THE OFFSHORE & INTERNATIONAL TAXATION REVIEW

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EDITORIAL

1999 has seen some important new English case law, some of which has already been commented on in the first issue of Volume 9 of this *Review*. The decision of the Court of Appeal in *R v Dimsey,* (conjoined with *R v Allen*) has once again reminded us that professional advisers are at risk of criminal prosecution and even imprisonment when their clients are allegedly detected in tax fraud. David Ewart's article ***R v Dimsey; R v Allen*: A Cause for Concern** is to be found at page 69. In this issue, Dr Raymond Ashton's article **Money Laundering Initiative in Guernsey** is a trailer for his **Money Laundering - The Practitioners's Guide** to be published in February by Key Haven Publications PLC. His article and book will be of widespread interest, as the Guernsey legislation is similar to that which is being enacted in many states, including the United Kingdom.

The *obiter dicta* of the Court of Appeal in *R v Allen* that a shadow director of a company can be taxable under the United Kingdom Taxes Act 1988 section 145 in respect of his occupation of a residence owned by a company have surprised most tax advisers. In **ICTA Section 146 and Allen: Must the Client Throw in the Towel?,** Stephen Brandon QC considers the implications of the decision, in particular the quantum of the charge under section 145 and the possible application of the, usually much higher, charge under section 146. While his article deals with the position where the occupier is admittedly a shadow director, the editors would point out that by the time the case reached the Court of Appeal it was conceded that Mr Allen was a shadow director: a concession which in our view should not readily be made simply because an occupier owns the company and/or is a beneficiary of a trust which owns the company and/or performs services for the company and/or has usurped the functions of the board of directors.

1999 has been in the English courts the year of the sham, or rather, the alleged sham. "Sham" was alleged in three tax cases, *R v Allen*, *Hitch v Stone* and *DTE Financial Services Ltd v Wilson*. While the cry of "sham" is often raised by Revenue authorities and by settlors of trusts and their heirs, there is often much confusion as to the real meaning of the term. In his article **What is (and what is not) A Sham,** James Kessler considers the true nature of a sham in trust, tax and other contexts and

contrasts it with some related concepts which may be confused with it. He gives practical advice on how to avoid creating a sham trust.

Milton Grundy can fairly be regarded as the father of the offshore trust. In his article **The Offshore Trust**, he draws on his long experience in this *Review* of its development over the past thirty-five years. He considers the litigation explosion and the wide misconception in the offshore industry as to "shams". He considers the Cayman Exempted Trust, asset protection trusts and the alteration or abolition of the perpetuity rules. His thesis that a United Kingdom resident "thin" trust may enable non-UK residents indirectly to obtain treaty relief from tax in third countries will excite debate. He considers changes of the proper law of a trust and "flee" or "trigger" clauses. In the context of the role of the Protector, he suggests, not entirely uncontroversially, that a Protector can be removed from office by the Court if he has a conflict of interest, for example, because he is the lover of one of the beneficiaries. The article concludes with reflections on the relative merits of large and small trust companies.

In **Purchase of Own Shares by Non-UK Incorporated Companies – Capital Or Income?** Alexander Pepper discusses the vexed question of whether a distribution from a company constitutes capital or income in the context of the purchase by a company of its own shares. Where the company is non-UK resident, the United Kingdom tax treatment will depend on private law principles. The distinction is also important for trust law purposes.

Clients are seldom interested in tax planning strategies which no longer work. Professional advisers should be, partly if only to stop themselves recommending a product which is past its sell-by date. In November, the United Kingdom Chancellor of the Exchequer (in his "mini-Budget" speech in November) abolished holdover relief from capital gains tax on gifts of shares and securities to United Kingdom resident companies. In his article, **United Kingdom Mini-Budget Anti-Avoidance Measures**, the Consulting Editor deals with the effect on several planning strategies, including those using Offshore Bonds, the so-called "Envelope Trick", various strategies involving the sale of an interest under a trust, and techniques used by Temporarily Non-UK Resident Individuals.

In *IRC v Willoughby* in 1997, the House of Lords propounded a new, restrictive, definition of "tax avoidance". In **When An Offshore Trust is Not Tax Avoidance**, the Consulting Editor welcomes as an application of that decision a recent decision of the United Kingdom Special Commissioners, *A Beneficiary v Inland Revenue Commissioners*, which decided that transfers of funds made in respect of a Jersey trust established for the benefit of a United Kingdom ordinarily resident individual were not for the purpose of "tax avoidance".

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: Amanda Hardy, Managing Editor, Offshore and International Taxation Review, 24 Old Buildings, Lincoln's Inn, London WC2A 3UP.

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