[2014] UKUT 0068 (TCC)
Appeal numbers: TC/08264/2010
TCC/JR/04/2011
FTC/52/2012

Non-approved retirement benefits scheme – refusal of relief from income tax in respect of payments by employer – proper procedure for challenge by taxpayer – judicial review or statutory appeal

Non-approved retirements benefits scheme – refusal of relief after issue of closure notice – whether too late to challenge refusal in appeal against closure notice (if statutory appeal were the correct route of challenge)

Non-approved retirements benefits scheme – section 392 Income Tax (Earnings and Pensions) Act 2003 – substitution of taxpayer's brother for taxpayer as beneficiary – meaning of "event" – whether substitution was a "payment" if made pursuant to a moral but not legal obligation – whether payments by the brother to the taxpayer out of benefits under the scheme could be in substitution for benefits for the taxpayer

IN THE UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

THE COMMISIONERS FOR HER MAJESTY'S

REVENUE AND CUSTOMERS Appellants/Respondents

-and-

MITESH DHANAK Respondent/Appellant

Tribunal : Mr Justice David Richards

Sitting in public in London on 26-28 June, 26 July 2013

Mr James Rivett, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for HM Revenue and Customs

Ms Hui Ling McCarthy, instructed by McKie & Co (Advisory Services) LLP, for Mr Dhanak

Mr Justice David Richards :

Introduction

1. The issue of this Decision has been considerably delayed because, following provision of the Decision in draft to the parties, they requested time to agree a resolution of the issues which remained between them following this Decision. The parties have now agreed a form of order which gives effect to the Decision and, by consent, deals with the outstanding matters. There is set out at the end of this Decision the substantive parts of the order.

2. A sum paid by an employer, in accordance with a non-approved retirement benefits scheme, to provide relevant benefits for an employee counts as employment income of the employee. It is chargeable to income tax in the tax year in which the sum is paid. This is the effect of section 386 of the Income Tax (Earnings Pensions) Act 2003 (ITPA 2003). In certain circumstances, an application for relief in respect of the tax on such sum may be made to HMRC under section 392 of the same Act.

3. The present case arises from the refusal of an application for relief made by the taxpayer, Mitesh Dhanak, in respect of tax arising on the sums paid to a retirement benefits scheme for his benefit in the tax years 2003/04 and 2004/05. The application for relief under section 392 was made on 11 February 2010 and was refused by HMRC on 17 November 2010.

4. Mr Dhanak's attempts to challenge the refusal of his application for relief has resulted in something of a procedural thicket.

5. Mr Dhanak first sought to raise the issue of his entitlement to relief under section 392 by appealing against amendments made by closure notices issued by HMRC on 20 April 2009 in respect of his self-assessment tax returns for the relevant years.

6. HMRC contends that the refusal of relief under section 392 cannot be the subject of a statutory appeal but can be challenged only by way of an application for judicial review. HMRC applied to the First-tier Tribunal for directions striking out the appeal on the grounds that the Tribunal had no jurisdiction to consider the refusal of relief. By a decision made on 21 March 2012, the First-tier Tribunal (Judge Bishopp) dismissed the application by HMRC. Judge Bishopp subsequently gave permission to appeal against this decision.

7. In order to protect his position in the light of HMRC's position that the refusal of relief could not be the subject of a statutory appeal, Mr Dhanak issued a claim on 16 February 2011 for judicial review of HMRC's decision dated 17 November 2010 to refuse his application for relief. By an order made by the Administrative Court on 20 May 2011, permission to proceed was granted and the claim was transferred to the Upper Tribunal pursuant to section 19 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007).

8. By a direction given in April 2013, HMRC's appeal against the refusal to strike out Mr Dhanak's statutory appeal, the statutory appeal itself and his application for judicial review were ordered to be heard together.

9. When the hearing started before me, HMRC's appeal and Mr Dhanak's application for judicial review were listed before me sitting in the Upper Tribunal, while the statutory appeal was listed before me sitting in the First-tier Tribunal. This did not appear to be a satisfactory situation, not least because I was not authorised to sit in the First-tier Tribunal. I heard argument on all the issues and heard evidence from Mr Dhanak, I adjourned the hearing for further argument and, over the adjournment, successful steps were taken to transfer the statutory appeal to the Upper Tribunal. Accordingly, all three matters are now proceeding in the Upper Tribunal and it is on that basis that I heard submissions on the final day of the hearing.

Statutory provisions

10. The provisions relevant to the substantive issues arising have been repealed but were in force at all material times. They are set out below with minor amendments, made principally by the Commissioners for Revenue and Customs Act 2005.

11. Section 386 of ITEPA 2003 provided as follows:

> *"(1) A sum paid by an employer—*
>
> *(a) in accordance with a non-approved retirement benefits scheme, and*
>
> *(b) with a view to the provision of relevant benefits for or in respect of an employee of the employer,*
>
> *counts as employment income of the employee for the relevant tax year.*
>
> *(2) The "relevant tax year" is the tax year in which the sum is paid.*
>
> *(3) Subsection (1) does not apply if or to the extent that the sum is chargeable to income tax as the employee's income apart from this section.*
>
> *(4) But if, apart from this section, the payment of the sum would be a payment to which Chapter 3 of this Part (payments and benefits on termination of employment etc.) would apply, subsection (1) applies to the sum (and accordingly that Chapter does not apply to it).*
>
> *(5) In this Chapter—*
>
> *(a) "employee" includes a person who is to be or has been an employee,*

(b) section 5(1) (application to offices) does not apply, but "employee", in relation to a company, includes any officer or director of the company and any other person taking part in the management of the affairs of the company,

(c) "employer" and "employment" have meanings corresponding to the meaning of "employee" given by paragraphs (a) and (b),

(d) "director" has the meaning given by section 612(1) of ICTA, and

(e) "relevant benefits" has the meaning given by that section, and section 612(2) of ICTA applies to references in this Chapter to the provision of relevant benefits as it applies to such references in Chapter 1 of Part 14 of ICTA.

(6) For the purposes of this Chapter benefits are provided in respect of an employee if they are provided for the employee's spouse or civil partner, widow or widower, surviving civil partner, children, dependants or personal representatives.

(7) Any liability to tax arising by virtue of this section is subject to the reliefs given under—

(a) section 392 (relief where no benefits are paid or payable), and

(b) section 266A of ICTA (life assurance premiums paid by employer)."

12. Section 392 of the ITEPA 2003 provided as follows:

"(1) An application for relief may be made to an officer of Revenue and Customs if—

(a) a sum is charged to tax by virtue of section 386 in respect of the provision of any benefits,

(b) no payment in respect of, or in substitution for, the benefits has been made, and

(c) an event occurs by reason of which no such payment will be made.

(2) The application must be made within 6 years from the time when the event occurs.

(3) The application must be made by the employee or, if the employee has died, the employee's personal representatives.

(4) If an officer of Revenue and Customs is satisfied that the conditions in subsection (1) are met in relation to the whole sum, the officer must give relief in respect of tax on it by repayment or otherwise as appropriate, unless subsection (6) applies.

(5) If an officer of Revenue and Customs is satisfied that the conditions in subsection (1) are met in relation to part of the sum, the officer may give such relief in respect of tax on it as is just and reasonable, unless subsection (6) applies.

(6) This subsection applies if—

(a) the reason why no payment has been made in respect of, or in substitution for, the benefits, or

(b) the event by reason of which there will be no such payment,

is a reduction or cancellation of the employee's rights in respect of the benefits, or part of the benefits, as a consequence of a pension sharing order or provision.

(7) In subsection (6) "pension sharing order or provision" means any such order or provision as is mentioned in—

(a) section 28(1) of WRPA 1999 (rights under pension sharing arrangements), or

(b) Article 25(1) of WRP(NI)O 1999 (provision for Northern Ireland corresponding to section 28(1) of WRPA 1999)."

Facts

13. The primary facts are uncontroversial and the following summary of the relevant facts is taken largely from the skeleton argument of counsel for HMRC.

14. Mr Dhanak is the sole shareholder and director of Precious Homes Limited (PHL), a company whose principal activities are the operation of care homes for people with learning difficulties and the provision of supported housing services.

15. On 27 February 2004, PHL established a Funded Unapproved Retirement Benefit Scheme (the pension scheme) in Guernsey for the sole benefit of Mr Dhanak.

16. During the tax year 2003/04, PHL made contributions to the pension scheme, comprising a cash contribution of £1000 and two contributions of real property with a combined market value of £355,000. During the tax year 2004/05, PHL made a further cash contribution of £1000 and a further contribution of real property with a market value of £385,000. PHL claimed deductions for the payments and the value of the properties in its corporation tax returns for the relevant years.

17. At the time of the contributions, Mr Dhanak was the only member of the pension scheme and, accordingly, it is not in issue that both the cash and the real property contributions were made for his benefit.

18. Mr Dhanak submitted his self-assessment tax returns for each of the relevant periods on the basis that income tax was payable by virtue of section 386 ITEPA 2003 in respect of the cash contributions but that no income tax was payable in respect of the contributions of real property. This was on the basis of advice received by him that a transfer of real property was not "a sum paid" for the purposes of section 386. HMRC opened enquiries into the two returns under section 9A of the Taxes Management Act 1970 (TMA 1970).

19. On 25 January 2008, the Court of Appeal gave judgment in *Irving v HMRC* [2008] EWCA Civ 6, holding that a transfer of real property to an unapproved pension scheme, such as the pension scheme in this case, constituted a "sum paid" within the meaning of section 386 and accordingly an employee was chargeable to income tax in respect of the value of such property.

20. On 20 April 2009, HMRC issued closure notices to Mr Dhanak under section 28A TMA 1970 in respect of each of the enquiries opened into the returns for the relevant tax years. Each closure notice had the effect of amending Mr Dhanak's self-assessment returns for those years to include amounts of additional income tax payable in respect of the value of the properties transferred to the pension scheme.

21. On 18 May 2009, Mr Dhanak appealed the closure notices and requested a review. At the same time he also applied prospectively for relief under section 392 ITEPA 2003 on the basis that the trustee of the pension scheme had decided to exclude him as a beneficiary and substitute his brother Dilip Dhanak as a beneficiary which, he said, he expected to happen within a month.

22. In fact, it was not until January 2010 that these steps were taken. By a letter dated 13 January 2010 to Mr Dhanak, PHL confirmed that it would not from that date make any further contributions to the pension scheme in respect of his membership and that, as a result of the termination of contributions, he would cease to be an active member of the scheme. By a further letter of the same date, PHL informed Dilip Dhanak that from the date of the letter he was a member of the pension scheme and that it would from time to time make contributions on his behalf. With the sanction of an order of the Royal Court of the Island of Guernsey, the trusts of the pension scheme were varied by the execution of the following documents. On 14 January 2010, a deed of amendment was executed which amended the rules of the pension scheme so as to give the trustee power, with the written consent of the relevant member,

to declare by deed that any member should cease to be a member and should be excluded from any benefit under the scheme. That member's interest would be held for or in respect of such one or more of the remaining members of the pension scheme as the trustee might select or, in default of such selection, for or in respect of the remaining members pro rata to their interests as at the time of the deed. On 15 January 2010, in exercise of this new power, a deed of exclusion was made between the trustee and Mr Dhanak, excluding Mr Dhanak from any future benefit under the pension scheme and declaring that his interest was to be held on trust for or in respect of Dilip Dhanak.

23. In a letter dated 11 February 2010, Mr Dhanak's advisors repeated his application for relief under section 392. On 25 October 2010 Mr Dhanak notified his appeal to the Tribunal on the ground that "the tax assessed in respect of contributions in specie is relieved in its entirety under…s.392". By a letter dated 17 November 2010, HMRC refused the application for relief.

24. On 17 January 2011, HMRC issued its application to strike out Mr Dhanak's statutory appeal to the First-tier Tribunal. On 16 February 2011, as a protective measure, Mr Dhanak issued his application for judicial review of HMRC's decision to refuse his application for relief under section 392.

Correct procedure: statutory appeal or judicial review

25. Logically, the first matter to consider is HMRC's appeal against the refusal of the First-tier Tribunal to strike out Mr Dhanak's statutory appeal. This will resolve whether, as HMRC contend, Mr Dhanak's challenge must proceed by way of judicial review or whether, as Mr Dhanak contends and as the First-tier Tribunal held, Mr Dhanak is entitled to proceed by way of his statutory appeal.

26. Certain matters are common ground between the parties.

27. First, the First-tier and Upper Tribunals were created by statute and have only the jurisdiction conferred on them by statute. They have no residual or common law jurisdiction. This has been emphasised in a number of recent decisions of the Upper Tribunal: see *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) at [36] – [39], *HMRC v Noor* [2013] UKUT 071 (TCC) at [25]. Section 3(1) and (2) of the TCEA 2007 established the First-tier Tribunal and the Upper Tribunal respectively "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". So far as the present case is concerned, the jurisdiction of the First-tier Tribunal and the Upper Tribunal is to hear "any appeal under the Taxes Acts": section 48(1)(a) TMA 1970. The Taxes Acts expressly and directly confer jurisdiction to hear appeals from a significant number of decisions of HMRC.

28. Secondly, no express provision is made either in section 392 ITEPA 2003 or elsewhere for an appeal against a refusal of an application for relief made under that section. Mr Dhanak has not sought to appeal directly against the refusal of relief in this case. He challenges the refusal in his appeal under section 31(1)(b) of TMA 1970 against the amendment made by the closure notices issued by HMRC. Notice of those appeals was given within the

requisite period of 30 days after the date on which the closure notices were issued.

29. Thirdly, it is accepted for Mr Dhanak that applications for relief under section 392 may be made, and refused, many years after the years in which contributions to pension schemes have been charged to income tax under section 386 and after any enquiries into the relevant returns have closed. This arises because the event which triggers an application for relief under section 392(1) may occur long after the contribution has been made and even then the application for relief may be made within 6 years after the event. It is accepted on behalf of Mr Dhanak that no appeal lies to the Tribunal after it has become too late to challenge an assessment and that in those circumstances the only means of challenge is by way of an application for judicial review, or possibly an action for a common law remedy. This latter possibility was not fully explored in argument and the suggestion of counsel for Mr Dhanak that an action for restitution for unlawfully demanded tax, such as was pursued in *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366, might be available appears misplaced, given that in these circumstances there would be no question of the income tax having been paid as a result of an unlawful demand. The important point, however, is that no statutory appeal would lie to the Tribunal.

30. In support of their position that a refusal of relief under section 392 cannot be challenged by or in an appeal to the Tribunal, HMRC relies on these features which are common ground. They rely also on a number of further factors.

31. First, the decision-maker in respect of any application for relief is, by virtue of section 392(4) and (5), "an officer of Revenue and Customs" who must be "satisfied that the conditions in subsection (1) are met". If the legislative intention was that a refusal of relief could be challenged by way of appeal to the Tribunal, one would expect to see provision made for the view of the Tribunal to be substituted for that of the officer of HMRC if the Tribunal considered that the relief had been wrongly refused. There are a considerable number of provisions in tax legislation where this approach is adopted. For example, under section 138 of the Taxation of Chargeable Gains Act 1992, HMRC may give clearance in advance that roll-over relief will be available on certain transactions in shares if they are "satisfied that the exchange or scheme of reconstruction will be effected for bona fide commercial reasons and will not form part of any such scheme or arrangements as are mentioned in section 137(1)." Section 138(4) provides that if the board is not so satisfied, application for clearance may be made to the Tribunal "and in that event any notification by the tribunal shall have effect for the purposes of subsection (1) above, as if it were a notification by the Board". Likewise, under section 751 of the Income Tax Act 2007, the jurisdiction of the Tribunal on an appeal against decisions under a number of specified provisions includes "jurisdiction to affirm or replace any decision taken by an officer of Revenue and Customs in exercise of the officer's functions". *HMRC v Hok Ltd* was concerned with paragraph (a) of section 100B(2) of the TMA 1970, which permits the Tribunal on an appeal to decide only whether a fixed rate penalty has been correctly imposed in accordance with the relevant legislation. By contrast,

sub-paragraph (b) of the same provision expressly permits the Tribunal to substitute its own view for that of HMRC as to the appropriate amount of a penalty which is not fixed by the legislation.

32. Secondly, the requirement that the HMRC officer should be "satisfied that the conditions in subsection (1) are met" involves, or may involve, an element of judgment on the part of the officer. The conditions set out in paragraphs (a) and (b) of section 392(1) are matters of fact involving no exercise of judgment as such. The condition set out in (c) requires the officer to be satisfied that as a result of the occurrence of the relevant event no payment in respect of, or in substitution for, the benefits under the scheme "will be made". Necessarily, this involves an assessment of what may occur in the future. In some cases, no doubt, it will be absolutely clear that no such payment will be made but there may well be other cases in which the officer must assess all relevant factors in order to determine that no such payment will be made in the future. It was put to the First-tier Tribunal on behalf of HMRC that this involved an exercise of discretion by the officer. Before the Upper Tribunal, HMRC accepts that it is not an exercise of discretion, but for the reasons just given it submits that it does involve an evaluative judgment. It is therefore significant that the legislation does not provide for the substitution of the judgment of the Tribunal for the judgment of the HMRC officer, as well as not providing for any appeal.

33. Thirdly, the provisions of section 392(5) strongly suggest that any challenge to a refusal of relief under section 392 should be made by way of an application for judicial review. While sub-section (4) provides that if the HMRC officer is satisfied that the relevant conditions are met in relation to the whole sum which has been charged to tax, the officer "*must* give relief in respect of tax on it", sub-section (5) provides that if the officer is satisfied that the conditions are met in relation to part of the sum, he "*may* give *such relief* in respect of tax on it *as is just and reasonable*". This clearly involves an exercise of discretion and the absence of an express right of appeal coupled with a power for the Tribunal to substitute its own view for that of the officer is fatal to any appeal against a refusal of relief under sub-section (5). HMRC submit that it would be extraordinary if a decision under sub-section (4) could be the subject of challenge in an appeal to the Tribunal, while a decision under sub-section (5) cannot be.

34. In her submissions on behalf of Mr Dhanak, Miss McCarthy relied on the decisions of the Upper Tribunal in *HMRC v Hok Ltd* and *HMRC v Noor* and the decision of the First-tier Tribunal in *Prince v HMRC* [2012] UKFTT 157 (TC) as demonstrating a principle that if a dispute is about the amount of tax lawfully due on a proper application of the tax legislation (i.e. a taxpayer's "liability" to tax), the correct route is a statutory appeal but, if, on the other hand, the dispute is not the amount of tax lawfully due from the taxpayer, but instead is about whether HMRC have in some way acted unlawfully and should therefore not be allowed to collect tax otherwise lawfully due, any challenge lies by way of an application for judicial review.

35. All three cases concerned the extent, if any, to which the First-tier Tribunal or the Upper Tribunal on a statutory appeal could review a decision by HMRC

on grounds of legitimate expectation. I agree that the decisions establish that, in the absence of clear statutory authority, it is not open to the Tribunals to review decisions on such grounds. In *Prince*, it was accepted that there was no express right of appeal from a refusal to apply an extra-statutory concession and the Tribunal held that any challenge on grounds of legitimate expectation must be brought by way of judicial review. In *Hok*, it was held that the Tribunals' jurisdiction on an appeal against the imposition of fixed penalties for the late filing of a P35 return was limited to the narrow issue specified in the express provision for an appeal. In *Noor*, the issue was whether a statutory provision which conferred an express right of appeal to the Tribunal with respect to the amount of input tax for VAT purposes enabled the Tribunal to entertain a challenge on grounds of legitimate expectation: see *Noor* at [31] and [71]. The Upper Tribunal held that, on its proper construction, the provision in question did not do so and that an appeal was limited to questions of the amount of tax under the relevant legislation.

36. I do not accept that the decisions establish the second half of the principle advanced by Miss McCarthy. They simply did not concern the question whether the correct route for *all* disputes on issues arising under the relevant legislation and going to a taxpayer's liability to tax or entitlement to a claim or relief is a statutory appeal.

37. Miss McCarthy relied on what Judge Bishopp said in *Prince* at [23]:

> "*The position here is very different, The tribunal is not being asked, as in Oxfam, to determine how much tax is due – that has already been agreed – but whether HMRC should be required to exercise their discretion not to collect the tax. That is not a tax dispute at all, but a matter governed by public or administrative law, and precisely the kind of issue which must be determined by judicial review. Nothing in the legislation could be construed as conferring any jurisdiction to determine such an issue on this tribunal, nor do I see any basis on which an argument of legitimate expectation that a statutory duty (as HMRC's obligation to collect tax which is due is) will, or should, by waived could properly be regarded as the province of a tribunal whose task is to determine the amount of tax which is due: in that, there is a clear distinction to be drawn between this case and Oxfam.*"

38. The point made by Judge Bishopp in that passage is that a challenge to a decision to collect tax lawfully due is a matter for judicial review and cannot be brought by way of a statutory appeal to the Tribunal. By saying that the proper province of the Tribunal is to determine "tax disputes", that is to say the amount of tax due, he is not saying that the Tribunal has jurisdiction in all such disputes, irrespective of whether provision for a statutory appeal is made.

39. Miss McCarthy submitted that there is no need for an express right of appeal against a refusal of relief under section 392 in circumstances where, as here, there is an appeal against an amendment made to a self-assessment by a closure notice, nor does it matter that the closure notice did not concern a

claim for relief under section 392. The effect of section 50 TMA 1970 is that the assessments remain open. Section 50(6) provides, so far as relevant, that "if, on an appeal notified to the Tribunal, the Tribunal decides a) that the appellant is over-charged by a self-assessment…the assessment…shall be reduced accordingly." Critical to the submissions for Mr Dhanak is section 386(7) which provides that "any liability to tax arising by virtue of this section is subject to the reliefs given under (a) section 392…". The amendments made by the closure notices in this case charged Mr Dhanak to income tax on the value of the properties transferred to the pension fund, by virtue of section 386(1). It is submitted that the effect of section 386(7) is that if an application has been made for relief under section 392 and refused by the time of the hearing of the appeal, and the refusal of relief was wrong, section 386(7) operates to reduce or cancel the charged tax under section 386(1) and the Tribunal should accordingly exercise its power under section 50(6) of TMA 1970. Miss McCarthy succinctly expressed the point in her written closing submissions:

> *"Section 386(7) expressly requires the availability of section 392 relief to be taken into account in fixing a taxpayer's liability to tax under section 386 - and the FtT plainly does have the jurisdiction to determine the taxpayer's liability to tax under section 386 (via the ordinary route of sections 31 and 50(6) TMA 1970). "*

40. Miss McCarthy emphasised that the question whether the refusal of relief under section 392 was wrong relates directly to an issue as to whether there is under the tax legislation a liability to tax. It is "a tax dispute", involving the construction and application of the provisions of section 392. This is not a case where the taxpayer relies on facts and considerations extraneous to the tax legislation, giving rise to unfairness or legitimate expectations, where the decision of HMRC can be challenged only by way of judicial review: see *HMRC v Hok Ltd* and *HMRC v Noor*. Even if the decision of the HMRC officer under section 392 involves an evaluative judgment, that is no bar to the Tribunal reviewing the decision where to do so is necessary in order to determine the amount of tax due under the provisions of the relevant legislation.

41. Miss McCarthy relied in particular on a passage in the judgment of the Upper Tribunal in *HMRC v Noor* at [87] :

> "*In our view, the F-tT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle is correct in his submission that the right of appeal given by section 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation. Within the rubric "VAT legislation" it may be right to include any provision, which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide this point…As Mr Mantle puts it, the jurisdiction of the F-tT is appellate (ie on appeal from a refusal of HMRC to allow a*

claim). The F-tT has no general supervisory jurisdiction over the decisions of HMRC. That does not mean that under section 83(1)(c) the F-tT cannot examine the exercise of a discretion, given to HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had been exercised reasonably (see eg Best Buys Supplies Ltd v HMRC [2012] STC 885 UT at [48] – [53] – a discretion under Reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which the legislation clearly confers on HMRC. That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers."

42. It is submitted that the present is a case to which that paragraph is applicable. The evaluative judgment, if such it be, conferred on the HMRC officer by section 392 is conferred as part of the tax legislation and an examination of the decision is necessary in order to determine the amount of income tax to which Mr Dhanak was or is chargeable in respect of the relevant years. It therefore falls within the jurisdiction of the Tribunal on an appeal against the amendments made by the closure notices.

43. The First-tier Tribunal accepted the submissions made for Mr Dhanak, with the principal reasons being given at [13] - [14] of the Reasons:

> "*13. The effect of the appeals against the closure notices is that the self-assessments for the two relevant years are still open before the tribunal. If that is so, the tribunal is required by ss 31 and 50(6)(c) of TMA to determine the correct amount of tax, and in doing so it plainly must take into account any relief which is available, whether in accordance with s 392 or otherwise. This is not only the contrary case to Michael Prince, but also precisely what s 386(7) requires.*
>
> *14. I accept (indeed it is its clear purpose) that relief in accordance with section 392 may become available to a taxpayer many years after his liability in accordance with section 386 has been determined, and the tax paid. In such a case he plainly would not be able to couple a challenge to any refusal of relief to an appeal against a closure notice, and it may be that in those circumstances his only remedy would be by way of judicial review; but that is not a matter I need to decide now. In this case, however, it seems to me that Miss McCarthy is right: section 386(7) can only be interpreted as meaning that any relief due, at the time of determination of the section 386 liability, is to be taken into account in making that determination. I am fortified in that conclusion by the use in section 392(4) of the phrase "by repayment or otherwise as appropriate", which makes it clear that repayment, which may well be the only practical means when the section 386 liability*

> *has been paid years before, is not the only possible course. Offsetting against a current liability, or elimination of the liability, would be entirely appropriate in this case, should the appellant succeed in the appeal itself.*"

44. At [15], Judge Bishopp rejected the submission which had been made to him on behalf of HMRC that section 392(4) involved an element of discretion. Having rejected that submission he said:

> "*I do not see how one can be "satisfied" that objective conditions, as those prescribed by the section are, are met as a matter of discretion: the conditions are met, or they are not. Sub-section (5), by its use of the word "may", in contrast to the "must" used in sub-s (4), does suggest a discretion but it is not necessary for present purposes to consider the differences between the two sub-sections.*"

45. The submissions made on this appeal, though perhaps more fully developed, were essentially the same as those put to the First-tier Tribunal.

46. There are important differences between an application for judicial review and a statutory appeal to the Tribunal, as the Upper Tribunal observed in *HMRC v Noor*. First, the permission of the court is required for an application for judicial review, whereas no permission is required for a statutory appeal. Secondly, different time limits may apply. Thirdly, applications for judicial review are heard either by the Administrative Court or by the Upper Tribunal, whereas the great majority of statutory appeals will be heard by the First-tier Tribunal and only in very limited circumstances by the Upper Tribunal. Fourthly, this in turn has an important impact on any appeal. A first appeal in judicial review cases, whether from the Administrative Court or the Upper Tribunal, lies to the Court of Appeal, whereas an appeal from a decision of the First-tier Tribunal lies to the Upper Tribunal. Fifthly, different criteria may apply to the review of, as against an appeal against, a decision of HMRC. There is no difference if the challenge is based on an alleged error of law, such as the construction of a statutory provision, but challenges as to the relevant facts or the exercise of a discretion will be different. In particular, where the legislation permits the Tribunal to substitute its decision for a decision of HMRC in a case involving the exercise of discretion, the Tribunal is exercising its own discretion rather than reviewing the discretion of HMRC.

47. The central issue, as I see it, is whether there can be discerned a legislative intention that a refusal of an application for relief under section 392 should be open to challenge in a statutory appeal to the Tribunal, albeit in the limited circumstances of an appeal under section 31 TMA 1970.

48. It weighs strongly against such conclusion that, unlike many provisions in the Taxes Act, there is no provision for an appeal against a refusal of relief under section 392 and that accordingly in general no such appeal may be brought, as is accepted for Mr Dhanak. If in general a challenge to a refusal of relief must be brought by way of an application for judicial review, it is surprising if such a challenge may in limited circumstances be brought by way of appeal to the

Tribunal. The circumstances would be limited in two ways. First, an appeal to the Tribunal if Mr Dhanak is correct can only be brought while it is possible to appeal against an assessment for the relevant year. It is to be expected that in many instances applications for relief will arise long after that and, as is accepted, any challenge to the refusal of relief in those cases cannot be the subject of an appeal. Secondly, section 392(5) clearly confers a discretion on the HMRC officer and no provision is made for a decision of the Tribunal as to what is just and reasonable to be substituted for that of the officer. It is therefore highly unlikely that there was a legislative intention that a refusal of relief under sub-section (5) could be the subject of an appeal to the Tribunal. It seems also to be unlikely that it was nonetheless intended that a refusal of relief under sub-section (4) could be the subject of an appeal to the Tribunal, but only in the limited circumstances of an appeal against an assessment or closure notice.

49. A consideration of section 392 as a whole and in its context leads in my view to the conclusion that there was no legislative intention that there should be an appeal to the Tribunal from a refusal of an application for relief.

50. Miss McCarthy submits for Mr Dhanak that the necessary link between an appeal against an assessment or closure notice and a refusal of relief under section 392 is provided by section 386(7). As it provides that any liability to tax arising by virtue of section 386 is subject to the reliefs given under section 392, it follows that when the Tribunal is concerned to determine the correctness of an amendment to an assessment which imposes a liability to tax under section 386, it is competent for the Tribunal to decide whether the refusal of relief was correct. She described Mr Dhanak's case as hingeing on section 386(7).

51. In my judgment, section 386(7) cannot bear the weight which Miss McCarthy seeks to put on it. In view of the otherwise strong indications that there was no intention that a refusal of relief under section 392 should be subject to an appeal to the Tribunal, section 386(7) would be a notably ellyptical way of conferring jurisdiction in the limited circumstances suggested. One would expect a clear statement of this limited jurisdiction, coupled with a power for the Tribunal to substitute its own view. If no alternative sensible meaning could be given to section 386(7), the conclusion might be that it was intended to have this effect. However, I accept the submission for HMRC that the straightforward purpose of section 386(7) is to provide that, where relief has been given under section 392 before the tax charged under section 386 has been assessed, HMRC may relieve the taxpayer from the obligation to pay it, rather than waiting for the taxpayer to pay and then making a repayment. This ties in with sub-sections (4) and (5) of section 392 which enable relief in respect of tax to be given "by repayment *or otherwise*".

52. Section 386(7) refers in general terms to "the reliefs given under" section 392 and section 266A of the Income Corporation Taxes Act 1988. The means by which reliefs are given under those two sections is different. Section 392 requires application to HMRC and the grant of relief if HMRC are satisfied as to the relevant conditions, whereas section 266A confers an automatic relief, without the need for any application to HMRC or decision by HMRC. I agree

with Miss McCarthy that the words "the reliefs given under" means "the reliefs provided by", or "available under". This does not however help to resolve the issue, because the relief provided under section 392 is available only if given by HMRC in response to an application. The issue remains as to how a refusal of an application is to be challenged.

53. For these reasons, I find myself unable to agree with the decision reached below and accordingly I allow the appeal by HMRC against the refusal of their application to strike out Mr Dhanak's statutory appeal to the Tribunal.

Timing: was the application for relief in any event outside the scope of the statutory appeal in this case?

54. If, contrary to the above, section 386(7) enables the Tribunal on a statutory appeal to consider a decision by HMRC to refuse an application for relief under section 392, HMRC submit that it would not be open to the Tribunal to do so in the present case. The ground, shortly stated, is that the closure notices were issued on 20 April 2009 some 8 months before the substitution of Dilip Dhanak for Mr Dhanak as the member of the scheme which formed the basis of the application for relief. The closure notices ended enquiries under section 28A TMA 1970 which were concerned with the quite separate issue decided against the taxpayer in *Irving v HMRC*. In support of this submission, HMRC rely on the decision of the Supreme Court in *HMRC v Tower MCashback 2 LLP* [2011] UKSC 19.

55. Mr Dhanak submits that the effect of the appeal against the amendment to his self-assessments made by the closure notices was that the self-assessments were open before the Tribunal and accordingly the Tribunal should, if satisfied that Mr Dhanak was entitled to the relief for which he applied under section 392, allow the appeal so as to ensure that he was not overcharged by the self-assessment, in accordance with section 50(6) TMA 1970. He relied on the decision of the Court of Appeal in *Glaxo Group Ltd v Inland Revenue Commissioners* [1996] STC 191.

56. It may be helpful to summarise the relevant dates. By letters dated 6 January 2006 and 22 December 2006, HMRC notified Mr Dhanak that they intended to open enquiries into his tax returns for the years ended 5 April 2004 and 5 April 2005 respectively. Mr Dhanak's self-assessment was prepared on the basis that the transfer of properties to the pension scheme did not give rise to a charge to tax under section 386. In January 2008, the Court of Appeal gave judgment in *Irving v HMRC* that such transfers did give rise to a tax charge. On the basis of that decision, HMRC issued closure notices to Mr Dhanak under section 28A TMA 1970 on 20 April 2009, amending his self-assessment returns to include tax payable on the value of the transferred properties. The substitution of Dilip Dhanak for Mr Dhanak as the beneficiary of the scheme occurred in January 2010. On that basis, an application for relief under section 392 was made on behalf of Mr Dhanak on 11 February 2010. The application was refused by HMRC on 17 November 2010. It is clear that HMRC's enquiries and closure notices issued on 20 April 2009 did not and could not relate to the substitution of Dilip Dhanak for Mr Dhanak as the beneficiary of the pension scheme or to any application by Mr Dhanak for relief under

section 392. The enquiries and the closure notices, so far as they were concerned with contributions to the scheme, were related to the issue decided in *Irving*.

57. The scope of an appeal against an amendment made to a self-assessment return by a closure notice was one of the issues, described as the procedural issue, arising in *HMRC v Tower MCashback 2 LLP*. It concerned self-assessment returns made by limited liability partnerships, but the relevant provisions are substantially the same as those applying to individuals such as Mr Dhanak. The taxpayers contended that the terms of closure notices issued by HMRC restricted them to a single issue arising in respect of claims for capital allowances, with the effect that it was not open to HMRC to rely on other issues in support of their rejection of the claims for capital allowances. The principal judgment in the Supreme Court was given by Lord Walker. Although he disagreed with the conclusion on the procedural issue reached at first instance by Henderson J, he cited the following paragraphs from the judgment of Henderson J which he said were entirely correct:

> "*There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest. [The judge then considered changes in the tax system and continued] For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and if the Commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the Commissioners on their own initiative.*
>
> *That is not to say, however, that an appeal against a closure notice opens the door to a general roving inquiry into the relevant tax return. The scope and subject matter of the appeal will be defined by the conclusions stated in the closure notice and by the amendments (if any) made to the return.*"

58. In the Court of Appeal, in a passage which Lord Walker also cited with approval, Moses LJ said at [41]:

> "*The closure notice completes that enquiry and states the inspector's conclusions as to the subject matter of the enquiry. The appeal against the conclusions is confined to the subject matter of the enquiry and of the conclusions. But I emphasise that the jurisdiction of the special commissioners is not limited to the issue whether the reason for the conclusion is correct. Accordingly, any evidence or any legal argument relevant to the subject matter may be entertained by the special*

> *commissioner subject only to his obligation to ensure a fair hearing.*"

The references in the passage from the judgment of Henderson J to "the Commissioners" and in the passage from the judgment of Moses LJ to "the special commissioners" should in each case be read now as referring to the Tribunal.

59. In other passages from the judgment of Moses LJ, cited with approval by Lord Walker, it was made clear that it is for the Tribunal to identify the subject matter of the enquiry and of the closure notice.

60. Miss McCarthy on behalf of Mr Dhanak submitted that the subject matter of the enquiries and closure notices in the present case was the liability of Mr Dhanak to tax under section 386 and that his application for relief under section 392 went to that issue. It was therefore irrelevant that the enquiries and the closure notices had not been and could not have been directed to the application for relief.

61. I am unable to accept this submission. However widely one identifies the subject matter of the enquiries and closure notices, they cannot in my judgment include an application for relief under section 392 which had not been made by the time of the closure notices, based on events which did not occur until some 8 months after the closure notices. In *Tower MCashback*, the subject matter of the enquiry and the closure notices was the refusal of an application for capital allowances. On an appeal against the conclusions of the closure notices, the Tribunal was not restricted to a consideration of the particular ground for the conclusion in the closure notices but could receive evidence and hear argument on other grounds which were available to support the conclusion but which had not, it appeared, been relied on for the conclusion. No doubt if such other grounds had undermined the conclusion of the enquiries, they too could have been relied on in an appeal to the Tribunal.

62. The *Glaxo* case was concerned with assessments to corporation tax in respect of a number of years. Appeals against the assessments had not been determined, and the assessments were accordingly "open assessments". The Inland Revenue considered that the taxpayer companies had in the relevant years entered into transactions to which transfer-pricing provisions were capable of applying. As required by the legislation, the Inland Revenue gave a direction that those provisions were to apply. Section 485(3) of the Income and Corporation Taxes Act 1970 provided that "where such a direction is given all such adjustments shall be made, whether by assessment, repayment of tax or otherwise, as are necessary to give effect to the direction." The issue was whether, following such direction, the Inland Revenue were required to make further assessments, which would have been out of time in relation to many of the relevant years, or whether they could without any further assessment ask for the open assessments to be increased to take account of the transfer-pricing provisions. The Court of Appeal, confirming the decision at first instance of Robert Walker J, held that a further assessment was unnecessary and that the Revenue were entitled to ask for the open assessments to be increased. Millett LJ said at pp 199-200:

> "*Section 50(7) of the Taxes Management Act 1970, however, preserved the right, and as it seems to me the duty, of the commissioners to increase the assessment on the hearing of the taxpayer's appeal if the evidence shows this to be appropriate. But the commissioners can only act on evidence and by a majority, and these two requirements, spelt out in section 50(6), are in my view necessarily imported into the next following sub-section. Accordingly, it is clear that the commissioners are entitled to receive evidence which would lead to an increase in assessments…*"

63. The decision of the Supreme Court in *Tower MCashback* is direct authority on the provisions governing the scope of an appeal against amendments made by a closure notice. Applying the approach adopted by the Court in that case, the availability of relief under section 392 on the ground relied on by Mr Dhanak is in my judgment outside the scope of his appeal, for the reasons earlier given. The relevant circumstances in the *Glaxo* case were different, and in particular, although the direction by the Inland Revenue applying the transfer-pricing provisions was not given until after the appeals had been lodged, the transaction said to be affected by those provisions occurred during the relevant years of account. Whether or not that is the appropriate ground for reconciling the two decisions, there can be no doubt that the reasoning of the decision in *Tower MCashback* must be applied to this case.

64. Accordingly, even if I had held that a refusal of an application for relief under section 392 could be challenged in the context of a statutory appeal against amendments made by a closure notice, I would have held that it was not open to Mr Dhanak to do so in the particular circumstances of this case.

Substantive issue: the challenge to the refusal of relief under section 392

65. The ground of Mr Dhanak's challenge by way of judicial review to the refusal by HMRC of his application for relief under section 392 is that it was based on an error of law. It is submitted that HMRC misconstrued section 392(1) and relied for their refusal on a ground which was not open to them.

66. The reason for the refusal of relief given in the HMRC officer's decision letter dated 17 November 2010 was expressed as follows:

> "*I accept that under the normal definition the decision of the Trustees of the Precious Homes FURBS to exclude you as a beneficiary of the pension scheme represents an event for the purposes of section 392(1)(c). However, because you have been replaced as a beneficiary of the FURBS by your brother, I am not satisfied a payment in substitution for your benefits (sub-section (1)(b)) will not be made (sub-section (1)(c)). Therefore, I am not satisfied that all thee conditions have been met.*"

67. This explanation of the reason is legitimately open to more than one interpretation and it does not clearly state the precise ground for the refusal. Following a detailed scrutiny of HMRC's own disclosed documents and

correspondence with Mr Dhanak's advisors both before and after the decision letter, HMRC accepted Mr Dhanak's submission that the ground for the refusal of the application for relief was that the relevant benefits that will at some stage be received by Dilip Dhanak will constitute a "payment…in substitution for the benefits" that Mr Dhanak himself would otherwise have received under the pension scheme.

68. The first step is to consider whether this ground for the decision involves an error of law. If it does not, the application for judicial review fails. If it does, HMRC submit that nonetheless the decision could and would have been made on grounds properly open to them. This will involve an examination of each of those grounds. It is submitted for Mr Dhanak that, on the proper construction of section 392, none of them would be available to HMRC.

69. As regards the actual ground for HMRC's refusal of Mr Dhanak's application for relief, Miss McCarthy submits that section 392(1) requires HMRC to be satisfied that no payment in substitution for the benefits will be made to the employee for whom the chargeable payment to the pension scheme was made or to any of the persons specified in section 386(6). As applied to this case, HMRC would need to be satisfied that no payment would be made to Mr Dhanak or any of his spouse, widow, children, dependents or personal representatives. Dilip Dhanak does not fall within that category and therefore it is irrelevant to the application for relief that payments from the pension scheme will or may in due course be paid to him. Such payments to Dilip Dhanak will be made because he is himself an employee of PHL and because, in such capacity, he is a member of the pension scheme. Since the purpose of section 386 is to impose a charge to tax if payments are made to a pension scheme with a view to the provision of relevant benefits to a particular employee or members of his family as included by section 386(6), it follows that the requirement of section 392(1) is satisfied if no such payment will be made to him or to any member of his family falling within section 386(6). If this were not the case, relief under section 392 could never be available to any taxpayer in circumstances where he ceases to be entitled to any benefit under the pension scheme, with the result that the funds previously contributed to the scheme on his behalf are available for providing benefits to other members of the scheme.

70. Miss McCarthy also relies, in particular, on section 392(6). This deals with a reduction or cancellation of an employee's rights in respect of benefits under a pension scheme as a consequence of a pension sharing order or provision, which is defined to mean any such order or provision as is mentioned in section 28(1) of the Welfare Reform and Pensions Act 1999. Such orders or provisions are made in the context of a divorce. The effect of a typical pension sharing order is that instead of benefits under a pension scheme being payable to one spouse as an employee, the whole or part of such benefits become instead available to the other spouse. The situation is therefore analogous to that in which Dilip Dhanak was substituted for Mr Dhanak under the pension scheme in this case. The effect of section 392(6), read with sub-sections (4) and (5), is that relief under section 392 in the specific case of a pension sharing order is not available. It must follow, Miss McCarthy submits, that but

for section 392(6) such relief might be available, thus showing that the payment contemplated by section 392(1) is not a payment to a person substituted for the employee under the pension scheme. The exclusion of pension sharing arrangements from relief under section 392 is explicable on the grounds that, but for such arrangements, the spouse giving up such pension rights would have had to provide other cash or benefits to their former spouse. By entering into a pension sharing order, the former spouse is in effect turning the scheme assets to account by using them to meet an obligation that would otherwise have had to be met out of other funds.

71. On behalf of HMRC, Mr Rivett submitted that there was nothing in the provisions of section 392 or elsewhere to require that, for the purposes of section 392(1), a payment in substitution for benefits under a pension scheme must be received by the employee previously charged to tax or a person falling within section 386(6). Dilip Dhanak was substituted for Mr Dhanak as the sole beneficiary of the pension scheme and benefits in due course paid to Dilip Dhanak will properly fall within the category of payments made in substitution for the benefits otherwise payable to Mr Dhanak. It is a question of fact, and of evaluative judgment by an HMRC officer in any particular case, whether payments to be made to a third party in due course under a pension scheme are properly regarded as being "in substitution for" the benefits otherwise payable to the original employee. It does not therefore follow that in every case where an employee is excluded from a pension scheme, thereby swelling the assets available for the provision of benefits to other employees, relief cannot be available under section 392. As to section 392(6), Mr Rivett submitted that at most its provisions make plain that the making of a pension sharing order is not the type of "event" in respect of which an application for relief under section 392 can be made.

72. Were it not for section 392(6), I would find some force in the submissions made on behalf of HMRC. However, section 392(6) is very difficult to reconcile with HMRC's reading of section 392(1). I do not accept that its purpose is to exclude a pension sharing order from being an "event" for the purposes of section 392(1)(c). It would be unnecessary so to provide, and unnecessary to include sub-section (6) at all, if a payment to X in substitution for a payment to Y otherwise fell within paragraphs (b) and (c) of section 392(1). In my judgment, it demonstrates that such payments otherwise fall outside the payments to which section 392(1) refers. Although I would otherwise see force in HMRC's submissions, there is nothing strained about this construction of section 392(1) and, for the reasons given by Miss McCarthy, it can be seen as being at least consistent with the basis on which a charge to tax arises under section 386.

73. I conclude therefore that in basing his refusal of Mr Dhanak's application for relief on this ground, the HMRC officer made an error of law and that, by reference to that ground alone, his decision cannot stand.

74. It follows that it is necessary to look at the other grounds advanced by HMRC on which it is said that the refusal of relief could and would properly be made. Three separate grounds are advanced and I shall consider each of them in turn.

75. First, HMRC submits that no relevant "event" within the meaning of section 392(1)(c) has occurred. They submit that, as a matter of construction, the voluntary exclusion of a beneficiary from benefit under the terms of a pension scheme at his request is not an "event" for these purposes. It is submitted that as a matter of strict language the concept of an "event" suggests an event which is beyond the control of the individual making the application for relief. The purpose of section 392 is to provide relief in circumstances where, for example, the asset base of a scheme has been destroyed or the scheme is insolvent.

76. I see no basis for restricting "event" in the way suggested by HMRC. There is nothing in the ordinary meaning of the word to restrict it to involuntary acts or outside occurrences. A marriage or civil partnership is an event, although entirely voluntary. HMRC's construction would draw a distinction between the dismissal of an employee and his resignation. I can see nothing in the language or purpose of the section which would justify drawing this line between voluntary and involuntary acts. Reliance by HMRC on this ground would, in my judgment, involve a clear error of law.

77. Secondly, HMRC submits that the ability of Dilip Dhanak to obtain relevant benefits under the pension scheme is itself a payment in respect of or in substitution for relevant benefits to Mr Dhanak. On this ground, it is not the ultimate payments to Dilip Dhanak which constitute payments in substitution for relevant benefits but it is the entitlement of Dilip Dhanak to such payments which is itself said to constitute a payment in respect of or in substitution for Mr Dhanak's relevant benefits. Reliance is placed on the decision of the Court of Appeal in *Irving v HMRC* to show that a broad construction should be given to the concept of making a payment for the purposes of section 392. As explained earlier in this judgment, the Court of Appeal in that case held that the transfer of an asset to a pension scheme constituted the payment of a sum for the purposes of section 386. It is not, I think, submitted, and in my view could not sensibly be submitted, that the simple admission of Dilip Dhanak to membership of the pension scheme constituted a payment to him, however widely the word payment is construed. What is submitted is that in the light of the evidence of Mr Dhanak that by substituting his brother for himself as a beneficiary under the pensions scheme he fulfilled an obligation as he perceived it to make financial provision for his family, the admission of Dilip Dhanak to membership involved or constituted the making of a payment to Mr Dhanak.

78. I could see force in this submission if the circumstances were that Dilip Dhanak was admitted to membership of the pension scheme in discharge of a debt or other legally enforceable obligation owed by Mr Dhanak to Dilip Dhanak. In such circumstances, Mr Dhanak would have ceased to be a member of the scheme and to be entitled to obtain benefits in the future, in consideration for the discharge of his debt or obligation. He would therefore clearly receive a benefit as a result of ceasing to be a member and it might be arguable that this constituted a payment in substitution for his relevant benefits.

79. HMRC do not in this case rely on the discharge or satisfaction of any legal obligation, but at most a moral obligation which Mr Dhanak feels towards other members of his family. Mr Dhanak was clear in his written and oral evidence that as a Hindu he felt under a moral and religious obligation in this respect. Members of other religious groups or of none may also feel such obligations, although equally many may not. I cannot, however, think that on any sensible reading of section 392, Parliament intended that the discharge of a perceived moral obligation could constitute "payment". It would be a very strained meaning of "payment" and it would create arbitrary distinctions between taxpayers and between communities of taxpayers which it is very hard to imagine can have been intended. In my judgment, reliance on this ground would also involve a clear error of law.

80. Thirdly, HMRC submit that on the evidence and in the circumstances of the present case, the exclusion of Mr Dhanak as a member of the pension scheme does not mean that no payment in substitution for his benefits under the scheme will be made. As just mentioned, the evidence of Mr Dhanak was that he and the other members of his family consider themselves to be under an obligation to assist each other as and when circumstances requiring it arise. If a member of the family falls on hard times, other members of the family will assist him or her. The present financial circumstances of Mr Dhanak are such that he can expect to provide financially for himself and his immediate family without recourse to the pension benefits from which he has been voluntarily excluded. Indeed, the trustee of the scheme required to be satisfied on that point before it consented to his exclusion. But circumstances could change. Much of his wealth is tied up in PHL and if it were to become insolvent Mr Dhanak's financial position might well be very different. He can reasonably expect that if in his later years his financial circumstances were poor, Dilip Dhanak would provide assistance, if necessary by making provision out of the benefits which he received under the pension scheme. HMRC does not contend that Mr Dhanak agreed to be excluded from the pension scheme in consideration of a promise by Dilip Dhanak to provide such financial support or even pursuant to an unenforceable arrangement to that effect. What HMRC does contend is that, having given up his pension entitlements in favour of Dilip Dhanak, he may well receive payments from Dilip Dhanak in the event that he needs them, and that such payments could properly be regarded as being in substitution for the pension benefits which he gave up. If he had not given up those benefits, then he would have the means of support in his later years and would not therefore need to look to Dilip Dhanak for support. In those circumstances, HMRC submit that they can reasonably come to the conclusion that they are not satisfied that Mr Dhanak's exclusion from the pension scheme constituted an event by reason of which no payment in substitution for the benefits given up would ever be made. For these purposes, they do not rely on a theoretical possibility but on a real possibility, albeit one dependent on a change in Mr Dhanak's financial circumstances. It is, they submit, a question of evaluative judgment which section 392 requires them to make.

81. Miss McCarthy submitted that the existence of a possibility, even a real possibility, that Dilip Dhanak would provide financial support to Mr Dhanak

effectively out of the benefits received by him under the pension scheme was, as a matter of construction of section 392(1), incapable of amounting to a ground on which HMRC could refuse an application for relief. Any payments in fact made by Dilip Dhanak to Mr Dhanak would not be "in substitution for" the benefits which would otherwise have been received by Mr Dhanak under the scheme. She submitted that such payments would constitute payments in substitution for those benefits only if made pursuant to some arrangement for Dilip Dhanak to do so and HMRC accepted that there was no such arrangement.

82. She further submitted that the prospect of Mr Dhanak receiving a payment from Dilip Dhanak in the future connected in some way to the pension scheme was so negligible as to be incapable of constituting a payment in substitution for benefits under the scheme. She pointed out that PHL appears to be a successful company which, according to Mr Dhanak's evidence, he runs conservatively. A reversal in Mr Dhanak's financial fortunes was sufficiently remote to be discounted for these purposes. In any event, even if Mr Dhanak needed to rely on assistance from his family, including Dilip Dhanak, it would not necessarily take the form of payments but could be provided, for example, by Dilip Dhanak's agreement that Mr Dhanak could share his home.

83. Taking first the question of construction of section 392(1)(c), it is in my judgment essentially a question of fact as to whether an event has occurred which means that no payment in substitution for the benefits given up will ever be made. Theoretical possibilities can no doubt be ignored but if there is what may be described as a real possibility that financial support will be provided in circumstances where it would not have been provided if membership of the pension scheme had not ceased, it would be open to HMRC in making the evaluative judgment required of them to conclude that the condition specified in section 392(1)(c) had not been satisfied. As to whether the prospect of any such payment being made is so negligible as to be discounted, this is classically a matter for the judgment of the decision-maker. So far as the evidence shows, Mr Dhanak's wealth is in large part tied up in PHL and, whatever its financial position at the moment, it might well be open to HMRC to conclude that there was a real possibility of insolvency at some stage in the future, in which event there was a real possibility that Mr Dhanak would receive payments from Dilip Dhanak.

84. In my judgment, a decision by HMRC to refuse relief under section 392 on these grounds would not involve a mis-reading of the section or an error of law in that sense, and that provided the evidence justified it they could reasonably come to a conclusion that the condition in paragraph (c) of 392(1) was not satisfied.

85. The decision which is the subject of challenge was not made on that ground and HMRC have not evaluated the evidence and circumstances in order to come to a conclusion on that ground. In those circumstances, on an application for judicial review a court or tribunal will quash the decision and remit the matter to the decision-maker to come to a new decision, taking into account the judgment, unless the court or tribunal is satisfied that it is inevitable, having regard to the relevant considerations, that the decision-maker will

come to the same decision: see *R (Smith) v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, [2006] 1 WLR 3315, at [10].

86. I do not consider it to be *inevitable* that, if required to retake the decision, HMRC will conclude that the application for relief under section 392 should be refused. It may well be likely in practice that they will, but that is not the same thing and is not the appropriate test for declining to quash the existing decision. However, Miss McCarthy's written closing submissions contains the following paragraph:

> "*It is common ground that if HMRC's decision does contain an error of law, then Mr, Dhanak is entitled to relief in the event that he can demonstrate that HMRC would not have reached the same decision, had they properly directed themselves in law (see Simplex at 329 and HMRC's Subs, paras.48-50). It would appear that the parties agree that this requires Mr. Dhanak to show that E1 and E4 are wrong.*"

The decision in *Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P&CR 306 does not support the proposition that anything less than inevitability will suffice for these purposes, and is indeed to the contrary effect and is relied on as such in *R (Smith) v North East Derbyshire Primary Care Trust* at [10]. In other words, I think that Miss McCarthy has assumed too much against herself. However, if this is indeed common ground or if Mr Dhanak takes a realistic view of what new decision HMRC are likely to make, I would not take the step of quashing the existing decision against the wishes of the parties. Accordingly, I circulated this Decision in draft to the parties in order that they could clarify their positions as to the appropriate remedy, if any.

87. As mentioned at the start, the parties have agreed a form of order giving effect to this Decision and resolving the remaining issues between them. The order provides that:

> 1. HMRC's appeal to the Upper Tribunal (Ref FTC/52/2012) is allowed.
>
> 2. Mr. Dhanak's appeal to the First-tier Tribunal (Ref TC/08264/2010) is dismissed.
>
> 3. Mr. Dhanak's claim for judicial review (Ref TCC/JR/04/2011) is allowed.
>
> 4. HMRC's decision of 17 November 2010 whereby HMRC refused Mr. Dhanak's application for relief under s.392 ITEPA 2003 is quashed.
>
> 5. HMRC is directed to make a further decision in respect of Mr. Dhanak's application for relief under s.392 ITEPA 2003 in accordance with the Decision of the Upper Tribunal of 11 February 2014.

and upon the orders in paragraphs 1 to 5 above being made it is further ordered by consent that

6. On the basis of the evidence provided to HMRC by Mr. Dhanak and his representatives in and in connection with his application for s.392 relief of 11 February 2010, the evidence before the Upper Tribunal and the further information provided to HMRC by Mr. Dhanak's representatives on 4 December 2013, Mr. Dhanak's application for relief under s.392 ITEPA 2003 is granted with effect from 16 December 2013.

88. There is one final matter on which I should comment. Both HMRC and Mr Dhanak sought, for different purposes, to rely on the Notes on Clauses provided to ministers for the Finance Bill 1947, the precursor to sections 386 and 392. Neither party suggested that the relevant Notes fulfilled the criteria in *Pepper v Hart* (1993) AC 593 but both suggested that they were informative by way of context. I do not agree that these Notes "cast a light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed": *R (Westminster City Council) v National Asylum Service* [2002] UKHL 38, [2002] 1 WLR 2956, per Lord Steyn at [5]. They are Notes on the intended meaning and effect, or part of the intended meaning and effect, of the relevant clauses. I do not consider that they are admissible in aid of the process of construction in which the Tribunal in this case was engaged. This is not the first case in which I have seen attempts to rely on such Notes without satisfying either the *Pepper v Hart* criteria or those stated by Lord Steyn. Perhaps for understandable reasons, it seems to be particularly prevalent in tax cases but it is not legitimate.

Mr Justice David Richards

Release Date: 11 February 2014