The Offshore Tax Planning Review

SECTION 739 AND THE FOREIGN DOMICILED SPOUSE

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In the last issue of the *Review*, Richard Rees-Pulley replied to my earlier article on the subject of s.739, and in particular its possible operation in the context of a husband with a foreign domiciled wife. It is conventional when a conflicting view is published to hide one's embarrassment with an excess of courtesy, the implication being not that one had made an error (perish the thought), but had merely expressed a point poorly. However, in my article I not only invited comment, but hoped that a contrary view would be forthcoming, because the alternative was too unpalatable. For this reason I am genuinely grateful to Richard Rees-Pulley for putting forward an opposing view, which I welcome. Unfortunately, much as I would like to, I feel unable to embrace all his views, although I remain open to persuasion.

The example I gave was of a UK domiciled husband with a foreign domiciled wife. The husband makes an absolute gift of cash of £100,000 to the wife which she deposits in the Channel Islands and does not remit any of the income. The question is whether s.739 can apply to charge the husband to tax on the unremitted foreign income of the wife.

There can be no doubt that the husband is the transferor in these circumstances, nor that the income becomes payable to his wife, a person not domiciled in the UK, by virtue or in consequence of his transfer. I suggested that because of s.742(9)(a), which states that for these purposes "a reference to an individual shall be deemed to include the wife or husband of the individual", the transferor husband must have power to enjoy the income. Accordingly, the income will be taxed on him by virtue of s.739.

Mr Rees-Pulley says that s.739 merely deems the wife's income to be her own, but I cannot see how this can be right. The wife's income is her own; it does not need to be deemed to be her own by s.739. The important point surely is that although the income is that of the wife, the husband has power to enjoy it because of s.742(9)(a), and because he is the transferor, it is taxable on him.

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Mr Rees-Pulley also says that the remittance basis is available under s.743(3), but again I cannot see why. This remittance basis protection is only available to an individual who is domiciled outside the UK; the wife clearly qualifies, but that is only relevant if she is taxable on the income. If the husband is taxed on the income, he cannot claim the benefit of s.743(3) because he is domiciled in the UK.

I understand Mr Rees-Pulley to challenge both these propositions on the basis that it may not be technically right to say that if the spouse of the transferor has power to enjoy, then the transferor is deemed to have power to enjoy as well. This is of course fundamental, but I am afraid that I cannot grasp why not. This seems to be exactly what s.742(9)(a) is saying. The wife is the individual who has power to enjoy. The individual with the power to enjoy includes the husband of the individual. Therefore the husband has power to enjoy and, as he also happens to be the transferor, he is chargeable on all the income by virtue of s.739.

The argument in which I see most substance is that s.739 should not apply at all where the assets transferred remain in the ownership of the husband or wife. (Quaere whether the same point can be made where the husband or wife has a life interest in the assets transferred). S.739 applies to a transferor being an individual who makes a transfer in consequence of which income becomes payable to a foreign domiciled person. If for all relevant purposes "an individual" includes the wife or husband of the individual, it could be said that both are included as the individual transferor, and so the transferee (or the person to whom the income becomes payable) must be a third party. S.742(2) could be said to lend some support to this argument, as it refers to an individual being deemed to have power to enjoy the income of a person domiciled abroad. These words seem inappropriate to describe the entitlement of a person to his own income; the provision appears to envisage one person having the power to enjoy income of another. However, that is exactly the point; it is the husband who is to be taxed on the income of the wife.

It is attractive to deal with the argument on the basis that the spouses should be treated as one. However, that is not what s.742(9)(a) says, and it would seem to create more problems than it solves - such as who is to be assessed as the transferor, given that a composite husband/wife transferor cannot be assessed directly.

A more compelling criticism of this approach seems to be the plain illogicality of the result. If one inserts "(including the wife or husband of the individual)" into the text after every appearance of the word "individual", the provision becomes unworkable very quickly. It is no better if one inserts "(or the wife or husband of the individual)", and to insert anything else would clearly be unauthorised.

How then is the provision to be interpreted, other than in the manner suggested in my previous article? I regret that I still do not know, but I live in hope that the point is merely academic.