

Personal tax (Lecture P1426 – 13.10 minutes)

Termination, not discrimination

Summary – The £6 million received by the taxpayer from her former employer in settlement of Employment Tribunal proceedings was received indirectly in consequence of or otherwise in connection with the termination of employment, meaning it was taxable employment income. It was not a settlement payment relating to her discrimination claims.

In April 2015, following investigations into the manipulation of interbank offered rates, Deutsche Bank AG agreed a settlement with the New York State Department of Financial Services. Under that settlement, the bank was required to pay a \$600 million penalty and terminate the employment of seven key, senior employees.

Shivani Mathur was one of the employees whose employment contract was terminated. She rejected the £82,135 termination payment offered, choosing to take her case to the Employment Tribunal, where she alleged harassment, discrimination and victimisation while employed by the bank.

Prior to the full hearing, Shivani Mathur accepted a settlement of £6 million. The bank treated this as a termination payment, with all but £30,000 treated as taxable under PAYE, resulting in tax deducted of £2,677,460.

Shivani Mathur argued that the sum was not taxable as the payment was not connected to the termination of her employment. Instead, it arose as a result of her alleged complaints regarding the harassment, discrimination and victimisation she had experienced while employed, as well as the bank's desire to prevent her claims becoming public.

The First Tier Tribunal had dismissed her appeal, finding that the £6million payment was received indirectly in consequence of, or otherwise in connection with, the termination of her employment.

Shivani Mathur appealed to the Upper Tribunal.

Decision

S.401(1)(a) ITEPA 2003 states:

“This Chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—the termination of a person’s employment.”

Such termination payments are treated as employment income, and the first £30,000 of such income can be received tax-free.

The Upper Tribunal found that the words 'otherwise in connection with' permitted a wide interpretation of whether there was a link between the payment and termination.

The Upper Tribunal found that there was a 'clear and obvious' connection between the termination and the payment, meaning that the First Tier Tribunal was entitled to conclude that the £6 million paid was in connection with the termination of her employment and so taxable under s.401 ITEPA 2003. The termination was the trigger for the claim, and also the reason that she was able to

negotiate such a large sum. Indeed, the settlement agreement referred to termination payments, and made reference to the £30,000 tax-free sum.

The First Tier Tribunal had not erred in law, as the termination was key to the claim.

“Consequently, the Upper Tribunal stated that the First Tier Tribunal “was entitled to conclude that the Settlement Sum was paid, at least, “in connection” with the termination of the Appellant’s employment”.

The employer had correctly deducted tax from the full sum, with the exception of the:

- £30,000 termination exemption;
- £40,000 agreed between the parties for injury to feelings; and
- £400,000 legal costs paid on her behalf.

Finally, the Upper Tribunal found that “the appellant produced no persuasive evidence or arguments to support any other” apportionment of the sum received.

The appeal was dismissed.

Shivani Mathur v HMRC [2024] UKUT 00038 (TCC)

Footballer's agent fees

Summary – Agent fees incurred while negotiating a transfer between football clubs were not deductible against employment income.

Baye Niasse is a professional footballer who has played for several clubs both in the UK and elsewhere.

On 1 February 2016, he joined Everton, with his agent having negotiated his transfer from FC Lokomotiv Moscow.

Under a tripartite agreement between Baye Niasse, his agent and his new club, Everton agreed to pay certain sums to his agent to discharge Baye Niasse's liability to pay fees to his agent under a Representation Contract that existed between the footballer and his agent.

The first of the payments to his agent by Everton, on behalf of Baye Niasse, was made on 1 February 2016. Further payments were made in accordance with the terms of the Tripartite Contract.

HMRC enquired into the tax returns for 2015/16 and 2016/17, later issuing closure notices, amending the returns and raising assessments on Baye Niasse for £76,410 (2015/16) and £76,463 (2016/17). A closure notice was also issued in respect of the tax year 2017/18, but it is not in issue in this case.

Baye Niasse accepted that the payments made by Everton to his agent on his behalf were either taxable as employment income (s.62 ITEPA 2003) or as an employment-related benefit (s.201 ITEPA 2003).

The issue in this case was whether the payments were deductible from employment income (s.336 or s.352 ITEPA 2003).

Decision

The First Tier Tribunal found that, under the terms of his employment, there was neither an express nor implied obligation to appoint an agent. The agent's services enabled the player to take up his position at Everton; they were not required in the performance of his duties. Baye Niasse was not obliged to incur these fees and further, they were not incurred necessarily in the performance of the duties.

Moving on to s.352 ITEPA 2003 (deductibility of agent's fees as an entertainer), Baye Niasse had argued that he was a 'theatrical artist' and an 'entertainer'. Unsurprisingly, the First tier Tribunal rejected this argument, finding that professional footballers do not perform with the 'theatrical bent' required. Further, to qualify for relief in this way, the fee must be calculated as a percentage of the earnings from the employment, which it was not.

The appeal was dismissed.

Baye Oumar Niasse v HMRC (TC09093)

Reversed property transfer

Summary - There was a disposal of properties deemed to take place at market value, resulting in CGT becoming payable. The transfers could not be treated as if they had never taken place, simply because the transfer was reversed.

On 15 November 2016, Arshad Mahmood transferred ten commercial properties to Rajay Khan Properties Limited, a company owned by his wife, with him as sole director.

Despite there being no written agreement, it was understood that the properties would be transferred at cost for £300,000. This sum would be left outstanding as a debt due from the company to Arshad Mahmood.

On the basis that the properties were transferred at cost and that the spouse exemption was available, Arhsad Mahmood did not report this on his tax return.

Following an enquiry, HMRC concluded that with the property transferred to a connected person, the disposals were deemed to take place at market value. Consequently, HMRC sought to collect £303,476 of Capital Gains Tax and charged a penalty of £81,938.52 for providing an inaccurate tax return.

In early 2019, before the assessment had been raised, Arhsad Mahmood and the company agreed to "rescind" the property deals by transferring them back into Arhsad Mahmood's name.

Arhsad Mahmood appealed, claiming that by rescinding the transfer of the properties, no taxable disposal has taken place.

Decision

Under contract law, parties can opt to reverse a transaction as long as both parties are in agreement, which is what happened here.

However, it does not follow that the original transfer of properties can then be treated as if it had never taken place.

The First Tier Tribunal believed that Arshad Mahmood was confusing two separate principles:

1. A transaction may be void “if it is entered into on the basis of a mistaken legal assumption, but only where the mistake affects the subject matter or the performance of the transaction and is sufficiently fundamental”.

However, the Tribunal concluded that the transaction was not void as the liability to CGT had no effect on:

- the terms or the subject matter of the transfer, which was the transfer of the properties in return for a consideration of £300,000 to be left outstanding as a debt due from the company to Mr Mahmood;
 - the way in which the transaction was to be performed, which was the transfer of legal title from Arshad Mahmood to the company using standard land registry transfer forms.
2. The parties to a transaction may agree to rescind a transaction for any reason but only if it has only been partially executed so that one or both parties still have outstanding obligations to perform. Rescission effectively cancels any further obligations which have yet to be performed.

Here, the transaction was fully executed as the properties had been transferred to the company, registered in its name at the Land Registry and the debt of £300,000 representing the consideration for the transfer of the properties had been recorded in the company’s books. Rescission was not possible. Even if rescission was possible, it would not have meant that the transfer of the properties could be ignored.

There was therefore a disposal of the properties by Arshad Mahmood that gave rise to a liability to capital gains tax.

Arshad Mahmood v HMRC (TC09056)

Investing or dealing in land

Summary – Distributions received by shareholders during a company’s liquidation did not qualify for entrepreneurs’ relief as the company had never traded.

Mark Stolkin, Margeaux Stolkin and Faye Clements were shareholders in Stolkin Greenford Limited.

The company acquired the former head-quarters site of GlaxoSmithKline in Greenford, referred to as the “GSK Land”. For planning purposes, the GSK Land had an allocation as Strategic Industrial Land protecting it for employment uses.

Stolkin Greenford Limited originally held the GSK Land as an investment but later, with the protection order lifted, the site became a mixed-use development and on 3 December 2013, the company appropriated it to trading stock.

On 24 November 2014, The London Borough of Ealing granted planning permission for the redevelopment of the Site which included the “provision of up to 593 homes, an extension and conversion of the Glaxo House from office to residential use, the provision of retail, restaurant and community space and a cinema”.

In September 2015, having received a third-party offer, the property was sold in January 2016.

Two months later, Stolkin Greenford Limited went into members' voluntary liquidation. At this time, Mark Stolkin, Margeaux Stolkin and Faye Clements were shareholders and directors. There were no other employees.

The individuals received distributions and, believing that the company had started trading from December 2013 when the property had been transferred into trading stock, claimed entrepreneurs' relief.

HMRC disagreed and denied the claim.

The taxpayers appealed.

Decision

The First Tier Tribunal stated that dealing in land can be a trade, but equally land may be acquired, held and disposed of as an investment. Whether the activity amounted to trading involved a multi factorial evaluation. The Tribunal looked at the Badges of Trade but then also stood back to “look at the whole picture”.

The Tribunal found that the company:

- owned just one valuable asset, initially as an investment. Merely deciding to sell an asset after five years did not convert a fixed asset into trading stock;
- sought planning applications for a large residential development so that the land could be sold with that development potential;
- had neither the funds nor expertise to perform the development work needed, which was to be undertaken by a third-party purchaser.

The First Tier Tribunal found that Stolkin Greenford Limited was not a trading company. Having agreed a development plan to enhance the land's value, the company had simply decided to sell the property.

The appeals were dismissed.

Mark Stolkin, Margeaux Stolkin and Faye Clements v HMRC (TC09086)