

CITY OF WESTMINSTER AND HOLBORN LAW SOCIETY
Revenue Committee

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[Posted copy to Rachel Salisbury]

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Dear Mr Hayward

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As indicated in our responses to the previous consultations, the City of Westminster and Holborn Law Society has, amongst its membership, probably the highest concentration of technical expertise relating to private client and trust issues.

We recognise the considerable effort which must have gone into the preparation of these clauses and, in particular, the provision allowing professional trustees to elect for non-residential status. The latter is a matter of considerable importance to our membership.

There are, however, four issues to which we feel that further consideration needs to be given:

1. Corporate and professional trustees

- (a) ICTA 1988, s.685E(6): Many foreign banks maintain only a representative office in the UK. For international banking purposes, this is a recognised category short of either a branch or an agency. “Permanent establishment” could give rise to a problem here, by reason of FA 2003, s.148(2)(c).

We wonder, therefore, whether the addition of that concept to (rather than in substitution for) “branch” and “agency” is really required.

- (b) TCGA 1992, s.69C(3)(a): If a trustee has to retire from practice through ill health (or, indeed, wishes to leave his current firm because he is not happy with a proposed merger or policy change) at short notice, it may not be practicable for his replacement as a trustee by non-resident persons to be arranged within the period in question.

A degree of flexibility, for instance three months, should therefore be provided for in this paragraph.

2. The relief of a beneficiary whose income has been attributed to the settlor

Should there not be added to ICTA 1988, s.685A a sub-section providing that the income attributed to the beneficiary should not be treated as his for any other UK legislative purpose, e.g. “tartan” tax, tax credits or student loan repayments?

3. Co-owned land where one co-owner’s interest is put into trust

During the original Consultation process, we drew attention to the general practice under which the other owner’s share was not treated as having become “settled” under the terms of Walton,J.’s judgment in *Stephenson v. Barclays Bank Trust Co Ltd*, [1975] STC 151, and for the need for this to be recognised officially.

The amendment to TCGA 1992, s.68 not only does not do this, but could bring this issue into play again following TLATA 1996, ss.12-13, the effect of which for inheritance tax purposes is not fully clear where the family home was originally held by husband and wife as tenants in common and, on the husband’s death, his half is left upon interest in possession trusts for a daughter who lived with them. By reason of s.20(1), she may not be able to claim s.12 rights and, if she cannot, it can be contended that, because the widow alone then has them, none of the options available under s.13 arise.

- (a) If the original co-owners had elected under TGCA 1992, s.222(5)(a) for another property to be treated as their main residence, a deemed disposal would be imposed upon the widow on the death if Walton,J.’s reasoning is carried to its logical conclusion.
- (b) The same would also apply in relation to a let shop owned by brother and sister if, on the brother’s death, his half was settled under his Will.

Plainly it is inequitable that any co-owner should be capable of incurring a deemed disposal by reference to something which occurs in relation to the share of another of the tenants in common.

It follows that both the revised TCGA 1992, s.68, and the proposed ICTA 1988, s.685A, need to be amended to take account of such situations.

4. Only an identifiable settlor should be capable of having income or gains attributed to him

There are two reasons for this:

- (a) that which the Courts have presumed all along (and we are assuming HMRC to intend), that income can only be taxed once; and
- (b) for self-assessment to work, there must be certainty.

Under the definition of “settlor” in ITTOIA 2005, s.620(1), it is quite clear that the relationship attaches only to the property derived from that person.

- (i) There are circumstances in which property passed down in succession may have two potential “settlors”, such as the original provider of the settled property and the life tenant who has (subsequently) given up his life interest in it, see *IRC v. Buchanan*, (1956) 37 TC 365.
 - (aa) One would, however, expect TCGA 1992, s.77 to be apply only to the former; and
 - (bb) The old ICTA 1988, s.660A code only to the latter.
 - (cc) And, in this context, we would point out that the draftsman of TGCA 1992, s.77(2A)(a) appears to have been overenthusiastic: surely (in the third line) for “, or will or may become payable to or applicable” should be substituted “(during that financial year) paid or applied”?
- (ii) But it would appear from the proposed ICTA 1988, s.685B(a) and (2)(b) (as well as TCGA 1992, s.68A(1)(a) and (2)(b)) that where a number of different people have provided assets to a single settlement, each of them could be assessed to all the income and gains of that settlement unless and until s.685B(6)(a) [s.68A(6)(a)] covers the position of any particular one of them.

Moreover, the repetition, from ITTOIA 2005, s.620(3)(b) in s.685B(3)(b) [s.68A(3)(b)] highlights this unsatisfactory position in the context of the previously-mentioned provisions because a non- (or ex-) provider could continue to be held liable until his release from that obligation: see s.685B(6)(b) [s.68A(6)(b)].

It therefore needs to be stated clearly, in both statutory contexts, that each item of income or gains may only be allocated once, and to the person from whom the property in question can be traced.

Yours sincerely

W J de Souza
Chairman