

ULTRA VIRES AND ALL THAT

Keith M Gordon¹

Introduction

Pensions simplification, so the Government has repeatedly told us, is (to use the terminology of W.C. Sellar and R.J. Yeatman) “a Good Thing”. Preserving existing exemptions or introducing new exemptions must therefore be considered “a [very] Good Thing for everyone (except the Common People)”.

It may therefore seem surprising that I would wish to challenge two recent statutory instruments, *The Armed Forces and Reserve Forces (Compensation Scheme) (Excluded Benefits for Tax Purposes) Regulations 2006*² and *The Employer-Financed Retirement Benefits (Excluded Benefits for Tax Purposes) Regulations 2006*³.

Exempt benefits for tax purposes

The phrase “exempt benefits for tax purposes” relates to three sections which are to be introduced into the Income Tax (Earnings and Pensions) Act 2003 (“ITEPA”) with effect from 6th April 2006.

Until 5th April 2006, Chapter 2 of Part 6 of that Act provides the basis of a tax charge in respect of benefits received from what are currently known as non-approved retirement benefits schemes (funded and unfunded)⁴.

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2 SI 2006/132

3 SI 2006/210

4 with the exception of schemes established under section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004

From 6th April 2006, the charge under Chapter 2 will apply to any “relevant benefits provided under an employer-financed retirement benefits scheme”⁵. The term “employer-financed retirement benefits scheme” is defined by new section 393A.

The term “relevant benefits” is defined by new section 393B and generally covers any lump sum, gratuity and any other benefit (cash or non-cash) provided to or in respect of an employee or former employee on or in anticipation of their retirement or on or after their death. However, there are statutory limitations on the term. Benefits taxed elsewhere are not “relevant benefits”. Nor are benefits received in respect of the ill-health, disablement or death of an employee during service, benefits under certain life policies and, pertinent to this article, benefits of any description prescribed by regulations made by the Board of Inland Revenue⁶.

Use of section 393B power

As referred to above, the Commissioners for Her Majesty’s Revenue and Customs have exercised the power in section 393B twice. The first time was to exempt any benefits provided under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 (SI 2005/439).⁷

The second occasion was to exempt from a tax charge any lump sum benefit which is in respect of the non-accidental death of an employee during service and already provided for under the rules of a scheme on 6th April 2006.

⁵ section 393 (as substituted).

⁶ Following the enactment of section 50 of the Commissioners for Revenue and Customs Act 2005, this power should now be interpreted as vesting in the Commissioners for Her Majesty’s Revenue and Customs.

⁷ Under the Finance Act 2005, section 19(2), section 393 of ITEPA as it then stood was amended so as to ensure that benefits provided under *any* scheme established by an order under section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004 will escape a charge under Chapter 2 of Part 6. The Finance Act 2005 change however did not take into account that section 393 in its then form was due to be substituted with effect 6 April 2006 under legislation enacted in 2004. As the post-2006 legislation allows for exceptions to the tax charge to be provided for by statutory instrument, it was considered sufficient to provide for this exemption using SI 2006/132. The overall effect of SI 2006/132 is to preserve the exemption introduced by section 19(2) of the Finance Act 2005. However, there is one (as yet, theoretical) difference. SI 2006/132 refers to only one particular scheme established under section 1(2) of the Armed Forces (Pensions and Compensation) Act 2004. It will be possible, therefore, for a new scheme to be introduced which, pending a similar statutory instrument, will not be exempt from a tax charge.

It is submitted that the policy behind both exercises of the power in section 393B is uncontroversial. However, what concerns me is whether the power has been properly exercised.

The right to use secondary legislation

According to Daniel Greenberg (of Parliamentary Counsel)⁸, subordinate legislation is “legislation that owes its existence and authority to other legislation [and therefore] the potential scope of the subordinate legislation is limited by the extent of the authority delegated”. Consequently, if the power was improperly exercised, the secondary legislation may be found to be invalid.

It is therefore important to consider the scope of the power under which the statutory instruments were made. Section 393B(3)(d) (as reinforced by section 717) appears to provide the valid power.

However, section 393B itself does not come into force until 6th April 2006. Until 5th April 2006, section 393B is merely a prospective section contained in section 249(3) of the Finance Act 2004. It is explicitly provided for in section 284(1) of the Finance Act 2004 that section 249 (along with most of Part 4 of that Act) does “not come into force until 6th April 2006”. Therefore, section 393B cannot be said to exist until 6th April 2006. It would therefore seem to be the case that no Government department can exercise any power conferred by a section that does not yet exist.

Section 284(2) purports to relax the commencement provisions by stating that “any power to make an order or regulation under any of those provisions may be exercised at any time after [midnight, 22nd July 2004]”. However, “those provisions” must refer to the provisions mentioned in subsection (1), being “Chapters 3 to 7 [of Part 4, which includes section 249] and section 281 (with Schedule 35)”.⁹ Therefore, any power to make an order or regulation contained within section 249 could be exercised at any time before 6th April 2006. The question is, therefore, whether a power to make an order or regulation contained *within a section to be inserted by section 249* could be so exercised.

⁸ *Craies on Legislation*, Eighth Edition, 2004, Sweet and Maxwell (London)

⁹ Such a relaxation of a commencement provision is commonly found and goes beyond the rule found in section 13 of the Interpretation Act 1978 which permits commencement orders to be made under a power that is otherwise not yet in force.

In my view, the answer to this must be in the negative. In his work on statutory interpretation¹⁰, Francis Bennion writes:

Effect of amending Act [here, the Finance Act 2004] – It follows that the usual rule is that the function of the amending Act is to serve as an instrument for altering the text of the earlier Act [here, ITEPA], subject only to the need for commencement and transitional provisions. Unless the contrary intention appears, the other provisions of the amending Act should not affect the construction of words inserted by it into the earlier Act.

These words were cited with approval by Neuberger J (as he then was) in *Brown v Bennett*¹¹. They consider the converse proposition as to whether section 393B of ITEPA (once it is in force) can be interpreted in the light of other provisions found in the Finance Act 2004. However, it is my view that the same logic should apply. Bennion's argument is that section 393B is to be considered to all intents and purposes a provision of ITEPA (once of course it comes into effect) and not a provision of the later Finance Act. Consequently, any provision in section 284(2) relaxing the commencement provisions must be read strictly as referring only to the provisions mentioned in section 284(1) and not the provisions of another Act.

Conclusion

It is my view therefore that the two statutory instruments were invalidly introduced and therefore the exemptions they purport to provide cannot be relied upon. The Government would no doubt wish to (and, in my view, ought to) remove any doubt by issuing revised instruments on or after 6th April 2006 with effect backdated (so far as is necessary) to 6th April 2006. Not to do so would be a Bad Thing.

¹⁰ *Statutory Interpretation*, Fourth edition, 2002, Butterworths (London)

¹¹ [2002] 2 All ER 273 at 287d