[2018] UKFTT 307 (TC)

TC06537

Appeal numbers: TC/2014/02454
TC/2014/04351
TC/2014/06517
TC/2015/00070

INCOME TAX – registered pension schemes – whether requirements for discovery assessments met – no because discoveries "stale" – whether transfers gave rise to unauthorised payments charges and surcharges or were recognised transfers to a qualifying recognised overseas pension scheme – no, unauthorised payments made – whether surcharges not just and reasonable – whether Mr Hills was careless for s 36 TMA and Schedule 24 FA 2007 purposes

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) GERRARD GORDON — **Appellants**
(2) GARY CONNELL
(3) NICOLA MARTINO
(4) IAN HILLS

- and -

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

TRIBUNAL: JUDGE SARAH FALK
TOBY SIMON

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 2 and 3 May 2018

Mr Gordon in person

Sarabjit Singh QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. These appeals all relate to discovery assessments made by HMRC on the appellants in respect of transfers made from registered pension schemes to the Wenns International Pension Scheme ("Wenns") in the tax year 2009-10. HMRC claims that the transfers gave rise to unauthorised payments charges and unauthorised payments surcharges on each of the appellants under s 208 and s 209 Finance Act 2004 ("FA 2004") because Wenns was not a "qualifying recognised overseas pension scheme" ("QROPS"). In essence, HMRC relies on the fact that all four appellants obtained the full value of their pension funds, less fees, shortly after the transfer to Wenns. Each appellant appeals against both the unauthorised payments charge and surcharge levied on him. Mr Hills' appeal also relates to a penalty for careless inaccuracy in his tax return for 2009-10 under Schedule 24 to the Finance Act 2007 ("FA 2007"), in respect of the omission of any reference to the transfer.

2. On 11 April 2016 HMRC applied to strike out parts of the appeals on the grounds that the appellants were making public law arguments that the Tribunal had no jurisdiction to consider. In a decision released on 7 February 2017 the Tribunal struck out the appeals to the extent that the appellants argued that it would be unfair for HMRC to impose the charges, but left it open to the appellants to argue that Wenns was in fact a QROPS, that it was not just and reasonable to impose the surcharges, and to raise an EU law based challenge.

3. Mr Connell, Mr Martino and Mr Hills did not attend the hearing before us, and were not represented. We were satisfied that they had been notified of the hearing and that it was in the interests of justice to proceed. In reaching our decision we took account of revised grounds of appeal served by Mr Connell on 20 March 2017, an "outline of case and witness statement" served by Mr Martino on 28 September 2017 and a further skeleton argument served by him on 24 April 2018, and a skeleton argument served by Mr Hills on 7 August 2017.

4. A further preliminary point is that s 268 FA 2004 permits an application to be made to HMRC to discharge a liability to the unauthorised payments surcharge on the basis that it would not be just and reasonable to impose it. If HMRC refuses to do so then an appeal can be made to the Tribunal under s 269. In the case of Mr Connell, Mr Hills and Mr Martino such applications were clearly made or accepted by HMRC as having been made, and were in each case refused, and their appeals to the Tribunal clearly extended to that refusal. In the case of Mr Gordon there was some confusion. HMRC's position was that no explicit application had been made by Mr Gordon under s 268 prior to his appeal to the Tribunal. HMRC proposed a stay to the appeal to allow an application to be made. Mr Gordon did not agree to the stay, but it is apparent to us that he did not appreciate the purpose of the proposed stay or that it was necessary for him to make any further application. It is quite clear that Mr Gordon does maintain that it would not be just and reasonable to impose a surcharge, and his skeleton argument included a request that it be discharged on those grounds. On reading the earlier correspondence with HMRC it also appears to us that there was a pretty clear application to discharge the surcharge in a lengthy letter from Mr

Gordon dated 23 December 2013 which is repeated in another letter dated 22 January 2014, and which HMRC appear to have missed. Mr Gordon's revised grounds of appeal dated 14 March 2017 made a specific reference to s 269 FA 2004, and his original grounds of appeal refer to there being just and reasonable grounds to discharge the liability. In addition, it is clear from the correspondence (and very clear from the submissions made at the hearing) that HMRC's position was and is that they would refuse any such application (see [88] below, referring to a letter dated 17 April 2014). In the circumstances we think it is appropriate to treat the correspondence between the parties as amounting to an application under s 268 FA 2004 which HMRC refused, and that Mr Gordon's appeal should be treated as extending to that issue. Mr Singh indicated at the hearing that HMRC would not object to the Tribunal taking this approach.

5. Relevant provisions of the Taxes Management Act 1970 ("TMA"), the Finance Act 2004 ("FA 2004") and the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006 (SI 2006/206), as in force at the relevant time, are set out in the Appendix to this decision, as are extracts from the Treaty on the Functioning of the European Union ("TFEU") and Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1") .

Evidence

6. The main documentary evidence available comprised correspondence between the parties, limited correspondence between Wenns and HMRC, versions of the list of QROPS on HMRC's website and some documentation from the transferring schemes relating to the transfers to Wenns. Mr Gordon gave oral evidence and the other appellants included some matters of fact in the documents referred to at [3] above.

Findings of fact

7. What follows are, first, some findings of fact relevant to all four appellants, including some findings in relation to HMRC's website and guidance which were referred to by both parties. This is followed by findings of fact relating to each individual appellant. Unfortunately, the documents available were not comprehensive and included varying levels of detail in respect of different aspects for each appellant. In addition very little information was available about Wenns. A number of our findings are necessarily based on inference. As far as the individual appellants are concerned, because many of our findings are based on conclusions drawn from HMRC correspondence, and also because some of the correspondence is relevant to the issues we need to decide, we have referred to individual items of correspondence in more detail than would ordinarily be the case.

Background: Wenns, Windsor Pensions and HMRC's website and guidance

8. On 15 July 2008 Wenns sent a letter to HMRC enclosing a completed form APSS 251, the form used to notify HMRC that a scheme is a recognised overseas pension scheme. The letter and form provided contact details in Latvia and were signed by

Tomass Rainis, described as Scheme Manager. The documents were received by HMRC on 1 August 2008.

9. The form contained a series of boxes which could be ticked to confirm the type of scheme and the relevant conditions that it met. In the case of Wenns the ticked boxes confirmed that it was a non-occupational regulated pension scheme, that it was open to persons resident in the country in which it was established, that it was established in a country with a system of personal taxation, that it met "Condition A"[1] in that it was approved or recognised by, or registered with, the tax authorities in the country in which it was established, and that it was established in the EU. Further ticked boxes confirmed that the scheme manager was an individual, that he would inform HMRC if the scheme ceased to be a recognised overseas pension scheme, that he would comply with the prescribed information requirements, and that to the best of his knowledge and belief the information given in the form was correct and complete. The form also confirmed that the name of the scheme could be published on HMRC's website.

10. Included with the application in the documents bundle, but clearly postdating it and with no indication of their source, are print outs from two Google pages with a date of 20 October 2009, apparently taken from a website providing guidance about different tax systems. These two pages indicate that receipts from a private pension fund are tax-exempt in Latvia, and that payments to an independent pension fund are tax deductible subject to certain limits.

11. HMRC responded to the application by a letter to Mr Rainis dated 18 August 2008. It is worth setting out the body of this letter in full:

> "**Pension Scheme Name Wenns International Pension Scheme**
>
> Thank you for your notification that the pension scheme above is a recognised overseas pension scheme and for your undertakings.
>
> I am pleased to accept that the scheme is a qualifying recognised overseas pension scheme for UK purposes with effect from 18 August 2008. You must notify Pension Schemes Services immediately if the scheme ceases to be a recognised overseas pension scheme.
>
> The reference number for the scheme is QROPS 502053. Please quote this number in any correspondence with HM Revenue and Customs."

12. HMRC maintains a list of QROPS on its website. Wenns was first included in this list no later than 8 September 2008, and a copy of the list as at that date was included in the bundle. The note at the top states that it is a list of QROPS that have consented to have their details published, so that not all QROPS would necessarily be listed. The list is stated to be updated twice a month and there is a cross-reference to guidance in chapter 14 of the Registered Pension Schemes Manual. Schemes are listed by country, and Wenns is one of two schemes listed under Latvia.

[1] See regulation 2(3) of SI 2006/206, in the Appendix.

13. The next version of the QROPS list was published on HMRC's website on 24 September 2008[2]. A copy of the list as at that date was included in the bundle. In that and subsequent versions HMRC included a caveat at the top of the list. The caveat is in the following terms:

> "This list is based on information provided to HMRC by these schemes when applying to be a QROPS. As part of its application the scheme notifies HMRC that it fulfils the requirements of being a "recognised overseas pension scheme". Publication on the list should not be seen as confirmation by HMRC that it has verified all the information supplied by the scheme in its application. If a scheme has been included on this published list in circumstances where it should not have been included because it did not satisfy the conditions to be a recognised overseas pension scheme, any transfer that has been made to that scheme could potentially give rise to an unauthorised payments charge liability for the member (see RPSM14102020).
>
> The transfer could also give rise to a scheme sanction charge on the scheme and to an unauthorised payments surcharge on the member. Where the scheme administrator has relied on the fact that the overseas pension is included on the latest published list (and can demonstrate if required that it checked the list no more than one day before the transfer was made) and did so in good faith, this should normally provide just and reasonable grounds for HMRC to discharge any liability of the scheme administrator to the scheme sanction charge (see RPSM14101050 and RPSM04104870). This should also normally provide just and reasonable grounds for HMRC to discharge any liability of the member to the unauthorised payments surcharge. (However, as referred to above there may still be an unauthorised payment charge liability for the member in these circumstances – see RPSM04102020.)"

14. On 24 August 2010 HMRC wrote to Mr Rainis noting that he had failed to provide information requested in an earlier notice and informing him that Wenns was now excluded from being a QROPS under s 169(5) FA 2004, on the basis that there had been a significant failure to comply with information requirements and as a result it was not appropriate that transfers to Wenns should be recognised transfers. Wenns was removed from HMRC's QROPS list on 3 September 2010[3]. There was no appeal by Wenns against the removal.

15. There was no clear documentary evidence confirming that HMRC had not levied a scheme sanction charge on any scheme administrator in respect of any of the transfers in dispute. However, based on the evidence available and a confirmation from HMRC officers present at the hearing that they were not aware of any such charges, we find

[2] On its face this version of the list has a publication date of 22 September 2008, but HMRC's position is that the caveat it contains was first added on 24 September 2008.

[3] There are a number of references in the documents and submissions to the removal occurring on a date in October 2010. 3 September 2010 is the date provided by HMRC, and the discrepancy is immaterial.

that no scheme sanction charge was levied on any of the transferring schemes, on the basis that HMRC accepted that they acted in good faith and had checked the list, in accordance with the terms of the caveat set out above.

16. Although again the documentary evidence was not entirely clear, it appears that all four appellants were introduced to Wenns by an organisation called Windsor Pensions ("Windsor"). We saw a sample "Letter of Engagement and Fee Agreement" entered into by another individual. This was clearly a standard document with spaces for details of the client's transferring scheme(s), scheme reference number(s) and the approximate value of the funds to be added in manuscript, and was intended to be signed by Windsor's client (as it was in the sample we saw). The terms of this document authorised Windsor to contact the UK pension scheme or schemes listed and to facilitate the transfer of the client's funds to a QROPS. The document states that the client "agrees and acknowledges" that Windsor is "not a financial adviser, is not intending to give, provide or infer the provision of any financial, taxation or other professional services advice", that Windsor will have "sole discretion" to select the QROPS, that on completion of the transfer the client will pay the "Transfer/Administration fee" set out in the form, and that the agreement is confidential and the client "will not disclose, publish or otherwise reveal any of the contents of this agreement to any other party" except with Windsor's prior written authorisation. There was no evidence to suggest that Windsor was regulated in any way, whether by the Financial Services Authority or any other body (and indeed the disclaimer on the form suggests otherwise), so we find that it was unregulated.

17. The fees set out in the document depend on the value of the pension funds transferred, being 20% for transfers between £10,000 and £25,000, 15% for transfers between £25,000 to £50,000, 12% for transfers between £50,000 to £100,000, and 10% for transfers over £100,000.

18. The document also provides for some obligations on Windsor. These mainly relate to completing tasks promptly but also state that Windsor "will not report distributions to HMRC, IRS or other taxation authority" and include a similar undertaking to that provided by the client about confidentiality and non-publication. The sample document we saw is signed by a Mr Steven Pimlott and a London address is provided (although elsewhere in some of the correspondence there is a reference to contact details for Mr Pimlott in the USA).

19. The documents bundle also included a statement published by HMRC on its website on 27 November 2013, stating how it would deal with transfers to a scheme included on the QROPS list where the scheme was not a QROPS at the date of the transfer. It states that the guidance is related to the case of *R (Gibson) v Commissioners for HM Revenue and Customs*. This was judicial review litigation against HMRC which attracted some publicity at the time, and is also referred to as the ROSIIP litigation. There was no decision in that case because HMRC decided to withdraw its assessments against the individuals concerned.

20. The guidance states that HMRC will exercise its collection and management powers not to raise or pursue assessments where the transfer took place before 24

September 2008 (the date HMRC say that the caveat on the QROPS list was published, see above) and the scheme was included on the list at the time of the transfer but was not a QROPS. This is subject to a proviso where there is evidence relating to "dishonesty, abuse, artificiality or any similar circumstances" and the imposition of tax charges appears not to be conspicuously unfair.

21. For transfers made from 24 September 2008 onwards to a scheme on the list but which is not a QROPS, the guidance states that HMRC "will consider whether to exercise its collection and management powers on the particular facts of the case in the light of the principle of conspicuous unfairness mentioned above".

22. The guidance goes on to provide further detail. It states that the list is "intended to be for use by UK scheme administrators", enabling them to be satisfied that the scheme has notified HMRC that it meets the relevant conditions before they make a requested transfer. It explains that before 24 September 2008 the list did not contain a caveat explaining the purpose of the list, which might have given the impression that HMRC was satisfied that any scheme included on the list was a QROPS. A section headed "Individuals – Understanding the QROPS regime" states:

> "The primary objective of the QROPS regime is to enable individuals leaving the UK permanently to simplify their affairs by taking their pension savings with them to their new country of residence. This is intended to enable them to continue to save to provide themselves with a higher income when they retire. In particular it is not considered desirable for individuals to be able to use a transfer to an overseas scheme to facilitate the withdrawal of their savings as a large lump sum or to receive more tax relief than would have been available had the pension savings remained in the UK. This objective was set out in a statement published on the HMRC website on 6 December 2011."

23. The guidance goes on to state that the tax charges levied if the scheme is not a QROPS represent a clawback of the tax relief from which the pension funds have benefited in the UK, refers to a charge of up to 55% of the amount transferred and advises individuals to obtain independent professional advice and also to confirm with the scheme that it meets the requirements to be a QROPS. It specifically says that a letter from HMRC with a QROPS number is not a confirmation that the scheme is or will remain a QROPS, and advises individuals to be particularly wary if they are told that there is a tax loophole or that they can receive a large lump sum. Further detail is provided about the QROPS requirements in the legislation.

Mr Hills

24. Mr Hills was born on 10 April 1974. He served in the Armed Forces from the age of 16 and subsequently worked in the North Sea oil and gas industry as a helicopter pilot. Although he uses a UK address for correspondence with HMRC this is a family address and Mr Hills has been non-UK resident since leaving the UK in 2008 to work in Dubai. He has no intention of returning to the UK.

25. Mr Hills was a member of the Bond Offshore Helicopter Pension Scheme operated by Standard Life. On 2 February 2010 Standard Life responded to an enquiry from Mr Hills or on his behalf about an overseas pension transfer. The response requested additional information, including a copy of the "QROPS certificate" provided by HMRC showing that the overseas pension scheme "has been granted approval by HMRC to receive pension transfers from the UK", which was stated to be a "regulatory requirement". Mr Hills had been provided with a copy of HMRC's letter to Wenns dated 18 August 2008, and this was passed to Standard Life with the other requested information. According to later HMRC correspondence, Mr Hills signed the relevant Standard Life application on 3 February 2010, and that application included a confirmation that he was "aware of the benefits that will be awarded in respect of the transfer value and the forfeiture provisions (if applicable) in the Receiving Scheme" and an acknowledgement that that scheme might not be regulated by UK law. A copy of the application was not included in the bundle.

26. The transfer was made on 16 February 2010 in the amount of £22,791.55, being the entire value of Mr Hills' fund. Mr Hills was 35 years old at the time. Shortly thereafter Mr Hills received the funds less their commission, which on the basis of the standard terms referred to above would have been 20%.

27. On 25 January 2011 Standard Life submitted their annual report to HMRC of all transfers made to overseas schemes during the 2009-10 tax year. This included details of the transfer by Mr Hills. On 12 May 2011 HMRC wrote to Mr Hills issuing a self-assessment return for 2009-10. The brief covering letter states that the return was being issued "as HMRC have information to suggest that you may have a liability to income tax in the year to 5 April 2010 resulting from a change in your pension arrangements", and goes on to state that this "needs to be declared on the enclosed additional pages entitled Additional information". The bundle did not include a copy of the enclosure but it appears that the letter was referring to the supplementary pages in form SA101, which include boxes that need to be completed showing the amount of any unauthorised payments from pension schemes.

28. Mr Hills filed the return on 17 May 2011, making no reference to his pension arrangements and stating that he was a non-resident working in Dubai who was not intending to be in the UK for more than 91 days in any tax year.

29. The documents bundle included no further correspondence with HMRC up to the point of the discovery assessment issued on Mr Hills on 25 April 2014, referred to below. However, there was further correspondence in the interim and a copy of this was provided by HMRC following the hearing following questions from the Tribunal relating to whether the requirements of s 29 TMA were met. This correspondence shows that HMRC wrote to Mr Hills on 26 March 2012. The letter states that the transfer "was an Unauthorised Payment and should have been included in your SA return", and states that HMRC has corrected Mr Hills' return under s 9ZB TMA on the basis that there was an obvious error. Some correspondence followed in which Mr Hills objected to this on the grounds that he was non-resident and made a transfer to a QROPS, and HMRC confirmed in a letter dated 2 May 2012 that "HMRC has established that Wenns International was not a legitimate pension scheme and was

being used by members to extract money from their pension schemes". Mr Hills' reply to this letter on 14 May attached the 18 August 2008 letter and stated that he had acted in good faith and demonstrated due diligence.

30. There was no further correspondence until a letter from a different officer at HMRC on 9 September 2013 which stated that they were carrying out a check to confirm the amount of tax, gave Mr Hills the opportunity to provide information or comments, failing which an assessment would be made, and asked (for penalty purposes) why he did not include the payment in his return. HMRC's explanation for the gap in the correspondence was that following Mr Hills' objection they reversed the correction to his return and referred the matter internally for investigation.

31. Further correspondence followed in which Mr Hills made similar points to those made previously. In a letter dated 8 October 2013 HMRC referred to the transfer being treated as unauthorised "because of the way [Wenns] had been administered by Windsor Pensions", and that when HMRC became aware of this its QROPS status was revoked. Since its removal from the list HMRC had become aware of many individuals who transferred into Wenns and had substantial amounts paid to them shortly afterwards, and in the light of those developments HMRC had reached the conclusion that Wenns never existed as a genuine pension scheme but rather as a vehicle to facilitate pension liberation.

32. In a reply dated 13 October 2013 Mr Hills acknowledged that he was aware of the disclaimer added to the QROPS list in September 2008, but chose a "fully certified QROPS" through careful due diligence. We infer that this is a reference to Mr Hills having seen the letter from HMRC to Wenns dated 18 August 2008, and this is supported by the way in which that document is referred to in another letter from Mr Hills dated 8 January 2014.

33. Following some further correspondence during which HMRC stated that they were continuing to consider the position, HMRC issued a discovery assessment on Mr Hills in the amount of £12,535.35, being 55% of the amount transferred. The assessment was issued on 25 April 2014, more than four years after the end of the tax year. Mr Corton of HMRC also wrote a letter to Mr Hills dated 28 April giving an explanation of the assessment. The letter summarises the facts as understood by HMRC and states that, based on those facts, HMRC had concluded that the transfer to Wenns was an unauthorised payment. Mr Corton goes on to explain the rationale for HMRC's view in some detail. The explanation includes a statement that, where a scheme notifies HMRC that it meets the QROPS conditions and elects to be entered on the list, HMRC would need good reason to refuse publication because under its charter it is committed, unless it has good reason not to do so, to presume that it is being told the truth. Mr Corton also states that although Mr Hills could apply under s 268 FA 2004 for the surcharge to be discharged, given that the transfer was "deliberately undertaken (by which I mean it was not as a result of an administrative error)", he would not anticipate that any such application would be successful.

34. The 28 April letter also refers to Mr Hills' right of appeal, listing additional information Mr Corton would require in that event, warns of potential liability to

penalties under Schedule 24 to the Finance Act 2007 and requests further information in relation to that aspect. The further information stated to be required for any appeal included the basis on which Mr Hills chose Wenns, copies of all correspondence with the person promoting or recommending the transfer (including promotional material), the benefits Mr Hills understood would be awarded, confirmation of what happened to the funds transferred and the extent of the due diligence referred to by Mr Hills in his letter of 13 October 2013.

35. Mr Hills replied by a letter dated 19 June 2014, in which he answered questions raised by Mr Corton in relation to penalties, primarily relating to any advice he obtained, why the transfer was not disclosed on his self assessment and whether he checked the position with HMRC or his agent, but did not specifically respond to other questions. The letter makes it clear that he did not include any reference to an unauthorised transfer in his tax return on the basis that it was an authorised transfer. The letter includes reference to Standard Life having a fiduciary responsibility to him to make only authorised transfers, and having made the transfer upon completion of internal due diligence. Mr Hills believed that Standard Life made the transfer with regulatory approval and in compliance with UK law. Mr Hills was not a pension, tax or legal expert. The clear implication from the letter is that Mr Hills was saying that he relied on Standard Life and took no advice. The letter also refers to the QROPS certificate provided by HMRC and requested by Standard Life in their letter of 2 February 2010.

36. In a subsequent letter dated 28 June 2014 Mr Hills also supplied a letter from Standard Life to Mr Hills dated 11 June 2014. This letter explained that Standard Life would have checked the QROPS list at the time of the transfer, that they referred this case to their Financial Crime team due to Latvia being a "country of concern" and that it was agreed that "all checks passed as per HMRC guidelines at the time", that Mr Hills' case was audited in 2011 to ensure it had been dealt with correctly and no faults were found, and that Standard Life had already been investigated regarding transfers to schemes like this and had been found to have done the transfer in good faith as per HMRC guidelines.

37. Mr Hills' 28 June letter also attached further commentary addressed to a review officer, further to a request in the previous letter that he have his case reviewed by another officer who had not been involved in the case. As well as referring to Standard Life's recent letter this further commentary states that Mr Hills had maintained good faith and integrity throughout the investigation, that he had no intention of returning to the UK and had no assets in or ties to the country, and that he transferred his pension offshore in good faith as part of his relocation out of the UK.

38. Mr Corton replied on 25 July 2014, listing information still required both by Mr Corton and for any review. The letter also invited an application for the surcharge to be discharged, and sets out the conclusions Mr Corton had reached in relation to penalties, namely that a penalty was appropriate for careless submission of an incorrect return. A penalty explanation document was enclosed. This document explains that the penalty charged was £2,538.40, that the penalty range was from 15% to 30% since it was a careless inaccuracy with prompted disclosure, and that a

reduction of 65% was being given for the quality of the disclosure (resulting in a penalty of 20.25%), on the basis that Mr Hills had provided full details of the amount transferred, had cooperated and responded to requests but had not supplied all the information or evidence requested. None of the penalty was suspended, on the basis that this was a one off event that was unlikely to re-occur.

39. In a letter dated 25 August 2014 Mr Hills applied for the surcharge to be discharged, on the basis of his continuing contention that the transfer was an authorised transfer. This letter also makes further reference to Mr Hills' reliance on Standard Life and its regulated status, and the fact that Standard Life required HMRC's QROPS "certificate" before proceeding as a "regulatory requirement".

40. Mr Hills' application for the surcharge to be discharged was rejected by a letter dated 15 September 2014 on the basis that it was entered into voluntarily, that Mr Hills relied solely on the advice of Windsor and did not seek clarification from HMRC or an independent party, that the published QROPS list at the time of the transfer clearly stated that a transfer could give rise to tax charges, and that the instruction to Standard Life dated 3 February 2010 declared that Mr Hills was aware of the benefits that would be awarded. An accompanying letter of the same date refers to a continued failure to provide evidence to substantiate Mr Hills' claim that he acted in good faith in making the transfer to Wenns, for example in not explaining the rationale in choosing a Latvian based entity, and what other research was undertaken. The letter also points out that Mr Hills provided nothing in response to some of HMRC's questions, such as how he chose Wenns, copy correspondence with the person recommending the transfer, and documentary evidence of what happened to the funds. A further letter dated 16 October makes further reference to failure to supply details of any contact with the agent or intermediary that Mr Corton said he was aware that Mr Hills had employed and paid (this is obviously intended to be a reference to Windsor, but there is no reference to it by Mr Hills).

41. The formal penalty assessment was issued on 16 September 2014 in the amount previously stated. HMRC's assessments were confirmed on review by a letter dated 10 December 2014. This letter mainly repeats points previously made. In relation to the application to discharge the surcharge, the letter cross refers to the wording of the caveat on the QROPS list and states that in the reviewing officer's view HMRC has "sufficient evidence to suggest that your chief motivation in choosing Wenns was a desire to gain early access to the funds held in your Standard Life pension scheme, rather than a desire to transfer your existing pension, on leaving the UK, into a comparable overseas scheme in order to secure retirement (or similar) benefits in the future", and therefore that the officer could not be satisfied that Mr Hills acted in good faith. In relation to suspension of the penalty, the main reason for HMRC being unable to do so is stated to be that Mr Hills is unlikely to be required to submit UK tax returns in the future. Mr Hills appealed to the Tribunal on 29 December 2014.

Mr Martino

42. Mr Martino was born on 25 June 1966. He has been an airline pilot for over 30 years, initially in the Italian Navy as a helicopter pilot and then as a commercial

airline pilot. He has been employed by easyJet as a Captain since June 2005. He was based at Gatwick for the first nine months and then transferred to Milan in March 2006, being based there since that time. Initially all easyJet pilots based in Italy were employed under UK contracts, but these were changed to Italian ones and since April 2008 Mr Martino has been paying full taxes and social security contributions in Italy, and has not spent more than a couple of weeks a year in the UK. Prior to April 2010 his income was taxed in the UK but was later reimbursed on the basis that he was not UK resident. He now has no UK taxable earnings or assets.

43. While he was employed under a UK contract Mr Martino used Scottish Equitable as a private pension provider, because it was made available by easyJet. His witness statement dated 28 September 2017 indicated that he became aware of the possibility of transferring his pension funds to a QROPS, Wenns, from colleagues at easyJet. The same document states that Wenns provided him with an HMRC published list of QROPS which did not include a caveat[4], together with a letter of approval of Wenns as a QROPS (this must have been the letter dated 18 August 2008). The document does not name Windsor but states that Mr Martino was "presented with a solution set by a specialized company", that he would have expected them to check all legal aspects and that he recalled checking himself at the time that Wenns was on the list published by HMRC.

44. The documents bundle included a signed transfer instruction from AEGON Scottish Equitable to Wenns dated on 19 January 2010. The form is completed on the basis that both protected and non-protected rights are being transferred, and includes confirmations that the receiving scheme is a QROPS, that Mr Martino has received from the overseas scheme a statement showing the benefits to be awarded, and that Mr Martino was aware that it may not be regulated by UK law. Mr Rainis provided details of the receiving scheme, also confirming that Wenns was a QROPS and stating that "a copy of our letter of acceptance from the Revenue" has been provided. An HMRC form, CA1881, was also completed by Mr Martino which confirmed that he had been made "fully aware of the risks involved in transferring to an overseas scheme or arrangement including that I will no longer be protected by pensions legislation enacted by the United Kingdom". The transfer of Mr Martino's funds was made on 26 January 2010 in an amount of £34,486, following which he received the funds less the commission charged, which we infer was 15%. He was aged 43 at the time.

45. Mr Martino's return for 2009-10 was filed on 5 August 2010. It confirms that he was not UK resident for the tax year but includes a return of employment income.

46. On 10 September 2013 an HMRC officer wrote to Mr Martino stating that he considered that his return for 2009-10 was incorrect. The letter states that based on information provided by Scottish Equitable the officer believed that the pension transfer to Wenns was an unauthorised payment. The letter invited Mr Martino to provide any comments or information he had which differed from the above. It appears that Mr Martino did not respond to this letter in writing but did telephone

[4] See [56] below for our findings on this.

HMRC for an explanation as to why he had received the letter despite not being UK resident.

47. On 31 March 2014 another officer wrote to Mr Martino referring to the earlier letter and stating that HMRC had recently completed a review of how to proceed with enquiries where funds had been transferred to schemes that had notified HMRC that they were QROPS. The letter states that the review was undertaken following a recent court case (a clear reference to the *Gibson* judicial review litigation), adding that the review was undertaken to ensure that enquiries are only progressed "in line with assurances made to the Court". After some general comments including about the objective of the QROPS regime the letter states that HMRC's investigations had concluded that Wenns was never a pension scheme, and that rather than providing savings for retirement the arrangement allowed individuals to gain access to their pension funds early. Funds were transferred to Wenns, fees were deducted and the balance was paid to the individual.

48. The letter refers to the QROPS list but states that it was published only so that scheme administrators could verify that a scheme has notified HMRC that it meets the requirements, and that a caveat was included when it became apparent that members were relying on the list. The transfer was made after the caveat was inserted and was liable to the unauthorised payments charge and surcharge. The letter asks for further information to establish whether a penalty was appropriate. The questions are similar to the penalty related questions asked of Mr Hills.

49. A discovery assessment was issued on the same day as the letter, 31 March 2014, in the amount of £18,967 (55% of the amount transferred). Mr Martino responded by a letter dated 22 May 2014, which pointed out that HMRC's letter (presumably both the letter and the assessment) had only arrived on 12 May 2014. This letter refers to Mr Martino being an Italian citizen living and working in Italy, and not resident or domiciled in the UK. It states that Mr Martino had sought to regularise his outstanding financial affairs and used the services of an agent in the UK who was "controlled and regulated by the Financial Services Authority", and that advice received from him complied with the rules and regulations in force at that time. Mr Martino had acted on that advice in good faith and was confident that HMRC was supervising the entire process. We infer that the reference to an agent was to Mr Pimlott and/or Windsor, although as referred to at [16] above the latter was not regulated and there is no evidence to indicate that Mr Pimlott was regulated either.

50. On 23 May 2014 HMRC purported[5] to issue a notice under Schedule 36 to the Finance Act 2008 to Mr Martino, formally requesting the information previously requested in the letter of 31 March. This clearly crossed with Mr Martino's letter dated 22 May. On 10 June HMRC responded to the letter of 22 May setting out in a bit more detail how the charges were calculated and notifying Mr Martino that he could apply for the surcharge to be discharged, but as with Mr Hills noting that the writer did not anticipate any such application would be successful because it was

[5] The notice was not valid because Mr Hills is outside the UK: see *R (oao Jimenez) v First-tier Tribunal* [2018] STC 132.

"deliberately undertaken" (by which I mean it was not as a result of an administrative error)".

51. Mr Martino requested a review by a letter dated 3 July 2014. This letter stated again that Wenns presented a list of QROPS to Mr Martino which included no caveat, together with the 18 August 2008 "letter of approval", a copy of which was attached. The letter refers again to Mr Martino being presented with a "solution set by a specialized company" whom he expected to have covered all the legal aspects, and that he also would have expected Scottish Equitable, as specialists in regulations relating to pensions, to prevent the money being transferred if the transfer was illegal. He was surprised by the total lack of supervision by HMRC. He had participated in the scheme only because colleagues had recommended it and had not looked for ways to avoid paying taxes. The entire process had been run by others that he believed were trustworthy professionals.

52. HMRC wrote on 23 July 2014 about the proposed review, noting that Mr Martino had not made an application to have the surcharge discharged. Mr Martino responded on 6 August in a manner that HMRC treated as an application to discharge the surcharge under s 268 FA 2004. HMRC replied on 10 September refusing the application on the basis that the transfer was made voluntarily rather than accidentally, that Mr Martino relied solely on the advice of Windsor and did not seek clarification from HMRC or an independent party, that the QROPS list at the date of the transfer clearly stated that a transfer could give rise to tax charges, that Mr Martino completed Scottish Equitable's transfer instruction declaring that he had received from the overseas scheme a statement showing the benefits to be awarded and that he was fully aware that it may not be regulated by UK law, and that Mr Martino had completed form CA 1881 declaring that he had been made fully aware of the risks involved in transferring to an overseas scheme, including that he would no longer be protected by the UK pensions legislation.

53. It appears that HMRC's 10 September letter was delayed in the post, and Mr Martino's formal appeal was made on 14 October 2014, repeating points made in earlier correspondence. HMRC's response dated 30 October notes that the transfer was made one year and four months after the caveat had been published. In relation to the 18 August 2008 letter it is stated that it was not anticipated that such a letter would be sent on to prospective members. Reliance on a letter dated some 17 months previously was in any event questionable.

54. The review decision was issued by a letter dated 4 November 2014. The review officer comments that Mr Martino had provided little in the way of documentary evidence. It states the officer's understanding that the intermediary was Windsor and that it was not FSA approved, that Mr Martino had not provided any information as to what he did with the pension funds when they were transferred from Wenns, but that he would have received the funds as a lump sum less fees. The letter notes that Wenns would have self assessed its status, that HMRC accepts what it is told unless there is a good reason not to, that it would have been prudent for Mr Martino to check an up-to-date list and verify the content of a letter dated some 16 months earlier. The letter also refers to the *Gibson* litigation, to which Mr Martino had referred in correspondence,

and noted that the transfer was made after 24 September 2008. It was Mr Martino's responsibility to undertake the necessary due diligence. The surcharge would not be discharged because Mr Martino would have known that he was releasing his pension fund before he was entitled to do so.

55. Mr Martino appealed to the Tribunal on 3 December 2014. His then advisers also wrote to HMRC on 5 December 2014. This letter provided some additional information, including confirming that Mr Martino had used Windsor and had not received professional advice prior to the transfer, and stating that if Wenns had not been registered as QROPS the transfer to it would not have been made. It notes that the 18 August 2008 letter is unequivocal and unqualified, and states that Mr Martino took this as proof that Wenns had been accepted by HMRC as a QROPS.

56. As noted above there are references in the correspondence to Mr Martino having been provided with a QROPS list that did not include a caveat. However, he also refers to recalling checking himself at the time that Wenns was on the list (see [43] above). We think it is more likely than not that Mr Martino did see a version of the list that included the caveat.

Mr Connell

57. Mr Connell was born on 21 April 1967. In May 2007 he moved from the UK to Australia and gained permanent residency there in 2009, but retained a house in the UK from which he received a small amount of rental income. He remains a resident of Australia. Prior to the disputed transactions he had pension funds in three registered pension schemes, run by Legal & General, Aviva (Norwich Union) and Zurich Assurance. On 3 September 2009 Mr Pimlott sent him an email which is stated to be further to a telephone conversation earlier in the day. The email stated:

> "Because of your fund sizes the only option I can offer you is to transfer your UK pensions to a EU based QROPS from which you will then immediately take your entire fund in a cash lump sum as a 'trivial sum commutation'. Your funds are too small to transfer to a 'managed' QROPS where the minimum transfer value in is £100,000."

The email went on to explain that the transfer usually took four to six weeks and the commutation one to two days extra. A fee table was included which is similar to the percentage fees referred to at [17] above. The email refers to a "Letter of Engagement/Fee agreement" as well as to letters of authority for each policy. In the absence of other evidence we infer that the former document was in the same form as the document described at [16] above. The letter of authority was simply an authority given by the individual to Windsor to receive information about the relevant pension fund, intended to be produced to the scheme administrator.

58. Mr Connell returned the letters of authority as requested and also emailed on 7 September asking whether there was any risk of his money "disappearing into Europe; never to be seen again?" Mr Pimlott replied that they had not lost any client's money yet, and if Mr Connell preferred the smallest fund could be transferred first.

59. On 17 September 2009 Legal & General wrote to Windsor in relation to Mr Connell. Among the enclosures to the letter was a one-page warning to policyholders, headed "Important!", about the potential tax consequences of pension transfers. This stated that a transfer to an overseas pension scheme that was not a QROPS would give rise to a 55% charge, that Legal & General would take reasonable steps to make sure that the receiving scheme was a QROPS, and advised contact with a financial adviser if the policyholder was concerned about the possible tax implications. Although it is not certain that this warning was passed on to Mr Connell, other documents enclosed with the same letter were signed and returned by him, so we think it is more likely than not that the warning was passed onto him. Those other documents included a "Protected Rights Declaration" requesting a transfer to Wenns. That document contained an acknowledgement that the receiving scheme was not regulated by UK law and that Mr Connell had received a statement from the receiving scheme showing the benefits to be awarded.

60. Zurich provided an overseas transfer claim form which Mr Connell signed on 27 September 2009. The form summarised the requirements for a scheme to be a QROPS. Mr Rainis signed a section of the form confirming that the receiving scheme was a QROPS. This part of the form also included a note that Zurich would check with HMRC that the receiving scheme maintained its status as a QROPS before proceeding with the transfer.

61. As with Mr Martino, the documents bundle included a form CA1881 signed by Mr Connell (see [44] above).

62. The amounts transferred and dates of the transfers to Wenns were:

Pension fund	**Date**	**Amount (£)**
Aviva	6 October 2009	340.70
Legal & General	14 October 2009	9,795.74
Zurich	16 October 2009	67,467.39
	Total	77,603.83

A 12% commission was deducted from each amount and the balance was converted to Australian dollars and paid into Mr Connell's account in Australia on 29 October 2009 (Aviva and Legal & General) and 11 November 2009 (Zurich). Mr Connell was aged 42 at the time.

63. On 28 May 2010 Mr Connell filed a tax return for 2009-10. The income disclosed in this return was limited to a small amount of property income. Mr Connell included a note stating that the current rent did not cover the mortgage payments.

64. On 19 April 2013 an HMRC officer, Mr Jones, wrote to Mr Connell at the correspondence address he had provided in the UK, stating that he believed that the 2009-10 return was inaccurate and that the transfers to Wenns may have resulted in unauthorised payments which should have been declared. The letter requested a list of information and documents about the transfer to Wenns. Mr Connell replied in a detailed letter dated 8 May 2013. The reply confirms that Mr Pimlott was the only person he had dealt with and encloses copies of all the correspondence he could find, together with a copy of the relevant bank statements showing the transfers to his account. Mr Connell explains that he transferred the funds because they became frozen after he moved to Australia. He gained permanent residency and knew he would not be returning to the UK indefinitely, "so it made sense to try and make the funds active again". From the research he did he had understood that Wenns "was an approved QROPS on the HMRC approved list" at the time of the transfer and that it would be a tax-free transfer. He states that this was mentioned on a lot of QROPS websites for transferring funds from the UK. The letter also refers to the *Gibson* litigation and states that because HMRC had not charged the scheme sanction charge on the UK pension schemes they should not be able retrospectively to demand an unauthorised payments surcharge.

65. Mr Jones responded on 12 June 2013 stating that the transfer was an unauthorised payment because it was made to facilitate payment to Mr Connell. The letter refers to the caveat on the QROPS list and also requests further information so that Mr Jones could determine the penalty position. Mr Connell responded by a letter dated 1 July 2013. This letter states that Windsor was advertising its services on Australian national television, that Mr Connell checked their website and that of companies offering the same services and it seemed that this was a common practice for people who did not intend to return to the UK. The letter adds that Mr Connell was sure that he checked the HMRC website at the time to make sure that "Windsor Pensions were an approved QROPS facilitator", that he followed all the advice he received from Windsor, who sounded very professional on the phone, and that he was not advised by Windsor that there would be any need to pay additional tax or include anything on his return. He admitted to being very naive and too trusting, and that he should have done more research.

66. It is of course not the case that Windsor was listed on an HMRC website. We think it more likely that Mr Connell was confusing Windsor with the inclusion of Wenns on the QROPS list. Our conclusion from the correspondence is that Mr Connell checked the QROPS list at the time of the transfer, and that he would therefore have seen the caveat. It is clear that Mr Connell did not receive independent advice at the time or check the position directly with HMRC.

67. After some holding letters HMRC issued a discovery assessment on 3 April 2014 in the amount of £42,681.10, and issued a letter to Mr Connell on the same date explaining that the tax charge represented 55% of the amount of unauthorised payments. The letter includes similar comments to the letter dated 31 March 2014 sent to Mr Martino (see [47] and [48] above), apart from confirming that the penalty would not be charged on the basis that HMRC believed Mr Connell took care when

completing his return. Mr Connell replied by email on 28 April 2014 in a manner which was treated as an appeal and a request for a review.

68. On 6 June 2014, following a prompt from HMRC, Mr Connell applied to have the surcharge discharged, which was refused on 18 June 2014. The reasons given were that the transfer was made voluntarily rather than accidentally or forced on Mr Connell, that the caveat on the list explained that the transfer could give rise to tax charges, that rather than the funds remaining in an active pension fund Mr Connell received 88% of the funds in cash, that if Mr Connell had checked Windsor's reference to "trivial sum commutation" with HMRC or an independent party he would have been advised that this course of action did not meet the requirements of a QROPS transfer or trivial commutation, that there were warnings on the Legal & General forms and that Mr Connell was aged only 42 at the time of the transfer so there was no legitimate expectation that he could access accrued pension benefits. Mr Connell appealed this decision on 23 June 2014.

69. Following a review HMRC confirmed the assessment on 9 July 2014 in a detailed letter setting out the review officer's understanding of the case. The letter concludes that it was always Mr Connell's intention and knowledge that the arrangements were entered into for the purpose of cashing his pension in, and that the surcharge should not be discharged because Mr Connell was aware that the result would be receipt of all of his funds less fees before the qualifying retirement age, the purpose was never to continue investment in a pension and Mr Connell did not contact HMRC or disclose the transfer in his tax return. Among other things the letter states the officer's understanding that Windsor was not FSA authorised, and notes that the officer had found a blog published in April 2010 which stated:

> "Intermediary firm Windsor Pensions has said it will accommodate British expats wishing to fully encash their pensions immediately upon leaving the country, despite this conflicting with UK regulations."[6]

70. Mr Connell appealed to the Tribunal on 8 August 2014. His revised grounds of appeal, filed following the strike out decision, refer to Mr Connell having relied on HMRC's letter dated 18 August 2008, which had no caveats, and having checked HMRC's QROPS list on their website. They also refer to checks carried out by the registered pension schemes, and state that Mr Connell carried out such reasonable checks as could be expected of any taxpayer. In fact, unlike the other appellants there was no evidence apart from the revised grounds of appeal that Mr Connell saw or relied on the 18 August letter at the time of the transfer: instead Mr Connell referred to the QROPS list. Our conclusion is that he did not see the 18 August letter at the time, and that this part of his revised grounds of appeal was taken from the grounds put forward by another appellant.

[6] There is however no evidence to indicate that any of the appellants saw comments of this nature at the time of the transfers.

Mr Gordon

71. Mr Gordon was born on 14 November 1956 and lived in the UK until he retired. He left school at the age of 15 and worked in the construction industry. Following his retirement at the end of 2008 he travelled, and during some temporary work in Malaysia he met and formed a relationship with a Malaysian lady. They got married in October 2009 and have a daughter who was born in January 2010. They have lived in Malaysia since that time. Mr Gordon also has three sons in the UK from a previous relationship.

72. Mr Gordon retained a house in the UK. He also initially had two pension policies with Standard Life but prior to the disputed transfer took a 25% lump sum plus a monthly annuity in respect of the larger one, leaving the policy that later became the subject of the disputed transfer. Mr Gordon's wife had no independent resources and Malaysia does not have the level of State support available in the UK, and Mr Gordon concluded that he should take steps to provide his wife and daughter with some financial security in the event of his death. His internet research led him to identify QROPS as a possibility and to contact Windsor, initially by a telephone call with Mr Pimlott, and on 29 September 2009 Mr Gordon signed a letter of authority permitting Windsor to contact Standard Life on his behalf. In oral evidence Mr Gordon suggested that he may also have contacted other providers but could not recall any details. He confirmed that he did not check whether Windsor was registered with the FSA.

73. On 19 October 2009 Mr Pimlott sent Mr Gordon an email containing a materially identical paragraph to that quoted at paragraph [57] above, stating that the only option he could offer was a transfer to an EU-based QROPS from which he would immediately take his entire fund in cash as a trivial sum commutation. The email also includes similar information about charges as referred to at [17] above and refers to a transfer fee of 15% on the basis of a fund value of £31,844.

74. The same email also states that a "Letter of Engagement/Fee Agreement" is attached for review, and requests that it be signed and sent back along with other documents. In oral evidence Mr Gordon denied having signed a form containing the statements referred to at [16] above about Windsor having discretion to select the QROPS and not being a financial adviser. However, in the absence of other evidence we have concluded that it is more likely than not that Mr Gordon did sign a document in the form described at [16] above, but either does not now recall the details or did not read the document properly. Finally, the email also states that a "copy of the receiving scheme (QROPS) HMRC approval letter is attached for your records". We infer that this was the 18 August 2008 letter.

75. Mr Gordon was asked in cross-examination why he thought that the only option offered was one involving the entire fund being paid out. Mr Gordon's response was that he thought it was to do with the level of administration charges on small fund sizes. We agree with Mr Singh that this is a questionable reason given that the funds were already being managed by a UK scheme.

76. Mr Gordon replied on 20 October 2009 asking Mr Pimlott to advise whether he would have to pay income tax if he took a lump sum, and querying how he would take the entire cash lump sum from the QROPS and whether there would be a charge for withdrawing money immediately. Mr Pimlott responded the same day stating that the transfer by Standard Life was made gross, with no deduction of income tax at source, that Mr Pimlott had no idea of the tax situation in Malaysia, and that there were no extra charges, the 15% fee covering everything (Windsor being paid an administration fee by the QROPS). Mr Gordon emailed again on 29 October saying he was still looking into what would be best for him, and checking that he understood that he would receive £31,884 less 15% into his bank account with no other charges. The bundle did not include any response to this email.

77. Mr Gordon's oral evidence, which we accept, is that he had considered the alternative of taking a 25% tax-free lump sum from Standard Life and an annuity, rather than transferring the funds to a QROPS. However he estimated that the annuity would probably only be about £120 a month, and that it would cost about £20 a month to transfer the money to Malaysia. He understood that a 100% lump sum could be taken from a pension scheme in Malaysia on a tax-free basis. Because of the level of his taxable income an annuity would also not have attracted tax in the UK. He did not intend to avoid tax. He also confirmed that he had not obtained any independent advice and had relied in particular on the 18 August 2008 letter, which he took to be an HMRC confirmation that Wenns was a QROPS.

78. Mr Gordon signed Standard Life's overseas transfer application on 2 November 2009. As with the equivalent application by Mr Hills, the form included a confirmation the Mr Gordon was "aware of the benefits that will be awarded in respect of the transfer value and the forfeiture provisions (if applicable) in the Receiving Scheme" and an acknowledgement that that scheme might not be regulated by UK law. The document also included a statement that Standard Life agreed to the transfer subject to "the consent of the Member and confirmation from HM Revenue & Customs that the Receiving Scheme is a Qualifying Recognised Overseas Pension Scheme". We infer that Standard Life confirmed this by checking the QROPS list (a point also raised by Mr Gordon in his revised grounds of appeal).

79. The transfer to Wenns was made on 18 November 2009. The value of the transfer was £31,952. Mr Gordon received the funds less fees of 15%. Mr Gordon was 53 years old at the time.

80. Mr Gordon completed a tax return for 2009-10 on 8 June 2010, disclosing UK property income and a limited amount of pension income. On 29 August 2013 an HMRC officer wrote to Mr Gordon stating that he believed the return to be incorrect because, based on information provided by Standard Life, the transfer to Wenns was an unauthorised payment. Mr Gordon was invited to provide any comments or information which differed from this. Mr Gordon initially responded by phone and then by letter saying that he needed to investigate the position and needed more time because of postal delays between Malaysia and the UK and because the paperwork was in the UK.

81. On 17 October 2013 Mr Gordon responded by letter, supplying a copy of the 18 August 2008 letter. The response states that Mr Gordon was informed by Windsor that Wenns was a QROPS, that he had tried to contact Mr Pimlott and Wenns and that it appeared that he was misled by being told his only option was to transfer money to an EU-based QROPS and take the full amount as a trivial sum commutation. The inclusion of the HMRC approval letter in the same email misled him to believe that it was an authorised transaction. The letter also refers to the further email correspondence with Mr Pimlott about the tax position, stating that he also checked the position in Malaysia and found that they do not tax any payments from pension funds. He had made the transfer in good faith believing that the QROPS was HMRC approved, and asked about the possibility of transferring the money back into a UK scheme.

82. An HMRC Complaint Manager wrote to Mr Gordon on 16 December 2013 asking for more information, and on 17 December Mr Gordon forwarded an email from Mr Pimlott dated 29 November 2013, sent following an enquiry made by Mr Gordon the previous month. Mr Pimlott's email stated that "as you know, we do not give any financial or taxation advice", but set out some points made by another client to HMRC. HMRC wrote again on 23 December 2013 stating that matters surrounding Wenns "are ongoing and as yet remain unresolved".

83. Mr Gordon's email of 17 December included a statement that he initially went with Windsor as they stated on their website that they were being used by ex-servicemen, and as this was another government department he believed they must be legitimate. A similar point was made in a further lengthy letter from Mr Gordon dated 23 December, which included a website quote, apparently dating from 10 April 2010, saying "the Latvian schemes are much more rigid in their rules and that Wenns International is used by ex-servicemen and that they have a lot of good packages as well as the pension transfers for ex-servicemen". Mr Gordon repeated the point about ex-servicemen in oral evidence, but was unclear whether he was referring to them using Windsor or Wenns. The 23 December letter also contained the statement that we have treated as an application to discharge the surcharge (see [4] above) and also indicated that Mr Gordon had relied on the 18 August 2008 letter and the fact that the scheme was still on the QROPS list at the time of the transfer. In fact, Mr Gordon's oral evidence, which we accept, was that he had not seen the QROPS list at that time (in contrast to the other three appellants). Instead he relied on the 18 August 2008 letter. However, he now understood that Standard Life had checked the list at the time of the transfer.

84. Mr Gordon's internet searches around this time also led him discover a Local Government Pensions Committee (LGPC) Bulletin dating from June 2010, which referred to Wenns and stated that the Pensions Regulator had advised that HMRC was unable to confirm that any transfer to Wenns was a recognised transfer.

85. On 6 January 2014, at Mr Gordon's request, HMRC confirmed how the charge will be calculated. Mr Gordon wrote another detailed letter on 22 January 2014, repeating points made previously (including the application to discharge the surcharge) and referring to the LGPC Bulletin as indicating that HMRC was aware of

problems with Wenns at an early stage. This letter also states that Mr Gordon had suggested that the "penalty" be amended to be "more in line with the tax relief previously given in respect of my pension pot".

86. Following further holding letters from HMRC and a chasing letter from Mr Gordon, Mr Corton wrote on 31 March 2014 with a full response, and issued a discovery assessment on the same day in the amount of £17,573. The letter includes similar comments to the letter dated 31 March 2014 sent to Mr Martino (see [47] and [48] above). It states that the writer had concluded that Mr Gordon intentionally chose to transfer funds from Standard Life in order to gain early access to monies which should have been used to provide a future pension, and that he gained access to his pension pot "prematurely before retirement".

87. Mr Gordon sent a further detailed letter on 3 April 2014, which was treated as an appeal. This letter commented that as he was aged over 50 at the time of the transaction he did not think it would be regarded as early access: the age limit of 55 only came into place after April 2010[7]. Mr Gordon also asked HMRC to consider taxing the pension based on his tax status rather than at a 55% rate. In response to the penalty related questions Mr Gordon described asking Windsor about the tax implications and checking the Malaysian position, confirmed that he did not ask HMRC directly about the transfer as he understood that Windsor was acting on his behalf and "ensuring that everything was legal", and repeated other points made previously. He emphasised that his primary intention was to provide security for his family, and that Windsor had told him that the only approved scheme available was one which required him to take a full lump sum. The letter also stated that he had used over 75% of the money to reduce his mortgage. This was a different explanation to one in his 17 December 2013 email, which had stated that the money from the pension was used to set up home in Malaysia and provide security for his wife and daughter by buying a house there: see [90] below for our findings on this.

88. Mr Corton provided a detailed reply on 17 April 2014, noting among other things that HMRC would expect anyone transferring a pension to an overseas scheme to investigate the position fully, and that HMRC guidance was extensive and freely available, including in relation to trivial sum commutations. The letter notes that Mr Gordon could apply to have the surcharge discharged but states "I would not anticipate any such application would be successful" because it was deliberately undertaken (meaning not as a result of an administrative error) and he was intending to access the entire fund. Mr Gordon responded on 18 April, offering that HMRC agree to tax the transfer as earnings and otherwise generally repeating points previously made.

89. On 2 May 2014 HMRC wrote again confirming that they considered the assessment to be correct and confirming that no penalty would be charged. Mr Gordon appealed to the Tribunal on 6 May 2014.

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[7] This is essentially correct: the normal minimum pension age was increased from 50 to 55 on 6 April 2010: see s 165(1) and s 279(1) FA 2004.

90. Further correspondence from HMRC on 9 October 2014 refers to Mr Gordon's offers to put the money back into a UK scheme or to be taxed on the transfer as earnings, and confirms that neither was acceptable. In oral evidence Mr Gordon explained that when he had first received the money he had made an investment in Malaysia, but that after HMRC had refused offers by him either to transfer the money to another pension or treat it as taxable income for 2009-10 he transferred the funds back to the UK and used them to pay off his UK mortgage, so reducing the expenses offsetting his UK rental income and indirectly increasing UK taxable income (albeit covered by a personal allowance). We accept this oral evidence.

The appellants' submissions

91. The grounds of appeal varied between the different appellants and were obviously also affected by HMRC's strike out application. Grounds were also expressed in different ways. Rather than consider each appellant's submissions separately what follows seeks to summarise the material points raised by the appellants cumulatively, referring to individual appellants where most relevant to do so.

92. The first, and key, submission was that Wenns was in fact, or should at least be treated as having been, a QROPS at the date of the transfers so that the unauthorised payments charges and surcharges (and the penalty in the case of Mr Hills) did not arise. Wenns was on the list of QROPS published by HMRC at the relevant time, and HMRC had provided a specific confirmation in the letter dated 18 August 2008, which was conclusive proof. It had been allocated a QROPS identification number. Section 169(2) FA 2004 had the effect that Wenns was a QROPS. HMRC, unlike the individuals, had the authority, and had the systems and resources in place, to determine whether Wenns was a QROPS and had certified that it was. It was not a self-certification system for applicants, rather the structure was one of assessment or approval by HMRC, or at least involved the provision of information to HMRC which was not publicly available. The declaration accompanying Wenns' original application, and other information supplied by Wenns to HMRC, was also not available to taxpayers or to transferring schemes. The only way in which it could be checked whether a scheme was a QROPS was via HMRC. The QROPS list was determinative and the removal of Wenns from it in 2010 pursuant to s 169(5) could not operate retrospectively. The transferring schemes had been able to rely on the inclusion of Wenns on the QROPS list and no sanction had been applied to them. The caveat on the list was not relevant because the list was not intended for use by members.

93. Secondly, imposing the charges was discriminatory and contrary to the principle of legal certainty (referring to *Commission v Italy* (C-129/00)). The transfers were movements of capital within Article 63 of the TFEU. If HMRC were entitled to regard Wenns as not being a QROPS from a date predating its removal from the QROPS list then a person moving his or her UK pension to a foreign fund was in a disadvantageous position compared to a transfer to a UK registered pension scheme. It was clear from s 169(1) FA 2004 that the domestic comparator of a QROPS is a registered pension scheme. Pension schemes are registered on the provision of certain information and declarations and can be deregistered in certain circumstances.

Critically however, any transfer to a registered pension scheme prior to deregistration would still be treated as a transfer to a registered pension scheme and could not attract an unauthorised payment charge, whereas if HMRC was correct the tax treatment of transfers to non-UK schemes would be uncertain. Assessments made on the basis that Wenns was not a QROPS from a date predating the caveat being added to the QROPS list offended the principle of legal certainty.

94. Mr Hills also referred to the fact that he did not live in the UK and had no earnings or assets in the UK, and claimed that he was being discriminated against as compared to other non-resident colleagues, many of whom transferred money from their pensions and had not been pursued, or had had the charges levied on them discharged. HMRC had also refused to consider his argument that the notice of assessment against him was received too late.

95. The assessments also breached the appellants' human rights. A1P1 was breached because the law was not sufficiently accessible to enable the appellants to know that Wenns might be retrospectively removed from the list, and did not enable them to foresee at the time of the transfer that a charge to tax could arise. (Mr Gordon also referred to Article 7 of the Convention, but that relates to criminal matters and is not relevant.)

96. It was also not just and reasonable to impose the unauthorised payments surcharges, and they should be discharged. The letter issued by HMRC to Wenns contained an unequivocal confirmation of QROPS status, and the appellants relied on it.[8]

97. In relation to s 29 TMA, Mr Martino submitted that no discovery had been made: HMRC would have learnt about the transfers from the transferring schemes by 31 January 2011 at the latest, within the usual enquiry time limit, but did not issue an assessment until 31 March 2014. There was nothing that HMRC could have discovered which they did not already know by 31 January 2011. Mr Hills also adopted this ground of challenge.

98. Mr Connell relied on s 29(2) TMA preventing HMRC from raising an assessment, or alternatively on one or both of the conditions in s 29(3) not being met. Mr Martino also referred to a "general prevailing practice defence".

99. In addition, Mr Martino raised the following arguments:

(1) If the transfer was illegal he would have expected Scottish Equitable to have prevented the money being transferred: they should be specialists in the applicable regulations.

(2) HMRC's notice of assessment was dated 31 March 2014 but was sent to Italy by second class mail, arriving only on 12 May 2014, after the deadline of 5 April 2014. This made the assessment invalid and contrasted

[8] We have found that Mr Connell did not see or rely on this letter: see [70] above.

with at least two other cases Mr Martino was aware of where HMRC did not pursue the matter having recognised that notice was late.

100. Mr Hills raised the following additional points:

(1) Standard Life had conducted "excessive due diligence" on Mr Hills' behalf and complied with all regulations. The case had been subject to an internal audit by Standard Life in which no faults were found, and HMRC had also investigated them and had concluded that the transfer was made in good faith (this clearly refers to comments in Standard Life's letter dated 11 June 2014, see [36] above). No sanction was applied to them. In contrast Mr Hills had been subject to charges and a penalty.

(2) Mr Hills had offered to redo the pension transfer to another scheme of HMRC's choosing, but HMRC had declined. He had also offered to engage in Alternative Dispute Resolution. He had replied to all letters in good time and in good order. In contrast HMRC had incompetently pursued recovery of monies despite having agreed that they should be held in suspension pending the Tribunal's decision, causing financial damage and severe personal stress to Mr Hills' UK-based family.

101. Mr Gordon also raised some additional arguments in a skeleton argument produced for the hearing, and orally. These were not straightforward to follow and what follows is a summary of our understanding of them:

(1) HMRC was wrong to suggest that Mr Gordon had intentionally chosen to enter into an arrangement to access his pension pot prematurely. This was effectively a serious allegation of deliberate behaviour or fraud, for which HMRC bore the burden of proof, whereas he had done nothing wrong.

(2) At the time of the transfer the earliest age for accessing pension benefits in the UK was 50, and Mr Gordon was aged over 50 at that time. He could in the alternative have taken a 25% tax free lump sum and an annuity, and his total UK income would have been below the personal allowance so he would have paid no UK tax. However, transferring money from the UK to Malaysia on a regular basis would not have been economically viable due to the cost of transfer. In any event he was entitled to organise his affairs so that the minimum tax was paid.

(3) What had been made available to Mr Gordon was a 100% drawdown arrangement under which he could take the entire pension from Wenns as a trivial commutation lump sum. Each jurisdiction was entitled to make its own rules and this was an arrangement permitted in Latvia. It did not matter that the threshold for a trivial commutation payment was higher than it would be in the UK. For example, EPF, a major Malaysian scheme, permits 100% tax free draw down at retirement age. UK rules now also permit a full drawdown. Although the rules for QROPS were modified in 2012, by SI 2012/884, to impose stricter requirements and to provide for tax on individuals who transfer funds to schemes that do not meet the requirements, those changes were not retroactive and did not apply to the

transfer to Wenns. The guidance published about the objective of the QROPS provisions in 2013 followed HMRC's withdrawal from the *Gibson* judicial review litigation was not binding[9].

(4) Standard Life was only "authorised" to make transfer to a QROPS, see ss 160(1) and 164(1) FA 2004. Standard Life did a thorough due diligence exercise, including confirming that Wenns was still a QROPS at the date of the transfer. A refusal to make the transfer would have contravened Article 63. Standard Life had not faced a sanction and the transfer by it must be treated as legitimate.

(5) Mr Gordon's receipt of the 18 August 2014 letter, together with Standard Life's check that the QROPS status was maintained, amounted to Mr Gordon performing due diligence.

(6) The changes made in 2012 by SI/2012/884 included a requirement for a UK registered pension scheme to obtain a specific confirmation from a member, confirming that they would be responsible for any unauthorised payment. Prior to that an authorised transfer could simply be made by reliance on the QROPS list.

Submissions for HMRC

102. Mr Singh for HMRC submitted that Wenns was not in reality a pension scheme within s 150(1) FA 2004 at all. Rather it was a pension liberation vehicle, whereby individuals were able to gain access to their pension funds less Wenns' charges. Since it was not a pension scheme it could not have been an overseas pension scheme within s 150(7), a recognised overseas pension scheme within s 150(8) or a QROPS within s 169(2) FA 2004. The fact that Wenns was on a list of QROPS published by HMRC did not mean that it was a QROPS or was approved. That this was simply a list of schemes that had notified HMRC that they were recognised overseas pension schemes and consented to their names being published.

103. Since Wenns was not a QROPS the transfers of the appellants' pension funds to it were not recognised transfers within s 169(1) FA 2004, and were therefore not payments which the transferring schemes were authorised to make under s 164(1)(c). It followed that the appellants are liable to unauthorised payments charges and surcharges under ss 208 and 209. The surcharges should also not be discharged on the basis that it is not just and reasonable to impose them. The appellants abused the system with the aim of cashing in their pensions. These were blatant cases rather than errors made in good faith. The appellants cannot absolve themselves by relying on checks by the UK pension schemes, because the transfers were made on the individuals' instructions and they must have realised that money was not being transferred to a pension scheme when the funds were just paid into their bank accounts less fees. If they had looked at the QROPS list they would have seen the caveat. Unauthorised payments charges and surcharges are imposed to prevent abuse

[9] In fact HMRC's position is that guidance about the objective was published in 2011, see the quote at [22] above, but the difference is not material.

and, in a broad-brush sense, reclaim tax relief given on contributions and investment growth within the fund.

104. EU law based challenges to the assessments on the grounds of discrimination could not succeed. A QROPS is a pension scheme established outside the UK that is broadly similar to a UK registered pension scheme. Transfers to QROPS may be made free of UK tax because they enable people permanently leaving the UK to simplify their affairs by taking their pension savings with them to their new country of residence, and continuing to save for retirement. Such people should be in broadly the same position as those who remain in the UK. In contrast, Wenns allowed individuals to obtain access to their pension funds, contrary to the policy rationale, and putting them in a better position than if their funds had remained in a UK pension scheme. There was no discrimination because the same tax charges would arise if a transfer was made to a UK scheme that transpired not to be a pension scheme: the s 150 definition also applies to UK schemes. Article 65(1)(b) of the TFEU makes it clear that Article 63 is without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law, in particular in the field of taxation. There was also no lack of legal certainty. HMRC was not compelled to treat a scheme as a pension scheme when it was no such thing.

105. A human rights based challenge could also not succeed. The charges were imposed under "conditions provided for by law" in A1P1 terms, and were in any event justified under the second paragraph (such laws as the State "deems necessary…to secure the payment of taxes…").

106. The claim that there was no discovery for s 29 TMA purposes was based on a misapprehension of the law, which did not require any new fact to arise. Mr Connell's claim that a discovery assessment was precluded by s 29(2) or (3) was also flawed. In the case of s 29(2) there was no generally prevailing practice under which listing a scheme as a QROPS on HMRC's website amounted to recognition that it was a QROPS: indeed this was made clear by the caveat. In relation to s 29(3), HMRC relied on the condition in s 29(5). Mr Connell had provided no documents to HMRC before the time referred to in s 29(5) which contained information or from which information could reasonably be inferred that there was an insufficiency in the assessment.

107. Mr Singh also submitted that Mr Hills was careless for the purposes of s 36 TMA and Schedule 24 FA 2007. HMRC's letter of 12 May 2011 had made specific reference to the pension arrangements, and he should have taken advice or possibly contacted HMRC. There was also no challenge by Mr Hills to the quantum of the penalty.

Discussion

108. In this discussion we deal first with a preliminary point about the burden of proof and then with the validity of the discovery assessments under s 29 TMA and (in the case of Mr Hills) s 36 TMA. We then address submissions about whether the transfers to Wenns were unauthorised payments and whether it is not just and

reasonable to impose the surcharges, and finally address the penalty assessment on Mr Hills.

Burden of proof

109. It was not disputed that the burden of proof lies on HMRC in relation to its ability to make discovery assessments under s 29 TMA and whether it was permitted to assess Mr Hills outside the normal four year time limit under s 36 TMA (sometimes referred to as competency and time limit issues). It was also not disputed that the burden of proof is on HMRC to demonstrate that Mr Hills is liable to a penalty. Mr Gordon at least, however, suggested that the burden was also on HMRC to demonstrate that the transfers gave rise to unauthorised payments charges and surcharges. We disagree. The normal rule is that, once HMRC has discharged its burden of proof in respect of any competency or time limit issue, the burden is on the taxpayer to demonstrate that an assessment is not justified, and otherwise it "stands good" under s 50(6) TMA, see for example *Haythornthwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657. We have identified nothing that displaces that normal rule. Although Mr Gordon justified his submission by reference to the fact that HMRC's approach was based on an alleged lack of good faith, the presence or absence of good faith is not relevant to the question of whether the transfers to Wenns were unauthorised payments. It may be relevant to whether or not HMRC chose to exercise its collection and management powers to issue an assessment, but the appropriateness or otherwise of its decision to do so in these cases (and possibly not to have done so in others) is not within this Tribunal's jurisdiction: that would be a matter for judicial review only. This point was effectively addressed in the strike out decision.

110. Questions of good faith may be relevant to the applications to discharge the unauthorised payments surcharges. However, we agree with a previous comment by the First-tier Tribunal ("FTT") that the burden of proof is also on the appellant to determine whether the surcharge should be discharged: see *O'Mara v HMRC* [2017] UKFTT 091 (TC) ("*O'Mara*") at [151].

Section 29 TMA

111. Under s 29(1) an officer of HMRC who discovers that income which ought to have been assessed to income tax has not been, or that an assessment to tax is or has become insufficient, may make an assessment or further assessment to make good the loss of tax. This is subject to certain restrictions where a return has been made under s 8 TMA. Subsection (2) can prevent an assessment being made where the return was made in accordance with prevailing practice, and subsections (3) to (6) will prevent an assessment being made unless, broadly, either the deficiency was brought about carelessly or deliberately (s 29(4)), or there was insufficient information in the return or certain other documents provided with the return (or during any enquiry) for an HMRC officer to reasonably be expected to be aware of the deficiency (s 29(5) and (6)).

112. Dealing first with the appellants' submissions, Mr Martino submitted that no discovery had been made and therefore that s 29 was not engaged. However, this reflects a misunderstanding of the provisions. A "discovery" may occur for s 29 purposes whether or not a new piece of information has been discovered by HMRC. It covers any situation where it newly appears to an HMRC officer that there is an insufficiency. As explained by Viscount Simonds in *Cenlon Finance Co Ltd v Ellwood* [1962] AC 782 at 794:

> "I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation."

113. The point was explained further by the Upper Tribunal in *Charlton v HMRC* [2013] STC 866 at [37]:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight…"

114. In this case there was clearly a discovery by HMRC officers that the appellants had been undercharged to tax because the transfers to Wenns were not recognised transfers.

115. We also agree with Mr Singh that HMRC was not precluded from issuing discovery assessments by s 29(2) or (3). As regards s 29(2), we do not consider that the inclusion of Wenns on the QROPS list meant that the returns were made in accordance with generally prevailing practice. If the point was not otherwise clear then the inclusion of the caveat on the QROPS list puts the point beyond doubt. As regards s 29(3), the condition in s 29(5) is met because none of the appellants made any reference in their tax returns or any accompanying documents to the transfer to Wenns, so that it would not have been possible for an HMRC officer considering the returns to have been aware of the issue. The point here is that for the purposes of s 29(5) only the limited categories of information set out in s 29(6) count as information available to the HMRC officer on the basis of which he could reasonably be expected to be aware of the deficiency, and this list essentially comprises information supplied by the taxpayer. Information supplied by others, including the transferring pension schemes, is not relevant.

116. In addition to the appellants' submissions on s 29, we raised two further issues. In doing so we pointed out that the burden of proof is on HMRC to satisfy the Tribunal that the requirements of s 29 are met and we referred to *Burgess and Brimheath Developments v HMRC* [2016] STC 579, where the Upper Tribunal made it very clear that that burden extends beyond addressing points positively raised by the taxpayer.

117. The first point was raised following the hearing, and relates to a recent FTT decision to which we were not referred, *Andrew Monaghan v HMRC* [2018] UKFTT 0156 (TC). In that case the taxpayer's appeal against a discovery assessment in respect of an unauthorised payment was allowed on the basis that s 208(8) FA 2004 states that such a payment is not to be treated as income for tax purposes, and that means that an assessment cannot be made under s 29(1)(a) TMA, because that refers to a discovery that "income" has not been assessed. Although the wording in s 29(1)(a) has been modified under the Registered Pension Schemes (Accounting and Assessment) Regulations 2005, SI 2005/3454 in a way that might have addressed the issue, that modification is stated to apply only where the person liable to the charge is a company rather than an individual. In submissions made following the hearing Mr Singh explained that HMRC was seeking to appeal *Monaghan* on this issue, on the basis that the FTT's approach took the statutory deeming in s 208(8) too far and that on a purposive construction "income" in s 29(1)(a) was a shorthand for any amount subject to income tax.

118. In *Monaghan* this issue was found to be fatal to the validity of the assessment. However, this case is different. In *Monaghan* the taxpayer had not made a self-assessment return (see paragraph [78] of the decision). In this case each of the appellants had done so. That means that HMRC do not need to rely on s 29(1)(a), because s 29(1)(b) applies in the alternative on the basis that HMRC concluded that an assessment to tax (being the self assessment contained in each of the appellant's returns) had become insufficient. We note that this was also the approach taken in *Clark v HMRC* [2017] UKFTT 392 (TC) at [15]. In these circumstances it is not necessary to decide whether the approach taken in *Monaghan* was correct and we do not propose to do so.

119. The second issue we raised was whether the discovery assessments had been made sufficiently promptly after the relevant discoveries were made. The point here is that there are a number of references in the case law to a requirement for "newness". This can be seen in the references to "newly" in the citations from *Cenlon* and *Charlton* referred to above. Paragraph [37] in *Charlton* continues as follows:

> "…The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question…"

120. This point was discussed in more detail in the recent Upper Tribunal decision in *HMRC v Tooth* [2018] UKUT 0038 (TCC) (to which we referred the parties), where this passage from *Charlton* was referred to in the following terms at [79] (footnotes omitted):

"Broadly speaking, we agree with this statement of the law. 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 assessment. That is what occurred in this case… 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 assessment. If, to use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued whilst 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…"

121. Mr Singh submitted, based on the documents available in the documents bundle, that there was no staleness in the assessments. He pointed out that in *Tooth* there is a reference at [83] to a five year gap prior to an assessment as meaning that a discovery was stale. In this case the relevant discovery for each appellant could only be that there was an unauthorised transfer. There was no evidence that this conclusion had been reached earlier than HMRC told each of the appellants that they had reached that conclusion. So, for example, for Mr Gordon the earliest available evidence was in the letter of 29 August 2013 (see [80] above). Arguably that was not a conclusion because it was not unequivocal (Mr Gordon was invited to provide comments or information) but even if that was wrong the assessment followed only seven months later, following substantive correspondence in which HMRC made it clear that they were asking for further information to consider the position fully, and apologised more than once for the length of time being taken because matters surrounding Wenns remained unresolved.

122. This point has caused us some significant concern, for two reasons:

(1) First, in our view HMRC's approach pays insufficient attention to the point, made very clearly in *Burgess and Brimheath Developments*, that the burden is on HMRC to make a positive case that the requirements of s 29 TMA are met. This includes making sure that the evidence needed to support that case is before the Tribunal. In circumstances where it was clear that HMRC had identified an issue with Wenns by 2010, they needed to do something more to explain why no assessments were issued until March 2014, beyond simply saying (in the example of Mr Gordon's case) that there was no evidence before the Tribunal that a discovery was made before August 2013.

(2) Secondly, it appeared to us that the reasons for the delay in issuing assessments on all four appellants might be explained not by a delay in concluding that their self assessments were insufficient, but rather by delays in deciding whether, following the *Gibson* judicial review litigation, HMRC should or should not exercise their collection and management powers to pursue the appellants. In our view that sort of decision-making process is not relevant to s 29(1). In that scenario an officer would have

concluded that there is an insufficiency in the assessments, but HMRC have not yet determined whether further assessments should be made.

123. As it turned out, the additional correspondence provided by HMRC in relation to Mr Hills following the hearing (see [29] above) turned out to be illuminating. This correspondence includes a very clear statement in the letter dated 26 March 2012 that the transfer to Mr Hills was an unauthorised payment, and HMRC went so far as to correct his return on the basis of an obvious error. HMRC explained this further in a letter dated 2 May 2012 which contains an unequivocal statement that HMRC had established that Wenns was not a legitimate pension scheme. HMRC's letter of 8 October 2013 also states that Wenns' QROPS status was revoked when HMRC became aware of transfers being unauthorised due to the way Wenns was administered by Windsor. This removal happened in 2010, see [14] above.

124. Given this further evidence we are driven to the conclusion that HMRC must have concluded not only that Wenns was not a pension scheme, but also that the transfers to each of the appellants amounted to unauthorised payments, by early 2012 at the very latest. The fact that Mr Hill's return was corrected in March 2012 on the basis of an obvious error is a clear indication of a firmly held HMRC view. Furthermore, there is evidence to indicate that HMRC's conclusion was reached earlier. We have found that Standard Life made its annual return to HMRC of all transfers to overseas schemes during 2009-10 on 25 January 2011 (see [27] above). There was no suggestion that any of the other transferring schemes had provided details of their transfers any later than the reporting deadline of 31 January 2011, and in the circumstances we consider that we are entitled to conclude, and do conclude, that the relevant information was provided within the time limit. The returns made by the transferring schemes would have identified the individuals involved, including their national insurance numbers[10]. HMRC issued a self-assessment return to Mr Hills on 12 May 2011 in terms which clearly invited him to declare the transfer as an unauthorised payment, suggesting to us that a conclusion had already been reached.

125. In the case of Mr Connell, Mr Gordon and Mr Martino HMRC have provided no evidence to "fill the gap" between the dates they filed their 2009-10 returns (28 May, 8 June and 5 August 2010 respectively) and being contacted by HMRC in 2013 (19 April for Mr Connell, 29 August for Mr Gordon and 10 September for Mr Martino). This is unsatisfactory, but it is for HMRC to make their case under s 29 TMA. The correspondence relating to Mr Hills is positively unhelpful to that case, and indicates that HMRC had decided that Wenns was not a pension scheme considerably earlier than the three individuals were contacted in 2013. It shows that that a conclusion in Mr Hills' case was clearly reached by early 2012, and the correspondence with Mr Hills in mid-2011 provides further evidence which indicates to us that a discovery was in fact made by that point. The burden is on HMRC to

[10] The reporting obligation and deadline are imposed by regulation 3 of the Registered Pension Schemes (Provision of Information) Regulations 2005, SI 2006/567. At the relevant time the information required in respect of a transfer to a QROPS included the individual's name and national insurance number, as well as the details of the amount transferred and the transferee scheme. Inclusion of national insurance numbers means that the identities of the individuals would not have been in doubt.

demonstrate that that was not the case in relation to each appellant, and in our view they have not discharged that burden. We have found that the details of all four appellants had been provided by the transferring schemes by the end of January 2011. Given the clear concerns about Wenns we cannot simply infer in favour of HMRC that an HMRC officer did not review the information provided by the transferring schemes during 2011, as was clearly done in respect of Mr Hills, and reach a conclusion that the transfers in respect of each appellant, despite being returned as recognised transfers to a QROPS, were in fact unauthorised payments, and that each of appellants had been under assessed. Accordingly, we think it is more likely than not that a discovery was made no later than 2011, namely that one or more HMRC officers reached the conclusion that all transfers made to Wenns were unauthorised payments, and therefore that all four appellants (whose details, including national insurance numbers, had been provided by the transferring schemes by the end of January 2011) had been under assessed. It does not matter in this respect that different HMRC officers might also have made "discoveries" in relation to the status of Wenns and its impact on one or more of the appellants at later stages: see the extract from *Tooth* referred to above, at paragraph [79(6)].

126. On that basis, were the discoveries "stale"? We think they were. A delay from mid-2011 (by reference to the May 2011 letter to Mr Hills) to March or April 2014 is around three years, and we think that is too long for the discovery to retain its "essential newness" (*Charlton* at [37]). If we were wrong about this and (by reference to the correspondence with Mr Hills) the discovery was only made in early 2012, we still think that two years is too long. This is not a case where, as in *Charlton*, the delay was to accommodate a decision in another case which was material to whether the liability existed. Delays connected to the *Gibson* litigation and decision-making about the exercise of HMRC's collection and management powers do not go to whether a liability exists, but whether HMRC chooses to seek to collect it. There was nothing to prevent HMRC issuing assessments under s 29 TMA at an earlier stage, or opening enquiries into the returns within the relevant time limits, but then not pursuing those assessments or enquiries if and when they chose to exercise their collection and management powers not to do so. But that is not what they decided to do.

127. On this basis, the appeals by all four appellants must succeed on the basis that the assessments were invalid. However, in case we are wrong on this, and in the event of an appeal by HMRC, we go on to deal with the other issues.

Assessment on Mr Martino: whether out of time

128. Mr Martino also raised an argument that the assessment on him was out of time because he only received it after 5 April 2014, and therefore outside the normal four year time limit for assessments in s 34 TMA (there being no submission by HMRC that Mr Martino acted carelessly, such that s 36 TMA extended the time limit).

129. The assessment on Mr Martino was dated 31 March 2014, within the period of four years following the end of the relevant tax year, 2009-10. The time limit in s 34 TMA runs from the date the assessment is made, not from the date it is notified, see *Honig v Sarsfield* [1986] STC 246. These days assessments are made by being input

into an HMRC computer rather than by being entered into an assessment book as described in that case, but the underlying point is the same: see *Corbally-Stourton v Revenue and Customs Commissioners* [2008] STC (SCD) 907. It follows that the assessment on Mr Martino was not out of time.

Section 36 TMA

130. Section 36 TMA, which is relevant to Mr Hills, extends the normal time limit for making assessments of four years after the end of the relevant tax year to six years, where a loss of tax is brought about carelessly.

131. Whilst HMRC's letter of 12 May 2011 enclosing a self-assessment return could have been more detailed, we agree with Mr Singh that Mr Hills' failure to take advice or at least contact HMRC following receipt of the letter was careless. Section 118(5) TMA provides that a loss of tax is brought about carelessly if the person "fails to take reasonable care to avoid bringing about that loss". This is an objective test, in the sense that it is necessary to consider what a reasonable hypothetical taxpayer would do, but allows account to be taken of the actual circumstances of the taxpayer in question: see (in the context of the similar language in s 29(4) TMA) *Alan Anderson v HMRC* [2016] UKFTT 0335 (TC), from paragraph [114] onwards, considered in *Adam Cooke v HMRC* [2017] UKFTT 844 (TC). Applying that test, we conclude that Mr Hills failed to take reasonable care in completing his self assessment, resulting in a loss of tax, and therefore that the assessment time limit was extended to six years.

Were the transfers unauthorised payments?

132. We have concluded that the appellants (on whom the burden of proof of this matter lies) have not demonstrated that Wenns was a pension scheme, and accordingly that the transfers to it were unauthorised payments for the purposes of s 208 and s 209 FA 2004.

133. Part 4 FA 2004 governs the taxation of pension schemes. Section 150(1) defines a "pension scheme" for the purposes of Part 4 as a scheme or arrangement having or capable of having effect so as to provide benefits to or in respect of persons on retirement, death, having reached a particular age, on serious ill-health or incapacity, or in similar circumstances. It is clear from this that, absent death, ill-health or similar circumstances, the intention is to restrict benefits to retirement or at least to the attainment of a particular age.

134. Only a pension scheme which falls within the definition in s 150(1) can be an "overseas pension scheme". This is clear from the reference to "pension scheme" in s 150(7). Similarly, the definition of "recognised overseas pension scheme" in s 150(8) is confined to overseas pension schemes as defined in s 150(7). So a scheme that is not a pension scheme at all cannot be a recognised overseas pension scheme. This in turn means that it cannot be a QROPS. This is quite clear from the initial words in s 169(2), which states that "a recognised overseas pension scheme is a qualifying recognised overseas pension scheme if" the conditions set out in paragraphs (a) to (d) are met. It is not right to say, as suggested in some of the submissions, that only the

conditions in paragraphs (a) to (d) are relevant, because that ignores the important introductory words.

135. If a scheme is not a QROPS then any transfer to it cannot be a recognised transfer within s 169(1). It cannot therefore fall within the list of “authorised” payments in s 164(1) unless it falls within one of the other categories, none of which has been suggested to be relevant in this case. Under s 160(2) and (3) the effect is that the payment is an unauthorised payment. Where there is an unauthorised payment, a 40% charge to income tax arises on the member under s 208 (irrespective of non-UK residence). In addition a 15% surcharge may arise under s 209. The legislation to determine whether a surcharge applies is not straightforward at first sight, but the effect of s 210 in a case where the entire fund is transferred by an unauthorised payment is a 15% charge on the full amount transferred.

136. It is not relevant to this analysis that HMRC confirmed that Wenns was a QROPS in the 18 August 2008 letter and gave it a QROPS identification number, or that it included Wenns on the QROPS list on its website (whether with or without a caveat). The second paragraph of the 18 August letter is without doubt unfortunately worded, and does suggest that HMRC accepted that the scheme was a QROPS, but that cannot affect the question whether Wenns was a pension scheme for the purposes of Part 4 FA 2004 as a matter of law. Neither the letter nor the inclusion of Wenns on the QROPS list could confer a status on Wenns that, not being a pension scheme, it could not have under the legislation.

137. As noted above, the appellants made a number of other submissions as to why charges should not arise. Apart from those dealing relating to Article 63 and A1P1, most of these essentially relate to fairness and are relevant (if at all) only to the applications to discharge the surcharges, which are considered below. We should however note here that we do not agree with Mr Gordon’s submission that the reference to “authorised” in s 160(1) and s 164(1) FA 2004 means that the transfer by Standard Life must be treated as legitimate, because it was not authorised to make anything other than a recognised transfer. The term “authorised” is not used in these provisions in a regulatory sense. The only consequences of making a payment that is not “authorised” are those set out in the legislation, namely the potential sanction of de-registration and an exposure to tax charges: see s 160(6). We should also note that we do not agree that the changes made by SI/2012/884, which were not retrospective, are relevant to the question of whether the charges arise.

138. The key question therefore is whether Wenns was in fact a pension scheme. We had virtually no documentary evidence relating to Wenns other than its correspondence with HMRC. We had no publicity or other promotional material produced by it (or by Windsor), and no documents relating to its establishment or structure. The appellants also produced no evidence as to the benefits accruing under the scheme (despite having in some cases explicitly asserted to the transferring provider that they were aware of those benefits). The evidence on which HMRC relied was that it was clear that all four appellants were able to access their full pension funds in cash shortly after the transfer was made. In our view this evidence outweighs the evidence provided by Wenns’ correspondence with HMRC, to the

extent that might otherwise provide any support that Wenns was a pension scheme. It is quite clear that the ability of the appellants to access their funds was not dependent on retirement or attaining any particular age, or on any of the other matters referred to in s 150(1), and that the purpose of the transfers was to obtain immediate access to the funds. Mr Hills was only 35, Mr Martino was 43 and Mr Connell was 42. Although Mr Gordon was aged over 50 the treatment of the other appellants demonstrates that this was not material to Wenns. Accordingly, we conclude that Wenns was not a pension scheme and therefore that, subject to the discussion below about Article 63 and A1P1, the transfers were all unauthorised payments that were subject to unauthorised payments charges and surcharges.

Article 63 TFEU

139. We also agree with Mr Singh that EU law based challenges on the grounds of discrimination and legal certainty cannot succeed. The definition of pension scheme in s 150(1) is equally relevant for UK schemes, and s 150(2) makes clear that to be a registered pension scheme a scheme must be a "pension scheme". It is therefore not the case that a transfer to a UK scheme that is not a pension scheme but has nonetheless been registered as one (and has not yet been de-registered) would not give rise to an unauthorised payments charge or surcharge.

140. This point is illustrated by another FTT decision, *Clark v HMRC* [2016] UKFTT 0630 (TC)[11]. In that case Mr Clark had been assessed to an unauthorised payments charge and surcharge in relation to transactions which had resulted in funds initially being transferred from his SIPP to a new scheme ("LML Pension"), and then on to further companies. The FTT decided that, although LML Pension was registered by HMRC and a registration certificate had been issued, that was not conclusive of its status as a pension scheme. In fact the trusts of the LML Pension were void for uncertainty and this meant that it was not a "pension scheme" within s 150(1), and so could not be a registered pension scheme: see in particular paragraphs [29] and [83] to [85] of the decision.

141. Mr Gordon submitted that the Upper Tribunal decision in *Danvers v HMRC* [2016] UKUT 0569 (TCC) provided support for a more favourable treatment of transfers to UK registered schemes. However, that case was not concerned with whether the scheme in question (a SIPP to which the taxpayer had transferred his pension funds) was or was not a pension scheme, but instead with whether an investment transaction it entered into, combined with a loan to the taxpayer, gave rise to an unauthorised payment. It does not assist the appellants.

142. Our conclusion on this issue is not affected by the power in s 169(5) to exclude a scheme from being a QROPS (a power which HMRC purported to exercise in 2010). Section 169(5) applies in terms to a scheme that is a recognised overseas pension scheme (which means it must meet the definition of pension scheme: see above), where there is a significant failure to comply with information requirements. Where a scheme is not a pension scheme at all it can never be a QROPS and s 169(5)

[11] This is an earlier decision in the same case as the *Clark* decision referred to at [118] above.

cannot operate. This is no different to UK registered pension schemes, which can be deregistered in certain circumstances under Chapter 2 of Part 4 FA 2004. These circumstances include, but are not limited to, a significant failure to provide information (s 158(1)(c)).

143. Mr Hills' submission that he was being discriminated against as compared to other non-resident colleagues who were not pursued, is an argument about fairness. As reflected in the strike out decision, this is a public law matter over which this Tribunal has no jurisdiction.

A1P1

144. The appellants' submission based on A1P1 was that the law was not sufficiently accessible to enable the appellants to know that Wenns might be retrospectively removed from the QROPS list, and did not enable them to foresee that a charge to tax could arise. We do not agree that this is a valid basis of challenge. The definition of a pension scheme in s 150(1), and the related definitions of overseas pension scheme, recognised overseas pension scheme and QROPS, are clear and as accessible as other legislation. The real problem was that the appellants did not take advice and relied on Windsor. Whilst as already mentioned the 18 August 2008 letter was inappropriately expressed, that cannot make a difference to this point. Whether Wenns was or was not a pension scheme is not affected by what was said in an HMRC letter or by whether Wenns was initially incorrectly included on HMRC's list of QROPS.

145. Although the point was not expressly raised, we should add that we agree with comments in earlier FTT cases that the unauthorised payments charge and surcharges are charges to tax rather than penalties: see *Stephen Willey v HMRC* [2013] UUKFTT 328 (TC) at [56], referred to in *O'Mara* at [105], and the conclusion that the surcharge was not penal in *O'Mara* at [154]. *O'Mara* contained at [107] an extract from the explanatory notes to the relevant clauses of the Finance Bill 2004, explaining that the intended effect of the charges was to remove the tax benefits obtained on contributions to the scheme and in respect of income and gains on investments held within the scheme, and were intended to prevent abuse. It is clear that the 55% rate is a rough and ready measure, but it is not necessary for it to be precise. Even if it was penal on the facts (we had no evidence about the level of tax relief actually obtained by any of the appellants on their pension contributions, or within the schemes), we agree with the comments in *Stephen Willey* at [57] that it cannot regarded as disproportionate or outside the wide margin of appreciation permitted to the legislature in the context of A1P1.

Applications to discharge the surcharges: ss 268 and 269 FA 2004

146. Under s 268 FA 2004 an unauthorised payments surcharge (but not an unauthorised payments charge) may be discharged on the grounds that it would not be just and reasonable for the person in question to be liable to it. A refusal of an application to discharge the surcharge can be appealed under s 269. It was not disputed that the Tribunal has a full appellate jurisdiction in respect of HMRC's refusal: see also *O'Mara* at [150].

147. Drawing together those of the appellants' submissions that we think may be relevant to this issue, the appellants have put forward the following points that might support their applications:

(1) The 18 August 2008 letter was unequivocal in its terms and the appellants relied on it.[12]

(2) The appellants had no way of checking whether Wenns was a QROPS apart from the QROPS list and 18 August 2008 letter.

(3) The appellants relied on the transferring schemes, who had the expertise and conducted due diligence, to make transfers that were authorised.

(4) The changes made by SI/2012/884 included a specific requirement[13] for a UK scheme to obtain confirmation from a member confirming that they would be responsible for any unauthorised payment, clearly putting them on notice. There was no such requirement prior to that date[14].

(5) HMRC was effectively relying on guidance which was only published in 2011 about the purpose of QROPS schemes being limited to individuals taking their pension savings with them to their new country of residence and continuing to save for retirement. There was nothing to indicate that it was not legitimate to choose a scheme in Latvia, or a scheme that enabled a full pay out to be made.

(6) It was unfair that HMRC had accepted that the transferring schemes had suffered no sanctions because they made the transfers in good faith, bearing in mind that those schemes would have been familiar with the pensions legal and tax regime and were managed by regulated entities, whereas in contrast HMRC had not accepted that the appellants acted in good faith (if they had acted in good faith, then under HMRC practice that would normally mean that the surcharge was discharged: see the terms of the caveat set out at [13] above).

(7) In the case of Mr Hills, he had offered to redo the pension transfer to another scheme, and HMRC had also caused financial damage and stress by pursuing recovery of monies when they had agreed not to do so.

(8) Mr Gordon also raised additional points, including as to his age, that are considered further below.

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[12] This point is potentially available to Mr Hills, Mr Martino and Mr Gordon, but not to Mr Connell in view of our finding that he did not have or rely on a copy of letter at the time of the transfer: see [70] above.

[13] Regulation 13 of the Registered Pension Schemes and Overseas Pension Schemes (Miscellaneous Amendments) Regulations 2012, SI 2012/884, inserting regulation 11BA into the Registered Pension Schemes (Provision of Information) Regulations 2006, SI 2006/567.

[14] In the case of Mr Connell, we have found that he did receive a warning from Legal & General: see [59] above.

148. HMRC's position was that the surcharges should not be discharged because the appellants had abused the system to cash in their pensions, and these were blatant cases rather than errors in good faith.

149. The "just and reasonable" test under s 268 was considered in some detail in *O'Mara*. We agree with the FTT's comments that all the circumstances must be taken into account, including the statutory scheme, the mischief at which the charge is aimed and the appellant's conduct and circumstances. It is also not the case that the surcharge can be discharged simply because the appellants acted honestly or in good faith, because that is not the statutory test. Questions of fairness as between the appellants and the transferring schemes are also not relevant: questions of fairness in HMRC's actions are not within this Tribunal's jurisdiction.

150. We have concluded that, other than in the case of Mr Gordon, HMRC's decision not to discharge the surcharges was correct. Although Mr Hills and Mr Martino did see the 18 August 2008 letter, we have also found that they saw the QROPS list with the caveat, as did Mr Connell (see [32], [56] and [66] above). Most importantly, however, each of them was well under any age that might reasonably be regarded as a retirement age. They should have questioned why it was possible to cash in their pension funds at that stage. At the very least, they should have considered taking advice from an independent adviser, rather than relying on Windsor, an entity that was clearly promoting and benefiting from the arrangements, and whose engagement terms provided that it was not giving any financial or other advice. We would add that the level of the fees charged for organising what were essentially two cash transfers was another element that should have created pause for thought, as should the confidentiality and non-disclosure provisions in Windsor's engagement letter (see [16] and [18] above). The effect of the arrangements was to extract money from their pension funds in a way that was clearly contrary to the scheme of the legislation. In those circumstances we think these appellants have not shown that it would not be just and reasonable for a surcharge to be imposed. In the case of Mr Hills we do not think that the fact he may have offered to HMRC to transfer the funds to another scheme is sufficient to outweigh the factors that point to the conclusion that discharge is not appropriate.

151. The position of Mr Gordon is less straightforward. He was aged over 50 at the time and had already taken his other Standard Life pension. He is quite right that the QROPS rules included no general requirement that an overseas scheme contain any particular limitation on the amount paid out as a tax-free lump sum or trivial sum commutation[15], and there is no reason not to accept his evidence that a 100% tax free

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[15] At the relevant time, regulation 2(2) of SI 2006/206 required either that a non-occupational scheme was locally regulated, or that it was located in the EU or certain other jurisdictions, or that at least 70% of the funds would be used to provide an income for life and that benefits would not be available before the age of 50. Regulation 2(3) required, among others things, that the scheme was either recognised or registered with the relevant tax authority (Condition A) or that at least 70% of the funds would be used to provide an income for life and that benefits would not be available before the age of 50 (Condition B). Regulation 3 required either that the scheme was located in the EU or certain other jurisdictions, or that at least 70% of the funds would be used to provide an income for life and that benefits would not be available before the age of 50: see the Appendix. So an EU based scheme

lump sum was, for example, permitted under Malaysian rules. We have also found that he relied on the 18 August 2008 letter and did not look at the QROPS list on the website, so he would not have seen the caveat. Although HMRC have said that they did not anticipate that such a letter would be sent to prospective members (see [53] above), their position has also been that the QROPS list was intended for use by scheme administrators rather than members (see [22] and [48] above). So it is not that straightforward for them now to say that Mr Gordon was effectively at fault for not checking the list. HMRC's view that the primary objective of the QROPS regime was to enable individuals leaving the UK permanently to take their pension savings with them to their new country of residence and that it was not considered desirable for individuals to be able to use a transfer to an overseas scheme to facilitate the withdrawal of their savings as a large lump sum, was not published until well after the transfer, in 2011(see [22] above)

152. We have also accepted Mr Gordon's evidence that he had considered taking a 25% tax-free lump sum and an annuity, and that he would not have expected to pay UK or Malaysian tax if he had. He had also offered to put the money back into a UK scheme and had transferred the funds back to the UK.

153. On the other hand, Mr Gordon should have considered taking proper advice rather than relying, as he clearly did, on Mr Pimlott. He should have read the documents and email exchanges carefully and should have appreciated that Windsor was not holding itself out as an adviser and that there were other "warning bells", and also that Mr Pimlott did not specifically confirm that there would be no UK tax consequences, but simply that tax would not be deducted at source. However, it is also clear that Mr Gordon was not well educated and that he did in fact rely heavily on the 18 August 2008 letter, which is unqualified in its terms.

154. Putting all these points together, we have concluded that in all the circumstances it would not be just and reasonable for Mr Gordon to be liable to the unauthorised payments surcharge, and accordingly if the assessment had been valid we would have granted Mr Gordon's application to discharge it.

Schedule 24 FA 2007

155. As already mentioned, Mr Hills also appeals against a penalty assessed under Schedule 24 FA 2007 on the basis of a careless inaccuracy in his return. For the purposes of Schedule 24, as with s 36 TMA, "careless" is defined as a failure to take reasonable care (paragraph 3(1) of Schedule 24). We have concluded that Mr Hills was careless and therefore that in principle a penalty is payable. Mr Hills made no challenge to the basis on which the penalty was calculated or to HMRC's failure to

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that was registered with the local tax authority could be a QROPS without any particular requirement to use any of the funds to provide income. There were also no requirements in respect of or limits on "trivial sum commutations".

suspend it, but only disputed whether a penalty was due at all, and we make no further comment on the manner in which the penalty was calculated[16].

156. However, the penalty charged is determined by reference to the additional tax payable (the "potential lost revenue", paragraph 5 of Schedule 24). On the basis that Mr Hills' appeal against the discovery assessment is allowed so that no additional tax is payable, the penalty appeal must also be allowed and the penalty cancelled.

Disposition

157. The appeals of all four appellants are allowed on the basis that the assessments were not validly made under s 29 TMA.

158. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 14 JUNE 2018

[16] Paragraph 15(1) of Schedule 24 permits an appeal against a decision that a penalty is payable, paragraph 15(2) permits an appeal against the amount of a penalty, and paragraph 15(3) an appeal against a decision not to suspend. Mr Hills' appeal appears to us to be an appeal under paragraph 15(1), and in that case the Tribunal's power under paragraph 17(1) is to affirm or cancel HMRC's decision.

APPENDIX

Taxes Management Act 1970

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment-

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where-

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above [was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

5 the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if-

10 (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any 15 accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards 20 the situation mentioned in subsection (1) above-

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

…

25 (8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to-

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) 30 above, the year of assessment mentioned in that subsection; and

…

34 Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment

to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

…

36 Loss of tax brought about carelessly or deliberately etc

5 (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates…

…

Finance Act 2004, Part 4

10 **150 Meaning of "pension scheme"**

(1) In this Part "pension scheme" means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons-

(a) on retirement,

15 (b) on death,

(c) on having reached a particular age,

(d) on the onset of serious ill-health or incapacity, or

(e) in similar circumstances.

(2) A pension scheme is a registered pension scheme for the purposes of this Part at 20 any time if it is at that time registered under Chapter 2.

…

(7) In this Part "overseas pension scheme" means a pension scheme (other than a registered pension scheme) which-

(a) is established in a country or territory outside the United Kingdom, and

25 (b) satisfies any requirements prescribed for the purposes of this subsection by regulations made by the Board of Inland Revenue.

(8) In this Part "recognised overseas pension scheme" means an overseas pension scheme which-

(a) is established in a country or territory prescribed, or of a description 30 prescribed, for the purposes of this subsection by regulations made by the Board of Inland Revenue, or

(b) satisfies any requirements so prescribed.

160 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, and

(b) anything which is to be treated as an unauthorised payment to or in respect of a person who is or has been a member of the pension scheme under this Part.

…

(5) In this Part "unauthorised payment" means-

(a) an unauthorised member payment, or

(b) an unauthorised employer payment.

(6) As well as section 157 (de-registration), the following provisions-

(a) section 208 (unauthorised payments charge),

(b) section 209 (unauthorised payments surcharge),

(c) section 239 (scheme sanction charge), and

(d) section 242 (deregistration charge),

specify consequences of making unauthorised payments.

…

164 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
5 Inland Revenue.

…

169 Recognised transfers

(1) A "recognised transfer" is a transfer of sums or assets held for the purposes of, or representing accrued rights under, a registered pension scheme so as to become
10 held for the purposes of, or to represent rights under-

(a) another registered pension scheme, or

(b) a qualifying recognised overseas pension scheme,

in connection with a member of that pension scheme.

…

15 (2) For the purposes of this Part a recognised overseas pension scheme is a qualifying recognised overseas pension scheme if-

(a) the scheme manager has given to the Inland Revenue notification that it is a recognised overseas pension scheme and has provided any such evidence that it is a recognised overseas pension scheme as the Inland Revenue may require,

20 (b) the scheme manager has undertaken to the Inland Revenue to inform the Inland Revenue if it ceases to be a recognised overseas pension scheme,

(c) the scheme manager has undertaken to the Inland Revenue to comply with any pre-scribed information requirements imposed on the scheme manager, and

(d) the recognised overseas pension scheme is not excluded from being a
25 qualifying recognised overseas pension scheme by subsection (5).

…

(5) A recognised overseas pension scheme is excluded from being a qualifying recognised overseas pension scheme by this subsection if the Inland Revenue has decided that-

30 (a) there has been a failure to comply with any prescribed information requirements imposed on the scheme manager and the failure is significant, and

(b) by reason of the failure it is not appropriate that transfers of sums or assets held for the purposes of, or representing accrued rights under, registered pension schemes so as to become held for the purposes of, or to represent rights under, the recognised overseas pension scheme should be recognised transfers,

5 and has notified the person or persons appearing to be the scheme manager of that decision (but subject to subsection (7) and section 170).

(6) A failure to comply with prescribed information requirements imposed on the scheme manager is significant if-

(a) the amount of the information which has not been provided is substantial,
10 or

(b) the failure to provide the information is likely to result in serious prejudice to the assessment or collection of tax.

(7) The Inland Revenue-

(a) may at any time after a recognised overseas pension scheme becomes
15 excluded from being a qualifying recognised overseas pension scheme decide that the pension scheme is to cease to be so excluded, and

(b) must notify the scheme manager of the decision.

208 Unauthorised payments charge

(1) A charge to income tax, to be known as the unauthorised payments charge,
20 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,

…

25 (4) A person is liable to the unauthorised payments charge whether or not-

(a) that person,

(b) any other person who is liable to the unauthorised payments charge, and

(c) the scheme administrator,

are resident, ordinarily resident or domiciled in the United Kingdom.

30 (5) The rate of the charge is 40% in respect of the unauthorised payment.

…

(7) An unauthorised payment may also be subject to-

(a) the unauthorised payments surcharge under section 209, and

(b) the scheme sanction charge under section 239.

(8) An unauthorised payment is not to be treated as income for any purpose of the
5 Tax Acts.

209 Unauthorised payments surcharge

(1) A charge to income tax, to be known as the unauthorised payments surcharge, arises where a surchargeable unauthorised payment is made by a registered pension scheme.

10 (2) "Surchargeable unauthorised payments" means-

(a) surchargeable unauthorised member payments (see section 210), and

(b) surchargeable unauthorised employer payments (see section 213).

(3) The person liable to the charge-

(a) in the case of a surchargeable unauthorised member payment made to or
15 in respect of a person before the person's death, is the person,

…

(5) A person is liable to the unauthorised payments surcharge whether or not-

(a) that person,

(b) any other person who is liable to the unauthorised payments surcharge,

20 (c) the scheme administrator and,

(d) the sub-scheme administrator,

are resident, ordinarily resident or domiciled in the United Kingdom.

(6) The rate of the charge is 15% in respect of the surchargeable unauthorised payment.

25 …

210 Surchargeable unauthorised member payments

(1) This section identifies which unauthorised member payments made by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme are surchargeable.

(2) If the surcharge threshold is reached before the end of the period of 12 months beginning with a reference date, each unauthorised member payment made to or in respect of the person in the surcharge period is surchargeable.

(3) The surcharge period is the period-

5 (a) beginning with the reference date, and

(b) ending with the day on which the surcharge threshold is reached.

(4) The first reference date is the date on which the pension scheme first makes an unauthorised member payment to or in respect of the person.

(5) Each subsequent reference date is the date, after the end of the previous 10 reference period, on which the pension scheme next makes an unauthorised member payment to or in respect of the person.

(6) The previous reference period is the period of 12 months beginning with the previous reference date or, if the surcharge threshold is reached in that period, is the surcharge period ending with the date on which it was reached.

15 (7) The surcharge threshold is reached if the unauthorised payments percentage reaches 25%.

(8) The unauthorised payments percentage is the aggregate of the percentages of the pension fund used up by each unauthorised member payment made by the pension scheme to or in respect of the person on or after the reference date.

20 (9) The percentage of the pension fund used up on the occasion of an unauthorised member payment is-

$$\frac{UMP}{VR} \times 100$$

where-

UMP is the amount of the unauthorised member payment, and

25 VR is an amount equal to the aggregate of the value of the member's rights under arrangements relating to the member under the pension scheme when the unauthorised payment is made (or, if the unauthorised member payment is made after the member has died or has otherwise ceased to be a member of the pension scheme, at the date when the member died or otherwise ceased to be a member).

30 (10) The value of the member's rights under an arrangement on any date is the aggregate of-

(a) the value of the member's crystallised rights under the arrangement on that date, calculated in accordance with section 211, and

(b) the value of the member's uncrystallised rights under the arrangement on that date, calculated in accordance with section 212.

268 Unauthorised payments surcharge and scheme sanction charge

(1) This section applies where-

5 (a) a person is liable to the unauthorised payments surcharge in respect of an unauthorised payment, or

(b) the scheme administrator of a registered pension scheme is liable to the scheme sanction charge in respect of a scheme chargeable payment.

(2) The person liable to the unauthorised payments surcharge may apply to the 10 Inland Revenue for the discharge of the person's liability to the unauthorised payments surcharge in respect of the unauthorised payment on the ground mentioned in subsection (3).

(3) The ground is that in all the circumstances of the case, it would be not be just and reasonable for the person to be liable to the unauthorised payments surcharge in 15 respect of the payment.

(4) On receiving an application by a person under subsection (2) the Inland Revenue must decide whether to discharge the person's liability to the unauthorised payments surcharge in respect of the payment.

…

20 **269 Appeal against decision on discharge of liability**

(1) This section applies where the Inland Revenue-

(a) decides to refuse an application under…section 268 (discharge of liability to unauthorised payments surcharge or scheme sanction charge)…

(2) The applicant may appeal against the decision.

25 …

(6) On an appeal under subsection (1)(a) that is notified to the tribunal, the tribunal must consider whether the applicant's liability to the…unauthorised payments surcharge or scheme sanction charge ought to have been discharged.

(7) If the tribunal considers that the applicant's liability ought not to have been 30 discharged, the tribunal must dismiss the appeal.

(8) If the tribunal considers that the applicant's liability ought to have been discharged, the tribunal must grant the application.

…

Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006 (SI 2006/206)

2(1) For the purposes of section 150(7) (meaning of overseas pension scheme) an overseas pension scheme must-

(a) satisfy the requirements in paragraphs (2) and (3)…

(2) This paragraph is satisfied if-

(a) …

(b) the scheme is not an occupational pension scheme and there is in the country or territory in which it is established, a body-

…

(ii) which regulates the scheme in question; or

(c) neither sub-paragraph (a) or (b) is satisfied by reason only that no such regulatory body exists in the country or territory and-

(i) the scheme is established in another member State…

(3) This paragraph is satisfied if the scheme is recognised for tax purposes.

A scheme is "recognised for tax purposes" under the tax legislation of a country or territory in which it is established if it meets the primary conditions and also meets one of Conditions A and B.

Primary condition 1

The scheme is open to persons resident in the country or territory in which it is established.

Primary condition 2

The scheme is established in a country or territory where there is a system of taxation of personal income under which tax relief is available in respect of pensions and-

(a) tax relief is not available to the member on contributions made to the scheme by the individual or, if the individual is an employee, by their employer, in respect of earnings to which benefits under the scheme relate;

(ab) the scheme is liable to taxation on its income and gains and is of a kind specified in the Schedule to these Regulations; or

(b) all or most of the benefits paid by the scheme to members who are not in serious ill-health are subject to taxation.

For the purposes of this condition "tax relief" includes the grant of an exemption from tax.

Condition A

The scheme is approved or recognised by, or registered with, the relevant tax authorities as a pension scheme in the country or territory in which it is established.

Condition B

If no system exists for the approval or recognition by, or registration with, relevant tax authorities of pension schemes in the country or territory in which it is established-

(a) it must be resident there; and

(b) its rules must provide that-

(i) at least 70% of a member's UK tax-relieved scheme funds will be designated by the scheme manager for the purpose of providing the member with an income for life, and

(ii) the pension benefits payable to the member under the scheme (and any lump sum associated with those benefits) must be payable no earlier than they would be if pension rule 1 in section 165 applied.

…

(5) In this regulation-…

"occupational pension scheme" has the meaning given by section 150(5)…

3(1) For the purposes of section 150(8) (recognised overseas pension schemes), in addition to satisfying the requirements set out in regulation 2 above, the pension scheme must-

(a) be established in a country or territory mentioned in paragraph (2); or…

(2) The countries and territories referred to in paragraph (1)(a) are-

(a) the member States of the European Communities, other than the United Kingdom…

Treaty on the Functioning of the European Union

Article 63

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Article 65

5 1. The provisions of Article 63 shall be without prejudice to the right of Member States:

…

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of
10 financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

A1P1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
15 No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or
20 penalties.