Tax Representation

TAXREP 33/09

THE NEW TECHNICAL GUIDANCE ON DOMICILE

Representations submitted on 8 June 2009 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to guidance published on 31 March 2009

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THE NEW TECHNICAL GUIDANCE ON DOMICILE

INTRODUCTION

1. We welcome the opportunity to comment on the new technical guidance on domicile published on 31 March 2009 at http://www.hmrc.gov.uk/cnr/domicile-tier2.pdf. It is understood that in due course this will from part of the new 'Residence, Domicile and Remittances' manual.

2. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in Annex 1. Our Ten Tenets for a Better Tax System by which we benchmark proposals to change the tax system are summarised at Annex 2.

3. Unless otherwise stated section references and the extracts below refer to the section numbers used in the draft technical guidance on domicile.

KEY POINTS SUMMARY

4. Revenue & Customs Brief 17/09 announced that '*Form DOM 1 is being withdrawn completely. It will be replaced by the new comprehensive domicile guidance....that will allow the vast majority of people to self assess their own domicile status.*'

5. Whilst there is some guidance on domicile within the 'Residence, Domicile and the Remittance Basis' guidance (HMRC6), this could not be referred to as comprehensive. Accordingly, it would appear to us that the intention is that the technical guidance we are commenting on herein is to be used by HMRC staff and by the public. It should, therefore be accessible to and written with a view to assisting taxpayers (whose background is such that their domicile status is not obvious) to determine their domicile status.

6. The technical guidance on domicile is of a far higher quality than the domicile section in the 'Residence, Domicile and the Remittance Basis' guidance (HMRC6). To an extent it could be said to be provide a reasonable overview of the law in this complex area. However, we have some serious concerns both with respect to its even handedness and whether it is fit for the dual purpose role it appears to have been given. We are particularly concerned that some sections appear to question the honesty of taxpayers and suggest that their submissions should be ignored.

7. It appears to us that the guidance is very much written for HMRC employees. Too much weight is given to setting down why a long term UK resident with a foreign domicile of origin may have acquired a UK domicile of choice and insufficient weight given to the adhesiveness of a domicile of origin. Given the volume of case law on this issue, this is a serious shortcoming.

8. In reading the guidance we feel that it was written with UK residents in mind and without considering that comments with respect to shedding a foreign domicile of origin and acquiring a UK domicile of choice will be seen by individuals who have

a UK domicile of origin and wish to acquire a foreign domicile of choice as being of relevance to their situation. The guidance could give these individuals the impression that shedding a domicile of origin is easier to do than in reality it is (see Re Clore (No 2)[1984]STC 609 and Gaines-Cooper [2007] EWHC 2617 (Ch)).

9. We are concerned (particularly given there is no reference in the guidance to any case law) that inexperienced HMRC staff may from reading the guidance not appreciate the general law concept of domicile with the nuances and the importance of looking at the actual detailed facts in a given situation rather than gathering some facts and then making assumptions which may not be warranted. The best and most concise exposition of domicile is the chapter within 'Dicey & Morris: The Conflict of Laws' and we would suggest that reference is made to this work in the guidance and all HMRC staff opining on domicile read this balanced work.

10. In addition to our concerns with respect to the bias expressed throughout the guidance, we consider that the guidance will be too academic for most unrepresented taxpayers to understand. We would suggest that specialist legal terms are not used because such terms are likely to confuse non-specialist HMRC staff as well as laymen and laywomen.

11. We would also highlight the fact that the guidance should be accessible and useful to individuals whose first language is not English. Accordingly, there is a need to be very precise in the terms used. References to making the UK your 'permanent home' and even staying here for an 'indefinite period' can be misinterpreted. An employee may come to the UK for work and intend to stay here until they can find a commensurate job opportunity in the territory where they have their domicile of origin. In their mind because they feel they will stay in the UK for at least five years they may answer 'yes' if asked whether their permanent home is in the UK and because they do not know when exactly they will leave, they could also answer 'yes' if asked whether they intend to remain in the UK for an indefinite period of time. However, if they were asked whether they intend to remain in the UK for an unlimited period (meaning they never intend to leave) their answer would be a resounding 'no'.

REVENUE & CUSTOMS BRIEF 17/09
(precursor to the detailed domicile guidance)

12. We are concerned with the comments within Revenue & Customs Brief 17/09 with respect to acquiring a UK domicile of choice:

'Where an individual has already submitted a form DOM 1 or P86 and obtained an initial view from HMRC about their domicile status it will be unusual for us to open an enquiry into domicile status in the few years after that, unless new information becomes available that indicates our initial view was incorrect or there has been a change in circumstances. However with the passage of time, circumstances and intentions change and so that initial view from HMRC can become less and less useful as an indicator of domicile status. For example if an individual had advised HMRC on their arrival in England a decade or so ago that they planned to leave the UK after five years but had since married, had a family and decided to make England their permanent home then they will have adopted a domicile of choice within the UK.'

13. The issue here, as in many places within the technical guidance on domicile, is that the term 'permanent home' does not to most people mean the place where one intends to stay for an unlimited time. In the example above, the individual's plans may have changed upon marriage but it might be that they still intend to leave the UK and that this intention is sufficiently real that they retain the foreign domicile of origin.

14. We are concerned about statements suggesting it is easier to lose one's domicile of origin than is in fact the case. Our concern is not only that foreign domiciliaries may be given the incorrect impression that they have acquired a UK domicile of choice. We are equally concerned that individuals who have a UK domicile of origin, but have left the UK, may read this and believe that losing their UK domicile of origin is easier than is in fact the case. As stated in paragraph 8 above case law illustrates how difficult it is to lose one's domicile of origin.

15. We agree that where the facts have changed, HMRC is not prevented from enquiring into an individual's domicile status and, just because there has been a prior domicile ruling or HMRC has not challenged an individual's domicile in past years, does not mean it cannot make enquiries where a tax year is open. We are, however, concerned by the Revenue & Customs Brief 17/09 comment *'Where a claim to the remittance basis is not challenged for that year it does not mean HMRC necessarily accepts the individual's domicile is outside the UK and does not prevent HMRC from later opening an enquiry to consider the domicile status of the individual in relation to that, or any earlier year.'*

16. It appears to us that there is an inference that HMRC can re-open closed years. This is unhelpful as it will worry taxpayers by suggesting that they do not have any closure with respect to their tax affairs. If this is was is meant, it would also be a change from the prevailing practice that said that a change made as a result of the enquiry would be applied from 6 April following the year the enquiry is closed (unless there was an event the magnitude of which meant that a change could be said to have taken place on that date). We would appreciate confirmation that there is no question of re-opening closed years and that the prevailing practice prior to Revenue & Customs Brief 17/09 will still be followed.

DETAILED COMMENTS ON THE REVISED GUIDANCE DATED 1 MAY 2007

Section 41000

17. The third bullet appears to suggest that domicile is not relevant to the apportionment of capital gains to shareholders in non-resident companies after 5 April 2008. This is a half truth. Domicile may not be directly relevant to the actual apportionment but if the gains are on foreign situs assets being a remittance basis user is relevant to the tax assessment and only a foreign domiciliary is entitled to the remittance basis with respect to foreign chargeable gains.

Section 41540

18. We consider that it would be helpful to explain that in the cases of individuals who on death are domiciled in Italy, France, India or Pakistan the deemed domicile provisions do not apply to transfers on death as a result of specific provisions in the Estate, Inheritance and Gift Agreements which override the deemed domicile legislation. This clarification aside, we welcome the clear statement here that HMRC accepts that the effect of the Estate Duty treaties with India, Pakistan, France and Italy is to disapply the deemed domiciled '17 out of 20 rule' to the advantage of the tax payers' beneficiaries in appropriate cases.

Section 42010 and later text

19. The use of the term 'municipal law', whilst entirely correct, does not add to the clarity of the text and could be confusing for a layman or laywoman using the guidance. We accept that the term is defined but since later references are not cross referenced to the definition, we believe that there is scope for confusion and that the meaning of this section could be conveyed without using this term. It would be simpler to say that the term relates to a territory which has its own state law as opposed to its national law.

Section 42130

20. This section does not assist in defining the domicile concept. It is confusing to refer to 'the municipal laws of other territories' at section 42010, and then to write about 'the legal system adopted by a community living within a defined territory'.

Section 42300

21. We suggest that a final sentence is inserted: 'In the context of UK law it means something different from residence, nationality or the country of your birth.'

Sections 42310- 42320

22. These sections came over as being unduly academic in tone, and completely irrelevant in this context.

Section 43600

23. While it is correct to state that the burden of proof, which is the balance of probabilities, is on the person asserting a change of domicile, the text is misleading. It should be stating that it is generally held to be more difficult for someone successfully to assert the acquisition of a new domicile of choice to replace a domicile of origin and least difficult to assert the acquisition of a new domicile of choice to replace a domicile of dependence.

Section 44100

24. HMRC Brief 17/09 makes it clear that this guidance is intended to assist individual taxpayers to assess their domicile status so they can complete their self-assessment returns. Accordingly, the guidance should be written at a level that the unrepresented can understand. We are not sure how many would understand what 'legal capacity' means. The term should be defined, especially

as later on (at section 49320) it states that if an HMRC employee has doubts about an individual's mental capacity, he or she should raise this with the individual's representative at an early stage.

Section 47100

25. In previous sections the term 'legal capacity' has been used, whereas here the term 'capacity' is used. We suggest that one term only should be used so there is consistency of approach and no danger that it might be thought that something different is meant as there are two terms.

Section 47500 to 47550

26. This section needs to be broken down to explain clearly the difference between illegitimate children, legitimate children and legitimated children and the different domicile rules that apply.

Section 47560

27. We are concerned by this statement because if the child was adopted, their domicile of origin would change. Realistically a child who is orphaned is quite likely to be adopted so this point should be included.

Sections 47900- 47910

28. The heading to these two sections is 'Individuals with insufficient mental capacity'. Presumably you meant to refer to individuals who lack sufficient legal capacity?

Section 48120

29. We would agree that it is harder to prove the acquisition of a domicile of choice where the previous domicile is a domicile of origin but where one is moving from one domicile of choice to another, we would not agree with the statement that it is easier to prove the loss of a domicile of choice than its acquisition.

Section 48250

30. There seems to be an inference that statements of intention can be readily disregarded because they may carry little weight. While in some exceptional cases that might be true, it would be an incorrect inference in all cases and is not supported by case law.

31. The second paragraph is worded badly, and would seem to suggest that taxpayers' statements can be routinely disregarded. This is a wholly inappropriate inference. We would suggest a more neutral form of wording such as:

    'As with all evidence, it is necessary to assess the validity of any statement of intention in an objective way as well as the veracity of the witness concerned.'

Section 48260

32. This guidance should be a neutral document to assist the reader in their understanding of domicile. It should not reflect bias against the taxpayer and cast aspersions on the honesty of taxpayers. As such this section should be deleted.

Section 48270

33. The meaning of this section appears to be that a declaration of domicile should be disregarded unless there is evidence that the declarant understood the relevant law. This is wrong. A correct statement would be to say that a statement can be disregarded ***but only*** where the person declaring it was entirely ignorant as to what the statement meant. As it stands the section appears to invite HMRC staff to take the view that to place any weight on an individual's declaration of domicile they need evidence that the person making a declaration of domicile is an expert on the relevant legal implications. This is not the case, and any inference that it is, could unfairly penalise taxpayers who lack formal education.

Section 48280

34. We are not sure that this section adds to the reader's understanding of the concept of domicile. The point that domicile is a question of fact appears to us to have already been made and we are at a loss as to what this section adds. We would suggest that this section is deleted.

Section 48300

35. We have no issues with the points set down in this section other than to say that it would be helpful here to draw on case law to illustrate the points (the two key cases being IRC v Bullock 51 TC 522 and Furse v IRC [1980] STC 596).

Section 48350

36. We agree entirely that every domicile case has to be decided on its facts. We do, however, believe that to assist the lay reader the examples should not just deal with situations where the individual's intentions are such that a domicile of choice is required. We accept that a refugee might decide to remain indefinitely in a new country but equally the refugee might intend to return to the territory where they have their domicile of origin as soon as regime change makes it safe for them to do so. To provide a balanced picture both possibilities should be set down.

Section 49040

37. We do not have an issue with the comment that 'HMRC will challenge cases where the facts appear to have been selected to fit the arguments rather than the arguments having been developed from a careful and objective review of the facts'. We would, however, point out that HMRC, when challenging an individual's domicile, should not select the facts to fit the argument. Given this guidance is in part to inform HMRC staff we believe this point should be made. In the fullness of time a domicile challenge is likely to be the subject of an internal review and we would hope that the reviewer will bear this maxim in mind when reviewing the case.

Section 49050

38. The following is unfortunate: 'In the vast majority of cases the facts speak for themselves and there is no need to develop an argument based on the principles'. We do not understand this statement or see how one can opine on a question of domicile without having reference to the principles. One can only understand the concept of domicile through the legal principles. The principles supply the framework within which one analyses the facts. Even in the simplest case where the answer is obvious, one applies the principles.

39. We do not see that the current wording does anything apart from confuse and so we consider that this section should be deleted.

Section 49100

40. This section should be revised as the current wording could mislead. Domicile is not a tax concept. Rather it is a concept of general law (being of significant importance in succession and family law) that is used by our tax system. Ignoring the deemed domicile concept, an individual cannot as a matter of law have a different domicile for tax purposes to their domicile for other purposes.

Section 49230

41. This suggested approach is unhelpful, and runs contrary to the way that the subsequent case histories are analysed and in our opinion the section should be deleted. In our experience it is of fundamental importance to first determine the domicile of origin and then decide if this has lapsed and been replaced by a domicile of choice.

Section 49470

42. This section should be rewritten as it is misrepresents the position. It deals with the case where someone remains in a country but has an intention to leave in the event of some future event and suggests that the contingency of 'giving up business' might be sufficiently vague to lead to the conclusion that the individual has acquired a domicile of choice here.

43. The issue is dealt with in Dicey, Morris & Collins 'The Conflict of Laws' 2006 edition where it is stated:

    'The fact that a person contemplates that he might move is not decisive: thus a person who intends to reside in a country indefinitely may be domiciled there although he envisages the possibility of returning one day to his native country. If he has in mind the possibility of such a return should a particular contingency occur, the possibility will be ignored if the contingency is vague and indefinite, for example making a fortune or suffering some ill-defined deterioration in health; but if it is a clearly foreseen and reasonably anticipated contingency, for example the termination of employment, or the offer of an attractive post in the country of origin, succession to entailed property, a change in relative levels of taxation between two countries, or the death of one's spouse it may prevent the acquisition of a domicile of choice.'

44. This commentary is based on the decisions in IRC v Bullock 51 TC 522 and Furse v IRC [1980] STC 596. The text should be revised to make the distinction clear so that a taxpayer has accurate information and is not deterred from making a legitimate domicile claim.

Section 49600

45. The word 'iterative' is used. It is doubtful if all of the people who read this guidance will understand the term especially if English is not their first language. We suggest that the word 'repetitive' is used instead.

46. We object to the following text:

'There is an understandable tendency for an individual to emphasise the evidence that supports his or her arguments and to place stress upon, or even to ignore, the evidence that does not do so.'

47. The text implies that taxpayers cannot be trusted. This is an unacceptable message to be giving HMRC staff and the section should be deleted. Such statements do not have any place in what should be balanced and even-handed guidance. We would also point out that whilst the statement may be true of a small minority of taxpayers the same could be said for the conduct of some HMRC staff when challenging a domicile claim.

Section 49610

48. This section sets out a daunting list of information of evidence that might be required. The taxpayer has a right to privacy and should have to provide no more evidence than is relevant to their case. Our concern is that this list could be used as a matter of routine by HMRC staff whether the information is relevant to the specific case or not. We accept that some of the information set out would be required. However, a significant amount of the information listed is highly personal and the taxpayer should not be asked to provide such personal information unless it can be shown to be necessary to the specific domicile enquiry.

49. We particularly take issue with the notion that it will always be necessary to provide details of religious connections and the degree of religious observation. We also do not see how a summary of professional personal advisers (including their location and the work they carry out for the taxpayer) is relevant to a domicile enquiry.

50. The detailed information with respect to personal relationships seems excessive, unduly intrusive and unrealistic. It is common for married couples to forget each other's dates of birth and expecting someone to remember the date of birth of someone they may have lived with a while ago is not realistic.

Section 49620

51. This deals with types of documentary evidence. Again we are very concerned that undue emphasis will be placed on the collation of evidence rather than dealing with the claim itself and whether the information is necessary. While we can understand the relevance of some items on the list much will be highly

personal and not be relevant in many cases. In our experience personal financial records will not generally be of relevance to a domicile enquiry. We are at a total loss as to how someone's old school records, reports and examination certificates could be necessary (we also feel that it is highly unlikely that school records and reports will have been retained).

52. We would assume that where individuals have come to the UK as refugees there will be a lessening of the evidentiary burden in recognition of the fact that they are unlikely to have been able to bring with them detailed documentation. This should be confirmed in the guidance.

Sections 49700 to 49890

53. As well as referencing the examples to the technical explanation it would be helpful to readers to give references in the technical explanation to the specific example dealing with the point.

54. While some of the examples are unquestionably useful (such as sections 49730 and 49750) and illustrate some key principles of domicile, as a general comment we feel that some examples contain additional unnecessary information. Our concern is that this additional information confuses rather than clarifies the principles being illustrated as the factors commented on are not in themselves determinative of the domicile status of the individual

Section 49710

55. There should be a statement that emphasises that B has not acquired a domicile of choice in England because of his intention to retire in Ireland. There should be a final statement that for the purposes of UK taxation, only the decision of an English Court would be relevant.

Section 49720

56. The place where an individual was born and raised is not necessarily also their domicile of origin. This point needs to be made clear. In simple terms stating that D is legitimate and that his father had a Northern Irish domicile at the time of his birth would clarify the point.

57. On the example D could well have become domiciled in France. It seems to be suggesting that the fact that he made business trips elsewhere than France would have prevented him acquiring a domicile of choice in France which is clearly wrong.

58. It needs to be emphasised that it is the UK Courts determination that matters and that if a UK Court determined than D was UK domiciled on his death then the executors would have to appeal to a higher court or accept this.

Section 49740

59. The reference to F's marriage is worded as if the reader was told about this earlier in the text. We do not think this is the case and would suggest minor re-wording here.

Section 49760

60. We are unclear as to why it is relevant that H's family has lived in France for several generations? Surely it is the domicile of the Father that matters, assuming that H was born at a time his parents were married.

Section 49770

61. We would suggest breaking the example up to provide the pertinent facts and analysis for each stages in J's life where the facts point to a change in her domicile. Redundant details should be omitted.

Section 49800

62. To assist readers we suggest that after the references to 25 September 1991 there is a brief explanation of why this date is important (that is it is the date the Age of Legal Capacity (Scotland) Act came into force and under the act is the date that individuals born between 25 September 1973 and 24 September 1975 acquired legal capacity).

63. Why is it necessary to speculate as to what a Singapore Court might or might not determine?

Section 49860

64. We consider that this section gives the wrong impression. Facts have to be placed into their correct context. Marriage to a UK domiciliary is not a sign that a UK domicile of choice has been acquired. There is no reason why the UK domiciled individual might not have agreed to leave the UK with the foreign domiciliary and that they are only remaining in the UK until some clear and reasonably foreseeable contingent event takes place.

Section 49890

65. We are told that Z was born and brought up in Poland. But we do not know the domicile of his relevant parent (not taking adoption into account this would be his natural father if he were born in wedlock and his mother if not). The facts given are not sufficient to be sure that he has a Polish domicile of origin. As this example is not seeking to illustrate any principle with respect to discerning an individual's domicile of origin, we would suggest that it is just stated that he has a Polish domicile of origin without suggesting that Poland is his domicile of origin because he was born and brought up there.

66. We are not told enough about the intentions of Z's elder brother to be sure that he has acquired a UK domicile of choice. Just because his wife is British (without a Polish background) and he does not intend to return to Poland at the same time as his brother does not mean he intends to stay in the UK for an unlimited period. He may only be staying in the UK because his wife does not want to live in Poland and intends to return to Poland to be with his family should he outlive his wife or persuade her to change her mind. In short the facts could be very similar to IRC v Bullock 51 TC 522.

67. In the case of Z's younger brother the facts are such that it is obvious that Z has not acquired a UK domicile of choice. However, there is an implication that if he had married a British citizen who did not have a Polish background that this would change things (the example goes into a great deal of detail about the wife's background). As set down when commenting on the case of the elder brother we are of the opinion that it is Z's intentions that matter. Marrying a British citizen who does not have a non British background does not mean that an individual has decided to stay in the UK for an unlimited period of time.

APPENDIX 1

WHO WE ARE

1. The Institute of Chartered Accountants in England & Wales is a professional body representing some 128,000 members. The Institute operates under a Royal Charter with an obligation to act in the public interest. It is regulated by the Department of Trade and Industry through the Accountancy Foundation. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy (which includes taxation).

2. The Tax Faculty is the centre for excellence and an authoritative voice for the Institute on taxation matters. It is responsible for tax representations on behalf of the Institute as a whole and it also provides services to more than 11,000 Faculty members who pay an additional subscription.

3. Further information is available on the ICAEW website, www.icaew.co.uk.

APPENDIX 2

THE TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.

2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.

3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.

4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.

5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.

6. **Constant:** Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.

7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.

8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.

10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as **TAXGUIDE 4/99**