SQUIRE SANDERS

EGG ON THE FACE OF QROPS TAXMAN

On Friday 2 March 2012 the Court of Appeal handed down judgement in the case of *TMF Trustees Singapore Limited (formerly Equity Trust (Singapore) Limited) v HM Revenue & Customs.*

The court found in favour of HMRC and held that the pension scheme in question, the Recognised Overseas Self-Invested International Pensions Retirement Trust was not a qualifying recognised overseas pension scheme. As a question of fact, to which Lord Justice Lloyd acknowledged that Judge Hodge QC in the high court could easily have concluded differently, Rosiip did not satisfy primary condition one of the 2006 regulations as it was not 'open' to Singapore residents (it turned out that there were Singapore members in the scheme but let us not get into that).

The Court of Appeal also decided that Rosiip did not satisfy condition B of the 2006 regulations as it was not regulated by the existing 'system' for schemes in Singapore. This latter conclusion effectively gave the kiss of death to any Singapore personal pension fund ever being a Qrops because section five could never regulate a Qrops. So if you want to take your personal pension fund with you when you move to Singapore – tough luck. And now if you want to take it elsewhere it will be a risky, and possibly expensive, course of action because you might find yourself subject to an unexpected 55 per cent tax charge and there may be little you can do to protect yourself as I shall go on to discuss.

After the Court of Appeal decided Rosiip was not a Qrops, HMRC imposed unauthorised payment charges and surcharges totalling 55 per cent on some of the investors who had transferred their pension funds to Rosiip. They had transferred their pension in good faith having checked that Rosiip was on the list of approved Qrops on HMRC's website and were safe in the knowledge that HMRC had sent Rosiip its approval as a Qrops in writing. Naturally the investors therefore felt aggrieved to find these charges imposed on them in these circumstances. In June 2012 a group of investors formed a group litigation order to challenge these assessments and protect their pension pots. HMRC was always going to have a hard time arguing that such charges were justified given that it had published Rosiip on the list of Qrops on its website and issued the letter of approval, but nonetheless it vehemently fought the assertion that Rosiip contributors had a legitimate expectation to rely on published materials made available by HMRC to the public. I think we have heard this story before.

In the administrative court, Mr Justice Charles had little time for the arguments of HMRC during a five-day hearing in June last year and was deeply troubled and seriously critical of its conduct. In the course of the hearing the judge required additional witness evidence to be disclosed that could and should have been disclosed much earlier on (not to mention potentially evidence that should have been disclosed under the original TMF litigation) and the witness evidence from HMRC was somewhat incongruous, particularly in relation to other schemes in a similar position to Rosiip. The hearing ended when HMRC offered to withdraw the assessments and pay the costs of the group litigation order on an indemnity basis. Ouch. On 3 December 2013 Mr Justice Charles decided not to publish a judgement as he was satisfied that HMRC had learnt a valuable lesson regarding its duties of candour and fairness.

As for the administration of the Qrops regime, that is the real tragedy. HMRC published guidance on 27 November 2013 in direct response to the criticisms of the court in the group litigation order in respect of transfers made in reliance on the published HMRC Qrops list. Where the transfer took place before 24 September 2008 (the date that a caveat or health warning was added to the Qrops list) HMRC will not seek to collect the unauthorised payments charge. It will exercise its collection and management powers in response to the particular facts of the case. I think this is what it should have done in the Rosiip case and look where it got HMRC. I should say that this new guidance gives the impression of correcting an issue which had arisen inadvertently. In the context of these proceedings this statement ironically lacks an appropriate degree of candour – although having regard to the severe criticisms it received one cannot blame HMRC for trying to put the best face on things.

What we have now is a self-assessment Qrops regime. The taxpayer must be satisfied that he is transferring his pension pot to a Qrops. I thought that Rosiip was a Qrops and I do this for a living. One might even be forgiven for thinking that HMRC thought it was a Qrops at some point in time. It took five years of litigation and for the Court of Appeal to decide that it was not. The HMRC guidance helpfully includes reference to the legislation and statutory instruments that you must read before you transfer your funds. You must also be sure that the country to which you transfer your pension also satisfies those rules which involves an intimate knowledge of the administration of the tax and pension system in that country. Um yes, and here I hark back to TMF's five-year long struggle in the courts with Rosiip. But no matter, apparently the ordinary taxpayer can make this assessment himself.

The real problem is that there can be no assurance that HMRC will not challenge the transfer and charge 55 per cent and even with the best professional advice, few people are going to take this risk.

This cannot be the end for the Qrops. Mr Justice Charles in declining to issue a judgement did not have to tackle the European argument: I want to move to France or Madeira, and under free movement of capital there should not be a charge on me taking my pension with me. Or should there? Surely such a charge would be discriminatory and contrary to the principles of EU law. HMRC will not be helping decide at this juncture that is for sure, and further litigation looks inevitable.

It is worth noting that, as with any tragedy, it did not have to end like this. All these problems were wholly avoidable. It just needed somebody in HMRC to step back and sensibly review what it was doing. In fact all the funds invested in Rosiip are now entirely outside HMRC's jurisdiction and the UK tax net, and this was never the intention of the investors. HMRC could have navigated this case with much more common sense and still got exactly what it wanted (in fact rather more than it ended up with) if only it had paused for thought before drawing its sword.

Helen McGhee – Squire Sanders

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Key Points

- Nearly two years ago the Court of Appeal decided the Rosiip scheme was not a Qrops and HMRC imposed unauthorised payments charges and surcharges, totalling 55 per cent.
- In the administrative court, Mr Justice Charles had little time for the arguments of HMRC during a five-day hearing in June last year.
- HMRC published guidance on 27 November 2013 in direct response to the criticisms of the court.

Contact

Helen McGhee
Associate
T +44 20 7655 1684
E helen.mcghee@squiresanders.com