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Reviving capital transfer tax scholarship

Ann Mumford*

ABSTRACT

Inspired by the Hayton and Tiley text, *Capital Transfer Tax*, this chapter reconsiders this famous twentieth century tax in four parts. First, the significance of the complicated and controversial history of the legislation introducing this tax is explored. Possible connections between this history, and some of the objections to the tax in the following years, are considered in the second part. The third part addresses perhaps the most significant legacy of this era, the case of *Pearson v CIR*. The final section weighs the Hayton and Tiley text for historical resonance, and finds there is much of modern value. Ultimately, the chapter advances the thesis that Hayton and Tiley sought to understand capital transfer tax both as a product of, and a part of, the system in which it operated.

INTRODUCTION

The scholarship of John Tiley is enormously rich, but it is in two areas, in particular, that he developed a significant, sustained, and historical perspective on policy evolution in the UK: taxation of the family, and (a famous title) ‘death and taxes.’¹ This paper will address the latter, and in so doing reconsider his text on *Capital Transfer Tax*.² The primary objective of this reconsideration is to trace the continuing impact of the capital transfer tax on modern political discourse surrounding the taxation of inherited wealth in the UK.

In substance the paper will cast an eye back at the period 1975–1986, reconsider the CTT literature from the period, and fashion an historical basis for the hybrid inheritance tax of the modern era. The period surrounding 2006–2007 saw an explosion of interest in inheritance taxation legal scholarship, largely due to the impact that public discussion of this tax seemed to have on a variety of elections in countries around the world, of course including the UK.³ The economic crisis of 2008, and a momentary worry that ‘inherited wealth may not be much of a problem,’⁴ suppressed this interest, and the scholarly discussion of the taxation of inherited wealth has been quiet of late. Consideration of the impact of the Capital Transfer Tax on modern tax discourse, and the evolution of late-middle twentieth century tax policy into the twenty-first century, may help to inspire a post-recession discussion.

* I am enormously indebted to John Pearce for very generous comments on an early draft, and, in particular, for introducing me to the major points of reference in this area of tax law.

¹ J Tiley, ‘Death and Taxes’ (2007) BTR 300.

² D J Hayton and J Tiley, *Capital Transfer Tax* (London, Butterworths, 1978).

³ See, inter alia, L L Batchelder, ‘What Should Society Expect from Heirs – The Case for a Comprehensive Inheritance Tax’ (2009) 63 *Tax L Rev* 1; M Schürz, ‘Zu den Rechtfertigungsverhältnissen einer Erbschaftssteuer’ in Gaisbauer, HP *et al.*, (eds) *Erbschaftssteuer im Kontext* (Weisbaden, Springer, 2013); and J Beckett, *Inherited wealth* (Princeton University Press, 2008).

⁴ A comment the author of this chapter heard mentioned at a number of workshops held in 2008, addressing the topic of taxing inherited wealth (and organised before the economic crash).

This chapter is in three parts. The first part provides the background to the legislation itself, and, in particular, traces the impact of the fraught legislative process which preceded its introduction. Wheatcroft and others were to describe the legislation as technically flawed.⁵ This part of the chapter will explain why, and consider the repercussions of these observations. Part two will describe some of the challenges that the CTT faced in operation. Part three will consider the first case to reach the House of Lords under CTT, and will assess the implications of this case for CTT's legacy. These three parts will converge in a final section, which considers Hayton and Tiley's observations on the CTT, and aims to discern which of these observations remain relevant for consideration of the modern inheritance tax. This chapter will conclude by suggesting that reconsideration of CTT reveals a number of important insights; in particular, for the significance of the relationship between capital and income taxation.

A COMPLICATED ROAD TO LEGISLATION

The Capital Transfer Tax was introduced quickly after the first of two elections in 1974, after which the Labour party came to power. Labour were determined to introduce immediate reforms to what were perceived as existing inequalities in taxation law. As dramatic as the election had been, the draft taxation legislation which quickly followed it, and which introduced the Capital Transfer Tax, was no less controversial. Indeed, as Hepker and Whitehouse were to recall in 1975, '[t]he publication on 10 December 1974 of the Finance Bill incorporating the CTT legislation raised the curtain on what was to become an absorbing Parliamentary drama.'⁶

The CTT was announced to Parliament on 26 March 1974, by Denis Healey, the new Chancellor of the Exchequer.⁷ Mr Healey stated that the CTT itself would not be introduced in his first Finance Bill; but, rather, in his second Finance Bill, which would follow in Autumn 1974.⁸ In the interim, a second election was held, producing a 'small overall majority' for the Labour Party.⁹ The Finance (No. 2) Bill 1974 followed on 10 December 1974.¹⁰ This in turn became the Finance Act 1975 (on March 18, 1975), but not without opposition, described by Wheatcroft and Hewson as 'strenuous'.¹¹ In this process, '...a very large number of amendments were proposed, both by the Government, which were usually adopted, and by the Opposition, which were usually not, and the Bill ultimately only passed after a 'guillotine' motion had been passed by Parliament.'¹² This outcome was accepted

⁵ G S A Wheatcroft and G D Hewson, *Introduction to Capital Transfer Tax*, Part 1A of *The Encyclopedia of Capital Taxation – Capital Transfer Tax* (London, Sweet & Maxwell, 1977).

⁶ M Z Hepker and C J Whitehouse, *Capital transfer tax* (London, Heinemann, 1975) 17.

⁷ Wheatcroft and Hewson, above n 5, 1009, [A1-05].

⁸ *Ibid.* See HC Deb 26 March 1974, vol 871, cc313–4, where Mr Healey seemed to acknowledge the controversy that lay ahead-

I recognise that to some who may be affected by these new tax proposals and who are unfamiliar with the way they operate in other Western countries they may seem revolutionary in the extreme. I can assure them that, while I am determined to ensure that the new taxes will be effective instruments for redistributing wealth as a means to greater justice and equality in our society, I am concerned that they should operate fairly on those affected and I will listen to any reasonable representations which will help me to secure this end.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

grudgingly, and led the Chief Secretary to the Treasury, Joel Barnett, to propose that ‘there is a need to look at our procedures and our way of examining Bills’.¹³

The impact of this process on the legislation itself, Wheatcroft and Hewson suggested, was not positive.¹⁴ The bill, as originally proposed back in March 1974, largely was designed to enforce a tax on gifts made after 26 March 1974; replace estate duties (at a date to be clarified later); and, to enforce a tax on ‘distributions from and certain other events in relation to settled property’ where these occurred after 26 March, 1974.¹⁵ The tax which emerged after the second Finance Bill, however, was, Wheatcroft and Hewson explained, ‘defective in a large number of technical respects’, leading to a period of heavy revision in both the Finance Acts 1976 and 1977.¹⁶

Hepker and Whitehouse, in another contemporary account, were more pointed in their criticisms, and suggested that ‘[i]t would be difficult to deny that some of the original provisions were imperfectly thought out and shoddily drafted.’¹⁷ They provided some context for the controversy:

...[the original provisions] seemed likely to produce effects which were far more drastic than the Government apparently intended. ‘At the eleventh hour...’ suggested *The Times*, ‘the realization is dawning that the provisions of the CTT in its present form will in practice be so vindictive that they must be fundamentally modified’.¹⁸

‘Fortunately’, Hepker and Whitehouse continued, ‘the Opposition took up the challenge’.¹⁹ They were referring to the fact that the Bill spent 160 hours in Committee, and apparently more time was allocated to the Report and Third Reading of the Finance Bill than could be recalled in the previous fifty years.²⁰

Whilst there is a trace of political partisanship in the observations of Hepker and Whitehouse, in particular, it is instructive to consider the impact of this fraught but extensive legislative process. The deficiencies mentioned by Wheatcroft and Hewson could not help but be noticed, given the extraordinary attention focused on this legislation. Indeed, it could be suggested that this was an unusual amount of attention. The controversy could be attributed to one of two causes. First, the intensely politicized nature of inheritance taxation, generally, could provide the cause.²¹ Any legislation addressing inheritance taxation is likely perhaps to produce this level of controversy. Secondly, perhaps the battle over CTT simply was an extension of the intensely fought election. It became a symbol of that fight, and, given its eventual repeal, perhaps it was never able truly to overcome that symbolism.

Following the election of 1974, the Labour Party also announced their intention to introduce a wealth tax.²² Had this plan succeeded, the change to the system for taxing capital in the UK would have been even more profound. As things stood, CTT, on its own, was a very significant change. This is partially because the estate duty, which CTT replaced, actually had been introduced by the Finance Act 1894, and had remained largely unchanged

¹³ Hepker and Whitehouse, above n 6, 18, quoting HC Deb 4 March 1975, vol 887, c 1347.

¹⁴ Wheatcroft and Hewson, above n 5, 1009.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Hepker and Whitehouse, above n 6, 17.

¹⁸ *Ibid.*, citing ‘First Leader’, *The Times*, 22 January 1975, *ibid.*, 17–18.

¹⁹ *Ibid.*, 18.

²⁰ *Ibid.*

²¹ See M J Graetz and I Shapiro, *Death by a thousand cuts: The fight over taxing inherited wealth* (Princeton University Press, 2011).

²² This history is discussed *infra*, in the review of the research of Howard Glennerster into the aborted wealth tax.

since then.²³ By the 1970s, the estate duty was an embedded part of tax legal culture. Interestingly, a booklet rushed out in the aftermath of the Finance Act 1975 wryly observed that ‘[e]ven now, over 80 years after the [1894 Finance] Act, the Courts are being asked to interpret some provisions [of the estate duty].’²⁴ Reviewing the literature from the era reveals a sense of surprise that this interaction with an almost 80 year old tax was to cease, and to be replaced with a new tax. There also appeared to be a realization that the disruption that would be caused by changing this legal regime would last for a significant amount of time. Indeed, the authors of the pamphlet proceeded to suggest that ‘[i]t would seem, therefore, that it will be many years before all the provisions of the Capital Transfer Tax can be interpreted without doubt.’²⁵

A White Paper²⁶ set out the proposed scope of CTT, which was followed by the Finance Act 1975. The CTT elements of the Finance Acts 1975–1984 ultimately were consolidated into the Capital Transfer Act 1984, which, in 1986, was replaced by the Inheritance Act 1986. The legislation which effected this change, the Finance Act 1986, dramatically changed the substance of this tax.²⁷ *Inter vivos* gifts, and contributions to accumulation and maintenance trusts, were free of tax once more, provided the donor survived the date of the gift for seven years. This exemption (or ‘potential exemption’ as it was described in the *British Tax Reporter*) extended to creation and termination of interests in possession in settled property in 1987. The *British Tax Reporter* described this as a substantive reversion to the old estate tax system, with a few exceptions. Although the tax now was called an inheritance tax, ‘transfer of value’ remains (to this day) the focus of the tax, and the charge itself derives from the donor’s estate. The essence of the tax, in other words, is the impact upon the donor, and not the person receiving the inheritance.

What was the difference between the estate duty, the capital transfer tax, and the modern inheritance tax? The change from estate duty to CTT involved a shift in the essential nature of the tax, given the incorporation of an element of gift taxation. This change, however, was in response to the perceived inefficiencies of estate duty, which had been too easy to avoid. So the intention was not exactly to tax gifts, but to devise legislation means for ensuring that, upon death, a tax was levied. The gift element, therefore, was in some ways a targeted anti-avoidance rule.²⁸ Language, of course, always has played an important part in the reaction of taxpayers to charges on death.²⁹ The reaction of tax advisers to the change from estate tax to CTT likely was driven by something more fundamental than instinctive reactions to terms like inheritance tax, estate tax, or even death tax. Whether or not such taxes apply to estates, or to their beneficiaries – an important part of the play of language in this context is whether or not the tax applies to (grieving) beneficiaries (*i.e.*, through an

²³ Chalmers, Impey & Co – Chartered Accountants, ‘Capital Transfer Tax,’ 14 April 1975 (booklet on file at the British Library, General Reference Collection X.519/28616) 2.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Government white paper, ‘Capital transfer tax’, August 1974, the National Archives, Kew, PS 6501/1974 Vol I. As Glennerster explained, the government’s plan had been to publish the white papers on capital transfer taxation, and wealth taxation, on the same day, 8 August 1974. H Glennerster, ‘Why was a wealth tax for the UK abandoned? Lessons for the policy process and tackling wealth inequality’ (2012) 41 *Journal of Social Policy* 233, 233. Glennerster notes that a Green Paper was considered by the Cabinet subcommittee at the end of July 1974, where some disappointment was expressed that legislation was not expected before 1976. ‘This,’ Glennerster writes, ‘was to be the high tide of optimism about implementing the tax’. After this point, it seemed that ‘[t]he government lost the initiative and the argument.’

²⁷ *British Tax Reporter*, above n 22, 600–150.

²⁸ Indeed, when the CTT was announced to Parliament, it was presented in this way. Mr Healy said, by way of introduction: ‘...I intend to take measures to close the loopholes which prevent the estate duty from performing the role assigned to it.’ HC Deb 26 March 1974, vol 871 cc 313–4.

²⁹ L Eisenstein, ‘The Rise and Decline of the Estate Tax’ (1955) 11 *Tax L Rev* 223, 223.

inheritance tax), or to inanimate ‘estates’ – was not solely at issue. Rather, the resistance focused on the loss of (familiar) a charge on death, and its replacement with a new, hybrid tax on death and gifts.

CTT encountered several distinct challenges in its operation. One issue arose in the context of valuing unquoted shares, which was necessary for practically any transfer or transaction, in the family company particularly.³⁰ An additional issue concerned whether a power to accumulate denies the possibility of there being an interest in possession.³¹ The essential charging provisions were found in sections 19–24 of the Finance Act 1975, with special provisions for settled property in Schedule 5 of that Act. The significant provisions included section 19(1), which taxed the ‘value transferred’ by a ‘chargeable transfer’.³² The key concept was a ‘transfer of value’, which, as defined in section 20(2), led to the value of an estate immediately after the disposition being less than it would be but for the disposition. The amount by which it is less (including the amount of the tax payable if it comes out of the transferor’s estate) is the value transferred by the transfer, and was liable to CTT.

Excluded property was defined under section 24(1), and was not covered by the tax.³³ It largely dealt with trusts, and property abroad, and was exempted from the charge through a curious amount of legal wrangling.³⁴ Distinctly *not* excluded from the charge was the family company, a clear target of the CTT. Sherring suggested that the most important reference to close and unquoted companies in the legislation was found in section 20(4) of the Finance Act 1975, where ‘...having stated that a disposition on arm’s length terms with no donative intent is not a transfer of value, the legislation goes on to say that this does not apply to a sale of shares or debentures which are not quoted, unless it is shown that the sale was at a price freely negotiated or at a price which free negotiations might have been expected to produce.....’³⁵

Familiarities, thus, lost with the introduction of the CTT were relatively straightforward forms of mitigation and avoidance. Given the extent of avoidance at the time, these were predictable targets for the Labour Party.³⁶ For example, the requirement that a donor should survive for seven years before the exemption would apply had little impact on avoidance, Walters explained, because many donors were careful to make gifts sufficiently

³⁰ Ibid., 18–19: ‘One thing which is going to increase is the number of occasions on which you will have to value unquoted shares. Of course, this has been done for the Estate Duty purposes since 1894, and for Capital Gains Tax since 1965. However, you will see that practically any transfer or transaction in shares in a family company now involves us in CTT considerations. So that it is not just on a death or where one wants to hark back to April 1965 that valuations are needed.’

³¹ R M Walters, *Finance Act 1978: taxation changes / prepared for the Society of Company and Commercial Accountants* (London, Society of Company and Commercial Accountants, 1978) [5.3]. (held at British Library)

³² Robert Dymond, *Dymond’s capital transfer tax : a companion volume to the fifteenth edition of Dymond’s death duties; / by Reginald K. Johns and Roy R. Greenfield* (Robert Dymond, Reginald Kimsey Johns and Roy R. Greenfield eds, Oyez Publishing 1977) 9.

³³ Ibid., 15.

³⁴ Ibid., 17: “[e]xcluded property” therefore occupies a somewhat curious position. It is technically part of the estate while the owner of it is alive, but not such a part that its transfer out of the estate (or, if it is settled property in which he has an interest in possession, the transfer or termination of such interest) can be a transfer of value by him, and it magically disappears from the estate immediately before his death and so likewise cannot be chargeable with Capital Transfer Tax on his death.’

³⁵ Ibid., 16–17, where Dymond continues: ‘[t]he words “freely negotiated” are the most important. During the debates on the 1975 Act, it was made clear that this phrase meant that one should temporarily ignore the restrictions which the Articles of a private company place on any transfer. This is the same position which we had for estate duty. Once one accepts the idea of an open market value, one accepts the idea that there are no restrictions on the hypothetical sale which one has to imagine in order to discover the open market value.’

³⁶ Indeed, Walters suggested at the time that the estate tax had become known as the ‘avoidable tax’ because it was very easy to give away assets before death: Walters, above n 31, [1.1].

early.³⁷ This in fact was the primary reason that the CTT originally taxed all gifts, over the course of a donor's lifetime.³⁸ The Finance Act 1981, however, ultimately limited the accumulation period to 10 years.³⁹ In this sense, the capital transfer tax maintained a link with the estate tax in more ways than one.

CTT: THE OBJECTIONS

The objections to Capital Transfer Tax focused, in particular, on two issues: the projected impact on family farm ownership, and the interaction with family companies. The concern over family farms occurred against the background of significant, contemporaneous research. A few years after its introduction, in 1978, the first report of the Royal Commission on the Distribution of Income and Wealth⁴⁰ emphasized that patterns of inheritance played a major role in the patterns of wealth distribution in the UK.⁴¹ This report, by G Z Fijalkowski-Bereday, was described as a 'pioneering study' of the impact of patterns of inheritance on farm ownership.⁴² This report was received within an existing intensity of interest concerning the interaction of farming and CTT. Literature from the era reveals an overall sense of uncertainty in this area. At a minimum, there was a call then for more scholarship of this type.⁴³ This call occurred in the context of the fact that (as of 1978) 1973 apparently was the last year that information concerning who paid death duties, and how much, was made public.⁴⁴ Horsman suggested that this, combined with the fact that the opposition in Parliament then was working steadily towards the repeal of CTT, seemed to contribute to a general sense of unease about how well the tax actually was understood.⁴⁵

The impact of CTT on smaller farmers was much discussed during its tenure.⁴⁶ In the House of Commons debate on CTT on 5 March 1975, Mr Francis Pym, speaking for the opposition, argued that the impact of CTT on farmers would be '...far too heavy.'⁴⁷ He warned that the only option available to farmers was to 'fragment' a family farm, and '[w]ho will buy the fragments?'⁴⁸ The outcome threatened, he predicted, was 'the peasant type of agriculture which is such a problem in certain parts of Europe.'⁴⁹ Other risks, he suggested, apparently included undermining the entire system of food production in the UK.⁵⁰

The structure of CTT did endeavour to encompass relief that would benefit small farmers. CTT allowed relief for small business assets,⁵¹ and, as Sutherland explained, '...UK agriculture is a collection of small businesses.'⁵² The challenge was that "smallness" is not a

³⁷ Ibid.

³⁸ Ibid.

³⁹ Finance Act 1981 s 93.

⁴⁰ *The Royal Commission on the Distribution of Income and Wealth No 1 Initial Report on the Standing Reference* (1978) [Cmnd. 6171].

⁴¹ E G Horsman, 'Inheritance in England and Wales: The evidence provided by wills' (1978) 30 *Oxford Economic Papers* 409, 409.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid, 409–410.

⁴⁶ See, *inter alia*, G H Peters and J C Eckford, 'The impact of capital transfer tax on agriculture a preliminary assessment' (1976) 5 *Oxford Agrarian Studies* 35, 35.

⁴⁷ Ibid, citing HC Deb, 5 March, 1975, cc 1609 ff.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Capital Transfer Tax Act 1984 (now known as Inheritance Tax Act 1984), s 20.

⁵² Alister Sutherland, 'Capital transfer tax and farming' (1980) 1 *Fiscal Studies* 51, 51.

universal characteristic',⁵³ and studies at the time revealed a considerable number of what could be described as larger farms.⁵⁴ Another challenge was that, even where a farm could be described as smaller, arguments supporting resemblance to other types of small businesses generally struggled, not least because – given that land is a limited resource – inheritance was virtually one of the only methods of entrance.⁵⁵

The impact of CTT on family *companies* also was much discussed in its time. It emerged as a distinct area of professional expertise, in part due to the impact of CTT. As FA Sherring suggested in a practitioner training tape from the era, '[a]s you can see, the problems of the family company and its shareholders are now a specialist tax field where, even if one ignores stamp duty, a good knowledge of CTT and CGT are essential, and where regular consultation between shareholders and their professional advisers is necessary to prevent falling into tax traps.'⁵⁶ Consideration of the scope of CTT helps this come into focus.

Capital Transfer Tax covered transfers of capital by persons during their lifetimes and upon their deaths; and, similar transactions by close companies (which were treated as 'transfers by the individual participators in such companies').⁵⁷ Capital transferred into, and out of, settlements also were taxed.⁵⁸ There were five categories of 'chargeable transfers' for the purposes of the tax. The first type included non-exempt transfers made after 29 March 1974.⁵⁹ The following three types were assessed 'as if' a transfer of value had been made, and included: transfers upon the death of a person after 12 March 1975, transfers by close companies, and when a person received a beneficial interest in settled property.⁶⁰ The final category included capital distributions made after 12 March 1975 from settled property in which no interest in possession subsists (and which was not defined in the legislation).⁶¹

The CTT employed two sets, or scales, of rates, known as 'the lifetime and the death scales'.⁶² The reasoning behind two different sets of scales was to encourage donors to dispose of as much property as possible during a lifetime, and not to wait until death.⁶³ Review of literature from the era reveals the belief that this was a direct effort to redress the perceived failure of the Finance Act 1894. This belief was underpinned by certain, well-known touchstones in the history of the estate duty. A particularly infamous example of the apparent inequalities of the act involved, with appropriate historic resonance, the Duke of Westminster. There were exemptions for taxpayers in the armed services, who died either on active service or because of active service. In an infamous example, the case of *Barty-King*,⁶⁴ the court upheld the Secretary of State's decision that the estate of the fourth Duke of Westminster, who died in 1967, was exempt from estate duty because of a wound suffered in 1944.⁶⁵ Of course it need not have followed from this controversial decision that an entire tax was so easily avoided (especially given the disparities in influence between the Duke of Westminster and the average taxpayer), but its evocation by Walters in a discussion of (a

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ F A Sherring, *Current Taxation Problems, Capital Transfer Tax and the Family Company – User's Guide* 2nd ed (London, ICAEW, April 1979), audio and transcript held in the Rare Books and Music Room, British Library, 27.

⁵⁷ Wheatcroft and Hewson, above n 5, 1010 [A1-05]. See generally Capital Transfer Tax Act 1984, part IV (relating to close companies).

⁵⁸ Ibid.

⁵⁹ Ibid., 1011 [1A1-06].

⁶⁰ Ibid., 1011 [1A1-07].

⁶¹ Ibid.

⁶² Walters, above n 31, [2.1].

⁶³ Ibid.

⁶⁴ *Barty-King v Ministry of Defence* [1979] STC 218.

⁶⁵ Under Finance Act 1978 Sch 7 para 1: Walters, above n 31, [4.21].

then, new) CTT indicates its symbolic place at the heart of discussions addressing why the Labour Party might have wished to reform the estate duty.

PEARSON V CIR⁶⁶

As the previous sections covered the fraught road to legislation for the CTT, as well as the primary sources of objections to the objections of the tax, the purpose of this section is to consider the tax's legacy. This is achieved through analysis of, arguably, the most famous case decided under CTT. *Pearson & Others v CIR* also was the first Capital Transfer Tax case to be decided by the House of Lords. It addressed the issue of the treatment, for the purposes of CTT, of interests in possession. The facts concerned a transfer by the settlor to a trust, Sir Richard Anthony Pilkington, of 13,333 Ordinary Shares of 10 pounds each in Pilkington Brothers Ltd. to his three children – Fiona, Serena and Julia – all of whom had reached the age of 21 by the end of February 1974.⁶⁷ The majority, reversing the decision of the lower court, held that neither Fiona (who received a later appointment in her favour) nor her sisters were beneficially entitled to an interest in possession in the settled property.

Wheatcroft and Hewson explained that, Lord Keith, writing for the majority,

...regarded it as significant that the existence or otherwise of an interest in possession forms the sole basis for determining which of the two alternative regimes of Capital Transfer Tax is to apply to particular settled property. The 1975 Act does not speak of discretionary or accumulation trusts; interests in possession are set on the one side, and all other kinds of interests on the other. This seemed to him to require that the concept of interest in possession should in this context be a clear and definite one.⁶⁸

Under the terms of the trust, the trustees were required to hold the capital and income, and to accumulate income, upon trust for the beneficiary absolutely. The beneficiary had no right to any income as it accrued but only a right to such income as the trustees thought fit not to accumulate. Fiona therefore, the Court held, did not have an interest in possession. It is not clear at this distance whether the poor drafting of which Wheatcroft and others complained led to *Pearson*, or whether this is an unremarkable case, involving the kind of interpretative attention that had surrounded the estate duty for eighty years previously.

The legacy of *Pearson v IRC* is that it remains the leading authority for the definition of an interest in possession.⁶⁹ *Pearson* also was an important case involving a moment of confrontation in 'the awkward relationship between the terminology of property law and the (legislative) terminology of tax law.'⁷⁰ Murphy suggested that this involved a discourse between 'common sense' (*i.e.*, 'did she *really* have an interest?') and, 'the metaphysical discourse of Equity' (*i.e.*, 'what is the *quality* of her interest?').⁷¹ The facts had hinged upon the appointment of an interest in 16,000 pounds to Fiona, the oldest daughter.⁷² The Inland Revenue had classified this appointment as giving rise to an interest in possession within the property of the trust, such that CTT was liable under para 6(2) of Schedule 5 to the Finance

⁶⁶ *Pearson v CIR* [1981] AC 753.

⁶⁷ See Dymond's Capital Transfer Tax, Fourth (Cumulative) Supplement, a Companion Volume to Dymond's Death Duties, 146–147 (London, Oyez, 1980). (Maugham Library, Tony Arnold Collection)

⁶⁸ Wheatcroft and Hewson, above n 5.

⁶⁹ HM Revenue & Customs, *Inheritance Tax Manual IHTM16062 – Interests in possession: definition of an interest in possession*, available online at <http://www.hmrc.gov.uk/manuals/ihmanual/ihm16062.htm> [accessed 8 January 2015].

⁷⁰ W T Murphy, 'Fiona's Fragile Possession' (1980) MLR 712, 713.

⁷¹ *Ibid.*, at 713.

⁷² *Ibid.* See also *Pearson*, above n 66, 753.

Act 1975.⁷³ An additional issue was whether, every time the trustees distributed trust property within the family, CTT would be due.⁷⁴

The Court held, in allowing the Crown's appeal, that the expression 'interest in possession' in Schedule 5 to the Finance Act 1975 should be interpreted within its 'ordinary natural meaning of a present right to enjoyment of property'.⁷⁵ Thus, the beneficiaries' entitlement to income was subject to the trustees' power to accumulate, which meant that attaining the age of 21 did not entail any significant changes in the beneficiaries' entitlement.⁷⁶ Thus, before the appointment in her favour in 1976, Fiona was not beneficially entitled to an interest in possession. Thus, the appointment had the impact of bringing Schedule 6(2) to the FA 1975 into effect.⁷⁷

Murphy suggested that, '[i]f we ask in a common sense way what Fiona really had that she could call her own, we would conclude that she was completely at the mercy of the trustees'.⁷⁸ This, Murphy stressed, is the entire point of family trusts, which endeavour to ensure that trusts should 'accumulate' until beneficiaries are 'settled in life', and thus in a position to claim the wealth of the trusts.⁷⁹ The objective is to delay the assumption of control until a point in time when the beneficiaries are ready.⁸⁰ From the perspective of tax law, the risk is that this moment may be delayed for tax motivated reasons, as opposed to the objectives of the trust. Murphy explained that the motive of the trustees is to delay the moment at which the trustees assume control until 'the future is reasonably clear'.⁸¹ Through this delay, however, the trustees also expand their opportunities to make 'optimum choices' in investment, and in tax planning.⁸²

Murphy concluded his analysis of *Pearson* by asking, '...what is the relationship between the terminology of the law of property and of tax law?'⁸³ He questioned whether it was likely that the phrase 'interest in possession' would be retained (as it turned out, it was), and then proposed that the real question was whether Parliament would opt for an 'exhaustive' rather than an 'illustrative' definition. The answer to Murphy's question was that *Pearson* filled the gap. The case provides, for all intents and purposes, the definition of an interest in possession. Murphy indicated that the case threw up more questions than it answered – for example, '[i]n the tax context, is it important to attend to the realities of the trust, to the 'practical results'?'⁸⁴ The alternative, he suggested, was 'a pure conceptualism, perhaps buttressed by the need for 'certainty', to continue to be acceptable?'⁸⁵ The alternative won, and *Pearson* in many ways became the end of a conversation (as opposed to, as Murphy seemed to suspect, the beginning). *Pearson* is now the authority on point, although the convergence between tax, property and trusts on this point, predicted by Murphy, seems not to have occurred.⁸⁶

⁷³ Murphy, *ibid.*, 755.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, 754.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Murphy, above n70, 713.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*, 717.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ For example, a major textbook on trusts writes of *Pearson*: 'Whether or not an object has a vested interest has been important for purposes of taxation law'. This specification seems to single tax law out, as containing a point of interest which is not necessarily shared in an equal way by the law of trusts. James Penner, *The law of trusts* (Oxford University Press 2012) 82 [3.64].

This moment of recognition between property, trusts and tax, for which the areas of law themselves appeared unprepared, is not surprising given the significant changes which CTT introduced. The CTT encompassed several major points of reform, not limited to, as discussed *infra*, the introduction of a unified transfer tax system, encompassing both *inter vivos* transfers and transfers upon death.⁸⁷ This ‘unified’ system included other provisions intended to minimize the sorts of ‘distortions’ also experienced, by way of example, in the US system, which taxes gifts and inheritances separately.⁸⁸ The CTT ultimately was designed to extend beyond its initial reach, and to presage deeper changes ahead for the system for taxing capital.

In this, it was very much a tax of its era. The unification of systems for taxing capital also was recommended in the US, prior to the introduction of the TRA 1969, by the American Law Institute.⁸⁹ Other proposals by the ALI which were mirrored in the structure of the Capital Transfer Tax included the principle that capital should be ‘taxed once in a generation’, an objective which was achieved by taxing the end of an interest in possession.⁹⁰ In fact, there were a number of interesting parallels between the reforms introduced with CTT, and reforms to estate and gift taxation that were introduced with the Tax Reform Act of 1969.⁹¹ The UK tax system did not possess a form of gift taxation, such as might be recognized in the US, until 1974.⁹² Maudsley described the UK system (in comparison with the US system) as operating thus: ‘[t]he [UK] fiscal system operated with few, but very severe, taxes, and there were well-known, widely practiced, and widely accepted loopholes at least in the estate duty system – the death tax.’⁹³

As mentioned *infra*, there was another, deeper change anticipated for the UK. The Labour government planned ‘equalize wealth,’ in two stages: first, by the introduction of CTT, and, secondly, by the introduction of a wealth tax, which (Maudsley wrote in 1975) was expected in 1977.⁹⁴ In the end, the Labour Government abandoned this plan.⁹⁵ Glennerster has conducted archival research into the reasons behind this change of plans.⁹⁶ His motivation for this research is described as starting from the point that, the last time a Labour government included the introduction of a wealth tax into its election platform, it abandoned the effort.⁹⁷ Glennerster suggests that the reasons for this abandonment are historically significant, and indeed describes the period 1974–1979 as a ‘post war break point’.⁹⁸ Wages were rising at significantly lower rates than inflation, which conflagrated to significant pressure being placed on Prime Minister Harold Wilson’s government.⁹⁹ As Glennerster explains, ‘[t]o win trade union agreement to some kind of wage restraint the Labour Party agreed, before the election, to introduce a range of measures that would “fundamentally redistribute income and wealth.”’¹⁰⁰ This package was to include initiatives in pensions, child benefits and other social policy changes.¹⁰¹

⁸⁷ Ronald Maudsley, ‘British Capital Transfer Tax, The’ (1975) 13 *San Diego L Rev* 779, 780.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, 779–781.

⁹⁰ *Ibid.*, 781.

⁹¹ *Ibid.*, 780.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*, 784.

⁹⁵ Glennerster, above n 26, 233.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, 3.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

THE CONTRIBUTION OF THE CTT, AND HAYTON AND TILEY

Glennerster's research reveals that the impetus to introduce these changes simply lost momentum. Perhaps the energy that had driven the significant changes in the field of capital taxation, for at least 10 years, was waning. Certainly, by 1974, a great deal had changed. Capital transfer tax was part of a major shift in the taxation of capital in the UK that had been occurring since capital gains taxation was introduced in 1965.¹⁰² Before 1965, the United Kingdom had only two forms of taxation on capital: stamp duty and estate duty.¹⁰³ By 1975, there were four taxes on capital: stamp duty, CGT, and (courtesy of CTT) a gifts tax and a tax from transfers upon death.¹⁰⁴ Indeed, as mentioned above, at that point in time, a fifth form of taxation upon capital (a wealth tax) was anticipated as a virtual political certainty.

Hayton and Tiley suggested that, '[i]n an ideal tax system the tax burden would be fairly shared between the different sections of the community and acknowledged to be so shared by those sections and the taxpayers would send in the tax due from them without being asked for it.'¹⁰⁵ They continued, '[t]he United Kingdom has not yet achieved this ideal.'¹⁰⁶ The CTT, they suggested, was a response to be anticipated against this background. It, perhaps, was an imperfect response to an imperfect tax structure. The challenge, Hayton and Tiley imply, is that in the midst of significant changes to the taxation of capital, the deficiencies of income taxation were insufficiently considered.

What is the legacy of CTT? Hayton and Tiley's text is contemporaneous, and does not address this question. More recently, Lee argued that there were a fundamental problems with the tax itself; and, indeed, that the days of CTT 'were not happy ones'.¹⁰⁷ She places emphasis on accounts from the era suggesting that one reason for the CTT's apparent, comparatively low yield was that a significant number of wealthy taxpayers may have fled the country to avoid the tax.¹⁰⁸ The essential problem, Lee suggests, was with the lifetime transfer element of the tax. This is the point at which CTT failed, and remains an important point of reference for assessment of modern day amendments to inheritance tax.

Of course, the justification for the lifetime transfer element of CTT was the need to address the ease with which a charge triggered solely by death might be avoided. And that, Hayton and Tiley argued, was the entire point, as '...one can say that the argument for taxing capital is that a tax based on income, particularly as defined in the United Kingdom, is inequitable in that it fails to tax many receipts but taxes those it does catch at very high rates.'¹⁰⁹ A CTT, thus, made up the difference, and caught 'receipts which had fallen through the income tax system'.¹¹⁰ This introduces the question of whether a revived discourse should focus not on the value of inheritance taxation, thus, but on the challenges faced by income taxation?

On this point, it is interesting to note that, in another proposal from the 1960s and 1970s, Simons investigated whether it might be possible to avoid the issue completely, by

¹⁰² Hepker and Whitehouse, above n 6, 7.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Hayton and Tiley, above n 2, 15.

¹⁰⁶ Ibid.

¹⁰⁷ Natalie Lee, 'Inheritance tax – an equitable tax no longer: time for abolition?' (2007) 27 *Legal Studies* 678, 680.

¹⁰⁸ Ibid., 684. The question of the overall yield of CTT was addressed in Parliament in 2012: HC Deb, 12 Jan 2012, c390W.

¹⁰⁹ Hayton and Tiley, above n 2, 16.

¹¹⁰ Ibid.

integrating, or subsuming, estate taxation within other forms of tax.¹¹¹ Simons supported an integration of income, death and gift taxes, but his proposal did not receive much support.¹¹² Unsurprisingly, the response to an approach which, amongst other issues, would eliminate a great deal of potential for instrumentalism was mixed, and '[t]ax scholars were sceptical of the idea that a one-shot transfer of wealth (a stock) should be mixed with the annual flow of income.'¹¹³

The importance of Simons' investigations is that they present the possibility of side-stepping the inheritance tax debate entirely, by effectively hiding it behind other forms of taxation. As Goldberg reminds us (in another context), sometimes the important question is the end, not the means.¹¹⁴ If it ever were possible in the modern era of sensitivity to stealth taxation to 'hide' estate taxation, would the presumed attendant absence of public debate of inherited wealth represent a loss? One of the reasons that Simons' proposal was rejected is that it did not allow the tax system to treat death as a significant, or special, event; *i.e.*, it did not permit a taxpayer's aggregated estate to be assessed at the end of her lifetime, within a rate structure that acknowledges death as a special circumstance.¹¹⁵ As an assessment of the economic sum of a taxpayer's life, a capital transfer tax has a philosophical advantage, if also the challenge (for its popularity) of its burdens landing upon taxpayers still living.¹¹⁶

CONCLUSION

Capital transfer tax (CTT), as the 1978 Hayton and Tiley text began, was 'a direct tax on capital', but with a difference.¹¹⁷ As this chapter has explained (and indeed as Hayton and Tiley explained in the beginning of their text), it applied to *inter vivos* transfers made after 26 March 1974, and to transfers on death occurring after 12 March 1975.¹¹⁸ In this, it was a thoroughly new kind of tax. As it applied to lifetime transfers, it differed from an estate tax; and, as it focused on the decedent (and not a person inheriting an estate), it could not be called a succession duty.¹¹⁹ It did not apply to the entirety of a capital gain, and thus could not be called a capital gains tax, but simply because capital gains tax may have applied would not have prevented CTT from applying as well.¹²⁰ Additionally, CTT did not apply to 'stationary' wealth, so it could not be described as a wealth tax. CTT did not fit within existing intellectual categories, and appeared to create a category of its own.

These points were covered in the introduction to the second edition of Hayton and Tiley's fascinating 1978 text. Given the distinguished backgrounds of its co-authors, the text always promised to remain of historical interest. This chapter argued that the text, and indeed the capital transfer tax, should be reconsidered, for two reasons. First, the intellectual fervour surrounding taxation of inheritance, and striking burst of scholarship that occurred in the first decade of the twenty first century has quietened, struck mute by the impact of the recession.

¹¹¹ As related in H M Groves, 'The Canadian Tax Report and the American Tax System' (1968) 379 *The ANNALS of the American Academy of Political and Social Science* 94, 97.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ F T Goldberg Jr, 'From FDR to W: The IRS as Financial Intermediary' (2002) 29 *Ohio Northern Univ L Rev* 1, 28.

¹¹⁵ Groves, above n 111, 97.

¹¹⁶ Groves relates 'what happened next' in his late 1960s analysis, which was, essentially, that '[t]he death tax in particular fell upon evil days.'. It became very easy to avoid, and '[i]ts contribution to the revenue dwindled from small to (almost) negligible.' The worst of the 'host of problems' with which it was 'beset', however, was that '[a]bove all the death tax encountered stagnation in public opinion.' See *ibid.*, 16, 97.

¹¹⁷ Hayton and Tiley, above n 2, 1.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

This chapter proposed that the UK's experience with CTT did not receive the attention it deserved within that scholarship. Forging a place for CTT within this scholarship carries the potential of reviving the discourse. Secondly, the Hayton and Tiley text on CTT complements recent scholarship into the historical place of the failed introduction of a wealth tax by the same government. CTT and the wealth tax were dual parts of a single project.

Ultimately, the value of considering, again, the capital transfer tax, on its own terms, is suggested by some of the observations offered by Hayton and Tiley. Their text sought to explain how CTT operated, and is rich in detail and illustrative examples, but they suggested that the tax could not fully be understood unless it was considered as both a product of, and a part of, the system in which it operated. It is distinct from other texts of the era, largely because it devotes few if any pages to criticism of the belaboured legislative process which produced it. Perhaps the authors felt that this territory already was well covered, as this chapter's analysis of the writings of Hepker and Whitehouse, and Wheatcroft and Hewson, amongst others, may suggest. Their text, by comparison, delves into more fundamental questions about the nature of the relationship between income taxation and capital taxation; and, strikingly appears to express more concern about the failure of the former than the latter.

They wrote in a time when the limitations of an eighty year old estate duty led to a radical legislative experiment. There are some interesting points to notice about this legacy. For example, the seven year survival rule was abandoned, and, then, ultimately, revived. Additionally, the relationships between trust law, property law and taxation law was challenged by the very first House of Lords case decided under the CTT legislation (and the case appeared to raise questions which ultimately were not answered). Perhaps the most interesting point of all to notice about this legacy, however, rests in the promise analysis of CTT may hold for consideration of the modern inheritance tax. As the pre-recession interest in inheritance taxation looks set for revival, the CTT, at the very least, sets out significant points of reference that a productive revival might consider.