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Dear Craig

Section 809L - Income Tax Act 2007

As I mentioned, I am writing on behalf of the CIOT to request H M Revenue & Customs (HMRC) views regarding the following scenario. It is a common situation and arises directly out of the 2008 legislation.

1 Assumptions

1.1 The assumed factual background is as follows:

- a H and ex-W were previously married but have now divorced and the decree absolute has been finalised so ex-W is no longer a relevant person in relation to H. They no longer live together as husband and wife. There are no minor children of H (or where there are they will benefit only incidentally to ex-W's benefit);
- b H and ex-W are both long-term UK residents;
- c H is non-UK domiciled and claims the remittance basis of taxation;
- d In many cases H will have extensive overseas assets and will not have attempted to keep income and gains segregated. Instead he will tend to have lived off the UK earnings and income he generated and never needed to remit funds from overseas and never intended to. Unfortunately, these overseas sums are nevertheless funds that are a financial resource for the purposes of the matrimonial courts and therefore have to be taken into account with regard to any final division of assets between the couple. In fact the capital value of what he has in the UK may be quite small;
- e The terms of a typical divorce order (the '**Order**') might provide that H will in due course need to raise sufficient funds to pay a capital sum to ex- W (the '**Capital Sum**'). Ex-W may retain the funds abroad or may bring them here but in any event either H will pay ex-W after the marriage has dissolved or ex-W will not bring in any funds until after decree absolute and after all claims have

been dismissed. Inevitably given H's wealth abroad the size of the order is likely to require H to use some of his overseas assets (including relevant foreign income or foreign gains) and pay ex-W these as part of the Capital Sum;

- f H will pay ex-W the Capital Sum to an account in the sole name of ex-W outside the UK and so makes no remittance himself of the Capital Sum; and
- g H will not benefit from or enjoy any part of the Capital Sum once it has been given to ex-W in satisfaction of the Order.

2 Question

Does either of the following:

- 2.1 the payment of part or all of the Capital Sum by H to ex-W from H's foreign income (or gains) outside the UK (the 'Payment'); and/or
- 2.2 the subsequent bringing in and use of the Capital Sum by ex-W in the UK for her sole benefit ('ex-W's UK Use')

constitute a remittance of the Capital Sum (ie of H's foreign income or gains) triggering a tax charge on H?

- 2.3 In our view it does not do so but this question can be of direct relevance to the final matrimonial settlement because obviously if H has to pay tax on sums paid to W then this liability must be taken into account in the final adjustment between the parties. The family courts themselves may find conflicting views presented to them particularly where, for example, one party wishes to use possible tax risks, however remote, as a reason for paying less or where tax indemnities are inserted but are time limited, so it is desirable in the interests of settling disputes quickly that greater certainty as to HMRC's position is obtained. In addition, the paying party often wishes to know what disclosure to put on his tax return regarding such payments.

3 Headline Analysis

3.1 *Summary of when a taxable remittance can occur*

3.1.1 An individual's income is remitted to the UK if:

- a Conditions A and B are met; or
- b Condition C is met; or
- c Condition D is met (Section 809 L(1¹)).

3.1.2 Conditions A and B deal with the circumstance where a relevant person (as defined in s 809M), brings to or makes use of the income or gains (or property deriving from the income or gains) in the UK.

¹ References are to the Income Tax Act 2007 unless stated otherwise.

3.1.3 Conditions C and D deal with the circumstance where the income or gains (or property deriving from the income or gains) belong to someone who is not a relevant person and a relevant person enjoys the income or gains (or property deriving from the income or gains) or enjoys property in the UK where the enjoyment has been facilitated by a gift or 'connected operation' relating to the income or gains (or anything deriving from the income or gains).

3.1.4 Each of conditions B-D can be satisfied by the settlement outside the UK of a 'Relevant Debt' (as defined in s809(L)(7)) using, broadly, foreign income or gains or property deriving from the foreign income or gains. The reasons why there is no relevant debt here are discussed below.

3.2 **No remittance of the Capital Sum**

3.2.1 A more detailed analysis of the legislation is set out below but, in summary, we do not think that there is a taxable remittance for the following reasons. As H and ex-W are no longer married or living together as husband and wife when the Capital Sum is brought to the UK by ex-W, ex-W is not a relevant person in respect of H's foreign income (Section 809M) at that time. As the Payment is made outside the UK, the Capital Sum is not brought into (or used in) the UK by any relevant person at that stage (notwithstanding the fact that if the payment was made before the decree absolute, ex-W would still be a relevant person). The Capital Sum is brought into the UK by ex-W as part of ex-W's UK use, at which time ex-W is not a relevant person in relation to H or the Capital Sum. Hence, Conditions A and B are not fulfilled.

3.2.2 H does not enjoy the Capital Sum (nor anything deriving from or facilitated by it) after the Payment has been made, in the UK or otherwise, as he is divorced from ex-W. Thus Conditions C and D are not fulfilled.

3.2.3 The only contrary point may be if it could be argued that H might indirectly be said to be enjoying the property in the UK by virtue of being relieved of something which was otherwise his obligation and/or he has received value in the UK. In most, albeit not all, cases the divorce order will specify what assets have to be transferred, eg foreign or UK assets although in some cases it will not specify but just require a generic lump sum.

4 **Detailed Analysis**

4.1 **Conditions A and B - 809L(2)/(3)**

Condition A

4.1.1 Condition A is that:

- a money or other property is brought to, or received or used in, the UK by or for the benefit of a relevant person; or
- b a service is provided in the UK to or for the benefit of a relevant person (Section 809 L(2)).

Condition B

4.1.2 Condition B provides that the property (or consideration for the service) either is, or derives from, the income or gains and is property of or consideration given by a

relevant person (Section 809 L(3)(a) and (b)). Alternatively that the income or gains, or anything deriving from the income or gains, are used outside the UK in respect of a 'relevant debt' (Section 809 L(3)(c) and (d)).

4.1.3 For there to be a remittance both Conditions A and B must be fulfilled.

Is Condition A fulfilled by the Payment?

4.1.4 Condition A requires property to be brought to, used or received in the UK by H or a relevant person in relation to him. As the Payment is made outside the UK by H (ie the Capital Sum is not brought to used or received in the UK by him), Condition A is not fulfilled by the Payment.

Is Condition A fulfilled by ex-W's UK Use?

4.1.5 For Condition A to be fulfilled a relevant person must use property in the UK or receive a service in the UK.

4.1.6 As H and ex-W are no longer married or living together as husband and wife, when the Capital Sum is brought to the UK by H, ex-W is not a relevant person in respect of H's foreign income (Section 809M) at that time. Hence Condition A is not satisfied if the Capital Sum is brought into the UK by or for the benefit of ex-W, nor if a service is provided for ex-W. In fact, as ex-W is not a relevant person, it does not matter what ex-W does with the Capital Sum.

4.1.7 Thus Condition A is not fulfilled by ex-W's UK Use (if that occurs – ex-W is free to do what she wants with the funds and may well never remit them to the UK) .

Is Condition B fulfilled?

4.1.8 Condition B can be fulfilled in one of two ways:

- a First, property (or consideration for a service) which is used by a relevant person in the UK (per Condition A) either is, or derives from, the income or gains and is property of or consideration given by a relevant person (Section 809 L(3)(a) and (b)) (the '**Direct Use Condition**'); or
- b Alternatively, Condition B is fulfilled if the income or gains, or anything deriving from the income or gains, are used outside the UK in respect of a 'relevant debt' (Section 809 L(3)(c) and (d)) (the '**Relevant Debt Condition**'). The reasons why there is no relevant debt here are set out later.

Is the Direct Use Condition fulfilled by the Payment?

4.1.9 The Payment is made outside the UK, therefore there is no property brought to, used or received in the UK. Hence the Direct Use Condition is not fulfilled by the Payment.

Is the Direct Use Condition fulfilled by ex-W's UK Use?

4.1.10 As ex-W is not a relevant person (see above), the Capital Sum is not property of a relevant person following the Payment. Hence ex-W's UK Use is not the use of property in the UK by a relevant person and does not fulfil the Direct Use Condition. Section 809L(3) is not satisfied unless the property or derived property is owned by a relevant person at the date of the remittance.

4.2 **Condition C - 809L (4)**

- 4.2.1 Section 809L(4) applies to 'qualifying property of a gift recipient' as defined by Section 809N.
- 4.2.2 There is a remittance if such property is 'dealt with' as set out in subsections (a)-(c).
- 4.2.3 A 'gift recipient' means a person other than a relevant person who receives a gift of foreign income or gains or property which is or derives from the income or gains of the donor from that individual (Section 809N(2)). An individual makes a gift if he disposes of property either for no consideration or for consideration less than the full consideration which would be given if it were an arm's length disposal (Section 809N(5)).
- 4.2.4 Qualifying Property is the property given to the gift recipient (see above), anything deriving from that property or anything else which is dealt with as described in 809L(4)(a)-(c) and which, broadly, is connected to or facilitated by the gift.

Is the Payment within section 809L (4)

- 4.2.5 The Payment is made in settlement of the Order. The Order is an arm's length bargain and the Payment is full consideration for this. Therefore, there is no gift and ex-W is not a gift recipient nor is there any 'Qualifying Property of a gift recipient'.
- 4.2.6 If the Payment is made before the decree absolute, ex-W is still a relevant person at the time of the Payment. As a gift recipient is 'a person other than a relevant person', and Section 809N(3) provides that 'the question of whether or not a person is a relevant person is to be determined by reference to the time when a gift is made', ex-W could not be a gift recipient in this case. Thus Section 809L(4), does not apply to the Payment.

Subsections 4(a) and 4(b)

- 4.2.7 Subsections 4(a) and 4(b) require enjoyment of qualifying property of a gift recipient or a service paid for by such qualifying property by a relevant person in the UK.
- 4.2.8 Ex-W, at the time of ex-W's UK use, will not be a relevant person in relation to H and hence in respect of the Capital Sum. H will not enjoy the Payment in the UK and nor will any other relevant person as it is made outside the UK. Therefore these subsections would not apply even if the Capital Sum included qualifying property of a gift recipient.

Subsection (4)(c)

- 4.2.9 Subsection 4(c) applies where qualifying property of a gift recipient is used outside the UK in respect of a relevant debt. There is no relevant debt here so this cannot apply - see below.

4.3 **Condition D - s809(L)(5)**

- 4.3.1 Section 809L(5) applies to property of a non-relevant person which is not qualifying property of a gift recipient and which is 'dealt with' as set out in that section. There must also be a connected operation (809L(5)) as defined by Section 809O.

- 4.3.2 A 'connected operation' is one which is effected with reference to a qualifying disposition or with a view to enabling or facilitating a qualifying disposition (809O(3)).
- 4.3.3 A qualifying disposition is a disposition which is made by a relevant person from his foreign income or gains to or for the benefit of the person who owns the property enjoyed by a relevant person in the UK (or used to pay for a service provided to a relevant person in the UK) (ie 'dealt with' under 809L(5)(a)(b) or (c)).

Is the Payment within section 809L (5)?

- 4.3.4 Sub-section 5(a) provides that the property is brought to, received or used in the UK and enjoyed by a relevant person. Sub-section 5(b) provides that the property is consideration for a service which is enjoyed in the UK by a relevant person. The Payment does not involve any enjoyment by H (or any other relevant person) of the Capital Sum in the UK nor is it payment for a service enjoyed in the UK by H (or any other relevant person). Hence sub-sections (5)(a) and (5)(b) are not fulfilled by the Payment.
- 4.3.5 Sub-section (5)(c) applies where the property has been used in respect of a relevant debt. The Order is not a relevant debt for the reasons set out below.

Is ex-W's UK Use within section 809L (5)?

- 4.3.6 Ex-W's UK Use does not include any enjoyment by H (or any other relevant person) of the Capital Sum in the UK nor is it payment for a service enjoyed in the UK by H. Hence sub-sections (5)(a) and (5)(b) are not fulfilled by ex-W's UK Use. There is no relevant debt so subsection 5(c) does not apply.

4.4 Relevant Debt

Is the requirement for H to pay the Capital Sum to W under the Order a relevant debt?

- 4.4.1 The Capital Sum is owed by H to W under the terms of the Order. As such it could be described as a 'debt' although the contrary is certainly arguable since until the Court order is finalised H owes nothing. The Payment would then be settlement of this debt outside the UK.
- 4.4.2 A 'relevant debt' means a debt which relates to one or more of the following:
- a property within sub-section (2)(a);
 - b a service within sub-section (2)(b);
 - c qualifying property dealt with as mentioned in sub-section (4)(a);
 - d a service falling within sub-section (4)(b);
 - e qualifying property dealt with as mentioned in sub-section (5)(a); and/or
 - f a service falling within sub-section (5)(b) (Section 809 L(7)).

Hence the Order is only a relevant debt (if it is a debt at all) if it 'relates' to one or more of items (a) - (f) as set out above. However, as noted earlier all the above require the property or service to which the debt relates to be enjoyed or used in the

UK by a relevant person in one form or another which does not occur here.

- 4.4.3 As the Order is not a relevant debt, the Payment cannot be a payment made in satisfaction of a relevant debt. Thus there cannot be a remittance under any of conditions B, C or D on the basis that foreign income or gains have been used directly or indirectly in respect of a relevant debt (subsections 3(c), 3(d), (4)(c) and (5)(c)).

5 Conclusion

As neither the Payment nor ex-W's UK Use fulfil any of Conditions A-D as set out in section 809L, in our view there is no remittance of the Capital Sum and therefore no tax charge on H. We should be grateful for confirmation of the HMRC view on this point and that it accords with our views stated above.

Yours sincerely

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The Chartered Institute of Taxation

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