



**TC03184**

**Appeal number: TC/2012/02464**

*INCOME TAX- strike out –appeal facts identical to case appealed by husband - first-tier tribunal dismissed the husband’s appeal and both the first-tier tribunal and the upper tribunal dismissed the husband’s application to appeal the case to the upper tribunal- case dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MRS PATRICIA SUTTON**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE DAVID S PORTER**

**Sitting in public at Alexandra House, Manchester on 2 December 2013**

**Mr Richard Sutton for the Appellant**

**Mr Bryan Morgan, an Inspector of Taxes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.**

## DECISION

1. Mr Bryan Morgan (Mr Morgan), an Inspector of Taxes, appeared on behalf of the Respondents (HMRC) and stated that in HMRC's view there was no prospect of the Appellant (Mrs Sutton) succeeding in her appeal, as the facts of this appeal are identical to those in her husband's (Mr Sutton) appeal and this appeal should be struck out under Rule 8 (3) (c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the Rules). Mr Richard Sutton, on behalf of Mrs Sutton, considered that the settlement with AXA/PPP was by way of surrender of the policy in consideration of a capital sum of money calculated in accordance with the formula in the Financial Ombudsman Service letter of 4 November 2009

### The facts

2. On 11 May 1994 Mr and Mrs Sutton took out lifetime care policies with AXA/PPP. At the time of the settlement the Financial Ombudsman Service had decided, on behalf of all the relevant policy holders, that these types of policies had failed to give adequate warnings of the true 'risk' involved in purchasing a Lifetime Care Policy and it had negotiated a settlement with AXA/PPP whereby they recommended that a refund of premiums, plus interest, was the most appropriate remedy under the circumstances. The Financial Services Authority, in an undertaking dated 5 April 2006, reached an agreement with PPP to the effect that for all future PPP long term protection products, single premium policy holders would be offered the option of a surrender value from their policies, based on a fair method of calculation and costs, taking into account the customer's and the firm's position. This undertaking did not assist Mr Sutton as it related to future settlements.

3. The offer made to Mr and Mrs Sutton by the Financial Ombudsman Service required them to sign an acceptance in the following terms:

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

Mr Sutton told the Tribunal that he had been unhappy to sign the confirmation as he would have to pay tax on the interest element of the compensation. He said that he had tried to negotiate a surrender of the policy with AXA/PPP, but to no avail. As a result, he and his wife had had to sign the confirmation, but he had said to AXA/PPP that he would take the matter up with the Tribunal. Mr Sutton is 90 years of age and had been a commercial accountant during his working life. As a result, he believed that he would not need to pay the interest of £6,193.25 calculated as 8% of the value of the premiums refunded.

4. Lady Mitting, a Tribunal Judge, heard his appeal on 14 November 2011 with Derek Robertson, a member. They decided that it was not possible to escape from the wording of the confirmation, which clearly referred to interest. She was not prepared to convert the interest element into a mere enhancement of the capital sum whereby the interest would be liable to tax. She dismissed the appeal.

5. Mr Sutton applied to Lady Mitting for the right to appeal his case to the Upper Tribunal. Lady Mitting considered his application on 24 February 2012 and dismissed his application for permission to appeal because she was satisfied that there was no error of law in her decision

5 6. Mr Sutton was not content with that decision and appealed, in writing, to the Upper Tribunal on 26 October 2012 requesting that he be allowed to appeal his case to the Upper Tribunal. Judge Timothy Herrington considered the written application. Mr Sutton's submission was based on the premise that in order for the sum concerned to amount to interest the principal sum concerned, by reference to which it was  
10 calculated, must have the character of a debt, which arises by virtue of the contract being rescinded or void. Mr Sutton also contended that as he had had the use of the benefit of the policy for ten years, he had no cause of action against AXA/PPP prior to the expiry of ten years, therefore the insurer was not indebted to him until the date of the acceptance of the settlement. Taxable interest could only apply from that date.

15 7. Judge Herrington agreed with the Judges in *Riches v Westminster Bank Limited* [1947] AC 390 and *Shop Direct Group and Others v the Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 128 (TC). It followed that the principal sum, to which the alleged interest relates, also did not exist as a debt until it was awarded, as damages in *Riches*, and as compensation for the absence of a  
20 surrender value to Mr Sutton's policy in his case. The two requirements set out by Megarry J in *Euro Hotel (Belgravia) Limited* [51 TC 159] were met, namely that there was a sum of money by reference to which the payment is said to be interest is to be ascertained, and the sum of money must be due to the person entitled to the alleged interest. The fact that the First-tier Tribunal made no finding as to whether the  
25 contract was avoided or rescinded discloses no arguable error of law.

8. Judge Herrington also confirmed that a sum may still be interest notwithstanding that the principal sum to which it relates did not exist as a debt until the settlement agreement was concluded. The fact that Mr Sutton had use of the policy in the  
30 meantime was irrelevant; AXA/PPP agreed that he should be compensated for the failure to provide a surrender value at the end of the initial term and that agreement generated both a principal sum, calculated by reference to the payments made from the outset of the contract, and a sum in respect of interest to represent compensation for the failure of the sums to have been invested so as to generate the right to a  
35 surrender value. On that basis, the sum expressed as interest meets the requirements formulated in the two cases referred above. He therefore refused to allow Mr Sutton to appeal to the Upper Tribunal.

9. Mr Sutton was not content with that decision and appealed to Judge David Demack in the Upper Tribunal requesting an oral hearing on 8 April 2013 for the right  
40 to appeal to the Upper Tribunal. Mr Sutton had not been able to attend that hearing, but provided the Tribunal with his speaking notes. Judge Demack found that both the First-tier Tribunal's decision and that of Judge Herrington contained no arguable errors of law and he refused Mr Sutton's application to appeal to the Upper Tribunal.

10. Mr Sutton has appealed to this Tribunal on behalf of Mrs Sutton by a Notice of Appeal dated 14 December 2011 for the repayment of tax amounting to £2014.14 assessed on interest of £10,070.71 paid in addition to the repayment of her premiums by AXA/PPP on the basis of the terms set out in paragraph 3 above. In the Notice of Appeal Mr Sutton seeks to argue, yet again, that the settlement with AXA/PPP was by way of a surrender value. He submits that taxable interest should arise only in respect of the period from the date of the acceptance of the initial offer to the dates of settlement. These arguments were rehearsed at length in his own appeal which was unsuccessful. I therefore strike out Mrs Sutton's appeal under Rule 8 sub-paragraph (3) (c) as there is no reasonable prospect of Mrs Sutton's case, or part of it, succeeding. I would also point out to Mr Sutton that he should bear in mind Rule 10 (b) as to costs

11. 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.

**DAVID S PORTER**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 6 January 2014**