Tax, Trust and Probate ~ April 2023

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**Can Managing Your Personal Share Portfolio be a Trade for Tax Purposes?**

With widely differing degrees of success, many enthusiastic investors buy and sell shares on their own account in the hope of boosting their incomes – but can such activities be viewed as a 'trade' for tax purposes? The First-tier Tribunal (FTT) addressed that issue in a case of importance to private investors.

After receiving a large inheritance, a man retired from his professional job and used part of the money to buy and sell shares on an 'execution only' basis. He had access to a live feed of share prices and kept up with the financial news, also carrying out further research in the hope of picking winning investments. During a three-year period, however, his efforts produced overall losses.

He asserted that those losses were incurred in the course of trade and sought to deduct them, for tax purposes, from his other income during the relevant period. HM Revenue and Customs, however, did not accept that he was entitled to any such deduction. It asserted that his share dealing activities did not amount to a trade, within the meaning of Section 64 of the Income Tax Act 2007.

Ruling on his challenge to that outcome, the FTT noted that his ambition to generate sufficient income from his share dealing to meet his outgoings sadly came to naught. He was not a registered or regulated trader and did not buy or sell shares on behalf of third parties. He would make phone or email contact with a broker who would perform trades in accordance with his instructions.

He bought and sold shares at an average rate of a little over once a week during the relevant period and estimated that he spent one or two hours a day on activities connected to share dealing. He did not follow a specific pattern of work across the week and the FTT noted that his approach to investment was not particularly organised, systematic or effective.

Rejecting his appeal, the FTT found that he had not seriously planned or considered his share dealing in a way that would be expected of someone engaged in a trade or business. He did not devote the majority of his time to investment activities, instead fitting them in around other things he wanted to do. In managing a portfolio of personal investments, he was not undertaking a trade.

It is important to source specialist legal advice if a dispute with HMRC arises. Our expert team can assist.

**Partner Note**

*Henderson v The Commissioners for Her Majesty's Revenue and Customs [2023] UKFTT 281 (TC)*

**High Court Ruling Underlines the Pitfalls of Making 'Inflexible' Mutual Wills**

It is legally possible for couples to make mutual wills by which each binds the other not to alter their bequests at any point in the future, save by mutual agreement. As a High Court ruling showed, however, the inherent inflexibility of such arrangements is one good reason why lawyers usually advise against them.

A married couple made mutual wills by which they each bequeathed their estates to the other. The wills provided that, on the death of the second spouse, the entirety of his or her estate would pass to their third-eldest child. Following the husband's death, however, the wife made a fresh will by which she appointed their sixth-eldest child as her sole beneficiary.

The effect of the mutual wills, if valid, was that, in the absence of their agreement to the contrary, each spouse bound the other to bequeath his or her estate to the third child. When the death of the husband rendered any such agreement impossible, the obligation on the wife to do so became irrevocable.

The sixth child sought a formal declaration that his mother's final will was valid. In resisting his claim, however, the third child asserted that the document was of no effect in that it conflicted with the terms of the earlier mutual wills.

Ruling on the matter, the Court noted that it is notorious to lawyers practising in the field that a decision to make mutual wills needs to be considered with the greatest care. The inflexibility of such arrangements, which take no account of any future changes in circumstances, usually renders them inappropriate.

The couple understood the effect of their agreement to enter into mutual wills. It was, however, certainly a transaction that called for an explanation. In setting aside the agreement, the Court was not satisfied that they had entered into it free from the third child's undue influence. The ruling meant that the mother's final will took full effect and that the sixth child, not the third, was the beneficiary of her estate.

For advice on making sure your estate will be dealt with fairly and efficiently, contact us.

**Partner Note**

*Naidoo v Barton and Another [2023] EWHC 500 (Ch)*

**Need Help with Your Tax Affairs? Choose Your Advisers Carefully**

Many people who have little understanding of the tax system sensibly seek help from those with greater expertise. However, a case that exposed an apparent loophole in HM Revenue and Customs' (HMRC's) systems showed how important it is to choose your advisers carefully.

A taxpayer contacted a company that he hoped would assist him in obtaining tax rebates. The company was alleged to have purported to act as his agent in causing self-assessment tax returns to be filed online, apparently on his behalf. The returns included claims for Enterprise Investment Relief (EIR) and, without any checks having been performed, tax repayments totalling almost £25,000 were made. The money was not paid to the taxpayer but to nominees identified in the returns.

After HMRC made inquiries, the taxpayer accepted without demur that he had not made any investments that would qualify for EIR. On the basis that he was deemed to have authorised the company to act on his behalf, HMRC raised tax assessments against him in the full amount of the repayments.

In upholding his appeal against those bills, the First-tier Tribunal (FTT) did not accept that the actions of the company could be viewed as merely careless. On the available evidence, it appeared that a fraud had been perpetrated. The taxpayer was not a tax expert and, in seeking professional advice and placing his trust in the company, he had acted reasonably and diligently.

He had not expressly or impliedly authorised the company to act on his behalf and, until he was put on the alert by HMRC, he was wholly unaware that the returns had been filed. He had no opportunity to check their accuracy and there was no knowledge or connivance on his part.

The FTT noted that, although a number of other taxpayers were said to have found themselves in a similar position, the circumstances of the case must be rare. They had, however, served to expose what appeared to be an unfortunate loophole in HMRC's systems that was open to abuse.

It is vital to seek expert legal advice before entering into tax tribunal proceedings. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*Robson v The Commissioners for His Majesty's Revenue and Customs [2023] UKFTT 226 (TC)*

**Want to Keep Your Will a Secret? High Court Ruling Underlines the Pitfalls**

Tensions simmer within many families and, when making your will, you may wish to keep its contents secret from your loved ones so as to avoid feeding the fire. As a High Court case showed, however, that makes it all the more vital to engage a solicitor to assist you in expressing your wishes.

By his will, a moderately prosperous businessman bequeathed all that he owned to his wife. The document was dated just over a month before he died in hospital. One of his daughters, who would have inherited part of his estate had he died without making a valid will, challenged its authenticity.

Ruling on the matter, the Court noted that the case was unusual in that there was no evidence as to how the will was created. There was no record of instructions having been given to a solicitor and it was unclear whether the document was home-made or expertly drafted. In the absence of professional involvement, the identity of the will's author itself remained uncertain.

There were certain suspicious circumstances surrounding the making of the will, not all of which could be explained. However, in upholding the document's validity, the Court rejected arguments that it was the product of a large-scale conspiracy, perpetrated by several people and persisted in for a long period.

The wording of the will was, at least in part, apparently based on a foreign precedent and the Court was satisfied that it was not the work of a professional well versed in English law. The document was capable of being a valid will, however, and its contents made complete rational sense in that there was no evidence that the man had any financial dependants other than his wife.

The decisive evidence, however, came from two witnesses to the will who testified that they had seen him sign it at his home. Given the rows and distrust that had riven his family, they complied with his request not to mention the will to anyone else. In the event, the document did not come to light until after his death.

In ruling that the will had been rightly admitted to probate, the Court was satisfied that, as required by law, the man had signed the document in the presence of two witnesses who had themselves subsequently appended their signatures to the document's attestation clause.

We can ensure that your wishes are made clear in an expertly drafted will. Contact us for advice.

**Partner Note**

*Selvarajah v Selvarajah and Others [2023] EWHC 474 (Ch)*

**Wife's Death Six Months After Divorce Settlement Triggers Guideline Ruling**

Financial settlements reached by divorcing couples are binding – but what if they are based on assumptions that are fundamentally undermined by subsequent events? A judge addressed that issue in the case of a woman who succumbed to cancer just six months after coming to terms with her ex-husband.

Following their divorce, the couple finalised a settlement whereby their capital assets were split roughly equally. An agreed pension sharing order (PSO) was made under which she received just over half of his occupational pension, which was worth over £1 million. She was unaware at the time that she had terminal cancer.

By her will, she bequeathed death benefits arising from her share of the pension to her adult children, who were estranged from the husband. He applied to set aside the PSO in its entirety on the basis that the income with which it was designed to provide her was no longer required. The children, acting as executors of their mother's estate, resisted the application.

Ruling on the matter, the judge found that the principal purpose of the PSO was to ensure that both husband and wife, who were in their sixties, had sufficient incomes during their retirement. That was their intention and, had it been known at the time that the wife had only months to live, the same pension share would not have been agreed. On that basis the PSO had to be set aside.

Her need for a pension income no longer existed. However, the judge ruled that the pension also represented a capital asset of which she had earned a share during the 38-year marriage. He directed that 25 per cent of the pension should pass into her estate for the benefit of the children. The remainder would meet the husband's income needs. That, the judge found, represented a fair outcome.

Contact us for expert advice on any matters relating to will disputes.

**Partner Note**

*Goodyear v Executors of the Estate of Goodyear [2022] EWFC 96*

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