

# THE NEW CLOSE-FAMILY RULES FOR THE REMITTANCE BASIS OF TAXATION<sup>1</sup>

James Kessler Q.C.<sup>2</sup>

## 1 Protected-trust regime: Outline

The general scheme is that:

- (1) UK resident foreign domiciliaries qualify for the remittance basis on their own income/gains until they become deemed domiciled
- (2) Trusts made by foreign domiciliaries have a protected status which continues after they become deemed domiciled.<sup>3</sup> In short:
  - (a) Trust income/gains are not subject to tax on the usual settlor-interested trust rules (s.624, s.720, s.86)
  - (b) The income/gains are subject to tax on distribution:
    - (a) on general principles; or
    - (b) under special provisions which only apply to protected trusts

There are four parts to the regime:

- (1) “Protected-trust reliefs”, which prevent charges on the settlor under s.86, 624, 720, and associated provisions.

---

1 Except where otherwise indicated, number references in the footnotes to this article are to paragraphs in *Taxation of Non Residents and Foreign Domiciliaries* published by Key Haven Publications Ltd.

2 15 Old Square, Lincolns Inn, London, WC2A 3EU. Tel: 020 7242 2744;  
E-mail: kessler@kessler.co.uk

3 Protected-trust relief does not apply to formerly-domiciled residents. References in this article to deemed domicile are references to deemed domicile under the 15-year rule only.

- (2) “Close-family/settlor trust charges” which apply on distribution from protected trusts to the close-family/settlor
- (3) “Settlor-attribution rules” which attribute income/gains of close- family to the settlor
- (4) “Onward-gift rules”

The protected-trust reliefs are:

Charge	Relief	Tax	Topic
s.86 TCGA	para 5A sch 5 TCGA	CGT	settlor-interested trust
s.624 ITTOIA	s.628A ITTOIA	IT	settlor-interested trust
s.629 ITTOIA	s.630A ITTOIA	IT	payment to child of settlor
s.720 ITA	s.721(3B) rule 2	IT	ToA transferor charge
s.727 ITA	s.728(1A) rule 2	IT	ToA capital sum charge
s.633 ITTOIA	s.635(2) ITTOIA	IT	capital payment to settlor

The new close-family/settlor charges are:

Section	Name of charge
s.643A ITTOIA s.643A	close-family benefit charge
s.731(1A)/s.732(1)(d) ITA s.731	extended to transferor

These charges are not closely aligned, because there was already a transfer of assets abroad charge on benefits, s.731; but the scope of that charge has been extended to include transferors and non-resident beneficiaries.

There is no s.87 equivalent because there already was a charge on benefits which included benefits conferred on the settlor.

The settlor attribution rules are:

Section	Name (my terminology)
s.87G, 87H TCGA	s.87 settlor-attribution rule
s.643A, E, ITTOIA	s.643A settlor-attribution rule
s.733A, 735B ITA	s.731 settlor-attribution rule

The onward gift rules are:

Section	Name (my terminology)
s.87 I -M TCGA	s.87 onward gift rule
s.643 I - N ITTOIA	s.643A onward gift rule
s.733B - 733E ITA	s.731 onward gift rule

The changes go far beyond what was necessary to accommodate the 2017 deemed domicile rules: HMRC took the opportunity for a wide-ranging reform of the taxation of offshore trusts. This revolution - the term is not too strong - was introduced in breach of the Tax Consultation Framework, as the proposals first emerged in the HMRC summary of responses to the original consultation paper. In fact there was little consultation on the principles at all, and only limited opportunity to consult on the drafting, since the September 2017 draft differed substantially from the Finance Bill, which in turn received 32 amendments at committee stage. Parliamentary discussion in the Public Bill committee was perfunctory.

## 2 Settlor-attribution rules: s.87

Settlor attribution rules apply (in short) where benefits within the scope of s.87, s.643A or s.731 are received by close family of the settlor. The s.87 gain or s.643A/731 income is in some cases attributed to the settlor, that is, treated as arising to the settlor rather than the individual (close-family) receiving the benefit, who would otherwise be taxable under those sections.<sup>4</sup>

### 2.1 “Close-family”

A common definition of close-family applies for:

- (1) The settlor-attribution rules
- (2) The close-family s.643A/s.731 benefit charges

Section 87H(1) TCGA provides:

For the purposes of sections 87D, 87G and 87L as they apply in relation to a settlement, a person is a close member of the settlor's family at any time if the settlor is living at that time and—

- (a) the person is the settlor's spouse or civil partner at that time, or
- (b) the person—
  - (i) is a child of the settlor, or of a person who at that time is the settlor's spouse or civil partner, and
  - (ii) at that time has not reached the age of 18.

---

<sup>4</sup> The background can be traced in HMRC, “Reforms to the taxation of non-domiciles: response to further consultation” (December 2016) para 2.3.5. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/574450/non\\_doms\\_consultation\\_response\\_final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574450/non_doms_consultation_response_final.pdf) But this is now of historical interest only.

As the word “close” suggests, this is a narrow definition. In short, close-family means spouse/cohabitee and minor children. Minor grandchildren are not included.

Section 87H(2) TCGA extends this to cohabitees, using the standard formula.<sup>5</sup>

The s.643A/s.731 equivalent definitions are in s.643H ITTOIA and s.733A(7) ITA.

## 2.2 s.87 settlor-attribution rule

### 2.2.1 Outline

In outline, the rule is that a capital payment to close-family of the settlor is attributed to the settlor (if UK resident).

This will generally apply where the settlor and close-family beneficiary are both UK resident, but then the only effect is likely to be loss of the CGT annual exemption, and lower rate of CGT, which is not that significant.

This will also apply where the close-family beneficiary is non-resident, but the settlor is resident. Then what would be a non-chargeable benefit becomes chargeable, which could be important. However it will be rare to have a UK resident settlor and non-resident close-family, and even then, the remittance basis will often avoid the charge.

### 2.2.2 s.87 attribution conditions

Section 87G(1) TCGA provides:

Subsection (2) applies if in the case of a settlement-

A set of three straightforward conditions then follow, which I call “s.87 attribution conditions”:

- (a) a beneficiary of the settlement receives a capital payment from the trustees in a tax year,
- (b) the settlor is resident in the UK at any time in that year, and
- (c) the beneficiary (“the original recipient”) is a close member of the settlor’s family (see section 87H) at the time of receipt.

---

<sup>5</sup> See App 1.4.1 (“Spouse” to include cohabitee).

### 2.2.3 s.87 settlor-attribution rule

Assuming the s.87 attribution conditions are met, we move on to the rule. Section 87G(2) TCGA provides:

Sections 87 and 87A have effect as if the capital payment-

- (a) was received from the trustees by the settlor-
  - (i) as a beneficiary of the settlement (whether or not the settlor is otherwise a beneficiary of the settlement), and
  - (ii) at the time it was received by the original recipient, and
- (b) was not received by the original recipient.

I refer to this as the “s.87 settlor-attribution rule”.

The remittance basis will apply to a settlor who is a remittance basis taxpayer.

### 2.3 Settlor-attribution indemnity

Section 87G(3) TCGA provides:

Where any tax is chargeable on the settlor as a result of subsection (2) and is paid, the settlor is entitled to recover the full amount of the tax from the original recipient.

The indemnity is from the beneficiary to settlor (not from the trustees). That is right, as an indemnity from the trustees would not have been convenient. Bearing in mind the limited scope of the settlor-attribution rules, the indemnity is not important, except in cases of divorce or separation. The equivalents for the s.643A/731 settlor-attribution rules are s.643E(1)(2) ITTOIA and s.733A(5) ITA.

### 2.4 Settlor-attribution: Commencement

Para 1(13) sch 10 FA 2018 provides:

The new sections ... 87G [s.87 settlor-attribution rule], and the amendments made by subparagraphs (4) and (11), have effect in relation to payments received in the tax year 2018-19 or a later tax year

A pre-2018 capital payment is not caught, even if matched to a post-2018 trust gain.

### 3 s.720 protected-trust relief

#### 3.1 Protected income: Terminology

The term “protected foreign-source income” is used in the following protected-trust reliefs:

- (1) s.624 protected-trust relief (and s.629 protected-trust relief)
- (2) s.720 protected-trust relief
- (3) s.727 protected-trust relief

But the definitions are not the same. It is necessary to distinguish them, so I refer to:

- (1) “Protected s.624 income”
- (2) “Protected s.720 income”

In the s.634A close-family benefit charge, the term used is PFSI, which seems the same, but its meaning is different from either of the above definitions.

It is bad drafting practice to use the same term with different meanings, but there it is.

Apart from that, the label “protected income” seems apt for a settlor-interested trust where the settlor is UK resident and in principle within s.624. In this case, s.624 protected-trust relief disapplies the s.624 charge.

However, as will appear from the definition discussed in detail below, trust income may also be what the statute calls “protected” income even if even in cases where s.624 and s.720 (and associated provisions) would not apply in any event, ie, in short, if:

- (1) the settlor is non-resident, or
- (2) the trust is not settlor interested

In these circumstances protected-trust relief is not needed. The significance of protected income status is to bring the income within the scope of the s.643A/s.731 close-family benefit charge. In this case the label ‘protected income’ is wholly inapt.

It is probably best to adopt the statutory terminology, as anything else is even more confusing, but these points must be kept in mind in order to understand the provisions.

There is no equivalent definition of “protected gains” as all gains are protected, whether UK source or not.

### 3.2 Protected s.720 income

Protected s.720 income matters because:

- (1) It qualifies for s.720 protected-trust relief and so is not taxed under s.720 on the arising or the remittance basis.
- (2) The transferor is potentially taxable on it under the s.731 close-family rules.

Section 721A(1) ITA provides the definition of what it calls “protected foreign-source income”, which I call “protected s.720 income”:

This section has effect for the purposes of rule 2 of section 721(3B)<sup>6</sup> (cases where the individual [transferor] is not UK domiciled and is not deemed domiciled by virtue of Condition A in section 835BA) [formerly-domiciled resident<sup>7</sup>].

Section 721A ITA provides:

- (2) The income of the person abroad is “protected foreign-source income” so far as it is within subsection (3) or (4).

There are two types of protected s.720 income:

Type of income	ITA section
Protected s.720 trust income	721A(3)
Protected s.720 company income	721A(4)

#### 3.2.1 Protected s.720 trust income

Section 721A ITA provides:

- (2) The income of the person abroad is “protected foreign-source income” so far as it is within subsection (3) or (4).
- (3) Income is within this subsection if—

A set of 5 conditions then follow, which I call “s.720 protected-trust conditions”:

- (a) it would be relevant foreign income if it were the individual’s,

---

<sup>6</sup> See 60.10 (s.720 protected-trust relief).

<sup>7</sup> See 4.4.1 (Condition A: formerly dom).

- (b) the person abroad is the trustees of a settlement,
- (c) the trustees are non-UK resident for the tax year,
- (d) when the settlement is created, the individual [settlor/transferor] is—
  - (i) not [actually] domiciled in the UK, and
  - (ii) if the settlement is created on or after 6 April 2017, not deemed domiciled<sup>8</sup> in the UK
- (e) no property or income is provided directly or indirectly for the purposes of the settlement by the individual [settlor/transferor], or by the trustees of any other settlement of which the individual is a beneficiary or settlor, at a time in the period—
  - (i) beginning with the start of 6 April 2017 or, if later, the creation of the settlement, and
  - (ii) ending with the end of the tax year,
 when the individual [settlor/transferor] is domiciled or deemed domiciled in the UK.

Para (e) is the tainting rule which applies for all the protected-trust reliefs.<sup>9</sup>

### 3.2.2 Protected s.720 company income

Section 721A ITA provides:

- (2) The income of the person abroad is “protected foreign-source income” so far as it is within subsection (3) or (4).  
...
- (4) Income is within this subsection if—

A set of 7 conditions then follow, which I call “s.720 protected-company conditions”. These are (more or less) the same as the 5 s.720 protected-trust conditions, except that:

- (1) Para (b) requires that the person abroad is a company (rather than trustees); and
- (2) Paras (c)(d) are added. Section 721A ITA provides:

---

<sup>8</sup> Section 721A(7) ITA provides the standard IT definition.

<sup>9</sup> See 60.4 (Condition D: Tainting).

- (4) Income is within this subsection if...
  - (c) the trustees of a settlement—
    - (i) are participators<sup>10</sup> in the person abroad, or
    - (ii) are participators in the first in a chain of two or more companies
      - [A] where the last company in the chain is the person abroad and
      - [B] where each company in the chain (except the last) is a participator in the next company in the chain,
  - (d) the individual's power to enjoy the income results from the trustees being participators as mentioned in paragraph (c)(i) or (ii)

If the company is not held in a trust, its income is not protected s.720 income, so there is no s.720 protected-trust relief.

That is surprising, but the rule is deliberate.<sup>11</sup> The answer may be to transfer the company to a trust. Trust-protection guidance notes that this includes “foreign entities that fall to be treated like trusts under the principle in *Memec plc v IRC* e.g. certain types of foundations”.

If the individual has power to enjoy for some reason other than the trust, the company income is not s.720 protected income. An example may be if there is a loan from the company to the individual (but a loan to the trust does not raise this problem).

### 3.2.3 “Protected income”

Section 721(3BA) ITA provides a definition of the term “protected income”, which is used in the s.731 settlor-attribution rule.<sup>12</sup>

---

10 Section 721A(7) provides the standard definition: “In this section “participator”, in relation to a company, has the meaning given by section 454 of CTA 2010”.

11 HM Treasury, “Reforms to the taxation of non-domiciles: response to further consultation” (December 2016) para 2.3.3.  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/574450/non\\_doms\\_consultation\\_response\\_final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574450/non_doms_consultation_response_final.pdf)

12 See 36.47 (s.731 settlor-attribution rule: Outline).

In a case in which rule 2 of subsection (3B) applies [non-dom transferor], so much of the income of the person abroad as is protected foreign-source income for the purposes of that rule counts as “protected income” for the purposes of section 733A(1)(b)(i).

### 3.3 s.720 protected-trust relief

Armed with the definition of ‘protected s.720 income’ we can turn to the s.720 protected-trust relief.

Section 721(3B) ITA provides:

The amount of the income treated as arising under subsection (1) [the amount of s.720 income] is (subject to sections 724 and 725<sup>13</sup>) given by the following rules-

#### 3.3.1 Transferor UK domiciled

Section 721(3B) ITA provides:

##### Rule 1

The amount is equal to the amount of the income of the person abroad if the individual [settlor/transferor]-

- (a) is [actually] domiciled in the UK at any time in the tax year, or
- (b) is at any time in the tax year regarded for the purposes of section 718(1)(b) as domiciled in the UK as a result of section

835BA having effect because of Condition A in that section being met [formerly-domiciled resident<sup>14</sup>].

#### 3.3.2 Transferor not UK domiciled

Section 721(3B) ITA continues:

##### Rule 2

In any other case

...

(that is, if the settlor/transferor is not actually UK domiciled, and not a formerly-domiciled resident):

---

<sup>13</sup> The exceptions referred to in brackets are rarely if ever invoked. For s.724, see 35.11.3 (Amount of charge: enjoyment condition C). s.725 concerns interaction with CFC rules.

<sup>14</sup> See 4.4.1 (Condition A: formerly dom).

... the amount is equal to so much of the income of the person abroad as is not protected foreign-source income (see section 721A).

In short, protected foreign-source income (which I call protected s.720 income) is not subject to the s.720 charge.

I refer to this rule as **s.720 protected-trust relief** though it is not formally expressed as a relief.

Section 720 protected-trust relief is better than the s.720 remittance basis, which applies to remittance basis transferors in the absence of protected-trust relief, because:

- (1) It is not necessary to pay the remittance basis charge to obtain the benefit of the relief.
- (2) s.720 protected-trust income is not subject to income tax even if remitted to the UK.

#### **4 s.731 charge on transferor**

Prior to 2017, Section 732(1) ITA provided:

- (1) This section applies if ...
  - (d) [i] the individual [the beneficiary] is not liable to income tax under section 720 or 727 by reference to the transfer
  - [ii] and would not be so liable if the effect of sections 726 and 730 [remittance basis] were ignored

##### 4.1.1 “Relevantly domiciled”

Statute uses the term “relevantly domiciled” and it is convenient to consider this first. Section 732(4) ITA provides:

For the purposes of subsection (1)(d), the individual [beneficiary] is “relevantly domiciled” at any time if at that time—

- (a) the individual is [actually] domiciled in the UK, or
- (b) the individual is regarded for the purposes of section 718(1)(b) [definition of “person abroad”] as domiciled in the UK as a result of section 835BA having effect because of Condition A in that section being met [formerly-domiciled resident<sup>15</sup>].

---

15 See 4.4.1 ( Condition A: Formerly domiciled).

“Relevantly domiciled” is an opaque term; I refer to it as “relevantly/taxably domiciled” as a transferor who is relevantly domiciled does not qualify for s.720 protected-trust relief.

A person who is not relevantly/taxably domiciled is one who is:

- (1) not actually UK domiciled; and
- (2) not a formerly-domiciled resident

#### 4.1.2 Taxable transferor

Section 732(1) ITA provides:

- (1) This section applies if ...
  - (d) where there is a time in the year when the individual [the beneficiary] is relevantly [taxably] domiciled, the individual is not liable to income tax under section 720 or 727 by reference to the transfer

Thus there are two classes of transferor; and in principle:

<b>Domiciled</b>	<b>s.720 applies</b>	<b>s.731 applies</b>
Relevantly/taxably domiciled	yes	no (taxable-transferor defence applies)
Not relevantly/taxably domiciled non resident	yes	(defence does not apply)

The taxable-transferor defence is sensible. A transferor who is relevantly/taxably domiciled is within s.720. There is no need to apply s.731 to a transferor to whom s.720 applies. The application of s.720 gives HMRC all they should need. But the transitional rule is generous, in that protected income which arises before the individual became UK domiciled is not subject to tax when benefits are provided to the settlor.

#### 4.1.3 Transferor not relevantly/taxably domiciled

The protected-trust regime has:

- (1) restricted s.720, for a transferor who is not relevantly/taxably domiciled, and so qualifies for s.720 protected-trust relief; and
- (2) widened the scope of s.731, because such a transferor is now within the scope of s.731, and not within the taxable-transferor defence.

A transferor who is not relevantly/taxably domiciled may be taxed under s.731 by reference to relevant income which arose before 2017/18, even though in earlier years the transferor qualified for the taxable-transferor defence. So there is an element of retrospectivity in the 2017 extension of the scope of s.731.

A transferor who is deemed UK domiciled under the 15-year rule is not relevantly/taxably domiciled and so is within s.731. The transferor is likely to be outside s.720. But the two sets of rules are not completely aligned. If the trust has been tainted, for instance, the transferor is within s.720 and also within s.731. I wonder if that is intended

## **5 s.731 settlor-attribution rule: Outline**

Section 733A introduces what I call “the s.731 settlor-attribution rule”. In outline, the rule applies where:

- (1) A beneficiary receives a benefit
- (2) The beneficiary is:
  - (a) close-family
  - (b) outside the s.731 charge (non-resident or remittance-basis exempt)
- (3) The settlor is UK resident (and so potentially chargeable).

The charge is on the lower of the value of the benefit and the amount of protected income.

It will be rare (though not unknown) for the s.731 settlor-attribution rule to arise, as it requires:

- (1) Benefit to close-family who are non-resident or remittance basis taxpayers (and so not themselves charged)
- (2) A settlor of a protected trust who is UK resident and not remittance basis exempt

A benefit to the settlor/transferor is not caught by the s.731 settlor-attribution rule, but it will usually be within s.731 under general principles.<sup>16</sup>

### **5.1 s.731 attribution conditions**

Section 733A(1) ITA provides:

---

<sup>16</sup> See 36.16 (Taxable transferor defence).

Subsections (2) and (3) apply if-

A set of six conditions then follow, which I call “s.731 attribution conditions”.

#### 5.1.1 Condition (a): s.731 income

Section 733A(1) ITA provides:

Subsections (2) and (3) apply if-

- (a) an amount of income [s.731 income] is treated as arising to an individual under section 732 for a tax year.<sup>17</sup>

All the usual s.731 conditions must be met.

#### 5.1.2 Condition (b)[i]: Match with protected income

Section 733A(1) ITA provides:

Subsections (2) and (3) apply if...

- (b) under section 735A<sup>18</sup> (if it applied also for this purpose) that amount [of s.731 income] would be matched—
  - (i) with an amount of relevant income that is protected [s.720] income for the purposes of this sub-paragraph (see sections 721(3BA) and 728(1B))<sup>19</sup>, and
 

*(Note however if income within s.731 accrues to a company not held in a trust, the income is not protected income and the s.731 settlor-attribution rule does not apply)*
  - (ii) with a benefit received by the individual [the beneficiary] at a time when the individual [the beneficiary] was a close member (see subsection (7)) of the family of the settlor of the settlement concerned.
- (c) there is no time in the year when the trustees of the settlement are resident in the UK.
- (d) there is a time in the year when the settlor is resident in the UK.

---

<sup>17</sup> Section 733A(4) provides: “The amount mentioned in subsection (1)(a) may be the whole, or part only, of the amount treated as arising to the individual under section 732 for the year in the case of the relevant transfer and its associated operations.”

<sup>18</sup> Section 735A is the s.731 matching rule: see 36.42 (s.731 matching rules).

<sup>19</sup> I use the term “protected s.720 income”; see 60.9.3 (“Protected income”).

- (e) there is no time in the year when the settlor is domiciled in the UK, and
- (f) there is no time in the year when the settlor is regarded for the purposes of section 718(1)(b) as domiciled in the UK as a result of section 835BA having effect because of Condition A in that section being met [formerly domiciled resident<sup>20</sup>].

### 5.1.3 Commencement

Para 39 sch 8 F(no.2)A 2017 provides:

The amendments made by paragraphs 19 to 38 [which include the s.731 settlor-attribution rule] have effect for the tax year 2017-18 and subsequent tax years.

By contrast, the s.643A and s.87 settlor-attribution rules commenced 2018/19. It is hard to see the reason for the earlier commencement of the s.731 settlor-attribution rule, though the decision seems to have been a deliberate one

### 5.2 s.731 settlor-attribution rule

Assuming the s.731 attribution conditions are met, we move on to the attribution rule.

Section 733A(2)(3) deal with 2 situations:

- (1) The beneficiary may be wholly exempt because they are non-resident, or because they are a remittance basis taxpayer and none of the income is remitted.
- (2) The beneficiary may be partly exempt because they are a remittance basis taxpayer and only part of the income is remitted.

It is easier to follow if the provisions are read side by side:

Beneficiary wholly exempt: ss(2)	Beneficiary partly exempt ss(3) for the year and
If— (a) the [close-family] individual is not resident in the UK at any time in the year, or	[ii] none of the amount mentioned in subsection (1)(a) of this section

---

20 See 4.4.1 (Condition A: Formerly dom).

(b)[i] section 809B, 809D or 809E (remittance basis) applies to the [close-family] individual	
If— (a) [identical to (b)[i] (b) part only of the amount mentioned in subsection (1)(a) of [s.731 income] is remitted to the UK in the year,	... [s.731 income] is remitted to the UK in the year,
[A] the settlor is liable for the tax charged under section 731 on that amount as if that amount were income arising to the settlor in the year	[A] the settlor is liable for the tax charged under section 731 on the remainder of that amount as if that remainder were income arising to the settlor in the year
[B] (and the [close-family] individual) is not liable in any later year for income tax on that amount).	[B] (and the [close-family] individual) is not liable in any later year for income tax on that remainder).

Para [B] is not relevant if the (close-family) individual is non-resident, but it is relevant if the individual is remittance-basis exempt: its effect is that there is no charge if (say) the individual later brings the benefit to the UK

### 5.3 s.731 settlor-attribution remittance-basis

Section 735B(1) ITA provides:

This section applies in relation to income if—

- (a) the [s.731] income is treated by section 732 as arising to an individual (“the beneficiary”) for a tax year,
- (b) another individual (“the settlor”) is under section 733A(2) or (3) [attribution to settlor<sup>21</sup>] liable for tax on the income, and
- (c) section 809B, 809D or 809E (remittance basis) applies to the settlor for that year.

Assuming these conditions are met, we move on to s.735B(2) ITA:

The income (“the transferred-liability deemed income”) is treated as relevant foreign income of the settlor.

This applies the remittance basis to the s.731 income attributed to the settlor.

<sup>21</sup> See 36.47 (s.731 settlor-attribution rule).

### 5.3.1 s.87 and s.643A/s.731 attribution rules compared

The s.87 attribution rule is unlike the s.643A/s.731 attribution rules in two important respects:

- (1) The CGT rule applies to all trust gains
- (2) The s.87 settlor-attribution rule applies even if the close-family individual who received the benefit is UK resident and so could have been chargeable

The s.643A/s.731 settlor-attribution rule applies only if the beneficiary is not UK resident, or non-domiciled, and so not chargeable. In other words, for s.643A/s.731, the settlor is the fall-back taxpayer if the beneficiary is not taxable.

## 6 s.624 protected-trust relief

### 6.1 Protected s.624 income

Protected s.624 income matters because:

- (1) It qualifies for s.624 protected-trust relief and so is not taxed under s.624 on the arising or the remittance basis.
- (2) It is potentially taxable (from 2018/19) under the close-family s.643A income charge.

Section 628A(2) ITTOIA provides the definition of what it calls “protected foreign-source income”, which I call “protected s.624 income”:

For this purpose, income arising under a settlement in a tax year is “protected foreign-source income” for the tax year if Conditions A to F are met.

I refer to these as “s.624 protected-trust conditions”.

#### 6.1.1 Relevant foreign income

Section 628A(3) ITTOIA provides:

Condition A is that the income would be relevant foreign income if it were income of a UK resident individual.

#### 6.1.2 Originating from settlor

Section 628A(4) ITTOIA provides:

Condition B is that the income is from property originating from the settlor (see section 645).

This deals with the issue of multiple settlors.<sup>22</sup>

### 6.1.3 Domicile of settlor

Section 628A ITTOIA provides:

- (5) Condition C is that when the settlement is created the settlor—
  - (a) is not [actually] domiciled in the UK, and
  - (b) if the settlement is created on or after 6 April 2017, is not deemed domiciled in the UK.
- (6) Condition D is that there is no time in the tax year when the settlor is—
  - (a) [actually] domiciled in the UK, or
  - (b) deemed domiciled in the UK by virtue of Condition A in section 835BA of ITA 2007 [formerly-domiciled resident<sup>23</sup>].

### 6.1.4 Non-resident trustees

Section 628A(7) ITTOIA provides:

Condition E is that the trustees of the settlement are not UK resident for the tax year.

### 6.1.5 Condition F: Tainting

Section 628A ITTOIA provides:

- (8) Condition F is that no property or income is provided directly or indirectly for the purposes of the settlement by the settlor, or by the trustees of any other settlement of which the settlor is a beneficiary or settlor, at a time in the relevant period when the settlor is—
  - (a) [actually] domiciled in the UK, or

---

<sup>22</sup> See 93.2.2 (Multiple settlor provision).

<sup>23</sup> See 4.4.1 (Condition A: Formerly domiciled).

- (b) deemed domiciled in the UK.<sup>24</sup>
- (9) In subsection (8) “relevant period” means the period—
  - (a) beginning with the start of 6 April 2017 or, if later, the creation of the settlement, and
  - (b) ending with the end of the tax year.

## 6.2 s.624 protected-trust relief

Armed with the definition of s.624 protected income, we can turn to the s.624 protected-trust relief.

S.624 protected-trust relief is not like s.86 protected-trust relief, because the s.86 relief applies to all trust gains, but s.624 relief applies only to protected s.624 income.

Section 624 provides the general rule that income of a settlor-interested trust is treated as income of the settlor.

Section 628A(1) ITTOIA provides the relief:

The rule in section 624(1) does not apply to income which arises under a settlement if it is [s.624] protected foreign-source income for a tax year.

Section 624 protected-trust relief is better than the s.624 remittance basis, which applies to a remittance basis taxpayer settlor in the absence of protected-trust relief, because:

- (1) It is not necessary to pay the remittance basis charge to obtain the benefit of the relief.
- (2) s.624 protected income is not subject to income tax even if remitted to the UK.

### 6.2.1 Pre-2017 trust income remitted post-2017

Income arising before 2017/18 did not qualify for s.624 protected-trust relief, but it could qualify for the s.624 remittance basis.

Section 628C(1) ITTOIA provides:

---

<sup>24</sup> Section 628A(12) ITTOIA defines deemed domicile in a clumsy fashion: “In this section “deemed domiciled” means regarded for the purposes of section 809(1)(b) of ITA 2007 as domiciled in the UK as a result of section 835BA of ITA 2007 having effect.”

“For the purposes of applying section 809L of ITA 2007 (meaning of remitted to the UK) in relation to transitional trust income, “relevant person” in that section does not include the trustees of the settlement concerned.”

Section 628C ITTOIA provides the definition of “transitional trust income”:

- (2) “Transitional trust income” means income
- (a) that arises under a settlement in the period beginning with the tax year 2008-0925 and ending with the tax year 2016-17 (“the protection period”),
  - (b) that would be protected foreign-source income<sup>26</sup> for the purposes of section 628A(1) if section 628A(2)—
    - (i) had effect for the protection period, and
    - (ii) so had effect with a reference to conditions A to E (instead of A to F),

The point of para (b)(ii) is that additions to a trust, which (post-2017) would taint the trust and lose s.624 protected-trust relief, do not affect the transitional relief for pre-2017 income.

## 7 s.643A charge: Outline

This section discusses the close-family charge introduced by sch 10 FA 2018.

In outline, where the settlor or close-family receive benefit from a protected trust, the recipient is subject to tax.

This is a significant new charge to tax. Before the 2018 changes, where there was a foreign domiciled settlor-interested trust, there were income tax charges on:

- (1) income distributions to UK beneficiaries
- (2) remittance of s.624 income

However it was in principle possible to provide some benefits to the settlor or close-family, without those charges. Now the provision of benefits will be chargeable (subject to the s.643A remittance basis).

---

<sup>25</sup> The reason for this start date is that pre-2008 income qualified for a different transitional relief: see 33.5.5 (Pre-2008 income: Transitional rule).

<sup>26</sup> See 60.6 (Protected s.624 income).

The s.643A charge is the s.624 equivalent of the extension of the s.731 charge to transferors.<sup>27</sup>

## 7.1 s.643A application conditions

Section 643A(1) ITTOIA is easier to follow if it is split into parts, the first part setting out the conditions for the application of the rule, and the second part containing the rule.

The first part of s.643A(1) ITTOIA provides:

- [a] If an individual [settlor/close-family]<sup>28</sup>
- [b] has an untaxed benefits total for a settlement for a tax year (see section 643B),
- [c] [i] an amount [s.643A income]
- [ii] equal to so much of that total as does not exceed the settlement's available protected income up to the end of the year (see section 643C)
- [iii] is [within s.643A]

The amount of s.643A income is the lower of:

- (1) Untaxed Benefits Total
- (2) Available Protected Income

## 7.2 Untaxed Benefits Total

Untaxed Benefits Total matters because the amount of s.643A income is the lower of (1) Untaxed Benefits Total and (2) Available Protected Income. If the UBT is nil, there is no s.643A income.

Section 643B(1) ITTOIA provides:

For the purposes of section 643A, whether an individual has an untaxed benefits total for a settlement for a tax year ("the current year"), and (if so) its amount, are determined as follows-

---

<sup>27</sup> See 36.16 (Taxable transferor defence).

<sup>28</sup> Section 643A(1)[a] appears to apply to any individual. But the effect of the definition of Untaxed Benefits Total is that it only applies to an individual who is the settlor or close-family; so I gloss it as "individual [settlor/close-family]".

The subsection sets out four steps:

- 1: Identify benefit to settlor/close-family
- 2: Value the benefit
- 3: Deductions where benefit already taxed
- 4: Conclusion

#### 7.2.1 “Provided by trustees”

Step 1 refers to benefits “provided by the trustees”. Benefits provided by other persons do not count. Before considering the steps, it is helpful first to set out the definition of this phrase. As one would expect, it is widely defined.

Section 643A provides:

- (4) In this section and sections 643C to 643M, a reference to a benefit provided by trustees of a settlement is to-
  - (a) a benefit treated by subsection (6) as provided by the trustees, or (b) any other benefit if it is provided by the trustees directly, or indirectly, out of-
    - (i) property comprised in the settlement, or
    - (ii) income arising under the settlement.

#### 7.2.2 Provided by trustees: IIP trust

Section 643A provides:

- (6) Where-
  - (a) income arises under a settlement, and
  - (b) the income, before being distributed, is the income of a person other than the trustees,a benefit is for the purposes of subsection (4)(a) treated as provided by the trustees ...

The income will normally be taxable, but this may be needed for the case where the life tenant is non-resident and the income is foreign source income, so it is not taxable.

### 7.2.3 Step 1: Identify benefits to settlor

Armed with the definition of benefits “provided by the trustees”, we can turn to step 1.

Section 643B(1) ITTOIA provides:

Step 1:

[Benefits to settlor]

If the individual [settlor/close-family] is the settlor, identify each benefit provided by the trustees to the individual at a time-

- (a) when the individual is not relevantly [taxably] domiciled,<sup>29</sup> and
- (b) in a tax year that is the current year or an earlier tax year.

If the settlor is relevantly/taxably domiciled the s.624 charge would usually apply. It is possible to envisage cases where the settlor will be better off if UK domiciled, but that will be rare.

### 7.2.4 Step 1: Identify benefits to close-family

Section 643B(1) ITTOIA provides:

Step 1 ...

If the individual [settlor/close-family] is not the settlor, identify each benefit provided by the trustees to the individual at a time-

- (a) when the individual is a close member of the settlor’s family (see section 643H),<sup>30</sup> and
- (b) in a tax year that is the current year or an earlier tax year.

It does not matter where the close-family individual is domiciled. Benefits to persons other than the settlor or close-family do not count.

---

<sup>29</sup> Section 643B ITTOIA provides the definition:

“(2) For the purposes of Step 1 in subsection (1), an individual is “relevantly domiciled” at any time if at that time-

(a) the individual is [actually] domiciled in the UK, or

(b) the individual is regarded for the purposes of section 809(1)(b) of ITA 2007 as domiciled in the UK as a result of section 835BA of ITA 2007 having effect because of Condition A in that section being met [formerly domiciled resident].”

The wording also used in the equivalent ToA rule; for discussion, see 36.16.1 (“Relevantly domiciled”). I refer to this as relevantly/taxably domiciled.

<sup>30</sup> See 58.23 (“Close Family”).

### 7.2.5 Step 2: Value benefits

Section 643B(1) ITTOIA provides:

#### Step 2

Identify the amount or value of each benefit identified in the individual's [settlor/close-family's] case at Step 1, and calculate the total of those amounts and values.

This is relatively straightforward.

### 7.2.6 Step 3: Deductions

Section 643B(1) ITTOIA provides four deductions to avoid double taxation:

#### Step 3

Take the total calculated at Step 2 and deduct from it the following-

- (a) any part of it on which the individual [settlor/close-family] is liable to income tax otherwise than under section 643A,
- (b) any income treated by
  - [i] section 643A [s.643A charge] or
  - [ii] [section] 643J<sup>31</sup> or
  - [iii] [section] 643L<sup>32</sup>
 as arising, to a person for a tax year earlier than the current year, by reference to any of the benefits identified in the individual's [settlor/close-family's] case at Step 1,
- (c) where the whole or part of a benefit identified in the individual's [settlor/close-family's] case at Step 1 is taken into account in charging income tax under Chapter 2 of Part 13 of ITA 2007 [ToA, s.731], the amount or value of so much of the benefit as is taken into account in doing that, and
- (d) any amount required to be deducted by section 643D(2) (gains treated as accruing in a year before the current year).

---

<sup>31</sup> See 33.30 (s.643A onward-gift donee charge).

<sup>32</sup> See 33.32 (Onward-gift to close-family: s.643A settlor-attribution rule).

### 7.2.7 Deduction for s.87 charge

Step 3(d) takes us on to s.643D ITTOIA, which provides:

- (1) Subsection (2) applies if-
  - (a) in the case of a settlement, benefits provided to an individual [settlor/close-family] as mentioned at Step 1 in section 643B(1) are received in a tax year, and
  - (b) chargeable gains<sup>33</sup> are treated by
    - [i] section 87,
    - [ii] 87K, [Onward-gift CGT rule]
    - [iii] 87L [Onward-gift to close-family] or
    - [iv] 89(2) [s.87 charge for immigrating trusts] of,
    - [v] or paragraph 8 of Schedule 4C [sch 4C charge] to, TCGA 1992 as accruing to a person in that or a subsequent tax year by reference (direct or indirect) to the whole or part of any benefits so provided.
- (2) In the calculation under section 643B of the individual's [settlor/close-family's] untaxed benefits total for the settlement for any tax year after the one in which such chargeable gains are so treated, the amounts to be deducted at Step 3(d) of that calculation include the amount of those gains.

This arises if:

- (1) A close-family individual receive a benefit which:
  - (a) is not taxed under s.643A because there is no Available Protected Income
  - (b) is taxed under s.87, as it is matched with trust gains
- (2) Available Protected Income arises later

In these circumstances, sensibly, the s.87 charge has priority over s.643A. This is an approximate equivalent of s.734 ITA.<sup>34</sup>

---

<sup>33</sup> Section 643D(3) ITTOIA extends the deduction to offshore income gains:

<sup>34</sup> See 36.20 (Deduction for s.87 charge).

### 7.2.8 Conclusion: Untaxed Benefit Total

Section 643B(1) ITTOIA provides:

Step 4:

If the result of the calculation at Step 3 is an amount greater than nil, that amount is the individual [settlor/close-family]'s untaxed benefits total for the settlement for the current year.

### 7.3 Available Protected Income

Available Protected Income matters because the amount of s.643A income is the lower of (1) Untaxed Benefits Total and (2) Available Protected Income. If there is no API, there is no s.643A income.

Section 643C ITTOIA provides:

- (1) For the purposes of the application of section 643A(1) in the case of an individual [settlor/close-family] and a settlement, the settlement has available protected income up to the end of a tax year if-

$$\text{PFSI} - \text{TOAA} > \text{TI}$$

and, if the settlement has available protected income up to the end of a tax year, its amount is given by-

$$\text{PFSI} - \text{TOAA} - \text{TI}$$

That is very clumsy drafting, but it works. In short:

PFSI is Protected Foreign-Source Income TOAA is Transfer Of Assets Abroad Amount TI is Taxable Income

#### 7.3.1 PFSI

Note that the term PFSI does not have the same meaning as the term “protected foreign source income” (which itself has a variety of definitions according to context).

There are two types of PFSI, which I call “s.624 PFSI” and “s.629 PFSI”.

Section 643C(2) ITTOIA provides the definition of s.624 PFSI:

In this section-

PFSI is the total of-

- (a) any protected foreign-source income-
  - (i) arising under the settlement in the year or in any earlier tax year, (ii) that would be treated under section 624 as income of the settlor but for section 628A,<sup>35</sup>
  - (iii) that can be used directly or indirectly to provide benefits for the individual, and
  - (iv) on which the individual is not liable to income tax (ignoring for this purpose any liability under section 643A)

The wording at (iii) is derived from the definition of relevant income.<sup>36</sup>

Section 643C(2) ITTOIA provides the definition of s.629 PFSI:

In this section-

PFSI is the total of [s.624 PFSI] and

- (b) any protected foreign-source income-
  - (i) arising under the settlement in the year or in any earlier tax year,
  - (ii) that would be treated under section 629 as income of the settlor but for section 630A, and
  - (iii) on which the relevant child concerned (see section 629) is not liable to income tax (ignoring for this purpose any liability under section 643A)

### 7.3.2 TOAA

TOAA (ToA amount) is deductible in computing Available Protected Income.

Section 643C(2) ITTOIA provides:

In this section ...

TOAA is so much of PFSI as is, in respect of benefits provided by the trustees in the year or in an earlier tax year, taken into account in charging

---

<sup>35</sup> See 60.7 (s.624 protected-trust relief).

<sup>36</sup> See 36.21 (“Relevant income”: Definition).

income tax under Chapter 2 of Part 13 of ITA 2007 (transfer of assets abroad) for the year or any earlier tax year.

### 7.3.3 TI

TI (taxable income) is deductible in computing Available Protected Income.

Section 643C ITTOIA provides:

(2) In this section ...

TI is the total of-

(a) so much of PFSI as is, by reference to benefits provided by the trustees to the individual [settlor/close-family], are treated by

[i] section 643A [s.643A attribution rule] or

[ii] [section] 643J<sup>37</sup> or

[iii] section 643L<sup>38</sup>

as income for any earlier tax year, and

(b) so much of PFSI as is, by reference to benefits provided by the trustees to other individuals [settlor/close-family], are treated by

[i] section 643A or

[ii] section 643I(4) and (5) or

[iii] section 643J(3) and (4)<sup>39</sup>

as income for the year or any earlier tax year.

### 7.4 s.643A income charge

Assuming the s.643A application conditions are met, we can move on to consider the charge on s.643A income.

Section 643A(1) ITTOIA provides:

[s.643A income] is

---

37 See 33.30 (s.643A onward-gift donee charge).

38 See 33.32 (Onward-gift to close-family: s.643A settlor-attribution rule).

39 See 33.30 (s.643A onward-gift donee charge).

- (a) where the individual is UK resident for the year, treated for income tax purposes as income of the individual [settlor/close-family] for the year, subject to subsections (2) to (5).
- (b) where the individual is non-UK resident for the year, treated for the purposes of
  - [i] subsection (2) and
  - [ii] sections 643I to 43L
  - [iii] (but no other purpose)as income of the individual for the year, [c] subject to subsection (5).

Para (a) is the charge, which is on the individual (settlor/close-family) who receives the benefit.

Para (b) is not a charge, but it specifies notional s.643A income which links into the s.643A settlor-attribution rule.

#### 7.4.1 No double charge

Section 643A(5) ITTOIA provides:

If there is a choice about the individuals in whose case income is to be treated as arising by subsection (1) (before the application of subsections (3) and (4))-

- (a) income is to be treated as arising to such one or more of them as appears to an officer of Revenue and Customs to be just and reasonable, and
- (b) if more than one, in such respective proportions as appears to the officer to be just and reasonable.

The wording is based on ToA double-counting relief.<sup>40</sup>

#### 7.5 s.643A remittance basis

Section 643A applies the remittance basis for:

- (1) Close family beneficiaries taxed on s.643A income under s.643A(1);
- and

---

40 See 37.4 (Double-counting relief).

- (2) the settlor, taxed on the s.643A settlor-attribution rule<sup>41</sup>

Section 643F(1) ITTOIA provides:

This section applies where-

- (a) in the case of a settlement, income (“the deemed [s.643A] income”) is treated by section 643A [s.643A charge] as arising to an individual for a tax year, and
- (b) section 809B, 809D or 809E of ITA 2007 (remittance basis) applies to the individual for that year.

Assuming these conditions are satisfied, we read on. Section 643F(2) ITTOIA provides:

The deemed [s.643A] income is treated as relevant foreign income of the individual.

The significance is that this incorporates the remittance basis.

This wording is drawn from s.735 ITA: for a discussion, see 36.41.1 (Operation of s.731 remittance basis).

#### 7.6 s.643A charge: Commencement

Para 21 sch 10 FA 2018 provides:

- (1) Subject as follows, the amendments made by paragraphs 3 to 19 have effect for the tax year 2018-19 and subsequent tax years.
- (2) [a] None of the references to an earlier tax year in Step 1 of the new section 643B(1) of ITTOIA 2005, or in new section 643C(2) of ITTOIA 2005, includes any tax year earlier than the tax year 2018-19
- [b] except that, in the phrase “benefits provided by the trustees in the year or in an earlier tax year” in the definition of “TOAA” in new section 643C(2) of ITTOIA 2005, the reference to an earlier tax year does include tax years earlier than the tax year 2018-19.

---

<sup>41</sup> See 33.24 (s.643A settlor-attribution rule: Outline).

## **8 s.643A settlor-attribution rule: Outline**

Where the settlor or close-family receive benefits, the recipient is subject to tax on the benefits. I refer to this as “the close-family s.643A benefit charge”, which imposes tax on what I call “s.643A income”.

Section 643A introduces what I call “the s.643A settlor-attribution rule”.

In outline, the rule applies where:

- (1) A beneficiary receives a benefit
- (2) The beneficiary is:
  - (a) close-family
  - (b) outside the s.643A charge (non-resident or remittance-basis exempt)
- (3) The settlor is UK resident (and so potentially chargeable)

The charge is on the lower of the value of the benefit and the amount of protected income.

It will be rare (though not unknown) for the s.643A settlor-attribution rule to arise, as it requires:

- (1) Benefit to close-family who are non-resident or remittance basis taxpayers (and so not themselves charged)
- (2) A settlor of a protected trust who is UK resident and not remittance basis exempt

A benefit to the settlor is not caught by the s.643A settlor-attribution rule, but it will usually be within s.643A under general principles.<sup>42</sup>

### **8.1 s.643A attribution conditions**

Section 643A(2) ITTOIA provides:

Subsections (3) and (4) apply if-

A set of 6 conditions then follow, which I call “s.643A attribution conditions”.

---

42 See 36.16 (Taxable transferor defence).

## 8.1.1 Condition (a): s.643A income

Section 643A(2) ITTOIA provides:

Subsections (3) and (4) apply if-

- (a) [i] an amount (“the [s.643A] deemed income”) is treated by subsection (1),
- [ii] before the application of subsections (3) and (4) [s.643A settlor-attribution rule],
- [iii] as income of an [close-family]<sup>43</sup> individual for a tax year

## 8.1.2 Condition (b): not settlor

Section 643A(2) ITTOIA provides:

Subsections (3) and (4) apply if...

- (b) the [close-family] individual is not the settlor

## 8.1.3 Condition (c): close-family individual non-resident or rem. basis user

Section 643A(2) ITTOIA provides:

Subsections (3) and (4) apply if

- (c) ... either-
  - (i) the [close-family] individual is non-UK resident for the year, or
  - (ii) the [close-family] individual is UK resident for the year and one of sections 809B, 809D and 809E of ITA 2007 (remittance basis) applies to the [close- family] individual for the year

## 8.1.4 Condition (d): Settlor UK resident

Section 643A(2) ITTOIA provides:

Subsections (3) and (4) apply if

...

- (d) the settlor is UK resident for the year

---

<sup>43</sup> Section 643A(2)(a)[iii] appears to apply to any individual. But the individual must be close-family of the settlor, in order to receive s.643A income; so I gloss it as “[close-family] individual”.

### 8.1.5 Condition (e)(f): Settlor not UK domiciled

Section 643A(2) ITTOIA provides:

Subsections (3) and (4) apply if

...

- (e) there is no time in the year when the settlor is domiciled in the UK, and
- (f) there is no time in the year when the settlor is regarded for the purposes of section 809B(1)(b) of ITA 2007 as domiciled in the UK as a result of section 835BA of ITA 2007 having effect because of Condition A in that section being met [formerly domiciled resident<sup>44</sup>].

### 8.1.6 Settlor-attribution: Commencement

Para 21(1) sch 10 FA 2018 provides:

Subject as follows, the amendments made by paragraphs 3 to 19 have effect for the tax year 2018-19 and subsequent tax years.

### 8.2 s.643A settlor-attribution rule

Assuming the s.643A application conditions are satisfied, we move on to the rule.

Section 643A(3)(4) ITTOIA deal with 2 situations:

- (1) The close-family individual may be fully exempt because they are non-resident, or because they are a remittance basis taxpayer and none of the income is remitted.
- (2) The close-family individual may be partly exempt because they are a remittance basis taxpayer and only part of the income is remitted.

It is easier to follow if the provisions are read side by side:

Beneficiary wholly exempt	Beneficiary partly exempt
(3) If the case is one-	(4) If the case is one-
(a) where the condition in subsection (2)(c)(i) is met [beneficiary non-resident], or	

---

44 See 4.4.1 (Condition A: formerly domiciled).

(b) where [i] the condition in subsection (2)(c)(ii) is met [beneficiary remittance basis taxpayer] and	(a) [identical to (b)[i] across]
[ii] none of the deemed [s.643A] income is remitted to the UK in the year,	(b) part only of the deemed [s.643A] income is remitted to the UK in the year,
the deemed income is to be treated for income tax as income of the settlor for the year and, in a case within paragraph (b), not as income of the individual for the year.	the remainder of the deemed income is to be treated for income tax purposes not as income of the individual for the year but as income of the settlor for the year.

This is the equivalent of s.733A(3)(4) ITA.63

The remittance basis can apply: see (s.643A remittance basis)

Statute frequently refers to an amount: treated by section 643A(1), before/after the application of section 643A(3) and (4), as income of an individual. For the sake of clarity I gloss that as “attribution to settlor”.