[2011] UKFTT 686 (TC)

TC01528

Appeal number: TC/2010/3597

Income tax – charge on retirement benefits scheme administrator under s591C ICTA 88 on cessation of approval of scheme – whether notice validly given - whether assessments valid – whether raised in respect of correct year of assessment – whether raised in name of correct person – whether out of time

FIRST-TIER TRIBUNAL

TAX

JOHN MANDER PENSION TRUSTEES LIMITED **Appellant**

- and -

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

TRIBUNAL: Mrs B Mosedale (Tribunal Judge)
Mr N Collard (Tribunal Member)

Sitting in public at 45 Bedford Square, London WC1 on 13 July 2011 with further submissions by the Appellant on 19 July 2011, responded to by HMRC on 21 July 2011; with a further submission on 25th July from the Appellant the admission of which was accepted by HMRC on 17 October 2011.

Mr L Sykes, Counsel, instructed by Ansons, solicitors, for the Appellant

Mr A Nawbatt, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. HMRC issued an assessment for £475,200 on 27 July 2000 on the Louvre Trustees Limited as trustee of the John Mander Limited Directors Pension Scheme ("the Scheme"). The Appellant is the current trustee of the Scheme and challenges the validity of the assessment. A second assessment in the same amount was raised on 22 January 2007 on the Appellant. That is also under appeal.

2. This appeal is designated as a lead appeal under Rule 18. The Direction issued by Judge Berner on 1 February 2011 was that:

> "For the purposes of Rule 18 of the Tribunal Procedure (First-tier) Tribunal)(Tax Chamber) Rules 2009 the following are the common or related issues of fact or law in the appeals in respect of which this is the lead appeal:
>
> (1) Whether the relevant year of assessment of the charge arising under section 591C of the Income and Corporation Taxes Act 1988 is the year ending 5 April 2001; and
>
> (2) (i) Whether the tax charged under s591C ICTA 1988 on the administrator of a scheme, and treated as charged on every relevant person under s658A ICAT 1988, can be recovered in full from any single relevant person on the basis that the assessment of only a single relevant person in the name of the administrator of the scheme establishes joint and several liability of all relevant persons (subject to s 658(1)(b)), or whether recovery of the tax from a relevant person requires an assessment of that specific relevant person,
>
> (ii) If the liability is joint and several, whether it extends to relevant persons not in existence at the time of the assessments."

Further submissions

3. The Appellant made further submissions on 19 July 2011 after the end of the hearing. The submissions were on two points: s606 and interest. Although HMRC disputes this, the Appellant justifies the later submissions on the grounds that they were matters raised at the hearing by HMRC which were not presaged in its skeleton argument. We do not need to resolve this dispute as HMRC, although stating it was inappropriate for further submission to be made, did in fact reply to them, so we accepted both the submissions and HMRC's reply.

4. The Appellant responded to HMRC's reply on 25 July with a brief reply and HMRC again said that they did not think further submissions appropriate and objected to their admission. The Appellant then formally applied for them to be considered and HMRC withdraw their objection on the grounds the submissions added nothing so objecting to their consideration would waste time and costs. So we considered the submissions of 25 July as well.

5. We note in passing that there must be finality in litigation and unless a party applies for and is given permission at the hearing to make later submissions,

submissions after the hearing should normally only be made in exceptional circumstances.

The facts

6. There was a statement of agreed facts between the parties. There were also two witness statements by Mr John Mander. HMRC did not choose to cross-examine Mr Mander and his statements were therefore unchallenged and accepted by this Tribunal. However, virtually all of both statements were concerned with Mr Mander's personal history, current financial position, what had happened to the funds in Vesuvius Scheme, and the authorship of his witness statement in the judicial review proceedings referred to below. None of these matters are relevant to this appeal and we do not refer them again apart from (briefly) Mr Mander's motivation in transferring the funds to the Vesuvius Scheme in paragraph 16 below.

7. We find the relevant facts were as follows:

8. The Scheme was created by a trust deed in 1987 and approved as a retirement benefit scheme under Chapter 1 of Part XIV Income and Corporation Taxes Act 1988 ("ICTA") by the Inland Revenue. The beneficiaries of it were Mr and Mrs J Mander.

The Trustees

9. The original trustees were Mr & Mrs J Mander and Mr A Jackson. Mr Jackson resigned on 9 September 1994 and on the same day DJT Trustees Ltd was appointed in his place. On 5 November 1996 Mr & Mrs J Mander resigned as trustees and the Louvre Trust Company Limited (a Guernsey registered company) was appointed in their place.

10. On 18 March 1997 DJT Trustees Ltd resigned as trustee. This left the Louvre Trust Company Limited as the only trustee. On 20 June 1997 TM Trustees Ltd was appointed and Mrs Mander re-appointed as trustees and the Louvre Trust Company resigned.

11. On 26 February 1998 Louvre Trustees Limited (another Guernsey registered company) was appointed as trustee and Mrs Mander resigned. Louvre Trustees Limited resigned as trustee on 1 November 2001, leaving TM Trustees Ltd as the only trustee. On 12 March 2002 the Appellant was appointed as trustee. It had been incorporated as a company only a few days earlier, on 28 February 2002. On 22 March 2007 TM Trustees Ltd resigned as trustee so that at the date of the hearing the only trustee was the Appellant.

Transfer of funds

12. On the same day that Mr & Mrs Mander resigned as trustees, 5 November 1996, the funds of the pension scheme were transferred to the Vesuvius Shipping Limited Pension Scheme ("the Vesuvius Scheme"). The Vesuvius Scheme had originally been a pension scheme approved by the Inland Revenue, but it became unapproved by reason of a change to the scheme rules which permitted it to make loans on terms not permitted for approved schemes.

Withdrawal of approval

13. On 19 April 2000 the Inland Revenue wrote two letters, one to the Louvre Trust Company Limited and one to TM Trustees Limited notifying them that the Inland Revenue were withdrawing approval from the Scheme. The letters said

> "The Board….has therefore decided to give notice that approval has been withdrawn with effect from 5 November 1996."

14. On 27 July 2000 an assessment was made on the Louvre Trustees Limited in the sum of £475,200 being 40% of the estimated value of the Scheme funds as at 4 November 1996. The year of assessment was stated as 2000/2001. The assessment was appealed on 31 July 2000.

15. A further assessment was raised by HMRC on 22 January 2007 against the then two trustees of the Scheme, the Appellant and TM Trustees Ltd. It was appealed on 13 February 2007.

Motives

16. The motivation of the appellant and HMRC is irrelevant to this appeal. Mr Mander in his witness statement gave evidence that the scheme assets were transferred in 1996 to the Vesuvius Scheme because he did not want the funds in so restrictive a regime which necessitated the purchase of an annuity. He wanted the trustees to have freedom to do other things with the money. HMRC describe this as tax avoidance. The Appellant, on the other hand, considers Mr Mander should not be criticised as the tax charge on the loss of approval of the retirement benefits scheme was rightly in its view described as "Draconian" by the Special Commissioner in *Thorpe* [2008] STC (SCD) 802, because it is a charge at 40% on the funds' value despite payments out of the fund being subject to tax. In passing, we note that we do not agree with the Appellant's view: the purpose of the 40% charge on assets leaving an approved scheme is to re-coup the tax advantages the funds enjoyed while in an approved scheme. If a scheme member does not wish to abide by the rules, and in particular accept the limitations on what can be done with the funds in an approved scheme, then he is not entitled to the tax benefits, and it seems quite reasonable for the Government to seek to recoup them. As Sir Edward Evans-Lombe said in *Thorpe*, at page 2136 paragraph 45, there is no element of double taxation in this charge to tax.

17. However, none of this is relevant to this case. Quite rightly no one suggested that this Tribunal had any judicial review function and we did not conduct any review of HMRC's decision to withdraw approval from the Scheme. A judicial review having failed in 2001, HMRC's power to withdraw approval and to raise an assessment could not be challenged: the case is about whether approval was validly withdrawn, whether the two assessments were validly made, at the right time, on the right person and in respect of the right year.

Preliminary issue

18. The Appellant applied for leave on 8 February 2011 to add a new ground of appeal. HMRC opposed the application. The new ground of appeal was that the withdrawal of approval of the Scheme was ineffective. This was because at the time

of the withdrawal of approval on 19 June 2000 the administrator of the scheme was Louvre Trustees Limited and TM Trustees Limited. Two notices of withdrawal, however, were sent, one to the Louvre Trust Company and one to TM Trustees Ltd.

19. HMRC's grounds of opposition to the application were:

- The validity of the notice of withdrawal was not appealable under section 31 TMA 1970. The proper course of action to challenge the notice is by judicial review but not only had this Tribunal no jurisdiction to hear a judicial review (see *Lambert v Glover* [2001] STC (SCD) 250), the appellant had already sought leave and been refused permission to apply for judicial review. Therefore, allowing the amendment would give the Appellant a second and improper challenge to the notice, which would constitute an abuse of process;

- The ground of appeal was raised too late for HMRC to deal with it by issuing a new notice;

- Notice was in fact given to TM Trustees; the ground of appeal was unmeritorious and bound to fail as there was no dispute that the Louvre Trustees Limited had known about the withdrawal of approval at the time even though the notice was not addressed to it.

The jurisdiction point

20. The Appellant's response to the first point was that it was not appealing the validity of the notice per se: it was appealing its liability to an assessment under s31 TMA in the course of which it was challenging whether the pre-conditions to liability were met and in particular whether there was in fact an effective withdrawal of approval.

21. We agree with the Appellant. Mr Justice Sullivan at the judicial review (no. 3644) hearing on 11 April 2001 was not asked to rule whether an assessment was validly made as a matter of law nor even whether HMRC's purported withdrawal of approval was effective: it was assumed it was effective and he was being asked whether Mr Mander should be given permission to bring a judicial review action against HMRC for its decision to withdraw approval from the scheme.

22. Mr Mander's application was refused on two grounds. Firstly, because of material non-disclosure by him and secondly, because the Judge considered HMRC were entitled to conclude the scheme no longer warranted approval. The issue of whether the withdrawal of the approval was validly made was not raised with Mr Justice Sullivan and indeed could not have been the subject of a judicial review. If HMRC had not actually validly withdrawn approval they could not be judicial reviewed for doing so.

23. In our view there could have been no objection to this as a ground of appeal had it been made in the Notice of Appeal. It is a challenge to whether a charge to tax had actually arisen. We have jurisdiction to entertain it.

Late or unmeritorious point?

24. Counsel for the Appellant stated (although no evidence was led on this) that the reason this point was not made earlier was because Mr Mander and the trustees had been forced to change advisors not long after the judicial review proceedings, the papers were not passed to their new advisors, and the result was they were reliant on HMRC for details of the scheme and did not realise until recently that the notice was addressed to the wrong trustee.

25. HMRC did not dispute the change of advisers but did challenge whether the outcome of the change of advisor was that the Appellant could claim it did not know the full facts earlier than 2010.

26. Since we were presented with no evidence on the point (it merely being assertions by each side's counsel), we conclude that the burden is on the Appellant to prove that it could not have known about this discrepancy earlier and without leading evidence on this it cannot do so. HMRC did not challenge the assertion that the Appellant's advisers did not in fact realise the discrepancy until late in 2010 whether or not they could and should have done so earlier. There is no suggestion that the Appellant deliberately delayed taking this point in the appeal.

27. The objective of the Tribunal is a fair trial: one that reaches a correct decision by a fair process. Ordinarily in reaching its decision a Tribunal should therefore consider all grounds of appeal which have at least some merit: the only reason for excluding a new ground would normally be that it was made too late to give the other party time to respond.

28. In this case HMRC had approximately four months warning of this ground of appeal. We consider this more than adequate time to address the issue and in any event they could have asked for an adjournment if they thought they needed more time. On the contrary they came to the hearing fully prepared to argue the point.

29. However, timing is also relevant in this case because the new point by being taken so late it deprived them, say HMRC, of the opportunity to correct the matter by issuing a new notice of withdrawal. For the reasons given in paragraph 136 and 140 we do not agree with HMRC on this point and this is therefore not a ground to refuse the application. Were it not for this, we would be sympathetic to the view that we should not exercise our discretion to admit a new point of appeal which amounts to taking exception to a technical mistake which at the time misled no-one and which, had it been pointed out timeously, could have been rectified. Nevertheless there are clearly cases where higher courts have allowed matters to be raised late in the day, such as in *Hoare Trustees v Gardner* [1978] STC 89 referred to below. This is because the point is fundamental to the court's jurisdiction and we would, therefore, allow the application.

30. The final point raised by HMRC (that the notice given to one trustee is adequate and/or notice was effectively given to both) was really a response to the new ground of appeal rather than a reason for refusing to admit the new ground of appeal. No doubt we should not admit a new ground of appeal if it was hopeless but this was not:

notice was given only to one of the trustees at the time. Whether that was sufficient is a clearly arguable point.

31. We allow the amendment to the Notice of Appeal.

The issues

32. Having allowed the Appellant to amend its Notice of Appeal, chronologically the first ground of appeal for this Tribunal to consider was whether HMRC's purported withdrawal of approval of the scheme on 19 April 2000 was effective. We will describe this as the "right person not notified" point.

33. The second issue raised by the Appellant is whether the assessment on the Louvre Trustees limited on 27 July 2000 was effective as against the Appellant who is the current trustee but did not exist at the time of the assessment and could not have lodged an appeal against it. The Appellant described this as the "wrong person" point, a term we adopt for convenience.

34. The third issue was whether the 2007 assessment against the Appellant was out of time. This was described as the "out of time point".

35. The last issue was whether both assessments, being in respect of tax year 2000/2001, were made in respect of the wrong year. This was described as the "wrong year" point.

Jurisdiction

36. Section 31 Taxes Management Act 1970 ("TMA") gives a right of appeal against "an assessment to tax which is not a self-assessment". It does not specify who may exercise that right of appeal. In our view it is only someone affected directly or possibly indirectly by an assessment who could exercise that right of appeal. Someone who is not affected by the assessment would have no right to bring an appeal.

37. If the Appellant is right on the "wrong person" point, it is *not* affected by the assessment and therefore we would have no jurisdiction to hear its appeal. Yet the Tribunal must have jurisdiction to decide whether it has jurisdiction: therefore we conclude we must have jurisdiction to determine whether the Appellant is a person liable to the tax assessed by the assessment in issue in this appeal. If we concluded that it was not , then we have no jurisdiction to consider the other issues.

38. Nevertheless, although we recognise this point we deal with the issues chronologically so we take the "right person not notified" issue first and then deal with the "wrong person" point.

Right person not notified issue.

The law

39. This appeal concerns a retirement benefits scheme which was approved under chapter 1 of Part XIV of the Income and Corporation Taxes Act 1988 ("ICTA").

Those provisions were largely repealed by s 326 and Schedule 42 of the Finance Act 2004 with effect from 6 April 2006. Schedule 36 of the same Act, however, enacted some transitional provisions.

40. So far as the 2000 assessment is concerned, the repeal is irrelevant as all relevant events, such as the assessment, took place before 6 April 2006. Even the date on which the Appellant became a trustee of the Scheme was before that date. This is not the case with the 2007 assessment and we deal with this point when we come to that assessment in paragraphs 147-150 below.

41. HMRC's power to withdraw approval from a previously approved scheme was contained in s591B ICTA which provided as follows:

> "(1) If in the opinion of the Board the facts concerning any approved scheme or its administration cease to warrant the continuance of their approval of the scheme, they may at any time by notice to the administrator, withdraw their approval on such grounds, and from such date (which shall not be earlier than the date when those facts first ceased to warrant the continuance of their approval….), as may be specified in the notice.
>
> (2) ….."

42. It was agreed that this gave HMRC power to withdraw approval from a scheme from a date earlier than the date of the notice of withdrawal (although not earlier than the date on which the events took place which gave rise to the decision to withdraw). It was also not in dispute that the notice was given on 19 April 2000 withdrawing approval with effect from 5 November 1996, the day the assets were transferred to the Vesuvius Scheme. Subject to the question of to whom the notification was given, there was no dispute that the notification was effective.

43. "Notice" is a defined term for the Tax Acts in s832(1) ICTA, which provided:

> " 'notice' means notice in writing…."

44. Notice must be given to "the administrator". This was a defined term in s 611AA ICTA which provides as follows:

> "(1) In this Chapter references to the administrator, in relation to a retirement benefits scheme, are to the person who is, or the persons who are, for the time being the administrator of the scheme by virtue of the following provisions of this section.
>
> (2) Subject to subsection (7) below, where –
>
> (a) the scheme is a trust scheme, and
>
> (b) at any time the trustee, or any of the trustees, is or are resident in the United Kingdom,
>
> the administrator of the scheme at that time shall be the trustee or trustees of the scheme."
>
> ……

> (9) In this section –
>
> (a) ….
>
> (b) references to the trustee or trustees, in relation to a trust scheme and to a particular time, are to the person who is the trustee, or the persons who are the trustees, of the scheme at that time;
>
> ….”

45. It was not suggested that subsection (7) was applicable so that at the time notice in writing was given on 19 April 2000 the administrator of the scheme was the two trustees, TM Trustees Ltd and Louvre Trustees Ltd.

Is notice to one trustee sufficient?

46. The Appellant’s case is that the legislation provides that the “administrator” comprised the persons who were the trustees at the relevant time. It provided that notice must be given in writing and given to the administrator.

47. It was accepted that HMRC only sent the notice to one of the trustees, TM Trustees Ltd, at the time. The other notice was sent to the right address but in the name of a former trustee, Louvre Trust Company, with a similar name rather than a present trustee, Louvre Trustees Ltd. As the Appellant had earlier informed HMRC of the change in trustees, the mistake was HMRC’s.

48. HMRC submit it is enough to send the notice to one of the trustees because they are jointly and severally liable in their office.

49. In our view the legislation clearly requires notice to the “administrator” and at the time the administrator comprised both TM Trustees Ltd and Louvre Trustees Limited. So unless either giving notice to TM Trustees Ltd is to be taken as giving notice to both trustees, or unless the notice to Louvre Trust Company Limited can be taken as notice to Louvre Trustees Limited, the notice was not given in accordance with the legislation.

50. Although we agree that there is joint and several liability (see paragraphs 90 below), that cannot alter the plain words of the statute that notice is to be given to the “administrator” and that there is nothing in the statute that would deem notice to one trustee to be taken to be notice to both trustees comprising the administrator. And even if there were any ambiguity in the legislation, we do not think the statutory scheme means it is obvious that Parliament would have necessarily intended notice to one trustee to be notice to all.

51. This is a case where both trustees had kept HMRC informed of their appointment and current address: there are provisions, such as s 115 TMA, immaterial to this appeal, which deal with taxpayers who do not keep HMRC informed .

52. Our conclusion is that the plain words of the statute require “notice to” both trustees comprising the administrator at the time the notice is given. The second notice was in the wrong name although at the correct address. Was this “notice to” Louvre Trustees Limited? If not, notice was not given to the administrator.

Technical flaw only

53. The Appellant accepts that Louvre Trustees Limited did know of the notice. It accepts that it is taking a technical point on the validity of the notice of withdrawal: it does not suggest that in practice sending the notice to the wrong trustee actually caused any confusion. We find from the correspondence put in evidence and the judicial review that followed the notice that the advisor (Mr Warner) acting for the Scheme was well aware of the withdrawal of approval.

54. We raised with the parties whether s114 TMA would have any application. This section provides:

> "(1) An assessment or determination, warrant, or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected is designated therein according to common intent and understanding."

55. The Appellant's view was that s114 would correct a technical error in the notice of withdrawal of approval but it could not re-write the past: the notice was sent to the wrong trustee and s114 could not correct this. However, neither party had considered the possible application of s114 before the hearing and the cases mentioned in the following discussion were not brought to the Tribunal's attention (with the exception of *Baylis* in a different context).

56. Our view is that s114 can apply to a notice of withdrawal of approval because it applies to a "proceeding" under the Taxes Acts (and ICTA is one of the Taxes Acts as it is an enactment relating to income tax: see s118(1) TMA and Schedule 1 to the Interpretation Act 1978). But s114 only rescues the notice if in "substance and effect" it is in conformity with the meaning of s591B ICTA and if the person affected is "designated therein according to common intent and understanding".

57. Cases, binding on this Tribunal, have decided that s114 cannot be used by HMRC to correct "gross" errors. In *Baylis v Gregory* [1987] STC 297, which we refer to in more detail below in paragraph 112, the Court of Appeal ruled that s114 could not correct a reference to an incorrect year of assessment. Prior to this, in *Fleming v London Produce Co Ltd* (1968) 44 TC 582 Megarry J commented, obiter, that he did not think the predecessor of s114(2) would save an assessment if the name of the taxpayer was not recognisable. The implication is that faulty spelling can be corrected: but a complete error of identification cannot be. However, in assessing whether something actually was a gross error he said "The likelihood of the recipient being deceived or misled would also be an important factor."

58. HMRC got the names completely wrong in the assessment at issue in *Hoare Trustees v Gardner* [1978] STC 89. Brightman J concluded that with s114(1) as with s114(2) the likelihood of the recipient being deceived or misled was an important factor. It was clear, he said, that in *Hoare* HMRC had intended to assess the current

trustees but by mistake had put the assessment in the name of the previous trustee. No one had been deceived. He held s114(1) cured the defect.

59. In this case, HMRC again got the name of the trustee wrong, referring to a previous rather than current trustee. The mistake was more understandable as the two companies had the same address and similar names. It caused no one any confusion. Both trustees were well aware of the notice. S 591B intended the administrator, defined as both trustees, to be given the notice. Both trustees did receive notice of the withdrawal. Therefore the notice was in substance and effect in conformity with s 591B.

60. One of the persons affected was not actually designated by its proper name, but was it designated according to common intent and understanding? Again it is not disputed that Louvre Trustees Limited did know of the notice and we infer it must have known it was intended to be affected as, apart from anything else Mr Mander, who was the main beneficiary of the trust and the person on whose instructions the trustee would act, then sought to judicially review HMRC's decision. We find it was the common understanding of the parties that HMRC intended to designate the current trustees.

61. Our conclusion is that, on the facts of this case and particularly because no one was in any doubt who HMRC intended to notify, s114(1) does apply to validate the mistake in the name of the trustee in one of the two notices withdrawing approval from the Scheme. This ground of appeal fails.

The wrong person point

62. It is the Appellant's case that it is not liable to the 2000 assessment because it was not named in the assessment. The assessment was on Louvre Trustees Ltd as administrator of the Scheme and not on the Appellant, which did not exist in 2000.

The law

63. It was not in dispute between the parties that the liability to tax (if any) on cessation of approval was provided for by section 591C ICTA (set out more fully below) which provides in sub-section (3) that:

> "…..the person liable for the tax shall be the administrator of the scheme…."

64. Section 611AA set out above gave the meaning of "the administrator of the scheme".

65. s658A ICTA was introduced by FA 1998 but deemed always to have effect. It provided as follows:

> (1) Tax charged under Chapter I or IV of this Part on the administrator of a scheme –
>
> (a) shall be treated as charged on every relevant person and be assessable by the Board in the name of the administrator of the scheme, but

> (b) shall not be assessable on any relevant person who, at the time of the assessment, is no longer either the administrator of the scheme or included in the persons who are the administrator of the scheme.
>
> (2) For the purposes of subsection (1) above a person is a relevant person in relation to any charge to tax on the administrator of a scheme if he is a person who at the time when the charge is treated as arising or any subsequent time is, or is included in the persons who are, the administrator of the scheme.
>
> …..
>
> (4) In this section "administrator", in relation to a scheme, means the person who is –
>
> (a) the administrator of the scheme within the meaning given by section 611AA; or
>
> (b) the scheme administrator, as defined in section 630.
>
> (5) …."

Is an assessment essential?

66. The Appellant's submission is that the effect of s658(1)(a) is that it imposes a liability which is contingent upon a subsequent assessment. To put it another way, "shall be treated as charged on every relevant person" imposes the liability but "and be assessable by the board" means it is contingent on an assessment being raised by the board on that particular relevant person. Mr Sykes says chargeability and assessment must both occur before there is enforceable liability to pay the tax. His case is that the Appellant may be chargeable (or charged) but it has not been assessed (ignoring the 2007 assessment for the time being). He cites Lord Dunedin in *Whitney v IRC* 10 TC 88 at 110:

> "…there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

67. The Appellant says that the words "in the name of the administrator of the scheme" supports this analysis as it is emphasising each relevant person must be assessed but assessed in their capacity as administrator of the scheme.

68. HMRC's point is that *Whitney* has to be seen in its context and its context was not a trust situation. HMRC agrees that there must be an assessment: but *Whitney* does not require that every assessment must be in the name of the person liable to pay it. Both parties therefore agree, as we do, that there must be an assessment but they disagree whether it must be in the name of the current administrator of the scheme to be enforceable against it.

No joint and several liability?

69. The Appellant says that if an assessment raised on one person is intended to be enforced against another person, then there would be an express provision to make that person jointly and severally liable with the person assessed. Yet, says the Appellant, there is no mechanism to make it jointly and severally liable with a relevant person who has been assessed to the tax.

70. The provision must be express, says the Appellant, as it is with trustees under s9 and s29 TMA. S8A(5) TMA provides:

> "The following references, namely –
>
> (a) references in section 9 or 28C of this Act to a person to whom a notice has been given under this section being chargeable to tax; and
>
> (b) references in section 29 of this Act to such a person being assessable to tax,
>
> shall be construed as references to the relevant trustees of the settlement being so chargeable or, as the case may be, being so assessed."

71. This section, when combined with the meaning of relevant trustees in s118 as encompassing all future trustees, provides the mechanism by which future trustees are fixed with liability under a self-assessment made by, or HMRC assessment on, a previous trustee, without need for a further assessment. There is no equivalent, says Mr Sykes, in relation to s658A. An assessment under s 658A has to be made by HMRC under that section: it is not a self-assessable tax as s9(1A) excludes it from the self-assessment regime. Therefore the deeming provisions of s8A(5) do not apply.

72. While we accept that s8A(5) TMA does not apply to s591C ICTA, that does not mean that there is no mechanism to fix liability for an assessment against a previous administrator on the new administrator. That depends on how s658A ICTA itself should be read.

73. Section 658A clearly provides for joint and several liability for the *charge* to tax as it says "shall be treated as charged on every relevant person". Mr Sykes point is that this does not extend to *assessment*. Assessments, he says, have to be made individually.

74. Mr Sykes points out that if HMRC are right someone could become an administrator and unwittingly be made liable for the tax under an assessment issued in the name of an earlier administrator. However, we note that that is the inevitable consequence of s8A TMA and must be taken to be intended in the context of trustees in general. There is no reason to suppose it is not intended in the context of approved pension scheme trustees either. After all, theoretically, the new administrator receives the trust assets out of which to meet the liability and any new administrator should investigate the trust's liabilities before agreeing to become the administrator.

75. Mr Sykes also says that Parliament would have intended the time limits to apply. By allowing a single assessment to cover all current and future relevant persons,

theoretically there is no time limit: a new administrator appointed 10 years after the original assessment could find itself fixed with liability. Mr Sykes is correct: s 37(2)(a) Limitation Act 1980 means that the enforcement of an assessment, as a debt due to the Crown, has no time limit. However, this is clearly intended in relation to all other assessments and we do not think that it can be assumed that Parliament did not intend the outcome postulated by Mr Sykes. We also agree with Mr Nawbatt's point that if HMRC intended that there had to be new assessments every time there was a new trustee, surely the section would extend the time limits. It does not.

76. A further point made by Mr Nawbatt was that section 658A(5) ICTA specifically provided that it was without prejudice to s591D(4) which exempts approved independent trustees from tax under s591C. Mr Nawbatt says that the clear inference is that without s 658A(5), approved independent trustees would have joint and several liability under s 658A for the tax liability on relevant persons in a situation where this was clearly not intended by Parliament. Yet if Mr Sykes were right s 591D(4) need only provide that they could not be assessed. We do not think much can be read into this either way.

Construction of s658A(1)(a)

77. It is the Appellant's contention that the assessment must be against each and every relevant person. But if that is what Parliament had intended, we think it is more likely s658A(1)(a) would have read something like "shall be chargeable and assessable on every relevant person". But that is not what it says. It makes a clear distinction between the persons who are chargeable and the person who is assessable as it says "treated as charged on every relevant person" but "assessable…in the name of the administrator".

78. Section 658A(1) says every relevant person is "treated as charged". This envisages a single charge and assessment and is merely deeming the charge to arise on additional persons (ie later administrators). It is not requiring HMRC to fix them with liability by raising a further assessment.

79. Then there is a clear distinction in that "*every*" relevant person is chargeable but the "every" is not repeated in respect of the administrator to be assessed. This suggests multiple (deemed) chargeability but singular assessment.

80. Further, chargeability is "on" the relevant person but the assessment is "in the name of" the administrator. Again linguistically this suggests that the assessment is not necessarily in the name of the person who is chargeable.

Meaning of "in the name of"

81. This is not how the Appellant reads "in the name of". Mr Sykes says the purpose of the phrase "in the name of" was to convey that the assessment of the relevant person's chargeability was in their capacity as administrator. Mr Sykes points as an example to s767A ICTA where a person other than the company originally assessed can be assessed to that company's tax "in the name of the taxpayer company". There are other examples of this use of "in the name of" in the Taxation of Chargeable Gains Act 1992 ("TCGA"). So, says Mr Sykes, "in the name of" merely indicates the

capacity in which they are assessed. It does not mean only a single assessment is required.

82. The clear statutory scheme under s8A(5) TMA is that there needs to be only one assessment to cover successor trustees. But 767A ICTA provides that where liability is being fixed, not on a successor trustee, but a third party, there must be a new assessment and the use of the phrase "in the name of" is making the point that the third party is being fixed with liability of the company. Section 658A(3) ICTA also expressly provides for a new assessment to be made where the liability falls on someone who is not the administrator.

83. Our view is that in s767A(1) ICTA the phrase "in the name of" does not imply that a new assessment must be raised. On the contrary that is expressly provided for elsewhere in that sub-section. The use of "in the name of" is simply to indicate that a third party is being fixed with some other person's tax liability.

84. We were also referred to s 151 Finance Act 1989 which provides that tax may be "assessed and charged on and in the name of any one or more of the relevant trustees". Relevant trustees are those who were trustees at the time of the charge to tax or at any subsequent time. Mr Nawbatt's interpretation of this was that Parliament here provided for liability to pay an assessment to pass to new trustees without the need for a new assessment to be made. Mr Sykes' interpretation was the opposite: that Parliament intended a new assessment to be raised on a trustee if that trustee was to be liable to pay it.

85. We note that s151 actually pre-dates s8A(5) TMA which was inserted by the Finance Act 1996. However, it seems likely s8A(5) was intended to be consistent with s151(else why not repeal s 151?) so HMRC's interpretation of s151 is the correct one.

86. Mr Nawbatt also referred us to s69(1) TCGA. This treats successive trustees as one and the same with the implication being that an assessment of one is an assessment of all. Mr Sykes accepts that this provision operates in this manner. Further, s 69(4) TMA allows HMRC to assess a third party in particular circumstances with the liability of the trustees. We think these provisions are consistent with a general policy in the Taxes Acts that one assessment covers all current and future trustees, but for liability to be enforced against a third party there must be a new assessment on that third party.

87. The use of the words "in the name of" in s658A is in a different context to s 767A and s151 FA: their use in s 658A cannot be to indicate that another person is being charged to the another person's liability as the words "treated as charged on every relevant person" has already given them liability. The words "in the name of" in the context of s658A must relate solely to the question of assessment and in our view imply that that a single assessment is sufficient to assess other relevant persons.

88. Such an interpretation is consistent with the scheme elsewhere in the Taxes Acts mentioned above, that a new assessment is not called for when a new trustee is

appointed. It is only when the liability of the administrator falls on to someone who is not an administrator, such as the company or fund members, that the Taxes Act provide that a new assessment must be made.

89. Further, if the Appellant's interpretation was right, then s658A(1) is more likely to have read "shall be assessable on every relevant person" and the words "in the name of the administrator" would be otiose. They are not interchangeable phrases.

Conclusion

90. Our conclusion is that although the statutory scheme is rather different to that in s8A(5), joint and several liability is the effect of s 658A(1)(a). This is the effect of the words "in the name of the administrator": it is providing that, rather than one assessment being deemed to be in the name of all as in s8A, for s658A the assessment of the tax chargeable on all relevant persons only needs only to be in the name of the current administrator.

91. Unlike Mr Sykes, we do not think that there was a deliberate omission of joint and several liability provisions from s 658A. On the contrary we think the draftsman thought that joint and several liability was provided for within s 658A.

Statutory construction of s 658A (1)(b)

92. Mr Sykes' case is also that the clear inference from s658(1)(b) ICTA is that each relevant person must be assessed. Firstly, he says it implies that the assessment falls on a relevant person because it says "shall not be assessable on any relevant person". Secondly, it is because the purpose of s658(1)(b) is to protect from liability to pay the tax a relevant person who was a relevant person at the time the charge to tax arose but was not a relevant person at the time of the assessment. If only one assessment against the current administrator were needed to fix liability to pay on all relevant persons it ought to have said something like "shall not be chargeable" on the retired relevant person. However it actually says "shall not be assessable" clearly implying an assessment on that relevant person would have been necessary to fix them with liability to pay.

93. Whereas, says Mr Sykes, if HMRC are right and only one assessment is required, although a retired relevant person can not be *assessed*, they are still *chargeable* so S658A fails in its object to protect retired relevant persons.

94. We think there is another way of reading this. *If* HMRC are right and there needs to be only one assessment, it must be on the administrator of the scheme: s658A(1)(b) is therefore simply making clear that it must be on the administrator of the scheme at the time of the assessment. The administrator of the scheme at the time the charge arose is *not* the person who can be assessed if they have ceased to be administrator at the time of the assessment. But Mr Sykes point is, that if this is the correct reading, how does it protect retired administrators? The answer is that the protection is in s 658A(2): they are protected only if they were the administrator *before* "the time when the charge is treated as arising" because they are then not a "relevant person". We consider this in more detail.

Construction of s 658A(2)

95. Mr Nawbatt says that Mr Sykes' interpretation makes s658A(2) otiose because his interpretation of s658A(1)(a) and (b) is that current and future administrators must be individually assessed. So what does s658A(2) achieve? If every reference to "relevant person" was exchanged for "administrator" in s658A(1), s 658(2) would on the appellant's reading be unnecessary. On the contrary, says Mr Nawbatt, Mr Sykes' reading is wrong and the purpose of s658A(2) is to avoid fixing a retired administrator with liability under the assessment because the *single* assessment applies to all administrators.

96. We agree with Mr Nawbatt that the appellant's reading of s 658A(1) and (2) does not make sense. The section is overly complex to achieve what the appellant contends, and s658(2) would be otiose if the assessments had to be individual.

97. HMRC's seems to be a more sensible reading of 658A(1)(b) and 658(2) as it means all administrators from the moment the deemed charge arises onwards are liable, as the charge arises during their control of the funds, although the assessment must be in the name of the administrator at the time of the assessment. The Appellant's reading would not only make 658(2) otiose because no administrator at a time before the assessment could be liable, but would exempt from liability the administrator who allowed the event which gave rise to the charge if subsequently he retired.

98. Mr Sykes' reply to this is that why would Parliament intend the retired administrator to have liability as control of the assets in the Scheme would have passed to the new administrator. We cannot agree. It seems logical that Parliament would not intend an administrator to have liability for the tax if it was an administrator before the events which gave rise to the charge took place (and s658(2) is apt to provide this.) We see no reason why Parliament would choose to exempt an administrator who was administrator at the time of the events giving rise to the charge just because the assets may have passed to a new trustee particularly when the more likely scenario is that the assets will have left the scheme altogether. We will not give a strained interpretation to s658A to arrive at such an unlikely result.

Parliament's intent

99. Mr Nawbutt's view is that we do not have to look at Parliament's intent: the statutory language is clear. We agree, for the reasons given above, that HMRC's interpretation is linguistically most straightforward and that only a single assessment is required on the administrator at the time of the assessment and that is sufficient to fix with liability all administrators at the time the charge is deemed to arise and at any time since that date.

100.But if there were any ambiguity in the meaning of s658A HMRC, we would resolve the point in HMRC's favour based on Parliament's likely intent. Because if the Appellant was right, a pension fund could endlessly avoid paying an assessment by appointing new administrators each of whom would have to be assessed. Ultimately HMRC would be out of time to assess and the final administrator would be scot free. This cannot have been intended by Parliament.

Out of time to assess

101.Mr Sykes points out that the previous administrators would still be liable under the assessments raised against them: HMRC do not have to follow the scheme assets. While it is clear the intent of Parliament that relevant persons other than those that retired before the charge remain liable, we are not at all persuaded that Parliament did not also intend liability to follow the scheme assets. Otherwise trustees with no assets could be assessed while the current trustee with the assets (if any) could be out of time to be assessed. This simply cannot have been intended. Mr Sykes disputes this on the basis that any existing relevant person who has been assessed would be foolish to transfer the assets to a new administrator without an indemnity: but that is not necessarily the case if the assessed person has no assets or is not in the UK. Our conclusion is that Parliament is much more likely to have intended that past and present administrators could be jointly and severally fixed with liability for the tax.

Imposition of liability on employer

102.Even more to the point, Mr Sykes' interpretation would seem to render s 606 otiose in respect of such assessments. This section provides that in certain circumstances, including where the administrator is in default, the employer becomes liable for the tax for which the administrator is liable:

> "606 (1) This section applies in relation to a retirement benefits scheme if at any time –
>
> (a) …
>
> (b) …
>
> (c) the person who is, or all of the persons who are, the administrator of the scheme is or are in default for the purposes of this section.
>
> (2) If the scheme is a trust scheme, then –
>
> (a) …
>
> (b) if…subsection … (c) above applies and at the time in question the condition mentioned in subsection (3) below is not fulfilled, the employer shall at that time be so responsible and liable.
>
> (3) The condition is that there is at least one trustee of the scheme who –
>
> (a) can be traced,
>
> (b) is resident in the United Kingdom, and
>
> (c) is not in default for the purposes of this section.
>
> ……
>
> (11) A person is in default for the purposes of this section if –
>
> (a) ….
>
> (b) he has failed to pay any tax due from him by virtue of this Chapter [which includes s 591C] …
>
> and … the Board consider the failure to be of a serious nature."

In other words, the statutory scheme is that the administrator is liable for the tax but if the administrator does not pay it, the employer who sponsored the Scheme becomes liable. But if the administrator is not "in default" the employer has no liability. So, say HMRC, it cannot have been intended that there could be a tax liability arising on a scheme but at the same time the current administrator would be out of time to be assessed for it because then that administrator could not be "in default" and s606 could not be used.

103.In his further submissions after the hearing, Mr Sykes' said he thought that his interpretation did not make s606 otiose. The administrator *at the time of the charge* could be assessed, even if there was later a new administrator who was out of time to be assessed. This original (but now retired administrator) would have been "in default" if it did not pay the assessment so the employer would become liable under s606.

104.However we do not consider that this is an answer. Section 606(2)(b) refers to the employer being liable only "at that time" referring to the time when the administrator is in default. Our interpretation is that as soon as a new administrator, who was not in default, was appointed the employer's liability would cease. This is because "at that time" the original administrator is a relevant person for s658A but is no longer the administrator so their default becomes immaterial. Nor is it clear the original administrator would have been "in default" if the assessment was under appeal, as in this case.

105.In conclusion, we find Mr Sykes' interpretation of s 658A would make it impossible for HMRC to assess the liability arising under s 591C if new administrators were appointed to the fund after the time limits for assessment expired and that would also mean that the liability could not be passed to the sponsoring company under s606. Such an interpretation cannot have been intended by Parliament.

Trusts have no independent legal existence

106.HMRC's interpretation on the other hand is that s658A ICTA is intended to recognise and deal with the difficulty that a trust does not have a legal existence independent of its trustees. The trust itself (unlike a company) cannot be assessed. Only its trustees can be assessed. Yet trustees can change. The purpose of s658A is to do what cannot be done: to assess the trust. It achieves this by an assessment on the administrator at the time of the assessment, providing that future administrators assume responsibility for that assessment, and that administrators prior to the events giving rise to the charge are never liable.

107.We agree with Mr Nawbatt that it is the scheme of the legislation that on becoming administrator the new administrator becomes responsible for the scheme's affairs and liable to discharge its accumulated liabilities. It was not intended by Parliament that changing administrator would relieve the fund of liability to pay an assessment to tax under s 658A.

Decision

108.Our conclusion is that there is nothing in the self-assessment provisions or s7(9) of TMA that does or could override the obvious inference from s 658A ICTA that current and future administrators are jointly and severally liable for the tax assessable under that section.

109.In our view the Appellant, as a relevant person “at a time subsequent” to the time at which the charge arose, is liable to the charge to tax under s658A(2). HMRC cannot enforce this liability without an assessment but an assessment “in the name of the administrator of the scheme” at the time of the assessment is a valid assessment. There is no need for the assessment to be in the name of the Appellant.

110.The assessment was raised in the name of the administrator of the Scheme on 27 July 2000 against Louvre Trustees Limited. The Appellant can appeal this under s31 TMA because it is a person affected by it. It is indeed liable to pay it (should it otherwise be valid). It makes no difference that the Appellant was not in existence at the date the assessment was issued.

The wrong year issue

111.Both assessments, irrespective of the issue of whether the first was in the name of the right person or whether the second was out of time, were, say the Appellant, in respect of the wrong year. Both were in respect of the tax year to 5 April 2001: in the Appellant’s opinion they should have been in respect of the tax year to 5 April 1997 which was the tax year in which (retrospectively) the scheme lost its approval.

An assessment must be for the right year

112.Clearly the date of an assessment is the date the assessment is raised and may be completely different to the year of assessment. The question is what is a “year of assessment”? There was no statutory definition at the time. Why does it matter? The Court of Appeal, in a decision binding on us, have ruled in *Baylis v Gregory* [1987] STC 297 per Slade LJ that HMRC must specify the year of assessment on an assessment and they must get it right:

> [324d-e] “To sum up, however, in my judgment, neither s 114 nor any other statutory provision provides an escape route for the Revenue if they issue an assessment for the wrong fiscal year. This is something they must get right.
>
> For all these reasons, I think that the assessment made against the trustees cannot be treated as an assessment for the year 1975-76. It is common ground that, if it is to be regarded as an assessment for 1974-75, it can give rise to no legal liability on the part of the trustees.”

113.The reason for Slade LJ’s decision was that s 113(3) TMA requires an assessment to be in the form prescribed by HMRC and HMRC prescribes that the year of assessment be on the notice of assessment. Slade LJ went on to say that s 114 TMA could not correct an assessment which had the wrong year of assessment on its face.

114.HMRC do not dispute that an assessment must specify the correct year of assessment.

115.The year of assessment is also important because it is from then that time limits start to run and because it is from then that interest starts to run.

What is the right year of assessment?

116.It was not in dispute between the parties that the liability to tax (if any) on cessation of approval was provided for by section 591C ICTA which reads as follows:

> "(1) Where an approval of a scheme to which this section applies ceases to have effect……, tax shall be charged in accordance with this section.
>
> (2) The tax shall be charged under Case VI of Schedule D at the rate of 40 per cent on an amount equal to the value of the assets which immediately before the date of the cessation of the approval of the scheme are held for the purposes of the scheme (taking that value as it stands immediately before that date).
>
> (3) Subject to section 591D(4), the person liable for the tax shall be the administrator of the scheme….

117.Section 591D contains supplementary provisions and sub-paragraph (7) provides the definition of 'ceasing to have effect':

> "(7) The reference in section 591C(1) to an approval of a scheme ceasing to have effect is a reference to –
>
> (a) the scheme ceasing to be an approved scheme by virtue of section 591(A(2);
>
> (b) the approval of the scheme being withdrawn under section 591B(1); or
>
> (c) the approval of the scheme no longer applying by virtue of section 591B(2);
>
> and any reference in section 591C to the date of the cessation of the approval of the scheme shall be construed accordingly."

Meaning of "where"

118.Mr Sykes says that the "where" used at the start of s591C(1) refers to "whenever" and he cites Harman LJ in *Davies v Davies, Jenkins & Co Ltd* 44 TC 273 at 283H. In that case Harman LJ was construing a section which read:

> "….<u>where</u> [an English trading concern] <u>has a deficit</u> for tax purposes during any accounting period of [that concern] and <u>receives</u> a subvention payment in respect of that period from an associated company [trading in England] having a surplus for tax purposes in the corresponding period, then in computing for the purposes of income tax the profits or gains or losses of those companies the payment shall be treated as trading receipt receivable by the one company on the last

> day of the accounting period during which it has that deficit, ….”(our emphasis)

119.The argument in that case was that the company was not entitled to the relief provided for because it did not receive the subvention payment until after the period in which the deficit occurred. The Court of Appeal decided that the section only required the deficit, not the receipt of the subvention payment, to arise in the accounting period:

> “(page 283H)…I think that ‘receives’ there means nothing in respect of time: it is not the present tense in the temporal sense at all. You might as well say ‘it has received’ or you might easily say ‘it shall receive’. It is ‘*whenever* it receives’ – ‘where’ means ‘whenever’; and where a company has plied its trade in England and has made its deficit during a given accounting period [it is entitled to the relief]”

120.Mr Sykes says that s 591C(1) ICTA gave “where” the meaning of “whenever”. He says that in this case the ‘whenever’ is 5 November 1996 because that is the date the approval was deemed to cease to have effect. Therefore, it is the Appellant’s case that the correct year of assessment was 1996/1997.

121.We cannot agree. In *Davies v Davies, Jenkins & Co Ltd*, Harman did not use the “whenever” meaning to indicate a particular date, rather the opposite. He employed it more with the meaning “at any time”. “Whenever” or “if at any time” could be used in substitution for “where” in that part of s 591C without changing its meaning, but “where” could not be read as “on the date that approval is deemed to be withdrawn” without changing its meaning. If Parliament had meant “where” to be read as “on the date on which approval was deemed to be withdrawn tax shall be deemed to be chargeable….” it could have said as much. It did not.

122.As we have said, the “where” in s 591C(1), is used in the sense of “whenever” and it is not used in the sense of intending to convey a specific date. Harman LJ used the “whenever” in the sense of a continuing present tense or as in “if at any time”. On the other hand, s 591C(2) is clearly about a specific date: it is clearly intended to mean that the tax charge is on the value of the assets immediately before the deemed date of loss of approval. So there is no reason to suppose that the drafter of s591C(1) necessarily meant the same date in the two subsections.

Meaning of “construed accordingly”

123.In support of its case that the year of assessment was 1996/97, however, the Appellant says it is clear that the charge to tax is intended to arise on the value of the assets the day before the event which causes the cessation (in this case 4 November) Otherwise charging tax would be pointless as the most likely event is the transfer of assets out of the fund. So the “date of the cessation of the approval” is clearly the date of the event which causes the cessation (ie 5 November 1996 in this case).

124.Building on this, it is the Appellant’s case that therefore it would be very odd if for s 591C(2) “the date of cessation of the approval” meant a different date to the one meant by the phrase “where an approval of a scheme…ceases to have effect” under s 591C(1). Both must mean 5 November 1996 says the Appellant. In any event, says

Mr Sykes, this is explicitly the case because s591D(7) says so because it says "any reference in section 591C to the date of the cessation of the approval of the scheme shall be construed accordingly." . Mr Sykes' case is that a reference to an approval of a scheme ceasing to have effect is the same as the approval of the scheme being withdrawn and the same as the date of cessation of approval of the scheme.

125.Succinctly the Appellant's case is that the liability to tax arose in 96/97 and because the assessment is for 00/01 it is for the wrong year; but if they are wrong on this and the assessment is for the right year, it is necessarily in the wrong amount. It should be nil as there were no assets in the fund on 18 April 2000.

126.HMRC's case is that the date of the tax liability is distinct from the date on which withdrawal of approval was deemed to take effect and they believe this interpretation is consistent with what Sir Edward Evans-Lombe said in *Thorpe* [2008] STC (Ch D) 2107. The Judge was clearly aware that the assessment in that case was raised in respect of the year in which the notice was given and did not suggest that it was thereby invalid. Similarly, Lloyd LJ was aware of the date of the years of assessment in the Court of Appeal hearing in the same case: see *Thorpe* [2010] STC 964 at page 968 paragraph 16. However, Mr Nawbatt accepts (rightly) Mr Sykes' point that the High Court and Court of Appeal were not asked to rule on this point and did not expressly consider it: their decisions are therefore not authoritative on this point.

Our conclusion

127.There is a clear distinction in section 591B(1) ICTA and the following sections, to the date on which notice of withdrawal of approval is actually given and the date from which the withdrawal of approval is effective.

128.Which date is intended by the phrase in the charging section 591C(1) "where an approval of a Scheme…ceases to have effect"? The answer appears to be in s 591D(7) which states that the reference in s591C(1) to an approval of a scheme ceasing to have effect is (in so far as s591B withdrawals are concerned) "the approval of the scheme being withdrawn under section 591B(1)".

129.The Appellant's view is that this has to be interpreted as being the date from which the withdrawal was effective because the last part of 591D(7) says a reference to the date of the cessation of the approval "shall be construed accordingly". So Mr Sykes' view is that "construed accordingly" means the date on which an approval "ceases to have effect" must be the same date on which approval is withdrawn. And he further reasons that this must be the deemed date of withdrawal because otherwise s 591C(2) makes no sense (and if he is wrong, then there is nothing to tax).

130.But this depends what is meant by "construed accordingly" in s 591D(7). Does it mean that the one date must be construed to be the same as the other date or does it simply mean that the date of cessation of approval must be construed according to the section numbers referred to as set out in that sub-paragraph (see paragraph 117 above where the provision is set out in full.) In the case of a withdrawal of approval by HMRC, as in this case, this would mean that "the date of cessation of the approval" must be construed according to s591B(1). We consider the latter construction has to be right because the drafters would otherwise have simply said the date of ceasing to have effect was the same date as the date of cessation. Instead they used the words "construed accordingly" to deal with the fact that there were different methods under different sub-sections for losing approval.

131.S 591D(7) dealt with three different ways a scheme became unapproved and the dates for loss of approval were not the same in all three. In particular, cessations under S591A(2) and 591B(2) occurred automatically on a specified date or event and did not require the exercise of a discretionary power by HMRC. For s591D(7)(a) & (c) there was only one date: the date of cessation of approval. It makes no difference for these two sub-sections whether "construed accordingly" means the same date or in accordance with the specified section. They are the same.

132.But it makes a difference for s591D(7)(b) and discretionary withdrawal of approvals: because if "construed accordingly" means 'construed in accordance with s591B(1)', then it brings in the two dates mentioned in that section: the date on which notice of withdrawal is actually given and the date from which such withdrawal is effective. So in using "construed accordingly" the draftsman intended to recognise that at least for s591(B)(1) the date of cessation of approval was not necessarily the same as the date of cessation.

133. Consistent with our view the drafter must have meant separate dates, S 591C(1) goes on to provide that "tax shall be charged". It does not say "tax shall be deemed to have been charged". Tax is not retrospective without clear words and there is no suggestion here that the tax charge is imposed retrospectively. In 1998 and 1999 the trustees were not in fact liable to be assessed to this tax: the charge could not arise until HMRC took the decision to withdraw approval in 2000.

Time-limits

134.In support of this conclusion HMRC contended that it is the day on which HMRC notifies withdrawal of approval which is the relevant date for s 34 TMA (the six year time limit) which provided:

> "(1) …an assessment to income tax …may be made at any time not later than five years after the 31st January next following the year of assessment to which it relates."

135.HMRC says this shows that the Appellant's interpretation of the legislation is absurd because, if the year of assessment was the year of the deemed withdrawal of approval, it would be possible for the time limit for making an assessment to have expired before the tax liability arose. We note that this could only be the case where HMRC decided to withdraw approval more than 6 years after the event which gave rise to the loss of approval.

136.The Appellant says that Parliament cannot have intended the statute to be read the way HMRC contends (ie that the year of assessment is the year in which the cessation of approval is notified rather than the year to which it is backdated) because that would allow HMRC make an assessment under s 591C without any regard for time limits. They could go back indefinitely to withdraw approval.

interest

137.Liability to interest arises under s 86(1) TMA and runs from the relevant date and the relevant date runs from a date calculated by reference to the "year of assessment" (see s 59B TMA).

138.In its further submissions the Appellant raised the point that, in its opinion, if HMRC are right and the year of assessment is the year in which notice of withdrawal was actually given, interest on the tax assessed only runs from that year and not from the deemed date of the charge. HMRC agree with this: they consider interest would only run from the year in which approval was actually withdrawn.

Decision

139.We have concluded (see paragraph 133 above) that on a proper construction of s591C(1), where approval 'ceases to have effect' is a reference to a decision by HMRC at any time to remove approval, whereas the reference in (2) to the 'date of the cessation of the approval' refers to the actual date from which withdrawal of approval is deemed to be effective.

140.However, even if we had concluded that the meaning of "ceases to have effect" was ambiguous, on a purposive construction we would arrive at the same conclusion. It must have been intended that s591C(1) referred to the actual date and not the deemed date of withdrawal of approval so that the year of assessment would be that in which the actual date fell because otherwise, as HMRC said, they could be out of time to assess before the event (the decision to withdraw) had taken place. It also makes much more sense for interest to run the actual date of withdrawal because otherwise interest would be deemed to run during a time when the trustees did not actually have any tax liability. As for the Appellant's point that that allows HMRC to withdraw approval at any time then that appears to be right and, certainly, Schedule 36 paragraph 5 Finance Act 2004 appears to anticipate that HMRC's ability to withdraw approval is unrestricted in time. We would expect that were HMRC to fail to act on information they possessed for an unreasonable length of time, this might lead to judicial review.

141.In conclusion, we consider that s 591D(7)(b) refers to the time the withdrawal actually takes place being the time at which it is notified, which in this case was 19 April 2000. The "construed accordingly" is a reference, so far as (b) is concerned to 591B(1), which brings in, for the "date of cessation of the approval" the date of deemed cessation of approval. The "where" in s591C(1) refers to "whenever" notice to withdraw approval is given but the date of cessation of approval in s 591C(2) is the deemed date of cessation.

142.The assessments were therefore both for the correct year of assessment of 2000/01.

The out of time issue

143.As we have concluded that the 2000 assessment was in respect of the correct year of assessment and enforceable against the current administrator, the question of whether the 2007 assessment was out of time is irrelevant. Apart from with respect to s34 TMA, the issues outlined below were not argued before us and normally we would ask for further representations on the matter before reaching a concluded view. However, as we have already determined the appeal against the Appellant we did not seek to put either party to the additional expense of consideration of these issues, but record our views in case the matter goes higher.

144.At the time of both assessments, s34 TMA provided the time limit in which an assessment must be raised as follows:

> "(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 later than five years after the 31st January next following the year of assessment to which it relates."

145.The Appellant submitted that the 2007 assessment was out of time, which would be true if we had found the year of assessment to be 1996/97. However, we concluded for the reasons explained above that the year of assessment was 2000/2001. The 31st January next following the year of assessment was therefore 31 January 2002. Five years later was 31st January 2007 and so an assessment for 2000/01 should have been raised no later than 31 January 2007. The 2007 assessment was raised on 22 January 2007 and was therefore in time.

146.However, although this point was not raised at the hearing, at the date of the 2007 assessment, s591C(1), which was the section under which the assessment had been raised, had been repealed the previous April. Does this affect the validity of the assessment?

147.There are saving provisions in Schedule 36 paragraph 5 of the Finance Act 2004. These are lengthy and we do not set them out in full. In brief, paragraph 1 provides that various pension schemes, including a retirement benefits scheme, which was immediately before 6 April 2006 approved under ICTA would be deemed to be registered as a scheme under the new pensions legislation. This did not apply to the Scheme because its approval had ceased in 2000.

148.Paragraph 2 of the saving provisions imposes a 40% charge on an approved retirement benefits scheme that opts out of registration under the new provisions: but contains no provisions to deal with a retirement benefits scheme which had lost its approval prior to 6 April 2006. The other provisions similarly do not deal with a retirement benefits scheme which lost approval before 6 April 2006. Paragraph 5 allows a retrospective withdrawal of approval after 6 April 2006 as long as the deemed date of cessation of approval is before that date.

149.We find there is nothing in Schedule 36 of the Finance Act 2004 to preserve a power for HMRC to make an assessment under a provision that was repealed by that Act. However, the Interpretation Act 1978 provides:

> "16 General savings
> (1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—

> (a) …..
>
> (b) …..
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

150. We consider that an assessment must be a legal proceeding. Under s 16 a legal proceeding in respect of a liability incurred under ICTA can be instituted and enforced as if the Finance Act 2004 had not been passed. In our opinion this means that HMRC were able to validly assess the Appellant on 22 January 2007 despite the earlier repeal of the provisions under which the assessment is raised. If we had not already found that the 2000 assessment was valid and can be enforced against the Appellant, we would have found that the 2007 assessment was valid and could be enforced against the Appellant.

151. We dismiss the appeal for the reasons set out above.

Conclusions on lead issues

152. From the above, we summarise our conclusions on the issues for which this was a lead case:

(1) The relevant year of assessment of the charge arising under section 591C of the Income and Corporation Taxes Act 1988 was the year ending 5 April 2001;

(2)(i) The tax charged under s591C ICTA 1988 on the administrator of a scheme, and treated as charged on every relevant person under s658A ICTA 1988, can be recovered in full from any single relevant person (unless they ceased to be a relevant person before the events in question) on the basis that the assessment of only a single relevant person in the name of the administrator of the scheme establishes joint and several liability of all relevant persons.

2(ii) The liability which is joint and several extends to relevant persons not in existence at the time of the assessment.

153. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal

against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 28 October 2011