

RE: THE ASSOCIATION OF MEMBER DIRECTED PENSION SCHEMES

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OPINION

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1. An individual who contributes to a registered pension scheme is entitled to tax relief.

That relief is granted by FA 2004 section 188 in the following terms:

*“(1) An individual who is an active member of a registered pension scheme is entitled to relief under this section in respect of relievable pension contributions paid during a tax year if the individual is a relevant UK individual for that year.*

*(2) In this Part “relievable pension contributions”, in relation to an individual and a pension scheme, means contributions by or on behalf of the individual under the pension scheme other than contributions to which subsection (3) applies.*

*(3) This subsection applies to-*

*(a) any contributions paid after the individual has reached the age of 75,*

*(aa) any contributions which are life assurance premium contributions (see section 195A),*

*(b) any contributions paid by an employer of the individual (as to which see section 196 to 201), and*

*(c) any amounts paid by the Board of Inland Revenue under section 42A(3) or 43 of the Pension Schemes Act 1993 (c 48) or section 38A(3) or 39 of the Pension Schemes (Northern Ireland) Act 1993 (c 49) (rebates and minimum contributions).*

...

*(8) The following sections make further provision about relief under this section -*

*Section 198 (relevant UK individual),*

*Section 190 (annual limit for relief),*

*Sections 191 to 194 (methods of giving relief), and*

*Section 195 (transfer of certain shares to be treated as payment of contributions)."*

2. The term "relevant UK individual" is defined in section 189 as follows:

- "(1) For the purposes of this Part an individual is a relevant UK individual for a tax year if-*
- (a) the individual has relevant UK earnings chargeable to income tax for that year,*
  - (b) the individual is resident in the United Kingdom at some time during that year,*
  - (c) the individual was resident in the United Kingdom both at some time during the five tax years immediately before that year and when the individual became a member of the pension scheme, or*
  - (d) the individual, or the individual's spouse or civil partner, has for the tax year general earnings from overseas Crown employment subject to UK tax."*

3. The annual limit for relief under section 188 is dealt with in section 190:

- "(1) The maximum amount of relief to which an individual is entitled under section 188 (relief for contributions) for a tax year is (subject as follows) the amount of the individual's relevant UK earnings which are chargeable to income tax for the tax year.*
- (2) If the amount of the individual's relevant UK earnings which are chargeable to income tax for the tax year is less than the basic amount, the maximum amount of relief to which the individual is entitled under section 188 for the tax year is increased by the difference between:*
- (a) the amount of the individual's relevant UK earnings which are so chargeable, and*
  - (b) the basic amount,*
- (so that, if the individual has no relevant UK earnings which are so chargeable, the maximum amount of such relief is the basic amount).*
- (3) Subsection (2) is subject to section 191(7) (limit on methods of giving relief to which individual's entitled by virtue of subsection (2)).*
- (4) "The basic amount" is £3,600 or such greater amount as the Treasury may by order specify."*

4. Relief can be given in a number of ways. This is provided for in section 191:

*“(1) Relief to which an individual is entitled under section 188 (relief for contributions) in respect of contributions is to be given as provided by this section.*

*(2) Subject as follows, the relief is to be given in accordance with section 192 (relief at source).”*

5. In this Opinion, I am concerned with relief at source under section 192. This section provides:

*“(1) Where an individual is entitled to be given relief in accordance with this section in respect of the payment of the contribution under a pension scheme, the individual or the person by whom the contribution is paid is entitled, on making the payment, to deduct and retain out of it a sum equal to income tax on the contribution at the basic rate for the tax year in which the payment is made.*

*(2) If a sum is deducted from the payment of the contribution-*

*(a) the scheme administrator must allow the deduction on receipt of the residue, and*

*(b) the individual or other person is acquitted and discharged of so much money as is represented by the deduction as if the sum had actually been paid, and*

*(c) the sum deducted is to be treated as income tax paid by the scheme administrator.*

*(3) When the payment of the contribution is received-*

*(a) the scheme administrator is entitled to recover from the Board of Inland Revenue the amount which is treated as income tax paid by the scheme administrator in relation to the contribution, and*

*(b) any amount so recovered is to be treated for the purposes of the Tax Acts in the same manner as the payment of the contribution.*

...

*(6) Subsections (1) and (2) have effect subject to such conditions as the Board of Inland Revenue may prescribe by regulations.*

- (7) *The Board of Inland Revenue may by regulations make provision, for carrying subsections (1) to (3) into effect, in particular by making provision-*
- (a) *about how a sum is to be recovered under subsection (3)(a) (including the manner in which a claim for the recovery of a sum is to be made,*
  - (b) *for the giving of such information, in such form, as is prescribed by or under the regulations,*
  - (c) *for the inspection of documents by persons authorised by the Board of Inland Revenue, and*
  - (d) *specifying the consequences of failure to comply with conditions prescribed by virtue of subsection (6).*
- (8) *Regulations under this section may, in particular-*
- (a) *modify the operation of any provision of the Tax Acts, or*
  - (b) *provide for the application of any provision of the Tax Acts (with or without modification)."*

6. The relevant regulations are the Registered Pension Schemes (Relief at Source) Regulations 2005 (SI 2005/3448). The key provisions in the 2005 Regulations are regulations 3-6 which provide as follows:

**“3 Prescribed conditions**

- (1) *Regulations 4, 5 and 6 specify the conditions subject to which relief under section 191 (methods of giving relief for pension contributions) shall be given in accordance with section 192(1) and (2) (relief at source).*
- (2) *The particulars specified in regulation 4(2) and the declarations required by regulations 5(2) and 6(2) must be given to the scheme administrator by the relevant individual. This paragraph is subject to the qualifications in paragraph (3) and regulation 7.*

...

**4 Information to be given to the scheme administrator**

- (1) *The scheme administrator must be given—*
  - (a) *the particulars specified in paragraph (2), and*
  - (b) *the declarations required by regulations 5(2) and 6(2),*

before the time specified in paragraph (5).

(2) *The particulars are—*

(a) *the relevant individual's full name and permanent residential address including, where the address is in the United Kingdom, the postcode.*

(b) *the relevant individual's date of birth;*

(c) *unless the relevant individual is—*

(i) *aged under 16, or*

(ii) *a citizen of a country outside the United Kingdom who is not resident in the United Kingdom,*

*the relevant individual's national insurance number, or a statement that he does not have one;*

(d) *except where the scheme is an occupational pension scheme within the meaning of section 150(5), the category of status specified in paragraph (3) applicable in the relevant individual's case or, if more than one category is applicable, the category which is that individual's principal source of income.*

...

**5 Declaration that relevant individual entitled to relief**

(1) *Before a relevant individual pays a net contribution for the first time, the scheme administrator must be given the declaration specified in paragraph (2).*

(2) *The declaration is one that the total contributions to any registered pension schemes in respect of which he is entitled to relief under section 188 will not exceed the higher of—*

(a) *the basic amount, or*

(b) *the relevant individual's relevant UK earnings, within the meaning of section 189 for that tax year.*

**6 Declaration about accuracy of information**

(1) *Whenever particulars are given in accordance with regulation 4 they must be accompanied by the declaration specified in paragraph (2).*

(2) *The declaration is one to the effect that—*

(a) *in relation to—*

- (i) *the particulars specified in regulation 4(2), they are, to the best of the maker's knowledge and belief, correct and complete;*
- (ii) *the declaration specified in regulation 5(2), it is, to the best of the maker's knowledge and belief, correct;*
- (b) *no later than the date specified in paragraph (3), the maker will give notice to the scheme administrator if an event occurs, as a result of which the relevant individual will no longer be entitled to relief for his contributions pursuant to section 188.*
- (3) *The date is the later of—*
  - (a) *5th April in the year of assessment in which the event referred to in sub-paragraph (2)(b) occurs; and*
  - (b) *the date which is 30 days after the occurrence of that event.*
- (4) *If a declaration given under this regulation or regulation 5 is in writing, it shall be signed by, or on behalf of, the maker."*

7. In a number of cases, HMRC have contended that the declaration given in writing by the individual member did not comply with the 2005 Regulations. In particular, it is alleged that declarations did not comply with Regulation 6(2)(b) of those Regulations. I have been provided with details of five cases by those instructing me. I shall deal with each Case separately. However, a general comment is that, while in some cases HMRC may be technically correct, its approach seems to me to be entirely unmeritorious. In no case has there been any loss of tax. There was no case in which relief was not substantively due. There must be a suspicion that this is simply a revenue raising exercise. That said, it cannot be unfair in a public law sense for HMRC to enforce the law unless it has led taxpayers to believe that it will not do so. There is no suggestion that HMRC have acted in that way.

8. Regulation 6(2)(b) is a puzzling provision. I find it difficult to think of an event which could occur which would result in the individual no longer being entitled to

relief for his contributions. For instance, if he ceases to have relevant UK earnings (or general earnings from overseas Crown employment), he will still be eligible for relief for contributions made in the rest of the tax year. The same point can be made if he ceases to be UK resident. In each case, he may be entitled to relief for contributions in the following tax years depending upon the circumstances in those years.

9. However, a court will strive to give regulation 6(2)(b) some meaning. The best that I can do is to construe it as referring to a situation where, as a result of an event and assuming nothing else changes, the individual will not be entitled to relief for contributions in subsequent tax years. That is reading quite a lot into the provision but it is the only way that I can give it any meaning. I shall, therefore, advise on that assumption.

#### **Case 1**

10. In this Case, the declaration to which HMRC took exception was in the following form:

***"I declare that:-***

- (i) To the best of my knowledge the information contained in this application is true and complete.*
- (ii) If contributions are to be paid I declare that I am under the age of 75 and UK relevant individual.*
- (iii) Any contributions made towards this scheme are not as a result of any pension commencement lump sum payment I have received from this or any other registered pension scheme.*
- (iv) The total contributions to be paid by me or on my behalf to this scheme, together with any contributions to any other registered pension scheme, and in respect of which I am entitled to tax relief, do not exceed the greater of the basic amount or the amount of my relevant UK earnings for that tax year.*

(v) *I agree to inform [REDACTED] in writing if any event occurs as a result of which I will cease to be a UK relevant individual. Notice must be given by 5 April in the year of assessment in which the event occurs or 30 days after the event occurs if later.*

11. HMRC contend that this declaration does not comply with regulation 6(2)(b).
12. The relevant requirement in regulation 6(2)(b) is that the member declares that he will give notice to the scheme administrator if an event occurs as a result of which he will no longer be entitled to relief for his contributions pursuant to section 188. It is necessary, therefore, to examine section 188 to determine the conditions for relief for contributions. Section 188(1) provides that a member is entitled to relief in respect of "relievable pension contributions" paid during the tax year if he is a "relevant UK individual" for that year. Relievable pension contributions mean contributions other than those to which subsection (3) applies. Subsection (3) applies to certain specified types of contributions and to any contributions paid after the individual has reached the age of 75. This is not a matter which needs to be covered by the Reg. 6(2)(b) declaration. The member is required to give his date of birth under Reg. 4(2)(b). It follows that the scheme administrator will know when the member will reach the age of 75.
13. The only other condition for relief in section 188(1) is that the individual is a "relevant UK individual" for that year. However, the declaration in Case 1 covers that requirement. HMRC, quite rightly, do not take any point that "relevant UK individual" has been miswritten as "UK relevant individual" in the declaration.
14. In correspondence, HMRC have made the following point:

*"I acknowledge the point you make about the term "relevant UK individual" but it is possible for anyone who is a relevant UK individual to over-contribute to a pension plan, without actually ceasing to have that status. An example of this would be an individual contributing in excess of their relevant*



*UK earnings in a given tax year. In these circumstances, the individual would not necessarily cease to be a relevant UK individual, but would still be required to tell his scheme administrator that he had over-contributed."*

15. In my view, that point is misconceived. The payment of a certain amount of contributions is not an "event" which results in the member ceasing to be entitled to relief for his contributions. It is highly artificial to regard the payment by virtue of which the member reaches his annual limit as being an "event". Further, the effect of reaching the annual limit is simply that the member is not entitled to relief for any more contributions paid in that year. It cannot be said that he is "no longer entitled to relief for his contributions". He will be entitled to relief for contributions made in the following year. Finally, the potential overpayment of contributions is dealt with by regulation 5(2), not regulation 6(2)(b). The member is required to make a declaration that he will not make contributions in excess of the limits set out in the legislation. In Case 1, the member makes just such a declaration.

## **Case 2**

16. The relevant declaration in Case 2 was as follows:

*"I declare that:*

...

- (c) *I will advise [REDACTED] if I cease to have any relevant UK earnings by the later of 5 April in the year of assessment in which the event occurs or 30 days after the event occurred."*

17. The problem with this declaration is that ceasing to have relevant UK earnings is not the only way in which a member might cease to be a "relevant UK individual" so as to cease to be entitled to relief for contributions. For instance, a member can be entitled to relief for contributions without having any relevant UK earnings. This could happen if he satisfies the alternative conditions in section 189(1)(b), (c), or (d).

Therefore it is possible that a member might cease to be UK resident without having any relevant UK earnings. This is likely to be a rare circumstance in practice. However, it cannot be entirely ruled out and, therefore, ought to be covered by the declaration required by regulation 6(2)(b).

18. HMRC's suggested declaration is:

*"I will advise [REDACTED] if an event occurs, for example I cease to have any relevant UK earnings (and as a result I am no longer entitled to tax relief for an earlier contribution) by the later of 5 April in the year of assessment in which the event occurs and 30 days after the event occurred."*

This declaration seems to me to be both ungrammatical and not compliant with reg. 6(2)(b). It is ungrammatical because there is no description of the event which must occur to trigger the requirement to "advise [REDACTED] Limited". There is simply an example. Further, the example is not a circumstance covered by reg. 6(2)(b). If a member does not have sufficient relevant UK earnings in a year to cover a contribution then the member was never entitled to relief for the amount of the contribution which exceeds the relevant UK earnings. It cannot be said that he is "no longer entitled" to relief. In any event, a failure to generate relevant UK earnings cannot be said to be an "event". The result is that the HMRC approved declaration does not comply with reg. 6(2)(b).

19. It appears, therefore, that HMRC does not understand the requirements of reg. 6(2)(b). It would be worthwhile to challenge HMRC's position on the grounds that its suggested wording is no better than the original wording. HMRC ought to be asked to explain fully why its wording is compliant and the original wording was not.

### Case 3

20. In Case 3, the only relevant declaration was as follows:

***“Personal and employer contributions***

- *If I contribute in excess of the basic amount in a tax year (£3,600 gross for 2008/2009). I understand that I will be entitled to tax relief on contributions equal to my relevant UK earnings.*
- *I will notify the scheme administrator in writing if I contribute in aggregate more than the relevant UK earnings to this and any other pension scheme in a single tax year.”*

21. Earlier in the form, the member is asked whether he is a “relevant UK individual”. However, he is not asked to declare that he will inform the scheme administrator if he ceases to be a relevant UK individual. Therefore, there is no declaration which could satisfy regulation 6(2)(b).

### Case 4

22. I have not had sight of the declarations in this Case. Therefore I cannot comment on whether HMRC’s contentions were correct.

### Case 5

23. As I understand it, the main point in this Case concerns the declaration required by regulation 5(2). The scheme administrators point to clause 7.1 of a Deed of Amendment, dated 7 April 2006. This clause is in the following terms:

**“7. Contributions**

**7.1** *If the Trustee and the Member agree, any restrictions in the Rules or the Establishing Trust Deed relating to the maximum contributions that can be made to the Scheme shall cease to apply from 6 April 2006, and subject to clauses 7.2 and 7.3 below, in any Tax Year contributions may be made by or on behalf of a Member who is a Relevant UK Individual up to the amount of his Relievable Pension*

*Contributions in that Tax Year in accordance with the terms of the Finance Act 2004. If the Trustee and the Member agree contributions may also be made directly to the Scheme by the Member's employer."*

24. The members did not sign the Deed of Amendment as suggested in correspondence with HMRC. However, they did sign an "Application Form" which included the following:

*"Declaration – I hereby apply to become a member of The [REDACTED] SIPP and to be bound by the terms of the Trust Deed & Rules in addition to the Supplemental Deed and any subsequent amendments to these deeds."*

This is a "Declaration" that the member agrees to be bound inter alia by the "Deed of Amendment" including clause 7.1

25. There is nothing in regulation 5 which prescribes any form which the required declaration must take. It is enough that the scheme administrator is given the declaration required by reg.5(2) by the member. In my opinion, by signing the Application Form and agreeing to be bound by the Deed of Amendment, the member is effectively stating that he will not make contributions which exceed the amount prescribed by statute. His statement (or declaration) is that he may not make contributions which exceed his "Relievable Pension Contributions" in accordance with Finance Act 2004. This is defined, by clause 1, as meaning "*any contribution made by a Member which can be treated as a Relievable Pension Contribution for the purposes of section 188(2) of the Finance Act 2004*". This must be a reference to the limit prescribed by Finance Act 2004 for contributions which are relievable. HMRC appear to draw a distinction between a statement and a declaration. It seems to me that the two terms are interchangeable. Indeed, the Application Form describes the act of the member in agreeing to be bound by the Trust Deed & Rules as a "Declaration".

26. In my view, it is strongly arguable that this amounts in substance to a declaration that he will not make contributions which exceed the statutory maximum as required by regulation 5.

#### **Case 6**

27. In this Case, the provider's application form did not include a declaration from the member concerning the accuracy of the information given. This would be a clear breach of Regulation 6(2)(a). As a result, HMRC are entitled to raise an interest charge under their simplified recovery procedure.

#### **Conclusion**

28. In summary, my view is that the scheme administrator in Cases 1 and 5 have a good case that HMRC were wrong to seek to impose an interest charge under the simplified recovery procedure. I would suggest that HMRC's approach in relation to Case 2 should be probed more thoroughly.



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22 December 2011

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DIRECTED PENSION SCHEMES**

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**OPINION**

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