HIGHLIGHTS OF THE 23RD ANNUAL OXFORD RESIDENTIAL CONFERENCE 22 – 24 SEPTEMBER 2005

Speakers:
Andrew Thornhill QC and Chair, Pump Court Tax Chambers ("Andrew")
James Kessler QC, 15 Old Square Lincoln's Inn ("James")
Elizabeth Wilson, Pump Court Tax Chambers ("Elizabeth")
Robert Venables QC, 15 Old Square Lincoln's Inn ("Robert")
Richard Bramwell QC, 3 Temple Gardens ("Richard")
Kevin Prosser QC, Pump Court Tax Chambers ("Kevin")
Philip Baker QC, Gray's Inn Tax Chambers ("Philip")
Stephen Brandon QC, 15 Old Square Lincoln's Inn ("Stephen")
Dr Timothy Lyons QC, 15 Old Square Lincoln's Inn ("Timothy")

Reported by Ralph Ray[1]

I **"FILM SCHEME LOSSES** and **CAPITAL ALLOWANCES"** was **Andrew's** theme. Andrew emphasised the gradual narrowing of loss and other reliefs for limited and general partners and companies: particular reference was made to TA 1988 as amended, e.g. ss 117, 118, 118ZB, 118ZC, 118ZD, 118ZE, 118ZL and 118ZN. The anti-avoidance provisions cover "contributions made"; "the amount subscribed"; "the amount of liability on a winding up"; "certain requirements as to devoting a significant amount of time to the trade" (10 hours a week). Further onerous conditions have been introduced by **regulations** as from 22 July 2005. The heyday of *Reed v Young* HL (1986) 59 TC196 is indeed over!

As to Capital Allowances, Andrew suggested that if the plant is in a building and part of the land, a licence to the trader could be the answer.

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1 Ralph Ray CTA(Fellow) TEP BSc(Econ), Consultant with Wilsons of Salisbury (www.wilsonslaw.com)

Once the trader is paid out, the licence terminates without compensation. Ownership may pass to the person who operates the plant.

II RESERVATION OF BENEFIT and PRE-OWNED ASSETS ('POAT') – SOME CURRENT ISSUES" was the subject matter covered by James.

- **Non-settled GWR and excluded property rules on death of donor**

Suppose:

- A gives property to B, an individual, outright.
- Assume that there is a reservation of benefit: i.e. A enjoys benefits at the time of his death.
- The property is not UK situated at the time of A's death.

A is treated as if he were beneficially entitled to the property at the time of his death. It forms part of his estate unless it is **excluded property** at that time. How do the excluded property rules work in these circumstances? Here we are concerned with non-settled property. The relevant rule is that: Property situated outside the UK is excluded property if the person beneficially entitled to it is an individual domiciled outside the UK. (Section 6(1) IHTA).

The puzzle here is caused by the deeming provision. In the example above, B is *in fact* beneficially entitled to the property. A is *treated* as beneficially entitled. Who is "the person beneficially entitled to it" for the purpose of applying the excluded property rule; is it A or is it B? This does not matter if A and B are both foreign domiciled, but it does if one is and the other is not. One common case is in a gift from a UK domiciled spouse to a foreign domiciled spouse. The answer is to be found by applying the general rule of construction which applies to deeming provisions, namely that the domicile of A is what matters for excluded property status. Thus if A has a foreign domicile, at the time of death, the property (if not UK situated) is excluded property. The domicile of B is irrelevant. HMRC accept this. See IHT Manual 14318.

- **Settled GWR and excluded property rules on death of donor**

Suppose:

- S (not UK domiciled) gives property to a discretionary settlement.

- There is a reservation of benefit – perhaps because S is a beneficiary.

- The property is not UK situated at the time of the death of S.

S is treated as if he were beneficially entitled to the property at the time of his death. It forms part of his estate unless it is excluded property at that time. How do the excluded property rules work in these circumstances? Where an individual makes a gift to a settlement with reservation of benefit, and dies, the property is excluded property for the GWR rules if:

- the donor is domiciled outside the UK at the time the settlement was made. (The domicile of the donor at the time of death is irrelevant); and

- the property is not situated in the UK at the time of death.

Change of domicile

Foreign property settled by a settlor with foreign domicile remains excluded property if the reservation continues **up to the settlor's death**, even though the domicile may have changed between those dates.

This appears to adopt the non-settled property solution. However, the Manual (at IHTM 14396) concludes with the discouraging words "Refer any cases where this is the situation to Litigation (IHTM01083)".

The settled property solution was restated in the 2003 Background Paper on domicile at 2.8 but this should not be relied upon. The authors were probably not aware of the current HMRC position, and their statement does not bind HMRC.

- **Reservation of benefit on inter-spouse gift**

  Application of spouse exemption on GWR property. The GWR rules do not generally apply to an inter-spouse gift. Section 102(5) FA 1986 provides relief. Where a UK domiciled individual makes a gift to a foreign domiciled spouse, the spouse exemption is restricted to £55,000 **and a gift over that limit will be within the scope of GWR**. Such gifts are often made for tax planning reasons. One solution to this problem is to sell assets at market value, so there is no disposal by way of gift. Watch the SDRT/SDLT implications.

- **GWR exemptions and POAT**

  Full GWR exemption

  FA 2004 Sch 15 paras 11(3) and (5)(a) provide that the POA charges do not apply to a person at a time when the relevant property or derived property would fall to be treated by virtue of any provision of Part 5 [FA 1986] as property which in relation to him is property subject to a reservation. James refers to this as the full GWR exemption. Note that the property may be subject to a reservation even though it is excluded property.

  Suppose:

  - T (not UK domiciled) transfers funds to a discretionary trust.

  - The trustees lend the funds to a company which purchases a house occupied by T. The shares and the benefit of the loan are derived property, and are subject to a reservation. This is so even if they are excluded property. So the GWR exemption applies.

  For **Partial GWR exemption** – a reasonable proportionate charge to POA remains.

III **Elizabeth** covered aspects of **"INCOME TAX SETTLEMENT PROVISIONS".**

- As regards s.620 ITT01A 2005 – a "settlement" includes "any disposition, trust, covenant, agreement, arrangement or transfer of assets (formerly TA 1988 s.660A) – a very wide definition.

  Elizabeth referred to the leading cases, including *CIR v Payne* 23 TC 610; *Butler v Wildin* 61 TC 666; *IRC v Plummer* (there must be an element of bounty); *Young v Pearce* 70 TC 331. *IRC v Mills* – "funds which ordinarily would have been received by Mr Hawkins and Miss Mills for their acting were diverted to companies which were channels for their transmission to trustees" per Viscount Dilhorne at p.408B-E.

  Elizabeth emphasised that you don't have to identify a trust fund; a trust as such is not a necessary element.

- **Recent application of the legislation**

Jones v Garnett [2005] EWHC 849 (Ch)
The case concerned a s.660A ICTA 1988, but the statutory language is, in Elizabeth's view, unaltered in all important aspects.

The substantive issues were whether the Appellant made a statutory "settlement" for the purposes of s.660A(1): and whether the Appellant made an outright gift of property to his wife within s.660A(6) such that any findings that he made a settlement is precluded.

The Revenue's case was that, taken as a whole, the formation of the company, the acquisition of the share by the Appellant's wife, the informal agreement of the Appellant to work for the company generating income for the company, the payment of the modest salaries and the payment of dividends to the Appellant's wife was an arrangement and therefore a settlement.

- There was a "definite scheme" intended to ensure that part of the profits of the company, derived from the Appellant's work, was paid to the Appellant's wife in the form of dividends with a consequent saving of income tax.

- Taken as a whole the arrangement was not a wholly commercial transaction devoid of any element of bounty.

- The element of bounty was there at the outset when the shares were acquired. The totality of the arrangement made by the Appellant was that the Appellant effectively gave away to his wife a part of the profits of the company which were earned as a result of the Appellant's efforts in providing consultancy services to clients.

In the High Court, Park J agreed with Dr Brice that in the circumstances there was an "arrangement" and so a "settlement" and there was no doubt that Mr Jones was settlor of it. In particular, Mr Jones "provided funds" for the arrangement because all of the receipts of the company, which enabled it to have profits and pay dividends were attributable to Mr Jones, and he drew only a modest salary (para 32 of the decision). Elizabeth emphasised that if an "arrangement" exists (as Park J so decided), the outright gift exemption was not available. Reference should be made to Revenue Tax Bulletin 64.

Elizabeth considers that the taxpayer's case would have been stronger if the husband had not been the **sole** director, and the wife had been a co-director or even better, the sole director, and that formal contracts of employment subsisted.[2]

IV **"VIABLE OFFSHORE STRUCTURES FOR THE UK RESIDENT & DOMILICARY"** was the subject chosen by **Robert**.

- Robert started with the generalisation that if the client is UK domiciled and UK resident, and wants to benefit from the arrangement, there is normally little to be gained from such offshore structures.

- **Non-settlor Trusts**

Much undistributed income having a UK source which arises to trustees is taxable at the highest rate (currently 40%). In all probability, as from 6th April 2006, *all* undistributed income having a UK source which arises to trustees will be taxable at the highest rate (currently 40%). Beneficiaries may not be able to reclaim tax if income is later distributed to them.

Income tax effective arrangements are likely to be limited to non-UK source income which is not distributed or to arrangements involving an underlying offshore company, which will not be liable to UK income tax at a rate higher than the ordinary rate and will not normally be liable to UK corporation tax. However, if a distribution of capital is made in due course to a beneficiary ordinarily resident in the UK, he may be liable to an income tax charge under TA 1988 s.740 if the undistributed income is "relevant income" in relation to him. There is no surcharge to reflect the delay in receipt of tax by the Revenue. Contrast capital gains tax.

If s.740 applies, the benefits of delay in tax being payable may be reduced or eliminated by the loss of credit for either UK or foreign tax. The position can even be worse than if the income had arisen to a UK resident beneficiary originally. Care must also be taken if an underlying company has been utilised not to increase artificially the amount of income and/or chargeable gains. One of the results of the changes to the taxation of UK resident trusts may be to make offshore accumulation trusts more attractive!

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2 *Editorial Note*: The High Court decision has since been overturned by the Court of Appeal and the House of Lords have subsequently given HMRC leave to appeal the case.

- **Offshore Income Gains**

  TA 1988 Chapter V (Offshore Funds) in effect taxes capital gains on the disposals of material interests in non-qualifying offshore funds as though they were income. Thus, even if such an interest were owned by an individual, it could be tax-effective in that payment of tax could be deferred for many years. However, no credit is given for UK or foreign income or capital gains tax suffered directly by the offshore fund. Insofar as the gain is attributable to underlying capital gains of the offshore fund, there will be no taper relief or indexation relief and no annual exemption available. There is no tax-free uplift on death. Foreign domiciliaries are not taxed on the remittance basis. Special planning is needed in their case. An offshore trust can be very useful.

- **IHTA 1984 s.43 (2)**. Robert referred to the sinister IHT extension of settlement definitions particularly the reference

  > *"or would be so held or charged or burdened if the disposition or dispositions were regulated by the law of any part of the United Kingdom; or whereby, under the law of any other country, the administration of the property is for the time being governed by provisions equivalent in effect to those which would apply if the property were so held, charged or burdened."*

  Robert stated that it is often wrongly assumed that a transfer of value made by an offshore company cannot be a chargeable transfer. None of the property comprised in the estate of a company will ever constitute "excluded property". The only relief is given by s.94(2)(b):

  > *"if any amount which would otherwise be apportioned to an individual who is domiciled outside the United Kingdom is attributable to the value of any property outside the United Kingdom, that amount shall not be apportioned."*

  Hence, if a non-UK domiciled individual owns the shares in an offshore company which makes a gift of a house situate in the UK, the individual will be deemed to make a transfer of value, even though his shares constitute "excluded property".

- **Liechtenstein Entities**

  Types of Entity – There are numerous entities/arrangements which can be formed under the Liechtenstein Personen-und Gesellschaftsrecht. Some of

these are similar to those found in all western countries, e.g. the company limited by shares.

Consider:

- the stiftung (foundation)
- the anstalt (establishment)
- the trust enterprise

(Note: do not be misled by the name. It could well be a company and not a trust!)

There is considerable flexibility within each category. A careful analysis will be needed in each case as to the legal position. Those considering using such entities will need to consider very carefully how they can obtain gilt-edged advice as to the legal position in Liechtenstein law, as well as how they and those who create and benefit from them will be taxed under UK tax law. Remember, that if the UK Revenue assess to tax and the taxpayer appeals, the onus of proof will be on the taxpayer to show that the assessment is wrong. This may well involve proving Liechtenstein law. This is a question of fact and would normally involve a Liechtenstein lawyer giving evidence – and being minutely cross-examined!

• **Derivatives** – Robert stated that there are many possible arrangements, which are prima facie promising. What they all have in common is that a UK taxpayer enters into a contract which an offshore person under which, in return for the payment of a premium, the taxpayer has an entitlement to receive in future a capital sum calculated by reference to the performing of an actual or notional fund. The ideal scenario is:

  - there is no charge on the offshore person
  - there is no charge on the taxpayer unless and until he takes a benefit
  - the taxpayer's rights constitute a capital asset and he is liable at the most to capital gains tax, not income tax, on any gain.

V **Richard** spoke on :
"A PURPOSIVE STATUTORY INTERPRETATION".

- **A Purposive Statutory Interpretation?** The crux of the matter is to establish what (if anything) remains of the "preordained series of transactions" doctrine established by *Ramsay* and *Furniss v Dawson*.

  There is a widespread opinion that following *Barclays Mercantile*, we can forget about pre-ordained transactions and look solely to the purpose of the statute:

  "[33] The simplicity of this question, however difficult it might be to answer on the facts of a particular case, *shows that the* ***Ramsay*** *case did not introduce a new doctrine operating within the special field of revenue statutes*. On the contrary, as Lord Steyn observed in *McGuckian* it rescued tax law from being "some island of literal interpretation" and brought it within generally applicable principles.

  [34] Unfortunately, the novelty for tax lawyers of this exposure to ordinary principles of statutory construction produced a tendency to regard *Ramsay* as establishing a new jurisprudence governed by special rules of its own."

  But if that is correct, what are we to make of this from Lord Walker[3] in *West v Trennery* [2005] STC 214?

  "[31] The agreed statement of facts included the fact that all the steps down to (and including) 5th April 1995 were "preordained" but the sale to North British was not "preordained" (in each case, in the sense described in *Craven v White* [1989] AC 398). In your Lordships' House the parties agree that no issue arises "under the so-called Ramsay doctrine" (see *W T Ramsay Ltd v IRC* [1982] AC 300). The issue is one of statutory construction, to be determined in accordance with the principles stated by the House in *IRC v McGuckian*[19971 WLR 991."

  Or this from *Scottish Provident* [2005] STC 15?

  "19. That depends upon what the statute means by "entitlement". If one confines one's attention to the Citibank option, it certainly gave Citibank an entitlement, by exercise of the option, to the delivery of gilts.

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3 Lord Walker was the Guest Speaker at the Gala Dinner and gave a stimulating analysis of this subject matter.

On the other hand, if the option formed part of a larger scheme by which Citibank's right to the gilts was bound to be cancelled by SPI's right to the same gilts, then it could be said that in a practical sense Citibank had no entitlement to gilts. Since the decision of this House in *W T Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 it has been accepted that the language of a taxing statute will often have to be given a wide practical meaning of this sort which allows (and indeed requires) the court to have

regard to the whole of a series of transactions which were intended to have a commercial unity. Indeed, it is conceded by SPI that the court is not confined to looking at the Citibank option in isolation. If the scheme amounted in practice to a single transaction, the court should look at the scheme as a whole. Mr Aaronson QC, who appeared for SPI, accepted before the Special Commissioners that if there was "no genuine commercial possibility" of the two options not being exercised together, then the scheme must fail."

- Richard referred to **"Closely articulated legislation"** and in the context of *Campbell v IRC* [2004] STC (SCD):

"Paragraph 2(3) is an entirely mechanistic provision which calculates the 'loss' by deducting the subscription price 'paid in respect of [the] acquisition of [the Loan Notes]', within para 2(2)(b), from the market value deemed by para 8 to be obtained on the 'transfer', within para 2(2)(a), and deducting any relevant costs.

… para 2 is a provision which is sufficiently 'closely articulated' (on Lord Millett's terminology in *Arrowtown*) or 'legal' (using Lord Hoffmann's terminology in *Westmoreland*) to be unaffected by the purpose of the Appellant in subscribing for the Loan Notes."

VI **"CAPITAL GAINS TAX IN 2005"** was analysed by **Kevin.**

- Kevin summarised the highly complex provisions in FA 2005 ss. 23-45 covering **special CGT relief for trusts with vulnerable beneficiary**. Relief can be claimed by **UK resident trustees** in respect of CGT on gains accruing from the disposal of settled property held on qualifying trusts for the benefit of a vulnerable person, provided that the trustees and the vulnerable person (or someone on his behalf) makes an **election**. A "relevant minor" will/has to become absolutely entitled at 18. In effect the relief reduces the CGT to the amount which the vulnerable person would have to pay if he were UK resident and he owned the property.

Civil partnerships: s.103 empowers the Treasury to make regulations to secure that civil partners are treated for e.g. CGT purposes, as married to each other.

F(No 2) A 2005 changes. Temporary non-residents: s.32 – previously s.10A TCGA charged CGT on gains accruing to an individual who was a temporary non-resident by treating the gain as accruing to him when he

became UK resident again. But s.10A(1) provided that the section was without prejudice to his right to claim relief under double tax relief arrangements. And s.10A had no application if the individual continued to be UK resident but claimed relief (pursuant to the tiebreaker) under double tax relief arrangements. All of a sudden, the ability to claim double tax relief was regarded as unacceptable tax avoidance, and so s.10A has now been amended so that (a) it applies where the individual is UK resident but can claim double tax relief and (b) s.10A overrides double tax relief. These amendments have effect where the year of departure is 2005/06 or a later year, or where the year of departure is 2004/05 and between 16 March and 5th April 2005 the individual was UK resident and was not Treaty non-resident. It is not clear whether HMRC will argue for earlier years that s.10A always overrode double tax relief (by deeming the gains to accrue in the year of return). It is now all the more important to turn capital into income, because there is no income tax equivalent of s.10A, e.g. extracting a dividend from a UK resident company.

Trustees both resident and non-resident in a year of assessment: s.33. Under the "round the world" scheme, non-UK resident (e.g. Jersey) trustees emigrate to a territory with which the UK has a double tax arrangement (e.g. Mauritius), and then dispose of the gain assets, and then before the end of the tax year emigrate to the UK. Sections 86 and 87 TCGA cannot apply because the trustees are UK resident in part of the year. The trustees are not liable to tax despite being UK resident in part of the year because they can claim Treaty relief. There cannot be a s.77 charge on the settlor because the trustees are not chargeable to tax in respect of the gains. Another version of the Scheme involves UK trustees emigrating to, say, Mauritius and disposing of the gain assets in the same year, avoiding the emigration charge by relying on s.106A. The Revenue appear to accept this analysis, except sometimes arguing that double tax treaty relief does not apply because the tiebreaker applies and the place of effective management of the trust at the time of disposal is the UK, given that the planning was initiated in the UK.

Kevin considers this is wrong on both counts. **The scheme is stopped by**

new s.83A TCGA which excludes double tax relief where in any part of the tax year the trustees are resident and not Treaty non-resident (i.e. when the immigrate under para 20 or emigrate under para 22) and at the time of the disposal they are non-UK resident or they are UK resident but Treaty non-resident.

- **Location of assets: s.34 and Sch 4.** Previously, a non-UK domiciled individual could avoid CGT by turning certain UK situated assets into non-UK situated assets prior to a disposal, e.g. by bearer shares or a non-UK share or debenture register. But now s.275 has been amended so that shares and debentures of a UK incorporated company are necessarily situated in the UK. Therefore the non-UK domiciled individual should invest in a non-UK incorporated company. Consider turning shares in a UK company into shares in a non-UK company, including by means of a "merger" pursuant to Articles 2(1) and 17(2) of EC Regulation 2157 (2000) on the Statute for a European Company ("SE"): see s.51 adding a new s.140G TCGA. But this does not apply if the formation of the SE is not for bona fide commercial reasons or forms part of a tax avoidance scheme: see s.140G(4) and s.240E(7).

- **Extraction of value from offshore trusts**. Turning capital into income. Trustees appoint valuable contingent irrevocable trust interest to beneficiary absolutely with allowable losses. He sells trust interest to non-UK resident purchaser. Kevin posed the query: are the sale proceeds a capital sum received indirectly from the trustees? Kevin suggested the possibility of using allowable losses created through use of capital redemption policies.[4]

VII **"SOME CURRENT CONCERNS for FOREIGN DOMICILED CLIENTS"** were highlighted by **Stephen.**

- For years many of us have been settling increasingly blunt letters to Somerset House on the effect of s.741[5]. In particular, this has focused on the Revenue's approach that: the test is objective, not subjective. Earlier in 2005, the Revenue had, it appears, received further advice on s.741 and recent replies on these points are much more fully argued than in previous

4 *Editorial Note*: It was subsequently announced that the use of capital redemption policies will be blocked (Pre-Budget Report, 5 December 2005).

5 *Editorial Note*: Following the Pre-Budget Report, references to s 741 relate to transactions before 5 December 2005.

years. The Revenue's position is:

- the test is definitely objective; this is a policy decision of the Board. The Revenue notes that evidence of the transferor's purpose may be highly relevant but the test is still objective;

- that "tax mitigation" involves finding an offer (in a specific provision) granting freedom from tax which Parliament intends to apply in the circumstances and which the taxpayer is not misusing;

- that if an arrangement has the *effect* of avoiding tax, that must be its *purpose*.

• **Hedge Funds and Foreign Domiciliaries under ITTOIA**. Stephen turned to the foreign domiciliary holding hedge funds in an offshore structure.

  The Basics: Before plunging into the niceties of ICTA 1988, ss. 761, 762, which are not rewritten, merely amended, Stephen set out the basic provisions behind the more complex analysis. Where appropriate, all references are to ICTA 1988 as amended by ITTOIA 2005.

  The remittance basis in respect of foreign income is conferred on "relevant foreign income" by ITTOIA 2005, Part 8. Section 831, subsection (3) provides for foreign domiciliaries to claim the relief. Section 832 states:

  (1) If a person makes a claim under s.831(1) for a tax year in respect of relevant foreign income, income tax is charged on the full amount of the sums received in the UK in the tax year in respect of the income.

  (2) For the purposes of subsection (1), it does not matter whether the income arises in the year for which the claim is made or arose in an earlier year in which the person was UK resident.

  Broadly speaking, ICTA 1988 s.761 will tax a client holding the hedge funds directly and s.762 will bring in ss. 739 and 740. It thus becomes crucial to understand, first, how the remittance basis applies to these sections, before moving on to their deemed application in s.762.

• **Practical Hedge Fund Issues and Sections 761, 762**. The client should not hold the hedge funds personally or the s.12 remittance basis will apply. If the funds are held in a foreign resident settlement, the relief in s.762(6)

should apply. This disapplies ss. 739, 740. It is, however, crucial to note that this is because:

(1) the offshore income gain can be treated by s.762(2) as accruing to the client under TCGA 1992, s.87(4);

(2) it does not matter that it is not chargeable because of s.87(7) – see the explicit reference in s.762(2)(b).

The caveat is that s.87(7) must apply in relation to the gain: s.86 is irrelevant. Thus there must be a capital payment (actual or deemed) with s.97. How do we structure this and what is the timing issue, asked Stephen. If the funds are held by a directly owned foreign resident company, TCGA 1992 s.13 applies. *Prima facie*, s.762(6) seems to give no relief but note: "… is treated, by virtue of subsection (1) … as having accrued …". And contrast with how s.13(2) works. Use (often inadvisable) of offshore company under offshore trust. Note: care with necessary casual relationships. Trace through subsection (1) to subsection (2). Securing that the "offshore income gain" falls within s.762(2).

- **Actual Section 12 Gains and Section 762 Issues**. The purchase of the hedge funds may have been funded by the use of consideration which is chargeable on remittance by TCGA 1992, s.12. There is no "source-ceasing" or "splitting" rule available. Can we isolate a sum by reference to a subsequent offshore income gain, protected by s.762(6), so that its remittance does not bring s.12 into play?

- **Underlying Hedge Fund Transactions**. The fund in which our client (through his/her offshore structure) invests may well accrue offshore income gains from its own hedge fund. As regards actual income, the s.739 position is likely to turn on whether our client purchased existing units or subscribed for a new issue. Section 762 can also operate at this level. Again, the relief from s.13 (read with s.762(1)) will not prevent s.762 applying on income charge by virtue of s.762(6) read with s.739 if relevant. Again, the trust is important. What of the different potential levels of the operation of s.739? *Ackroyd v IRC* 24 TC 515; ss. 743(4); 744.

VIII "INTERNATIONAL ESTATES, TAX and SUCCESSION" by Timothy.

Introduction: The action programmes of the EC Commission and the judgments of the ECJ are now taken as permanent features in the landscape surveyed by the adviser to multinational corporations. The advisers of small and medium sized enterprises and of private clients need feel no twinge of envy. Both in non-tax and tax matters their environment is rapidly being influenced by EC law and by the concept of the internal market and the areas of freedom, security and justice. Some EU states are solving the problems in this area by abolishing inheritance and gift taxes. It is not just in parts of new Europe that successions are free from tax. In Sweden, from 1st January 2005, all inheritance and gift tax was abolished in relation to individuals and companies. The move was justified, at least in part, by a desire to make the transmission of businesses easier. Wealth tax, though, remains. Timothy suggested that in an EU in which exit taxes are illegal, the absence of inheritance and gift taxes may well prove significant beyond national boundaries.

A confusing and changing world: The world of the private client adviser may be changing. It is also confusing. There are a giddying number of variations in the basic construction of inheritance and gift taxes and few double tax treaties to help out. Double or even multiple taxation is the inevitable consequence. Whilst there is always unilateral relief that may prove unsatisfactory and does not always exist.

There are a least three areas in which gift and inheritance taxes differ markedly throughout the EU and which contribute to confusion and multiple taxation. First, there may be fundamental differences in design of taxes. The UK inheritance tax is a misnomer as it does not assess donees primarily. Secondly, there may be incompatible rules governing liability, for example the concepts of domicile, deemed domicile, resident and nationality. Thirdly, there may be conflicting rules governing liability in relation to the assets in question. Not infrequently one may have a combination of all three. The difference of approach is bound to be problematic for tax systems and was noted a number of years ago in the context of trusts. The commentary on Article 7 of the OECD Model Double Taxation Convention on Estates and Inheritance and on Gifts (1982) observes, perhaps simplistically, that some states regard the individual with an interest in a trust as having an interest in the underlying trust property. Other states regard the individual as having an interest in the trust itself. These different items of property may, clearly, be located in different states.

The situs of assets: The difference between states' rules governing situs of assets can produce double liability. Take patents, for example. One state may regard them as situated at the place of registration. Another state may regard them as situated where they are exploited.

The confusing world of multiple taxation: Assume a European entrepreneur who is a national of State A, a resident of State B and domiciled (in the common law sense) in State C. The entrepreneur marries a national of State D which has deemed residence rules. He lives there for a while before making a gift of property registered in State E and exploited in State F. Six states have been brought into play before the trusts set up by the individual have been mentioned.

If one wants to introduce regional taxes into the situation one can complicate the picture further. Who would not want to escape from this confusing world to a new world? In this context, Timothy referred to some recent EU decisions:

- Case C-251/98 *C Baars v Inspecteur der Belastingen Particulieren etc* [2000] ECR I-2787. Wealth tax exemption confined to holdings in companies established in the Netherlands held to be contrary to the freedom of establishment.

- Case C-364/01 *Heirs of H Barbier v Inspecteur van de Belastingdienst Particulieren etc* [2003] ECR I-15013. Transfer duty treatment of non-residents harsher than of residents. Free movement of capital provisions infringed.

- Case C-513/03 *Heirs of M E A van Hilten v Inspecteur van de Belastingdienst,* Opinion, 30th June 2005. The Netherlands relied upon deemed residence rules, using a ten year period, in imposing succession tax on the heirs of a Dutch citizen who died in Switzerland in 1997 having left the Netherlands in 1988.

- Case C-376/03 *D v Inspecteur van de Belastingdienst etc* 5th July 2005. Mr D was a resident of Germany. He had 10% of his wealth in real property in the Netherlands. He was refused certain allowances because 90% of his wealth was not in the Netherlands. The ECJ found no infringement of the free movement of capital rules on either ground. It is clearly an important decision but not, in Timothy's view, as surprising as some commentators suggest.

Timothy's Conclusion: Until recently, at least, taxes on gifts, inheritance and wealth had a relatively low political priority. Now that the Commission is paying attention to succession law and the abolitionists are active, that may change to some extent. The Commission has particular concerns in relation to double taxation agreements generally within the EU.

IX **"INTERNATIONAL ASPECTS OF PERSONAL and TRUST TAX PLANNING"** was **Philip's** subject and continuing the theme of Timothy. In particular, Philip gave a fascinating insight as to the areas of UK law which may well be **incompatible** with Community Law including, for example:

- **ss. 739 and 741** TA 1988 – **transfer of assets abroad** anti-avoidance cases are pending.
- **s.13 TCGA 1992 – attribution of gains** to members of non-resident companies.

Inheritance Tax IHTA 1984:

- **s.6(3)** investments held by persons domiciled in Channel Islands and Isle of Man
- **s.18(2)** - £55,000 limits on inter-spousal transfers to non-domiciled spouse – e.g. UK-deemed domiciled wife; gift of UK-situs asset to non-domiciled husband.
- **s.23** – gifts to charities
- **s.24** – gifts to political parties
- **s.25** – gifts for national purposes (and Sch 3)
- s.**27** – maintenance funds for historic buildings
- s.**105(4)(a)** – business property relief: certain activities restricted to UK
- s.**115(5)** – agricultural property
- s.**125** – woodlands

- s.**154** – death on active service
- s.**162(5)** – deduction of liabilities
- s.**218** – non-resident trustees
- s.**267** – deemed domicile: 3 year trailing domicile