[2016] UKFTT 147 (TC)

TC04932

Appeal number: TC/2014/5241 and TC/2014/5201

PROCEDURE – application for third party disclosure – opposed on grounds of privacy and relevance – whether irrelevant as issue not expressed in notice of determination –*Tower MCashback *and* Fidex *considered – held – relevant and right to privacy outweighed by need for fairness in judicial proceedings and the public interest in proper collection of taxes – application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHRISTOPHER EDWARDS-MOSS **Appellants**
and
DAVID EDWARDS-MOSS

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at the Royal Courts of Justice, the Strand, London on 26 February 2016

Mr S Hackett, Counsel, instructed by Johnsons Solicitors, for the Appellant

Ms A Nathan, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Lady Edwards-Moss (the deceased) died on 8 February 2007. On 10 April 2014 HMRC issued a notice of determination on her executors (two of her sons) under s 221 Inheritance Act 1984 ('IHTA'). The executors appealed this on 19 May 2014. HMRC offered a review which was duly carried out and the conclusion notified on 22 August 2014. The executors lodged an appeal with this Tribunal and they are the appellants in this appeal.

2. In the course of preparing for the hearing of the substantive appeal, and after service of the witness statements but before any hearing was set down, HMRC applied for disclosure of:

> 'Copies of all medical records for the period 8 February 2002 until 8 February 2007 (be they electronic or paper based) of Lady Edwards-Moss in connection with her attendance with her GP (or GPs) in the practice regarding her (i) chronic obstructive pulmonary disorder ('COPD') (also known as 'emphysema') and (ii) Cor Pulmunale including any referrals or responses received from specialists in or attending at the Brompton hospital; as well as any correspondence/referrals or notes or reports passing between the GP surgery and the Brompton Hospital.'

I understand that 'cor pulmunale' is a medical term which refers to heart failure. It was used on the Deceased's death certificate as the secondary cause of death: the primary cause of death recorded was COPD.

3. The appellant opposed the application.

4. The grounds of opposition were two fold: relevance and the right to privacy. I will deal with each in turn.

Relevance

5. Although the appellant originally couched their objection in terms of jurisdiction, Mr Hackett agreed that the core of this objection was that the Tribunal had no jurisdiction to order disclosure if it was not relevant to an issue in the proceedings. He pointed to rule 16(1)(b) which gives the Tribunal power to order disclosure against third parties

> 'which relate to any issue in the proceedings'

6. Ms Nathan's response was that Rule 5(3)(d) did not have any such limitation on the Tribunal's power to order disclosure. However, as the Tribunal only has power to give directions in relation to the conduct or disposal of proceedings (Rule 5(2)) so unless the disclosure relates to an issue in these proceedings, I do not consider I would have either power or need to order it.

7. It was HMRC's application for disclosure and therefore for HMRC to show that the requested disclosure was relevant to the proceedings.

8. HMRC's position in the appeal (as explained in their statement of case) was that the appellants' liability arose on two alternative and mutually exclusive bases. Their primary position was that the transfer of her freehold property ('the farm') by the deceased in return for an annuity on 23 January 2007 (17 days before her death) was allegedly ineffective. (In fact, this ground itself includes alternatives as, I understand, it was HMRC's position that as a matter of law the transfer did not take place and/or should be deemed not to have taken place because of a reservation of benefit under Finance Act 1986. None of this matters for the purpose of this application).

9. HMRC's alternative position was that if they were wrong to say the transfer was ineffective, then it was a transfer at an undervalue and therefore a transfer of value on which an inheritance tax liability arose, as a failed potentially exempt transfer, on the executors at the date of death.

10. While the appellant had not objected to HMRC's statement of case at the time, it was their position that the second alternative basis of HMRC's case against them could not be considered by the Tribunal as this 'transfer at an undervalue' issue was no part of the appeal and therefore, as the medical records related only to the second issue, they were irrelevant to the appeal.

11. Everyone agreed, as I do, that the medical records were relevant but only to the second issue, the 'transfer at an undervalue' issue. This was because it was HMRC's case was that the deceased's life expectancy to her knowledge at the date of transfer was such that the annuity she received in return for the transfer of the farm was worth little or nothing. So her state of health was clearly relevant to the second issue. It had no relevance to the first issue about the effectiveness of the transfer.

12. So the dispute about 'relevance' was solely about whether or not the second issue (which I shall refer to as the 'transfer at an undervalue' issue) was properly an issue in the proceedings.

The notice of determination

13. The notice of determination issued under s 221 stated as follows:

> a. no part of the Deceased's interest in [the farm] was transferred to the Trust prior to the date of her death
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> b. The full unencumbered open market value of [the farm], in accordance with s 160 IHTA, is to be taken into account in ascertaining the value of the Deceased's estate for the purpose of inheritance tax having regard to s 4(1) and 5(1) of IHTA.

14. It was HMRC's case and accepted by Mr Hackett, and I find, that the correspondence passing between the parties in the years since Lady Edwards-Moss' death and the issue of the determination covered both issues. I will not set it out in detail although I was taken through it in the hearing, because of Mr Hackett's

agreement that the transfer at an undervalue issue was a live and contested issue in the pre-Notice of Determination correspondence.

15. HMRC's case was that Notice of Determination at (b) covered the second issue as well as the first and even if it did not, the correspondence passing before, and the covering letter under which the determination was issued, should be taken into account in deciding what issues were in dispute in the appeal.

16. The appellant's case was that a natural reading of the Notice of Determination was that although HMRC had had two lines of attack against the transfer entered into by the deceased, they had decided only to issue a determination in respect of one of them. They had dropped the second issue by failing to include it in the Notice of Determination. And they were not entitled to revive it.

17. I agree with the appellant that a literal reading of the Determination is that it covers the first but not second issue. Clearly (a), which refers to no transfer taking place, does not apply to HMRC's second case which is that a transfer was made but it was a transfer at an undervalue. So far as (b) is concerned, it refers to the full value of the farm being comprised in her estate at her date of death. Yet the alternative case is that she disposed of the farm at an undervalue some 17 days before her death thus making her executors liable to tax under s 2 and s 3 IHTA on a chargeable transfer. On the contrary (b) referred to s 4 and 5 IHTA which relate to transfers on death; on its face it did not relate to chargeable transfers and PETs which are s 2 and 3 IHTA.

The case law

18. But how literally should notices of determination be read? Inevitably, I was referred to *Tower MCashback LLP 1 and another* [2011] 3 All ER. The first question between the parties was whether what the Supreme Court said in that case had any relevance to a determination under s 221 IHTA. That case concerned a closure notice issued after an enquiry under s 28B TMA. And that section merely required the closure notice to (1) state that the enquiries were complete; (2) to state the officer's conclusions (3) to state whether the return required amending, and if so, to make the amendments to give effect to the officer's conclusions.

19. Section 221 was not the same. Firstly, there was no formal enquiry process under IHTA and so a s 221 Determination was not the same as a notice closing an enquiry. The notice of determination could only be issued where HMRC considered that a transfer of value had been made and then it had to state that HMRC had determined the matters specified in the notice. S 221(2) set out what matters could be specified in the notice but it is a permissive section as it uses "may" and there was no requirement that HMRC specify all the matters in 221(2).

20. However, I agree with Ms Nathan that despite the different wording of the sections, s 221 was effectively the same as s 28B in so far as the latter was about conclusions of an officer and the former about a determination of an officer. A determination is much the same as reaching conclusions and so I consider that what was said in *Tower M Cashback* and in the Upper Tribunal case of *Fidex* [2014]

UKUT 454 about how a closure notice should be interpreted is relevant to a s 221 determination.

21. So what did the Supreme Court say in *Tower MCashback* a closure notice and therefore by implication about interpretation of a notice of determination? The parties did not agree on the relevance of *Tower M Cashback* each party relying on different aspects of what was said to support their opposing positions.

Do stated conclusions limit grounds on which HMRC can resist an appeal?

22. Lord Walker SCJ approved what Henderson J had said in the case when it was in the High Court (see [15]) and what Moses LJ had said in the case in the Court of Appeal (see [16-17]).

> Henderson J reached his conclusion despite his having correctly observed, at para 113:
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> > "There is no express requirement that the officer must set out or state the reasons which have led him to his conclusions, and in the absence of an express requirement I can see no basis for implying any obligation to give reasons in the closure notice. What matters at this stage is the conclusion which the officer has reached upon completion of his investigation of the matters in dispute, not the process of reasoning by which he has reached those conclusions."
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> He also observed (again, in my view, entirely correctly), at paras 115-116:
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> > "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest. [The judge then considered changes in the tax system and continued] For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and if the Commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the Commissioners on their own initiative. That is not to say, however, that an appeal against a closure notice opens the door to a general roving inquiry into the relevant tax return. The scope and subject matter of the appeal will be defined by the conclusions stated in the closure notice and by the amendments (if any) made to the return."
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> Arden LJ reached the same conclusion as Henderson J but the majority of the Court of Appeal took a different view. Moses LJ (with whom Scott Baker LJ agreed) observed, at para 32, that an appeal under section 31(1)(b) of TMA 1970 is confined to the subject-matter of the conclusion. On this point he approved and followed the decision of Dr John Avery Jones CBE in *D'Arcy v Revenue and Customs Commissioners*. Moses LJ (at para 41) took the view that it was for the Special Commissioner (or now the First-tier Tribunal) –
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> > "to identify what section 28ZA describes as the subject matter of the enquiry. The closure notice completes that enquiry and states the inspector's conclusions as to the subject matter of the enquiry. The appeal against the conclusions is confined to the subject matter of the enquiry and of the conclusions. But I emphasise that the jurisdiction of the special commissioners is not limited to the issue whether the reason for the conclusion is correct. Accordingly, any evidence or any legal argument relevant to the subject matter may be entertained by the special commissioner subject only to his obligation to ensure a fair hearing."

> There was little if any difference between the majority of the Court of Appeal and Henderson J as to the principles to be applied (Arden LJ did take a rather different approach). The difference between the majority and the judge was as to the application of those principles. I prefer the approach of Moses LJ, who set out his conclusions on this point at paras 50-51:
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> > "I agree with Henderson J that the fact that the taxpayers had pressed the inspector to issue the closure notice had no relevance to the identification of the subject matter of the appeal. It was, as he remarked, open to the inspector to delay until he had considered, for example, the business plan. He chose not to do so. But the fact that the inspector had indicated that there might have been other issues which arose, was relevant to the exercise of the special commissioner's case management powers. The taxpayer was not deprived of an opportunity fairly to marshal evidence as to the other grounds subsequently advanced by the Revenue on the appeal.
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> > There is a second basis on which I differ from Henderson J. Apart from the importance of leaving it to the fact-finding tribunal to determine the subject matter of the closure notice, in my view the closure notice itself does not allow of so restricted a view of the subject matter of the appeal. Whilst it did refer to previous correspondence which clearly focussed on section 45(4), the closure notice itself was, in plain terms, a refusal of the claim for relief under section 45 CAA 2001. That was the conclusion stated pursuant to section 28B(1). There is neither statutory warrant nor any need to look further."

23. The appellant's view of this is that Lord Walker was effectively stating that HMRC did not need to provide reasons for the conclusions they reached, and were not limited to the reasons, if any, which they did provide, but the conclusions themselves limited the scope of the appeal. In that case, the taxpayer had been denied a claimed relief by the closure notice. No reason for this conclusion was given in the closure notice and only one reason was given at the time in correspondence; in the hearing HMRC successfully relied on a quite different ground to deny relief. The effect of the Supreme Court's decision was that HMRC were entitled (subject to proper case management to ensure that there was no ambush) to change the reasons on which they justified the conclusion which they had reached to deny the relief.

24. The appellant's case is that that has no application here where HMRC effectively want to incorporate into the notice of determination, not different reasoning for the same conclusion, but a completely different conclusion. In other words, the original conclusion, says the appellant, was that the appellant's estate still included the value of the farm at her date of death because the transfer of it out of her estate before her death was (allegedly) ineffective; HMRC now want to (in effect) incorporate a new, alternative, conclusion that, if their first conclusion was wrong, and the transfer was effective, then the transfer of the farm out of her estate before the date of her death was at an undervalue and therefore a chargeable transfer.

25. However, I think the appellant is taking too narrow a view of what the Supreme Court said. The Supreme Court were concerned with fairness to the taxpayer on the one hand and the public interest in the correct collection of taxes on the other [18]; on the one hand they thought taxpayers entitled to closure notices which were informative but on the other considered a general conclusion may be sufficient where 'the facts are complicated and have not been fully investigated, and if their analysis is controversial' [also 18]. Lord Hope also considered that a closure notice must be seen

in its context [84] and in particular with reference to any letters passing between the parties in advance of the closure notice:

> [18] This should not be taken as an encouragement to officers of HMRC to draft every closure notice that they issue in wide and uninformative terms. In issuing a closure notice an officer is performing an important public function in which fairness to the taxpayer must be matched by a proper regard for the public interest in the recovery of the full amount of tax payable. In a case in which it is clear that only a single, specific point is in issue, that point should be identified in the closure notice. But if, as in the present case, the facts are complicated and have not been fully investigated, and if their analysis is controversial, the public interest may require the notice to be expressed in more general terms. As both Henderson J and the Court of Appeal observed, unfairness to the taxpayer can be avoided by proper case management during the course of the appeal. Similarly Dr Avery Jones observed in *D'Arcy,* para 13:
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> > "It seems to me inherent in the appeal system that the tribunal must form its own view on the law without being restricted to what the Revenue state in their conclusion or the taxpayer states in the notice of appeal. It follows that either party can (and in practice frequently does) change their legal arguments. Clearly any such change of argument must not ambush the taxpayer and it is the job of the Commissioners hearing the appeal to prevent this by case management."
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> ….
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> [84] Notices of this kind, however, are seldom, if ever, sent without some previous indication during the enquiry of the points that have attracted the officer's attention. They must be read in their context. In this case Mr Frost drew attention to this when he prefaced his conclusion with the words "as previously indicated." He also sent a covering letter which cast further light on the approach which he had taken to the various issues that had been under examination. In these circumstances it does not seem unfair to the LLPs to hold that the issue as to their entitlement to the allowances claimed should be examined as widely as may be necessary in order to determine whether they are indeed entitled to what they have claimed. Furthermore, while the scope and subject matter of the appeal will be defined by the conclusions and the amendments made to the return, section 50 of TMA does not tie the hands of the Commissioners (now the Tax Chamber) to the precise wording of the closure notice when hearing the appeal.

26. Lord Walker and Lord Hope also commented that s 50 TMA did not tie the Tribunal to the precise wording of the closure notice. S 50 is not relevant to a determination but s 224 is (while considerably shorter) to the same effect in that the role of the Tribunal is to decide whether the determination appealed against (or in the case of s 50 the assessment) overcharges the appellant to tax. So similarly there is nothing in s 224 to tie HMRC to the wording of a notice of determination.

27. Moreover, the Judges' summary of the law in this area in *Fidex* included at [8(8)] a statement that the context of the closure notice is relevant and may include the subject matter of the enquiry and any relevant correspondence. They also indicated, as did the Supreme Court, that it was for the FTT to determine the subject matter of the appeal [8(7)].

28. It seems to me that there are two ways of looking at the s 221 Notice at issue in this appeal. If the (a) and (b) of the Notice of Determination (§13) are seen as the determination, then they do not include a determination that there was an effective pre-death transfer on which tax arises as it was at an undervalue. On the other hand, if the executors had not appealed the s 221 notice then its effect would have been liability to IHT on the executors on the value of the farm (subject to applicable reliefs). This is because a determination is conclusive if not appealed (s 221(5)), and that would be the effect under IHTA of the notice stating that the farm formed a part of the deceased's estate at death.

29. And if the notice is seen as determining liability on the executors to IHT on the value of the farm then what is stated at (a) and (b) is merely the reasoning which supports that conclusion. And *Tower MCashback* makes it clear that HMRC can (subject to ambush) rely on alternative reasoning to support the conclusion. And the alternate reasoning they rely on is that the executors were liable to tax on the value of the farm because the deceased had made a transfer of value of it shortly before her death at an (alleged) undervalue which is chargeable on the executors under s 199 IHTA.

30. Should the notice of determination be read like this?

31. While the Supreme Court in *Tower MCashback* (at [18]) and the Upper Tribunal in *Fidex* (at [62(5)]) did refer to the duty of HMRC to make closure notices as informative as possible and contain the officer's reasons, it was clear because at the same time both courts said that the closure notice did not need to contain reasons, that this was not a duty which was absolute; the impression is that the Tribunal had to fairly balance the competing interests of taxpayer and general public in deciding what fairly was in dispute between the parties. And in doing so the Tribunal should have a look at the context of the closure notice (in this case, the notice of determination) and in particular the preceding and accompanying letters.

32. And as I have found (§14) that the preceding correspondence made it very clear that HMRC were considering both the question of the effectiveness of the transfer and whether it was at an undervalue, so the appellants were well aware that both routes to liability were in issue. Moreover, this is a case, such as that mentioned by Lord Walker, where the facts are complicated and have not been fully investigated, and their analysis was controversial. The appellant suggested that the case did not fall into that category but I disagree: this case involves a number of different deeds and the involvement of offshore companies. The investigation is not complete: for instance, HMRC have no independent evidence about the state of knowledge of the deceased about her health at the time of the transfer. In such a case, it seems to me,

the notice of determination ought to be interpreted with the preceding correspondence in mind.

33. The closing notice should not lead to a 'general roving enquiry' (as per Lord Walker). But a decision that the determination was that the executors were liable to IHT on the farm does nothing of the sort: it merely allows HMRC to rely on alternate reasoning to justify that conclusion, being reasoning well known to the appellants to be an issue in the case.

34. Mr Hackett suggested that the executors were misled by the limited nature of the notice of determination into thinking HMRC had dropped the second issue as it was not mentioned. But even if they were misled, they could not have been under that misapprehension once HMRC's statement of case was served, and indeed it is clear that they were not, as they served a witness statement which addressed the deceased's state of health. I do not consider that they have lost anything by such a misapprehension for such a short period.

35. My conclusion is that in these circumstances the determination reached by HMRC must be interpreted as a determination that the executors ought to pay IHT on the value of the farm; and although the notice of determination did not state any reasoning relying on s 2 and 3 IHTA for this conclusion, nevertheless HMRC are entitled in this appeal to rely on such reasoning as the executors were well aware that was an issue between the parties.

36. So the Tribunal will determine whether the executors are liable for IHT on the value of the farm (or a part of the value of the farm) and in doing so will consider both whether the deceased made an effective transfer of it, and if she did, whether it was at an undervalue.

37. As it was accepted that if this second issue formed part of the dispute between the parties then the medical records were relevant to the appeal, I find that they are relevant.

Privacy

38. The appellant's claimed a right to privacy. As I understood they relied both on Art 8 of the European Convention on Human Rights as well as a general right under UK law not to have private matters made public. They accepted that the right was not absolute and was only a factor to be weighed in the balance against others when the Tribunal was considering whether to order disclosure.

39. It was their case that nothing here justified the invasion of privacy of the deceased and her family in having her medical records made available to HMRC and ultimately the Tribunal.

40. I was referred to a number of authorities. But I accept what Ms Nathan said which is that each authority turns very much on its own facts and whatever competing interests arose in those cases, such that it was difficult to draw general principles.

41. In *S v S* [1997] 1 WLR 1621, for instance, the judge weighed the interest of the public in the correct payment of taxes against the public interest in full and frank disclosure in ancillary relief proceedings and refused to permit the disclosure to the IRC (a third party) of the transcript of the hearing which was in fact unlikely to advance the IRC investigation; in *Bennett v Compass Group UK* [2002] EWCA Civ 642 the court dismissed an appeal against an order requiring the appellant to consent to disclosure of her medical records in a personal injury claim; in *R (oao B) v Stafford Combined Court* [2007] 1 All E R 102 the defendant charged with sexual offences against a girl, who would be the chief prosecution witness, sought disclosure of her medical records and in particular of her psychiatric treatment and the Administrative Court overturned the decision ordering disclosure on the grounds that the girl had not been given the opportunity to object in person.

42. In two of these cases, disclosure was refused. In *Bennett v Compass* it was upheld. Mr Hackett sought to persuade me that there was something unusual about a court ordering disclosure of medical records in a personal injury case, and that doing so rested on provisions of the CPR which have no parallel in this Tribunal's rules. That is not how I read *Bennett v Compass*. It seems disclosure of the claimant's medical records is a normal incident of personal injury claims: the issue in that case was the breadth of the order given by the judge. The order applied to all the claimant's medical records when the defendant only needed those relevant to the injury. And the issue of jurisdiction under the CPR concerned whether the court could order the claimant to consent to the release of her medical records: the Court of Appeal concluded that under the CPR a County Court could make such an order. That is irrelevant here where the deceased's consent cannot be sought: the order HMRC seek is against third parties and not against the appellants. And it is clear that I can make such an order under the Rules of this Tribunal (see Rule 16) although of course there must be provision for the third party to make an objection if it wishes.

43. I find that the cases make it clear that it is case of weighing competing interests. For instance, in *Nayler and Boyle v Beard* [2001] EWCA Civ 1201 Lady Justice Hale referred *S v S* and to the courts conducting a balancing act:

> "[49]…It cannot be the law that the privacy interests in the ancillary relief proceedings always trump the interests in the fair trial of the civil proceedings."

44. In *R (oao B) v Stafford Combined Court* the judge said it was a balancing act and there was no presumption that the defendant's right to fair trial would always trump the witness' right to privacy. This was said with particular reference to Article 8 which while it conferred the right to respect for a person's private life, caveated this in Art 8(2) that such respect did not apply where necessary 'in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.'

45. So while a Tribunal cannot act in breach of a person's rights under the Convention (S6(1) of the Human Rights Act 1998), nevertheless the right to privacy is caveated and that right is balanced against other public interests.

46. I asked whether a deceased person has a right to privacy: both parties thought that she did and I agree that persons have the right in general to expect their medical records will remain confidential even after their death. I also accept that the deceased family have a right to a private life and therefore have some expectations that their deceased mother's medical records will remain confidential.

47. But those rights must be balanced against the public interest in the collection of the right amount of tax. Having decided that the question of whether there was a transfer of value by the deceased 17 days before her death when she sold the farm in return for the benefit of an annuity is an issue in this appeal, it follows that her medical condition and in particular what she knew about her medical condition may be critical to determine whether the sale was at an undervalue. There is a public interest in the full facts being known in order that the Tribunal is more likely to reach the right conclusion on whether there is tax liability on the executors in respect of the transfer of the farm.

The balancing act

48. How should the right to privacy be balanced against the public interest in the collection of the right amount of taxes?

49. The deceased's knowledge of her medical condition shortly before her death is central to a live issue in this appeal. In such a case, I would ordinarily expect the public interest in the correct amount of tax being paid to outweigh the appellants' rights to privacy in relevant medical records. It is after all the appellants' choice to challenge the tax assessment. They ought to be prepared to allow HMRC full access to relevant material.

50. This is particularly the case as HMRC owes a duty of confidentiality and while an order for disclosure would result in the medical records being known to HMRC, it would be a serious not to mention potentially criminal matter if HMRC were to make them generally available (ss 18 & 19 Commissioners for Revenue and Customs Act 2005). The riposte to that is that this matter is already before the Tribunal and may well go to hearing, at which point HMRC's duty of confidentiality will cease in so far as using the evidence in the hearing is concerned.

51. However, it is open to the appellants to seek an order from the Tribunal that the medical evidence is heard in private and/or redacted in the written decision. I will not prejudge what the Tribunal would decide were such an application be made: merely that the Tribunal will weigh in the balance the appellants' and deceased's right to privacy against the public interest in open hearings. The possibility of a public hearing does not alter my view that the balance in this case is in favour of disclosure because of the public interest in the proper collection of taxes.

52. Moreover, there are two further reasons why the balance is clearly in HMRC's favour in this case.

53. Firstly, I find HMRC have sought only the records actually relevant to the appeal in that they limited the application to recent records relating to the illnesses of which she actually died. In particular, the two matters specified in the application are the two matters which the death certificate records as the cause of death, COPD and 'cor pulmunale' (see §2).

54. Secondly, and significantly, the appellants themselves have already led evidence on the state of their mother's health in the six months or so before her death. It is contrary to justice to allow the appellants to lead evidence on this matter, but deny HMRC the right to independent medical records on the same matter which will enable them to verify or not what the appellants' witness says.

55. In all the circumstances, there is clear public interest in both fairness in judicial proceedings and in the proper collection of taxes due that the deceased's medical records in so far as relevant are made available to HMRC and that public interest outweighs the deceased and her family's right to keep them entirely confidential.

Period of disclosure?

56. If I decided against them, as I have, the appellants indicated that they wished the Tribunal to restrict the scope of the order sought. In particular, they considered that anything more than 6 months' of medical records, or at worst 12 months, was beyond what was required for HMRC's case was that the deceased entered into the sale of the farm at a time when she knew the consideration given in return of the annuity was not worth much to her. The appellant suggested 6 months on the basis that the evidence was that the more serious symptoms had only started 6 months before death, or 12 months on basis the evidence was she had first taken estate planning advice within the last year before her death.

57. I agree that 5 years of records may be excessive. The evidence referred to by Ms Nathan, however, suggests that the deceased either took some steps towards a planning scheme, or at least advice in respect of it, in 2005. Bearing in mind that the medical records sought are only those relating to the illnesses of which she died, it seems to me that it would be appropriate (if an order is made) to order disclosure for the period of two years. That does not prevent a later application for further records should either party later consider that they may be relevant.

Decision

58. I allow HMRC's application for the reasons given above and will order disclosure from the general practice attended by Lady Moss-Edwards of:

> 'Copies of all medical records for the period 8 February 2005 until 8 February 2007 (be they electronic or paper based) of Lady Edwards-Moss in connection with her attendance with her GP (or GPs) in the practice regarding her (i) chronic obstructive pulmonary disorder ('COPD') (also known as 'emphysema') and (ii) Cor Pulmunale

including any referrals or responses received from specialists in or attending at the Brompton hospital; as well as any correspondence/referrals or notes or reports passing between the GP surgery and the Brompton Hospital.'

59. The Tribunal will prepare a draft of the Order to be sent to the GP practice and will send a copy to both HMRC and the appellants for comments within 14 days. Such comments should be limited to matters of form and must not attempt to reopen any matter decided in this decision notice. At the expiry of the 14 days, and after consideration of any comments on the form, the Tribunal will issue the Order.

60. HMRC should note that Rule 16(4) will give the GP practice to which this Order is addressed the right to object to it. If such an objection is received, the parties will be notified and the Tribunal will consider the matter afresh.

61. Once the records are received by the Tribunal, they will be made available to both parties.

62. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 2 MARCH 2016