TRANSFERS OF ASSETS ABROAD AFTER *McGUCKIAN*[1]

Robert Venables QC[2]

1 The Importance of the Decision

The House of Lords decision in *Commissioners of Inland Revenue v McGuckian*, 12th June 1997, as yet unreported, allowing the appeal of the Revenue from the decision of the Court of Appeal of Northern Ireland, is on one view the most significant Revenue victory yet in the development of the *Ramsay* doctrine. The House of Lords may well be about to shake off the limitations it imposed on the doctrine in *Furniss v Dawson* and which it so decisively re-asserted in *Craven v White*. I discuss this aspect of the case in a forthcoming article 'The *Ramsay* Doctrine after *McGuckian*' in *The Personal Tax Planning Review*.

The decision is also relevant to the interpretation of the statutory provisions aimed at tax avoidance by individuals by the transfer of assets abroad, now contained in Taxes Act 1988 Part XVIII Chapter III, sections 739-746. Sections 739-744 are set out in the Appendix to this article.

Although the central dispute concerned the year 1979/80, when Taxes Act 1970 was in force, I shall refer in this article to the provisions of Taxes Act 1988, which has consolidated the 1970 Act. Although there have been substantial changes in the Chapter since 1979, nothing in the decision is affected by the changes.

---

1 The starting point for this article was another article written by me immediately after the speeches were handed down and published in 18th June *Taxation* 1997. Transfers of assets abroad were considered in outline only in that article. My thinking as to the implications of the decision has naturally developed further in the interval between the two articles so that this article represents my more considered view.

2 Robert Venables QC, 24 Old Buildings, Lincoln's Inn, London WC2A 3UJ.
Tel: (0171) 242 2744 Fax: (0171) 831 8095.

Consulting Editor of this *Review*.

2 The Facts

Mr McGuckian and his wife were domiciled and resident in the United Kingdom at all material times. In the early 1970s they owned equally the share capital of Ballinamore Textiles Ltd, which was incorporated and resident in the Republic of Ireland. By November 1979, the shares were held, as a result of gratuitous dispositions by them, by Shurltrust Ltd, a Guernsey resident trustee on trusts under which they were both beneficiaries and the income was payable to Mrs McGuckian. Ballinamore had income available for distribution by way of dividend amounting to £400,055. On 23rd November 1979, the trustee assigned to Mallardchoice Ltd for £396,054 the right to any dividend payable by Ballinamore in 1979. On 27th November Ballinamore declared a dividend of £400,055 on the shares held by the trustee. Ballinamore gave a cheque for that amount to a Dublin solicitor for Mallardchoice. The solicitor paid the cheque into his client account out of which he then paid 99% of the sum, i.e. £396,054, to Shurltrust. The solicitor than paid the balance of 1%, less his fee, to Mallardchoice. The only way in which Mallardchoice could fund the purchase price was out of the dividend.

3 The Dispute

The whole point of the strategy was to ensure that what the trustees received was capital and therefore outside the scope of what is now Taxes Act 1988 section 739. Prima facie, this flowed from the decision of the Court of Appeal in *IRC v Paget* [1938] 21 TC 677. Unfortunately, the guiding mind behind the scheme appears to have overlooked that the strategy had been blocked by legislation as early as 1938, now consolidated as Taxes Act 1988 section 730! The Revenue assessed the taxpayer under what is now Taxes Act 1988 Part XVIII Chapter III (Tax Avoidance - transfers of assets abroad) but not under what is now section 730. The taxpayer's technical argument, which was conceded to have no ethical merit, amounted to this: because he should have been assessed under section 730, he could not be assessed under section 739 and it was now too late to assess him under section 730.

4 The "Prejudice"

The House of Lords took a dim view of the conduct of the solicitor. As Lord Browne-Wilkinson said: "There was prolonged correspondence between [the Revenue] and [the solicitor] who took every step to obfuscate what had happened and obstruct the Revenue in discovering the true facts ... At the date of the assessment [two weeks before the expiry of the normal six-year period] the Revenue had not discovered the existence of the settlement." He referred elsewhere to "the dubious stalling tactics" adopted by the English solicitor acting for the taxpayer.

The case was decided *in furore*, or at least in moral indignation at the repugnant thought that a taxpayer should escape a charge to tax simply because he was not assessed under the right section and the only reason he was not so assessed was that he had successfully concealed the true facts from the Revenue until the expiration of a limitation period. In an ideal world, this consideration would not have influenced the result. Either the taxpayer was entitled to act as he did and to escape an assessment to tax by the Fabian tactics of himself or of his advisers or he was not. If he was, then the law is deficient and needs amending. If he was not, then the appropriate steps should have been taken. Depending on the circumstances - and I stress that I am speaking purely theoretically and am not in a position to comment on the facts of this case - this could have involved his being assessed out of time, and/or being liable to penalties or even, in a serious case, of being indicted for conspiracy to cheat the Revenue. This is not an ideal world and their Lordships succumbed to the temptation to spike the taxpayer's guns at this stage rather than let him live to fight another battle, even one he was perhaps destined to lose. The price paid was arguably the making of some bad law, not least on Taxes Act 1988 section 739.

5 What was the Position in Private Law?

One unsatisfactory feature of the speeches is that they contain no analysis of the underlying private law, particularly trust law. The action of the trustees was, as a matter of trust law, extremely peculiar. The question which immediately sprang to my mind was: "What power did the trustees have to sell a dividend to which Mrs McGuckian would be absolutely entitled once it were declared?" Unless the terms of the settlement were extremely unusual or there were some other relevant factor which does not appear from their Lordships' speeches, the sale was *ultra vires* the trustees, the purchaser must assuredly have had constructive, if not actual notice, that it was and thus Mrs McGuckian would have remained the sole beneficial owner of the dividend. This would in principle have been a complete defence to an assessment under Schedule D Case VI under section 739, although it would not have prevented a simple assessment under Schedule D Case V. *Ramsay* would have been irrelevant as the steps adopted to effect the tax planning would have been ineffective as a matter of private law and there would have been nothing to counteract.

Even if the trustees did prima facie have power to enter into this type of transaction, it would still have been arguable that effecting it was a breach of their duty to keep a balance between those interested in income and those interested in capital, and thus the proceeds of sale of the right to the dividend belonged to Mrs McGuckian, the improper conversion being disregarded. This is not a matter of direct authority but is in my view the conclusion which follows from the application of certain basic principles of Equity, subject to there being nothing unusual in the trust documentation. Again, there would be no scope for *Ramsay* to apply.

The argument appears to have proceeded on the basis that the trustees did have power to effect the transaction. It *probably* also proceeded on the basis that the proceeds of sale did not in reality belong to Mrs McGuckian but were trust capital. The significance of these points will appear from the discussion below.

6 A Significant Development in the *Ramsay* Doctrine?

6.1 The Actual Decision

The transaction which was "collapsed" was the simple sale of the right to a dividend for a capital sum before it was declared. It was held that the sale of the dividend was to be largely ignored. The Revenue's argument, which was accepted, was that, applying the *Ramsay* principle, the sale of the right to the dividend fell to be disregarded for tax purposes on the grounds that it was an artificial transaction inserted for the sole purpose of gaining a tax advantage and that the reality of the transaction was the payment of a dividend by Ballinamore to the trustee, which received it as income. One might have thought that, given that the taxpayer could choose either to keep his right and himself collect the dividend, as income, or sell the right in advance and convert it into capital, then the case was governed by the residual principle of the *Duke of Westminster* case under which every man is entitled if he can to order his affairs so that tax under a tax statute is less than it otherwise would be. What is not entirely clear is whether their Lordships felt themselves able to ignore the sale only because it was clear from the outset that the purchaser would use 99% of the dividend to pay the price for the right to it, so that what the vendor received was the very same money paid out as a dividend by the company.

6.2 The Restrained View

The different approaches of their Lordships is striking. Lord Browne-Wilkinson stated that "nothing in this case turns on the exact scope of the *Ramsay* principle" and regarded the decision as falling "squarely within the classic requirements for the application of the principle as stated by Lord Brightman in *Furniss v Dawson*". On his approach, there is at least no abandonment of the limitations introduced by

Furniss v Dawson. Instead, he is simply refining, and, in my view, extending, the law on what constitutes a transaction and what can be regarded as inserted steps, without denying that inserted steps are needed. He is simply being disingenuous when he states that nothing in this case turned on the exact scope of the *Ramsay* principle. The difference of opinion between himself and the majority in the Court of Appeal turned precisely on the exact scope of the *Ramsay* principle.

Lord Clyde applied *Ramsay* in just the same way.

6.3 The Wilder View

Lord Steyn, by contrast, ominously rejected as a "false foundation" counsel for the taxpayer's plea that the scope of the underlying principle in *Ramsay* should not be extended beyond the existing decisions. He regarded tax law as having been "by and large left behind as some island of literal interpretation" while over the last thirty years there had generally been a shift from a literalist to a purposive construction of statutes. In asserting in *Ramsay* the power to examine the substance of a composite transaction "the House of Lords was simply rejecting formalism in fiscal matter and choosing a more realistic legal analysis". He thus concluded, somewhat alarmingly, that "it is wrong to regard the decisions of the House of Lords since *Ramsay* as necessarily marking the limit of the law on tax avoidance schemes". The actual *ratio* of his decision, however, is indistinguishable from Lord Browne-Wilkinson's: the assignment was not "the whole substance of the transaction", as the majority of the Court of Appeal had held, but merely "a means to an end", a step taken purely for tax avoidance purposes.

Lord Cooke of Thorndon associated himself with all that Lord Steyn said about statutory interpretation, i.e. the *Ramsay* principle. The *ratio* of his decision, too, was identical to that of Lord Browne-Wilkinson and of Lord Steyn. Even more ominously, while accepting that the present case fell within the limitations of the doctrine expressed by Lord Brightman in *Furniss v Dawson*, he added "but it may well be as well to add that, if the ultimate question is always the true bearing of a particular taxing provision on a particular set of facts, the limitations cannot be universal" - by which he means, in plain language, that the limitations are not limitations at all! He adds: "I suspect that advisers of those bent on tax avoidance .... do not always pay sufficient heed to the theme in the speeches in *Furniss* ... to the effect that the journey's end may not yet have been found." No doubt that it because they naively thought that the House of Lords in *Craven v White* had definitively stated that the journey's end had been found.

Of course, the notion that *Ramsay* is simply a rule of statutory interpretation fools no one. Nor is it seriously intended to. By treating the *Ramsay* doctrine as a general rule of statutory interpretation, rather than as a judge-made rule applicable to tax avoidance, the judges are on the one hand defending their actions as constitutional and on the other giving themselves almost carte blanche to re-write the tax code, under the guise of interpretation, whenever they consider that unacceptable tax avoidance is involved.

6.4 The Casting Vote

Lord Lloyd of Berwick agreed that he would allow the appeals "for the reasons which [the other four Lord Lords] give". It would appear that he is not agreeing with the wider dicta of Lords Steyn and Cooke, as it was not their reason for allowing the appeals, and Lord Browne-Wilkinson and Lord Clyde confined themselves to a narrower *ratio*. Hence, for the moment, one cannot say that the wider approach has commanded a majority in the House of Lords.

6.5 The Future?

What is so alarming is the apparent unpredictability of the House of Lords reaction to tax planning. The low water-mark of the doctrine was reached in *Fitzwilliam* in 1993. In that case, in implementation of a preordained tax-avoidance scheme, a mother gifted a large sum of money to her daughter and the daughter used it to pay a grossly inflated price in purchasing a virtually worthless interest in possession from the mother. All their Lordships, save Lord Templeman, refused to re-characterise the transactions as a simple gift of the interest in possession from the mother to the daughter, ignoring the money which went round in its predestined circle. One wondered what was left of *Furniss v Dawson*. I went on record as saying that the decision was too good to be true. It was. I understand from Leading Counsel for the Revenue that the *Fitzwilliam* decision played very little part in the argument in *McGuckian*. In fairness to Leading Counsel for the taxpayer, I doubt it would have made much difference if it had.

Lords Steyn and Cooke may well turn out to be *enfants terribles* who will terrorise tax planners (and their clients' counsel!) for many a year. Now that the ground rules are once again shifting, anything is possible. If *Lady Ingram*, the judgment of the Court of Appeal in which has been awaited since 7th May, goes to the Lords, that could well be the next opportunity for the Revenue to seek to extend the judicial doctrine, as their *Ramsay* argument in that case does not depend on inserted steps or self-cancelling transactions.[3]

7 Taxes Act 1988 Section 739

7.1 Can Section 739 Apply to Income which is, or is Deemed to be, the Income of a Person who is not Domiciled or Resident outside of the United Kingdom?

7.1.1 The Problem

Is it part of the *ratio* of the decision that a person assessed to tax on income under section 739 cannot plead in his defence that the income is already his (or deemed to be his) under some other section? If that is so, then it is in my respectful view wrong, at least where the income is his in reality or under some general provision, as opposed to another specific anti-avoidance provision, where the Revenue might arguably have a choice as to which provision to invoke.[4]

7.1.2 The Author's Argument

I would have put the following argument had I represented the taxpayer:

> Section 739 bites only on "income of a person resident or domiciled outside the United Kingdom"; hence if the income beneficially belonged to and was income of the taxpayer's wife, she did not fall within that description and the section failed to bite *in limine*.[5]
>
> *Ramsay* apart, there was no income;[6] hence section 739 could not operate.

---

3 Other implications for the *Ramsay* doctrine are discussed in my forthcoming article in *The Personal Tax Planning Review*.

4 See 7.2.

5 It is true that the trustees would have been entitled to any dividend at law, but it was established by the House of Lords in 1920 in *Williams v Singer* 7 TC 387 that where a beneficiary entitled to an interest in possession is beneficially entitled to the dividend, it is his income for tax purposes and the trustees are taxable (if at all) only in a representative capacity.

6 Pace Lords Cooke and Steyn.

The only way in which section 739 could be brought into play would have been if the income was deemed to arise to the trustees yet not to belong beneficially to Mrs McGuckian.

Yet the *Ramsay* doctrine could not operate so as to produce that result. As was established by the House of Lords in *Fitzwilliam*[7] it must be intellectually possible realistically to treat the steps involved as constituting a single and indivisible whole in which one or more of them was simply an element without independent effect. The consequence is that while you can "re-characterise" the transaction(s) for tax purposes, you must be able to do so consistently with reality.

In this case, their Lordships identified the "real transaction" as "the payment of a dividend to the shareholder [the trustee] which received such dividend as income".[8] Yet if the payment was income of the trustee, then it belonged to Mrs McGuckian beneficially, so that section 739 could not apply.[9]

7.1.3 The Argument for the Taxpayer

The argument which appears to have been presented to their Lordships was rather different. The main burden of the submissions of Leading Counsel for the taxpayer was that section 730 prevented section 739 from applying. It provides:

"730. Transfers of income arising from securities

(1) Where in any chargeable period the owner of any securities ("the owner") sells or transfers the right to receive any interest payable (whether before or after the sale or transfer) in respect of the securities without selling or transferring the securities, then, for all the purposes of the Tax Acts, that interest, whether it would or would not be chargeable to tax apart from the provisions of this section:

---

7 [1993] STC 502.

8 Per Lord Browne-Wilkinson.

9 The argument might, of course, have been turned on its head. It might have been said that the fact that the proceeds of sale of the right to the dividend did not in fact belong to Mrs McGuckian prevented the transaction from being re-characterised as it was. The transaction was not a circular one at all as it involved a change of beneficial ownership. This is a point I would have pressed with much force. It would have been very interesting to see how, if at all, their Lordships would have been able to counter it.

(a) shall be deemed to be the income of the owner or, in a case where the owner is not the beneficial owner of the securities and some other person ("a beneficiary") is beneficially entitled to the income arising from the securities, the income of the beneficiary, and

(b) shall be deemed to be the income of the owner or beneficiary for that chargeable period, and

(c) shall not be deemed to be the income of any other person.

(2) For the purposes of subsection (1) above, in the case of a sale or other realisation the proceeds of which are chargeable to tax [by virtue of section 18(3B)] the interest so deemed to be the income of the owner or beneficiary shall be deemed to be equal in amount to the amount of those proceeds.

(3) Nothing in subsection (1) above shall affect any provision of this Act authorising or requiring the deduction of income tax -

(a) from any interest which, under that subsection, is deemed to be the income of the owner or beneficiary, or

(b) from the proceeds of any subsequent sale or other realisation of the right to receive that interest;

but the proceeds of any such subsequent sale or other realisation shall not, for any of the purposes of the Tax Acts, be deemed to be the income of the seller or the person on whose behalf the right is otherwise realised.

(4) Where -

(a) the securities are of such a character that the interest payable in respect thereof may be paid without deduction of income tax, and

(b) the owner or beneficiary does not show that the proceeds of any sale or other realisation of the right to receive the interest which is deemed to be his income by virtue of this section have been charged to tax [by virtue of section 18(3B)],

then the owner or beneficiary shall be chargeable to tax under Case VI of Schedule D in respect of that interest, but shall be entitled to credit for any tax which that interest is shown to have borne.

(5) For the purposes of subsection (4) above, in any case where, if the interest had been chargeable under Case IV or Case V of Schedule D, the computation of tax would have been made by reference to the amount received in the United Kingdom, the tax under Case VI shall be computed on the full amount of the sums which have been or will be received in the United Kingdom in the year of assessment or any subsequent year in which the owner remains the owner of the securities.

(6) In relation to corporation tax, subsections (4) and (5) above shall not apply but, subject to the provisions of the Tax Acts about distributions, the owner or beneficiary shall, in respect of any interest which is deemed to be his income by virtue of this section, be chargeable to corporation tax under Case VI of Schedule D unless he shows that the proceeds of any sale or other realisation of the right to receive that interest have been charged to tax [by virtue of section 18(3B)].

(7) In this section -

"interest" includes dividends, annuities and shares of annuities, and

"securities" includes stocks and shares.

(8) The Board may by notice require any person to furnish them within such time as they may direct (not being less than 28 days), in respect of all securities of which he was the owner at any time during the period specified in the notice, with such particulars as they consider necessary for the purposes of this section and for the purpose of discovering whether -

(a) tax has been borne in respect of the interest on all those securities; or

(b) the proceeds of any sale or other realisation of the right to receive the interest on the securities have been charged to tax [by virtue of section 18(3B)]."

The argument was that the effect of section 730 is that the dividend was "for all the purposes of the Tax Acts" deemed to be the income of Mrs McGuckian and not that of the trustees or any other person. My reaction to this argument was that this cannot be the way in which section 730 operates, yet none of their Lordships took this simple way out. In my view, income from securities held on trusts under which a beneficiary is entitled for an interest in possession can be deemed to be that of the beneficiary only if the beneficiary is entitled to the proceeds of sale of the income the right to receive which is sold. Hence, if the beneficiary is not entitled to the proceeds of sale, because they are capital for trust purposes, he is not caught by section 730. This is partly a matter of plain English: "the income arising from the securities" must mean the income the right to which is sold and not just income in general. Ex hypothesi, given that it is sold, the beneficiary can never be entitled to it *in specie*. But he can be entitled to it in the sense of being entitled to the proceeds of sale.[10] This result also follows from a purposive construction. Otherwise, trustees of a trust with "real" beneficiaries could appoint an interest in possession to a stooge beneficiary, not liable to tax, sell the right to the income for a capital sum, none of which the stooge would enjoy, and thus escape section 730. Perhaps understandably, the Revenue do not seem to have argued that 730 would not apply in such circumstances. It was not in their interests to argue for a narrow interpretation of section 730 simply to win one case.

7.1.4 The View of the Majority

Lord Browne-Wilkinson simply stated that because *Ramsay* applied, the sale of the right to the dividend fell to be ignored; hence section 730 did not come into play. Lords Steyn and Cooke of Thorndon adopted a similar approach. Lord Lloyd of Berwick agreed with all their Lordships.

So far, there is no problem. The four Law Lords had established a new proposition, that so far from *Ramsay* not applying where there is an adequate anti-avoidance provision in point, rather *Ramsay* can actually operate in priority so as to prevent the anti-avoidance provision from applying. Yet their actual decision is still unsatisfactory in that none of them explained how on earth the dividend could, consistently with *Ramsay*, be deemed not to belong to Mrs McGuckian.[11]

One possible answer is that their Lordships impliedly agreed with Lord Clyde, whose speech is discussed below, who seemed to regard the fact that the income was, or was deemed to be, Mrs McGuckian's did not prevent an assessment under section 739. In my view, that is inherently unlikely, as they did not expressly agree with his reasoning, nor he with theirs, and as their argument that *Ramsay* prevented section 730 from applying would have been quite unnecessary had they agreed with him.

Another possible answer is that while the trustees were to be regarded as receiving a dividend for income tax purposes, tax law would not close its eyes to the fact (if

---

10 Compare the common situation where land is held on trust for sale. We would say that the beneficiaries are entitled to the land, even though technically they are entitled only to the proceeds of sale.

11 Lord Clyde's reasoning on this point was quite different: see below.

such it was) that the proceeds of sale of the right to the dividend were for trust purposes capital and thus did not belong to Mrs McGuckian. If that is the answer, it marks a considerable extension of *Ramsay,* a vital inroad into *Furniss v Dawson* and *Craven v White* and a complete reversal of *Fitzwilliam.* It means that the Revenue can re-characterise those parts of a compound transaction which suit them while rejecting inconvenient consequences which inexorably flow from that re-characterisation. In *McGuckian* it would mean that the Revenue could *uno flatu* disregard the fact that the right to the dividend had been sold for a capital sum and treat the trustees as having received (99% of) the dividend in order to deem the trustees to have received taxable income, yet could also regard what the trustees received as a capital receipt and not as a dividend so as to reach the conclusion that it did not belong to the beneficiary entitled for an interest in possession.

The other possible answer is that, for whatever reason, the point was not raised in argument, the problem was not present to their Lordships' minds and so the decision was, on this point, *per incuriam.*

7.1.5 Lord Clyde's View

Lord Clyde gave quite a different reason: the phrase which is found in section 739(2) 'whether or not [the income or a person resident or domiciled out of the United Kingdom] would have been chargeable to income tax apart from the provisions of section [739]' ... seems to me to answer any argument that an assessment under section 739 cannot lie where an assessment under another section is open, such, as was contended in the present case, an assessment under section [730]."

Now if the words relied on would otherwise be completely otiose and misconceived, that might be some justification for Lord Clyde adopting the view he did. But such is not the case. The statute does not contain the italicised words: "whether or not [the income etc] would or would not have been chargeable to tax *as income of the individual* apart from the provisions of this section". They cover the case where the income of the non-UK resident is chargeable to UK tax but at a lower rate than the individual would suffer, as where the individual is a higher-rate taxpayer who transfers real property producing Schedule A income to a Manx company because it will pay income tax at the basic rate only. But in any case, they cannot, with respect, override the basic precondition for the application of the section that income must arise to a person resident or domiciled out of the United Kingdom.

In my view, the other four Law Lords did not adopt the same reasoning on this aspect. Lord Clyde's reasoning is thus of persuasive authority only and, with respect, erroneous. One cannot be sure that the Revenue will agree.

7.1.6. Consequences of Lord Clyde's View

7.1.6.1 Cases where Consequences Nil or Minor

What is the scope and practical importance of Lord Clyde's proposition? Where the income belongs beneficially to a person other than the taxpayer or his wife, it will normally be zero. For the taxpayer will not have "power to enjoy" the income. Similarly where the trusts of income are ones under which the settlor and his spouse are excluded from benefit (even if they are potential beneficiaries of capital), as where there is an exhaustive discretionary trust of income for the benefit of the settlor's issue. It is only where the taxpayer does have power to enjoy the income that there could be a problem. Where the income actually belongs to the taxpayer as it arises, by virtue of an interest in possession, the consequences of the decision will normally be very limited. The Revenue will at the very least have the option to assess him under section 739 or under some other provision. (Lord Clyde expressed no opinion as to whether they are *bound* to assess him under section 739.) While assessment under section 739 is under Schedule D Case VI, it will be only in exceptional cases that this will be of any practical importance. Where the income actually belongs to the taxpayer's spouse, it could be taxed as his rather than hers under section 739 whereas, in these days of independent taxation, the Revenue might not have this option, section 739 apart. Again, in the normal case, so long as there is only one higher rate, that may not be of much consequence.

7.1.6.2 Problem Cases

The serious implications of the decision on this point will not, I fear, have been present to Lord Clyde's mind. Where the income does not actually belong to the taxpayer (or his spouse) but is deemed to be his under some other provision, then the income should normally, as a matter of pure reason, escape tax under section 739 as it is deemed to be income of a transferor who is not resident or domiciled outside the United Kingdom and must, by necessary implication, be deemed not to be the income of the person whose income it is in reality.[12] Yet that is not what Lord Clyde has decided. Where the taxpayer neither is nor becomes entitled to the income, it could be crucial to know under which section he is to be assessed.

For example, if a transferor creates a discretionary offshore settlement of which he is a beneficiary, income arising under the settlement will *prima facie* be deemed to be his by virtue of Taxes Act 1988 Part XV, Settlements. Although he will be

[12] Special cases beyond the scope of this article are where the settlor is ordinarily resident in the United Kingdom but either resident or domiciled outside of the United Kingdom.

liable to tax on the income he will have a right of indemnity: see section 660D. A settlor assessed under section 739 is given no express right of indemnity. My own view is that he has one on general restitutionary principles, but as at present this is only a view and there is no direct judicial authority either way. If I am wrong, it could make a world of difference if the Revenue now had power, or were obliged, to assess him under section 739 rather than under Part XV. Even where a settlor assessed under section 739 was voluntarily prepared to forgo reimbursement, his doing so could itself have very important fiscal consequences if he in fact had the right. Conversely, if trustees reimbursed him when they were neither obliged nor entitled to do so, that would normally constitute a breach of trust. If they were entitled to reimburse him under the terms of the trust but not obliged to reimburse him as a matter of fiscal or general law, the reimbursement could well itself give rise to further tax charges.

7.2 Can Section 739 Apply where the Income would be Deemed to be that of the Taxpayer or his Spouse under some Other Provision?

Let us assume that the conditions of application of section 739 are otherwise satisfied except that the income in question is deemed by some other provision to be that of the transferor or his spouse and that neither of them is resident or domiciled outside of the United Kingdom. Here, there is not the same difficulty in applying section 739. There would be nothing illogical in the courts deciding that there is a hierarchy of anti-avoidance provisions or that the Revenue can choose which one to apply, just as, where income is caught by more than one Case of the same Schedule, they can choose under which Case to assess.

Lord Steyn, after rejecting the argument that for section 739 to apply there must be proof of an actual avoidance of tax liability, went on to state that "the sensible construction is that section 739 can be applied even if there are other provisions which could be invoked to prevent the avoidance of tax". He pointed out that it is not an unremarkable consequence that the revenue authorities should have overlapping taxation powers and there can be no unfairness to the taxpayer since he cannot be taxed twice in respect of the same income.

7.3 Must there have been an Intent to Avoid Income Tax?

Leading Counsel for the taxpayer submitted that section 739 does not apply because no tax was in fact avoided. That was not surprisingly rejected. Lord Steyn stated that there must "be an intention to avoid liability for tax". That is quite correct and entirely in accordance with the House of Lords decision in *Vestey* [1980] STC 10. The *ratio* of that case was that the only person who is caught by what is now section 739(2) is an individual who had sought to avoid income tax by means of the transfer of assets abroad, and, possibly, his spouse. Yet Lords

Browne-Wilkinson and Clyde stated, quite unnecessarily in the present context, that it is not necessary that the transfer should itself be carried out with the purpose of avoiding liability to income tax! Lord Browne-Wilkinson said: "The words [in the preamble to section 739] refer not to the intention of the transferor of the assets or the effect of such transfer but to the intention of Parliament in enacting the section." Lord Clyde said: "The statute is simply expressing the purpose of the section, not of the substance of the transaction." These dicta are, with respect, quite incompatible with the decision of all five Law Lords in *Vestey*.

7.4 Must the Income which is Caught have arisen in Consequence of the Transfer?

7.4.1 The Position Before *McGuckian*

Before *McGuckian*, it was generally supposed that there was a condition precedent to the application of section 739 which can be very important in tax planning, namely that the income which the individual has power to enjoy and which it is sought to make his under the section should have arisen to a non-United Kingdom resident/domiciliary by virtue or in consequence of the offending transfer, either alone or in conjunction with associated operations. The authority was *Vestey v Inland Revenue Commissioners* [1977] STC 414, in the Chancery Division, where Walton J accepted the taxpayers' eighth contention to this effect, at the bottom of page 414. The point was not seriously resisted by Leading Counsel for the Crown, namely the Solicitor General, Peter Archer QC, and Michael Nolan QC and was not pursued on appeal.[13]

7.4.2 Lord Browne-Wilkinson

Lord Browne-Wilkinson set out five conditions which have to be satisfied for what is now Taxes Act 1988 section 739 to apply. He did not refer to the condition mentioned above. The central dispute concerned only whether one of these was satisfied, namely, whether income had arisen to the Guernsey trustee. Lord Browne-Wilkinson did not say that they were the only conditions which had to be satisfied. Given that the point was immaterial in *McGuckian*, it is in my view most unlikely that Lord Browne-Wilkinson was intending to rule that there is no such condition precedent. That is not to say that the Revenue could not possibly argue that he was.

---

13 Other anti-avoidance provisions, such as the Controlled Foreign Companies legislation, contained in Taxes Act 1988 Part XVI Chapter III, contain no such limitation.

7.4.3 Lord Clyde

Lord Clyde stated: "...the transfer has to be one by virtue or in consequences whereof income becomes payable to persons resident or domiciled out of the United Kingdom. That suggests that but for the transfer the income would not have been payable to that person."

This is not conclusive. For, consistently with that dictum, it could be argued that the requirement that income should have arisen to a person resident or domiciled out of the United Kingdom in consequence of the offending transfer is simply a trigger condition and that once *some* income has so arisen, all income which arises to a person domiciled or resident outside of the United Kingdom which the transferor or his spouse has power to enjoy is caught by the section whether or not it arises in consequence of the offending transfer, either alone or in conjunction with associated operations. To my mind, that would be an impossibly wide interpretation, as it would not even involve the limitation that the individual has power to enjoy the income as a result of the offending transfer or even that the income in question had the remotest connection with the offending transfer.

A later dictum of Lord Clyde leaves the question, so far as he is concerned, tantalisingly open: "Subsection (1) ... also relates to income of a person resident or domiciled out of the United Kingdom. That at least includes, and may only comprise, the income which, as was mentioned earlier, is expressed to be payable to such a person." It follow logically that it might also include income which does not arise to a person resident or domiciled outside of the United Kingdom in consequence of the offending transfer.

8 Future Planning

Is should be noted that if in this case Mrs McGuckian, rather than the trustee, had sold the right to the dividend in advance, she could not have been caught by section 730, because she was not the "owner" of the securities. There is still the possibility of a beneficiary under a trust reaping a tax-free capital sum in such a case. Of course, section 730 is not the only anti-avoidance provision which needs to be considered, as does *McGuckian* itself on the possible application of *Ramsay*.

9 Conclusion

McGuckian is arguably the most important tax case on *Furniss v Dawson* since *Craven v White*. How important it is for the development of section 739 remains to be seen. The speeches in the long-awaited decision in *IRC v Willoughby*, which the taxpayer appears to have won, may well throw no light on the features of the section discussed above. Possibly, changes to section 739 as a result of the review which is now under way may resolve the ambiguities.

APPENDIX

Taxes Act 1988 Part XVI Chapter III

739. Prevention of avoidance of income tax

(1) Subject to section 747(4)(b), the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.

(2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.

(3) Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment of which is in any way connected with the transfer or any associated operation, any income which, by virtue or in consequence of the transfer, either alone or in conjunction with associated operations, has become the income of a person resident or domiciled outside the United Kingdom shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.

(4) In subsection (3) above "capital sum" means, subject to subsection (5) below:

(a) any sum paid or payable by way of loan or repayment of a loan, and

(b) any other sum paid or payable otherwise than as income, being a sum which is not paid or payable for full consideration in money or money's worth.

(5) For the purposes of subsection (3) above, there shall be treated as a capital sum which an individual receives or is entitled to receive any sum which a third person receives or is entitled to receive at the individual's direction or by virtue of the assignment by him of his right to receive it.

(6) Income shall not by virtue of subsection (3) above be deemed to be that of an individual for any year of assessment by reason only of his having received a sum by way of loan if that sum has been wholly repaid before the beginning of that year.

740. Liability of non-transferors

(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.

(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 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;

(b) to the extent to which it is not by virtue of this subsection treated as his income for that year and falls within the amount of relevant income of the next following year of assessment, be treated for those purposes as his income for the next following year, and so on for subsequent years, taking the reference in paragraph (b) to the year mentioned in paragraph (a) as a reference to that and any other year before the subsequent year in question.

(3) Subject to subsection (7) below and section 744(1), 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.

(4) Income tax chargeable by virtue of this section shall be charged under Case VI of Schedule D.

(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 it he would not, by reason of his being so domiciled, have been chargeable to income tax in respect of it; and subsections (6) to (9) of section 65 shall apply for the purposes of this subsection as they would apply for the purposes of subsection (5) of that section if the benefit were income arising from possessions outside the United Kingdom.

(6) Where:

(a) the whole or part of the benefit received by an individual in a year of assessment is a capital payment within the meaning of section [87 or 89(2) of the 1992 Act] (chargeable gains: non-resident and migrant settlements) (because not falling within the amount of relevant income referred to in paragraph (a) of subsection (2) above); and

(b) chargeable gains are by reason of that payment treated under either of those sections as accruing to him in that or a subsequent year,

paragraph (b) of that subsection shall apply in relation to any year of assessment ("a year of charge") after one in which chargeable gains have been so treated as accruing to him as if a part of the amount or value of the benefit corresponding to the amount of those gains had been treated under that subsection as his income for a year of assessment before the year of charge.

(7) This section applies irrespective of when the transfer or associated operations referred to in subsection (1) above took place, but applies only to relevant income arising on or after 10th March 1981.

741. Exemption from sections 739 and 740

Sections 739 and 740 shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either:

(a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or

(b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation.

The jurisdiction of the Special Commissioners on any appeal shall include jurisdiction to review any relevant decision taken by the Board in exercise of their functions under this section.

742. Interpretation of sections 739 to 741

(1) For the purposes of sections 739 to 741 "an associated operation" means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets.

(2) An individual shall, for the purposes of section 739, be deemed to have power to enjoy income of a person resident or domiciled outside the United Kingdom if:

(a) the income is in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to enure for the benefit of the individual; or

(b) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit; or

(c) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income; or

(d) the individual may, in the event of the exercise or successive exercise of one or more powers, by whomsoever exercisable and whether with or without the consent of any other person, become entitled to the beneficial enjoyment of the income; or

(e) the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income.

(3) In determining whether an individual has power to enjoy income within the meaning of subsection (2) above:

(a) regard shall be had to the substantial result and effect of the transfer and any associated operations, and

(b) all benefits which may at any time accrue to the individual (whether or not he has rights at law or in equity in or to those benefits) as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits.

(4) Subsection (5) below applies where a person resident or domiciled outside the United Kingdom throughout any chargeable period in which an interest period (or part of it) falls would, at the end of the interest period, have been treated under section 714(2) as receiving annual profits or gains or annual profits or gains of a greater amount if he had been resident or domiciled in the United Kingdom during a part of each such chargeable period.

(5) Sections 739 to 741 shall have effect as if the amount which the person would be treated as receiving or the additional amount (as the case may be) were income becoming payable to him; and, accordingly, any reference in those sections to income of (or payable or arising to) such a person shall be read as including a reference to such an amount.

(6) Where income of a person resident or domiciled outside the United Kingdom throughout any chargeable period in which an interest period (or part of it) falls consists of interest:

(a) which falls due at the end of the interest period, and

(b) which would have been treated under section 714(5) as reduced by an allowance or an allowance of a greater amount if he had been resident or domiciled in the United Kingdom during a part of each such chargeable period,

then for the purposes of sections 739 to 741, the interest shall be treated as being reduced by the amount of the allowance or by the additional amount (as the case may be).

(7) In subsections (4) to (6) above "interest period" has the meaning given by section 711.

(8) For the purposes of sections 739 to 741, any body corporate incorporated outside the United Kingdom . . .shall be treated as if it were resident outside the United Kingdom whether it is so resident or not.

(9) For the purposes of sections 739 to 741:

(a) a reference to an individual shall be deemed to include the wife or husband of the individual;

(b) "assets" includes property or rights of any kind and "transfer", in relation to rights, includes the creation of those rights;

(c) "benefit" includes a payment of any kind;

(d) . . .

(e) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligations of any other person to whom, those assets, that income or those accumulations are or have been transferred.

(10) . . .

743. Supplemental provisions

(1) Income tax at the basic rate [or the lower rate] shall not be charged by virtue of section 739 in respect of [any income to the extent that it has borne tax at that

rate] by deduction or otherwise but, subject to that, income tax so chargeable shall be charged under Case VI of Schedule D.

(2) In computing the liability to income tax of an individual chargeable by virtue of section 739, the same deductions and reliefs shall be allowed as would have been allowed if the income deemed to be his by virtue of that section had actually been received by him.

(3) An individual who is domiciled outside the United Kingdom shall not be chargeable to tax in respect of any income deemed to be his by virtue of that section if he would not, by reason of his being so domiciled, have been chargeable to tax in respect of it if it had in fact been his income.

(4) Where an individual has been charged to income tax on any income deemed to be his by virtue of section 739 and that income is subsequently received by him, it shall be deemed not to form part of his income again for the purposes of the Income Tax Acts.

(5) In any case where an individual has for the purposes of that section power to enjoy income of a person abroad by reason of his receiving any such benefit as is referred to in section 742(2)(c), then notwithstanding anything in subsection (1) above, the individual shall be chargeable to income tax by virtue of section 739 for the year of assessment in which the benefit is received on the whole of the amount or value of that benefit except in so far as it is shown that the benefit derives directly or indirectly from income on which he has already been charged to tax for that or a previous year of assessment.

744. No duplication of charge

(1) No amount of income shall be taken into account more than once in charging tax under the provisions of sections 739 and 740; and where there is a choice as to the persons in relation to whom any amount of income can be so taken into account:

(a) it shall be so taken into account in relation to such of them, and if more than one in such proportions respectively, as appears to the Board to be just and reasonable; and

(b) the jurisdiction of the Special Commissioners on any appeal against an assessment charging tax under those provisions shall include jurisdiction to review any relevant decision taken by the Board under this subsection.

(2) In subsection (1) above references to an amount of income taken into account in charging tax are:

(a) in the case of tax which under section 739 is charged on income, to the amount of that income;

(b) in the case of tax charged under that section by virtue of section 743(5), to an amount of the income out of which the benefit is provided equal to the amount or value of the benefit charged;

(c) in the case of tax charged under section 740, to the amount of relevant income taken into account under subsection (2) of that section in charging the benefit.