SOME FOREIGN ASPECTS OF THE SCHEDULE E ACCOMMODATION CHARGE

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> "*`It was as true', said Mr Barkis, nodding his nightcap, which was his only means of emphasis, `as taxes is. And nothing's truer than them'.*"[2]

Where a person upon beneficial terms occupies a property belonging to a company, the shares in which are all owned by the trustees of a settlement, the question arises as to the taxability of the benefit undoubtedly arising to the occupier. A number of different provisions of the tax legislation may be in point, depending on the precise factual situation, but I am concerned here specifically with the case where

(a) the company is not resident in the UK, and

(b) the occupier can fairly be said to be a person "in accordance with whose directions or instructions the directors of the company ... are accustomed to act".

The classic case is where the settlor of a trust is also the principal beneficiary and the occupier of the property concerned, but the possibilities are wider than that.

A common fear in such a case is that the occupier will be liable to charges to income tax by virtue of sections 145 and 146 of the Taxes Act 1988, which in certain circumstances deem a person to be in receipt of emoluments equal to the value to him of the accommodation (as differently calculated by each section). The Revenue's argument[3] is said to be that:

(1) the occupier is by virtue of his *de facto* control a "director" of the company

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[2] Charles Dickens, *David Copperfield*, Ch 21.

[3] see the Revenue's letter dated 25 January 1989.

within section 168(8)[4] ("any person in accordance with whose directions or instructions the directors of the company ... are accustomed to act");

(2) he accordingly has an "employment" within section 168(2) ("an office or employment the emoluments of which fall to be assessed under Schedule E");

(3) he is the "employee" of the company, which is his "employer";

(4) the accommodation is provided by his "employer";

(5) the accommodation is therefore deemed to be provided by his employer by reason of his "employment" within section 145(7) and section 146(10);

(6) therefore sections 145 and 146 can apply;

(For the sake of simplification, I have omitted certain qualifications and exceptions which will not apply in the ordinary case with which we are concerned.)

There are a number of difficulties with the Revenue's argument, and these have been explored elsewhere[5]. But, despite these difficulties, there seems to be a residual fear that the Revenue might still have the law on their side, and after all, even if they have not, no one wants to be a test case in the House of Lords. It may very well be "'something', as Lord Mildew said in *Rex v Badger*, 'to dot an "i" in perpetuity'"[6], but does your client really want to pay for it?

I am not concerned here to re-examine the arguments over the tortuous and (arguably) logically impermissible route that the Revenue's argument must follow if it is to succeed. Others far more capable than I have already done that[7]. I am concerned instead to push the argument forward into less well covered territory. Let us suppose that, as far as it goes, the Revenue's argument is correct, and that sections 145 and 146 can in principle apply in the circumstances stated. But let us now consider four variations of the basic facts:

(1) the occupier (and potential taxpayer) is neither resident nor ordinarily resident in the UK, though the property concerned *is* here;

(2) the occupier is resident and ordinarily resident in the UK, but the property

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4 References to section numbers without more are references to sections of the Taxes Act 1988.

5 see, e.g., Malcolm Gunn, *Taxation*, 19 June 1987, p.243; Robert Venables QC, *Taxation*, 16 February 1989, p.468; Christopher Sokol, *Taxation*, 19 April 1990, p.64; James Kessler, Volume 1, 1990/91, Issue 1, 27, *The Offshore Tax Planning Review*.

6 A P Herbert, *Uncommon Law* (1969 ed), p.72.

7 see note 5 above.

concerned is outside the UK;

(3) the occupier is neither resident nor ordinarily resident in the UK, and the property concerned is outside the UK;

(4) the occupier is resident in the UK, and the property concerned is in the UK.

Variation (1): UK Property, Non-Resident Occupier

It will be said against me that, if the property is in the UK and is accommodation available for the occupier's use, it is difficult to see how he can be non-UK resident. But whilst it may be difficult, it is not impossible. For example,

(a) the Revenue's view[8] that a person is resident in the UK if he has accommodation available to him in the UK and spends at least one day in the UK in the tax year is not statutory, and is based on an interpretation of case law[9] that may not withstand detailed scrutiny;

(b) even if the Revenue's view is correct, the occupier may not come to the UK at all in a particular tax year;

(c) even if the Revenue's view is correct, the occupier may have a full-time business occupation outside the UK and thus fall within section 335(1), which provides that in such circumstances the question of the occupier's residence is to be decided without regard to the existence of any place of abode maintained in the UK.

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8 see leaflet IR 20, paras 14, 28-30.

9 particularly *Cooper v Cadwallader* (1904) 5 TC 101.

Sections 145 and 146 do not themselves impose a liability to tax; they are not charging sections. Instead, they deem a person to have received emoluments *for the purposes of Schedule E*. Plainly, therefore, if a person for any reason does not fall within the scope of Schedule E, the sections can have no impact on him. If the occupier truly is not resident for income tax purposes, then cases I and III of Schedule E[10]cannot apply, since they depend on UK residence.

Case II is different; it reads as follows[11]:

> "any emoluments, in respect of duties performed in the United Kingdom, for any year of assessment in which the person holding the office or employment is not resident (or, if resident, not ordinarily resident) in the United Kingdom, subject however to section 192 if the emoluments are foreign emoluments (within the meaning of that section)."

We can dismiss the reference to section 192 immediately, as in all the circumstances it cannot make the occupier's tax position any better than it otherwise would be. The much more significant question is whether the emoluments deemed by sections 145 and 146 to be received by the occupier can be shown to be "in respect of duties performed in the United Kingdom". If they can, they are within Case II and hence chargeable to income tax.

Our factual assumptions are:

(1) The company is UK non-resident (and hence is almost certainly not incorporated in the United Kingdom)[12];

(2) The occupier is UK non-resident;

(3) The property is in the UK.

Sections 145 and 146 deem the occupier to receive emoluments. There is nothing in these sections to suggest that the occupier is deemed to carry out *any* duties, much less that they are deemed to be performed in the UK. Although it may be said, on the Revenue's part, that you must follow through the *consequences* or *incidents* of the statutory deeming, at least until you reach the point of absurdity[13], yet it may fairly be said that there is nothing in that principle to *trace back* from the statutory deeming the antecedents which, had it been a fact, would logically have preceded it.

Accordingly, the occupier ought in most cases to be able to show an absence of "duties performed in the UK", and hence that he falls outside Case II. And, looking

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10 Taxes Act 1988, s.19(1) (as amended).

11 *ibid.*

12 see Finance Act 1988, s.66(1).

13 *Re Levy, ex p Walton* (1881) 17 Ch D 746 at 756; *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] 2 AC 109 at 132-133; *IRC v Metrolands* [1981] STC 193 at 208; *Marshall v Kerr* [1991] STC 686 at 696-697.

at the true factual position, that must surely accord with reality: a non- resident occupier is for the purposes of the legislation within the definition of "director" of a non-resident company by reason of effective control of the company. To say that the "duties" of such a directorship (meaning, if it means anything, the exercise of control) were performed anywhere inside the UK is factually unlikely. It should therefore seem that Case II can have no application, and thus income tax is not properly chargeable on the occupier, notwithstanding the applicability (if it be so) of sections 145 and 146.

Variation (2): Non-UK Property, Resident Occupier.

This variation is more complex. Only Case II of the three cases of Schedule E can be easily excluded on the basis of the occupier's non-residence in the UK (or at any rate lack of ordinary residence). We must consider each of the two remaining cases separately.

Case I is as follows:

> "any emoluments for any year of assessment in which the person holding the office or employment is resident and ordinarily resident in the United Kingdom, subject to section 192 if the emoluments are foreign emoluments (within the meaning of that section) and to section 193(1) if in the year of assessment concerned he performs the duties of the office or employment wholly or partly outside the United Kingdom."

Assuming (as we do) that the company is not UK resident (and also, in this case, that it is not resident in the Republic of Ireland) the emoluments will be foreign emoluments within the meaning of section 192, as long as the occupier is foreign domiciled. That section excludes foreign emoluments from Case I where the duties of the "office" are performed outside the UK. If the occupier can so prove (and the burden will be on him if an assessment has been made against him) then Case I will not apply. But he will have difficulty. Apart from the fact that there may not be any duties of which to prove the existence[14], even if he could do so, they might well be thought to have taken place in the UK, given that that is where he is resident. Of course, he may be able to prove that he travelled abroad for every decision made by him as to what the company should do, and in that case he may well have an argument that the "duties" were carried on outside the UK. Since the property itself is outside the UK, it may be possible to structure things so that all aspects of control by the occupier are demonstrably carried on in the place where the property itself is.

Then there is Case III, which is as follows:

> "any emoluments for any year of assessment in which the person holding the office or employment is resident in the United Kingdom (whether or not ordinarily resident there) so far as the emoluments are received in the United Kingdom."

Are the emoluments "received in the United Kingdom"? Unfortunately, sections 145 and 146 do not assist. They merely say that the occupier shall "be treated for the

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[14] see above, variation (1).

purposes of Schedule E as being in receipt of emoluments ... ", they do not say *where* the deemed receipt is to take place. Does it matter where the property is? In my view it does not, since the benefit of the use of the accommodation (which in normal circumstances will take place where the property is) is not *itself* the emolument, but by virtue of the terms of sections 145 and 146 is merely something against which the value of the emolument is to be measured. Again, one must resolve the matter by reference to the burden of proof[15]. If the burden is on the occupier, he cannot show that they have been "received" outside the UK, even if the property is outside the UK. If the burden is on the Revenue, they cannot show that they were received inside the UK.

Variation (3): Non-UK Property, Non-Resident Occupier

This can be taken more shortly. The same considerations apply as with variation (1), save that the property is outside the UK. This latter fact merely goes to strengthen the occupier's argument that, even if there *are* "duties" involved in the production of the deemed emoluments, no decisions or other acts regarding the (non-resident) company have been made or done, and hence no "duties" performed, in the UK.

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[15] *contra*, James Kessler, *loc cit* note 5 above at 33, who says that since the emoluments are fictional they cannot be "remitted to the United Kingdom".

Variation (4): UK Property, UK Resident Occupier

Again, this can be taken shortly. The reasoning is much the same as with variation (2). The occupier will be within Case I of Schedule E unless he can prove that there were "duties" and that they were performed *outside* the UK. He will also be within Case III (assuming the burden of proof to be on him) unless he can prove that the emoluments were "received" outside the UK.

Conclusions

It will be seen that, even supposing the Revenue to have an arguable case on the applicability in principle of sections 145 and 146 in such circumstances, the additional factual complication of a non-resident occupier makes their case much weaker, in some cases diminishing it to vanishing point. Where the additional complication is merely that the property concerned is outside the UK, the occupier's argument is marginally improved, but not to so considerable an extent.

The more xenophobic amongst us may well agree with Nancy Mitford when she wrote

> "I loathe abroad, nothing would induce me to live there ... and, as for foreigners, they are all the same, and they all make me sick."[16]

but she cannot have had sections 145 and 146 in mind at the time.

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[16] *The Pursuit of Love*, Ch 10.