The Offshore & International Taxation Review

COOPER v BILLINGHAM; FISHER v EDWARDS: A WELCOME VICTORY FOR THE TAXPAYERS

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The decisions of the Special Commissioners, Mr T H K Everett and Dr A N Brice, in *Cooper v Billingham* and *Fisher v Edwards*, which decisions have not at the time of writing been fully reported, are a welcome victory for the taxpayer on the difficult subject of the application of sections 87 and 97 of the Taxation of Chargeable Gains Act 1992 ("TCGA") to the granting of interest free loans.

The two appeals, which had substantially similar facts, were heard together following a direction made by the Presiding Special Commissioner pursuant to Regulation 7 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994.

The facts were, briefly, as follows. Both Mr Cooper and Mr Fisher established settlements prior to 19th March 1991 when they were both domiciled and resident in the United Kingdom. Mr Cooper and Mr Fisher were domiciled and resident in the United Kingdom at all material times. At no material time were the trustees of either settlement resident or ordinarily resident in the United Kingdom for the purposes of capital gains tax. No additions to either trust fund has been made on or after 19th March 1991.

Under the terms of Mr Cooper's settlement, the trust property is held on trust to pay the income to Mr Cooper during his lifetime or for a shorter period if Mr Cooper's life interest is determined under powers given to the trustees. The trustees also have power

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to apply capital to or for the benefit of the members of a specified class which includes Mr Cooper and his wife.

Under Mr Fisher's settlement, the trust fund is held upon trust to pay the income to Mr Fisher during his lifetime and the trustees have a discretion to apply capital to or for Mr Fisher's benefit during his lifetime.

Mr Cooper's trustees advanced to Mr Cooper, and Mr Fisher's trustees advanced to Mr Fisher, a number of unsecured loans on terms that no interest should be payable and that the loans should be repayable on demand. Mr Cooper's settlement had trust gains for the purposes of section 87(2) TCGA that exceeded the capital payments made by the trustees for the relevant years of assessment (if the contention of the Inland Revenue as to the value of the benefit of the interest free loans advanced by Mr Cooper's trustees was correct). Mr Fisher's settlement had trust gains for the purposes of section 87(2) TCGA for one of the relevant years of assessment.

At the relevant time, sections 87 and 97 TCGA provided as follows:

> "87. Attribution of gains to beneficiaries
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> (1) This section applies to a settlement for any year of assessment during which the trustees are at no time resident or ordinarily resident in the United Kingdom if the settlor or one of the settlors is at any time during that year, or was when he made his settlement, domiciled and either resident or ordinarily resident in the United Kingdom.
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> (2) There shall be computed in respect of every year of assessment for which this section applies the amount on which the trustees would have been chargeable to tax under section 2(2) if they had been resident or ordinarily resident in the United Kingdom in the year; and that amount, together with the corresponding amount in respect of any earlier such year so far as not already treated under subsection (4) below or section 89(2) as chargeable gains accruing to beneficiaries under the settlement, is in this section and sections 89 and 90 referred to as the trust gains for the year.
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> (3) Where as regards the same settlement and for the same year of assessment—
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> > (a) chargeable gains, whether of one amount or of 2 or more amounts, are treated as accruing by virtue of section 86(4), and

(b) an amount falls to be computed under subsection (2) above,

the amount so computed shall be treated as reduced by the amount, or aggregate of the amounts, mentioned in paragraph (a) above.

(4) Subject to the following provisions of this section, the trust gains for a year of assessment shall be treated as chargeable gains accruing in that year to beneficiaries of the settlement who receive capital payments from the trustees in that year or have received such payments in any earlier year."

"97. Supplementary provisions

(1) In sections 87 to 96 and this section "capital payment"—

(a) means any payment which is not chargeable to income tax on the recipient or, in the case of a recipient who is neither resident nor ordinarily resident in the United Kingdom, any payment received otherwise than as income, but

(b) does not include a payment under a transaction entered into at arm's length if it is received on or after 19th March 1991.

(2) In subsection (1) above references to a payment include references to the transfer of an asset and the conferring of any other benefit, and to any occasion on which settled property becomes property to which section 60 applies.

(3) The fact that the whole or part of a benefit is by virtue of section 740(2)(b) of the Taxes Act treated as the recipient's income for a year of assessment after that in which it is received—

(a) shall not prevent the benefit or that part of it being treated for the purposes of sections 87 to 96 as a capital payment in relation to any year of assessment earlier than that in which it is treated as his income; but

(b) shall preclude its being treated for those purposes as a capital payment in relation to that or any later year of assessment.

(4) For the purposes of sections 87 to 96 the amount of a capital payment made by way of loan, and of any other capital payment which is not an outright payment of money, shall be taken to be equal to the value of the

benefit conferred by it."

Mr David Ewart, who appeared for the taxpayers, made three main submissions, contending as follows:

(1) A capital payment is received from the trustees when a loan is made and there is no further capital payment while the loan remains outstanding.

(2) If there is a capital payment received from the trustees while a loan is outstanding, the value of the benefit of the loan to the life tenant of the trust is nil.

(3) Alternatively, the value of the benefit to the life tenant is the tax which would have been borne on the interest paid to the trustees if the loan had been at a commercial rate of interest.

Mr Christopher Tidmarsh, who appeared for the Inland Revenue, accepted that it may well be that the benefit conferred by the initial advance to the taxpayer of the various loans was nil because the loans were repayable on demand, but he submitted that the making of the loans and the refraining from calling them in also comprised capital payments and the amount of the capital payment in a year of assessment was the value of the benefit conferred in that year by the capital payment. Mr Tidmarsh also contended that once a loan has been made the decision of the trustees not to call it in conferred a further benefit for each day or for each minute that the loan continued to be outstanding. He also contended that the value had to be assessed objectively and that the individual circumstances of the recipients of the loans were irrelevant.

The Special Commissioners in their decision noted that there was no dispute between the parties that the initial making of the loans constituted capital payments. However, they noted that section 97(4) TCGA defines the "amount"of a capital payment made by way of loan as "equal to the value of the benefit conferred by it" and the Inland Revenue had agreed that the value of the benefit conferred by the initial loan was "very little" or nil, because they were repayable on demand.

However, Mr Tidmarsh had argued that the trustees, by allowing the taxpayers to have the free use of the money lent, also made capital payments to the taxpayers on a continuing basis.

The Special Commissioners rejected these submissions and noted that they would produce certain difficulties. Firstly, they noted that the scheme of the legislation is to the effect that capital payments are single identifiable payments made on single identifiable occasions.

Secondly, loans were specifically provided for in section 97(4) TCGA and the result of the Inland Revenue's concession that the value of the benefit conferred by the loan at the date of the loan was "very little" or nil, meant that they had to submit either that as each second passed the trustees were making further capital payments *by way of loan* or rely on the second limb of section 97(4) to the effect that the conferring of the benefit of the interest free use of the money is some "other capital payment which is not an outright payment of money". The Special Commissioners held that as section 97(4) deals with loans quite specifically it does not appear to have been the intention of Parliament to tax loans further either under the first or second limb of section 97(4).

Thirdly, the Special Commissioners noted that there was no mechanism comparable with, for example, section 160 ICTA 1988, for the valuation of capital payments made on a continuing basis as was contended for by Mr Tidmarsh. The Inland Revenue had suggested a commercial rate of interest and for the purposes of the appeals had alighted upon the official rate of interest. However, the Special Commissioners stated that it seemed to them that there was no reason why that should be the benefit rather than any other value. They concluded that the lack of such a provision to enable valuation also inevitably pointed towards the conclusion that it is only a single identifiable capital payment which is to be taxed.

Fourthly, the Special Commissioners noted that it was common ground in the appeals that where a loan is made for a fixed period it confers a benefit once and for all at the date of the loan and there is no subsequent conferring of a benefit. That remained the position even if the loan was at a reduced rate or interest free. They therefore stated that they found it hard to understand why an interest free loan repayable on demand should be treated differently from a loan for a fixed period.

Finally, the Special Commissioners rejected the submission that the personal circumstances of the recipients of the loans are irrelevant and should be ignored, bearing in mind the circumstances affecting these particular taxpayers who were life tenants of a settlement entitled to receive from their trustees any interest paid on the loan. They held that as section 97(4) ensured that not the full amount of the loan payment was taxed but only the benefit conferred on the individual recipient, they found it hard to see what benefit was received by Mr Cooper and Mr Fisher by reason of their enjoying interest free loans when, as life tenants of the settlements, they were entitled to receive from their trustees any interest they paid on the loans.

In the circumstances, the Special Commissioners did not feel that it was necessary to deal with Mr Ewart's third alternative submission.

The editors are aware that this decision is differently viewed by different members of the Tax Bar, and therefore look forward to its treatment on appeal.