The Offshore Tax Planning Review

CASE NOTE
Marshall v Kerr [1993] STC 360

The Facts

The testator died neither domiciled, resident nor ordinarily resident in the UK. Under the terms of his will, one half of his residuary personal estate was given to his daughter ("the taxpayer") absolutely. The taxpayer subsequently executed an instrument of family arrangement, the effect of which was to settle the property which she received under her father's will upon certain trusts. The taxpayer elected for the instrument to fall within FA 1965 s.24(11). The sole trustee of the trusts was a company which was not resident in the UK. The trustee realised capital gains and made capital payments to the taxpayer at a time when she was resident in the UK. The Revenue assessed the taxpayer to capital gains tax on the basis that the capital payments were caught by the provision of FA 1981 ss.80-85 ("the Trust Gains Provisions"). The taxpayer appealed against those assessments on the grounds that the Trust Gains Provisions did not apply.

The Issue

Shortly stated, the issue is whether, for the purposes of the Trust Gains Provisions, the "settlor" of the trusts created by the instrument of family arrangement was the testator or the taxpayer. If it was the testator then the Trust Gains Provisions would not apply, as he was non-UK domiciled when he created the trusts (i.e., on death) and in every year of assessment thereafter (because he was dead) : FA 1981 s.80(1). However, if the taxpayer was the settlor, that let-out would not be available.

There is no doubt that in reality the taxpayer was the settlor. However, it was claimed on behalf of the taxpayer that the effect of FA 1965 s.24(11) was to deem the testator to be the settlor for capital gains tax purposes, including the Trust Gains Provisions. Therefore, the question which the Courts had to decide was the true extent of the deeming in FA 1965 s.24(11).

The Lower Courts

The taxpayer was successful in her appeal to the Special Commissioner. However, Harman J reversed that decision when the case was heard in the High Court (see [1991] STC 686). The Judge felt that the purpose of s.24(7)(11) was to deal with the computation of gains and to exclude from charge gains which would otherwise accrue to a person who entered into a deed of family arrangement. There was, therefore, no basis for extending it to resolve the question of the identity of the settlor for the purposes of FA 1981 s.80. The taxpayer appealed.

The Court of Appeal

The Court of Appeal identified the two crucial provisions as being FA 1965 s.24(7) :

> "On a person acquiring any asset as legatee -
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> (a) no chargeable gain shall accrue to the personal representatives, and
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> (b) the legatee shall be treated as if the personal representatives' acquisition of the asset had been his acquisition of it."

and s.24(11) :

> "If not more than two years after a death any of the dispositions of the property of which the deceased was competent to dispose, whether effected by will, or under the law relating to intestacies, or otherwise, are varied by a deed of family arrangement or similar instrument, this section shall apply as if the variations made by the deed or other instrument were effected by the deceased, and no disposition made by the deed or other instrument shall constitute a disposal for the purposes of this Part of this Act."

It may appear at first sight that the subs.(11) hypothesis is limited in its effect to s.24. However, the Court of Appeal found that the bridge between subs.(11) and the rest of the capital gains tax provisions was

subs.(7). This is because the subs.(11) hypothesis clearly applies to subs.(7). For instance, the recipient under the deed of arrangement must be the "legatee" for the purposes of subs.(7). It was accepted by the Crown that subs.(7) applied generally for all capital gains tax purposes, including FA 1981 s.80, and so subs.(11) must have the same general effect.

The Court of Appeal, therefore, decided that the testator was deemed to be the settlor of the trusts for the purposes of FA 1981 s.80 and so the taxpayer's appeal was allowed. It is understood that the Revenue are seeking to appeal to the House of Lords.

Comment

This decision is, of course, significant for its direct implications. Apart from TCGA 1992 s.87 (previously FA 1981 s.80), it will affect both the offshore (TCGA 1992 s.86) and onshore (ibid s.77) settlor provisions which both require one to identify the "settlor" of a settlement. In the case of the two latter provisions, the deemed CGT charge is on the "settlor". Therefore, neither set of provisions will operate if the settlor is dead. By contrast, s.87 will only be disapplied if the deceased "settlor" was either non-UK domiciled or neither resident nor ordinarily resident in the UK at the date of his death. The decision also has some wider importance, as it contained an attempt by Peter Gibson J to set out the principles to be applied in construing a deeming provision. The relevant paragraph is to be found at page 366c-e:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

This is important to tax practitioners as fiscal legislation is very heavy with deeming provisions. This approach may be important, for instance, in the argument concerning the loophole said to have been left by the interaction of FA 1988 Sch 10 and FA 1981 s.80.

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