CAPITAL GAINS TAX – ESSENTIAL PLANNING FOR REGIME CHANGE: NON UK RESIDENT TRUSTS AND COMPANIES

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SECTION I

THE STRUCTURE OF THE LECTURE

INTRODUCTION

1.1.1 I was asked to speak on this topic after the Pre-Budget Report but before any of the draft legislation was available. The only information we were given about the proposed changes to offshore trusts and companies was an enigmatic point in a single paragraph headed "Anomalies" in the press release issued at the time of the Report. The changes were to include:-

> "Reducing the scope for the alienation of income and gains through the use of offshore structures, such as companies and trusts, which convert to taxable income and gains in to non-taxable payment"

1.1.2 That enigmatic comment resulted in nine pages of draft legislation included in the draft Schedule[1] which was published on the 18th January 2008. The draft legislation includes substantial amendments to the offshore settlor charge (imposed by TCGA 1992 s.86), the capital payments charge (imposed by TCGA 1992 s.87) and the provisions attributing the gains of non-resident companies to their participators (TCGA 1992 s.13).

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[1] References in these notes to "New Schedule" are to this schedule published on 18th January 2008. Statutory references prefaced by the word "New" are to the relevant legislation as it would be amended if the New Schedule were enacted

1.1.3 In this lecture I shall first place the changes in their wider context. I shall then look at the detailed changes that have been made to s.86 and then at the changes to s.87. I shall then examine the interaction between these amended charges. We shall then look at the amendments to s.13 and their implications for tax planning. We shall briefly look at the proposed new information disclosure duty placed on non domiciled settlors. Finally, I shall examine a letter from the Acting Head of HMRC of the 12th February 2008 "clarifying" the Government's intentions in relation to this proposed legislation.

SECTION II

THE CHANGES IN CONTEXT

INTRODUCTION

2.1.1 These are interesting times in capital taxation planning. The proposed changes to Capital Gains Tax which we are discussing today are introduced in a wider context of revolutionary change in the tax system.

2.1.2 In order to raise revenue without raising headline rates of tax or introducing new taxes, the Government has attempted to squeeze more revenue out of essentially the same taxes and tax rates. In order to do that it has created ever more complex taxing provisions and has responded to the resultant development of new tax planning techniques with a ferocious attack on tax planning. That has seen the introduction of the disclosure provisions and a campaign of vilification by senior civil servants and ministers of those who advise in this area. Whilst excoriating tax planning HMRC have developed ever more artificial approaches to tax collection, such as the decision to pursue family businesses in the *Artic Systems* case and subsequently producing the draft income shifting legislation. It has been particularly disturbing to see HMRC introducing legislation which is so poorly and widely drafted that it can only be made to work by the use of what are, in reality, extra statutory concessions masquerading as Revenue guidance.

2.1.3 Finally, HMRC are now making an attempt to introduce selective, purposive tax legislation under the guise of "principles based anti-avoidance legislation."

IRONY UPON IRONY

2.2.1 The package of Capital Gains Tax measures which the Government proposes to introduce, as we know, was not introduced because the Government wanted to reform Capital Gains Tax. It was the result of newspaper agitation on the taxation of private equity firms and of proposals emanating from the Conservative party.

2.2.2 As such, it is rich in irony.

2.2.3 Over the last ten years the Labour Government has been conservative, with a small c, in resisting pressure to reform the remittance basis on the pragmatic grounds that it has worked to the economy's advantage. The Conservative party, manoeuvred them into a position where they had to be seen to be taking action. Having done so, however, they have not taken a minimalist route. They have taken the opportunity to launch yet another attack on offshore trust and companies and, in line with their modern practice, have produced legislation of extraordinary breadth which inevitably contains many anomalies some of which will only emerge over the coming months.

2.2.4 In a final irony, it appears that one result of the proposals will be to stimulate the use of offshore companies by resident and domiciled individuals.

SECTION III

THE OFFSHORE SETTLOR CHARGE – TCGA 1992 SECTION 86

3.1.1 The taxation of offshore trusts and companies builds on the changes to the remittance basis which were examined by Claire Maurice in the preceding lecture.

3.1.2 Currently, one of the conditions for the application of the Offshore Settlor Charge imposed by TCGA 1992 s.86 to a settlement in a fiscal year is that:-

> "… a person who is a settlor in relation to the settlement ("the Settlor") is domiciled in the United Kingdom at some time in the year and is either resident in the United Kingdom during any part of the year or ordinarily resident in the United Kingdom during the year …"

3.1.3 New Schedule para 66 deletes the words "… domiciled in the United Kingdom at some time in the year and is either …" with the result that s.86 will now apply to attribute the gains of non-resident settlements to the settlor even in fiscal years in which the settlor is not domiciled in a country of the United Kingdom at any time during the year.

3.1.4 The amendments to s.86 are to "… have effect for the tax year 2008/2009 and subsequent tax years".[2]

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[2] New Schedule para 71

3.1.5 So, the change will apply to gains arising on non resident trustees as from the 6th April.

3.1.6 If that was all the Government had done, however, non domicillaries subject to the Offshore Settlor Charge would be in a considerably worse position than if they held their assets directly. For that reason a new paragraph is added to TCGA 1992 Schedule 5 (which contains detailed provisions in relation to the Offshore Settlor Charge) to create a remittance basis for the purpose of that charge. Doing so is not a simple matter. Under s.86 a calculation is made of the gains on which the trustees would have been chargeable to Capital Gains Tax had they been resident or ordinarily resident during the fiscal year. These gains are not directly allocated to the beneficiaries. Rather:-

> "chargeable gains of an amount equal to [the Computed Amount] shall be treated as accruing to the settlor in the year …"

3.1.7 It is therefore necessary to provide a mechanism to relate this purely arithmetical, imputed amount to the gains of the trustees by reference to which it is computed. As part of creating the new remittance charge on individuals, TCGA 1992 s.12 is to be repealed and replaced by a new section which utilises the phrase "foreign chargeable gains" which are defined as chargeable gains accruing upon the disposal of an asset which is situated outside the United Kingdom.

3.1.8 New TCGA 1992 Sch 5 para 5A(2) treats the deemed chargeable gains accruing to the Settlor under s.86 as foreign chargeable gains to the extent that a Computed Amount is attributable to disposals of settled property situated outside the United Kingdom ("Relevant Disposals"). It is then necessary to provide a link between the Computed Amount and the consideration received by the trustees on the disposals by reference to which the Computed Amount is calculated so as to apply to the extended definition of a remittance under New ITA 2007 ss.809G - 809L. This is done by treating the consideration for the Relevant Disposals as deriving from so much of the deemed chargeable gains under s.86 as are deemed to be foreign chargeable gains.

3.1.9 As you have seen earlier today the new remittance rules contain special provisions where foreign chargeable gains accrue to an individual on the disposal of an asset at less than market value. In that case, the asset itself on which the gain arises is treated as deriving from the gains which arise on its disposal.[3]

3.1.10 A matching rule is made for s.86 purposes.[4] If the trustees do not receive consideration for a Relevant Disposal of an amount equal to the market value of the subject of the disposal, that settled property is treated as deriving from so much of the deemed chargeable gains arising by virtue of the disposal as are foreign chargeable gains. An example may help.

3 New ITA 2007 s.809L
4 New Sch 5 para 5A(7)

3.1.11 **Example**

Chimp Twist is resident but not domiciled in the United Kingdom. Many years ago he made the Twist Settlement[5] of which he is a discretionary beneficial object. The trust property consisted of an apartment in the Bronx (the "Bronx Apartment") and the entire issued share capital of Twist Worldwide Enterprises Inc ("Worldwide").

The Bronx Apartment

On the 30th April 2008 the trustees disposed of the Bronx Apartment (the "Bronx Disposal"), receiving proceeds of a sterling equivalent of £2,000,000 and realising a gain of £1,000,000. The trustees used £25,000 of the proceeds to pay the outstanding fees of their UK tax adviser for advice rendered at a series of meetings which took place in the UK.

The disposal of the Bronx Apartment took place in the tax year 2008/2009 so that the amendments in the New Schedule applied in relation to it. Therefore under s.86(4), subject to the special remittance rules, gains equal to the gains on which the trustees would have been chargeable had they been UK resident, were deemed to accrue to Mr Twist in 2008/2009.

To the extent that that amount was attributable to the Bronx Disposal it is foreign chargeable gains. So Mr Twist has foreign deemed chargeable gains by

[5] All settlements and companies referred to in any of the examples in this lecture are resident and in the case of companies, are incorporated in a tax haven country unless otherwise stated

reference to the Bronx Disposal of £1,000,000. Under New TCGA 1992 s.12 those foreign deemed chargeable gains are treated as accruing to Mr Twist in any tax year in which they are remitted to the UK.

As an aside one should note that there doesn't seem to be a provision that the gains are not treated as accruing in the year in which they arise.

The consideration for the disposal of the Bronx apartment is treated (by New Sch 5 para 5A(3)) as deriving from the Bronx gain.

For the purposes of the new remittance rules Mr Twist and the trustees are connected.[6] The trustees are therefore a relevant person for the purposes of the remittance rules.[7] Remittance Condition A is satisfied because the UK tax adviser has provided a service in the United Kingdom for the benefit of a relevant person, the trustees.[8] Remittance Condition B is also satisfied because something, the money in the trustees' bank account, which derives from the chargeable gains, has been used "outside the United Kingdom to satisfy a debt which is in respect of the service".

Mr Twist is therefore treated as having remitted £25,000 of the foreign deemed chargeable gains arising by reference to the Bronx Disposal.

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[6] New ITA 2007 s.993(3)(a)
[7] New ITA 2007 s.809H(4)
[8] New ITA 2007 s.809H(2)(b)

The Painting

Worldwide owned a painting which it had brought for £1,000,000 and which it sold to Soapy Malloy for £2,000,000. The directors did not realise when they sold the painting that it had a market value of £2,250,000. Having bought the picture, Mr Malloy sent it to the UK to hang in his Knightsbridge flat. Mr Malloy and Mr Twist's sister lived together 'as husband and wife'.

An amount is included in Mr Twist's foreign chargeable gains by virtue of Worldwide's disposal of the painting.

Section 18 deems transactions with connected persons to be treated as not taking place under a bargain made at arms length and therefore as taking place at market value by virtue of s.17. The relevant definition of connected persons, here, is that given by TCGA 1992 s. 286. Mr Malloy and Worldwide are not connected persons under this test and therefore the gain on Worldwide's disposal is £1,000,000 (£2,000,000 - £1,000,000). This gain forms an element in computing Mr Twist's Computed Amount.

Mr Malloy is a person connected with Mr Twist for the purposes of the remittance rules because for the purposes of those rules "a man or woman living together as husband and wife are treated as if they were married to each other"[9] so Mr Malloy is treated as if he were the spouse of Mr Twist's sister. Under ITA 2007 s.993 a person

[9] New ITA 2007 s.809H(5)(a)

is connected with the spouse of his relative and for this purpose a relative includes a sister.[10] Mr Malloy is therefore a relevant person in relation to Mr Twist.

Property (the "Picture") has been brought to the UK for the benefit of Mr Malloy so that Remittance Condition A is satisfied. Because the company did not receive consideration for its disposal of the picture of an amount equal to its market value the picture is treated as deriving from the foreign chargeable gains arising in respect of its disposal.[11] So Remittance Condition B is satisfied because the Painting derives from the chargeable gains on its disposal.[12] Where the property derives from the chargeable gains, the amount remitted is equal to the amount of chargeable gains from which it derives.[13] So Mr Twist is treated as having remitted £1,000,000 of his Computed Amount by reference to the gain on the Painting.

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[10] ITA 2007 s.994(1)
[11] New `TCGA 1992 Schedule 5 para 5A(7)
[12] New ITA 2007 s.809H(3)(b)
[13] New ITA 2007 s.809I(3)

SECTION IV

THE CAPITAL PAYMENTS CHARGE: TCGA 1992 SECTION 87

4.1.1 The Capital Payments Charge imposed by TCGA 1992 s.87 deems gains to arise to beneficiaries who receive capital payments which are matched with trust gains of the trustees. Until 1998/1999 the capital payments charge did not apply in a fiscal year in which a settlor was not both domiciled and either resident or ordinarily resident in the United Kingdom. Thereafter, this exclusion did not apply.

4.1.2 A beneficiary is not charged to tax on chargeable gains treated as accruing to him under the capital payments charge in any year unless he is domiciled in the UK sometime in that year.[14] This non-domiciled beneficiary exemption is repealed by New Schedule para 72 of the draft schedule. A new subsection (9A) is inserted into s.87 providing that a chargeable gain treated under the Capital Payments Charge as accruing to a beneficiary is not a foreign chargeable gain within the meaning of s.12.

4.1.3 So not only will capital payments made to non domiciled beneficiaries now trigger charges under s.87 but there is no remittance basis provided for s.87 gains.

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[14] TCGA 1992 s.87(7)

4.1.4 These amendments of s.87 have effect for the tax year 2008/2009 and subsequent years.[15] Under the Capital Payments Charge the trust gains for a year are the aggregate of the gains on which the trustees would have been chargeable in that year had they been UK resident and of the gains of previous years to the extent that they have not been matched with capital payments. The trust gains are matched with capital payments of the year or of previous years to the extent that those capital payments have not already been matched with trust gains. The result is that the trust gains of 2008/2009 and future years may be calculated by reference to the gains of previous years and the capital payments with which they are matched may have arisen in previous years. It is possible, therefore, that gains will arise under the amended provisions by reference to events which took place many years ago.

4.1.5 **Example**

Mr Twist is a discretionary beneficiary of two settlements.

The Uncle Bert Settlement

The first was made by his uncle on the 5th April 1984 at which time his uncle was resident and domiciled in the United Kingdom. The trustees realised a gain of £2,000,000 in the tax year 1984/1985. His uncle died on the 30th June 1986. The trustees made no capital payments until the 6th April 2008 when they made an interest free loan to Mr Twist of £10,000,000. A market rate of interest on such a loan would have been 5%.

[15] New Schedule para 75

The settlement was within s.87 in 1984/1985 because the settlor was resident and domiciled in the United Kingdom at the time it was made. It continued to be within s.87 thereafter, in spite of the settlor's death, because it satisfied the condition that:-

> "… one of the settlors is, at any time during that year, *or was when he made his settlement* [emphasis added] domiciled and either resident or ordinarily resident in the United Kingdom."

The trust gains in 1984/1985 were therefore £2,000,000. Those trust gains were not matched with any capital payments up to and including the fiscal year 2006/2007. In 2007/2008 the trust gains were therefore £2,000,000.

The provision of an interest free loan to Mr Twist was a capital payment because it conferred a benefit on Mr Twist and the measure of that capital payment was the value of the benefit conferred by it. In calculating that benefit one would consider the interest which would have been paid by Mr Twist if he had raised the loan commercially.[16]

As from the 6th April 2008, therefore, Mr Twist will receive capital payments from the trustees of £500,000 per annum until the loan is called in or otherwise extinguished or reduced. Those capital payments will be matched with the trust gains which are calculated by reference to the gains in 1984/1985.

[16] *Cooper v Billingham; Fisher v Edwards*, CA 2001 74 TC 139; [2001] STC 1177

The Twist Senior Settlement

He is also a beneficiary of a settlement, the Twist Senior Settlement, made by his father who was neither domiciled nor resident in the United Kingdom at any time. The settlement was made on the 6th April 1998 and the settled property was a holiday property in the Bahamas. The trustees immediately resolved to allow Mr Twist exclusive occupation of the property and this situation continued until the 30th June 2008 when the property was sold resulting in a capital gain of £5,000,000. A market rental of the property would have been £250,000 per annum.

Because the provision of exclusive occupation of the Bermuda property was a benefit, Mr Twist received capital payments from the trustees in every tax year from 1998/1999 onwards. The measure of those capital payments was the market rent which could have been charged for exclusive occupation of the property and was therefore £250,000 per year. The trust gains of 2008/2009 of £5,000,000 were matched with the capital payments of that year (£250,000) and the unmatched capital payments of previous years (£2,250,000) (9 x £250,000). Mr Twist was therefore deemed to realise capital gains of £2,500,000 (£250,000 + £2,250,000) by virtue of a situation which had been in existence since the 6th April 1998.

SECTION V

THE INTRODUCTION OF OSSHORE SETTLOR AND CAPITAL PAYMENTS CHARGE

5.1.1 It will often be the case that the offshore settlor charge and the capital payments charge will both apply to a non resident settlement in relation to the same fiscal year. The existing legislation deals with that by providing that, where in the same year of assessment chargeable gains are treated as accruing under the Offshore Settlor Charge the trust gains of the settlement for the same year under the Capital Payments Charge are reduced by the amount treated as accruing under the Offshore Settlor Charge.[17] Because the remittance basis applies to gains under s.86 and not gains under s.87 and because gains and capital payments under s.87 can be taken into account in years other than the years in which they arise, the proposed changes necessitate a more complicated set of rules to deal with the interaction of ss.86 and 87.

5.1.2 The rules apply for a tax year where some of the gains accruing to a person under s.86 are foreign deemed chargeable gains and the remittance basis applies to the settlor for the relevant tax year.

5.1.3 If the capital payments charge applies to the settlement for the relevant tax year or any subsequent tax year, the trust gains under that charge are increased by an amount equal to:-

[17] TCGA 1992 s.87(3)

FDCG – RA

Where –

FDCG is the amount of foreign deemed chargeable gains, and

RA is the total amount of those gains that have been remitted to the United Kingdom in the tax year or any earlier tax year.[18]

5.1.4 As we have seen, any gains which are charged under s.86 are deducted in computing trust gains for the purposes of s.87 so without this further provision gains which were deemed to accrue under s.86 but which were not chargeable because they had not been remitted would have been excluded from the s.87 charge. The purpose of this provision is to add them back to the computation of s.87 trust gains.

5.1.5 Where there is an add back under this provision, the foreign deemed chargeable gains of subsequent years are reduced by the add back.

5.1.6 The interaction of ss.86 and 87 can bring different gains into charge by reference to the same event as the following example shows.

5.1.7 **Example**

Mr A is not domiciled in the United Kingdom. He made an election for the remittance basis to apply in 2008/2009 and all succeeding years. He had settled a non-resident trust of which he was a beneficiary in 1999/2000 and the

[18] New TCGA 1992 Sch 5 para 5B(2)

trustees had made a gain of £1,000,000 in that year. No other transactions took place until 2008/2009 when the trustees made a further gain on a foreign situs asset. In 2009/2010 the trustees made a capital advance of £1,000,000 to Mr A in the UK.

The gains realised in 1999/2000 were not treated as accruing under s.86 but they were trust gains for the purposes of s.87.

An amount equal to the gains realised in 2008/2009 were deemed accrue to Mr A in that year under s.86. That amount of deemed chargeable gains were foreign chargeable gains and so, not having been remitted in 2008/2009, Mr A was not chargeable in respect of them.

The trust gains in that year would, under s.87(2), have included the gains of previous years of £2,000,000 (£1,000,000 – £1,000,000) except that s.87(2) excluded the gain of 2008/2009 from being included in trust gains.

In that year, Schedule 5 para 5B would have added back an amount to the trust gains for 2008/2009 equal to the unremitted deemed chargeable gains.

In 2009/2010 the foreign chargeable gains which had been treated as accruing to him under s.86 were deemed to have been remitted by Mr A and so were chargeable on him.

For s.87 purposes, no addback under Schedule 5 paragraphs 5B was made to

trust gains because the gains were remitted in that year. So trust gains in 2009/2010 were £1,000,000. The result was that the trust gains of £1,000,000 were matched with the advance in 2009/2010 which was a capital payment and gains of that amount accrued to Mr A under s.87.

So it is at least arguable that the interaction of ss.86 and 87 has not resulted in double taxation. The assessment under s.86 brought into charge in 2009/2010 the gain realised by the trustees in 2008/2009. The assessment under s.87 brought into charge in 2009/2010 the gain made by the trustees in 1999/2000. But it should be noted that a single payment of £1,000,000 has caused to be brought into charge gains of £2,000,000. This, in spite of the fact that some eight years had passed between the realisation of the first gain and the publication of the draft legislation which, when enacted, brought it into charge. What is more, the tax on the gain assessed under s.87 will be increased by the supplementary charge by sixty per cent because over six years has passed between its realisation and the capital payment of which it is matched.

The CIOT has said that it assumes that this cannot be HMRC's intention but I think that it is highly unlikely that it is not. It should be noted, however, that if the trustees had accelerated the disposal in 2008/2009 and the advance in 2009/2010 to 2007/2008 the problem would largely have been avoided. The gain in 2007/2008 would not have been a gain within s.86 and although the advance to Mr A would have resulted in gains accruing to him under s.87 because of the exemption which currently exists in s.87(7) that gain would not have been chargeable. The situation would have been less favourable, had

there been a transfer of value by trustees linked to a trustee borrowing within TCGA 1992 Schedule 4B.

SECTION VI

OFFSHORE COMPANIES

INTRODUCTION

6.1.1 The attribution of the gains of non-resident companies under s.13 to participators in those companies is extended to participators who are not domiciled in the United Kingdom.[19] Previously, gains were only attributed under that section to participators who were resident or ordinarily resident and domiciled in the United Kingdom.

6.1.2 New TCGA 1992 s.14A applies where:-

(a) By virtue of s.13 part of a chargeable gain that accrues to a company on the disposal of an asset is treated as accruing to an individual in a tax year; and

(b) The individual is not domiciled in the United Kingdom in that year.[20]

6.1.3 Where those conditions are satisfied the part of the chargeable gain treated as accruing to the individual is a foreign chargeable gain and can therefore be taxable on the remittance basis. For the purposes of the new remittance rules any consideration obtained by the company on the disposal of the asset is treated as deriving from the deemed chargeable gain and if the consideration so

[19] New Schedule para 62
[20] New TCGA 1992 s.14A(1)

obtained is not equal to the market value of the asset, the asset is to be treated as deriving from the deemed chargeable gains arising on its disposal.

6.1.4 So these provisions aim to reproduce the effect of the new remittance basis rules in relation to the gains of non-resident companies.

6.1.5 Although this may be bad news for non-domicillaries, s.13 companies could continue to be useful investment holding vehicles for those who have either not opted for the remittance basis or, alternatively, have done so but will remit significant capital gains. That is because the gains of non-resident companies are calculated under Corporation Tax rules which gives an allowance for indexation but the rate of tax applicable to those gains will be the individual's rate of eighteen per cent. Thus, holding investments through a non-resident company neatly combines Corporation Tax Indexation Relief with the individual's rate of Capital Gains Tax.

6.1.6 This advantage does not depend upon the participator being a non-domiciliary. It applies as well to UK domicillaries. The advantage also applies where gains arise within a non-resident company held in an offshore trust.

RESTRICTION ON RELIEFS

Losses

6.2.1 Where gains are treated under s.13 as accruing to an individual who is not domiciled in the United Kingdom there are two restrictions on reliefs which

would otherwise be provided by s.13. Section 13(8) allows losses arising in a non-resident company to be apportioned to participators for the purposes of reducing gains allocated under s.13 in respect of the same fiscal year. Where, however, a gain becomes chargeable by virtue of being remitted in a year later than the year in which it arises, losses arising in the offshore company in the year of remittance cannot be set off. Nor will any losses arising in the year of the disposal be set off in determining the amount of the gain. That is because s.13(8) works not by setting the loss off against the gains of the company in determining the amount of a gain which is allocated to the individual, but rather by allocating both the gains and the loss to the individual (but only for the purposes of relieving section 13 gains of the same year) and allowing the set off at the level of the individual. TCGA 1992 s.12(2) deems chargeable gains in respect of foreign chargeable gains where the remittance basis applies to accrue at the time of remittance and not at the time of the disposal which gives rise to them.[21]

6.2.2 That is a very significant disadvantage in comparing the effects of the application of the remittance basis with being taxed on an arising basis. It shows, that a decision to make the remittance election will never be a simple one and will require detailed predictions of future events to be made.

Credit for Tax Paid

6.2.3 The second disadvantage under s.13 applies where the participator is not domiciled in the United Kingdom even if he is fully taxable on an arising basis.

[21] At least, that seems to be the intention of the legislation, although read literally it actually seems to give rise to a double charge

Were it not for the provisions of ss.13(5A) and 13(7) the s.13 charge would lead to double taxation; a charge on the attribution of the gain to the participator and a charge on the participator when he disposes of the shares in the offshore company. That of course mirrors the situation of a UK resident holding assets through a UK resident company but at the time that s.13 was enacted it was thought inappropriate. Section 13(5A), as subsequently amended, provides a credit for the tax suffered under s.13 against the UK tax charged on a subsequent distribution in respect of the capital gain made within three years of the end of the period in which the gain is made.

6.2.4 To the extent that the tax has not been credited in this way, s.13(7) allows the tax to be treated as a deduction in the computation of a gain accruing on the disposal by the participator of any asset representing his interest in the company.

6.2.5 Section 13(5A) can apply to gains allocated under s.13 to non-domicillaries but s.13(7) cannot. It is difficult to understand why it should not but it is particularly outrageous that it should not apply to a non-domiciliary fully taxable on the arising basis.

SECTION VII

COMPLIANCE

7.1.1 TCGA 1992 Schedule 5A imposes various duties of disclosure in relation to non resident settlements. Paragraph 2 of that Schedule imposes a duty on settlors to provide certain information about a settlement within two months of creating it. These provisions only apply if, at the time the settlement is created, the settlor is domiciled in the United Kingdom and is either a resident or ordinarily resident here. Paragraph 2 applies only to settlements created on or after the 3rd May 1996.

7.1.2 In relation to settlements made on or after the 6th April 2008 the duty will fall on settlors who are resident or ordinarily resident in the United Kingdom regardless of whether or not they are domiciled here.[22]

7.1.3 Schedule 5A also contains information provisions relating to settlements created before the 17th March 1998. Paragraph 1 requires information to be provided by a person who transfers property to the trustees otherwise than under a transaction entered into at arms length. There is no exclusion for non domiciled transferors.

7.1.4 A non domiciled settlor who made a settlement between the 3rd May 1994 and the 17th March 1998 would not have had to have made a return in relation to his creation of the settlement but he would have had to make a return of any

[22] New TCGA 1992 Sch 5A para 2

additions to the settlement. If he made the settlement after the 17th March 1998 but before 6th April 2008, however, he would neither have been required to make a return of the making of the settlement nor of the additions.

7.1.5 If he makes the settlement on or after 6th April 2008 he must make a return of the creation of the settlement but not of any addition to it.

SECTION VIII

A STRANGE CORRESPONDENCE

INTRODUCTION

8.1.1 HMRC's concern for the standard of its written English is very different from that of previous generations. Two and a half centuries ago the Secretary to the Commissioners of Excise wrote the following to the Supervisor of Pontefract:-

> "The Commissioners, on perusal of your Diary observe that you make use of many affected phrases and incongruous words … all of which you use in the sense that the words do not bear. I am ordered to acquaint you that if you hereafter continue that affected and schoolboy way of writing and to murder the language in such a manner, you will be discharged for a fool."

8.1.2 On the 12th February 2008 STEP and the CIOT received a very strange document. It was in the form of a letter and yet there was no salutation and no valediction. There was, however, a name at the end of the letter; 'Dave' Hartnett and floating near the top left hand corner was the phrase "Key Stakeholder". In the top right hand corner 'Dave' Hartnett is described as 'Acting Chairman' although of what he is Acting Chairman is not stated. Presumably the reader is to infer he is the Acting Chairman of HM Revenue and Customs, the logo of which appears on the document although not as part of the sender's address.

8.1.3 This strange document began by stating:-

> "The Government's consultation on changes to the tax rules on residence and domicile closes on the 28th February. In the meantime, there are 4 [sic] issues that have been raised, where I want to make clear what the Government's intention has always been and how it will be set out in the legislation to be brought forward."

8.1.4 As you will see from the copy which is included with your lecture notes, the letter goes on to say:-

> "The consultation process will run to the 20th February. However, I want to make clear that the Government's intention – which will be set out in the legislation to be brought forward – has always been to ensure that:
>
> - those using the remittance basis will not be required to make any additional disclosures about their income and gains arising abroad. So long as they declare their remittances to the UK and pay UK tax on them, they will not be required to disclose information on the source of the remittances;
> - there will be no retrospection in the treatment of trusts and the tax changes will not apply to gains accrued or realised prior to the changes coming into effect;
> - money brought into the UK to pay the £30,000 charge will not itself be taxable; and
> - it will continue to be possible to bring art works into the UK for public display without incurring a charge to tax.

> In addition, we will continue to discuss with the US authorities how the £30,000 charge can become creditable against US tax."

8.1.5 It is difficult to see how one is to understand this. If we take the second to last bullet point, for example, HMRC had published FAQs on the draft legislation which contained the following question and answer:-

> "If I remit £30,000 to the UK in order to pay the additional tax charge but I remit no other money, will I have to pay tax on the £30,000 when I remit it?
>
> The £30,000 is in addition to any tax due on foreign income and gains remitted to the UK. It is up to the taxpayer whether they wish to pay the £30,000 charge by remitting money to the UK."

8.1.6 It would have been breathtaking incompetence for a Government which intended specifically to exempt income from charge in these circumstances to put out FAQs which specifically said the opposite. However low an opinion one may have of the competence of the civil service it is difficult to believe it could be as incompetent as that.

8.1.7 Of course, we all know that these 'clarifications' were reversals of the Government's intentions made in the face of public criticism. I cannot recall a previous occasion on which a Chairman of HMRC has allowed his name to be put to such blatantly political material as this.

8.1.8 One may ask how useful the ‘clarifications’ are when one is formulating a tax planning strategy?

THE FIRST ‘CLARIFICATION’

8.2.1 The first ‘clarification’ appears to relate to individual taxpayers and certainly cannot be read as implying that the additional disclosure provisions in relation to offshore trusts will not be introduced. It is of course highly unlikely to be true. Without making an enquiry into a non-domiciled taxpayer’s worldwide affairs HMRC could not determine whether or not he had declared all of his remittances and paid UK tax on them. HMRC is surely not going to give up its powers of enquiry so that it must simply accept the return at face value.

THE SECOND ‘CLARIFICATION’

8.3.1 What about the second ‘clarification’ in relation to retrospection in the treatment of trusts? Of course, retrospection is not a precise word. The Government often disagrees with professionals as to whether a provision is retrospective or not, but even if that were not the case, what are “gains accrued or realised prior to the changes coming into effect.”

8.3.2 I have shown, for example, that the draft legislation will bring into charge under s.87, amounts calculated by reference to gains realised many years ago. But the term “realised” is not one which is used in the legislation. The term “accrued” is so used but s.87 provides that “the trust gains for a year of assessment shall be

treated as chargeable gains accruing in that year ...” so it is arguable that the effect of s.87 is that the gains accrue not in a previous year but in the year in which the legislation takes effect in accordance with the alterations.

8.3.3 So whether this statement deals with the problems that we have identified will not become clear until we see draft legislation giving effect to it. That is unlikely to be before Budget Day.

THE THIRD ‘CLARIFICATION’

8.4.1 The third ‘clarification’ as we have seen, directly contradicts the position set out in the Frequently Asked Questions which HMRC have published. It seems an unequivocal statement and so may presage a real change.

THE FOURTH ‘CLARIFICATION’

8.5.1 The final ‘clarification’ may be artfully worded. Of course it will be possible to bring art works into the UK for public display without incurring a charge to tax but it will also be possible under the proposed new legislation to incur a charge to tax by bringing art works into the country because doing so will represent a remittance within the remittance rules. As the rules are currently drafted, not every work of art brought to the country will represent a remittance of income or gains but some will.