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## **THE OFFSHORE TAXATION REVIEW**

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## From the Editors

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### EDITORIAL

In this issue, the Consulting Editor discusses what could be the most important United Kingdom tax case for ten years: the decision of the House of Lords in *McGuckian*, on appeal from the Court of Appeal of Northern Ireland. The decision has a double interest for international tax practitioners: it marks the possible beginning of a period of enormously increased judicial activism against tax avoidance and it concerns the transfer of assets abroad provisions which, since their introduction in 1936, have given rise to more House of Lords decisions than any other provision in the Taxes Acts.

In *McGuckian*, the approach of the House of Lords was distinctly anti-taxpayer. On 10th July, the House of Lords gave their pro-taxpayer decision in *Commissioners of Inland Revenue v Willoughby*, another transfer of assets abroad case. It will form the subject matter of an article in the next issue. The Appellate Committees in the two appeals contained only one member in common, Lord Clyde, who was one of the "doves" in *McGuckian*. In *Willoughby* their Lordships accepted both that the provisions do not apply to a transfer of assets made by a person who was *at the time of the transfer* not ordinarily resident in the United Kingdom and that in investing in an offshore bond for the taxation of which Parliament had provided a beneficial regime, Professor Willoughby was not indulging in "tax avoidance" but merely accepting "an offer of freedom from tax which Parliament has deliberately made". The first *ratio* will have no practical effect as regards income arising after 25th November 1996, on account of the change in the law made by Finance Act 1997. The second could have far-reaching consequences, beneficial to taxpayers.

Another important United Kingdom tax case, *Bricom v IRC*, concerning treaty override by domestic anti-avoidance provisions, continues to excite interest. We publish in this issue two responses, by Geoffrey J Simpson and the Consulting Editor, to the letter in the first issue of this volume from (now Sir) John Avery Jones in response to the Consulting Editor's article in Volume 6 Issue 3. The taxpayer has appealed directly to the Court of Appeal under the "leapfrog" procedure. Andrew Park QC adopted as his first argument on behalf of the taxpayer that put forward by the Consulting Editor in his article. The Revenue

have countered with the novel argument that the effect of the deeming provision should be extended not merely so as to deem the offshore company to be resident in the United Kingdom but also to deem it not to be resident elsewhere. In the Consulting Editor's view, this argument would have zero chance of success were the case concerned with anything but a tax anti-avoidance provision. The Court of Appeal is still taking time to consider its decision.

The Privy Council, presided over by Lord Nolan, the Law Lord who has the greatest experience of tax law, has decided *Commissioner of Inland Revenue v Orion Caribbean Ltd* [1997] STC 923, which contains an important review of the learning on the territory of source of income. These questions of source are often most difficult to determine, with judicial authorities going in all directions and distinctions being based ostensibly on tiny linguistic differences. A duo of Privy Council cases on appeal from Hong Kong, *IRC v Hang Seng Bank Ltd*<sup>1</sup> and *IRC v KH-TVB International Ltd*<sup>2</sup> had, as the Consulting Editor remarked in his article 'UK Taxation of Non-residents: the New Substantive Rules', in Volume 5 Issue 2 of this *Review*, "served to obfuscate rather than clarify the position". An article on the *Orion Caribbean* decision will appear in the next issue of this *Review*.

Another vexed question is when a trader resident in one country has a permanent establishment in another. Jonathan Miller considers the case of a United Kingdom resident company with trading connections with Spain.

Patrick Taylor concludes his three-part article on 'The Isle of Man Limited Liability Company or "LLC"' with a case for the adoption of LLC concept within Great Britain, in order to provide small businesses with a much simpler format than is the case at present.

The United Kingdom Finance Bill No 2 of 1997 was published on 9th July. It contains no provisions altering the taxation of foreign domiciliaries or directed against offshore trusts or companies. In his Budget Speech on 2nd July, the Chancellor of the Exchequer announced future restrictions on tax credits attached to dividends and other "distributions" from United Kingdom companies. These will particularly affect shareholders who are resident in foreign jurisdictions which have double taxation treaties with the United Kingdom. The provisions will form the subject matter of a future article in this *Review*.

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<sup>1</sup> [1990] STC 733 (PC)

<sup>2</sup> [1992] STC 723.

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: Julian Ghosh Esq, Managing Editor, Offshore Taxation Review, 24 Old Buildings, Lincoln's Inn, London WC2A 3UJ.

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July 1997