

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

CHANGES TO THE TRANSFER OF ASSETS ABROAD CODE AND SECTION 13 TCGA 1992

Rory Mullan

These notes were prepared for a seminar hosted by Tax Chambers, 15 Old Square on 27 February 2012. They contain a discussion of the draft Finance Bill clauses published at that time.

1. It has long been acknowledged by practitioners that the anti-avoidance provisions contained in the transfer of assets abroad code (“the TOAA provisions”) and section 13 TCGA 1992 are not compatible with established principles of EU law. It was therefore not surprising that the European Commission commenced infringement proceedings against the UK in relation to these provisions under Article 258 TFEU, announcing on 24 October 2012 that the matter would be referred to the CJEU (the last stage in the infringement proceedings).
2. The response of the UK has been to announce a series of changes to both sets of provisions (effective from 5 April 2012) the aim of which appears to be to make the provisions compliant with EU law. The most recent version of the proposed changes were published on 11 December 2012.
3. The changes are in one sense cosmetic. The improvement in the position of a UK taxpayer is largely procedural (although even that improvement in position has been lessened by the latest amendments). UK taxpayers are able to rely on rights derived from EU law before UK Courts regardless of change in the terms of the legislation (indeed the incompatibility of the TOAA charge on transferors with EU law has recently been argued before the FTT: *Fisher v HMRC TC/2010/07613*).
4. At the same time as introducing changes to make the legislation more compliant with EU law, there have been a number of further changes introduced to the TOAA provisions as well.
5. Firstly, a change has been introduced which would appear to be intended to meet the argument that treaty relief under a suitable double taxation agreement is available in respect of income chargeable under the TOAA transferor provisions. An amendment has been proposed which is intended to treat the chargeable income as a notional sum so that applying the approach in *Bricom Holdings v IRC* [1997] STC 1179 treaty relief will not be available in respect of it.
6. Secondly, matching rules are introduced in relation to the charge on non-transferors. At the same time, that charge is extended in scope to cover income which the recipient of a benefit can never receive.

An overview of EU law issues

7. As a major reason behind the proposed changes to the TOAA provisions and section 13 TCGA 1992 is to ensure that they comply with the UK's obligations under the EU Treaties, it is useful to consider the relevant principles of EU law which the changes are supposed to be giving effect to.
8. The basic principle as regards direct tax is that although direct taxation falls within the individual competence of each Member State of the EU, that competence must be exercised in

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

compliance with EU law and in particular with the freedoms of movement laid down in the EU treaties¹.

9. UK tax legislation will be contrary to EU law if it has the consequence of discriminating on grounds of nationality or otherwise restricting the exercise of a right guaranteed under EU law. For legislation to be regarded a restriction on freedom of establishment, it is not necessary that it in fact restrict the exercise of the right of establishment but merely that it is capable of doing so². An unfavourable difference in treatment by reference to whether or not a person has exercised the right of establishment will demonstrate a restriction on the exercise of that right.
10. Where a tax provision prohibits, impedes or renders less attractive the exercise of a freedom of movement will be unenforceable as against a tax payer exercising EU law rights³, unless that provision
 - a) can be justified as pursuing a legitimate objective compatible with the EU treaties or is otherwise justifiable by overriding reasons in the public interest⁴ and
 - b) it can be shown that the provision is a proportionate means of achieving the justification in a), in that it is both appropriate to achieving its aim and that it does not go further than necessary in so doing⁵.
11. Maintaining tax revenues is neither among the objectives stated in the Treaty nor an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the Treaty⁶. As such restrictive tax measure cannot be justified on the ground that a Member State's tax revenue would be reduced, unless it can be shown that the purpose and effect of the provision is to prevent activities carried out in the Member State escaping the charge to tax (in which case the measure will still need to be proportionate).

The right of establishment and free movement of capital

12. The freedoms of movement which are most relevant in the context of the TOAA provisions and section 13 TCGA 1992 are the right of establishment (Article 49 TFEU) and the free movement of capital (Article 63 TFEU). Certainly, it is these freedoms which are referred to by the European Commission in its press releases concerning the infringement proceedings.

The right of establishment.

13. The right to freedom of establishment is contained in article 49 TFEU which provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-

¹ C-337/08 *X Holding BV v Staatssecretaris van Financiën* [2010] STC 941 at paragraph 16

² C 311/08 *Société de Gestion Industrielle SA (SGI) v État belge* at paragraph 50

³ C 311/08 *Société de Gestion Industrielle (SGI) v État belge* at paragraph 50 and 51

⁴ C 318/07 *Persche v Finanzamt Lüdenscheid* [2009] STC 586 at paragraph 41

⁵ C 524/04 *Test Claimants in the Thin Cap Group Litigation v IRC* [2007] STC 906 at paragraphs 82 and 83

⁶ C 318/07 *Persche v Finanzamt Lüdenscheid* [2009] STC 586 at paragraph 36

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

14. The right confers on both individuals and companies the right to participate on a stable and continuing basis in the economic life of another Member State⁷.
15. The approach to construction of EU legislation is different to that which applies considering UK legislation. In that context it is necessary to apply what has been described as a teleological approach which requires the relevant provision of EU law to be placed in its relevant context and interpreted in light of the provisions of EU law as a whole (*H P Bulmer Ltd and another v J Bollinger SA and others* [1974] Ch 401 at 425/6).
16. Adopting this approach, the CJEU has interpreted Article 49 TFEU in a manner which extends beyond its literal scope⁸:

“Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58. As the Commission rightly observed, the rights guaranteed by Article 52 et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State”.

17. This has the important consequence that UK nationals seeking to exercise the right can rely upon it as against the UK.

Free movement of capital.

18. The right to free movement of capital is contained in article 63 TFEU:
 1. *Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.*
 2. *Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.*
19. Pursuant to this right restrictions on movements of capital and/or payments are prohibited both within the EU and between Member States and third countries. Movement of capital is widely defined⁹.
20. It can be seen that this right is expanded to cover movements between Member States and third countries. Nevertheless, although the provisions concerning free movement of capital are said to apply to third countries in the same way as they apply to Member States¹⁰, that is subject to two important caveats:
 - a) The legal relations between Member States and third countries is likely to be

⁷ C 55/94 *Gebhard* at paragraph 25

⁸ C-81/87 *R v H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC* at paragraph 16

⁹ The Nomenclature contained in Annex I to Directive 88/361 gives an indication of the type of transaction which comes within the meaning of movement of capital, although it is not exhaustive (C 510.08 *Mattner* at paragraph 19).

¹⁰ C 101/05 *A* at paragraph 31

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

different to that which exists between Member States, and this can accordingly allow a Member State to justify a measure as against a third country which it could not justify as against an Member State¹¹.

- b) Measures in place on 31 December 1993 will not be disapplied to the extent that they restrict movements of capital with third countries involving direct investment (the 'standstill')¹². This will not apply where the measure has been changed to create a new restriction¹³.

Difference between residents and non-residents

21. An apparent difference between the right of free movement of capital and the right of establishment concerns Article 65(1) TFEU which provides:

1. *The provisions of Article 63 shall be without prejudice to the right of Member States:*

- (a) *to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;*
- (b) *to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.*

22. It is sometimes suggested that this Article has the consequence that the free movement of capital cannot be relied upon in the same way as the freedom of establishment, in relation to which there is no equivalent provision. That suggestion is not, however, correct. It is clear from various judgments of the CJEU that this Article is interpreted in a manner which is consistent with the reasoning which the CJEU has developed as regards discrimination in the context of other treaty freedoms¹⁴.

23. Firstly, it has been held that in so far as this provision can be said to amount to a derogation from the fundamental principle of the free movement of capital then it is to be interpreted strictly. Not all tax legislation which draws a distinction between taxpayers based on their place of residence or the Member State in which they invest their capital will automatically be compatible with the Treaty¹⁵. Rather, as in any situation where there is a difference in treatment, such difference will not be justified in circumstances where the persons treated differently are in comparable situations. That is to say, this Article does not permit discrimination on grounds of nationality.

24. This follows from the condition that a provision within Article 65(1) cannot amount to a means of arbitrary discrimination or a disguised restriction. Article 65(3) TFEU confirms this requirement:

3. *The measures and procedures referred to in paragraphs 1 and 2 shall not constitute*

¹¹ C 72/09 *Rimbaud*

¹² Article 64 TFEU and C 436/08 *Haribo*

¹³ C 446/04 *FII* at paragraph 194

¹⁴ C 319/02 *Proceedings brought by Manninen* per A.G. Kokott at paragraph 38

¹⁵ C 11/07 *Eckelkamp v Belgische Staat* at paragraph 57

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

25. Accordingly, any difference in treatment can only be justified on the basis that the different treatment concerns situations which are not objectively comparable¹⁶ or alternatively that there are overriding reasons in the general interest for such a difference in treatment¹⁷. Moreover, the difference in treatment between the two categories must not go beyond what is necessary in order to attain the objective of the legislation in question. This is the same test as is applied in the context of other freedoms of movement.

Overlap between the rights

26. There can be an overlap between the right of establishment and the free movement of capital. For example investment in the share capital of a company can involve the exercise of both treaty freedoms, although typically the right of establishment will only be engaged if the shareholding gives a level of influence in the running of the company (likely to be at least 25%).
27. Where a provision can apply to either treaty freedom, both will be in point. Where, however, a provision is aimed primarily at the right of establishment, for example because it targets persons engaged in the influence and running of a company, it may be that free movement of capital will be excluded¹⁸. This will typically cause a problem in situations involving a third country.
28. This issue is relevant in the context of the amendments to section 13 TCGA 1992 as one of the questions which arises is whether those amendments are sufficient to exclude reliance on the right to free movement of capital.

Direct effect of EU law

29. The right to freedom of establishment and the right to free movement of capital are two of a number EU law rights which have direct effect, that is to say that they can be relied upon and are directly enforceable in the UK Courts¹⁹.
30. The consequences of a conflict between directly enforceable EU law rights and the provisions of UK tax legislation are summarised by Lord Walker in *Fleming (t/a Bodycraft) v Customs and Excise Comrs* [2008] UKHL 2, [2008] STC 324:

“[24] My Lords, it is a fundamental principle of the law of the European Union (EU), recognised in s 2(1) of the European Communities Act 1972, that if national legislation infringes directly enforceable Community rights, the national court is obliged to disapply the offending provision. The provision is not made void but it must be treated as being (as Lord Bridge of Harwich put it in Factortame Ltd v Secretary of State for Transport [1990] 2 AC 85 at 140):

‘... without prejudice to the directly enforceable Community rights of nationals of

¹⁶ C 265/04 *Bouanich v Skatteverket* at paragraph 38

¹⁷ C 11/07 *Eckelkamp v Belgische Staat* at paragraph 59 and C 436/08 *Haribo Lakritzen Hans Riegel Betriebs GmbH v Finanzamt Linz* at paragraphs 55 to 58

¹⁸ C 31/11 *Scheunemann v Finanzamt Bremerhaven*

¹⁹ See for example *Vodafone 2 v HMRC* [2009] STC 1480 at paragraph [5] where the Court of Appeal accepted the point as common ground

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

any member state of the E.E.C.’

The principle has often been recognised your Lordships’ House, including (in the context of taxes) Imperial Chemical Industries plc v Colmer (Inspector of Taxes) [1999] STC 1089 at 1095, [1999] 1 WLR 2035 at 2041 per Lord Nolan, and recently Re Claimants under Loss Relief Group Litigation Order (sub nom Autologic Holdings plc v IRC) [2005] UKHL 54 at [16]-[17], [2005] STC 1357 at [16]-[17] per Lord Nicholls of Birkenhead.

[25] Disapplication is called for only if there is an inconsistency between national law and EU law. In an attempt to avoid an inconsistency the national court will, if at all possible, interpret the national legislation so as to make it conform to the superior order of EU law: Pickstone v Freemans plc [1989] AC 66; Litster v Forth Dry Dock & Engineering Co Ltd (in receivership) [1990] 1 AC 546. Sometimes, however, a conforming construction is not possible, and disapplication cannot be avoided. Disapplication of national legislation is an essentially different process from its interpretation so as to conform with EU law. Only in the most formal sense (because of the terms of s 2(4) of the European Communities Act 1972) can disapplication be described as a process of construction”.

31. It follows that if and to the extent that the Appellants’ EU law rights would be prejudiced or otherwise infringed by the TOAA charge then that charge cannot apply. Rather, the provisions giving rise to the TOAA charge must be interpreted in a manner which is consistent with the Appellants’ EU law rights, that is to say in a manner which does not infringe upon their rights to freedom of establishment. If it is not possible to interpret the legislation in such a manner, it must be disapplied.
32. In any event, it is clear that reliance on EU law rights is not dependent upon legislative changes to give effect to those rights, and the proposed changes should be considered in that context.

Duty of sincere co-operation

33. It is worth noting that the terms of Article 4(3) TEU impose a duty of sincere co-operation upon Member States:

“3. Pursuant to the principle of sincere co-operation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives”.

34. This imposes a duty on Member States to uphold and give effect to EU Law. It is not, however, clear that HMRC (as an organ of the UK government) are complying with this duty in their approach to UK tax legislation and in certain instances appear to be attempting to apply such legislation even where it is realised that it is inconsistent with EU law. The following text from an e-mail between two HMCE officials in 2005²⁰ is a rather unfortunate example of the UK Government ignoring the duty of sincere co-operation:

“We were surprised that they didn’t challenge the validity of s9 and its incompatibility with

²⁰ The e-mail was disclosed under order of the Tribunal in *Fisher v HMRC* and was referred to in open Court. It is therefore not confidential.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

EU principles of freedom of establishment and barriers to trade etc. – we didn't think we would have a leg to stand on and the recent EU cases seem to bear this out.

...

In the meantime, s9 is still in force. Unless the trader asks about it, I'd not mention it. If they do ask, it's still in force”.

35. This illustrates an approach which is some way from ensuring that obligations arising from the EU treaties is fulfilled. It is perhaps non surprising to those who have engaged in correspondence with HMRC on EU matters.
36. There is clearly a further question as to how much the current approach to the TOAA provisions and section 13 TCGA 1992 is in compliance with the duty of sincere co-operation.

THE TOAA PROVISIONS

37. The provisions apply where there has been a *relevant transfer*. There is a *relevant transfer* if:
 - a) there is a transfer of assets and
 - b) as a result of either
 - i) that transfer,
 - ii) one or more associated operations or
 - iii) the transfer and one or more associated operationsincome becomes payable to a person abroad (section 716 ITA 2007).
38. It is, however, to be noted that a *transfer* is expanded to include the creation of rights (section 716(2) ITA 2007), *assets* includes property or rights of any kind (Section 717 ITA 2007) and that a *person abroad* can include persons are in fact UK resident (non-UK domiciled persons and non-UK incorporated companies).
39. An *associated operation* is an operation of any kind effected by any person in relation to (i) any of assets transferred or (ii) any assets directly or indirectly representing the assets transferred, or (iii) income from (i) or (ii) or (iv) assets representing accumulations of income from (i) or (ii) (section 719 ITA 2007).
40. The legislation also refers to *relevant transactions* which is a transaction which is either a relevant transfer or an associated operation.
41. There are four potential charges under the provisions. These charges currently apply to persons who are ordinarily resident in the UK, although presumably with the abolition of ordinary residence this will be changed to UK residents:
 - (i) *The power to enjoy charge*: a person who has sought to avoid liability to UK tax by means of a relevant transfer (a transferor) will have the income of the person abroad treated as arising to him if he has power to enjoy that income as a result of the relevant transfer and/or associated operations (section 720(2) and 721 ITA 2007).
 - (ii) *The transferor's benefit charge*: a transferor who has power to enjoy by reason of receiving a benefit out of the income of the person abroad is liable to income tax on the whole of the amount or value of that benefit save to the extent that he has already been subject to tax on income from which the benefit derives (section 720(2) and 724 ITA 2007).

- (iii) *The capital receipt charge*: a transferor who receives a capital sum (which includes a loan, a repayment of a loan and other sum which is not income and not paid for full consideration) in connection with a relevant transfer or an associated operation is deemed to have income of the person abroad arising to him (section 727 ITA 2007).
- (iv) *The non-transferor's benefit charge*: a non-transferor who receives a benefit out of assets which are available as a result of a relevant transfer will be treated as receiving income of a person abroad if that income has not been subject to charge under (i) to (iii) (section 732 ITA 2007).

The draft legislation – a notional amount of income

42. A further change concerns the introduction of a charge on a notional amount of income. Section 721 ITA 2007 now provides:

721 Individuals with power to enjoy income as a result of relevant transactions

- (1) *Income is treated as arising to such an individual as is mentioned in section 720(1) in a tax year for income tax purposes if conditions A and B are met.*
- (2) *Condition A is that the individual has power in the tax year to enjoy income of a person abroad as a result of—*
 - (a) *a relevant transfer,*
 - (b) *one or more associated operations, or*
 - (c) *a relevant transfer and one or more associated operations.*
- (3) *Condition B is that the income of the person abroad would be chargeable to income tax if it were the individual's and received by the individual in the United Kingdom.*
- (3A) *The amount of the income treated as arising under subsection (1) is equal to the amount of the income of the person abroad (subject to sections 724 and 725).*
- (3B) *Subsection (1) does not apply if—*
 - (a) *the individual is liable for income tax charged on the income of the person abroad by virtue of a charge not contained in this Chapter, and*
 - (b) *all income tax for which the individual is liable has been paid.*
- (4) *For the purposes of subsection (2), it does not matter whether the income of the person abroad may be enjoyed immediately or only later.*
- (5) *It does not matter for the purposes of this section—*
 - (a) ~~*whether the income would be chargeable to income tax apart from section 720,*~~
 - (b) *whether the individual is ordinarily UK resident at the time when the relevant transfer is made, or*
 - (c) *whether the avoiding of liability to income tax is a purpose for which the transfer is effected.*
- (6) *For the circumstances in which an individual is treated as having the power to enjoy income for the purposes of this section, see section 722.*

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

“... the income of the person abroad...”

43. Rather worryingly the amendment in the new subsection (3A) appears to make the transferor liable to the entirety of the income of the person abroad, regardless of whether that income arose to the person abroad as a result of the relevant transfer. That would seem to be a large extension of the scope of the charge.
44. While section 743 ITA 2007 might allow HMRC some discretion to deal with the problem in a situation in which there are multiple transferors (or at least where there is more than one person potentially liable). That will not, however, always be the case.
45. In this respect, a literal reading would, however, seem to deal with the issue of attributing a transfer to shareholders in a company identified in *IRC v Pratt* (and in relation to which section 743 ITA 2007 failed to provide an adequate solution) namely the problem of identifying what income results from the transfer by each shareholder/transferor. If each shareholder is treated as liable to all of the income, then HMRC can apportion as they see fit.
46. A better interpretation is likely to be that the reference to “the income of the person abroad” in subsection (3A) is to be read as the income of the person abroad falling within subsection (2). Such an interpretation is likely to be informed by requirements of EU law, and in particular the requirements of proportionality, assuming that the provisions can be justified as a matter of EU law at all.

Priority of application

47. The new subsection (3B) makes the charge under the TOAA provisions sub-ordinate to the charge under any other provisions (for example the settlement provisions where the EU arguments are less well established).
48. The amendment does, however, seek to deal with the *McGuckian* issue by providing that this sub-ordinate application only applies to the extent that income tax is actually paid under the other provision.

“...is equal to the amount of...”

49. The explanatory notes describe this amendment as clarifying that the income that is treated as arising to the individual is not the income that the person abroad receives but an amount equal to it.
50. This change was introduced to deal with an argument that since the income which arises to the person abroad is treated as arising to the UK resident individual, then if that income benefits from treaty relief in the hands of the person abroad, it also benefits from treaty relief in the hands of the UK resident individual.
51. This argument had been made in the context of section 739 ICTA 1988 and Article 3(2) of the UK/Isle of Man double taxation agreement before the Special Commissioner in *IRC v Willoughby* (reported at [1995] STC 143 at 169), where it was rejected:

“I go back to s 739(2). I ask myself what income of Royal Life has Professor Willoughby power to enjoy (now or in the future) which, if it were his income received in the United Kingdom would be chargeable to income tax? It must surely be the income arising from the investments owned by Royal Life ... As part of Royal Life's income it would not have been chargeable in fact or by virtue of art 3(2), nevertheless it is to be deemed to be Professor Willoughby's income. May one apply the provisions of the Arrangement to that income deemed to be his when the actual income is not subject to United Kingdom tax for so art 3(2) provides? One cannot, as it seems to me, apply the provisions twice nor to two different

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

people.

In my opinion there is a distinction between actual income of an individual and actual income of another person which is deemed to be the income of the individual. Such income is not industrial or commercial profits of the individual nor quoad the individual is it deemed to be industrial or commercial profits or deemed to be his income as if it were such profits...

I hold therefore that the income of Royal Life deemed to be Professor Willoughby's income does not come within the provisions in art 3(2). It is not exempt from United Kingdom tax by virtue of the Arrangement".

52. A similar argument was subsequently considered in *Bricom Holdings Ltd v IRC* [1997] STC 1179 by Court of Appeal in the context of an assessment to corporation tax under the controlled foreign companies provisions in relation to certain interest payments. It was argued that the interest payments could not be subject to UK corporation tax, because the relevant article of the applicable double taxation treaty provided:

"Interest arising in one of the States which is derived and beneficially owned by a resident of the other State shall be taxable only in that other State".

53. The Court of Appeal held (Millet LJ delivering the judgment) that (at 1195):

"The correct analysis is that the interest received by Spinneys is not included in the sum apportioned to the taxpayer company on which tax is chargeable. It merely provides a measure by which an element in a conventional or notional sum is calculated, and it is that conventional or notional sum which is apportioned to the taxpayer company and on which tax is charged".

54. Thus a distinction was drawn between actual and notional income and it was held that where notional income was concerned, there was no possibility of treaty relief being available. That left open the question of the position where a person was deemed to be entitled to actual income. In that respect, Millet LJ also made the following comments (at 1194-1195, emphasis added):

"The taxpayer company relies on Hughes (Inspector of Taxes) v Bank of New Zealand [1938] AC 366, 21 TC 472 and Lord Strathalmond v IRC [1972] 1 WLR 1511, 48 TC 537. In my judgment neither case assists the taxpayer company. In Hughes v Bank of New Zealand the bank was resident outside the United Kingdom but had a branch in London on the profits of which it was assessable to tax in the United Kingdom. Part of the bank's income represented interest which was exempt from United Kingdom tax in the hands of a non-resident. It was held that the exempt interest retained its exempt status in the hands of the London branch. There, however, the interest was received by the bank and the Revenue sought to assess the actual interest which it received. The case is authority for the proposition that exempt interest retains its character as interest even when it is taxable as a component element of the recipient's trading profits. It would support the taxpayer company's case if s 747(4)(a) charged the taxpayer company with corporation tax on Spinneys' trading profits; but it provides no assistance for the taxpayer company's contention that that is what s 747(4)(a) does.

*In the Strathalmond case the taxpayer company's wife was an American citizen resident for tax purposes in the United Kingdom. Because of her American citizenship, however, she was not resident in the United Kingdom for the purposes of the double taxation agreement between the United Kingdom and the United States. Her husband was assessed to tax on her American dividends. The assessments were discharged on the ground that the dividends were exempted from United Kingdom tax by the double taxation agreement. **Thus the case shows that the relief from United Kingdom tax accorded by a double taxation agreement can enure for the benefit of a third party.** But the taxpayer*

company in that case was directly assessable on his wife's income, which the relevant statutory provisions (most recently contained in s 279 of the 1988 Act but now repealed) deemed to be the income of her husband. The decision would support the taxpayer company's argument in the present case if s 747 deemed Spinneys' income to be the income of the taxpayer company or apportioned Spinneys' income to the taxpayer company; but it does not assist the taxpayer company's contention that that is what the section does.

...

*In my judgment these cases show that the question turns on the nature of the statutory process. Interest from exempt securities does not cease to be such by being included as a component element of the recipient's taxable profits (see Hughes). **Exempt income does not change its character or lose its exemption merely because it is deemed to be the income of another person or is imputed to him** (see Strathalmond). But where tax is charged on a conventional or notional sum which exists only as the product of a calculation, the fact that one of the elements in the calculation is measured by reference to the amount of exempted income does not make the exempted income the subject of the tax (see Australian Mutual Provident Society)”.*

55. Thus it appeared to be accepted that contrary to the approach of the Special Commissioner in *Willoughby* it was possible for the provisions of the double taxation agreement to be applied to two different persons. It did, however, remain a question of statutory interpretation which would be more obvious in some cases than others.
56. For example, in *Lord Strathalmond v IRC* [1972] 1 WLR 1511 the question of whether exemption should be lost because income was treated as that of another person did not arise and was not addressed. The case turned solely on the construction of the UK/US double tax treaty. It was accepted by all the parties that if the double tax treaty applied *vis a vis* Lady Strathalmond, then no charge to income tax arose.
57. This was not surprising given the terms of the deeming provision under which Lord Strathalmond was treated as entitled to the income of his wife. That provision was contained in section 354(1) ITA 1952 which provided as follows (emphasis added):

*“Subject to the provisions of this Part of this Act, a woman's income **chargeable to income tax** shall so far as it is income for a year of assessment or part of a year of assessment during which she is a married woman living with her husband, be deemed for income tax purposes to be his income and not to be her income*

Provided that the question whether there is any income of hers chargeable to income tax for any year of assessment, and, if so, what is to be taken to be the amount thereof for income tax purposes, shall not be affected by the provisions of this section”.
58. If the double tax treaty applied, then there was no income chargeable to income tax, and the income would *not* be treated as that of the husband. It was not a case of the double tax treaty applying to deemed income, but rather of the double tax treaty preventing the deeming provision applying *at all*.
59. The position in the context of the TOAA provisions is less clear. In determining whether double tax treaty relief can apply indirectly for the benefit of a person who is deemed to be entitled to income one has to construe (i) the treaty provision in question and (ii) the deeming provision in question. Given the unclear application of the charging provision in the first place, this is not always a straightforward matter.
60. Some support for the argument can be found in *R (Huitson) v HMRC* [2010] STC 715 at paragraph 64 where Parker J stated:

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

“The Claimant also relies upon s 788(3) of ICTA 1988 (see para 19 above) which, it is argued, in effect disapplies s 739 where its application would conflict with the DTA. This issue has spawned a somewhat metaphysical debate as to whether the “notional” income under s 739 is different from the “real” income in the hands of the foreign resident, so that taxation of the “notional” does not conflict with relief of the “real”. This distinction first surfaced in the decision of the Special Commissioners in IRC v Willoughby [1995] STC 143, 70 TC 57. However, I find this distinction difficult to square with the approach taken in Lord Strathalmond v IRC [1972] 3 All ER 715, [1972] 1 WLR 1511, 48 TC 537 and by the Court of Appeal in Bricom Holdings Ltd v IRC [1997] STC 1179, 70 TC 272, 1 OFLR(ITLR) 365. Without, of course, purporting to decide the point, it seems to me that the application of s 788(3) must depend upon the proper construction and application of the relevant DTA. If, in this case, the relevant part of the profits of the Manx enterprise (the Partnership) did, on the correct interpretation of art 3(2), “belong” as income to the Claimant, as life tenant of the Trust, then to apply s 739 would be to subject those profits to UK income tax, contrary to art 3(2) of the DTA, and contrary to s 788(3). However, that invites the question whether the profits did so “belong”, and again raises the issue whether the rule in Archer-Shee determines the proper interpretation of art 3(2); and that authority, therefore, in my view, remains central to the whole analysis of the tax efficacy of the arrangements”.

61. The approach in the amended legislation seeks to put the matter beyond doubt, but does so not by providing that relief under a double taxation convention will not be available (which might be the straightforward approach) but rather by importing the reasoning in *Bricom*. That would be less objectionable if the reasoning in *Bricom* was obvious to anyone unfamiliar with the decision. (In that respect, although it does represent the law in that context, and UK courts are likely to follow it in the context of the TOAA provisions, it is noted that it is not consistent with the approach of other countries in this area (see *Schneider* (2002) 4 ITLR 1077 where the French Court reached an opposite conclusion)).
62. In any event, it is not at all clear that the reasoning in *Bricom* can be straightforwardly applied to the amended legislation. The income of the person abroad is not an element in the calculation, it is the income which is treated as arising to the UK national.
63. Moreover, it is not apparent that this ‘clarification’ affects the historical position, so that the issue will remain open for periods up to 5 April 2013.

The draft legislation – non-transferor’s benefit charge

64. The draft legislation rewrites section 732 to 735 ITA 2007. It provides new matching rules on a LIFO basis.
65. One of the main issues with the new changes in that whereas the previous rules taxed individuals on income which could be applied for the benefit of that individual, the amended rules would appear to allow an individual to be taxed on income which results from a relevant transfer but which cannot be applied for his or her benefit. For example, an individual could be taxed on income of a fund in which he has no interest.
66. This change is achieved by treating individuals and benefits globally rather than charging them individually.
67. Moreover, the income chargeable is only reduced by payments to UK residents, on which there is a charge – and not by payment to non-residents. This means that a UK resident beneficiary could be charged on all of the income of a trust, even though he receives only a portion of it. For example, if there was a trust to pay income to A (an non-resident) with remainder to B (a UK resident) there would be an income tax charge on B becoming entitled

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

to the capital.

68. Operated in this manner, it is very doubtful whether the proposed changes can be regarded as compatible with EU law for the reasons discussed below.

The defence to the application of the TOAA provisions

69. There is a defence to the transfer of assets charge where either of the following is satisfied in relation to *all* relevant transactions (that is to say both the relevant transfer and also any associated operations) (section 737 ITA 2007):

“... it would not be reasonable to draw the conclusion, from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected”.

or

“(a) all the relevant transactions were genuine commercial transactions (see section 738), and

(b) it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of those transactions was more than incidentally designed for the purpose of avoiding liability to taxation”.

70. *Commercial transaction* is narrowly defined. A transaction will not be a commercial transaction unless it is effected in the course (or with a view to setting up) a trade or business and for its purposes. Furthermore it must be on arm's length terms. Making or managing investments is only a business if done by a person unconnected with the person for who it is done and on arm's length terms (section 738 ITA 2007).

71. The above motive defence applies to transactions made after 5 December 2005. For transactions before that date a wider motive defence was available if:

“... the purpose of avoiding liability to taxation was not the purpose, or one of the purposes, for which the relevant transactions or any of them were effected”.

or

“... the transfer and any associated operations-

(a) were genuine commercial transactions, and

(b) were not designed for the purpose of avoiding liability to taxation”.

The draft legislation – the new defence

72. In dealing with EU law issues the draft legislation does not alter the manner in which the TOAA provisions operate so as to remove the restriction on the freedoms of movement, but rather appears to have been altered with the intent of limiting the situations in which a restriction on freedom of movement occurs to those situations where such a restriction can be justified.

742A Post-5 April 2012 transactions: exemption for genuine transactions

(1) Subsection (2) applies for the purpose of determining the liability of an individual to tax under this Chapter by reference to a relevant transaction if-

(a) the transaction is effected on or after 6 April 2012, and

(b) conditions A and B are met.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(2) Income is to be left out of account so far as the individual satisfies an officer of Revenue and Customs that it is attributable to the transaction.

(3) Condition A is that-

(a) were, viewed objectively, the transaction to be considered to be a genuine transaction having regard to any arrangements under which it is effected and any other relevant circumstances, and

(b) were the individual to be liable to tax under this Chapter by reference to the transaction, the individual's liability to tax would, in contravention of Title II or IV of the Treaty on the Functioning of the European Union, constitute an unjustified and disproportionate restriction on a freedom protected under that Title.

(4) Condition B is that the individual satisfies an officer of Revenue and Customs that, viewed objectively, the transaction must be considered to be a genuine transaction having regard to any arrangements under which it is effected and any other relevant circumstances.

(5) Without prejudice to the generality of subsection (3)(a) or (4), in order for the transaction to be considered to be a genuine transaction the transaction must not-

(a) be on terms other than those that would have been made between persons not connected with each other dealing at arm's length, or

(b) be a transaction that would not have been entered into between such persons so dealing,

having regard to any arrangements under which the transaction is effected and any other relevant circumstances.

(6) Subsection (7) applies if any asset or income falling within subsection (11) is used for the purposes of, or is received in the course of, activities carried on in a territory outside the United Kingdom by a person ("the relevant person") through a business establishment which the relevant person has in that territory.

(7) Without prejudice to the generality of subsection (3)(a) or (4), in order for the transaction to be considered to be a genuine transaction the activities mentioned in subsection (6) must consist of the provision by the relevant person of goods or services to others on a commercial basis and involve-

(a) the use of staff in numbers, and with competence and authority,

(b) the use of premises and equipment, and

(c) the addition of economic value, by the relevant person, to those to whom the goods or services are provided,

commensurate with the size and nature of those activities.

(8) In subsection (7)(a) "staff" means employees, agents or contractors of the relevant person.

(9) To determine if a person has a "business establishment" in a territory outside the United Kingdom, apply sections 1141, 1142(1) and 1143 of CTA 2010 as if in those provisions-

(a) references to a company were to a person, and

(b) references to a permanent establishment were to a business establishment.

(10) Subsection (5) does not apply if-

(a) the relevant transfer is made by an individual who makes it wholly-

(i) for personal reasons (and not commercial reasons), and

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(ii) for the personal benefit (and not the commercial benefit) of other individuals, and

(b) no consideration is given (directly or indirectly) for the relevant transfer or otherwise for any benefit received by any individual mentioned in paragraph (a)(ii),

and all assets and income falling within subsection (11) are dealt with accordingly.

(11) The assets and income falling within this subsection are—

(a) any of the assets transferred by the relevant transfer;

(b) any assets directly or indirectly representing any of the assets transferred;

(c) any income arising from any assets within paragraph (a) or (b);

(d) any assets directly or indirectly representing the accumulations of income arising from any assets within paragraph (a) or (b).

(12) In subsections (10) and (11) references to the relevant transfer are

To-

(a) if the transaction mentioned in subsection (1) is a relevant transfer, the transfer,
or

(b) if the transaction so mentioned is an associated operation, the relevant transfer to
which it relates.

73. This new defence is perhaps most easily considered having dealt with the EU law issues which arise with the TOAA provisions generally.
74. It is, however, noted that the need to show that reliance on the TFEU does not put the taxpayer in any better position than he currently is. As such, the benefit of legislation framed in EU compliant terms is largely lost.

THE EU LAW ISSUE – THE TOAA PROVISIONS GENERALLY

75. It appears to be the EU law issues which arise in the context of the TOAA provisions which the new section 742A defence is largely aimed at addressing.

The restriction on freedoms of movement

76. There is a restriction on EU law rights where a tax charge is levied against a person in the UK on the profits of an entity which would not be levied if that entity were established in the UK. For example, as the CJEU observed in *Cadbury Schweppes* at paragraphs 44 to 46:

“44. Where the resident company has incorporated a CFC in a member state in which it is subject to a lower level of taxation within the meaning of the legislation on CFCs, the profits made by such a controlled company are, pursuant to that legislation, attributed to the resident company, which is taxed on those profits. Where, on the other hand, the controlled company has been incorporated and taxed in the United Kingdom or in a state in which it is not subject to a lower level of taxation within the meaning of that legislation, the latter is not applicable and, under the United Kingdom legislation on corporation tax, the resident company is not, in such circumstances, taxed on the profits of the controlled company.

45. That difference in treatment creates a tax disadvantage for the resident company to which the legislation on CFCs is applicable. Even taking into account ... the fact referred to

by the national court that such a resident company does not pay, on the profits of a CFC within the scope of application of that legislation, more tax than that which would have been payable on those profits if they had been made by a subsidiary established in the United Kingdom, the fact remains that under such legislation the resident company is taxed on profits of another legal person. That is not the case for a resident company with a subsidiary taxed in the United Kingdom or a subsidiary established outside that member state which is not subject to a lower level of taxation.

46. As submitted ... the resulting disadvantage for resident companies which have a subsidiary subject, in another member state, to a lower level of taxation are such as to hinder the exercise of freedom of establishment by such companies, dissuading them from establishing, acquiring or maintaining a subsidiary in a member state in which the latter is subject to such a level of taxation. They therefore constitute a restriction on freedom of establishment within the meaning of arts 43 EC and 48 EC."

77. The position with the TOAA provisions insofar as they charge transferors on income of a company is even clearer. Individuals face charges at their personal rates, which are higher than the corporate rates which would have applied to the profits of a UK resident and incorporated company.
78. In any event, the TOAA charge on a transferor is an obvious restriction. It imposes a charge where none would exist if matters were contained wholly within the UK, that is if the person abroad was a UK resident company or UK resident trustees.
79. The non-transferor's benefit charge is slightly more problematic (particularly in the context of justifications). Nevertheless, since capital payments and benefits from a UK resident trust would not attract a charge to income tax, the less favourable treatment amounts to a restriction on movements of capital.

Justifications and proportionality

80. Having established that freedom of establishment is in point, the basic approach which has been laid down by the CJEU is that²¹:

"According to established case law, a measure which is liable to hinder the freedom of establishment enshrined in Article 43 EC is permissible only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons in the public interest. It is also necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it (see, inter alia, Case C-250/95 Futura Participations and Singer [1997] ECR I-2471, paragraph 26; Case C-9/02 de Lasteyrie du Saillant [2004] ECR I-2409, paragraph 49; Marks & Spencer, paragraph 35; and Lammers & Van Cleeff, paragraph 25)."

81. This raises **two** important questions:
 - a) Does the legislation pursue a legitimate objective and is it justified?
 - b) If there is such a legitimate objective and justification, does the TOAA represent a proportionate means of achieving it?

²¹ C 311/08 *Société de Gestion Industrielle SA (SGI) v État belge* at paragraph 56

82. It is not possible to address the question of proportionality without first identifying the legitimate objective being purposed, yet all too often it is argued that legislation is proportionate without any clear explanation of what the proportionality relates to. It is, however, impossible to have a proportionate means of achieving an aim without first identifying that aim.

Justifications – tax avoidance and the new section 742A defence

83. A justification which is often raised by HMRC concerns the need to prevent tax avoidance. Although that is recognised by the CJEU it is clear from the case law that the meaning of tax avoidance as that term is used by the CJEU is significantly different from the meaning of tax avoidance as that term is used by the UK Courts in the context of applying the motive defence. In particular, to date no UK Court has considered how the exercise of EU law rights impact upon the meaning of tax avoidance.

84. It is, however, plain that the CJEU considers that the exercise of one of the freedoms of movement in order to benefit from a different tax regime is not tax avoidance. As the CJEU made clear in *Cadbury Schweppes* at paragraph 36:

“36. However, the fact that a Community national, whether a natural or a legal person, sought to profit from tax advantages in force in a member state other than his state of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty (see, to that effect, Heirs of Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen (Case C-364/01) [2003] ECR I-15013, [2004] 1 CMLR 1283, para 71)”.

85. The CJEU went on to make clear that for national legislation to comply with EU law it could not tax situations which had an economic reality notwithstanding evidence of a tax motive (paragraphs 61 to 69):

“The performance by the CFC of trading activities excludes, for its part, the existence of an artificial arrangement which has no real economic link with the host member state.

... in order for the legislation on CFCs to comply with Community law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality.

66. That incorporation must correspond with an actual establishment intended to carry on genuine economic activities in the host member state, as is apparent from the case law recalled in paras 52 to 54 of this judgment.

67. As suggested by the United Kingdom government and the Commission at the hearing, that finding must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment.

*68. If checking those factors leads to the finding that the CFC is a fictitious establishment not carrying out any genuine economic activity in the territory of the host member state, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement. That could be so in particular in the case of a ‘letterbox’ or ‘front’ subsidiary (see *Re Eurofood IFSC Ltd* (Case C-341/04) [2006] All ER (D) 20 (May), paras 34 and 35 of the judgment).*

69. On the other hand, as pointed out by the Advocate General in para 103 of his opinion, above, the fact that the activities which correspond to the profits of the CFC could just as well have been carried out by a company established in the territory of the member state in which the resident company is established does not warrant the conclusion that there is a wholly

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

artificial arrangement”.

86. The reference to “genuine activities” is echoed in the draft legislation. It is assumed that the legislation is on one level an attempt to codify the CJEU’s tax avoidance justification. However, that justification is limited to legislation which
- a) *“specifically targets wholly artificial arrangements designed to circumvent the legislation of the member state concerned”²² and*
 - b) *“the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory”²³.*
87. The section 742A defence attempts to deal with this point by excluding the application of the TOAA provisions by referring to two conditions. The first of these (Condition A) is that EU law could be relied upon if the transaction were a genuine transaction. As noted, this does not put the taxpayer in much of an improved position. There is currently a defence where EU law is in point, and all this does is acknowledge the established position. In this respect, the previous draft (and the section 13 TCGA 1992 drafting) is perhaps more useful in classifying when relief will be available.
88. The second condition (Condition B) is that the transaction is a genuine transaction. Left there, it might seem that the legislation is trying to carve out an exception so that the defence does not apply to “wholly artificial transactions which do not reflect economic reality”.
89. It is apparent, however, that the definition of “genuine transaction” excludes a good deal of genuine transactions. Transactions which are not at arm’s length are excluded unless they can be shown to be for purely personal reasons and the individual is excluded from benefit.
90. Moreover, if the assets are used for activities, then those must be commercial in nature and involve the provision of goods and services.
91. This means that the defence is not available where assets are transferred to be held as an investment. That is plainly not compatible with the right to free movement of capital.
92. Having regard to the totality of the new defence it is difficult to see how the definition of genuine transaction corresponds with EU law. Moreover, as the defence requires showing that EU law is in point in any event, it is difficult to see what benefit is available from relying on it.

Other justifications

93. Other justifications which the CJEU has recognised include the need to maintain a balanced allocation of taxation and the need to maintain fiscal cohesion.
94. The CJEU has made clear that justifications concerning the need to maintain a balanced allocation of taxation or the fight against tax avoidance can only apply to measures intended to enable a Member State to exercise its taxing jurisdiction in relation to activities carried on within its territory²⁴. The purpose of TOAA provisions is not, however, to tax by reference to the activities carried on within the UK’s territory, but rather to tax activities carried on outside that territory but rather to tax activities properly falling within the scope of another

²² Case C-524/04 Test Claimants in the Thin Cap Group Litigation v Inland Revenue Commissioners [2007] STC 906 at paragraph 72

²³ Case C-524/04 Test Claimants in the Thin Cap Group Litigation v Inland Revenue Commissioners [2007] STC 906 at paragraph 74

²⁴ C 311/08 *Société de Gestion Industrielle SA (SGI) v État belge* at paragraph 60

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

territory's power of taxation being activities in relation to which the UK has no right to tax at all.

95. Even if the section 742A defence was not deficient in its definition of a genuine transaction, the problem would remain that the UK is seeking to tax income which arose in another territory and not income which arose in the UK.
96. One possible exception to this relates to the non-transferor's benefit charge. An argument might conceivably be made that a tax charge can be justified on receipt of a benefit as it puts the beneficiary of the receipt from a person abroad in a similar position to the beneficiary of the UK trust – in both situations the sum received should suffer UK tax (albeit at different stages).
97. As the *FII* litigation has shown, however, while it is possible to adopt such an approach ensuring equality of treatment in practice will be much more difficult. In particular, the charge under the TOAA provisions cannot put the recipient in a worse position than if the receipt was from a UK resident. The legislation at present does not do this and does not attempt to do this.
98. Another justification is the need to maintain fiscal cohesion. Although the CJEU has recognised such a justification for a restriction on tax legislation, it has also made clear that in order for the justification to apply there must be a tax advantage which is offset by the tax levy which is sought to be justified. Further there must be a direct link (examined in light of the objectives of the legislation) between the tax advantage in question and the offsetting of that advantage²⁵. There is no income tax charge to income tax on which under TOAA is intended to offset such a tax advantage and accordingly no direct link to any tax advantage. The justification based on the need to maintain fiscal cohesion is entirely misconceived.

Proportionality

99. A final major problem with attempting to amend the TOAA legislation so that it is limited to circumstances in which it can be said to pursue a legitimate objective and it seems likely that the legislation would not in any event be a proportionate means of attaining that objective.
100. Proportionality requires that the application of legislation in question is appropriate to ensuring the attainment of the legitimate objective pursued and must not go beyond what is necessary to attain it. In that respect, it is not sufficient to restrict the application of the charge, it is also necessary to consider the scope of the charge, even in cases where it does apply.
101. As a matter of general application, the TOAA charge is almost certain to go beyond what is necessary to attain a legitimate objective and indeed it is intended to. Lord Greene M.R. described the penal nature of the provision in Lord *Howard de Walden v Commissioners of Inland Revenue* 25 TC 121, at page 134 put it in the following manner.

“The Section is a penal one and its consequences whatever they may be, are intended to be an effective deterrent which will put a stop to practices which the Legislature considers to be against the public interest”.
102. It is difficult to conceive of how a provision penalising transfers of assets can be justified and in any event a provision which is intended as a deterrent is almost certain to go farther than necessary to meet any legitimate objective, so that it will almost certainly be a

²⁵ see for example *Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg* (Case C-293/06) [2008] STC 1721, [2008] ECR I-1129, ECJ at paragraphs 37 to 39 and the cases cited there

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

disproportionate approach to attaining a legitimate objective.

103. This is even more obvious in the context of the changes to the non-transferor's benefit charge. As noted above, even if the idea of such a charge is potentially justifiable as ensuring that the recipient receives income subject to UK tax, the current charging mechanism is a manifestly inappropriate approach to achieving that objective.

SECTION 13 TCGA 1992

104. This section imposes a charge by attributing gains of a non-resident company which would be a close company if resident in the UK to UK resident participators.
105. The gain is attributed in proportion to the interest of the participator in the company, although there will be no attribution of the participator and connected persons would not have more than 10% of the gain apportioned to them.
106. There is an exclusion for assets used for the purposes of a trade or for which the company would otherwise be chargeable by reason of A UK permanent establishment.
107. The effect of the section is to restrict the exemption from capital gains of non-resident persons by attributing those gains to UK resident participators. It operates to prevent individuals from sheltering gains by transferring them to a non-resident company.

EU law issues

108. The section has the effect that shareholders of a non-resident company are faced with capital gains tax charges at the higher rates applying to individuals, whereas shareholders of a UK resident company would benefit from (i) not having any liability and (ii) that liability being at lower corporation tax rates. That would seem to be a clear disincentive to the exercise of treaty freedoms and as such, would amount to a *prima facie* breach of the UK's obligations under EU law.

Justifications and proportionality

109. It is difficult to see what justifications the UK could raise for the charge. While an argument might be made that the UK is entitled to tax gains from UK situate property, it is not proportionate to charge shareholders rather than the company itself. Furthermore, the charge applies to worldwide assets of the non-resident company.
110. In the circumstances, it seems clear that section 13 TCGA 1992 is incompatible with EU law and will be unenforceable in any case where EU law rights have been exercised.

The draft legislation

111. It is proposed to amend section 13 TCGA 1992 in the following manner:

13 Attribution of gains to members of non-resident companies

- (1) *This section applies as respects chargeable gains accruing to a company—*
- (a) *which is not resident in the United Kingdom, and*
- (b) *which would be a close company if it were resident in the United Kingdom.*

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(2) Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident or ordinarily resident in the United Kingdom [and]¹⁰ [is a participator]¹ in the company, shall be treated for the purposes of this Act as if a part of the chargeable gain had accrued to him.

[(3) That part shall be equal to the proportion of the gain that corresponds to the extent of the participator's interest as a participator in the company.]¹

[(4) Subsection (2) above shall not apply in the case of any participator in the company to which the gain accrues where the aggregate amount falling under that subsection to be apportioned to him and to persons connected with him does not exceed [one quarter]³ of the gain.]¹

(5) This section shall not apply in relation to—

(a) ...¹

[(b) a chargeable gain accruing on the disposal of an asset used, and used only—

(i) for the purposes of a trade carried on by the company wholly outside the United Kingdom, or

(ii) for the purposes of the part carried on outside the United Kingdom of a trade carried on by the company partly within and partly outside the United Kingdom,]³ or

(c) a chargeable gain accruing on the disposal of currency or of a debt within section 252(1), where the currency or debt is or represents money in use for the purposes of a trade carried on by the company wholly outside the United Kingdom, or

(ca) a chargeable gain accruing on the disposal of an asset used, and used only, for the purposes of economically significant activities carried on outside the United Kingdom by the company through a business establishment in a territory outside the United Kingdom, or

(cb) a chargeable gain accruing to the company on a disposal of an asset where it is shown that neither—

(i) the disposal of the asset by the company, nor

(ii) the acquisition or holding of the asset by the company,

formed part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to capital gains tax or corporation tax, or

(d) to a chargeable gain in respect of which the company is chargeable to tax by virtue of section [10B]⁵.

[(5A) Where—

(a) an amount of tax is paid by a person in pursuance of subsection (2) above, and

(b) an amount in respect of the chargeable gain is distributed (either by way of dividend or distribution of capital or on the dissolution of the company) before the end of the period specified in subsection (5B) below,

the amount of tax (so far as neither reimbursed by the company nor applied as a deduction under subsection (7) below) shall be applied for reducing or extinguishing any liability of that person to income tax, capital gains tax or corporation tax in respect of the distribution.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(5B) *The period referred to in subsection (5A)(b) above is the period of three years from—*

(a) *the end of the period of account of the company in which the chargeable gain accrued, or*

(b) *the end of the period of twelve months beginning with the date on which the chargeable gain accrued,*

whichever is earlier.

...⁴]

(6) ...¹

(7) *The amount of capital gains tax paid by a person in pursuance of subsection (2) above (so far as [neither reimbursed by the company nor applied under subsection (5A) above for reducing any liability to tax])¹ shall be allowable as a deduction in the computation under this Act of a gain accruing on the disposal by him of [any asset representing his interest as a participator in the company.]¹*

[(7A) *In ascertaining for the purposes of subsection (5A) or (7) above the amount of capital gains tax or income tax chargeable on any person for any year on or in respect of any chargeable gain or distribution—*

(a) *any such distribution as is mentioned in subsection (5A)(b) above and falls to be treated as income of that person for that year shall be regarded as forming the highest part of the income on which he is chargeable to tax for the year;*

(b) *—(d) ...⁸]¹*

(8) *So far as it would go to reduce or extinguish chargeable gains accruing by virtue of this section to a person in a year of assessment this section shall apply in relation to a loss accruing to the company on the disposal of an asset in that year of assessment as it would apply if a gain instead of a loss had accrued to the company on the disposal, but shall only so apply in relation to that person; and subject to the preceding provisions of this subsection this section shall not apply in relation to a loss accruing to the company.*

(9) *If [a person who is a participator in the company]¹ at the time when the chargeable gain accrues to the company is itself a company which is not resident in the United Kingdom but which would be a close company if it were resident in the United Kingdom, an amount equal to the amount apportioned under subsection (3) above out of the chargeable gain [to the participating company's interest as a participator in the company to which the gain accrues shall be further apportioned among the participators in the participating company according to the extent of their respective interests as participators, and subsection (2) above shall apply to them accordingly in relation to the amounts further apportioned, and so on through any number of companies.]¹*

(10) *The persons treated by this section as if a part of a chargeable gain accruing to a company had accrued to them shall include[[the trustees of a settlement who are participators]¹ in the company, or in any company amongst the participators in which the gain is apportioned under subsection (9) above,²]¹ if when the gain accrues to the company the trustees are neither resident nor ordinarily resident in the United Kingdom.*

(10A) ...⁹

[(10B) *A chargeable gain that would be treated as accruing to a person under subsection (2) above shall not be so treated if—*

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(a) *it would be so treated only if assets that are assets of a pension scheme were taken into account in ascertaining that person's interest as a participator in the company, and*

(b) *at the time the gain accrues a gain arising on a disposal of those assets would be exempt from tax by virtue of [section 271(1)(c) or (1A)]⁶.*

In paragraph (a) above "assets of a pension scheme" means assets held for the purposes of a fund or scheme to which any of the provisions mentioned in paragraph (b) above applies.]⁹

(11) *If any tax payable by any person by virtue of subsection (2) above is paid by the company to which the chargeable gain accrues, or in a case under subsection (9) above is paid by any such other company, the amount so paid shall not for the purposes of income tax, capital gains tax or corporation tax be regarded as a payment to the person by whom the tax was originally payable.*

[11A] *For the purposes of this section the amount of the gain or loss accruing at any time to a company that is not resident in the United Kingdom shall be computed (where it is not the case) as if that company were within the charge to corporation tax on capital gains.]²*

[12] *In this section "participator", in relation to a company, has the meaning given by [section 454 of CTA 2010]¹².]*

[13] *In this section—*

(a) *references to a person's interest as a participator in a company are references to the interest in the company which is represented by all the factors by reference to which he falls to be treated as such a participator; and*

(b) *references to the extent of such an interest are references to the proportion of the interests as participators of all the participators in the company (including any who are not resident or ordinarily resident in the United Kingdom) which on a just and reasonable apportionment is represented by that interest.]¹*

[14] *For the purposes of this section, where—*

(a) *the interest of any person in a company is wholly or partly represented by an interest which he has under any settlement ("his beneficial interest"), and*

(b) *his beneficial interest is the factor, or one of the factors, by reference to which that person would be treated (apart from this subsection) as having an interest as a participator in that company,*

the interest as a participator in that company which would be that person's shall be deemed, to the extent that it is represented by his beneficial interest, to be an interest of the trustees of the settlement (and not of that person), and references in this section, in relation to a company, to a participator shall be construed accordingly.]¹

[15] *Any appeal under section 31 of the Management Act involving any question as to the extent for the purposes of this section of a person's interest as a participator in a company shall be to the Special Commissioners.]¹¹*

13A Section 13(5): interpretation

(1) For the purposes of section 13(5)(b) a disposal of an asset is to be regarded as a disposal of an asset used for the purposes of a trade carried on wholly outside the United Kingdom by a company if—

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(a) the asset is accommodation, or an interest or right in accommodation, which is situated outside the United Kingdom, and

(b) the accommodation has for each relevant period been furnished holiday accommodation of which a person has made a commercial letting.

(2) For the purposes of subsection (1)(b) each of the following is “a relevant period–

(a) the period of 12 months ending with the date of the disposal and each of the two preceding periods of 12 months, or

(b) if the company has been the beneficial owner of the accommodation (or interest or right) for a period longer than 36 months, the period of 12 months ending with the date of the disposal and each of the preceding periods of 12 months throughout which the company has been the beneficial owner of the accommodation (or interest or right).

(3) The reference in subsection (1)(b) to the commercial letting of furnished holiday accommodation is to be read in accordance with Chapter 6 of Part 4 of CTA 2009, but–

(a) as if sections 266, 268 and 268A were omitted, and

(b) as if, in section 267(1), the reference to an accounting period were a reference to a relevant period as defined by subsection (2) above.

(4) For the purposes of section 13(5)(ca) activities carried on by a company through a business establishment are “economically significant activities” if they are activities which consist of the provision by the company of goods or services to others on a commercial basis and involve

(a) the use of staff in numbers, and with competence and authority,

(b) the use of premises and equipment, and

(c) the addition of economic value, by the company, to those to whom the goods or services are provided, commensurate with the size and nature of those activities.

(5) In subsection (4) “staff” means employees, agents or contractors of the company.

(6) For the purposes of section 13(5)(ca) “business establishment” means a permanent establishment as defined by sections 1141 to 1144 of CTA 2010

Exclusion of free movement of capital?

112. It has been suggested that by increasing the threshold at which a charge applies the provisions concerning free movement of capital are excluded. This is based upon the approach of the CJEU in a series of cases in which it has held that the 25% holding is the threshold at which a person has an influence over a company, and that provisions which are aimed at persons who have an influence over a company properly fall within the scope of freedom of establishment, and reliance on free movement of capital is subsequently excluded (see for example C-31/11 *Scheunemann*).
113. The relevant principle, however, is that in considering which treaty freedom applies, regard must be had to the purpose of the legislation in question. In the context of section 13 TCGA 1992 it is plain that the purpose of the legislation is *not* to tax persons who have created an establishment in another country through a company. Gains from such are expressly excluded. Rather it is intended to tax gains on investments and other assets in circumstances where a right of establishment may not have been exercised at all. As such, it is not clear that simply having a 25% threshold excludes the provisions on free movement of capital, and

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

certainly it is clear that it does not insofar as the charge concerns gains from real property which is not a furnished holiday letting (see for example *Schmelz v Finanzamt Waldviertel* (Case C-97/09) [2011] STC 88).

114. As such, there would seem to be a good argument that section 13 TCGA 1992 continues to be deficient as regards free movement of capital.

Right of establishment

115. Even if the right to free movement of capital is excluded, it is not clear that the exclusion for economically significant activities ensures that restrictions on the right of establishment are removed.
116. The reference to economically significant activities carried on through a business establishment is a stricter test than participating in economic life in stable and continuing basis (A.G. Leger in *Cadbury Schweppes* at para 42).
117. Nevertheless, it is an improvement and at least is an attempt to provide a legislative explanation of what the UK considers to meet the EU concept. Moreover, it is a concept which some taxpayers will be able to show they fall within without having to fall back on EU law arguments.

The motive defence

118. More usefully, the amendments also introduce a motive test which (unlike that for the TOAA provisions) is expressly limited to capital gains tax and/or corporation tax.
119. This should mean that the defence is available where it can be shown that the main purpose in placing property in a company was to meet inheritance tax or SDLT concerns.
120. More generally, and notwithstanding that the amendments improve the position they do not make section 13 TCGA 1992 compliant with EU law. There remains restrictions on both free movement of capital, which continues to be in point, and freedom of establishment, which has a wider application than economically significant activities.

RORY MULLAN

27 February 2013

AMENDMENTS PROPOSED ON 11 DECEMBER 2012

13 Attribution of gains to members of non-resident companies

(1) This section applies as respects chargeable gains accruing to a company—

(a) which is not resident in the United Kingdom, and

(b) which would be a close company if it were resident in the United Kingdom.

(2) Subject to this section, every person who at the time when the chargeable gain accrues to the company is resident or ordinarily resident in the United Kingdom [and]¹⁰ [is a participator]¹ in the company, shall be treated for the purposes of this Act as if a part of the chargeable gain had accrued to him.

[(3) That part shall be equal to the proportion of the gain that corresponds to the extent of the participator's interest as a participator in the company.]¹

[(4) Subsection (2) above shall not apply in the case of any participator in the company to which the gain accrues where the aggregate amount falling under that subsection to be apportioned to him and to persons connected with him does not exceed [**one quarter**]³ of the gain.]¹

(5) This section shall not apply in relation to—

(a) ...¹

[(b) a chargeable gain accruing on the disposal of an asset used, and used only—

(i) for the purposes of a trade carried on by the company wholly outside the United Kingdom, or

(ii) for the purposes of the part carried on outside the United Kingdom of a trade carried on by the company partly within and partly outside the United Kingdom,]³ or

(c) a chargeable gain accruing on the disposal of currency or of a debt within section 252(1), where the currency or debt is or represents money in use for the purposes of a trade carried on by the company wholly outside the United Kingdom, or

(ca) a chargeable gain accruing on the disposal of an asset used, and used only, for the purposes of economically significant activities carried on outside the United Kingdom by the company through a business establishment in a territory outside the United Kingdom, or

(cb) a chargeable gain accruing to the company on a disposal of an asset where it is shown that neither—

(i) the disposal of the asset by the company, nor

(ii) the acquisition or holding of the asset by the company,

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

formed part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to capital gains tax or corporation tax, or

(d) to a chargeable gain in respect of which the company is chargeable to tax by virtue of section [10B]⁵.

[(5A) Where—

(a) an amount of tax is paid by a person in pursuance of subsection (2) above, and

(b) an amount in respect of the chargeable gain is distributed (either by way of dividend or distribution of capital or on the dissolution of the company) before the end of the period specified in subsection (5B) below,

the amount of tax (so far as neither reimbursed by the company nor applied as a deduction under subsection (7) below) shall be applied for reducing or extinguishing any liability of that person to income tax, capital gains tax or corporation tax in respect of the distribution.

(5B) The period referred to in subsection (5A)(b) above is the period of three years from—

(a) the end of the period of account of the company in which the chargeable gain accrued, or

(b) the end of the period of twelve months beginning with the date on which the chargeable gain accrued,

whichever is earlier.

...⁴]³

(6) ...¹

(7) The amount of capital gains tax paid by a person in pursuance of subsection (2) above (so far as [neither reimbursed by the company nor applied under subsection (5A) above for reducing any liability to tax])¹ shall be allowable as a deduction in the computation under this Act of a gain accruing on the disposal by him of [any asset representing his interest as a participator in the company.]¹

[(7A) In ascertaining for the purposes of subsection (5A) or (7) above the amount of capital gains tax or income tax chargeable on any person for any year on or in respect of any chargeable gain or distribution—

(a) any such distribution as is mentioned in subsection (5A)(b) above and falls to be treated as income of that person for that year shall be regarded as forming the highest part of the income on which he is chargeable to tax for the year;

(b) -(d) ...⁸]¹

(8) So far as it would go to reduce or extinguish chargeable gains accruing by virtue of this section to a person in a year of assessment this section shall apply in relation to a loss accruing to the company on the disposal of an asset in that year of assessment as it would apply if a gain instead of a loss had accrued to the company on the disposal, but shall only so apply in relation to that person; and subject to the preceding provisions of this subsection this section shall not apply in relation to a loss accruing to the company.

(9) If [a person who is a participator in the company]¹ at the time when the chargeable gain accrues to the company is itself a company which is not resident in the United Kingdom but which would be a close company if it were resident in the United Kingdom, an

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

amount equal to the amount apportioned under subsection (3) above out of the chargeable gain [to the participating company's interest as a participator in the company to which the gain accrues shall be further apportioned among the participators in the participating company according to the extent of their respective interests as participators, and subsection (2) above shall apply to them accordingly in relation to the amounts further apportioned, and so on through any number of companies.]¹

(10) The persons treated by this section as if a part of a chargeable gain accruing to a company had accrued to them shall include [the trustees of a settlement who are participators]⁷ in the company, or in any company amongst the participators in which the gain is apportioned under subsection (9) above,¹ if when the gain accrues to the company the trustees are neither resident nor ordinarily resident in the United Kingdom.

(10A) ...⁹

[(10B) A chargeable gain that would be treated as accruing to a person under subsection (2) above shall not be so treated if—

(a) it would be so treated only if assets that are assets of a pension scheme were taken into account in ascertaining that person's interest as a participator in the company, and

(b) at the time the gain accrues a gain arising on a disposal of those assets would be exempt from tax by virtue of [section 271(1)(c) or (1A)]⁶.

In paragraph (a) above “assets of a pension scheme” means assets held for the purposes of a fund or scheme to which any of the provisions mentioned in paragraph (b) above applies.³

(11) If any tax payable by any person by virtue of subsection (2) above is paid by the company to which the chargeable gain accrues, or in a case under subsection (9) above is paid by any such other company, the amount so paid shall not for the purposes of income tax, capital gains tax or corporation tax be regarded as a payment to the person by whom the tax was originally payable.

[(11A) For the purposes of this section the amount of the gain or loss accruing at any time to a company that is not resident in the United Kingdom shall be computed (where it is not the case) as if that company were within the charge to corporation tax on capital gains.]²

[(12) In this section “participator”, in relation to a company, has the meaning given by [section 454 of CTA 2010]¹².]¹

[(13) In this section—

(a) references to a person's interest as a participator in a company are references to the interest in the company which is represented by all the factors by reference to which he falls to be treated as such a participator; and

(b) references to the extent of such an interest are references to the proportion of the interests as participators of all the participators in the company (including any who are not resident or ordinarily resident in the United Kingdom) which on a just and reasonable apportionment is represented by that interest.]¹

[(14) For the purposes of this section, where—

(a) the interest of any person in a company is wholly or partly represented by an interest which he has under any settlement (“his beneficial interest”), and

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(b) his beneficial interest is the factor, or one of the factors, by reference to which that person would be treated (apart from this subsection) as having an interest as a participator in that company,

the interest as a participator in that company which would be that person's shall be deemed, to the extent that it is represented by his beneficial interest, to be an interest of the trustees of the settlement (and not of that person), and references in this section, in relation to a company, to a participator shall be construed accordingly.]¹

[(15) Any appeal under section 31 of the Management Act involving any question as to the extent for the purposes of this section of a person's interest as a participator in a company shall be to the Special Commissioners.]^{1,11}

13A Section 13(5): interpretation

(1) For the purposes of section 13(5)(b) a disposal of an asset is to be regarded as a disposal of an asset used for the purposes of a trade carried on wholly outside the United Kingdom by a company if-

(a) the asset is accommodation, or an interest or right in accommodation, which is situated outside the United Kingdom, and

(b) the accommodation has for each relevant period been furnished holiday accommodation of which a person has made a commercial letting.

(2) For the purposes of subsection (1)(b) each of the following is "a relevant period-

(a) the period of 12 months ending with the date of the disposal and each of the two preceding periods of 12 months, or

(b) if the company has been the beneficial owner of the accommodation (or interest or right) for a period longer than 36 months, the period of 12 months ending with the date of the disposal and each of the preceding periods of 12 months throughout which the company has been the beneficial owner of the accommodation (or interest or right).

(3) The reference in subsection (1)(b) to the commercial letting of furnished holiday accommodation is to be read in accordance with Chapter 6 of Part 4 of CTA 2009, but-

(a) as if sections 266, 268 and 268A were omitted, and

(b) as if, in section 267(1), the reference to an accounting period were a reference to a relevant period as defined by subsection (2) above.

(4) For the purposes of section 13(5)(ca) activities carried on by a company through a business establishment are "economically significant activities" if they are activities which consist of the provision by the company of goods or services to others on a commercial basis and involve

(a) the use of staff in numbers, and with competence and authority,

(b) the use of premises and equipment, and

(c) the addition of economic value, by the company, to those to whom the goods or services are provided, commensurate with the size and nature of those activities.

(5) In subsection (4) "staff" means employees, agents or contractors of the company.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(6) For the purposes of section 13(5)(ca) "business establishment" means a permanent establishment as defined by sections 1141 to 1144 of CTA 2010.

AMENDMENTS

¹ Words in sub-ss (2), (7), (9), (10) substituted or inserted, sub-ss (3), (4) substituted, sub-ss (7A), (12)–(15) inserted and sub-ss (5)(a), (6) repealed by FA 1996 s 174(1)–(9), (11), Sch 41 Pt V(30) with effect in relation to gains accruing after 27 November 1995.

² Sub-s (11A) inserted by FA 1998 s 122(4) with effect in relation to disposals on or after 6 April 1998, subject to FA 1998 s 122(7).

³ Words in sub-s (4) substituted, sub-s (5)(b) substituted, sub-ss (5A), (5B) substituted for old sub-s (5A), and sub-s (10B) inserted by FA 2001 s 80 with effect for chargeable gains accruing as mentioned in sub-s (1) above after 6 March 2001.

⁴ In sub-s (5B), words repealed by FA 2002 s 141, Sch 40 Pt 3(16) with effect from 24 July 2002—

⁵ Reference substituted by FA 2003 s 155, Sch 27 para 2(1), (3) with effect for accounting periods beginning after 31 December 2002.

⁶ In sub-s (10B)(b), words substituted by FA 2004 ss 281, 284, Sch 35 paras 38, 39, with effect from 6 April 2006, subject to transitional provisions and savings in FA 2004 Sch 36.

⁷ Words in sub-s (10) substituted by FA 2006 s 88, Sch 12 paras 7, 8 with effect in relation to gains accruing on or after 6 April 2006.

⁸ Sub-s (7A)(b)–(d) repealed by FA 2008 s 8, Sch 2 paras 1, 4 with effect for the tax year 2008–09 and subsequent tax years.

⁹ Sub-s (10A) repealed by FA 2008 s 8, Sch 2 paras 23, 28 with effect in relation to chargeable gains accruing or treated as accruing in the tax year 2008–09 or any subsequent tax year.

¹⁰ Words in sub-s (2) substituted by FA 2008 s 25, Sch 7 para 103 with effect in relation to chargeable gains accruing on or after 6 April 2008.

¹¹ Sub-s (15) repealed by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order, SI 2009/56 art 3, Sch 1 para 178 with effect from 1 April 2009.

¹² In sub-s (12) words substituted by CTA 2010 s 1177, Sch 1 para 227. CTA 2010 has effect for corporation tax purposes for accounting periods ending on or after 1 April 2010, and for income and capital gains tax purposes for the tax year 2010–11 and subsequent tax years.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

AMENDMENTS PROPOSED ON 11 DECEMBER 2012²⁶

CHAPTER 2

TRANSFER OF ASSETS ABROAD

Modification—

ITA 2007 Sch 2 para 138 (in relation to transfers and associated operations on or after 20 March 1990 and before 30 November 1993, a body corporate regarded as resident in a territory outside the United Kingdom for the purposes of any double taxation arrangements is treated as if it were resident outside the United Kingdom for the purposes of this Chapter).

INTRODUCTION

714 Overview of Chapter

- (1) This Chapter imposes a charge to income tax on—
 - (a) individuals to whom income is treated as arising under section 721 (individuals with power to enjoy income as a result of relevant transactions),
 - (b) individuals to whom income is treated as arising under section 728 (individuals receiving capital sums as a result of relevant transactions), and
 - (c) individuals to whom income is treated as arising under section 732 (non-transferors receiving a benefit as a result of relevant transactions).
- (2) The charges apply only if a relevant transfer occurs, and they operate by reference to income of a person abroad that is connected with the transfer or another relevant transaction.
- (3) For the meaning of “relevant transaction”, “relevant transfer” and “person abroad”, see sections 715, 716 and 718 respectively.
- (4) In this Chapter references to individuals include their spouses or civil partners.

715 Meaning of “relevant transaction”

- (1) A transaction is a relevant transaction for the purposes of this Chapter if it is—
 - (a) a relevant transfer, or
 - (b) an associated operation.

²⁶ The following inserts the changes in the proposed Schedule concerning the response to the consultation on the TAA legislation. It does not include changes to the TAA legislation incidental to other proposals for which draft legislation was produced on 11 December 2012 such as the abolition of ordinary residence.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(2) For the meaning of “relevant transfer” and “associated operation”, see sections 716 and 719 respectively.

Derivation—

TA 1988 s 741B(2).

716 Meaning of “relevant transfer” and “transfer”

- (1) A transfer is a relevant transfer for the purposes of this Chapter if—
- (a) it is a transfer of assets, and
 - (b) as a result of—
 - (i) the transfer,
 - (ii) one or more associated operations, or
 - (iii) the transfer and one or more associated operations, income becomes payable to a person abroad.
- (2) In this Chapter “transfer”, in relation to rights, includes the creation of the rights.
- (3) For the meaning of “assets”, see section 717.

Derivation—

TA 1988 ss 739(1), 740(1) and 742(1A) and (9).

Modification—

ITA 2007 Sch 2 para 141(1) (in relation to any time before 5 December 2005, the reference in sub-s (1)(b) above to income which becomes payable to a person abroad does not include income that becomes so payable just as a result of one or more associated operations).

717 Meaning of “assets” etc

In this Chapter—

- (a) “assets” includes property or rights of any kind, and
- (b) references to assets representing any assets, income or accumulations of income include references to—
 - (i) shares in or obligations of any company to which the assets, income or accumulations are or have been transferred, or
 - (ii) obligations of any other person to whom the assets, income or accumulations are or have been transferred.

Derivation—

TA 1988 s 742(9).

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

718 Meaning of “person abroad” etc

(1) In this Chapter “person abroad” means a person who is resident or domiciled outside the United Kingdom.

(2) For the purposes of this Chapter, the following persons are treated as resident outside the United Kingdom—

~~(a) — a UK resident body corporate that is incorporated outside the United Kingdom,~~

(b) the person treated as neither UK resident nor ordinarily UK resident under section 475(3) (trustees of settlements), and

(c) persons treated as non-UK resident under section 834(4) (personal representatives).

Derivation—

TA 1988 ss 739(1) to (3), 740(1), (3), 742(2), (4), (8), (9A) and 745(3) and FA 1989 s 111(1).

719 Meaning of “associated operation”

(1) In this Chapter “associated operation”, in relation to a transfer of assets, means an operation of any kind effected by any person in relation to—

(a) any of the assets transferred,

(b) any assets directly or indirectly representing any of the assets transferred,

(c) the income arising from any assets within paragraph (a) or (b), or

(d) any assets directly or indirectly representing the accumulations of income arising from any assets within paragraph (a) or (b).

(2) It does not matter whether the operation is effected before, after or at the same time as the transfer.

Derivation—

TA 1988 s 742(1).

Changes in the law—

See ITA 2007 EN Annex 1 Change 110. This change clarifies the meaning of “associated operation” for the purposes of the transfer of assets abroad legislation.

Modification—

ITA 2007 Sch 2 para 141(2) (modification of this section in relation to any time before 5 December 2005).

CHARGE WHERE POWER TO ENJOY INCOME

720 Charge to tax on income treated as arising under section 721

(1) The charge under this section applies for the purpose of preventing the avoiding of liability to income tax by individuals who are ordinarily UK resident by means of relevant transfers.

(2) Income tax is charged on income treated as arising to such an individual under section 721 (individuals with power to enjoy income as a result of relevant transactions).

(3) Tax is charged under this section on the amount of income treated as arising in the tax year.

(4) But see section 724 (special rules where benefit provided out of income of person abroad) [and section 726 (non-UK domiciled individuals to whom remittance basis applies)]¹.

(5) The person liable for any tax charged under this section is the individual to whom the income is treated as arising.

(6) For rules about the reduction in the amount charged in some circumstances and the availability of deductions and reliefs, see—

section 725 (reduction in amount charged where controlled foreign company involved), and

section 746 (deductions and reliefs where individual charged under this section or section 727).

(7) For exemptions from the charge under this section, see sections 736 to [742](#) [742A](#) (exemptions where no tax avoidance purpose or genuine commercial transaction *etc.*).

Derivation—

TA 1988 ss 739(1), (2) and 743(1).

Amendments—

¹ *Words in sub-s (4) inserted by FA 2008 s 25, Sch 7 paras 163, 164 with effect for the tax year 2008–09 and subsequent tax years.*

721 Individuals with power to enjoy income as a result of relevant transactions

(1) Income is treated as arising to such an individual as is mentioned in section 720(1) in a tax year for income tax purposes if conditions A and B are met.

(2) Condition A is that the individual has power in the tax year to enjoy income of a person abroad as a result of—

- (a) a relevant transfer,
- (b) one or more associated operations, or
- (c) a relevant transfer and one or more associated operations.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(3) Condition B is that the income of the person abroad would be chargeable to income tax if it were the individual's and received by the individual in the United Kingdom.

(3A) The amount of the income treated as arising under subsection (1) is equal to the amount of the income of the person abroad (subject to sections 724 and 725).

(3B) Subsection (1) does not apply if-

(a) the individual is liable for income tax charged on the income of the person abroad by virtue of a charge not contained in this Chapter, and

(b) all income tax for which the individual is liable has been paid.

(4) For the purposes of subsection (2), it does not matter whether the income of the person abroad may be enjoyed immediately or only later.

(5) It does not matter for the purposes of this section—

~~(a) whether the income would be chargeable to income tax apart from section 720;~~

(b) whether the individual is ordinarily UK resident at the time when the relevant transfer is made, or

(c) whether the avoiding of liability to income tax is a purpose for which the transfer is effected.

(6) For the circumstances in which an individual is treated as having the power to enjoy income for the purposes of this section, see section 722.

Derivation—

TA 1988 ss 739(1) to (2) and 742(1B).

HMRC Manuals—

International Manual, INTM 600020 (“income charge”).

Modifications—

ITA 2007 Sch 2 para 140 (sub-s (5)(b), (c) above does not apply if the income arose before 26 November 1996).

ITA 2007 Sch 2 para 141(3) (in relation to any time before 5 December 2005, the reference in sub-s (2) above to income which an individual has power to enjoy does not include income which the individual has power to enjoy just as a result of one or more associated operations).

722 When an individual has power to enjoy income of person abroad

(1) For the purposes of section 721, an individual is treated as having power to enjoy income of a person abroad if any of the enjoyment conditions are met.

(2) In subsection (1) “the enjoyment conditions” means conditions A to E as specified in section 723.

(3) In determining whether an individual has power to enjoy income for the purposes of section 721, regard must be had to the substantial result and effect of all the relevant

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

transactions.

(4) In making that determination all benefits which may at any time accrue to the individual as a result of the transfer and any associated operations must be taken into account, irrespective of—

- (a) the nature or form of the benefits, or
- (b) whether the individual has legal or equitable rights in respect of the benefits.

Derivation—

TA 1988 s 742(2) and (3).

723 The enjoyment conditions

(1) Condition A is that the income is in fact so dealt with by any person as to be calculated at some time to enure for the benefit of the individual, whether in the form of income or not.

(2) Condition B is that the receipt or accrual of the income operates to increase the value to the individual—

- (a) of any assets the individual holds, or
- (b) of any assets held for the individual's benefit.

(3) Condition C is that the individual receives or is entitled to receive at any time any benefit provided or to be provided out of the income or related money.

(4) In subsection (3) “related money” means money which is or will be available for the purpose of providing the benefit as a result of the effect or successive effects—

- (a) on the income, and
- (b) on any assets which directly or indirectly represent the income,

of the associated operations referred to in section 721(2).

(5) Condition D is that the individual may become entitled to the beneficial enjoyment of the income if one or more powers are exercised or successively exercised.

(6) For the purposes of subsection (5) it does not matter—

- (a) who may exercise the powers, or
- (b) whether they are exercisable with or without the consent of another person.

(7) Condition E is that the individual is able in any manner to control directly or indirectly the application of the income.

Derivation—

TA 1988 s 742(2).

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

724 Special rules where benefit provided out of income of person abroad

(1) This section applies if an individual has power to enjoy income of a person abroad for the purposes of section 721 because of receiving any such benefit as is referred to in section 723(3) (benefit provided out of income of person abroad).

(2) Despite anything in section 720, the individual is liable to income tax under that section for the tax year in which the benefit is received on **an amount equal to** the whole of the amount or value of that benefit.

(3) But subsection (2) does not apply so far as it is shown that the benefit derives directly or indirectly from income on which the individual has already been charged to income tax for that tax year or a previous tax year **under this Chapter**.

Derivation—

TA 1988 s 743(5).

725 Reduction in amount charged where controlled foreign company involved

[(1) This section applies if—

(a) under Part 9A of TIOPA 2010 (controlled foreign companies), the CFC charge is charged in relation to a CFC's accounting period, **and**

~~(b) — apart from this section, the amount of income treated as arising to an individual under section 721 for a tax year would be or include a sum forming part of the CFC's chargeable profits for that accounting period.]~~

(b) an amount of income is treated as arising to an individual under section 721 for a tax year, and

(c) the income mentioned in section 721(2) is or includes a sum forming part of the CFC's chargeable profits for that accounting period.

OR WHERE THE AMENDMENTS MADE BY PARAGRAPH 22 OF SCHEDULE 20 TO FA 2012 ARE TO BE IGNORED IN ACCORDANCE WITH PARAGRAPH 50(9) OF THAT SCHEDULE THE DELETION OF (B) IS IGNORED AND THE FOLLOWING ARE ADDED

(c) an amount of income is treated as arising to an individual under section 721 for a tax year, and

(d) the income mentioned in section 721(2) is or includes a sum forming part of the controlled foreign company's chargeable profits for that accounting period.

(2) The amount of income so treated is reduced by—

$$S \times (CA / CP)$$

where—

S is the sum forming part of the controlled foreign company's [CFC's] chargeable profits for that accounting period,

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

CA is the chargeable amount [CFC's chargeable profits for that accounting period so far as apportioned to chargeable companies at step 3 in section 371BC(1) of TIOPA 2010], and

CP is the controlled foreign company's [CFC's] chargeable profits for that accounting period.

(2A) In a case in which section 724 applies, the reference to S in the formula in subsection (2) is to be read as a reference to X% of S.

(2B) "X%" is determined as follows-

$$100\% \times (A/I)$$

where-

A is the amount on which the individual is liable as determined under section 724(2), and

I is the amount of the income mentioned in section 721(2).

[(3) Terms used in this section which are defined in Part 9A of TIOPA 2010 have the same meaning as in that Part.]

Derivation

Sub-ss (1), (2) derived in part from the Income and Corporation Taxes Act 1988, s 747(4); sub-s (3) is a drafting provision.

Initial Commencement

Specified date

This Act comes into force on 6 April 2007 and has effect, for the purposes of income tax for the year 2007–08 and subsequent tax years, and for the purposes of corporation tax for accounting periods ending after 5 April 2007: see s 1034(1); for transitional provisions and savings see Sch 2 hereto.

Amendment

Sub-s (1): substituted by the Finance Act 2012, s 180, Sch 20, Pt 3, para 22(1), (2).

Date in force: this amendment has effect in relation to accounting periods of CFCs beginning on or after 1 January 2013: see the Finance Act 2012, s 180, Sch 20, Pt 4, para 49; for transitional provisions and savings see Sch 20, Pt 4, para 50, Pt 5 thereto.

Sub-s (2): in definitions "S", "CP" words "controlled foreign company's" in italics repealed and subsequent reference in square brackets substituted by the Finance Act 2012, s 180, Sch 20, Pt 3, para 22(1), (3)(a).

Date in force: this amendment has effect in relation to accounting periods of CFCs beginning on or after 1 January 2013: see the Finance Act 2012, s 180, Sch 20, Pt 4, para 49; for transitional provisions and savings see Sch 20, Pt 4, para 50, Pt 5 thereto.

Sub-s (2): in definition "CA" words "chargeable amount" in italics repealed and subsequent words in square brackets substituted by the Finance Act 2012, s 180, Sch 20, Pt 3, para 22(1), (3)(b).

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

Date in force: this amendment has effect in relation to accounting periods of CFCs beginning on or after 1 January 2013: see the Finance Act 2012, s 180, Sch 20, Pt 4, para 49; for transitional provisions and savings see Sch 20, Pt 4, para 50, Pt 5 thereto.

Sub-s (3): substituted by the Finance Act 2012, s 180, Sch 20, Pt 3, para 22(1), (4).

Date in force: this amendment has effect in relation to accounting periods of CFCs beginning on or after 1 January 2013: see the Finance Act 2012, s 180, Sch 20, Pt 4, para 49; for transitional provisions and savings see Sch 20, Pt 4, para 50, Pt 5 thereto.

See Further

See further, in relation to the application of this Chapter to an offshore income gain arising to a person resident or domiciled outside the United Kingdom: the Offshore Funds (Tax) Regulations 2009, SI 2009/3001, reg 21; for transitional provisions and savings see reg 13(1), Sch 1 thereto.

[726 Non-UK domiciled individuals to whom remittance basis applies

(1) This section applies in relation to income treated under section 721 as arising to an individual in a tax year (“the deemed income”) if—

- (a) section 809B, 809D or 809E (remittance basis) applies to the individual for the year, and
- (b) the individual is not domiciled in the United Kingdom in the year.

(2) For the purposes of this section the deemed income is “foreign” if (and to the **corresponding** extent that) the income mentioned in section 721(2) would be relevant foreign income if it were the individual's.

(3) Treat the foreign deemed income as relevant foreign income of the individual.

(4) For the purposes of Chapter A1 of Part 14 (remittance basis) treat so much of the income within section 721(2) as would be relevant foreign income if it were the individual's as deriving from the foreign deemed income.¹

Amendments—

¹ Section 726 substituted by FA 2008 s 25, Sch 7 paras 163, 165 with effect for the tax year 2008–09 and subsequent tax years.

CHARGE WHERE CAPITAL SUMS RECEIVED

727 Charge to tax on income treated as arising under section 728

(1) The charge under this section applies for the purpose of preventing the avoiding of liability to income tax by individuals who are ordinarily UK resident by means of relevant transfers.

(2) Income tax is charged on income treated as arising to such an individual under

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

section 728 (individuals receiving capital sums as a result of relevant transactions).

(3) Tax is charged under this section on the amount of income treated as arising in the tax year.

[(3A) But see section 730 (non-UK domiciled individuals to whom remittance basis applies).]¹

(4) The person liable for any tax charged under this section is the individual to whom the income is treated as arising.

(5) For exemptions from the charge under this section, see sections 736 to **742 742A** (exemptions where no tax avoidance purpose or genuine commercial transaction **etc**).

(6) For rules about the availability of deductions and reliefs where income is charged under this section, see section 746 (deductions and reliefs where individual charged under section 720 or this section).

Derivation—

TA 1988 ss 739 and 743.

HMRC Manuals—

International Manual, INTM 600020 (“income charge”).

Amendments—

¹ *Sub-s (3A) inserted by FA 2008 s 25, Sch 7 paras 163, 166 with effect for the tax year 2008–09 and subsequent tax years.*

728 Individuals receiving capital sums as a result of relevant transactions

(1) Income is treated as arising to such an individual as is referred to in section 727(1) in a tax year for income tax purposes if—

(a) income has become the income of a person abroad as a result of—

(i) a relevant transfer,

(ii) one or more associated operations, or

(iii) a relevant transfer and one or more associated operations, and

(b) the capital receipt conditions are met in respect of the individual in the tax year (see section 729).

(1A) The amount of the income treated as arising under subsection (1) is equal to the amount of the income of the person abroad (subject to subsection (2)).

(2) Section 725 (reduction in amount charged where controlled foreign company involved) applies for determining the amount of income treated as arising under subsection (1) as **it applies for determining the amount so treated under section 721(1) if-**

(a) in subsection (1) of that section-

(i) the reference to section 721 were a reference to this section, and

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

~~(ii) the reference to section 721(2) were a reference to subsection (1)(a) of this section, and~~

~~(b) subsections (2A) and (2B) of that section were omitted.~~

~~(2A) Subsection (1) does not apply if—~~

~~(a) the individual is liable for income tax charged on the income of the person abroad by virtue of a charge not contained in this Chapter, and~~

~~(b) all income tax for which the individual is liable has been paid.~~

(3) It does not matter for the purposes of this section—

~~(a) whether the income would be chargeable to income tax apart from section 727,~~

(b) whether the individual is ordinarily UK resident at the time when the relevant transfer abroad is made, or

(c) whether the avoiding of liability to income tax is a purpose for which that transfer is effected.

Derivation—

TA 1988 ss 739(1), (1A) and (3), 742(1A) and 747 (4).

Modifications—

ITA 2007 Sch 2 para 140 (sub-s (3)(b), (c) above does not apply if the income arose before 26 November 1996).

ITA 2007 Sch 2 para 141(4), (5) (In relation to any time before 5 December 2005, the reference in sub-s (1)(a) to income which has become the income of a person abroad does not include income that has become such income just as a result of one or more associated operations).

729 The capital receipt conditions

(1) For the purposes of section 728(1), the capital receipt conditions are met in respect of the individual in a tax year (“the relevant year”) if—

(a) either—

(i) in the relevant year the individual receives or is entitled to receive any capital sum, whether before or after the relevant transfer, or

(ii) in any earlier tax year the individual has received any capital sum, whether before or after the relevant transfer, and

(b) the payment of that sum is (or, in the case of an entitlement, would be) in any way connected with any relevant transaction.

(2) But subsection (1)(a)(ii) does not apply merely because of the receipt of a sum by way of loan if the loan is wholly repaid before the relevant year begins.

(3) In subsection (1) “capital sum” means—

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

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

- (b) any other sum paid or payable—
 - (i) otherwise than as income, and
 - (ii) not for full consideration in money or money's worth.

(4) For the purposes of subsection (1), a sum is treated as a capital sum which the individual (“A”) receives or is entitled to receive if another person receives or is entitled to receive it—

- (a) at A's direction, or
- (b) as a result of the assignment by A of A's right to receive it.

Derivation—

TA 1988 s 739(3)–(6).

Changes in the law—

See ITA 2007 EN Annex 1 Change 111. This change makes it clear that there is no liability under TA 1988 s 739(3) (transfer of assets abroad: charge where capital sum receivable or received) if the taxpayer's entitlement to receive a capital sum has ceased.

[730 Non-UK domiciled individuals to whom remittance basis applies

(1) This section applies in relation to income treated under section 728 as arising to an individual in a tax year (“the deemed income”) if—

- (a) section 809B, 809D or 809E (remittance basis) applies to the individual for the year, and
- (b) the individual is not domiciled in the United Kingdom in the year.

(2) For the purposes of this section the deemed income is “foreign” if (and to the extent that) the income mentioned in section 728(1)(a) would be relevant foreign income if it were the individual's.

(3) Treat the foreign deemed income as relevant foreign income of the individual.

(4) For the purposes of Chapter A1 of Part 14 (remittance basis) treat so much of the income within section 728(1)(a) as would be relevant foreign income if it were the individual's as deriving from the foreign deemed income.¹

Amendments—

¹ Section 730 substituted by FA 2008 s 25, Sch 7 paras 163, 167 with effect for the tax year 2008–09 and subsequent tax years.

CHARGE WHERE BENEFIT RECEIVED

731 Charge to tax on income treated as arising under section 732

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(1) Income tax is charged on income treated as arising to an individual under section 732 (non-transferors receiving a benefit as a result of relevant transactions).

(2) Tax is charged under this section on the amount of income treated as arising for the tax year.

[(2A) But see section 735 (non-UK domiciled individuals to whom remittance basis applies).]¹

(3) The person liable for any tax charged under this section is the individual to whom the income is treated as arising.

(4) For exemptions from the charge under this section, see sections 736 to ~~742~~ 742A (exemptions where no tax avoidance purpose or genuine commercial transaction *etc*).

Derivation—

TA 1988 s 740(2).

HMRC Manuals—

International Manual, INTM 600030 (“benefits charge”).

Amendments—

¹ *Sub-s (2A) inserted by FA 2008 s 25, Sch 7 paras 163, 168 with effect for the tax year 2008–09 and subsequent tax years.*

~~732 — Non transferors receiving a benefit as a result of relevant transactions~~

~~(1) — This section applies if —~~

~~(a) — a relevant transfer occurs,~~

~~(b) — an individual who is ordinarily UK resident receives a benefit,~~

~~(c) — the benefit is provided out of assets which are available for the purpose as a result of —~~

~~(i) — the transfer, or~~

~~(ii) — one or more associated operations,~~

~~(d) — the individual is not liable to income tax under section 720 or 727 by reference to the transfer and would not be so liable if the effect of sections 726 and 730 were ignored, and~~

~~(e) — the individual is not liable to income tax on the amount or value of the benefit (apart from section 731).~~

~~(2) — Income is treated as arising to the individual for income tax purposes for any tax year for which section 733 provides that income arises.~~

~~(3) — Also see that section for the amount of income treated as arising for any such tax year.~~

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

~~Derivation~~

~~TA 1988 ss 740(1), (2) and 742(1A).~~

~~Changes in the law~~

~~See ITA 2007 EN Annex 1 Change 112. This change clarifies the exclusion from liability to income tax under TA 1988 s 740 (transfer of assets abroad: charge where benefit received) for those who are liable to income tax under TA 1988 s 739 (transfer of assets abroad: charge where power to enjoy income or where capital sum received) on deemed income in respect of the same transfer. The change makes it clear that this exclusion extends to those who would be liable under s 739 apart from falling within the exception in s 743(3) for non-domiciled individuals taxed on the remittance basis.~~

~~Modification~~

~~ITA 2007 Sch 2 para 133 (transitional provisions and savings).~~

732 Non-transferors receiving a benefit as a result of relevant transactions

(1) This section applies if a relevant transfer occurs.

(2) Income is treated as arising to an individual in a tax year ("the relevant tax year") for income tax purposes if—

(a) in the relevant tax year or any earlier tax year, the individual receives a relevant benefit, and

(b) all or part of the relevant benefit is matched (under section 733 as it applies for the relevant tax year) with the relevant income amount for the relevant tax year or any earlier tax year.

(3) The amount of the income treated as arising is equal to—

(a) the amount or value of the relevant benefit, or

(b) if only part of the relevant benefit is matched, the amount or value of that part.

(4) A benefit received by an individual is "relevant" if—

(a) the individual is ordinarily UK resident when the benefit is received,

(b) the benefit is provided out of assets which are available for the purpose as a result of—

(i) the relevant transfer, or

(ii) one or more associated operations,

(c) the individual is not liable to income tax under section 720 or 727 by reference to the relevant transfer and would not be so liable if the effect of sections 726 and 730 were ignored, and

(d) the individual is not liable to income tax on the amount or value of the benefit (apart from section 731).

(5) The "relevant income amount" for a tax year is the total amount of income arising in the year to persons abroad which, as a result of the relevant transfer or associated operations, can be used directly or indirectly for providing benefits to individuals.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(6) Income which arises to a person abroad is to be left out of account for the purposes of subsection (5) if it is required to be left out of account because of section 743(1) and (2).

(7) Income which arises to a person abroad is also to be left out of account for the purposes of subsection (5) if—

(a) an individual to whom the income can be used for providing benefits is liable for income tax charged on the income by virtue of a charge not contained in this Chapter, and

(b) all income tax for which the individual is liable has been paid.

~~733—Income charged under section 731~~

~~(1)—To find the amount (if any) of the income treated as arising under section 732(2) for any tax year in respect of benefits provided as mentioned in section 732(1)(c) take the following steps:~~

~~Step 1 Identify the amount or value of such benefits received by the individual in the tax year and in any earlier tax years in which section 732 has applied.~~

~~The sum of those amounts and values is “the total benefits”.~~

~~Step 2 Deduct from the total benefits the total amount of income treated as arising to the individual under section 732(2) for earlier tax years as a result of the relevant transfer or associated operations.~~

~~The result is “the total untaxed benefits”.~~

~~Step 3 Identify the amount of any income which—~~

~~(a)—arises in the tax year to a person abroad, and~~

~~(b)—as a result of the relevant transfer or associated operations can be used directly or indirectly for providing a benefit for the individual.~~

~~That amount is “the relevant income of the tax year” in relation to the individual and the tax year.~~

~~Step 4 Add together the relevant income of the tax year and the relevant income of earlier tax years in relation to the individual (identified as mentioned in Step 3). The sum of those amounts is “total relevant income”.~~

~~Step 5 Deduct from total relevant income—~~

~~(a)—the amount deducted at Step 2, and~~

~~(b)—any other amount which may not be taken into account because of section 743(1) and (2) (no duplication of charges).~~

~~The result is “the available relevant income”.~~

~~Step 6 Compare the total untaxed benefits and the available relevant income.~~

~~The amount of the income treated as arising under section 732(2) for any tax year is the total untaxed benefits unless the available relevant income is lower. If the available relevant income is lower, it is the amount of income treated as so arising.~~

~~(2)—Subsection (1) is subject to section 734 (reduction in amount charged: previous~~

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

~~capital gains tax charge).~~

~~(3) — See also section 740(5) to (7) (which makes provision about relevant income and benefits where relevant transactions include both transactions before 5 December 2005 and transactions after 4 December 2005 and exemptions under this Chapter cease to apply).~~

~~Derivation —~~

~~TA 1988 ss 740(2), (3) and 741C(7).~~

~~Changes in the law —~~

~~See ITA 2007 EN Annex 1 Change 119. This change clarifies how liability for income tax of non-transferors who receive a benefit is calculated, in particular where the benefit is less than the “relevant income” in relation to the individual receiving the benefit.~~

~~Modifications —~~

~~ITA 2007 Sch 2 para 133 (transitional provisions and savings).~~

~~ITA 2007 Sch 2 para 135(3)–(5) (transitional provisions and savings).~~

~~ITA 2007 Sch 2 para 137(3)–(5) (transitional provisions and savings).~~

733 Matching relevant benefits with relevant income amounts

(1) Take the following steps in order to match relevant benefits with relevant income amounts for the purposes of section 732(2).

Step 1

Find the relevant income amount for the relevant tax year.

Step 2

Find the total amount of relevant benefits received by individuals in the relevant tax year.

Step 3

The relevant income amount for the relevant tax year is matched with—

(a) if the total amount of the relevant benefits received in the relevant tax year does not exceed the relevant income amount, each relevant benefit so received, and

(b) otherwise, the relevant proportion of each of those relevant benefits.

“The relevant proportion” is the relevant income amount for the relevant tax year divided by the total amount of the relevant benefits received in the relevant tax year.

Step 4

If paragraph (a) of Step 3 applies—

(a) reduce the relevant income amount for the relevant tax year by the total amount of the relevant benefits referred to there, and

(b) reduce the amount of those relevant benefits to nil.

If paragraph (b) of Step 3 applies—

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(a) reduce the relevant income amount for the relevant tax year to nil, and

(b) reduce the amount of each of the relevant benefits referred to there by the relevant proportion of that relevant benefit.

Step 5

Start again at Step 1 (unless subsection (2) applies).

If the relevant income amount for the relevant tax year (as reduced at Step 4) is not nil, read references to relevant benefits received in the relevant tax year as references to relevant benefits received in the latest tax year which—

(a) is before the last tax year for which Steps 1 to 4 have been taken, and

(b) is a tax year in which relevant benefits (the amounts of which have not been reduced to nil) were received by individuals.

If the relevant income amount for the relevant tax year (as so reduced) is nil, read references to the relevant income amount for the relevant tax year as the relevant income amount for the latest tax year—

(a) which is before the last tax year for which Steps 1 to 4 have been taken, and

(b) for which the relevant income amount is not nil.

(2) This subsection applies if—

(a) all relevant benefits received by individuals in the relevant tax year and earlier tax years have been reduced to nil, or

(b) the relevant income amounts for the relevant tax year and all earlier tax years have all been reduced to nil.

(3) The effect of any reduction under Step 4 in subsection (1) is to be taken into account in any subsequent application of this section.

734 — Reduction in amount charged: previous capital gains tax charge

(1) — This section applies if—

(a) — benefits provided as mentioned in section 732(1)(c) are received in a tax year,

(b) — for that tax year the whole or part of any benefits so provided is a capital payment to which section 87 or 89(2) of, or paragraph 8 of Schedule 4C to, TCGA 1992 applies (chargeable gains: gains attributed to beneficiaries),

(c) — it is such a payment because the total untaxed benefits exceed the available relevant income (see Step 6 in section 733(1)) and so it is not treated as income arising to the individual under section 732(2), and

(d) — because of that capital payment chargeable gains are treated as accruing to the individual in that or a subsequent tax year under any of the provisions referred to in paragraph (b).

(2) — For any tax year after one in which such chargeable gains are so treated, the amount of income treated as arising to the individual under section 732(2) in respect of benefits provided as mentioned in section 732(1)(c) as a result of the transfer or operations in

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

question is calculated as follows:

(3) — The amount is calculated under section 733(1) as if the total untaxed benefits were reduced by the amount of those gains.

(4) — In this section “the total untaxed benefits” and “the available relevant income” have the same meaning as in section 733(1) (see Steps 2 and 5).

[(5) — References in this section to chargeable gains treated as accruing to an individual include offshore income gains treated as arising to the individual (see [regulations 20 and 22 to 24 of the Offshore Funds (Tax) Regulations 2009 (SI 2009/3001)]^a).]

~~Derivation~~

~~TA 1988 s 740(6)~~

~~Amendments~~

^a — ~~Sub-s (5) inserted by FA 2008 s 25, Sch 7 para 97 with effect for the tax year 2008–09 and subsequent tax years.~~

^a — ~~In sub-s (5), words substituted for words “section 762 of ICTA” by the Offshore Funds (Tax) Regulations, SI 2009/3001 reg 129(1), (5) with effect for the purposes of income tax for the tax year 2009–10 and subsequent tax years and for distributions made on or after 1 December 2009; for the purposes of corporation tax, on income, for accounting periods ending on or after 1 December 2009 and for distributions made on or after that date and, on chargeable gains, in relation to disposals made on or after 1 December 2009; and for the purposes of capital gains tax, in relation to disposals made on or after 1 December 2009.~~

734 Reduction in relevant income amount: previous capital gains charge

~~(1) This section applies if—~~

~~(a) a relevant benefit is received by an individual in the relevant tax year,~~

~~(b) for that tax year the whole or a part of the relevant benefit is a capital payment to which section 87 or 89(2) of, or paragraph 8 of Schedule 4C to, TCGA 1992 applies (chargeable gains: gains attributed to beneficiaries),~~

~~(c) it is such a payment because it is not matched with the relevant income amount for the relevant tax year or any earlier tax year, and~~

~~(d) because of that capital payment, chargeable gains are treated as accruing to the individual in the relevant tax year or a subsequent tax year under any of the provisions referred to in paragraph (b).~~

~~(2) In applying section 732 (and section 733) for any tax year after the relevant tax year, the relevant benefit is to be reduced by the amount of those gains.~~

~~(3) References in this section to chargeable gains treated as accruing to an individual include offshore income gains treated as arising to the individual (see regulations 20 and 22 to 24 of the Offshore Funds (Tax) Regulations 2009 (S.I. 2009/3001)).~~

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

734A Further provision about matching

(1) This section applies where the relevant benefits received in a tax year are to be matched with the relevant income amount for a tax year at Step 3 in section 733(1) as it applies for the relevant tax year.

(2) Take the following steps to determine how the relevant benefits are matched with the income included in the relevant income amount; and the reductions in the relevant benefits and the relevant income amount which are then to be made at Step 4 in section 733(1) are to be made accordingly.

Step 1

Determine which (if any) of the relevant benefits are benefits received by an individual to whom section 735 applies for the relevant tax year.

Such benefits are referred to below as “section 735 benefits”.

Benefits which are not section 735 benefits are referred to below as “non-section 735 benefits”.

If there are no section 735 benefits, go straight to Step 4.

Step 2

Match the section 735 benefits with UK income included in the relevant income amount.

For this purpose, if the total amount of the section 735 benefits exceeds the total amount of the UK income included in the relevant income amount, apportion the UK income between the section 735 benefits in proportion to their amounts.

If paragraph (b) of Step 3 in section 733(1) applies, references above and at Step 3 below to the section 735 benefits are to be read as references to the relevant proportion of each of the section 735 benefits.

Step 3

So far as the section 735 benefits are not matched at Step 2, match them with non-UK income included in the relevant income amount.

Step 4

Match the non-section 735 benefits with non-UK income included in the relevant income amount that is unmatched after Step 3.

For this purpose, if the total amount of the non-section 735 benefits exceeds the total amount of the unmatched non-UK income, apportion the unmatched non-UK income between the non-section 735 benefits in proportion to their amounts.

If paragraph (b) of Step 3 in section 733(1) applies, references above and at Step 5 below to the non-section 735 benefits are to be read as references to the relevant proportion of each of the non-section 735 benefits.

Step 5

So far as the non-section 735 benefits are not matched at Step 4, match them with UK income included in the relevant income amount that is unmatched after Step 2.

(3) In this section “UK income” means income which is not non-UK income.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(4) In this section and section 735 “non-UK income” means income which would be relevant foreign income of the person abroad to whom it arises were that person a UK resident individual.

~~735 Non-UK domiciled individuals to whom remittance basis applies~~

(1) This section applies if—

(a) income is treated under section 732 as arising to an individual in a tax year (“the deemed income”);

(b) section 809B, 809D or 809E (remittance basis) applies to the individual for the year, and

(c) the individual is not domiciled in the United Kingdom in the year.

(2) For the purposes of this section the deemed income is “foreign” if (and to the extent that) the relevant income to which it relates would be relevant foreign income if it were the individual's.

(3) Treat the foreign deemed income as relevant foreign income of the individual.

(4) For the purposes of Chapter A1 of Part 14 (remittance basis) treat relevant income, or a benefit, that relates to any part of the foreign deemed income as deriving from that part of the foreign deemed income.[†]

Amendments

[†] Sections 735, 735A substituted for previous s 735 by FA 2008 s 25, Sch 7 paras 163, 169 with effect for the tax year 2008–09 and subsequent tax years.

735 Non-UK domiciled individuals to whom remittance basis applies

(1) This section applies to an individual for the relevant tax year if—

(a) section 809B, 809D or 809E (remittance basis) applies to the individual for the relevant tax year, and

(b) the individual is not domiciled in the United Kingdom in the relevant tax year.

(2) The following subsections apply if—

(a) income (“the deemed income”) is treated under section 732 as arising to the individual in the relevant tax year by virtue of a relevant benefit (“the matched benefit”) received by the individual in a tax year being matched with income (“the matched income”) included in a relevant income amount for a tax year, and

(b) the matched income includes non-UK income.

(3) For the purposes of this section the deemed income is “foreign” to the corresponding extent that the matched income is non-UK income.

(4) Treat the foreign deemed income as relevant foreign income of the individual.

(5) For the purposes of Chapter A1 of Part 14 (remittance basis) the following are treated as

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

~~deriving from the foreign deemed income—~~

~~(a) the matched benefit so far as it is matched with non-UK income, and~~

~~(b) the matched income so far as it is non-UK income.~~

~~[735A Section 735: relevant income and benefits relating to foreign deemed income~~

~~(1) For the purposes of section 735—~~

~~(a) place the benefits mentioned in Step 1 in the order in which they were received by the individual (starting with the earliest benefit received);~~

~~(b) deduct from those benefits so much of any benefit within section 734(1)(b) as gives rise as mentioned in section 734(1)(d) to chargeable gains or offshore income gains;~~

~~(c) place the income mentioned in Step 3 for the tax years mentioned in Step 4 (“the relevant income”) in the order determined under subsection (3);~~

~~(d) deduct from that income any income that may not be taken into account because of section 743(1) or (2) (no duplication of charges);~~

~~(e) place the income treated under section 732(2) as arising to the individual in respect of the benefits in the order in which it is treated as arising (starting with the earliest income treated as having arisen); and~~

~~(f) treat the income mentioned in paragraph (e) as related to—~~

~~(i) the benefits, and~~

~~(ii) the relevant income;~~

~~by matching that income with the benefits and the relevant income (in the orders mentioned in paragraphs (a), (e) and (e)).~~

~~(2) In subsection (1) references to a step are to a step in section 733(1).~~

~~(3) The order referred to in subsection (1)(c) is arrived at by taking the following steps:~~

~~*Step 1* Find the relevant income for the earliest tax year (of the tax years referred to in subsection (1)(c)).~~

~~*Step 2* Place so much of that income as is not foreign in the order in which it arose (starting with the earliest income to arise).~~

~~*Step 3* After that, place so much of that income as is foreign in the order in which it arose (starting with the earliest income to arise).~~

~~*Step 4* Repeat Steps 1 to 3.~~

~~For this purpose, read references to the relevant income for the earliest tax year as references to the relevant income for the first tax year after the last tax year in relation to which those Steps have been undertaken.~~

~~(4) For the purposes of subsection (3) relevant income is “foreign” where it would be relevant foreign income if it were the individual's.~~

~~(5) For those purposes treat income for a period as arising immediately before the end of~~

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

the period.

(6) — Subsection (1)(a) does not apply if the income may not be taken into account because the individual has been charged to income tax under section 731 by reason of the income.[†]

~~Amendments~~

~~* — Sections 735, 735A substituted for previous s 735 by FA 2008 s 25, Sch 7 paras 163, 169 with effect for the tax year 2008–09 and subsequent tax years.~~

EXEMPTIONS: NO TAX AVOIDANCE PURPOSE OR GENUINE COMMERCIAL TRANSACTION

736 Exemptions: introduction

(1) Sections 737 to ~~742~~ **742A** deal with exemptions from liability under this Chapter.

(2) Some exemptions apply according to whether the relevant transactions are all pre-5 December 2005 transactions or all post-4 December 2005 transactions or include both (see sections 737, 739 and 740).

(2A) The exemption given by section 742A applies only in the case of a relevant transaction effected on or after 6 April 2012.

(3) In this section and sections 737 to 742—

“post-4 December 2005 transaction” means a relevant transaction effected on or after 5 December 2005, and

“pre-5 December 2005 transaction” means a relevant transaction effected before 5 December 2005.

Derivation—

TA 1988 s 741B(2)–(5).

HMRC Manuals—

International Manual, INTM 600040 (exemption from liability).

737 Exemption: all relevant transactions post-4 December 2005 transactions

(1) This section applies if all the relevant transactions are post-4 December 2005 transactions.

(2) An individual is not liable to income tax under this Chapter for the tax year by reference to the relevant transactions if the individual satisfies an officer of Revenue and Customs—

(a) that Condition A is met, or

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(b) in a case where Condition A is not met, that Condition B is met.

(3) Condition A is that it would not be reasonable to draw the conclusion, from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected.

(4) Condition B is that—

(a) all the relevant transactions were genuine commercial transactions (see section 738), and

(b) it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of those transactions was more than incidentally designed for the purpose of avoiding liability to taxation.

(5) In determining the purposes for which the relevant transactions or any of them were effected, the intentions and purposes of any person within subsection (6) are to be taken into account.

(6) A person is within this subsection if, whether or not for consideration, the person—

(a) designs or effects, or

(b) provides advice in relation to,

the relevant transactions or any of them.

(7) In this section—

“revenue” includes taxes, duties and national insurance contributions,

“taxation” includes any revenue for whose collection and management the Commissioners for Her Majesty's Revenue and Customs are responsible.

(8) If—

(a) apart from this subsection, an associated operation would not be taken into account for the purposes of this section, and

(b) the conditions in subsections (2) to (4) are not met if it is taken into account, because of—

(i) the associated operation, or

(ii) the associated operation taken together with any other relevant transactions,

it must be taken into account for those purposes.

Derivation—

TA 1988 ss 741A(1)–(4), (7), (8) and s 741B(4).

738 Meaning of “commercial transaction”

(1) For the purposes of section 737, a relevant transaction is a commercial transaction only if it meets the conditions in subsections (2) and (3).

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

- (2) It must be effected—
- (a) in the course of a trade or business and for its purposes, or
 - (b) with a view to setting up and commencing a trade or business and for its purposes.
- (3) It must not—
- (a) be on terms other than those that would have been made between persons not connected with each other dealing at arm's length, or
 - (b) be a transaction that would not have been entered into between such persons so dealing.
- (4) For the purposes of subsection (2), making investments, managing them or making and managing them is a trade or business only so far as—
- (a) the person by whom it is done, and
 - (b) the person for whom it is done,
- are persons not connected with each other and are dealing at arm's length.

Derivation—

TA 1988 s 741A(5) to (7).

739 Exemption: all relevant transactions pre-5 December 2005 transactions

- (1) This section applies if all the relevant transactions are pre-5 December 2005 transactions.
- (2) An individual is not liable for income tax under this Chapter for the tax year by reference to the relevant transactions if the individual satisfies an officer of Revenue and Customs that condition A or B is met.
- (3) Condition A is that the purpose of avoiding liability to taxation was not the purpose, or one of the purposes, for which the relevant transactions or any of them were effected.
- (4) Condition B is that the transfer and any associated operations—
- (a) were genuine commercial transactions, and
 - (b) were not designed for the purpose of avoiding liability to taxation.

Derivation—

TA 1988 ss 741(1) and 741B(3).

Changes in the law—

See ITA 2007 EN Annex 1 Change 5. This change replaces references to “the Board of Inland Revenue” (and one reference to “the Commissioners for Her Majesty's Revenue and Customs”) in the source legislation with references to “an officer of Revenue and Customs”.

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

740 Exemption: relevant transactions include both pre-5 December 2005 and post-4 December 2005 transactions

(1) This section applies if the relevant transactions include both pre-5 December transactions and post-4 December transactions.

(2) An individual is not liable to tax under this Chapter for the tax year by reference to the relevant transactions if—

(a) the condition in section 737(2) (exemption where all relevant transactions are post-4 December 2005 transactions) is met by reference to the post-4 December 2005 transactions, and

(b) the condition in section 739(2) (exemption where all relevant transactions are pre-5 December 2005 transactions) is met by reference to the pre-5 December transactions.

(3) If subsection (2)(b) applies but subsection (2)(a) does not, this Chapter applies with the modifications in subsections (4) ~~to (6)~~.

(4) For the purposes of sections 720 to 730, any income arising before 5 December 2005 must not be brought into account as income of the person abroad.

~~(5) — In determining the relevant income of an earlier tax year for the purposes of section 733(1) (see Step 4), it does not matter whether that year was a year for which the individual was not liable under section 731 because of section 739 or this section.~~

~~(6) — For the purposes of Step 1 in section 733(1), a benefit received by the individual in or before the tax year 2005–06 is to be left out of account.~~

~~(7) — But, in the case of a benefit received in the tax year 2005–06, subsection (6) applies only so far as, on a time apportionment basis, the benefit fell to be enjoyed in any part of the year that fell before 5 December 2005.~~

Derivation—

TA 1988 ss 741B(5) and 741C(1) to (6) and (8).

741 Application of section 742 (partial exemption)

(1) Section 742 (partial exemption where later associated operations fail conditions) applies if—

(a) an individual is liable to tax because of section 720 or 727 for a tax year (the “taxable year”) because condition B in section 737(4) (genuine commercial transaction: post-4 December 2005 transactions) is not met, and

(b) subsections (2) and (3) apply.

(2) This subsection applies if—

(a) since the relevant transfer there has been at least one tax year for which the individual was not so liable by reference to the relevant transactions effected before the end of the year, and

(b) the individual was not so liable for that year because—

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

- (i) condition B in section 737(4) was met, or
 - (ii) condition B in section 739(4) (genuine commercial transaction: pre-5 December 2005 transactions) was met.
- (3) This subsection applies if the income by reference to which the individual is liable to tax for the taxable year is attributable—
- (a) partly to relevant transactions by reference to which one of those conditions was met for the last exempt tax year, and
 - (b) partly to associated operations not falling within paragraph (a).
- (4) For the purposes of this section a tax year is exempt if—
- (a) it is one of the tax years mentioned in subsection (2), and
 - (b) there is no earlier tax year for which the individual was liable to tax because of section 720 or 727 by reference to the relevant transactions or any of them.
- (5) References in this section to a person being liable to tax for a tax year because of section 720 or 727 include references to the individual being so liable had any income been treated as arising to the individual for that year under section 721 or 728.

Derivation—

TA 1988 s 741D(1)–(5) and (9).

742 Partial exemption where later associated operations fail conditions

- (1) If this section applies, the individual is liable to tax under this Chapter only in respect of part of the income for which the individual would otherwise be liable.
- (2) That part is so much of the income as appears to an officer of Revenue and Customs to be justly and reasonably attributable to the operations mentioned in section 741(3)(b) in all the circumstances of the case.
- (3) Those circumstances include how far those operations or any of them directly or indirectly affect—
- (a) the nature or amount of any person's income, or
 - (b) any person's power to enjoy any income.

Derivation—

TA 1988 s 741D(6) and (7).

742A Post-5 April 2012 transactions: exemption for genuine transactions

(1) Subsection (2) applies for the purpose of determining the liability of an individual to tax under this Chapter by reference to a relevant transaction if—

(a) the transaction is effected on or after 6 April 2012, and

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(b) conditions A and B are met.

(2) Income is to be left out of account so far as the individual satisfies an officer of Revenue and Customs that it is attributable to the transaction.

(3) Condition A is that-

(a) were, viewed objectively, the transaction to be considered to be a genuine transaction having regard to any arrangements under which it is effected and any other relevant circumstances, and

(b) were the individual to be liable to tax under this Chapter by reference to the transaction, the individual's liability to tax would, in contravention of Title II or IV of the Treaty on the Functioning of the European Union, constitute an unjustified and disproportionate restriction on a freedom protected under that Title.

(4) Condition B is that the individual satisfies an officer of Revenue and Customs that, viewed objectively, the transaction must be considered to be a genuine transaction having regard to any arrangements under which it is effected and any other relevant circumstances.

(5) Without prejudice to the generality of subsection (3)(a) or (4), in order for the transaction to be considered to be a genuine transaction the transaction must not-

(a) be on terms other than those that would have been made between persons not connected with each other dealing at arm's length, or

(b) be a transaction that would not have been entered into between such persons so dealing,

having regard to any arrangements under which the transaction is effected and any other relevant circumstances.

(6) Subsection (7) applies if any asset or income falling within subsection (11) is used for the purposes of, or is received in the course of, activities carried on in a territory outside the United Kingdom by a person ("the relevant person") through a business establishment which the relevant person has in that territory.

(7) Without prejudice to the generality of subsection (3)(a) or (4), in order for the transaction to be considered to be a genuine transaction the activities mentioned in subsection (6) must consist of the provision by the relevant person of goods or services to others on a commercial basis and involve-

(a) the use of staff in numbers, and with competence and authority,

(b) the use of premises and equipment, and

(c) the addition of economic value, by the relevant person, to those to whom the goods or services are provided,

commensurate with the size and nature of those activities.

(8) In subsection (7)(a) "staff" means employees, agents or contractors of the relevant person.

(9) To determine if a person has a "business establishment" in a territory outside the United Kingdom, apply sections 1141, 1142(1) and 1143 of CTA 2010 as if in those provisions-

(a) references to a company were to a person, and

(b) references to a permanent establishment were to a business establishment.

(10) Subsection (5) does not apply if-

(a) the relevant transfer is made by an individual who makes it wholly-

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

(i) for personal reasons (and not commercial reasons), and

(ii) for the personal benefit (and not the commercial benefit) of other individuals, and

(b) no consideration is given (directly or indirectly) for the relevant transfer or otherwise for any benefit received by any individual mentioned in paragraph (a)(ii).

and all assets and income falling within subsection (11) are dealt with accordingly.

(11) The assets and income falling within this subsection are—

(a) any of the assets transferred by the relevant transfer;

(b) any assets directly or indirectly representing any of the assets transferred;

(c) any income arising from any assets within paragraph (a) or (b);

(d) any assets directly or indirectly representing the accumulations of income arising from any assets within paragraph (a) or (b).

(12) In subsections (10) and (11) references to the relevant transfer are

To—

(a) if the transaction mentioned in subsection (1) is a relevant transfer, the transfer, or

(b) if the transaction so mentioned is an associated operation, the relevant transfer to which it relates.

GENERAL

743 No duplication of charges

(1) No amount of income may be taken into account more than once in charging income tax under this Chapter.

(2) If there is a choice about the persons in relation to whom any amount of income may be taken into account in charging income tax under this Chapter, it is to be taken into account—

(a) in relation to such one or more of them as appears to an officer of Revenue and Customs to be just and reasonable, and

(b) if more than one, in such respective proportions as appears to the officer to be just and reasonable.

(2A) Subsection (2B) applies if—

(a) in the case of an individual, an amount of income is taken into account in charging income tax under section 720 or 727, and

(b) the individual subsequently receives that income.

(2B) The income received is treated as not being the individual's income for income tax purposes."

(3) For the meaning of references in **subsections (1) and (2) this Section** to an amount of income taken into account in charging tax, see section 744.

(4) If income treated as arising to an individual is charged to income tax under section 720 or 727 and the individual subsequently receives that income, it is treated as not being

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

~~the individual's income again for income tax purposes.~~

Derivation—

TA 1988 ss 743(4) and 744(1).

Changes in the law—

See ITA 2007 EN Annex 1 Change 5. This change replaces references to “the Board of Inland Revenue” (and one reference to “the Commissioners for Her Majesty's Revenue and Customs”) in the source legislation with references to “an officer of Revenue and Customs”.

744 Meaning of taking income into account in charging income tax for section 743

(1) References in section 743~~(1) and (2)~~ (no duplication of charges) to an amount of income taken into account in charging income tax are to be read as follows.

(2) In the case of tax charged on income under section 720 (charge where income enjoyed as a result of relevant transactions)—

(a) if section 724(1) (benefit provided out of income of person abroad) applies, they are references to an amount of the income out of which the benefit is provided equal to the amount ~~or value of the benefit~~ charged, and

(b) otherwise they are references to the amount of the income mentioned in section 721(2) income charged.

(3) In the case of tax charged on income under section 727 (charge where capital sums received as a result of relevant transactions), they are references to the amount of the income mentioned in section 728(1)(a) that income.

(4) In the case of tax charged under section 731 (charge to tax on income treated as arising to non-transferors where benefit received as a result of relevant transfers), they are references to the amount of any income included in a relevant income amount for a tax year (see section 732(5)) relevant income taken into account under section 733 (income charged under section 731) in calculating the amount to be charged in respect of the benefit for the tax year in question.

Derivation—

TA 1988 s 744(2).

745 Rates of tax applicable to income charged under sections 720 and 727 etc

(1) Income tax at the basic rate, the [starting rate for savings]¹ or the dividend ordinary rate is not charged under section 720 or 727 in respect of any income ~~so far as it is~~ (and to the corresponding extent that) the income mentioned in section 721(2) or 728(1)(a) has borne tax at that rate by deduction or otherwise.

(2) Subsection (1) does not affect the tax charged if section 724(2) applies (benefit

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

provided out of income of person abroad charged in year of receipt).

~~(3) Subsection (4) applies to income treated as arising to an individual under section 721 or 728 so far as subsection (1) does not apply to it.~~

~~(4) The charge to income tax under section 720 or 727 operates by treating the income as if it were income within section 19(2) (meaning of "dividend income") if the income mentioned in section 721(2) or 728(1)(a) would be dividend income were it the income of the individual.~~

~~(3) Subsection (4) applies to any income that—~~

~~(a) is treated as arising to an individual under section 721 or 728, and~~

~~(b) apart from this Chapter is dividend income,~~

~~so far as subsection (1) does not apply to the income.~~

~~(4) The charge to income tax under section 720 or, as the case may be, section 727 operates by treating the income as if it were income within section 19(2) (meaning of "dividend income").~~

Derivation—

TA 1988 s 743(1)–(1B) and (5).

Amendments—

¹ *Words in sub-s (1) substituted by FA 2008 s 5, Sch 1 paras 1, 24 with effect for the tax year 2008–09 and subsequent tax years.*

746 Deductions and reliefs where individual charged under section 720 or 727

(1) This section applies for the purpose of calculating the liability to income tax of an individual charged under section 720 or 727.

(2) The same deductions and reliefs are allowed as would have been allowed if **the amount by reference to which** the income treated as arising to the individual under section 721 or 728 **is determined** had actually been received by the individual.

Derivation—

TA 1988 s 743(2).

747 Amounts corresponding to accrued income profits and related interest

(1) This subsection applies if a person—

(a) would have been treated as—

(i) making qualifying accrued income profits, or

(ii) making qualifying accrued income profits of a greater amount,

in an interest period, but

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

- (b) is not so treated because of being resident or domiciled outside the United Kingdom throughout any tax year in which the interest period (or part of it) falls.
- (2) If subsection (1) applies, this Chapter applies as if the amount which the person would be treated as making or, as the case may be, the additional amount were income becoming payable to the person.
- (3) Accordingly, any reference in this Chapter to income of (or payable or arising to) a person abroad must be read as including a reference to such an amount.
- (4) This subsection applies if income consisting of interest which falls due at the end of an interest period—
- (a) would have been income as respects which a person is entitled to an exemption, or an exemption of a greater amount, from liability to income tax under section 679 (interest on securities involving accrued income losses: general), but
- (b) is not such income because it is income of a person who is resident or domiciled outside the United Kingdom throughout any tax year in which the interest period (or part of it) falls.
- (5) If subsection (4) applies, for the purposes of this Chapter the interest is treated as reduced by the amount of the exemption or, as the case may be, the additional exemption.
- (6) In this section—
- (a) expressions which are also used in Chapter 2 of Part 12 (accrued income profits) have the same meaning as in that Chapter (but see subsection (7)), and
- (b) “qualifying accrued income profits” means accrued income profits which are treated as made—
- (i) under section 628(5), or
- (ii) under section 630(2) in respect of a transfer of variable rate securities.
- (7) In the case of qualifying accrued income profits within sub-paragraph (ii) of the definition of that expression in subsection (6)(b)—
- (a) references in subsection (1)(a) to making qualifying accrued income profits in an interest period are to be read as making them in the tax year in which the settlement day falls, and
- (b) the reference in subsection (1)(b) to the interest period is to the period—
- (i) beginning with the day after the last day of the only or last interest period of the securities, and
- (ii) ending with the settlement day.

Derivation—

TA 1988 s 742(4) to (7).

Changes in the law—

See ITA 2007 EN Annex 1 Change 101. This change relates to the clarification of when accrued income scheme profits on transfers of variable rate securities arise where the settlement day for the

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

transfer occurs after the end of the securities' last interest period and consequential changes.

SUPPLEMENTARY

748 Power to obtain information

(1) An officer of Revenue and Customs may by notice require any person to provide the officer with such particulars as the officer may reasonably require for the purposes of this Chapter.

(2) The officer may direct the time within which the particulars must be provided and that time must be at least 30 days.

(3) The particulars which a person must provide under this section, if required to do so by a notice under subsection (1), include particulars about—

(a) transactions with respect to which the person is or was acting on behalf of others,

(b) transactions which in the opinion of the officer should properly be investigated for the purposes of this Chapter even though in the person's opinion no liability to income tax arises under this Chapter, and

(c) whether the person has taken or is taking any part and, if so, what part in transactions of a description specified in the notice.

(4) A [relevant lawyer]¹ is not treated as having taken part in a transaction for the purposes of subsection (3)(c) merely because of giving professional advice to a client about it.

[4A In this section “relevant lawyer” means a barrister, advocate, solicitor or other legal representative communications with whom may be the subject of a claim to professional privilege or, in Scotland, protected from disclosure in legal proceedings on grounds of confidentiality of communication.]¹

(5) This section is subject to—

section 749 (restrictions on particulars to be provided by [relevant lawyers]¹), and

section 750 (restrictions on particulars to be provided by banks).

Derivation—

TA 1988 s 745(1)–(3).

Changes in the law—

See ITA 2007 EN Annex 1 Change 5. This change replaces references to “the Board of Inland Revenue” (and one reference to “the Commissioners for Her Majesty's Revenue and Customs”) in the source legislation with references to “an officer of Revenue and Customs”.

See ITA 2007 EN Annex 1 Change 108. This change provides that the recipient of a notice to provide information relevant to the legislation on transactions in securities or transfers of assets abroad must have at least 30 days to reply, rather than at least 28 days.

See ITA 2007 EN Annex 1 Change 114. This change expressly restricts the particulars that an

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

HMRC officer may require to be provided under TA 1988 s 745(1) or s 778(1) to those particulars which the officer may reasonably require.

Amendments—

¹ *In sub-s (4) words substituted for word “solicitor”, sub-s (4A) inserted, and in sub-s (5) words substituted for word “solicitors” by the Legal Services Act 2007 s 208, Sch 21 paras 157, 158 with effect from 1 January 2010 (by virtue of SI 2010/3250, art 2(h)).*

749 Restrictions on particulars to be provided by [relevant lawyers]¹

(1) In relation to anything done by a [relevant lawyer]¹ on behalf of a client who does not consent to the information otherwise required from the [relevant lawyer]¹ under section 748 being provided, the [relevant lawyer]¹ may not be compelled under that section to do more than—

- (a) state that the [relevant lawyer]¹ is or was acting on behalf of a client, and
- (b) give the name and address of the client and any relevant person.

(2) In the case of anything done by the [relevant lawyer]¹ in connection with the transfer of any asset by or to an individual who is ordinarily UK resident to or by a body corporate to which subsection (6) applies, the transferor and the transferee are relevant persons.

(3) In the case of anything done by the [relevant lawyer]¹ in connection with any associated operation in relation to any such transfer, the persons concerned in the associated operations are relevant persons.

(4) In the case of anything done by the [relevant lawyer]¹ in connection with the formation or management of a body corporate to which subsection (6) applies, the body corporate is a relevant person.

(5) In the case of anything done by the [relevant lawyer]¹ in connection with—

- (a) the creation of any settlement as a result of which income becomes payable to a person abroad, or
- (b) the execution of the trusts of any such settlement,

the settlor and that person are relevant persons.

(6) This subsection applies to bodies corporate resident or incorporated outside the United Kingdom which—

- (a) are, or if UK resident would be, close companies, and
- (b) are not companies whose business consists wholly or mainly of the carrying on of a trade or trades.

[(7) In this section—]

“relevant lawyer” means a barrister, advocate, solicitor or other legal representative communications with whom may be the subject of a claim to professional privilege or, in Scotland, protected from disclosure in legal proceedings on grounds of confidentiality of communication;

“settlement” and “settlor” have the meanings given by section 620 of ITTOIA

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

2005.]¹

(8) In the application of this section to Scotland, any reference to the trusts of a settlement is a reference to the purposes of the settlement.

Derivation—

TA 1988 s 745(3), (4) and (6).

Modifications—

ITA 2007 Sch 2 para 139 (so far as sub-s (6) above applies for the purposes of sub-s (2) or (3), it applies in relation to transfers and associated operations on or after 20 March 1990 and before 30 November 1993, with the modifications set out in ITA 2007 Sch 2 para 139(2)).

Amendments—

¹ *In heading words substituted for word “solicitors”, words substituted in each place for word “solicitor”, and sub-s (7) to be substituted by the Legal Services Act 2007 s 208, Sch 21 paras 157, 159 with effect from from 1 January 2010 (by virtue of SI 2010/3250, art 2(h)).*

750 Restrictions on particulars to be provided by banks

(1) Section 748 does not oblige a bank to provide any particulars of any ordinary banking transactions between the bank and a customer carried out in the ordinary course of banking business, unless subsection (2) or (3) applies.

(2) This subsection applies if the bank has acted or is acting on behalf of the customer in connection with—

(a) the creation of any settlement as a result of which income becomes payable to a person abroad, or

(b) the execution of the trusts of any such settlement.

(3) This subsection applies if the bank has acted or is acting on behalf of the customer in connection with the formation or management of a body corporate to which section 749(6) applies.

(4) In this section—

“bank” has the meaning given by section 991, and

“settlement” has the meaning given by section 620 of ITTOIA 2005.

(5) In the application of this section to Scotland, any reference to the trusts of a settlement is a reference to the purposes of the settlement.

Derivation—

TA 1988 s 745(5) to (6).

751 [The Tribunal's]¹ jurisdiction on appeals

TAX CHAMBERS

15 OLD SQUARE

Rory Mullan

Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE

T: (020)7242 2744 F: (020)7831 8095
rorymullan@15oldsquare.co.uk

[On any appeal that is notified to the tribunal, the jurisdiction of the tribunal]¹ includes jurisdiction to affirm or replace any decision taken by an officer of Revenue and Customs in exercise of the officer's functions under—

- (a) section 737 (exemption: all relevant transactions post-4 December 2005 transactions),
- (b) section 738 (meaning of “commercial transaction”),
- (c) section 739 (exemption: all relevant transactions pre-5 December 2005 transactions),
- (d) section 742 (partial exemption where later associated operations fail conditions),
- (da) section 742A (post-5 April 2012 transactions: exemption for genuine transactions),
- (e) section 743(2) (no duplication of charges: choice of persons in relation to whom income is taken into account).

Derivation—

TA 1988 ss 741(1), 741A(9), 741D(8) and 744(1).

Changes in the law—

See ITA 2007 EN Annex 1 Change 5. This change replaces references to “the Board of Inland Revenue” (and one reference to “the Commissioners for Her Majesty's Revenue and Customs”) in the source legislation with references to “an officer of Revenue and Customs”.

Amendments—

¹ *Words in the heading substituted for the words “The Commissioners”; words at the beginning substituted for words “The jurisdiction of the Special Commissioners on any appeal” by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order, SI 2009/56 art 3, Sch 1 para 461 with effect from 1 April 2009.*