TC06408

Appeal number: TC/2017/04460

INCOME TAX – registered pension schemes – payment to member following transfer of funds consisting of rebate of commission from introducer – whether unauthorised member payment – whether assessment valid: no, s 29 TMA 1970 cannot apply – if valid, discovery would have been "stale" following* HMRC v Tooth *(Upper Tribunal) - observations on whether case governed by* Danvers, *failure to notify penalties and interest – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW MONAGHAN	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondent**

TRIBUNAL: JUDGE RICHARD THOMAS
MOHAMMED FAROOQ

Sitting in public at City Exchange, Leeds on 12 February 2018

Mrs Susan Monaghan for the Appellant

Mr Daniel Baird, Solicitor's Office and Legal Services HMRC, for the Respondent

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DECISION

1. This was an appeal by Mr Andrew Monaghan ("the appellant") against an assessment for the tax year 2012-13 made on or about 3 February 2017 by an officer of the respondent ("HMRC"). The assessment was said to be made under s 29 Taxes Management Act 1970 ("TMA") and charged tax of £4,514.46 on what was said to be an unauthorised payment said to have been received by the appellant from a pension scheme of which he was a member

The facts

2. We had a bundle of papers prepared by HMRC and a witness statement made by Mr Mark Davies, an officer of HMRC who had been in charge of an investigation into the pension scheme to which the appellant had transferred his pension fund. Mr Davies gave oral evidence on which we questioned him.

3. The appellant also gave evidence.

4. From the documents in the bundle and from the evidence we heard we find the following facts.

The appellant's pension fund

5. The appellant began to contribute to a company personal pension scheme on 6 May 1999 operated by the Prudential Assurance Co Ltd. As at 28 November 2012 the value of the appellant's rights in the scheme was £24,951.77.

6. On that day the appellant transferred his rights to a pension scheme, the EP1 Retirement Plan, whose trustee was Fast Pensions Ltd and the administrators AC Management and Administration Ltd ("ACMAL"). The value of the opening fund in that scheme was £23,451.77 reflecting a "member initial pension scheme fee" of £1,500.

7. Under the terms of the EP1 plan the trustees were to invest "with a view to" a minimum return of 5% net of charges over a 6 year period in underlying assets with a 6 year return.

8. Because of, it was said, the underlying structure of the assets there was an early redemption penalty of 42% of capital in the first year, reducing by 7% each year.

9. The annual administration fee was nil.

10. A "Financial summary" of the Fund put in by the appellant showed as at 7 August 2013 that the gross transfers in from members was £2,797,705.52 and that the funds had been invested in 10 companies all of which appeared to be unquoted. Liquid assets were £5,813.80 cash at bank. The net return for members "to date" was £73,364.50 all of which was received from the 10 companies. No indication was given about the start date for the statement.

11. A statement given to the appellant by Fast Pensions showed the value of his fund at 30 April 2014 was £24,912.21 and at 28 February 2017 it was £26,929. No contributions had been made to the fund in these periods.

12. On 12 December 2012 the appellant had received in his bank account a payment of £2,345 from a company Signpost 4 Ltd. This was 10% of the net value of the fund transferred, ie after the £1,500 "transfer" fee.

13. This company had no ownership or control connection with Fast Pensions.

The HMRC investigation

14. Mr Davies began an investigation into funds administered by ACMAL in November 2012, including the EP1 scheme.

15. In 2014 Fast Pensions provided information about the members of its schemes showing the value of the funds transferred and details of the members' addresses and National Insurance numbers and tax references. The appellant was identified from these schedules as having transferred his pension fund to the EP1 plan.

16. Fast Pension also provided to Mr Davies a schedule of the main organisations who had introduced new members for the scheme, the total of such introducers said by Fast Pensions to number over 200. He exhibited a redacted copy of this schedule showing the name "Sign Post". He had no evidence of an ownership or control connection between companies with the name Signpost on the one hand and Fast Pensions or ACMAL ion the other.

17. Although Signpost only featured as an introducer in the schedule supplied by Fast Pensions, Mr Davies also exhibited a specimen of "Signpost Marketing Ltd Terms & Conditions" which showed that that company was not authorised by the FSA to give investment advice; nor able to recommend any Self Invested Personal Pension administrators or pensions products; and that they promoted "alternative investment products" which were not regulated by the FSA, so, it was said, buyers would have no access to any regulatory protections.

18. The material described the "alternative investment products" Signpost Marketing Ltd promoted as including "gold and wine, and social and ethical investments such as carbon credits and agricultural land".

19. Signpost Marketing Ltd did not charge for its products but said it received a commission from the alternative investment provider based on a percentage of the overall investment.

20. We had no evidence that the appellant had signed such an agreement, nor any material relating to the payment by any Signpost companies to the appellant.

21. Fast Pensions had also provided information about the companies in which the EP1 Retirement plan's funds had been invested. We did not have a copy of this

information, but Mr Davies told us that the companies were connected with the people in control of Fast Pensions.

22. Enquiries into other members who made tax returns revealed that some members had received payments as a consequence of their "pension scheme transactions". Two separate types of payment had been made, loans (where the maximum was 35% of the fund value) and "thank you" payments equal to 10% of that value.

23. Because the appellant had been identified on a schedule of members, HMRC made the assumption that he had received a payment for transferring his funds.

HMRC's compliance check

24. On 24 January 2017 Ms Leigh Hands, an officer of HMRC in "Pensions Compliance Delivery", wrote to the appellant saying HMRC had reason to believe that he had received an "unauthorised payment" in the tax year 2012-13, and that because the four year time limit for assessments was fast approaching HMRC had to protect their position and would be assessing him on the maximum amount of tax which might be due.

25. HMRC also issued, on the same day, an information notice under Schedule 36 Finance Act ("FA") 2008 to which the appellant responded fully on 31 January 2017. In that reply he said he was unable to recall whether he had received any payment "in relation to this arrangement, no matter how they were described eg loan, commission, thank you gift" (to quote the Schedule 36 notice). The appellant did supply a signed copy of his application form to join the EP1 scheme

26. On 3 February 2017 Ms Hands wrote to the appellant repeating what had been foreshadowed in their letter of 24 January 2017 but now enclosing a notice of assessment. The amount assessed was £8,208.11 and the tax charged at 55% was £4,514.46. The charging provisions were sections 208 and 209 FA 1994.

27. The notice of assessment sought payment of £4,916.45 which it was said included interest though no calculation of how the interest was determined and from what date was given. There was also said to be enclosed a tax calculation but this was not in our bundle.

28. On 15 February 2017 the appellant sent a letter to Ms Hands in which he gave her an appeal against the assessment. In this letter he informed her that he had traced a payment of £2,345 from "Signpost 4 Limit" into his bank account on 12 December 2012. He denied any knowledge of this company.

29. On 23 February 2017, in response to questions from an anonymous officer the appellant said that he was "cold called" by Fast Pensions. They suggested he had a "dormant fund" and they were confident they could make it work better for him. He presumed the payment to him was an inducement to transfer his fund.

30. A letter of 1 March 2017 from the appellant states that HMRC had asked that he submit a tax return for 2012-13. The letter said it was providing all the information that

he had about his tax affairs for the year, being a P60 from his employment with the Crown Prosecution Service. He asked that if there was a form they wished him to complete it should be sent to him by post.

31. On 14 March 2017 Ms Hands wrote again giving more information about HMRC's enquiries. She informed him that many individuals had been approached by Fast Pensions and persuaded to transfer their funds. They had been enticed to do so by the offer of loans. The loans were made by companies in which the pension funds were invested, with the largest amount of a loan being 35% of the funds transferred.

32. She added that some "members of Fast Pensions" (sic) had "also" received payments described as "thank you payments", "gifts" or "commissions" for transferring their pensions. The majority of these were 10% of the funds transferred.

33. She further explained that because the 35% payment assumed to have been received was over 25% of the value of the funds the assessment had been at 55%, being 40% under s 208 FA 1994 and 15% an unauthorised payment surcharge under s 209 FA 1994.

34. Because of the information provided by the appellant Ms Hands said she was amending the original assessment to show a 10% payment and so the charge was only under s 208 FA 1994 at 40%. The revised tax amount was £938. Ms Hands did not explain under what authority she was able to amend an assessment, and neither could Mr Davies explain to us.

35. Ms Hands then explained the interest charge as running from 31 January 2014 and threatened penalties under Schedule 41 FA 2008 for failure to notify the unauthorised payment.

36. On 14 March 2017 an anonymous letter was sent by HMRC to the appellant purporting to be a notice of amended assessment for 2012-13. It has three lines in bold at the top:

> Total amount now assessed: £2,345
>
> Previous assessment: £8208.11
>
> Amount charged by this assessment: £938.

What was said to be payable was £938 also, even though that was said to include interest.

37. On 29 March 2017 the appellant responded, stressing that the value of his pension fund had increased and he put forward his annual pension statement as at 30 April 2014 and other documents from Fast Pensions to demonstrate that. On that basis he failed to understand how the £2,345 he had received could have come from the investments of his pension fund.

38. HMRC's response of 7 April 2017 said

> "Please note, HMRC cannot accept letters or statements written by Pension Schemes as evidence regarding the value of the funds"

No comment is needed.

39. On 20 April the appellant responded saying he wished to appeal to the Tribunal.

5 40. On 2 May 2017 HMRC responded, not by informing the appellant how to appeal to the Tribunal, but by purporting to deal with his appeal to them of 15 February 2017. They turned down his appeal, and told him he could ask for a review or notify his appeal to the Tribunal.

41. On 24 May 2017 the appellant notified his appeal to the Tribunal.

10 *Findings of fact about the appellant's receipt*

42. We find that the immediate source of the payment to the appellant was a company, Signpost 4 Ltd.

43. We had no evidence to show or suggest that Signpost 4 Ltd, and other companies with similar names, were connected with Fast Pensions or the EP1 Retirement scheme 15 or any companies in which the assets of the scheme had been invested, and we find that they were not.

44. Nor did we have any evidence from which we could find that Signpost 4 Ltd or any other Signpost company had received any commission or other payment from the EP1 scheme or any companies in which the assets of the scheme had been invested.

20 45. We find that the appellant was unaware of, and had no way of finding out, whether the payment he received from Signpost 4 Ltd had been ultimately derived from, or was in any way linked to, assets of the EP1 Retirement scheme or investments acquired by the scheme. He accepts, as do we, that there is a "but for" connection between the payment and the transfer by the appellant of his funds, as it is clear the 25 payment would not have been made if the appellant had not signed an agreement to transfer.

46. But having considered the evidence of Mr Davies and the documents we had we cannot find that the ultimate source of the payments was those assets or investments.

The law

30 *What is an unauthorised payment?*

47. Chapter 3 Part 4 of the Finance Act 2004 sets out what payments a registered pension scheme is authorised to make to or in respect of a member. The purpose of authorisation is to give the scheme concerned assurance that there will be no adverse tax consequences of the payment. Authorised payments are those which are in keeping 35 with the philosophy of the UK's pension tax regime. This is characterised by academics and others as an EET regime. That means that contributions to the scheme are exempt ("E") from tax (in the sense that contributions may be relieved against tax liability);

income and gains accruing to the scheme are exempt ("E") from tax, but payments made out of the scheme by way of pension are taxable ("T").

48. Section 160 FA 2004 introduces the subject:

> "*Payments by registered pension schemes*
>
> (1) The only payments which a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are those specified in section 164.
>
> (2) In this Part "unauthorised member payment" means—
>
> (a) a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is not authorised by section 164,
>
> …
>
> …
>
> (5) In this Part "unauthorised payment" means—
>
> (a) an unauthorised member payment, …
>
> …"

49. Section 164 lists the authorised member payments:

> "(1) The only payments a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are—
>
> (a) pensions permitted by the pension rules or the pension death benefit rules to be paid to or in respect of a member (see sections 165 and 167),
>
> (b) lump sums permitted by the lump sum rule or the lump sum death benefit rule to be paid to or in respect of a member (see sections 166 and 168),
>
> (c) recognised transfers (see section 169),
>
> (d) scheme administration member payments (see section 171),
>
> (e) payments pursuant to a pension sharing order or provision, and
>
> (f) payments of a description prescribed by regulations made by the Board of Inland Revenue."

50. The only conceivable heading, apart from paragraph (f) and regulations made under the power in it[1], under which the payments made to the appellant in this case may fall are those in paragraph (d) of s 164(1) and they are listed in s 171, thus:

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[1] There are many regulations that have been made under this power. HMRC did not draw our attention to any that might be relevant to this case. We have however examined these regulations and they do not seem to be relevant. We would have expected to have had this demonstrated to us by HMRC.

> "(1) A "scheme administration member payment" is a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is made for the purposes of the administration or management of the pension scheme.
>
> (2) But if a payment falling within subsection (1) exceeds the amount which might be expected to be paid to a person who was at arm's length, the excess is not a scheme administration member payment.
>
> (3) Scheme administration member payments include in particular—
>
> (a) the payment of wages, salaries or fees to persons engaged in administering the pension scheme, and
>
> (b) payments made for the purchase of assets to be held for the purposes of the pension scheme.
>
> (4) A loan to or in respect of a person who is or has been a member of the pension scheme is not a scheme administration member payment."

Thus unless the payment in this case falls within s 171(1), is at an arm's length rate and is not a loan, it will not be an authorised payment, and so by s 160 will be an "unauthorised member payment".

51. Section 279(2) FA 2004, part of a general definition provision for the whole of Part 4 says:

> "In this Part references to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the pension scheme."

52. Section 161 FA 2004 provides some further interpretative matter on payments for the purposes of Chapter 3:

> "(2) "Payment" includes a transfer of assets and any other transfer of money's worth.
>
> (3) Subsection (4) applies to a payment made or benefit provided under or in connection with an investment (including an insurance contract or annuity) acquired using sums or assets held for the purposes of a registered pension scheme.
>
> (4) The payment or benefit is to be treated as made or provided from sums or assets held for the purposes of the pension scheme, even if the pension scheme has been wound up since the investment was acquired.
>
> (5) A payment made by a registered pension scheme to or in respect of a person who—
>
> (a) is connected with a person who is or has been a member … ,
>
> (b) is not a person who is or has been a member …,
>
> is to be treated as made in respect of the person who is or has been a member ...."

53. Applying the expansions of definitions in sections 161 and 279 to the definition in s 160(2) of "unauthorised member payment" (so far as relevant to this case) results in:

> "In this Part "unauthorised member payment" means a payment made
>
> (a) from sums or assets held for the purposes of the pension scheme by a registered pension scheme to or in respect of a … member of the pension scheme or
>
> (b) under or in connection with an investment acquired using sums or assets held for the purposes of a registered pension scheme,
>
> which is not authorised by section 164".

54. The distinction between the two paragraphs in our rewritten s 160(2) is explained in *Danvers v HMRC* [2016] UKFTT 3 (TC) (Judge Kevin Poole and Janet Wilkins CTA) at [39] and [40]:

> "39. This provision is required mainly because a 'pension scheme' is defined in section 150 FA04 as being a 'scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide…' benefits for retirement, death, ill-health or similar situations. Clearly a 'scheme or other arrangement' is not a legal entity and, as such, is unable to make a payment. Thus section 279(2) FA04 makes it clear that references to payments 'by' a pension scheme are to be interpreted as payments 'made from sums or assets held for the purpose of the pension scheme', regardless of what legal entity actually makes the payment.
>
> 40. This interpretation provision on its own would not 'catch' a payment made by a third party out of sums of money invested in it as share capital by a pension scheme, as such a payment would not, on the basis of section 279(2) alone, be treated as having been 'made' by the pension scheme. It does however set the scene for the more important second interpretation provision contained in section 161 FA04, and in particular in subsections 161(2), (3) and (4), which read as follows [citation of statute omitted – see §52]

55. As to the purposes of the unauthorised payments charge we, like the Upper Tribunal in *Danvers v HMRC* [2016] UKUT 569 (TCC) ("*Danvers*"), find very helpful the summary of the purpose behind the various tax charges which can arise under Chapter 5 of Part 4 FA 2004 provided in *Willey v HMRC* [2013] UKFTT 328 (TC) by this Tribunal (Judge Jonathan Cannan and Alan Redden FCA) at [6]:

> "FA 2004 contains a prescriptive regime in relation to the payments that registered pension schemes are authorised to make and the consequences of unauthorised payments. The rationale is to ensure that the tax reliefs and exemptions in respect of contributions to registered pension schemes are available only to the extent that the pension schemes genuinely make provision for the benefit of members on retirement, subject to various statutory limits. The compliance regime and reporting requirements set out in FA 2004 are directed towards the same end."

The charge on unauthorised payments

56. Section 208 FA 2004 provides for a charge to tax thus:

> "(1) A charge to income tax, to be known as the unauthorised payments charge, arises where an unauthorised payment is made by a registered pension scheme.
>
> (2) The person liable to the charge—
>
> (a) in the case of an unauthorised member payment made to or in respect of a person before the person's death, is the person,
>
> …
>
> (3) If more than one person is liable to the unauthorised payments charge in respect of an unauthorised payment, those persons are jointly and severally liable to the charge in respect of the payment.
>
> …
>
> (5) The rate of the charge is 40% in respect of the unauthorised payment.
>
> …
>
> (8) An unauthorised payment is not to be treated as income for any purpose of the Tax Acts."

57. Section 255 FA 2004 provides for assessments to be made:

> "(1) The Board of Inland Revenue may by regulations make provision for and in connection with the making of assessments in respect of—
>
> (a) the unauthorised payments charge,
>
> …
>
> (2) The provision that may be made by the regulations includes (in particular) provision for the charging of interest on tax due under such assessments which remains unpaid.
>
> (3) The regulations may, in particular—
>
> (a) modify the operation of any provision of the Tax Acts, or
>
> (b) provide for the application of any provision of the Tax Acts (with or without modification)."

Discovery assessments

58. The only requirement in this case where a return has not been delivered for any of the tax years concerned is in section 29(1):

> "If an officer of the Board …, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, …

> the officer … may … make an assessment in the amount, or the further amount, which ought in his … opinion to be charged in order to make good to the Crown the loss of tax."

The parties' submissions

59. HMRC say on the discovery assessment, recognising that *Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 578 (TCC) applies:

(1) The appellant was not given a notice to file a return and so did not do so. To justify the s 29 assessment made on him it is only necessary to show that there was a loss of tax arising because "an amount which ought to have been assessed was not assessed". The amount is the amount of the unauthorised payment "made by the pension scheme to or in respect of" the appellant on 12 December 2012.

(2) The assessment was made within the time limit of four years from the end of the tax year in which the unauthorised payment was received.

(3) On 3 February 2017 HMRC were in possession of a member list of the EP1 scheme showing the appellant as a member of the scheme. They made a discovery that the appellant had not been assessed and issued the assessment to make good the amount of tax not assessed.

60. HMRC say on the question of whether the payment received by the appellant was an unauthorised payment

(1) The appellant entered into an arrangement which resulted in the EP1 scheme making an unauthorised payment to him.

(2) The payment made by Signpost was not an authorised member payment.

(3) The payment was made to the appellant because he transferred his pension fund to the EP1 scheme, so there is a causal connection between the two events.

(4) The appellant received the payments within a few weeks of transferring his funds to Fast Pensions having suffered an administration fee of £1,500.

(5) Fast Pensions and Signpost are connected, as Signpost was listed as an introducer to Fast Pensions.

(6) The impugned payment was precisely 10% of the net funds transferred. This is therefore more than an inducement.

(7) The only place logically that the impugned payment could have come from is the pension scheme. Even if the £1,500 was simply passed through the scheme, that left £845 to be accounted for.

(8) The accounts of the EP1 scheme suggest that growth in value in the period ended 7 August 2013 was 2%. Therefore the payment represents 5 year's growth and is therefore not commercial or an arm's length amount, so cannot be a payment within s 171 FA 2004.

(9) The investment by the appellant of his funds in Fast Pensions is inextricably linked to the payment by Signpost. The payment came indirectly from the pension transfer and so is an unauthorised payment within s 161(3) FA 2004.

61. HMRC cite *Danvers* in support.

62. The appellant says in relation to the discovery assessment that he is highly critical of HMRC leaving it until a few weeks before the deadline for assessing before informing him of the issue with the payment, when HMRC knew he was a member in, at the latest, 2014.

63. He also criticises their assumption that he received a loan of 35% of the value and whether that was to the best of their judgment.

64. As to the impugned payment he says that to show the payment did not come out of his pension fund he had provided evidence to HMRC of continuous growth in the assets of his fund and that the fund is intact.

Discussion

The legal background to charging and assessing the UPC

65. There are two unusual things about the UPC. It is charged at a flat rate of 40% irrespective of the personal circumstances of the recipient (s 208(5) FA 1994) and it is expressly said not to be income for any purposes of the Tax Acts (s 208(8) FA 1994).

66. These two points raise the question whether the UK tax system accommodates the UPC and how it fits into that system. Adopting the well known three stages of the system as laid down by Lord Dunedin in *Whitney v CIR*[2], liability (or chargeability), assessment and enforcement, the chargeability to income tax on particular items of income is found in those Acts, primarily ITTOIA and ITEPA, which charge various types of income (or matters treated as income) to income tax. These different types are known in the Income Tax Act 2007 ("ITA") as "components" and what they are components of is a person's "total income"[3].

67. To get from the total income to the amount in which any person is chargeable to tax, ITA helpfully provides that which was missing before, a series of steps. These steps are found in s 23 ITA. In brief Step 1 is the collection together of the components of total income as described above; Step 2 allows deduction of reliefs from either a component or from total income to produce "net income"; Step 3 deducts personal allowances from net income; Steps 4 and 5 provide for the calculation of the tax rates on each component in accordance with Part 2 ITA and their aggregation.

[2] 10 TC 88. The relevant passage, at 110, is "Now, 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."

[3] See Step 1 (second sentence) in s 23(1) ITA.

68. The rates used at Step 4 are of course, for most components of income, the familiar progressive rates such as the basic rate and the higher rate, which are established anew each year.

69. At Step 6 there is deducted from the aggregate tax found at Step 5 any reliefs in terms of tax such as marriage allowances and double taxation relief.

70. Step 7 the provides for the addition to the Step 6 amount of any amounts of tax listed in s 30 ITA. That list, at subsection (1) includes the UPC. In its second sentence Step 7 says:

> "The result [*of the addition of any s 30 TMA amount*] is the taxpayer's liability to income tax for the tax year." [My interpolation]

71. From this it is clear that Steps 1 to 6 establish the amount of income tax for which a person is liable only in respect of that person's total income net of reliefs and allowances and those Steps show the calculation of that amount of income tax. Step 7 brings in any other income tax with which the person is chargeable and liable, but the addition of the s 30 amounts at Step 7 is not any part of the calculation of a person's income tax liability on total income. That is reinforced in the case of an unauthorised payment by s 208(8) FA 2004 which, as has been seen, expressly excludes such a payment from forming part of a person's income for any purpose of the Tax Acts, which clearly include Step 1 of s 23 ITA.

72. The second *Whitney* stage is assessment, ie the particularising of a specific individual's liability to tax. Under the current UK system there are two types of assessment dealing with income tax liability, a self-assessment and an assessment by HMRC, called in tax law "an assessment which is not a self-assessment[4]" ("NSA assessment").

73. A self-assessment is, as set out in s 9(1) Taxes Management Act 1970 ("TMA"):

> (1) an assessment of the amounts in which, on the basis of the information contained in a tax return under s 8 TMA and taking into account any relief or allowance a claim for which is included in the return, the person making the return ("the taxpayer") is chargeable to income tax and capital gains tax for the year of assessment
>
> and of
>
> (2) the amount payable by the taxpayer by way of income tax, ie the difference between the amount in (1) and the amount of any income tax deducted at source, eg under the PAYE system).

74. The "information contained in a tax return" is such information as may reasonably be required by a notice given to the taxpayer by an officer of HMRC for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains

[4] See for example s 30A TMA.

tax for a year of assessment, and the amount payable by him by way of income tax for that year (s 8(1) TMA).

75. There is nothing express in section 8 TMA which limits the information that may be required by a return to total income and nor anything express in s 9 which limits the self-assessment to the amount of tax chargeable on total income as found at Step 6 s 23 ITA 2007.

76. And, as a matter of fact, the tax returns for the tax year with which this appeal is concerned contain a box in which an unauthorised payment is to be entered, box 13 on page Ai4 in the "Additional information" pages

77. And the "Tax Calculation Summary Notes" which enable a taxpayer to calculate their own self-assessment has a box, A264, in which the amount of the tax charged by the UPC is entered. This box follows that, A261, for the total of "Income Tax and Class 4 National Insurance contributions" due, and the amount in A264 together with A261 and sundry other amounts is aggregated at box A268 which after deduction of tax already deducted at source forms A272 which is then entered on the "Tax Calculation Summary" in Supplementary Pages SA 110 as Box 1, the self-assessment.

78. In this case however the appellant was not required by a notice under s 8(1) TMA to make a return and self-assessment for the tax year. The amount of the unauthorised payment and the income tax under the UPC was instead included in a NSA assessment. That NSA assessment was, according to the papers we had, made under the power in s 29 TMA to make a "discovery assessment".

The assessment validity issue

79. Because we had noted the terms of s 208(8) FA 2004 to the effect that an unauthorised payment is not to be treated as income for any purposes of the Tax Acts and the reference in s 29(1) to "income", we asked Mr Baird to take us through what we called the "legal audit trail" that led from s 208 FA 1994 establishing the charge to income tax on an unauthorised payment on the member to the assessment made under s 29 TMA.

80. Mr Baird took us first to s 255 FA 2004 and pointed to subsection (1) as giving the Commissioners for Her Majesty's Revenue and Customs the power to make regulations to make provision for and in connection with the making of assessments, and subsection (3) which permits those regulations, among other things to either modify the operation of any provision of the Tax Acts or to provide for the application of any such provision with or without modification.

81. The next stopping point was the regulations which the copy of s 255 FA 2004 included in the authorities bundle showed as being SI 2005/3454, the Registered Pension Schemes (Accounting and Assessment) Regulations 2005 ("the RPSAAR").

82. Unfortunately in the place where the index to the authorities bundle said we would find those regulations, we had noted that there was only an Explanatory Memorandum for some 2014 regulations, which although they did in fact amend the

RPSAAR, were not the RPSAAR themselves or even the Explanatory Memorandum to that instrument.

83. Anticipating this, the Tribunal had printed off copies of the RPSAAR for the parties. Mr Baird lit upon regulation 9 which provided that s 29(1)(a) TMA applies with a modification, which is to insert, after "any income" a reference to unauthorised payments under s 208 FA 2004. Regulation 9 also said that this modification applied in relation to an assessment to tax "under Case 1, 2 or 3".

84. The search was on for what those Cases covered. Regulation 4 had the answer. It starts:

> "The making of assessments
>
> (1) In the cases listed in column 1 of Table 2 an officer of Revenue and Customs must issue an assessment to tax to the assessable person specified in column 2.
>
> Table 2

Column 1	*Column 2: assessable person*
Case 1: a charge to tax arises under section 208 of the Act (unauthorised payments charge) and the person liable to the charge is a company.	The person liable to the charge under section 208(2) of the Act."

85. This seems to cover the case here but for one thing: the appellant is not a company[5]. In an effort to find out if the limitation of the modification to s 29 TMA was a slip we looked for the Explanatory Memorandum. This is of necessity short as the Memorandum covers a large number of pension-scheme-related regulations issued at the same time, but what it says is:

> "**The Registered Pension Schemes (Accounting And Assessment) Regulations 2005 No**.
>
> These regulations make provision in relation to the making of assessments and related matters with charges to tax under Part 4 of FA 2004. Under the new regime, there will be occasions when the scheme administrator of a registered pension scheme will have to account to Revenue and Customs for tax. These regulations prescribe those occasions and the particulars to be reported.
>
> The tax will be due without the making of an assessment but if the incorrect tax has been paid, Revenue and Customs may make assessments. These regulations provide for:
>
> (a) the making of assessments and the person assessable,
>
> (b) the right of appeal against any assessment,

[5] Cases 2 and 3 are about different provisions of Part 5 FA 2004 and also apply only to companies.

(c) interest to be charged for tax which is not paid on or before the due date,

(d) scheme administrators to make amended returns if they discover an error has been made, and

5 (e) adjustment of, and repayment and interest on, tax overpaid."

86. This is very muddled. The whole of the memorandum down to "may make assessments" in the second paragraph refers to the obligations of scheme administrators to account for tax and that seems to be the province of regulation 3 and returns by the administrator of their own tax liability. The scheme administrator does appear in 10 RPSAAR as a person liable to be assessed in regulation 4 but only in cases 4 and 5.

87. The memorandum does not refer at all to those regulations of RPSAAR which are modification regulations. There is no explanation of why Case 1 only seems to apply to members who are companies.

88. There is no correction slip for these regulations shown on legislation.gov.uk.

15 89. Because of this apparent lacuna in the legislative provisions we gave HMRC the opportunity to make further submissions on the issue of the legal audit trail. HMRC duly made such submissions which we summarise as follows

(1) An unauthorised payment is charged to income tax under s 208 FA 1994.

(2) Section 3(1) ITA provides that income tax is charged under "other 20 provisions" including under Part 5 FA 2004 (which includes the UPC).

(3) The amount of an unauthorised payment and the UPC should be included in a tax return by virtue of sections 8 and 9 TMA

(4) As there is as obligation to include an unauthorised payment and the UPC in a return and self-assessment it is therefore within s 29(1)(a) and there is no 25 need to modify s 29 by the RPSAAR.

(5) The section 208 FA 2004 charge on an individual is not within the table in regulation 4 RPSAAR of charges for which HMRC must issue an assessment and this is because the charges are within self-assessment.

(6) Because no notice to file was issued to the appellant, HMRC was not 30 notified of the chargeability of the appellant in relation to the an unauthorised payment. By s 7 TMA the appellant should have notified chargeability but did not, so s 29(1) TMA applies.

(7) Therefore HMRC contend the assessment was validly issued.

90. We agree with items (1), (2) and (3).

35 91. As to (4) we consider that this is a non sequitur. Firstly s 29(1)(a)[6] only applies to a discovery of "income" which ought to have been assessed, and an unauthorised

[6] Paragraphs (b) and (c) of s 29(1) are clearly irrelevant as they involve existing assessments having become inadequate and excessive reliefs.

payment is not income (s 208(8) FA 1994). On this point we have noted the lack of any mention of "income" in HMRC's submissions in s 29(1) TMA. Second, there is no exact equation between what may be included in a self-assessment and what may be covered by a s 29 TMA assessment.

5 92. In §78 we referred, obliquely at least, to the fact that not every NSA is a s 29 TMA assessment. TMA is consistent in referring to a NSA, not to a s 29 or discovery assessment, in those provisions such as sections 30A, 31, 31A and 50 which provide general rules for dealing with procedures for making assessments and for dealing with appeals against them.

10 93. It is clearly the case that all the components of total income can be the subject matter of a s 29(1)(a) assessment, given the use in the latter of the word "income". It is also clear from Part 2 ITA that there are a number of charges to income tax which do not relate to any component of total income but which are capable of being included in a tax return and self-assessment, and these are those listed in s 30(1) ITA where the tax
15 on them is brought into account at Step 7. Those listed in that subsection as it stood for 2012-13 are seven charges under Part 4 FA 2004 (pension schemes) including the UPC[7]; the charge under s 7 Finance (No. 2) Act 2005 on State Retirement pension lumps sums where the taking of the pension is deferred[8]; the charge under s 424 ITA where a gift aid payment is not paid out of profits or gains brought into to charge to tax[9] and
20 certain other gift aid matters; and the high income child benefit charge ("HICBC") in s 681B Income Tax (Earnings and Pensions) Act 2003[10] ("ITEPA").

94. Section 32 ITA is noteworthy too. It lists a number of provisions of the Tax Acts which impose charges to tax and says that those liabilities are not to be included in the s 23 ITA calculations. The majority of them are concerned with tax relief which has
25 been given erroneously or where conditions for it have been contravened and it is necessary to recover the relief. But two entries in the list are noteworthy as being relevant to a number of cases and being of long-standing. These are counteraction

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[7] The others are s 205 FA 2004, which at subsection (7) says that the amount is not to be treated as income for any purpose of the Tax Acts; s 206, which at subsection (7) is to the same effect as s 205(7) and 208(8); s 209 which is an additional rate of tax on certain UPCs; s 214 where s 215(11) is to the same effect as s 206(7) and s 227 which at subsection (5) is to the same effect as s 215(11). Thus none of the pension scheme charges in the list are treated as income.

[8] Section 7 of that Act of 2005 says that the lump sum is to be treated as income but is not to be treated as part of total income. There is a box for this lump sum on the main Tax Return at box 8 on page TR3 under UK Pensions.

[9] Section 424 is silent on whether the amount charged is treated as income or as part of total income. There is nothing explicit on the tax return for it, as it will be a product of other entries. The Tax Calculation Summary Notes do cover it but they are too complicated to enable us to see exactly how the amount calculated is treated. Whether or not it is treated correctly, Step 7 leaves us in no doubt that it is not part of total income.

[10] Section 681B and other provisions of Chapter 5A Part 10 ITEPA are silent on whether the charge is to be treated as income. By its nature it would seem clear that it is not income in any sense. There is an entry in the tax return for the tax on this charge – Box 1 in the section on HICBC on page TR5.

assessments under Part 13 ITA (transactions in securities) and the requirements for accounting for tax deducted from various payments in Part 15 ITA.

95. All of the listed provisions provide for assessments to be made. Some of them refer to sections or Parts of TMA as being applied as they are applied to assessments under that Act; some provide their own time limits and some are simply statements that an assessment may be made. None of them invoke or apply, with or without modifications, s 29 TMA.

96. One entry in this list though is particularly relevant. The list includes

> "income tax liability
>
> …
>
> under Chapter 5 of Part 4 of FA 2004 (registered pension schemes: tax charges), *except any liability under a provision mentioned in section 30(1)*" [Our emphasis]

97. These liabilities are ones where the scheme administrator is solely liable, or is liable jointly and severally with a scheme member etc. The only one which expressly refers to whether the amount assessable is "income" is s 207 FA 2004 which is a charge on an administrator in respect of payment made to an employer. Where charges are imposed on an administrator, 254 FA 2004 requires quarterly returns and payment of the tax without assessment. Section 254(6)(c) then provides for regulations to be made with respect to, among other things, the making of assessments where tax has not been accounted for in a return. The regulations are the RPSAAR.

98. As to (5) in §89, this does not help HMRC. They seem to be saying that there is no power to make an NSA because the liability comes within self-assessment. But they did not require the appellant to make a self-assessment – instead they purported to make a s 29 assessment.

99. Nor does (5) explain why the RPSAAR, in regulation 4 and 9, only applies to an assessment to be made on a company, but not an individual. The thinking was, we assume, that because a company receiving an unauthorised payment is liable to income tax, not corporation tax on it, but is not required to make a self-assessment of the UPC, there has to be a mechanism for collecting the tax and that is an NSA. Regulation 9 RPSAAR which modifies s 29(1) to include the charges in Cases 1, 2 and 3 in regulation 4 thus permits an assessment on something which is admittedly not income[11] for the purpose on the only type of recipient which HMRC seemed to have thought was not within the scope of self-assessment, a company.

100. Item (6) in §89 is correct to say that the appellant did not notify chargeability. Whether he was obliged to do so is a separate question and which does not affect this issue. It does affect penalties which have been threatened but not yet imposed. We consider that question later. We do not doubt that HMRC may make a s 29 assessment

[11] There is in fact nothing in s 8 TMA which prevents a notice to file a tax return and self-assessment being issued to a company which is within the charge to income tax.

on any person who has not been required to make a return[12], but that is not the issue here: the issue is whether the s 29 assessment made can be made to charge an unauthorised payment to the UPC.

101. Having examined the legislation in Part 4 FA 2004 and Part 2 ITA and what HMRC say about it, we have a great deal of difficulty in seeing how a s 29 assessment is valid to charge the tax on the unauthorised payment imposed by s 208 FA 1994 given the terms of s 208(8) FA 2004.

102. In *Whitney*, immediately before the passage quoted in footnote 1, Lord Dunedin said:

> "My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

103. We must therefore strive to give effect to the intention of Parliament that the liability to income tax charged by the UPC should be effective. But it seems to us that Parliament has enacted an obvious way to ensure that that tax charge is effective, and that is by including the tax at Step 7 in the tax calculation which is required in a self-assessment.

104. HMRC cannot say that because the appellant was not within self-assessment when the unauthorised payment was made it had no way of knowing about the payment and so no way of knowing that the appellant should be required to file a tax return.

105. First, the administrator is required to make an "event return" by regulation 3 of the Registered Pension Schemes (Provision of Information) Regulations 2006 (SI 2006/567) and is required by regulation 11 to give information about an unauthorised payment to the member, presumably so that the member can return the unauthorised payment in their tax return and so include the UPC in their self-assessment.

106. Second, either from an event return or as a result of a notice requiring information, HMRC knew in 2014 at the latest of the payment made to the appellant and they knew his National Insurance number from which they could obtain details of his tax records on the NPS computer system. They could have then served on him a notice under s 8 TMA to file a return for the year. Had he failed to return any amount of an unauthorised payment (and as we have said there is a box in the "Additional Information" pages for an unauthorised payment) they could have opened an enquiry under s 9A TMA, as they did with those people whose details they had who were also members of the same pension scheme as the appellant but who were then within self-assessment. Had he failed to deliver the return they could have issued a determination under s 28C TMA.

[12] Subject to the circumstances not being as they were in *Goldsmith v HMRC* [2018] UKFTT 5.

107. We can then only conclude that the legislation has either missed fire or it was a policy decision in 2004 or 2005 not to exercise a power to make an NSA on an individual. Had HMRC wished to give themselves the power to make an NSA on the appellant they could easily have done so in the RPSAAR, but they did not. They cannot use s 29 TMA to fill that gap – regulation 9 RPSAAR is clear evidence for that proposition, because the unauthorised payment is not income for the purposes of s 29(1).

108. Therefore the assessment purporting to be an assessment under s 29 TMA is invalid.

109. Because there is now legislation in s 34A TMA which prohibits a person from (validly) delivering a return and self-assessment after the expiry of four years from the end of the relevant tax year (which expiry date is 5 April 2017) and because the time limit for a determination under s 28C has now also passed, HMRC is, it seems, unable to recover the tax.

The discovery assessment (if valid)

110. In case we are wrong about HMRC's inability to use s 29 TMA to charge an unauthorised payment, we go on to consider the relevance of the appellant's complaints about the assessment being made at the eleventh hour.

111. We do not think that in itself there is anything in this point that we can criticise HMRC for. What we do note however is that information about the EP1 scheme and in particular its members was given by Fast Pensions to HMRC in 2013. We cannot see that HMRC acquired any further information about the potentially unauthorised payment before they made the assessment in February 2017. That raises the question whether the discovery was too "stale" to justify the assessment.

112. In *HMRC v Raymond Tooth* [2018] UKUT 38 (TCC) the Upper Tribunal (Marcus Smith J and Judge Charles Hellier) considered "staleness". They said at [79] after approving what was said at [37] in the Upper Tribunal decision in *Charlton and others v HMRC* [2012] UKUT 770 (TCC)

> "79. Broadly speaking, we agree with this statement of the law [*in Charlton*]. However, for the purposes of determining this case, it is necessary to consider the question of 'newness' and its corollary 'staleness' in a little greater detail:
>
> (1) The 'discovery' in section 29(1) TMA relates to one of the three situations set out in section 29(1)(a), (b) or (c). If it is discovered that such a situation pertains (or may pertain: all that is required is for the officer to act honestly and reasonably), then the officer is at liberty to make an assessment under section 29 TMA.
>
> (2) We should say that we see no reason why one officer cannot make the discovery and delegate to another officer the making of the Decision, set out in paragraph 40 above. However, it is important, we consider, to bear in mind that section 29 TMA envisages two stages – (i) the

discovery and (ii) the making of the assessment consequent upon the discovery.

(3) We entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an cannot make a discovery. Indeed, that is confirmed by the reference to the "Board" (a collective) in section 29(1) TMA. If to use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued while the discovery is new.

(4) It follows from this that the same officer (or officers) cannot make the same discovery twice. We see no reason, however, why the same officer cannot, for different reasons, discover that one of the situations set out in section 29(1)(a), (b) or (c) pertains a second time. Suppose an officer discovers that an assessment to tax has become insufficient for a certain reason, but HMRC decides not to issue an assessment because the point is controversial and the amount small. Suppose that officer then – for different reasons – discovers that the assessment has become insufficient. We consider that this, second, discovery could justify the making of an assessment.

(5) The position is, obviously, *a fortiori* where two different officers are independently involved. Again, provided the basis for the discovery is different, there is a statutory basis under section 29(1) for issuing two assessments.

(6) What, however, if two different officers independently make the same discovery? In our judgment, as a matter of ordinary English, a discovery can only be made once. We accept that section 29(1) TMA is framed by reference to the subjective state of mind of an officer or the board, but what is a "discovery" is an objective term. It seems to us that in this case, the first officer makes the discovery; the second officer simply finds out something that is new to him. In particular if one officer is made aware of, and accepts, the conclusion of another officer it cannot be said that the first officer made a discovery.

(7) We consider that such a construction is necessary for the protection of both the taxpayer and officers of HMRC:

(a) The taxpayer, as we have found, should be protected from stale assessments. It follows that, if the first officer – for whatever reason – having made the discovery and (following the two-stage process we have described in paragraph 79(2) above) having determined not to issue an assessment, that outcome ought to be binding on HMRC. No doubt such an officer would record his discovery, and the reason for not issuing an assessment, in the files.

(b) As to HMRC's position, in their own interests, officers need to have clarity as to what constitutes a "discovery" for the purposes of section 29 TMA. For example, any second officer making a "discovery" in succession to another officer might, should an assessment be issued, be faced with a contention that his "discovery" was in some way an illicit attempt to re-open a stale point. Inevitably, there would have to be questions regarding what the second officer knew of the first officer's work, and whether the second officer's "discovery" was related to that of the first officer and so not his own at all. As can be seen from

> paragraph 88(7) below, we consider that this is a case where HMRC's officers would have benefited from a clear understanding of the requirements of section 29 TMA."

113. In this case it is clear to us that the discovery used to justify the making of the assessment in 2017 was made at the latest in 2014, albeit by a different officer. There is no good reason for the failure to make an assessment in 2014 given that HMRC knew of the appellant's NINO and other details. Mr Davies admitted that HMRC made enquiries in 2014 only of those within self-assessment, leaving others for later. That delay makes the discovery stale and on that basis the assessment could not have stood.

Was there an unauthorised payment?

114. Again we do not need to decide this. But we give an indication of our thinking.

115. HMRC point to *Danvers*. In that case there was a clear link between the transfer of a pension fund, and the assets of the pension fund, preference shares in a company (KJK); a clear link between KJK and G (loans from KJK to G); and a clear link from G to Mr Danvers, a loan on terms that his pension fund must be invested in preference shares of KJK.

116. Mr Davies said that there was a similar set up in the case of the EP1 scheme where the members received loans, with the companies listed in the accounts of the scheme being the equivalent of KJK in *Danvers*.

117. But this was not a loan case. As set out in our findings of fact we had no evidence of any link between the companies in which the appellant's funds were invested and Signpost 4 Ltd, the company which made the payment to the appellant. HMRC's submission say there was a connection. It was not a "connection" within the meaning of the Taxes Acts – there was Mr Davies admitted no commonalty of shareholding or directors. The "connection" they say is that Fast Payments show Signpost 4 Ltd as an introducer. That is not any sort of relevant connection.

118. It is reasonable to assume that Signpost received a commission for introducing the appellant. It has been a common commercial happening in financial services that generous commissions to agents and introducers can be rebated in part to the customer: it is or was commonplace in insurance and unit trust/OEICs investment. But we do not know from what source Signpost received a commission, or whether if it did, that commission was the source of the payment to the appellant.

119. HMRC also argue that the payment was not an arm's length amount, being 10% of the appellant's transfer value, compared with an annual growth rate that they put at 2%, so that the payment to the appellant represents five year's growth. We do not know how the 2% is computed: the appellant's "Pension Plan Statement" for the period from December 2012 to April 2013 shows growth of £1,460 which on an annualised basis is about 4.6%, so that the payment would represent just over two years' growth.

120. Nor do see the relevance of HMRC's submissions on this. The only reference in the law here to an arm's length amount is in s 171(2) FA 2004 and that relates to the possibility of excess scheme administration payments. Since HMRC are not arguing

that the payment, although a scheme administration payment, is too big, it is wholly unclear to us why the question of the arm's length basis of the payment is relevant. HMRC would not, we think, argue that a payment of the sort made that was an arm's length amount (whatever that means in this context) was not an unauthorised payment.

5 121. But in any event it is not the relative size of the payment compared to the value of the fund that can determine whether the payment is an unauthorised one. That question is determined by applying sections 160 and 161 FA 2004 to the facts about the ultimate source of the payment.

122. In *Danvers* there was no doubt where the funds to make the loan came from.
10 They came indirectly but obviously from the pension scheme assets: indeed it was a term of the loan that they must come from that source. Here the inextricable link demonstrated in *Danvers* is not present and we simply do not know what the ultimate source was.

123. We would if it were necessary hold that there was no unauthorised payment.

15 Failure to notify penalties

124. This is not part of our decision, because no such penalties have been imposed (pending the outcome of this appeal, we presume). Such penalties arise under Schedule 41 FA 2008 as is clear from the fact that HMRC mentioned this to the appellant in a letter of 14 March 2017 and issued a Factsheet on the subject to him.

20 125. Paragraph 1 Schedule 41 says that

> "a penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation")."

The only relevant obligation in relation to income tax is the obligation under s 7 TMA to give notice of chargeability to income tax

25 126. Section 7 provides that a person who is chargeable to income tax for any tax year must give notice that they are chargeable. As s 208 FA 2004 is a charge to income tax then it seems at first glance that a person who receives an unauthorised member payment must give the notice.

127. But there is an exception in subsection (3). To be within it the person must not
30 have any chargeable gains, not be liable to the high income child benefit charge (s 681B ITEPA) and be someone whose "total income" consists of income falling within subsections (4) to (7).

128. The appellant's only income apart from the s 208 FA 2004 payment is earnings taxed through PAYE. That income is within subsection (4). Is there any other receipt
35 of income that can be included in his total income? The only possible candidate is the s 208 FA 2004 payment, but s 208(8) FA 2004 says that it is not income for any purpose of the Tax Acts. And we have seen that s 23 ITA 2007 brings in the tax on a UPC at Step 7 after the income tax on total income had been calculated

129. Therefore the appellant had no obligation to notify and cannot have failed to do so.

Interest

130. This is also not part of our decision, because it is not possible to appeal against a charge to interest. The interest charged on the appellant in a statement dated 11 May 2017 is £90.43 on a tax bill of £938, just under 10%. The tax charged by the assessment was shown as due no later than 3 March 2017. (That was later amended to be 14 March 2017 when the original assessment was (unaccountably) amended). Those two notices of assessment said "We have charged you late payment interest for the amount charged by this assessment", a statement that must be baffling to the recipient of the notice who has been told that the date for payment has not yet arrived.

131. It is obvious that an interest charge of this magnitude cannot be for a couple of months, and indeed the statements issued show that "You may be charged interest, from the due dates shown on this statement". It shows the due date as 30 January 2014.

132. When is the date for payment of the assessment in this case? The usual place to look for the date of payment of an assessment is s 59B TMA and at subsection (6) it says:

> "Any amount of income tax or capital gains tax which is payable by virtue of an assessment made otherwise than under section 9 … of this Act shall, unless otherwise provided, be payable on the day following the end of the period of 30 days beginning with the day on which the notice of assessment is given."

133. That notice of assessment was given on 3 February so 30 days beginning with that day is either 4 March (if we count the 3 February in the period) or 5 March if we exclude it. So 3 March is a fairly close approximation to the actual payable date. So why does interest apparently run from 31 January 2014, the date which the SA statement gives as the "becoming due" date.

134. If we turn to the rules for interest in the Taxes Acts we find s 101 FA 2009.

> "(1) This section applies to any amount that is payable by a person to HMRC under or by virtue of an enactment.
>
> …
>
> (3) An amount to which this section applies carries interest at the late payment interest rate from the late payment interest start date until the date of payment.
>
> (4) The late payment interest start date in respect of any amount is the date on which that amount becomes due and payable.
>
> (5) In Schedule 53—
>
> …
>
> (b) Part 2 makes special provision as to the late payment interest start date"

135. Subsection (4) tells us that the date from which interest starts to run ("LPISD") is the date on which an amount of tax becomes due and payable. We cannot see any escape from the conclusion that in this case LPISD was 3 March 2017 (or possibly 4 or 5 March). So where does 31 January 2014 come from? There might be a clue in the wording of subsection (5)(b) but nothing in subsection (4) suggest that the statement in it is in any way qualified.

136. But when we look at Part 2 Schedule 53 the first paragraph, paragraph 3, is headed "amendments and discovery assessments etc". It says

> "(1) This paragraph applies to any amount which is due and payable as a result of—
>
> (c) an assessment made by HMRC in place of an assessment ("assessment A") which ought to have been made by a taxpayer.
>
> (2) The late payment interest start date in respect of that amount is the date which would have been the late payment interest start date if—
>
> (a) assessment A had been complete and accurate and had been made on the date (if any) by which it was required to be made, and
>
> (b) accordingly, the amount had been due and payable as a result of assessment A.
>
> (3) In the case of a person ("P") who failed to give notice in accordance with a requirement under section 7 of TMA 1970 (notice of liability to tax) that arose by virtue of subsection (1A) of that section, the reference in sub-paragraph (1)(c) to an assessment which ought to have been made by P is a reference to the assessment which P would have been required to make if an officer of Revenue and Customs had given notice under section 8 of that Act."

137. The first question is what (self-)assessment ought the appellant to have made? He had not been given a s 8 TMA notice to file, so the answer is there is no such assessment. Sub-paragraph (3) then seems to come to HMRC's rescue by dealing with a person who hadn't, like the appellant, received a s 8 TMA notice (the counterfactual at the end). But this creation of a deemed obligation to self-assess in the dim and distant past only applies if P has failed to give notice of chargeability to income tax. But as the previous section of this decision points out the appellant had no such liability, and neither would anyone else who only had income falling within s 7(4) to (7). We are not prepared to read paragraph 3(3) Schedule 53 as if it applied to a person who "failed" to give notice because they were exempt from the obligation to do so, any more than we would apply it to someone who failed to give notice because they had been served with a notice to file a return but had not done so by 31 October in the tax year following the year of the return.

138. But assuming, contrary to the facts, that he ought to have made an assessment (ie self-assessed) or can be deemed to have been required to make one, then by sub-paragraph (2) LPISD is indeed 31 January 2014, a hypothetical due and payable date, not the real one.

139. This must be the basis on which HMRC say the LPISD is 31 January 2014. But they are wrong.

Decision

140. We cancel the assessment as being invalidly made.

141. If that is wrong we would cancel it as we would hold that there was no unauthorised payment.

142. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 22nd MARCH 2018