[2018] UKFTT 0262 (TC)

TC06493

Appeal number: TC/2015/05765
TC/2015/05766

The proper construction of section 863 Income Tax (Trading and Other Income) Act 2005.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BAYONET VENTURES LLP — **Appellant**
RONALD KEITH HOWARD

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MRS RUTH WATTS-DAVIES.

Sitting in public at Taylor House, London on 25 September 2015 & 26 April 2018.

Mr. Thomas Chacko, counsel, the Appellant.

Miss Georgina Hirsch, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

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<u>DECISION</u>

(Paragraph numbering (only) amended under the slip rule).

1. It will be apparent from the dates on which these appeals were heard that there was a period of seven months between the two hearings. That is manifestly unsatisfactory and would not have happened if the initial part heard date had been held. Unbeknown to us it was vacated administratively and then there were difficulties arranging a further date. The troubling feature of cases where there is a lengthy period between hearings is that memories fade and the Tribunal becomes more reliant upon notes taken at an earlier hearing than would be the case if a Decision was prepared whilst matters are fresh in the minds of the panel. We discussed this aspect of the case and after considering our notes of evidence we came to the view that there should be no unfairness or injustice to either side by reason of the lengthy part heard period given that there are only a few facts in dispute and, as will appear below, the outcome of this appeal turns essentially upon matters of law.

2. The Bayonet Ventures Pension Scheme ("BVPS") filed its pension scheme tax return for the fiscal year ended 05 April 2010, whereafter the respondents undertook an enquiry into it. The upshot was that on 13 June 2013 the respondents wrote to the first named appellant, Bayonet Ventures LLP ("the first appellant"), asserting that "the scheme", by which we take it to mean BVPS, had "*made an unauthorised member payment of £66,000.*" The letter went on to assert that by reason of section 863 of The Income Tax (Trading and Other Income) Act 2005 ("the 2005 Act")*, "the loan to the LLP is treated as a loan to the partners of the LLP. One of the partners of the LLP is also a member of the pension scheme."*

3. The letter of 13 June 2013 then went on to explain that the respondents considered the loan (referred to below) to be an "unauthorised member payment" within the meaning of section 164 Finance Act 2004.

4. The same letter went on to state that the respondents had made an assessment in respect of a Scheme Sanction Charge at 40% of £66,000, being £26,400. The same letter then correctly identified that the first appellant was the "scheme administrator" before going on to make a rather strange assertion. The letter (addressed to the second appellant) says "*As you are a designated member of the LLP, you are liable for the scheme sanction charge. I have set you up as a scheme administrator of the pension scheme in order to raise this charge.*" Mr Howard may well have felt that he had been "set up".

5. The letter of 13 June 2013 also suffers with the difficulty that it is addressed: "Mr. K. Howard, Bayonet Ventures LLP, ……………………….., London". Applying the norms of business practice and etiquette that letter is properly to be construed as addressed to the first appellant notwithstanding that it begins, "Dear Mr Howard". However, that may be of little or no significance because under cover of that letter the

respondents sent a Notice of Assessment, dated 13 June 2013, which was specifically addressed to the second named appellant ("the second appellant").

6. On 17 June 2013 the respondents wrote to the second appellant asserting that BVPS had made a loan of £66,000 to the first appellant on 27 November 2009. It asserted that that loan must be treated as made to the individual members of the LLP (whether jointly and/or severally was not stated) and said that the respondents took the view that it was an "unauthorised member payment" because it fell outside section 164 Finance Act 2004. Accordingly the second appellant had to pay an unauthorised payment charge under section 208 Finance Act 2004, in the sum of £26,400, and an unauthorised payment surcharge under section 209 Finance Act 2004, at the rate of 15%, being £9,900. An assessment dated 17 June 2013 against the second appellant, in the total sum of £36,300, accompanied that letter.

Facts not in dispute.

7. The BVPS was established pursuant to a Trust Deed on 02 November 2009. It was/is a Small Self-Administered Scheme.

8. Under the Trust Deed the first appellant was stated to be the "Principal Employer" with the second appellant the "Trustee".

9. On 02 November 2009 the second appellant applied to be a member of the scheme.

10. The first appellant was the designated Scheme Administrator.

11. The respondents' Statement of Case (paragraphs 19-21) refer to a loan of £66,000 made by BVPS to the first appellant, such loan being made on 27 November 2009.

12. The loan was made pursuant to a written loan agreement of the same date but made between the first appellant and BVPS.

13. At this time the second appellant was still trading as Bayonet Ventures, as a sole trader, notwithstanding that the first appellant had been formed.

14. Bank statements show that the £66,000 was paid by BVPS into a bank account "Mr Keith Howard, trading as Bayonet Ventures." The loan is not recorded in the first appellant's accounts 2009 – 2011.

The Respondents' Case - Sham.

15. It soon became apparent to us that the respondents sought to put their case on the basis that the loan, evidenced by a written loan agreement, was not made by BVPS to the first appellant but was in fact made to the second appellant. That was specifically contradicted by the Loan Agreement dated 27 November 2009 (tab 46) and immediately raised the question of whether the respondents were contending that the

loan agreement was a sham; as defined by Lord Justice Diplock in Snook v London and West Riding Investments [1967] 2 QB 786 at 801:

> "It is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties, legal rights and obligations different from the actual legal rights and obligations (if any), which the parties intend to create".

16. In most instances where there is a sham transaction, in the Diplock sense, it will involve dishonesty and/or deception. We were concerned to establish whether the respondents were or were not alleging dishonesty and/or deception, given the way in which Miss Hirsch asserted that, in effect, the loan agreement could be ignored and we should find as a fact that the loan was, in truth, between BVPS and the second appellant. Conscious of the need for there to be absolute clarity in a case where one party is alleging fraud or dishonesty, which had not been raised in its pleadings or otherwise, we invited Miss Hirsch to make it unequivocally clear whether the respondents were alleging that the written loan agreement (tab 46) was a sham and/or whether the respondents were alleging any form of dishonesty and/or deception on the part of the second appellant.

17. After a short adjournment to consider that matter and to take instructions, Miss Hirsch returned to inform us that the respondents were not alleging that the loan agreement was a sham and/or that this case had anything to do with dishonesty and/or deceit. We thought that position was tolerably clear, but that did not prevent Miss Hirsch, later, again attacking the reliability of the loan agreement and asserting that it could/should be ignored and the loan should be regarded as made between BVPS and the second appellant. It seems that that was based primarily upon the fact that the £66,000 went from BVPS into the second appellant's bank account; not into a bank account operated by the first appellant. We were troubled that the respondents were attempting to re-introduce a suggestion of sham or dishonesty, notwithstanding that it had earlier, through counsel, expressly stated that it did not seek to advance such a case. It was pointed out to Miss Hirsch that the mere fact that funds flow from person A to person C, notwithstanding that the loan agreement is between person A and person B is certainly not unusual, for example, where the funds are paid to the borrower's agent or solicitor to be used or deployed on behalf of the borrower. Then, for the second time, the respondents, through counsel, made it clear that sham, fraud, dishonesty and/or deceit were not being alleged.

The Witness Evidence.

18. Mr Howard gave evidence notwithstanding that no witness statement had been filed/served in advance of the hearing. That was unsatisfactory and a deficiency in the preparation for this hearing.

19. His evidence was that the principal area of business operated by him, trading as Bayonet Ventures, was the development of software to facilitate lenders and/or legal firms in processing and progressing loans or other financing agreements, where, by reason of stringent regulation, it is necessary for there to be a structured approach to the lending process, accompanied by properly completed *pro forma* documents. Thus his stock in trade or working capital was substantially represented by intellectual property and/or copyright materials.

20. Mr Howard explained that he decided to establish a LLP because he would find it easier to gain F. C. A. approval with a corporate structure in place, rather than if he applied as a sole trader. He explained that the first appellant did not trade in its years ended 31 December 2010 and/or 31 December 2011. It began trading in its year ended 31 December 2012 and it can be seen from its accounts for that period (tab 64) that in that year the first appellant had a turnover of £384,910 and a profit attributable to members of £208,833. Mr Howard explained that the transition of the business into the LLP took place during 2012 because a large contract had been procured from a customer in the Cayman Islands. He gave evidence that by 2012 all the necessary software and intellectual property necessary for the operation of the business had been transferred by him to the first appellant.

21. When cross-examined, Mr Howard acknowledged that he had formerly traded as a sole trader. He gave evidence that he had not been rigourous in maintaining an account of expenses and/or payments made in respect of liabilities of the first appellant, such payments being made from the £66,000 loan which had, as a matter of fact, been lodged into the second appellant's bank account. He said that he did not realise that there could be any adverse implications arising therefrom. Mr Howard referred to loan repayments being made. He acknowledged that the security provided by the first appellant for the loan from BVPS may not have been adequate, given that it was substantially reliant upon a valuation of the software used in and about the business (which in 2009/2010/2011 was almost none). Furthermore, the valuation of that software was said to be based upon a letter dated 23 November 2009 from Wilky Loan Management Ltd, a company which does not even profess to have expertise in and about valuing software. The letter said no more than that the first appellant's software "could have a market value of at least £80,000 were we considering purchasing it." That is not an open market valuation between a willing vendor and willing purchaser, at arm's length.

22. Mr Howard acknowledged that the floating charge granted in favour of BVPS had not been registered at Companies House – a point relied upon by the respondents to contend that that simple fact meant that the security could not be considered as adequate security.

23. Mr Howard was then asked some questions which flirted with the idea that one or more transactions may have been a sham and/or intended to mislead. We say no more about that aspect of the evidence given what we have said above, to the effect that twice the respondents, by counsel, informed us that the case advanced by the respondents was not based upon any allegation of sham, deceit and/or dishonesty.

24. There was no other witness evidence. The other material made available to us was in documentary form, in a hearing bundle running to 290 pages.

Findings of Fact.

25. In 2009/2010 Mr Howard was a businessman who, in common with many, occasionally had cash flow difficulties and sought legitimately to use a loan from monies lodged in a pension scheme, to ease those cash flow problems. We say "legitimately" because provided that certain statutory restrictions are observed, a pension scheme such as BVPS is permitted to make loans.

26. So that the matter is beyond doubt we find as a fact that the loan was made in accordance with the written agreement dated 27 November 2009 between the first

appellant and BVPS. The consequence of such a loan was that the loan monies became monies belonging to the first appellant. The first appellant was then at liberty to do as it pleased with what was by then, its money. It was at liberty to cause or permit that money to be paid to the second appellant, subject only to that not being a breach of the terms of the loan agreement. The mere fact that the monies actually passed from BVPS to the second appellant does not mean that the loan was made to the second appellant (as the respondents had sought to contend). The identity of the parties to a loan is a matter of law; albeit informed by the factual matrix within which the loan is made and documented.

27. We find as a fact that the first appellant did not trade until sometime in 2012. We cannot be more precise than that. However, by reference to the first appellant's accounts (referred to above) we are satisfied that it did not trade in its year ended 31 December 2011 or prior thereto.

28. We find that the Floating Charge dated 27 November 2009 (tab 48) was not adequate security for the loan of £66,000. We arrive at that conclusion, not because it was not registered at Companies House, but because the first appellant's underlying assets charged by that floating charge were inadequate to provide security for a loan of £66,000, in the event of the charge becoming crystallised. The requirement for a loan to be adequately secured arises under section 179 Finance Act 2004. In those circumstances we need not enter into a discussion of whether a charge is of "adequate value" if not registered at Companies House, notwithstanding that we were referred to Event Consulting Services (Richmond) Ltd v HMRC [2017] UKFTT 596 where this Tribunal decided that the fact of non-registration was relevant to the adequacy of the security provided by a floating charge. Section 179 of the 2004 Act looks to the adequacy of the underlying value of the assets subject to the charge; not to enforceability or priority. Thus had we been persuaded that the underlying assets were of adequate value we would not have been inclined to find that non-registration *ipso facto* meant that the security was of inadequate value.

Discussion.

29. These appeals involve:

(1) An appeal by the second appellant against the assessment of £26,400 made against him (see above) on the basis that the respondents have deemed him to be the scheme administrator when, as a matter of fact, he was not.

(2) An appeal by the first appellant against the scheme sanction charge which was levied on the basis that there had been an unauthorised member payment.

(3) An appeal by the first appellant against the surcharge on the allegedly unauthorised member payment. It was common ground that this limb of the appeal stands or falls with (2) above.

30. As we have set out above, the respondents decided to appoint the second appellant as the Scheme Administrator of the BVPS or to deem him to be such. Mr Chacko takes the rather predictable point that the respondents do not have any statutory power or authority to treat somebody who is not the scheme administrator as if he/she was or is the scheme administrator; let alone to deem such a person to be the scheme administrator. As a matter of fact, the second appellant was/is not the scheme

administrator. Thus unless the respondents could point to a lawful basis upon which they were entitled to substitute him as the scheme administrator, for the purpose of the assessment of 13 June 2013, by setting him up (to use the respondents' expression) as the scheme administrator, the second appellant's appeal must succeed.

31. We asked Miss Hirsch to identify any provision which, she contended, gave the respondents the power or authority to impose a status upon the first appellant, which had not been conferred upon him by the Trust Deed or otherwise by BVPS and/or the first appellant. She was unable to do so.

32. It is the respondents' case that sections 239 and 240 Finance Act 2004, when read together, apply a scheme sanction charge on the scheme administrator in the event of certain defaults taking place. In the letter of 13 June 2013 the respondents correctly identified that the scheme administrator was the second appellant. Nonetheless, it went on to say to the first appellant that "*I have set you up as a scheme administrator of the pension scheme in order to raise this charge.*" As a matter of law HMRC was not entitled to do so. It follows that the assessment against the second appellant must be discharged.

33. We now turn to the next part of this appeal, which relates to the unauthorised member payment charge and the attendant surcharge. Essentially these assessments turn upon whether there was an unauthorised member payment made by BVPS. The respondents' letter of 17 June 2013 asserts that BVPS made a loan of £66,000 to the sponsoring employer, that is, the first appellant (notwithstanding that during this appeal hearing the respondents sought to say that the loan had in fact been made to the second appellant personally).

34. Section 164 Finance Act 2004 is as follows:

Authorised member payments

164. The only payments a registered pension scheme is authorised to make to or in respect of a member of the pension scheme are—

(a) pensions permitted by the pension rules or the pension death benefit rules (see sections 165 and 167),

(b) lump sums permitted by the lump sum rule or the lump sum death benefit rule (see sections 166 and 168),

(c) recognised transfers (see section 169),

(d) scheme administration member payments (see section 171),

(e) payments pursuant to a pension sharing order or provision, and

(f) payments of a description prescribed by regulations made by the Board of Inland Revenue.

35. The letter of 17 June 2013 proceeded on the basis that the loan, which the respondents were then plainly treating as a loan to the first appellant, must nonetheless be treated as a loan to the second appellant by reason of section 863 of The Income Tax (Trading and Other Income) Act 2005, which is as follows :

Limited liability partnerships

863 (1) For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit—

(a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),

(b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and

(c) the property of the limited liability partnership is treated as held by the members as partnership property.

References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade, profession or business with a view to profit.

(2)For all purposes, except as otherwise provided, in the Income Tax Acts—

(a) references to a firm **[F1**or partnership**]** include a limited liability partnership in relation to which subsection (1) applies,

(b) references to members **[F2**or partners**]** of a firm **[F3**or partnership**]** include members of such a limited liability partnership,

(c) references to a company do not include such a limited liability partnership, and

(d) references to members of a company do not include members of such a limited liability partnership.

(3) Subsection (1) continues to apply in relation to a limited liability partnership which no longer carries on any trade, profession or business with a view to profit—

(a) if the cessation is only temporary, or

(b) during a period of winding up following a permanent cessation, provided—

(i) the winding up is not for reasons connected in whole or in part with the avoidance of tax, and

(ii) the period of winding up is not unreasonably prolonged.

This is subject to subsection (4).

(4) Subsection (1) ceases to apply in relation to a limited liability partnership—

(a) on the appointment of a liquidator or (if earlier) the making of a winding-up order by the court, or

(b) on the occurrence of any event under the law of a territory outside the United Kingdom corresponding to an event specified in paragraph (a).

35. Thus, argue the respondents, even if the loan was made by BVPS to the first appellant, it is statutorily treated as made to the second appellant and the other members of the LLP. The respondents were not clear as to whether they allege that, on the facts of this case, the loan made only to the first appellant or was made to its several members jointly and/or severally. There are several possibilities :

a. The statute deems the entire loan to be made to each member of the LLP. If that is so, there was no explanation as to why other members of the first appellant were not sent a like assessment to that sent to the second appellant.

b. The statute deems the entire loan to be made to the members, but jointly.

c. If that is the case, the statute fails to say whether any such joint loan is then apportioned between the members equally or by reference to their respective shares in the profits/losses of the LLP.

36. The respondents did not say what their position would be if the effect of the statute was to deem the loan to be made to each member of the LLP severally. The foregoing possibilities demonstrate the improbability of the construction of the section for which HMRC contends.

37. This statutory interpretation was also advanced in the respondents' Review Letter dated 20 August 2015 where it was asserted that the effect of section 863 of the 2005 Act is that the activities and assets of the LLP are treated as carried out and held by its members. It then asserted that *"for tax purposes HMRC must look through the LLP to the members, which means that the loan to Bayonet Ventures LLP is also a loan to the members of the LLP".* Whether jointly or severally was not stated.

38. Mr. Chacko takes the rather simple point that even if, which he disputes, the respondents' construction of section 863 of the 2005 Act is correct, it is immaterial because section 863 of the 2005 Act only applies, as sub-section 1 makes clear, "if a limited liability partnership carries on a trade, profession or business with a view to profit… …". He takes the simple point that in the relevant tax year and up until sometime in 2012, the first appellant was not carrying on a trade, profession or business with a view to profit. It was, in effect, dormant. Miss Hirsch sought to meet this point by saying that because the very essence or definition of a limited liability partnership is that it must exist for the purpose of carrying on a trade, profession or business with a view to profit, there can be no limited liability partnerships which do not carry on a trade, profession or business with a view to profit – at least for tax purposes. In other words, once a limited liability partnership is formed and has a legal persona, the fact that it possesses that legal persona is sufficient to demonstrate that it carries on a trade, professional business with a view to profit; even if factually, it does not.

39. We are singularly unattracted by the argument advanced by Miss Hirsch, who advanced it solely to meet Mr. Chacko's submission that the unauthorised member payment charge and the surcharge thereon must fail because at the time when the loan was made to the first appellant it was not carrying on a trade, profession or business with a view to profit and thus, even if the respondents are correct in their assertion that *"HMRC must look through the LLP to the members, which means that the loan ……… is also a loan to the members of the LLP",* section 863 of the 2005 Act has no application.

40. In our judgement there is no basis for deeming the first appellant to have been trading or carrying on a business with a view to profit, nor is there any basis for applying the unattractive and quite unworkable construction of section 863(1) contended for by the respondents. Our judgement is based upon the usual and accepted canons of statutory construction.

41. There are four principal canons of statutory construction :

a. The literal rule. This speaks for itself.

b. The so called golden rule, as defined by Ld. Wensleydale in **Grey v Pearson [1857] H.L. Cas 61**

"The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical

and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further."

c. The mischief rule, which ordinarily requires the court to look to what the law was before the relevant statute was passed, in order to discover what gap or mischief the statute was intended to cover. The court then construes the statute in such a way as to ensure that the gap or mischief has been covered [Heydon's case : 1584].

d. The purposive approach, which is the canon of construction currently in vogue, particularly when reference is made to European Directives.

42. In our judgement section 863(1) of the 2005 Act contains no words which, if applied in their ordinary grammatical sense, give rise to some kind of absurdity or repugnance. It is commonplace for certain bodies corporate to be inactive or dormant for periods of time. Indeed, in such cases, the respondents usually do not require tax returns to be made until such time as any such body corporate becomes active and begins to trade.

43. There is no discernible mischief which section 863(1) of the 2005 Act was designed to meet; at least, none which was identified to us during argument in these appeals.

44. Equally, no particular purpose was identified to us during these appeals which, it was argued, section 863(1) was designed to achieve.

45. We can see no proper basis for departing from the literal rule of statutory construction. There is nothing whatsoever surprising in Parliament applying certain statutory rules, for income tax purposes, only if a limited liability partnership is in fact carrying on a trade, professional or business with a view to profit. If this gives rise to some perceived gap in the legislation, then it is a gap to be filled by Parliament and not by the inventiveness of judges.

46. On the facts of this case, as we have found them to be, the first appellant was not carrying on a trade, professional or business with a view to profit at the time when the loan was made to it. The fact that it entered into a loan agreement and received a loan is not indicative of it carrying on a trade, professional or business with a view to profit. Indeed, the respondents' did not argue otherwise.

47. Miss Hirsch argued in her Note of Additional Points (dated 22 September 2017) that section 863(3) of the 2005 Act informs the proper construction of section 863(1) because it provides that subsection (1) continues to apply to a limited liability partnership which no longer carries on a trade, profession or business with a view to profit. In our judgement subsection 3 wholly undermines Miss Hirsch's primary argument that a limited liability partnership must be treated as carrying on a trade, profession or business with a view to profit from the moment when it comes into being. By subsection 3 Parliament plainly envisages that there will be limited liability partnerships in existence, albeit that they do not carry on a trade, professional business with a view to profit.

48. Although the foregoing is sufficient to reach conclusions upon these appeals it would be remiss of us to leave these appeal without dealing with further issues argued before us relating to section 863.

49. Mr. Chacko submitted that the purpose of section 863(1) of the 2005 Act is to assimilate the tax position of partners within an active limited liability partnership with the partners in a non-LLP partnership. He argued that is not some kind of statutory deeming provision which deems every activity or thing done by the LLP also to have been done by its members, whether jointly or severally. In support of that submission he referred us to Vaines v HMRC [2018] STC 297 at paragraph 15 of the judgment of the Court of Appeal :

15. For income tax purposes, however, limited liability partnerships are treated in the same way as an ordinary English partnership. This is achieved by section 863 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), the first two subsections of which provide as follows:

"(1) For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit –

(a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),

(b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and

(c) the property of the limited liability partnership is treated as held by the members as partnership property.

References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade, profession or business with a view to profit.

(2) For all purposes, except as otherwise provided, in the Income Tax Acts –

(a) references to a firm or partnership include a limited liability partnership in relation to which subsection (1) applies,

(b) references to members or partners of a firm or partnership include members of such a limited liability partnership,

(c) references to a company do not include such a limited liability partnership, and

(d) references to members of a company do not include members of such a limited liability partnership."

50. The flaw in the argument advanced by the respondents, as summarised in the letter of 17 June 2013 and the Review Letter, is that section 863(1) of the 2005 Act does not say that all the activities of the limited liability partnership are treated as carried on by its members, whether or not jointly or severally (which the statute certainly does not deal with). As explained by the Court of Appeal, it assimilates the position of partners in a limited liability partnership with that of partners in a non-LLP. It does that by providing that :

(1) The activities of the limited liability partnership are treated as carried on by its members in partnership : s863(1)(a).

(2) Anything done by, to or in relation to the limited liability partnership etc is treated as done by its members as partners : s863(1)(b).

(3) The property of the limited liability partnership is held by its members, not personally, but as partnership property.

51. The error in the approach taken by the respondents' Review Letter of 20 August 2015 arises (i) from a general misunderstanding of partnership law as it has existed since the Partnership Act 1890 and (ii) because the respondents have ignored the words "in partnership", "as partners." and "as partnership property" in each of the subsections of section 863(1). Property which belongs to a partnership, whether a limited liability partnership or a non-LLP, is no more the property of the individual partners than the property of a body corporate is the property of its shareholders. Such property might become the property of members and/or shareholders upon winding up or dissolution once debts and liabilities have been paid, but until that time it is the property of the partnership (firm) or, as appropriate, the LLP; each of which are recognised in law as having a legal persona separate and distinct from the members of the partnership. In our judgement it was and is fundamentally wrong for the respondents to proceed on the basis that because a loan was made by BVPS to the first appellant, it follows that that same sum of money was lent to the second appellant. That is to misunderstand the purpose and effect of section 863 of the 2005 Act.

52. We recognise that other arguments were put to us, particularly by reference to section 161 of the 2005 Act. However, by reference to the respondents' Statement of Case, the only other argument advanced which we have not already dealt with, relates to section 179 Finance Act 2004. Paragraph 45 of the Statement of Case introduces section 179 of the 2004 Act and comments that because the statutory requirements for an "authorised employer loan" have not been met, the loan made by the first appellant cannot be classified as an authorised employer loan. The respondents' position on that issue is correct because, as we have found, one of the pre-requisites for an authorised employer loan, that is, adequate security, was not met. However, the respondents do not explain in the Statement of Case, nor did they explain at the hearing before us, what, if anything, flows from such a finding. We put the matter in that way because our function is to decide whether the assessments, to which we have referred above, stand (in full or in part) or must be discharged.

53. The assessment dated 13 June 2013, addressed to the second appellant, was put expressly on the basis that it is a scheme sanction charge levied under section 255 Finance Act 2004. For the reasons which we have given above, it must be discharged. It was addressed not to the scheme administrator, but, inappropriately, to the second appellant.

54. The assessment dated 17 June 2013 levied against the second appellant, was expressly put on the basis that it was levied pursuant to section 208 of the 2004 Act with, in addition, an unauthorised payment surcharge under section 209 of the 2004 Act. There has been no assessment raised against either the first or second appellant on the basis that they or either of them are liable to any kind of assessment or penalty in respect of an (alleged) unauthorised employer loan. These appeals are against the assessments made and it is not open to the respondents to argue, albeit rather obliquely, that liability against either or both appellants might have, or could have, arisen under some other basis of assessment (which has not been assessed).

55. Thus, we conclude that there was no unauthorised member payment which attracts an unauthorised member payment charge to tax and/or any surcharge thereon. It follows

that for the reasons set out above the assessments in respect of the alleged unauthorised member payment and the surcharge thereon, must be discharged.

56. 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.

Geraint Jones Q. C.
TRIBUNAL JUDGE

RELEASE DATE: 11 May 2018

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Post Script.

1. We add this postscript not as an integral part of our Decision, which has already been promulgated, but because by her email of 15 May 2018 Miss Hirsch sent us a document headed "Respondents' Note in Response to Appellant's Closing" in which she sought to make submissions, or further submissions, in respect of six numbered points, being those set out in paragraph 2(1) – (6) of that document.

2. The hearing on 26 April 2018 was mainly taken up with Closing Submissions. The procedure followed the traditional course of the Respondents to the appeal making their Closing Submissions first with the Appellant having the last word by being able to make Closing Submissions after those made on behalf of the Respondents. We were at pains to try to ensure that each side had more or less an equal amount of the allotted hearing time.

3. Miss Hirsch's Closing Submissions had proceeded against the assertion that the respondents were entitled to treat or deem the second appellant to be the Administrator, as mentioned in paragraph 35 of our Decision.

4. As recorded in paragraph 31 of our Decision, Miss Hirsch was unable during the hearing to identify, at our invitation, any provision which the respondents contended gave them the power or authority to deem the second appellant to be the Scheme Administrator. Accordingly, we indicated that Miss Hirsch could, if she saw fit, submit a written note to us setting out what, if any, provisions she submitted allowed the respondents to deem or treat the second appellant as the Scheme Administrator.

5. Upon considering the arguments advanced before us and undertaking our own legal research on the issue of whether the respondents had any power or authority to deem or treat the second appellant to be a Scheme Administrator, we were entirely satisfied that there was/is no such power or authority. In those circumstances we considered it unnecessary to delay promulgating our Decision.

5. When we received the Note from Miss Hirsch it sought to deal with several issues over and above the single issue upon which we had indicated we would be receptive to a supplemental written submission.

6. By her email of 16 May 2018 Miss Hirsch expressed her dissatisfaction with our reply to the effect that the provision for making a supplemental written submission had been limited to the legal point which Miss Hirsch had been unable to deal with during the hearing. She says that it was/is her belief that she was entitled to put in a far more comprehensive and all-embracing written response to Mr Chacko's closing submissions. If we gave that impression, that is regrettable because there has to be finality to proceedings, and after the conventional procedure has been followed. It is comparatively exceptional for either party to have permission to send supplemental submissions to the Tribunal. If that does happen, they have to be copied to the other side, who, quite often, will want to reply and so it can go on and on.

7. Nonetheless as a courtesy to Miss Hirsch, but stressing that the following comments form no part of our Decision, we explain why the several points set out therein, could/would have made no difference to our Decision.

8. At paragraph 2(1) Miss Hirsch does not identify any provision or authority in support of the argument that the respondents could deem or treat the second appellant as the Scheme Administrator. She simply says that the assertion in the respondents' letter must be read as a whole (which is plainly correct) and, when so read, contains the assertion that by reason of section 863 of The Income Tax (Trading and Other Income) Act 2005 the respondents could "look through" the LLP and by reason thereof deem or treat the second appellant as the Scheme Administrator. This was not a new argument. It can be seen that we dealt specifically with this point in paragraphs 50 and 51 of the Decision.

9. Miss Hirsch's second point, in paragraph 2(2) of her note, is that she wants to address Mr Chacko's point that the second appellant could not have been the scheme administrator because he had not made the declarations required under section 270 Finance Act 2004. As will be apparent from our Decision, we did not consider it necessary to deal with that point, given the conclusion at which we had already arrived, as set out in paragraphs 50 and 51 of the Decision.

10. At paragraph 2 (3) of her note Miss Hirsch says that she wishes to make further submissions concerning section 863 of the 2005 Act. That statutory provision loomed large in the hearing before us and we had certainly understood that Miss Hirsch had made all and any relevant submissions thereon during the hearing. In paragraph 12 of her note Miss Hirsch again (gently) tries to resurrect the argument that there was no loan between BVPS and the first appellant.

We have dealt with at point in detail in our Decision. We also specifically dealt with the point whether the loan to the LLP was or was not an "unauthorised payment" and concluded that it was because there was inadequate security. Thus, whether it was an "unauthorised payment" for any additional reason is rather academic.

11. By reference to her paragraph 2(4) in the note Miss Hirsch argues that Mr Chacko's argument concerning section 173 Finance Act 2004 is misconceived. As will be apparent from our Decision we did not consider it necessary to decide whether Mr Chacko was or was not correct about that because we took the view that the outcome of the appeal did not turn on whether he was or was not correct about it.

12. At her paragraph 2(5) Miss Hirsch indicates that she wishes to reply to paragraph 26 in Mr Chacko's written closing submissions. We have no hesitation in saying that had paragraphs 17 and 18 of Miss Hirsch's Note dated 15 May 2018 been available to us when we considered our Decision, the content thereof would have made no difference whatsoever to our overall Decision based upon our consideration of the decision of the Court of Appeal in Vaines v HMRC [2018] STC 297 (cited in the note as the First Tier Tribunal decision at [2013] UKFTT 576).

13. Miss Hirsch's final point, set out in paragraph 19 of her note, is that in our Decision we have made no mention of Danvers v HMRC [2016] UKUT 569 which was mentioned and discussed during the oral submissions on the final day of the hearing. If we had considered it necessary to refer to it, or that it established any legal principle applicable in the instant appeal, we would have dealt with it in our Decision.

14. In preparing this postscript we have noticed that in the original Decision, towards the end of the Decision, the paragraph numbering went awry. Accordingly, that and that alone has been amended under the slip rule.

Geraint Jones QC.
16 May 2018.