Neutral Citation: [2023] UKFTT 00653 (TC)

Case Number: TC08874

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/04335
TC/2018/04336
TC/2018/04337

INCOME TAX – Sippchoice considered – whether transfers of assets to self-invested pension plans are "contributions paid" in Section 188(1) Finance Act 2004 – no – whether there was a debt – no – appeals in that regard dismissed – whether a return must be rendered before the provisions of Section 29(2) TMA may be invoked – yes – whether there was a "practice generally prevailing" and if so did the appellant act in accordance with that – no – appeals dismissed

Heard on: 25 & 26 April 2023
Judgment date: 25 July 2023

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

KILLIK & CO LLP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Sam Brodsky of counsel, instructed by Reynolds Porter Chamberlain LLP ("RPC")

For the Respondents: Charles Bradley, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appeal is brought against the following decisions of the Respondents ("HMRC") pursuant to the Registered Pension Scheme (Relief at Source) Regulations 2005 ("RASR"), namely:-

(a) An estimated assessment dated 29 March 2017 in respect of the tax year 2012/13 assessing the appellant in the sum of £104,683.92 which sum, by agreement, was reduced to £80,695.94 by a decision dated 17 May 2017. An amended assessment was subsequently issued but has not been produced.

(b) A revised protective assessment dated 1 October 2018 in respect of the tax year 2013/14 in the sum of £82,809.42. In the first instance an estimated assessment in the sum of £73,639.12 had been issued on 14 March 2018.

(c) A decision dated 29 December 2016 in respect of the tax year 2015/16 refusing part of the appellant's annual Relief at Source ("RAS") claim in the sum of £149,165.53 ("the 2015/16 appeal"). In fact, it seems from an email dated 22 June 2018 that it is not disputed that the sum in issue is £149,074.76.

Both of the assessments were made pursuant to Regulation 14 of RASR ("Reg.14") which allows HMRC to withdraw relief previously provided on a claim made under RASR.

HMRC are not bound to accept RAS claims.

2. In each case, HMRC refused or withdrew the tax relief sought by the appellant, as a registered pension scheme, under Part 4 of the Finance Act 2004 ("FA 2004"). The basis for HMRC's refusal was that the relevant individuals made contributions to their self-invested personal pensions ("SIPPs") in specie rather than by monetary consideration.

3. I heard evidence from Mr Last for the appellant and Officers Burns and Platnauer for HMRC.

4. I had a Statement of Agreed Facts and Issues, a hearing bundle extending to 437 pages, an authorities bundle extending to 940 pages, a witness statement with related exhibits extending to 59 pages and Skeleton Arguments for both parties. I had the benefit of a transcription service.

5. I have annexed at Appendix 1 the Statement of Agreed Facts and Issues as submitted by the parties. I have approached the issues rather differently herein since, for the reasons set out in the following paragraphs, the evidence in the hearing and the oral arguments did not follow the parties' agreed sequence of issues. The agreed facts are incorporated herein both in the narrative and in the findings in fact.

6. In Opening Submissions, Mr Brodsky confirmed that there had originally been four Grounds of Appeal. One of those, being rectification, was no longer relied upon and "of the remaining three grounds, it is accepted that the FTT is bound to reject them". He confirmed that in relation to the assessments that was because this Tribunal is bound by the decision of Mr Justice Roth and Judge Sinfield in *Sippchoice v HMRC* [2020] UKUT 149 (TCC) ("Sippchoice 2"). Mr Brodsky then went on to say that that left the "practice generally prevailing ("PGP") ground" which applies only to the assessments.

7. In fact, that was the third Ground of Appeal and it raises issues of both fact and law. Paragraph 5 of the Statement of Agreed Facts said that, because PGP did not arise in the 2015/16 appeal, it was agreed that the Tribunal was bound to dismiss the 2015/16 appeal because of *Sippchoice 2*.

8. Mr Brodsky intimated that neither Counsel intended to make oral submissions in relation to *Sippchoice 2*. He had made written submissions in his Skeleton Argument but Mr Bradley had not done so. He relied on a number of Judge Gething's findings in *Sippchoice v HMRC* [2018] UKFTT 122 (TC) ("Sippchoice 1"). For completeness, I narrate at Appendix 2 both those findings in *Sippchoice 1* and the reasons that Mr Brodsky has advanced as to why the appellant intends to challenge *Sippchoice 2* in the Upper Tribunal with new arguments.

The Factual Background

9. The appellant is, and was at all material times, a registered provider of SIPPs and acted as a Scheme Administrator for those SIPPs. Killik & Co is its trading name.

10. The appellant is, and has been since at least 2012 and possibly before that, a member of the Association of Member-Directed Pension Schemes ("AMPS") which is the industry body representing SIPP providers.

11. From 2012 when he joined the appellant, Mr Last was the Technical Pensions Administrator. In 2015 he took over as Head of Pensions Administration. In approximately 2008/09, his predecessor had established the processes and procedure for the making of in specie contributions. He had apparently done so having consulted with others in the industry.

12. In 2016, when HMRC challenged the RAS claims, Mr Last consulted with his predecessor. He cannot recall the detail but he said that he was told that the processes and procedure deployed by the appellant were believed to be in line with industry practice. That had always been his, and therefore the appellant's, understanding.

13. All clients must sign Terms and Conditions ("T&Cs") which, in the version that was produced, being 08/11, includes a section for SIPPs. At 6.1.2 under the heading "Provisions" it describes the services that will be provided for being a member of a SIPP as being:-

> "…administration, share dealing, brokerage, advisory, discretionary management or such other services as may be agreed from time to time."

14. Killik & Co Trustees Limited ("the Trustees") are described as being the first and sole Trustee and the Bank of Scotland as the "Provider of the Scheme". The appellant agrees "… on behalf of the Provider, to administer the Scheme as required by the Scheme Rules".

15. Under the heading "Contributions" at 6.1.5 (a) it states that contributions which are to be paid to the Trustees should be paid

> "…as if the payment had been taxed at the basic rate and not the full amount of the Contribution.
>
> We shall arrange to recover the difference from the HM Revenue & Customs on your behalf and apply it to your SIPP…".

At sub-paragraph (c) which is headed "Contributions in specie" it states that:- "Subject to our agreement on each occasion and **any HMRC requirements**, a contribution may be paid by a transfer to us of assets…" (Emphasis added)

16. Of course, the Bank of Scotland was a PLC and it entered into a Deed of Amendment with the Trustees and the appellant on 1 September 2011 which was described as being supplemental to the establishing trust deed dated 30 December 2003 as amended on a number of occasions thereafter. It amends and restates the trust rules. Under the heading "Contributions" it states that, provided that the appellant permitted it, contributions may be paid "in money form" or as shares or otherwise in specie.

17. The appellant made claims for relief at source on an annual basis, and made those claims in respect of contributions made by individuals to their SIPPs. In particular, the appellant made such claims in respect of the tax years 2012/13, 2013/14 and 2015/16 (being "the Relevant Tax Years"). It transpired that there are outstanding assessments in respect of 2014/15 and 2016/17 which the appellant has appealed but which are not currently before the Tribunal.

18. During the Relevant Tax Years, individuals made contributions to their SIPPs, administered by the appellant. Some of the contributions made by those individuals were contributions by way of bank transfer and other contributions were contributions in kind, such as by way of shares ie in specie.

19. Typically, individuals would make an application to the appellant for the contributions to be made, via a prescribed form. Formal documentation would then be entered into, in order to give effect to the contributions. Certificates would eventually be issued by the appellant to the individuals confirming the transactions.

20. Those individuals included John Thomas, Alison Fernando and Dr David Day. The fact pattern relating to the contributions of those individuals were typical of, and are representative of, other individuals who made contributions in kind to their Killik & Co SIPPs during the Relevant Tax Years.

21. In the course of the hearing it was agreed that the facts relating to Dr Day, only, should be narrated in this decision as there was no material difference between the relevant factual matrices for these three individuals.

Dr Day

22. On 20 January 2013, Dr Day signed a document headed "SIPP additional contribution form". Like all of the other documentation it carried a "Plan number" so it is clear that the appellant had previously accepted Dr Day as a member of the SIPP on or before that date.

23. It stated that all cheques should be payable to the Trustees. Under the heading "Please indicate the level of contribution you intend to make", Dr Day indicated that he intended to make a personal (net) contribution of £8,000.

24. That form was received by the appellant on 23 January 2013 and on the following day the appellant wrote to Dr Day stating under a heading "In-specie contribution":-

> "I refer to the recent contribution form submitted by you for a contribution of £8,000.00. I understand that you wish to pay for this contribution by way of shares and cash. Please note that payment in this manner creates an irrevocable and legally enforceable debt, which is payable in full by yourself in favour of Killik and Co Trustees Ltd.
>
> I would be grateful if you could confirm the stocks that you wish to use for payment of the contribution. Should the stock value be lower than the net contribution on the date of transfer, the remainder will need to be paid in cash. Where the value is higher, the balance can be repaid to you or can count as an additional contribution. Full details will be communicated to you once you have returned the slip at the bottom of this letter."

It indicated that a fee of £100 plus VAT per holding transferred in specie would be charged plus stamp duty. A footnote stated that "All holdings will be valued on a quarter up basis on the date of transfer. Please note this is an HMRC requirement."

25. It is obvious from the heading and from the terms of that letter that by that time a decision had been taken that there would be either only a minimal or no monetary contribution. Mr Last confirmed in oral evidence that there would have been some form of

communication with Dr Day before that letter was issued when an in specie contribution rather than money would have been discussed. He could not confirm what would have been communicated.

26. On 3 February 2013, Dr Day signed the pro forma slip at the bottom of the letter. All that he added was the name of the stock. The slip read:-

> "I refer to your letter of 23rd January 2013.
>
> I wish to subscribe the following shares as payment of my contribution of £8000------ Shares in WPP PLC.
>
> I understand that this transaction creates an irrevocable and legally enforceable debt, which is payable in full by me in favour of Killik and Co Trustees Ltd and that the Trustees can demand a settlement at any time.
>
> I also understand that the valuation of the shares will be undertaken on a quarter up basis, as required by HM Revenue and Customs, which may differ from the value that the stock is priced in the market."

27. As can be seen, the number of shares was not included. There is a handwritten annotation that is undated but states that a named but unidentified individual "confirmed to transfer 1693 via email".

28. There was in the bundle a valuation of Dr Day's holding as at 5 February 2013 and then a quarter up valuation dated 6 February 2013. That shows that the valuation of 1693 shares was £17,073.90. There is a handwritten annotation showing that therefore £9,073.90 had been over contributed so there had been an over contribution of 899 shares together with £7.49 in cash.

29. On 8 February 2013, the appellant wrote to Dr Day stating that:-

> "I refer to your recent instruction to make an In Specie Contribution of £8,000. You instructed us to settle this contribution by transferring a total of 1693 shares in WPP Plc. The actual value of this contribution, based on a valuation of these shares on 6 February 2013 amounted to £17,073.90.
>
> This is an over contribution and therefore we need to repay the excess back to you. This transaction can be carried out in cash or shares. However as there is insufficient cash we would need to refund shares to you. The number of shares needing to be refunded is 899 and a small amount of cash totalling £7.49.
>
> Alternatively, you can elect to treat this overpayment as an additional contribution, in which case we will need a further additional contribution form for the sum of £9,073.90".

30. On 10 February 2013, Dr Day signed a further additional contribution form indicating that he intended to make a personal (net) contribution of £9,073.90.

The Guidance

31. Initially, there was a lack of clarity as to what guidance issued by HMRC had been published and when. At paragraph 17 in his witness statement, Mr Last had referenced the Registered Pension Schemes Manual at RPSM05101045 which he stated that he had exhibited. The quotation in the witness statement was not from that exhibit.

32. In his Skeleton Argument Mr Brodsky referred to the guidance discussed by the FTT in *Sippchoice 1* at paragraph 33 being the Pensions Manual PTM042100 which had been relied

upon in the Grounds of Appeal (see paragraph 53(b) below). He also relied upon the guidance which I have quoted at paragraph 36 below. The two are largely similar.

33. Ultimately, with the assistance of Mr Bradley's exposition of the policy on archiving HMRC's guidance and Mr Platnauer's evidence and exhibits, it was established that there were two types of guidance and the fact that they were archived did not imply that they were not still "live".

34. There was guidance which was described as being for "Employer contributions" and also guidance for "Member contributions". That guidance set out HMRC's interpretation, at the relevant dates, of the legislation at sections 188 and 196 FA 2004.

35. I say at the relevant dates because the versions that were published on 9 December 2006 were subsequently changed but it is relevant to note what they said, not least because the exhibit produced by Mr Last was that version but his quotation was not.

36. The 2006 version of the Members contributions RPSM05101045 read:-

> "As explained at RSPM05101020 contributions to a **registered pension scheme** must be a monetary amount. But what is allowed is for an individual to agree to pay a monetary contribution and then to settle this debt by way of a transfer of asset(s).
>
> An example will probably aid understanding here. If an individual wishes to pay a contribution they cannot do this by merely saying 'take this asset and whatever it is worth that is my contribution'. What they must do is to say that I wish to pay a contribution of, say, £10,000. If the scheme agrees, this debt may be paid by the member through a transfer of an asset of that value. If the asset is of a lower value the balance will be paid in cash.
>
> If the contribution is being made to a registered pension scheme that operates relief at source (RAS) the amount of cash contributions specified should, if applicable, be the net amount after the individual exercises his right to deduct from the payment the basic rate RAS relief (see RSPM05101310). The basic rate relief will be recoverable by the **scheme administrator** in the normal way from HMRC and if appropriate the individual can claim higher rate relief via his self-assessment return."

37. The 2006 version of the Employers contributions RSPM05102035 read:-

> "In-specie contributions in their strictest sense are not allowed. The legislation is framed in such a way that contributions have to be expressed as cash sums. But what is allowed is for an employer to agree to pay a monetary contribution and then to settle the debt by way of a transfer of an asset or assets.
>
> For example, if an employer wishes to pay a contribution he cannot do this by merely saying 'take this asset and whatever it is worth that is my contribution'. What he must do is to say that he wishes to pay a contribution of a specified monetary sum, say, £10,000. If the scheme agrees, this debt may be paid by the employer through a transfer of an asset of that market value. If the asset is of a lower market value the balance will be paid in cash."

38. On 2 April 2009, having taken legal advice and as a matter of urgency, HMRC published a revised version of the Employer guidance. The new version of RSPM05102035 read:-

> "**Contributions made in-specie**

In-specie contributions are not allowed. The legislation only permits monetary contributions. However, it is possible for an employer to agree to pay a monetary contribution and then to settle this debt by way of a transfer of an asset or assets.

For example, if an employer wishes to pay a contribution he cannot do this by merely saying 'take this asset and whatever it is worth that is my contribution'.

There must be

- a clear obligation on the employer to pay a contribution of a specified monetary sum, say, £10,000. This needs to create a recoverable debt obligation.
- a separate agreement between the scheme trustees and employer to pass an asset to the scheme for consideration.
- If the scheme agrees, the cash contribution debt may be paid by off set against the consideration payable for the asset. This is the scheme effectively agreeing to acquire the asset for its market value.

If the asset market value is lower than the contribution debt the balance will be paid in cash.

If the cash contribution debt is not created, then the transaction is the acquisition of an asset by the scheme not a contribution."

39. On 8 May 2009, HMRC published Pension Schemes Newsletter 37 and under the heading "Clarifying HMRC's position on employer contributions that include asset transfers" it stated that the recent update to the Guidance (incorrectly stated to have been published on 15 April 2009) "…provides a clearer and more detailed explanation of how an employer can make a pension scheme contribution that includes an asset transfer".

40. On 23 October 2009, HMRC published the revised guidance on Member contributions. That is the version which Mr Last quoted in his witness statement. As with the Employer guidance it sets out a three step off setting mechanism, through which, in HMRC's view, a transaction involving the transfer of an asset i.e. in specie would be a monetary contribution.

41. It reads:-

"As explained at RPSM05101020 contributions to a **registered pension scheme** must be a monetary amount. However, it is possible for a member to pay in monetary contribution and then to settle this debt by way of a transfer of an asset or assets.

For example, if a member wishes to pay a contribution he cannot do this by merely saying 'take this asset and whatever it is worth that is my contribution'.

There must be

- a clear obligation on the member to pay a contribution of a specified monetary sum, say, £10,000. This needs to create a recoverable debt obligation.
- a separate agreement between the scheme trustees and member to pass an asset to the scheme for consideration.
- If the scheme agrees, the cash contribution debt may be paid by off set against the consideration payable for the asset. This is the scheme effectively agreeing to acquire the asset for its market value.

If the asset market value is lower than the contribution debt the balance will be paid in cash.

If the cash contribution debt is not created, then the transaction is the acquisition of an asset by the scheme not a contribution.

If the contribution is being made to a registered pension scheme that operates relief at source (RAS) the amount of cash contributions specified should, if applicable, be the net amount after the individual exercises his right to deduct from the payment the basic rate RAS relief (see RSPM05101310). The basic rate relief will be recoverable by the **scheme administrator** in the normal way from HMRC and if appropriate the individual can claim higher rate relief via his self assessment return."

Clearly, it mirrors the Employer guidance.

AMPS

42. In May 2007, AMPS published a Newsletter No 20 which was exhibited by Mr Platnauer. That set out HMRC's answers to a number of questions in relation to in specie contributions and showed some development in HMRC's view from the original guidance. In particular, it refers to the need for a debt obligation to be created, which is not mentioned explicitly in the original guidance.

43. A further Newsletter, No 25, was published in September 2007. Under the heading "Why direct in specie contributions are not allowable" HMRC stated that:-

"…we have received legal advice that the term 'contributions paid' within s188 FA 04 means cash. So apart from the exception set out in s195 FA 04 contributions must be a cash form (sic)

…

To 'contribute' assets such as shares to a scheme they must first be converted into a cash form…If you don't create a cash debt then what you have is simply the purchase of an asset from a connected party, not a contribution.

For this method of making a contribution to work there must be a prior debt obligation to pay a cash amount to the scheme. What the completion of a stock transfer does is transfer ownership of the asset from the individual to the scheme, it does not create a contribution debt from the individual to the scheme."

44. There was discussion as to what might constitute a debt with AMPS requesting greater clarity as to what HMRC viewed as a debt but HMRC's stance was that that was a matter of law and would depend on the individual facts and circumstances.

45. A further response from HMRC on the subject of "payment date" stated that:-

"The contribution is made at the point that the contribution debt is offset against the asset purchase debt, when the scheme becomes legal owner of the asset".

46. Mr Platnauer also produced an AMPS Committee HMRC Issues Log 2007/2008. That recorded the details of a meeting which took place between representatives of HMRC and AMPS on 27 February 2008 and is described as a "Discussion Document". The opening paragraph under the heading "In Specie Contributions" and sub-heading "Description" reads:-

"The industry widely regarded in-specie contributions as allowable under the FA04 pension regime by means of a simple administration process. HMRC have sought legal opinion on what qualifies as a payment in the context of a pension contribution and take this to mean a cash payment. Their view therefore is that in-specie contributions are allowable if there is an obligation on the contributor to make a contribution and that obligation is then settled by transfer of an asset or assets. Any difference in value

between the value of assets and the obligation has to be attended to. As the obligation creates an irrevocable debt, any undervalue needs to be pursued by the scheme administrator where commercially viable. Any overpayment can be dealt with by way of refund or additional contribution in-specie, but HMRC do not expect material differences in valuations.".

47. The document records that AMPS wished sight of that legal advice. Mr Platnauer confirmed that he had seen the legal advice and it had covered much wider issues and thus HMRC had chosen not to disclose it. The document states that HMRC said that the legal advice had said that relief was limited to cash contributions.

48. Mr Platnauer confirmed that he had looked at the documentation in its totality but in particular that he had noted that, under the heading "Latest Position", point d of that document had articulated, for what he believed to be the first time, HMRC's view on the issue of offset.

49. That sub-paragraph and the following sub-paragraph read as follows:-

"d. Stephen Webb [HMRC] continued to described (sic) the in-specie process as one of offset, whereby the member undertakes to make a contribution, e.g. £10,000, whilst the Scheme Trustees have agreed to acquire assets from the member for a cash consideration; the market value of the assets being say £10,000. Thus rather than the member paying in cash only to have it returned in consideration of the assets, a simple offset is carried out. If the member contributions were £10,000 but market value of assets were £9,000, the member still needs to pay £1,000.

e. Mike N [AMPS] enquired whether this exchange could be facilitated by means of an exchange of letters. The answer was affirmative based on it being a single transaction happening at the same time".

50. Mr Platnauer also exhibited Minutes of an AMPS Liaison Meeting dated 8 January 2009 which he described as reflecting HMRC's then current approach. It expands on the information I have recorded in the preceding two paragraphs.

51. The first item was "In Specie contributions". HMRC are recorded as having stated that:-

"HMRC commented that the employer and member contribution legislation only permits tax relief for monetary contributions. However, HMRC accepts that a monetary contribution can be effected by a mechanism that involves an asset transfer. To achieve this 3 steps are necessary:

- the employer or member agrees to make a monetary contribution of a particular amount to the pension scheme
- the pension scheme contracts with the employer or member to acquire an asset from the employer or member for monetary consideration
- the two cash debts can be set off against each other instead of being physically paid.

If the value of the asset transferred does not equal the amount of the obligation to pay a monetary contribution there will need to be an additional cash adjustment. If these steps are followed tax relief is available for the amount of the contribution."

Overview of the Grounds of Appeal

52. In his Skeleton Argument Mr Brodsky stated that the appellant's appeal was made on the following three Grounds:-

(1) Payments in Kind – "First, section 188 of FA 2004 provides for pension relief in respect of '*pension contributions paid*' during the tax year. The word 'paid' is broad enough to cover *in specie* contributions as well as payments by bank transfer, and a bank transfer / in specie distinction makes little sense in terms of either legal principle or legislative intent.

(2) Discharge Obligations –"Secondly (and in the alternative), the words 'contributions paid' are broad enough to include an *in specie* contribution where that contribution is made in order to discharge a monetary obligation."

(3) PGP- "Thirdly, the Appellant is entitled to the 'practice generally prevailing' (PGP) protection in the legislation since RASR reg.14 specifically imports the statutory protections of ss.29 and 30 of the Taxes Management Act 1970 (TMA). The claims were made in accordance with PGP. (This ground applies to the assessments…only, and not to the HMRC's decision refusing the annual claim for relief…)".

53. I have quoted directly from the Skeleton Argument but I have given the headings since they follow the agreed three issues (see Appendix 1) but in slightly different detail so they fall to be considered as a whole.

54. Furthermore, I note that the original Grounds of Appeal, are more expansive and, in particular state:-

(a) At paragraph 3.9 in relation to payments in kind that "all payments in kind fall within the statutory words 'contributions paid' in section 188", and

(b) In relation to PGP at paragraph 5.5 that:-

"HMRC accepted, in their Pensions Manual PTM042100, that a transfer of assets could amount to a 'contribution paid' where it discharged a monetary liability:

'…it is possible for a member to agree to pay a monetary contribution and then to give effect to the cash contribution by way of a transfer of an asset or assets.'", and

(c) At paragraph 5.7 that:-

"There was a PGP, encouraged by HMRC's published guidance, that a transfer of an asset would be a 'contribution paid' under the legislation where it followed an agreement to pay a monetary amount. Accordingly, HMRC are prevented by section 29(2) TMA 1970 from raising an assessment on a basis contrary to that PGP. This ground of appeal was not considered by the FTT or UT in *Sippchoice*".

55. It is argued that HMRC issued guidance, which was followed, and then HMRC resiled from that guidance with retrospective effect.

Summary of HMRC's arguments

56. HMRC argue that the expression "contributions paid" in section 188(1) FA 2004 is limited to payments of money. That expression does not encompass the transfer of assets and satisfaction of a money debt because there is no more a payment of money than a transfer of assets *simpliciter*. In that regard HMRC rely on paragraphs 34 and 42 in *Sippchoice 2*.

57. Those paragraphs read:-

"34. Accordingly, we hold that the expression "contributions paid" in section 188(1) FA 2004 is restricted to contributions of money (whether in cash or other forms)."

and

> "42. … If, as we have found, 'contributions paid' in section 188(1) FA 2004 means paid in money then it cannot encompass settlement by transfer of non-monetary assets even if the transfer is made in satisfaction of an earlier obligation to contribute money. An agreement to accept something other than money as performance of an obligation to pay in money does not convert the transfer of shares (or other assets) into a payment in money. It is difficult to see why legislation relating to pension contributions should distinguish between and provide different tax treatments for transfers of assets in place of payments made under a contractual obligation and transfers of assets in place of payments made freely at the option of the payer."

58. In relation to the appellant's second Ground of Appeal, HMRC deny that any of the transfer of assets made by the individual members were in discharge of a monetary obligation.

59. Section 29(2) TMA applies where "the taxpayer has made and delivered a return under section 8 or 8A of [TMA] in respect of the relevant year of assessment" and where the loss of tax is attributable to an error or mistake in that return. The appellant has never made such a return and it therefore follows that section 29(2) does not apply.

60. In the alternative, if section 29(2) does apply the onus of proof lies with the appellant to establish that the relevant claims were made on the basis of, or accordance with, the PGP at the time they were made. HMRC argue that there was no PGP of the kind alleged by the appellant.

61. In the alternative, the relevant claims were not made on the basis of, or in accordance with, HMRC's guidance. That is on the basis that at no stage prior to the transfer of assets had any individual member incurred a liability to pay a sum of money ie a debt.

Overview of the Legislation

62. The taxation of registered pension schemes is set out in FA 2004, Part 4 and the Schedules thereto. That was new legislation and neither re-wrote nor clarified previous legislation.

63. There is no material dispute between the parties as to which legislative provisions apply. Mr Brodsky argues that, given the interaction of FA 2004 and TMA, there is ambiguity in the legislative provisions when considered as a whole. Mr Bradley disagrees.

64. Insofar as relevant, I annex at Appendix 3, the text thereof but summarise the provisions here.

65. Section 188 FA 2004 provides that an individual who is an active member of a registered pension scheme is entitled to tax relief in respect of "relievable pension contributions paid during a tax year".

66. As the Upper Tribunal pointed out at paragraph 31 in *Sippchoice 2,* section 195 FA 2004 is an extension of the relief under section 188 FA 2004.

67. Section 191 FA 2004 provides *inter alia* that relief to which an individual is entitled under section 188 is to be given in accordance with section 192.

68. Section 192 FA 2004 provides that the taxpayer having deducted a sum equal to the basic rate of income tax, the sum deducted is treated as income tax paid by the Scheme Administrator who is entitled to recover that from HMRC.

69. The Scheme Administrator of a registered pension scheme can make claims for RAS under Regulations 9 to 11 inclusive of RASR. Those may be "annual" claims for a year of assessment or "interim" claims for a tax month.

70. If HMRC reject an annual claim, then an appeal lies under Regulation 12(3) and Regulation 12(5) provides that the provisions of Part 5 of TMA apply to any such appeal.

71. If HMRC accept a claim (whether interim or annual), then in terms of Regulation 14, HMRC may make an assessment in order to recover the amount due. Regulation 14(1) provides that section 30 TMA applies in relation to amounts paid, to which a Scheme Administrator was not entitled, as if it had been income tax repaid to the Scheme Administrator to which they were not entitled.

72. Regulation 14(2) provides that, subject to the other provisions of RASR, TMA shall apply as if the assessment under Regulation 14 was an assessment to tax for the tax year in respect of which the amount was paid or is recoverable.

73. Section 30(1) TMA provides that where an amount of income tax has been repaid to any person which ought not to have been repaid to him, then that amount of tax may be assessed and recovered as if it were unpaid tax.

74. Section 30(1B) provides that subsections (2) to (8) of section 29 TMA shall apply in relation to an assessment under section 30(1) as they apply to an assessment under section 29(1).

75. Section 29(2) TMA provides that where HMRC have ascertained that where there has been a loss of tax in terms of section 29(1) then 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" ie PGP.

76. Pursuant to subsections (3) to (5) of section 29 a discovery assessment cannot be made unless either the loss of tax was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf ("the culpability condition") or, at the time that HMRC ceased to be entitled to enquire into the taxpayer's return, HMRC could not have been expected, on the basis of the information available before that time, to have been aware of the loss of tax ("the knowledge condition"). It is a matter of agreement that the burden of proof for demonstrating that those conditions are met lies with HMRC.

Discussion

77. Unsurprisingly, I have no hesitation in agreeing with both parties that I am bound by the decision in *Sippchoice 2*.

78. At the outset of the hearing, I pointed out to the parties that at paragraphs 15 and 16 in her decision refusing strike out applications in these appeals, Judge Amanda Brown KC stated that there were factual disputes between the parties in connection with each of the three Grounds of Appeal. For that reason she declined to strike out the appeals in order that this Tribunal "may find the relevant facts on which the Upper Tribunal may then determine whether to accept an appeal on grounds (1) and (2)".

79. In that regard I drew the parties attention to an email from RPC to HMRC dated 26 January 2022 which stated that "…there appears to be no material disagreement over the facts". I pointed out the disjunct and sought elucidation.

80. Mr Brodsky confirmed that the factual dispute related to:-

(a) The PGP, and

(b) Does a debt arise on the facts?

Mr Bradley did not demur.

81. The PGP does not arise in relation to the first two Grounds of Appeal so the only factual issue in dispute in relation to the first two grounds is whether, on the facts, there was a debt.

The first Ground of Appeal – Payments in Kind

82. I cannot agree with the proposition that the use of the words "contributions paid" is broad enough to encompass in specie contributions as well as a monetary consideration. The Upper Tribunal in *Sippchoice 2* made it explicit at paragraph 31 that the legislation made a very clear distinction between monetary consideration and in specie contributions.

83. Paragraph 31 reads:-

> "We accept Mr Bradley's submission that section 195 is an extension of the relief under section 188. Section 195 informs the way we read 'contributions paid' in section 188(1). In our view, it makes no sense, in the context of provisions to relieve contributions to pension schemes, to restrict relief for transfers of eligible shares to a period of 90 days from acquisition if transfers of non-eligible shares or other assets are not so limited. That logical inconsistency disappears if 'contributions paid' is interpreted as restricted to monetary contributions."

84. I therefore answer the questions posed in the first Agreed Issue as follows:-

> (1) "Payments in kind" or in specie contributions, unless falling within the provisions of section 195 FA 2004, do not amount to "pension contributions paid" in terms of section 188 FA 2004.
>
> (2) The phrase "pension contributions paid" in section 188 FA 2004 is limited to monetary contributions.

Accordingly the first Ground of Appeal is dismissed.

The second Ground of Appeal – Discharge Obligations

85. Mr Platnauer agreed that if the three step process in both versions of the 2009 HMRC guidance was followed, which is to say where the member contracted to make a contribution and the scheme administrator contracted to buy the shares for the same value and then there is an offset, there is a single transaction and everyone understands that no cash will actually pass hands. That is supported by the guidance and the AMPS evidence. I accept that.

86. He also agreed that whilst it was not possible to transfer assets directly into a SIPP, nevertheless if the three step process outlined in both versions of the 2009 guidance was followed then it was possible to obtain the relief. I also accept that.

87. Mr Brodsky argued that there are two ways of looking at the three step process. The first is to take the steps one by one and say that the practice that HMRC required involved meeting the conditions of each one. In that situation, it is conceded that a formal requirement for a debt to be created is required since that is stated clearly in HMRC's guidance and in the AMPS documentation.

88. The second is to take the view that the guidance sets out a preordained series of steps which taken as a whole allow in specie contributions. Thus, looked at realistically, albeit probably not correct in law, the guidance suggests that HMRC required the creation of a debt only in a formal way as one step in the process. There was never any expectation that money would change hands and everyone knew that. In that situation it was always envisaged that

the obligation to pay would be offset by an obligation in precisely or nearly precisely identical terms but going in the other direction.

89. Leaving the question of expectation, which is really an argument on PGP, to one side for now, in either case there must be a debt. Therefore the first question to be answered is whether a payment of an in specie contribution in settlement of a debt can be a "contribution paid".

90. I agree with Mr Bradley that it is clear from the 2006 guidance that it said that a contribution would be paid if an asset was transferred in satisfaction of a money debt. However, that changed. The 2009 guidance was brought in precisely because Counsel had advised that that guidance was wrong in law.

91. The 2009 guidance makes it explicit that contributions must be monetary but if there is a clear obligation on the member to pay a specified money sum, which must be a "cash contribution debt", then that can be satisfied by the acquisition of an asset.

92. Therefore the answer to the first question posed in the second Agreed Issue is that if there is a "cash contribution debt" which is discharged by a payment in specie that can be "pension contributions paid" within section 188 FA 2004 ie where the payment is made in order to discharge a monetary obligation.

93. That then takes me to the second question which is whether on the facts of this case a debt had been constituted and the third which is whether an in specie contribution had discharged that debt.

Is there a debt?

94. In summary, it was argued that the appellant's primary position is that the missive dated 20 January 2013 was the offer, the response dated 24 January 2013 was the acceptance and the pro forma slip dated 3 February 2013 was an amendment to a contract between the appellant and Dr Day. Accordingly, there is a contract which has been varied whereby Dr Day provides £8,000 which the appellant accepted. Basically, the appellant did not have to accept contributions but if it did it was agreeing to provide a service ie there was a consideration.

95. The appellant relies upon *Williams v Roffey Bros. & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1 which provides that a promise to pay in the context of a contractual variation will be enforceable and will be supported by consideration if there is some practical benefit for the promisor.

96. Mr Brodsky quoted from Glidewell L.J. who approved the following paragraph from *Chitty on Contracts 26th Ed:-*

> "The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him e.g. where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment."

97. In other words, where there is a practical benefit then that is good consideration. He argued that the practical benefit for Dr Day was agreeing to contribute the additional sum because when he pays it over there is a legal obligation and he will get tax relief for it. It is also administered in terms of the trust deed. It is not a gift.

98. Therefore, because the appellant is not the gratuitous recipient of the funds which were not gifts, the appellant owed obligations and that means that there was a consideration.

Disregarding for now the fact that the payment was to the Trustees and not the appellant, HMRC are not arguing that the payment, in whatever form, was a gift.

99. Mr Brodsky stated, correctly, that in terms of the Trust Deed, the appellant had a discretion as to whether or not a contribution of any sort whether in money or shares should be accepted. He then argued that when accepted, the appellant was under an obligation to:-

(i) Provide services in respect of membership of the SIPP,

(ii) Administer the pension scheme

(iii) Recover from HMRC by way of RAS a sum equivalent to the basic rate of tax.

100. That is correct. For that reason Mr Brodsky took me through the trust amendment and the terms and conditions etc that I have set out above.

101. Effectively, he argued that the contribution was not made gratuitously and therefore there was a debt. Whilst I agree that the consequence of anyone having a contribution accepted, by the Trustees, was that the appellant had consequential reciprocal obligations in that tri-partite arrangement, I do not accept that a debt was created simply because of that. Those obligations were triggered by the transfer of the shares.

102. Quite apart from the fact that these are tripartite arrangements with payments going to the Trustees but the services provided by the appellant, whilst I note those arguments, I find the matter to be more straightforward than that. As HMRC told AMPS (see paragraph 43 above) what constitutes a debt turns on the individual facts and circumstances and that is a matter of general law.

103. I do not accept that the letter of 20 January 2013 constituted a debt; it was simply an indication of intention. There was no request to, or for consideration by, the appellant of a purchase of a particular asset from Dr Day.

104. I do accept that, because any difference in value between the amount offered and the amount contributed in specie is contractually dealt with by way of either a refund or an additional contribution, that that reflects the fact that there was a <u>proposed</u> contribution. I highlight the word "proposed" deliberately because, in my view, the additional contribution form does not constitute anything final.

105. As can be seen, the additional contribution form itself did not create a legally enforceable obligation and Mr Last conceded that in oral evidence. It was simply an offer, as Mr Brodsky also conceded.

106. There was then the unspecified, and undocumented, telephone or email communication which preceded the letter of 24 January 2013 where that offer was apparently varied in that the offer became an offer to make a contribution in kind. That communication simply replaced the intimation of a wish to make a cash contribution with a different and unilateral one which was to contribute the shares to that value.

107. In the case of Dr Day it can be seen that, in fact, the value of the shares was more than double the original cash contribution.

108. That offer was then accepted by the appellant in the letter of 24 January 2013 which stated that "payment in this manner creates an irrevocable and legally enforceable debt".

109. Mr Brodsky argued that the parties intended the documentation to create what was a legally binding debt. Certainly, those are the words used but the issue is when, if at all, a debt was created. He argued that the Tribunal should give effect to the parties' intentions which was that they wanted it to be a legally binding agreement. Mr Brodsky relied on paragraph 29 in *Carlyle v Royal Bank of Scotland Plc* [2015] UKSC 13 where Lord Hodge stated:-

"Once he [the Lord Ordinary] was satisfied that the bank had had the intention to make a legally binding promise, he was entitled and indeed required to look for ways to give effect to that promise. In *Fletcher Challenge Energy Limited v Electricity Corporation of New Zealand Limited* [2002] 2 NZLR 433, the Court of Appeal of New Zealand stated in the majority judgment at para 58:

> 'The Court has an entirely neutral approach when determining whether the parties intended to enter into a contract. Having decided that they had that intention, however, the Court's attitude will change. It will then do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities (*Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503; [1932] All ER 494, *R & J Dempster Ltd v The Motherwell Bridge and Engineering Co Ltd* 1964 SC 308 and *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495).'

He argued that that applied squarely to the facts in this case 'since the parties did intend to make the promise to contribute legally binding'".

110. The problem with that is that, although Mr Last argued that what the appellant believed that they had been doing was to create a debt that "…was then settled by the transfer of shares", that is not consistent with the sequence of events or the wording.

111. The documentation makes it clear that the intention to make the arrangements between the parties legally binding only arose after the decision was made to make an in specie contribution.

112. Payment appears to have occurred on or about 6 February 2013. That payment was not to the appellant. It was to the Trustees (see paragraph 40 above).

113. The die was cast before the issue of the letter from the appellant dated 24 January 2013. I do not accept the argument that the reference to the irrevocable and legally enforceable debt in that letter assists the appellant. The wording is clear, it is payment in shares that is envisaged and not money. The pro forma slip poses the same problem for the appellant.

114. Dr Day was never under any contractual obligation to pay £8,000, or any other sum, other than potentially a marginal balancing sum, in money to the appellant. Accordingly, as I am bound by *Sippchoice 2* the appeals must fail since there was never a debt and, of course, transfers of non-cash assets, are not "contributions paid" within section 188(1) FA 2004.

115. Accordingly, the answer to the second question in the second Agreed Issue is that as a matter of fact there were no monetary obligations, or debts, prior to the making of the contributions and therefore the contributions from the taxpayers could not be in discharge of a monetary obligation.

116. Therefore the second Ground of Appeal is dismissed

The third Ground of Appeal - PGP

117. HMRC's starting point is that section 29(2) TMA has no application in the circumstances of this case because it only applies where a taxpayer has made and delivered a return under section 8 or 8A TMA. Therefore the third ground should be dismissed.

The appellant's primary position and HMRC's response

118. Whilst Mr Brodsky acknowledges that no such return would be made, nevertheless he argues that Reg.14 requires the reference to such a return to be read as including a reference to a claim under RASR because the statutory fiction and the words "as if" in Reg.14 extend that far.

119. For that argument he relies on two principles of statutory construction.

120. The first is based on paragraph 31 of *Oldham Metropolitan Borough Council v Tanna* [2017] EWCA Civ 50 where Lewison, LJ stated:-"It is a fundamental principle of the interpretation of statutes that Parliament does not intend an absurd or futile result".

121. As subsections 29(2) to (8) of section 29 TMA have been expressly applied through the application of section 30 TMA, it would be both absurd and futile if subsection 29(2) could never apply.

122. The second principle is that the legislative provisions must be construed purposively. Therefore:-

(1) The purpose of subsections 29(2) to (8) of section 29 TMA is to give taxpayers protection.

(2) The reference to a return in subsection (2) is to ensure that there is formal communication with HMRC. Accordingly, the reference to section 8 should be read as a reference to an RAS claim.

(3) Section 29 TMA must not be read in isolation and all of the relevant legislative provisions should be read as a whole.

(4) Reg.14(1) and (2) and section 30 TMA all use the words "as if" and that creates a statutory fiction.

123. Mr Bradley certainly agrees that the legislative provisions should be read as a whole and that subsections (2) to (8) do offer taxpayers protection in that they impose limitations on HMRC's powers to make a discovery assessment. Subsections (2) and (3) provide that the taxpayer "shall not be assessed under subsection (1) above" unless certain conditions are met. Subsections (2) to (6) define those conditions by reference to "the situation mentioned in subsection (1) above". The effect of section 30(1B) TMA is that, in the case of an assessment under section 30(1) TMA, those references to section 29(1) TMA are read as references to section 30(1) TMA. I agree with that analysis.

124. I also agree with him that the combined effect of Reg.14 (1) and Section 30(1B) TMA is that:-

(a) the reference in subsection 29(2) TMA to "the situation mentioned" in subsection 29(1) is read as a reference to the payment of RAS to which, in this case, the appellant, is not entitled, and

(b) the protection against the taxpayer being assessed in subsection 29(2) TMA is read as a protection against the taxpayer being assessed under section 30(1) TMA.

125. As can be seen, the key issue is the reference to the "return under section 8 or 8A" in subsection 29(2)(a) TMA and both parties agree that that could never apply in respect of an assessment under section 30(1) to recover wrongly paid RAS. That takes me to purposive construction and to do that I must look at the whole legislative context.

126. I agree with Mr Bradley that the starting point is section 192 FA 2004. As I have said in paragraph 67 above, the effect of that provision is that the deduction from the contribution made by the taxpayer, which is equivalent to income tax at the basic rate, is treated as an amount of tax paid by the appellant. That is a notional amount since, in fact, nothing has been paid. The appellant can, and did, make RAS claims for repayment of those notional sums.

127. Reg.14(1) then confers on HMRC the power to use Section 30 TMA to make an assessment "as if [the sums involved] had been income tax repaid…" ie the notional sum which had not been paid. As Mr Bradley pointed out, the words "as if" modify the provisions of the TMA as do the remaining two subsections of Reg.14. Subsection (2) modifies the provisions relating to time limits for a year of assessment "as if" the year of assessment is when the amount is paid or recoverable. Subsection (3) achieves the same for the dates for interest in terms of section 86 TMA.

128. Mr Bradley argues that had Parliament intended to modify the application of subsections 29(2) to (8) TMA then it would have been found in Reg.14 and it would have had to have been relatively extensive since there are references to "section 8 or 8A" in sections 29(3) and (5) and the latter relates to an enquiry into a self-assessment return. If, as is argued for the appellant, the reference to section 8 or 8A should be read as a reference to a RAS claim that would be futile and absurd since neither FA 2004 nor RASR make provisions for enquiries into RAS claims. I agree.

129. I accept Mr Bradley's argument, based on *Tower MCashback LLP1 v HMRC* [2010] EWCA Civ 32, that the provisions of sections 29(2) to (8) TMA were introduced in the context of self-assessment, enquiries into tax returns and closure notices. At paragraph 24 Moses LJ stated:-

> "These provisions underline the finality of the self-assessment, a finality which is underlined by strict statutory control of the circumstances in which the Revenue may impose additional tax liabilities by way of amendment to the taxpayer's return and assessment."

130. I agree with Mr Bradley that there is nothing absurd in those provisions applying only in the context of self-assessment. Those who drafted Reg.14 did not need to exclude section 30(1B) TMA because, self-evidently, it has no application to RAS claims.

131. In summary, what Reg.14 does is to provide a mechanism for assessing, the time limits for doing so and the dates from which interest on those assessments run. It is neither futile nor absurd.

132. Therefore I find that the appellant's primary position that a return under section 8 or 8A should be read as a claim being made for RAS cannot be a remedy for any shortcomings in the interaction between the legislative provisions.

The appellant's first alternative position

133. The appellant's first alternative position is:-

(a) That the reference to section 8 is a reference to the underlying taxpayer not to the Scheme Administrator,

(b) The Scheme Administrator is reclaiming on behalf of the taxpayer, and

(c) The annual claim form wording is "for recovery of tax deducted by individuals" as demonstrated in the letter of 24 September 2016 from HMRC which read:

> "…I am going to need to see the same documentation for each individual represented by those claims" ie the appellant is making the RAS claims in a representative capacity. The appellant is simply an administrator.

134. I do not accept that. The wording in a form produced by HMRC does not dictate the actual fiscal position.

135. The legislative provisions are very clear.

136. Firstly, section 192(1) FA 2004 provides that the underlying taxpayer is entitled to make a payment net of basic rate tax and section 192(2)(b) is acquitted and discharged as if the sum had actually been paid.

137. Secondly, sections 192(2) and (3) read together make it explicit that the sum that is deemed to have been deducted by the underlying taxpayer must be treated as having been paid by the Scheme Administrator and it is the Scheme Administrator who is entitled to reclaim it and not the underlying taxpayer.

138. Section 30(1A) TMA makes it clear that sections 29(1) and 30(1) TMA are mutually exclusive but section 30(1B) then applies the subsections 29(2) to (8). I agree with Mr Bradley that the way in which it does so is important in the context of that mutual exclusivity because it does so saying that they will apply "to an assessment under subsection (1) above [section 30] as they apply to an assessment under section (1) of that section [section 29]". The "person" in section 29(1) is defined as being the "taxpayer". Mr Brodsky argues that that definition is not carried across into section 30 when subsections (2) to (8) are inserted but, as can be seen, that term is used throughout subsections 29(2) to (8) TMA.

139. The logical *sequitur* to that is that, for the purposes of an assessment under section 30(1) TMA, the "person" is the taxpayer, the person who is deemed to have paid the tax, which, in terms of the legislation, is the appellant.

140. I therefore reject that alternative argument.

The appellant's second alternative position

141. The second alternative position is that it is a clear drafting error. Mr Brodsky argues that inadvertently the draftsman failed to give sufficient thought to the interaction of the legislative provisions.

142. In that regard the appellant relies upon *Inco Europe Limited v First Choice Distribution* [2000] UKHL 15 where Lord Nicholls, having acknowledged that his construction of the legislation being considered had involved reading words into it, said:-

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, *Statutory Interpretation*, 3rd ed., pp. 93-105. He comments, at page 103:
>
> > 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in

this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance.

143. Mr Brodsky relied upon that quotation but I observe that Lord Nicholls went on to say:-

> "Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105. In the present case these three conditions are fulfilled.

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v Schindler* [1977] Ch 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation"

144. For the reasons given in regard to the appellant's other arguments I find that the legislative intention is clear. Parliament used Section 192 and Reg.14 to give a mechanism for providing RAS and for recovering any tax that was overpaid. The policy intention is clear:

(1) the individual taxpayer is allowed to make net payments and is treated as having deducted an amount equivalent to the basic rate of tax,

(2) the Scheme Administrator is treated as having made that payment as if it were income tax,

(3) the Scheme Administrator is entitled to recover that payment as if it were income tax, and

(4) if there is an overpayment HMRC are entitled to recover it by way of an assessment.

145. In summary, if there was an error in the drafting, which I do not accept for the reasons given, then Reg. 14 would have said that section 30(1B) would have no application.

Was there a PGP?

146. It is indeed settled law, as the Upper Tribunal made clear at paragraph 61 in *Hargreaves v HMRC* [2022] UKUT 32 (TCC) when endorsing the approach of the FTT, that for there to be a PGP:-

> "(1) The practice has to be one adopted by taxpayers and HMRC alike ([24(1)]).
>
> (2) A practice will not be generally prevailing if it is not agreed, or respected, as a whole, either by HMRC failing to apply every element of the practice in every case where it should be applied, or by taxpayers adopting only those parts that are favourable to them, but disputing others ([24(5)])."

147. It was argued for the appellant that the best evidence of HMRC's practice was the contemporaneous guidance and publications such as the documentation produced by AMPS. I agree primarily because there was very little other evidence. As can be seen, Mr Last's

evidence was very scant and amounted to saying that his predecessor had spoken to others in the industry.

148. When one looks at the guidance prior to 2009, it can be seen that it did say that a contribution would be treated as paid if an asset was transferred in satisfaction of a money debt. However, that changed in 2009. Unlike the previous guidance both the Employer and Member 2009 versions of the guidance are articulated in mandatory terms. Specifically both state that "There must be" the three steps which are then narrated and if the cash contribution debt is not created the in specie contribution cannot qualify. That set out the mechanism for the off set.

149. In Closing Submissions Mr Brodsky argued that, as Mr Platnauer had agreed, the reality of the situation was that it was possible to make the contributions by exchange of letters provided that both parties agreed and that the valuations were matched. What Mr Paltnauer did agree was that HMRC did understand that provided the three steps set out in both versions of the 2009 guidance were followed, it was possible to simply off set the in specie contribution against a recoverable debt obligation for a specified amount and no cash would actually change hands.

150. Although Mr Bradley argued that it was *obiter*, that is consistent with the finding of the Upper Tribunal at paragraph 43 in *Sippchoice 2* where they quoted with approval a quotation from the pensions tax manual at PTM043310:

> "… it may be possible to structure a transaction so that a monetary contribution is achieved without the need for cash to pass between the employer and the pension scheme."

151. That quotation is very similar to the quotation relied upon by the appellant (see paragraph 54(b) above).

152. However, it does not assist the appellant because the guidance does not say that cash must pass hands but rather that there has to be a set off of cross obligations.

153. Mr Platnauer also made it clear that HMRC accept that there will be situations where there is an off set arrangement because there are "equal or very nearly equal obligations going both ways".

154. Of course, in Dr Day's case that was far from the case since the value of the shares was more than double the original cash contribution so there had to be a further contribution.

155. I agree with Mr Platnauer that in the Relevant Years HMRC did not have a policy or practice of accepting that the transfer of an asset would be a "contribution paid" under the legislation where it simply followed an offer to pay a monetary amount. On the contrary HMRC have set out clearly in both versions of the 2009 guidance that that was not sufficient to achieve a monetary contribution. A debt had to be created and there had to be agreement between the Scheme Administrator and the employer before there was any off set.

156. Furthermore, there should not be any material difference between the valuations. As can be seen from the AMPS documentation that had been discussed with the industry representatives at some length in the period 2007 to 2009 (see in particular paragraphs 46, 49 and 51 above).

157. On the facts found the appellant did not implement the three step process in the manner set out either in the 2009 Guidance or as recorded in the AMPS documentation.

158. I therefore answer the questions posed in the third Agreed Issue as follows:

(1) Assessments made by HMRC under Reg.14 are not subject to the condition in section 29(2) TMA which provides that an assessment cannot be made if the taxpayer delivered a return and that return was "in fact made on the basis or in accordance with the practice generally prevailing at the time it was made."

(2) The interaction between RASR and section 29(2) TMA does not require the word "return" in section 29(2) to be read as including "a claim" for RAS.

(3) In the Relevant Years there was not a PGP that a transfer of an asset would be a "contribution paid" for the purposes of section 188 FA 2004 where it followed an agreement to pay a monetary amount.

Decision

159. For all these reasons the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

160. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 25th JULY 2023

Appendix 1

Agreed Issues

1. Payments in kind

1.1 As a matter of law, when an individual contributes to their registered self-invested personal pension by way of "payments in kind" (that is to say, by way of valuable contributions in money's worth), do such contributions amount to "pension contributions paid" under the Finance Act 2004 (FA 2004) s.188.

In other words, is the phrase "pension contributions paid" within FA 2004, s.188 to be limited to certain payments (and if so, to what payments).

It is agreed that the FTT is bound by the decision of the Upper Tribunal in *Sippchoice v HMRC* [2020] UKUT 4 WLR 80 to determine this issue against the Appellant; the Appellant intends to take this issue further on appeal.

2. **Discharge Obligations**

2.1. Are payments in kind "pension contributions paid" within FA 2004 s.188 in the particular situation where those payments are made in order to discharge a monetary obligation.

This issue arises only if Issue 1 is determined against the Appellant; i.e. if it is decided that the phrase "pension contributions paid" does not, as a general rule, include payments in kind.

It is agreed that the FTT is bound by the decision of the Upper Tribunal in *Sippchoice v HMRC* [2020] UKUT 4 WLR 80 to determine this issue against the Appellant; the Appellant intends to take this issue further on appeal.

2.2. On the facts of this case, did taxpayers make contributions in kind to their SIPPs in order to discharge a monetary obligation; ie were there in fact monetary obligation(s) and were payments in kind made to discharge those obligation(s).

3. **Practice Generally Prevailing**

3.1. As a matter of statutory interpretation, are assessments made by HMRC under the Registered Pension Scheme (Relief at Source) Regulations 2005 (SI2005/3448) (RASR 2005), regulation 14, subject to the condition in the Taxes Management Act 1970 (TMA 1970), s.29(2), which provides that an assessment cannot be made if the taxpayer delivered a return and that return was "in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made"?

If so,

3.2. Does the interaction between RASR 2005 REG.14 and TMAs.29(2) require the word "return" in s.29(2) to be read as including a "claim" for relief at source.

3.3. Was there a practice generally prevailing (PGP) that a transfer of an asset would be a "contribution paid" for the purposes of FA 2004 s.188 where it followed an agreement to pay a monetary amount?

Agreed Facts

1. The Appellant is, and was at all material times, a provider of registered SIPPs and acted as a Scheme Administrator for such SIPPS.

2. The Appellant made claims for relief at source on an annual basis, and made those claims in respect of contributions made by individuals to their SIPPs. In particular, the Appellant made such claims in respect of the tax years 2012/13, 2013/14 and 2015/16 (being "the Relevant Tax Years").

3. During the Relevant Tax Years, individuals made contributions to their SIPPs, administered by the Appellant. Some of the contributions made by those individuals were contributions by way of bank transfer and other contributions were contributions in kind, such as by way of shares.

4. Those individuals included John Thomas, Alison Fernando and David Day. The fact pattern relating to the contributions of those individuals were typical of, and are representative of, other individuals who made contributions in kind to their Killik & Co SIPPs during the Relevant Tax Years. Typically, individuals would make an application to the Appellant for the contributions to be made, via a prescribed form. Formal documentation would then be entered into, in order to give effect to the contributions. Certificates would eventually be issued by the Appellant to the individuals confirming the transactions.

5. The Appellant's appeals in respect of 2012/13 and 2013/14 are against assessments made under RASR 2005, regulation 14. The Appellant's appeal in respect of 2015/16 ("the 2015/16 Appeal") is against HMRC's refusal of the Appellant's annual relief at source claim for that year. Issue 3 does not arise on the 2015/16 appeal and, given the agreement on Issues 1 and 2.2 it is agreed that the FTT is bound to dismiss the 2015/16 Appeal; as already noted, the appellant intends to take Issues 1 and 2.1 further on appeal.

Appendix 2

Sippchoice 1

The appellant argues that the following findings by Judge Gething are relevant:

1. Mr Carlton (whose case was accepted as representative of all four members who made contributions to *Sippchoice*) had a legally binding obligations to make a monetary contribution of £68,324 to his SIPP – [32].

1. Mr Carlton then settled his debt obligation by the transfer of shares to the SIPP (and there was no question of those shares being transferred at an undervalue or with any other tax avoidance motive).

2. Accordingly, this "should be the end of the matter" as HMRC accepted in their Pensions Manual 042100 that "*it is possible for a member to agree to pay a monetary contribution and then to give effect to the cash contributions by way of a transfer of an asset or assets",* ie payment in kind qualifies for relief provided that they were made in charge of a monetary obligation – [33]-[34].

3. HMRC had resiled from their "clear statement" of their understanding of the legislation and sought to argue that only monetary contributions fell within the statute. However, following the decision of Lord Hoffmann in *MacNiven v Westmoreland Investments Ltd* [2001] UKHL 6 (**MacNiven**), satisfaction of a monetary obligation by a payment in kind does fall within the ordinary meaning of "payment" – [41].

4. The appeal was accordingly to be allowed in full. It was not necessary to consider whether, absent a pre-existing monetary obligation, a transfer of assets would otherwise fall within the ambit of the relief – [47].

Sippchoice 2

1. Whilst accepting that the Tribunal is bound by *Sippchoice 2* the appellant wishes to take the first and second Grounds of Appeal further on appeal since –

   a. It has a realistic prospect of success, not least because the taxpayer in *Sippchoice 2* succeeded before the FTT before ultimately losing in the Upper Tribunal.

   b. The appeal involves an important point of principle and practice, since very many individual taxpayers relied on HMRC and industry guidance to make in *specie* contributions to their SIPPs across various tax years.

   c. It is understood that the taxpayer in *Sippchoice 2* never sought permission to appeal from the Court of Appeal.

   d. There are important arguments in favour of the Appellant's construction that were not raised by the taxpayer in *Sippchoice 2*."

2. The words "pay", "payment" and "paid" are broad enough to encompass payments in kind for the reasons relied on by the taxpayer in *Sippchoice* and, further –

   a. Legislation often refers to "payments in kind" – see for example the Income Support (General) Regulations 1987, Regs 35(2), where payments "*in kind"* are

specifically excluded from the general definition of "earnings" and "payment" respectively. There is no such exclusion in FA 2004.

b. HMRC/Government Guidance specifically refers to payments in kind and non-cash payments. For example, HMRC Manual BIM50626 is headed *"Athletes: Payments in kind"* and refers to the taxation of a "non-cash payment". The Bank of England, similarly, uses the term "payment" to include payment in kind, referring to a shop owner's right to *"accept payments in Pokémon cards"*.

c. The word "contribution", similarly, is used in tax legislation to refer to non-cash contributions – see e.g. s.356OH (8) of the Corporation Tax Act 2010, where "contribution" is defined as *"any kind of contribution, including for example – (a) the provision of professional or other services, or (b) a financial contribution (including the assumption of a risk)."*

d. The FCA have issued guidance in relation to cryptocurrencies, stating that *"any [cryto-] token that is pegged to a currency, like USD or GP, or other assets, as is used for the payment of goods or services on a network could potentially meet the definition of e-money.* Accordingly cryptocurrencies are generally regarded as assets which are "paid".

3. The UT in *Sippchoice* relied on the fact that, whilst "payment" was given a broad definition (to include *in specie* contributions) in s.161(2) of FA 2004, that broad definition was stated to apply *"for the interpretation of [Chapter 3]"*, when s.188 is contained in Chapter 4".

4. But Chapter 5 of FA 2004, which taxes unauthorised member payments, also refers to "payment" throughout the Chapter. Chapter 5 only functions if the definition of "payment" is, throughout, consistent with Chapter 3. If "payment" means a particular thing in Chapters 3 and 5 then it should mean the same thing in Chapter 4.

5. Similarly, a "money only" rule makes little sense in historical context and fails to take account of the various complexities and intricacies of the modern day financial landscape –

a. Historically, our coinage had an intrinsic value (due to its gold or silver content) approximately equivalent to its face value – it was "commodity money". Modern banknotes are "fiat" money, carrying little or no intrinsic value, but the "trial of the pyx", whereby Bank of England Mint coins are tested for quality remains annual tradition and legislative requirement – Coinage Act 1971, s.8. The first recorded trial dates to 1248.

b. For most of the period 1717 to 1931, the UK operated under the "gold standard", meaning that any holder of a Bank of England banknote would present the note at the Bank and demand payment in bullion.

c. Banknotes remain promissory notes. But Government issued notes are not the only negotiable instruments – privately issued loan notes underpin many financial transactions, and the Government issues various types of promissory note (such as bonds) and negotiable instruments.

d. Despite general public belief, a business is not required to accept payment in coins or notes even if legal tender. A business can require payment in any form (such as contactless payment, gold bars or collectors cards).

e. If a particular asset is "legal tender" it means that it must be accepted in discharge of a debt. There are restrictions on what counts as legal tender – for example 1p and 2p coins are not legal tender for any amount over 20pence – Coinage Act 1971, s.2.

f. Gold coins are legal tender for any amount but are not generally used since their intrinsic value often exceeds their face value – Coinage Act 1971, s.2. There are historic cases discussing whether payment in "gold sterling" is a reference to the intrinsic value of gold coins or to their face value – see eg *Treseder-Griffin v Co-operative Insurance Society Ltd; cf The Rose S*[1989] 2 WLR 162. In either case, the amount given amounts to a "payment".

g. Countries will often have their own currency and laws on legal tender; in El Salvador Bitcoin is legal tender along with the US Dollar. Similarly, private organisations can have their own legal tender, such as chips used in casinos. Players receive payment in chips and *"in substance, staking a chip is the same as staking money" – Aspinalls Club Ltd v HMRC* [2012] UKUT 242 (TCC), [35].

h. Payments are (or, were) often made by cheque but cheques are not legal tender. They are conditional promises to pay that temporarily suspend the creditor's ability to sue for payment (which resumes if the cheque is dishonoured).

i. Payment by bank transfer is, similarly, not legal tender. In fact, it is not a payment in money at all, but a transfer of a debt. Payments by credit card are yet more complex so it is the credit card company who transfer value to the recipient, not the credit card holder.

6. In short, there is no easy or bright-line rule as to what amounts to a "monetary contribution" as opposed to a "financial contributions". If there was to be a distinction between certain types of payment (allowing, on the one hand, cheques made out in £sterling and any coin which is legal tender but, on the other, denying the USD Dollar, Bitcoin and government bonds) then that would have been set out clearly.

7. The UT in *Sippchoice 2* were not presented with these arguments."

Appendix 3

Relevant legislation

FA 2004

1. Section 188 provides in so far as material:

'188.— Relief for contributions

(1) An individual who is an active member of a registered pension scheme is entitled to relief under this section in respect of relievable pension contributions paid during a tax year if the individual is a relevant UK individual for that year.

(2) In this Part "relievable pension contributions", in relation to an individual and a pension scheme, means contributions by or on behalf of the individual under the pension scheme other than contributions to which subsection (3) or (3A) applies…'

2. Section 191(1)-(2) provides, subject to exceptions that are not relevant here, that relief to which an individual is entitled under section 188 is to be given in accordance with section 192.

1. Section 192 provides in so far as material:

'192.— Relief at source

(1) Where an individual is entitled to be given relief in accordance with this section in respect of the payment of a contribution under a pension scheme, the individual or other person by whom the contribution is paid is entitled, on making the payment, to deduct and retain out of it a sum equal to income tax on the contribution at the [basic rate]…

(2) If a sum is deducted from the payment of the contribution—

(a) the scheme administrator must allow the deduction on receipt of the residue,

(b) the individual or other person is acquitted and discharged of so much money as is represented by the deduction as if the sum had actually been paid, and

(c) the sum deducted is to be treated as income tax paid by the scheme administrator.

(3) When the payment of the contribution is received—

(a) the scheme administrator is entitled to recover from the Board of Inland Revenue the amount which is treated as income tax paid by the scheme administrator in relation to the contribution, and

(b) any amount so recovered is to be treated for the purposes of the Tax Acts in the same manner as the payment of the contribution…'

2. Section 195 reads:-

"195 Transfer of certain shares to be treated as payment of contribution -

(1) For the purposes of sections 188 to 194 (relief for contributions) references to contributions paid by an individual include contributions made in the form of the transfer by the individual of eligible shares in a company within the permitted period.

(2) For the purposes of those sections the amount of a contribution made by way of a transfer of shares is the market value of the shares at the date of transfer.

(3) 'Eligible shares', in relation to a contribution made by an individual, means shares –

(a) which the individual had exercised a right to acquire in accordance with the provisions of an SAYE option scheme, or

(b) which had been appropriated to the individual in accordance with the provisions of a share incentive plan.

(4) 'The permitted period –

(a) in relation to shares which the individual has exercised a right to acquire in accordance with the provisions of an SAYE option scheme, is the period of 90 days following the exercise of that right, and

(b) in relation to shares which have been appropriated to the individual in accordance with the provisions of a share incentive plan, is the period of 90 days following the date when the individual directed the trustees of the shared incentive plan to transfer the ownership of the shares to the individual.

…".

RASR

1. The Regulations, which were made under section 192(6)-(7) FA 2004, set out administrative provisions relating to RAS claims by scheme administrators.
2. Regulation 9(1) provides that amounts recoverable by a scheme administrator under section 192(3)(a) FA 2004 shall be recovered on a claim made to HMRC for the purposes of the Regulations.
3. Regulation 9(2) provides that a claim shall be for a year of assessment (an 'annual claim'). That is subject to Regulation 9(3), which provides that a claim may also be made for a tax month (an 'interim claim'). Regulations 10 and 11 make provisions governing interim claims and annual claims respectively.
4. Regulation 12(1) provides that section 42 TMA (procedure for making claims) shall not apply to a claim under RASR. Regulations 12(2)-(5) provide for a right of appeal against HMRC's decision on an annual (but not an interim) claim and that the provisions of Part 5 TMA apply to such an appeal.
5. Regulation 14 provides:

'14.— Recovery of amounts by assessment &c.

(1) Section 30 of TMA 1970 (recovery of overpayment of tax, etc.) shall apply in relation to the payment by Her Majesty's Revenue and Customs of an amount—

(a) paid under these Regulations to which a scheme administrator was not entitled, or

(b) recoverable from a scheme administrator under Regulations10(5), 11(4) or (6) or (13)

as if it had been income tax repaid to the scheme administrator to which he was not entitled.

(2) An assessment made by virtue of this regulation shall be made by an officer of Revenue and Customs and, subject to the provisions of these Regulations, TMA 1970 shall apply as if the assessment were an assessment to tax for the year of assessment in respect of which the amount was paid or is recoverable.

(3) For the purposes of section 86 TMA 1970 (interest on overdue income tax and capital gains tax) the relevant date shall be the later of—

(a) 1st January in the year in which the amount was paid or is recoverable; or

(b) the date of the making of the repayment by Her Majesty's Revenue and Customs following receipt of the annual claim for that year.'

TMA

1. Section 30 TMA provides in so far as material:

'30.— Recovery of over payment of tax, etc.

(1) Where an amount of income tax or capital gains tax has been repaid to any person which ought not to have been repaid to him, that amount of tax may be assessed and recovered as if it were unpaid tax.

(1A) Subsection (1) above shall not apply where the amount of tax which has been repaid is assessable under section 29 of this Act.
…

(1B) Subsections (2) to (8) of section 29 of this Act shall apply in relation to an assessment under subsection (1) above as they apply in relation to an assessment under subsection (1) of that section; and subsection (4) of that section as so applied shall have effect as if the reference to the loss of tax were a reference to the repayment of the amount of tax which ought not to have been repaid.'

2. Section 29 TMA provides:

'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) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

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—

(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 accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquires 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 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.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding years of assessment;

(ia) a reference to any NRCGT return made and delivered by the taxpayer which contains an advance self assessment relating to the relevant year of assessment or either of the two immediately preceding chargeable periods; and

(ii) where the return in under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf…

(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….'