

AN ANALYSIS OF DEEMED DOMICILE FOR IHT

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1. Introduction

There are three types of domicile for IHT. We need terminology to describe them and I use the following terms:

- (1) General law domicile (“**actual domicile**”).
- (2) IHT deemed domicile:
 - (a) under s.267 IHTA (“**s.267 deemed domicile**”)
 - (b) under s.267ZA IHTA (“**spouse election domicile**”)

This article considers the two types of deemed domicile (“**IHT deemed domicile**”). A person who is deemed domiciled in the UK for IHT purposes under these rules is described as “**IHT deemed domiciled**”.

2. Scope of IHT deemed domicile

IHT deemed domicile applies for (almost) all IHT purposes but not for other taxes. For example, it does not affect eligibility for the remittance basis for income tax or capital gains tax purposes.

The two exceptional situations where IHT deemed domicile does not apply for IHT are not considered further here:

- (a) FOTRA securities and qualifying certificates of Islanders
- (b) Estate Duty double tax treaties

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2.1 *S.267 deemed UK domicile*

A foreign domiciliary can often live almost indefinitely in the UK without acquiring a UK domicile of choice and so (more or less) exempt from inheritance tax. The s.267 deemed domicile rule seeks to identify foreign domiciliaries who have close UK connections and provides that for IHT purposes, such individuals are generally treated as if they were UK domiciliaries, and so (more or less) within the full scope of IHT.

Section 267(1) IHTA provides:

A person not domiciled in the UK 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 UK (and not elsewhere) at the relevant time if—

- (a) he was domiciled in the UK within the three years immediately preceding the relevant time, or
- (b) he was resident in the UK in not less than seventeen of the twenty years of assessment ending with the year of assessment in which the relevant time falls.

“S.267 deemed domicile” is not an altogether helpful label, but no short label could do justice to the rather complicated rules.

In this book:

“The 3 year domicile rule” is the rule in para (a)

“The 17-year residence rule” is the rule in (b)

2.2 *3-year domicile rule*

The 3-year domicile rule concerns the person who is actually UK domiciled and who loses their UK domicile. Such a person is IHT deemed for three years from the date of their change of domicile.

Unlike the 17-year residence rule, the three year period is not related to years of assessment.

Section 267(5) IHTA provides:

In determining for the purposes of this section whether a person is, or at any time was, domiciled in the UK, sections 267ZA and 267ZB are to be ignored.

Thus spouse election domicile and s.267 deemed domicile operate independently:

the loss of spouse election domicile does not give rise to s.267 deemed domicile under the 3-year domicile rule.

2.3 *17-year residence rule: Time of acquisition of IHT deemed domicile*

The 17-year residence rule concerns the person who is not actually UK domiciled but who becomes resident here. Once they have been resident in the UK for 17 out of the last 20 years of assessment they become IHT deemed domiciled. In the discussion below I abbreviate “years of assessment” to “tax years”.

A person may meet this condition before they have been present in the UK for 17 complete years. In theory, fifteen years and a few days may suffice:

- (1) An individual who arrives in the UK on 5 April 2003 may arguably be resident in the UK in the tax year 2002/03. (Although this seems surprising, this was the HMRC view of the pre-SRT residence rules, if the individual came to the UK to live here permanently or intending to stay for three years or more.)
- (2) If they are still resident in 2018/19 they may be resident in the tax year 2018/19. The 17-year residence condition would then be satisfied.

Under the SRT, one may not know whether one is resident in a tax year until well into the year, or even until some time after the year. So during the 17th year of residence one may not know whether or not one is IHT deemed domiciled. The taxpayer must guess as best one can, and if that proves to be wrong, then puts in a return or tax reclaim later if needed.

The 17-year residence rule does not apply to visiting forces.

It may be useful to set out an aide memoire of when the 17-year residence rule begins to apply. Assuming a continual period of UK residence:

UK res: s.267 deemed dom

1997/98:	6 April 2013	2006/07:	6 April 2022
1998/99:	6 April 2014	2007/08:	6 April 2023
1999/20:	6 April 2015	2008/09:	6 April 2024
2000/01:	6 April 2016	2009/10:	6 April 2025
2001/02:	6 April 2017	2010/11:	6 April 2026
2002/03:	6 April 2018	2011/12:	6 April 2027
2003/04:	6 April 2019	2012/13:	6 April 2028
2004/05:	6 April 2020	2013/14:	6 April 2029
2005/06:	6 April 2021	2014/15:	6 April 2030

2.4 17-year residence rule: Time of loss of IHT deemed domicile

If an individual has been UK resident continuously for a block of 17 tax years, IHT deemed domicile under the 17-year residence rule ceases to have effect at the start of the 4th year of non-residence. The matter is best illustrated by a table:

Year	Resident Years	20 years ending year:				
		2009/10	2010/11	2011/12	2012/13	2013/14
1990/91	<i>Not relevant</i>	1				
1991/92	<i>Not relevant</i>	2	1			
1992/93	<i>Not relevant</i>	3	2	1		
1993/94	Resident 1	4	3	2	1	
1994/95	Resident 2	5	4	3	2	1
1995/96	Resident 3	6	5	4	3	2
1996/97	Resident 4	7	6	5	4	3
1997/98	Resident 5	8	7	6	5	4
1998/99	Resident 6	9	8	7	6	5
1999/00	Resident 7	10	9	8	7	6
2000/01	Resident 8	11	10	9	8	7
2001/02	Resident 9	12	11	10	9	8
2002/03	Resident 10	13	12	11	10	9
2003/04	Resident 11	14	13	12	11	10
2004/05	Resident 12	15	14	13	12	11
2005/06	Resident 13	16	15	14	13	12
2006/07	Resident 14	17	16	15	14	13
2007/08	Resident 15	18	17	16	15	14
2008/99	Resident 16	19	18	17	16	15
2009/10	Resident 17	20	19	18	17	16
2010/11	Non-resident 1		20	19	18	17
2011/12	Non-resident 2			20	19	18
2012/13	Non-resident 3				20	19
2013/14	Non-resident 4					20
Deemed domicile in 2013/14		Yes	Yes	Yes	Yes	No

Suppose an individual is resident in the UK throughout the block of 17 tax years from 1993/94 to 2009/10. We have to identify a relevant time. We then have to identify the tax year in which the relevant time falls. The table considers transfers of value in each of the 5 years 2009/10 to 2013/14.

We then have to identify “the twenty years of assessment ending with the year of assessment in which the relevant time falls”. For each of the years 2009/10 to

2013/14 those 20 years include the 17-year block (shaded in the table), so the individual is IHT deemed domiciled.

2.5 *Comparison of 3- year domicile and 17-year residence rules*

It is easy to envisage cases where a person is caught by one rule and not by the other.

For instance, a person who has always been UK resident and domiciled and who ceases to be UK domiciled on 1 August 2008. They cease to be caught by the 3-year domicile rule on 1 August 2011. However, as they were UK resident in 2008/09, they will still be IHT deemed domiciled under the 17-year residence rule until 6 April 2012 (the start of the year 2012/13).

Again, a UK domiciled person may reside outside the UK for twenty years, and subsequently acquire an actual foreign domicile. Such a person is not affected by the 17-year residence rule. But three more years must pass before they cease to be UK domiciled under the 3 year domicile rule.

2.6 *Meaning of “residence” for 17-year residence rule*

Section 267(4) IHTA provides:

For the purposes of this section the question whether a person was resident in the UK in any year of assessment shall be determined as for the purposes of income tax.

Thus in this context “residence” has its normal income tax meaning. From 2013/14, the statutory residence test applies.

For years prior to 1993/94 s.267(4) IHTA provided:

For the purposes of this section the question whether a person was resident in the UK in any year of assessment shall be determined as for the purposes of income tax *without regard to any dwelling house available in the UK for his use.*

This excluded the (supposed) available accommodation rule but it went further and disregarded available accommodation for all residence purposes.² This remained significant when determining residence for the years up to 1992/93 which ceased to feature as part of the 17-year calculation in 2010. The issue might still arise in

² See the 2012/13 edition of *Taxation of Non-Residents and Foreign Domiciliaries* para 3.6 (Accommodation in the UK).

determining whether trust property is excluded property, as that depends on the domicile of the settlor at the time the trust was made.

IHT Manual provides:

10685. D31- Domicile outside the UK [July 2011]

Trusts & Estates, Inheritance Tax follow any advice given by PTI Advisory with one qualification. For the tax years before 6 April 1993, someone was considered to be resident in the UK if they visited the UK during the year and had a dwelling house in the UK, which was available for their use. However, availability of a dwelling house was ignored for the purposes of our 17/20 rule (IHTA84/S267 (4)). In the absence of any information, you should assume that advice given by PTI Advisory for the purpose of Income Tax made before 93/94 was **not** made on the basis of this rule alone.

Split years count as full years of residence for s.267 deemed domicile purposes. The pre-2013 split year concession did not apply and from 2013 the position is statutory.

3. IHT deemed domiciled individual leaving the UK

Suppose:

- (1) A person who is not actually UK domiciled becomes IHT deemed domiciled, having spent 17 tax years resident here.
- (2) They then cease to be resident in the UK. In the fourth tax year after departure, they cease to satisfy the 17-year residence rule.

Is the person still treated as domiciled here for three years under the 3-year domicile rule? In other words, does the deemed domicile rule in (a) apply to a person who was only a deemed domiciliary under (b)? The answer is, no. If that were wrong, then the following absurdity arises. Suppose T, non-resident for many years, ceases to be actually UK domiciled. In years 1 -3 T is still IHT deemed domiciled. In year 4 T ceases to be deemed domiciled. HMRC could argue that since T was (deemed) domiciled in year 3, T must wait three more years before T can cease to be deemed domiciled. Then, of course, three years later T is still deemed domiciled. T can never throw off the deemed domicile. This shows that “domicile” in s.267(1)(a) means actual domicile and not IHT deemed domicile. The word should have the same meaning throughout the section.³

³ This is consistent with *Russell v IRC* [1988] STC 195.

4. Domicile of child of a IHT deemed domiciled parent

A child in principle acquires the domicile of their father at the time of their birth as a domicile of origin; and if the father's domicile changes while the child is under 16, the child in principle acquires the father's new domicile as a domicile of dependency. Does IHT deemed domicile count for this purpose? Suppose:

- (1) A father ("F") is actually foreign domiciled but IHT deemed domiciled when his child ("C") is born; or
- (2) F is not IHT deemed domiciled when C is born but becomes IHT deemed domiciled while C is under 16.

It is the old question of how far one carries the deeming. It is suggested that the deemed domicile of F does not affect the domicile of C. The question may not arise directly in that form, as the domicile of children and young persons only rarely needs to be ascertained. When C is adult, it is suggested that his domicile for IHT purposes is determined on the basis of his actual foreign domicile of origin; one does not deem C to have a fictional UK domicile of origin. For s.267 only requires F to be treated as UK domiciled. The section is not needed for C, as C will himself become IHT deemed domiciled once he has been UK resident for 17 tax years.

5. 1974 transitional rules

Section 267(3) IHTA contains five transitional rules:

Para (a) of subsection (1) above shall not apply in relation to a person who (apart from this section) has not been domiciled in the UK at any time since 9th December 1974 ...

This disapplies the 3-year domicile rule only. It would only apply in a relatively rare case of someone who was actually UK domiciled and ceased to be so before 9 December 1974.

and para (b) of that subsection shall not apply in relation to a person who has not been resident there at any time since that date ...

This disapplies the 17-year residence rule only. It would only apply to someone who had been UK resident for 17-years and ceased to be so before 9 December 1974.

and that subsection shall be disregarded—

- (a) in determining whether settled property which became comprised in the settlement on or before that date is excluded property,

This applies to pre-9 December 1974 settlements.

that subsection shall be disregarded— ...

- (b) in determining the settlor's domicile for the purposes of section 65(8) above in relation to settled property which became comprised in the settlement on or before that date, and
- (c) in determining for the purpose of section 65(8) above whether the condition in section 82(3) above is satisfied in relation to such settled property.

This applies to the exemption for FOTRA securities.

6. Spouse election domicile

6.1 Section 267ZA IHTA provides:

- (1) A person may, if condition A or B is met, elect to be treated for the purposes of this Act as domiciled in the UK (and not elsewhere).
- (2) A person's personal representatives may, if condition B is met, elect for the person to be treated for the purposes of this Act as domiciled in the UK (and not elsewhere).

In the discussion below:

An election under s.267A is a **“spouse⁴ election”**

IHT deemed domicile under s.267ZA(1) is **“spouse election domicile”**

The conditions in s.267ZA are **“spouse election conditions A and B”**.

The point of making a spouse election is to qualify for the unrestricted IHT spouse exemption: see 73.2 (Restricted IHT spouse exemption for foreign domiciled spouse).

The development of the provisions can be traced through an HMRC Technical Note⁵ but that is now of historic interest only.

⁴ I use the word “spouse” to include a civil partner.

⁵ HMRC, “IHT: spouses and civil partners domiciled outside the UK” (December 2012) accessible <http://www.hmrc.gov.uk/budget-updates/11dec12/784.pdf>.

6.2 *Spouse election condition A*

Section 267ZA(3) IHTA provides:

Condition A is that, at any time

[a] on or after 6 April 2013 and

[b] during the period of 7 years ending with the date on which the election is made,

the person had a spouse or civil partner who was domiciled in the UK.

It is necessary to consider two individuals, which statute calls

- “the person” and
- “the spouse”.

To avoid confusion, I refer to them as:

“W (the electing person)” and

“H (the donor spouse)”

My terminology embodies certain assumptions. The first assumption is that H makes a gift to W. The terminology embodies a gender assumption, which the drafter of the statute rightly avoids, namely that *H* makes a gift to *W*. But it does make discussion of the provisions slightly easier to follow than if the spouses were called X and Y, and in this rather confusing area of law, the reader may grasp at any aid to navigation.

In the usual course of events, W will survive H, but of course H may die first.

Spouse election condition A is just that H (the donor spouse) was UK domiciled or deemed domiciled. But in practice W (the electing person) will only⁶ consider a spouse election if:

- (1) H makes (or intends to make) a gift to W.
- (2) H is UK domiciled or IHT deemed domiciled at the date of the gift.
- (3) W is not UK domiciled or IHT deemed domiciled at the date of the gift.
- (4) The gift would or might otherwise be chargeable being:
 - (a) made on the death of H or

⁶ There may, exceptionally, be a case where an election may be made to qualify for relief under a DTA even in the absence of a gift, but I doubt if that would ever happen.

- (b) a failed PET (H has died within 7 years of the gift) or
- (c) a PET anticipated to become a failed PET (H still living but may not survive 7 years from the gift).

In the following discussion, it is assumed that

- H is UK domiciled (at the time of the gift)
- W is not UK domiciled (at the time of the gift), and
- the gift from H to W is a PET.

That is the scenario where the IHT spouse election is important.

6.3 *Spouse election condition B*

Section 267ZA(4) IHTA provides:

Condition B is that

- [A] a person (“the deceased”) dies and,
 - [B] at any time
 - [i] on or after 6 April 2013 and
 - [ii] within the period of 7 years ending with the date of death,
- the deceased was—
- (a) domiciled in the UK, and
 - (b) the spouse or civil partner of the person who would, by virtue of the election, be treated as domiciled in the UK.

It is necessary to consider two individuals, which statute calls:

- “the deceased” and
- “the spouse who will by virtue of the spouse election be treated as UK domiciled”.

To avoid confusion, I refer to them as:

- “**H (the deceased donor spouse)**” and
- “**W (the electing person)**”

Spouse election condition B is just that H (the deceased donor spouse) was UK domiciled or deemed domiciled. But in practice W (the electing person) will only consider a spouse election if:

- (1) H makes a gift to W.
- (2) H is UK domiciled or IHT deemed domiciled at the date of the gift.
- (3) W is not UK domiciled or IHT deemed domiciled at the date of the gift.
- (4) The gift would otherwise be chargeable being:
 - (a) made on the death of H or
 - (b) a failed PET (H has died within 7 years of the gift).

6.4 “Lifetime election” and “death election”

Section 267ZB(1) IHTA defines these terms:

For the purposes of this section–

- (a) references to a lifetime election are to an election made by virtue of section 267ZA(3) [condition A], and
- (b) references to a death election are to an election made by virtue of section 267ZA(4) [condition B].

The terminology is slightly confusing:

A *lifetime* election (condition A) is made by W (the electing spouse) so W must be alive at the time of the election. But H (the donor spouse) may be alive or dead at the time of the election.

A *death* election (condition B) can only be made after H has died. But W (the electing person) may be alive, or else she may have died (in which case the election is made by W’s PRs).

It might have been clearer to refer to a “condition A election” and a “condition B election”. I will use the terms

“lifetime election (condition A)” and

“death election (condition B)”

Summarising in a table:

W	H	Election by W
Alive	Alive	Lifetime election (condition A)
Alive	Dead	Lifetime election or death election (conditions A or B)
Dead	Alive	No election possible until H dies
Dead	Dead	Death election (condition B)

6.5 The 7 year period” and conditions A and B compared

Spouse election conditions A and B refer to distinct periods, thus:

Condition	Period
Condition A	7 years ending with the date on which the election is made
Condition B	7 years ending with the date of death H (the deceased donor spouse)

I refer to these as “**the 7 year periods**”.

Condition B is not so different from condition A, except that:

- (1) H (the deceased donor spouse) must have died.
- (2) The 7 year periods are different:
 - (a) Condition A: the 7 year period runs up to the date of the election.
 - (b) Condition B: the 7 year period runs up to the date of the death of H (the deceased donor spouse).
- (3) If W has died, her PRs may make an election (a death election) under condition B. The PRs cannot make a lifetime election under condition S: if W has not made a lifetime election during her life, the opportunity is lost.

6.6 Date from which spouse election domicile takes effect

It is necessary to distinguish:

- (1) The date that the spouse election is *made*
- (2) The date that the spouse election *takes effect*; this is earlier, and will be the date from which spouse election domicile starts.

The starting point is that W (the electing person) can choose the date from which the spouse election takes effect. Section 267ZB(3) IHTA provides:

A lifetime or death election is treated as having taken effect on a date specified, in accordance with subsection (4), in the notice.

Then s.267ZB(4) IHTA goes on to impose a number restrictions on that freedom of choice. Firstly:

- (4) The date specified in a notice under subsection (3) must—
 - (a) be 6 April 2013 or a later date

The earliest date that a spouse election can take effect is 6 April 2013. That is the effective commencement date of the spouse election regime. EU law may provide a remedy for transfers of value before 6 April 2013. The EU law remedy will continue to be important until 6 April 2020 (at which point PETs made before 6 April 2013 must become exempt). The EU law remedy will continue to be important even after 2020 where:

- (1) H makes a gift to W before 2013.
- (2) The gift is a gift with reservation of benefit.
- (3) H dies and there is a charge under the GWR rules.

In practice that may not happen often (and if it does, the GWR may often be overlooked).

Section 267B(4) IHTA continues:

- (4) The date specified in a notice under subsection (3) must ...
 - (b) be within the period of 7 years ending with—
 - (i) in the case of a lifetime election [condition A], the date on which the election is made, or
 - (ii) in the case of a death election [condition B], the date of the deceased's death ...

In the case of a lifetime election (condition A), the election must take effect (and spouse election domicile begins) within 7 years of the election. If H (UK domiciled) makes a gift to W (foreign domiciled), and the gift is a PET, there is a choice:

- (1) W could elect immediately.
- (2) W could wait and see. If H died (or was expected to die) then an election could be made later:
 - (a) If H survived 7 years then an election should not be needed.⁷
 - (b) If H died within the 7 year period, W could make an election after the death. This allows W to consider the trade-off between the advantages and disadvantages of the election in the light of the circumstances at the time. For instance, if H survived more than 3 years from H's gift, then W's election decision could take into account IHT taper relief.
 - (c) There would be a risk that H might die just at the end of the 7 year

⁷ Unless there is a GWR.

period, in which case W may be unable to elect in time. But if an election is signed, and ready to dispatch if needed:

- (i) The risk is small.
- (ii) If W does not elect, there would at least be 80% taper relief on H's gift.⁸

If W has died, without electing, we move to the death election (condition B). Here the PRs of W (the electing spouse) can only make the election

- (1) if H has died, or
- (2) if H survives W, but dies within 2 years of W's death.

Section 267ZB IHTA provides:

- (4) The date specified in a notice under subsection (3) must—
 - (c) meet the condition in subsection (5).

So we turn to s.267ZB(5) IHTA:

The condition in this subsection is met by a date if, on the date—

- (a) in the case of a lifetime election—
 - (i) the person making the election was married to, or in a civil partnership with, the spouse or civil partner, and
 - (ii) the spouse or civil partner was domiciled in the UK, or
- (b) in the case of a death election—
 - (i) the person who is, by virtue of the election, to be treated as domiciled in the UK was married to, or in a civil partnership with, the deceased, and
 - (ii) the deceased was domiciled in the UK.

In short, the donor spouse must be UK domiciled when the spouse election takes effect, but that does not matter as in practice the election is only wanted in those circumstances.

If H (the donor spouse) has become UK domiciled, W may still make an election to cover an earlier period when H was non-UK domiciled.

⁸ There is also perhaps a chance that HMRC may allow a late election but one could not expect that.

The IHT Manual correctly provides:

IHTM13046 - Domicile: election by non-UK domiciled spouse or civil partner: the date the election takes effect [Nov 2013]

The person making the election does not need to be married or in a civil partnership when the election is made

Individuals who divorce may make an election to cover the period they were married.

6.7 Cessation of spouse election domicile

IHT deemed domicile is good from the point of view of allowing the unrestricted IHT spouse exemption; but of course it has the drawback that IHT may be due on the death of W (the electing spouse) and on gifts made by her. How much that matters depends of course on all the facts of the case. It may be a serious drawback; it may not. The point of the election is to allow the electing spouse to weigh the advantages and disadvantages.

Section 267ZB(9) IHTA provides:

A lifetime or death election cannot be revoked.

There is one get-out from spouse election domicile: non-residence. Section 267ZB(10) IHTA provides:

If a person who made an election under section 267ZA(1) [spouse election] is not resident in the UK for the purposes of income tax for a period of four successive tax years beginning at any time after the election is made, the election ceases to have effect at the end of that period.

So an electing person will cease to be IHT deemed domiciled, and so cease to be liable to IHT on foreign situate assets, after 3 non-resident tax years;⁹ that effectively breaks their connection with the UK.

The IHT Manual provides:

IHTM13049 - Domicile: election by non-UK domiciled spouse or civil partner: election ceasing to have effect [Nov 2013]

...This approach is in line with the position where a taxpayer is deemed domiciled in the UK under IHTA84/S267(1)(b). To shake off that

⁹ Assuming they are not then deemed IHT domiciled under s.267 IHTA, or actually UK domiciled.

deemed domicile, they need to be resident outside the UK for four years.

In fact the rules are not aligned. The requirement to lose spouse exemption domicile is to be non-UK resident for four *successive* tax years and deemed domicile is lost at the end of the 4th year of non-residence. The requirement to lose s.267 deemed IHT domicile under the 17-year residence rule is to be non-resident for four tax years, but the non-resident years need not be successive and deemed domicile is lost at the start of the fourth year of non-residence.

6.8 Time limit for death election

There is no express time limit as such for a lifetime election. However since the election can only take effect within the 7 year period up to the election, there is effectively a time limit of 7 years from the death of H (the deceased donor spouse).

Section 267ZB(6) IHTA provides:

A death election may only be made within 2 years of the death of the deceased or such longer period as an officer of Revenue and Customs may in the particular case allow.

Suppose the sequence of events is:

- (1) H makes a gift to W (a PET).
- (2) W dies (leaving H surviving).
- (3) H dies more than 2 years later (but within 7 years of the gift).

W's PRs may want to elect to make H's gift exempt. They would depend on HMRC allowing a time extension. A refusal to allow extra time may breach EU law, as it penalises the foreign domiciled spouse. But W could have avoided the problem if she had made a lifetime election before she died.

6.9 EU law compliance

The CIOT say:

3 Non-compliance with EU law

- 3.1 The proposed changes to do not appear to us to be compliant with EU law. It is disappointing that the Technical Note fails to address this aspect at all.
- 3.2 Although, from an EU perspective, the availability of an election, which allows a non-domiciled spouse to elect to be UK-

domiciled for IHT purposes, appears to level the playing field, this is a disproportionate response to the perceived problem of assets escaping the inheritance tax net because an election will have the effect of bringing all of the non-domiciled spouse's assets within the UK IHT net.

- 3.3 The European Court has held (Case C-440/08 *F. Gielen v Staatssecretaris van Financiën*) that discrimination cannot be countered by the availability of an election to be treated in particular way if the making of the election, while alleviating the specific issue causing the discrimination, puts the taxpayer in a worse position in some other respect.
- 3.4 In our view a more proportionate response to the discrimination faced by non-domiciled spouses would be to provide for an election which, if made, would apply only to the assets being transferred, that is there would be no inheritance tax on the transfer of value to the spouse, but that the assets would then be caught by UK inheritance tax on a subsequent transfer of value by the non-domiciled spouse regardless of where they are situated.¹⁰

HMRC have not responded, at least publically, and the CIOT have followed this up with a complaint to the EC. It will be interesting to watch how the battle proceeds.

6.10 *Planning*

The IHT Manual provides some IHT planning advice:

IHTM13047 - Domicile: election by non-UK domiciled spouse or civil partner: consequences of making an election [Nov 2013]

When an election is made, the person making the election will be treated as domiciled in the UK for all IHT purposes from the date stated in the election. Consequently, any transfers between spouses or civil partners made after that date qualify for full spouse or civil partner exemption.

Whether to make an election and the date it is take effect from will require careful consideration as it could mean that a transfer that did not give rise to a charge at the time it was made, proves to be chargeable.

¹⁰ CIOT, "IHT Spouses and Civil Partners domiciled outside the UK" (February 2013) accessible:
<http://www.tax.org.uk/Resources/CIOT/Documents/2013/02/130204%20IHT%20and%20NDS%20-%20CIOT%20comments.pdf>.

Example (David and Birgit) (“H” and “W”)

H, who is domiciled in the UK transfers property worth £1m in 2014 to his spouse, W who is not domiciled in the UK.

Subsequently, in 2016, W transfers some German shares to the trustees of an offshore¹¹ trust.

H dies in 2019.

The HMRC analysis is as follows:

At the time of H’s transfer, the value transferred is exempt to the extent of £325,000 and a PET to the extent of £675,000.¹² Following his death, the failed PET is chargeable and after deducting the nil-rate band, £350,000 is subject to tax.

B’s transfer was a transfer of excluded property, IHTA84/S6(1). Following D’s death, W has the choice of electing to be treated as domiciled in the UK. If she does so, the gift from H in 2014 will become fully exempt as a transfer where both spouses are domiciled in the UK.

However, W will then be treated as domiciled in the UK from 2014 for all IHT purposes. This means that her transfer to the trustees is no longer one of excluded property and will be subject to IHT. As a transfer to a trust, it will be immediately chargeable to tax.

W will need to consider all the consequences of making an election...

W (or her advisors) will indeed have much to consider. Firstly, if she elects and falls within the scope of IHT, what will be the IHT on her death? Is she, or will she become non-resident for four years, so as to lose IHT spouse election domicile? Will the current law be held to be invalid under EU law and does she have to take the point now, or can she make the election and take it later?

The example assumes that W did not have to consider the position until the death of H in 2019. But if she is non-resident, she should consider the issue in 2016 when the gift was made. If she had made an election then, and was non-resident, her spouse election domicile would expire in 2020; by waiting until 2019, she extends the period during which she is at risk of IHT.

In fact, if W is non-resident, she should consider the position before H makes the gift. If W had made the spouse election in 2013, then the gift made in 2016 would

¹¹ [Author’s footnote] The residence of the trust is not relevant to the example.

¹² [Author’s footnote] It is assumed that H has not made earlier gifts which would reduce the IHT spouse exemption.

be exempt, and spouse election domicile would expire in 2017. Even if W is in good health, insurance against the risk of death would be cheaper if the election is made sooner rather than later.

6.11 *Procedure for making election*

Section 267ZB(2) IHTA provides:

A lifetime or death election is to be made by notice in writing to HMRC.

There is no prescribed form. The IHT Manual provides:

IHTM13043 - Domicile: election by non-UK domiciled spouse or civil partner: how to make an election [Nov 2013]

An election must be made by notice in writing and sent to HMRC. It must be made by the person who is not domiciled in the UK. There is no prescribed form of election, but for HMRC to keep meaningful records it must contain:

- the full name and address of the person making the election, or for whom the personal representatives are making an election,
- their date of birth and, if appropriate, their date of death,
- the full name of their spouse or civil partner who is domiciled in the UK, and
- the date the election is to take effect from.

If you receive an election that does not contain all of the information we need you should write to the sender, using standard letter SL16, to ask for the missing information. The election should be sent to:

Trusts & Estates Risk Team (Elections), Inheritance Tax, Ferrers House,
Castle Meadow Rd, Nottingham NG2 1BB.

6.12 *Due dates for payment of IHT and returns: Alteration of time limits*

A retrospective election could mean that gifts made by the electing spouse become retrospectively chargeable. This requires some tinkering with the rules relating to time limits and interest. Section 267ZB IHTA provides:

- (7) Subsection (8) applies if—
- (a) a lifetime or death election is made,
 - (b) a disposition is made, or another event occurs, during the period beginning with the time when the election is

- treated by virtue of subsection (3) as having taken effect and ending at the time when the election is made, and
- (c) the effect of the election being treated as having taken effect at that time is that the disposition or event gives rise to a transfer of value.
- (8) This Act applies with the following modifications in relation to the transfer of value—
- (a) subsections (1) and (6)(c) of section 216 [date for payment of IHT] have effect as if the period specified in subsection (6)(c) of that section were the period of 12 months from the end of the month in which the election is made, and
 - (b) sections 226 and 233 [interest on unpaid tax] have effect as if the transfer were made at the time when the election is made.

6.13 *Informing PRs whether spouse election has been made*

The IHT Manual provides:

IHTM13045 - Domicile: election by non-UK domiciled spouse or civil partner: disclosure about elections [Nov 2013]

If a person who has made an election has died, it is possible that their personal representatives may want to know whether or not a lifetime election had been made. This is because it could have a significant impact on the tax liability that arises following their death. If they cannot trace any information amongst the deceased's papers, they may phone the Helpline to find out if we have any record of an election.

You may not disclose any information about the existence of an election over the phone. Instead, you should ask the executors to make their request in writing and provide evidence that they are the people entitled to apply for a grant of representation.

If the executors can demonstrate that they are appointed by sending us a copy of the Will, you can disclose whether or not the person has made an election and the date that the election took effect. You can also disclose this information to administrators, provided they can demonstrate that they are applying for letters of administration, or that they are entitled to apply. You should refer any case of doubt to Technical.

6.14 *Commentary*

I wonder if this was fully worked out at the time when the legislation was enacted. Probably not. One's confidence is slightly dented by s.267ZB(8) IHTA which provides:

In determining for the purposes of this section whether a person making an election under this section is or was domiciled in the UK, section 267 is to be ignored.

This is otiose as the domicile of the person making the election (in my terminology, W, the electing person) is not relevant. The provision made sense under the original Finance Bill clauses, but lost its purpose when the provisions were amended at committee stage.

7. Tax planning for IHT deemed domiciled individual

An individual who is IHT deemed domiciled because of:

- (1) a spouse election; or
- (2) 17 years UK residence

will lose IHT deemed domicile status after three or four years non-residence. An individual who is IHT deemed domiciled because of a former actual UK domicile ceases to be UK domiciled 3 years after acquiring a foreign domicile.

For such individuals, a simple form of tax planning is to refrain from making any gifts until they have ceased to be IHT deemed domiciled.

A non-resident individual who is deemed IHT domicile may obtain exemption without waiting four years by purchasing FOTRA securities or some other property which qualifies as excluded property. This may be important for deathbed planning.

In the case of an individual who is IHT deemed domiciled but actually domiciled in the Isle of Man or in the Channel Islands there is scope for acquiring excluded property in the form of exempt saving certificates.