MAKING SENSE OF SECTION 809L

by Laurent Sykes

Section 809L ITA 2007 contains the guts of the new remittance rules introduced by FA 2008. Those who find the section confusing on first reading may take comfort from the fact that the draftsman also, in places, appears confused.[1] The highly compressed language needs to be unpacked before it can be fully comprehended, and is an example of why, sometimes, more actually *is* more. The aim of this brief note is to do some of this unpacking.

The first step is to recognise that s809L caters for nine different kinds of remittance. This reflects the fact that there are three categories of remittance which are catered for (conditions A and B which operate as one, condition C and condition D - I refer to these below as “category 1”, “category 2” and “category 3”). Further, each of category 1, 2 and 3 applies slightly differently, depending on whether remittance is being tested by reference to property, services or debts. (To summarise the last point crudely, I can remit income or gains if I bring the money, or anything derived from it, into the UK (property), use it outside the UK to pay for a service received here (services) or to pay off a debt outside the UK incurred in relation to either (debts).)

I propose to focus on the three categories as they apply to property. For those wishing to see what the legislation looks like once a pen has been taken to those words of s809L which do not relate to property, please see the Appendix. The section looks a lot simpler once this has been done.

Turning then to the three categories of remittance in s809L (conditions A and B, condition C and condition D) as they apply to property, what do all three categories have in common? They each have three conditions built into them (a) a “derivation” condition i.e. the property must either be, or derive from, the income or gains, (b) a “use or enjoyment” condition – which in all cases involves a “relevant person” (as defined in s809M), and (c) an “ownership” condition. Each condition must be satisfied in order for there to be a remittance. I propose to consider each briefly below in reverse order.

(1) The ownership condition

The ownership condition is best illustrated by way of example.

> Example: Non-Dom gives property representing income taxed on a remittance basis to X who makes a gift of it to Y. Y then brings the property into the UK and allows the Non-Dom or another relevant person to use it there at no cost (but without transferring ownership of the property to the Non-Dom). Is this a remittance?
>
> Assume the two gifts are respected as such. Assume also that neither X nor Y is a “relevant person” in relation to the Non-Dom; for example X could be a trust from which the Non-Dom is excluded from benefit, and Y could be an adult child of Non-Dom. Also assume that Non-Dom is UK

resident throughout and that the transitional rules/permanent exemptions do not apply.

Turning to category 1 (i.e. conditions A and B, in s809L(2) and s809L(3)), what distinguishes it from category 2 and category 3 is that it is capable of applying only where the property brought to, received or used in, the UK is property which belongs to a relevant person at that time[2]. For categories 2 and 3 to apply, by contrast, the opposite in true: the property must belong to someone who is not a relevant person.[3] In the example therefore, there is no category 1 remittance since Y is not a relevant person in relation to the Non-Dom.

Category 2 (i.e. condition C, in s809L(4)) applies to property which belongs to a person who is not a relevant person and to whom the individual (see s809N(2)), i.e. the Non-Dom, has made a gift of money or other property which is or derives from the income or gains. It follows that the second category is only applicable where the person owning the property which is brought to, received or used in the UK received that property (or property from which it derives[4]) from the Non-Dom himself i.e. the individual whose income or gains are in question. Thus, returning to the example, Y has not received any property from Non-Dom so there cannot be a category 2 remittance.

Category 3 (i.e. condition D, in s809L(5)) applies to property brought to, received or used in the UK which belongs to a person who is neither a relevant person nor a gift recipient and where, simplifying slightly, that owner received it as a result of a disposition made by a relevant person to or for the benefit of that owner. Thus, in this respect, category 3 is wider than category 2 – the person whose property is brought to, received or used in, the UK need not have received it from the Non-Dom himself. However the person must still have received it from a relevant person[5].

Thus, to return to the example, if the Non-Dom gives property to X who makes a gift of it to Y, who then brings the property into the UK and allows the Non-Dom or another relevant person to enjoy the property in the UK, a category 3 remittance is avoided given X and Y are not relevant persons (assuming the two gifts are respected i.e. that the gift by Non-Dom is not viewed as being to or for the benefit of Y). So too are categories 1 and 2 for the reasons set out above.

Note by the way that, in relation to pre-6 April income or gains, the transitional rules limit the definition of relevant person to the Non-Dom himself, so one may well be pushed out of category 1 into category 2 or 3 (if not, outside the rules altogether).

(2) The “use or enjoyment” condition

The “use or enjoyment” condition must also be satisfied in order for a remittance to arise.

It appears easier to fail this condition, thereby avoiding a remittance, where one is dealing with a category 2 or a category 3 remittance. These require “enjoyment” by a relevant person (whereas a category 1 remittance does not) and enjoyment does not count if full consideration is given for it. (Enjoyment also does not count if it is virtually to the entire exclusion of all relevant persons, or if enjoyment by relevant persons is in the same way, and on the same terms as the property may be enjoyed by the general public or by a section of the general public.[6])

The ability, when dealing with a category 2 or a category 3 remittance, to avoid a remittance by the relevant person giving full consideration for the enjoyment allows the harshness of the remittance rules to be mitigated to some degree. As an illustration of this point consider the following: absent this let-out, property representing (say) £100 of income would, if used in the UK, be remitted even if the value of the use in the UK was only, say, £1. The ability to avoid a remittance by paying market value consideration for the use is therefore helpful in these circumstances; pay £1 and avoid a remittance of £100. This, on the face of it, only applies to category 2 and category 3 remittances however.

(3) The "derivation" condition

The derivation condition is the final condition. The property must either be, or derive from, the income or gains. Section 809T tells us that where foreign chargeable gains accrue to an individual on the disposal of an asset, and the individual does not receive consideration for the disposal of an amount equal to the market value of the asset, one is to continue to treat the asset as deriving from the chargeable gains (as well as the undervalue proceeds presumably). Suppose the individual does receive market value: the implication is that one must follow the proceeds of sale rather than the asset itself.

However that is about all the guidance that is given. It is not clear here whether the old remittance cases are going to be relevant.

These authorities might be taken to suggest that an amount received can be said to "derive" from an amount of income or gains where: (a) there is some form of "monetary or financial equivalence" between the receipt in the UK and the income or gains whose remittance is in question (*Grimm v Newman*), and what is received in the UK is "derived from the application of the income to achieving the necessary transfer" (*Thomson v Moyse*). The machinery which is used to effect this can be complex and can involve third parties (*Moyse* and *Harmel v Wright*). In order for a sum received in the UK to be derived from income or gains it is not enough (*Timbrell v Lord Aldenham's Executors*, a useful limiting authority – see below) or even a prerequisite (*Moyse*) that both are represented by the same cash. Nevertheless the mechanism employed may well involve the same cash going in and coming out at the other end (*Harmel v Wright*).

The concept of derivation is therefore a wide one. That is on the whole bad news – although it may be useful in arguing that the generous transitional rules apply; for example paragraph 86 Schedule 7 applies where property consisting or deriving from pre-6 April 2008 relevant foreign income has already been brought to, received or used in the UK by or for the benefit of a relevant person (even if this did not count as a taxable remittance at the time).

But the concept of derivation must have limits. Suppose I fund an offshore company in relation to which s13 TCGA 1992 applies through debt. The company invests the funds and eventually realises a capital gain. The problem with capital gains is that the gain and the clean capital cannot be separated by the use of different accounts. But suppose I demand repayment of my loan and remit the proceeds of repayment? Arguably the repayment proceeds cannot plausibly be said to derive from the gain, but rather only from the loan made at the outset – *Timbrell* is helpful here by analogy.[7] If, before the debt is repaid, I assign the benefit of the debt to a third party and the debt is repaid by the company outside the UK, it is perhaps clearer still that there has been no remittance of property deriving from the gain by virtue of my receipt in the UK of the proceeds of assignment.[8]

Other consequences of falling within a particular category

Which category applies, assuming one does apply, has consequences. The difference between category 1 remittances, on the one hand, and category 2 and category 3 remittances, on the other hand, when it comes to the "use or enjoyment" condition has already been discussed. Note also that the mixed fund rules only apply for the purposes of working out whether there has been a category 1 remittance (see s809Q(2)).

Services and debts

The three categories of remittance contained in s809L also apply in similar form to services and debts. There are some slight variations. For instance in relation to services, s809W provides an exemption for services which relate wholly or mainly to property situated outside the UK and where payment is offshore. For some reason this too only applies to category 1 remittances.

A final word

It may not of course be necessary to avoid a remittance within s809L. A tax charge on remittance can be avoided if the remittance takes place when the Non-Dom is non-UK resident (subject to the temporary non-residence rules and assuming we are not dealing with employment income) or if the permanent exemptions or the very generous transitional rules apply. These points (particularly the last of these) can easily be overlooked.

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[1] Take for instance s809L(7). Why does s809L(7)(e) refer to qualifying property when that is not a concept which is relevant to Condition D? What does s809L(7)(f) add to s809L(7)(d)?

[2] Because it must either be property which is the income or gains of the individual (s809L(1) and s809L(3)(a)) or else derive from such income or gains <u>and</u> be the property of the individual (s809L(3)(b)(ii)). Strictly, the ownership condition need not be satisfied where the property "is" the income or gains of the individual – the cash representing the income or gains could be owned by someone other than the Non-Dom in a case where the income or gain has been attributed to the Non-Dom for tax purposes under e.g. s720 ITA 2007 or s13 TCGA 1992.

[3] Strictly, in the case of a gift recipient within category 2, at the time of the gift or, in the case of a qualifying disponee within category 3, at the time when it is dealt with as mentioned in s809L(5). It is assumed throughout that no-one who is not a relevant person at the relevant time becomes one later.

[4] See also s809N(7)(c).

[5] Or, to be more exact, in circumstances where there was a disposition of property deriving from the income or gains by a relevant person to or for the benefit of the owner i.e. a qualifying disposition. To be more exact still, the legislation does not require a qualifying disposition itself but rather an operation

which is effected with reference to a qualifying disposition or with a view to enabling or facilitating a qualifying disposition (a "connected operation"). However, presented in the manner above, it is easier to see the difference with the second category.

[6] S809N(9) and s809O(6).

[7] The case concerned the assignment, by a London firm, of its share of the partnership profits owed to it by an Australian firm. These would have been taxable on remittance. The profits were assigned to a Chilean firm with which the London firm was also involved. The London firm was, in relation to the Chilean firm, both debtor and creditor, on capital and trading account respectively. The debt due from the Australian firm, assigned to the Chilean firm, was set against the amounts owed on capital account by the London firm to the Chilean firm and was then applied by the Chilean firm in satisfying its debt on current account owed to the London firm. In cash terms however there was only one payment, by the Australian firm to the London firm. In the Court of Appeal Lord Greene MR, with whom Morton LJ and Somervell LJ agreed, considered that: "In the course of its journey from Australia back to London [the character of the money] had been entirely changed. It had been changed because it had passed into the ownership of Chile and become an asset belonging to Chile, and, when it came out from the ownership of Chile, it came out for the purpose, not of effecting a transfer from Australia to London of London's share in the Australian profits, but for the purpose of discharging a debt due from Chile to London, a purpose for which it was perfectly open for Chile to use it." Morton LJ and Somervell LJ agreed. Morton LJ emphasised that the Commissioners had found there to be a "real transaction, with a real business effect, by their finding that 'the sums in question were remitted by Chile in part payment of the debt' ".

[8] One also needs to be sure that the loan is not a "relevant debt" so as to avoid a remittance under category 1 as it applies to debts (as opposed to property). However, whilst just about arguable, it seems unlikely that the debt could be so viewed. If the debt was not a relevant debt at the outset (because the money loaned went outside the UK, not to the UK), it seems unlikely that an assignment of the debt for money received in the UK could turn it into one.

APPENDIX

809L Meaning of "remitted to the United Kingdom"

(1) An individual's income is, or chargeable gains are, "remitted to the United Kingdom" if—

(a) conditions A and B are met,

(b) condition C is met, or

(c) condition D is met.

(2) Condition A is that—

(a) money or other property is brought to, or received or used in, the United Kingdom by or for the benefit of a relevant person …

(3) Condition B is that—

(a) the property… is (wholly or in part) the income or chargeable gains,

(b) the property…—

(i) derives (wholly or in part, and directly or indirectly) from the income or chargeable gains, and

(ii) ….is property of … a relevant person,

(4) Condition C is that qualifying property of a gift recipient—

(a) is brought to, or received or used in, the United Kingdom, and is enjoyed by a relevant person…

(5) Condition D is that property of a person other than a relevant person (apart from qualifying property of a gift recipient)—

(a) is brought to, or received or used in, the United Kingdom, and is enjoyed by a relevant person,….

in circumstances where there is a connected operation.

(6) In a case where subsection (4)(a) … or (5)(a) … applies to the importation or use of property, the income or chargeable gains are taken to be remitted at the time the property … is first enjoyed by a relevant person by virtue of that importation or use.

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(10) This section is subject to sections 809V to 809Z6 (property treated as not remitted to the United Kingdom).