



TC01544

Appeal number TC/2009/14701

COMPENSATION PAYMENT for loss of office – Post Office Network Reinvention – whether capital payment for goodwill – or compensation for loss of office- payment compensation for loss of office – HMRC out of time to raise discovery assessment – section 29 (4) Taxes Management Act 1970 - appeal allowed

FIRST-TIER TRIBUNAL

TAX

MOHINDER SINGH

Appellant

- and -

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

Respondents

**TRIBUNAL: DAVID S PORTER (JUDGE)
BEVERLEY TANNER (MEMBER)**

Sitting in public at Temple Court, Birmingham on 8 September 2011

Talwinder S Patara for the Appellant

Byan Morgan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Mohinder Singh (Mr Singh) appeals against a discovery assessment raised on 20 October 2006 on his self-assessment return for the year 2004/5 in the sum of £20,619.58. He also appeals on behalf of his company Malcolms Post & News Ltd (the Company) against a corporation tax liability raised under paragraph 24 (1) Schedule 18 Finance Act 1998 disallowing, for capital gains tax purposes, the deduction of a goodwill payment arising from the compensation paid by Post Office Ltd to Mr Singh on the closure of the Sub-Post Office. Mr Singh alleges that the compensation paid by the Post Office to the Company, when it closed his Sub-Post Office, belonged to the Company and not to him. Further the Respondents (HMRC) had had full notice, from his earlier self-assessment returns and his return for the year 2004/5, of the basis on which the payments from the Post Office had been treated in the Company's accounts. It could not therefore raise a discovery assessment against him as HMRC were out of time and that neither Mr Patara, the Company's accountant, nor Mr Singh, had acted negligently. HMRC say that the Post Office has made it abundantly clear that the compensation was paid as compensation for the loss of Mr Singh's position as Subpostmaster. Mr Singh owned the licence and the payment was made to him personally by way of compensation for loss of his Office. He and his accountant had acted negligently in not identifying that to be the case in his self-assessment return and HMRC could raise a discovery assessment

2. Mr Bryan Morgan (Mr Morgan) appeared for HMRC and produced agreed bundles and a speaking brief for the Tribunal. Mr Talwinder S Patara (Mr Patara), an accountant, appeared for Mr Singh and called Mr Singh and Mr Ian Davies to give evidence.

3. We were referred to the following cases:

- *Hurley v Taylor (Inspector of Taxes)* [1998] STC 202
- *Blyth v The Company of Proprietors of the Birmingham Waterworks*[1856] EWHC Exch J65
- *The King v The Kensington Income Tax Commissioners (ex parte Aramayo* 6 TC 279
- *Inland Revenue Commissioners v Brander & Cruickshank* [1971] 1 All ER 36
- *Great Western Railway Company v Bater (Surveyor of Taxes)* 8 TC 231
- 14956: *H & V Patel*

Preliminary

4. This case relates to the re-opening of a return made over 6 years ago .We have been told that the Company's accounts for the accounting period ending 30 April 2005 included a capital gains computation in respect of the disposal of the Sub-Post Office. 5 An enquiry was opened in to the Company's return on 10 May 2006. Guidance from the Department of Trade and Industry was sought. A discovery assessment was issued to Mr Singh on 20 October 2006. Mr Patara appealed to the Special Commissioners on 27 October 2006. Mr Patara was advised on 20 December 2006 that there were ongoing discussions with the Post Office and the matter should be put on hold for a while. 10 On 7 January 2008 Mr Patara was advised that a similar matter was listed for a hearing in the High Court as a stated case. We have been told that the High Court decided in that case that the compensation payments, made by the Post office, were payments for loss of office. It did not prove possible thereafter to have this case listed for hearing before the Special Commissioners or to use the transitional provisions for a hearing before the First-tier Tribunal. Therefore steps were taken to bring the appeal 15 within the new procedures working under the new Tribunal Rules. HMRC's view of the matter was issued on 5 August 2009 with Mr Patara's letter of 17 July 2009 being treated as a request for a statutory review. The conclusion of the statutory review was issued on 28 August 2009 and Mr Patara appealed against the conclusion of the 20 review on 29 September 2009. We have found in favour of Mr Singh and we have not therefore had to consider, nor have we been addressed, with regards to any human rights which might arise as a result of the delays. In the event of an appeal we consider the human rights legislation and case law should be considered.

The facts

25 5. Mr Singh originally purchased a newsagent's business in 1983 in partnership with his wife. The partnership was increased to four persons when Mr P Singh (his son) and Mrs P Kaur (his daughter-in-law) joined the business in 1996. There was an uplift in the value of the goodwill at that time accounted for in the tax returns. The partnership was approached by the Post Office to take over a failing Sub-Post Office 30 in April 2000. The Post Office agreed that the business could be run from the partnership's existing shop premises, but that Mr Singh should be the nominated partner to hold the Post Office license. The partnership carried out and paid for the necessary works to enable the Sub-Post Office to be installed in the newsagent's shop. In April 2002 the partnership was incorporated and Mr Singh was appointed the sole 35 director and retained the licence. The partnership business was paid £70400 for the transfer of the goodwill to the Company. As a result there was an uplift in the value of the goodwill and the resulting capital gain declared on all partners tax returns in 2002/2003.

40 6. Mr Singh did not produce to the Tribunal his contract with the Post Office setting out the terms of his licence. Mr Morgan produced a standard Subpostmasters' contract to which Mr Patara did not object. The contract indicates:

(1) The contract is a contract for services and consequently the Subpostmaster is an agent and not an employee of Post Office Counters Limited.

5 (9) If on the resignation of his appointment the Subpostmaster disposes of his private business and/or premises in which the sub-Office is situated, the person acquiring the business and/or the premises or exchanging contracts in connection with the purchase of the private business and/or premise will not be entitled to preferential consideration for appointment as Subpostmaster.

Section 2 General (1) A Subpostmaster is paid according to the amount of work which is transacted at his sub-Office.

10 7. Although Mr Singh was the Subpostmaster, he arranged for the salary to be paid directly to the partnership's and latterly to the Company's accounts at the Bank. The company accounts to 2005 were produced to the Tribunal and the payment appears as Post Office Salary £27,228 under the heading 'Other operating income'. Mr Singh had not included that payment in his annual self-assessment returns as he had not received the income for his own benefit. He accepted that someone had to hold the licence and this he did for the benefit of the Company. The remuneration of a
15 Subpostmaster is by statute assessable under Income Tax (Earnings and Pensions) Act 2003 (ITEP) and subject to Class 1 NIC as income from an Office. Mr Morgan confirmed, however, that historically HMRC, and formerly the Inland Revenue, have allowed, as a concession, the Subpostmaster's remuneration to be included in the
20 income of the partnership and accordingly to be assessed under Schedule D. A similar concession applied to the Company and its corporation tax liability.

8. Post Office Limited underwent a restructuring exercise known as 'Network Reinvention'. In October 2002 parliament approved the programme and the government released £180 million to fund the scheme closing down uncommercial
25 Sub-Post Offices. Mr Singh was approached by the Post Office towards the end of 2004 on the basis that his Sub-Post Office was to be closed under the scheme and he was offered compensation. The compensation was negotiated by Mr Singh with the Post office and was calculated on the Business Value method. The calculation was based on:

30 A. "Cost of purchasing Post Office business

Total purchase price paid to previous subpostmaster for the business including legal fees - (as identified in the Business Plan and purchase documents)

Less

35 The purchase price of the premises - (as identified in the Business Plan and purchase documents)

Less

The purchase price of the stock at the time the business was purchased - (as identified in the Business Plan and purchase documents)

Plus

Cost of improving the fit-out of the branch, which the subpostmaster agreed to incur at the request of Post Office Ltd as a condition of appointment, and any other defined investment in the Post Office business.

5 B. On the basis of sound input data provided by the subpostmaster, the value emerging from the above calculation (“cost of purchase figure”) will be compared with the amount calculated as the equivalent of 28 months’ remuneration, based on the subpostmaster’s most highly remunerated full financial year (April to March) since 1st April 1999.

10 C. Where the cost of purchase figure is less than or equal to the 28 months’ equivalent remuneration, the cost of purchase figure will be the amount of compensation payable to the subpostmaster for the closure of the branch under the programme.

Under the heading “Basis of payments of compensation to sub-postmasters

15 1.4 reads: The compensation payments described in this note and its Appendix 1 represent, in their entirety, compensation for loss of office....”

9. The resulting figures were as follows:

	Goodwill	£70,400.00	
	Fixtures and fittings	£ 600.00	
20	Legals	£ 522.88	
	Callows shopfitters	£ 6,905.83	
	Able Builders	£ 449.25	
	Sign	£ 664.46	Total £79,542.42

25 A further sum of £14,850 was added for building works on the original conversion bringing the total compensation to £94,392.42. However, the Company wished to retain the Camelot Lottery Terminal, which it was allowed to do, subject to the deduction of £4,847.74, which reduced the compensation to £89,544.68.

30 10. From the Company’s accounts to 30 April 2005 the previous years’ column to 2004 identifies the Post Office salary as £47,975. As a result the maximum that would appear to be available on the most highly remunerated financial year basis as compensation for loss of office would have been £111,941.66 (£47,975 /12 * 28).

11. Although £89,544.68 appears in a letter from the Post Office dated 27 October 2004 advising that the Sub-Post Office would close on 6 November that year, that

letter followed an earlier letter dated 16 March 2004, which set out the basis on the compensation would be paid and referred to the sum of £94,392.42. That letter reads:

URBAN POST OFFICE ® -OFFER OF COMPENSATION PAYMENT

This letter;

- 5 (a) summarises the discussion which took place between Keith Long, network development manager (“NDM”) and yourself, regarding the proposal to close your Post Office ® Branch; and
- (b) sets out the terms and conditions of our offer of compensation to you ,in accordance with the Urban Post Office ® Closure Scheme as described to you
10 by the NDM (the “Closure Scheme”).....

Please note the Post Office Ltd cannot commit to closing your branch until it makes a final decision to do so. This will depend upon the outcome of the public consultation process and Post Office Ltd’s consideration of the results of that process, which would lead to the withdrawal of the proposal to close your branch.

15 2. “What you agree to do

2.1 Subject to each of the conditions listed at paragraph 1 above (with which he complied) Post Office Ltd offers to pay you on or about the last day of service the sum of £94,392.42 (later reduced as above), if a final decision is taken to close your branch. **This sum represents compensation for loss of office**, (Our
20 emphasis) and all Post Office Business must cease upon the last day of service.

2.3. Subject to Post Office Ltd taking a final decision to close your branch

2.3.1 You hereby (by means of your counter-signature at (A) below) give notice to Post Office Limited of your resignation.....

2.4 Both Post Office Ltd and you acknowledge that if Post Office Ltd does not
25 take a final decision to close your branch, the notice of resignation set out in paragraph 2.3 will no longer apply and compensation will not be payable

2.8 We have sought the views of the Inland Revenue on the treatment of compensation received under the Closure Scheme. The Inland Revenue has confirmed that the part of the total payment which relates to compensation for
30 loss of office will be chargeable to tax under section 401 of ITEP and will attract exemption, up to a maximum of £30,000.

12. We understand that Mr Singh signed this letter and no objection was raised by him with regard to the suggestion that the payment would in part amount to compensation for loss of office. We have been told that the compensation, as
35 identified above, had been calculated on a Business Valued method. In their subsequent letter of 3 February 2009, Mr Halis, on behalf of the Royal Mail, wrote to

HMRC, as a result of enquires raised by HMRC as to the method of calculating the compensation, in the following terms:

5 “.... I understand that payment to Mr Singh was based on a method known as the Business Value method. This was used, at the Subpostmasters request, where due to the relative short time that he/she had held Office they didn’t qualify for the usual compensation based on 28 months remuneration, In these circumstances a sliding scale was used to calculate the compensation but, if the Subpostmaster could show the cost of purchasing the Office exceeded the sliding scale, then compensation would be based on these costs subject to a maximum of 28 months
10 remuneration. However, how the compensation figure is calculated does not change the nature of the payment which is compensation for loss of office.”

13. The sum of £89,544.68 received from Post Office Ltd was paid into the company’s bank account with NatWest by automated credit from Post Office Ltd on 15 November 2004, as had all the previous salaries during the operation of the Sub-
15 Post Office. Mr Singh submitted his self-assessment return for the year 2004/5 on 2 January 2005 on the same basis as he had done so in the past, omitting any reference to any payments received from the Post Office. He understood that HMRC had agreed that all such payments should be accounted for through the company’s accounts. The company return for the period I May to 30 April 2005 was submitted on 30 April
20 2005 and declared a chargeable gain of £59,545 described as Post Office Compensation payment. That figure appears to be the total compensation less the sum of £30,000 being the exemption for the payment for the loss of office. An enquiry was opened into the company accounts on 10 May 2006 and a protective assessment was raised on Mr Singh on 20 October 2006.

25 **The Law**

14. Section 29 of the Taxes Management Act 1970 provides at:-

29 (1) if an Officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

30 (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that any assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

35 The Officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

29 (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under section (1) above –

(a) in respect of the year of assessment mentioned in that subsection; and

5 (b) ...in the same capacity as that in which he made and delivered the return,

Unless one of the two conditions mentioned below are fulfilled.

10 (4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of [was brought about carelessly or deliberately by]¹ the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when the Officer of the Board-

a. ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

15 b. informed the taxpayer that he had completed his enquiry into the return,

the Officer could not reasonably be expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above

20 (6) For the purposes of subsection (5) above, information is made available to an Officer of the Board if-

(a) it is contained in the taxpayer's return under sections 8 or 8A of this Act in respect of the relevant year of assessment (the return) , or in any accounts, statements or documents accompanying the return;

25 (b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying the same.

30 (c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return on any such claim by an Officer of the Board, are produced or furnished by the taxpayer to the Officer or...;

¹[Note: "careless and deliberate" in subsection 29 (4) are contained in the Finance Act 2008 and cae into force on 1 April 2010, which is after the dates of the enquiries in this appeal.]

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above –

(i) could reasonably be expected to be inferred by an Officer of the Board from information falling within paragraphs (a) to (c) above; or

5 (ii) are referred to in writing by the taxpayer to an Officer of the Board

(7) In respect of subsection (6) above-

(a) reference to a taxpayer's return under section 8 and section 8A of this Act in respect of the relevant year of assessment includes-

10 (i) a reference to any return of his under that section to either of the two immediately preceding years of assessment; and

(ii)....

(b)

15. Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) provides as follows:

15 **Section 5. Application to Offices and Office-holders**

(1) The provisions of employment income Parts that are expressed to apply to emoluments apply equally to Offices, unless otherwise indicated.

(2) In those provisions as they apply to an Office-

(a) References to being employed are to being the holder of an Office;

20 (b) "employee" means Office-holder;

(c) "employer" means the person under whom the Office-holder holds Office.

(3) In the employment income parts "Office" includes in particular any position which has an existence independent of the person who holds it and may be filled by successive holders.

25 **Section 62 Earnings**

(1) This section explains what is meant by "earnings" in the employment parts.

(2) In those Parts "earnings", in relation to employment, means –

30 (a) any salary, wage or fee'

(b)

Section 401 Application of this chapter

(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, or
- b.
- c.

Section 403 Charge on payment or other benefit.

- 5 (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.
- (2)
- (3)
- 10 (4) For the purposes of this Chapter the amount of a payment or benefit in respect of an employee or former employee exceeds the £30,000 threshold if and to the extent that, when it is aggregated with other such payments or benefits to which this Chapter applies, it exceeds £30,000 according to the rules in section 404 (how the £30,000 threshold applies)
- 15 (5)
- (6) In this Chapter reference to the taxable person are to the person in relation to whom subsection (1) or (5) provides for an amount to count as employment income .

Submissions

20 16. Mr Morgan submitted that the onus of proof is on HMRC to establish that the discovery assessment raised by Mr Singh was validly raised. The onus then passes to Mr Singh to demonstrate why the assessment is incorrect. Section 29 (1) (a) of the Taxes Management Act 1940 allows an Officer of the Board to make an assessment when:

25 “an Officer of the Board or the Board discover... that any income which ought to have been assessed to income tax(has) not been assessed.

Section 29 (3) Taxes Management Act 1970 prevents HMRC making a discovery assessment unless one of two conditions are fulfilled. These are the taxpayer or person acting on his behalf has been negligent (Section 29 (4)); or the information that has
 30 been discovered was made available to HMRC before the enquiry window had closed or a closure notice had been issued (section 29 (5)). Negligence was defined in *Blyth v The Company of Proprietors of the Birmingham Waterworks*[1856] EWHC Exch J65

35 “Negligence is the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might be liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.”

17. Mr Morgan submitted that in the very least negligence exists in a case in which a statement of income submitted for HMRC purposes is found to contain errors or omissions, which lead to a loss of income tax and class 1 NIC. Mr Singh failed to take account of documents provided by Post Office Ltd which quite clearly showed the payment to be compensation for loss of office. Income is taxable as earnings under ITEPA when there is an Office of employment: Mr Singh's contract made it clear that that he was not an employee of Post Office Ltd. HMRC have always accepted that Subpostmasters are not employees of Post Office Ltd.

(b) Section 5 ITEPA states: In these provisions as they apply to an Office – reference to being employed are to being the holder of an office. "Employee" means the Office holder and "employer" means the person under whom the officer holder holds office. Hence an office holder and an employee are treated the same.

(c) The position of subpostmaster is directly granted by Post Office Ltd. It is a position which cannot be bought or sold and it remains the right of Post Office Ltd to appoint who they wish. Mr Singh has a contract of services with Post Office Ltd, which holds him responsible for losses through his or his staffs' carelessness, error or negligence. The contract regards him as an Officer holder.

- the income falls within the section 62 definition of earnings and arises from either the Office or the employment.
 - Section 62 (ITEPA) 'earnings' in relation to an employment means – any salary, wages or fee....
 - The subpostmasters income from Post Office Ltd is made up of a fixed sum payable 12 monthly and payments based on the number of transactions carried out at the post Office branch. These payments arise as a result of the contract of service which Mr Singh has with Post Office Ltd.

18. Mr Morgan confirmed that, by concession, HMRC allowed the income due to Mr Singh to be paid to the partnership and latterly the Company. This concession was allowed to simplify the affairs of the subpostmaster. The liability to Class 1 NIC remains on the salary irrespective of the NT coding.

19. Mr Morgan submitted that the compensation of £89,545 paid by Post Office Ltd to Mr Singh was paid to him as compensation for the loss of his Office as subpostmaster. Section 403 (1) (a) ITEPA, any payment received from the termination of someone's employment is chargeable as his income. Section 403 (1) allows the first £30,000 of any such payment to be exempt. As a result £59,545 should be taxed as Mr Singh's normal employment income. The payment has arisen as a result of the Network Reinvention and some 3000 Sub-Post Offices have been closed. Although the standard Post Office contract provides at paragraph 8:

“The terms of the appointment of sub postmaster do not entitle the holder to be paid sick or annual leave, pension or compensation for loss of office.

5 However, the letter of 16 March 2004 identifies that the payment was made under the Network Reinvention Scheme. The closure of the Sub-Post Office did not include the closure of Mr Singh’s private business. Mr Singh counter-signed the letter and as a result gave notice of his resignation and that his position as an officer holder would terminate. Post Office Ltd ® have sought the views of HMRC and it has been agreed that;

10 “that part of the total payment which relates to compensation for loss of office will be chargeable to tax under section 401 of ITEPA 2003 and will attract the exemption, up to a maximum of £30,000”

20. Mr Morgan submitted that the reference to “part” was included in case there were further smaller compensation payments. In the Network Reinvention Scheme there were no such further payments. There is nothing in the documentation that attributes the payment to a capital payment, or as anything other than compensation for loss of office. He also submitted that this interpretation is consistent with HMRC’s guidance available on their website at EIM 68228, which deals with the tax treatment of Post Office employees; sub-postmasters; payments on termination of Office. EIM 68228 indicates that payments under Network Rationalisation initiatives such as Urban Network Reinvention Scheme fall to be charged under section 401 ITEPA 2003.

21. Essentially, the Post Office has clarified the position with HMRC and has agreed that the payments represent compensation for loss of office. HMRC has dealt with these payments on a consistent basis and Mr Singh falls within that basis. There is no doubt that the payment made to Mr Singh related to his position as subpostmaster. The compensation came from the severing of his original contract with Post Office Ltd, which was not a trading contract but a contract of service. The payment can only be considered using ITEPA rules as a payment for loss of office and should be correctly assessed under section 401 ITEPA.

22. The Tribunal is requested to find that;

- 30
- Mr Singh held the Office of sub postmaster in his own right.
 - That the payment of £89,545 was solely in respect of a compensation payment for loss of office.
 - That Mr Singh was negligent in omitting the payment from his self assessment return
- 35
- That the quantum of the assessment raised to bring in charge a figure of £59,545 under section 401 ITEPA 2003 is correct

and that the appeal should be dismissed.

23. Mr Patara submitted that the Tribunal should look at the substance of the transactions. Mr Singh had been approached by Post Office Ltd ® to take over a failing Sub-Post Office. This he had done by incorporating it in his existing Newsagent's shop which he ran with his family. Mr Singh had been required to
5 expend a considerable amount of money adapting the premises. He had also had to sacrifice the right to use his 'Payzo' facility so that Post Office Ltd ® could obtain commission on the use of their 'Paygo' system and the Lottery terminal. Mr Singh had been no more than the name necessary to run the Sub-Post Office business but all the income, by way of the salary and the commission on the machines, and
10 expenditure passed through the partnership's and latterly the Company's accounts. The Post Office Ltd ® contract provided that he was self-employed and at paragraph 8 stated:

15 "The terms of the appointment of sub postmaster do not entitle the holder to be paid sick or annual leave, pension or compensation for loss of office".

24. When the Post Office Ltd ® decided to close the Sub-Post Office business under the Urban Post Office ® Closure Scheme Mr Singh negotiated the compensation himself under the Business Value method of calculation, which made no reference to compensation for loss of office. In fact the only reference to remuneration was to the
20 effect that whatever compensation was agreed could not exceed 28 months salary. Mr Patara suggested that that was no more than a cap to the level of the payment and did not alter its substance as a payment for goodwill. The original offer letter of 16 March 2004 at paragraph 28 anticipates that 'part' of the payment, which relates to compensation for loss of office, namely £30,000 will be chargeable under section 401
25 ITEPA. This means that Mr Singh was entitled to £30,000 free of tax and that the balance, amounting to £59,545, could be treated as a payment for goodwill. Mr Singh had therefore included that figure in the Company's accounts as a 'Post Office compensation payment' and deducted from it the allowable costs for the goodwill carried forward of £70848 leaving a capital loss in the Company of £11,303. He had
30 included none of the £30,000 in Mr Singh's return as he understood that that the £30,000 was tax free, as it still is, and gave no rise to loss of tax.

25. Mr Patara suggested that the Tribunal should consider the payment against the background by which the business was conducted. The payments from the Post Office had always been paid into and accounted for in the Company's accounts. It was not
35 unreasonable to expect the compensation to be treated in the same way. All the payments of salary and the compensation had been paid directly in to the Company's bank account and not into Mr Singh's personal account. Mr Singh had shared the same with the family and had not benefited from the full payment. The documentation was clearly confusing and in December 2006 the Revenue had asked
40 that the matter be put on hold as discussions were ongoing between HMRC and the Post Office in respect of the treatment of the Network Reinvention compensation payment. Mr Singh had not produced his contract, but Mr Morgan had referred to a generic contract which appeared to indicate that there would be no payment for loss of office. Mr Morgan has submitted that the payment must be considered in the light of
45 the letter of 16 March 2004, which referred to the Network Reinvention Scheme, and

confirmed that the payment was compensation for the loss of office. In spite of that, Mr Morgan still relies on the generic contract of services as the basis under which Mr Singh was employed. He cannot have it both ways and the Tribunal must look at the substance of the transaction which, in the current circumstances, was that the payment
5 was calculated mathematically without reference to income and paid to the Company's account. As such, it was a capital payment and formed no part of Mr Singh's income. By concession, £30,000 could be treated as a payment for loss of office and as it is not taxable it was not included in Mr Singh's return

26. HMRC could not re-open the 2004/5 self-assessment as they were out of time. There had been no negligence on either Mr Singh's or Mr Patara's part, as his agent. HMRC had conceded that the position was far from clear and HMRC had asked that Mr Patara and Mr Singh await the outcome of the discussions with Post Office Ltd ® before the matter was resolved. Since there was no negligence, and the self-assessment return had been completed, as conceded by HMRC over the years, HMRC
15 must have been aware at the time of the self-assessment return of the way in which payments from the Post Office were to be treated. The Company's accounts to 30 April 2005 had included the salary of £27,228 as income. The Tribunal should allow the appeal and confirm that the sum of £59,545 be allowed in calculating the capital loss for capital gains tax purposes in the Company.

20 **The Decision**

27. We have considered the law and the evidence and have decided that the payment of £89,545 was a payment for loss of office and as such should have been accounted for in Mr Singh's self-assessment return. However, we have also decided that HMRC were out of time in raising the discovery as they were fully aware of the
25 way in which the money from the Post Office had been treated in the past and should, therefore have raised the matter when the return was submitted. Because they did not do so they are out of time. Nor do we accept that either Mr Patara or Mr Singh had been negligent in completing the return. Mr Patara was entitled to complete the return as he had done in the past. There has been considerable doubt surrounding the status
30 of the payment. HMRC have defended several previous applications to the Commissioners and required a Stated Case. In the Stated Case the High Court found in HMRC's favour and confirmed that the payment in that case was compensation for the loss of office.

28. The generic contract, produced by Mr Morgan clearly identifies that the contract with Post Office Ltd ® is personal to Mr Singh. He is responsible for running the
35 Sub-Post Office and personally liable for any claims. Furthermore, he still had to pay the Class 1 NI liability even though, by concession, HMRC allowed the payments to be made to and accounted for in the Company. That status was further confirmed by paragraph 8:

40 "The terms of the appointment of sub postmaster do not entitle the holder to be paid sick or annual leave, pension or compensation for loss of office".

Mr Singh has suggested, therefore, that the payment could not be compensation for loss of office. He is not correct. The letter of 16 March 2004 at clause 2.1 indicates that

“this sum represents compensation for loss of office...”

5 We have been told that the letter was signed by Mr Singh in the following terms

“ I acknowledge and agree to be bound by the terms set out in paragraph 2, on the basis of the conditions set out in paragraph 1 above, and hereby give notice to resign under my Contract (subject to paragraph 4 above).”

10 29. The letter of 16 March 2004 must not have been clearly worded to have given rise to the several applications to Commissioners referred to by Mr Morgan. Paragraph 2.8 referred to above indicated that Post Office Ltd ® had sought the views of the Inland Revenue on the treatment of compensation received under the Closure Scheme. The Inland Revenue had confirmed that that part of the total payment as relates to compensation for loss of office will be chargeable to tax under Section 401
15 of ITEPA and will attract the exemption, up to a maximum of £30,000. We note that the generic contract on, which the letter relied, indicted that there could not be any compensation for loss of office. The position is not helped by the fact that the calculation was made by reference to the Business Valuation method, which makes no reference to income of any kind, but is the sort of calculation one would expect to see
20 in a capital gains tax calculation. Nor does Appendix 1 make any reference to compensation for loss of office. It is only in the section dealing with the basis of payments that paragraph 1.4 states

25 “ the compensation payments described in this note and **its Appendix 1** (our emphasis) represent **in their entirety** (our emphasis), compensation for loss of office”.

The Letter of 16 March 2004 does, however, suggest that part of the payment may not be for loss of office. In light of the note in Appendix 1 it is difficult to see what that might be referring to. Unfortunately Mr Singh signed the letter confirming that the payment was compensation for loss of office and he cannot know dispute that. He
30 accepts that the Post Office licence belonged to him. When the matter was ultimately concluded by the letter of 4 October 2004 it was concluded by reference to the letter of 16 March 2004. We are satisfied that he was an Office holder and the payment was compensation for loss of office.

35 30. Mr Singh’s self-assessment return was submitted on 2 January 2005 and we have been told that HMRC were aware of the final payment at that time. The return followed a sequence of returns, which HMRC had allowed by concession, as the salary appeared in the Company’s accounts and had been so returned. HMRC were undoubtedly aware of the way the payments were dealt with and should have raised their observations when the return was sent in. They raised the discovery assessment
40 on 20 October 2006, 22 months later and out of time. The Company accounts were filed on 31 August 2005 and declared the chargeable gain of £59,545. The enquiry

into the Company's affairs was commenced on 10 May 2006 and is still open. The affairs of Mr Singh and the Company have been dealt with together and HMRC were on notice as a result of the chargeable gain referred to in the accounts and to the fact that the final salary, which was substantially less than the previous year, had been
5 accounted for in the Company's accounts.

31. Mr Patara, on behalf of Mr Singh, had entered £59,545 into the Company's accounts as the payment for goodwill. The letter of 16 March 2004 indicated that part of the total payment, which relates to compensation for loss of office, would attract an exemption of £30,000. Mr Patara took the view that he could allocate part of the
10 compensation as exempt and as there was no tax loss he did not need to return it in Mr Singh's self-assessment. He has not tried to hide it. He has accounted for the last year's salary of £27,228 in the accounts and brought in the figure of £59,545 as the goodwill payment based on the calculation he had been given by Mr Singh, which had been calculated under the Business Valuation method. If HMRC had queried the
15 matter at that time they could reasonably have been expected, on the basis of the information made available to them at the time, to be aware that further income would have been assessable against Mr Singh. They would undoubtedly have been told that £30,000 had been omitted as it was not, and still is not, subject to tax. The letters and documentation are far from clear. HMRC were content to allow the matter to go
20 before the Special Commissions (now this Tribunal) for a definitive answer. In those circumstances we do not accept that Mr Singh was negligent in the way he has dealt with the matter. He arranged for all the payments to go through the Company's accounts, as he had in the past. Had the matter been dealt with correctly, and on time, by HMRC the £30,000 would still have been exempt with no loss to HMRC. The
25 discovery assessment anticipated that. We therefore find that, although the payment was in its entirety a payment for compensation for loss of office, the discovery assessment must fall as it was brought out of time and neither Mr Singh nor Mr Patara act negligently.

32. As a consequence of this decision the payment of £89,545 cannot form any part
30 of the Company's accounts, which should be concluded without the reference to £59,545 and the capital gains assessment as raised should be disallowed.

33. 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
35 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.

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TRIBUNAL JUDGE
RELEASE DATE: 4 November 2011

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