even indicate, what those situations might be, it showed a lack of clarity. Mr Mehta said that he took my point but that this was just guidance about the general rules.

92. I conclude that it is unclear, at the very least, whether a registered non-UK pension scheme would be obliged to pay the tax charges, in relevant circumstances, and comply with the reporting obligations in relation to all of its members and all of its assets or only those that had the relevant connection with the UK. By contrast, the position of a UK-resident registered pension scheme would be certain or, at least, more predictable, because the provisions of the FA 2004 would clearly be applicable to it. I consider that the lack of certainty would tend to dissuade or hinder non-UK pension schemes from investing in the UK and, accordingly, the provisions amounted to a restriction on the free movement of capital.

93. It does not necessarily follow from that conclusion that, even if they restrict the movement of capital, the provisions of the FA 2004 are in breach of Article 63 TFEU. A difference in the treatment of non-resident pension schemes and UK-resident pension schemes will nevertheless be compatible with Article 63 if the schemes are not objectively comparable or if the different treatment is justified by an overriding reason in the general interest (see Case C-386/04 *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften* [2006] ECR I-8203 ("*Stauffer*") at [32]).

*Was BÄV objectively comparable to a UK pension scheme?*

94. Ms Shaw submitted that the evidence of Ms Kempinger and Ms Goodall showed that BÄV was objectively comparable to a large UK pension scheme that would probably be registered. Essentially, Ms Kempinger's evidence showed that BÄV was a large scheme and Ms Goodall had stated that probably all large UK pension schemes were registered. Ms Shaw also submitted that BÄV was objectively comparable to a UK-registered pension scheme because it had the same objects and satisfied the same conditions as were imposed on UK-registered pension schemes. She made the point that, if HMRC were right and BÄV was eligible to register, then it must follow that it was objectively comparable with a registered pension scheme.

95. HMRC's response was that BÄV was objectively comparable to an unregistered UK resident pension scheme because BÄV chose not to register.

96. I consider that HMRC are correct on this point. It seems to me that if BÄV were eligible to register, which is not my view (see above) but is the basis on which I am considering this point, then it would have been in the same position as and objectively comparable to a UK resident pension scheme that was eligible to register but, for whatever reason, was not registered. The fact, which I accept, that UK resident pension schemes with the same or similar characteristics to BÄV would probably be registered is not relevant to the difference in issue here. It does not mean that BÄV, which was not registered and had never applied to be registered, could be regarded as objectively comparable to registered schemes. That would be to treat BÄV differently, and in a more favourable way, to unregistered UK-resident pension schemes. Accordingly and on the basis that BÄV was eligible to register, the difference in

treatment does not mean that the provisions of FA 2004 were contrary to Article 63 TFEU. Of course, if I am correct and BÄV was not eligible to register then it does not need to rely on this point because the UK legislation was discriminatory in not allowing BÄV to register.

*Was the difference in treatment justified?*

97. As stated above, a difference in the treatment of non-resident pension schemes and UK-resident pension schemes that restricts the free movement of capital will still be compatible with Article 63 TFEU if it is justified by an overriding reason in the public interest. Even if it would otherwise be justified, the restriction must go no further than is necessary to achieve that objective (see *Futura* at [26] and *Coal Staff* at [88]).

98. HMRC say that, if there is any restriction, it is justified by three overriding reasons in the public interest and is proportionate to those reasons. The three reasons said to justify the restriction are:

(1) the principle of territoriality;

(2) the effectiveness of fiscal supervision; and

(3) coherence of the tax system.

99. Both parties accepted that, in the field of direct taxation, the UK is free to tax or exempt from tax UK source rental income of pension schemes provided that the imposition of and relief from tax comply with EU law such as the prohibition on restrictions on the movement of capital.

100. Ms Shaw submitted that the UK's right to tax or exempt from tax could not justify the requirement to register if the registration discriminated against non-UK pension schemes. She contended that even if BÄV were eligible to register, the consequences of registration would be more onerous for non-UK schemes such as BÄV. As such, the UK's right to tax cannot justify a difference of treatment in the investment income arising to a UK registered pension scheme and a non-resident pension scheme like BÄV.

101. Mr Mehta submitted that the registration requirement was designed to ensure that pension schemes seeking tax exemption from liability to UK tax identified themselves. That was, he contended, a necessary and proportionate way to preserve the UK's ability to ensure that rental income of pension schemes within its jurisdiction was taxed or exempted from tax appropriately.

102. I agree with Mr Mehta on this point. There is nothing wrong with a registration requirement in itself. Ms Shaw was clear in her submissions that BÄV did not object to the process of registration but its consequences. In my view, the principle of territoriality can justify a system of registration as a condition of obtaining exemption from tax even where the result is that the movement of capital is restricted (subject to it being proportionate). That restriction may arise because, as I have found in [92], a pension scheme resident in another Member State is disadvantaged in some way not because it is treated differently but because the consequences of registration may be more onerous for the non-UK scheme by reason of the fact that the application of UK law to the scheme is uncertain. I consider that, as Mr Mehta submitted, the need for the UK to ensure that the non-resident pension scheme is taxed or relieved from taxation appropriately justifies a registration requirement even if the consequences in terms of compliance obligations are more onerous for pension schemes that

are resident in another Member State. Accordingly, the principle of territoriality provides a justification for the system of registration applying to pension schemes wherever they are established as a condition of obtaining exemption from tax of their UK investment income. This is subject to proportionality which I discuss below.

103. As I have found that the registration requirement can be justified by the principle of territoriality, I can deal briefly with the other reasons put forward as justifying registration.

104. The submissions in relation to effective fiscal supervision as a justification were very similar to the points made in relation to the principle of territoriality. HMRC's case was that a Member State can legitimately provide mechanisms that enable them to check that an entity complies with the rules of that Member State. Ms Shaw agreed that fiscal supervision is an overriding requirement of general interest capable of justifying a restriction on the exercise of fundamental freedoms (see *Futura* at [31]). Her contention was that the requirement to register went further than necessary to ensure effective fiscal supervision. I consider that point when I discuss proportionality below.

105. Ms Shaw accepted that coherence (or symmetry) of the tax system could justify a restriction on the granting exemption from tax only if there were a direct link between that exemption and a particular tax charge (see *Manninen* at [42] and *Coal Staff* at [120]). She submitted that there was no such link between the tax exemption for the investment income of a pension scheme and any tax charge. She said that investment income is exempt because it forms part of a suite of tax incentives for pension schemes used in a particular way. Mr Mehta submitted that registration was an inherent feature of the regime and it made no sense to suggest that one could have a tax exemption without the attendant administrative procedure and substantive requirements to check whether an entity complies with the underlying substantive requirements. Mr Mehta said that the registration regime had the necessary trade-offs between registration and tax exemption.

106. I agree with Ms Shaw on this point. Mr Mehta's submission really showed the need for registration to ensure effective fiscal supervision rather than promote the coherence of the tax system. It seems to me that, as Ms Shaw submits, investment income is not exempt because it has been or will be taxed elsewhere or otherwise correlates to a UK tax charge but to encourage savings in pension schemes by providing a tax incentive. It follows that registration to control the grant of the exemption from tax was not a measure to ensure or enhance the coherence of the tax system but to control the availability of the exemption. Accordingly, coherence of the tax system was not a justification for a registration requirement that resulted in restrictions on the movement of capital.

107. I have found that the application of the registration requirement to pension schemes established in other Member States is capable of being justified by the principle of territoriality and as much was conceded by Ms Shaw in relation to the need for effective fiscal supervision. In both cases, however, the requirement must not go beyond what is necessary to achieve that objective in relation to a non-resident pension scheme such as BÄV.

108. Ms Shaw submitted that, in the circumstances, the requirement to register went beyond what is necessary to achieve the objectives. She said that the relevant objectives were to ensure that any tax reliefs are only available to pension schemes which meet certain conditions, namely that pension schemes are not overfunded and not used to make unauthorised payments. Ms Shaw submitted that the evidence showed that, in practice, HMRC do not "normally"

enforce those objectives in the case of a non-resident pension scheme because any non-compliance charges and administrative requirements imposed by registration are limited to those members of such a scheme who are or were relevant UK individuals. Ms Shaw submitted that the registration requirement could not, therefore, be justified as necessary for fiscal supervision if the policy objectives are, in practice, inapplicable (or substantially inapplicable) in the case of a non-resident pension scheme like BÄV. Ms Shaw further submitted that HMRC could have introduced measures that were less restrictive of the free movement of capital than registration under the provisions of FA 2004, such as a separate reporting regime for non-resident pension schemes to ensure compliance with the objectives in respect of relevant UK individuals or a requirement to establish comparability with a UK pension scheme.

109. In response, Mr Mehta's submissions were essentially that the registration requirements did not go beyond what was necessary and the proposed alternatives were not any less onerous or restrictive than the existing regime.

110. In short, I agree with Mr Mehta on this issue. The actual registration process, which involves answering 19 questions, is not onerous. The consequences of registration undoubtedly impose a burden on the non-resident pension scheme, as I have already found, but I struggle to see how it could be otherwise without relinquishing effective supervision of such schemes. In conclusion, my view is that if the requirement to register results in a restriction of the movement of capital that affects non-resident pension schemes, it is justified and proportionate.

**Remedy**

111. In view of my conclusions on the appeals, no question of remedy arises and, although I received submissions on it, no useful purpose would be served by discussing the issue here.

**Reference to the CJEU**

112. As every lawyer knows, Article 267 TFEU provides, in relation to a question about the interpretation of EU law, that

> "Where such a question is raised before any … tribunal of a Member State, that ... tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."

113. I have decided that this appeal should be allowed based on my interpretation of the provisions of FA 2004. In reaching my conclusion, I have not found it necessary to reach a view on any issue of EU law about which I had any real doubt (see *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else (1982) Ltd* [1993] QB 534 at 545). Accordingly, a reference to the CJEU is neither necessary in order to decide this appeal nor permissible under Article 267 TFEU.

**Disposition**

114. For the reasons set out above, BTI's appeal is allowed.

**Costs**

115. This appeal was allocated as a Complex case under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules'). BTI has not made any written request, under rule 10(1)(c)(ii) of the FTT Rules, that the proceedings be excluded from potential liability for costs or expenses under rule 10(1)(c). Accordingly, the Tribunal has the

power under section 29 of the Tribunals Courts and Enforcement Act 2007 and rule 10(1)(c)(i) of the FTT Rules to make an order in respect of the costs of and incidental to the proceedings.

116. Any application for costs in relation to this appeal must be made within 28 days after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(3)(b) of the FTT Rules.

**Right to apply for permission to appeal**

117. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JUDGE GREG SINFIELD**
**CHAMBER PRESIDENT**

**RELEASE DATE: 22 FEBRUARY 2019**