No tax relief on pension contributions paid in shares

COMMENTARY BY MICHAEL ASHDOWN

In a decision which threatens to bring turmoil to vast number of SIPPs (self-invested personal pensions), the Upper Tribunal has decided in *HMRC v Sippchoice Ltd* [2020] UKUT 149 (TCC) (Roth J and Upper Tribunal Judge Greg Sinfield) that member contributions to registered pension schemes are only eligible for tax relief where they are paid in money. Where a member transfers shares to the scheme trustees no tax relief is available, even where done in satisfaction of a money debt, and notwithstanding the terms of HRMC's own Pensions Tax Manual which appears to say the opposite.

The Upper Tribunal's decision

SIPP members had each purported to agree with Sippchoice Ltd, as scheme administrator, to make contributions of stated cash amounts, and had then sought to satisfy those obligations by transferring shares to Sippchoice. Sippchoice's case was that the transfer of shares attracted relief for "*pension contributions paid*" under section 188(1) of the Finance Act 2004, at least when made in satisfaction of a pre-existing money debt. HMRC argued that a transfer of shares could never be "*pension contributions paid*", irrespective of whether there was a pre-existing money debt. Sippchoice prevailed before the First Tier Tribunal ([2018] UKFTT 122 (TC)), and HMRC appealed.

The question for the Upper Tribunal was simply the true construction of section 188(1). The Upper Tribunal rejected HMRC's contention that "*contributions paid*" had necessarily to be in money rather than *in specie* as a matter of the ordinary use of the word "*paid*" ([22]-[23]) and likewise rejected Sippchoice's submission that it followed from cases on the interpretation of other statutory provisions that "*paid*" was necessarily wider than money payments only ([24]-[27]).

Instead what the Upper Tribunal decided was important was the construction of "*paid*" in the context of Chapter 4 of Part 4 of the Finance Act 2004 as a whole. Most important was the

provision in section 195 of certain share transfers to count as contributions, including for the purpose of section 188(1). But section 195 applies only to a very limited class of "Eligible Shares" acquired in accordance with a share incentive plan or a Save as You Earn scheme, and transferred to the pension scheme within 90 days. The Upper Tribunal rejected Sippchoice's ingenious submission that this provision was designed to restrict the availability of tax relief in relation to Eligible Shares by imposing the 90 day requirement, whilst leaving all other shares to attract relief under section 188(1), and acceded instead to the more obvious submission for HMRC that if section 195 extends the meaning of "*contributions paid*" only to Eligible Shares, then it follows that other shares are not eligible for relief ([27]-[31]).

The Upper Tribunal also saw two further advantages to this interpretation. First, it avoids problems with attributing value to shares transferred, as section 195(2) – unlike section 188 – provides expressly for the valuation of Eligible Shares transferred to a pension scheme ([32]). Second, it is consistent with the wide partial definition of "payment" in section 161(2) being expressly restricted to Chapter 3 of Part 4 only i.e. it applies to payments made by registered pension schemes in accordance with Chapter 3, and not to contributions made in accordance with Chapter 4.

Finally, the Upper Tribunal considered that it made no difference if the member had a pre-existing obligation to pay money. If "*contributions paid*" means "*paid in money*" then it cannot include a transfer of shares or other assets, irrespective of the obligation being satisfied by the transfer ([42]). It was of no consequence that the HMRC Pensions Tax Manual at PTM042100 was quite clear that "*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.*"

Comment

First, there are bound to be substantial practical consequences. This decision will doubtless come as unwelcome surprise to both SIPP members and providers who have made or permitted *in specie* transfers to SIPPs and treated them as contributions attracting tax relief. It remains to be seen how pro-active HMRC will be in using this decision to pursue SIPP providers, and whether they in turn will seek to pass on those costs to SIPP members. There is certainly scope for this case to trigger much further litigation, including Financial Ombudsman Service complaints by members who believe they have been badly advised.

Second, as a matter of pure law, it is hard to criticise the Upper Tribunal's understanding of the relationship between sections 188(1) and 195 of the Finance Act 2004. Section 195 appears on its face to permit privileged treatment to "*Eligible Shares*" (as defined by section 195(3)) and that does make it very difficult to explain how all other share transfers could attract more favourable relief under section 188(1).

Third, this decision should provide (yet another) reminder to both legal and financial professionals that whilst the availability online of the HMRC manuals is a useful source for research, they must not be assumed to represent the final word on the law, and HMRC can and will resile from them. The Upper Tribunal attached "*little weight*" to the Pensions Tax Manual, rightly calling it "*merely HMRC's interpretation of the law*" ([44]). It was not argued before the Upper Tribunal that Sippchoice had a "*legitimate expectation*" that HMRC would not depart from what they had said in the Pensions Tax Manual. Although such an argument could in principle succeed in an appropriate case, the Court of Appeal in *R (Aozora GMAC Investment Ltd) v HMRC* [2019] EWCA Civ 1643 has set the bar high as a matter of public law, particularly where what is relied upon is merely HMRC's own internal view of the law (Rose LJ at [57]).

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