

The Offshore Taxation Review

BOOK REVIEW

Tax Planning for the Foreign Domiciliary, 2nd Edition 1996 by James Kessler & Peter Vaines, published by Key Haven Publications PLC. ISBN 1 870070 98 4. Hardback, 140 pages, plus tables of cases and statutes, and index.

This book is written for practitioners and is very well written. It is said that anyone can write a long book but few can write a good short book. This is a very good short book.

As the Introduction explains, this book "is concerned principally with the practical tax problems which arise when a foreign domiciliary comes to live in the United Kingdom..." While this is true, the book also deals by implication with the problems for returning British expatriates who are unlikely to be able to establish a continuing foreign domicile of choice and who therefore either are or will become domiciled in the United Kingdom.

The book covers a huge range of difficult law with great clarity and manages to set out all the main taxation problems comprehensively by covering the income tax, capital gains tax and inheritance tax implications. Unfortunately, discrete books on income tax, capital gains tax and inheritance tax rarely seem to pull the threads together and to cover the principles of all three taxes. Not only is the book helpful to United Kingdom tax practitioners, it is also helpful to overseas practitioners who are asked to advise individuals who plan to settle in or return to the United Kingdom.

The book is divided into twelve chapters covering Domicile (a particularly well written and helpful chapter), Income Tax, Foreign Income, The Remittance Basis: Foreign Income, Employment Income, Income Tax Anti-Avoidance Provisions, Capital Gains Tax: Basic Principles, Capital Gains Tax and Trusts, Domicile and Inheritance Tax, The Territorial Exemptions, Reservations of Benefits, and Inheritance Tax Planning for Individuals.

This review has been somewhat delayed as the reviewer wanted to wait until the case of *IRC v Willoughby* [1997] 1 WLR 1071 had been decided by the House of Lords. There is a general point that emerges from the *Willoughby* case which, while touched on briefly, is not fully considered by the authors. This concerns the meaning of tax avoidance. The *Willoughby* case did not involve an elaborate or contrived scheme aimed at tax avoidance. It concerned tax deferral for bona fide long term retirement saving in accordance with a tax regime enacted by Parliament. It therefore was not tax avoidance. By way of contrast, in *CIR v McGuckian* [1997] 1 WLR 991 the House of Lords appears to have held that elaborate schemes undertaken solely for tax avoidance reasons are likely to be set aside under the principles established in *WT Ramsay v IRC* [1982] AC 300 and *Furniss v Dawson* [1984] AC 474. This may mean that unless it can be shown that a scheme has been implemented for reasons of ordinary business or family dealing and that any tax benefit was incidental, it could well be ineffective for tax purposes if challenged in the courts. Following the *Willoughby* case it is clear that planning which involves the use of reliefs or allowances specifically provided for by Parliament (and, one might add, in the way intended by Parliament where this is clear) is not tax avoidance. This may be an area which the authors will wish to explore in their next edition which will certainly be welcomed. It is possible that further attacks on tax and estate planning will be announced in next year's Budget Speech. These could include confirmation of the intention to provide for a general anti-avoidance section along Australasian lines. Should this be so the authors will have an additional reason for preparing a third edition.

Mention has already been made of tax planning for the returning expatriate who is, in all probability, already domiciled in the United Kingdom or will be when he or she abandons a foreign domicile of choice. Perhaps the next edition could cover specifically the tax planning which should be undertaken for such persons. As the world becomes more and more international and more and more people work abroad, there is an increasing need for comprehensive and authoritative guidance not only for foreign domiciliaries but also for United Kingdom domiciliaries who work abroad and then return.

Another matter that might usefully be included, particularly for those who are to be settlors of offshore trusts, is the importance of setting up the trust correctly, followed by scrupulous administration of the trust assets by a competent trustee. Trusts which are in reality administered by a settlor who directs the trustees in their dealings with the trust assets and continues to control the assets, are at serious risk of being set aside as shams. Moreover, the existence of a protector who habitually acts on the instructions of the settlor may also render the trust at risk of being held to be a sham.

One final point, a minor criticism; there are errors and omissions in the Table of Cases. For example, *Ingram v IRC* is referenced to paragraph 16.6 which does not exist as there are only twelve chapters. The case is in a footnote to paragraph 6.16! *IRC v Willoughby* is shown in the Table of Cases as appearing in paragraph 6.10. This is correct but the case is also referred to in a footnote to paragraph 6.16 and again in the text three pages later in the same paragraph.

This is a very helpful and clearly written book. Lawyers, accountants and trust officers would be wise to buy it.

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