[2017] UKFTT 139 (TC)

TC05633

Appeal number: TC/2015/06812&06813

INCOME TAX and NATIONAL INSURANCE – premiums paid by employer on insurance policies relating to director – contracts taken out erroneously in name of director rather than employer – whether premiums taxable as income of director and subject to NI contributions by employer – held yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MACLEOD AND MITCHELL CONTRACTORS LIMITED **Appellant**

- and -

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

and

WILLIAM MITCHELL **Appellant**

- and –

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

TRIBUNAL: JUDGE PHILIP GILLETT
G NOEL BARRETT LLB

Sitting in public at George House, Edinburgh on 2 November 2016

Philip Simpson QC, instructed by AA Mackenzie & Co Ltd, Chartered Accountants, for the Appellant

Matthew Mason, Officer of HMRC, for the Respondents

DECISION

1. This was a joint appeal by Macleod & Mitchell Contractors Limited ("MMCL") and William Mitchell against a decision of HMRC dated 26 August 2015, in respect of National Insurance contributions alleged to be due by MMCL, and assessments dated 29 May 2015 and a closure notice dated 3 June 2015 in respect of income tax alleged to be due by Mr Mitchell. Both appeals relate to the appropriate tax treatment of premiums paid by MMCL in respect of various insurance policies relating to Mr Mitchell.

2. Mr Mitchell was the sole director and shareholder of MMCL throughout the relevant period.

3. The decision in respect of National Insurance contributions covered the years 2009-09 to 2013-14 and these contributions amount to £49,947.21. The assessments and closure notice in respect of Mr Mitchell cover the years 2011-12 to 2013-14 and amount to additional income tax due of £8,953.68 in respect of 2011-12, £9,574.74 in respect of 2012-13 and £9,375.97 in respect of 2013-14.

4. The assessments on Mr Mitchell in respect of 2011-12 and 2012-13 had been raised under the discovery provisions of s29 Taxes Management Act 1970. These assessments were accepted by the Appellant as having been properly made in accordance with the provisions of s29 and we do not therefore consider these provisions further.

5. It was common ground between the parties that all the premiums in question had been paid by MMCL and that all the insurance policies in question, which were a mixture of life insurance, critical illness and income protection policies, were in the name of Mr Mitchell. The key issue therefore, for both appeals, was whether or not these premiums should be treated as earnings from Mr Mitchell's employment with MMCL, and therefore subject to primary and secondary class 1 National Insurance contributions payable by MMCL, and assessable to income tax on Mr Mitchell.

Evidence

6. We heard evidence from Mr Mitchell and from Mr Michael Evans, of AA Mackenzie & Co Ltd and The Long Partnership, reporting accountants and advisers to MMCL and Mr Mitchell. We found both to be reliable and credible witnesses and the truth of their evidence was not challenged by HMRC.

7. We have also read and considered the bundles of documents.

8. Given that the discovery by HMRC has not been challenged by the appellants, the burden of proof lies with the Appellants and the standard of proof is the normal civil standard ie, in order to be successful in their appeal the Appellants must prove their case on the balance of probabilities.

9. The key points emerging from their evidence was that when the decision had been made to take out these insurance contracts it had been the intention of Mr Mitchell, and therefore of MMCL, of which Mr Mitchell was the controlling shareholder and director, that the policies should be in the name of the company. Mr Mitchell had approached Michael Coll, an independent financial advisor recommended to him by a colleague, to take out these insurance policies and had trusted him to do what was intended.

10. Mr Mitchell stated that he had signed incomplete proposal forms for the insurance policies and had trusted Mr Coll to complete them correctly and finalise the arrangements. He said that he did not recall receiving copies of the completed proposal forms. He said that he did receive copies of the policies and although he had read them he had not fully understood them, although we did not understand why Mr Mitchell had been unable fully to understand the policy documents since the name of the policyholder should have been clear from even a superficial reading.

11. Whilst we accept that Mr Mitchell to a large extent relied on his financial advisor, Mr Coll, we do not accept that it is reasonable for him to have abrogated his responsibility entirely in this regard. When looking at the policy schedules to the insurance policies in issue, which are within the bundle, it seems very clear to us that the first page or two of those policy schedules make it clear that the policyholder in each case was Mr Mitchell and not MMCL.

12. Mr Mitchell also confirmed that he had his own personal insurance policies with American Insurance Company, which had been taken out directly by him with a representative of the company.

13. Mr Evans said that in the course of preparing the company's annual accounts, as reporting accountant not auditor, he had found that the company's bookkeeper had charged the insurance premiums to the Director's Loan account, which she had used as a suspense account for items about which she was unclear. Mr Evans explained that he had therefore taken great care to ensure that these premiums were correctly treated and had asked Mr Mitchell to confirm that these policies were in the name of the company and should therefore be correctly treated as a company expense. Mr Mitchell stated that he had checked this with Mr Coll and Mr Coll had confirmed that the policies were indeed in the name of the company, although there was no written evidence of this advice.

14. Mr Evans stated that he had asked this question of Mr Mitchell at most if not all year-ends during the period in question and Mr Mitchell stated that he had checked this with Mr Coll every few years.

15. The fact that the insurance policies were all in the name of Mr Mitchell had only come to light as a consequence of an HMRC PAYE audit in 2013, because HMRC had asked to see copies of the policies.

16. Both Mr Evans and Mr Mitchell stated that when the error had been discovered Mr Coll had stated that he was always aware that the policies should have been in the

name of the company and initially he blamed the insurance companies for the error. However, according to the note of a subsequent telephone conversation with an HMRC officer, towards the end of 2014, he stated that for such policies it was the normal practice to take out the policies in the name of Mr Mitchell, with the intention that a declaration of trust should subsequently be made by Mr Mitchell in favour of the company. He had stated in this telephone call that he expected this to be arranged by the accountants and repeated this in his letter to HMRC dated 11th November 2015, which corrected his understanding set out in his earlier letter in July 2014.

17. We note from the bundle, that Mr Evan's firm, AA Mackenzie and Co Ltd, appeared to be acting as Company Secretary for MMCL in 2012, at the time that the Abbey Life policy was assigned to Royal Bank of Scotland, as they co-signed MMCL's resolution authorising Mr Mitchell to sign the documentation required by the Bank and as both Mr Mitchell and Mr Evans confirmed in their evidence the two companies, MMCL and AA Mackenzie and Co Ltd had enjoyed a lengthy business relationship which predated Mr Evan's acquisition of AA Mackenzie and Co Ltd.

18. Clearly everything that was attributed to Mr Coll by Mr Mitchell, Mr Evans and what was recorded in the note of the telephone conversation with HMRC can only be considered to be hearsay. It was unfortunate that neither party called Mr Coll as a witness, which might have enabled us to determine exactly how the apparent error had occurred. Nevertheless, we are not sure that precisely how the error occurred is important. In this connection we note that Mr Mitchell stated that he had commenced civil proceedings against Mr Coll but had not progressed these pending the outcome of this appeal.

Facts

19. On the basis of the evidence we heard, the papers presented to us and the statements from the parties we find as a matter of fact that:

(1) All the premiums on the policies in question were paid by the company.

(2) All those policies were in the name of Mr Mitchell.

(3) The intention of MMCL and Mr Mitchell was that the policies should be taken out in the name of, or for the benefit of, MMCL.

(4) Clearly MMCL's book-keeper was unsure as to the correct treatment of the policy premiums as referred to in Mr Evans evidence.

(5) Given that Mr Mitchell was the sole Director and the sole Shareholder of MMCL, to some extent, while this position inured and MMCL remained solvent, there would it seems have been little practical difference, as and when any claim was made on the policies, as to whether Mr Mitchell or MMCL was in fact the policy holder, apart from the taxation consequences in relation to the premiums.

(6) All the relevant policies, with the exception of one with Abbey Life, which had been assigned to RBS as security for a loan to the company, were assigned from Mr Mitchell to MMCL in 2014. We also noted that HMRC,

quite correctly in our view, had agreed to exclude the premiums in respect of the Abbey Life policy from the assessments after it had been assigned to RBS, because during the period of that assignment the policy was clearly for the benefit of MMCL.

(7) None of the policies had paid out any benefits prior to their assignment to MMCL but one, a policy with Cirencester Friendly Society, had paid out in respect of a period of illness in early 2016, after the assignment. There had been some confusion with the insurance company as to whom the benefit should be paid but we were informed that this had been resolved and the company had received the money. In addition a letter was produced within the bundle from Cirencester Friendly Society dated 8th July 2014 which acknowledged receipt of the nomination form to MMCL.

Discussion

20. The relevant legislation is set out in s62 Income Tax (Earnings and Pensions) Act 2003 which defines earnings in the context of an employment. In particular s62(2)(b) ITEPA defines earnings to include "any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth".

21. Mr Mason, on behalf of HMRC, contended that where an employer makes a payment which is of direct monetary value to an employee, because he or she no longer has to pay that amount of money to a third party, that counts as money's worth under s62(2)(b) ITEPA. This was not challenged by the Appellants and we accept it as a correct statement of the law.

22. We are therefore left with the position that although it was intended that the insurance policies should have been taken out in the name of the company they were in fact taken out in the name of Mr Mitchell and it was Mr Mitchell whom the insurance companies regarded as the beneficiary.

23. Mr Mason put forward in support of his position the well-known words of Rowlatt J in *Cape Brandy Syndicate v CIR* [1921] 1 KB 64 "… in a taxing Act one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." However, this passage relates to the interpretation of a taxing statute and not to the interpretation of a sequence of events as he claimed. This is not therefore of direct help to us.

24. However, Mr Mason also suggested we should consider the words of Lord Green, MR, in *Henriksen v Grafton Hotel Ltd* [1942] 24 TC 453 at page 460. "This argument has a familiar ring. The answer to it is that this was not the contract which the parties chose to make. It frequently happens in Income Tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not, or vice versa." We believe that this is of direct relevance to our decision and that we should therefore look at the transactions

which actually took place, whether or not they were the transactions which the parties intended. The policies were taken out in the name of Mr Mitchell and the premiums were paid by MMCL and these are the transactions we should consider.

25. Whilst accepting that these were the transactions which actually took place, Mr Simpson, on behalf of the Appellants, put forward a number of reasons why we should not regard the payments by MMCL as a settlement of liabilities due by Mr Mitchell.

26. Firstly, Mr Simpson referred us to the case of *The Edinburgh Life Assurance Company v Balderston* [1909] 2 SLT 323. We do not consider it necessary to relate the facts of the case in this judgement but Mr Simpson's proposition, following this case, was that if a person, such as MMCL, had paid insurance premiums incorrectly, believing them, wrongly, to have been its own liabilities, then MMCL would have the right to recover those premiums from Mr Mitchell, whose liabilities they truly were.

27. Alternatively, Mr Simpson proposed that if the company had paid the premiums wrongly then the debt from Mr Mitchell to the insurance companies still existed and the company would have the right to recover those premiums from the insurance companies.

28. However, we noted that in fact the company did not seek to recover those premiums from either Mr Mitchell or the insurance companies. We also noted that the benefits which Mr Mitchell enjoyed from those insurance policies, until they were assigned to the company, were the benefits which might have been paid out to him had an insured event taken place.

29. Our conclusion in response to these propositions therefore is that even if one accepts the proposition that the company had the right to recover the premiums from either Mr Mitchell or the insurance companies, as Mr Simpson argued, the fact remains that it did not do so. By implication, in those circumstances, once it became aware of the issue, in 2013, the company must have made the decision not to seek such a recovery and such a decision, in those circumstances, was a decision which relieved Mr Mitchell of a pecuniary liability, either to the company or to the insurance companies. This does not therefore advance Mr Mitchell's case but merely replaces one source of assessable income by another.

30. Mr Simpson also suggested that because Mr Mitchell had fiduciary obligations to the company of which he is a director, when he came into the ownership of assets that ought to be the property of the company, ie the insurance policies, he was obliged to convey them to the company. In fact this is precisely what he did once he became aware of the issue. Prior to that conveyance however Mr Simpson suggested that the asset in question, being any benefits received under the insurance policies, would be held by Mr Mitchell on constructive trust for the company. We accept this argument in principle. However, we cannot see that it is applicable to the current case for two reasons; firstly, no benefits actually accrued either to Mr Mitchell or MMCL during the relevant period prior to the polices being assigned in 2014; and, secondly, neither Mr Mitchell nor MMCL were aware that the polices had not been taken out for

MMCL's benefit or, alternatively, had not been assigned to MMCL during the relevant period. For these reasons we do not accept that a constructive trust can arise where there is no tangible benefit or asset held within the trust and where neither the constructive trustee nor the constructive beneficiary are aware of the existence of the constructive trust. The principle of "knowing receipt" is well established in Commonwealth Oil & Gas Company Ltd. v Baxter [2009] CSIH 75.

Decision

31. Having considered the arguments set out above the tribunal decided that both appeals should be DISMISSED.

32. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 31 JANUARY 2017