TAXABLE REMITTANCES (2): ICTA 1988, SECTIONS 739 TO 745

Stephen Brandon QC[1]

1 Introduction

1.2 This, second, article on remittances deals with how they fall to be charged on a foreign domiciled taxpayer under ICTA 1988, sections 739 and 740.

2 Section 739

2.1 The principal provision, section 743, subsection (3), is relatively straightforward, once the way section 739 works is understood. Leaving aside for the moment the limited charge where tax is charged because of the existence of power to enjoy only in the form of the receipt of a benefit (section 742, subsection (1), (c)), liability under section 739 results in the whole of the income which becomes payable by virtue or in consequence of the transfer[2] (and associated operations) being deemed to be the individual's (and no one else's) for income tax purposes.[3] Thus, the taxpayer is deemed to be entitled to the underlying income.

2.2 That income is then charged under Case VI, which does not contain a remittance rule, hence the need for section 743, subsection (3), which states:

> "(3) An individual who is domiciled outside the United Kingdom shall not be chargeable to tax in respect of any income deemed to be his by virtue of that section if he would not, by reason of his

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2 That is, of course, the transfer which (with any associated operations) produced the "power to enjoy" or entitlement to a capital sum.

3 Although not for corporation tax, according to *Dimsey*.

being so domiciled, have been chargeable to tax in respect of it if it had in fact been his income."

2.3 Thus, ICTA 1988, section 65 is brought in. The application is relatively simple:

2.3.1 Assuming that the underlying income were that of the taxpayer (as section 739 itself assumes), would section 65 provide relief?

2.3.2 Obviously, provided the income is foreign source, section 65, subsection (4) would. We must, however, bring in subsection (5), so that, if the income is remitted, as section 65 would not provide relief, neither will section 743, subsection (3).

2.3.3 This raises several issues. First, what of the source-ceasing rule? Again, the application is relatively simple. We ask the question, had the taxpayer been entitled to the income, would section 65, subsection (5) have charged tax in respect of its remittance? It would not if the source ceased in the previous year: we are, again, following *Brown*,[4] dealing with the *measure* of income taxed in a year after it arises. (The position may thus be contrasted with the more worryingly drafted ICTA 1988, section 660G(4), which deems income to arise in the year in which it is remitted. Does this mean that the source ceasing rule has no application? No. This provision is first predicated with the requirement that the settlor would be taxed on the remittance because of United Kingdom residence, so it would seem that, at *that* point, we claim the "source-ceasing" defence. On that basis, if the source ceasing principle applied, the deemed "arising" will never be reached).

2.3.4 Secondly, what if the remittance is not by the taxpayer but, e.g., by the company to which the income became payable? It is arguable that, since *Carter v Sharon* tells us that a remittance has to be by the taxpayer, or so that he/she is entitled to the income, there is no (taxable) remittance. Certainly, while section 739 deems the income to arise to the taxpayer, it does not deem a remittance by someone else to be by him/her. A purposive approach by the Courts is a danger here: better to look on this as an argument in respect of what has gone wrong than a planning tool.

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4 See paragraph 6 in article (1).

2.3.5 Thirdly, unlike other provisions[5] section 743, subsection (3) does not expressly incorporate the anti-avoidance rules in section 65, subsections (6) to (9). Does this matter? I think not. It seems to me that the draftsperson has incorporated the "code" in section 65, rather than, as that of TCGA 1992, section 12, taxed a remittance and then (necessarily) brought in *part* of the code in section 65.

2.3.6 Turning to the charge levied in respect of benefits only caught by virtue of section 742, subsection (2), (c), there, section 743, subsection (5) limits the charge to the benefit received, but it does not deem any income to be that of the taxpayer: it merely provides that:

> "... the individual shall be chargeable to income tax by virtue of section 739 for the year of assessment in which the benefit is received on the whole of the amount or value of that benefit ...".

This is a substantive taxing provision: the benefit is taxed in the year of receipt. Section 743, subsection (3), however, only offers relief where income is deemed to be that of the taxpayer, which is not what happens with subsection (5). Thus, strictly, the remittance basis is not relevant.

3 Section 740

3.1 While the application of the remittance basis to section 739 is relatively straightforward, its application to section 740, subsection (2), is not. Section 740, like section 743, subsection (5), charges tax on the receipt of a benefit. The benefit, however, must be measured against the "relevant income" of the recipient, i.e., income which, when it arose, briefly, could be used for providing a benefit for that individual. It does not, itself, deem income to be that of the recipient.

3.2 A different form of relief to that given by section 743, subsection (3) is therefore needed. It is given by section 740, subsection (5), which is drafted in a way which renders it one of the easiest provisions to misunderstand:

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5 See e.g., TCGA 1992, section 12, subsection (2).

"(5) An individual who is domiciled outside the United Kingdom shall not, in respect of any *benefit* not received in the United Kingdom, be chargeable to tax under this section by reference to *relevant income* which is such that if he had received *it* he would not, by reason of his being so domiciled, have been chargeable to income tax in respect of it; and subsections (6) to (9) of section 65 shall apply for the purposes of this subsection as they would apply for the purposes of subsection (5) of that section if the *benefit* were income arising from possessions outside the United Kingdom." [My italics].

3.3.3 At this point it is worthwhile applying the cold towel. It is crucial to bear in mind, first, the reference to the receipt of a benefit (which is what it taxes), secondly, to hypothetical receipt of relevant income and thirdly, to the application of the anti-avoidance rules of section 65 to the *benefit* as if it were income.

3.4 The subsection works as follows:

3.4.1 A foreign domiciled individual is not chargeable, provided, first, that the charge is "... in respect of any benefit not received in the United Kingdom". We then need to know if the "benefit" *is* so received and, surprisingly, it is the words at the *end* of the subsection (after the semicolon) which deal with this. Section 65, subsections (6) to (9) apply here, as they would to section 65, subsection (5), if the benefit were foreign source income. I stress that this is *purely* concerned with the question: where was the benefit received?

3.4.2 Assuming, then, that our benefit (say, cash) is received abroad, that is only the first hurdle got over. It will be appreciated that it is the time of receipt only which is relevant (subject to section 65, subsections (6) to (9)) and, at this stage, later remittance is irrelevant.

3.4.3 The second requirement depends on a hypothesis: had the taxpayer received "it", would his/her foreign domicile have prevented "it" being taxed. This is the other, this time *implicit*, incorporation of section 65. There can be no doubt that "it" must be the "relevant income" and *not* the benefit received (there is, of course, no point in assuming the receipt of a benefit which, necessarily, must have been received or we are all wasting our time).

3.4.4 This is where the problems start. Let us, however, assume the simplest possible situation. The taxpayer receives a benefit of £100, which exactly matches his/her "relevant income" and the only *actual* income arising in the structure is £100. If £20 of that is United Kingdom source, section 65 would not help nor can section 740, subsection (5). The other £80 is foreign source. Of the benefit received, the taxpayer remits all £100. While, therefore, section 65 at first provided relief in respect of £80, the remittance by the taxpayer forfeited the relief, since, if he/she *had* received the £80 income, the remittance basis would have secured he/she was taxable on "it".[6]

3.4.5 Suppose, however, that all of the £80 emanated from a source which ceased in the previous year. While it is the view of some other commentators that the source ceasing principle cannot protect against liability under section 740, this is, in my view, wrong. Asking the question, would the taxpayer have been taxable on the underlying income if he/she received *it*, the answer is, *no*, since section 65, subsection (5) does not bite on "source-ceased" income. Thus, the "source-ceasing" principle, in my opinion, does provide relief.

3.4.6 The problems increase as the facts become more realistic. I set out the following as examples:

3.4.6.1 first, the "relevant income" of an individual is likely to be far greater than any particular benefit received. If the benefit is £100 but that year's (unused) relevant income £1,000, half foreign source and half United Kingdom source, which source of income comprises "*it*"? An analogy with the *Edinburgh Life* line of cases[7] points to an argument that if the taxpayer can show that foreign source "relevant income" was available, it is that income which should be "matched";

3.4.6.2 secondly, suppose the benefit is £100 (all remitted) but there was £100 potentially taxable income and £100 "source-ceased" income comprised in "relevant income".

6 It is important to stress that we are *not*, here, looking at where the benefit was received, which deals only with the moment of receipt.

7 See article (1).

Which is used as the "measure"? Again, I would argue that the taxpayer is able to point to the "source ceased" income which is available to be matched as "relevant income".