TRANSFER OF ASSETS ABROAD POST INCOME TAX ACT 2007[1]

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1 Overview

1.1 The Mischief[3]

UK income tax is levied partly on a territorial basis, that is on income having its "source" within the United Kingdom, and partly on the basis of United Kingdom residence and, in some cases domicile.

A person ("the Transferor") who was domiciled, resident and ordinarily resident in the United Kingdom could, at least for the time being, escape a charge to income tax on non-UK source income by ensuring that income arose to a person (typically, but not exclusively, a trustee, a company or other foreign institution) who was not chargeable to tax because he was not resident or ordinarily resident or domiciled within the United Kingdom ("a Person Abroad"). The income of the Person Abroad could in due course be enjoyed, by one means or another, by the Transferor or persons he wished to benefit (his "Beneficiaries"). Ideally, the enjoyment of the income would not, for one reason or another, involve any charge to United Kingdom income tax or any other tax. Or, at least, the overall charge to tax would be diminished or deferred, or both.

Even income which has a United Kingdom source sometimes escapes a charge to tax if it belongs to a non-UK resident. And income having a United Kingdom source can sometimes be charged at a lower rate if it belongs to one type of taxpayer, for

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1 This article was written before the Pre-Budget Statement of October 2007. It is possible that the law may be changed (in ways as yet unspecified) as respects foreign domiciliaries.

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3 This Article is based on a draft of my forthcoming Key Haven Intelligence Report, which is provisionally entitled "**The Transfer of Assets Abroad Provisions**".

example, a company, than another, say an individual.

1.2 The Answer to the Mischief: The Transfer of Assets Abroad Provisions

It was (partly) to counter this possibility that the transfer of assets abroad legislation was introduced in 1936 by Finance Act 1936. It was highly technical and has had to be amended and expanded several times, sometimes quite substantially. It has been the subject of four consolidating acts. The latest amendments, intentional and otherwise, are contained in the Income Tax Act 2007 Part 13 (Tax Avoidance) Chapter 2 (Transfer of Assets Abroad). I predict that we shall see further amendments still.

1.3 Application of the Provisions

The legislation applies only where there has been a "Relevant Transfer" (formerly a "transfer of assets"), as extensively defined, in consequence of which income arises to a Person Abroad. A person who has sought to avoid liability to United Kingdom taxation by means of such a transfer ("the Transferor" – a term not used in the legislation, past or present) may find that income which arises to the Person Abroad is deemed to be his for United Kingdom income tax purposes. That may be for one of three reasons. The first is that he has the ability to enjoy the income of the Person Abroad. Since 1969, the test has been a technical one of whether he has "Power to Enjoy" that income. The second is that he receives a benefit as a result of relevant transactions. The third is that he has received or is entitled to receive a "Capital Sum" (as defined).

The spouse (and, nowadays, the civil partner) of a Transferor is for some purposes equated with the Transferor. Subject to that, it was established in 1979 in *Vestey v Inland Revenue Commissioners* (1979) 54 TC 503 that a third party could not be caught by the legislation at all. Hence, new legislation was tacked on by Finance Act 1981 which allows third parties ("Non-Transferors") to be subject to a charge to income tax in respect of income which has arisen to a Person Abroad to the extent to which they receive a benefit as the result of relevant transactions. This legislation, too, is highly technical.

1.4 Double Taxation

It is a moot point to what extent there can be double (or multiple) liability to United Kingdom income tax (or corporation tax) in respect of income which is caught by the legislation. The Provisions themselves contain only limited exceptions from double charges.

1.5 The Limits of the Legislation

1.5.1 Causation

The causation requirements for the legislation to apply are extremely technical.

If one is concerned to see whether there is any charge on the Transferor, it is crucial to be able to identify a Relevant Transfer in relation to which he was the Transferor and to show that income arose to a Person Abroad in consequence of that transfer. The necessary causal link must be that the income arose either as a result of the transfer, one or more "Associated Operations" (as defined) or the Relevant Transfer and one or more Associated Operations. Hence, income which does not so arise is not caught.

1.5.2 Need for Person Chargeable to be Ordinarily Resident in the United Kingdom

Transferors are caught only to the extent to which they are ordinarily resident in the United Kingdom at the relevant time. A transferor who is not ordinarily resident in the United Kingdom at a material time can have entered into as much United Kingdom tax planning as he likes. For example, if an individual who is neither resident nor ordinarily resident in the United Kingdom holds United Kingdom income-producing real property through an offshore company, thereby limiting the liability to United Kingdom income tax to the basic rate, there is no question of the provisions applying to him.

By contrast, the residence status of the Transferor when he made the Relevant Transfer is immaterial, although it could well be a factor to be taken into account in determining whether the motive defence is satisfied.

1.5.3 Non-UK Domicile of Person Potentially Chargeable

Foreign domiciliaries will in some cases have a defence against the operation of the Provisions. There is no defence available for a person who is not the Transferor that the Transferor was not at any material time domiciled in the United Kingdom. The domicile of the Transferor when he made the Relevant Transfer is not of itself material, although it could well be a factor to be taken into account in determining whether the motive defence is satisfied.

1.6 The Motive Defence

There is no exception for transfers for full consideration. In contradistinction to the income tax Settlement Provisions, contained in Income Tax (Trading and other Income) Act 2005 Part 5 Chapter 5, there is no need for "bounty".

There is, however, a motive defence, which it is incumbent on the taxpayer to establish. It was substantially altered with effect from 5th December 2005. The old law is still relevant in some cases.

Under the law applicable where all Relevant Transactions (i.e. a Relevant Transfer or an Associated Operation) occur after December 4th 2005, the defence has two limbs, either of which it is enough for the taxpayer to establish. They are:

(A) that it would not be reasonable to draw the conclusion, from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected and

(B) that-

2.1 The Heads of Charge

2.1.7 Compatibility with EC Law

I am confident that it will one day be held by the European Court of Justice that the legislation is to some extent incompatible with EC law. The United Kingdom Parliament has hitherto made no attempt to make it so compatible.

2 The Legislation in Outline

2.1 The Heads of Charge

2.1.1 Income Tax Act 2007 Section 714

Income Tax Act 2007 section 714 is intended to give an overview of Part 13 (Tax Avoidance) Chapter 2 (Transfer of Assets Abroad). It provides:

“ 714 Overview of Chapter

(1) This Chapter imposes a charge to income tax on—

(a) individuals to whom income is treated as arising under section 721 (individuals with power to enjoy income as a result of relevant transactions),

(b) individuals to whom income is treated as arising under section 728 (individuals receiving capital sums as a result of relevant transactions), and

(c) individuals to whom income is treated as arising under section 732 (non-transferors receiving a benefit as a result of relevant transactions).

(2) The charges apply only if a relevant transfer occurs, and they operate by reference to income of a person abroad that is connected with the transfer or another relevant transaction.

(3) For the meaning of "relevant transaction", "relevant transfer" and "person abroad", see sections 715, 716 and 718 respectively.

(4) In this Chapter references to individuals include their spouses or civil partners."

As an overview, this is less than perfect. While the section mentions three of the charges to tax, it fails to show the proper hierarchy and omits the fourth!

2.1.2 A Better Overview

As explained in Part 1 of this article, there are two main groups of charges, those on Transferors and those on Non-Transferors.

The charges on Transferors are:

- the general charge on a Transferor, imposed by section 720(2), in conjunction with section 721, resulting from the Transferor having "Power to Enjoy" the "Income" of a Person Abroad, to which I shall refer as the "Power to Enjoy Charge"

- the more limited charge on a Transferor, imposed by section 720(2), in conjunction with section 724, resulting from the Transferor having "Power to Enjoy" the "Income" of a Person Abroad by virtue only of receiving a benefit provided out of it, to which I shall refer as the "Transferor Benefit Charge"

- the charge on a Transferor, imposed by section 727, resulting from his receiving or being entitled to receive a "Capital Sum" connected with a "Relevant Transaction" whereby "Income" arises to a Person Abroad, to which I shall refer as the "Capital Sum Charge"

The charge on Non-Transferors is that imposed by section 731, in conjunction with section 732, on persons who receive a benefit as the result of a relevant transaction, to which I shall refer as the "Non-Transferor Benefit Charge".

2.2 Key Conditions for All Charges

In order for any of the four charges to tax to arise,

(a) There must be "Income" "of"[4] a Person Abroad

(b) the Income must have arisen as a result of a Relevant Transfer and / or one or more Associated Operations in relation to a Relevant Transfer (collectively called "Relevant Transactions")

(c) there must be an individual, whether or not a Transferor, who is ordinarily resident in the United Kingdom at a material time[5]

(d) the individual must have no defence based on his foreign domicile

(e) the Motive Defence must not be available

The only person who can be charged to tax is an *individual* ordinarily resident in the United Kingdom.

Hence, there is no charge on trustees, personal representative or corporations. However, that does not prevent a transfer made by trustees, personal representatives or a corporation from constituting a Relevant Transfer.

A corporation can itself be liable to corporation tax under the Controlled Foreign Companies provisions, contained in Income and Corporation Tax Act 1988 Part XVII Chapter IV. A Relevant Transfer made directly by a corporation can also involve an individual being chargeable under the Provisions.

2.3 The Meaning of "Income"

2.3.1 The Ambiguity

In an income tax act, the prima facie meaning of "income" is "income for income tax purposes", i.e. "taxable income" or, at least, that which would be taxable income if a person resident, ordinarily resident and domiciled in the United Kingdom were entitled to it and received it. If, therefore what would be a capital profit as a matter

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4 Income "of" a Person Abroad probably means income which has "Become Payable" to a Person Abroad. Section 714 (Overview of Chapter) provides: "(2) The charges apply only if a relevant transfer occurs, and they operate by reference to income of a person abroad that is connected with the transfer or another relevant transaction."

5 The material time will usually be the time the income arises but can in some case be the time a relevant benefit is conferred on the individual, if later.

of common law[6] constitutes taxable income for United Kingdom income tax purposes, it would prima facie fall within the meaning of "income" in an income tax act. An example would be an offshore income gain taxable under Income and Corporation Taxes Act 1988 Part XVII Chapter V. Similarly, if something which is merely a receipt as a matter of common law, which might be taken into account in determining whether an income or capital profit has been realised and, if so, what is its quantum, is regarded for United Kingdom income tax purposes as taxable income, then it will prima facie fall within the meaning of "income" in an income tax act. An example would be gross dividend income, before deducting the income expenses of realising it. [Cf *Lord Chetwode*.]

2.3.2 *Lord Chetwode v Commissioners of Inland Revenue*

In the context of the charges on Transferors, the decision of the House of Lords in *Lord Chetwode v Commissioners of Inland Revenue* (1977) 51 TC 647[7] suggests that "income" means "income for income tax purposes". The decision, however, is highly suspect, for a number of reasons.

2.4 Some Other Key Terms

2.4.1 "Person Abroad"

Income Tax Act 2007 section 718 (Meaning of "person abroad" etc) provides:

> "(1) In this Chapter "person abroad" means a person who is resident or domiciled outside the United Kingdom.
>
> (2) For the purposes of this Chapter, the following persons are treated as resident outside the United Kingdom—
>
> > (a) a UK resident body corporate that is incorporated outside the United Kingdom,
> >
> > (b) the person treated as neither UK resident nor ordinarily UK resident under section 475(3) (trustees of settlements), and
> >
> > (c) persons treated as non-UK resident under section 834(4) (personal representatives)."

It is enough that a person is resident *or* domiciled outside the United Kingdom. Thus a person resident only in the United Kingdom but domiciled in, say, New South Wales, will still be a Person Abroad.

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6 or trust law or accountancy practice

7 and [1977] 1 W.L.R. 248; [1977] 1 All E.R. 638; [1977] STC 64; 121 S.J. 172

The ordinary residence of the person in question is irrelevant.

If a person is dual resident, both inside and outside the United Kingdom, he is still a Person Abroad. This remains the case even if he is treated by a double taxation agreement between the two states as a resident of the United Kingdom.

The concept of "domicile" is strictly used only in relation to individuals. However, for many purposes, a corporation will be treated as domiciled in the jurisdiction in which it is incorporated. In the present context, section 718(2)(a) makes it clear that such a corporation will always be treated as a Person Abroad.

Income Tax Act 2007 section 474(1) provides that "the trustees of a settlement are together treated as if they were a single person (distinct from the persons who are the trustees of the settlement from time to time)". Section 475 then lays down rules determining where this artificial person is treated as being resident. As section 474 does not deem the trustees of a settlement to be a single person, with the residence ascribed to him by section 475, for all the purpose of the income tax acts, section 718(2)(b) is necessary.

2.4.2 "Transfer"

Income Tax Act 2007 section 716(2) provides:

> "(2) In this Chapter "transfer", in relation to rights, includes the creation of the rights."

"Transfer" is not otherwise defined. The importance of this provision is discussed in the context of the meaning of "Transfer of Assets".

2.4.3 "Transfer of Assets"

The phrase "Transfer of Assets" in used in both the definition of "Relevant Transfer" and of "Associated Operation" and is thus indirectly relevant to the meaning of "Relevant Transaction". It is not directly defined.

The partial definition of "Transfer" has been discussed in the preceding section. Income Tax Act 2007 section 716(3) provides:

> "(3) For the meaning of "assets", see section 717."

Income Tax Act 2007 section 717 (Meaning of "assets" etc) in turn provides:

> "In this Chapter-
>
> (a) "assets" includes property or rights of any kind ..."

Thus, "Transfer of Assets" would in my view include the following:

- the assignment of the right to a debt, a patent or any other chose in action[8]

- the grant of a lease of land out of the freehold (or superior lease)[9]

- the giving of a guarantee[10] or the conferring of a right of indemnity.

Suppose I declare myself trustee of property in favour of the trustees of Person Abroad. Is that a Transfer of Assets? I feel sure that the Courts would hold that it was. Although the legal title to the property would not be transferred, I would have created an equitable right in favour of the Person Abroad.

It should be noted that the absence of gratuitous intent is irrelevant in determining whether there has been a Transfer of Assets. Even a transfer for full consideration on arms' length terms can qualify.[11]

It should also be noted that it is not necessary that the Transferor is the person who made the transfer.

2.4.4 "Relevant Transfer"

The Statute

Income Tax Act 2007 section 716 (Meaning of "relevant transfer" and "transfer") provides:

> "(1) A transfer is a relevant transfer for the purposes of this Chapter if-
>
> (a) it is a transfer of assets, and
>
> (b) as a result of-
>
> (i) the transfer,
>
> (ii) one or more associated operations, or

8 an assignment is clearly a "transfer" and a chose in action clearly falls within "property".

9 This is clearly the "creation" of property.

10 the benefit of the guarantee would fall within "rights" and the creation of those rights would amount to a "transfer".

11 The fact that the transfer is on commercial terms *may* be relevant in determining whether the motive defence can be satisfied.

(iii) the transfer and one or more associated operations,

income becomes payable to a person abroad."

The phrase "as a result of" looks deceptively straightforward. Yet any student of private law will know how often the Courts have made apparently heavy weather[12] of the concept of causation. This is hardly surprising, as philosophers from Aristotle onwards have found an analysis of the concept – or rather concepts – far from easy. Given that the Provisions have been remarkably difficult to construe, the reader will be hardly surprised to learn that what the Courts have had to say about causation in this context has been sometimes surprising and not always to the Revenue's liking.

Two points on causation. The first point is that if no (additional) income had arisen to a Person Abroad as a result of a Transfer and / or one or more Associated Operations, then the Transfer cannot be a Relevant Transfer. Thus is can be the case that income arises to a Person Abroad which a person has Power to Enjoy as a result of a Transfer of Assets in relation to which he was a Transferor. Yet if that income would have arisen in any case, he will not be taxable in respect of it by virtue of the Provisions. This is a very important limitation on the scope of the Provisions.

The second point is that by including so much in section 716(1), Parliament has actually reduced its potential scope. If the subsection had simply stated that income must payable to a Person Abroad as a result of a Transfer of Assets, the Courts would have had ample scope to hold that income had become so payable in any case where it would not have become so payable but for the Transfer of Assets. That would have included not only the situations mentioned in section 716(1)(b)(i) and (ii) but others beside. [If income becomes so payable not as a direct consequence of a Transfer of Assets alone but only in conjunction with something else which is not an Associated Operation, then the Transfer of Assets cannot in my view rank as a Relevant Transfer.]

While only individuals can be made liable to tax under the Provisions, it is not necessary for a Relevant Transfer to have been made by an individual who is chargeable to tax under the Provisions. Indeed, it is not necessary for a Relevant Transfer to have been made by an individual at all.

In the case of the Non-Transferor Charge, there is no requirement at all that the person chargeable under the Provisions should have been in any way connected with the transfer.

In the case of the charges on Transferors, i.e. the Power to Enjoy Charge, the Transferor Benefit Charge and the Capital Sum Charge, there must be a person (the Transferor) who is in some way connected with a Relevant Transfer.

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12 or, to use an expression which is as vulgar as it is graphic, "got their knickers in a twist"

2.4.5 “Associated Operation”

Income Tax Act 2007 section 719 (Meaning of "associated operation") provides:

> “(1) In this Chapter "associated operation", in relation to a transfer of assets, means an operation of any kind effected by any person in relation to-
>
> (a) any of the assets transferred,
>
> (b) any assets directly or indirectly representing any of the assets transferred,
>
> (c) the income arising from any assets within paragraph (a) or (b), or
>
> (d) any assets directly or indirectly representing the accumulations of income arising from any assets within paragraph (a) or (b).
>
> (2) It does not matter whether the operation is effected before, after or at the same time as the transfer.”

Thus, in order for there to be an Associated Operation there must first be a Transfer of Assets. See 2.4.3. There need not, however, have been a Relevant Transfer, i.e. it is not necessary that any income becomes payable to a Person Abroad as a result of the Transfer of Assets.

2.4.6 “Income Becomes Payable”

There cannot be a Relevant Transfer, within the meaning of Income Tax Act 2007 section 716(1), unless “incomes becomes payable to a person abroad”. The phrase “income becomes payable” has been a constant feature of the Provisions from their inception in 1936.

I have already discussed the ambiguity in the simple word “income”. For over forty years, following the House of Lords decision in *Latilla v Commissioners of Inland Revenue* it was considered highly arguable that what is now Income Tax Act 2007 section 720 could not apply to deem trading income of a person domiciled or resident outside of the United Kingdom to be that of a "transferor" who was ordinarily resident in the United Kingdom. It is generally supposed that in *IRC v. Brackett* and the related appeal of *Brackett v. Chater*, Hoffmann J killed the argument. But did he?

Several provisions in the Taxes Act would be otiose if it were the case that "income becomes payable" to a Person Abroad whenever such person is regarded as entitled to "income" for United Kingdom income tax purposes or would be regarded as so entitle were he domiciled, resident and ordinarily resident in the United Kingdom.

2.4.7 Who is a Transferor?

The term "Transferor" is not used at all in Income Tax Act 2007. It was used in the pre-Income Tax Act 2007 legislation, but only in the information provisions (e.g. Income and Corporation Tax Act 1988 section 745(3)(a)), where its meaning was obviously thought to be obvious!

The term has been in use for many years. It became particularly important after it was established by the House of Lords in *Vestey v Inland Revenue Commissioners* [1980] A.C. 1148 that the only person who could be made chargeable under Income Tax Act 1952 section 412 was an individual who had sought to avoid liability to income tax by means of such transfers of assets as are mentioned in the preamble, which read: "'For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom ..."[13]

In order to be so taxable, must a person have actually effected the transfer in question? Or is it enough that he has sought to avoid liability to income tax by means of the transfer? In *Vestey v Inland Revenue Commissioners*, the House of Lords decided that beneficiaries of discretionary settlement trusts who had not been in any way concerned in the making of the settlement were not caught.

It is highly arguable that

(a) Lords Wilberforce and Salmon would confine liability to actual transferors.

(b) Lord Edmund Davies would clearly extend it to not persons who procured the transfer

(c) while the language of Viscount Dilhorne and Lord Keith is more ambiguous, it is wide enough to cover persons who procured the transfer (or their spouses), provided they had sought to avoid liability to income tax by means of a Relevant Transfer

13 The spouse or civil partner of such an individual might also be liable.

2.4.8 Who is a "Non-Transferor"?

The term "Non-Transferor" was used in the pre-Income Tax Act 2007 legislation only in the sidenote to Income and Corporation Tax Act 1988 section 740.[14] The charge to tax under section 740 was imposed only on "an individual ordinarily resident in the United Kingdom who is not liable to tax under section 739": section 740(1)(b). One was left to surmise that a "Non-Transferor" was a person who was "not liable to tax under section 739".

There was a potential ambiguity in the word "liable". What of a person who would have been chargeable to income tax under section 739 in respect of income which had become to a Person Abroad but was not in fact so chargeable on account of his non-UK domicile. While I took the view that "liable" meant "potentially liable", so that such a person would never have been caught by section 740, the contrary was not unarguable. The point is likely[15] to be academic in view of Revenue Interpretation 201 of April 1999 which states:[16] "A non-UK domiciled individual who transfers assets but is outside the charge to tax under s 739 by virtue of the provisions of s 743(3), is not assessed under s 740." Under Income Tax Act 2007 section 732(1)(d), this is now made statutory.

Is the position under Income Tax Act 2007 any different? The Income Tax Act 2007 again uses the term "Non-Transferor" in a side note (to section 732) and in addition three times in the actual text.[17] Yet the term is again not defined and the three references in the text are simply cross-references which result from the new style of legislation which involves expanding the length of the screed without elucidating the meaning.

3 The Liability of Non-Transferors

3.1 Overview

The charge on Non-Transferors is now contained in Income Tax Act 2007 sections 731 – 735. I shall refer to these sections as "the Non-Transferor Provisions". The key provisions are sections 731 – 733 and of those section 733 is the most important and section 732 is the second most important.

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14 And its predecessor, Finance Act 1981 section 45.

15 It would become a live issue were the Revenue to seek to resile from their interpretation. See *Gaines-Cooper v HMCRC* (2006)

16 Sub "Section 740", first paragraph.

17 Sections 714(1)(c), 731(1) and 744(4).

Of course, there are other parts of the Provisions which are also relevant, such as sections 714 – 719 in the Introduction which largely contain definitions and conditions precedent to the application of the Provisions, sections 736 – 742 (the motive defence) and the so-called "General" sections, i.e. 743 to 745, which largely deal with the avoidance of double taxation.

3.2 Section 731: The Charge to Tax

Section 731 (Charge to tax on income treated as arising under section 732) provides:

> "(1) Income tax is charged on income treated as arising to an individual under section 732 (non-transferors receiving a benefit as a result of relevant transactions).
>
> (2) Tax is charged under this section on the amount of income treated as arising for the tax year.
>
> (3) The person liable for any tax charged under this section is the individual to whom the income is treated as arising.
>
> (4) For exemptions from the charge under this section, see sections 736 to 742 (exemptions where no tax avoidance purpose or genuine commercial transaction)."

This section tells us very little. Neither this nor succeeding sections always make entirely clear *how much* income is treated as arising to an individual for a tax year and to what extent it is in fact chargeable to income tax.

3.3 Section 732: Conditions of Liability

Section 732 (Non-transferors receiving a benefit as a result of relevant transactions) provides:

> "(1) This section applies if-
>
> (a) a relevant transfer occurs,
>
> (b) an individual who is ordinarily UK resident receives a benefit,
>
> (c) the benefit is provided out of assets which are available for the purpose as a result of-
>
> (i) the transfer, or

(ii) one or more associated operations,

(d) the individual is not liable to income tax under section 720 or 727 by reference to the transfer and would not be so liable if the effect of sections 726 and 730 were ignored, and

(e) the individual is not liable to income tax on the amount or value of the benefit (apart from section 731).

(2) Income is treated as arising to the individual for income tax purposes for any tax year for which section 733 provides that income arises.

(3) Also see that section for the amount of income treated as arising for any such tax year."

This section lays down the basic conditions. First, there must have been a Relevant Transfer, i.e. a Transfer of Assets as a result of which income became payable to a Person Abroad.

Second, a non-Transferor can be taxable only if, when he is ordinarily United Kingdom resident[18], he receives a benefit provided out of assets which are available for the purpose as a result of a Relevant Transaction.[19] I shall refer to such a benefit as a "Relevant Benefit", as, oddly enough, the Provisions do not define it and it is a useful phrase.

It should be noted that there are methods of benefiting in consequence of a Relevant Transfer which do not involve receiving Relevant Benefits and thus any charge to tax on a Non-Transferor under the Provisions. For obvious reasons, they are not spelled out in this article, as, if they were, it would have to be swiftly re-written.

The Revenue accept, in RI 2001 of April 1999 (which is still couched in terms of Income and Corporation Taxes Act 1988):

> "*For the purposes of s 740(1)(b) a benefit is treated as not including either the giving of a life interest to a beneficiary or the receipt by a beneficiary of the proceeds of selling a life interest. But it is otherwise treated as including all benefits taken into account in determining whether an individual has power to enjoy income for the purposes of s 739. It therefore includes for*

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18 The position where the residence status of the individual changes from time to time is discussed below.

19 It is odd that the draughtsman does not use this phrase in subsection (1)(c). Possibly, he thought "Why use three words when you can use eight?"

> *example receipt of a loan at less than a commercial rate of interest, and the use of trust property at less than an open market rental*."

This Interpretation has been drafted by civil servants and not by lawyers. It must not be interpreted as if it were a statute. If the trustees of Trust A were to accumulate Relevant Income in relation to a beneficiary, N, and were then to use it to buy a life interest in Trust B which they assigned to N, who then sold it, I feel that the Revenue might well wish to resile from the application of their interpretation.

Where the Transferor is domiciled in the United Kingdom, section 732(1)(d) is superfluous. Where, however, he is not, it is extremely important. See the discussion of the application of this part of the Provisions to the taxation of Foreign Domiciliaries.

Section 732(1)(a), (b), (c) and (d) by and large[20] reflect the former Income and Corporation Tax Act 1988 section 740 (Liability of non-transferors) subsection (1), which, immediately before its repeal, provided:

> "(1) This section has effect where-
>
> (a) by virtue or in consequence of a transfer of assets, either alone or in conjunction with associated operations, income becomes payable to a person resident or domiciled outside the United Kingdom; and
>
> (b) an individual ordinarily resident in the United Kingdom who is not liable to tax under section 739 by reference to the transfer receives a benefit provided out of assets which are available for the purpose by virtue or in consequence of the transfer or of any associated operations."

Section 732(1)(e) reflects part of the old section 740(2), as to which, see below.

3.4 Section 733: The Quantum of the Charge

3.4.1 The Statute

Section 732 does not determine the *quantum* (if any) of any charge. That is left to the central section 733 (Income charged under section 731), subsection (1) of which provides:

> "(1) To find the amount (if any) of the income treated as arising under section 732(2) for any tax year in respect of benefits provided as

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20 As will be seen, (d) is less ambiguous than the corresponding part of the old section 740.

mentioned in section 732(1)(c) take the following steps.

Step 1- Identify the amount or value of such benefits received by the individual in the tax year and in any earlier tax years in which section 732 has applied.

The sum of those amounts and values is "the total benefits".

Step 2- Deduct from the total benefits the total amount of income treated as arising to the individual under section 732(2) for earlier tax years as a result of the relevant transfer or associated operations.

The result is "the total untaxed benefits".

Step 3- Identify the amount of any income which-

(a) arises in the tax year to a person abroad, and

(b) as a result of the relevant transfer or associated operations can be used directly or indirectly for providing a benefit for the individual.

Step 4- Add together the relevant income of the tax year and the relevant income of earlier tax years in relation to the individual (identified as mentioned in Step 3).

The sum of those amounts is "total relevant income".

Step 5- Deduct from total relevant income-

(a) the amount deducted at Step 2, and

(b) any other amount which may not be taken into account because of section 743(1) and (2) (no duplication of charges).

The result is "the available relevant income".

Step 6- Compare the total untaxed benefits and the available relevant income.

The amount of the income treated as arising under section 732(2) for any tax year is the total untaxed benefits unless the available relevant income is lower.

> If the available relevant income is lower, it is the amount of income treated as so arising."

3.4.2 Relevant Income

Somewhat oddly, section 733 does not use the concept of "relevant income", which was, more helpfully, used in Income and Corporation Tax Act 1988 section 740, in which it was defined, by subsection (3), to mean

> "*in relation to an individual, ... any income which arises in that year to a person resident or domiciled outside the United Kingdom and which by virtue or in consequence of the transfer or associated operations referred to in subsection (1) above can directly or indirectly be used for providing a benefit for the individual or for enabling a benefit to be provided for him*"

I propose to use the phrase "Relevant Income" to mean, in relation to an individual, N, income which arises in the tax year to a person abroad and, as a result of a Relevant Transaction could at some relevant time[21] be used directly or indirectly for providing a benefit for that individual.

Section 733 does, however, use the expression "the relevant income of the tax year". That is the amount determined at Step 3.

3.4.3 The Superficial View

The superficial position is that for each year of assessment (Year X) one calculates, from the time of the first Relevant Transfer in relation to an individual, N:

(A) the total amount of income which has become payable to a person abroad as a result of a Relevant Transaction and which has not already been taxed (on N or anyone else) under the Provisions

(B) the total value of Relevant Benefits which N has received and on which he has not been taxed under the Provisions.

N is prima facie taxable in Year X on an amount equal to the lesser of A and B.

I now discuss the problems which begin to appear once one gives the section more than a superficial reading.

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21 as to which, see further below

3.4.4 Necessity for Receipt of a Relevant Benefit in the Year of Charge?

Is it necessary that N has received a Relevant Benefit in a year of assessment in order for him to be taxable in that year of assessment? Or does one simply carry forward the amount of Relevant Benefits which an individual has received in prior years of assessment and which have not given rise to a charge to tax under the Non-Transferor Provisions ? Under Income and Corporation Taxes Act 1988 section 740, it was clear that there was no requirement for receipt of a benefit in the current year. Income Tax Act 2007 section 733(1) Step 1, however, does provide ammunition for the argument that there now is. For it appears to presuppose that the individual has received Relevant Benefits in the current year. See also section 732(1)(b). The argument to the contrary is that one should read Step 1 as if the italicised words had been added:

> "*Identify the amount or value of such benefits (if any) received by the individual in the tax year and in any earlier tax years in which section 732 has applied*."

It would be most surprising that, if N receives no Relevant Benefit at all during the current year of assessment, then any Relevant Benefit he has received in a previous year of assessment will fall to be disregarded, at least as regards the current year, yet once he receives *some* Relevant Benefit during the current year, then any Relevant Benefit received at any time can then be taken into account.

3.4.5 Section 733(1) Opening Words

The section 733(1) provides:

> "(1) To find the amount (if any) of the income treated as arising under section 732(2) for any tax year in respect of benefits provided as mentioned in section 732(1)(c) take the following steps."

These opening words are very odd. Section 732(2) applies as a result of benefits provided as mentioned in section 732(1)(a), (b) (c), (d) and (e), not just (c). (a) can perhaps be ignored, as (c) in effect refers back to it, but (b), (d) and (e) cannot. I suspect this is just sloppy drafting and the draughtsman intended to refer to the whole of section 732(1). No corresponding ambiguity arose in the Income and Corporation Taxes Act 1988 section 740!

3.4.6 Step 1

Step 1 provides:

> "Identify the amount or value of such benefits received by the individual in the tax year and in any earlier tax years in which section 732 has applied."

"The sum of those amounts and values is "the total benefits".

Step 1 refers simply to the total of "such" benefits the individual has received. Grammatically, it is difficult to construe "such" as referring to anything other than Relevant Benefits and in particular as excluding a Relevant Benefit received by him in a year of assessment during no part of which he was ordinarily resident in the United Kingdom (so that the condition in section 732(1)(b) was not satisfied. As already stated at 3.4.5, the opening words of section 733(1) refer only to paragraph (c) of section 732(1) and not to paragraph (b).

This point is particularly important in the context of a person whose residence status and / or domicile changes from time to time.

It is not entirely clear what is meant by section 732 applying "in" a tax year. What is clear is that section 732 can have the result that income is deemed to arise to any individual in some year other than that in which the conditions mentioned in section 732(1) are all satisfied: see section 732(2), read in conjunction with section 733. In my view, for what it is worth, section 732 applies "in" a year if and only if the conditions set out in section 732(1)(b) to (e) are all satisfied in that year and condition set out in section 732(1)(a) was satisfied during or before the tax year. I agree that the construction is not an easy one, given that the Relevant Transfer will usually have occurred in some year yet earlier than the earlier year in question. My construction involves some violence to the language in that it involves reading the opening words of section 732(1) as

"(1) This section applies *in any tax year* if

(a) a relevant transfer *has occurred (whether during or before such tax year)*

..." etc

In my view, it is immaterial whether section 732 applying in a tax year resulted in any charge to tax on the individual under the Non-Transferor Provisions for the year.

3.4.7 Step 2

Step 2 provides:

"Deduct from the total benefits the total amount of income treated as arising to the individual under section 732(2) for earlier tax years as a result of the relevant transfer or associated operations.

The result is "the total untaxed benefits".

Obviously, in the first tax year in which section 732 applies this Step is irrelevant.

3.4.8 Step 3

Step 3 provides:

> "Identify the amount of any income which-
>
> (a) arises in the tax year to a person abroad, and
>
> (b) as a result of the relevant transfer or associated operations can be used directly or indirectly for providing a benefit for the individual."

The predecessor of Step 3 (b), Income and Corporation Taxes Act 1988 section 740(3) spoke of:

> "any income which arises in that year to a person resident or domiciled outside the United Kingdom and which by virtue or in consequence of the transfer or associated operations referred to in subsection (1) above can directly or indirectly be used for providing a benefit for the individual *or for enabling a benefit to be provided for him*."[22]

While the italicised words have no counterpart in Income Tax Act 2007 section 733, I cannot see that their omission makes much difference.

Is income Relevant Income in relation to a person of whom it could not be said in the year of assessment in which it arose that it could *in that year*, "be used directly or indirectly for providing a benefit for" him within the meaning of section 733(1) Step 3 (b)? Suppose, for example, that there is provision for automatic accumulation of income under an offshore discretionary trust and that the accumulations cannot be used, directly or indirectly, to benefit any person for several years. The provision is silent on this point, as was its predecessor, Income and Corporation Taxes Act 1988 section 740(3).[23]

One of the most ambiguous parts of the Provisions is Step 3. At what point in time does one ask the question posed in (b) as to whether income "can" be used to benefit

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22 Italics added by R.V.

23 Section 740(3), so far as material, provided: "(3) ... the relevant income of a year of assessment, in relation to an individual, is any income which arises in that year to a person resident or domiciled outside the United Kingdom and which by virtue or in consequence of the transfer or associated operations referred to in subsection (1) above can directly or indirectly be used for providing a benefit for the individual or for enabling a benefit to be provided for him."

an individual. Suppose, for example, that the trustees of an offshore discretionary trust receive income which they have discretion to divide between a class of beneficiaries, of which one is N. During the course of the year of assessment, they distribute all the income as income to another beneficiary, M. Depending on the time at which one asks the question, the income can or cannot be used to benefit N.

The question is a very important one, in that, given while M's income may well be liable to United Kingdom income tax, as it will not be taxable under the Provisions, there is no question of relief being given by sections 743 and 744.

The Courts could minimise the possibility of double taxation by holding that the relevant time was the later of the end of the year of assessment and the time the Relevant Benefit was received by N.[24]

3.4.9 Step 4

Step 4 provides:

> "Add together the relevant income of the tax year and the relevant income of earlier tax years in relation to the individual (identified as mentioned in Step 3).
>
> The sum of those amounts is "total relevant income"."

This Step contains another important ambiguity. Does one calculate the amount of Relevant Income in relation to an individual at the end of each year of assessment and that amount is thereafter fixed for evermore in relation to that year? Or does one recompute it each subsequent year of assessment, identifying it as mentioned in Step 3 but asking the vital question as at the end of the current year of assessment?

The word "can" in Income and Corporation Taxes Act 1988 section 740(3) was similarly ambiguous. "Can" at what point in time? If anything, the wording of the old section 740 pointed less to the Relevant Income of a year of assessment being fixed once and for all, by the end of that year, and naturally allowed for the possibility of answering from the current perspective the question income which had arisen in past years was still Relevant Income in relation to the current year. Moreover, Revenue Interpretation 201 of April 1999 suggested that that was the case.

There is something for and against the Revenue in either construction. If one recomputes Relevant Income of earlier years on a year by year basis, then the possibility of double taxation is reduced, albeit not entirely avoided. Consider again

24 In the latter case, we are already involved in Step 4, which has a similar difficulty of interpretation.

the above example, where the trustees of an offshore discretionary trust receive income which they have discretion to divide between a class of beneficiaries, of which one is N. During the course of the year of assessment in which it arises they make no distribution. Therefore at the end of that year, all of the income is Relevant Income in relation to N. However, during the course of the next year of assessment, they distribute all the income (whether as income or as capital) to another beneficiary, M. If they later confer a Relevant Benefit on N, it could make a world of difference whether the income which has in fact been distributed to M is still Relevant Income in relation to him.

I shall now consider the converse situation, where recomputing the relevant income of a year of assessment year by year could favour the Revenue. I have asked above, in the discussion of Step 3, whether income is Relevant Income in relation to a person of whom it could not be said in the year of assessment in which it arose that it could *in that year*, "be used directly or indirectly for providing a benefit for" him.

Suppose that the answer to that question is in the affirmative. Another question then arises. Can income be Relevant Income in relation to a person of whom it could not be said in the year of assessment in which it arose that it could "be used", whether or not in that year, "directly or indirectly for providing a benefit for the individual"? Clearly, for the Non-Transferor Provisions to have any relevance, a Relevant Benefit must have in fact been conferred on the individual in question. Therefore, it must have been the case that income could have been so used at the latest at the time when the Relevant Benefit was actually conferred. There will be many situations in which the test is not satisfied in the year in which the income arises. The most common would be where the individual was not then alive. Then there could be the situation where it cannot be said of the individual in the year in which the income arises that he could benefit under a trust,[25] yet he might purchase or inherit from a beneficiary his beneficial interest. Then again, it might be the case that income of a non-UK resident company could not in the year in which it arose be used to benefit an individual, but he subsequently buys its shares capital while it still owns undistributed profits.

Income and Corporation Taxes Act 1988 section 740(2) provided:

> "(2) Subject to the provisions of this section, the amount or value of any such benefit as is mentioned in subsection (1) above, if not otherwise chargeable to income tax in the hands of the recipient, shall-
>
> > (a) to the extent to which it falls within the amount of relevant income of years of assessment up to and including the year

25 not because he is an Excluded Person, but because he is not a beneficiary and there is no possibility of his becoming a beneficiary under the terms of the trust, e.g. by marrying or being adopted.

of assessment in which the benefit is received, be treated for all the purposes of the Income Tax Acts as the income of the individual for that year and be charged to income tax on that individual for that year;

(b) ....

...

(3) ... the relevant income of a year of assessment, in relation to an individual, is any income which arises in that year to a person resident or domiciled outside the United Kingdom and which by virtue or in consequence of the transfer or associated operations referred to in subsection (1) above can directly or indirectly be used for providing a benefit for the individual or for enabling a benefit to be provided for him."

While there was a similar ambiguity in section 740(2), it was if anything more favourable to recomputing the Relevant Income of a year of assessment on an annual basis.

3.4.10 Step 5

This step in itself is not controversial.

3.4.11 Step 6

This step in itself is not controversial.

3.5 Changes in Ordinary Residence Status

3.5.1 Relevant Benefits Received in Year before Recipient Ordinarily Resident in the United Kingdom

Is a Relevant Benefit to be taking account in charging tax under the Provisions if it was received in a year during no part of which N was ordinarily resident in the United Kingdom? In my view, it clearly is not. Now section 732(1)(b) requires an individual to receive a Relevant Benefit in a year of assessment in which he is ordinarily United Kingdom resident.[26] That is the trigger. Yet, once that has happened, i.e. he has received some Relevant Benefit, could it be argued that section 733(1) Step 1 refers simply to the total of "such" benefits he has received and that, grammatically, it is difficult to construe "such" as referring to anything other than

26 As to whether it needs to be the current year or whether it can be some earlier year, see the preceding section. While the discussion there is not in the specific context of an individual whose residence status alters, the considerations are much the same.

Relevant Benefits and in particular as referring to a Relevant Benefit received by him while he was ordinarily resident in the United Kingdom? It possibly could.

However, the Revenue has to overcome another hurdle. They have to show that the Relevant Benefit was received "in any earlier tax years in which section 732 has applied". If the individual was not ordinarily resident in the United Kingdom in a year in which the Relevant Benefit was received, then one might well ask: "How could that be a year in which section 732 applied, given that section 732 applies only if "an individual who is ordinarily UK resident" receives a Relevant Benefit: see section 732(1)(b)?"

The answer is that it not entirely clear what is meant by section 732 applying "in" a year. What is clear is that section 732 can have the result that income is deemed to arise to any individual in some year other than that in which the conditions mentioned in section 732(1) are all satisfied: see section 732(2), reading conjunction with section 733. In my view, for what it is worth, section 732 applies "in" a year provided if and only if the conditions set out in section 732(1) are all satisfied during the year, irrespective of whether that resulted in any charge to tax on the individual under the Non-Transferor Provisions for the year. I agree that the construction is not an easy one, given that the Relevant Transfer will usually have occurred in some year yet earlier than the earlier year in question. Therefore, it is only the conditions set out in section 732(1)(b) and (c) which are relevant.

If my view is correct, then one does ignore completely a Relevant Benefit received by an individual in any year of assessment during no part of which he was ordinarily resident in the United Kingdom.

It is interesting that, while this was undoubtedly the effect of Income and Corporation Taxes Act 1988 section 740,[27] the "re-write" of Income Tax Act 2007 has produced so much ambiguity! Interesting, but, to me, not in the least surprising.

3.5.2 Relevant Benefits Received in Year After Recipient has Ceased to be Ordinarily Resident in the United Kingdom

Suppose Relevant Income arises in relation to an individual in years throughout which he is ordinarily resident in the United Kingdom but during which he receives no Relevant Benefit but that he then ceases to be ordinarily resident in the United Kingdom and only then receives a Relevant Benefit. In that case, he is not caught by the Provisions. For section 732(1)(b) has never been satisfied.

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27 Section 740(1) provided categorically:
"(1) This section has effect where-
(a) ... and
(b) an individual ordinarily resident in the United Kingdom ... receives a benefit ..."

Supposing, however, he has received a small Relevant Benefit during the years he was ordinarily resident and has been taxed on it under the Non-Transferor Provisions. If he then ceases to be ordinarily resident in the United Kingdom and only then receives a substantial Relevant Benefit, is he caught by the Non-Transferor Provisions in respect of this second Relevant Benefit? The answer is again negative, as section 732(1)(b) is not satisfied in relation

3.5.3 No Relevant Income While United Kingdom Ordinarily Resident

Now suppose an individual receives a Relevant Benefit at time when he is ordinarily resident in the United Kingdom. However, no Relevant Income in relation to him has arisen before the end of the year of assessment in which the benefit is received. He then ceases to be ordinarily resident in the United Kingdom and, in some later year, in which he receives no Relevant Benefit, Relevant Income arises in relation to him. Can he be taxed in that later year?

If it is the case that no Non-Transferor can be taxed under the Provisions in a year in which he does not receive a Relevant Benefit, then, of course he cannot. See above. Let me assume, for present purposes that that is not the case.

Under the plain words of the Income and Corporation Taxes Act 1988 section 740 a person could in theory be taxable in a later year in respect of a benefit received by him in an earlier year, even if he was not ordinarily resident in the United Kingdom in that latter year. The argument to the contrary would have been that he was impliedly not taxable because there was lacking the necessary fiscal connection with the United Kingdom. See *Colquhoun v Brooks* (1889) 14 App Cas 493 and *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] STC 25. Such an argument was not made any easier by the amendments to section 740 made by the Income Tax (Trading and other Income) Act 2005. However, it was by no means untenable.

In my view, Income Tax Act 2007 has made the argument to the contrary somewhat easier to mount.

3.5.4 Split Years of Assessment

So far I have considered the position in terms of years of assessment during the whole of which or during none of which the individual was ordinarily resident in the United Kingdom. Yet a person's residence status can change during the course of a year of assessment. There is nothing in the Provisions to suggest that a person who is ordinarily resident for part of a year is treated as ordinarily resident throughout the year?[28]

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28 See the decision of the House of Lords in *Gubay v Kington* (Inspector of Taxes) [1984] STC 99. See also the decision of the Court of Appeal in that case, reported at [1983] STC 443.

Now what is clear is that, in order for there to be a charge to tax under the Provisions on a non-Transferor an individual who is ordinarily resident in the United Kingdom must receive a Relevant Benefit; section 732(1)(b). If therefore, the only time an individual receives a Relevant Benefit is in a year of assessment during another part of which he has been ordinarily resident in the United Kingdom but at a time when he is not, then the Provisions fail to bite *in limine*.

3.6 Foreign Domiciliaries

3.61 Terminology

I refer to any individual who is domiciled within any part of the United Kingdom, that is, England and Wales, Scotland or the Province of Northern Ireland as a "United Kingdom Domiciliary" and to any individual who is not so domiciled as a "Foreign Domiciliary".

3.6.2 Transferor a Foreign Domiciliary

Before the enactment of Income Tax Act 2007, it was a moot point whether a Transferor who was in principle taxable under that part of the Provisions relating in terms to Transferors but who escaped an actual charge to tax in respect of non-UK source income could nevertheless be taxable as a Non-Transferor if, notwithstanding that the income which had become payable to the Person Abroad was not remitted to the United Kingdom, he had "received" a Relevant Benefit in the United Kingdom. Although the Revenue did not in practice claim that he was, the only legislative authority was the very flimsy one of the side-note to Income and Corporation Taxes Act 1988 section 740. Now, however, section 732(1)(d) makes it crystal clear that he cannot be taxed as a Non-Transferor.

3.6.3 Non-Transferor a Foreign Domiciliary

In the case of the charges on Transferors, a Foreign Domiciliary will escape a charge to tax in respect of offshore income which is taxed (if belonging to an individual) on the remittance basis and is not in fact remitted to the United Kingdom.

In the case of the charge on Non-Transferors, however, the conditions which a Foreign Domiciliary must satisfy in order to escape the charge are more stringent. It is necessary not only that the income has not been remitted to the United Kingdom but that the Relevant Benefit is not "received" in the United Kingdom.

Income Tax Act 2007 section 735 (Non-domiciled individuals) provides:

> "(1) This section applies if—

(a) apart from this section, an individual receiving a benefit would be chargeable to income tax under section 731 in respect of any income treated as arising to the individual ("the chargeable amount"), and

(b) conditions A to C are met.

(2) Condition A is that the individual is domiciled outside the United Kingdom.

(3) Condition B is that the benefit is not received in the United Kingdom.

(4) Condition C is that, if the individual had received any of the relevant income by reference to which the chargeable amount is determined under section 733, because of being domiciled outside the United Kingdom the individual would not have been chargeable to income tax in respect of it.

(5) If this section applies, the individual is not chargeable to income tax under section 731 on so much of the chargeable amount as is determined by reference to the relevant income to which condition C applies.

(6) Sections 833 and 834 of ITTOIA 2005 (income treated as remitted to the United Kingdom) apply for the purposes of this section as they would apply for the purposes of section 832 of that Act (remittance basis) if the benefit were relevant foreign income."

There is disagreement as to what is meant by "the benefit is not received in the United Kingdom".[29] Is it enough that the benefit is not conferred in the United Kingdom or is it also necessary that it is not thereafter remitted to the United Kingdom? If, as some argue, it is the former, the reference to Income Tax (Trading and other Income) Act 2005 sections 833 and 834 is difficult to fathom. Those sections apply to deem foreign income to be remitted to the United Kingdom where, broadly speaking, loans are involved.

If the test is a remittance test, the reference to Income Tax (Trading and other Income) Act 2005 sections 833 and 834 is strong evidence that it intended to be the narrower test which operates for the purposes of most foreign income other than employment income and which is contained in section 832, rather than the, arguably wider, test which operates for the purposes of foreign earned income, offshore

29 The wording of Income and Corporation Taxes Act 1988 section 740(5) was virtually identical in this respect. See below.

income gains and capital gains and is contained in Income Tax (Earnings and Pension) Act 2003 section 33 and Taxation of Chargeable Gains Act 1992 section 12.

The draughtsman of Income Tax Act 2007 can at least be congratulated on having impartially preserved the ambiguity of Income and Corporation Taxes Act 1988 section 740. When we come to a consideration of Condition C, however, he has surpassed himself by increasing the ambiguity.

Condition C is badly phrased in one obvious way. What the draughtsman clearly means is:

> "(4) Condition C is that, if the individual had *been beneficially entitled to* any of the relevant income by reference to which the chargeable amount is determined under section 733, because of being domiciled outside the United Kingdom the individual would not have been chargeable to income tax in respect of it."

Would that were the only difficulty with condition C. Consider the case of an individual who was a Foreign Domiciliary when Relevant Income arose but has become a United Kingdom Domiciliary by the time he receives a Relevant Benefit? Let us assume, for the sake of simplicity, that no Relevant Income in relation to him has arisen in any year of assessment during any part of which he was a United Kingdom Domiciliary. If he is a United Kingdom Domiciliary during the entire year in which the benefit is received, can he avoid a charge under the Provisions? Prima facie, he cannot. "Chargeable" in the context of the phrase "chargeable to income tax" means "actually chargeable" and not "potentially chargeable in a future year of assessment". Thus one is looking to the year of charge in order to determine whether Condition A is satisfied.

Before the Income Tax Act 2007 the position was rather different. The Income and Corporation Taxes Act 1988 section 740 provided:

> "(5) An individual who is domiciled outside the United Kingdom shall not, in respect of any benefit not received in the United Kingdom, be chargeable to tax under this section by reference to relevant income which is such that if he had received[30] it he would not, by reason of his being so domiciled, have been chargeable to income tax in respect of it ..."

It was much easier to argue that this should be read as:

> "(5) An individual ~~who is domiciled outside the United Kingdom~~ shall

30 Again, "received" clearly meant "beneficially entitled to".

> not, in respect of any benefit not received in the United Kingdom, be chargeable to tax under this section by reference to relevant income which is such that if he had received it he would not, by reason of his being ~~so~~ domiciled *outside the United Kingdom* , have been chargeable to income tax in respect of it ..."

What one can say, in the context of Income Tax Act 2007 section 735, is that the wording of Condition B is "the benefit is not received in the United Kingdom". Now a Relevant Benefit which has been received in prior years of assessment can still be taken into account in the current year. It is therefore clear that the use of the word "is" is not the present tense but is atemporal. That provides some ammunition that "is" in Condition A is not the present tense. Further, a consideration of the position of an individual whose domicile status changes within a year of assessment supplies some further ammunition. See below.

In the case where the individual received the benefit while he was a Foreign Domiciliary but the Relevant Income arose at a time when he was a United Kingdom Domiciliary, it is not – and never was – possible to argue that he could rely on the defence that his benefit had not been received in the United Kingdom.

What of the case of the individual who begins by being a United Kingdom Domiciliary but then becomes a Foreign Domiciliary? Suppose, for example, Relevant Income in relation to him arises in Year 1, but none thereafter. Let us suppose that he is a United Kingdom Domiciliary throughout the whole of Year 1 and a Foreign Domiciliary throughout the whole of Year 3, during which year there is conferred on him for the first time and outside of the United Kingdom a Relevant Benefit which he does not "receive" in the United Kingdom. In such a case, can he satisfy condition C? That depends on whether the relevant time is the time the income in fact arose or the current year of assessment. If it is the former, he cannot satisfy the condition and is therefore taxable.

Let us consider the other permutation involving an individual who begins by being a United Kingdom Domiciliary but then becomes a Foreign Domiciliary. Let us again suppose that he is a United Kingdom Domiciliary throughout the whole of Year 1 and a Foreign Domiciliary throughout the whole of Year 3. Let us this time, however, suppose that it is during Year 1 that there is conferred on him for the first time and outside of the United Kingdom a Relevant Benefit which he does not "receive" in the United Kingdom. Let us further suppose that no Relevant Income in relation to him arises until Year 3 and it is then non-UK source income. In my view, there is no reason why the individual should not be able to rely on the section 735 defence. The Revenue can prima facie charge him to tax only because a Relevant Benefit was received in a *prior* year. As mentioned above, the use of "is" in Condition B is atemporal. Hence, there is absolutely no reason why he should not be able to rely on the defence.

In the examples I have used so far, I have not considered years of assessment during which the domicile of a person changes. Yet what of an individual who becomes a United Kingdom Domiciliary or a Foreign Domiciliary during a year of assessment? Now the charge under the Provisions is an annual charge. Even if before the end of a year of assessment a person has received a Relevant Benefit and Relevant Income has arisen in relation to him the amount of which is more than the value of the Relevant Benefit, one cannot, on account of section 743 (No duplication of charges), say with certainty that he will be charged to tax in respect of that Relevant Benefit. Yet domicile is something which can change at any time, not just at the end of a year of assessment.

At what stage, therefore, must the individual show that he “is” domiciled in the United Kingdom, in order to satisfy Condition A? To my mind, there is only one sensible answer: at the time the Relevant Income which he seeks to exclude from the computation of his liability arises. After all, any other time is irrelevant, as he could satisfy Condition C.

Now a consideration of this situation throws light on the question discussed above of the individual who is a Foreign Domiciliary when foreign source income arises to the Person Abroad but who receives a Relevant Benefit when he is a United Kingdom Domiciliary. If, within a year of assessment, the relevant time to enquire whether the individual is a Foreign Domiciliary for the purposes Condition A is the time the income in question arises, why should not the same be true where income on which the Revenue need to rely in order to levy a charge for the current year of assessment in fact arose in a previous year?

4 No Duplication of Charge

4.1 The Statute

Income Tax Act 2007 section 743 provides:

> “(1) No amount of income may be taken into account more than once in charging income tax under this Chapter.
>
> (2) If there is a choice about the persons in relation to whom any amount of income may be taken into account in charging income tax under this Chapter, it is to be taken into account-
>
> (a) in relation to such one or more of them as appears to an officer of Revenue and Customs to be just and reasonable, and
>
> (b) if more than one, in such respective proportions as appears

to the officer to be just and reasonable.

...”

What does a taxpayer put on his self-assessment return? Unless and until a choice has been made by an officer of the Revenue, it is far from clear that he needs to return anything.