The Personal Tax Planning Review

REPEAL OF THE CHARGE ON EMIGRATION OF TRUSTEES?

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1 The Background

Taxation of Chargeable Gains Act 1992 section 80(2) deems the trustees of a settlement who cease to be United Kingdom resident to dispose of and immediately reacquire most of the settled property for a market value consideration.[2] Any inherent gains will thus be taxed at that point.[3]

Finance Act 1998 introduced amendments to the Taxation of Chargeable Gains Act 1992 in order to prevent "bed and breakfasting" of securities.[4] Taxation of Chargeable Gains Act 1992 section 106A (Identification of securities: general rules for capital gains tax) was inserted with effect from April 6th 1998. It is concerned with the "identification" of shares which are disposed of.

In this article, I suggest that Parliament, in enacting section 106A, may have inadvertently repealed section 80(2) as respects securities comprised in a trust fund.

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2 The predecessor of Section 80 had been originally enacted in Finance Act 1991.

3 See generally my *Non Resident Trusts* 7th edition published by Key Haven Publications PLC, Chapter 11 *Emigrating Trusts*.

4 Notwithstanding that this practice has been characterised by the courts as not involving tax avoidance. See, for example, *Westmoreland Investments Ltd v Macniven* [1998] STC 1131.

2 Section 80

Sections 80(1) and (2) Taxation of Chargeable Gains Act 1992 provide:

> "(1) This section applies if the trustees of a settlement, become at any time 'the relevant time' neither resident nor ordinarily resident in the United Kingdom.
>
> (2) The trustees shall be deemed for all purposes of this Act:
>
> (a) to have disposed of the defined assets immediately before the relevant time, and
>
> (b) immediately to have reacquired them,
>
> at their market value at that time."

3 Section 106A

The material parts of section 106A provide:

> "(1) This section has effect for the purposes of capital gains tax (but not corporation tax) where any securities[5] are disposed of by any person.
>
> (2) The securities disposed of shall be identified in accordance with the following provisions of this section with securities of the same class that have been acquired by the person making the disposal.
>
> (3) The provisions of this section have effect in the case of any disposal notwithstanding that some or all of the securities disposed of are otherwise identified-
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> (a) by the disposal, or
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> (b) by a transfer or delivery giving effect to it;

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5 This is defined.

but where a person disposes of securities in one capacity, they shall not be identified under those provisions with any securities which he holds, or can dispose of, only in some other capacity.

(4) Securities disposed of on an earlier date shall be identified before securities disposed of on a later date; and, accordingly, securities disposed of by a later disposal shall not be identified with securities already identified as disposed of by an earlier disposal.

(5) Subject to subsection (4) above, if within the period of thirty days after the disposal the person making it acquires securities of the same class, the securities disposed of shall be identified-

(a) with securities acquired by him within that period, rather than with other securities; and

(b) with securities acquired at an earlier time within that period, rather than with securities acquired at a later time within that period."

4 The Reasoning

If trustees are deemed by section 80(2) to dispose of securities on emigration and immediately reacquire them, the shares disposed of are "identified" by section 106A(5) with the shares reacquired. This means that, while there will be no indexation relief or taper relief (or any other relief based on a period of ownership) the gain will be nil. The trustees will own the securities offshore, but when they are actually disposed the shares will be identified with the shares acquired by them before emigration - which in reality they are. Any gain will thus escape a direct charge to United Kingdom capital gains tax (unless Taxation of Chargeable Gains Act 1992 section 86 applies to deem the gain to be the settlor's).

5 Conclusion

This result is paradoxical and unintended. No doubt, the Courts would listen very sympathetically to any Revenue argument that it was wrong. Can any reader see one?