The Offshore & International Taxation Review

R v DIMSEY; R v ALLEN: A CAUSE FOR CONCERN

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The judgment of the Court of Appeal (Criminal Division) in *R v Dimsey*; *R v Allen* has not at the time of writing been fully reported. There is, however, a digest of the judgment at [1999] STI 1206. A number of points were taken on those appeals. Two of those points are of general importance to tax practitioners. The first concerns the situation where, by virtue of a transfer of assets within ICTA 1988 section 739, income arises to a company which is incorporated outside the UK but is resident in the UK for tax purposes. Section 739 applies to that income, due to the operation of section 742(8) which deems the company to be non-UK resident for the purposes of section 739.

In both *R v Dimsey* and *R v Allen*, the prosecution alleged that the businesses of certain companies, incorporated outside the UK, were in fact centrally managed and controlled in the UK, and that as a result, the defendants had been involved in the evasion of UK corporation tax by those companies. The jury decided that the companies were UK resident and so UK corporation tax had been evaded. On appeal, the prosecution accepted that the income of those companies was caught by section 739 for the reasons set out above. The defendants argued that the effect of section 739 was for tax purposes to deem the income of the companies to be the income of the transferor and therefore not the income of anyone else. If the companies had no income liable to tax then there was no liability for corporation tax to be evaded.

The Court of Appeal pointed out that the deeming provision in section 739(2) only applies "for the purposes of the Income Tax Acts". Therefore, the Court came to the conclusion that the deeming could have no effect on the computation of the income

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of the companies for the purposes of corporation tax which was carried out under the Corporation Tax Acts. Both the transferor and the company were liable to tax in respect of the same income. The Court did not find that conclusion odd or absurd. Indeed, it suggested that there were good policy reasons for this double charge. The transferor may be impecunious and so unable to pay his liability under section 739. The double charge gives the Revenue the opportunity to recover tax from the company. *Vestey v IRC* (1980) 54 TC 503 was dismissed as a case which bore no resemblance to the present appeals. However, the Court of Appeal accepted the proposition that a subject is not to be taxed by discretion. Finally, it was suggested that, if the Revenue sought to recover tax from the transferor and the company, the Court would prohibit that action as an abuse of power.

It is convenient to deal with the last point first. If the Court of Appeal is correct then, as a matter of the true construction of the 1988 Act, Parliament has provided for a tax charge on the transferor and a tax charge on the company in respect of the same income. It is difficult to see how a Court could say it was an abuse of power for the Revenue to collect the tax due on a true construction of the tax legislation. The only possible foundation for such an argument would be the Revenue's "plain statement" to the Court of Appeal that they would not seek to exact tax from both the transferor and the transferee. However, such an undertaking cannot help in the construction of the statutory provisions. If the undertaking had never been given or was withdrawn in the future, one would be left with the statutory provisions which, according to the Court of Appeal, require two tax charges.

The inevitable consequence of the Revenue's self denying ordinance is that they have a choice whether to tax the transferor or the company. This is exactly the kind of taxation by discretion which was excoriated by the House of Lords in *Vestey*. It is particularly inappropriate in the age of self assessment. Who is to return the liability? Do the transferor and company have to ask the Revenue who the Revenue choose to tax before making their returns?

The writer would respectfully suggest that the answer is that Parliament has already made this choice. There is only one charge and that is under section 739. This becomes clear when one looks carefully at ICTA 1988 section 9 subsections (1) and (2). Sub-section (1) provides:

> "... the amount of any income shall for purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income ... being determined in accordance with income tax law and

practice ...".

Subsection (2) explains that:

> "... 'income tax law' means ... the law applying ... to the charge on individuals of income tax, except that it does not include such of the enactments of the Income Tax Acts as make special provision for individuals ...".

Reading those provisions together the result is that in computing the income of the company one applies the income tax law which applies in computing the income of individuals. Section 739(2) tells us that for the purposes of the Income Tax Acts the income is treated as income of the transferor and (by implication) not the income of anyone else. This means that an individual would not be charged to income tax in relation to income which was chargeable on a transferor under section 739. It must follow that a company cannot be charged to corporation tax in relation to that income. It is unnecessary for section 739(2) to mention corporation tax as section 9 automatically applies the provision to corporation tax just as it does in relation to many other provisions in the Income Tax Acts. The only exceptions are sections which make special provision for individuals. Section 739(2) is not limited to the income of non-resident individuals. It primarily applies to the income of non-resident companies and trustees. Therefore, it clearly does not make special provision for individuals.

The Court of Appeal's construction requires one to give the provisions a strained meaning and results in an unjust double charge which has to be ameliorated by administrative concession. The alternative construction set out above gives the provision their natural and obvious meaning and results in a sensible single charge. The writer has little doubt which construction ought to find favour in the House of Lords.

In *R v Allen*, the Court of Appeal had to consider a situation in which the defendant was neither an officeholder nor an employee of a company but fell within ICTA 1988 section 168(8) as a person "in accordance with whose direction, or instructions the directors of the company are accustomed to act". The defendant received benefits in kind from the company including the provision of living accommodation in a property owned by the company. The defendant did not make any return of those benefits and so was convicted of evading his liability to tax. On appeal it was argued that there was no tax charge in those circumstances. The Court of Appeal held there was a liability under ICTA 1988 sections 154 and 145.

The Court of Appeal reasoned that since the defendant was deemed by section 168(8) to be a "director", he must also be deemed to hold an office. Since employment includes the holding of an office (section 168(2)), the defendant was deemed to be employed as a director of a company and so fell within section 167(1)(a). He was, therefore, "employed in employment to which this Chapter applies" and so fell within section 154.

This is surely a mistaken construction of those provisions. Section 168(8) is a special definition of a word placed in inverted commas, i.e. "director". This definition applies wherever one sees the word "director" in the relevant part of the Act. There are a number of provisions where a distinction is drawn between an employee simpliciter and an employee who is also a director: see e.g. sections 145(5), 164(1), 167(1)(a). The definition applies to the word "director" in those provisions. The Revenue's argument collapses when one realises that section 168(8) is not a deeming provision, but provides a definition of a particular word.

Further, it is fairly clear that section 168(2) must be referring to a real office or employment since it requires the office or employment to be one "the emoluments of which fall to be assessed under Schedule E". This is not to say that there must be emoluments from the office or employment. That point was set up and, rightly, knocked down by the Court of Appeal. However, the office or employment must be such that the emoluments from it (if any) are taxable under Schedule E. This is the limit of the territorial scope on the benefit in kind provisions. When one turns to ICTA 1988 section 19(1).1, which sets out the scope of the charge under Schedule E, one finds that in some circumstances the existence of a charge depends upon where the duties of the office or employment are performed (see Schedule E Case II). This can only be applied to a real office or employment which has actual duties. A deemed office has no duties. Therefore, as a matter of construction, section 168(2) must be referring to a real office or employment.

The most puzzling part of the whole judgment is the Court's assertion that its construction "has the merit of giving content to s.168(9)". This subsection provides:

> "A person is not under subsection (8) above to be deemed to be a person in accordance with whose directions or instructions the directors of the company are accustomed to act by reason only that the directors act on advice given by him in a professional capacity."

Subsection (9) is puzzling since, on any construction of subsection (8), it is difficult to see how "advice" could amount to "directions or instructions". In any event, subsection (9) is aimed at protecting a person such as a solicitor or accountant who is a company secretary with emoluments of a few thousand pounds a year and who receives benefits in kind from the company. Such a person holds an office, but is not a director of the company. Subsection (9) prevents the secretary being a deemed "director" if he gives advice to the directors which they are accustomed to follow. If he was a "director" as defined in sub-section (8) then he would fall within the benefit in kind provisions despite the fact that the emoluments from his office were less than £8,500 per annum. This gives plenty of "content" to subsection (9) on either construction of subsection (8). There is no "accident of repetition".

In my view, the Court of Appeal were wrong in concluding that a "shadow director" who does not hold an actual office or employment and who receives a benefit in kind, is chargeable under ICTA 1988 section 154. They were equally wrong in concluding that such a person is liable to tax under section 145 in relation to living accommodation provided to him. Section 145(8)(b) emphasises the fact that one is simply dealing with the definition of the word "director" where it appears in the legislation (e.g. section 145(5)).

It is a serious cause for concern that the Revenue should have prosecuted an individual for evading a tax charge which almost the entire profession would have said did not exist and which a Special Commissioner had held did not exist. It is equally a cause for concern that a jury should have convicted in those circumstances. A third cause for concern is the fact that these issues of the construction of tax legislation should have been considered not by the specialist tribunal (the Special Commissioners), the Chancery Division or the Civil Division of the Court of Appeal, but by the Crown Court and the Criminal Division of the Court of Appeal. The matter can only be put right if the House of Lords grant leave to appeal.