

Ombudsman's Determination

Applicant	Mr O
Scheme	Animagic Directors Pension Fund (the Scheme)
Respondent	Hartley SAS Ltd (Hartley)

Outcome

1. I do not uphold Mr O's complaint and no further action is required by Hartley.

Complaint summary

2. Mr O is unhappy because Hartley allowed him to withdraw two tax-free payments from the Scheme, when he had already reached his Lifetime Allowance (**LTA**).
3. Hartley is now asking Mr O to repay £17,303.21 to the Scheme, in order to cover the resulting tax charge.

Background information, including submissions from the parties

4. On 21 November 1985, the Scheme was established. The Scheme is a Small Self-Administered Scheme and Hartley is the administrator.
5. On 1 December 2008, Mr O retired. On the same date, he crystallised £1,237,500 of his benefits under the Scheme and withdrew £309,375 as a tax-free cash sum.
6. On 2 August 2009, Mr O crystallised a further £452,670.51 and withdrew £124,545.51 as a tax-free cash sum.
7. On 3 July 2012, Mr O crystallised a further £16,289.88 and withdrew the full amount as a tax-free cash sum.
8. On each occasion, Hartley calculated and confirmed that Mr O was withdrawing the correct amount of tax-free benefits.
9. In 2018, following a request from Mr O's advisor, Hartley conducted a review of Mr O's benefits under the Scheme.

10. On 6 April 2018, Hartley wrote to Mr O and stated that it had miscalculated his tax-free benefits previously. It explained that Mr O had withdrawn £31,460.39 of tax-free cash over the LTA limit.
11. Hartley explained that the error had arisen because Mr O reached the relevant LTA limit in August 2009. However, unfortunately, it did not factor this into its calculations.
12. In 2008, the LTA was £1.65m. So, the benefits Mr O crystallised equated to 75% of the LTA.
13. In April 2009, the LTA was increased to £1.75m. Mr O was still able to crystallise the remaining 25% of the LTA, so he could crystallise a further £437,500 and take £109,375 tax-free. However, he withdrew £124,545.51 tax-free, or £15,170.50 too much.
14. As Mr O had already crystallised his full LTA by 2012, he should not have taken any further funds tax-free. However, he withdrew £16,289.88 tax-free.
15. Hartley confirmed that these payments could not be recorded as income payments retrospectively, and so they would need to be recorded as unauthorised payments, attracting a 55% tax charge.
16. Hartley requested that Mr O repay £17,303.21 to the Scheme, in order to cover the arising tax charge.
17. Mr O raised a complaint, saying that Hartley should cover the tax charge because it had made the error. He said he had spent the money already, on housing and private education for his children, and so it was not fair for him to be asked to repay it.
18. Mr O also queried whether Hartley should be barred from seeking recovery of his benefits under the Limitation Act 1980 (**the Limitation Act**).
19. A series of correspondence followed, and subsequently Hartley offered to pay all interest and penalties arising from the late payment of the tax charge. In addition, it offered to contribute £5,000 towards the tax charge itself, reducing Mr O's liability to £12,303.21.
20. Mr O did not accept Hartley's offer.

Adjudicator's Opinion

21. Mr O's complaint was considered by one of our Adjudicators who concluded that no further action was required by Hartley. The Adjudicator's findings are summarised below:-
 - Hartley allowed Mr O to withdraw too much tax-free money in 2009 and 2012, which amounts to maladministration. However, the evidence does not indicate that Mr O will suffer a financial loss overall as a result.

- The sum of £17,303.21 is a tax charge resulting from a miscalculation. As such, the money is ultimately owed to HMRC and the Limitation Act does not apply against Hartley.
 - Whilst Hartley made an error, the tax charge would always have been payable, and it is payable by Mr O.
 - Mr O has not put forward sufficient evidence to demonstrate that he cannot now pay the tax charge. As such, it is not reasonable to suggest that Hartley ought to pay his tax on his behalf.
 - Mr O has also not put forward any evidence to demonstrate that he could have taken his benefits in a more tax efficient way, had the error not occurred. He has confirmed that he was a higher rate taxpayer in the relevant years, and so it is unlikely he could have taken his benefits in a more tax efficient way, even if Hartley had provided the correct information.
 - Hartley has offered to pay any interest and penalties due over and above the tax charge. So, Mr O will not be paying more tax as a result of Hartley's error.
 - Lastly, Mr O has suffered a non-financial loss, as Hartley's error will have caused him significant distress and inconvenience. In addition, Hartley's initial responses to Mr O did not always answer his questions fully. This would have added to Mr O's stress. However, Hartley has agreed to contribute £5,000 towards the tax charge itself, which more than redresses the non-financial loss it has caused.
22. Mr O did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr O has stated:-
- Hartley carried out the relevant calculations and authorised the tax-free payments in 2009 and 2012. So, it does not seem appropriate to reference HMRC and state that legal defences are not available when the error has arisen because of Hartley's negligence.
 - He does not believe he should pay £12,303.21 for Hartley's mistake.
 - He may have left the £31,460.39 in the Scheme, had Hartley not told him he could withdraw it tax-free. In particular, he has planned for his wife to inherit any unused pension benefits. He adds that, in that instance, his wife may choose to draw down everything in one go even if this incurs a large tax liability.
23. Mr O's further comments do not change the outcome. I agree with the Adjudicator's Opinion and will only respond to the additional points raised by Mr O.

Ombudsman's decision

24. Mr O does not believe he should pay for Hartley's error. However, Mr O is being asked to pay his tax bill; he is not being asked to pay for an error.

25. Importantly, the tax charge has not arisen as a result of Hartley's error. The tax charge has arisen because Mr O has accrued benefits in excess of the LTA.
26. Mr O has been provided with the opportunity to demonstrate how he could have accessed his benefits more tax efficiently if it were not for Hartley's error. However, he has not done so. From the evidence available to me, I find it unlikely that he could have withdrawn his benefits in such a way as to be more tax efficient long-term.
27. Mr O may have withdrawn the benefits of £15,170.50 and £16,289.88 in 2009 and 2012 respectively as income, rather than lump sum payments, if he had known they would not be tax free. He argues that, if he had done that, he would have only paid his marginal tax rate on those amounts.
28. However, as Mr O has accrued benefits in excess of the LTA, he will ultimately pay a tax surcharge on a portion of his total benefits. If he had taken the £15,170.50 and £16,289.88 as income from his crystallised benefits in 2009 and 2012, he would have simply incurred the tax surcharge when he crystallised and withdrew the equivalent sums in excess of the LTA at a later date.
29. If Mr O had taken the £31,460.39 as a lump sum in excess of the LTA, he would have paid a tax surcharge of 55% on it. If he had withdrawn the £31,460.39 as income, he would have paid a tax surcharge of 25% plus his marginal tax rate. As he is a higher rate taxpayer, this would have equated to an overall tax rate of 55%.
30. Mr O has said that he would have left the £31,460.39 in the Scheme, if the error had not occurred. However, his uncrystallised pension benefits would have been tested against the LTA when he reached his 75th birthday, or if he died before age 75, and a tax surcharge of 25% would have been applied then. If the benefits remained unused and were ultimately inherited, the further tax payable would be dependent on the tax position of his beneficiaries. Based on the evidence available, it is likely the benefits would always have been subject to an overall tax rate of 55% and, even if this were not the case, I find that Hartley's offer to contribute £5,000 towards his tax charge more than compensates Mr O for any additional tax liability.
31. I do not find that Mr O is likely to have suffered a financial loss as a result of Hartley's error.
32. However, I agree he will have suffered a non-financial loss. Mr O has been put in a position where he now needs to pay an unexpected tax bill. He has not evidenced that he cannot pay it, but nonetheless I find it likely that he has suffered distress and inconvenience which will continue while he rearranges his affairs in order to pay the outstanding charge.
33. In addition, I find that Hartley's initial responses to Mr O were lacking. Hartley did not respond to Mr O's queries in full and initially it did not take responsibility for the error.
34. Generally, I would award £1,000 for the serious distress and inconvenience, which I believe has been caused in this case. However, as Hartley has already offered to pay

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Mr O £5,000, which I consider more than covers any additional tax charge, I find that its offer is reasonable and no further award is warranted.

35. I do not uphold Mr O's complaint and he should contact Hartley directly if he now wishes to accept its offer.

Anthony Arter

Pensions Ombudsman
7 July 2021