# TC01606

**Appeal number: TC/2011/00483**

*Income tax – claim for overpayment relief – nature of a sum of money paid to Mr Sutton and described as interest – appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**RICHARD SUTTON** **Appellant**

**- and -**

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

**TRIBUNAL: LADY MITTING (TRIBUNAL JUDGE)**
**DEREK ROBERTSON (MEMBER)**

**Sitting in Manchester on 14 November 2011**

**The Appellant appeared in person.**

**Bryan Morgan from HM Revenue and Customs, for the Respondents**

## DECISION

1. Mr Sutton is appealing against a decision of the Respondents to refuse a claim for overpayment relief. The claim arises out of Mr Sutton's challenge to the Respondents' view that a sum of money paid to Mr Sutton in circumstances described below, by AXA (PPP Lifetime Care) included a sum of £6,193.25 interest, thus chargeable to income tax. Mr Sutton accepted that if the payment is interest then it is properly taxable. The issue before the Tribunal therefore is to determine the nature of the payment. We understand that Mrs Sutton was either a party to the same policy as her husband or had a separate policy in her own name, it matters not which, but we refer here only to Mr Sutton as he is the Appellant.

2. We had before us an extensive bundle of documents which we had read but in this decision we refer only to those documents to which we were directed by the parties, as we told Mr Sutton and Mr Morgan we would be doing. The background facts were not in dispute and we find to be as follows.

### The Facts

3. On 11 May 1994, Mr Sutton took out with AXA a lifetime care policy on the payment of one single lump sum premium of £5,649.08. The benefits under the policy were contractually guaranteed for ten years but following the tenth anniversary came up for renegotiation. AXA put two options to Mr Sutton: either he could pay a further, and large, lump sum premium or, for no additional payment, the policy would continue but pay out reduced benefits. Neither of these options was acceptable to Mr Sutton who sought to extricate himself from the policy by (on the advice of the Financial Services Authority) attempting to negotiate a fair and reasonable surrender value. This was initially refused by AXA and protracted negotiations then proceeded between the FSA, the Financial Ombudsman Service and AXA. By this time a number of other similar policy holders were in the wings with similar claims.

4. In mid 2006, the FSA issued consumer information to the effect that the single premium policies were more akin to Lifetime Care Bonds which would carry a surrender value as they held an investment interest. By an undertaking dated 5 April 2006, the FSA recorded an agreement which it had reached with PPP in the following terms.

"PPP agreed that in relation to *future* (our emphasis) PPP long term protection products, it would offer single premium policy holders the option of a surrender value from their policies, based on a fair method of calculation and cost, taking into account the customer's and the firm's position".

This of course did not relate to Mr Sutton's already existing policy as it expressly referred to future products.

5. The negotiations between AXA and the FOS clearly continued, although not directly involving Mr Sutton. They culminated in an offer made to Mr Sutton by letter dated 19 December 2007 from the FOS in the following terms.

> "As a result of our recommendations, I am pleased to advise that AXA is now prepared to refund your premiums in full, plus interest at the rate of 8% simple per annum.
>
> In our view, the policy documentation failed to give adequate warnings of the true 'risk' involved in purchasing a Lifetime Care policy. We therefore feel that a refund of premiums, plus interest, is the most appropriate remedy under the circumstances.
>
> If you are prepared to accept AXA's offer, please sign the attached duplicate of this letter and return it to me. However, if you do not wish to accept the offer, or would like to discuss the matter further, please contact me.
>
> I look forward to hearing from you as soon as possible and, in any event, by 7 January 2008. If there is any reason why you will be unable to reply fully by then, please let me know now."

This offer was acceptable to Mr Sutton and he and his wife both signed an agreement in the following terms:

> "We confirm our acceptance of AXA's offer to refund all premiums paid in respect of our Lifetime Care policies, plus interest at the rate of 8% simple per annum, in full and final settlement of our complaint."

6. Mr Sutton confirmed in his evidence that he had no knowledge of the ongoing negotiations and has never known what "our recommendations" were and does not to this day know why what he described as an "unnecessarily generous offer" was made, although his belief is that AXA were being put under an increasing pressure to settle.

7. When the payment was made, AXA had added to the returned premium a payment of £6,193.25 which sum equates exactly to a rate of 8% simple per annum applied to £5,649.00 over the period 11 May 1994 to 23 January 2008. AXA deducted tax in the sum of £1,238.65 from this "interest" payment and issued an R185 on 1 February 2008. It is this deduction of tax which Mr Sutton seeks to recoup by his claim for overpayment relief.

8. Mr Sutton has pursued his claim for overpayment relief through extensive correspondence with the Respondents and attempts to elicit further clarification from the FOS of the nature of the payment. By letter dated 21 October 2009, Mr Sutton wrote to the FOS seeking to obtain "a consensus as to the interpretation" of the terms of the offer. He suggested the FOS could write in the following terms:

> "In the circumstances affecting the above policies, being investments in lifetime care, we wish to acknowledge that the offer contained in our letter of 20 December 2007 was on the basis of the surrender of the policies in consideration of a sum representing the premiums paid plus notional interest at 8% simple per annum."

The letter which came back from FOS dated 4 November 2009 was in the following terms:

> "Further to our previous correspondence, I am writing to clarify the basis upon which your complaint against AXA was resolved.
>
> Whilst your complaint was awaiting a review by the Ombudsman for the purposes of a formal decision, AXA offered to pay you an amount equivalent to your single premiums, plus interest at the rate of 8% simple per annum (from the start of your policy) in an effort to conclude matters.
>
> As you accepted AXA's offer, the complaint was closed before the Ombudsman had the opportunity to comment on the merits of your complaint (including whether or not your individual policies were 'mis-sold').
>
> I trust that this clarifies the position. If you have any further questions please contact me."

**Case Law**

9. We were referred by the parties to two cases. Lord Wright in *Westminster Bank against Riches* (28TC159) stated:

> " 'the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation'."

In Re Euro Hotel (Belgravia) Ltd (51TC293) Mr Justice McGarry stated:

> " '….as a general rule two requirements must be satisfied for a payment to amount to interest, and a fortiori to amount to 'interest of money'. First, there must be a sum of money by reference to which the payment which is said to be interest is to be ascertained. A payment cannot be 'interest of money' unless there is the requisite 'money' for the payment to be said to be 'interest of'. Plainly, there are sums of 'money' in the present case. Second, those sums of money must be sums that are due to the person entitled to the alleged interest; and it is this latter requirement that is mainly in issue before me.' "

**Submissions**

10. It was Mr Morgan's contention that the payment to Mr Sutton expressly included an interest element and the payment did therefore have to be treated as interest and the deduction of tax by AXA at source was correct, thus not giving rise to any overpayment. He further submitted that the terms of the settlement were in line with issued guidance from the FOS in the following terms:

> "what about other forms of redress?

> Occasionally we may require that an investment should be "rescinded" (unwound back to the beginning) – for example, if the complaint involves a protection policy with little or no investment value. In these cases, we are likely to award a refund of premiums with interest added at a rate of 8% simple."

Mr Morgan maintained that the policy had been rescinded, the premium refunded and interest added.

11. Mr Sutton's submission was that the entire payment was of a capital nature. Mr Sutton very helpfully put in a written submission which we set out verbatim here for two reasons. First, we cannot improve on its clarity and succinctness by attempting to summarise it. Secondly, we wish to be certain that it is not subject to being misunderstood by any attempt of ours to summarise it.

> "5. Lord Wright held in the above case [*23] that "the essence of interest is that it is because the creditor has not had his money at the due date. It may be the profit he might have made if he had had the use of the money, or because he had not that use." Lord Simonds in that same case [*30] made clear that the test for income tax purposes is whether the receipt is of an income or a capital nature.
>
> 6. The FSA has recognised that single premium policyholders were more akin to Lifetime Care bondholders – who had an investment interest and were entitled to surrender values – than to annual premium policyholders. The established method of compensating the latter was by treating the policy as **void.** This resulted in the policyholder becoming a creditor of the insurer at the dates of payment of the various premiums. He had been deprived of the use of the money until settlement and interest was due, therefore, as compensation. That compensation was of an income nature and was thus taxable.
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> 7. The investors for life in policies requiring payment by single premiums had no means of escape. None was needed for ten years. No cause for action arose during that time. The valuable protection provided was strictly in accordance with contract. There was no voiding of the policies. There was no case for such.. Thus no liability of the insurer to the insured was created as at the date of payment of the premium. The policyholder had not been deprived of money. The interest provided in the negotiated settlement was not of an income nature. Its receipt, therefore, has to be regarded as one of capital and as such is not subject to income tax.
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> 8. HMRC's references to FOS guidelines, to its own websites and to its practice instructions have relevance only if the products under review are identical. The products under review differed substantially. There were thus no precedents. The FOS has continued since 2008 to maintain its principle of treating all cases on their merits. It has been firm in its determination to refuse to accept the contention promoted by others that the policies were to be treated as void. As has been claimed above, "interest proper" is not possible in the absence of voiding."

12. Mr Sutton placed great reliance on the wording of the letter of 4 November 2009. He argued that the FOS did not use words loosely and the reference to the payment of a sum "equivalent to…" was indicative of one single capital payment, albeit reached by a mechanism which comprised what was referred to in correspondence as a refund of premium plus interest.

**Conclusions**

13. As we have said, the task before the Tribunal is to interpret the nature of the payment to Mr Sutton. We believe it is not possible to escape from the wording of the agreement which quite clearly refers to the additional payment of "interest". Moreover, the payment to Mr Sutton was precisely calculated as to rate and period. An offer was made and accepted "to refund all premiums paid…plus interest at the rate of 8% simple per annum" and the payment offered was precisely that. Moreover, we cannot accept Mr Sutton's reliance upon and interpretation of the letter of 4 November 2009 for two reasons. First, it cannot, in our view, alter the term of an agreement which is quite explicit and clear in itself as to its terms. Secondly, it does not actually do so. As Mr Sutton said the FOS does not use words lightly and in fact the letter is very carefully worded and punctuated. The explanation given by the FOS is that AXA offered to pay "an amount equivalent to your single premiums, plus interest at the rate of 8% simple per annum from the start of your policy." It is the placing of the comma which is critical because the phrase "equivalent to", in our view, attaches to the premiums. The interest is an additional element outside that phrase. Far, therefore, from leading to an interpretation that this was a single capital payment, in fact it emphasises the dual nature of the payment – the return of the premium plus interest.

14. We accept that Mr Sutton had the use and benefit of the policy for ten years before the payment out was made and he had not therefore in this sense been deprived of the money which he had paid out for the premium. This cannot however negate an express agreement to repay the capital sum plus interest and cannot convert the interest element into a mere enhancement of the capital sum. The offer which was made and accepted meets the two requirements stipulated by McGarry J. Mr Sutton was offered and accepted the return of his premium. This clearly was the sum of money by reference to which the payment which is said to be interest was ascertained. Secondly, Mr Sutton, under the terms of the agreement was the person to whom the alleged interest was due.

15. We don't know why AXA made an offer in these precise terms and we don't think that discussion of the policy being or not being rendered void or of being rescinded takes us any further. As we said at the outset we cannot escape from the very clear and precise terminology of the agreement itself. We therefore have to conclude that the payment of £6,193.25 was rightly described as interest. It was therefore taxable and tax was correctly deducted at source and no claim to an overpayment can arise. We therefore have to dismiss the appeal.

**Amendment added after initial release of Judgment**

16. After the release of the judgment, Mr Sutton raised with the Tribunal whether his Response to the Respondents' Statement of Case dated 6 April 2011 had been in the bundle of documents. The answer is that it had not but it was found on the tribunal file and the tribunal has read it. The Response raises a further point to that which was argued before the Tribunal but is one which we now deal with. In the Response, Mr Sutton rests his case on the letter of the 4 November 2009 from the FOS to Mr and Mrs Sutton which we have already set out in para 8.

17. Mr Sutton's case in respect of that letter is set out in his Response in the following terms:

> 2.5/6 It is disputed that the terms of the statement signed on 11 January 2008 constituted a binding agreement with AXA(PPP) through the agency of the Financial Ombudsman. No such agreement was then reached nor exists to this day. All parties (with – it appears – the exception of HMRC) recognise this. It is claimed, moreover, that the question is irrelevant. AXA(PPP) is bound by the decisions of the Financial Ombudsman. His decision is documented in the FOS letter of 4 November 2009. The Appellant has based his appeal solely on the contents of that letter. All reference to it is excluded in the Respondents' Statement of Case.
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> Additional evidence is now being made available to the Tribunal concerning the manner in which the offer contained in the FOS letter of December 2007 was received and administered. The FOS accepted the Appellant's signature on the basis only of its providing authority for proceeding to accept the money value of the offer. The FOS was fully updated on the Appellant's negotiations directly with AXA(PPP) aimed at achieving joint representation to HMRC to declare that the settlement was of a capital nature.
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> The failure of the above negotiations highlighted the reluctance of the FOS to follow the lead of the FAS in declaring the settlement to be a surrender of the policies for a capital sum. However, on the contrary, the FOS continued its refusal to pronounce that the policies had been mis-sold and treated as having been voided (as claimed by AXA(PPP). Additional evidence is now being made available illustrating the depth of the later discussions between the FOS and the Appellant – augmented by a lengthy telephone call from the FOS – which resulted in the FOS letter of 4 November 2009.
>
> 4.1 to 4.3 These points are disputed.
>
> 5.1 It is submitted that Part 1 of the statement annexed to section 7 of the Notice of Appeal to the Tribunal supplies the proof necessary to satisfy the Tribunal. The Tribunal is respectfully requested to accept that the terms of the FOS letter of 19 December 2007 had long been superseded.

18. We do not accept Mr Sutton's contention that there has been no agreement. The letter of 4 November quite clearly refers to the nature of the offer and to Mr Sutton's

acceptance of it. This can only be construed as an agreement and indeed it is an agreement pursuant to which Mr Sutton accepted and received the payment in question. The terms of the FOS letter of 19 December 2007 cannot be and have not been "superseded". The issue before the Tribunal, as we stated at the outset, is to determine the nature of the payment made to Mr Sutton and specifically that described as 'interest'. This we have done in paragraphs 13-15 and our decision remains unchanged.

19. 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.

**TRIBUNAL JUDGE**

**RELEASE DATE: 29 November 2011**

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 23 December 2012