

Neutral Citation Number: [2007] EWHC 147 (Ch)

Case No: CH 2006/APP/368

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

Royal Courts of Justice
Strand, London. WC2A 2LL

8 February 2007

Before:

THE HON MR JUSTICE BLACKBURNE

Between:

Irving

Appellant

-and-

**Commissioners for HM Revenue and
Customs**

Respondents

David Goy QC and **Michael Sherry** (instructed by **DMH Stallard**) for the
Appellant

Philip Jones QC (instructed by **HMRC Solicitor's Office**) for the
Respondents

Hearing date: 23 November 2006

Mr Justice Blackburne:

Introduction

1. This is an appeal by the taxpayer, John Leslie Irving, from a decision of the Special Commissioners (John Walters QC and Howard Nolan) released on 23 March 2006. The Special Commissioners dismissed the taxpayer's appeal against an amendment to his self-assessment to income tax for the year 1996-1997. The amendment was an increase of £145,051 in the taxpayer's Schedule E income. The increase reflected the view of the respondents, the Commissioners of Her Majesty's Revenue and Customs ("the Revenue"), that a transfer of shares in sixteen different quoted companies to a funded unapproved retirement benefits scheme (a "FURBS") by the taxpayer's employer was to be deemed the income of the taxpayer assessable under Schedule E pursuant to section 595 of the Income and Corporation Taxes Act 1988 ("the 1988 Act"). Although section 595 has since been repealed by the Income Tax (Earnings and Pensions) Act 2003 with effect, for income tax purposes, from the year 2003-2004, the language of the replacement provision (section 386 of the 2003 Act) gives rise to the same point as arises on this appeal. Section 386 and related provisions of that Act have also now been repealed and replaced by the different regime now to be found in the Finance Act 2004.
2. Section 595, which was contained in Chapter 1 of Part XIV (concerned with retirement benefit schemes), provided as follows:

"595 Charge to tax in respect of certain sums paid by employer etc

(1) Subject to the provisions of this Chapter, where, pursuant to a retirement benefits scheme, the employer in any year of assessment pays a sum with a view to the provision of any relevant benefits for any employee of that employer, then (whether or not the accrual of the benefits is dependent on any contingency)-

(a) the sum paid, if not otherwise chargeable to income tax as income of the employee, shall be deemed for all purposes of the Income Tax Acts to be income of that employee for that year of assessment and assessable to tax under Schedule E; and

(b) where the payment is made under such an insurance or contract as is mentioned in section 266, relief, if not otherwise allowable, shall be given to that employee under that section in respect of the payment to the extent, if any, to which such relief would have been allowable to him if the payment had been made by him and the insurance or contract

under which the payment is made had been made with him.

(2) ...

(3) ...

(4) Where the employer pays any sum as mentioned in subsection (1) above in relation to more than one employee, the sum so paid shall, for the purpose of that subsection, be apportioned among those employees by reference to the separate sums which would have had to be paid to secure the separate benefits to be provided for them respectively, and the part of the sum apportioned to each of them shall be deemed for that purpose to have been paid separately in relation to that one of them.

(5) Any reference in this section to the provision for an employee of relevant benefits includes a reference to the provision of benefits to that employee's wife or widow, children, dependants or personal representatives."

3. The issue for determination on this appeal is whether the transfer of the shareholdings constituted the payment of a sum for the purposes of section 595(1). In agreement with the Revenue when dismissing the taxpayer's appeal, the Special Commissioners held that it did. The question is whether they were correct in that conclusion.

The background facts

4. The relevant facts can be very shortly stated. The taxpayer's employer - a company of which the taxpayer was at the material time a director - decided in the third quarter of 1996 to establish a FURBS for the benefit of its executives. To this end, on 16 September 1996, the company executed a trust deed establishing the relevant scheme. The taxpayer, who was also one of the first trustees of the scheme, was among those admitted to membership of it. The company transferred cash of £80,000 to Murray Johnstone Personal Asset Management Limited ("Murray Johnstone") on 25 July 1996 having appointed Murray Johnstone as discretionary asset managers for the company. A further £120,000 was transferred on 12 September 1996. On 8 August 1996 Murray Johnstone acquired on behalf of the company shareholdings in sixteen quoted companies. On 19 September 1996 Murray Johnstone acquired on behalf of the company further shares in each of those sixteen quoted companies. On 20 September, the company contributed £1,300 to the scheme of which £1,000 was allocated to the taxpayer. On 24 September, the company's directors decided to recommend in relation to the taxpayer a pension contribution of £5,000 cash plus the transfer of a part - with an approximate value of £145,000 - of the sixteen shareholdings it had previously acquired. The following day, 25

September, at an extraordinary general meeting of the company's shareholders, the directors' recommendation was accepted and, that same day, the transfer was made.

5. The taxpayer's tax return for the year ended 5 April 1997 contained a disclosure to the effect that a non-monetary contribution had been made to the scheme in respect of him. It was asserted that this did not create a liability to income tax. The inspector of taxes opened an enquiry into the taxpayer's tax return for that year. This culminated in the inspector's notification to the taxpayer that he was amending the taxpayer's self-assessment for 1996-1997 to increase the Schedule E income by £145,051 in respect of the contribution of shares. The taxpayer appealed. The quantum of the amendment is not in dispute although it was not agreed.

The Special Commissioners decision

6. The Special Commissioners' starting point was to note that the statutory words “pays a sum”, “sum paid” and “payment is made” appearing in section 595(1) did not in terms convey the meaning that a contribution must be in cash or money. They accepted that the words “pays a sum” primarily suggested the payment of a sum of money but rejected the view that they could, without more, accept this as the exclusive meaning of the expression. They concluded that as a matter of literal construction the words used “connote no more than that a transfer of value is required”.
7. From this they went on to consider whether the more obvious meaning of the statutory words, namely pays a sum of money, was so compelling, when taken with other statutory references, as to lead to its adoption as the meaning of the words in section 595(1). Applying a purposive approach to determine “what transaction will answer to the statutory description” (see Barclays Mercantile Business Finance Ltd v Mawson [2004] UKHL 51; [2005] 1AC 684 at [36]) and in particular whether the expression “pays a sum” must be confined to the payment of a sum of money or can comprehend other transfers of value, the Special Commissioners observed that the main purpose of section 595(1) was to impose an income tax charge on contributions to unapproved schemes and that this was achieved by the general charge imposed by the section, subject to exceptions set out in section 596. They stated that they could not see why the means by which a contribution was made (cash or kind) should be relevant to the purpose of section 595(1) and noted that no cogent policy reason had been suggested by the taxpayer for confining the charge to contributions made in money alone.
8. Accepting that Chapter 1 of Part XIV was drafted on the basis that contributions and benefits would normally take a monetary form, the

Special Commissioners stated that they would need to conclude that the form of drafting was intended to confine the contributions and benefits to which Chapter 1 applied to monetary amounts. They felt unable, however, to reach such a conclusion. Although they looked at provisions in Chapters 3 and 4 of Part 4 of the Finance Act 2004 (concerned with registered pension schemes), in particular section 195 treating the transfer of “eligible shares” -an expression given a very specific and limited definition - as payment of a contribution for the purpose of other provisions which are concerned with relief for contributions made, they noted that the provisions were part of a code which was distinct from the code of which section 595 was a part. They concluded that any inference to be drawn from section 195 of the 2004 Act was not as strong as the taxpayer contended. They considered that there was no ambiguity in the meaning of "sum paid" in section 595(1) to warrant recourse to the 2004 Act as an aid to its construction and that, whatever view the draftsman of section 195 took of the meaning of “sum paid” in section 595(1), his belief was irrelevant to the construction of those words.

9. The Special Commissioners found support for their view that the words “sum paid” in section 595(1) were apt to cover a transfer of shares in the decision of the Court of Appeal in Lowe v Peter Walker (1935) 20 TC 25. They were unpersuaded by the point that in both Chapter 1 of Part XIV and also in unrelated provisions of tax legislation, express extensions are to be found of references to “payment” so as to include transfers of assets or money's worth whereas in section 595(1) there is no such express extension.
10. Summarising their views at paragraph 48, the Special Commissioners said this:

“48. In summary, we accept that Mr Sherry's three submissions have force. "Payment of a sum" is certainly an expression which more obviously applies to a payment of money than a transfer of non-monetary assets. We accept that there are many instances in tax legislation where provision is expressly made to treat a transfer of assets as a payment, and that such an express provision is absent in relation to section 595(1). Also, his reliance on section 195 FA 2004 would have some persuasive power if it were directly in point. So far as support for Mr Jones's wider interpretation of the critical phrase is concerned, we are strongly influenced by the fact that no mention was made of the point now in contention in *Lowe v Peter Walker*, albeit that the point would appear to have been equally as maintainable in that case as in this. We are also influenced by the fact that the Revenue apparently always concedes otherwise allowable deductions to employers on making specie contributions to schemes, which at the time material to this case is based on an identical point of interpretation. However, as we see it, the most powerful point in the Revenue's favour is that, in examining the purpose of section 595(1), we can see no merit or logic in the distinction which Mr

Sherry's argument involves. We do not believe that Parliament intended to make such a distinction or, in enacting section 595(1), was concerned to stipulate how a sum should be paid with a view to the provision of benefits. Therefore, as the wider interpretation of the statutory phrase is entirely tenable, we favour it because it accords with the legislative purpose as we have discerned it, produces a sensible result, avoids a perverse distinction, and adopts an approach consistent to that adopted by the Revenue in relation to allowing deductions for employer specie contributions.”

11. The Special Commissioners therefore concluded (in paragraph 49) that for these reasons:

“...the statutory description "sum paid" in section 595(1) is apt to cover a transfer of value whether in the form of a monetary payment or of a payment in kind.”

12. In the ensuing three paragraphs of their decision, the Special Commissioners dealt with points with which this appeal is not concerned. The overall result was that the taxpayer's appeal was dismissed.

Other provisions

13. What then is the meaning of the words “paid a sum” and cognate expressions appearing in section 595(1). Before coming to the parties' submissions it is appropriate to refer to other provisions contained in Chapter 1 of Part XIV of the 1988 Act.

“592 Exempt approved schemes

(1) This section has effect as respects-

(a) any approved scheme which is shown to the satisfaction of the Board to be established under irrevocable trusts; or

(b) any other approved scheme as respects which the Board, having regard to any special circumstances, direct that this section shall apply;

and any scheme which is for the time being within paragraph (a) or (b) above is in this Chapter referred to as an "exempt approved scheme".

(4) Any sum paid by an employer by way of contribution under the scheme shall, for the purposes of Case I and II of Schedule D and of sections 75 and 76, be allowed to be deducted as an expense, or expense of management, incurred in the chargeable period in which the sum is paid but no other sum shall for those purposes be allowed to be deducted as an expense, or expense of management, in respect

of the making, or any provision for the making, of any contributions under the scheme.

(7) Any contribution paid under the scheme by an employee shall, in assessing tax under Schedule E, be allowed to be deducted as an expense incurred in the year of assessment in which the contribution is paid.

593 Relief by way of deductions from contributions

(1) Relief under section 592(7) shall be given in accordance with subsections (2) and (3) below in such cases and subject to such conditions as the Board may prescribe by regulations under section 612(3) in respect of schemes-

(a) to which employees, but not their employers, are contributors; and

(b) which provide benefits additional to benefits provided by schemes to which their employers are contributors.

(2) An employee who is entitled to relief under section 592(7) in respect of a contribution may deduct from the contribution when he pays it, and may retain, an amount equal to income tax at the basic rate on the contribution.

596 Exceptions from section 595

(1) Section 595(1) shall not apply where the retirement benefits scheme in question is-

(a) an approved scheme, or

(b) a relevant statutory scheme, or

(c) a scheme set up by a government outside the United Kingdom for the benefit, or primarily for the benefit, of its employees.

(3) Where, in respect of the provision for an employee of any relevant benefits-

(a) a sum has been deemed to be income of his by virtue of subsection (1) of section 595, and

(b) subsequently, the employee proves to the satisfaction of the Board that-

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

(ii) some event has occurred by reason of which no such payment will be made,

and makes application for relief under this subsection within six years from the time when that event occurred, the Board shall give relief in respect of tax on that sum by repayment or otherwise as may be appropriate; and if the employee satisfies the Board as mentioned above in relation to some particular part, but not the whole, of the benefits, the Board may give such relief as may seem to them just and reasonable.

596A Charge to tax: benefits under non-approved schemes

(1) Where in any year of assessment a person receives a benefit provided under a retirement benefits scheme which is not of a description mentioned in section 596(1)(a), (b) or (c), tax shall be charged in accordance with the provisions of this section.

(2) Where the benefit is received by an individual, he shall be charged to tax under Schedule E for that year.

(4) Subject to subsection (9) below the amount to be charged to tax is-

(a) in the case of a cash benefit, the amount received, and

(b) in the case of a benefit in kind, an amount equal to whatever is the cash equivalent of the benefit.

(6) Tax shall not be charged under this section in the case of-

(a) any pension or annuity which is chargeable to tax under Schedule E by virtue of section 19(1); or

(b) any pension or other benefit chargeable to tax under section 58.

(7) But where the amount chargeable to tax as mentioned in subsection (6)(a) above is less than the amount which would be chargeable to tax under this section-

(a) subsection (6)(a) above shall not apply, and

(b) the amount chargeable to tax under this section shall be reduced by the amount chargeable to tax by virtue of section 19(1).

(8) Subject to subsection (9) below, tax shall not be charged under this section (or section 19(1) or 148) in the case of a lump sum where-

(a) the employer has paid any sum or sums with a view to the provision of any relevant benefits under a retirement benefits scheme;

(b) an employee has been assessed to tax in respect of the sum or sums by virtue of section 595(1); and

(c) the lump sum is provided under the scheme to the employee, any person falling within section 595(5) in relation to the employee or any other individual designated by the employee.

(9) Where any of the income or gains accruing to the scheme under which the lump sum is provided is not brought into charge to tax, tax shall be charged under this section on the amount of the lump sum received less any deduction applicable under subsection (10) or (11) below.

(10) Subject to subsection (11) below, the deduction applicable is the aggregate of-

(a) any sum or sums in respect of which the employee has been assessed as mentioned in subsection (8)(b) above, and

(b) any sum or sums paid by the employee,

which in either case were paid by way of contribution to the provision of the lump sum.

(11) Where-

(a) the lump sum is provided under the scheme on the disposal of a part of any asset or the surrender of any part of or share in any rights in any asset, and

(b) the employee, any person falling within section 595(5) in relation to the employee or any person connected with the employee has any right to receive or any expectation of receiving a further lump sum (or further lump sums) under the scheme on a further disposal of any part of the asset or a further surrender of any part of or share in any rights in the asset,

the deduction applicable shall be determined in accordance with the formula in subsection (12) below.

(15) For the purposes of subsections (8) and (9) above, it shall be assumed unless the contrary is shown-

(a) that no sums have been paid, and the employee has not been assessed in respect of any sums paid, with a view to the provision of relevant benefits;

(b) that the income or gains accruing to a scheme under which the benefit is provided are not brought into charge to tax; and

(c) that no deduction is applicable under subsection (10) or (11) above.

596B Section 596A: supplementary provisions

(1) For the purposes of section 596A the cash equivalent of a benefit in kind is-

[Provisions are then set for the ascertainment of the cash equivalent]

611 Definition of “retirement benefits scheme”

(1) In this Chapter “retirement benefits scheme” means, subject to the provisions of this section, a scheme for the provision of benefits consisting of or including relevant benefits, but does not include any national scheme providing such benefits.

612 Other interpretative provisions and regulations for the purposes of this Chapter

(1) In this Chapter, except where the context otherwise requires-

“relevant benefits” means any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death, or in anticipation of retirement

The taxpayer's submissions

14. Mr David Goy QC, appearing with Mr Michael Sherry for the taxpayer, reminded me that the aim of statutory interpretation is to identify the meaning borne by the words in question in their particular context and that this involves establishing the intention which the court reasonably

imputes to Parliament in respect of the language applied. He also reminded me that in approaching this task a purposive approach is now often resorted to, namely ascertaining what the purpose is of the provision and, having found that purpose, considering whether it is furthered or hindered by the interpretation which is put forward. He emphasised, however, that in order to adopt a purposive approach the court needs to understand as best it can from the words Parliament has used the purpose or policy behind the provisions that the court has to interpret. Whether or not in the abstract it may be thought that there is a good policy reason for one interpretation or another is not, he said, at the end of the day a consideration relevant to interpretation; the purpose or policy has to be found from the words that Parliament has used. He submitted that in stating, in paragraph 39 of their decision, that they could not see why the means by which a contribution is made should be relevant to the purpose of section 595(1) and that Mr Sherry had been unable to suggest a cogent policy reason for confining the charge to contributions made in money the Special Commissioners fell into error: whether or not it was possible to think of a good policy reason in the abstract was immaterial; the question rather was to ascertain the purpose or policy from the words used in the statute.

15. Coming to his main submissions, Mr Goy raised essentially three points.
16. The first was that, looking at section 595, the natural and obvious meaning of the phrase "pays a sum" is that it refers to the payment of a sum of money rather than to a transfer of non-monetary assets. He pointed out that the Special Commissioners themselves (at paragraph 48 quoted earlier) accepted that this was so. Accepting that in an appropriate context the expression "payment" can on its own refer to a transfer of assets and so also, in context, can the expression "sum", Mr Goy submitted that when used together the words "pays a sum" usually refer to a sum of money and that if that ordinary and natural meaning was not to be applied to section 595(1) there had to be something in the context of the legislation as a whole to justify doing so. He pointed out that, although the Schedule E basis of charge is applicable to the sums paid under section 595, the emoluments which form the basis of the Schedule E charge to tax extend to transfers of assets convertible into cash and not just to payments of cash. However, he said, section 595 did not seek in its wording to replicate the Schedule E basis of charge: it referred simply to the payment of a sum. Nor did section 595 indicate how if a "sum paid" did include transfers of assets, the quantum of the charge to tax was to be computed. Moreover, section 595 did not apply, he contended, to all assets capable of being put into a retirement benefits scheme: he instanced a £1 million interest free loan to the scheme repayable on demand, the benefit to the scheme being the failure, so long as the loan lasted, of the lender/employer to demand repayment. It

could not be realistically supposed, said Mr Goy, that such a transaction constituted payment of a sum. If therefore it was correct that section 595 did not in any event apply to all ways by which an employer could put value into a scheme fund, it was no more absurd to find that the section applied only to payments of cash. The fact is, he said, that the section was on any view limited in its scope. That the provision was limited was evident, he said, from the fact that at any rate when first enacted - as section 19 of the Finance Act 1947 - it applied only to payments by body corporates and not to payments by other kinds of employer (a distinction which has since gone).

17. Mr Goy pointed out that in 1989 various amendments were made to Chapter 1 including, by the insertion of section 596A, the charging to tax of all benefits (including benefits in kind) received under a non-approved retirement benefits scheme. In the case of benefits in kind (as distinct from cash benefits) an elaborate provision was to be found in section 596B (introduced at the same time as section 596A) for determining the cash equivalent of the benefit in question. There were also provisions to ensure that the benefits received were not the subject of more than one charge to tax on receipt and that the charge was the higher of (1) the rate otherwise applicable and (2) the amount chargeable under section 596A. Thus, from 1989 the structure of the charging provisions was that all benefits became subject to tax when received by the individual concerned but on terms, by section 596A(8), that tax should not be charged under the section in the case of a lump sum where (a) the employer had "paid any sum or sums with a view to the provision of the relevant benefits under a retirement benefits scheme", (b) the employee "has been assessed to tax in respect of the sum or sums by virtue of section 595(1)" and (c) the lump sum had been provided under the scheme to, inter alia, the employee. Thus, the broad structure thenceforth applicable was, he submitted, that the exemption from the charge to tax on lump sum benefits coming out of the scheme did not apply if there was no section 595 charge when payment into the scheme was made whereas there was such a charge (subject to the provisions in sub-sections (9) and following of section 596A) to the extent that there had been a charge to tax under section 595 on the payment into the scheme. One way or the other, he said, there was in the case of a lump sum payment a single charge to tax: it arose either when the payment was made but could be avoided if a lump sum benefit was paid out of it but if there was no charge on payment in there would be a charge to tax on payment out (whether as a lump sum or otherwise). His purpose in drawing my attention to this was to counter any suggestion that if section 595(1) was confined to cash payments but the employer's contribution was in kind, the taxpayer would be able to avoid payment of tax altogether. This was not so. There was inevitably a charge to tax. The only question was at what point in time.

18. Mr Goy also drew my attention to the terms of section 593. That section was concerned with the grant of tax relief under section 592(7) in the case of schemes to which employees but not their employers were contributors. It did so by way of deductions from the contributions made. He pointed in particular to section 593(2) which provided that an employee who was entitled to such relief in respect of a contribution "... may deduct from the contribution when he pays it, and may retain, an amount equal to income tax at the basic rate on the contribution". Mr Goy submitted that one cannot deduct tax from assets such as land. His point was that the legislation contemplated a deduction and that it was difficult to see how this could occur in the case of a non-cash asset.
19. Mr Goy also mentioned that historically the Revenue have viewed the expression "relevant benefits", defined by section 612(1) of the 1988 Act to mean, so far as material, "any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death...", as confined to cash benefits. He referred me in this connection to Inland Revenue Employment Income Manual ("EIM") 15020 and also to EIM 15021 stating that "only cash benefits count as 'relevant benefits' for non-approved schemes". That, said Mr Goy, was consistent with his submission that section 595(1) was likewise confined to cash benefits.
20. Mr Goy's second main submission involved drawing my attention to other provisions in Chapter 1 where the expression "payment" was defined to "include references to any transfer of assets or other transfers of money's worth". Thus, he drew my attention to the following provisions, section 599A(10) (contained in a provision concerned with payments made to or for the benefit of an employee or to his personal representatives out of funds held for the purposes of an exempt approved and certain statutory schemes and which had been made in pursuance of a duty to return surplus funds), section 600(4) (contained in a provision concerned with unauthorised payments to or for the benefit of an employee, otherwise than in course of payment of a pension, being a payment out of funds held for the purposes of certain approved schemes) and section 601(6) (contained in a provision concerned with certain kinds of payments made to an employee out of funds held for the purpose of an exempt approved scheme). Mr Goy pointed out that in those provisions Parliament had gone out of its way to ensure that references to payment included references to asset transfers. He submitted that the fact that there was no such reference in section 595 gave the very clear indication that Parliament had no intention that the section should apply where assets rather than cash had been paid.
21. Mr Goy's third main submission, following on and reinforcing his second submission, concerned Parliament's practice in taxing statutes

generally of providing, where this was intended, that expressions analogous to "payment of a sum" should extend to transfers of assets. Thus, section 24(4) of the 1988 Act (concerned with the Schedule A charge to tax), which defines references to "a sum" as including "the value of any consideration", section 313(4) of the that Act (since repealed) which was concerned with "valuable consideration otherwise than in the form of money" given in respect of a restrictive undertaking in connection with an office or employment, and section 701(12)(a) of the 1988 Act (concerned with the rules applicable to estates in the course of administration) which defines references to "sums paid" as including "assets that are transferred". To similar effect is section 161(2) of the Finance Act 2004 contained in Part 4 (concerned with the taxation of pension and similar schemes). It defines "payment" as including "a transfer of assets and any other transfer of money's worth".

22. Mr Goy had a further point in respect of the Finance Act 2004. He referred me to section 188(1) of that Act which, so far as material, entitles an individual "who is an active member of a registered pension scheme ... to relief... in respect of relievable pension contributions paid during a tax year..." and to section 188(2) defining "relevant pension contributions" as "...contributions by or on behalf of the individual under the pension scheme other than [there is then a reference to various exceptions set out in section 188(3)]". He also referred me to section 195(1) of the 2004 Act which provides that "for the purposes of sections 188 to 194 ... references to contributions paid by an individual include contributions made in the form of the transfer by the individual of eligible shares in a company within the permitted period". "Eligible shares" and "permitted period" are then given specific and limited meanings by sections 195(3) and (4). Mr Goy referred to section 195(1) in order to make the point that Parliament makes distinctions (in that case, limiting the meaning of "contributions) which, as he put it, "you and I looking at and standing back might find really rather difficult to understand and justify" just as, in his submission, Parliament had done by confining the operation of section 595(1) to cash payments. (In passing, he pointed out that the Special Commissioners had misunderstood that that was the sole purpose of the same submission when it had been put to them by Mr Sherry.)
23. Finally, Mr Goy referred me to the PAYE collection mechanism applicable to income assessable to tax under Schedule E set out in sections 203 (and following) of the 1998 Act. What emerged from those provisions, said Mr Goy, was that the basis of the PAYE system was that it applied to cash payments and that specific provision had to be made to deal with non-cash payments. He referred me, by way of example of such special provision, to sections 203F and 203J. He also submitted that as the section 595(1) charge made the payment in

question assessable to tax under Schedule E it was consistent with the basic assumption under Schedule E (that the payment in question would be in cash) that the payment in question would be in the form of cash, thus providing further support for its operation as being limited to cash payments.

The Revenue's submissions

24. For the Revenue Mr Philip Jones QC submitted that, so far as relevant to this appeal, the decision of the Special Commissioners should be upheld for the reasons that they gave. He submitted, in agreement with the Special Commissioners, that "pays a sum" appearing in section 595(1) is not confined to a cash payment but includes a transfer of shares, at any rate shares of the kind in issue of the instant case (ie in quoted companies and thus readily realisable in cash), as being a transfer of value. He pointed out that the relevant words in section 595(1) are "pays a sum" and not "pays a sum *in cash*" or even "or pays a sum *of money*". If, he said, Parliament had intended to confine the meaning of the expression to cash, it could easily have done so, not least when elsewhere in the -1988 Act, Parliament has so provided where that is what it intends. Thus, section 481(3) defines a "deposit" as "a sum of money paid on terms under which it will be repaid", and section 785 defines "capital sum" as "any sum of money or money's worth...". He referred also to section 143(3). Moreover, as he pointed out, the taxpayer accepted that a "payment" could refer to cash or kind and that a "sum" could likewise so refer. The taxpayer also accepted, he said, that "pays a sum" and "sum paid" could in context extend to a non-cash transfer of value. The question therefore was simply how the words were to be understood when used in section 595 in the context in which that provision appeared.
25. He went on to submit that to contend that the expression was confined to a cash payment would mean that the charge to tax imposed by section 595(1) was in effect a voluntary tax since it could so easily be avoided. This, he said, was well illustrated by the facts of the instant case where shares were acquired by the employer out of a cash surplus which were then paid into the scheme in circumstances where the employer could just as easily have paid the cash into the scheme and left it to the scheme trustees to acquire the shares. According to the taxpayer the former method -the method in fact adopted - avoided the charge to tax where as the latter did not. He submitted that this was an absurd outcome based on an absurd distinction between cash and non-cash assets and that the taxpayer was unable to think of any reason why Parliament should have intended so unlikely a result. It was a result which could be avoided simply by reading the phrase "pays a sum" as including a payment of anything having value which could be turned into money. No violence

was done to the language of section 595 by saying that, when the employer transferred shares of a value of £145,051 to the scheme trustees, it "paid a sum" of £145,051 to them. He also pointed out that the effect of section 595(1)(a) was to deem the sum paid, if not otherwise liable to income tax, as income of the employee assessable to tax under Schedule E. Schedule E, he reminded me, is not confined to payments in cash; it extends to other forms of emolument from the office or employment, including benefits in kind, if capable of conversion into money. See Tennant v Smith [1892] AC 150 at 156 (Lord Halsbury) and 159 (Lord Watson). He submitted that it was difficult to see why Parliament should wish in section 595(1) to distinguish between cash and cash-convertible assets when it does not seek to do so under Schedule E.

26. Mr Jones submitted that the Special Commissioners rightly placed reliance on the decision in Lowe v Peter Walker (1935) 20 TC 25. In that case a company had allotted some of its shares to a revocable employees benefit trust. Some years later, by which time the shares had been sold, the proceeds placed in other investments and substantial further contributions to the trust had been made, the company revoked the trusts in respect of the greater part of the trust assets and resettled the assets in question, which consisted largely if not wholly of securities, on the terms of a new employees benefit trust approved by the Inland Revenue as a superannuation fund. The Court of Appeal held that the re-settlement of the assets in the first trust on the terms of the second trust amounted to a "sum paid by an employer... by way of contribution towards a superannuation fund" within the meaning of what was then section 32 of the Finance Act 1921 and therefore could be deducted as an expense incurred in the year in which, this took place. Mr Jones submitted that although the words "sum paid" were not in issue in that case, nevertheless it obviously did not strike any of the judges in the Court of Appeal or the judge at first instance or the Special Commissioners in that case as odd that the re-settlement of the trust assets (in substance a transfer of shares) should fall within the words "sum paid". He submitted that this was not surprising: the investment in question had an ascertainable monetary value and the "sum paid" was the value of the investments re-settled on the second trust.
27. The equivalent of section 32 of the Finance Act 1921 to be found in the 1988 Act was section 592(4). Like its predecessor it was applicable only to approved schemes. So far as material, section 592(4) provided that any sum paid by an employer by way of contribution under an approved retirement benefits scheme "shall for the purposes of Case I or II of Schedule D ... be allowed to be deducted as an expense, or expense of management, incurred in the chargeable period in which the sum is paid ...". Mr Jones stated that as far as the Revenue were aware it had never

before been suggested that a transfer to an approved retirement benefits scheme of assets in specie with a monetary value was not a "sum paid" within the meaning of section 592(4). He submitted that, as with section 595, it was difficult to discern any reason why Parliament should allow cash payments to be deductible but not payments in specie with a monetary value. If only cash payments were deductible, it would mean that, to obtain the deduction, the employer would first have to sell the assets and then put the cash proceeds into the scheme to purchase the assets. He submitted that it could not be seriously contended that that is what Parliament intended. If therefore it was right, as Lowe v Peter Walker assumed, that section 592(4) (as the provision became) was not so confined but extended to, for example, shares, it was difficult to see why the same expression "sum paid" and cognate expression occurring within section 595(1) should have a different and narrower meaning.

28. Mr Jones submitted that there was nothing in the taxpayer's contention that the expression "contribution paid" when used in section 592(7) and the cognate expression "... contribution when he pays it" when used in section 593(2) assumed a cash payment on the ground that section 593(2) envisaged that the employee making the payment should be able to deduct and retain tax at the basic rate on the contribution and that this could only realistically be achieved if the contribution were in cash. He submitted that the provision was concerned with a notional retention of tax and that it worked equally well where the contribution took a non-cash form: the amount transferred was grossed up, a notional deduction calculated and a reclaim made from the Revenue for an amount equal to the deduction. But even if section 592(3) were limited to cash contributions, the provision, being a relieving provision, was, he said, a different animal from section 595 which was a charging provision. It was one thing, he submitted, to say that tax relief was only to be given to cash payments but a completely different thing to maintain that in terms of a tax charge the charge should only apply to cash payments into a retirement benefits scheme but not to a transfer of shares.
29. Mr Jones submitted that the taxpayer could derive no comfort from section 195 (or other provisions) of the Finance Act 2004 as an aid to the interpretation of section 595 (as the Special Commissioners had understood Mr Sherry to be contending), nor, as the taxpayer's submission was now understood, did the taxpayer seek to do, beyond pointing to the apparent arbitrariness of the inclusion in section 195(1) of "eligible shares" within the scope of what, for the purposes of sections 188 to 194 of that Act, is to be understood by "contributions paid by an individual". But that, said Mr Jones, was no more than a reflection of Parliament's wish to limit the extent to which contributions to a pension scheme are entitled to relief.

30. Mr Jones referred also to section 596A of the 1988 Act but, in contrast to Mr Goy, did so for the purpose of pointing out that, as section 596A(4) made clear, the charge to tax on the benefits a person received under a retirement benefits scheme, having regard to the definition of such a scheme contained in section 611(1) of the 1988 Act, extended not just to "a cash benefit" but also to "a benefit in kind". If therefore it was envisaged by Parliament that other assets could be held by a scheme, why, he asked, should there be a different tax treatment in respect of those other assets as opposed to cash when those other assets were transferred into the scheme? He also pointed out that section 596A(4) provided another illustration of Parliament specifically using the word "cash" where this was what was intended to be referred to.
31. Mr Jones went on to submit, although he accepted that this was contrary to the Revenue's historic practice, that the different tax treatment accorded by section 596A(8) and following where the payment of the benefit was by way of a "lump sum" (the expression used in subsection (8) and following) was not confined to lump sums in cash since there was nothing in the legislation to suggest that a "lump sum" had to be a payment in cash as opposed to, for example, a payment of shares which have a cash equivalent. He submitted that there was no logical reason, given the wide terms of, for example, section 596A(4), why it should be so confined. He submitted that even if there was a different tax treatment accorded to the payment of cash lump sums out of the scheme as opposed to the transfer of shares out of the scheme, this was no reason for according a different tax treatment to such contributions into the scheme in the first place.
32. Mr Jones turned next to section 596(3) of the 1988 Act. Section 596(3)(a) referred to "a sum" which was "deemed to be ... income" by virtue of section 595(1). The question was whether, in the context of that provision, "sum" could be confined to cash. If it could not, then it was clear that the operation of section 595(1) could not be confined to cash payments. He submitted that it was reasonably plain that the expression "payment" as used in section 596(3)(b) could not be confined to a cash payment. To do so would produce an absurdity. Suppose, he said, all the assets in the scheme had been paid out by way of a transfer of shares. In such circumstances an event would have occurred by reason of which no payment of cash would be made because there would be no assets left in the scheme with which to do so. He asked whether the taxpayer was seriously arguing that the Revenue had to repay tax paid under section 595(1) when the contribution was originally made to the scheme. He submitted that the word "payment" when used in section 596(3)(b) plainly referred to any benefits payable under the scheme. "Retirement benefits scheme" was defined by section 611(1) as a scheme "for the provision of benefits consisting of or including relevant benefits". Even

assuming the words "relevant benefits" were restricted in meaning to cash payments, a retirement benefits scheme can provide benefits other than by way of cash payments. For example, it can provide a transfer of shares. If, however, "payment" in section 596(3)(b) was confined to a cash payment, a person who had already received his benefits in a non-cash form could demand a refund of tax paid under section 595(1) on contributions made. This, he submitted, would be a result plainly contrary to the intent of the legislation. It was therefore clear, he submitted, that "payment" in that subsection meant anything that could be a "benefit" under a retirement benefits scheme and was not limited to cash benefits. If "payment" in that subsection extended to non-cash benefits, as he submitted was plainly the case, it was difficult, he said, to see why Parliament could have intended "sum" in section 596(3)(a) to be confined to cash.

33. It was true, he said, that the effect of section 596A was to impose a charge to tax on all benefits coming out of the scheme except, in the case of a lump sum, if (and to the extent that) there had been a charge to tax under section 595(1) and the other conditions of section 596A(9) and following were fulfilled, so that any recoupment under section 596(3) would be countered by a charge under section 596A. But, and this was Mr Jones's point, this would not have been so prior to the insertion of section 596A into Chapter 1 in 1989. Prior to that date, on the taxpayer's construction of sections 595(1) and 596(3), a taxpayer, having received no "payment" in cash but having received a payment in kind, could obtain relief under section 596(3) in respect of the tax charged under section 595(1) on the employer's payment into the scheme. The effect of that would be to enable the payment into the scheme and subsequent receipt of benefit out of it to escape tax altogether. It is difficult to suppose, said Mr Jones, that Parliament could have so intended.
34. For all of these reasons, he submitted that the Special Commissioners reached the right decision.

The taxpayer's response

35. In response, Mr Goy was "inclined" to accept that the expression "sum paid" in section 592(4) was not limited to cash but extended to non-cash assets. He submitted that this was principally because the context and purpose of the provision was different: it was concerned with what deductions (by way of expenses) were permissible in computing a trading profit in that if a contribution was made to a retirement benefits scheme, whether in cash or non-cash form, it would, subject to section 76 of the Finance Act 1989, be deductible and would not fail to be so because, for example, it was capital in nature or was not "wholly and

exclusively" incurred. In short, subject to section 76(1), section 592(4) guaranteed deductibility of the contribution in question.

36. Section 76 (since repealed) of the Finance Act 1989, to which section 592(4) referred, provided, so far as material:

"(1) In computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of any expenses falling within subsection(3) below...

(3) ...expenses fall within this subsection if-

(a) they are expenses of paying any sum pursuant to a relevant retirement benefits scheme with a view to the provision of any benefits, and

(b) the sum is not one which when paid is treated as the income of a person by virtue of section 595(1) of the Taxes Act 1988..."

37. As I understood the submission, although "sum paid" in section 592(4) included a non-cash asset (and would therefore prima face be deductible in computing the employer's taxable profits), in fact, by force of section 76(1) it would only be deductible insofar as it was treated as income of a person by virtue of section 595(1) which it would not be if made otherwise than in cash. In short, the employer could only obtain a deduction for the value of assets paid into the scheme insofar as the contribution to the scheme was in the form of cash.

38. Mr Goy submitted that Lowe v Peters did not take the matter any further: the meaning of "sum paid" in section 32(1) of the Finance Act 1921 (subsequently to be found in section 592(4) of the 1988 Act) was not under consideration and, in any event, what was in question was, so far as material, whether the assets transferred to the new fund were allowable as deductions in the computation of the relevant company's profits for the purposes of Case I of Schedule D. Issues of deductibility are different, he said, from the question of the charge to tax under section 595(1) where the words "pays a sum" and cognate expressions are used in a wholly different context.

39. As to section 596A(8), Mr Goy submitted that the protection given by that subsection was limited to payments in cash (ie that, in accordance with historic Revenue practice, lump sum meant a lump sum in cash) and that this was entirely consistent with the submission that section 595(1) was itself limited to cash contributions. He submitted that section 596A was a recognition of the limitations of section 595 in that it was concerned to deal with situations where there was a fund to which assets had been transferred in ways that were not caught by section 595. The

purpose of subsection (8), he submitted, was to ensure that the charge to tax imposed by section 596A did not give rise to a double charge (where a lump sum payment was made) to the extent that section 595(1) had applied on the payment in.

40. Section 596(3), upon which the Revenue had placed reliance, was to be construed, he said, on the footing that the expression "relevant benefits" (the phrase referred to in the subsection) was understood historically as confined to cash benefits. On that footing, when a situation arose in which no such benefits had been or would be made out, it was understandable that Parliament should, by allowing recovery of the tax paid under section 595(1) (when the payment in was made), enable the position to be restored to what it would have been if, all along, the scheme had prohibited cash payments. For, in that event, there would not have been a relevant scheme and therefore there would not have been a charge to tax under section 595(1). Second, and in any event, Mr Goy submitted that any repayment to tax required by section 596(3) was negated (to the extent that there had been the provision of a benefit in non-cash form out of the scheme) by section 596A which taxed all benefits out of the scheme save and to the extent that section 596A(8) applied which, for the reasons already advanced, it did not to lump sum payments in cash. The fact that, looked at through today's eyes, there might before the introduction of section 596A in 1989 have existed a lacuna (in that a taxpayer could recover tax paid under section 595(1) and yet enjoy a tax-free non-cash benefit coming out of the scheme) might be one of the reasons for the introduction of 596A in the form that it took: to make up for the limitations of the charge under section 595(1).
41. In short, he submitted, there was no reason not to give the words "pays a sum" used in section 595(1) the limited construction for which the taxpayer contended.

Conclusions

42. I accept that the more usual meaning of "pays a sum" and cognate expressions ("sum paid" and "payment ... made") is that they refer to a payment in cash. But, as was common ground, context may justify giving the expressions a wider meaning so that they extend to payments otherwise than in cash form (such as the share transfers in the instant case) which are readily realisable in cash. I am also inclined to accept Mr Goy's criticism of the Special Commissioners' approach to the perception of the legislative purpose underlying section 595(1).
43. But, even if, as Mr Goy submitted, section 595(1) is on any view limited in its scope, I nonetheless consider that, viewed in the overall context of Chapter I of Part XIV, the words "pays a sum" and similar expressions

used in section 595 are not confined to payments in cash. Accepting, as the Special Commissioners did, that Chapter I was probably drafted on the basis that contributions and benefits would normally take a monetary form, I do not consider that the words used must be taken as an indication by Parliament that they could only extend to non-cash contributions. It is quite true that, in contrast to other provisions in Chapter I (and elsewhere in the 1988 Act), Parliament has not expressly provided that "payment" should include transfers of money's worth, but I do not consider that this is conclusive. As Mr Jones pointed out, where Parliament has wanted to confine itself to a cash payment form of transfer, it has done so. To my mind, the absence of any express extension of the meaning of the words, although a factor in the taxpayer's favour, carries little weight.

44. There are, to my mind, two reasons why I agree with the conclusion reached by the Special Commissioners. The first is the obvious one that, if section 595(1) is confined to cash payments, it is open to the employer to avoid the charge to tax by ensuring that the contribution is otherwise than in cash, of which the present case is a paradigm example. This would, as Mr Jones submitted, make the charge to tax in effect voluntary. I consider that Parliament could not have intended that so easy an avoidance of the charge should be available. The force of this point is not sufficiently answered by the argument that, in such circumstances, there would be a charge to tax under section 596A on all benefits coming out so that the issue is merely one of timing.
45. Second, I am impressed by the taxpayer's acceptance - in my view rightly made and consistent with the acceptance, admittedly without argument, of the position by the Court of Appeal in Lowe v Peters - that the expression "sum paid" in section 592(4) extends to non-cash transfers. It is true that section 592(4) is concerned with deductibility. But it would seem odd that Parliament should in the space of three sections within the same Chapter have intended different meanings for the same expression. Moreover, as I understood Mr Goy to accept, if "sum paid" as used in section 595(1) were confined to cash but, as used in section 592(4), extended to non-cash contributions, the odd consequence would be that, by force of sections 76(1) and (3) of the Finance Act 1989, the employer could deduct for the cash contribution to the scheme but, unless otherwise deductible, could not do so for the non-cash contribution.
46. As for the arguments based upon sections 593(2), 596(3) and 596A and those concerned with the scope of the Schedule E charge to tax and the operation of the PAYE scheme, I consider that none is conclusive one way or the other. Each can plausibly be prayed in aid of the competing constructions of section 595(1).

Result

47. It follows that the Special Commissioners reached the correct conclusion and, therefore, that this appeal fails.