

Appellant -v- Comptroller of Taxes

The Widow's tax appeal

January 2022

For the purpose of anonymisation, the true name of any individual or company mentioned below has been fictionalised.

INTRODUCTION

At the Appeal Hearing on 5 January the question was raised at the outset of the hearing by Mr Dominic Murphy of Revenue Jersey as to whether the Appellant has a right of Appeal under Article 42 to the Commissioners. It was agreed that the Clerk to the Commissioners would review the ITL and provide a response to that question after the meeting.

The Sitting Panel of Commissioners also agreed after the hearing that they would provide what would have been their decision in the form of their 'view' had there been a right of Appeal, should it turn out the Appeal had not been validly brought before them.

The Clerk has subsequently advised the Commissioners that there is no statutory right to Appeal under the ITL in respect of a recovery notice issued under Article 42(2) (as opposed to an assessment issued on Mrs "Smith", for which there is no statutory route under the ITL). However, as agreed, the Commissioners have provided their 'decision', in the form of their 'view', which is set out below.

PRELIMINARY

The following generic steps or stages in the income tax process are set out in *Whitney v IRC* (1926) AC 37 and were agreed by the parties:

1. Charge

There is a charge to tax for taxpayers, and chargeability provisions to assess the income that is chargeable. The charge to tax arises pursuant to Article 1 of the Income Tax (Jersey) Law 1961 ("ITL"). In the case of these taxpayers, the relevant charging provision is Schedule D.

Chargeability is defined pursuant to Article 121(1) ITL

2. Submission of tax return

Typically, a taxpayer would submit a tax return to confirm the income chargeable to tax and apply any "credits" of whatever nature available to determine the net income chargeable to tax.

3. Assessment

Revenue Jersey reviews the tax return as submitted, completes its assessment, and sends the assessment with the final chargeability to tax and requesting payment of tax due, which is offset by any payments made towards the account.

Assessment is defined pursuant to Article 121(2) ITL

Assessment on an Heir, a Personal Representative or an Executor for the estate of a deceased person is defined pursuant to 125(1) ITL

4. Collection of Tax

There are several ways that tax is collected, the main one for these purposes being ITIS payments made by each of Mr and Mrs "Smith". It may be that the application of these payments has been incorrectly applied. That has not been raised in the appeal and is therefore not in scope for review here.

5. Recovery

Where collection of tax has not resulted in full payment of the outstanding tax, Revenue Jersey may seek to recover any outstanding tax not collected through regular means.

Recoverability is defined pursuant to Article 42 ITL.

It should be noted that while the ITL currently references Spouse and Civil Partner, the ITL changes to include these references were made after the Tax Years under appeal. Under the current ITL, in this case, what would currently be defined as Spouse A is the late Mr "Smith", while Spouse B is Mrs "Smith". This 'decision' therefore references Wife and Husband in reference to the ITL application to the Appellants.

ANALYSIS

Charge to tax and crystallisation of the charge

Mr and Mrs "Smith" each had a charge to tax pursuant to Article 1 of the Income Tax Act, under Schedule D income. This charge to tax arose during the course of each tax year and crystallized at 31 December in each year. In 2017, Mr "Smith's" charge crystallized on his death in Feb 2017.

For the tax years 2015 and 2016, which are the 2 years under Appeal, each of Mr and Mrs "Smith" were therefore subject to a charge to tax on their Schedule D income for the whole of the tax year.

Chargeability

Article 121(1) states that a charge to tax on the Wife while married and living with her Husband, is deemed to be income of her Husband and not to be income of the Wife.

For the whole of 2015 and 2016, Mr and Mrs "Smith" were married and living together; therefore, Mrs "Smith's" income is deemed to be that of Mr "Smith". The second paragraph of Article 121(1) specifies that notwithstanding the deeming provisions in the first paragraph, the deeming provisions do NOT affect the chargeability to tax, if any, which arises pursuant to Article 121(1).

The UK Supreme Court case of *DCC Holdings v HMRC* [2010] UKSC 58 sets a limit to the principle of deeming such that deeming is limited to the assessment to tax and would not, as in the *DCC Holdings* case, extend the deemed categorisation for assessment purposes, i.e. stage 3 above, to the applicable article for double tax treaty purposes and, in the case of the Wife, in this case, to stage 5 recovery.

It could therefore be said that once an 'Article 121 wife', always, for the purposes of chargeability, an 'Article 121 wife', a status that is not changed by the 'Article 121 wife' subsequently becoming a widow or surviving spouse.

The fact that the Wife's income has been deemed to be her Husband's for the purpose of assessment *and* that the assessment cannot be collected because of an insufficiency of assets in the estate of the Husband *and* that the chargeability, tax liability or debt of the Husband dies with him does not mean that the Wife's chargeability to tax also dies: it remains alive and well, both under the principle in the *DCC Holdings* case and for the purposes of recovery under Article 42(2).

Furthermore, the term 'the wife' in Article 42(2) refers to 'the wife' in Article 121. It should not be read conatively as 'a wife' which can then be read, as the Appellant maintains, as excluding the meaning 'widow'. Read conatively, the term 'the wife' should be expanded to read 'the Article 121 wife', not contracted to read 'a wife' or simply 'wife' as the Appellant mistakenly reads the term 'the wife' in Article 42(2). This reading is confirmed by the subsequent rewrite of the section in 'the spouse A' and 'the spouse B' language.

Assessment

Article 121(2) ITL specifically states that, barring any election for individual assessment pursuant to Articles 121A and 121B, any chargeability to tax on the Wife which is deemed to be income to the Husband shall be assessed on the Husband or on the Husband's heirs, executors, or administrators. In this case there has been no election for individual assessment. Mrs "Smith's" otherwise chargeable income is therefore assessed to Mr "Smith" as a result of Article 121(1) ITL. The effect of these provisions is that the whole of the income that is chargeable to Mrs "Smith" is deemed and falls to be charged to Mr "Smith" or to his heirs, executors or personal administrators. In the event of his death, Mr "Smith's" outstanding tax liability therefore can be assessed on his heirs, executors or administrators or, if assessed on him prior to his death, collected from his estate.

Article 125(1) ITL stipulates that where a person dies without having delivered a return of all of his income chargeable to income tax, an assessment may be made on the person's heir's, executors or administrators and the amount of the tax thereon shall be a debt from and payable out of the person's estate.

As Mr "Smith's" tax returns for 2015 and 2016 were submitted after his death, the Notice of Assessment could not be issued to him. Under the provisions of both 121(2) and 125(1), the assessment may be made on any of the person's heirs, executors or administrators. The Notice of Assessment for each of these years were issued to the Executors of the Estate of Mr "Smith", not its heirs or administrators.

Recovery

Article 125(1) stipulates that the tax thereon shall be a debt from and payable out of the person's estate. The Executor of the Estate must then make payments on debts owing by the estate out of the proceeds of the estate.

Recovery of the outstanding tax must, by virtue of Article 125(1) ITL, therefore, be from the estate, unless Article 42 ITL can be found to effect recovery against the widow or surviving spouse in the event that the tax cannot be collected under Article 125(1) ITL from the estate.

It was agreed at the hearing that Article 125(1) ITL was not under appeal and that the focus of the appeal was on the application of Article 42(2). Furthermore, the Respondent confirmed that it was not Revenue Jersey's policy to pursue a liability on the heir under Article 125(1) which, as Mr "Smith" died

intestate and Mrs “Smith” had inherited by right of survivorship the family flat, it appeared that Mrs “Smith” was.

Article 42(2) ITL stipulates that where income tax is charged on the Husband in respect of income of the Wife, the powers of recovery for non-payment of tax by the Husband can extend to the property, goods and chattels of the Wife. In this case it is accepted that the Revenue sought to recover the outstanding tax from Mrs “Smith”, although the service of the demand for payment was made after tax collections in the form of Mrs “Smith’s” ITIS payments were applied to Mr “Smith’s” debt. It is unclear where Mrs “Smith’s” ITIS payments have been applied in regard to the 2015 and 2016 tax years. That is not a matter under appeal and can be resolved between the Appellant and the Respondent once it is clear whether Revenue Jersey can recover the outstanding tax from Mrs “Smith” under Article 42(2).

Article 42(2) stipulates that recovery of tax chargeable on the Husband can be recovered from the Wife. The Appellant argues that as a Widow, Mrs “Smith” could not be considered a Wife and therefore no recovery is possible. If this position is accepted, the tax due on Mrs “Smith’s” income chargeable to tax would not be recoverable at all. The ITL now refers to Spouse and Civil Partner. It does not include the term “former” or “surviving” for either of those terms where the Spouse or Civil Partner has died. The Commissioners have reviewed a number of definitions of “Wife”, “Widow” and “Spouse”. None of these provided a definitive inclusion or exclusion of a Widow as a Wife, surviving Wife or Spouse. It is therefore up to the Commissioners to decide whether the Widow can still be considered a Wife for the purposes of Article 42(2), enabling Revenue Jersey to seek recovery from her.

The term Widow could be changed to surviving Wife and be included in the above category. The current term Spouse or Civil Partner could also be changed to surviving Spouse and surviving Civil Partner. In those cases, it would be clear that the Revenue could seek recovery from the surviving Wife/Spouse or Civil Partner.

It would be an inequitable application of the ITL to suggest that, because the term surviving is not included in Article 42(2), no surviving Wife, surviving Spouse or surviving Civil Partner will ever have to pay tax on income that was chargeable to tax on them which had been deemed to be that of their Husband, Spouse or Civil Partner, but at the time of the death of their Husband, Spouse or Civil Partner, that tax remain unpaid. Effectively that would create a scenario of unjust enrichment where any Spouse or Civil Partner who died without having paid their surviving Spouse or Civil Partner’s tax would effectively “gift” a “tax free” year(s) to their surviving Spouse or Civil Partner.

In the Commissioners’ view, given the relatively recent statutory changes from Wife to Spouse and Civil Partner, and the fact that there is no reference to a surviving Spouse or Civil Partner in the ITL, the drafters intended that Wife/Spouse and/or Civil Partner included someone who had that status at the time of chargeability, notwithstanding the death of their Husband/Spouse/Civil Partner before recovery could be made.

CONCLUSION

In the Commissioners’ view, Revenue Jersey is able to recover the tax on Mrs “Smith’s” income chargeable to tax for 2015 and 2016 from Mrs “Smith” under the provisions of Article 42(2) for the following reasons: (1) the term Wife can be read broadly to include a surviving Wife or Widow analogously to a surviving Spouse or Civil Partner, (2) because the failure to recover the tax assessed on Mr “Smith’s” estate under the statutory route of Article 125(2) and Article 42(1) does not preclude recovery from Mrs “Smith” under the statutory route of Article 121 and Article 42(2), (3) the deeming of Mrs “Smith’s” chargeable income to be that of her husband under Article 121 does not preclude it, under the principle in *DCC Holdings*, from being her chargeable income for the purposes of recovery

under Article 42(2) and (4) the fact that Mrs "Smith" was a widow at the time the Article 42(2) notice was served on Mrs "Smith" is irrelevant for the reasons given.