

Update on Domicile and UK Taxation

Introduction

In this note, the author comments on events in the UK Parliament and at the Commission that have highlighted the perceived unfairness of the availability of the remittance basis for UK non-domiciliaries. He also considers new material from Her Majesty's Revenue and Customs (HMRC) on how domicile outside the United Kingdom should be established and the remittance basis claimed.¹

Perceived Unfairness of the Remittance Basis

Pressure in the UK Parliament on new Chancellor of the Exchequer, Alistair Darling,² and his Treasury team has focused attention on the conflict between what is perceived to be the unfairness of allowing individuals not domiciled in the United Kingdom to pay UK tax on non-UK income and chargeable gains only if remitted there and the economic benefits to the United Kingdom of attracting such persons to do business there.³

Whilst admitting that the 2003 Review⁴ has made no changes to the residence and domicile rules,⁵ the Financial Secretary to the Treasury, Jane Kennedy, has confirmed that it is ongoing under the management of two officials from the Treasury with the part-time support of others from the Treasury and HMRC.⁶ She has also pointed out that, though it is not possible to ascertain the amount of the unremitted non-UK income and gains of individuals resident but not domiciled in the United Kingdom that *escapes* UK tax,⁷ those individuals did *pay* tax of approximately GBP 3.3 billion on income of GBP 9.8 billion in the tax year 2004/05.⁸

Ms Kennedy has also confirmed that 112,000 individuals indicated on their 2004/05 self-assessment tax returns that they were not domiciled in the United Kingdom,⁹ an increase of 74% compared to 2002.¹⁰ This position appears to have angered her Labour Party Parliamentary colleague, Jim Cousins, who has stated,¹¹ "it is absolutely certain" that the cross-party Commons Treasury Select Committee on which he sits "will look at tax domicile. ... We can't run the tax economy of this country as a large-scale version of the Chelsea Football Club".¹²

So what, if anything, is likely to result? In his first interview as Chancellor,¹³ Darling said "I am very aware that there are a number of people who are doing business here, and are contributing to business here, and could go somewhere else". He subsequently confirmed¹⁴ that "he would not commit to reforming or scrapping the rules" until "a Treasury review of the regime was completed" and that "any changes will be done in the context of the Budget and Pre-Budget Report". Accordingly, Chancellor Darling may say something when he presents his first such Report this month, earlier in the year than usual,¹⁵ if the 2003 Review¹⁶ has been completed.

The Commission has, interestingly, served a formal notice¹⁷ on the UK government asking for information regarding the United Kingdom's remittance basis of taxation that the Commission considers to be discriminatory as far as Ireland is concerned. This is because the UK taxes the income of UK non-domiciliaries arising in Ireland, regardless of whether or not that income is remitted to the United Kingdom.¹⁸ The Commission has already asked Ireland¹⁹ to apply the remittance basis to income²⁰ arising in the United Kingdom to individuals not domiciled in Ireland.²¹

The perceived unfairness is that Ireland and the United Kingdom each treat income²² arising in the other country less favourably than other foreign income by *not* allowing the remittance basis. This is considered to be contrary to the EC Treaty²³ and the European Economic Area (EEA) Agreement²⁴ in that it restricts the free movement of capital.²⁵ Commissioner Laszlo Kovacs' remark that the Commission is not, nevertheless, advocating the remittance basis "as it may lead to double non-

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1. The note follows the author's article in the October Issue of *European Taxation*, Douglas Roxburgh, "Domicile and the Remittance Basis in UK Taxation", 46 *European Taxation* 10 (2006), pp. 496-503.
2. Appointed on 28 June 2007 following his predecessor's (Gordon Brown) elevation to Prime Minister.
3. See Roxburgh, note 1, pp. 496-497 for a summary of the position up to and including the April 2003 background paper "Reviewing the residence and domicile rules as they affect the taxation of individuals". That paper initiated the current review of the residence and domicile rules. The Review has yet to report let alone move to formal consultation.
4. *Id.*
5. House of Commons Written Answer, 26 July 2007.
6. House of Commons Written Answer, 24 July 2007.
7. House of Commons Written Answer, 26 July 2007.
8. *Id.*
9. House of Commons Written Answer, 5 July 2007.
10. Presumably based on the figure of 65,000 at 2.14 of the April 2003 Review (see note 3).
11. *Times*, 13 July 2007, p. 49.
12. Owned by Roman Abramovich, who is understood to be domiciled in Russia.
13. *Financial Times*, 3 July 2007.
14. *Accountancy Age*, 19 July 2007, pp. 1 and 3.
15. October 2007 (*Times*, 13 July 2007, p. 26).
16. See note 3.
17. Case reference 2007/2003.
18. Sec. 831(5) Income Tax (Trading and Other Income) Act 2005. See Roxburgh, note 1, 4.1.3., p. 499.
19. Case reference 2005/4950.
20. Specifically, interest on a UK bank account but, presumably, all UK-source income and gains. The United Kingdom *does* apply the remittance basis to Irish-source gains.
21. The Commission has yet to make any announcements on what action it proposes to take on these two cases.
22. And gains in the United Kingdom by Ireland. (See note 20.)
23. Art. 56 EC Treaty.
24. Art. 40 EEA Agreement.
25. European Commission Press Release, IP/07/445, 30 March 2007.

taxation²⁶ does not, however, recognize the limitation of relief articles, which appear in over one half of the United Kingdom's tax treaties with the other Member States. Such an article cancels tax relief in the state of source on unremitted income arising there.²⁷

Establishing a Non-UK Domicile

There is no provision in the relevant UK tax statutes for non-UK domicile to be established if no income or gains arise to which domicile status is relevant for tax purposes. HMRC, in fact, makes it clear that they will not consider the position if domicile has no immediate relevance to an individual's tax liability²⁸ and that no claim can then be made. HMRC's use of the term "claim" here is technically incorrect, as an actual claim is only required in this context for relevant foreign income arising to a non-UK domiciliary to be taxed on the remittance basis²⁹ once non-domicile has been established. Gains and chargeable overseas earnings arising to non-UK domiciliaries are automatically taxed on the remittance basis.

The questions to be answered where non-UK domicile is to be established have been changed for 2006/07³⁰ as part of a rewrite of the non-residence and non-domicile pages³¹ of the tax return form. An individual is now merely asked whether or not this is the first year for which non-UK domicile has been claimed³² and, if so, HMRC is then likely to enquire into the position within the enquiry period allowed for the particular return under the self-assessment provisions.³³

There are now, however, three further questions to be answered,³⁴ these being to confirm when any domicile of origin in the United Kingdom changed, whether or not the individual was born in the United Kingdom but has never been domiciled there, and when they came to live in the United Kingdom if not born there. These questions are likely to be relevant not for UK income tax and capital gains tax, but, rather, for the deemed domicile provisions regarding UK inheritance tax.³⁵ In particular, though the answers to the first two questions may classify the individual as not domiciled in the United Kingdom under the general law, they must usually also not have been domiciled there within three years of the time relevant for the particular inheritance tax charge, nor resident³⁶ there in not less than 17 of the 20 tax years ending with the tax year in which that relevant time falls.³⁷

Claiming Remittance Basis

As stated previously, the application of the remittance basis to the relevant foreign income³⁸ of a non-UK

domiciliary must be claimed³⁹ and the rules governing claims,⁴⁰ therefore, apply. Specifically, the claim must be made in a return⁴¹ and HMRC has confirmed⁴² that this requirement is satisfied if the non-residence supplementary pages⁴³ and F2 of the foreign pages of the tax return are completed. If there have been no remittances, the claim can be made by an entry in the additional information box at 6.39 on F5 to prevent assessment of the income to UK tax on the arising basis.

HMRC has also confirmed that, where no UK tax return is issued because there is no income arising within the United Kingdom, there is no need to notify chargeability of the relevant foreign income provided a claim for the remittance basis could be made and there have been no remittances.⁴⁴ This, however, assumes that HMRC accepts that the individual is not domiciled in the United Kingdom on enquiring into their affairs. It may, therefore, benefit an individual to notify chargeability to establish the position and it appears that there is no reason why this cannot be done.⁴⁵ It can, however, be beneficial *not* to claim the remittance basis where there are relevant foreign income losses, though the relief available for those losses may be limited.⁴⁶

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26. Id.
 27. Roxburgh, note 1, 6., p. 502.
 28. Q9 and 9.5 (NR1) of the 2006/07 tax return form.
 29. See note 39.
 30. Year ended 5 April 2007.
 31. NR1 and 2.
 32. NR2, 9.23.
 33. Roxburgh, note 1, 3., p. 498 explains the procedure but subject to the simplification of the initial questions asked for 2006/07 onwards.
 34. NR2, 9.24, 9.25 and 9.26.
 35. Sec. 267 Inheritance Act 1984 (IHTA).
 36. Under the rules for Income Tax (Sec. 267(4) IHTA).
 37. Sec. 267(1) IHTA.
 38. Basically, income other than overseas earnings. See Roxburgh, note 1, 4.1.3., p. 499.
 39. Sec. 831(1) Income and Corporation Taxes Act 1988.
 40. Sec. 42 Taxes Management Act 1970 (TMA).
 41. Sec. 42(2) TMA.
 42. This and the other confirmations regarding relevant foreign income remittance basis claims were made in a statement issued by the UK Chartered Institute of Taxation on 4 June 2007 and agreed by HMRC.
 43. NR1 and 2.
 44. On the basis that HMRC will not be alleging negligence or fraud (Sec. 36 of the TMA), it will, in any event, still be possible to make a claim as the time limit for this (Sec. 43 of the TMA) is the same as that for assessing the income (Sec. 34 of the TMA), which is five years and ten months from the end of the tax year concerned.
 45. Sec. 7(7) TMA. As the income could become liable to tax if no remittance basis claim were made.
 46. Roxburgh, note 1, 5.3., p. 501 explains the position.