[2018] UKFTT 0200 (TC)

TC06443

Appeal numbers: TC/2016/04412
TC/2016/04742
TC/2016/04783

INCOME TAX – Pension liberation arrangements – Whether discovery assessments valid – Whether liable to unauthorised payments charge and unauthorised payments surcharge – Whether just and reasonable in all the circumstances – Appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) BRENDAN McCORMACK
(2) MARTYN NOSWORTHY
(3) JAQUELINE HEATH **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 20 March 2018

Angela Brooks, of Pension Life, Granada, Spain, for the Appellants

Charles Bradley, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Brendan McCormack, Mr Martyn Nosworthy, Mrs Jacqueline Heath and others, after attending presentations extolling its virtues, transferred funds from their respective pension schemes, registered under s 153 of the Finance Act 2004, to another registered pension scheme, the Salmon Enterprise Pension Scheme ("SEPS"). These funds were then paid out of the SEPS account to the accounts of various companies under the control of the scheme promoters which then made payments, in what is accepted to be pension liberation arrangements, to those, including Mr McCormack, Mr Nosworthy and Mrs Heath who had transferred their pensions to the SEPS.

2. HM Revenue and Customs ("HMRC") assessed the payments to Mr McCormack, Mr Nosworthy and Mrs Heath and other individuals who had received them, under s 29 of the Taxes Management Act 1970 ("TMA"), to an "unauthorised payments charge" under s 208 of the Finance Act 2004 and (except for Mr Nosworthy) to an "unauthorised payments surcharge" under s 209 of the Finance Act 2004. Mr McCormack's and Mrs Heath's applications to HMRC, under s 268 of the Finance Act 2004, for the discharge of the unauthorised payments surcharges were refused. Therefore, they and Mr Nosworthy have appealed to the Tribunal against the unauthorised payments charge and, in the case of Mr McCormack and Mrs Heath the unauthorised payments surcharge. With the agreement of the parties their appeals are informal "lead cases" for the appeals of a number of other taxpayers who have been assessed to unauthorised payments charges and surcharges as a result of their participation in the SEPS arrangements and who are also represented by Ms Angela Brooks of Pension Life.

3. Although Mr McCormack did not attend the hearing and, despite attempts to do so, could not be contacted, I was satisfied that he had been notified of the hearing and that it was in the interests of justice to proceed in his absence in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, particularly as the other parties and their representatives, including Ms Brooks who had travelled from Spain, were present.

Law

4. Section 29 TMA, insofar as it applies in this case, provides:

> **Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable payments under section 209 of that Act … which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) …

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) ... in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

5. An assessment to income tax may, under s 34 TMA, be made at any time "not more than 4 years after the end of the year of assessment to which it relates." In this case all assessments were made within that four year time limit.

6. Under s 50(6) TMA:

If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is overcharged by a self-assessment;

(b) that any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

7. In *Burgess & Brimheath Developments Ltd v HMRC* [2016] STC 579 the Upper Tribunal (Judges Berner and Scott) held that it is for HMRC to establish the relevant conditions for the issue of a discovery assessment under ss 29 and 34 TMA have been met whether or not this has been raised as an issue by an appellant. However, if HMRC establish the validity of a discovery assessment s 50(6) TMA then applies, as it does for in-date assessments, and the assessment "shall stand good" with the burden resting on the taxpayer to establish that it is wrong (see eg *Johnson v Scott* (*Inspector of Taxes*) [1978] STC 48 at 53).

8. Unless otherwise stated, all subsequent statutory references are to the provisions of the Finance Act 2004.

9. Section 160 provides:

> **Payments by registered pension scheme**
>
> (1) The only payments which a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are those specified in section 164'.
>
> (2) In this part "unauthorised member payment" means:
>
> (a) a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is not authorised by section 164, and
>
> (b) anything which is to be treated as an unauthorised payment to or in respect of a person who is or has been a member of the pension scheme under this Part.

10. Insofar as it applies to this case, s 161 provides:

> **Meaning of "payment" etc**
>
> (1) this section applies for the interpretation of this Chapter
>
> (2) "Payment" includes a transfer of assets and any other transfer of money's worth.
>
> (3) Subsection (4) applies to a payment made or benefit provided under or in connection with an investment … acquired using sums or assets held for the purposes of a registered pension scheme.
>
> (4) The payment or benefit is to be treated as made or provided from sums or assets held for the purposes of the pension scheme …

11. As is clear from the decision of the Tribunal (Judge Poole and Mrs Wilkins CTA) in *Danvers v HMRC* [2016] UKFTT 3 (TC) at [58] a loan is a "payment" for the purposes of s 160.

12. It is common ground that the payments made in this case are not within the list contained in s 164(1) which sets out the "only payments" a registered pension scheme is authorised to make. Where an unauthorised payment has been made s 208 imposes a charge to income tax, "the unauthorised payments charge", on the person to whom the payment is made (see s 208(2)(a)).

13. A further charge to income tax, the "unauthorised payments surcharge", arises under s 209 on the person to whom an unauthorised surchargeable payment (which includes a surchargeable unauthorised member payment) is made. Section 210 provides that an unauthorised surchargeable member payment is surchargeable where it, together with other unauthorised payments made during the same 12 month period, comprise 25% or more of the value of the individual's pension fund.

14. Under s 268 a person who is liable to the unauthorised payments surcharge in respect of an unauthorised payment may apply to HMRC for a discharge of his or her liability on the ground that "in all the circumstances of the case, it would be not be just and reasonable for the person to be liable to the unauthorised payments surcharge in respect of the payment" (see s 268(3)). If HMRC refuse such an application there is a right of appeal to the Tribunal under s 269, the relevant parts of which provide:

> **Appeal against decision on discharge of liability**
>
> …
>
> (6) On an appeal under subsection (1)(a) that is notified to the tribunal, the tribunal must consider whether the applicant's liability to the lifetime allowance charge, unauthorised payments surcharge or scheme sanction charge ought to have been discharged.
>
> (7) If the tribunal considers that the applicant's liability ought not to have been discharged, the tribunal must dismiss the appeal.
>
> (8) If the tribunal considers that the applicant's liability ought to have been discharged, the tribunal must grant the application.'

15. Section 279(2) provides that:

> In this Part references to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the pension scheme.

16. These provisions were considered in some detail by the Tribunal (Judge Rupert Jones and Mr Farooq) in *O'Mara & another v HMRC* [2017] UKFTT 91 (TC) which observed that:

> "150. Section 269(6) of the Finance Act 2004 confers upon the Tribunal full appellate jurisdiction to determine whether the unauthorised payments surcharges ought to have been discharged. The ground for discharge is whether it would not be just and reasonable in all the circumstances for the appellants to be liable to the unauthorised payments surcharges in respect of their payments under section 268(3) of the Act.
>
> 151. The burden of proof is upon the appellants to bring evidence to satisfy the Tribunal that it would be not be just and reasonable in all the circumstances for them to be liable to the surcharges.
>
> 152. The statutory test will not benefit from unnecessary gloss. It requires the Tribunal to examine all the circumstances and decide whether it would be just and reasonable for the appellants to be liable to surcharges.

153. It does not require any finding of dishonesty or negligence on part of the appellants. It allows the Tribunal to examine all the circumstances surrounding the making and receipt of the unauthorised payments in each appellant's case. This in turn allows the Tribunal to examine an appellant's conduct or any other relevant mitigating circumstances pertaining to the payments or the appellant's circumstances. It also allows the Tribunal to take account of the statutory scheme and mischief the surcharge is designed to prevent.

154. The Tribunal is of the view that it would be wrong to characterise the surcharge as penal – the surcharge is a tax charge designed to recoup tax relief on contributions and tax free growth. This is for the same reasons suggested in the decision on unauthorised employment payments in *Willey* [*v HMRC* [2013] 328 (TC)] at paragraph 56:

> "Both parties agreed that the 55% charge is a broad measure by which the tax relief on contributions and tax free growth are recovered. In that sense, the scheme sanction charge, being part of an overall charge of 55% does appear to be a charge to tax rather than a penalty."

155. The rationale appears at paragraph 16 of the background note to Clause 197 of the Finance Bill 2004:

> "The "unauthorised payments surcharge" is a further tax charge, paid in addition to the unauthorised payments charge. It can be imposed where the value of the payment was 25% or more of the fund value. The unauthorised payments surcharge will be 15%, bringing the total tax charge to 55%, to reflect the higher level of tax relief likely to have been received on such a large amount of the scheme's fund."

156. The Tribunal is not required to enter into a detailed attempt to calculate whether 55% does exactly represent or equate to the value of tax relief and tax free growth on the appellants' pensions. We therefore resist Mr Rooney's invitation to enter into a notional calculation of what the tax relief on contributions and tax relief amounts to. As Mr Bradley submits, this is a broad or 'rough and ready' measure. The surcharge is aimed at payments which are 25% or more of the value of the pension fund. In the appellants' case their unauthorised payments (the loans to their company Biz-Works) represented the entirety of the pension funds held by Salmon Enterprises. The unauthorised payments also represent the vast majority of the value of their previous authorised pensions funds (subject to WFM's fees)."

Evidence and Facts

17. In addition to a bundle of documents, which included HMRC's Statement of Case for each of the appeals, correspondence between the parties and copies of the assessments and refusals to discharge unauthorised payments surcharges, I heard from Mrs Heath, Mr Nosworthy and Mr Michael Bridges of HMRC's Pensions Compliance team, who was the HMRC Officer responsible for the assessments under ss 208 and 209. It is on the basis of this evidence that I make the following findings of fact, first

in relation the operation of the SEPS arrangements and enquiries by HMRC and then in respect of each the appellants.

The SEPS arrangements and HMRC enquiries

18. An individual, usually after having attended a presentation setting out the "benefits" of doing so, would transfer funds from his or her registered pension scheme into the SEPS (also a registered pension scheme) bank account. Most of these funds were paid to GG Blue Sky Limited, with smaller amounts being paid to Wightman Fletcher McCabe Limited and Goswell Square Capital Limited, a Forex company in Dubai used by GG Blue Sky Limited. Payments were then made from these companies directly to the individuals, although in some cases the payments to individuals were made from Wightman Fletcher McCabe Limited and Goswell Square Capital Limited via Trious Limited and Wealth Growth Group Limited. There were also some payments made through Standard Chartered Bank by order of Goswell Square Capital Limited.

19. James Lau, the company secretary of Salmon Enterprises (UK) Limited, was the "salesman" for the SEPS arrangements and trustee with David Salmon of the scheme. He appears to have spoken to, and convinced, every individual who participated in them. Generally, potential SEPS participants attended presentations in London at which they were instructed by Mr Lau not to take any notes as all necessary information would be provided. However, this never happened and the participants did not receive anything further from him. Mr Lau was a director of GG Blue Sky Limited and Wightman Fletcher McCabe Limited and, as such, had access to the bank accounts of these companies in addition to the SEPS bank account. His Wightman Fletcher McCabe Limited business card describes that company as being "Independent Financial Advisers" and Mr Lau as a "Senior Adviser". It also stated that:

> "Wightman Fletcher McCabe Limited is a trading style of the Clarkson Hill Group plc which is authorised and regulated by the Financial Services Authority."

20. The HMRC Pension Compliance team first became aware of potential pension liberation activity occurring within the SEPS when it was contacted, on 19 January 2012, by Aegon Limited on behalf of a former member of its pension scheme who, having transferred his pension to the SEPS via the schemes administrator Tudor Capital Management Limited, was concerned that he had been "scammed". As a result, on 9 October 2012, HMRC opened an enquiry into the SEPS 2010-11 tax return writing to the administrator, Tudor Capital Management Limited, and the trustees James Lau and David Salmon although, for the most part, only Mr Lau responded.

21. His advisor, Liz Coleman, attended a meeting with Officers Michael Bridges and Alan Bush of HMRC on 3 July 2014 at which she provided copies of bank account statements for GG Blue Sky Limited and Wightman Fletcher McCabe Limited. She also provided account statements for individuals who had participated in the arrangements. These set out the amounts transferred to the SEPS, commission,

amounts paid to the individuals and sums remaining. HMRC's note of that meeting records that Ms Coleman thought that although some individuals were genuine investors, "many people would have wanted to join because they were well aware they could receive their money from the pension" and that "this was very evident from the paperwork she had provided" to HMRC at the meeting. Ms Coleman also acknowledged that the SEPS was a "vehicle for pension liberation" for those who had received money back but that she believed that some people re-invested funds through the scheme without liberating their pension fund.

22. Ms Coleman provided further information to HMRC as an attachment to an email of 1 April 2015. This included statements for individuals who had at least part of their pension fund invested in the foreign exchange market, described in the statements and email as "FX Pension Investment". The email also clarified the descriptions in the statements of "Liberation Payments" and FX Liberation interest payment respectively as payments directly to the individual and interest payments on the FX pension investment which should have gone back to the pension scheme but had gone back to the individual. Officer Bridges explained that this information formed the basis for the issue of discovery assessments, under s 29 TMA, in 2015 to those (including the appellants as described below) whose pension fund transfers were matched to the SEPS bank accounts with which HMRC had been provided.

Mr Brendan McCormack

23. Mr McCormack, an IT Service Manager, transferred £64,315.87 from his pension with Mercer to the SEPS on or around 23 September 2010. He was paid a "liberation payment" of £26,935 on or around 21 October 2011 from Standard Chartered Bank and subsequently received a further payment of £3,000 from Standard Chartered Bank. Further payments of £14,000 and £5,000 were also received in 2012 however, as the assessment against which he has appealed was for 2010-11, the payments received in 2012 do not form part of the appeal.

24. In a document, dated 11 November 2016 and described by Ms Brooks as a "Q10", Mr McCormack states that he was introduced to the SEPS arrangement by James Lau on whose advice he "heavily relied" as at that time he "had several credit card issues and was facing serious risk of becoming bankrupt". He goes on state:

> "At no point was it indicated that I would lose my pension and generate tax liabilities. The monies released from the pension were described as a loan and the forex investment was sold as a repayment vehicle for the loan. I made it clear that I was under pressure financially and needed finances to help me through the economic downturn. I was led to believe the scheme was low risk and completely above board. I was assured the pension monies were to be invested over several industries in order to minimise risk and assure growth of my pension. I was led to believe the scheme was authorised by the FSA and this was highlighted in all email footers and on James Lau's business card. The financial adviser (James Lau) made mention of his law qualifications and his association, Wightman Fletcher McCabe Limited, were a trading style of the Clarkson Hill Group plc which was

> authorised and regulated by the Financial Services Authority. I was not told if the financial adviser held any professional indemnity insurance."

25. The document also explains that, although he was registered for self-assessment Mr McCormack was advised that the proceeds from the pension was a loan and not taxable and did not need to be included in his tax return. For that reason, there was no mention of the SEPS or any payments received under the arrangements by Mr McCormack in his 2010-11 self-assessment tax return.

26. On 19 March 2015 HMRC issued an assessment, under s 29 TMA, to an unauthorised payments charge and an unauthorised payments surcharge (under s 208 and s 209 respectively) originally in the sum of £35,373.73 but subsequently reduced to £26,914.25 following the receipt of further information regarding the payments received. However, as this includes the payments of £14,000 and £5,000 received in 2012 which it is accepted should not be included, the actual amount with which this appeal is concerned is £16,464.[1]

27. An appeal against the assessments was made to HMRC on 30 March 2016 together with an application, under s 268, for the discharge of the unauthorised payments surcharge. The assessments to the unauthorised payments charge and unauthorised payments surcharge were upheld on 22 July 2016 following a review. On 17 August 2016 Mr McCormack appealed to the Tribunal against the assessment and the refusal of HMRC to discharge the unauthorised payments surcharge.

Mr Martyn Nosworthy

28. Mr Nosworthy, who sought a better return on his pension, attended a James Lau presentation on the recommendation of an acquaintance. Having been convinced of a 7% – 8% return on his investment and having "googled" Wightman Fletcher McCabe Limited and found it and Mr Lau to be "bona fide" independent financial advisers Mr Nosworthy decided to move his pension to the SEPS transferring £265,443 of funds from his previous pension with CSC Computer Sciences Limited 2005 Pension Scheme. He explained that he had not intended to take anything out of his pension but was told, wrongly, by Mr Lau that as he was 55 he was entitled to take up to 55% of his pension as a pension commencement lump sum ("PCLS") without any liability to tax. Accordingly, on 19 December 2012, £10,000 was paid into Mr Nosworthy's bank account by Trious Limited which he used to purchase a car. However, although Mr Nosworthy did meet the "normal minimum pension age" (see paragraph 1(1)(d) of schedule 29), the other conditions necessary for a payment to be a PCLS, particularly the requirement under paragraph 1(1)(aa) of schedule 29 of becoming entitled to a relevant pension, were not satisfied.

29. An assessment, under s 29 TMA, was issued by HMRC on 21 April 2015 in respect of an unauthorised payments charge for 2012-13. The assessment was originally in the sum of £154,993.36 but was subsequently reduced to £4,000. Mr

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[1] ie £29,945 x 40% (s 208) + £29,945 x 15% (s 209) = £16,464.25

Nosworthy described how he had panicked when he received the assessment and how, other than the £10,000, he did not know what had happened to the rest of the monies he had transferred to the SEPS. On 6 September 2016 Mr Nosworthy notified the Tribunal of his appeal against the assessment.

30. Mr Nosworthy was not required, and did not file, a self-assessment tax return for 2012-13.

Mrs Jacqueline Heath

31. Mrs Heath was concerned that her teacher's pension would not be sufficient to provide the lifestyle she hoped for herself and her husband when she retired. She wanted something that would provide a higher return for her investment but did not want to receive any funds before her retirement. A colleague's mother told her about Mr Lau and following a presentation by him in London Mrs Heath invested £15,000 which had grown to £20,000 in 15 months. Mrs Heath was impressed with the performance of her investment and with Mr Lau, who advised her of an 8% return on her pension. He convinced Mrs Heath that the SEPS scheme, which was registered with HMRC, was "a very safe investment" and, on or around 12 August 2011, she transferred £88,212.16 from her pension into the SEPS.

32. In May 2012 Mrs Heath received a telephone call from Mr Lau to tell her that the investment had collapsed and that her money would be released in three tranches. On 3 May 2012 Mrs Heath was paid £26,235 by GG Blue Sky Limited which paid her a further £23,765 on 20 June 2012 and £18,981.91 on 16 August 2012. Mrs Heath who said that she had not been expecting to receive such a telephone call explained that she found the whole situation to be "mind boggling scary". Mrs Heath used the money she received to purchase a residential property which, as it could not be utilised for self-invested personal pension (SIPPS) purposes, she subsequently sold. The money is now held in a bank account.

33. On 19 March 2015 HMRC issued an assessment under s 29 TMA to an unauthorised payments charge (s 208) and unauthorised payments surcharge (s 209) for 2012-13 originally in the sum of £48,516.69 but subsequently reduced to £37,940.05. The application of Mrs Heath to HMRC to discharge the unauthorised payments surcharge was refused and on 7 September 2016 Mrs Heath appealed to the Tribunal against this decision and the assessment.

34. Like Mr Nosworthy, Mrs Heath was not required to, and did not, file a 2012-13 self-assessment tax return.

Discussion and Conclusion

35. The following issues arise:

(1) Whether the s 29 TMA discovery assessments are valid;

(2) Whether the appellants are liable to an unauthorised payments charge under s 208; and

(3) Whether Mr McCormack and Mrs Heath (but not Mr Nosworthy) are liable to an unauthorised payments surcharge under s 209, ie whether in in all the circumstances of the case, it would not be just and reasonable for the person to be liable to the unauthorised payments surcharge (see s 208(3)).

Discovery assessments

36. Although not raised by any of the appellants in this case, given the decision of the Upper Tribunal in *Burgess & Brimheath Developments Ltd v HMRC*, it is for HMRC to establish the validity of the discovery assessments.

37. In *HMRC v Charlton Corfield & Corfield* [2013] STC 866 ("*Charlton*") the Upper Tribunal (Norris J and Judge Berner) summarised the test for a discovery at [37] as follows:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself."

38. I am satisfied that in this case that it newly appeared to Officer Bridges on the basis of the information provided to HMRC as described in paragraphs 20 to 22 above, that there was an insufficiency to tax because of the payments received by Mr McCormack, Mr Nosworthy and Mrs Heath under the SEPS and therefore find that he did make a "discovery" within s 29 TMA.

39. In the case of Mr Nosworthy and Mrs Heath as they did not file self-assessment tax returns the assessments made against them are valid. However, as Mr McCormack did file a self-assessment tax return it is necessary for HMRC to establish that one of the conditions in s 29(5) and (6) TMA have been fulfilled (see s 29(3) TMA). Because Mr McCormack did not refer to the payments of £26,935 and £3,000 that he received in 2010-11 under the SEPS in his tax return for the year, an officer of HMRC could not have been reasonably expected to be aware of these payments thus fulfilling the condition in s 29(5) TMA (see paragraph 4, above). Accordingly, I consider the assessment against Mr McCormack to be valid.

Unauthorised payments charge

40. In her submissions on behalf of Mr McCormack, Mr Nosworthy and Mrs Heath Ms Brooks emphasised that they were essentially victims that had been taken in by the "convincing, impressive and plausible" assurances given by James Lau, who they understood to be an independent financial adviser regulated by the Financial Services Authority, of the high returns that could be expected if they transferred their pensions to the SEPS. Additionally, she contends that they were "betrayed" by HMRC which should have done more to prevent what she referred to as the "SEPS disaster" in what was a registered pension scheme under s 153.

41. However, although I sympathise and understand how Mr McCormack, Mr Nosworthy and Mrs Heath came to be in their present position, it is clear from the binding decision of the Upper Tribunal (Warren J and Judge Bishopp, the then Presidents of the Tax and Chancery Chamber of the Upper Tribunal and Tax Chamber of the First-tier Tribunal respectively) in *HMRC v Hok Limited* [2013] STC 225 at [56] that as this Tribunal, the Tax Chamber of the First-tier Tribunal, was created by statute its jurisdiction which is defined and limited by legislation does not extend to the power to override a statute or supervise the conduct of HMRC to consider whether it was fair or reasonable.

42. As it is accepted that Mr McCormack, Mr Nosworthy and Mrs Heath all received payments provided from sums held for the purposes of the SEPS as defined by s 161(3)-(4) and s 279(2), and were not within the payments specified under s 164, these were "unauthorised member payments" as defined by s 160(2) even if, as in the case of Mr McCormack, described as a loan (see *Danvers v HMRC* at paragraph 11, above). It therefore follows that the payments are liable to income tax under s 208. As such the appeals of Mr McCormack, Mr Nosworthy and Mrs Heath against the unauthorised payments charges cannot succeed.

43. Support for such a conclusion can be found in the decision of the Court of Appeal in *Aspin v Estill (Inspector of Taxes)* [1987] STC 723 in which Nicholls LJ said. At 727:

> "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."

44. I should also mention that Ms Brooks referred to the decision in *Dalriada Trustees Ltd v Faulds and Others* [2011] EWHC 3391 (Ch), which concerned pension schemes generally described as the Ark Pension Schemes, as "significant" because in that case of Bean J (as he then was) had found "loans" to members of the pension schemes were both "unauthorised and not unauthorised payments". However, this is not the case, what was actually said by Bean J, at [57], having concluded that the loans were unauthorised member payments as defined by s 160(2), was (with added emphasis) that:

> "… since this matter may go further, and in deference to the sustained arguments of [counsel for the Defendants], I turn to deal with the issues as to validity which do not derive from the 2004 Act; and do so on the basis, **contrary to the ruling I have just given**, that the MPVA [Maximising Pension Value Arrangement] loans were <u>not</u> unauthorised member payments within the terms of the Act."

45. There is, therefore, nothing in the decision of Bean J in *Dalriada Trustees* that can assist the appellants in this case.

Unauthorised payments surcharge

46. It is not disputed that both Mr McCormack and Mrs Heath, because of the sums received, are liable to an unauthorised payment surcharge under s 209. To succeed in their appeals, it is necessary for them to establish that it would not be just and reasonable in all the circumstances for them to be liable to the surcharge.

47. As the Tribunal observed in *O'Mara*, an unauthorised payments surcharge is not a penalty but a "rough and ready" measure, to recoup the tax relief on pension contributions. As such, the circumstances in which it would not be just and reasonable to impose an unauthorised payments surcharge may be limited. Additionally, it is not necessary for there to be any dishonesty or negligence on the part of a taxpayer for liability to an unauthorised payments surcharge to arise and the fact that he or she has taken legal, accounting or tax advice is not sufficient of itself to make it unjust or unreasonable for the imposition of a surcharge.

48. It is with these general principles in mind that I consider, in turn, the circumstances of Mr McCormack and Mrs Heath.

49. In the case of Mr McCormack, from the evidence contained in his "Q10" (see paragraph 23, above) it appears that he understood the SEPS was "low risk and completely above board" and that it would "not generate tax liabilities". It is also apparent from that document that he understood that monies, albeit described as a loan, would be released to him from the SEPS and that he needed this money to "help me through the economic downturn" because he was under financial pressure.

50. Given that Mr McCormack had the benefit of the money paid to him knowing that it had been released out of the SEPS I am unable to find the imposition of an authorised payments surcharge in his case to be unjust or unreasonable.

51. The circumstances in which Mrs Heath received payments from the SEPS are not so straightforward. Unlike Mr McCormack she did not intend or wish to receive these but sought a pension arrangement which would provide a higher return on her investment and was led to believe that the SEPS was the answer. As is now only too clear this was not the case and, on receiving the payments via GG Blue Sky Limited in 2012, she used the funds to purchase a property and on its sale deposited these in the bank where it remains.

52. However, as Mrs Heath has received and is still in possession of these funds and given the purpose of the unauthorised payments surcharge is not to penalise her but to recoup the tax relief given when she made her pension contributions I am not satisfied, having regard to all the circumstances of Mrs Heath's case, that the imposition of the unauthorised payments charged is unjust or unreasonable.

Conclusion

53. Therefore, for the above reasons the appeals are dismissed and the assessments confirmed although in the case of Mr McCormack and for the reasons stated in

paragraph 26, above, the assessment against him is confirmed in the reduced sum of £16,464.

Appeal Rights

54. 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

55. referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 12 APRIL 2018