

## **John Tiley: Revenue Law, 6<sup>th</sup> Ed, 2009 Supplement**

This supplement draws attention to new developments, principally statutory and case law, and to one or two errors in the text that managed to slip through the author's mind in August 2008 – for which he apologises.

### **Part I – Introduction (pp. 1-129)**

#### **Chapter 2 - Jurisdiction: The Taxing Power (pp. 29-50)**

**2.3. p. 32 The European Community.** A number of changes made by FA 2009 are in response to ECJ decisions. These include s 36 on controlled foreign companies, 40 on income tax credits on dividends and 41 on loan relationships and connected parties. The ECJ decisions also helped to bring about the new exemption system for foreign dividends in 34.

*Vodafone 2 v Revenue & Customs Commissioners (No 2)* [2009] STC 1480, [2009] EWCA Civ 446 is a very important decision of the UK courts applying the ECJ jurisprudence on controlled foreign companies and exploring the boundary between permissible interpretation and impermissible legislation. In finding that they were only interpreting the UK rules the judges applied principles in human rights cases – and reversed *Evans-Lombe J* [2008] STC 2391. Their interpretation was permissible even though it extended the legislation as written.

*Test Claimants FII Group Litigation v Revenue & Customs Commissioners* [2009] STC 254, [2008] EWHC 2893 (Ch) is the 150 page decision of Henderson, J and essential reading on the topic of international groups of companies.

ECJ decisions include *Rüffler v Dyrektor Izby Skarbowej we Wrocławiu Ooerodek Zamiejscowy w Walbrzychu* (Case C-544/07) [2009] STC 1464 on Articles 18 and 39 and free movement. The reference raised issues on Articles 12 and 39 but the ECJ held Art 39 did not apply to retirees, applying *Proceedings brought by Turpeinen* (Case C-520/04) [2008] STC 1. Instead the Court found the failure of the Polish tax authorities to take into account German healthcare contributions in assessing Polish income tax on the taxpayer's pension, amounted to a restriction on his right to free movement and residence under Art 18.

**Charities and free movement** On charities and free movement of capital we have *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* (Case C-386/04) [2008] STC 1439, [2006] ECR I-8203 on exemption of the charity itself and *Persche v Finanzamt Lüdenscheid* (Case C-318/07) [2009] STC 586 on income tax deduction for transfer to a charity.

**Loss Relief** On loss relief see *Finanzamt für Körperschaften III in Berlin v Krankenhaus Ruhesitz am Wannsee-Seniorenheimstatt GmbH* (Case C-157/07) [2009] STC 138 upholding a German rule restricting losses; the rule was proportionate and necessary for the coherence of the German tax system (Paragraph 42).

*Marks and Spencer* had three strands of reasoning; balanced allocation of tax jurisdiction, no double use of losses, and no loss trafficking. ECJ had to decide whether these were cumulative conditions or whether each has independent existence. 2008 cases show that each has independent existence – *Lidl Belgium GmbH and Co KG v Finanzamt Heilbronn* (Case C-410/06) [2008] STC 3229. Adv Gen Sharpston noted the three justifications made in *Marks and Spencer* and held, following cases such as *N* (C-470/24) [2008] STC 436, *OyAA* (Case C-231/05) [2008] STC 991 and *Amurta* (Case C-379/05) [2008] STC 2851, that it was clear that the three could operate independently of each other (Paragraph 18). The Court agreed (Paragraph 40).

**Article 56:** *Skatteverket v A* (Case C101/05) [2009] STC 405 is a very important case on free movement of capital, the boundary between Art 56 and Art 43, and on the justification based on the need for fiscal supervision.

**Article 43:** *Société Papillon v Ministère du budget* (Case C-418/07) [2009] STC 542 is a straightforward case striking down a French group taxation rule which distinguished between intermediate companies resident in France and an intermediate company resident in another MS. Breach of Art 52 (now Art 43) freedom of establishment.

**Company Tax Directives** On Merger Directive see *AT v Finanzamt Stuttgart-Körperschaften* (Case C-285/07) [2009] STC 1058 and on Parent Subsidiary Directive see *Belgium v NV Cobelfret* (Case C 138/07) [2009] STC 1127.

**2.4. p. 46 Human Rights Law** *Jussila v Finland* (Application 73053/01) [2009] STC 29 is a Grand Chamber decision on VAT penalties and surcharge. The ECHR held that as the purpose was deterrent and punitive it was a criminal proceeding and so within Art 6.

Not much new law but reaffirms *Engel v The Netherlands* (see main volume).

## **Chapter 4 - The Setting of the Tax System (pp. 65-100)**

### **4.2.6. p. 69 Citizens Charter (obsolete)**

FA 2009 s 92 inserts Customs and Revenue Act 2005 s 16A imposing a duty on HMRC to prepare a Charter including standards of behaviour and values; HMRC must report at least once a year showing how far they have demonstrated these values.

### **4.3.1. p. 70 Self-Assessment**

Self assessment paper return deadline. The legislative change which brought the deadline for non electronic returns forward to 31 October also pushed back the deadline for getting the Revenue to calculate the assessment from 30<sup>th</sup> September to 31<sup>st</sup> October (FA 2007 s 91 and 92 applying as from start of 2007-08 tax year).

### **4.5. p. 85 Encouraging payment of Tax**

FA 2009 includes two major provisions. FA 2009 s 93 and Sch 46 impose new duties on senior accounting officers (SAO) of qualifying companies to take reasonable steps to ensure that the company establishes and maintains appropriate tax and accounting arrangements in relation to relevant tax liabilities (paragraphs 1 and 14). The SAO must also take reasonable steps to monitor the accounting arrangements and identify

any respect in which the arrangements are not appropriate tax accounting arrangements (on certificate see paragraph 2). A company qualifies if its balance sheet exceeds £2billion or its turnover exceeds £200 million (paragraph 15).

FA 2009 s 94 authorises HMRC to publish details of deliberate tax defaulters where the potential lost revenue and penalties exceeds £25,000.

#### **4.6. p. 93 Revenue Information Powers**

Information Powers Rules introduced by FA 2008 Sch 36 now extended to other taxes listed in new FA 2008 Sch 36 paragraph 63 including inheritance tax – FA 2009 s 96.

#### **4.6.3. p. 95 Serious Tax Fraud: Powers of Entry and Search**

*R (Mercury Tax Group) v Revenue & Customs Commissioners* [2009] STC 743, [2008] EWHC 2721 is an important case because Underhill J quashed a warrant obtained on the basis that HMRC had reasonable cause to suspect dishonesty offence committed. The case concerns an avoidance scheme which would have been perfectly valid if operations genuine and carried out in right order. What seems to have undone HMRC was the failure to disclose all the relevant information. Also, Underhill J said case was not strong (paragraphs 48-65).

FA 2009 s 95 and Sch 47 contain a number of amendments to the information and inspection powers in FA 2008 Sch 36. These include powers to obtain information from persons liable to counteraction of a tax advantage under TA 1988 s 703 (ITA s 684) and a new penalty for inaccurate information and documents. Section 95 also allows future changes to be made by statutory instrument.

**Interest 1)** TMA 1970 s 33 Recovery of Overpaid Tax. FA 2009 s 100 and Sch 52 provide new rules in Sch 1AB for the recovery of overpaid income tax and capital gains tax; these replace TMA ss 33 and 33A. The separate but similar new rules for corporation tax take the form of the replacement of FA 1998 Sch 18 paragraph 51 by paragraphs 51-51 G.

**Interest 2)** FA 2009 s 101 provides ‘simple and consistent’ bases for calculating payments of interest on sums due to HMRC; s 102 deals with repayment interest on sums to be paid by HMRC. Section 103 is a new statutory power for setting the rates of interest. The Notes on Clauses say that it is intended that there will be one single rate for late payments from taxpayers – apart from quarterly payments of corporation tax. A single (different) rate will apply where repayments are due from HMRC. On definitions, administration and commencement see s 104 and 105.

**Penalties** Completing the FA 2008 programme announced in 4.6.5, FA 2009 s 106 and Sch 55 provide a code of penalties for failure to make returns. Section 107 and Sch 56 provide rules so relating to the failure to pay tax; paragraph 10 provides for the suspension of penalties while an agreement for deferred payment is current; s 108 provides for penalties if the agreement is broken. Section 109 and Sch 57 completes the work begun in 2007 principally by making some amendments to earlier rules.

**Enforcement** HMRC have sometimes been criticised for not doing all it might do to collect tax that is due. FA 2009 adds two powers to help. First s 97 and Sch 49 allow

HMRC to obtain contact details on its debtors. Second, s 110 and Sch 58 allow HMRC to use the PAYE system for the recovery of debts.

In addition FA 2009 s 111 provides statutory basis for allowing taxpayers to enter into a managed payments plan, i.e. payment by instalments. Compliance with the plan is treated as payment of the debt (subs (4)). Section 108 deals with the suspension of penalties during currency of agreement for deferred payments.

Although listed as one of the measures to support business during the recession, FA 2009 s 25 deserves particular mention here. It deals with agreements to forgo tax reliefs. Most reliefs have to be claimed but some do not – or apply automatically for later years. Section 25 is intended to apply where the agreement to forgo relief is part of arrangements under which the government provides financial support (e.g., currently, many of the banks).

**Director misfeasance claim** HMRC sometimes use the Insolvency Act s 212 action for misfeasance and breach of duty. In *Re Pay check Services 3 Ltd and others* [2009] STC 1639, [2009] EWCA Civ 625 (appeal from [2008] STC 3142, [2008] EWHC 2200 Ch) the scheme sought to make use of the lower rate of company tax for ‘small’ companies was flawed because companies became associated. Court of Appeal held however that H, an individual, was not a de facto director of the relevant company (see e.g. Elias LJ paragraph 115)

**Law of Tort** For recent use by HMRC of Intentional Economic Torts (Intentionally Inducing Breach of Contract, Causing Loss by Unlawful Means, and Conspiracy) see two recent House of Lords decisions, *OBG Ltd v Allan* [2007] UKHL 21 and *Total Network SL v Revenue & Customs Commissioners* [2008] UKHL 19. For comment see O’Sullivan 2008 CLJ 459.

## Chapter 5 – The Control of Avoidance (pp. 101-129)

**5.6.6. p. 126 Other old cases and the case since *Barclays Prudential v Revenue & Customs Commissioners*** [2008] STC 2820, [2008] EWHC 1839 (Ch) has now reached the Court of Appeal; Sir Andrew Morritt C dismissed the taxpayer’s appeal from the Special Commissioners. The principal question was whether a ‘front end’ payment was a ‘qualifying’ payment for the purpose of the foreign exchange rules then in force (FA 1994); if it were, it would be deductible so giving rise to the advantage sought by the taxpayer company. The essential reasoning begins at paragraph 36 and the consequences are set out at 54-58. He held that a payment could only be a qualifying payment if made ‘to secure the making of the contract’; here the payment was made not by way of inducement to enter into the contract, but in fulfilment of it (paragraph 54) and no amount of mislabelling could alter the facts (paragraph 55).

In *Astall v Revenue & Customs Commissioners* Peter Smith J dismissed the taxpayer’s appeal [2008] STC 2920, [2008] EWHC 1471 (Ch). Like the Special Commissioner the judge took a purposive approach to the meaning of ‘discounted security’. He had to consider real possibilities of redemption, not those written into the document, creating the security that the parties, and any reasonable person having the knowledge

available to the parties, knew would never occur. The difference between the issue price and the redemption price had to give rise to a possibility of making a gain that could be objectively seen to exist. The security never had that possibility; it was a practical certainty that there would be a loss (paragraph 42).

Among other new cases where the Revenue won see *Revenue & Customs Commissioners v Limitgood*; *Revenue & Customs Commissioners v Prizedome* (now in the Court of Appeal) [2009] STC 980, [2009] EWCA Civ 177; taxpayer company appeal against Blackburne J [2008] STC 361, [2008] EWHC 19 (Ch). Mummery LJ agreed with Blackburne J and Special Commissioner paragraph 36; reasons for specifically agreeing is that appeal hearing narrower – see paragraph 18.

**By contrast the Revenue lost in two other cases** In the two cases just considered the courts adopted a purposive approach to interpreting coherent sets of statutory rules and so reaching results which are favourable to HMRC. In the next two the Revenue failed because the taxpayer takes advantage of gaps between different sets of rules. *Revenue and Customs Commissioners v Bank of Ireland Britain Holdings Ltd* [2008] STC 253, [2007] EWHC 941 (Ch) involved an interest Repo Scheme. The judge was Henderson J, who, as a barrister, had frequently represented the Revenue. He gave a full account of TA 1988 s 730A, now ITA Part 11 Ch 4 for income tax, and its related provisions (paragraph 19 et seq) and even of TA 1988 s 125 (paragraph 51). Section 730A is one of a number of provisions attacking schemes under which taxpayers turn taxable income into a capital sum; the legislation turns them back into taxable income. Here, however, the scheme did not turn income into capital but arranged matters so that the income accrued to a non-resident company outside the charge to corporation tax (High Court paragraph 41). Counsel did not claim that there was any fiscal or economic merit in the result for which they contend; they simply submitted that the relevant legislation admitted of only one construction, and if the result was not to the Revenue's liking, then the Revenue has only itself to blame for procuring the enactment of such complex deeming provisions without giving enough thought to the consequences (High Court paragraph 4). The Court of Appeal agreed – [2008] STC 398, [2008] EWCA Civ 58.

The other taxpayer success was *Revenue and Customs Commissioners v D'Arcy* [2008] STC 1329, [2007] EWHC 163 (Ch), which concerned the accrued income scheme (TA 1988 s 710, now ITA Part 12 (ss 615 et seq)). Under a scheme the taxpayer (DA) had made a sale and repurchase of gilts, a 'repo' transaction. Henderson J dismissed the Crown's appeal from the Special Commissioner. The taxpayer had taken advantage of an unintended gap left by the interaction between two different sets of statutory provisions – TA 1988 s 710 and s 737A, now ITA Part 11 Ch 4, allowed DA to claim a deduction. What the Revenue were really complaining about was that the accrued income scheme and the manufactured payment scheme were not one coherent set of rules; the accrued income scheme did not give rise to a charge which counterbalanced DA's deduction under s 737A. This did not entitle him to construe s 710 differently to fill the gap. There is also material on the relationship between different parts of the accrued income rules.

For rates enacted by FA 2009 for 2009-10 and 2010-11 see Chapter 11 below.

**9.4. p. 178 Tax Credits: Tax Credit Acts 2002 and Later** New figures available on-line note that on annual basis, and using maximum figures for 2009-10, child tax credit is now worth £2,235 per child with each family getting £545 (enhanced for first year of child's life). Working tax credit is now worth maximum of £1,890 and further £1,860 for certain couples and lone parents.

## **Chapter 11 - Personal Reliefs and Tax Reductions (pp. 201-207)**

Basic Rate limit i.e. the point at which higher rate liability begins (ITA s 10(5)) is set for 2009-10 at £37,400: FA 2009 s 2.

**11.1.1. p. 202 Non-residents** Personal allowances for a small number of non-residents are removed by FA 2009 s 5 and Sch 1 as from 2010-11. Those losing their entitlement are Commonwealth citizens who do not come within any other category; see new TA 1988 s 266(1A). The Finance Bill notes list 14 countries including the Cook Islands and the Bahamas.

**11.2. p. 203 The Reliefs** Allowances for 2009-10

**11.2.1. p. 203 The Basic Personal Relief** Personal allowance for single person £6,475.

**11.2.2. p. 203 Blind Person's Relief** Blind person's allowance £1,890.

**11.4. p. 204 Older Taxpayers** Personal allowance for single person (over 65, under 75) £9,490 or over 75, £9,640; extra above £9,490 is subject to tapering if total income exceeds £22,900.

**11.4.2. p. 205 Couple's Reduction** Taxpayer born before 6 Apr. 1935 elder spouse 75 or over, £6,965. Married couple's allowances take effect only at 10%; these too are subject to some tapering subject to minimum figure of £2,670. The legislation no longer refers to people between 65 and 75. This is because as they must have been born before 6<sup>th</sup> April 1935 in order to qualify, they must now all be '75 or over'

**Rates and allowances from 2010-2011** FA 2009 enacts changes to the rate of income tax to apply as from 2010-11, i.e. after the next election.

First the personal allowance for individuals (ITA s 35) will be phased out as their 'adjusted net income' rise above £100,000. £1 for every £2 making a marginal rate of 60% as opposed to the otherwise relevant rate of 40%: FA 2009 s 4. The concept of adjusted net income is already used where a taper is applied to old people's reliefs.

Secondly a new 50% rate of income tax, called the additional rate, will apply. As a corollary the 'additional dividend rate' is introduced - 42.5%. The £100,000 is called the basic rate limit i.e. the limit beyond which the basic rate does not apply.

The trust rate and dividend trust rate will also rise by 10% to 50% and 42.5%, respectively: FA 2009 s 6.

Thirdly the rate of the special charges arising in connection with the pension schemes rules will increase from 25% and 60% if the individual's adjusted net income exceeds £150,000.

FA 2009 s 72 and Sch 35 introduces the special annual allowance charge see Part V Chapter 56 below

### **Chapter 15 - Benefits in Kind, s 62, the Benefits Code Part I: Exemptions and Exclusions (pp. 267-285)**

**15.4.1.6. p. 277 The Charge** FA 2009 s 71 modifies the rules for taxing the benefit from employer-provided living accommodation to stop attempts to avoid tax through the payment of a lease premium rather than a full market rent for the use of the accommodation. Amended ITEPA s 105 and new ss 105A and 105B require the value of the lease premium to be taken into account when computing the benefit charge where the lease is for less than 10 years. The charge related to the premium is computed using a formula allocating the lease premium to the relevant period based on the length of the relevant period as a proportion of the total lease period, and also takes into account the effect of break clauses (if any).

**15.7. p. 283 Other Exemptions Health screening and medical check-up.** FA 2009 s 55 codifies HMRC practice by introducing a new exemption from tax on the provision to employees of one health screening and one medical check-up each year (or the provision of a non-cash voucher or credit token to facilitate same).

**MEPs.** FA 2009 s 56 extends the equivalent of double-tax relief to salary payments made by the EC to MEPs now subject to Community tax. Payments of transitional allowance will also be treated as termination payments, bringing the tax treatment into line with similar payments to MPs.

### **Chapter 16 – Benefits Code II: Not Low Paid Employees (pp. 287-309)**

**16.3.3. p. 293 Statutory Exceptions** Health screening: see 15.7 above.

**16.4. p. 299 Particular Rules for Particular Benefits** Car Benefit. FA 2009 s 53 and s 54 modify the car benefit charge. Section 53 and Sch 28 abolish the £80,000 price cap used to compute the cash equivalent of the car benefit, reduce the lower threshold to 125 g/km of CO<sub>2</sub> emissions and change the appropriate percentage for electrically propelled cars from 15 per cent to 9 per cent. Section 54 provides that for purposes of computing the car benefit charge, the price of an equivalent manual transmission car may be substituted for the price of an automatic car used by a disabled employee where this is advantageous to the employee.

### **Chapter 17 - Securities: Income and Exemptions (pp. 311-338)**

**17.4.4. p. 324 Securities disposed of for more than market value** The Scottish case *Gray's Timber Products v Revenue and Customs Commissioners* [2009] STC 889, [2009] CSIH 11 sheds some light on the determination of market value of shares under the employment-related securities rules. At issue was whether rights under a subscription agreement requiring the purchase of the taxpayer's shares along with an extra payment to him in the event that more than 50% of the company's shares were sold were to be taken into account in determining the market value of his shares for purposes of ITEPA s 446 X (b) when such a sale occurred. The majority (Lord Osborne dissenting) held that the rights were personal to the taxpayer and were not to be so taken into account; the taxpayer's shares had the same value as the other ordinary shares. The extra payment was subject to income tax under ITEPA 446Y.

**17.7.2. p. 332 Tax Treatment** Tax Treatment Approved SAYE Option Schemes Tax Treatment - administration. FA 2009 s 50 and Sch 26 concern administrative arrangements for SAYE schemes. These move some functions from the Treasury to HMRC (paragraph 2) and make other changes - e.g. removing the requirement that certain notices must be sent by post (paragraph 6).

## **Chapter 18 - Employment Income: Deductions and Expenses ITEPA Part 5 (pp. 339-356)**

**18.1. p. 339 Introduction** Employment loss relief. FA 2009 s 68 introduces a similar new anti-avoidance rule in relation to employment loss relief. Pursuant to new s 128(5 A) employment losses will be relieved only where they are not derived from arrangements the main purpose, or one of the main purposes, of which is the avoidance of tax.

**18.3.4.4. p. 354 Liability insurance premiums and uninsured liabilities; employment and post-employment** FA 2009 s 67 introduces a new anti-avoidance rule in response to arrangements involving the creation of a contrived liability through deliberate default. Pursuant to new ITEPA ss 346(2A) and 556A employee liabilities will be deductible only where they are not derived from arrangements the main purpose, or one of the main purposes, of which is the avoidance of tax.

## **Chapter 20 - Business Income – Part II: Basis of Assessment and Loss Relief (pp. 379-402)**

**20.10. p. 395 Relief from Trading Losses** Loss Relief under ITA s 64; FA 2009 s 23 and Sch 6 paragraph 1 and 2 allow a business to carry a trading loss arising in 2008-09 and 2009-2010 back three years instead of just one. For £50,000 limit see paragraph 1(12). This is to help businesses through the recession.

## **Chapter 24 - Capital Allowances (pp. 493-548)**

**24.2.5. p. 514 First Year Allowances and the annual investment allowance Machinery and Plant.** To help businesses through the recession where new

expenditure exceeds the annual investment allowance of £50,000, a first year allowance of 40% is given by FA 2009 s 24 amending CAA ss 39 and 52(3). For timing and conditions see subs (2) – (6). The allowance is increased from 20% - for one year. Among the exclusions are special rate expenditures.

**First Year allowances.** 100% allowances for certain environment-related expenditure; this change to existing schemes will take effect under statutory instrument.

**24.2.10. p. 522 Motor Vehicles** Restrictions on capital allowances for ‘Expensive’ motor cars to be recast in terms of CO<sub>2</sub> emissions not price. Related rules on leases also changed. Motor bicycles remain outside these rules: FA 2009 s 30 and Sch 11 amending inter alia s 104A and adding ss 104AA, 104F and 208A and making new 268A-268C. CAA ss 74 -79 are repealed.

**24.2.12.6. p. 525 Long funding leases** Leases of plant and machinery. FA s 64 and Sch 32 come in response to the disclosure of schemes to avoid tax. The first change is to the value to be brought into account where a long funding lease commences (CAA s 61 Table 1 item 5A); it is now the greater of a) the market value of the plant and b) the qualifying lease payments (defined in s 61(5A)). The second makes sure that the definition of disposal receipts in s 60 includes a disposal on the determination of a long funding lease under s 70E.

The third is favourable to taxpayers and makes sure that an initial payment brought in as a disposal value under s 785C is not also taxed as income under TA 1988 s 785B. Finally the rules make it clear that the annual investment allowance is not available to the lessee under a) a transfer and long funding leaseback arrangement or b) a hire purchase and long funding leaseback arrangement (changes to CAA s 51A (10)).

**24.2.14. p. 526 Films and sound recordings; master versions** Long Funding Leases of Films: FA 2009 s 65 and Sch 33. These are rules to prevent avoidance of tax involving the long funding leases of films by adding TA 1988 s 502GD and ITTOIA s 148FD. The schemes disclosed involved partnerships ending existing leases and replacing them with new leases intended to qualify as long funding leases for plant. The blocking legislation is not confined to partnerships.

**24.3.2.1. p. 530 Qualifying Trends** n 388 In *Maco Door and Window Hardware UK Ltd* [2008] STC 2594, [2008] UKHL 54, the House of Lords agreed with the High Court judge. They reversed the Court of Appeal but by a narrow majority (3-2).

## **Chapter 26 –ITTOIA Part 4 Savings Income: Interest and Premium, Bond and Discount: Schedule D, Case III (pp. 567-588)**

**26.4. Accrued Income Profits ex Accrued Interest** On recent avoidance case see 5.5 above

## **Chapter 29 – Trusts (pp. 613-627)**

**29.2.3. p. 618 Rates of tax Expenses.** p. 619 n 40 Trusts: *Revenue & Customs Commissioners v Peter Clay Discretionary Trust* has reached the Court of Appeal [2009] STC 469, [2008] EWCA (Civ) 1441. Reversing the Chancery Division judge ([2008] STC 928) in part, the Court held that a wider range of fees could be apportioned between income and capital: see especially paragraphs 40-46. Whether the fees of an investment advisor could be deducted might depend on when the decision to accumulate was made.

### **Part III - Capital Gains Tax (pp. 661-823)**

**33.9. p. 679 Connected Persons** In *Kellogg Brown and Root Holdings (UK) Ltd v Revenue & Customs Commissioners* [2009] STC 1359, [2009] EWHC 584 (Ch) Sir Andrew Morritt C. dismissed HMRC's appeal. He held that TCGA s 28 applied to determine time at which connection for purpose of s 18: see paragraph 22 et seq.

**35.2. p. 710 Timing of Disposal** On application of s 28 in context of determining connected part status see this supplement 33.9 above.

**35.7. p. 721 The Underwood Case** The Underwood saga has now reached the Court of Appeal. In *Underwood v Revenue & Customs Commissioners* [2009] STC 239, [2008] EWCA Civ 1423 the taxpayer's appeal was dismissed. Note Lawrence Collins LJ at paragraphs 49 and 50 and the elegant judgment of Lord Neuberger especially at paragraphs 63 and 68.

**43.1. p. 805 Consideration** On finding the consideration see also *Revenue & Customs Commissioners v Collins* [2009] STC 1077, [2009] EWHC 284 (Ch) Henderson J.

**43.2.2. p. 812 Restrictions and 43.2.4. p. 813 Apportionment of expenditure** Issues under these two rule arose in *Drummond v Revenue and Customs Commissioners* [2008] STC 2707, [2007] EWHC 1758 (Ch). The taxpayer (D) carried out a CGT loss avoidance scheme. D had bought a second hand life policy in 2001 for £1.962m. He then surrendered the policy and obtained its surrender value of £1.75m (based on the premiums paid); the surrender cost him £210,000. He claimed, invoking s 37, that in calculating his gain he could exclude the £1.75m of surrender value from the proceeds of sale because this was liable to income tax under special rules (then TA 1988 s 541 now ITTOIA Part 4 Chapter 9). This would leave him with the large loss now claimed. Today this would be countered by TCGA 1992 s 16A added in 2007. Norris J held that this was not a correct application of s 37 because the sum was neither charged nor chargeable to income tax (see e.g. paragraph 20- 24), and he was not going to be party to a decision which meant that this sum escaped both income tax and CGT.

The second question was whether costs had been incurred 'wholly and exclusively' as required by TCGA 1992, s 38. Sums paid to implement the avoidance scheme had not been incurred wholly and exclusively for the acquisition of the asset but payments to acquire the policies were deductible. Sums held to be not deductible included an

investment company fee, introductory commissions, a fee for independent legal advice and a contribution to a fighting fund.

#### **43.5.1. p. 818 Rebasing Election**

It is a matter of great regret to the author that owing to his failure to make necessary changes at proof stage) for which he alone is responsible) the text in the second paragraph should still read '1982' as in the previous edition and '2008'. The first paragraph deals with the general rule in TCGA 1992 s 35, which sets out the 31 March 1982 market value rebasing rule before the 2008 changes.

The second paragraph is headed 'CGT rebase without future election FA 2008' The original rule, applying from 1988 (when rebasing was introduced) to 2008 for CGT and still applying for corporation tax see below, gave a taxpayer the right to elect for a value at 31 March 1982 instead of the actual acquisition etc costs. This might be suitable if the pre 1982 acquisition cost was greater than the value on 31<sup>st</sup> March 1982; restrictive rules prevented abuse. FA 2008 makes the rebasing election mandatory; both the right to elect for the 1982 value and any right to elect back are removed by FA 2008 so that for disposals on or after 6<sup>th</sup> April 2008 only the March 82 may be taken. There is also a special CGT rule, new s. 35A, for certain no gain no loss disposals occurring between 31 March 1982 and 5 April 2008 where the asset is disposed of after 5<sup>th</sup> April 2008.

### **Part IV - Corporation Tax (pp. 827-993)**

#### **Chapter 45 – Structure (pp. 843-870)**

No change. For 2010 the main rate is to be 28%, or 30% for ring fence profits (FA 2009 s 7). For 2009 the small companies rate remains at 21% (and will not be increased as had been intended); ring fenced remain at 19%. This means that the relevant fraction is 7/400ths generally and 11/400ths for ring fenced profits.

By TA 1988 s 13 (7) on FII to be included in calculation is extended to take account of foreign dividends see FA 2009 Sch 14 Part 2.

**45.15. p. 866 The Luxembourg Jurisprudence** For new decisions including reversal on *Vodafone 2* (p. 870 n. 178) see also above chapter 2.

On losses see **2.3.** above.

On dividends, there are two Art 56 cases. *Amurta SGPS v Inspecteur van den elastingdienst/Amsterdam* (Case C-379/05) [2008] STC 2851 concerns the Dutch tax system's 25% withholding tax on dividends. Company A receiving a dividend from Company B, could claim exemption if As seat or permanent establishment was in the Netherlands and it had at least 5% of the shares of B. In other situations, a higher percentage (25%) was required. The ECJ had little difficulty in finding that there was a breach of Art 56 where the percentage was less than 25% and the seat was not in the Netherlands.

Dividends (3) Art 56, non-member state (Art 57) *Holböck v Finanzamt Salzburg-Land* (Case C-157/05) [2008] STC 92 The taxpayer, H, was an Austrian who was the sole shareholder in a Swiss company. Under Austrian tax law dividends from an Austrian company was taxed at half rate while dividends from companies in non-member states were taxed at ordinary rate. The relevant years were from 1992 to 1996. The Court held that it was a pre-existing restriction within Art 57. The Court also held that the Austrian legislation was not intended to apply only to those shareholdings which enabled the holder to have a definite influence on a company's decisions and to determine its activities – this meant that Art 43 did not apply but Art 56 did and Art 56 was excluded by Art 57.

### **Chapter 46 – Distributions and ITTOIA Part 4 Chapter 3 (pp. 871-888)**

P878 FA 2008 and 2009 (for international detail see 61.1 p. 1129)

FA 2009 gives us CTA s 931A, a new basic provision for charging dividends and other distributions unless they are either exempt (sub paragraph (1)) or of a capital nature (sub paragraph (2)). For an interesting discussion see Greenbank *The Tax Journal* 3 August 2009 p.9.

**Non-resident shareholders in a UK resident company** ITTOIA s 397A was inserted by FA 2008 s 34 to give a tax credit to a non resident minority shareholder (defined by s 397C as less than a 10% shareholding); it did not apply if the company was an offshore fund. FA 2009 rewrites s 397A and deals with the situation where the individual owns 10% or more. Section 397C is repealed and now shareholders are entitled to a tax credit regardless of the size of their holdings if they come within one of the three categories in s 397AA: 1) the shareholder is a minority shareholder 2) the company is an offshore fund 3) is more complex – the company must be resident in a qualifying territory (and only so resident). Where there is a series of distributions each distributing company must meet the residence test; where this is not so there must be no tax advantage scheme (defined s 397AA(5)). A territory is a qualifying territory if it is the UK itself or is one with which the UK has a double taxation agreement containing a non-discrimination clause. In this way the UK rules meet the requirements of EC law and provide analogous treatment where a non-member state is involved.

### **Chapter 47 – Computation (1): General Rules (pp. 889-916)**

**47.2.5.2. p. 893 Contaminated Land** Scope of relief in CTA Part 14 is widened by FA 2009 s 26 and Sch 7 to provide incentive to bring long term derelict land – commonly known a brown field land - into use and to include costs of removing Japanese Knotweed. On derelict land see especially ss 1144F and 1146. However, relief is restricted by being denied if a polluter or person connected to polluter retains an interest in the land: CTA s 1163. The legislation makes it clear that the land must have been contaminated when the major interest was acquired.

**47.5. p. 906 Losses** Loss Relief, s 393A. FA 2009 s 23 and Sch 6 paragraph 3 allow a company to carry a trading loss back three years instead of just one; this period already applies to terminal losses but is now made general, subject to a £50,000 limit

each year. The years are determined by reference to accounting periods specified in paragraph 3(3). This is to help businesses through the recession.

FA 2009 s 62 dealing with cessations of trade on or after 21 May 2009 provides that terminal loss relief is not available if when the company ceases to carry on a trade any of the activities are taken over by a person who is not (or by persons any or all of whom are not) within the charge to corporation tax. The section only applies if the main purpose or one of the main purposes of the company's cessation is to secure the terminal loss relief. The purpose of s 62 is to counter an avoidance scheme (HMRC Notes on Clauses – New clause 8).

**47.5.6. p. 913 Leasing plant and machinery** The rules in FA 2006 Sch 10 are amended by FA 2009 s 63 and Sch 31 to make changes to help industry during the recession.

## **Chapter 48 – Computation (2): Accounting Based Rules for Specific Transactions (pp. 917-945)**

**48.1.1. p. 918 Introduction-History, purpose, and structure** Impairment relief text at n 16. It was found that the 2005 changes did not interact correctly with the general trade rules. If a trade debt was released by a creditor connected with the debtor company the creditor was denied relief under the loan relationship rules but the debtor was charged to tax under TA 1988 s 94 unless the release was part of a statutory insolvency arrangement. A change made by FA 2009 s 42 applies the loan relationship rules to both parties and removes the anomaly. The note to clauses point out that if the parties are not connected and carry on a property business the effect of the change will convert the profit from property income to a non trading loan relationship credit – which may be disadvantageous.

**48.1.7. p. 925 Connected party transactions** Rules in FA 1996 Sch 9 paragraph 2(1A)-6, now CTA ss 374-76, are amended by FA 2009 s 41 and Sch 20. The reasons are the same as for the changes to dividends at 46 above. These rules allow a deduction for interest between connected parties only where the interest is paid. This ban on the deduction for interest due but not paid applied where the creditor company was not taxable under the loan relationship rules e.g. where it was not resident. This ban is now removed as long as the company is resident in a qualifying territory (and only so resident). As with 46 above a territory is a qualifying territory if it is one with which the UK has a double taxation agreement containing a non-discrimination clause.

A similar widening change is made in the rules on postponement of relief until redemption for discounts - FA 1996 Sch 9 paragraphs 17 and 18, now CTA ss 407, 409 and 410.

**48.1.10. p. 927 Foreign exchange** FA 1996 s 84A now CTA s 328, allows for the disregard of certain matching foreign exchange transactions. This was based on the assumption that this would lead to the disregard of a loss as often as the non-taxing of a gain. However, some schemes used 'one-way exchange effects and these are now stopped by FA 2009 s 43 and Sch 21 amending CTA s 328 and inserting ss 328A-

328H. These rules are wider than those introduced as regulations in 2006 and those regulations are repealed.

**48.3. p. 933 Intangible Fixed Assets (Capital Intellectual Property)** Goodwill is subject to the rules in FA 2002 Sch 26, now CTA Part 8 (ss 711-906) FA 2009 s 70 enacts the view held widely, but not apparently universally, that goodwill created in the course of carrying on the business is subject to these rules. CTA s 712(2) is amended to confirm that an intangible asset includes an internally generated asset. We shall have to see whether the alternative (minority) view is upheld by the courts.

**48.4. p. 941 International Trade – Trading Currency** FA 2009 s 38 and Sch 18 amend FA 1993 rules by amending s 92D and inserting ss 92DA-92DE in reaction to recent uncertainty in the currency markets. The old rules require unused losses to remain converted into sterling when they accrued. Sections 92DA-92DB apply as from 18 December 2008 and will allow them to be computed in the currency in which they were originally computed; so, as the Notes on Clauses explain, losses incurred in a foreign currency will be set against the same measure of profits. Sections 92DC-92DD deal with losses computed in sterling which are used in a different period and the profits are computed in that other period in a currency other than sterling. Section 92DE contains definitions. There are transitional rules - Sch 18 paragraphs 7 et seq including an election for a different commencement and transition – paragraph 13.

**48.5. p. 943 Repos** For explanation of Repos, an attack on the disgraceful form of the legislation and a decision not to the Revenue's liking see *DCC Holdings v Revenue & Customs Commissioners* [2009] STC 77, [2008] EWHC 2429 (Civ), Norris J at paragraphs (1) and (22) and generally.

On new rules see **48.6** below

**48.6. p. 943 Structured Finance Arrangements (SAFs); Factoring of Income Receipts; Abusing Finance Transaction Treatment** CTA Part 6 (relationships treated as loan relationships) is amended by the addition of two main sets of rules (FA 2009 s 48 and Sch 24). First ss 486A-486E are added as Chapter 2A to deal with disguised interest payments. Secondly, ss 521A-521F are added as Chapter 6A to deal with shares accounted as liabilities. Provisions repealed include TA 1976 ss 736C and 736D (stock lending), FA 2004 ss 131-133 (loss relief for companies in partnership) later CTA Part 6 Ch 8, a rule on repos, and FA 2007 Sch 13 para 12 later CTA s 547. Part 6 Ch 7 shares with guaranteed returns, previously FA 1996 ss 91A and 91B, is also repealed.

#### **Chapter 49.6.2. p. 953 Group and Consortium Relief for Losses, etc**

TA 1988 Sch 18 paragraph 1 is amended so that certain types of preference shares will be ignored. At present only fixed rate preference shares are ignored; as from FA 2009 it will be 'relevant preference shares.' If the relevant shares carry a right to a dividend they must meet various conditions set out Sch 18 paragraph 1 A, including one relating to a reasonable commercial return. A fear that a company which was

unable to pay a dividend because it had insufficient distributable reserves was addressed by an amendment to the Bill.

**49.9. Group Financing Costs – The debt cap** FA 2009 s 35 and Sch 15 were altered considerably during the passage of the Finance Bill; the changes are explained in HMRC Technical Note 8 April 2009. The legislation is free standing and its 99 paragraphs await translation into the second Corporation Tax rewrite Bill; the detail of the rules are way beyond this supplement and the reader is referred to the relevant pages in the British Tax Review. They apply to accounting periods beginning on or after 1 January 2010.

The purpose is to restrict the tax deduction for finance expenses of groups of companies. Para 2 directs that the rules apply if the UK net debt (see paragraph 3 and 4) exceeds 75% of the worldwide gross debt (paragraph 5); the figure of 75% may be changed by statutory instrument.

Subject to this 75% threshold, the system limits the aggregate UK tax deduction for the UK members of a group of companies that have net finance expenses to the consolidated group's finance expense. The disallowance is laid down by paragraph 15. The restriction is calculated by comparing the UK measure of net finance expenses with the worldwide measure of the groups finance expense. More technically paragraph 15 asks whether a) the tested expense amount, defined in Part 8 (paragraphs 70-72), exceeds b) the available amount, defined in part 9 (paragraphs 73-77). If so the excess is disallowed. Paragraphs 16-26 set out the procedure for making a report detailing the allocation of the disallowed amount to one or more UK group companies.

Part 4 deals with the group's financing income amounts as defined in paragraph 55. These give rise to exemption from corporation tax if the group has had finance expenses which have been disallowed; paragraphs 27-39 deal with the allocation of the exemptions among the companies.

Part 5 (paragraphs 40-46) deals with various EEA matters where financing income is received from certain EEA countries.

Part 6 (paragraphs 47-53) contains various anti avoidance rules.

Part 7 (paragraphs 54-68) contains the key definitions of the financing expenses of a company (paragraph 54) and the financing income amounts of a company (paragraph 55). Paragraph 57 deals with Group Treasury companies. There follow special rules granting conditional exclusions for Real Estate Investment Trusts, companies with oil extraction activities, intra group short term finance, short term loan relationships, stranded deficits, stranded management expenses; there are exemptions for amounts paid to charities and other bodies (paragraphs 58-68). The exclusion for financial services is in Part 2: see paragraph 2(2) and paragraphs 7-13.

**50.2.2. p. 964 Sink companies and capital losses** TCGA 1992 s 171A is further simplified and completely rewritten by FA 2009 s 31 and Sch 12; it is now ss 171A-

171C. Where a gain or loss would arise on a transfer to another group member, the companies may simply elect that the gain or loss be transferred – in whole or in part – from the disposing company to any other member of the group. This allows full and immediate matching of gains and losses within the group without having to wait for there to be a disposal outside the group. The effects of the election are spelt out in s 171B; there is a special rule for insurance companies in s 171C. An amendment ensures that the new rule applies where the group wishes to reallocate a gain or loss to a non-resident group member carrying on a trade in the UK through a permanent establishment.

## **Part V- Charities (pp. 997-1009)**

On important EC case law see Chapter 2 above.

## **Part VI – Savings (pp. 1013-1068)**

### **Chapter 54 – Savings (1): Favoured Methods (pp. 1013-1024)**

FA 2009 s 27 and Sch 8 contain new rules for VCTs (54.4), EIS (54.5) and CVS (54.6)

On EIS the £50,000 restriction for shares purchased before 6 October is removed, amending ITA s 158. ITA s 175 is simplified - all the money must be employed within two years of the date of issue. The changes to EIS income tax relief apply also to reinvestment relief. A similar change is made for CVS – FA 2000 Sch 15 paragraph 36 is amended – and for VCTs – ITA s 293.

On EIS there is technical change on share for share exchanges; the change is beneficial to taxpayers and is designed to prevent a taxable gain arising in relation to the old shares (see HMRC Notes on Clauses paragraph 1-6).

**54.5. p. 1019 Enterprise Investment Scheme** *Blackburn v Revenue & Customs Commissioners* [2009] STC 188, [2008] EWCA Civ 1454 is an interesting case on proving that money had been subscribed for shares when it had been left with the company and allowed to build up.

### **Chapter 55 – Savings (2): Investment Intermediaries (pp. 1025-1045)**

**55.4. p. 1031 Investment Trusts** FA 2009 s 45 grants a regulation making power so that these companies will have the right to treat dividends as distributions of interest instead. This will shift the tax point from the company to the shareholder and will make investment by such companies in interest bearing assets more efficient. It also means no accompanying tax credit and tax at 40% rather than 32.5% for higher rate taxpayers.

**55.5. p. 1032 Insurance Policies**

**55.5.3. p. 1036 Sums payable on chargeable events: liability to tax in excess of lower rate non-qualifying policies** When a charge arises ITTOIA s 530 treats basic rate income tax as paid. ITA ss 152 and 153 deal with losses arising from miscellaneous transactions (ex Schedule D Case VI). According to the HMRC Notes on Clauses, schemes tried to ‘create loss relief from offshore life insurance policies against offshore income gains.’ This is stopped by FA 2009 s 69 amending ITA s 125(8), which directs that gains from policies etc, whether foreign or not, will not be eligible for claiming income tax loss relief. Some parts apply from 2008-09 (s 69(3)).

**55.8. p. 1040 Insurance Companies** FA 2009 s 46 and Sch 23 makes a number of changes. Perhaps the most important is the provision of a clear statutory framework for the tax treatment of additions by a life insurance company to its long term insurance fund.

**55.9. p. 1041 Offshore Funds Income Gains Distribution.** FA 2009 s 39 inserts ITTOIA s 378A, a rule designed to prevent funds gaining an advantage through having a corporate structure. Where the fund is substantially invested in interest bearing (or economically similar) securities (as defined in CTA s 494) the distribution is treated as interest for income tax purposes. This means no accompanying tax credit and tax at 40% rather than 32.5% for higher rate taxpayers. Substantially is defined in ITTOIA s 387A as meaning broadly when the value of the interest bearing assets, widely defined, exceeds 60% of market value of all the investments (excluding cash awaiting investment).

FA 2009 s 44 and Sch 22 build on the changes made by FA 2008; they amend FA 2008 s 40 and insert ss 40A-40G. The purpose is to make the offshore fund more like a unit trust (55.3) and treat the interest in the funds as the chargeable assets – and not the underlying investments.

On loss relief note **55.5.3** above.

**55.10. p. 1043 Real Estate Investment Trusts (REITs)** FA 2009 s 65 and Sch 34 aims to do three main things. First, it hopes to prevent exploitation of the relief when a company restructures (paragraph 7 inserting FA 2006 s 136A and promising future regulations). Secondly it removes an obstacle to entering the regime (paragraph 2). Generally it clarifies and improves the legislation and makes it more consistent. Thus, it allows the company to issue convertible preference shares (paragraph 3).

**55.10.3. p. 1044 Restrictions** FA 2009 s 66 adds FA 2006 s 3A; this retrospective provision allows HMRC to waive the charge that would otherwise arise because the REIT company breaches the profit finance costing ratio where the company is in severe financial difficulties owing to unexpected circumstances and the company could not reasonably have taken action in time.

**55.11. p. 1045 Alternative [Finance] Investment Bonds**

The implementing tax legislation is in FA 2009, s 123 and Sch 61.

## Chapter 56 - Savings (3): Pensions (pp. 1047-1068)

**56.9. p. 1055 April 2006 FA Part 4 Rules** FA 2009 makes a number of changes. FA 2009 s 72 and Sch 35 (see BN47) is of most political interest and is part of the package that will result from the new upper rate of income tax. It creates a new special annual allowance charge. The charge will not apply where T's income is less than £150,000; it will not apply where T's total pensions saving for the year do not exceed £20,000 and it will not apply to those who can establish that the payment is part of a regular pattern of saving and that this can be established for the period before 22 April 2009. Its target is the person facing the 50% upper rate of income tax who decides to get round the problem by making new and substantial contributions to a pension scheme. Where such a person makes a substantial contribution in 2009-10 which may otherwise create a potential liability to this charge in 2011-12 the person is allowed to ask for a repayment – subject to a 40% charge. There is no such power for payment in 2010-11 because the person may reasonably be assumed to know what is coming. As a result of the special annual allowance which takes effect in 2011, individuals earning over £170,000 will be allowed just 20% tax relief; their pensions remain taxable in full.

Some further rules demand brief notice. The charge is freestanding and quite distinct from FA 2004. This means that if the 50% rate is abolished this too can be repealed quite simply but it goes against the Rewrite philosophy of having most of the charging provisions in the main acts – and not creating new ones.

Lastly ones of less importance but still of interest FA 2009 s 73 deals with payments under the financial assistance scheme established under FA 2004 s 286 - the lifeboat. The FAS is not itself a registered pension scheme but s 73 allows the Treasury to make regulations to achieve that goal – and see BN 48. Section 74 creates a similar power in relation to sums paid out under the Financial Services Compensation Scheme (see BN 49). Section 75 widens the powers to make retrospective changes to FA 2004 if the provision does not increase any person's liability to tax, by adding FA 2004 ss 282(A1) and (A2).

## Part VII - Anti-Avoidance (pp. 1071-1089)

**57.2. p. 1072 Bond Washing** Transfer of Income Streams. Here we have a new general rule finally sweeping away what was left from recent tidying up. It is an important and welcome essay in a new style of drafting. Unlike the disguised interest rules above these changes affect both CT and income tax. FA 2009 s 49 and Sch 25 insert ss 809AZA-AZG into ITA; there are analogous corporation tax rules in Sch 25 itself (part 1); the charge is brought into the CTA structure as Chapter 2B – see ss 486F and 486G. The provisions repealed are TA 1988 ss 730 (57.2.2), 775A (57.2.2) and 785A rent factoring of leases of plant and machinery.

The new general rule, in its income tax form s 809AZA, is in Part 2 of the Schedule and applies where a person makes a transfer of a right to 'relevant receipts'. *McGuckian* would be a classic example. Receipts are 'relevant' if they would, but for the transfer, be income in the hands of the transferor or brought into account in

computing profits of the transferor. So the rules catch both a transfer of a right to pure income and the sale of a right to income which forms part of trading profits.

Section 809AZA does not apply if, per paragraph 1(1)(b), the transfer also applies to the asset from which the receipts arose, though there is an express exclusion if the asset is a right to annual payments (paragraph 1(3)).

Section 809AZB charges the amount of the consideration or if that is too low the market value of the right. These rules do not apply if the receipt is already taxed as income in some other way (s 809AZC). There are also exceptions for life annuities and pension income (s 809AZCA) and for transfers of two other sorts of annuity (s 809AZD) or by way of security (s 809AZE). The CT rules are in Part 1 of the Schedule.

Among the fascinating points in the Notes on Clauses are the 2006 American case of *Lattera v Lattera* (see paragraph 9) and an explanation of a change to TA 1988 s 785A made by FA 2008 (see paragraph 19).

TA 1988 s 730A On history see Henderson J in *Revenue and Customs Commissioners v Bank of Ireland Britain Holdings Ltd* [2008] STC 253, [2007] EWHC 941 (Ch) (above 5.5).

## **Part VIII - International (pp. 1093-1207)**

**58.3. p. 1097 UK Connecting Factors: Individual's Residence** Revenue Leaflet IR 20 has finally been replaced by leaflet HMRC6; for comment see Kessler *Taxation* 30 April 2009 p. 418. The new document indicates, amongst many things, that HMRC will not take the 91 day practice as mechanical sort of safe harbour rule. This is consistent with the quotation from Rand J at p.1099. Kessler repeats the suggestion by the House of Lords Select Committee report on the Finance Bill 2008 that a complete statutory definition of residence was desirable.

**p. 1100** *Revenue and Customs Commissioners v Grace* [2009] STC 213, [2008] EWHC 2708 (Ch) is an important, interesting and Revenue-friendly case on TA 1988 s 336 / ITA s 831 on whether a person is in UK for a temporary purpose only. Lewison J allowed HMRC appeal.

**58.7. p. 1115 Movement of Corporate Capital: Reporting and Penalties** As part of the reform of the UK tax system to help international businesses, FA 2009 Sch 17 paragraphs 1-3 repeal TA 1988 ss 765-767 and associated provisions altogether. The Schedule goes on to impose a duty to notify reportable events or transactions of a value exceeding £100m. The list of events is in paragraph 8(2) and the exclusions are in paragraph 9. A group with more than one UK corporate parent must nominate a single reporting body (paragraph 6).

## **60. UK Residents and Foreign Income**

**60.1. p. 1127 General and 60.2.2. p. Basis of Assessment: ITTOIA – trading, savings and property income** Corporation Tax and Foreign Dividend Income - Companies. Where a UK resident company had dividend income from a UK resident company the dividend was not subject to UK corporation tax by virtue of TA 1988 s 208. Dividend income was to be covered by the second Corporation Tax Act in 2010 but FA 2009 s 34 and Sch 15 insert Part 9A into the 2009 Act which exempts a number of distributions. If the distribution is not exempt it is subject to corporation tax; if it is exempt the company may elect to treat it as taxable (s 931R). The rules include anti-avoidance provisions e.g. s 930MA.

Where the company is small the dividend is exempt (s 931B) provided it meets various conditions. First the company must be resident in a qualifying territory (and only so resident); a territory is a qualifying territory if it is the UK or is one with which the UK has a double taxation agreement containing a non-discrimination clause. Next the distribution must not come within TA 1988 s 209(2)(d) or (e) and must not be deductible under the law of the qualifying territory. Finally, it must not be part of a tax advantage scheme (defined in s 931V). In this way the UK rules meet the requirements of EC law and provide analogous treatment where a non-member state is involved. A company is small (s 931S) if it meets certain EC based tests. Certain investment companies, e.g. an authorised unit trust, cannot be small.

If the company is not small, more elaborate rules apply (ss 931D-931Q). Once again the distribution must not come within TA 1988 s 209(2)(d) or (e) and must not be deductible under the law of the territory. The rules then create five exemptions. Section 931E gives exemption to dividends from controlled companies – the 40% CFC test being used, but slightly modified. 931F exempts dividends in respect of non-redeemable ordinary shares. 931G exempts dividends from portfolio holdings (not more than 10% issued share capital). 931H exempts dividends from transactions not designed to reduce tax. 931I exempts dividends in respect of shares accounted for as liabilities for loan relationships (there is a cross reference to CTA s 521C).

Sections 931J to 931Q contain eight categories of schemes which will prevent an exemption from applying. These are schemes involving (i) the manipulation of the controlled company rules (ii) quasi-preference or quasi-redeemable shares (iii) manipulation of portfolio holdings (iv) in nature of loan relationships (v) distributions for which deductions are given (vi) involving payments for distributions (vii) non-arms length and (viii) the diversion of trade income.

**60.4. p. 1137 Remittance Basis for Relevant Foreign Income and Chargeable Gains (FIGs)** FA 2009 s 51 makes a few changes in the light of one year's experience of the new rules. One concerns the relevant person test where close companies are concerned. The definition of close company includes subsidiaries and there is a definition of participator (s 809 M (3) (ca)) – paragraph 7. The value of a remittance where property forming part of a larger set is remitted is redefined in the Revenue's favour (paragraph 8). There are some procedural changes to do with self-assessment (paragraphs 3 and 4). Property is 'remitted to the UK' if used to pay interest on a debt – and not just the debt itself (paragraph 6). The scope of the exemption in s 809X is widened slightly (paragraph 10). There are rules on gift aid (paragraphs 2 and 5). There are also changes to TCGA – paragraphs 11 and 12 – while clarifying the

interaction of the remittance basis and the settlement legislation in ITTOIA s 648. Para 14 amends the transitional rules in FA 2008 Sch 7 paragraph 86.

**Migrant Exemption** FA 2009 inserts Chapter 1A into the remittance legislation (ITA Part 14). Sections 828A-828D are designed to exempt from UK tax altogether people not wanting to use the remittance basis. The person in mind is the migrant worker employed seasonally in agriculture in the UK and other countries in the same tax year and whose non-UK income is subject to tax where it is earned. By granting the exemption these rules remove the duty to file a self assessment return. Relevant foreign income for the year must not exceed £10,000; relevant foreign investment income must not exceed £100; the worker must have been liable only to basic or starting rate income tax.

### **61.1. p. 1158 Basic Rules**

p 1129 See 46 above.

## **Chapter 62 - Controlled Foreign Companies Resident in Low Tax Areas (pp. 1173-1190)**

**62.5. p. 1183 Exclusions** As part of the 2009 review of the taxation of foreign income FA 2009 s 26 and Sch 16 make two major simplifications to the CFC rules. First they abolish the exemption for payments falling within the acceptable distribution policy TA 1988 s 747 and Sch 25 Part 1 (p. 1184 62.5.1) Secondly they simplify the exempt activities exemption where a holding company is concerned (pp1186-87). As from 1 Jul 2009 the rules will be concerned simply with 'local holding companies'; the references to 'superior' and 'non-local' holding companies are removed. There are transitional rules (Sch 15 paragraphs 14 et seq - including an anti avoidance rule (paragraph 19)).

## **Chapter 64 - Relief against Double Taxation; Unilateral Credit (pp. 1209-1232)**

**64.2.2. p. 1212 Credits: Direct and indirect** FA 2009 s 34 introduces (above 60.1) an exemption system for dividends in the circumstances there set out, including the taxpayers right to elect not to use it.

**64.4. p. 1215 Credit Relief: The Framework** Although, as foretold at 64.8, FA 2009 s 34 introduces an exemption system for dividends there will be many circumstances when that system does not apply and the existing credit system does. FA 2009 makes three changes to the credit system. In addition, s 58 makes a change to manufactured dividend rules: 57.3 (q.v.)

First with regard to the mixer cap rate itself, FA 2009 s 57 ensures that the rules reflect the rate of UK corporation tax applicable to the foreign dividend – by amending TA 1988 s 799(1)(b) and (1A); a change to s 801 on underlying tax is similar. The purpose is to undo an anomaly that had arisen from the reduction in the CT rate to 28%. In so far as the change is beneficial to the taxpayer it is retrospective. The Notes to the Finance Bill draw tantalising attention to the curious treatment of income from St Kitts and Myanmar.

Secondly s 59 introduces TA 1988 s 804G; where relief is claimed for the foreign tax by T but a payment is made by a tax authority to T or to a person connected to T, by reference to the foreign tax; the credit is reduced by the amount of the payment.

Finally s 60 introduces an anti-fragmentation rule into TA 1988 ss 798A and B for banks. It is designed to clarify the existing rules and make sure that schemes do not work.

## **Chapter 65 - Double Taxation: UK Treaty Relief (pp. 1233-1254)**

**65.6.1. p. 1247 Residence** *Re Trevor Smallwood Trust* [2009] STC 1222, [2009] EWHC 777 (Ch) concerns the capital gains article in the UK-Mauritius Treaty (Art 13(4)) but the case turns on the tie breaker rules for residence. Reversing the Special Commissioners Mann J allowed the taxpayers appeal. The Special Commissioners had turned factual residence for part of the year into deemed residence for tax purposes for the whole of the year (as directed by the rule in TCGA 1992 s 2). Mann J said this was not justified and preferred a snapshot day by day approach. A question on the place of effective management did not arise.

## **Part IX - Inheritance Tax (pp. 1257-1474)**

**66.4.1. p. 1264 Progression** The rates set out apply as stated for 2009-10 (threshold £325,000).

**67.2. p. 1278 Disposition IHT.** In *Bhat v Bhat* [2009] STC 1540, [2009] EWHC 734 (Ch) Martin Mann QC considered and applied *Re Griffiths* [2008] STC 776. He held that he could set aside documents executed by the deceased on a mistaken basis. That basis was that they would be potentially exempt transfers. In fact she believed arrangements would be such that they would have fallen foul of the gift with reservation rule. She also believed that IHT would have been due on death of her husband but this belief was wrong as surviving spouse exemption would have applied. Sufficiently serious to be set aside subject to HMRC having right to contest

**76.2. p. 1410 Business Property Reliefs** In *Re Nelson Dance Family Sett* [2009] STC 802, [2009] EWHC 71 (Ch) Sales J upholding the Special Commissioner rejects the views expressed in three leading works (McCutcheon, Dymond and Foster). HMRC argued, as the books suggested, that for the relief to apply there had to be had to be a transfer of value of the business and not just business assets. A sole trader farmed agricultural land consisting of two farms and two cottages. He made a transfer of the farm and got agricultural relief on the agricultural value of the land. The land had development value and so was worth more. Sales J held that D's executor was entitled to business property relief on the balance of the value.

*McCall v Revenue & Customs Commissioners* [2009] STC 990, [2009] NICA 12 is a less exciting case. It held that while letting land under seasonal grazing arrangements,

known as agistment, was a business it was a business of 'holding investments' and so excluded from the relief. This is in line with other case in the text.

**76.3. p 1419 Agricultural Property** and **76.5. p. 1429 Timber**; reliefs extended to land in EEC area by FA 2009 s 121.

**77.1. p. General Principles of Valuation** Although s 160 sets out the basis on which a valuation is to be made it must yield to the real world. If in the real world the asset is worthless, the assumption in s 160 cannot make it valuable. See Lewison J in *Revenue & Customs Commissioners v Bower* [2009] STC 510, [2008] EWHC 3105 (Ch). Case concerned valuation of annuity taken out by lady of 90. Finding of fact that asset not commercially saleable; result was that value of reserved gift was not £7,800 but £250.

**78.4. p. 1461 Revenue Procedure and Appeals** Rules introduced by FA 2008 Sch 36 now extended to inheritance tax by change to FA 2008 Sch 36 paragraph 63: FA 2009 s 96.

**p. 1462** Time limits for claims and underpayments. The changes made by FA 2008 for the main direct taxes, allowing a four year period for claims and a four or six period for loss of tax are applied to inheritance tax by FA 2009 s 99 and Sch 51 paragraphs 5-13. On rules for losses see changes to IHTA s 240 and new s 240A.

**78.5.3. p. 1464 Interest** The rates for unpaid and overpaid IHT are now the same as for other taxes: FA 2009 ss 103 and 104.