Meeting points

Tax planning for non domiciliaries

IBC conference, 26 November 2008

Speakers:
Giles Clarke: Author of *Offshore Tax Planning 15th Edition*
Simon Jennings: Partner, Rawlinson and Hunter
Emma Chamberlain: Barrister, 5 Stone Buildings
Arabella Saker: Partner, Allen & Overy
Dougal Powrie: Technical Director, One E Tax Ltd
Neil Manalay: Director, Barclays Wealth Advisor

OIGs and the transfer of assets

For the purposes of the transfer of assets code (TA 1988, s 762ZA(1)), offshore income gains (OIGs) are deemed to be the income of the trust, noted **Giles Clarke**. In the absence of any provision to the contrary, the primary and secondary rules would result in many OIGs being taxed twice. So rules are provided to deal with these situations.

(1) An OIG matched with a capital payment under the primary rule cannot be income under the secondary rule in and after the year of matching provided that the recipient of the capital payment is UK resident in the year of matching. This is the effect of s 762ZA(5).
(2) Assuming s 762ZA(5) is not in point, the OIG amount is reduced by any amount of income treated as arising under the transfer of assets code (s 762ZA(6)) and takes effect in and after the following tax year.

Transfer of assets

Giles Clarke explained that ITA 2007, ss 726 and 730 go no further than deeming the actual income of the person abroad to be derived from the deemed income of the transferor.

Where a gap appears to exist is if the person abroad makes a gift outside the UK of the income, whether to a trust, a company, or to the transferor or another individual. When this happens, the income is capital in the hands of the donee. It is plainly derived from the actual income, but here the point arises that only the actual income of the person abroad is deemed to be derived from the transferor's deemed income. If right, there is a gap in that a remittance charge may be avoided by transferring the actual income to another party prior to remittance. Indeed, on one view, the gap would still exist if that other party is the transferor himself for, if the analysis above is right, what in those circumstances would be in his hands would be neither the income of the person abroad nor anything derived from his deemed income.

Remittance and inadvertent routing

Simon Jennings considered various aspects of the new meaning of 'remittance'. He noted that Condition A in ITA 2007, s 809L is satisfied if:

(a) money or other property is brought to, or received or used in, the UK by or for the benefit of a relevant person; or
(b) a service is provided in the UK to or for the benefit of a relevant person.

Simon pointed out that it was quite easy for assets to be routed through the UK without the owner knowing that that has happened. He gave the example of where a specialty debt was to be created under British Virgin Islands law and the instrument was to be kept in the British Virgin Islands. For various reasons it was only practical for it to be signed in Switzerland and so it was necessary to make arrangements for it to be transported to the British Virgin Islands from there. The parties had attempted to send it by a well-known courier, but the courier would not accept any instruction which included a routing instruction nor would they confirm the route which would be used.

The parties decided that they could not take the risk of sending the document by courier because it might have been sent via London and therefore satisfied Condition A. The bringing of the specialty debt into the UK would not have been exempt under the temporary importation rule in ITA 2007, s 809(Z)(4). That rule applies only to property and for this purpose (but not for the remittance rules generally) property does not include money (ITA 2007, s 809Z6(2)). Money for this purpose includes any 'instrument that is evidence of a debt' (s 809Z6(3)(d)(i))'.

BBA correspondence

Simon Jennings mentioned that in recent correspondence with the British Bankers' Association (BBA), HMRC had given it as their opinion that where a payment is made from a foreign bank account in sterling it will always clear through a UK bank. HMRC went on to say, however, that this would not constitute a remittance because at the point at which the money clears through the UK it is owned by the clearing bank and not by the payer or payee.

Determining situs

Simon Jennings pointed out that the deemed situs rules of TCGA 1992, s 275 to s 275C, apply for the purposes of the provisions in ITA 2007, s 809W, but not for the remittance rules generally where situs will be based on established case law.

The new regime and trusts

With regards to the new capital gains tax regime and trusts, **Emma Chamberlain** pointed out that a non-UK domiciled beneficiary who claims the remittance basis will be liable to capital gains tax only if the capital payment is remitted to, or a benefit is received in, the UK. The situs of the assets on which the trust gains are realised is irrelevant in contrast to the position for settlement income or for personal gains.

Capital payments pre-6 April 2008

Capital payments made to non-UK domiciliaries before 6 April 2008 are not taxed even if matched to post-5 April 2008 gains and irrespective of whether the beneficiaries are remittance basis users explained **Emma Chamberlain**. However, to the extent that capital payments remain unmatched and the trust then realises the gains at a time when the relevant beneficiary is UK domiciled and resident, the beneficiary can be taxed. (Emma gave three useful examples, which can be found on the website version of this article.)

The overall result is that for some time to come, particularly given current economic conditions, foreign domiciles are unlikely to pay significant tax under s 87 because most gains to which capital payments are matched will either have been realised or accrued prior to 6 April 2008.

Death of a qualifying IIP beneficiary

Emma Chamberlain pointed out that unrealised gains are still effectively wiped out on the death of a qualifying interest in possession beneficiary. This may not always be advantageous if the death wipes out unrealised pre-April 2008 gains and there are UK-resident foreign domiciled beneficiaries who are likely to receive future capital payments. (There is an example on the website version of this article.)

If the trust has UK domiciled beneficiaries, however, they are likely to be better off if less trust gains are realised.

Matching gains and capital payments

In relation to the capital payments charge under TCGA 1992, s 87 and following, **Emma Chamberlain** commented that the timing of matching is not only important in determining rates. It is the domicile and residence of the beneficiary at the date of matching that determines chargeability.

If a number of payments are made to different beneficiaries, it is important to know which gains are matched to which payments. The surcharge also depends on the time gap between the date gains are realised and the time they are matched.

Note that the surcharge applies by reference to the year of capital payment, not by reference to the year of remittance.

Surplus capital payments

If, after matching to all trust gains, there is still an unmatched capital payment, then the surplus capital payment is carried forward to be matched against future gains, said **Emma Chamberlain**. However, if in future years there is a capital payment, that later capital payment is matched first to future gains before any carried forward capital payment. This can provide opportunities for planning.

(There is an example on the *Taxation* website version of this article at taxation.co.uk.)

The £30,000 charge

Arabella Saker explained that under ITA 2007, s 809B, money that is brought into the UK by way of one or more direct payments to the Commissioners is treated as not remitted to the UK if the payments are made in relation to a tax year in which the remittance basis charge applies to the extent that payments do not exceed £30,000.

One could use, for this purpose, the income and/or gains nominated under s 809C without falling foul of the deemed remittance rules in ss 809I and 809J because the effect of the exemption is that the funds remitted are treated as not having been remitted.

Providing protection from UK IHT

Dougal Powrie pointed out that under some double tax treaties where domicile, as determined under the treaty, is outside the UK no account has to be taken of non-UK situated property. This applies to the treaties with France, Italy, India and Pakistan even though India has no effective inheritance tax and Pakistan has no tax on the estate at death.

Editorial note:
A longer version of these meeting points is on the *Taxation* website at www.taxation.co.uk.