Neutral Citation: [2022] UKFTT 179 (TC)

Case Number: TC08504

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: **Appeal number: TC/2017/05148**
TC/2017/05149
TC/2017/05150
TC/2017/05151
TC/2017/05152
TC/2017/05154
TC/2019/06219
TC/2019/06220
TC/2019/06221
TC/2019/06222
TC/2019/06224

INCOME TAX – Sippchoice considered – whether the creation of a debt quantified in monetary terms is a relievable contribution for the purposes of Section 188(1) Finance Act 2004 – no – appeal dismissed

Heard on: 16 December 2021
Judgment date: 07 June 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

MATTIOLI WOODS PLC (As scheme administrator for the Lanson SIPP and others)
Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: **Emily Campbell of counsel, instructed by Burges Salmon LLP**

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

Supplemental Skeleton Argument, with supporting evidence dated 10 January 2022

DECISION

INTRODUCTION

1. There are 11 appeals in this matter and they had originally been stayed behind *HMRC v Sippchoice Ltd*[1] ("Sippchoice").

2. Following the issue of the decision in *Sippchoice,* the appellant amended their Grounds of Appeal in each appeal. The appellant agrees that the appeals will fail if, what was identified as a preliminary issue ("the Preliminary Issue"), were to be decided in favour of HMRC. The parties then negotiated the terms of the Preliminary Issue.

3. On 18 March 2021 the Tribunal directed that pursuant to Rule 5(3)(e) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") a hearing would be fixed for determination of the Preliminary Issue, which is:-

> "Where a member of a registered pension scheme assumes a legally enforceable obligation to pay an amount of £x is the assumption of the debt in and of itself a 'contribution paid' (in the amount of £x) within the meaning of s188(1) of the Finance Act 2004, regardless of whether the debt is in fact satisfied for full value or at all?".

4. I heard only argument from counsel and there was no witness evidence. Given that there were 11 appeals, the parties had decided that a pragmatic approach should be adopted. The parties had agreed that the outline facts set out in the (sample) Amended Grounds of Appeal together with Documents A to C (relating to a Mr Koslover and a contribution made to the Jonathan Koslover Pension Trust ("the Scheme") in 2015) would suffice to ensure that the context of the Preliminary Issue could be understood.

5. Simply put, the Preliminary Issue relates to the creation of a debt, being what the parties referred to as an IOU, and the settlement of that IOU by an *in specie* transfer of shares.

6. In this case the *in specie* transfer was a 2% shareholding in a property syndicate. It was valued at £8,442.

7. Both parties rely on the decision in *Sippchoice* but for very different reasons.

The Directions

8. Following the hearing on 20 December 2021, I issued Directions seeking clarification of what seemed to me to be obvious errors in the dates in the outline facts and Documents B and C. The supplemental Skeleton Argument, with supporting evidence, submitted by the appellant on 10 January 2022, clarified that. HMRC took no exception to the further evidence. Accordingly, when I quote from the Documents B and C, the dates should be recognised as being inaccurate in the quotation. It appears to be quite clear that Document B is wrongly dated 30 June 2015 and should have been dated 30 July 2015. Further, Document C was apparently prepared after Document B was signed and replicated the date error in Document B but it too is wrongly dated. The correct dates are used in the Findings in Fact.

The Facts

9. The appellant is the scheme administrator of a number of registered pension schemes.

10. The appeals are all against decisions by HMRC to refuse part of the appellant's claims for relief at source in respect of individual member contributions to the various pension schemes. The appeals cover the four years of assessment from 2012/13 to 2015/16.

11. The appellant, as administrator of the Scheme, prepared drafts of Documents B and C.

---

[1] 2020 UKUT 149 (TCC)

12. On 20 July 2015, Greg Ward of the appellant, emailed Mr Koslover stating that he would need "…to sign a letter creating a contribution debt with the SIPP for £8076.30 which will be settled once the transfer happens…". The intention was that the IOU would be settled once the transfer of the shares had taken place.

13. On the same date Mr Ward emailed his colleague telling her that before Mr Koslover made the contribution to the SIPP he needed to create a debt with the SIPP and he requested her to prepare an IOU in the amount of the contribution, being Document B, apparently based on their standard letter.

14. On 28 July 2015, Document A, being the covering email which referred to the communication with Greg Ward, was sent to Mr Koslover including only the draft Document B and not the draft Document C.

15. Document A, insofar as relevant read:

> "…please find attached a declaration in connection to the proposed contribution of your 2% personal holding of the property syndicate into your Mattioli Woods SIPP.
>
> As discussed this will initially create a debt with the pension scheme.
>
> Upon receipt of this signed document we can proceed with the contribution into the scheme."

16. On 29 July 2015, Mr Koslover emailed the appellant to notify a change in the valuation of the shares and made a manuscript amendment to Document B changing the amount of the contribution.

17. Document B, as amended, was very simple in its terms and read:

> "Please accept this as my application to make a net contribution of £8442 to the above scheme.
>
> I accept that this application will create a debt to the above scheme which I am legally obliged to settle."

Mr Koslover had handwritten the date "30/6/15" on the document but, as indicated above, I accept that that was an error and on the balance of probability it should have been 30 July 2015.

18. Document B was subsequently returned to the appellant at an unknown date between 30 July 2015 and 13 November 2015.

19. A draft of Document C was sent to Mr Koslover under cover of an email dated 13 November 2015 and timed at 11.06. That email read:

> "With reference to…your recent in-specie transfer of your 2% personal holding of….please find attached a further declaration that the debt has been settled to the pension scheme."

He was asked to sign and return it.

20. Document C was presumably prepared on the basis of Document B so the erroneous date of 30 June 2015 was used and repeated. Regrettably, Document C is dated 11 November 2015 (in Mr Koslover's handwriting). It read:

> "Further to my application of 30 June 2015 to make a net contribution of £8,442.00 to the above scheme, I intend to settle the amount owed by in specie transfer of the following asset: …

I understand that any shortfall in debt created in my application of 30 June 2015 and the final transfer of assets must be settled and I will be pursued by the scheme administrator in the event of non-settlement.

I understand that any excess above the debt created in my application of 30 June 2015 and the final transfer of assets must be returned to me by the scheme, purchased by the Scheme or treated as an additional contribution (as agreed by the scheme administrator)."

21. Later that day Mr Koslover emailed the appellant stating that Document C was in the post.

The Legislation

22. The taxation of registered pension schemes is set out in Finance Act 2004 ("FA 2004"), Part 4 and the Schedules thereto. That was new legislation and neither re-wrote nor clarified previous legislation.

23. Insofar as applicable Section 188 reads as follows:-

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

(2) In this Part 'relievable pension contributions', in relation to an individual and a pension scheme means contributions by or on behalf of the individual under the pension scheme other than contributions to which subsection (3) or (3A) [from 2014/15] applies [which contains certain exceptions] ….

(8) The following sections make further provision about relief under this section –

section 189 (relevant UK individual),

section 190 (annual limit for relief),

sections 191 to 194 (methods of giving relief),

section 195 (transfer of certain shares to be treated as payment of contribution)."

24. Section 191 provides *inter alia* that relief to which an individual is entitled under Section 188 is to be given in accordance with Section 192. Insofar as material Section 192 provides:-

"(1) Where an individual is entitled to be given relief in accordance with this section in respect of the payment of a contribution under a pension scheme, the individual or other person by whom the contribution is paid is entitled, on making the payment, to deduct and retain out of it a sum equal to income tax on the contribution at the [basic rate] …

(2) If a sum is deducted from the payment of the contribution –

(a) the scheme administrator must allow the deduction on receipt of the residue,

(b) the individual or other person is acquitted and discharged of so much money as is represented by the deduction as if the sum had actually been paid, and

(c) the sum deducted is to be treated as income tax paid by the scheme administrator.

(3) When the payment of the contribution is received –

(a) the scheme administrator is entitled to recover from the Board of Inland Revenue the amount which is treated as income tax paid by the scheme administrator in relation to the contribution, and

(b) any amount so recovered is to be treated for the purposes of the Tax Acts in the same manner as the payment of the contribution …".

25. Section 195 reads:-

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

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

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

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

(a) which the individual had exercised a right to acquire in accordance with the provisions of an SAYE option scheme, or

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

(4) 'The permitted period –

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

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

…".

26. Given the terms of paragraph 31 of *Sippchoice,* the appellant correctly accepts that Section 195 is an extension of the relief under Section 188 and that a transfer of shares cannot be a relievable pension contribution paid unless the requirements of that Section are satisfied.

27. Regulation 9(1) of the Registered Pension Scheme (Relief at Source) Regulations provides that "Amounts recoverable by a scheme administrator under Section 192(3)(a) shall be recovered on a claim made to Her Majesty's Revenue and Customs for the purpose of these Regulations". Such a claim may be either for a tax month, which is an interim claim, or for a year of assessment which is an annual claim.

28. Regulation 12(3) provides for appeals, such as these, against decisions of officers of HMRC in respect of annual claims.

29. Lastly, and for the avoidance of doubt, although Section 161 FA 2004 contains a wide meaning of "payment" it is common ground that that definition does not apply to Section 188.

Overview of the appellant's arguments

30. The appellant argues that *Sippchoice* is not determinative of the Preliminary Issue. At paragraph 51 of that decision, it was held that on the facts of *Sippchoice* there was never any contractual obligation to pay a particular sum of money and that is contrary to the factual

assumption upon which the Preliminary Issue is based. The Preliminary Issue is predicated on the IOU being legally enforceable so the observations of the Upper Tribunal in *Sippchoice* on the question of a binding IOU are simply *obiter*.

31. The argument for the appellant is that, unlike in *Sippchoice* where the issue was whether the fact of the IOU caused the share transfer, in this appeal the issue is whether the IOU itself was a relievable contribution paid. The appellant argues that the IOU becomes an asset of the scheme and therefore a contribution paid in terms of the legislation.

32. There were two grounds of appeal in the amended grounds of appeal. Insofar as it goes beyond the second ground, the appellant no longer relies on the first ground, which was that on a true construction of Section 188 FA 2004 "relievable pension contributions paid" includes contributions paid *in specie*.

33. The second ground is that the IOU (Document B) creates a legally enforceable debt which was incurred in consideration of the agreement by the Operator/Trustees (Document A) that the IOU would be accepted in return for the provision of benefits under the Scheme. The creation of the debt was itself a "relievable pension contribution paid" as it was for an amount certain and sufficiently close to cash to be treated in the same way as a contribution in cash.

34. A relievable payment does not require a transfer *per se.* The subsequent exchange of the debt for property *in specie,* as contemplated by Document C, was simply an administrative step in the administration of the Scheme and it was the *de facto* transfer.

35. The appellant relied on Section 638 Income and Corporation Taxes Act 1988 ("ICTA"), which was the legislation in force prior to 6 April 2006, arguing that the Tribunal should adopt the approach in Section 638(9) which focussed on what was received by the relevant pension scheme being monetary sums or the transfer of eligible shares. Therefore the Tribunal should decide whether the acceptance by the Scheme of the IOU is a monetary consideration paid by Mr Koslover.

36. Shortly put, it is now common ground that to be a "contribution paid" the payment must be monetary, so the issue can be distilled down to "what is monetary?" and the appellant argues that the "right" kind of property can be monetary.

HMRC's arguments

37. HMRC argued that *Sippchoice* is a binding authority for the proposition that the expression "contributions paid" is restricted to contributions of money whether in cash or other forms. It does not encompass a transfer of assets in satisfaction of a pre-existing money debt nor the assumption of a debt.

38. The purpose of relief in terms of FA 2004 is to encourage individuals to save for retirement. The appellant's argument that a promise by a member to pay a contribution to a pension scheme generates an immediate entitlement to income tax relief regardless of whether the member actually parts with any money at that point, or ever, is inconsistent with that Parliamentary intention.

39. The expression to be construed is "contributions paid" and the assumption of a debt is not a "payment" in any ordinary sense of that concept.

Discussion

40. I have quoted the agreed terms of the Preliminary Issue at paragraph 2 above but it is very important to focus on the wording thereof because this hearing was specifically, and clearly, predicated on deciding what that meant. There are three issues which arise from that, namely:-

(a) It states that there is an assumption that there is a "legally enforceable obligation". For the purposes of the substantive appeals, HMRC certainly do not accept that but, for the purposes of determination of the Preliminary Issue, and only for those purposes, they accept that.

(b) The crucial issue is whether the "assumption of the debt in and of itself" is a contribution paid in terms of Section 188. Therefore I am considering whether the delivery of the IOU is a contribution paid and attracts relief under Section 188.

(c) The final key issue is the stipulation that the Preliminary Issue should be decided in a context where it is "regardless of whether the debt is in fact satisfied for full value (or at all)".

41. I have broken the Preliminary Issue down into these three issues because they are all key but also because they go to the heart of the matter given that the appellant has conceded that if they do not succeed on the Preliminary Issue their appeals fail.

42. Since the first and last issues go to assumptions for the purpose of this exercise, I make the following points. It is not open to either party to argue about the validity or otherwise of the IOUs. They have agreed that, in this context, the IOUs amount to a legally enforceable obligation. That is the end of the story. Whether, in the real world, those are utter shams is irrelevant. I say that because I heard argument on the potential for abuse etc and the remedies available. Frankly, that is irrelevant. I am considering the Preliminary Issue on the assumption that the IOU creates a legally enforceable obligation.

43. On a similar basis, I heard argument that, on the particular facts of this case, Mr Koslover had actually paid the debt in full. Again that is entirely irrelevant, given the terms of the Preliminary Issue. Ms Campbell argued that I should consider the IOU in the context of what happened thereafter. That is not appropriate. That is not part of the Preliminary Issue. Although the appellant argues that HMRC insisted on the wording, nevertheless the appellant agreed to it.

44. Simply put, I can only consider whether or not "the assumption of the debt in and of itself [is] a 'contribution paid'".

45. Ms Campbell spent considerable time referring to HMRC's iterations of their manuals, albeit she accepted that HMRC are not bound by previous iterations.

46. There were two, dealing with *in specie* contributions, attached to her Skeleton Argument. The first, RPSM05101045, was stated to have been available until June 2009 and the second, with the same number but radically different, was said to have been available from February 2010. That confused me when it came to drafting this decision since in the amended Bundle of Authorities, which was produced to me in the course of the hearing, the second version was included as it had been in the original Bundle where there was no indication as to the dates when it was available. In the index to the amended Bundle it was stated to have been available after June 2009 and archived in December 2014.

47. The amended Bundle of Authorities also included the version of PTM042100 which was updated on 5 August 2016 and archived on 21 December 2016 and the version of that which was updated on 17 November 2021 (the index incorrectly stated 21 November 2021).

48. The original Bundle included only the former.

49. Ms Campbell argued that PTM042100 superseded RPSM05101045. I have no reason to doubt her but the former states on the face of it that it was updated and makes no reference to the latter. As can be seen from paragraph 46 above, it seems that the latter was archived in December 2014 so there is an unexplained gap. The last year of assessment with which I am

concerned is 2015/16 so I do not have clarity as to whatever was in issue in the period prior to August 2016.

50. The amended grounds of appeal stated that what had occurred was:

> "….not materially different from the example in PTM042100 which HMRC accept satisfies the requirements for relief under section 188".

51. Not only am I bound by, but I entirely agree with, the Upper Tribunal in *Sippchoice* where it stated at paragraph 44:

> "Statements in HMRC's manuals are merely HMRC's interpretation of the law in their internal guidance and they do not have the force of law. We must interpret the legislation in accordance with the principles of construction described above and if we conclude, as we have, that the legislation bears a different meaning to that found in the HMRC manual, the legislation must be preferred."

I am therefore confining myself to looking at the law and forming my view thereon.

52. Therefore, it is irrelevant whether or not what occurred was, or was not, materially similar to an example in HMRC's manual in 2015. RPSM05101045 contained no example. In any event it dealt with *in specie* contributions and the Preliminary Issue is not predicated on that.

53. It was a matter of agreement that the Upper Tribunal in *Sippchoice* considered a similar scheme of transactions to that under consideration in these appeals.

54. The Upper Tribunal states at paragraph 5 that it decided that "…transfers of non-cash assets are not 'contributions paid' within section 188(1) FA 2004". It went on to state at paragraph 34 that "…we hold that the expression 'contributions paid'…is restricted to contributions of money (whether in cash or other forms)."

55. The question therefore is whether Document B, an IOU, is money. It certainly is not cash.

56. I was perplexed by Ms Campbell's argument at paragraph 17 of her Skeleton Argument stating, correctly, that contributions to a pension scheme are "usually paid by direct debit, BACs transfer or cheque into the trustee's bank account". The issue is that she goes on to argue that:

> "The property which the trustees receive is therefore an IOU from the bank in the form of a materially enhanced bank balance."

and that that is not materially different to the facts in this case.

57. I do not agree as direct debits and BACs transfers are payments in cash. The Bills of Exchange Act 1892 makes it clear that a cheque is a bill of exchange and payable on demand. An IOU is not a bill of exchange.

58. An IOU is a promissory note and therefore a negotiable instrument. It is a document that acknowledges the existence of a debt.

59. The appellant argues that a crucial distinction between these appeals and *Sippchoice* is that in *Sippchoice* there was only a failed attempt at creating a debt. Paragraph 6(12) of *Sippchoice* records the terms of that document.

60. The difference between that and the IOU in these appeals is that the statement that it was intended to make a net contribution and that it was "…a legally binding and irrevocable obligation" was in a box dealing with *in specie* contributions whereas, of course, the IOU makes no mention of how the contribution will be paid other than expressing it in monetary terms.

61. In other respects, as Mr Bradley argues, I find that the mechanism and documents are very similar. The primary difference is the assumption, for the purposes of determination of the Preliminary Issue only, that there is a legally enforceable debt, namely Document B.

62. At paragraph 42 in *Sippchoice* the Upper Tribunal found that

> "… If, as we have found, 'contributions paid' in section 188(1) FA 2004 means paid in money then it cannot encompass settlement by transfer of non-monetary assets even if the transfer is made in satisfaction of an **earlier obligation to contribute money**. An agreement to accept something other than money as performance of an obligation to pay in money does not convert the transfer of shares (or other assets) into a payment in money. It is difficult to see why legislation relating to pension contributions should distinguish between and provide different tax treatments for transfers of assets in place of payments made under a contractual obligation and transfers of assets in place of payments made freely at the option of the payer." (emphasis added).

It is clear from paragraph 46 of *Sippchoice* that the Upper Tribunal found that a transfer of non-cash assets made in satisfaction of pre-existing money debts are not contributions paid. The IOU is a pre-existing money debt. That is why, in order to succeed in these appeals, the appellant needs to establish that the IOU is a contribution paid.

63. The Upper Tribunal in *Sippchoice* at paragraphs 50 and 51 found that in that case there had never been a promise and a concomitant obligation to make a monetary payment of the sum involved. That is crucial distinction between these appeals and *Sippchoice.* Mr Bradley argues that if the IOU is held to be a contribution paid then that would be inconsistent with the words in paragraph 42 that I have emphasised. I agree.

64. Ms Campbell relied on *Garforth v Newsmith Stainless Ltd*[2] ("Garforth") but I do not agree with her analysis. She argues that because in *Garforth* no funds changed hands and there was no transfer out of the company, it contradicts HMRC's proposition that "paid" cannot include an assumption of a debt.

65. That case turns on very different facts. The two directors and controlling shareholders voted themselves bonuses, part of which were credited to their accounts in the company. It was also concerned with very different legislative provisions.

66. At paragraph 27 in *Sippchoice* the Upper Tribunal made it clear that when looking at "paid", the "context is the key" and that context is FA 2004. Interestingly, as Mr Bradley pointed out, Walton J said that:

> "….there can be no doubt at all…that the word 'payment' is a word which has no one settled meaning but which takes its colour very much from the context in which it is found."

67. In any event what Walton J also stated clearly was that:

> "I am clearly of the opinion that the placing of the money unreservedly at the disposal of the directors as part of their current accounts in the company was the equivalent, in the present case, to payment."

68. On the facts of that case that must be right since, from the moment the accounts were credited the directors could immediately access the money if they chose to do so.

[2] [1978] 1 WLR 409

69. However, when the IOU was delivered, even although the IOU was, for these purposes, enforceable, the Scheme administrators did not have unreserved access to any money or indeed anything. They only had a right of action against Mr Koslover.

70. I have emphasised the words "paid during a tax year" in section 188(1) because I find that Parliament's intention is clear. Tax relief can only be granted for a given tax year if, in that year, the taxpayer parts with money whether in cash or otherwise. Mr Koslover did not do so until he transferred the *in specie* contribution which satisfied the debt created by the IOU.

71. The IOU does not specify that the debt will be paid within the tax year. All I have is the inaccurately dated document which simply establishes that a debt existed.

72. The key argument for the appellant was that when the IOU was delivered to the Scheme there was a shift in value, the Scheme value was enhanced and there was nothing more to be looked at.

73. I was entirely unpersuaded by Ms Campbell's argument (see paragraph 35 above) that I should be guided by, or at least take account of, Section 638 ICTA. Her reasoning was that it focussed on what was received by a pension scheme. She conceded that it was not referred to in *Sippchoice* and it is not. Mr Bradley, who appeared in *Sippchoice,* said that there had been a brief reference to it in the hearing, in the context of the history of pension legislation, but no-one had relied on it and nor should they, given that FA 2004 was a reform of pensions legislation. I agree. I must look only at FA 2004.

74. Ms Campbell rejected any suggestion that there had to be an actual transfer into the Scheme stating that it sufficed that value was added to the Scheme.

75. Whilst I accept that the IOU, once delivered to the Scheme, is an asset of the Scheme, I find that it is the same as any other creditor recorded as an asset. Those creditors have not paid anything until they actually make a payment.

76. For the avoidance of doubt, I heard no argument about the accounting treatment, if any, of the IOU. I do not know what value an IOU with no provisions as to payment dates or interest might have. On the balance of probability and, this is a specialist Tribunal, it would be very unlikely to be worth its face value even if legally enforceable.

77. Lastly, I am not persuaded by Ms Campbell's arguments that the regime concerning unauthorised payments is a sanction that means that tax relief should be available when the IOU is granted, and the possibility of the IOU not being honoured should be ignored.

78. The more logical construction is that, as Mr Bradley argued, Parliament's intention was clearly that tax relief is only available in the tax year in which the taxpayer deprives himself or herself of either money or an asset which meets the criteria for an *in specie* contribution. The granting of an IOU deprives the taxpayer of nothing until it is honoured.

Decision

79. For all these reasons the appeal is dismissed. The answer to the question posed in the Preliminary Issue is no.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

80. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 09 June 2022