



TC06378

Appeal number: TC/2017/02306:

Income Tax – whether relief for "contributions" paid to self-invested pension plan in respect of contribution of assets in satisfaction of debt, whether there was a debt - appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SIPPCHOICE LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE GETHING

**Sitting in public in Court 35 at Taylor House, Rosebery Avenue, London on
Monday 26 February 2018 at 10.30am**

Rebecca Murray of counsel for the Appellant

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

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DECISION

1. The issue in this case is whether contributions made by four members of a Self-
5 Invested Pension Plan ("SIPP") were "paid" within the meaning of section 188(2)
Finance Act 2004 (FA 2004) and therefore qualify for relief from income tax at
source, as claimed by SIPPCHOICE Limited (SIPPCHOICE) in its annual claim
form. The facts and circumstances and the issues pertaining to the four members are
10 identical save for the amount/value of the contributions. For simplicity Counsel for
SIPPCHOICE referred me to the documents relating to Mr Marcus Carlton ("Mr
Carlton") only and HMRC did not object to referring only to Mr Carlton's documents.
For simplicity and brevity therefore, I refer only to the facts and circumstances of Mr
Carlton but this decision applies to all four members.

The facts

15 2. In the period 6 March to 5 April 2016 SIPPCHOICE made a claim for relief
from income tax at source in respect of a contribution with a net value of £68,342.00
made by Mr Carlton to the SIPPCHOICE BESPOKE SIPP which is constituted by a
Trust Deed and Rules. The Trust had been declared by SIPPCHOICE Limited on 6
20 April 2009. HMRC denied the claim for relief. SIPPCHOICE contested that decision
and included the denied claim in its Annual Relief at Source claim (on form APSS
106). HMRC decided to refuse that claim. SIPPCHOICE appeals against that
decision.

The Trust Deed and Rules

3. The recitals to the Trust Deed indicate that:
- 25 (1) SIPPCHOICE as Provider wished to establish a personal pension scheme
which provided benefits to enable the scheme to be a registered pension scheme
under Part 4 of the Finance Act 2004. The benefits are listed in section 150 FA
2004 as benefits on retirement, death, reaching a particular age, onset of serious
ill-health or incapacity or in similar circumstances.
- 30 (2) SIPPCHOICE also agreed to be the Trustee of the Scheme. The Scheme
was to be known as the SIPPCHOICE BESPOKE SIPP.
4. Under clause 2 of the Deed SIPPCHOICE agrees to be the first Administrator of
the Scheme and to administer the Scheme per Clause 3(a) in accordance with the
provisions of the Trust Deed and the rules set out in the first and second schedules to
35 the Trust Deed, referred to as the Scheme Rules and the General Rules respectively
but together referred to as the Rules. The registered pension scheme which was
thereby established is referred to as "the Scheme".
5. Clause 3(b) of the Deed provides that the Scheme Administrator shall enter into
a contract with every individual who wishes to become a member of the SIPP and the
40 terms of that contract shall be referred to as the "Terms and Conditions".

6. Clause 11 of the Deed indicates that the Scheme Administrator has discretion not to make investments and not to make payments, if to do so would prejudice the registration of the Scheme under the Finance Act 2004 ("FA 2004").

5 7. The Scheme Rules in the First Schedule to the Trust Deed provide for a number of things:

(1) Rule 4(a) provides that any individual wishing to join the Scheme must make an application to the Scheme Administrator in such form as the Scheme Administrator shall require.

10 (2) Rule 5(a) of the Scheme gives the Scheme Administrator complete discretion to admit a new member of the Scheme.

(3) Rule 5(b)(i) provides that a member agrees as a condition of membership to comply and observe the provisions of the Rules and Terms and Conditions.

8. (4) Rule 7 provides that:

15 *"The payment of contributions shall be subject to such provisions as are set out in the Rules and the Terms and Conditions and such other requirements that the Scheme Administrator may specify from time to time."*

(5) Rule 12(a) gives the Member the right and entitlement:

20 *"solely to exercise, in relation to his Member's Fund, at his absolute discretion, the powers to instruct the Scheme Administrator to make an Eligible Investment."*

(6) Under Rule 12(d) the Scheme Administrator if required shall invest or apply the Member's Fund in Eligible Investments in accordance with instructions given to the Scheme Administrator by the member consequent upon the exercise by the Member of the power to instruct conferred by Rule 12(a).

25 (7) Under Rule 12(e) in order to comply with an instruction under rule 12(a) the Trustees shall execute such documents and do such things as may be necessary to give effect to the instructions under Rule12(a).

The General Rules

30 9. The General Rules in the Second Schedule to the Trust Deed relevantly provide as follows:

35 (1) Rule 3 deals with Members and Arrangements. Specifically Rule 3(a) requires a person who wishes to become a Member to complete an application procedure as required by the Scheme Administrator which must include two declarations. First, the Member agrees to be bound by the General Rules and secondly, the Scheme Administrator agrees to administer the Scheme as required by the General Rules.

(2) Rule 4 deals with Contributions. Relevantly Rule 4(a) states that the Scheme may accept only Contributions by Members or contributions made on behalf of Members and Contributions by the Members' employer.

5 (3) Rules 4(c) and (d) provide for tax relief at source reclaims and whether the Member is entitled to the relief under sections 188 to 190 FA 2004.

(4) Rule 4(g) requires that contributions can only be paid in the methods prescribed in that rule including in money, by a transfer of assets in specie in satisfaction of an obligation by the member to pay a monetary amount by way of contribution, and by transfer of shares acquired pursuant to a SAYE share option scheme etc under section 195 FA 2004

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The Terms and Conditions

10. These are expressed to apply from acceptance of an individual as a Member subject to the Rules. Relevantly they provide:

15 (1) Clause 3(a) indicates that contributions "*may be made only in such manner as [the SIPPCHOICE Limited, the Scheme Administrator] "may from time to time prescribe"*."

(2) Clause 6 deals with Investments and Clause 6(a)(i) provides, subject to the Trust Deed and Rules, that the Member will instruct the Administrator in such manner as the Administrator from time to time prescribes, as to the investment of the Members Fund. Rule 6(b) further provides that if the Member wishes to exercise the power of investment under the Trust Deed the Member must comply with the Administrator's requirements

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(3) Clause 10 deals with Instructions and Notices. All notices and instructions must be in writing and in such form as the Administrator may from time to time prescribe and, by agreeing to the Terms and Conditions, the Member authorises the Administrator to accept such instructions.

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(4) Clause 19 gives the Administrator the power to amend the Terms and Conditions if there is a material change in the procedure for recovery of tax relief or compliance with applicable laws

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The Application Form

11. The application form completed by Mr Carlton and signed on 9 March 2016 indicates that:

35 (1) he wished his join the HFM Columbus SIPP which was part of the SIPPCHOICE BESPOKE SIPP

(2) Mr Carlton wished his pension fund to be invested in unquoted shares in a trading company with a value of approximately £70,000.

(3) By Clause 7, Mr Carlton agreed to be bound by the Trust Deed and Rules and the Terms and Conditions.

12. A footnote indicates that the SIPPCHOICE DESPOKE SIPP is registered with HMRC.

13. The bundle does not contain a copy of a communication from SIPPCHOICE to Mr Carlton accepting him as a Member. As Mr Carlton executed a contribution form mentioned in Para 14 below, it seems clear he must have been accepted. HMRC did not assert that Mr Carlton had not been accepted as a Member.

Documentation implementing the contribution

14. On 9 March 2016 Mr Carlton executed a SIPPCHOICE BESPOKE SIPP Contribution Form. Section D of the form, entitled "*In Specie contribution*" reads as follows:

| | |
|-----------------------------------|--|
| Declaration to Sippchoice Limited | I propose to make a net contribution of the amount shown below to the SIPPCHOICE Bespoke SIPP and this notification constitutes an irrevocable and binding obligation to make this contribution. |
| Proposed net contribution | £68,324 (net) |
| Agreement | I understand that by signing this declaration I am creating a legally binding and irrevocable obligation to make the specified contribution and that it will not be possible to change my mind even if, for whatever reason, I am unable to proceed with the asset transfer that was originally envisaged. |
| Signature | [Mr Carlton's signature] |
| Date | 9.03.16 |

15. On 16th March 2016 SIPPCHOICE wrote to Mr Carlton acknowledging receipt of the Contribution Form notifying them of Mr Carlton's intention "*to make an 'in specie' contribution to the HFM Columbus SIPP*" and advising him that "*By signing the declaration [in the Contribution Form] you created a legally binding and irrevocable obligation to make the contribution and as such we now require written confirmation from you as to how you intend to settle the debt.*"

16. On 24 March Mr Carlton wrote confirming that his "*contribution shall be made by way of an in-specie transfer of the following assets to satisfy the obligation*"

20 "*HFM Columbus Group Holdings Ordinary Shares: 760,846 units*"("the Shares")

17. In the letter he acknowledged that the contribution being made "*will be the value of the assets mentioned above. I understand that the value may change and that there are rules that must be adhered to with regards change in value.*"

18. *"I agree if the value decreases I will pay a monetary amount into the scheme to bring the contribution up to the value quoted in my first letter. I understand that you as Administrator are legally bound to pursue this payment from me."*

19. There was also a mechanism to deal with overpayment.

5 20. On 29 March 2016 SIPPCHOICE wrote accepting the in specie contribution of the Shares and asking for the duly completed stock transfer to be executed in the name of the Trustee.

10 21. On 29th March 2016 SIPPCHOICE wrote to Mr Carlton advising him that the valuation report of 31 December 2015 indicated the shares had a value of £68,323.97 and that Mr Carlton had to make a payment of 3p to settle the debt of £68,324.00

HMRC Guidance

22. The HMRC Pensions Tax Manual ("PTM") at Paragraph 042100 sets out the circumstances in which tax relief will be available in respect of contributions. The final paragraph is headed, "*Giving effect to cash contributions*". It reads as follows:

15 *"As explained above, contributions to a registered pension scheme must be a monetary amount. However, it is possible for a member to agree to pay a monetary contribution and then to give effect to the cash contribution by way of a transfer of an asset or assets.*

20 *"For example, if a member wishes to pay a contribution he cannot do this by merely saying 'take this asset and whatever it is worth it is my contribution'."*

"There must be:

- *a clear obligation on the member to pay a contribution of a specified monetary sum, say £10,000. This needs to create a recoverable debt.*
 - *a separate agreement between the scheme trustees and the member to pass*
- 25 *an asset to the scheme for consideration.*

If the scheme agrees, the cash contribution debt may be paid by offset against the consideration payable for the asset. This is the scheme effectively agreeing to acquire the asset for its market value.

30 *If the asset's value is lower than the contribution debt the balance will be paid in cash.*

If the cash contribution debt is not created, then the transaction is the acquisition of an asset by the scheme and not a contribution."

23. HMRC have not questioned the valuation placed upon the Shares.

The legislation

24. Relief from income tax is available for contributions paid to a registered scheme under sections 188 and 195 FA 2004. Section 188 which provides as follows:

5 *"(1) An individual who is an active member of a registered pension scheme is entitled to relief under this section in respect of reliev-able pension contributions paid during a tax year if the individual is a relevant UK individual for that year.*

(2) In this part "reliev-able pension contributions" in relation to an individual and a pension scheme, means contributions by or on behalf of the individual under the pension scheme other than contributions to which subsection (3) or (3A) applies"

10 *(3) This subsection applies to-*

(a) any contributions paid after the individual has reached the age of 75,

(aa) any contributions which are life assurance premium contributions (see section 195A),

15 *(b) any contribution paid by an employer of the individual (as to which see section 196 to 201).*

(3A) This subsection applies to contributions if the contribution results from the transfer of property or money, or the payment of a sum, towards the pension scheme pursuant to a relevant order in a case where-

20 *(a) section 266A (members' liability in respect of unauthorised member payments) applies,*

(b) relief is claimed under that section in respect of the liability mentioned in subsection(1)(a) of that section.

25 *(3B) In the case of a contribution which is greater than UMP (see section 266A(5)), subsection(3A) does not apply to the contribution so far as it is greater than UMP.*

(3C) In subsection (3A) any order means an order under any of the following-

(a) Section 16(1), 19(4) or 21(2)(A) of the Pensions Act 2004 (orders for money etc to be restored to pension schemes) or

30 *(b) Article 12(1), 15(4). Or 17(2)(a) of the Pensions (Northern Ireland) Order 2005 (corresponding provision for Northern Ireland)*

"Section 195 Transfer of certain shares to be treated as payment of contribution

(1) *For the purposes of sections 188 to 194 (relief for contributions) references to contributions paid by an individual include contributions made in the form of the transfer by the individual of eligible shares in a company within the permitted period.*

5 (2) *For the purposes of those sections the amount of the contribution made by way of a transfer of shares is the market value of the shares at the date of the transfer.*

(3) *Eligible Shares, in relation to a contribution by an individual, means shares –*

10 (a) *which the individual has exercised a right to acquire in accordance with the provisions of an SAYE option scheme*

(b) *which have been appropriated to the individual in accordance with the provisions of a share incentive plan.*

(4) *The permitted period –*

15 (a) *in relation to shares which the individual has exercised a right to acquire in accordance with the provisions of an SAYE option scheme, is the period of 90 days following the exercise of that right, and*

20 (b) *in relation to shares which have been appropriated to the individual in accordance with the provisions of a share incentive plan, is the period of 90 days following the date when the individual directed the trustees if the share incentive plan to transfer the ownership of the shares to the individual."*

"Chapter 3 Part 4

Section 161 Meaning of "payment"

(1) *This section applies for the interpretation of Chapter 3.*

(2) *"Payment" includes a transfer of assets and any other transfer of money's worth."*

Submissions for the Appellants

25. SIPPCHOICE made the following points:

30 (1) The correspondence between SIPPCHOICE and Mr Carlton evidences an intention to create legal relations and did in fact create a legally binding contract to make a contribution of £68,324 and that could be and was satisfied by a transfer of the Shares having an equivalent value. The consideration given by SIPPCHOICE for Mr Carlton's promise to make the contribution was the agreement to accept the shares in discharge of the monetary obligation under General Rule 4(g) and/or to hold them on trust.

35 (2) The legislation should be construed purposively and expressions used should be presumed to have a practical rather than narrow legalistic meaning.

The concept of "paid" should be presumed to include not only a transfer of money, but also the discharge of a debt and a transfer of money's worth. Counsel said that the following authorities support that contention:

5 (a) The *Oxford English Dictionary* includes the following definitions of the word paid "*to give, transfer or hand over money or its equivalent*" when used in senses involving financial transfer, and "*To give money or goods in discharge of a debt*".

10 (b) The House of Lords in *Tennant v Smith* [1892] 3 TC 158 found that a perquisite which is defined as a fee or other emolument "payable" to a taxpayer extended to money's worth where the perquisite was capable of being turned into money.

15 (c) The House of Lords in *McNiven v Westmoreland Investments Limited* [2001] UKHL 6 discussed the concept of payment. The issue in that case was whether transactions between Westmoreland Investments Limited (Westmoreland) and the Trustees of the Electricity Supply Pension Scheme (the Trustees), the sole shareholder of its parent company, resulted in payments of interest. Westmoreland had borrowed heavily to fund property purchases and by the late 80s owed the Trustees £70m including £40m of interest. Westmoreland had no net value except if it could generate tax losses by paying the interest it owed to the Trustees. Those tax losses could be used to discharge future profits and would make the company more attractive to buyers. The Trustees loaned Westmoreland money which it used to pay the out-standing interest on the original loan. Lord Hoffmann confirmed that discharge of a debt amounts to payment [67] and that where bonuses payable to a director are discharged by the transfer to the director of platinum sponge, the bonuses should be treated as paid [68].

25 (d) The Court of Appeal in *Lowe (HM Inspector of Taxes) v Peter Walker (Warrington & Robert Cain & Sons Limited)* (1935) 20 TC 25 ("*Lowe*"), which concerned "pre A day" legislation, and a claim for tax relief for assets contributed to a pension scheme where the legislation referred to relief for "*sums paid*", confirmed that the assets transferred to the scheme were a "*sum paid by an employer ... by way of contribution to a superannuation fund*".

35 (e) The Court of Appeal in *Irving v HMRC* [2008] STC 597 ("*Irving*") where HMRC relied on *Lowe* to say an in specie contribution was a payment to successfully impose a charge to income tax on a beneficiary of an unapproved pension scheme under section 595(1) Income & Corporation Taxes Act 1988 (ICTA) where an employer transferred shares to the unapproved scheme. The transfer of shares was accepted by the Court of Appeal as being "*a payment of a sum*". The Court noted that "*The form of the funding can make no rational difference to the taxing policy underlying section 595(1).*" The Upper Tribunal followed the same reasoning in the 2015 case of *Allan v HMRC* which concerned section 386 ITEPA, the replacement of section 595 ICTA.

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(3) Alternatively if payment cannot be said to include a transfer of assets, it should be presumed to do so where the assets are transferred in satisfaction of a money debt or other commitment to pay a specified sum of money. In support Counsel referred to the following passages in *Irving* where Lord Justice Rimer said:

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"...In common with the Special Commissioners and Blackburn J, I am of the view that – subject always to a consideration of the particular context in which it is used- the more natural meaning of the phrase "pays a sum" is "pays a sum of money". ...If A transfers to B shares with a value of £1,750, he is unlikely to describe himself as having paid B £1750. He would say he had sold, given or transferred (whatever the appropriate verb) 1,000 shares to B.....If A had owed B £1,750 and B had agreed to take the shares in satisfaction of the debt then, to the question whether he had paid B the debt, he might legitimately say yeas: only a pedant would reply that he had not actually paid the debt, but that B had agreed to accept a transfer of the shares in discharge of it. But that example does not assist the present argument, which is as to the meaning of a familiar English phrase as used in an Act of Parliament. In my view its more natural meaning is that it means "pays a sum of money"." [38]

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"I accept that the inclusion in sections 599A, 600 and 601 of definitions extending the sense of payment to include 'any transfer of assets or other transfer of money's worth' tells against that interpretation, there being no like expanding definition in s595(1). But whilst that consideration cannot be ignored, I do not regard it as conclusive against the Revenue's argument, any more than did the Special Commissioners and Blackburn J. The three provisions referred to are concerned with different considerations and cannot answer the question raised by section 595(1)" [42]

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" More generally whether the scheme is funded by cash payments or by non cash assets, the funding will in both cases have to be recorded in the books of the employer and of the trustees by reference to a particular monetary figure; and the substance of the matter will be that the scheme will have been funded by assets of that value, whatever their nature. If cash had been paid, it might well the next day be converted into shares; and if shares had been transferred, they might well the next day be converted into cash. The form of the funding can make no rational difference to the taxing policy underlying section 595(1)." [46]

(4) Parliament cannot have intended there to be a difference between cash and asset contributions. Indeed Parliament intended to provide an incentive to individuals in the form of tax relief to make contributions to registered pension schemes. Counsel for the Appellant asked why should it matter whether the contribution is in cash or shares.

(5) The ordinary meaning of the word contribution is not restricted to payment of money and can include gifts in non-monetary form by which I understand SIPPCHOICE to mean not only voluntary dispositions but also business transactions such as contributions to a SIPP.

(6) There is no indication in the legislation that "contribution paid" in section 188(1) and (2) should be confined to cash payments:

5 (a) Section 195 FA 2004 provides for income tax relief where there is a contribution of shares acquired under particular approved incentive arrangements and does not assist in the meaning of the expression "contribution paid" in relation to other contributions made by a taxpayer.

10 (b) The amendment in 2014 to section 188 by the introduction of subsection (3A) which deals with contributions made by way of transfers of assets does not alter the meaning of section 188 as originally enacted. It does however support the interpretation of "contributions paid" contended for by the Appellant. HMRC's reliance on the House of Lords decision in *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] 1WLR 295 to say that the Appellant may not rely on the 2014 change is misguided. In any event the Appellant points to the words of Lord Neuberger at 295B when he says that a later change can affect the meaning of an earlier provision:

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20 *"In my opinion, the legislature cannot have intended the meaning of a subsection to change as a result of amendments to other provision of the same statute, when no amendments were made to that subsection, unless of course, the effect of one of the amendments was, for instance, to change the definition of an expression used in the subsection."*

25 (c) The wide definition of payment in Chapter 3 of Part 4 which deals with payments by the Scheme does not affect the meaning of expressions in Chapter 4 and further, given the wide meaning that payment has, the wide words in Chapter 3 are redundant. Further the absence of expanding words in section 595(1) ICTA did not prevent the Court of Appeal from giving payment a wide interpretation in *Irving* at [42].

30 (d) The absence of a valuation method does not detract from the meaning of contribution paid. In any event HMRC did not challenge the valuations placed upon the Shares. It is also noteworthy that there is no valuation method in connection with "payments" made by a Scheme under section 160 FA 2004 which term is widely defined in section 161 to include transfers of assets. .

35 (7) HMRC's manuals contemplate a transfer of securities by way of set-off which implies a broad meaning of "contribution paid". The facts in this case involve a transfer of assets in satisfaction of a money debt. There is no mention in the guidance of the need for valuations.

40 (8) The Hansard Reports are not admissible in this case as an aid to construction as the legislation is neither ambiguous nor obscure and the section being reported on is not that under consideration.

Submissions for HMRC

26. HMRC made the following points:

(1) The expression "contributions paid" in Part 4 Chapter 4 of FA 2004 should be given their natural meaning which would require the Tribunal to find it meant a "money" payment.

5 (2) The Oxford English Dictionary definitions of payment relied on by SIPPCHOICE are examples of uses of payment indicating whether a person has been paid and not focussing on what has been paid. The correct sense in which the word is being used in the expression "contributions paid" is to identify what is being paid and HMRC say the natural inference is a payment of money. That accords with the third meaning in the Oxford English Dictionary, "To give to (a
10 *person, organisation, etc*) money that is due for goods received, a service done, a debt or obligation incurred, etc to remunerate."

(3) The Appellant's assertion that contribution paid can be satisfied by a contribution of money's worth is incorrect and the ordinary meaning of the expression "contribution paid" means money payment. The context of section
15 188 points to the natural meaning of the word paid which limits relief from income tax to contributions paid in cash.

(4) The legislation in question is in Part 4, Chapter 4 and gives no indication that a wider meaning should be adopted. Further if a transfer of assets were contemplated the legislation would contain a valuation mechanism.

20 (5) Counsel for HMRC thought that the taxpayer might advance an argument based on subsection (3A) which excludes from the category of contributions which are "relievable pension contributions", those that are made pursuant to various statutory provisions. The opening words of subsection (3A) refer to contributions resulting "from the transfer of property or money, or the payment
25 of a sum, towards the pension scheme ...". Counsel's concern appeared to be that the taxpayer might argue that there was an implication to be drawn from subsection (3A) that non cash contributions would otherwise be within the category of relievable contributions and would qualify for tax relief. He indicated however that it would be inappropriate to draw that inference:
30 subsection (3A) resulted from an enacted in 2014 and so cannot affect the meaning of "relievable pension contribution paid" as enacted in 2004. He referred to the decision of the House of Lords in *Boss Holdings* in 2008 in particular the speech of Lord Neuberger at [23]. Further counsel said the purpose and effect of subsection (3A) is to deny double relief for specific
35 transfers of assets into a pension scheme and not to expand or affect the meaning of relievable pension contribution paid in subsections (1) and (2).

(6) Furthermore:

(a) Part 4 Chapter 3 expressly refers to the possibility of payment including "*a transfer of assets and any other transfer of money's worth*",
40 see Section 161(1) and (2) FA 2004.

(b) Section 195(1) specifically contemplates a transfer of shares by employees where the shares had been acquired pursuant to an approved share scheme. Section 195(2) provides that such a contribution is to be

treated as having been made at market value and section 195(3) and (4) requires the transfer to be made within 90 days of their acquisition.

These provisions indicate that a transfer of shares would not otherwise be a contribution paid to a scheme.

5 (7) An Explanatory Note prepared by HMRC to the clause 177 of the Finance Bill (which became section 188 of the 2004 Act) indicates that "contribution" is to mean a "*monetary contribution unless otherwise specifically provided for*". Further the Explanatory Note could be taken into account as an aid to construction of section 188 following the decision in *re Biggs* [2018] 1WLR 10 152 and in consequence the term contribution paid should be confined to a payment of money .

(8) If the legislation is ambiguous or obscure such that the Tribunal could have regard to the Hansard Reports, there is a clear statement by a Minister, in response to a tabled amendment by the opposition which would have enabled employers to make contributions in the form of shares and securities. The Financial Secretary to the Treasury rejected the amendment on the ground that avoidance could take place if a member controlled the company and if transfers of assets were allowed there would need to be a valuation mechanism.

(9) The Tribunal ought not to follow the decision in *Irving* where the Court of Appeal gave a wide meaning to the expression "pays a sum". The Court was only enabled to do so after a detailed review of the surrounding provisions. It cannot assist the Appellant in this case. Further the decision in *Irving* was based on pre-A day legislation and ought not to have a bearing on post A day legislation.

25 (10) There was no contract under which there was a binding obligation on Mr Carlton to transfer shares in satisfaction of a debt because there was no debt. There was a mere promise to pay. As the Appellant accepts the so called obligation to pay a sum was not made under a deed there can be no debt which is discharged by the transfer of the Shares. HMRC considered that Mr Carlton's intention at the outset to settle any debt obligation created by the transfer of Shares would prevent the contribution being eligible for relief.

27. HMRC accepted that income tax relief would be available if either:

(a) Mr Carlton had borrowed and paid cash to SIPPCHOICE and SIPPCHOICE had used the cash to buy the Shares from Mr Carlton and he repays the money, or

(b) There was a legally binding obligation in contract or by document under seal to pay a sum of money and Mr Carlton had transferred the shares to SIPPCHOICE in satisfaction of that obligation.

28. HMRC did not assert that the Shares were not Eligible Shares.

40 *Discussion*

29. ***Was there a legally binding obligation on Mr Carlton to make a contribution to SIPPCHOICE of £68,324?***

Before addressing the meaning of "contributions paid" I will deal with the contractual obligations of the parties.

30. I was not taken to the Trust Deed or Rules or the Terms and Conditions by counsel for either party during the course of the hearing. I raised the issue of the need
5 to consider the March correspondence between Mr Carlton and SIPPCHOICE in the context of the Trust Deed and Rules and Terms and Conditions. Counsel advised me of the location of the documents in the bundle. As the bundles were delivered to the Tribunal for the day of the hearing I had had no chance to read them in advance of the half day hearing. In a short break between 1 and 1.45 I had managed to understand the
10 nature of the pension plan and those instructing counsel clarified some aspects of the scheme and the rules. Counsel for SIPPCHOICE indicated that the consideration for Mr Carlton's obligation was the agreement by SIPPCHOICE to accept Eligible Shares in discharge of a debt or hold on trust as shown in General Rule 4(g). HMRC asserted there was no consideration given by SIPPCHOICE for the promise given by Mr
15 Carlton to contribute £68,324 and further as the promise was not under seal, there no legally enforceable obligation. HMRC also asserted that SIPPCHOICE's argument was circular.

31. I consider that the declaration in the Contribution Form dated 9 March 2016 on its own cannot create a legally binding obligation. The inclusion of the word
20 irrevocable cannot make a revocable promise into an irrevocable promise. The position would have been different had the Contribution Form been executed as a Deed, which HMRC accepted and which SIPPCHOICE accepted was not the case.

32. I consider that the parties intended to create legal relations and there was a
25 legally binding obligation on Mr Carlton to make a contribution of £68,324 for the following reasons:

(1) The contract between Mr Carlton and SIPPCHOICE Limited was contained in part by the correspondence and in part by the Trust Deed and Rules and Terms and Conditions, the relevant extracts of which I have set out above.

(2) The Application Form completed by Mr Carlton was the offer as that term
30 is understood in the law of contract because SIPPCHOICE as Administrator had absolute discretion to refuse to accept an individual as a Member.

(3) No copy of a letter from SIPPCHOICE accepting Mr Carlton as a Member was in the bundle but, as Mr Carlton went on to complete a Contribution Form it must be the case that SIPPCHOICE as Administrator accepted the offer and
35 Mr Carlton became a Member. HMRC did not assert that Mr Carlton was not a Member.

(4) By clause 7 of the Application Form, Mr Carlton agreed to be bound by the Trust Deed and Rules and the Terms and Conditions and under Clause 2 of the Trust Deed SIPPCHOICE agreed to administer the Scheme in the manner
40 contemplated by the Trust Deed and Rules.

(5) Rule 4(g) of the General Rules specifically requires that contributions can only be paid in the methods prescribed in that rule including in money, by a

transfer of assets in specie in satisfaction of an obligation by the member to pay a monetary amount by way of contribution, as well as transfer of shares acquired pursuant to a SAYE share option scheme etc under section 195 FA 2004

5 (6) When Mr Carlton completed the Contribution Form he offered to make a contribution of a monetary amount (£68,324) as contemplated by the Trust Deed and Rules and Terms and Conditions and in consideration, under the Rules, SIPPCHOICE agreed to administer the Scheme and apply contributions in the acquisition of Eligible Investments in such a manner as the Member shall
10 direct and make payments etc in such manner as to retain the registered status of the Scheme.

(7) SIPPCHOICE's acceptance of the proposal in the Contribution Form (which took place at some time prior to 16 March 2016, see [13] – [16] of this Decision) created the legally binding obligation to make a contribution of
15 £68,324.

(8) On 24th March 2016 Mr Carlton indicated to SIPPCHOICE how he wished to discharge his obligation.

(9) The legal obligation on Mr Carlton to make a contribution of a monetary amount exists even though Mr Carlton intended to settle the debt obligation he
20 had created by transferring the Shares to the Administrator.

33. I note that this accords with the Guidance given by HMRC in the Pensions Manual at para 042100 where HMRC state:

*"...contributions to a registered pension scheme must be a monetary amount. However, it is possible for a member to agree to pay a monetary contribution and
25 then to give effect to the cash contribution by way of a transfer of an asset or assets.*

For example, if a member wishes to pay a contribution he cannot do this by merely saying 'take this asset and whatever it is worth it is my contribution'.

There must be:

a clear obligation on the member to pay a contribution of a specified monetary sum, say £10,000. This needs to create a recoverable debt.
30

a separate agreement between the scheme trustees and the member to pass an asset to the scheme for consideration.

*If the scheme agrees, the cash contribution debt may be paid by offset against the consideration payable for the asset. This is the scheme effectively agreeing to acquire
35 the asset for its market value.*

If the asset's value is lower than the contribution debt the balance will be paid in cash.

If the cash contribution debt is not created, then the transaction is the acquisition of an asset by the scheme and not a contribution."

This should be the end of the matter. Notwithstanding this clear statement of HMRC's understanding of the effect of the legislation concerning contributions HMRC contest this appeal on the basis that the contribution has not been paid within the meaning of the legislation.

34. ***What is the meaning of "contribution paid" in section 188 Finance Act 2004?***

Neither party addressed the Tribunal on the scheme of legislation relating to the post "A day" pensions to assist in construing the legislation. I note that the key difference between pre and post "A" day approved/registered pension schemes is in relation to the payments that can be made to members. Pre A day approved pension scheme members could take a specified percentage of the pension pot as a lump sum and the balance had to be applied in purchase of an annuity within a specified period of time after retirement. Post "A" day payments can be taken in many forms including "draw down" pensions, defined benefits pensions and the purchase of annuities, and lump sums can be taken in many circumstances and of varying amounts. A number of specified payments are however unauthorised. The rules of a scheme are no longer approved but when a Provider seeks to register a scheme under the 2004 Act the Provider must declare that the payments that may be made under the Scheme must accord with the statute. I also note that the SIPPCHOICE BESPOKE Self-Invested Pension Plan as the name suggests allows the Member to direct the choice of investments. Mr Carlton was able to direct the Administrator to buy the Shares from him if he had made cash contributions as those shares are Eligible Shares.

35. ***Pepper v Hart and the admissibility of Hansard Reports***

When construing section 188 Finance Act 2004 I am required to ascertain the intention of Parliament from the words used in the Act. I am not required to look into the minds of Ministers and others sponsoring the legislation. I was asked by HMRC to consider the application of the House of Lords decision in *Pepper (Inspector of Taxes) v Hart* [1992] AC 593 to admit a Hansard Report of Standing Committee A of 6 May 2004 at Columns 563, 564 and 565 as an aid to construction. The case of *Pepper v Hart* was most unusual. HMRC sought to charge to tax the benefit available to school teachers in private schools whose children were educated at the school on the market value of the benefit and not the marginal cost to the school of providing the benefit. Clear statements had been made to the House of Commons when the benefits legislation was introduced that the teachers would be taxed only on the marginal cost to the school of educating the children. The House of Lords said in *Pepper v Hart* that in exceptional cases where the words used were ambiguous or absurd the Hansard Reports could be admitted.

I consider there is no ambiguity as to what is meant by "contribution paid" in section 188(1). There is ample judicial authority on what constitutes a contribution paid in the context of contributions to legal entities such as a company and there is no requirement for the company to receive the subscription monies and then buy services

with the cash from the subscriber of the shares. Instead the company can issue shares as fully paid and for the contributor's obligation to pay for the shares to be off-set against an obligation of the company to pay the contributor for goods and services. This is a long established principle. There is no reason why it cannot also apply to contributions to a SIPP. It was illustrated in *Ooregum Gold Mining Company of India Limited v Roper* [1892] 1 AC 125 (House of Lords). Lord Watson said at 136:

"A company is free to contract with an applicant for its shares; and when he pays in cash the ... amount of nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. **That circuitous process is not essential.** It has been decided that under the [Companies] Act of 1862 shares may be lawfully issued as fully paid up for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash."

[Emphasis Added]

I also consider that the ordinary legal meaning of "contributions paid" does not give rise to an absurd result and in consequence the threshold conditions for the application of decision *Pepper v Hart* are not satisfied. I would note that Lord Steyn in the 2002 House of Lords case of *Westminster City Council v National Asylum Support Service* [2002] UKHL 38 indicates that the rule in *Pepper v Hart* should be considered as one of estoppel and not one of construction at [6] where he said:

"If exceptionally there is found in Explanatory Notes a clear assurance by the executive about the meaning of a clause, or a circumstance in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a Court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593. "

36. ***Explanatory Notes to the Bill forming part of the context***

HMRC invited me to construe section 188(1) in light of note 4 to an Explanatory Note issued by HMRC to clause 177 of the Finance Bill which became section 188 FA 2004. Note 4 of the Explanatory Note reads as follows:

"Subsection (2) defines "relievable pension contributions" as contributions paid by or on behalf of the individual and so includes third party contributions-subject to exceptions in subsection (3). The term "contribution" is taken to mean a monetary contribution unless otherwise specifically provided for."

37. HMRC say the note indicates that the expression "contributions paid" in section 188(1) must be construed and restricted to money payments.

HMRC indicated that the Court of Appeal in *re Briggs* [2018] 2WLR 151 had taken into account the structure of the Act, the Code of Practice and Explanatory Notes in determining whether legal aid should be available to a party to challenge the medical treatment available to a person. The Act allowed two potential routes to challenge the treatment. The natural route of challenge in the circumstances would have meant no legal aid was available. The Court of Appeal overturned the decision of the Judge at first instance who had allowed the claim for legal aid. The decision in *re Briggs* refers to decisions of Lord Steyn in (*Westminster City Council*) v *National Asylum Support Service* [2002] 1 WLR 2956 in which Lord Steyn said at 169:

"5 . *The question is whether in aid of the interpretation of a statute the court may take into account the Explanatory Notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. In regard to contractual interpretation this was made clear by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384-1386, and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 995-996. Moreover, in his important judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913, Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction. In *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763, Lord Blackburn explained the position as follows:*

"I shall . . . state, as precisely as I can, what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."

Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-

parliamentary aids which in principle are already treated as admissible: see Cross, *Statutory Interpretation*, 3rd ed (1995), pp 160-161. If used for this purpose the recent reservations in dicta in the House of Lords about the use of Hansard materials in aid of construction are not engaged: see *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 407; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, *The Times*, 26 July 2002, in particular per Lord Hoffmann, at paragraph 40. On this basis the constitutional arguments which I put forward extra-judicially are also not engaged: "*Pepper v Hart: A Re-examination*" (2001) 21 *Oxford Journal of Legal Studies* 59.

6. If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."

[Emphasis added]

38. It is clear from the speech of Lord Steyn that the task of this Tribunal is to ascertain the intention of Parliament from the meaning of the words actually used in the Act. It is impermissible to treat the wishes and desires of the Government about the scope of statutory language as reflecting the will of Parliament. The aims of Government in respect to the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament.

39. It is also clear from the Court of Appeal decision in *Sun Life Assurance Company of Canada (UK) Limited v HMRC* [2010] STC 1173 that the Explanatory Notes do not give a sponsoring Government Department a second bite of the cherry if the terms of the legislation as enacted do not produce the result that the department expected. The *Sun Life of Canada* case was concerned with the carry forward of losses in pension business. HMRC considered that the losses were only capable of being carried forward from 1 January 2003. Moses LJ (speaking for the Court) said this:

"66. Mr Ewart repeated his reliance on the Explanatory Notes to Schedule 33 of the Finance Bill 2003 which make it plain that the intention was to introduce the right to carry forward unused losses but only with effect from 1st January 2003.

67. Even if such Notes were admissible, as to which I entertain doubt, they are of no assistance since they merely demonstrate the Revenue's mistaken belief

5 *that it was appropriate to introduce a right which already existed. They do not assist as to whether the amendment had the effect of removing a pre-existing right. On the contrary, on the Revenue's mistaken view of the unamended legislation there was no need to do so, the previous legislation contained no such right."*

10 40. The Explanatory Note to clause 177 does not in my opinion reveal the objective setting or contextual scene of the statute or the mischief at which it is aimed. It seems to me the purpose of the post A day pension legislation was to enable and encourage taxpayers to provide for their retirement and to protect them from (i) the tyranny of interest rates prevailing at the date of retirement which directly affects the value of an annuity which had to be purchased within a limited period of time following retirement, and (ii) the loss of the capital value of the pension pool upon the death of the taxpayer which has nothing to do with contribution in cash or kind. Preventing contributions in kind does not seem to be the mischief at which the legislation was aimed.

20 In any event the words "monetary contribution" in the Explanatory Note would be wide enough to encompass a monetary amount which is later satisfied by a transfer of shares as occurred in this case. The requirement for a monetary value to be stipulated is consistent with the need for the value of the contribution to be known to enable the machinery for granting relief to be implemented.

41. ***Ordinary meaning of "contributions paid"***

25 It is clear from Lord Hoffmann's statements in *MacNiven v Westmoreland Investments Limited* ("*MacNiven*") that satisfaction of a monetary obligation or debt in cash or kind amounts to "payment". I do not therefore accept HMRC's assertion that the normal meaning of contribution paid is confined to a payment of cash. As the meaning of contribution has a legal definition I do not consider the various meanings contended for by the parties in the *Oxford English Dictionary*.

30 42. My view is that the Chapter 3 definition, which is concerned with payments out of pension schemes and is thus not directly relevant, could be redundant but that this does not undermine the Appellant's argument. I refer to the speech of Lord Hoffmann in *Walker v Centaur Clothes Ltd* [2000] STC 324 at330:

35 "[Counsel for the Revenue] said that the objection to [the construction proposed by Lord Hoffmann] was that it would make [a particular subsection] unnecessary...My Lords, I seldom think that an argument from redundancy carries great weight even in a Finance Act. It is not unusual for Parliament to say expressly what the courts would have inferred anyway."

40 43. It is my view in this case that it is to be "inferred" (to use Lord Hoffmann's word), that a payment in kind out of a SIPP would be a "payment" for the purposes of Part 4 Chapter 3 of FA 2004, even without the extended definition in FA 2004 s.161, and that, accordingly the extended definition in Part 4 Chapter 3 does not negative the construction advanced by the Appellant in this case.

44. HMRC's assertion that the absence of any valuation mechanism is an indication that, in the context, the term "contributions paid" in section 188(2) should be given a narrow meaning is flawed in the context of assets being transferred in satisfaction of a specified monetary amount/debt. This is especially so where, as in this case, the Administrator requires valuations of assets transferred to discharge the debt and top up payments, if necessary, from the Member. I note this is the process set out in HMRC's own guidance to taxpayers which is still available on the HMRC website.

45. HMRC's assertion that as "payment" in Chapter 3 of Part 4 is widely defined to include a transfer of assets and other money's worth is an indication that the expression "contribution paid" where it appears in Chapter 4 should be confined to cash payments is flawed. The extended definition of payment in Chapter 3 is not expressed to apply to Chapter 4. Further the post A day legislation liberalised the manner and timing of taking benefits under a pension scheme and naturally all benefits in whatever form that are paid, whether directly or indirectly, should be taxed.

46. HMRC's assertion that fact that shares acquired pursuant to an approved SAYE option scheme or an approved share incentive plan may be contributed by a member to a registered scheme under section 195 (in Chapter 4, Part 4) and if so contributed shall be taken to be contributed at their market value is an indication that "contribution paid" should not otherwise be taken to include a straight transfer of shares to a scheme. I asked Counsel what would be the outcome if section 195 were not included in relation to shares acquired under an approved SAYE scheme but he was unable to assist. I also asked for the Hansard and Explanatory Notes on the clause but he was unable to assist. It seems to me that the market value rule is simply to put the position of employees under SAYE and incentive plans beyond doubt.

47. As a legally binding monetary obligation to make a contribution of £68,342 had been created by Mr Carlton on 9th March 2016 which was discharged by him on 24th March 2016 by the transfer of the Shares to the SIPP together with a cash payment of 3p, Mr Carlton should be given relief from income tax in respect of a contribution paid by him of £68,342. I cannot see that Mr Carlton's intention always to satisfy the monetary obligation with a transfer of the Shares when he completed the Contribution Form can affect the availability of the relief for genuine contributions paid to a SIPP.

I do not consider in detail the assertions relating to the effect of subsection (3A) or the assertion that contribution should include money's worth as well as money because the meaning of "contribution paid" is wide enough to cover a transfer of assets in satisfaction of a debt as occurred in this case.

Decision

48. Part 5 Taxes Management Act 1970 applies to this appeal as specified by Para 12(3) Registered Pension Schemes (Relief at Source) Regulations 2005/11 and the Tribunal may vary the decision made by HMRC. I vary the decision of HMRC by allowing the appeal in full.

49. 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.

10

TRIBUNAL JUDGE
RELEASE DATE:10 MARCH 2018