TC03900

Appeal numbers: TC/2012/08217 & TC/2012/08219

INCOME TAX – transfer of assets abroad – liability of transferors under section 739 ICTA 1988 – decision in principle – held that the transferors had power to enjoy the income of non-residents – also held that they received or were entitled to receive capital sums within section 739(3) – appeal dismissed in principle with liberty to apply to relist the appeal if the parties are unable to agree how to dispose of the appeal having regard to this decision in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

RAJENDRA SEESURRUN **Appellants**
GNIAMNUN SEESURRUN

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
MR AMMED FAROOQ

Sitting in public at Birmingham on 25 and 26 March 2014

Rajendara Seesurrun (the First Appellant) appeared on 25 but not on 26 March 2014

Peter G. Kane, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

1. The appellants, who are husband and wife, and to whom we will refer as Mr and Mrs Seesurrun, appeal against decisions of the Respondents ("HMRC") that income of certain non-UK entities (including settlements established in the Isle of Man) for the years of assessment 2001/02 to 2005/06 inclusive could be attributed to them pursuant to section 739 Income and Corporation Taxes 1988 ("ICTA") which dealt with the prevention of avoidance of income tax by individuals ordinarily resident in the United Kingdom by means of transfers of assets abroad. The decision letters appealed against were dated 21 May 2012 and made reference to earlier decision letters dated 5 September 2011. The decisions were reviewed internally by HMRC at Mr and Mrs Seesurrun's request and upheld on review. HMRC's enquiry into Mr and Mrs Seesurrun's tax returns had commenced in 2007 and resulted in amendments to their self-assessments which were made by the issue of closure notices. During the course of the hearing, Mr Kane, for HMRC, asked that we should give a decision in principle only, on liability pursuant to section 739 ICTA, leaving the consequences of our decision, so far as quantum is concerned, to be worked out later.

Introductory

2. Mr Seesurrun, who appeared on the first day of the two-day hearing, read out a letter addressed to the Tribunal by the Chartered Accountant who was advising him, Mr Ian Beech of Accountancy 4 Growth Ltd of Cannock, Staffs. In that letter Mr Beech complained that the hearing of the appeals was going ahead, notwithstanding a request for a stay made earlier by him. He said in the letter that this was unreasonable and unfair, adding:

> 'In essence the Appellants cannot put forward what they believe is a major, if not complete, defence to the assessments because evidentially they need an order from the Isle of Man Court regarding an application by the trustee of who exactly the beneficiaries of each Isle of Man trust are. The Isle of Man Court is the only competent authority that can so order and advise the trustee. As the Tribunal is aware, the application by the trustee has been lodged in the Isle of Man Court and awaits a hearing.
>
> …
>
> Given that the Appellants cannot defend themselves in a conclusive manner as they would wish, they have decided that they cannot incur the costs of counsel for the hearing. Consequently Mr Seesurrun and Mr Garrett as directed by the Tribunal will attend the hearing solely to be cross examined on their witness statements.'

The letter concluded with a further request to the Tribunal to stay the hearing pending the outcome of the Isle of Man proceedings referred to.

3. Mr Kane, opposing a stay of the hearing on behalf of HMRC, told us that there were other arguments being advanced by HMRC to support their case that section 739 ICTA applied to attribute the income concerned to Mr and Mrs Seesurrun, whatever the identity of beneficiaries of the Isle of Man settlements involved. Further, the matter was an old matter (as we have noted) and neither Mr Beech nor Mr or Mrs Seesurrun had given any satisfactory explanation of why the application to the Isle of

Man Court had not been made before 18 February 2014 (the date on the copy of the application which was with the Tribunal's papers). In all the circumstances he submitted that the hearing should proceed.

4. In deciding to proceed with the hearing, we had well in mind the overriding objective of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") to deal with cases fairly and justly. We informed the parties that we would not make any assumptions as to who the Isle of Man Court might declare was, or were, the beneficiary(-ies) of the Isle of Man settlements concerned, and would see whether we could reach a satisfactory decision on that basis. As correspondence in the matter had been long drawn out and all the evidence was before the Tribunal (Mr Seesurrun and Mr Garrett being in attendance), we considered that it was in the interests of justice to proceed with the hearing. We gave full consideration to the Statement dated 6 March 2014 (dealing with the decision to make an application to the Isle of Man Court) and the Skeleton Argument dated 11 March 2014 which had been filed on behalf of Mr and Mrs Seesurrun.

The evidence and findings of fact

5. We had before us witness statements made by Mr Seesurrun, Mrs Seesurrun and Mr Garrett (a director of the trustee of the Isle of Man settlements). Both Mr Seesurrun and Mr Garrett gave oral evidence and were cross examined by Mr Kane. Jason Price and Marian Burns, both inspectors of taxes working for HMRC, each made a witness statement, but neither gave oral evidence or was cross examined. We had also a substantial amount of documentary evidence including a draft report by KPMG, which had been commissioned, but not accepted by Mr Seesurrun (or, presumably, Mrs Seesurrun).

6. Mr Seesurrun explained that he had instructed KPMG to draft a report for the purposes of HMRC's investigation into his and Mrs Seesurrun's tax affairs and that the KPMG draft report had been produced following those instructions. However, KPMG's charges had proved too high and the instructions had been withdrawn before the report was finalised. In fact KPMG had sued Mr Seesurrun for their fees and had obtained a judgment against him. He maintained that the KPMG draft report is flawed and that it was unsafe for HMRC or the Tribunal to rely on anything in it.

7. We recount the relevant evidence, which we accept, and find facts accordingly, except where the contrary appears in this Decision.

8. Mr Seesurrun, who claims that he is not domiciled within the UK (a claim not contested by HMRC), lived in the UK from 1970 working as a student nurse, a staff nurse and a charge nurse before he opened his first nursing home in 1986. This was Woodcross Nursing Home in Sedgley, Wolverhampton. In the period from 15 March 1998 to 15 June 1999 he and Mrs Seesurrun lived abroad, in Mauritius, where Mr Seesurrun was employed full time as a marketing manager with Pearle Beach Hotel Ltd (a Mauritian company). They returned to live in the UK at the end of this period. Mr Seesurrun and, we assume, Mrs Seesurrun were resident and ordinarily resident in the UK in the tax years (years of assessment) with which this appeal is concerned.

9. Mr Seesurrun asserts that he was not resident in the UK during his period of absence from the UK. This is not contested by HMRC. He also asserts that he should not be treated as ordinarily resident in the UK in that period, but this is contested by HMRC.

10. On 12 March 1998, shortly before leaving for Mauritius, Mr Seesurrun settled £1,000 in cash on the trusts of a settlement known as "The Rajendra Seesurrun Settlement" ("the RS Settlement") in the Isle of Man. The trustee of the RS Settlement was Mt Management Limited ("MML"), a company incorporated in the Isle of Man and resident there for tax purposes. MML is a professional trustee and is trustee of several thousand settlements. Mr Seesurrun has no connection with MML.

11. On the same day, 12 March 1998, Mrs Seesurrun also made a settlement, "The Gnianum Beeghaye Seesurrun Settlement" ("the GS Settlement"). The trustee of the GS Settlement was also MML. £1,000 in cash was also settled on the trusts of the GS Settlement when it was made.

12. On 13 March 1998, MML as trustee of the RS Settlement subscribed for 1 ordinary share of £1 in Calinda Properties Limited ("Calinda"), an Isle of Man incorporated company. MML as trustee of the GS Settlement subscribed for a further ordinary share of £1 in Calinda (it is likely that this subscription was made on the same day, 13 March 1998). The two £1 ordinary shares made up the entirety of the issued share capital of Calinda.

13. Similar subscriptions were made by MML as trustee of the RS Settlement and of the GS Settlement for two £1 ordinary shares in Mannville Limited ("Mannville"), also an Isle of Man incorporated company.

14. Mr and Mrs Seesurrun between them owned three companies carrying on the trade of providing residential care to the elderly, namely Ashleigh Healthcare Limited ("Ashleigh"), Manor Court Healthcare Limited ("Manor") and Churchill Court Limited ("Churchill"). These companies operated from premises as follows: Goldthorn Court (Ashleigh), Manor Court and Drake Court (Manor) and Churchill Court (Churchill). Manor Court, Drake Court and Churchill Court were also owned by Mr and Mrs Seesurrun between them – the evidence suggested that Mr and Mrs Seesurrun never personally owned Goldthorn Court, but we were left unclear on this point.

15. The properties (other than Goldthorn Court) were, according to Mr Seesurrun's evidence, transferred by Mr and Mrs Seesurrun to Calinda and Mannville as follows: Manor Court and Drake Court, in 1999 to Calinda; and Churchill Court in 2003 to Mannville.

16. The transfers of these properties gave rise to rents being paid by Manor and Churchill to Calinda and Mannville. Dividends were also paid by Manor to Calinda.

17. Goldthorn Court was, according to Mr Seesurrun's evidence, acquired by Calinda in November 2002, or earlier, for £250,000 from unconnected third parties, Lackbir Singh Tutt and Tasem Singh Tutt. Mr Seesurrun advanced £250,000 to Calinda to

enable it to make the purchase. This sum was repayable on demand and the advance was interest free. Calinda went on to raise further finance from National Westminster Bank plc in order to develop Goldthorn Court as a nursing home. On completion, Goldthorn Court was leased by Calinda to Ashleigh for a term of 7 years at a rent of £130,000 per year. We note that the KPMG draft report contains different information. There it is stated that the land on which Goldthorn Court was built was acquired by Calinda in 1998 and that the property was built Cousin Construction (an unconnected UK company) and funded by Ashleigh on behalf of Calinda, creating an intercompany loan of £172,025. Rent was therefore paid by Ashleigh to Calinda in respect of Goldthorn Court and dividends were also paid by Ashleigh to Calinda.

18. Manor Court was sold by Mr and Mrs Seesurrun to Calinda on 1 April 1999 for £495.000. The consideration was left outstanding, payable on demand and not carrying interest. There was no written agreement dealing with this financial arrangement. On 1 December 2001, Calinda leased Manor Court to Manor for a term of 10 years at a rent of £54,000 per year.

19. Drake Court was sold by Mr and Mrs Seesurrun to Calinda, also on 1 April 1999 and also for a consideration of £495,000. That consideration was paid by Calinda as to £366,500 in cash, the remaining £128,500 being left outstanding on the same terms as applied to the consideration for the sale of Manor Court, referred to above. Again, there was no written agreement to record this financial arrangement. Calinda raised a mortgage from National Westminster Bank plc to enable it to make the cash payment of £366,500 to Mr and Mrs Seesurrun. On 1 April 1999, Calinda leased Drake Court to Manor for a term of 10 years at a rent of £6,061 per month.

20. The land on which Churchill Court was subsequently built was, according to Mr Seesurrun's evidence, acquired by Mannville for £55,000 in May 2002. Mannville then constructed the nursing home with funding provided by a bank. We note that the KPMG draft report states that Calinda acquired Churchill Court from three unconnected individuals on 12 October 1998, before selling it to Mannville on 24 May 2002 for £225,000. There was a conflict here with Mr Seesurrun's evidence that Churchill Court was transferred by Mr and Mrs Seesurrun to Mannville in 2003 (see: above, paragraph 13).

21. Mr Seesurrun stated in his witness statement that 'the final transactions concerned the gifting of shares owned by [himself and Mrs Seesurrun]' in Ashleigh and Manor (one ordinary share in each company by each donor) to Calinda on 31 March 1999.

22. Mr Seesurrun's evidence was that he was advised that he might consider rearranging his financial affairs for the long term benefit of his family to take advantage of the tax consequences of his becoming not resident and not ordinarily resident in the UK when he took up his employment in Mauritius. The advice was that his assets could be transferred to 'an appropriate offshore structure' and this would have inheritance tax, capital gains tax and income tax advantages. In particular, he was advised that whether or not he or his wife was resident in the UK, if they had no power to enjoy the income of the structure (settlements and underlying companies), then none of the income would be treated as taxable in their hands.

23. When the RS Settlement was made (on 12 March 1998), Mr Seesurrun was stated to be the "Principal Beneficiary" and the first in the list of "Beneficiaries", ahead of his children, spouse, widow, mother, brothers, sisters etc. Mrs Seesurrun was stated to be the Protector of the RS Settlement. It was stated (at clause 4 of the copy of the Settlement with our papers – in the same terms as Clause 4 of the GS Settlement, see paragraph 24 below) that the Trustees shall hold the capital and income of the Trust Fund (of the RS Settlement) "upon such trusts in favour or for the benefit of all or one or more of the Beneficiaries exclusive of the other or others of them". Clause 5 provides for the Principal Beneficiary to be paid the income of the Trust Fund of the RS Settlement for life, subject to and in default of any appointment under clause 4.

24. The GS Settlement is in similar terms with Mrs Seesurrun being named as the "Principal Beneficiary" and the first in the list of "Beneficiaries". Mr Seesurrun was named as the Protector of the GS Settlement. Clause 4 of the GS Settlement is in same terms as the parallel provision of the RS Settlement. It provides as follows:

> '(a) The Trustees shall hold the capital and income of the Trust Fund
>
> (i)upon such trusts in favour or for the benefit of all or one or more of the Beneficiaries exclusive of the other or others of them
>
> (ii) in such shares or proportions if more than one Beneficiary and
>
> (iii) with and subject to such
>
> (aa) powers and provisions for maintenance education or other benefit or for the accumulation of income
>
> (bb) administrative powers and
>
> (cc) discretionary or protective powers or trusts
>
> as the Trustees shall in their absolute discretion appoint PROVIDED THAT
>
> (i)the exercise of this power of appointment shall
>
> (aa) be subject to the application (if any) of the rule against perpetuities
>
> (bb) be by deed or deeds revocable during the Trust period or irrevocable and executed during the Trust period
>
> (cc) not invalidate any prior payment or application of all or any part of parts of the capital or income of the Trust Fund made under any other power or powers conferred by this Settlement or by law
>
> (dd) be subject to the written consent of the Protector
>
> (ii) these trusts and powers may be delegated to any extent to any persons or person whether or not including the Trustees or any of them'

25. Clause 5 of the GS Settlement is in parallel terms to those of clause 5 of the RS Settlement, providing that until and subject to and in default of any appointment under

clause 4 the Trustees shall pay the income of the Trust Fund to the Principal Beneficiary for life.

26. From these provisions, as was accepted by Mr Seesurrun, it is clear that, at any rate at their commencement, the RS Settlement and the GS Settlement both provided effectively for interests in possession for their respective 'Principal Beneficiaries' – i.e. Mr and Mrs Seesurrun.

27. Mr Seesurrun said in his witness statement that when he left the UK to take up his contract of employment in Mauritius he was unclear about exactly how long he would stay in Mauritius, which might have been indefinitely. He received advice that he should retain an interest in the RS Settlement unless and until he decided to resume UK residence. In that event the trustee would effectively exclude him and Mrs Seesurrun from the respective settlements by holding the assets of the settlements solely for his children to the exclusion of him and Mrs Seesurrun. The reason for this advice was the avoidance of UK income tax liabilities in respect of the income of the settlements on Mr and Mrs Seesurrun.

28. Mr Seesurrun's evidence was that in or around June 1999, shortly before he returned to the UK from Mauritius the trustees executed an appropriate deed (or deeds) with his consent to exclude him from benefit under the settlements. Mrs Seesurrun's witness statement evidence makes clear that she also consented to the exclusion of herself from benefit under the settlements.

29. Mr Seesurrun's evidence was that the trustees appear to have mislaid the original deeds and that he does not have a copy.

30. Mr Paul William Garrett, a director of Montpelier (Trust and Corporate) Services Limited ("MTCSL"), which succeeded MML in 2005 as trustee of the RS Settlement and the GS Settlement, gave evidence in his witness statement as follows:

> 'I can confirm that it was always my understanding that the intention of [Mr and Mrs Seesurrun] in forming the trusts was that for so long as they were not resident in the UK they would have a life interest in their respective trusts but in the event that they ever resumed UK tax residence then prior to such resumption they would be excluded from their respective trusts such that all trust assets would thereafter be held on discretionary trusts exclusively for their issue.
>
> I can recall that in or around May 1999 Mr Seesurrun advised me that he and his wife were to resume UK residence on or about 1st June 1999. In accordance with the original tax planning which the trustee was aware of and with the consent of each settlor the trustee executed deeds of appointment so as to declare the whole of the assets of the trust to be held for the exclusive benefit of their issue. In that way [Mr and Mrs Seesurrun] with effect from 1st June 1999 could not be said to have any power to enjoy the income of the trusts within the meaning of Section 739 TA 1988 once they became UK resident.
>
> The trustee executed these deeds in this way because the trust deeds do not expressly provide a power of exclusion of any beneficiary. However this power was not necessary as precisely the same result was achieved by the trustee exercising its power of appointment pursuant to Clause 4(a)(i) of the trust deeds which permits the trustee to hold all or part of the trust funds for the benefit of any one or more beneficiaries to the exclusion of any one or more of them.
>
> Clause 4(a)(i) states as follows:-

"The trustee hall hold the capital and income of the Trust Fund

(i)Upon such trusts in favour of or for the benefit of all or one or more of the beneficiaries exclusive of the other or others of them"

Deeds of the nature referred to above are kept in permanent paper files by the trustee. I have searched the files for the trusts and unfortunately I cannot locate them or copies of them therefore they have for reasons unknown been lost.

I have seen a copy of the witness statement of Marian Burns for the Respondents in which she suggests that the trustee is seeking some sort of deed or variation or rectification to exclude [Mr and Mrs Seesurrun] retrospectively. That is not true. The trustee is in the process of preparing new deeds given the loss of the old deeds as part of an application to the Isle of Man court to declare the deeds effective from 1st June 1999. The trustee may not under Isle of Man law have the power to deem these deeds to be effective from 1st June 1999 therefore the trustee seeks a declaration from the Isle of Man court that in the light of the original missing deeds the new deeds were and are to be deemed effective from 1st June 1999. I have received the confirmation of [Mr and Mrs Seesurrun] that not only do they have no objection to this but it accords with their intention and recollection of events. I can further confirm that since 1st June 1999 the trustee has operated on the basis that both [Mr and Mrs Seesurrun] are not entitled to any income of the trusts.'

31. We note that the KPMG draft report states as follows:

'We understand from Montpelier that Deeds of variation for both trusts were not prepared in March 1999 to exclude Mr & Mrs Seesurrun as beneficiaries of the trusts as originally intended. However, we understand from Montpellier their files indicate it was always the intention to do so. Our understanding is that Deeds of variation will now be prepared and the Montpelier will seek Trust Counsel's opinion confirming the retrospective efficacy of such variations. We understand that Montpelier expect to receive Trust Counsel's opinion by 15 January 2007.'

32. Mr Garrett said in cross examination that this was not correct and that he did not known where KPMG had got that from and that the report was anyway only a draft report.

33. Mr Garrett was taken to a note of a telephone call made to HMRC (Jill Jeffery and Geoff Lewis) on 12 March 2008 by Mr Watkin Gittins of Montpelier Trust Company. The note stated that Mr Gittins had said that 'they would be applying to the Isle of Man courts to have a Deed of Exclusion retrospectively ratified. Once that had happened there could be no possibility of a charge arising under s.739'. An email sent to HMRC by Carina McWhinnie, personal assistant to Mr Gittins, on 19 February 2008, was to similar effect. Mr Garrett's response was that he did not know what had transpired between Mr Gittins and HMRC and that Mr Gittins 'might have' instructed Counsel on the matter.

34. Mr Garrett accepted that he was a director of Calinda as at 29 March 2006 and throughout its existence.

35. The Financial Statements of Calinda for the year ended 5 April 2006 were with our papers. The notes to those Statements showed loans due to Calinda (i.e. debtors), which were unsecured, interest free and repayable on demand as follows:

Manor	£673	(comparable figure for 2005 - £2,173)

RK & GB Seesurrun	£959,794	(comparable figure for 2005 - £1,183,094)
Ravi Jay Seesurrun	£32,291	(comparable figure for 2005 - £32,291)
Mannville	£4,945	(comparable figure for 2005 - £3,765)
Ashleigh	£1,763	(comparable figure for 2005 - £1,763)
GS Settlement	£189,998	(comparable figure for 2005 - £19,998)

36. Mr Garrett confirmed that he had signed these financial statements as a director of Calinda.

37. The notes to the same Financial Statements showed loans due by Calinda (i.e. creditors), which, again, were unsecured, interest free and repayable on demand, including "Mr Seesurrun" as a creditor for £17,761 – the comparable figure for 2005 was the same. "Drake Court" was also a creditor for £278,500 – the comparable figure for 2005 was £276,000.

38. The Financial Statements of Mannville for the year ended 5 April 2006 were with our papers. Mr Garrett was also a director of Mannville and had signed those Statements in that capacity.

39. The profit and loss account of Mannville showed that in the year ended 5 April 2006 its rental income had been £21,874 (the comparable figure for 2005 being £131,243). A gain on disposal of property of £1,299,902 was also reported.

40. The notes to the Financial Statements showed a loan due to Mannville (i.e. a debtor) from Mr Seesurrun in the amount of £1,529,872. The comparable figure for 2005 was nil. Mr Seesurrun was also shown in another note as a creditor of Mannville in 2005 in the amount of £61,047 – but that debt had been paid off by 5 April 2006. The debts referred to were both unsecured, interest free and repayable on demand. Mr Seesurrun was not able to give any information about these debts when asked in cross examination.

41. Also with our papers were the Financial Statements for the period from 12 March 1998 to 5 April 2009 of the RS Settlement and the GS Settlement. Both were signed by Mr Garrett as director of Montpelier (Trust and Corporate) Services Limited – the trustee of both settlements.

42. The Financial Statements for the GS Settlement showed as an asset "loans due to the Trust" of £170,998 as at 5 April 2009. The notes to the Financial Statements explain that this amount is made up of loans due to the GS Settlement of £170,000 by Mr Seesurrun and £998 by Ashleigh. Both loans are stated to be unsecured, interest free and repayable on demand. The notes also disclose that the GS Settlement owed Calinda £179,921, also unsecured, interest free and repayable on demand.

43. A Statement of Personal Assets and Liabilities and Business Assets of Mr Seesurrun was with our papers. In it, it is stated that Mr Seesurrun had liabilities totalling £2,705.589 "due to Trust/Calinda (31/5/11)", which we take to be a

statement that Mr Seesurrun owed this amount at that date to either or both of the RS Settlement and the GS Settlement and/or Calinda. Mr Garrett was not able to give any information about this statement or who prepared it. Mr Seesurrun said that he had not signed that statement and could not give any information about it. He indicated that his accountant (Mr Beech) would know more about it and he said that it was Mr Beech's document.

44. The KPMG draft report included the comment that "overall, rent has been overpaid [by the tenants to their overseas landlords] compared to market value". The figures given in an Appendix to the KPMG draft report show the rents paid to overseas landlords as follows:

'Ashleigh to Calinda re: Goldthorn Court

2000	*2001*	*2002*	*2003*	*2004*
130,000	130,000	200,001	300,001	302,000

Manor to Calinda re: Manor Court

1999	*2000*	*2001*	*2002*	*2003*	*2004*
36,000	54,000	72,736	102,736	78,502	82,860

Manor to Calinda re: Drake Court

1999	*2000*
46,664	35,000

Churchill to Mannville Re: Churchill Court

2003	*2004*
150,000	300,000'

45. These figures for rent were different from (and sometimes more than) the amounts stated in the various leases and Mr Seesurrun was asked why. He replied that every year there was an amount of rent payable which was dependent on the market value of the property concerned.

46. In Mr Seesurrun's witness statement he stated that rent had been paid to Calinda and Mannville as follows:

From Ashleigh to Calinda re: Drake Court

2001/02	*2002/03*	*2003/04*	*2004/05*	*2005/06*
£72,736	£72,736	£81,796	£86,620	£75,735

From Manor to Calinda re: Drake Court

2001/02	*2002/03*	*2003/04*	*2004/05*	*2005/06*
£114,133	£114,015	£114,576	£125,469	£113,925

From Manor to Calinda re: Goldthorn Court

2004/05
£725,947

From Churchill to Mannville re: Churchill Court

2001/02	*2002/03*	*2003/04*	*2004/05*	*2005/06*
Nil	Nil	£92,186	£131,243	£21,874

47. As can be seen, Mr Seesurrun's witness statement is wholly at variance with the KPMG draft report on this issue.

48. Mr Seesurrun also stated in his witness statement that in '2001/2003' Manor declared a dividend of £110,000 to its shareholder, Calinda. Mr and Mrs Seesurrun agreed with Manor and Calinda that this dividend should be applied by Manor (*sic*) to credit Mr Seesurrun's director's loan account in reduction of the debt due to Mr and Mrs Seesurrun by Calinda (*sic*). Also, Ashleigh declared a dividend of £240,000 to its shareholder, Calinda, which was treated in the same way. Mr Seesurrun asserted in his witness statement:

> 'At no time did these dividends belong to me hence I did not declare them on my UK tax return. All that essentially happened was that the indebtedness between Calinda and myself and my wife by mutual agreement was reduced by accounting entries rather than cash movements.'

The relevant legislation

49. HMRC's decision is that dividends paid by Calinda and Mannville out of profits accruing from rents received by those companies from Ashleigh, Manor and Churchill are taxable as the income of Mr and Mrs Seesurrun in the tax years 2001/02 to 2005/06 inclusive by virtue of section 739 and succeeding sections of ICTA. The legislative provisions relied on by HMRC relevantly provide as follows:

> 's. 739 Prevention of avoidance of income tax
>
> (1)… the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers 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.
>
> (1A) Nothing in subsection (1) above shall be taken to imply that the provisions of subsections (2) and (3) below apply only if –
>
> (a)the individual in question was ordinarily resident in the United Kingdom at the time when the transfer was made; or

(b) the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer was effected.

(2) 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 were income of that individual received by him in the United Kingdom, would be chargeable to income tax by 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 purposes of the Income Tax Acts.

(3) Where, whether before or after any such transfer, such an individual receives or is entitled to receive any capital sum the payment of which is in any away connected with the transfer or any associated operations, any income which, by virtue or in consequence of the transfer, whether alone or in conjunction with associated operations, has become the income of a person resident or domiciled outside the United Kingdom 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 purposes of the Income Tax Acts.

(4) In subsection (3) above "capital sum" means …

(a) any sum paid or payable by way of loan or repayment of a loan,

(b) any other sum paid or payable otherwise than as income, being a sum which is not paid or payable for full consideration in money or money's worth.

s. 742 Interpretation of this chapter

(1) For the purposes of [section 739] "an associated operation" means, 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.

(2) An individual shall, for the purposes of section 739, be deemed to have power to enjoy income of a person resident outside the United Kingdom if –

(a) the income is in fact so dealt with by any person as to be calculated at some point of time, and whether in the form of income or not, to enure for the benefit of the individual; or

(b) the receipt of accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit; or

(c) the individual receives, or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of monies which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income; …

(3) In determining whether an individual has power to enjoy income within the meaning of subsection (2) above –

(a) regard shall be had to the substantial result and effect of the transfer and any associated operations, and

(b) all benefits which may at any time accrue to the individual (whether or not he has rights at law or in equity in or to those benefits) as a result of the transfer and any associated operations shall be taken into account irrespective of the nature of form of the benefits.'

50. HMRC's first case is that section 739 ICTA applies to Mr and Mrs Seesurrun by reference to the dividends paid by Calinda and Mannville, and the rental income paid to Calinda and Mannville, by virtue of their power to enjoy the income of the settlements which own Calinda and Mannville (the RS Settlement and the GS Settlement) as beneficiaries of those settlements. As we have decided to deal with the appeal at this stage without making any assumptions as to who the Isle of Man Court might declare was, or were, the beneficiary (-ies) of the Isle of Man settlements, we say no more in this Decision about HMRC's first case.

51. HMRC's second case is that Mr Seesurrun has received a capital sum within section 739(3) ICTA, so that income of Calinda (a person resident outside the United Kingdom) is to be deemed to be Mr Seesurrun's income. HMRC make particular reference to the dividend of £110,000 declared by Manor to Calinda and the dividend of £240,000 declared by Ashleigh to Calinda being applied to reduce Mr Seesurrun's indebtedness. They add that in this connection Mr Seesurrun has not only had power to enjoy the income of Calinda but has actually received and enjoyed the funds.

52. HMRC make a general point that the liabilities of £2,705,589 stated to have "due to Trust/Calinda" by Mr Seesurrun on 31 May 2011 evidence the receipt by him of a capital sum of that amount within section 739(3) ICTA.

53. HMRC also contend that (apart from any power to enjoy inherent in Mr and Mrs Seesurrun's status as beneficiaries of either of the RS or GS Settlements) the accrual of income to Calinda operates to increase the value to Mr Seesurrun of loans due to him from Calinda – those loans being unsecured, interest free and repayable on demand, which has the consequence that the increase of funds available to the debtor (Calinda) would increase the value to the creditor (Mr Seesurrun) of the obligation.

54. The Skeleton Argument, filed on behalf of Mr and Mrs Seesurrun, and dated 11 March 2014, is almost entirely concerned with the question of the identification of beneficiaries of the RS Settlement and the GS Settlement in accordance with Isle of Man law. As to the other arguments made by HMRC, the Skeleton Argument says that:

> 'the view of HMRC that payments to Mr Seesurrun constitute the power to enjoy the income of the companies is wrong because the companies were indebted to him for the purchase consideration of certain properties. Consequently, Mr Seesurrun has received no loans so as to trigger section 742 ICTA.'

Discussion and decision

55. As stated above, we have decided at this stage not to investigate who the beneficiaries of the RS Settlement and the GS Settlement were in the tax years 2001/02 to 2005/06 inclusive.

56. However, we are satisfied from the evidence that in those tax years Mr and Mrs Seesurrun were both ordinarily resident in the UK. We are also satisfied that there were relevant "transfers of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income [has become] payable to persons

resident or domiciled outside the United Kingdom" (cf. section 739(1) ICTA) – indeed, we did not understand this to be in contention.

57. The transfers of assets concerned were as follows. First, the two amounts of £1,000 settled by Mr and Mrs Seesurrun respectively on the trusts of the RS Settlement and GS Settlement respectively; secondly, Manor Court and Drake Court, transferred by Mr and Mrs Seesurrun in 1999 to Calinda; thirdly, £250,000 advanced by Mr Seesurrun to Calinda in 2002 to enable Calinda to purchase Goldthorn Court; and fourthly the gifts of shares in Ashleigh and Manor by Mr and Mrs Seesurrun on 31 March 1999 to Calinda. Possibly there was also a transfer of Churchill Court to Mannville by Mr and Mrs Seesurrun in 2003.

58. The subscriptions by MML as trustee of the RS Settlement and of the GS Settlement for shares in Calinda and Mannville are "associated operations" in relation to the transfers of assets constituted by the two amounts of £1,000 settled on the trusts of those settlements.

59. Income has arisen to Calinda (rents on Drake Court, Goldthorn Court and Manor Court) and to Mannville (rents on Churchill Court). Dividend income has also arisen to Calinda (the £110,000 dividend declared by Manor and the £240,000 dividend declared by Ashleigh, both in '2001/2003').

60. We accept that the evidence we have seen proves that Mr and Mrs Seesurrun were debtors of Calinda in the period in '2001/2003' – as per Mr Seesurrun's witness statement, That is, they owed money to Calinda, and the debt they owed was reduced by application of the dividends declared by Manor (£110,000) and Ashleigh (£240,000) to Calinda. Those applications were "associated operations" in relation to the transfers of assets identified. This, we find, is clear evidence of Mr and Mrs Seesurrun having power to enjoy the income of Calinda as a matter of fact, having regard to the substantial result and effect of the transfers and associated operations (cf. section 742(3)(a) ICTA).

61. We also accept that the evidence we have seen proves that Mr and Mrs Seesurrun were creditors of Calinda in different amounts (arising from the sales of Manor Court and Drake Court to Calinda by Mr and Mrs Seesurrun and the advance made by Mr Seesurrun to Calinda to enable it to purchase Goldthorn Court). We are unsure of the terms of any transfer by Mr and Mrs Seesurrun of Churchill to Mannville. Any such transfer may have caused Mr and Mrs Seesurrun to become creditors of Mannville.

62. The terms of the debts owed to Mr and Mrs Seesurrun by Calinda – they were unsecured, interest free and payable on demand – were such that the receipt of income by Calinda 'operated to increase the value to [Mr and Mrs Seesurrun] of [the debts] held by [them]' (cf. section 742(2)(b) ICTA). Thus, for the purposes of section 739 ICTA, Mr and Mrs Seesurrun had power to enjoy the rental income received by Calinda (as well as the dividends declared by Manor and Ashleigh to which we have already referred).

63. To the extent identified above we hold that Mr and Mrs Seesurrun have a liability to income tax under section 739(2) ICTA.

64. We also accept that the evidence shows that Mr and Mrs Seesurrun received "capital sums", the payment of which was connected with the transfers of assets and associated operations which we have identified, and that this means that Mr and Mrs Seesurrun also have a liability to income tax under section 739(3) ICTA. This will not, of course, cause the same income to be taxed under both section 739(2) and section 739(3).

65. Subject to the point made in paragraph 70 below, the "capital sums" concerned are as follows. First, they are the payments of amounts on loan by Calinda and/or the RS Settlement and/or the GS Settlement to Mr Seesurrun giving rise to the liabilities totalling £2,705,589 referred to in the Statement of Personal Assets and Liabilities and Business Assets of Mr Seesurrun.

66. Secondly, so far as not included in the aforesaid liabilities, they are the amounts stated in the Financial Statements of Calinda to be loans due to Calinda from RK & GB Seesurrun (£1,183,094 as at 5 April 2005 and £959,794 as at 5 April 2006). A deduction from these amounts falls to be made for the amounts in respect of which Mr Seesurrun was a creditor of Calinda (£17,761 as at 5 April 2006).

67. Thirdly, so far as not included in the aforesaid liabilities, they are the amounts stated in the Financial Statements of Mannville to be loans due to Mannville from Mr Seesurrun (£1,529,872 as at 5 April 2006). This cannot, of course, as HMRC accepted, charge to income tax in Mr Seesurrun's hands the capital gain realised by Mannville.

68. Fourthly, so far as not included in the aforesaid liabilities, they are the amount stated in the Financial Statements for the GS Settlement to be "loans due to the Trust" by Mr Seesurrun (£170,000).

69. The Skeleton Argument filed on behalf of Mr and Mrs Seesurrun, to which we have referred above, included the contention that: 'the companies were indebted to [Mr Seesurrun] for the purchase consideration of certain properties. Consequently Mr Seesurrun has received no loans so as to trigger section 742 ICTA.' (We assume a reference to section 739(2) ICTA is meant, instead of section 742.)

70. Manor Court was sold by Mr and Mrs Seesurrun to Calinda for £495,000, which consideration was left outstanding, payable on demand and interest-free. Similarly, Drake Court was sold by Mr and Mrs Seesurrun to Calinda for £495,000, £128,500 of which consideration was left outstanding, payable on demand and interest-free. This accounts for £623,500 of debt owed by Calinda (there may also be a debt owed by Mannville arising from a transfer of Churchill Court by Mr and Mrs Seesurrun to Mannville) to which Mr and Mrs Seesurrun were entitled as creditors and which may represent a sum paid or payable otherwise than as income, being a sum which is payable for full consideration in money or money's worth and therefore outside the scope of the definition of "capital sum" for the purposes of section 739(3) ICTA –

see: section 739(4). Clearly the figure of £623,500 is much lower than the amounts of debt owed by Calinda to which we make reference in paragraphs 65 to 68. Those amounts, insofar as they exceed £623,500 are, we consider, proved to be "capital sums" which Mr and/or Mrs Seesurrun have received or are entitled to receive so as, pursuant to section 739(3) ICTA, to deem the income of Calinda to be their income for income tax purposes.

71. We say that £623,500 of debt owed by Calinda to which Mr and Mrs Seesurrun were entitled as creditors "may" represent a sum payable for full consideration in money or money's worth, because we have received no evidence as to the open market value of the interests in Manor Court and Drake Court when they were sold by Mr and Mrs Seesurrun to Calinda. However, as HMRC did not suggest that those interests were not sold by Mr and Mrs Seesurrun to Calinda at open market value, we accept for the purposes of this Decision that they were.

72. We have noted the evidence that the rent actually paid by Ashleigh and Manor was in excess of the amounts apparently stated to be payable as rent in the leases of the properties concerned. We have also noted Mr Seesurrun's explanation that the rents paid were recalculated every year by reference to the market value of the properties concerned. We consider this to be a strange procedure and have not been shown anything which would provide for adjustments of this kind in the rents payable.

73. It seems to us that the scheme that Mr and Mrs Seesurrun embarked on had as its object the shelter from UK tax of all the income arising from their nursing homes. Even if the contention advanced on their behalf that in the years of assessment with which this appeal is concerned is correct and they were effectively excluded from any possibility of benefit under the RS Settlement and the GS Settlement, the income of the offshore structure, as we have held above, is deemed to be their income for income tax purposes (notwithstanding any such exclusion) by reason of their effective power to enjoy it and/or their receipt or entitlement to receive capital sums from the structure.

74. As we have noted above, Mr Kane asked that we should give a decision in principle. This decision is a decision in principle that Mr and Mrs Seesurrun have liabilities to income tax under section 739(2) and (3) ICTA to the extent indicated. We direct that if the parties are not able to agree how the appeals should be determined having regard to our decision, then they have general liberty to apply to relist the appeal for a further hearing before this Tribunal. At the hearing it was mentioned by Mr Kane that credit would be given in calculating the income tax liabilities of Mr and Mrs Seesurrun by reference to the UK tax paid by Calinda (and, possibly, Mannville) under the non-resident landlord's scheme.

75. In principle, for the reasons given above, the appeal is dismissed.

76. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 13 August 2014