TC04480

Appeal number: TC/2014/02112

INCOME TAX – Earnings from employment – compensation for departure from the terms of a contract of employment following a TUPE transfer – whether payment earnings from employment – yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR ANDREW HILL **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
MR MICHAEL SHARP FCA

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 27 May 2015

The Appellant appeared in person

Mr John Corbett, Officer of HM Revenue and Customs, appeared for the Respondents

DECISION

1. This is an appeal made by Mr Andrew Hill ("Mr Hill") against an amendment made by Her Majesty's Revenue and Customs ("HMRC") on 2 January 2014 to his self assessment tax return. The appeal relates to the treatment for income tax purposes of the sum of £30,000 which Mr Hill received under the terms of a compromise agreement entered into in October and November 2010 between Mr Hill, Saab City Limited ("Saab City"), General Motors UK Limited ("GM") and Saab GB Limited ("Saab GB").

2. Pursuant to the amendment to Mr Hill's self-assessment tax return, HMRC have assessed Mr Hill to income tax in respect of the £30,000 so received on the basis that it falls within the definition of earnings in Part 3 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Mr Hill contends that the relevant amendment is misconceived because the sum in question falls within the terms of Chapter 3 of Part 6 ITEPA (which covers, inter alia, sums paid on the termination of employment) and is therefore exempt from income tax because it does not exceed the threshold of £30,000 in sub-section 403(1) ITEPA.

The facts

3. Subject to one point which we mention below, there is no dispute between the parties as to the relevant facts in this case.

4. Mr Hill worked for GM from 1 December 2001 until 1 June 2010. His employment contract included a provision stipulating that he was to be located at Griffin House, Osborne Road, Bedfordshire but that he might be required to work at other sites within a 10 mile radius of Griffin House. On 1 January 2007, Mr Hill was seconded to Saab City in London, a secondment which continued until 1 June 2010. On that date, Mr Hill's employment transferred from GM to Saab City under the Transfer of Undertakings Regulations 2006 (the "TUPE Regulations").

5. Mr Hill was unhappy with the transfer of his employment to Saab City. He had been hoping to return to GM at the end of his secondment and to continue his career with GM. In particular, he was not happy about the prospect of continuing to work in London, which was a long way from home, and about the fact that GM had failed to consult with him in advance of the transfer as required by the TUPE Regulations. Accordingly, he raised a grievance with GM and Saab City about this and, after a protracted period of negotiation, a compromise agreement involving Mr Hill, both employers and Saab GB was executed over the period between 21 October 2010 and 11 November 2010.

6. The compromise agreement is not a model of clarity. For example, there are repeated references to the "Employer" but that term is not defined and the implication is that all three of GM, Saab City and Saab GB are intended to fall within the definition. The key terms of the compromise agreement are paragraphs 5 to 7, which between them stipulate that Mr Hill will receive £15,000 from each of Saab City and

GM and that this is to be in full and final settlement of all and any claims or rights of action that Mr Hill has or may have against either of them or any related company.

7. Paragraph 6 enumerates certain specific complaints which Mr Hill is expressly agreeing to forgo by virtue of entering into the agreement but both Mr Hill and HMRC agree that this is largely formulaic and that the predominant reason for the payment was the fact that Mr Hill was now being required to work in London despite the term in his contract stipulating that he should be required to work no further than 10 miles from Griffin House.

8. We think that it is important to note two points in this context. First, Mr Hill had been paid a travel allowance during the course of his secondment to Saab City and this travel allowance continued following the transfer under the TUPE Regulations. Secondly, Mr Hill had not raised a grievance with GM about the fact that he was being required to work more than 10 miles from Griffin House during the terms of his secondment. He raised his grievance following the transfer under the TUPE Regulations.

9. Mr Hill contends that another reason for the payments was that GM had failed to comply with its obligation under the TUPE Regulations to consult with him prior to transferring his contract of employment to Saab City. However, Mr Hill could not put a figure on how much of the £30,000 that he received could properly be allocated to that breach of the TUPE Regulations.

10. HMRC disputes the fact that any of the payment was allocable to the failure by GM to consult with Mr Hill. Mr Corbett pointed out that, by the time that the compromise agreement was signed, the time limit for Mr Hill to complain about the absence of consultation had expired and therefore no part of the £30,000 could properly be allocable to the failure to consult.

11. It is unfortunate that no evidence in relation to this question was available at the hearing and, in particular, that no evidence as to the motives of GM and Saab City in making the payments was available. However, HMRC is correct in saying that the time limit for Mr Hill to make a claim in respect of the failure to consult had passed by the time that the compromise agreement was executed. Moreover, we understand that a claim in relation to a failure to consult cannot be the subject of a compromise agreement in this form – any such claim can be settled only by the execution of an ACAS-conciliated agreement under sub-section 203(2)(e) of the Employment Rights Act 1996. For those reasons, and because, in any event, Mr Hill did not think that it was possible to apportion any part of the £30,000 specifically to the failure to consult, we propose to consider this question on the basis that the £30,000 was paid in respect of the departure from the contract inherent in Mr Hill's being required to work more than 10 miles from Griffin House.

12. There is one further provision of the compromise agreement which should be mentioned at this point. This is paragraph 9 of the agreement, which stipulated that, if Mr Hill were to cease to be employed by Saab City within 2 years from the date of payment (except in the case of redundancy or unfair dismissal), he would be required

to pay back to GM and Saab City 100% of the amounts received (in the case of a cessation occurring within 6 months of the payment date), 50% of the amounts received (in the case of a cessation occurring between 6 months and 12 months of the payment date) and 25% of the amounts received (in the case of a cessation occurring between 1 year and 2 years of the payment date).

The parties' arguments

13. Mr Hill contends that the payments he received from GM and Saab City fall within Chapter 3 of Part 6 ITEPA because they were paid under a compromise agreement in return for his agreement not to pursue his claim for damages against either company. His view is that, as the payments were made under a compromise agreement, they were not made in return for his services to either employer and therefore they cannot constitute earnings for the purposes of Part 3 ITEPA.

14. The Respondents' view is that the payments were consideration for Mr Hill's agreement to work more than 10 miles from Griffin House and were therefore attributable to Mr Hill's agreement to a change in a key term of his employment contract. Mr Corbett points out that the fact that the payments were attributable to Mr Hill's continuing employment on altered terms can be found in the refund obligations in paragraph 9 of the compromise agreement pursuant to which Mr Hill was required to repay all or some part of the payments if his employment with Saab City terminated within 2 years of the payment date. Thus, said Mr Corbett, the payments are taxable either as emoluments of Mr Hill's employment falling within Section 62 ITEPA or as relocation payments falling with Section 201 ITEPA. In either case, the fact that the amounts are taxable under the relevant provisions prevents from them falling within Chapter 3 of Part 6 ITEPA.

Discussion and conclusion

15. In order to be successful in arguing that the payments in question fall within Chapter 3 of Part 6 ITEPA, Mr Hill must first of all establish that the payments were received directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of his employment, a change in the duties of his employment or a change in the earnings from his employment.

16. The application of that language in the case of a transfer falling within the TUPE Regulations is not entirely straightforward. This is because, in the case of such a transfer, and ignoring the terms of the TUPE Regulations themselves, there is clearly a cessation of one employment (in this case, Mr Hill's employment by GM) and the commencement of another employment (in this case, Mr Hill's employment by Saab City). However, the TUPE Regulations specifically say that a transfer under the regulations "shall not operate so as to terminate the contract of employment of any person employed by the transferor... but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee". So it quite clear that, at least as a matter of general law, Mr Hill's original contract of employment with GM should be regarded as having continued without a termination

and Saab City should be regarded as having stood in the shoes of GM following the transfer.

17. Left to our own devices, we would have thought that the tax legislation should be applied on the same basis - that is to say that there was no termination of Mr Hill's employment with GM as a result of the transfer under the TUPE Regulations and, instead, there was simply a change in the terms of his duties under that single, ongoing employment. Having said that, we note that this is not the view which was taken by the First-tier Tribunal in *Kuehne & Nagel Drinks Logistics Ltd and Others v Revenue and Customs Commissioners* ([2009] UKFTT 379). In that case, the tribunal considered that the deeming language in the TUPE Regulations should be limited to its particular purpose and should not be taken into account in applying ITEPA.

18. Be that as it may, we consider that the answer in this case does not turn on the question of whether Mr Hill's contract of employment with GM was terminated and replaced by a new contract of employment with Saab City or whether Mr Hill's contract of employment with GM simply continued but on different terms. This is because, in either case, the payments are precluded from falling within Chapter 3 of Part 6 ITEPA to the extent that they are subject to income tax apart from that Chapter (see sub-section 401(3) ITEPA). In that regard, Part 2 ITEPA imposes a charge to tax on, inter alia, "earnings, as described in Part 3 ITEPA" and "earnings" are defined in Part 3 ITEPA as including, inter alia, "anything... that constitutes an emolument of the employment".

19. Thus, if the payments received by Mr Hill from GM and Saab City can properly be described as emoluments from his employment with either company, then, by virtue of sub-section 401(3) ITEPA, they cannot fall within Chapter 3 of Part 6 ITEPA.

20. At the hearing, Mr Hill conceded that, if he had simply received the payments as consideration for his agreement to work for Saab City, following the transfer, outside the 10 mile radius from Griffin House set down in his contract with GM, the payments would be taxable as emoluments falling with Section 62 ITEPA. However, he alleged that the answer should be different where, instead of being paid to agree to a change in the terms of his contract of employment, he was paid for agreeing not to pursue a claim for damages in respect of a breach of those terms.

21. We have some difficulty in accepting that distinction. It seems to us that, whether the payments were consideration for an agreement to accept a change in that particular term of his employment contract going forward or consideration for agreeing not to pursue a claim for breach of that particular term in his employment contract going forward, the tax treatment should be the same. In both cases, the effect of the agreement between the parties is that Mr Hill was paid £30,000 and, in return for receiving that sum, he accepted that he could be required to work more than 10 miles from Griffin House following the transfer.

22. There are a number of cases where a payment received by an employee in return for an agreement to a change in the terms of employment has been treated as

constituting an emolument of the employment and therefore as comprising earnings for the purposes of ITEPA (or the equivalent for the purposes of its predecessors). One such case is *Hamblett v Godfrey (Inspector of Taxes)* ([1987] STC 60), where Ms Hamblett was held to be subject to tax in respect of a payment from her employer because she "received her payment as a recognition of the fact that she had lost certain rights as an employee, and by reason of the further fact that she had elected to remain in her employment at GCHQ." Another such case is *Kuehne & Nagel Drinks Logistics Ltd and Others v Commissioners for Her Majesty's Revenue and Customs* ([2012] EWCA Civ 34), in which the Court of Appeal held that amounts received by employees as compensation for agreeing to accept a reduction in pension rights following a transfer under the TUPE Regulations were taxable as emoluments.

23. We do not see any meaningful difference between the facts in those cases and the facts in the present one. In each case, the relevant employee receives a payment from his employer as compensation for a change in the terms of his employment contract and the payment is properly characterised as an emolument from the employment.

24. Our conclusion on this point is reinforced by the terms of paragraph 9 of the compromise agreement which required Mr Hill to refund all or part of the payments in the event that he ceased to be employed by Saab City within 2 years of the payment date. In our view, this supports the proposition that these payments were emoluments of Mr Hill's employment – whether it was the single employment which commenced with GM and continued with Saab City or the employment with Saab City which commenced on the termination of his employment with GM.

25. In his written submissions to HMRC in advance of the hearing, Mr Hill mentioned four cases which he said supported his analysis of the payments in this case. Those cases were *Henley v Murray* (31 TC 351), *NJ Wood v HMRC* ([2010] UKFTT 288), *Walker v Adams* ([2003] STC (SCD) 269) and *WDB Porter v HMRC* (SPC 00501). We do not think that any of those case supports Hr Hill's proposition. In *Henley v Murray* (31 TC 351), the Court of Appeal distinguished between two categories of cases - cases where a contract of service continues following the relevant payment and cases where the payment is made in connection with the termination of a contract of service. The facts of that case were such that the arrangements were held to fall within the second category of cases. The facts of this case are such that it falls within the first category of cases because Mr Hill's employment continued, albeit with Saab City and not GM, and the payments related to the location in which he performed the duties of that employment.

26. Each of the other three cases is distinguishable from the present one for the same reason. In other words, in each case, there was a termination of an employment contract and no ongoing employment arrangement. We regard that as being a distinction of some significance in this context.

27. The answer in this case might have been different if there had been no transfer under the TUPE Regulations and instead Mr Hill had been paid a sum by GM on the termination of his contract in respect of a breach by GM of its obligation in relation to

Mr Hill's location during the period of secondment. In that case, there would clearly have been no ongoing employment to which the payments could be referenced and the cases described above would potentially be relevant. However, those are not the facts in this case. First, there was a continuing employment with Saab City and, secondly, the payments clearly related to Mr Hill's location following the transfer under the TUPE Regulations and not his location before then. At no point during the period of his secondment prior to 1 June 2010 did Mr Hill allege that GM were in breach of contract and demand compensation for that breach. The issue arose only when the secondment came to an end and the transfer under the TUPE Regulations occurred. Those facts, coupled with the provision in paragraph 9 of the compromise agreement requiring all or part of the payments to be refunded in the event that Mr Hill's employment with Saab City terminated within 2 years of the payment date, show that the payments were referable to Mr Hill's continuing employment on and after 1 June 2010.

Result

28. It follows from the above that we must dismiss Mr Hill's appeal. We do so with some regret. It became apparent at the hearing that Mr Hill went through a difficult process in pursuing his grievance against his employers and that his willingness to accept the £30,000 that was paid to him was predicated on his belief that the sum would be free of tax in his hands. He said that he might well have held out for more if he had known that he would be subject to tax on the payments.

Right of appeal

29. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 19 JUNE 2015