[2018] UKFTT 83 (TC)

TC06341

Appeal number: TC/2016/3794

Income Tax - Procedure – jurisdiction of the tribunal – whether a letter from HMRC saying that a sum was not taxable was an assessment giving rise to a right of appeal under s31(1)(d) TMA. Held: no

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL GOODRUM **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public in Cambridge on 12 January 2018

The Appellant in person

Mrs B Sanu for the Respondents

DECISION

1. Mr Goodrum was employed by a company in the Shell group. But by mid 2006 his health had deteriorated and he had been on sick leave for an extended period. In 2006 his employment terminated and, following negotiations with Shell, he entered in to a compromise agreement under which he became entitled to a partial incapacity pension (a "Pip") payable by the trustees of the Shell Contributory Pension Fund, and a sum of £381,225 payable to him by his employer.

2. The Payment of £381,225 had three components:

(1) a discretionary ex gratia payment of £154,120;

(2) a payment of £27,105 in lieu of notice; and

(3) £200,000.

3. Mr Goodrun's appeal concerns the tax treatment of the £200,000.

4. Mr Goodrum told me that under the Shell Pension Fund an employee who became unable to carry out the duties of his employment became entitled, depending upon the nature of his incapacity, to either a "total incapacity pension" (a "Tip") or a "partial incapacity pension" (a "Pip") from the date of the cessation of his employment until his normal retiring date. A Tip was a pension of about two thirds of what the employee's pension would have been on reaching normal retiring date, and a Pip was a pension of one third of that normal pension. The pension Deed provided that on reaching retirement age any incapacity pension was replaced by a normal pension at the same level as the incapacity pension.

5. After 2006 Mr Goodrum was in receipt of a Pip, as a result the pension payable to him when he reached retirement age was therefore considerably less than it would have been had he been in receipt of a Tip.

6. In recent years Mr Goodrum has approached Shell and the trustees of the Shell Pension Fund and has argued that the £200,000 represented the difference between the value of a Tip and the value of a Pip and that accordingly he should be treated, or the company should exercise the discretion given to it under the Pension Trust deed so as to treat him, as having been in receipt of a Tip or at least a higher Pip prior to his retirement. He cites in this argument the calculations he provided to Shell in 2006, which showed that the difference in aggregate receipts between a Tip and a Pip was some £203,000 which, he says indicates the origin of the figure of £200,000. If Mr Goodrun is successful in this approach he hopes to become entitled to a larger retirement pension.

7. The £200,000 was not treated as liable to tax when it was paid by Shell: no PAYE was deducted. No assessment was made on Mr Goodrum in which it was treated as a taxable receipt of his employment.

8. . If the £200,000 does represent the difference between a Tip and a Pip Mr Goodrum argues that it should have been taxable as employment income in 2006. Conversely he says that if this tribunal holds that it should have been subject to tax that will, at the least, be a strong argument in his discussions with, or his actions against, the trustees of the Pension Fund for it will show that in effect he was receiving a higher incapacity pension prior to normal retirement age.

9. The tax treatment of the payment was raised as part of the negotiation of the compromise agreement under which Mr Goodrum left Shell's employ. I was told that that agreement contained a clause under which Shell agreed to indemnify Mr Goodrum against any tax liability which he might incur by virtue of the receipt of the £200,000.

10. In 2006, around the time of the payment of the £200,000, and possibly spurred by the indemnity provision, Shell corresponded with HMRC about its tax treatment. In October 2006 Shell wrote to HMRC describing the payment as an "estimated figure representing the difference between a "partial" and a "total" incapacity pension under

the Shell Contributory Pension Scheme" until Mr Goodrum reached normal retirement date.

11. In response HMRC indicated that it was thought that the sum was taxable under Part 6 Chapter 2 ITEPA 2003. However after further representations from Shell in which it was said that Mr Goodrum was not waiving a right to a Tip in consideration of the £200,000, HMRC agreed in a letter of 2 July 2008 that the £200,000 was "exempt from tax by virtue of section 406 (b) ITEPA 2003".

12. Mr Goodrum maintains that the decision made and reflected in that letter of 2 July 2008 was wrong and that the £200,000 should properly be regarded as a taxable.

13. He took this up with HMRC in 2014 and provided copies of his old correspondence with Shell and of correspondence between Shell and HMRC. On 15 August 2014 Mr Goble of HMRC wrote to "confirm that HMRC have accepted that the payment is covered by the provisions of section 406(b)…" and said, "Nothing n my review gives me cause to change this decision." On 22 October 2014 Mr Hopkins of HMRC wrote to Mr Goodrum and said that, having consulted the original decision maker, he "reconfirmed [his] belief" that the £200,000 was exempt from income tax. This view was reiterated in letters from HMRC of 17 March 2015 and 20 August 2015. The letter of 20 August 2015 indicated that Mr Goodrum could challenge HMRC's decision in this tribunal, a position now disputed by HMRC..

14. In his grounds of appeal Mr Goodrum cites the letter of 17 March 2015 as the decision against which he is appealing. Nevertheless it is clear that the same decision had been made by others some time before that letter.

15. HMRC have applied for Mr Goodrum's appeal to be struck out. They say that: (i) (notwithstanding the letter of 20 August 2015) whilst an appeal lies against an assessment, no assessment was made against which Mr Goodrum could appeal and therefore this tribunal has no jurisdiction to hear his appeal; and (ii) even if it could be said that an assessment had been made in 2007 (or even 2014) Mr Goodrum was out of time to appeal against it.

Relevant statutory provisions.

16. Rule 8 of the tribunal's rules provides so far as relevant:

> "(2) The tribunal must strike out the whole or part of the proceedings if the tribunal -
>
> > (a) does not have jurisdiction in relation to the proceedings or that part of them ...
>
> (3) The tribunal may strike out the whole or part of the proceedings if -
>
> > …(c) the tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

17. The ability of the tribunal to strike out under (3)(c) is subject to the requirement that it must give the appellant an opportunity to make representations in relation to the proposed striking out.

18. Section 406(b) ITEPA provides that:

> "This chapter does not apply to a payment or other benefits provided --
>
> ... (b) on account of injury to or disability of an employee.

The chapter to which this applies is Chapter 3 of Part 6 ITEPA which relates to benefits received in connection with the termination of a person's employment or change in the duties or earnings in that employment.

Discussion

(a) Jurisdiction

19. This tribunal is creature of statute. It is set up by statute and given powers by various statutes to hear appeals against the matters specified in those statutes. It has no other jurisdiction. The issue therefore is whether there is a statutory provision which permits the tribunal to investigate and conclude upon the concerns which Mr Goodrum raises.

20. There are a number of statutory provisions permitting appeals to this tribunal. Various Acts provide for various appeals to be made, among them: against PAYE assessments, VAT assessments and certain decision specified in section 83 VAT Act 1994, inheritance tax assessments and certain IHT decisions, capital gains tax assessments, changes to self-assessments and decisions by HMRC in relation to the status of an investment company.

21. However, I have searched the Acts and the only provision which I could find under which it might be argued that the statute gave a right of appeal against a decision by HMRC of the kind with which Mr Goodrum is concerned was that in section 31 TMA. As a result in my judgement it is only if Mr Goodrun can bring his complaint within the terms of that section that this tribunal has any jurisdiction to adjudicate upon it.

22. Section 31 Taxes Management Act 1970 ("TMA") provides:

> (1) An appeal may be brought against -
>
> > (a) any amendment of a self-assessment under section in 9C of this Act (an amendment by Revenue during enquiry to prevent loss of tax),
> >
> > (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by revenue on completion of enquiry into return), and
> >
> > (c) any amendment of a partnership return ..., or
> >
> > (d) any assessment to tax which is not a self-assessment.

23. The first three subparagraphs of section 31 do not concern us. The fourth relates to an assessment to tax which is not a self-assessment. If Mr Goodrum can bring the decision of the revenue against which he complains into the words "assessment to tax" then section 31 gives him a right of appeal against that assessment (for plainly it

was not a self assessment), and that appeal may be heard by the tribunal (subject to the relevant time limits).

24. I therefore turn to the question of whether any of the letters in which HMRC expressed the view that the £200,000 was not taxable was an "assessment to tax" for the purposes of section 31(1)(d).

25. Chambers English dictionary defines "assess" as: "to fix the amount of, as a tax ... to estimate, judge", and "assessment" as the "act of assessing" or "a valuation for the purposes of taxation".

26. Mr Goodrum's argument must be that HMRC's letter of 2 July 2008 (or one or more of the later letters) was an assessment of the taxability of the £200,000 on the grounds that it fixed the amount of tax and judged it to be nil. On that basis section 31(1)(d) would permit an appeal to be made against that assessment.

27. For the reasons which follow it seems to me that the manner in which "assessment to tax" is used in the Taxes Acts and the way it has been used by the tribunals and courts indicates that a narrower meaning of the phrase is intended than "decide, judge or determine". In my judgement it is used to mean the computation and fixing of HMRC's view of the amount of a liability to tax of a particular person and its notification to that person in a formal manner.

28. The Taxes Management Act 1970 contains a number of provisions dealing with "assessment"

(1) Section 9 (and related sections dealing with self-assessment) concerns the self-assessment required to accompany a tax return. Section 9 describes such self assessment as:

> "(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim which is included in return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
>
> (b) an assessment of the amount payable by him by way of income tax, that is the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source ...

(2) Section 29 provides that where an officer discovers that income has not been assessed or that an assessment to tax is insufficient he may assess "the amount or the further amount" to make good the loss of tax.

(3) Section 30 provides that where tax has been erroneously repaid that it "may be assessed and recovered as if it were unpaid tax".

(4) Section 114 provides that:

> (1) An assessment or determination, warrant or other proceeding on ... shall not be quashed or deemed void ... for want of form ... if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or

intended to be charged or affected thereby is designated therein according to common intent and understanding.. ...

(2) An assessment or determination shall not be impeached or affected -

(a) by reason of a mistake therein as to -

(iii) the amount of the tax charged or…

(5) Section 118 (4) provides

(4) For the purposes uses of this Act, the amount of tax covered by any assessment shall not be deemed to be finally determined until that assessment can no longer be varied ...

29. All these provisions seem to me to use "assessment" to mean a document by which HMRC calculate and notify a person of an amount of tax due from him or her.

30. This impression is also supported by the words "to tax" which follow "assessment": they indicate that an "assessment to tax" is concerned with telling someone the amount of tax which HMRC expect him or her to pay.

31. By contrast other determinations which do not consist of the calculation and specification of an amount of a liability to tax are in the Taxes Acts generally referred to as "decisions" or "determinations". Thus for example section 153 FA 2004 provides for HMRC to notify its "decision" whether or not to register a pension scheme, and section 156 provides a right of appeal to this tribunal against that decision; section 234 ITA 2007 provides for giving notice stating an officer's opinion that an enterprise investment scheme certificate was not due and section 236 for an appeal against that notice to this tribunal (whereas section 235 provides for the withdrawal of relief by the making of an "assessment to income tax");

32. This view of the special meaning of assessment to tax in the Acts is also reflected in the case law.

33. In *Whitney v IRC* [1926] AC 37, 52 Lord Dunedin said:

"Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But *assessment particularizes the exact sum which a person liable has to pay*. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay." [my italics].

34. That emphasises the role of an assessment in calculating or particularising the amount of a liability.

35. *Honig v Sarsfield* [1986] STC 246 was concerned with the time limit for making as assessment. The relevant time limit provision was similar to that now found in section 34 which provides that subject to the provisions of the Act, ... "an assessment to income tax or capital gains tax may be made at any time not more than four years after the end of the year of assessment to which it relates". The question which arose in that case was as to when the assessment had been made. It was held that assessment

was "made" when the officer making it (or a person he or she authorised) signed the certificate in the assessment book. This was followed in *Craven v White* 1987 STC 297).

36. This judgement reflects the formality of the process of assessment. That formality is also reflected in the provisions of section 30A(3) TMA which provides: :

> (3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.".

37. Together *Honig* and section 30A indicate to my mind that for the purposes of the Act an assessment is a formal document recorded as such by HMRC by which a person is notified of an amount of tax payable by him.

38. In *Michael Prince and other v HMRC* [2012] UKFTT 157 (TC) Judge Bishopp considered whether a statement in which HMRC calculated the unpaid liability of a taxpayer arising from the operation of a PAYE system reconciliation was an assessment to tax. He said of the calculation:

> "It is not the result of the ordinary assessment process, by which – quite outside the PAYE system – a taxpayer's income, gains, allowances and reliefs are determined, a calculation of the tax is made, the calculation is notified to the taxpayer and (subject to appeal) the amount so notified becomes payable…".

He held that the calculation was not itself an assessment to tax because of the availability of means of challenge other than those in section 31. Those latter reasons are inapplicable in this appeal but I note the description of the "ordinary assessment process" and the part an assessment to tax plays in it.

39. I conclude that for the purposes of TMA an "assessment to tax" is a written formal document which indicates to a particular taxpayer the amount of tax whic HMRC calculate and consider that he or she is liable to pay,. It does not include a decision by HMRC that no tax is payable on a particular transaction or that a particular transaction is taxable.

40. There may be cases (for example where HMRC perform the calculations to determine the net tax due from a taxpayer for a year in order to compare them with the calculation in the taxpayer's self assessment) where the results of the computation is that no further tax is due. If that result is formally notified to the taxpayer in a manner complying with section 30A I would hesitate to say that that notification was not an assessment to tax; but such a document is a computational assessment and would differ from the record of a decision that a particular sum was or was not taxable under a particular head. The latter does not assess tax, it communicates a decision.

41. Neither the letter of 2 July 2008 nor any other letter from the HMRC gave formal notice to anyone that HMRC considered that an amount of tax was payable by any particular person or provided any tax calculation; they were merely decisions that the sum was not taxable. As a result I conclude that none of the letters in which officers of HMRC expressed the view that the £200,000 was not liable to tax as employment income was an "assessment to tax" for the purpose of section 31. As a result that section provides no right of appeal to this tribunal.

42. I conclude that I have no jurisdiction to entertain an appeal against them, and Rule 8 requires me to strike out this appeal.

(b) Time limits

43. In this section I consider the position if I am wrong in my earlier conclusions and one or more of the relevant letters was an "assessment to tax" within section 31(1)(d).

44. Mrs Samu says that if HMRC's decision in a letter 2 July 2008 (or any of the later letters) were an assessment under section 31(1)(d), then Mr Goodrum is out of time to make an appeal against it. She relies upon section 31A TMA which requires any appeal against an assessment under section 31(1)(d) to be made within 30 days of the making of the assessment. She accepts that section 49 TMA permits a late appeal but she notes that it does so only if either (i) HMRC agree, or (ii) the tribunal gives permission. HMRC have not agreed. She says that the tribunal should not give permission because Mr Goodrum's complaint is in reality one against Shell or the Pension Fund Trustees, and it would be an abuse of the forum of this tribunal to settle their dispute here.

45. In my judgement it would be wrong to give permission for a late appeal. That is for two reasons.

46. First, regulation 185 of the PAYE regulations provides that in determining for the purposes of section 59B TMA the residual tax payable by a taxpayer for a year, income tax which his or her employer was liable to deduct but failed to deduct should be treated as having been deducted unless it was tax which was the subject of a "direction" under regulation 72(5), 72F or 81(4). No such direction had been made under those regulations.

47. As a result even if the sum received by Mr Goodrum was taxable, PAYE would have been would be deemed to have been deducted from it. The PAYE would have been deductible in accordance with Mr Goodrum's ordinary code at the time of payment. Thus, given the size of the sum paid, the effect would be that no material further extra tax would have been due from Mr Goodrum as a result of the payment (although there might have been an obligation on Shell to make payment under the PAYE regulations). Thus a decision of this tribunal that the payment was or was not tax deductible would not materially affect Mr Goodrum's tax liability for the period in which the sum was received.

48. It does not seem to me to be at an appropriate exercise of discretion afforded to this (tax) tribunal to exercise it to make a judgement which is likely to have no material effect on the tax position of the appellant.

49. Secondly, I agree with Mrs Samu that in reality Mr Goodrum's complaint is against his former employer or the Pensions Trustee. I take note of the principle that the factual findings of this tribunal would not bind the parties in an action between Shell or the Pension trustees and Mr Goodrum. It would, in my view, be an abuse of the process of this tribunal to give permission for late appeal solely for the purposes of providing Mr Goodrun with some (uncertain) leverage in relation his approach to Shell and the Pension Trustee.

50. Thus if I was wrong in relation to meaning of assessment I would still have to strike out the appeal because it was not brought within the prescribed period and I have declined to give permission for a late appeal.

Summary

51. I find that no assessment was made against which an appeal can be brought. I therefore find that this tribunal has no jurisdiction to hear the appeal which Mr Goodrum wishes to bring.

52. I am therefore compelled by Rule 8(2) to strike the appeal out.

53. The appeal is struck out.

Rights of appeal

54. 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.

CHARLES HELLIER

TRIBUNAL JUDGE
RELEASE DATE: 14 February 2018