For whom the bell tolls

Management of taxes **Personal tax**



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Keith Gordon revisits a case concerning a negligible value claim made on behalf of a deceased taxpayer

Key Points

What is the issue?

As part of the tax return prepared by Mr Leadley's, his executors included the negligible value claim that Mr Leadley would have been able to make but for the fact of his untimely death. HMRC's appeal against the First-tier's decision was based on the legislative wording 'a claim may be made by the owner of an asset ('P') if … the asset has become of negligible value while owned by P'

What does it mean to me?

The Upper Tribunal allowed HMRC's appeal. They pointed out that, contrary to the view expressed by the First-tier judge, the date of a negligible value claim is when the claim is submitted and not any earlier date

What can I take away?

The Upper Tribunal's decision gives rise to potential anomalies. One example that has occurred to me is the ordinary rules for enquiries in the Taxes Management Act 1970.

In my article 'Whose claim is it anyway?' in the January 2015 issue of *Tax Adviser*, I wrote about the taxpayers' successful appeal in *Drown & Leadley v HMRC*. The taxpayers were the executors of the late Mr Leadley who had been killed in a motoring accident in May 2010.

During Mr Leadley's lifetime, he had made a couple of investments which had become worthless. As at the time of Mr Leadley's death, no negligible value claims had been made in respect of those investments even though the conditions for making such claims were met. As part of the tax return prepared by Mr Leadley's executors for the tax year which had ended 5 April 2010, they included the negligible value claim that Mr Leadley would have been able to make but for the fact

of his untimely death.

HMRC rejected the claims on the basis that they would have been valid only if:

- they had been made by Mr Leadley personally (which they weren't); or
- given that they were made by the executors, the assets had become of negligible value during the executors' period of ownership (which, clearly, commenced following Mr Leadley's death, by which time the assets were already of negligible value).

HMRC's case was based on the wording of the Taxation of Chargeable Gains Act 1992 ('TCGA'), section 24(1A), (2) which provides that 'a claim may be made by the owner of an asset ('P') if … the asset has become of negligible value while owned by P'. In the First-tier, Judge Mosedale rejected HMRC's argument as overly literal. Instead, she considered that references to the taxpayer should be interpreted so as to cover both Mr Leadley for periods during his lifetime and his executors subsequently.

HMRC were undaunted and appealed against the First-tier's decision to the Upper Tribunal. Given the potential costs implications, the executors chose not to participate in the proceedings (with HMRC's agreement not to seek their costs). Consequently the Upper Tribunal heard arguments from HMRC alone.

The Upper Tribunal's decision

The Upper Tribunal (Mr Justice Newey and Judge Greg Sinfield) allowed HMRC's appeal. They pointed out that, contrary to the view expressed by Judge Mosedale, the date of a negligible value claim is when the claim is submitted and not any earlier date; section 24(2)(b) simply allows an earlier date to be specified as the time of the deemed disposal and reacquisition.

In reaching this decision, the Judges also referred to an internal Inland Revenue memorandum dated 1993 which asserted that there is a difference in tax treatment between the following two cases:

- a taxpayer accidentally killed on her way to her accountant's office for the purposes of making a negligible value claim; and
- the same taxpayer accidentally killed on her way back from her accountant's office having just made a negligible value claim.

The Judges also referred to a decision of Mr Justice Vinelott in *Williams (HM Inspector of Taxes) v Bullivant* [1983] STC 107 which concerned a previous version of the negligible value provisions where the Judge had cautioned against taking an overly literal approach to the legislation (albeit in a different circumstance). The Judges in the Upper Tribunal considered that the Williams v Bullivant decision presented no obstacle to HMRC's case.

The Tribunal's decision then notes that the Judges 'floated' the question as to whether it is possible to identify Mr Leadley with his executors. On this point, too, the Tribunal agreed with HMRC. They accepted HMRC's submissions that the TCGA treats deceased taxpayers and their personal representatives as distinct entities, there is a deemed disposal by the deceased and acquisition by the personal representatives upon death (TCGA, section 62) and that there could be further anomalies and confusion if one were to conflate deceased taxpayers and personal representatives.

As a result, HMRC's appeal was allowed.

Commentary

Having considered the original decision to be a triumph of common sense, has the additional learning of the Upper Tribunal made me change my mind? The answer to this question is no.

I fully accept that Judge Mosedale was incorrect when she stated that the date of the claim was 5 April 2010 (being the end of the last full tax year of Mr Leadley's life and the date on which the deemed disposal and reacquisition were meant to take place). However, this is a slip of terminology and it is perfectly clear what Judge Mosedale meant. In any event, the point does not go to the real point in dispute.

Furthermore, the Upper Tribunal's reliance on the 1993 memorandum is slightly worrying. It is obvious that it does not clarify the meaning of the law and does no more than to say what one individual in the former Inland Revenue considered 24 years ago to be the rather harsh effect of the legislation. What the Tribunal's decision does not record is whether that interpretation was in fact shared by others within the Revenue, or even the extent to which the memorandum was relied upon by the Tribunal as 'evidence' of the meaning of the statute.

I agree that the decision in Williams v Bullivant presented no obstacle to HMRC's argument in the present case. But, there again, it did not advance it either, other than to create the impression that Judge Mosedale's approach to the legislation was wildly at odds with reality. The truth is somewhat different – as already noted, Judge Mosedale had made a small error in terminology which does not address the real issue in the case. In fact, most of the Upper Tribunal's discussion focused on this irrelevant point and just two paragraphs are spent looking at whether one can in fact identify the deceased with his executors. Rather worryingly, it seems as if HMRC did not even attempt to address this point in their arguments and the point was raised by the Tribunal Judges themselves, even though it was at the heart of Judge Mosedale's original decision.

So far as the Tribunal's (brief) analysis of the key question, a number of points are worth making. As noted above, HMRC argued that identifying a deceased with his personal representatives would cause anomalies in other contexts. In making this submission, they made specific reference to investors' relief. But that relief was introduced by the Finance Act 2016, nearly two years after Judge Mosedale had given her decision in the case. Not only can a provision introduced in 2016 not be properly used to assist the interpretation of statute several years earlier, but can we be sure that Parliamentary Counsel was not asked to draft the 2016 provisions specifically to enable the argument to be made in HMRC's appeal in the present case. Without wishing to get bogged down with conspiracy theories, it would at least provide an explanation as to why it took so long for HMRC's appeal to be heard.

Furthermore, Judges will regularly say that the risk of anomalies in one part of the tax legislation should not deflect them from construing other legislation in a natural way. In any event, the Upper Tribunal's decision gives rise to its own set of potential anomalies. One example that has occurred to me is the ordinary rules for enquiries in the Taxes Management Act 1970.

Section 9A provides that an enquiry into a return may be made by HMRC giving notice to the person whose return it is. If the taxpayer has since died (during the enquiry window), it is at least arguable that the return was that of the deceased and therefore not of the personal representatives. The consequence of this is that no enquiry notice may be served on them, meaning that enquiries cannot commence following a taxpayer's death.

The point is even clearer in cases when an individual dies during the course of an enquiry. Closure notices may be given under section 28A(1) only ‘to the taxpayer’. However, the ‘taxpayer’ is defined in the same subsection as ‘the person to whom notice of enquiry is given’, which in such a scenario would be the (now deceased) individual.

Applying the Upper Tribunal’s decision to that situation, it would seem that HMRC will be precluded from closing any enquiry after a taxpayer’s death.

These all sound rather unlikely as surely HMRC’s right to ensure that the full amount of tax should not die with the taxpayer. But to use the Upper Tribunal’s words in the present case: ‘If that seems an unsatisfactory outcome, there are other situations, where the death of an owner of an asset can produce a tax liability lower than would have been the case had the deceased person survived.’

In either case, should one not presume Parliament to have legislated for a more satisfactory outcome?

In the circumstances, it is unlikely that the executors will appeal against the decision. In my view, this is a real shame as this is an area which would merit further review. However, it is also unfortunate that the Upper Tribunal did not have the advantage of a fully-argued case. In some cases, where a party is not going to be represented and an important point of law is in issue, the Tribunal will appeal to members of the tax bar to appoint an advocate to the Tribunal specifically to allow both sides of the argument to be aired. Why this was not considered appropriate in the present case is unclear – one possibility is that the Tribunal was not made aware of the absence of any arguments from the executors until it was too late to make the appropriate arrangements.