Neutral Citation: [2022] UKFTT 238 (TC)

Case Number: TC08558

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/07217

INCOME TAX – pensions – unauthorised payment charge – whether price paid by scheme in excess of arm's length – yes – whether just and reasonable to discharge surcharge – no – whether distributions made – yes – whether trading status of LLP established by withdrawal of LLP appeal – yes – whether LLP trading with view to profit in alternative – no – appeal dismissed subject to amendment requested by Respondents

Heard on: 21-23 March 2022
Judgment date: 03 August 2022

Before

TRIBUNAL JUDGE ANNE FAIRPO
MR JOHN AGBOOLA

Between

MR GUY BOARDMAN

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Sherry, Counsel, instructed by Weil Gotshal & Manges

For the Respondents: Mr Sarabijt Singh QC instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. The Tribunal is grateful to the parties for agreeing to hold the hearing at short notice via the Tribunal video hearing system to accommodate the fact that the judge had tested positive for Covid shortly before the hearing.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Introduction

3. This is an appeal against:

   (1) notices amending Mr Boardman's tax returns for the tax years ended 5 April 2012 to 5 April 2015 inclusive, issued on 3 March 2017, imposing an aggregate unauthorised payments charge of £154,053.20 and a surcharge of £57,769.95, and bringing certain payments into tax as distributions;

   (2) the refusal on 27 February 2018, upheld on review on 31 August 2018, by HMRC to discharge the surcharge.

4. A schedule of the relevant amounts is provided at Appendix 1 of this decision.

5. The appeal originally included an appeal against assessments in respect of interest relief claimed. In the hearing it was confirmed on behalf of Mr Boardman that these assessments were no longer in dispute and so the aspect of the original appeal is not considered further in this decision.

Abbreviations used

6. Omega No.4 2009 Developments Ltd: *Omega 4 Ltd*

7. Omega Design & Build Partners No.4 LLP: *Omega 4 LLP*

8. Omega No.9 2009 Developments Ltd: *Omega 9 Ltd*

9. Omega Design & Build Partners No.9 LLP: *Omega 9 LLP*

10. Future Capital Partners Limited: *FCP*

11. Future Capital Project Finance Limited: *FCPF*

12. Future Design and Build Services Limited: *FDBS*

13. Boka Property Holding Services (Jersey) Limited: *Boka Jersey*

14. Integrated Property Contractor Services (Montenegro) Limited D.O.O Budva: *IPCS*

15. Liam Martin: *LM*

Background

16. The background to this appeal lies in investments purchased by a self-invested personal pension (SIPP) and associated arrangements. The SIPP was opened by the Appellant (Mr Boardman) with Rowanmoor, a pension scheme administrator, on 17 August 2009.

17. On 31 March 2011 Mr Boardman applied for £289,157 £1 shares in Omega 4 Ltd. On the same date Mr Boardman applied for a partnership interest in the associated partnership, Omega 4 LLP and made a capital contribution of £10,843 to Omega 4 LLP. The total investment of £300,000 was funded by:

   (1) a full recourse loan of £35,000 from FCPF, a company controlled by the promotor of the Omega 4 and Omega 9 investments, FCP. This loan was required to be repaid on or before 30 April 2011;

(2) £10,000 from Mr Boardman's own funds; and

(3) a limited recourse loan from FCPF of £255,000.

18. Mr Boardman was admitted as a member of Omega 4 LLP and allocated the shares in Omega 4 Ltd on 5 April 2011.

19. On 16 May 2011, Mr Boardman sold 170,000 of his shares in Omega 4 Ltd to his SIPP for £1 per share. A further 118,750 Omega 4 Ltd shares were sold by Mr Boardman to his SIPP on 8 June 2011, again for £1 per share. Mr Boardman therefore received, in aggregate, £288,750 from his SIPP as payment for the Omega 4 Ltd shares transferred to the SIPP.

20. The full recourse loan of £35,000 was repaid by Mr Boardman on 24 May 2011.

21. On 12 March 2012, Mr Boardman applied for 96,385 shares in Omega 9 Ltd and also applied for a partnership interest in the associated partnership, Omega 9 LLP, making a capital contribution of £3,615.00. The investment of £100,000 was funded by a limited recourse loan of £88,157.50 from FCPF with the balance being paid from Mr Boardman's own funds.

22. Mr Boardman was admitted as a member of Omega 9 LLP, and was allocated the shares in Omega 9 Ltd, on 20 March 2012.

23. On 23 March 2012, Mr Boardman sold his shares in Omega 9 LLP to his SIPP for £1 each, receiving £96,385 as payment.

24. The companies, Omega 4 Ltd and Omega 9 Ltd, and the related partnerships, Omega 4 LLP and Omega 9 LLP, were described as investment opportunities connected with a hotel development project in Montenegro.

25. Following enquiries into the partnerships' returns, HMRC issued notices amending Mr Boardman's tax returns to give effect to amendments made to the partnerships' tax returns. HMRC also issued closure notices to Mr Boardman imposing the unauthorised payments charge and surcharge, on the basis that the amounts received by Mr Boardman from Rowanmoor were in excess of the amount which might be expected to be paid to a person who was at arm's length.

26. HMRC considered that the arrangements were, in effect, a pension liberation scheme and that the companies' shares had no value. Amounts received from the LLPs were also taxed as a distribution, as HMRC had concluded that the LLPs were not transparent.

27. Extensive documentation was provided to the Tribunal, as summarised below.

The project

28. Mr Boardman provided documentation relating to the overall project to which the Omega 4 and Omega 9 investments were related. The summary investment document for "Project Adriatic" describes it as "an investment opportunity in a trading company that will develop a 5 star branded Hotel with Wyndham and a suite of luxury apartments" and a "world class conference centre" connected to the hotel and residential section. Later in this document, dated February 2011, it states that Wyndham Hotels "will be signing a 25 year Hotel Management Agreement in January 2011".

29. The summary states that investments can be made by "…individual purchasing and subsequent warehousing into a Pension Scheme: a tax protected investment enabling additional 633% of 15% net capital to be made available from Pension capital. Investment return will be warehoused in a tax free environment". The summary also notes that there is an "option to borrow up to 85% of your investment reducing cash investment to 15%". This is repeated in the business plan for the LLPs.

30. The "structured pension solution" states that a "£1m cash investment" results in a "release of capital from your Pension" of £6.41m. The summary states that "we strongly recommend that you consult legal, accounting and appropriate professional advice before you make this investment", in connection with the "structured pension solution".

31. The commercial structure plan in the summary document refers to "Omega No 3 2009 Developments Ltd", which was presumably the predecessor investment round, but there was no evidence that the project had changed before Mr Boardman took part in the Omega 4 and Omega 9 arrangements.

Omega 4

32. On 31 March 2011 Mr Boardman signed the application pack in respect of the Omega 4 Ltd investment, applying for 289,157 shares in Omega 4 Ltd, although the application form states that "Applications must be for a minimum of 500,000 Shares and thereafter in multiples of 20,000 Shares". The price paid was £1 per share.

Full recourse loan

33. Mr Boardman was granted a full recourse loan facility of £65,000 by FCPF on 30 March 2011, from which he drew down £35,000 on 31 March 2011 to part-fund the Omega 4 investments. He repaid £35,000 to FCPF on 24 May 2011. The loan facility stated that it was subject to interest at 5% per calendar month, but there was no evidence that interest was paid or demanded on the loan.

Business plan

34. Mr Boardman provided a business plan for Omega 4 LLP, dated March 2011. The notice at the start of the business plan notes that the investment was not a public offering, and states that it was to be offered only to qualified investors and otherwise to fewer than 100 persons. Potential investors were advised that they should take independent advice, and that the document should not be regarded as providing any advice of any nature.

35. The purpose of the LLP is stated to be to "undertake an integrated property construction and design services business", although this is noted to be subject to "ongoing negotiations" between the partnership and the property developer group (Boka Adriatic Developments (Montenegro) Limited). The business plan refers to a number of agreements with third parties: a 'real estate consultancy agreement' with Boka Jersey, a 'partnership consultancy agreement' with FDBS, a co-venture agreement with Foundation Global Partners to be a party to the developer construction and design contract and an agreement with IPCS to provide the services under the co-venture agreement. This last agreement was stated to involve an irrevocable payment of £8.3m by Omega 4 LLP to IPCS "to secure its services".

36. The business plan stated that the consideration received by the LLP for the provision of services under the co-venture agreement would be two contingent revenue streams: income from the apartments (although this appeared to be a single payment, dependent on the sale value of the apartments) and a 4% share of the hotel management contract. Under the real estate consultancy agreement with Boka Jersey, the LLP would receive a fixed fee 'equivalent to' £1.05m per year for eight years if the partnership was capitalised with £8.3m or a contingent amount equal to 8.3% of Boka Jersey's profits (later in the plan, this is qualified as being a share of Boka Jersey's "contingent income from the Adriatic Project"). The choice as to which of these payment methods would apply was given to Boka Jersey. The business plan stated that the choice was to be made by 31 December 2010.

37. We note that the real estate consultancy contract between Omega 4 LLP and Boka Jersey (dated 5 April 2011) states that the choice as to the format of the payment was to be made by 31 January 2012. Further, the variable fee was stated, in that contract, to be "2% of Boka Jersey

Project and its associated group undertakings which hold the asset value in respect of the referred projects from time to time". The contract defined the alternative fixed fee as £6,160,000, paid in eight annual payments of £770,000 each.

38. The business plan also referred to entitlement to a share of profits equal to "5% of the developers once the developer has achieved an IRR of 50%". Although this is presumably intended to be a reference to a share of the developer's profits, the word 'profits' (or other measure) is omitted in the plan.

39. The contract between Omega 4 LLP and Boka Jersey set this additional amount as being 3% of "any end profits after an IRR of 50% … that Boka Jersey generates from projects which Boka Jersey undertakes as a direct result" of services provided by Omega 4 LLP.

40. The plan stated that the partnership agreement would allocate profit and losses initially to the individual members of the LLP until those individual members had received the benefit of any of the real estate consultancy agreement. Thereafter, members would be entitled to receive profits and losses pro rata to their capital contributions. The LLP deed detail as to distributions was slightly different, with the corporate investor being paid amounts from the co-venture agreement after the individual members had received the benefit of the real estate consultancy agreement and before profits and losses are then distributed pro-rata.

41. The construction and design services were stated to take place over an "anticipated 24-36 month … period". The business plan noted that some site clearance activities commenced in October 2008, some two and a half years before Mr Boardman made his investment. The plan also noted that initial planning permission had been granted for the project and first draft design plans had been prepared for discussion.

42. The business plan included a "strategic & development programme timetable". This set out steps to be undertaken, under various headings. The only elements which were stated to be underway were the "schematic design", which had been completed, and the technical audit of that design, which was said to be 90% complete at March 2011. The build permit, which was anticipated to have been started in December 2010 and finished by mid-January 2011, had not been started, neither had the design been submitted as anticipated in December 2010. The procurement steps and site preparation steps which were to have been started by early March 2011 were shown as not started, even though the plan states that 'site clearance' works had started in October 2008.

Hillier Hopkins letter

43. Included in evidence was a letter to the directors of Omega 4 Ltd from Hillier Hopkins dated 26 May 2011.

44. This letter noted that it contained "information and explanations in connection with the business and investments of [Omega 4 Ltd] and its investment in [Omega 4 LLP] … to obtain a better and independent understanding of the activities of the entities and the consequence financial and accounting implications".

45. The letter states that:

(1) Omega 4 Ltd had acquired a partnership interest in Omega 4 LLP for £5,880,876, which amounted to 96% of the total investment in the LLP;

(2) the LLP had raised approximately £6.1m in capital, of which £5.65m had been paid to IPCS. The remainder had been paid in fees to the "partnership consultant", and administrative costs reserved;

(3) the developer had contracted to pay variable amounts to the LLP, based on successful disposal of the residential element of the project, togther with a percentage of the hotel profits;

(4) the project was "high risk, high return" with a very uncertain outcome as at May 2011;

(5) as the outcome of the project could not be assessed at the time the letter was written, the expenditure incurred by the LLP on the project would be charged to the profit and loss account as there was no reasonable certainty that work in progress expenditure would be recovered and no certifiable construction costs to give a valuation for work in progress;

(6) the investment in the LLP was required to be stated at its market value which would normally be at cost, as it was assumed that the company would have perceived it to be worth the value paid, less any necessary provision for impairment. Hillier Hopkins were not aware of any evidence of any change in circumstances which would result in an impairment to the value paid;

(7) the carrying value of the investment in the LLP would therefore remain at the original cost paid so long as no deterioration in circumstances occurred.

46. The letter confirms that Hillier Hopkins had not verified the existence or ownership of the project property and had assumed that all parties were satisfied as to their rights and obligations and that the rights for the LLP to develop the land existed and were legally perfected. Hillier Hopkins could not comment on the value of the property nor the level of proceeds which might be achieved once the design and build project had been undertaken and completed.

Power of attorney

47. On making the investment Mr Boardman signed a power of attorney, appointing various people at FCP as his attorney in connection with the investment in Omega 4 LLP and the Omega 4 Ltd shares, to execute or sign any documents considered necessary or desirable in relation to the investments. The power of attorney expired three months after the date of execution.

LLP deed

48. Omega 4 LLP was incorporated on 5 February 2010. An LLP Deed, dated 5 April 2011, was entered into between Omega 4 Ltd, the individual investors, Omega 4 LLP and the designated members (Omega Genesis Services Ltd and Omega Administrative Services Ltd).

49. On the same date that the LLP Deed was entered into, Omega 4 LLP entered into the partnership consultancy agreement, the real estate consultancy agreement and the services sub-contract with IPCS. The co-venture agreement, to which the services sub-contract related, was noted as "to be entered into" in future. The co-venture agreement was in fact entered into on the same date, 5 April 2011.

50. The LLP deed provided that amounts available for distribution were to be paid as follows:

(1) firstly, £6,160,000 (in aggregate) to the individual investors, pro rata to their capital contributions, but only to the extent that the amounts ere awre derived from payments under the real estate consultancy agreement;

(2) then, the corporate investor was to be paid amounts derived from the co-venture agreement;

(3) then any other amounts were to be distributed between the members pro rata to their capital contributions.

Partnership consultancy agreement dated 5 April 2011

51. This was an agreement for services between Omega 4 LLP and FDBS. FDBS were to provide property advisory services. The background noted that Omega 4 LLP wished to subcontract out the services to be provided to Boka Jersey under the real estate consultancy agreement. The first schedule of services to the agreement appeared, however, to be a list of work to be undertaken in connection with the Adriatic Project (indeed, it appeared to be the list of work from the sub-contract agreement with IPCS). The second schedule of services in the agreement did relate to the real estate consultancy agreement.

52. Omega 4 LLP were to pay a consultancy fee of £401,606 for these services; no details were included as to when this fee was to be paid although the implication is that it was to be a single fee.

Real estate consultancy agreement

53. This was an agreement for services between Omega 4 LLP and Boka Jersey, to provide advisory services on potential development projects within certain criteria, notably that the project must be in a country (other than the UK) in which Boka Jersey already owned, or had optioned, land. At least one potential development per year had to be identified to Boka Jersey.

54. This contract could be terminated by Boka Jersey at will at any time with twenty business days' notice to Omega 4 LLP. The LLP could terminate only if Boka Jersey did not make the contract payments, or if it became bankrupt (or similar).

55. As noted above, the payments by Boka Jersey would take one of two forms at Boka Jersey's option. The variable fee was "2% of Boka Jersey Project and its associated group undertakings which hold the asset value in respect of the referred projects from time to time". The alternative fixed fee was £6,160,000, paid in eight annual payments of £770,000 each. A further amount of 3% of "any end profits after an IRR of 50% … that Boka Jersey generates from projects which Boka Jersey undertakes as a direct result" of services provided by Omega 4 LLP would also be paid.

Co-venture agreement

56. This agreement was entered into by Omega 4 LLP and Foundation Partners GP ("FGP") on 5 April 2011. It referenced other contracts entered into by FGP in connection with the Adriatic Project, including a consultancy agreement between FGP and FDBS dated 9 July 2008, a FPG Takeover Agreement between FGP and FCP dated 9 July 2008, a subcontract with IPCS dated 1 April 2009, varied as to the scope of works on 19 October 2009, another co-venture agreement with Opus Design & Build Partners (GP) dated 19 October 2009, and other undated agreements including a further co-venture with Artemis Design & Build Partners (GP).

57. The payment to Omega 4 LLP for the works was set at 3% of amounts payable to FGP under the principal construction project, limited to amounts paid under an (undefined) "Anticipated Hotel Management Contract" and an amount calculated by reference to the residential sales achieved.

58. The services to be undertaken by Omega 4 LLP were stated to be set out in Appendix 1 to the agreement; that appendix is blank in the copy agreement provided in evidence (that copy agreement is signed on behalf of FGP but not signed on behalf of Omega 4 LLP).

IPCS contract

59. The copy contract produced in evidence was not particularly legible but makes it clear that IPCS were to undertake the works which Omega 4 LLP had agreed to under the co-venture

agreement. IPCS were paid £6,643,803 as the contract sum and the contract notes that no amount would be repaid if the contract were terminated. The services to be provided by IPCS ere not stated: as with the co-venture agreement, the services appendix was blank.

Omega 9

60. The arrangements for Omega 9 were reasonably similar to those for Omega 4.

61. Omega 9 LLP was incorporated on 1 February 2012. An LLP Deed, dated 20 March 2012, was entered into between Omega 9 Ltd, the individual investors, Omega 9 LLP and the designated members (Omega Genesis Services Ltd and Omega Administrative Services Ltd).

62. On the same date that the LLP Deed was entered into, Omega 9 LLP entered into the partnership consultancy agreement, the real estate consultancy agreement and the services sub-contract with IPCS. The co-venture agreement, to which the services sub-contract related, was noted as "to be entered into" in future. This agreement was in fact entered into on the same date as the LLP Deed.

LLP distributions

63. The LLP deed provides that amounts available for distribution are to be paid as follows:

(1) firstly, £3,183,505 (in aggregate) to the individual investors, pro rata to their capital contributions, but only to the extent that the amounts available are derived from payments under the real estate consultancy agreement;

(2) then, £38,823 to the corporate investor, to the extent that the amounts available are derived from payments under the real estate consultancy agreement;

(3) then, from amounts derived from the co-venture agreement, 95% of such amounts to the corporate investor and the remaining 5% to the individual investors, pro rata to their capital contributions;

(4) then any other amounts are to be distributed between the members pro rata to their capital contributions

Co-venture agreement dated 20 March 2012

64. This agreement was entered into by Omega 9 LLP and Mimosa Real Estate Partners GP ("Mimosa") on 20 March 2012. It is similar to but apparently not identical to the co-venture agreement entered into between FGP and Omega 4 LLP, as the underlying principal contract with Boka Adriatic Developments (Montenegro) Limited in this case was for the provision of services relating to management of a hotel and leisure development rather than construction services.

65. Omega 9 LLP were to be paid 1.55% of the profits generated by Boka Jersey under the Anticipated Hotel Management Contract, and an amount calculated by reference to the average sale price achieved by Boka Jersey for the residential accommodation,

IPCS sub-contract dated 20 March 2012

66. This sub-contract was apparently intended to enable Omega 9 LLP fulfil its co-venture agreement with Mimosa. Unlike the sub-contract agreement for Omega 4 LLP, the copy of this agreement produced in evidence was legible.

67. The services to be provided included:

(1) management of the residential part of the project, once completed

(2) securing restaurant operators and negotiating commercial terms with the operators

(3) securing a licence for the use of the public beach in front of the project area

(4) negotiate and secure a casino operating licence, and a casino operator

(5) negotiate a plan for overall management of the project and negotiate an agreement to control the management

(6) securing a strategic investor for the project, such investor to have access to €30-€50m for property transactions in the Balkans

(7) securing a lease for the operation of the marina

(8) procuring and negotiating utilities requirements (water, waste, power etc)

(9) managing capital replacement budget for the project post-completion

(10) securing a spa operator

(11) maintenance and administration of the project

68. IPCS was paid £3,157,883 on the date of the agreement, and that amount was stated not to be subject to any adjustment for any reason. That amount could not be repaid (in part or full) if the contract were terminated. The contract could be terminated by Omega 9 LLP at will on twenty day's notice, or immediately if IPCS were to become insolvent (or similar) or if Boka Jersey were to become insolvent (or similar).

Partnership consultancy agreement dated 20 March 2012

69. This was an agreement for services between Omega 9 LLP and Future Design and Build Services Ltd. FDBS were to provide property advisory services, to advise Omega 9 LLP whether to undertake property management services. Omega 9 LLP were to pay a consultancy fee of £16,112 for these services, being a single payment to cover what is described as an ongoing service over the life of the Omega 9 LLP.

Real estate consultancy agreement dated 20 March 2012

70. This was an agreement between Omega 9 LLP and Boka Jersey for the LLP to provide advisory services on potential development projects within certain criteria.

71. This contract could be terminated by Boka Jersey at will at any time with twenty business days' notice to Omega 9 LLP. The LLP could terminate only if Boka Jersey did not make the contract payments, or if it became bankrupt (or similar).

72. The payment under this contract was either a fixed fee or a variable fee, at Boka Jersey's choice. The fixed fee was £3,222,328 paid in eight annual payments of £402,791 each; the variable fee was 2% of the net profit generated by Boka Jersey and associated group undertakings during the term of the contract from projects arising from the services provided by Omega 9 LLP.

The limited recourse loans

73. Mr Boardman borrowed £255,000 to purchase Omega 4 shares and £88,157.50 to purchase Omega 9 shares. The loans were made by FCFP, a company controlled by the promotor of the Omega 4 and Omega 9 investments.

74. The loan documents for these two loans were on very similar terms. The borrowed funds could only be used to purchase the shares. The borrower was required to enter into an LLP Interest Security Agreement over their membership in the relevant Omega LLP. The relevant LLP was required to enter into a guarantee and debenture in respect of its assets, including its rights to receive particular contractual amounts.

75. The Omega 4 loan was stated to be subject to interest at 4%; the Omega 9 loan was stated to be subject to interest at 5%. Interest on each loan was capitalised, with repayment of the

capital and interest required on the eighth anniversary of the date on which the loan was made, although pre-payments were permitted. Overall liability for repayment was capped at the lower of:

(1) aggregate amounts received by the relevant company or LLP pursuant to:

(a) the a co-venture agreement;

(b) the real estate consultancy agreement;

(c) the partnership consultancy agreement between the LLP and FDBS;

(d) the sub-contract between that LLP and IPCS;

(e) a corporate finance consultancy and advisory agreement between the LLP and FCP; and

(f) amounts received by the borrower as a member of the LLP; or

(2) aggregate gross proceeds received by the borrower on a disposal of their LLP membership interest to an unconnected party.

76. The effect of this was that for each loan, if no amounts had been received by the company or LLP under these contracts by the eighth anniversary of the loan and the LLP membership interest had not been disposed of, there would be nothing to repay on the loan.

LLP Interest security agreement in respect of the loan

77. Omega 4: between Mr Boardman, Omega 4 LLP and FCPF, dated 26 May 2011

78. Omega 9: between Mr Boardman, Omega 9 LLP and FCPF, dated 20 March 2012

79. These agreements were described as providing FCPF with security over Mr Boardman's LLP interest for the payment and satisfaction of all present and future obligations and liabilities owed by Mr Boardman to FCPF.

80. The security was provided by assigning by way of security to FCPF absolutely, with full title guarantee, all of Mr Boardman's rights, title, benefit and interest over his LLP membership interest together with all dividends, interest, capital contribution or income derived from that membership interest. In addition to assigning the interest, Mr Boardman also agreed to provide FCPF with a fixed charge over the membership interest and any dividends or other income derived from that interest.

Guarantee and debenture in respect of the loan

81. Omega 4: between Omega 4 LLP and FCPF, dated 26 May 2011

82. Omega 9: between Omega 9 LLP and FCPF, dated 20 March 2012

83. The agreements are effectively the same for each LLP. The agreement provides a covenant to pay on demand, and a guarantee from the LLP to FCPF in respect of unpaid amounts, in respect of payments which are required to be made to FCPF by the individual LLP members (present and future, actual or contingent). FCPF could demand payment at any time, but the LLP was not obliged to comply with such demand unless the relevant amount had become due and payable. The LLP provided, by way of security, an assignment of its rights over the various project contracts and any other assets owned by the LLP.

84. The LLP agreed to realise any receivables in the ordinary course of business and pay them into specified accounts. The LLP further agreed (inter alia) that amounts received under the real estate consultancy agreement (with Boka Jersey) could only be applied in paying any amounts owed by the individual LLP members to FCPF.

Relevant law

85. The relevant law has been included at Appendix 2 below.

Whether the unauthorised payments charge and surcharge were correctly imposed

86. A pension scheme may purchase assets from a member of the scheme without creating an unauthorised payments charge, but only to the extent that the amount paid does not exceed the amount which might be expected to be paid to a person who was at arm's length (s164 and s171 FA 2004).

Whether Mr Boardman and Rowanmoor must be regarded as being 'at arm's length' such that the price paid by the SIPP cannot exceed the amount which might be expected to be paid to a person who was at arm's length

87. It was contended for Mr Boardman that amounts paid by Rowanmoor must be regarded as being not more than might have been paid at arm's length because he and Rowanmoor had no relationship other than that of pension holder and pension trustee.

88. HMRC contended that this would mean that a scheme member payment could never be unauthorised, as it would always take place between a pension holder and a pension trustee.

89. This argument is not particularly helpful, as a pension holder may be related to a pension trustee in other ways in addition to the pension relationship and misconstrues the argument made for Mr Boardman. Mr Boardman's argument was that he and Rowanmoor had no other relationship, and that therefore they had to be dealing arm's length.

90. That argument is, we consider, also flawed. The fact that there is no other relationship between a pension holder and a pension trustee does not mean that dealings between those parties must always be at arm's length. We consider that it is, instead, a matter of fact in each case.

91. It was also submitted for Mr Boardman that Rowanmoor were FCA accredited and would be expected to behave appropriately as a pension trustee and as such would not purchase investments at a price in excess of that which might be paid at arm's length. Correspondence showed that Rowanmoor had checked the price at which the shares were offered.

92. HMRC contended that Rowanmoor were acting on Mr Boardman's instructions and had no funds of their own that would be put at risk from the purchases. It was submitted that there was no evidence that Rowanmoor had undertaken any due diligence to determine whether or not they were purchasing the shares at a price that was in excess of that which might be paid at arm's length.

Discussion

93. The Rowanmoor correspondence in evidence, sent in May 2011, requests confirmation from FCP that the offer price for the shares was "still £1". On 8 June 2011, on the same day that the second tranche of Mr Boardman's Omega 4 shares were purchased by the SIPP, Rowanmoor wrote again to FCP and stated that "the member wishes to purchase further Omega shares. Can you please confirm that the share price is still £1". FCP replied to say that they could "confirm that the share price is £1". We note that the correspondence copies provided in the bundle do not identify which Omega investment is being referred to, nor does it identify the member of the pension scheme referred to.

94. The tribunal bundle also included an email, dated 24 March 2011, in which Rowanmoor stated to LM that Rowanmoor agreed that it could hold shares in Omega No 3 2009 Developments Limited under their SIPP products. That email also considered the potential for HMRC to "change their requirements in a way which would prevent a pension scheme investor owning shares in the company" and concluded that there is little risk of a change having

retrospective effect. In our view, this email considers only whether a SIPP could hold this type of shares and does not contain any consideration of share price and so cannot support a contention that Rowanmoor had undertaken appropriate due diligence as to the share price.

95. There was no further evidence provided to us that Rowanmoor had undertaken any due diligence as to the value of the shares. Rowanmoor declined to provide a witness statement or give evidence to the Tribunal, although they wrote to Mr Boardman's lawyers to say that it was "self-evident that Rowanmoor was a third party acting at arm's length in relation to the … Omega share transfers". Rowanmoor also confirmed that "no internal approvals were required to accept the transfers".

96. Considering the evidence in this case, we find that Rowanmoor acquired the shares in Omega 4 Ltd and Omega 9 Ltd on Mr Boardman's instructions, issued via Liam Martin at PK Financial Planning. Mr Boardman was therefore both the vendor of the shares, selling them at £1 each, and was also the person instructing Rowanmoor to make the purchase of those shares at that price.

97. Given this relationship, we find that the share purchases cannot be regarded as being dealings at no more than arm's length simply because Mr Boardman and Rowanmoor had no relationship other than that of pension holder and pension trustee. Rowanmoor were acting on Mr Boardman's instructions and as such cannot be regarded as automatically acting at arm's length in respect of these transactions.

98. The evidence provided to us means that we cannot conclude that Rowanmoor had carried out any independent due diligence as to the value of the shares which were acquired by the SIPP, beyond confirming that the issue price was £1, or considered independently the question of whether the SIPP should acquire the shares. As set out below, we do not consider that Mr Boardman established that he had carried out any reliable due diligence as to the value of the shares.

99. As such, we further consider that the fact that the price paid by the SIPP was the price at which the shares were offered in the investment rounds is not, without a consideration of the overall structure and terms of those investment rounds, evidence that the price paid by the SIPP for the shares was not in excess of the amount which might be expected to be paid for the shares to a person who was at arm's length.

Whether the purchase price paid by the SIPP was an amount which might be expected to be paid to a person who was at arm's length

100. It is, therefore, necessarily to consider whether in the circumstances of this case the £1 per share paid by the SIPP for the Omega 4 Ltd and Omega 9 Ltd shares was in fact a "amount which might be expected to be paid to a person who was at arm's length".

101. Mr Boardman contended, in summary, that the price paid for both sets of shares was the price at which the shares had been offered for investment a short time earlier and that this should be regarded as the market value. Further, it was contended that this was supported in each case by a valuation letter from Hillier Hopkins, the companies' auditors.

102. HMRC contended that the provisions of s273(3) of the Taxation of Chargeable Gains Act 1992 (TCGA 1992) should be regarded as applying, as the shares were unquoted, and so it should be assumed that a hypothetical purchaser would have had access not only to the documents provide to Mr Boardman but also that:

> "there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm's length".

103. HMRC contended that a purchaser would have obtained information from a variety of sources (including the company and the promoter in each case) and concluded that there was a circular flow of funds which was designed to make the shares appear to have significant value without actually providing any value to the shares.

104. In summary, HMRC submitted that a hypothetical purchaser would know that:

(1) at the time of investment into Omega 4, there had been three previous investment rounds but no substantive progress had been made even though over 50% of the stated construction costs had been raised;

(2) at the time of investment into Omega 9, there had been eight previous investment rounds but no substantive progress had been made even though almost 90% of the stated construction costs had been raised;

(3) very little progress had been made against the timetable for the project, and that the project was behind schedule;

(4) the funding flowchart, provided by FCP to HMRC, showed that funds moved in a circle so that the loans made by FCPF and then invested by the individuals were ultimately repaid to FCPF.

105. HMRC contended that a hypothetical purchaser would realise that the Hillier Hopkins letters were not valuations (even if seen before the purchase) and contained substantial caveats which meant that they could not be relied upon as supporting a share valuation. The hypothetical purchaser would also be aware that the shareholders in the company had paid for a substantial proportion of their shares by way of limited recourse funding provided by the promoter. HMRC submitted that, if the value of the shares had genuinely been £1, there would have been no need for uncommercial limited recourse lending.

106. HMRC submitted that for these reasons, and as the funds raised were ultimately used to repay the loans made by FCPF those funds could not be used for any works or services, and so a hypothetical purchaser would not have placed any value on the shares as there was no basis on which a return could be made and the structure was uncommercial.

Discussion

107. The legislation does not define what is an "amount which might be expected to be paid by the SIPP to a person who was at arm's length" and neither is there any useful case law on the point. HMRC contended that the phrase should be interpreted as being equivalent to the concept of 'market value'. For Mr Boardman, it was contended that the wording of the legislation indicates a more flexible concept. In particular, it is an amount which "might be" paid rather than "would be" paid. Nevertheless, it was agreed that some of the case law authorities in respect of market value might be of assistance in interpretation.

108. In particular, we note the summary in *Nicholas Green* [2014] UKFTT 396 (TC) at [90]:

> "(1) The hypothetical vendor and purchaser should be assumed to do whatever reasonable people buying and selling the property in question would be likely to have done in real life (*IRC v Gray* [1994] STC 360 per Hoffmann LJ at 372);
>
> (2) The purchaser is a willing purchaser who behaves reasonably and makes proper enquiries about the property (ibid) and is cautiously optimistic about the company's future prospects (*Marks v Sherred* [2004] STC 362 at §26);
>
> (3) The only information available to the hypothetical purchaser is what is available to the open market (*re Lynall deceased: Lynall & another v CIR* [1972] AC 680; 47 TC 375);

> (4) The vendor is a reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being over-anxious or unduly reluctant (*Gray*, as above); …
>
> (7) While a sale between parties acting at arm's length may provide evidence of the market value, it is a logical fallacy to assume that an arm's length price must equal the market value."

109. Considering, first, the Hillier Hopkins letters: the Omega 4 Ltd letter was dated 26 May 2011 and therefore could not have been relied upon to support the value of a purchase made on 16 May 2011, or the original purchases by Mr Boardman earlier. The letter in respect of Omega 9 Ltd is, somewhat improbably, dated 20 March 2011. That company was not incorporated until 1 February 2012. It is possible that this was a typographical error, and the letter was intended to be dated 20 March 2012, the date on which Mr Boardman made his investment.

110. Regardless of the questions as to dates, and the description of the Omega 4 letter in a letter from Mr Boardman from FCP on 2 June 2011 as a "an independent valuation", we consider that these letters are clearly not intended to be regarded as a valuation of the relevant shares. Each sets out the accounting treatment of an investment by the relevant company in the corresponding LLP and does not purport to be a valuation of that investment. The letters clearly state that Hillier Hopkins has assumed that the directors are satisfied that the price paid is appropriate. The letters also make it clear that Hiller Hopkins have not examined the underlying documentation for the structure or undertaken any due diligence as to the project.

111. We do not consider that either letter would be relied upon by a hypothetical purchaser, acting reasonably and with access to the documentation noted below, to support any contention that the shares in Omega 4 Ltd or Omega 9 Ltd had a particular value.

112. There was some disagreement between the parties as to the extent to which information which would have been available to a hypothetical purchaser. In particular, for Mr Boardman it was contended that the documents which would have been available were those which were available to Mr Boardman and would not, for example, have included agreements with third parties such as Boka Jersey. HMRC considered that a hypothetical purchaser would also have had any information which the companies and the promoter could provide.

113. There was also some disagreement as to whether HMRC should have produced expert evidence in support of their contentions as to valuation, given submissions made on the basis of documents provided to HMRC by other parties in the structure. Given the reasoning set out below, we do not consider that we would have been assisted by any expert evidence.

114. For the reasons set out below, we consider that all that would be in practice be required to reach a conclusion as to value for each of Omega 4 Ltd and Omega 9 Ltd at the relevant times are documents which were available to Mr Boardman. In particular, these would be the LLP deeds, the shareholder agreements, the business plan documents and summary documents, and the limited recourse loan documentation. This does not mean that other documents such as agreements with third parties and the funds flow provided to HMRC could not be regarded as available, but the point is not one that needs to be addressed in this decision as we do not consider that those documents would alter the conclusions reached as to share value on the basis of the documents available to Mr Boardman.

115. From these documents we consider that a hypothetical purchaser of the shares at arm's length would have been aware that the shares were acquired by Mr Boardman in connection with the purchase of an LLP interest and that the offer price for the shares was set as part of an overall investment package which also involved an investment in the LLP. There was no evidence that the shares would be offered separately from an LLP investment at the date of the

offer; the business plans for both investments clearly anticipated that any investment would be to acquire both shares and an LLP interest.

116. We consider that such hypothetical purchaser would be aware from the shareholder agreement and the business plan documentation that in each case the company's only asset was its investment in the LLP, and that each LLP had paid out virtually all of the capital contributed to it (and so almost all of the company's investment) in an irrevocable payment to IPCS (this was stated in the "commercial structure plan" attached to the summary document and business plan).

117. Such a person would also be aware that the individual LLP members had significant priority over the corporate investor in each of the LLPs in receiving distributions (as stated in the LLP deeds). It was suggested for Mr Boardman that, as the investors would have been attributed the losses arising in the LLP from the irrevocable payments that the corporate investor would have had first call on the cashflow. However, we consider that the LLP deeds are clear in their attribution of income and that the corporate investor does not have that first call. We do not consider that a hypothetical purchaser would place any reliance on the corporate investor having any such priority.

118. In the case of Omega 4 Ltd, the individual investors had invested a total of £6,101,406 (having subscribed for £5,880,874 shares in Omega 4 Ltd, and directly contributed capital of £220,532 to Omega 4 LLP). Clause 13.4.1 of the LLP deed gave them a priority distribution of £6,160,000 from income received by the LLP from the real estate consultancy agreement (confirmed in the definition of "Preferred Distribution" in the LLP deed. The subscription and capital information can be determined from the shareholders agreement and the LLP deed.

119. In the case of Omega 9 Ltd, the individual investors had invested a total of £3,222,327 (having subscribed for £3,105,587 shares in Omega 9 Ltd and contributed capital of £116,470 to Omega 9 LLP). Clause 13.4.1 of that LLP deed gives those individuals a priority distribution of £3,183,505 from income received by the LLP from the real estate consultancy agreement (also confirmed in the definition of "Preferred Distribution" in that agreement).

120. As such, the arrangements (if they had operated as apparently intended by the documents) would have meant that the original investors would have been fully reimbursed within a few years for the cost of their shares in the relevant company such that they would, in effect, have paid almost nothing for those shares other than, potentially, interest on the limited recourse loans and the time value of the cash invested. These arrangements would also correspond with the repayment terms of the limited recourse loans.

121. In our view, any potential purchaser of Omega 4 Ltd shares in May and June 2011 and Omega 9 Ltd shares in March 2012 would therefore have been aware that the priority distributions from the LLP would have (if paid) ensured that the original individual investors would have effectively recovered their cost of the investment in the shares as well as their capital contribution to the LLP.

122. We consider that such a hypothetical purchaser would also be aware that the substantial majority of the purchase price for the shares acquired by Mr Boardman had been funded by a limited recourse loan such that, if the arrangements did not succeed, the actual cost of the shares to Mr Boardman would be significantly less than the £1 per share which it was proposed that the SIPP would pay.

123. Such a purchaser would conclude, in our view, that the original investment had involved arrangements which meant that the effective purchase cost of those shares for Mr Boardman was limited and apparently intended to be nil overall.

124. Under the Omega 9 LLP deed, the corporate investor was also entitled to a distribution of £38,823 from payments derived from the real estate consultancy agreement. This was approximately 1.2% of the amounts distributable from the income from the real estate consultancy agreement and was payable only once the individual investors have received the other 98.8% of such amounts. If that LLP distribution were made to the corporate investor, and if that company in turn distributed that amount (after deduction of corporation tax at 19%) in full to the shareholders, a hypothetical purchaser of Mr Boardman's 3% shareholding in Omega 9 Ltd would (under that provision) receive less than £1,000, and that would be received several years after acquiring the shareholding.

125. The companies' prospects of receiving any distributions as corporate investors in the LLPs, and therefore being able to provide a return to shareholders, otherwise depended entirely on the project being completed as the potential distributions to the corporate investor in each LLP would come from payments derived from the management of the hotel and the sale of residential units once 90% of those units had been sold.

126. At the date of purchase of the shares by the SIPP in 2011 and 2012, the information in the business plan provided to Mr Boardman showed that the project clearly still required substantial financing and had not progressed beyond initial drawings even though the project had apparently started in 2008. Any prospects of income from hotel management and residential unit sales could only be speculative and could not arise for a number of year. Any such income, if it ever arose, would clearly be shared with other Omega entities (as Mr Boardman had been made aware of the Omega 3 investment, having been given the business plan, before acquiring his Omega 4 investment and, obviously, any hypothetical purchaser of the Omega 9 investment would have been aware of the Omega 4 investment at least, as Mr Boardman was aware of it and the information was publicly available).

127. We therefore conclude that even the cautiously optimistic hypothetical purchaser described in (2) in the summary above from the decision in *Nicholas Green* would have considered that the prospect of any return on the shares at that time to a purchaser of the shares alone, without an LLP interest also being acquired, was very remote and highly speculative even in the context of a very high risk speculative project.

128. For Mr Boardman, it was suggested that the provisions which attribute income to individual investors in priority to the corporate investor might not have been effective if the LLP was in deficit as a result of the losses initially incurred by making the irrevocable payments. It was further suggested that these provisions could produce surprising results in respect of creditors. It was argued that it was therefore unclear whether the distributions could have been made at all.

129. To the extent that this relates to the value of the shares, rather than the question of whether distributions were made, we consider that it remains the case that the potential return to the corporate investor in the LLP would be highly uncertain. Even if the corporate investor could be argued to be entitled to income in preference to the individual investors, those individuals would be expecting the distributions to be made in accordance with the deed, and such income to be paid to them in order that they could repay the limited recourse loans which appear to assume that such income would have been paid to the individual investors. It would seem likely that there would be a significant dispute if the LLP did not pay the distributions in the priority anticipated in the deed. In our view, any such lack of clarity and uncertainty would mean that a hypothetical purchaser would not give any weight to the possibility of a return to the corporate investor.

130. We note also that the security agreement entered into in respect of the limited recourse loan required that the security be provided over the LLP interest and not the shares acquired with that loan.

131. In our view, such a hypothetical purchaser would not have purchased the shareholdings in either Omega 4 Ltd or Omega 9 Ltd in circumstances where that purchase would not also include the acquisition of the vendor's related LLP interest. This is because we consider that the hypothetical purchaser would conclude that the shares alone had no value.

132. The SIPP did not (and could not, without incurring a tax charge) acquire Mr Boardman's LLP interests with the shares. For the avoidance of doubt, we express no view as to whether a hypothetical purchaser would have purchased the shares if they were to be sold together with the associated LLP interests.

133. Accordingly, we find that the price paid by the SIPP to Mr Boardman for his shares in Omega 4 Ltd and Omega 9 Ltd was, in each case, in excess of the price which might have been expected to be paid for those shares to a person who was at arm's length.

134. We find, therefore, that an unauthorised payments surcharge arises in respect of each of the purchases of the Omega 4 Ltd and Omega 9 Ltd shares by the SIPP.

Whether the surcharge should be discharged

135. Having established that Mr Boardman is liable to an unauthorised payments surcharge in respect of each of the acquisitions of Omega 4 Ltd and Omega 9 Ltd shares, the next question to be considered is whether that surcharge should be discharged.

136. The legislation (s268 Finance Act 2004) provides that a surcharge may be discharged where "in all the circumstances of the case, it would not be just and reasonable for the person to be liable to the unauthorised payments surcharge in respect of the payment".

137. Mr Boardman contended that the surcharge should be discharged because he acted in good faith in the sales of the shares to the SIPP, he took reasonable care and he placed reliance on others who he considered were appropriately qualified. He had also placed some reliance on the Hillier Hopkins letter which had been described to him as a valuation report and which, it was submitted, was not unreasonable for a reader to take as being a report on market value. In particular, it was not unreasonable to expect a company to be worth the investment it had made recently in the LLP, which was the same as the amounts subscribed for shares.

138. HMRC submitted that the surcharge was just and reasonable and should not be discharged because they contended that there had been a lack of due diligence or reasonable care on Mr Boardman's part. The fact that he acted in good faith and relied on others was not sufficient to justify discharge of the surcharge as the purpose of the surcharge legislation was to prevent unauthorised payments and abuse of the tax system.

Investment in good faith

139. At the time of the Omega 4 investment, Mr Boardman explained that he was about to turn 50 and was aware that in five years' time he would be able to extract 25% of the value of his pension fund without a tax charge. He was attempting to maximise the returns on his pension to create better prospects for his "soon-to-be" retirement. His SIPP investments had been made with the intention of achieving better returns for his pension than the stock market tracking that had been achieved before he moved his pension to the SIPP, and which had resulted in a reduction in value in his pension when the dot-com bubble collapsed.

140. Mr Boardman noted that, despite his plans, none of the SIPP investments had succeeded and as he had made substantial losses trading on the financial markets using some of the funds which he had received from the SIPP for the shares, he had no pensions savings remaining

other than £4,000 of premium bonds (£1,000 of which were in his wife's name) which he had purchased with some of the funds received from the SIPP. He was now working in an administrative role on an income which was low enough that he also received universal credit.

141. Mr Boardman said that he had not been aware that there was any particular tax advantage to the Omega investments and had simply been looking for a Euro denominated investment to balance the US denominated investment which he had invested in when he set up the SIPP.

142. That initial US denominated investment had been made following conversations with his cousin, who was FCA registered. Mr Boardman had moved his existing pension fund into a SIPP in July 2009 and the SIPP had invested £75,000 in a property investment in the Caribbean. That investment had been made directly by the SIPP, rather than by the SIPP purchasing shares from Mr Boardman. The balance of his pension funds had been invested by the SIPP in various funds.

143. Mr Boardman had considered the Omega investments to be attractive both for the potential increase in land value but also the potential for rental income and management income from the property. He had not originally anticipated that the investments would also enable him to sell the Omega shares to his SIPP as the banking contact who had introduced him to LM had not given any detail. Mr Boardman had assumed that the investment would be similar to the Caribbean investment, where his SIPP had invested directly. It was LM who had explained that the shares could be sold to his SIPP to provide Mr Boardman with capital to trade outside his pension fund.

144. Once he was aware of the possibility, Mr Boardman did not think that there was anything wrong with using his pension in this way, as he believed that by gearing the investment, via the limited recourse loan, he could both have his pension fund and spend the money in the pension fund. His evidence was that the investment opportunity sounded more attractive as it enabled him to trade with his pension fund in an even better way than he had anticipated. However, he did not agree that accessing his pension fund was not the reason that he did not question the arrangements in any detail.

145. He believed that the arrangements would mean that he would still have the same value in his pension fund, as it would be invested in the shares in the Omega investments, and that at the same time he would be able to use the money which had been paid to him for the shares to create additional sources of income, either by investing in other products or trading on the futures market. In the hearing he accepted that, looking back, it did seem a bit too good to be true. At the time, that had not occurred to him as everyone seemed very professional and he knew his banking contact had invested in the same arrangements. He accepted in the hearing that he might have been "sucked in" by the glossy brochure.

146. We note that Mr Boardman stated that he knew at the time that the project was high risk, but that his view was that this was inevitable when seeking a high return. It does not appear to have occurred to Mr Boardman that, firstly, his risk was substantially minimised by the limited recourse loan and secondly that he had effectively transferred the full investment risk to his pension fund by selling the shares to that fund without also providing his SIPP with the benefit of the limited recourse loan.

147. Mr Boardman said that he had believed, at the time, that any problem would be to do with delays and also believed that it was a bit optimistic for the project to be completed within eight years. We note that he did not, however, question the eight year limitation on the limited recourse loan. He also agreed that he did not investigate the background to the project and had not, for example, looked at the documentation provided in any detail.

148. He accepted that he had not read the Hillier Hopkins letter before investing; he thought he had been shown something similar by LM before making the investment but had not read it. When he did read it, a lot of the information "went over [his] head".

149. HMRC contended that the purpose of the surcharge was to prevent abuse of the tax system by broadly reclaiming tax relief given on pension contributions and on tax-free growth in pension funds. In that context, they submitted that an unauthorised member payment is an abuse of the tax system regardless of the intention of the taxpayer in receiving that payment.

150. HMRC submitted, in summary, that Mr Boardman had carried out no due diligence failing to ask questions which a prudent purchaser would have asked. In particular he did not ask about the previous iterations of the Omega investments, and how they were performing. He had not been concerned about the lack of progress between the investments. He had no concerns about being able to use his pension funds early. HMRC submitted that this was because Mr Boardman was concerned only with accessing his pension fund and that, as the scheme would enable him to do so, he was not concerned with the investment aspects of the structure. They contended that a reasonable person would have questioned why FCP would provide limited-recourse loans to investors when they could have invested those funds in the project. They also contended that a reasonable person would have asked why Rowanmoor could not directly invest in the companies' shares, in the same way as the earlier investment undertaken by the SIPP.

151. HMRC contended that no reasonable person would believe that they could both have their pension fund and also spend it, which was Mr Boardman's assertion of his view at the time of the investments. Once received, Mr Boardman had spent approximately half the funds to trade although he had apparently made losses on those trade; the remainder of the money had been spent on other things, such as repaying his father and reducing a mortgage. HMRC submitted that a reasonable person would have realised that this was not something that was feasible with pension funds. They contended that Mr Boardman had either been very naive or had turned a 'blind eye' to the red flags because he was focussed on accessing his pension. Neither option made it just and reasonable to discharge the surcharge.

Reliance on others

152. Mr Boardman's evidence was that he had trusted the established reputations and credentials of individuals and entities responsible for marketing the investments. He had checked their credentials and relied on them as being professional regulated advisers. His intention had, throughout, been to increase the returns in his SIPP.

153. Although he had worked in the financial services sector, at the London International Financial Futures Exchange, his work involved only execution-only transactions. He had no formal qualifications to give investment advice and instead worked with market professionals who gave such advice to customers. He had an understanding of the concept of investment risks, but did not have any particular market expertise or trading capacity beyond that which an average person would have.

154. Mr Boardman explained that he now did not consider himself to be a sophisticated investor. He accepted that he had signed various forms as part of the Omega investments in which he confirmed that he was a sophisticated investor, and explained in the hearing that at that time he probably did think that he was a sophisticated investor but events had shown that belief to be incorrect. He had, for example, accumulated trading losses of over £200,000 in financial trading between 1998 and 2015.

155. Mr Boardman stated that he had relied on advice from a number of people with regard to the Omega investments. He had discussed the possibility of maximising the return on his SIPP

with a banking contact, who had recommended that Mr Boardman speak to his financial adviser (LM) who was an independent financial adviser (IFA) at PK Financial Planning LLP. Mr Boardman contacted LM, who he described as "impressive … engaging and persuasive [and] seemed knowledgeable about investments and the wider financial markets".

156. Mr Boardman said that he was happy to discuss his pension options with LM, and had explained that he had used his SIPP to invest in an overseas property structure. LM had put forward the Omega 4 investment as being similar, an offshore capital growth investment with a regular income stream in the medium to long term. Mr Boardman confirmed that he did not recall LM "pitching" any investment opportunities other than the Omega investments. He considered that LM was "very keen" to get him involved with the Omega investments from the outset. LM had emphasised that he had long-standing relationships with Future Capital Partners, the investment firm promoting the Omega investments and also with Rowanmoor. LM had stated that he had invested in one of the Omega rounds himself.

157. Mr Boardman explained that he now considered that he had made the mistake of trusting reputable outfits such as FCP, PK Financial Planning and Rowanmoor. Mr Boardman had been assured that there was no problem with the structure from a tax perspective, and he considered that Rowanmoor had assured him that the investment was "above board" and permitted by law.

158. In the hearing, Mr Boardman also agreed the following:

(1) he had not looked at the documents in any great detail. The structure had made sense when LM had talked it through, but Mr Boardman now found it confusing. He did not have the background knowledge to be able to assess whether the business plan was credible and had "gone by" the marketing literature and LM talking it through generally, saying that it was a great idea;

(2) he had asked LM whether HMRC "would be happy" with the investment and thought, following his conversations with LM, that there was no problem with regard to tax in connection with the investments. He had not realised at the time that he should have obtained this assurance in writing;

(3) he had signed documents confirming that he was a sophisticated investor and requiring that the investment be undertaken on an execution only basis such that, he agreed, LM had not given him advice in relation to the Omega 4 investment. At the time, Mr Boardman had a new job and did not have time to spend the 2-3 hours with LM that would have been needed for LM to provide formal advice. LM had already talked him through the investment, although he also accepted that there was a difference between advice and sales patter;

(4) he agreed that Rowanmoor would not have advised him as to whether or not the investments were going to make money and agreed that when he had discussed the investment with Rowanmoor the conversation was focussed on the pension rules as he did not think that there was a tax issue; he believed that if the pension rules allowed the SIPP to buy the shares, that would cover any tax implications. He was aware from earlier potential investments that there were limits on what could be purchased by a SIPP;

(5) he considered that he had had something like independent advice from his banking contact, who had stated that he and his colleagues (and the wife of one was a tax lawyer) had gone through the details and thought it was a good investment, which they had also invested in;

(6) he had invested on the basis that his banking contact and "a couple of other bright people had invested" and that he was "hanging on the shirttails of good people";

(7) he had mentioned the investment to his accountant, who had said that he did not have the expertise to be able to advise on it and had given Mr Boardman details of another IFA who could advise him. Mr Boardman had also considered discussing it with his cousin, who had recommended the Caribbean investment, but considered that IFAs were salesmen and that, if he had discussed the investment with another IFA, they would have talked him out of it and into another investment;

(8) he considered any independent advice would have looked at the affordability, not the investment in detail, and would simply have told him it was "quite risky for a 50 year old" which he knew and so did not consider that there would be any value in obtaining independent advice;

(9) he had trusted that, as LM was FCA regulated, he would not sell something deliberately illegal, and also considered it enough that his banking contact had had dealings with LM before;

(10) he had researched the names mentioned in the documents to make sure that they were credible. He mentioned particularly "Bouygues", as he had not known of the business before. He accepted that this research consisted of checking the name on Google.

159. Mr Boardman accepted in the hearing that even if he had asked more questions, he would not necessarily have understood the implications of the answers.

160. HMRC contended that Mr Boardman had been rather blasé about the risks involved and had not sought advice from anyone, even though the business plan and other documents given to him by LM had made it clear that he should take advice. Mr Boardman's evidence was, HMRC considered, that he had not considered the documentation in any real detail and had accepted what he was told by others without question.

161. HMRC submitted that Mr Boardman's assumption that Rowanmoor would have undertaken their own checks was not reasonable, as they were not putting their own funds at stake, and that it was not just and reasonable to discharge the surcharge simply because a taxpayer had made misplaced assumptions.

162. He had undertaken the Omega 4 investment on an 'execution only' basis and had signed documentation to confirm that he had not received advice from LM. In the case of Omega 9, HMRC contended that Mr Boardman should not have taken independent advice rather than relying on information from a person selling the scheme. Mr Boardman's reliance on FCA regulation and following in the steps of 'clever people' did not provide a reason for failing to undertake his own checks and get independent advice.

Discussion

163. It was not disputed that our jurisdiction in relation to HMRC's decision to refuse to discharge the surcharge is fully appellate and not supervisory. As the statutory wording makes clear, we can consider the matter, in all the circumstances, rather than consider only whether HMRC's refusal is unreasonable.

164. There is limited case law, and no assistance in statute, as to the meaning of the provisions regarding discharge of the surcharge. However, we agree with previous First-tier Tribunal decisions that assessment of what is just and reasonable must be a "fact-sensitive and multifactorial assessment" (*Elizabeth Hughes* TC07417, at [92]). The taxpayer's state of knowledge or belief has to be, potentially and depending on the facts of the individual case, a relevant circumstance when it comes to the assessment of what is "just and reasonable".

165. However, we also agree with the view of the Tribunal in *O'Mara* (TC05609) at [154] (and note that the same point is made in other cases) that "it would be wrong to characterise the surcharge as penal … [it] is a tax charge designed to recoup tax relief on contributions and tax free growth". That is, the policy objective behind the unauthorised payments surcharge is primarily to recover tax reliefs rather than punish the circumstances in which the unauthorised payment was made. This, in our view, limits the circumstances in which it would not be just and reasonable to impose a surcharge.

166. On balance, considering the evidence, we accept Mr Boardman's explanation that he invested in good faith and believed that the arrangements were permitted. We do not, however, consider that this means that it would be just and reasonable to discharge the surcharge. His evidence was that he knew he was not able to access his pension fund before he turned 55, and then would only be able to access 25% without a tax charge. It is clear that Mr Boardman did little research and asked very few questions about the structure and particularly did not ask how he was able to access a very substantial proportion of his pension fund across the two investments at the age of 50 without a tax charge. We consider that it is more likely than not that he was swept along by what appeared to him to be a fabulous opportunity.

167. It remains the case that Mr Boardman entered into arrangements through which he obtained benefits from his pension fund before the age at which he was entitled to do so. Given that the policy objective behind the surcharge regime is to recover pension tax reliefs, we do not consider that the surcharge regime can be limited to those who do not act in good faith; we agree here with the comment in the decision in *O'Mara* at [169], which states that:

> "Of itself, an honest but mistaken belief of a taxpayer, based on the advice of a scheme provider or otherwise, that that the arrangement is authorised and compliant is not sufficient to render liability to a surcharge as unjust or unreasonable. Otherwise it would encourage the promoters of unauthorised schemes, whatever the promoter's beliefs. Unscrupulous advisers and promoters, in recommending such schemes, would be able to advise clients that the worst that would happen if a scheme turned out to be unauthorised is that HMRC would impose an unauthorised payment charge to recover the tax relief."

168. With regard to Mr Boardman's assertions that he relied on others, we note and agree with the decision in *O'Mara* at [170], that "the fact that a taxpayer has taken legal, accounting or tax advice that the scheme was legitimate or authorised should not be sufficient, of itself, to make it unjust or unreasonable to impose a surcharge. The taxpayer cannot rely on such advice as conclusive. Of course, it may be a relevant circumstance, but it would not be determinative. The nature and extent of the advice and other circumstances of the case would have to be taken into account."

169. Taking all of Mr Boardman's evidence into consideration, we consider that his assertions that he had taken care to check the credentials of advisers and relied on them being regulated professionals have to be viewed in the context of his evidence that he also believed that IFAs were salesmen that would push their own products and so did not want to speak to another IFA, even his cousin, about the Omega investments. We note that, although he had mentioned the investment to his accountant, when his accountant made it clear that he did not have the expertise to advise and offered the contact details for another IFA, Mr Boardman did not ask for details of any other (non-IFA) independent adviser.

170. We note also that, although Mr Boardman did receive a letter from LM confirming that the Omega 9 investment was "a suitable recommendation for [his] needs", that letter makes no reference to the investment being contributed to Mr Boardman's SIPP. The information in the letter relates only to the initial investment in the Omega 9 structure, and states in several places

that it is not intended to constitute legal or taxation advice, and that individuals should seek their own tax advice. The letter also states clearly that LM has relied, in making the recommendation, upon Mr Boardman's own representations as to his net worth and annual income.

171. In these circumstances, we do not consider that Mr Boardman's assertion that he relied on others means that it would be just and reasonable to discharge the surcharge. Mr Boardman was being offered a structure which apparently permitted him to extract for his own use a substantial amount of money from his pension fund before the age at which he knew a lump sum could be extracted and he acknowledged that he did not particularly understand the documentation he was being asked to sign. Nevertheless, although he did not believe that he would be getting impartial advice from the IFAs that he did speak to, he did not pursue any advice independent from those endeavouring to "pitch" the Omega investment to him and made unverified assumptions as to the nature of conversations which he had with his SIPP provider.

172. There was also no evidence that Mr Boardman sought any advice regarding the sale of the shares to the SIPP, rather than the initial investment. Mr Boardman's reference to "hanging on the shirttails of good people" and, in effect, relying on the comments and actions of others whom he thought knew what they were doing also does not amount to circumstances which would make it just and reasonable to discharge the surcharge.

173. To the extent that Mr Boardman asserts that he had relied on Rowanmoor, we note that his evidence was that discussions with Rowanmoor related to whether they were able to purchase the shares rather than any tax implications of doing so, as that he had assumed that if the pension rules allowed the SIPP to purchase this type of share then there would be no tax implications of doing so.

174. Given our conclusions above, and noting the policy objective underlying the surcharge, we do not consider that it would be just and reasonable to discharge the surcharge.

Whether taxable distributions were received from the LLPs

175. HMRC have categorised payments which they contend were made to Mr Boardman as distributions and assessed these accordingly. Mr Boardman contended firstly that he had no entitlement to payments and no such payments had been received and, secondly, even if the Tribunal found that the payments had been made, the LLPs were carrying on business with a view to profit and so could not be regarded as opaque, such that the payments could not be regarded as distributions.

Amounts assessed

176. Mr Boardman's evidence was that he did not understand how the amounts assessed as distributions were calculated. Reviewing the closure notices and notices of amendment, the amounts assessed are the amounts declared in Mr Boardman's tax returns for the relevant years as profits from the LLPs.

177. For example, for the tax year ended 5 April 2014 HMRC amended his tax return to remove LLP profits of £37,531 in respect of Omega 4 LLP and £12,334 in respect of Omega 9 LLP (and also remove the associated loss relief claims). The closure notice for that year in respect of his tax return added £49,865 (being the aggregate of £37,531 and £12,334) as distributions from the two LLPs. HMRC contended that these amounts, declared as drawings, were taxable as distributions.

178. For the tax year 2014-15 HMRC stated that FCP had confirmed that the amounts declared as profits for this tax year for both LLPs were in fact paid in July 2016 due to a delay in payment by Boka Jersey. HMRC stated that the distributions assessed for the tax years 2014-15 was

therefore taxable in 2016-17 and asked that the Tribunal reduce the distribution assessed for 2014-15 to nil.

Whether the amounts assessed were in fact paid

179. HMRC contended that each LLP had received payments from Boka Jersey in respect of their real estate consultancy agreement, shown in the accounts, and that these payments were paid almost immediately by the LLPs to FCPF in respect of the limited recourse loans of the individual investors. The accounts show the amounts as drawings by the individual members.

180. HMRC contended that FCPF was entitled to the payments under the security agreements and the guarantee and debenture agreements entered into between Mr Boardman, FCPF and the relevant LLP. Although the limited recourse loans, and interest thereon, were each stated to be payable at the maturity date, each agreement contained provisions enabling early repayment.

181. The interest security agreements assigned Mr Boardman's interest in each LLP to FCPF by way of security, and HMRC submitted that this meant that FCPF had the rights to take funds from the LLPs to satisfy any debt owed by Mr Boardman. The LLPs guaranteed payment on demand of any borrower obligations under the guarantee and debenture agreements. HMRC submitted that this put beyond doubt that FCPF were entitled to take funds from the LLPs to repay the loan.

182. For Mr Boardman it was contended that he had not received any payments. If FCPF had taken funds from the LLPs, they were not entitled to do so and thus factually any such payments could not be regarded as distributions even if the LLPs were not transparent.

183. It was also contended that, even if payments were made, there was no evidence as to in what capacity or for what purpose the payments were made to FCPF by each of the LLPs. Even if HMRC could establish that payments could be made to pay down the loans, it had not been shown that the payments had paid down the loans. It was contended that it was for the borrower to decide whether or not they made repayments, rather than the lender, given the terms of the facility. The security agreement did not entitle the lender to demand repayment contrary to express provisions as to capitalisation of interest and the repayment provisions.

Discussion

184. The accounts for the LLPs state that distributions to members were at the discretion of the designated members (these were the same for both LLPs: Omega Genesis Services Limited and Omega Administrative Services Limited). The accounts showed that the members withdrew amounts equal to the payments from Boka Jersey in each of the relevant periods (other than 2014-15 for which, as set out above, the drawings were not paid until Boka Jersey had made payment), consistent with the terms of the LLP deeds which each state that available funds will be applied first by way of payment to the individual investors to the extent that the funds are derived from the real estate consultancy agreement. We note also that Mr Boardman's tax returns declared, as profits from the LLPs, amounts equal to his share of the amounts noted in the accounts as having been withdrawn by members.

185. We note also that the bundle contained letters from FCPF to Mr Boardman with tax return information setting out the interest "charged and paid" (emphasis added) on his loans, to be entered into the "Additional Information (Supplementary pages)" of his tax return in the following tax years:

(1) Omega 4 LLP: 2013-14 - interest of £8,147; 2014-15 - interest of £6,922. Letters were also provided for 2011-12 and 2012-13 showing negative figures in the "Additional Information" section. The narrative for these figures was unreadable.

(2) Omega 9 LLP: 2012-13 - interest of £3,301; 2013-14 - interest of £2,820; 2014-15 - interest of £2,460. A letter for the period 1 February 2012 to 5 April 2012 was also providing, showing nil interest in the Additional Information section.

186. We note that these interest figures reduce each year. As the interest rate on each loan is fixed, we consider that this shows that the balance on each loan has also reduced from year to year, consistent with an amount having been repaid during the year.

187. We note that Mr Boardman's evidence is that he was not aware that any amounts had been set-off against his loans. We consider that this evidence needs to be weighed in the light of Mr Boardman's evidence that he did not know anything about partnerships in general. We also note that, in the hearing, Mr Boardman had said that he was not expecting to receive the tax return information detailing interest deductions and had asked LM to speak to his accountant to explain the information.

188. Mr Boardman did not suggest that he had requested an explanation personally, even though his evidence was that he believed that nothing needed to be repaid on the loans until the maturity period had expired. The accountant included the amounts in Mr Boardman's tax returns, indicating that Mr Boardman did not express any further concern to him about why the interest information had been provided. As such, we consider that Mr Boardman's lack of knowledge as to the payments and any set-off against the loans does not mean that such payments were not made.

189. On the balance of probabilities, considering the evidence before us, we conclude that the LLPs made the disputed payments to Mr Boardman.

190. It was contended for Mr Boardman that the finance documents did not permit the LLPs to make payment to FCPF by way of set-off and the consumer credit act warning on the facility agreement meant that the borrower could not be bound by any other agreements which did not form part of that agreement. It was also contended that an early repayment would need to be demanded by FCPF, and that if FCPF had "helped themselves" to funds from the LLP, this may have created a resulting trust but did not amount to a distribution within the tax provisions.

191. We consider that this does not alter our conclusion above: we consider that, on the balance of probabilities, the LLP made payment of the amounts to members. How those amounts paid to Mr Boardman were then applied on his behalf, and whether that application was permissible, relates to events which follow on from the receipt by Mr Boardman of amounts from the LLPs and, in our view, do not mean that such payments were not made for tax purposes to Mr Boardman.

Whether the Tribunal has jurisdiction to consider the trading status of the LLPs

192. HMRC submitted that the question of whether the LLPs were trading was a question that needed to be established at the level of the LLP in each case and that this had been settled by the LLPs withdrawing from their appeals against the amendments made to their partnership returns to reflect HMRC's conclusion that they were not carrying on business with a view to profit.

193. For Mr Boardman it was submitted that the withdrawal of the LLP appeals did not mean that the LLPs were required to be treated as opaque for the purposes of the individual members' personal tax returns. The facts could not be regarded as settled simply because the appeals had been withdrawn. It was suggested that, if the LLPs were not regarded as partnerships, there could not have been any adjustment to the individual members' returns by reference to the partnership returns.

Discussion

194. We do not agree that, if HMRC concludes that a partnership is opaque rather than transparent, that there cannot be an adjustment to the individual members' returns by reference to the partnership returns. This was not expanded upon but appears to imply that if the partnership is treated as opaque, the partnership returns can no longer be regarded as such. We were not provided with any statutory or otherwise detailed support for this suggestion, which was not referred to elsewhere in argument.

195. We further note that it would also logically follow that, if the partnership returns no longer exist, then the entries on individual members' tax returns which were included as partnership profits and losses should also no longer exist. Given that this was the effect of the adjustments made by HMRC to the individual members' returns, the suggestion does not appear to advance matters.

196. Further, the effect of the withdrawal of the LLP appeals is that these are treated as settled as if the parties had come to an agreement that the matter under appeal should be upheld in favour of HMRC without variation. This is set out in statute, at s54(4) Taxes Management Act 1970.

197. Accordingly, the withdrawal by the LLPs from an appeal against the conclusion that they were opaque must be regarded as an agreement by the LLPs that HMRC were correct in that conclusion. We do not consider that there is any scope for an individual LLP member to bring an individual appeal against their personal tax return which contradicts that agreement.

198. As the LLPs must therefore be regarded as opaque, we conclude that the amounts which we have found were paid to Mr Boardman by the LLPs were taxable as distributions. It was submitted for Mr Boardman that the payments did not have the character of a distribution within the tax provisions, without further detailed submissions in explanation. As such, we do not consider that this submission satisfies the burden of proof, which is on Mr Boardman, to show why payments made to him by the LLPs as a member of the LLP should not be taxed as distributions where the LLP is opaque for tax purposes.

Whether the LLPs were carrying on business with a view to profit

199. The parties made submissions with regard to the question of whether the LLPs were carrying on business with a view to profit. Given our conclusion above, that it is not open to Mr Boardman to dispute the status of the LLPs as opaque, it is not strictly necessary for us to consider these submissions, In case we are incorrect on the conclusion above, however, we have set out or views on those submissions.

200. For Mr Boardman it was contended in his skeleton argument that the LLPs were clearly carrying on business, and had made profits, and so the distributions tax rules could not apply.

201. It was further submitted that the decision in *Foundation Partners (GP)* (TC08005), which considered the status of a partnership within the overall Montenegro structure to which the Omega investments related, was reached on the basis of the specific facts in that case and that the question of whether or not the Omega 4 and Omega 9 LLPs were trading should be considered on the basis of the evidence provided in this appeal. It was also submitted that, as Foundation was under appeal, it was not appropriate to rely on that decision.

202. It was submitted that there was, in this case, the following evidence of trading activity:

(1) continued information from FCP that efforts continued to be made to develop the property in Montenegro, and the LLPs showed a profit each year and it is these profits which funded the amounts which HMRC contended were distributions; and

(2) minutes of meetings which indicated that people were behaving as if the LLPs were trading.

203. HMRC submitted that, following the approach set out in *Ingenious Games LLP* [2021] EWCA Civ 1180], even if a partnership was undertaking activities which might be regarded as those of a business, these needed to be undertaken by those controlling the partnership with a real subjective intention of profit (per Ingenious [157]). The existence of surplus funds, which might be described as profit, was not evidence of such a subjective intention.

204. HMRC contended that the documentation provided made it clear that IPCS, to which both LLPs outsourced their activities, had no track record in providing construction services and also that IPCS had received approximately £52m by the time of the Omega 4 LLP payment, and £86m by the time of the Omega 9 LLP payment, without any work reflecting the use of such amounts having commenced. There would be no need for the immediate payments by the LLPs if the funds received by IPCS at those dates had not been returned to FCPF within the funds flow. The documentation showed that IPCS had paid the amounts onward to Boka Jersey on the same day that the funds had been received from the LLPs and therefore could not have used the funds for the services which it had agreed to provide to the LLPs.

205. HMRC submitted that it was clear from the documentation provided by Future Capital that there was one "controlling mind" behind each of the LLPs, an individual named Tim Levy, who was the CEO of Future Capital Partners, the promotor of the arrangements. Mr Levy had, it was contended, set up and controlled the Omega structures and FCP. They contended that Mr Levy, as the "controlling mind" could not have a subjective intention of profit as he was aware that the arrangements were circular, with the irrevocable payments made by the LLPs (funded in large part by the limited recourse loans) being ultimately used to return to FCPF the funds used to make the limited recourse loans in a circular flow, and that the development project could not be built as there were no funds for construction within that circular flow.

206. HMRC submitted that there was therefore no real subjective intention of profit within the LLPs as a result and so they could not be regarded as undertaking any activities with a view to profit.

Discussion

207. Having regard to the approach in Ingenious, which is binding upon us, we note from the accounts of the LLPs that Mr Levy is described in the "related party transactions" sections as:

(1) the sole owner of the designated members of both LLPs;

(2) having ultimate control of Future Capital Partners Limited, which wholly owned FCBS and FCPF;

(3) having ultimate control over Boka Jersey; and

(4) having ultimate control over IPCS.

208. We note also that Mr Levy was, prior to the acquisition of shares by the individual investors, the sole shareholder in Omega 4 Ltd and Omega 9 Ltd. He was also the sole director of both of Omega 4 Limited and Omega 9 Limited. He was given power of attorney by Mr Boardman (and, apparently, each of the other investors) to execute all of the agreements entered into by the companies and the LLPs as well as the security agreements and other documents relating to the limited recourse loans.

209. Given Mr Levy's connection to, and/or control of, the various entities in the structure, we agree that he should be considered to be the controlling mind of the partnership. None of the LLP members were in fact able to vote on or otherwise influence any of the key decisions made by the LLP , as the key agreements which outsourced all of the purported functions of

the LLPs were all entered into on the same day that the members were admitted, under the power of attorney given by the members to Mr Levy.

210. We agree therefore that, on the basis of the evidence before us, Mr Levy should be regarded as the 'controlling mind' for both of the LLPs and that, following Ingenious, the question is whether he had a real subjective intention of profit in respect of the LLPs' activities.

211. Mr Boardman's contentions that the board minutes show that activities were being undertaken do not assist with establishing whether there was a subjective intention of profit as to those activities.

212. Considering the evidence, and noting the above, we consider that on the balance of probabilities the activities of the LLPs were not conducted with a subjective intention of profit. We consider that the circular flow of funds shown within the documentation means that the funds invested cannot have been intended to be used for construction and other services and, as the LLPs had no other funds within which to undertake those services (or otherwise pay others to undertake them on their behalf), we do not consider that there can have been any subjective intention of profit in the activities which were undertaken by the LLPs.

213. Accordingly, if the LLPs' trading status is open to challenge contrary to our conclusion above, we find that the LLPs were not carrying on business with a view to profit and so we find that the amounts received by Mr Boardman should be regarded as distributions for the reasons given above.

Conclusion

214. In summary, and for the reasons set out above, we find that an unauthorised payments surcharge arises in respect of each of the purchases of Mr Boardman's Omega 4 Ltd and Omega 9 Ltd shares by his SIPP as the price paid by the SIPP was in each case, in excess than the price which might have been expected to be paid for those shares to a person who was at arm's length.

215. We find that neither shareholding had any value such that the amounts paid for each of the purchases cannot be a scheme administration member payment. The assessment in respect of the unauthorised payments charge are upheld.

216. We do not consider that it is just and reasonable to discharge the surcharge, given the circumstances of the arrangements and the policy objective underlying the surcharge. The assessment as to the surcharge is also upheld.

217. We find that the assessed payments were made by the LLPs to Mr Boardman, albeit that they were subsequently paid to FCPF on his behalf and we find that the LLPs cannot be regarded as trading with a view to profit and that the payments are therefore taxable as distributions.

218. However, we note HMRC's request that the assessment for the distribution assessed in 2014-15 be reduced to nil and find accordingly that such assessment shall be so reduced. The remaining assessments are upheld.

219. The Tribunal is grateful to Mr Sherry and Weil Gotshal & Manges for their pro bono representation of Mr Boardman, and to the parties for their patience in accommodating the judge's bout of covid (which not only necessitated a short notice conversion of the hearing to video but also affected the time taken to produce this decision).

Right to apply for permission to appeal

220. 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: 03 AUGUST 2022

APPENDIX 1 – ASSESSMENTS

Year	Unauthorised payments charge	Unauthorised payments surcharge	Distribution	Interest relief claim[1]	Tax
2012	£154,053.20	£57,769.95	£37,436.00	nil	£212,644.23
2013	nil	nil	£5,286.15	nil	£5,286.15
2014	nil	nil	£49,865.00	£10,967.00	£3,193.78
2015	nil	nil	£44,483.00[2]	£9,382.00	£1,881.34

[1] Interest relief assessments not in dispute
[2] Distribution assessment to be reduced to nil at HMRC request, as set out in the body of the decision

APPENDIX 2 – RELEVANT LAW

1. s160 Finance Act 2004

> (1) The only payments which a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are those specified in section 164.
>
> (2) In this Part "unauthorised member payment" means—
>
> (a) a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is not authorised by section 164, and
>
> (b) anything which is to be treated as an unauthorised payment to or in respect of a person who is or has been a member of the pension scheme under this Part.

2. s164 Finance Act 2004: Authorised member payments

> (1) The only payments a registered pension scheme is authorised to make to or in respect of a person who is or has been a member of the pension scheme are—
>
> … (d) scheme administration member payments (see section 171) …

3. s171 Finance Act 2004: Scheme administration member payments

> (1) A "scheme administration member payment" is a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is made for the purposes of the administration or management of the pension scheme.
>
> (2) But if a payment falling within subsection (1) exceeds the amount which might be expected to be paid to a person who was at arm's length, the excess is not a scheme administration member payment.
>
> (3) Scheme administration member payments include in particular—
>
> (a) the payment of wages, salaries or fees to persons engaged in administering the pension scheme, and
>
> (b) payments made for the purchase of assets to be held for the purposes of the pension scheme.
>
> (4) A loan to or in respect of a [person who is or has been a]1 member of the pension scheme is not a scheme administration member payment.
>
> (5) Regulations made by the Board of Inland Revenue may provide that payments of a description specified in the regulations are, or are not, scheme administration member payments.

4. s208 Finance Act 2004: Unauthorised payments charge

> (1) 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.
>
> (2) The person liable to the charge
>
> (a) in the case of an unauthorised member payment made to or in respect of a person before the person's death, is the person …
>
> (4) A person is liable to the unauthorised payments charge whether or not
>
> (a) that person,

(b) any other person who is liable to the unauthorised payments charge, and

(c) the scheme administrator,

are resident or domiciled in the United Kingdom.

(5) The rate of the charge is 40% in respect of the unauthorised payment …

(7) An unauthorised payment may also be subject to

(a) the unauthorised payments surcharge under section 209, and

(b) the scheme sanction charge under section 239.

(8) An unauthorised payment is not to be treated as income for any purpose of the Tax Acts.

5. s209 Finance Act 2004: Unauthorised payments surcharge

(1) A charge to income tax, to be known as the unauthorised payments surcharge, arises where a surchargeable unauthorised payment is made by a registered pension scheme.

(2)

(a) surchargeable unauthorised member payments (see section 210) …

(3) The person liable to the charge

(a) in the case of a surchargeable unauthorised member payment made to or in respect of a person before the person's death, is the person…

(5) A person is liable to the unauthorised payments surcharge whether or not

(a) that person,

(b) any other person who is liable to the unauthorised payments surcharge,

(c) the scheme administrator and,

[(d) the sub-scheme administrator,

are resident

(6) The rate of the charge is 15% in respect of the surchargeable unauthorised payment …

6. s210 Finance Act 2004: Surchargeable unauthorised member payments

(1) This section identifies which unauthorised member payments made by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme are surchargeable.

(2) If the surcharge threshold is reached before the end of the period of 12 months beginning with a reference date, each unauthorised member payment made to or in respect of the person in the surcharge period is surchargeable.

(3) The surcharge period is the period—

(a) beginning with the reference date, and

(b) ending with the day on which the surcharge threshold is reached.

(4) 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.

(5) Each subsequent reference date is the date, after the end of the previous reference period, on which the pension scheme next makes an unauthorised member payment to or in respect of the person.

(6) The previous reference period is the period of 12 months beginning with the previous reference date or, if the surcharge threshold is reached in that period, is the surcharge period ending with the date on which it was reached.

(7) The surcharge threshold is reached if the unauthorised payments percentage reaches 25%.

(8) The unauthorised payments percentage is the aggregate of the percentages of the pension fund used up by each unauthorised member payment made by the pension scheme to or in respect of the person on or after the reference date.

(9) The percentage of the pension fund used up on the occasion of an unauthorised member payment is UMP/VRx100 where—

UMP is the amount of the unauthorised member payment, and

VR is an amount equal to the aggregate of the value of the member's rights under arrangements relating to the member under the pension scheme when the unauthorised payment is made (or, if the unauthorised member payment is made after the member has died or has otherwise ceased to be a member of the pension scheme, at the date when the member died or otherwise ceased to be a member).

(10) The value of the member's rights under an arrangement on any date is the aggregate of—

(a) the value of the member's crystallised rights under the arrangement on that date, calculated in accordance with section 211, and

(b) the value of the member's uncrystallised rights under the arrangement on that date, calculated in accordance with section 212.

7. s268 Finance Act 2004: Unauthorised payments surcharge and scheme sanction charge

(1) This section applies where

(a) a person is liable to the unauthorised payments surcharge in respect of an unauthorised

payment …

(2) The person liable to the unauthorised payments surcharge may apply to the Inland Revenue for the discharge of the person's liability to the unauthorised payments surcharge in respect of the unauthorised payment on the ground mentioned in subsection (3).

(3) The ground is that in all the circumstances of the case, it would not be just and reasonable for the person to be liable to the unauthorised payments surcharge in respect of the payment.

(4) On receiving an application by a person under subsection (2) the Inland Revenue must decide whether to discharge the person's liability to the unauthorised payments surcharge in respect of the payment.

(5) The scheme administrator may apply to the Inland Revenue for the discharge of the scheme administrator's liability to the scheme sanction charge in respect of a scheme chargeable payment on the ground mentioned in subsection (6) or (7) …

(8) On receiving an application under subsection (5), the Inland Revenue must decide whether to discharge the scheme administrator's liability to the scheme sanction charge in respect of the unauthorised payment.

(9) The Inland Revenue must notify the applicant of the decision on an application under this section.

(10) Regulations made by the Board of Inland Revenue may make provision supplementing this section; and the regulations may in particular make provision as to the time limits for the making of an application.

8. s269 Finance Act: Appeal against decision on discharge of liability

(1) This section applies where the Inland Revenue

(a) decides to refuse an application under … section 268 (discharge of liability to unauthorised payments surcharge or scheme sanction charge) …

(2) The applicant may appeal against the decision …

(5) An appeal under this section against a decision must be brought within the period of 30 days beginning with the day on which the applicant was given notification of the decision.

(6) On an appeal under subsection (1)(a) that is notified to the tribunal, the tribunal must consider whether the applicant's liability to the … unauthorised payments surcharge ought to have been discharged.

(7) If the tribunal considers that the applicant's liability ought not to have been discharged, the tribunal must dismiss the appeal.

(8) If the tribunal considers that the applicant's liability ought to have been discharged, the tribunal must grant the application …