

THE GENERAL ADMINISTRATION OF A TRUST

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Under s.69(1) TCGA, the residence of trustees as a body of persons is determined by the residence of the persons who are the trustees (or a majority of them) and the place where the general administration of the trust is carried on. The application and meaning of this second requirement was the subject of a protracted debate with the Revenue in a case concerning a testamentary trust arising under the will of a South African domiciled testator, and readers may find the content and outcome of the controversy of interest.

The bulk of the testator's estate comprised tenanted houses in England. He appointed as his trustees, two individuals resident in South Africa. As mentioned, the testator was domiciled in South Africa at the date of his death. The trusts were for the benefit of individuals, most of whom were resident in the UK. The main trusts gave concurrent interests in possession to several individuals, but the trustees had wide powers of appointment and advancement.

The properties were let on landlord's repairing leases. It was obviously impractical for the trustees to oversee the repairs personally and it was their practice each year to execute powers of attorney in favour of two agents, the agents being authorised to carry out repairs, to collect rents and to sell properties as they become vacant.

When properties were sold it was contended on behalf of the trustees that the gains were not taxable because the trustees were non-resident within the meaning of s.69(1). The Revenue accepted that the individuals who were trustees were non-resident, but claimed that the general administration of

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the trusts was not ordinarily carried on outside the UK and that therefore the trustees as a body were resident here. The annual power of attorney in favour of UK agents was said to be fatal.

Two questions arose: first, were the trusts in fact generally administered in the UK? Second, if so, was the administration of the trusts deemed to be carried on abroad by virtue of s.69(2) (non-domiciled settlors)? It is convenient to take the s.69(2) point first.

Section 69(2) is as follows:

"Notwithstanding subs.(1) above, a person carrying on a business which consists of or includes the management of trusts, and acting as trustee of a trust in the course of that business, shall be treated in relation to that trust as not resident in the United Kingdom if the whole of the settled property consists of or derives from property provided by a person not at the time (or, in the case of a trust arising under a testamentary disposition or on an intestacy or partial intestacy, at his death) domiciled, resident or ordinarily resident in the United Kingdom, and if in such a case the trustees or a majority of them are or are treated in relation to that trust as not resident in the United Kingdom, the general administration of the trust shall be treated as ordinarily carried on outside the United Kingdom."

Readers will be familiar with this provision in that it undoubtedly enables UK professional trustees to act as trustees of a trust created by a non-domiciled settlor without the trustees as a body being treated as resident here. The provision is in two main parts. First, it deals with the residence of professional trustees and, second, it deals with the place of administration of the trusts. The position of the Revenue was that the second part was linked to the first and could apply only if the first part had effect so as to treat professional trustees as resident abroad. Readers are now invited to look at the second part again (emphasis supplied):

" ... if in such a case the trustees ... *are* or are treated in relation to that trust as not resident in the United Kingdom, the general administration of the trust shall be treated as ordinarily carried on outside the United Kingdom."

What are the circumstances to which "if in such a case" refer? They are the circumstances described by the words " ... if the whole of the settled property consists of or derives from property provided by a person not ... at his death domiciled, resident or ordinarily resident in the United Kingdom ... ".

The reference back cannot include the earlier part of the subsection so as to limit "in such a case" to that of a professional trustee of a non-domiciled settlor, *treated* as resident abroad, because otherwise the reference to "trustees [who] *are*" not resident, would be otiose. Further, it is only the words beginning "if the whole" that describe a "case", or set of facts - the earlier part of the subsection prescribes a rule to be applied where that set of facts exists.

The argument for the trustees was therefore that because the testator was domiciled abroad, the general administration was deemed to be carried on abroad even though the individuals who were trustees were not deemed to be resident abroad (because they were in any event non-resident). The Revenue would not accept this argument, but your contributor considers it to be correct.

On the question of where the general administration was in fact carried on, the trustees' position was that there is a difference between the administration of the trusts, and the administration of the assets held upon the trusts. The administration of the trusts covers the policy questions addressed by the trustees from time to time (such as whether to exercise their powers of advancement), whereas the administration of assets covers day to day questions such as whether repairs should be carried out. The trustees always held their meetings in South Africa, though they did make trips to England to consult the wishes of the beneficiaries. On this basis it was contended that the general administration of the trusts was carried on in South Africa. Readers will be glad to hear that, eventually, this argument was accepted.