



INTRODUCTION AND WHAT'S NEW

This file contains the Introduction
Taxation of Non-Residents and Foreign Domiciliaries
by James Kessler KC

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Cross references work as links in the Online version of this chapter but do not work in this pdf file



1.1 *Scope of this book*

There are three main themes to this book:

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

To attempt to cover these topics comprehensively is ambitious enough, perhaps quixotic, and if books could burst, this one might have done. But these territorial issues must be understood in a wider context: in taxation, as in life, everything is connected. So I discuss many general private client topics, procedural (disclosure and compliance, Tax return filing positions, CDD, TRS); and substantial (meaning of fundamental terms, the nature of of entities such as partnerships). I also discuss many tax avoidance codes. As a result the title of this book does not do justice to its contents. The time is coming when it might be renamed.

1.2 *A statute-focussed approach*

I set out statutory and other material verbatim:

... in the end we must always return to the words of the statute¹

Returning to the verbatim text, it is surprising how often one finds that the words do not say what one expects.

This is not just a common law approach. Richard Hyland tells this story of his class at Université Paris II Panthéon-Assas:²

Mme Gobert asked simply: *L'article 2 du Code civil, qu'est-ce qu'il dit?* Article 2 of the Civil Code, what does it say?

My classmates were some of the best private law students in France. This was a question to which they knew the answer. One of them explained that article 2 provides for the nonretroactivity of the law. Mme Gobert looked at the student without smiling. Then she repeated the question. *L'article 2 du Code civil, qu'est-ce qu'il dit?* A different student mentioned Paul Roubier's suggestion that a new law may be applied to *les situations juridique en cours*. Again she repeated the question. *L'article 2 du Code civil, qu'est-ce qu'il dit?* Another student tried, and then another, each new voice attempting yet a more refined statement of the concepts involved. After each comment she responded in the same way. It was my first French law class, so I did not know what to think. It seemed like a Zen-like version of the Socratic method. The French students were terrified. This was material they thought they knew, and yet they could not guess what was on her mind. Finally, one of the students had the presence of mind simply to read the code provision aloud. Mme Gobert's eyes lit up. *Mais bien sûr!* she responded *C'est ça qu'il dit!*

1.3 The year 2022/23 in review

OTS stated in 2017:

The UK tax code is widely cited as being the longest in the world".³

This claim had been made at least since 2010.⁴ In recent years Parliament

1 *RFC 2012 Plc v AG* [2017] UKSC 4 (the *Rangers* case) at [11]; see 86.5.2 (A judicial gloss).

2 Hyland. *Gifts: A study in comparative law*, 1st ed (1989) p.xvi.

3 It is hard to empirically assess the claim that the UK has the longest tax code in the world, and OTS made no attempt to do so. But if any readers are aware of other serious contenders for that title, I would be interested to hear.

4 For older references see the Introduction to the 2016/17 edition of this work.

added:⁵

Finance Act(s)	Pages		
2012	703 (a record)	2017	829 (2 Finance Acts)
2013	648	2018	196
2014	668	2019	337
2015	597 (2 Finance Acts)	2020	217 ⁶
2016	662	2021	428
		2022	225

OTS estimated HMRC guidance at 90,000 pages in 2018;⁷ whatever the true figure, it will have grown considerably since then. This guidance was “not comprehensive” - something of an understatement; but according to the OTS “real life cannot be reduced to a neat description in a few (!) pages of writing”.⁸ The “mini” budget of October 2022 announced the

5 Finance Act page counts are a rough proxy for the ever growing complexity of the UK tax system, but not an altogether bad one. A (slightly) better proxy would also consider secondary legislation and HMRC guidance; and, perhaps, case law; then the page counts would multiply the Finance Act numbers set out here tenfold. For a discussion of the multidimensional concept of tax complexity, see Tran-Nam and Evans, “Towards the Development of a Tax System Complexity Index” (2014) *Fiscal Studies* Vol 35 p.341.

OTS have published two (somewhat simplistic) discussions of tax complexity:

Length of Tax Legislation as a Measure of Complexity (Apr 2012)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193496/ots_length_legislation_paper.pdf

OTS Complexity Index (2012)

http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193493/ots_complexity_index_methodology_paper.pdf

6 The unusually short length of the FA 2020 is due to the December 2019 election.

7 OTS, “Guidance for taxpayers: a vision for the future” (2018) para 1.21. These pages have assuredly not been printed or counted. Quantification raises methodological issues which deserve a short essay to itself. We have reached the stage where even the amount of HMRC guidance is impossible to quantify: the words are uncountable. Within the limits of guesswork, and assuming 500 words per page (single spacing), the figure of 90,000 pages seems to me to be on the low side. There are 150 HMRC Manuals, just for a start.

Perhaps the focus of enquiry should be whether HMRC guidance is too short, because 90,000 pages would not be sufficient to do justice to the topic. The legislation, measured by pages of the Orange & Yellow tax handbooks, can be counted and amounts to 20,836 pages in 2020/21 (that does not include DTAs, which would be another 3,000 pages). The Tax Cases reports, which ceased publishing cases from 2014, reached 82 volumes and did not cover VAT.

8 Para 1.24.

abolition of OTS. In its 12 years of existence, the OTS did not achieve much simplification, at least in relation to topics covered in this book, and I do not think it will be missed.⁹

It is easier to *talk* of simplification. In the ill-fated “mini” budget of October 2022:

the government will embed tax simplification into the institutions of government ... and set a mandate to HM Treasury and HMRC to focus on simplifying the tax code.¹⁰

The reader may think that satirists better identify the reality:

We will further complicate the UK tax system so that large companies can no longer find loopholes.¹¹

The task of dealing with the effect of Brexit continues: a decade will not suffice for this, and this area of law will remain in a state of flux for the foreseeable future.

Scotland continues its fiscal drift from the UK, with Northern Ireland and Wales following.

Statutory changes relevant to this work include minor new rules for reorganisations, an extension of the CGT spouse exemption in cases of divorce, and significant changes to rates and bands. With the rise in CT from 19% to 25% we return to the complexities of the small profits rate. The Economic Crime (Transparency and Enforcement) Act 2022 has set up a beneficial ownership register of overseas entities that own UK

9 CIOT disagree; see CIOT letter to Chancellor of the Exchequer (24 October 2022) according to which “OTS has achieved a great deal”.

<https://assets-eu-01.kc-usercontent.com/220a4c02-94bf-019b-9bac-51cdc7bf0d99/850ebe14-77fb-4fd1-af43-34baa1b43aea/221024%20Letter%20to%20Chancellor%20re%20OTS%20from%20CIOT%20President.pdf>

10 HM Treasury, “The Growth Plan 2022”.

<https://www.gov.uk/government/publications/the-growth-plan-2022-documents>

The emphasis, or one might say, rhetoric, of simplification has fluctuated. OOTLAR 2008 had 45 references to simplification. OOTLAR 2021 had none. The “Growth Plan 2022” had 15.

In (I think) 2013 the government came up with the slogan “Creating a simpler, fairer tax system”, which OTS adopted; it imagines away a troubling reality in which simplicity and fairness are competing values which require hard choices.

<https://www.gov.uk/government/policies/creating-a-simpler-fairer-tax-system>

11 Official Monster Raving Loony Party Manifesto 2017

<https://www.loonyparty.com/2017-general-election-manifesto>

property.

Interesting cases working their way through the Courts include ToA cases: *Fisher* and *Rialas*; and partnership cases: *BCM* and its associated cases. We have the first case on the statutory residence test, introduced in 2013 (*A Taxpayer v HMRC*) and the first on the remittance basis, introduced in 2008 (*Seghal v HMRC*). Neither of these are final, and neither will be the last on these topics.

The Supreme Court refused permission to appeal in *Embiricos v HMRC*, leaving a decision that will add to the already substantial cost of tax litigation.

1.4 *The future*

We face an extended period of change and uncertainty, in politics, economics, law and taxation, and will continue to live in fiscally exciting times.

1.5 *Thanks ...and request for help*

I am very grateful to my colleagues in chambers, especially Robert Venables KC, Philip Simpson KC and Rory Mullen KC, for discussions on many aspects of tax. Stephania Moreira as research assistant resolved many puzzles. I owe a great debt to Jane Hunt and Ruth Shaw who work committedly on this text throughout the year.

Comments from my readers and clients continue to be of the greatest value and interest. I am very grateful to all who commented, and in particular to John Barnett (who commented on a variety of topics), Mark Pearce (cryptoassets), and Sam Dewes (Adoption and parental orders, and same sex families). In order not to be defeated by the size of this work, such help is needed more than ever. If anyone would like to offer to write or revise a section - or chapter - of this book please get in touch.

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. On the basis of what is known at 1 April 2023, it seeks to state the law for 2023/24.

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Further advice

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 <https://www.kessler.co.uk>

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- (3) to correct or contribute to the book

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Disclaimer

The professional bodies issue the *Professional Conduct in Relation to Taxation* with a disclaimer:

While every care has been taken in the preparation of this guidance¹ the PCRT Bodies do not undertake a duty of care or otherwise (?) for any loss or damage occasioned by reliance on this guidance. Practical guidance cannot and should not be taken to substitute appropriate legal advice.²

1 PCRT is not in fact guidance: it is mandatory.

2 *Professional Conduct in Relation to Taxation* (2019), Forward.
<https://www.tax.org.uk/professional-standards/professional-rules/professional-conduct-relation-taxation>

The second sentence is an improvement on the common form that guidance on legal

When that appeared in 2011 it seemed extraordinary. But nowadays no professional body issues guidance without a disclaimer.³ Similarly, and *a fortiori*, the views expressed in this book are put forward for consideration only and are not to be relied upon. Neither the author nor the publisher accept responsibility for any loss to any person arising as a result of any action or omission in reliance on this work. But could anyone have thought that a claim might arise in absence of this disclaimer?

A note to the lay reader

This book is not intended as a self-help guide, and is addressed to tax practitioners. In earlier editions I said: "... but it is readable for a lay person." I think that is still true, though the text is more daunting than when I first wrote those words, because the law has become much more complicated. However, 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

1 st 2001	8 th 2009	15 th 2016
2 nd 2003	9 th 2010	16 th 2017
3 rd 2004	10 th 2011	17 th 2018
4 th 2005	11 th 2012	18 th 2019
5 th 2006	12 th 2013	19 th 2020
6 th 2007	13 th 2014	20 th 2021
7 th 2008	14 th 2015	21 st 2022

This book was called *Taxation of Foreign Domiciliaries* for 9 editions; it changed to *Taxation of Non-Residents and Foreign Domiciliaries* in the

issues "does not constitute legal advice". That seems an idiosyncratic use of the word "advice"; but for the meaning of "advice" see 127.4.2 (Tax adviser).

3 For instance, the Law Society likewise issue a disclaimer for their Practice Notes: The standard form is: "While care has been taken to ensure that they are accurate, up to date and useful, the Law Society will not accept any legal liability in relation to them."

10th edition.⁴

⁴ The text of earlier editions is available on <https://www.foreigndomiciliaries.co.uk>