

DEEMED DOMICILE FOR CERTAIN IHT PURPOSES - CLAUSE 205 FINANCE (NO. 2) BILL 1993

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In this article I examine the presumably unintended potential effects of Clause 205(3) and (5) Finance (No. 2) Bill 1993 on the deemed domicile rule contained in section 267(1)(b) and (4) Inheritance Tax Act 1984.²

Section 336 Income and Corporation Taxes Act 1988 currently provides:

"(1) A person shall not be charged to income tax under Schedule D as a person residing in the United Kingdom, in respect of profits or gains received in respect of possessions or securities out of the United Kingdom, if -

- (a) he is in the United Kingdom for some temporary purpose only and not with any view or intent of establishing his residence there, and
- (b) he has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment,

but if any such person resides in the United Kingdom for such a period he shall be so chargeable for that year.

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² Readers might refer to Philip Baker's article at page 143 *et seq* of Volume 3, Issue 2 of this *Review* for a discussion of *inter alia* the demise of "available accommodation" as a factor in determining residence for income tax and capital gains tax.

(2) For the purposes of Cases I, II and III of Schedule E, a person who is in the United Kingdom for some temporary purpose only and not with the intention of establishing his residence there shall not be treated as resident in the United Kingdom if he has not in the aggregate spent at least six months in the United Kingdom in the year of assessment, but shall be treated as resident there if he has."

Clause 205 would provide *inter alia*:

"(1) In section 336 of the Taxes Act 1988 (temporary residents in the United Kingdom) the following subsection shall be inserted after subsection (2) -

"(3) The question whether -

- (a) a person falls within subsection (1)(a) above, or
- (b) for the purposes of subsection (2) above a person is in the United Kingdom for some temporary purpose only and not with the intention of establishing his residence there,

shall be decided without regard to any living accommodation available in the United Kingdom for his use."

(2) ...

(3) ...

(4) Subsections (1) ... above shall have effect for the year 1993-94 and subsequent years of assessment.

(5) ..."

Section 267 Inheritance Tax Act 1984 currently provides *inter alia*:

"(1) A person not domiciled in the United Kingdom at any time (in this section referred to as "the relevant time") shall be treated for the purposes of this Act as domiciled in the United Kingdom (and not elsewhere) at the relevant time if -

- (a) ..., or
 - (b) he was resident in the United Kingdom in not less than seventeen of the twenty years of assessment ending with the year of assessment in which the relevant time falls.
- (2) ...
- (3) ...
- (4) For the purposes of this section the question whether a person was resident in the United Kingdom in any year of assessment shall be determined as for the purposes of income tax, but without regard to any dwelling-house available in the United Kingdom for his use."

Clause 205 would also provide *inter alia*:

- "(3) In consequence of subsection (1) above, in section 267(4) of the Inheritance Tax Act 1984 (residence in United Kingdom determined as for purposes of income tax) the words "but without regard to any dwelling-house available in the United Kingdom for his use" shall be omitted.
- (4) ...
- (5) Subsection (3) above shall have effect where the year of assessment concerned is 1993-94 or a subsequent year of assessment."

Thus Clause 205(3) would make a *purportedly* consequential / "tidying-up" amendment in deleting the words "but without regard to any dwelling-house available in the United Kingdom for his use" from s.267(4) Inheritance Tax Act 1984. However, the true effect of Clause 205(3) would be to either

- 1 Render relevant to deemed domicile within s.267(1)(b) and (4) Inheritance Tax Act 1984 the availability of accommodation to those in the UK for a short period in any one of the relevant years of assessment, or
- 2 Destroy the operation of s.267(1)(b) and (4) *in toto*.

S.267(4) Inheritance Tax Act 1984 currently provides that, for the purpose of deemed domicile for certain inheritance tax purposes, "the question whether a

person was resident in the United Kingdom in any year of assessment shall be determined *as for the purposes of income tax*³, but without regard to any dwelling-house available in the United Kingdom for his use", whereas section 336(1) and (2) Income and Corporation Taxes Act 1988 only treat respectively (a) Schedule D, Cases IV and V and (b) the three Cases of Schedule E.

The income tax purposes for which the determination of residence is relevant are found not merely in Schedule D, Cases IV and V and Schedule E⁴, so that Clause 205(1) is at best incompetent to affect the operation of section 267(4) Inheritance Tax Act 1984. In removing the words "but without regard to any dwelling-house available in the United Kingdom for his use" from s.267(4) Inheritance Tax Act 1984, Clause 205(3) might thus introduce the available accommodation rule in determining residence for the purpose of deemed domicile within section 267(1)(b) Inheritance Tax Act 1984. Cases such as *Cooper v Cadwalader*⁵ and *Loewenstein v De Salis*⁶ would be relevant.

This is on the assumption that the courts would struggle to give some effect to s.267(1)(b) and (4) by falling back on the common law, and ignoring the new s.336(3) Income and Corporation Taxes Act 1988⁷, in determining residence "as for the purposes of income tax".

If this assumption cannot be made, then Clause 205(3) would not so introduce the available accommodation rule, but instead Clause 205(1) and (3) would in fact destroy the operation of s.267(4), i.e., by respectively (a) destroying the uniformity of the test of residence for all income tax purposes and (b) removing the curing⁸ words "but without regard to any dwelling-house available in the United Kingdom for his use" from s.267(4) Inheritance Tax Act 1984, Clause 205(1) and (3) would destroy the meaning of the words "as for the purposes of income tax" in s.267(4) Inheritance Tax Act 1984. Such destruction cannot be the draftsman's intention.

³ Italicisation added.

⁴ See, e.g., s.48(1) Income and Corporation Taxes Act 1988 in relation to Schedule C.

⁵ (1904) 5 TC 101, Court of Exchequer (Scotland), First Division.

⁶ (1926) 10 TC 424, High Court, King's Bench Division.

⁷ See Clause 205(1).

⁸ See the next paragraph for elucidation of the meaning of "curing".

In the circumstance of the non-enactment of Clause 205(3) and (5), the operation of s.267(4) Inheritance Tax Act 1984 would not be disrupted by an enacted Clause 205(1) even though the effect of such enactment would be a lack of a uniform rule in relation to the residence for income tax purposes of temporary residents. The lack of uniformity created by Clause 205(1) would be cured by the words "but without regard to any dwelling-house available in the United Kingdom for his use" with which s.267(4) would still end, so that s.267(4) could operate in a satisfactorily logical manner.

Conclusion

In order to produce such a satisfactory operation of s.267(4) Inheritance Tax Act 1984 and to keep faith with their Budget Day Press Release⁹ statement that the abolition of the "available accommodation" rule "reflects the Government's determination to make the UK an attractive business location, from the point of view both of international companies and their employees", the Inland Revenue should seek to procure that sub-clauses (3) and (5) of Clause 205 are not enacted.

⁹ Set out at [1993] STI 468-469.