Transfer of assets code and corporation tax

1. The purpose of this briefing is to highlight an area of uncertainty which exists amongst a number of CIOT members. The issue is whether the UK-resident shareholder of (or settlor of a settlor-interested trust containing) a non-UK resident company which is paying UK corporation tax on UK rental income should be subject to income tax on that same income by virtue of the Transfer of Assets Abroad (TOAA) legislation. Our members have highlighted that there is a lack of conclusive HMRC guidance as to whether s.3(1) CTA 2009 absolves individuals of any such liability or duty to notify this income on their UK tax returns, and if HMRC's position is that this is not the case, why the section does not have this effect.

The technical question

2. The UK rental income of non-UK resident companies has been subject to Corporation Tax rather than income tax since 6 April 2020[1]. Many such companies have UK resident shareholders or are owned by settlor interested trusts whose settlor is UK resident. In all such cases, once the rental income is payable to the non-resident company, the UK resident shareholder or settlor may be liable to income tax under the TOAA legislation on an amount equal to the company's income[2].

3. The TOAA rules do not apply where the person abroad is subject to UK income tax on its income (more specifically, that in such a case the liability of the transferor does not extend to basic rate income tax)[3].

4. However, s.745 does not refer to Corporation Tax. In R v Dimsey [2001] UKHL 46 the predecessor legislation to s.745 was discussed obiter. Lord Scott said (at para 55):

> *"If the point ever arose for decision I should be attracted by the view that s.743(1)[4] should be construed so as to cover income which had been included in the computation of profits on which a company had paid tax."*

5. HMRC consider that Corporation Tax payable by the non-UK company can be taken as a deduction in computing the UK individual transferor's resulting income tax liability. Helpsheet 262 so states, and the point is confirmed by INTM 601280. But their view is clearly that the individual transferor is subject to income tax nonetheless.

6. However, many advisers have questioned HMRC's conclusion that income which is subject to corporation tax can be charge to income tax as that of the individual transferor under the TOAA code. This is because of s.3(1) CTA 2009 which provides:

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[1] s.5(3A) CTA 2009

[2] s.720 ITA 2007 (or under s.727 where capital sums, rather than income, are received)

[3] s.745 ITA 2007

[4] *"No amount of income may be taken into account more than once in charging income tax under this Chapter"*

"The provisions of the Income Tax Acts relating to the charge to income tax do not apply to income of a company if…. (b) the company is not UK resident and is chargeable to corporation tax in respect of the income"

7. It is understood by some CIOT members that HMRC consider s.3(1) does not have this effect on the grounds that it deals with the tax position of the company and not that of other persons. Analogy is drawn with cases on the interaction of treaty relief with liability under s.720 ITA 2007 (see for example Davies v HMRC [2020] UK UT 67). However, we do not have any focussed guidance or ruling from HMRC as to the interaction between s.3(1) specifically and the TOAA rules.

8. There is a view that the treaty relief analogy is flawed. The rationale of the treaty cases is that treaty provisions which give exclusive taxing rights to the country of residence do not prevent the other treaty partner from taxing the income or deemed income of its own residents. This rationale is difficult to apply to s.3(1), as that sub section disapplies income tax legislation as a whole. At the very least there is ambiguity and on that scenario, the lack of reference to corporation tax in s.745 is a strong purposive indication that s.3(1) does disapply the transferor charge.

9. James Kessler KC in his book "The Taxation of Non-Residents and Foreign Domiciliaries" (23rd edition 2023-24) concludes that the better technical argument is that s.3(1) does prevent a charge on the transferor. Mr Kessler states there is much to be said on both sides and points out that the predecessor legislation to s.3(1) was not put to the Court in Dimsey.

10. Our concern at the CIOT is that this view (of the individual transferor's not being subject to UK income tax on the company's profits by virtue of s.3(1)) has not been definitively addressed by HMRC and therefore taxpayers and agents are left with two potential interpretations:

    a. That the rental income is chargeable on the individual transferor with relief for corporation tax paid (if HMRC's guidance is followed) or,
    b. The income is chargeable exclusively to corporation tax, with the individual transferor not needing to report it on their personal UK tax return (by virtue of s.3(1))

Where a taxpayer wishes to take a different view of the law to HMRC on their self-assessment return, you should have regard to the guidance at PCRT[5] - This will typically require detailed "white-space" disclosure to be included in the return.

We are aware that this gives rise to uncertainty as to the interaction of this sub-section with the transfer of assets legislation. We have approached HMRC for their views on this specific

[5] A Tax Filings helpsheet 1 March 2019.pdf (kc-usercontent.com) – particularly paragraphs 23ff and to HMRC's Statement of Practice 1/06 – Statement of Practice 1 (2006) – GOV.UK (www.gov.uk).

technical questions, and will continue to work with them to encourage clear, decisive guidance is produced to address this uncertainty as soon as possible.