The acquisition of domicile of choice: HMRC's changing approach

Inheritance tax and trusts | Personal tax

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The First-tier Tribunal's decision on the acquisition of domicile of choice in the case of *Shah* illustrates HMRC's changing approach in these matters.

Key Points

What is the issue?

The case of *Shah v HMRC* is relevant to individuals wishing to benefit from a UK estate treaty with, for example, India or Pakistan, which overrides the UK's deemed domicile provisions.

What does it mean to me?

The courts are increasingly applying a multi-factorial approach in such cases, and critically looking at the evidence available.

What can I take away?

Any individual relying on their domicile status should be made aware of the current focus of HMRC in pursuing domicile enquiries and have their status reviewed thoroughly.

There has been another success for HMRC at the First-tier Tax Tribunal in relation to a taxpayer's domicile status (*Shah v HMRC* [2023] UK FTT 539 (TC)).

Whilst parallels can be drawn with other recent domicile 'wins' for HMRC at the First-tier Tribunal, this case is particularly interesting as it is a case relevant to individuals wishing to benefit from a UK estate treaty with, for example, India or Pakistan, which overrides the UK's deemed domicile provisions.

Case overview

The case concerned an appeal against an inheritance tax assessment raised by HMRC in relation to the estate of Mr Anantrai Shah. The salient facts, which were not under dispute, were as follows.

Mr Shah was born in 1929 in Karachi (part of British India at the time). Between 1929 and 1954, Mr Shah moved between Karachi and Tanzania for education purposes and to live with family who had moved to Tanzania. In 1954, at the age of 25, Mr Shah moved to Sunderland in the UK to study pharmacy. After graduating in 1957, he moved back to Tanzania.

Mr Shah married in 1960 in Mumbai, India. Mr Shah continued to live in Tanzania with his wife and they had two children. In 1961, Mr Shah acquired UK citizenship following an offer made to him when Tanzania became independent from the UK. Mr Shah was required to give up his Indian citizenship as a result of this.

In 1972, Mr Shah with his wife and children moved from Tanzania to Mumbai, India and obtained a job with ICI. Around a year later, Mr Shah moved to the UK and his family followed suit a few months later.

Mr Shah worked as a pharmacist from 1973 and owned the freehold of a shop related to the pharmacy business. After selling the business in 1994, he worked as a locum pharmacist before retiring completely in 1997.

Mr Shah's daughter and wife died in 2010 and 2011 respectively. Mr Shah died in the UK in 2016, aged 87 years old. Mr Shah's executors claimed that the taxpayer had not acquired a domicile in choice in the UK as he had always intended to return to India. HMRC's task, being the party asserting the change in domicile, was to prove its case based on the balance of probabilities.

Mr Shah's son, as executor for his father, contended that Mr Shah had originally left India because he was unable to find secure employment there and that he had always intended to return to India at the end of his working life. Such a return was delayed by the deaths of his daughter and wife, and his own poor health. The return was then further delayed pending completion of his grandson's education in the UK. Overseas citizenship from India was acquired in 2014, and Mr Shah sent gifts to family members in India and remained in contact with them.

The decision of the tribunal

Taking all of the evidence into account across the course of Mr Shah's life, the tribunal concluded that he had settled and intended to remain in England permanently, such that he had acquired a domicile of choice in England and had not abandoned that domicile of choice before his death. Mr Shah's intention of moving to India was described as a 'vague and floating idea'.

In arriving at this decision, the following facts were taken into account:

- Mr Shah had no significant connections to India. He had only visited India twice for a total period of three weeks in a period of over 43 years. Such visits were related to family events.
- Mr Shah had no bank account in India or any assets or investments in India – consistent with somebody who might be planning to retire there.
- Whilst Mr Shah's deceased wife may have had closer connections to India, such connections could not be attributed to her husband.
- Although a DOM1 form had been completed, it had not been submitted to HMRC at the time and the tribunal found it unreliable and inconsistent with the evidence available.
- Despite potential trigger points at which Mr Shah could have left the UK (e.g. retirement, following the death of his wife, the sale of the family home), Mr Shah remained in the UK.
- Mr Shah's close attachment to his family in the UK was noted and the court considered it unrealistic for somebody of his age and health to relocate from a place where he was regularly visited by family living close by to a place which he had never visited before (i.e. Bangalore).
- The structuring of Mr Shah's investments into a non-UK company in 2014 was contended to be a move for inheritance tax purposes, rather than preparation for a move to India.

The 'multi-factorial' approach

It is clear from reviewing the judgments from the recent domicile cases of *Henkes v HMRC* [2020] UKFTT 159 (TC) and *Coller v HMRC* [2023] UKFTT 212 (TC) that the courts are increasingly applying a multi-factorial approach. This means that the court is arriving at its decision following consideration of a wide range of factors and critically looking at the evidence available.

This could be regarded as an unorthodox approach for the courts to take. After all, it is well known that a UK resident individual who does not have the necessary intention to remain in the UK permanently or indefinitely will not acquire a domicile of choice here. Furthermore, where an individual has not yet made up their mind about where they wish to retire to, the domicile of origin adheres.

Strictly, the retention of a foreign domicile is not seen as dependent on establishing a positive intention to return to the country of their origin. Similarly, the collating of evidence pointing to such a return, whilst potentially helpful, is not absolute to the test.

However, a taxpayer would be foolish to rely on such a strict interpretation, given the recent tribunal decisions finding in HMRC's favour. Such decisions have specifically highlighted the lack of ties with the country of origin as a key deciding factor.

If there is a third jurisdiction, in circumstances where the taxpayer doesn't intend to return to the country of origin, the links to that country should be strong and multi-faceted. Correspondingly, if the connections the taxpayer has to the UK are significant, their lack of connections to any other jurisdiction can affect the oft-quoted 'adhesive' nature of the domicile of origin.

What should taxpayers do?

The retention of a non-UK domicile of origin under common law is essential, not least for substantiating any claim for the remittance basis. This also applies in cases where deemed domicile status has been acquired and:

- the individual wants to rely on the provisions of an estate treaty between the UK and another country (such as India or Pakistan) which overrule the UK's deemed domicile rules;
- the individual wishes to benefit from the capital gains tax rebasing provisions if selling a foreign asset that was held when they became deemed UK domiciled on 6 April 2017; or
- the individual has settled a 'protected settlement' which attracts significant tax benefits and which can be lost in the event the settlor becomes UK domiciled.

Whilst the judgment in *Shah v HMRC* may be considered an easy 'win' for HMRC, its confidence in challenging domicile status will only increase following the outcomes in *Henkes* and *Coller*.

Domicile enquiries are unlike most other tax enquiries in that they involve extensive personal questions with the request for supporting evidence. Protracted correspondence can be exchanged between the taxpayer (or their adviser) and HMRC spanning several years. Furthermore, the financial and emotional cost of pursuing a domicile dispute at the First-tier Tribunal is not for the faint-hearted, given that one's life will be mapped out in the public arena.

Having a tax adviser who is familiar with dealing with domicile enquiries is key, because responding appropriately to what may seem an innocuous line of questioning requires in-depth knowledge of the relevant case law.

Any individual relying on their domicile status should be made aware of the current focus of HMRC in pursuing domicile enquiries and have their status reviewed thoroughly. As part of this review, contemporaneous evidence and any domicile opinions should be retained on file in the event of an HMRC enquiry.

Domicile enquiries which have become protracted or have reached an impasse with HMRC may require a different strategic approach, including the instructing of tax counsel or consideration of alternative dispute resolution.