

THE OFFSHORE TAXATION REVIEW

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**The Offshore Taxation Review
(formerly The Offshore Tax Planning Review)**
is published by
Key Haven Publications PLC
7 Crescent Stables, 139 Upper Richmond Road
London SW15 2TN
Telephone (0181) 780 2522, Facsimile (0181) 780 1693

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Printed in England by Vitesse

Cross Reference of Articles

CROSS-REFERENCE OF ARTICLES

Articles published in one Key Haven Review may often be of interest to readers of another Review. In the past, we have consequently sometimes published the same article in more than one Review. As there was but a tiny overlap of subscribers and as the second publication was in addition to the material which would otherwise have been provided, we considered this helpful and unobjectionable.

It now appears that there is a considerable overlap of non-subscribing readers of our Reviews, some of whom are opposed to this practice. Some of our editors, too, prefer to maintain the integrity of “their” Review and would prefer articles appearing in it not to be duplicated elsewhere.

In deference to representations which have been made, we shall for a trial period not duplicate any articles. Instead, we shall provide a brief resumé in each Review of articles of interest which are being published in one of our other Reviews.

Robert Venables QC

President, Key Haven Publications PLC

Publishers' Announcement

THE OFFSHORE AND INTERNATIONAL TAXATION REVIEW

This issue marks the end of Volume 8 of the Offshore Taxation Review.

The Review will be changing its name with Volume 9 to *The Offshore and International Taxation Review*.

The Review will remain substantially unchanged. As is pointed out by Charles Cain in his article in this Issue, the word “offshore” in the context of taxation is often misunderstood. The publishers are advised that the current title gives the misleading impression that the Review is concerned solely with personal tax planning, including private trusts, and is of no interest to corporate taxation specialists.

The Editors are aiming to include more articles on corporate tax, or both corporate and personal tax. This will not, however, involve any reduction in the coverage of personal tax.

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There is a UK test of corporate residence enunciated in *De Beers Consolidated Mines Limited v Howe*: “a company resides, for purposes of Income Tax, where its real business is carried on ... and the real business is carried on where the central management and control actually abides.” In this article, the Consulting Editor explains that this formulation can be easily misunderstood, especially by criminal lawyers in trials for tax fraud. He re-analyses what is involved in the light of the authorities, most of which are now of some antiquity, and distinguishes the test from three other tests, namely (a) of who has control of the company, (b) of where the business of the company is carried on and (c) of where the profits of the company are earned.

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One might think that the new UK Transfer Pricing Provisions would have no relevance to gratuitous benefits conferred by companies on their participators or on beneficiaries of trusts which own them. One section of the Revenue has taken a contrary view, based on the literal wording of the Provisions. The consequences of that could be horrendous. In this article the author argues that application of the

principles laid down in the decision of the English Court of Appeal in *Memec plc v IRC* [1998] STC 754 leads to a different result.

The Interpretation of Double Taxation Conventions: Residence of Dual Resident and Temporarily Non-UK Resident Individuals

Robert Venables QC

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The author considers the tie-breaker paragraph on dual resident individuals in Article 4 of the OECD Model Convention. He first discusses the principles enunciated by the English Court of Appeal in *Memec plc v IRC* [1998] STC 754 and then shows how a construction of the paragraph in the light of the OECD Commentary leads to a rather different result than if one applied UK principles.

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In this article, Mr Charles Cain, of the Isle of Man, provides a lively riposte to the bureaucrats who drew up the OECD Report on “Harmful Competition” The article delves into philosophical, political and economic theory.

Where is an Interest in a Unit Trust Situated?

Robert Venables QC

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The author suggests that the answer to this question may not always be “in the place where the trustees are resident and administer the trust”, especially if the trust is governed by a proper law similar to English law and the trust instrument does not contain any special provisions.

A Note on Geoffrey Simpson’s ‘The Source of Interest: A Practical Hard Matter of Fact’

Robert Venables QC

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Mr Simpson’s original article appeared at page 109 in Issue 2 of Volume 8 of the *Offshore Taxation Review*.

A Note on Leon Sartin’s ‘Tax Recovery Claims by the Settlor’

Robert Venables QC

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In *The Personal Tax Planning Review* Volume 6, Issue 3, Leon Sartin considers whether or not trustees are bound or entitled to satisfy a claim by the settlor of a trust for reimbursement of capital gains tax he has been compelled to pay the UK Inland

Revenue, pursuant to the Offshore Settlor Provisions. In this Issue, the Consulting Editor writes a Note on Mr Sartin's article.

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EDITORIAL

Most of our international contributors have been in the *grippe* of a serious flu over the holiday season, when they had planned to finalise their contributions for this Issue. Happily, the Consulting Editor has discharged his New Year resolution of completing some of the articles which he has had on the stocks during the exceptionally busy period since the Chancellor's Budget Speech and has modemed from the virus-free air of the Florida Keys almost the entire contents of this Issue.

In 'Golden Trusts: Action Prior to 6th April 1999', the Consulting Editor considers the extension of the UK Offshore Settlor Provisions to certain non-UK resident trusts which were formerly "grandfathered in" and were colloquially referred to as "golden trusts". Although the changes were announced in the 1998 Budget Speech, they do not become fully effective until 6th April, but will then usually apply with quasi-retrospective effect to gains realized by the trustees after 16th March 1998. The author considers what tax planning steps can be taken before 6th April.

Many are familiar with the UK test of corporate residence enunciated in *De Beers Consolidated Mines Limited v Howe*: "a company resides, for purposes of Income Tax, where its real business is carried on ... and the real business is carried on where the central management and control actually abides." In 'Residence of Companies: The Real Management and Control Test', the Consulting Editor explains that this formulation can be easily misunderstood, especially by criminal lawyers in trials for tax fraud. He re-analyses what is involved in the light of the authorities, most of which are now of some antiquity, and distinguishes the test from three other tests, namely (a) of who has control of the company, (b) of where the business of the company is carried on and (c) of where the profits of the company are earned.

After a quarter of a century in the EEC/EC, we in the UK are beginning to learn that the canons of interpretation of international treaties and legislation made under them are very different from those of a UK statute. The recent case of the English Court of Appeal in *Memec plc v IRC* [1998] STC 754, in which the Consulting Editor and the Managing Editor represented the taxpayer, forcefully reminds us that double taxation conventions are no exception. The Consulting Editor deals with the *Memec* principles in articles on two different topics.

One might think that the new UK Transfer Pricing Provisions would have no relevance to gratuitous benefits conferred by companies on their participators or on beneficiaries of trusts which own them. One section of the Revenue has taken a contrary view, based on the literal wording of the Provisions. The consequences of that could be horrendous. In 'The Transfer Pricing Provisions and Benefits From Offshore Structures', the Consulting Editor argues that application of the *Memec* principles lead to a different result.

In 'The Interpretation of Double Taxation Conventions: Residence of Dual Resident and Temporarily Non-UK Resident Individuals', the Consulting Editor considers the tie-breaker paragraph on dual resident individuals in Article 4 of the OECD Model Convention. He first discusses the *Memec* principles and then shows how a construction of the paragraph in the light of the OECD Commentary leads to a rather different result than if one applied UK principles.

The 1998 OECD Report on "Harmful Competition" has excited some lively reactions, not least from Charles Cain, of the Isle of Man. In this Issue, Mr Cain, in his 'Musings on the OECD Report on Harmful Competition' provides a lively riposte to the bureaucrats who drew up the Report. The article delves into philosophical, political and economic theory. It contains some strong comments, which may shock some readers. It is the policy of the Editors not to suppress articles simply because they may be controversial. Even though we may not agree with quite everything Mr Cain says, we believe he should be given a platform for his sincerely held views, which are well reasoned and entertainingly expressed.

In 'Where is an Interest in a Unit Trust Situated?', the Consulting Editor suggests that the answer may not always be "in the place where the trustees are resident and administer the trust", especially if the trust is governed by a proper law similar to English law and the trust instrument does not contain any special provisions.

Geoffrey Simpson's article 'The Source of Interest: a Practical, Hard Matter of Fact' appeared at page 109 in Issue 2 of Volume 8 of this *Review*. His views to some extent differed from those of the Consulting Editor as set out in his article in Volume 7, Issue 3, at page 177 'The Territorial Source of Income: *Hang Seng Bank, HK-TVB International* and *Orion Caribbean*'. In this Issue, the Consulting Editor writes a Note on Mr Simpson's article.

In an article 'Tax Recovery Claims by the Settlor', in *The Personal Tax Planning Review* Volume 6, Issue 3, Leon Sartin considers whether or not trustees are bound or entitled to satisfy a claim by the settlor of a trust for reimbursement of capital gains tax he has been compelled to pay the UK Inland Revenue, pursuant to the Offshore Settlor Provisions. In this Issue, the Consulting Editor writes a Note on Mr Sartin's article.

The Editors welcome contributions. The Editors particularly welcome debate on points raised in articles appearing in the *Review* (or indeed other Reviews and Journals). All articles (whether long or short), ideas for articles, and other correspondence on editorial matters should be addressed to: Amanda Hardy, Managing Editor, Offshore Taxation Review, 24 Old Buildings, Lincoln's Inn, London WC2A 3UP.

Robert Venables QC

Amanda Hardy

January 1999