



29 July 2015

PRESS SUMMARY

John Mander Pension Trustees Limited (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2015] UKSC 56
On appeal from [2013] EWCA Civ 1683

JUSTICES: Lord Neuberger (President), Lord Sumption, Lord Reed, Lord Carnwath and Lord Hodge

BACKGROUND TO THE APPEAL

Until 2006, pension schemes could be approved by the Inland Revenue (now HMRC). Taxpayers who paid contributions into approved pension schemes received relief from income tax on their contributions, but were subject to certain restrictions on the application of the fund. In particular, with limited exceptions assets could only be withdrawn from an approved pension scheme on retirement (or death, if earlier), and then had to be used to purchase an annuity.

A practice arose under which small pension schemes would gain approval and the consequent tax advantages, then be managed in such a way as to lose their approval, so that the scheme funds could be withdrawn free of the restrictions. Parliament enacted anti-avoidance legislation to prevent this practice. The Income and Corporation Taxes Act 1988 (as amended) sets out three scenarios where a scheme's approval may cease. Approval is withdrawn automatically where the scheme fails to comply with regulations, in which case its approval automatically ceases 36 months after the introduction of the regulations (s 591A(2), a transitional provision), and immediately after an unapproved and unauthorised alteration is made to the scheme (s 591B(2)). Where the Revenue considers that the facts cease to warrant the continuance of approval, the Revenue may also withdraw approval by notice from a date specified in the notice, which must not be earlier than the date when the facts first ceased to warrant the continuance of approval (s 591B(1)).

Under s 591C of the Act, once approval "ceases to have effect", the scheme is liable to a 40% tax charge on an amount equal to the value of the scheme assets immediately before the date of the "cessation of approval" of the scheme. The question arising in this appeal is when the charge is incurred where approval is withdrawn following the giving of notice by the Revenue under s 591B(1). In that case, does approval "cease to have effect" at the date of the notice itself, or at the date from which the facts of the scheme cease to warrant the continuance of approval, as specified in the notice?

The Revenue notified the administrator of the Appellant pension scheme on 19 April 2000 that approval was withdrawn under s 591B(1) with effect from 5 November 1996. The Revenue says that the 40% tax charge fell to be assessed in the 2000/1 tax year when the withdrawal was notified. The taxpayer says that it fell to be assessed in the 1996/7 tax year when the scheme ceased to be eligible and withdrawal of approval took effect under the Revenue's notice (and therefore that the Revenue is out of time to impose the assessment). The First-tier tribunal, Upper Tribunal and Court of Appeal all considered that the tax charge fell in the 2000/1 tax year.

JUDGMENTS

The Supreme Court allows the appeal by a 3:2 majority. Lord Sumption gives the leading judgment. Lord Neuberger agrees with Lord Sumption and sets out his own reasoning. Lord Reed agrees with both Lord Sumption and Lord Neuberger, and again sets out his own reasoning. Lord Hodge and Lord Carnwath give dissenting judgments.

REASONS FOR THE JUDGMENTS

The charge is assessed on a notional profit or gain accruing immediately before the “cessation of approval” under s 591C(2). [9] The parties correctly agreed that the date of “cessation of approval”, immediately before which the fund is valued, is the date specified in the notice. The conditions for liability to the tax charge in s 591C(4)-(6A) only make sense on the footing that the “cessation of the approval of the scheme” is the effective date of the withdrawal of the approval and not the date of the notice itself. [11, 29] This is also the outcome which makes most sense as a matter of language and of principle: it avoids double taxation, and ensures that the fund is valued while it is still intact. [48]

The words “cessation of approval” in s 591C(2) mean the same thing as the words “ceases to have effect” in s 591C(1). The date of cessation of approval is obvious in the case of automatic withdrawal under ss 591A(2) and 591B(2): it is the date when the scheme ceases to qualify for approval. The functional equivalent in the case of withdrawal by notice under s 591B(1) is the date specified in the Revenue’s notice. This is the natural result of the language of these provisions, and also reflects their common purpose. [10, 50] This is confirmed by s 591D(7), which equates “approval of the scheme being withdrawn” with its “ceasing to have effect” and “cessation of approval”. [13, 50] Lord Neuberger notes that as a general proposition, the use of two different expressions—“an approval [ceasing] to have effect” in s 591C(1), and “the cessation of the approval” in s 591C(2)—indicates an intention that the expressions should have different meanings; however, that presumption is rebutted by s 591D(7). [28, 30] The majority’s analysis is supported by s 61 of the Finance Act 1995 (introducing ss 591C and D into the 1988 Act), which presupposes that the date of the notice and the date of cessation of approval may be different. [12, 33]

The result is therefore to expose the taxpayer to retrospective assessment and to the payment of interest from the earlier date. Per Lord Sumption [15-20], this is not anomalous, but occurs whenever tax is assessed in arrears, and amounts simply to a recognition of facts which already existed; per Lord Neuberger [32], retroactivity is inherent in any case where a notice is served under s 591B(1), and it is consistent that the valuation of the assets and the charge to tax should take place at the same date; and per Lord Reed [52] the charge is not truly retrospective, because it involves the recovery of tax forgone at an earlier date in reliance upon an expectation as to the future management of the scheme which was not fulfilled, and it is legitimate to charge interest from the earlier date because the taxpayer has had the use of the money for that period. The Revenue’s concern that it will often take more than the six-year time limit to identify abusive schemes and issue the requisite notice is better addressed through the Revenue’s power to make regulations requiring the provision of information relating to any approved scheme; accepting the Revenue’s argument would effectively mean that there would be no time limit and that it could choose the chargeable period at its discretion. [21]

Lord Hodge, dissenting, considers that s 591C(2) specifies the rate of the charge by reference to the value of the assets immediately before the cessation of approval of the scheme, but makes no statement as to the tax year in which that charge is to fall. [75] He emphasises that clear and positive words are needed to justify the imposition of retrospective tax and is not satisfied that s 591D(7) contains such words, particularly in light of the different conclusion reached by the lower courts. [72-73, 76] Rather, s 591D(7) shows that the words “approval of a scheme ceasing to have effect” in s 591C(1) look to the process by which withdrawal occurred, namely the giving of the notice. [77] The administrator of a pension scheme may, as in this case, be unaware of the circumstances which later cause the Revenue to withdraw approval of their scheme, and it would be unfair retroactive taxation to impose a liability in interest for unpaid tax on the scheme administrator in such circumstances. [79] The majority’s other points do not provide the needed clarity. [80-84] Lord Carnwath, agreeing with Lord Hodge, considers that the s 591C(1) charging provision unequivocally provides that an approval ceases to have effect when it is withdrawn by notice and so the charge arises in the year when the notice is served. [87] Section 591D(7) provides no principled basis for rewriting it. [88]

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.shtml>