# NOTES ON KHP CONFERENCE

## PRACTICAL TAX PLANNING: 20-22 September 2007

**Chairman:**
Robert Venables QC[1]

**Speakers (in order of appearance):**
James Kessler QC[1]
Richard Vallat[2]
Rory Mullan[1]
Kevin Prosser QC[1]
Stephen Brandon QC[1]
Timothy Lyons QC[1]
Martin O'Dwyer [3]

**Reported by**
Ralph Ray[4]

Following the dramatic **Pre-Budget Report** items of 9th October 2007, especially re IHT, some brief **"Reporter's Update Notes"** have been inserted.

### I Individuals' Arrival in and Departure from the UK – James Kessler QC

### Introduction

James' talk concerned with income and gains accruing in a year during which an individual becomes or ceases to be UK resident. It is necessary to consider income

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tax and CGT separately. His notes are based on *Taxation of Foreign Domiciliaries 6th ed. 2007 (Key Haven Publications).*

**Year of arrival**

The usual conditions for year of arrival treatment are that the individual comes to the UK to take up permanent residence, or to stay for at least two years. See ESC[2] and [3].

**Year of departure**

The usual conditions for year of departure treatment are that the individual must leave for permanent residence abroad (ESC [2] (b)), or the individual must cease to be ordinarily resident in the UK (ESC [3](b)). There is a relaxation for absence under contract of employment (ESC All). James mentioned that IR20 has become desperately out of date.

**Remittance basis**

However, IR20 provides that "*you will not have to pay tax on overseas investment income you remit from a source which ceased before the date of your arrival (for example, a bank account which you have closed).*"

**UK source income**

ESC A11 provides: Where the concession applies and the tax year is split, FA 1995 s.128 (now s.811 ITA 2007) (limit on income chargeable on non-residents – income tax) does not apply for the period for which an individual is treated as not resident. That section applies only to complete years of non-residence.

James commented that there is no good reason for this anomaly, but there it is.

**CGT on individuals**

Section 2(1) TCGA provides: ... a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during **any part** of which he is resident in the UK, or during which he is ordinarily resident in the UK.

Reference should be made to concession ESCD2 and the special rules for CGT on trusts for year of arrival and departure. If a UK resident individual leaves the UK to take up residence abroad, he is strictly subject to CGT on the disposal of assets until the following 6 April; if, while non-resident, he disposes of an asset, he is strictly subject to CGT if he becomes UK resident before the following 6th April.

As with income tax, this is subject to two exceptions of such breadth that the general principle rarely applies: (1) Relief is available by concessions: ESC D2; and (2) Double Tax Treaties split UK tax years into resident and non-resident periods.

**Computation of CGT ESC D2 Losses**

The concession says nothing about allowable losses accruing in the non-resident part of the year. The possibilities are:

(1) losses of the period remain allowable although gains of the same period are not;

(2) losses of the period are allowable only so far as they exceed the gains of the same period;

(3) losses of the period are not allowable at all.

James' comment: Solution (1) is too good to be fair, but it is the most consistent with the words of the concession and it is tentatively considered that this is correct. Solution (3) cannot be applied, since it imposes more tax than would be the case without the concession.

**CGT planning: postponing disposals until non-resident**

The obvious CGT planning is to postpone disposals until non-resident. The CG Manual 25805 sets out three ways to attack this planning, including where there was a binding agreement or contact for sale on or before the date of emigration, or a business was carried on in the UK through a branch or agency in the period from the date of emigration to the date of disposal, or uncommercial cross options are entered into.

**CGT planning before arrival in the UK**

A minimum course would be for the individual to dispose of UK situate assets with inherent gains so as to bring their base cost up to market value. This need apply only to UK situate assets which might be disposed of while the individual is resident here. The individual might go further and dispose of non-UK situate assets if he wishes to have the ability to sell the asset and remit the gain. A better course, involving more work, may be to transfer assets to a non-resident trust. Watch the pre-owned asst rules: see *Taxation of Foreign Domiciliaries, 6th Ed 2007,* James Kessler, 43.1 (Pre-owned assets).

**Pre-Budget Report 09/10/07 "PPR" Reporter's Update Note:**

- days of arrival and departure from UK will count towards the 90 days allowed.
- certain non-UK domiciled individuals will from April 2008 be subject to a £30,000 levy after seven years of UK residency.

CGT – note the proposed 18% flat rate from April 2008, particularly disadvantageous regarding abolition of business asset taper relief: consider disposals pre 6 April 2008.

## II The Family Home – Richard Vallat

### Introduction

For many people, the family home forms a large part of their estate. They would like, therefore, to remove it from their estate whilst remaining in occupation and without (a) creating an immediate IHT liability (b) losing the benefit of main residence or PPR relief from CGT or (c) creating an SDLT charge. Unfortunately, there are a number of tax provisions that make this difficult.

- The gift with reservation of benefit provisions, as amended to counter the *Ingram* scheme (FA 1986 s.102A), the *Eversden* scheme (FA 1986 s.102(5A)) and the termination of an interest in possession (FA 1986 s.102ZA);

- The pre-owned assets rules in FA 2004 Sch 15;

- The fact that SDLT is chargeable on the transfer of land whether or not completed, and that any debt charged on the land and assumed to any extent by the transferee counts as chargeable consideration;

- The charges on transfers into lifetime trusts (even if the settlor is the life tenant) introduced by FA 2006 Sch 20; and

- The new SDLT anti-avoidance provision (FA 2003 s.75A).

Unless otherwise stated, it is assumed in what follows that (1) A and B are married or in a civil partnership, (2) A owns a house and (3) A and B occupy the house as the main "family home" (so that it qualifies for full PPR relief).

**Do nothing**

This has the obvious advantage of allowing the taxpayer to retain security and control, as well as avoiding any future legislation aimed at preventing tax planning with the home. If the family home forms only a small part of the estate, and/or the house is not one that is going to be used by another generation, this may well be a sensible solution. And the abolition of IHT (or at least a significant increase in the nil rate band) remains a possibility, in which case those who have done nothing will feel they have made absolutely the right decision.

On the other hand, house prices have of course risen far faster than inflation and the IHT nil rate band in recent years and to many the family home inevitably represents a large part of what can be left to the next generation so they will be keen to protect its value.

**Gift from A to B**

Transfers between husbands and wives, or civil partners, are exempt under IHTA 1984 s.18 and TCGA 1992 s.58, and there are specific exemptions from the anti-avoidance provisions mentioned above. Since the IHT exemption is available on death anyway, this does not itself reduce the overall IHT due on the combined estates but it might allow the use of both nil rate bands in appropriate circumstances: see below. There will be SDLT if, but only if, the transfer is subject to a mortgage.

**Sale from A to B**

An alternative is the "home loan" scheme but with a **sale** to, say, B instead of house trustees. The scheme will be familiar to many but in outline A sells the house for a loan note. The loan note can then be given away and provided no benefit is reserved in the note the value of the house should be outside the taxpayer's IHT estate. There is no CGT on the sale since (1) the family home qualifies for PPR and (2) the transfer is between spouses/civil partners. Assuming the Loan Note has been drafted as a non-QCB there should be no CGT as to the gift of the Note. SDLT applies on the **sale**.

**Transfer to joint occupier**

There is an express exemption from the gift with reservation of benefit regime in FA 1986 s.102B for gifts of undivided shares to those in occupation with the donor (incorporated by reference into Sch 15 paragraph 11(5)(c)). If C and D are unmarried and not in a civil partnership, but living together, C might give an undivided half share in the property to D within this exemption. Alternatively, E and F as joint (or co-) owners might give an undivided share in the property to children living at home.

The main caveat is that the donor must not receive a benefit connected with the gift (FA 1986 s.102B(4)). One way in which this might happen is if the **donee** started paying all the bills. The safest option is for the **donor** to keep paying all the bills (which, where the parent is the donor and the children the donees, is likely to be what the family wants in any event). The main difficulty in this case is what to do when the donee wishes to move out. This has two consequences: Section 102B(4) ceases to apply and the gift becomes a gift with reservation, so falling back within the donor's estate; and PPR relief is lost on the donee's share. The reverter to settlor relief will not be available.

**Sale subject to lease(/equity release)**

If the home is sold for full value but subject to a right to take a lease back, there should be no gift and no Sch 15 pre-owned asset charge. The purchaser might be family or third party (i.e. an equity release scheme). Later the vendor could give away proceeds (to someone other than the purchaser).

**Use of debt**

Another simple idea is to borrow on the security of the house, invest the proceeds in assets qualifying for APR or BPR relief and, in due course, give away those assets. One problem may be finding a safe investment that qualifies for relief. Another is that if the borrowing is commercial it will of course bear interest.

**Will Planning and Use of the Nil Rate Band** – *see Reporter's Update Note*

It is always worth remembering the nil rate band (currently £300,000). A common way to take advantage of this is to leave an amount equal to the nil rate band on discretionary trusts with the balance of the estate left to the surviving spouse (with further provisions relating to relieved and exempt property), ensuring there is no immediate charge. A question that arises for some, although not perhaps for so many high net worth individuals, is what to do if the only, or best, asset available to satisfy the nil rate band legacy is the family home, or a share in the family home.

A generally satisfactory method to use is the charge scheme and ensure that the residuary beneficiary does not assume any personal liability for the debt. Use of the charge should also avoid any difficulties with FA 1986 s.103 (i.e. the *Phizackerley* problem discussed below).

The recent case of *Phizackerley v HMRC* SpC 591 [2007] STC(SCD) 328 emphasised the fact that FA 1986 s.103 can apply to the debt scheme where (1) A gives a share in the family home to B (2) B dies leaving property to A and (3) B's will puts in place a NRB trust that is satisfied with a debt due from A. On A's death, deduction of the debt is blocked with a debt due from A. On A's death, deduction of the debt is blocked by s.103 because the consideration for the debt (i.e. the share in the house) consists of property derived from A. Importantly, however:

a) The case suggests that this result only follows where the Revenue can trace the gift into the consideration for the debt (which will not always be possible)

b) The reasoning does not apply to either the charge scheme (where no debt is incurred by the second to die and no incumbrance created by him or her); and

c) The reasoning does not apply where the survivor is left only an interest in possession in the house.

This means taxpayers and advisers must either be sure that there have been no gifts that can be traced into the debt, or avoid the simplest version of the scheme.

As a general rule nil rate band discretionary will trusts cease to be tax advantageous from 9 October 2007. Reason: the transferability/aggregation of the nil rate band of the 1st spouse/civil partner to die can be utilised by the surviving spouse/civil partner, as well as their own nil rate band, on the second death and at the **then**, normally higher, rate i.e. in circumstances where 1st spouse/civil partner left the estate absolutely or by way of life interest to the survivor. By 2010 the combined nil rate band will increase to £700,000. Consider removing such discretionary will trusts from wills, but could still be useful where assets values have substantially increased since the 1st death, or where business or agricultural property relief is available.

This transferability also applies to widows(ers) (surviving civil partners) i.e. where 1st spouse/civil partner dies pre 9 October 2007, and survivor dies since that date – a retrospective advantage.

## III Recent Cases – Kevin Prosser QC

### 1. *Jones v Garnett*

After he was made redundant as an employee in the IT field, Mr J decided to work as a consultant for a number of clients. The clients would not contract directly with him, but only with a limited company. Mr J's accountants arranged for him and Mrs J each to acquire for £1 one of the 2 issued shares in an off-the-shelf company, Arctic Systems Limited. Mr J was the sole director and Mrs J was the company secretary. The object was to enable Mr and Mrs J to receive dividends from the company, their overall tax liability being less than if it was all received by Mr J (as salary or dividend). Thereafter the company contracted to provide clients with Mr

J's services as a computer consultant. Mrs J performed book-keeping services, working 4-5 hours per week. Neither Mr nor Mrs J had a formal contract of employment with the company. They agreed that the company should pay them a salary to meet their basic needs and that any profits would be distributed as dividends.

According to HMRC, Mr J could not rely on the let out for a settlement which is an outright gift by one spouse to another of property from which income arises (in ICTA 1988 s.660A(6)) because (i) the "settlement" here was more than, and so different from, the "gift" of the 1 share to Mrs J; (ii) anyway, she did not acquire her share by way of "gift": she paid £1 on acquiring it from the formation agents; (iii) in any event, the share was "wholly or substantially a right to income" and so not within s.660A(6). The HL however found in favour of the taxpayers in these contexts. HMRC have threatened to alter the law! [**Reporter's Update Note** – in the PBR, the Chancellor promised draft legislation by next April plus consultation.]

## 2. *Snell v IRC*

Mr Snell owned 90% of shares in a company. In December 1996 he agreed to sell the shares for guaranteed loan notes. on 2 April 1997 he left the UK, becoming non-UK resident. In July 1997 he redeemed some of the notes. The Special Commissioners found that at the time of the sale Mr S intended to go non-resident and took the loan stock so that he could redeem it when non-resident. Mr S relied on s.135 TCGA but this was disapplied by s.137 "unless the exchange is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability for CGT".

Sir Andrew Morritt C in the High Court, in agreement with the Special Commissioners, concluded that the exchange was part of a scheme or arrangements of which a main purpose was the avoidance of liability to CGT.

## 3. *IRC v Foulser*

Clarifies the scope of the definition of "connected persons" in s.286(7) TCGA (2 or more persons acting together to secure or exercise control of a company shall be treated in relation to that company as connected with one another). Held, this treatment is not limited to s.286(5) and (6). And "secure" can mean obtain as well as retain.

## 4. *HMRC v Drummond*

In 2000-01 Mr D had made a substantial chargeable gain for CGT purposes. He wanted to make an equivalent allowable loss in the same tax year, without suffering a commercial loss. On 4 April 2001, Mr D accepted by conduct a written offer (this was to avoid stamp duty) to sell him 5 second-hand life policies for £1.96 million. The surrender value of the policies was £1.75 million. On 5 April 2001, Mr D requested the seller to surrender the policies, which was done on the same day and he received £1.75 million surrender proceeds. Mr D argued that he had made an allowable loss of £1.96 million on the disposal of the policies which were assets for CGT purposes (ss. 37 and 38 TCGA).

Before the Special Commissioner, Sir Stephen Oliver QC rejected all of the taxpayer's arguments. In particular, he held, applying *Ramsay*, that Mr D did not give any consideration for the acquisition of any asset for CGT purposes. He was never going to complete the contract of purchase. The only purpose of his purchase was to avoid tax. The surrender was pre-ordained at the time of his acceptance of the offer.

## IV Income Tax Act 2007: Transactions in Securities – Stephen Brandon QC

### Basic Requirements

It is essential to keep requirements in section 684 separate, i.e:

(1) Circumstances (ss. 686 to 690);

(2) A transaction in securities;

(3) A person obtains/is in a position to obtain an income tax advantage;

(4) (3) is in consequence of (2);

(5) Determine what is the quantum of any tax advantage;

(6) Does escape clause in s.685 apply?

The burden of proof is on HMRC (*Garvin* 55 TC 24) except in relation to the "escape clause" and (query) whether a "relevant company" is controlled by a quoted company: compare *Garvin* with *Bird* 61 TC 238.

"Securities" includes shares, stock and "in relation to a company not limited by shares ... includes a reference to the interest of a member in the company as such ..." and therefore catches the membership of a person in a company limited by guarantee/a hybrid company: section 713 sub-section (1). Stephen considers that debentures are **probably** included – *Parker* 43 TC 396.

## Procedure

Stephen referred to: Preliminary Notification (section 695); Statutory Declaration (section 696); Counterstatement (section 697); Counteraction Notice (section 698); Notice of Appeal (section 705); Special Commissioners; optional rehearing at Tribunal (section 706); High Court etc.

## Requirements for Liability

HMRC must show the following from section 684:

> **684 Person liable to counteraction of income tax advantage**
>
> "(1) This section applies to a person in respect of a transaction in securities or two or more such transactions if the person is in a position to obtain or has obtained an income tax advantage-
>
> (a) in circumstances where any of the provisions specified in subsection (2) applies in relation to the person, and
> (b) in consequence of-
>
> a. the transaction, or
>
> b. the combined effect of the transactions."

The Circumstance exists. Typically we are likely to be concerned with Circumstance D or, more likely, in a two company situation, where a new holding company, "Holdco" is imposed, Circumstance E may be in point. This will involve showing the requisite causal relationship, that is to say first, the "connection", e.g. between the distribution transfer or realisation of assets of a relevant company and a particular receipt within section 689(3) (or, in the case of Circumstance C, the dual causal relationship).

That there are one or more "transactions in securities", as defined by section 713:

> "... transaction in securities" includes transactions of whatever description, **relating to securities**, and in particular (*Words in brackets now deleted*)–
>
> (i) the purchase, sale or issue of securities;
>
> (ii) issuing or securing the issue of [~~applying or subscribing for~~], new securities;
>
> (iii) [~~the~~] altering or securing the alteration of the rights attached to securities; ..."

We now know that the payment of a dividend is not a transaction "relating to securities": *Laird Group* [2003] STC 1349.

Escape Clause: section 685

If relevant, the *taxpayer* must prove that conditions A and B apply.

Condition A

If the transaction or transactions were effected for genuine commercial reasons or in the ordinary course of making or managing investments; and

Condition B

Enabling tax advantages to be obtained is not the main object of one of the main objects of the transaction or any of the transactions.

**Relevant Circumstance**

Circumstances D s.689 and E s.690

They are still mutually exclusive (Court of Appeal in *Williams* 54 TC 257), thus the decision in *Anysz* 53 TC 601 was wrong. (This could be a useful point as *Anysz* is the most extreme case on the width of "tax advantage", which aids HMRC (in structures involving a new Holdco).)

All companies are "relevant companies" for ss. 689 and 691 unless quoted on the stock exchange or under the control of such a company. Application of ICTA 1988 s.416.

**Is a liquidation a "transaction in securities"?**

Understanding *Joiner* after *Laird Group* [2003] STC 1349. Brief facts were that the shareholders of a company entered into a liquidation agreement under which certain business assets were transferred to a new company, which would carry on the business while others would be distributed to the shareholders. The liquidation agreement set out the basis of valuation of the assets which was not in accordance with the articles of association. The old company was liquidated with certain of its assets passing to the shareholders in accordance with the liquidation agreement.

Why did what is now section 684 apply there? The ratio is that it applied by virtue of the joint effect of the liquidation and a transaction in securities, namely the liquidation agreement. Inherent in the agreement was the creation and transfer of the debt instrument (loan note) which itself was a security. Lord Wilberforce referred to a "pure liquidation" which would not involve a transaction in securities.

## V Planning for Clients Domiciled outside the UK: What's New?- Timothy Lyons QC

### The *Review* Reviewed

A government review of domicile and residence was announced in March 2002. In April 2003 the Treasury and Inland Revenue published: "*Reviewing the residence and domicile rules as they affect taxation of individuals: a background paper*".

**Reporter's Update Note:** but NB the proposed crackdown on non-UK domiciliaries from April 2008 referred to above.

There has been considerable interest in the review in some quarters, particularly press coverage. The Review is ongoing.

### Some things don't change

The range of considerations relevant to non-domiciled clients is well-known. For IHT purposes:

- ensure that deemed domicile is avoided where it is not overridden (e.g. by double taxation treatment such as France and Pakistan);

- use excluded property settlements;

- ensure that property is situated outside the UK and that property within the UK is reduced in value so far as possible, e.g. by mortgages;

- remember that holdings in authorised unit trusts and shares in OEICs are excluded property if the person beneficially entitled to them is an individual domiciled outside the UK;

- note the position re exempt gilts and certain deposits, certificates and arrangements for those domiciled in the Channel Islands or the Isle of Man;

- for the person who is non-UK domiciled and non resident and ordinarily resident in the UK immediately before death, the balances on accounts with a bank which are not denominated in sterling are left out of account (IHTA 1984 section 157). The section also excludes accounts held by trustees in certain circumstances.

### Some things do change: tax return 2006/07

If the government has not yet concluded its review, HMRC has apparently decided already to increase its scrutiny of non-UK domiciled individuals. The tax return for

2006/07 contains a specific section headed domicile with more specific questions than appeared in the 2005/06 return.

IR21 makes this comment on the quality of the evidence required in respect of a domicile of choice:

"You have the legal capacity to acquire a new domicile (a **domicile of choice**) when you reach age 16. To do so, you must broadly leave your current country of domicile and settle in another country. You need to provide strong evidence that you intend to live there permanently or indefinitely. Living in another country for a long time, although an important factor, is not enough in itself to prove you have acquired a new domicile."

**The EU gets involved**

The Commissioner for Tax and Customs in Brussels has made clear his dislike of remittance bases of taxation on the ground that they may lead to double non-taxation. Nevertheless, if a state is going to have a remittance basis it must be non-discriminatory.

**£55,000 limit**

Note the maintenance of the limit of £55,000 on the inter-spouse/civil partner exemption where the transferor but not the transferee is UK domiciled: IHTA 1984 section 18(2). Does the limit give rise to an exit charge which can be challenged in some circumstances? Does the concept of EU citizenship assist? The limit may, in some circumstances be overridden by the terms of a double tax treaty: see e.g. the USA/UK treaty, Art 8.

**Deemed domicile override**

Deemed domicile rules for IHT are sometimes overridden by treaty provisions in relation, e.g. to France.

**Excluded property: advantages comparatively increased**

FA 2006 increased the categories of property subject to the relevant property regime of ten yearly and exit charges. In so doing it made comparatively more attractive the IHT position of excluded property settlements. See IHTA 1984 section 58(1)(e).

The legislation is directed at purchases of interests in possession. It may be possible, though, to effect a purchase of a valuable interest in a settlement which is not an interest in possession. See in this context *IRC v Pearson* [1980] STC 318.

## VI Transfer of Assets Abroad – Post Income Tax Act 2007 – Robert Venables QC

### Application of the Provisions

The legislation applies only where there has been a "Relevant Transfer" (formerly a "transfer of assets"), as extensively defined, in consequence of which income arises to a Person Abroad. A person who has sought to avoid liability to United Kingdom taxation by means of such a transfer ("the Transferor" – a term not used in the legislation, past or present) may find that income which arises to the Person Abroad is deemed to be his for UK income tax purposes. That may be for one of three reasons. The first is that he has the ability to enjoy the income of the Person Abroad. The second is that he receives a benefit as a result of relevant transactions. The third is that he has received or is entitled to receive a "Capital Sum" (as defined). Note the leading case of *Vestey v Inland Revenue Commissioners* [1979] 54TC503.

### Double Taxation

It is a moot point to what extent there can be double (or multiple) liability to UK income tax (or corporation tax) in respect of income which is caught by the legislation. The Provisions themselves contain only limited exceptions from double charges.

### Compatibility with EC Law

Robert is confident that it will one day be held by the European Court of Justice that the legislation is to some extent incompatible with EC law. The United Kingdom Parliament has hitherto made no attempt to make it so compatible. The Legislation is now contained in Income Tax Act 2007 ss. 714 – 743.

In the context of the charges on Transferors, the decision of the House of Lords in *Lord Chetwode v Commissioners of Inland Revenue* [1977] 51TC647 suggests that "income" means "income for income tax purposes". The decision, however, is highly suspect, for a number of reasons. The absence of gratuitous intent is irrelevant in determining whether there has been a Transfer of Assets. Even a transfer for full consideration on arms' length terms can qualify. However, it is not necessary that the Transferor is the person who made the transfer.

### The Liability of Non-Transferors

The charge on Non-Transferors is now contained in Income Tax Act 2007 sections 731-735. The key provisions are sections 731-733 and of those, section 733 (providing when income arises for any tax year) is the most important, and section 732 is the second most important.

Section 732 lays down the basic conditions. First, there must have been a Relevant Transfer, i.e. a Transfer of Assets as a result of which income became payable to a Person Abroad. Second, a non-Transferor can be taxable only if when he is ordinarily UK resident he receives a benefit provided out of assets which are available for the purpose as a result of a Relevant Transaction.

**Transferor a Foreign Domiciliary**

Before the enactment of Income Tax Act 2007, it was a moot point whether a Transferor who was in principle taxable under that part of the Provisions relating in terms to Transferors but who escaped an actual charge to tax in respect of non-UK source income could nevertheless be taxable as a Non-Transferor if, notwithstanding that the income which had become payable to the Person Abroad was not remitted to the UK, he had "received" a Relevant Benefit in the UK. Although the Revenue did not in practice claim that he was, the only legislative authority was the very flimsy one of the side-note to Income and Corporation Taxes Act 1988 section 740. Now, however, section 732(1)(d) makes it crystal clear that he cannot be taxed as a Non-Transferor.

There is disagreement as to what is meant by "the benefit is not received in the UK". Is it enough that the benefit is not conferred in the UK or is it also necessary that it is not thereafter remitted to the UK? If, as some argue, it is the former, the reference to Income Tax (Trading and other Income) Act 2005 sections 833 and 834 is difficult to fathom. Those sections apply to deem foreign income to be remitted to the UK where, broadly speaking, loans are involved.

## VII Trusts and Settlements – Post Finance Act 2007 and Income Tax Act 2007 – Robert Venables QC

**The Main Provisions**

Summary of the Main Charging Provisions and Their Effect. Income Tax Act 2007 lists the main charging provisions in s.619 Charge to tax under Chapter 5. In very broad, untechnical, terms, the Provisions deem income arising under a settlement to be that of the settlor if he or his spouse/civil partner can benefit from the settled property in any way; a minor unmarried child of the settlor in fact benefits from the settled property; the trustees directly or indirectly make loans to, or confer gratuitous benefits on, the settlor or his spouse/civil partner, but only to the extent that there is undistributed income.

However, the technique used is different, depending on the precise charging provision. Section 624 catches income as it arises and thus deems it to be income of the settlor and of the settlor alone). That section is very easy to operate. Any income tax paid by the trustees is treated as paid by them in a representative capacity on behalf of the settlor. If the trustees pay the income in the exercise of a discretion to a beneficiary other than the settlor, it is in Robert's view, deemed not to be the income of that beneficiary.

Section 629 purports to apply the same principle. However, that gives rise to difficulties where income which arises under a settlement is paid to, or for the benefit of, a relevant child of the settlor in a year of assessment other than that in which it arises. The difficulty is compounded if section 631 (retained and accumulated income) applies where the trustees retain or accumulate income arising under the settlement and a payment is subsequently made in connection with the settlement to, or for the benefit of, a child of the settlor who is unmarried or not in a civil partnership, so that the payment is treated for the purposes of section 629(1) as a payment of income.

In the case of the charges under sections 633 and 641, it is not the case that the income which is deemed to be that of the settlor is the same income as that which arose under the settlement. It is theoretically different income. However, there is a relationship between income arising under the settlement and the income the settlor is deemed to receive in that: (a) there is a cap on the settlor's liability which takes into account, *inter alia*, the quantum of income arising under the settlement and (b) in taxing the settlor, he obtains a credit for income tax paid by the trustees.

## VIII Trusts in Divorce – Martin O'Dwyer

Martin's talk was concerned with the approach of the courts of the Family Division in cases of divorce to entitlements or potential entitlements of a party under a trust and in particular discretionary trusts.

A. Sources of the Court's basic jurisdiction to make orders consequent to divorce- ss.24 & 25 Matrimonial Causes Act 1973.

B. Are assets in discretionary trusts 'family assets' or 'resources' which the courts will use to fund capital settlements – the interpretation is **broad**. "Not only what he (the spouse in question) is shown to have, but also what could reasonably be made available to him if he so wished" – *O'D v O'D* [1976] Fam 83, 90 Ormorod LJ. *Thomas v Thomas* [1995] 2 FLR 668 CA the court is to evaluate "reality of spouse's circumstances". In *Browne v Browne* [1989] 1 FLR p291 an offshore discretionary trust was held to be a resource of the wife. See also *Charman v Charman* [2006] 2 FLR 422.

This broad approach can also extend to companies for the majority shareholder, but only if minority interests could be disregarded i.e. for one-man companies. See *Mubarak v Mubarak* [2001] 1FLR673.

C. Inspection appointments and summonses. "A wife [in this case] is entitled to go "fishing" in the Family Division within the limits of the law and practice" – Dunn LJ, *B v B* [1978] Fam 181,191.

Any party may apply to the court for an order that any person do attend an appointment (an "inspection appointment") before the court and produce any documents to be specified or described in the order, the production of which appears to the court to be necessary for disposing fairly of the application for ancillary relief or for saving costs.

D. Joinder of Trustees. FPR 19.2(2) enables the court to add a new party "if it is desirable so that the court can resolve all the matters in dispute in the proceedings." However, trustees particularly offshore and/or discretionary may have good grounds for resisting the application.

E. Letters of request CPR 34.13 *Charman v Charman* [2005] EWCA 1606. H appealed against orders obtained by W for the issue of a letter of request to the Bermudian Court for H's Bermudian solicitor to be orally examined and to produce various trust documents as the examination, including the trust deeds, letters of wishes, trustee resolutions and recent trust accounts. H argued that this was a "fishing expedition" and that the orders granted were disproportionate, oppressive, too wide and in any event, unnecessary. The appeal was dismissed and the Court of Appeal held amongst other things that:

> "... the court should in principle be receptive to an application where there was good reason to suppose that evidence of assistance to the court in carrying out its quasi inquisitorial role under s.25 of the 1973 Act might be obtained ... the judge had correctly concluded that the production and inspection of the documents were necessary for disposing fairly of the application or for saving costs ... it was not oppressive for the professionals to be required to provide information and documentation."

F. The Sham Trust : The concept of a sham trust is well known and see *Minwalla v Minwalla* [2005] 1 FLR 771. It may be necessary to pierce the veil, e.g. where a husband never had the slightest intention of respecting even the formalities of the trust and corporate structures that had been set up at his direction.

G. Discretionary Trust as post nuptial settlement and capable of variation. In *C v C* [2003] 2 FLR 493, Coleridge J stated that "I find there is no impediment to the court dealing with this trust, either because it is foreign or discretionary".