

CHAPTER 19

OVERSEAS TRUSTS - INCOME TAX ISSUES

19.1 Background

Up until 1991, overseas trusts were hugely popular with wealthy UK individuals as such vehicles gave them (and their families) the opportunity to be able to benefit from trusts created offshore with significant CGT advantages.

These advantages were removed in the 1998 Finance Act and pre-1991 "golden trusts" were thereafter brought within the regime for settlor interested trusts. Therefore nowadays, **where a settlor wants to create a trust for the benefit of themselves and/or their immediate family, there is no tax advantage in establishing the trust offshore.** Indeed there could be tax disadvantages as some of the rules for non-resident trusts are stricter than they are for those resident in the UK, plus the cost of establishing and thereafter running offshore trusts can be very expensive.

There do remain some advantages in creating an offshore trust where either the settlor is non-UK domiciled or the beneficiaries of the trust do not include the settlor or his immediate family.

If an offshore trust is to be considered, **it should be established in a low tax jurisdiction** such as the Channel Islands (Jersey or Guernsey), the Isle of Man, Gibraltar, Liechtenstein or a Caribbean island state such as the Bahamas, Cayman Islands or British Virgin Islands (BVI), all of whom will have professional trust companies willing to host the trust (for an appropriate fee).

When choosing a jurisdiction, consideration should be given to the level of trustees' fees as well as factors such as time zones for personal contact and travel costs for meetings etc. For this reason, UK based taxpayers tend to use the Channel Islands or the Isle of Man, both of which recognise the common law concept of trusts in the same way as English law.

19.2 Residence of trustees

The residence of the trustees of a trust is important for income tax and CGT.

If the trustees are UK resident, they will be taxable on their worldwide income and gains.

If the trustees are treated as non-UK resident they will only be taxed on UK income. Non-resident trustees are not (generally) charged to CGT. However there are special rules which can attribute gains of non-resident trustees to the settlor or the beneficiaries (to be discussed in the next chapter).

The trustees of a trust are treated as a single person for tax purposes. That person's residence status depends on the residence status of each trustee.

[ITA 2007, s.474](#)

A trust will be treated as **resident in the UK** for income tax and CGT purposes if either:

[TCGA 1992, s.69](#)
[ITA 2007, s.475](#)

1. **all the trustees are UK-resident, or**
2. **at least one trustee is resident in the UK, and the settlor was either domiciled, or resident or ordinarily resident in the UK at the time when he made the settlement.**

Therefore a UK settlor can create an overseas trust simply by appointing Trustees who are not resident in the UK.

The administration of overseas trusts is dealt with by HMRC Residency in Liverpool.

19.3 Change in residence status

A change in the residence status of a body of trustees is usually caused by a change in the trustees who make up the body. It can also happen where the trustees remain the same but one of them changes their residence status.

For income tax purposes, if the residence status of a body of trustees changes during the tax year, "split year" treatment is available. Therefore the trustees will only be **liable for income tax on all their worldwide income for the period in which they were actually resident in the UK**. The trustees will **not be liable for income tax on non-UK income for the period after they became non-resident**.

For capital gains tax purposes, if trustees are **resident for any part of a tax year, gains arising at any time in that tax year are chargeable to UK CGT**. Therefore "split year" treatment is not available for CGT.

Where the trustees become not resident during the year, there may be an "exit charge" for CGT.

19.4 Income tax on non-resident trusts

Foreign income of overseas trusts is not chargeable to UK income tax. Non-resident trusts will therefore **only pay tax on their UK source income**. Many overseas trusts invest their funds entirely abroad and will therefore not pay UK income tax.

Where the trustees have the power to accumulate income or make discretionary payments, UK source income is taxed at the usual "discretionary" rates (50% & 42½%), after deducting trust management expenses. There is a £1,000 "basic rate band" as for UK trusts.

[ITA 2007, s.479](#)

Trust management expenses must be apportioned between UK and foreign income. Only expenses relating to **UK income** are deductible for income tax.

Where a beneficiary has a right to the income of the trust, the UK income is charged at the basic rate / dividend rate only.

If none of the beneficiaries are ordinarily resident in the UK, the overseas trustees do not pay tax on interest on FOTRA securities (Free of Tax to Residents Abroad). These will include UK government stocks.

If the **settlor retains an interest in an overseas settlement, the trust income arising is taxable as part of the settlor's own personal income** in the same way as it is for a UK trust.

[ITTOIA 2005,
S.624](#)

In general, a settlor will be regarded as having retained an interest in a settlement if the income from the trust property can be paid to the settlor or the settlor's spouse or civil partner.

There are special anti-avoidance provisions which apply where settlors transfer assets to non-resident persons (including trusts) which we shall cover later.

19.5 Beneficiaries of non-resident trusts

i) Discretionary trusts

Non-resident trustees may make a discretionary payment out of trust income to a beneficiary who is resident in the UK. **This is treated as untaxed income of the beneficiary** (there is no automatic 50% tax credit as there is for UK trusts). It does not matter that the trustees may have suffered tax on the trust income.

The payment is not treated as made up from the separate sources of income arising to the trustees. Instead it is treated as non-savings income and taxed at the non-savings rates - 20%, 40% and 50%.

If the beneficiary is resident in the UK but is non-UK domiciled, the trust distribution is treated as "foreign income".

Therefore if the beneficiary makes a claim under S.809B ITA 2007, the **trust income is only taxable if it is remitted** to the UK.

ESC B18 allows the beneficiary to claim credit for some of the tax suffered by the trustees. The concession only applies if:

ESC B18

- The trustees make annual trust SA returns, detailing all sources of trust income and any payments made to beneficiaries; &
- The trustees have paid all tax due, together with any interest, surcharges and penalties arising; &
- The trustees keep available any relevant tax certificates for inspection by HMRC.

After claiming relief under ESC B18, the beneficiary's tax office will recalculate the Self Assessment liability. **HMRC Residency will not let a beneficiary have a copy of the calculation of the relief due under ESC B18.** This is because the calculation may contain details of total trust income and tax, and any distributions to other beneficiaries, and the trustees may not wish the beneficiary to have this information.

When calculating the credits available, the distribution to the beneficiary is treated as having been made rateably from all sources of income arising to the Trustees in the year.

ii) Interest in possession trusts

Unless the remittance basis applies, the **beneficiaries are chargeable on their share of the trust income as it arises**, less a rateable proportion of the trust expenses. This should be certified to them by the Trustees on form R185.

If the trust income has suffered tax, these tax credits will be reflected on the R185.

If the beneficiary is non-UK domiciled and makes a claim under S.809B ITA 2007 to be a remittance basis user, the trust income is taxed when remitted to the UK. In this instance, the income is treated as non-savings income and taxed at 20%, 40% or 50%.

19.6 Transfer of assets abroad

Introduction

HMRC have no power to charge UK tax on foreign income received by a non-resident person (for example, a non-resident trust). As such there is potential for tax to be avoided by a UK individual transferring assets to an overseas trust for the benefit of him and/or his family. In such cases, the income would therefore arise to the non-resident trustees and no tax could be charged.

Therefore there are anti-avoidance mechanisms in UK tax law for a **tax charge to be levied on settlors and/or beneficiaries instead**. Such mechanisms are called the "transfers of assets abroad" provisions and are found within S.714 - S.751 ITA 2007.

We shall look at 2 anti-avoidance charges;

- 1) the charge on transferors (ie, settlors) under S.720; and
- 2) the charge on non-transferors (ie, beneficiaries) under S.731.

19.7 The S.720 charge

Under S.720, **income tax is charged on income treated as arising to the transferor** (ie, the settlor).

[ITA 2007,
S.720\(1\)](#)

The S.720 charge is intended to prevent the avoidance of tax by persons ordinarily resident in the UK by means of "relevant transfers". A charge under S.720 arises if the transferor is **ordinarily resident in the UK when the income arises**. However there is no requirement for the transferor to have been ordinarily resident in the UK at the time of the transfer.

A "relevant transfer" is a **transfer of assets as a result of which income becomes payable to a person abroad**. "Person abroad" means a person who is resident or domiciled outside the UK. "Person" includes trustees (although in practice the anti-avoidance rules are often applied to transfers to non-resident companies). A gift of assets by a UK individual to a non-resident trust would therefore be a "relevant transfer", potentially subject to S.720.

[ITA 2007,
S.716\(1\)](#)

[ITA 2007,
S.718\(2\)](#)

A relevant transfer **can include assets situated outside the UK** (despite the description, a "transfer of assets abroad" does not confine itself to transfers of UK assets).

A tax charge under S.720 only arises if Conditions A and B within S.721 are met.

Condition A is that a transferor (or his spouse / civil partner) must have "the power to enjoy the income of a person abroad as a result of the relevant transfer".

[ITA 2007,
S.721\(2\)](#)

"Power to enjoy" means either;

- an ability to **benefit from the income**; or
- an ability to **otherwise control the application of the trust property** (for instance, where the non-resident Trustees act in accordance with the settlor's wishes without giving independent consideration to the decisions they take - ie, "puppet" Trustees).

Therefore, in simple terms, an individual ordinarily resident in the UK who transfers assets to an overseas trust from which he or his spouse can benefit, will be caught by S.720.

The broad effect of S.720 is to **charge the UK settlor to UK tax on the income of the overseas trust**. The charge is on an arising basis (irrespective of whether the transferor actually receives any benefit). There is no relief for any trust expenses charged against the trust income.

The trust income retains its character in the hands of the settlor. For example, trust dividend income is treated as dividend income received by the settlor and will be charged at the dividend rates in the UK.

If a benefit is subsequently received by the settlor (for example, if the settlor receives an income distribution), it is not taxed again.

S.720 therefore **operates in a similar way to S.624 ITTOIA 2005** (which imposes a charge on the settlor on trust income where the settlor or spouse is a beneficiary of the trust).

S.624 ITTOIA 2005 has no territorial restriction and can apply to both UK and non-UK trusts. Therefore (in theory), where a UK settlor transfers assets to a non-resident trust from which he can benefit, a charge to tax can arise under both sections.

There is no order of priority laid down by statute, although practitioners and HMRC seem to agree that **S.624 takes priority**.

Condition B in S.721 is that "income would be chargeable to income tax if it were the individual's and received by the individual in the UK". In practice this will always be satisfied. The transferor must be ordinarily resident in the UK when the income arises and he would therefore be chargeable to tax on the income received by him. There are special rules where the settlor is non-UK domiciled (see below).

[ITA 2007,
S.721\(3\)](#)

Individuals liable under S.720 are required to report the income via their self-assessment returns in the usual way.

19.8 S.720 charges - Non-domiciled transferors

S.720 can apply to non-domiciled transferors providing that they are ordinarily resident in the UK when the income arises. This will broadly be the case if such persons have been (or intend to be) resident in the UK for 3 years or more.

Where a non-domiciled transferor is caught by S.720, the trust income is "relevant foreign income". Where a non-domiciled individual has relevant foreign income, that income is **only taxed in the hands of the transferor in the UK if the trust income is actually remitted to the UK**. This rule only applies if the individual makes a claim under S.809B to use the remittance basis (or is allowed to use the remittance basis automatically).

[ITA 2007,
S.726](#)

Income charged on a remittance basis is taxed at 20%, 40% or 50% (the dividend rates do not apply).

If the transferor is not a remittance basis user, the trust income is taxed on an arising basis. In this case, the dividend rates will apply to trust dividend income.

19.9 The S.731 charge

S.731 imposes a charge on a transfer of assets abroad where a **non-transferor receives a benefit**. In this case, the **liability to UK tax arises to the beneficiary** (as opposed to the settlor). A S.731 charge will therefore typically arise where a UK settlor creates a non-resident trust and the settlor is excluded from benefit (or has died).

[ITA 2007,
S.731](#)

A charge will arise if the following conditions are met;

[ITA 2007,
S.732\(1\)](#)

- 1) a relevant transfer occurs;
- 2) an ordinarily resident individual receives a benefit;
- 3) the benefit is provided out of assets available to the trustees as a result of the transfer; and
- 4) there is no liability to tax under S.720.

"Benefit" is not defined but **will include both income and capital distributions** as well as deemed benefits such as the use of trust assets (eg, occupation of trust property) or low interest loans.

The tax charge **arises in the year in which the beneficiary receives the benefit** (not the year in which the income arises). There is therefore a cashflow benefit for structures caught by S.731 (rather than S.720) as no charge will arise unless and until a benefit is paid to the beneficiary.

19.10 The "matching" rules

The benefit is "matched" with "relevant income" and S.731 imposes a charge on the **lower** of;

[ITA 2007,
S.733](#)

- a) the benefit received; and
- b) the "relevant income".

"Relevant income" of a tax year is any income arising in that year to the overseas trustees. Relevant income is "pooled" and forms the "relevant income pool".

Every year the balance in **relevant income pool is compared to the benefits received**.

If the relevant income pool exceeds benefits received, the benefits are charged to tax in the hands of the beneficiary. The balance in the relevant income pool is then carried forward and may be taxed in a later year if subsequent benefits are received.

If benefits received exceed the relevant income pool in the tax year, the whole of the relevant income pool is taxed. This reduces the pool to zero. The excess benefit is then carried forward and matched with relevant income of future years.

There is no "transparency" for income taxed under S.731. Where a S.731 charge arises, the **income is treated as non-savings income** in the hands of the beneficiary, and is taxed at 20%, 40% or 50%. The underlying source of the income is irrelevant.

If some of the trust income has already suffered UK tax, the beneficiary can claim credit for tax suffered under the ESC B18 procedure as outlined above.

Illustration 1

Mr Lucas is resident, ordinarily resident and domiciled in the UK.

On 5 April 2008 he transferred a cash sum of £306,000 to a discretionary trust for the benefit of his four grandchildren (all UK resident). The gift was intended to utilise the IHT nil band and annual exemptions.

The trustees of the trust are resident in the Bahamas. Mr Lucas and his wife are excluded from benefit and have no influence over the decisions of the Trustees. The Trustees are holding the funds on interest bearing bank deposit in the Cayman Islands.

Interest received (gross) has thus far been as follows:

Year	Interest £
2008/09	12,800
2009/10	13,500
2010/11	11,200
2011/12	9,800

On 5 April 2011, the Trustees distributed £10,000 to each of the 4 grandchildren.

S.731 ITA 2007 will apply. There was a transfer of assets to a person not resident in the UK as a result of which income becomes payable to a person abroad. S.720 will not apply as the settlor and spouse are excluded from benefit.

There is no charge on the income as it arises. Instead, **trust income is "matched" with benefits received.**

In this case, benefits received in 2010/11 are £10,000 × 4 = £40,000. These are matched with the relevant income pool as follows;

<u>Year</u>	£
2008/09	12,800
2009/10	13,500
2010/11	<u>11,200</u>
Pool at 5.4.2011	37,500
Matched with benefits received 2010/11	<u>(37,500)</u>
Pool c/fwd	<u>NIL</u>

Each of the 4 grandchildren will therefore be treated as entitled to income of £9,375 in 2010/11 and will report this on their SA returns.

Benefits exceed relevant income, therefore the excess benefit is carried forward and matched with relevant income of future years as follows;

	£
Relevant income pool	37,500
Benefits received 2010/11	<u>(40,000)</u>
Excess benefit c/fwd	<u>2,500</u>
Relevant income 2011/12	9,800
"Matched" benefit 2011/12	<u>(2,500)</u>
Relevant income pool c/f	<u>7,300</u>

The beneficiaries will therefore be taxed on the "matched" income in 2011/12. Therefore each of the 4 grandchildren will be treated as entitled to income of £625 in 2011/12.

At 6 April 2012, there is a balance in the relevant income pool of £7,300 which will be taxed as and when a beneficiary receives another benefit.

19.11 Distributions to non-UK residents

Distributions are only caught by S.731 if the beneficiary is ordinarily resident (OR) in the UK in the tax year of the "match". Therefore **distributions can be made free of UK tax out of offshore trusts to individuals who are not ordinarily resident (NOR) in the UK.**

Where a non-resident trust makes a distribution to a NOR individual out of current year income, the distribution is "matched" with relevant income and **reduces the pool to carry forward**. However the "matched" income is not taxed as S.731 does not impose a charge where the beneficiary is NOR.

However **this principle does not apply to capital distributions**. Therefore where a non-resident trust makes a capital distribution to a NOR individual, the distribution is not matched with relevant income and **does not reduce the pool to carry forward**. Again there is no UK tax charge as the beneficiary is NOR.

Once current year income has not been paid out, it is accumulated within the trust and becomes part of trust capital. A later distribution of this accumulated income is therefore a payment of capital and will not reduce the relevant income pool if paid to a NOR beneficiary.

Non-resident trustees therefore need to check the residence status of their beneficiaries to determine whether to reduce the relevant income pool.

19.12 S.731 charges - Non-domiciled beneficiaries

For non-domiciled beneficiaries caught by S.731, the income treated as arising (ie, the "matched" income) is **treated as relevant foreign income for UK tax purposes**. Therefore if the person receiving the benefit makes a claim under S.809B to use the remittance basis (or is allowed to use the remittance basis automatically), the **S.731 income is only taxed if the benefit is actually received in the UK**.

If the beneficiary is not a remittance basis user, the S.731 income is taxed in the year in which it is matched.

19.13 Exemptions for bona fide commercial transactions

Under S.737, an individual is not liable to tax under the "transfer of assets abroad" provisions if he can satisfy HMRC that either Condition A or Condition B is satisfied.

Condition A is that "it would not be reasonable to draw the conclusion from all the circumstances of the case that the **purpose of avoiding liability to taxation** was the purpose or one of the purposes for which the relevant transactions were effected".

[ITA 2007,
S.737\(3\)](#)

The **onus here is on the taxpayer to prove that tax avoidance was not one of the purposes** he had in mind when entering into the transfer of assets abroad. "Tax" in this context means any direct taxation (not simply income tax).

In practice, this "motive test" can be difficult for a taxpayer to refute.

Condition B states that:

[ITA 2007,
S.737\(4\)](#)

- a) "all the relevant transactions were **genuine commercial transactions**; and
- b) it would not be reasonable to draw the conclusion that one or more of the transactions was more than incidentally designed for the purpose of avoiding liability to taxation".

In essence this means that the **"transfer of assets abroad" provisions do not usually apply to an arms length sale to a non-resident person** (providing that the purchase price does not manifestly differ from the value of the asset sold).

There is **no provision for a taxpayer to apply to HMRC for clearance** as to whether the anti-avoidance rules apply.

Example 1

The Mason Family trust was established by Joyce Mason in March 2008 for the benefit of her 3 adult grandchildren, Alex, Simon and Victoria. Joyce had always been UK resident and domiciled and the Trustees are all resident in Jersey. All the beneficiaries live in the UK. Joyce died in 2009.

The trust had the following income in recent years:

	£
2008/09	32,000
2009/10	25,000
2010/11	36,000
2011/12	40,000

Each year on 6 April, the Trustees make an income distribution of £10,000 to each of the 3 beneficiaries.

On 1 June 2010, the Trustees loaned Alex £120,000 (interest free) as a deposit on a house. The loan was repaid in full on 1 March 2012.

Show the amounts chargeable to income tax on Alex for 2008/09 to 2011/12 inclusive.

Assume that the HMRC official interest rate is 4.75%.

Answer 1

S.731 ITA 2007 will apply. There was a transfer of assets to a person not resident in the UK as a result of which income becomes payable to a person abroad. S.720 will not apply as the settlor is excluded from benefit (and has also now died).

There is no charge on the income as it arises. Instead, trust income is "matched" with benefits received.

The interest free loan is a benefit, the value of which is calculated as follows:

		£
2010/11	$£120,000 \times 4.75\% \times 10/12$	4,750
2011/12	$£120,000 \times 4.75\% \times 11/12$	5,225

Taking each year in turn;

2008/09

	£
Relevant income	32,000
Benefits received	<u>(30,000)</u>
Relevant income pool c/fwd	<u>2,000</u>

Each beneficiary has a matched benefit of £10,000.

Alex will be taxed on £10,000 in 2008/09.

2009/10

	£
Relevant income pool b/fwd	2,000
Relevant income 2009/10	<u>25,000</u>
	27,000
Benefits received	<u>(30,000)</u>
Excess benefits (£1,000 each)	<u>3,000</u>

Each beneficiary has a matched benefit of $£27,000 / 3 = £9,000$.

Alex will be taxed on £9,000 in 2009/10.

2010/11

	£
Relevant income pool b/fwd	NIL
Relevant income 2010/11	36,000
Benefits received $£(30,000 + 4,750)$	<u>(34,750)</u>
Excess benefits b/f	<u>(3,000)</u>
Excess benefits c/f	<u>1,750</u>

"Matched" benefits are £36,000. These are apportioned as follows:

	Alex £	Simon £	Victoria £	Total £
Unmatched benefits b/fwd	1,000	1,000	1,000	3,000
Benefits 2010/11	<u>14,750</u>	<u>10,000</u>	<u>10,000</u>	<u>34,750</u>
	15,750	11,000	11,000	37,750
Matched with income (£36,000)	<u>(15,020)</u>	<u>(10,490)</u>	<u>(10,490)</u>	<u>(36,000)</u>
Unmatched benefits c/fwd	<u>730</u>	<u>510</u>	<u>510</u>	<u>1,750</u>

Alex will be taxed on £15,020 in 2010/11.

2011/12

	£
Relevant income pool b/fwd	NIL
Relevant income 2011/12	40,000
Benefits received £(30,000 + 5,225)	(35,225)
Excess benefits b/fwd	<u>(1,750)</u>
Relevant income pool c/fwd	<u>3,025</u>

"Matched" benefits are £36,975. These are apportioned as follows:

	Alex £	Simon £	Victoria £	Total £
Unmatched benefits b/f	730	510	510	1,750
Benefits 2011/12	<u>15,225</u>	<u>10,000</u>	<u>10,000</u>	<u>35,225</u>
Matched with income	<u>15,955</u>	<u>10,510</u>	<u>10,510</u>	<u>36,975</u>

Alex will be taxed on £15,955 in 2011/12.

SUMMARY

Alex's taxable income under S.731 is:

	£
2008/09	10,000
2009/10	9,000
2010/11	15,020
2011/12	15,955