Closure notices can be issued to personal representatives of deceased (Sara Winstanley (as personal representative of Mark Winstanley deceased) v HMRC)

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Private Client analysis: The First-tier Tax Tribunal's decision in Winstanley v HMRC ensures that a taxpayer's death does not generally prevent HMRC (or the personal representatives of the deceased) from continuing procedural matters previously under way with the deceased. Keith Gordon, barrister at Temple Tax Chambers, examines the case and its implications.

Sara Winstanley (as personal representative of Mark Winstanley deceased) v HMRC [2018] UKFTT 0154 (TC)

What was the background?

The case concerned an enquiry into an individual's (Mr Winstanley) tax return for the 2006/07 tax year. In the course of that enquiry, Mr Winstanley died. A closure notice was subsequently issued to his widow who was also his personal representative.

The legislation governing closure notices (section 28A of Taxes Management Act 1970 (TMA 1970), however, provides that a closure notice must be sent to 'the person to whom notice of enquiry was given'. As that was Mr Winstanley and he was no longer alive, it was contended that no closure notice could be given and that HMRC's only remedy was to issue a discovery assessment (subject to the relevant time limits).

What did the court decide?

The First-tier Tax Tribunal concluded that this would represent an absurd outcome and that TMA 1970, s 28A should be interpreted so as to treat a personal representative as a successor to the deceased and to enable HMRC to issue valid closure notices in cases where the taxpayer has died during the enquiry.

What are the practical implications of this case?

The First-tier Tax Tribunal's decision is without doubt a sensible one and indeed can be backed up by case law from both the present and the past century.

In short, the decision ensures that a taxpayer's death does not, in one fell swoop, generally prevent HMRC (or indeed the personal representatives) from continuing procedural matters previously under way with the deceased.

Nevertheless, it is interesting that the decision does stand in stark contrast to the Upper Tribunal's decision in 2017 in *HMRC v Peter L Drown & Mrs RE Leadley (as executors of Jeffrey John Leadley deceased)* [2017] UKUT 0111 (TCC). That case concerned the right of personal representatives to make negligible value elections in relation to assets held by the deceased and nominating a date during the deceased's lifetime. HMRC argued (and, allowing their appeal, the Upper Tribunal agreed) that a negligible value election may be made only by the taxpayer and at a time when the taxpayer still owns the asset in question. In other words, an intervening death will preclude the personal representatives from making a claim on the deceased's behalf in respect of a date during the deceased's lifetime.

The obvious question, therefore, is how can the two decisions be properly reconciled? The First-tier Tax Tribunal identified some legislative distinctions. However, it remains my view that *Drown & Leadley* was in fact wrongly decided (and got side-tracked by an irrelevant argument).

It should also be remembered that the Upper Tribunal in *Drown & Leadley* did not have the benefit of any argument on behalf of the taxpayers in that case. Therefore, while the decision is undoubtedly of binding authority on the First-tier Tax Tribunal (in respect of the specific provisions in question), it is less persuasive than it might have been.

Keith Gordon practised as a chartered accountant and chartered tax adviser before qualifying as a barrister. He advises in all tax-related matters, extending to social security contributions and benefits as well as professional negligence matters, where he acts for claimants and defendants alike.

Interviewed by Kate Beaumont.

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