FIELD COURT TAX CHAMBERS

Leadley: claims by executors[1]

Executors cannot claim s 131 relief on shares

Section 131 of ITA 2007 provides income tax relief where a person subscribes for shares in an unquoted trading company which subsequently become of negligible value. The recent case of *HMRC v Leadley* [2017] UKUT 111 (TCC) considered such a claim, and the issue was simply this: if the owner of the shares dies before making a claim, can the claim be made by his executors?

Mr Leadley had invested in a company and by 5 April 2010, his shares had become valueless. His tax return for the year 2009/10 would ordinarily be filed by 31st January 2011 – but he was killed in May 2010. He had not, of course, filed his tax return by then.

In January 2011 when his executors submitted his tax return, they included a claim for the relief. HMRC refused the relief on the grounds that only the person who owned the shares can make the claim; he was dead, so bad luck.

The executors said, 'OK, we owned the shares in the company when the claim was submitted, so please can we have the relief?' Er no; by the time the executors acquired the shares, they had already become of negligible value so the executors could not make the claim either.

The First-tier Tribunal decided that the executors had a valid claim because executors stand in the shoes of the deceased and are therefore able to make such claims as the deceased could have made had he lived. The tribunal expressed the position as follows:

> "By virtue of their common law legal status as his personal representatives, the executors stand in the shoes of Mr Leadley and are treated, and were intended by Parliament to be treated, in so far as Mr Leadley's chargeability is concerned as if they were Mr Leadley".

The FTT may have had in mind the following extract from the judgment in *Rickless v United Artists* [1987] 1 All ER 679:

> "Personal representatives are not the agents of the deceased; their powers rest not on the authority given to them by the deceased but on a quite separate authority given to them by the law to stand in the place of the deceased"

The tribunal might also have had regard to the case of *Otter v Church, Adams, Tatham & Co* [1953] 1 All ER 168 in which it was said that:

> "what vests in the personal representatives is the right of action which was previously vested in the deceased"

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and in which reference was made to *Raymond v Fitch* [1842] which showed that:

> "as a matter of common law all choses in action which are not of a purely personal nature such as an action for slander, survive and pass to the personal representatives".

HMRC appealed against the decision and during the course of the hearing before the Upper Tribunal, it produced an internal HMRC memorandum which contained the following passage:

> "we have the situation where if a taxpayer is knocked down on her way to her accountant's office to sign a negligible value claim, no one can make a capital loss on the asset whereas if she is knocked down after signing the claim a capital loss will be available. This seems extremely harsh".

I am sure everybody would agree that this is extremely harsh, but what on earth has an internal HMRC memorandum got to do with it? Is this memorandum relevant to the court in determining the meaning of s 131? What if the taxpayer had produced a letter from his adviser, or even perhaps counsel's opinion, saying that relief was available? Would that have been relevant to the court in interpreting the provision?

Anyway, the essential point, however harsh, is reasonably clear. To make a valid claim under s 131, it is necessary for the person who owns the shares at the relevant time to make the claim. Accordingly, the executors need to be treated as the person who owns the shares for this purpose. If they cannot be so treated, they cannot make the claim.

The FTT said that they could, but the Upper Tribunal held that this was mistaken. It said that they deceased and the executors cannot be equated. In support of this conclusion, it explained that the TCGA 1992 treats the two as distinct and provides in s 62 for personal representatives to be deemed to acquire the assets of a deceased person on his death for consideration equal to their market value without a disposal.

We hear a lot about purposive interpretations when HMRC seek to deprive a taxpayer of a relief – but sadly, it never seems so keen on purposive interpretations when they benefit the taxpayer. The FTT thought that a purposive interpretation was appropriate here but, unfortunately for the executors, the Upper Tribunal took a different view.

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