IBC'S 7TH ANNUAL PRIVATE CLIENT TAX CONFERENCE:

CONFUSION WORSE COUNFOUNDED - THE 2008/2009 REGIME FOR UK RESIDENT NON-UK DOMICILED INDIVIDUALS

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SECTION I

INTRODUCTION

IN LABOUR'S SIGHTS

1.1.1 As Shadow Chancellor before Labour's great electoral landslide of 1997, Gordon Brown listed the remittance rules for non-domicillaries as one of the tax loopholes which a future Labour Government would close.

SECOND THOUGHTS

1.2.1 Throughout my professional lifetime, Government's have been reviewing the remittance basis for non-domicillaries. Whenever they have done so in the past, they have quietly dropped the whole matter. It soon became apparent to them when they looked at the matter that the additional tax raised by taxing on an arising basis those who would remain would not compensate for the loss of those who would move overseas. That was not only because we would lose their direct tax revenues but also because we would lose the VAT chargeable in respect of their purchases and, far more significantly, would lose the benefit of their wealth and business expertise in our business life and indeed, in many other aspects of life in the UK.

1.2.2 In this, Gordon Brown was like all other Chancellors. In the Budget Report for 2002 he announced a review of the residence and domicile rules as they effected the taxation of individuals and he continued to announce further reviews and consultations up to, and including, his last Budget Speech last year. No doubt he hoped that the reviews and consultations would never have to reach a conclusion and that the remittance rules could be left decently unchanged.

CAUGHT ON THE WRONG FOOT

1.3.1 Then came the political debacle of the election that never was when a combination of envy of the earnings of the private equity industry stimulated by the newspapers and astute, if not particularly responsible, political manoeuvring by the Conservative Party led to the announcement of an additional charge on non-residents in the Pre-Budget Report.

A SINGLE CHARGE?

1.4.1 The Pre-Budget Report press release giving an outline of the change was only three pages long and at first it seemed that the new charge would be very simple. Those who wished to claim the advantage of the remittance basis would suffer an additional tax charge of £30,000 after they had been resident for seven years and they would also lose the benefit of their personal allowances, including the blind persons allowance; the latter was a peculiarly mean-spirited provision that made the remittance basis more expensive for the blind than for the sighted.

1.4.2 The press release also contained a paragraph, paragraph 12, which announced that:-

> "Anomalies in the current rules mean that individuals using the remittance basis of taxation can avoid paying UK tax on their foreign income and gains effectively brought into the UK. A number of changes are being made to ensure that where foreign income and gains are remitted to the UK then tax is charged on those remittances.

1.4.3 These changes were then listed in the most general of terms in five short bullet points.

1.4.4 The justification for the remittance charge is that non-domicillaries can easily base themselves in other jurisdictions. The presence of those with large incomes or great capital wealth bring significant economic and other benefits to the United Kingdom in addition to the direct tax that they pay. Those benefits come from indirect tax receipts, from their spending in the UK, from the businesses which their presence attracts or they establish here, from their contributions to our culture, from their charitable activities and from their business and investment acumen.

1.4.5 The policy justification for the remittance basis is that the tax lost through giving a special privilege to this class of individuals is outweighed by these benefits.

The remittance basis is indeed a tax loophole as Gordon Brown said all those years ago but it is one which is sensible for our Government to offer. If one is going to offer an incentive to individuals it is clearly sensible to offer an incentive which is simple, easily understood and is not so complicated as to divert the money which a non-domicillary is willing to pay for the privilege of residence away from the Government and into the hands of advisers.

1.4.6 When the remittance basis charge was announced in last October's budget speech, an inattentive reader of the press release might have thought that that was what it would be.

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The January Draft Legislation

1.5.1 The draft legislation implementing the legislation was promised before the end of last year but in fact it wasn't published until the 18th January. This 'simple' change had metamorphosed into twenty six pages of dense legislation largely because of the way it implemented paragraph 12 of the press release. A storm of protest followed as it was realised that the new rules would adversely affect numerous important activities in the United Kingdom.

The Finance Bill

1.5.2 There followed a series of piecemeal announcements of modifications of the proposals and when the Finance Bill was published the legislation had grown to fifty three pages. Even then, the notes which accompanied the Finance Bill contained the following remarkable statement:-

> "Some of the clauses in the published version of the Finance Bill 2008 are not wholly complete. The Government has said it wants to ensure these changes are comprehensive and workable. The areas where legislation is incomplete continue to be subject to on-going [sic] discussions with interested parties to ensure that the final legislation is comprehensive, workable and fair whilst delivering the overall policy. Further changes will be introduced by way of Government amendments during the course of the Bill."

1.5.3 There then followed a list of no less than seven major areas where the Government acknowledged that the legislation was inadequate and would require revision.

1.5.4 I cannot recall any previous occasion when the Finance Bill has been published containing legislation affecting tens of thousands of people in a form which the Government acknowledged at the time of publication was incomplete and inadequate. That is completely different from the normal practice where the

Government publishes a Finance Bill which, to the best of its knowledge and belief, has been properly drafted but which, after review by the professional bodies and other interested parties, proves in need of some amendments. It represents a further degradation in the process of enacting legislation and demonstrates a contempt for the Parliamentary process.

Committee Stage Amendments

1.5.5 Substantial Government amendments were introduced in the Finance Committee debates and published on the 17th and 18th June 2008. After amendment by the Finance Committee the new legislation to seventy pages.

Report Stage Amendments

1.5.6 Further amendments were published on Monday and the Bill is to have its last Parliamentary scrutiny on Tuesday or Wednesday at the Report Stage debate after which is passes to the purely formal stages of consideration by the House of Lords and of Royal Assent in late July. That allows no adequate time for review. The provisions are still littered with errors and uncertainties.

Retrospective Taxation

1.5.7 The new regime has effect from the 6th April of this year so substantial numbers of UK residents have been subjected for a quarter of a year to a taxation regime on their transactions which in substantial aspects was un-knowable.

1.5.8 This lecture attempts to outline the major provisions of the new charge which will be inserted into the existing charging acts by Schedule 7 of the Finance Bill 2008 on the assumption that it is enacted.[1] It looks primarily at relevant foreign income and capital gains and not relevant foreign earnings. It does not deal with the changes to the taxation of offshore trusts and companies and to offshore income gains.

1 References to statutory provisions that will be amended by the Finance Bill on the assumption that it will be passed as amended by the Finance Committee are prefaced in this lecture by the word 'New'. Where no act is specified the reference is to ITA 2007. Reference to the Finance Bill Schedule 7 are simply prefaced 'Schedule' with the paragraph number

SECTION II

NEW SECTIONS 809B – 809E

THE FOUR SECTIONS

2.1.1 The mechanism for the application of the remittance basis is first to decide whether an individual falls within four new sections inserted into ITA 2007 Part 14.

Section 809D

2.1.2 An individual will fall into New ITA 2007 s.809D if he is UK resident in that tax year, is either not domiciled or not ordinarily resident in the United Kingdom in the year and the amount of his unremitted foreign income and gains is less than £2,000.

Section 809E

2.1.3 An individual will fall into New s.809E if he is UK resident and non-domiciled or non-ordinarily resident in the year and:-

(a) has no UK income or gains for the year; and

(b) has not remitted any relevant income or gains to the United Kingdom in that year; and

(c) he is either:-

i) under eighteen years of age; or

ii) has been UK resident in not more than six of the nine years immediately preceding that year.

2.1.4 So to fall within either of these two sections does not require an election.

New Sections 809B and 809C

2.1.5 For an individual to fall into New ss.809B and 809C a claim must be made.

New Section 809B

2.1.6 New s.809B applies to an individual for a tax year if he is UK resident in that year and is either not domiciled or not ordinarily resident in the United Kingdom in that year and he makes a claim under New s.809B for the year.

2.1.7 Obviously a person who falls within New ss.809C or 809D might also fall under New s.809B if he makes a claim. In most circumstances, however, such individuals will be disadvantaged by doing so.

2.1.8 Any claim under New s.809B must contain a statement either that the individual is not domiciled in the United Kingdom in that year or that the individual is not ordinarily resident in that year.

New Section 809C

2.1.9 If the individual making the claim is both aged eighteen or over in the year and has been UK resident for at least seven of the nine tax years immediately preceding that year, the claim must contain a nomination of the income or chargeable gains of the individual to which New s.809G(2) (the section imposing the Remittance Basis Charge) is to apply and those income or chargeable gains must be part or all of the foreign income and gains in that year.

Traps

2.1.10 These provisions contain a very nasty trap. An individual can very easily make a mistake as to the amount of his foreign income and gains and as to whether they are remitted. Even well advised taxpayers, for example, may make mistakes in relating foreign legal concepts to United Kingdom taxation or in determining trading profits or capital allowances in respect of overseas enterprises. It will be very easy for a person either to underestimate or overestimate his income and gains which may only be discovered at a later date. Similarly, as we shall see, the remittance rules are so complex that it would be easy to miscalculate whether or not a remittance has been made, particularly in view of the uncertain scope of New s.809S (see below).

2.1.11 The difficulty is that if a taxpayer relies on falling within New s.809D because his foreign income and gains are less than £2,000 and finds that he is actually above that amount, it may be too late to make an election. Even worse, if one makes a claim under New ss.809B and 809C erroneously, thinking that one's remitted income exceeds £2,000 paragraph 65 of the Schedule prevents one making an error or mistake claim. Para 65 also has the effect that one cannot withdraw an election if it subsequently transpires that it would be more advantageous for a person to be taxed on the full arising basis.

2.1.12 Apparently, the intention of para 65 was to prevent non-compliant individuals from back dating a claim to the remittance basis on their non-compliance being discovered. Actually, it does the opposite of that but even if it only did what it was supposed to do, it is the penalty system which is supposed to deal with non-compliant taxpayers. Para 65 in effect introduces double jeopardy. It may result in a tax liability many times greater than the tax liability which would apply if the Remittance Basis Charge applied and then penalties on a percentage basis could be applied to that increased liability.

AN EXAMPLE

2.2.1 The following example illustrates the application of New ss.809B to 809E.

Example
Senor Sidoli became resident in the United Kingdom in the fiscal year 2001/02 together with his wife Maria and his youngest son Giovanni, who was born on

the 31st May 1991. They have remained resident and ordinarily resident in the UK since that time.

His eldest son, Guiseppe, who was born on the 31st August 1985, remained in Italy to complete his schooling until the 30th June 2003 so that he became resident and ordinarily resident in 2002/03 and thereafter. None of the family made any capital gains in 2008/09 nor had any employment income for that year nor had they remitted any employment income in respect of previous years. Their investment income for the year was as follows:-

NAME	UK INCOME £	OVERSEAS INCOME ARISING IN YEAR £	OVERSEAS INCOME REMITTED IN YEAR £
Paolo	100,000	500,000	300,000
Maria	Nil	4,000	2,500
Giovanni	1,000	30,000	2,500
Guiseppe	0	30,000	2,500

All the family members preserved their domicile of origin in Italy.

Paolo makes a claim for the remittance basis to apply. Section 809B applies to him for 2008/09 because he is UK resident in that year, he is not domiciled in the United Kingdom in that year and he has made a claim under that section. He is also within s.809C so he must nominate the income and/or the gains to which the Remittance Basis Charge is to apply.

Maria falls within New s.809D for 2008/09 because she is resident in the UK but not domiciled here in that year and her unremitted foreign income and gains are less than £2,000 (£4,000 – £2,500).

Giovanni does not fall within New s.809E because he has UK source income. He therefore makes a claim under New s.809B. He does not fall within New s.809C because he is not eighteen years of age or over at any time in 2008/09.

Guiseppe also doesn't fall within New s.809E because he has remitted income and gains to the United Kingdom. He therefore makes a claim under New s.809B. He does not fall within New s.809C because he has not been UK resident for at least seven of the nine years immediately preceding 2008/2009.

The result is that the remittance basis applies to every member of the Sidoli family in 2008/09 but the Remittance Basis Charge applies only to Paolo.

SECTION III

THE EFFECT OF FALLING WITHIN NEW SECTIONS 809B – 809D

NEW SECTION 809F

3.1.1 Where New s.809B, New s.809D or New s.809E applies, New s.809F provides that the individual's relevant foreign income for that year is charged in accordance with New ITTOIA 2005 s.832 and his foreign chargeable gains are charged in accordance with New TCGA 1992 s.12. Similar provisions are made in relation to relevant foreign earnings.

ITTOIA SECTION 832

3.2.1 Para 53 substitutes a new ITTOIA 2005 s.832. New s.832 provides that, for any tax year in which the individual is UK resident and in which any of his relevant foreign income is remitted to the United Kingdom, Income Tax is charged on the full amount of the income so remitted. It also provides that this is to apply whether or not the source of the income exists when the income is remitted, so abolishing the 'source ceased' rule.

3.2.2 New ITTOIA 2005 s.832A then extends the rule to temporary non-residents in provisions based on the Capital Gains Tax charge on temporary non-residents in TCGA 1992 s.10A.

TCGA 1992 SECTION 12

3.3.1 Similarly, para 60 substitutes a new TCGA 1992 s.12 which provides that where New s.809B, New s.809D or New s.809E apply to the individual for the year and that individual is not domiciled in the United Kingdom in that year chargeable gains are treated as accruing to the individual in any tax year in which any of the foreign chargeable gains are remitted to the United Kingdom.

DOUBLE TAXATION?

3.4.1 It will be noticed that the remittance basis on capital gains, in contrast to the remittance basis for relevant foreign income, does not apply where the individual is domiciled in a country of the United Kingdom but is not ordinarily resident in the United Kingdom.

3.4.2 The previous version of TCGA 1992 s.12 specifically provided that:-

> "Capital Gains Tax shall not be charged in respect of gains accruing to … [non-domicillaries] … from the disposal of assets situated outside the United Kingdom except on gains which have been remitted to the United Kingdom."

3.4.3 The new versions of ITTOIA 2005 s.832 and TCGA 1992 s.12 do not specifically provide that income and gains taxed on the remittance basis are not also taxed on the arising basis (the previous version of ITTOIA 2005 s.832 also did not specifically provide that income was not to be taxed on an arising basis). Now, it may be that the general presumption against double taxation will prevent a charge arising on relevant foreign income and foreign chargeable gains on an arising basis in addition to the charge on the remittance basis. It would have been better, however, if the legislation had said so directly.

SECTION IV

EFFECT ON ALLOWANCES

INCOME TAX ALLOWANCES

4.1.1 Where New s.809B applies to an individual for a tax year that individual is not entitled to a Personal Allowance or a Blind Person's Allowance, or a Married Couple's Allowance or relief for payments under ITA 2007 s.457-459 covering payments to trade unions, police organisations and to the benefit of family members.

CAPITAL GAINS TAX ANNUAL EXEMPT AMOUNT

4.2.1 Nor does the individual receive the benefit of the annual exempt amount from Capital Gains Tax.

HIDDEN COSTS

4.3.1 If we assume a forty percent rate of tax on foreign income and sufficient UK gains to absorb the annual exempt amount, therefore, the cost to an individual of losing the personal allowance and the annual Capital Gains Tax allowance in 2008/2009 would be £4,142 so that the cost of making the Remittance Basis Election would be £34,142. Assuming the taxpayer has no unremitted gains he would therefore have to have unremitted income of £85,355 to make the remittance basis election worthwhile.

SECTION V

NEW SECTION 809H – THE REMITTANCE BASIS CHARGE AND THE ADDITIONAL CHARGE

THE REMITTANCE BASIS CHARGE

5.1.1 New s.809H applies in circumstances where New s.809C applies to an individual for a tax year. Strangely, this section does not refer to New s.809C but rather itself reproduces duplicate conditions for an individual to fall within that section.

5.1.2 Where New s.809H applies a Remittance Basis Charge under New sub-section (2) ibid is charged on the income and chargeable gains nominated under New s.809C. There is no requirement to nominate sufficient gains to create a £30,000 charge and so it is possible for the charge under New s.809H(2) to be less than £30,000.

THE ADDITIONAL CHARGE

5.2.1 For that reason an additional charge is imposed by New s.809H(4). This deems an amount of unspecified income to have been nominated under New s.809C sufficient to make the relevant tax increase equal to £30,000. For this purpose it is assumed that the individual's income for that year was such that such a nomination could have been made.

5.2.2 The relevant tax increase is:-

(a) the total amount of income tax and capital gains tax payable by the individual for the relevant tax year, minus

(b) the total amount of income tax and capital gains tax that would be payable by the individual for the relevant tax year apart from subsection (2).

CIRCULARITY

5.3.1 There is a circularity in this definition. Because the amount charged under New s.809G(4) forms part of the total Income Tax and Capital Gains Tax of the individual if the provision is read literally, the relevant tax increase must be determined in order to calculate the total Income and Capital Gains Tax liability of the individual. Yet the total Income and Capital Gains Tax liability of the individual must be determined in order to calculate the relevant tax increase.

DENIAL OF RELIEF FOR FOREIGN TAX

5.4.1 Even if it is assumed that the Courts would correct this circularity to avoid absurdity, if New s.809G is construed literally it has the effect that, where foreign tax is creditable against the Remittance Basis Charge for double tax relief purposes, the amount chargeable under New s-s (4) ibid, will be increased by the amount of the double tax relief. The effect of that would be that no effective relief for foreign tax suffered would have been given. A purposive construction of the relevant legislation is likely to negate the additional charge in these circumstances but until a case on the matter is heard there must be an element of doubt.

INADVERTENT LOSS OF THE REMITTANCE BASIS

5.5.1 The Government has had several tries at designing the mechanism for the Remittance Basis Charge in order to try to ensure that it will be creditable against foreign tax and, in particular, American tax for double tax treaty relief purposes. At Report stage New s.809C(4) was inserted which provides that where an individual falling within New s.809C makes a claim for the remittance basis to apply:-

> "The income and chargeable gains nominated must be such that the relevant tax increase does not exceed £30,000."

5.5.2 The notes released with the Report stage resolutions said that the new sub-section(4):-

> "Ensures that the amount of income and gains nominated must be such that the Remittance Basis Charge (described in this sub-section as a relevant tax increase) does not exceed £30,000. This stops an individual from nominating too much income and gains and as a result paying a remittance basis charge of more than £30,000."

5.5.3 This is literally true. The result of nominating income and chargeable gains which would result in a relevant tax increase exceeding £30,000 would be that the claim for the remittance basis will not have complied with the conditions of New s.809C and would therefore be invalid. The result of that would be that the unfortunate taxpayer would be assessable on the arising basis. Of course, it will often be difficult to know whether the income and gains nominated will give rise to a liability of more than £30,000 because the effect of adjustments elsewhere in one's assessable income and gains may be to change one's marginal rates of tax. Getting the nomination wrong by one pound could be a very expensive error. In making representations about this, the CIOT generously assumed that laying this trap was unintentional on the Government's part.

SECTION VI

COMING INTO FORCE

6.1.1 Para 81 of Schedule 7 provides that the:-

> "… amendments made by … [Part 1 of the new Schedule which contains all of the relevant provisions] … shall have effect for the tax year 2008/09 and subsequent tax years."

6.1.2 At first sight it might be thought that the effect of this is that these amendments are not to have effect for 2007/2008 and before. But para 81 does not say that. It simply says that they shall have effect for 2008/2009 onwards. Of course, in the absence of any other provision, they would not have effect for previous years but paragraphs 83 and 84 contain provisions governing their application in 2007/2008 and previous years. Paragraph 83 subsections 1 and 2 provide that:-

> "(1) This paragraph applies to an individual's relevant foreign income for the tax year 2007-08 or any earlier tax year ("the relevant tax year") if:-
>
> (a) the individual made a claim under section 831 of ITTOIA 2005 for the relevant tax year, or

(b) section 65(5) of ICTA (or any earlier superseded enactment corresponding to that provision) applied in relation to the individual for the relevant tax year.

(2) Section 832 of ITTOIA 2005 (as amended by this Part of this Schedule) applies in relation to the relevant foreign income as if section 809B of ITA 2007 (claim for remittance basis to apply) applied to the individual for the relevant tax year."

6.1.3 HMRC's view seems to be that these provisions cannot create a charge for any year before 2008/2009 but that in determining the composition of existing funds and in determining what income and gains have been remitted for previous years, one applies the new rules. Similar provisions in relation to Capital Gains Tax were made by para 84.

6.1.4 We can test the effect of these provisions using the following example:-

Example

Mr A is a non-domiciled individual who has been resident in the United Kingdom since 1988/1989. In every fiscal year in which he has been UK resident the remittance basis has applied to him. In 2005/2006 he had an offshore bank account ('Account 1') into which only foreign interest income had been paid and which then had a balance of one million pounds. In that year he closed Account 1 and transferred the money to a new account ('Account 2'), also offshore, with another bank. In 2007/2008 he transferred the balance of Account 2 to a UK bank account ('Account 3').

6.1.5 Under the rules current in 2007/2008 and before one would analyse the taxation consequences of these transactions as follows.

6.1.6 In the House of Lords decision in *National Providence Institution v. Brown* 8 TC 57 three rules were stated as applying to determine whether a remittance of income was taxable.[2]

6.1.7 First Income Tax is not a tax on income of every kind but a tax on income from various specified sources. So if there is not a source of the type specified in the legislation there is no charge. Secondly Income Tax is an annual tax. One should therefore treat each Income Tax year as a separate independent matter and one must ask in respect of each year whether, *in that year*, the conditions of the charge to tax are satisfied. Thirdly, Income Tax is *charged* on income arising in any year from specified sources in that year but it is *computed* by references to the sums received in the UK.

6.1.8 The result of applying these three principles to Mr A's transactions is that he was charged to Income Tax on the whole interest arising in 2005/2006 but the

2 See the illuminating discussion in *Taxation of Foreign Domicillaries 6th Edition* – James Kessler, at pages 271 *ff*

amount of that income was computed as nil because none of it was remitted. In 2007/2008 he was not charged on the interest because in that year it did not have a source.

6.1.9 The conditions of para 83(1) of Schedule 7 are satisfied in relation to Mr A for all years in which he has been resident in the United Kingdom because he has made claims under s.831 of ITTOIA 2005 for the tax years 2005/06 onwards and, in previous years, was taxed on the remittance basis under ICTA s.65(5).

6.1.10 The result of para 83 of Schedule 7 applying is, under sub-para 2 ibid, that ITTOIA 2005 s.832 (as amended by Part 1 of the new Schedule) applies in relation to the relevant foreign income as if New s.809B of ITA 2007 (Claims for remittance basis to apply) applied to Mr A for the relevant tax year.

6.1.11 Sub-para 2 then has the result that "Section 832 of ITTOIA (as amended by Part I of the Schedule 7) applies in relation to the relevant foreign income as if section 809B of ITA 2007 … applied to the individual for the relevant tax year." It is clear that the "relevant foreign income" referred to must be "the relevant foreign income for the tax year 2007/2008 or any earlier year "referred to at the beginning of paragraph 83.

6.1.12 One then turns to New ITA 2007 s.832 which is as follows:-

"(1) This section applies to an individual's relevant foreign income for a tax year ("the relevant foreign income") if section 809B or 809D or 809E of ITA 2007 (remittance basis) applies to the individual for that year.

(2) For any tax year in which:-

(a) the individual is UK resident, and

(b) any of the relevant foreign income is remitted to the United Kingdom, income tax is charged on the full amount of the relevant foreign income so remitted in that year.

(3) Subsection (2) applies whether or not the source of the income exists when the income is remitted.

(4) See Chapter A1 of Part 14 for the meaning of "remitted to the United Kingdom" etc."

6.1.13 Because para 83(2) of Schedule 7 deems New ITA 2007 s.809B to have applied to Mr A's income for all years up to and including 2007/2008, New ITA 2007 s.832 applies because the condition for its application in sub-section (1) ibid. is satisfied in respect of all of those years. Subsection (3) ibid then has the result that the source closing rule does not apply in determining the charge on Mr A's relevant foreign income in any of those years. Subsection (4) ibid then tells you to apply the new rules to determining whether there has been a remittance of income. Para 86(5) of Schedule 7, however, provides that the meaning of "relevant person" in the rules for determining a remittance in New ITA 2007 s.809H is to be restricted to the individual taxpayer concerned for the years 2007/2008 and before. The complex and broad provisions for determining whether there has been a remittance and how much has been remitted in New ITA 2007 ss.809L *ff* are not disapplied.

6.1.14 The result of that is that one is called upon to perform a new computation of Mr A's remittances of income for 2007/2008 and all preceding years for the purposes of computing the charge to Income Tax on that income.

6.1.15 That seems to be the literal result of the new provisions. It creates, of course, a series of retrospective Income Tax charges.

6.1.16 One might argue that a purposive construction of the New Schedule would prevent it creating charges in prior years. It is well established, however, that the purpose of legislation is to be determined from the actual words used by Parliament and there is nothing in the draft legislation which indicates that those charges are not part of its purpose. Perhaps a general presumption against retrospective taxation would allow the Courts to conclude that such charges were not intended. Predicting how the Courts will apply a purposive construction to ignore the literal meaning of legislation, however, is always a highly uncertain activity. One is left with the fact that the legislation read literally imposes such charges and the hope that the Courts would modify its literal meaning.

6.1.17 The retrospective charges might be limited by the fact that the enquiry period has now closed in relation to 2005/2006 and previous years so that only two fiscal years are within the enquiry window. That assumes, however, that the taxpayer will have supplied sufficient information about his income on his return to have allowed the Inspector to have assessed the income on the correct basis (*Veltema v Langham* [2004] EWCA Civ 193). Of course, it is very unlikely that he will have done so because at the time he made his return he would not have known that the information was relevant.

SECTION VII

DETERMINING REMITTANCES

THE BASIC RULES

7.1.1 The basic rules for determining the meaning of 'remitted to the United Kingdom' are contained in New s.809L and are as follows:-

(1) An individual's income is, or chargeable gains are, "remitted to the United Kingdom" if—

(a) conditions A and B are met,

(b) condition C is met, or

(c) condition D is met.

(2) Condition A is that—

(a) money or other property is brought to, or received or used in, the United Kingdom by or for the benefit of a relevant person, or

(b) a service is provided in the United Kingdom to or for the benefit of a relevant person.

(3) Condition B is that—

(a) the property, service or consideration for the service, is (wholly or in part) the income or chargeable gains,

(b) the property, service or consideration—

(i) derives (wholly or in part and directly or indirectly) from the income or chargeable gains, and

(ii) in the case of property or consideration, is property of or consideration given by a relevant person,

(c) the income or chargeable gains are used outside the United Kingdom (directly or indirectly) in respect of a relevant debt, or

(d) anything deriving (wholly or in part, and directly or indirectly) from the income or chargeable gains is used as mentioned in paragraph (c).

(4) Condition C is that qualifying property of a gift recipient—

(a) is brought to, or received or used in, the United Kingdom, and is enjoyed by a relevant person,

(b) is consideration for a service that is enjoyed in the United Kingdom by a relevant person, or

(c) is used outside the United Kingdom (directly or indirectly) in respect of a relevant debt.

(5) Condition D is that property of a person other than a relevant person (apart from qualifying property of a gift recipient)—

(a) is brought to, or received or used in, the United Kingdom, and is enjoyed by a relevant person,

(b) is consideration for a service that is enjoyed in the United Kingdom by a relevant person, or

(c) is used outside the United Kingdom (directly or indirectly) in respect of a relevant debt,

in circumstances where there is a connected operation.

(6) In a case where subsection (4)(a) or (b) or (5)(a) or (b) applies to the importation or use of property, the income or chargeable gains are taken to be remitted at the time the property or service is first enjoyed by a relevant person by virtue of that importation or use.

(7) In this section “relevant debt” means a debt that relates (wholly or in part, and directly or indirectly) to—

(a) property falling within subsection (2)(a),

(b) a service falling within subsection (2)(b),

(c) qualifying property dealt with as mentioned in subsection (4)(a),

(d) a service falling within subsection (4)(b),

(e) qualifying property dealt with as mentioned in subsection (5)(a), or

(f) a service falling within subsection (5)(b).

(8) For that purpose, the reference to a debt that relates to property or a service includes a debt for interest on money lent, where the lending relates to the property or service.

(10) The cases in which income or chargeable gains are used in respect of a debt include cases where income or chargeable gains are used to pay interest on the debt.

(11) This section is subject to sections 809S to 809Y (property treated as not remitted to the United Kingdom).

An Exhaustive Definition?

7.1.2 This extremely detailed definition is then supported by a further eleven pages of the legislation. One might have thought that it was clear this definition is exhaustive; it is certainly exhausting. It can be seen, however, that New s.809L(1) states that amounts will be remitted to the United Kingdom if certain conditions are satisfied and not that where those conditions are not satisfied there will be no remittance. Remittance is, of course, a word in general use and with a long history in commercial usage. Is it possible that New s.809L extends the meaning of 'remittance' but does not exhaust it?

7.1.3 On balance, it seems unlikely that the Court would accept that such extensive statutory provisions are merely supplementary to the general meaning of the word. Once again, however, there is uncertainty where careful drafting should have provided certainty.

RELEVANT PERSONS

7.2.1 The definition of 'remittance' applies in relation to a relevant person which is defined in New s.809M. The definition is extremely broad and the CIOT has particularly criticised the inclusion of “the trustees of a settlement of which a person falling within any other paragraph of [this definition] is a beneficiary.

7.2.2 The CIOT said that the result of including such trustees in the class of relevant persons is that these provisions will catch many inadvertent situations which are far from those which it believes their policy is intended to catch.

DETERMINING THE AMOUNT REMITTED

7.3.1 Because of the width of the definition of ‘remittance’ determining the amount remitted is not simple. New s.809P contains extremely complex provisions to do so.

MIXED FUNDS

7.4.1 Again, in order to determine what and how much is remitted it is necessary to provide rules to determine the constituent parts of mixed funds and the order in which those constituent parts are remitted. This is done by New ss.809Q to 809S.

A Mini-GAAR

7.4.2 Having provided rules of the most extraordinary complexity in New s.809Q and 809R, s.809S contains a general anti-avoidance rule (a mini GAAR) overriding the provisions of the preceding two sections. Like all such GAARs, this rule will create great uncertainty. The CIOT has said of this provision which was introduced at a late stage in the Finance Committee's consideration of the Finance Bill:-

> "First, we think it is wrong to introduce Finance Bill amendments of this nature at this stage. We had been led to understand that Finance Bill amendments would merely clarify and make consequential amendments, not introduce whole new anti-avoidance provisions which are already effective since 6 April.
>
> Second, we think it is wrong to introduce a very detailed step test for identifying which income or gains is remitted and then entirely to contradict this by introducing a purposive provision of this nature.
>
> Third, we think that this legislation misses its target. Those who are well advised do not have mixed accounts. They carefully segregate their income, gains and capital and ensure that they remit from the correct account. Those caught by the mixed fund rules will be those in lower income brackets who are less well advised and who have inadvertently mixed different sources.

Fourth, it is difficult to see what avoidance could be caught here. Those with pure capital, for instance, are unlikely to inject it into an offshore account in order to swamp that account. They can just as easily maintain the capital separately and remit from that account.

And fifth, we believe that the drafting of this section is far too wide. "Arrangements" and "tax advantage" are both given such wide definitions that they will catch almost any transactions. And "main purpose" is clearly defined by case law to mean something like "any significant purpose". Does this mean, therefore, that as soon as a foreign domiciliary segregates income within paragraphs (f) to (i) from other income or gains with a view to remitting the former, that he is caught by this provision?"

EXEMPTIONS

7.5.1 Having determined what is remitted various exemptions are then provided deeming particular amounts not to have been remitted.

7.5.2 Amounts of up to £30,000 paid directly from an overseas source to HMRC in satisfaction of a tax liability for a year to which the Remittance Basis Charge applies are deemed not to be remittances. It should be noted that if the payment is repaid, even if it is repaid directly by the Revenue to an offshore bank account, the exemption does not apply.

7.5.3 A relief is given where there is a remittance by virtue of the provision of a service in the United Kingdom and that service relates wholly or mainly to properties situated outside the United Kingdom. Strangely the exemption only applies where the whole of the relevant consideration is given by way of one or more payments to one or more bank accounts held outside the United Kingdom by or on behalf of the person who provides the relevant UK service.

7.5.4 New s.809X provides three categories of exempt property which, if brought to or received or used in the United Kingdom by or for the benefit of a relevant person, is not to be treated as remitted to the United Kingdom.

7.5.5 The first exemption is for property brought into the United Kingdom for the purposes of public access. The CIOT have made a number of criticisms of these rules saying:-

> "We believe that the public access rules … are bizarre and unduly restrictive. They exclude twentieth century items and require the immediate re-export of property which has been brought in for public display or repair. This would seem to exclude, for instance, property which is temporarily brought back to the foreign domiciliary's UK house for examination (e.g. for damage) after a period of public display. We would suggest that the property can be retained in the UK after public

access or repair for 275 days, that the definition of 'collector's items' is extended and that all repairs, including where art is purchased with foreign gains not just relevant foreign income, are covered."

7.5.6 The second category is for clothing, footwear, jewellery and watches that are for personal use.

7.5.7 The third category is of property of any description that derives from relevant foreign income is exempt property if it is brought in for repair, it is only temporarily imported or the notional remitted amount is less than £1,000. It should be noted, however, that this exemption only applies to remittances of relevant foreign income and not to remittances of capital gains.

DEEMED REMITTANCES

7.6.1 Even when one has determined what and how much has been remitted, one has still not reached the journey's end. Of course, we have not discussed the rules relating to employment income nor the special rules applying to non-resident companies and trusts and to offshore income gains, but even putting that aside, one has one more step to take. If one finds that one has remitted nominated income and gains and any of one's remittance basis income and gains have not yet been remitted to the United Kingdom in the year concerned or in a previous year, one has then to apply a complex set of rules found in New s.809J to determine a deemed order of remittance. The purpose of that set of rules is to ensure that the nominated income and gains are treated as remitted last and that other income and gains are treated as remitted in the order which is most favourable to the Treasury.

SECTION VIII

CONCLUSION

REPAIRING THE DAMAGE?

8.1.1 In the Finance Act 2006 the then Chancellor, Mr Brown, did his best destroy the UK's international trustee business by abolishing the professional trustee rule. He also struck at the UK's provision of investment, accountancy and other professional services to international trustees through the trustee deemed residence rule (which deems a non-resident trustee to be resident in the United Kingdom at any time he acts as trustee in the course of business which he carries on in the United Kingdom through a branch, agency or permanent establishment).

8.1.2 If one took a generous view of the remittance basis rules in this year's Finance Bill, one would regard them as Mr Darling's gift to the legal and accountancy professions to repair the damage done by his predecessor. It may seem, therefore, churlish and ungrateful to say that we would have preferred our esteemed Chancellor to have left well alone – but we would.