Pension scheme loans prove poison chalice to taxpayer employer (Eden Consulting Services (Richmond) Ltd v Revenue and Customs Commissioners)

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Pensions analysis: Are occupational pension scheme loans considered as authorised employer loans? Elizabeth Wilson, a barrister specialising in tax law at Pump Court Tax Chambers in London, comments on what lessons can be learned from this case and looks at the wider implications for these types of cases.

Eden Consulting Services (Richmond) Ltd v Revenue and Customs Commissioners, [2017] UKFTT 596 (TC), [2017] All ER (D) 38 (Aug)

The two loans made to the taxpayer company by an occupational pension scheme, of which the taxpayer had been the principal employer, had not complied with the conditions set out in section 179 of the Finance Act 2004 (FA 2004) in order to be treated as authorised employer loans. Accordingly, they gave rise to unauthorised payments and charges under FA 2004, ss 208, 209. The (First-tier Tax Tribunal) FTT so held in dismissing the taxpayer's appeal against the notices of assessment issued against it by the Revenue and Customs Commissioners in respect of those unauthorised payments.

What is the background to this case?

Eden Consulting Services (Richmond) Ltd (Eden) was a sponsoring employer of an occupational pension scheme. It owned a property in Surrey. In 2004 a first charge over the property was registered in favour of Barclays Bank plc at Companies House. In 2007 the pension scheme lent £60,000 to Eden, expressed to be secured as follows:

- first charge against the chattels, furniture and fittings at the property owned by Eden
- second charge over the property itself

These charges were not registered at Companies House. The second loan in 2009 for £15,000 was similarly secured and not registered. In 2010, Eden registered a third charge over the chattels, furniture and fittings to secure £20,772.

HMRC issued notices of assessment under FA 2004, ss 208, 209 on the grounds that two loans fell to be treated as unauthorised payments because the loans were not 'secured by a charge which is of adequate value' as required by FA 2004, s 179(1)(b). HMRC relied in particular on the fact that none of the charges were registered at Companies House as required under company law, with the result that the charges were void against a liquidator, administrator or creditor. Thus, there was either no 'charge', or a charge which was not 'of adequate value' (because of the sanctions of invalidity under company law). The taxpayer contended that the loans were secured as required—FA 2004, s 179 should be read 'literally'—it did not expressly state that a charge had to be 'registered' and registration was not an absolute requirement of company law (albeit there might be sanctions for non-compliance).

Eden had sought to pursue other arguments to the effect that HMRC had not acted fairly. Following a preliminary hearing, the FTT (Judge Thomas Scott) on 4 October 2016 decided that these arguments were properly for judicial review proceedings or the HMRC Adjudicator. These allegations were therefore struck out (TC05399: *EDEN CONSULTING SERVICES (RICHMOND) LTD* [2016] UKFTT 656 (TC)).

What were the legal issues the judge had to decide? What did the judge decide and why?

The judge had to decide these three issues:

- the proper interpretation of the word 'charge' in FA 2004, s 179
- if the charge here was of 'adequate value' or not
- whether a surcharge was due under FA 2004, s 209

FA 2004, s 179(7) provides that a charge includes a right in security and FA 2004, Sch 30, para 1 defined 'charge which is of adequate value' for the purposes of FA 2004, s 179.

On the first issue, the FTT rejected the taxpayer's submission that the word 'charge' should be construed 'literally' and without any regard to the applicable company law or general law. It held that the meaning of the word was a question of law and that the ordinary rules of statutory construction applied. However, contrary to HMRC's submission, the FTT considered that an unregistered charge was still a charge for the purposes of general law, and thus for the purposes of FA 2004, s 179, albeit it was a charge which was subject to sanctions of invalidity as a matter of company law.

On the second issue, the FTT held for HMRC. FA 2004, s 179(1)(b) required that the loan be 'secured' by a charge of adequate value, and FA 2004, Sch 30, para 1(4) makes it clear that in order for a 'charge' to be of 'adequate value' it had to take 'priority over any other charge over the assets' concerned. The second charge securing the 2007 loan could not take priority over the first charge in favour of the bank and so did not satisfy that requirement. The position was the same with the unregistered first charges over the chattels, furniture and fittings. Construed purposefully, it was not enough for there simply to be no other charge over the assets—the charge had to be one which secured the repayment of the loan. This was evidenced by the fact that the charge had to have the attribute of being first in priority. In this case, the unregistered charge was void as regards liquidators, administrators and creditors and could not take its place in the statutory order of priority for repayment. Thus, it could not provide security for the repayment of the loan. The 2009 loan therefore failed to meet the conditions of FA 2004, s 179(1)(b).

On the third issue, the FTT held that the value of the 2007 loan exceeded 25% of the pension scheme's assets so that FA 2004, s 209 applied.

The FTT also made the following three additional findings:

- the value of the two loans exceeded 50% of the aggregate of the amount of the sums and the market value of the assets held for the purposes of the pension scheme. This meant that the 2009 loan failed to meet the condition in FA 2004, s 179(1)(a). This was a further reason why an unauthorised payment arose
- if the 2010 registered charge took priority over the unregistered charges, unauthorised payment charges would arise under FA 2004, Sch 30, para 6 for the accounting period in which the 2010 charge was registered
- the FTT ruled that a subsequent rectification of the 2007 and 2009 charge arrangements could not cancel earlier unauthorised payment charges

To what extent is the judgment helpful in clarifying the courts' approach to the law in this area? How does the decision compare with previous cases?

This is the first case to deal with this specific point. It is notable that although HMRC succeeded, the FTT did not adopt HMRC's analysis wholesale. The decision is therefore a useful exposition of the precise scope of the statutory provisions.

What are the implications of this decision? What are the key considerations to be mindful of when advising in this area?

The key message from this case is that tax law does not exist in a vacuum and when dealing with companies, regard must be had to the relevant company law. In addition, when reading the pensions legislation in the FA 2004, it is important to consider the underlying statutory policy. The statutory code is designed to promote investment for the purposes of providing a pension on retirement. As such, it is unlikely to allow transactions that risk devaluing the pension fund or which treat the pension fund as a cash pot for the sponsoring employer. In this case, the loans were secured on chattels and/or were unregistered second charges. That is not obviously compatible with the protection of the fund in the long term. So, as already observed, it is not surprising that the FTT found that the loans were unauthorised payments.

Interviewed by David Bowden.

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