[2018] UKFTT 0412 (TC)

TC06614

Appeal number: TC/2016/04490
TC/2016/03677

INCOME TAX – pensions – whether payments unauthorised employer loans – unauthorised payment charges, unauthorised payment surcharges and scheme sanction charges – whether discovery assessments valid – HMRC's refusal to discharge unauthorised payment surcharges and scheme sanction charges

FIRST-TIER TRIBUNAL
TAX CHAMBER

BELLA FIGURA LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR

Sitting in public at Royal Courts of Justice, Strand, London on 30 and 31 May 2017

Carol Bun, of Birketts LLP, for the Appellant

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

DECISION

Introduction

1. These are two appeals arising from the same set of facts, which were therefore heard together. The first appeal is against HMRC's review decision to uphold discovery assessments of unauthorised payment charges, unauthorised payment surcharges and scheme sanction charges charged on the Appellant, Bella Figura Limted ("BFL"), in relation to two loans that were made from the Bella Figura Pension Scheme ("BFPS") to BFL and Falken Limited. The second appeal is against HMRC's decision refusing to discharge the unauthorised payment surcharges and scheme sanction charges.

Evidence

2. The following evidence was presented to the Tribunal:

(1) Witness evidence of Mr Antony Wightman, majority shareholder and director of BFL and Falken Limited;

(2) Witness evidence of Mrs Iwona Wightman, wife of the first witness;

(3) Witness evidence of Mr John Bhandal, officer of HMRC; and

(4) Two joint bundles of documentary evidence.

Law

Discovery assessment

3. HMRC is entitled to make discovery assessments in accordance with section 29 of the Taxes Management Act 1970 (TMA 1970). The general conditions are set out in section 29(1):

> (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 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.

4. Subsections 2 and 3 deal with the circumstances where a self-assessment has been made in respect of the relevant year and are not relevant in this case. Where the

5. The general power in section 29(1) is subject to the conditions in subsections 4 and 5:

(1) Subsection 4 provides:

> "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.

(2) Subsection 5 provides:

> "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.

Unauthorised employer payments

6. The law relating to unauthorised employer payments from pension schemes is in FA 2004, ss 175-180.

7. A payment is an authorised employer loan under FA 2004, s 179 as follows:

(1) A loan made to or in respect of a person who is or has been a sponsoring employer is an authorised employer loan if—

> (a) the amount loaned does not exceed an amount equal to 50% of the aggregate of the amount of the sums, and the market value of the assets, held for the purposes of the pension scheme immediately before the loan is made,
>
> (b) the loan is secured by a charge which is of adequate value, and
>
> (c) the repayment terms comply with subsection (2).

(2) The repayment terms comply with this subsection if-

> (a) the rate of interest payable on the loan is not less than the rate prescribed by regulations made by the Board of Inland Revenue,
>
> (b) the loan repayment date is before the end of the period of five years beginning with the date on which the loan is made, or has been postponed to a date after the end of that period under subsection (3), and

(c) the amount payable in each period beginning with the date on which the loan is made, and ending with the last day of a loan year, is not less than the required amount.

(3) If on a standard loan repayment date any amount (including interest) is owing, the loan repayment date may be postponed to a date before the end of the period of five years beginning with the standard loan repayment date.

(4) The loan repayment date may be postponed under subsection (3) only once.

(5) If the amount of a loan to or in respect of a person who is or has been a sponsoring employer is increased, the amount of the increase is to be treated as a loan made on the date of the increase.

(6) Schedule 30 gives the meaning of expressions used in this section and explains how to calculate the amount of the unauthorised payment when a loan to or in respect of a person who is or has been a sponsoring employer does not comply with subsection (1).

(7) In this section and that Schedule "charge" includes a right in security or an agreement to create a right in security; and any reference to assets subject to a charge or assets charged includes a reference to the property over which such a right is granted.

(8) Schedule 36 contains (in Part 4) transitional provision about loans to sponsoring employers.

8. A charge of adequate value is defined in Schedule 30 to Finance Act 2004:

(1) A charge is of adequate value if it meets conditions A, B and C

(2) Condition A is that, at the time the charge is given, the market value of the assets subject to the charge—

(a) in the case of the first charge to secure the loan, is at least equal to the amount owing (including interest), and

(b) in any other case, is at least equal to the lower of that amount and the market value of the assets subject to the previous charge.

(3) Condition B is that if, at any time after the charge is given, the market value of the assets charged is less than would be required under condition A if the charge were given at that time, the reduction in value is not attributable to any step taken by the pension scheme, the sponsoring employer or a person connected with the sponsoring employer.

(4) Condition C is that the charge takes priority over any other charge over the assets.

9. Paragraph 4 of Schedule 30 to FA 2004 states the required amount for the purposes of repayment of the loan is calculated as follows:

"The required amount", in relation to a period beginning with the date on which the loan is made and ending with the last day of a loan year, is—

((L + TIP) / TLY) x NLY

where—

L is the amount of the loan,

TIP is the total interest payable on the loan,

TLY is the total number of loan years, and

NLY is the number of loan years in the period.

Charges arising from unauthorised employer payments

10. Three different charges can arise when a pension scheme has made an unauthorised employer payment:

(1) An unauthorised payment charge (UPC) which is a tax charge of 40% of the amount of the unauthorised payment (under FA 2004, s 208(5));

(2) An unauthorised payment surcharge (UPS) of 15% of the amount of the unauthorised payment (under FA 2004, s 209(6));

(3) A scheme sanction charge (SSC) of 40% of the scheme chargeable payments made (under FA 2004, s 239).

11. The provisions relating to assessments of charges under Part 4 of FA 2004 are in sections 254 and 255 of FA 2004. Under section 254, the scheme administrator is obliged to make a return of the income tax to which it is liable under Part 4 of FA 2004, which includes a charge to income tax arising from unauthorised payment charges, unauthorised payment surcharges and scheme sanction charges. The returns are to be made quarterly (within 45 days of the end of the quarter), but only if an income tax charge has arisen in the quarter. HMRC will then raise an assessment under section 255 of FA 2004 and Regulation 4 of RPSAAR. However, FA 2004, s 254(5) and 239(1) state that the charge to income tax arises and is payable without the making of the assessment.

Discharge of charges

12. Under FA 2004, s 268 certain persons can apply for discharge of UPS and SSCs:

(1) Under subsections (2) and (3), a person who has been liable to a UPS can apply to HMRC to discharge the UPS on the grounds that, 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 in respect of the payment.

(2) Under subsections (5) and (7), the scheme administrator may apply to HMRC to discharge a SSC (so far as is relevant in this case) on the grounds that:

(a) the scheme administrator reasonably believed that the unauthorised payment was not a scheme chargeable payment, and

(b) in all the circumstances of the case, it would not be just and reasonable for the scheme administrator to be liable to the scheme sanction charge in respect of the unauthorised payment.

Background facts and matters under appeal

13. It is helpful to set out the background facts (which were not in dispute) and the matters which are under appeal before going into more detail.

14. BFL is a company, incorporated in 1982, which sells lighting products. Mr Wightman bought BFL in January 2008. It was at all relevant times 100% owned by Mr and Mrs Wightman.

15. Falken Limited (FL) is a company, incorporated in June 2010, also at all relevant times 100% owned by Mr and Mrs Wightman.

16. BFPS was set up in March 2010. BFL was its sponsoring employer and scheme administrator.

17. Shortly after BFPS was set up, Pension Practioner.com Limited ("PPCL") was appointed as pension practitioner for BFPS.

18. On 15 November 2010, BFPS made a loan to FL of £200,000 ("Falken 1").

19. On 3 March 2011, BFPS made a loan to BFL of £200,000.

20. On 31 January 2012, BFPS made a loan to FL of £50,000 ("Falken 2").

21. BFL, as scheme administrator, did not make returns of income tax in respect of the relevant quarters in which the loans were made.

22. PPCL submitted an event report reporting the Falken 2 loan as an unauthorised payment on 30 January 2013.

23. HMRC issued a notice of assessment to BFL charging a SSC of £20,000 on Falken 2 (not under appeal) on 4 December 2013.

24. HMRC opened an enquiry into the BFPS pension scheme returns filed by PPCL for the years ending 5 April 2011 and 5 April 2012 on 9 January 2014.

25. Following exchanges of correspondence and meetings, HMRC raised the following assessments (among others that are not the subject of this appeal):

(1) On 19 October 2015 an assessment for a UPC and UPS of £110,000 (being 55% of the £200,000 loan) in respect of the period 1 January 2010 to 31 December 2010 (i.e. in relation to the Falken 1 loan);

(2) On 19 October 2015 an assessment for a UPC and UPS of £110,000 (being 55% of the £200,000 loan) in respect of the period 1 January 2011 to 31 December 2011 (i.e. in relation to the BFL loan), but only £80,000 of this charge (being the 40% UPC) remains under appeal because the UPS was discharged by HMRC on 13 April 2016 (confirmed 16 June 2016) under FA 2004, s 268;

(3) On 24 March 2015 an assessment of a SSC of £160,000 (being 40% of £400,000) in respect of the tax year ending 5 April 2011 (i.e. in relation to both the Falken 1 loan and the BFL loan), but only £80,000 of this assessment remains under appeal because the £80,000 in relation to the BFL loan was discharged by HMRC on 13 June 2016 under FA 2004, s 268.

26. Further facts are found as set out in the relevant passages of the decision below.

Grounds of appeal

27. I set out a summary of the grounds of appeal here because it is helpful to explain the structure of the rest of this decision. Further details of each ground are set out in the sections that follow.

28. Ms Bun submitted that:

(1) The discovery assessment relating to the SSC is not validly issued because HMRC had no competence to raise a discovery assessment in relation to scheme sanction charges;

(2) The discovery assessment relating to the Falken 1 loan is not validly issued because it is out of time;

(3) If the discovery assessments are not quashed, that:

(a) the BFL loan was not an unauthorised payment because it is not an unauthorised employer loan and therefore the UPC and UPS did not validly arise; and

(b) HMRC's decision to refuse to discharge the UPS and SSC should be overturned on the grounds that the scheme administrator reasonably believed that the Falken 1 loan was not a scheme chargeable payment and that it would not be just and reasonable in all the circumstances to impose the SSC.

The application of discovery assessments to scheme sanction charges

29. This section deals only with the question of how TMA 1970, s 29 is to be interpreted in the context of scheme sanction charges. The more general questions about the validity of the discovery assessments are set out in the section that follows. For the purposes of this question only, I assume that there is an underlying unauthorised payment that would give rise to a scheme sanction charge.

Appellant's arguments

30. Ms Bun submitted, on behalf of the appellant, that HMRC does not have the power to issue a discovery assessment at all in relation to scheme sanction charges.

31. Ms Bun submitted that the general conditions for issuing a discovery assessment in section 29 of the Taxes Management Act 1970 are modified by the application of regulation 9 of the Registered Pension Schemes (Accounting and Assessment) Regulations 2005 (SI 2005/3454) (RPSAAR) in relation to assessments of tax under cases 1, 2 or 3 set out in regulation 4 of RPSAAR. Cases 1, 2 and 3 are:

> (1) Case 1: an UPC under FA 2004, s 208, where the person liable to the charge is a company;
>
> (2) Case 2: an UPS under FA 2004, s 209, where the person liable to the charge is a company; and
>
> (3) Case 3: a lifetime allowance charge under FA 2004, s 217 (not relevant to this appeal)

32. Since the person that is liable to the charges under appeal is BFL, a company, the effect of regulation 9 of RPSAAR is that TMA 1970, s 29(1) is amended as follows (with the amendments shown in italics):

> (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 unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) 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.

33. Ms Bun argues that the absence of SSCs from the amendments to TMA 1970, s 29(1)(a) is a deliberate exclusion, supported by the fact that SSCs are dealt with in Regulation 4 of the RPSAAR as Case 4, i.e. the SSCs were in the contemplation of the drafter but specifically excluded from Regulation 9.

34. Ms Bun further argues that it is clear from the need for Regulation 9 of the RPSAAR that UPCs and UPSs would not otherwise be caught by TMA 1970, s 29 at all because they could not fall within the natural and ordinary meaning of the word

income and that deemed income is not expressly included in the words of TMA 1970, s 29 and cannot be read into clear and unambiguous words.

35. Therefore Ms Bun submits that HMRC is not empowered to make a discovery assessment of a SSC against BFL.

HMRC arguments

36. HMRC submitted that:

(1) Regulation 9 of RPSAAR was only inserted as an avoidance of doubt provision; and

(2) SSCs are clearly income tax charges;

Therefore the provisions of section 29 clearly apply to allow discovery assessments to be raised.

37. HMRC also submitted that the assessment could be made under section 29(1)(b) because the assessment of scheme sanction charges is made by HMRC on the basis of the returns made the scheme administrator. The absence of the event reports prevented HMRC from making such an assessment within the normal assessment rules.

38. HMRC cited the case of *Gareth Clark v HMRC* [2017] UKFTT 0392 (TC), stating that, although it was not directly on point, it gives the background for assessments in the context of pensions tax charges.

Discussion

39. I cannot accept HMRC's submission that Regulation 9 of RPSAAR was included only for the avoidance of doubt. Without it, section 29(1)(a) of TMA 1970 would not have included an assessment of UPC or UPS because they do not relate to any income. As noted in *Clark*, FA 2004, s 208(8) expressly states that an unauthorised payment is not to be treated as income for any purposes of the Tax Acts. Therefore I conclude that the wording inserted by Regulation 9 of RPSAAR is required to permit HMRC to make a discovery assessment of UPC or UPS charges under section 29(1)(a) of TMA 1970.

40. The question relevant to this ground of appeal, however, is whether the SSC can be assessed under section 29 of TMA 1970. The SSC in this case arises in relation to a scheme chargeable payment that is an unauthorised payment under section 241(1)(a) of FA 2004 rather than any other type of scheme chargeable payment. Given the statement in FA 2004, s 208(8) noted above that unauthorised payments are not income, I can see no basis on which the SSC in this case could be classified as income for the purposes of section 29(1)(a) of TMA 1970. I also agree with Ms Bun that the absence of SSCs from the amendments made to section 29(1)(a) of TMA 1970 by Regulation 9 of RPSAAR is clear. Therefore I conclude that HMRC is not permitted to make a discovery assessment of a SSC under section 29(1)(a) of TMA 1970.

41. HMRC are correct to conclude that *Clark* is not directly on point. The case did not relate to scheme sanction charges and the modifications made by Regulation 9 of RPSAAR were not relevant because the charges were assessed against an individual, rather than a company. However, the First-tier Tax Tribunal in that case went on to conclude that the relevant assessments had been made under section 29(1)(b), i.e. that they were assessments to tax that were or had become insufficient.

42. As set out above, BFL as scheme administrator was obliged to make a return of the income tax to which it was liable under Part 4 of FA 2004, which includes a charge to income tax arising from a scheme sanction charge. BFL, as scheme administrator of BFPS, did not make such a return of income tax in respect of the relevant quarters.

43. The words of section 29(1)(b) are "that an assessment to tax is or has become insufficient". On the plain reading of those words it seems clear to me that there must have been a previous 'assessment' which proved to have been insufficient. This sits squarely with the different targets of sub-paragraphs a, b and c of the discovery assessment provisions:

> (1) paragraph a is targeting income and gains that ought to have been assessed but have not been assessed at all;
>
> (2) paragraph b is targeting assessment that has happened but has proved insufficient; and
>
> (3) paragraph c is targeting excessive reliefs (which might otherwise have escaped assessment under the first two paragraphs);
>
> If paragraph b could encompass the absence of an assessment, there would be no reason to have paragraph a.

44. While this seems an unusual outcome, parliament made specific amendments to incorporate UPCs and UPSs into the discovery assessment regime and did not include SSCs in that list. I can see no reason to read the words 'there has been no assessment to tax' into section 29(1)(b). In this case there had been no previous assessment of BFL as scheme administrator in relation to the tax year ending 5 April 2011 and therefore section 29(1)(b) cannot apply.

45. I therefore conclude that HMRC was not permitted to raise a discovery assessment in respect of the SSCs in the tax year ending 5 April 2011 and it should be set aside.

Were the remaining discovery assessments valid?

46. For the purposes of this question only, I assume that there is an underlying unauthorised payment that would give rise to the UPC and UPS charges.

HMRC's arguments

47. HMRC submits that it was entitled to make discovery assessments under TMA 1970, s 29(1) because:

(1) the existence of the Falken 1 and BFL loans only came to HMRC's attention following enquiries raised after PPCL reported an event in relation to Falken 2 loan; and

(2) HMRC, or an officer acting for it, could not reasonably have been expected to be aware of the Falken 1 and BFL loans prior to that time.

48. The assessment in respect of the BFL loan was made on 19 October 2015 and related to the year ended 31 December 2011, it was therefore made within the 4 year time limit in TMA 1970, s 34(1).

49. The assessment of the UPC and UPS in respect of the Falken 1 loan was made on 19 October 2015 and related to the year ended 31 December 2010. It was therefore made outside the 4 year time limit. HMRC submit that it was entitled to raise the assessment within the longer 6 year time limit under TMA 1970, s 36(1) because the loss of tax was brought about carelessly.

Appellant's arguments

50. Ms Bun, on behalf of the appellant, argued that:

(1) HMRC had failed to discharge the burden of proof in regards to its competence to issue a discovery assessment under TMA 1970, s 29; and

(2) HMRC was incorrect to submit that the loss of tax in respect of the Falken 1 loan had been brought about carelessly by BFL and the assessment was therefore out of time.

Discussion

51. With regards to the question of HMRC's competence to issue the assessments, I find that HMRC did meet the requirements of TMA 1970, s 29. The reasons for this conclusion are that:

(1) The submission of the event report by PPCL in relation to the Falken 2 loan in January 2013 was the first step in the series of events that culminated in the discovery assessments;

(2) The second step was HMRC concluding its assessment on that loan, which happened in December of the same year;

(3) A month later, HMRC started enquiring into earlier years and, following extended correspondence with BFL, made the assessments on 19 October 2015;

52. In the absence of the returns from the scheme administrator regarding its income tax liabilities in the earlier years, HMRC could not reasonably have been expected to know that there were income tax charges, or loans that potentially could have given rise to income tax charges, during the normal enquiry window.

53. Therefore, I find that the assessment in respect of the BFL loan, which was made within the standard 4 year period, was validly made.

54. The question of carelessness relates to the same factual issues regarding the appointment and advice of PPCL that are discussed in the section below on the discharge of the charges. On the same basis set out there, I find that the loss of tax was brought about carelessly and therefore HMRC was entitled to raise the discovery assessment in relation to the Falken 1 Loan within the longer 6 year window and therefore the discovery assessment is valid.

Were the loans made by BFPS unauthorised employer payments?

Appellant's arguments

55. The appellant accepts that the Falken 1 loan was an unauthorised employer payment because it did not meet the security requirements of FA 2004, s 179.

56. Ms Bun submitted that the BFL loan was not an unauthorised employer payment because it was an authorised employer loan under FA 2004, s 179.

57. In particular, she argued that the security test was met because a charge securing the BFL loan was registered at Companies House and was legally valid security for the loan.

58. Secondly, that the repayment test was satisfied because:

(1) The statutory test simply refers to the fact that the terms of the loan must comply with the repayment provisions in FA 2004, s 179(2);

(2) The terms of the BFL loan required repayment of capital in equal instalments; and

(3) The fact that the capital was not in fact repaid in equal instalments is a practical contractual matter to be resolved between the parties and does not affect the question of whether the loan meets the conditions in section 179 of FA 2004.

HMRC's arguments

59. HMRC submits that none of the conditions in FA 2004, s 179 are met in relation to the BFL loan.

60. The 50% asset test is failed because at the point the BFL loan of £200,000 was made:

(1) The total value of the BFPS fund was approximately £610,000, and

(2) Loans of £200,000 had already been made under Falken 1;

Therefore the total loans of £400,000 exceeded 50% of the value of the fund.

61. HMRC submit that the security was not a charge of adequate value because:

(1) It was not registered until 3 months after the loan was made;

(2) The obligation to register the charge within 21 days of the creation of the charge is found in Companies Act 2006, s 870, i.e. a requirement of company law that does not need to be repeated in pensions law; and

(3) Even once registered, the charge did not take priority over other security on the same assets because two other charges already existed and therefore the condition in paragraph 1(4) of Schedule 30 to FA 2004 is not met.

62. HMRC also submit that the repayment terms condition is not met, in particular:

(1) The term in the loan agreement relied upon in the appellant's submissions does not in fact require capital repayments in accordance with the requirements of paragraph 4 of Schedule 30 to FA 2004; and

(2) In any event, Mr Wightman's evidence contradicted the assertion that equal capital repayment was required.

Findings of fact

63. Based on the evidence presented both in witness and documentary form, I find the following further facts:

(1) The loan agreement between BFPS and BFL was signed on 3 March 2011;

(2) At the time of entering into the BFL loan, the asset value in BFPS was approximately £610,000;

(3) A deed creating a floating charge over assets of BFL in favour of BFPS was also signed on 3 March 2011;

(4) A floating charge created on 20 May 2011 was registered at Companies House over assets of BFL in favour of BFPS on 6 June 2011;

(5) At the time of the creation of the floating charge, there were at least two other registered charges existing over the assets of BFL;

64. The loan agreement contained the following term 7.3 under the heading 'Amortisation of Loan':

(1) Upon the making of any Loan the number of days falling between the date of the advance of the Loan and the date stipulated in the relevant Drawdown Request as the Term Date shall be the number of "Loan Repayment Instalments".

(2) Commencing on the first anniversary following payment and on each year thereafter following the advance of the Loan, the Loan shall be repaid by paying from other sources in pounds sterling to the Scheme for credit in the relevant Loan Account an amount equal to the Loan Repayment Instalments.

65. There is no further definition of 'Loan Repayment Instalments' elsewhere in the loan agreement.

66. Mr Wightman's evidence in letters to HMRC and witness statements was that this clause did not require fixed capital repayments, but that it was open to the parties to agree repayment by instalments. However, Mr Wightman made contrary statements in witness evidence that he had believed there was an obligation to pay in equal instalments. On cross-examination, Mr Wightman accepted that the text of the loan agreement seemed to be incomplete and that it doesn't make sense.

67. I agree with Mr Wightman's final conclusion that the clause does not make sense, in particular the fact that definition of 'Loan Repayment Instalments', which seems to be related to a number of days, cannot generate a number that could equate to an instalment to be repaid annually. I find that there is nothing in the clause that could realistically be interpreted as requiring payment of equal instalments for each year of the loan and that Mr Wightman, as both director of BFL and on behalf of BFPS did not have an expectation that this was required.

Discussion

68. The requirements for the repayment of the employer loans are found under FA 2004, s 179(1)(c) and (2)(c) as supplemented by paragraph 4 of Schedule 30 (set out above). The effect of these requirements is that loans must be repaid in equal instalments for each year that the loan is outstanding, i.e. for a 5 year loan, 20% of the capital must be repaid at the end of each loan year. As I have set out in the findings of fact above, the terms of the BFL loan did not meet these requirements and therefore this condition is not met.

69. Only one of the three conditions for an authorised employer loan has to be failed in order for the BFL loan to be treated as an unauthorised employer payment. However, since I heard argument on all three, I will set out briefly my decisions on the other two conditions.

70. Although a charge was drawn up and signed at the same time that the loan was entered into, that charge was, for whatever reason, not registered at Companies House (as is required for good security over a company's assets). Therefore from 3 March to 6 June 2011 there was no security at all to support the loan. The definition of a charge of adequate value in Schedule 30 to FA 2004 does not stipulate a relationship in time between the making of the loan and the establishment of the charge. Section 179(7) states that a charge includes 'an agreement to create a right in security'. It may be arguable that this means that a contractual right to create a valid charge would be sufficient to meet the requirements, but I need not decide that in this case because, in any event the charge that was eventually created 3 months later did not have priority over other charges on the same assets and therefore did not meet the third condition of a charge of adequate value.

71. On the question of the asset valuation, there was some debate about whether HMRC was entitled to argue that this test was not met, because, in the review letter (dated 5 August 2016), HMRC had stated that the 50% asset condition had been met at the time of the BFL loan. Given the decisions on the previous two conditions, I will not provide a full discussion of why this does not prevent HMRC from raising the

point on an appeal, but, put briefly, I apply the principle in *Burgess and Brimheath v HMRC [2015] UKUT 578*, that the matter under appeal is the decision made on the review, ie the decision to uphold the charges, not each and every statement within the letter.

72. The requirement is that the 'amount loaned' does not exceed 50% of the value of assets in the fund at the time of the loan. Since the value of the fund assets was approximately £610,000 and the amount of the BFL loan was £200,000, certainly the amount loaned under the BFL loan agreement did not exceed 50%. However, the question arises as to what 'amount loaned' means, i.e. whether it includes both the loan in question and the Falken 1 loan, which would take the amount loaned to £400,000 and therefore exceeding the 50% condition. HMRC's view was that the amount loaned means 'cumulative loans'.

73. Although I would lean towards the conclusion that the words of FA 2004, s 179 do not support HMRC's contention that this test relates to the cumulative loans made from the pension fund because the introductory language to section 179 refers to 'a loan' and is clearly referring to assessing individual loans; and when setting out the conditions for a loan to be authorised, it refers back to that loan, I did not hear strong arguments on either side and, given it is not determinative in this case, I will leave a conclusion on this matter to another Tribunal.

74. In summary, therefore, I find that the BFL loan was an unauthorised employer payment. For this reason the UPC was chargeable in respect of the BFL loan.

Should the charges be discharged under FA 2004, s 268?

75. This question relates only to the UPS and SSC in respect of Falken 1 loan because UPCs cannot be discharged under FA 2004, s 268 and the UPS in respect of BFL has already been discharged.

76. Although I do not strictly need to make the decision in respect of the SSC because I have found the discovery assessment to have been invalid, I make the decision in respect of both charges given that they relate to the same set of facts.

Appellant's arguments

77. Ms Bun, on behalf of the appellant, submits that in all the circumstances of the case it would not be just and reasonable to impose the UPS because BFL had:

(1) Reasonably and honestly believed that it had all material times ensured compliance with the law in BFPS;

(2) Reasonably and honestly and in good faith relied at all times on the professional, expert advice and guidance of PPCL as well as the registration and reporting services;

(3) Made reasonable enquiries about PPCL's competence by requesting confirmation that it was registered with HMRC as a pension practitioner and reviewing pension information sheets on PPCL's website; and

(4) Been careful and concerned that BFPS should only be making what it reasonably and honestly believed to be legally compliant, commercial, revenue-generating investments for the pension scheme.

78. In further support of BFL's case, Ms Bun submitted that:

(1) There was no question of tax abuse or intention or recklessness on the part of BFL to frustrate the purposes of the pension tax regime; and

(2) There had been no loss or damage suffered by BFPS or HMRC.

79. With regards to the SSC, Ms Bun submitted that:

(1) BFL had, through its managing director, Mr Wightman, reasonably believed that the Falken 1 loan had been a legally compliant authorised employer loan because PPCL had confirmed that to him and he had been entitled to rely on their advice; and

(2) There are no exceptional circumstances in this case making it just and reasonable to impose the SSC on BFL.

HMRC's arguments

80. Ms Hirsch submitted, on behalf of HMRC, that:

(1) The alleged 100% reliance by Mr Wightman, as director of BFL, on PPCL was not a reasonable position to take because:

(a) His enquiries into PPCL's competence were limited to interviewing them prior to appointment (as part of a shortlisting process);

(b) He had obtained no independent verification of their competence;

(c) Given his fiduciary duties as director of both companies and the potential conflict of interest between his roles as director and as scheme administrator, he should have been extra careful to ensure the highest standards of competence.

(2) Mr Wightman's reliance on PPCL with regard to the question of whether the loans made were unauthorised payments (and therefore scheme chargeable payments) did not amount to a reasonable belief because Mr Wightman did not discharge the burden of proof of showing that PPCL had so advised in a manner that it would have been reasonable for him to rely on, in particular it was not in writing; and

(3) It is just and reasonable in all the circumstances of the case for BFL to be subject to the UPS and SSC because:

(a) Mr Wightman had not taken sufficient steps to discharge his statutory duties as director of BFL, and therefore as scheme administrator; and

(b) The statute does not provide for credit for the fact that the loans were ultimately repaid, or that HMRC has not been disadvantaged.

Further findings of fact

81. The majority of the oral evidence at the hearing centred around the skills and qualifications of PPCL; the relationship between BFL and PPCL and the extent of Mr Wightman's reliance on PPCL. Based on the oral and documentary evidence before me, I find the following additional facts:

(1) Mr Wightman did not have any special knowledge of pensions law, but was an experienced businessman and director, with experience of negotiating contracts;

(2) BFPS was set up in order to receive transfers of previous pension pots from both Mr and Mrs Wightman from previous employers;

(3) The ability for BFPS to make loans to the employer was one of the reasons that establishing the scheme was appealing to Mr Wightman, but it was not the only reason;

(4) Mr Wightman had read in the financial press about self-administered pension schemes and the flexibility they offered. As a result he went looking for a pension practitioner to assist in establishing and running the scheme;

(5) Mr Wightman researched online for an appropriate practitioner and found 8 practitioners holding themselves out as having the right skill set. He whittled that down to 3 and interviewed them. The managing director of PPCL was very convincing that they were experts in self-administered pensions and would be able to assist BFL. In addition they held themselves out as HMRC-registered, which Mr Wightman found reassuring;

(6) Being an HMRC-registered pension practitioner, at the relevant time, brought with it no assertion of any particular qualifications or approval by HMRC, but was simply a process of registration to use the HMRC website;

(7) Mr Wightman was aware of the concept of an unauthorised payment and that loans made by the pension fund had to meet certain criteria because he had come across it in the course of his research into pension practitioners;

(8) Mr Wightman was also aware that the obligations of scheme administrator remained on BFL and were not delegated or outsourced to PPCL;

(9) PPCL drafted the loan agreements for the BFL and Falken loans and all other accompanying documentation;

82. There was some dispute about the format of advice received by BFL from PPCL, in particular whether it was in writing or orally. At the hearing, Mr Wightman asserted that all of the advice was oral, either on phone or face to face and that email and post was only used to exchange documents, eg the loan agreements etc or for 'correspondence'. He also asserted that this was completely normal 'in this day and age' and that he would expect the same from chartered accountants and lawyers save in circumstances where litigation was specifically in prospect. As a result Mr

Wightman could not produce any documentary evidence of the advice received from PPCL.

83. This oral evidence was at odds with some statements Mr Wightman had made in earlier letters to HMRC during the enquiry.

84. I did not find Mr Wightman's evidence on this issue very convincing. I find it very unlikely indeed that there was nothing whatsoever written down in email or postal correspondence from PPCL regarding the compliance of the loans with the pensions legislation. However, I do not need to make a final finding on this issue, because I do not think it is determinative of the issues at hand.

Discussion

85. The questions to be answered in relation to discharge are:

(1) Whether, in all the circumstances of the case, it would be just and reasonable for BFL to be liable to the UPS in respect of the payment; and

(2) In respect of the SSC, whether:

(a) BFL reasonably believed that the unauthorised payment was not a scheme chargeable payment, and

(b) in all the circumstances of the case, it would not be just and reasonable for BFL to be liable to the scheme sanction charge in respect of the unauthorised payment

86. Before moving onto the just and reasonable arguments, I will consider the question of whether BFL reasonably believed that the Falken 1 loan was not a scheme chargeable payment. The appellant now accepts that Falken 1 loan was in fact an unauthorised employer payment, so the question is whether BFL reasonably believed that it was not such a payment at the time of the loan. While the reasonable belief has to have been held by BFL as Scheme administrator, the reality is that Mr Wightman as director of BFL was the guiding mind of BFL in this matter and therefore it is his reasonable belief that I assess.

87. Mr Wightman submitted that he had complete faith and trust in PPCL to advise him on the use of the funds in the pension and relied entirely on advice he says they gave.

88. I find that Mr Wightman has not discharged the burden of showing, as he must since it is his reasonable belief that is in question, that he actually did receive advice that the Falken 1 loan was not a scheme chargeable payment from PPCL. As noted above, I find that PPCL did provide the necessary documentation to implement the loan and was instructed by BFL to make all necessary returns on behalf of BFPS. However, Mr Wightman's own admissions in evidence were that the ability to lend money from the pension fund was one of the reasons for setting it up, that he had read a number of articles on pension practitioner websites prior to choosing PPCL and that he was aware there were a number of requirements in order for loans made to be

compliant. In addition, he is an experienced businessman with knowledge of the importance of both company and director responsibilities and contractual obligations. I therefore find that any belief he held, if he did so hold one, that the payment was not a scheme chargeable payment was not a reasonable one to hold because he should have considered the basis for any advice received and whether it made sense, as was the case in *A Anderson* [2016] UKFTT 335 (TC). I find that if he had applied such a critical mind to the situation, he would have challenged the validity of the loan and sought clarification from PPCL, but he did not (or at least has not discharged the burden of showing that he did).

89. For the sake of completeness, it is for these same reasons that I find that the loss of tax was brought about carelessly by BFL for the purposes of the discovery assessment, as discussed above.

90. The 'just and reasonable' question is a wider one. Although the decision on reasonable belief is sufficient to dispose of the claim for discharge in respect of the SSC, the assessment is the same for both charges in any event.

91. Much of the argument on the just and reasonable tests also centred around whether BFL and Mr Wightman were just and reasonable in relying entirely on PPCL. There was some debate about whether it would be just and reasonable to rely on a lawyer or chartered accountant, but not just and reasonable to rely on a pension practitioner with no particular professional qualifications. I do not believe that the qualifications of the advisers involved are particularly instructive here. BFL must show that it would not be just and reasonable to allow the charges to remain in all the circumstances of the case.

92. I adopt the approach taken by the Tribunal 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.

93. The Tribunal observed in *O'Mara* that an unauthorised payments surcharge is a "rough and ready" measure to recoup the tax relief on pension contributions and that therefore the circumstances in which it would not be just and reasonable to impose the charges may be limited. In addition, the fact that the taxpayer has taken legal, accounting or tax advice is not sufficient of itself to make it unjust or unreasonable for the charge to remain.

94. With these principles in mind, I consider the position of BFL and am not satisfied, having regard to all the circumstances, that the imposition of the charges is unjust or unreasonable.

Decision

95. For the reasons set out above, the decisions in these joined appeals are as follows:

(1) HMRC was not entitled to raise the discovery assessment of the Scheme Sanction Charge of £80,000 in relation to the Falken 1 loan in the tax year ending 5 April 2011, made on 24 March 2015, and therefore the assessment must be set aside;

(2) The discovery assessments made of the Unauthorised Payment Charge and Unauthorised Payment Surcharge in relation to the Falken 1 loan (amounting to £110,000) and the Unauthorised Payment Charge in relation to the BFL loan (amounting to £80,000), made on 19 October 2015, were validly made under the discovery regime;

(3) The BFL loan was an unauthorised employer payment and that the Unauthorised Payment Charge arising in respect of it therefore validly arose;

(4) HMRC's decisions to refuse to discharge the Unauthorised Payment Surcharge in relation the Falken 1 loan (and the related Scheme Sanction Charge, should the decision in (1) above be found to have been wrong) should not be overturned.

96. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

RELEASE DATE: 20 June 2018