TC06406

Appeal number: TC/2016/04560

INCOME TAX – enquiry into tax returns 2006-07 & 2007-08 – taxpayer died in 2010 – notice of closure of enquiries and of conclusions given to taxpayer's personal representative in 2016 – whether notice may validly be given to personal representatives – appeals dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SARA WINSTANLEY **Appellants**
(as personal representative of
MARK WINSTANLEY deceased)

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Taylor House, London EC1 on 30 October 2017 with post-hearing submissions on 21, 22 and 29 November 2017

Michael Firth, instructed by RfM Chartered Accountants, for the Appellant

Patrick Boch, solicitor-advocate, instructed by Solicitor and Counsel-General for HM Revenue and Customs for the Respondents

DECISION

1. This was an appeal by Mrs Sara Winstanley ("the appellant"), the widow and personal representative (as executor of his will) of Mark Winstanley, against conclusions stated and amendments made by two closure notices issued by an officer of the respondents ("HMRC").

Facts

2. The matters set out below are taken from the hearing bundle for the case. They are not in dispute and I find them as fact.

3. On 5 August 2008 Mrs C Higham, an officer of HMRC in Local Compliance, wrote to Mark Winstanley informing him that she was opening an enquiry into his 2006-07 tax return. The enquiry concerned "the transactions surrounding your share disposal and capital loss", and pending completion of the enquiry no repayment would be made, this withholding of the repayment being, she said, in accordance with s 59B(4A) Taxes Management Act 1970 ("TMA").

4. A copy of the letter was sent to Mark Winstanley's agent, HWCA Ltd, together with a further letter expressly saying that the enquiry was being made under s 9A TMA and requesting a substantial number of documents together with a large amount of other information (if that information was not apparent from the documents).

5. On 27 October 2009 it seems that a Mrs T D Madeley-Jones of Local Compliance wrote to Mark Winstanley informing him that she was checking his 2007-08 return. No copy of this letter is in the bundle, but a letter to Haines Watts (Lancashire) Ltd is, saying that this check was also under s 9A TMA but that no information was being sought. She referred to a "scheme number" and a trade in second hand cars in which Mark Winstanley had made a loss which he had claimed to use.

6. On 15 February 2010 Mark Winstanley died.

7. On 9 December 2015 (nearly 6 years later) Chris Ashton, an officer of HMRC Counter-Avoidance, wrote to Haines Watts (Preston) Ltd[1] ("HWP") with a heading "Mr M Winstanley (deceased)". The letter stated that Mr Winstanley had used "the Stony Heating avoidance scheme in 2006-07 and Working Wheels avoidance scheme in 2007-08" and that s 9A TMA enquiries had been opened into the returns for those years.

[1] The address for HWP was in Leyland, Lancs and was the same address as HWP, so I assume this was just a change of name.

8. In relation to Stony Heating the letter informed HWP that the Upper Tribunal ("UT") had held that the scheme did not work[2] and that the allowable loss was 8p per share. On that basis Mark Winstanley's loss was £3.44.

9. In relation to Working Wheels the letter informed HWP that the "Courts" do not accept that Mr Winstanley was trading, so no losses were allowable.

10. Chris Ashton attached calculations of the additional tax liability arising from the removal from Mark Winstanley's returns of the losses claimed, and warned that interest would run from the original due date.

11. This letter was expressed not to be a closure notice but an intimation of the intended issue of such a notice and of the conclusion of enquiries regarding both schemes on 8 January 2016 to "allow time if there [are] outstanding issues or preparations required regarding Mr Winstanley's estate".

12. On 12 January 2016 Chris Ashton sent a letter to HWP attaching copies of the closure notices for both years, with calculations and printouts of Mark Winstanley's self-assessments showing the total amounts due.

13. On the same day Chris Ashton also sent two letters addressed to "Mr M Winstanley" at an address in Ormskirk, Lancs with the greeting "Dear Sir or Madam". Each letter said it was a closure notice issued under s 28A(1) and (2) TMA.

14. The letter for 2006-07 under the heading "My decision" said that the Stony Heating scheme did not work and the loss on disposal of the shares in Stony Heating was reduced to £3.44, which had been rounded up to £4. The letter also said that Mark Winstanley's tax return had been amended to show additional tax of £136,002.23.

15. The letter for 2007-08 under the heading "My decision" said that the Courts[3] did not accept he was trading and no loss had been sustained in trading. The letter also said that Mark Winstanley's tax return had been amended to show additional tax of £183,523.05.

16. On 8 February 2016 Steve Towler of RfM Chartered Accountants ("RfM") faxed an appeal against both notices and asked for postponement of all tax payable. The fax contained a copy of a letter of 3 February from RfM asking:

(1) Why both letters were addressed to Mr Winstanley and not his widow, as HMRC were aware of his death 6 years before?

(2) Whether the letters were actually posted, as there were a number of errors in the address line, and if they were posted who would be the recipient?

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[2] "Stony Heating" was the name given to the scheme whose tax efficacy was finally decided in *Steven Price & ors v HMRC* [2015] UKUT 164 (TCC) (Nugee J and Judge Nowlan).

[3] This must I think be a slip, as the "Working Wheels" final decision was made by this Tribunal in *Flanagan & Ors v HMRC* [2014] UKFTT 175 (TC) (Judge Colin Bishopp).

The fax said that since the demands for tax were made 6 years after Mr Winstanley's death, RfM did not consider HMRC could demand the tax and that they should be cancelled. No suggestion was made that HMRC were wrong to conclude that the decisions of Tribunals or Courts in relation to the two schemes were wrong or inapplicable to the circumstances of Mr Winstanley.

17. On 12 February Chris Ashton replied to the letter of 3 February, saying that the letters were addressed to Mr Winstanley as the enquiries were into his personal tax returns. HMRC did know that his widow was the executor and the letter should have been addressed to her.

18. Copies were also sent to HWP who were "still listed as his personal representative" and Chris Ashton asked if RfM were now Mr Winstanley's personal representative as well as his agent.

19. In addition, Chris Ashton did not believe the notices were invalid but agreed "to reissue signed copies to whomever [*sic*] is the current personal representative or Mrs Winstanley as the executor", adding that the fact of Mr Winstanley's death does not impose a time limit for closing enquiries.

20. On 2 March 2016 RfM replied to the effect that HWP, the former name of their current practice, had never been personal representatives of Mark Winstanley and that the Revenue were out of time to collect the tax they sought.

21. In response to further queries from HMRC, on 12 May 2016 RfM informed HMRC that the appellant was the personal representative and executrix of the estate of Mark Winstanley and gave her address. They added that she had not received any correspondence from HMRC and suggested the closure notices be reissued to her at her current address.

22. On 11 June 2016 Chris Ashton issued closure notices to "the personal representative of Mr Mark Winstanley" at the address of the appellant in Ormskirk given to them. They were copied to RfM.

23. On 13 July 2016 RfM said that s 40 TMA limits the time for the issue of assessments to personal representatives to 4 years from the date of death and so they were out of time and asked for withdrawal of the assessments.

24. On 14 July 2016 Chris Ashton replied that s 40 only applied to s 29 TMA assessments not s 9A enquiries or the conclusions given under s 28A TMA.

25. On 5 August 2016 a new case officer, Miss Guy, replied to a letter from RfM of 28 July which is not in the bundle. In her letter Miss Guy repeated the views previously given by Chris Ashton, and added that she was not treating the request to postpone tax (which is what must have been in the RfM letter) as an appeal, as RfM had not questioned the amendments to the return but only to the legality of HMRC's actions. She said that if RfM did wish to appeal they should put forward their technical arguments.

26. In a letter of 16 August 2016 RfM appealed against the closure notices repeating their arguments on invalidity.

27. On 1 September 2016 Miss Guy said that no valid grounds for appeal had been identified and so no postponement of the tax would be allowed and she enclosed a separate letter addressed to the appellant with a different suggestion for postponement, nil.

28. She also sent a letter to the appellant on the same day giving her "view of the matter" informing the appellant that she could ask for a review or go to the Tribunal.

29. On 8 September RfM said, after disagreeing that there were no valid grounds of appeal, that they had notified an appeal to the Tribunal.

30. The notice to the Tribunal is dated 28 August 2016.

Law

31. The giving of closure notices is governed by s 28A TMA:

> "(1) An enquiry under section 9A(1) … of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.
>
> In this section "the taxpayer" means the person to whom notice of enquiry was given.
>
> (2) A closure notice must either—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (3) A closure notice takes effect when it is issued.
>
> (4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a closure notice within a specified period.
>
> (5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).
>
> (6) The tribunal shall give the direction applied for unless … satisfied that there are reasonable grounds for not issuing a closure notice within a specified period."

32. In relation to personal representatives generally section 74 TMA provides:

> "(1) If a person chargeable to income tax dies, the executor or administrator of the person deceased shall be liable for the tax chargeable on such deceased person, and may deduct any payments made under this section out of the assets and effects of the person deceased.

(2) On neglect or refusal of payment, any person liable under this section may be proceeded against in like manner as any other defaulter."

33. Other provisions referred to by the parties in their skeletons or in oral or written submissions are set out in the relevant place in the discussion.

Submissions

34. For the appellant Mr Firth submitted:

(1) HMRC have not issued valid closure notices because such a notice cannot be provided to anyone other than the original taxpayer (s 28A(1) TMA).

(2) Where Parliament intended to extend a provision to a personal representative it did so expressly (e.g. s 43A TMA). The necessary inference is that it did not intend to extend s 28A in this way.

(3) Parliament has provided a distinct regime for the taxation of personal representatives: they are chargeable in their own right (s 74 TMA) and subject to special rules (in particular s 40 TMA).

(4) HMRC complain about the effect of this conclusion on them, but that is irrelevant in the absence of a reasonable alternative interpretation (which there is not) and, in any event, misconceived. [1 SEP]

35. For HMRC Mr Bach submitted:

(1) The starting point when considering the liability of a personal representative should be s 74 TMA, which puts it beyond question that the personal representatives are liable for the tax chargeable on the deceased.

(2) The common law position is that the personal representatives stand in the shoes of the taxpayer.

(3) Section 28A(1) TMA should be interpreted purposively so as to allow the personal representatives to stand in for "the taxpayer" in line with common law. In support of this proposition HMRC submit that as a matter of statutory interpretation the legal meaning of "taxpayer" in TMA is broad and apt to refer to more than a natural person. But if a literal interpretation is required, and an enquiry cannot be closed, that cannot prevent a closure notice being issued to the personal representatives of a deceased taxpayer.

(4) If an officer of HMRC could not issue a closure notice to the personal representatives in place of the taxpayer, as argued by the appellant, it would lead to the untenable position that enquiries could never be closed. [1 SEP]

(5) Issuing an assessment in place of a closure notice (and resultant amendment) as suggested by the appellant, does not sufficiently redress the issue of an enquiry that can never be closed. [1 SEP]

36. In response to HMRC's case Mr Firth says:

(1) Considering TMA as a whole provides no warrant for conflating personal representatives with the deceased person, as they are explicitly dealt with separately.

(2) HMRC are not without a remedy as they could have relied on s 29(4) or (5)(a) TMA.

(3) The legislation shows that HMRC are expected to consider enquires within 4 years. The appellant's interpretation brings finality at the appropriate point.

37. At the end of the hearing I passed to the parties copies of a case, *J W Smith (Surveyor of Taxes) v O D Williams* (1921) 8 TC 321 ("*Williams*"), which I said I thought had some relevance. I informed the parties that I considered that I would benefit from further submissions on this case and I directed that parties could if they wish explain the significance if any of the case on their submissions.

Discussion

The issue

38. The issue for the Tribunal is whether s 28A(1) TMA ("the enactment") permits a notice of closure to be given to the personal representatives of a "taxpayer", the person the notice of enquiry was given to, if that taxpayer died before the officer of HMRC had given that notice.

The Tribunal's approach to the construction of the enactment

39. It is easy to characterise the opposing contentions as literal (the appellant's) and purposive (HMRC's), but I think that can be misleading as both say that their interpretation best fits the purposes of the legislation.

40. It is also easy to characterise the contentions as textualist against contextualist, but that would I think not do justice to Mr Firth's arguments.

41. I think the real distinction, in terms of the parties' respective approaches to the interpretation of the enactment, is between a literal construction and a strained one, and I have to decide which better gives effect to the legislative intention. By a "strained" construction I mean in this case one that involves treating words that are not present in the black letter text of the enactment as being implicitly understood to be there.

42. There is no doubt that, whatever may have been the case in the past, tax law is not stuck in an island of literal interpretation (see eg *CIR v McGuckian* 69 TC 1 per Lord Steyn at 78). A strained construction may be justified if a literal construction would lead to injustice or absurdity (see eg *Luke v CIR* 40 TC 630, *O'Rourke (HM Inspector of Taxes) v Binks* 65 TC 165 and *Jenks v Dickinson (HM Inspector of Taxes)* 69 TC 458).

43. In arguing for a literal construction and a strained one respectively the parties seek to employ a number of interpretative rules or canons of construction, including that one must have regard to the context of any enactment. That almost goes without saying.

44. They also employ the rule that it is better to interpret an enactment so that it has effect rather than being superfluous or redundant (known previously as *ut res magis valeat quam pereat*), and that if Parliament had meant an enactment to include a particular case it would have said so, and because it has said so elsewhere in the same context it follows that it deliberately didn't do so in the case in question (the rule previously known as *inclusio unius exclusio alterius*[4] - see eg *Prudential Assurance Co Ltd v Bibby (HM Inspector of Taxes*) 73 TC 142 at 161). In discussing this later I call it the "*exclusio*" argument.

Case law and precedent

45. I also have to abide by the doctrine of precedent. If there is a decision of a superior court or tribunal then I must follow it if it decides the issue in the instant case and is part of the reasons for the decision in the superior tribunal. I do not have to follow a decision of an equal level tribunal, whether of this tribunal or its predecessor, the Special Commissioners of Income Tax. But I would do unless I am satisfied that the decision is clearly wrong.

46. Because the case law my be decisive as to the meaning I should give the enactment in this case I consider it first before examining the statute.

47. HMRC referred in their skeleton to the case of *Drown and anor (as Executors of Leadley deceased) v HMRC* [2014] UKFTT 392 (TC) ("*Leadley FTT*") a decision of this Tribunal (Judge Barbara Mosedale). The appellant pointed out that that decision had been overturned by the UT ("*Leadley UT*"). HMRC also referred to *Morris and another v HMRC* [2007] EWHC 1181 (Ch) ("*Morris*") a decision of the Chancery Division. As mentioned above I drew the parties' attention to *Williams* and sought submissions on it.

Leadley UT

48. HMRC say that *Leadley FTT* supports their view that in general personal representatives stand in the shoes of the deceased for tax purposes. The appellant says, as mentioned above, that *Leadley FTT* had been overturned in HMRC's favour by *Leadley UT* so cannot help HMRC.

49. Both *Leadley FTT* and *Leadley UT* were concerned with the proper construction of s 24 Taxation of Chargeable Gains Act ("TCGA") (apart from subsection (1)). Those remaining subsections provide so far as relevant:

> "(1A) A negligible value claim may be made by the owner of an asset ("P") if condition A … is met.
>
> (1B) Condition A is that the asset has become of negligible value while owned by P.
>
> …

[4] There were 6 hits for the term "exclusio" when I searched online in HMSO Tax Cases. Those 6 cases contained 5 different ways of setting out the maxim in Latin!

(2) Where a negligible value claim is made—

(a) this Act shall apply as if the claimant had sold, and immediately reacquired, the asset at the time of the claim or (subject to paragraphs (b) and (c) below) at any earlier time specified in the claim, for a consideration of an amount equal to the value specified in the claim.

(b) an earlier time may be specified in the claim if—

(i) the claimant owned the asset at the earlier time; and

(ii) the asset had become of negligible value at the earlier time; and either

(iii) for capital gains tax purposes the earlier time is not more than two years before the beginning of the year of assessment in which the claim is made; …

…

..."

50. It can be seen that there may be, and nearly always will be, more than one point in time which is relevant. In what follows:

(1) TNV is the date when the asset became of negligible value,

(2) TC is the date of the claim and, subject to (3), the date of the deemed disposal for CGT purposes, and

(3) TE is an earlier time specified in the claim as the date of the deemed disposal for CGT purposes.

51. TE may only be a date on which the claimant (C) was the owner (O) of the asset, and C had also to be O on TNV.

52. The facts as to who C was, who O was at any time and when the dates were are:

(1) Mr Leadley was O at TNV (a date no later than 5 April 2010)

(2) on 11 May 2010 Mr Leadley was killed in a motoring accident (before he filed a return for 2009-10)

(3) in January 2011 Mr Leadley's executors made a claim (and so were C) in a tax return reporting Mr Leadley's chargeability to tax for 09/10 for relief against income arising in 09/10.

53. HMRC's case was:

(1) the executors were C, they were O at TC but not at TNV

(2) Mr Leadley was O at TNV but not at TC.

54. The executors' case was that they stood in the shoes of Mr Leadley to make the claim so that they were deemed to be O at both TNV and TC.

55. In her decision in *Leadley FTT* Judge Mosedale said that 5 April 2010 was TE and so that date was deemed to be TC. Mr Leadley was O at TC, and so he was therefore O at TNV and TC.

56. The UT (Newey J and Judge Sinfield) posed the issue thus:

> "1. Where an asset has become of negligible value, or a loan irrecoverable, the person who owns the asset or made the loan may be able to claim relief for tax purposes. This case is concerned with the position if the owner/lender has died without making such a claim. Can his personal representatives claim relief?"

57. HMRC in their appeal, and now represented by counsel, argued that "contrary to Judge Mosedale's view, the date of a negligible value claim must be that of its submission."

58. At [22] the UT agreed:

> "We find Miss Lemos' submissions convincing. We can see no indication in the legislation that a negligible value claim can be taken as made at a time other than that at which it is submitted. While section 24(2) TCGA allows an earlier time to be specified as that of the notional sale and reacquisition, there is nothing comparable as regards the claim itself. Moreover, section 24(2)(b)(iii) and (iv) appear to contemplate a claim being made *during* a year of assessment rather than at its beginning or end. Further, we agree with Miss Lemos that the purpose and wording of section 24 suggest that a claimant must still own an asset at the point a negligible value claim is submitted in respect of it."

59. The last sentence is the nub of the matter. At TC, the "point" [in time, ie April 2011] that the claim was submitted, the executors were O, but at TNV (some time in 2009-10) the Mr Leadley was O. TE did not backdate the claim, only the disposal.

60. At [26] the UT went on to say:

> "During the hearing, we floated the idea that the solution to the case might lie in identifying Mr Leadley and the Executors. On that basis, it would not matter that Mr Leadley owned the shares when they became of negligible value and the Executors owned them when the negligible value claim was submitted. Treating Mr Leadley and the Executors as one, it could be said both that the claim was made "by the owner" for the purposes of section 24(1A) TCGA (since the claim was made by the Executors) and that the shares had become of negligible value "while owned by P" for the purposes of section 24(1B) (since they were owned at the time by Mr Leadley)."

61. It seems to me that for this to work so as to give the relief against the deceased's income in 2009-10, the deemed disposal and reacquisition must be treated as being by the deceased as well (as well as the time having been specified in the claim). But the answer they reached was:

> "In the light, however, of Miss Lemos' further submissions on the point, we have been persuaded that a deceased person and his personal representatives cannot be equated. *The TCGA treats the two as distinct and provides, in section 62, for personal representatives to be deemed to acquire the assets of a deceased person on his death for a consideration equal to their market value without a disposal.* As Miss Lemos observed, the beginning of the personal representatives' ownership period is demarcated as a matter of law and fact and with specified consequences as regards the application of TCGA. Further, conflating deceased and personal representatives would cause confusion, and potentially anomalies, in other contexts (for example, the availability of investors' relief under chapter 5 of Part V TCGA)." [*my emphasis*]

62. In other words the UT were persuaded by Ms Lemos (the appellant not being represented, so presumably not making any post-hearing submissions) that this idea of equation was not a runner because of the way s 62 TCGA operates to deem the executors to acquire the assets for MV without a disposal, and because of confusion and anomalies in other contexts (mentioning Chapter 5 Part 5 TCGA).

63. In my view this part of the UT's decision is limited to saying that equation of ownership at two points in time between which death occurs is not possible for the purposes of s 24(1A) to (2) and because of section 62 TCGA, a provision which is particular to CGT because of the nature of that tax.

64. What the UT decision does not do is say anything about the situation where income tax is the tax concerned. It relates to claims the conditions for which are somewhat peculiar because they require there to be ownership at two distinct points in time and they deem there to be a disposal when in law there is not, even though the tax in question is one where liability is triggered by a disposal.

65. I also add that it does not seem to me that "equation" or the treating of two persons as one for the purpose of determining ownership of an asset is necessarily the same as one person "standing in the shoes" of another. That was a term used by Judge Mosedale in *Leadley FTT* about which I say more later.

Morris

66. HMRC considered this case was exactly in point and supported their case. Mr Firth said it was *obiter*.

67. *Morris* is also binding on me, but only as Mr Firth stresses, for the reason for the decision[5]. It was an appeal from the Special Commissioners (Dr David Williams and Mr Edward Sadler) and the issue was whether the time limit in s 34 TMA (then 6 years) applied to the issue of closure notices under s 28A TMA (the very section with which I am concerned in this appeal. The decision of Patten J (as he then was) in the Chancery Division was that it did not.

[5] Or *ratio decidendi* for the older among us.

68. At [32] he said:

> "It seems to me that this section [34] has always been and remains concerned only with assessments by the Revenue. This is made clear by reading s.34 in conjunction with s.36 which was obviously intended to extend the time limits in cases of fraudulent or negligent conduct by the taxpayer. Section 36 can have no application in the case of a self-assessment by the taxpayer because that is not "an assessment on any person ... for the purpose of making good to the Crown" a loss of tax. It would involve the taxpayer in effect alleging negligence or fraud against himself. Mr Baker ultimately accepted this."

69. At [33], [34] and [38] he said:

> "The suggestion that s.34 can apply to the taxpayer is also, I think, inconsistent with the structure and provisions of TMA in relation to the audit of self-assessments made by the taxpayer. ….
>
> … If s.34 does apply to self-assessment including amendments to self-assessments, then one has two inconsistent time limits to deal with. This was clearly not what was intended and it is avoided if one gives to the word 'assessment' in s.34 a more limited meaning which excludes self-assessment by the taxpayer."
>
> … it follows that a closure notice under s.28A is not within s.34 because although served by the Revenue it has the effect of amending the taxpayer's self-assessment which is not an assessment within the meaning of s.34 and an amendment to it cannot change its character. I would, therefore, for these reasons alone have dismissed the appeal on the first issue."

70. Having it seems to me decided the issue firmly in favour of the appellants he went on at [41]:

> "But if I am wrong about this and s.34 is not excluded simply because s.28A(1) provides for the amendment of the taxpayer's self-assessment, then I need to consider Mr Grodzinski's specific arguments which relate to these provisions."

71. Then at [45] he dealt with arguments about analogies to be drawn with the time limit in s 30(5) TMA for recovering overrepaid tax which could be greater than 6 years. The appellant's answer to HMRC's point on this was (at [44]) "far from attempting to equalise the position s.30(5) was intended to give a special treatment to cases falling within s.30 but to leave s.34 to apply in its full vigour to the power to amend by closure notice under s.28A."

72. At [45] Patten J said:

> "… Although I prefer to base my reasons for this on the non-application of s.34 to self-assessments by the taxpayer (and therefore to amendments of such self-assessments) I accept the submissions of Mr Grodzinski on this point if I am wrong about that. The draftsman has been careful in his choice of terminology and s.28A does not involve an assessment within the meaning of s.34. On Mr Baker's argument the time limit

would have expired in this case solely due to the delaying tactics of his clients and the Revenue, in order to serve the closure notices, would have to rely on allegations of negligence and fraud. This seems to me to be an unlikely structure for Parliament to have adopted. Much more likely is that any possible delay in achieving finality following an audit inquiry could be dealt with by the inclusion of a right to apply for a direction for closure which was granted by s.28A(4). In my judgment this was the solution adopted."

73. At this point he dealt with two objections by Philip Baker QC for the appellants. The first concerned s 9C TMA which is irrelevant here. The second is very relevant:

"47. The second objection was that the right to seek a direction for the closure of the inquiry would not be available to a personal representative in a case where the taxpayer died after the inquiry was instituted but before it was completed. It would also, Mr Baker submitted, deprive the personal representatives of the reduction in the time limit provided by TMA s.40. This provides that:

'40 Assessment on personal representatives

(1) For the purpose of the charge of tax on the executors or administrators of a deceased person in respect of the income, or chargeable gains, which arose or accrued to him before his death, the time allowed by section 34, 35 or 36 above shall in no case extend beyond the end of the period of three years beginning with the 31st January next following the year of assessment in which the deceased died.

(2) …, for the purpose of making good to the Crown any loss of tax attributable to the fraudulent or negligent conduct of a person who has died, an assessment on his personal representatives to tax for any year of assessment ending not earlier than six years before his death may be made at any time before the end of the period of three years beginning with the 31st January next following the year of assessment in which he died.

… " [Irrelevant material on EEIGs excluded by me]

48. The first part of this argument turns on the meaning to be given to the word "taxpayer" in s.28A(4). *In his example, Mr Baker said that it would obviously cover the taxpayer himself but not his personal representatives after his death. If that is right it would, of course, not only defeat the personal representative's right to seek an early closure of the inquiry but would also prevent the Revenue from serving a valid closure notice under s.28A on the "taxpayer". It seems to me that there is nothing in this point. Although the TMA does not in terms define the taxpayer as including his personal representatives, they are under TMA s.74 liable for the tax chargeable to the deceased taxpayer and are liable to be proceeded against for default. In these circumstances they fall, in my judgment, to be treated as the taxpayer for the purposes of the recovery of the tax and references to the taxpayer in s.28A are to be interpreted as including his personal representatives.* [My emphasis]

> 49. As for the argument under s.40 it seems to me that this section does no more than to give personal representatives a shorter time limit in cases where s.34 applies. What it does not do is to cast any light in itself on the circumstances in which s.34 does apply and therefore has no relevance to the argument about the scope of s.34 in relation to s.28A.
>
> 50. For these reasons the appeal on the first issue will be dismissed."

74. The passage I have emphasised seems to me to be determinative of this case if it is binding on me. I agree with Mr Firth though that it is not binding. It was not, as the other extracts from the decision I have quoted were, at all necessary to decide the issue in hand. Mr and Mrs Morris had not died, and Patten J had clearly come to a conclusion for his finding in their favour long before he dealt with the s 40 TMA argument, which only arose on the basis that Patten J was wrong about that decision.

Williams

75. This case probably needs some scene setting. Nowadays an appeal from this Tribunal arises on a point of law on permission being granted either by this Tribunal or the UT. This was also the case with an appeal from the Special Commissioners from 1994 (see s 56A TMA). But from 1878 to 1994 (and to 2009 for the General Commissioners) an appeal to a higher court (the High Court, in fact) was by way of case stated by the Commissioners, for which the only conditions were an immediate expression of dissatisfaction to the Commissioners on the determination of an appeal, a requirement by the dissatisfied party within 28 days that the Commissioners state a case, payment to the clerk of the necessary fee (20/- in 1874, £50 in 2008) and transmission of the case stated to the High Court, for which no time limit was laid down. See s 56 TMA (now repealed) and its predecessors including s 59 Taxes Management Act 1880[6]. The important point for this case is that the person who is required to do all these things is the "appellant" or the "party" where it is not the inspector or surveyor.

76. In *Williams* the surveyor[7] had expressed dissatisfaction with a decision of the General Commissioners in November 1914. Discussion and agreement of the case stated was prolonged and in November 1919 the respondent taxpayer died before the case was agreed and transmitted. The case stated was filed in the High Court on 14 December 1920 by the surveyor but the executor of Mr Williams, Mr Snow, refused to have anything to do with it.

77. The surveyor applied to the King's Remembrancer for a summons that the executor be added as a respondent to the appeal and that the proceedings be continued between the surveyor and the executor. The summons was referred to the judge of the revenue list in the King's Bench Division, Sankey J. In his judgement he said:

> "The matter raises a somewhat curious point of law which may be stated generally, but for the moment without any pretence to accuracy, as to whether the Court can add, or make - I do not like to say 'add' - another

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[6] The Taxes Management Act 1880 can lay claim to be the predecessor of the Tax Law Rewrite Acts – see eg s 2 with its division of the parts).

[7] An officer who was the predecessor of Her Majesty's Inspectors of Taxes.

person as Respondent to an appeal by way of Special case under Section 59 of the Taxes Management Act of 1880.

It appears that this Mr. Williams was assessed and his assessment was reduced, and the Surveyor of Taxes desired to appeal by way of Special Case against the reduction. Before the case came on for hearing - indeed before it was filed in Court - Williams unfortunately died, and it is said by the learned Counsel who argued the Case on behalf of Mr. Snow, Mr. Williams' executor, that the matter abated, or nothing now can be done.

…

Mr. Latter, on behalf of Mr. Snow, takes three points: firstly that there are no proceedings in the action, and that there is no appeal. He refers to the terms of the Notice of Motion and says that it is for an order that the proceedings in this appeal be continued. He says 'There are no proceedings; there is no appeal.' Secondly, he says that, if there are any proceedings, they are or have been abated. *Thirdly, he says that by Section 59 of the Taxes Management Act, 1880, it is provided that the other party - either the Surveyor or the Appellant as the case may be - shall have been served with a copy of the Case*[8]*. Now in this particular case he says that that must refer to Mr. Williams, the deceased, and he has not been served with a copy, and could not have been, because he is dead, and, as the service of a copy upon the other party is a condition precedent to the jurisdiction of this Court, that condition precedent has not been performed, and could not be performed, by the party undertaking the appeal.* I will endeavour to deal with those points in the order in which Mr. Latter has argued them. [*My emphasis*]

…

Now for the reasons I have already given I think the proceedings were started. Then, says Mr. Latter - and it is by no means a weak point - let the other side point out something in the Statute which enables them to take their present procedure. That is a formidable point. It may be doubted whether it is possible to put your finger upon a particular passage and say that is a passage which gives the Surveyor of Taxes the right which he claims; but two cases have been cited to me, by no means cases identical with the Present one, but cases of a similar character, where, perhaps under different Statutes, it has not been found easy to discover in the Statute itself a remedy in circumstance like the present. … But there is a decision of the Irish Court of Appeal which went into this matter with very great thoroughness, *Canning v Farren* (reported in 1907, Law Reports, Ireland, 2 King's Bench, at page 486). It is a very long report occupying nearly 20 pages of the volume in question. The headnote is this: 'County Court Decree - Civil Bill Appeal Death of Plaintiff (Respondent) after Notice of Appeal - Continuing proceedings - Practice Jurisdiction. Where after an appeal from a decree of the

[8] Subsection (1) which ends "The case shall set forth the facts and the determination, and the party requiring the same shall transmit the case, when so stated and signed, to the High Court within seven days after receiving the same, *and shall previously to or at the same time give notice in writing of the fact of the case having been stated on his application, together with a copy of the case to the other party,* being the surveyor or the appellant as the case may be." [My emphasis]

County Court Judge to a Judge of Assize the Appellant or Respondent dies after notice of appeal but before the hearing, there is jurisdiction in the Judge of Assize to adjourn the appeal to enable a personal representative of the deceased to be added to the record, and upon this being done there is jurisdiction to hear and determine the appeal.' Now, I need not go into the very elaborate judgment on the facts of that case, but I refer to the remark of the Lord Chief Justice of Ireland on page 499. After setting out all the sections and provisions of the various Acts of Parliament under review in that case, he says:

> 'All these provisions show that the Legislature contemplated a hearing of and an adjudication upon every appeal by the Judge. Thus the verbal and grammatical construction of the words is in favour of the existence of the jurisdiction. Further, this construction is necessary to give adequate effect to the intention of the Legislature. The mischief to be remedied is a possibility of an erroneous decision of the Court of First Instance: But such a mischief, if it exists at the institution of the appeal, must continue at the Assizes notwithstanding the death of any party, and in order to make the remedy co-extensive with the mischief we are driven to the construction we have adopted'

He goes on to refer to the English cases, especially the case of *Hemming v Williams* to which I have just referred, and says: 'This construction has been uniformly adopted,' that is to say, the construction of allowing the matter to proceed by adding a personal representative of the deceased in order to give adequate effect to the intention of the Legislature. … *Now, coming to the conclusion that I have come to, that the object of Section 59 of the Taxes Management Act is to enable the parties to come to the High Court, as the Lord Chief Justice of Ireland puts it, 'All these provisions showing that the Legislature contemplated a hearing of and an adjudication upon every appeal by the Judge', and coming to the conclusion that the proceedings started as soon as the notice in writing was given, I am of opinion that I am entitled to do what it seems to me has been done both in the English Divisional and the Irish Appeal Courts, namely, to so mould a convenient form of procedure to meet the case.* [*My emphasis*]

Mr. Latter in reply to that point said: 'Oh, but that cannot be done where the Crown is a party'. I regret that I personally am not able to follow that point. I am not at all thinking of the Crown at the moment. I am thinking of what would happen when the boot is on the other leg, and when it is the subject who wants to appeal. I think it would be the height of injustice - and I use the words advisedly - if in a case where the subject wished to appeal - and I am not using in any way offensive words - against assessment - which is considered to be grossly excessive - and I think there are some subjects who think assessments are grossly excessive - the mere fact of his death should shut out those who would benefit from the appeal from prosecuting it. Therefore, I think Mr. Latter is wrong on his second point.

With regard to Mr. Latter's third point, that is, the point that the Notice of Appeal must be served upon the other party, that is to say, that a copy of the Case must be served upon the other party, Mr. Latter says it has

> not been served upon Mr. Williams. *I think it follows from what I have already decided upon the first point that the personal representative can stand in the place of Mr. Williams, and I think the service on him is service, within the meaning of Section 59, upon the other party.*" [*My emphasis*]

78. Thus in relation to this procedural provision in the Income Tax Acts the High Court held that the death of a person does not prevent the Crown from seeking to establish the correct amount of tax[9].

Leadley FTT and the common law principle

79. Judge Mosedale's decision in *Leadley FTT* still stands where it has not been explicitly reversed by the UT. Any comments she made (eg at [58]) about the position of personal representatives apart from in relation to s 24 TCGA are it seems to me totally unaffected by the UT decision, as are her remarks about ss 72 and 74 TMA (which I consider later).

80. In *Leadley FTT* at [29] Judge Mosedale said:

> "Everyone was agreed that as a matter of common law, the personal representatives of a deceased person become the owner of the deceased's assets at the moment of his death. Any income arising on those assets after that date is the liability of the personal representatives because it is their income."

81. And at [58]:

> "*Common law*
>
> I was not referred to the common law provisions affecting personal representatives, which is not surprising as neither party was represented by lawyers. While I have been without the benefit of submissions on the point, it seems to me that as a matter of common law the personal representatives do represent the deceased in respect of all assets. They are his heirs and assigns. The right to make a claim must under common law transfer on death to the personal representatives, and it seems to me that under common law the executors would be able to make on behalf of Mr Leadley any claim which he could have made, unless the taxing statute expressly provided that the claim died with Mr Leadley. There is no such express provision."

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[9] The provision that currently applies to second tier appeals, and so is the successor to s 59 TMA 1880 and to s 56 TMA, is Rule 23 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (L.15). Rule 23(6) provides that when it receives an appeal the Upper Tribunal must "send a copy of the notice and any accompanying documents to each respondent.". A respondent is defined in Rule 1(3) as "in an appeal … against a decision of another tribunal, any person other than the appellant who—(i) was a party before that other tribunal." There is it seems no rule for dealing with the case where the respondent died between the hearing of the case by the lower-tier tribunal and the submission of the appeal to the Upper Tribunal.

82. Mr Firth considered that Judge Mosedale was wrong to talk about the common law, because there was statute law dealing with personal representatives and he mentioned in particular the Administration of Estates Act 1925 ("AEA"). I consider this a mere pedantic quibble, a playing with words.

83. Mr Firth did not point to anything in the statutes which he brought to the hearing, not having previously referred to them, that embodied, or for that matter cast doubt on, what Judge Mosedale had said.

84. HMRC were content to adopt Judge Mosedale's views on what she calls the common law position of personal representatives, but Mr Bach preferred to say "the general law" ie both common and statutory law. It certainly seems to be the case from the extracts from the AEA that Mr Firth passed up that personal representatives have the duty to collect the assets of the deceased, real and personal, and a duty to pay the debts of the deceased. I am prepared to assume, as Judge Mosedale did, that the assets of the estate include any claims in relation to tax that might benefit the estate, such as a claim for repayment of tax. But I am not prepared to assume that there is a common law rule, and I have been shown no statutory rule outside the Tax Acts, that personal representatives stand in the shoes of the deceased for all administrative matters relating to tax such as the making of returns or the giving or receiving of notices. In *Williams* no such principle was referred to: in that case what Sankey J did was to give a strained and purposive construction to the tax statute in question.

The statute

85. I turn now to the enactment under consideration, s 28A(1) TMA. It seems to me that it can be rewritten thus:

> "An enquiry is completed when an officer of HMRC (O) by notice
>
> (a) informs the person to whom notice of enquiry was given that O has completed their enquiries and
>
> (b) states their conclusions."

86. I find it impossible to say, simply looking at this enactment, that the language is not clear and obvious, ie I hold that these are "plain words" which mean what they say. So far, but only so far, I am with Mr Firth.

87. But the days when the words, even plain ones, of a single subsection in the distinctly non-seamless garment[10] of the Tax Acts could trump any other considerations

[10] To adapt the phrase used by Lord Hodge JSC in *RFC 2012 plc (formerly The Rangers Football Club plc) v Advocate-General for Scotland* [2017] UKSC 45 where he said at [10]:

"The legislative code for the taxation of income has developed over time to reflect changing governmental policies in relation to taxation, to remove loopholes in the tax regime and to respond to the behaviour of taxpayers. Such responses include the enactment of provisions to nullify the effects of otherwise successful tax avoidance schemes (or schemes which were apparently successful pending a definitive judicial determination). *As a result, the legislative code is not a seamless garment but is in certain respects a patchwork of provisions.* Over time, judicial decisions on the interpretation of sections of the tax legislation have assisted in clarifying the boundaries of those provisions. Such decisions have influenced Parliament in the re-enactment of legislation. Some judicial decisions, for example, as I

or principles of statutory interpretation are no longer with us – if they ever were (see for example what Sankey J said in *Williams*).

88. As I have mentioned it is always necessary to examine the context of any enactment even if at first glance it is clear and unambiguous. Here the context is not just s 28A TMA as a whole but those parts of TMA which give effect to what Lord Dunedin described in *Whitney v CIR* (1925) 10 TC 88 at 110 ("*Whitney*"):

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

89. These stages are legislated for in the years concerned in Parts 2 to 5A TMA. Any conclusions I draw about s 28A(1) or s 28A a. s a whole as it affects deceased taxpayers must be checked to ensure that the conclusions are consistent with the whole of the machinery of liability, assessment and collection as it affects those taxpayers. Immediately before the passage from *Whitney* I have quoted, Lord Dunedin said:

> "My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

90. Taxpayers have been dying while their tax affairs were still open ever since the start of the income tax. *Williams* shows that this raised issues of interpretation at the time of the First World War. I have therefore examined the historical provisions of income tax law.

91. In order to allow me to consider the context and the history properly I asked the parties to provide me with the answers to a number of questions. The questions were

Issue 1

What significance, if any, do the parties attach to the fact that section 365 Income Tax Act 1952, consolidating previously enacted provisions, included:

> **"**(1) If a person chargeable to tax dies, the executor or administrator of the person deceased shall be liable for the tax charged on such deceased person and may deduct any payments made under this subsection out of the assets and effects of the person deceased."

---

discuss in paras 42-44 below, the requirement that a "perquisite" in section 131 of ICTA be convertible into money, have been definitional." [*My emphasis*]

and

> "(4) Where any person dies without having delivered a return of all his profits or gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of profits or gains which arose or accrued to him before his death may, subject to the provisions of section forty-seven of this Act (which relates to the time allowed for making assessments), be made upon his executors or administrators, and the amount of the tax thereon shall be a debt due from and payable out of his estate."

Subsection (1) became s 74(1) Taxes Management Act 1970 ("TMA"), and subsection (4) was repealed by the Income Tax Management Act 1964.

Issue 2

Does a comparison of s 74 TMA with s 72 TMA [text of s 72 before its repeal in 2012 included in directions] alter either of the parties' construction of s 74?

Issue 3

Each party must set out its answer to the question posed below and its reasons for the answer. References to things being done etc to or by the deceased assume that those things were done before their death.

92. These questions are set out in Appendix 1.

93. But before considering the both the immediate context of s 28A(1) TMA and the wider context of scheme of TMA, I look at the specific provisions of TMA which refer to personal representatives in relation to the income tax affairs of the deceased.

Section 74 TMA

94. Both parties seem to say that s 74 TMA indicates, but does not explicitly provide, that the personal representatives are at least assessable on income accruing to the deceased before his death. The appellant says that while s 72 TMA was more explicit than s 74 is, the fact that they were once in the same section of predecessor Acts demonstrates their close similarity. HMRC says that s 74 indicates that personal representatives stand in the shoes generally of the deceased for all tax matters relating to Lord Dunedin's three stages.

95. In *Leadley FTT* [29] to [34] Judge Mosedale took the view the s 74 relates only to the liability of the personal representatives to pay tax arising on the income of the deceased, the third *Whitney* stage. So I think does Patten J in *Morris*, although I find the logic in the last clause in the last sentence in [48] (see §73) difficult to follow. I agree with them that s 74 TMA itself only has this enforcement role.

96. That role is entirely consistent with another part of what Judge Mosedale said is the "common law" rule, and that is the rule that personal representatives are liable for the debts of the deceased (see §84). When tax becomes payable the person liable to pay it has become indebted to the Crown.

97. The contrast with s 72 TMA is clear – by using the words "shall be assessable and chargeable" that section permits an assessment on a person (R) in respect of the chargeability of another, incapacitated, person (P) with whom R stands in the relevant relationship or has the relevant capacity. Personal representatives do not in my view "represent" the deceased, and it is, in that regard, notable that Part 7 TMA is headed "persons chargeable in a representative capacity, etc.". That "etc." is important. I consider Mr Firth's argument that there is something useful to be drawn from the fact that what is in s 72 and 74 as separate sections of TMA were once in the same section of an earlier Act later.

98. But while I also think it would be odd if personal representatives were not assessable on the pre-death income of the deceased, s 74 of itself is not conclusive that they must be. This is because it cannot be said that s 74 would have no sphere of operation if the personal representatives were not themselves assessable, as the tax payable by the deceased for which they are liable under s 74 could include any tax on which the deceased was assessed before death and which had not been paid by the date of death. The most that can be said of it is that Parliament may have assumed that personal representatives are assessable on some or all of the income arising to the deceased before death ("pre-death income").

99. I agree then with the parties that s 74 TMA may be an indicator that personal representatives are assessable on pre-death income, but no more than that. But there may be another provision of TMA that does more than merely indicate, and that is s 40.

Section 40 TMA & the assessment assumption

100. In their skeleton HMRC make no mention of s 40 TMA. In their responses to the questions posed after the hearing they say that s 40 makes it clear that Parliament intended discovery assessments to be issued to personal representatives, and that it would be absurd to provide for time limits for something which could not lawfully be done.

101. In his skeleton Mr Firth points to s 40 TMA as part of the specific regime for personal representatives. Its purpose is to curtail time limits otherwise applying for the making of assessments. He adds that that purpose would be frustrated if HMRC are right about s 28A as it would allow them to drive the proverbial coach and horses through the carefully constructed limitations in s 40.

102. Essentially then the parties are at one – they differ about the implications to be drawn about s 28A TMA. I agree with them, but it is worth examining s 40 in a bit more detail to see if it can stand for any wider proposition than that which the parties have ascribed to it. Section 40 TMA says:

> "(1) *For the purpose of the charge of tax on the executors or administrators of a deceased person in respect of the income, or chargeable gains, which arose or accrued to him before his death*, the time allowed by section 34, 35 or 36 above shall in no case extend more than 4 years after the end of the year of assessment in which the deceased died. [*My emphasis*]

> (2) In a case involving a loss of tax brought about carelessly or deliberately by a person who has died (or another person acting on that person's behalf before that person's death), an assessment on his personal representatives to tax for any year of assessment ending not earlier than six years before his death may be made at any time not more than 4 years after the end of the year of assessment in which he died.
>
> (3) In this section "tax" means income tax or capital gains tax."

103. Section 36 TMA which would be the only relevant provision in this case of those referred to in s 40(1) says:

> "(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> (1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—
>
> (a) brought about deliberately by the person,
>
> …
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

104. But it should be noted that s 40(1) is of universal application because it applies in cases where s 36 does not extend time limits on account of careless or deliberate conduct – it applies to any assessment.

105. In enacting s 40(1) in 1970 (and the words emphasised are unchanged since then) Parliament must have meant the subsection to have effect. It is a truism of tax law (see the quotation from *Whitney* at §89) that there is unlikely to be a charge to tax if there is no machinery to assess and collect it: it is also unlikely that Parliament enacted a limitation on machinery rules such as those in sections 34 and 36 TMA if there was nothing on which they could bite.

106. The clear purpose of s 40(1) is to limit what would otherwise be the unfettered right of HMRC to raise an assessment within the time limits laid down in sections 34 and 36[11]. That right is explained in the opening clause of subsection (1) which defines the filed of operation of the enactment in that subsection. The right is to raise an assessment on the personal representatives in respect of the charge to tax on them in relation to pre-death income. Section 40(1) then does not *establish* that personal representatives are assessable on the deceased's pre-death income and gains, because it *assumes* that they are ("the assessment assumption"). That assumption is not however founded on anything explicit in TMA, and certainly not on s 74.

[11] I think s 35 TMA is a dead letter.

107. There is nothing[12] else in TMA which supports the assessment assumption. But a bit of archaeology[13] is instructive.

The historical background - 1918

108. In the first consolidation of the Income Tax Acts, the Income Tax Act ("ITA") 1918, General Rule 18 of the General Rules applicable to Schedules A, B, C, D and E said:

> "Where any person dies without having delivered a statement of all his profits or gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of the profits or gains which arose or accrued to him before his death may be made at any time within the year of assessment, or within three years after the expiration thereof, upon his executors or administrators, and the amount of the tax thereon shall be a debt due from and payable out of his estate."

109. This can be seen as an expression in statute of the assessment assumption. It should be noted that it applied only where a return had not been made before death, contrary to the position in this case. It also authorised an assessment within the year of assessment, no doubt so as to facilitate an early distribution of the estate. The time limit of three years was one which already applied to amendments of assessments and additional first assessments (ie discovery assessments) to income tax and to super-tax[14].

The historical background – 1923 and 1952

110. In the next consolidation, that of 1952, Rule 18 became s 365(4) ITA 1952:

> "Where any person dies without having delivered a return of all his profits or gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of profits or gains which arose or accrued to him before his death may, subject to the provisions of section forty-seven of this Act (which relates to the time allowed for making assessments), be made upon his executors or administrators, and the amount of the tax thereon shall be a debt due from and payable out of his estate."

111. The only change is that instead of embodying the time limit, section 365(4) ITA 1952 refers to s 47 of the 1952 Act, the immediate predecessor of s 40(1). Section 47 is a consolidation of s 29 Finance Act ("FA") 1923. This section extended the period for amendment and additional first assessments generally from three to six years, but by subsection (3) retained a three year rule (introduced at Report Stage) for executors specifically only in relation to amendments of assessments and additional first assessments (ie discovery assessments) to income tax and to super-tax.

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[12] With the possible exception of s 43A TMA which is prayed in aid by Mr Firth and which I consider later.

[13] See *Times Newspapers Ltd & Ors v Armstrong* [2006] EWCA Civ 519 at [14].

[14] Sections 125 and 7 ITA 1918 respectively.

112. That three year rule for certain types of assessment was itself consolidated as s 47(2) ITA 1952.

113. Rule 18 of the General Rules in ITA 1918 had become the law in the Irish Free State in 1922. Interestingly it was replaced by a new Rule 18 in 1932. Details are in Appendix 2.

The historical background – 1964 & 1970

114. Section 365(1) and (2) ITA were again consolidated as s 74 TMA, while s 365(3) was a special rule to the same effect for Schedule A. Section 365(3) was repealed by FA 1963 when Schedule A was abolished.

115. Section 365(4), which did specifically embody the assessment assumption (see §110), was itself repealed by the Income Tax Management Act 1964 ("ITMA"[15]) without replacement.

116. Quite why is a bit of mystery. The major change made by ITMA was to remove the assessing functions of the General Commissioners and to pass them to the Inspector of Taxes. This was done by s 5:

> "(1) Subject to any provision in the Income Tax Acts under which assessments to tax at the standard rate are to be made by the Board, all assessments to tax at the standard rate shall be made by an inspector, and—
>
> (a) if the inspector is satisfied that any return under the Income Tax Acts affords correct and complete information concerning income in respect of which tax is chargeable at the standard rate, he shall make an assessment accordingly, and
>
> (b) if it appears to the inspector that there is any income in respect of which tax is chargeable at the standard rate and which has not been included in a return of income, or if the inspector is dissatisfied with any return of income, he may make an assessment to tax at the standard rate to the best of his judgment.
>
> (2) All assessments to surtax shall be made by the Board and—
>
> (a) if they are satisfied that a return of the income of an individual affords correct and complete information concerning the whole of his income computed in accordance with the provisions of the Income Tax Acts relating to surtax, they shall make an assessment accordingly, and
>
> (b) if it appears to them that there has been a failure to make a return of the income of an individual, or if they are dissatisfied with a return of the income of an individual, they may make an assessment to surtax to the best of their judgment.
>
> (3) If an inspector or the Board discover—

[15] Only those readers who are at least as old as me will see the acronym ITMA and think of Tommy Handley, Colonel Chinstrap and Mrs Mopp.

> (a) that any income which ought to have been assessed to tax at the standard rate or to surtax has not been assessed, or
>
> (b) that an assessment to tax at the standard rate or to surtax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the inspector or, as the case may be, the Board may make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged.
>
> (4) All tax at the standard rate which is charged for any year on any person under subsection (3)(c) of this section may, notwithstanding that it was chargeable under more than one Schedule, be included in one assessment, and an appeal against an assessment under subsection (3)(c) of this section shall be to the Commissioners to whom an appeal would lie on a claim for the relief in connection with which the assessment is made.
>
> (5) Notice of an assessment under this section shall be served on the person assessed and shall state the time within which any appeal against the assessment may be made."

117. Older readers will also recognise that subsections (1) to (5) became s 29(1) to (5) TMA 1970 as originally enacted, and younger readers will recognise subsection (3) as now reading much like s 29(1) TMA as substituted by FA 1994. They will also recognise s 5(5) ITMA and s 29(5) TMA 1970 as originally enacted as now in s 30A(3) TMA which was also inserted by FA 1994.

118. What is noteworthy about s 5 ITMA and s 29 TMA as originally enacted is that nowhere does it specify who is to be assessed. This differs from what was the case before its enactment where a person failed to make a return. In that case, so far as Schedule D was concerned, s 36(3) ITA 1952 provided that:

> "the Additional Commissioners shall make an assessment on the person concerned in such sum as, according to the best of their judgment, ought to be charged on him."

"the person concerned" being the person who had not made a return.

119. It should also be noted that the time limit provision in s 47 ITA 1952 which applied to certain amendments and assessments was extensively modified by Schedule 6 ITMA (the repeals Schedule) so as to leave it applying to all assessments. In this form it was consolidated as s 40 TMA.

120. My assumption is that s 365(4) ITA 1952 was thought necessary, in the face of s 36(3), to allow an assessment by the Additional Commissioners on the executors, but when the more general wording of s 5 ITMA was enacted it no longer became necessary to have a special rule. This interpretation is also suggested by HMRC in their response to Issue 1 (see §91).

121. Thus the assessment assumption that was made by s 40(1) TMA when enacted was founded upon the lack of a tie between the assessing power in s 29 TMA and the person required to make a return.

122. The substitution of s 29 TMA as originally enacted by a new version in FA 1994 ("new s 29") may however have changed the landscape.

Section 29 TMA, self-assessment and the assessment assumption

123. Subsection (1) of new s 29 retains the non-specificity of the old s 29(3) which it replaced. It does now refer to it operating "as regards any person (the taxpayer) and a year of assessment", but without saying that the taxpayer is the person making or being required to make a return. And "as regards" seems to me to be capable of allowing an assessment on personal representatives.

124. Subsections (2) to (8) are however specific: the person who may be assessed if the conditions in those subsections are not met is the "taxpayer [who] has made or delivered a return[16]" and it is that taxpayer who may not be assessed unless the conditions are met by the taxpayer[17].

125. It is precisely this person, the one who has made a return, who is not within the contemplation of s 365(4), so it seems that if I am right that it is the non-specificity of s 5 ITMA and s 29(3) TMA (as originally enacted) that made s 365(4) ITA 1952 redundant, that still holds good for the case where no return was made by the deceased for a tax year where new s 29(1) can be employed to make an assessment on the personal representatives without running into any need to consider the subsection (3) conditions.

126. Thus turning back to s 40(1) TMA it clearly applies to a new s 29(1) TMA assessment made in a case where no returns were made before death. It is much less obvious that it applies to a new s 29 assessment made after death where a return was delivered before death, because of the references in new s 29 equating "the taxpayer" who is the subject of the assessment with the person who made and delivered the return. But s 29(1) says that it applies as regards the taxpayer. "As regards" seems to me to be capable of allowing an assessment on personal representatives in relation to the pre-death income of the deceased. Mr Firth does not demur from saying that s 29(1) TMA may apply to personal representatives, although I cannot say that I fully understand his reasoning. HMRC also say it may be done because of s 40 TMA. Thus the assessment assumption lives on.

The assessment assumption and self-assessment

127. The actual field of operation of s 40(1) is confined to s 29 assessments. *Morris* holds that sections 34 and 36 TMA do not apply to an enquiry under s 9A. But it does not, in my view, necessarily follow that the field of operation of the assessment

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[16] See subsections (2)(a) and (3).

[17] Or in a subsection (4) case by a person acting on his behalf, which cannot in my opinion include personal representatives.

assumption on which s 40 is grounded is also so confined, following the enactment in FA 1994 of the provisions relating to self-assessment.

128. This is because what s 40 TMA specifically refers to is a *charge* of tax on the personal representatives of a deceased person in respect of the income, or chargeable gains, which arose or accrued to him before his death and which may be assessed on the personal representatives.

129. This is in contrast with s 74 which refers to "tax chargeable on [a] deceased person", tax for which the personal representatives are *liable*.

130. It is notorious that the words "charge" and "assess" and cognate expressions have been used in Taxes Acts throughout the centuries in many different ways to express different stages in the process of administration of the income tax system. A similar charge can be laid against the words "liable" and "liability".

131. In *Rex v. The Kensington Income Tax Commissioners (ex parte Aramayo)* 6 TC 613, at 622, Lord Wrenbury said:

> "In these Acts it is impossible to rest any conclusion upon a particular word. The same word is in one section used in one sense and in another in a different sense. The preliminary ascertainment of amount is, however, generally spoken of by the verb 'assess', and its result by the noun 'assessment'. But it is equally true that the final act of imposing liability on the taxpayer is spoken of sometimes by these same words, but sometimes also by the word 'charge'. In popular language also the taxpayer is said to be 'assessed', when the meaning is that he has been rendered liable to pay. On the other hand the word 'charge' is sometimes used to express the preliminary act done by the subordinate officer, the assessor, and also, as I shall presently show, to express the final act done by the General Commissioners in fixing liability on the taxpayer."

132. If a charge of tax is equated to the first stage in the *Whitney* trilogy, ie what the law imposes on a person who meets the conditions set out in eg ITTOIA in relation to their income, that charge arose in the tax years 2005-06 and 2006-07 when Mr Winstanley was still alive, and it is impossible to see how it can be a charge on his personal representative.

133. I consider however that the assumption must relate to the second *Whitney* stage, assessment. Section 40(1) TMA does not say that for the purposes of the *charge* the personal representatives may be *assessed* but only within the time limit laid down: it says that for that purpose the time limits for assessing are different. The purpose then must be the purpose of enabling the pre-death income of the deceased to be *assessed* on the personal representatives.

134. That this is the correct reading is borne out by s 40(2) which applies only in cases of carelessness or deliberate (ie fraudulent) conduct by the deceased. There the words "assessment on his personal representatives to tax" is used.

135. The assessment assumption in my view applies in relation to any method by which that income may be assessed, that is to say the amount of tax which a person is liable to pay is particularised (as in *Whitney* stage 2) even if the actual sphere of operations of s 40 TMA itself is limited. In this case HMRC amended, or purported to amend, Mr Winstanley's returns and self-assessments for the two years and increased the tax shown on the self-assessments in those returns to the amount which they considered to be the correct amount payable.

136. Is that action within the assessment assumption? It seems to me that it is, for the following reasons.

137. First, the assessment assumption is that there is a charge of tax which can be assessed on the personal representatives. By s 197(1) FA 1994:

> "In the Tax Acts …, any reference (however expressed) to a person being assessed to tax, or being charged to tax by an assessment, shall be construed as including a reference to his being so assessed, or being so charged—
>
> (a) by a self-assessment under section 9 … of the Management Act, or
>
> (b) by a determination under section 28C of that Act (which, until superseded by such a self-assessment, has effect as if it were one)."

138. We know from *Morris* that in s 34 TMA references to an assessment being made do not include cases where a self-assessment is made or to the amending of a self-assessment. But this case does not involve the time limits in s 40 which modify those in s 34 and s 36 TMA. So there is no reason not to construe the reference in s 40 to the existence of an ability to make an assessment on PRs which charges tax on pre-death income (the assessment assumption) as including an amendment to a self-assessment which does the same.

139. Second, in *R (oao Archer) v HMRC* [2017] EWCA Civ 1962 Lewison LJ said at [26]

> "It is true that the self-assessment regime places the burden on the taxpayer, at least in the first instance, to work out the amount of tax for which he is liable and to state it in his return. It is also true that for some purposes, including time limits[18], an amendment to a self-assessment is not an 'assessment'. But in functional terms an amended self-assessment is still a variety of assessment (even if preceded by the prefix 'self'). Where it is HMRC that makes the amendment, I do not consider that the onus lies on the taxpayer to work out his liability all over again."

140. The assessment assumption, if not s 40(1) TMA itself, is on that basis capable of applying to a self-assessment and in particular to an amendment of it. But that amendment was only validly made if s 28A(1) TMA is read so as to permit it.

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[18] This statement follows discussion of *Morris* and is obviously a reference to it.

The appellant's exclusio *argument*

141. The appellant argues that no words should be read into s 28A(1) TMA to include a notice given to personal representatives, because Parliament has shown that when it wants to specifically refer to personal representatives in relation to the deceased's pre-death income it does so specifically. The main provision the appellant points to here is s 43A TMA.

142. Section 43A, which is headed "Further assessments: claims etc" says

> "(1) This section applies where—
>
> (a) ... by virtue of section 29 of this Act an assessment to income tax or capital gains tax is made on any person for a year of assessment, and
>
> (b) the assessment is not made for the purpose of making good to the Crown any loss of tax brought about carelessly or deliberately by that person or by someone acting on behalf of that person.
>
> (2) Without prejudice to section 43(2) above but subject to section 43B below, where this section applies—
>
> (a) any relevant claim, election, application or notice which could have been made or given within the time allowed by the Taxes Acts may be made or given at any time within one year from the end of the year of assessment in which the assessment is made, and
>
> (b) any relevant claim, election, application or notice previously made or given may at any such time be revoked or varied—
>
> (i) in the same manner as it was made or given, and
>
> (ii) by or with the consent of the same person or persons who made, gave or consented to it (or, in the case of any such person who has died, by or with the consent of his personal representatives),
>
> except where by virtue of any enactment it is irrevocable.
>
> …
>
> (5) Where a claim, election, application or notice is made, given, revoked or varied by virtue of subsection (2) above, all such adjustments shall be made, whether by way of discharge or repayment of tax or the making of assessments or otherwise, as are required to take account of the effect of the taking of that action on any person's liability to tax for any year of assessment.
>
> (6) The provisions of this Act relating to appeals against decisions on claims shall apply with any necessary modifications to a decision on the revocation or variation of a claim by virtue of subsection (2) above."

143. It must follow from Mr Firth's argument that if the person who made a return ("taxpayer") died before the assessment was made, the personal representatives of the deceased taxpayer could not have made the consequential claim in subsection (2)(a), because they are not specifically mentioned. But as to subsection (2)(b) if the taxpayer who made the previous claim died before the assessment was made, the personal

representatives could give the consent that the taxpayer could have given had they survived.

144. There is no logic to this position. HMRC say that the reason s 43A TMA refers to personal representatives only in subsection (2)(b) is that the personal representatives there are taking an action that the deceased had not intended to happen. Thus there is greater need to explicitly state that the personal representatives have this power, and it goes beyond "standing in the shoes" of the deceased.

145. The appellant's position here is predicated on the assumption that the assessment can be made on the personal representatives, and indeed Mr Firth's submissions accept that.

146. But it seems to me that Mr Firth has overlooked s 43C TMA. This provides relevantly:

> "(2) Where—
>
> (a) a return is amended under section 28A(2)(b) …, and
>
> (b) the amendment is not made for the purpose of making good to the Crown any loss of tax brought about carelessly or deliberately by the taxpayer or a person acting on his behalf,
>
> sections … 43A and 43B apply in relation to the amendment as they apply in relation to any assessment under section 29.
>
> (3) References to an assessment in sections … 43A and 43B, as they apply by virtue of subsection … (2) above, shall accordingly be read as references to the amendment of the return.
>
> (4) Where it is necessary to make any adjustment by way of an assessment on any person—
>
> (a) in order to give effect to a consequential claim, or
>
> (b) as a result of allowing a consequential claim,
>
> the assessment is not out of time if it is made within one year of the final determination of the claim.
>
> For this purpose a claim is not taken to be finally determined until it, or the amount to which it relates, can no longer be varied, on appeal or otherwise.
>
> (5) In subsection (4) above 'consequential claim' means any claim, supplementary claim, election, application or notice that may be made or given under section … 43A … (as it applies by virtue of subsection (1) … above or otherwise)."

147. Making the necessary modifications in s 43A produces (with the modifications in bold):

> "(1) This section applies where—
>
> (a) … by virtue of section **28A(2)(b)** of this Act an **amendment** is made on any person for a year of assessment, and

(b) the **amendment** is not made for the purpose of making good to the Crown any loss of tax brought about carelessly or deliberately by that person or by someone acting on behalf of that person.

(2) … where this section applies—

(a) any relevant claim, election, application or notice which could have been made or given within the time allowed by the Taxes Acts may be made or given at any time within one year from the end of the year of assessment in which the **amendment** is made, and

(b) any relevant claim, election, application or notice previously made or given may at any such time be revoked or varied—

(i) in the same manner as it was made or given, and

(ii) by or with the consent of the same person or persons who made, gave or consented to it (or, in the case of any such person who has died, by or with the consent of his personal representatives),

except where by virtue of any enactment it is irrevocable.

…

(5) Where a claim, election, application or notice is made, given, revoked or varied by virtue of subsection (2) above, all such adjustments shall be made, whether by way of discharge or repayment of tax or the making of assessments or otherwise, as are required to take account of the effect of the taking of that action on any person's liability to tax for any year of assessment.

(6) The provisions of this Act relating to appeals against decisions on claims shall apply with any necessary modifications to a decision on the revocation or variation of a claim by virtue of subsection (2) above."

148. But if the appellant is correct, that consent in s 43A(2)(b)(ii) would be pointless as it is the appellant's case that the amendment cannot be made. If however the assessment assumption applies to amendments then the personal representatives' consent is meaningful. The appellant's case would also in fact mean that the whole of s 43C TMA is pointless where the taxpayer dies before the amendment is made, as there is no specific reference to personal representatives in s 43A(2)(a) and indeed it would not be possible to make the amendment.

149. There are a couple of other specific references to personal representatives in TMA, in s 43B(1) and in s 12AA(13). I discount those in s 30AA as they related to personal representatives taxable in their own right in relation to income of the estate.

150. Section 43B deals with cases where the power in s 43A to make or revoke a claim is exercised, and the result of its exercise is that the liability of another person may be affected. In that case the other person has to consent to the claim. Section 43B(1) specifically caters for the case where the other person has died and so allows the consent to be given by the personal representatives.

151. Section 12AA TMA covers the making of partnership return for a period. HMRC may, and usually do, give a notice to file such a return to the "nominated partner". Such

a partner is required to be "the partner nominated by the other members of the partnership *during the period covered by the tax return*" [my emphasis] or their successor. "Successor" is defined in s 12AA(11) as the partner for the time being (which I take as a reference to the time when the notice was given) nominated by the relevant partners. A "relevant partner" for this, and only this, purpose is a partner at any time during the period for which the return was made or is required, or the personal representatives of such a person". Thus if a person who was a partner in the tax return period had died before the successor was to be elected, his personal representatives may take part in the vote.

152. Neither of these situations is remotely comparable with the case in this appeal. The persons for whom their personal representatives may or must stand in their shoes are third parties, not the person who made the return. I derive no assistance whatever from these examples.

Absurdity

153. HMRC's main submission in this case is that the appellant's proposition gives an absurd result. Not only would HMRC never be able to bring an enquiry to a conclusion and so establish any further amount of tax as due, the personal representatives would not be able to seek a closure notice from this Tribunal under s 28A(4).

154. The appellant says that what happened in this case is HMRC's fault. Had they done what he says they could have done, which is to make a s 29 assessment on the personal representatives, they would have been able to bring the increased tax into charge. If there is another step HMRC could have taken it cannot be absurd for a s 9A enquiry to become barred by the death of the taxpayer.

155. But the appellant accepts that HMRC would have had to make the assessments within the time limit in s 40 TMA, or if earlier, in other parts of TMA.

156. HMRC's response is to say that in this case where no careless or deliberate conduct is alleged or could be alleged, the normal four year time limit in s 34 TMA would have applied, so that an assessment became impossible by 6 April 2011 (for 2006-07) or 6 April 2012 (2007-08). But in any case a s 29 assessment would only have been possible if the condition in s 29(5) TMA had been met. Here there was nothing to show that to be the case: in fact s 9A enquires *were* made within in the normal time limit.

157. In my view the appellant's construction of s 28A TMA is an absurd one. If there was a remedy genuinely freely available to HMRC to overcome the grinding to an irrevocable halt of a s9A enquiry on the death of taxpayer, then the position may be different, but there was no remedy in this case and I suspect in most if not all other cases.

Purpose

158. Both parties say that their construction advances the purpose of the law. The appellant says that the construction they put forward is consistent with the purpose of s

40 TMA in bringing finality at a reasonable time to personal representatives needing to administer an estate.

159. HMRC say that the purposes of s 28A is to enable enquiries to be brought to a conclusion. *Morris* shows that the normal time limits for assessment do not apply to s 9A TMA enquiries, and that Parliament had decided that the protection for the taxpayer is s 28A(4) TMA, the ability to seek a closure from this Tribunal. To deny both HMRC and the personal representatives the ability to conclude an enquiry without another practical remedy is to thwart Parliament's purpose in enacting s 28A.

160. I agree with HMRC essentially for the same reasons that I think the appellant's construction is absurd.

Conclusion

161. I conclude that s 28A(1) TMA must be interpreted as allowing a notice of closure to be given to the personal representatives of a deceased taxpayer, and s 28A(4) TMA must be interpreted as allowing the personal representatives to seek a closure notice from this Tribunal. This is a strained construction because it requires words to be assumed to be in s 28A(1). There is no difficulty about the words as sections 12AA(13), 43A(2)(b)(ii) and 43B(1) show: what is needed is to add to the end of s 28A(1)[19] the words ", or where he has died, his personal representatives".

162. I add that I do not come to my conclusion on s 28A(1) TMA as a result of any common law (or statutory) principle about personal representatives. A claim to relief as in *Leadley FTT* may be an asset in relation to which the personal representatives stand in the shoes of the deceased for tax purposes (and s 43C TMA strongly suggests that it is), but that is not this case.

163. But my conclusion is reinforced by what I have held in relation to the ability of HMRC to make assessments on the personal representatives of deceased person in relation to pre-death income, on their ability to amend returns and self-assessments and their ability to make claims under s 43A and 43C TMA.

164. My conclusion is wholly consistent with *Williams* which established that it would be absurd to deny a losing party at the first level of appeal the right to seek to overturn that decision and which interpreted the predecessor of s 56 TMA purposively by giving it a strained construction that gave it effect rather than a literal one which caused it to fail.

165. It is also in agreement with what Patten J says in his decision in *Morris*.

166. I do not need to decide whether personal representatives may make a return under s 8 TMA in respect of the deceased where it was the deceased who was given a notice to file, or whether HMRC may enquire into a return under s 9A TMA if the taxpayer who made the return died after delivering it but before the enquiry was opened. Nor do

[19] As a result of amendments to s 28A made by Schedule 15 Finance (No. 2) Act 2017 the relevant subsection to which words should be added is now subsection (1B).

I need to decide a number of other related questions, such as whether the personal representatives may amend a return made by a deceased taxpayer who died after delivery but before the need for an amendment became obvious.

167. I add only this. In answer to the questions I raised as shown in the appendix, HMRC's answer to all of them was "yes". This was based on the absurdity and injustice of the personal representatives being liable for the tax to which the deceased was chargeable but not being able to take the necessary steps to establish that liability, and on the absurdity and injustice generally of the consequences of the appellant's position when applied to eg s 8 TMA.

168. The appellant's answer to the questions set out in Appendix 1 was for the most part "no", including in relation to sections 7, 8, 9ZA, 9ZB(2) and (4), 9A, 28ZA, 28C, 42(9) and most paragraphs of Schedule 1A TMA. The appellant answers yes in relation to s 29, 30, 31A, 49B, 49C, 50 and 54 TMA.

169. And I cannot see any logical reason why what I say in relation to s 28A does not apply in relevant cases to those sections of TMA which the appellant says cannot apply to personal representatives in relation to pre-death income of the deceased. What I say about s 28A is consistent with the thrust of Parts 2 to 5A TMA generally, the wider context in which s 28A should be placed. If my construction of s 28A also applies to the rest of those parts of TMA as I think (without deciding) it does, it allows the machinery in those sections to give full effect to the *Whitney* stages.

Decision

170. Under s 50(6) TMA 1970 the self-assessments as amended by the closure notices given to the personal representatives of Mr Winstanley for the tax years 2006-07 and 2007-08 stand good in the sums of £136,002.23 and £183,523.05 respectively.

171. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 22nd MARCH 2018

Issue 3

Each party must set out its answer to the question posed below and its reasons for the answer. References to things being done etc to or by the deceased assume that those things were done before their death.

(1) Can personal representatives validly notify liability to tax of the deceased under s 7 TMA?

(2) Can an officer of HMRC give a notice under s 8(1) TMA to personal representatives to make a return of the deceased's income?

(3) If an officer of HMRC has given such a notice to the deceased, can personal representatives validly make and deliver a return to that officer?

(4) Can personal representatives validly amend a return made by the deceased under s 9ZA TMA?

(5) Can an officer of HMRC validly give notice under s 9ZB(2) TMA of a correction to a return made by the deceased?

(6) Can personal representatives validly reject (s 9ZB(4)) a notice given to them, or to the deceased if the deceased died after notice of correction was received but before any rejection could be made by them?

(7) Can an officer of HMRC give a valid notice of enquiry under s 9A TMA to personal representatives where the return was made by the deceased?

(8) Can personal representatives join in a notice of referral to the tribunal under s 28ZA TMA?

(9) Can an officer of HMRC make a determination under s 28C TMA on personal representatives?

(10) If a determination was made and notified to the deceased, can personal representatives validly submit a self-assessment to supersede the determination?

(11) Can an officer of HMRC make a s 29 TMA assessment on personal representatives?

(12) Can an assessment under s 30 TMA be made on personal representatives where the repayment was made to the deceased?

(13) Can personal representatives give notice of appeal under s 31A TMA to the relevant officer of HMRC where (a) the assessment was notified to the deceased and (b) where the assessment was made on and notified to the personal representatives?

(14) Can personal representatives form a belief within paragraph 1(1)(a) Schedule 1AB TMA if the deceased paid the tax referred to?

(15) Can personal representatives make a claim under paragraph 1(2) in relation to that tax?

(16) Can personal representatives make a supplementary claim under s 42(9) TMA where the original claim was in a return made by the deceased?

(17) Can personal representatives be a "claimant" within Schedule 1A TMA?

(18) Can an officer of HMRC validly give notice of a correction under paragraph 3 Schedule 1A to a claim made by the deceased?

(19) Can an officer of HMRC give a valid notice of enquiry under paragraph 5 Schedule 1A to personal representatives where the claim was made by the deceased?

(20) Can an officer of HMRC give a closure notice to personal representatives under paragraph 7(1) Schedule 1A?

(21) Can personal representatives seek a direction for a closure notice under paragraph 7(5) Schedule 1A?

(22) Can an officer of HMRC make an assessment on personal representatives under paragraph 8(1) Schedule 1A?

(23) Can personal representatives make an appeal under paragraph 9 Schedule 1A?

(24) Can personal representatives request a review under section 49B TMA if it was the deceased who gave notice of appeal and so is the appellant?

(25) Can personal representatives accept an offer of a review under section 49C TMA if it was the deceased who gave notice of appeal and so is the appellant?

(26) Can personal representatives notify an appeal to the Tribunal if it was the deceased who gave notice of appeal and so is the appellant, or if the deceased requested or accepted a review but dies before notification to the Tribunal?

(27) Can HMRC validly notify the conclusion of a review to personal representatives where the appellant died before the review was completed?

(28) Can the Tribunal reduce or increase a self-assessment or a s 29 assessment under s 50 TMA if the appellant notifying the appeal is the personal representatives?

(29) Can personal representatives enter into a valid s 54 TMA agreement with personal representatives if the appellant was the deceased?

APPENDIX 2

1. Following the establishment of the Irish Free State in 1922, United Kingdom law on taxation, as it applied in Ireland, continued to apply with necessary adaptations. This included Rule 18 of the General Rules applying to all Schedules in the Income Tax Act 1918.

2. By s 5 Finance Act 1932 the Free State substituted a new Rule 18. It read:

> "(1) Where a person dies whether before, on, or after the 6th day of April, 1932, an assessment or an additional first assessment (as the case may be), may be made for the year of assessment in which such person dies or for any one or more of the six years next preceding that year in respect of the profits or gains which arose or accrued to such person before his death, and the amount of the tax on such profits or gains shall be a debt due from and payable out of the estate of such person, and the executor or administrator of such person shall be assessable and chargeable in respect of such tax.
>
> (2) No assessment under this rule shall be made later than six years after the expiration of the year of assessment nor, in any case, later than three years after the expiration of the year of assessment in which the deceased person died.
>
> (3) The executor or administrator of any such deceased person shall, when required by a particular notice so to do, prepare and deliver to the inspector of taxes a true and correct statement in writing signed by such executor or administrator and containing particulars, to the best of his judgment and belief, of the profits or gains which arose or accrued to such deceased person before his death and in respect of which such executor or administrator is assessable under this rule, and the provisions of the Income Tax Acts relating to statements to be delivered by any person shall apply, with any necessary modifications, to statements to be delivered under this rule.
>
> (4) Nothing in this rule shall apply to or affect statements to be delivered or assessments to be made in respect of a trade, profession, or vocation carried on by two or more persons jointly."

3. This it can be seen is a far more comprehensive rule that Rule 18.

4. In the debate on 1 June 1932 in Committee in the Dáil Éireann on the resolution founding the clause in the Bill that became s 5, the Minister for Finance (Mr McEntee) said:

> "Paragraph 1 deals with Rule 18 of the General Rules of the Income Tax Act of 1918. It provides that where any person dies, without having delivered a statement of all his profits or gains, an assessment in respect of such profits or gains may be made on his executors. A case recently arose in which a person having an income of over £2,000 a year made a complete return and died about a week before the assessment was signed. The Special Commissioners, on appeal, held that the existing rules did not enable an assessment to be made on the executors. The

resolution substitutes a new rule which enables an assessment to be made on the executors, whether a return has been made or not. Some questions have been raised in other cases as to whether the Acts create any charge on executors, and words are introduced in the new Rule expressly providing that the executor or administrator shall be assessable and chargeable. The new Rule is so drafted as to enable assessments to be made for past years, subject to the time limit in sub-clause 2, but does not operate to validate any assessments already made. It merely enables assessments, including assessments for certain past years, to be made after the passing of the Act.

Sub-clause 2 of the new Rule provides that assessments made under the preceding sub-clause shall be made not later than six years after the expiration of the year of assessments, but any such assessments must be made not later than three years after the expiration of the fiscal year in which the deceased died. There is no change in the law in regard to this time limit. The existing provisions embodied in Section 8 of the Finance Act of 1925, as amended by Section 2 of the Finance Act of 1921, are to the same effect.

Sub-clause 3 of the new Rule provides for the making of returns by executors, to the best of their judgment and belief, in respect of profits or gains which accrued to a deceased person for any year for which an assessment could be raised under sub-clause 1. At present, there is no power to require an executor to make a return in respect of the income of a deceased person. It is to be observed that, under the law as it stands, if an executor desires to make a return, he may be faced with the position that he could be challenged in respect of any expenses being incurred in the preparation of the return. As the sub-clause imposes a statutory liability on the executor, the executor will, in future, be entitled to have any expenses which he incurs borne by the estate.

…

Mr. Blythe

As I understand, this Resolution prevents any difficulty arising in cases where the deceased has made a return but has not been assessed before death and, secondly, it makes it obligatory on executors to furnish a return, whereas in the past, although there was power to assess, there was no power to compel a return.

Mr. MacEntee

That is right. The assessment almost inevitably led to some sort of return being furnished. It saved the executors time and it saved the Revenue Commissioners time."

5. The new Rule seems to put in clear statutory terms what the parties' and I agree was the somewhat unclear position in the UK from 1918 to 1964.

6. The provision still substantially stands as the law of Ireland in s 1048 Tax Consolidation Act 1997:

> "(1) Where a person dies, an assessment or an additional first assessment, as the case may be, may be made for any year of assessment

for which an assessment or an additional first assessment could have been made on the person immediately before his or her death, or could be made on the person if he or she were living, in respect of the profits or gains which arose or accrued to such person before his or her death, and the amount of the income tax on such profits or gains shall be a debt due from and payable out of the estate of such person, and the executor or administrator of such person shall be assessable and chargeable in respect of such tax.

(2) No assessment under this section shall be made later than 3 years after the expiration of the year of assessment in which the deceased person died in a case in which the grant of probate or letters of administration was made in that year, and no such assessment shall be made later than 2 years after the expiration of the year of assessment in which such grant was made in any other case; but this subsection shall apply subject to the condition that where the executor or administrator—

(a) after the year of assessment in which the deceased person died, delivers an additional affidavit under section 38 of the Capital Acquisitions Tax Act, 1976, or

(b) is liable to deliver an additional affidavit under that section, has been so notified by the Revenue Commissioners and did not deliver the additional affidavit in the year of assessment in which the deceased person died,

such assessment may be made at any time before the expiration of 2 years after the end of the year of assessment in which the additional affidavit was or is delivered.

(3) The executor or administrator of any such deceased person shall, when required to do so by a notice given to the executor or administrator by an inspector, prepare and deliver to the inspector a statement in writing signed by such executor or administrator and containing particulars, to the best of such executor's or administrator's judgment and belief, of the profits or gains which arose or accrued to such deceased person before his or her death and in respect of which such executor or administrator is assessable under this section, and the provisions of the Income Tax Acts relating to statements to be delivered by any person shall apply with any necessary modifications to statements to be delivered under this section."