[2014] UKFTT 915 (TC)

TC04029

Appeal number: TC/2014/00364

INCOME TAX – Payment by former employer to retired employee on termination by compromise agreement of his membership of employer's private healthcare scheme – Whether subject to income tax under s 394 Income Tax (Employment and Pensions) Act 2003 as "relevant benefit provided under an employer-financed retirement benefits scheme"– Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRAEME FORSYTH **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
DAVID EARLE

Sitting in public at Colchester County Court on 17 September 2014

David Cowling, Accountant, for the Appellant

Alan Hall of HM Revenue and Customs, for the Respondents

DECISION

1. Mr Graeme Forsyth retired from Nestlé UK Limited ("Nestlé") in 1995. Whilst employed by the company he had been a member of its healthcare scheme. Although this ceased on his retirement Mr Forsyth discovered that others in his position were still able to enjoy its benefits. He therefore contacted Nestlé and it was agreed that he could continue to enjoy the benefits of the scheme for himself and his family but he was required to make a contribution for doing so.

2. On 30 October 2009 Nestlé wrote to Mr Forsyth having undertaken a "thorough review" of its healthcare provision and offered him the opportunity to leave its healthcare scheme in return for a one off payment of £29,783. Mr Forsyth decided to take up the offer and, after having had the benefit of independent legal advice, entered into a Compromise Agreement with Nestlé on 30 December 2009.

3. Although the parties to the Compromise Agreement were Mr Forsyth and Nestlé, Mr Forsyth's solicitors wrote to Mrs Forsyth on 15 December 2009 to explain that, as she was entitled to receive the benefit of healthcare under her husband's membership of the scheme, this would cease on her husband entering in to the Compromise Agreement. In the circumstances she was advised to seek separate independent legal advice. On 18 December 2009 Mrs Forsyth returned a copy of the letter to the solicitors on which she acknowledge receipt of the letter and confirmed that she accepted the position as set out in the Compromise Agreement.

4. Under the terms of the Compromise Agreement Nestlé agreed to pay Mr Forsyth £29,783 and his entitlement, and that of his family, to medical cover under the healthcare scheme would be terminated from 31 December 2009. In accordance with the Compromise Agreement Nestlé made a payment, after deduction of income tax, into Mr Forsyth's bank account in January 2010.

5. In September 2010 Mr Forsyth completed his 2009-10 self-assessment tax return. The payment from Nestlé under the Compromise Agreement was shown on the return under "Any other information" as:

> Compensation received by G Forsyth & M Forsyth [Mrs Forsyth] from Nestlé UK Ltd for surrender of their rights to medical cover £29783
>
> G Forsyth share £14,891
> Exemption 10,100
>
> 4,791
>
> Tax at 18% £862

6. In his letter of 17 September 2010 submitting the return to HM Revenue and Customs ("HMRC") Mr Cowling, Mr Forsyth's accountant, explained that in his view the £29,783 paid by Nestlé under the Compromise Agreement was compensation for the surrender of rights to medical care which should be taxed as capital gains split equally between Mr Forsyth and his wife.

7. On 14 April 2011 HMRC opened an enquiry into Mr Forsyth's 2009-10 tax return seeking further information in relation to the £29,783 he had received from Nestlé. Following further correspondence between HMRC and Mr Cowling, on 6 February 2012 HMRC concluded that this sum should be liable to income tax and not capital gains tax as contended by Mr Cowling and issued a closure notice under s 28A Taxes Management Act 1970 accordingly. This conclusion was upheld following a review. Mr Forsyth was notified of the outcome of the review by a letter from HMRC dated 12 December 2013. On 13 January 2014 Mr Forsyth appealed to the Tribunal.

8. Before us Mr Cowling maintained that the £29,783 Mr Forsyth has received from Nestlé should be subject to capital gains rather than income tax but contended, in the alternative, that if we did not agree that the payment from Nestlé was subject to capital gains tax it should be treated as a payment on termination of employment and only subject to income tax insofar as it exceeded £30,000.

9. For HMRC Mr Hall submitted that it was clear from the Compromise Agreement that the payment was to Mr Forsyth alone and not jointly to him and his wife. He contended that under the applicable legislation capital gains tax could not apply if the payment under the Compromise Agreement was subject to income tax and that the £30,000 threshold for payment on termination of employment was not appropriate in this case as the payment was not made in respect of the termination of Mr Forsyth's employment with Nestlé but was a payment, in connection with his past service, under an employer financed retirement benefits scheme.

10. We agree with Mr Hall that the payment under the Compromise Agreement was made to Mr Forsyth alone. This is clear from the agreement itself which was made between Mr Forsyth and Nestlé and which, although written in what Mr Cowling described as a "standard form", is nonetheless a legally binding document entered into by Mr Forsyth after having had the benefit of independent legal advice.

11. With regard to the other submissions of Mr Cowling and Mr Hall it is necessary to consider the relevant legislation.

12. Section 37(1) of the Taxation of Chargeable Gains Act 1992 ("TCGA") provides:

> There shall be excluded from the consideration for a disposal of assets taken into account in the computation of the gain any money or money's worth charged to income tax as income of, or taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts

Therefore, if the payment under the Compromise Agreement is chargeable to income tax it shall not, as a result of s 37 TCGA, be subject to capital gains tax.

13. Turning to the income tax legislation; provisions in relation to payments and benefits on the termination of employment are contained in Chapter 3 of Part 6 (ss 401 – 414) of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA").

14. Section 401 ITEPA provides:

> (1) 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—
>
> (a) the termination of a person's employment,
>
> (b) a change in the duties of a person's employment, or
>
> (c) a change in the earnings from a person's employment,
>
> by the person, or the person's spouse [or civil partner], blood relative, dependant or personal representatives.
>
> (2) Subsection (1) is subject to subsection (3) and sections 405 to 413 (exceptions for certain payments and benefits).
>
> (3) This Chapter does not apply to any payment or other benefit chargeable to income tax apart from this Chapter.

If Chapter 3 of part 6 ITEPA applies, s 403(1) ITEPA provides that a payment is treated as employment income of a former employee "if and to the extent that exceeds the £30,000 threshold". However, it is clear from s 401(3) ITEPA that if the payment under the Compromise Agreement is chargeable to income tax under any other provision it cannot fall within chapter 6 and the statutory provision in relation to the £30,000 threshold does not apply.

15. Section 393 ITEPA provides that Chapter 2 of Part 6 ITEPA applies to "relevant benefits" provide under an "employer-financed retirement benefits scheme". An "employer-financed retirement benefits scheme" is defined in s 393A ITEPA which provides:

> (1) In this Chapter "employer-financed retirement benefits scheme" means a scheme for the provision of benefits consisting of or including relevant benefits to or in respect of employees or former employees of an employer.
>
> (2) But neither—
>
> (a) a registered pension scheme, nor
>
> (b) a section 615(3) scheme,
>
> is an employer-financed retirement benefits scheme.
>
> (3) "Section 615(3) scheme" means a superannuation fund to which section 615(3) of ICTA applies.
>
> (4) "Scheme" includes a deed, agreement, series of agreements, or other arrangements.

16. In the present case it has not been suggested that the payment under the Compromise Agreement was either a registered pension scheme or a s 615(3) scheme. Given that the definition of "scheme" in s 393A(3) ITEPA includes an "agreement" it must follow that Compromise Agreement is a "scheme" for the purposes of the legislation. As such it is necessary to consider whether the payment under that agreement amounts to a "relevant benefit".

17. Section 393B ITEPA provides:

> (1) In this Chapter "relevant benefits" means any lump sum, gratuity or other benefit (including a non-cash benefit) provided (or to be provided)—
>
> (a) on or in anticipation of the retirement of an employee or former employee,
>
> (b) on the death of an employee or former employee,
>
> (c) after the retirement or death of an employee or former employee in connection with past service,
>
> (d) on or in anticipation of, or in connection with, any change in the nature of service of an employee, or
>
> (e) to any person by virtue of a pension sharing order or provision relating to an employee or former employee.
>
> (2) But—
>
> (a) benefits charged to tax under Part 9 (pension income),
>
> (b) benefits chargeable to tax by virtue of Schedule 34 to FA 2004 (which applies certain charges under Part 4 of that Act in relation to non-UK schemes), and
>
> (c) excluded benefits,
>
> are not relevant benefits.
>
> (3) The following are "excluded benefits"—
>
> (a) benefits in respect of ill-health or disablement of an employee during service,
>
> (b) benefits in respect of the death by accident of an employee during service,
>
> (c) benefits under a relevant life policy, and
>
> (d) benefits of any description prescribed by regulations made by [the Commissioners for Her Majesty's Revenue and Customs].

18. As a lump sum was paid to Mr Forsyth under the Compromise Agreement after his retirement in connection with his past service with Nestlé (as the payment would not have arisen but for his employment with the company) it falls within s 393B and, as it is not pension income, a non-UK scheme or an excluded benefit, is a relevant benefit. It follows that as Mr Forsyth has received a relevant benefit provided under an employer-financed retirement benefits scheme chapter 2 of part 6 ITEPA applies (see s 393 ITEPA).

19. Section 394(1) ITEPA provides that the amount of such a benefit received by an individual:

> … counts as employment income of the individual for the relevant tax year.

The "relevant tax year" is, according to s 394(3) ITEPA "the tax year in which the benefit is received".

20. Section 394(5) ITEPA makes it clear that:

> No liability to income tax arises by virtue of any other provision of this Act in respect of a benefit to which this Chapter applies.

The value of the cash benefit is, according to s 398 ITEPA:

> … the amount of a benefit is taken to be the amount received.

21. We therefore find that the payment under the Compromise Agreement is chargeable to income tax under s 394 ITEPA. As such it follows that neither chapter 3 of part 6 of ITEPA (£30,000 threshold) nor, by virtue of s 37 TCGA, capital gains tax can apply.

22. Accordingly, we dismiss the appeal in principle and, as requested by the parties, leave the figures to be determined by them.

23. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 24 September 2014