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## The Offshore & International Taxation Review

# OTHER KEY HAVEN ARTICLES RELEVANT TO OFFSHORE AND INTERNATIONAL TAX

### THE PERSONAL TAX PLANNING REVIEW

VOLUME 7 ISSUE 2

#### **Capital Losses and Trusts** **Robert Venables QC**

The author considers the utilisation of capital losses of trustees, settlors and beneficiaries, in the light of the changes made by the 1998 and 1999 Finance Acts. He concludes that the rules have become much more complex and that more care than ever is required to ensure that losses are not “stranded” but are utilised in the most tax-efficient manner. He notes that while one scheme for the sale of trust losses has apparently been outlawed, one will often be able to achieve the same result by other means.

#### **Gifts with Reservation Wrinkles** **Ralph Ray**

The author deals with several aspects of the United Kingdom inheritance tax gift with reservation of benefit provisions, including:

- capital gains tax advantages and disadvantages

- gifts to trusts using the inter-spouse exemption

- avoidance of a double charge

- variations of estates

*Ingram v IRC* and Finance Act 1999 s.104

Reversionary leases

### **Double Taxation Under Section 13**

**Sarah Dunn**

The article deals with the situation where a United Kingdom domiciled and ordinarily resident individual, A, owns an offshore company, B which in turn owns another offshore company, C, which owns a valuable asset which has increased in value and which is ripe for sale. The author points out various possibilities of double liability to United Kingdom taxation arising out of The Taxation of Chargeable Gains Act 1992 and suggests two solutions. The article also contains an analysis of whether a sale of an asset at an undervalue by an offshore company to its shareholder constitutes a "capital distribution" for United Kingdom capital gains tax purposes.

### **Some Thoughts on Stamp Duty in the New Regime**

**Reginald S Nock LL.M., FTII**

United Kingdom Stamp Duties have been increased by up to 250% by the Labour Government and a new compliance regime has been introduced. The acknowledged expert on United Kingdom stamp duty considers the new compliance regime. The discussion includes:

Territorial Jurisdiction

Tax-efficient transfers of assets into an offshore company

Execution of documents offshore

Defects of CREST

Avoiding stamp duty reserve tax

Use of contracts for sale which are not "conveyances"

"Long division"

Avoidance of document

Land transactions

### **Transitional Gains and Losses of Golden Trusts**

**Robert Venables QC**

In this article, the author disagrees with certain views of the FICO of the United Kingdom Revenue in the context of the transitional provisions relating to “golden trusts”, namely that:

- (a) net losses of a non-UK resident trust realised by the trustees in the transitional period March 19th 1998 - April 5th 1999 cannot be set off against gains actually realised by the trustees in the year of assessment 1999/2000 and
- (b) losses actually realised by the trustees in the year of assessment 1999/2000 cannot be set off against gains actually realised by the trustees in the transitional period

### **The Application of Section 86 TCGA 1992 to the Migration of Trusts**

**Elizabeth Wilson**

The author discusses a strategy whereby trustees of an offshore trust potentially caught by the United Kingdom Offshore Settlor Provisions (Taxation of Chargeable Gains Act 1992 section 86) can realise capital gains without the gains being visited on the settlor. The strategy involves the migration of the trust to a jurisdiction which has a suitably worded double taxation convention with the United Kingdom, a disposal of the relevant assets by the trustees and their subsequently becoming resident only in the United Kingdom.

The author also considers a variant strategy where the trust is initially United Kingdom resident and the assets in question consist of quoted securities.

## THE PERSONAL TAX PLANNING REVIEW

### VOLUME 7 ISSUE 1

#### **Trustee Investment in Offshore Funds**

**Robert Venables QC**

The author suggests that, despite the Offshore Funds Provisions, investment in offshore funds can be tax-efficient for non-United Kingdom resident trusts where it is expected that beneficiaries domiciled and resident or ordinarily resident in the United Kingdom will receive capital payments from the trustees. He further suggests that the holding of interests in material funds in an interest in possession trust, no matter where resident, may possibly prevent the Provisions applying.

#### **Barring A Recovery, and Other Taxing Notions**

**Professor Paul Matthews**

The author considers the vexed question of whether a United Kingdom resident settlor of an offshore trust who is compelled by the Offshore Settlor Provisions to pay capital gains tax in respect of trust gains, will be able to enforce his statutory right of indemnity in foreign jurisdictions. He disagrees with the view expressed in Volume 6 Issue 3 of the Review by Leon Sartin that:

- (i) it is not possible for UK legislation to alter the rights of beneficiaries under a non-UK law trust;
- (ii) enforcing the statutory right or reimbursement amounts to an interference with those rights; and hence
- (iii) in the case of a non-UK law trust this UK legislation will not be enforced.

#### **Can I Make A Clean Breast of it to the Gentleman I Consult?**

**Hartley Foster**

In view of the decision of the President of the Tax Tribunal, Stephen Oliver QC, *An Applicant v Inland Revenue Commissioners* [1999] STC (SCD) 128, which rightly made the national press, there can be no question currently more vital to tax practitioners than the extent to which legal professional privilege can be a

defence to a notice to produce documents served under section 20 of the Taxes Management Act. The question has aroused keen debate amongst counsel and a wide spectrum of opinions. This article could not be more topical. The author produces a series of arguments why privilege has not been overridden by the Act.

**Migrant Individuals and Concessionary Relief From UK Capital Gains Tax:  
A Case For Judicial Review?**  
**Robert Venables QC**

Finance Act 1998 introduced new rules, contained in Taxation of Chargeable Gains Act section 10A, concerning individuals who are "temporarily" non-UK resident. Extra-Statutory Concession D2, dealing with split years of residence for capital gains tax purposes has been drastically amended in consequence. It is suggested in this article suggests that it has been revised much more than was necessary simply to take account of section 10A, and with retrospective effect. The author suggests that, having regard to the Treasury Explanatory Notes to the 1998 Finance Bill, there would be a good prospect of an action for judicial review succeeding against the Revenue on the grounds that they had acted unreasonably and /or unfairly and/or defeated the legitimate expectations of taxpayers who were already neither United Kingdom resident nor ordinarily resident on March 17th 1998.

**Insurance Policies Held by Trusts, Companies or Foreign Institutions**  
**Robert Venables QC**

In this article, the author considers, *inter alia*, the taxation of insurance policies held by companies or "foreign institutions" post the substantial amendment, by Finance Act 1998, of the income tax and corporation charging provisions. The author considers the effect of the changes and concludes that there are significant remaining opportunities for tax planning through offshore policies.

**Discretionary Trusts and the New Dividend Regime**  
**Richard Vallat**

It was stated in the Forward to the Inland Revenue Consultative Document on the Taxation of Trusts:

"The primary aim is to bring the taxation of trusts more closely into line with the taxation of individuals. This reflects a key principle:

The author shows how the Revenue's principle "that property held in trust should in the case of trusts of any size be taxed neither more lightly nor more heavily than property held by individuals" has been sacrificed in constructing the rules for the taxation of dividends and other Schedule F distributions from United Kingdom companies which came into force on April 5<sup>th</sup> 1999. The Revenue Interpretation of February 1999, The taxation of Schedule F income received by trustees after 6th April 1999, published at [1999] STI issue 7, explains only the mechanics of the new rules and offers no justification for them.

***Memec Plc v Inland Revenue Commissioners and the Source of Discretionary Income Payments From Trusts***  
**Robert Venables QC**

The author challenges the view that Walker J in *Memec* confirmed the Revenue view that "the trust constitutes a new source of income where trustees distribute trust income in the exercise of their discretion. The author has also updated part of his privately circulated Comments on the Revenue Consultative Document on the Taxation of Trusts under the title **Fundamentals of the Income Taxation of Trustees and Beneficiaries**.

**THE CORPORATE TAXATION REVIEW**

**VOLUME 2 ISSUE 3**

**Yearly Interest of Money Chargeable to Tax Under Case III of Schedule D - Deduction at Source**  
**Catherine Ghosh**

This article considers two situations of interest payments by a UK company and whether UK withholding tax needs to be applied. The first is where UK Company A pays to a non-group UK Company B. The second is the borrowing, in the local country, by an overseas trading partnership with a UK corporate partner. In this second case, what is crucial is the "source" of the income for United Kingdom taxation purposes, which may be a different jurisdiction from that of the situs of the debt.

## **THE CORPORATE TAXATION REVIEW**

### **VOLUME 2 ISSUE 2**

#### **UK Transfer Pricing Documentation: A Practical Perspective**

**John Hobster & Robert Miall**

The authors consider the practical implications of the requirements of the new legislation in relation to documentation, especially in the context of avoiding penalties.

#### **Some Problems With Hybrid Entities**

**Richard Ward**

This article deals with some of the uses in international tax planning of a hybrid entity, i.e. one which is classified for tax purposes differently in two jurisdictions, by being treated as fiscally transparent in one jurisdiction but a taxable entity in another. It deals in particular with a joint venture context where one or more of the parties want the joint venture vehicle to be treated as a partnership for tax purposes and the other(s) are seeking corporate treatment.

#### **What Can We Say to Uncle Sam? (Tax Credits for Non Residents on UK Dividend Income)**

**Howard Nowlan**

Recent changes to the corporate tax regime are also considered by the author, who analyses the tax position of non-UK residents located in jurisdictions with which the UK has concluded a double tax treaty and who received dividends from the UK.

**THE EC TAX JOURNAL****VOLUME 3 ISSUE 3****EC Law and Double Taxation Agreements****Paul Farmer**

This article deals with the interrelationship between Community Law and double taxation conventions, both those made between Member States and those made with third parties. The discussion includes the competence of Member States to enter into fresh DTC's between themselves and that of the Community to enter into conventions with non-Member States. A comparison is made between non-discrimination rules in DTC's and the EC equal treatment principle and fundamental freedoms.

**The Card Protection Plan Case****Marc Dassesse**

This article deals with the decisions of the European Court of Justice on a reference from the House of Lords in *Card Protection Plan Ltd v Commissioners of Customs & Excise* [1999] STC 270 and *Sparekassernes Datacenter (SDC) v Skatteministeriet* [1997] STC 932. The author suggests that these decisions are not merely of interest to the insurance and banking industries but are relevant to e.g. tourism services, sale of consumption goods and long-term car rentals.

**Reflections on Tax Discrimination and How It Can Be Justified****Timothy Lyons**

This article deals with the decision of the European Court of Justice on 29<sup>th</sup> April 1999 in *Royal Bank of Scotland plc v Elliniko Dimosio* (Greek State) Case C-311/97, which arose out of Greece taxing the profits of the Greek branch of a UK bank at a higher rate than those of Greek banks. The author considers in particular the approach of the Court to the question of whether or not discrimination existed and the attitude of the Court to the justification of the discrimination which was found to exist.



**Enforcement of Foreign Revenue Law**

**Jonathan S Schwarz**

This article concerns a recent decision of the Court of Appeal of England *Aps and Others v Frandsen* [1999] STC 616, which involved an attempt by the Danish tax authorities to collect unpaid taxes in England. The Court reaffirmed the traditional rule that English courts will not assist the collection of a foreign Revenue debt, even by indirect means. It rejected attempts by Denmark to rely on EC law and the Brussels Convention. The author considers the three questions: (a) What are revenue matters? (b) Can a claim be struck out even if the Convention applies? and (c) Is the rule against enforcing foreign revenue judgments contrary to the EC Treaty?

**Will the Proposed "Taxation of Savings Income Directive" be the Victim of its Contradiction?**

**Marc Dasse**

This article deals with the European Commission "Proposal for a Council Directive to ensure a minimum of effective taxation of savings income in the form of interest payments within the Community" and shows its many inadequacies. The author concludes that the proposal is a makeshift job because a coherent approach to European tax issues is only possible if Member States no longer attempt to superimpose a thin layer of Community tax law on widely diverging national tax systems.