TC03548

Appeal number: TC/2012/07106

INHERITANCE TAX – transfer of funds to personal pension plan while diagnosed with terminal cancer – whether transfer of value - omission to take lifetime benefits – whether disposition and transfer of value – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD WILLIAM JAMES PARRY
(as personal representative of the late Rachel Frances Staveley)
-and-
HENRY FRANCIS ALEXANDER PINEY
-and-
TOBY ANTHONY STAVELEY
(as personal representatives of the late Rachel Frances Staveley and as beneficiaries under her will) **Appellants**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
MR IAN MENZIES-CONACHER

Sitting in public at Bedford Square, London on 14 and 15 April 2014

Mr D Rees, instructed by Farrar & Co for the Appellant

Miss E Wilson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 20 April 2012, the executors of the late Mrs Rachel Frances Staveley were served with two notices of determination assessing them to IHT on two alleged transfers of values made by the deceased. The appellants appealed.

2. The parties agreed that this Tribunal should only deal with the issue of liability in principle and should leave matters of quantum (if necessary) to be agreed by the parties, and only failing agreement should it return to the Tribunal for a ruling. This is therefore a decision in principle only.

Facts

The witnesses

3. Mr Richard Parry is the senior partner in Farrar & Co and acted for Mrs Staveley in the divorce and is now one of the executors of her will, and the first appellant in this appeal. Mr Parry provided a witness statement but he did not attend for cross examination. HMRC did not object to the admission of his witness statement but did suggest little or no weight be placed on it. We find that Mr Parry's evidence was largely to exhibit various letters; his evidence was consistent with those letters and with what other witnesses said and we have no reason to doubt it. As his statement provided background information rather than crucial evidence, and Miss Wilson did not suggest that there was any particular matter arising from his witness statement that she wished to cross examine him about, we chose to accept his evidence.

4. The second and third appellants were Mrs Staveley's only children and the other two executors of her will. They were also the only beneficiaries under her will and therefore, the persons financially concerned in the outcome of this appeal. Both gave evidence. Very largely we accept their evidence. It was credible and largely consistent with the other evidence in the case. For instance, the concerns they attribute to their mother were apparent from letters to and from her advisers. Their evidence was not completely consistent with the other evidence on the issue of whether Mrs Staveley accepted her terminal diagnosis: but it seems to us this distinction reflects no more than the different views a person might present, on the one hand, to a doctor when asked to accept a terminal diagnosis and, on the other hand, to their family when discussing it. To the very limited extent we do not accept the brothers' evidence, we record this with our reasons below.

5. HMRC's witness was Mr Oxlade. He was an HMRC officer who had valued the diminution of the deceased's estate by the alleged two transfers of value. We were not asked to make a decision on valuation and therefore do not need to make any decision on whether or not we accept his evidence, which, as we heard no submissions on it, we are not in a position to do.

Findings of fact

6. Many years ago, Mrs Staveley set up with her then husband a company called Morayford Limited ('Morayford'). She was a director of the company, employed by the company and had a large pension fund with the company's occupational pension scheme (the AXA Morayford Executive Pension Plan).

7. In 1996, Mrs Staveley instructed Farrar & Co to act on her behalf in her divorce. The divorce was finalised in January 2000.

8. The divorce was acrimonious and left her with bitter feelings towards her ex-husband and concerned about her long-term financial security.

9. The terms of the divorce were that Mrs Staveley gave up her employment with, directorship of, and shares in, Morayford. The ancillary relief order ordered that her share of the company pension scheme be transferred to her.

10. Advice from an actuarial company to Mrs Staveley in March 2000 was that the effect of the law was that the only option for her was to have her fund transferred into what was called a 's 32 buyout' policy. While this would give her independence on choice of investments, any surplus on the fund would (as with the then current occupational scheme) be returned to Morayford. The reality was that her pension fund was over-funded in respect of her level of salary. She was told she would have to wait 10 years before she could transfer the fund to a personal pension plan ('PPP') the terms of which would enable the entire value of the fund to be paid to her estate or beneficiaries.

11. Mrs Staveley was not happy with the advice and sought alternative advice from other advisers. Initially, this alternative advice conflicted with that offered by the original adviser, but by June 2000 the second adviser had agreed with the original adviser that her only option was a s 32 policy, and that she would not be able to transfer to a PPP until 10 years after her departure from the company.

12. In July 2000, she transferred her fund of £571,715 from the Morayford occupational pension scheme into a s 32 scheme. Various letters from Mrs Staveley at this time record that it was "absolutely unacceptable" to her that there was a possibility that her ex-husband or Morayford could benefit from her pension fund if she died. Mr Parry's correspondence with Mrs Staveley ended in around mid-2001 but it was clear that she was still unhappy with the position on the pension fund.

13. One of the terms of the s 32 policy was that if she died without taking the lifetime benefits, the trustees would pay the death benefits (such as they were) to the policy holder's personal representatives. She could have chosen to access her pension at any time as the minimum age was 50 and she was 50 in 2000.

14. We accept the evidence of her sons, as is indeed borne out by the correspondence, that she remained very concerned that her pension fund could in whole or part revert to the benefit of her ex-husband and/or his new family.

15. Mr Piney avoided conversations with his mother about the pension fund as it was such an emotive issue for her, with Mrs Staveley expressing the desire to ensure that 'that bastard doesn't get his hands on the money'. He had no recollection that inheritance tax ('IHT') was ever mentioned as a concern by her. Mr Staveley was similarly unaware that his mother saw IHT as a concern.

16. His expressed the view that, while she wished her sons to benefit from her pension fund, she would rather they got nothing than her ex-husband benefit from it in any way. We reject this as we find that this was nothing more than his opinion, and not factual evidence, as it was not a choice that had arisen in her life and she had never been asked to express a view on it. We do, however, accept the overall tenor of the brothers' evidence that preventing Morayford receiving benefit from her pension fund was very important to her; but we accept Mr Piney's view that it was also very important to her that her sons did benefit from her estate. So far as IHT is concerned, while she did not discuss it with her sons, we do find, as set out below (§§26, 27 & 29) that she was given advice on IHT.

17. In 2002, her bankers (C Hoare & Co) wrote a letter of advice which reflected that her concerns at that time with her pension fund were the possibility of transferring her fund from the s 32 policy to a PPP and the security of her investments.

18. A letter to Hoare's from Mrs Staveley in 2003 shows she was weighing up the possibility of drawing her pension at 57 (to maximise the overall benefit from the pension) or waiting another four years when it would be the 10 year anniversary and she could transfer the fund to a PPP.

19. In 2004, Hoare & Co wrote again following a telephone conversation with Mrs Staveley. In this it was clear she was advised of a forthcoming legal change expected for April 2006 which would make it possible for her to transfer her pension fund to a PPP from that date and not wait for the 10 year anniversary.

20. In December 2004, Mrs Staveley was diagnosed with ovarian cancer. She was treated for this and initially the treatment was successful.

21. In early 2005 Farrer & Co drew up a will for Mrs Staveley. Her estate was divided equally between her two sons on trust to pay income in their lifetime, with power for the trustees to advance capital. A letter attached to the will explained that she left the money on trust rather than absolutely because she did not want her sons to come under pressure to share the money with their wives and to protect the money if they divorced.

22. In July 2005, Mrs Staveley was told she was in complete remission from the cancer. Six months later, however, the symptoms returned. While she was given chemotherapy early in 2006, as 2006 progressed the prognosis given by her doctors deteriorated and only palliative care was offered.

23. Mrs Staveley was, as she had been before, financially frugal throughout 2006 and interested in and concerned by the performance of her various investments. She

did not change her lifestyle. She undertook no IHT lifetime planning nor did she discuss funeral arrangements. Mr Piney suggested to her that she take her pension to alleviate short term money concerns but she refused to do this because of her concerns over her long term financial security.

24. On 20 June 2006, Hoare & Co wrote again, following a meeting with Mrs Staveley. The letter says that the sole issue on which Mrs Staveley sought advice was on whether to access her pension policy. It was clear that Mrs Staveley had informed her adviser that she was undergoing chemotherapy and had an uncertain prognosis. There was nothing before the tribunal to explain why Mrs Staveley asked Hoare's in June about accessing her pension, except perhaps that Mr Piney had suggested this to her as recorded in the above paragraph.

25. While the letter refers obliquely to 'various courses of action', the entire letter was about accessing her pension policy. For this reason, and because the advice actually identifies the down sides of immediately accessing her pension policy, we find that the 'course of action' referred to was an immediate accessing of her policy. The identified risks with the course of action were (a) taking a high income now would erode income in old age and (b) it would provide lower death benefits in the event of premature death. Overall the tone was that the letter writer was against an immediate accessing of the fund.

26. The next part of the letter advised her that if she wanted immediate funds, it was more tax efficient to spend her other source of money (a bond) before accessing her pension fund. The letter mentioned three different ways she could access her pension if she still wished to do this, despite the advice that she should not. A part of the advice on these methods of access (secured, unsecured, and phased) mentioned IHT, especially with regards the unsecured pension.

27. The letter went on to discuss death benefits under her existing s 32 policy if she did not access her pension in her lifetime. The letter recorded that her concern was still the risk that surplus funds would be returned to Morayford. She was told that the change in legislation which had happened on April 2006 should mean that the limits were now much more generous (£1.5 million) and that the whole of her fund would go to her named beneficiaries (her sons), with none reverting to Morayford. The letter went on to say:

> "This is new legislation and may be challenged by your former husband.
>
> In order to remove all the concerns which you have about this matter you could transfer your s 32 policy to a Personal Pension Plan…and this would completely sever any link with the company. You could do this without needing to take any tax-free cash or income."

There was nothing in this letter about the PPP having any IHT benefits compared to the existing s 32 policy, although the writer was clearly giving her IHT advice in respect of the position if she chose instead to take the lifetime benefit from her s 32 pension.

28. In any event, she chose not to access her pension fund and must have communicated this decision to Hoare & Co, presumably in about October 2006, as they wrote to her again on 31 October 2006. This letter records the writer's understanding that Mrs Staveley had agreed with his advice not to access the pension fund and that her only remaining issue was to ensure her ex-husband would not benefit from her pension fund. The writer records that the purpose of the letter was to explain how that could be achieved and the writer's understanding that it was the only area on which she required advice.

29. He went on to advise that her objective would be achieved by transferring the s 32 policy into a PPP. He advised that a PPP would be suitable for additional reasons, including that the death benefits should not form part of her estate for IHT. There was a dispute about the meaning of the last substantive paragraph in the letter. It advised:

> "Under both arrangements, in the event of your death prior to taking pension benefits, the full value of the fund up to the present Lifetime Allowance of £1.5 million may pass to your beneficiaries and should be free of inheritance tax….."

30. HMRC's position was that this paragraph did not compare the s 32 and PPP policies because it would be inaccurate if that was so: the death benefits from the s 32 policy would be paid to her executors and would form part of her estate for IHT. Miss Wilson suggested the comparison was between a stakeholder pension and the PPP, as a stakeholder pension was mentioned at the start of the letter, although not referred to again. However, we find that the paragraph immediately preceding the one in dispute was about pension benefits from the s 32 policy as compared with a PPP.

31. Miss Wilson also suggested that this last paragraph can be explained if it is assumed that the writer had advised Mrs Staveley that the s 32 policy death benefits could be settled. It is true that earlier in the letter, the writer had explained that the death benefits of a PPP could pass to her beneficiaries without IHT 'without the need to place death benefits in trust.' Be that as it may, whatever the writer intended, we find that a natural reading of that final paragraph was that the writer incorrectly advised Mrs Staveley that the IHT position on the death benefits from the s 32 policy and PPP was the same: both would be free of IHT. Indeed, the tenor of the last paragraph was that a transfer to the PPP would not adversely affect the death benefits.

32. We accept the brothers' evidence that for much of 2006, despite the steadily worsening prognosis, Mrs Staveley refused to accept her death was inevitable. She investigated different treatments and did not want to recognise that the best that she could be offered was palliative care. She tried to carry on as normal up until around November 2006.

33. She was admitted to hospital at various times for palliative treatment to relieve symptoms and notes from her times in hospital were in evidence, mostly from October 2006. Notes dated 10 October record that she was not prepared to accept that

she could only benefit from palliative care, she wanted resuscitation and to look for experimental treatments.

34. Notes dated 12 & 13 October, only a few days later, however, record that she understood that her prognosis was terminal and that only palliative care could be offered. On the same day she signed a form opting not to be resuscitated if her heart stopped during the surgery. This was somewhat at odds with her sons' view that she never really accepted her untimely death as inevitable. We consider that the difference is explained, as we have said at §4, that while intellectually she had accepted by mid-October that she was dying, emotionally she had not given up hope.

35. After her release from hospital, on 30 October 2006 Mrs Staveley signed a request that her s 32 policy be transferred, and on 3 November 2006 she applied for the s 32 policy funds be transferred into an AXA PPP. One part of the form comprised an expression of wishes that the death benefits be paid equally to her two sons. Another section stated that her expected retirement age was 65.

36. On 30 November, AXA sent Mrs Staveley the policy documents, which showed the policy commenced on 9 November 2006. Although she had the right to take a pension at any time after age 50, she did not access the lifetime benefit of the PPP.

37. Mrs Staveley died on 18 December 2006, aged 56.

38. Probate was granted to the three appellants as the named executors in her will on 19 June 2007.

39. The PPP policy was a very long document. We are concerned only with the terms of the payment of death benefits. We find that the effect of the policy was that the trustees had a discretion to pay the death benefits to all or any of the following:

- The persons nominated by Mrs Staveley (she had, as mentioned, nominated her two sons);
- Her grandchildren
- Her legal representatives.

40. As during her brief membership of the PPP she had never opted to take any lifetime benefits, the trustees of the PPP in exercise of their discretion and in accordance with her statement of wishes, paid the death benefits equally to her two sons sometime in mid-2007.

The notices of determination

41. The first notice of determination was issued on the basis that HMRC consider that the transfer effected on 9 November 2006 of her s 32 policy funds into her PPP was a transfer of value by Mrs Staveley of £405,694.

42. The second notice of determination was issued on the basis that HMRC considered that the omission by Mrs Staveley to take any lifetime benefits under the

PPP from the date it was created on 9 November 2006 to the day she died six weeks later was a transfer of value by Mrs Staveley of £302,498.

The law

43. Section 2(1) of the Inheritance Tax Act 1984 ('IHTA') provides that a chargeable transfer is 'a transfer of value which is made by an individual' other than an exempt transfer. There was no suggestion that if there was a transfer of value it was an exempt transfer.

44. Transfers of value are defined by s 3 IHTA as:

> "(1) …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.
>
> (2) …[not relevant]
>
> (3) Where the value of a person's estate is diminished, and the value –
>
> (a) of another person's estate, or
>
> (b) of any settled property, other than settled property treated by s 49(1) below as property to which a person is beneficially entitled
>
> is increased by the first-mentioned person's omission to exercise a right, he shall be treated for the purposes of this section as having made a disposition at the time (or latest time) when he could have exercised the right, unless it is shown that the omission was not deliberate."

Transfer of funds from s 32 policy to PPP

45. The appellants accept that the transfer of the deceased funds from Mrs Staveley's s 32 policy to the PPP on 9 November 2006 (see §§35-36) was a 'disposition' within the meaning of s3(1) IHTA. They do not accept that it was a 'transfer of value' within the meaning of s 3(1) IHTA. This is on the grounds that they consider s 10(1) IHTA applies. S 10 provides:

> "(1) A disposition is not a transfer of value if it is shown that it was not intended, and was not made in a transaction intended, to confer any gratuitous benefit on any person and either:-
>
> (a) that it was made in a transaction at arm's length between persons not connected with each other, or
>
> (b) that it was such as might be expected to be made in a transaction at arm's length between persons not connected with each other.
>
> ….
>
> (3) In this section –
>
> 'disposition' includes anything treated as a disposition by virtue of s 3(3) above;

> 'transaction' includes a series of transactions and any associated operations."

We will break this provision down into its constituent parts, all of which the appellants must prove. So we will consider whether they have proved that the conceded disposition of the pension funds by transfer from the s 32 policy to the PPP was:

- not intended to confer any gratuitous benefit on any person; and
- was not made in a transaction intended to confer any gratuitous benefit on any person; and
- was made in a transaction at arm's length between persons not connected with each other or was such as might be expected in such a transaction.

'Intended… to confer any gratuitous benefit on any person'

46. The appellants' contention is that Mrs Staveley's sole intention on transferring her pension funds from the s 32 policy to the PPP was to cut out any possibility of risk that any part of the pension fund might be returned to Morayford.

47. HMRC's view is that the changes in law in April 2006 were such that it should have been obvious that while the fund remained well below £1.5million (it was about half that) there was no risk of any part of the pension fund being returned to Morayford; and even if Mrs Staveley did not know this, she had at least a dual motive in transferring the funds and that second motive was to ensure that the death benefits passed to her sons free of IHT.

48. We find on the evidence that her sole motive in making the transfer was to sever all ties with Morayford. She had clearly been very aggrieved, not surprisingly, that, while her part of the pension fund was supposed to come to her absolutely following the divorce, the terms of the s 32 policy and the effect of the law prior to April 2006 meant that a substantial part of the fund might revert to Morayford for the benefit of her ex-husband. She was consistent in her desire to thwart this outcome during the last six years of her life following her divorce. While it is not clear why in June 2006 she was considering accessing her s 32 policy in her lifetime, by October 2006 it was clear she was only seeking advice on severing her pension fund's links with Morayford (§28). While her transfer of funds to the PPP may have been based on a risk that was by then more perceived than real, she had been advised that there was such a risk (see §27), and the perceived risk was the reason why she acted as she did.

49. HMRC suggest she had dual motivation. We accept that as a matter of law a person could have dual motivation. But we do not find it is made out as a matter of fact in this case. HMRC suggest her second intent was to ensure the death benefits passed to her sons free of IHT. We find no evidence of that. She did not seek advice on IHT. It was clear (§28) that the only subject matter on which she sought advice in October 2006 was keeping the benefit of her pension fund away from Morayford. She did not discuss IHT with her family. She entered into no (other) form of IHT

planning. While her adviser took IHT into account in the advice which he proffered, we consider it more likely than not that Mrs Staveley took what was said in the October 2006 letter at face value (§29) and was under the (mistaken) impression that the transfer would not affect the amount of IHT payable in the event of her death. IHT did not, therefore, form part of her motivation.

50. HMRC say that, even ignoring the IHT, she clearly had an intent that the death benefits would pass to her sons, and this was an intent to confer a gratuitous benefit. She signed the statement of wishes. However, we do not see how this could be properly described as an intention to *confer* a gratuitous *benefit*. Her sons were her beneficiaries named in her will and therefore the persons who had stood to benefit from the death benefits of the s 32 policy (which after April 2006 would have been the whole fund). They were the persons named in her expression of wishes for the PPP. Either way they were the intended beneficiaries so that the transfer did not confer a benefit that was new to them and cannot therefore have been part of the motivation for Mrs Staveley.

51. Miss Wilson did not agree that the provision should be limited in this way. She considered that the sons were the beneficiaries under the PPP and therefore, irrespective of the fact that had been the beneficiaries under the old policy, she was of the opinion a benefit had been conferred on them by the PPP.

52. We do not agree. The entire premise of s 10 is that benefit is conferred. It presupposes that the benefit did not exist before and is newly conferred. If Miss Wilson was right, a transfer from one PPP to another PPP for commercial reasons (perhaps to get a better rate of return), without any change in beneficiaries, would be caught. We do not think that this was intended by Parliament.

53. The only difference to the sons in being named in the statement of wishes in respect of the PPP rather than as her residuary legatees for the death benefits from the s 32 policy was that the death benefits could be paid to them directly by the pension administrator and not come to them under their mother's estate: the effect was that the death benefits could avoid IHT whereas before the transfer they would have been subject to it. HMRC's view was that this was a very real benefit.

54. It certainly is a very real benefit, but we have already concluded that this IHT advantage was not a benefit which Mrs Staveley *intended* to confer, even though that was the effect of what she did.

55. In conclusion, the appellants therefore succeed on this point. The admitted disposition by the transfer of the funds from the s 32 pension to the PPP was not intended to confer any gratuitous benefit on any person. But that does not decide the case in the appellants' favour. In addition, they have to satisfy the Tribunal that the transfer was not part of a *transaction* intended to confer gratuitous benefit and that it was at arm's length.

'made in a transaction intended, to confer any gratuitous benefit on any person'

56. HMRC's case was that the two 'events' on which IHT was charged should be seen as a single transaction, and that each event would be 'tainted' by the Mrs Staveley's intention in respect of the other event.

57. As we have already cited, s 10(3) IHTA provided:

> "'transaction' includes a series of transactions and any associated operations."

58. The two events were, as we have said, the transfer of funds to the PPP (the first determination) and the omission by Mrs Staveley to take any lifetime benefits from the PPP (the second determination). While the transfer from the s 32 policy to the PPP was clearly a transaction, the omission to take a pension would not fall within the normal definition of a transaction. This is because the word implies a positive act involving (at least) two persons. The omission to do something is not a positive act and involves only the person who omits to do something. The IHTA carries no extended meaning of transaction and we conclude that the omission to take the pension benefits cannot be described as a transaction and therefore the two events (the transfer and omission) cannot properly be described as a series of transactions.

59. However, it was HMRC's case that the omission to take a pension was an 'associated operation' with the transfer of the fund to the PPP. Associated operations are defined in s 268 IHTA:

> (1) In this Act, 'associated operations' means, subject to subsection(2) below, any two or more operations of any kind, being -
>
> (a) operations which affect the same property, or one of which affects some property and the other or others of which affect property which represents, whether directly or indirectly, that property, or income arising from that property, or any property representing accumulations of any such income, or
>
> (b) any two operations of which one is effected with reference to the other, or with a view to enabling the other to be effected or facilitating its being effected, and any further operation having a like relation to any of those two, and so on,
>
> whether those operations are effected by the same person or different persons, and whether or not they are simultaneous; and 'operation' includes an omission.
>
> (2) …[not relevant]….
>
> (3) Where a transfer of value is made by associated operations carried out at different times it shall be treated as made at the time of the last of them; but where any one or more or the earlier operations also constitute a transfer of value made by the same transferor, the value transferred by the earlier operations shall be treated as reducing the value transferred by all the operations taken together, except to the extent that the transfer constituted by the earlier operations but not that

> made by all the operations taken together is exempt under section 18 above."

60. From the last part of s 268(1), " 'operation' includes an omission", it is clear that the *omission* to take a pension right can, therefore, be a part of an associated operation. There is no requirement for the two operations to take place at the same time.

61. The use of the word 'associated' presupposes that there is some connection between the operations in order for them to be associated operations. If s 268 should be read as requiring some sort of association between the two events, we find as a matter of fact that they were not associated. Mrs Staveley's decision not to exercise her pension benefit was a continuing decision which she made in respect of both the s 32 policy and the PPP. Nothing changed in this respect when the transfer from the s 32 to the PPP took place: the two decisions were entirely independent of each other. Indeed it was clear from the letter of October 31st, that she had already decided to continue omitting to take the lifetime benefit from her pension fund, while asking for advice which led to the transfer of the fund to the PPP. The events were not connected.

62. HMRC do not agree with this interpretation of the facts. They consider the omission to take the pension rights was part and parcel of the decision to transfer the funds to the PPP. However, we reject this. It is very clear from the letter dated 31 October 2006 that the decision not to access the pension funds was taken before the decision to transfer to the PPP, and whatever her reason for not accessing the lifetime benefits was, her reason for the transfer was clearly (however misguidedly) to keep the funds from her ex-husband.

63. However, apart from the use of the word 'associated' in the definition, there is no requirement on the face of s 268 that there is any connection between the two operations in order to make them 'associated', other than that they must affect the same property (with its expanded definition). But we find that there must be a connection of intent because s 10(1) itself only applies if the disposition was 'made in a transaction intended, to confer any gratuitous benefit…'. Transaction here has the extended meaning and includes 'any association operations'. So if HMRC rely on 'associated operations', s 10 should be read as applying to a disposition:

> 'made in [associated operations] intended, to confer any gratuitous benefit….'

64. In other words, if HMRC rely on the combination of transfer of fund and omission to take a pension, the combination of operations must have been intended to confer a gratuitous benefit. However, we find as a fact that the combination of two operations was not intended to confer a gratuitous benefit. Whatever the intent behind the omission, it was not linked with the transfer to the PPP in Mrs Staveley's mind, and her intent with respect to the transfer to the PPP was (we have found at §48) solely to break the connection with Morayford. There was no intent linking the two matters.

65. These provisions have been considered in a different context in the case of *Macpherson and another* [1989] 1 AC 159. This was a decision of the House of Lords and is binding on this Tribunal. The facts were quite different to those in this case. In 1970, a beneficiary of a discretionary trust entered into a contract with the trustees on certain terms over pictures the subject of the trust. In 1975, that beneficiary was, with his and the court's consent, excluded permanently from any beneficial interest in the trust. In 1977, the trustees agreed with the ex-beneficiary to vary the terms of the 1970 contract to be on terms more favourable to the beneficiary. The following day the trustees gave another beneficiary a life interest in the pictures.

66. The question was whether the variation in the contract, which devalued the pictures in the hands of the trustees, was an associated operation with the gift made the following day. The Lords ruled that the variation in the contract and the appointment the following day were associated operations. In that case, HMRC had conceded that the variation of the contract was not by itself intended to confer a gratuitous benefit on anyone (page 173F-G). The issue was whether it was 'made in a transaction intended to confer any gratuitous benefit' (page 174E).

67. Lord Jauncey, giving the unanimous decision of the Lords, said:

> "In [the case of a transaction intended to confer any gratuitous benefit] the disposition would form one of a number of events of which the sum constituted the transaction which was relevant to intent…"(page 174F)

68. In other words, as we have said, the (alleged) associated operations must be linked by the intention to confer gratuitous benefit. If they are not so linked, they are not associated operations. Lord Jauncey repeated the point a little later:

> "…intention to confer gratuitous benefit qualifies both transactions and associated operations. If an associated operation is not intended to confer such a benefit it is not relevant for the purpose of the subsection. That is not to say that it must necessarily per se confer a benefit but it must form part of and contribute to a scheme which does confer such a benefit." (page 175H-176A)

69. We have found that the transfer to the PPP was not intended to confer a gratuitous benefit; we have also found it was not part of nor did it contribute to a scheme which did confer such a benefit. This is because the transfer and the omission were not linked by motive. This is in contrast to the position in *Macpherson* where it seems the Lords were of the view that the devaluation of the pictures (by the variation to the contract) was done with the intent of making a gift of them the next day: see page 174G. In this case, the transfer to the PPP was <u>not</u> made with the intent of omitting to take the lifetime benefits. In so far as Mrs Staveley made any positive decision not to take lifetime benefits, that decision had already been taken and taken independently of the decision to transfer the funds to the PPP. See §28.

70. HMRC do not agree. They consider that if the second event has the necessary intent, that intent taints the first event, even if by itself it did not have the necessary intent. This seems to go beyond a purposive interpretation of what Parliament

intended: HMRC's interpretation would catch an unrelated operation in respect of the same property which had nothing to do with the intent to confer a gratuitous benefit which was behind an earlier or later transaction or operation. Yet Parliament clearly intended by s 10 to catch only those events, or a combination of events, which did have such an intention to confer a gratuitous benefit. We reject HMRC's interpretation which is inconsistent with what the Lords said in *Macpherson.*

71. We note that the Tribunal's view in the case of *Arnold* (discussed below at §93) was that on similar facts to this case the declaration of trust of the pension benefits and the continuing omission to take lifetime benefits were linked: see §§49 of that decision. However, in that case the clear implication was that the creation of the trust was part and parcel of a decision to confer a benefit on the beneficiaries and would have been pointless without the continuing omission to take the lifetime benefits. In this case, we have found, contrary to HMRC's case, that the motive for the transfer and the omission were not linked and the purpose of the transfer at least was not to confer a benefit.

72. The omission to take the pension was not part of an associated operation together with the transfer, because the transfer was not intended to confer gratuitous benefit and was not part of a scheme intended to confer gratuitous benefit.

a transaction at arm's length between persons not connected with each other'

73. That still does not conclude matters with respect to the first event. The appellants must satisfy the Tribunal in addition that s 10(1)(a) or (b) applies. In the event, all parties assumed that if either (a) or (b) applied, it would be (a). Either the transfer was a transaction at arm's length or it was not in (a) or (b).

74. The appellants' case is that the transaction in question was the transfer of Mrs Staveley's funds from the AXA s 32 policy to the AXA PPP. The only parties to that transaction were Mrs Staveley and AXA. The transaction was between unconnected parties and at arm's length.

75. HMRC, needless to say, do not agree. They consider that the transfer must be seen as including the statement of wishes. It was indeed part of the application form. They consider the transaction in question to involve three parties: Mrs Staveley, AXA and her two sons.

76. We find that the statement of wishes (whether viewed as part of the transfer of the pension fund or as an associated operation with it) was between Mrs Staveley and the AXA pension administrator. It informed the pension administrator of Mrs Staveley's wishes with respect to her death benefits but did not confer any obligation on the pension administrator. While the sons were the object of the statement of wishes, they were neither parties to it nor given any rights or property by it.

77. If a statement of wishes is not by itself a transaction (as no consideration is given) it is nevertheless the sort of thing that would happen in an arms length transfer into a pension policy and fulfils s 10(1)(b) if not (a).

78. HMRC's case is that the transfer combined with the expression of wishes cannot be seen as being at arm's length because (in their view) the combined effect of both was a disposition in favour of the sons of the death benefits. Yet, while the transfer from one pension fund to another was a disposition, the statement of wishes effected no disposition because it conferred no obligation on the pension administrator nor rights on the sons.

79. HMRC consider this literal interpretation of s 10 should be discarded. They consider that that the recipients of any gratuitous benefit must be seen to be parties to the transaction which effected the disposition. But is such an interpretation giving effect to Parliament's intention? If that had been intended, it would have been enough for s 10 simply to say that any transaction not at arm's length was caught. It would mean the requirement for *intention* to confer gratuitous benefit would be superfluous because any event which had the *effect* of conferring gratuitous benefit would not be at arm's length.

80. It seems to us that Parliament intended that a transaction between parties at arm's length which had the effect but not the intent of conferring a gratuitous benefit on a third party to the transaction would not be a transfer of value. That is also the literal meaning of s 10. We apply that meaning. Therefore, although named in the statement of wishes, because the sons gave no value for it nor were conferred rights by it, they cannot be considered as parties to the statement of wishes in particular nor the transfer to the PPP in general. The parties were only Mrs Staveley and AXA. Those two parties were at arm's length. The appellants succeed on s 10(1)(a).

81. Our conclusion is that the appellants have proved that the disposition by the transfer of the funds to the PPP was not intended, and was not made in a transaction intended, to confer gratuitous benefit on any person and was made in a transaction at arm's length between unconnected persons.

82. We allow the appeal in so far as the first notice of determination is concerned.

Omission to take lifetime benefits

83. Under the terms of her pension, both under the s 32 fund and the PPP, from age 50, Mrs Staveley had the right to take life time pension benefits of a tax free lump sum and annuity. She did not exercise that right at any time after her 50th birthday in 2000 and before her death in 2006. And because she did not exercise her lifetime rights, following her death the pension administrator, in accordance with the terms of the policy, paid out death benefits.

84. HMRC contend, and the appellants accept, that Mrs Staveley's right in her lifetime to claim her life time benefits under her pension fund had a value to her estate. HMRC calculated the value of the unexercised lifetime benefits the moment before death as being £302,498, being the total of the net present value of the right to a lump sum and annuity. We are not asked to comment on whether this is right. The appellants contend it is a lower figure. While it is obvious that the right to a lump sum, albeit as yet unexercised, confers an immediate value on a person's estate, it

might seem strange that HMRC contend that the right to the annuity could have any value at the moment before death. We understand that HMRC contend this because Mrs Staveley could have opted for a guaranteed 10 year annuity. We are not asked to decide the question of valuation and make no comment on this but proceed on the basis that the parties were agreed that the unexercised lifetime benefits had some value to her estate at the moment immediately preceding her death.

85. HMRC contend that this value was disposed of at the moment of death because at that point Mrs Staveley lost the right to exercise her lifetime benefits. So this value, say HMRC, passed from her estate. Had she died while funds were in the s 32 policy, the value of the unexercised lifetime benefits would have left her estate on her death, but in substitution her estate would have acquired the death benefits, which even on HMRC's figures would have been more valuable than the life time benefits. Her estate would not have been diminished in value by her death.

86. However, at the time of her death, the pension funds had been transferred to the PPP. At the moment of death, her estate did not acquire any right to the death benefits in substitution for the right to the lifetime benefits: as mentioned at §39, the pension administrator had the discretion to pay the death benefits to her personal representatives or directly to her sons or grandchildren. Her estate was therefore diminished in value at her death as it lost the right to the lifetime benefits but did not acquire any right to the death benefits in substitution.

87. HMRC attribute this diminution in value of Mrs Staveley's estate as being due to her failure to take the lifetime benefits in her lifetime. We made the point in the hearing that the immediate cause of the diminution of value of Mrs Staveley's estate was her *death.* Her ongoing choice not to take the lifetime benefit at any time since 2000 by itself did not lead to a diminution in value of her estate. It was only the omission coupled with her death that led to this diminution.

88. Miss Wilson eventually accepted that this was right but her point was that the Tribunal must give a purposive interpretation to the legislation. She pointed out that the provisions of s 12(2A)-(2G) expressly contemplate that an omission to take pension benefits during lifetime could amount to a disposition. S 3(3), while it did not refer to any specific omission, clearly intended that omissions could be dispositions, and provided that they should be treated as taking place at the latest time the right could have been exercised. In other words, s 3(3) should be read as meaning that the disposition was the omission to exercise the right at the latest time that it could be exercised: to read it any other way would deprive it of meaning. We accept that. It is the omission to take the lifetime benefit before her death that potentially brings Mrs Staveley's omission into s 3(3).

89. For other reasons, the appellants do not accept that the omission to take pension benefits was a disposition. As we have already said, s 3 IHTA reads as follows:

> "(1) …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.

(2) …[not relevant]

(3) Where the value of a person's estate is diminished, and the value –

(a) of another person's estate, or

(b) of any settled property, other than settled property treated by s 49(1) below as property to which a person is beneficially entitled

is increased by the first-mentioned person's omission to exercise a right, he shall be treated for the purposes of this section as having made a disposition at the time (or latest time) when he could have exercised the right, unless it is shown that the omission was not deliberate."

90. Mr Rees has two alternative arguments in putting his case that the omission was not caught by s 3(3) and is therefore not a disposition within s 3(1). Firstly, it is his case that the proper interpretation of s 3(3) is that the decrease in value of the deceased's estate must be causally linked with the increase in value of the other person's estate. The second is that the omission was not deliberate.

Linkage of increase in estate to omission

91. Mr Rees' case is that the causal linkage is absent. The omission to exercise the lifetime benefits before her death decreased the value of Mrs Staveley's estate but, it is his case, it did not increase anyone else's estate. The value was in a sort of limbo. It did not form part of the pension administrator's estate, or, if it did, it was matched by an obligation to dispose of any equal amount on the terms of the pension deed. It did not therefore increase the value of AXA's estate. Nor, at the point of death, did it enrich anyone else's estate as the pension administrator had the power to pay it to *either* Mrs Staveley's personal representatives *or* directly to family members. It was only when the pension administrators, many months later, took the decision and actually paid out the death benefits to the sons, that the sons' estates were enriched.

92. We accept that the decrease in value of Mrs Staveley's estate did not occur at the same time as the increase in value of the sons' estates. But we do not think that read literally or purposively s 3(3) would require the increase and decrease to occur at the same moment. We accept also that the amount of decrease in Mrs Staveley's estate was necessarily smaller than the increase in value of the sons' estates (see §84 where we comment that even at the highest that HMRC contend it to be, the net present value of the lifetime benefits at the moment of death was lower than the death benefits). We do not think read literally or purposively, s 3(3) would require the value of the increase and decrease to precisely match.

93. But we do think that that both must be linked in the sense that both must be caused 'by' the omission to take the lifetime benefits in Mrs Staveley's lifetime. This was considered by the first-tier Tribunal ('FTT') in the case of *Fryer and others (personal representatives of Arnold (deceased))* [2010] UKFTT 87 (TC).

94. That case concerned very similar facts to that of this present case. The deceased, Mrs Arnold, too, had most unfortunately suffered from ovarian cancer and died from it. Mrs Arnold, too, had held a pension plan which had entitled her to take

lifetime benefits after her 50th birthday, yet she had omitted to do so before her untimely death aged 60.

95. The facts were not, however, identical with those of this case. Mrs Arnold had made no transfer of funds from her pension plan: instead she had declared a discretionary trust over her pension plan, the effect of which was that the death benefits accrued to this trust on her death.

96. HMRC see the difference in facts as a distinction without relevance. As the death benefits fell into a trust at the moment of Mrs Arnold's death, the effect was to diminish Mrs Arnold's estate: her estate immediately before her death had the net present value of the right to take the lifetime benefits. The moment immediately after her death it had lost this right (as she had died), and had not acquired the rights to the death benefits in substitution as these benefits now fell into a trust and not into her estate. Something similar occurred in Mrs Staveley's case, as explained above, although for slightly different reasons: Mrs Staveley had not created a trust over her s 32 policy but she had transferred the pension funds to a PPP, one of the terms of which was that the death benefits could be appointed to persons other than her personal representatives.

97. In *Arnold*, HMRC's case (as here) was that s 3(3) applied. In that case HMRC relied on s 3(3)(b) and claimed that, rather than another person's estate being increased by the omission, that settled property (ie a trust) was increased by the omission.

98. On the question of linkage, this was dealt with at §44. In that case, the effect of Mrs Arnold's settling her pension fund on trust was that the death benefit would be payable to the trustees of the trust. The Judge said:

> "[44]…If instead of taking no action Mrs Arnold had exercised her right to take the pension benefits, the whole of the contract value would have been used to provide pension benefits, within approved limits. Thus …the trust would have received nothing.
>
> [45] It follows that Mrs Arnold's omission to exercise the rights did increase the value of the settled property, as the omission resulted in the death benefits payable under the policy being paid to the trustees…."

99. However, it can be seen that there is a material distinction with the *Arnold* case. In *Arnold,* the failure to take the lifetime benefits in her lifetime necessarily increased the value of the trust fund. The death benefits had to be paid to the trustees of the trust. In this case, however, the failure to take the lifetime benefits in her lifetime did not necessarily increase the value of her sons' estates: even overlooking the fact that the pension administrator had the power to pay the funds directly to a grandchild, they had the power to pay the funds to Mrs Staveley's executors. In the event, they chose to pay it (in accordance with Mrs Staveley's wishes) directly to her sons. But the immediate cause of the increase in value of the sons' estates was the decision of the pension administrator to pay out the funds in this manner. There was no such discretion in the *Arnold* case.

100. Mr Rees in any event urged us not to follow *Arnold*. He pointed out that the Judge had considered the appellant to be effectively unrepresented. The appellant certainly did not have legal representation in the case which involved difficult questions of law. The Judge had not had the benefit of properly reasoned legal arguments on behalf of the appellant. Mr Rees pointed out that the Tribunal's conclusion had been criticised by Richard Bramwell QC in the *Tax Adviser* for April 2010 in an article at pages 22-23.

101. However, the criticism of the case was on the basis of the timing discrepancy: Mrs Arnold's estate was diminished the moment before death; the value of the settled property was increased in the moment immediately after death. The Tribunal in *Arnold* said in the second half of §45:

> "[45] …The fact that this increase occurred after her death does not prevent this condition in s 3(3) IHTA 1984 from being fulfilled, as there is no reference in the subsection to the time at which the value of the settled property is increased."

102. In so far as it was Mr Rees' case that the increase in value of the other person's estate must be at the same time as or in the same amount as the decrease in value of the deceased's estate, we reject it. We consider the Tribunal in *Arnold* was quite right. There is nothing on the face of s 3(3) which requires the change in values of the two estates to be in the same amount and to occur at exactly the same time. There is no reason to think that Parliament intended such limitations to be read in. If such limitations were read in, it would allow money to escape the tax net on technical grounds for which there is no logical justification.

103. The timing and the amounts do not matter: but what does matter, as it apparent from a literal and purposive reading of s 3(3), is that both the decrease in value of the deceased's estate and the increase in value of the other person's estate is effected by the same omission. The two changes in value must therefore be linked, and linked by the omission. It is not a question of whether we should follow *Arnold* on this because, on this crucial issue, the two cases differ on the facts. The question this Tribunal faces, which the Tribunal in *Arnold* did not have to consider, is whether the pension administrator's discretion to whom to pay the death benefits was sufficient to break the link between the omission and the increase in the sons' estates.

104. We note in passing that (putting aside the right to pay to a grandchild) the pension administrator had two options. One was to pay the death benefits to the sons directly; the other was to pay them to the executors. As her sons were the only legatees of Mrs Staveley, either way the sons' estates would be increased by the death benefits. However, we consider that a purposive interpretation of s 3(3) is that we must disregard at this point that the sons were Mrs Staveley's legatees. The purpose of s 3(3) was to catch a diminution in value of estate such that the money fell outside the IHT net. If the money was paid to the executors, Mrs Staveley's estate would benefit and the money would not fall outside the IHT net. So the 'increased' estate of another person refers to an increase other than as legatee of the funds of the deceased's estate.

105. In practice what happened was the pension administrator exercised his discretion to pay the death benefits directly to the sons. The funds fell outside the IHT net and the sons' estates were directly benefited by this exercise of discretion. This enrichment of the sons needed (at least) three events to occur: their mother's omission to take lifetime benefits, their mother's death, and finally the pension administrator's exercise of discretion.

106. The question is whether the pension administrator's discretion meant that the sons' estates were 'increased by [Mrs Staveley's] omission to exercise [her lifetime pension rights]. We do not consider this a straightforward question. The legislation requires the sons' estates to be 'increased *by* [their mother's] omission to exercise a right'. Yet the immediate cause of their enrichment was the exercise of the pension administrator's discretion in their favour.

107. HMRC relied on the case of *Drummond v Collins* [1915] AC 1011. In that case, the deceased left foreign property on trust for his UK-resident grandchildren for life. The terms of the trust were that the income should be accumulated for the grandchildren until they reached 25 years, although the trustees had a discretion to pay it out for their benefit before that age.

108. The question was whether income paid at the trustees' discretion to the beneficiaries' mother for their benefit while under the age of 25 was income arising in respect of foreign possessions. The appellant's case was that the money was paid at the trustees' discretion and that therefore the money did not arise from foreign possessions but from the trustee's discretion.

109. The decision of the Lords was that, even if the grandchildren would have had no immediate right to the income but for the trustees' exercise of discretion, the exercise of the discretion gave them the income and that income was, within the meaning of the then income tax legislation, to be treated as profits arising from foreign property.

110. HMRC's case is that in both cases the receipt was derived from (in the one case) foreign property and (in the other case) the omission, but that in both cases an intermediate act of discretion was the immediate cause of the receipt. That intermediate act of discretion was irrelevant in *Drummond* and HMRC say it should be irrelevant here.

111. But we think that is making comparisons between things that can't be compared. In *Drummond* the question was the *origin* of the money received. The money was income from foreign property. All the House of Lords were saying was the fact that the *reason* the income was paid to the grandchildren was the trustees' exercise of discretion (which was the immediate cause of the receipt) did not alter the *source* of the money being foreign property. For instance, Lord Wrenbury said at page 1021-1022:

> "The test is not, I think, whether there is an absolute interest in a foreign possession, but whether there is such an interest in a foreign possession that the party assessed derives income from it…the income

> is annual profits arising to a person residing in the UK form property situate elsewhere than in the UK."

112. Here the money is the proceeds of a pension policy. That is its origin. But the question is not the *origin* of the money, but the *reason* it was paid to the sons. Was the reason it was paid to the sons the omission of the mother to take her lifetime benefits? We find that that the *cause* of the receipt was, firstly, the omission by the mother, and secondly, the exercise of discretion by the trustees.

113. Ordinarily, we would regard the voluntary exercise of discretion as a break in the chain of causation from the omission to exercise a right before death to the receipt. But is it right to do so where it is common knowledge that a pensions administrator will normally and perhaps invariably exercise its discretion in accordance with the deceased's statement of wishes?

114. Our conclusion on this is that, while *Drummond* is not directly in point, nevertheless the appellants have not satisfied us that the increase in the sons' estates was not caused by the omission. We are entitled to take into account that the owner of the pension policy has every reason to expect their statement of wishes to be respected. It would be wrong to regard the pension administrator's legal discretion as a break in the chain of causation when it was virtually inevitable that he would honour the deceased's wishes and pay the money directly to her sons.

Omission not deliberate?

115. To recap, the appellant's position is that the omission by Mrs Staveley to take her lifetime pension benefits is not a disposition within s 3(1) IHTA because it is not brought into s 3(1) by s 3(3). That section provides:

> Where the value of a person's estate is diminished, and the value –
>
> (a) of another person's estate, or
>
> (b) of any settled property, other than settled property treated by s 49(1) below as property to which a person is beneficially entitled
>
> is increased by the first-mentioned person's omission to exercise a right, he shall be treated for the purposes of this section as having made a disposition at the time (or latest time) when he could have exercised the right, unless it is shown that the omission was not deliberate."

116. Our conclusion set out above is that the value of the sons' estates was increased by their mother's omission to take her lifetime benefits. That means we must move on to consider whether the appellant can show that the omission was not deliberate.

117. Mr Rees' first proposition was that the failure to take the lifetime benefits was not deliberate because Mrs Staveley had not reached the normal retirement age specified in either of her pension plans (age 61 under the s 32 policy and 65 under the PPP). He pointed out that Mrs Arnold had passed the normal retirement age at the date of her death, and on that basis distinguished the two cases.

118. Mr Rees agreed that the specified normal retirement age had little significance on the basis that the pensioner could take the pension at any time after age 50. As we do not consider that the specified normal retirement age, and whether or not the deceased had reached it at the time of her death, has any significance in this context, we reject this first proposition.

119. Mr Rees' second proposition was that Mrs Staveley's omission is treated as taking place at the last possible moment on which she could have elected to take lifetime benefits, which was the moment before death. At that point, she was too ill to take any decision, let alone *deliberately* omit to take a benefit. He relies on *Dymond* at chapter 11.535 where the author stated that:

> "Arguments against the HMRC view were not put forward in *Arnold*. For example it could be argued that the last omission occurs just before death when the deceased is terminally ill and at that point is certainly not deliberate…"

120. Mr Rees' third proposition is that Mrs Staveley's omission was inadvertent: her concern was to ensure that her ex-husband could not benefit from the pension fund. He suggests that by the start of the PPP in early November, there was no positive decision by her not to take the lifetime benefits from the PPP, even though the evidence is (§28) that there was a positive decision by her sometime before October not to take the lifetime benefits from the s 32 policy.

121. Mr Rees' fourth proposition was that to the extent that Mrs Staveley took any decision with respect to the lifetime benefits under the PPP, the evidence showed that her concern would have been to maximise her long term financial interests as she hoped, despite the prognosis, to survive, rather than preserve the fund for her sons after her death.

122. What does 'deliberate' mean in this context? HMRC say as a matter of law it is enough if the appellant took a conscious decision not to access the lifetime benefits and then put the matter out of her mind or later became too ill to think about it. They say Parliament must have intended the Tribunal to attribute to the person at the moment of death intentions that that person had earlier in time consciously formed: to do otherwise would be to deprive many provisions in the IHTA of meaning.

123. We agree with the analysis in *Arnold* at §§35-38 which amounts to much the same thing. As the Tribunal in that case pointed out, the burden of showing intention was on the appellant as s 3(3) says:

> "unless it is shown that the omission was not deliberate."

Where the evidence is that a conscious decision was taken at some point to omit to take the lifetime benefits, it is for the appellants to demonstrate that this changed at some later point. If they cannot do that, the omission was deliberate for the purposes of s 3(3).

124. The evidence is that Mrs Staveley took a decision not to access the lifetime benefits of the s 32 policy sometime between June – October 2006. The advice given

by Hoare's in respect of the transfer to the PPP was on the basis that this decision not to access lifetime benefits had been made: see §28. There was no suggestion that the transfer to the PPP would lead to a reappraisal of that decision not to access the lifetime benefit of her (current) pension policy. There is no suggestion that her view ever changed. The appellants, therefore, have not shown that the omission was not deliberate.

125. This disposes of the appellants first, second and third propositions above. The normal retirement age was irrelevant. Her illness and incapacity on death, and the reason for the transfer to the PPP, do not matter as she had already taken a positive decision not to access the lifetime benefits of her pension and the appellants failed to show anything had changed.

126. So far as the fourth proposition is concerned, this assumes that in law the reason for the omission is relevant. But there is nothing express in s 3(3) which suggests that the reason the deliberate omission occurred is relevant and indeed the existence of s 10 which does look at motive, suggests, on the contrary, that motive is irrelevant to s 3. So the question for s 3(3) is whether the omission was deliberate or inadvertent; the question for s 10 is the motive for any deliberate omission.

127. Therefore, even if Mr Rees is right about Mrs Staveley's motivation in omitting to take her lifetime benefit, this does not make the omission any the less deliberate. It was clearly not inadvertent. We dismiss this ground too. The omission has not been shown not to be deliberate. And in any event on the facts, we do not consider Mr Rees is right about Mrs Staveley's motivation: we find (see §149) that at least one of her motives was to preserve the value of the pension fund for her sons in the event of her untimely death

Is the disposition a transfer of value?

128. Even if the omission is a disposition, as we have found it to be, Mr Rees' case is that it is not a transfer of value within the meaning of s 10. As stated above, this provision says:

> "(1) A disposition is not a transfer of value if it is shown that it was not intended, and was not made in a transaction intended, to confer any gratuitous benefit on any person and either:-
>
> (a) that it was made in a transaction at arm's length between persons not connected with each other, or
>
> (b) that it was such as might be expected to be made in a transaction at arm's length between persons not connected with each other.
>
> ….
>
> (4) In this section –
>
> 'disposition' includes anything treated as a disposition by virtue of s 3(3) above;
>
> 'transaction' includes a series of transactions and any associated operations."

129. HMRC's case is that a 'transaction' by definition cannot include an omission to do something. So it is impossible for the appellants to show that it fails the conditions of s 10(1).

130. It must be right to say that an omission is not a transaction, nor can it be made in a transaction (unless of course there was agreement to omit to do something). Nevertheless, that would not prevent an omission benefiting from the exemption to s 10. For an omission, that section would require the appellants to show both that:

- the omission was not intended…to confer any gratuitous benefit on any person (s 10(1));
- it was, or was such as might be expected to be, made in a transaction at arm's length between persons not connected with each other (s 10(1)(a) or (b))

131. It is s 10(1)(b) that causes the conceptual difficulty where an omission is concerned. The Tribunal in *Arnold* considered this at §§53-58. The Tribunal considered that the disposition (by omission) was between connected persons, as the disposition was to the trust and Mrs Arnold and the trustees were connected. It also considered that it was not what might be expected in an arm's length transaction because:

> "It was certainly not an 'open market' form of transaction." (§57).

132. Mr Rees' point is that an omission is not a transaction at all, so therefore a very wide interpretation must be given to 'transaction' because otherwise all omissions would be transfers of value as it would be impossible to satisfy s 10(1)(a) or (b) and therefore s 12(2A)-(2G) would be otiose. He says the Tribunal in *Arnold* did not consider this and its decision should not be relied on as persuasive. Of course, the Tribunal in *Arnold* did not consider s 12(2A)-(2G) because those sections came into force on 6 April 2006 which was after the death of Mrs Arnold.

133. We consider s 12(2A)-(2G) in detail below. Suffice it to say here that we agree with Mr Rees that s 12(2A) clearly contemplates the possibility that s 10 could apply to an omission to take lifetime benefits of a pension because that is the only circumstance in which s 12(2B) could apply. S 12(2A) so far as relevant provides:

> "[2A] Subsection (2B) below applies where a person who is a member of a registered pension scheme…has omitted to exercise pension rights under the pension scheme and, if the words '(or latest time)' were omitted [from subsection 3(3)] above -
>
> (a) [subsection 3(3)] would have treated the person as having made a disposition by reason of omitting to exercise the pension rights, but
>
> (b) section 10 above would have prevented the disposition being a transfer of value." (our emphasis).

134. In fact, s 12(2A) assumes that s 10 does not apply to prevent the disposition being a transfer of value but that it would have had that effect if s 3(3) did not include the words '(or latest time)'. Certainly we agree that the omission of these words would not alter the application of s 10(1)(a) or (b) and that therefore we agree that

Parliament, when inserting s 12(2A)-(2G) considered it possible that an omission to exercise pension rights at any time could either:

> (a) be made in a transaction at arm's length between persons not connected with each other, or
>
> (b) was such as might be expected to be made in a transaction at arm's length between persons not connected with each other.

However, as a matter of statutory interpretation, a later amendment cannot discern Parliament's intention at the time of original enactment. So what was Parliament's intention when s 10 was enacted? Were omissions to exercise pension rights to be seen as occurring within the transaction between the pensioner and pension administrator, or was the transaction to be seen as the conferring of benefit by the pensioner on the person named in the statement of wishes?

135. What is clear is that the 'disposition' is not (necessarily) the same thing as the transaction. S 10 clearly contemplates that a disposition can be made "in a transaction". As an example, in *Arnold,* the 'transaction' was the creation of the trust to which the parties were the deceased and the trustees (middle of §52). The beneficiaries of that transaction were the persons in whose favour the disposition was made.

136. Literally, the 'disposition' by omission to take lifetime benefits was an omission which occurred "in" the transaction between Mrs Staveley and AXA. That transaction was between persons at arm's length and not connected with each other. The same could not be said in *Arnold:* the deceased (as settlor) was connected with the trustees: §55.

137. HMRC do not agree with this literal interpretation. Yet the only alternative would be to say that the 'omission' was a transaction between Mrs Staveley and those whose benefited by it: this not only does considerable violence to the words of the section but we see no reason to suppose it was intended by Parliament. Putting aside the fact that such an interpretation renders the later amendment ineffective, it would mean many things not intended to confer gratuitous benefit would nevertheless be caught. We think that Parliament would have meant the intention to confer gratuitous benefit to have been a significant part of the test: whereas intention becomes irrelevant if omissions by their very nature cannot fulfil s 10(1)(a) or (b).

138. In conclusion, we consider that it is possible for an omission to benefit from s 10. In this case, we find that the omission was made "in" the transaction between Mrs Staveley and AXA, who were at arm's length and not connected. S 10(a) or s s(10)(1)(b) are fulfilled. That transaction, as we have already found at §81, was not intended to confer gratuitous benefit, and therefore the omission was not made in a transaction intended to confer gratuitous benefit. But that leaves the question whether:

> '[the omission] was not intended…to confer any gratuitous benefit on any person'

When should intention be measured?

139. The remaining question is whether the omission was 'intended…to confer any gratuitous benefit on any person'. Mr Rees makes much the same point as he made above in connected with the question of whether the omission was deliberate. His point is that, in his opinion, at the relevant time Mrs Staveley subjectively did not have an intention to confer a gratuitous benefit. In so far as she thought about taking the lifetime benefit at all, Mr Rees' view was that her reason for not doing so would be to protect her own long time financial security rather than ensure a bigger pot for her sons on her imminent death.

140. We find that Mrs Staveley had clearly first taken a positive decision sometime in 2003 not to access her pension funds (see §18). Her only reason of which we have evidence appears to be her long term financial best interests. She was well at the time. However, we find she reconsidered the matter in around June 2006 as at this point Hoare's wrote to her (following a meeting) in which letter it is stated that her only concern was whether should access her pension policy. At that time, we find, she knew that she had cancer from which she might die in the relatively near future, however much she hoped for a different outcome.

141. HMRC's case is that her decision not to access the PPP was taken (or to be treated as taken) when she was very ill in October-December 2006 and therefore her intent by her omission can only have been to maximise the pot for her sons. She could not have had any personal long term financial concerns at that point.

142. Intent is subjective. Much of what we said in relation to 'deliberate' at §§115-127 above is relevant here. Parliament wanted the Tribunal to consider the actual intent of the deceased but did not intend the provisions to be rendered ineffective by looking at intent at the moment of death when the deceased was highly unlikely to have had any intent whatsoever. So it seems to us Parliament intended us to take Mrs Staveley's actual intention from the time she made a positive decision to omit to take her lifetime benefits and attribute that to her at the moment of death.

143. The evidence we have of a positive decision not to access lifetime benefits being last made by Mrs Staveley was in June 2006. HMRC reject this date as the date on which intention should be measured as there was no omission to take lifetime benefits from the PPP before the end of October, when Mrs Staveley transferred her funds into the PPP. Be that as it may, we think that her June intention must be treated as her intention in respect of the PPP at her date of death as there is no evidence she thought about it again. Hoare's letter of October makes it clear that the decision had been made earlier: §28.

144. In the event, we do not think it matters because of what we say below at §149 about dual intention.

Intention to confer gratuitous benefit?

145. What evidence do we have of her reasons at this time for not taking her lifetime benefits? The main evidence is Hoare's letter of 20 June. It is clear it was shortly

preceded by a meeting between Mrs Staveley and the writer, and it is the only evidence we have of what was said.

146. We have mentioned this letter at §§24-27. We find, for the reasons given, that Hoare's gave Mrs Staveley (at least) 3 reasons not to access her pension policy: (a) her own long term financial interests should she read old age (b) maximising her sons' financial interests should she suffer premature death; and (c) it was less tax efficient than using other funds available to her.

147. Her sons' evidence was that in 2006 so far as they were concerned she was interested in her own long term financial interests. We accept that this was a major concern to her as she was reluctant to accept she had no future, but we do not accept it was the only concern she had.

148. We consider that while intent is subjective, it is for the appellants to satisfy the Tribunal that Mrs Staveley did not intend to confer gratuitous benefit. We find that omitting to take life time benefits would increase the funds available to her sons in the event of her death and that she knew that and had discussed it with her adviser and been advised about it, amongst other things. There is nothing to indicate that she had no interest in such advice. She followed the advice although there is nothing to indicate which of factors (a), (b) or (c) primarily motivated her in June 2006. It is more likely than not that she was influenced by all three factors.

149. We find as a fact, therefore, that conferring on her sons' a greater benefit than otherwise was one of the factors in her decision not to access her pension fund. There was an intent in June 2006 to confer gratuitous benefit, even though there was other intent too. That intent must be attributed to her at the moment of her death. We consider that as long as it was a part of her motivation such dual (or triple) motivation at the moment of death is sufficient to deny the appellants the benefit of s 10.

Section 12

150. Lastly, Mr Rees relied on the provisions of s 12(2B).

151. This section provides:

> "(2B) Section 3(3) above does not actually treat the person as making a disposition by reason of omitting to exercise the pension rights (at the latest time when the person could have exercised them) unless the condition in subsection (2C) below is satisfied.

152. Subsection 12(2C) provides:

> "(2C) That condition is that –
>
> (a) the person makes an actual pensions disposition under the pension scheme which is not prevented from being a transfer of value by section 10 above within the period of two years ending with the date of his death, and

> (b) it is not shown that, when he made the actual pensions disposition, he had no reason to believe that he would die within that period."

153. These provisions are somewhat opaque. However, if (2B) applies it means the omission is not a disposition and IHT not payable. (2B) applies unless the condition in (2C) is satisfied. (2C) actually contains two conditions (a) and (b): they must therefore be read as cumulative. The omission will not be a disposition unless both (a) and (b) apply.

154. Mr Rees accepts that it is impossible to make a case that (b) does not apply. Mrs Staveley did have reason to believe within two years of her death that she would die within that period. Therefore 'it is not shown…[Mrs Staveley] had no reason to believe that she would die within that period.'

155. But is the whole of (2C) fulfilled? Did Mrs Staveley make an actual pensions disposition within two years of her death, and if so, was it prevented from being a transfer of value by s 10? 'Actual pensions disposition' is defined in Section 12(2F)(b) in these terms:

> "a person makes an actual pensions disposition under a registered pension scheme if he makes a disposition within section 3(1) above by doing anything in relation to, or to rights under, the pension scheme"

'The pension scheme' is clearly a reference to the PPP, as it is the omission to take the lifetime benefits under the PPP which HMRC have sought to charge to tax and therefore it is that omission to which s 12(2A) refers.

156. Did Mrs Staveley do anything in relation to the PPP, or to her rights under the PPP?

157. Miss Wilson's view appears to be that the *omission* to take the lifetime benefits is doing something in relation to her rights under the PPP. We do not agree. The purpose of s 12(2A)-(2G) is to catch an omission in combination with a disposition. Contrast the reference to the 'disposition' in (2B) which is clearly a reference to the omission, with an 'actual pensions disposition' within (2C) which is clearly something additional to the omission and defined in (2F)(b) as 'doing anything'. Apart from the fact it refers to the positive doing of something, it makes a nonsense of s 12(2A)-(2G) if the omission which is the subject of it is also treated as the actual pensions disposition.

158. In conclusion, the question is whether, apart from the omission, did Mrs Stavely do anything in relation to the PPP, or her rights under it, within two years from the date of her death.

159. Mr Rees refers to s 12(2C) which refers to an 'actual pensions disposition under the pension scheme…' and says that transferring funds into a pension scheme is not doing anything 'under' the scheme. However, s 12(2F) defines the whole of the phrase 'actual pensions disposition under a registered pension scheme' as the 'doing anything in relation to, or to rights under, the pension scheme.'

160. Our view is that she did do something in relation to the pension scheme: she transferred funds into the PPP. By virtue of s 12(2F) that is a disposition 'under' the PPP. In any event, it is obvious that Parliament's intention was that s 12(2F) should be given a general interpretation: the intention of s 12(2C) was to exclude all omissions from IHT which followed a disposition of funds in a pension scheme other than those made within two years of death and in contemplation of dying. It must have been intended to catch IHT avoidance by the method of transferring funds into a pension scheme with the intention of never taking a pension but having the funds fall outside the IHT net on death. Transferring money into a pension fund would be the archetypal disposition within s 12(2C) and must therefore be within the meaning of 'actual pensions disposition' in 12(2F).

161. We do, however, agree with Mr Rees' that the transfer to the PPP was prevented from being a transfer of value because of the operation of s 10. We agree because this is what we have found at §81.

162. The effect is that the appellant would be able to rely on the exemption for the omission contained s 12(2B), but only if they appellants can bring themselves within s 12(2A). We have set this out already but to recap it provides a gateway into the relief of s 12(2B) as follows:

> "[2A] Subsection (2B) below applies where a person who is a member of a registered pension scheme…has omitted to exercise pension rights under the pension scheme and, if the words '(or latest time)' were omitted [from subsection 3(3)] above -
>
> (a) [subsection 3(3)] would have treated the person as having made a disposition by reason of omitting to exercise the pension rights, but
>
> (b) section 10 above would have prevented the disposition being a transfer of value."

Does omission of 'or latest time' make a difference?

163. These are rather complex provisions. What (2A) is saying is that where an omission is a disposition (as we have found it to be in this case), nevertheless the relief provided by (2B) is available if the effect of s 3(3) with the omission of the words '(or latest time)' would have been that there was a disposition within the s 10 relief.

164. To recap on s 3(3) it provides, so far as relevant:

> "Where the value of a person's estate is diminished, and the value –
>
> (a) of another person's estate, ….
>
> is increased by the first-mentioned person's omission to exercise a right, he shall be treated for the purposes of this section as having made a disposition at the time (or latest time) when he could have exercised the right, unless it is shown that the omission was not deliberate." (our emphasis)

165. If the words '(or latest time)' are omitted, by necessary implication it means we must consider the earlier (and perhaps earliest) moment at which there was an omission to take pension benefits and ask if that omission would be relieved by s 10.

166. However, the earliest point in time that we can consider is the commencement of the PPP as it is clear that s 12(2A) refers to 'the pension scheme'. The relevant pensions scheme is the one under which she omitted to exercise rights which led to the increase in the sons' estates. That was the omission under the PPP. The omission under the s 32 scheme was of no effect as that terminated before she died.

167. This is therefore a short point. As at 30 October 2006, when she applied to transfer the s 32 policy to the PPP, her intention in respect of the omission, we must presume, would have been the same as at June 2006 and that intention was (we have found at §§148-149) in part to confer gratuitous intent. So measuring intent at 30 October rather than at date of death would make no difference to the applicability of the relief in s 10. The appellants are therefore unable to access the relief of s 12(2B), as they cannot get through the gateway of s 12(2A).

168. We must therefore dismiss their appeal in relation to the second notice of determination. This is a decision in principle only. If the parties are unable to agree the valuation of the disposition by omission, they are at liberty to revert to the Tribunal to determine it.

169. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 7 May 2014