[2018] UKFTT 0559 (TC)

TC06733

Appeal number: TC/2012/10369 & TC/2012/10370 & TC/2012/10371

INCOME TAX – transfer of assets abroad – s 739 ICTA 1988, s 720 ITA 2007 – UK/Mauritius double tax agreement

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) ANDREW DAVIES **Appellants**
(2) PAUL MCATEER
(3) BRIAN EVANS-JONES

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE Rachel Mainwaring-Taylor
Mrs Akhtar

Sitting in public at Taylor House, London on 20 November 2017

Patrick Way QC and Philip Goeth of Counsel for the Appellant

Elizabeth Wilson of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. HMRC issued assessments to income tax to each of the Appellants as set out further below on the basis that they were liable to income tax on the income of ABP Properties Limited ('**ABP**'), a company registered in Mauritius, under section 739 Income and Corporation Taxes Act 1988 (ICTA 1988) for years to 2005/06 and section 720 Income Tax Act 2007 (ITA 2007) for years from 2007/08.

2. Mr Davies appeals under section 31 Taxes Management Act 1970 (TMA 1970) against assessments to income tax totalling £229,012. The assessments are dated:

(1) 26 January 2010 for years 2003/04 and 2004/05 (appealed 18 February 2010)

(2) 18 March 2010 for 2005/06 (appealed 11 May 2010)

(3) 23 March 2012 for 2007/08 (appealed 10 May 2012)

(4) 14 March 2012 for 2008/09 (appealed 10 May 2012)

(5) 23 March 2012 for 2009/10 (appealed 10 May 2012)

3. Mr McAteer appeals under section 31 Taxes Management Act 1970 (TMA 1970) against assessments to income tax totalling £145,658. The assessments are dated:

(1) 26 January 2010 for years 2003/04 to 2004/05 (appealed 18 February 2010)

(2) 18 March 2010 for 2005/06 (appealed 11 May 2010)

4. Mr Evans-Jones appeals under section 31 Taxes Management Act 1970 (TMA 1970) against assessments to income tax totalling £241,283. The assessments are dated:

(1) 26 January 2010 for years 2003/04 to 2004/05 (appealed 18 February 2010)

(2) 18 March 2010 for 2005/06 (appealed 11 May 2010)

(3) 23 March 2012 for 10 May 2012)

(4) 14 March 2012 for 2008/09 (appealed 10 May 2012)

(5) 23 March 2012 for 2009/10 (appealed 10 May 2012)

5. The Appellants argue that they are subject to UK tax in relation to life policies they hold, the proceeds of which are linked to ABP, that the arrangements were not established for the purpose of tax avoidance and so the provisions under which HMRC seek to assess them should not apply, and further, if these arguments fail, that

tax has been paid in Mauritius and the double tax convention between the UK and Mauritius should provide relief so that the Appellants are not subject to UK income tax under the assessments.

6. The Appellants seek a decision in principle, not a determination of each assessment.

Relevant law

7. **Income and Corporation Taxes Act 1988 (ICTA 1988)**

8. Section 739 is intended to prevent "the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom".

9. Section 739(2) provides that "where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it where income of that individual received by him in the United Kingdom, would be chargeable to income tax by a deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Taxes Acts".

10. Section 741 provides that section 739 "shall not apply if the individual shows in writing or otherwise to the satisfaction of the Board either –

> (a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or
>
> (b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation."

11. Section 742(1) defines 'an associated operation' as meaning "in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets".

12. Section 743(2) provides that "in computing the liability to income tax of an individual chargeable by virtue of s739, the same deductions and reliefs shall be allowed as would have been allowed if the income deemed to be his by virtue of that section had actually been received by him".

13. **Income Tax Act 2007 (ITA 2007)**

14. Section 720 imposes a charge "for the purpose of preventing the avoiding of liability to income tax by individuals who are ordinarily UK resident by means of relevant transfers". It operates by charging income tax on income treated as arising to such an individual under section 721.

15. Section 720(3) provides that "tax is charged under this section on the amount of income treated as arising in the tax year".

16. Section 721 provides that "income is treated as arising to such an individual as is mentioned in s720(1) in a tax year for income purposes if conditions A and B are met".

17. Under section 720(2) "Condition A is that the individual has power in the tax year to enjoy income of a person abroad as a result of –

(a) A relevant transfer;

(b) One or more associated operations; or

(c) A relevant transfer and one or more associated operations".

18. Under section 720(3) "Condition B is that the income would be chargeable to income tax if it were the individual's and received by the individual in the United Kingdom".

19. Under section 720(4) "For the purposes of sub-section 2 it does not matter whether the income may be enjoyed immediately or only later".

20. Under section 720(5) "It does not matter for the purposes of this section –

(a) Whether the income would be chargeable to income tax apart from s720;

(b) Whether the individual is ordinarily UK resident at the time when the relevant transfer is made; or

(c) Whether the avoiding of liability to income tax is a purpose for which the transfer is effected".

21. Section 739 provides that an individual is not liable for income tax under the foregoing provisions if either:

(1) "the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the relevant transactions or any of them were effected" (section 739(3)); or

(2) "the transfer and any associated operations were genuine commercial transactions and were not designed for the purpose of avoiding liability to taxation" (section 739(4)).

22. **Income Tax (Trading and Other Income) Act 2005 (ITTOIA 2005)**

23. Sections 461-463 ITTOIA 2005 deal with income tax charged on gains treated as arising from policies and contracts to which the chapter applies. Broadly, a gain from a policy or contract arises when a chargeable event occurs in relation to the policy or contract and such gain is subject to income tax (as opposed to capital gains tax).

Evidence

24. We heard evidence from all of the Appellants and from Mr Francis Howard, a tax advisor.

25. We also examined the documents provided in the bundles to which we were directed by Counsel.

26. HMRC drew evidence from internal documents prepared by employees of the Yorkshire Bank relating to the financing provided by that institution. The Appellants objected to this being admitted as evidence on the grounds that it amounted to hearsay, no-one from the Yorkshire Bank being present. We concluded that these documents could not amount to evidence of anything other than the bank employees' understanding of the arrangements and that this was not relevant to the present case.

27. Unfortunately, no-one had been able to produce copies of the insurance policy contracts or any other relevant documents relating to the setting up of the arrangements or any professional advice given at that time.

Agreed facts

28. Mr McAteer and Mr Evans-Jones were involved in giving professional advice in relation to SA Properties Limited ('**SAP**'), a company incorporated in the Isle of Man, and the Davies Grandchildren's Settlement, the trustees of which held the entire share capital of SAP. Mr McAteer is a chartered surveyor and advised on property transactions. Mr Evans-Jones is an accountant.

29. The Davies Grandchildren's Settlement was created by Mr Davies' parents. Mr Davies was neither a settlor nor a beneficiary of the settlement.

30. In 2002 Mr McAteer identified a property investment opportunity for SAP and on 2 November 2002 SAP entered into an agreement with Wolverhampton and Dudley Breweries under which SAP would buy the bulk of a property in Yarm identified by Mr McAteer for £1.25m, with the remainder being purchased by a company owned by Mr Jonathan Marsh, a property developer. SAP paid a non-refundable deposit of £125,000.

31. Sometime after, Mr Evan Jones raised concerns about the purchase and further advice was taken.

32. In the event, arrangements were entered into whereby:

(1) ABP was incorporated and ultimately completed the purchase in place of SAP;

(2) The Appellants each took out a life policy with Credit Suisse Life & Pensions (Bermuda) Limited ('**CSLP**'), paying premiums of £3,000 each;

(3) ABP was wholly owned by CSLP;

(4) The Appellants' entitlements under the life policies were linked to ABP.

33. ABP went on to undertake further transactions with professional input from Mr McAteer and Mr Evans-Jones.

Submissions

34. HMRC submitted that the Appellants made transfers of assets by:

(1) The payment of premiums to CSLP;

(2) The making or procurement of finance for ABP; and/or

(3) The exploitation of their own personal goodwill and services,

and as a consequence of these transfers and other arrangements being put in place, trading income arose to ABP.

35. HMRC submitted that the Appellants had power to enjoy the trading income of ABP within the meaning of section 739(2) ICTA 1988 and s721(2) ITA 2007 pursuant to their arrangements with CSLP.

36. HMRC submitted that the Appellants were all ordinarily resident in the UK for the years of assessment and the Appellants did not challenge this.

37. HMRC concluded that the Appellants should be liable for income tax on the income arising to ABP.

The motive defence

38. The Appellants agreed that in principle the arrangements could fall within the provisions of section 739 ICTA 1988 and section 720 ITA 2007, but submitted that the motive defence under section 741 ICTA 1988 and section 739 ITA 2007 applied so that the income of ABP should not be attributed to them.

39. The Appellants submitted that they did not enter into the arrangements for the purpose of avoiding tax. Further, they did not avoid tax; the life policy arrangements are subject to UK tax and ABP has paid tax in Mauritius. Their purpose was to find an alternative vehicle for the purchase to release SAP from its commitments without forfeiting the deposit and also to make pension plans for themselves.

40. HMRC submitted that section 741 ICTA 1988 and section 739 ITA 2007 did not apply because tax avoidance was a purpose of the arrangements. The Appellants sought an offshore company in order to avoid UK tax being paid on the income generated by the property development. They chose to use a Mauritian company

specifically because of the UK/Mauritius double taxation agreement ('**the Treaty**'), under which ABP's income was solely taxable in Mauritius, where the effective rate of tax was ultimately around 3%. The motive defence under section 741 ICTA 1988 and section 739 ITA 2007 did not apply where tax avoidance was one of the purposes of the arrangements (it need not be the sole purpose).

41. The Appellants further submitted that the arrangements were entered into for bona fide commercial purposes, namely the carrying on of the property development trade and the provision of pension arrangements, and therefore if the first limb of the motive defence did not apply, the second did.

42. HMRC noted that the Appellants had not raised this argument prior to the hearing, but responded that the purpose of putting in place the arrangements involving the Mauritian company was not purely in order to carry out the property development in Yarm. That trade could have been carried out in any number of ways, including using a UK registered company held directly by the Appellants. The purpose of using ABP and CSLP was to avoid the profits of the trade being taxed as income in the UK.

43. The Appellants cited the case of *CIR v Willoughby & Another* (70 TC 57) ('***Willoughby**'*) as authority that the motive defence should apply. The Appellants acknowledged that a deferral of tax could constitute the avoidance of income tax for the purposes of section 739 ICTA 1988. However, in this case as in *Willoughby* they maintained there was no avoidance (nor was any intended): income tax was paid on the profits from the property development in Mauritius and income tax would be paid by the Appellants on the occurrence of a chargeable event in relation to the proceeds of their policies with CSLP. Further, this principle of deferral must be considered in the context of pension provisions, otherwise all pension planning would constitute tax avoidance.

Treaty protection

44. The Appellants argued further that, should the motive defence not apply, they were effectively protected by the Treaty.

45. Article 7 of the Treaty provides that "the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein". ABP was an enterprise of Mauritius with no permanent establishment in the UK and therefore its profits were taxable only in Mauritius.

46. The Appellants argued that if ABP's income was attributed to them under s.739 ICTA 1988 and/or s.720 ITA 2007, it was attributed along with the relief afforded by Article 7 and therefore still only taxable in Mauritius.

47. The Appellants maintained that Article 22 of the Treaty further supported this argument. It states that income not otherwise specifically mentioned, which arises to a resident of one Contracting State and is taxable on that person in that state, shall be taxable only in that state, unless the person is carrying on a business through a permanent establishment in the other Contracting State (which ABP was not).

48. The Appellants argued that the Treaty was clear in providing that the income in question could be taxed only in Mauritius. The transfer of assets abroad code could not operate so as to subject that income to UK taxation 'through the back door'. Even if it were attributed to the Appellants, the income remained taxable only in Mauritius.

49. In support of this argument, the Appellants cited *Bricom Holdings Limited v Inland Revenue Commissioner* Court of Appeal [70 TC 272] ('***Bricom***'). In his judgment, Millett LJ reviewed a number of other cases including *Strathalmond v Inland Revenue Commissioners* [1972] 1 WLR 1511, 48 TC 537 ('***Strathalmond***') before concluding that "exempt income does not change its character or lose its exemption merely because it is deemed to be the income of another person or is imputed to him". So, in this case, where the Treaty has determined that the income may be taxed only in Mauritius, the transfer of assets legislation cannot override this premise by attributing the same income to UK ordinarily resident individuals and then seeking to tax it.

50. The Appellants maintained that no claim for relief under the Treaty was necessary since the relevant provisions (Articles 7 and 22) did not operate to provide relief, but to determine which jurisdiction had exclusive taxing rights over the income, citing section 6, Taxation (International and Other Provisions) Act 2010 ('**TIOPA 2010**'). Subsection (2) of that provisions states that:

> "Double taxation arrangements have effect in relation to income tax and corporation tax so far as the arrangements provide-
>
> (a) for relief from income tax or corporation tax,
>
> (b) for taxing income of non-UK resident persons that arises from sources in the United Kingdom,
>
> (c) for taxing chargeable gains accruing to non-UK resident persons on the disposal of assets in the United Kingdom,
>
> (d) for determining the income or chargeable gains to be attributed to non-UK resident persons…"

51. TIOPA 2010 subsection 6(6) goes on to provide that "relief under subsection (2)(a), (3)(a) or (4) requires a claim".

52. The Appellants argued that this demonstrated that double taxation agreements performed various different functions including providing relief from taxation in some circumstances and determining where income should be taxed in others. Where certain reliefs were provided for they had to be claimed. However, in this case, the provision fell under TIOPA 2010 subsection 6(2)(b), not listed amongst the reliefs that must claimed and therefore there was no need to claim relief to have the benefit of the Treaty's provisions. Rather, they simply applied.

53. HMRC argued that Article 7 did provide relief from UK taxation, since absent that provision, the income would be taxable in the UK. Typically, it is necessary to claim a relief from tax in the UK. In this case, the relief provided fell under subsection (2)(a) and had to be claimed under subsection (6).

54. HMRC cited ICTA 1988 section 788 which deals with double taxation relief and provides at subsection (3) that:

> "Subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide-
>
> (a) for relief from income tax or from corporation tax in respect of income or chargeable gains; or
>
> (b) for charging the income arising from sources, or chargeable gains accruing on the disposal of assets, in the United Kingdom to persons not resident in the United Kingdom…"

55. ICTA 1988 subsection 788(6) provides that "..a claim for relief under subsection (3)(a) above shall be made to the Board".

56. HMRC submitted that the relief afforded by Article 7 fell under s.788(3)(a) since by granting exclusive taxing jurisdiction to Mauritius it gave relief from UK tax. It therefore fell to be claimed under s.788(6).

57. The Appellants countered that it was not s.788(3)(a) that was in point in relation to Article 7, but s.788(3)(b), since it provided for the charging of income arising from sources in the UK to persons not resident in the UK. The requirement to claim under subsection (6) did not therefore apply.

58. The Appellants submitted that *Strathalmond* was persuasive that where income tax was deemed to belong to someone other than the person it actually arose to, it should retain whatever qualities were inherent to it in the hands of the actual recipient. This was contrasted with the position where legislation required a computation of a sum to be treated as the taxpayer's income. In this case, this meant that the income retained the Treaty protection from UK tax even when attributed to the Appellants.

59. The Appellants submitted that *Willoughby* shows that taking advantage of a favourable tax regime is not necessarily avoiding tax:

> "*I also find that the transfers and associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding a liability to taxation. They were designed to take advantage of a favourable tax regime and not for the purpose of avoiding liability to taxation*".

60. HMRC argued that the existence of relief under a double taxation agreement did not prevent Parliament from enacting domestic law that has the effect of preventing that relief from being obtained, citing as an example the CFC legislation which was the subject of *Bricom.* This follows because double taxation agreements have no direct effect. They require secondary legislation to give them effect under UK law (unlike, for example, EU Regulations).

61. HMRC submitted that it was important to understand the background to s.739. It was not intended to push around treaty-relievable income from one person to another. That was not how it worked. It is a statutory hypothesis that says the income

of a foreign person is the income of the UK resident transferor. It is a charge on what would be that individual's income if he had carried on a trade or held shares providing dividends or debt providing interest. It is a fictional or notional amount of income as those are not in reality the facts.

62. If there has been a transfer as a result of which income arises to a non-UK resident person which would have been subject to UK income tax had it arisen to the UK individual, then the income is deemed to be that of the UK resident transferor. It is the income itself that must be identified and attributed to the taxpayer, not the income net of all reliefs that could be claimed. This is clear because it is what the legislation says: it refers to 'the income' and makes no mention of reliefs.

63. The policy behind the legislation is to effectively deny the action that put the income outside the UK tax net. It would be absurd, then, to attribute to it all the reliefs resulting from the transfer abroad. Section 743 ICTA 1988 ensures that the taxpayer will not be in a worse position than if he had not made the transfer, by allowing him all the reliefs he would have had if he had not made the transfer.

64. If the effect of the transfer is not counteracted, the legislation has not had its intended effect. HMRC cited *Carvill v IRC* [2000] STC (SCD) 143 ('***Carvill***') as authority for the purpose of the legislation being to reverse the effect of the transfer.

65. Applying the *Carvill* approach, giving sections 739 and 743 ICTA 1988 their ordinary meaning, the income attributed to the Appellants is the income before any reliefs afforded by the Treaty. The Appellants do not themselves qualify for relief under the Treaty as they are not resident in Mauritius.

66. Turning to *Willoughby* HMRC cited the following passage:

> "there is a distinction between actual income of an individual and actual income of another person which is deemed to be the income of the individual. Such income is not industrial or commercial profits of the individual nor quoad the individual is it deemed to be industrial or commercial profits or deemed to be his income as if it were such profits"
>
> to demonstrate that it is the income that has arisen that is deemed to be the Appellant's income, not the profits of ABP somehow put into his hands.

67. HMRC submitted that the language of s.720 ITA 2007 was consistent in this with that of s.739 ICTA 1988 and that of ss.745 and 746 ITA 2007 with s743 ICTA 1988. Neither s.739 nor s.720 pushed 'treaty-relieved-income' into the hands of the Appellants. There was no such thing. There was only 'income' with its ordinary meaning.

68. Turning to *Bricom* and *Strathalmond*, HMRC argued that these cases did not support the Appellants' submissions. At best, the judgment in *Bricom* to which the Apellants' had referred went as far as saying that the *Strathalmond* decision would support the taxpayer's argument in *Bricom* if the circumstances in *Bricom* were different. HMRC submitted that one had to look at the legislation itself to see what it actually did. *Bricom* is authority that it is necessary to look at the precise provisions

involved and those of the present case are not the same as those in *Bricom* or *Strathalmond* so those cases do not assist here. In particular, *Strathalmond* was not comparable to the present case as it involved the raising of assessments for administrative purposes on a husband rather than his wife. There was no question of anti-avoidance or need to reverse a transaction. So it was a question of determining the wife's liability to tax, which then fell on the husband instead. Here, it is the income, not the liability to tax, which is being attributed to the Appellants.

Findings of fact

69. On 6 November 2002 SAP entered into an agreement with Wolverhampton and Dudley Breweries under which SAP would buy the bulk of a property in Yarm identified by Mr McAteer for £1.25m, with the remainder being purchased by a company owned by Mr Jonathan Marsh, a property developer. SAP paid a non-refundable deposit of £125,000.

70. Sometime after, Mr Evans-Jones raised concerns about the purchase and further advice was taken.

71. Up to that point, SAP had only undertaken property investment business. Profits were therefore in the form of capital gains and SAP, as a non-UK resident company, was not subject to UK capital gains tax. The purchase of the Property would have constituted property development and would have led to SAP carrying on a trade in the UK, the profits of which would have been subject to UK tax.

72. Proceeding with the purchase would have resulted in SAP coming within the UK tax net and would have 'tainted' the structure of which it formed part.

73. Defaulting on the purchase would have meant forfeiting the £125,000 deposit.

74. The Appellants sought advice from Mr Howard. They sought a solution that would allow SAP not to proceed with the purchase without forfeiting the deposit.

75. Following some level of advice from Mr Howard and with input from CSLP:

(1) ABP was incorporated in Mauritius;

(2) ABP completed the purchase of the property in place of SAP and undertook the development;

(3) The Appellants each took out a life policy with CSLP, paying premiums of £3,000 each;

(4) ABP was wholly owned by CSLP;

(5) The Appellants' entitlements under their life policies were linked to ABP.

76. The Appellants sought an offshore company as a vehicle for the purchase and settled on Mauritius specifically because of the terms of that jurisdiction's double taxation agreement with the UK.

77. ABP went on to make further property investments with input from Mr McAteer and Mr Evans-Jones in particular.

78. There was no suggestion by HMRC that ABP was not managed and controlled in Mauritius through its board.

Discussion

79. The Appellants do not dispute the application in principle of the transfer of assets code to the arrangements with ABP and CSLP. It is accepted by both parties that the Appellants made a transfer, in consequence of which, together with associated operations, income arose to a person not resident in the UK.

80. The first question before the Tribunal is whether sections 741 ICTA 1988 and 739 ITA 2007 apply to prevent the income of ABP from being attributed to the Appellants under sections 739 ICTA 1988 and 720 ITA 2007.

81. Section 741 ICTA 1988 disapplies section 739 ICTA 1988 if the taxpayer "shows…to the satisfaction of the Board either-

> (a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected; or
>
> (b) that the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation."

82. Section 739 ITA 2007 disapplies section 720 ITA 2007 if the taxpayer "satisfies an officer of Revenue and Customs that condition A or condition B is met", that is:

> (1) "that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the relevant transactions or any of them were effected" (condition A); or
>
> (2) "that the transfer and any associated operations- (a) were genuine commercial transactions, and (b) were not designed for the purpose of avoiding liability to taxation" (condition B).

83. On appeal against the decision of the Board/an officer of Revenue and Customs that these exemptions do not apply, the Tribunal may impose its own decision as to the application of the exemption (section 751 ITA 2007).

84. The first question is whether it can be said that avoiding liability to taxation was not at least one of the purposes of creating the arrangement involving ABP and CSLP.

85. On the facts, we have found that liability to tax was a consideration in the arrangements. The Appellants were concerned about SAP's exposure to UK tax if it proceeded with the property purchase. The jurisdiction of Mauritius was chosen because of the provisions of the Treaty which would result in the special purpose vehicle's income being taxed only in Mauritius and so at a lower rate of tax than

would have applied in the UK. The life policies presumably appealed to the Appellants because they were taxed in a similar way to pensions, allowing profits to roll up and be taxed only on a chargeable event.

86. Consideration of tax is not necessarily avoidance of tax. There is no definition of 'tax avoidance' in the legislation. It is accepted that taxation means any UK taxation. Case law draws a distinction between tax mitigation and tax avoidance. For example, in *Carvill*, it was found that the use of split contracts to ensure that UK employment income was subject to UK income tax but overseas employment income was not, was found to be tax mitigation. In *Willoughby*, on the facts it was found that the taxpayer had genuinely incurred expenditure involved in buying bonds and had done so to provide for his retirement. His actions, to the extent that they resulted in an advantageous tax regime applying, constituted tax mitigation, not avoidance.

87. The Appellants argued that the present case should follow *Willoughby* on the basis that they did not avoid tax because their life policies were subject to UK tax under the particular regime in sections 461 to 463 ITTOIA 2005. Further, the purposes of the arrangements were to get SAP out of the property purchase without forfeiting the deposit and to make pension arrangements.

88. The taking out of life policies per se does not constitute tax avoidance. However, unlike in *Willoughby*, that is not the only transaction in this case. The creation of a special purpose vehicle was primarily for the purpose of creating an entity to complete the purchase in SAP's place. The selection of Mauritius as the jurisdiction for this vehicle, however, was specifically for tax reasons: to avoid paying tax in the UK under the terms of the Treaty. In addition, the purpose of creating a vehicle to replace SAP was to avoid SAP becoming liable to UK tax on income from the property development as well as to avoid losing its deposit.

89. It cannot therefore be said that "avoiding liability to taxation was not…one of the purposes for which the transfer or associated operations [or "relevant transactions" in the ITA 2007 exemption]…were effected".

90. Can it be said that "the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation"? There were certainly commercial elements to the overall transactions: the underlying property development was a trading activity and the purchase of a life policy is a commercial transaction. However, considering the overall arrangement that was put in place, with the deliberate choice of Mauritius for its tax treaty with the UK, to ensure that tax was not paid in the UK on the profits of the UK based property development, we are not able to conclude that the arrangements "were not designed for the purpose of avoiding liability to taxation".

91. The final question is therefore whether the Appellants are effectively protected by the Treaty from liability to UK income tax on the income arising to ABP, which section 739 ICTA 1988 and section 720 ITA 2007 deem to be theirs.

92. It is helpful to look first at the provisions of section 739 ICTA 1988. For the section to apply, the result of the transfer of assets (with or without associated operations) must be that "income becomes payable to persons resident or domiciled outside the United Kingdom". In this case, income from UK property transactions arose to ABP. We understand that ABP never had any other source of income so for convenience we will refer to this as 'ABP's income'.

93. ICTA 1988 s.739(2) goes on to provide that "where…[the]…individual [who made the transfer] has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were the income of that individual received by him in the United Kingdom, would be chargeable to income tax…that income shall…be deemed to be income of that individual".

94. In this case, 'the individual' is the Appellants. The income is again ABP's income. HMRC submitted that the Appellants had power to enjoy that income by virtue of their entitlements under the policies with CSLP since their entitlements were directly linked to ABP. The Appellants did not dispute this. Had ABP's income actually belonged to the Appellants and been received by them in the UK it would have been chargeable to income tax in their hands (as income of a trade). ABP's income is therefore deemed to be the Appellants' income.

95. The fiction imposed by this provision is that the income from the property development is the Appellants' income. It is then taxed on them as if it were their income and they may claim any reliefs that would have been available to them if it had in fact been their income. It is ABP's income that is deemed to be that of the Appellants', not ABP's UK tax status or UK tax liability. The income is not subject to UK tax in ABP's hands because it is resident in Mauritius and the provisions of the Treaty apply to it. It would be subject to UK in the Appellants' hands if it arose directly to them. And it is subject to UK tax in their hands under these deeming provisions.

96. Relief under the Treaty would not have been available to the Appellants had the income actually arisen to them. We were not persuaded that the authorities the Appellants cited enabled them to benefit from the protection of the Treaty. Neither *Strathalmond* nor *Bricom* dealt with section 739 ICTA 1988 or section 720 ITA 2007 and the facts in both are very different from those in the present case.

Conclusion

97. The appeal is dismissed.

98. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

RELEASE DATE: 26 September 2018