

The Nugee Pensions Lectures

#4: Talking about tax

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“Payments” and “Discoveries”:
Clark v HMRC [2020] EWCA Civ 204

Jonathan Davey QC

Two issues

1. Meaning of “payment” within “unauthorised member payment” (section 160 FA 2004).
2. Scope of a “discovery” assessment (section 29 TMA 1970).

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The facts

- Retired businessman
- Concern at low returns from SIPP
- Desire to invest in London property market
- Pension transfer plan



Three key elements

1. £2m transferred from Suffolk Life SIPP to Laversham Marketing pension scheme (Transfer 1).
2. £2m transferred from Laversham Marketing pension scheme to Laversham Marketing Ltd (Transfer 2).
3. First instance finding that trusts of Laversham Marketing pension scheme void for uncertainty.

Resulting trust

- *Lewin on Trusts* (19th ed.) para 8-002:

“A resulting trust arises by operation of law if a person makes a disposition of property upon trust but no trusts are effectively declared...”

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Tax building blocks

- Unauthorised payments charge (s. 208 FA 2004)
- Authorised member payment (s. 164 FA 2004)
- Unauthorised member payment (s. 160(2) FA 2004)

FA 2004

- Part 4 FA 2004: Pension Schemes (s. 149 onwards)
 - Within Part 4, Chapters 3-5: Payments by registered pension schemes and tax charges (s. 160 onwards)
 - Ss. 160-161: unauthorised member payment

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Meaning of “payment”

- Section 160(2)(a) FA 2004: “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”
- Section 161(1)-(2) FA 2004: “(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.”

Case law

- *Hilldown Holdings plc v Inland Revenue Commissioners* [1997] STC 561 – re section 601 ICTA 1988
- *Venables v Hornby (Inspector of Taxes)* [2002] EWCA Civ 1277 – re section 600 ICTA 1988

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Essence of Clark judgment at [82]

“The question whether a “payment” is made for these purposes should be answered by looking at **the practical, business reality of the transaction, including any composite transaction of which the payment forms part.**

If the intended purpose and effect of the transactions is that money leaves the scheme and is placed at the free disposal of the member, the mere fact that the money may be subject to an equitable obligation to restore it to the scheme will not prevent it from being a “payment” in the ordinary sense of that word.

To conclude otherwise would deprive the charge to tax of effect in many of the most egregious cases where it is most needed.”

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Concluding points on “payment” issue

- Important clarity or disregarding principle?
- Wiggle room depending upon fact pattern (*Clark* at [86])?

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Issue 2: Discovery assessments

1. What is a “discovery” assessment?
2. What falls within the scope of a “discovery” assessment?

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Section 29(1) TMA 1970

“(1) If an officer of the Board or the Board **discover**, as regards any person (the taxpayer) and a year of assessment –

- (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
- (b) that an assessment to tax is or has become insufficient, or
- (c) that any relief which has been given is or has become excessive,

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.”

Subjective nature of “discovery”

Clark v HMRC at [106]:

“...the scope of the assessment, and of any appeal from it, must be defined by the **subjective discovery** that the assessing officer has made. That is the only assessment which the officer has jurisdiction to make, and the scope of the assessment, as opposed to the arguments which may be used to support it, cannot in my view be extended by virtue of the appeal process...”

Discovery assessments: points to consider

Check carefully what HMRC is asserting:

1. Does the transaction in question fall within the scope of the “discovery” asserted?
2. Has the discovery gone “stale”, i.e. has HMRC sat on its information too long with the result that the opportunity to issue an assessment has passed?
3. Are other conditions for issuing a discovery assessment present or absent?

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Thank you

The tax treatment of arrears and interest

Michael Furness QC



How may arrears arise?

- A simple computational error by the scheme administrator.
- A court ruling on the construction of the rules which reveals that members have been entitled to higher benefits than have been paid hitherto.
- The invalidity of past amendments which purported to reduce rates of benefit accrual.

General Rules

The issue is whether or not arrears and interest are “authorised payments”.

The basic principle – all payments are unauthorised unless specifically authorised by the legislation.

Unauthorised payments to a member will result in penal tax consequences for the member and the scheme administrator.

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What payments to members are authorised?

Under section 164(1) the categories may be summarised as follows:

- (a) pensions
- (b) lump sums
- (c) transfers
- (d) scheme administration member payments
- (e) payments pursuant to pension sharing and
- (f) payments of a description prescribed by regulations made by [HMRC].

Under (f) see The Registered Pension Schemes (Authorised Payments – Arrears of Pension) Regulations 2006/614.

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The arrears regulations (1)

The regulations apply to –

... so much of the payment ... as

- (a) does not exceed the amount accrued during the period-
 - (i) ending with the date on which he became entitled to the pension ("the actual start date"); and
 - (ii) beginning with the earliest date from which the member could, at the actual start date, have required the scheme administrator, in accordance with the rules of the scheme, to make a payment of arrears of pension;

and

- (b) constitutes taxable pension income within section 579B of ITEPA 2003.

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The arrears regulations (2)

These only apply to arrears built up before the pension is put into payment.

They do not cover arrears built up as a result of underpayment of a pension in payment.

The latter arrears have to be justified as payments of pension.

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Arrears as payments of pension

Section 164(1)(a) only applies to payments of pension which have been made in accordance with the “pension rules”. These prohibit the payment of a pension which is not a “scheme pension”. It is a requirement of a scheme pension that:

... the rate of pension payable at any time during any 12 month period is not less than the rate of pension payable at the relevant time.

“The relevant time” is the beginning of any twelve-month period.
(Sch 28 para 2(3)(b))

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The tax justification for a lump sum payment of arrears

HMRC will in effect allow the lump sum payment to be spread over the years in which it has arisen – see Employment Income Manual at para EIM74103

It must be accounted for for PAYE purposes in the year in which it arises.

Trustees must be in a position to explain convincingly how the arrears arose, and how spreading the payments over earlier years does not breach the pension rules.

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Compromises

These should be acceptable to HMRC, provided that they represent a reduced amount of the maximum arrears which could actually have been due to the members concerned.

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Interest

This can only be justified as a scheme administration member payment. This is defined in section 171 as a payment

“made for the purposes of the administration or management of the pension scheme”

But HMRC guidance is unhelpful – no mention of interest on arrears, merely a statement that modest payments order by the PO by way of compensation for

“distress or inconvenience or other non-financial loss”

may qualify.



Pitfalls

Compromises must avoid any payment which is in excess of the maximum which a member could actually have claimed as arrears if the action had fought.

Arrears cannot be created with retrospective effect.

Underpayment of pension commencement lump sums

Unauthorised payments

Member pays 40% tax on the payment

Administrator pays 40% tax on the payment but gets credit for tax paid by the member. But the administrator still has to pay a minimum of 15%.

In extreme cases the Member pays 15% surcharge.

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Conclusions

The tax consequences of correcting past mistakes in pension administration always need careful analysis.

If in doubt seek HMRC guidance (but be prepared for it to be unhelpful).

If in doubt seek indemnities for any tax exposure from the employer, or make retentions from payments until the tax position is clear.

Thank you

HMRC v Sippchoice Ltd

Robert Ham QC

Finance Act 2004 section 188(1)

Tax relief is given on pension contributions “paid”.

According to the PTM this means contributions to a registered pension scheme must be a monetary amount, for example, in cash, cheque, direct debit and bank transfer.

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The qualification: PTM 024100

it is possible for a member to agree to pay a monetary contribution and then to give effect to the cash contribution by way of a transfer of an asset or assets ...

There must be:

- a clear obligation on the member to pay a contribution of a specified monetary sum, say £10,000. This needs to create a recoverable debt.
- a separate agreement between the scheme trustees and the member to pass an asset to the scheme for consideration ...

This is the scheme effectively agreeing to acquire the asset for its market value.

Sippchoice Bespoke SIPP Contribution Form

Declaration: I propose to make a net contribution to the SIPP and this notification constitutes an irrevocable and binding obligation to make this contribution.

Proposed net contribution: £68,324 (net)

Agreement: I understand that by signing this declaration I am creating a legally binding and irrevocable obligation to make the specified contribution and that it will not be possible to change my mind even if, for whatever reason, I am unable to proceed with the asset transfer that was originally envisaged.

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The appeals

FTT (Judge Gething) allowed an appeal by the SIPP administrator against a refusal for RAS but the UT (Roth J and Judge Sinfield) in turn allowed by an appeal by HMRC. Construed in context “contributions paid” meant paid in money and did not cover settlement by transfer of non-monetary assets even if the transfer was made in satisfaction of an earlier obligation to contribute money.



The UT's reasons

Read in isolation “paid” might cover non-monetary payments

But this would mean that the provisions of section 195 about eligible shares made no sense and this informed the way contributions “paid” in section 188 should be read

And it removed the “valuation problem”

A further appeal?

No application for permission to appeal to the CA:
not enough at stake

But criteria for permission would have been satisfied

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Consequences

Reversal of relief previously given
Recovery of asset contributed
Income and gains in scheme free of tax
Asymmetrical tax treatment

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Was there a debt?

On its view this did not arise, but the UT found that there was no contractual obligation to pay £68,324 in money to Sippchoice

The application form and contribution form were not a single package

The member's promise was to make an in specie contribution not a monetary payment

Legitimate expectation and abuse of power

No application for judicial review but another illustration of how difficult it is to challenge HMRC on public law grounds

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