



Appeal number: TC/2016/04759

PROCEDURE – application for closure notice – whether HMRC bound by previous confirmation of domicile – no – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STUART GULLIVER

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE JONATHAN RICHARDS

**Sitting in public at The Royal Courts of Justice, Strand, London on 28 February
2017**

Peter Vaines, instructed by Squire Patton Boggs LLP, for the Appellant

**Christopher Stone, instructed by the General Counsel and Solicitor to HM
Revenue & Customs, for the Respondents**

DECISION

1. Mr Gulliver has applied for a “closure notice” under s28A of the Taxes
5 Management Act 1970 (“TMA 1970”) in respect of an enquiry that HMRC have
opened into his tax return for the year 2013-14. Mr Gulliver is Group Chief Executive
of HSBC and it may be that the public will show some interest in his tax affairs. I will
therefore make it clear right at the outset that HMRC have not alleged any
impropriety on Mr Gulliver’s part: their enquiry is limited to the factual question of
10 whether he was domiciled in the UK for that tax year.

Evidence

2. I had witness evidence from two HMRC officers, Mr Clive Richards and Mr
John Murray, who have both been involved in different aspects of Mr Gulliver’s tax
affairs. Mr Vaines cross-examined both witnesses and I found them both to be honest
15 and reliable.

3. Mr Gulliver did not rely on witness evidence. Rather, Mr Vaines made
submissions by reference to a bundle of documentary evidence which included a
statutory declaration that Mr Gulliver had provided to HMRC during their enquiries
dealing with a number of issues relevant to his domicile.

Findings of fact

4. I will limit my findings of fact to those necessary to determine Mr Gulliver’s
application for a closure notice. Very few of these facts were in dispute.

5. Mr Gulliver is a UK national with a UK domicile of origin. Following his
education in the UK, he has had an international business career which has seen him
25 spend significant amounts of time living in the Far East.

6. On 29 December 2015, HMRC opened a valid enquiry into Mr Gulliver’s tax
return for the 2013-14 tax year. That enquiry extended to the whole of Mr Gulliver’s
return for that year because, if he had a UK domicile in that tax year, that could have
implications for any part of his tax return. The question of Mr Gulliver’s domicile is
30 the only material point that remains outstanding for the purposes of HMRC’s enquiry.

7. Mr Gulliver and his advisers have had previous correspondence with the Inland
Revenue’s Capital Taxes Office dealing with matters relevant to his domicile. (For
ease of reference, I will include the Inland Revenue within the expression “HMRC”.)
On 31 October 2002, Mr Gulliver’s advisers, Haarmann Hemmelrath, wrote a letter to
35 HMRC running to just over two pages that explained that, on 4 September 2002, Mr
Gulliver had transferred £273,677 (from funds that were held outside the UK) to a
discretionary trust established for the benefit of his family. This sum was above the
nil rate band applicable for inheritance tax (“IHT”) purposes and the contribution
would, therefore, have given rise to an IHT liability of some £4,735 if Mr Gulliver
40 were UK domiciled at any time in the three years leading up to the time of transfer.

5 However, Haarmann Hemmelrath explained why, in their view, Mr Gulliver was domiciled in Hong Kong. In particular, they noted that Hong Kong was Mr Gulliver's permanent home and the centre of his business and social life. They acknowledged that HSBC had asked Mr Gulliver to undertake a specific assignment in London but that this was expected to last for only two years after which he would return home to Hong Kong. Having enclosed relevant documentation, Haarmann Hemmelrath concluded their letter with a request that HMRC confirm that no IHT arose on the transfer to the discretionary trust.

10 8. On 2 December 2002, HMRC replied to Haarmann Hemmelrath's letter. They explained that they required further information on a number of issues and also indicated that Haarmann Hemmelrath should anticipate that information on some of these issues should be provided as standard on any future domicile queries for other clients. They justified this request saying:

15 If this type of information is not included, we will not be able to give a domicile ruling on UK domicile of origin without coming back to you.

20 9. On 4 March 2003, Haarmann Hemmelrath provided a response to HMRC's further queries. Those were dealt with in seven numbered points that, took up less than one page of text (in double spacing). On 10 March 2003, Mr Murray at HMRC wrote a very brief letter (the "Letter") to Haarmann Hemmelrath, the full text of which was as follows:

25 Thank you for your letter of 4 March.
On the basis of the information before us and on balance we would agree that Mr Gulliver has not made a transfer of value for the purposes of UK Inheritance Tax, having regard to s6(1) & 3(2) IHTA'84

30 10. At the time, HMRC took a "risk based approach" to requests for confirmation of the IHT treatment of lifetime transfers that took into account the amount of the tax potentially in issue, and the chance of the taxpayer concerned being UK domiciled on the basis of the information provided. Applying that approach, Mr Murray did not consider it an appropriate use of resources to engage in a full enquiry into all aspects of Mr Gulliver's domicile given that the amount of tax in issue was only £4,735. He also concluded that there was not a high risk, based on the information provided, of Mr Gulliver having a UK domicile. Mr Murray did not, therefore, conduct a detailed investigation as to Mr Gulliver's circumstances before writing the Letter. It was, however, common ground that, by confirming that the transfer to the discretionary trust did not attract IHT, Mr Murray was accepting that Mr Gulliver had, despite having a UK domicile of origin, acquired a domicile of choice in Hong Kong (as, if Mr Gulliver had a UK domicile, the transfer to the discretionary trust would have attracted IHT).

40 11. As noted at [7] above, at the time of the correspondence with HMRC in 2002, it was expected that Mr Gulliver would stay in the UK for only two years to perform a specific assignment whereupon he would return to Hong Kong. Events, however, turned out differently and Mr Gulliver has been resident in the UK for UK tax

purposes for the past 13 years, during which period he became the Group Chief Executive of HSBC¹.

12. Having opened their enquiry into Mr Gulliver's tax return, HMRC have sent him requests for a large amount of information and a large number of documents. On 5 11 October 2016, they sent a formal notice under the provisions of Schedule 36 of the Finance Act 2008 requesting answers to 123 questions and the provision of 33 categories of document. These requests were not limited to matters arising after 4 March 2003 (the date of the Letter) and involved a searching examination of a number of aspects of his personal and professional life dating back to 1981.

10 13. Mr Gulliver has appealed to HMRC against the information notice and has not to date answered all of HMRC's requests for documents or information. Rather, he has explained to HMRC that, in his view, HMRC concluded in the Letter that he had acquired a domicile of choice in Hong Kong in 1999 (three years before he made the contribution to the discretionary trust). On that basis, he has told HMRC that he 15 considers that their queries, insofar as they seek to establish whether he acquired a domicile of choice in Hong Kong, are simply not relevant as that has already been established. He has not answered HMRC's queries in that regard. He accepts that it is open to HMRC to ask whether he lost that domicile of choice and has provided HMRC with documents and information that he considers relevant to that issue.

20 **Relevant statutory provisions**

14. Section 28A(4) of TMA 1970 permits a taxpayer to apply to the Tribunal for a direction that HMRC issue a closure notice within a specified period. Section 28A(6) provides that the Tribunal is obliged to give such a direction unless it is satisfied that there are reasonable grounds for not issuing a closure notice within a specified period. 25 In considering whether there are "reasonable grounds", I will consider both the extent to which HMRC's queries are relevant to their enquiries and the extent to which Mr Gulliver has answered those queries. Both of those issues need to be considered since, if HMRC have raised reasonable and relevant queries which Mr Gulliver has not answered, that may well establish a "reasonable ground" for not directing HMRC to 30 close the enquiry. By contrast, if HMRC have not received answers to questions that are unreasonable or irrelevant, that is unlikely of itself to constitute a "reasonable ground" of the kind referred to in s28A(6).

The parties' respective arguments

15. The essence of Mr Vaines's argument was as follows:

35 (1) HMRC had determined in the Letter that Mr Gulliver acquired a domicile of choice in Hong Kong. They were therefore, "stuck with" the consequences of that determination and queries that HMRC were raising as to whether Mr

¹ In making this finding, I am recording only the agreed fact that Mr Gulliver was resident for tax purposes in the UK for those 13 years. Mr Gulliver's position is that he also maintained a residence in Hong Kong during this period and I do not need to make any finding on that issue.

Gulliver did indeed acquire a domicile of choice in Hong Kong were simply not relevant.

5 (2) As a matter of law, once Mr Gulliver acquired a domicile of choice in Hong Kong that domicile of choice was presumed to continue. Mr Gulliver could lose that domicile of choice but only if both (i) he ceased to reside in Hong Kong and (ii) he ceased to intend to reside in Hong Kong. The effect of that legal presumption is that HMRC bear the burden of showing that Mr Gulliver abandoned his domicile of choice in Hong Kong.

10 (3) Mr Gulliver has provided HMRC with ample evidence to establish that, while he spends a large part of his time in the UK given his professional duties as HSBC's chief executive, he still maintains a residence in Hong Kong. He has also provided HMRC with ample evidence of his intention to continue to reside in Hong Kong (and has sworn a statutory declaration to this effect). In those circumstances, he has answered all of HMRC's relevant questions and HMRC's enquiry should be closed.

15 16. Mr Stone's argument can be summarised as follows:

(1) HMRC are seeking to establish Mr Gulliver's domicile for the 2013-14 tax year. In order to do so, they need to look back over the whole of his life "at what he had done with his life, at what life had done to him and at what were his inferred intentions" (to use an expression in *Agulian v Cyganik* [2006] EWCA Civ 129). Their enquiries into domicile would necessarily be wide ranging.

20 (2) HMRC were not "stuck with" the conclusions they expressed in their 2003 letter. That letter did not create a binding contract. It could not be argued that, having written that letter, HMRC were estopped from looking again at Mr Gulliver's domicile in a subsequent tax year. Therefore, HMRC did not need to show any change of circumstances and were not confined to an examination of whether a Hong Kong domicile of choice had been lost.

25 (3) HMRC were, therefore, entitled to engage in a broad enquiry that considered all issues relevant to Mr Gulliver's domicile (including whether he had acquired a domicile of choice in Hong Kong and, if he had, whether he subsequently lost it). Since Mr Gulliver had not answered all of their questions in this regard, it would be premature to direct a closure of their enquiry.

Discussion

35 17. At the heart of Mr Vaines's argument is the proposition that HMRC are "stuck with" the consequences of the Letter. Mr Vaines made it clear in his submissions that he was not arguing that the Letter created a binding contract. He also accepted that there could be no estoppel for the reasons that Mr Stone gave in his submissions. However, he still submitted that, having written the Letter, HMRC had to pursue their enquiries consistently with it which meant that, if they wished to assert in 2013-14 that Mr Gulliver had a UK domicile, they bore the burden of proving that he had lost his Hong Kong domicile of choice and should direct their enquiries to that matter.

18. I do not accept Mr Vaines's central proposition. The law set out in *Caffoor v Commissioner of Income Tax* [1961] AC 584, *Barnett v Brabyn* [1996] STC 716 and *King v Walden* [2001] STC 822 is clear. Income tax and capital gains tax are charged by reference to separate tax years. In those circumstances, a determination of fact
5 (whether made by a tribunal or following an agreement under s54 of TMA 1970) made in relation to one tax year is not binding in relation to a later tax year. Both HMRC and a taxpayer are permitted to make arguments that call into question factual determinations made in respect of a different tax year.

19. In fact, the principle is even wider than that set out at [18]. In *Barnett v Brabyn*,
10 the taxpayer and HMRC had reached an agreement under s54 of TMA 1970 that income the taxpayer received in certain tax years from his activities as a technician was taxable under what was then Case I of Schedule D. HMRC discovered that the taxpayer had received additional income from these activities and raised a further assessment for the same tax years. Lightman J held that the taxpayer was free to
15 argue, in appeals against these additional assessments that, despite the position set out in the s54 agreement, he was an employee and not an independent contractor.

20. The courts have on occasions expressed some surprise that this is the position. In *King v Walden*, Jacob J found it to be "startling", saying:

20 15. I was at first startled by the proposition. It means that one could have a first finding that tax was due yet a subsequent finding that no interest or that any tax was due because the tax had not been due after all. Or, as is claimed here, a finding of wilful default or neglect justifying out-of-year assessments but then a finding of no interest on those assessments because wilful default or neglect was not re-proved.
25 Moreover, the Revenue, or indeed the taxpayer, would find itself having to prove the same thing over and over again in relation to exactly the same facts for exactly the same periods.

However, despite finding the proposition startling, Jacob J felt constrained by authority to give effect to it. One result of doing so was that, even though in 1991 the
30 Special Commissioners had determined that the taxpayer was guilty of wilful default or neglect (so that HMRC were entitled to make late assessments against him for certain tax years), it was still open to Mr King to argue, in an appeal against penalties imposed in connection with those very assessments, that there was no neglect or wilful default.

35 21. Therefore, even if, in 2003, a court or tribunal had decided that Mr Gulliver had a Hong Kong domicile of choice, or HMRC and Mr Gulliver reached an agreement under s54 of TMA 1970 to this effect, there would be no impediment to HMRC arguing, in proceedings relating to the 2013-14 tax year, that Mr Gulliver never acquired a Hong Kong domicile of choice. Mr Gulliver does not even have a court or
40 tribunal decision on his domicile or a s54 agreement. He cannot be in any better position simply because HMRC wrote the Letter. Since there would be no impediment to HMRC arguing that Mr Gulliver never acquired a Hong Kong domicile of choice in any appeal relating to the 2013-14 tax year, I see no reason why they should be precluded from using their powers of enquiry to seek to establish this.

22. Mr Vaines argued that such a conclusion would render HMRC determinations worthless but I do not agree. If Mr Gulliver considers that there are particular reasons in his case why it would be unfair for HMRC to depart from the position set out in the Letter, he may seek judicial review of HMRC's actions. However, this Tribunal has
5 no power to consider such issues. My decision is confined to the much narrower question of whether HMRC should be allowed to continue with their current enquiries into Mr Gulliver's domicile and I should not be taken as expressing any view on whether or not Mr Gulliver has any public law remedies available to him.

23. I will not express any view on the detailed questions set out in HMRC's notice under Schedule 36 of Finance Act 2008 as whether the information and documents requested are "reasonably required" is the subject of Mr Gulliver's separate appeal against that notice. However, I have concluded that HMRC are, in principle, entitled to enquire into the question of whether Mr Gulliver acquired a domicile of choice in Hong Kong. It was common ground that Mr Gulliver has not provided HMRC with
15 the majority of the information and documents they have requested (albeit because he genuinely thinks that HMRC are asking the wrong questions). In those circumstances, there are reasonable grounds for not directing HMRC to issue a closure notice.

24. The conclusion I have expressed at [23] makes it unnecessary for me to consider other issues that the parties raised during the hearing. I will not, therefore, express any
20 view on whether information of which HMRC were not aware at the time they wrote the Letter (for example the fact that he was previously married and divorced in 1998) was relevant to his domicile status in 2003. I do not need to decide whether Mr Gulliver has provided adequate responses even on the narrow question of whether he lost any domicile of choice he acquired in Hong Kong. Nor will I decide whether, as
25 Mr Vaines submitted, Mr Gulliver's swearing of a statutory declaration is conclusive evidence of his intention to continue to reside in Hong Kong.

Overall conclusion and right to request permission to appeal

25. Mr Gulliver's application for a closure notice is refused.

26. This document contains full findings of fact and reasons for the decision. Any
30 party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"
35 which accompanies and forms part of this decision notice.

JONATHAN RICHARDS
TRIBUNAL JUDGE

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RELEASE DATE: 13 MARCH 2017