TAXATION OF CHARGEABLE GAINS TAX ACT 1992 SECTIONS 77 AND 86: INTERNATIONAL ASPECTS

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1 Scope of Article

1.1 Overview

In this article I consider certain international aspects of Taxation of Chargeable Gains Tax Act 1992 section 77 and 86. I consider the position both before the Budget Speech on March 16th 2005 and the position as from that date if the Finance (No 3) Bill 2005 clause 33, which is aimed at so-called 'Around the world' schemes, becomes law in the form in which it was Ordered to be Printed by the House of Commons on May 25th.[2]

1.2 Taxation of Chargeable Gains Tax Act 1992 Section 77

Taxation of Chargeable Gains Tax Act 1992 section 77 applies where the trustees of a 'Settlement' are United Kingdom resident[3] and where the settlor is resident[4] in the United Kingdom and has, or is regarded as having, an interest in it. The result of

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2 References in this article to Finance (No 3) Bill 2005 are to the bill as it was Ordered to be Printed by the House of Commons on May 25th.

3 or ordinarily resident. In this article, I shall concentrate on the residence position of the trustees, rather than on their ordinary residence.

4 or ordinarily resident

section 77 applying is that the settlor is in effect taxable on the trustees' capital gains. Given that the settlor has a right of indemnity against for the tax payable by him, the result at the end of the day is to alter the rate at which trustees pay capital gains tax on chargeable gains realised by them.

Although the section was originally conceived as an anti-avoidance provision, and would usually in the past have operated to increase the amount of capital gains tax payable, given that chargeable gains of the trustees of United Kingdom of resident settlements are chargeable at the rate applicable to trusts and, since 2004/05, that rate is the same as the higher rate of income tax, and thus the highest rate at which capital gains tax is charged on individuals, its current effect can only be to reduce the amount of capital gains tax payable and never to increase it.

The section has recently been considered by the House of Lords in *West v Trennery* [2005] UKHL 5 [2005] STC 214. I have written a separate article on that decision. (See a forthcoming issue of the Personal Tax Planning Review.) In this article, I shall consider two questions concerning the section which are unaffected by it. The first question concerns the position where the settlor is United Kingdom Resident but is non-United Kingdom domiciled and whether he is able to escape tax on gains realised by the trustees from property situate outside the United Kingdom provided that the proceeds are not remitted to the United Kingdom.

The second question is the extent to which the provisions of a double taxation convention can be relied on in the application of section 77.

1.3 Taxation of Chargeable Gains Tax Act 1992 Section 86

I also consider to what extent a double taxation convention can be relied on in the context of Taxation of Chargeable Gains Tax Act 1992 section 86.

1.4 Finance (No 3) Bill 2005 Clause 33

Finally, I consider Finance (No 3) Bill 2005 clause 33 and whether, if it is enacted in its present form, there will be any loopholes. I also consider future planning for those who in the past would have used a round the world scheme.

2 Section 77 and United Kingdom Resident but Non-United Kingdom Domiciled Settlors

2.1 The Statutory Provisions

Taxation of Chargeable Gains Tax Act 1992 sections 77(1) provides:

77 Charge on settlor with interest in settlement

(1) Where in a year of assessment-

(a) chargeable gains accrue to the trustees of a settlement from the disposal of any or all of the settled property,

(b) after making any deduction provided for by section 2(2) in respect of disposals of the settled property there remains an amount on which the trustees would be chargeable to tax for the year in respect of those gains if-

(i) the gains were not eligible for taper relief, but section 2(2) applied as if they were (so that the order of deducting losses provided for by section 2A(6) applied), and

(ii) section 3 were disregarded,

and

(c) at any time during the year the settlor has an interest in the settlement,

the trustees shall not be chargeable to tax in respect of those but instead chargeable gains of an amount equal to that referred to in paragraph (b) shall be treated as accruing to the settlor in that year.

Taxation of Chargeable Gains Tax Act 1992 section 12(1) provides:

12 Foreign assets of person with foreign domicile

(1) In the case of individuals resident or ordinarily resident but not domiciled in the United Kingdom, capital gains tax shall not be charged in respect of gains accruing to them from the disposal of assets situated outside the United Kingdom (that is, chargeable gains accruing in the year 1965-66 or a

> later year of assessment) except that the tax shall be charged on the amounts (if any) received in the United Kingdom in respect of those chargeable gains, any such amounts being treated as gains accruing when they are received in the United Kingdom.

2.2 The Argument for the Remittance Basis of Taxation

The proposition which has been put forward is that if the chargeable gains in respect of which the trustees would, but for section 77, be chargeable, are from the disposal of assets situated outside the United Kingdom, the settlor is taxable under section 77 only on the remittance basis, as set out in section 12.

That would be a fair result, given that the evident purpose of section 77 is to tax the chargeable gains in just the same way as if the settlement had not been created. And if only courts were as keen on interpreting revenue statutes purposively when that confers an advantage on the taxpayer as when it confers an advantage on the Revenue, that would in itself be a formidable argument in favour of taxation on the remittance basis.

2.3 The Contrary Argument

The difficulty lies in the actual wording of the section:

> '*chargeable gains of an amount equal to that referred to in paragraph (b) shall be treated as accruing to the settlor in that year.* '

It could be argued by the Revenue that the effect of section 77(1)(c) is not to deem the gains which in fact accrued to the trustees to have accrued to the settlor but to deem purely hypothetical gains of a certain amount to accrue to him. They could argue that the gains realised by the trustees are merely the measure of the hypothetical gains which are deemed to accrue to the settlor and are not the same gains. The gains treating as accruing to the settlor are treated as gains in gross, i.e. not from the disposal of any particular assets. Consequently, section 12 cannot operate as regards any of them.

2.4 The Author's View

Were it not for the decision of the Court of Appeal in *Bricom Holdings Ltd v Inland Revenue Commissioners* [1997] STC 1179, I would regard this as an untenable argument which overlooks the plain reality of the situation that what is being taxed is the gains realised by the trustees, albeit at a rate calculated by reference to the settlor's personal taxation circumstances. Moreover, it produces the result that more capital gains tax is payable than if the settlement had never been made.

In *Bricom*, however, which concerned the application of the controlled foreign company provisions, the Court of Appeal held that interest received by the foreign subsidiary was not included in the sum apportioned to Bricom, the United Kingdom resident taxpayer, and on which tax was chargeable; it merely provided a measure by which an element in a conventional or notional sum was calculated, and it was that conventional or notional sum which was apportioned to Bricom and on which tax was charged. The result was that the UK-Netherlands double taxation convention, which exempted the interest from United Kingdom tax, was not relevant.

Now, the provisions of the controlled foreign companies legislation are somewhat differently worded from section 77 and are therefore distinguishable. However, a court as determined as, say, the House of Lords in *West v Trennery*, could follow the *Bricom* approach. One therefore cannot advise with safety that there is no charge to capital gains tax.

I would add for completeness that one argument which the Revenue might adduce which appears to me to have no merit is that the gains are not from the disposal of property by the settlor. That is an argument which could perhaps have some force in other contexts. However, section 12(1) merely requires that the gains accrue to the foreign domiciliary, not that he himself has disposed of any asset situate outside the United Kingdom.

2.5 Planning

The advice should be that the trustees of a settlement the settlor of which is United Kingdom resident but not United Kingdom domiciled should in general be neither resident nor ordinarily resident in the United Kingdom at any time. For in that case, neither section 77 nor section 86 of the Taxation of Chargeable Gains Tax Act 1992 will apply to deem gains of the trustees to be those of the settlor on an arising basis.[5] Section 77 will not apply because of the residence status of the trustees and section 86 will not apply because of the domicile of the settlor: see section 86(1)(c).

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5 Of course, there may be situations where this is positively desired. For example, the settlor may have capital losses which he is not able otherwise to utilise.

In certain, exceptional cases, it may be desired that the trustees are United Kingdom resident, for example, in order to take advantage of a double taxation convention with Contracting State A. If the trustees are at all times dual resident and are regarded for the purposes of a double taxation convention with Contracting State B as resident in Contracting State B, then, in my view, it should be possible to ensure that there is no charge to capital gains tax on either the trustees or the settlor provided that the gains in question are protected from a charge to United Kingdom capital gains tax by the terms of the double taxation convention with Contracting State B. And this is the case even if clause 33 of the Finance (No 3) Bill 2005 becomes law in its present form.

What of existing settlements the trustees of which are United Kingdom resident? If they simply emigrate, they will be deemed to dispose of all their assets and reacquire them for a market value consideration: see Taxation of Chargeable Gains Tax Act 1992 section 80. Thus, while emigration will solve the problem for the future, it will not protect inherent gains, which will thereby be precipitated.

There may be possible solutions in certain cases. For example, if the decision of Park J in *Davies v Hicks* [2005] EWHC 847 (Ch) 12th May 2005 is upheld on appeal and the chargeable assets in question consist of securities, it may be possible to avoid the emigration charge by using the strategy which has so far in that case been held to be successful.

There are also strategies which involve the trustees of an existing United Kingdom resident settlement transferring assets to the trustees of another United Kingdom resident settlement which then emigrates without an emigration charge. However, these strategies are viable only if a claim for holdover relief can be made on the transfer between the two settlements and that is no longer possible in the case of settlor-interested settlements: see Taxation of Chargeable Gains Tax Act 1992 section 169B, inserted by Finance Act 2004.

It might be asked whether the problem can be solved by the trustees of the settlement becoming for the first time dual resident. The difficulty is that Taxation of Chargeable Gains Tax Act 1992 section 83 causes the trustees to make a deemed disposal of protected assets for a market value consideration. In certain, exceptional, cases, it may be possible for the trustees to become dual resident at a time when there are no protected assets but for them to later convert non-protected assets into protected assets without a charge to capital gains tax.

3 The Effect of a Double Taxation Convention

3.1 Taxation of Chargeable Gains Tax Act 1992 Section 77

I shall in this section consider the position without regard to the Finance (No 3) Bill 2005 clause 33, which, if enacted in its current form, will alter the position as regards disposals on or after March 16th 2005.[6]

Section 77 does '*not apply unless … the trustees are either resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom during the year*': see section 77(7). It might be asked how a double taxation convention could therefore be relevant.

First, the trustees might be dual-resident at all times in the year of assessment in question at which they are UK-resident but regarded for the purposes of a double taxation convention as resident in a territory outside the United Kingdom. However, in that case, if the settlor is also domiciled in the United Kingdom at some time during the year of assessment in question, then Taxation of Chargeable Gains Tax Act 1992 section 86 will apply to deem chargeable gains of a certain amount to be treated as accruing to the settlor in the year. The position under section 86 is discussed at 3.2 below. If, however, the settlor is not domiciled in the United Kingdom at any time in the year of assessment in question, then the question of relief under a double taxation convention in relation to section 77 is by no means academic.

Secondly, the trustees might be resident in the United Kingdom during part only of the year (and not ordinarily resident in the United Kingdom during the year) but they do not at any time of such residence fall to be regarded for the purposes of any double taxation relief arrangements as resident in a territory outside the United Kingdom. In that case, section 86 cannot apply. This was the basis of a strategy sometimes known as the 'round the world' scheme.

If gains were as yet unrealised but were likely to be realised, either by a sale or by a transfer of assets to beneficiaries, it was possible in principle for the trustees to emigrate to a jurisdiction which had a double taxation convention with a suitably worded capital gains tax article.[7]

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6 I consider the effect of clause 33 in section 4 below.

7 If the trustees were already United Kingdom resident or ordinarily resident, the strategy would not normally work unless some means could be found of overcoming the deemed disposal for a market value consideration on emigration. This scheme was therefore normally implemented in cases where the trustees were already non-UK resident but were not resident in a jurisdiction with a suitably worded double taxation convention with the United Kingdom.

One would ensure that the trustees would, if not already, become residents of that jurisdiction for the purposes of the convention and thus any gains they realised would be exempt from United Kingdom capital gains tax, notwithstanding that they were resident in the United Kingdom at a different time in the year (and thus potentially within the charge to capital gains tax on all gains realised by them in the year, by virtue of Taxation of Chargeable Gains Tax Act 1992 section 2(1)).

It was essential that the trustees became United Kingdom resident before the end of the year of assessment, so that Taxation of Chargeable Gains Act 1992 sections 87 and, if the settlement were a settlor-interested one, section 86 would not apply to the trust gains for that year. In addition, if the trust were a settlor-interested one (within the section 86 definition) and the settlor was domiciled in the United Kingdom, it was also regarded as important that they were not at the time they were United Kingdom resident regarded for the purposes of any double taxation relief arrangements as resident in a territory outside the United Kingdom. Otherwise, section 86 would have arguably still come into play.

If the settlement were not a settlor-interested one within the meaning of Taxation of Chargeable Gains Tax Act 1992 section 77, the position was relatively straightforward in that none of sections 77, 86 or 87 would be a concern.

If, however, as was often the case, the settlement were a settlor-interested one for the purposes of section 77, then the question arose whether the settlor could indirectly obtain the benefit of the trustees' immunity from capital gains tax. In my opinion, he could. In brief, that is because of the way section 77 is worded. The amount of chargeable gains which is treated as accruing to the settlor in that year is the 'amount on which the trustees would be chargeable to tax for the year in respect of those gains'. It was, in my view, clear that, but for section 77, in calculating the amount on which the trustees would be chargeable, one ignored a gain which would escape United Kingdom capital gains tax because a claim for double taxation relief would be available. And in this particular context, the result is entirely what one would expect. For the gains are deemed to be those of the settlor only for the purpose of computation[8] and the tax is ultimately borne by the trustees. It would have been odd indeed if the effect of section 77 had been to deprive them of double taxation relief.[9]

8 and enabling the Revenue to collect the tax in the first instance from the settlor.

9 I have seen several other arguments put forward which might be relied on by the Revenue to defeat the scheme. In my view they are not sound. If the scheme were to be litigated, however, one would have to be prepared to deal with them if and when they arose.

3.2 Taxation of Chargeable Gains Tax Act 1992 Section 86

3.2.1 The Statute

Taxation of Chargeable Gains Tax Act 1992 section 86 can apply so as to visit on the settlor of a settlor-interested trust[10] capital gains realised by non-UK resident trustees or, in certain circumstances, dual resident trustees.

Section 86 provides, so far as is material, provides:

> 86 Attribution of gains to settlors with interest in non-resident or dual resident settlements
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> (1) This section applies where the following conditions are fulfilled as regards a settlement in a particular year of assessment-
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> (a) the settlement is a qualifying settlement in the year;
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> (b) the trustees of the settlement fulfil the condition as to residence specified in subsection (2) below;
>
> (c) a person who is a settlor in relation to the settlement ('the settlor') is domiciled in the United Kingdom at some time in the year and is either resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom during the year;
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> (d) at any time during the year the settlor has an interest in the settlement;
>
> (e) by virtue of disposals of any of the settled property originating from the settlor, there is an amount on which the trustees would be chargeable to tax for the year under section 2(2) if-
>
> (i) the assumption as to residence specified in subsection (3) below were made, and

10 a more widely defined concept than in the context of section 77.

(ii) any chargeable gains on the disposals were not eligible for taper relief, but section 2(2) applied as if they were (so that the order of deducting losses provided for by section 2A(6) applied);

(f) paragraph 3, 4 or 5 of Schedule 5 does not prevent this section applying.

(2) The condition as to residence is that-

(a) the trustees are not resident or ordinarily resident in the United Kingdom during any part of the year, or

(b) the trustees are resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom
during the year, but at any time of such residence or ordinary residence they fall to be regarded for the purposes of any double taxation relief arrangements as resident in a territory outside the United Kingdom.

(3) Where subsection (2)(a) above applies, the assumption as to residence is that the trustees are resident or ordinarily resident in the United Kingdom throughout the year; and where subsection (2)(b) above applies, the assumption as to residence is that the double taxation relief arrangements do not apply.

(4) Where this section applies-

(a) chargeable gains of an amount equal to that referred to in subsection (1)(e) above shall be treated as accruing to the settlor in the year …

Thus, section 86 applies to settlements the trustees of which are not resident or ordinarily resident in the United Kingdom during any part of the year: section 86(2)(a). It also applies to those dual resident trusts where the trustees are resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom during the year, but at any time of such residence or ordinary residence they fall to be regarded for the purposes of any double taxation relief arrangements as resident in a territory outside the United Kingdom: section 86(2)(b).

3.2.2 Non-UK Resident Trusts

Let us first consider the position where the trustees are not resident or ordinarily resident in the United Kingdom during any part of the year. In that case, one must calculate the amount on which the trustees would be chargeable to tax for the year (under section 2(2) of the Taxation of Chargeable Gains Tax Act 1992) on the assumption that the trustees were resident or ordinarily resident in the United Kingdom throughout the year.[11] Let us assume, for the sake of simplicity, that the only gain realised by the trustees was one which was in terms protected from charge to United Kingdom capital gains tax by a suitably worded double taxation convention.

The first question is whether one can deduct that amount in computing the amount on which the trustees would be chargeable to tax for the year. Consider the following argument: the assumption that the trustees are resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom during the year is not inconsistent with the fact that they were resident in the other Contracting State at the relevant time; on that basis, it will usually be the case (applying the tie-breaker clause) that they would be treated for the purposes of the double taxation convention between the United Kingdom and that Contracting State as resident in that other Contracting State; hence, the amount on which they would be chargeable to capital gains tax in the United Kingdom would still be nil. In other words, the argument is very similar to that which in my view holds good for section 77 purposes.

There are two problems with this argument. The first is that a very similar argument was advanced by Andrew Park Q.C. as he then was on behalf of the taxpayer in *Bricom Holdings Ltd v Inland Revenue Commissioners* [1997] STC 1179 and was rejected. I had myself proposed it in an article written after the decision at first instance. While I still believe the argument is technically sound, it was rejected by the Court of Appeal (for reasons which I find totally unconvincing). It would only be realistic to accept that the courts might equally, and for as little good reason, reject the similar argument in the context of section 86.

The second problem involves a very subtle argument. The Revenue could assert that if the trustees had indeed been dual resident, section 86 would still have imputed the

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11 and ignoring any taper relief. There are interesting points, beyond the scope of this article as to (a) whether one takes into account any annual exemption which would be available to the trustees, (b) to what extent one takes into account losses realised by the trustees in preceding years and (c) whether one can argue that in those cases where 77 would have applied to the settlement (broadly speaking if the settlor or his spouse has an interest in the settlement) if the trust had been United Kingdom resident, then the amount on which the trustees would be chargeable would be nil.

trustees' gains to the settlor, despite the terms of the double taxation convention (as to which, see below) and it would therefore be odd if that could not be the case if the trust was not in fact dual resident. While this is not itself a sound technical argument, it might, however, persuade the court to adopt the reasoning in *Bricom*. The reason the argument is not technically sound is that, even if one can, in applying the statutory hypothesis to the situation where the trustees are not dual resident, take section 86 itself into account on the hypothetical basis that they are, the result would be simply that it was the settlor, and not the trustees, who would thereby be chargeable to capital gains tax as if the double taxation convention did not exist.

The second question is whether, even if one assumes, contrary to the settlor's contentions, that one disregards the double taxation convention in calculating the amount on which the trustees would be chargeable to tax, so that the actual gains are imputed to the settlor under section 86, he can still take advantage of the double taxation convention.

The stronger case would be where the double taxation convention was worded in such a way that it was the gain in fact realised by the trustees which was protected from the charge to United Kingdom tax and not simply the trustees themselves. If it was simply the trustees themselves, one would have to argue in addition that if the settlor were made liable, the trustees would thereby be made liable, as he has a right of indemnity against them, under Taxation of Chargeable Gains Tax Act 1992 schedule 5 paragraph 9; that the imputation of gains to the settlor is merely a computational provision and collection machinery whereby the trustees are made liable and hence that he ought, on their behalf, to be able to rely on a provision of the double taxation convention intended to protect them.

No matter which way the double taxation convention in question is worded, the settlor / trustees would have to overcome a further hurdle. They would have to show that the gains imputed to the settlor are the same gains as those realised by the trustees. The problem is very similar to that discussed, in a different context, in section 2.3 above. The crucial words are 'chargeable gains of an amount equal to that referred to in subsection (1)(e) above shall be treated as accruing to the settlor in the year'. It could similarly be argued by the Revenue that the effect of section 86(4)(a) is not to deem the gains which in fact accrued to the trustees to have accrued to the settlor but to deem purely hypothetical gains of a certain amount to accrue to him. They could argue that the gains realised by the trustees are merely the measure of the hypothetical gains which are deemed to accrue to the settlor and are not the same gains. The gains treating as accruing to the settlor are treated as gains in gross, i.e. not from the disposal of any particular assets or by any particular person, and are thus not covered by the terms of any double taxation convention.

In this context, too, were it not for the decision of the Court of Appeal in *Bricom*

Holdings Ltd v Inland Revenue Commissioners [1997] STC 1179, I would regard this as an untenable argument which overlooks the plain reality of the situation that what is being taxed is the gains realised by the trustees, albeit at a rate calculated by reference to the settlor's personal taxation circumstances. In this context, too, it is always possible that a pro-Revenue court might follow the *Bricom* approach.

The position is, however, much stronger in one important respect in the section 86 context. For at this point, too, an argument referred to above can be utilised: if the settlor were made liable, the trustees would thereby be made liable, as he has a right of indemnity against them, under Taxation of Chargeable Gains Tax Act 1992 Schedule 5 paragraph 9; the imputation of gains to the settlor is merely a computational provision and collection machinery whereby the trustees are made liable and hence he ought, on their behalf, to be able to rely on a provision of the double taxation convention intended to protect them. That, in my view, is a strong argument in favour of the settlor / trustees.

3.2.3 Dual Resident Trusts

Where the trustees of a settlement are resident in both the United Kingdom and in another Contracting State, the application of section 86 is in my view somewhat clearer.

The section will apply because the trustees fulfil the condition as to residence specified in section 86(2)(b), namely that they are 'resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom during the year, but at any time of such residence or ordinary residence they fall to be regarded for the purposes of any double taxation relief arrangements as resident in a territory outside the United Kingdom.' In that case, the 'assumption as to residence' referred to in section 86(1)(e)(i) will be the second of those referred to in section 86(2)(b), namely 'that the double taxation relief arrangements do not apply'.

That clearly precludes any argument that, in apply the statutory hypothesis, one is allowed to take the double taxation convention into account.

Does it preclude any argument that the settlor / trustees can rely on the terms of the double taxation convention? I fear that, realistically, that it does. For if they could so rely, section 86 would have no effect. It can have an effect, in the case of dual resident trusts, only where the trustees would (but for section 77) escape liability to capital gains tax on chargeable gains accruing to them and where, taking section 77 into account, the settlor would escape a liability to tax under section 77. And that can only be because of the protection given by the double taxation convention. The Revenue could thus argue with considerable force that section 86 would have no effect in so far as it applies to the gains of dual resident settlements if the settlor /

trustees could rely on the terms of the double taxation convention. While that is not a cast-iron argument, it would, in my view, exercise enormous influence over the court in these days of purposive construction.

4 The Assault on Round the World Schemes

4.1 The Revenue's Initial Reaction

Round the world schemes have been briefly described in section 3.1 above. The Revenue first reacted to them by renegotiating with the Contracting States which were commonly used the terms of their double taxation conventions with the United Kingdom.

4.2 Budget Speech 2005

Then, on March 16th 2005, it was announced that United Kingdom law was to be amended so as to introduce what is sometime euphemistically referred to as 'treaty override' but might be more pejoratively referred to as ratting on one's international obligations. Finance (No 3) Bill 2005 clause 33 will, if enacted in its present form, add, with effect in relation to disposals made on or after 16th March 2005, a section 83A to the Taxation of Chargeable Gains Tax Act 1992 in the following terms:

> 83A Trustees both resident and non-resident in a year of assessment
>
> (1) This section applies if a chargeable gain accrues to the trustees of a settlement on the disposal by them of an asset in a year of assessment and the trustees—
>
> (a) are within the charge to capital gains tax in that year of assessment, but
>
> (b) are non-UK resident at the time of the disposal.
>
> (2) Where this section applies, nothing in any double taxation relief arrangements shall be read as preventing the trustees from being chargeable to capital gains tax (or as preventing a charge to tax arising, whether or not on the trustees) by virtue of the accrual of that gain.
>
> (3) For the purposes of this section the trustees of a settlement are within the charge to capital gains tax in a year of assessment-

(a) if, during any part of that year of assessment, they are resident in the United Kingdom and not Treaty non-resident, or

(b) if they are ordinarily resident in the United Kingdom during that year of assessment, unless they are Treaty non-resident during that year of assessment.

(4) For the purposes of this section the trustees of a settlement are non-UK resident at a particular time if, at that time,-

(a) they are neither resident nor ordinarily resident in the United Kingdom, or

(b) they are resident or ordinarily resident in the United Kingdom but are Treaty non-resident.

(5) For the purposes of this section the trustees of a settlement are Treaty non-resident at any time if, at that time, they fall to be regarded as resident in a territory outside the United Kingdom for the purposes of double taxation relief arrangements having effect at that time.

The effect of section 83A is clearly to stop the round the world scheme in its traditional form.

4.3 Loopholes in Section 83A?

It might at first blush be thought that there is a loophole in section 83A. What if the trustees (a) are United Kingdom resident during part of the year but are also Treaty non-resident during the whole of that time and (b), if ordinarily resident in the United Kingdom during that year of assessment, they are Treaty non-resident during that year? In that case they will not be 'within the charge to capital gains tax' so that the condition in section 83A(1)(a) will not be satisfied.

The drafter no doubt thought that he need not worry because in those circumstances section 86 would apply to the settlement. And in many cases he would be right. Yet in other cases he would not. However, these are unlikely to be cases with which he is unduly concerned.

It might be asked whether such a revised round the world scheme using a dual resident trust would still be effective where section 86 is, for whatever reason, not a problem but the intention is to prevent section 87 gains arising. The answer is in the negative. For Taxation of Chargeable Gains Tax Act 1992 section 88 applies to dual resident settlements in much the same way as section 87 applies to non-UK resident settlements.

4.4 Substitute Planning for Round the World Schemes

If it is not possible to avoid a charge to tax by means of a dual resident trust, it should be borne in mind that round the world schemes were adopted precisely to avoid the argument, discussed at 3.2.2 above, that the provisions of a double taxation convention could not avail against a section 86 charge. If the trustees are already non-UK resident, it is worth while considering whether they should emigrate to a jurisdiction with a suitably worded double taxation convention and then realise capital gains but should *not* at any time in that year become United Kingdom resident or ordinarily resident. Much depends on the alternatives. If there is a stark choice between an immediate charge to capital gains tax and having an argument that there is no immediate charge, the exercise may still be considered to be well worthwhile.

One advantage of the traditional round the world scheme was that section 87 would not apply to the trust gains in question. Yet even if the gains escape being taxed under section 86, by virtue of some double taxation convention, they will *prima facie* enter the pool of trust gains for the purposes of Taxation of Chargeable Gains Tax Act 1992 section 87 and be capable of being visited on beneficiaries who receive "capital payments" from the trustees. Whether such beneficiaries can rely on the terms of a double taxation convention is itself a complex, and rather different, question which is beyond the scope of this article.