Neutral Citation: **[2025] UKUT 00206 (TCC)**

Case Number: UT/2024/000093

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

The Royal Courts of Justice,
Rolls Building, London

INCOME TAX – unauthorised payments from pension scheme – whether HMRC have power under section 29 Taxes Management Act 1970 to assess amounts chargeable to income tax under sections 208 and 209 Finance Act 1994 – yes – appeal dismissed

Heard on: 2 April 2025
Judgment date: 26 June 2025

Before

JUDGE THOMAS SCOTT
JUDGE ASHLEY GREENBANK

Between

LARRY TRACHTENBERG

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Keith Gordon, instructed by Simmons Gainsford LLP

For the Respondents: Rebecca Murray, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. HMRC issued assessments to income tax to Mr Trachtenberg in relation to unauthorised payments made to him by his pension scheme. One assessment related to the tax year 2006/07, and the second to the tax year 2009/10. Mr Trachtenberg appealed against the assessments to the First-tier Tribunal (Tax Chamber) (the “FTT”). In a decision released on 9 May 2024 (the “Decision”), the FTT dismissed the appeal.

2. Mr Trachtenberg appeals against the Decision on a single ground. The ground is that the statutory provision relied on by HMRC to issue the assessments cannot be used to recover the amounts said by HMRC to be assessable.

RELEVANT LEGISLATION

3. This appeal is confined to issues of statutory construction, so it is helpful to begin by setting out the legislation relevant to the appeal. The provisions set out below are those which were in force for the periods relevant to this appeal, and so far as relevant to the issues in this appeal.

4. Certain unauthorised payments made by a registered pension scheme are chargeable under section 208 Finance Act 2004 (“FA 2004”), which provides as follows:

> **208 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,
> >
> > (b) in the case of an unauthorised member payment made in respect of a person after the person's death, is the recipient, and
> >
> > (c) in the case of an unauthorised employer payment, is the person to or in respect of whom the payment is made.
>
> (3) If more than one person is liable to the unauthorised payments charge in respect of an unauthorised payment, those persons are jointly and severally liable to the charge in respect of the payment.
>
> …
>
> (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. In addition to the 40% charge under section 208, an additional 15% charge can arise under section 209 FA 2004:

> **209 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) "*Surchargeable unauthorised payments*" means—

(a) surchargeable unauthorised member payments (see section 210), and

(b) surchargeable unauthorised employer payments (see section 213).

(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,

(b) in the case of a surchargeable unauthorised member payment made in respect of a person after the person's death, is the recipient, and

(c) in the case of a surchargeable unauthorised employer payment, is the person to or in respect of whom the payment was made.

(4) If more than one person is liable to the unauthorised payments surcharge in respect of a surchargeable unauthorised payment, those persons are jointly and severally liable to the surcharge in respect of the payment.

…

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

…

6. Section 255 FA 2004 provides for the making of regulations, as follows:

255 Assessments under this Part

(1) The Board of Inland Revenue may by regulations make provision for and in connection with the making of assessments in respect of—

(a) the unauthorised payments charge,

(b) the unauthorised payments surcharge,

(c) liability to the lifetime allowance charge under section 217(2) (person to whom lump sum death benefit paid),

(d) the scheme sanction charge,

(e) liability under section 272 (trustees etc. liable as scheme administrator),

(f) liability under section 273 (member liable as scheme administrator), and

(g) liability under section 394 of ITEPA 2003 (benefit under employer-financed retirement benefits scheme: charge on responsible person).

(2) The provision that may be made by the regulations includes (in particular) provision for the charging of interest on tax due under such assessments which remains unpaid.

(3) The regulations may, in particular—

(a) modify the operation of any provision of the Tax Acts, or

(b) provide for the application of any provision of the Tax Acts (with or without modification).

7. We turn now to the collection and assessment provisions which are said by HMRC to apply to amounts chargeable under section 208 or section 209.

8. Sections 208 and 209 both describe a "charge to income tax". For the tax year 2009/10, a general framework for charging income tax was set out in sections 3 and 4 of the Income Tax Act 2007 ("ITA 2007"), which provide as follows (emphasis added to original):

> **3 Overview of charges to income tax**
>
> (1) Income tax is charged under–
>
> (a) Part 2 of ITEPA 2003 (employment income),
>
> (b) Part 9 of ITEPA 2003 (pension income),
>
> (c) Part 10 of ITEPA 2003 (social security income),
>
> (d) Part 2 of ITTOIA 2005 (trading income),
>
> (e) Part 3 of ITTOIA 2005 (property income),
>
> (f) Part 4 of ITTOIA 2005 (savings and investment income), and
>
> (g) Part 5 of ITTOIA 2005 (miscellaneous income).
>
> **(2) Income tax is also charged under other provisions, including–**
>
> **(a) Chapter 5 of Part 4 of FA 2004 (registered pension schemes: tax charges),**
>
> (b) section 7 of F(No.2)A 2005 (social security pension lump sums),
>
> (c) Part 10 of this Act (special rules about charitable trusts etc),
>
> (d) Chapter 2 of Part 12 of this Act (accrued income profits), and
>
> (e) Part 13 of this Act (tax avoidance).
>
> **4 Income tax an annual tax**
>
> (1) Income tax is charged for a year only if an Act so provides.
>
> (2) A year for which income tax is charged is called a "tax year".
>
> (3) A tax year begins on 6 April and ends on the following 5 April.
>
> (4) "The tax year 2007-08" means the tax year beginning on 6 April 2007 (and any corresponding expression in which two years are similarly mentioned is to be read in the same way).
>
> (5) Every assessment to income tax must be made for a tax year.
>
> (6) Subsection (5) is subject to Chapter 15 of Part 15 (by virtue of which an assessment may relate to a return period).

9. The calculation of a person's income tax liability is dealt with by section 23 ITA 2007, which provides (emphasis added to original):

> **23 The calculation of income tax liability**
>
> To find the liability of a person ("the taxpayer") to income tax for a tax year, take the following steps.
>
> *Step 1*
>
> Identify the amounts of income on which the taxpayer is charged to income tax for the tax year.
>
> The sum of those amounts is "total income".
>
> Each of those amounts is a "component" of total income.
>
> *Step 2*

Deduct from the components the amount of any relief under a provision listed in relation to the taxpayer in section 24 to which the taxpayer is entitled for the tax year.

See section 25 for further provision about the deduction of those reliefs.

The sum of the amounts of the components left after this step is "net income".

Step 3

Deduct from the amounts of the components left after Step 2 any allowances to which the taxpayer is entitled for the tax year under Chapter 2 of Part 3 of this Act or section 257 or 265 of ICTA (individuals: personal allowance and blind person's allowance).

See section 25 for further provision about the deduction of those allowances.

Step 4

Calculate tax at each applicable rate on the amounts of the components left after Step 3.

See Chapter 2 of this Part for the rates at which income tax is charged and the income charged at particular rates.

If the taxpayer is a trustee, see also Chapters 3 to 6 and10 of Part 9 (special rules about settlements and trustees) for further provision about the income charged at particular rates.

Step 5

Add together the amounts of tax calculated at Step 4.

Step 6

Deduct from the amount of tax calculated at Step 5 any tax reductions to which the taxpayer is entitled for the tax year under a provision listed in relation to the taxpayer in section 26.

See sections 27 to 29 for further provision about the deduction of those tax reductions.

Step 7

Add to the amount of tax left after Step 6 any amounts of tax for which the taxpayer is liable for the tax year under any provision listed in relation to the taxpayer in section 30.

The result is the taxpayer's liability to income tax for the tax year.

10. The provisions referred to in Step 7 are set out in section 30 ITA 2007 (emphasis added to original)[1]:

30 Additional tax

(1) If the taxpayer is an individual, the provisions referred to at Step 7 of the calculation in section 23 are–

section 424 (gift aid: charge to tax),

section 205 of FA 2004 (pension schemes: the short service refund lump sum charge),

section 206 of FA 2004 (pension schemes: the special lump sum death benefits charge),

[1] As discussed below, these provisions did not apply for the 2006/07 assessment in this appeal.

section 208(2)(a) of FA 2004 (pension schemes: the unauthorised payments charge),

section 209(3)(a) of FA 2004 (pension schemes: the unauthorised payments surcharge),

section 214 of FA 2004 (pension schemes: the lifetime allowance charge),

section 227 of FA 2004 (pension schemes: the annual allowance charge), and

section 7 of F(No.2)A 2005 (social security pension lump sum).

…

11. The self-assessment process is dealt with in section 9 of the Taxes Management Act 1970 ("TMA 1970"):

9 Returns to include self-assessment

(1) Subject to subsections (1A) and (2) below, every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—

(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) or 397A(1) of ITTOIA 2005 applies

…

(1A) The tax to be assessed on a person by a self-assessment shall not include any tax which—

(a) is chargeable on the scheme administrator of a registered pension scheme under Part 4 of the Finance Act 2004,

(ab) is chargeable on the sub-scheme administrator of a sub-scheme under Part 4 of the Finance Act 2004 as modified by the Registered Pensions (Splitting of Schemes) Regulations 2006, or

(b) is chargeable on the person who is (or persons who are) the responsible person in relation to an employer-financed retirement benefits scheme under section 394(2) of ITEPA 2003.

(2) A person shall not be required to comply with subsection (1) above if he makes and delivers his return for a year of assessment—

(a) on or before the 31st October next following the year, or

(b) where the notice under section 8 or 8A of this Act is given after the 31st August next following the year, within the period of two months beginning with the day on which the notice is given.

(3) Where, in making and delivering a return, a person does not comply with subsection (1) above, an officer of the Board shall if subsection (2) above applies, and may in any other case—

(a) make the assessment on his behalf on the basis of the information contained in the return, and

(b) send him a copy of the assessment so made;

.

(3A) An assessment under subsection (3) above is treated for the purposes of this Act as a self-assessment and as included in the return.

12. The provision which lies at the heart of this appeal is section 29 TMA 1970, which relevantly states as follows:

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

…

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

…

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

BACKGROUND AND THE ISSUE IN THIS APPEAL

13. References below in the form [ ] are to paragraphs of the Decision.

14. The facts in this case are not in dispute. The assessments made by HMRC against Mr Trachtenberg were under sections 208 and 209 FA 2004 in respect of "unauthorised payments" made by his pension scheme pursuant to arrangements to enable him to use funds from his pension scheme to repay certain loans. In the appeal against the assessments to the FTT, there were three grounds of appeal, summarised at [16]-[17] as follows:

16. There are three grounds of appeal raised by Mr Trachtenberg:

a. that s29 TMA 1970 cannot be used to recover amounts which are chargeable to tax under s208 and s209 Finance Act (FA) 2004;

b. if s29 TMA 1970 can so be used, whether HMRC have shown that Mr Trachtenberg acted deliberately in failing to return the chargeable amounts in his self-assessments returns (as required by s29(4) TMA 1970);

c. whether s268 FA 2004 applies to remove the surcharge for the 2007 year.

17. It was agreed that the loans to Mr Bishop and Ms Doyle were unauthorised payments made to Mr Trachtenberg by his pension scheme.

15. The FTT found in favour of HMRC and against Mr Trachtenberg on all three grounds. Mr Trachtenberg does not appeal against the decisions in respect of grounds (b) and (c), so we need say no more about them. The only issue in this appeal is ground (a), which is whether section 29 TMA 1970 extends to an assessment to income tax arising under section 208 and under section 209. If the appeal were to succeed on that single ground, then the result would be that HMRC's assessments were invalidly raised.

THE FTT'S DECISION ON THE SECTION 29 ISSUE

16. The FTT first considered the consequences of HMRC's power under section 255 FA 2004 to make regulations regarding assessments to tax under (amongst other statutory provisions) sections 208 and 209. It noted that the parties agreed that under the only relevant regulations in fact made pursuant to that power, there was no provision authorising the assessments under appeal: [22]. Mr Gordon, who also appeared for Mr Trachtenberg before the FTT, argued that section 255 was an exclusive provision under which Parliament had delegated to HMRC the mechanism for assessments under sections 208 and 209, and it was clear that the TMA 1970 alone did not enable such assessments, so in the absence of any applicable regulations having been made under section 255, assessments could not be made.

17. The FTT rejected this argument, concluding "on balance" that section 255 was a permissive rather than mandatory provision: [26].

18. Mr Gordon's alternative submission was that any charges arising under section 208 and 209 did not fall within any of the three situations in respect of which an assessment was permitted under section 29(1) TMA. The only potentially relevant situation was section 29(1)(b), which refers to a discovery by HMRC that "an assessment to tax is or has become insufficient"[2]. Mr Gordon argued that sections 208 and 209 were freestanding charges which applied to payments rather than to years of assessment, and since section 29 refers to assessments being "for a year of assessment", such charges would fall outside of the ambit of section 29. He further contended that, notwithstanding section 30 ITA 2007, sub-paragraph (b) did not apply as the charges could not be self-assessed.

19. The FTT noted that Mr Trachtenberg had completed self-assessment returns for the years in question, which could only be "insufficient" within sub-paragraph (b) if the section 208 or 209 charges were required to be included in the self-assessment returns. The FTT did not accept that the words "for a year of assessment" or "for a tax year" in section 29 had "any particular magic": [41]. The FTT stated at [42]:

> Considering the legislation and case law, we conclude that charges for a year of assessment are income tax charges arising in the tax year for which a particular self-assessment return is made (in this context). The fact that legislation contains provisions which are intended to specify how to identify

[2] Section 29(1)(c) was agreed not be relevant on the facts, and section 29(1)(a) was accepted by HMRC not to be applicable following the decision in *HMRC v Jason Wilkes* [2022] EWCA Civ 1612: [28].

> when certain types of income, and so the associated income tax charges, arise as between different tax years in particular circumstances does not mean that the absence of such identification provisions requires that an income tax charge which arises in a tax year is not to be included in assessing the amount of income tax payable by the taxpayer "for" that tax year.

20. The FTT considered that its conclusion was consistent with the purpose of the unauthorised payments regime: [44]. It stated at [45]:

> An unauthorised payment will be made during a tax year and we consider that it is clear that the related income tax charge therefore arises in, and so is "for", that tax year.

21. The FTT then considered the submissions of the parties as to whether a section 209 charge must be included in a self-assessment return, taking into account that a taxpayer could apply in the same return for such a charge to be removed under section 268 FA 2004. The FTT considered it "clear from the legislation that the [s209] charge arises when a relevant payment is made and the liability continues to exist unless and until relief is granted": [50].

22. The FTT set out its conclusion at [51]:

> We therefore find that the s208 and s209 charges are income tax charges which are to be included in a self-assessment return in accordance with s9 TMA 1970, and so s29 TMA 1970 can be used to recover amounts which are chargeable to tax under s208 and s209 Finance Act 2004.

GROUND OF APPEAL

23. The single ground of appeal renews the two alternative arguments rejected by the FTT, namely that (1) section 29 TMA 1970 cannot be used to assess the charges otherwise than under regulations made under section 255 FA 2004, and (2) section 29 does not cover the charges as they are not tied to any year of assessment and cannot be self-assessed.

24. We now consider these arguments in turn.

SECTION 255 REGULATIONS NEEDED IN ORDER TO ASSESS

25. There have been no regulations issued pursuant to section 255 which would authorise the making of the assessments on Mr Trachtenberg which are the subject of this appeal. So, if the argument that a power to assess charges under sections 208 and 209 can only arise pursuant to regulations issued under section 255 is correct, then the assessments issued to Mr Trachtenberg would be invalid and his appeal would succeed.

26. In support of this argument, Mr Gordon made the following points:

(1) The provisions in relation to unauthorised payments form part of a "comprehensive and prescriptive pension schemes code" introduced by FA 2004. Contrary to the FTT's conclusion, the TMA 1970 alone would not enable charges to be assessed under the code in the absence of any express application by section 255 or regulations issued under it.

(2) Examples illustrating that it is a self-contained code are the provisions of sections 149 and 252 FA 2004.

(3) The position is put beyond doubt by section 255(3)(b), which states that regulations under section 255 "may…provide for the application of any provision of the Tax Acts (with or without modification)". Such words would be unnecessary if section 29 TMA 1970 operated independently.

(4) HMRC may well have believed that there was no need for assessment regulations under section 255 in a case such as this, and that section 29 TMA 1970 could be utilised,

but they were mistaken. Parliament had left it to HMRC to implement the necessary regulations, but they had simply failed to do so.

27. We do not accept Mr Gordon's submission, for the following reasons.

28. First, beginning with the statutory wording, the power to make regulations in section 255 is clearly expressed in discretionary or permissive terms. Section 255(1) states that the Board "**may** by regulations make provision for and in connection with the making of assessments…". Subsection (2) adopts the same language.

29. We agree with Ms Murray that if the drafter had intended the provisions introduced by FA 2004 to be an exclusive and self-contained code, with no provisions as to collection and assessment included in the primary legislation, it is very likely that they would have specifically addressed such a fundamental feature of the code, rather than simply including permissive powers.

30. Second, while we accept that sections 149 and 252 FA 2004 are examples of specific provisions dealing with procedural matters contained within the code, that is materially outweighed by the absence of any clear statutory language to support his reading.

31. Third, Mr Gordon placed reliance on the reference in section 255(3)(b) to regulations which "may…provide for the application of any provision of the Tax Acts (with or without modification)". However, paragraph (a) of subsection (3) refers to regulations which may "modify the operation of any provision of the Tax Acts"[3]. The natural implication of section 255(3)(b) is that, contrary to Mr Gordon's submission, certain other provisions are operative for the purposes of the code, as otherwise there would be no need for provision to be made by regulation modifying them. When we put this to Mr Gordon, he argued that paragraph (a) "became meaningless in light of paragraph (b)", but effectively conceded that paragraph (a) operated against his argument regarding paragraph (b).

32. Fourth, we do not accept Mr Gordon's argument that the only purpose of section 255 could have been to facilitate the incorporation by regulation of the essential body of assessment provisions found elsewhere in the tax legislation, including but not limited to provisions of TMA 1970. We pointed out to the parties that the Explanatory Note to what became section 255 (Clause 242 of the Finance Bill 2004) stated as follows:

> Clause 241(6) gives the Inland Revenue a regulation making power in respect of making assessments of the income tax the scheme administrator is liable for, and which they must make a quarterly return of to the Inland Revenue. The Inland Revenue will also need to have powers to raise other assessments in connection with payment of income tax due under this Part. For example:
>
> - The scheme administrator is assessable in respect of the scheme sanction charge under Clause 228, which is excluded from Clause 241;
> - The recipient of a relevant lump sum death benefit may be chargeable to the lifetime allowance charge…

33. The detail of the Note is not material, but we consider that it indicates that section 255 could have had another, much more limited, purpose than that suggested by Mr Gordon.

[3] The question of whether "the Tax Acts" includes TMA 1970 has been discussed in a number of cases. We agree with the view expressed in *HMRC v Inverclyde Property Renovation LLP* [2020] UKUT 0161 (TCC) at [39] that "the Tax Acts" includes provisions of TMA 1970 relating to income tax (including section 29 TMA 1970). In his skeleton argument Mr Gordon stated that "it is tolerably clear in this instance that Parliament intended to include the TMA for the purposes of section 255(3)". We agree.

34. Finally, the effect of this argument, if it were correct, would be that HMRC cannot and have never been able to assess charges imposed on individuals under section 208 or 209. That interpretation renders the legislation unworkable. Where possible, the interpretation of legislation by the courts and tribunals should be such as to secure a workable result in a case where Parliament has clearly imposed a liability. As Lord Dunedin stated in *Whitney v Inland Revenue Commissioners* [1926] AC 37 (at page 52):

> My Lords, I shall now permit myself a general observation. Once that it is fixed that there is a liability, it is antecedently highly improbable that the statute should not go on to make it effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.

35. For these reasons, we consider that the FTT reached the right conclusion, and we reject Mr Gordon's first submission.

SECTION 29(1)(B) TMA 1970 NOT APPLICABLE BECAUSE CHARGES UNDER SECTIONS 208 AND 209 ARE NOT CHARGES FOR A YEAR OF ASSESSMENT

36. Mr Gordon argued in the alternative that amounts chargeable to tax under sections 208 and section 209 cannot be assessed by HMRC under section 29 TMA 1970 because the reference in section 29(1)(b)[4] to a situation where "an assessment to tax is or has become insufficient" simply does not apply to such amounts.

37. In support of this submission, Mr Gordon made the following points (leaving aside arguments relying on the section 255 submission which we have rejected):

(1) Section 29 begins by referring to a discovery "as regards…a year of assessment". Income tax is an annual tax and the tax year is a fundamental component of any assessment. Amounts chargeable under sections 208 and 209 are flat rate charges which are not chargeable by reference to any year of assessment, but are "simply freestanding charges which apply on a payment-by-payment basis"[5].

(2) Amounts chargeable under sections 208 and 209 are not required to be, and cannot be, self-assessed. The calculation provisions contained in section 30 ITA 2007 (which are in any event applicable in this appeal only to the assessment for the year 2009/10) do suggest that unauthorised pension payments and surcharges should be brought into a taxpayer's self-assessment, but that is a drafting error. Section 30 is in any event inconsistent with the wording of Step 7 in section 23, which refers to a liability to tax "for the tax year".

(3) The discretionary nature of the charge under section 209 and the right of appeal against it under section 269 FA 2004 indicate that these charges were not intended by Parliament to be part of the self-assessment machinery. Furthermore, the fact that the section 209 surcharge is capable of being discharged makes it inappropriate to be included in a self-assessment, and, indeed, there is no provision in the self-assessment code for variation of a return on any discharge.

(4) There are several legislative examples of "standalone" tax charges, and the drafter has in each of those cases explicitly spelt out the year in which the relevant income is taxable. That has not been done here, and that was deliberate.

[4] As explained above, it was common ground that this was the only situation set out in section 29(1) which could potentially apply in this case.
[5] Paragraph 30 of Mr Gordon's skeleton argument.

(5) There are other indicators in the code that the charges under sections 208 and 209 are not part of the self-assessment machinery.

Discussion

38. We agree with Mr Gordon that income tax is an annual tax and that it applies by reference to years of assessment or tax years.

39. We also agree with Mr Gordon that the assessment provision relied on by HMRC in this case, namely section 29 TMA 1970, applies only where there is a discovery "as regards…a year of assessment".

40. However, Mr Gordon also puts forward two related propositions which are considerably more controversial, namely that:

(1) Charges arising under sections 208 and 209 FA 2004 are not charges for a year of assessment, and

(2) Such charges are not required to be included in a self-assessment return.

41. If those two propositions were correct, then there would not have been a situation within section 29(1)(b) in this appeal, because there would have been no insufficiency in the return which Mr Trachtenberg submitted for HMRC to have discovered. As a result, the assessments in the appeal would be invalid.

42. If correct, that consequence would logically apply to any discovery assessment purportedly made by HMRC under section 29(1)(b) in respect of a charge on an individual under section 208 or 209, and would have applied since the unauthorised payments provisions came into force.

43. The issue is one of statutory construction, namely whether or not section 9 TMA 1970 applies to oblige a taxpayer to include in their self-assessment return charges arising under sections 208 and 209.

44. The principles to be applied in construing statutory wording are now well-established. Very recently, then Court of Appeal set out a number of such principles in *HMRC v Innovative Bites Limited* [2025] EWCA Civ 293, ("*Innovative Bites*") at [34], certain of which are particularly pertinent in this appeal:

> **Some principles of statutory interpretation**
>
> When considering how Note (5) is to be construed, the following principles are to be borne in mind:
>
> i) "The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid and the "primary source by which meaning is ascertained" is "the words which Parliament has chosen to enact as an expression of the purpose of the legislation": *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 ("*Project for the Registration of Children*"), at paragraph 29, per Lord Hodge;
>
> ii) "Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions": *Project for the Registration of Children,* at paragraph 30, per Lord Hodge. However, "[e]xternal aids to interpretation … must play a secondary role" and they do not displace the meanings conveyed by the words of a statute that, after consideration of the context, are "clear and unambiguous and which do not

produce absurdity": *Project for the Registration of Children*, at paragraph 30, per Lord Hodge;

iii) "[I]t is without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results": *Project Blue Ltd v Revenue and Customs Commissioners* [2018] UKSC 30, [2018] 1 WLR 3169, at paragraph 31, per Lord Hodge. In *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209, Lord Millett said in paragraphs 116 and 117 that the Courts "will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless" but that "the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result". That observation was quoted with approval by Lord Scott in *Gumbs v Attorney General of Anguilla* [2009] UKPC 27, at paragraph 44, and also cited by Lord Kerr in *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, at paragraph 25;

iv) Identifying the purpose of legislation is of "central importance" in construing it: *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 ("*Rossendale*"), at paragraph 10, per Lords Briggs and Leggatt. As this principle has been applied in the context of tax legislation, it involves "determin[ing] the nature of the transaction to which [the statutory provision] was intended to apply and then … decid[ing] whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description": *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684, at paragraph 32, per Lord Nicholls. "The ultimate question", Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, at paragraph 35, "is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically";

…

45. Bearing these principles in mind, we turn to the relevant statutory provisions.

46. We can deal briefly with the purpose of the relevant legislation. We agree with the FTT's statement, at [44], that "[t]he purpose of the unauthorised payment regime is to deter people from accessing their pension funds other than in circumstances permitted by the pensions regime…". One of the main ways it achieves that purpose is by imposing a charge to income tax on certain payments. The purpose of sections 8 and 9 TMA 1970 is to oblige taxpayers to make a self-assessment return which assesses "amounts in which…the person making the return is chargeable to income tax and capital gains tax for the year of assessment".

47. Mr Gordon's case rests on the submission that, where there has been an unauthorised payment, the language of sections 208 and 209 does not result in an amount which is chargeable to income tax for a particular year of assessment.

48. As eloquently and forcefully as Mr Gordon presented his case, we do not agree.

49. Section 208(1) states that "a charge to income tax, to be known as the unauthorised payments charge, arises **where an unauthorised payment is made**…" (emphasis added to original). Section 209(1) mirrors this wording in respect of the unauthorised payments surcharge. In our opinion, this wording makes it clear that the liability to income tax arises at the point in time when the particular unauthorised payment is "made", and whichever year of assessment that point in time occurs in will be the year of assessment in respect of which an

income tax liability arises under sections 208 and 209. Put simply, the charges under sections 208 and 209 arise in the year of assessment when the unauthorised payment is made.

50. An unauthorised payment is not to be treated as income for tax purposes: section 209(8). However, because a charge to income tax arises where such a payment is made, on the person to whom the payment is made, that person must include it in their tax return for the year of assessment in which the payment is made. That is because the charges under sections 208 and 209 are "amounts in which…the person making the return is chargeable to income tax" for that year of assessment within section 9(1) TMA 1970.

51. Mr Gordon argued that an intention on the part of the drafter that charges under sections 208 and 209 should fall outside the self-assessment regime could be inferred from the unusual characteristics of the charges and from the fact that other "standalone" charges to income tax contained provisions which made clear the year of assessment in which they arose.

52. The FTT rejected both of these arguments, concluding as follows, at [42]-[45]:

> 42. Considering the legislation and case law, we conclude that charges for a year of assessment are income tax charges arising in the tax year for which a particular self-assessment return is made (in this context). The fact that legislation contains provisions which are intended to specify how to identify when certain types of income, and so the associated income tax charges, arise as between different tax years in particular circumstances does not mean that the absence of such identification provisions requires that an income tax charge which arises in a tax year is not to be included in assessing the amount of income tax payable by the taxpayer "for" that tax year.
>
> 43. Most tax legislation concerns charges relating to events which often occur multiple times throughout a tax year (such as dividends and employment income); some events might also offer scope to manipulate a liability to tax in the timing which the legislation needs to deal with. There is also in many cases good reason to aggregate the amounts, to ensure that the correct tax charge can be calculated after taking into account allowances and other appropriate deductions and then considering the relevant applicable rates and thresholds. As such it is unsurprising that legislation sets out provisions to deal with these issues.
>
> 44. The purpose of the unauthorised payment regime is to deter people from accessing their pension funds other than in circumstance permitted by the pensions regime; one would not usually expect multiple such payments to be made in the course of a year. Further, as the charge is a fixed rate relating to each unauthorised payment alone, there is no need to aggregate the amounts to determine the relevant income tax liability. None of this means that a payment is not made in, and thus to be taken into account in assessing the amounts to which the individual is chargeable to income tax for a tax year.
>
> 45. We therefore do not agree with Mr Gordon's submissions that the absence of such specific allocation details in s208 and s209 means that the charges cannot be "for" a tax year. An unauthorised payment will be made during a tax year and we consider that it is clear that the related income tax charge therefore arises in, and so is "for", that tax year.

53. We agree with the FTT. While it may be legitimate to draw inferences from the characteristics of a charge to tax, or from how other tax charges deal with the timing of, or assessment of, a particular charge to tax, in the process of statutory construction, the principles which we have referred to above require that the primary task is to construe purposively the statutory wording. As we have explained, in agreement with the FTT we consider that in this case the critical statutory wording does not support Mr Gordon's analysis.

54. Far more explicit wording would be required to exclude charges under sections 208 and 209 from the obligation to be included in a self-assessment return. Where the drafter wishes to achieve that result, they say so. An example in the context of unauthorised payments is section 9(1A) TMA 1970, introduced by section 281 and Schedule 35 FA 2004. This explicitly carves out from the self-assessment obligation an unauthorised payments charge on a scheme administrator:

> (1A) The tax to be assessed on a person by a self-assessment shall not include any tax which—
>
> (a) is chargeable on the scheme administrator of a registered pension scheme under Part 4 of the Finance Act 2004,
>
> …

55. For the later tax year in this appeal (2009/10), Mr Gordon's argument that the relevant charges are outside self-assessment faces the additional hurdle that sections 23 and 30 ITA 2007 refer specifically to the inclusion in a self-assessment return of an individual's liability to tax under sections 208 and 209 FA 2004. Section 23 (headed "the calculation of income tax liability") states that to find a person's liability to income tax for a tax year, seven "steps" are to be taken. Step 7 is to add "any amounts of tax for which the taxpayer is liable under any provision listed in relation to the taxpayer in section 30". Section 30(1) includes in the listed provisions section 208(2)(a) and section 209(3)(a) FA 2004.

56. Mr Gordon submitted that these references in section 30 were a "drafting error", and were in any event inconsistent with the reference in Step 7 to a tax liability "for the tax year". He said that they were an error in the sense that they arose from the same misunderstanding as HMRC, namely that the charges were within self-assessment for individuals.

57. We do not accept that argument, which is entirely circular. The references in section 30 are unambiguous and strongly indicate that Mr Gordon's argument is wrong.

58. We were referred to comments made by the FTT in *Monaghan v FTT* [2018] UKFTT 156 (TC) ("*Monaghan*"), at [89]-[90], suggesting that section 9 TMA 1970 required charges under sections 208 and 209 to be included in a self-assessment return. Those comments appear in a section of the decision in which the FTT is discussing submissions made by HMRC after the hearing. However, the FTT in *Monaghan* expressed a similar view earlier in its decision at [72] – [77].

59. Mr Gordon submitted that those comments were, in any event, obiter. This was because the FTT's decision in *Monaghan*, which turned on the wording of an earlier version of section 29(1)(a) TMA 1970, did not require a finding that as assessment was insufficient. As Judge Falk (as she then was) observed in *Gordon and others v HMRC* [2018] UKFTT 307 (TC), at [118]:

> …In *Monaghan* the taxpayer had not made a self-assessment return (see paragraph [78] of the decision). In this case each of the appellants had done so. That means that HMRC do not need to rely on s 29(1)(a), because s 29(1)(b) applies in the alternative on the basis that HMRC concluded that an assessment to tax (being the self-assessment contained in each of the appellant's returns) had become insufficient. We note that this was also the approach taken in *Clark v HMRC* [2017] UKFTT 392 (TC) at [15]. In these circumstances it is not necessary to decide whether the approach taken in *Monaghan* was correct and we do not propose to do so.

60. That having been said, in our view, the obiter comments of the FTT in *Monaghan* suggesting that charges under sections 208 and 209 must be included in a self-assessment return

were correct. As we pointed out to the parties, in *Knibbs v HMRC* [2019] EWCA Civ 1719 ("*Knibbs*"), the Court of Appeal tacitly approved the proposition that Step 7 requires a charge under section 208 to be included in a self-assessment return, stating at [49]:

> 49. We gratefully adopt the following summary of the provisions in the skeleton argument of counsel for the claimants:
>
> > "Section 23 sets out a series of steps which are to be taken "*to find the liability of a person ("the taxpayer") to income tax for a tax year"; "the result* [of these steps] *is the taxpayer's liability to income tax for the tax year."*
> >
> > …
> >
> > Finally, Step 7 is to add in any amount of tax for which the taxpayer is liable under the miscellaneous charging provisions listed in s 30. The common feature of the provisions listed in s30 is that they impose liabilities to income tax that are not based on any actual amount of income. (For example, where a member of a registered pension scheme receives an "unauthorised payment", the unauthorised payment is not strictly speaking "income" of any description, but the member is liable to an "unauthorised payments charge" under s 208(2)(a) of the Finance Act 2004 in an amount equal to 40% of the unauthorised payment.)

61. Sections 23 and 30 ITA 2007 were not in force for the earlier tax year in this appeal, 2006/07. However, we do not consider that this means that charges under sections 208 and 209 were not similarly required to be included in a self-assessment return for that earlier year. Sections 23 and 30 were part of the Tax Law Rewrite project, and we see no justification for concluding that they were intended to change a fundamental issue such as the self-assessment position as regards sections 208 and 209 charges. In *Knibbs*, the paragraph preceding the passage quoted above is consistent with this:

> 48. For 2007/08 onwards, the calculation of a person's liability to income tax for a tax year is prescribed in exhaustive detail by Chapter 3 of Part 2 of ITA (sections 22 to 32). There was no direct equivalent to these provisions in the previous legislation. The explanatory notes to section 23 of ITA explain that the section "is based on many provisions in the source legislation, in particular section 835 of ICTA".

62. In relation to charges under section 209 FA 2004, Mr Gordon argued that the fact that such charges are discretionary is an indication that they are unsuitable for self-assessment. The FTT dealt with the competing arguments on this issue at [48]-[50], as follows:

> 48. In submissions made in writing after the hearing in respect of the application of s268, HMRC submitted that a s209 charge must be included in a self-assessment return. An application for relief under s268 may also be made in the same self-assessment return (ie: in the white box of the return) but could be made in writing at any time within the relevant time limits set out in SI 2005/3452. A taxpayer cannot unilaterally determine that the charge is not due and so the initial requirement to declare the s209 charge is not discretionary: it must be included in the self-assessment tax return.
>
> 49. Mr Gordon contended that it was a surprising interpretation of the legislation that a person be required to pay a charge, and can be liable to interest and penalties for not doing so, whilst the application for discharge is being considered. Further, the legislation does not provide any details as to how a discharge is to be effected, nor for how any interest and late payment penalties are to be dealt with if discharge is granted. Mr Gordon submitted that this supported the view that an application under s268 is a consequence

of an HMRC assessment rather than a follow-up to a self-assessed liability. There were also no provisions to permit the reduction of a (tax-based) late return penalty to reflect the removal of a surcharge where a taxpayer had incurred such a penalty in respect of a return which included a s209 charge which had subsequently been discharged on application.

> 50. In the case of the interaction of s209 and s268 we consider that it is clear from the legislation that the charge arises when a relevant payment is made and the liability continues to exist unless and until relief is granted. The charge does not arise only when relief is refused. In the circumstances it is entirely possible that penalties and interest might arise. We do not consider that this is particularly surprising in the context of legislation that is intended to deter behaviour. This is not legislation which seeks to tax everyday transactions. With regard to the intention of Parliament invoked in submissions, we consider that the key intention was that people should not generally be able to access their pensions early without a tax charge. The fact that, if they do access their pension early and fail to comply with their self-assessment obligations, there may be complications with penalties and interest does not mean that the s209 charge is in any way discretionary and outside the scope of self-assessment.

63. Again, we agree with the FTT's conclusion. A charge arising under section 209 is not truly discretionary in the sense that it requires some prior action by HMRC outside the normal assessment machinery for it to arise (as does, for instance, the legislation dealing with transactions in securities). Neither the availability of a claim for relief against the charge nor any of the complexities of the legislation outweigh the language of the statutory provisions, which, for the reasons we have explained, mean the charge arises in the year when the unauthorised payment is made, and that it is liable to self-assessment for that year.

64. This conclusion is consistent with Lord Dunedin's direction in *Whitney*, and with the principles of statutory interpretation set out by the Court of Appeal in *Innovative Bites* which we set out above.

65. We reject the second argument made by Mr Gordon.

DISPOSITION

66. The assessments were validly raised, and the appeal is dismissed.

JUDGE THOMAS SCOTT
JUDGE ASHLEY GREENBANK

Release date: 26 June 2025