TRANSFERS BETWEEN SETTLEMENTS AND CAPITAL PAYMENTS

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1 Scope of the Article

1.1 The Question

If the trustees of a settlement in the exercise of a dispositive power transfer settled property to the trustees of a transferee settlement under which a beneficiary takes some beneficial interest (less than an absolute interest), do the trustees of the transferor settlement confer on him a "capital payment" within the meaning of Taxation of Chargeable Gains Act 1992 section 87 and for the purposes of the Offshore Beneficiary Provisions.[2] At first blush, it might appear that they do. Taxation of Chargeable Gains Act 1992 section 97(1) defines "capital payment" in terms of certain types of "payment". Section 97(2) provides that in subsection (1) "references to a payment include references to the transfer of an asset and the conferring of any other benefit ..." Surely, it might be thought, the conferring of a beneficial interest is the conferring of a benefit. And is this impression not reinforced by section 97(5) which provides: "(5) ... a capital payment shall be regarded as received by a beneficiary from the trustees of a settlement if ... (b) it is ... otherwise paid or applied for his benefit ..."?[3]

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2 Taxation of Chargeable Gains Act 1992 section 87 - 97 and Schedules 4B and 4C.

3 Similar, if not totally identical, questions arise where trustees appoint to a beneficiary a new beneficial interest under the existing settlement.

1.2 The Author's View

In my opinion, the scheme of capital gains tax legislation is such as to preclude any such conclusion. Where, in exercise of dispositive powers, trustees transfer assets between settlements, a beneficiary does not receive a "capital payment" from the trustees within the meaning of section 87 by virtue of his obtaining a beneficial interest under the transferee settlement. If I am wrong on that, the amount or value of the capital payment is the market value of the interest so obtained minus the market value of any interest under the transferor settlement of which the beneficiary has been deprived by the transfer. As a corollary, the mere fact that the transfer may be justified as a matter of trust law as being for the "benefit" of a particular beneficiary does not mean that he has received a capital payment equal to the value of the assets transferred.

2 Same Settlement: New Beneficial Interest

2.1 Irrational and Capricious Effect of Contrary View

Let us follow the Cartesian method and analyse the problem step by step. Let us first take the simple situation where the trustees of a settlement in exercise of their dispositive powers confer a fresh beneficial interest, say, a life interest, on a beneficiary.

I note firstly that, if I am wrong, then the incidence of the legislation would be capricious indeed. It is an insult to the legislature to impute to it such an irrational intention. For the conferring of many, probably most, beneficial interests would not constitute the making of capital payments, whereas the conferring of others would, even though the benefit from the beneficiary's point of view was the same and the tax consequences ought to be the same.

If a beneficiary is given, say, a life interest by the settlement itself, not even the Revenue have argued that that is a capital payment.[4] Does it make all the difference if, say, a testator creates a short-term discretionary will trust, to take advantage of Inheritance Tax Act section 144,[5] and the trustees then create the life interest within two years of his death? Or a settlor creates an accumulation and maintenance trust *inter vivos* for a class of grandchildren and the trustees are given power to vary the

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4 As they could have done in *Billingham v Cooper* [2001] EWCA Civ 1041; [2001] STC 1177.

5 See my Inheritance Tax Planning 3rd Edition B.2.2.6.14.

shares of the beneficiaries *inter se*, a power which they exercise to increase the settled shares of some beneficiaries by adding to them the presumptive shares of others?

Suppose that it is not the trustees but some other donee of a power of appointment who confers the interest. It is not uncommon for such a power to be conferred on the settlor, a beneficiary or an "appointor", i.e. a third party who is clearly not the trustees or one of them, even though the power may be vested in him in a fiduciary capacity.

2.2 Nothing Received "From" the Trustees

What all the cases in the preceding two paragraphs have in common is that the interest is not in any sense received "from the trustees" and therefore cannot fall within the definition in section 87(4).

In my view, when the trustees create a beneficial interest in exercise of their dispositive powers, it is not they, but the settlor, who is conferring the beneficial interest on the beneficiaries through the agency of the trustees. The trustees are merely perfecting his original gift. There is a long line of judicial authority to this effect. *Drummond v Collins* (1915) 6 TC 526 concerned a discretionary trust of income. The trustees exercised their discretion to pay foreign income for the benefit of minors resident in the United Kingdom. It was argued on behalf of their guardian, that as the payments from the trust were voluntary, they could not constitute taxable income. The House of Lords rejected this argument. Lord Wrenbury said, at the bottom of page 538:

> "At the time with which your Lordships have to do, there could be no payment except by exercise of the discretion vested in the Trustees; but so soon as their discretion is exercised in favour of the child, the resulting payment seems to me, upon the language of the Will, to be a payment of income to which the child is entitled *by virtue of the gift made by the testator.*"[6]

Similarly, in *Eilbeck v Rawling*,[7] Buckley LJ, in the Court of Appeal, put it even more clearly, at the top of page 161:

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6 Italics supplied.

7 Reported, together with *W T Ramsay Ltd v Commissioners of Inland Revenue*, at (1981) 54 TC 101. *Eilbeck v Rawling* in the Court of Appeal is also reported at [1980] 2 All ER 12 and [1980] STC 192.

> "It has long been firmly established law that the donee of a special power of appointment is charged with the exercise of a personal discretion which he cannot delegate. When he exercises that discretion in making an appointment, he acts as the delegate of the settlor. What the donee does in exercise of a special power of appointment is done vicariously by the settlor."[8]

Now there is one apparent exception which proves the rule. If the trustees confer an absolute interest on a beneficiary, that is the making of a capital payment. But that is because he has become absolutely entitled as against them to the settled property. The fictitious corporation which the trustees are deemed to be for capital gains tax purposes[9] has ceased to be entitled to the asset itself and the beneficiary has, for capital gains tax purposes, if not in reality, disposed of his beneficial interest in the asset and received the asset itself as the proceeds of the disposal.[10] The trustees may actually transfer both legal and equitable title to the asset to him; yet even if they simply confer an absolute equitable interest on him, are still deemed to dispose of the asset to him.[11] In either case, the appointment is expressly deemed to be a capital payment. Section 97(1) defines "capital payment" in terms of "payment", while section 97(2) provides that in section 97(1) references to a "payment" include references "to the transfer of an asset ... and to any occasion on which settled property becomes property to which section 60 [nominee property] applies." In other words, it is not the conferring by the trustees on the beneficiary of an equitable interest which is the capital payment: it is the beneficiary becoming absolutely entitled as against the trustees, which could happen simply because his interest had fallen into possession or had otherwise ripened into an absolute interest.

If my view were wrong, there could be double taxation. Wherever the interest conferred is an interest in capital, there would be a capital payment made when it was conferred and another made when it ripened into an absolute interest. The presumption against double taxation is very strong indeed. Nor, in my view, has the latest House of Lords case on the topic, *R v Dimsey* [2001] UKHL 46; [2001] STC

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8 See also *Chinn v Collins* 54 TC 311 (1980).

9 Taxation of Chargeable Gains Act 1992 section 69(1).

10 Taxation of Chargeable Gains Act 1992 section 71(1).

11 Taxation of Chargeable Gains Act 1992 section 71(1): " (1) On the occasion when a person becomes absolutely entitled to any settled property as against the trustee all the assets forming part of the settled property to which he becomes so entitled shall be deemed to have been disposed of by the trustee, and immediately reacquired by him in his capacity as a trustee within section 60(1), for a consideration equal to their market value."

1520 much shaken the general principle. The principal authorities are reviewed in my article *R v Dimsey* in *The Offshore and International Taxation Review* Volume 10 Issue 3 page 175. They are: *Vestey v Inland Revenue Commissioners* [1980] AC 1148; *Canadian Eagle Oil Company Limited v R* [1946] AC 119; *Bird v Inland Revenue Commissioners* [1989] AC 300; *Commissioners of Inland Revenue v Garvin* [1981] 1 WLR 793; *Commissioner of Inland Revenue v Auckland Harbour Board* (PC) (New Zealand) [2001] STC 130; *Lord Herbert v Commissioners of Inland Revenue* (1943) 25 TC 93; *Commissioners of Inland Revenue v Clifforia Investments, Ltd* (1962) 40 TC 608; *Powell-Cotton v Inland Revenue Commissioners* [1992] STC 625 and *F.S. Securities Ltd v Inland Revenue Commissioners* [1965] AC 631. Indeed, after the passing of the Human Rights Act the presumption is stronger than ever.

2.3 No Loss to the Trustees

I must accept that one of the reasons I gave in my Non-Resident Trusts 8th Edition in support of the view that the conferring of a fresh beneficial interest on a beneficiary cannot amount to the making of a capital payment can no longer be regarded as entirely sound. I said, at 14.7.4:

> "It might be asked whether the trustees make a capital payment to a beneficiary if in the exercise of the power of appointment they appoint, say, a life interest to him. At first sight, it would appear that they do. However, in my opinion, the scheme of capital gains tax legislation is such as to preclude any such conclusion. When property is added by way of gift to an existing settlement, the number of assets in existence for capital gains tax purposes is doubled; for the trustees are deemed to be a single and continuing body of persons who own the underlying settled property, while at the same time the beneficial interests are regarded as being owned by the beneficiaries and as constituting separate chargeable assets from the underlying settled property. Taxation of Chargeable Gains Act 1992 sections 87-98 are concerned only with situations where the trustees confer a benefit out of the underlying settled property which they are deemed to own for capital gains tax purposes. The beneficiary receives nothing from the trustees if and to the extent to which the value of the settled property which the trustees are deemed to own remains unaffected. Thus a mere rearrangement of the beneficial interests by the trustees will not amount to a conferring by them of a benefit on an individual within the meaning of section 97(2)."

The Court of Appeal decided in *Billingham v Cooper* [2001] EWCA Civ 1041; [2001] STC 1177 that the making by the trustees to a beneficiary of an interest-free loan did amount to a capital payment. Although it is not clear whether the point I had made in my book was argued,[12] the judgment arguably rejects it by implication. There is, however, a *tertium quid*. In *Billingham*, by making the interest-free loan and not calling it in, the trustees did not diminish the value of the trust fund but they did forego an increase in its value which might have resulted from their investing it. In the language of Civilians, while there was no *damnum emergens*, there was a *lucrum cessans* i.e. they lost the opportunity of making a profit; even though they were no worse off, they lost a potential profit. This is not true in the case where they confer a new beneficial interest.

2.4 The Revenue Interpretation 201

The Revenue Interpretation RI 201 of April 1999 "Transfer of Assets Abroad – taxation of income under the provisions of TA 1988 ss.739-746" is concerned with, *inter alia*, the interpretation of section 740 of the Taxes Act, which can apply where a beneficiary receives a capital benefit from a non-UK resident trust.[13] Section 74(1) provides:

> "(1) This section has effect where-
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> > (a) by virtue or in consequence of a transfer of assets, either alone or in conjunction with associated operations, income becomes payable to a person resident or domiciled outside the United Kingdom; and
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> > (b) an individual ordinarily resident in the United Kingdom who is not liable to tax under section 739 by reference to the transfer *receives a benefit provided out of assets which are available for the purpose* by virtue or in consequence of the transfer or of any associated operations."[14]

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12 It was perhaps unfortunate that a case with such important consequences should have involved taxpayers who were not both willing and able to instruct Leading Counsel to argue it. While they instructed a Junior of very high quality, one will forever speculate whether the result might have been different.

13 RI 201 is discussed at length in my article '*Tax Avoidance by Transfers of Assets Abroad: the Revenue View*' in *The Offshore and International Taxation Review* Volume 9, Issue 1, at p.45.

14 Italics supplied.

The Revenue state, under the heading *Section 740*:

> "For the purposes of s.740(1)(b) a benefit is treated as not including either the giving of a life interest to a beneficiary or the receipt by a beneficiary of the proceeds of selling a life interest."

While the wording of Taxes Act 1988 section 740 is not identical to that of Taxation of Chargeable Gains Act 1992 section 87, I myself cannot see any reason why they should be construed differently.

3 Transfer to Another Settlement

Does it make any difference that the new interest conferred on the beneficiary is under the terms of a transferee settlement? It seems to me that it can make no difference in principle at all. What the beneficiary finishes up with is an equitable interest in the same settled property. Which settlement it is comprised in for capital gains tax purposes is neither here nor there. This is borne out by the judgment of Buckley LJ in the Court of Appeal in *Eilbeck v Rawling*.[15] In that case, the trustees of a Gibraltar settlement had in exercise of their dispositive powers transferred substantial sums to the trustees of a Jersey decanting settlement which had been established with a £100 initial trust fund. Buckley LJ said, on page 161:

> "If one asks who was the settlor of the £315,000 appointed by the appointment of 27 March 1975, the only possible answer is the settlor of the £600,000 comprised in the Gibraltar settlement. The taxpayer's brother [the settlor of the Jersey settlement] did not settle the £315,000; he settled only £100. The Gibraltar trustee did not settle the £315,000; *it was not the Gibraltar trustee's to settle*, and making the appointment the Gibraltar trustee was only exercising a fiduciary power conferred on him by the Gibraltar settlor, whose delegate he was as donee of the power. *The exercise of the power had, in my opinion, precisely the same effect as if the Gibraltar trustee had appointed the £315,000 in favour of the Jersey trustee to be held upon trusts identical with the trusts of the Jersey settlement but set out in extenso in the appointment without reference to the Jersey settlement.* If the appointment had taken that form, there could, I think, be no doubt that the trusts so appointed would be trusts taking effect under the Gibraltar

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15 Reported, together with *W T Ramsay Ltd v Commissioners of Inland Revenue*, at (1981) 54 TC 101. *Eilbeck v Rawling* in the Court of Appeal is also reported at [1980] 2 All ER 12 and [1980] STC 192.

settlement."[16]

4 The Value of the Benefit

4.1 Meaning of "Benefit"

What is meant by "benefit" in section 97? It is used:

> in the definition of "payment" in section 97(2) "the conferring of any other benefit"
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> in the quantification of the amount of a capital payment in section 97(4) "equal to the value of the benefit conferred by it" and
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> in determining when a capital payment is to be regarded as received by a beneficiary in section 97(5)(b) "paid or applied for his benefit".

How does one ascertain the "value" of the benefit. If the phrase used were "market value" one would apply the convertibility test, as one so often does in the capital gains tax and inheritance tax legislation. While it is possible that "value" has some other meaning, it is difficult to see what that could be. In *Cooper v Billingham*,[17] the concept of "value" was discussed only within narrow confines. The Court of Appeal decided simply that one could look back year by year and see what benefit had been conferred on the beneficiary by the failure of the trustees to call in a beneficial loan which was repayable on demand. There seemed to be no real argument how one valued that benefit in the instant case. The taxpayer had agreed with the Revenue in advance of the hearing on the point of principle what interest he would have had to pay on the loans year by year if they had been made on commercial terms.[18] The Revenue's contention was that "the effect of the legislation was that Mr Cooper had received capital payments ... corresponding 'to the interest that would have been paid in the relevant years on the loans ... had those loans been taken from a commercial lender'. Mr Cooper agreed the computation but challenged

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16 While it is true that the conclusion which Buckley LJ reached was implicitly later rejected by the House of Lords in *Roome v Edwards* (1981) 54 TC 359, that does not detract from the force of the dicta cited.

17 [2001] EWCA Civ 1041; [2001] STC 1177.

18 I cannot myself see why the taxpayer should have so agreed, although I can, of course, see the enormous tactical advantage to the Revenue.

the premises on which it was made."[19] It would *appear* that the taxpayer agreed that if a capital payment of some value had been made to him, then that was a proper method of computing its quantum. While that agreement may have been sensible on the facts of the case, it might be far from sensible on the facts of a different case. For present purposes, the point is that the case does not help us very much at all in the present context.

4.2 Revocable and Irrevocable Interests

Could *Billingham v Cooper* have any relevance in the case of the conferring of a beneficial interest? Let us distinguish between those interests which the trustees are free to revoke at will and those which they are not. In the latter case, there is only one capital payment, which is made on the date of the appointment. One must, in my view, value it then. If it is, say, a reversionary interest contingent on what appears to be a remote contingency, say, H.R.H. Queen Elizabeth the Queen Mother surviving both her younger daughter and her eldest grandson's first wife, it will then have little value and it is irrelevant that its value later increases. It is difficult to see what "value" can mean if not "market value". Anything else would be entirely subjective.

In the former case, while it might be conceded that when the interest was granted it had no value, it could still then be argued that the failure by the trustees year by year to revoke the interest was a further capital payment which could be valued with hindsight. We must here distinguish between revocable interests in possession and other revocable interests which I shall call interests in remainder. If the interest in possession is, say, a life interest, then one could indeed argue that the failure to revoke it during the year conferred a benefit. Yet I doubt whether this would assist the Revenue in imposing a tax charge. For if the benefit of non-revocation in the year in effect consisted in the beneficiary receiving taxable income, it would not be a capital payment: see section 97(1)(a); whereas if it consisted of some income benefit which was not liable to income tax, then that benefit would, after *Billingham v Cooper*, already constitute a capital payment. Only if the power of revocation lapsed during the year, so that the interest became indefeasible, could it be said that the trustees had conferred any further benefit on the beneficiary.

If the interest is in remainder and remains in remainder and revocable at the end of the year, then no value has been conferred on the beneficiary. It is again only if the power of revocation lapses during the year, that it can be said that the trustees have conferred a further benefit on the beneficiary.

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19 [2001] EWCA Civ 1041; [2001] STC 1177 paragraph 9.

4.3 Gross or Net Benefit?

Does one have regard to the gross or the net benefit conferred on a beneficiary by the appointment? In my view, to the net benefit, i.e. one determines how much better off the beneficiary is as a result of the appointment. If assets have been transferred between settlements and his interest under the new settlement is no more valuable than his interest under the old settlement, then he has received a capital payment of no value. As a matter of trust law, this is glaringly obvious where he has the same beneficial interest in the same underlying assets both before and after the transfer, but it ought still to be the case where one interest is replaced by another of no greater value.

Compare the position where the trustees, in exercise partly of their administrative and partly of their dispositive powers, sell a trust asset to a beneficiary at a deliberate undervalue. The benefit to him is only the element of undervalue.

It might be argued that doubt is impliedly cast on my views by the decision of the Court of Appeal in *Billingham v Cooper* [2001] EWCA Civ 1041; [2001] STC 1177, approving, albeit with some reluctance, the reasoning of Lloyd J in the Chancery Division, reported at [2000] STC 122. Walker LJ, who gave the only reasoned judgment, said, at paragraph 39:

> "The whole scheme of the legislation requires the court to see what benefit a beneficiary actually receives, in cash or in kind, otherwise than as income or under an arm's length transaction. Any pre-existing beneficial interest belonging to the beneficiary is irrelevant. The judge dealt with this point shortly ([2000] STC 122 at 135) but there was no need for him to say more."

Lloyd J said, at the bottom of page 134:

> "Mr Ewart's other contention is that no benefit is received from the trustees or that the value of the benefit is nil because the benefit, if any, is the non-charging of interest whereas if interest had been charged it would have gone to the borrower in his capacity as the beneficiary entitled to income and thus he was no better off than he would otherwise have been and in that sense got no benefit from the transaction, or in a different sense any benefit he received was from himself.
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> Again, I prefer Mr Tidmarsh's submissions. It seems to me that the legislation does not call for or permit a comparison of the position that the recipient might have been in if a different transaction had been undertaken

> by the trustees. There are too many different possible comparisons for that to be a tenable approach. The proper comparison is with the position of the recipient if the actual loan had not been made rather than if some other transaction had been entered into. The recipient of the actual loan, if it had not been made, would not have had the use of the money lent."

The statement "Any pre-existing beneficial interest belonging to the beneficiary is irrelevant" must be read in the context of the argument. To paraphrase the words of Lloyd J: "The proper comparison is with the position of the recipient if the actual transfer/appointment had not been made rather than if some other transfer had been made". In the present type of case, if the actual transfer or appointment had not been made, the beneficiary would automatically have had the beneficial interest of which he has been deprived by the transfer/appointment. In *Billingham*, the taxpayer had to go a step further and say that if the loan had not been made the trustees would have entered into some other transaction, such as investing in an income-producing asset, and that other transaction would have conferred a benefit on him. Thus, in my view, the case in fact lends some support to my view.

It is true that Lloyd J said at page 135:

> "Mr Ewart expressly disavowed the contention that, if the benefit which the income beneficiary received was by way of capital advance, an outright transfer of an asset, say a holding of gilts, the benefit conferred was to be valued by reference to the reversionary interest only because he was already entitled to the income interest of that same asset. That being so, and I am sure he is right, it seems to me to confirm that the recipient's existing interest under the trust has to be left out of the calculation for the purpose of valuing the benefit conferred under s.97(4)."

The judge does not tell us how Mr Ewart dealt with this point. One trusts that he pointed out that in the case of the beneficiary becoming absolutely entitled, there is expressly *deemed* (by section 97(2)) to be a capital payment, that there is a disposal by the notional body corporate consisting of the trustees of the settlement and that there is a corresponding diminution in the value of the settled property which is owned by that body corporate.

4.4 Financial or Moral Benefit

Does one have regard to financial or moral benefit in valuing a capital payment? Few would doubt that one could look only to financial benefit. Taxing statutes can in general regard only that which can be valued in money. That is why, for example, I am not denied gift aid relief when I make a gift to charity on the grounds that I have benefited morally and even derived enormous satisfaction from my gift. The "benefit" referred to in Finance Act 1990 section 25(2)(e) is a financial benefit. Nor can settled property be used to "benefit" me, so as to bring the income tax or capital gains tax settlement provisions or the inheritance tax gifts with reservation of benefit provisions into play, simply because under the trusts it is used to discharge my moral obligations.

Now in trust law, "benefit" can have a wider meaning. The power of advancement conferred by Trustee Act 1925 section 32, for example, which is a power, inter alia, to apply capital for the "benefit" of a beneficiary, can be so exercised as to create new trusts. These trusts need not be for the financial benefit of the beneficiary: it is enough that they are for his moral benefit. Indeed, the result of the exercise of the power may be that his estate has thereby reduced in value[20] or that his interest in the settled property is reduced to zero.[21]

Some have argued that where trustees exercise a dispositive power exercisable only for the benefit of A so as to create fresh beneficial interests vested in X and Y, that must be a capital payment conferred on A. They rely on Taxation of Chargeable Gains Act 1992 section 97(5):

> " ... a capital payment shall be regarded as received by a beneficiary from the trustees of a settlement if-
>
> (a) ...
>
> (b) it is directly or indirectly applied by them in payment of any debt of his or is otherwise paid or applied for his benefit ..."

They assume that as the whole of the appointed fund is applied in creating the new trusts, so the value of the capital payment received by A is the value of that fund. Yet if my view that "benefit" must mean "financial benefit" is correct, then section 97(5) takes the Revenue no further.

If my view is wrong, then the most extraordinary state of affairs arises. Suppose the trustees have power to apply capital for the benefit of A and do so by making an absolute payment to his natural child. The payment is clearly a capital payment

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20 As would have been the case in *Pilkington v IRC* [1964] AC 630, had the exercise of the power been valid.

21 As in *In Re Hampden's Settlement* [1977] TR 177.

received by the child. If it is also a capital payment received by A, the same payment has done double duty and resulted in the potential visitation of double gains! Even if the trustees create, say, a life interest to X, the mother of the child, with remainder to Y, the child, there will be capital payments received by X and by Y immediately (as well as a further capital payment received by Y when he becomes absolutely entitled to capital on his mother's death).[22]

5 Conclusion

There is nothing anomalous or surprising about my view. The purpose of section 87 is to deem capital gains realised by non-UK resident trustees to be those of beneficiaries who receive settled property representing such gains. Admittedly, the technical provisions are such that that purpose is but imperfectly achieved. In particular, the provisions work on a FIFO (first in, first out) basis and there is no attempt to trace gains realised by the trustees into the payments received by the beneficiaries. The Court of Appeal has also decided, whether rightly or wrongly, at least authoritatively, that such gains can also be visited on beneficiaries who clearly do not receive property representing such capital gains from the trustees but who receive merely an income benefit which is not liable to income tax. But the basic purpose remains quite clear. In these days of purposive construction, ascertaining and giving effect to that purpose is very important.

Nor is there, on my view, any possibility of tax avoidance. When a beneficiary[23] is given a beneficial interest less than an absolute interest, he is given a right to future enjoyment. As and when that right ripens into actual enjoyment, he will be taxed. If he, for example, is given a life interest and receives taxable income, he will be liable to income tax, whereas if he receives an income benefit which is not itself liable to income tax, he will have gains imputed to him under section 87. If he receives a right to capital in future, then he will have gains imputed to him under section 87 as and when that right falls into possession. In principle, it makes no difference whether the right is absolute (though subject to some prior interest or trusts) or contingent or defeasible. It is simply that in the latter case, if he never does become entitled to capital, then no capital gains will be imputed to him, which seems entirely fair.

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22 Nowadays, it does not matter whether X and Y are beneficiaries of the settlement: Taxation of Chargeable Gains Act 1992 section 97(8).

23 I consider only the position of a beneficiary who is domiciled and either resident or ordinarily resident in the United Kingdom. A beneficiary who is not is in any case outside the scope of section 87.

If assets are transferred between settlements and the beneficiary has an interest under the transferee settlement, there is no tax avoidance if he receives no capital payment at that point. Section 90 will ensure that an appropriate fraction of the trust gains are carried over to the new settlement. True, where section 90(5) applies, there will be a possibility of tax avoidance. Yet it would be improper to construe the whole edifice of the Offshore Beneficiary Provisions, which have been with us since 1981, in the light of an amendment made only in 2000, which applies only in restricted circumstances and which has clearly been mis-drafted.

A loose analogy is the case of a barrister who is appointed a High Court judge. He has, say, an expectancy of twenty years in office and to receive a six figure annual salary during that period. His right to receive that salary can be quantified now, making due allowance for the chances of his ceasing to hold his office before retirement, and is clearly a right of some considerable value. It is equally clearly derived from, and attributable to, that office. Why cannot it be said that he is at once liable to income tax under Schedule E on the actuarial value of his rights to be paid in future? He is, *mutatis mutandis*, in the same position as a beneficiary who is given now a beneficial interest under a settlement. He is given now a present right to future enjoyment. What the judge and the beneficiary should be taxed on is the actuality of the enjoyment, not the right to future enjoyment. In my opinion, they are.

I therefore conclude that my view leads to a fair and just result whereas it is the contrary view which would be creative of distortion and injustice as well as potential double taxation.