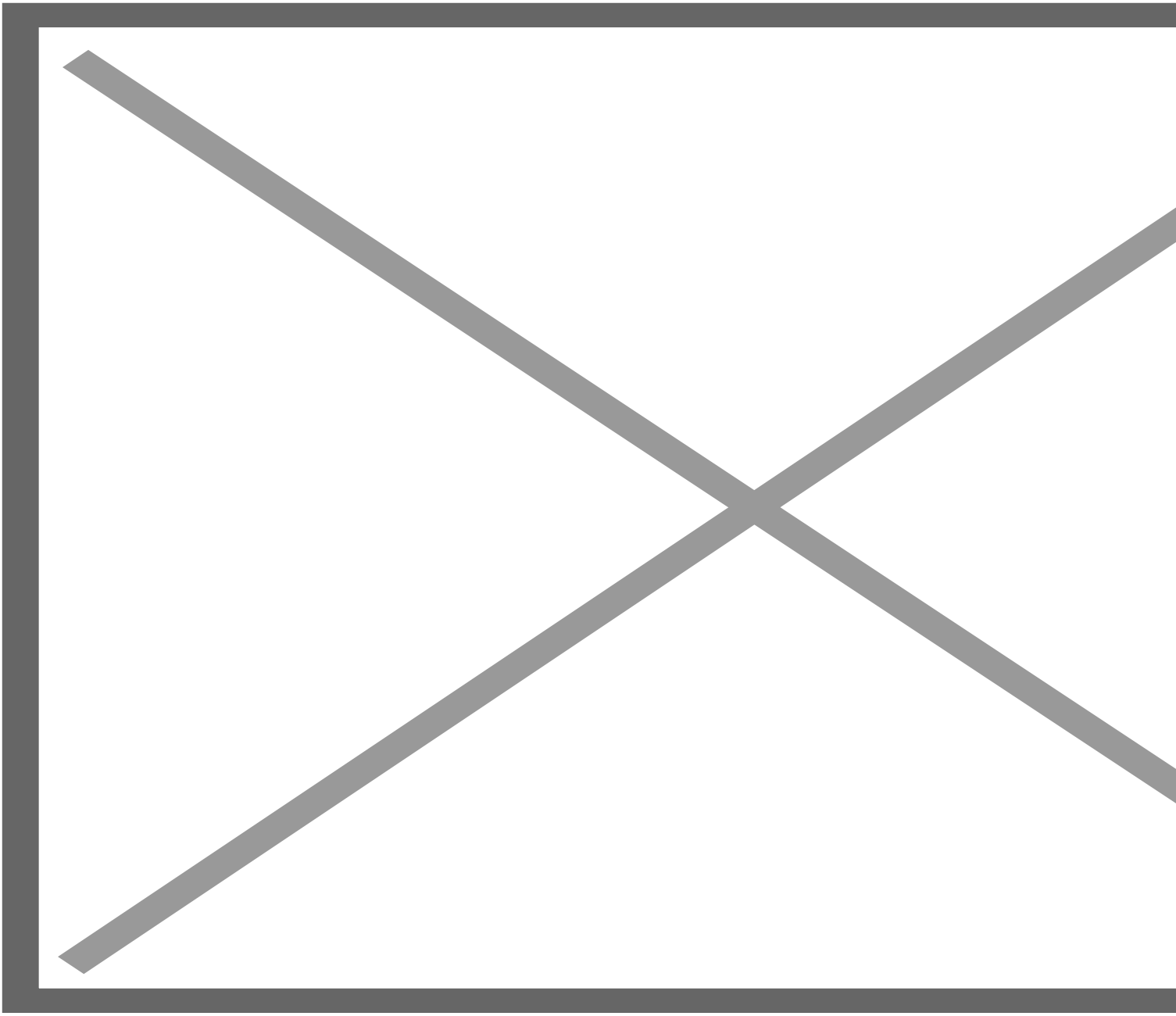
Regular review

International Tax | Personal tax



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Andrew Titchener provides an overview of the practical issues faced by high net worth individuals, families and entrepreneurs regarding domicile

Key Points

What is the issue?

The law of domicile is subject to much uncertainty.

What does it mean to me?

A domicile of choice may be acquired more easily than previously thought.

What can I take away?

Individuals should keep their status under regular review.

Domicile: a difficult question

The law of domicile is not tax law at all – but as most practitioners will be aware, an individual's domicile can have wide-ranging consequences for their tax position. Recent changes have brought these issues into sharper relief. Many individuals will not have reviewed their domicile position for some time and may not see the need to do so. But why is it important?

What is domicile?

Domicile is a concept of private international law. The UK legal position is summarised in *Conflict of Laws, 15th edition* (Dicey, Morris & Collins). As evidenced by its appearance in a book about the conflict of laws, it is a concept designed to assist in deciding when the courts of a particular jurisdiction have the right to hear an action. Whilst the effects of domicile may vary across different areas of law, the basic concepts for deciding domicile remain the same.

To draw on Dicey again briefly, there are three types of domicile:

1. Domicile of origin; inherited from one's father (or if born outside of marriage, one's mother) at birth.
2. Domicile of dependence; taken from father or mother (depending on the circumstances), until one reaches the age of 16. The domicile of dependence changes with the father's/mother's domicile during this period.
3. Domicile of choice; where one (at age 16 or over) has freely chosen to settle in a new jurisdiction permanently or indefinitely

It has been widely considered that a domicile of origin is difficult to 'shake off' and indeed, it is the default domicile when 2 or 3 do not apply. As we will see below, however, acquiring a domicile of choice in the UK for those whose domicile of origin is overseas is not perhaps as difficult as practitioners may expect. Note that in this article, 'UK' means a domicile in any one of the constituent countries of the UK.

The case law touching upon domicile of choice is substantial, and this is not the place for a full literature review. However it should be noted that many of the core principles deriving from the most oft-cited cases draw towards the same conclusion – as again summarised neatly in *Dicey* (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.'

Any confusion surrounding the permanence of this intention will affect whether a new domicile of choice has been acquired or not. Thus, if the intention to leave one's current jurisdiction is vague, for example if a contingency exists whereby the individual will leave (say) the UK and there is sufficient doubt that such a contingency will arise (e.g. 'when I win the lottery'), this will lend credence to the idea that a domicile of choice in the residence jurisdiction has in fact been acquired – because there is not a sufficiently realistic scenario in which the individual will leave the country.

Note however, the burden of proof is on the person asserting the change (*Winans v Attorney-General* [1904] A.C. 287) and the standard of proof is the usual civil standard of 'balance of probabilities'.

Practical issues with this definition

Thus, to acquire a domicile of choice, one must both actually reside in the chosen country at some point in time and must intend to reside there permanently or for an unlimited time (temporary breaks of actual residence do not count against this). Note that the intention of permanent residence need not exist on arrival in the chosen country – it could be formed later. The duration of actual residence (other than as evidence of intention) is not considered generally important – it could be one day (assuming an intention to reside rather than just travel through) or 100 years.

In a globalised world, people have family, friends and finances spread widely geographically and, very likely, the locations of these will have changed over time. Many people to whom domicile matters will be internationally mobile, perhaps having work or other interests in many countries and perhaps with homes in more than one country. Thus, intention becomes difficult to assess – 'cogent and clear evidence' is required (*U v J* [2017] EWHC 449 (Fam)), which may not always be available, given the timescales on which these matters often operate.

HMRC may, of course, challenge an individual's domicile, on the basis that they have acquired a UK domicile of choice. How does one approach this? The law in this area is very fact-sensitive, due to the subjectivity of intention as regards permanent residence. A brief review of some of the cases in this area shows that the courts will look at family ties, finances, location of friends, career choices, quality of residence (e.g. was it just a 'holiday'?), location and ownership of houses, length of residence, acquisition of citizenship in the new country, languages spoken, places where medical treatment was received and even 'warmth of feeling' for the new country, amongst many other factors. This fact sensitivity is well illustrated by the numerous pages of facts recited in *Gaines-Cooper v HMRC* [2008] EWCA Civ 1502; covering 67 years from 1937–2004.

This is all necessary to determine whether the intention to permanently reside in a country existed at all, and if it did, or does, when did it come into being? The timelines are crucial. The court must look back at the 'whole of the deceased's life' (or life so far in respect of the living) (*Agulian v Cyganik* [2006] EWCA Civ 129), because 'there is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration' (*U v J* [2017] EWHC 449 (Fam) citing *Drevon v Drevon* (1864) 34 L.J. Ch 129).

In short, everything an individual does and says can be evidence of their intention (or not), to reside in a country permanently. HMRC (or, say, a party to a family case) will often wish to assert that a domicile of choice in the UK has been acquired (ignoring for the moment the specific statutory rules on deemed-domicile for tax purposes). Because it is HMRC asserting a change of domicile, the burden of proof is on HMRC. However, the quality of the individual's evidence remains vital – it may still be viewed with scepticism, even 'caution' if it is unclear, and/or they have a vested interest in asserting no change (e.g. *Holliday v Musa* [2010] EWCA Civ 335). Of course in practice this is a problematic area – unless clients have been meticulous record keepers for a long time, they may not have all the evidence to hand, or recollections may be vague.

Finally, it bears recalling that intentions form and change over time; all of these considerations will be constantly changing for most people as they grow older, their children grow up, their business interests change etc. Perhaps they previously had strong evidence of an intention to move (say) back to their domicile of origin, but in fact this intention has become more remote as the years have gone by. A vague or doubtful contingency to leave the jurisdiction of residence may help to affirm the acquisition of a domicile of choice there (e.g. *Inland Revenue Commissioner v Bullock* [1976] STC 409).

Practicalities

It is perhaps much easier than, prima facie, it appears, to acquire a domicile of choice in the UK. Additionally, consider that a person's intentions can (and probably will) vary over time, then the initially simple statement of the law of domicile is suddenly exposed as being full of complexity. It should also be noted that recent case law (for example *U v J* as above) has shown the UK courts more willing to find that a UK domicile of choice has been acquired in circumstances that might surprise practitioners. Meticulous record-keeping is vital but often overlooked.

It therefore goes without saying that individuals should keep their domicile status under regular review, in particular if they have a significant life event, but also more generally to sense-check their position, keep their records up-to-date and take account of any development of the case law. Additionally, specifically for tax, the statutory 'deemed-domicile' rules must always be considered, although of course this is a much clearer test.

Many readers will be aware that only non-domiciled individuals can claim the remittance basis of taxation. In 2017, rules were introduced such that many individuals who are non-domiciled under general law, may now be deemed-domiciled for UK tax purposes. Allied to this change are the twin opportunities of 'cleansing mixed funds' (until 5 April 2019) and rebasing offshore chargeable assets for capital gains tax purposes to 5 April 2017 market values. Given the impact of becoming deemed-domiciled will mean a loss of the remittance basis and worldwide income and gains becoming subject to tax; this is important to consider.
Further, as noted in the article '*HMRC gets more time*' by Helen Adams and Dawn Register (*Tax Adviser*, October 2018), the time limits for assessment for issues involving 'offshore matters' and 'offshore transfers' are soon to be extended to 12 years even where a taxpayer took reasonable care – many previously non-domiciled individuals may have significant offshore assets. The tax and interest exposure resulting from successful HMRC domicile enquiries could be huge in many cases.

More generally, it is clear that HMRC are querying claims for non-domiciled status in ever more detail and with more scepticism.

Our experience guiding clients through these enquiries is that they require detailed evidence for, often, very personal aspects of the client's lives. When these facts have to be reconstructed from the person's memory it is especially challenging. Combine this with the nuances of the domicile law and the turning tide in recently reported cases and it shows how vital it is that clients are discussing these issues in advance with an expert.