Neutral Citation: [2022] UKFTT 00172 (TC)

Case Number: TC08499

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/02063

INCOME TAX – Part 4 Finance Act 2004 – pension fund – whether unauthorised member payment – assessment of unauthorised payments charge and unauthorised payments surcharge – discovery assessment – whether conditions in s29 TMA 1970 were satisfied – appeal allowed

Heard on: 29 March 2022
Judgment date: 06 June 2022

Before

TRIBUNAL JUDGE JONATHAN CANNAN
MR JOHN ROBINSON

Between

ELAINE CURTIS

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

The Appellant appeared in person

For the Respondents: Alex Turnbull, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Elaine Curtis is an honest, hard-working woman. In 2012, she was suffering financial difficulties and had resorted to payday loans which was repaying. She had been forced to pawn her engagement ring. A colleague at work recommended a financial adviser who might be able to help, called Martin Peacock. She met with Mr Peacock and he reviewed her financial position. Mr Peacock arranged a loan for her of £20,000 from a business called Blu Funding. He also recommended that she move her occupational pension from a previous employment with BT to a new private pension with a company called Fast Pensions. Mrs Curtis did not realise or have any reason to think that the transfer of her pension was connected to the loan she received from Blu Funding. Her pension with BT had a transfer value of £49,208 and she transferred it to Fast Pensions.

2. We set out the detailed background to these arrangements in our findings of fact. In short, the arrangements entered into by Mrs Curtis resulted in her losing her pension fund. She received the loan of £20,000 but repaid some £13,500 of the loan to Blu Funding by way of monthly repayments before realising that she had been badly advised. It is HMRC's case that the loan of £20,000 was actually derived from Mrs Curtis' pension. As such, they say it was an unauthorised member payment from her pension pursuant to the regime for pension tax charges in Part 4 Finance Act 2004 ("FA 2004"). HMRC have assessed Mrs Curtis to an unauthorised payments charge and an unauthorised payments surcharge in the total sum of £9,280 ("the Assessment"). It is their case that the Assessment should be increased to £11,000.

3. Mrs Curtis has appealed against the Assessment on the ground that there was no unauthorised member payment. She has also appealed against a decision of HMRC not to discharge the unauthorised payments surcharge.

4. The principal issues which arise in the appeal may be summarised as follows:

   (1) Was the loan of £20,000 made to Mrs Curtis by Blu Funding an unauthorised member payment?

   (2) Was HMRC entitled to make the Assessment pursuant to section 29(1) Taxes Management Act 1970 ("TMA 1970")?

   (3) Is it just and reasonable for Mrs Curtis to be liable to the unauthorised payments surcharge?

5. We heard evidence from Mr Mark Davies, an officer of HMRC, and from Mrs Curtis. We make our findings of fact on the balance of probabilities based on the oral and documentary evidence before us. We shall first consider the legal framework pursuant to which unauthorised member payments from pension funds fall to be taxed and pursuant to which HMRC are entitled to assess an unauthorised payments charge and an unauthorised payments surcharge.

6. By way of summary our findings are as follows:

   (1) The loan of £20,000 made to Mrs Curtis by Blu Funding was an unauthorised member payment, although Mrs Curtis had no reason to know that was the case.

   (2) HMRC were not entitled to make the Assessment because we are not satisfied that the conditions under section 29 TMA 1970 were fulfilled.

   (3) If necessary, we would have found that it was not just and reasonable for Mrs Curtis to be liable to the unauthorised payments surcharge.

   (4) In all the circumstances, we allow the appeal.

LEGAL FRAMEWORK

7. FA 2004 contains a prescriptive regime in relation to the payments that registered pension schemes are authorised to make and the consequences of unauthorised payments. The rationale is to ensure that the tax reliefs and exemptions in respect of contributions to a registered pension scheme are available only to the extent that the pension scheme genuinely makes provision for the benefit of members on retirement.

8. The only payments which a registered pension scheme is authorised to make to a person who is or has been a member of the scheme are those specified in section 164. Those payments include permitted pensions and lump sum payments on death or retirement. Any other payment is defined by section 160 as an "unauthorised member payment":

> 160(1) The only payments which a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are those specified in section 164.
>
> (2) In this Part 'unauthorised member payment' means –
>
> > (a) a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is not authorised by section 164, and
> >
> > (b) anything which is to be treated as an unauthorised payment to or in respect of a person who is or has been a member of the pension scheme under this Part.

9. Where an unauthorised member payment is made there is a charge to income tax pursuant to section 208 FA 2004 at the rate of 40% on the person to whom the payment is made. This is known as an "unauthorised payments charge". Section 209 also makes provision for a charge to income tax known as an "unauthorised payments surcharge". It is payable where the unauthorised payment is 25% or more of the value of the pension fund. The rate of the unauthorised payment surcharge is 15% of the unauthorised payment.

10. Section 268 FA 2004 provides for relief where a person is liable to the unauthorised payments surcharge:

> 268(2) The person liable to the unauthorised payments surcharge may apply to the Inland Revenue for the discharge of the person's liability to the unauthorised payments surcharge in respect of the unauthorised payment on the ground mentioned in subsection (3).
>
> (3) The ground is that in all the circumstances of the case, it would be not be just and reasonable for the person to be liable to the unauthorised payments surcharge in respect of the payment.

11. Section 255 FA 2004 makes provision for HMRC to make regulations in connection with the making of assessments to the unauthorised payments charge and the unauthorised payments surcharge. The relevant regulations are The Registered Pension Schemes (Accounting and Assessment) Regulations 2005 SI 2005/3454. Regulation 9 provides that section 29(1)(a) TMA 1970 applies to such assessments with certain modifications which are not relevant for present purposes.

12. Other provisions of the TMA 1970 apply to the Assessment in the present case, including the right of appeal under section 31(1)(d) TMA 1970. The jurisdiction of the tribunal is set out in section 50(6) and (7) TMA 1970 as follows:

> (6) If, on an appeal notified to the tribunal, the tribunal decides –
>
> (a)…

(b)…

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

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

(7) If, on an appeal notified to the tribunal, the tribunal decides –

(*a*) that the appellant is undercharged to tax by a self-assessment;
(*b*) that any amounts contained in a partnership statement are insufficient; or
(*c*) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.

13. There is specific provision in section 269 FA 2004 for appeals to this Tribunal against the unauthorised payments surcharge:

(7) If the tribunal considers that the applicant's liability ought not to have been discharged, the tribunal must dismiss the appeal.

(8) If the tribunal considers that the applicant's liability ought to have been discharged, the tribunal must grant the application.

14. The Assessment in the present case was made pursuant to section 29 TMA 1970. Broadly, an officer of HMRC must discover that tax which ought to have been assessed has not been assessed. In cases where the taxpayer has delivered a self-assessment return, one of two conditions must be satisfied. The relevant provisions are as follows:

(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.

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

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

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

unless one of the two conditions mentioned below is fulfilled.

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

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

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

(b) in a case where a notice of enquiry into the return was given —

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

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.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if —

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above —

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

15. Section 29(8) TMA 1970 makes provision for appeals against discovery assessments:

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

16. Section 34 TMA 1970 sets out the ordinary time limit for making an assessment. It is four years from the end of the tax year to which it relates.

THE ISSUES

17. We have described above the principal issues which arise on the appeal. Mrs Curtis' grounds of appeal assert that she was unaware of any connection between the loan she obtained from Blu Funding and her pension, which was transferred from BT to Fast Pensions. She consulted an independent financial adviser who separately arranged the loan and the transfer of her pension.

18. HMRC accept that they have a burden of establishing that the Assessment was validly made pursuant to section 29 TMA 1970. If that is established, it is for Mrs Curtis to establish that the Assessment is incorrect or excessive, and in the case of the unauthorised payments surcharge, that it would not be just and reasonable for her to be liable to the unauthorised payments surcharge.

19. We set out below our principal findings of fact based on the witness evidence and the documentary evidence before us.

FINDINGS OF FACT

20. Mrs Curtis worked for BT as a telephone sales manager until she was made redundant in 2002. Soon afterwards she got a job as a renewal consultant for Yellow Pages, later called Yell. She continued in that job until 2014. By 2012, Mrs Curtis' salary from Yell was about £41,000pa plus commission however she was suffering financial difficulties. The trigger for those difficulties was that her husband broke his collarbone and was off work without pay. She was paying off various unsecured debts including payday loans and was paying fees to cash cheques. She had a fixed rate mortgage on her home, but she had a poor credit rating which

meant she could not obtain bank loans. At one stage she had been forced to pawn her engagement ring. A colleague at work recommended a financial adviser who might be able to help, called Martin Peacock. Mr Peacock had helped her colleague obtain a mortgage.

21. Mrs Curtis met with Mr Peacock two or three times in the summer of 2012. He reviewed her finances and told her that he could arrange a loan for her which would reduce the monthly repayments on her existing loans. Mr Peacock also asked Mrs Curtis about her future financial plans, including questions about her mortgage and pensions. She told him that the only pension she had was from a previous employment with BT, which had been frozen when she left BT in 2002. She was also aware of rumours at this time that the BT pension fund might not be able to pay out all members' pensions. Mr Peacock discussed the benefits of transferring this pension into a new private pension fund. Mrs Curtis was led to believe that moving her pension would give her a better rate of return. She considered that this conversation was separate from their conversations about obtaining a loan, and she had no reason to think that the loan was connected to the pension transfer.

22. Mrs Curtis was unable to find a copy of any loan agreement with Blu Funding. However, we are satisfied from her evidence that she entered into a loan for £20,000 with a business called Blu Funding Corporation Limited ("Blu Funding"). The loan was repayable at the rate of £250 per month. We do not know what rate of interest was charged on the loan. Mrs Curtis made the monthly repayments from about November 2012 to May 2017. We are satisfied that Mrs Curtis therefore repaid some £13,500 towards the capital and interest due on the loan. She stopped making repayments in May 2017, following the Assessment, when Fast Pensions and Blu Funding did not respond to her correspondence.

23. Mrs Curtis was not aware that Mr Davies of HMRC had started enquiring into a number of pensions schemes being administered by AC Management & Administration Limited ("ACMAL") in November 2012, including Fast Pensions. In August 2013 he used an information notice to obtain a list of members from the trustees of funds operated by Fast Pensions including the FP 1 Retirement Fund ("the FP1 Fund"). Mrs Curtis was shown as a member of the FP1 Fund. There were some 500 members involved across various funds. Mr Davies' enquiries were delayed because of changes in the identity of the scheme administrator.

24. In 2014, HMRC issued what were described as "nudge letters" to some scheme members giving them an opportunity to register for self-assessment and declare any unauthorised member payments. There was very little response. In 2015, similar letters were issued to a wider sample amounting to about 10% of members, including Mrs Curtis. At this stage HMRC did not know that Mrs Curtis had received an unauthorised member payment.

25. HMRC wrote to Mrs Curtis for the first time on 30 December 2015 requiring her to file a tax return for the tax year 2012-13. The letter stated as follows:

> HMRC has become aware that during the year 2012/13 you made changes in the way that your pension fund had been invested. I have reason to believe that a payment has been made to you as a result of this transaction any such payment maybe deemed to be an unauthorised payment from your pension scheme. Unauthorised payments are chargeable to tax by virtue of S208 Finance Act 2004.
>
> For this reason I enclose a Self Assessment return to enable you to make a return of your income. Any unauthorised payments should be declared on the additional information (SA101) under the section Pension savings tax charges (page 4) and should include the amount of any unauthorised payment.
>
> You may be liable to the unauthorised payment charge and unauthorised payment surcharge for the tax year 2012/13.

26. Mrs Curtis sent a completed tax return to HMRC on 19 May 2016. The return included her employment income and made no reference to any unauthorised payments. She had never previously been required to complete a self-assessment return. Nor had she ever had any need to consult an accountant about her tax affairs. She had always been employed with tax deducted under PAYE. At this stage, Mrs Curtis believed the funds representing her pension were being held by Fast Pension and was unaware that any sum had been transferred by Fast Pension to Blu Funding. She had no reason to believe that there had been any unauthorised payment from her pension.

27. It was put to Mrs Curtis that she did not, at this stage, take any professional advice as to whether there might have been an unauthorised member payment. It was suggested that she might also have contacted HMRC to ask why she had received the letter. However, in Mrs Curtis' mind there was no reason to think that the transfer of her pension to Fast Pensions was anything other than an entirely proper and straightforward transaction, carried out on professional advice. In her mind, the transfer of her pension had no connection to the loan.

28. In 2016, enquiries pursuant to section 9A TMA 1970 were opened into the returns of some members included in the sample. It is significant that no enquiry was ever opened into Mrs Curtis' return. It became apparent to Mr Davies from these enquiries that fund members received either loans or commission payments on transferring their pension funds to Fast Pensions. The maximum level of payments appeared to be 35% of the fund transfer value. In the case of loans, these appeared to be made via Blu Funding. Not all members made loan repayments in the same way that Mrs Curtis made repayments. Some members told Mr Davies that they were offered loans on condition that they transferred their pensions to Fast Pensions.

29. In 2017, Mr Davies formed the view that it was appropriate to raise discovery assessments pursuant to section 29 TMA 1970 on members of the relevant schemes. The assessments were timed to be sent out before the end of the 2016-17 tax year so as to be within the time limit laid down by section 34 TMA 1970. The time limit expired on 5 April 2017.

30. At this stage, HMRC would have been in-time to open an enquiry into Mrs Curtis' self-assessment return. However, Mr Davies considered that it was more efficient to issue discovery assessments to the taxpayers involved.

31. Mr Davies considered that because Mrs Curtis was on the list of members of the FP1 Fund, it was likely that she had received an unauthorised member payment. However, he did not have information from which he could calculate the amount of the assessment and he intended to obtain that information using an information notice.

32. HMRC wrote to Mrs Curtis on 15 February 2017. The letter stated that HMRC had reason to believe that Mrs Curtis may have received an unauthorised payment from her pension fund in tax year 2012-13. It indicated that HMRC would shortly be issuing an assessment for tax on the unauthorised payment. In the meantime, the letter also enclosed an information notice pursuant to Schedule 36 Finance Act 2008. The information notice required Mrs Curtis to provide information and documents in relation to the changes in her pension arrangements in 2012-13. The information was required by 17 March 2017.

33. In fact, HMRC issued the Assessment on 17 February 2017. The Assessment was in the sum of £9,280. This sum was calculated on the basis that information from the trustees indicated that the transfer value of Mrs Curtis' fund was £48,208. It was considered likely that Mrs Curtis would have received an unauthorised member payment of £16,872, which was 35% of the transfer value.

34. Mrs Curtis immediately called HMRC to query the Assessment. On 2 March 2017 she sent the information which HMRC had requested, including explanations to the best of her knowledge and copies of relevant documents. Those documents included:

(1) A letter dated 13 December 2012 from Fast Pensions setting out her fund reference number and certain details in connection with the fund.

(2) A letter from Fast Pensions dated 13 January 2016 attaching a pension statement as at 31 December 2015 which purported to show that the value of her fund at that date was £55,467. The sum transferred into the fund was identified as £48,208.

(3) Copies of certain bank statements.

35. We do not appear to have all the subsequent correspondence between Mrs Curtis and HMRC, although it does not appear that anything of significance has been omitted from the evidence. It appears that there was a response by HMRC dated 5 March 2017. Mrs Curtis replied in a letter which appears to have been sent or received on 21 March 2017 in which she appealed the Assessment. On 31 March 2017, HMRC wrote to Mrs Curtis acknowledging her appeal and providing some background into their investigations into Fast Pensions and unauthorised payments made to fund members including Mrs Curtis. The letter asked Mrs Curtis to provide some further bank statements. Mrs Curtis provided those bank statements in a letter dated 5 April 2017.

36. HMRC replied on 27 April 2017 seeking further information about Mrs Curtis' loan repayments to Blu Funding of £250 per month. Mrs Curtis replied on 3 May 2017 stating that she had no further information she could provide, also stating that she had been trying to contact Fast Pensions and Blu Funding without response.

37. On 1 May 2017, HMRC wrote refusing an application which Mrs Curtis had made to discharge the unauthorised payments surcharge.

38. On 19 May 2017, HMRC issued an amended assessment based on an unauthorised member payment of £20,000. The amended assessment was in the sum of £11,000 and together with interest the sum claimed by HMRC was £12,066. In a covering letter, HMRC acknowledged that Mrs Curtis had not received any form of commission payment in connection with her pension transfer, but said that the loan she had received was from her pension fund and was an unauthorised member payment.

39. On 26 May 2017, Mrs Curtis repeated her application to HMRC seeking a discharge of the unauthorised payments surcharge pursuant to section 268 FA 2004. It is not clear what contact there was between Mrs Curtis and HMRC in the period between May 2017 and September 2019. HMRC confirmed their decision refusing to discharge the surcharge in a letter dated 19 September 2019.

40. At some time in 2018, Mrs Curtis consulted a firm of solicitors which was investigating Fast Pensions. However, her understanding is that nothing can be done and her pension has been lost.

41. Mrs Curtis then asked for a statutory review of the decision not to discharge liability for the surcharge, and the decision was confirmed in a letter dated 14 February 2020. Overall, HMRC considered that Mrs Curtis ought to have conducted due diligence herself, or sought further advice from an independent financial adviser, HMRC, the Pension's Regulator or the Financial Conduct Authority. As such, they considered that it was just and reasonable for Mrs Curtis to be liable to the unauthorised payments surcharge.

42. Mrs Curtis lodged a notice of appeal with the Tribunal on 17 June 2020. The appeal was strictly out of time for reasons we need not describe. HMRC do not object to an extension of

time and we extend time accordingly. HMRC accept that the appeal is against the Assessment as a whole, which includes both the unauthorised payments charge and the unauthorised payments surcharge.

43. HMRC's enquiries showed that Fast Pensions had been incorporated on 28 June 2012. The FP1 Fund was established on 27 July 2012 and was administered by ACMAL.

44. Mr Davies used information notices to obtain information and documents from the trustees of the FP1 Fund. We are satisfied on the evidence before us that a sum of £49,208 was transferred from Mrs Curtis' BT Pension to ACMAL on 26 October 2012. A schedule of members of the FP1 Fund shows Mrs Curtis as a member, and that the amount transferred into the FP1 Fund was £48,208. It seems likely and we find that ACMAL deducted a fee of £1,000 from the value transferred from the BT Pension Scheme. On the same date a sum of £43,046 was transferred from ACMAL to the FP1 Fund. It is not clear how this sum relates to the transfer of Mrs Curtis' pension, but we are satisfied that Mrs Curtis' fund was transferred by ACMAL to the FP1 Fund.

45. On 29 October 2012, the FP1 Fund made a transfer of £20,000 to Blu Funding which was described as a loan to Blu Funding. On the same date, Blu Funding made a payment of £20,000 to Mrs Curtis, which was a loan from Blu Funding to Mrs Curtis. The loan was received into Mrs Curtis' account with TSB on 30 October 2012. Mrs Curtis then made loan repayments to Blu Funding of £250 per month until May 2017.

46. HMRC obtained evidence from the trustees of the FP1 Fund that the trustees had access to and some control over the bank accounts of companies in the Blu Funding group. We find that is the case.

47. The evidence before us included a report to the trustees of the FP1 Fund dated 7 August 2013. The report shows investments of the FP1 Fund at that date totalling some £3.8m. This includes some £1.35m described as "Blu Fund Management", and a note to the report states that "Investment into Blu Funding Corporation Limited has been provided in the form of a loan with an annual return of 5% pa". It is not clear whether this relates to the FP1 Fund or to other funds managed by the same trustees.

48. HMRC have established further connections between Fast Pensions, the FP1 Fund and Blu Funding. Sara Moat was a director of Fast Pensions and a trustee of the FP1 Fund. Her husband Peter Moat had been a director of Blu Funding and its other group companies. He was made bankrupt in 2012 and disqualified from acting as a company director. Subsequently, Ian Chapman was a director of Blu Funding, and he also signed off accounts for Fast Pensions as a director in 2016. The report to trustees also indicates a link between Mr Peacock and Mr Moat in connection with some of the investments of FP1.

49. In March 2018, Fast Pensions and Blu Funding were placed into provisional liquidation by the Official Receiver. They were subsequently wound up in the public interest in May 2018. An independent trustee was appointed to the FP1 Fund. Mrs Curtis has not recovered any of the pension fund she transferred to Fast Pensions.

CONSIDERATION OF THE ISSUES

50. It is logical to deal first with the question of whether there was an unauthorised member payment to Mrs Curtis. We shall then consider whether HMRC were entitled to make the Assessment pursuant to section 29 TMA 1970 and if they were, whether it is just and reasonable for Mrs Curtis to be liable to the unauthorised payments surcharge.

(1) Was there an unauthorised member payment?

51. Section 160(2) FA 2004 defines an unauthorised payment as a payment made in respect of a member of the scheme which is not authorised by section 164.

52. The scope of what is an unauthorised member payment for the purposes of s 161(3) was considered by the Upper Tribunal in *Danvers v HM Revenue & Customs* [2016]UKUT 0569 (TCC). In that case, Mr Danvers transferred his pension fund to a SIPP with a view to obtaining a loan of those funds. A lending company made a loan to Mr Danvers. The loan was conditional upon the SIPP investing in preference shares of a finance company which substantially funded the lending company.

53. The Upper Tribunal was concerned with the construction of section 161(3) FA 2004 which provides as follows:

> 161(1) This section applies for the interpretation of this Chapter.
>
> (2) "Payment" includes a transfer of assets and any other transfer of money's worth.
>
> (3) Subsection (4) applies to a payment made or benefit provided under or in connection with an investment (including an insurance contract or annuity) acquired using sums or assets held for the purposes of a registered pension scheme.
>
> (4) The payment or benefit is to be treated as made or provided from sums or assets held for the purposes of the pension scheme, even if the pension scheme has been wound up since the investment was acquired.

54. The question for the Upper Tribunal was whether the loan fell within section 161(3) as a payment made in connection with an investment, namely the investment by the SIPP in the finance company preference shares. The Upper Tribunal held that it did:

> 51. In our judgment, it is clear from the language of the relevant provisions of Part 4 FA 2004 that it is intended that their scope goes wider [than] merely catching payments made "from" investments acquired for the scheme.
>
> 52. … It is therefore clear that the legislation does envisage that payments made to a member of a pension scheme by a third party in circumstances where there is a connection between that payment and an investment in the scheme can fall within the scope of the legislation. The statutory provisions should not be construed by substituting different words from those used in the provision itself.
> …
>
> 64. As we have said above, the question is whether there is a link between a specific investment made by the scheme and a payment received by a member of the scheme. In our view the wording is consistent with it being necessary that there is a causal link between the investment and the payment.
>
> 65. An obvious situation where the necessary link would exist would be if a third party lender was funded entirely by a company in which a pension scheme was invested, loans being made by the investee company to the third party lender only in circumstances where the scheme member was to take up a loan from the third party lender, the amount being lent by the investee company being identical to the amount on-lent to the scheme member. In such a case, the investee company would be a mere conduit for the making of loans from the scheme to the member and would in our view quite clearly come within the anti-avoidance provisions of s 161 (3) and (4) FA 2004.

55. In the present appeal, we are satisfied that there was an investment by way of loan by the FP1 Fund to Blu Funding. The loan from Blu Funding to Mrs Curtis was a payment made in

connection with that investment. Section 161(4) is therefore engaged so as to treat the payment to Mrs Curtis as having been made from the assets of the FP1 Fund. Blu Funding was a mere conduit for the purpose of making a loan from the FP1 Fund to Mrs Curtis. The loan to Mrs Curtis was inextricably linked to the pension transfer and the fund was the source of the loan. It is therefore an unauthorised member payment. It is not relevant that Mrs Curtis was unaware of the connection between her fund and the loan which she received from Blu Funding.

56. We are satisfied therefore that Mrs Curtis became liable to the unauthorised payments charge at 40% pursuant to section 208 FA 2004. The amount of the unauthorised payments charge was £8,000. The unauthorised member payment reached the threshold of 25% of the value of the fund and Mrs Curtis therefore became liable to the unauthorised payments surcharge at 15% pursuant to section 209 FA 2004. The amount of the unauthorised payments surcharge was £3,000. The total assessment to income tax would therefore be £11,000.

(2) Validity of the Assessment

57. An issue arises as to the validity of the Assessment. Mr Turnbull, who appeared for HMRC, accepted that the burden is on HMRC to establish that a discovery assessment was validly made. This is essentially a technical issue which involves construing section 29 TMA 1970. At the end of the oral hearing, we invited Mr Turnbull to provide further written submissions in relation to this issue. We are grateful for those submissions.

58. Mr Turnbull did not take any point that this was a new ground of appeal. In all the circumstances, including the fact that Mrs Curtis was self-represented, we consider he was right not to do so. In so far as necessary we grant Mrs Curtis permission to amend her grounds of appeal to raise the issue.

59. Mr Davies made the Assessment pursuant to section 29 TMA 1970. He did so on the basis that he had discovered that income of Mrs Curtis in 2012-13 which ought to have been assessed to income tax had not been so assessed. Mrs Curtis had submitted a self-assessment for 2012-13.

60. For the reasons given above, we are satisfied that there was an unauthorised member payment of £20,000 and that income of Mrs Curtis in 2012-13 which ought to have been assessed to income tax had not been so assessed. Mr Davies made a discovery to that effect in late 2016, although he did not know the value of the unauthorised member payment at that time.

61. In the circumstances, we are satisfied that section 29(1) is engaged. Further, Mrs Curtis had delivered a self-assessment return so that the Assessment will only be valid if one of the two conditions in section 29(4) and (5) is satisfied. We shall deal with each condition in turn.

62. The first condition is that the insufficiency of tax was brought about carelessly or deliberately by Mrs Curtis or someone acting on her behalf. There was no-one acting on her behalf, therefore it is necessary for HMRC to establish that Mrs Curtis brought about the insufficiency of tax carelessly or deliberately. Mr Turnbull did not suggest that Mrs Curtis had acted deliberately, so we are concerned with whether Mrs Curtis carelessly omitted the unauthorised member payment from her self-assessment return.

63. The test for carelessness in this context is helpfully set out in *Anderson (Deceased) v HM Revenue & Customs* [2009] UKFTT (TC) where Judge Berner said as follows:

> The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.

64. Mr Turnbull submitted that Mrs Curtis' failure to take independent advice or to check the position with Mr Peacock or Fast Pensions when completing her self-assessment return amounted to carelessness. Further, that her carelessness resulted in the under-assessment to tax.

65. We do not accept that Mrs Curtis was careless. There was no reason for Mrs Curtis to know or have any reason to suspect that her loan from Blu Funding was in any way connected with or conditional upon the transfer of her BT Pension to Fast Pensions. In the circumstances, the omission of the unauthorised member payment from her self-assessment return was neither deliberate nor careless.

66. Mr Davies suggested having received the letter dated 30 December 2015, Mrs Curtis could have researched the position herself or could have spoken to HMRC or a financial adviser. We do not accept that Mrs Curtis should reasonably have been expected to do that. In our view, she was entitled to make her return on the basis that there was nothing to disclose other than her income from Yell. She did not have access to any of the information in the hands of HMRC which identified the link between her pension and her loan from Blu Funding. There was no way in which she could reasonably obtain that information.

67. We asked Mrs Turnbull what HMRC would have told Mrs Curtis if she had queried their concerns in 2016. Mr Turnbull said that he would not like to hazard a guess. There was no evidence before us as to what the response might have been. We consider it unlikely that an officer of HMRC at that stage would have volunteered any of the information which caused them to think that there might have been an unauthorised member payment.

68. Further, we are not satisfied that enquiries of Mr Peacock or Fast Pensions would have given a reasonable taxpayer any reason to think that there would or even might have been an unauthorised member payment. We know that when Mrs Curtis tried to contact Mr Peacock and Fast Pensions in May 2017, they did not respond to her enquiries. It is likely that Mrs Curtis would have been left with no response in May 2016. Any other financial adviser would have been in no better position than Mrs Curtis to obtain information that would confirm there was an unauthorised member payment.

69. In the circumstances, we find that the insufficiency of Mrs Curtis' self-assessment to tax was not caused by any carelessness on her part in completing her self-assessment return.

70. We now turn to the second condition. For the sake of convenience, we repeat the provisions relevant to the second condition in section 29(5) and (6):

> (5) The second condition is that at the time when an officer of the Board —
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) in a case where a notice of enquiry into the return was given —
>
> (i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or
>
> (ii) if no such partial closure notice was issued, issued a final closure notice,
>
> 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.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if —
>
> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above —

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

71. On the facts of this case, Section 29(3) provides that Mrs Curtis shall not be assessed under section 29(1) unless one of the two conditions is satisfied. It is clear that the second condition was not satisfied at the time of the Assessment. It could not be satisfied at that time because the time for an officer of HMRC to give notice of an intention to open an enquiry into Mrs Curtis' return had not expired. Mrs Curtis submitted her return on 19 May 2016. Mr Turnbull accepted that the effect of section 9A(2)(b) TMA 1970 was that HMRC had until 31 July 2017 to give notice opening an enquiry. Instead of opening an enquiry, HMRC chose to make a discovery assessment on 17 February 2017. In circumstances where HMRC cannot rely on the carelessness of the taxpayer, the question which arises is whether they can make a valid assessment before the "enquiry window" has closed.

72. We raised this issue with Mr Turnbull at the hearing. He drew our attention to a decision of the FTT (Judge Hellier) in *Tim Norton Motor Services Limited v HM Revenue & Customs* [2020] UKFTT 503 (TC) where the point had been argued by counsel on both sides. Counsel for the taxpayer in that case relied on an observation by a Special Commissioner (Dr Williams) in *Lee v HMRC* [2008] SPC 715, a case where there was an application to close an enquiry under section 28A TMA 1970:

8. Section 28A applies only to valid enquiries under section 9A. It does not apply to other forms of investigation. In particular, it does not apply to investigations related to the potential use of section 29 TMA (assessment where loss of tax discovered). It is worth noting that section 29 makes provision to avoid an overlap between investigations linked with that section and section 9A enquiries. This emphasises that the two are separate. Section 29(3) to (7) limits the powers of an Officer under that section where the taxpayer has delivered a return under section 8. One limit is that the section 29 powers can only be used after either the "window" under section 9A has passed in respect of that tax return or the Officer has closed an enquiry into that tax return: section 29(5).

73. Judge Hellier in *Tim Norton Motor Services* did not agree with that observation and held as follows:

137. I accept that usually one would expect HMRC to avail itself of the power to open an enquiry rather than making an assessment. The condition in section 29(5) gives rise to some difficulty if an assessment is made during an enquiry window because the condition relates to the knowledge of the inspector when that window closes, which would in such a case be determined at a time after the issue of the assessment and between the time of issue of the assessment and the closure of the window new information may be gleaned from the prescribed sources which could at that time of the closure of the window make the inspector aware of the deficiency. And if an enquiry is opened the period for the receipt of additional information would be extended still further. Thus if a discovery assessment is made during the enquiry window or during an enquiry the consideration of the legality of the assessment must be postponed until the window or enquiry has closed.

> 138.That would permit the retrospective voidance of an assessment made during the window if a taxpayer notifies the inspector in writing with the information which would enable him to come to the conclusion which gave rise to the assessment (see s 29(6)(d)(ii). That may present HMRC with procedural problems and may make it more difficult for a tribunal to deal with and in an appeal against a discovery assessment before the end of the relevant window, but the difficulty visited upon HMRC will be one of their own making because they could have opened an enquiry or given a partial closure notice during an enquiry, and the tribunal will in my view be able to manage an appeal to take account of the timing issues. It does not seem to me that the difficulties created are such that it is necessary to construe section 29 as prohibiting assessment within the relevant window or as imposing conditions in addition to those described by Lewison J [in *Hankinson*].
>
> 139. I conclude (in respectful disagreement with the Special Commissioner in *Lee*) that the fact that the assessment was made during the enquiry window at a time when an enquiry could have been opened does not invalidate that assessment.

74. The effect of the conclusion in *Tim Norton Motor Services* is that the validity of a discovery assessment issued whilst the enquiry window is still open cannot be determined at the time the assessment is made. It is necessary to wait until the enquiry window has closed to then see what information the taxpayer has provided to HMRC by that time. If the information provided would enable the hypothetical officer to be aware that there was an insufficiency of tax in the self-assessment, then the discovery assessment would be invalid. If no information was provided or inadequate information was provided, then the discovery assessment would be valid.

75. Mr Turnbull acknowledged that it was preferable for HMRC to open an enquiry and then issue a closure notice if they were in time to do so, as opposed to making a discovery assessment. However, he submitted that on the facts of this case the discovery assessment was still valid. In making that submission he relied on the following argument:

> (1) No information that would enable an officer to be aware of the insufficiency of tax was provided by Mrs Curtis at any time prior to 31 July 2017 when HMRC ceased to be entitled to open an enquiry.
>
> (2) Section 29(5) seeks to protect a taxpayer from a discovery assessment only where such information is provided prior to that date.

76. Mr Turnbull accepted that information provided by Mrs Curtis prior to 31 July 2017 could fall within the description of information identified in section 29(6)(a). However, he submitted that the information provided would not have meant that the hypothetical officer could reasonably have been expected to be aware of the insufficiency of tax in the self-assessment. The requisite information was only made available on 7 February 2018. The significance of that date appears to be that it is the date of a letter from the FP1 Fund trustees providing information and explanations as to the operation of the bank accounts of FP1 and Blu Funding. Mr Turnbull submits that this information was not available at the time when the enquiry window closed, and HMRC were therefore entitled to make the discovery assessment.

77. As to the point of principle as to whether a discovery assessment can be made prior to the expiry of the enquiry window, Mr Turnbull submitted as follows:

> (1) Section 29 does not explicitly or implicitly exclude reliance on section 29(5) where a discovery assessment is issued prior to the expiry of the enquiry window.
>
> (2) The only condition for a discovery assessment is the discovery of an insufficiency.
>
> (3) The only method of objecting to a discovery assessment on the ground that neither of the two conditions is fulfilled is by way of an appeal.

(4) The date on which the hypothetical officer's awareness of the insufficiency is tested is the date on which an officer ceases to be entitled to open an enquiry into the return. There is no restriction on the date on which a discovery assessment may be issued.

(5) That approach is supported by the FTT decision in *Tim Norton Motor Services* and the reasoning at [137] to 139] of that decision.

(6) The approach was also said to be supported by the Upper Tribunal decision in *Hankinson v HM Revenue & Customs* [2010] UKUT 361 (TCC).

78. The Upper Tribunal in *Hankinson* considered the operation of section 29 and said as follows at [23]:

> 23. In our view, s29 is not concerned with the subjective view of the assessing officer (or the Board) about fulfilment of either or both of the conditions specified in sub-ss (4) and (5). The officer must, of course, have made a discovery. Unless he has done so, he cannot raise an assessment; but subject to that, if he does raise an assessment its validity is to be tested by reference to those two conditions. The phrase "he shall not be assessed", as it is used in s 29, means "he shall not be validly assessed". Accordingly, if one or both of the conditions is fulfilled, the assessment is valid; if neither of them is fulfilled, the assessment is invalid. The subjective opinions of the assessing officer or the Board about fulfilment of the conditions have no part to play in the operation of s 29. We consider this to be the only conclusion consistent with sub-s (8): the subject matter of an appeal is whether or not either of the conditions is fulfilled, without any form of qualification. If neither is fulfilled, the assessment should not have been made and will be invalid. And that is so whether the officer had formed the view that the conditions were fulfilled (and turns out to be wrong) or whether he has not considered them at all. The protection for the taxpayer in either case is his right of appeal under sub-s (8).

79. We do not accept Mr Turnbull's submissions.

80. In the context of Mr Turnbull's arguments, it is notable that the Assessment in this case was made before HMRC ceased to be entitled to open an enquiry. Mr Davies had already discovered that there was a deficiency of tax and did not need any information from Mrs Curtis to make that discovery. Further, Mrs Curtis had appealed the Assessment on 21 March 2017 before the enquiry window closed. If her appeal had been determined at that time, the Assessment would have been found to be invalid. Having said that, HMRC would still have been in time to open an enquiry.

81. In our judgment, the scheme of section 29 is clear. It was not intended that HMRC should make a discovery assessment prior to the end of the enquiry window. It is implicit that the discovery required by section 29(1) is a discovery made after the closure of the enquiry window or after an enquiry has been opened and closed in circumstances where HMRC were not aware of the deficiency.

82. Mr Turnbull made the point that what is postulated in section 29(5) is a hypothetical officer of HMRC. That is undoubtedly right (see *HM Revenue & Customs v Lansdowne Partners* [2011] EWCA Civ 1578). Further, the information available to the hypothetical officer at the relevant time, from which he could not reasonably have been expected to be aware of the deficiency, is the information specifically defined by section 29(6).

83. It seems to us that the observations in *Hankinson* do not support HMRC's arguments as to the validity of the Assessment in the present case. If anything, we consider that they support the invalidity of the assessment. If the Assessment should not have been made because neither of the conditions was satisfied, then it is invalid. HMRC's argument rests on the proposition that an assessment which is invalid when made, can somehow be validated if, when the enquiry

window closes, the taxpayer has not provided any information from which the hypothetical officer might reasonably be expected to know of the insufficiency of tax.

84. In our judgment that proposition must be wrong. The condition in section 29(5) is looking back at the position when the enquiry window closed. Hence it refers to the time when the officer "ceased to be entitled" to open an enquiry. If Mr Turnbull was right, Parliament would have left open the possibility that such a date might be in the future. The wording would have been "ceases or ceased".

85. The purpose of the two conditions in section 29 is to protect both the taxpayer and HMRC. The taxpayer is protected from an assessment if he has not been careless and if in the course of making a return, or in the course of an enquiry into a return, he has made available information from which a hypothetical officer should reasonably be expected to be aware of the deficiency. HMRC are protected because they are entitled to make a discovery assessment if the taxpayer is careless in completing a return or if the taxpayer fails to provide information from which the deficiency should be apparent by the time the enquiry window closes. HMRC do not require that protection in a case where they are still entitled to open an enquiry.

86. Mr Turnbull submitted that support was to be gleaned from the acknowledgment of the Upper Tribunal in *Hankinson* that the subject matter of an appeal is whether or not either of the conditions is fulfilled, without any form of qualification. It is said that the requirement to issue a discovery assessment after the expiry of the enquiry window would amount to a further qualification. We do not consider that is correct. The question in the present case is whether the conditions were satisfied at the time of the Assessment. There is no further qualification.

87. Mr Turnbull also noted that the Upper Tribunal considered the words in s 29(3) "he shall not be assessed" as meaning "he shall not be validly assessed". We do not see how that helps HMRC's argument. Again, it seems to support the contrary view, focussing as it does on the validity of the assessment and whether the conditions are satisfied. The Upper Tribunal states that "if neither [condition] is fulfilled, the assessment should not have been made and will be invalid". That observation supports the view that it is necessary to test the validity of a discovery assessment at the time it is made.

88. The Upper Tribunal was not considering the issue in the present appeal. It found that the question whether one of the two conditions is satisfied is a question of fact to be considered objectively. It is not relevant whether the assessing officer relied on one or other of the conditions at the time of making the assessment. Again, the focus was on the position at the time the discovery assessment was made.

89. Mr Turnbull did not provide any example of a case where an assessment might be invalid when made, but could later be validated by subsequent events. His submissions lead to the validity of an assessment being uncertain until the end of the enquiry window. It is unlikely that was the intention behind the provision, especially where, as Mr Turnbull accepts, it is preferable and straightforward for HMRC to simply open an enquiry into the return.

90. There is also some support for our conclusion in *HM Revenue & Customs v Tooth* [2021] UKSC 17 where the Supreme Court considered a contention that the question whether a discovery had been made was to be tested by reference to the collective knowledge of the Revenue, rather than the knowledge of an individual officer. That contention had been rejected by the Upper Tribunal in a previous case. The Supreme Court said at [72] (emphasis added):

> 72. This view of the operation of section 29(1) is supported by other authority as well. In *Sanderson v Revenue and Customs Comrs* [2016] EWCA Civ 19; [2016] 4 WLR 67, para 25, Patten LJ explained that "[t]he exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made."

91. The protection given to HMRC by the way in which the conditions are framed is subject to the time limit in section 34 TMA 1970 of 4 years from the end of the tax year to which the return and self-assessment relates. HMRC had the benefit of an extended time limit for opening an enquiry in section 9A(2)(b) TMA 1970. This gave them until 31 July 2017 to open an enquiry. Having failed to take advantage of that time limit, we do not consider that HMRC can rely on what, to us, is a strained construction of section 29(3). That sub-section simply provides that the taxpayer shall not be assessed unless one of the conditions.

92. We are not satisfied that either of the conditions required by section 29(3) was satisfied and the Assessment was therefore invalid. There is no provision for an invalid assessment to be subsequently be validated. We have come to a different conclusion to that of the FTT in *Tim Norton Motor Services*, but the same conclusion as the Special Commissioner in *Lee*. Our conclusion on this issue is sufficient to dispose of the appeal

(3) Is it just and reasonable for Mrs Curtis to be liable to the unauthorised payments surcharge?

93. In case we are wrong and the Assessment was technically valid, we shall consider whether it is just and reasonable for Mrs Curtis to be liable to the unauthorised payments surcharge of £3,000.

94. The approach to this question was considered by the Upper Tribunal in *HM Revenue & Customs v Bella Figura* [2016] 569 (TCC) where it said as follows:

> 70. As to the considerations that should be taken into account in evaluating the question whether it is just and reasonable to set aside a scheme sanction charge or unauthorised payments surcharge, we would respectfully endorse what the First-tier Tribunal (Judge Rupert Jones and Mohammed Farooq) said in *O'Mara v HMRC* [2017] UKFTT 91 (TC):
>
> > 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.

95. The burden is on Mrs Curtis to establish that it would not be just and reasonable for her to be liable to the surcharge. We have taken into account the statutory regime for pension tax relief and the various charges and surcharges that may be imposed as described at [71] – [75] of *Bella Figura*. We have also taken into account all our findings of fact as to the circumstances in which the unauthorised member payment came to be made. In our view there was nothing more that Mrs Curtis might reasonably be expected to do that would have avoided the unauthorised member payment. She obtained what she believed to be independent advice from an independent financial adviser who had been recommended to her by a colleague. It appears that she was the unfortunate victim of a scam.

96. HMRC say that Mrs Curtis did not obtain independent advice, because Mr Peacock was clearly obtaining some form of commission from the transactions he advised Mrs Curtis to enter into. That may be true, but it was not uncommon for financial advisers to be remunerated by way of commission.

97. HMRC say that Mrs Curtis did not take any steps to mitigate the risk of entering into the unauthorised member payment. In our view, that criticism is made with the benefit of hindsight. On the face of it, Mrs Curtis took advice from an independent financial adviser and was entitled to rely on that advice. We have found that there was no reason for Mrs Curtis to consider that the loan from Blu Funding was in any way connected with the transfer of her pension to Fast Pensions. HMRC say that Mrs Curtis should have been suspicious that Mr Peacock was able to secure a loan for her when she had a bad credit rating and had been unable to secure a loan from high street lenders. Again, we consider that criticism is made with the benefit of hindsight.

98. Overall, we are satisfied that it would be not be just and reasonable for Mrs Curtis to be liable to the unauthorised payments surcharge.

CONCLUSION

99. For the reasons given above we allow appeal on the ground that the Assessment was not validly made in accordance with section 29 TMA 1970.

100. If the Assessment had been valid, we would have allowed the appeal in part and discharged the unauthorised payments surcharge. In that case we would have reduced the Assessment to £8,000.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

101. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 06 JUNE 2022