Careful consideration

Personal tax

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Andrew Titchener looks at the new deemed domicile rules and their interaction with domicile under general law

Key Points

What is the issue?

The new deemed domicile rules from 6 April 2017 and their interaction with domicile under general law.

What does it mean to me?

This interaction gives rise to opportunities, but also creates risks to be managed, for an individual's tax position.

What can I take away?

Clients should be keeping regular check on their domicile position both statutory and at general law, and advisers should be alive to the interaction between the two regimes and the results this can produce.

In the article 'Regular Review' (*Tax Adviser*, December 2018), I briefly considered the concept of domicile, noting two recent cases (*U v J [2017] EWHC 449 (Fam) and Proles v Kohli* [2018] EWHC 767 Ch) that surprised many in the legal and accounting professions. These and similar cases, along with HMRC's dogmatic approach to domicile enquiries continue to make domicile a hot topic.

But does domicile matter now for those who from 6 April 2017 find themselves falling within the new long term deemed domicile rules, i.e. individuals who have resided in the UK for 15 out of the past 20 tax years?

One obvious area is the protections afforded to non-UK resident trusts will be lost if the settlor acquires a UK domicile of choice. However, there are other areas also impacted as illustrated below.

- Matching of trust stockpiled gains under the FA 2008 transitional rules
- 2017 capital gains tax rebasing
- Pre 1974 Estate Treaty planning (for example the Indian/UK Estate Agreement)
- Ceasing UK tax residency with the potential to return to the UK after six years

Matching of trust stockpiled gains under paragraph 126, Schedule 7 FA 2008

Paragraph 40, Schedule 8, F(No2)A 2017 provides that the advantageous tax treatment conferred in paragraph 126, Schedule 7 FA 2008 continues after 5 April

2017. These provisions ensure that capital gains arising before April 2008 do not give rise to a capital gains tax liability if matched to a payment to an individual who is non-UK domiciled under general law (even if UK deemed domiciled for tax purposes unless the individual was born in the United Kingdom with a UK domicile of origin). In addition, it ensures gains arising after April 2008 on assets owned before April 2008 only give rise to a liability to capital gains tax on the element of the gain that relates to the period after April 2008. This seems sensible given that the original intention was that non-doms should only be subject to capital gains tax on gains accruing from 6 April 2008.

Capital gains tax rebasing

The provisions in paragraphs 41 and 42, Schedule 8, F(No 2)A 2017 seek to ensure that for individuals becoming long term deemed doms as of 6 April 2017, only foreign gains accruing on or after this date are taxable in the UK, effectively rebasing qualifying assets to their market value on 5 April 2017.

There are various conditions which need to be met but relevant to this article is that the taxpayer must be non-UK domiciled under general law for all tax years up to and including the tax year of disposal.

This is not a permanent relief, so consideration should be given to whether the rebasing relief can be captured whilst all the conditions are met, especially the requirement to be non-UK domiciled under general law.

Pre-1974 Estate Agreements

A long term deemed dom is subject to UK inheritance tax on worldwide assets (subject to treaty relief). There are still a few pre-1974 Estate Agreements that can provide favourable outcomes for individuals that are non-UK domiciled under general law, even if UK deemed domiciled for tax purposes. For example, the UK/Indian Estate Agreement provides that UK inheritance tax will not be imposed on the death of an individual who was not domiciled in the UK at the time of death (but was domiciled in India), in respect of property that is situated outside of the UK, provided such property does not pass under a disposition or devolution regulated under UK law. With careful structuring such individuals can still arrange their affairs to take advantage of such Estate Agreements but it is important that they continue to be non-UK domiciled under general law.

Becoming non-UK tax resident in the future

If an individual leaves the UK and ceases to be UK tax resident, they may be able to return to the UK after six years and start the 15 year period again which brings many planning opportunities for income tax, capital gains tax and inheritance tax providing the individual continues to be non-UK domiciled under general law. Care will be needed with the interaction of the rebasing provisions noted above and planning may need to be undertaken before leaving the UK to protect this relief.

Acquiring a UK domicile of choice

So, for many longterm deemed doms, whilst they may be UK domiciled for tax purposes, continuing to evidence that they have not acquired a UK domicile of choice under general law will still be important.

It has been said that the acquisition of a domicile of choice is regarded as a serious matter not to be lightly inferred from slight indications or casual words (see *Re Fuld's Estate (No 3)* [1968] p67 at 684). *Dicey Conflict of Laws, 15th edition* summarises when a domicile of choice can be acquired in Rule 10: 'every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence but not otherwise.'

Note that both residence and intention are necessary.

The quality and length of residence is relevant in considering whether an individual has ever obtained the intention of permanent or indefinite residence in England. Length of residence can be important as evidence of intention rather than conclusive in itself of an acquisition of a domicile of choice.

It is not enough for someone with a foreign domicile of origin to have a residence in England, the intention must be to reside in England for an unlimited period before such a person can acquire a domicile of choice here.

Determining someone's intention is very difficult as all pieces of evidence have to be weighed up and different facts are given different weight in the cases (see *Re Flynn* [2968] 1 All ER 49 at para 51).

But what does intention to remain here permanently or indefinitely mean?

‘Indefinitely’ does not mean that the individual forms a domicile of choice if he does not know when he will leave the new country. It does not matter that the length of the individual’s stay in the new country has not been precisely determined but as the Court of Appeal in *Henwood v Barlow Clowes* [2008] EWCA Civ 577 noted (paras 10 and 14), the new country must be the place where he intends to end his days. That said, and particularly in cases of lengthy residence in one country, there must be more than a vague possibility of leaving the UK.

In *Holiday v Musa* [2010] EWCA Civ 335 the Court of Appeal noted that length of stay in the UK could be a strong starting point in demonstrating the acquisition of a domicile of choice particularly if he had his family here and did not have his home elsewhere. The fact that in Holiday the deceased contemplated he might leave was held not to prevent him having acquired a domicile of choice in England as it was too vague an intention.

The need for a definite contingency on which someone realistically will leave the country where they have resided for a lengthy period is confirmed in IRC v Bullock [1976] STC 409 where the taxpayer who was Canadian had come to England in 1932 to serve in the RAF and had married an English lady in 1947. He had lived in England for 40 years and HMRC claimed that he had acquired an English domicile of choice. His wife did not want to move to Canada but the evidence was that the taxpayer would go back there if she predeceased him. He therefore still retained his Canadian domicile of origin. He had no children, he read newspapers from Canada every week, his wife owned the house in the UK, he retained a house in Canada and he never voted in the UK. However, the critical point was that the contingency on which he resolved to leave was not doubtful or indefinite and there was a sufficiently substantial possibility of it happening. Therefore, Bullock retained his foreign domicile of origin.

In *Proles v Kohli* [2018] EWHC 767 Ch the deceased had stated that he was domiciled in the UK; his business, social and personal connections (particularly a personal relationship and a young baby) were all centred in the UK. There was no obvious event on which he would leave the UK.

Thus, the key point emerging from the cases is that an individual needs a definite intention to leave, especially after a long period of residence and to show in what circumstances they will leave. They need to carry through on their intentions and if they do not do so, there must be a good reason why not and one that is compatible

with their current intentions (e.g. a fundamental change in circumstance such as serious and unexpected ill health that prevents him leaving).

Finally, as noted in ‘Regular Review’, the time limit for assessment for issues involving ‘offshore matters’ may soon be extended to 12 years (as I write, the relevant Bill is still being debated after the extension having been challenged in the House of Lords). Carefully considering and evidencing domicile therefore becomes even more important along with non-doms carrying out their stated intentions otherwise there is a significant risk that HMRC could argue that the individual acquired a UK domicile of choice much earlier than anticipated with potential tax exposures for those earlier years.