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Domicile Enquiries.

The Revenue has recently set up a department to pursue long term residents who claim not to be domiciled in the UK. This has resulted in a sharp increase in the number of enquiries by the revenue on the question of domicile.

This lecture will look at:

- The underlying legal questions.
- How best to deal with enquiries.

The points are connected, as the nature of the legal question has significant ramifications for the scope of the enquiry process and the tactics available.

A: DOMICILE.

1. What is Domicile?

It is a common law legal concept, designed to accommodate the empire builders of the 19th century. It enabled British subjects working abroad for long periods to retain a British identity and an allegiance to Briton, and to be protected by its laws.

It is a concept of private international law different from Residence and Nationality.

2. Why is Domicile important?

A taxpayer's domicile is important for:

- The remittance basis of taxation
- IHT
- Various anti-avoidance rules (eg ToAA)

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It also governs the applicability of English law to various personal matters such as marriage and succession.

3. Deemed Domicile

We now of course also have the deemed domicile rules. The legal test is under section 835BA ITA 2007. This tells us that if a person is tax resident in the UK for 15 of the last 20 years they will be deemed domiciled for the purposes of income tax and capital gains.

So although deemed domicile is beyond the scope of this talk, it is worth noting that:

- An enquiry into deemed domicile is actually an enquiry into residence over the last twenty years, which will for most of that time have already been determined for tax purposes.
- Deemed domicile doesn't replace the concept or test for actual domicile, nor remove the ramifications of being domiciled. So even if your client doesn't meet the deemed domicile test, they may become domiciled anyway.

4. What is the test?

You inherit the domicile of father (if parents married at time of birth, otherwise mother) at the time of your birth.

This is your ***Domicile of Origin.***

There is also a ***Domicile of Dependency*** acquired by minors through their guardians. It is not often relevant to taxpaying adults.

You can loose a domicile of origin and obtain a ***Domicile of Choice*** if:

- You are resident in another country
- You form an intention to reside permanently or indefinitely in that country.

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Firstly, note that residence does not quite equal tax residence here. Tax residence is status that applies to a whole year. In this circumstance the term means something more like home, and there is no minimum period that is required.

But the real nub of the test is the concept of 'an intention to reside permanently or indefinitely'. What does it mean?

There is quite a volume of judicial consideration of the point, but it is perhaps best answered by Buckley LJ in *IRC v Bullock [1976] 3 All ER 353* at 359a:

> *"In my judgment, the true test is whether he intends to make his home in the new country until the end of his days unless and until something happens to make him change his mind."*

This succinct elaboration was approved by the Court of Appeal in 2008 in *Barlow Clowes International v Henwood [2008] EWCA Civ 577* at [10] to [15].

It is a subjective test in one sense. It enquires about the state of a man's (or woman's) mind regarding something which is inherently uncertain – their future.

However it is better seen as an objective fact. As Meggarry J observed in *Re Flynn [1968] 1 All ER 49:* "*the state of a man's mind may be as much a fact as the state of his digestion*". The Court will treat it is as such and aim to determine it objectively.

Conditional intentions are an obvious sticking point. The statement "I will leave the country if…" could probably be finished by anyone. The key issue then, is the nature of the contingency. Compare:

- *Bullock* – in which the taxpayer resided in England for 40 years but hoped to return home to Nova Scotia (to which his wife objected) should he survive her or persuade her to change her mind; this was a sufficient contingency to retain the domicile of origin; to
- *Re Furse [1980] STC 596* – where the taxpayer intended to live in England for the rest of his life except that he would return to America in the event that he were to become physically incapable of taking an active interest in his farm; this was too indefinite and a domicile of choice was acquired.

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The conceptual simplicity of the test should not be confused with one that leads to straightforward results.

- A short-lived intention is enough:
    - if one is resident in a country, one must only have formed the intention to stay at some moment in the past. From that point on the new domicile of choice is adopted until you both (a) form a positive intention not to reside there any more and (b) cease residing.
- There is an element of retrospectivity in that later actions can influence the finding of a previous intent:
    - "in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at the time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight and cogency" (*Re Grove (1888) 40 Ch D 216)*
- One can maintain a domicile despite never knowing the country:
    - In *Grant v Grant 1931 SC 238* three generations lived in India, but still did not acquire domicile there as they always considered England home and imagined that they would retire there.
- It is surprisingly difficult to manipulate, and telling everyone that you intend to do something is not enough.
    - In *Proles v Kohli [2018] EWHC 767 (Ch)* this January the High Court decided (obiter) that intention to reside permanently meant more than intention to die. This must of course be right – or terminally ill people could simply head abroad to die somewhere beneficial for tax purposes – but emphasises how the test is one of substance rather than circumstance, and the courts will look through the immediate facts.

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5. The Relevant evidence

The whole thing hinges on intention. What is relevant to determining this? Everything.

In Re Flynn Megarry J observed:

> *"In one sense there is no end to the evidence that may be adduced; for the whole of a man's life and all that he has said and done, however trivial, may be prayed in aid in determining what his intention was at any given moment of time."*

Crucially, however, he added the following practical observation.

> *"... All that the court can do is to draw inferences from what has been said and done; and* ***in doing this, too much detail may stultify****"*

This may be only a sliver of authority, but the point is a good one and a powerful one for the taxpayer faced with an enquiry.

B: INFORMATION REQUESTS

Whether or not an enquiry is opened formally, HMRC has the power to request information under Schedule 36. If a request for information is refused, they can obtain an order from the Tribunal requiring the taxpayer to deliver it.

6. Circumstances in which information can be requested

HMRC can ask for information or documents from a taxpayer about their affairs under Schedule 36 FA 2008 **if it is reasonably required for the purposes of checking the taxpayer's 'tax position'.**

- 'Tax position' is defined very broadly, including past and future liability to pay any tax.
- It even includes foreign tax if relating to an EU Member State or country with whom there is a tax treaty.

HMRC can only request documents which are within your 'power or possession'.

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This test, which is interpreted in the same was as disclosure in litigation, does not rely on a legal right to the document and pays no account of confidentiality obligations.

The recent decision in *Jiminez*[1] established that the powers are constrained by the jurisdiction of the UK courts. So a foreigner cannot be served with a Schedule 36 request abroad. This decision is being appealed.

7. Old Documents

The only express limit on the age of the information that can be requested is that a notice requesting documents over 6 years old must be given by or with the agreement of an 'authorised officer'. This just means a senior officer with experience, so the only real defences to a request for old documents are:

- That you don't have the document in your "possession or power" anymore; or
- That the request is unreasonable.

Since HMRC can only correct a tax position if they can make an assessment, if a document relates to tax years for which there is no longer a power of assessment then it will normally be unreasonable to request it.

In regard to domicile however, the relevant period under consideration is the entire life of the taxpayer. So the age of the evidence is unlikely to be a defence.

8. Excluded types of information

HMRC cannot request information relating to the conduct of a tax appeal, journalistic material, or 'personal records' (broadly medical records and spiritual/welfare counselling).

They cannot obtain legally privileged information.

[1] *T M Jimenez v the FTT and HMRC [2017] EWHC 2585*

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C: CLOSURE NOTICES

Section 28A of the Taxes Management Act 1970 provides the legal machinery under which HMRC issue closure notices. Subsections (4) to (6) allow the taxpayer to apply for one. The section has recently been amended by section 63 and Schedule 15 of the Finance (No2) Act 2017, which introduced a scheme of partial closure notices to complement the existing closure notices — the latter are now referred to as 'final closure notices' to distinguish them from their new siblings.

These amendments apply to any enquiry in progress on 16 November 2017, when the Act received Royal Assent.

So the relevant authority to apply for and issue a closure notice now reads:

> ***28A Completion of enquiry into personal or trustee return or NRCGT return***
>
> *(1) This section applies in relation to an enquiry under section 9A(1) or 12ZM of this Act …*
>
> ***(2)*** *…*
>
> ***(3)*** *…*
>
> ***(4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a partial or final closure notice within a specified period.***
>
> *(5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).*
>
> ***(6) The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing the partial or final closure notice within a specified period.***

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On an application under subsection (4), therefore, a closure notice must be issued unless not doing so is reasonable, and the burden of proving reasonableness is on the Revenue[2].

9. Reasonableness

A useful summary of the law regarding the test for reasonableness was summarised by Sarah given in *Beneficial House*[3]. It was emphasised that the procedure for making an application for a closure notice is aimed at balancing the wide investigatory powers of the Revenue with protections for the taxpayer against overly protracted delays in the process. Consequently, the test is a broad one which will look at all the facts:

> *"In summary:*
>
> *(1) The procedure is intended as a protection to a taxpayer against enquiries being inappropriately protracted, providing a "reasonable balance" to HMRC's substantial powers to investigate returns … and protecting the taxpayer against undue delay or caution on the part of the officer in closing the enquiry …* ***The Tribunal is required to exercise a value judgment, determining what is reasonable on the facts and circumstances of the particular case ... This involves a balancing exercise.***
>
> *(2)* ***The reasonable grounds that HMRC must show must take account of proportionality and the burden on the taxpayer*** *….*
>
> *(3) The period required to close an enquiry will vary with the circumstances and complexity of the case and the length of the enquiry: complex tax affairs and large amounts of tax at risk are likely to extend an enquiry, but* ***the longer the enquiry the greater the burden on HMRC to show reasonable grounds as to why a time for closure should not be specified*** *…* ***It may be appropriate to order a closure notice without full facts being available if HMRC have unreasonably protracted the enquiry****…*

[2] *Frosh and others v Revenue and Customs Commissioners [2017] UKUT 320 (TCC)* at [58]
[3] *[2017] UKFTT 801 (TC)* at [15]

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(4) *A closure notice may be appropriate even if the officer has not pursued to the end every line of enquiry.* ***What is required is that the enquiry has been conducted to a point where it is reasonable for the officer to make an "informed judgment" of the matter*** …

(5) ***If it is clear that further facts are or are likely to be available or HMRC has only just received requested documents and may well have further questions, then a closure notice may not be appropriate***… *The Tribunal should guard against an inappropriate shifting of matters that should be determined by HMRC during the enquiry stage to case management by the Tribunal. However, the position will turn on the facts and circumstances of each case".* [Emphasis added and references removed]

D: STRATEGY

The only protection for the taxpayer in an enquiry is the ability to resist a Schedule 36 information request or apply for a closure notice. Both depend on the reasonableness of the enquiry. In reality, the two tests are the same and should be considered together.

It is therefore advantageous to position oneself as the reasonable party. The Revenue and their requests will look much more reasonable if you are being difficult or look like you have something to hide.

On the contrary, providing good answers to the questions asked, in full, on time, is likely to make you appear the good taxpayer deserving of decent treatment.

When in this position the only substantial question is when enough is enough and an application for a closure notice should be applied for.

In answering this question, as well as in responding to the revenue during the enquiry, the following are some points to bear in mind:

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10. Burden of proof

The burden of proof falls on the person alleging a change of domicile. However not too much reliance should be placed on this – the standard is the civil standard of the balance of probabilities and the Tribunal will normally make up its own mind about domicile on the available evidence.

It can be relevant however when the Revenue is enquiring into matters that are long passed, such as the domicile of a taxpayer's father (to show a different domicile of origin of the taxpayer). In this circumstance the scarcity of evidence can present problems for the Revenue.

11. Co-operation.

It is worth cooperating with the requests for information at all times. Non-cooperation naturally appears unreasonable and suspicious.

However information requests will often ask for corroborating evidence such as financial records and contracts. When and how to resist these is a question of tact, the substance of the information, and the cost of obtaining it, but answers should be given if possible.

On the other had such requests are often no more than a fishing expedition and, particularly with financial records, raise a serious risk of the enquiry spilling over into another area such remittance calculations. So a tough line should sometimes be taken.

12. Meetings

The revenue will often suggest a face to face meeting.

The benefits of a meeting are that you look reasonable and ready to come to the table. However, particularly in the later stages of an enquiry there is a danger that their unstructured nature means the questions expand into other areas.

One other aspect of a meeting is that it gives the Revenue the opportunity to get a sense of how the taxpayer will appear if cross-examined in the Tribunal on the question of their intention. This could go either way, depending on the character of the individual.

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13. Privilege

Properly asserting privilege should not be seen as being uncooperative. It is a substantial right.

However *Conegate Limited v HMRC [2018] TC06340* highlights the difficulties of asserting privilege on a selective basis where the taxpayer has to explain the motivation behind their affairs. Where privilege is waived to prove a point, all other privileged material relevant to that point will also need to be disclosed. In the context of a question as broad as domicile this could be significant. So care is needed.

14. Previous HMRC decisions

The fact that HMRC has already appeared to accept a party's domicile for a period does not bind them if they are investigating tax in a different year (*Gulliver v HMRC [2017] UKFTT 222*).

15. Partial closure notices

The Revenue may argue at the last minute that the enquiry should be continued to investigate a new issue, such as domicile of origin instead of the acquisition of a domicile of choice. Partial closure notices can be a powerful tool to counter this.

When applying for a final closure notice it is therefore effective to apply in the alternative for a partial closure notice on the issue that central to the dispute. Whilst not the preferred result, a partial notice will at least relegate the discussion to the issues on which the Revenue are probably weakest and thereby encourage them to move on.

16. Summary

Ultimately, there is only one card to play: seeing if the Tribunal will agree that the request is unreasonable and order that a closure notice be issued. Increasing the likelihood of that outcome should be born in mind at all times during an enquiry.