[2019] UKFTT 0206 (TC)

TC07054

Appeal number: TC/2014/05476

INCOME TAX – closure notices – whether interest received on bank and building society accounts beneficially owned – whether liability to tax for pensions receivable affected by private agreement to share the pensions – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

SEAN KIRBY **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE HEIDI POON
MR SIMON NEWTON

Sitting in public at the Tribunal Centre, City Exchange, 11 Albion Street, Leeds on 11 April 2016

Followed by Directions issued on 27 April 2016, and 24 October 2017, and subsequent Final Notice served on the Appellant on 18 October 2018

Mr Sean Kirby in person for the Appellant

Mrs Rosaline Oliver, presenting officer, HMRC Solicitor's Office, for the Respondents

DECISION

Introduction

1. Mr Sean Kirby ('the appellant'), appeals against assessments to income tax by the respondents ('HMRC') by Notice of Appeal dated 29 September 2014, attaching HMRC's letter dated 26 September 2014, which referred to the following matters:

(1) Year 2010-11, Discovery assessment dated 24 September 2014 for £902.95.

(2) Year 2011-12, Closure notice dated 26 September 2014 for £1,296.25.

(3) Year 2012-13, Closure notice dated 26 September 2014 for £994.80.

(4) Year 2013-14, Closure notice (subsequently issued) dated 9 January 2015 for £1,029.75.

2. The Notice of appeal did not specify the quantum of tax in dispute, nor was the letter of 26 September 2014 a review conclusion decision.

3. In HMRC's Statement of Case received by the Tribunal on 30 March 2015, and revised in May 2015 by Tribunal's Directions, HMRC's position in relation to two of the years under appeal is as follows:

(1) Year 2010-11 – HMRC do not resist the appeal, having found that there is not a valid decision under the discovery provisions of either s 29 or s 30 of the Taxes Management Act 1970 ('TMA').

(2) Year 2012-13 – HMRC do not resist the appeal, having found that there was no valid enquiry under s 9A TMA, and that while there is a loss of tax, the discovery provisions of s 29 TMA do not apply.

4. HMRC have not sought to raise any penalty assessments under Schedule 24 to the Finance Act 2008 in relation to the inaccuracies in the self-assessment returns submitted for the years 2011-12 and 2013-14 that have resulted in a loss of tax as assessed by the closure notices that remain in dispute.

Matters and issues for determination

5. Consequently, the matters to which this Decision relates are:

(1) The closure notice for 2011-12 in the sum of £1,296.25; and

(2) The closure notice for 2013-14 in the sum of £1,029.75.

6. The two substantive issues in relation to these closure notices are:

(1) Whether the funds on which interest has been earned were held during all relevant periods on a resulting trust basis by Mr Kirby for his father, and the tax treatment of the interest that follows therefrom ('**the First or Interest issue**');

(2) Whether the pensions receivable by Mr Kirby are fully assessed on him ('**the Second or Pension issue**').

The relevant legislation

7. The statutory provisions under the Taxes Management Act 1970 relevant to this appeal are the following:

(1) Section 9ZA provides for the amendment of a personal tax return by the taxpayer within 12 months after the filing date.

(2) Section 9ZB provides that an officer of HMRC may amend a return submitted by a taxpayer within nine months after the return was delivered or after the return was amended, so as to correct –

> '(a) obvious errors or omissions in the return (whether errors of principle, arithmetical mistakes or otherwise), and
>
> (b) anything else in the return that the officer has reason to believe is incorrect in the light of information available to the officer.'

(3) Section 9A gives HMRC the power to enquire into a taxpayer's return, by serving a notice within the time limit, which is –

> '(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;
>
> (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;
>
> (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.'

(4) Section 28A provides for the completion of an enquiry under s 9A 'when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions'.

(5) Section 50(6) provides for the jurisdiction of the Tribunal in relation to an appeal against a closure notice. On an appeal notified to the tribunal, if the tribunal decides 'that the appellant is overcharged by an assessment other than a self-assessment', 'the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good'.

8. The relevant provisions under the Income Tax (Earnings and Pensions) Act 2013 ('ITEPA') are:

(1) Section 579A provides that any pension under a registered pension scheme is subject to income tax.

(2) Section 579B provides that where s 579A applies, 'the taxable pension income for a tax year is the full amount of the pension under the registered pension scheme that accrues in that year'.

(3) Section 579C states that 'the person liable for any tax charged under this Part is the person receiving or entitled to the pension under the registered pension scheme.'

The Substantive Hearing on 11 April 2016

9. For the hearing, the joint bundles of documents lodged are detailed below.

(a) The Main Bundle of documents

(1) Documents paginated as A1 to A111, comprising:

(a) A1 to A4 being Decision notices and records of the appellant's actions at the Social Entitlement Chamber and County Court;

(b) Standard forms R85 and R40 and explanatory notes on how to complete an SA return;

(c) SA returns for the years 2008-09, 2010-11, 2011-12, 2012-13, and 2013-14 as submitted, and the tax calculations related thereto;

(2) Correspondence between Mr Kirby and HMRC paginated as B1 to B138 to cover the periods:

(a) from September 2010 to September 2014 between Mr Kirby and HMRC, comprising letters and notes of telephone calls in relation to the return enquires, and of the protracted complaint against HMRC that ran in parallel to the enquiry, and of the appellant's correspondence with the Adjudicator's Office to escalate the complaint (B1 to B82);

(b) from 29 September 2014 when Mr Kirby lodged his appeal with the Tribunal, including the Notice of Appeal, standard directions, the service of a Statement of Case by HMRC, and a Statement of Case served *by the Appellant* (adopting HMRC's Statement of Case as a template); a letter from the Adjudicator's Office in January 2015; and the ongoing correspondence with the Complaints Team of HMRC to March 2015 (B83 to B B138).

(3) Section C (C1 to C32) contains the relevant legislation.

(b) The Supplementary Bundle of documents

(4) HMRC's Amended Statement of Case by Tribunal's directions, which appended two spreadsheets as Appendix A and B (D1-D13).

(5) Correspondence between the appellant and HMRC subsequent to the Amended Statement of Case (E1 to E14).

(6) Appellant's bank statements, certificates of interest, a bank letter, mostly in relation to the year 2009-10, with online statements for accounts held with Virgin Money (Jan 2011 to Jan 2013), with Lloyds (May, June 2015), and with Santander (March to June 2015) (F1 to F41).

Documents furnished by HMRC at the hearing

10. In 2012, Mr Kirby raised two contemporaneous actions: (i) at the First-tier Tribunal (Social Entitlement Chamber) and (ii) at the County Court in relation to his divorce settlement. From Mr Kirby, four documents relating to these proceedings

were included in the bundles, paginated as A1 to A4. During the substantive hearing in April 2016, HMRC produced additional documents, namely:

(1) In relation to the appeal at the Social Entitlement Chamber:

(a) Mr Kirby's letter dated 21 April 2012 to state his claim, with two attachments from East Riding Council in relation to his father's 'Deferred Payments Scheme';

(b) The Hearing Record, and the Transcript of the substantive hearing on 18 June 2012 under the appeal reference SC950/12/00222.

(2) In relation to the County Court proceedings, associated documents and records in the disposition of those proceedings.

These documents are supplemental to what have been included in the bundles, and were admitted by the Tribunal.

Witness evidence

11. Mr Kirby gave evidence, and was cross-examined by Mrs Oliver. The points being cross-examined are referenced in the footnotes to the relevant documents. Mr Kirby's replies to these questions were dismissive in tone and elusive in content.

12. Mr Tony Galvin, who is a Complaints Manager in HMRC and had dealt with Mr Kirby's formal complaints, gave evidence and was cross-examined by Mr Kirby.

13. Mr Kirby also tried to cross-examine Mrs Oliver. The Tribunal explained and reiterated that Mrs Oliver was the presenting officer for the respondents, and was not a witness being called in these proceedings to be cross-examined.

HMRC's witness evidence

14. Mr Galvin is the manager of the team handling complaints in the Local Compliance Directorate based in Leeds. He dealt with Mr Kirby in relation to an episode in the ongoing complaint against Officer Hammond, who had opened the enquiry into Mr Kirby's tax return for the year 2008-09.

15. In his witness statement, Mr Galvin stated as follows:

> 'Mr Sean Kirby telephoned me on 4 January 2011 about a letter of complaint he had written. We received his letter on 21 December 2010. Mr Kirby was not satisfied with HMRC's response to an earlier complaint and wanted to escalate the matter and discuss it with a manager. I discussed the complaint with Mr Kirby and told him HMRC would respond fully within 15 working days of receiving his letter. I asked Mr Kirby what it would take to resolve his complaint and he said an extra £25 redress payment would do it. I said we would be able to do this.
>
> I wrote to Mr Kirby on 12 January 2011 in response to his letter. In my letter, I confirmed that I had authorised the £25 payment. I also advised

> him that he could approach the Adjudicator if he was unhappy with my response.
>
> These were my only contacts with Mr Kirby. I do not visit him at his home or meet him in person.'

16. Mr Galvin referred the Tribunal to the letter he sent to Mr Kirby dated 12 January 2011, in which the context for the payment of £25 was set out as follows:

> '… I apologise for the oversight by Mr Hammond [the enquiry officer] when he forgot to insert a copy of the complaints factsheet with his letter. This was a careless mistake and should not have happened. I do regard it as careless, rather than 'incompetent' or 'stupid' as you had suggested ….'

17. Mr Galvin was referred to a letter written by Mr Kirby on 6 February 2014, to the Adjudicator's office to escalate his complaints against HMRC. In this letter, Mr Kirby stated the following:

> '… I am retired and only receive small company pensions. I was required by Leeds County Court, as a settlement of an action taken by my ex-wife, to pay her half of these pensions for a period. She pays tax on these payments, which are not a matrimonial settlement.
>
> Tony Galvin, Compliance Manager (Munro Court, Leeds LS11 0EA) came out to see me in Dec 2010 and viewed the order yet HMRC now require sight of it again. …'

18. Mr Galvin confirmed that he was based at Munro Court in Leeds. However, the meeting in December 2010 alleged to have taken place in Mr Kirby's home never happened, nor was it possible to have been substituted by Officer Hammond, who was based in Salford. Mr Galvin was emphatic that he had never met with Mr Kirby.

The appellant's witness evidence

19. Mr Kirby said that he had worked as an operations manager in the food industry. He took early retirement at the age of 50 in or around 2006 due to a medical condition; that he had no mortgage; 'managed on very small pensions'; that 'money is not an issue but time you have on earth'; that he had '£60 per week of income' and 'very little outgoings'.

20. Speaking of the monies which he claimed to be holding for his father:

(1) Mr Kirby said his father was an 'ex-farmer from southern Ireland'; that his farm is still in Ireland; that his father worked in engineering, on mechanical axles for heavy goods vehicles; that his father 'fell out' with his mother in 1988 when he was about 62; that they 'did not divorce as they were Catholic'; that was how his father 'came to live on his own in Leeds in 1988'; (but later he also said his parents had lived in Leeds since 2006); that his father 'got money all over the place', which led Mr Kirby to say to his father: 'I had to take over your finances', since Mr Kirby (the appellant) is the eldest son in the family, his older brother having died when aged 32 in 1982.

(2) Mr Kirby related that in early 2010, his father went into Parklands Care Home, which charged fees at £500 a week; that Kirby 'needed to use his father's money' to meet his care home fees; that he managed to obtain his father's stay as a 'self-funder at the council rate' of £344 a week by putting 'a charge on a property'; that DWP wanted to pay his father's pension into a nominee account; that his father had a small company pension from GKM.

(3) Mr Kirby said he renovated his father's house for about a year, working 2 days a week most weeks for about a year with a view to let it out; that it was 'not a success to rent out'; that his father died on 12 December 2014; the proceeds from house sale in May 2015 were returned to his estate.

21. Mr Kirby told the Tribunal of the hearing at the Social Entitlement Chamber:

(1) That it was in relation to his benefit appeal for a reduction in council tax from £1,600 per annum to £350 per annum, given the fact that he was on low income, and with savings less than £16,000.

(2) That the benefit appeal hearing on 18 June 2012 lasted for 3 hours; his father attended and gave evidence to prove that Kirby's bank accounts were holding his father's monies; that his father was 92, 'compos mentis' and 'lucid'; that he 'won' his appeal.

(3) That Kirby had 'taken Halifax to the County Court' in relation to his father's account holdings; monies in Halifax accounts were moved to Lloyds and Yorkshire. (A letter from Halifax was included as F24.)

22. Speaking of the matter regarding his pensions, Mr Kirby said he and his wife divorced in 2012; that they had an agreement – 'a deed to that effect' – that he would pay half of his pensions to his wife.

23. In cross-examination, Mrs Oliver referred to documents which show factual inconsistencies from Mr Kirby's evidence. The conclusions drawn therefrom are related in the Decision under the heading of 'HMRC's case'.

24. Mr Kirby emphasised in response to the cross-examination that he had Excel spreadsheets 'showing all the ins and outs' of the funds he claimed to have held for his father. He described the spreadsheets as having been 'meticulously kept since 2010', and were 'readily available', and were relevant to his appeal.

Post-hearing Directions for production of documents

25. By Directions issued on 27 April 2016, Mr Kirby was given the opportunity to produce additional evidence that he had referred to at the hearing as follows:

> '(1) By 26 May, the **spreadsheets since 2010** that are *readily available* as Mr Kirby informed the Tribunal that he has been maintaining these records for the purpose of tracing the sums belonging to his father, and recording the expenses made on his father's behalf.
>
> (2) By 15 July, the **Probate Statement of Account** as the Lead Schedule and the supplementary documents …' (emphasis original)

26. The procedural history that followed in relation to the production of the additional evidence is protracted, with the key events summarised as follows:

(1) Mr Kirby started serving a custodial sentence on 4 May 2016, soon after the issue of the post-hearing Directions, and the sentence lasted until 30 December 2017. The proceedings were stayed until 28 February 2017.

(2) An interim hearing in front of Judge McNall on 4 October 2017 was attended by Mr Kirby and HMRC's representative Mrs Oliver, which resulted in directions being varied with an extension of time for Mr Kirby and HMRC to comply with the post-hearing Directions.

(3) On 18 October 2018, Judge Scott issued Directions to give Mr Kirby 'a **final** opportunity' (emphasis original) to lodge further evidence as he deemed fit by 8 November 2018. Mr Kirby was also 'put on notice that the appeal will be remitted to the original panel' to decide 'whether the appeal can be determined on the basis of the available evidence or whether further procedure is required'.

27. On 30 October 2018, Mr Kirby's response to Judge Scott's Notice of 18 October 2018 was to request 'a decision that [he] can appeal to the upper tribunal'.

28. In a later email dated 14 December 2018, he informed the Tribunal that he was awaiting criminal trial to commence on 21 January 2019 and that his computers which contained the additional evidence were retained by the Police for the trial.

29. In these circumstances, and in accordance with the Notice that was placed on Mr Kirby, the appeal is now remitted to the original panel. We are of the view that the appeal can be determined on the basis of the available evidence, and we do so by way of this Decision notice. The release of this Decision notice provides closure to the proceedings in the First-tier Tribunal. This Decision notice is also a prerequisite for an appeal to the Upper Tribunal, and its release therefore accords with Mr Kirby's request as communicated by email on 30 October 2018.

The Facts

The origin of the Interest issue

30. Notwithstanding the matters under appeal are confined to the tax years 2011-12 and 2013-14, both parties have made references to earlier years in which HMRC had opened an enquiry in relation to the Interest issue.

Tax Year 2008-09

31. The Interest issue was first raised in the enquiry opened on 13 September 2010 by Officer Hammond into Mr Kirby's 2008-09 SA return, with the key facts being:

(1) Untaxed interest was noted by HMRC as having been received on three HOBS accounts in Mr Kirby's name; the sums of interest (a) £10,404, (b) £114, and (c) £322 were omitted in the SA return.

(2) The entries that were included in the return were: Employment income from (a) Bakkavor £4,384, PAYE of £605, and (b) Smith and Nephew, £44,804, PAYE of £9,695;[1] allowable expense against employment of £100. Gift Aid payments of £5,200 were also stated.

(3) In November 2010, by telephone and by letters, Mr Kirby complained against Officer Hammond for 'pestering him with his return', and he sought compensation; £25 was paid.

(4) On 6 December 2010, Mr Kirby replied to Officer Hammond's letter of 20 November 2010, stating that the HBOS account ending –1905 was holding his father's money. He stated that he had taken over his father's finances; that his father was 92 and not in good health and was in a care home for which he was using his father's money to pay for the care home fees.

(5) HMRC accepted the explanation; the enquiry was closed on 6 January 2011 without amendment to the return. By letter dated 12 January 2011, Mr Galvin handled the complaint that remained ongoing, with a further payment of payment of £25.

32. For the tax year 2009-10, HMRC did not issue a notice to file a return. No return was made.

Tax year 2010-11

33. The key facts in relation to the year 2010-11 are as follows.

(1) HMRC did not give notice to file an SA return.

(2) On 6 April 2011, Mr Kirby filed a return online with the following entries:

(a) interest received of £4,419, tax credit of £247.75;

(b) a tax charge of £1,300 to cover the tax credit attached to the gift aid payments claimed to have been made of £5,200;

(c) that tax due was £1,052.25 (after offset of tax credit on interest).

(3) On 5 May 2011, Mr Kirby made amendments to his return as follows:

(a) taxed interest became £9,619, with tax credit being £1,287.75;

(b) gift aid payments total of £5,200 was removed completely;

(c) untaxed interest declared became 3,181, giving rise to an overall tax due of £384.80, and a net balance of tax repayment of £902.50.

(4) HMRC's system had a 'Flag' stopping Mr Kirby's repayment claims from being automatically processed.

[1] This contradicts what the appellant said in oral evidence; that he retired in 2006. Clearly he was still in active employment in 2008-09 as evidenced by the employment income. In the benefit appeal hearing, the appellant was recorded to state: 'I retired 20.04.2011' (see §61(2)).

(5) On 10 December 2011, Mr Kirby submitted a form R40 for 'Claim for repayment of tax deducted from savings and investments', with a view to circumvent the 'Flag' in the SA system for processing his repayment claim.

(6) A certificate was enclosed from ICICI Bank showing tax deducted of £425.22.

(7) On 13 January 2012, HMRC amended the 2010-11 SA return to reflect income and tax details from the R40 claim.

Tax Year 2011-12 (under appeal)

34. For the tax year 2011-12, there were a few versions of figures due to the amendments by Mr Kirby and the repairs by HMRC. The key facts in relation to the return filed by Mr Kirby and his amendments are as follows:

(1) On 6 April 2012, HMRC gave notice to file a return.

(2) On 11 April 2012, Mr Kirby's return was filed online, in which he stated his capacity in filing the return as 'son and appointee'. The same day, he amended his return to include pension receipt of £2,423. In the white space for 'additional information', the following entry was made:

> 'I have a court order requiring me to pay half of my employers' pension payments to my ex-wife. I manage my father's financial affairs by means of bank accounts in my name. Your system is not allowing me to input this information.'

(3) On 12 April 2012, Mr Kirby reduced the figure for taxed interest from £2,126 to £1,706.

(4) On 18 May 2012, Mr Kirby telephoned HMRC to seek advice about the account holding his father's money.

(5) On 3 July 2012, HMRC replied by telephone, advising that the interest from the account holding his father's money would need to be declared on Mr Kirby's return. The same advice was confirmed by letter dated 5 July 2012.

(6) On 17 July 2012, Mr Kirby telephoned HMRC to state that he disagreed with the advice.

(7) On 30 August 2012, a Ms E Hewitt (Complaints Adviser of HMRC based in Portsmouth) wrote to Mr Kirby advising that the issue raised in his phone call of 17 July 2012 had been referred to the Financial Products Team ('FPT').

(8) On 2 November 2012, Mr Kirby telephoned Ms Hewitt, referring to the fact that he had not heard from the FPT, and that he was advised by the Department of Work and Pensions ('DWP') that the arrangements for his father's money were common and had no tax implications provided meticulous records were kept.

HMRC's advice letter raising the 'presumption of advancement'

35. By letter dated 7 November 2012, Ms Hewitt wrote to relate a reply from a Senior Tax Specialist regarding the holding of his father's funds. The advice, given by HMRC via Ms Hewitt, is as follows:

> '… the upshot is, you can have the account in your name, and not be liable to the tax on it.
>
> The reason you can do this in your circumstances under the Presumption of Advancement. In simple terms as long as we can establish that the money is not a gift to you and the account is operated in a manner consistent with you having access to the account exclusively for dealing with your father's financial affairs, this results in a trust in favour of your father. In short, you are the legal owner of the account but your father is the beneficial owner and actually owns the money in the account and any income that accrues from it.
>
> In order to rectify the situation, you will need to request we amend your tax return to remove the interest in respect of your father's money. … There may however be a request in future for you to provide recent bank statements so we can ensure the money is being used as intended and still complies with the exemption under the Presumption of Advancement.'

36. It would appear that after the receipt of the advice letter, Mr Kirby made further amendments to the 2011-12 return. The series of amendments are summarised below:

Date amended	Untaxed Interest	Taxed Interest	Tax credit on interest	UK Pensions	Repayment
11/4/2012	5810	2126	531.50		432.30
11/4/12 at 19:00	5810	2126	425.25	2423	346.80
12/4/2012	5810	1706	314.25	2423	346.75
24/11/2012	4777	1257	314.25	2423	314.25
19/12/2012	4777	3462	865.50	2423	553.40
4/1/2013	nil	2197	549.25	2423	549.25

HMRC's repair to the 2011-12 return as regards pensions

37. By letter dated 28 December 2012, HMRC notified Mr Kirby of the 'repair' made under s 9ZA TMA to his 2011-12 return with the following details:

(1) From the Employers' Returns, Mr Kirby received from Heinz 1975 Pension Scheme £3,527.48 with no tax deducted, and from Asda Stores Ltd, £1,200.74 with no tax deducted.

(2) Mr Kirby had only declared half of the amounts as income received from his pensions. The other half of these pensions was stated as maintenance payments, making a claim of relief in the sum of £2,423.

(3) HMRC 'repaired' the return, to bring the amounts of pensions received as those reported by Heinz and Asda, and to remove the relief as claimed.

38. The letter of 28 December 2012 gave reasons for the repairs made to the return, stating that 'Maintenance Payments relief can be claimed if all of the following conditions apply' (emphasis original):

> '(a) you or your ex-spouse or former civil partner were born before 6 April 1935,
>
> (b) you're separated or divorced or the civil partnership has dissolved and you're making the payments under a Court Order,
>
> (c) the payments are for the maintenance of your ex-spouse or former civil partner (provide they aren't now remarried or in a new civil partnership) or for your children who are under 21.'

39. The letter advised that the repairs to the return can be rejected, 'which must be in writing normally within 30 days of the issue of the revised tax calculation'. Instead of rejecting the repairs in writing, on 4 January 2013, Mr Kirby amended his return to remove the repairs in relation to his pensions, and amended the return further by removing all untaxed interest, and reducing the taxed interest (see table above).

40. On 4 January 2013, Mr Kirby also telephoned HMRC and his call was returned by Officer West. Mr Kirby's position in relation to the maintenance payments, as recorded from the Note of call, was as follows:

> 'He stated that he had been before a Tribunal for his local council who had stated that as he was not legally receiving 100% of the occupational pensions that only half could be taken into account when determining his benefits and payments to the council. Therefore he disputed my decision to amend his 11/12 tax return to include the whole amounts.
>
> I asked if he was receiving the full amount or only half with the other half being paid directly to his ex-wife. He explained that he would have had to pay over £1000 to arrange for the pension providers to split the payments and therefore he was still receiving 100% of the pensions. …'

Section 9A enquiry into 2011-12 return

41. On 12 September 2013, Officer Bench opened an enquiry into the 2011-12 return as amended on 4 January 2013, with a request for the information: (a) certificates of bank interest showing tax deducted; (b) details of the figures for pensions as it did not agree with the amounts returned by the pension providers.

42. On 28 November 2013, HMRC wrote again to request sight of the copy of the Court Order to resolve the issues regarding the maintenance payments and the halving of the sums of pensions as returnable income.

43. In December 2013, Mr Kirby made a series of complaints about the enquiry process. Mr Kirby asserted that Mr Galvin had visited him at his home on 12 January 2011 to see the Court Order, that Mr Galvin had promised to put a 'flag on the

system' so that Mr Kirby would not be bothered again (HMRC's note of call on 5 December 2013), and that he was being 'harassed' to produce it again.

44. By letter dated 6 February 2014, Mr Kirby escalated his complaint to the Adjudicator's Office, in which he again alleged that Mr Galvin had been to visit him and had viewed the Court Order.

45. On 16 February 2014, Mr Kirby wrote to Officer Bench over the request for the Court Order, that he was 'shocked' by her letter of 12 February still asking for details of maintenance payments after having spoken to her for an hour. He replied:

> '… I made it very clear to you that I am not required to make any maintenance payments to my ex-wife. The court order was to satisfy an outstanding debt to her. There was no pension sharing order.'

Tax Year 2012-13

46. The time limit for making a valid s 9A enquiry into the 2012-13 return was 26 April 2014; that is, the anniversary of the date of filing the return. The s 9A enquiry was opened on 6 May 2014 (along with the enquiry into 2013-14 return; see below). Consequently, the enquiry was opened after the expiry of the time limit. Although the SA return included only half of the pensions received, and a set of figures for taxed and untaxed interest that similarly resulted in a tax repayment, HMRC do not seek to defend the appeal against this year, as the s 9A notice was not served in time.

Tax Year 2013-14 (under appeal)

The SA return filed for 2013-14

47. On 6 April 2014, Mr Kirby submitted his 2013-14 return. The tax deducted at source included: £23 from pensions, £536.75 from interest received of £2,417; dividends received of £324. The total taxable income inclusive of the tax credits was £5,809, and the tax repayment sought was £559.75. In the white space for additional information, Mr Kirby stated the following:

> 'I am required under a court order to pay half of my company pensions to my ex wife. These are not maintenance or alimony payments but are to repay a debt I owe to her. *This was agreed with HMRC Portsmouth UK pension and state benefits 2* (sic)[2] – details of the payers, the amounts paid and tax deducted from each: Asda Stores Ltd £822.17 tax paid £23.00 HJ Heinz Co Ltd £1944.48 no tax paid.' (emphasis added)

Enquiry into 2013-14 return and revised tax calculations for prior years

48. On 6 May 2014, Officer Evans wrote to open a s 9A enquiry into Mr Kirby's 2013-14 return; (and to extend the enquiry to 2012-13). Mr Kirby was advised that the tax repayment for 2013-14 was withheld in the meantime. The letter also summarised

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[2] HMRC Portsmouth advised on the Interest treatment per letter dated 7 November 2012, and did not advise on the position of pensions.

Mr Kirby's tax positions for prior years 2010-11 and 2011-12, with revised tax computations, for Mr Kirby's agreement.

49. For the year 2011-12 which remains under appeal, the tax re-calculation is as follows:

> (a) The submitted return showed £2,197 of taxed interest and £2,423 of income from UK Pensions.
>
> (b) HMRC's figures show that Mr Kirby was in receipt of £0 taxed interest, £7,763.66 of untaxed interest from six accounts, and £4,727 from two UK pensions.
>
> (c) The tax position changed from £549.25 repayable to £747 payable.
>
> (d) The tax repayment had been made, so the tax liability is the sum of the tax repaid and the tax payable, being £1,296.25.

50. On 9 May 2014 Mr Kirby wrote to state his disagreement to the tax re-calculations, reiterating 'that most of the savings money belongs to [his] father and also that [he] was ordered to share half of [his] pension payments with [his] ex-wife.'

51. On 17 May 2014, Mr Kirby wrote a long letter to the Adjudicator's Office ('AO'), in which he said the following in relation to the Interest issue:

> 'My father's money was scattered around various accounts and I needed to pay the care fees when I installed him in Parklands Care Home on 28 Feb 2010. The DWP wanted somewhere to pay his state pension. Due to money laundering regs, it is not possible to open a UK bank account in someone else's name. The DWP said standard practice is to use my name and keep records….'

In relation to the Pension issue, Mr Kirby said:

> 'I divorced my wife in 2001. We agreed a Deed that I would sell our house and give my ex-wife half the proceeds. We would split the savings 50/50 and when pensions became payable we would split those proceeds 50/50. The judge agreed and we parted amicably.
>
> *The local council wanted verification of this in 2011*, *resulting in myself, my ex-wife and my father attending a First tier Tribunal*.[3] It was established that half of my pension were indeed being paid to my ex-wife and also that my father's money was his, not mine.'

Letter of 26 September 2014 and Notice of Appeal

52. On 26 September 2014, Officer Evans wrote to Mr Kirby to advise that in the absence of a response to his letter of 31 July 2014, he would be issuing a closure notice letter for the years 2010-11 to 2012-13, and that he would be making amendments under s 9ZB to the return for 2013-14.

[3] What was stated here is factually inconsistent with the Hearing Record for the Social Entitlement appeal in June 2012, which recorded Mr Kirby as the only person attending.

53. On 29 September 2014, Mr Kirby wrote to HMRC as well as lodged a Notice of Appeal with the Tribunal, to contend against all amended calculations.

The appealable decision for 2013-14

54. On 10 December 2014, Mrs Oliver, as Inspector of Taxes, wrote to Mr Kirby, advising that HMRC had not yet made a decision for the year 2013-14 which carried a statutory right of appeal.

55. On 9 January 2014, HMRC issued their closure notice decision in relation to 2013-14, with the following amendments:

(1) SA return stated £2,147 of taxed UK interest; amended to show none.

(2) SA return stated £0 of untaxed interest; amended to show £7,767.

(3) SA return stated £2,766 of pension income; amended to show £5,533.

56. Consequently, the 2013-14 return was amended. The tax position changed from £559.75 as tax repayable to £470 as tax payable. Since £559.75 had been refunded, the assessment to additional tax following the check is £1,029.75.

Evidence from the Social Entitlement appeal

57. Mr Kirby provided documents relating to his actions in the Social Entitlement Chamber (as A1 to A2). HMRC supplemented the records of these proceedings by producing the hearing record, the transcript, and Mr Kirby's letter of 21 April 2012 with two attachments. The combined contents of these productions are detailed below.

Appeal at the First-tier Tribunal (Social Entitlement Chamber)

58. On 18 June 2012, Mr Kirby was the appellant at a hearing held in Leeds in front of Judge MA Taylor against East Riding of Yorkshire Council. The decision notice stated that: (i) 'The Council Tax appeal is allowed'; and (ii) 'The decision of the Respondent in relation to Housing Benefit issued on 05/12/2011 is set aside.'

59. The Decision Notice includes the following 'Short Statement of Reasons', with its full content being:

> '1. The issues in this appeal are one, whether the monies in Mr Kirby's account at the relevant time were his or whether they belonged to his father Mr John Kirby. I am satisfied from the evidence which I have heard that the money belongs to Mr John Kirby and that Mr Sean Kirby administered it for the benefit of his father. In those circumstances it does not fall to be taking (sic) into account as capital belonging to Mr Sean Kirby for Council Tax Benefit purposes.
>
> 2. The second issue is slightly more complex. In 2001 Mr Kirby began divorce proceedings. He was not represented by solicitors. His wife was. At some stage the parties went to court where they appeared before District Judge Lord. Mr Kirby says that at this point there was no agreement about the division of the matrimonial assets. He says and

I accept that he was told by District Judge Lord that the law in his circumstances were straightforward, namely that there would be an equal division of assets. In this case that amounted to the former matrimonial home, the joint savings and Mr Kirby's pensions from Heinz and Asda.

3. Mr Kirby says, and I accept that he believed that District Judge Lord had made an order to that effect. In pursuance of it he sold the house and gave Mrs Kirby half the proceeds. The savings were divided equally and when the time came for his pensions to be paid he gave Mrs Kirby half.

4. Whilst there was no formal order I am satisfied that Mr Kirby thought there was because he acted in accordance with what he understood its terms to be. In his mind at least there was a legal obligation to make payment and there was nothing voluntary about it as far as he was concerned.

5. He has continued to make payments even after he became aware there was no court order and is seeking to regularise by getting a court order.

6. In all the circumstances I consider that 50% of the pension payments only should be taken into account as Mr Kirby's income for these purposes.'

60. Judge Taylor's decision would appear to have been queried by the Council (per Mr Kirby's letter to the Adjudicator's Office dated 17 May 2014). On 29 June 2012, Judge Taylor issued another 'Statement of Reasons for Decision', stating that he had 'little to add' to his 'Short Statement of Reasons' issued on 18 June 2012, save that he would deal with the capital belonging to Mr Kirby, and stated that he was 'satisfied':

(1) that 'the only capital of which Mr S Kirby was the beneficial owner was that in the Reward Current Account –565[4] and the Yorkshire Bank Account [ending–860]. At all material times the combined credit balance in these accounts did not exceed the capital threshold for council tax and housing benefit'; and

(2) that 'whilst there were accounts in the name of Mr S Kirby with Northern Rock the monies in those accounts were owned beneficially by Mr Kirby's father and that Mr S Kirby was a trustee of them (sic) funds. They were used to pay for Mr Kirby senior's care home fees and I fully accept that it was easier and more convenient in terms of administration for the accounts to be in Mr S Kirby's name.'

61. HMRC obtained the hearing record and the transcript in relation to the hearing in front of Judge Taylor on 18 June 2012:

(1) From the Hearing Record, Judge Taylor was sitting on his own with a clerk in attendance. Mr Kirby was present as the appellant, and no

[4] The account –565 was one of the two accounts closed by Halifax following County Court claim, see Halifax letter at §64.

representative appeared for East Riding Council. No further persons were noted as having been present at the hearing.

(2) From the first page of the hand-written transcript, the relevant details are:

> '*27-02-2010 Father John went into care home.*
> *I assumed responsibility for managing his affairs. Take over all his accounts among other things.*
>
> Had £2,000 in cash; PO cash card account. I took £12,000 from this and put it into Northern rock paying good interest.
>
> Halifax A/c – same thing.
>
> He also had other accounts – e.g. Leeds + Holbeck, B+B [Bradford & Bingley]. I withdrew all funds and put them into Northern Rock.' (emphasis added)

(3) The rest of the transcript (pages 2 to 4) covers mainly the matter of the divorce settlement, interspersed with the entry: 'All monies used to pay care home fees'; and of 'a bulk rate' being agreed for the care home fees. The relevant details in relation to Mr Kirby's pensions being:

> 'I *retired 20.04.2011*. …
>
> Heinz want £1600 + Asda £600 in fees to split the pensions. …
>
> I sold house + gave ½. Gave her ½ savings, and when pensions began in payment.
>
> Asda – July 2011
>
> Heinz – May 2011
>
> W [wife] has agreed that she [not legible] annual sum equivalent to 52 x 50% of monthly (sic [weekly]) payments.
>
> I would have paid her monthly if she had wanted by she didn't. …
>
> *I understood it that what Judge said was an "order" although I realise now that it wasn't.*' (emphasis added)

62. In the letter dated 21 April 2012 in relation to his council tax appeal, Mr Kirby stated his claim as follows:

> 'My claim consists of two elements: my requirement to pay 50% of my company pensions to my ex-wife and the classification of my father's savings as his own money.
>
> In respect of the first matter, my ex-wife and I attended Leeds County Court on 17 April 2012 and were heard by District Judge Lord. He requires me to asks my pension providers to formally split the pensions into separate accounts for myself and my ex-wife as part of a forthcoming consent order. We were ordered to meet him again on 22 June 2012 at 12 noon to show that this is being/has been enacted.
>
> In respect of the second matter, I was visited at home by [Mr] Drury, Welfare Rights Officer at East Riding Council, as part of a takeover of payments for my father's care home provision by the council, on April 18th 2012.

> [He] checked and verified *both of my father's bank accounts, seeing that the monies inputted were from his pensions and the rental income from his property which is rented out*. Also he verified that the out-payments were for his care home fees. He also checked, verified and signed that he had *assessed my certificates for Lasting Power of Attorney* for my father.
>
> Clearly the money which is now verified as being my father's cannot reasonably also be credited as being mine. Since *I have LPoA for my father*, there should be no dispute.[5]' (emphasis added)

63. Mr Kirby's letter of 21 April 2012 was accompanied by two attachments: (i) a handwritten note on compliments slip of East Riding Council from Mr Drury stating that he 'enclosed a copy of your Father's Deferred Payments Scheme paperwork for your records'; (ii) a checklist of 'Record of Information Discussed' for the service user as 'John Kirby', of which under 'General Issues':

(a) 'Lasting Power of Attorney discussed' – Yes;

(b) '50% Occupational Pension sharing explained and paperwork issued' – N/A.

64. Included in the supplementary bundle for the tax appeal hearing is a letter dated 16 March 2011 from Halifax Customer Relations (F24), which notified the closure of two 'Reward Current' accounts, one of which ended with –565, (and was identified by Judge Taylor as beneficially owned by Kirby). The letter referred to Kirby's 'recent County Court claim against the Bank', and Mr Hall of Halifax wrote:

> 'Having completed an investigation into your complaint, I do not believe the Bank has made any mistake nor provided poor service.
>
> Having considered the reasons that have caused you to complain by means of issuing County Court claims against the Bank, … it seems we are unlikely to meet your banking requirement in the future. … the Bank intends to close your two Halifax Reward Current Accounts …
>
> I can confirm we do not propose to close your share dealing account [number] and 2 Saga Savings accounts at present.
>
> We have taken this decision on the basis that the relationship between us has irretrievably broken down.'

The proceedings in the Leeds County Court

65. HMRC obtained documents in relation to the proceedings in the Leeds County Court in the case of *Kirby v Kirby*, in which Mr Kirby was the Petitioner and Mrs Kirby was the Respondent. The details of the documents are as follows.

(1) A letter to Mr Kirby, dated 23 February 2012, and signed by a clerk at the Family Section of HMCTS of the Leeds County Court, stating that:

> 'Further to your recent letter dated the 21st February 2012, the same was referred to District Judge Lord who commented:

[5] The claim that he had lasting Power of Attorney contradicted what he said in his Statement of Case subsequently, see §67.

"The Consent Order was not filed by either party and the file was never referred to me for review. There is no Order. He shall take this up with his former Wife ir her solicitors Godloves."'

(2) The letter of 23 February 2012 would appear to be also the covering letter enclosing an Order issued by District Judge Lord, sitting at Leeds County Court, on 22 February 2012. The Order was to list the matter for a hearing:

> '1) This matter is listed before District Judge Lord at The Courthouse on the 17the April 2012 at 11:30am with a time estimate of 30 minutes.'

(3) No record of the listed hearing on 17 April 2012 was produced by either party. (It is inconclusive whether this was an omission, or the hearing of 17 April 2012 was re-scheduled to 22 June 2012.)

(4) The third document produced by HMRC bears a handwritten date at the top right-hand corner of '*22 June 12 noon*' and is entitled 'Divorce Consent Order' between Mr and Mrs Kirby, and the recitals of the agreed terms are numbered as 1 to 9.

(5) The fourth recital reads as follows:

> '4. Pension sharing
>
> There are two (and only two) pensions in payment that we request a sharing order to be made.
> Asda Stores pays £1573 per annum
> HJ Heinz Co Ltd pays £3527 per annum
> *We request an order that Sean Kirby pays [Mrs] Kirby half of the amount he has received from these pensions and that the order is made from the date of divorce*.' (emphasis original)

(6) The Consent Order does not bear the parties' signatures, merely stating their agreement after the recitals of terms. The document ends by stating: 'Order to be enacted from 1 Jan 2002, but this deed dated 17 April 2012.'

(7) The County Court record to dispose of the proceedings reads as follows:

> 'Before District Judge Lord sitting at Leeds County Court, [address] on 22 June 2012
> Upon the non attendance of the Petitioner and the Respondent
>
> IT IS ORDERED THAT
> 1. There be no further order.'

The appellant's grounds of appeal

66. On the Notice of Appeal lodged on 29 September 2014, Mr Kirby's stated grounds of appeal are:

(1) In relation to the First/Interest issue:

> 'I have received much conflicting advice from HMRC regarding my parents' savings. I have had to put them into accounts in my name. HMRC agree that the money is theirs (my parents) but are trying to tax

me on the interest received. I have a letter from HMRC stating that this is a "presumption of advancement" …

Under Tax (sic) Laundering legislation, it is not possible to open an account in my parents' names. I t must be done in mine. The interest should be set against their own personal allowances.

(2) In relation to the Second/Pension issue:

'HMRC assess all of my private pensions to be made to me. I was divorced in 2002 and the Judge permitted my ex-wife and I to agree a Deed whereby I would pay half of the pensions directly to my ex-wife. There was no pension sharing order or maintenance payment order. We returned to see the Judge, who confirmed this was sufficient and provided us with a court order saying so.

My ex-wife pays tax on these receipts for me.'

(3) For 'Result' of the outcome of his appeal, Mr Kirby stated as follows:

'I have already attended 2 First Tier Tribunals in related matters. Both resulted in my retraining the money exactly as declared to HMRC.

I expect the same result here.'

67. Mr Kirby also lodged a 'Statement of Case' with the following points under his chosen headings, and where relevant, excerpts are included as follows:

(1) *Background* – The statements made under this heading are:

(a) 'The appellant is the eldest surviving child of four sons. He assumed responsibility for his parents' financial affairs in 2003, following his mother's failed hip replacement operations' and 'admission to a permanent care home. She had previously managed all finances within her household and her husband was not financially astute.'

(b) 'The appellant's father managed for the next 7 years but sustained 3 serious falls at home, resulting in bleeding to his brain and senile dementia. He was admitted to care home on February 28th 2010.'

(c) 'The appellant had deposited all their money in various bank accounts, all paying interest gross, except one account with Bank of India ICICI Hi-save. ...'

(d) 'HMRC *were always made aware of this arrangement and no problems occurred* until Sept 2010 with a tax enquiry from [Officer] Hammond.'[6]

(2) *Checking commences* – Referring to the enquiry by Officer Hammond in Sept 2010 querying untaxed interest paid on 3 bank accounts, the Statement of Case claimed: 'Resulting discussions with [4 named HMRC officers] revealed all was correct and no adjustment was needed nor was any tax due. They had been shown all the bank books, statements and had spoken on the telephone to

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[6] Mrs Oliver questioned Mr Kirby in cross-examination how HMRC could have been aware of this before the enquiry into the 2008-09 return.

the appellant's parents.[7] *It should be noted that all the interest, save that from ICICI Bank was being paid under R85 declarations and was paid without deduction of tax.*' (emphasis added)

(3) *Appellant and wife divorce –*

> 'The divorce was made absolute at Leeds County Court after a Hearing with District Judge Lord. The Judge stated that only one settlement would be seen as fair to both parties. …
>
> The 2 small company pensions were to be split 50:50. On this point we discussed the options.
>
> a) The Judge could make a pension sharing order, but the providers wanted £1800 to accede. This was declined.
>
> b) Earmarking could be ordered but that would mean the tax liability would remain with the appellant. This was declined.
>
> c) Offsetting could be ordered, where part of the assets could be given to either party, in exchange for retaining the pensions. This was declined.
>
> d) The final option, which we did, was to draw up a deed where we would split the pensions on payment and each party would be responsible for paying their own taxes. *The parties subsequently returned to see Judge Lord, who confirmed that the deed is actionable and no further order was necessary*.'[8] (emphasis added)

(4) *ICICI bank* – 'This single account has now … closed. … *Much discussion occurred with Emma Hewitt, at HMRC Cosham*. It was agreed that *a single use of form R40 would be permitted to reclaim the tax* on the interest paid. This was done and the tax was recovered.'[9]

(5) *LPA* – 'The appellant investigated Lasting Power of Attorney and learned that it costs £300 each to register this with the Office of the Public Guardian. There was no obvious benefit … *so it was not done.*[10] Initially, HMRC would not permit an R85 form to be used on this account, which was a 2-year bond. The appellant cannot now recall just how the second year interest tax was recovered, but it certainly was.'

68. During the substantive hearing, Mr Kirby submitted that Judge Taylor decision in June 2012 had ruled that he held capital less than £16,000 and was entitled to council tax reduction benefit. He asserted that Judge Taylor's decision was

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[7] Mr Kirby was referred to this statement in cross-examination. Mrs Oliver confirmed that no documents were produced for checking, and none of the officers had ever spoken to Kirby's parents.

[8] From the Court record of 22 June 2012, the parties did not attend, and therefore did not 'return' to court, even if the hearing listed on 17 April 2012 was accepted to have taken place.

[9] Mrs Oliver stated that HMRC have no record of such a discussion with Ms Hewitt about the R40 submitted in December 2011. The only record of a phone call from Kirby to Ms Hewitt was on 17 July 2012 and related to the FPT, which meant the R40 could not have been prompted by the July call.

[10] The claim that he had lasting Power of Attorney would seem to contradict directly what the appellant stated in his benefit claim by letter dated 21 April 2012, see §62.

conclusive that he could not have been the beneficial owner of the interest in the total of around £7,000 annually if his capital was less than £16,000.

69. Mr Kirby referred to a statement from Halifax dated 24 February 2010 in relation to a sum invested of £100,000 (F13). He submitted that the statement clearly indicated £100,000 was his father's capital; he claimed that the £10,404 untaxed interest which Officer Hammond was enquiring into (for year 2008-09) related to this Halifax Bond, which was a High Interest Bond to maximise his father's income, and when it matured, the interest was compounded to a total of £10,404.

HMRC's case

70. The Statement of Case submitted in March 2015 was amended by Directions from the Tribunal to provide supplementary details on the interest assessed. The Amended Statement of Case furnished in May 2015 contains two appendices. Appendix A is a summary of the details of bank account interest received under the name of Mr 'Sean Joseph Kirby', which were extracted from returns from banks under s 17 TMA and from bank statements provided by Mr Kirby (F1 to F41). Appendix B is a summary of the figures for taxed and untaxed interest included in Mr Kirby's returns for the four years 2011-12 to 2013-14, including all the amendments made at their respective dates.

71. On the Interest issue, HMRC submitted:

(1) The tax positon of interest relevant to the appeal:

(a) For bank and building society accounts, the legal owner is the person whose name appears on the account.

(b) The advice given to the appellant in HMRC's letter dated 5 July 2012 was incorrect. The letter dated 7 November 2012 correctly set out the position for ownership and taxation for the account held in the appellant's name holding his father's money. However, it should not have stated there was a presumption of advancement but that there was a resulting trust.

(c) HMRC accept that where an account is not in beneficial ownership of the appellant any taxed interest arising on it is not his income, and consequently it should not be included in the appellant's tax returns.

(d) Although the appellant was told that interest from accounts holding his father's money should be removed from his tax returns, he continued to include both taxed and untaxed interest in his returns.

(2) In relation to the information from banks and other institutions:

(a) The appellant consistently stated the interest arising on an account with ICICI Bank holding his father's money suffered tax because form R85 could not be completed, and yet he included it in his returns to effect repayment of the tax.

(b) Returns from banks under s 17 TMA and Sch 23 Finance Act 2011 show the appellant had, over the years, accounts where interest was paid without deduction of tax by completing form R85.

(c) The information from the banks shows that the only sum of tax deducted was £425 and from the ICICI account in relation to 2010-11.

(d) The appellant has not provided any specific details or documents concerning the various accounts with Yorkshire, Birmingham Mindshare, Irish Resolution and Virgin Money.

(3) In relation to the extent of reliance on the Decision notice of the Council Tax Benefit appeal:

(a) The decision stated that accounts held in the name of the appellant for his father were with Northern Rock, and did not provide any further details of any other accounts. Neither did it find any accounts in the beneficial ownership of the appellant's mother.

(b) HMRC are aware that Northern Rock was taken over by Virgin Money in 2012, but there is no documentary evidence or certainty that the accounts became the Virgin Money accounts.

(c) The Social Entitlement tribunal decided the following accounts were in the beneficial ownership of the appellant; namely Halifax Reward–565 and Yorkshire –860. There does not appear to be any dispute that these remain in the beneficial ownership of the appellant along with the Lloyds account–560.

(d) That tribunal did not give any decisions on the beneficial ownership of the accounts with ICICI, Yorkshire or Birmingham Midshires.

(e) In the absence of documentary proof to the contrary, HMRC contend that the accounts detailed by the table in the Statement of Case were in both the legal and beneficial ownership of the appellant for the years 2011-12 to 2013-14 inclusive, and the untaxed interest arising on these accounts should have been included in the appellant's returns. (The table lists the numbers with Yorkshire (3 accounts), Birmingham Midshires (7 accounts), and Virgin Money (3 accounts).)

72. In relation to the Pension issue, Mrs Oliver submitted that:

(1) There is no pension sharing order in favour of the appellant's ex-wife; the appellant admitted as much in his letter dated 16 February 2014.

(2) Any attachment order effectively earmarks part of the pension without transferring part of the ownership. The pension remains the income of the scheme member who is taxed on the full amount.

(3) The appellant provides a copy of a decision by a First-tier Tribunal concerning his income for council tax and housing benefit purposes. The decision confirms that there is no pension sharing order and it does not mention a trust deed or court order.

(4) The whole amounts of the pensions paid to the appellant are therefore assessable on him under s 579 ITEPA 2003.

Discussion

The emergence of common ground

Date of death of Mr Kirby Snr

73. The time lapse of nearly three years between the substantive hearing and the release of this Decision notice has allowed a crucial fact to be ascertained beyond doubt. The fact at issue concerns the date of death of Mr Kirby's father, John Kirby.

74. HMRC had obtained the Grant of Probate of Mr John Kirby, which was produced at the interim hearing in front of Judge McNall on 4 October 2017, and there followed what Judge McNall referred to as the 'emergence of common ground' in his decision dated 24 October 2017:

> '[9] … the Grant of Probate led to the emergence of common ground that Mr Kirby's father, John Kirby, died on 8 December 2012, and a Grant of Probate in his estate was personally extracted from the Principal Registry on 15 April 2013 by Mr Francis Kirby, who is named as one of the executors in the will dated 9 January 1984.
>
> [10] I refer to the "emergence of common ground" as to the date of Mr Kirby Snr's death because on 16 December 2014 (that is, just over 2 years after his father's death) Mr Kirby – the present Appellant – wrote to the Tribunal in terms that his father was looking forward to attending the Tribunal to give evidence on the Appellant's behalf: "his evidence will be vital". On 30 March 2015, Mr Kirby again wrote to the Tribunal that he was expecting to collect his father from his care home, and that wheelchair access to the courtroom, and hourly breaks, would be needed to accommodate his elderly witnesses. On 15 May 2015 Mr Kirby was writing that he had discussed the appeal with his parents (note the plural).'

The alleged visit by Mr Galvin to view the Court Order

75. We found Mr Galvin a clear and credible witness, and accept that he had never visited Mr Kirby in December 2010, or seen any such Court Order as asserted repeatedly by Mr Kirby.

76. Mr Galvin's evidence is further corroborated by the following facts:

(1) The disposition of the County Court proceedings was in June 2012, which was 18 months *after* the alleged visit by Mr Galvin in December 2010. It is factually impossible that the alleged Court Order (even if it existed) could have been available for sight, as asserted by Mr Kirby in February 2014.

(2) In January 2011, when Mr Galvin was dealing with Kirby's complaint in relation to the enquiry into his 2008-09 return, *the Pension issue simply did not*

arise in the year 2008-09. There was no reason to require the sighting of the Court Order at the time of the 2008-09 enquiry.

(3) The request for the Court Order was first made in relation to the enquiry into the return for 2011-12. Mr Galvin had no involvement with subsequent enquiries into Mr Kirby's returns.

77. The emergence of common ground in these aspects, together with the numerous factual inconsistencies as highlighted in the relevant footnotes, has severely undermined the credibility of the appellant. Whilst we accept that some of the events referred to by the appellant did occur, we conclude that the appellant is neither a credible nor a reliable witness, and his accounts of what happened, whether in evidence or in correspondence, cannot be taken at face value.

The First issue regarding Interest

78. To decide whether the interest element of the closure notices is to be upheld, we address two questions in turn: (a) the veracity of the figures produced by the parties as interest received; (b) whether these sums of interest are beneficially owned by the appellant to be assessable on him.

The veracity of figures produced by the parties

79. The figures in HMRC's revised calculations, and those in the SA returns are:

Year (ref)	**Interest**	**HMRC**	**SA Return**	**Difference**
2008-09	Taxed (grossed up)	56	0	
	Untaxed	10,897	0	Understated 10,840
2009-10	Taxed (grossed up)	1,076	No return filed	
	Untaxed	6,082		
2010-11	Taxed (grossed up)	0	6,851	Overstated 6,851
	Untaxed	6,466	3,181	Understated 3,285
2011-12	Taxed (grossed up)	0	2,197	Overstated 2,197
	Untaxed	7,763	2,423	Understated 5,340
2012-13	Taxed (grossed up)	0	3,404	Overstated 3,404
	Untaxed	3,855	960	Understated 2,895
2013-14	Taxed (grossed up)	0	2,147	Overstated 2,147
	Untaxed	7,767	0	Understated 7,767

80. The amounts of interest are *all* reported to have been paid without deducting tax, except for the ICICI Bank and Irish Resolution which paid interest as follows:

(a) in 2010-11, ICICI Bank: grossed up at £2,125 with tax credit of £425, and reclaimed by submitting a form R40 in December 2011.

(b) in 2011-12, ICICI Bank: interest was paid *untaxed* of £2,142.46.

(c) In 2009-10, Irish Resolution: interest on 3 accounts totalled £1,076; *no* SA return was filed, but tax credit of £215.20 would appear to have been reclaimed per Kirby's Statement of Case (see §67(5)).

81. HMRC's Appendix A lists the amounts of interest being credited to accounts held in Mr Kirby's name in the years from 2008-09 to 2013-14, according to returns made by banks and building societies. The number of accounts (though not all conterminous) receiving interest over the years are summarised as follows:

(1) HBOS accounts: 6 in total;

(2) Yorkshire Building Society: 3 in total;

(3) Birmingham Midshires: 7 in total;

(4) Irish Resolution: 3 in total;

(5) Virgin Money: 3 in total;

(6) ICICI: 2 in total;

(7) Halifax Reward – ending 565: 1 listed (the only account without interest credited, and was held to be beneficially owned by Judge Taylor)

(8) Yorkshire/Clydesdale – ending 860: 1 listed

(9) Lloyds: 1 listed

82. Mr Kirby produced bank statements and certificates of interest received (F1 to F41), which related mostly to 2009-10. Apart from *one* taxed certificate submitted for the ICICI Bank, Mr Kirby has not provided any evidence to support the sums of *taxed* interest declared in the SA returns under enquiry. In fact, to have declared any amounts of interest (apart from ICICI) as having borne tax in his SA returns directly contradicts his own Statement of Case:

> 'It should be noted that all the interest, save that from ICICI Bank, was being paid under R85 declarations and was paid without deduction of tax.'

83. In these circumstances, and addressing only the question of veracity of the amounts of interest, the figures produced by HMRC as Appendix A, on which the closure notices have been based, represent the true and fair sums of interest credited to accounts held in Mr Kirby's name over those years.

Conclusions drawn from the confirmed date of death

84. The emergence of common ground from the Grant of Probate establishes the date of death of Mr Kirby Snr beyond doubt as 8 December 2012. At the substantive hearing on 11 April 2016, Mr Kirby stated that his father died on 12 December 2014.

85. When the post-hearing Directions were issued on 27 April 2016, the Tribunal was working with the date of death of Mr Kirby Snr being 12 December 2014. Notwithstanding the appellant's unreliability as a witness, the Tribunal had regard to the fact that it was possible that some of the funds held in Mr Kirby's name could have been attributed to his father, and that the untaxed interest received thereon could be apportioned. It was with this factor in mind that the post-hearing Directions were drafted, for Mr Kirby to produce the spreadsheets which might allow any mixed funds to be traced.

86. The emergence of Mr Kirby Snr's date of death as 8 December 2012 means that none of the interest earned in the tax year 2013-14, which remains in dispute, could have been attributed to John Kirby, who was not alive for the whole of 2013-14.

87. Had any untaxed interest been attributable to John Kirby's capital, and that Mr Kirby was holding the capital and the interest on a resulting trust basis, then John Kirby's estate would have been the rightful recipient of the interest earned. There is no evidence to suggest that John Kirby's estate was entitled to any of the interest earned in 2013-14.

88. This aspect of evidence concerning the administration of the estate following the Grant of Probate was directed for production in the Directions issued on 27 April 2016. The Grant of Probate in Mr Kirby Snr's estate was personally extracted on 15 April 2013 by Mr Kirby's brother as an executor named in the will of John Kirby dated 9 January 1984, as noted in Judge McNall's Decision.

89. If there had been funds and monies repatriated to Mr Kirby Snr's estate, that would have been evidenced by the relevant documents and bank transfers during the administration of the estate. No evidence has been produced to support the appellant's assertion that the interest earned of £7,767 in 2013-14 had accrued from capital that was beneficially owned by Mr Kirby Snr, and should have been returned to his estate.

90. Furthermore, this aspect of evidence in relation to the estate administration would not be dependent on records kept on Mr Kirby's personal computers: there would have been audit trail of any transfers of funds via the banking intermediaries.

91. In the alternative, if the terms of the John Kirby's will have designated the capital and accrued interest held on a resulting basis to be retained by the appellant as a beneficiary of the will on the death of John Kirby, then all the untaxed interest credited in 2013-14 on those accounts with the appellant as the account holder was *de facto* also *beneficially* owned by the appellant.

Conclusions on beneficial ownership of interest earned in 2011-12

92. It is the appellant's case that the facts on which Judge Taylor's decision was based were conclusive for present purposes. There was proximity in timing between the benefit appeal heard on 18 June 2012 and the year of assessment in relation to 2011-12. It is not to say that the evidence adduced in the benefit appeal hearing could not be relevant to the present appeal, but it is incumbent on this Tribunal to make our own findings of fact relevant to this appeal, especially given that the appellant's credibility is in issue.

93. So far as the present appeal in relation to 2011-12 is concerned, this Tribunal needs to make two findings of fact:

(1) When Mr Kirby assumed responsibility for his father's accounts; and

(2) The accounts identified as his father's by Judge Taylor.

94. The transcript for the benefit appeal recorded Mr Kirby as having stated:

> '27-02-2010 Father John went into care home.
>
> I assumed responsibility for managing his affairs.
>
> Take over all his accounts among other things.'

The date of Mr Kirby's father being admitted to a care home and Mr Kirby taking over his father's accounts is consistent with the date given elsewhere: (a) 'I installed him in Parklands Care home on 28 February 2010' (Kirby's letter to the Adjudicator's Office of 17 May 2014); (b) 'He was admitted to a care home on Feb 28th, 2010' (appellant's Statement of Case); (c) in oral evidence, Mr Kirby said that he had spreadsheets 'meticulously kept since 2010'.

95. We find as a fact that John Kirby went into a care home on 27 February 2010, and was the *triggering* event for the appellant's assumption of responsibility for managing his father's affairs, which included taking over all his accounts among other things. The triggering event for taking over his father's accounts being his admission to a care home accords with Kirby's 'explanation' to the AO in May 2014 (see §51).

96. We accept what the appellant told Judge Taylor in June 2012 to be a fair account of the sequence of events leading to him taking over his father's accounts. We reject the account given by Mr Kirby in oral evidence, or that he 'assumed responsibility for his parents' financial affairs in 2003' as claimed in his Statement of Case'. In accordance with the evidence given at the benefit appeal hearing as recorded by the transcript, we find as a fact that the appellant took over his father's accounts no earlier than February 2010, when his father was admitted to a care home.

97. Secondly, the transcript of the benefit appeal hearing recorded Mr Kirby as having stated the monies and accounts held by his father being: (a) £2,000 in cash; (b) £12,000 from Post Office cash card account; (c) other accounts: Halifax, Leeds & Holbeck, Bradford and Bingley. The transcript recorded Mr Kirby as saying: 'I withdrew *all* funds and put them into Northern Rock'.

98. Mr Kirby produced bank statements (F26 to F33) for the Virgin Money account–3298, (printed on 26 June 2015 as indicated on the top left-hand corner of the statements). The statements cover the period from 3 March 2011 to 22 January 2013.

99. For the following reasons, we conclude that on the balance of probabilities, the Virgin Money account represents *all* the funds held by Mr Kirby for his father.

(1) The transcript recorded that *all* the funds were put into Northern Rock to earn a good rate of interest: John Kirby's funds were gathered into *one* account.

(2) Northern Rock was bought by Virgin Money in November 2011, which explains why the print-run of the bank statements, whilst covering a period from March 2011, was generated from Virgin Money's website in June 2015.

(3) The bank statements run from 3 March 2011 with a balance of £31,941.

(4) The inflow of funds would appear to have come from two sources: (a) weekly pay-in of £248; (b) monthly credit form 'Yorks BK' in the range of £550 to £700.

(5) The first source of income would appear to be the state pension, and the second source, the rental income on John Kirby's house. These were the two sources of his father's income stated by Mr Kirby in his letter of 21 April 2012 to the Social Entitlement Chamber.

(6) The outflow of funds in this account was always to the same account ending –860, which matches exactly the one listed as 'Yorkshire/Clydesdale' in HMRC's Appendix A.

(7) The account balance stood at £30,628.60 on 19 January 2013, and was transferred to the Yorkshire account–860 in three tranches of £10,000 plus on 21 January 2013. (The timing of the closure of the account was just over a month after the death of John Kirby.)

100. We have considered the evidence given by Mr Kirby at the Social Entitlement Chamber as recorded in the transcript in detail. Whilst Mr Kirby had been factually more consistent in the benefit appeal than in his tax appeal, we do not consider that he had given the *whole* truth in the benefit appeal: the accounts held in Mr Kirby's name were not fully disclosed in the benefit appeal.

101. Judge Taylor stated in the supplementary decision notice that he found the Halifax Reward Account –8565 and Yorkshire Bank account –6860 to be beneficially owned by Mr Kirby. On that basis, Judge Taylor found that the capital on these two accounts did not exceed the £16,000 threshold.

102. Neither of these two accounts identified in Judge Taylor's decision were bearing any interest in the six years being analysed, save for £50.46 taxed interest being credited to the Yorkshire account in 2013-14 (probably on the capital of £30,628 introduced from the Virgin Money in January 2013). As HMRC have emphasised, the Social Entitlement tribunal did not give any decisions on the beneficial ownership of the accounts with ICICI, Yorkshire or Birmingham Midshires that were operating in the year 2011-12.

103. Having made the finding of fact that Mr Kirby took over his father's accounts no earlier than February 2010, the logical inference is that the Halifax Guarantee Reserve Bond that *matured* on 25 February 2010 (F13) on the principal invested of £100,000 could not have come from his father.

(1) The interest statement shows the bond as having been held for one year.

(2) The sum of £3,250 was paid as untaxed interest on its maturity date of 25 February 2010, which was the exact amount identified as one of the untaxed interest from an 'HBOS' account in HMRC's Appendix A. (Halifax was part of the HBOS banking group.)

(3) The principal of £100,000 was held in Mr Kirby's name on 25 February 2009, before he took over his father's accounts in February 2010.

(4) The £100,000 most probably originated from the capital accumulated on the High Interest Bond that matured in 2008-09.

(5) The High Interest Bond earning compounded gross interest of £10,404 in 2008-09 (but omitted in Kirby's SA return) triggered HMRC's enquiry.

104. Whilst we accept that when the enquiry into 2008-09 opened in September 2011, Mr Kirby had by then taken over his father's accounts, we reject his submission that the principal of the bond that matured in February 2010 belonged to his father. The Tribunal is not bound by HMRC's decision as regards the 2008-09 enquiry. HMRC had accepted Mr Kirby's explanation that the £10,404 untaxed interest received as belonging to his father and closed the enquiry of the 2008-09 return without any substantive proof of beneficial ownership.

The fact at issue to be determined by burden of proof

105. The *de facto* position in relation to the holding of funds with a bank or building society is that the named account holder is both the legal and beneficial owner of the capital and interest accruing thereon, unless there is substantive proof to the contrary that the legal owner (the account holder) is not also the beneficial owner.

106. The burden of proof rests on the appellant to satisfy the Tribunal that the interest earned in those accounts held in his name in the relevant years was not beneficially owned by him.

107. We have afforded the appellant the opportunity, (which was extended on numerous occasions due to his custodial sentence), to provide further evidence which he claimed at the hearing to be 'readily available'. To date, none of this evidence has been produced.

108. In the absence of any satisfactory evidence being forthcoming, we have examined the documentary evidence as regards the beneficial ownership of the funds generating the interest in considerable detail in order to make any relevant findings of fact that may assist the appellant's case.

109. The assertion that the principal of £100,000 that gave rise to the interest of £3,250 in 2011-12 was not supported by the conclusion reached after the tracing exercise that the £100,000 invested in the Halifax Bond could not have originated from Mr Kirby Snr as explained above.

110. As to the Virgin Money account, Mr Kirby made no references to that account in his evidence or submission. The inferences drawn in relation to the Virgin Money account are by tracing the capital that could have been attributed to Mr Kirby Snr based on the evidence recorded in the transcript. We conclude that, on the balance of probabilities, only one account in Mr Kirby's name that operated between March 2011 and January 2013, with Northern Rock to begin with, and then became Virgin Money account –298, held monies that probably belonged to Mr Kirby Snr. In the year 2011-12, £716.88 untaxed interest was earned; in 2013-14, no interest was earned as the account was closed by then.

111. To the extent that the Tribunal can vary the amount of assessment raised by the closure notice for 2011-12, we reduce the assessment by £143.20, being the tax effect of allowing the interest earned of £716, (in tax terms at 20%). There is no further reduction, since the appellant has not met the burden of proof that he was not the beneficial owner of other sums of interest received on the accounts held in his name (other than the Virgin Money account).

112. For the reasons stated, the Tribunal varies the assessment by closure notice for 2011-12 from £1,296.25 to £1,153.05.

The Pension issue

113. The reference to a Court Order was first made by Kirby in the white space for additional information in his 2011-12 return, but he had staunchly resisted the production of the alleged Court Order throughout the enquiry process.

114. The County Court proceedings commenced in February 2012, and were contemporaneous with the benefit appeal at the Social Entitlement Chamber. The County Court proceedings would appear to be triggered by the benefit appeal, as Mr Kirby stated in his letter of 17 May 2014 to the AO: 'The local council wanted verification of [the pension arrangement] in 2011' (§51).

115. In the light of the documents subsequently obtained by HMRC, the reference to no 'further' order in the County Court record of 22 June 2012 is to be read in the context of the previous order made by Judge Lord, sitting on 22 February 2012, to list the matter for a hearing on 17 April 2012.

116. It is unclear whether the scheduled hearing took place on 17 April 2012 or postponed to 22 June 2012, since HMRC's production contained no records of a hearing having taken place on 17 April 2012.

117. Mr Kirby's letter of 21 April 2012 (at §62) referred to the County Court hearing on 17 April 2012 as having taken place and that he was asked by Judge Lord to

approach his ‘pension providers to formally split the pensions into separate accounts’. It was probable that the hearing on 17 April 2012 did take place, and Mr Kirby was advised to find out about the costs for splitting his pensions.

118. Whilst the Consent Order would appear to have been filed at some stage for the hearing marked as ‘22 June 12 noon’ in handwriting on the copy of Consent Order, nothing further emerged from the proceedings since the parties did not attend.

119. The position in relation to the County Court proceedings therefore remains that as given in the covering letter of 23 February 2012 to Mr Kirby, in which the Court clerk related Judge Lord’s comment:

> ‘The Consent Order was not filed by either party and the file was never referred to the Judge for review. *There is no Order*. He shall take this up with his former Wife ir her solicitors Godloves.’ (emphasis added)

120. Indeed, while appearing in front of Judge Taylor in the Social Entitlement Chamber, Mr Kirby understood the final legal position of his action in the County Court that there was no Order. In the transcript of the benefit appeal hearing on 18 June 2012, Mr Kirby was recorded to have said:

> ‘I understood it that what Judge said was an “order” although I realise now that it wasn’t.’

121. It would seem that by 18 June 2012, Mr Kirby knew there was not going to be a Court Order for pension sharing, despite the Consent Order having been filed. As recorded in the transcript, Mr Kirby had decided by then not to incur the costs of £1,600 for Heinz, and £600 for Asda, to effect a pension sharing order. Hence, there was no reason to attend the County Court hearing scheduled on 22 June 2012.

122. Furthermore, it was no longer necessary to obtain a pension sharing order for the purposes of the benefit appeal: Judge Taylor had already allowed his appeal on 18 June, (ahead of the hearing on 22 June 2012).

123. Mr Kirby stated in his letter of 17 May 2014 to the Adjudicator’s Office that the sharing of his pensions with his ex-wife ‘is not a maintenance payment’; but ‘an agreed contract between [them]’, because his ‘ex-wife had paid into [his] pensions form [their] joint finances’; and that ‘her receipts now are part of that original debt’. These statements show Mr Kirby’s thorough understanding of the private nature of the agreement to share his pensions.

124. In Kirby’s Statement of Case, he referred to the discussion with Judge Lord of the options, which included ‘earmarking’, but that the tax liability would remain with the appellant. But ‘earmarking’ is what has happened here, and the tax liability, as Mr Kirby had been advised, remains his and his alone.

125. The basis of income tax chargeability is as provided by s 579C of ITEPA, which means the person liable for any tax charged is ‘the person receiving or entitled to the pension under the registered pension scheme’. Mr Kirby remains the only person entitled to his pensions; his wife has no entitlement so far as the scheme providers are

concerned. Unless and until his pensions were split into separate pots, Mr Kirby cannot escape the full amounts of pensions being included as his income for assessing his overall tax liability in any one year.

126. Judge Taylor's decision for social entitlement purposes took into account the disposable income of Mr Kirby, and allowed a discount on the basis of the private agreement by deed to share the pensions. The basis relevant to the social entitlement decision, however, is not relevant to the determination of the person assessable to tax for the pension income.

127. It is clear there was no court order splitting the pensions. Mr Kirby stated as much in his letter to Officer Bench on 16 February 2014: 'I made it very clear to you … There was no pension sharing order'. Even if there was a pension sharing order, it would not remove Mr Kirby's liability for the tax unless the right to 50% of the pensions was assigned to his ex-wife, which could only be effected by incurring the costs to the pension providers to split the pensions.

128. Without having incurred the costs to assign 50% of the right of his pensions to his ex-wife, it is simply not arguable that only half of the appellant's pension receipts should be assessed as his income: there is no statutory provision to that effect. The closure notices to amend the relevant returns by stating the full sums of pensions as the appellant's income are in accordance with the provision under s 579C ITEPA.

Decision

129. The closure notice for 2011-12 is reduced to £1,153.05. The closure notice for 2013-14 in the sum of £1,029.75 is confirmed. The appeal is allowed in part.

130. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 25 MARCH 2019