

MEMEC PLC v INLAND REVENUE
COMMISSIONERS AND THE SOURCE OF
DISCRETIONARY INCOME PAYMENTS
FROM TRUSTS

Robert Venables QC¹

In his article 'Discretionary Trusts and the New Dividend Regime' in this issue of the Review, Richard Vallat suggests that the "Revenue's view ... that the trust constitutes a new source of income [where trustees distribute trust income in the exercise of their discretion] ... was confirmed by Walker J in *Memec v Inland Revenue Commissioners* [1996] STC 1346 at 1351". Mr Vallat accepts that the Court of Appeal expressly declined to address the point but states that "the High Court decision is likely to be found persuasive by other judges".

My view is that the Revenue are wrong. Although I have never set out fully the reasons for my view, which would be a lengthy process, they are summarised in section 3 of 'Fundamentals of The Income Taxation of Trustees and Beneficiaries', being Appendix C to my comments on *The Inland Revenue Consultative Document on Trusts*, published March 1991. As my book *The Income Taxation of Trustees* has been in the course of preparation for over a decade and, given my limited resources and the demands on them, may not be published for some time, and as my Comments were published for private circulation only, I have reproduced the Appendix in this issue, lest what I regard as heresy should become orthodoxy by default.

I have the greatest respect for the intellect and learning of Walker LJ, as he now is. As a QC, he had a thriving practice which included what one might call "Chancery tax", which embraced the income taxation of trusts. Yet his comments in *Memec* were made without the benefit of any argument, as they were tangential to the main issue. I imagine that, like many others, he simply supposed that the Revenue view

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which has been propounded so consistently over the decades and which, rightly or wrongly, underlies Taxes Act 1988 section 687, was unchallenged orthodoxy.

Alarmed lest this statement by so eminent and respected a judge should be taken, as Mr Vallat considers it indeed will be, as ammunition for the Revenue view, I took the Court of Appeal through the point in some detail. Peter Gibson LJ, the presiding judge, who himself had lots of experience of Chancery tax at the bar, seemed to me to accept in argument that the speeches in *Drummond v Collins*, in the Court of Appeal as well as in the House of Lords, lent considerable support to my view. I was not surprised that their Lordships found that it was not necessary for the purposes of this appeal to resolve the dispute. It is a fundamental point and should perhaps be decided only after full argument in a case where it was directly relevant.

In my view, one reason that the Revenue have not been challenged over the years is that, while it is sometimes to a taxpayer's advantage to accept that their view is correct, most of the disadvantages have hitherto been removed by extra-statutory concession.

I intend, time permitting, to publish the full reasons for my view that 'in general' the source of income paid by discretionary trustees is the same as the trustees' source and that there is no difference in this respect between an interest in possession trust and a discretionary trust. In the meantime, I would refer the reader to section 3 of the following article.