The Offshore Tax Planning Review

TAXING ISSUES IN PLANNING FOR THE FOREIGN ELEMENT

Richard Rees-Pulley, Accountant[1]

Volume 2, 1991/92, Issue 2

I have recently read the above issue of *The Offshore Tax Planning Review*. Two articles in particular caught my attention:-

1. Section 739: A Conventional Problem?

2. When is Remittance not a Remittance?

The point raised in the first article has been the subject of debate with my colleagues and an alternative analysis of the position is set out below. The issue discussed in the second article is in my view crystal-clear, and the conclusion expressed in the article cannot be allowed to stand on a proper analysis of case law. As the issue of remittances is of great practical import, it is extremely important that the view expressed in the article is not given credence by being left unquestioned. To this end comment is also provided below on why the relevant case law indicates a contrary view, namely that remittances in kind are not taxable merely due to their importation to the UK.

Section 739: A Conventional Problem

The article considered the hypothetical situation of a married couple where the husband was UK domiciled and the wife was non-UK domiciled. The husband made an outright gift of £100,000 cash which the wife deposited in the Channel Islands. The alternative view, on the basis of the hypothetical example, is that the wife is taxable on the deposit interest on the remittance basis and the husband is not liable under s.739 TA 1988. The following reasons are put forward for this view:

[1] Richard Rees-Pulley FTII FCA, Partner, Ernst & Young, Head of Private Client Services, Lonsdale Chambers, 27 Chancery Lane, London WC2A 1RY
Tel: (071) 931 6688 Fax: (071) 931 6705

(a) The charging provisions are contained in s.739(2)(3) whereby income of the "overseas" person is deemed to belong to the individual who is considered the "transferor".

(b) In the straightforward situation where the transferor has power to enjoy, receive or is entitled to receive a capital sum, then income of the "overseas person" is deemed to belong to the transferor.

(c) Where the transferor is not within (b) then s.742(9)(a) is in point and it is necessary to see if the spouse of the transferor has power to enjoy, receives or is entitled to receive a capital sum. If this is the case then the income of the overseas person is deemed to be the transferor's spouse's income. Therefore the remittance basis is available under s.743(3).

Accordingly, in s.739(2)(3) "an individual" is read as referring to the transferor or his/her spouse and "that individual" as referring to the person targeted as falling within the relevant subsection. Where the transferor and his/her spouse have power to enjoy, etc., then in our view it is the transferor who is liable to charge, there being no provision within s.739 to allocate or offset multiple liability. In other words s.742(9)(a) is being read as a reference to an individual or is alternatively a reference to the individual's spouse.

The above analysis is something of a departure from the typical application of anti-avoidance provisions whereby an individual is caught if either he or his spouse is involved, e.g., Part XV TA 1988 settlor anti-avoidance provisions. However, it is difficult to reconcile the normal anti-avoidance approach, namely that only the transferor is caught by s.739, with the decision in *Vestey v IRC* [1980] STC 10. The existence of s.742(9)(a) was pointed to as a strong indication that the *Congreve* decision was doubtful and plays an important role in the judgment of Viscount Dilhorne:

Page 26, Paragraphs d and e

> "Lord Simmonds in the course of his speech did not refer to [Section 742(9)(a)]. It states inter alia:- 'For the purposes of this section - (a) a reference to an individual should be deemed to include the wife or husband of the individual...'."

These words have considerable significance and importance if "such an individual" means an individual ordinarily resident in the UK who has sought to avoid income tax by the transfer of assets abroad. If the decision in *Congreve* is right, it is not easy to attach significance to them. Counsel for the Crown suggested that they might have been inserted to cover a case where a husband and wife jointly but not separately had control of a company. I find it difficult to accept that this provision was inserted by Parliament to meet that situation. I think it is much more likely that it was inserted to secure that the wife or the husband of the transferor was brought within the scope of the section and I consequently regard this provision as an indication that by "such an individual" is meant "an individual who has sought to avoid tax by the transfer of assets abroad."

Page 27, Paragraph f

> "None of these consequences would arise if the person deemed to have the income of the non-resident were the individual who had sought to avoid income tax and, by virtue of [s.742(9)(a)], his wife or husband."

Page 27, Paragraph g

> "The choice lies between the section having a limited application, applying only to the individual who has sought to avoid income tax and his or her spouse and a wide application..."

Page 31, Paragraph h

> "If the conclusion I have reached as to the construction of the section is accepted, then there is indeed a gap to be filled for then the section only applies to the individual who has sought to avoid tax and to his or her spouse...".

Given that the scope of s.739 was the key element in the *Vestey* decision, it is suggested that if only the transferor was liable, on the basis that he or his spouse fell within s.739(2)(3), this would be plain from the judgments. However, the views expressed in the House of Lords in *Vestey* appear to indicate that it is the transferor or his/her spouse who is caught.

Applying the above analysis to the example in the article removes the anomalies described on the basis that:

1. If s.739 applies it merely deems the wife's income to be her own.

2. There is no room for s.739 to apply where assets remain within the ownership of the transferor or his/her spouse; the "overseas" person to whom income is payable must be another person.

In summary, the point that is being highlighted is that it may not be technically correct to say that if the spouse of the transferor has power to enjoy then the transferor is deemed to have power to enjoy. In such a case it is argued that the spouse of the transferor is "that individual" for s.739(2)(3) purposes.

Section 742(9)(a) applies for s.740 purposes also. It is noted that s.739(2)(3) deem income to be income of **that** individual. Section 740 refers to "an individual" (s.740(1)(3)(5)(6)) and "the individual" (s.740(2)(3)). In s.742(9)(a) reference is to "an individual" and "the individual". Again applying the analysis for s.739 to s.740 it is submitted that the individual in s.740 is the person who can directly or indirectly receive a benefit out of relevant income. This person, the individual who can so benefit, is liable under s.740 irrespective of whether he or his spouse is the recipient of the benefit. If the recipient spouse is also a person who can receive a benefit from relevant income, then s.740(2) applies to tax the recipient rather than the non-recipient spouse.

By this point the reader is no doubt considering whether it is worth planning for mixed domicile families and the purpose of these comments is not to delude readers that pitfalls and anomalies do not exist - extreme care must be applied in all such cases.

When is Remittance Not a Remittance?

The basics of the Case V remittance provisions, as outlined in s.65(5)-(9) TA 1988, require that income tax is chargeable on the full amount of the actual sums received in the UK from:

1. remittances payable in the UK;
2. property imported;
3. money or value arising from property not imported;
4. money or value so received on credit or on account in respect of any such remittances, property, money or value brought or to be brought into the UK;
5. certain other cases involving debts, etc.

It is difficult to see that if foreign income is applied in buying a car outside the UK and that car is then imported to the UK and enjoyed in the UK, an actual sum has been received in the UK. "Actual sum" implies the receipt of money or something looked upon as akin to money. The requirement is that an actual sum is received in the UK from property imported. Reviewing case law it is quite clear that this is the approach adopted by the courts. The article states that in the case of *Scottish*

Provident Institution v Farmer (1912) 6 TC 34, the only argument was that the interest was earned not in the year of assessment but in an earlier year. It is then stated at the end of the article that "none of the cases cited by Professor Whiteman is directly in point". Respectfully, these conclusions are disagreed with and in the *Scottish Provident Institution* case we refer to the Joint Minute of Admissions agreed between the Institution and the Surveyor of Taxes at page 35:

> "The said sums of £129,019 and £26,557 represented interest which had accrued to the Institution in the United States of America and Canada and had been paid and invested there during the year ending 31 December 1907 in the purchase of bearer bonds which were thereafter transmitted to this country for safe custody. In respect, however, of the decision in the case of the *Scottish Widows' Fund v Surveyor of Taxes* 1909 Session Cases p1372 [5 TC 502] to the effect that the transmission of such securities was not equivalent to a remittance of the interest to the United Kingdom, the assessment is no longer maintained on its original ground, but is maintained to the extent of £15,681 on the ground set forth in the immediately succeeding paragraph and in respect of sums received in the UK in the year ending 5 April 1909 and not during the year ending 31 December 1907."

The £15,681 represented US interest used to purchase bonds in the US which were then dispatched to the Institution's head office in the UK in July 1907. These bonds were sold and the proceeds received in the UK in the tax year ending 5th April 1909. While it is accepted that this case concerned arguments as to the taxing of the sums received in 1907 or 1909, clearly the whole case points to the fact that it was accepted that the importation of the bonds bought with reinvested foreign income was not the receipt of a sum giving rise to remittance:

Lord President, Page 37

> "There was a case before your Lordships in which the Crown intended that the bringing of the corpora of these bearer bonds was equivalent to the receipt of money, but your Lordships held otherwise."

In summary, the *Scottish Provident Institution* case clearly indicates a consensus between all parties and the Court that the bringing in of foreign income in the form of an asset is not a remittance of a sum for the purposes of Case V charging.

The review of *Scottish Provident Institution* begs consideration of the decision in the *Scottish Widows' Fund v Surveyor of Taxes* 5 TC 502.

The Facts

Again the taxpayer and the Surveyor of Taxes agreed a Joint Minute of Admissions. The Society was based in Edinburgh and received coupon interest on various US bearer bonds. The bonds were held in Edinburgh together with their attached interest coupons. These coupons could be presented for payment mainly in the US. The Society's practice was to send such coupons as were not cashed in the UK to the US to arrive there before they fell due. The interest collected by the Society's US agents was used, as directed by the Society's head office in Edinburgh, to purchase further US bearer bonds and mortgages. These bonds and mortgages were then sent to the Society's head office in Edinburgh.

The Contentions

The Society contended that money must be actually received in the year of charge in the UK, not necessarily *in forma specifica* but in the form of a remittance recognised as such by businessmen.

The Surveyor of Taxes contended that the importation of the bonds and mortgages together with the argument that the interest coupons were equivalent to money or convertible into money represented the receipt in the UK of the coupon interest.

The Decisions

The Commissioners decided that remittance had occurred in respect of these coupons that could be readily sold in the UK. On appeal the case was heard by the Court of Session and decided in the Society's favour. It is clear from the Lord President's judgment that he considered that a remittance to the UK occurred where the money was brought over in specie, i.e., actual coined money, or sent in the form which, according to the ordinary usages of commerce, is one of the known forms of remittance. A bearer bond was not an ordinary form of remittance, it was an asset whose money value fluctuated. To suggest in the article that this argument by the Lord President proves too much and indicates only sterling remittances could ever occur is absurd. The transfer of US dollars is the transfer of money, its value remains constant in dollar terms. Given that Case V by definition will be dealing with mainly foreign currency sums, the Lord President was clearly indicating that for a remittance to occur these sums of foreign income must be communicated to the UK in hard cash form or in a manner used to transfer such money sums, e.g., bank drafts, cheques, etc. The sterling equivalent of a sum of money is irrelevant.

Referring to the case of *Thomson v Moyse* 39 TC 291 it is noted that on p330 Lord Reid stated that the point in the *Scottish Widows* case was that no money was in fact received in the UK (see also Lord Radcliffe at p336). Lord Denning at p340 describes sums in coins or dollar notes or treasury notes, and the other forms of money recognised by commercial men, such as bills of exchange, cheques, promissory notes or cash at bank.

Lord Denning also refers to the judgment of Lord Lindley (see *Gresham Life Society v Bishop* 4 TC at p476).

From the above it is clear that it is accepted that the *Scottish Widows* case did decide that on the basis that no sum of money was received in the UK, no remittance occurred. The importation of bearer bonds not being a sum of money in the UK, giving the expression "sum of money" a normal commercial meaning, was not a taxable remittance, it was reinvested money. Subsequent case law reinforces the view that sum means sum of money or what is in commercial terms a sum of money. The importation of a car is therefore clearly not a sum of money unless sold or used to discharge a liability. To suggest that Wrottesley J in *Walsh v Randall* (1940) 23 TC 55 would have held that the importation of a car was a remittance cannot be sustained. Surely he would have held that the car, although a capital item, represented reinvested income and therefore any receipt in the UK of a sum of money *from* the car was a remittance. The *Walsh* case concerned the issue of whether, in computing tax, sums paid to the hospital at the request of Mr Walsh represented such monies brought into this country and therefore a taxable remittance. The case merely confirms the issues that foreign income is not washed out of charge by reinvestment and that to avoid a remittance alienation of foreign income must occur before the income is received in the UK. Further, the case concerned a transmission of funds to the UK which in normal commercial terms could be said to give rise to a sum of money. During the case the Judge therefore did not need to consider the *Scottish Widows* case nor is it listed in the authorities cited. In short, it has nothing to do with the importation of non-cash assets and is neither direct nor indirect authority for opinions on that point which had already been specifically decided upon elsewhere.

With respect, it is considered that the original article indicated a confusion in the author's mind in that the wide range of circumstances which can give rise to a sum in the UK were being argued to give rise to a remittance by themselves.