

‘Remarkable tax loophole’ ...or effective planning in international divorce

Tax loopholes, solicitors acting ‘plainly wrong’ and 1.1 million spent on legal fees makes the reading of ABX v SBX [2018] EWFC 81 very interesting for most. What is particularly interesting is how the proposed settlement has been structured to gain a tax advantage benefiting both the husband and wife.

In the experience of the author, tax-has an incredible ability to bring together disputing spouses, who, understandably would rather keep the wealth in the family than pay it over to HMRC. Clearly, unintended tax consequences can dramatically reduce the funds available and in some instances cause couples to return to the courts to dispute tax liabilities.

In this case, the husband and wife were both nationals of a mainland Continental European country and not domiciled in the UK. The couple have three young children who all live in the UK. There is no statutory definition of domicile, though in the UK there are several tax benefits of being non UK dom, as demonstrated in this case.

As a non UK domicile individuals have the option to claim the remittance basis, the remittance basis effectively allows all non UK sourced income to only be taxable in the UK if it is remitted (brought into) the UK.

It appears both parties sought tax advice and agreed that the structure of any payments of capital from the husband should be as follows, the ‘funds are paid offshore to her [the wife], she is able to remit them onshore without incurring a tax liability’. This was presented to the Judge who noted that (at para 48) to him this seemed ‘a remarkable tax loophole, but given that both parties accept that, on advice, it exists and is legitimate’ that he would not stand in the way of the wife ‘receiving lump sums into an offshore account’.

At first glance this may seem to be a win for both parties as ‘every pound received by the wife is worth a pound and every pound received by the husband is worth 55p’ P.58. However, scrutinizing this further it seems this may be more complex for the wife to implement than originally presented.

There is an extremely wide definition as what counts as a taxable remittance; money or property is remitted to the UK if it is brought to, or received or used in the UK by or for the benefit of a **relevant person**.

A relevant person includes;

- the individual
- the individual’s spouse or civil partner
- child or grandchild of any of the above

Therefore, whilst they remain married the wife will be a relevant person.

In the authors opinion, the most tax effective structure would be for the wife to receive the funds into a foreign bank account on condition that she undertakes not to remit them into the UK until

after the decree absolute. A second issue then arises and that is of the children. The children will remain relevant persons even after the decree absolute so potentially any funds spent on them even by the wife (now a non-relevant person) would be counted as a remittance in the UK. Perhaps it would be beneficial for the wife to undertake to not to earmark any funds directly for the benefit of relevant minor children/grandchildren.

It's also unclear whether this arrangement could potentially be caught by the General Anti Avoidance Provisions (GAAR) FA 2013, ss 206–215 which applies where *arrangement are enters into or carried out which cannot reasonably be regarded as a reasonable course of action given all the circumstances*. To understand if an arrangement potentially falls foul of the GAAR rules the following questions should be considered (plus many more);

- Is the main purpose to secure a tax advantage?
- Are the results of the arrangement consistent with any principals on which the relevant tax provisions are based?
- Does it involves one or more contrived or abnormal steps?
- Are the arrangements intended to exploit shortcomings in the relevant provisions?
- Do the arrangements accord with established practice

The situation is far more complex than it seems at first glance potentially leaves the husband exposed to a tax liability or even penalties that are unforeseen.

Sofia Thomas, ATT, CTA
Director, Sofia Thomas Ltd
<http://www.sofiathomas.co.uk/>