

Isle of Jersey Court creates a new exception to the revenue rule

The principle that the courts of one jurisdiction will not collect the tax of another is a longstanding tenet of law in many legal systems around the world. This so-called "revenue rule" forms part of Jersey law, which has adopted and applied the leading and well-known English case, *Government of India, Ministry of Finance v Taylor*. However, in *Re. Representation of Viberts Executors Limited and Ross Badger*¹ the Jersey Court recently took the opportunity to develop and finesse that principle in a novel fashion.

Facts

The case concerned the worldwide movable and immovable estates of a married, childless couple (defined as "A" and "B" in the redacted judgment) who had retired to Jersey in 2008. A, who was a very wealthy US citizen, died in the summer of 2021. Her husband, B, a UK citizen, died a few weeks after A. Both A and B were domiciled in Jersey at the time of their deaths.

A left a will which appointed the residue of her real and personal property located in the US to the trustees of an *inter vivos* trust which had been settled by A in 1988. In broad terms, that trust was intended to provide for B's benefit during his lifetime but as he had died shortly after A, the trust fund was being held for the benefit of M (a relative of A) and for general charitable purposes. Shortly after A's death a professional trust company services provider, Brown Brothers Harriman Trust Company, N.A. ("BBHTC"), took out a grant of probate with respect to A's US will in Massachusetts and was appointed as the sole trustee of the *inter vivos* trust.

Although there was some evidence which suggested that A made a will dealing with her non-US situs movable property, no signed version of such will was found and ultimately Viberts Executors Limited, the first Representor, applied to the Jersey Court for letters of administration in relation to A's Jersey situs movable estate on the basis of intestacy. Under Jersey's inheritance regime, B inherited all of A's non-US situs property. Importantly, A's non-US estate included the sole ownership of a Jersey holding company which owned a valuable portfolio comprised exclusively of US situs securities.

A was also the sole owner of the matrimonial home, a residential property in Jersey, and title to that property passed to B, A's sole heir at law, immediately on A's death. As B was the sole owner of the matrimonial home at the time of his death a few weeks later, title to that property then passed to B's sole brother, X, under Jersey's intestacy rules. X subsequently renounced his interest in the matrimonial home in favour of his two children, Y and Z.

As regards B's movable estate, he left a will which covered all of his property outside of the US. By that will he left all of that movable property to A, but as she had pre-deceased him, B's movable estate was split between a UK charitable foundation and another eighteen legatees (a mix of family members including M, X, Y & Z, A's former work colleagues, and the couple's friends and acquaintances), a class which came to be known as the "Group of 19". The second Representor, Mr. Badger, the couple's long-time public accountant, took out a grant of probate with respect to B's will in the United Kingdom. Viberts Executors Limited subsequently received a grant of probate from the Jersey Court as Mr. Badger's attorney executor.

US estate tax

Because A was a US citizen at death her entire worldwide estate was subject to US Federal estate taxation at the rate of 40% after the first \$11,700,000. The obligation to pay the estate tax fell on BBHTC as A's personal representative in the US. Although BBHTC only had dominion over A's US situs assets, being concerned to avoid the late payment and interest charges which would otherwise have been incurred, it

¹ *Re. Representation of Viberts Executors Limited and Ross Badger* [2024] JRC 055 ([Representation of Viberts Executors Limited and Anor 07-Mar-2024 \(jerseylaw.ie\)](#)).

made a provisional payment of the estate tax to the US Internal Revenue Service (IRS) in 2022 which was calculated by reference to the total value of A's US estate and A's non-US estate.

Under the law of the Commonwealth of Massachusetts BBHTC had the statutory right to seek an apportionment of liability for the estate tax amongst all of A's estate beneficiaries wheresoever they might reside.² BBHTC therefore asked the Representors to enter into a Memorandum of Understanding (the "MofU") by which the Representors would agree to pay BBHTC a refund of a proportion of US estate liability calculated by reference to the value of A's non-US situs property.

The Representors were inclined to make that payment but, being conscious of the application of the revenue rule, they applied to the Jersey Court for (a) an order that they enter into the MofU and, subject to that order, (b) a direction as how they should pay the refund, i.e. whether it should be borne by A's movable estate, A's immovable estate or some combination of them both. Prior to the hearing the Representors traced and wrote to all but two³ of the members of the Group of 19 to brief them about the proposed settlement and to seek their views on the allocation.

The new exception to the revenue rule

The Jersey Court reviewed the decided cases and concluded that the revenue rule, as well as a small number of limited but longstanding exceptions to that rule, all formed part of Jersey law. It also noted that as the First Representor did not have an express power to pay taxes to a foreign state (whether directly or indirectly), the guiding principle should be whether the proposed settlement was in the interests of the Group of 19.

The Jersey Court went on to consider the affidavit evidence provided by two experienced US legal practitioners.⁴ Those lawyers both agreed that, as a matter of the law of the Commonwealth of Massachusetts, BBHTC had the right to recover a proportion of the US estate tax payment from the Representors and that any attempt by the Representors to resist an application by BBHTC in the US for a contribution based on that right would be "*highly unlikely to succeed.*" Critically, the US lawyers further opined that BBHTC could, if it needed to, immediately enjoin/encumber/freeze all of the US situs securities which formed part of the Jersey holding company's investment portfolio with likely success.

On the basis of this undisputed expert evidence the Jersey Court felt that it could formulate a new exception to the revenue rule in these terms – it would be willing to permit a fiduciary to pay a foreign tax liability provided that a claim to recover the foreign tax exists and could be enforced against the fiduciary's property in the country in which the foreign tax claim would be brought.

The Jersey Court then approved the execution of the MofU by the Representors finding that it was in the best interests of the members of the Group of 19 for the Representors to avoid incurring costs in relation to any potential litigation in the United States.

The apportionment between A's immovable and movable estate

Oddly, there was very little legal authority in Jersey on the way in which a foreign tax liability should be apportioned between a deceased person's immovable and movable estates. The sole authority, a short case

² M.G.L. ch. 190B, Art. III, § 3-916.

³ Two legatees in the Group of 19 were not able to be located.

⁴ Both of whom are also Fellows of ACTEC.

report from 1907,⁵ appeared to suggest that the debts of a deceased person should be paid first from that person's movable estate and only once that had been exhausted should they be funded from that person's immovable estate, but the Jersey Court was reluctant to accept that old style *jugement* as a binding authority.

The Jersey Court was willing however to proceed on the basis that A's movable estate should bear the Representatives' proposed contribution to the US estate tax liability exclusively provided that all of the members of the Group of 19 expressly agreed to that apportionment. It therefore ordered the Representatives (a) to contact the seventeen members of the Group of 19 with whom they were in communication to obtain their express consent and (b) to continue to take all reasonable steps to try to find the remaining two members (albeit that the proposed contribution could still be made if those two members could not ultimately be traced).

Conclusion

This is a pragmatic and commonsense decision which will be welcomed by the trust, estate and private wealth industry. The revenue rule still stands in Jersey but the Jersey Court is now willing to come to the aid of a fiduciary which finds itself facing a tax claim in a foreign jurisdiction if the fiduciary has property in that foreign jurisdiction which could be used to satisfy that claim.

In formulating this new exception, the Jersey Court was keen to stress however that the new exception is strictly limited to the situation where assets of the estate are in the same country where a claim to enforce a foreign tax claim might be made (whether directly or indirectly). The Jersey Court indicated that had all of A's non-US estate been in Jersey then it would have refused the application unless "*some other form of peril to either the personal representatives or the beneficiaries could be established.*"

BBHTC and M were represented by Advocate Keith Dixon of Carey Olsen Jersey LLP, Jersey and Attorney Scott E Squillace of Squillace & Associates, P.C., Boston, Massachusetts.

⁵ *Mitchell et au. v Mousir* (77 Exs. 308)