

DOMICILE AND TAX: A POCKET REMINDER

By Harry Winter

Introduction

This article aims to provide a brief crib to domicile, deemed domicile, and domicile under inheritance tax (“IHT”) double tax treaties.

Common Law Domicile

There are three types of Common Law Domicile: a domicile of origin, a domicile of choice, and a domicile of dependency. An individual may only have one at a time. The place of domicile is a legal jurisdiction not a country; hence, in a federal state, one has a jurisdiction in New Jersey rather than the USA (*Re Fuld’s Estate* (No 3) [1968] P 675). Companies are domiciled where they are registered and no more is said here about companies (*Gasque v IRC* (1940) 23 TC 210).

A domicile of origin is the default domicile: if domicile of choice or dependency cease, domicile of origin reasserts itself (*Henwood v Barlow Clowes International Ltd* [2008] EWCA Civ 577). A legitimate child born during his father’s life has his domicile of origin where his father was domiciled at the date of that child’s birth; If illegitimate, the same applies but using the mother (*Udny v Udny* (1869) L.R. 1 Sc. & Div. 441). A foundling has his domicile of origin where he is found (*Re McKenzie* (1951) 51 S.R.N.S.W. 293). Tom Jones can relax!

Domicile of choice is acquired by both residence and intention. Residence here means physical presence as an inhabitant, i.e. more than being a mere traveller (*IRC v Duchess of Portland* [1982] Ch 314). Illegality of physical presence is no bar (*Mark v Mark* [2005] UKHL 42). Intention here means the intention to reside permanently or for an unlimited time (*Udny v Udny*);

residence without any intention of leaving it, i.e. indefinite residence, is enough (*Bell v Bell* [1922] 2 I.R. 152). If the intention is to leave should a contingency occur, the more likely the contingency the less likely there is to be the required intention (Dicey 6-040).

Domicile of choice is lost when both the residence and intention required for its acquisition are abandoned (*Udny v Udny*). When this occurs, either another domicile of choice is acquired, or the domicile of origin revives.

Domicile of dependency is generally the same as, and changes with, the domicile of person on whom the dependency falls. Since the Domicile and Matrimonial Proceedings Act 1973, dependent persons are unmarried children under sixteen and those with mental disorders. Unmarried children are generally dependent on their father, except (broadly) where the child is illegitimate or the child lives with his mother and not his father: see section 4 of the aforementioned Act. Prior to that Act, married women were viewed as dependent on their husbands.

Deemed Domicile

There are different deemed domicile regimes for IHT on the one hand and Income Tax (“IT”)/Capital Gains Tax (“CGT”) on the other. These override the Common Law position.

For IT and CGT, deemed domicile is governed by s.835BA ITA 2007. An individual is deemed domiciled in the UK in two sets of circumstances. First, he was born in the UK with a domicile of origin in the UK, and is UK tax-resident for the relevant tax year. Second, he has been UK tax-resident for at least 15 of the last 20 tax years. There is a carve-out from this latter scenario where he is not tax-resident for the relevant tax year and he has not been UK-resident in any tax year after 2016-17.

For IHT, there are four circumstances in which an individual be deemed domiciled in the UK. Three are governed by

s.267(1) IHTA 1984. First, he has been domiciled in the UK within the last three years. These are calendar years (HMRC Manual IHTM13024). Second, he was born in the UK with a domicile of origin in the UK, is UK tax-resident in the relevant tax year, and was tax-resident in the UK for at least one of the two tax years immediately proceeding the relevant tax year. Third, he was tax-resident in the UK for at least fifteen of the twenty tax years immediately preceding the relevant tax year and for at least one of the four tax years ending with the relevant tax year. Note that these rules were slightly changed with effect from 2017-18. The fourth circumstance is governed by s.267ZA IHTA 1984. This is an election to be deemed domiciled, which may be made in two cases. First, where at any time on or after 6 April 2013 and during the period of 7 years ending with the date on which the election is made, the individual had a spouse or civil partner who was domiciled in the UK. Second (broadly), where an individual's spouse or civil partner has died and at any time on or after 6 April 2013 and during the period of 7 years ending with the date of death that spouse or civil partner was UK domiciled.

Domicile under IHT Double Tax Treaties

The rules around domicile in the various IHT double tax treaties ("DTT") of the UK are too various to go into in detail. Suffice to say that they must always be considered when looking at IHT: they can override not merely Common Law domicile but also deemed domicile. The override of deemed domicile is particularly important because where deemed domicile is relevant an individual will have a domicile elsewhere. In short: always check when the client may be domiciled in any of the ten countries where there is a IHT DTT. Those with France, India, Italy, and Pakistan only apply to IHT charges on death, but those with Ireland, the Netherlands, South Africa, Sweden, Switzerland, and the USA can apply to lifetime transfers too.