# TC01529

**Appeal number TC/2010/06504**

***Capital Gains Tax – Gift of property – CGT not paid by donor – Subsequent assessment on donee under s 282 Taxation of Chargeable Gains Act 1992 – Whether subsequent assessment for correct year – No – Appeal allowed***

**FIRST-TIER TRIBUNAL**

**TAX**

**ZOE HAMAR** **Appellant**

**- and -**

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

**TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)**
**RICHARD CORKE FCA (MEMBER)**

**Sitting in public at Vintry House, Wine Street, Bristol, BS1 on 8 September 2011**

**John Barnett of Burges Salmon LLP for the Appellant**

**Colin Brown of HM Revenue and Customs, for the Respondents**

## DECISION

1. Mrs Zoe Hamar appeals against an assessment to capital gains tax ("CGT") for 2002-03 in the sum of £43,501.20 in respect of a chargeable capital gain of £108,753.00. Mrs Hamar was notified of the assessment, which was made under s 282 of the Taxation of Chargeable Gains Act 1992 ("TCGA"), in a letter from HM Revenue and Customs ("HMRC") dated 18 August 2009.

*Facts*

2. Mr Herbert Rogerson, Mrs Hamar's father, owned three flats (Flats A, B and C) in Ryde, Isle of White which he transferred to her by way of a gift. It appears that, despite the transfer documentation showing a date of 2 December 2002, the beneficial interest of Flat B was transferred to Mrs Hamar on 1 July 2000 and that of Flats A and C transferred to her on 1 July 2002. These transfers gave rise to a CGT liability which was not paid by Mr Rogerson before his unexpected death on 22 June 2003.

3. Following an enquiry by HMRC into the tax returns of the late Mr Rogerson an amendment was made to his 2002-03 return on 25 July 2007. Although the CGT liability arising out of the transfer of the flats was agreed with the deceased's personal representative, his son Mr Norman Rogerson, the CGT remained unpaid.

4. In the absence of payment of the CGT liability on 18 August 2009 HMRC wrote to Mrs Hamar with a Notice of Assessment, also dated 18 August 2009, made in accordance with s 282 TCGA "FOR YEAR 2002-03 ENDING 5 APRIL 2003". In addition as HMRC sought interest calculated on the basis that it should have been paid by 31 January 2004 (see s 59B Taxes Management Act 1970 ("TMA").

5. Until she received the s 282 TCGA assessment Mrs Hamar was unaware of any outstanding CGT liability in relation to her late father's estate.

*Section 282 TCGA*

6. Insofar as it is relevant to this appeal s 282 TCGA provides:

> *(1) If in any year of assessment a chargeable gain accrues to any person on the disposal of an asset by way of gift and any amount of capital gains tax assessed on that person for that year of assessment is not paid within 12 months from the date when the tax becomes payable, the donee may, by an assessment made not later than 2 years from the date when the tax became payable, be assessed and charged (in the name of the donor) to capital gains tax on an amount not exceeding the amount of the chargeable gain so accruing, and not exceeding the grossed up amount of that capital gains tax unpaid at the time when he is so assessed, grossing up at the marginal rate of tax, that is to say, taking capital gains tax on a chargeable gain at the amount which would not have been chargeable but for that chargeable gain.*
>
> *(2) A person paying any amount of tax in pursuance of this section shall be entitled to recover a sum of that amount from the donor.*

*(3) References in this section to a donor include, in the case of an individual who has died, references to his personal representatives.*

*Submissions*

7. Mr Barnett, for Mrs Hamar, challenges the assessment made under s 282 TCGA on the basis that the underlying assessment on the late Mr Rogerson's estate for 2002-03 was patently wrong in that it included an asset, Flat B, that had been disposed of in 2000-01 and that HMRC had understated the valuations of the flats used in the CGT computations. He contends that we are entitled to re-open and consider the validity of the underlying assessment on Mr Rogerson's estate and relies on the decision of the Special Commissioner (Charles Hellier) in *Courbally-Stourton v HMRC* [2008] STC (SCD) 907 and the Tribunal Judge (Barbara Mosedale) in *Phillips v HMRC* [2010] SFTD 332 in support of this submission.

8. In addition Mr Barnett submits that the assessment under s 282 TCGA should be for 2009-10 the year it was issued and not 2002-03 when the transfer of the legal title to the flats to Mrs Hamar took place. This would mean that Mrs Hamar would only be charged interest for her own default and not that of her father and his estate.

9. For HMRC, Mr Brown contends that s 282 TCGA is not a provision for bringing into charge CGT following the disposal of an asset but an alternative means of recovering a tax liability that has already become final and conclusive. He submits that the details of the underlying gain are not relevant and, as such, any right of appeal does not extend to the calculation of the liability giving rise to the assessment on the donor or his personal representative and that even if it did any question relating to the valuation of the flats it would be a matter for the Upper Tribunal (see s 46D TMA).

*Discussion and Conclusion*

10. Given that a CGT liability arose on Mr Rogerson (and subsequently his estate) as a result of a chargeable gain on the disposal of the flats to Mrs Hamar by way of gift and that this liability remained unpaid 12 months from the date when the tax became payable, we consider that HMRC were entitled to raise the s 282 TCGA assessment on Mrs Hamar (as the donee) on 18 August 2009 as it was made within two years of the date that the tax became payable.

11. This raises the issue of whether the s 282 TCGA assessment was made for 2002-03, as stated in the Notice of Assessment, or in 2009-10 as Mr Barnett contends as it is clear from the decision of the Court of Appeal in *Baylis v Gregory* [1987] STC 297 that it is not possible to treat an assessment made for one year as an assessment for another.

12. As Slade LJ said (at 323) in that case:

> "I find it is impossible to say that an assessment for one specified fiscal year can ever be or take effect as an assessment for another fiscal year."

13. Although s 282 TCGA refers to a chargeable gain accruing to any person in "any year of assessment" and any amount of CGT assessed on that person "for that year of assessment" remaining unpaid for 12 months it continues by making provision for the donee of an asset, received by way of a gift, to be assessed and charged to CGT. The assessment made under s 282 TCGA on the donee, although derived from the assessment on the donor, is a distinct and different assessment from that on the donor and s 282 TCGA does not specify the year for which the assessment on the donee should be made.

14. Unlike other assessing provisions (eg s 29 TMA) s 282 TCGA does not refer to gains or income which ought to have been taxed or an assessment that has become insufficient or excessive relief having been given. Its purpose is not to determine the liability to CGT as this has already been finally and conclusively determined by the assessment on the donor but to protect the public purse and provide a mechanism to ensure that any outstanding CGT is paid in circumstances where the donor of a gift has, despite being liable to CGT, failed to make payment of the tax. The absence of any reference to a year of assessment in respect of the assessment on the donee in s 282 TCGA, which could have been included if it were intended to be the year in which the donor made the gift, leads us to the conclusion that the assessment should only apply from the date, and therefore for the year, in which it was made.

15. We find support for our conclusion from s 282 TCGA itself which gives the person responsible for payment of the CGT a statutory right to pursue the donor for "*any amount of* ***tax*** *in pursuance of this section*" under s 282(2) TCGA (emphasis added).

16. This may be contrasted with the position of a shareholder who is connected with a company and who receives or becomes entitled a capital distribution from the company arising as a result of a disposal of assets in respect of which a chargeable gain accrued to the company or the where distribution constitutes such a disposal of assets. If following an assessment on the company corporation tax is not paid within six months HMRC may issue an assessment on the shareholder, under s 189 TCGA, to recover any unpaid corporation tax that has previously been assessed on the company. If a shareholder has paid any amount of tax in such circumstances s 189(4) provides that "*he shall be entitled to recover from the company a sum equal to that amount* [of tax] ***together with any interest*** *paid by him …*" (emphasis added).

17. We consider that s 282 TCGA could, like s 189 TCGA, have included a reference for the recovery of interest and would surely have done so had it been intended that the assessment was to be for the year in which a gift was made and it was possible for interest to be added to any CGT not paid by a donor.

18. A consequence of our conclusion is that any charge to interest on the unpaid CGT, against which there is no statutory right of appeal, can only be made from the date and in the year the assessment was made. If this were not the case it would be possible to arrive at an absurd situation where a person could become liable to interest, with no right of recovery, on unpaid CGT for a period before an assessment was made during which not only, as in this case, may he be unaware that CGT had not

been paid, but could become liable to pay interest for a period before any liability to pay CGT had arisen!

19. Therefore in the present case as the s 282 assessment was made on 18 August 2009 it must follow that it was made for 2009-10 and not 2002-03. As an assessment for one specified tax year can never be or take effect as an assessment for another tax year it follows that the appeal against the 2002-03 s 282 TCGA assessment must succeed.

20. The appeal is therefore allowed.

21. In the circumstances it is not therefore necessary for us to consider Mr Barnett's contention that we are entitled to re-open the underlying assessment or the valuations used in the CGT computation to determine the amount of tax payable under the s 282 TCGA assessment. However, we note that although *Courbally-Stourton* and *Phillips* would appear to suggest that Mrs Hamar had a sufficient interest to have been entitled to appeal against the amendment to her late father's tax return these authorities do not in our judgment provide support for a re-consideration of the underlying assessment or the valuations used in the CGT computation to determine the amount of tax payable under the s 282 TCGA assessment.

22. 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.

**JOHN BROOKS**

**TRIBUNAL JUDGE**
**RELEASE DATE: 28 October 2011**