Gulliver's travails

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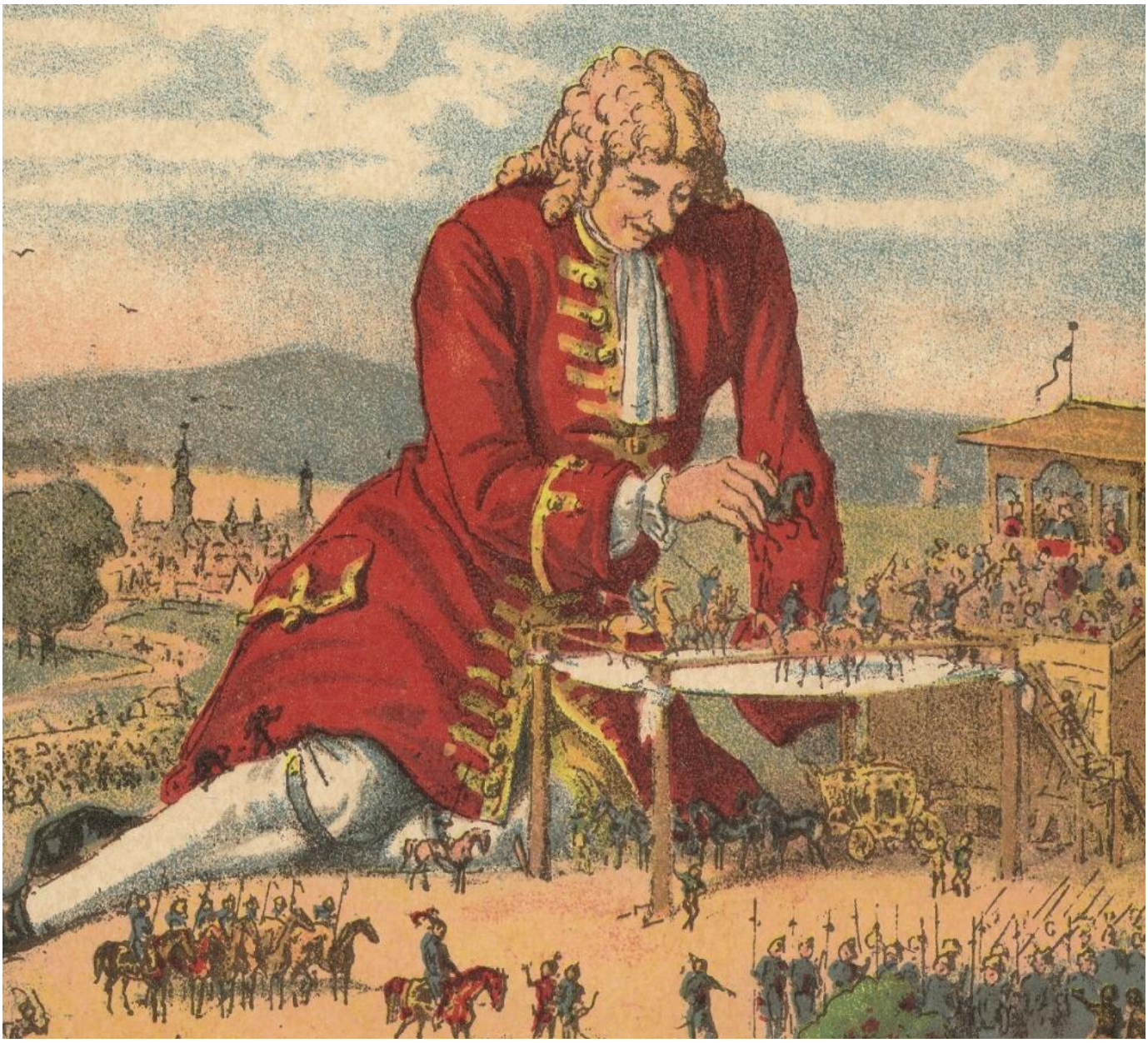

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Keith Gordon considers the extent to which HMRC are bound by a previous domicile decision

Key Points

What is the issue?

If HMRC have previously decided a taxpayer is not UK domiciled, when can they reconsider this matter?

What does it mean for me?

Each tax year is treated in isolation, meaning that issues resolved in one year can be revisited in another year.

What can I take away?

Clients, particularly those claiming non-resident or non-domiciled status, should retain records from older years in case the issue is revisited by HMRC.

After HMRC's onslaught in the first decade of this century on taxpayers who claimed to have been non-UK resident, I always considered it inevitable that domicile challenges would soon follow. That prediction has proven to be correct, with the first hint of a domicile challenge to come to the First-tier Tribunal in the case of *Gulliver v HMRC* [2017] UKFTT 222 (TC).

Facts of the case

Mr Gulliver is a UK national whose domicile of origin was in the UK. The decision does not specify which of the (currently four) constituent parts of the UK was where Mr Gulliver was originally domiciled. Although that might prove to be an important factor, it was not relevant for the purposes of the present case.

During the course of Mr Gulliver's international business career, he spent significant amounts of time living in the Far East. In 2002, his tax advisers wrote to the former Inland Revenue to seek a domicile ruling. This had been prompted by a transfer of funds during the previous month to a discretionary trust, the amount transferred exceeding the nil-rate band. Ordinarily, Mr Gulliver would have been liable to some inheritance tax on this transfer (on the basis that it was a chargeable lifetime transfer). However, Mr Gulliver believed that he had lost his 'UK' domicile and that he had instead acquired a domicile of choice in Hong Kong more than three years

previously (the relevance of the three-year period being to ensure that he could not be caught by the ‘deemed domiciled’ rules). The inheritance tax potentially payable by that transfer was just under £5,000. The Inland Revenue asked a few questions and, on 10 March 2003, wrote to Mr Gulliver’s advisers confirming that, ‘on balance we would agree that Mr Gulliver has not made a transfer of value’ for IHT purposes.

The natural reading of the Revenue letter was that they agreed ‘on balance’ that Mr Gulliver had indeed lost his UK domicile more than three years previously (and not reacquired it in the meantime). However, it now appears that the Revenue’s ‘decision’ was pragmatic as opposed to representing a considered opinion based on the information available to them. This was because, as has since become clear, the Revenue operated a ‘risk-based approach’, choosing not to engage in a full domicile enquiry in cases where the amount of tax potentially at stake did not warrant it.

At the time, Mr Gulliver was in fact living in the UK having been posted here on a two-year assignment, after which he was due to return to Hong Kong. However, events did not transpire as planned and Mr Gulliver has in fact continued to live in the UK, in a career which has seen him as Group Chief Executive of HSBC.

HMRC have since opened an enquiry into Mr Gulliver’s 2014 tax return. The focus of this enquiry is Mr Gulliver’s domicile. The enquiry has led to an information notice extending to 123 questions and which asks for details concerning matters dating back as far as 1981. That information notice is under appeal although Mr Gulliver has provided HMRC with information which will enable HMRC to conclude whether or not he has lost his Hong Kong domicile of choice. The appeal is on the basis that Mr Gulliver considers that he does not need to answer any requests which appear more geared to the question as to whether he had in fact acquired the Hong Kong domicile in the first place.

In parallel, Mr Gulliver has sought a closure notice in relation to the 2014 enquiry, and this article considers the Tribunal’s decision in respect of Mr Gulliver’s application. However, the application clearly overlaps with the reasonableness of the information notice. Indeed, as the Tribunal noted, if the outstanding questions on the Schedule 36 notice concern areas which HMRC are not (or no longer) entitled to investigate, then this is likely to point to the conclusion that a closure notice should be given, and *vice versa*. Consequently, although the hearing was technically to hear Mr Gulliver’s closure notice application, it focused on the over-arching reasonableness of HMRC’s broader lines of questioning in the information notice.

The reasonableness of the specific questions in the Schedule 36 notice was not considered and that has been left to a separate hearing.

The Tribunal's decision

The Tribunal (Judge Jonathan Richards) considered that HMRC were not precluded from asking questions which could lead to a conclusion that Mr Gulliver had not in fact acquired a domicile of choice in Hong Kong and, presumably, had remained UK-domiciled throughout his life.

The Judge noted that the case law showed that income tax and capital gains tax are determined on a year-by-year basis – 'both HMRC and a taxpayer are permitted to make arguments that call into question factual determinations made in respect of a different tax year'. Indeed, as the Judge continued, this is the case even if the original determination is by a Court (or the subject matter of a section 54 agreement which has like effect). The Judge noted, in particular, the initial view of *Jacob J in King v Walden* [2001] STC 822 who considered this to be 'startling' before concluding that, at least based on existing authority, it was indeed the case.

For these reasons, the Tribunal refused to direct the giving of a closure notice and, therefore, the Schedule 36 notice is likely to be the subject of further debate.

Commentary

On the narrow question before the Tribunal, I cannot fault the Tribunal's decision. At its simplest, an acceptance that Mr Gulliver had acquired a Hong Kong domicile of choice before 2000 cannot be determinative of his domicile in the 2014/15 tax year. Although (as is widely accepted) HMRC would have the burden of proof to demonstrate a subsequent abandonment of the domicile of choice, there is no legal impediment to Mr Gulliver having revived his domicile of origin in the intervening years. (For a recent application of the domicile rules which demonstrates this point, readers are referred to the recent Family Division judgment in *J v U (Domicile)* [2017] EWHC 449 (Fam).)

The point is even more acute in the present case because there was not in fact any previous determination of Mr Gulliver's domicile, merely a pragmatic decision not to challenge the asserted acquisition of a domicile of choice in or before 1999. It is of

course a shame that the Revenue's 2003 letter was worded in such a way so as to give the impression of a formal determination having been made (as it would have been just as easy to say that HMRC were prepared to treat the transfer as not giving rise to an inheritance tax charge on a without prejudice basis because of the potential costs not justifying a further investigation).

However, the case serves as a useful reminder of two fundamental concepts of tax law. The first is that appealable decisions can generally be challenged by taxpayers notwithstanding the fact that they are practically identical to earlier decisions which have gone against the taxpayer, even if those earlier decisions have been upheld by the Tribunals and/or the Courts. To use the legal jargon, the principle of *res judicata* does not generally apply to tax decisions. For similar reasons, the parallel concept of 'abuse of process' will not generally preclude a taxpayer from challenging a decision notwithstanding a defeat in an earlier appeal on materially identical facts for a different period.

This can be demonstrated by a couple of cases. In the direct tax sphere, the principle was clearly set out in *Carvill v Inland Revenue Commissioners* [2002] EWHC 1488 (Ch). In the indirect tax arena, the recent VAT case of *HMRC v The Open University [*2015] UKUT 0263 (TCC) showed that the Open University was fully entitled to revisit a matter that had been decided against it in respect of one VAT quarter. In both cases, the original decisions (relating to the tax year or VAT quarter, respectively, under appeal) had to remain undisturbed due to the principle which confers finality on completed litigation.

It should of course be remembered that there are always exceptions to such rules. For example, suppose a closure notice application were made and rejected because, say, of outstanding information following Schedule 36 notices, it would almost certainly be an abuse of process for a further closure notice application to be made without any progress being made in relation to the information notices. In any such case, the dissatisfied taxpayer should appeal against the First-tier's refusal.

The second point is the extent to which facts pertinent to one tax year can also be critical to the tax position in a later year. This is clearly the case in respect of domicile, where a person's domicile in one tax year will generally be presumed to carry forward to subsequent years. And, similarly, in respect of capital gains tax, where a taxpayer's liability in one year will often be determined by reference to facts of an earlier year.

However, the point is even clearer in relation to an individual’s residence status. Under the statutory residence test, one of the many statutory factors that determines an individual’s residence status for a particular tax year is that individual’s residence status in the three previous tax years. Furthermore, the process repeats itself. For example, an individual’s residence status in the 2013/14 tax year is directly relevant to the residence status in 2016/17. However, since the 2016/17 residence status is directly relevant to the status in 2019/20, it can be seen that the 2019/20 status might not be capable of being determined without determination of the residence in 2013/14. And so on. Although there are clearly some limits to this and one would expect the Tribunals to take a pragmatic approach, matters from the past might, at least in theory, be with us permanently or indefinitely.