[2012] UKUT 261 (TCC)
Appeal number: FTC/82/2011

INCOME TAX – whether First –tier Tribunal has jurisdiction to waive interest payable under s 86 Taxes Management Act 1970 – no - appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

NEIL & MEGAN GRETTON **Respondents**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Appeal determined on written submissions only

DECISION

1. This is an appeal by The Commissioners for Her Majesty's Revenue & Customs ("HMRC") against a decision of the First-tier Tribunal (Judge Khan and Mrs R Watts Davies) released on 28 October 2010, by which in dismissing the appeal of Neil and Megan Gretton ("Mr and Mrs Gretton") against assessments to income tax under s 647 of the Income and Corporation Taxes Act 1988 ("ICTA") in respect of certain transfer payments made by them from their personal pension schemes in the United Kingom to certain retirement annuity trust schemes established for their benefit in Guernsey, it also concluded that Mr and Mrs Gretton should not be liable for the penalties and interest determined by HMRC to be payable in respect of such assessments.

2. Originally, Mr and Mrs Gretton had been given leave to appeal by this Tribunal against the decision of the First-tier Tribunal that the assessments should stand. HMRC were given leave to appeal against the decision that no interest should be paid on the income tax assessed. HMRC did not appeal against the decision that the penalties imposed should be set aside.

3. Mr and Mrs Gretton subsequently decided to withdraw their appeal. They also indicated that they did not seek to contest HMRC's appeal against the decision that interest should not be charged. In the circumstances, HMRC requested that their appeal be addressed without a hearing, pursuant to Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 which provides:

> "(1) Subject to paragraph (2), the Upper Tribunal may make a decision without a hearing.
>
> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing."

4. Mr and Mrs Gretton, through their representative, have expressed their agreement to the matter being determined on the papers without a hearing and accordingly I have decided to take that course.

5. There follows a summary of the facts found by the First-tier Tribunal. Mr and Mrs Gretton, were members of the Scottish Equitable Personal Pension Scheme, which was a scheme approved under Part XIV of ICTA. Acting on the advice of their financial adviser, Mr and Mrs Gretton entered into arrangements whereby the funds representing the value of their pension funds held for them by Scottish Equitable were transferred to retirement annuity trust schemes established in Guernsey for their benefit. Under the terms of a reciprocal agreement entered into between the UK and Guernsey, provided certain conditions were met, a member of a personal pension scheme approved under Part XIV of ICTA may transfer the funds representing his rights under the scheme to a duly constituted retirement annuity scheme in Guernsey.

6. Under the relevant Guernsey regulations, to be eligible to join such a scheme , the person concerned had to become resident in Guernsey. Acting on advice, Mr and Mrs Gretton purported to meet this requirement by acquiring the lease of a property in Alderney, part of the Bailiwick of Guernsey, but they never actually took up residence there.

7. The relevant UK conditions were set out in a practice note entitled Pensions Schemes Office PS 121, which only contemplated a transfer where, on a change of job, an individual moves from Guernsey to the UK or vice versa. Mr and Mrs Gretton had no intention of taking up employment in Guernsey, but their advisers confirmed to Scottish Equitable that the conditions for a transfer were met and accordingly the transfers were made on the strength of that representation.

8. The conclusions of an HMRC enquiry into the transfers were that the pension fund transfers did not meet the requirements of the reciprocal agreement between the UK and Guernsey. As a result, the transfers breached the rules of the Scottish Equitable Scheme which did not permit transfers to be made unless they were to a scheme approved approved by the HMRC, a condition that would have been met had the terms of the reciprocal agreement been satisfied. Consequently, HMRC made assessments under s 647 of ICTA which makes payments out of a scheme approved under Part XIV of ICTA chargeable to income tax under Schedule E unless the payment is authorised by the rules of the transferring scheme. In addition to seeking to charge interest on the tax so assessed, HMRC sought to impose penalties equivalent to 45% of the tax payable under s 95 of the Taxes Management Act 1970 ("TMA") on the basis that Mr and Mrs Gretton were negligent in delivering incorrect tax returns in the mistaken belief that the terms of the reciprocal agreement had been met.

9. The First-tier Tribunal found that Mr and Mrs Gretton had not been negligent on the basis that they had reviewed the relevant explanatory notes issued in the UK and Guernsey and had contacted the Guernsey authorities to clarify the position. The First-tier Tribunal found that they had made an honest mistake in focusing purely on the Guernsey requirements and not considering PS 121, which their own adviser had not considered before the representation as to the UK conditions having been met had been given to Scottish Equitable.

10. Consequently, the First-tier Tribunal concluded that the determination to impose the penalties should be set aside, a course of action that was clearly open to it by virtue of s 100 TMA, but it went further, stating in paragraph 89 of its decision "that there should be no penalties or interest, for the reasons given above, in the circumstances."

11. There is nothing in the First-tier Tribunal's decision to indicate the basis on which it had concluded that it was appropriate to determine that there should be no interest payable on the tax which it had concluded was properly payable pursuant to the assessments made by HMRC. Nor does it appear from the decision that any submissions were made by either party on this issue.

12. HMRC submit that the First-tier Tribunal did not have the jurisdiction to decide that no interest would be payable. They referred to Section 86 of the TMA which provides:

> "(1) The following , namely
>
> (a) any amount on account of income tax which becomes due and payable in accordance with section 59A(2) of this Act and
>
> (b) any income tax or capital gains tax which becomes due and payable in accordance with section 55 or 59B of this Act,
>
> shall carry interest at the rate applicable under section 178 of the Finance Act 1989 from the relevant date until payment"

HMRC submit that the word "shall" is used to indicate that there is no discretion as to whether interest is applied to any amount of tax paid after the due date and this is further reflected in the fact that the statute provides no right of appeal against the application of interest in such cases.

13. I accept HMRC's submissions. The amounts assessed in respect of the unauthorised payments from the Scottish Equitable scheme under s 647 of ICTA clearly come within the scope of s 86 of the TMA and therefore interest is payable on them. There is no discretion on the part of the First-tier Tribunal to determine that interest should not be payable and the First-tier Tribunal made a clear error of law in doing so. Mr and Mrs Gretton do not seek to argue otherwise. The appeal is therefore allowed.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 20 July 2012