



TC02161

Appeal number TC2011/05946

Statutory benefit on employee's mortgage from employer. Not at favourable rate. Statutory deemed benefit still applicable.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JUSTIN FLANAGAN

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GERAINT JONES Q. C.
SHEILA CHEESMAN**

Sitting in public at 45 Bedford Square, London WC1 on 07 March 2012.

The Appellant in person.

HMRC representative.

DECISION

1. The appellant, Mr Flanagan, is an employee of a bank, RBS plc. In that capacity he obtained a mortgage advance in connection with his purchase of a dwelling. The advance was at a mortgage rate available only to employees of that bank. Accordingly, he was deemed to have a benefit in kind in accordance with sections 174 – 176 Income Tax (Earnings and Pensions) Act 2003. The respondent has demanded (and received) tax calculated in accordance with those statutory provisions.

2. The appellant has appealed on the basis that he has not truly received a benefit because during the relevant tax years he could have obtained a commercially available mortgage, that is, a mortgage available to any member of the public meeting the lending criteria, at an interest rate much below the "official rate" applied pursuant to section 175 of the 2003 Act. It has not been contended that the appellant can come within any of the exceptions set out in section 176 of the 2003 Act.

3. The respondent points out that if a person is an employee of an appropriate financial institution and obtains a mortgage from that institution which is available only to its employees, usually at a preferential interest rate, then the calculation of any benefit has to be undertaken by reference to the "official rate" referred to in the above-mentioned statutory provisions. In other words, the benefit in kind calculation does not necessarily bear any relationship to interest rates in the commercial market; the extent of the benefit is calculated by reference to an artificially set "official rate". That is capable of causing unfairness; as in this case.

4. The respondent contends that in those circumstances it has correctly collected tax from the appellant without making any decision capable of being appealed pursuant to the appeal provisions in the Taxes Management Act 1970. It is not an attractive argument but it is a technically correct argument.

5. If the appellant wishes to challenge the correctness of the benefit or deemed benefit that has been subjected to tax, he would have to submit a tax return for the relevant years; invite a decision as to how much tax was due (albeit already paid); and then appeal that decision. That is not a course that the Tribunal recommends given that, as pointed out above, the appellant is caught in a situation where the amount of his benefit is calculated by reference to inflexible statutory rules, rather than by reference to the reality of the benefit actually obtained or any criteria designed to achieve a fair outcome.

6. The result of the legislative provisions referred to above, when applied to the facts of this case, works unfairness upon the appellant, but that is not a matter that can influence the outcome of this application. The arguments advanced by HMRC are technically correct and accordingly, the appeal is struck out.

7. 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.

**GERAINT JONES Q. C.
TRIBUNAL JUDGE**

RELEASE DATE: 30 July 2012