

The Offshore Taxation Review

OTHER KEY HAVEN ARTICLES ON OFFSHORE AND INTERNATIONAL TAX

THE PERSONAL TAX PLANNING REVIEW VOLUME 6 Issues 2 and 3

Transfers Between Settlements: a Loophole?

Robert Venables QC

The author considers the scenario where A creates a settlement. Some time later, the trustees in exercise of their dispositive powers transfer the settled property to the trustees of another settlement, to be held by them on the trusts of that settlement. Let it be assumed that there are, as there usually will be, two separate settlements. Who is the settlor of the transferee settlement? Does anything turn on the relevant definition of “settlement” and/or “settlor”?

The author suggests in the article that the transfer can be tax-effective in two situations. The first is to prevent the Offshore Beneficiary Provisions, (Taxation of Chargeable Gains Act 1992 section 87 onwards) from applying to the transferee settlement as regards trust gains realised and capital payments made before 17th March 1998, even if it applied to the transferor settlement.

The author suggests further that in the case of a non-discretionary settlement, property contained in the transferee settlement can constitute excluded property even though property contained in the transferor settlement could not.

In the course of the discussion, the author examines what is meant by “settlement” and “settlor” in certain tax contexts, in particular Taxation of Chargeable Gains Act 1992 section 87, in the Offshore Beneficiary Provisions.

“Carbolic Smoke Ball Protects Against Influenza” or *Lady Ingram* in the House of Lords

Robert Venables QC

The author discusses the unanimous decision of the House of Lords on 10th December 1998 to allow the Executors’ appeal from the majority decision of the Court of Appeal in *Lady Ingram’s Executors v Commissioners of Inland Revenue*. The Revenue raised a *Ramsay* point, which their Lordships did not find it necessary to address in dismissing the appeal. Some of their Lordships did have something to say about *Ramsay* and tax avoidance in the course of the argument. The author, who was Leading Counsel for the Executors, discusses these dicta, which he considers will be most useful to practitioners in indicating which way the wind is blowing.

Tax Recovery Claims by the Settlor

Leon Sartin

The author considers to what extent a settlor, who has been compelled by UK Revenue authorities to pay capital gains tax on gains realised by non-UK resident trustees, pursuant to the Offshore Settlor Provisions, will be able to enforce abroad the right of indemnity against the trustees. Robert Venables QC puts forward, in a Note on this article, a different view.

Trustee Exemption Clauses

James Kessler

The author reviews, in the context of the decision of the English Court of Appeal in *Armitage v Nurse* the topic of trustee exemption clauses. The author discusses it in the following divisions:

1. Questions of Construction: What is a particular form of words taken to mean.
2. Questions of Validity: To what extent exclusion clauses are valid.
3. Questions of Drafting: What clauses should a draftsman actually use in a settlement.
4. Questions of Legal Policy: What clauses should the law recognise as effective.

The Territorial Source of Interest Payments

Alexander Thornton

In Volume 6 Issue 2, the author considers the difficult question of the source of interest payments and concludes that the most decisive factor is not the residence of the debtor. Instead, it is the situs of funds from which the interest payments are made.

In Volume 8 Issue 2 of this Review, Geoffrey Simpson expressed a different view in *The Source of Interest: A Practical, Hard Matter of Fact*. In a Note in The Personal Tax Planning Review Volume 8 Issue 3, Robert Venables QC comments on Geoffrey Simpson's article in this Review.

Loan Relationships and TCGA 1992: Conversions

Julian Ghosh

The author considers, inter alia, what happens when a non-UK resident company becomes UK resident and within the charge to corporation tax so that bonds which it holds become qualifying corporate bonds. He considers in particular whether there is a "conversion" of the bonds at that stage and, if so, with what consequences.

Inheritance Tax And Transfer Pricing: a New Problem?

James Henderson

This is the article to which Robert Venables QC replies in this issue of this Review in his article *The Transfer Pricing Provisions and Benefits From Offshore Structures*.

THE PERSONAL TAX PLANNING REVIEW VOLUME 7 Issue 1 (forthcoming)

Migrant Individuals and Concessionary Relief from UK Capital Gains Tax

Robert Venables QC

The author discusses the drastic revision made by the UK Inland Revenue to its Extra-Statutory Concession D2 in conjunction with the introduction by Finance Act 1998 of the new charging provision on temporarily non-UK resident individuals. The author points out that, whereas the statutory provision is not retrospective, the amendment of the Extra-Statutory Concession is.

Taper Relief Traps: Imputed Gains of Trusts and Companies

Robert Venables QC

The author deals with the interaction of taper relief, introduced by the UK Finance Act 1998 and anti-avoidance provisions deeming gains of trusts and companies to be those of others. He deals also with the new rules, allegedly required by the introduction of taper relief, whereby in certain cases one can no longer set off a personal loss against an imputed gain.

THE CORPORATE TAXATION REVIEW VOLUME 1 ISSUE 4

Partnerships - Forex Financial Instruments and Loan Relationships

Charles Hellier

The author considers the application of the UK loan relationship rules, the financial instruments rules and the forex legislation to partnerships involving companies, in the light of Inland Revenue Statement of Practice (SP4/98).

Loan Relationships and TCGA 1992: Conversions

Julian Ghosh

This article deals with the general question when there is a “conversion” of a security for the purposes of United Kingdom taxes on capital gains. Some of the problems discussed have an offshore element. For example: “Assume that a non UK resident company exchanged, several years ago, well before the advent of the loan relationship provisions was contemplated, shares for loan notes issued by the purchaser company, which loan notes were non-QCBs and that TCGA 1992, section 135 applied to the exchange. The shares had a latent gain of, say, £1m, which was “rolled into” the loan notes. The vendor company then “immigrates”, i.e. becomes UK resident (at which point the loan notes become QCBs under section 117(A1)) and thereafter redeems the loan notes. What is the analysis here?”

Rollover Revisited

Francis Sandison

The thesis of this article is that “the structure of the roll-over reliefs given by the section 135 of the Taxation of Chargeable Gains Act 1992 is looking creaky and in need of a thorough review. Perfectly commercial ways of structuring company acquisitions can be made impossible by the requirements of section 135, while the rules relating to debt securities continue to confuse and frustrate the practitioner.” An example is cited the recent negotiations for the agreed acquisition of a smallish British PLC (“Tommy”) by a US competitor (Uncle Sam). The Tommy shareholders were to receive shares in Uncle Sam. Uncle Sam wished the acquisition to be made by an existing subsidiary (Pierre) based somewhere in Europe. “But the proposal was that Pierre would acquire shares in Uncle Sam and use them in effect as currency to

pay for the shares in Tommy. Of course, this would have prevented the Tommy shareholders from getting roll-over.”

“Control” In the New Transfer Pricing Provisions

Robert Venables QC

Finance Act 1998 has introduced into the Taxes Act 1988 a new schedule 28AA “Provisions not at Arm’s Length”, which are transfer pricing provisions under another name. In this article the author considers principally the test of “control” for the purpose of the provisions, which is crucial in determining when they come into play. He also discusses the existing Taxes Act 1998 section 416 and section 840 tests of control and compares and contrasts them with the new. He points out that trusts will often provide a means of circumventing the provisions.

THE OFFSHORE TAXATION REVIEW Volume 9 Issue 1 (forthcoming)

Problems with the UK TCGA Section 13

Attribution of Capital Gains of Non-UK resident Quasi-Close Companies

Robert Venables QC

In this extended article, the author discusses several of the many problems with the interpretation of these provisions, including:

- Companies to which Provisions Apply
- Persons to whom the Provisions Apply
- Persons with Changing Domicile and Residence Status
- Participators
- Non-UK Resident Trustees
- Method of Attribution
- Practical Difficulties
- Relevance of *Leedale v Lewis*
- Minority Shareholders
- Exempt Gains
- Double UK Taxation
- Credit or Deduction or Neither
- Gains Imputed to Trustees
- Ordering Rules
- Payment of Tax by the Company
- Losses
- Taper Relief and Indexation Relief
- Indirect Interests

Double Taxation Relief
Relief for Foreign Tax

THE EC TAX JOURNAL VOLUME 3 ISSUE 1

Harmful Tax Competition: the EU and OECD Responses Compared

Professor Alex Easson

The author considers:

the adoption by the EC Commission of a number of formal proposals to deal with two particular aspects of the tax competition problem, in particular proposing the adoption of a Directive on taxation of interest payments and of a "Code of Conduct" on business taxation;

the new proposal by the Commission for a Directive to ensure minimum effective taxation of savings income within the European Union (EU);

the presentation by the OECD's Committee on Fiscal Affairs, of its report to the ministers of the member countries on 27th April, 1998

the new initiatives of the EU and the OECD were endorsed by the G7 finance ministers at their meeting in London on 9th May, 1998.

The author provides a brief review of these developments, contrasts the different approaches taken by the EU and the OECD, and attempts to suggest where the various initiatives may lead. He focuses on the issues of:

the taxation (or non-taxation) of international portfolio investment income, especially of individuals; and

the taxation of foreign direct investment income of companies.

Unlawful German Tax Discrimination of Permanent Establishments Before The European Court of Justice

Dr Martin Lausterer

The prohibition against discrimination on grounds of nationality is another aspect of general EC law which has a significant impact on the direct tax systems of member states. This thoughtful article deals with the *Saint Gobain* case, which raises the issue of whether or not it is discriminatory to treat the German permanent establishment of a French company differently from a German subsidiary.

Commentary on the *ICI v Colmer* Case

Heather Corben

The issue of discrimination on grounds of nationality features again in Heather Corben's article on the *ICI* case which, rightly, suggests that further cases may be expected to arise in relation to UK taxation.

Indeed, cases concerning direct taxation and discrimination continue to be referred to the ECJ from around the EU. On 5th September 1998 it was announced in the Official Journal (OJ C 278/23) that a case (C-251/98) has been referred to the ECJ from the Appeal Court in the Hague, asking whether or not it is compatible with EC law for a Netherlands' wealth tax exemption to be confined to shareholdings in companies established in the Netherlands.

Bernd von Hoffman v Finanzamt Trier

Stephen Coleclough

In this article, the author considers a trio of German cases referred to the European Court of Justice, in all of which Germany has claimed a right to charge to VAT services which its opponent has claimed were supplied outside that state. The author sees these claims as a tightening of the German belt consequent on reunification; in effect, a claim for more *lebensraum* for Germans, at least in taxing matters.

THE EC TAX JOURNAL VOLUME 3 ISSUE 2 (forthcoming)

Implications of Recent EC Tax Initiatives for the Channel Islands and the Isle of Man

Phillip Bently QC

Fraud Against the Community Budget: a Common Concern

Peter Cullen

Harmful Tax Competition: the OECD and the EU on Separate Tracks

Eric Osterweil

VAT Groups in the United Kingdom

Robert Venables QC

Of particular interest to readers of this Review will be section 4 of this article, *Residence or Presence in the UK*, in which the author considers the recent rejection by the Value Added Tax and Duties Tribunal in *Shamrock Leasing Ltd v Commissioners of Customs & Excise*⁸ of the argument of the Commissioners of Customs & Excise that “because a director is resident in the UK, a company is “established” in the UK notwithstanding that it has no established place of business here”. While this decision was advantageous to the appellant in this appeal, it may force the Customs to abandon a practice which, however unsustainable in law, has often been taken advantage of in international tax planning.

The author also considers the relevance of Double Taxation Conventions to the EC value added tax legislation.

⁸ Case Reference LON/98/184, Decision number 15719, June 28th 1998, Theodore Wallace Chairman