



TC07079

Appeal number TC/2016/01551

Income Tax - registered pension scheme - unauthorised payment charge - scheme funds invested at taxpayer's direction in preference shares of finance company as part of arrangement providing for loan from third party lender - payment made 'under or in connection with' investment in preference shares - Finance Act 2004, ss 161(3) and (4) - HMRC amending taxpayer's return and imposing unauthorised payment charge and unauthorised payment surcharge on loan - Sections 209, 268 and 269 Finance Act 2004 - whether surcharge not 'just and reasonable' in all the circumstances and whether relief should be granted under s 268(3) Finance Act 2004 - no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

CLARE FRANKLIN

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL JUDGE MICHAEL CONNELL

Sitting in public at City Exchange, Albion Street, Leeds on 20 August 2018

The Appellant did not attend and was not represented.

Ms Hannah Wilce of HMRC Solicitors and Legal Services for the Respondents.

DECISION

The appeal

1. This is an appeal by Clare Franklin ('the appellant') against an unauthorised payment surcharge of £4,026.30 issued by the Respondents ('HMRC') under s 209 Finance Act 2004 for an unauthorised payment of £26,842.11 from her registered pension scheme and HMRC's decision under s 268(3) of the 2004 Act to refuse to discharge the surcharge.

2. In her notice of appeal, the appellant also disputed the unauthorised payment charge of £10,736.80 issued by HMRC, on the basis that the payment was a loan not a 'payment' (from her pension fund). She has now agreed to pay the charge. The only remaining question for the Tribunal is whether in all the circumstances it would not be just and reasonable for the appellant to be liable to the unauthorised payment surcharge under s 268(3) FA 2004.

3. The appellant did not attend the hearing. The Tribunal was nonetheless satisfied that the appellant had been given notice of the time, date and venue of the hearing and that it was in the interests of justice to proceed.

Factual background

4. In June 2011 the taxpayer was 44 years old and was therefore below the statutory age at which she was entitled to take benefits from her pension fund (55) without incurring a charge to income tax.

5. She requested details of a scheme promoted as a 'Pension-backed Loan' scheme from an agency, 'The I Q Business Services Group', which described itself as:

'...authorised introducers to the relevant Provider Companies. We do not offer any regulated financial advice and you may wish to speak to your own Independent Financial Adviser. We are not regulated by the FCA.'

6. The scheme's literature explained that:

'This alternative has only become available in the UK since October 2009, and is the result of three years' work by the specialist advisers in conjunction with Pension Trustees, Independent Financial Advisers, an Investment Company and a Loan Company. It is only through the involvement of all of these groups that there are sufficient 'steps' to make the eventual loan to the pension holder deemed to be 'un-connected' to the original pension fund. It is a fairly complicated process legally and administratively, but all the documentation is dealt with by I Q staff and the professionals involved. In order to keep this relatively simple for the client it fully meets all current UK pension legislation and rules.'

7. The scheme was described by the agency's tax advisors Optimum Tax Solutions Limited ('Optimum') as relating to:

'...an arrangement whereby the individual agrees to transfer some or all of his personal pension funds to a new Self Invested Personal Pension. The SIPP subsequently decides to invest in the share capital of another lending company, which provides loans to other companies,

including the lending company that provides the loan to the pension holder. All loans referred to are on commercial terms.'

5 8. Documentation provided by the agency explained in further detail how the scheme worked:

10 'Step 1. - Your existing pension fund is transferred into a SIPP, (Self-Invested Personal Pension). There are dozens of SIPP Providers in the UK, some of which are part of major financial institutions and others which are specialist independent companies. Only a small number are capable of investing your pension fund into un-listed securities rather than stock and market listed companies, and this is a requirement if the whole transaction is to proceed. IQ have access to these specialists and one in particular is highly efficient and excellent value for money, with annual management charges of only £350+vat per annum, which covers unlimited work.

15 Step 2. - Using the services of the SIPP Trustee, you invest part of your pension fund by purchasing Cumulative Preference Shares in a specific Investment Company. This company's primary trading purpose is to lend money on a wholesale basis to other lending providers, such as those offering Bridging Finance or high-interest short-term loans to customers. One of the lending providers they lend to, is the Company which your personal loan will come from.

25 Step 3. Once your investment has been made, you will be able to obtain your loan up to a maximum of 50% of the amount you have invested in Step 2. This is usually credited direct to your chosen bank account within 48 hours of the investment having been made. The loan can be used for any purpose, and is charged at only 5% over BOE base rate provided annual payments are made. Should you be unable to make the annual payment, the rate rises to 10% over BOE base rate and will therefore accumulate to a higher debt figure. If Steps 1 and 2 have been made, you are guaranteed the loan, provided you are not currently in an IVA or bankrupt.

35 Please note — IQ Business Services DO NOT offer any authorised financial advice to you as an individual and you will need to decide if this fits in with your existing arrangements and plans. We DO guide you fully from an administrative position through the process and the individual steps involved. Our services to you are FREE and we will be your point of contact throughout the process, providing regular updates and coordinating all paperwork and communication.'

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9. On 15 July 2011 the appellant was advised by G Loans Limited, (the company which would provide the loan), that it :

45 '...had recently been made aware HMRC had threatened to levy tax charges against a very small number of our clients who we helped last year. As a result of this we have asked our tax advisers Optimum Tax Solutions Ltd to comment. Their opinion is set out in the attached 'Professional Advice July 2011'. Based on that advice G Loans Ltd continues to believe there is no tax payable on a 'G loan'. Nevertheless we thought it prudent to bring this matter to your attention and request that you email back to confirm if you wish to proceed.'

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10. The advice given by Optimum states:

‘HMRC Enquiries into the Pension Loan Scheme.

5 The above title may be misleading. It implies that it is the pension that provides the loan but it does not. The loan is made by a third party and is merely in conjunction with a pension transfer.

10 HMRC have begun to raise enquiries into the personal tax returns of some of the individuals who have taken advantage of this arrangement. Having gathered certain details around the arrangements, they have, in some instances, decided to levy unauthorised payment charges at a total rate of 55% on the total value of the pension funds transferred. In some cases, the 55% tax charge is on an amount that is in excess of the amount borrowed by the pension scheme member.

15 In my view, there can be only 2 explanations as to the stance that HMRC have taken. The first is that HMRC have misunderstood the arrangements. This is because, in their correspondence, they refer to ‘the payment’ for the investment by the SIPP in the money lending company being a payment that is outside of the list of authorised payments to pension members, as outlined in Section 164 of FA 2004. Section 164 deals with payments made to members of pension schemes by their pensions. It does not relate to investments made by those pensions. Under these arrangements, there is no payment to the member and so Section 164 is not in point.

20 The second possibility is that HMRC do understand the arrangements, but are struggling to find a good technical reason why it does not incur any tax liability on the member. In a sense, they could be ‘clutching at straws’ by trying to use Section 164 as a possible mechanism for raising a tax charge on the member.

25 In any event, I cannot see from the HMRC correspondence that they have any basis upon which to levy a tax charge on the members for entering into these arrangements.’

30 11. The appellant was provided with further information in two documents. The first of these was headed ‘G Loans - Questions and Answers’. It described a ‘G Loan’ as ‘a loan whereby the capital is repaid using the proceeds from your personal pension fund’. The document referred to the fact that a participant’s pension fund had to be invested with ‘a company on an approved panel’ in order to ‘ensure that G Loans Ltd can be as sure as possible that sufficient funds will be available to repay your loan’. The second document was headed ‘KJK Investments Limited - Information Memorandum’ and gave details of a proposed issue of cumulative preference shares by KJK. The proposed business of KJK was said to be ‘taking advantage of the current difficulties in the lending market’ by specialising in ‘wholesale lending, i.e. lending to other lenders’.

45 12. In early July 2011 the appellant decided to go ahead with the scheme. She applied to a separate agency which provided pension, administration and trustee services to pension schemes including Small Self-Administered Schemes. The agency was authorised and regulated by the Financial Services Authority.

50 13. She arranged for a new ‘SIPP’ to be set up, and on 31 August 2011 transferred approximately £51,000 from her Civil Service Pension scheme into the SIPP. She signed the SIPP documentation to acquire the KJK shares and the loan documentation with G Loans Ltd. The SIPP then invested the monies in KJK Investments Ltd (‘KJK’) preference shares.

14. In broad terms the gross amount of the loan to the appellant was £26,842.11 at a 5.5% fixed interest only basis, with the interest paid in advance and subject to an arrangement fee of £1,342.11. The total deductions were therefore £2,737.90, which left the appellant with a loan advance of £24,104.21, which monies were paid into her bank account.

15. Following an investigation by the Insolvency Service, on 8 August 2013, petitions to wind-up KJK and G Loans Ltd were presented under s 124A of the Insolvency Act 1986,. On 15 April 2015 winding up orders were made by the High Court.

16. The Report by the Insolvency Service found that:

- 10 i. 'Clients were led to believe that their investment in KJK would increase in value by 6% each year and that these returns would be sufficient to enable the client to repay their loan from the proceeds of their pension upon retirement. The investigation found that KJK was not a commercial lender (as it claimed to be), but that a significant portion of the funds invested by the clients were, in fact, lent by KJK on uncommercial terms to G Loans. This was the only means by which G Loans was able to provide loans to the clients – meaning that the loans which clients received from G Loans were funded from their own pension funds invested in KJK. This was not made clear to clients.
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- 20 ii. The court was satisfied that the companies acted with a lack of commercial probity in the way in which they marketed the scheme to clients and that the scheme itself was lacking in any proper commercial basis – with the result that there was no realistic prospect of clients getting back the funds which they had originally invested in KJK Investments Ltd.'

25 17. The loans provided by both KJK and G Loans were on terms that allowed interest to be accrued rather than paid, such that G Loans was not in a position to repay its liability to KJK, and that KJK Investments, in turn, could not pay a dividend to the clients that had invested in it. The remaining funds invested in KJK were used to make loans to other associated companies on uncommercial terms and to pay substantial commissions, fees and salaries to those involved in the operation of the companies. 209 individuals used the scheme, investing a total £11.9m in KJK. Sales commissions totalled in excess of £900,000, whilst the directors received payments totalling £490,000.

35 18. The Appellant did not declare the payment on her Self-Assessment Tax Return ('SA') for the year 2011-12, believing the monies she received to be 'a loan' from the SIPP.

19. On 7 October 2013, HMRC opened an enquiry into the appellant's 2011-12 SA return.

40 20. On 4 April 2014 HMRC wrote to the appellant explaining that s 161 (3) and (4) Finance Act 2004 treats the payment received by her, that is the loan, as made or provided from sums or assets held for the purposes of a self-invested pension plan because it was made 'in connection with an investment' (the shares in KJK) acquired using sums or assets held for the purposes of a registered pension scheme. The loan would be treated as an unauthorised payment because it fell outside the list of authorised member payments referred to in s 164 (1) by virtue of s 171 (4) of the Act, and was therefore subject to the unauthorised payments charge at 40% and the unauthorised payment surcharge at 15% under s 208 and 209 of the Act. The gross

amount of the loan was £26,842.11 and that was the amount which would be taxed at 40% and on which the surcharge would be calculated at 15%.

21. On 23 April 2015 a closure notice was issued by HMRC, amending the appellant's SA statement imposing:

- 5 i. an unauthorised payments charge of £10,736 (calculated as 40% of the £26,842 unauthorised payment [loan] which HMRC maintain was made);
- ii. an unauthorised payments surcharge of £4,026.30 (calculated as 15% of the £26,842 unauthorised payment [loan]); and
- 10 iii. a 15% penalty of £2,214.47 under Schedule 24 Finance Act 2007 in respect of the appellant's alleged failure to take reasonable care in delivering her tax return without including the unauthorised payment (calculated as 15% of the combined sum of the £10,736.80 unauthorised payment charge and the £4,026.30 unauthorised payment surcharge);
- 15 iv. an interest charge

22. On 25 May 2015 the appellant appealed HMRC's decision to amend her tax return. This appeal was rejected by HMRC on 24 June 2015. On 16 July 2015 the appellant requested an independent review.

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23. HMRC wrote to the appellant on 28 July 2015 informing her that arrangements were being made for an independent review and that she could make an application under s 268 FA 2004 regarding the 15% surcharge that had been applied. Her application was duly made on 7 August 2015, but subsequently rejected by HMRC on 19 November 2015. On 15 February 2016 HMRC completed their review of that decision, but concluded that the decision should be upheld.

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24. The appellant filed a Notice of Appeal with the Tribunal on 10 March 2016. Her grounds of appeal were that the payment she received was a loan and therefore not taxable. She said that she had relied on advice from G Loans, who had been provided with guidance from Optimum.

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Procedural background

25. On 30 June 2016, on the direction of Judge Poole, the Appeal was stayed behind the Upper Tribunal case of *Danvers v HMRC* (TC/2013/00239), the stay to be lifted 60 days after the decision which was released on 10 January 2017. Following expiration of the 60 day period the Tribunal wrote on 1 August 2017 requesting that HMRC file a Statement of Case.

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26. On 19 September 2017, HMRC made an application to the Tribunal requesting a direction that the appellant file amended grounds of appeal on the basis that the Notice of Appeal was insufficient.

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27. On 29 September 2017, Judge Poole issued directions that the appellant should provide the Tribunal with amended grounds of appeal, which set out with reasonable particularity all the legal grounds upon which the appellant disputed HMRC's decision, and an outline of the facts upon which she intended to rely in support of those legal grounds. Judge Poole further directed that HMRC were not obliged to file

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their statement of case until 56 days after the appellant had complied with the direction.

28. The appellant did not comply with the direction other than to say that she relied on her original appeal grounds, being that the payment she received was in fact a loan from a third party company and therefore not subject to an unauthorised payments charge. She reiterated that she had relied on advice given by Optimum, who she believed to be experts in the matter.

29. On 6 December 2017 HMRC applied to strike out the Appeal on the basis that no amended grounds had been filed by the appellant. The appellant wrote to HMRC on the same day stating she would file the grounds by close of play that day. No further correspondence was received from the appellant and HMRC made a further application for strike out on 2 January 2018.

30. On 3 January 2018 the appellant wrote to the Tribunal and HMRC explaining that she was suffering from ill-health. She reiterated that she...

‘...took out a loan which I was assured had no tax implications. The company is now in receivership and there is no sign that I will receive any pension (if I reach that age). I cannot reverse the situation back to its original state as the company is no longer trading.’

31. On 15 January 2018 the appellant emailed the Tribunal to say that she no longer wished to pursue the appeal, saying:

‘I have no fight left and no chance of winning, or retiring as I have no pension funds left it seems.’

32. On 18 January 2018 the Tribunal refused the strike out application and Judge Poole made further directions that HMRC confirm whether their intention was to persist with (all elements of) their case. He also directed that the appellant should file clearer and more comprehensive grounds of appeal. The Judge noted that s 268(3) allows for a taxpayer to be relieved of the 15% surcharge if “in all the circumstances of the case, it would not be just and reasonable for the person to be liable” to the charge; and before a Schedule 24 penalty can be charged, it must be established that there was a “failure to take reasonable care” on the part of the taxpayer in delivering his/her return.

33. Judge Poole added that bearing in mind the appellant had no professional representation but has expressed her disagreement throughout with the fairness of the liabilities, these seemed to him to be issues which should not be allowed to go by default. The surcharge (totalling £4,026.30) and the penalty (totalling £2,214.47) deserved more careful consideration by the Tribunal unless the appellant specifically confirms her acceptance of them.

34. He further commented that in the review letter dated 15 February 2016, the decision in *Danvers* had been heavily relied upon, but without mentioning that in that case there was no dispute about the applicability of the 15% surcharge, nor was any Schedule 24 penalty under consideration. He contrasted the case of *Morgan Lloyd*, (see below) in which the taxpayers were relieved of the 15% surcharge and no question of any penalty arose.

35. On 2 February 2018 HMRC wrote to the Tribunal affirming that they wanted to continue their case, but would remove the penalty.

36. The appellant wrote on 8 March 2018 and stated:

5 ‘I have no evidence to offer other than my original defence. I accept that I must make arrangements to pay the charge of £10,736 and am happy that HMRC have removed the penalty of £2,214.47 but I would request judgement be made to also remove the surcharge of £4,026.30. As stated in previous communications I have limited means of supporting myself and my daughter and no emotional or financial fight left.’

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37. On 18 April 2018 Judge Poole directed that there should be a single issue hearing only on the matter of the surcharge. He said:

15 ‘It seems to me that the remaining issue between the parties in connection with the disputed amount of £4,026.30 is whether it is “just and reasonable” for the surcharge to have been imposed. HMRC say that the only argument put forward by the Appellant is that “she is unable to pay the charge”. This is not strictly correct. In her original notice of appeal, she said “I still maintain that it was a loan and as such should not be taxable as no other personal loans are. I was advised as such by G Loans and they provided that based on guidance given by Martin Westall (see evidence).”

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 As the issue between the parties is now a simple one, I consider it is one which the Appellant should be given an opportunity to make her argument on (and put her evidence forward on) without more formality. If she can come to a hearing (which will be kept as informal as possible) and put forward the reasons why she considers it would be “just and reasonable” for her to be relieved of the £4,026.30 surcharge, I consider she should be given the opportunity to be heard so that a Tribunal can reach an objective decision on the matter rather than letting it go by default.’

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30 38. Nothing further was heard from the appellant. HMRC filed their statement of case prior to the hearing.

The Legal Framework

Legislation

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Finance Act 2004

39. Part 4 of Finance Act 2004 (‘FA 2004’) contains various tax provisions about pension schemes.

40 40. The appellant has agreed that she is required to pay the unauthorised payments charge. Therefore the legislative framework for that matter is not set out here. Suffice it to say that under s171(4) and s209 of the Act the unauthorised payment charge is levied at 40% of the amount of payment to the taxpayer.

41. Section 209 identifies that an unauthorised payments surcharge will arise where a ‘surchargeable unauthorised payment’ is made.

45 Section 209 *Unauthorised payments surcharge*

(1) A charge to income tax, to be known as the unauthorised payments surcharge, arises where a surchargeable unauthorised payment is made by a registered pension scheme.

5 (6) The rate of the charge is 15% in respect of the surchargeable unauthorised payment.

42. Section 210 deals with surchargeable unauthorised member payments.

Section 210 *Surchargeable unauthorised member payments*

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(1) This section identifies which unauthorised member payments made by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme are surchargeable.

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(2) If the surcharge threshold is reached before the end of the period of 12 months beginning with a reference date, each unauthorised member payment made to or in respect of the person in the surcharge period is surchargeable.

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(7) The surcharge threshold is reached if the unauthorised payments percentage reaches 25%.

43. Section 268 gives the taxpayer the right apply to HMRC for a discharge from an unauthorised payments surcharge liability.

Section 268 *Unauthorised payments surcharge and scheme sanction charge*

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(1) This section applies where –

- 30 (a) a person is liable to the unauthorised payments surcharge in respect of an unauthorised payment, or
(b) the scheme administrator of a registered pension scheme is liable to the scheme sanction charge in respect of a scheme chargeable payment.

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(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).

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(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.

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(4) On receiving an application by a person under subsection (2) the Inland Revenue must decide whether to discharge the person's liability to the unauthorised payments surcharge in respect of the payment.

Case Law

50 44. In *Danvers v HMRC* the facts and issues involved were very similar to the present case, in that they involved the same scheme with KJK and G Loans Limited. In that case the appellant was appealing both the unauthorised payment charge and the surcharge and the decision of the FtT that HMRC had correctly imposed an unauthorised payment charge and unauthorised payment surcharge.

45. The FtT had found that a loan of £18,656.69 ('the Loan') by G Loans to Mr Danvers fell within s 161(3) and (4) FA 2004 as being made in connection with an investment made by Mr Danvers' self-invested pension scheme, the 'HD SIPP'. The relevant investment was made by the HD SIPP in KJK in circumstances where it was a condition of the making of the Loan that the HD SIPP invest the whole of its net assets in cumulative preference shares of KJK and where G Loans was funded substantially by loans made to it by KJK.

46. The FtT had concluded that the Loan was an unauthorised payment for the purposes of FA 2004 and accordingly Mr Danvers was properly subject to an unauthorised payments charge pursuant to s 208 of the Act and an unauthorised payments surcharge pursuant to s 209.

47. The UT found that the investment made by the HD SIPP in the KJK preference shares had the necessary connection with the Loan because on the facts, the investment and the Loan were inextricably linked..

48. The issue as to whether relief should be granted in respect of the surcharge under s 268(3) FA 2004, on the basis that it would not be just and reasonable for the appellant in that case to pay the surcharge, was not argued. The decision was released on 10 January 2017.

49. The FtT case of *O'Mara v HMRC* [2017] UKFTT 091 (TC) set out a number of principles to be considered in relation to the "just and reasonable" test applied under s 268(3). The Tribunal stated at paragraph:

[166] The policy objective was to primarily recoup tax and not to punish the circumstances in which an unauthorised payment was made. Therefore the circumstances in which it would not be just and reasonable for a surcharge may be limited;

[167] The Tribunal had to look at the purpose of the payments not just the state of mind of the Appellants; and

[168] The tribunal does not need to go so far as to find that a taxpayer entered into an arrangement which they understood or believed to have constituted unauthorised payments for the purposes of the legislation.

50. At paragraph [170] the Tribunal went on to state that the fact that the Appellant had taken legal, accounting or tax advice that the scheme was legitimate did not mean it was not just and reasonable for the surcharge to be upheld. This was relevant but not determinative. Further, it was stated that:

[151] The burden of proof is on the Appellant to bring evidence to satisfy the Tribunal that it would not be just and reasonable for them to be liable for the surcharge.

[152]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] [No] finding of dishonestly or neglect was required for the surcharge to be imposed - instead the Tribunal had to consider the appellants' conduct and any other mitigating circumstance.

[154] [The surcharge was not penal but was] a further tax charge intended to recoup the tax relief on contributions and tax-free growth already obtained

(evidenced by the background note to Finance Bill 2004, clause 197). This therefore limits the circumstances in which it would not be just and reasonable to impose it.

5 51. The FtT considered the conduct of the appellants, and found that their intention in
entering into the arrangements was clearly to benefit from the pension fund before
retirement age. Although the FtT accepted that the appellants honestly believed no tax
charges would ensue, they considered this was not based on reasonable grounds, as
they had relied on an adviser who had a financial interest in selling the product and
10 they did not take independent advice.

52. Furthermore, if a payment does turn out to be unauthorised, the fact that a
taxpayer has taken legal, accounting or tax advice that the scheme was legitimate or
authorised does not of itself make it unjust or unreasonable to impose the surcharge
(although it may be a relevant factor).

15 53. The standard of care which is expected to be exercised by the appellant is that of a
prudent and reasonable taxpayer in the position of the taxpayer in question *HMRC v
Collis* [2011] UKFTT 588 (TC).

54. The First-tier Tribunal case of *Morgan Lloyd Trustees Limited (as administrator
of the Wren Press Pension Scheme) (1) Ray Hallam (2) and The Commissioners for
Her Majesty's Revenue & Customs* [2017] UKFTT 131 (TC) decided very shortly
20 after the *O'Mara* case, further elaborated on what may be considered "just and
reasonable" under s 268(3). The Tribunal stated at paragraph[148] :

[148]. It is self-evident that the scheme of legislation for pensions remains immensely
complicated, in spite of the Government's stated aim of simplifying it. Under the
25 regime in force up to April 2006, the transactions the subject of this appeal would
have been entirely uncontroversial, and (as we have found above) the way in which
the rules were changed was unclear even to professionals operating in the field. The
second appellant relied on advice from an apparently competent professional adviser
in what he did. He was in our view entitled to do so in the circumstances of the case.
30 We would observe that HMRC themselves only published any indication that such
transactions might (contrary to previous indications) give rise to a problem in late
July 2006, when the provisions themselves were expressed to come into force on 6
April 2006; and even then, their published commentary blew "hot and cold" (see [46]
above)...."

35 55. The Tribunal concluded that it would not be just and reasonable for him to be
subject to the unauthorised payments surcharge".

56. The appellant has not filed amended Grounds of Appeal, but her email of 8 March
2018 (paragraph 36 above) sets out her position on the matter.

40 57. The 'original defence' referred to by the appellant was set out in her Grounds of
Appeal and was simply that the money received from G Loans was a personal loan
and not taxable. The appellant further stated that G Loans advice was based on
guidance given by Optimum Tax Solutions Limited.

45 58. HMRC applied for the appeal to be struck out under rule 8 of The Tribunal
Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, on the basis that the
appellant had failed to comply with a direction of the Tribunal.

59. The Tribunal had not stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings and, particularly in the absence of the appellant, I refused HMRC's application in order that the appeal could be heard.

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60. Pension scheme contributions and their funds, and the generous tax reliefs granted on them, are intended to help provide for benefits in retirement. Where unauthorised payments are made from the scheme, and prior to that statutory age at which individuals can draw down their pension funds HMRC will, where appropriate, seek to recover that tax relief by the unauthorised payments charge and surcharge.

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61. When arranging the loan, the appellant was not professionally represented and sought no advice from an independent adviser. She relied on advice given by the loan provider G Loans Ltd themselves. HMRC submit that she did not take reasonable care when entering into this scheme to determine whether or not she would be liable to tax.

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62. The appellant was taking part in a scheme the purpose of which was to circumvent legislation and gain access to her pension funds without paying tax. Her mental state is not the only factor to be considered. It is also necessary to consider objectively the purpose of the payments.

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63. The Appellant has not discharged the burden of proof to evidentially show that it would not be just and reasonable for her to pay the surcharge.

Conclusion

64. The Tribunal has some sympathy with appellant. It is not known how much of her original payment into the scheme was recovered following the winding up of the two companies KJK and G Loans. Doubtless the High Court would have ordered that the costs of winding up should be borne by monies in the scheme, further depleting what remained of the appellant's 'investment' after payment of the unauthorised payment charge.

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65. As the appellant did not attend the hearing I am limited to considering the documentary evidence in the bundle and HMRC's submissions in order to determine whether it would not be just and reasonable for the appellant to be liable to the surcharge in all the circumstances. The appellant has not as directed, advanced any argument or provided clearer comprehensive grounds of appeal with reasonable particularity, as to why relief from the surcharge should be granted.

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66. There are restrictions on the use of an individual's pension funds, which are not ordinarily available until the age of 55. The clear purpose of the scheme which involved the payment to the appellant was to circumvent the rules which otherwise applied.

67. The appellant must have realised that entering any scheme in which it was proposed that no tax charges would result, came with some risk. Indeed she was put on notice of this in clear terms by G Loans on 15 July 2011 and to some extent by the opinion of Optimum, who spelt out HMRC's opinion that unauthorised payments could result in a 55% penalty.

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68. Following *O'Mara* it is not necessary to demonstrate that the appellant was dishonest or negligent, or that she was aware that the payment to her was an unauthorised payment, in order to establish that the surcharge is just and reasonable.

69. I therefore do not have to find that the appellant entered into an arrangement which she knew or believed to have constituted unauthorised payments for the purposes of the legislation. It is clear that is not the case. She believed the payment to be a loan and that it would not be 'a connected payment'. This belief was based on the opinion of a third party, Optimum, which, subject to certain qualifications, stated that the scheme was risk free. However it also reiterated that HMRC may not have shared that view and that there was at least some risk of a 55% penalty.

70. The appellant nonetheless decided against taking independent legal, accounting or tax advice before making the decision to proceed. She honestly believed, albeit mistakenly, that the scheme and the payments were compliant and authorised. She relied on the generic advice of Optimum, who owed her no personal duty of care, that no tax charges would follow. She was relying upon the opinion of a third party agent who was simply expressing a view rather than providing advice. The local agent through whom she entered the scheme and who had a financial interest in selling the product stated in clear terms that he was not providing independent advice. His literature stated that he was not regulated by the FSA. This should have put the appellant on her guard.

71. The appellant's belief that the scheme did not contravene pension's legislation was not based upon reasonable grounds. She undertook little if any due diligence and an almost careless disregard of the risks that were inherent in the scheme. She chose not to consult an independent competent professional adviser. This was not a reasonable response.

72. However in my view the appellant did not act reasonably in relation to entering into the scheme and receiving the unauthorised payment.

73. I am satisfied that it would not be just and reasonable for the unauthorised payment surcharge to be discharged.

74. The appeal is therefore dismissed, and the surcharge of £4,026.30 confirmed.

75. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 09 APRIL 2019