[2020] UKUT 149 (TCC)

INCOME TAX – whether transfers of assets to self-invested pension plan are "contributions paid" in section 188(1) Finance Act 2004 - whether transfers of assets in satisfaction of monetary debts are "contributions paid" - whether there was a debt - appeal allowed

Appeal number: UT/2018/0087

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN

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

-and-

SIPPCHOICE LIMITED **Respondent**

TRIBUNAL: THE HONOURABLE MR JUSTICE ROTH
JUDGE GREG SINFIELD

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 28 February 2020

Charles Bradley, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Rebecca Murray, counsel, for the Respondent

DECISION

INTRODUCTION

1. The Appellants ('HMRC') refused a claim for relief from income tax at source ('RAS') made by the Respondent ('Sippchoice') in relation to contributions to a self-invested personal pension scheme ('SIPP') administered by Sippchoice. Sippchoice appealed to the First-tier Tribunal ('FTT') against HMRC's decision.

2. The contributions had been made by four members transferring shares in companies to the SIPP. The only issue in the appeal was whether transfers of shares were "contributions paid" by those members within the meaning of section 188(1) Finance Act 2004 ('FA 2004') and therefore conferred an entitlement to relief from income tax.

3. In a decision released on 10 March 2018 with neutral citation [2018] UKFTT 122 (TC), the FTT (Judge Heather Gething) allowed Sippchoice's appeal in full. Save as otherwise indicated, paragraph references in square brackets in this decision are to paragraphs in the FTT's decision. The FTT held, in summary, that:

   (1) the four individuals had contracted with Sippchoice to pay particular sums of money to the SIPP, so that their subsequent transfer of the shares was in satisfaction of those money debts ([29] - [33]); and

   (2) the expression 'contributions paid' in section 188(1) FA 2004 is "wide enough to cover a transfer of assets in satisfaction of a debt" ([47]).

4. HMRC now appeals, with permission of the UT, on the following two grounds:

   (1) The FTT erred in law in construing the expression 'contributions paid' in section 188(1) FA 2004. On its true construction, and contrary to the FTT's conclusion, that section gives relief for money payments only and not for transfers of assets. That is so whether or not the asset is transferred in satisfaction of a money debt.

   (2) The FTT erred in law in concluding from the facts that it had found that the four individuals had entered into a binding contract obliging them to pay sums of money to their SIPP and/or erred in law in determining the terms of any such contract.

5. For the reasons set out below, we have decided that transfers of non-cash assets are not "contributions paid" within section 188(1) FA 2004 and that HMRC's appeal must be allowed.

FACTUAL BACKGROUND

6. There was no witness evidence in the FTT and the parties agreed that the documents relating to one of the four individuals, Mr Carlton, were representative of the others. Accordingly, we only refer, as did the FTT, to the documents relating to Mr Carlton. The FTT's findings of fact in relation to Mr Carlton's application are set out at [2] to [21]. The material facts can be summarised as follows.

   (1) On 9 March 2016, Mr Carlton completed an application to become a member of the SIPP ('the Application Form'). By signing the Application Form, he agreed to be bound by the SIPP Trust Deed and Rules and the Terms and Conditions. The Rules consisted of the Scheme Rules and the General Rules set out in the first and second schedules to the Trust Deed respectively. We refer briefly to those parts of the Trust Deed or Rules that seem to us to be relevant.

   (2) Clause 3(b) of the Trust Deed provided that Sippchoice, as the Scheme Administrator, shall enter into a contract with every individual who wishes to become a member of the SIPP and the terms of that contract shall be referred to as the 'Terms and Conditions'.

(3) Rule 5(a) of the Scheme Rules states that membership of the SIPP is at the absolute discretion of the Scheme Administrator and that a new member shall be admitted to the Scheme from the date notified to him in writing by the Scheme Administrator. Rule 5(b) provides that a member must agree to comply with the Rules and Terms and Conditions including paying charges specified in them to the Scheme Administrator. Rule 7 provides:

> "The payment of contributions shall be subject to such provisions as are set out in the Rules and the Terms and Conditions and such other requirements that the Scheme Administrator may specify from time to time."

(4) Rule 3(a) of the General Rules provides that a person who wishes to become a Member must complete an application procedure as required by the Scheme Administrator. That includes two declarations:

> (a) the Member agrees to be bound by the General Rules; and
>
> (b) the Scheme Administrator agrees to administer the SIPP as required by the General Rules.

(5) Rule 3(b) of the General Rules provides that a person can become a Member only if, among other things, the Scheme Administrator agrees.

(6) Rule 4 of the General Rules deals with contributions. Rule 4(g) provides, so far as relevant, that contributions made by the Member can only be paid in money or by a transfer of assets in specie in satisfaction of an obligation by the member to pay a monetary amount by way of contribution.

(7) The Terms and Conditions set out the terms of the contract between Sippchoice, as the Scheme Administrator, and the member under which Sippchoice administers the SIPP. Both parties referred to and relied on the Terms and Conditions and the Application Form as well as the Contribution Form described at (12) below.

(8) Clause 2(c) of the Terms and Conditions provides that Sippchoice has the right to decline any application for membership of the SIPP without giving reasons.

(9) Clause 3(a) of the Terms and Conditions states that contributions to the SIPP may be made only in such manner as Sippchoice prescribes from time to time. Clause 3(e) provides that Sippchoice has the right to refuse to accept further contributions to the SIPP without giving reasons.

(10) Clause 25 of the Terms and Conditions contains some general conditions, including:

> "(a) Except in the case of contributions of shares acquired through a savings related share option scheme, an approved profit-sharing scheme or an employee share ownership plan made in accordance with the Rules, or as otherwise agreed by us, all contributions to and payments from the [SIPP] are payable in sterling … unless otherwise specified in the Terms and Conditions."

(11) There was no document before the FTT communicating Sippchoice's acceptance of Mr Carlton's Application Form but the FTT inferred at [13], and it was common ground, that Sippchoice did accept it. That acceptance must have occurred on or before 16 March as is clear from the letter of that date, discussed at (13) below, which shows Mr Carlton's membership number. From the date of acceptance of Mr Carlton's membership application, both Mr Carlton and Sippchoice came under various contractual obligations set out in the Terms and Conditions.

(12) On the same date as he completed the Application Form, ie 9 March 2016, Mr Carlton completed a document headed 'Sippchoice Bespoke SIPP Contribution Form' ('the Contribution Form'). At section D of this form, which was headed 'In-specie Contributions' and preceded by the words 'PLEASE COMPLETE THE FOLLOWING SECTION ONLY IF YOU WISH TO MAKE AN IN-SPECIE CONTRIBUTION', was written the following:

Declaration to Sippchoice Limited	I propose to make a net contribution to the Sippchoice Bespoke SIPP and this notification constitutes an irrevocable and binding obligation to make this contribution.
Proposed net contribution	£68,324 (net)
Agreement	I understand that by signing this declaration I am creating a legally binding and irrevocable obligation to make the specified contribution and that it will not be possible to change my mind even if, for whatever reason, I am unable to proceed with the asset transfer that was originally envisaged.
Signature	[Mr Carlton signed here]
Date	9.03.16

(13) On 16 March, Sippchoice wrote to Mr Carlton as follows:

> "I confirm receipt of your Contribution Form dated 9 March 2016 notifying us of your intent to make an in-specie contribution to the [SIPP].
>
> By signing the declaration you created a legally binding and irrevocable obligation to make the contribution and as such we now require written confirmation from you of how you intend to settle the debt."

(14) On 24 March, Mr Carlton replied to Sippchoice:

> "Further to my Contribution Form dated 9th March 2016 I can confirm that this contribution shall be made by way of an in-specie transfer of the following assets to satisfy the obligation: -
>
> HFM Columbus Group Holdings Limited Ordinary Shares: 760,846 units
>
> The contribution being made will be the value of the assets mentioned above. I understand that the value may change and that there are rules that must be adhered to with regards to a change in value.
>
> I agree that if the value decreases, I will pay a monetary amount into the scheme to bring the contribution up to the value quoted in my first letter. I understand that you, in your role as scheme administrator, are legally bound to pursue this payment from me.
>
> ...."

(15) On 29 March, Sippchoice wrote to Mr Carlton confirming that "we are happy to accept the in-specie contribution of [the shares]" and asking him to arrange for the necessary stock transfer forms to be completed. It appears from another letter dated 29 March from Sippchoice to Mr Carlton that the stock transfer forms were executed on the

same day. In the second letter, Sippchoice informed Mr Carlton that the valuation report of 31 December 2015 showed that the shares had a value of £68,323.97. That was lower than the amount of £68,324 indicated on the Contribution Form. In the letter, Sippchoice stated that:

> "As a result, we require you to contribute additional funds to the value of £0.03 to settle the debt of £68,324 that has been created."

LEGISLATION

7. The taxation of registered pension schemes is dealt with in Part 4 of FA 2004 and the Schedules thereto. In this appeal, we are primarily concerned with Chapter 4 which relieves income and capital gains arising to registered pension schemes and also provides for tax relief on individual or employer contributions to registered pension schemes.

8. Section 188 FA 2004 provides in so far as material (with our emphasis added):

> "188 Relief for contributions
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> (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.
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> ...
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> (8) The following sections make further provision about relief under this section –
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> ...
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> section 195 (transfer of certain shares to be treated as payment of contribution)."

9. The parties agreed that subsection (3), (3A), (4) and (5) of section 188 were not relevant to the issue in this appeal.

10. Sections 189 and 190 define 'relevant UK individual' and set an annual limit for relief under section 188 for a given individual. Neither of these provisions are relevant to this appeal.

11. Section 191(1) and (2) provide, subject to immaterial exceptions, that relief to which an individual is entitled under section 188 is to be given in accordance with section 192.

12. 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].
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> …
>
> (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 …"

13. Section 195 provides as follows:

"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 the transfer.

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

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

(b) which have 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 share incentive plan to transfer the ownership of the shares to the individual.

(5) In this section—

'SAYE option scheme' has the same meaning as in the SAYE code (see section 516 of ITEPA 2003 (SAYE option schemes)), and

'share incentive plan' has the same meaning as in the SIP code (see section 488 of ITEPA 2003 (share incentive plans))."

14. We note that, at [28] of its decision, the FTT said "HMRC did not assert that the Shares were not Eligible Shares" but it was common ground in the FTT and before us that the shares were not eligible shares within the meaning of section 195(3).

DISCUSSION

15. In summary, HMRC's position is that section 188(1) FA 2004 gives relief only for payments of money and not for transfers of assets even if made in satisfaction of a money debt.

HMRC further contend that, in any event, there was no such debt in this case. Sippchoice's primary case is that "contributions paid" includes the transfer of assets in satisfaction of a money debt and the four individuals each transferred their shares to the SIPP in satisfaction of such a debt. Sippchoice's alternative contention is that transfers of non-cash assets are nevertheless "contributions paid" within section 188(1) even if they are not in satisfaction of a money debt.

Meaning of "contributions paid"

16. We first consider whether the expression "contributions paid" in section 188(1) FA 2004 includes contributions by way of transfers of assets or is restricted to contributions of money (whether in cash or other forms).

17. The proper construction of a taxing Act (or any statute), as opposed to the ordinary meaning of a word in the English language, is a question of law. In *Brutus v Cozens* [1973] AC 854, Lord Reid said at 861:

> "The meaning of an ordinary word in the English language is not a question of law. The proper construction of a statute is a question of law if the context shows that a word is used in an unusual sense; the court will determine in other words what that unusual sense is. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision."

18. If 'paid' is an ordinary word in the English language then its meaning is a question of fact but, as Lord Reid recognized, the context in which the word appears may show that it bears an unusual, which we take to mean a special or technical, meaning. If so, the meaning of the word is a question of law. Lewison LJ helpfully explained the correct way to approach the construction of legislation in *Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 753, [2013] STC 1479, in particular at [24] where he summarised the applicable principles as follows:

> "[24] The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other: see *IRC v McGuckian* [1997] STC 908 at 915, [1997] 1 WLR 991 at 999; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51 at [28], [2005] STC 1 at [28], [2005] 1 AC 684. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: see *WT Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] STC 174 at 179–180, [1982] AC 300 at 323; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes),* [2005] STC 1 at [29], [2005] 1 AC 684 at [29]. The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the

> requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found: see *Barclays Mercantile Business Finance Ltd v Mawson* at [32]."

19. The FTT stated in [41] that it did not consider the definitions of "payment" in the Oxford English Dictionary to which it had been referred by the parties because it considered that the meaning of "contribution" has a legal definition. We consider that the FTT misspoke when it said "contribution" in [41]. The parties had referred to the OED definition of "paid" not "contribution" and the FTT clearly considered the meaning of "payment" and "paid" in [42] – [47] not "contribution".

20. At [41], the FTT rejected HMRC's submission that the normal meaning of "contribution paid" is confined to a payment of cash. The FTT held that satisfaction of a monetary obligation or debt in cash or kind amounts to "payment". In doing so, the FTT relied on the observations of Lord Hoffmann in *MacNiven v Westmoreland Investments Limited* [2001] STC 237 ('*MacNiven*') at paragraph 68 that (on the facts of another case) bonuses were "paid" to directors where they were provided by the company in the form of platinum sponge held in a bank, accompanied by arrangements under which the directors could immediately sell it to the bank for cash. Ms Murray also referred us to paragraphs 14, 27 and 64 of *MacNiven* as showing that "paid" includes a discharge of a monetary debt. Mr Bradley contended that the Lord Hoffmann's comments were made in a completely different context to the present case.

21. We agree that *MacNiven* was a very different case to this one. In *MacNiven*, the issue was whether a payment of interest made by a company with money borrowed from the lender to enable the interest to be repaid so that the borrower could reclaim an amount of tax was, in those circumstances, a payment within section 338 of the Income and Corporation Taxes Act 1988 ('ICTA'). The Inland Revenue (now HMRC) argued that the payment was not a payment for the purposes of the legislation because it had been made purely for the purpose of avoiding tax. The amounts of interest and the payments were, in any event, payments of money. For those reasons, we do not consider that the comments in *MacNiven* provide us with any guidance when considering whether "contributions paid" can only mean contributions of money.

22. The phrase "relievable pension contributions" for the purposes of Chapter 4 of Part 4 FA 2004 is defined by section 188(2). So far as relevant to this appeal, it means "contributions by or on behalf of the individual under the pension scheme". There is no requirement in section 188(2) and it cannot be inferred that the contributions can only be monetary. HMRC's case is that the word "paid" modifies "relievable pension contributions" in section 188(1) and imposes such a requirement. Mr Bradley observed that section 188(1) could easily have said "contributions made" or just "contributions" but it did not. Mr Bradley accepted that "paid" is a flexible concept but contended that, at least where the direct object of the verb is the thing being paid, the natural meaning of the word "paid" is the payment of money. He said that it would not be a natural use of language to say "I paid shares" or "I paid gold bars" whereas, if someone said "I paid contributions", the natural inference would be that the person was referring to a payment of money.

23. We are not persuaded by Mr Bradley's semantic and syntactic analysis or that the meaning of the word "paid", whatever its direct object, is restricted to monetary payments. Ms Murray relied on definitions in the Oxford English Dictionary which showed that, among other possible meanings, "paid" could mean "to give money or goods in discharge of a debt" and "to give, transfer or hand over money or its equivalent". She also referred to a number of tax and other cases on the ordinary meaning of the word, including *Ooregum Gold Mining Company of India Limited v Roper* [1892] 1 AC 125 ('*Ooregum*') at pp.134-136 and *Irving v HMRC* [2008] EWCA Civ 6, [2008] STC 597 ('*Irving*') at [46].

24. In *Ooregum*, the issue was whether shares issued at a discount were fully paid up for the purposes of the Companies Act 1862 and that required consideration of section 25 of the Companies Act 1867. Section 25 provided that shares are deemed to have been issued for payment in full in cash save where otherwise determined by a contract filed with the equivalent of today's Companies' House. Unlike the FTT at [35], we do not find that *Ooregum* assists us in deciding whether "contributions paid" in section 188(1) FA 2004 should be interpreted as restricted to payments in money. The passages relied on by Ms Murray as showing that "payment … in cash" includes payment of the cash amount by an agreement to accept non-monetary consideration were in the context of section 25 of the 1867 Act and the company law that preceded it. In the event, the House of Lords held that section 25 did not affect the interpretation of the 1862 Act provision and the shareholders were liable to pay any unpaid amount in cash.

25. The case of *Irving* concerned whether a transfer of shares to an unapproved pension scheme by an employer was subject to a charge to income tax on an employee who was a beneficiary of the scheme. The relevant provision was section 595(1) ICTA, which later became section 386 Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'). In that case, HMRC contended that, when transferring the shares, the employer "pays a sum" for the purposes of section 595(1) ICTA. The Court of Appeal in *Irving* agreed that, in the circumstances, the employer had paid a sum. Rimer LJ held:

> "[38] In common with the Special Commissioners and Blackburne J, I am of the view that - subject always to a consideration of the particular context in which it is used - the more natural meaning of the phrase 'pays a sum' is 'pays a sum of money'. I was not persuaded by Mr Jones that it can as naturally refer, for example, to the transfer of a holding of shares. If A transfers to B 1,000 shares worth £1,750, he is unlikely to describe himself as having 'paid B £1,750'. He would say that he had sold, given or transferred (whatever the appropriate verb) 1,000 shares to B, perhaps (if relevant) adding their precise value (if known) or their approximate value. If he had owed B £1,750 and B had agreed to take the 1,000 shares in satisfaction of the debt then, to the question whether he had *paid* B the debt, he might legitimately say yes: only a pedant would reply that he had not actually *paid* the debt, but that B had agreed to accept a transfer of the shares in discharge of it. But that example does not assist the present argument, which is as to the meaning of a familiar English phrase as used in a section in an Act of Parliament. In my view, its more natural meaning is that it means 'pays a sum of money'.
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> [39] That, however, is not the end of the case since, as Mr Jones urged and Mr Goy rightly accepted, the context in which the phrase is used may compel the conclusion that Parliament intended it to have a wider meaning, including the transfer of non-cash assets. That may be because the context is sufficient to show that, to limit the meaning of the phrase to its more natural sense, would lead to an absurdity in the operation of the legislation; or because, viewed objectively, the context of the legislation points towards the conclusion that the wider meaning must have been intended.
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> …
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> [42] I am inclined, therefore, to consider that there probably is a sufficient context in s 19 to require a broader interpretation to be attached to the phrase 'pays a sum', although I would, without more, hesitate so to interpret s 19. When, however, attention is focused on s 595(1) in the context in which it appears in Pt XIV, I consider that there are further factors supporting this broader interpretation of 'pays a sum'. I accept, first, that the inclusion in ss 599A, 600 and 601 of definitions extending the sense of 'payment' to include

> 'any transfer of assets or other transfer of money's worth' tells against that interpretation, there being no like expanding definition in s 595(1). But whilst that consideration cannot be ignored, I do not regard it as conclusive against the Revenue's argument, any more than did the Special Commissioners and Blackburne J. The three provisions referred to are concerned with different considerations and cannot answer the question raised by s 595(1).
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> …
>
> [45] These considerations have satisfied me that the overall context in which s 595(1) uses the phrase 'pays a sum' points away from the conclusion that it should be construed narrowly as meaning 'pays a sum of money'. Mr Goy's concessions as to the wider meaning of 'sum paid' in s 592(4) of ICTA and in s 76(3) of the Finance Act 1989, the unlikelihood of 'payment' in s 596(3)(b)(ii) bearing the narrow meaning of 'payment of a sum of money' and the practical difficulties of Mr Goy's interpretation for the operation of s 596A(8) have collectively satisfied me that, objectively interpreted in its proper context, the phrase 'pays a sum' in s 595(1) includes not just the payment of money but also the transfer of non-cash assets. It appears to me that the suggested distinction between these two funding methods is one that in practice makes no commercial sense and cannot reflect any legislative policy intended to underlie s 595(1).
>
> [46] More generally, whether the scheme is funded by cash payments or by non-cash assets, the funding will in both cases have to be recorded in the books of the employer and of the trustees by reference to a particular monetary figure; and the substance of the matter will be that the scheme will have been funded by assets of that value, whatever their nature. If cash has been paid, it might well the next day be invested in shares; and if shares have been transferred, they might well the next day be converted into cash. The form of the funding can make no rational difference to the taxing policy underlying s 595(1). Further, if the distinction is in fact relevant, there could in some cases be a real uncertainty as to the side of the line on which the method of funding lay. In most cases the contribution proposed to be made by the employer for a particular year will be the subject of prior agreement with the scheme trustees. If, for example, an employer agrees to pay £100,000 and later agrees with the trustees that he will satisfy that commitment by transferring £100,000 worth of shares, will he be regarded as having 'paid' £100,000 pursuant to his commitment? Or will he be regarded as having simply made a transfer of non-cash assets? Whatever the answer, why should Parliament be interpreted as having intended such an inquiry to be embarked upon? What possible difference can it or should it be regarded as making?"

26. Ms Murray submitted that the phrase "pays a sum" that was considered in *Irving* is narrower than "contributions paid" and yet Rimer LJ was able to conclude that it should not be construed as limited to 'pays a sum of money'.

27. We accept that, viewed in isolation, "paid" is broad enough to encompass non-monetary payments. That, however, is not enough to determine this case. As can be seen from *Brutus v Cozens*, *Pollen Estate* and, in particular, *Irving* at [39] and [45], context is key. The outcome of HMRC's appeal depends on whether "paid" in section 188(1) must be construed, not in isolation but in the context of Chapter 4 of Part 4 FA 2004, as "paid in money". The cases relied on by Ms Murray concerned different facts and legislation and, accordingly, the context was different.

28. Mr Bradley submitted that the context includes section 195 FA 2004 which, in summary, provides that "contributions paid" in sections 188 to 194 includes contribution by transfers of

shares in a company by an individual if certain conditions are met. Those conditions are that the shares are "eligible shares" and they are transferred within 90 days of acquisition by the individual. He contended that the section showed that the expression "contributions paid" in section 188(1) referred only to monetary contributions. Mr Bradley submitted that the requirement that eligible shares must be transferred within 90 days of acquisition made no sense if transfers of all shares made at any time fell within section 188(1). Such an interpretation would mean that either the 90 day condition in section 195 is entirely ineffective or that owners of eligible shares would be in a worse position than owners of other shares.

29. Further, Mr Bradley submitted that section 195(2), which provides for the valuation of the eligible shares, showed that Parliament had recognised that such a provision was required where shares were transferred. He contended that the absence of any valuation mechanism elsewhere in Chapter 4 is another indicator that "contributions paid" refers only to money payments. If transfers of any assets were "contributions paid", it is unclear why Parliament included a valuation mechanism in Chapter 4 that only applied to one type of assets, ie eligible shares. Nonetheless, in the present case Mr Bradley accepted that no problem with valuation arose as HMRC did not contest the value used by Mr Carlton for the shares.

30. Ms Murray submitted that section 195 is part of a scheme of provisions for relief for certain special, ie tax advantaged, shares acquired by reason of employment. She contended that, properly construed, section 195 does not extend relief under section 188 to a transfer of eligible shares but, on the contrary, restricts it so that relief only applies where the transfer of such shares is made within 90 days of acquisition of the shares. In relation to HMRC's argument that the absence of a valuation mechanism in Chapter 4 indicates that contributions must be paid in cash, Ms Murray said that there are many tax provisions which charge tax by reference to transfers of assets or money's worth but which contain no valuation mechanism and no such mechanism is needed where, as here, the asset is accepted in satisfaction of a money debt.

31. 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.

32. We also accept that HMRC's interpretation avoids what Mr Bradley described as the "valuation problem". He submitted that an interpretation of "contributions paid" that included non-monetary assets would potentially require HMRC to check the valuations applied to many such transfers.

33. Moreover, our reading of "contributions paid" as restricted to monetary contributions is supported by section 161 FA 2004. Section 161(2) states that:

> "'Payment' includes a transfer of assets and any other transfer of money's worth".

That might be thought to assist Sippchoice's case but section 161(1) provides that the section applies for the interpretation of Chapter 3 of Part 4 of FA 2004 while section 188(1) is in Chapter 4 of Part 4. Mr Bradley submitted that where Parliament intended 'payment' to have a wide meaning in Part 4, it said so in terms. The extended definition in section 161 could simply be for the avoidance of doubt but if so, there seems no discernible reason why such clarification should have been expressly restricted to Chapter 3 of Part 4 if what it says should apply also to Chapter 4 of Part 4. In our view, it is more likely that in stating that the definition should extend beyond the ordinary meaning of "payment" for the purposes of Chapter 3,

Parliament intended that this extended meaning did not apply elsewhere in the statute where the word and its cognate forms are used.

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).

Significance of a pre-existing obligation to pay money

35. We next consider whether transfers of non-cash assets which are made in satisfaction of a pre-existing money debt are 'contributions paid' within section 188(1) FA 2004. This was Sippchoice's primary contention before us

36. The FTT concluded, at [47], that a legally binding obligation to make a monetary contribution which was discharged by the transfer of shares to the SIPP together with a cash payment was a contribution paid.

37. Ms Murray submitted that "paid" in section 188 applies to transfers of assets in satisfaction of a money debt and that Mr Carlton transferred the shares to his SIPP in satisfaction of a pre-existing money debt. She stated that her interpretation applied even if, as HMRC contended, section 195 widens the meaning of "paid" to cover simple transfers of eligible shares without more.

38. Ms Murray also referred us to a passage from HMRC's internal Pensions Tax Manual at PTM042100:

> "Giving effect to cash contributions
>
> As explained above, contributions to a registered pension scheme must be a monetary amount. However, 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."

39. The FTT accepted, at [33], that PTM042100 was a clear statement of HMRC's understanding of the effect of the legislation concerning contributions which "should have been the end of the matter".

40. Mr Bradley submitted that whether assets are transferred in satisfaction of a money debt was irrelevant because, for reasons already discussed, the expression 'contributions paid' does not include the transfer of non-money assets. The existence of an obligation to pay an amount of money does not change that. When Mr Carlton transferred shares to fulfil his promise to contribute £68,324, he did not pay Sippchoice £68,324 but transferred shares to Sippchoice. He contended that there is no material difference between a transfer of shares where there is a pre-existing liability to pay a sum of money and a transfer where no such liability exists. In both cases, there was a transfer of the shares and no "contribution paid".

41. Mr Bradley also submitted that the FTT had misunderstood PTM042100. He contended that the passage was talking about set-off and did not mean that a transfer of assets could be substituted for a monetary payment. He accepted that the passage was not very clearly worded and said that if that was not the correct meaning of PTM042100, it did not affect the outcome of the appeal, on his submissions, as HMRC's manuals do not have legal force and the passage was wrong.

42. We agree with Mr Bradley's main submission on this point. 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.

43. However, we do not consider that the passage from PTM042100 can be read in the way suggested by Mr Bradley. We accept, as Ms Murray submitted, that the statements in the pension tax manual are consistent with Sippchoice's case. The natural reading is that HMRC did not see any objection to a promise to make a monetary contribution to a pension scheme being satisfied by a transfer of an asset or assets where the member and scheme administrator both agreed to it. This is even more clearly stated in relation to employer's contributions in HMRC's 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."

44. Nonetheless, the fact that HMRC's pensions tax manual contains passages that support Sippchoice's case carries little weight in this case. Sippchoice has not sought to make any argument that it relied on the passages or had a legitimate expectation that HMRC would not resile from them. Statements in HMRC's manuals are merely HMRC's interpretation of the law in their internal guidance and they do not have the force of law. We must interpret the legislation in accordance with the principles of construction described above and if we conclude, as we have, that the legislation bears a different meaning to that found in the HMRC manual, the legislation must be preferred.

45. At the hearing, Mr Bradley also sought to rely on the explanatory notes to clause 177 of the Finance Bill 2004 (which became section 188 FA 2004) in support of his submissions. In his skeleton, Mr Bradley included references to *Pepper v Hart* [1993] AC 593 and statements made in the Standing Committee debates on the relevant provisions. As we have already found that "contributions paid" in section 188(1) refers to money payments only by applying the ordinary principles of statutory construction, there is no need for us to consider the explanatory notes or *Pepper v Hart*.

Was there a debt?

46. In the event that we are wrong in our conclusion that transfers of non-cash assets made in satisfaction of pre-existing money debts are not "contributions paid" within section 188(1) FA 2004, we consider whether there was such a debt in this case.

47. It was common ground that, as the FTT held in [31], the statement in the Contribution Form that it created a legally binding and irrevocable obligation to make the specified contribution was not sufficient to make it so. The parties accepted that, in order to create a legally binding contract, there must be an offer, an acceptance, consideration and the intention to create legal relations. Ms Murray urged us to apply adopt the same approach as the Supreme Court in *Carlyle (Scotland) v Royal Bank of Scotland Plc* [2015] UKSC 13 at [29], namely that we should look for ways to give effect to the parties' intentions to make a legally binding promise.

48. Ms Murray submitted that the Application Form and the Contribution Form were a package deal. The two application forms were completed and sent at the same time and Sippchoice considered them together and there was no evidence that Sippchoice separately accepted the application for membership. She contended that the consideration given for Mr Carlton's promise to pay £68,324 was the promise by Sippchoice to accept his application to become a member of the SIPP and the contribution. Ms Murray contended that, before it had agreed to accept Mr Carlton's application to be a member and his contribution, Sippchoice had no obligation to administer his contribution in accordance with the Rules of the SIPP. Agreeing

to do either or both was consideration for Mr Carlton's promise to pay £68,324 as a contribution.

49. Mr Bradley accepted that a contractual relationship came into existence when Sippchoice accepted Mr Carlton's Application Form but contended that nothing in the Application Form or Terms and Conditions obliged Mr Carlton to make any contribution. He submitted that the Contribution Form was not an offer but merely a promise to pay £68,324. He further contended that there was no acceptance or consideration given by Sippchoice in return for that promise.

50. We do not accept that the Application Form and the Contribution Form were a package in the sense of constituting a single offer. There was no evidence to show when Sippchoice accepted Mr Carlton's application to become a member but the use of his membership number on the letter of 16 March 2016 (see [6(11)] above) strongly suggests that Sippchoice had already accepted Mr Carlton as a member of the SIPP when it acknowledged receipt of his Contribution Form. Moreover, there is an obvious conceptual distinction between becoming a member of a pension scheme and the making by a member of a specific contribution to that scheme. The Contribution Form was only to be used where the member wished to make an in-specie contribution to the SIPP. In it, Mr Carlton stated that he would make a contribution by the transfer of an (unspecified) asset worth £68,324 to Sippchoice. Sippchoice's letter of 16 March, notwithstanding its reference to settling a debt, makes clear that Sippchoice understood that Mr Carlton had promised to make an in-specie contribution and not a monetary payment. That remained true notwithstanding that Mr Carlton was obliged to make a balancing payment in the event that the assets were not worth £68,324 on the date of transfer and, in this case, was required to pay £0.03. In summary, Mr Carlton had never promised and was never obliged to make a monetary payment of that amount.

51. For those reasons, we find that Mr Carlton was never under any contractual obligation to pay £68,324 in money to Sippchoice.

DISPOSITION AND COSTS

52. For the reasons we have given, HMRC's appeal against the FTT's decision is allowed.

53. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision. A party making an application for such an order must provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

THE HON MR JUSTICE ROTH

JUDGE GREG SINFIELD

Release date: 12 May 2020