First-Tier Tax Tribunal calls for change to strict application of unauthorised payments rules to victims of pension scams (West v Revenue and Customs Commissioners)

15/10/2019

Pensions analysis: On first blush this is a standard case where the First-tier Tribunal (Tax) (the Tribunal) dismissed the taxpayer's appeal against an assessment to tax made by HMRC on an unauthorised transfer out of a scheme, but interestingly here the Tribunal choose to call on HMRC to target its resources on pursuing the major beneficiaries, orchestrators and promotors of unlawful pension schemes rather than those individuals falling victim to the actual pensions scam. Emily Campbell, a barrister at Wilberforce Chambers, discusses this case.

West v Revenue and Customs Commissioners [2019] UKFTT 602 (TC)

What are the practical implications of this decision?

This case provides an example of the application of the unauthorised payment rules to loans to members connected with pension funds and considers the application of the principles by which discovery assessments may be raised by HMRC. It shows that liability to the basic unauthorised payment charge (by contrast with the unauthorised payment surcharge and scheme sanction charge) can, provided HMRC act within time, be imposed on a strict basis (ie even though the member has not been careless and has been the victim of an exploitative scheme).

The Tribunal was evidently uncomfortable with the result to which it had been driven by the legislation. It commented that the appellant and his wife had been misled and taken advantage of at a vulnerable point in their life when they faced difficult financial circumstances and that they had no intention to misuse or liberate the appellant's pension.

The Tribunal recognised that HMRC was required to enforce the law, but asked HMRC to consider 'whether there is anything they can do to mitigate the consequences of the assessment' for the appellant and his wife. This appears to have been on the basis that the enforcement of the assessment was in the discretion of HMRC. The Tribunal also expressed the wish that HMRC target its resources on pursuing the major beneficiaries, orchestrators and promotors of unlawful schemes rather than individuals in the position of the appellant and his wife.

The Tribunal's statements in the postscript to its judgment, as mentioned above, may be regarded as somewhat political. Those advising innocent victims of scams may, however, draw on them in correspondence with HMRC to seek to contend for clemency.

What is the background?

This was a very sad case where the appellant and his wife had—in the words of the Tribunal—been the victims of exploitative and untoward behaviour by the promoters and orchestrators of a pension liberation scheme. In August 2012, the appellant received a telephone call from an individual acting on behalf of a company. The appellant had been seeking a loan because he was in financial difficulty following ill health and readily accepted. He was offered a loan of around £11,000 on normal commercial terms.

A few days after the initial call, the appellant was asked about his pension arrangements and it was recommended that he transfer one of his pensions (worth around £48,000) to another company. It was never explained to him that the earlier offer of the provision of the loan was connected to his transfer of the pension. He was completely unaware of the link until later, after he made a complaint to the Pensions Ombudsman following difficulties experienced regarding a further transfer of his pension to an insurance company. The appellant at no time had any intention to extract or liberate funds from his pension scheme and had no idea of the fact that the loan would emanate from his pension scheme.

The loan was made on 29 January 2013.

What did the Tribunal decide?

On 30 March 2017, HMRC issued an assessment to the appellant for 40% of the amount of the loan on the basis that it was an unauthorised payment. The assessment was issued pursuant to section 29 of the Taxes Management Act 1970, relating to discovery assessments. The Tribunal considered the definition of 'unauthorised member payment' for the purposes of the Finance Act 2004 and the charging regime relating to registered pension schemes. It was satisfied that tax was due on an unauthorised payment.

The Tribunal further considered the principles by reference to which discovery assessments could be raised. These included the requirement that HMRC had made a discovery and that HMRC makes an assessment promptly once a discovery has been made so that the claim does not become stale. The Tribunal was satisfied that there had been a relevant discovery and that the assessment was not stale.

The Tribunal then considered the further requirements of section 29(4) (carelessness or deliberate conduct by the taxpayer) and 29(5) (HMRC had not had sufficient evidence to challenge the return in the ordinary way). HMRC had argued that the appellant had been careless, as he had not sought any independent advice on the completion of his tax return. However, the Tribunal was not satisfied that HMRC had demonstrated that the appellant had acted carelessly. The appellant and his wife did not know and had no reasonable grounds to connect the pension to the loan until the receipt of the Ombudsman's report after his return had been filed. Accordingly, the requirements of section 29(4) were not satisfied.

However, the Tribunal concluded that the requirements of section 29(5) were instead satisfied. The information contained within the return was not of sufficient quality to be enough to make HMRC aware of the under-assessment of tax. Therefore, the Tribunal was satisfied that the assessment was raised correctly within the statutory time limit.

Case details

- Court: First-tier Tribunal (Tax Chamber)
- Judge: Judge Rupert Jones
- Date of judgment: 4 June 2019

Emily Campbell's practice encompasses a broad range of chancery and commercial work. She is particularly experienced in both the litigation and advisory sides of the law relating to pension schemes, trusts, estates and taxation. While her practice has an emphasis on matters involving complex technical issues, such as those with a significant actuarial or mathematical content, she has a reputation for giving clear, practical and commercial advice and being very user-friendly.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

FREE TRIAL