Neutral Citation: [2024] UKFTT 00872 (TC)

Case Number: TC09302

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sitting in public in Taylor House, London

Appeal reference: TC/2022/00705

INCOME TAX – pensions – unauthorised payments charge – discovery assessment – burden of proof – valuation and cooling off period

Heard on: 18-19 April 2024
Judgment date: 26 September 2024

Before

TRIBUNAL JUDGE MALCOLM FROST
NOEL BARRETT

Between

JAMES GREENE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Grant Middleton, AGL Tax Solutions LLP

For the Respondents: Michael Ripley of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a discovery assessment which assesses the Appellant (Mr Greene) to income tax on the basis that he received an unauthorised payment from his pension fund.

2. For the reasons set out below, save for adjustments to the quantum of the assessment agreed by HMRC (set out later in this decision), the appeal is dismissed.

BACKGROUND FACTS

3. Prior to 2015, Mr Greene had a pension fund in a UK-registered pension scheme with a value of £192,825.

4. In early 2015, Mr Greene transferred his pension fund to a Qualifying Recognised Overseas Pension Scheme ("QROPS") known as "the Metro Scheme". The trustee of this scheme was a Gibraltar-registered company called Castle Trust & Management Services Ltd ("CTMS").

5. On 11 March 2015, CTMS transferred £48,000 from Mr Greene's pension fund to a company called Digital Media Service Ltd ("DMSL") in consideration of the acquisition of 48,000 shares in a company called Lily Research Ltd ("LRL").

6. On 19 March 2015, DMSL paid £36,480 to Mr Greene (the "Payment").

7. On 22 March 2019 HMRC issued a discovery assessment under s 29 Taxes Management Act 1970 ("TMA") for £74,370.45 on the basis that Mr Greene had received an unauthorised payment from his pension fund.

8. By letter dated 2 April 2019, Mr Green appealed to HMRC against the assessment.

9. Following an HMRC review, HMRC sought to reduce the tax assessed to £20,064.

10. On 19 November 2021, Mr Greene notified his appeal to the Tribunal.

11. HMRC and Mr Greene have agreed that, even if upheld, the assessment should be reduced to £14,592. This is on the basis that no unauthorised payments surcharge (described below) applies as a result of the Payment.

THE LEGISLATION

12. The law relating to unauthorised payments is set out in Finance Act 2004 ("FA 2004"). References to statutory sections are to that act unless stated otherwise.

13. Section 160 FA 2004 introduces the subject as follows (so far as is relevant):

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

(5) In this Part "unauthorised payment" means—

(a) an unauthorised member payment, or

(b) an unauthorised employer payment."

14. As a result, any payment (made to or in respect of a person) not authorised by s. 164 is unauthorised.

15. Section 164 then lists the authorised member payments:

"164 Authorised member payments

(1) The only payments a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are—

(a) pensions permitted by the pension rules or the pension death benefit rules to be paid to or in respect of a member (see sections 165 and 167),

(b) lump sums permitted by the lump sum rule or the lump sum death benefit rule to be paid to or in respect of a member (see sections 166 and 168),

(c) recognised transfers (see section 169),

(d) scheme administration member payments (see section 171),

(e) payments pursuant to a pension sharing order or provision, and

(f) payments of a description prescribed by regulations made by the Board of Inland Revenue."

16. The only category of payments, (apart from paragraph (f) and regulations made under that section – none of which are relevant), into which the Payment may fall are those in paragraph (d): scheme administration member payments.

17. Scheme administration payments are defined in s 171, thus:

"171 Scheme administration member payments

(1) A "scheme administration member payment" is a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is made for the purposes of the administration or management of the pension scheme.

(2) But if a payment falling within subsection (1) exceeds the amount which might be expected to be paid to a person who was at arm's length, the excess is not a scheme administration member payment.

(3) Scheme administration member payments include in particular—

(a) the payment of wages, salaries or fees to persons engaged in administering the pension scheme, and

(b) payments made for the purchase of assets to be held for the purposes of the pension scheme.

(4) A loan to or in respect of a person who is or has been a member of the pension scheme is not a scheme administration member payment."

18. The significance of this definition is that payments made for the purchase of assets (such as the shares in LRL) can be authorised payments, but only to the extent that the payment does not exceed the arm's-length value of those assets.

19. "Payment" is defined by s 161 FA 2004, as follows (so far as is relevant):

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

20. Section 279(2) FA 2004 also makes provision in relation to the definition of payments provided by a pension scheme, thus:

> "279 Other definitions
>
> ...
>
> (2) In this Part references to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the pension scheme."

21. Section 208(1) FA 2004 establishes the charge to tax on unauthorised payments. Insofar as material it provides:

> "208 Unauthorised payments charge
>
> (1) A charge to income tax, to be known as the unauthorised payments charge, arises where an unauthorised payment is made by a registered pension scheme.
>
> (2) The person liable to the charge– (a) in the case of an unauthorised member payment to or in respect of a person before the person's death, is the person…"

22. Additionally, s 209 FA 2004 provides for an "unauthorised payments surcharge" of 15% where a "surchargeable unauthorised payment" is made by a registered pension scheme.

23. A "surchargeable unauthorised payment" is defined by s 210 FA 2004 and, in outline, it encompasses all unauthorised payments within a 12-month period where the total value of those payments reaches 25% of the value of the member's rights under the pension scheme.

24. HMRC's original assessment had included an assessment in relation to the unauthorised payments surcharge but it is now common ground between the parties that no surcharge arises as the 25% threshold has not been met.

25. The above provisions refer to a "registered pension scheme" (which does not encompass a QROPS). However, the charges to tax under ss 208 and 209 FA 2004 are extended to members of QROPS by virtue of Sch 34 FA 2004.

26. The legislation relating to discovery assessments is also relevant to this case. Section 29(1) Taxes Management Act 1970 ("TMA") provides (in so far as material):

> "29 Assessment where loss of tax discovered
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

> (a) that an amount of income tax…ought to have been assessed but has not been assessed
>
> …
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

27. The words in s 29(1)(a) were substituted for the previous wording, which had read "(a) that any income…which ought to have been assessed to income tax…have not been assessed", by s 97(1) of the Finance Act 2022. This amendment has retrospective effect, subject to certain restrictions. It is common ground that those restrictions do not apply in this case, so it is the amended wording which applies here.

28. The Tribunal's role in relation to this appeal is provided for in s 50(6) TMA, the relevant part of which provides that:

> "If, on an appeal notified to the tribunal, the tribunal decides:
>
> ...
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment... shall be reduced accordingly, but otherwise the assessment... shall stand good."

THE ISSUES

29. There are two overall issues that this Tribunal must determine:

(1) Was the discovery assessment validly made?

(2) Was Mr Greene overcharged by the assessment?

30. HMRC readily accept that the burden falls upon them in relation to the first issue.

31. The second issue potentially requires detailed consideration of the unauthorised payments regime. However, it is important to be clear that the overall issue is whether or not the Tribunal can positively decide that Mr Green has been overcharged. This Tribunal need not come to any definitive view as to whether or not the Payment constituted an unauthorised payment.

32. The legislation provides that, unless the Tribunal decides that Mr Greene has been overcharged then the assessment stands good. The default outcome therefore, if insufficient evidence is before us for us to be able to form a view as to the status of the Payment, is that the assessment stands. It is therefore for Mr Greene to positively demonstrate, on the balance of probabilities, that no tax charge arises in relation to the Payment (or that the assessment overcharges him in some other way).

33. The evidence we were provided with consisted of a Hearing Bundle of 294 pages (plus a native-format version of a spreadsheet included in the bundle), witness evidence from Mr Vivek Sharma (who provided additional documents alongside his witness statement) and Mr Colin Campbell. Both parties also provided skeleton arguments. The parties also provided the Tribunal with a statement of agreed facts, for which we are grateful.

WAS THE DISCOVERY ASSESSMENT VALID?

34. There is no dispute that the procedural aspects of the assessment process were complied with. However, there is some uncertainty as to whether or not a discovery (within the meaning of the legislation) was made, so as to enable an assessment to be validly made.

Meaning of discovery

35. HMRC drew our attention to the case of *Anderson v HMRC* [2018] UKUT 159 (TCC). In that case, the Upper Tribunal reviewed the authorities on the meaning of s 29(1) TMA and concluded that the test of whether or not there had been a discovery had both a subjective and an objective element.

Subjective test

36. In relation to the subjective element of the test, HMRC emphasised the formulation set out in paragraph [28] of *Anderson:*

> "Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:
>
> > 'The officer must believe that the information available to him points in the direction of there being an insufficiency of tax.'
>
> That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not."

37. That formulation is doubtless helpful, but should not be seen as replacing the statutory wording or diminishing the obligation upon the officer.

38. Mr Ripley, for HMRC, appeared to contend that the reference to 'pointing in the direction' of an insufficiency effectively meant that the officer need only discover something 'that might be an insufficiency of tax'. This is to disregard both the wording of the statute and the qualification set out immediately after the *Anderson* formulation: that there must be more than a suspicion. An officer who discovers something that might be an insufficiency must actually form a view as to whether there is an insufficiency in order to move beyond a suspicion (albeit that such a view may be preliminary, and the officer will be well aware that that such a view may turn out to be incorrect once fuller information becomes available).

39. The *Anderson* formulation and the qualification must be read together in order to avoid interpreting the discovery of evidence pointing in the direction of an insufficiency of tax as substituting for the discovery itself (the discovery itself being the forming of a subjective view of the tax position).

40. The point is perhaps better expressed in some of the earlier authorities. For example, in *Hankinson v Revenue and Customs Comrs* [2011] EWCA Civ 1566, Lewison LJ endorsed (at [15]) the meaning of the word "discovers" as meaning "comes to the conclusion from the examination he makes and from any information he may choose to receive" or being equivalent to "finds" or "satisfies himself ".

41. Furthermore, in *Charlton v Revenue and Customs Comrs* [2012] UKUT 770 (TCC) the Upper Tribunal (at [28]) described the required change in the officer's state of mind thus:

> "At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view"

42. The Tribunal must therefore be able to make a finding that the officer had formed the necessary conclusion. In the absence of a clear statement from the officer, or agreement between the parties, the Tribunal must weigh the available evidence.

43. We appreciate that in many cases this will be a distinction without a difference – the fact that an officer has raised an assessment is in itself evidence that the officer held the view that an insufficiency existed. Nonetheless, we bear in mind that it is the discovery that must

precede the making of the assessment and that discovery must be of an insufficiency and not merely of evidence that points in the direction of one.

Objective test

44. The objective test is concisely summarised in *Anderson* as follows (at [30]):

> "The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be 'reasonable', this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable."

45. We take this to mean that the officer's subjective decision must conform to ordinary public law principles. Most commonly, this will mean that the officer's decision can only be impugned as being made on the basis of insufficient evidence if it is a view no reasonable officer could come to on the basis of that evidence. This provides the officer with a wide margin of appreciation to consider the information available and come to a view.

Findings of fact

46. Having set out the test, we now proceed to make relevant findings of fact in relation to discovery.

47. The assessment in the present case was made by Ms Lisa Da Costa, an officer in HMRC's Counter Avoidance unit. Ms Da Costa was not available to provide evidence to the Tribunal. In her stead, Mr Colin Campbell, who was at the time a technical lead in the Counter Avoidance Directorate, gave evidence and was cross examined on behalf of Mr Greene.

48. We make the following findings:

(1) On 26 October 2018 HMRC's QROPS, Transfers and Registrations Team, wrote to a Mr Colin Gibb at CTMS.

(2) The letter primarily sought information in relation to shares in Elysian Fuels. HMRC considered that these shares formed part of arrangements used by taxpayers to extract funds from their pension funds. However, the letter also noted that pension schemes operated by CTMS held investments in four other companies: Bluebell Research Ltd, Crocus Research Ltd, Snowdrop Research Ltd and Tulip Research Ltd. The letter sought detailed particulars in relation to these investments and any other investment held by a CTMS QROPS.

(3) On 22 November 2018, CTMS responded to HMRC's letter. The response included a spreadsheet detailing investments held in CTMS QROPS. The spreadsheet contained six entries with member reference "3773GRE" (which refers to Mr Greene). The entries had a total investment amount of £135,219, including an investment of £48,000 in Lily Research Ltd with the investment provider Aspiro Research and Development LLP.

(4) Ms Da Costa had been informed by Mr Campbell that arrangements through Aspiro were similar to other arrangements encountered by HMRC (including Elysian Fuels) which were used to extract funds from pensions by using shares in companies which had no value.

(5) Ms Da Costa was provided with instructions by Mr Campbell as to the actions to complete in relation to those who had invested in such arrangements.

(6) On 22 March 2019 Ms Da Costa issued the discovery assessment that is the subject of the present appeal. The assessment was for an unauthorised payment charge and unauthorised payment surcharge on the full £135,219 investment value shown by the spreadsheet to have been held by Mr Greene.

Discussion

49. It was suggested on behalf of Mr Greene that the above only gave rise to a suspicion of a loss of tax, rather than a discovery (or alternatively, we infer, that any discovery was not objectively reasonable).

50. This submission was based upon the fact that Ms Da Costa only had very limited information available at the relevant time. In particular, she did not in fact know how the arrangements worked (or were intended to work) and did not have any direct evidence that a payment had been made to Mr Greene.

51. We do not agree with such a submission.

52. An HMRC officer will often be operating in a low-information environment and is entitled to draw conclusions based upon the material available – which can include suggestions from colleagues that the investments in question are similar to structures known to give rise to a loss of tax.

53. Overall, we find that Ms Da Costa discovered a loss of tax within the meaning of s 29(1) TMA. We consider that, based upon specific figures provided by CTMS as to the investments made, and her understanding of the nature of the arrangements, she formed a view that an amount of income tax that ought to have been assessed had not been assessed.

54. We also find that Ms Da Costa's discovery was objectively reasonable. It was based upon the information provided to her and we consider that a reasonable officer could come to the view she did based upon the information that was available to her.

55. We therefore find in favour of HMRC on the discovery issue

WAS MR GREENE OVERCHARGED?

56. We were provided with a statement of agreed facts, which forms the basis for the background facts set out at the beginning of this decision. Beyond that statement there was very little evidential material placed before us.

57. Submissions were made before us, and assertions in correspondence, as to the exact transactional structure involved and the effect of that structure. Those submissions and assertions are not themselves evidence.

58. We have therefore first set out the explanation provided on behalf of Mr Greene in order to understand the context for the arguments being put forward on his behalf. We have then reviewed the evidence in order to make such factual findings as we are able to make. We have then commented on the impact of the arguments put forward within that factual context.

The structure, as put forward on behalf of Mr Greene

59. The transactional structure put forward by Mr Middleton, on behalf of Mr Greene (quoting from Mr Middleton's skeleton argument, but the below is not an indication that we find that the underlying facts were established) was as follows:

"

(1) A company (Digital Media Services Ltd ("DMSL") incorporated in Gibraltar) acquired shares in unconnected corporate seed funding companies along with an interest in unconnected seed funding LLPs.

(2) In order to fund the acquisition of the shares, DMSL;

(a) borrowed 82% of the required funds to make the purchases above from Meridian Capital Limited ("MCL") (an unconnected company incorporated in Jersey) on a limited recourse basis. Security over the loans was taken over the interests purchased in the seed funding LLPs. A full commercial interest rate was charged on the loans.

(b) The balance of the purchase price was borrowed from an unconnected bridge financer.

(3) As part of the subscription process for the seed funding companies shares a cooling off period was granted such that any holder of the shares during the cooling off period was entitled to return the shares in exchange for a full refund of the subscription price. During that cooling off period the seed funding companies held the subscription monies in a bank account.

(4) During the cooling off period, DMSL sold the seed funding company shares to unconnected entities such as pension funds, companies and trusts [we understand that the suggestions is that it is during this period that Mr Greene's pension fund would have bought the shares in Lily research Ltd]. The price paid for the shares by the purchasing entities was £1 per share based on a valuation of the shares confirming that, on the basis that the purchaser could, during the balance of the cooling off period, obtain a refund of £1 per share should they make a claim to the company.

(5) Following the end of the cooling off period the funds raised in both the seed funding companies and the seed funding LLPs were used to acquire an interest in Aspiro Research and Development LLP ("Aspiro"), an LLP set up for the purpose of identifying medium to long term projects/investments in the technology and pharmaceutical industries into which the funds would be invested. A further LLP, Lister Research and Development LLP ("Lister"), was appointed as nominee for Aspiro to identify and invest in such projects on its behalf.

(6) The interests which the various seed company and LLPs held in Aspiro were on terms that any profits made were to be divided on the following basis:

(a) Until the seed funding companies received a return equal to their capital invested, 95% of profits were to go to the seed companies and 5% to the seed LLPs. The latter to cover accumulated interest due.

(b) Once (a) Had been met in full, the seed LLPs would receive 95% of profits and the seed companies 5% until all outstanding capital and interest on the loans was repaid.

(c) Once (a) And (b) had been met in full, the profits were to be split 50.50 between the seed companies and the seed LLPs

(7) To date Lister has identified 3 projects (2 of which are being combined into one) and holds interests in both as nominee for Aspiro. All projects had an expected period before return of 10 years.

(8) Alongside, and unconnected with the purchase of shares from DMSL, individuals connected to the entities purchasing seed funding company shares from DMSL were

invited to appoint a nominee company, Marrista Limited ("ML") registered in Gibraltar, to seek to identify and acquire a book of limited and/or non-recourse loans on their behalf.

(9) ML entered into an agreement with DMSL under which DMSL novated the limited recourse loan(s) it had taken out with MCL to ML together with the interests held in the various seed funding LLPs and the cash collateral it had received from the sale of the seed funding company shares.

(10) ML, having no requirement to hold the cash collateral nor any incentive to repay the limited recourse loans, instructed DMSL to send the cash direct to the individuals on whose behalf it acted as nominee."

60. We now go on to consider whether the factual underpinnings of the above structure are made out. Where relevant, we adopt Mr Middleton's various abbreviations quoted above.

Findings of fact

61. The evidence before us as to whether Mr Greene actually entered into the transactions set out in the previous section was very limited.

62. We were provided with only a single document that had been signed by Mr Greene, which was a Nominee Form issued by ML. It is this form which is said to have resulted in ML instructing DMSL to make a cash payment to Mr Greene under steps 8-10 of Mr Middleton's suggested structure. The form consists or two pages. The first page is for the client's name, address and bank details (Mr Greene's details have been entered onto the form we were provided with). The second page consists of a signed declaration consenting for the nominee company to act on Mr Greene's behalf, along with a money laundering declaration.

63. We were also provided with:

(1) A document entitled "Lily Research Limited Information Memorandum: Private Offer of Securities". This is a promotional document for potential investors into Lily Research.

(2) A document entitled "Aspiro A2 Adviser process and application form pack", dated March 2014. This appears to set out the steps a financial adviser is to take in order to sign a client up to the arrangements. The steps include the completion of the Nominee Form mentioned above.

(3) An unsigned Deed of Novation of a Loan, dated 30/01/2015. This document would purport to novate a loan taken out by DMSL from Meridian Capital Ltd to ML. We understand that Mr Middleton would suggest that this agreement would have been executed in order to carry out step 9 of the transaction steps set out above.

(4) An unsigned document entitled: "Security Assignment of LLP Interest: Marrista Limited and Meridian Capital Limited". This again appears to be a draft of a document that would have been used to implement step 9 of Mr Middleton's transaction steps.

(5) A copy of the annual report and financial statements for Lily Research Ltd for the period ended 5 April 2015. These show no income arising to Lily and fixed assets (being share capital) of just over £5m.

(6) The Annual Return for Lily Research Ltd dated 20/10/2015. Page 4 of the return has an entry for a shareholding of 48000 ordinary shares held by CTMS with the reference "3773GRE". We understand this to be Mr Greene's shareholding.

(7) A document entitled "Aspiro Research and Development LLP Interim Update" dated November 2020. This document discussed the potential future value of interests held by Aspiro.

(8) Account transaction records showing that the funds transferred by CTMS were deposited into the same bank account (in the name of DMSL) from which the Payment was made. Accordingly, we find that the funds for the Payment came from the same bank account that received the funds for the purchase of the LRL shares.

64. Mr Middleton called Mr Vivek Sharma to give evidence, and Mr Sharma was cross-examined by HMRC. Mr Sharma's evidence was that his role was to monitor projects entered into by Aspiro Research and Development LLP (the vehicle through which LRL is said to have entered into investments).

65. From Mr Sharma's evidence it was clear that the investments entered into by LRL were highly speculative and very high risk. Mr Sharma described them as having a time horizon of 10 years and "having venture capital style risk and returns".

66. Mr Sharma was unable to provide any evidence as to whether Mr Greene actually entered into the structure put forward by Mr Middleton, nor was he in a position to provide evidence as to why Mr Greene had received the Payment.

67. The threadbare nature of the evidence before us means that we are unable to make findings beyond the facts agreed between the parties: that on 11 March 2015 £48,000 was transferred from Mr Greene's pension fund to DMSL, that 48,000 shares in LRL were acquired, and that on 19 March 2015, DMSL paid £36,480 to Mr Greene.

68. Beyond those basic points, there is simply no evidential basis upon which we can conclude that Mr Greene entered into arrangements in accordance with the structure put forward on Mr Greene's behalf.

69. Most notably, we are unable to form any view as to the reason why DMSL made the Payment to Mr Greene.

70. Mr Greene did not appear at the hearing and did not provide any witness evidence. Mr Greene would have been in a position to confirm the arrangements he had entered into (or believed he had entered into), what documents he signed, what he understood the arrangements were intended to achieve and why DMSL paid him £36,480 eight days after £48,000 had been transferred from his pension fund to DMSL.

71. In the absence of any such evidence, we are unable to make any positive finding as to whether the structure contended for by Mr Middleton on Mr Greene's behalf was in fact implemented.

72. HMRC invite us to draw adverse inferences from Mr Greene's failure to give evidence., We agree that we are entitled to do so. However, this is not necessary, and we decline to do so. There is no positive evidential case before us which may be undermined by an adverse inference.

73. Where money is paid out of a pension fund, and that payment out is followed shortly afterwards by a payment to the relevant pension scheme member, that situation calls for explanation. It is incumbent upon the pension scheme member to positively establish that the payment is authorised, otherwise an assessment against them will be expected to stand good.

74. In the circumstances, Mr Greene has not established sufficient facts to be able to support an argument that the Payment was not unauthorised.

75. As a result, we are unable to find that Mr Greene was overcharged and, in accordance with s 50 TMA, the assessment must stand good.

ARGUMENTS PUT FORWARD

76. As a result of our findings (or lack thereof) set out above, Mr Greene's appeal fails.

77. However, for completeness, we go on to consider the various arguments put forward on his behalf as to how the arrangements were intended to work and provide our views on the likely outcome if evidence of the underlying transactions were in fact available.

The meaning of Unauthorised Member Payment

78. Mr Middleton began by suggesting that the definitions in sections 161 and 279 can simply be substituted into to the definition in s 160(2) of "unauthorised member payment" to produce the following composite relevant to the present case:

> "In this Part "unauthorised member payment" means a payment made:
>
> (a) from sums or assets held for the purposes of the pension scheme by a registered pension scheme to or in respect of a … member of the pension scheme or
>
> (b) under or in connection with an investment acquired using sums or assets held for the purposes of a registered pension scheme,
>
> which is not authorised by section 164."

79. Mr Middleton then argued that neither limb of the above composite definition applied to the present case. We have considered Mr Middleton's arguments in relation to each of the limbs of the composite definition.

The first limb – payment made from sums or assets held for purposes of pension scheme

80. Mr Middleton argued that, in relation to the first limb above, the Payment could not be said to be 'from' Mr Greene's pension fund as the pension scheme paid market value for the 48,000 A Ordinary £1 shares in LRL which it purchased from DMSL.

81. Therefore, Mr Middleton argued, after the purchase of the LRL shares, DMSL could not hold any further funds of Mr Greene's pension with which to make the Payment. In other words, the payment of £48,000 to DMSL was entirely 'used up' by the purchase of LRL shares and there was no surplus held by DMSL.

82. This argument is predicated on the valuation of the shares in LRL. Indeed, Mr Middleton readily conceded that this line of argument could not succeed unless the Tribunal found that the shares were worth the £48,000 paid for them. Mr Middleton urged the Tribunal to make firm findings as to the value of the shares in LRL.

83. In relation to this point, we note that no expert valuation evidence was put before us. Mr Middleton's argument as to valuation rested on the submissions that:

> (1) On acquisition of the shares in LRL by DMSL, a cooling-off period applied to any holders of shares in the company.
>
> (2) Mr Greene's pension fund acquired those shares from DMSL within that cooling-off period.
>
> (3) Therefore, as no funds were invested during that cooling-off period, the logical conclusion is that each £1 share had a market value of £1 at the date they were acquired by the pension fund.

84. As to the existence of a cooling-off period, Mr Middleton drew our attention to references to such a period in the LRL Information Memorandum. As such, we find that it is

possible that such a period applied to the shares bought by CTMS on behalf of Mr Greene's pension fund. However, we cannot make a firm finding that such an arrangement did in fact apply due to the lack of any witness or documentary evidence of the arrangements.

85. On the question of valuation, we find Mr Middleton's argument unpersuasive. We do not see that the existence of a short-term right to a refund would have any significant bearing on the value of the underlying asset. If an asset is worthless, an informed third-party investor would not, in our view, be expected to pay more for the asset purely because they could obtain a refund during a short cooling off period.

86. If Mr Middleton's argument were correct, it would be trivially simple to extract funds from a pension fund by the use of a cooling-off period. A broker could purchase a known-worthless asset for a nominal sum, sell it to a pension fund for a high value (with a cooling-off period attached) and, after waiting for expiry of the cooling-off period, be left with a significant amount to pay out as directed.

87. As a result, we are not able to agree with Mr Middleton's argument on valuation and this limb of his submissions fails on its own terms.

The second limb – payment made in connection with an investment

88. In relation to the second limb of his composite definition, Mr Middleton argued that "the monies subscribed for the shares by DMSL when it acquired them is fully invested in unconnected investments and that no monies have gone in a circular fashion back to DMSL".

89. We take this to mean that Mr Middleton is suggesting:

(1) Any money held by DMSL after the LRL shares had been purchased could not be part of Mr Greene's pension fund - as that money had been spent on the LRL shares.

(2) Therefore, the Payment could only constitute an unauthorised payment under the second limb of the composite definition if the money paid for the LRL shares passed through LRL and back to DMSL before being paid to Mr Greene.

90. Mr Middleton submitted that the Tribunal could not find that there had been any cycling of funds between entities as there is no evidence of any connection or co-ordination between the entities involved.

91. This misunderstands both the nature of the test and the evidential burden.

92. The evidential burden is on Mr Greene to prove a lack of a connection between the purchase of shares in LRL and the Payment. Pointing to an absence of evidence is unlikely to discharge this burden.

93. It is doubtless challenging to prove a negative. In order to discharge that burden a party will often need to provide the Tribunal with a clear understanding of what has happened in order that the Tribunal can draw an inference that something else has not happened. It is not sufficient to provide very little evidence of anything and then suggest there is no specific evidence of connection.

94. In terms of the meaning of 'connection' for these purposes, both Mr Middleton and Mr Ripley drew our attention to *Danvers v HMRC* [2016] UKFTT 3 (TC) ("Danvers"). The UT held at [64]:

> "…in our view the words 'in connection with' are also broad in scope. As we have said above, the question is whether there is a link between a specific investment made by the scheme and a payment received by a member of the scheme. In our view the wording is consistent with it being necessary that there is a causal link between the investment and the payment."

95. As noted above, there is limited evidence available to us as to the transactions that actually took place – beyond the basic agreed facts that there was a purchase of shares in LRL from DMSL and the Payment made by DMSL.

96. Nonetheless, HMRC put forward the following supporting arguments for a causal link between the purchase of shares in LRL and the making of the Payment.

97. Firstly, as we have found above, the funds for the Payment came from the same bank account that received the funds for the purchase of the LRL shares. In the absence of any evidence of any trading or other fundraising activity by DMSL, an inference can be drawn that the Payment was funded by monies received for share purchases.

98. Secondly, Mr Ripley put forward an apparent connection between the relevant entities in the arrangements. The LRL Information Memorandum indicated that Corinthian Trust Company Limited was a corporate director of Lister, whereas that same company was listed as the 'care of' address for DMSL and ML. Mr Singh had also confirmed in evidence that Corinthian were involved in both entities.

99. Thirdly, the "Adviser process & application form pack" indicated that the completion of the nominee form said to give rise to the payment was an integral part of the investment process.

100. Fourthly, the timing of events point towards the Payment being a consequence of the receipt of funds from CTMS. The payment to DMSL was made by CTMS on 11 March 2015 and the Payment was made to Mr Greene on 19 March 2015. This was in spite of the nominee form having been signed sometime earlier - 27 January 2015.

101. Fifthly, Mr Ripley made submissions as to the nature of the investment. In essence, Mr Ripley argued that the highly risky and speculative nature of the investments, coupled with an apparent lack of concern from Mr Greene in correspondence as to whether he would get a return on that investment, is consistent with the investments not being the real focus. Instead, Mr Ripley submitted, the arrangement is consistent with a composite arrangement intended to result in the Payment to Mr Greene.

102. Sixthly, and finally, Mr Ripley drew our attention to both the spreadsheet provided to HMRC by CTMS and the statement of capital in LRL, to indicate that (i) for each particular investment vehicle there was often only a single introducer who had introduced investors to it and (ii) that the investors in LRL were (with the exception of a founder share) all pension schemes. Mr Ripley submitted that this was consistent with a mass marketed pension 'liberation' scheme rather than an arms-length investment.

103. Collectively these submissions have some force, and are supported by the limited evidence available. In particular, we consider that the application pack makes it clear that, if the investments were entered into in accordance with the process put forward by Mr Middleton, that the nomination form which gave rise to the payment was an integral part of that process. In other words, Mr Greene would have only got the Payment because he was making the investment in LRL.

104. We must weigh the above submissions against the Mr Middleton's reliance on the lack of evidence of connection between the relevant entities. This submission would in some sense require us to accept that Mr Greene signed a form with ML and was transferred the Payment a week later as part of a purely speculative investment that was wholly separate from the purchase of LRL shares by his pension fund.

105. Even if we were to accept the entity-level separation argued for by Mr Middleton between investment and Payment, Mr Greene only had the opportunity to enter into the ML

transaction because his pension had made the investment in LRL. Furthermore, it appears that DMSL only had the funds to make the payment because it had received funds from Mr Greene's pension fund.

106. On this basis, we conclude that, if we were satisfied that the arrangements were entered into as described, we would have found that there was a connection (within the meaning of the legislation) between the investment in LRL shares and the Payment.

107. As a result, we reject Mr Middleton's submissions on the composite definition of unauthorised payment.

CONCLUSION

108. For the reasons set out above, Mr Greene's appeal largely fails.

109. However, HMRC had accepted both that the initial assessment of 74,370.45 was too high and that the Unauthorised Payments Surcharge was not applicable. As such, HMRC contended that the correct assessment figure was £14,592.

110. The assessment is therefore reduced to £14,592, but otherwise the appeal is dismissed

RIGHT TO APPLY FOR PERMISSION TO APPEAL

111. 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.

MALCOLM FROST
TRIBUNAL JUDGE

Release date: 26th SEPTEMBER 2024