



**TC04455**

**Appeal number: TC/2014/02790**

*Inheritance Tax – Determination – whether gifts effected – whether  
“delivery” – Yes – Appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MALCOLM SCOTT**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE KENNETH MURE, QC  
MEMBER: MISS SUSAN C STOTT, FCA, CTA**

**Sitting in public at Leeds on 2 and 3 March 2015**

**Appellant:- Mr William East, of Counsel**

**Respondents:- Mr Stuart Douglas, Officer of HMRC**

## DECISION

### Preliminary

5 1. This appeal relates to the Inheritance Tax Notice of Determination dated  
22 May 2013 (D98-105) in respect of the estate of the late Dr Olive Scott (“Olive”)  
who died on 4 March 2007. The appellant, Malcolm Scott (“Malcolm”), is her  
surviving son and co-executor. The other executor is the deceased’s late son Alistair  
Scott (“Alistair”), who died on 7 November 2009. They each submitted different IHT  
10 400 accounts in respect of Olive’s estate. Principally there are two differences in the  
accounts *viz* whether there was an effective gift of three paintings (the Atkinson  
Grimshaw paintings) in 1985 by Olive and her late husband, Professor James Scott  
(“James”) who died in September 2006, to Malcolm and Alistair, and whether there  
was an effective gift of six other paintings by Dr Janet Steel (“Janet”), the appellant’s  
15 great aunt, who died on 15 December 1992, in favour of Malcolm and Alistair in early  
1986 or 1991.

### The Law

2. In addition to general reference to the Inheritance Tax Act 1984 Parties referred to  
several authorities:-

20 *In Re Cole* [1963] 3 AER 433;

*Thomas v The Times Book Co* [1996] I AER 241;

*In Re Garnett* [1885] 31 ChD 1;

*Hubbard v Dunlop’s Trustee* (1933) SN 62 (HL);

Palmer on Bailment

### 25 Evidence

3. The only witness was the appellant himself. He spoke to his two Witness  
Statements (C1 and C10) and confirmed their terms. Malcolm explained that he and  
his brother, Alistair, were joint executors on his mother’s estate. His father had died  
some months earlier, in September 2006. He, his brother and mother were his father’s  
30 joint executors. He observed that in the course of preparing their mother’s IHT  
account Alistair raised concerns about Malcolm’s claims as to gifts of the paintings.  
According to Malcolm the three Atkinson Grimshaw paintings had been gifted to him  
and his brother in 1985. Malcolm spoke to these being physically transferred to him  
by his parents for himself and Alistair. This had followed advice from their solicitor,  
35 who was a close personal friend. The paintings were removed in turn from the walls  
in the family home where they were hung, handed individually to Malcolm, and then  
re-hung on his direction. There had been a degree of formality and discussion in  
relation to each one. (Para 6 of C10). They had not been removed from the family

home for some time as initially neither Malcolm nor Alistair had a permanent address elsewhere, and thereafter and for an extended period their accommodation was modest and insecure. The family home was their home too, immediately after the gift.

5 4. Alistair then referred to his parents' letter of 14 August 2001 (E49) and  
independent legal advice which he had taken about the validity of the gift. Earlier for  
the purposes of James' estate account, the executors had all agreed that these pictures  
had effectively been gifted and were no longer part of his estate. Initially, Malcolm  
continued, he and Alistair had agreed that the paintings were not part of their  
10 mother's, Olive's estate. However, some months later they had disagreed over the  
Inheritance tax account in respect of Olive's estate and whether the paintings had  
indeed been effectively gifted in 1985.

5. While Malcolm had instructed that four other paintings should be included in his  
mother's estate as "gifts with reservation", Alistair felt that the Atkinson Grimshaw  
15 paintings and other paintings belonging originally to their great aunt, Janet, should  
also be included in the estate. Accordingly in view of their contradictory stances, it  
was settled that they should each submit separate accounts. Alistair, Malcolm  
explained, has since died of alcoholism. He had complained unreasonably, in  
Malcolm's view, about the division of family property. His behaviour in his later  
20 years had been bizarre. He had even failed to attend his mother's funeral.

6. The other controversial group of paintings were from Janet's estate. Malcolm  
explained that having discussed these with his great aunt in about 1985, he was aware  
of her intention to gift these to himself and Alistair. He understood that these had  
been *delivered* to his father on their behalf in about 1986 at about the same time as he  
25 had received personally the Atkinson Grimshaw paintings from his parents. These  
other paintings remained, however, at Dr Steel's house in St Andrews until she moved  
into a nursing home in 1991. Malcolm stressed that there had been no intention to  
benefit his uncle, Janet's nephew, Ronald. While these had been retained at his  
parents' house after Janet moved into care, they never held them as owners, according  
30 to Malcolm.

7. In relation to the third group of paintings, included as "gifts with reservation" in  
Malcolm's account, he observed that HMRC viewed these still as part of Olive's  
estate. However, on either view the Inheritance Tax liability remained the same.

8. Finally, "Ludlow Church", a painting which Malcolm considered was his, was  
35 viewed by HMRC as unaccounted for.

9. Malcolm then commented on various aspects of the Statement of Case. He  
considered that his mother's letter in December 1985 (E12/13) supported the gift  
earlier of the Atkinson Grimshaw paintings. The later 2001 letter (E49) should be  
disregarded as the gift in 1985 was valid. (Incidentally Malcolm denied having  
40 received an enclosed list of paintings with that letter.) He noted that Janet's Will  
(dated 15<sup>th</sup> June 1988) was later in date than her gift of the paintings and hence, he  
suggested, was irrelevant. Malcolm was insistent that the Atkinson Grimshaw

paintings were handed over to him on his and Alistair's behalf and thereafter a change of possession followed. There were practical problems affecting the removal of the paintings from the family home.

5 10. In amplification of his Witness Statements, Malcolm stressed that when his parents gifted their paintings neither he nor Alistair had secure and satisfactory accommodation to house them. When they each acquired their own "first" homes, these were small and in insecure areas. Renovation works had been required to houses which they had acquired subsequently. Accordingly the paintings remained at the family home for safe-keeping.

10 11. Malcolm confirmed that Alistair had taken the Ferguson painting, "Paris Plage", in 2003. He himself had taken "Japanese Lady" slightly earlier and had taken "Ludlow Church" in about 2000/2001. He did not feel uneasy about taking it then as it was less valuable than the other paintings. There had been an extended delay before he and Alistair had agreed on a final division of the paintings. That had almost been  
15 settled by the date of their mother's, Olive's, death.

12. In cross-examination by Mr Douglas, Malcolm indicated that he was uncertain whether his parents had acquired their paintings individually or whether they viewed them as jointly owned. They were hung on the walls of their jointly owned house, he explained. Malcolm wondered whether Alistair had confused the process of division  
20 of the paintings with that of the making of the gift. He was invited to comment on his parents' letter in August 2001 (E49) and why it referred to "our" pictures and "giving" them. Malcolm explained that he understood that Alistair believed the 1985 gift to be invalid, and that he had prompted his parents to write this letter. However, he (Malcolm) had reassured them that they could not gift them twice. Malcolm was  
25 then referred to his mother's letter of 17 December 1985 (E12/13). At that stage he had been working as a travel representative in Switzerland and could not take the paintings away. In relation to his great-aunt's paintings, Malcolm stated that he was not present when these were gifted. He was in Zermatt. His father had told him of the gifts, which, he believed, had been effected on his parents' customary New Year  
30 visit to his great-aunt in early 1986, after their skiing holiday. Malcolm agreed that there was no reference to the paintings as "gifts made within seven years of death" in the Inventory to his great-aunt's estate (E28-31). Malcolm was not an executor on the estate. He could not explain why there were no invoices for the more recently acquired paintings unlike the documentation produced for earlier acquisitions at C6  
35 and E1-9. "Horse Island" and "The Ferry" might, he thought, have been gifts.

13. Malcolm indicated that he had not traced the Sotheby's valuation noted in E49/50. The "ear-marking" of individual paintings viz, Paris Plage and Japanese Figure, which was not done until 2003, suggested that E50 was not the list referred to in the parents' letter of August 2001 (E49).

40 14. There was no re-examination of Malcolm by Mr East. (As was observed later by Mr East, there was no cross-examination as to the circumstances of the alleged gift of the Atkinson Grimshaw paintings by their parents to Malcolm and Alistair.)

## Appellant's Submissions

15. In addition to his Skeletal Argument Mr East presented to us a written submission, setting out suggested Findings-in-Fact. In relation to both the Atkinson Grimshaw paintings and Dr Janet Steel's paintings, he argued that *delivery* had taken place, so effecting the transfer of proprietary rights. Scots Law, he considered, governed the gifting of Janet's paintings. Scots Law, he submitted, was essentially similar in principle to English Law. Also, he raised as a preliminary hurdle for HMRC to overcome whether his father's interests in the paintings (*esto* retained post-1985) had passed into the estate of his widow, Olive.
16. So far as the three Atkinson Grimshaw paintings were concerned (two are the most valuable ones listed) Mr East urged us to accept the account of Malcolm. His evidence as to "physical" transfer had not been challenged in cross-examination. We should hesitate not to accept it, he continued. Alistair had not been present on that occasion. If we accepted Malcolm's narrative, that demonstrated the change of ownership from the parents to their sons. There was evidence of *delivery*. The fact that the paintings were not then divided between the sons was not inconsistent with a gift to them jointly. Nor was the paintings' remaining in the family home at Knaresburgh inconsistent with a gift. Neither Malcolm nor Alistair had then, or for many years thereafter, a permanent dwelling, or at least one suitably large and sufficiently secure to display the paintings. For many years after the gift, therefore, the paintings remained in the family home for safe keeping.
17. It was acknowledged by Mr East that (and this is relevant to the gifts made under English law) that there was no deed (or deeds) of gift. However, important corroborative evidence was available in Olive's letter dated December 1985 (E12-13). It confirms the circumstances of the change of ownership: it emphasises Malcolm and Alistair's responsibility for the paintings: and the desirability of insurance. It records the advice of Mr Cox, the parents' solicitor, who was then advising on their house purchase and was a "private client" specialist.
18. So far as Dr Janet Steel's paintings were concerned, Mr East invited us to infer that these were gifted to Malcolm and Alistair by her entrusting them to their father. *Delivery* at her home in St Andrews, sufficient for the purposes of Scots Law, took place, Mr East inferred (and submitted) in early 1986. Malcolm had spoken to the discussion with his great-aunt in 1985. It was his parents' established practise to visit Janet shortly after the New Year after their skiing holiday abroad. Given the estate planning advice to the parents from Mr Cox in 1985 and their acting upon it, it was more than likely that this advice was communicated to Janet and thereafter acted upon by her. Accordingly it was reasonable to infer, Mr East argued, that delivery took place completing the gift to Malcolm and Alistair in early 1986.
19. Failing that, as a reserve stance, Mr East submitted that delivery took place in 1991 when Janet entered a care-home and her paintings were removed and taken by James to Knaresburgh.

20. The completion of the gift from Janet was corroborated by the terms and circumstances of the valuation of these paintings by the Calton Gallery, Edinburgh. That referred to the “family division” instructed by James. There was no evidence to support the stance of HMRC that the paintings had been gifted to James and his brother, Ronald, rather than to the grand-nephews, Malcolm and Alistair.

21. Mr East referred us to both the Will of Janet (E20-21) and her draft IHT account (E28). In terms of the Will, James and Ronald received equal shares of the estate and equal monetary gifts. There was no specific reference to (any of) the paintings in the Will and they were not noted in the IHT account as *inter vivos* gifts.

22. Mr East then addressed us on the letter of 14 August 2001 (E49) and the existence of an attached list of paintings, the “Sotheby’s valuation” (E50). It was argued by Mr East that the list of paintings bearing to be attached to that letter was in fact later in date. Malcolm had no recollection of any such enclosure with the copy of the letter sent to him. The initialling of two paintings, *viz* Paris Plage and Japanese Figure, referred to a specific agreement in 2003 made between Malcolm and Alistair.

23. On any view HMRC had to demonstrate that the paintings were all in Olive’s estate for their determination to be upheld. There was no indication that Janet wished to benefit Olive. If the paintings had passed into James’ estate, HMRC had to show how they passed in favour of his widow after his death. The Deed of Variation to his estate provided for a nil rate band trust (E177) and a residuary gift to his widow. However, there was no evidence, Mr East continued, to show how the paintings were appropriated.

24. Having regard to the authorities cited Mr East relied heavily on *Re Cole*. In 1985 there was, he submitted, delivery of the Atkinson Grimshaw paintings and the letter of (E12/13) indicated a change of possession. He commented on the reference in *Cole to Bashall v Bashall* (p437/8).

25. In reply Mr Douglas submitted that delivery of the Atkinson Grimshaw paintings in 1985 had not been established. He too relied on *Cole* for the interpretation of *delivery*. The act here was equivocal. Alistair was not present. The paintings remained with the parents, he noted. In the 2001 letter they referred to them as “our” paintings. Mr Douglas urged us to view Malcolm’s account with suspicion. He is the only surviving party and his account was diametrically different from Alistair’s. Mr Douglas acknowledged that he had not cross-examined Malcolm as to his account of the alleged delivery: in his view it was insufficient technically to amount to a *delivery*.

26. Mr Douglas complained that information as to the circumstances of the *delivery* had been drip-fed over a period in response to queries from HMRC. (However there was no allegation of inconsistencies in the account provided.) In respect of Janet’s paintings Mr Douglas emphasised that there was a general uncertainty. He accepted that there was a meeting in January 1986 between her and James but Malcolm was not present. Janet died in December 1992. He wondered why there was no reference to lifetime gifts in her IHT return (E28-39), or to the paintings as part of her estate. On

any view the Return was incorrect. There was no safe basis supporting a gift by Janet of her paintings in 1986. The paintings remained in her possession, certainly until she went into care. Mr Douglas observed that the “family division” noted in the Calton Gallery valuation did not necessarily mean “Malcolm and Alistair” only. There was,  
5 Mr Douglas submitted, continuing possession by James and Olive of the paintings at their home.

27. “Ludlow Church”, Mr Douglas observed, was not included in the Notice of Determination. The Sotheby’s Valuation referred to in E50 has not been produced.

10 28. Mr Douglas noted the “Group 3” paintings next, ie h, i, j and k in the Notice of Determination. No invoices relating to these were available. It was suggested that Olive owned these but it was unclear how they came into parties’ ownership. On the basis of *Thomas v The Times Book Co* Mr Douglas urged us to view Malcolm’s evidence with caution. Similarly there was an uncertainty about *Paris Plage* and *Japanese Figure* were concerned a decision had to be made to tax these in full as  
15 Olive’s estate.

29. In conclusion and in respect of the two named sets of paintings, so far as the Atkinson Grimshaw ones were concerned Mr Douglas repeated that there had been no effective delivery in 1985. For Dr Steel’s paintings it was impossible to say whether these were delivered in 1986 or 1991, the latter seemed more likely.

20 30. Mr Douglas invited us to dismiss the appeal and make Findings-in-Fact about the transfer of *Ludlow Church*.

31. In his concluding submissions Mr East argued that the Notice of Determination was seriously deficient. On the basis of *Re Cole* and *Bashall* the physical hand-over of the Atkinson Grimshaw paintings represented delivery. It was wholly  
25 inappropriate to view Malcolm’s evidence with suspicion. The circumstances of this appeal differed from *Thomas v The Times Book Co*. That related to a hostile claim between parties. This was a tax dispute. In the absence of cross-examination about the transfer of the Atkinson Grimshaw paintings it was procedurally unfair of HMRC to criticise that evidence. Where extra evidence and explanation had been added later  
30 in response to HMRC’s questions, that had not been in conflict with earlier accounts.

32. The Inheritance Tax account of Dr Steel, which made no reference to her paintings, should be viewed as neutral, Mr East suggested. On the basis that these were gifted in early 1986 (pre 18/03/86) they were not potentially exempt transfers or failed potentially exempt transfers requiring disclosure. There was no suggestion that  
35 any of Dr Steel’s paintings passed to her other nephew, Ronald, suggesting that they were unaffected by her Will as they had been an earlier gift.

33. The Group 3 paintings were of relatively low value. They were taxable whether as gifts with reservation or as retained within Olive’s estate.

40 34. Alistair’s acquisition of the Ski Solutions shares worth about £94,000 might have affected his views about an equitable division of the paintings.

35. The paintings, *Japanese Figure* and *Paris Plage*, according to the Determination were given by Olive in 2003 and hence failed potentially exempt transfers. More likely they were the subject of a joint gift by James and Olive. More seriously there was no evidence that they had passed into Olive's estate. It was unclear whether they were part of the nil rate band trust set up by the Variation of James' estate.

36. In relation to *Ludlow Church* Mr East invited us to find that it was part of Dr Steel's 1986 or 1991 gift.

37. For all of these reasons, Mr East concluded, the appeal should be allowed.

### Decision

38. There are two principal issues for us to determine. Firstly, was there a gift of the Atkinson Grimshaw and other Group 1 paintings to Malcolm and Alistair in 1985, or at least before 18 March 1986 when the Transfer Tax system was effectively superseded by Inheritance Tax. Secondly, did Dr Steel gift her paintings to Malcolm and Alistair in early 1986 or, possibly, in 1991, when she entered care. Helpfully Parties agreed that the standard of proof applicable was the balance of probabilities.

39. It was accepted that the matter of an alleged gift by Professor and Dr Olive Scott fell to be governed by English law. To effect a gift there has to be *intention* and (in the absence of a Deed of Gift) *delivery*. Following the decision in *Re Cole* it is clear that delivery involves a physical transfer, essentially putting the donee in control of the property. We accept as entirely credible Malcolm's account to us in evidence. It was not the subject of cross-examination, and Mr Douglas confirmed that he did not challenge the factual narrative. Rather, he questioned its technical sufficiency in amounting to *delivery*. We find Malcolm's account as narrated in para 3 of a physical hand-over of each painting individually, consistent with his mother's letter of December 1985 (E12/13) which we accept at face value and do not consider to be contrived. That and Malcolm's evidence confirms a change in the quality and purpose of the parents' possession after the physical transfer. They no longer held the Atkinson Grimshaw paintings for themselves, but rather on behalf of Malcolm and Alistair, and to their order. The parental home was for several years Malcolm and Alistair's "home" too and permanent address. Thereafter the accommodation which each son had was limited in size and not sufficiently secure to hold assets of value. It was impracticable for Malcolm and Alistair to remove them. We find that from 1985 until their physical removal the parents held paintings on behalf of and to the order of their sons. We discount the terms of the 2001 letter (E49). It appears to have been prompted by Alistair. While he obtained legal advice from Messrs Boodle Hatfield, the information and account communicated to them are uncertain. It is irreconcilable with Malcolm's evidence and Olive's earlier letter (E12/13). Alistair's stance was in conflict with his approving the terms of his father's IHT account which made no reference to the Atkinson Grimshaw paintings. He could not sadly attend the hearing to be cross-examined on the inconsistencies in his varying accounts.

40. The foregoing paragraph represents our **Findings-in-Fact** in relation to the Atkinson Grimshaw paintings and our **conclusion in law** thereanent.

41. Next, the question of a gift by Dr Steel of her paintings falls to be considered. This is to be determined by Scots Law. Rights in corporeal moveable property are regulated by the *lex situs*. In any event we note that Dr Steel was according to her IHT Inventory domiciled in Scotland. Scots Law emphasises the significance of delivery in addition to the intention to gift: *traditionibus non nudis pactis transferuntur rerum dominia*. In cases of ambiguity there is a presumption against donation. Delivery requires essentially a physical act as in English law.

42. The circumstances of a possible gift in 1986 are unclear to us. We note carefully paras 11-13 of Malcolm's second Witness Statement. We accept his account of a declared intention by his great-aunt to gift her paintings to himself and Alistair, but they did remain in her house until she moved into a care-home in 1991. While Malcolm believed that there had been "parallel" thoughts and actings with his parents' gift in 1985, there is no evidence of acts which might amount to *delivery* until 1991 when the contents of Dr Steel's flat were removed. Delivery and a change of possession and control about that time bears to be confirmed by Malcolm's account and objectively by his father's instructions recorded in the Valuation by the Calton Gallery (E24-27). Therefore, we **find in fact** and **in law** that in 1991 when Dr Steel had to enter care and leave her own flat, her paintings were delivered by her to James on behalf of Malcolm and Alistair as a joint gift to them both.

43. There now remain only minor matters for consideration. We comment only briefly on *Ludlow Church*. We **find** that this was from Dr Steel's collection and part of her 1991 gift. It was taken by Malcolm towards his share in about 2000/2001. He felt able then that it was practicable to take possession of it particularly as it was not of special value.

44. The Group 3 paintings are of relatively low value. Whether these are treated as gifts with reservation or retained within Olive's estate, they are liable to the Inheritance Tax charge.

45. For the reasons set out in our Decision we consider that HMRC's Determination is flawed, and accordingly we allow the appeal.

46. 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.

**KENNETH MURE**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 2 June 2015**