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PROPERTY CASE NOTE: **Elborne v HMRC [2025] UKUT 00059 (TCC)**

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This is the latest in a line of battles between taxpayers and HMRC over ‘Home Loan’ tax avoidance schemes, and a rare win for taxpayers which vindicates the original advice upon which the schemes were based.

The facts are archetypal of the ‘Home Loan’ scheme, and involved the following key steps:

1. **Creation of the Life Settlement:** In November 2003, Mrs. Elborne created a Life Settlement, under which she was the life tenant. The beneficiaries included herself and her descendants.
2. **Sale of Property:** On the same day, she entered into a contract to sell her home, the Old Rectory, to the trustees of the Life Settlement (the Life Trustees) for £1.8 million. The consideration for this sale was a promissory note (the Note) issued by the Life Trustees.
3. **Trustees' Resolution:** The Life Trustees resolved to purchase the Property for £1.8 million, to be satisfied by the issue of the Note, and allowed Mrs. Elborne to occupy the Property rent-free during her lifetime. Mrs. Elborne continued to live in the Property until her death on 6 January 2011.
4. **Creation of the Family Settlement:** In December 2003, Mrs. Elborne created the Family Settlement, under which the principal beneficiaries were her three children, and she was excluded from benefit.
5. **Assignment of the Note:** On the same day, she assigned the Note to the trustees of the Family Settlement (the Family Trustees) for no consideration.
6. **Election under FA 2004:** In November 2006, Mrs. Elborne executed and sent to HMRC an election under paragraph 21(2) of Sch 15 FA 2004, stating that the Property was to be treated for the purposes of Part 5 FA 1986 as property subject to a reservation, but only insofar as she was not beneficially entitled to an interest in possession in the Property.

The intended operation of the Scheme, in summary, is that:

- The sale to trustees at full value is not a gratuitous disposition and so not a chargeable transfer;
- Upon Mrs Elborne’s death the value of the property would be aggregated to her estate because of her life interest under s.49 IHTA, but would be reduced by the trustees’ liabilities under the Note;

- The gift of the Note would be a potentially exempt transfer, and so tax-free if Mrs Elborne survived for 7 years.

The FTT ([2023] UKFTT 626 (TC)) rejected 10 of the 11 objections taken by HMRC to the effectiveness of the scheme, but concluded that the value of the Note should not be deducted from the value of the Property, because:

- a. The liabilities of the Life Settlement were to be treated as incurred by Mrs Elborne as the holder of the interest in possession, and therefore was a debt 'incurred by' Mrs Elborne and so not deductible under s.103 FA 86;
- b. The consideration for the debt was 'property derived from' Mrs Elborne' and so excluded by s.103(1)(a).

The taxpayer appealed on the s.103 issue. HMRC cross-appealed on five main issues:

1. **Section 102 Property Issue:** HMRC submitted that section 102 FA 1986 applies in respect of the transfer by Mrs. Elborne of her interest in the Property, with the effect that such interest falls to be treated as property to which Mrs. Elborne was beneficially entitled immediately before her death and forms part of the value transferred by way of the deemed transfer of value immediately before her death.
2. **Section 102A Issue:** HMRC submitted that section 102A FA 1986 applies in respect of the transfer by Mrs. Elborne of her interest in the Property, with the effect that such interest falls to be treated as property to which Mrs. Elborne was beneficially entitled immediately before her death and forms part of the value transferred by way of the deemed transfer of value immediately before her death.
3. **Election Issue:** HMRC submitted that by virtue of making the Election, Mrs. Elborne brought herself within the ambit of section 102 such that her interest in the Property falls to be treated as property to which Mrs. Elborne was beneficially entitled immediately before her death and forms part of the value transferred by way of the deemed transfer of value immediately before her death.
4. **Section 49/Rossendale Issue:** HMRC submitted, in part based on *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, that the liability to which the Note gave rise is not one which falls to be taken into account by way of a deduction for the purposes of section 49 IHTA 1984, having been manufactured solely for the purpose of diminishing the value of the property in which Mrs. Elborne's interest in possession subsisted.
5. **Section 102 Note Issue:** HMRC submitted that section 102 applies in respect of the transfer by Mrs. Elborne of her interest in the Note, with the effect that such interest falls to be treated as property to which Mrs. Elborne was beneficially entitled immediately before her death and forms part of the value transferred by way of the deemed transfer of value immediately before her death.

The Tribunal made the following decisions on the appeal and cross-appeal:

- **Section 103 'Debt Incurred' Issue:** The Tribunal allowed the Appellants' appeal. The liability under the Note was not a 'debt incurred by' Mrs Elborne, but by the Life Trustees. Liabilities of the trustees of a settlement in which the Deceased had a life interest are not, either by necessary implication or statutory construction, to be treated as liabilities of the Deceased. The purpose of s.49 is to include the value of settled property in the estate of the Deceased for IHT purposes; there is no need to imply a further construction deeming the Deceased as the person liable for trustee liabilities. It is sufficient for that section to take effect if the net assets of the trust, taking account of liabilities, are aggregated.
- The consideration for the debt was also not 'property derived from' Mrs Elborne for the purposes of s.103. That section requires two transactions: the creation of the liabilities and a disposition made by the Deceased
- The appeal was therefore allowed on that issue and the decision of the FTT reversed [58-59].

CROSS-APPEAL

- **Section 102/102A / Election Issues:** S.102(3) / 102A could not apply to make the Home the subject of a gift with reservation of benefit because Mrs. Elborne was already treated as beneficially entitled to the whole of the Property by virtue of section 49(1) IHTA 1984. S.102 only applied to property that *"would not, apart from this section, form part of [her] estate immediately before [her] death"*.
- **Section 49/Rosendale Issue:** The liability under the Note should not be disregarded for the purposes of section 49 IHTA 1984, as the Note gave rise to a genuine debt; the FTT's findings of fact did not support an argument that the liability was 'manufactured solely for the purpose of diminishing the value of the property'.
- **Section 102 Note Issue:** Although it was common ground that all of the steps involved in the home loan scheme were "associated operations" for this purpose, the benefit to Mrs Elborne in occupying the property was not a benefit derived from the Note, which was the subject of the gift. The requirements of section 102(1)(a) and section 102(1)(b) were not met, and therefore, the Note was not property subject to a reservation under section 102 IHTA 1984.

The Tribunal set aside the FTT's decision and re-made the decision, allowing the Appellants' appeal against the notices of determination.

COMMENTS

It is almost inevitable that HMRC will seek to appeal this decision to the Court of Appeal, given the extensive use of Home Loan schemes in the period before 2003 and the large number of such schemes which are still working through the system. Nevertheless, the finding in relation to s.103, permitting the value of the Note to be deducted from the value of the trust assets, is a major development and potentially opens the doors to hundreds of such schemes being successfully applied to reduce IHT liabilities.

One point which was emphasised by the FTT but given less value by the Upper Tribunal was that there were deviations from the intended operation of the scheme in Elborne: various documents were not in fact executed on the dates they bore; Mrs Elborne's executors, rather than the Life Trust trustees, became the registered proprietors of the house and purported to sell and retain proceeds of sale. Those dealing with other schemes will want to give careful thought to whether they can actually prove the authenticity of the documentation and that events have actually transpired as the scheme intended.



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