Family fortunes

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Keith Gordon discusses *Baylis v HMRC* [2016] UKFTT 725 (TC) which considers how to allocate a benefit in kind when more than one family member is employed by the same employer

Key Points

What is the issue?

How should benefits-in-kind be assessed when more than one family member is employed by the same employer?

What does it mean to me?

The Tribunal considered that the question will usually be answered by reference to a hierarchy inherent in ITEPA, section 721.

What can I take away?

There is an alternative approach which might need to be considered in a future case.

In one of the first cases I ever argued before the (now defunct) General Commissioners, I had been instructed by the director of a family-owned company. HMRC had assessed him in relation to a benefit received by his son. A major part of the case concerned the question as to whether the father should be assessed for tax in circumstances where the son was also an employee of the company, but entitled to a statutory relief. At an extremely late stage in the proceedings, HMRC formally admitted that they do not assess more than one family member in relation to the same benefit-in-kind. As the General Commissioners were clearly persuaded that the son was indeed an employee of the company, the appeal was soon allowed (and, indeed, because of some failures to comply with the discovery assessment rules, HMRC actually agreed to repay some of the tax that had not even been in dispute).

It was therefore with some intrigue that I came across the recent case of Baylis, where similar issues arose.

Facts of the case

The Appellant (Sarah Baylis) was employed by a company of which her father, Mr Alec Baylis, was the majority shareholder and managing director. The company had paid for the care home fees in relation to the Appellant’s late mother, Mr Baylis’s wife (‘Mrs Baylis’).

It was HMRC’s primary contention that Sarah Baylis had incurred a personal liability to pay the care home fees. In the alternative (i.e. if it were found that the contract had been reached with the company itself), HMRC argued that they had the discretion as to which family member (if, as in this case, more than one was an

employee) would be subject to a benefit-in-kind charge. They chose Ms Baylis.

Mr and Mrs Baylis had separated in 1977, but remained formally married. Furthermore, despite living apart, it appears that Mr Baylis maintained a number of obligations towards his wife. After the separation, Sarah Baylis continued to live with her mother up until the time when Mrs Baylis was admitted to hospital in 2009.

Also in 1977, Mr Baylis purchased all the shares in the company. These have subsequently been subject to various reorganisations into different classes and some disposals. Nevertheless, at all relevant times Mr Baylis remained the majority shareholder.

By the time that Mrs Baylis went into hospital, her daughter (Sarah) was effectively in day-to-day control of the company. However, the Tribunal noted that her father was a controlling character who regularly attended the company premises without notice to check what was going on and, despite day-to-day responsibility being held by Ms Baylis, he was very much in overall control.

For many years, the company made monthly payments to Mrs Baylis. HMRC tried to suggest that this was evidence of a self-employment business being carried on by her. However, the Tribunal accepted that this was housekeeping money, noting that the payments continued even after Mrs Baylis went into hospital.

By late 2009, it was clear that a nursing home would be more appropriate for Mrs Baylis and her daughter signed the relevant contract with the home, where Mrs Baylis resided until her death in early 2011. The fees were paid for by the company, which recorded the expenditure as staff welfare.

The P11Ds prepared by the company’s accountants initially made no mention of the care home fees. However, when they came to prepare the company’s statutory accounts, the accountants discovered the fees and raised the subject with Ms Baylis. She considered that any benefit-in-kind was referable to her father and, in due course, amended P11Ds were submitted to HMRC.
Subsequently, there appears to have been a major rift within the family which has involved Ms Baylis leaving the company’s employment. In August 2012, her replacement drafted a board minute which reallocated the responsibility for the benefit-in-kind from Mr Baylis to Ms Baylis. This was duly passed to HMRC together with a further set of revised P11Ds. This then led to HMRC’s assessments on Ms Baylis.

The Tribunal’s decision

The Tribunal (Judge Anne Redston) first considered the law of agency and whether this led to the conclusion that Ms Baylis’s agreement with the care home was reached with her acting as the company’s agent. Judge Redston concluded that this was indeed the case. In reaching her conclusion, the Judge considered it clear that Mr Baylis had authorised both the payment by the company of the care home fees and for Ms Baylis to act as the company’s agent in this regard.
With relation to the second issue, the Tribunal readily concluded that the payment of the care home fees amounted to a benefit provided for a member of the employee’s family or household. However, the difficulty of the case was whether this meant a benefit-in-kind charge for Ms Baylis or for Mr Baylis, given that the late Mrs Baylis was a family member of both and that they were both employed by the company that had incurred the expense.

On behalf of Ms Baylis, it was suggested that the tax charge should follow a hierarchy as represented by the various different paragraphs in the definition of ‘a person’s family’ as found in the Income Tax (Earnings and Pensions) Act 2003 (‘ITEPA’), section 721(4). HMRC’s view was that the employer simply had a discretion as to which family member they choose to assess in such cases.

Judge Redston’s decision notes that she referred the parties to the speeches in the House of Lords’ decision in *Vestey v Inland Revenue Commissioners* [1980] AC 1148 which concerned and rejected the idea of HMRC being able to choose which (if more than one) taxpayer should be saddled with a particular tax charge. Although HMRC’s argument was subtly different in this case (in that they were suggesting that the employer could choose), the Judge considered that the same objections would apply.

Although she recognised that the hierarchy approach could lead to similar difficulties in other cases (for example, if two siblings were both employed in a business), it was held that the tax charge should generally follow the statutory hierarchy in section 721(4). In the alternative, however, (i.e. assuming it was down to the employer’s discretion) Judge Redston held that she would have decided on the case in the same way (i.e. so as to identify Mr Baylis as the recipient of the benefit-in-kind). This would have been on the basis that he had consistently accepted financial responsibility for his wife and because he had instructed his daughter to arrange for the fees to be paid by the company.

For these reasons, Sarah Baylis was held not to have been in receipt of a taxable benefit-in-kind and, consequently, her appeal was allowed.

Commentary

The Tribunal was conscious at an early stage of proceedings that the possible outcome (which in due course was realised) that Ms Baylis's appeal would be successful could mean that there would be a tax charge on her father. The Judge considered the prospect of adding Mr Baylis to the appeal so that his position could be protected. However, he was unavailable for the hearing. As Judge Redston noted, the tax years in issue were more than four years old although (in one of them) HMRC were still in time to issue an assessment on the basis of careless conduct. However, the Tribunal thought that this would be unlikely and decided that the interests of justice were best served by continuing with the hearing. This seems like a very pragmatic decision.

However, one has to ask why HMRC had not taken any precautions to cover the possibility that Mr Baylis might have been the relevant taxpayer in this case. Perhaps they were concerned (not necessarily rightly) that this would undermine their argument that they could choose which taxpayer was liable for the benefit-in-kind charge. However, I assume that the question was not even considered and that HMRC simply felt that they had found someone on whom they could allocate a tax charge and thought no further. Of course, the nature of the company's disclosure made to HMRC in 2012 would explain why HMRC readily adopted the view that Sarah Baylis was liable for the tax.

Although one might ordinarily assume a spouse (if still alive) is more likely to pay for care home fees than a child, the detailed facts of this particular case do certainly explain why HMRC initially considered Sarah Baylis to be in the frame. Indeed, it is quite likely that the Tribunal might well have considered HMRC's arguments (even if not their reasoning) to be correct if it were not for the detailed evidence provided by Sarah Baylis and on her behalf to paint the more accurate picture for the benefit of the Tribunal. This is certainly a lesson that should be remembered by other taxpayers as there is almost never a second chance to provide such evidence.

The Judge was correct to refer to the Vestey case and the constitutional concerns that were expressed by the very senior judges at the 'frightening' thought that an HMRC officer could simply choose how much tax a taxpayer was liable to pay,

suggesting that would amount to ‘a radical departure from constitutional principle’. I wonder therefore what Lord Wilberforce, Lord Salmon, Lord Edmund-Davies, Lord Keith of Kinkel and Viscount Dilhorne (whose opinions should not be easily cast aside) would have made of Accelerated Payment Notices. However, where I am in respectful disagreement with the Judge is in relation to her acceptance of the argument that the process of identifying the correct taxpayer liable to pay tax on a benefit-in-kind should follow the hierarchy set out in ITEPA, s. 721(4). First, I consider that that could give rise to results that are unnecessarily capricious (even by tax standards). Secondly, the statute gives no indication whatsoever to suggest that it is providing any form of hierarchy. Thirdly, I am of the view that section 721(4) is drafted by reference to the taxpayer and who constitutes a member of the taxpayer’s family, whereas the approach taken by the Tribunal seems more akin to starting from the receiver of the care (Mrs Baylis) and then working down to identify who might be found to be a relevant member of her family. Fourthly, although of limited persuasiveness, it is noted that section 721(4) rewrote a number of different provisions from the Income and Corporation Taxes Act 1988, some of which listed family members in a different order.

Instead, I consider that (almost as the Judge concluded with her alternative finding) that the facts of the case should identify the employee on whom the tax charge should fall. Thus, had Mr Baylis been totally uninvolved in the decision to let the company pay for the care home fees then it would have been wholly inappropriate for him to be liable to the tax charge on the benefit-in-kind simply because spouses come higher up the list than children.

There will of course be some situations where there is simply no way to differentiate between two taxpayers: for example, a situation in which two siblings are co-directors of a company which pays for the siblings’ elderly parents’ care home fees. However, I see no real obstacle to the siblings in that situation each being jointly assessed for half of the taxable benefit.
Finally, it is worth noting that the Tribunal and HMRC were, to a significant extent, having to sort out the tax consequences of what was developing into a full-blown family feud. The Judge was careful to ensure that it addressed the evidence entirely dispassionately. Although HMRC were aware of the conflicting stories, their handling of the case suggests that they reached an initial view and felt compelled to stick with the first answer that they gave.