



TC02369

Appeal number: SC/3011/2009

INHERITANCE TAX – whether amount paid by the deceased to a company owned by him was a loan or a gift – found on the evidence a loan – whether a payment made by legatees under a will to a third party in settlement of litigation concerning the validity of the will was in discharge of a liability of the deceased which was deductible in computing his estate for IHT purposes – held it was not – whether further charitable payments made by a legatee and personal representative of the deceased attracted an exemption from IHT in the computation of the IHT due on the death of the deceased – held no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MRS GINETTE SILBER
(personal representative of the estate of Mr M M M Lerner deceased)

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
MICHAEL SHARP FCA**

Sitting in public at Bedford Square, London on 17 April 2012

The Appellant was neither present nor represented

Colin Ryder, Officer of HM Revenue and Customs, for the Respondents

DECISION

5 1. The appellant, Ginette Silber (“Mrs Silber”) appealed on 27 October 2008 against a Notice of Determination (“the Notice”) dated 20 October 2008 made by the Respondents (“HMRC”) in relation to the deemed transfer of value on the death on 21 October 1999 of Martin Moses Menachem Lerner (“the Deceased”).

10 2. By the Notice, HMRC have determined that the value transferred on the death of the Deceased was £795,573; the amount of the chargeable transfer was £716,016; the inheritance tax (“IHT”) on that chargeable transfer was £215,606.40 of which £73,985.06 remained unpaid, together with interest thereon to the date of the Notice of £14,497.85; and that, as personal representative of the Deceased, Mrs Silber was liable for the total of £88,482.91 (£73,985.06 + £14,497.85) with further interest on
15 the unpaid tax until payment.

20 3. No appearance at the hearing was made by Mrs Silber or by any person representing her. We were satisfied that Mrs Silber or Fox Associates, Chartered Accountants (“Fox”), who had been representing Mrs Silber, had been notified of the hearing or that reasonable steps had been taken to notify them of the hearing and considered that it was in the interests of justice to proceed with the hearing, particularly having regard to the fact that it was an old case and that, as Mr Ryder told us, HMRC had been trying to collect the IHT which they claim is outstanding, since 2002. We therefore decided to proceed with the hearing in the absence of the Appellant or any representation on her behalf, pursuant to rule 33 of the Tribunal
25 Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

4. A Statement of Agreed Facts was before the Tribunal. The facts stated therein (which we find) are as follows – see paragraphs 5 to 19 inclusive below:

5. The Deceased was born on 6 September 1927.

30 6. On 7 May 1993 the Deceased executed a Will whereby he left half of his estate to his sister Sula Kestenbaum (“Mrs Kestenbaum”) and half to Mrs Silber.

7. On 1 March 1994, the Deceased gave to Mrs Silber his reversionary interest, expectant on the death of his mother, in all of the money due to him from his father’s estate.

35 8. On 12 May 1997, the Deceased executed his last Will. The execution of this Will revoked the 1993 Will. In his Will he appointed Benzion Dunner and Montague David Frankel as his executors and trustees. He gave his entire estate to his trustees on trust to sell the property and pay his debts, funeral and testamentary expenses. They were to pay Mrs Kestenbaum and each of her children £250. The residue was to be divided into ten equal shares, one share for the Chay Charitable Trust (“the CCT”)

(of 23 Rodburgh Road, London NW11 8SA) absolutely and the other nine shares for Mrs Silber absolutely.

5 9. On 6 June 1997 the Deceased executed a Jewish Will in Israel in Hebrew. Mrs Silber and Mrs Kestenbaum both took the view that the Jewish Will had no effect under English law and probate of the Jewish Will was never taken out in England.

10. On 3 July 1997, the Deceased made a gift of £60,000 cash to Mrs Silber.

11. On 9 August 1997, the Deceased transferred four holdings of quoted shares valued at a total of £400,253.24 to the CCT.

10 12. The Deceased died unmarried on 21 October 1999 resident at Mrs Silber's house at 23, Rodburgh Road, London NW11 8SA. He was aged 72 years and was at the time of his death domiciled in England and Wales.

15 13. On 2 July 2001 Graham Stephen Brown took out a grant of letters of administration of the Deceased's estate pending suit following an Order dated 9 January 2001 by the High Court (Chancery Division). Mrs Kestenbaum was involved in an action involving the estate, Mrs Silber and the CCT. The action was entitled Dunner and another v Kestenbaum and another.

14. The trial of the action commenced in October 2001 and was partly heard. Mrs Kestenbaum's position was that the 1993 and 1997 English Wills were invalid because the Deceased lacked capacity to make a valid Will both in 1993 and in 1997.

20 15. However the action was resolved by consent without the trial being completed, an Order being made by Mr Justice Collins in the Chancery Division (Probate) on 22 October 2001. Under the terms of the Order, the Deceased's Will dated 12 May 1997 was declared valid and Mrs Silber and the CCT undertook to make to Mrs Kestenbaum a lump sum payment of £400,000 within 21 days of the Order. The gifts
25 made by the Deceased to Mrs Silber and to the CCT were declared to be valid. And the agreement contained in the Schedule to the Order was in full and final settlement of all claims involved in the action.

16. The £400,000 was paid to Mrs Kestenbaum.

30 17. At his death, the Deceased owned 100 £1 ordinary shares, the entire issued share capital, in Towvale Limited ("Towvale") (Company Registration Number 1305061), an unquoted company. The assets of the company at that time consisted of £10,790.03 in a current account and 13 policies of insurance secured on the life of the Deceased and valued as at that time at £236,769.68. The abbreviated financial statement for Towvale for the year to 31 May 2000 shows a total amount owed by
35 Towvale to creditors of £108,974.

18. The open market value for the Deceased's shares in Towvale was included in the Inland Revenue account at £70,174. Following negotiation between Mrs Silber and her agents and the Inland Revenue Shares Valuation Division, Mrs Silber on 12

June 2002 agreed the open market value of the shares in Towvale at the Deceased's death at £170,000. Business Property Relief for IHT was not claimed.

5 19. Mrs Silber was given a grant of letters of administration with the Will annexed in respect of the Deceased's estate at the Principal Probate registry on 7 November 2002.

10 20. From a letter dated 2 November 2005 sent by HMRC to Fox, it is clear that the figure of £716,016, which features in the Notice as the determined amount of the chargeable transfer on the death of the Deceased, is calculated to include an amount of £107,210 in respect of a loan made by the Deceased to Towvale. It is also clear from a letter dated 16 December 2009 from Fox to HMRC, in which Mrs Silber's grounds of appeal were 'better clarified and explained' that it is contended on Mrs Silber's behalf that that amount (£107,210) ought not to feature in the calculation of the chargeable transfer on the death of the Deceased because the money concerned was not lent by the Deceased to Towvale, but given by the Deceased to Towvale.

15 21. The Inland Revenue account was included with our papers. It was delivered by Mr Graham Stephen Brown of Payne Hicks Beach and Mrs Silber under cover of a letter dated 15 June 2001. This was at a time when the action entitled Dunner v Kestenbaum, referred to above, was still pending. The Inland Revenue account shows as an asset of the estate of the Deceased a loan of £107,210 due to the Deceased from
20 Towvale.

22. The letter dated 16 December 2009 from Fox to HMRC, referred to above, which expanded on the grounds of appeal also stated that it was contended that the payment of £400,000 made to settle the legal action of Dunner v Kestenbaum (see: above) was a liability of the estate of the Deceased, which was deductible in arriving
25 at the amount of the chargeable transfer on his death.

23. Following the letter dated 16 December 2009 to HMRC, referred to above, Fox wrote again to HMRC on 25 January 2010. In this letter Fox enlarged on the grounds of appeal advanced, repeating the contentions that the sum of £107,210 was a gift by the Deceased to Towvale, not a loan, and that the payment of £400,000 made to Mrs
30 Kestenbaum represented the discharge of a liability of the estate.

24. In respect of the contention regarding the sum of £107,210, Fox stated in that letter:

35 'Whilst there is no direct evidence of this fact [that the sum represented a gift by the Deceased to Towvale] we believe there is sufficient circumstantial evidence based on [the Deceased's] actions that can substantiate our claim.

Firstly, there is no mention of this Directors Loan Account in any of the documents drawn up by [the Deceased] and it is clear from that that he did not count this gift as part of his assets.

Secondly, his instructions to Mrs Silber both written and verbal show that she had full flexibility in distributing the assets of [Towvale] without any regard to the loan account.

The sums of money had clearly been there some time, he had no need for the money and indeed there was no practical way that it could be repaid to him.'

25. In respect of the contention regarding the payment of £400,000 to Mrs Kestenbaum, the letter dated 25 January 2010 states:

5 'It is clear from the [relevant Court documents, which were enclosed with the letter] that the sums paid by the Estate were not as a result of an entitlement to distribution but is clearly as a result of a claim on the Estate. The difference is therefore apparent in as much as for [IHT] purposes the settlement payment of £400,000 should be treated as a direct reduction in the value of the estate and therefore no IHT should be attached to this sum.

10 There is nothing in the documentation that suggests a distribution or entitlement to assets as it is clear from the documents enclosed that there was no wish on [the Deceased's] behalf to distribute money to members of his family with whom he was clearly in dispute.

The sum paid of £400,000 is to repeat a clear liability on the Estate.

15 This is further proof that the fact that the Will was accepted by all parties [*sic*] that a claim had been made on the Estate.'

26. The letter from Fox to HMRC dated 25 January 2010 also makes a further contention. This is that further distributions to the CCT made by Mrs Silber, over and above the one-tenth share in residue provided for by the Will executed on 12 May 1997, should also qualify as being gifts to charity by the Deceased and exempt from
20 IHT. The letter does not quantify the amount of 'further amounts' distributed to the CCT (and indeed it is not clear that the CCT was the charity to which such further amounts were distributed), which Mrs Silber appears to be claiming should qualify for the charitable exemption from IHT on the death of the Deceased.

27. Apart from these three points raised by Fox, we understand the Notice to be
25 accepted as accurate by Mrs Silber. Certainly we have not been made aware of any other challenge to it.

28. HMRC's position is that the amount of £108,974 is stated to have been a loan due from Towvale in Towvale's abbreviated balance sheet as at 31 May 2000 (showing no movement from 31 May 1999), which was signed by Mrs Silber on
30 behalf of the board of Towvale on 7 June 2002 (after the Deceased's death). In the light of the information regarding the loan of £107,210 made by the Deceased to Towvale, which was included in the Inland Revenue account, it was likely that the loan due to the Deceased was included in the figure for creditors appearing in Towvale's balance sheet. Further, there was no evidence supporting Fox's claim (on
35 Mrs Silber's behalf) that it was not a loan but a gift to Towvale. Mr Ryder made the additional point that the loan of £107,210 had been deducted in arriving at a valuation for IHT purposes of the Deceased's 100% shareholding in Towvale. Neither the loan, nor the shares attracted business property relief and therefore, even if it were accepted that the Deceased had gifted, instead of loaned, £107,210 to Towvale, this would have
40 no or a minimal net effect on the amount of the chargeable transfer on the Deceased's death, because the amount of £107,210 would in that event fall to be added back to the computation, increasing the value of the shares in Towvale, which, of course,

formed part of the Deceased's estate and therefore the chargeable transfer on his death.

29. As to the payment of £400,000 to Mrs Kestenbaum, HMRC submit that this should not be characterised as a debt of the Deceased's estate. On any demand for payment of £400,000 made by Mrs Kestenbaum to the Deceased before his death, the Deceased would have been under no obligation to make any payment to Mrs Kestenbaum. Immediately before the death of the Deceased (the relevant time, having regard to section 5(1) IHTA Act 1975 ("IHTA")) there was no liability on the Deceased (imposed by law or otherwise) to make any such payment to Mrs Kestenbaum. Indeed, as Fox note in their letter (see: above) there was no wish on [the Deceased's] behalf to distribute money to members of his family with whom he was clearly in dispute. HMRC contend that, even if the payment could be characterised as testamentary in nature, in that it effected a change to the distribution of the Deceased's estate following his death, that would not affect the valuation of the Deceased's estate for IHT purposes, as a bequest to Mrs Kestenbaum would not have attracted any IHT exemption or relief. HMRC's case is that the correct characterisation of the payment of £400,000 is that it was the sum that Mrs Silber and the CCT were prepared to forego to bring the legal proceedings to a conclusion in a way that allowed the 1997 Will and the lifetime gifts of the Deceased to be considered valid. The payment, say HMRC, was therefore made in an arm's length transaction between Mrs Silber, the CCT and Mrs Kestenbaum and has no IHT consequences for the Deceased's estate.

30. In relation to the further charitable payments which Mrs Silber says she has made, HMRC submit that no evidence of such payments has been provided by the Appellant and no amounts have been specified. They say that for that reason alone this aspect of the appeal fails. They make reference in their Skeleton Argument to section 143 IHTA under which transfers of property by a legatee in accordance with the expressed wish of a testator can be regarded as transfers made by the testator on his death, but point out that it is a condition of this provision that any such transfers must be made within 2 years after the death of the testator. Although the Deceased in a letter dated 16 April 1997 (which did not have testamentary force) appeared to make arrangements for the distribution of his estate prior to the preparation and execution of a new will and included the statement: "I leave it to Mrs Silber the authority to distribute the money to her good cause", this would not cause the provisions of section 143 IHTA to apply to further amounts distributed to charity by Mrs Silber following the settlement of the court action on 22 October 2001 (two years and one day after the date of death of the Deceased).

31. On the evidence before us, we accept HMRC's submissions, which we also consider to be founded on a correct view of the law.

32. The sum of £107,210 was accounted for by Towvale as an amount due to a creditor (the Deceased). This is *prima facie* evidence that it was a loan and not a gift. That accounting treatment was confirmed by the post-death balance sheet signed by Mrs Silber. It is also consistent with the Inland Revenue account. None of the points made by Fox in their letter to HMRC of 25 January 2010 amount to evidence capable

of rebutting the *prim facie* evidence. Accordingly we find as a fact that the sum of £107,210 represented a debt due by Towvale to the Deceased at the date of the death of the Deceased. It was not a gift to Towvale.

5 33. The payment of £400,000 by Mrs Silber and the CCT to Mrs Kestenbaum was not the discharge of a liability of the Deceased which existed immediately before his death. It was thus not a liability deductible pursuant to section 5 IHTA. It was, instead, a payment made by Mrs Silber and the CCT in order to settle the action brought by Mrs Kestenbaum and, in particular, to assert the validity of the Will of the Deceased dated 12 May 1997. Although it was a payment made to Mrs Kestenbaum
10 in satisfaction of her claim to share in the estate of the Deceased, it was not a liability of the Deceased such as would go to reduce his estate for IHT purposes.

15 34. There is no basis on the evidence, on which we could find that the amount of the estate of the Deceased which benefited from the charitable exemption was more than the amount allowed by HMRC in respect of the bequest to the CCT of a one-tenth share of the residue of the estate. In particular we have seen no evidence that the further amounts of charitable payments to which Fox make reference were ever made. And even if they were made, we have seen nothing which could persuade us that they ought to be regarded as charitable payments made by the Deceased for the purposes of computing the IHT payable on his estate.

20 35. Accordingly, we uphold the Notice of Determination against which this appeal was brought and dismiss the appeal.

25 36. 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.

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**JOHN WALTERS QC
TRIBUNAL JUDGE**

RELEASE DATE: 14 November 2012

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