

RAPID RESOLUTION OF DOMICILE DISPUTES: BE CAREFUL WHAT YOU WISH FOR

14 May 2020 | London
Legal Briefings

In *Henkes v HMRC* [2020] UKFTT 7645 (“**Henkes**”), the First-tier (Tax) Tribunal (“**the Tribunal**”) held that (a) it could (and would) determine the taxpayer’s domicile status when determining an application for the closure of a domicile enquiry and (b) its determination of that issue would be binding in any substantive appeal against a subsequent tax assessment. Unfortunately for the taxpayer, however, the Tribunal agreed with HMRC that the taxpayer had acquired a domicile of choice within the UK.

BACKGROUND

In the context of domicile investigations, HMRC have, with increased regularity and vigour, taken the position that the individual under investigation has acquired a domicile of choice within the UK. In consequence, HMRC have issued information notices requiring the production of extensive information about the individual’s non-UK affairs (on the basis that, as a UK domiciliary, the individual is not entitled to pay tax on the remittance basis).

This trend is regarded by many as relatively bold on the part of HMRC. This is because it requires HMRC to adduce cogent evidence (which is most readily available to the taxpayer) of that which can be notoriously difficult to prove: namely, a change of domicile.

In a string of three recent cases (generating three conflicting decisions), the individual under investigation disagreed with HMRC’s position that they were domiciled within the UK. Further, in each case the individual took steps to have that domicile dispute determined in advance of complying with HMRC’s requests for information about their non-UK affairs (on the basis that, if HMRC were wrong, the trouble, expense and intrusion of responding to the requests could be avoided).

In the first case (*Embiricos v HMRC* [2019] UKFTT 1418, "**Embiricos**"), the individual succeeded in forcing HMRC to issue a partial closure notice (addressing the narrow point of his domicile status) against which he could appeal. Pending determination of that appeal, HMRC were prevented from enforcing their request for information.

By contrast, in the second case (*Levy v HMRC* [2019] UKFTT 2369, "**Levy**"), the executors of the deceased individual failed to secure an order for a partial closure notice. As such, HMRC's request for information was upheld. Notably, the Tribunal decided that it did not have jurisdiction to determine the deceased's domicile status as a preliminary issue in determining the applications before it (and, notwithstanding the decision in *Embiricos*, found that HMRC could not be required to issue a partial closure notice relating to the taxpayer's domicile status before HMRC had the information necessary to assess the taxpayer's consequent tax liability).

In the third and most recent case, *Henkes* (which is considered in more detail below), the Tribunal took a different approach and found that it did have jurisdiction to determine the domicile dispute as a preliminary issue (albeit its determination of that issue proved to be a disappointment to the taxpayer).

FACTS

In *Henkes*, the taxpayer considered himself to be domiciled outside the UK and had filed his tax returns on the basis that he was entitled to pay tax on the remittance basis. HMRC opened enquiries into the tax returns made by Mr Henkes in respect of the tax years 2014/15 and 2015/16 ("**the Enquiries**"). The Enquiries centred on Mr Henkes' domicile status.

On 17 October 2018, Mr Henkes applied to the Tribunal for an order directing the closure, either by way of final closure notices or partial closure notices (in respect of Mr Henkes' domicile status), of the Enquiries.

After Mr Henkes made his application for closure notices, HMRC reached the conclusion that Mr Henkes had acquired a UK domicile of choice and issued an information notice to him, requiring the production of information relating to his worldwide income and gains in order to assess his tax liability for the years under enquiry. HMRC also issued an information notice in respect of the tax year 2013/14, which was not under enquiry. Mr Henkes appealed to the Tribunal against those notices.

LAW

Section 28A of the Taxes Management Act 1970 provides, relevantly, that where a taxpayer applies to the Tribunal for a direction requiring the closure of an enquiry (or part of an enquiry), the Tribunal should direct that a closure notice be issued unless it is satisfied that there are "reasonable grounds" for not issuing the closure notice.

Paragraph 1(1) of Schedule 36 Finance Act 2008 ("**Schedule 36**") provides, relevantly, that HMRC may issue an information notice to a taxpayer if the information is "reasonably required" by HMRC for the purpose of checking the taxpayer's tax position.

As such, at the heart of both legislative provisions is a test based on reasonableness. The core issue between the parties in *Henkes* was whether the Tribunal had jurisdiction to determine the issue of Mr Henke's domicile status as a preliminary step in assessing the reasonableness of HMRC's actions.

DECISION

The Tribunal decided that the issue involved two questions:

- whether the Tribunal had jurisdiction to determine Mr Henkes' domicile status in the relevant tax years ("**the Jurisdiction Question**"); and
- (if it did) whether it should determine his domicile status ("**the Discretion Question**").

In answering the Jurisdiction Question, the Tribunal drew on the decision of the Court of Appeal in *HMRC v Vodafone 2* [2006] EWCA Civ 1132 ("**Vodafone 2**"). In that case, the Court held that, in determining an application for a closure notice, the Court could determine a question of law as a preliminary issue. Although the issue in *Henke* was a mixed question of fact and law, the Tribunal was satisfied that the principle set out in *Vodafone 2* was equally applicable. In particular, the Tribunal considered that the decision in *Vodafone 2* supported the proposition that the Tribunal is competent to determine any threshold question which will (in turn) determine conclusively the success or failure of the application for the closure notices.

In answering the Discretion Question, the Tribunal relied on the principles (relating to closure notice applications) summarised in *Beneficial House v HMRC* [2017] UKFTT 801 (TC) and the overriding objective in Rule 2 of the Tribunal Rules (to deal with the case fairly and justly). In particular, the Tribunal considered that the question of whether to exercise its jurisdiction involved balancing the right of HMRC "*to ensure that it has the armoury to pursue the investigations which are necessary in order for it to be able to assess each taxpayer to the correct amount of tax*" and the right of the taxpayer "*to be protected from undue delay in closing the enquiries.*" In the case before it, the Tribunal found that the balance pointed strongly in favour of exercising its discretion to determine the taxpayer's domicile status. In reaching that conclusion, the Tribunal took into account the length of the Enquiries, the cooperation of Mr Henkes during the Enquiries, and the binary and fundamental nature of the domicile issue.

The Tribunal also held that its determination of Mr Henkes' domicile status would be binding on both parties in any subsequent appeal against a closure notice by Mr Henkes, based on the doctrines of issue estoppel and abuse of process. In coming to that decision, the Tribunal held that the more restrictive approach to issue estoppel adopted in many tax cases (stemming from the decision in *Caffoor v Income Tax Commissioners* [1961] AC 584; namely, that a decision relating to one tax year does not create an issue estoppel in relation to any other tax year) is limited to tax cases which concern assessments to tax or payments of tax. (Given that a decision in relation to Mr Henkes' domicile was not a decision regarding an assessment to or payment of tax, the Tribunal held that the general law of issue estoppel applied, i.e. in summary, a conclusion on a question of law and fact which has been reached by a court or tribunal in the course of earlier proceedings between the same parties is treated as binding.)

The Tribunal held that its reasoning in relation to determination of the domicile issue in the closure notice application applied equally to Mr Henkes' appeal against HMRC's information request. However, and importantly, insofar as Mr Henke disagreed with the Tribunal's finding on domicile in that context, he had no statutory right of appeal. This was because, in an appeal against an information notice, paragraph 32(5) of Schedule 36 provides that the Tribunal's decision is "final and conclusive".

Notwithstanding the Tribunal's support for Mr Henke in relation to these procedural issues, it found for HMRC on the domicile issue (concluding that Mr Henke had acquired a domicile of choice within the UK).

COMMENT

Clearly, it is unhelpful to have conflicting decisions of the Tribunal (in *Levy* and *Henkes*) as to whether an individual's domicile status can be determined as a preliminary issue in a closure notice application / information notice appeal.

Given the Tribunal's suggestion in *Henke* that appeal rights may be severely limited where domicile status is determined as a preliminary issue, the better approach to take by taxpayers (seeking an early determination of domicile status) seems to be the one taken in *Embiricos*. As such, it is similarly unhelpful to have conflicting decisions of the Tribunal (in *Levy* and *Embiricos*) on whether a Tribunal can order a partial closure notice (relating to domicile status) before the taxpayer has complied with HMRC's requests for information about their non-UK affairs. It is some comfort to know that the decision in *Embiricos* has been appealed to the Upper Tribunal, so it is hoped that there will be an authoritative decision on this closure notice point in early 2021.

It is also worth reflecting on the fact that HMRC clearly is much more willing than it was in the past to assert that an individual has acquired a domicile of choice in the UK. This highlights the importance of individuals taking as much care over considering periodically their domicile status as they do their residence status.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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