REMITTANCES IN KIND — A REPLY TO RICHARD BRAMWELL QC

Robert Venables QC[1]

1 History of the Controversy

In my article entitled 'When is Remittance not a Remittance?'[2] I argued that where foreign income assessable under Schedule D, Case IV or V, on a remittance basis was converted into a chattel, such as a motor-car, which was physically imported into the United Kingdom, then there was a remittance. I was concerned to deal with an argument based on the effect of certain authorities. I must confess to having been somewhat surprised at the strength of reaction to my article. Richard Bramwell QC is fairly representative of those who consider that I am wrong.

Richard Bramwell QC has set out his view very shortly in an article entitled 'Remittances: "Actual Sums Received"'.[3] In summary he says "... the statute[4]... is all that is needed to show that the proposition [for which I argued] cannot be sustained." He even suggests that my article may have been written *per incuriam*! It would be indeed quite a feat to have written an article on a statutory provision and to have overlooked the provision itself.

2 How Clear is the Point?

I am rather reminded of the *Misleading Case* of A P Herbert where Her Majesty's judges were vexed with a real brain-teaser: were defamatory statements ejaculated by a trained parrot libel or slander? The matter went to the House of Lords where all five of their Lordships were adamant that the law was clear. The only difficulty was that two of them considered the case was clearly one of libel and

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[2] OTPR Volume 2 Issue 2 p 99.

[3] OTPR Volume 2 Issue 3 p 183.

[4] Taxes Act 1988 section 65(5)(b). This provision is not materially altered by

two considered it was equally clearly one of slander. The fifth Lord managed to state only that the law was clear before expiring on the spot.

All too often, opposing sides each consider the law is clearly in their favour, whereas it is only when the matter comes to Court that the case suddenly seems less clear-cut.[5] In my respectful view, in this case the law is not at all clear. Certainly, it is not to be ascertained at a glance by a cursory reading of the statute. To discern the true state of the law requires a sound legal approach, a thorough knowledge of the history of the provision and of the case law and reflection, all seasoned with a good dose of common-sense. By the end of this article, I hope to have convinced my readers that my view is correct or, at the very least, that it is a sustainable one.

One of the difficulties is that one is dealing with provisions of very great antiquity. They saw the light of day in Pitt's Income Tax Act of 1799. Their present wording dates back to the 1803 Income Tax Act, as extended (by words not material to the present debate) by the Income Tax Act 1842.[6] If modern tax drafting is thought to be imprecise, Parliamentary drafting two centuries ago was even less precise and usually more voluminous. Moreover, international trade and finance were very much simpler in those days. Situations might now exist which the draftsman never contemplated. Of course, if his words cannot be fairly taken to cover the new situation, then they will not bite. On the other hand, courts are ready to adapt old language to new situations, as did, for example, Lord Radcliffe in *Thomson v Moyse*,[7] the latest House of Lords authority on the section.

The fact that the old style of Parliamentary drafting was loose and convoluted means that one cannot construe it in quite the same way as one can in principle

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5 A recent instructive example is *R v Commissioners of Customs & Excise ex parte EMU Tabac SARL et al.*, which concerns the interpretation of "products acquired by private individuals for their own use and transported by them" in the Council Directive 92/12/EC on excise duties. Both sides and the interveners all agreed that the matter should not be referred to the European Court of Justice as the meaning of these words was perfectly clear. While the Applicants contended that the transporting could be done by agents of the individual, the Respondents and the Intervener claimed it could be done only personally. The Court of Appeal directed a reference.

6 For a fuller account of the history of the provisions, see *Thomson v Moyse* per Pearce LJ in the Court of Appeal at pages 325-326. (He dissented from the Court of Appeal decision, which was reversed by the House of Lords.)

7 (1960) 39 Tax Cases 291.

construe a modern statute. One should expect to find greater or lesser degrees of infelicity of expression. As Lord Radcliffe[8] said in *Thomson v Moyse*:[9]

> "[The provisions of section 65(5)(b)], which are not at all very clearly phrased, should accordingly be construed according to their general sense and without too much nicety of language. I draw attention to this because one or two of the authorities have treated these and other words with more semantic scruple than is appropriate to the context: and from that have come some of our present troubles."

3 The Statute

The remittance basis for Case V is now contained in Taxes Act 1988 section 65(5) which provides:

> "Where subsection (4) above applies the tax shall ... be computed:
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> (a) in the case of tax chargeable under Case IV, on the full amount, so far as the same can be computed, of the sums received in the United Kingdom in the year preceding the year of assessment, without any deduction or abatement; and
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> (b) in the case of tax chargeable under Case V, on the full amount of the actual sums received in the United Kingdom in the year preceding the year of assessment from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money or value brought or to be brought into the United Kingdom, without any deduction or abatement other than is allowed under the provisions of the Income Tax Acts in respect of profits or gains charged under Case I of Schedule D."

The language of remittance applicable to Case IV and Case V is slightly different in each case. This is no doubt attributable to the nature of the income assessable under each Case. Income from securities will normally consist only of identifiable cash, whereas income from possession could include trading stock of an overseas

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8 Viscount Simonds was "in complete agreement with his reasoning and conclusions": see page 328. Lord Cohen agreed that the appeal should be allowed for the reasons given by Lord Radcliffe: see page 338.

9 At pages 335-336.

plantation imported into the United Kingdom. I shall consider Case V, as it is the more difficult one. Certainly, the language is much more convoluted. In *Thomson v Moyse*, different opinions were expressed in their Lordships' House as to whether there could ever be something which could be a remittance for Case IV purposes without being a remittance for Case V purposes. In fact, no judge has been able to instance such a case.

4 The Argument of Richard Bramwell QC

Richard Bramwell QC has seized upon the words "on the full amount of the actual sums received ... from". He takes the view that for sums to be received in the United Kingdom, say, from property imported, one must find that there has been an importation of property followed by a sale of that property for money,[10] which money or "sums" are, if received in the United Kingdom, then assessable. The enthymematic reasoning must be that one must necessarily imply in the paragraph the words I have added and italicised:

> "(b) in the case of tax chargeable under Case V, on the full amount of the actual sums received *as sums* in the United Kingdom in the year preceding the year of assessment from remittances payable in the United Kingdom, or ..."

I propose a three-fold attack on this view. Firstly, I shall consider the provision in the light of the English language and of pure reason. Secondly, I shall consider the effect of the authorities, including some to which Richard Bramwell QC does not refer, and, thirdly, I shall consider what interpretation the paragraph would be given when exposed to the full glare of the judicial realism of a modern court, which would have the mischief at which the provision is aimed firmly in mind.

5 Language and Pure Reason

5.1 Sums as Amounts and Sums as Money

Firstly, then, let us consider what is meant by "the full amount of the actual sums received". The words in subsection (1) lay down the rule in general terms that "income tax chargeable under Case IV or Case V of Schedule D shall be computed on the full amount of the income arising ...". Income for income tax purposes always being of a monetary amount, there will always be a "sum" of income, in the sense of an arithmetical amount, even though there is not an actual fund of money corresponding to that amount. It will be not uncommon to find the former

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[10] It is not clear what Mr Bramwell regards as money. No doubt it would be more than sterling cash and would include, for example, a sterling cheque.

but not the latter. For example, a dealer may have made trading profits and thus have taxable income even though he has no cash and his profits are simply represented by, say, a rise in the value of his trading stock at the end of the period of account.

To my mind, "the full amount of the actual sums received" means no more than "the full amount of the actual amounts received". Richard Bramwell's interpretation involves interpreting "sums" to mean "money", which is only one of its meanings. Its more usual meaning is "amounts". One can see why, for stylistic reasons, the draughtsman preferred the phrase "on the full amount of the sums received", rather than "on the full amount of the amounts received".

5.2 Sums Received as Sums?

Further, the reading of Richard Bramwell QC involves reading in the italicised words which are not there: "on the full amount of the actual sums received *as sums*". Income can quite clearly be received in the United Kingdom even though it is not received as sums. This is a perfectly standard use of English. If one asked a Columbian who carried on the trade of cocaine farming in Columbia whether he had received in the United Kingdom the sums generated by his farming trade, the only truthful answer would be "yes" whether he had brought them here in the shape of notes, coins, gold bars, diamonds, his produce or a motor-car.

What is abundantly clear from the authorities is that income does not cease to be income merely because it has changed its shape or form. One can conduct a tracing exercise. Indeed, Richard Bramwell QC admits as much because he concedes that the proceeds of sale of an imported car would themselves be assessable.

5.3 Sums Received "from"

Richard Bramwell QC might object that I have failed to give any force to the word "from" which precedes each of the four listed methods of receipt. He might well argue that if "actual sums" refers to the foreign income, such income is not "from" the imported motor-car; if anything, the reverse is the case. To this I reply that the word "from" is capable of many meanings, especially in the English of 1803. He reads "from" to mean "resulting from the sale of".[11]

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[11] I appreciate that he would also probably allow other cases where the imported property is by any means converted into money, as where, for example, it is destroyed by fire and the owner receives an indemnity under an insurance policy. This does not, however, affect the general principle.

In my view, however, "from" has the less precise and more general meaning of "as", "by means of", "in the form of". I would respectfully suggest that the sub-section is unworkable on any other basis. Take the simplest case of all, where income arises in the USA and takes the form of dollar bills which are physically brought to the United Kingdom in the taxpayer's wallet. If "from" involves the sale or other disposal, then there would be no remittance in such case. In my view, there is a remittance of "actual sums received in the United Kingdom ... from property imported", the dollar bills being the property imported.[12]

5.4 My View

In my view, the importation of a motor car which represents foreign income gives rise to the receipt of that income in the United Kingdom as sums are thus received here, because the car is either itself "property imported" or is, alternatively, "value arising from property not imported", the "property not imported" being the cash which was used to buy the car.

6 Authority

6.1 *Thomson v Moyse*

Richard Bramwell QC relies upon *Thomson v Moyse*.[13] In essence, Mr Moyse sold dollars situate in the USA representing foreign income for sterling situate in England. He contended that there was no remittance because nothing had been brought into the United Kingdom. The House of Lords unanimously found against him. Lord Radcliffe gave the lead judgment. He contented himself with the fact that the taxpayer parted with his dollars and got his sterling. There was no importance in the mechanism employed:

> "but what importance can there be in the actual place of making the instrument, or in its physical movements, if the direct result of the mechanism employed was to turn the taxpayer's income in one country

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[12] For authority in support of this proposition, see 6.1.

[13] 39 TC 291.

> into money *or value*[14] in the other country, to which he had decided to transfer it?"[15]

All their Lordships agreed that the sterling obtained in London was "money or value arising from property not imported".[16] There are two important consequences of this. Firstly, the sterling was clearly "money" so arising. "Value" so arising must include any valuable consideration other than money, such as a car. If Richard Bramwell QC is correct, the words "or value" should be struck out. Secondly, the composite phrase is "the actual sums received ... from money (or value) arising from property not imported". This strongly supports my arguments[17] based on the wording that (a) "actual sums" means the amount of the income rather than actual sums of money and (b) that "from" means "in the form of". One cannot contend, consistently with their Lordships' judgments, that the sterling received in London was "the actual sums received" and that it was also derived "from" itself!

Of course, one can find passages in the judgments where their Lordships talk of the "sums" or "money" received by the taxpayer in London; but that was simply because the case was one of a receipt of money in the United Kingdom. Their Lordships were not considering the case of a remittance in kind. Perhaps the best example is the extended passage in the speech of Lord Radcliffe starting at the last break on page 335. He states towards the beginning of the passage: "If sterling sums are received and are so attributable, that is enough for liability." The word used is "enough", not "necessary".

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14 Italics supplied.

15 See pages 333. See also bottom of page 334 to top of page 335, especially "It is plain, therefore, that the "bringing in" of a person's income in this context means nothing more than the effecting of its transmission from one country to the other by whatever means the agencies of commerce or finance may make available for that purpose. If that transmission takes place, it is neither here nor there to ask whether anything, items of property or instrument of transfer, has actually been brought into the country or not."

16 Per Lord Radcliffe, with whom Viscount Simonds and Lord Cohen agreed, at the top of page 336; per Lord Reid at page 332, first break; per Lord Denning at page 342, first break.

17 See 5 above.

6.2 *Scottish Widows' Fund v Surveyor of Taxes*[18]

Scottish Widows' Fund v Surveyor of Taxes was decided in the Court of Session.[19] The taxpayer company had imported into the United Kingdom certain New York bonds acquired with foreign income taxable on a remittance basis. The Lord President delivered a judgment in which Lord Kinnear and Lord Pearson concurred. The ratio was that although the bonds were situate in the United Kingdom, the asset they evidenced was situate abroad. If Richard Bramwell QC is correct, the Court asked itself a perfectly unnecessary question. For unless and until the asset were sold, it was irrelevant whether or not it had been imported into the United Kingdom. Only on my view did the Court ask, and answer, exactly the right question: has value been imported into the United Kingdom?

The case was followed by the Court of Session in *Scottish Provident Institution v Farmer*.[20]

7 The Mischief and Judicial Realism

There is a great deal to be said for income tax being payable only on income arising within a jurisdiction or on income which is enjoyed within that jurisdiction. On that view, income arising outside the jurisdiction which is not enjoyed within it would escape tax.[21] The purpose of the remittance rules is clearly to give effect to this principle. It makes no sense at all for a taxpayer to be able to buy an asset abroad, import it *in specie* into the United Kingdom and consume it here without paying any tax on it, especially where he would be taxable if he had first imported cash and then bought the asset here. If Richard Bramwell QC is right, tax may be lawfully avoided where a wasting asset, such as a car, is bought and run into the ground. Further, where a non-wasting asset is acquired and imported, tax may be also be deferred until the sale of that asset. Indeed, if the asset is not sold but simply gifted, whether *inter vivos* or by will, tax will be avoided altogether.

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18 5 TC 502.

19 For a fuller discussion of this case, see my original article in OTPR Volume 2 Issue 2 page 99 et seq.

20 (1912) 6 TC 34.

21 Currently, the rule applies within the United Kingdom only to United Kingdom residents who are domiciled abroad. Until 1915, it applied to all United Kingdom residents. There is much to be said for returning to the pre-1915 rule.

Richard Bramwell QC does not tell us what happens in the case where cash is paid abroad to purchase a motor car, or any other asset, already situate in the United Kingdom. Given that no money is received in the United Kingdom, it would appear to follow from his view that there is likewise no remittance.

Then again, it would follow that a taxpayer could enjoy the benefit of services in the United Kingdom provided he paid for them abroad. For example, he could pay his domestics' wages into a Channel Island bank account. On the view of Richard Bramwell QC there would be no liability to tax as no money had been received in the United Kingdom. In my view, the Revenue could argue with considerable force that the taxpayer received his income in the United Kingdom in that he received "value" from property not imported into the United Kingdom. I do accept, however, that this is a somewhat weaker argument than the case where he used his foreign income to pay abroad for property which is brought into or is already in the United Kingdom.

It is, to my mind, almost inconceivable[22] that, unless it were constrained to do so by unambiguous language, a modern court would accept that tax avoidance is so easy and that the legislation fails to deal with the mischief at which it was aimed.

8 Conclusion

At the very least, this is not a clear-cut case. In my view, the ordinary and natural meaning of the provision, judicial authority and a purposive construction in accordance with the mischief rule all lead one to the same conclusion, that foreign income is remitted within the meaning of section 65(5)(b) when property representing it is brought into the United Kingdom or, for that matter, when property already in the United Kingdom comes to represent it.

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[22] One can never, of course, predict with certainty the outcome of any litigation. The recent victory of Professor Willoughby in the Court of Appeal shows that one can sometimes find a Court of Appeal so constituted that is strongly pro-taxpayer. See [1995] STC 143.