TC02047

Appeal number: TC/2011/02043

Income tax – whether lump sum on termination of employment chargeable to income tax under section 62 ITEPA 2003 – held yes – whether additional tax recovered from employer creditable to former employee in full or in part as under regulation 185(2) Income Tax (PAYE) Regulations 2003 – held no – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALFREDO GOMEZ RUBIO **Appellant**

- and -

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

TRIBUNAL: JUDGE GREG SINFIELD
DAVID E WILLIAMS CTA

Sitting in public at 45 Bedford Square, London on 19 and 20 April 2012

Mr Peter Moroz for Mr Gomez Rubio

Mr Chris Birkett of HM Revenue and Customs for the Respondents

DECISION

Introduction

1. Alfredo Gomez Rubio has appealed to the Tribunal against amendments made by HM Revenue and Customs ("HMRC") under section 28A(1) and (2) of the Taxes Management Act 1970 following an enquiry into his personal tax return for 2003/4.

2. The appeal raises two issues which are described more fully below. In brief, the first issue is whether the disputed payments amounting to £434,493 are earnings within section 62 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") or payments in connection with the termination of employment within section 401 ITEPA. If the payments fall within section 401 then HMRC accepts that they are taken out of the charge to tax by section 413 ITEPA. The second issue is whether Mr Gomez Rubio is entitled to a refund of tax overpaid by his former employer.

Facts

3. The facts in this appeal were largely agreed. We take the following facts from the documents that were presented to us.

4. Mr Gomez Rubio, a resident of Spain, was employed in Spain by Symbol Technologies SL ("Symbol Spain") under an employment contract dated 1 August 1991. The employment offer letter was dated 26 April 1991 and stated that a more detailed employment contract would be produced but it set out the main terms and conditions. One of the terms was as follows:

> "In the event of involuntary termination, a severance arrangement would exist that would extend your employment in a pay and benefit status for six months. After 2 years of employment, this period would be increased to 12 months."

Manuscript amendments to the copy of the letter that we were shown changed "six months" to "twelve months", "2 years of employment" to "January 1, 1992" and "12 months" to "18 months".

5. We were provided with a translation of the Spanish employment contract dated 1 August 1991. Among other things, the contract provided that:

> "If termination occurs after 31 December 1991, the employee shall receive financial compensation equivalent to one and a half year's pay with bonuses and other benefits of the post."

6. In June 2000, Mr Gomez Rubio was assigned to a position in the UK working for Symbol Technologies Limited ("Symbol UK") in Reading. During that period, he would continue to be responsible for Spain and Italy and also take on additional responsibility for France, Portugal and South Africa. The terms of employment were set out in a letter dated 30 June 2000 from the Director of Human Resources for

Europe, Middle East and Africa ("EMEA") to Mr Gomez Rubio. The letter included the following terms:

> "… you will be employed on a UK based local contract and on local terms. Previous service/seniority will be respected and your service will be regarded as continuous from your original date of hire of the 1st June 1991.
>
> …
>
> Your notice period entitlement will remain unchanged from that enjoyed in your present contract dated 26th April 1991.
>
> …
>
> You will terminate as an employee of Symbol Spain and therefore all salary and benefits of employment under your contract of employment in Spain will also cease on the 30th June 2000. Your period in the UK will be regarded as leave of absence from the Spanish Subsidiary.
>
> …
>
> It is mutually agreed that this assignment in the UK will be for a period of approximately 24 months after which, it is planned that you will return to Spain.
>
> Symbol's business is forever changing and as such roles and responsibilities may change from time to time. Subject to these changes, your status and compensation level in Symbol will be maintained and in the event of your return to Spain as a Symbol employee, your Spanish compensation and benefit will be re-instated at a comparable level to that which you enjoyed when you left and also considering any changes in the nature of your responsibilities and general salary movements in the Spanish subsidiary."

7. On 6 March 2002, the Vice President and General Manager EMEA of Symbol Technologies, Inc. based in the UK increased the termination period under Mr Gomez Rubio's contract to 18 months for the next year reducing to 12 months in monthly steps thereafter.

8. On 28 June 2002, a letter to Mr Gomez Rubio from the President of Symbol Spain and the Human Resources Manager of Symbol UK extended the assignment in the UK by one year to 30 June 2003. The letter stated that:

> "Your assignment reflects a temporary relocation between the two companies belonging to the same group, [Symbol Spain] and [Symbol UK]. Thereby, you will maintain your seniority and all the benefits accrued, including appropriate indemnities.

…

It is mutually agreed that you will return to [Symbol Spain] to a position with a similar status and responsibility at the end of this temporary assignment. In particular, your base salary, on-target-bonus and pension contributions will be determined by applying the percentages of the salary increases you have enjoyed in the UK to your last Spanish salary.

All other terms of your employment with Symbol remain unchanged – particularly those related to your assignment letters dated as the 30th June 2000."

9. The relationship between Mr Gomez Rubio and his employer, Symbol UK, began to break down in April 2003. An email dated 6 May 2003 from Symbol's Vice President EMEA informed Mr Gomez Rubio that there was no alternative employment for him in the group and his position was potentially redundant. By letter dated 6 June 2003, Mr Gomez Rubio was informed that his employment with Symbol UK would be terminated and that there was no position available for him in Symbol Spain. On 9 June 2003, and without notice, Symbol UK blocked Mr Gomez Rubio's email and voicemail passwords and revoked his company ID card thus preventing him from communicating with his colleagues or having access to the Symbol UK offices.

10. Mr Gomez Rubio and Symbol then entered into negotiations by correspondence and in meetings which culminated in an agreement between Symbol UK, Symbol Spain and Mr Gomez Rubio dated 7 August 2003 ("the Compromise Agreement"). There is no need to describe the negotiations in detail for the purposes of this decision save to note one point relied on by HMRC, namely that on more than one occasion Symbol UK, having made an offer to Mr Gomez Rubio, said that if he did not accept it then his employment would transfer back to Spain and the termination would be handled in accordance with Spanish law.

11. The Compromise Agreement provided that Mr Gomez Rubio's employment with Symbol UK, Symbol Spain and all associated companies terminated on 31 July 2003. It went onto provide that Mr Gomez Rubio would be paid various sums amounting to £694,783.

12. During his assignment to Symbol UK, Mr Gomez Rubio was resident, but not ordinarily resident, in the UK. HMRC accept that, during his employment by Symbol UK, Mr Gomez Rubio spent 60.5% of his time working outside the UK and, as 'earnings' under section 62 ITEPA is limited by section 25 ITEPA to general earnings in respect of duties performed in the UK, it followed that only 39.5% of his income was subject to UK tax. We were told and HMRC did not dispute that Mr Gomez Rubio ceased to be resident in the UK on 8 August 2003 and returned to live in Madrid but not to work for Symbol Spain. We were also told and HMRC accepted that Symbol UK paid £694,783, less deduction of £72,477.16 tax under PAYE, to Mr Gomez Rubio on 15 August 2003.

13. In his return for 2003/4, submitted on 17 January 2005 by Ernst & Young, Mr Rubio entered £694,783 in box 1.25 as qualifying for foreign service and disability relief and made a 'white space' entry stating that the amounts "included in boxes 1.24 to 1.26 are non-contractual amounts paid to me by my former employer by way of compensation for loss of rights, as set out in the compromise agreement dated 7 August 2003". Mr Gomez Rubio's tax return showed that Symbol UK had deducted tax of £72,477.16 under PAYE and claimed a repayment of £59,681.72 on the basis that Mr Gomez Rubio's actual liability to tax for the period was £12,795.58.

14. HMRC opened an enquiry on 7 March 2005 and, after an exchange of correspondence in which the tax treatment of several items was agreed, the tax treatment of the following amounts (using the descriptions in the Compromise Agreement) remained in dispute:

> £199,305 – in lieu of salary for an 18 month notice period;
>
> £47,688 – as compensation for benefits (car allowance, medical insurance and pension contributions) for the 18 month notice period;
>
> £157,500 in lieu of anticipated bonus for an 18 month notice period; and
>
> £30,000 as a discretionary payment for tax equalisation to assist Mr Gomez Rubio's return to Spain.

15. Symbol UK had deducted tax of £72,477.16 from the payment to Mr Gomez Rubio in 2003. Following an Employer Compliance Review, Symbol UK paid £24,012 to HMRC on account of tax due in relation to Mr Gomez Rubio on 22 November 2006. At the conclusion of the Employer Compliance Review in April 2009, HMRC determined that the further amount that should have been deducted by Symbol UK was £17,165.57. That amount (plus interest) was settled by deduction from the amount paid in November 2006. The calculation of £17,165.57 was based on figures which HMRC now accept were incorrect. As set out above, HMRC accept that Mr Gomez Rubio spent 60.5% of his time working outside the UK and so, as a person who was resident but not ordinarily resident in the UK, only 39.5% of his income was subject to UK tax. The letter of 16 March 2009 notifying the payroll company for the successor to Symbol UK that a further amount of £17,165.57 was payable used a figure of 40% rather than 60.5% as the percentage of Mr Gomez Rubio's earnings not chargeable to UK tax. The correct further amount of tax should have been £10,530.13.

16. HMRC issued a closure notice on 10 February 2011. It showed the refund due as nil and the additional tax due as £10,530.13. Because an amount in excess of £10,530.13 had already been paid by the employer, HMRC gave Mr Gomez Rubio credit for £10,530.13 and amended the return to nil. Following correspondence between HMRC and Mr Moroz acting for Mr Gomez Rubio, Mr Gomez Rubio appealed to the Tribunal on 10 March 2011. Mr Gomez Rubio contends that the amendment to the return was incorrect and an amount of £83,693.72 (ie £59,681.72

repayment claimed by Mr Gomez Rubio in his return and £24,012 paid by Symbol UK in November 2006) should be refunded to him.

Issues

17. There are two issues in this case. The first issue is whether the four disputed amounts are

> (1) earnings in relation to Mr Gomez Rubio's employment and thus within section 62 ITEPA; or
>
> (2) payments received in consideration or in consequence of or otherwise in connection with the termination of Mr Gomez Rubio's employment and thus within section 401 ITEPA.

If Mr Gomez Rubio succeeds on the first issue then HMRC accept that he will be entitled to the repayment of £59,681.72 that he claimed in his return for 2003/4.

18. The second issue is whether Mr Gomez Rubio is entitled to a refund of any part of the amount originally paid by Symbol UK in November 2006. If Mr Gomez Rubio succeeds on the first issue then the question is whether he is entitled to a repayment of the full amount of £24,012 paid on account by Symbol UK in relation to Mr Gomez Rubio even though the amount was not deducted from any payment made to him by the company. If Mr Gomez Rubio fails on the first issue then he is liable to pay an additional amount of £10,530 tax but that has already been paid by his employer and the question is whether Mr Gomez Rubio is entitled to a repayment of £13,482 (ie the excess of £24,012 over £10,530).

Legislation in relation to earnings and employment income

19. Section 25 ITEPA provides that general earnings in respect of duties performed in the UK received by an employee in a tax year in which the employee is resident but not ordinarily resident in the UK are taxable earnings. Accordingly, Mr Gomez Rubio was liable for tax on his income arising from employment duties performed in the UK. Many of Mr Gomez Rubio's employment duties were undertaken outside the UK during 2003-04. HMRC accept that only 39.5% of Mr Gomez Rubio's income related to duties performed in the UK and was, accordingly, liable to tax.

20. Section 62 ITEPA provides

> "62 Earnings
>
> (1) This section explains what is meant by "earnings" in the employment income Parts.
>
> (2) In those Parts "earnings", in relation to an employment, means
>
> (a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) "money's worth" means something that is—

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7))."

21. Part 6 of ITEPA is entitled "Employment income: income which is not earnings or share-related". Chapter 3 of Part 6 is entitled "Payments and benefits on termination of employment, etc". Section 401(1) ITEPA, which is in Chapter 3 of Part 6, relevantly provides as follows:

"(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.

…

(3) This Chapter does not apply to any payment or other benefit chargeable to income tax apart from this Chapter."

22. Section 403(1) ITEPA then provides as follows:

"(1) The amount of a payment or benefit to which this Chapter applies counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold."

23. Section 413 ITEPA provides as follows:

"413 Exception in certain cases of foreign service

> (1) This Chapter does not apply if the service of the employee or former employee in the employment in respect of which the payment or other benefit is received included foreign service comprising
>
> > (a) three-quarters or more of the whole period of service ending with the date of the termination or change in question, or
>
> …
>
> (2) In subsection (1) "foreign service" means service to which subsection (3) … applies.
>
> (3) This subsection applies to service in or after the tax year 2003–04 such that
>
> > (a) the earnings from the employment were not general earnings to which section 15 or 21 applies (earnings for year when employee resident and ordinarily resident in UK), or would not have been had there been any ..."

HMRC accept that Mr Gomez Rubio was not ordinarily resident in the UK during the relevant period.

Authorities on whether payment under contract of employment

24. The Court of Appeal in *EMI Group Electronics Ltd v Coldicott (HMIT)* [1999] STC 803 [1999] EWCA Civ 1868 considered whether a payment in lieu of notice was an emolument from employment taxable under Schedule E. Chadwick LJ held, at page 808f, that the first step must be to identify what, on a true analysis, the payments were for. He then referred to a passage in the speech of Lord Browne-Wilkinson in *Delaney v Staples* [1992] 1 AC 687. That was not a tax case but a case concerning whether payments in lieu of notice following summary dismissal were "wages" for the purposes of the Wages Act 1986. Nevertheless, Chadwick LJ found assistance in Lord Browne-Wilkinson's categorisation of payments in lieu of notice as follows:

> "The phrase "payment in lieu of notice" is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principal categories.
>
> > (1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called "garden leave") there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages.

> (2) The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu. But the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work to be done under the contract of employment.
>
> (3) At the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract in dismissing summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment.
>
> (4) Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment."

Chadwick LJ observed that:

> "Payments in the second category have two important features in the present context. First, they are payments made under and in accordance with the contract of employment; second, they are not payments for work done under the contract of employment. But, there is a third feature, which may be regarded as the obverse of the first: they are not payments made by way of compensation or damages for breach of the contract of employment."

Later Chadwick LJ concluded, at 810f, that:

> "The question, therefore, is whether a payment in lieu of notice made in pursuance of a contractual provision, agreed at the outset of the employment, which enables the employer to terminate the employment on making that payment is properly to be regarded as an emolument *from* that employment. In the absence of authority which compels a contrary conclusion, I would have no doubt that that question must be answered in the affirmative."

25. A similar point arose in the case of *Wilson (HMIT) v Clayton* [2004] EWHC 898 (Ch) [2004] STC 1022. In that case, the taxpayer was a council employee who was unfairly dismissed when the council terminated the contract of employment and immediately re-employed the taxpayer on terms which excluded a car user allowance. Following a compromise of proceedings in the Employment Tribunal, the council made a payment to the taxpayer which the Inland Revenue assessed to tax as an emolument or benefit in kind. The taxpayer appealed to the General Commissioners who found in favour of the taxpayer and the Inland Revenue appealed to the High Court. In the High Court, Patten J reviewed several authorities and held, at [16] that:

> "In the present case the contract of employment relevant to the payment had been terminated in 1997. There was therefore no subsisting agreement for services to which the payment could relate, nor were there any arrears due under that contract for which it was intended to provide. Therefore unless the payment can be linked to and treated as a payment for services under the new contract subsisting since 1997, it is not taxable as a profit under s.19 [the forerunner of section 62 ITEPA]."

26. Patten J went onto hold that the payment was not an emolument but was within the predecessor to section 401 ITEPA. The Inland Revenue appealed to the Court of Appeal (see [2004] EWCA Civ 1657, [2005] STC 157) which confirmed the decision of the High Court and dismissed the appeal.

Discussion of whether payment under contract of employment

27. It follows from the authorities that, in relation to the first issue, if the disputed payments were made pursuant to a provision of Mr Gomez Rubio's contract of employment then they were taxable under section 62 ITEPA. If the payments were made outside the contract (because they were damages for breach of contract or because the contract had ended) then they would fall outside the charge to tax under section 62 and instead fall within section 401 and be relieved from tax by section 413.

28. HMRC accepted that the contract with Symbol UK had ended on 31 July 2003. HMRC submitted that Mr Gomez Rubio's contract dated 1 August 1991 with Symbol Spain had revived, with its original terms and conditions intact, when the contract with Symbol UK ended on 31 July 2003. HMRC relied on the fact that the parties had originally intended that Mr Gomez Rubio would transfer back to Spain at the end of the assignment to the UK; his assignment was described as a leave of absence; and some of the letters from Symbol in the negotiations leading up to the Compromise Agreement said that his employment would transfer back to Symbol Spain.

29. HMRC submitted that the 1991 contract contained provisions for payment in lieu of notice, namely the clause that provided that Mr Gomez Rubio was entitled to receive financial compensation equivalent to one and a half year's pay with bonuses and other benefits if the contract was terminated after 31 December 1991. HMRC's case was that the 1991 contract was in force when the payment was made by Symbol UK on 8 August 2003 and that the disputed elements of the payment were made under that contract and so were taxable under section 62 ITEPA. HMRC contended that the

three payments in lieu of salary, bonus and benefits matched the notice provisions in the 1991 contract and, therefore, such payments were from the employment with Symbol Spain rather than from the termination of the employment with Symbol UK. In relation to the point that the amounts paid matched the periods in the notice clause in the 1991 contract, HMRC frankly stated that it was unclear what the £30,000 payment related to as there did not appear to be any provision for it in the 1991 contract. The Compromise Agreement described it as a discretionary payment for tax equalisation to assist Mr Gomez Rubio's return to Spain. There is no mention of such a payment in the 1991 contract or any later one. HMRC submitted that this payment should, nevertheless, be seen as additional earnings and treated as taxable.

30. Mr Gomez Rubio submitted that the 1991 contract ceased to have effect on 30 June 2000 and, in the absence of any contractual entitlement, the payments in dispute should properly be categorised as payments of damages. Mr Gomez Rubio contended that that the disputed elements were chargeable under section 401 ITEPA and that section 413 ITEPA provided relief on the full amount as Mr Gomez Rubio had left the UK and was in Spain when the payment was made to him.

31. The first issue turns on whether the relevant amounts are payments under a contract of employment or non-contractual payments by way of compensation or damages for breach of the contract of employment. We consider that the termination in this case falls into the fourth of Lord Browne-Wilkinson's categories. Symbol UK, without the agreement of Mr Gomez Rubio, summarily dismissed him and agreed to make a payment in lieu of proper notice. Symbol UK was in breach of contract by dismissing Mr Gomez Rubio without proper notice but the summary dismissal was effective to put an end to the employment relationship. As the employment relationship had ended, it follows that no further services were rendered by Mr Gomez Rubio under the contract (indeed, they could not be as he was prevented from accessing the premises or his company email). It follows that the payment was not a payment for work done under the contract of employment with Symbol UK.

32. We did not understand HMRC to contend that the payments were made under the contract of employment with Symbol UK. HMRC submitted that the payments were made under the 1991 contract with Symbol Spain that had revived on the termination of the contract with Symbol UK on 31 July 2003. We do not accept HMRC's submissions on this point. First, the Compromise Agreement, dated 7 August 2003, clearly states that Mr Gomez Rubio's employment with all Symbol companies, including Symbol Spain, terminated on 31 July 2003. Further, the parties did not treat the 1991 contract as having revived and Mr Gomez Rubio did not perform any duties of employment for Symbol Spain in the period from 1 August to 7 August 2003 when the Compromise Agreement terminated the employment with all Symbol group companies with effect from 31 July 2003. It follows that the 1991 contract with Symbol Spain never had any separate existence in 2003 (it was not suggested, nor could it be in our opinion, that Mr Gomez Rubio had two full-time contracts of employment prior to 31 July 2003).

33. The documentation we were shown painted a picture of a relationship between Mr Gomez Rubio and the Symbol group that had wholly broken down, not one in

which, in August 2003, the parties were seriously contemplating reviving a contract whose terms had ceased to apply at the end of June 2000. We discount the references in correspondence during negotiations that led to the Compromise Agreement to Mr Gomez Rubio's employment being transferred to Symbol Spain. Such references seem us to have been a threat to make him accept the terms offered rather than a statement of genuine intent. The tenor of the correspondence, especially the without prejudice letters, was that there was no job for Mr Gomez Rubio with Symbol Spain. In any event, nothing in the correspondence concerning the termination of employment or in the Compromise Agreement stated that Mr Gomez Rubio had become (again) an employee of Symbol Spain or that the 1991 contract that was expressed to have terminated in a letter dated 30 June 2000 had revived.

34. Our view is that the 1991 contract had terminated on 30 June 2000 and did not revive thereafter. We find that the four disputed payments made by Symbol UK to Mr Gomez Rubio on 15 August 2003 were not payments made under any contract of employment. It follows that the payments were not within section 62 ITEPA but within section 401 and outside the charge to tax by virtue of section 413 ITEPA.

Legislation in relation to repayment of tax paid by employer

35. Regulation 185 of the Income Tax (PAYE) Regulations 2003 SI 2003/2682 ("the PAYE Regulations") provides:

> (1) This regulation applies for the purpose of determining
>
> > (a) the excess mentioned in section 59A(1) of TMA (payments on account of income tax: income tax assessed exceeds amount deducted at source), and
> > (b) the difference mentioned in section 59B(1) of TMA (payments of income tax and capital gains tax: difference between tax contained in self-assessment and aggregate of payments on account or deducted at source).
>
> (2) For those purposes, the amount of income tax deducted at source under these Regulations is the total net tax deducted during the relevant tax year ("A") after making any additions or subtractions required by paragraphs (3) to (5).
>
> (3) Subtract from A any repayments of A which are made before the taxpayer's return and self-assessment is made under section 8 or 8A of TMA (personal return and trustee's return).
>
> (4) Add to A any overpayment of tax from a previous tax year, to the extent that it was taken into account in determining the taxpayer's code for the relevant tax year.
>
> (5) Add to A any tax treated as deducted, other than any direction tax, but—

(a) only if there would be an amount payable by the taxpayer under section 59B(1) of TMA on the assumption that there are no payments on account and no addition to A under this paragraph, and then

(b) only to a maximum of that amount.

(6) In this regulation—

"direction tax" means any amount of tax which is the subject of a direction made under regulation 72(5) or regulation 81(4) in relation to the taxpayer in respect of one or more tax periods falling within the relevant tax year;

"relevant tax year" means—

(a) in relation to section 59A(1) of TMA, the immediately preceding year referred to in that subsection;

(b) in relation to section 59B(1) of TMA, the tax year for which the self-assessment referred to in that subsection is made;

"tax treated as deducted" means any tax which in relation to relevant payments made by an employer to the taxpayer in the relevant tax year—

(a) the employer was liable to deduct from payments but failed to do so, or

(b) the employer was liable to account for in accordance with regulation 62(5) (notional payments) but failed to do so;

"the taxpayer" means the person referred to in section 59A(1) of TMA or the person whose self-assessment is referred to in section 59B(1) of TMA (as the case may be).

Discussion of claim for repayment of tax paid by employer

36. In relation to the second issue, Mr Gomez Rubio submitted that if the payments were not subject to UK tax, as we have found, then he was entitled to a repayment of £24,012 paid to HMRC by Symbol UK on 22 November 2006. HMRC accepted that if the Tribunal found in favour of Mr Gomez Rubio then he was entitled to a repayment of tax overpaid (ie £59,681.72 claimed on the return) but not of more than he paid or suffered by deduction. Mr Moroz contended that the payment of £24,012 by Symbol UK was made on account of Mr Gomez Rubio. It was not accepted that the amount was paid as PAYE.

37. It is relevant to note that the PAYE Regulations require tax to be deducted (or repaid) by an employer on making a "relevant payment" (regulation 21), which is defined by regulation 4(1) as a payment of, or on account of, "net PAYE income". That term is defined by regulation 3(1) as "PAYE income" less certain deductions not in issue here. "PAYE income" is defined in sections 683(1)(a) and 683(2)(a) ITEPA as taxable earnings from an employment, determined under section 10(2) ITEPA. "Taxable earnings", for Mr Gomez Rubio, means his earnings determined under Chapter 5 of Part 1 (section 10(2)(b) ITEPA), plus his "taxable specific income" under Part 6 (section 10(3) ITEPA). Shortly stated, this means his UK-based earnings for the tax year, plus any taxable termination payments under section 401 ITEPA. It would not, of course, include any payments otherwise taxable under section 401 but relieved under section 413. The objective of the process is to ensure that the employer, during the tax year, deducts and accounts to HMRC for the correct amount of tax due from the employee.

38. In the ordinary way an employer would make these deductions as and when payments were made and account for them to HMRC. At the end of the tax year, the employer is obliged to make an annual return of such payments and deductions under regulation 73. Regulations 78 and 80 empower HMRC to issue a notice in respect of any tax which it believes was under-deducted and unpaid and then, in effect, to assess and collect such tax as if it had been income tax charged on the employer.

39. Turning to the position of the employee, after completion of his self assessment return for the year, the amount of tax payable will be the tax on the taxable employment income less the tax deducted at source (regulation 185(1)(b)), but also less "tax treated as deducted" as defined in regulation 185(6), quoted above. This will include "tax which the employer was liable to deduct from payments but failed to do so", such tax normally being collected from the employer by HMRC following the issue of a notice under the procedure in regulations 78 and 80. As an alternative to the notice procedure, HMRC may agree an amount to be paid by the employer in settlement of any claims. As stated above, on 22 November 2006 Symbol UK paid £24,012 as a "general payment on account" of alleged PAYE underpayments. HMRC later calculated the correct tax due in respect of Mr Gomez Rubio was £17,165.57 and required payment of that amount, plus interest, which was taken from the payment of £24,012 already made.

40. Mr Moroz submitted that HMRC relied on regulation 185 of the PAYE Regulations to refuse the repayment but contended that the regulation is not engaged in this case because it only applies where the employer was liable to deduct tax. As the tax was not chargeable, the employer was never liable to deduct it under PAYE and it should be repaid to Mr Gomez Rubio because it was paid on his account and failure to do so would result in unjust enrichment of HMRC.

41. HMRC submitted that the payment of £24,012 was made, under the informal procedure described above, on account of an amount owed by Symbol UK in respect of PAYE. Mr Gomez Rubio did not suffer deduction of the £24,012 (or the £17,165.57 subsequently determined as payable) as the company paid it to HMRC in November 2006 after having already paid Mr Gomez Rubio. He had by then long

since severed any connection with the company, having resigned in August 2003 and so it was too late for the company to make any deduction.

42. We do not accept Mr Moroz's submissions on the second issue. It seems to us that the flaw in the argument is that the payment of £24,012 was not made by Symbol UK on account or on behalf of Mr Gomez Rubio. The payment was made by Symbol UK because it believed at the time that it was or might be liable to pay such amount to HMRC as a result of its failure to deduct the amount as PAYE. It was never a payment to discharge a liability of Mr Gomez Rubio to HMRC. The company could not deduct it from the payment that had already been made and we saw no evidence that it ever tried to recover that amount from Mr Gomez Rubio. As we have outlined above, the payment was made under an agreement between HMRC and Symbol UK in settlement of the company's supposed PAYE liabilities. In our view, nothing in the legislation and regulations we have outlined above can give Mr Gomez Rubio any claim to a repayment (sic) of money that he has never paid and that was, in fact, paid to HMRC by a third party (Symbol UK) under a negotiated agreement to which he was never a party.

43. The provisions of regulation 185 of the PAYE Regulations merely reach the same conclusion by a different route. Mr Gomez Rubio, in establishing his income tax liability for the year, can take credit for "the total net tax deducted during the relevant tax year ("A") after making any additions or subtractions required by paragraphs (3) to (5)" of regulation 185. It is true that the "total net tax deducted" for this purpose is to be augmented by what regulation 185(6) calls "any tax which in relation to relevant payments made by an employer to the taxpayer in the relevant tax year…the employer was liable to deduct from payments but failed to do so", and we read this as enabling an employee to benefit from a credit for tax which ought to have been deducted by his employer but was, for whatever reason, not deducted. Where, either under a notice under regulation 80 or, as here, under a contractual settlement, the employer has paid to HMRC more than it ought to have deducted, regulation 185(5)(b) limits, entirely reasonably, the employee's credit to the amount that ought to have been deducted. He cannot have credit for an amount that he neither suffered nor was liable to suffer.

44. Mr Moroz also made a written submission to us after the hearing on this issue. This largely repeated his arguments at the hearing but also raised a new point, based on regulation 22 of the previous PAYE regulations (SI 1993/744), which reads as follows:

> "Where the employer makes a payment to or for the benefit of the employee in respect of his income tax, the amount of the emoluments which the employer pays to the employee shall be deemed for the purposes of deduction and repayment of tax under these Regulations to be such a sum as will include the amount assessable on the employee in respect of the payment made by the employer in respect of the employee's income tax."

45. This provision was omitted from the current Regulations made in 2003 but, in Mr Moroz's submission, HMRC's practice remains the same. That may well be correct, but in our view it is not relevant to Mr Gomez Rubio's situation: quite clearly on its face, it deals with the case where an employer pays an employee's income tax on employment income, as well as the income itself. In other words, the employer pays him "free of tax" and this provision simply provides for the income to be "grossed up" and for PAYE to be applied to the income plus the tax met by the employer. This is quite different to Mr Gomez Rubio's position; no evidence was produced to us that there was ever an agreement that Symbol UK would bear his tax bill on his termination and, in our view, this former Regulation has no bearing on the issue before us.

Decision

46. In summary, our decision is that the disputed payments amounting to £434,493 do not fall within section 62 ITEPA but are within section 401 of that Act and, as the foreign service exception under section 413 applies, it follows that the amounts are not chargeable to tax. Accordingly, the appeal in relation to the first issue is allowed and Mr Gomez Rubio is entitled to a repayment of £59,681.72 claimed on the return. In relation to the second issue, our decision is that the Mr Gomez Rubio does not have any entitlement to a repayment of an additional amount of £24,012 paid by Symbol UK as PAYE tax which, following our decision on the first issue, was not due. Accordingly, the appeal on the second issue is dismissed.

Rights of appeal

47. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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.

Greg Sinfield
TRIBUNAL JUDGE

RELEASE DATE: 30 May 2012