[2017] UKFTT 596 (TC)

TC06038

Appeal number: TC/2013/00740

INCOME TAX – unauthorised employer loan – whether loan is secured by a charge of adequate value as required by section 179 Finance Act 2004 – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

EDEN CONSULTING SERVICES (RICHMOND) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Royal Courts of Justice, London on 23 June 2017

Mr Sanjeev Sharma, an adviser from The Finance Warehouse Limited, for the Appellant

Ms Moira Browne, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is concerned with the question of whether two loans made to the Appellant ("Eden") by an occupational pension scheme complied with the conditions set out in section 179 Finance Act 2004 in order to be treated as authorised employer loans or whether, as submitted by the Respondents ("HMRC"), they gave rise to unauthorised payments and charges under sections 208 and 209 Finance Act 2004 ("FA 2004"). The appeal is against an assessment of £33,000 for the accounting period ended 30 September 2008 in respect of the loan advanced on 29 October 2007 ("the 2007 loan") and an assessment of £6,000 for the accounting period ended 30 September 2009 in respect of the loan advanced on 12 January 2009 ("the 2009 loan").

The facts

2. I was provided with a bundle of documents for the hearing from which I find the facts set out in paragraphs 3 to 20 below. Neither party had prepared witness evidence. Mr Sharma was accompanied by Mr Michael Goodall, director and sole shareholder of Eden, at the hearing. I noted that the hearing could not reopen the issues considered by Judge Thomas Scott in his preliminary decision on this appeal (released on 4 October 2016). This concluded that the Tribunal does not have jurisdiction to consider the claims raised by Mr Sharma and Eden regarding HMRC's abuse of powers, inappropriate behaviour and unfair conduct. These issues had also been the subject of an investigation into Eden and Mr Sharma's complaints by HMRC. I also noted that HMRC do not object to the late appeal by Eden and that, given the circumstances of the delay described in paragraph 20 below, I agree that it should be allowed.

3. On 29 October 2004 Datasky Consulting Limited ("DCL") established an occupational pension scheme, the Datasky Consulting Executive Pension Scheme ("the Pension Scheme"). Eden was appointed as the new principal employer in place of DCL with effect from 6 April 2006 and it is a sponsoring employer within section 150(6) FA 2004.

4. Eden was incorporated on 22 October 1999 as Eden Consulting Services Limited and changed its name to Eden Consulting Services (Richmond) Limited on 23 May 2011. Eden owns the Crown House building at 9 Duke Street, Richmond, Surrey TW9 1HP ("the Property"). On 12 July 2004 a first charge over the Property was registered at Companies House in favour of Barclays Bank PLC ("Barclays") in respect of all monies due or to become due from Eden to the bank.

5. From correspondence between DCL, Eden and their advisers, The Finance Warehouse Ltd ("TFW"), between April and August 2007 it is clear that it was DCL and Eden's intention that the Pension Fund should acquire 15% of the Property at market value. Based on a 2006 valuation of the Property at £800,000, it was considered that this would leave £680,000 value in the Property in Eden, and that as

the Barclays mortgage balance stood at £510,000 at that time, it was expected that Barclays would agree to the arrangements. It was noted by Mr Sharma of TFW that "[t]he Pension Fund has to have first charge over 15% of the building, and Barclays will have to remove and agree to this. A contract will also have to be drawn between the parties for payment of expenses and collection of rents."

6. On 7 August 2007 TFW wrote to HMRC to ask for advice in relation the proposed purchase of 15% of the Property by the Pension Scheme. The questions asked were whether it would be an allowable investment and whether the income, costs and mortgage should be split between the Pension Scheme and Eden. The letter does not refer to a loan to be made by the Pension Fund to Eden. HMRC responded on 31 August 2007 that a scheme may purchase a commercial property and that it could be managed in this way, but that it was for schemes and their advisers to "self serve" and consider the tax consequences of scheme activities.

7. The arrangements for the transfer of ownership of part of the Property to the Pension Fund were not agreed with Barclays prior to the 2007 and 2009 loans being made, but Eden continued to pursue the proposal that the Pension Scheme should acquire an interest in the Property for some time. In 2010 Mr Goodall was in correspondence with Barclays about this following his acquisition of 100% control of Eden. Barclays noted in this context that a search at Companies House on 10 June 2010 had revealed that an all assets debenture dated 27 June 2002 was in place in favour of TSB Commercial Finance Limited trading as Alex Lawrie Factors.

8. On 29 October 2007 the Pension Scheme entered into a first loan agreement, the 2007 loan, to lend Eden £60,000. The loan agreement states that the loan to Eden is secured by a first charge against the chattels, furniture and telephone system installed at the Property and by a second charge over the Property. Neither charge was registered with Companies House. The terms of the loan were that it should be repaid in five annual instalments, beginning on the first anniversary of the loan and that the rate of interest to be charged was 6.75%.

9. On 12 October 2007 £20,000 was paid to the Pension Scheme. This was invested by the Pension Scheme in securities by Friends Provident on 1 November 2007. In a letter from TFW to HMRC dated 15 September 2010 this is described as an employer contribution. Mr Sharma of TFW later suggested in an email to HMRC on 28 September 2011 that the £20,000 was paid to cover the costs of the Pension Scheme's expected ownership of part of the Property and that when Barclays delayed the proposal it was then treated as an advance repayment of the 2007 loan made by the Pension Scheme to Eden. He referred to a letter to support this not being included in the bundle by HMRC, but I note that there is an undated and unattributed manuscript entry on a letter dated 27 October 2008 from TFW (on behalf of the Pension Scheme) to Eden at page 106 in the bundle that suggests that the £20,000 was paid by Eden "against [the] loan". This manuscript entry contradicts the typed content of the letter that states that the first instalment of the first loan was due at that time and that it was £14,172 (being one fifth of the full £60,000 loan plus finance charge).

10. Having considered the evidence regarding the payment of £20,000 to the Pension Fund, I do not accept the suggestion that the payment was an advance repayment of the loan for two reasons. First, the payment pre-dates the 2007 loan and the £20,000 was transferred to acquire securities on 1 November 2007, a couple of days after 2007 loan was made, rather than being used to reduce the amount to be borrowed as would be expected. The content of the letter from TFW dated 27 October 2008 confirms this finding. Second, the suggestion that it was an advance repayment is not consistent with the accounts given by Eden's accountant and Mr Goodall (set out in paragraphs 13 and 18 below) about the financial reasons for the Pension Scheme's 2007 and 2009 loans to Eden.

11. On 12 January 2009 the Pension Scheme entered into a second loan agreement, the 2009 loan, to lend Eden £15,000. The second loan agreement was secured by a first charge on the chattels, furniture and fittings installed at the Property. The charge was not registered with Companies House.

12. Both the first loan agreement and the second loan agreement state in the paragraph setting out the terms of the security:

> "There must be no other charge on the asset that takes priority over the charge made by the scheme. If the asset used as security is replaced by another asset, the value of the replacement asset must be at least equal to the lower of the market value of the asset it has replaced or the amount of the loan outstanding (including interest) at the time the security is replaced."

13. I accept the background to and reasons for the 2007 and 2009 loans as confirmed by Eden's accountant to Mr Sharma in a letter dated 17 November 2010 as follows:

> "The original loan was made by the scheme in October 2007 for the value of £60,000 and a further amount of £15,000 being advanced in January 2009. Both these advances were paid directly into the Barclays current account of Eden Consulting Services Ltd (ECSL).
>
> The original loan and the further £15k advance were primarily made to finance the operations of the principal employer, that is to say Datasky Consulting Ltd (DCL). For example at the time of the £60k advance ECSL had already provided in excess of £90k working capital to DCL in anticipation of the forthcoming funding. Although utilised in full to fund the operations of DCL the loan was secured against the fixtures and fittings of ECSL with the intention that it should be further secured against the freehold interest in the property at 9 Duke Street, Richmond ("the property"). The principle of granting a suitable charge was extensively discussed with Barclays Bank (the first charge mortgagees of the property) including detailed meetings at which I was myself present. Although it would be untrue to state that there was an unequivocal commitment from Barclays that security by way of legal charge over the freehold could be made available to the scheme in support of the required loan it is certainly the case that they (Barclays) gave the strongest possible indication that they would agree to this and that all was necessary was to "work out the details". It should also be

observed in this context that Barclays were at the same time agreeing to further funding of DCL's operations subject to the provision of the scheme loan.

As per the loan agreement entered on 29 October 2007 regarding the £60k advance a […] charge over both fixtures and fittings and the freehold was created. This charge has not been registered at Companies House as a result of difficulties obtaining the promised consent from Barclays (who of course remain the principal charge-holders). As with the entire SME community DCL faced a very different attitude from its bankers in summer 2008 and unfortunately in this instance the breakdown in the relationship with Barclays has led to the failure of DCL which was formally wound up in June 2010."

14. Correspondence between Mr Goodall and Barclays between February and July 2010 explains that DCL had failed to repay £60,000 to Eden and that, following a meeting with Mr Sharma, a solution had been agreed as a result of which Mr Goodall had become the 100% owner of Eden. He also stated that he intended to transfer funds from his SIPP Barclays Pension to the Pension Scheme in return for a 25% holding in the Property by the Pension Scheme. Eden's solicitors wrote to Barclays on 16 December 2011 to advise that the Pension Scheme owned 25% of the Property.

15. On 5 August 2010 HMRC wrote to TFW to notify them that HMRC intended to enquire into the Pension Scheme's return for 2009 and to look at transactions in the tax years ending 5 April 2007 and 2008 under discovery provisions.

16. On 18 November 2010 Companies House registered a legal charge created by Eden in favour of the Pension Scheme on 28 October 2010. The amount secured by the charge is £20,772 due or to become due from Eden to the Pension Scheme. The charge is over Eden's chattels, fittings and assets, plus goodwill at the Property. There is no loan agreement in the bundle or explanation of how the sum of £20,772 was agreed.

17. On 1 June 2011 HMRC notified Eden that it had been concluded that the 2007 and 2009 loans fell to be treated as unauthorised payments to Eden. On 2 June 2011 HMRC issued notices of assessment under sections 208 and 209 FA 2004 for the accounting period ended 30 September 2008 in the amount of £33,000 and for the accounting period ended 30 September 2009 in the amount of £8,250. Following calls with Mr Sharma, HMRC wrote to Mr Sharma on 3 June 2011 to clarify why the loans were to be treated as unauthorised employer payments.

18. On calls with HMRC on 15 and 16 June 2011 Mr Goodall confirmed that the first and second loans were made by the Pension Scheme to Eden because, at that time, he didn't feel that he had any other option but to take this course of action in order to save the business and his building. He also stated that he was still actively trying to agree with Barclays that a charge should be given in favour of the Pension Scheme based on it having a percentage ownership of the Property. Mr Goodall was advised by HMRC that a first charge had to be in place at the time when a pension scheme made a loan in order to prevent a tax charge arising. HMRC then emailed Mr Goodall

with a link to make an appeal against the assessments. On 17 June 2011 HMRC acknowledged receipt of Eden's appeal and the amounts payable were postponed.

19. On 11 January 2012 HMRC wrote to Eden providing their view of the matter under appeal and advised that Eden could request an independent review. Eden then requested a review of the decision. On 12 April 2012 HMRC wrote to Eden to advise that the decision that it is chargeable to tax in respect of two payments from the Pension Scheme had been reviewed. The conclusion was that the decision should be upheld but that the rate of the charge on the second loan should be reduced from 55% to 40% as the second loan did not exceed 25% of the aggregate of the amount of sums, and the market value of the assets, held for the purposes of the Pension Scheme immediately before the loan is made. This reduced the assessment for the accounting period ended 30 September 2009 from £8,250 to £6,000.

20. On 10 May 2012 Mr Goodall notified HMRC that he wished to appeal to the Tribunal. There was then a period of correspondence and calls with the tribunal and on 22 January 2013 Mr Sharma signed a notice of appeal to the Tribunal on behalf of Eden. On 27 January 2015 HMRC and Eden made a joint request for a case management hearing. This took place on 12 June 2015. On 23 July 2015 Judge Thomas Scott issued directions for another hearing and this took place before Judge Thomas Scott on 16 September 2016. The decision of the Tribunal released on 4 October 2016 was that the Tribunal does not have jurisdiction to decide matters relating to HMRC's conduct or fairness, and accordingly those grounds of appeal were struck out.

The law

21. The relevant legislation which is argued by the parties in this case is in sections 175 and 179 FA 2004, paragraphs 1, 5 and 6 of Schedule 30 FA 2004 and the charging sections 208, 209 and 213 FA 2004.

22. Section 175 FA 2004 lists the only payments which a registered pension scheme that is an occupational pension scheme is authorised to make to or in respect of a sponsoring employer. The list includes "authorised employer loans (see section 179)" in section 175(d) FA 2004.

23. Section 179(1) FA 2004 provides as follows:

"A loan made to or in respect of a [person who is or has been a] sponsoring employer is an authorised employer loan if –

(a) the amount loaned does not exceed an amount equal to 50% of the aggregate of the amount of the sums, and the market value of the assets, held for the purposes of the pension scheme immediately before the loan is made;

(b) the loan is secured by a charge which is of adequate value; and

(c) the repayment terms comply with subsection (2)."

24. Section 179(7) FA provides that "[i]n this section and that Schedule [30] "charge" includes a right in security or an agreement to create a right in security".

25. Schedule 30 FA 2004 gives the meaning of expressions used in section 179 FA 2004 and explains how to calculate the amount of the unauthorised payment when a loan to or in respect of a sponsoring employer does not comply with section 179(1).

26. Paragraph 1 Schedule 30 FA 2004 defines "Charge of adequate value" for the purposes of section 179 as follows:

> (1) A charge is of adequate value if it meets conditions A, B and C.
>
> (2) Condition A is that, at the time the charge is given, the market value of the assets subject to –
>
> > (a) in the case of the first charge to secure the loan, is at least equal to the amount owing (including interest) and;
> >
> > (b) in any other case, is at least equal to the lower of that amount and the market value of the assets subject to the previous charge.
>
> (3) Condition B is that if, at any time after the charge is given, the market value of assets charged is less than would be required under condition A if the charge were given at that time, the reduction in value is not attributable to any step taken by the pension scheme, the sponsoring company or a person connected with the sponsoring employer.
>
> (4) Condition C is that the charge takes priority over any other charge over the assets.

Paragraph 5 of Schedule 30 FA 2004 provides that if the loan does not comply with section 179 (1) when made, there is an unauthorised payment of an amount equal to the amount owing (including interest) if this arises because the loan is not secured by a charge of adequate value. Paragraph 6 provides that if the loan ceases to be secured by a charge of adequate value at any time after the loan is made, there is an unauthorised payment equal to the amount owing (including interest) at the relevant time.

27. Section 208 FA 2004 imposes a 40% charge to income tax ("the unauthorised payments charge") on the person to whom an unauthorised employer payment was made.

28. Section 209 FA 2004 imposes a 15% surcharge to income tax ("the unauthorised payments surcharge") on the person to whom the an unauthorised employer payment was made if it surchargeable pursuant to section 213 FA 2004 because the unauthorised payments in a twelve month period exceed 25% of the pension fund.

29. Section 860 Companies Act 2006 provides that a company that creates a charge to which the section applies (which includes a charge on land or any interest in land, a floating charge on the company's property or undertaking or a charge on goodwill or intellectual property) "must deliver the prescribed particulars of the charge, together

with the instrument (if any) by which the charge is created or evidenced, to the registrar before the end of the period allowed for registration."

30. Section 870 Companies Act 2006 provides that the period allowed for registration of a charge is 21 days beginning with the day after the day on which the charge is created.

31. Section 874 Companies Act 2006 sets out the consequences of failure to register charges as follows:

"If a company creates a charge to which section 860 applies, the charge is void (so far as any security on the company's property or undertaking is conferred by it) against –

(a) a liquidator of the company;

(b) an administrator of the company, and

(c) a creditor of the company,

unless that section is complied with."

Submissions

32. Eden argues in its notice of appeal that based on its interpretation of section 179(1) FA 2004 the two loans to the Pension Scheme were secured by charges of adequate value. Eden argues that there is no reference in HMRC's guidance to the necessity of a charge being registered at Companies House and that the words "a charge which is of adequate value" should take their literal meaning, that is, as understood by the reasonable man in the street on the authority of *Procter & Gamble UK v HMRC* [2008] EWHC 1558 (Ch) ("*Procter & Gamble*").

33. Mr Sharma submitted at the hearing that nothing in FA 2004 or tax law states that the charges have to be registered and that it was therefore a matter for the trustees' discretion whether to register, and that as this is single member scheme, the trustees have greater flexibility. Mr Sharma referred to text in the government's online publication "Life of a Company" that states that charges "may be" registered at Companies House. He submitted that as the charges were over assets that could be disposed of by Eden it would not be practicable to register them. Mr Sharma and Mr Goodall also submitted that HMRC had been aware of what was proposed and didn't suggest that it would be an unauthorised payment.

34. Eden argues that the £20,000 payment made in October 2007 reduced the balance outstanding on the 2007 loan for the purpose of calculating the assessments on the loans.

35. HMRC submits that the two loans fail to meet the statutory requirements in section 179(1)(b) FA 2004 that a loan must be secured by a charge which is of adequate value in two distinct ways:

(1) The effect of the failure to register the charges with Companies House is that the securities are unenforceable, and as such the loans are not secured; and

(2) There is no evidence as to the value of the assets the subject of the charges.

Discussion

36. This case concerns the question of whether the two loans made by the Pension Scheme to Eden were authorised employer loans which satisfied the conditions set out in section 179 FA 2004 or unauthorised payments subject to the assessments imposed by HMRC.

37. The two loans are recorded in simple contracts that state that the amount outstanding is secured by a first charge against Eden's chattels, furniture and fittings at the Property (and in the case of the 2007 loan, a second charge over the Property). HMRC make no comment on whether the contracts between Eden and the Pension Scheme create enforceable debts or contractual obligations to repay debt, but focus on whether the loans meet the condition in section 179 FA 2004 that such debt should be secured by a charge of adequate value.

38. I have considered Eden's submission that, following *Procter & Gamble,* "charge" should be given its ordinary meaning and that this doesn't require a charge to be registered. Section 179(7) FA 2004 states that a "charge" includes a right in security and paragraph 1 Schedule 30 gives the meaning of the expression a "charge which is of adequate value" for the purposes of section 179 FA 2004. The interpretation of section 179 FA 2004 is a matter of interpretation of this law rather than a matter of fact based an ordinary meaning of the word "charge". Further, I do not consider that reference to a statement on the government website "Life of a Company" that charges "may" be registered is persuasive evidence that a charge need not be registered for the purposes of section 179 FA 2004. The extract does not provide the context of the statement nor whether it relates to the relevant law at the dates of the 2007 and 2009 charges or later legislation.

39. HMRC contend that "charge" should be given its meaning from the Companies Act provisions at the date of the loans. Section 860(1) Companies Act provides that a company must deliver "particulars of the charge, together with the instrument (if any), to the registrar for registration". Section 860 (7) Companies Act specifies this requirement applies to, inter alia, floating charges on the company's property such as the charges in this case. Section 860 also specifies that if a company fails to register a charge, an offence is committed by the company and every officer of it who is in default. Section 874 Companies Act provides that if a company fails to register a charge that it has created the charge is void against the liquidator or administrator of the company and a creditor of the company. HMRC submit that the unregistered charges are therefore unenforceable, and as such the loan is not secured by a charge.

40. I do not consider that the requirements of the Companies Act can be taken to mean that only a charge that is registered in accordance with the Companies Act is a

charge. An unregistered charge is a charge, albeit subject to the sanctions of invalidity against a liquidator, administrator or creditors. However, I agree with HMRC that the sanction of invalidity for the failure to register a charge is relevant in the determination of whether a loan is "secured by a charge which is of adequate value" for the purposes of section 179 FA 2004.

41. The provisions of paragraph 1(4) Schedule 30 make clear that in order for a charge to be of adequate value it must take "priority" over any other charge over the assets concerned. In this respect the parties do not dispute that the second charge on the Property in the 2007 loan agreement does not assist with regard to the application of section 179 FA 2004 as it cannot take priority over the first charge in favour of Barclays. It does not therefore satisfy the criteria in paragraph 1 Schedule 30. The issue is whether the unregistered first charges over the chattels, furniture and fittings, unregistered floating charges, can satisfy the criteria in section 179 as defined in paragraph 1 Schedule 30 FA 2004.

42. Eden has argued that as long as there is no other charge over the assets, the unregistered charges effectively take priority over any other charge over the assets. I do not agree with this analysis. Section 179(1)(b) FA 2004 provides that an employer loan must be "secured by a charge which is adequate value". This means that the charge must secure the repayment of the loan. Paragraph 1 Schedule 30 FA 2004 lists taking priority as a required feature of a charge of adequate value. This is because priority between charges determines the order in which the creditors are repaid. As an unregistered charge is void as regards the liquidator, administrator or creditors, it cannot take its position in statutory priority and does not therefore provide security for the repayment of the loan. A clear purpose of this provision is to protect the pension scheme's assets and it is implicit that the charge must be effective security for repayment when priority is in point. The 2007 and 2009 loans are not secured by charges which can provide security as required by section 179 (1)(b) FA 2004.

43. As the 2007 loan was in excess of 25% of the assets of the Pension Scheme as set out in section 213 FA 2004, the section 209 FA 2004 surcharge is applicable. The £20,000 payment to the Pension Scheme in October 2007 cannot reduce the amount of the 2007 loan for the purposes of this calculation. Similarly, the £20,000 payment did not reduce the amount outstanding when the 2009 loan was made, with the result that the total loans to Eden then exceeded 50% of the aggregate of the amount of the sums, and the market value of the assets, held for the purposes of the pension scheme. The 2009 loan therefore fails to meet the condition in section 179(1)(a) FA 2004.

44. Although I have not been addressed by the parties on 2002 TSB charge referred to in paragraph 7 above, I note that it would have taken priority over both of the unregistered charges if it was valid at the relevant dates in 2007 and 2009, providing another reason why the 2007 and 2009 loans fail to meet the conditions to be authorised employer loans. I have not been addressed about the effect of the 2007 and 2009 charges on each other on the basis that both failed to meet the conditions of section 179 when granted, but I note that the 2010 registered charge in favour of the Pension Scheme presumably takes priority ahead of the prior unregistered 2007 and 2009 charges. If so, the effect of the later registered charge taking priority is that

unauthorised payment charges would arise under paragraph 6 Schedule 30 FA 2004 for the accounting period in which the later charge is registered (if the unauthorised payment charges have not already arisen for the periods in which the 2007 and 2009 loans were made).

45. Eden has argued that the 2010 registered charge was to secure the 2007 and 2009 loans but as the documentation filed with Companies House states that the charge was created in respect of indebtedness of £20,772 on 28 October 2010, it represented a further charge. Even if this were not the case, a later rectification of the 2007 and 2009 charge arrangements cannot cancel earlier unauthorised payment charges. Eden has not explained why the amount secured by the 2010 charge was £20,772 and the documentation does not refer to the value of the assets, but the amount secured by the 2010 charge puts into question whether the assets could ever have been of adequate market value for the 2007 and 2009 unregistered charges.

46. As I have found that both loans did not satisfy section 179(1)(b) FA 2004 when they were made, that the 2009 loan also fails to satisfy the condition in section 179(1)(a) FA 2004 and that the 2007 loan is subject to the surcharge, I do not need to address whether condition A in paragraph 1 Schedule 30 is satisfied in order to determine this appeal. I note this because there was a misunderstanding on Eden's part as Mr Sharma believed that HMRC had not raised the argument that the market value of the assets subject to the 2007 and 2009 charges was not sufficient to meet condition A in paragraph 1 Schedule 30 FA 2004. This was raised in HMRC's statement of case and skeleton arguments, but not in HMRC's letter of 12 April 2012 setting out the conclusion of the independent review of the decision to raise the assessments. Mr Sharma said that HMRC had failed to include a letter from the Eden's accountants with regard to the value of the assets in the bundle and he did not have access to it. I have found the following general statement by Mr Sharma in his letter of 4 May 2011 to HMRC about the value of the assets, but there is no valuation of the assets in the bundle to satisfy Eden's burden of proof that the market value of the assets was at least equal to the amounts owing (including interest):

"The principle security is represented by the freehold of the commercial property located in Richmond, Surrey. However there are also all of the fixtures, fittings, equipment and improvements contained within that property the majority of which were purchased as part of a high-quality refurbishment exercise undertaken in late 2005 therefore remaining of substantial value."

47. Finally, Eden has submitted that the charges should not have been imposed because HMRC were aware of the proposals and did not suggest that an unauthorised payment could arise. As noted in paragraph 6 above, I do not accept that HMRC were informed or asked about the proposed loans to Eden before HMRC's enquiries began in 2010. It is in any event for schemes and their advisers to consider the tax treatment of their activities.

Decision

48. For the reasons set out above the appeal is dismissed.

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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 01 AUGUST 2017