The Offshore Tax Planning Review

IN DEFERENCE TO ROBERT VENABLES QC: *Yuill v Wilson* Revisited

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Robert Venables QC, in his article *Double Taxation Treaties as a Defence to Taxes Act 1988, Sections 775-777* (4 OTPR 2 p 129) refers to *Yuill v Wilson* (1980) 52 TC 674. In that case I was leading Counsel for Mr Yuill. Robert Venables describes me in agreeably flattering terms but (p 132) suggests that, as I do not devote the whole of my time to Revenue matters, I might "understandably have missed" the "somewhat esoteric" point expounded in his article.

That point, as applied to the *Yuill* case, would have depended on the Guernsey Double Taxation Arrangement of 24th June 1952. So far as relevant this, and particularly Article 3(2), is in the same terms as the Jersey Arrangement to which Robert Venables referred. We recognised some problems in Article 3(2). Neither Ceville nor Mayville (the Guernsey companies which bought, and then, later, sold the Hartlepool land) had a permanent establishment in the UK. Each of them, was carrying on a "Guernsey enterprise" if what it was doing was "an industrial or commercial enterprise or undertaking carried on by a resident of Guernsey": see Article 2(1)(i). If each company was carrying on a *commercial* enterprise, there might nevertheless have been argument as to whether it was a "resident of Guernsey". But there was, in relation to Article 3(2), the further question: whether the gain realised by each company's sale of the Hartlepool land formed part of its "commercial profits".

Neither company was trading or intended to trade in land. Each was a non-trading, investment holding company. Advice from Guernsey was that the profit or gain realised by each company when it sold its land was not income or profit taxable in Guernsey. The profit was of a capital nature, not of a revenue nature, and not chargeable to tax in Guernsey. In 1952, the date of the Guernsey Arrangement, capital gains tax had not been introduced in the UK and "profits" for tax purposes, in England or in Guernsey, were taxable only if of revenue character. In Guernsey capital gains have remained untaxable.

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All those and other matters arising out of the Guernsey Arrangement were considered and, indeed, debated. My recollection is that we did consider Robert Venables' "somewhat esoteric" proposition that, if "profits" were realised by the Guernsey companies' sales, those "profits" might arguably be exempt from any income tax which might be imposed under what was then s.488 of the Taxes Act 1970, notwithstanding that any charge on such "profits" in the UK would be on Mr Yuill and not on either of the Guernsey companies. The concept of "profits" as for this purpose a sort of disembodied parcel independent of the person who made the profits was intellectually delightful. In the end, however, it seemed to us that in the particular - special and confusing - circumstances of the *Yuill* case, arguments based on Article 3(2) should not be pursued. They did not have a sufficient practical chance of success; would have represented an additional complication in an already complex case; and, in our judgment, would not have fitted in well with, and might even have damaged, other more promising arguments. In our shoes Robert Venables might have decided otherwise; and the "somewhat esoteric" point might have triumphed. Advocates, in deciding how to argue a particular case, may be mistaken in any of their strategic or tactical decisions. I am, however, confident that, in that particular respect, we did not make a mistake although, almost inevitably, there were other aspects of the case on which, with hindsight, I would prefer to have made some different choices.

In suggesting that we might have missed his "somewhat esoteric" point, Robert Venables was perhaps a bit unkind to my formidable, exclusively tax-committed, junior (Carl Kennigsberger). For myself I plead guilty to devoting much of my time to non-tax matters; and, unaided, even my obsessive diligence might perhaps have missed the point.

In fact our preparation for Mr Yuill's case was rigorous. The assessed tax bill, as adjusted before the Commissioners, was over £1 million. There had been no previous judicial exposition of s.488 of the Taxes Act 1970.

One conspicuous failure in our presentation of facts and our advocacy concerned the sale of the shares in Ceville and Mayville (the two Guernsey companies). The purchaser was a Guernsey company, Valnord Investments Ltd. Its shares belonged to another trust from which - as stated in evidence by Mr de Putron (one of that other trust's Trustees and also a director of the Valnord company) - Mr Yuill and his family could not derive any benefit.

The sale of the Ceville and Mayville companies was quickly and very bitterly regretted by Mr Yuill and his family and, indeed, by Yuill advisers. Shortly after the sale, there came a wholly unexpected planning decision allowing development of the Hartlepool land. That decision came from the Secretary of State on an appeal which had been the subject of great delay. The very confident advice of the experts dealing with the appeal had been that it had no chance at all of success but that the terms in which it was dismissed might be useful when fashioning other applications for development of other land by the Yuill companies. Meanwhile

there was no point (the experts said) in delaying any decisions about the future of the land involved in the appeal.

So the Ceville and Mayville shares were all sold; and in the Yuill camp there was shock and dismay when, shortly afterwards, success in the appeal was announced. Because of the sale, the benefit of that success would not accrue to the Yuill trusts or family but would all go to the purchasing trust, Valnord, from which the Yuill family would not benefit. After some inevitable recriminations, negotiations were opened with Ceville and Mayville (now in Valnord ownership) and the land was bought from them by a Yuill company (well placed to be the builder/developer of the land) at prices which *conferred great financial benefit on the Valnord trust and beneficiaries*. But for the bitterly regretted sale to Valnord, *all* the benefit would have been for the Yuill family.

As Counsel advising Mr Yuill we had no doubt that the shock, dismay and regret were real; that the sale of Ceville and Mayville shares to Valnord was not a device and, as things quickly turned out, was to the substantial disadvantage of the Yuill family. Counsel *can* be misled by their own client. We were not misled. We realised, nevertheless, that because of the timetable of events we might have great difficulty in dissuading the Commissioners and Judges from an impressionistic but (as we knew) mistaken view that the sale of the Ceville and Mayville companies was part of pre-conceived tax avoidance planning.

At the hearing before the Commissioners Counsel for the Revenue stated that the Revenue was interested in defeating the taxpayer's appeal and supporting the assessment only if it could satisfy the Commissioners that the Yuill family was interested in, or might benefit from, the Valnord settlement.

Mr de Putron, a well-known Guernsey professional of impeccable reputation, gave evidence that the Yuills had no such interest or possibility of benefit. He was not, however, willing to name the Valnord settlor nor to give more information about the Valnord trusts or beneficiaries. He said that such information was confidential and that neither the Valnord settlor nor the Valnord trustees had authorised further or, indeed, any disclosure of the affairs of the Valnord trust. The Revenue did not contradict this evidence of Mr de Putron; and my recollection is that Revenue Counsel did not pursue the point in cross-examination. Indeed, it is difficult to see what he could have done by way of cross-examination, or to satisfy the Commissioners that the Yuills *could* benefit from the Valnord trust, without adducing direct evidence to rebut what Mr de Putron had said.

We pointed out that the Revenue had sources of information denied to us. Article 10 of the Guernsey Arrangement provides for exchange of information by the Guernsey and UK tax authorities. The Revenue did not attempt to obtain any information about the Valnord trust. Instead it promoted the impression or suspicion, based on the timetable and coincidence of the sale of Ceville and Mayville shares and the arrival of planning permission, that Yuill benefit from the

Valnord trust must have been a possibility; and that possibility had not been disproved! But, in Mr de Putron's evidence, we had provided proof. The Revenue provided none although, if they failed to *satisfy* the Commissioners on this point, they professed not to be interested in winning the case!

That point had important effects upon the treatment of the case before the Commissioners and the courts. Certainly, before the Commissioners, we made some considerable cuts in the presentation of our case and argument, accepting - on the basis of the Revenue statement - that the crucial issue was whether Yuills could benefit under the Valnord trust! That *was* a mistake which, in the courts, we could not correct. It did not directly affect the argument about s.488, but it had an indirect effect and importance because of the judges' impression that the coincidence was too extraordinary to be real. Templeman J expressed irritation that he was not to be told more details, including more information, about the Valnord trust (which I could not provide although I explained what had happened before the Commissioners). In the House of Lords Counsel for the Revenue actually voiced the speculative suggestion that the Valnord settlement might have been one under which Yuill family members could and would be added to the beneficiaries! So, probably, at the backs of the minds of all the judges concerned, the truth - that the sale of the Ceville and Mayville shares had been a disaster for the Yuills - had no place at all. *That* was a failure of advocacy!

After we had lost at the first appeal stage the Revenue required the tax (over £1 million) to be paid. The Revenue rejected the suggestion, presented by leading Counsel in person to the Board of Inland Revenue, that the tax should be left unpaid pending the outcome of the appeals, which were likely to continue to the House of Lords. If Mr Yuill won, requiring him in advance to pay such a large sum of tax wrongly claimed would be seen to have been very unjust. Rejecting that reasonable suggestion was, I thought and think, oppressive. It represented another failure of advocacy!

There was, however, compensation for that failure. Mr Yuill had to raise the money. Public flotation of Yuill company shares or a take-over of the Yuill companies could not be arranged while the tax litigation continued. The only available method of raising such a large sum was the sale of Yuill company shares by Mr Yuill to a family settlement at a valuation. The Revenue were unimpressed by the suggestion that, if the appeals were won, such a sale would have been imposed unfairly on Mr Yuill. So, under protest on behalf of Mr Yuill, the Revenue were invited to approve the terms of the sale as being at the (then very depressed) full market value. Approval was given; and the arrangement was in fact a quite remarkable achievement in family tax planning.

At the end of that line of appeals, in the House of Lords, the assessed tax was reduced from over £1 million to £1,147, and the Revenue was ordered to pay all Mr Yuill's costs. Mr Yuill had won; and, although a general should never boast

of his army's successes, it was a much greater victory than appears from the mere reading of the reported case.

An impression from reading the House of Lords' judgments is that the victory was temporary; that, in practical terms, the tax would be collected, by instalments, for *subsequent* years of assessment. That impression would overlook the advantages achieved and mistake the reality. After the House of Lords decision we were in a position to start again; to try and remedy some of the defects in the facts as found for the original case (there being no estoppel or other principle requiring us to assume, in an appeal against any succeeding year's assessment, that the facts had been correctly so found); in such new appeals, to avoid some of our previous failures of presentation and advocacy; and, because money to pay the maximum possible tax had already been raised (at the Revenue's lawful but unfair insistence), battle renewed could be without fear of running up any new liability for interest on tax. Any student of tactics would detect much potential opportunity and comfort in that extraordinary situation; and, for my part, perhaps because of my failure to devote myself exclusively to tax matters, I did not feel that this run through the courts had produced an exposition of s.488 which added greatly to the opaque language of that strange section. *Verbum satis sapienti* or, briefly, *Verb sap*!