FIRST-TIER TRIBUNAL
TAX CHAMBER

London Tax Tribunal Centre

Appeal reference: TC/2018/02594

INCOME TAX – accessing pension fund via indirect loans – whether s29 TMA 1970 can be used to recover amounts chargeable to tax under s208 and s209 FA 2004 – yes – whether deliberate behaviour established such that the extended time limits of s36(1A) TMA 1970 and the provisions of s29(4) TMA 1970 apply – yes – whether it is just and reasonable in all the circumstances to remove the surcharge – no – appeal dismissed.

Heard on: 18, 20 and 21 September 2023
Judgment date: 09 May 2024

Before

TRIBUNAL JUDGE ANNE FAIRPO
TRIBUNAL MEMBER JULIAN SIMS

Between

LARRY TRACHTENBERG

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Gordon, of counsel, and Ms Montes Manzano, of counsel, instructed by Simmons Gainsford LLP

For the Respondents: Mr Marks, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

Introduction

1. This matter was heard on 18. 20, and 21 September 2023; further written submissions were received by the panel from the parties on 16 October 2023.

Background

2. This is an appeal against two assessments issued under s29 Taxes Management Act 1970 (TMA 1970) for the tax years ended 5 April 2007 and 5 April 2010 in respect of unauthorised pension scheme payments, and an unauthorised payment surcharge under s209 Finance Act 2004 which HMRC have refused to discharge under s268 FA 2004.

3. The background facts of the case are not in dispute. The assessments arise from Mr Trachtenberg's pension arrangements. He was a member of the Alliance Trust Full Self Invested Personal Pension (SIPP) until 2 August 2009.

4. On 23 October 2006, the SIPP made a loan of £230,000 to Adam Bishop. The loan agreement stated that the loan term was for a minimum period of 160 days and had to be repaid within 365 days. The loan was stated to be made for the sole purpose of the purchase of development property.

5. The money loaned to Mr Bishop was then loaned by him to Mr Trachtenberg. We were not provided with a copy of any agreement in respect of this loan.

6. On 27 May 2009, Mr Trachtenberg wrote to Alliance Trust instructing them to transfer his SIPP assets to a new provider, Sippchoice Ltd. The transfer application documents were sent to Sippchoice by Vintage Financial Limited on 8 June 2009.

7. On 1 July 2009, the Sippchoice SIPP loaned £16,000 to Rosemary Doyle. The loan agreement stated that the term was to be three years, beginning 6 July 2009. The interest rate was 6%. The purpose of the loan was stated to be for investment purposes. Interest was to be paid annually. The agreement was signed by Mr Trachtenberg, Ms Doyle and also signed on behalf of Sippchoice Trustees Limited.

8. The money loaned to Ms Doyle was then loaned by her to Mr Trachtenberg on the same day. The terms of this loan agreement were that it was also subject to interest at 6% and was for a minimum of three years and a maximum of three years and six months. The purpose of the loan stated that it was to be used only for investment purposes.

9. The assets in Mr Trachtenberg's SIPP fund were transferred to the Sippchoice Bespoke SIPP between 6 July 2009 and 2 September 2009. The fund was valued at £305,716.81 on that date. No payments had been made in respect of the loan to Mr Bishop; it was transferred to the new SIPP by an agreement addendum to the loan dated 21 August 2009, stating that the lender was now Sippchoice Trustees Ltd. the addendum was signed by Mr Trachtenberg, Mr Bishop and on behalf of both Alliance Trust Pensions Limited and Sippchoice Trustees Limited.

10. On 15 September 2009 Sippchoice wrote to Mr Trachtenberg confirming receipt of the pension transfer.

11. In early 2010, the loan to Mr Bishop was rolled over into a new loan for the full amount of capital (£230,000) plus accrued outstanding interest of £63,825. The agreement was signed by Mr Trachtenberg and Mr Bishop on 4 January 2010, and was signed on behalf of Sippchoice Trustees Limited on 3 February 2010. The rollover agreement changed the interest rate from 0.75% per month to 5% per year and the term was set as five years from 22 November 2009. Interest payments were due every twelve months.

12. HMRC opened a check of Sippchoice on 6 January 2012. The information received as a result of this included the information that Mr Trachtenberg's SIPP had made two loans which had not been repaid.

13. The loan to Ms Doyle was repaid on 8 July 2013. The loan to Mr Bishop has not been repaid.

14. Following correspondence HMRC raised assessments on 16 November 2017 on the basis that unauthorised payments had been made to Mr Trachtenberg from his pension scheme. Following a review, Mr Trachtenberg appealed these assessments to the Tribunal on 18 April 2018.

15. On 6 September 2019 Mr Trachtenberg made an application to HMRC to have the surcharge under s209 discharged. HMRC refused the application 9 October 2019. Following a review, the refusal was appealed to the Tribunal on 6 January 2020.

Issues in the appeal

16. There are three grounds of appeal raised by Mr Trachtenberg:

a. that s29 TMA 1970 cannot be used to recover amounts which are chargeable to tax under s208 and s209 Finance Act (FA) 2004;

b. if s29 TMA 1970 can so be used, whether HMRC have shown that Mr Trachtenberg acted deliberately in failing to return the chargeable amounts in his self-assessments returns (as required by s29(4) TMA 1970);

c. whether s268 FA 2004 applies to remove the surcharge for the 2007 year.

17. It was agreed that the loans to Mr Bishop and Ms Doyle were unauthorised payments made to Mr Trachtenberg by his pension scheme.

Ground 1 - whether s29 TMA 1970 can be used to recover amounts chargeable to tax under s208 and s209 FA 2004

18. s208(1) FA 2004 provides that a "charge to income tax, to be known as the unauthorised payments charge, arises where an unauthorised payment is made by a registered pension scheme." The person liable to the charge in the case of an unauthorised member payment made before the member's death, is the member to or in respect of whom the payment is made (s208(2)(a)).

19. The charge is calculated as 40% of the unauthorised payment (s208(5)) and it is expressly stated that the "unauthorised payment is not to be treated as income for any purpose of the Tax Acts" (s208(8) FA 2004).

20. s209 FA 2004 provides for an unauthorised payments surcharge, adding an additional 15% charge to the unauthorised payment charge under s208 in certain circumstances. s210 FA 2004 sets out the conditions for a surcharge to apply.

21. s255 FA 2004 states that HMRC may make regulations in connection with the making of assessments in respect of the unauthorised payment charge and the unauthorised payment surcharge. s255(3) FA 2004 states that the

> "regulations may, in particular
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> (a) modify the operation of any provision of the Tax Acts, or
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> (b) provide for the application of any provision of the Tax Acts (with or without modification)."

22. The only relevant regulations issued were those in the Registered Pension Schemes (Accounting and Assessment) Regulations 2005 (SI 2005/3454) as amended from time to time.

The parties agreed that there was no provision in those regulations which authorised the assessments under appeal. Although the regulations (and s29 TMA 1970) have been modified by FA 2022, those modifications are subject to transitional provisions which mean that these assessments are not affected by the amendments.

Whether s255 means that power to assess can only be granted by regulations, such that s29 TMA 1970 cannot be used alone

23. Mr Gordon submitted that Part 2 FA 2004 provides a self-contained code for pension scheme taxation and that s255 provided exclusive provisions under which Parliament delegated to HMRC the mechanism for assessment. For example, s255(2) provided for interest charges; if the mainstream provisions were to apply, interest would be charged under those provisions without the need for such a provision. He contended that s255(3) made it clear that TMA 1970 alone did not enable the charge or surcharge to be assessed in the absence of any express application by s255 or regulations issued under it. He submitted that in the absence of a specific power given in accordance with s255, assessments could not be made under s29 TMA 1970. Further, in any event, the wording of s29 TMA 1970 (as it stood at the relevant times) was not effective to tax unauthorised payment charges and surcharges.

24. Mr Gordon submitted that s255 was clear that provisions for making assessments would be introduced by statutory instrument, which could either provide a stand-alone assessing power or could modify the operation of an existing provision. He submitted that in the absence of any such regulation s29 TMA 1970 could not be used to make an assessment as the wording of 255(3)(b), which allows for modification of existing legislation, would be unnecessary if the existing legislation could be used without modification. HMRC had made regulations but there was nothing in the relevant regulations which gave such power; SI 2005/3454 did not include assessment in circumstance such as this.

25. Mr Marks submitted that this was not a correct reading of the legislation and, in particular, that there was nothing in s255 which required new provisions, or modified provisions, to be introduce by way of statutory instrument before HMRC could make assessments. Mr Marks contended that s255 was a discretionary provision and only states that HMRC may make regulations, which may modify the Tax Acts. The word ‘may’ indicates that something is possible, not that it must occur. HMRC were able to make regulations if required but were not required to do so if the relevant powers already existed. It was submitted that the purpose of the permissive power was to cover the possibility that existing provisions might not apply to one or more of the different entities which might be subject to a charge. In the hearing, it was subsequently accepted for Mr Trachtenberg that s255 was permissive rather than prescriptive.

26. On balance, we agree that the provisions of s255 are permissive rather than mandatory and do not preclude the use of existing provisions without modification or specific application. The fact that s255(3) provides alternative ways of introducing a charging provision does not mean that a relevant charge or surcharge can only be assessed by new or modified provisions, nor does it require that existing provisions must be stated to apply where they would already apply. We consider that s225(3) is intended to enable HMRC to repurpose without modification a charging provision that would otherwise not apply, not that it must be invoked to confirm an already applicable provision.

Whether s29(1) covers unauthorised payments charges and surcharges

27. An assessment under s29(1) TMA 1970 requires that one of three conditions exist:

   a. income or a capital gains which ought to have been assessed has not been so assessed; or

b. an assessment to tax is or has become insufficient; or

c. relief given is or has become excessive.

28. The third condition was agreed not to be relevant in this case. HMRC agreed that s29(1)(a) was not relevant following the Court of Appeal decision in *Wilkes* [2022] EWCA Civ 1612.

29. Mr Gordon contended that the provisions of s208 and s209 are freestanding charges that apply to payments, rather than to years of assessments. This was, he submitted, made clear by the fact that the charges are flat rate charges. s29(1)(b) relates to an assessment, and s29 specifically refers to assessments being "for a year of assessment" and so would not apply to freestanding charges of this nature. The Regulations had had to include provisions regarding timing of the charge where it applied to a company, which it was submitted was because the charge did not relate to a specific year.

30. Mr Marks submitted that this was an incorrect view of the legislation; s29(1)(a) similarly applies to assessments "for a year of assessment" but is stated to cover capital gains which are stand-alone charges which relate to a disposal, rather than a year of assessment. The charges in this case are stand-alone charges to income tax and there is nothing to indicate that they are excluded from assessment under s29 TMA 1970. If s29 could only apply to taxes which relate to a year of assessment, then only income tax for a period of employment with a defined annual salary would be covered; any other definition of salary would not relate to a year of assessment.

31. Mr Gordon disagreed, noting that capital gains tax would depend on the total gains made within a tax year and would need to take into account losses and the annual allowance. The concept of a year of assessment therefore applied to capital gains tax in a way that had no counterpart in respect of charges and surcharges under s208 and s209.

32. Mr Marks contended that the charges arise when an unauthorised payment is made and there is therefore no ambiguity: the charge should be included and returned in the year of assessment in which the payment is made, in the same way that disposals which give rise to a chargeable capital gain in such a year must also be included. If charges were not to be so included, they would have been specifically excluded, as had been done in respect of charges on scheme administrators which were excluded from self-assessment by s281 FA 2004 and Schedule 35(1).

33. Mr Gordon further contended that s29(1)(b) did not apply as the charges could not be self-assessed. The obiter comments in *Monaghan* [2018] UKFTT 156 (TC) relied on provisions of the Income Tax Act (ITA) ITA 2007 which did not exist and have no equivalent in respect of the 2006/07 tax year. The relevant legislation focussed on income during a tax year which, as already submitted, was not a concept which applied to the charging regime which included s208 and s209.

34. Mr Gordon submitted that any indication in s30 ITA 2007 that unauthorised payment charges and surcharges should be self-assessed was an error in the drafting of the Act as it is inconsistent with 'Step 7' of s23 which focuses on "any amount of tax for which the taxpayer is liable for the tax year listed". s208 and s209 do not identify any tax year to which they relate. The discretionary nature of the surcharge and separate right of appeal in s269 also indicate that these were not intended to be part of self-assessment.

35. Mr Marks submitted that ITA 2007 provides details of how to calculate income tax rather than being a charging provision. ITA 2007 includes FA 2004 in the provisions under which income tax is charged. Step 7 of s23 sets out where in the calculation the charge should be brought in and is not a charging provision. The Upper Tribunal in *Monaghan* confirmed (at

[89]) that an unauthorised payment and the charge should be included in a tax return by virtue of s8 and s9 TMA 1970.

36. Mr Marks further submitted that the lack of an equivalent to s30 ITA 2007 in the preceding legislation did not mean that charges under FA 2004 could not be assessed before ITA 2007 came into force. It would be absurd for parliament to create a tax charge which was not chargeable until legislation was enabled two years later. It was submitted that the operation of ss7-9 TMA 1970 clearly showed the requirement for such charges to be included in a self-assessment return.

37. We considered all of the arguments made and start by noting the specific wording of the legislation. s29 TMA 1970 states that:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment
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> (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
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> (b) that an assessment to tax is or has become insufficient, or
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> (c) that any relief which has been given is or has become excessive,
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> 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."

38. It is agreed that it is only s29(1)(b) which might operate in this case. Mr Trachtenberg completed self-assessment returns for the years in question. The question, therefore, is whether these returns can be regarded as assessments to tax which are, or have become, insufficient. They could only be insufficient if a s208 or s209 charge was required to be included in the self-assessment returns.

39. s9(1) TMA 1970 requires that a tax return include an assessment of the amounts in which the person making the return is chargeable to income tax for the year of assessment.

40. Mr Gordon focused on the words "for a year of assessment", contending (in summary) that s208 and s209 did not create a charge that was "for a year of assessment" but one that was stand-alone and therefore not within self-assessment.

41. On balance, we do not think there is any particular magic to the words "for a year of assessment" (or the equivalent "for a tax year") in respect of the self-assessment and assessment provisions in TMA 1970 beyond the self-evident point that an individual's self-assessment in respect of income tax must relate to a year of assessment. We agree with HMRC that the provisions of s23 ITA 2007 set out a process for calculating income tax liability and are not charging provisions. We do not think that these provisions, or the absence of an equivalent in earlier years, offer any assistance in determining whether or not a specific income tax charge is "for" a tax year.

42. Considering the legislation and case law, we conclude that charges for a year of assessment are income tax charges arising in the tax year for which a particular self-assessment return is made (in this context). The fact that legislation contains provisions which are intended to specify how to identify when certain types of income, and so the associated income tax charges, arise as between different tax years in particular circumstances does not mean that the absence of such identification provisions requires that an income tax charge which arises in a

tax year is not to be included in assessing the amount of income tax payable by the taxpayer "for" that tax year.

43. Most tax legislation concerns charges relating to events which often occur multiple times throughout a tax year (such as dividends and employment income); some events might also offer scope to manipulate a liability to tax in the timing which the legislation needs to deal with. There is also in many cases good reason to aggregate the amounts, to ensure that the correct tax charge can be calculated after taking into account allowances and other appropriate deductions and then considering the relevant applicable rates and thresholds. As such it is unsurprising that legislation sets out provisions to deal with these issues.

44. The purpose of the unauthorised payment regime is to deter people from accessing their pension funds other than in circumstance permitted by the pensions regime; one would not usually expect multiple such payments to be made in the course of a year. Further, as the charge is a fixed rate relating to each unauthorised payment alone, there is no need to aggregate the amounts to determine the relevant income tax liability. None of this means that a payment is not made in, and thus to be taken into account in assessing the amounts to which the individual is chargeable to income tax for a tax year.

45. We therefore do not agree with Mr Gordon's submissions that the absence of such specific allocation details in s208 and s209 means that the charges cannot be "for" a tax year. An unauthorised payment will be made during a tax year and we consider that it is clear that the related income tax charge therefore arises in, and so is "for", that tax year.

46. Mr Gordon submitted that the absence of such allocation details meant that there could be ambiguity as a payment may be received in a different year to that in which it is paid, and in the case of s209 could be the tax year in which discharge from the surcharge is refused under s268. He also contended that the effect of s209 and s268 was that the charge under s209 was discretionary and so could not be self-assessed.

47. The wording of s208 and s209 is that the charge arises where a relevant payment is made. There were no submissions that there might be any ambiguity as to the timing of the relevant events in this appeal; the fact that there might in a hypothetical case be a dispute as to the specific date on which a payment is made and the charge arises does not mean that such a charge cannot be "for" a tax year.

48. In submissions made in writing after the hearing in respect of the application of s268, HMRC submitted that a s209 charge must be included in a self-assessment return. An application for relief under s268 may also be made in the same self-assessment return (ie: in the white box of the return) but could be made in writing at any time within the relevant time limits set out in SI 2005/3452. A taxpayer cannot unilaterally determine that the charge is not due and so the initial requirement to declare the s209 charge is not discretionary: it must be included in the self-assessment tax return.

49. Mr Gordon contended that it was a surprising interpretation of the legislation that a person be required to pay a charge, and can be liable to interest and penalties for not doing so, whilst the application for discharge is being considered. Further, the legislation does not provide any details as to how a discharge is to be effected, nor for how any interest and late payment penalties are to be dealt with if discharge is granted. Mr Gordon submitted that this supported the view that an application under s268 is a consequence of an HMRC assessment rather than a follow-up to a self-assessed liability. There were also no provisions to permit the reduction of a (tax-based) late return penalty to reflect the removal of a surcharge where a taxpayer had incurred such a penalty in respect of a return which included a s209 charge which had subsequently been discharged on application.

50. In the case of the interaction of s209 and s268 we consider that it is clear from the legislation that the charge arises when a relevant payment is made and the liability continues to exist unless and until relief is granted. The charge does not arise only when relief is refused. In the circumstances it is entirely possible that penalties and interest might arise. We do not consider that this is particularly surprising in the context of legislation that is intended to deter behaviour. This is not legislation which seeks to tax everyday transactions. With regard to the intention of Parliament invoked in submissions, we consider that the key intention was that people should not generally be able to access their pensions early without a tax charge. The fact that, if they do access their pension early and fail to comply with their self-assessment obligations, there may be complications with penalties and interest does not mean that the s209 charge is in any way discretionary and outside the scope of self-assessment.

51. We therefore find that the s208 and s209 charges are income tax charges which are to be included in a self-assessment return in accordance with s9 TMA 1970, and so s29 TMA 1970 can be used to recover amounts which are chargeable to tax under s208 and s209 Finance Act 2004.

Ground 2 - whether the requirements of s29(4) TMA 1970 are met

52. As noted above, it was not in dispute that unauthorised payments had been made. We therefore find that an income tax charge arose when each of the unauthorised payments was made and that this should have been included in Mr Trachtenberg's self-assessment returns for the tax years 2006/07 and 2009/10.

53. In order for an assessment to be made under s29 TMA 1970, as Mr Trachtenberg had submitted tax returns in both of the relevant tax years, one of two conditions must be met.

54. The first is in s29(4) TMA 1970: "that the [insufficiency in the assessment] was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf."

55. The second condition is that "at the time when an officer of the Board ceased to be entitled to give notice of his intention to enquire into the taxpayer's return … in respect of the relevant year of assessment … 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 [insufficiency in the assessment]."

56. Further, the assessments in this appeal were made in November 2017. This was more than six years (but less than twenty) after the end of each of the years of assessment to which they relate. In order for HMRC to be able to raise the assessments they therefore must also satisfy s36(1A) TMA 1970 which requires (in this context) that there be a loss of income tax brought about deliberately by the taxpayer or another person acting on behalf of the taxpayer.

57. Some guidance as to the meaning of the word "deliberate" was set out by the Supreme Court in *HMRC v Tooth* [2021] UKSC 17, [2021] 1 WLR 2811 at [42], stating that:

> "Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely "inaccuracy". An inaccuracy in a document is a statement which is inaccurate. Thus the required intentionality is attached both to the making of the statement and to its being inaccurate.)"

58. The Supreme Court was, here, considering the provisions of s118(7) TMA 1970 which states that "references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person." The taxpayer in *Tooth* had filed a tax return in which a loss had been designed to be an employment-related loss was wrongly inserted into a box on the electronic form reserved for partnership losses. This was because his advisers had been informed that a technical software issue meant that the

loss could not be inserted into a box for employment-related losses and so they should utilise this box and explain what they had done in the white space on the form for explanations from the taxpayer.

59. The Supreme Court concluded (at [47]) that:

> "for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so.".

HMRC evidence and submissions

60. Officer Walsh gave evidence for HMRC and stated that he had concluded that Mr Trachtenberg acted deliberately, misadvising his pension scheme administrators in order to gain access to his pension funds for his personal use via payments to third parties. He had signed documents which he knew to be inaccurate and false with the intention of accessing his pension funds in circumstances which he knew should lead to a tax charge.

61. Officer Walsh considered that Mr Trachtenberg had known that tax charges would arise if he accessed his pension funds directly and that he had deliberately not made any enquiries of the pension administrators as to whether his access of the funds via third parties would result in the same tax charges.

62. Mr Marks submitted that (in summary) Mr Trachtenberg knew that there are tax restrictions around accessing pension funds and that he intentionally misled his pension administrators, arranging loans with documentation that contained intentionally incorrect information, to ensure that he could access the funds to pay his personal debts without paying the associated tax charges.

63. Mr Marks contended that Mr Trachtenberg also knew that he was required to declare the tax charges on his self-assessment return but failed to do so. He had acted deliberately, within the meaning of *Tooth* and so the requirements of s29(4) and s36(1A) TMA 1970 are met.

Appellant evidence and submissions

64. Mr Trachtenberg's evidence was, in summary, that he had been advised that he could obtain money from his SIPP by way of loans to third parties which were then passed to him. This mechanism had been described as some form of loophole in the SIPP rules. He stated that he had been advised that he could do this by an adviser, Joe Nygate, who he described as being someone who was very careful with his reputation. His evidence was also that he could not believe that Mr Nygate would have advised him to lie in a document.

65. Mr Nygate had indicated to Mr Trachtenberg that he could not borrow the money personally, or lend it to his business, but that he could lend the funds to a third party who could in turn lend it back to Mr Trachtenberg on a strictly personal basis. Mr Nygate had stated that this was totally legal as long as the loan was undertaken on current commercial terms and ideally the loan should be repaid within three years. The issue of a personal tax liability had never arisen in discussion and Mr Nygate had never offered advice in that respect. Mr Trachtenberg supposed that he had assumed that Mr Nygate, as a qualified independent financial adviser, was well versed in the rules and would have informed him if such a liability issue would arise. He had received assurances that no personal liability would arise from the transactions, but this had not included any discussion of tax liability. Mr Trachtenberg's evidence was also that Mr Nygate had pointed out that, as Mr Trachtenberg was over 50 years old at the time of the intended loan, he was already entitled to draw funds from the pension in any case.

66. Mr Trachtenberg also assumed that the pension administrator (Alliance Trust or later Sippchoice) would have advised him of any tax implications arising from the loans. However, he did not dispute that he had not given his pension administrators full details of the transaction. He did not recall Mr Nygate saying specifically that he should not provide full information to the pension administrators.

67. Mr Trachtenberg accepted that there was "a degree of artifice in the documents" relating to the loans and that he signed the documents. He disagreed that this was because he wanted to hide the arrangements from the pension administrators as he knew that there were tax consequences but, rather, that he wanted to buy time for the loans to be repaid. He had not thought to check the arrangements with anyone else, trusting Mr Nygate. He had no clear recollection of going through the documents with Mr Nygate but had no doubt that he must have done so. He disagreed that he had not discussed the documents with Mr Nygate because he knew that Mr Nygate would have told him that he could not make the inaccurate statements in the documents.

68. Mr Bishop also briefly gave evidence to confirm that he had taken the loan from the SIPP to pass the money on to Mr Trachtenberg; although he had undertaken some property development, that was not the purpose of this loan. Mr Nygate had given him similar advice that a SIPP was a new concept that allowed a person to manage their own pension fund and legitimately access the pension. He was not advised that the loan arrangements were a way to get around the tax charge.

69. Ms Montes Manzano submitted (in summary) that HMRC had not shown that Mr Trachtenberg had deliberately submitted inaccurate tax returns. Their case was based on speculation and assumptions, but only actual knowledge or a deliberate decision to avoid confirming facts would be sufficient to establish deliberate behaviour (per *CPR Commercials*).

70. Ms Montes Manzano contended that HMRC had made assumptions as to Mr Trachtenberg's state of knowledge of pension tax matters which were not supported. They had failed to establish a link between his borrowing of funds derived from his SIPP and the deliberate submission of inaccurate tax returns. Mr Trachtenberg had relied on and followed advice given to him by Mr Nygate and had not known of the tax costs of his actions. He was not given any advice or warning by those advising him, whether Mr Nygate or his pension administrators, who had made the initial loans.

Discussion

71. We considered all of the evidence put to us. We find that Mr Trachtenberg's evidence regarding Mr Nygate was contradictory: he stated that Mr Nygate was scrupulously honest and could not believe that Mr Nygate would advise him to lie in a document. However, his evidence was also that Mr Nygate had done exactly that (that is, to use Mr Trachtenberg's words, to sign documents which contained a "degree of artifice"), as Mr Trachtenberg had no doubt that he would have gone through the documents with Mr Nygate, and that Mr Nygate would have guided him through the transactions.

72. Further, Mr Trachtenberg's evidence in the hearing was that he never did any business with Mr Nygate. He considered that Mr Nygate was an extremely friendly adviser, but Mr Trachtenberg never bought anything from Mr Nygate as he was not really in a financial position to purchase any products. We do not consider that an independent financial adviser would give detailed advice about arrangements to extract significant value from a pension fund for no remuneration.

73. Notes of a personal financial review carried out in 2011 and signed by an adviser who included his name as "Joe" were attached to Mr Trachtenberg's witness statement. The section

dealing with personal pension arrangements includes a handwritten note which states “Has a scheme called SIPPchoice, wouldn’t or couldn’t divulge accrual!” Mr Trachtenberg’s witness statement describes this document as being part of “copies of whatever notes and records [Mr Nygate’s employer] had of our various meetings”.

74. This is a note of meeting which took place after both loans were taken out. We consider that it confirms that Mr Nygate had little or no knowledge of Mr Trachtenberg’s pension arrangements. We consider that the note would have read very differently if Mr Nygate had provided any advice as to extracting funds from this pension scheme.

75. On balance we do not accept Mr Trachtenberg’s evidence that he was provided with any substantive advice by Mr Nygate. The fact that Mr Nygate had not told him of any tax liabilities was therefore unsurprising and offers no assistance to Mr Trachtenberg. We note that Mr Trachtenberg’s evidence was he could not recall asking about any such liabilities. He stated that it was a “fair point” in response to the question whether it was correct that he and Mr Nygate had not discussed the tax consequences of taking money out of the pension fund. We find that he did not ask Mr Nygate about the potential tax liabilities involved in these arrangements.

76. Mr Trachtenberg stated in the hearing that he was very concerned to minimise the risk of personal liability as he had been caught up in problems relating to a former employer which, although he was not found to have been involved, had had a significant impact on him. He wanted to ensure that he was on the right side of what was seen to be fit and proper: his evidence was that he had also given no thought to potential tax liabilities in this, that his concern was with personal liability. He did not explain why he did not consider a personal tax liability to be a personal liability, nor why ensuring that one’s tax position is correct is not part of ensuring that one is on the right side of being “fit and proper”. We do not consider that this evidence was particularly compelling in the context of whether or not Mr Trachtenberg acted deliberately.

77. Given that Mr Trachtenberg’s evidence was that the documents contained a “degree of artifice”, we find that Mr Trachtenberg knew that the loan documents contained false information, that the purpose of the loans was not to enable Mr Bishop and Ms Doyle to undertake property development or make investments but, instead, to enable the funds to be provided to Mr Trachtenberg for his own, non-investment, use. He confirmed that the purpose of the arrangements had always been for him to have access to his pension fund for his personal use.

78. We do not consider that it is credible that Mr Trachtenberg believed that arrangements which involved the provision of false information to his pension administrators were legitimate.

79. Mr Trachtenberg could not recall why he had not approached his pension administrators directly to see whether he could draw the funds directly, given that his evidence was that Mr Nygate had advised that he could do this. Given that this would be a much simpler route to accessing the funds and would not involve making false statements in documents, we find that Mr Trachtenberg knew that he would be liable to a tax charge if the amount of the funds he wanted to access were made available to him otherwise than in accordance with the pensions tax rules.

80. Mr Trachtenberg’s evidence was also that Mr Nygate had told him that, for the arrangements to work, the loans had to be on current commercial terms. Even if this were true, Mr Trachtenberg entered into documents which he knew contained false information and he sustained that false information for a number of years. The bundle provided to us contained an email sent by Mr Trachtenberg in 2013 to Sippchoice in which he states that Mr Bishop would be able to pay off the loan by a transfer of shares following a flotation of a company. Mr

Trachtenberg knew from the outset that Mr Bishop's repayment of the loan would depend on Mr Trachtenberg repaying the loan which Mr Bishop had made to him. In the same email, he refers to Mrs Doyle's repayment being delayed by "serious personal issues" when he knew that repayment would depend on his repaying Ms Doyle. Mr Trachtenberg could not have placed any reliance on advice, nor on any assurances (whether made directly or by assumption) as to whether there would be any associated tax liabilities, when he did not follow the advice.

81. We conclude that Mr Trachtenberg knew from the outset that the loans were not on commercial terms and that false statements were made to obtain the loans to Mr Bishop and Ms Doyle, and that a false statement was made in the loan agreement between himself and Ms Doyle (that the funds were for investment purposes).

82. Given our findings above, we conclude that Mr Trachtenberg was not a credible witness and we find that he knew that the arrangements would give rise to a tax charge as the funds were to be made available to him and that he arranged for false statements to be made in the documentation to ensure that his pension administrators did not realise that he was entering into such arrangements. We do not accept Mr Trachtenberg's statement that this was because he wanted to buy time to repay the loans; there would have been no reason for the false information in the documents at the outset if the arrangements were legitimate.

83. We find that Mr Trachtenberg did not rely on any specific advice from Mr Nygate with regard to these arrangements. We find that there was no reason for him to assume, and that he did not so assume, that Mr Nygate considered that these arrangements as specifically entered into were permitted for tax purposes. We find that Mr Trachtenberg knew that there would be tax consequences to the arrangements. We find that he hid the purpose of the arrangements from his pension administrators and made no enquiries as to the tax position relating to these arrangements because he did not want to the pension administrators to make tax deductions from the amounts or confirm the specific tax charge to him.

84. We find, therefore, that Mr Trachtenberg knew that there was a tax charge involved in his accessing his pension fund by way of loans via third parties. We find that he deliberately chose to complete the relevant tax returns without reference to the receipt of funds from his pension scheme. We find that he intended that HMRC should rely on the returns which he knew to be inaccurate. We find that this deliberate behaviour led to the loss of income tax.

85. We find that the condition in s29(4) TMA 1970 as to deliberate behaviour is met such that HMRC are entitled to raise the assessments. It follows, and we so find, that the extended time limits in s36(1A) TMA 1970 are therefore available and the assessments were made in time.

86. We note that there were various submissions as to the contents of correspondence between HMRC and Mr Trachtenberg's advisers regarding the use of a contract settlement, and whether this included or amounted to admission of deliberate behaviour. No contract settlement was entered into. We considered the correspondence and submissions. There was also some discussion about the precise term of the initial loan from the pension fund to Mr Bishop but, as we did not consider that any of this assisted our decision in any particular way, we have not included details above.

Ground 3 - whether s268 FA 2004 applies to remove the surcharge in respect of the 2006/07 year

87. HMRC assessed Mr Trachtenberg to a surcharge under s209 FA 2004 for the 2006/07 tax year as the funds extracted from the pension scheme amounted to more than 25% of the total funds in the scheme. There was no dispute that this was the case.

88. s268 FA 2004 provides that a person who is liable to a surcharge under s209 may apply to HMRC for the discharge of their liability to that surcharge where, in all the circumstances of the case, it would not be just and reasonable for the person to be liable to the surcharge in respect of the payment. s269 FA 2004 enables a taxpayer to appeal such a refusal to this Tribunal, which then has full appellate jurisdiction to consider whether the discharge should have been given.

89. Mr Trachtenberg made an application under s268 on 6 September 2019; HMRC refused the application on 6 October 2019. Mr Trachtenberg requested a review of this refusal and HMRC upheld their decision on review on 18 December 2019.

90. The grounds for Mr Trachtenberg's application were (in summary) that he had taken professional advice from Mr Nygate that gave him no reason to doubt that there would be any tax issues with the arrangements and he reasonably believed at the time of making the arrangements that there would be no associated tax liability.

91. The Upper Tribunal in *Bella Figura* [2020] UKUT 120 (TCC) set out at [70] the "considerations that should be taken into account in evaluating the question whether it is just and reasonable to set aside [an] unauthorised payments surcharge". They endorsed the approach in *O'Mara* [2017] UKFTT 91 (TC) at [152 onwards] that the Tribunal should

> "examine all the circumstances and decide whether it would be just and reasonable for the appellants to be liable to surcharges … This in turn allows the Tribunal to examine an appellant's conduct or any other relevant mitigating circumstances pertaining to the payments or the appellant's circumstances. It also allows the Tribunal to take account of the statutory scheme and mischief the surcharge is designed to prevent."

92. The statutory scheme and mischief was described in *Bella Figura* at [72 onwards] as providing

> "(i) for contributions made by employers and employees to benefit from tax relief at the point of payment; (ii) for the funds contributed to be held securely to provide pension benefits that can, at least in usual cases, only be taken once an individual reaches the age of 55; (iii) for most income and gains received by the registered pension scheme in connection with the investments of contributions not to be subject to tax; but (iv) for amounts payable to an individual taking benefits to be subject, in most cases, to income tax (with the most important exception of the ability to take a tax-free lump sum equal to 25% of the accumulated fund).
>
> While conceptually it might be said that tax relief granted to individuals and employers at stage (i) is counteracted by the taxability of pension benefits at stage (iv), the overall scheme clearly involves a material cost to the Exchequer … Parliament is content for the Exchequer to suffer these costs given the social utility of individuals saving for their retirement, but only where the entire bargain set out [above] is respected. It is for this reason that different aspects of the unauthorised payments regime apply to different potential breaches of the bargain. For example, if a registered scheme impermissibly pays benefits to a member before he or she reaches 55, there is an unauthorised payment because the Exchequer has suffered the costs we have outlined, but since the funds have been drawn before retirement age, the social utility of funding retirement is not present. In a similar vein, if pension funds are lent by way of risky loans to an employer, the Exchequer is exposed to the risk that, even though it has given tax relief, and exempted income and gains of the scheme from tax, the funds are not ultimately available to pay pension benefits."

93. Given our findings above we conclude that Mr Trachtenberg knowingly entered into arrangements with the intention that the "entire bargain" of the pensions' regime would not be met. He intended that others should rely on documentation with false information and that he knew that the arrangements would give rise to a tax charge and that he acted deliberately in providing an inaccurate tax return to HMRC. The loan in respect of which this surcharge arises has not been repaid.

94. We find that Mr Trachtenberg's conduct, in the light of the statutory scheme and mischief which it is designed to prevent, and the overall circumstances of the case are such there are no grounds on which it is appropriate to discharge the liability to the s209 surcharge.

Conclusion

95. For the reasons set out above, we find that the assessments were validly raised and that no discharge from the s209 surcharge should be given. The appeal is dismissed.

Right to apply for permission to appeal

96. 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 FAIRPO
TRIBUNAL JUDGE

Release date: 09 May 2024