



TC05331

**Appeal number: TC/2015/03327
TC/2015/04227**

INCOME TAX – registered pension schemes, whether payments made which were intended by the schemes to be registered transfers to another registered pension scheme were such, despite the fact that they were retained by the taxpayer (the member of the scheme) for three years before being paid into a different registered pension scheme – held the payments in those circumstances were not registered transfers but were unauthorised member payments attracting the unauthorised payment charge under s208 FA 2004 and the unauthorised payment surcharge under s209 FA 2004 – whether the unauthorised payment surcharge should be discharged pursuant to s269(6) FA 2004 – held that in all the circumstances it should be discharged – held also that the discovery assessment raised in respect of the year 2009/10 under s29 TMA 1970 was competent – appeal allowed in relation to the unauthorised payment surcharges but otherwise dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PETER BROWNE

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE JOHN WALTERS QC
 MR WILLIAM SILSBY**

Sitting in public at Eastgate House, Newport Road, Cardiff on 18 April 2016

Mr Martyn Arthur, Martyn F Arthur Ltd., for the Appellant

Mrs L Gray, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant, Mr Browne, appealed to this Tribunal, by a notice of appeal dated
5 19 May 2015, against a decision of the Respondents (“HMRC”) dated 23 April 2015,
confirming an amendment made by a closure notice issued on 16 January 2015, that
an unauthorised payment charge and surcharge of £11,619.85 (as to which, see below)
arises in respect of Mr Browne’s receipt of pension funds of £21,127 from his Pearl
Assurance Pension Plan into a bank account under his sole control on 13 April 2010.
10 This appeal was given the reference TC/2015/03327. £11,619.85 is 55% of £21,127
and, according to HMRC, represents an unauthorised payment charge at a rate of 40%
made pursuant to section 208 Finance Act 2004 (“FA 2004”) and an unauthorised
payment surcharge at a rate of 15% made pursuant to section 209 FA 2004.

2. Mr Browne also appealed to this Tribunal, by a notice of appeal dated 9 July
15 2015, against an assessment made under section 29 of the Taxes Management Act
1970 (“TMA 1970”) for the year ended 5 April 2010 in the amount of £64,613.63.
This appeal was given the reference TC/2015/04227. £64,613.63 is 55% of
£117,479.34, which is the amount of a cheque made payable to “St James’s Place Mr
P Browne” which was sent to Mr Browne by Scottish Life, a division of The Royal
20 London Mutual Insurance Society, on 16 March 2010 representing the designated
amount of Mr Browne’s pension plan (Number 2531940) with Scottish Life. Scottish
Life stated in the letter to Mr Browne which covered this cheque that the cheque
‘discharges us of all liability for the fund’ – i.e. in respect of Mr Browne’s pension
plan referred to. The 55% rate of tax assessed represents an unauthorised payment
25 charge at 40% under section 208 FA 2004 and an unauthorised payment surcharge at
15% under section 209 FA 2004, which HMRC contend are due.

3. Mr Browne arranged for the payment of £138,606.34 (the aggregate of the
amounts of £21,127 and £117,479.34 received by him from the Pearl and Scottish
Life respectively) into a self-invested personal pension plan (a “SIPP”) with TD
30 Direct Investing in April 2013 (after 5 April 2013). His case is that there has been no
unauthorised payment made – what has happened is that his pension funds with Pearl
and Scottish Life were transferred to a SIPP with TD Direct Investing, albeit over a
period of time, and that it was his intention at all relevant times to achieve such a
transfer.

35 4. A form of application for discharge of the unauthorised payment surcharges was
made by Mr Arthur on behalf of Mr Browne by a fax to HMRC dated 28 January
2015. This was responded to by HMRC by a letter to Mr Arthur dated 23 April 2015.
HMRC’s decision was that the application (treated as made under section 268 FA
2004) should be refused on the ground that the surcharge was just and reasonable and
40 that the circumstances did not disclose an error of administration.

The issues

5. Four issues for our decision were identified by HMRC. They are: (1) whether the
transfers respectively from the Pearl and Scottish Life were unauthorised member
payments chargeable to tax at 40% under section 208 FA 2004; (2) whether, if so, the

payments exceeded 25% of the total value of Mr Browne's respective pension funds and were therefore chargeable to the unauthorised payment surcharge at 15% under section 209 FA 2004; (3) whether, if so, Mr Browne's application for discharge of the unauthorised payment surcharge under section 268 FA 2004 ought to have been
5 accepted; and (4) whether HMRC were entitled to raise the assessment for the year ended 5 April 2010 under section 29 TMA 1970.

The relevant law

6. Sections 160 and 164 FA 2004 deal with payments which a registered pension scheme (being a pension scheme as defined in section 150 FA 2004 which is
10 registered under Chapter 2, FA 2004) is authorised to make to or in respect of a member of the pension scheme. A payment made by a registered pension scheme to or in respect of a member which is not authorised by section 164 is an 'unauthorised member payment' – see: section 160(2)(a) FA 2004.

7. Section 164 FA 2004 lists various payments which a registered pension scheme is
15 authorised to make and, relevantly to this appeal, they include 'recognised transfers' (see: section 164(1)(c) FA 2004). A 'recognised transfer' is defined in section 169 FA 2004, so far as relevant to this appeal, as being 'a transfer of sums or assets held for the purposes of, or representing accrued rights under, a registered pension scheme so as to become held for the purposes of, or to represent rights under' another
20 registered pension scheme, in connection with a member of that pension scheme.

8. By section 169 (1B) FA 2004, HMRC may by regulations provide that where sums or assets transferred represent an original scheme pension, the transfer is not a recognised transfer 'unless those sums or assets are, after the transfer, applied towards the provision of' a new scheme pension'. HMRC has, by regulation 3 of the
25 Registered Pension Schemes (Transfer of Sums and Assets) Regulations 2006 (SI 2006/499), made such a regulation, and by regulation 3(2) of those Regulations it is provided that if the sums or assets are so applied, the new scheme pension is to be treated as if it were the original scheme pension for stated relevant purposes.

9. Section 208 FA 2004, as already indicated, imposes a charge to income tax, to be
30 known as the unauthorised payments charge, to which, in the case of an unauthorised member payment, the person in respect of which the payment is made is to be liable (section 208(2)(a) FA 2004). The rate of the charge is 40% (section 208(5) FA 2004) and it is provided that an unauthorised payment (which includes an unauthorised member payment) may also be subject to the unauthorised payments surcharge under
35 section 209 (see: section 208(7)(a) FA 2004).

10. Section 209 FA 2004 imposes a charge to income tax, to be known as the unauthorised payments surcharge, where a surchargeable unauthorised payment (which includes a surchargeable unauthorised member payment) is made by a
40 registered pension scheme. The rate of the surcharge is 15% (see: section 209(6) FA 2004).

11. In the case of unauthorised member payments, the surcharge applies only if 'the surcharge threshold' is reached within 12 months after a 'reference date' (section 210

FA 2004). The first ‘reference date’ is the date on which the pension scheme first makes an unauthorised member payment to or in respect of the person concerned (section 210(4) FA 2004). The ‘surcharge threshold’ is reached, in effect, when 25% of the pension fund is used up by unauthorised member payments. In this case, if the payments made by Pearl and/or Scottish Life were unauthorised member payments, the ‘surcharge threshold’ was reached immediately on the respective payments being made because those payments represented 100% of the respective funds held by the Pearl and Scottish Life for Mr Browne.

12. As already indicated, a person liable to the unauthorised payments surcharge may apply to HMRC for the discharge of that person’s liability to the surcharge on the ground that ‘in all the circumstances of the case, it would not be just and reasonable for’ that person to be liable to the surcharge in respect of the payment giving rise to it (section 268(2) and (3) FA 2004).

13. Where HMRC decide to refuse an application made under section 268 (as in this case), the applicant may appeal to this Tribunal against that decision (section 269(2) FA 2004). The Tribunal’s function on that appeal is to consider whether the applicant’s liability to the surcharge ought to have been discharged (section 269(6) FA 2004). In other words, this Tribunal has a full appellate jurisdiction in the matter.

14. We were also referred to HMRC’s published guidance as to the treatment of ‘genuine errors’ where, in certain circumstances unauthorised payments are not regarded as such. This guidance is contained in HMRC’s Pension Tax Manual under reference PMT 146100. This guidance is given as part of the care and management functions of HMRC and (we were informed by Mrs Gray) has no specific legislative authority.

15. We were also referred to regulation 13 of the Registered Pension Schemes (Authorised Payments) Regulations 2009 (SI 2009/1171). Pursuant to that regulation (and regulation 4 of those Regulations) a payment made in error, which is intended to represent a payment permitted by the pension rules to or in respect of a member, provided the payer believed that the recipient was entitled to the payment (and was entitled to it in the amount paid), may be regarded as an authorised member payment within section 164(f) FA 2004 (a payment of a description prescribed by regulations).

The Facts

16. We had before us a statement (called a “Chronology Time Line – Peter Brown Pension Transfer”) made by Mr Browne, who also gave oral evidence at the hearing and was cross-examined by Mrs Gray. We also had before us two bundles of documents produced by HMRC and a bundle provided by Mr Arthur on behalf of Mr Browne.

17. From the evidence before us we find the following facts.

18. Mr Browne started his career as a financial advisor with the Prudential in 1994. He was made redundant by them in 2000. From that time onwards he worked for various Independent Financial Advisers (IFAs). He was an agent for SIFA Ltd. from

2005 to 2008 and joined St James's Place Wealth Management ("St James's Place") as an adviser in 2008. He was with them until February 2011, and it was in this period that the two payments from Scottish Life (on 16 March 2010) and the Pearl (on 13 April 2010) were made. The areas of financial advice covered by his work included pensions and life assurance.

19. Mr Browne intended to transfer all his existing pension arrangements (being the funds with the Pearl and Scottish Life respectively) to the St James's Place Wealth Management Retirement Plan ("the St James's Place Plan"). Being an adviser with St James's Place, he attempted to handle the transfer himself.

20. In relation to the Scottish Life transfer, Mr Browne wrote on 22 February 2010 to Scottish Life from an address in Lewes (Castledon), which he told us was an office address which he had rented in his capacity as agent for St James's Place, confirming that he gave his permission for the transfer of his Scottish Life policy to the St James's Place Plan. We have also seen a copy of a St James's Place compliments slip dated 8 March 2010, which Mr Browne sent to Scottish Life asking that the cheque be sent to St James's Place Wealth Management at the Castledon address. We have also seen letters dated 16 March 2010 from Scottish Life to St James's Place and to Mr Browne, both sent to the Castledon address. Both letters referred to the "Transfer Value/Open Market Option Request Form" which had been completed. We have not seen a copy of this form, but it appears to us (and we so find) that it was completed by Mr Browne himself with a view to his intended transfer of the fund with Scottish Life to the St James's Place Plan.

21. The letter dated 16 March 2010 from Scottish Life to St James's Place covered a cheque for £117,479.34 which the letter states was 'made payable to Mr P Browne'. The letter of the same date from Scottish Life to Mr Browne states as follows: "We've issued a cheque for £117,479.34 made payable to St James' Place Mr P Browne".

22. We have not seen a copy of the cheque. Mr Browne's evidence was that it was made out to St James's Place re: Mr P Browne. In any event, Mr Browne said that he regarded it as quite unusual to receive such a cheque and that he was waiting to receive the later transfer from the Pearl and thought that he needed to get the Scottish Life cheque paid so as to be ready for the amount to be transferred (to the St James's Place Plan). His evidence was that he did not consider any option other than banking the cheque and that he had made an error in not giving the cheque to St James's Place. He opened a new bank account with Lloyds TSB in the name of 'St James Place Re Peter Browne' giving his home address (in Brighton). He had never needed a business bank account before. The bank account was opened on 29 March 2010 with the deposit of a cheque for £100 referenced 'Cliffe Lewes' and the cheque for £117,479.34 was deposited in the account the next day, 30 March 2010. He had told Lloyds TSB that he needed a business bank account and his purpose in opening it was, he said, to keep the pension funds separate from other funds.

23. The statements for the Lloyds TSB account which were with our papers show that a further deposit of £21,127 (the amount of the payment made by the Pearl) was made to the account on 13 April 2010.

24. We have also seen a letter from the Pearl to St James's Place at St James's Place House, in Cirencester, which was dated 8 April 2010 referencing Mr Browne as the 'Client name' and covering the cheque for £21,127. This letter followed a letter dated 6 April 2010 sent by the Pearl to St James's Place at the Cirencester address. The letter is headed "Transfer of pension benefits – Mr Peter Browne" and refers to 'your request to transfer benefits for the above customer'. We have seen a copy of the request stating that the receiving pension scheme is 'St James's Place Personal Retirement Plan' and a form of discharge authorising the Pearl to transfer the sum of £21,127.00 to 'St James Place UK PLC', which was made and signed by Mr Browne. It is stated in the letter dated 8 April 2010 that 'the cheque representing the transfer value [£21,127.00] is being sent separately to you. This must be used to invest the policyholder's benefits in the receiving scheme'.

25. We have also seen a letter dated 6 April 2010 from the Pearl to Mr Browne at the Castledon address confirming that 'your recent request to transfer your pension benefits to St James's Place Personal retirement Plan has now been processed. The transfer value payment of £21,127.00 representing the transfer value has been forwarded to St James's Place Personal Retirement Plan today'.

26. The precise circumstances in which the cheque from the Pearl (which we have seen, and which was made out to 'St James's Place re Browne', with a reference number) came to Mr Browne were not made clear to us. Mr Browne however told us that the documentation and the cheque came to him and, as we have already said, the cheque was deposited in the new Lloyds TSB account in the name of 'St James Place Re Peter Browne' on 13 April 2010. Mr Browne told us that he did not take any advice at this stage.

27. We were also shown a St James's Place document headed "Partners/SJP Employees – Own Life Pension Transfers including use of the SJP Drawdown Plan". This document was apparently a circular put out by the Business Assurance department of St James's Place, based in Cirencester. It set out arrangements whereby certain partners and their spouses and employees were able to transfer their accrued pension benefits with other providers to a plan with St James's Place without following the normal pension transfer advice and documentation procedures. It is made plain in the document that St James's Place does not advise in these cases and that therefore no St James's Place guarantee applies.

28. The document indicates that the individual concerned (in this case, Mr Browne) would send the necessary documents provided by the other pension provider(s) (ceding providers) to the ceding providers and would receive a cheque from the ceding provider. The document states that the cheque 'can be submitted to Craigforth via Office Administration'.

29. Whatever submission 'to Craigforth via Office Administration' might mean, it was not carried out in this case. Mr Browne told us that his decision to transfer his existing pension funds to the St James's Place Plan had been "sparked" by this document and that he had expected to be paid a commission in connection with the transfer.

30. The statements for the Lloyds TSB account show that Mr Browne made a payment of £115,000 out to another account which was debited on 18 May 2010. He made further transfers which were debited on 14 June 2010 (£10,000) and 16 June 2010 (£8,000). These latter two transfers were traced to deposits made into another Lloyds TSB account in Mr Browne's own name, where they were additions to other savings. A statement of another savings account in Mr Browne's name, with SAGA Personal Finance Limited, showed a deposit on £100,000, recorded as being credited on 17 May 2010. Mr Browne's evidence (which we accept) was that this was derived from the pension payments – and was linked to the debit of £115,000 from Lloyds TSB (business) account on 18 May 2010.

31. The statements for the Lloyds TSB (business) account also show 'bill payments' of £5,000 and £705 being debited on 3 June 2010 and 31 December 2010 respectively. Mr Browne's evidence was that he did not recollect what these payments represented.

32. In September 2010 Mr Browne was informed by St James's Place that he would have his contract as an adviser with St James's Place terminated due, as he said, to 'lack of production'. He had not found a way to complete the transfer into the St James's Place Plan by the time he left St James's Place in February 2011.

33. Mr Browne's evidence was that he thought that the fact that the designated amount paid by Scottish Life of £117,479.34 included 'protected rights' valued at £45,211.26, as well as non-protected rights (valued at £72,268.08) had been an obstacle to making the transfer to the St James's Place Plan. We did not understand from his evidence why he held this view.

34. He told us that the reason he was unable to complete the transfer into the St James's Place Plan was that a payment from a personal bank account could not be accepted as a transfer of pension funds.

35. Mr Browne decided to find another pension provider to transfer the funds to. His evidence was that this was difficult because the funds included a value for protected rights, because the funds were to be provided from a private account and because he did not want to trigger tax relief in relation to the transferred funds – tax relief would only have been appropriate to a 'fresh' pension contribution, and would not have been appropriate to a pension transfer. Mr Browne's difficulty was that pension providers accepting funds from a private account would treat the payment as a 'fresh' pension contribution.

36. On 22 June 2011, Mrs Irene McGowan, Director of Life and Pensions Administration at St James's Place wrote to Mr Browne informing him that HMRC had advised St James's Place that a transfer of protected rights should have been received by St James's Place for Mr Browne from Scottish Life in March 2010. Mrs McGowan went on to inform Mr Browne that St James's Place had been unable to trace a Plan for him containing protected rights and asked for his confirmation that the funds were not invested with St James's Place. Mr Browne confirmed that he had no protected rights invested with St James's Place in a letter to them dated 29 June 2011.

37. Mr Browne wrote to HMRC on 4 July 2011 stating that he understood that there was a query over his protected rights pension plan transferred from Scottish Life, and adding that the transfer 'did not get completed and is now held by me. I am declaring this as a lump sum on my 2010/2011 self assessment'. This correspondence seems to have prompted a letter from HMRC to Mr Browne dated 5 December 2011 (which we have not seen), to which Mr Browne replied on 30 December 2011 confirming that St James's Place did not hold the protected rights fund (of £45,211.26) but that he held it and 'will declare it as a Lump Sum in my Tax Return January 2012 if this is acceptable to you'. On 17 January 2012, Mr Browne wrote a follow-up letter to HMRC informing them that he proposed 'to transfer the pension funds in question to an appropriate pension fund with another provider as the transaction to St James Place did not complete'. He asked for HMRC's confirmation that this was acceptable. (This letter was resent to another official at HMRC, this time dated 27 March 2012.) He received from HMRC a response to his letter dated 17 January 2012 – their letter dated 15 March 2012. In that response a Customer Advisor at HMRC PAYE and Self Assessment office asked Mr Browne to 'tell us about any appropriate transaction with regard to this fund in your self assessment return'.

38. On 20 July 2012, Mr Browne wrote to HMRC informing them that he had 'as yet been unable to complete an appropriate transaction re the uncompleted transfer of the Pension Funds in question' and that he was still holding a total of £138,606.34 including £45,211 in protected rights fund. He said that 'if this transfer cannot be completed [he would] confirm to you'. There was in our papers a letter from Mr Browne to HMRC dated 31 July 2012 in which he said that he had not been able 'to complete an appropriate transaction re the uncompleted transfer of the Pension Funds in question' and offering to make a payment of £57,174.97 being 55% of a calculated excess over 'the normal lump sum'. Mrs Gray told us that HMRC had not been able to trace having received this letter, to which Mr Browne commented that he had had no response to it but that he was 'quite used to not getting responses'.

39. Mr Browne did not make any relevant declaration in his tax return for 2010/2011 – his explanation being that he was dealing with the matter in correspondence with HMRC.

40. Mr Browne contracted to act as a representative of another firm, Lighthouse Advisory Services ("Lighthouse"), following his departure from St James's Place. Following a meeting on 17 July 2012 with Lighthouse, Mr Browne's authorisation to transact business as their representative was suspended 'as a result of concerns regarding the pension switch you arranged for yourself in or around March 2010'.

41. Nothing significant appears to have happened between mid-2012 and 23 April 2013, when Mr Browne contributed £138,606.34 into a SIPP with TD Direct Investing. He completed the relevant form with TD Direct Investing on the basis that he was transferring his pension fund to them.

42. TD Direct Investing apparently made a tax reclaim of £34,651.59 to HMRC in respect of this transaction. Plainly they treated the transaction as a fresh pension contribution rather than as a transfer of a pension fund. Mr Browne emailed TD

Direct Investing on 31 July 2013 requesting that they ‘ensure the return of the tax reclaim of £31,651.59 amount to HMRC as soon as possible as I am not entitled to it’. Mr Browne also wrote to HMRC on 10 November 2013 requesting that they authorise the return of the tax reclaim amount of £34,651.59 ‘as soon as possible’.

5 43. We were told that HMRC opened a criminal investigation into Mr Browne’s transactions. This however was discontinued after some 9 months on the advice of the Crown Prosecution Service.

44. Mr Browne also told us that at some period during these events, possibly from 2012 onwards, he has been taking medical advice and medication for anxiety.

10 45. This was the position when HMRC made the decisions against which these appeals have been brought.

Discussion and Decision

15 46. We deal with the issues identified above, as follows. At our oral direction, HMRC sent further written submissions on the effect of section 169 FA 2004 after the hearing (on 10 May 2016). Neither Mr Browne nor Mr Arthur responded to those submissions. We have taken account of HMRC’s submissions in our decision.

Were the transfers respectively from the Pearl and Scottish Life unauthorised member payments chargeable to tax at 40% under section 208 FA 2004?

20 47. The transfers must be regarded as unauthorised member payments, unless they fall within the meaning of either ‘recognised transfers’ in section 164(1)(c) FA 2004 or ‘payments of a description prescribed by regulations made by’ HMRC in section 164(1)(f) FA 2004. Neither party suggested otherwise. Unauthorised member payments are chargeable to tax at 40% - see: section 208(5) FA 2004.

25 48. A ‘recognised transfer’ is, as we have already said, relevantly defined in section 169(1) FA 2004 as ‘a transfer of sums or assets held for the purposes of, or representing accrued rights under, a registered pension scheme so as to become held for the purposes of, or to represent rights under ... another registered pension scheme ... in connection with a member of that pension scheme’.

30 49. The words ‘transfer of sums or assets ... *so as to become held* for the purposes of, or to represent rights under ... another registered pension scheme’ (our emphasis) in our view plainly indicate that the transfer cannot have an intermediate stage where the sums or assets are not held for the purposes of another registered pension scheme, even though eventually they come to be so held.

35 50. Mr Arthur submitted that as a matter of substance the transfers from the Pearl and Scottish Life were transfers of sums so as to become held for the purposes of another pension scheme, the TD Direct Investing SIPP, in connection with a member (Mr Browne) of that SIPP. He supported that submission by emphasising that Mr Browne had acted in good faith and that he had intended to make a transfer to another pension scheme throughout. We note that Mr Browne’s original intention had been to transfer
40 his pension funds from the Pearl and Scottish Life to the St James’s Place Plan but

that this had not been possible and the payment into the TD Direct Investing SIPP had been an alternative solution that it took some three years to achieve.

51. We reject Mr Arthur's submission as being incompatible with the wording of section 169(1) FA 2004, particularly the words 'so as to become held' which in our view must be construed strictly to apply the evident legislative purpose that sums transferred between pension schemes can only be authorised payments if they do not leave the control of a registered pension scheme and, particularly, if they do not come at any time into the control of the member of the scheme. This is necessary in order to protect the integrity of the tax reliefs and exemptions associated with registered pension schemes. On the facts, the sums in question came into Mr Browne's control from the time they were credited to the Lloyds TSB account which he opened in the name of 'St James Place Re Peter Browne'.

52. Regulation 3 of SI 2006/499 operates as a restriction of the definition of 'recognised transfer' in section 169(1) FA 2004, requiring that the transfer must, in addition to falling within the words of section 169(1) entail that the sums or assets transferred are, after the transfer, applied towards the provision of a new scheme pension. Plainly, if, as we have held, the payments from the Pearl and Scottish Life in this case did not constitute recognised transfers within the wording of section 169(1), they will not constitute recognised transfers by virtue of regulation 3 of SI 2006/499.

53. Regulation 13 of SI 2009/1171 (pensions paid in error) has effect if a payment is made in error which is intended to represent a payment permitted by the pension rules to or in respect of a member if the payer (in this case the Pearl and/or Scottish Life) believed that the recipient was entitled to the payment and entitled to it in the amount paid. In this case, the facts found suggest that the payments (to Mr Browne) were made in error, and that they were intended (by the Pearl and/or Scottish Life) to represent payments permitted by the respective pension rules, but they do not suggest that the Pearl and/or Scottish Life believed that Mr Browne was entitled to the payment. The cheque issued by the Pearl was made out to 'St James' Place re Browne' and the cheque issued by Scottish Life was made out to 'St James' Place Mr P Browne' – and this is why the Lloyds TSB account was opened by Mr Browne in the name of 'St James Place Re Peter Browne' – which shows conclusively that the Pearl and Scottish Life intended to make the payments into the St James's Place Plan and not to Mr Browne personally. Therefore we decline to find that the Pearl and/or Scottish Life believed that Mr Browne (personally) was entitled to the respective payments. For this reason, regulation 13 (read together with regulation 4) of SI 2009/1171 cannot have the effect of making the payments 'recognised transfers' within section 164(1)(f) FA 2004 or at all.

54. Finally, with respect to this issue, we make reference to HMRC's published guidance as to the treatment of 'genuine errors'. Because this guidance has no specific legislative authority, we would in any case be unable to hold on the basis of the guidance alone, that the payments, which we consider – for the reasons given above – are unauthorised member payments as a matter of law, are not or are not to be treated as unauthorised member payments. However we do not consider that the relevant part of the guidance could apply to the facts of this case. It is necessary for

such application that an inadvertent payment is made in genuine error, such that there was no intention to make a payment to that extent or at all, and the erroneous payment must be spotted by the management of the scheme and the error rectified as soon as reasonably possible. In this case there was an intention to make a payment, albeit not to Mr Browne personally, but in any event there was no timely rectification of the error.

55. For the reasons given above, we hold that the transfers respectively from the Pearl and Scottish Life were unauthorised member payments chargeable to tax at 40% under section 208 FA 2004.

10 **Did the payments exceed 25% of the total value of Mr Browne's respective pension funds so that they were therefore chargeable to the unauthorised payment surcharge at 15% under section 209 FA 2004?**

56. There was no argument to the effect that the payments by the Pearl and Scottish Life did not exceed 25% of the total value of Mr Browne's respective pension funds. As we have said, the 'surcharge threshold' referred to in section 210 FA 2004 was reached immediately on the respective payments being made, because those payments represented 100% of the funds held by the Pearl and Scottish Life respectively for Mr Browne.

57. It follows that the payments were both chargeable to the unauthorised payment surcharge at 15% under section 209 FA 2004.

Ought Mr Browne's application for discharge of the unauthorised payment surcharge under section 268 FA 2004 to have been accepted?

58. As we have already said, the Tribunal's function with respect to this issue is to consider whether Mr Brown's liability to the unauthorised payment surcharge ought to have been discharged by HMRC – see: section 269(6) FA 2004. The Tribunal has a full appellate jurisdiction over this issue.

59. A liability to the unauthorised payment surcharge arising in this case ought to be discharged if 'in all the circumstances of the case, it would not be just and reasonable for [Mr Browne] to be liable to the unauthorised payment surcharge in respect of the [payments]' (see: section 268(3) FA 2004).

60. HMRC's case that we should refuse a discharge of the unauthorised payment surcharge is as follows.

61. First, Mr Browne could have avoided the making of unauthorised payments simply by returning the cheques to the Pearl and/or Scottish Life pending readiness of the transfer documentation to the St James's Place Plan. Instead he credited the cheques to a bank account under his own control.

62. Secondly, as an IFA himself, Mr Browne should have been aware of the correct transfer procedures and the error of taking control of the transferred funds himself personally.

63. Thirdly, in order to cash the cheques issued by the Pearl and Scottish Life, Mr Browne opened a bank account using his home address, when the cheques were made payable to St James's Place.

5 64. Fourthly, the monies were moved around Mr Browne's personal accounts a few weeks after they were credited to the new bank account.

65. Fifthly, Mr Browne only put the funds into a SIPP some three years after receiving them, and after HMRC had opened enquiries into the matter.

10 66. HMRC did not challenge Mr Browne on his contention that at all relevant times he intended to transfer his pension funds into another registered pension scheme. Indeed they justified the making of the discovery assessment (see: below) on the basis that Mr Browne's omission of the unauthorised payment surcharge from his tax return was careless rather than deliberate. We find that at all relevant times he did hold the
15 intention to transfer his pension funds into another registered pension scheme. He made, as he recognised, a material error in not handing over the cheques received by him to St James's Place – as appears to have been the procedure indicated by the St James's Place document referred to at paragraphs 27 to 29 above. He also could have, but did not, return the cheques to the Pearl and Scottish Life until he had clarified how they would be passed to St James's Place as transfers into the St James's Place Plan.
20 Further, he took no advice on how to proceed in the circumstances he found himself in.

67. However, we consider these errors were made because of foolishness. We agree with HMRC that, as an IFA, Mr Browne should have known how to avoid the errors
25 he made. Nevertheless we find that his conduct was caused by his foolishness rather than any desire to obtain pension funds under his own control without suffering the accompanying tax consequences.

68. The most material fact in the context of this issue is, we find, that Mr Browne kept the funds (£138,606.34) during the three years from the receipt of them in 2010 to the
30 payment of them to the TD Direct Investing SIPP in 2013. This, and the payment of them into the TD Direct Investing SIPP, is corroborative of, and consistent with, our finding that he intended throughout to transfer his pension funds into another registered scheme.

69. We recognise that the payment of the funds into the TD Direct Investing SIPP in
35 2013 took place after HMRC had begun enquiring into the matter, but, as we have found that Mr Browne at all relevant times intended to transfer the funds into another registered pension scheme, the fact that this objective was achieved after HMRC had begun enquiring into the matter is not significant.

70. In the context of deciding whether, in all the circumstances of the case, it would
40 not be just and reasonable for Mr Browne to be liable to the unauthorised payment surcharge in respect of the payments by the Pearl and Scottish Life, we consider that we should have regard to the discernible purpose of the surcharge.

71. We consider that the purpose of the surcharge is to penalise unauthorised payments where they are made in order to frustrate the purposes of the pension scheme tax regime and abuse its tax reliefs and exemptions. Where, as we consider is the case with these appeals, the unauthorised payments were not made for that reason, and the funds concerned remain vested in a registered pension scheme (albeit with a three year interlude under the personal control of Mr Browne), we find, having considered all the circumstances, that it would not be just and reasonable for Mr Browne to be liable to the unauthorised payment surcharge in respect of the payments by the Pearl and Scottish Life, and we so decide. Among the circumstances relevant to our decision is the fact that at least some of the three year delay was caused by Mr Browne's anxiety and HMRC's criminal investigation into the matter.

72. We therefore allow Mr Browne's appeal on this issue and quash the unauthorised payment surcharge imposed.

Were HMRC entitled to raise the assessment for the year ended 5 April 2010 under section 29 TMA 1970?

73. The relevant provisions of section 29 TMA 1970 are as follows.

'(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment-

(a) that any income which ought to have been assessed to income tax ... [has] not been assessed

...

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the crown the loss of tax.

(2) ...

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.'

5 74. There are provisions in section 29(6) and (7) amplifying section 29(5) above, but it is not necessary for us to set them out.

75. As HMRC recognise, the burden of proof is on them to establish that there has been a discovery, that there has been a loss of tax brought about carelessly or deliberately by Mr Browne – in this case HMRC allege carelessness and not any deliberate action on Mr Browne's part – and that Mr Browne acted carelessly or
10 deliberately – carelessness is alleged – in the completion and submission of his tax return for the year ended 5 April 2010.

76. It is clear that HMRC discovered that the unauthorised payment charge relative to the payment of £117,479.34 made by Scottish Life on 16 March 2010 had not been assessed. Mr Browne's self assessment for that year had not included it. An
15 assessment under section 29 TMA 1970 for the year ended 5 April 2010 could therefore be made, provided that either section 29(4) or section 29(5) TMA 1970 is satisfied.

77. We consider that the evidence shows that the omission of the unauthorised payment charge from Mr Browne's self assessment for the year ended 5 April 2010
20 was careless. He knew at the time he made that self assessment that the funds paid by Scottish Life had not been transferred to another registered pension scheme and he should have known that in those circumstances an unauthorised member payment giving rise to an unauthorised payment charge had been made. Therefore the condition in section 29(4) TMA 1970 was satisfied. This is enough to confirm the
25 validity of the discovery assessment.

78. We therefore decide this issue in favour of HMRC and confirm the validity of the assessment.

Disposition

79. For the reasons given above we dismiss Mr Browne's appeal against the
30 amendment made by the closure notice in relation to the year ended 5 April 2011, except insofar as that amendment represents an unauthorised payment surcharge at the rate of 15% made pursuant to section 209 FA 2004. We also dismiss Mr Browne's appeal against the discovery assessment made under section 29 TMA 1970 for the year ended 5 April 2010 except insofar as that assessment relates to an unauthorised
35 payment surcharge at the rate of 15% made pursuant to section 209 FA 2004. To the extent that the appeals relate to the unauthorised payment surcharges, they are allowed.

Afterword

80. Although the tax consequences of the payment made by Mr Browne to TD Direct
40 Investing whereby his SIPP with them was set up in 2013 are not part of the issues to be determined by us in this appeal, we observe that it seems to us to follow from our decision that the payments made to Mr Browne by Scottish Life and the Pearl were

unauthorised payments, that the payments made by Mr Browne into the TD Direct Investing SIPP on 23 April 2013 were not recognised transfers and so may well be contributions to that SIPP attracting income tax relief in the tax year ended 5 April 2014. We leave this to the parties as a matter to consider further.

5 **Further appeal**

81. 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.

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**JOHN WALTERS QC
TRIBUNAL JUDGE**

RELEASE DATE: 17 AUGUST 2016

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