
The Offshore Tax Planning Review

LETTERS TO THE EDITORS

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Dear Sirs,

REVENUE BITE THE HELPING HAND A CONSIDERATION OF IR STATEMENT OF PRACTICE 5/92

In his article (3 OTPR (1992/93) 75-79) David Ewart considered the Inland Revenue Statement of Practice 5/92, with particular reference to the comments in the Statement of Practice relating to the 'administrative expenses' proviso (contained in paragraph 29 of the Statement).

The second part of Paragraph 29, which David Ewart rightly describes as very unclear, provides that a capital expense paid out of trust income is not to be treated as a provision by the income beneficiary provided that:

'The trustees borrow money from the income account which is subsequently restored, along with interest over the period of the loan. The appropriate rate of interest is considered to be that which a Court of Equity would order on the replacement of trust income'.

The three circumstances identified by David Ewart where trustees can borrow money from the income account are as follows:

- (i) Where there is a specific power for them to do so in settlement;
- (ii) where there is a short term emergency due to lack of capital liquidity; or
- (iii) the life tenant authorises the loan.

However, in my view there is a fourth circumstance, which overrides the three identified by David Ewart. Section 30(2) Trustee Act 1925 provides that 'a trustee

may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers'. It seems clear that this statutory lien enables trustees to retain income to meet capital expenses. Snell's *Principles of Equity* 28th Edition at page 255 states that 'although the reimbursement is usually made out of the *corpus* of the trust estate, it is a first charge on all the trust property, both *corpus* and income and the trustee has a right to retain the expenses out of income until provision can be made for raising them out of the *corpus*'. It seems to me that the lien conferred upon trustees by the statute should cover nearly all situations where trustees are illiquid, and have to call upon income cash to meet outgoings. It follows from this that the holding back of income cash itself could not constitute a breach of trust, nor need trustees obtain the specific consent of the life tenant.