

## INTRODUCTION AND WHAT'S NEW

### *Scope of this book*

There are three themes to this book:

- (1) Taxation of foreign domiciliaries
- (2) Taxation of non-residents on UK assets; and
- (3) Taxation of UK residents on foreign assets.

To attempt to cover all these topics is ambitious, and this book is in danger of bursting, particularly because often foreign aspects can only sensibly be discussed in a wider context. But one cannot address the first topic without the second and third: in taxation, as in life, everything is connected to everything else. I hope as a result that the book will help with all offshore aspect of UK tax issues.

Thus what started as a book on foreign domiciliaries has become a book on offshore taxation. I have revised the title accordingly.

### *The year 2010/11 in review*

It is only a year since the last edition but the pace of tax reform is frenetic.

HMRC have issued a new version of HMRC6 (residence) and guidance on trustee residence (25 pages). They have ceased to give rulings on domicile. A new statement on interaction of GWR and excluded property settlements vindicates the views expressed in the earlier editions of this book.

The most important development of the year, as far as this work is concerned, is the European Commission action requiring the UK to amend the transfer of asset rules and s.13 TCGA to make them EU law compliant. Reform is inevitable though it is not likely to come any time soon.

### *The state of UK tax legislation*

The chancellor stated in the Budget speech 2011 “our tax code has become so complex that it recently overtook India to become the longest in the world..”<sup>1</sup> Since then Parliament has added an additional 400 pages of Finance Act. Set against that, the Office of Tax Simplification has achieved little, and as matters stand it is unrealistic to hope for much.<sup>2</sup>

These have been bad times for tax policy. The CIOT expresses itself strongly: “the way tax law is developed and effected in the UK is deeply flawed.”<sup>3</sup> Two recent publications shed a good deal of light on what has gone wrong with tax legislation in recent years. Firstly, Demos:

The centralisation of [tax policy-making power] is a particular problem because of the lack of institutional accountability of the Treasury on taxation policy and the lack of accountability of chancellors themselves in matters of taxation. ... The concept of checks and balances in tax policy is nonexistent.

... the current relationship between the Treasury and HMRC was ‘very dysfunctional’, had ‘almost gone as wrong as it could have gone’...

At the moment, pursuing a career only in tax policy is not valued within the Treasury hierarchy. Officials pass through the tax teams rather than making tax policy a career choice. ... High turnover results in a lack of experience in the tax section and little institutional memory...

... There are traditional areas that are ring-fenced as not for consultation, including tax rates and anti-avoidance measures. ...

... ‘at the moment [anti-avoidance] works like a drive-by shooting.

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- 1 The comment is probably based on CIOT, “The Making of Tax Law” (June 2010) para 3.3, [www.tax.org.uk/attach.pl/9328/10960/CIOT\\_tax\\_law\\_Jun10.pdf](http://www.tax.org.uk/attach.pl/9328/10960/CIOT_tax_law_Jun10.pdf). It is hard to empirically assess a claim that the UK has the longest tax code in the world, but there seem to be no other serious contenders for that title.
  - 2 “[The OTS] cannot be an effective solution to the problem of over-complication without the Treasury allowing it a far more fundamental role.” Ussher and Walford, *National Treasure* (Demos, 2011) accessible [www.demos.co.uk/files/National\\_treasure\\_-\\_web.pdf?1299511925](http://www.demos.co.uk/files/National_treasure_-_web.pdf?1299511925).
  - 3 Letter from CIOT to George Osborne, 19 May 2010 [www.tax.org.uk/showarticle.pl?id=9279](http://www.tax.org.uk/showarticle.pl?id=9279)

You might hit your objective but you also hit a lot of other people.<sup>3</sup>

At present, policies are frequently changed without understanding the impact the policy has initially had in practice.<sup>4</sup>

Along with a decision not to consult is a government policy which is not so much deaf to the views of the tax profession as vociferous in their rejection. The Director of the HMRC Tax Avoidance Group 2004-2009 records:

... I was never happier than when a new tax avoidance initiative was greeted with howls of protest from the tax avoidance quarter.<sup>5</sup>

This confirms what anyone could have inferred from a variety of provisions, that preventing avoidance - a term which HMRC do not construe narrowly or technically - has been a priority that trumps all other policy considerations such as certainty, workability and the rule of law; and listening to the tax avoidance quarter - a term which includes STEP, the CIOT, and any practitioner who said what HMRC did not want to hear - has been ruled out.

The consequences of a decade or so of that policy can be seen in seeking to state the law, as this book seeks to do, or in seeking to understand the law, as you the reader will do now.

### *Panaceas to improve the tax system*

There is one route and one route only to a good tax system: sound tax policy devised by those with a sound understanding of the current tax system; a leisurely timetable of legislative drafting; and the 10 tax tenets of the ICEAW.

That is not an easy prescription, and it is tempting to look for an easier solution. Recent attempts include the tax law rewrite and (perhaps) the HMRC charter.

The 2010/11 edition of this work did not have much time for the charter:

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4 Ussher and Walford, *National Treasure* (Demos, 2011) accessible [www.demos.co.uk/files/National\\_treasure\\_-\\_web.pdf?1299511925](http://www.demos.co.uk/files/National_treasure_-_web.pdf?1299511925).

5 Tailby, "Some reflections on Tax Avoidance" [2011] PCB 41.

HMRC have published a charter called (absurdly) “Your Charter”.<sup>6</sup> Dicey’s comment on constitutions also applies to charters:

... any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced. ...<sup>7</sup>

An unenforceable charter is a cross between a PR exercise and a sermon.

I have not noticed any significant references to the charter since its publication, and “Your charter” died even sooner than the taxpayer’s charter produced by John Major in 1990 (which was never, as far as I recall, publically withdrawn).

As to the Rewrite, last year I wrote:

Parliament have passed the final two Bills from the Tax Law Rewrite project: CTA 2010 (which should not have been given the same title as CTA 2009) and TIOPA. This brings the 14 year project to an end, and it can now be seen to be a disappointment which has not met its founders hopes of a substantially improved tax system.<sup>8</sup>

Increasing familiarity with the new legislation has not changed this view.<sup>9</sup>

The next big idea on the agenda - not a new one - is a GAAR. Comment will have to wait for the publication of the report of the General Anti Avoidance Rule Study Group, promised October 2011.

*Thanks ...*

I am very grateful to my colleagues Robert Venables QC and Stephen Brandon QC for discussions on many aspects of tax. I owe a great debt to Jane Hunt who works patiently on an intractable manuscript.

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6 Presumably “Taxpayers charter” was rejected because HMRC do not currently like to use the word “taxpayer”.

7 Introduction to the Study of the Law of the Constitution, Dicey, (LF ed.) (1915) part II, The Rule of Law, chapter 4.

8 “... it would have been better to put the effort into simplifying the system rather than just the wording. The Institute believes that bringing the Rewrite to a close is correct.” (CIOT, 20 Nov 2009.)

9 See for instance 31.1 (Offshore funds – Introduction).

*... and request for help*

Comments from readers would be of the greatest value and interest to the author. In the 9<sup>th</sup> edition of this work I said it has taken 2 years to complete a *preliminary* analysis of the provisions in what the House of Lords Economic Select Affairs Committee called the “absolute shambles” of the FA 2008. Now, 3 years after introduction of 2008 rules I still making new discoveries and do not believe that a full analysis could ever be written.

The pleasure in writing this book consists in the interest of the questions which it raises and the success which it may have achieved in answering them. It seeks to state the law as at 1 August 2011.

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If you want advice on which you are legally entitled to rely you can obtain it - but not from this work.

In particular, you may instruct the author to advise. I enjoy writing, but spend most of my time giving independent specialist professional advice in private client matters especially areas covered in this work. For further details see *www.kessler.co.uk*.

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### *Disclaimer*

The CIOT issued new guidance on professional conduct in relation to taxation in 2011. It is a sign of the times that the CIOT issue *professional guidance* with a disclaimer:

While every care has been taken in the preparation of this guidance the Chartered Institute of Taxation, the Association of Taxation Technicians and all those involved in the preparation and approval of this guidance do not accept any responsibility for any loss occasioned by reliance on this

guidance.<sup>1</sup>

Similarly, the views contained in this book are put forward for consideration only and are not to be relied upon. Neither the publisher nor the author accept any responsibility for any loss to any person arising as a result of any action taken or refrained from in reliance of this work.

### *A note to the lay reader*

This book is not intended as a self-help guide, and is addressed to tax practitioners, but it is readable for a lay person. Initiation in these matters must often be by the taxpayer. If you wish to research this subject in depth, and so take more control of your own tax affairs, read on. But for implementation you will need to find professionals to advise you. Self-help guides extol “the benefit of bypassing expensive lawyers”; but the bypass may prove the more expensive route in the long run.

### *Edition history*

First Edition 2001	Sixth edition 2007
Second Edition 2003	Seventh edition 2008
Third Edition 2004	Eighth edition 2009
Fourth Edition 2005	Ninth edition 2010
Fifth Edition 2006	

*This book was called Taxation of Foreign Domiciliaries for the first nine editions and changed to Taxation of Non-residents and Foreign Domiciliaries in the 10<sup>th</sup> edition.*

ISBN: 978-1-901614-53-4

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<sup>1</sup> CIOT, *Professional Conduct in Relation to Taxation* (4 Jan 2011), para 1.10, [2011] STI p.215, accessible [www.tax.org.uk](http://www.tax.org.uk).