# NON-DOMICILED UK CHARITIES: STILL POSSIBLE?

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The prospect of forming an entity which was a charity in UK tax law but incorporated abroad so as to be foreign domiciled was explored in this author's article in Volume 7, Issue 2 of 1997 Offshore Taxation Review. The value of being able to organise such an entity was put forward as being its capacity to receive capital distributions on a tax free basis from an offshore trust governed by the section 87 Taxation of Chargeable Gains Act 1992 regime.

The prospect of establishing such an entity was based on comments of Lord Greene MR in *Camille and Henry Dreyfuss Foundation Inc v IRC* (1955) 36 TC 126 where the opinion was expressed that a foreign incorporated company could qualify as a charity "established in the UK". Having UK directors, bank accounts and premises was suggested in the article as sufficient to achieve this objective when combined with a Branch Registration under Part XXIII, Companies Act 1985 plus registration under section 96(1), Charities Act 1993 which applies to charities that are established in England & Wales and subject to control by the High Court.

It has, however, now been held in the Court of Appeal in the case *Gaudiya Mission & Others v Brahmachary* [1997] 4 All ER 957 that a charity formed under the laws of India could not, despite having established premises and presence in the UK, be regarded as within the scope of the Charities Act 1993, and accordingly, the Chancery Division decision of 14th March 1997 to the contrary was overturned. The question then arises as to whether this eliminates scope for the concept of a foreign incorporated UK charity for tax purposes.

As the entity in the recent case was one formed under the law of India no issue of EC legislation arose and so the point remains that if an Irish company was incorporated with objects expressed as being exclusively charitable under UK law, then if the premises, officers, finances, and operations were all based in the UK it would still

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seem discriminatory for UK tax law to deny recognition as a charity to this Hybrid entity.

A decision that a particular body is not within the scope of the Charities Act 1993 cannot, of course, determine that an entity is not a UK charity, as Scottish charitable trusts are plainly charities for UK tax purposes despite being outside the scope of the Charities Act 1993 in view of it being confined to the laws of England & Wales. Further encouragement for the possibility of establishing such an entity can in fact be derived from a close reading of the leading judgement by Mummery LJ who based his decision not just on the principle of implied territoriality of legislation but on this being coupled with practical considerations of enforceability in determining whether a particular institution should be regarded as within the legislative grasp or intendment of the statute. He emphasised the need for an entity to be established in England & Wales in accordance with English law and subject to the control of the High Court's charity jurisdiction, and it is notable that the term "established" is used rather than "incorporated" or "formed under" and this leaves open scope for the proposed Hybrid.

The emphasis in the case was on entities being outside the scope of the legislation where their creators had chosen to make them be wholly governed by foreign law and had thereby rendered impractical any control by the High Court in England (e.g. where an entity might hold property abroad and have administrators both within and outside England so that those here had difficulty in controlling those overseas). However, these points could equally be made with respect to a UK incorporated charity that had power to appoint non-resident directors.

Emphasis was laid on the fact that it was because entities established under a foreign legal system were in practice beyond the control of the High Court that they were therefore outside the scope of the statute. Arguably, this reinforces the point that if the constitution of a foreign incorporated entity itself brings it within the jurisdiction of the High Court in England & Wales by expressly prescribing that its objects are to be charitable in accordance with such laws then there seems no reason why, in the light of Lord Greene's comments in the *Dreyfuss* case, a foreign incorporated but UK resident company should not be established here as a charity.

Reference was made in the decision to several cases where charitable funds were to be administered in Scotland and the Courts of England refused jurisdiction, which demonstrates that the decision of the Court of Appeal on the limited scope of the Charities Act 1993 does not mean that an entity is outside the scope of charity for UK tax purposes and that the location that governs the day to day administration and practical regulation of an organisation is relevant to the allocation of judicial control over it and to deciding that it is established in a particular place. From the stress on practicalities and the specific reference to situations where the trustees are abroad and administration is overseas one is encouraged to support the conclusion that if all administrative aspects are centred in the UK then a foreign company would be a UK charity for UK tax purposes. If a charitable trust was formed under the law of Northern Ireland with power to appoint trustees in other parts of the UK and in due course the charitable trust came to have two trustees, one resident in England and one resident in Scotland, a situation would exist of three distinct legal systems having elements involved in the charitable trust without any one of these having exclusive control but can there be any doubt that the trust would still qualify as a charity under UK tax law, and if it did, why should any different treatment be given to an Irish incorporated company that by its constitution was formed to only have UK directors, premises, bank accounts, etc and whose constitution expressly made its operations fall to be conducted and interpreted in accordance with English law as charitable?

In the *Dreyfuss* case it was emphasised that the term charity did not "ordinarily" include an institution established under the laws of a foreign legal system, implying that extraordinarily it could do so, such as with the Hybrid scenario proposed, and the judgement of Lord Greene in that 1954 case focused not only on the need for the purposes of an entity to be charitable as defined by the laws of the UK but also on the fact that it would not be so unless it was either constituted "**or regulated**" so as to be subject to the jurisdiction of the UK Courts.

The recent case also gave brief consideration to a prior Court of Appeal decision in *Re Duncan* (1867) which it was noted had to be disregarded **if** it was properly to be considered as inconsistent with the *Dreyfuss* case (i.e. it was not necessarily inconsistent). In that 1867 case Turner LJ and Cairns LJ acknowledged that an institution located abroad takes effect here if it applies its property here and stated that as a general rule where there is an application and expenditure of money in England under a charitable endowment then the Charity Commissioners have jurisdiction at least to the extent of that application and expenditure, even though the constitution of the charity or the corpus of the property is abroad.

In closing his recent judgment Mummery LJ added that there may be cases in which it would be proper for the Attorney General to be joined as a party to proceedings involving a foreign charity and that, while this was not such a case, nothing in the judgement was intended to restrict the constitutional role of the Attorney General as protector of a charity. Accordingly, parties seeking to raise funds for benevolent purposes and who seek to escape the application of the Charities Act 1993 by operating through a foreign incorporated company, despite their activities otherwise clearly being within the scope of the Act, may not be successful in their aim.

From a tax viewpoint ECJ decisions such as that in the *Halliburton* case still seem the strongest pointer to suggesting that an Irish company established with all the features previously proposed would be difficult for the Inland Revenue to resist as a qualifying charity even though the Charity Commissioners might endeavour to do so on the grounds that their jurisdiction was not co-ordinate with the UK as a whole and so was no more discriminatory against an Irish company than it was against a Scottish charitable trust.

In summary, the viability of the concept of a corporate foreign domiciled UK charity does not appear to be diminished and, alongside the concept of the UK incorporated but foreign resident charity, does seem to offer opportunities for the extraction of trust funds that otherwise could create a taxable capital distribution if passed through a resident charity established under UK law.

Since producing the original article on the extraction of funds from a non-resident section 87 TCGA 1992 trust into a UK charity for onward distribution to genuine worthy causes that include UK individual beneficiaries, a further point worth noting has occurred to the author with regard to the combined effect of sections 90 & 97 TCGA 1992. Previously it was assumed that while distribution to a UK charitable trust would cause a carryover of pooled gains for assessment on beneficiaries who obtained capital distributions from the receiving charity, distributions to a corporate charity that obtained funds beneficially was outside the scope of section 90 TCGA 1992. However, this may not be so in the light of section 97(7) TCGA 1992 and the decision in *Thomas v Marshall* (34 TC 178) that an outright payment is itself a transfer to a settlement for the purposes of what is now Part XIV, ICTA 1988. Accordingly, an outright payment by an offshore trust to a UK corporate charity may not of itself create a capital gains tax charge until application of the funds to beneficiaries. Even an outright gift to an individual for their own beneficial use might be similarly regarded so that only when they spent the money on themselves would there then be a capital distribution, and if they made onward gifts to family and friends there could be further deemed settlements from which capital distributions would not derive until the recipient applied the payments for their own use and enjoyment rather than in making gifts to others. The absurdity of all this causes one to question whether it is stretching a deeming provision too far in the light of the guidance in *Marshall v Kerr*, but, if so, then what test is to be applied or formulated to achieve a sensible result? Can one simply say that the *Thomas v Marshall* case does not apply in the context?