COLLAS CRILL

In the matter of Abacus Global Approved Managed Pension Trust

MAY 2016

Facts

The applicant, Mr Gresh, requested that the trustee of his pension fund pay to him a lump sum distribution (nearly £1.5 million). Mr Gresh had received tax advice which stated that so long as the distribution was not sent to the UK the distribution would be tax-free. It later transpired that this advice was wrong (in that only periodic payments rather than a lump sum would be tax-free) and therefore the distribution was subject to a UK income tax liability of 40%. Consequently, Mr Gresh sought to have the distribution set aside (i.e. to undo the transaction) on grounds of mistake. He contended that in requesting the distribution in reliance on the tax advice, he was mistaken as to the tax consequences of it and had he known that the distribution would not be tax-free, would not have requested it. The trustee had a broadly neutral role in the court application but on the whole agreed with the Mr Gresh's submissions.

The decision

The Guernsey courts have a discretion to set aside a voluntary transaction where it has been made as a result of a mistake. Here, the Royal Court of Guernsey considered decisions of the English courts which set out the principles courts should consider when deciding whether or not a mistake should be corrected. Whilst both parties agreed that the distribution was made in reliance on the incorrect tax advice, the main principle the court had to consider was whether or not it would be unjust to leave the mistake uncorrected. The court looked at the consequences of setting aside, or not setting aside, the distribution and concluded that only the Mr Gresh would be affected (by having a tax liability) if the mistake was not corrected (and HMRC who would not be able to levy the tax if the distribution was set aside). The court decided not to set aside the distribution and held that it would not be unfair (in the sense described in the law) for Mr Gresh to retain the proceeds of the distribution made by the trustee to him and to pay the tax liability.

Interesting comments

Often in the past, trustees and beneficiaries have applied to court to set aside decisions which, in hindsight, they would not have made. To many, this has been regarded as a "get-out-of-jail-free" card for those seeking to avoid tax liabilities. However, the court in this case made it clear that "not every mistake will be corrected by the courts". The court noted that there was a contractual relationship between Mr Gresh and his tax advisers and pointed to English case law which suggested that, in circumstances such as this, it may be more

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appropriate for parties to pursue a claim against their tax (or other relevant) advisers (for example, for a claim in negligence). The court also made clear that whilst the incorrect tax advice was the central factor in the distribution, Mr Gresh was the only person who would suffer as a result of the decision not to set the distribution aside. The case suggests that in circumstances where other family members or third parties would also suffer, then the court may be persuaded to set aside such distributions.

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