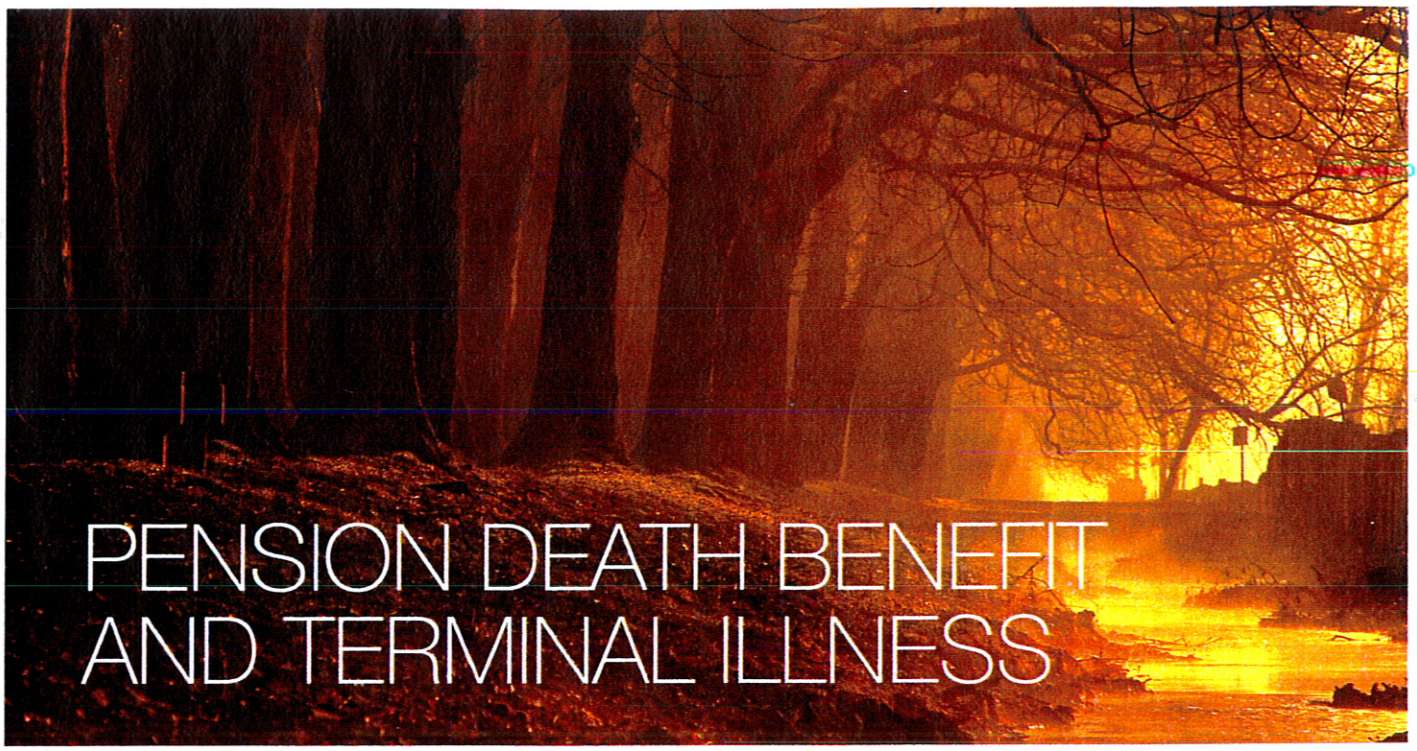

PENSION DEATH BENEFIT AND TERMINAL ILLNESS

Richard Bramwell QC considers a recent First-tier Tax Tribunal decision that practitioners should not treat as determinative

The First-tier Tax Tribunal has held that a person suffering a terminal illness who failed to take her pension benefits thereby made a lifetime transfer of value under *IHTA* 1984, s. 3(3) (omissions). The transfer of value was measured by reference to the lump sum that could have been taken under the policy, plus the value of an annuity guaranteed for 10 years.

The executors were not professionally represented, and the Tribunal observed:

'92. This case has raised complex issues. Although Mr Evans sought to make the case on the Executors' behalf, it was clear that he had no previous experience of appearing before these tribunals. He appeared as the Executors' representative, but I have had to treat this appeal as if it were conducted by an unrepresented appellant. In particular, I have sought to draw out points on the Executors' behalf which might have been expected to be made by an experienced representative. This is a case where quite clearly it would have been appropriate for the Executors to be represented by counsel, or by someone else equally experienced in representing parties before the Tribunal.'

This greatly reduces the authority of the decision. Nevertheless, practitioners will no doubt have to take account of it when preparing IHT returns, and my purpose here is to explain why, in my view, they should not treat it as determinative.

The decision in question is *Fryer & others v HMRC*, decided on 17 February 2010 and not yet reported.[1] The facts were that the deceased died in July 2003, aged 60, having been diagnosed as suffering from a terminal disease in April 2002. In 1995 she had created a discretionary trust of any pension death benefits, and in the same year took out the pension policy in question. Under the policy she could take the benefits at any time from age 50. In June 2002 she confirmed to her IFA that she did not intend to take her pension benefits, and additional trustees of the death benefit settlement were appointed.

The Act's provisions

IHTA 1984, s. 3(3) provides that:

'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 section 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.'

It is uncontroversial that:

- the deceased's failure to take her pension benefits was an omission;
- given her consideration of her entitlements in June 2002, the executors could not show that the decision was not deliberate;
- the latest time when the right could have been exercised was immediately before death.

So, if s. 3(3) applied, it applied immediately before death. In a normal case of an unexpected death, the omission to take a pension would be covered by s. 10 (no transfer of value if no intention to confer gratuitous benefit), but again it was clear that this defence could not be made out. Accordingly, two technical issues remained:

(i) Was the value of the deceased's estate *diminished* by the failure to exercise the right?
(ii) If so, was the value of settled property *increased*?

Was the estate's value diminished?

The property comprised in the estate was the right to claim the lump sum and the guaranteed annuity. Although in fact that right was non-assignable, for IHT purposes it had to be valued on the assumption that it could be sold. On that assumption it had a market value equivalent to the discounted value of the benefits obtainable by exercising the right immediately before death. This was the Tribunal's conclusion (in my view, the correct one).

Was the settled property's value increased?

It will be recalled that the death benefit was held on discretionary trusts. It will also be recalled that the latest time at which s. 3(3) could apply was immediately *before* death. It would therefore seem clear that the section did not apply because the value of the settled property only increased *after* death. The Tribunal met this point as follows:

'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. 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 sub-section to the time at which the value of the settled property is increased.*'

It is here that I respectfully disagree. The sub-section provides for a lifetime transfer at the latest time at which the right could have been exercised. It is expressed in the present tense: 'where the value of a person's estate is diminished and the value ... of any settled property ... is increased'. It requires that these events result from the omission. It would require specific language to enable regard to be had to an increase in the value of the settled property at some later time. It is as if the Tribunal is extending the omission to encompass the death on the basis that the two events are 'associated operations', but as was said in the High Court in *Bambridge v IRC* 36 TC:

'Death, as we know, is an awfully big adventure, but even the Crown admits that it is not an associated operation' (page 322).

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1. Available at www.bailii.org/uk/cases/UKFTT/TC/2010/TC00398.html