[2019] UKFTT 602 (TC)

TC07385

INCOME TAX – Sections 160 and 208 Finance Act 2004 – Unauthorised Payments – Pension Schemes – Pensions Liberation scheme – Discovery – Section 29 Taxes and Management Act 1970 – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/05836

BETWEEN

GARY WEST — **Appellant**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS — **Respondents**

TRIBUNAL: JUDGE RUPERT JONES
MR CHARLES BAKER FCA

Sitting in public at Southampton Magistrates' Court on 21 May 2019

Having heard Mr and Mrs West for the Appellant and Moira Browne, Presenting Officer and Litigator of HM Revenue and Customs' Solicitor's Office for the Respondents

Summary decision released on 3 June 2019, corrected and published on 25 September 2019

SUMMARY DECISION

1. The Appellant appealed against an assessment to tax made by HMRC on 30 March 2017 for £4,660 for the year ending 5 April 2013.

2. The Tribunal decided that the appeal should be dismissed and the assessment should be confirmed, albeit in the amended sum of £4,460 rather than the original figure of £4,660.

3. This is a summary of the Tribunal's findings of fact and reasons for decision.

4. The Tribunal announced its decision at the end of the hearing on 21 May 2019 and HMRC requested that it produce written reasons for its decision. The Tribunal released a summary decision on 3 June 2019.

5. Subsequent to its release, in late September 2019, the Tribunal has corrected clerical mistakes or other accidental omissions in that decision including amending typographical errors pursuant to its power under Rule 37 of the Tribunal Procedure (First-tier tribunal) (Tax Chamber) Rules 2009. The Tribunal has also directed that the decision be published.

6. HMRC's assessment was made in respect of a loan advanced to the Appellant and his wife, Mrs West, from Blu Funding Corporation Ltd ('Blu Funding') on 25 January 2013 in the amount of £11,150. HMRC submits that the loan was a payment made in connection with the transfer of the Appellant's pension of around £48,000 to the FP1 Retirement Fund. Therefore, HMRC submit that the payment of the loan was an unauthorised payment for the purposes of the Finance Act 2004 and subject to a charge of 40% income tax.

7. It was not in issue by the time of the hearing of the appeal, because the Appellant and his wife accepted this, that the loan they received from Blu Funding was from the pension monies he had transferred to Fast Pensions Ltd. At the time of making the appeal they had not accepted there was such a connection. They now accepted that HMRC had proved there was a connection between the Appellant's pension fund transferred from Novartis to Fast Pensions Ltd ('Fast Pensions') and placed in the FP1 Retirement Fund (as transferred onwards via the administrator, AC Management and Administration Ltd) and that transferred to Blu Funding, part of which was then re-paid to them in a loan from Blu Funding.

8. Put simply, the Tribunal is satisfied that the Appellant's pension fund with Novartis which had first been transferred to Fast Pensions' FP1 Retirement Fund was then transferred to a third-party company, Blu Funding which finally paid the Appellant and his wife part of the same money, as a loan. Following the three steps in the chain, the loan received by the Appellant was essentially part of his pension fund.

9. Nonetheless, the essence of the Appellant's case at the hearing was that he and his wife were completely unaware at the time that there was any connection between the pension transfer and the loan they received. They had no knowledge that this would happen and it was not their intention. They had no knowledge of any pension liberation scheme nor intention to 'liberate' any of the funds from the Appellant's pension scheme.

Summary findings of fact

10. The Tribunal received two bundles of documents which were considered during the hearing. It heard oral evidence from HMRC officer Mark Davies, who made the decision to issue the discovery assessment, even though he was not the Officer who notified the assessment to the Appellant. It also heard oral evidence from the Appellant and Mrs West, who also represented the Appellant.

11. The Tribunal found all three witnesses to be credible and reliable and makes the factual findings below on the balance of probabilities.

12. Fast Pensions Ltd (hereinafter referred to as 'Fast Pensions') was incorporated on 28 June 2012. At the relevant time, its sole director and shareholder was Sara Moat.

13. Blu Funding Corporation Ltd (hereinafter referred to as "Blu Funding") was incorporated on 31 August 2011. It changed its name to Blu Personal Finance Ltd on 14 November 2013 subsequent to the key events in question (the transfer of the pension and receipt of the loan). At the relevant time, its sole director and shareholder was Ian Chapman.

14. The FP1 Retirement Plan was established on 27 July 2012. Its sponsoring employer was Fast Pensions. It was registered with HMRC on the same day by AC Management and Administration Ltd ('ACMAL').

15. At the time of the transfer of the Appellant's pension, between November 2012 and January 2013, the administrators of the FP1 Retirement Fund were AC Management & Administration Ltd.

16. The report of the Trustees of the FP1 Retirement Fund (HMRC has taken this to be referring to the FP1 Retirement Plan) indicates that in the year to 7 August 2013, the fund invested a total of £3,820,783, of which £1,352,589.89 was invested in Blu Debt Management Ltd (hereinafter referred to as "Blu Debt Management") in the form of loans to Blu Debt Management. The appendix to the report indicates that although Fast Pensions funds were invested in Blu Funding, the FP1 Retirement Fund was not one of the funds invested in Blu Funding.

17. On 30 May 2018, the Insolvency Service issued a press release headed "Rogue pension and finance companies closed down after abusing millions of pounds". The text continued "Fast Pensions Ltd and five other related firms have been wound up in the public interest at the High Court on 30 May 2018".

Summary of the background – the transfer of the pension and receipt of the loan

18. In August 2012 the Appellant received a telephone call from Mr Mark Young on behalf of Blu Funding offering a loan. The Appellant had been seeking a loan because he was in financial difficulty following ill health and readily accepted – he thought he might be able to obtain a loan of £5,000 but was told that a greater sum might be available. In September 2012 the Appellant asked for a loan of £10,000 and this was agreed. Later (it is not clear when) he was in fact offered a larger loan of £11,650. The loan was on normal commercial terms involving repayments over seven years. He and his wife later signed the paperwork to accept the loan some time between December 2012 and January 2013 and have been making the relevant repayments ever since.

19. In a phone call a few days after the initial call in August 2012, the Appellant was asked about his pension arrangements and it was recommended that he transfer one of his pensions, with Novartis, to Fast Pensions Ltd. It was never explained to the Appellant 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 or connection at the time and only became aware in November 2016 after his complaint to the Pensions Ombudsman as set out below. This is supported by a fairly lengthy email trail setting up the loan that makes no mention of the pension fund.

20. 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 funds from the loan would in fact emanate from his pension scheme. He believed the transfer of his pension to be a good idea because his then current pension with Novartis was not receiving any further contributions, being managed or growing. His Novartis pension was the largest of his three pensions worth around £48,000, and he was told the funds would be actively managed in the Fast Pensions scheme so that they

would grow. At the time he believed his Novartis pension 'was not doing anything' ie. not performing or growing.

21. The Appellant received a letter from Fast Pensions dated 20 September 2012, which set out the fees for transferring his pension from Novartis to the FP1 Retirement plan. There would be a processing fee of £500 and a set-up fee of the greater of £1,000 or 1% of the pension value.

22. After agreeing to the transfer, the Appellant received a letter dated 21 December 2012 from the Novartis UK Pension Scheme confirming that the transfer of his pension to the FP1 Retirement Plan. The transfer value of the pension was £48,185.87.

23. Handelsbanken bank statements for the Trustees of the FP1 Retirement Plan for the period 1 August 2012 - 7 August 2013 show repeated credits from "AC MGMT & ADMIN LTD", and repeated transfers out described as "TRANSFER LOAN TO BLU FUNDING". AC Management and Admin Ltd (ACMAL) was the administrator or the scheme. The statement does not indicate that any payments were made to Blu Debt Management.

24. It is not possible to identify the precise credit ('money in') representing the transfer of the Appellant's pension from Novartis via the administrator of the scheme (ACMAL) into the FP1 Retirement fund because many of the payments appear to represent the aggregate of multiple transfers. There is no matching payment in the statements of the FP1 bank account of £48,157.87 or a similar sum, the amount confirmed by the letter from Novartis UK, which would equate precisely to the transfer from Novartis via ACMAL to FP1. However, there is a credit from the administrator of the pension scheme (ACMAL) to the FP1 retirement scheme of £355,633.36 on 11 January 2013 which is more likely than not to include the Appellant's pension transfer from Novartis. None of the other credits to the FP1 retirement scheme at the relevant time (between 21 December 2012 and 18 January 2013 when the transfer from Novartis and receipt by Fast Pensions were confirmed) were close to, equal to or larger than £48,185.87.

25. The Appellant received a letter dated 18 January 2013 from Fast Pensions setting out that his transfer balance was £47,185.87 (there had been a fee of £1,000 deducted) and, amongst other things, there would be no annual fee for the administration of the fund. At a similar time, at least before 29 January 2013 when the loan was received, the Appellant & Mrs West entered into and signed a loan agreement with Blu Funding Corporation Limited for a loan of £11,650. The amount repayable was £22,251.50 over 84 months.

26. Of the payments from FP1 to Blu Funding it is possible to identify the single credit in the Handelesbanken statement that represents the transfer of the Appellant's pension from the FP1 Retirement Plan to Blu Funding. There is a credit – money out – set out in the bank statement in the sum of £11,650 on 25 January 2013 described as 'Transfer loan to Blu funding'.

27. On 29 January 2013 the sum of £11,150 was paid into Mrs West's HSBC bank account from "Blufunding".

28. Throughout all the relevant time – from 2012 to 2016 – the Appellant's wife was acting on the Appellant's behalf in relation to all their financial dealings, including the loan and the pension, whether in their joint names or his name alone.

29. In November 2014 as he was approaching his fifty-fifth birthday the Appellant had researched taking 25% of his pension fund as a lump sum. At this point it was discovered by him and his wife, that Blu Funding no longer existed and the Appellant became concerned he may have been a victim of a fraud. The matter was reported to Action Fraud.

30. On 23 December 2014, the Appellant received £12,861.02 into his Co-Operative bank account. This sum represented his 25% tax free lump sum from his pension with the FP1 retirement fund of Fast Pensions Ltd.

31. The Appellant was still in touch with Fast Pensions Ltd and, as set out above, received his tax free lump sum on 24 December 2014. In April 2015 Action Fraud reported that no evidence of a fraud had been found. By June 2015 the Appellant was experiencing problems with Fast Pensions and information about transferring away from the Policy to Standard Life was requested on 16 June 2015.

32. Further correspondence followed and he signed discharge forms requesting a transfer of his pension funds to Standard Life, which was sent to Fast Pensions on 13 July 2015. Since that point, Fast Pensions no longer responded to any phone calls or emails and the Appellant's correspondence was returned to sender.

33. The loan that the Appellant had taken out with Blu Funding was subsequently assigned to Umbrella Loans Ltd on 3 August 2015.

34. Umbrella Loans Ltd was incorporated on 30 July 2010. At the time the loan was transferred, 100% of Umbrella Loan Ltd's share capital was held by Ian Chapman, who was also its only director. Mr Chapman had also been the director of Blu Funding and subsequently Blu Personal Finance Ltd (the name of the company having been changed).

35. HMRC wrote to the Appellant on 6 January 2016 requesting that he file a tax return for the year ended 5 April 2013. The covering letter stated 'HMRC has become aware that during the year 2012/13 you made changes in the way that your pension fund had been invested. I have reason to believe that a payment has been made to you as result of this transaction, any such payment may be deemed to be an unauthorised payment from your pension scheme.'

36. The Appellant filed his tax return for the year ended 5 April 2013 on 20 January 2016 with assistance from his wife. The Appellant only returned his income and PAYE from his employment. Attached to the return were copies of letters Mr West had received from Novartis UK Pension Scheme and Fast Pensions. The Appellant and his wife did not acknowledge the loan was an unauthorised payment in the appropriate box in his return nor provide any details of the loan from Blu Funding within the return or in any additional correspondence.

37. The Tribunal accepts that the reason they did not reveal the loan, the unauthorised payment, to HMRC in the return was that they did not know it was relevant or taxable – they did not know it was connected to the transfer or the pension or that any part of the loan had been derived from the pension.

38. It was only later in November 2016 that they became aware of the link between the transfer of the pension and receipt of the loan and that the sum of money received by loan was part of the same money transferred into the pension.

39. On 11 November 2016, the Pensions Ombudsman upheld a complaint made by the Appellant against Fast Pensions, and agreed that maladministration had been established on the part of Fast Pensions. The Appellant and his wife had earlier complained that when they had tried to contact Fast Pensions to transfer the pension to Standard Life they had received no response or acknowledgement regarding the Appellant's pension. This had made them very concerned for the reasons set out above. The Ombudsman ordered Fast Pensions to pay the appellant £1,000 within 14 days.

40. On 30 March 2017 HMRC issued an assessment to the Appellant for £4,660 (40% of £11,650) in respect of the year ended 5 April 2013. A letter accompanied the assessment to explain why HMRC considered that the Appellant was due to pay additional tax.

41. The Appellant appealed against the assessment by email on 7 April 2017.

42. Following the receipt of further information from the Appellant, HMRC wrote on 8 May 2017 setting out that they considered that he had received an unauthorised payment because the loan was a payment made from the sums or assets held for the purposes of the pension fund.

43. The Appellant replied by email on 22 May 2017 saying that he had considered the transfer to be legitimate, he was still repaying the loan and that he was in dispute with Fast Pensions and had been trying to get his pension fund transferred elsewhere. He had taken his complaint to the Pensions Ombudsman, who had found in his favour. He was awarded £1,000 compensation which had not been paid some 7 months after the ruling.

44. On 30 May 2017 the Appellant received an email from Fast Pensions stating that they were unaware of any unauthorised payments and that his pension fund was fully intact.

45. Following receipt of the further information, HMRC issued a notice of amended assessment on 22 June 2017, reducing the amount of tax assessed to £4,460 (40% of 11,150).

46. HMRC provided their view of the matter with the notice of amended assessment, stating that their view was that the Appellant's pension fund had been transferred by Fast Pensions to Blu Funding Corporation Ltd, and the Appellant's pension fund was essentially the source of his loan.

47. On 30 June 2017, the Appellant emailed HMRC to appeal against the decision of HMRC.

48. On 7 July 2017, HMRC responded by letter to ask the Appellant to confirm whether he wished to request a review of the decision or appeal to the Tribunal.

49. On 20 July 2017, the Appellant emailed HMRC to confirm he wished to appeal to the Tribunal. On 21 July 2017, HMRC responded by email providing details of the appropriate website.

50. The Appellant appealed to the Tribunal on 26 July 2017.

51. Following a petition from the Secretary of State for Business, Energy and Industrial Strategy (acting through the Insolvency Service), Fast Pensions Ltd, FP Trustees Ltd, Blu Funding Corporation Ltd, Blu Debt Management Ltd and Umbrella Loans were wound up by order of the High Court on 30 May 2018.

Procedural Background

52. HMRC made an assessment on 30 March 2017 of £4,660, based on the quantum of the loan indicated in the Pensions Ombudsman's report of £11,650.

53. Following receipt of Mrs West's bank statement, HMRC reduced the assessment to £4,460, based on the payment received of £11,150.

54. As the matter had not been settled under section 54 Taxes Management Act 1970 the amended assessment does not stand.

55. HMRC requested that the Tribunal exercise its power under section 50(6) Taxes Management Act 1970 to reduce the assessment to £4,460.

Issues in the appeal

56. The issues in the appeal were threefold.

57. Whether the loan advance of £11,150 received by the Appellant and Mrs West from Blu Funding Corporation Ltd was a payment made under or in connection with an investment acquired using the sums or assets held for the purposes of the Appellant's pension scheme, namely the FP1 Retirement Fund.

58. Whether the payment is an unauthorised payment under Part 4, Finance Act 2004, and as such is chargeable under section 208 Finance Act 2004.

59. Whether the discovery assessment issued by HMRC under section 29(1)(b) Taxes Management Act 1970 is correct, competent and issued within the relevant time limit.

Summary of the law

Discovery assessments

60. In so far as applicable, section 29 TMA 1970 provided at the relevant time as follows:

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 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.
(2) …
(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
(a) in respect of the year of assessment mentioned in that subsection; and (b) in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.
(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
(5) The second condition is that at the time when an officer of the Board—
(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 of this Act in respect of the relevant year of assessment: or
(b) informed the taxpayer that he had completed his enquiries into that return, the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
…………………………

61. The normal four-year time limits for issuing an assessment under section 34 TMA 1970 can be extended, for example to six years in certain circumstances by section 36 TMA 1970., Section 34, in so far as relevant, provides as follows:

34 Ordinary time limit of 4 years
(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, [an assessment to income tax or capital gains tax may be made at any time [not more than 4 years after the end of] the year of assessment to which it relates.

Case law on discovery assessments

62. At paragraphs 10-15 of *Atherton v HMRC* [2019] UKUT 41 (TCC) the Upper Tribunal summarised the principles on discovery assessments as follows:

‘10. Two important principles underpin the construction and application of the discovery assessment provisions.

11. First, as this Tribunal stated in *Burgess v HMRC* [2015] UKUT 578 (TCC), at [59]:

“It must be recognised… that the assessment system that Parliament has legislated for is designed to provide a balance between HMRC and the taxpayer. Part of that balance is the requirement, in relation to discovery assessments and assessments outside the normal time limits, that HMRC satisfy the FTT that the relevant conditions for those assessments to have been validly made have been met.”

12. In this case, the burden of proof is on HMRC to establish on the balance of probabilities that the discovery assessment was validly made.

13. Secondly, the discovery provisions now in force were intended to be more restrictive of HMRC’s powers than the provisions in force prior to the introduction of self-assessment in 1996-97. In the context of the pre-2008 rules, which referred to fraudulent or negligent conduct, Moses LJ stated in the Court of Appeal’s judgment in *Tower MCashback LLP 1 v HMRC* [2010] EWCA Civ 32, at [24]:

“… apart from a closure notice, and the power to correct obvious errors or omissions, the only other method by which the Revenue can impose additional tax liabilities or recover excessive reliefs is under the new s29. That confers a far more restricted power than that contained in the previous s29.”

Meaning of discovery

14. In *HMRC v Charlton* [2012] UKUT 770 (TC), this Tribunal stated (at [28]): “…the word “discovers” does connote change, in the sense of a threshold being crossed. 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. That is the only threshold that has to be crossed. We do not agree that the lawyer, in Lord Denning’s example, would be regarded as having made a discovery any the less by waking up one morning with a different conclusion from the one he had earlier reached, than if he had changed his mind with the benefit of further research. It is, we think, evident that the relevant threshold for there to be a discovery may be crossed as a result of a “eureka” moment just as much as by painstaking research.”

15. It is well established that the threshold at which a discovery arises for the purposes of section 29 is low. In *Hankinson v HMRC* [2011] EWCA Civ 1566, the Court of Appeal stated that it simply meant that the officer came to a conclusion, or satisfied himself, as to an insufficiency of tax. No new information, of fact or law, is required in order for there to be a discovery. It includes a case where an officer (acting honestly and reasonably) changes his mind, changes his opinion or corrects an oversight: *Charlton* at [37].

Staleness

…….

17. The answer lies in the supposed concept of staleness. This asserts that, in order for a discovery assessment to be valid, it must be issued by HMRC without undue delay after they have discovered an insufficiency.

18. Ms Balmer argued forcefully that the concept of staleness has no place in the legislation. We acknowledge the cogency of the argument. However, in *Pattullo v Revenue & Customs Commissioners* [2016] STC 2043, this Tribunal decided that on the natural meaning of section 29 there was a requirement for HMRC to act upon a discovery while it remained fresh. This was part of the ratio of the decision in *Pattullo*. Although for the reasons given below it is unnecessary for us to decide the point, we would record our agreement with the recent conclusions and comments of this Tribunal in *Clive Beagles v Revenue & Customs Commissioners* [2018] UKUT 0380 (TCC), as follows:

"58. In the absence of the authorities, we can see some force in the submission that the concept of "newness" involved in a discovery relates simply to the nature of the discovery at the time at which it is made. Whilst we accept Mr Firth's arguments that the implication of a requirement for HMRC to act promptly following any discovery promotes efficiency in the administration of tax and that the concept of a discovery must clearly involve something new (as confirmed by the House of Lords in *Cenlon*), on the words of s29(1), there is nothing express which would appear to provide for any requirement that the discovery must retain that quality until the assessment is made. The only requirement on the face of the legislation is that an assessment under s29(1) can only be made following a discovery.

59. Nevertheless, whatever might be said of the status of the statements of the Upper Tribunal in *Charlton* or in *Tooth* on this issue, in our view, the decision of the Upper Tribunal in *Pattullo* is not obiter. A decision of the Upper Tribunal is not binding on a later Upper Tribunal (see *Raftopoulou v Revenue and Customs Commissioners* [2018] STC 988 at [24]). As a tribunal of coordinate jurisdiction the later tribunal will follow the decision of the earlier one unless it is convinced that the earlier decision is wrong (see *Gilchrist v. Revenue and Customs Commissioners* [2014] STC 1713 at [94] referring back to *Secretary of State for Justice v B* [2010] UKUT 454 (AAC) at [40]). We are not convinced *Pattullo* is wrong, particularly given the existence of the other similar (obiter) statements and so we will follow it.

60. It seems to us that, given the state of the authorities at the Upper Tribunal level, the question of whether a discovery is capable of becoming "stale" is a matter best reviewed by the higher courts. We recognise both sides of the argument, particularly, on the one side, the point that it seems wrong not to require HMRC to make an assessment promptly once a discovery has been made, and, on the other, the simple point that the legislation does not make any express provision for any kind of limitation period except that specified by s34 TMA and so in *Pattullo* the Upper Tribunal pressed the word "if" into action to achieve that end."

63. The Tribunal takes into account the principles set out in the authorities above in relation to the requirements for a discovery assessment to be raised, including the requirement that a discovery must be fresh or not stale.

64. In addition to the principles, above the Tribunal considered the subjective and objective thresholds necessary to raise a discovery assessment.

65. An officer of HMRC's subjective discovery pursuant to section 29(1) of the TMA 1970 must be proven on the balance of probabilities and positively advanced on appeal (*Burgess & Brimheath v HMRC* [2015] UKUT 578 (TCC) per Judge Berner at [49]).

66. A discovery under section 29(1) of the TMA 1970 requires an Officer to have reason to believe a loss of tax exists (*Aramayo* per Mr Justice Avory at p 289). The loss of tax must newly appear to the Officer (*Cenlon Finance* per Viscount Simonds at p 204).

67. No new fact or law is required for there to be a discovery. The loss of tax, newly appearing to the Officer, can be for any reason, including a mere change of view, change of subjective opinion and indeed the correction of an oversight (*Charlton* per Judge Norris [37]).

68. In this regard, the threshold for an Officer's discovery is low. At one point the Officer may not be of the view that a tax loss exists and at another, he concludes a loss of tax exists, such that an assessment ought to be raised. This is the subjective 'threshold' which exists under section 29(1) (*Charlton* [28]).

69. Put in another way, an Officer making the discovery must believe that the information available to him points in the direction of there being an insufficiency of tax (*Anderson* [28]). An Officer's conclusion is subjective, as is the test under section 29(1) (*Sanderson* per Lord Justice Patten sitting in the Court of Appeal [25]).

70. However, the conclusion must be a reasonable conclusion based upon the evidence available to him or her (*Charlton* [24]). As such, the Officer's belief must be one which a reasonable Officer could form (*Anderson* [30]).

71. Consequently, a second stage and element of objectivity is introduced into section 29(1). Additionally, there need only be a progression in the Officer's knowledge rather than a 'eureka moment' that leads to the subjective conclusion and discovery (*Hicks* per Judge Scott [51]-[54]).

72. The fact that the Officer could have reached the conclusion earlier on the basis of the evidence available, does not preclude a discovery at a later date (*Sanderson* per Mr Justice Newey sitting in the Upper Tribunal [24]).

Unauthorised Payments

73. The relevant legislation is set out in Part 4 of the Finance Act 2004 (hereinafter "FA 2004").

74. Section 150(1) FA 2004 defines "pension scheme" as follows:

"In this Part "pension scheme" means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons
(*a*) on retirement,
(*b*) on death,
(*c*) on having reached a particular age,
(*d*) on the onset of serious ill-health or incapacity, or
(*e*) in similar circumstances."

75. A pension scheme which meets the requirements for registration and is registered is a "registered pension scheme". A registered pension scheme is subject to restrictions on what payments may be made out of the scheme.

76. Section 160 provides:

"(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."

77. The meaning of payment is set out in section 161 FA 2004, which provides:

"(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 under or 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 purposes of the pension scheme, even if the pension scheme has been wound up since the investment was acquired.

(5) A payment made by a registered pension scheme to or in respect of a person who—

(*a*) is connected with a person who is or has been a member or sponsoring employer (or was connected with [such a person at the date of the person's]2 death), and

(*b*) is not a person who is or has been a]2 member or sponsoring employer,

is to be treated as made in respect of the [person who is or has been a]2 member or sponsoring employer.

(6) …..

(7) ……

(8) For the purposes of this section whether a person is connected with another person is determined in accordance with section 993 of ITA 2007."

78. Section 993(2) of the Income Tax Act 2007 provides:

"An individual ("A") is connected with another individual ("B") if—

(*a*) A is B's spouse or civil partner,.."

79. The Upper Tribunal in the case of *Danvers v. Commissioners for Revenue and Customs* [2016] UKUT 0569 (TCC) considered payments made from a pension scheme via a loan from a chain of investment vehicles. The Tribunal took the view that the scope of the legislation was "*wider [than] merely catching payments made "from" investments acquired for the scheme. "*(Paragraph 51).

80. At paragraph 52 of the decision, the Upper Tribunal further considered how the legislation should be interpreted:

"Had the provisions been intended only to catch payments made "from" investments made with the assets of the scheme then the draftsman could quite easily have said so by using the word "from" rather than "in connection with" in s 161(3). If the draftsman had done so, however, then the word "under" used in the same provision would have been superfluous. This indicates that there was a deliberate choice to use a term with wider meaning and the term "in connection with" was intended to be capable of catching payments that went wider than those which were simply made from an investment purchased with the funds of the scheme, such as a dividend or other distribution, or by the company in which the scheme had made such an investment, such as a loan made by such company to a member of the scheme. It is therefore clear that the legislation does envisage that payments made to a member of a pension scheme by a third party in circumstances where there is a connection between that payment and an investment in the scheme can fall within the scope of the legislation. The statutory provisions should not be construed by substituting different words from those used in the provision itself."

81. The Tribunal went on to consider how the legislation might be applied in circumstances similar to those before the Tribunal (paragraph 65):

"An obvious situation where the necessary link would exist would be if a third party lender was funded entirely by a company in which a pension scheme was invested, loans being made by the investee company to the third party lender only in circumstances where the scheme member was to take up a loan from the third party lender, the amount being lent by the investee company being identical to the amount on-lent to the scheme member. In such a case, the investee company would be a mere conduit for the making of loans from the scheme to the member and would in our view quite clearly come within the anti-avoidance provisions of s 161 (3) and (4) FA 2004."

82. Section 164 FA 2004 provides:

"(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."

83. Section 171 FA 2004 defines "scheme administration payments", and specifically 171(4) excludes a loan to a member from being a scheme administration payment. A loan to a member is not within the definition of an authorised member payment elsewhere.

84. Pursuant to section 208 FA 2004 unauthorised payments that are both unauthorised member payments and made in respect of a member before the member's death are taxable on members and the income tax charge is 40% of the unauthorised payment.

85. Furthermore, when a payment is regarded as having been made by a registered pension scheme section 279(2) FA 2004 provides:

"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."

Summary of submissions of each party

86. At the time of his original appeal the Appellant contended that he had received a loan and that loan was unconnected with his pension, specifically with the transfer of his pension to the FP1 Retirement Fund. During the hearing he and his wife conceded that the loan was connected to his pension but that they were completely unaware of this at the time and they had no intention to extract or receive any sums from his pension.

87. The Appellant and his wife considered they had been very unfairly treated. They had been victims of the promoters and orchestrators of a pension liberation scheme who had exploited them and misled them into transferring the pension and taking out a loan when they were in serious financial need. They had been taken advantage of by the promoters and orchestrators of a pension liberation scheme and were victims. As a result, they had: a) lost the majority of the Appellant's pension scheme of around £48,000 which had been transferred to Fast Pensions (only having received 25% of it in a lump sum, around £12,000); b) been saddled with a loan to repay of over £20,000 having only borrowed £11,150 from Blu Funding; and c) were being required to pay a further £4,460 to HMRC in tax on an unauthorised payment.

88. HMRC submitted that the loan to the Appellant and his wife was an unauthorised payment under the FA 2004. It was a payment on first principles, albeit a payment which is expected to be repaid. They submitted that the loan advance to Mrs West's account was a payment made in connection with an investment acquired using the sums or assets held for the purposes of the FP1 Retirement Plan, that is the loan from the plan to Blu Funding. Therefore, the loan to the Appellant and his wife was from the same assets transferred from the Appellant's pension and therefore was an unauthorised payment. The intention of the Appellant and his wife were not relevant to the decision – it was effectively a matter of strict liability.

Summary of Discussion and Decision

89. The evidence proves on the balance of probabilities that following the transfer of the Appellant's pension fund from Novartis to the FP1 Retirement fund, repeated payments were made from FP1's bank account to Blu Funding which are described as loans to Blu Funding. This is contrary to the Trustee's report which shows that the main investment made by the fund was to Blu Debt Management.

90. Blu Funding's bank account demonstrates receipt of the funds from FP1's accounts. As set out above, the Tribunal is satisfied that this proves on balance that funds have moved from the FP1 account to the Blu Funding account, and then through to Mrs West's account as the advance of the loan. HMRC has proved to the requisite standard the tracing exercise. There

is a connection between the funds from the Appellant's pension transferred to Fast Pension's FP1 retirement fund and the loan received by him and his wife. The loan is from the same funds. The Appellant's wife is connected to the Appellant and the loan was for both of their benefit.

91. The Trustee report of the FP1 fund indicates that investments have been made in a number of vehicles. With the exception of the alleged investment in Blu Debt Management, this is borne out by the FP1 bank statements.

92. Blu Funding was the lender for the Appellant & Mrs West's loan. The loan advance was made to the account of Mrs West.

93. Section 161(5) FA 2004 deems a payment made by a registered pension scheme to a person connected to the member as being made in respect of the member. By virtue of section 993 Income Tax Act 2007, a person is connected to another person if one is the spouse of the other person.

94. Accordingly, the Tribunal is satisfied that although the loan payment might have been made to Mrs West in her bank account, the loan agreement being in their joint names, it is still a payment made in respect of the Appellant.

95. The Tribunal is satisfied that the loan advanced from Blu Funding to Mrs West was a payment made in connection with an investment in Blu Funding acquired using the funds of the FP1 Retirement Fund.

96. This is evidenced through the transactions shown in the bank accounts of the FP1 Retirement Fund, Blu Funding Corporation Ltd, and Mrs West.

97. Although strictly the amount of the unauthorised payment is the amount borrowed, £11,650, HMRC is prepared to accept that the amount of unauthorised payment is the amount received into Mrs West's bank statement rather than the amount borrowed. As such, the Tribunal is satisfied that the taxable amount is £11,150.

98. The Tribunal is satisfied that as both a matter of fact and law the payments made by the FP1 Retirement Fund, to Blu Funding Corporation Ltd and then to Mrs West were made to or for the benefit of the Appellant.

99. Unauthorised payments that are both unauthorised member payments and made in respect of a member before the member's death are taxable on members under section 208 FA 2004, and the income tax charge is 40% of the unauthorised payment. As such, the Tribunal is satisfied that the tax due on the unauthorised payment is £4,460.

Discovery Assessment

100. HMRC made an assessment on 30 March 2017 within the four-year time limit required by section 34 TMA 1970 from the end of the relevant tax year ending on 5 April 2013.

101. The notice of assessment was in the name of an issuing HMRC officer, Leigh Hands, but the Tribunal accepts the evidence of HMRC Officer Mark Davies that he was the officer who made the decision to assess the Appellant and that the officer named on the notice of assessment was merely a notifying officer.

102. Officer Davies gave evidence that he believed he had made a discovery of the loss of tax in November 2016. The Tribunal is satisfied that Officer Davies made a subjective discovery of an assessment to tax that become insufficient, pursuant to section 29(1)(b) Taxes Management Act 1970 (hereinafter TMA 1970).

103. The insufficiency was discovered with regards to the Appellant's self –assessment tax return for the year ending 5 April 2013 which was filed on 20 January 2016. That return did not mention the receipt of any loan. At that time the Officer, whilst enquiring into Fast Pensions and Blu Funding, did not have sufficient evidence that there had been any loan received by the Appellant from his pension, nor that there had been any unauthorised payment or any tax loss. As part of his investigation into the schemes operated by Fast Pensions, the Officer discovered that those transferring their pensions from one of the ceding schemes (other than Novartis) to the FP1 Retirement Fund did not result in any unauthorised loans payments being made to recipients, such as 'thank you or commission payments'. Therefore, not all of the members of the FP1 Retirement Fund received unauthorised payments.

104. Although Officer Davies was aware that the Appellant was a member of the FP1 Retirement Fund in August 2013, at the outset of his investigations, there was no evidence that the Appellant had received a payment from or in connection with his pension fund.

105. It was only after receipt of the pensions ombudsman report of 11 November 2016, sometime later that month, that Officer Davies concluded with a reasonable degree of certainty that, based upon his examination of the facts, law and evidence available, an unauthorised payment had been made to the Appellant. The Ombudsman's determination, while anonymised, rereferred to the pension policy WESO202 and a pension of £48,185.17 transferred to Fast Pensions and a loan of £11,650 from Blu Funding. Officer Davies was able to match this loan to the bank statements and to the very similar policy number of WES02002 and amount of £47,185.87 in the name of the Appellant in the register of members of the FP1 retirement scheme. He was only in November 2016 able to connect the Appellant's pension membership to the loan the Appellant (through his wife) received.

106. Specifically, Officer Davies's conclusion was based upon a review of his investigations into a number of members of pension schemes of which Fast Pensions Ltd was the sponsoring employer, and his investigation directly into the FP1 fund of Fast Pensions ltd.

107. The Tribunal is satisfied that the Officer subjectively believed the Officer had made a discovery of a tax loss in late November 2016. Further, the Tribunal is satisfied that this was objectively a reasonable conclusion that there had been a discovery of a tax loss.

108. The discovery of a loss of tax was considered in the case of *Commissioners for HMRC v. Charlton, Corfield and Corfield* [2012] UKFTT 770 (TCC). At paragraph 37, the Tribunal states:

"All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself."

109. It was following a wider investigation that Officer Davies reached the conclusion in late 2016 that the Appellant received an unauthorised payment in January 2013, for the reasons set out above.

110. Further, the Tribunal is satisfied that the discovery assessment was not stale. Officer Davies made the discovery that an assessment was insufficient in November 2016, and gave instructions for the issue of the notice of assessment. The notice of assessment was issued four months later in March 2017 as part of a batch of assessments relating to the scheme

111. In order for Officer Davies to have validly raised an assessment, the restriction contained in section 29(3) TMA 1970 requires one of the conditions in sections 29(4) or (5) to be met. HMRC contend that both section 29(4) and 29(5) are satisfied.

112. Section 29(4) requires that the underassessment was brought about carelessly or deliberately by the taxpayer or someone acting on his behalf. HMRC submit there is no evidence that the Appellant sought any independent advice on the completion of his tax return in January 2016, even though HMRC had suggested to him that there may have been a liability to tax connected with the change in his pension arrangements.

113. HMRC submit that it was clear from the Ombudsman's report that the Appellant understood that there was some connection between the loan and the transfer of his pension. According to the report, it was during the same call the Appellant received about borrowing money that he was recommended to change his pension provider. The call is purported to have been from Blu Funding, not a financial adviser. There has been no suggestion that the Appellant sought any independent financial advice connected to either the transfer of his pension or entering into a loan arrangement from Blu Funding. Further evidence that the Appellant understood the loan and the pension to be connected can be found in paragraph 11 of the Ombudsman's report in that he was concerned that he had fallen foul of a pension liberation scam when he discovered that Blu Funding no longer existed.

114. HMRC submit that if the Appellant did not at least have suspicions that the two entities and events were connected, then he would not have had any concerns over the security of his pension when he believed that Blu Funding ceased to exist. HMRC submit there is no evidence that the Appellant sought any independent advice on the completion of his tax return, even though HMRC had suggested to him that there may have been a liability to tax connected with the change in his pension arrangements.

115. The Tribunal is not satisfied that HMRC have proved that the Appellant acted carelessly. The careless actions which are referred to in section 29(4) are those which result in the underassessment of tax, not the circumstances which result in a liability to tax. This is confirmed in the first instance decision of *Atherton v. Commissioners for HMRC [2017] UKFTT 0831 (TC)* at paragraph 116: "*In other words, the carelessness must be the cause of the insufficiency in the assessment*". In the case of *Anderson v. Commissioners for HMRC [2009] UKFTT (TC)*, carelessness was further considered. At paragraph 22, Judge Berner states: "*The test to be applied, in my view, to consider what a reasonable taxpayer, exercising reasonable due diligence in the completion and submission of the return, would have done.*"

116. The Tribunal has accepted the evidence given by the Appellant and Mrs West that they did not know and had no reasonable grounds to connect the pension to the loan until receipt of the Ombudsman's report in November 2016. The Tribunal has accepted their evidence that there were two separate phone-calls made to the Appellant in 2012. The first was to offer the Appellant a loan which he accepted, followed by a later phone-call offering to transfer his pension. The two were never linked to each other and the Appellant had no reason to believe they were. The Appellant's investigations and complaints to the Ombudsman during 2014 and 2015 did not conclude in him discovering the link between his pension and the loan.

117. The Tribunal does not accept that the prudent and reasonable person would have taken steps to check the position following receipt of the letter from HMRC before submitting his tax return for the year ending 5 April 2013 in January 2016. The Appellant's complaint to the Pensions Ombudsman suggested that he had concerns about Fast Pensions from November 2014 and had been trying to transfer his pension since June 2015. The focus of his concerns was the justifiable concern about the loss of contact from Fast Pensions and the loss of most of his pension with them (which has turned out to be true). He was seeking to recover his pension in order to transfer it to another provider. He was not complaining about the loan. He did not have the banking evidence available that would have identified the connection.

118. However, the Tribunal is satisfied that the condition in section 29(5) is satisfied in order for HMRC to have made a valid discovery assessment.

119. The Appellant made and delivered a tax return for the year ended 5 April 2013 on 20 January 2016, having not previously filed a return. On 20 January 2017, HMRC ceased to be entitled to open an enquiry under section 9A TMA 1970. At 20 January 2016 and 20 January 2017, a hypothetical Officer of HMRC based upon the information made available in the Appellant's tax return for the year ending 5 April 2013, could not have been reasonably expected to be aware of the insufficiency in tax.

120. The Appellant's tax return did not contain any of the information listed in section 29(6) TMA 1970, and although it makes reference to the pension transfer (and attached two letters dealing with the pension transfer), the return and correspondence do not make reference to the loan or the receipt of an unauthorised payment.

121. The Tribunal is satisfied that this information contained within the return was not of sufficient quality to be enough to make HMRC aware of the under-assessment of tax. Without confirmation of the loan, from the Pensions Ombudsman material in November 2016 connecting it to the pension, then HMRC could not reasonably be expected to be aware of an unauthorised payment.

122. This point was considered in *Revenue and Customs Commissioners v. Lansdowne Partners Ltd Partnership* [2012] STC 544. Sir Andrew Morritt C, referring to *Langham v. Veltema* [2004] STC 544, stated at [56] that the question:

"is whether the hypothetical inspector having before him those…documents…would have been aware of "an actual insufficiency" in the declared profits….It is enough that the information made available to him justifies the amendment to the tax return he seeks to make."

123. The Upper Tribunal also considered "made available" in *Charlton, Corfield and Corfield* holding the view that the correct focus of section 29(5) Taxes Management Act 1970 was "*that it is on the quality and extent of the information made available"*.

124. The information provided with the Appellant's tax return related solely to the transfer of his pension and does not reference receipts of any description and HMRC could not reasonably have been expected to be aware of the same.

125. The Upper Tribunal considered further the construction of section 29(6)(d)(i) in *Charlton*:

"The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc provided by the taxpayer.

As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s29 when applying the test of reasonableness."

126. The Tribunal is satisfied that it is not reasonable to infer from the information relating to the Appellant's pension transfer provided with the return that he or his wife had received an unauthorised payment. The two events (transfers of a pension and receipt of an unauthorised payment) are not commonly linked.

127. The Tribunal is satisfied that information was not made available to the hypothetical officer so that, and that the test set out in section 29(5) is therefore satisfied.

128. The Tribunal is satisfied that the assessment raised on 30 March 2017 is therefore competent.

129. The ordinary time limit for HMRC to raise an assessment under section 29 TMA is set out in section 34 TMA 1970, which is four years after the year to which it relates. For the year ended 5 April 2013, this expired on 5 April 2017.

130. The Tribunal is satisfied that the assessment was raised correctly within the statutory time limit.

Conclusion

131. The Tribunal confirms that:

(a) the payment made by the FP1 Retirement Fund to Blu Funding Corporation Ltd and onwards by way of loan to the Appellant and Mrs West is an unauthorised payment;
(b) The Tribunal confirms that there was a valid discovery assessment and the assessment is in time and competent;
(c) The Tribunal reduces the assessment to £4,460; and
(d) The Tribunal dismisses the appeal.

Postscript

132. This was a very sad case. The Tribunal is satisfied that the Appellant and his wife were the victims of exploitative and untoward behaviour by the promoters and orchestrators of a pension liberation scheme. They were misled and taken advantage of by these individuals at a vulnerable point in their life when they faced difficult financial circumstances. They had no intention to misuse or liberate the Appellant's pension. They did not know of the connection between the pension transfer and receipt of the loan at the relevant time. They did not benefit from receipt of the unauthorised payment. In fact, the very reverse. They have suffered serious financial consequences: the loss of the majority of the Appellant's pension, the repayment of a loan at twice the amount borrowed and a tax assessment from HMRC on top. They have also suffered the stress and distress of HMRC's investigations, assessment and litigation. They made two complaints to the Pensions Ombudsman in respect of Fast Pensions, both of which were upheld on the basis they had been mistreated.

133. The Tribunal recognises that HMRC are required to enforce the law. Nonetheless, given the peculiar and exceptional circumstances of this case, the Tribunal invites HMRC to consider whether there is anything they can do to mitigate the consequences of the assessment for the Appellant and his wife. The enforcement of the assessment remains within the discretion of HMRC and the Tribunal hopes that they will give careful consideration to exercising that discretion generously.

134. Further, the Tribunal understands that HMRC must target their resources. Part of their duty is to address and investigate unlawful pension liberation schemes, both the members who benefit from them, but also their orchestrators and promoters – such as those referred to in *O'Mara and O'Mara v HMRC* [2017] UKFTT 091 (TC). The Tribunal very much hopes that HMRC prioritise their actions according to factors such as the potential culpability of the individuals and companies and tax at risk. The Tribunal hopes that HMRC's priority is to investigate and assess the major beneficiaries, orchestrators and promoters of unlawful schemes rather than individuals in the position of the Appellant and his wife (those with low or no level of culpability, no knowledge of the link between pension transfer and loan received,

no benefit but rather financial loss caused by the unauthorised payment, a relatively low level of tax at risk and insecure finances).

135. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 04 JUNE 2019