

Unauthorised payments from registered pension schemes and HMRC time limits (Revenue and Customs v Bella Figura Ltd)

24/04/2020

Pensions analysis: The case concerns an unauthorised employer loan in relation to an occupational pension scheme which was a registered scheme for tax cases. There is a detailed discussion of the relevant procedure and the time limits for HMRC to raise assessments for tax charges arising on an unauthorised payment. There is also a detailed discussion of the question of whether HMRC had demonstrated that the taxpayer had been careless for the purposes of the time limits for raising assessments and for the purposes of an application to discharge the scheme sanction charge/unauthorised payments surcharge. Written by Emily Campbell, barrister, at Wilberforce Chambers.

Revenue and Customs v Bella Figura Ltd [2020] UKUT 0120 (TCC), [\[2020\] All ER \(D\) 139 \(Apr\)](#)

What are the practical implications of this case?

This case is a further example of a tribunal's approach to 'carelessness' in the context of unauthorised payments by registered pension schemes. It will be of particular interest to taxpayers who have discovered that they have received unauthorised payments. While the tribunal held that the scheme sanction charge should stand on just and reasonable grounds, the assessments for the unauthorised payment charge and surcharge were held to be out of time because HMRC had not demonstrated that the taxpayer had acted carelessly—the taxpayer had taken reasonable care to engage an adviser who could help it to navigate the various constraints.

Of particular interest is the tribunal's conclusion that, although the taxpayer did not obtain express advice that the loan was an authorised employer loan, it did rely on the adviser to produce documentation and make necessary filings to achieve that outcome. In substance, the tribunal considered that the taxpayer had relied on implicit advice/reassurance by the conduct of the adviser in producing documentation that the loans would qualify and it was reasonable for the taxpayer to rely on this. Accordingly, the case will be particularly useful for taxpayers who have worked on a transaction together with a professional service provider in the pensions sector and who have not, perhaps because of their own lack of knowledge and understanding of a technical area, asked the provider explicitly: 'Is this transaction an unauthorised payment?'.

What was the background?

This was an appeal by HMRC and a cross-appeal by Bella Figura Ltd (BFL) to the Upper Tribunal (UT) against a decision of the First-tier Tribunal (FTT). BFL was the sponsoring employer and scheme administrator of the scheme, which was a registered pension scheme. The scheme had made a loan to a company called Falken Ltd, which was connected with BFL. The loan did not meet the requirements of an authorised employer loan as defined in [section 179](#) of the Finance Act 2004 ([FA 2004](#)). For example, it was not secured. Accordingly, it was an unauthorised employer payment and therefore a scheme chargeable payment for the purposes of [FA 2004, s 241](#), giving rise to an unauthorised payments charge and unauthorised payments surcharge on BFL in its capacity as employer and a scheme sanction charge on BFL in its capacity as scheme administrator. HMRC have power to set aside a scheme sanction charge and an unauthorised payments surcharge (although not an unauthorised payments charge).

The FTT had considered technical questions as to the provisions under which HMRC could assess each type of charge and the applicable time limits. It had concluded that a discovery assessment could not be made in respect of the scheme sanction charge, so that BFL's appeal against the scheme sanction charge succeeded, although it could be made in respect of the other charges. It held, however, that there was a loss of tax brought about carelessly by BFL for the purposes of the discovery assessment and that it was not unjust or unreasonable to impose the unauthorised payments surcharge (or, indeed, a scheme sanction charge, had this been relevant).

What did the tribunal decide?

The UT decided (issue one) that, while owing to a peculiarity in the drafting of the Registered Pension Schemes (Accounting and Assessment) Regulations 2005, [SI 2005/3454](#), a discovery assessment could not be made in respect of the scheme sanction charge, there was a freestanding power under [SI 2005/3454, reg 4](#) to make an assessment.

The parties agreed that the applicable time limits for making any permitted assessments would be those set out in [section 34](#) and [section 36](#) of the Taxes Management Act 1970 (in broad terms, this is four years after the end of the relevant year of assessment or six years in the case of carelessness). The issue in this context (issue two) was whether there had been an error of law by the FTT in concluding from the primary facts that the relevant loss was brought about 'carelessly', given that the assessments (other than that relating to the scheme sanction charge, which had been issued earlier) had been outside the four-year time limit but within the six-year time limit. The UT considered that there was an error of law, namely that the FTT had failed to take into account relevant considerations, specifically whether BFL had obtained implicit advice or whether the carelessness had caused a loss of tax. Accordingly, FTT's conclusion was vitiated.

There were further errors of law in the FTT's approach to whether it would be just and reasonable to set aside the scheme sanction charge or the unauthorised payments surcharge (issue three). The FTT had focused almost exclusively on what it considered to be BFL's carelessness, but in doing so had ignored other considerations which were relevant to whether it was just and reasonable for these charges to stand. It had not taken into account that BFL had at least tried to ensure that the loan met the necessary requirements and that the loan had been repaid.

On the basis of the above, the decision of the FTT was set aside and the UT concluded that it should remake the decision. The UT did not consider that the facts showed that there was carelessness causing a loss of tax. Hence, the assessments relating to the unauthorised payments charge and surcharge were out of time and set aside. As regards the assessment in respect of the scheme sanction charge, while carelessness had not been shown, it was just and reasonable for this assessment to stand otherwise BFL would have escaped any charge at all.

Case details

- Court: UK Upper Tribunal (Tax and Chancery Chamber)
- Judge: Mr Justice Nugee and Judge Jonathan Richards
- Date of judgment: 20 April 2020

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