

Key points

- Taxpayer wins important case – HMRC lose on every point
- Possible overpayment relief claim cases
- Current HMRC calculator still giving wrong results in some cases

Taxpayer wins important case

The First-tier Tribunal heard the *Judges* case on 19 January 2022 and the judgment was published on 18 February 2022.

This is the case that I referred to in the July 2021 update. I represented the taxpayer at the hearing.

The case involved a difference in the calculation of TSR in the year of death (2017-18) of over £44,000.

There were four important issues to be decided and the judge agreed entirely with me on all four of them.

The four issues can be summarised as:

- 1 Can allowances and reliefs be allocated in the most advantageous way (so called “beneficial ordering”) in the top slicing relief calculations as well as in the primary tax calculation? Answer – Yes.
- 2 Should the personal savings allowance (and other allowances and reliefs) be recalculated if necessary in the top slicing relief calculations (as was so held in *Silver* for the personal allowance itself)? Answer – Yes.
- 3 Should beneficial ordering be applied to minimise income tax liability rather than income tax payable (ie before rather than after deducting any notional tax credit on the chargeable event gains)? Answer – Yes.
- 4 Can HMRC apply the FA 2020 changes to events occurring before 11 March 2020? Answer – No.

In [Silver](#) Judge Mosedale found that HMRC’s calculation of top slicing relief wrongly restricted the personal allowance when performing the hypothetical calculation of tax liability on the annual equivalent of a chargeable event gain. HMRC appealed to the Upper Tribunal but then withdrew at the eleventh hour. Subsequently provisions were introduced by the Finance Act 2020 which (only to an extent) limit the application of the judgment in *Silver* for events occurring on or after 11 March 2020.

In the most recent case of *Judges* Judge Brown endorsed the findings of Judge Mosedale and found that HMRC's methodology until 11 March 2020 incorrectly applied the statutory rules in several respects.

The result for the deceased taxpayer in *Judges* is to reduce the income tax liability for the year of death (2017-18) by £44,763.

It is especially noteworthy that HMRC accepted in *Judges* that the full personal allowance should be used in the hypothetical calculation of tax liability on the annual equivalent of a chargeable event gain – as per *Silver*. However HMRC insisted that the provisions relating to “beneficial ordering” and the non-reinstatement of the personal savings allowance that were introduced by FA 2020 should be applied retrospectively.

The consequences of the judgment in *Judges* can be summarised as follows:

- the provisions enacted by FA 2020 only apply with effect from 11 March 2020 and may not be applied retrospectively;
- until 11 March 2020 “beneficial ordering” of allowances and reliefs applies just as much in the hypothetical calculations as in the primary income tax calculation;
- until 11 March 2020 the personal savings allowance and any other income related reliefs or allowances must be recalculated in the hypothetical calculations as must the personal allowance.

In a further rebuttal of HMRC's position Judge Brown also agreed that when applying “beneficial ordering” the legislation requires that the income tax liability rather than the income tax payable is to be minimised (ie before rather than after deducting any notional tax credit on chargeable event gains). This part of the judgment has two important consequences:

- it can result in significantly higher amounts of top slicing relief in respect of gains arising before 11 March 2020;
- it may occasionally result in higher overall tax payable than calculated by the current HMRC self assessment calculator in respect of gains arising on or after 11 March 2020.

What next?

HMRC have until 15 April 2022 (Good Friday) to lodge an appeal and it is highly likely that they will. It may be that they adopt the same strategy as in *Silver* – appeal then withdraw at the eleventh hour – in the hope that this will minimise the number of cases that they have to concede.

In the meantime interested parties should review all cases involving top slicing relief where the tax year in question is still open or an overpayment relief claim could be made.

The opportunity to make overpayment relief claims for 2017-18 expires on 5 April 2022 and HMRC will reject such claims on the grounds that their incorrect calculations followed “practice generally prevailing” until the publication of the *Silver* judgment on 19 April 2020. This is highly arguable (I first advised HMRC that their calculator was wrong on 9 August 2017). It is likely that a further Tribunal hearing will be required to settle the question as to from what date HMRC’s incorrect calculations ceased to be “practice generally prevailing”.

What you should do

Check all top slicing relief calculations using the latest version of my Topslicer calculator. The calculator quickly shows the correct figure for top slicing relief and the figure that HMRC’s current calculator will get. In many cases these will be the same but in many others there will be significant differences. My calculator can do the calculations for all of the years from 2013-14 to 2022-23 inclusive.

The amendment window for 2019-20 closed on 31 January 2022 but overpayment relief claims can (and should) still be made until 5 April 2022 for 2017-18.