CHAPTER ONE

FOREIGN DOMICILE: TAX POLICY

1.1 Introduction

The topics of this chapter are:

(1) Policy arguments for and against a lighter tax regime for foreign domiciliaries (or some similar class of footloose individuals)[1]
(2) A brief history of domicile tax reform
(3) An assessment of the reforms of
    (a) 2008
    (b) 2017/18
(4) State of UK tax reform, and prospects for the future

1.2 Tax competition

All UK residents have some choice where to reside, but foreign domiciled individuals are in general less securely attached to the UK. Tax competition arguments claim that if their tax burden was as great as that of a UK domiciliary, fewer would choose to live in the UK, and overall the UK economy would lose:

(1) directly, from tax paid by the foreign domiciliaries (including VAT); and

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1 For discussion on policy issues, see STEP, "Residence and Domicile: Response to Background Paper" (2003) *https://www.kessler.co.uk/wp-content/uploads/2013/07/Domicile_reform_STEP_response.pdf*
CIOT, "Reviewing the Residence and Domicile Rules" (2003) *http://www.tax.org.uk/Resources/CIOT/Migrated%20Resources/j-l/j-jenkins-esq.pdf*
CIOT, "PBRN18 (Residence & Domicile Review)" (2007) *https://www.kessler.co.uk/wp-content/uploads/2018/12/PBRN18ResAndDomReview-final201107.pdf*

(2) indirectly, from investment and expenditure in the UK which is more likely to be made by UK residents.[2]

Similarly, UK firms competing in the global market for talent and expertise will find recruitment easier if the tax regime for foreign employees is lighter. Some potential employees would not choose, or could not afford, to come if the UK tried to tax them as it does its own domiciliaries.

In a nutshell: the argument is that the UK economy benefits from foreign domiciliary reliefs.

1.2.1 *Tax competition: Analysis*

Tax competition raises a number of distinct sub-issues, in particular:
(1) To assess the existence and importance of tax competition
(2) What the UK should do in the light of tax competition
(3) What international agreements might do to regulate tax competition

The first question is essentially one of fact; the second is a question of domestic politics. The third is a matter of foreign politics.

In principle there are many low-tax or preferential tax regimes where wealthy individuals may choose to reside.[3] Switzerland, for instance, has a lump sum taxation regime for non-Swiss citizens, specifically targeted for this purpose and more favourable than the UK remittance basis.[4] Ireland retains the pre-2008 remittance basis.

In assessing the existence and strength of international tax competition

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2 Except to the extent that tax makes investment by UK resident foreign domiciliaries difficult, as to which, see 14.23 (Investment relief: Critique).

3 In 2017, Italy introduced a fixed levy in lieu of tax on foreign income of new residents: art.24-bis [Italy] *Testo unico delle imposte sui redditi*; as there is no further tax on remittance, this is much more favourable than the UK system. Daniel Simon also singled out Spain, Portugal and France: Tax Journal (21 July 2017).

4 See 7.5.3 (Swiss forfait taxpayer). This was at one time politically controversial; it was abolished in Zurich in 2009 and 5 other cantons followed suit. But in a referendum in 2014, the regime was supported by 59% of voters, on a 49% turnout; see Sigg and Luongo, "The Swiss lump-sum taxation regime: after the storm comes the calm?" [2015] JITTCP 169;
http://www.swissinfo.ch/eng/bloomberg/swiss-say-foreign-millionaires-are-still-welcome-after-tax-vote/41144174
So I expect that Swiss tax law is now stable. In the 2014/15 edition of this work I added "and probably more stable than in the UK" and that proved to be correct!

several points must be borne in mind.

Effective low tax may be achieved in other countries by relaxing legal provisions at administrative level, in a non-transparent way.

One-paragraph summaries of a country's tax system are bound to be misleading.

The terms of statutory tax law are only one aspect of tax competition. Compliance costs are important. The quality of tax administration is important. An OECD study identifies six desiderata: a developed legal system, confidentiality, impartiality, proportionality, responsiveness (meaning a CRM for large companies, and at least answering correspondence from lesser taxpayers) and competence. They add:

> Frequent changes in legislation, particularly where there has been an absence of consultation, can have an adverse impact on the taxpayers and their advisers trust in the tax system.[5]

But there are others: can a tax authority subject an individual to an expensive and intrusive tax investigation without evidence that tax returns were wrong? Certainty is very important.[6] Perception matters as much as reality. Rates of tax on UK source income may matter more than the rules for foreign domiciliaries. By many of these measures, the UK competes poorly.

1.2.2 *Other tax competition*

The debate about international tax competition is long standing.[7] Tax competition arises in many areas of taxation, and affects different types of income in different ways.

In areas where investment by non-residents is (more or less) completely mobile, tax competition has driven UK tax rates down to zero. Examples include:

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5 "Engaging with High Net Worth Individuals on Tax Compliance" (2009) para 208 and 243; see *http://www.oecd.org/ctp/aggressive/engagingwithhighnetworthindividualsontaxcompliance.htm*

6 See 2.5 (The Rule of Law).

7 See the evidence of Lord Vestey to the 1920 Royal Commission, *https://www.kessler.co.uk/wp-content/uploads/2013/07/Vestey_Royal_Commission_evidence_and_ensuing_debate.pdf*

(1) Interest arising to non-residents on UK bank deposits (and other cases where there is no withholding tax on interest)
(2) Trading income arising to non-residents from investment management
(3) IHT on UK funds held by foreign domiciliaries[8]

In the case of very mobile sources of income, such as interest on bank deposits and trading income from asset management, any UK tax charge would only cause the non-resident investor to move the investments to a different jurisdiction with a resultant loss in economic activity and profits in the UK.

In the corporate field, tax competition has reduced the rate of CT, though not of course to zero or near it. Tax competition may not be the only factor which contributes to the reduction in CT rates, but if HM Treasury is to be believed, it is one of the important factors. In the 2017 spring budget:

> 3.11 The UK is one of the most open economies in the world, and a highly competitive business tax regime remains a key factor in retaining that position. The UK's corporate tax rate is the lowest in the G20.[9]

But headline rates are only part of the story, and if one looks deeper, a different (and more complex) picture emerges, having regard to other major changes to corporate taxation:

(1) reduced capital allowances[10]
(2) increase in taxation of dividends in 2016 (though perhaps this is not relevant to tax competition, as it does not apply to non-residents)

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8 See 74.3 (Non-settled UK funds). Another example from the field of shipping: "The location of ownership, flagging (registration) and management activities is very 'footloose', since it can easily be transferred from one country to another. This makes it vital to have regard to the fiscal regimes in other countries if we want to maintain a successful shipping industry in the UK. The modern armoury in the battle for success invariably includes a virtually tax-exempt fiscal regime." (Independent Enquiry into a Tonnage Tax, Lord Alexander, HM Treasury 1999.) Another example is the exemptions for major sports events; see s.48 FA 2014. These events would not be held in the UK in the absence of tax exemption.

9 *https://www.gov.uk/government/publications/spring-budget-2017-documents* This is the latest in a line of similar statements, traced in the 2016/17 edition of this work para 1.2.2, but I omit that here as it has diminishing contemporary significance.

10 See Pomerleau, "What We Can Learn from the UK's Corporate Tax Cuts" (July 2017) *https://taxfoundation.org/can-learn-uks-corporate-tax-cuts/*

1.2.3 *Tax competition within UK*

Devolution now raises the issue of tax competition within the UK. Debate has focused on the possibility that Scotland and Northern Ireland may compete in the corporate field, by a lower corporation tax rate than England:

> a lower headline rate of corporation tax could encourage greater investment by Scottish and UK firms in both physical and human capital and in research and development within Scotland.
> At the same time, it could make the country more attractive as a location for multi-national investment. It could also act as an important signal to global companies and investors as to Scotland's ambition to be a location for competitive business.[11]

Similar issues apply to taxation of individuals. SNP initially backed the 50p rate of tax across the UK but decided not to do it in Scotland alone, as that was likely to cost money.[12] In 2018, CIOT said:

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11 "Devolution of tax powers to the Scottish Parliament - Commons Library Standard Note" (2012, 2013) *http://www.parliament.uk/briefing-papers/SN05984*
The consultation paper does not consider the possibility that England might match the Scottish lower rate and does not address the question of what constitutes a Scottish company for the purpose of the lower rate.
Likewise in Northern Ireland: The Corporation Tax (Northern Ireland) Act 2015; House of Commons Briefing paper No 7078, "Corporation tax in Northern Ireland" (September 2017)
http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07078#fullreport
HMRC, "Draft guidance on the NI CT regime"
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/677832/NI_CTregime-draft_guidance.pdf
Wales would also like to join in:
"If Northern Ireland is allowed to cut corporation tax, it would be outrageous if Welsh politicians did not have the option of doing the same"
Gerald Holtham, chair of the Holtham Commission for Wales (Cited in the Scottish consultation paper).
So in due course we will have no shortage of corporation tax competition within the UK.

12 The Scottish Government, unlike HMRC, publish the background analysis: "The impact of an increase in the additional rate of income tax from 45p to 50p Scotland" (2016) *http://www.gov.scot/Resource/0049/00497818.pdf*
2018 saw the Scots higher/additional rates nudge up to 41%/46%, but an increase to

> The decision to freeze the higher rate threshold is unlikely to result in a rush to legitimately avoid paying higher rates of Scottish tax – for example by relocating to other parts of the UK or choosing to incorporate a business in order to benefit from lower rates of UK corporation and dividend tax.
>
> But they do lend themselves to a growing perception that Scotland is taking a different tax tack to the rest of the country, particularly as the UK income tax regime moves in the opposite direction.[13]

But Scots rates continue to drift above rUK rates, and for some individuals with homes in Scotland and rUK, it can be finely balanced whether they are Scottish taxpayers or not: a small change in lifestyle may make the difference. In computing the loss to Scotland of a taxpayer moving jurisdiction, one must bear in mind that the loss to Revenue Scotland is not the (relatively small) difference between the Scots and the rUK rates; it is the whole of the tax paid by that individual (which is credited to rUK, not to Scotland).[14]

Competition in the foreign domicile field is therefore only one aspect of much wider topic.

1.2.4 *Attitudes to tax competition*

Most though not all commentators would accept that tax competition is an important consideration in framing UK taxation.

Tax competition offers advantages to countries which compete successfully and disadvantages to those who do not. In many areas government have accepted the challenge of competition, and sometimes with enthusiasm:

> The [investment manager] exemption enables non-residents to appoint UK-based investment managers without the risk of UK taxation and is one of the key components of the UK's continuing attraction for

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50% was still rejected for this reason: Scottish Government, "The Role of Income Tax in Scotland's Budget" at p.23 *http://www.gov.scot/Resource/0052/00527052.pdf*.

13 CIOT press release 9 Jan 2019 *https://www.tax.org.uk/media-centre/press-releases/press-release-chartered-institute-taxation-comments-scottish-budget*

14 Except so far as Scotland may benefit from an increased grant, under the Barnett formula.

investment managers.[15]

Those opposed to the consequences of this line of argument deride it as:
(1) a "race to the bottom"[16]; and
(2) "harmful" tax competition

It is correct that tax competition should logically drive tax rates on the mobile sources of income of non-residents down to zero, and in some cases that has been the result. Of course tax competition is not the only consideration in forming tax policy.

The expression "harmful tax competition" conceals awkward questions about harmful to whom? "Harm" is not an obvious or self-defining concept. The focus is often on harm to the G7 countries.[17]

Most sober commentators recognise that the UK could not act alone, as if there were no such thing as international tax competition.[18]

Unfortunately, it is always hard to predict what will be the overall economic effect of any reform, and predictions reflect the views and wishes

15 SP 1/01; see 51.1 (Investment manager exemptions).

16 This metaphor goes back at least to OECD *Harmful Competition* (1998) *https://ntanet.org/NTJ/51/3/ntj-v51n03p601-08-oecd-report-harmful-tax.pdf* The problem is not unique to tax: international regulatory competition may also lead to a "race to the bottom"; but perhaps in areas outside tax it is easier to reach international agreements imposing minimum standards.

17 See Littlewood, "Tax Competition: Harmful to Whom?" in Asif Qureshi and Xuan Gao, eds, Critical Concepts in Law: International Economic Law, Routledge, London (2010) volume VI, 162-234; reprinted from (2004) 26 Michigan Journal of International Law 411-487 *https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1227&context=mjil* Avi-Yonah "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State" [2000] Harvard Law Review p.1573.

18 However at the extreme even this is denied; eg "Tackle Tax Avoidance" a campaign of Progress (which describes itself as a New Labour pressure group):
> "There is real fear at the heart of government that if it gets tough on business, businesses will flee the UK. But as the chief executive of Google, Eric Schmidt, himself admitted in an interview: 'Google will continue to invest in the UK no matter what you guys do because the UK is just too important for us.'

http://www.progressonline.org.uk/campaigns/tackle-tax-avoidance/articles/ (accessed 2013).

of the partial pundits who make them.[19] Ascertaining the effect of reforms after they are made is scarcely less difficult.

1.2.5 *Tax competition: EU-law*

The freedom of the UK to enter into tax competition against other countries is subject to certain constraints of EU and international law and politics. International fiscal co-operation in this area at present operates only to a limited extent, but it has made some progress in a (non-binding) EU code of conduct on business taxation.[20]

State Aid rules also impose restrictions on UK's freedom to tax and untax.[21]

The EC has expressed disapproval of the remittance basis:

> The Commission does not advocate remittance base taxation, as it may (?) lead to double non-taxation.[22]

That did not seem to have had any impact on UK domestic politics. But the issue is ongoing. In 2018 the European Parliament set up a committee on financial crimes, tax evasion and tax avoidance whose remit includes to assess national schemes providing tax privileges for new residents.[23] What (if anything) may result, and how it may impact on the UK post-Brexit, remain unpredictable; though it seems safe to say that nothing will happen soon.

1.2.6 *International tax law reform*

Since tax competition extends beyond the EU, and EU powers in relation to tax are (to say the least) politically controversial, those hoping for a body

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19 For instance, HMRC estimate that a reduction in the rate of Corporation Tax in Scotland to 12.5% would cost £2.6bn, but the Scottish Parliament say the impact will be positive: "Corporation Tax: Discussion Paper Options for Reform" (2011) p.43, *http://www.scotland.gov.uk/Resource/Doc/919/0120786.pdf*.
The reductions in the UK corporation tax rates from 2012 may be partly motivated by anticipation of Scottish tax competition, though this was tactfully not mentioned.

20 *http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm*

21 See 73.19 (State aid).

22 Kovács (EU Taxation and Customs Commissioner 2004 - 2010) IP/07/445 (2007).

23 *http://www.sven-giegold.de/wp-content/uploads/2018/02/adopted-taxe3-mandate-2018-02-08.pdf*

to curb international tax competition tend to look to OECD.[24] At present this is focussed on corporate rather than personal taxation.

1.3 Fairness

The other consideration in the assessment of foreign domicile taxation is fairness.

1.3.1 *What is fairness*

The starting point for any serious discussion of fairness in tax is terminology from economics rather than law:

(1) "**Horizontal equity**", the view that people who are relevantly equal should pay the same amount of tax.

(2) "**Vertical equity**", the view that people who are relevantly different should pay different amounts of tax, which leads to the (more or less) accepted view that fair taxation should be progressive rather than regressive.

Economists have developed these concepts with considerable sophistication[25] but their limitations are exposed when one tries to apply them in a real life context, such as an assessment of the fairness of the taxation of foreign domiciliaries. The concept of horizontal equity is not so much a definition of fairness as an approach to identifying the issues. In deciding whether one group (foreign domiciliaries, say) is fairly taxed, one needs to identify another group by way of comparison (UK domiciliaries, say) and ask if they are relevantly equal.

1.3.2 *Are non-dom reliefs fair*

In the author's view, domicile is in general a useful and practical measure

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24 Eg Jeffrey Sachs "Stop this race to the bottom on corporate tax" Financial Times, March 28 2011.

25 For a starting point, see Kaplow, "Horizontal Equity: Measures in Search of a Principle" National Tax Journal 42, no. 2 (1989) p.139-55 *http://www.ntanet.org/NTJ/42/2/ntj-v42n02p139-54-horizontal-equity-measures-search.pdf*
Musgrave "Horizontal Equity Once More" National Tax Journal 43, no. 2 (1990) p.113-23 *http://www.ntanet.org/NTJ/43/2/ntj-v43n02p113-22-horizontal-equity-once-more.pdf*

of UK linkage, and to regard UK and foreign domiciled residents as completely equivalent is facile. Or put the other way, foreign domicile does constitute a significantly weaker UK link than UK domicile. Accordingly conferring a lighter UK tax regime on foreign domiciliaries, such as a remittance basis, is indeed fair. This is especially so bearing in mind that:

(1) Residence alone does not require a very close connection to the UK.[26]
(2) A foreign domiciliary may not have had a fair opportunity to arrange their affairs with UK tax in mind; for instance creating settlements from which they were excluded.
(3) Another consideration is the impracticality (both for taxpayers and HMRC) of untangling ownership of assets, especially in family ownership arrangements which are common in third world countries.

This view is not universally held. Some maintain that any distinction (for IT or CGT) between UK residents based on domicile is unfair. The two are relevantly equal. It is difficult to see how the dispute between the rival views can be judged, or what either side could do or say to convince the other. The concept of fairness is insufficiently precise to resolve the dispute. One might say that it comes down to a matter of impression, or politics; which is to say the same thing.

Those who advocate this view most strongly are not tax practitioners, and I think would be surprised to find how little is required to be UK resident: their views are based on a paradigm of a foreign domiciliary who is a very long-term UK resident (at least). Thus the Guardian front page offered the heading:

> "We'll end non-dom status"- Miliband. All who live *permanently* in UK will pay all their tax here.[27]

Similarly, in Ireland, which has similar rules, a Commission on Taxation report argued:

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26 Though the SRT has mitigated the worst excesses of the pre-2013 (common law) residence test.

27 Guardian 8 April 2015. Similarly, perhaps, the Labour Manifesto 2015: "we will abolish non-dom status so that all those who make the UK their home pay tax in the same way as the rest of us." But the words "make the UK their home" may mean little or much.

> Equity requires that taxpayers who are in a comparable situation should be afforded the same treatment for tax purposes. Making a distinction between individuals based on their domicile results in a situation where taxpayers who are otherwise in a comparable situation are treated for tax purposes in different ways. This is inequitable. Thus, for example, an individual who, although domiciled outside of Ireland, is a *permanent resident* should be treated the same as any other resident taxpayer. The special treatment afforded to individuals who are resident, but not domiciled, in Ireland whereby they are only taxable in Ireland on foreign source income and capital gains to the extent that the income and gains are remitted to Ireland is inequitable and should be discontinued.[28]

To repeal the remittance basis altogether in order to tax "permanent residents" (however that expression is defined) is to throw out the baby with the bathwater. To restrict the remittance basis to those who are not "permanent residents" requires thought to be given to a definition of the term.

It has to be said that in political debate, depth of analysis is not to be expected; assessment of fairness is visceral, and sensitive ears might detect elements of class or wealth hostility and xenophobia.

1.3.3 *Is a remittance basis fair*

Even if it is accepted that it is fair to tax foreign domiciliaries less than UK domiciliaries, the question of what constitutes a fair reduction is a distinct and more difficult issue. The 2008 reforms accepted the principle of a distinction (which is why they did not go far enough for some commentators) but reduced the extent of the tax reduction by making the remittance basis less attractive.

The remittance basis of taxation is a form of qualified non-taxation. In assessing its fairness it is relevant to compare different groups of foreign domiciliaries:

(1) *Short-term residents* who are:
   (a) wealthy individuals, who can elect for the remittance basis and are able to retain (or spend) significant foreign income/gains abroad,

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28 [Ireland] Commission on Taxation Report (2009) para 6.2.2 https://www.kpmg.com/IE/en/IssuesAndInsights/ArticlesPublications/Documents/Tax/COT.pdf

and

(b) less wealthy individuals for whom the remittance basis offers little or no benefit since they have no foreign income/gains, or cannot afford to retain (or spend) much foreign income/gains abroad.

(2) *Long-term residents*

(a) ultra-wealthy individuals, who can elect for the remittance basis and are able to retain significant foreign income/gains abroad, and

(b) less wealthy individuals for whom the remittance basis does not justify paying the remittance basis charge.

The effective rate of tax under the remittance basis approximately declines with income and it can be described as regressive taxation. If one accepts that taxation ought in principle to be progressive, which has always been a broad feature of UK taxation, then there is a sound argument that the remittance basis is unfair.

What effect did the 2008 reforms have in this area? So far as they decreased the attractiveness of the remittance basis by withdrawal of personal reliefs as a cost of the remittance basis they have decreased the unfairness.

So far as they have introduced the remittance basis claim charge, the reforms have targeted the benefit of the remittance basis at a small number of ultra-wealthy individuals. That may make sense under the tax competition argument, but from a fairness point of view it is difficult to justify.

1.4 Domicile as fiscal test

The domicile concept is not ideally framed to identify the "footloose" individuals, whose UK links are sufficiently less that a lighter tax regime is appropriate on fairness or tax competition arguments. The adhesive quality of a domicile of origin, and the restrictive rules for the acquisition of a domicile of choice, allow some fortunate individuals to enjoy foreign domicile tax treatment, despite very close UK links and only tenuous, historical and fortuitous links to their domicile of origin. To the extent that they do so the current tax system fails both on economic and fairness criteria.

In considering this objection to domicile, however, one should bear in mind that no perfect criteria exists: the question is not whether domicile always produces the right answer, but whether one can do significantly

better with other concepts or refinements.

Other concepts are sometimes used:

(1) Long term residence, of which UK tax uses a variety of tests:
   (a) Deemed domicile: 15 years residence
   (b) Remittance basis claim charge: 7 and 12 years residence
   (c) Temporary non-residence: 4 years residence and 5 years absence
   (d) Arriver/leaver rules for residence & OWR: 3 years residence
(2) Citizenship (not much used in UK domestic tax law but used in OECD Model treaty and some IHT DTAs)

These are all alternative ways to make the distinction between UK residents with strong and weaker UK links; whether they would serve better than a domicile test seems to me rather doubtful. The 2017 deemed domicile rules take us down this path, but the rules for protected trusts means that common law domicile will continue to be important.

1.5 Non-dom tax reform

It is helpful to distinguish different ways of altering the tax system for foreign domiciliaries:

(1) Alter the definition of domicile for general purposes and so alter the class who qualify for foreign domicile tax treatment. Of course this would have ramifications beyond tax. Those proposing reforms of this kind are not usually motivated by tax – though those objecting to them may be.[29]
(2) Alter tax laws applying to all foreign domiciliaries.
(3) Alter the definition of foreign domicile for some or all tax purposes.
(4) Identify subclasses of foreign domiciliaries with close UK links so as to tax them more heavily than foreign domiciliaries with less close UK links.

One can of course achieve the same end result by more than one technique. The 2017 deemed domicile changes adopt approaches (3) and (4).

1.6 Non-dom tax reform history[30]

The chequered history reflects the difficulty, or impossibility, of

29 See 3.5.6 (Domicile of choice: Critique).

30 See too 12.2 (History of remittance basis).

reconciling incompatible policy considerations.

1.6.1 *1974-2002*

The 1974 Finance Bill included a provision (clause 18) that an individual ordinarily resident in the UK for 5 out 6 years should be deemed UK domiciled for IT and CGT purposes. By the time the clause came to be debated, the Labour (Wilson) administration proposed to amend it so that individuals resident for 9 years out of 10 years were deemed UK domiciled.[31] But even after this concession, the clause did not survive to the Finance Act.[32]

The 1988 Consultative Document (Residence in the UK) made radical proposals. The remittance basis would be abolished. Those resident here for less than seven out of 14 years (and, perhaps, who are also not UK domiciled) would qualify for a new "intermediate basis" of taxation. This would require disclosure of worldwide income in order to tax it at an effective rate of 2% or less. This proposal was abandoned.

1.6.2 *2003 - 2008*

In 2002 a newspaper campaign emerged which pressed the Blair administration into action, or at least into the appearance of action. The Budget of April 2003 delivered a "background paper" called "Reviewing the residence and domicile rules as they affect the taxation of individuals".[33] This was a facile document[34] but it may be unfair to

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31 Hansard, Finance Bill debate 9 May 1974.

32 For an account of the lobbying behind this, see Barnett, *Inside The Treasury* (1982) p.28–9. For the Parliamentary debate, see HC Deb 13 June 1974 vol 874 cc1842-948 *http://hansard.millbanksystems.com/commons/1974/jun/13/cases-i-and-ii-of-schedule-e#S5CV0874P0_19740613_HOC_311*
It is perhaps relevant to the outcome that the Labour administration was a minority government from 4 March 1974 until the election on 10 October 1974, after which it had a majority of 3 seats.

33 *http://webarchive.nationalarchives.gov.uk/20091222074811/http://www.hmrc.gov.uk/budget2003/residence_domicile.pdf*

34 It contained an outline of the law (a rehash of IR20) and one paragraph summaries of the law of 29 other countries (of insufficient detail to be of any use and generally said to be misleading). The paper did not consider any proposals or their possible impact. It (consciously?) ignored every earlier discussion of reform: the Royal Commissions of 1920 and 1955, the 1936 Codification Committee, the 1974 Finance Bill, the 1987

criticise its (unnamed) authors. Their instructions may have been to be uncontroversial; by saying nothing, there was nothing in the document to which anyone could object.

Nothing then happened from 2003 to 2008.[35] It is clear that the review of foreign domicile tax did not follow the normal course of consultation, decision and implementation. In the absence of a frank explanation of what went on, it is tempting to speculate. The likely explanation is that the Blair administration wanted to do nothing, but prevaricated to avoid an announcement which would have lead to a furore from those in favour of reform.[36] Blair resigned in June 2007. A change of power led to an unannounced U-turn from that unannounced policy.[37]

1.7 Approach to assessment of reform

The 2003 background paper on domicile recited the principles that taxation of foreign domiciliaries should:

[1] be fair;
[2] support the competitiveness of the UK economy. [I think this just means, benefit the economy: "competitiveness" was just the buzzword of the day. The principal benefit must be to raise revenue, though one might, perhaps, look for other more intangible benefits.]
[3] be clear and
[4] be easy to operate.

Although not mentioned, the principles derive from Adam Smith, *The Wealth of Nations* (1776).[38]

Law Commission Report and the 1988 Consultation Paper.
For an account of the decline in quality of government white and green papers, see Forster, *British Government in Crisis* (2005), p.134.

35 The history is set out in the 9th edition of this work para 1.3.2. The last outing of (by then extremely tired) statement was Hansard 12 July 2007 Col 1605 by which time almost no-one believed it, but by then it was possibly true.

36 See Oborne, *The Rise of Political Lying* (2005).

37 Earlier editions of this work contain a more detailed history of this period, but details seem less important with the passage of time and changes of government.

38 Smith *The Wealth of Nations* (1776) Book 5 chapter 2.
http://www.bibliomania.com/2/1/65/112/frameset.html
In Scotland, Adam Smith is more highly regarded:
"As with the entire approach the Government takes ... on taxation, these proposals

It is naive to recite these principles without noting (as Adam Smith did) that they are irreconcilably conflicting and incommensurable values. Mirrlees stated:

> These recommendations may command near-universal support but
> [1] they are not comprehensive, and
> [2] they do not help with the really difficult questions which arise when one objective is traded off against another.[39]

It is a common feature of HMRC papers to ignore point [2], and to claim the mantles of fairness and competitiveness without acknowledging a conflict between them. Thus the HMRC policy paper "Domicile: Income Tax and CGT":

> The government wants to reform the tax treatment of non-doms so that the UK can continue to benefit from the presence of talented foreigners while also addressing unfair tax outcomes.[40]

This is the Janet and John approach to tax reform.

The House of Commons Treasury Committee provide an intelligent approach to assessment of tax reform, identifying 8 criteria:

> The Committee recommends that tax policy should be measured by reference to the following principles. Tax policy should:
> 1. **be fair**. We accept that not all commentators will agree on the detail of what constitutes a fair tax, but a tax system which is considered to be fundamentally unfair will ultimately fail to command consent.
> 2. **support growth and encourage competition**.
> 3. **provide certainty**. In virtually all circumstances the application of the

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are firmly founded on principles, Scottish (!) principles, that have stood the test of time. Adam Smith in 1776 in his "Inquiry into the nature and causes of the Wealth of Nations", set out four maxims with regard to taxes; the burden proportionate to the ability to pay, certainty, convenience and efficiency of collection."
Swinney (Finance Secretary) "The Scottish Government's Approach to Taxation" (2012)
http://www.scotland.gov.uk/News/Speeches/taxation07062012

39 Mirrlees, *Tax By Design* (2011) p.22
http://www.ifs.org.uk/uploads/mirrleesreview/design/ch2.pdf

40 Feb 2016,
https://www.gov.uk/government/publications/domicile-income-tax-and-capital-gains-tax/domicile-income-tax-and-capital-gains-tax

> tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs. **Certainty about tax requires**
> i. **legal clarity**: Tax legislation should be based on statute and subject to proper democratic scrutiny by parliament.
> ii. **Simplicity**: The tax rules should aim to be simple, understandable and clear in their objectives.
> iii. **Targeting**: It should be clear to taxpayers whether or not they are liable for particular types of charges to tax. When anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system.
> 4. **provide stability**. Changes to the underlying rules should be kept to a minimum and policy shocks should both be avoided. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
> 5. The Committee also considers that it is important that a person's tax liability should be easy to calculate and straightforward and cheap to collect. To this end, tax policy should be **practicable**.
> 6. The tax system as a whole must be **coherent**. New provisions should complement the existing tax system, not conflict with it.

The Committee acknowledge that these objects are incompatible:

> 85. No tax system is, or can be, static. There will always be trade-offs and difficult decisions; a desire for fairness may increase complexity; a desire for certainty may increase administrative complexity. Nonetheless, the principles we set out, which reflect a surprising degree of convergence within our evidence, give a direction of travel which, in the long run, can both secure consent and improve the performance of the economy.[41]

I think Adam Smith would be content with that.

1.8 2008 reform: Assessment

The 2008 reforms increased the tax burden on foreign domiciliaries in four main ways:

41 Treasury "Principles of tax policy" (2011) *http://www.publications.parliament.uk/pa/cm201011/cmselect/cmtreasy/753/753.pdf*

(1) Remittance basis claim charge for long-term residents
(2) Withdrawal of personal allowances for remittance basis claimants
(3) ITA remittance basis, stricter than the pre-2008 remittance basis
(4) Extension of anti-avoidance provisions to remittance basis taxpayers (in particular, the s.720, s.3 and s.87 remittance bases, and the AIP remittance basis)

1.8.1 *Clear and easy to operate*

It will be evident to anyone who skims this volume that the 2008 rules are a failure by this criteria. The rules are unclear, often difficult and sometimes impossible to operate. In these respects they are unquestionably worse than the pre-2008 rules.

Government policy normally requires an impact assessment.[42] None was carried out in relation to any of the 2008 reforms. Many features of the reforms could not have survived if it had been.

1.8.2 *Benefit to UK economy*

On one side of the account is the gain of more tax paid by foreign domiciliaries. On the other is:

(1) Tax and investment lost from individuals who leave the UK, and those who (because of the reforms) decide not to come.
(2) The loss to the economy that the 2008 rules generally discourage or prevent investment in the UK and use of UK service providers.

In the 2008/09 edition of this work my initial assessment was as follows:

> Overall it seems to me implausible that the reforms will make a positive contribution to the UK economy. One can test the matter this way. If a wealthy individual, a beneficiary of offshore trusts created by himself or his family, asked for advice on the desirability of choosing the UK as a residence, what would one say? Even now the individual could still do worse; and if enough advance planning and restructuring is possible, the problems may be ameliorated, at an administrative cost. Thus tax may still not prevent an individual from coming to the UK if he wants to sufficiently. Also, the old cliché about the tax tail and the commercial dog still holds good. But all this is a far cry from the pre-2008 position, where one would simply respond that the UK was clearly a desirable

42 http://old.tax.org.uk/ciot_media/themakingoftaxlaw.pdf

place to reside.[43]

The 2008 reforms did not in the event greatly reduce the non-dom population, though they may have reduced it slightly.

HMRC offer the following statistics:[44]

Remittance basis claimants[45]

	Total 000's	*Tax paid*[46] *£billion*	*Rem basis charge payers 000s*	*Tax paid £billion*	*Tax per rem basis payer £100k*
2007-08	no data				
2008-09	48	5.3	5.4	1.9	350
2009-10	46	5.8	5.2	2.1	406
2010-11	49	6.3	5.5	1.9	343
2011-12	49	6.6	5.5	1.8	326
2012-13	48	6.5	5.1	1.8	352
2013-14	53	6.9	5.0	2.1	421
2014-15	55	6.9	5.1	1.1	412

The figures are interesting; but a proper analysis would require a team with both economic and tax expertise, and so far no such analysis has been published. John Barnett summarises some key facts:

- the non-dom population [including those who do not claim the remittance basis] contributed £9.25bn in income tax, CGT and national insurance contributions in 2014/15
- Each UK resident non-dom paid an average of £105,000 in income tax, CGT and national insurance.
- The average income tax paid by UK resident non-doms was £76,500; the average income tax paid by taxpayers as a whole was £5,430
- UK resident non-doms paid 3.9 per cent of all income tax (£167 billon) yet represented only 0.2 per cent of the taxpaying population

43 Kessler, *Taxation of Non-Residents and Foreign Domiciliaries* (7th ed, 2008), pp. 8

44 HMRC, "Statistics on Non-domiciled Taxpayers in the UK 2007-08 to 2014-15" (August 2017) *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640897/Statistical_commentary_on_non-domiciled_taxpayers.pdf*

45 Those who fill in SA returns. Those who do not are not counted.

46 IT, CGT and NIC. IHT and VAT and other taxes are not included, though the total amounts may be large.

(30.7 million)

The statistics omit to look back at how much tax the changes in 2008 (and 2012) were supposed to bring in. One has to dig back to find these[47] but one discovers that the 2008 reforms were supposed to yield nothing in 2008/09, £700 million in 2009/10 and £500 million in 2010/11. It is not clear whether this was just wrong or can somehow be reconciled with the outturn that the yield fell by £1.2 billion in the first year; and remained £400 million down in the second year; and £300 million in the third year. The 2012 changes[48] were similarly supposed to be neutral and then raise money, but revenues subsequently fell.[49]

Subsequent data may in due course allow an answer to the important question whether the 2017 reforms increase or decrease the tax yield.

1.8.3 *Fairness of 2008 reforms*

The FA 2008 contained a wide ranging package of reforms and any short assessment of its merits must be limited to its main features.

The remittance basis claim charge distinguishes between short term and long-term residents, and taxes the latter more heavily, the connecting factor here being the long term residence tests. One cannot categorise those distinctions as unfair.

On the other hand, among long-term foreign domiciliaries, the charge distinguishes between the extremely wealthy (to whom the remittance basis is still attractive) and others (to whom it is not). This offends against the principle of vertical equity, which suggests that people with higher incomes should pay more tax. That is not fair, it represents a decision to prioritise the economic advantage of tax competition by targeting the remittance basis to the wealthiest. The tax competition consideration conflicts with fairness.

The withdrawal of personal allowances as a quid pro quo of a remittance basis is not unfair (though it comes at a cost in terms of complexity).

Of perhaps greater importance is the other aspects of a package of reforms

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47 *http://webarchive.nationalarchives.gov.uk/20100407164623/http://www.hm-treasury.gov.uk/d/bud08_completereport.pdf* - see p.112.

48 *http://webarchive.nationalarchives.gov.uk/20130129110540/http://www.hm-treasury.gov.uk/budget2012_documents.htm* - see p.52.

49 *https://www.tax.org.uk/media-centre/blog/media-and-politics/non-dom-stats-important-what-they-don%E2%80%99t-tell-us-what-they-do*

which affect all foreign domiciliaries, not just long-term residents.

The stricter ITA remittance basis is not unfair, except for the wilder reaches of the relevant person definition[50] and the supposed rule (probably ignored in practice) that the taxable amount remitted may exceed the value of the asset remitted.[51]

The extended 2008 anti-avoidance rules can work unfairly but complete fairness is impossible to achieve in this area.

The transitional rules were another matter but their significance has faded over time.

All in all, the 2008 reform may be given some limited marks for fairness. This is not to say that the pre-2008 rules should be regarded as unfair: the concept of fairness (especially if viewed with some attention to practicality) is so vague that a very wide range of tax policies may all be categorised as "fair".

Some of the hardest hit are long-term UK resident US citizens, who pay
(1) US tax on a citizenship basis and
(2) substantially greater UK tax liabilities under the 2008 regime
with only treaty relief to mitigate double taxation, as far as it goes.

That is unfair, but the reason is not that UK unfairly taxes its long-term residents, but that the US imposes US tax on non-resident citizens, so all its non-residents face the burden of double taxation: US tax and tax in their country of residence (subject to limited tax credit relief). In this respect the US is almost unique. The only other country which taxes worldwide income of non-resident citizens is Eritrea.[52]

1.8.4 *Process of implementation*

50 See 13.7.1 (Company person: Critique); 13.11 (Relevant person rules: Critique).

51 See 13.31.2 (Remittance of derived property).

52 A few countries (i.e. Finland, France, Hungary, Italy, Spain and Turkey) tax on citizenship, but only for a limited duration or in special cases.
Ironically, in 2011 the United States condemned Eritrea at the United Nations for its "diaspora tax".
See Hammer, "Old Habits Die Hard: Should the United States Abolish Citizenship-Based Taxation?" (2016), IBFD
http://www.ibfd.org/IBFD-Tax-Portal/White-Papers?utm_source=linkedin&utm_medium=social-media&utm_campaign=linkedin-discussion-week-9&utm_content=IBFD-Tax-Portal/White-Papers

The manner in which the FA 2008 was introduced deserves to be recorded.

In January 2008, 26 pages of draft clauses were published whose unwritten message to wealthy non-residents was broadly: *do not come to the UK if possible; if you must, do not invest any money here*. The clauses were officially described as work in progress, but this was unfit for publication.

HMRC[53] presumably agreed. On 27 March the Finance Bill was published, containing 54 pages of legislation. The FB clauses bore almost no resemblance to the January draft. One consequence is that the professional time and clients' money spent considering the old clauses was almost entirely wasted. That certainly cost many £millions. Another consequence was that the profession had nine frantic days to scramble around before the end of the tax year. Because of the absence of sensible transitional reliefs, large amounts of tax depended on decisions and actions taken in those days. Sensible consideration of difficult and important matters was rendered impossible.

On the date of publication the Treasury announced that the Finance Bill was incomplete and amendments covering almost every aspect of the rules[54] were made in the course of progress of the Finance Bill.[55] Thirty pages of amendments duly emerged in mid June – far too late in the Finance Bill timetable to give them any serious consideration. Forty eight more Report Stage amendments were published on 26 June. The report stage and third reading (after which no further amendments could be made) were held on 1 and 2 July 2008. Avery Jones notes that "Report Stage

53 In this work I use the expression HMRC loosely, to include those in HM Treasury and in Government who share the responsibility for tax reform; it is not easy, or necessary, to identify where tax reform decisions are actually made.

54 Explanatory notes to Schedule 7, para 36 (mixed funds); para 47 (s.87 charge); para 52 (non-resident trusts); para 74 (Schedule 4C); para 91 (ToA provisions; para 106 (works of art); para 107 (employment related securities).

55 In the 2008/09 edition I said:
"This is a new development in tax legislation. While from time to time inadequately drafted clauses have always been found in Finance Bills, this is as far as I am aware the first time that the Government has had to announce that fact at the time of publication of the Finance Bill."
There are similar examples in the FA 2009 but it has not become a trend.

amendments are usually a disaster."[56]

As a result, the final legislation poses problems which will occupy practitioners, and (so far as they care about the legislation) HMRC, for many years, but it is also noteworthy that during the first three months of 2008/09 taxpayers could not know what laws governed transactions which they might wish to carry out, or what record keeping would be required of them.

The former editor of *Taxation* is blunt:

> The standard of strategic policy making at the Treasury has been unacceptably poor in recent years, but this must surely have been one of its lowest ebbs ever.[57]

CIOT say:

> when corners are cut, especially under time pressures, there can be serious deficiencies.

and their example to prove the point is the non-domicile rules in the FA 2008.[58]

The House of Lords Economic Affairs Committee comment in measured language:

> Our private sector witnesses would not have used words like "a real shambles" if they did not feel strongly about this. ...
> 176. We recommend that, if they have not already done so, HMT and HMRC should carry out a full review of the reasons why there were so many difficulties in the development of this policy initiative. They should ensure that the lessons are learned so that these problems do not emerge in other initiatives.
> 177. We also recommend that if another policy initiative gets to the point where the legislation cannot be finalised for inclusion in the Finance Bill, that initiative should not be included in the Bill, or, if feasible, the part which is not finalised should not be included. We cannot support the

56 See "Taxing Foreign Income from Pitt to the Tax Law Rewrite—The Decline of the Remittance Basis", Avery Jones in *Studies in the History of Tax Law* (Vol 1 2004) *https://www.kessler.co.uk/wp-content/uploads/2013/12/Remittance-basis.pdf*.

57 *Taxation* 12 June 2008 Vol 161 No. 4160 p.627 (Malcolm Gunn).

58 The Making of Tax Law, para 3.2, CIOT, June 2010 *http://www.tax.org.uk/resources/CIOT/Documents/2010/09/themakingoftaxlaw.pdf*

> approach of the Finance Bill's still being subject to much amendment at the time it is published, particularly when the proposals come into effect from the beginning of the tax year, as in this case. [59]

No review was carried out.

Does it now matter? Readers may think it pointless to cry "foul" in a game which has no referee, and whose result was long ago declared. But I think the story deserves to be recorded as what Lord Howe described as "an object lesson in how not to legislate".[60]

1.9 2017 domicile reform: Assessment

The 2017 reforms[61] contain a wide ranging package of reforms and any short assessment of its merits must be limited to its main features, which are:

(1) 15-year deemed domicile rule for IT/CGT
(2) Formerly domiciled residents rules
(3) Protected trust regime
(4) IHT residential-property regime
(5) Non-resident disregard for s.87 gains

1.9.1 *Political background*

The inspiration for the changes was political. The decision did not much depend on an assessment of the policy arguments analysed in this chapter. The decision should be seen in the context of the 2015 summer budget's adoption of other Labour policies: the increased national living wage[62] and

59 Select Committee on Economic Affairs, 2nd Report of Session 2007–08, The Finance Bill 2008 *http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeconaf/117/117i.pdf*.

60 Making Taxes Simpler - The final report of a Working Party chaired by Lord Howe (2008) *https://conservativehome.blogs.com/torydiary/files/making_taxes_simpler.pdf*

61 The reforms should be considered as a package with the supplemental offshore trust reforms which were announced together but deferred until 2018.

62 Labour Manifesto 2015 provided: "We will [raise] the National Minimum Wage to more than £8 an hour by October 2019". *http://www.labour.org.uk/page/-/BritainCanBeBetter-TheLabourPartyManifesto2015.pdf*

the apprenticeship levy.[63] The Cameron administration sought to occupy middle ground left vacant, or perceived vacant, by the Corbyn opposition.

The Government have shown no interest in debate on the policy issues. Since the policy was taken from the Labour manifesto,[64] and continued to be supported by Labour, there was little possibility of a successful lobby against it.

This is not to say that the 2017 reforms are not defensible, on the basis of fairness or otherwise, just that little reasoned debate took place in public, and probably little debate took place in private. The IFS, as usual, shone an intelligent beam into the fog, though I am not sure that anyone took any notice.[65]

Contrast the 2008 reforms where there was at least the appearance of consultation and debate.

Perhaps it would be naive to expect otherwise.

1.9.2 *Clear and easy to operate*

By this criterion the 2017 reforms fail hopelessly.

1.9.3 *Fairness*

A 15-year deemed domicile rule for IT/CGT seems fair. The protected trust regime leaves us short of equality between long term foreign domiciled individuals and UK domiciliaries, but that can itself be defended as fair.

Formerly domiciled residents rules can work harshly, but all workable rules must have hard cases at the borders and the number of truly unfair cases will be very small.

The difficulty in assessing the fairness of the IHT residential-property regime is that IHT (unlike, say, CTT) is a fundamentally unfair and illogical tax. I would have thought it reasonably clear that any advantage does not justify the complexity and oddity of the results from the territorial

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63 Labour Manifesto 2015 provided: "[Apprenticeships] will be co-funded ... by employers..."
https://www.slideshare.net/miquimel/2015-04-labourgeneralelectionmanifesto2015britaincanbebetterlabour

64 See 1.3.2 (Are non-dom reliefs fair).

65 IFS, "Unknown quantities: Labour's 'non-dom' proposal" (2015)
http://www.ifs.org.uk/publications/7703

limits of the tax which now apply.

The non-resident disregard will operates unfairly, and significantly extends the unfairness of a code which was already unfair.

1.9.4 *Benefit to UK economy*

Perhaps more importantly: Will the reforms benefit the UK economy? The consultation was prefaced with the statement that:

> The government wants to attract talented individuals to live in the UK who will help to contribute to the success of this country by investing here and creating jobs. The long-standing tax rules for individuals who are not domiciled in the UK are an important feature of our internationally competitive tax system, and the government remains committed to that aim.[66]

I wonder how far that was meant to be taken seriously. In 1974, when the Conservatives successfully opposed a similar reform proposed by Labour, Peter Rees (later Conservative Chief Secretary to the Treasury) said:

> I agree with my hon. Friend the Member for Pembroke (Roger Edwards, now Lord Crickhowell), that very little tax will be gained.[67]

But it was, perhaps, a different computation when income tax rates reached 83% or 98%, and without the protected trust regime.

The 2016 policy paper provides:

> The costing has been adjusted to account for behaviour, which includes increased tax planning on offshore income, non-compliance and choosing to become non-UK resident. However, behavioural response for high net worth individuals is difficult to predict.[68]

What is clear is that economic benefit was not a consideration, or at least not a major consideration, behind the reforms. This may also be inferred

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66 Consultation paper "Reforms to the taxation of non-domiciles" (2015) *https://www.gov.uk/government/consultations/reforms-to-the-taxation-of-non-domiciles/reforms-to-the-taxation-of-non-domiciles*

67 *http://hansard.millbanksystems.com/commons/1974/jun/13/cases-i-and-ii-of-schedule-e#S5CV0874P0_19740613_HOC_311*

68 "Domicile: Income Tax and CGT" (Feb 2016) *https://www.gov.uk/government/publications/domicile-income-tax-and-capital-gains-tax*

from the fact that the reforms were announced in the Summer Budget 2015, but no estimate of the tax yield was published until Budget 2016. The budget figures[69] are:

Year	Deemed domicile	IHT residence-property rules
2016-17	0	-5
2017-18	-20	+30
2018-19	+395	+90
2019-20	+310	+60
2020-21	+310	+70

These figures include an estimate of the effect on the yield caused by those who decide to leave the UK rather than become deemed domiciled here. However, there is no account made for:

(1) secondary impacts that the reforms could have, for example, on spending or investment here by those who decide to leave.
(2) those who decide not to come to the UK as a result of the reforms.

The figures are approved by the Office for Budget Responsibility, which, I am told, considered these effects would not be significant.[70] But it seems to me that these omissions render the table invalid, and the reform is likely to cost more than it brings in.

1.10 The promise of stability

There is a long tradition of instability in the UK tax system. In 1981:

> One of the most noticeable characteristics of the British tax system is that it is under continual change.[71]

In 1993:

> The major distinguishing characteristic of the British tax system is its instability. The British tax system changes faster, more frequently, and more radically than any other tax system I have observed.[72]

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69 Budget 2016 (March 2016) Table 2.2 *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508193/HMT_Budget_2016_Web_Accessible.pdf*

70 Clarified with HM Treasury. The figures are (necessarily) based on the then economic forecasts.

71 James & Nobes, *Economics of Taxation* (1st ed., 1981), p.135.

72 Steinmo, *Taxation and Democracy* (1993), p.44.

In 1999:

> The UK tax system is caught in a culture of never-ending change.[73]

The years 2008 - 2013 saw a series of broken promises of stability without any perceptible change of practice.[74] The promises of stability should be regarded as lip-service to the desideratum of stability. The practice, which lies deep in the culture of government, proved immune to such announcements. A true commitment to stability requires HMRC to refrain from making reforms which they would like to make, and when actual proposals come to the table, the interest of reform overcomes the interest of stability. It is easier for politicians to talk about stability than to achieve it. Perhaps HMRC have recognised this, as the 2014, 2015 budgets contained no further promises of stability. The 2017 budget has only a vague reference to "a more stable and certain tax environment", and I doubt if anyone is expected to take that seriously.

1.11 State of UK tax reform

In 2010 CIOT expressed itself strongly:

> The way tax law is developed and effected in the UK is deeply flawed.[75]

Two publications shed light on what went wrong with tax legislation in recent years. Demos say:

> The centralisation of [tax policy-making power] is a particular problem because of the lack of institutional accountability of the Treasury on taxation policy and the lack of accountability of chancellors themselves in matters of taxation. ... The concept of checks and balances in tax policy is nonexistent.
>
> ... the current relationship between the Treasury and HMRC was 'very dysfunctional', had 'almost gone as wrong as it could have gone'...
>
> At the moment, pursuing a career only in tax policy is not valued within

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73 ICAEW TAXGUIDE 4/99 (Towards A Better Tax System) *http://www.icaew.com/en/technical/tax/towards-a-better-tax-system*

74 I set them out the 2016/17 edition of this work para 1.10 (The promise of stability) but omit that here as it has diminishing contemporary significance.

75 Letter from CIOT to George Osborne, 19 May 2010

> the Treasury hierarchy. Officials pass through the tax teams rather than making tax policy a career choice. ... High turnover results in a lack of experience in the tax section and little institutional memory...
> ... There are traditional areas that are ring-fenced as not for consultation, including tax rates and anti-avoidance measures. ...
> ... 'at the moment [anti-avoidance] works like a drive-by shooting. You might hit your objective but you also hit a lot of other people.'
> At present, policies are frequently changed without understanding the impact the policy has initially had in practice.[76]

Along with a tendency not to consult is an HMRC policy which is profoundly hostile to the tax profession . The Director of the HMRC Tax Avoidance Group 2004-2009 records:

> ... I was never happier than when a new tax avoidance initiative was greeted with howls of protest from the tax avoidance quarter.[77]

In short, preventing avoidance has been a priority that outweighs other considerations, such as certainty, workability and the Rule of Law; or rather obliterates all consideration; and listening to the tax avoidance quarter – which includes the professional bodies and almost any practitioner who said what HMRC did not want to hear – has been ruled out. The professional bodies are regarded by HMRC as a pressure group whose vaunted commitment to fairness, practicality and the Rule of Law is merely a cloak for self-interested whingeing of a featherbedded elite.[78]

That policy has ruled since the 1997 Blair administration, and its consequences can be seen in seeking to state the law, as this book seeks to do, or in seeking to understand the law, as you the reader will do now.

1.11.1 *Tax Consultation Framework*

In 2011 the coalition administration promised a fresh start with The Tax

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76 Ussher and Walford, *National Treasure* (Demos, 2011) *http://www.demos.co.uk/files/National_treasure_-_web.pdf?1299511925*. Demos claims to be Britain's leading cross-party think-tank.

77 Tailby, "Some Reflections on Tax Avoidance" [2011] PCB 41.

78 This may be seen in the context of a more general antagonism to the legal (and other) professions, and dismissal of their ethical pretensions. That is an ancient trope, but took renewed vigour under Thatcher, and has lead to a transfer of regulatory power from the Bar and Law Society to regulation by non-lawyers.

Consultation Framework. The 2015 Cameron administration also committed to this.[79] It provides:

> 2. There are five stages to the development and implementation of tax policy:
> Stage 1 Setting out objectives and identifying options.
> Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
> Stage 3 Drafting legislation to effect the proposed change.
> Stage 4 Implementing and monitoring the change.
> Stage 5 Reviewing and evaluating the change.
> 3. Where possible, the Government will:
> • engage interested parties on changes to tax policy and legislation at each key stage of developing and implementing the policy;
> • make clear at what stage (or stages) the engagement is taking place so that its scope is clear;
> • carry out at least one formal, written, public consultation in areas of significant reform;
> • set out, as the policy develops, its strategy for stakeholder engagement including planned formal consultation periods, informal discussions, working groups and workshops;
> • consult, where it can, on the policy design, draft legislation and implementation of anti-avoidance and other revenue protection measures, provided this does not present additional risk to the Exchequer;
> • minimise the occasions on which it consults only on a confidential basis. Where confidential consultation has been necessary the Government will be as transparent as possible about its outcome and consult openly if pursuing the policy change further; and
> • provide feedback which sets out the Government's response to the views received and makes clear what changes, if any, have been made to the planned approach as a result of those views.
> 4. At each stage of consultation, the Government will set out clearly:
> • the policy objectives and any relevant broader policy context;

79 HM Treasury: "Tax policy consultation will continue and be strengthened. The government remains committed to consulting on policy as set out in 'The new approach to tax policy making' in 2010." (November 2016). *https://www.gov.uk/government/news/7-things-you-need-to-know-about-the-new-budget-timetable*

- the scope of the consultation, in particular what is already decided and where there is still scope to influence the outcome;
- its current assessment of the impacts of the proposed change and seek to engage with interested parties on this analysis. A final assessment of impacts will be published once the final policy design has been confirmed...

5. Informal consultation will be as transparent as possible, consistent with the need to protect revenue. The best principles of formal consultation will be applied to informal consultation to ensure clarity of scope, impact, accessibility, and meaningful feedback. ... Informal consultation can run alongside formal consultation but will often be most appropriate at the earliest and latest stages of tax policy development to identify options and then to fine-tune the detailed legislation and implementation of change.

Exceptions

8. The Government will generally not consult on straightforward rates, allowances and threshold changes, or other minor measures; recognising, however, that even in these cases some level of consultation can often be informative. It may also adopt a different approach for revenue protection or anti-avoidance measures where following this Framework could present a risk to the Exchequer. In other circumstances where the Government decides not to consult during tax policy development it will explain the reasons for that decision.

9. There will be times when it will be necessary to deviate from this Framework. In these circumstances the Government will be as open as possible about the reasons for such deviations.[80]

Of course tax is not unique in this respect: similar considerations apply to all areas of law reform. The Data Retention and Investigatory Powers Act 2014 was enacted in two working days; and in holding it to be unlawful, the Divisional Court noted in moderate terms:

> legislation enacted in haste is more prone to error.[81]

1.11.2 *Compliance with Framework*

80 *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89261/tax-consultation-framework.pdf*

81 *R oao Davis v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin) at [121].

How far has tax reform since 2011 has complied with the Framework? That is a broad question; it would need a series of volumes, there has been so much.

In brief, compliance with the Framework's tax reform timetable has been patchy. It is easier to announce good intentions than to abide by them. The culture of "ready, fire, aim" still prevails.

A few examples will illustrate the point.

The ATED regime was introduced in breach of the Framework. The House of Lords Economic Affairs Committee commented:

> ... the Government's response to SDLT avoidance might have been more appropriately designed had it consulted interested parties at the outset as its 'new approach to tax policy making' stipulates. We recommend that the Government adhere to that approach in designing future tax changes.[82]

The 2013 disallowances of debts for IHT were introduced in breach of the Framework. But neither here, nor, as far as I am not aware, in any other case have the Government acknowledged a breach of the Framework or been "as open as possible about the reasons for such deviations."

The 2016 dividend income reforms, a major change (also misdescribed as simplification[83]), were introduced in breach of the Framework. The House of Lords Economic Affairs Committee comment:

> We deeply regret the lack of consultation on the savings [Personal Savings Allowance] and dividend income proposals and repeat the recommendation in our Report on the draft Finance Bill 2014 that the Government should reassert its commitment to the 'new approach' to tax policy making and make sure that, in future, it adheres to it in full except in the most exceptional circumstances.[84]

The Law Society say:

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82 House of Lords Select Committee on Economic Affairs *The Draft Finance Bill 2013* (March 2013) para 210 *http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeconaf/139/139.pdf*

83 Summer Budget 2015, para 1.186: "the government will reform and simplify the system of dividend taxation...".

84 "The Draft Finance Bill 2016" (2016), para 250 *http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeconaf/108/108.pdf*

> ... the new approach is (i) not always followed, and (ii) side-stepped by labelling new tax law as anti-avoidance when it is no such thing.
> A case in point is the FA 2014, which introduced changes to the way in which certain members of limited liability partnerships were taxed. When this proposal was first published, it was an anti-avoidance measure. Following initial consultation, the nature of the proposal changed markedly and became more widely applicable to professional partnerships. This was not anti-avoidance legislation but, nevertheless, there was no formal consultation of the kind envisaged by Tax Consultation Framework.[85]

The Tax Professionals Forum note some cases where the framework was followed, and then say:

> In contrast, however, in other cases, consultations have started:
> - part way through the process (such as that on the provisions relating to the transfer of assets abroad and gains made by offshore close companies),
> - without a clear articulation of the policy involved (for example, on IR35 and Controlling Persons), or
> - without any discussion of the policy (for example, the changes to SDLT on properties owned by non-residents through companies, investment funds and others and the cap on income tax reliefs).[86]

The 2017 reforms were announced in 2015, which should have allowed time for thinking and consultation. Two years is an appropriate time scale to introduce major reforms, and at the time it seemed a refreshing break from the pattern of 2008 to see reform enacted on that basis. But two caveats to this welcome development:

(1) A distant deadline allowed the more difficult and serious work to be put off, the matter was concluded in the usual frantic rush, and the end result is disappointing. Still, deferring the some aspects of the offshore tax reforms to 2018, to allow consideration, is encouraging.

(2) The need for time was not accepted by Labour:

> ... why else would the Government have given a grace period for those

85 The House of Lords Economic Affairs Committee was also highly critical: see the Committee report "The Draft Finance Bill 2014" (2014).

86 Tax Professionals Forum Second Independent Annual Report (2013).

> non-doms affected to get an offshore trust if they do not have one already? ... why else would the Government have actively signposted the changes for non-doms, which has set hares running? It seems to me that those are things that the architect of the measures would do if they were of a mind to completely undermine the measures' effectiveness.[87]

On the other hand, the IHT residence nil-rate band, 10 dense pages of legislation, was slotted into F(no.2)A 2015, thus precluding proper debate and consideration, even though the rules only took effect from 2017/18! and even though there had to be a second installment of the legislation in FA 2016.

The last part of the Tax Consultation Framework requires post-implementation monitoring and evaluation. This is almost never done.[88] It is interesting to speculate what would happen if it were. Much would depend on the identity of those carrying out the review and, in controversial areas, on their instructions and on politics.[89]

1.11.3 *Alternatives to Framework*

There is one route and one route only to a good tax system: sound tax policy devised by those with a sound understanding of the current tax system; a leisurely timetable of consultation and legislative drafting as envisaged in the Tax Consultation Framework and the 10 tax tenets of ICAEW.[90] That is a hard prescription, though CIOT and others continue to bang at the drum.[91]

It is tempting to look for easier solutions. Past attempts include the tax

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87 Peter Dowd (Labour Shadow Chief Secretary to the Treasury) Hansard, 19 Oct 2017 *https://hansard.parliament.uk/Commons/2017-10-19/debates/aea0b4b1-dc6c-4153-a24f-09fb6be7d155/FinanceBill(FourthSitting)*

88 Even in the cases where the FA 2018 required post-implementation reviews, the results were "singularly unilluminating. Most of them merely contains words to the effect of 'this legislation is new and we haven't yet seen how it will work in practice'." See Hubbard, Taxation Magazine, 4 April 2019.

89 See ? (12 year limit: Critique).

90 *https://www.icaew.com/en/technical/tax/towards-a-better-tax-system/ten-tenets-of-tax*

91 See Institute for Government, "Better Budgets: Making tax policy better" (Jan 2017) *https://www.instituteforgovernment.org.uk/publications/better-budgets-making-tax-policy-better*

law rewrite, which achieved little; and, perhaps,[92] the HMRC charter which achieved nothing.

The most recent is the GAAR; it will take several decades to assess whether that will yield a consistent case law and reasonable predictability of outcome. Advocates of the GAAR claimed:

> Enacting an anti-abuse rule should make it possible, by eliminating the need for a battery of specific anti-avoidance sub-rules, to draft future tax rules more simply and clearly. Also, fewer schemes would be enacted and so there will be less call for specific remedial legislation...In time, once confidence is established in the effectiveness of the anti-abuse rule, it should be possible to initiate a programme to reduce and simplify the existing body of detailed anti-avoidance rules.[93]

I am not sure if anyone seriously believed that, but it has not come about, or at least, there is no sign of it yet.

1.12 The future

The 2017 reforms may put to an end the lobbying on the domicile issue from the left (also to some extent from beyond that). But that seems unlikely.

In the 2016/17 edition of this work I cited the assessment of Martin Wolf (chief economics commentator at the Financial Times):

> The chancellor has little interest in making the tax system less complex and more coherent.[94]

That still seems to be the case, and my earlier conclusion seems justified by events:

> The complexity and incoherence of the UK tax system will continue to increase for as long as the HMRC view prevails, that simplicity and coherence, while perhaps desirable, have low or nil priority in the context

92 But the HMRC charter should probably be regarded a matter of spin and presentation, and not as a serious attempt to address any tax issues.

93 Aaronson, *GAAR Study* (2011) para 1.7 *http://webarchive.nationalarchives.gov.uk/20130321041222/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf*

94 Financial Times 9 July 2015.

of tax reform;[95] and that the current state of tax and tax reform is good, or if it is not good, nothing can be done to make it better.

Perhaps the safest prediction is continued publication of new reports condemning the existing state of legislation and seeking improvement. For the most recent, see "House of Lords Select Committee on the Constitution, "The Legislative Process: Preparing Legislation for Parliament".[96]

This file contains Chapter 1, Taxation of Non-Residents and Foreign Domiciliaries by James Kessler QC (chapter version date: 8.8.19)
Note: Cross references work as links on the online version of this chapter, but do not work in this pdf file.

95 Thus the OTS has no role in the development of new tax law.
96 *https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/27.pdf* (2017)