Neutral Citation: [2024] UKFTT 00651 (TC)

Case Number: TC09248

TAX CHAMBER

Taylor House

Appeal reference: TC/2020/03753; TC/2020/03754

INHERITANCE TAX – whether a guarantee executed by a person (the "settlor") shortly before her death of a loan to a discretionary trust settled by her where that loan was secured by a charge over the trust assets, followed by the transfer of the trust assets (whilst subject to the charge) to the settlor's children gave rise to a lifetime transfer of value by the settlor – no – whether, if the execution of the guarantee had been a lifetime transfer of value, the certificate of clearance which was given by the Respondents in relation to the transfer of value that was deemed to take place on the settlor's death precluded the Respondents from issuing determinations in respect of the lifetime transfer of value – no - whether, if the execution of the guarantee had been a lifetime transfer of value, the Respondents were out of time for issuing those determinations because of the time which had expired since the delivery of the account in relation to the transfer of value which was deemed to take place on the settlor's death – no – appeals allowed

Heard on: 5 June 2024
Judgment date: 11 June 2024

Before

TRIBUNAL JUDGE TONY BEARE

Between

(1)LUIS CARVAJAL and (2)NICHOLAS CARVAJAL (AS EXECUTORS OF THE ESTATE OF MS JENNIFER ELIZABETH FLEET)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr John Craggs, of counsel, instructed by Kukar & Co

For the Respondents: Ms Sadiya Choudhury KC and Mr Sam Glover, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision relates to appeals by the Appellants, who are the sons and executors of the late Mrs Jennifer Elizabeth Fleet ("Mrs Fleet") against notices of determination for inheritance tax dated 17 June 2019 (the "Determinations") which were issued to the Appellants under Section 221 of the Inheritance Tax Act 1984 (the "IHTA"). The aggregate amount of tax at stake in those Determinations, not including interest, is £588,700.

THE AGREED FACTS

2. The parties have agreed certain facts in relation to the appeal as follows:

(1) on 15 April 2011, Kukar & Co (the Appellants' representative) ("Kukar") accepted its appointment as the adviser to Mrs Fleet, principally in relation to the implementation of a strategy offered by Mercury Tax Group ("Mercury");

(2) on 16 May 2011, Mrs Fleet settled The Jennifer Fleet Trust (the "JFT") with initial capital of £20,000. The trustee of the JFT was Bourse Trustee Company Limited ("BTCL") and the beneficiaries of the JFT were Luis Jeffrey Carvajal ("LJC") and Nicholas John Carvajal ("NJC"), the settlor's sons. The £20,000 was shown as a credit to BTCL's client deposit account for the JFT;

(3) on the same day, Havelet Finance Limited ("HFL") offered a term loan facility to BTCL in the amount of up to £1,400,000, in order to assist with the funding of the JFT. The offer was to remain open until close of business on 17 May 2011. Subject to certain conditions' being satisfied, the facility could be drawn in one amount up to a month from acceptance. The arrangement fee was £20,000. The conditions included that Mrs Fleet provide a personal guarantee and indemnity to HFL. The loan was repayable on demand and was also repayable on whichever was the earlier of the death of Mrs Fleet or five years following the date on which it was drawn down;

(4) also on the same day, Mrs Fleet provided the guarantee required by HFL for the liabilities of BTCL up to the amount of £1,400,000 plus interest and any costs incurred by HFL in connection with the guarantee;

(5) on 17 May 2011, the loan was drawn down by BTCL and credited to BTCL's client deposit account for the JFT. BTCL immediately invested the proceeds of the loan in International Employment Services Discount Demand Bonds (the "Bonds") and charged the Bonds in favour of HFL. BTCL sought permission from HFL to distribute the Bonds to the Appellants in their capacity as beneficiaries of the JFT;

(6) on 19 May 2011, BTCL's board of directors had a meeting. A board resolution dated 19 May 2011 records that the board discussed that it would not be in the Appellants' interests for the funds to be held by the JFT for any length of time. HFL had confirmed to them that it would allow distribution of the funds in the JFT to the Appellants in their capacity as beneficiaries if both Appellants "collateralised" the personal guarantee provided to HFL by their mother. BTCL resolved irrevocably to allocate the funds contained within the JFT to the Appellants in equal shares provided that they gave HFL sufficient collateral to allow the distribution;

(7) on 20 May 2011, NJC gave a personal guarantee and indemnity to HFL;

(8) on 21 May 2011, LJC gave a personal guarantee and indemnity to HFL;

(9) BTCL reported in a board resolution dated 23 May 2011 that, having received guarantees and indemnities from LJC and NJC, and following confirmation from HFL

that it agreed to allow BTCL to distribute funds to LJC and NJC on the basis that they collateralised Mrs Fleet's personal guarantee, BTCL resolved to allocate the funds of the JFT to LJC and NJC;

(10) BTCL's general ledger on that date showed capital distributions of £700,000 each, in the form of the Bonds, to LJC and NJC, leaving the JFT with no assets;

(11) on 24 May 2011, Mrs Fleet died;

(12) the debt became repayable within one month of Mrs Fleet's death. Correspondence indicates that Mrs Fleet's guarantee was called in by HFL in May 2011;

(13) on 14 November 2011, the Respondents received Mrs Fleet's inheritance tax account (IHT 400) signed by the Appellants in their capacity as executors of Mrs Fleet's estate. The guarantee given to HFL by Mrs Fleet for £1,400,000 was shown as a liability of Mrs Fleet's estate (along with £14,000 costs owed to BTCL), which she was called upon to repay, thereby reducing the inheritance tax payable by the estate. LJC and NJC both signed the IHT 400, but NJC's name does not appear on the Calendar of Grants;

(14) on 23 February 2012, interest due for the month following Mrs Fleet's death was received by HFL;

(15) on 24 October 2014, HFL wrote to the executors of the estate of Mrs Fleet confirming that repayment of the debt was required, and requesting immediate payment;

(16) on 4 March 2015, HFL issued a demand, which was addressed to LJC and NJC as beneficiaries of the JFT, rather than as executors of Mrs Fleet's estate, and which contained a calculation of the debt due. It referred to the absence of assets within the estate and the requirement that LJC and NJC settle the debt under the terms of their guarantees. The letter also mentioned HFL's consent, given on 23 May 2011, to the irrevocable allocation of the Bonds to LJC and NJC, and requested that the beneficiaries arrange for the redemption of the Bonds and the payment of the redemption proceeds to an account held by HFL;

(17) on 29 April 2015, HFL confirmed to LJC and NJC, as beneficiaries of the JFT, receipt of £1,400,000 from the redemption of the Bonds. It also confirmed that the debt due by BTCL as the trustee of the JFT had now been discharged in full;

(18) on 21 September 2015, HFL confirmed to LJC and NJC, as executors of Mrs Fleet's estate, receipt of £1,400,000 from the redemption of the Bonds on 29 April 2015. It also confirmed that the debt due by BTCL as the trustee of the JFT had now been discharged in full;

(19) in November 2018, Kukar used form IHT 30 to make a formal application under Section 239(2) of the IHTA for a certificate of discharge in relation to the tax liability arising on Mrs Fleet's death. The application was made. The Appellants applied for a certificate of discharge using section A of the IHT 30 form (signed and dated by LJC on 1 November 2018 and by NJC on 10 November 2018), which applies to liability arising on death. The Appellants did not populate section B of the IHT 30 form, which applies to liability in respect of a lifetime transfer;

(20) the application was received by the Respondents on 30 November 2018. A certificate of discharge was issued on 11 December 2018 (the "Clearance Certificate"), pursuant to the application, apparently in error. The officer responsible for the case,

Officer Amanda Benson, was unaware that a certificate of discharge had been applied for and issued;

(21) on 17 June 2019, Officer Benson, who was still unaware of the Clearance Certificate, issued the Determinations to the Appellants stating that the amount chargeable to inheritance tax was £1,400,000. This was later revised to £1,668,750 by virtue of Section 5(4) of the IHTA;

(22) the Determinations were made on the basis of three alternative contentions:

(a) first, having regard to the provisions of Section 5(3) and Section 162(1) of the IHTA, the guarantee was not a liability of Mrs Fleet immediately before her death;

(b) alternatively, the giving of the guarantee was a disposition by Mrs Fleet as a result of which her estate immediately after the disposition was less than it would have been but for the disposition. This was a transfer of value of £1,400,000 for the purposes of Section 3(1) of the IHTA and a chargeable transfer of the same amount for the purposes of Section 2(1) of the IHTA; and

(c) alternatively, Mrs Fleet had a right to recover an amount of £1,400,000. That right, having regard to Section 5(1) and Section 272 of the IHTA, was property to which Mrs Fleet was beneficially entitled and formed part of her estate immediately before her death;

(23) on 15 July 2019, the Appellants appealed against the Determinations on the grounds that they were not valid as a result of the Clearance Certificate;

(24) on 4 March 2020, the Respondents informed the Appellants that the arguments at paragraphs 2(22)(a) and 2(22)(c) above would not be pursued because the Clearance Certificate discharged the Appellants from further liability arising on death. However, the Respondents continued to rely on the argument at paragraph 2(22)(b) above, namely that, in giving the guarantee to HFL, Mrs Fleet made an immediately chargeable lifetime transfer for the purposes of Section 3(1) of the IHTA. This conclusion was subsequently upheld on review, the conclusions of which were notified to the Appellants on 25 September 2020;

(25) on 23 October 2020, the Appellants filed notices of appeal at the First-tier Tribunal (the "FTT"). Each of those notices included three grounds of appeal, as follows:

(a) the Clearance Certificate discharged the Appellants from any further claim to inheritance tax attributable to the property or transfers of value included in the original inheritance tax account ("Ground 1");

(b) the giving of the guarantee did not constitute a lifetime transfer of value ("Ground 2"); and

(c) the Determinations were in any event statute-barred by virtue of Section 240(2) of the IHTA ("Ground 3"); and

(26) on 16 January 2021, the FTT issued directions that the appeals should proceed and be heard together.

3. For completeness, I should record that, following an alternative dispute resolution meeting between the parties on 22 September 2021, the Appellants asked the Respondents to consider whether the amounts subject to the Determinations could be remitted in accordance with the Respondents' guidance in their Inheritance Tax Manual at paragraph 30411. When

the Respondents refused to do so, the Appellants applied to amend their grounds of appeal by including the remission issue and this was granted by Judge Vos on 30 September 2022. However, at the hearing, Mr Craggs, who was representing the Appellants, conceded that the remission issue was outside the scope of the FTT's jurisdiction because the Respondents' conduct in relation to it could be challenged only by way of judicial review and he therefore formally withdrew that ground of appeal. I do not address the remission issue further in this decision.

THE CORRESPONDENCE

4. It is fair to say that both parties have been guilty of some egregious delays in the course of this dispute. For present purposes, it is unnecessary for me to set out the entire history of the correspondence. However, because it has some relevance to the matters which are in dispute, I would note the following key aspects of the correspondence:

(1) On 30 October 2011, the Appellants signed the IHT 400 account. This recorded that:

(a) Mrs Fleet had made lifetime transfers of value of £128,000 on or after 18 March 1986 and listed those transfers;

(b) the gross value of Mrs Fleet's assets was £1,780,052;

(c) the gross value of Mrs Fleet's liabilities was £1,616,807 and those liabilities included her liability under the guarantee to HFL of £1,400,000;

(d) the net value of Mrs Fleet's estate was therefore £163,245;

(e) the gross value of gifts made by Mrs Fleet in the seven years preceding her death was £128,00; and

(f) the aggregate of the figures in paragraphs 4(1)(d) and 4(1)(e) above was £291,245, which was below the nil rate band at the time of Mrs Fleet's death of £325,000.

The IHT 400 account was accompanied by schedule IHT 403, the form required to be sent in order to record lifetime transfers of value made by the deceased prior to his or her death. In this case, the IHT 403 accompanying the IHT 400 recorded lifetime transfers of £128,000 but did not include the execution of the guarantee by Mrs Fleet;

(2) on 6 January 2014, Mr John Friend of Kukar wrote to Officer MS Davis of the Respondents and provided Officer Davis with, inter alia, a copy of Mrs Fleet's guarantee;

(3) on 22 September 2016, Officer Martin Tempany of the Respondents wrote to Mr Friend to say, inter alia, that:

(a) Section 162 of the IHTA had the effect that the liability under Mrs Fleet's guarantee was not deductible in calculating the value of Mrs Fleet's estate because the existence of the charge over the Bonds and the guarantees from the Appellants meant that it was unlikely that Mrs Fleet's guarantee would need to be called;

(b) even if Section 162 of the IHTA did not have the effect set out above because Mrs Fleet's guarantee was likely to be called, the Respondents would need to consider whether the giving of the guarantee should be treated as a chargeable lifetime transfer of value by Mrs Fleet to the JFT; and

(c) even if neither of the above was correct, the estate had been undervalued by the executors in failing to take into account Mrs Fleet's rights of subrogation as against the JFT should payments fall to be made under her guarantee;

(4) on 29 November 2016, Mr Friend wrote to Officer Tempany to say that, in the light of Officer Tempany's letter of 22 September 2016, he was in the process of taking further advice and hoped to be able to respond in the near future;

(5) on 17 July 2017, Mr Friend wrote to Officer Alan Hackney of the Respondents (who had taken over responsibility for handling the dispute) to apologise for his delay in responding substantively to Officer Tempany's letter of 22 September 2016 and to reiterate that, having taken specialist advice, the Appellants' position remained the same;

(6) on 7 November 2018, Officer Camilla Rudge of the Respondents wrote to Mr Friend to say, inter alia, that she apologised for the length of time that it had taken the Respondents to get back to Mr Friend, that she had taken over responsibility for the dispute from Officer Hackney and that she was reviewing all of the information which Mr Friend had provided and aimed to respond substantively to Mr Friend within the next few weeks;

(7) on 11 November 2018, the Appellants submitted form IHT 30 – signed by LJC on 1 November 2018 and NJC on 10 November 2018 - with section A ("Liability arising on death") and section E ("Application in respect of property or transfers of value included in:") completed; and

(8) on 11 December 2018, Officer E Mesa executed section H of the IHT 30 on behalf of the Respondents, which stated that the Respondents "discharge the above applicant(s) from any (further) claim for tax or duty on the value attributable to the property at section E, on the occasion specified at section A, B, C or D except for any tax which is being paid by instalments".

THE RELEVANT LEGISLATION

5. The legislation which is relevant to these appeals is set out in some detail in the Appendix at the end of this decision. For present purposes, it suffices to note that:

(1) inheritance tax is payable in respect of a transfer of value which is made by an individual and which is not exempt;

(2) a transfer of value occurs when there is a disposition by a person as a result of which the value of his or her estate immediately after the disposition is less than it would be but for the disposition;

(3) certain transfers of value are categorised as "potentially exempt transfers" or "PETS". These include a transfer of value to an individual but not a transfer of value to a discretionary trust. No inheritance tax liability arises in respect of a PET which is made seven years or more before the transferor's death;

(4) on a person's death, inheritance tax is chargeable as if, immediately before his or her death, the deceased had made a transfer of value equal to the value of his or her estate before death;

(5) a person making a transfer of value is required to deliver an account to the Respondents of that transfer of value;

(6) a person can apply to the Respondents for a certificate of discharge in respect of a transfer of value and the Respondents may give a certificate to that effect and are

obliged to do so if the transfer of value is one deemed to be made on death or the transferor has died; and

(7) where inheritance tax attributable to a transfer of value has been paid in accordance with an account delivered to the Respondents and the payment has been accepted in full satisfaction of the tax so attributable, then, after the expiry of four years following the date of payment, no proceedings for the recovery of any additional tax may be brought and the liability for any such additional tax is extinguished. Otherwise, the Respondents may bring proceedings within twenty years of the making of the transfer of value or without limit as to time if the loss of tax was brought about deliberately.

DISCUSSION

Introduction

6. Although it was only given as each Appellant's second ground of appeal, Ground 2 is the logical starting point in this decision for the simple reason that, unless there was a lifetime transfer of value when Mrs Fleet executed the guarantee described above, the appeals must necessarily succeed.

Ground 2

7. For that reason, I wrote to the parties some time before the hearing asking them to make submissions at the hearing in relation to the manner in which the principle of subrogation would have applied to each of the guarantees which had been provided in the course of the arrangements and to provide further information about the security involved in the arrangements. I had observed that each of the Determinations which had been issued under Section 221 of the IHTA had been issued on three alternative bases, the second of which was now the only outstanding limb, and that the third limb (now withdrawn) was based on the proposition that the arrangements did not reduce the value of Mrs Fleet's estate on her death because, as a surety, Mrs Fleet was entitled to call on the security representing the charge over the Bonds and the personal guarantees of the Appellants of the liability of BTCL under the loan and that that right of recovery formed part of the property to which Mrs Fleet was beneficially entitled at her death and therefore formed part of her estate on her death.

8. At the hearing, it became clear to me that, although there was no documentary evidence to the effect that the charge over the Bonds which was granted when HFL made its loan to the JFT had remained in place after the Bonds had been transferred to the Appellants, this was highly likely to have been the case. This was because:

(1) in its letter to the Appellants of 4 March 2015, HFL referred to the fact that the Bonds were to be sold in order for the Appellants to repay the outstanding loan;

(2) HFL therefore knew that the Bonds remained in the ownership of the Appellants at that time, which was some four years after the transfer of the Bonds to the Appellants;

(3) from the commercial perspective, it is inconceivable that HFL would have been prepared to countenance an amount which was the size of the loan to the JFT to remain outstanding for so long without having adequate security for the debt and the likelihood was that that security would be over the Bonds; and

(4) it was clearly of the essence of the arrangement as originally conceived that the monies provided by HFL to the JFT should remain in a locked box until they could be returned to HFL.

9. For that reason, I have concluded, and I therefore find to be a fact for the purposes of this decision, that, on the balance of probabilities, HFL had security in the form of its charge over the Bonds throughout the period that the loan to the JFT remained outstanding and that the security represented by the charge over the Bonds was entirely satisfactory to HFL as lender, by which I mean that the Bonds provided security for the full amount of the loan in the event that the JFT and the guarantors together did not have the means otherwise to repay the loan. As for the effect which that had on the position of Mrs Fleet in law, I would like to record my indebtedness to Ms Choudhury and Mr Glover for the learned note which they provided to me at the hearing in relation to contracts of guarantee and indemnity and the rights of subrogation to which such contracts give rise. That note served to confirm my prior understanding that, were Mrs Fleet or her estate to have discharged the loan made by HFL to the JFT pursuant to her guarantee, she or her executors would have been subrogated to the rights of HFL in respect of the charge over the Bonds. It follows that, by virtue of that subrogation right, Mrs Fleet also had adequate security for her exposure under the guarantee in the form of the charge over the Bonds.

10. In the light of the above finding of fact and the consequence to which it gave rise in law for Mrs Fleet, I need now to address the question of whether, in executing her guarantee, Mrs Fleet made a lifetime transfer of value.

11. At the hearing, Ms Choudhury, who, along with Mr Glover, was representing the Respondents, pursued two distinct lines argument as to why this was the case.

12. The first was focused solely on the fact that, given that the JFT had transferred all of its assets in the form of the Bonds to the Appellants prior to Mrs Fleet's death, there was a significant likelihood that Mrs Fleet's estate would be called upon to repay the loan which had been made to the JFT and that therefore, applying a realistic and unblinkered approach to the arrangement as required by the line of cases which included *UBS AG v The Commissioners for Her Majesty's Revenue and Customs; DB Group Services (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 13, *Barclays Mercantile Business Finance Limited v Mawson* [2004] UKHL 51 and *Inland Revenue Commissioners v Scottish Provident Institution* [2004] UKHL 52, the execution of the guarantee should be treated as a transfer of value by Mrs Fleet which was made at the time of that execution.

13. I believe that this line of argument was flawed in that it was focused solely on the likelihood that Mrs Fleet's guarantee would be called and did not take into account the value of the rights of subrogation which Mrs Fleet would necessarily enjoy as a consequence of repaying the loan pursuant to any such call. In my view, the likelihood or otherwise of a guarantee's being called is not determinative of whether the execution of the guarantee amounts to a transfer of value. Instead, in answering that question, it is also necessary to take into account the extent to which the guarantor will be able to recover the amount which the guarantor has paid out under the guarantee from the assets to which it has recourse by virtue of its rights of subrogation.

14. It therefore follows that I do not agree that the likelihood of Mrs Fleet's estate having to pay out under Mrs Fleet's guarantee is determinative of this question although I would note in passing that the fact that each Appellant also provided a guarantee to HFL as primary obligor and that the loan was in fact discharged by the Appellants in their personal capacities under their own guarantees and not as the executors of Mrs Fleet under Mrs Fleet's guarantee suggests that there is another fundamental flaw with this line of argument. Indeed, the submission that the loan was highly likely to be repaid by virtue of Mrs Fleet's guarantee is

directly contrary to the point that was made in paragraphs [3] to [7] of the letter from Officer Tempany in his letter of 22 September 2016 to Mr Friend (see paragraph 4(3)(a) above).

15. As a second line of challenge, Ms Choudhury made a valiant attempt at the hearing to persuade me that, even though Mrs Fleet enjoyed the same rights as did HFL by virtue of her rights of subrogation, that did not mean that Mrs Fleet did not make a transfer of value for inheritance tax purposes by virtue of executing the guarantee because the scheme depended for its very efficacy on the guarantee's reducing her estate and therefore there was no realistic prospect that her estate would ever exercise those subrogation rights.

16. I am also not convinced by that argument.

17. In the first place, as a factual matter, it seems highly unlikely to me that Mrs Fleet had any intentions whatsoever as regards her rights of subrogation. She had purchased a scheme to save inheritance tax and, in executing the guarantee, she was simply following the steps that she had been instructed to take by Mercury, as the scheme arrangers. I very much doubt that she was aware of the rights of subrogation at all.

18. In the second place, there is no evidence that the scheme arrangers themselves were cognisant of the rights of subrogation because, as I mention in paragraph 22 below, if they had been aware of those rights, they would have realised that the scheme was going to be ineffective in reducing the value of Mrs Fleet's estate and achieving its objective.

19. Finally, even if Mrs Fleet had had the intention that her estate would waive (or fail to exercise) her rights of subrogation, any such waiver could actually be made (or failure could actually occur) only at the stage when Mrs Fleet's guarantee was discharged and the rights became exercisable, which, by definition, would be only after Mrs Fleet's death (as it was only after her death that the loan became repayable and her guarantee could be called). Moreover, whether or not the estate of Mrs Fleet would be required to pay under her guarantee (and thereby acquire subrogation rights) would also depend on whether it was Mrs Fleet's guarantee or either or both of the Appellants' guarantees pursuant to which payment would be made. As it happened, no payment was made under Mrs Fleet's guarantee and therefore no rights of subrogation arose to be waived or not exercised. As such, any transfer of value which was attributable to the waiver or failure to exercise subrogation rights could occur only after Mrs Fleet's death and would therefore not be a lifetime transfer of value by Mrs Fleet.

20. For the reasons set out above, I have concluded that Mrs Fleet did not make a transfer of value for inheritance tax purposes by executing the guarantee.

21. A number of conclusions naturally follow from this.

22. The first is that, in my view, the arrangements were ineffective in reducing the value of Mrs Fleet's estate for inheritance tax purposes at her death. The rights of subrogation enjoyed by Mrs Fleet meant that the guarantee did not reduce the value of her estate at the time of her death.

23. The second, which follows on from the first, is that, had the Respondents not issued the Clearance Certificate in error, and thereby debarred themselves from pursuing the two grounds set out in each Determination which related to the transfer of value on death – as to which see paragraphs 2(22)(a) and 2(22)(c) above - the Respondents would have succeeded in relation to the appeals because of the ground described in paragraph 2(22)(c) above.

24. The third is that, in consequence of the error by the Respondents mentioned in paragraph 23 above, the Appellants are entitled to succeed in the appeals.

25. That final conclusion is sufficient to determine these proceedings but, because the Appellants made submissions in relation to the other two grounds of appeal at the hearing, I will deal with them briefly.

Ground 1

26. In relation to Ground 1, the Appellants submitted that, in issuing the Clearance Certificate, the Respondents formally determined the amount of inheritance tax which was chargeable in respect of any transfer of value which was made by Mrs Fleet prior to her death and that meant that the Respondents were therefore precluded from subsequently assessing the Appellants to any inheritance tax in respect of that transfer. At the hearing, Mr Craggs said that the correspondence between the parties in the period leading up to the application for, and issue of, the Clearance Certificate showed that the Appellants were under the impression, and had been led by the conduct of the Respondents to believe, that the Clearance Certificate was intended to be determinative of all inheritance tax liabilities which were due to be paid out of Mrs Fleet's estate.

27. Mr Craggs said that, at the time of applying for the Clearance Certificate, the Appellants were unaware that the Respondents were still pursuing the allegation that the execution of the guarantee might have amounted to a lifetime transfer of value by Mrs Fleet. It had been some time since the Respondents had said that they were considering that approach and a considerable period of time had passed since the Respondents had mentioned it. Consequently, the Respondents were precluded by having issued the Clearance Certificate from assessing the Appellants to inheritance tax in respect of any lifetime transfer of value made by Mrs Fleet before her death.

28. For their part, the Respondents submitted that the application made on behalf of the Appellants on IHT 30, and therefore the Clearance Certificate, related only to the amount of inheritance tax which was chargeable in respect of the transfer of value that was deemed to be made on Mrs Fleet's death. The Clearance Certificate therefore had no relevance to any transfer of value which was made by Mrs Fleet prior to her death, whether immediately chargeable or a PET which became chargeable only on Mrs Fleet's death, and did not preclude a later determination in respect of any such transfer. Ms Choudhury said that that was the case regardless of any subjective belief that the Appellants might have had in applying for the Clearance Certificate.

29. In relation to the latter point, Ms Choudhury added that, in any event, at the time when the Appellants applied for the Clearance Certificate, the correspondence demonstrated that the Respondents were still considering whether the execution of the guarantee might have amounted to a lifetime transfer of value and that ought to have been tolerably clear to the Appellants.

30. In my view, the Respondents' position in relation to this issue is correct and the Appellants' submissions are untenable. Whatever may have been the subjective understanding of the Appellants as to the subject matter of the application and the effect of the Clearance Certificate – and regardless of whether or not that subjective understanding was justified - is of no moment in this context. All that matters are the terms of the relevant legislation and the instructions which were set out on the form on which the application was made pursuant to that legislation.

31. It is plain from Section 239(2) of the IHTA and the form on which the application for the Clearance Certificate was made that the Clearance Certificate could not apply to more than one transfer of value. The different sections in the application form made this apparent. Thus, the Clearance Certificate was incapable of doing service in relation to both a lifetime transfer of value made by Mrs Fleet and the transfer of value which was deemed to take place

on Mrs Fleet's death. The Appellants completed section A on the form, which related to the deemed transfer of value on Mrs Fleet's death. Had the Appellants wished to cover any actual lifetime transfer of value, then they would have needed to submit a second application form for clearance with section B completed.

32. I would add that I am not convinced that anything in the correspondence which passed between the parties in the lead up to the application could reasonably have conveyed the impression to the Appellants that the Clearance Certificate, if granted, would cover any lifetime transfer which Mrs Fleet had made in addition to the deemed transfer of value on her death.

33. It was perfectly plain from the letter from Officer Tempany of the Respondents to the Appellants of 22 September 2016 that the Respondents were pursuing three distinct lines of challenge in connection with the arrangement and that, whilst the Respondents were still considering whether the value of Mrs Fleet's estate on her death had been reduced by the existence of the guarantee, they were also considering whether the execution of the guarantee might have amounted to a lifetime transfer of value. The next letter from the Respondents to the Appellant – a letter of 7 November 2018 from Officer Camilla Rudge to Mr Friend - reiterated that Officer Rudge was still considering these arguments. Whilst I accept that Mr Friend and the Appellants may not have received this letter before making the application for the Clearance Certificate, there was nothing in the letter from Officer Tempany of 22 September 2016 or the conduct of the Respondents between the date of that letter and the date when the Appellants made the application which could reasonably have suggested to the Appellants that, were the Respondents to issue the Clearance Certificate, the Respondents would be confirming that no inheritance tax liabilities whatsoever were due from the Appellants as executors of the estate because any lifetime transfer of value was included in section A on the Clearance Certificate.

34. There is one other point which I should make in relation to Ground 1 and that is that one of the arguments made by the Appellants in relation to this ground was that any lifetime transfer of value would not have been chargeable immediately under Section 3 of the IHTA but would instead have been a PET falling within Section 3A of the IHTA, with the result that the inheritance tax arising in respect of the transfer would not have arisen until Mrs Fleet's death and was therefore capable of falling within section A of the Clearance Certificate for that reason.

35. It is quite hard to know how to deal with this point given the conclusion that I have reached above to the effect that, in executing the guarantee, Mrs Fleet did not in fact make a transfer of value. However, assuming for the moment that I am wrong about that and that the execution of the guarantee did amount to a transfer of value, then I would be inclined to see that transfer of value as having been made to the JFT, which was a discretionary trust, and not to the Appellants as individuals because, at the time when the guarantee was executed, it was to support the making of the loan by HFL to the JFT. Consequently, any such transfer of value would not have been a PET falling within Section 3A of the IHTA and the liability to inheritance tax would have arisen immediately and not on Mrs Fleet's death.

36. Having said that, even if the execution of the guarantee were to have been a transfer of value and that transfer of value were to have been a PET, I can still see no reason for the Appellants to think that it fell within section A of the Clearance Certificate any more than any other lifetime transfer of value. It would still be a quite distinct transfer of value from the one which was deemed to take place on Mrs Fleet's death.

37. For the above reasons, if I had found for the Respondents in relation to Ground 2, I would have found for them also in relation to Ground 1.

Ground 3

38. I think that there is equally little merit in the Appellant's position in relation to Ground 3.

39. In order for the four-year limitation period set out in Section 240(2) of the IHTA to apply to a lifetime transfer of value, three conditions need to be satisfied as follows:

(1) first, an account in respect of the relevant transfer of value must have been delivered to the Respondents;

(2) secondly, the tax in respect of the transfer of value must have been paid; and

(3) thirdly, the payment must have been accepted by the Respondents in full satisfaction of the liability in question.

40. If any of those conditions has not been satisfied, then Section 240(2) of the IHTA is inapplicable and, instead, the time limits in Sections 240(6) and 240(7) of the IHTA apply, which is to say twenty years except where the loss of tax has been brought about deliberately.

41. The Appellants' submissions in relation to this question were very largely focused on the second and third of the above conditions and how those conditions should be applied in a case where the transfer of value in question was initially considered to give rise to a nil liability.

42. However, the Appellants conspicuously failed to address the first of the above conditions in any depth. Mr Craggs's only submission in relation to the third condition was that the Respondents had been made aware of the execution of the guarantee by the filing of the IHT 400 and the subsequent correspondence between the parties. He said that the latest possible date when the Respondents could be said not to have been aware of all the relevant information pertaining to the guarantee was 6 January 2014, when a copy of the guarantee was provided to Officer Davis of the Respondents by Mr Friend. Since that date was more than four years prior to the date on which the Determinations were made, the Determinations were out of time.

43. However, that submission is not in point.

44. It is plain that, when a lifetime transfer of value is made, the transferor is obliged to deliver to the Respondents under Section 216(1) of the IHTA an account detailing the value of the property transferred. No such account was delivered in this case. Whilst the IHT 400 was accompanied by a schedule (form IHT 403) outlining the gifts which had been made by Mrs Fleet in the seven years preceding her death, the gifts listed on that form did not include the giving of the guarantee by Mrs Fleet. The fact that the Respondents were aware that the guarantee had been executed and had seen a copy of the guarantee by 6 January 2014 is neither here nor there. They had not been informed by the Appellants that Mrs Fleet had made a lifetime transfer of value by executing the guarantee.

45. It follows that, if the execution of that guarantee had amounted to a lifetime transfer of value, as the Respondents have been claiming, then the four-year time limit in Section 240(2) of the IHTA would be inapplicable and the Determinations made by the Respondents would be within time.

46. For the above reasons, if I had found for the Respondents in relation to Ground 2, I would have found for them also in relation to Ground 3.

47. Generally in relation to both Ground 1 and Ground 3, with all due respect to the Appellants, I think that they have, throughout the process of this dispute, failed to observe that the Respondents were pursuing two quite distinct lines of challenge to the arrangements

– one which was focused on whether or not the existence of the guarantee reduced Mrs Fleet's estate on her death and one which was focused on whether or not the execution of the guarantee amounted to a transfer of value in and of itself. The Appellants have therefore blurred the distinction between the transfer of value which was deemed to take place on Mrs Fleet's death and the transfer of value which was alleged to have taken place when Mrs Fleet executed the guarantee. Consequently, they have proceeded on the assumption that:

(1) a clearance in relation to the amount of inheritance tax chargeable on Mrs Fleet's death was also apt to cover the inheritance tax arising in respect of any transfer of value which had been made by Mrs Fleet during her lifetime (which was the Appellants' Ground 1); and

(2) the inheritance tax return which was made in respect of the deemed transfer of value on Mrs Fleet's death in form IHT 400 and IHT 403 was also apt to qualify as a return in respect of any lifetime transfer of value by Mrs Fleet (which was the Appellants' Ground 3).

CONCLUSION

48. For the reasons set out above, the appeals are allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. 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.

TONY BEARE
TRIBUNAL JUDGE

THE APPENDIX

1. Section 1 of the IHTA provides that:

"Inheritance tax shall be charged on the value transferred by a chargeable transfer."

2. Section 2(1) of the IHTA provides that:

"A chargeable transfer is a transfer of value which is made by an individual but is not (by virtue of Part II of this Act or any other enactment) an exempt transfer."

3. Section 3(1) of the IHTA provides that:

"Subject to the following provisions of this Part of this Act, a transfer of value is a disposition made by a person (the transferor) as a result of which the value of his estate immediately after

the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer."

4. Section 3A of the IHTA introduces the concept of a PET. The relevant part of the section provides that:

"(1A) Any reference in this Act to a potentially exempt transfer is … a reference to a transfer of value—

(a) which is made by an individual on or after 22nd March 2006,

(b) which, apart from this section, would be a chargeable transfer (or to the extent to which, apart from this section, it would be such a transfer), and

(c) to the extent that it constitutes—

(i) a gift to another individual,….

(2) Subject to subsection (6) below, a transfer of value falls within subsection …(1A)(c)(i) above, as a gift to another individual,—

(a) to the extent that the value transferred is attributable to property which, by virtue of the transfer, becomes comprised in the estate of that other individual, . . . , or

(b) so far as that value is not attributable to property which becomes comprised in the estate of another person, to the extent that, by virtue of the transfer, the estate of that other individual is increased, . . .

(4) A potentially exempt transfer which is made seven years or more before the death of the transferor is an exempt transfer and any other potentially exempt transfer is a chargeable transfer.

(5) During the period beginning on the date of a potentially exempt transfer and ending immediately before—

(a) the seventh anniversary of that date, or

(b) if it is earlier, the death of the transferor,

it shall be assumed for the purposes of this Act that the transfer will prove to be an exempt transfer.

(6) Where, under any provision of this Act .. . tax is in any circumstances to be charged as if a transfer of value had been made, that transfer shall be taken to be a transfer which is not a potentially exempt transfer."

5. The relevant part of Section 4 of the IHTA provides that:

"(1) On the death of any person tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death."

6. The relevant parts of Section 5 of the IHTA 1984 provide that:

"(1) For the purposes of this Act a person's estate is the aggregate of all the property to which he is beneficially entitled …

(3) In determining the value of a person's estate at any time his liabilities at that time shall be taken into account, except as otherwise provided by this Act.

(4) The liabilities to be taken into account in determining the value of a transferor's estate immediately after a transfer of value include his liability for inheritance tax on the value transferred but not his liability (if any) for any other tax or duty resulting from the transfer.

(5) Except in the case of a liability imposed by law, a liability incurred by a transferor shall be taken into account only to the extent that it was incurred for a consideration in money or money's worth."

7. The relevant parts of Section 199 of the IHTA provide that:

"(1) The persons liable for the tax on the value transferred by a chargeable transfer made by a disposition (including any omission treated as a disposition under section 3(3) above) of the transferor are—

(a) the transferor;

(b) any person the value of whose estate is increased by the transfer;

(2) Subsection (1)(a) above shall apply in relation to —

the tax on the value transferred by a potentially exempt transfer; and

(b) so much of the tax on the value transferred by any other chargeable transfer made within seven years of the transferor's death as exceeds what it would have been had the transferor died more than seven years after the transfer,

with the substitution for the reference to the transferor of a reference to his personal representatives."

8. The relevant parts of Section 200 of the IHTA provide that:

"(1) The persons liable for the tax on the value transferred by a chargeable transfer made (under section 4 above) on the death of any person are . . —

(a) so far as the tax is attributable to the value of property which …—

(i) was not immediately before the death comprised in a settlement, …

the deceased's personal representatives;…

(c) so far as the tax is attributable to the value of any property, any person in whom the property is vested (whether beneficially or otherwise) at any time after the death,.…";

9. The relevant parts of Section 216 of the IHTA provide that:

"(1) Except as otherwise provided by this section or by regulations under section 256 below, the personal representatives of a deceased person and every person who

(a) is liable as transferor for tax on the value transferred by a chargeable transfer, or would be so liable if tax were chargeable on that value, or…

(bb) is liable under section 199(1)(b) above for tax on the value transferred by a potentially exempt transfer which proves to be a chargeable transfer, or would be so liable if tax were chargeable on that value,…

shall deliver to the Board an account specifying to the best of his knowledge and belief all appropriate property and the value of that property….

(6) An account under the preceding provisions of this section shall be delivered—

in the case of an account to be delivered by personal representatives, before the expiration of the period of twelve months from the end of the month in which the death occurs, or, if it expires later, the period of three months beginning with the date on which the personal representatives first act as such;

(aa) in the case of an account to be delivered by a person within subsection (1)(bb) … above, before the expiration of the period of twelve months from the end of the month in which the death of the transferor occurs; …";

10. Section 239 of the IHTA provides that:

"(1) Where application is made to the Board by a person liable for any tax on the value transferred by a chargeable transfer which is attributable to the value of property specified in the application, the Board, on being satisfied that the tax so attributable has been or will be paid, may give a certificate to that effect, and shall do so if the chargeable transfer is one made on death or the transferor has died.

(2) Where tax is or may be chargeable on the value transferred by a transfer of value and—

(a) application is made to the Board after the expiration of two years from the transfer (or, if the Board think fit to entertain the application, at an earlier time) by a person who is or might be liable for the whole or part of the tax, and

(b) the applicant delivers to the Board, if the transfer is one made on death, a full statement to the best of his knowledge and belief of all property included in the estate of the deceased immediately before his death and, in any other case, a full and proper account under this Part of this Act,

the Board may, as the case requires, determine the amount of the tax or determine that no tax is chargeable; and subject to the payment of any tax so determined to be chargeable the Board may give a certificate of their determination, and shall do so if the transfer of value is one made on death or the transferor has died. "

11. The relevant parts of Section 240 of the IHTA provide that:

"…. (2) Where tax attributable to the value of any property is paid in accordance with an account duly delivered to the Board under this Part of this Act and the payment is made and accepted in full satisfaction of the tax so attributable, no proceedings shall be brought for the recovery of any additional tax so attributable after the end of the period of four years beginning with the later of—

(a) the date on which the payment (or in the case of tax paid by instalments the last payment) was made and accepted, and

(b) the date on which the tax or the last instalment became due; and at the end of that period any liability for the additional tax and any Inland Revenue charge for that tax shall be extinguished…

(6) Subsection (7) applies to any case not falling within subsection (2) where too little tax has been paid in respect of a chargeable transfer, provided that the case does not involve a loss of tax brought about deliberately by a person liable for the tax (or a person acting on behalf of such a person).

(7) Where this subsection applies—

(a) no proceedings are to be brought for the recovery of the tax after the end of the period of 20 years beginning with the date on which the chargeable transfer was made, and

(b) at the end of that period any liability for the tax and any Inland Revenue charge for that tax is extinguished."

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