



TC05336

Appeal number: TC/2015/06444

*Unauthorised payment charge under Section 208 Finance Act 2004 –
refund of widows and orphans contributions – appellant liable – appeal
dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STEPHEN MICHAEL MCGREVEY

Appellant

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in public at Exeter on 9 June 2016

The Appellant appeared in person

**Mrs Linda Wheeler, Officer of HM Revenue and Customs, instructed by the
General Counsel and Solicitor to HM Revenue and Customs, for the
Respondents**

DECISION

Introduction

1. This case concerns a tax charge of £2,350.40 visited on the appellant under section 208 Finance Act 2004 being 40% of an unauthorised payment of £5,876 paid to the appellant on 22 February 2013 by the trustees of the Principal Civil Service Pension Scheme 1974 (the "Pension Scheme").

The evidence

2. I was provided with a bundle of documents containing all the relevant correspondence. The appellant gave evidence in person. He is hearing impaired. He gave his evidence, along with his submissions, in an honest and straightforward manner and I accept his oral evidence. His hearing impairment did not, in my view, prevent him from fully understanding the proceedings, nor the respondents case, nor my observations concerning the issues in this case.

Findings of fact

3. The appellant worked in the civil service. He retired and started to take his civil service pension on 31 January 1996.
4. He had contributed to the Pension Scheme, and one element of that contribution was a contribution towards widows and orphans of scheme members.
5. On 10 January 2013, the administrator of the Pension Scheme wrote to the appellant informing him that he was entitled to a refund of the widows and orphans contributions totalling £5,876.36.
6. That letter set out a choice of two options for payment of the refund. Option 1 stated as follows:

"Option 1

To avoid your refund being taxed as an unauthorised payment you may change your net refund into a continuing pension plus a lump sum. The lump sum shown below is the maximum amount of lump sum pension schemes may pay in this way.

If you choose this option your refund will be paid as follows:

- continuing commuted pension (after allowing for maximum lump sum) of £222.34 per year plus
- A lump sum (a maximum lump sum available) of £1482.25".

7. In other words Option 1 would avoid the refund being taxed as an unauthorised payment and would have enabled the appellant to have taken the refund as a continuing pension.

8. Option 2 offered to the appellant in that letter was:

"Option 2

This option allows you to take all of your refund as a lump sum. As an "unauthorised" payment under the new legislation, it may be liable for tax. The charge will be at least 40% of the lump sum and may be as high as 55%. You should contact your tax office for advice".

9. So it was made expressly clear to him that should the appellant take Option 2, he will be liable for an authorised payment charge.

10. The letter went on to say (in bold type) **"it is then your responsibility to tell Her Majesty's Revenue and Customs (HMRC) that you have received an unauthorised payment from the scheme"**.

11. The appellant elected for Option 2 (i.e. the lump sum) and on 22 February 2013 he received £5,876 as a lump sum.

12. The appellant did not include this payment in his 2012-2013 tax return. The respondents opened an in time enquiry into that return following which, on 4 December 2014, they issued a closure notice in the amount of £2,350.40. It is against the conclusion in that closure notice against which the appellant appeals.

The law

13. In light of the fact that he appellant accepts that the refund of the widows and orphans contributions is an unauthorised lump sum payment, I have included a summary of the relevant legislation, rather than setting it out in detail.

14. All references to section numbers below are to section numbers in the Finance Act 2004

(1) A charge to income tax, known as the unauthorised payment charge, arises where an unauthorised payment is made by a registered pension scheme (section 208(1)).

(2) The person liable to the charge in this case is the appellant (section 208(2)(a)).

(3) The rate of the charge is 40% of the unauthorised payment (section 208(5)).

(4) An unauthorised payment in the case of this appellant is one which is not authorised by section 164 (section 160(2)(a)).

- (5) A registered pension scheme is authorised to make a lump sum payment but only if it is within the list of permitted lump sum payments set out in section 166 (section 164(1)(b)).
- (6) The list of authorised lump sum payments which a registered pension scheme can pay to a member without attracting the unauthorised payment charge does not include a refund of widows and orphans contributions (section 166(1)).

Discussion

15. The appellant has accepted that the refund of the widows and orphans contributions is a lump sum, and he also accepts that it is not an authorised payment under section 166. I agree with this.
16. It is the appellant's case that he is not liable for the tax of £2,350.40 in respect of the unauthorised payment. The burden of proving this is on the appellant, and he must discharge that burden by establishing, on the balance of probabilities, that he is not liable for that tax.

The appellant's position

17. The appellant's position is that:
 - (1) The refund of the widows and orphans contribution should have been included in the list of authorised payments set out in section 166. This is what the Cabinet Office had asked the respondents to do, and something which the respondents have failed to do. Evidence of this was in a letter written to the appellant by the Pension Scheme administrator on 31 July 2006.
 - (2) Had the appellant retired at 60, no liability would have arisen. It has only done so because he retired on 31 January 1996.
 - (3) The refund of the widows and orphans contributions has been withheld for 17 years and should have been paid to him when he retired.
 - (4) Had he taken Option 1 it would have taken 20 years and 3 months for him to have received his refund in full, and he thought that he might not live that long.
 - (5) The respondents should use their discretion to waive his liability to the charge.
18. I deal with each of these below, but before doing so, I make three preliminary points:
 - (1) The appellant submitted that it is the role of Parliament to enact legislation, and for the Courts to interpret it. There is no role for the

respondents in interpreting laws. I disagree. The respondents are charged with collecting tax in accordance with the law, and to do that they must interpret the law. Should a taxpayer disagree with that interpretation, he or she has the right to appeal to this Tribunal. That is what the appellant has done in this case. He disagrees with the respondent's interpretation of the law.

- (2) I must apply the law as it has been enacted by Parliament, and interpret it in accordance with cases which are binding upon me. I have no discretion in this.
- (3) The respondents, too, have no discretion under the Finance Act 2004 as to whether they should apply the legislation set out in paragraph 14 above, and in particular whether they should visit an unauthorised payment charge on the appellant. However, they do have a broad general discretion under Section 1 of the Taxes Management Act 1970 ("TMA"). By virtue of Section 51(3) of the Commissioners for Revenue and Customs Act 2005, the respondents responsibility for the collection and management of income tax is defined as having the same meaning as their previous statutory responsibility for "care and management of revenue". As Lord Diplock said in *IRC v National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617 at 636, Section 1 TMA gives HMRC "a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection". In my view it might be open to the respondents under these discretionary powers to relieve the appellant from the unauthorised payment charge on the grounds that given the circumstances of his retirement and subsequent payment (see paragraphs 17(2) and (4) above) it would be unfair to visit the unauthorised payment charge on him.
- (4) But it is clear that the exercise of this discretion is not a matter which falls within my jurisdiction. As was held by the Upper Tribunal in *HMRC v Hok Limited* [2012] UKUT 363, the First Tier Tribunal is a creature of statute and can only exercise such jurisdiction as Parliament has chosen to confer on it. The jurisdiction imposed on me in respect of this appeal is to determine whether an unauthorised payment charge should be visited on the appellant. I have no jurisdiction to go any further, and, for example, to direct that the respondents exercise their care and management function to relieve the appellant of his liability. Such care and management function is a matter for HMRC. Whilst the exercise of any such discretion is subject to oversight by the courts, that must be by way of an application for judicial review, which should be brought either before the Upper Tribunal or the Administrative Court. But not before me. I have no supervisory jurisdiction to review whether it was appropriate for the respondents to consider or exercise any discretion in this case.

19. With these in mind, I now turn to the appellant's submissions:

- (1) The refund of the widows and orphans contributions is not an authorised payment under section 166. The appellant accepts this. In these circumstances, the respondents must visit an unauthorised payment charge under section 208 on the appellant. This is the case whether or not the appellant is correct in surmising that Parliament has got the law wrong. The respondents, and myself, must apply the law as it stands, not what it might be. I have no power to substantively amend primary legislation which is in effect what the appellant asking me to do. I can interpret primary legislation, but not create it.
- (2) The appellant has not established that the Parliament intended to include the refund of widows and orphans contributions within the list of authorised payments in section 166. The basis of the appellant's submission is a letter dated 31 July 2006 from Capita Hartshead, the administrator of the Pension Scheme to the appellant.
- (3) In that letter, Capita Hartshead say as follows:

"I refer to your recent enquiry following the mailing regarding changes to the way refunds of widower's pension contributions are to be paid.

Please note that the purpose of this exercise was simply to advise you, on behalf of the scheme managers, the Cabinet Office of the impact of recent tax changes and to establish your continued eligibility for payment... [emphasis added].

These changes have been imposed upon the scheme as a result of new legislation from Her Majesty's Revenue and Customs (HMRC). HMRC have produced a definitive list of "authorised" payment types that are allowable under new regulations. Unfortunately the new tax laws do not allow for lump sums to be paid at any time other than within 3 months of when a pension commenced. If not paid within this timescale, these lump sums become "unauthorised" payments and are subject to an increased tax charge of 40%. Despite representations from the Cabinet Office over the impact this will have on members already receiving a pension who will qualify for a refund at a future date, HMRC have confirmed this is the correct interpretation of the legislation which can be found in the Finance Act 2004".

- (4) It is the appellant's submission that this is evidence that HMRC have incorrectly legislated that refunds of widows and orphans contributions are unauthorised payments, when the Cabinet Office has told HMRC that they should be treated as authorised payments.

- (5) Unfortunately for the appellant, I cannot agree with his submission. Whether or not the Cabinet Office can or should influence legislation which has been enacted by Parliament, is something I seriously doubt. But in any case, I do not read this letter as suggesting, as the appellant contends, that the Cabinet Office have recommended that the law should be one thing, yet HMRC have legislated in a contradictory fashion. I read the letter as simply informing the appellant of the changes to the Pension Scheme as far as they affect refunds of widowers pension contributions. The administrator of the pension scheme, Capita Hartshead, makes it clear that they are writing on behalf of the Cabinet Office in the latter's capacity as scheme manager, and no more. The Cabinet Office, in its capacity as scheme manager, seems to have made representations about the impact that the new tax laws would have on refunds of widowers pension contributions paid as a lump sum. And HMRC has confirmed that those tax laws do impose an unauthorised payment charge on such payments and this reflects the legislation. This letter does not suggest that Parliament has somehow introduced "wrong" legislation.
- (6) The appellant is a victim of timing. When he retired on 31 January 1996, he was not entitled to a refund of the widows and orphans contributions which only arose when he reached the age of 60. The tax charge for an unauthorised payment is visited on someone who receives the widows and orphans contributions more than 3 months after their pension commences; so it would have been impossible for the appellant to have avoided the unauthorised payment charge given that he retired in 1996, but did not become entitled to the refund until 2013. But I have no jurisdiction to relieve the appellant from the unauthorised payment charge on this basis. As I say, I have to apply the law as it stands, and that means that, notwithstanding any perceived injustice in its application, the appellant has received the refund more than 3 months after he took his pension and thus is liable to the unauthorised payment charge.
- (7) The appellant submits that the payment has been withheld for 17 years and should have been paid when he retired. As the respondents have pointed out, this is impossible under the rules of a Pension Scheme. The trustees had no power to make the refund to the appellant in 1996.
- (8) The appellant was offered two alternative ways in which he could receive the refund. That was made very clear to him by the scheme administrator in its letter of 10 January 2013. Option 1 would avoid the refund being taxed as an unauthorised payment. Option 2 would bring with it a charge to tax since the refund would be treated as an unauthorised payment. The appellant had read this letter and chosen Option 2. I find it difficult, therefore, to be sympathetic to his complaint that he should not suffer the consequences of that choice. The appellant had clearly taken into account that the tax benefits of Option 1 bring with it a cashflow disadvantage. Having then come to a conscious decision to take Option 2, he must suffer the tax consequences of that decision.

- (9) The appellant thinks HMRC should exercise their discretion to waive the charge. I have dealt with this at paragraphs 18(3) and (4) above. I have no jurisdiction to consider the exercise of any such discretion. As far as the law stands, HMRC have, in my view correctly, assessed the appellant to the unauthorised payment charge.
20. A refund of widows and orphans contributions, paid as a lump sum to the appellant, attracts an unauthorised payment charge under section 208 FA 1994, to which a tax charge of 40% attaches.
21. The respondents have correctly interpreted the law and the tax assessed on the appellant has been correctly computed.
22. The appellant has failed to establish, on the balance of probabilities, that the respondents have wrongly assessed him.

Decision

23. Accordingly my decision is that this appeal must be dismissed.

Appeal rights

24. 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.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

RELEASE DATE: 22 AUGUST 2016