casebook

odyssey

volume #2

the loan that wasn't a loan

Our casebooks are drawn from the chronicles of the Pensions Ombudsman and HMRC Tribunals and are designed to draw from these cases, perhaps in a light-hearted and easily digestible way, points that might be of relevance to advisers who work with self-invested and self-administered pensions.

so… what happened?

Well, in the beginning, there was a pension scheme. Now, this pension scheme was established perfectly validly in accordance with the laws of the land at a time when, well, perhaps it was simply inviting trouble to do that…

The pension scheme was a Small Self-Administered Scheme (a SSAS) and it was established in the usual sort of way with a Sponsoring Employer and with Trustees, whom we shall call Mr & Mrs Z. Critically, however, Mr & Mrs Z did not include a Professional Trustee (although we might be slightly biased in making that statement). Instead, they used the services of an authorised Practitioner.

Things went swimmingly until they decided to start lending monies from the pension scheme to the Sponsoring Employer. Cutting a long story short, the Practitioner felt obligated to report to HMRC that the loans were unauthorised. Tax charges ensued (as they are wont to do), and Mr & Mrs Z appealed…

what was the outcome?

Three loans had been granted to the Sponsoring Employer. Two separately for £200,000 each, and a third for £50,000. HMRC proceeded to raise Unauthorised Payment Charges, Unauthorised Payment Surcharges and Scheme Sanction Charges. In other words, throwing the book at them (along with, or so it might seem, the rest of the library).

The appeal was made on a number of grounds, somewhat condensed as follows:

- It was argued that HMRC was not entitled to raise a Scheme Sanction Charge. This was because they had used the evidence of the reporting of one of the Unauthorised Payments to look further back at the history of the Scheme and they were not allowed to do this.

- Secondly, it was argued that the loans were, in fact, authorised employer loans fully compliant with the rules.

- And finally, that it was not just and reasonable to raise the charges in the first place.

The Tribunal considered the first point in depth and, having devoured and regurgitated some considerably complex legislation, sided with Mr & Mrs Z. No Scheme Sanction Charge.

The second point looked at the requirements necessary for loans to comply with the legislation that rendered them authorised. There were two contentious points:

- That the loan did not have required repayment terms; and

- That it did not have the requisite security.

Unfortunately, the defence didn't get off to a resounding start. Examination of the loan agreement revealed very ambiguous wording as regards repayment terms along with an acceptance by Mr Z that the agreement didn't actually make sense. And given that the loan only needed to fail on one condition, that was pretty much the end of that…

There were two interesting observations made, however:

- Firstly, HMRC had contended that the loan was unauthorised because the security was not registered in time at Companies House. The Tribunal suggested that the wording of legislation did not create this specific a link, and that it might have been arguable that a contractual right was sufficient – in other words, a written agreement to create a charge was compliant with legislation.

- Secondly, HMRC argued that the loan maximum was breached because, at the time of the second £200,000 loan, the overall amounts that constituted loans exceeded 50% of net assets. The Tribunal suggested that legislation only referenced a loan in isolation and cumulative calculations might not actually apply.

Sadly, both of these points were untested as they might well have made for some very interested changes in wider practice. It'll currently take a very brave provider to allow the flexibility hinted at by the Tribunal!

The final part of the appeal rested on the reliance that Mr and Mrs Z had placed on an Authorised Practitioner. In essence, that this reliance should mitigate their mistakes as they genuinely believed they were acting in accordance with legislation and had not intended any abuse.

Unfortunately, the Tribunal decided this was not an adequate defence. There was insufficient evidence to document how closely Mr & Mrs Z had worked with the Practitioner, and despite suggestions they had been supplied with the documentation, the Tribunal decided that Mr & Mrs Z should have (in essence) taken far more care.

So, the overall conclusion? One hefty tax charge.

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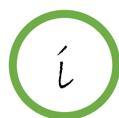
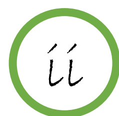
what do we learn?



One of the critical tests for whether a loan is authorised or not is the documentation that is used. If the documentation is not explicitly compliant, then it doesn't matter how the loan is necessarily operated. HMRC will pursue unauthorised payment charges.



Reliance on a Practitioner can be problematic. A Practitioner does not involve itself in the release of monies from a pension scheme bank account, nor is it involved in the signing of paperwork for investments. Some of the safety valves involved in employing professionals are therefore missing.

Discharge from tax charges on the grounds of the 'just and reasonable' test can't necessarily just be based on 'we thought we were doing the correct thing', and 'we relied on someone else'. In this case, the Tribunal looked at the experience of Mr & Mrs Z in a wider business context, and their knowledge of corporate and director responsibilities, rather than their lack of specific pensions knowledge.