[2020] UKUT 0067 (TCC)

Appeal numbers: UT/2019/0015, UT/2019/0016 AND UT/2019/0017

INCOME TAX – transfer of assets abroad – s 739 ICTA 1988, ss 720 and 721 ITA 2007 – exemption from these provisions – s 741 ICTA 1988, s 739 ITA 2007 – purposes of transactions– whether open to First-tier Tribunal to make findings, adverse to the Appellants, as to purposes – yes – whether Appellants entitled to rely on Article 7 of UK/Mauritius double tax treaty – no – whether (if they were) they were out of time to claim relief - yes

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

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

TRIBUNAL: MR JUSTICE MORGAN
JUDGE ANDREW SCOTT

Sitting in public at the Royal Courts of Justice, Rolls Building, London, EC4A 1NL on 6-7 February 2020

Patrick Way QC, instructed by DLA Piper UK LLP, for the Appellants

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

DECISION

Introduction

1. This is an appeal, with permission granted by the Upper Tribunal, from the decision of the First-tier Tribunal (Tax Chamber) (Judge Rachel Mainwaring-Taylor and Mrs Akhtar) ("the FTT") released on 26 September 2018. The FTT dismissed the appeals of the three taxpayers who are now the Appellants in the Upper Tribunal. The appeals to the FTT were against a number of discovery assessments made by HMRC. The discovery assessments were made in reliance on the "Transfer of Assets Abroad" provisions in Chapter III of Part XVII of the Income and Corporation Taxes Act 1988 ("ICTA 1988") later replaced by the provisions in Chapter 2 of Part 13 of the Income Tax Act 2007 ("ITA 2007").

2. Before the FTT, the taxpayers relied on the exemption provision in section 741 ICTA 1988, later replaced by section 739 ITA 2007. The FTT held that the taxpayers were not able to bring themselves within the exemption provision. The taxpayers further contended that they were not liable to be taxed under the Transfer of Assets Abroad provisions by reason of Article 7 of the Double Taxation Convention made between the United Kingdom and Mauritius ("the Treaty") which was given effect by the Double Taxation Relief (Taxes on Income) (Mauritius) Order 1981 (SI 1981/1121). The FTT did not accept the taxpayers' contention based on the Treaty. The result was that the appeals to the FTT were dismissed.

3. On this appeal to the Upper Tribunal, the taxpayers have again relied on the exemption provision referred to above and, further, on Article 7 of the Treaty. The taxpayers accept that they are not able to rely on Article 7 of the Treaty in relation to income arising on or after 12 March 2008 by reason of section 815AZA ICTA 1988, inserted by section 59 Finance Act 2008 and re-enacted as section 130(4), Taxation (International and Other Provisions) Act 2010.

The assessments

4. Although the appeals to the FTT turned on questions of principle, and not on the detail of the assessments, and although this is also the position on this appeal to the Upper Tribunal, we will briefly summarise the assessments and the appeals in this case. This summary is based on how matters were described by the FTT.

5. HMRC issued discovery assessments to income tax to each of the Appellants 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 ICTA 1988 for years to 2005/06 and section 720 ITA 2007 for years from 2007/08.

6. Mr Davies appealed under section 31 Taxes Management Act 1970 ("TMA 1970") against assessments to income tax totalling £229,012. The assessments were 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); and (5) 23 March 2012 for 2009/10 (appealed 10 May 2012).

7. Mr McAteer appealed under section 31 TMA 1970 against assessments to income tax totalling £145,658. The assessments were dated: (1) 26 January 2010 for years 2003/04 and 2004/05 (appealed 18 February 2010); and (2) 18 March 2010 for 2005/06 (appealed 11 May 2010).

8. Mr Evans-Jones appealed under section 31 TMA 1970 against assessments to income tax totalling £241,283. The assessments were 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); and (5) 23 March 2012 for 2009/10 (appealed 10 May 2012).

The transfer of assets abroad legislation

9. Sections 739 to 742 ICTA 1988 are contained in Chapter III of Part XVII ICTA 1988. Part XVII is headed "Tax Avoidance" and Chapter III is headed "Transfer of Assets Abroad".

10. The version of Section 739 ICTA 1998 in force from 19 March 1997 to 5 April 2007 provided:

> "**739 Prevention of avoidance of income tax**
>
> (1) Subject to section 747(4)(b), 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 way connected with the transfer or any associated operation, any income which, by virtue or in consequence of the transfer, either 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, subject to subsection (5) below—

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

(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.

(5) For the purposes of subsection (3) above, there shall be treated as a capital sum which an individual receives or is entitled to receive any sum which a third person receives or is entitled to receive at the individual's direction or by virtue of the assignment by him of his right to receive it.

(6) Income shall not by virtue of subsection (3) above be deemed to be that of an individual for any year of assessment by reason only of his having received a sum by way of loan if that sum has been wholly repaid before the beginning of that year.

11. The version of section 741 ICTA 1998 in force from 6 April 1998 to 4 December 2005 provided:

"**741 Exemption from sections 739 and 740**

Sections 739 and 740 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.

> The jurisdiction of the Special Commissioners on any appeal shall include jurisdiction to review any relevant decision taken by the Board in exercise of their functions under this section."

12. Section 741 ICTA 1988 was amended, and sections 741A to 741C were inserted, by the Finance Act 2006 with effect from 5 December 2005. We were not referred to the detail of those provisions as the argument before us turned on the references to "purposes" in the original section 741.

13. Section 742 ICTA 1998 contained a number of provisions as to the interpretation of sections 739 to 741. In view of the acceptance by the Appellants that the facts of this case come within section 739 subject only to the exemption provision in section 741, it is not necessary to set out section 742 in full but we note that section 742 provides for the interpretation of "an associated operation" and "power to enjoy income" where those phrases appear in the earlier sections.

14. Section 743(2) ICTA 1998 provided:

> "In computing the liability to income tax of an individual chargeable by virtue of section 739, 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."

15. These provisions in ICTA 1988 were replaced by somewhat differently expressed provisions in ITA 2007, with effect from 6 April 2007. Neither the Appellants nor the Respondents contended that the 2007 provisions operated in a different way from the 1988 provisions. The provisions of ITA 2007 which were we asked to consider were sections 720, 721 and 739, as originally enacted.

16. Section 720 ITA 2007 provided:

> "**720 Charge to tax on income treated as arising under section 721**
>
> (1) The charge under this section applies for the purpose of preventing the avoiding of liability to income tax by individuals who are ordinarily UK resident by means of relevant transfers.
>
> (2) Income tax is charged on income treated as arising to such an individual under section 721 (individuals with power to enjoy income as a result of relevant transactions).
>
> (3) Tax is charged under this section on the amount of income treated as arising in the tax year.
>
> (4) But see section 724 (special rules where benefit provided out of income of person abroad).

(5) The person liable for any tax charged under this section is the individual to whom the income is treated as arising.

(6) For rules about the reduction in the amount charged in some circumstances and the availability of deductions and reliefs, see–

section 725 (reduction in amount charged where controlled foreign company involved), and

section 746 (deductions and reliefs where individual charged under this section or section 727).

(7) For exemptions from the charge under this section, see sections 736 to 742 (exemptions where no tax avoidance purpose or genuine commercial transaction)."

17. Section 721 ITA 2007 provided:

"**721 Individuals with power to enjoy income as a result of relevant transactions**

(1) Income is treated as arising to such an individual as is mentioned in section 720(1) in a tax year for income tax purposes if conditions A and B are met.

(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.

(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.

(4) For the purposes of subsection (2), it does not matter whether the income may be enjoyed immediately or only later.

(5) It does not matter for the purposes of this section–

(a) whether the income would be chargeable to income tax apart from section 720,

(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.

(6) For the circumstances in which an individual is treated as having the power to enjoy income for the purposes of this section, see section 722."

18. Section 739 ITA 2007 provided:

> "**739 Exemption: all relevant transactions pre-5 December 2005 transactions**
>
> (1) This section applies if all the relevant transactions are pre-5 December 2005 transactions.
>
> (2) An individual is not liable for income tax under this Chapter for the tax year by reference to the relevant transactions if the individual satisfies an officer of Revenue and Customs that condition A or B is met.
>
> (3) Condition A is 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.
>
> (4) Condition B is 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."

19. Section 737 ITA 2007 provided for the exemption where all relevant transactions were post-4 December 2005 transactions. Section 737 also contained a Condition A which was in slightly different terms from Condition A in section 739 but nothing turns on the differences in this case. Section 740 ITA 2007 provided for the case where the relevant transactions include both pre-5 December 2005 and post-4 December 2005 transactions. Again, it is not necessary to refer to the detailed provisions of section 740.

20. The history of these various statutory provisions can be traced back to section 18 of the Finance Act 1936 and the current provisions continue to reflect the broad scheme of what was enacted as long ago as 1936: see *R v Dimsey* [2001] STC 1520 at [5] per Lord Scott.

The relevant facts

21. The FTT made the following findings as to the facts which were relevant to the statutory provisions as to the transfer of assets abroad:

> "69. On 6 November 2002 [SA Properties Ltd ("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 [Credit Suisse Life & Pensions (Bermuda) Ltd ("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."

The transfer of assets abroad

22. There was no dispute before the FTT, nor before the Upper Tribunal, as to the application in principle of the various statutory provisions as to the transfer of assets abroad. The Appellants accepted that they made a transfer in consequence of which, together with associated operations, income arose to ABP, a person not resident in the UK and that they had a power to enjoy that income.

23. It followed that the income of ABP was "deemed to be income [of the three Appellants] for all purposes of the Income Tax Acts" (section 739(2) ICTA 1988) and "treated as arising to" the three Appellants (section 721(1) ITA 2007). Accordingly,

that income of the Appellants was chargeable to tax unless the Appellants could bring themselves within the exemption provided for in section 741 ICTA 1988 or section 739 ITA 2007.

The exemption

24. The Appellants sought to rely on section 741(a) ICTA 1988 and condition A in section 739 ITA 2007. For this purpose, the Appellants had to show "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" (section 741(a) ICTA 1988) and "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" (section 739(3) ITA 2007).

25. The FTT concluded that the Appellants had not shown that they could rely on the exemption. The FTT's reasoning was as follows:

> "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 [of the Income Tax (Trading and Other Income) Act] 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"."

The appeal in relation to the exemption

26. The Appellants advanced two grounds of appeal in relation to FTT's decision that they had not brought themselves within the exemption. In their grounds of appeal, the Appellants refer to the exemption as involving a "motive test".

27. The Appellants' first ground of appeal in relation to the exemption asserts that the FTT did not afford to the Appellants the benefit of the motive test. The second ground of appeal under this head is that there was no evidence of tax avoidance.

28. We consider that it is logical to address first the ground of appeal as to the evidence which was before the FTT. If we reached the conclusion that the FTT were not entitled to make the findings of fact which they made in relation to the exemption, then we would have to consider what to do. If, on the other hand, we concluded that we were not entitled to disturb the FTT's findings of fact, then we would consider the first ground of appeal under this head on the basis of those findings of fact.

29. The three Appellants all gave evidence before the FTT and they called as a witness Mr Howard, who was referred to in the findings of the FTT which we have quoted above. The Appellants submit that in this evidence they acknowledged that the transactions in this case were tax efficient but they never acknowledged that the transactions involved tax avoidance. It was submitted that at no point was any appellant asked if there was tax avoidance but, on each occasion when "similar points" were raised, the witness said that the motive was tax efficiency or tax mitigation. It was said

that it was never put to the witnesses that the motive was tax avoidance. It was said that the failure to put that allegation in cross-examination meant that there was no evidence on which the FTT could make a finding that one of the purposes of the transactions was tax avoidance.

30. Mr Way QC on behalf of the Appellants did not cite any authority as to the legal principles to be applied where a witness is not challenged on an issue of fact on which he has given evidence. However, the basic principle is not in doubt and we have reminded ourselves of the principal authorities which are relevant. These include *Browne v Dunn* (1893) 6 R 67, *Markem Corporation v Zipher Ltd* [2005] RPC 31, *Dempster v HMRC* [2008] STC 2079 at [26] and *Abbey Forwarding Ltd v Hone* [2010] EWHC 2029 (Ch) at [46]-[47]. These decisions stress that, in a case where fraud or dishonesty is alleged or where a court or tribunal is asked to disbelieve a witness, the witness should be specifically cross-examined in relation to the relevant matter. This is required in order to give the witness the opportunity to deal with the allegation which will be made against him and which allegation the court or tribunal will be asked to accept.

31. In addition to these authorities we have considered the recent decisions in *Howlett v Davies* [2018] 1 WLR 948 and *Travel Document Service v Revenue and Customs Commissioners* [2018] 3 All ER 60. We specifically drew the attention of counsel to the second of these cases in the course of the appeal.

32. In *Howlett v Davies*, the District Judge held that claimants had been dishonest and the Court of Appeal had to consider whether that finding was open to the District Judge when, in the course of his cross-examination, it was not put in terms to the relevant witness that he had been "dishonest". The Court of Appeal held what mattered was that the witness had had fair notice of a challenge to his honesty and an opportunity to deal with that challenge.

33. In *Travel Document Service v Revenue and Customs Commissioners*, the issue was whether the taxpayer had an "unallowable purpose" within paragraph 13 of Schedule 9 to the Finance Act 1996. What mattered was the taxpayer's subjective purposes: see per Newey LJ at [41(iii)]. A witness gave evidence as to the taxpayer's purposes. The witness described in his witness statement what was the purpose of the taxpayer in terms which did not amount to an "unallowable purpose". This evidence was not the subject of a direct challenge when the witness was cross-examined. The taxpayer submitted that it was not open to the tribunal in that case to make a finding contrary to the statement in the witness statement. The Court of Appeal did not accept that submission. Newey LJ said that it followed inevitably from the tribunal's findings that securing a tax advantage must have been a main purpose of the taxpayer. It was further held that the tribunal did not need to disbelieve the witness in order to decide that the taxpayer had an "unallowable purpose": see at [45]. Bean LJ said that the description of the purpose in the witness statement was essentially a statement of the argument for the taxpayer or an opinion on an issue of law rather than a statement of fact: see at [57]. Bean LJ also said that it had been obvious in that case that HMRC's case was that there was an "unallowable purpose" and that a direct challenge to the

evidence of the witness would not have elicited any new evidence or have enabled the witness to raise any points that he was not already making: see at [58].

34. In the present case, the discovery assessments were made on the basis of the anti-avoidance provisions in respect of the transfer of assets abroad. The Appellants knew that those provisions were the subject of an exemption which referred to the purposes for which the transactions were effected. The Appellants sought to rely on the exemption. In their statement of case before the FTT, HMRC addressed the exemption and asserted that the transactions were part of a wider scheme to avoid paying tax on the income generated from UK property transactions. The Appellants submitted a statement of case in response and stated that they would demonstrate that the avoidance of tax was not the purpose or one of the purposes of the transactions. HMRC's skeleton argument before the FTT was that the evidence to be relied upon by the Appellants went nowhere near satisfying the burden on them pursuant to the terms of the exemption.

35. Each of the Appellants served a witness statement and gave oral evidence and was cross-examined. They said that their purpose was to obtain pensions for themselves.

36. Although the Appellants submit that their evidence as to the purpose of the transactions was not challenged, we were not provided with a transcript of their cross-examinations. Nor were we given a note of the cross-examinations. Instead, we were shown the written submissions on the evidence which were made to the FTT and from those submissions we are able to see some of the things which were raised in the course of the cross-examinations. However, a note of some of the things said in cross-examination could not in itself establish the negative proposition put forward by the Appellants that they were not cross-examined at any point as to the purposes of the transactions.

37. In fact, if one reads the written submissions on behalf of HMRC which were put to the FTT, it seems to us that the Appellants were cross-examined as to why they had entered into the transactions in the way in which they had and why they had not entered into possible other forms of transaction. Those questions appear to be about the purposes behind the transactions taking the form in which they did.

38. In any case, the circumstances are very similar to those considered in the *Travel Document Service* case, which also involved an inquiry into the subjective purposes of the taxpayer. Much of the reasoning in that case applies also here. Here, there was a strong case based on inference from the circumstances in which the transaction took place and from the way in which the transaction was structured for saying that at least one of the purposes of the transaction was to avoid tax. Further, it was not necessary to disbelieve the witnesses when they said that they wanted an investment which could be seen as their pensions. That, if true, did not prevent the FTT assessing and then making findings as to what sort of investment and what sort of pension the witnesses wanted. The FTT found that the sort of investment and pension in question was one which involved the avoidance of tax which would otherwise be due.

39. We also consider that there was nothing remotely unfair or inappropriate in the way in which HMRC presented their case and cross-examined the witnesses. The witnesses knew the case they had to meet and they had a full opportunity to meet it. Their evidence as to their purposes was essentially their argument as to the way in which their conduct should be assessed. Their evidence as to their purpose being to obtain pensions did not gainsay a finding that the investments or pensions which they sought were ones which involved the avoidance of tax.

40. We therefore conclude that the FTT were entitled to make the findings of fact which they made and we would reject this ground of appeal.

41. The other ground of appeal in relation to the exemption is the assertion that the FTT did not give the Appellants the benefit of the motive test. We can take this ground of appeal more shortly.

42. Mr Way did not submit that there was any statement in the FTT decision which was wrong as a matter of legal principle. Mr Way relied heavily on the decision of the House of Lords in *IRC v Willoughby* (1997) 70 TC 57 but he did not show us anything in the FTT decision which amounted to a misdirection having regard to the statements of principle in that case. Mr Way stressed that in *Willoughby* the taxpayer's purpose was to obtain a pension and he succeeded in showing that tax avoidance was not one of the purposes of the transaction. However, the facts in that case were different from the facts in the present case.

43. We consider that it has not been shown that the FTT made any error of principle and, having applied the correct principles, they reached a decision on the facts which was open to them.

44. Mr Way stressed that the arrangements made by the Appellants did not mean that they were not liable for tax in some circumstances. He explained that under Chapter 9 of Part 4 of the Income Tax (Trading and Other Income) Act 2005 a taxable gain arises when a chargeable event occurs in relation to the policy entered into in this case. However, this point is not decisive. Mr Way correctly accepted that there could be tax "avoidance" where tax was deferred or reduced; it was not necessary for the arrangements to produce the result that no tax was payable in any circumstance.

45. Accordingly, we dismiss the appeal in relation to the ability of the Appellants to rely on the exemption. It follows that the Appellants are properly chargeable to tax in accordance with the transfer of assets provisions unless the Appellants can show that such a result is contrary to the Treaty.

The Treaty

46. As mentioned above, the Double Taxation Relief (Taxes on Income) (Mauritius) Order 1981 gives legal effect in the United Kingdom to the Double Taxation Convention set out in the Schedule to the Order. The Order stated that the arrangements set out in the Convention had been made with a view to affording relief from double taxation in relation to income tax (in particular) and taxes of a similar character imposed

by the laws of Mauritius. As explained earlier, we will refer to this Convention as "The Treaty".

47. The Treaty contained a preamble reciting that the two governments were desirous of concluding a treaty "for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains".

48. The provision of the Treaty which is of central relevance is Article 7, which provides:

> "ARTICLE 7
>
> **Business profits**
>
> (1) 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. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State, but only so much of them as is attributable to that permanent establishment.
>
> (2) Subject to the provisions of paragraph (3) of this Article, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment.
>
> (3) In determining the profits of a permanent establishment, there shall be allowed as deductions all expenses of the enterprise which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise no account shall be taken, in determining the profits of a permanent establishment, of amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services

performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

(4) Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph (2) of this Article shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

(5) No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

(6) For the purposes of the preceding paragraphs of this Article, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

(7) Where profits include items which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article."

49. Article 3(1)(g) defined "enterprise of a Contracting State" in a way which meant that ABP was an enterprise of Mauritius.

50. The effect of Article 6 was that any rent which ABP received from UK immovable property could be taxed in the UK. Article 11 provided for the possibility that interest arising to ABP in the UK could be taxed in the UK. The present case is not concerned with rent and interest but with the profits of ABP apart from rent and interest.

51. Article 7 refers to an enterprise having a "permanent establishment", a phrase which is defined in Article 5. It was accepted that ABP did not have a permanent establishment in the UK.

52. The Treaty in this case is closely based on the OECD Income and Capital Model Convention which contains a provision in the same terms as Article 7, quoted above. Ms Wilson for HMRC referred us to the Commentary on the OECD Model Convention published in Materials on International & EC Tax Law, both in the 8th ed. (2008) and the 11th ed. (2011). The commentary as published in the 8th ed. stated (in relation to Article 7):

"The purpose of paragraph 1 is to provide limits to the right of one Contracting State to tax the business profits of enterprises that are residents of the other Contracting State. The paragraph does not limit the right of a Contracting State to tax its own residents under controlled foreign

companies provisions found in its domestic law even though such tax imposed on these residents may be computed by reference to the part of the profits of an enterprise that is resident of the other Contracting State that is attributable to these residents' participation in that enterprise. Tax so levied by a State on its own residents does not reduce the profits of the enterprise of the other State and may not, therefore, be said to have been levied on such profits … ."

53. The Treaty in this case was considered by the Special Commissioners in *Re the Trevor Smallwood Trust, Smallwood v Revenue and Customs Commissioners* [2008] STC (SCD) 629. The decision in that case was included in the bundles of authorities before us. That decision contained a detailed discussion as to the correct approach to the construction of a treaty, such as the Treaty in this case, and, in particular, discussed when it was appropriate to give the words of the Treaty a purposive construction. We were not referred to this case in the course of argument and neither party before us suggested that there was any particular difficulty in construing the Treaty.

54. The correct approach to the construction of a double taxation treaty was also considered in *Bayfine UK v HMRC* [2012] 1 WLR 1630. The double taxation treaty in that case contained the same preamble as the Treaty in this case. At [17], Arden LJ said, in relation to that preamble:

> "17. These words, however, make it clear that the primary purposes of the Treaty are, on the one hand, to eliminate double taxation and, on the other hand, to prevent the avoidance of taxation. In seeking a purposive interpretation, both these principles have to be borne in mind. Moreover, the latter principle, in my judgment, means that the Treaty should be interpreted to avoid the grant of double relief as well as to confer relief against double taxation."

55. Ms Wilson also referred us to the following general remarks of Mummery LJ in *R (Huitson) v Revenue & Customs Commissioners* [2012] QB 489 at [33]-[34]:

> "33. Of prime significance is the fact of the residence of individuals and partnerships exercising a trade or profession: residence is *the* connecting factor which entitles a state to impose income tax. The correlative proposition is that the resident of a state, who enjoys the benefits provided by it to its residents, has a reasonable expectation of being taxed by the state in question on the income of a trade or profession.
>
> 34. Secondly, [double taxation agreements ("DTAs")] respect the principle of taxation by the state of residence. They aim to avoid the taxation of residents twice over on the same income. What DTAs do *not* aim to do is to facilitate the avoidance of tax, or its reduction below the level of tax ordinarily paid by residents. In those circumstances it is a legitimate aim of the public policy of the state in fiscal matters to ensure that DTAs relieve double taxation of residents rather than serve as an instrument used by

taxpayers who choose to participate in artificial arrangements to avoid or reduce their level of taxation."

56. The 1981 Order was made under the relevant provisions of the Income and Corporation Taxes Act 1970. Those provisions were re-enacted in section 788 ICTA 1988. Subsection (3) of that section provides:

> "(3) 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; or
>
> (c) for determining the income or chargeable gains to be attributed—
>
> (i) to persons not resident in the United Kingdom and their agencies, branches or establishments in the United Kingdom; or
>
> (ii) to persons resident in the United Kingdom who have special relationships with persons not so resident; or
>
> (d) for conferring on persons not resident in the United Kingdom the right to a tax credit under section 231 in respect of qualifying distributions made to them by companies which are so resident."

57. Subsection (6) of that section went on to provide that "a claim for relief under subsection (3)(a) above shall be made to the Board".

The decision of the FTT in relation to the Treaty

58. The FTT held that the Appellants could not rely on Article 7 of the Treaty to claim that they were not liable to be taxed in accordance with section 739 ICTA 1988 or sections 720 and 721 ITA 2007. The FTT's reasons were as follows:

> "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."

The appeal in relation to the Treaty

59. Mr Way submits that the Appellants can rely on Article 7 of the Treaty to produce the result that the income which is deemed to be their income under section 739 ICTA 1988 or treated as arising to them under section 721 ITA 2007 can only be taxed in Mauritius and cannot be taxed in the UK. The income which is attributed to the Appellants under these sections is the income of ABP. The income of ABP has a tax-free character in the UK. Mr Way submits that when that income is attributed to the Appellants it does not lose its tax-free character. He submits that the point in issue has effectively been determined in his favour by the decision in *Strathalmond v Inland Revenue Commissioners* [1972] 1 WLR 1511 and the decision of the Court of Appeal in *Bricom Holdings Inc v Commissioners of Inland Revenue* (1997) 70 TC 272, where the earlier authorities were reviewed.

60. Mr Way advanced a further ground of appeal to the effect that the FTT had erred in law in not giving adequate reasons as to why it erroneously considered that *Strathalmond* and *Bricom* were not relevant. We agree that the FTT did not explain its conclusion in this respect and that it ought to have done so. However, in view of the

fact that the principal ground of appeal relies on these authorities and we will consider that ground of appeal and give our reasons in relation to it, this further ground of appeal does not require separate consideration. If we give our reasons in relation to the application of these authorities, there is no question of us remitting the matter to the FTT for them to explain in greater detail their reasons for their conclusion that these authorities did not assist the Appellants.

61. Ms Wilson submitted that the Appellants' submissions involve a wrong reading of Article 7. She submitted that the effect of Article 7 in this case is that the profits of ABP are taxable only in Mauritius unless ABP carried on business in the UK through a permanent establishment situated in the UK. As ABP did not carry on business in the UK through a permanent establishment in the UK the result is that the profits of ABP are taxable only in Mauritius. The profits of ABP are therefore not taxable in the UK. Ms Wilson submits that Article 7 has had effect in relation to ABP in accordance with its terms.

62. Ms Wilson submits that Article 7 has nothing to say about the taxation of the income of the Appellants as UK residents. The UK is entitled to tax the income of the Appellants as its residents as it sees fit and the Treaty contains no provision to the contrary. The UK has legislated to tax the income of the Appellants as UK residents in accordance with the statutory provisions as to the transfer of assets abroad. Section 739 ICTA 1988 provides for what is to be deemed to be the income of the Appellants. Section 721 ITA 2007 provides for what income is treated as arising to the Appellants. The income in question is not taxed as trading income of the Appellants. Rather, it is taxed simply as an amount of income (of an indeterminate kind) under Case VI of Schedule D (see section 743(1) ICTA) or under section 720 ITA 2007.

63. Ms Wilson also distinguished *Strathalmond* and *Bricom* and the cases referred to in *Bricom* from the facts of this case and the statutory provisions applicable to those facts.

64. Ms Wilson had a further point in relation to the Appellants' attempt to rely on Article 7 of the Treaty. She submitted that if, contrary to her main submission, we held that the Appellants could rely on Article 7 to claim to be relieved against their liability to tax under section 739 ICTA 1988 and sections 720 and 721 ITA 2007, it was nonetheless necessary for them to claim such relief under section 788(3)(a) and (6) ICTA 1988 and they had not done so within the time permitted for such a claim by section 43(2) TMA 1970. This submission had been made to the FTT but they did not rule on it in their decision. HMRC has raised this contention before the Upper Tribunal by way of a response to the appeal.

Discussion and conclusion in relation to the Treaty

65. In the absence of any authority requiring a decision to the contrary, our provisional view is that the submissions of HMRC as to the non-application of Article 7 to the deemed income of the Appellants are entirely correct. It seems to us that Article 7 is dealing with the tax treatment of the profits of ABP and is not dealing with the UK's powers to tax its own residents. As is explained in the Commentary to the OECD

Model Convention, Article 7 provides limits on the UK's ability to tax the profits of ABP but does not limit the UK's ability to legislate to tax the income, including the deemed income, of its residents. This is so even though the deemed income of its residents is computed by reference to the profits of ABP. The tax charged to UK residents does not reduce the profits of ABP and is not levied on such profits. Further, as explained in *Huitson* and *Bayfine*, the purpose of the Treaty is to confer relief against double taxation but not to confer double relief. Further, it is not the purpose of the Treaty to facilitate the avoidance of taxation or to reduce the level of taxation below the level ordinarily paid by the residents of the UK.

66. Nonetheless, the view expressed above can only be a provisional view until we have considered the authorities relied upon by the Appellants. The principal case relied upon is the decision of the Court of Appeal in *Bricom* but that case also considered the earlier decisions in *Hughes v Bank of New Zealand* [1938] AC 366, *IRC v Australian Mutual Provident Society* [1947] AC 605, *Ostime v Australian Mutual Provident Society* [1960] AC 459 and *Strathalmond*.

67. In *Bricom*, Millett LJ gave a judgment with which the other members of the Court (Otton and Beldam LJJ) agreed. Millett LJ set out the facts of that case as follows at page 284B-F:

> "The facts are extremely simple. The taxpayer is incorporated and resident in the United Kingdom and is an indirect wholly owned subsidiary of The Bricom Group Limited ("BGL"). It has a wholly owned direct subsidiary Spinneys International BV ("Spinneys") which is incorporated and resident in the Netherlands. Spinneys is an investment holding company which formerly carried on business through a branch in Singapore. After selling that branch it had surplus funds which it lent at interest to BGL. BGL duly paid interest to Spinneys, which was taxable on such interest in the Netherlands. The Revenue alleges that Spinneys is a controlled foreign company within the meaning of Chapter IV of Part XVII of the Act, which allows income of such a company to be attributed to its United Kingdom resident shareholders, and has raised assessments on the taxpayer by reference to the United Kingdom source interest received by Spinneys from BGL.
>
> The taxpayer does not dispute that Spinneys is a controlled foreign company and that but for the provisions of the Double Taxation Agreement with the Netherlands it would be unable to challenge the assessments. But it claims that the terms of the Agreement exempt it from liability. For its part the Revenue accepts that the effect of the Agreement is to exempt the interest itself from United Kingdom corporation tax and not merely the resident of the Netherlands who receives it. The benefit of the exemption, therefore, is capable of enuring to the taxpayer. But the Revenue claims that the assessments are not precluded by the terms of the Agreement because they are not assessments to corporation tax on the exempted interest."

68. At page 284G, Millett LJ then summarised the double taxation agreement with the Netherlands. The relevant provision was Article 11 which provided that: "interest arising in one of the States which is derived and beneficially owned by a resident of the other State shall be taxable only in that State". Millett LJ recorded the agreement of the parties to the appeal that Article 11 prevented the interest paid to Spinneys from being chargeable to corporation tax in the United Kingdom. This was an important matter and reflects what Millett LJ had earlier said when summarising the facts of the case, namely, that the agreement exempted the interest itself from UK corporation tax and did not merely exempt the resident of the Netherlands who received that interest.

69. At pages 285 to 287, Millett LJ summarised the controlled foreign company provisions which were relevant in that case. Spinneys was a controlled foreign company. Its shares were wholly owned by Bricom Holdings Ltd. Under the statutory provisions, the whole of the chargeable profits of Spinneys were attributed to Bricom Holdings Ltd. Bricom Holdings Ltd accepted that, but for the double taxation agreement, it would be liable to tax in the UK on the whole of the chargeable profits of Spinneys. The question was whether the interest received by Spinneys was part of its chargeable profits in the light of Article 11 of the double taxation agreement which provided that such interest was taxable only in the Netherlands. Because it was common ground in that case that Article 11 exempted the interest itself and not merely the resident of the Netherlands who received that interest it was necessary to inquire whether the element of the chargeable profits of Spinneys which were attributed to Bricom Holdings Ltd still retained the character of interest within Article 11.

70. At page 289I, Millett LJ explained that the "chargeable profits" as defined by the statutory provisions were a purely notional sum. They were the product of a mathematical calculation made on a hypothetical basis and making counterfactual assumptions. The "chargeable profits" existed only as a measure of computation.

71. At pages 290I-291B, Millett LJ reviewed the earlier authorities and, having done so, commented:

> "In my judgment these cases show that the question turns on the nature of the statutory process. Interest from exempt securities does not cease to be such by being included as a component element of the recipient's taxable profits: *Hughes*. 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: *Strathalmond*. But where tax is charged on a conventional or notional sum which exists only as the product of a calculation, the fact that one of the elements in the calculation is measured by reference to the amount of exempted income does not make the exempted income the subject of the tax: *Australian Mutual Provident Society*."

72. At page 291C, Millett LJ reached the conclusion:

> "The correct analysis is that the interest received by Spinneys is not included in the sum apportioned to the taxpayer on which tax is chargeable.

> It merely provides a measure by which an element in a conventional or notional sum is calculated, and it is that conventional or notional sum which is apportioned to the taxpayer and on which tax is charged."

73. We do not need to carry out a detailed analysis of the cases which were fully analysed by Millett LJ. However, we will comment on *Hughes*, *Strathalmond* and *IRC v Australian Mutual Provident Society*.

74. When discussing *Hughes*, Millett LJ said that it did not support the argument of Bricom Holdings Ltd but suggested that it would support that argument if the controlled foreign company provisions charged Bricom Holdings Ltd with corporation tax on Spinney's trading profits. Mr Way relied on this statement and submitted that the transfer of assets abroad provisions do purport to charge the Appellants with income tax on the profits of ABP.

75. In *Strathalmond*, the issue was whether Lady Strathalmond had the benefit of double taxation relief, under a treaty between the United States and the UK, in relation to her income from investments in the United States on which she paid United States tax. The High Court held that she could take the benefit of double taxation relief so that her United States income was not chargeable to tax in the UK. That issue, in so far as it concerned the liability of Lady Strathalmond to be taxed in the UK, has really nothing to do with the issue in the present case which concerns the liability of a UK resident to tax on income which is deemed to be his income. The suggestion that the decision is relevant in the present context arises because, at the time of that decision, the position as to the income of a married woman was dealt with by section 37 of the Taxes Act 1970 which provided that "a woman's income chargeable to income tax shall, so far as it is income for a year of assessment … during which she is a married woman living with her husband, be deemed for income tax purposes to be his income and not to be her income". Thus, the facts of the case did involve a deeming provision but the only income of the wife which was deemed to be the income of the husband was income of the wife which was "chargeable to income tax". Thus, before any deeming took place, the prior question was whether the wife's income was chargeable to income tax and the wife's ability to rely on the double taxation agreement arose for decision irrespective of the operation of the deeming provision. In *Bricom*, Millett LJ said at page 290 that the case showed that relief from UK tax accorded by a double taxation agreement could enure for the benefit of a third party. We agree but it is relevant to point out that that consequence came about because the relevant statute expressly provided that the only income of the wife which was deemed to be the income of the husband was income of the wife which was chargeable to UK tax. Millett LJ also suggested that *Strathalmond* would support the argument for Bricom Holdings Ltd if the relevant provisions deemed Spinney's income to be the income of the taxpayer. Again, Mr Way relied on that suggestion and submitted that the transfer of assets abroad provisions do deem ABP's income to be the income of the Appellants.

76. Millett LJ derived some assistance from *IRC v Australian Mutual Provident Society* as explained by Lord Radcliffe in *Ostime v Australian Mutual Provident Society*. Millett LJ analysed the first of these cases as involving a charge to tax on a conventional sum calculated in accordance with a formula using an input represented

by certain income. It was said that the charge to tax was not on that income but on the conventional sum.

77. We consider that we must follow *Bricom* when it explains that the answer in any particular case depends on the nature of the relevant statutory process. The wording of Article 11 of the Netherlands double taxation agreement is not the same as the wording of Article 7 of the treaty with Mauritius. In *Bricom,* Millett LJ's reasoning was framed to accommodate the common ground in that case that Article 11 exempted the interest itself and not merely the resident of the Netherlands who received that interest.

78. Applying *Bricom* in the way described above, we reach the conclusion that our provisional view expressed earlier does properly reflect the nature of the statutory process in this case. Article 7 provides, in effect, that ABP is only to be taxed in Mauritius (absent a permanent establishment in the UK). The transfer of assets abroad provisions deem the profits of ABP to be the income of the Appellants and then charge the deemed income of the Appellants to tax. However, those provisions charge the income to tax as income of a miscellaneous character and not as trading profits arising to the Appellants. The Appellants are not relieved against that tax under Article 7 of the Treaty because the UK is not taxing the profits of ABP but is taxing something different, namely, the deemed income of the Appellants. It is nothing to the point that the deemed income of the Appellants is computed by reference to the profits of ABP. It remains the case that the deemed income of the Appellants is not the profits of ABP; and it remains the case that the trading profits of ABP are taxed by Mauritius and not by the UK. The Mauritian tax authorities would have no more cause to complain that the Treaty is not being respected in this case than they would have if the profits of ABP were distributed to UK residents and taxed in their hands. In either case, the UK would be simply seeking to tax its own residents. Applying *Bricom* in this way, we give effect to the policy of the Treaty as described earlier and the Treaty is not used, impermissibly, to obtain double relief or to avoid tax. We would, moreover, observe that, if Mr Way were right in his submissions about the meaning of the Treaty, it would seem to follow that the UK would, in seeking to tax its residents under its anti-avoidance provisions (which Mr Way accepts that the UK undoubtedly does on and after 12 March 2008), be in breach of the Treaty. That is, in our view, a somewhat improbable conclusion.

79. We acknowledge that, as Mr Way submitted, there are sentences in the judgment of Millett LJ in *Bricom* which, taken alone, can be relied upon by the Appellants to suggest that the above reasoning might not apply in a case where the statutory provision purported to tax the Appellants on ABP's trading profits or where the statutory provision deemed the income of ABP to be the income of the Appellants. In response to that submission, we consider that our reasoning is supported by other passages in *Bricom* and the wider considerations to which we have referred. In particular, it seems to us that the discussion of the authorities by Millett LJ was precisely to illustrate the importance of properly analysing the particular statutory provisions relevant to the cases in question. The sentences relied upon must be seen in that context: properly understood, they are simply a brief description by Millett LJ of the cases on which the taxpayer was seeking to rely so as to demonstrate, by reference to the <u>different</u> statutory provisions relevant to *Bricom,* why they were of no assistance to the taxpayer. The cases were not cited by Millett LJ to justify the conclusions which he reached.

80. Accordingly, we find that the FTT were right to reach the conclusion that the Appellants could not rely on Article 7 of the Treaty to escape their liability to tax under section 739 ICTA 1988 and sections 720 and 721 ITA 2007. We therefore dismiss the appeal on the grounds of appeal relating to the Treaty.

81. The above conclusions make it unnecessary to decide the procedural point relied on by HMRC to the effect that the Appellants did not claim relief as they were obliged to do under section 788(3)(a) and (6) ICTA 1988 and are now out of time to do so. However, as the point was fully argued we will give our decision on that point also.

82. We were told that in their self-assessment tax returns, the Appellants did not return the deemed income under section 739 ICTA 1988 or sections 720 and 721 ITA 2007. Therefore, as the deemed income was not returned, no claim for relief was made under 788(3)(a) and (6) in relation to that deemed income. The assessments relied upon by HMRC were discovery assessments so that the time limit for the Appellants to claim relief in response to the discovery assessments is the end of the year of assessment following that in which the discovery assessments were made: see section 43(2) TMA 1970.

83. In response to HMRC's procedural point, Mr Way submitted that Appellants could simply rely on Article 7 to show that they were not chargeable to tax under section 739 ICTA 1988 or sections 720 and 721 ITA 2007 and could appeal the discovery assessments as unfounded on that ground. It was not clear to us whether Mr Way said that he had to bring his case within one of the paragraphs of section 788(3) ICTA apart from paragraph (a) and it was not clear which of the other paragraphs he would seek to rely upon.

84. We have reached the conclusion that Ms Wilson is right that if the Appellants were able to rely on Article 7, then they were required, in their self-assessment tax returns, to return the deemed income in accordance with the transfer of assets abroad provisions and then to claim relief in reliance on Article 7. Such a claim would come within section 788(3)(a) and had to be made by reason of section 788(6) and, further, had to be made within the time limit imposed by section 43 TMA 1970. Further, in response to the discovery assessments which were based on section 739 ICTA 1988 and sections 720 and 721 ITA 2007, the Appellants had to claim relief in reliance on Article 7 pursuant to section 788(3)(a) and (6) within the time limit imposed by section 43(2) TMA 1970. Such a claim would naturally come within the wording of section 788(3)(a). Indeed, it seems to us that it is a paradigm case of a relief. Although this is not in any way decisive, we note that that is how Millett LJ described matters in *Bricom*: see at page 285D-E. The other paragraphs of section 788(3) do not apply to Article 7 of the Treaty in so far as it allows the Appellants to say that they are thereby exempted from the charging provisions in section 739 ICTA 1988 or sections 720 and 721 ITA 2007. The way in which the Appellants seek to rely on Article 7 does not involve them saying that Article 7 charged a person not resident in the UK (paragraph (b)), nor saying that Article 7 determined the income to be attributed to the Appellants (paragraph (c)) nor saying that Article 7 conferred a tax credit on persons not resident in the UK (paragraph (d)).

The overall result

85. The overall result is that we dismiss the appeal against the decision of the FTT.

MR JUSTICE MORGAN
JUDGE ANDREW SCOTT

UPPER TRIBUNAL JUDGES

RELEASE DATE: 10 MARCH 2020