

charge (for example, transferring ownership of intangible property to another group entity resident in a full treaty jurisdiction). The draft legislation has been published but taxpayers should not expect draft guidance to be published much before the effective date. ■

*Rhiannon Kinghall Were, head of tax policy, Macfarlanes (rhiannon.kinghallwere@macfarlanes.com)*

## Davies and tax treaty protection

**Shouldn't the principle in *Bricom* apply in a case concerning transfers of assets abroad?**

The recent case of *A Davies and Others v HMRC* [2018] UKFTT 559 discusses the overlap between anti-avoidance provisions such as ITA 2007 s 720 (transfer of assets abroad) and the protection provided by double taxation agreements.

The tribunal decided that the double taxation agreement provided no protection to the taxpayer in this case, but the reasoning is not easy to grasp from the judgment.

The taxpayer entered into various transactions involving life policies and an offshore company. There is no doubt that the arrangements in principle fell within the transfer of assets abroad legislation because there was a transfer of assets whereby income became payable to a person not resident in the UK, and the other relevant conditions were satisfied. The taxpayer claimed the motive defence (now in s 736) on the basis that the transactions were not undertaken with the purpose of avoiding tax. However, the motive defence was rejected by the tribunal.

So far, nothing unusual.

However, the jurisdiction where the income arose was Mauritius, with which we have a double taxation agreement. The treaty provided that the income was taxable only in Mauritius and not in the UK.

HMRC argued that the treaty did not give any protection to the taxpayers because they were not subject to tax in Mauritius on the income: it was the company which was entitled to the exemption. However, it was not the company that was being charged tax under what is now s 720; it was the UK resident individuals to whom the income was deemed to accrue.

One can understand the mismatch argument here. The income arises to one person who is protected by the treaty, but the anti-avoidance provisions deem the income to be the income of somebody else who is not so protected – and the exemption does not flow through. We are dealing here with complex anti-avoidance provisions and it would be no surprise to end up with a harsh result.

**This would seem to be contrary to the decisions in *Strathalmond v IRC* and *Bricom Holdings Ltd v IRC***

The tribunal held that relief under the treaty would not have been available to the appellants had the income actually arisen to them, and therefore there was no protection from the charge to tax in the UK.

However, this would seem to be contrary to the decision in *Strathalmond v IRC* (1972) 48 TC 537 and also in *Bricom Holdings Ltd v IRC* (1997) 70 TC 272, where the Court of Appeal came to the opposite conclusion.

In *Strathalmond*, the taxpayer's wife was a US citizen but not resident in the

UK for the purposes of the UK/US treaty. Her husband was assessed to tax on her US dividends, but the court held that he was protected because the dividends were exempt under the treaty.

Similarly, in *Bricom*, which concerned the anti-avoidance provisions under the controlled foreign companies legislation, the company's income was deemed to be that of the taxpayer. Again, the treaty was held to provide the relevant exemption. The principle was expressed as follows:

'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.'

This would appear to be exactly the position with Mr Davies. The income of the company in Mauritius was deemed to be his for UK tax purposes and, according to the Court of Appeal in *Bricom*, he should not lose the exemption merely because it is deemed to be his.

The tribunal said that neither *Strathalmond* nor *Bricom* dealt with the transfers of assets abroad legislation, and the facts were different from the present case. That is clearly right – but facts are always different and it is the principles which matter. It is also right that the case did not deal with s 720, but the anti-avoidance provisions relating to controlled foreign companies which applied in *Bricom* were designed to have exactly the same purpose as those in s 720: that is, to deem the income of one person to be the income of another for tax purposes. The statement that the income does not lose its character or exemption under a treaty for this reason looks compelling.

This is clearly an important issue, and it would have been helpful to have had a more detailed analysis from the tribunal to explain why the Court of Appeal decision in *Bricom* should not be applicable in a case concerning transfers of assets abroad. ■

*Peter Vaines, Field Court Tax Chambers (pv@fieldtax.com)*

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"The estimation of the value of a share in a company whose shares cannot be bought and sold in the open market, and with regard to which there have not been any sales on ordinary terms, is obviously one of difficulty."

Lord Fleming in *Salvesen's Trustees v IRC* [1930]

B W Sutherland CBE FCA FTII

Miss J A Nelder BA FCA FTII

David Bowes FTII MAE EWI

Moreton House, Moreton-in-Marsh, Gloucestershire GL56 0LH

Tel: 01608 651091 Fax: 01608 651973 DX 11484 Moreton in Marsh

[bruce.sutherland@bruce-sutherland.com](mailto:bruce.sutherland@bruce-sutherland.com) [jenny.nelder@bruce-sutherland.com](mailto:jenny.nelder@bruce-sutherland.com) [david.bowes@bruce-sutherland.com](mailto:david.bowes@bruce-sutherland.com)