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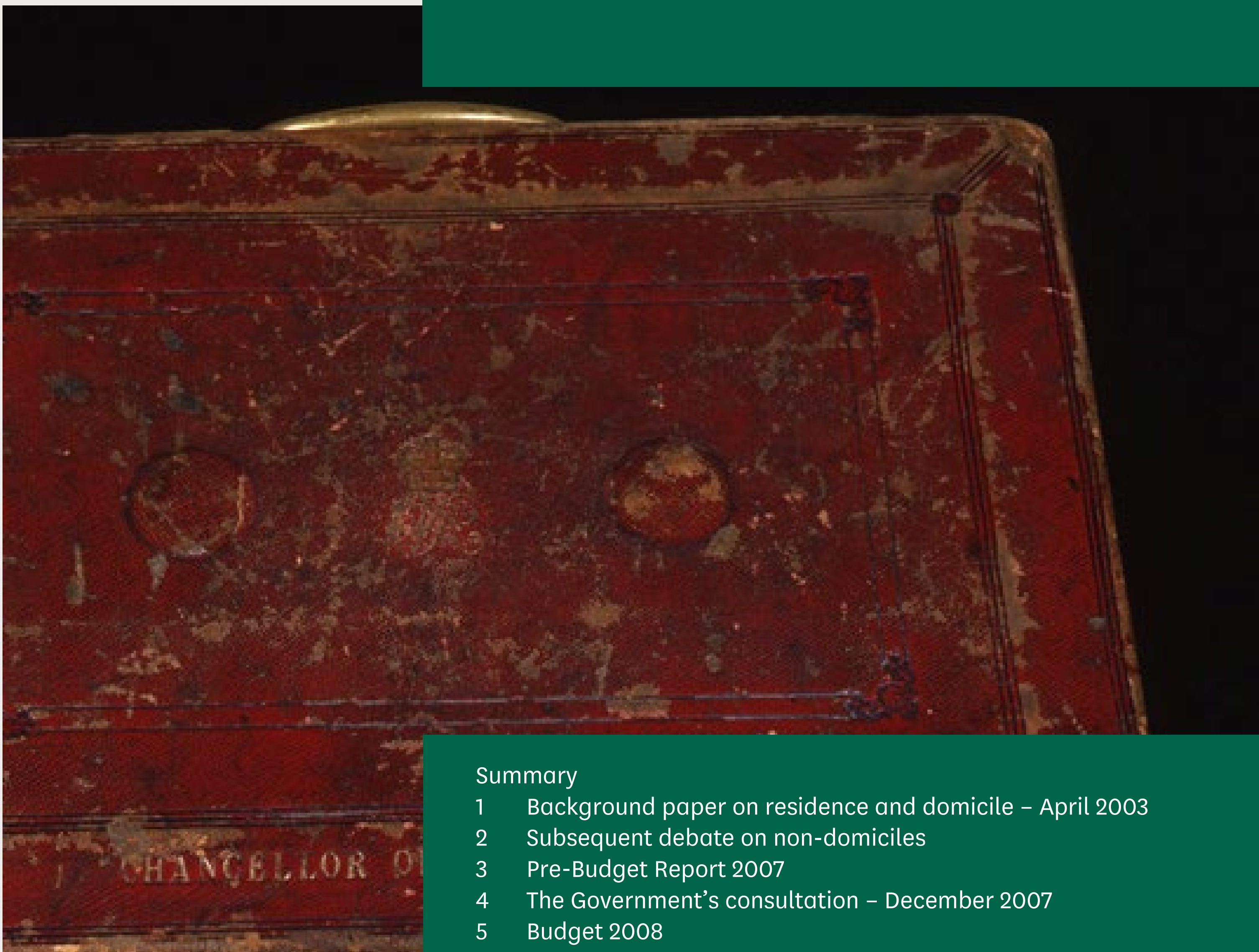
By Antony Seely

Taxation of non-domiciles: the 2008 reforms



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Summary

Historically an individual's liability to pay tax in the UK has been determined by three tests: whether they are resident, ordinarily resident, and/or domiciled in this country. Broadly speaking, a person's domicile is their permanent home. Individuals who live in the UK but have domicile elsewhere are liable to UK tax on overseas income and gains only to the extent that such funds are either received or 'remitted' here – that is, transmitted or brought into this country. This is called the remittance basis of taxation.

The use of the remittance basis by wealthy individuals living in this country to shield their assets from UK tax has been controversial for many years.[1]

In April 2003 the Labour Government published a discussion document as part of a review on reforming these rules.[2] The review continued over the next four years without any further details being published.

Subsequently in his Pre-Budget statement on 9 October 2007 the then Chancellor Alistair Darling announced that the Government would consult on introducing a new annual £30,000 charge which non-domiciles would have to pay if they wished to be taxed under the remittance basis.[3] A number of other changes would be made to the residence and domicile rules. All of these provisions would apply from 6 April 2008.[4]

The Labour government launched a consultation on 6 December 2007, asking for views "on the implementation of the reform package" and whether there was a case "for any further changes to the rules on the treatment of non-domiciles to be considered.[5] HM Revenue & Customs (HMRC) published draft legislation in January 2008 and further clarification of the government's aims in undertaking this reform the next month.[6]

Finally in his 2008 Budget speech on 12 March 2008 Mr Darling confirmed that the new charge would be introduced from April 2008, although there would "be no further changes to this regime for the rest of this Parliament or the

[1] For example, "How the richest man in Britain avoids tax", Guardian, 11 April 2002; "Tax savings: only the rich need apply", Observer, 22 April 2007

[2] HM Treasury (HMT), Reviewing the residence and domicile rules as they affect the taxation of individuals: a background paper, April 2003

[3] HC Deb 9 October 2007 c171

[4] HMRC, Pre-Budget Report Note PBRN18: Residence and domicile review, (PDF) 9 October 2007

[5] HM Treasury press notice, Pre-Budget Report consultation documents published today, 6 December 2007. Responses were invited by 28 February 2008.

[6] At the time this material was collated, along with a series of FAQs, on HMRC's site. An archive version of this page is available on the National Archives site.

next."[7] Provision to this effect was included in the Finance Act 2008 (specifically sections 24-5 and schedule 7).[8]

This briefing discusses the background to the Labour Government's reforms to the taxation of non-domiciles. A second Library briefing discusses developments in the taxation of non-domiciles since then.[9]

7 HC Deb 12 March 2008 c292. See also, Budget 2008, HC 388 (PDF), March 2008 p68 (Box 4.3)

8 See also, HMRC, Budget Note BN102-107: Residence and domicile: annual £30,000 charge for some users of the remittance basis, (PDF) 12 March 2008

9 Commons Library research briefing CBP8099, Taxation of non-domiciles: recent developments, 6 October 2017

1 Background paper on residence and domicile – April 2003

In its 2002 Budget in April 2002 the Labour government stated that it was reviewing the residence and domicile rules, which determine an individual's liability to pay tax in the UK. The purpose of the review was to ensure that these rules were "fair, clear, easy to operate, and support the competitiveness of the British economy."[10]

The next year HM Treasury published a background paper as part of this review, alongside the 2003 Budget. The paper provided an introduction to the three key concepts underpinning these rules: residence, ordinary residence, and domicile:

> **Residence**
>
> 2.3 The residence basis of taxation defines the individuals who have a liability for tax in the UK. Non-residents are not generally liable to income or capital gains tax, except on income arising in the UK. They may, however, pay VAT and excise duties, and usually pay national insurance contributions on work they do in the UK for a UK employer. Individuals who are, or become, non-resident in the UK may well, of course, be resident and subject to tax in another country. The terms 'resident', 'ordinarily resident' and 'domiciled' are also used for other purposes in income and capital gains tax – for example, the residence, ordinary residence and domicile of a settlor may be material in determining the residence of trustees in particular circumstances, but these are not covered below.
>
> 2.4 The circumstances in which individuals are treated as UK resident for tax purposes include the following:
>
> - they spend 183 days or more here in any tax year or more than 90 days on average over a period of up to 4 years;
> - they come to the UK intending to live here permanently or for at least three years;
> - they come to the UK for a purpose (for example employment) that will mean that they remain here for at least two years (whether or not, in a particular year, they spend 183 days here); and
> - they usually live in the UK and go abroad for short periods, for example on business trips.
>
> 2.5 People who have been treated as tax resident may lose that status:

[10] Budget 2002, HC 592 (PDF), April 2002 para 5.83

- if they leave the UK permanently, or to live abroad for at least three years, and their return visits since leaving are less than 183 days in any tax year, and average less than 91 days per tax year over the period of absence; or

- if they leave the country to take up full time employment abroad and their absence covers a complete tax year, and their return visits do not exceed those set out immediately above.

For the purposes of the various day counting tests, days of arrival and departure are not normally taken into account.

Ordinary residence

2.6 Broadly, being ordinarily resident means being resident here year after year. Individuals are treated as ordinarily resident if they usually live in the UK (or intend to do so), or come to the UK regularly (or intend to do so), and these visits average 91 days or more per tax year.

Domicile

2.7 It is important to stress that, while the concept of domicile is an important characteristic identifying those who pay tax in the UK on their worldwide income, it is not in itself a tax concept, but one of general law. It is distinct from nationality, residence or citizenship. Individuals acquire a "domicile of origin" at birth, which usually follows their father's domicile. Until the age of 16, their domicile will follow that of the person on whom they are legally dependent – a "domicile of dependency". After the age of 16, an individual can acquire a "domicile of choice" by providing evidence that they intend to settle permanently or indefinitely in another country. There are special rules for married women who married before 1 January 1974.

2.8 Domicile also plays a part in determining liability to Inheritance Tax. Individuals domiciled overseas pay Inheritance Tax to the UK exchequer on wealth situated in the UK. They become liable on their worldwide wealth either when they acquire a domicile in the UK or when they are deemed to be domiciled here under special rules for Inheritance Tax. These special rules apply to those who have been resident in the UK for seventeen out of the last twenty years. However if property outside the UK is put in a trust before an individual becomes UK domiciled for Inheritance Tax purposes, it will be excluded from the charge to Inheritance Tax, even if the individual continues to enjoy the property after they are domiciled here.[11]

In this context it is important to note that, following a consultation exercise, in 2013 the then Coalition Government introduced a statutory residence test, removing the concept of 'ordinary residence' for the determination of tax liability.[12] From this point individuals coming to the UK have only needed to consider residence and domicile in determining their liability to pay UK tax.[13]

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[11] HMT, Reviewing the residence and domicile rules as they affect the taxation of individuals: a background paper, April 2003 pp3-4

[12] HMRC, Overview of tax legislation and rates (PDF), March 2013 para 1.3-4

[13] Provision was made by sections 218-9 and schedules 45-6 of the Finance Act 2013. The impact of these changes was set out by the then Exchequer Secretary David Gauke when these provisions were debated in Committee: Public Bill Committee, 18th sitting (PDF) 18 June 2013 cc617-26. For details see, HMRC, RDR3 Statutory Residence Test, June 2014

As the Treasury's paper explained, the rules on residence and domicile may be traced back to the introduction of income tax in 1799, and the regime had changed relatively little since then:

> The current rules on residence and domicile can be traced back to the introduction of Income Tax in 1799 to meet the cost of the Napoleonic wars. This was imposed upon all income arising from property in Great Britain, whether or not the person was resident here, and on all income of those defined as being resident here. However those here for some temporary purpose, with no view or intent of establishing residence here, were not taxed as residents. Those who had been ordinarily resident here, and had gone overseas for occasional residence abroad, continued to be taxed as residents. Income from foreign assets was subject to tax if it was remitted to the UK, but not if it was kept offshore. (The remittance basis was devised primarily as a means of taxing income from British plantations in the Americas.)
>
> The regime has changed little since its introduction. By 1800 the definition of residence had been tightened so that those here for 6 months, even if for a temporary purpose, were treated as resident. In 1803 Schedule D was introduced, charging tax on residents in respect of profits from property, wherever situated, and non-residents for property in Great Britain and on the profits of activities exercised here.
>
> During the twentieth century, occasional reforms have concentrated upon tightening up the remittance basis. In 1914 and 1940 it was tightened to cover fewer types of foreign income, and there was further tightening in 1956 and 1974. When Capital Gains Tax was introduced in 1965, it was charged on individuals who were resident or ordinarily resident, and the remittance basis applied to gains from foreign assets for those who were non-domiciled.
>
> Most recently, in 1993, the 'available accommodation' rule, under which those with accommodation in the UK might be regarded as resident for any year they visited here, was abolished.[14]

The paper set out in some detail the practical implications of the interaction of these three concepts for someone's liability to UK tax:

> 2.9 Resident individuals who are both ordinarily resident and domiciled in the UK are liable to tax on their worldwide income and gains, wherever these arise.
>
> 2.10 UK residents who are not domiciled in the UK are liable on overseas income and gains only to the extent that they are remitted to or received in the UK. This is called the remittance basis of taxation. It applies where a UK resident who is not domiciled here receives:
>
> - employment income, where the employer is not resident in the UK and the duties of the employment are performed wholly outside the UK;
> - pensions and other earned income arising outside the UK;
> - investment income arising outside the UK; and

[14] HMT, Reviewing the residence and domicile rules as they affect the taxation of individuals: a background paper, (PDF) April 2003 p6 (Box 2.2)

- gains on disposal of overseas assets.

2.11 The remittance basis also applies where a UK resident who is not ordinarily resident here receives:

- employment income, in respect of duties which have been performed outside the UK;
- pensions and other earned income arising outside the UK (and the Republic of Ireland), if the individual is a Commonwealth citizen (which includes a British citizen) or a citizen of the Republic of Ireland; and
- investment income arising outside the UK (and the Republic of Ireland), where the individual is a Commonwealth citizen or a citizen of the Republic of Ireland.[15]

Box 2.1 A Summary of the Residence and Domicile Rules

UK Status			Income Tax on Employment	Income Tax on Savings Income	Capital Gains Tax	Inheritance Tax
Resident	**Ordinarily Resident**	**Domiciled**				
√	√	√	Worldwide (1)	Worldwide (2)	Worldwide	Worldwide
√	√	X	Worldwide (1) (3)	Worldwide (2) (4)	Worldwide (4)	UK
√	X	√	Worldwide (5)	Worldwide (2) (6)	Worldwide	Worldwide
√	X	X	Worldwide (5)	Worldwide (2) (4)	Worldwide (4)	UK
X	√	√	Duties performed in the UK	UK Source (7)	Worldwide	Worldwide
X	√	X	Duties performed in the UK	UK Source (7)	Worldwide (4)	UK
X	X	√	Duties performed in the UK	UK Source	None (8)	Worldwide

For Income Tax and Capital Gains Tax all sources are taxed on the full amount of the income or gain arising except:
(1) Foreign Earnings Deduction of 100 per cent may apply – this only applies to seafarers.
(2) Special rules apply for foreign pensions in certain circumstances.
(3) Where an individual is non-domiciled and works for a non-resident company, earnings from employment wholly outside the UK are taxed on the Remittance Basis.
(4) Foreign sources taxed on the Remittance Basis.
(5) Income from duties of employment performed overseas taxed on Remittance Basis.
(6) Commonwealth and Irish citizens taxed on the Remittance Basis for all foreign sources (except Irish sources).
(7) Taxable on UK source income and FOTRA's.
(8) Gains on the disposal of assets used or held etc. for the purposes of a trade carried on in the UK by a branch or agency are chargeable.

15 as above pp4-5

A more detailed explanation of these concepts and how the tax authorities interpreted them in practice, was given in HM Revenue & Customs' guidance for taxpayers. Two extracts from the 1999 edition of this guidance are reproduced below; first, on what 'overseas assets' are for the purposes of capital gains tax:

> Overseas assets
>
> 8.8 An overseas asset is one situated outside the UK under the capital gains tax rules. For assets such as land and most types of movable property the asset is situated where it is located. For other assets (for example shares and securities) the rules are more complex. Your Tax Office will be able to advise you further.
>
> If you are resident or ordinarily resident in the UK, and dispose of overseas assets, you will normally be liable to capital gains tax on any gains arising. But if you are not domiciled in the UK, you are taxed on such gains only to the extent that they are received in or remitted to the UK in a tax year for which you are resident or ordinarily resident in the UK. There is no capital gains tax charge on gains remitted to the UK before you become resident in the UK. (See also paragraph 5.12 on the remittance basis.) Where the proceeds of a disposal are remitted, an appropriate proportion of the proceeds is treated as a remittance of the gain.[16]

Second, more detail on the remittance basis:

> 5.12. Where the remittance basis applies, you are liable to UK tax on the amount of your overseas income that is remitted to the UK. Income is remitted if it is paid here or transmitted or brought to the UK in any way. In working out your tax liability, we include all income remitted to the UK.[17]

The Treasury paper provided an example of how the potential anomalies from the operation of these rules:

> 2.17 Example 1 illustrates the differential treatment of individuals with a long-term connection to the UK, depending on their domicile status. It highlights a case in which, for relatively non-mobile people, the precise status accorded to them under the rules can have a marked effect on their tax liabilities and can produce different treatment between two individuals spending the same amount of time here.
>
> Example 1
>
> Adam & Bill have lived in the UK all their lives. Both are now 50. Adam is domiciled here. He is resident and ordinarily resident and is taxed on his worldwide income and gains. Bill is domiciled overseas. He is treated as resident and ordinarily resident and pays tax on UK income and gains. Income and gains with a non-UK source are taxed only when remitted to the UK.[18]

16 HMRC, Residents & non-residents IR20, December 1999 para 8.8,
17 as above para 5.12
18 HMT, Reviewing the residence and domicile rules as they affect the taxation of individuals: a background paper, (PDF) April 2003 p 7

As noted, the Labour Ggvernment's stated aim was that a modernised system would have to be based on three principles: that the rules should be fair; should support the competitiveness of the UK economy; and, should be clear and easy to operate. In its discussion of fairness, the paper looked at the position of non-domiciles avoiding UK tax while living and working in the UK:

> 4.6 It is generally accepted as fair that those with the same characteristics are taxed in the same way. In the context of residence and domicile, the degree of connection of an individual to a country is an important characteristic, which may vary in intensity and over time. It is also generally accepted as fair that those with a long-term connection owe a special obligation to support the social structures of the state. It is therefore necessary for governments to define the degree of long-term connection which is sufficient to generate this special obligation, and to set criteria for determining when that long-term connection is made, severed or suspended; for example, in cases where people with a long-term connection are temporarily absent.
>
> 4.7 At any point in time, a person with a long-term connection to one state may be present, or engage in forms of economic activity, in other states. The tax system therefore needs to establish the conditions under which a presence, or the degree of economic activity, in the country is sufficient to give rise to particular obligations to the tax system.
>
> 4.8 The rules need to be applied within this to the taxation of employment income, and of savings income and gains. Their application to savings income is inherently more complex, for example because of the greater mobility of savings, which are more likely to arise across international borders; while the taxation of employment activities will usually be linked to the same geographical location as the person earning the income.[19]

The paper also gave some details on the numbers of non-domiciled UK residents, and the sectors in which they work:

> 2.14 Data from Self Assessment returns indicates that there are around 100,000 individuals who benefit from the remittance basis of whom:
>
> - 65,000 are non-domiciled residents; and
> - 33,000 are resident, but not ordinarily resident.
>
> Of these, around 75,000 completed an employment schedule with UK employment income of about £8 billion, giving an average annual income of just over £100,000. A smaller subset of 16,000 also returned foreign earnings totalling £800 million which were not remitted to the UK and therefore not liable to tax, giving an average foreign earnings of £50,000.
>
> 2.15 Routine Self Assessment information on non-domiciled residents by industrial sector is not available, but an analysis of the top 40 largest employers of resident non-domiciles – with 11,000 non-domiciled resident employees – showed that two-thirds were in banking and financial services, 10 per cent were in the oil industry, and 20 per cent were in manufacturing (particularly electronics) and others. Self Assessment data will, of course, only

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[19] HMT, Reviewing the residence and domicile rules as they affect the taxation of individuals: a background paper, (PDF) April 2003 p24

> cover individuals within Self Assessment. There is no centrally held data on the above lines for individuals falling outside Self Assessment.[20]

In answer to subsequent PQs, the government stated it was infeasible to update these estimates:

> **Jim Cousins**: To ask the Chancellor of the Exchequer if he will update the information contained in paragraphs 2.14 and 2.15 of the April 2003 background paper on reviewing residence and domicile rules in individual taxation for the most recent date for which the information is available.
>
> **Jane Kennedy**: It is not possible to update these figures on a directly comparable basis due to changes in the methodology applied since the publication of the background paper. Specifically, whereas the figures set out in the background paper were based on a 10 per cent. sample of the self-assessment system, current data draws on all available self-assessment returns. On that basis, data drawn from the 2005-06 self-assessment returns show that some 143,000 have a residence or domicile status which would enable them to benefit from the remittance basis of taxation. Of these, some 114,000 are non-domiciled residents, with the remainder being resident but not ordinarily resident.
>
> The most recent analysis suggests that around 83,000 individuals completed an employment schedule with UK employment income of about £9.7 billion, giving an average annual employment income of just under £120,000. A smaller subset of 17,000 also returned foreign earnings totalling £900 million which were not remitted to the UK and therefore not liable to tax, giving an average foreign earnings figure of just over £50,000. As the data contained in paragraph 2.15 of the background paper was the result of a one-off analytical exercise which has not been repeated, an update is therefore not available.[21]

Ministers also declined to provide any detailed information on the cost to the UK Exchequer of non-domiciles using the remittance basis:

> **Lynne Jones**: To ask the Chancellor of the Exchequer what assessment he has made of the effect on the economy of non-domiciled residence tax status; and if he will make a statement.
>
> **Ed Balls**: No overall figure for the number of individuals with non-domicile tax status is available. Estimates of the tax foregone in the UK as a consequence of the use of the remittance basis by those not domiciled in the UK are not routinely made. Information is not held on overseas income and gains that do not give rise to a tax liability in the UK. Information on the average length of residence is not routinely collected.
>
> A small sample survey in 2004 suggested that the majority of non-domiciled individuals who had already left the UK spent no more than five years here. No estimates have been made of the economic benefits to the UK from the retention of the domicile laws on taxation.
>
> HMRC carry out investigations into non-domiciled status where this may be relevant to a taxpayer's UK tax liability. Such investigations may occur to verify

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20 HMT, Reviewing the residence and domicile rules as they affect the taxation of individuals: a background paper, (PDF) April 2003 p6

21 HC Deb 8 October 2007 cc 239-40W

> information given to HMRC by individuals completing self-assessment tax returns or making other claims for non-domicile status; as a result of third-party disclosure; or because of the outcome of other HMRC enquiries. No information is available on the number of investigations undertaken. Information on how many individuals qualify for non-domicile tax treatment in the UK is not available. 112,000 individuals indicated non-domicile tax status through their SA returns in 2004-05.[22]

As part of a second written answer on this issue, the Minister commented, "in general, individuals do not have to inform HMRC of their foreign income or gains unless this is relevant to their UK tax liability."[23] Subsequently in August 2017 HMRC published a statistical survey of UK non-domicile taxpayers for the first time; this included figures for the numbers of non-domiciles paying UK tax from 2007/08 to 2014/15.[24]

At this time there was a considerable amount of press coverage on the use of the remittance basis, focused, as one would expect, on a small number of very rich people – though these concerns are long-standing.[25]

Notably in July 1988 the Inland Revenue published a consultation document on residence. At the time the UK still had two revenue authorities: the Inland Revenue (responsible for the collection of direct taxes), and HM Customs and Excise (responsible for the collection of indirect taxes). HM Revenue & Customs was established in April 2005 from the merger of the two.[26]

The Revenue's consultation document observed that one defect of the remittance basis was that it was easy "for the well advised to arrange to bring back money from overseas to meet their expenditure in the United Kingdom without it being regarded under the present law as a 'remittance'":

> These arrangements include:
>
> - opening separate accounts for capital and income and remitting only from the capital account; and
>
> - closing an account or selling an income producing asset in one year, and remitting accumulated income in the new when there is no longer a source of income that can be charged to tax.[27]

The consultation document proposed the introduction of a new charge on world income and gains, graduated according to the length of stay in the UK, to relate liabilities to UK taxes more closely to the degree of an individual's connection with this country.

22 HC Deb 30 April 2007 cc1382-3W

23 HC Deb 8 March 2007 c2234W

24 HMRC, Statistical commentary on non-domicile taxpayers, August 2017

25 For example, "Once is happenstance", Taxation, 21 October 2004

26 For further background see, Commons Library research briefing CBP04/90, Commissioners for Revenue and Customs Bill (Bill 3 of 2004/05), 6 December 2004.

27 Inland Revenue, Residence in the United Kingdom: the scope of UK taxation for individuals, July 1988 para 4.18

However, the then Conservative government decided not to take this reform any further, as the then Financial Secretary, Norman Lamont, explained, during the debates on the 1989 Budget:

> Last July, the Government issued a consultative document that considered the possibility of simplifying the rules determining residence in this country for tax purposes and of relating liability for United Kingdom income tax more closely to the degree of an individual's connection with this country.
>
> It has always been recognised that any changes must take account of the wider economic implications and ensure in particular that our tax environment is broadly comparable with that of other developed countries. The United Kingdom derives considerable benefit from people who come here from overseas to carry on business and other activities. We have no wish to see them leave. I am grateful for the many responses that we received. They expressed a variety of views, and considerable concern was expressed about the implications of moving to a world income basis of liability for certain categories of people not domiciled here.
>
> We decided that the world income approach would not provide a satisfactory basis of taxation for non-United Kingdom domiciled foreigners who are resident in this country. Therefore, we do not intend pursuing it, and in those circumstances it is not our intention to bring forward any proposals at this time. I may say that we received representations from members of the Labour party as well as of the Conservative party on that matter, and they were both in the same direction.[28]

Notably, in a policy paper published on tax abuses by the Labour Party in November 1994, one of the proposals was that "taxation of … non-domiciles … should be overhauled in line with the recommendations of the Inland Revenue."[29]

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[28] HC Deb 15 March 1989 cc501-2. In July 1993, during debate on the Finance Bill, Stephen Dorrell, then Financial Secretary, confirmed that "the overwhelming majority" of representations in response to the Revenue paper "were hostile" to the proposals (HC Deb 13 July 1993 c869).

[29] Labour party, Tackling tax abuses – tackling unemployment, November 1994 p8

2 Subsequent debate on non-domiciles

In August 2003 the Financial Times reported on a number of the responses that had been made to the Treasury's discussion paper:

> Ernst & Young … said simplification of the residence rules would be a positive step … The Chartered Institute of Accountants in England and Wales (ICAEW) also supported reform of the residence rules to provide greater certainty compared with the current, complex arrangements. It did not see a convincing case for reform of the domicile rules, but suggested one possible change could involve people losing non-domicile status after 17 years. The Chartered Institute of Taxation (CIOT) supported statutory clarification of the residence rules, but admitted its members were divided over the case for reform of the domicile arrangements …
>
> The Society of Trust and Estate Practitioners also supported the onus of proof reform because some people who claim non-domicile status have lived here all their lives. … The Association of Chartered Certified Accountants, which supported improvements to the residence rules only, called on ministers to publish details of potential revenue gains that might follow reform.[30]

The Labour government did not publish any summary of the responses it received, but made some comments on the views that had been expressed in the Pre-Budget Report in December 2003:

> At Budget 2003, the Government published a discussion paper on reform of the residence and domicile rules […] . Many respondents emphasised the attractiveness of the UK as a place to do business and invest, and identified the tax treatment of skilled workers from overseas as one factor in this attraction.
>
> Many also recognise that the current rules may not be appropriate in their treatment of people who stay in the UK for long periods, though there was also a concern that people in this position are treated fairly. Responses to the paper have also signalled a potential need for greater clarity and objectivity in the rules, which have not kept up with increases in international travel and commuting, and the globalisation of parts of the labour market, and so have added to compliance costs for businesses and individuals […]
>
> The Government is continuing to examine responses to the background paper and welcomes further contributions. Once this process is complete it will move forward with a formal consultation paper on possible approaches to reform.[31]

Over the next four years the Labour government published no other details of its review of residence and domicile, simply stating on occasion that this

[30] "Accountants support tax reform for foreigners", Financial Times, 19 August 2003

[31] Pre-Budget Report, Cm 6042 (PDF), December 2003 para 5.108-9

review was continuing.[32] In Budget 2007 it was confirmed that the review was "ongoing".[33] One commentator, writing in Taxation magazine, noted that Gordon Brown, when Shadow Chancellor, had suggested amending the non-domicile rules prior to the 1997 General Election: "after ten years of no apparent progress in this regard, perhaps a government paper could at least explain the difficulties that have prevented action being taken."[34]

At this time, the activities of private equity funds, and certain tax advantages exploited by executives at these firms, came under intense public scrutiny. Though the focus was on the use of taper relief on business assets to mitigate the CGT charge on 'carried interest' – so that executives paid tax on these rewards at 10% - some mention was also made on the position of non-domiciles, for example, in the Treasury Committee's interim report on private equity, published in July 2007:

> Several of our witnesses referred to the tax domiciliary status of private equity partners and private equity firms. Paul Kenny of the GMB referred to the public's "right to know that people are paying a fair share of tax, whether they are domiciled here or are offshore". The Observer has claimed that only 40 of the top 200 private equity partners are tax domiciled in the UK, but witnesses from private equity firms regarded this figure as unrealistically low. Jon Moulton of Alchemy said that he thought there were abuses by individuals of the domicile rules "which allow in the case of the UK people who have lived here 50 years in some cases still to claim they are not liable to UK capital gains tax". [...]
>
> Whilst recognising that this issue is not exclusive to private equity, we ask the Treasury to inform us of the progress on the 2003 review of the residence and domicile rules as they affect the taxation of individuals, setting out what evidence has been assembled, whether any external advice has been commissioned and the rationale behind any proposed changes. Given the apparently rising number of the non-domiciled, and a perception that monitoring of the status of non-domiciles is weak, it is essential that the Treasury and HM Revenue and Customs are able to demonstrate that they have a rigorous approach towards claims of non-domicile status.[35]

Some commentators raised concerns as to the UK's reputation in attracting non-domiciles this way, pointing out that the UK had been labelled as an 'offshore financial centre', or tax haven, along with what might be termed the usual suspects, such as the Bahamas and the Channel Islands, in a recent study published by the IMF.[36] Others argued that despite their reputation, the

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32 For example, Budget 2004, HC 301, March 2004 para 5.103; Budget 2005, HC 372, March 2005 para 5.116; Budget 2006, HC 968, March 2006 para 5.104

33 Budget 2007 HC 342 March 2007 para 5.120

34 "Stuck in the groove!", Taxation, 24 May 2007

35 Private Equity, 30 July 2007, HC 567, 30 July 2007 para 95. See also, "Just passing through", Financial Times, 13 August 2007

36 "Tax savings: only the rich need apply", Observer, 22 April 2007. The paper was, Ahmed Zoromé, IMF Working Paper WP/07/87 - Concept of Offshore Financial Centers: In Search of an Operational Definition, April 2007.

residence of wealthy foreigners brought considerable benefits to the wider economy.[37]

At the Conservative Party conference on 1 October 2007 George Osborne, then Shadow Chancellor, proposed a new flat-rate charge on non-domiciles using the remittance basis:

> There are currently a number of people living in Britain who register for non-domiciled tax status offshore. It is a good thing for Britain that they live here and bring their talent and their investment to our economy. I make this promise: I am not going to tax all that income as Gordon Brown has persistently threatened to do. But in return for that promise and the certainty it brings, we will charge a flat annual levy of around £25,000 for those who register for non-domicile status. It is easy to administer, difficult to avoid and strikes the right balance between a fair tax system and a competitive economy.[38]

Mr Osborne suggested that this initiative could pay for two reforms: a new relief from stamp duty for any first time buyer purchasing a house under £250,000, and an increase in the zero-rate threshold for inheritance tax from £300,000 to £1 million.

There was considerable scepticism as to whether the new annual levy on 'non-doms' would raise £3.5 billion as Mr Osborne had suggested.[39] On 3 October the Treasury published estimates of the yield of this measure, requested by Mr Osborne the day before, stating that it might raise in the region of £500 million, although this had to be treated "with a great deal of caution due to the lack of available data or evidence." In particular, it remained the case that "there is no complete data set for the unremitted foreign income of non-domiciles, and the costing does not contain any such estimate."[40]

Mr Osborne's announcement attracted widespread surprise, and, from some commentators, considerable acclaim. Indeed, the Conservative proposal on inheritance tax was widely credited for the Prime Minister's decision at the end of that week not to hold a snap general election in early November,[41] and to bring forward the Pre-Budget Report to 9 October 2007.[42]

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37 For example, "Let us praise them - Why we need foreign billionaires: John Jay, New Star Asset Management's development director,", Observer, 22 April 2007

38 Conservative Party press notice, George Osborne: It's Time for Aspiration, 1 October 2007

39 see for example, "Do the sums add up?", Guardian, 2 October 2007. The paper quoted the Institute for Fiscal Studies as commenting, "If it was this easy you have to ask why Labour didn't do it."

40 HMT, Costing of a Conservative Party policy for a new levy on non-domiciled individuals, 3 October 2007

41 "Brown and out: Exclusive", News of the World, 7 October 2007. The paper had commissioned an ICM poll, which showed a Conservative lead over Labour of 6% in 83 key marginal constituencies.

42 HMT press notice 101/07, 5 October 2007. Prior to this, the Chancellor had announced on 25 July that he would be making a single statement in October (HC Deb 25 July 2007 c61WS).

3 Pre-Budget Report 2007

The then Chancellor Alistair Darling presented his Pre-Budget statement to the House on 9 October 2007. As part of his statement Mr Darling argued that the Conservative proposals for an annual charge on non-domiciles were flawed, but that the government would consult on "an alternative route":

> Non-domiciled taxpayers already pay about £4 billion on their earnings. Any proposal for change has to be fair, workable and affordable. I can tell the House that I have examined proposals to impose a flat-rate annual charge of £25,000 on 150,000 non-domiciled taxpayers, which it is claimed would raise £3½ billion. There are in fact only 115,000 registered non-domiciles. I can tell the House, too, that if the charge of £25,000 were imposed, only an estimated 15,000 of those would earn sufficient money abroad to make it worthwhile to maintain non-domiciled status.
>
> As a result, the combined effect of people paying this charge or changing their tax status would be revenue not of £3.5 billion but of only £650 million a year at most—a shortfall of more than £2 billion. In addition to that, such a charge could discourage men and women [...] from coming to this country in the short term. Such men and women do pay tax on their earnings here, and do contribute to the country's wealth, and we do not want to turn them away.
>
> So I will now consult with a view to early legislation on an alternative route. As a first step, we will introduce a charge after seven years, then a higher rate after 10. We will prevent people claiming that they are out of the country when they are actually here, from disguising income as capital and from claiming in effect two allowances; and for completeness we will introduce a flat-rate charge for everyone. Those measures will raise an average of £650 million.[43]

The Pre-Budget Report gave a few more details of these proposals:

> 5.80 The Government today announces the completion of the review of the residence and domicile rules that apply to personal taxation. The Government has concluded that the existing arrangements make an important contribution to the UK's competitiveness, by making the UK an attractive place for skilled people to come to work and do business and where non-domiciles contribute £4 billion of tax on UK earnings.
>
> Reforms are required to make the current arrangement operate fairly:
>
> - firstly, from April 2008 resident non-domiciles who have been in the UK for longer than seven out of the past ten years will only be able to access the remittance basis of taxation on payment of an annual charge of £30,000, unless their unremitted foreign income or gains are less than £1,000;

[43] HC Deb 9 October 2007 c171

> - secondly, people who use the remittance basis of taxation will, from April 2008, no longer be entitled to income tax personal allowances. Again, people with small amounts of foreign income will be exempt;
>
> - thirdly, the Government will introduce changes to the residence rules so that days of arrival in and departure from the UK will count toward establishing residence. This brings the UK into line with international practice; and
>
> - finally, the Government will amend the current rules to remove flaws and anomalies that allow individuals using the remittance basis of taxation to sidestep UK tax, where it is due on foreign income and gains.
>
> 5.81 The Government will consult on a wider range of options and specifically on whether people who have been resident in the UK for longer than ten years should make a greater contribution, and on the detail of these proposals before the changes are introduced to ensure non-domiciles pay their fair share of UK tax.[44]

The Financial Times quoted one tax practitioner at Deloitte saying the proposal was "a brilliant example of intellectual theft [...] a fee-based system is a good idea wherever it came from", although there was criticism that the new rules would come into effect from April 2008. A practitioner at Allen & Overy commented, "this is a bold move which will cause uncertainty for many, including potentially a lot of foreign business people in the City."[45] The CIOT observed "foreign domiciliaries gain no certainty from these proposals since the Government has announced that they are also looking at other loopholes."[46]

There was considerable speculation that there might be an 'exodus' of people affected by the new rules.[47] An editorial in the Financial Times at this time argued that this was "scaremongering":

> Fortunately, a large-scale exit of foreign workers is unlikely to happen ... The 3,000 whom the Treasury admits could leave will derive much of their income from realising investment gains. Their capital gains liability will be much greater than any from employment. As for the feared economic impact, we would already have seen non-doms hurriedly disposing of shares if that were a real concern. There has been no visible effect on private equity investments either ...
>
> The Treasury has an important point of principle on its side, too. Non-doms who consume public services should pay tax like everyone else. A counter-argument that their offshore assets should always be exempt from capital gains because family wealth is not the UK's business makes an artificial and self-serving distinction. This principle applies as much to CGT as it does to

44 Pre-Budget Report, Cm 7227 (PDF) October 2007 para 5.80
45 "Rich 'non-doms' face £30,000 fee", Financial Times, 10 October 2007
46 CIOT press notice, CIOT comments on non-domicile proposals, 10 October 2007
47 "Brain drain fears grow as Darling's levy on non-doms meets wave of resentment", Times, 18 October 2007

> income tax. The government should approach all tax changes carefully. In the case of non-doms, its rationale is sound.[48]

In part of the Institute for Fiscal Studies' commentary on the PBR, economist Stuart Adam noted that there were "lots of unknowns" in estimating the impact of both Labour and Conservative proposals:

- How many non doms are there?
- How many have unremitted foreign income above £62.5k/£80k?[49]
- How much foreign income do the remainder have?
- Might people with high foreign income fail to declare it?
- Could clever advisors find ways around the new charge?
- How many would leave the country?

As Mr Adam went on to say, "no-one really knows the answers to these questions."[50]

In evidence to the Treasury Committee, officials from the Treasury stated that there were an estimated 20,000 'non-doms' who had been in the UK for more than seven years, of whom about 4,000 would have sufficient unremitted income to make it worth their while to pay the fixed charge.[51] This compared with an estimated 114,000 individuals indicating non-domicile status on their tax return in 2005-06.

Subsequently the Treasury gave more details of its estimate that the Government's proposals would raise £800 million in 2009/10:

48 "Leader: Wealthy foreigners drawn into tax net", Financial Times, 8 December 2007
49 Individuals would have to have an income above these limits to be better off paying the £25K or £30K flat rate charge, and retaining the remittance basis – rather than have this income liable to UK tax at 40%.
50 "Non-doms : how much revenue?", in IFS, Post PBR and CSR Briefing, (PDF) 10 October 2007
51 Treasury Committee, The 2007 Pre-Budget Report, HC 54, 26 November 2007 para 70

As the 2007 Pre-Budget Report states, the reforms are made up of four components. For 2008–09, 2009–10 and 2010–11, the figures given in table B4 break down as follows:

	2008–09	2009–10	2010–11
			£ million
From April 2008 resident non-domiciles who have been in the UK for longer than seven out of the past 10 years will only be able to access the remittance basis of taxation on payment of an annual charge of £30,000, unless their unremitted foreign income or gains are less than £1,000.	0	+350	+200
People who use the remittance basis of taxation will, from April 2008, no longer be entitled to income tax personal allowances. Again, people with small amounts of foreign income will be exempt.	0	+230	+150
The Government will introduce changes to the residence rules so that days of arrival to and departure from the UK will count toward establishing residence.	+20	+55	+50
The Government will amend the current rules to remove flaws and anomalies that allow individuals using the remittance basis of taxation to sidestep UK tax, where it is due on foreign income and gains.	0	+150	+100
Total package	0	+800	+500

Please note that the total package figures do not always equal the sum of the component parts due to rounding.

Part of the revenue from counting days of arrival and departure for establishing residence is expected to be received through Pay As You Earn (PAYE). National Accounts conventions dictate that this revenue is shown when liabilities arise, hence some revenue is shown for 2008–09. The remaining reforms are all expected to generate revenue largely through Self Assessment (SA), for which the National Accounts convention is to show revenue as it is received. As a result no revenue is shown for 2008–09, and revenue for 2009–10 is higher than 2010–11. [52]

The committee took the view that the government should ensure that consultation on the new rules should take place "in the near future", and that it should be made clear "whether people who have been resident in the United Kingdom for more than ten years will pay a higher charge."[53]

Tax commentator Simon Sweetman writing for AccountingWeb.co.uk argued that the introduction of a flat-rate charge amounted to arbitrary taxation:

> As I understand it the proposal is that if you pay your £30,000 you are absolved from paying tax on or even declaring your worldwide income, but if you do not then you are taxable on it all (and so presumably must complete a tax return) ... The government have told us that they want everyone to pay the right amount of tax. So why they should choose to bring in a law that makes sure that a lot of people will pay the wrong amount?"[54]

The editor of Taxation, Mike Truman, made this case in a long piece, from which the following is taken:

> Now there is an argument to be made for the present non-domiciled system. It is not an argument I agree with, but it is a tenable one; that by definition, non-doms are not as connected with the UK as those who are domiciled, so it is therefore legitimate to only tax them on the income and gains which do have a close connection with this country, either by virtue of arising here or being remitted here.

52 Treasury Committee, The 2007 Pre-Budget Report (volume II), HC 54-II, (PDF) 26 November 2007 Ev 63-4 "Further memorandum submitted by HM Treasury, 22 October 2007"

53 Treasury Committee, The 2007 Pre-Budget Report, HC 54, 26 November 2007 para 72

54 "We know where you live (well, actually, we're not too sure)", AccoutingWeb.co.uk, 19 October 2007

> There is equally an argument, with which I would agree, that after a number of years of residence in the UK you should not be entitled to any special reliefs or exemptions, and that we ought to have a deemed domicile rule for all taxes that kicks in at somewhere around ten years of continuous residence. But there is no legitimate argument to be made for a policy which says that non-doms should be allowed to bung the taxman thirty grand in order to make him go away. It is a squalid, disreputable, grubby idea that has no place in the tax system of a major enterprise-driven, wealth-creating country. It legitimates a transaction that would otherwise have advisers reaching for a money-laundering report, and I find it hard to understand how either of the two major parties who believe themselves fit to be stewards of our tax system came up with it, let alone both of them.[55]

Richard Murphy, the Tax Justice campaigner, and a long-standing critic of the operation of the remittance basis, made a similar argument, following the launch of the Government's consultation on reform:

> The Treasury admit that the new charging arrangement they propose is likely to be used by no more than about 4,000 people a year. But they also say that 80% of all non-domiciled people stay for less than seven years and will be unaffected by the new charge as a result.
>
> This still means that more than 80,000 people a year who are resident in the UK will be able to run their tax affairs according to entirely different taxation law from everyone else in the UK. But not once does the paper ask what the impact of this is on the remaining 30 million taxpayers in the UK, how this affects their tax compliance, and how it informs their opinion of fairness in their relationship with HMRC and the government as a whole. None of those things can be helped by having a tax system that treats foreigners and the wealthy (always touch stones for discontent, whether we like it or not) as being privileged compared to the local population.[56]

In a subsequent piece Mr Truman was more positive about the £30,000 charge, even though it failed to achieve equal treatment for everyone who, in effect, had made the UK their home:

> Once a number of years has passed – and seven seems to me to be pretty fair – the argument that the non-domiciled should be treated significantly differently from those who are domiciled here evaporates, or so it seems to me. What significant difference is there, for tax purposes, between someone UK domiciled and resident, who might at some point decide that they want to emigrate, and someone who has been resident for many years but who remains non-domiciled on the basis of an expressed intention to return to their 'home country' at some time in the distant future? Horizontal equity seems to me to demand that they are treated equally. A £30,000 annual charge does not achieve that, but it is at least a start.[57]

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55 "Simply unfair", Taxation, 25 October 2007

56 "Domicile: where are the Treasury now?", TaxResearch.org.uk, 6 December 2007

57 "So long, farewell", Taxation, 20 February 2008. For a contrary view see, "Squeezing the pips", Taxation, 24 April 2008.

4 The Labour government's consultation – December 2007

On 6 December 2007 the government published a consultation document on its proposals. Responses were invited by 28 February 2008.[58] The document gave more detail on the way the annual charge would work:

> This will be an annual tax charge, and each year individuals will have the choice of whether or not to pay the charge and claim the remittance basis. A decision not to claim the remittance basis in any given year does not close off the option of reclaiming it in subsequent years. The charge does not, therefore, impact on an individual's non-domicile status.
>
> The Government recognises that in some cases, remittance basis users who have small amounts of unremitted foreign income and gains, and modest income and gains in the UK, might be disproportionately affected by these changes. For example, it is possible for people on modest income in the UK to have a small amount of income accruing in overseas bank accounts. To ensure that the new charge does not have a disproportionate impact a de minimis limit of £1,000 will apply. This means that a remittance basis user with unremitted foreign income and gains of less than £1,000 in a tax year will be able to retain access to the remittance basis for that tax year without paying the £30,000 charge.
>
> The new charge will therefore impact on remittance basis users who have been resident in the UK for more than seven out of ten tax years, and who have more than £1,000 of unremitted foreign income and gains in any given tax year. Self-Assessment (SA) data shows that some 23,000 non-domiciled individuals meet the more than seven out of ten years criterion, of which, 20,000 are assumed to be above the de minimis threshold.
>
> In addition, it is possible that individuals who are not ordinarily resident will also be liable to pay the new charge. However, given that this is an essentially temporary status and generally individuals will, in due course, establish ordinary residence in the UK, and thereby make a normal contribution to the UK tax system, the number affected by this measure is likely to be small. Only those with unremitted income in excess of £80,000 are likely to pay the charge; others will find it less costly to opt out of the remittance basis.[59] It is expected that almost 4,000 individuals will pay the charge and that almost 14,000 more will opt out of the remittance basis in the long term and pay UK

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58 HMT, Paying a Fairer Share - a consultation on residence and domicile, December 2007

59 An individual whose marginal tax rate is the higher rate of 40 per cent will require £75,000 of unremitted foreign source income per year to generate a tax charge of £30,000. Personal allowances must be added to this to calculate the point at which it becomes more beneficial to pay the charge and lose personal allowances (see below) rather than opting out of the remittance basis. In 2008-09 the usual personal allowance is £5,435 so the minimum income required is £80,435.

> tax under the normal rules. It is estimated that almost 3,000 people will become non-resident in response to the charge in the long term.[60]

The consultation document gave details on the proposals regarding personal allowances, and day counting for establishing resident-status.[61] It also set out a number of "flaws and anomalies" in the remittance basis to be addressed:

> 2.25 The flaws and anomalies being addressed are:
>
> - the 'ceased source' loophole, where foreign savings and investment income and gains cannot currently be taxed when remitted to the UK if the source of the income or gain no longer exists in that year. For example, with foreign bank interest, tax can be side-stepped by closing that bank account at the end of the tax year, transferring the interest to a new bank account, and then remitting it to the UK tax-free as the source of the interest no longer exists.
>
> - The 'cash only' loophole which means HMRC can currently only tax foreign savings and investment income if it is brought into the UK as cash. If a remittance basis taxpayer turns foreign investment income into an asset outside the UK and then imports that asset, no UK tax can be charged on the income unless and until the asset is sold or turned into cash in the UK.
>
> - The 'claims mechanism' loophole for foreign savings and investment income where income from a year in which a claim to use the remittance basis is made cannot be taxed if it is remitted in a subsequent year in which no claim is made.
>
> - The problems in taxing remittances from 'mixed funds'. There are currently no statutory rules on the treatment of remittances from funds including some combination of relevant foreign income, employment income, capital gains and capital if they are remitted to the UK. These can sometimes give uncertain and unsatisfactory results where the remittance contains two or more of these elements which may or may not have been subject to UK tax.
>
> - Alienation of income and gains through offshore vehicles or closely connected persons to avoid tax. The current rules can allow overseas income and gains to be alienated by an individual to some third party, such as an offshore trust or close relative, and then brought to the UK in such a way that the individual whose income or gain it was effectively has the use or enjoyment of it in the UK.
>
> - The fact that certain anti-avoidance legislation, such as provisions introduced to prevent UK residents from making gains tax free in offshore structures, does not work effectively in relation to remittance basis users. This means, for example, that non-domiciled residents can avoid tax on gains accruing in non-resident trust or companies when they are remitted to the UK.[62]

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60 HMT, Paying a Fairer Share - a consultation on residence and domicile, December 2007 pp5-6

61 as above para 2.12-18, para 2.19-23

62 as above pp 9-10

The Treasury also asked for views on whether further changes should be considered, to increase the contribution of non-domiciles: in brief,

- Whether the annual charge should be applied without the seven-year grace period, possibly at a lower rate.
- Whether an additional, higher charge should be levied on individuals living in the UK for more than ten years, set, possibly, at £50,000 a year.
- Alternatively, if an upper limit should be set for the length of time over which a UK resident non-domicile could retain access to the remittance basis – similar to the test that means someone who has been resident for 17 out of 20 years is deemed to be UK domiciled for inheritance tax purposes.

There was strong reaction from City representatives that the new rules would have a serious impact on London's strength as a financial sector – and criticism that the paper created more uncertainty, with proposals for a new, higher charge.[63] The Financial Times quoted a practitioner at KPMG saying, “"Everyone I speak to is aghast. It is like a breach of the law ...They are saying this is the thin end of the wedge.”[64] An editorial in the paper criticised the consultation document as being “both overly complex and vague”:

> [The document] estimates that only 3,000 of the 20,000 non-doms affected will leave. But it admits to being far from certain how much tax has been foregone. Why should anyone believe the estimates of numbers affected? ... The complexity of the non-dom plans means much depends on fine detail. By tweaking the small print, they can be made to work without an exodus of smart workers. But ministers need to tread carefully to avoid any unintended consequences.[65]

Writing in the Independent, business commentator Hamish McRae came to similar conclusions:

> We need to remain a magnet for global talent and the last thing we need to do is to encourage people to take the talent - and their money - to some other jurisdiction. For every one person we push out there will be many others who don't come. But there have been abuses and those need to be tackled. It should not be beyond the skills of the authorities to fine-tune our tax system in such a way as to increase revenue but at the same time continue to attract talent. Surely we can do a deal.[66]

In an editorial the Times argued that both the Government's proposals, and the Conservative party's initial ideas for an annual charge, were misguided:

> Both parties propose an annual levy that is a poll-tax-style charge, not a justifiable tax. It is regressive because it does not vary in line with an individual's ability to pay. It may be tempting to soak the rich in tax because, one supposes, they can afford it. But on this point of principle the wealth of

[63] For example, “Rich non-doms 'preparing to leave UK'”, Financial Times, 2 February 2008
[64] “Warning of threat to City's dominance”, Financial Times, 18 December 2007
[65] “Editorial: Taxman cometh”, Financial Times, 18 December 2007
[66] “We must remain a magnet for global talent”, Independent, 13 February 2008

> the individual is irrelevant. The Tories' plan is less bad because the levy is smaller and more palatable: unlike Mr Darling, Mr Osborne does not want to know about non-doms' worldwide earnings. This scares non-doms because they cannot trust governments with such data and compounds the incentive to steer clear of Britain. Unlike Labour, the Tories have no plans to tighten other aspects of non-dom taxation such as residency definitions. Labour's plans are worse, but all fixed tax charges are counter-productive in practice and regressive in principle. Non-doms are innocent. We should welcome them with open arms, not pick at their pockets.[67]

There was also criticism that despite the use of a £1,000 de minimis limit, the new rules would represent an unfair burden on many foreigners on low incomes. The Low Incomes Tax Reform Group published a submission, from which the following is taken:

> One of the [Government's] … key proposals … is that from next April most temporary visitors will be given a choice:
>
> - Pay tax like everyone else in the UK (on a worldwide income basis); or
> - If you want to take advantage of the existing tax breaks for visitors then you will lose your tax free allowances under the UK tax system if you have more than £1,000 of income or gains overseas …
>
> The existing system of tax breaks for the temporary visitor has the merit that for people on low incomes they just pay their UK tax and national insurance on what they earn in the UK and forget the complexities of what they might have overseas. As far as the Revenue in the UK is concerned the tax loss is negligible and the paperwork is kept very low. Once you put such people in the spotlight and make them disclose in detail their worldwide situation the full complexity is revealed.
>
> - Students often work back in their home countries during vacations and do have overseas bank accounts funded by their parents. Some mature students have left businesses and families behind.
> - Migrant workers may leave their families behind and keep involved in their family business back in their home country, for example, a rural smallholding.
> - Some seasonal migrant workers work on farms here in the summer months and return home and do part-time jobs in the winter.
> - Some skilled workers come to the UK and let out their homes back in their home country and live in rented accommodation here.
> - Some refugees have assets and income back in the countries they have fled from.
>
> Some will say "why shouldn't such people pay the same tax as we do in the UK?" That's a fair point in many ways – but the financial advantage, whether for the rich or poor, is more perception than reality for most 'non-doms' who often have two sets of costs due to being away from home. But for the low

[67] "Editorial: Taxing non-doms", Times, 11 February 2008

> paid, the result will be enormous amounts of paperwork, enquiries, correspondence with multiple government authorities when their total income is probably less than working full time on the national minimum wage. For many there will be no extra tax to pay, just the hours and hours it takes to prove it.[68]

There continued to be concern that the new rules were to come into effect in April 2008. On 18 January 2008 HMRC published draft legislation, underlining that this was not in its final form, and should be "regarded as work in progress." The Observer quoted Bill Dodwell, head of tax policy at accountants Deloitte and Touche, as saying, "I think they are in some disarray ... It's too late to put forward changes of this importance. People need time to adjust to the new regime."[69] In addition a number of major art galleries – such as the Tate – argued that their ability to obtain charitable donations and loans of artworks would be significantly affected.[70] (The threat to art loans came from the government's proposal to close the 'cash only' loophole in the remittance basis, which allows individuals to import assets, such as art works, purchased with overseas income not to be treated as remitted income, unless they are sold or turned into cash in the UK.[71]) Similar anxieties were raised about the ability of British universities to attract the most qualified applicants.[72]

In an interview with the Financial Times on 8 February 2008 Digby Jones, then Trade and Investment Minister, said the proposals would diminish the UK's attractions for skilled people: "it has caused people to say 'does this mean you don't want us?" Mr Jones also argued that non-domiciles were worried about greater intrusion into their affairs: "It's also a 'how much do you want to know about me?' bit, as well as the £30,000."[73]

On 12 February 2008 Dave Hartnett, who was then acting Chairman of HMRC, published an open letter, to answer four concerns that had been raised as part of the consultation process; an extract is given below:

> I want to make clear that the Government's intention – which will be set out in the legislation to be brought forward – has always been to ensure that:
>
> - those using the remittance basis will not be required to make any additional disclosures about their income and gains arising abroad. So long as they declare their remittances to the UK and pay UK tax on them, they will not be required to disclose information on the source of the remittances;
> - there will be no retrospection in the treatment of trusts and the tax changes will not apply to gains accrued or realised prior to the changes coming into effect;

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68 LTRG press notice, Temporary visitors to the UK - tax problems ahead, 11 January 2008
69 "Revenue lags on non-dom laws", Observer, 20 January 2008
70 "Great art 'will be forced abroad by tax law'", Times, 9 February 2008
71 HMT, Paying a Fairer Share - a consultation on residence and domicile, December 2007 p10
72 "Universities warn on non-dom taxes", Financial Times, 21 February 2008
73 "Minister warns on non-doms tax purge", Financial Times, 8 February 2008

> - money brought into the UK to pay the £30,000 charge will not itself be taxable; and
>
> - it will continue to be possible to bring art works into the UK for public display without incurring a charge to tax.
>
> In addition, we will continue to discuss with the US authorities how the £30,000 charge can become creditable against US tax.[74]

The statement was widely reported as a 'climb-down'[75] though the then Chief Secretary to the Treasury, Yvette Cooper, was quoted as saying "there have been some misunderstandings as a result of some of the detail of the consultation document, things that were never intended, and we've clarified that."[76] The papers quoted a number of individuals from the City arguing the proposals would still cause significant economic damage.[77]

The Chartered Institute of Taxation stated that the letter was very welcome, but went on to argue that some of the changes should be postponed until April 2009 as "this would give time for advisers and taxpayers to be able to understand and comply with the new rules and ensure that the drafting works as intended."[78] Similarly the Confederation of British Industry argued for a 12 month delay for the Government to "buy time to consult properly and iron out the confusion and inconsistencies."[79] However, the then Chancellor, Alistair Darling, ruled this out in an interview with the BBC when he said, "we have got a consultation, which is running until the end of February, and obviously I must listen to what people have got to say. But frankly once you've decided on a policy to start looking at delaying it doesn't help anybody at all ... People want certainty about what your intentions are."[80]

The Financial Times reported that one positive aspect of HMRC's open letter had been to calm fears about the amount of information non-domiciles might have to provide HMRC under the new rules: "Tax advisers had warned that those with family trusts overseas might have to give far more information about those to the UK taxman – even if neither the assets, nor any income or gains, was related to the UK."[81] However, the Society of Trust and Estate Practitioners (STEP) suggested that this "may well not prevent HMRC from seeking evidence of the nature of any remittance in the context of an enquiry

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74 HMRC, Open letter from Dave Hartnett (Acting Chairman, HMRC): Residence and domicile consultation, 12 February 2008

75 "Darling forced to retreat on non-doms", Financial Times, 13 February 2008; "Darling back pedals over the tax treatment of non-doms", Times, 13 February 2008

76 "Darling caves in after storm of criticism", Guardian, 13 February 2008

77 eg, "Treasury retreat seen as too little, too late", Financial Times, 13 February 2008

78 CIOT press notice, CIOT welcomes step in the right direction on domicile, 13 February 2008.

79 CBI press notice, Flawed non-dom proposals need to be postponed and rethought, 28 February 2008. The Institute of Directors also supported a year's delay ("City seeks delay to new tax regime", Financial Times, 13 February 2008).

80 "Chancellor rebuffs pleas for delay", Financial Times, 14 February 2008

81 "Retreat calms some tax fears", Financial Times, 14 February 2008

into any individual taxpayer's return."[82] The tax campaigner Richard Murphy made a similar point:

> [Dave Hartnett's letter states] only remittances need be declared and overseas income need not be … What he says is technically true, and it's also absolutely correct that so long as tax is paid on remittances no enquiry will arise on the source. But from my experience of this issue (and I have done investigations on remittances) the moment you claim a remittance is not taxable the fun starts. It is always the case that you then have to prove why the sum remitted was capital and for that reason anyone who plays the remittance game has to keep the most meticulous of records of their income, gains and capital (which few are capable of doing).[83]

Mr Murphy also argued for a much wider reform, along the lines set out by the Trade Unions Congress, in their response to the consultation paper; an extract is reproduced below:

> Adam Smith said in 1776 that a good taxation system should be equitable, certain, convenient and efficient. The domicile rule fails these tests … If, as we contend, use of the domicile rule in taxation is highly problematic at a number of levels … then its use must be ended …
>
> The UK currently has two residence concepts in addition to domicile. These are residence and ordinary residence. The technical differences are not an issue of concern here except to note that ordinary residence is usually acquired after the elapse of three tax years of residence in the UK. We suggest that a new rule should, in large part accept this principle. A person who has arrived temporarily in the UK (assuming that they have not already done so in the previous ten years) should be entitled to have a four year period of temporary residence status for tax purposes in this country. During that period they should be taxed on all their UK source income and capital gains and on their non-UK income and gains on a remittance basis. They should only be liable to Inheritance Tax on their UK assets.
>
> At the end of the four tax year period they would have a choice: they could leave the UK or they could move to being taxed on an arising basis on their world-wide income and gains on a basis exactly consistent with that of any other UK resident person, none of whom would by then, with this one exception, have use of the remittance basis.[84]

For the Conservatives, the shadow Chancellor, George Osborne, took the view that the Government's proposals were flawed because they did not offer individuals who pay the annual charge a guarantee that HMRC would not investigate their offshore holdings. Writing in the Sun on 12 February he argued that "[the Chancellor] told the non-doms that not only would they have to cough up more money, but also the taxman would start poking his nose into their offshore bank accounts looking for new things to tax … That is the one thing above all they want to avoid."[85] For the Liberal Democrats,

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[82] Society of Trust and Estate Practitioners. STEP Briefing: New rules for non-domiciled UK residents, 12 February 2008

[83] "Domicile: clarification, what clarification?", TaxResearch.org.uk, 13 February 2008

[84] TUC, Paying a Fairer Share: a Response to the Treasury Consultation on Residence and Domicile, (PDF) February 2008 pp6-8

[85] "Opinion: I'll tax non-doms my way, Darling", The Sun, 12 February 2008

Vincent Cable argued that both the Government's proposals and those by the Conservatives for an annual charge are flawed:

> The poll taxes proposed by Mr Darling and George Osborne, Tory shadow chancellor, will not work. The fee is prohibitive for large numbers of non-doms with modest income or gains. Even for a banker on temporary secondment to the UK the charge is the equivalent of £50,000 a year extra in UK taxed income, which many employers will balk at paying. But, for Roman Abramovich and Lakshmi Mittal, the charge is the cost of a small party.
>
> The City has mounted a counteroffensive. They have a point about some details added by the Treasury … But the apocalyptic predictions of mass exodus will not wash … Big centres competing with London - New York and Frankfurt, for example - recognise no such animal as a non-domiciled resident and any non-dom taking refuge in the US or Germany would pay full tax on their global income and gains.
>
> In my view, the government should drop the Darling-Osborne poll tax on non-doms. It should, instead, restrict non-dom status to those who are not yet fully settled here - a seven-year cut-off seems reasonable. Short-term expatriates would not be affected. Others could plan their future with certainty.[86]

One correspondent to the Financial Times argued that it was inaccurate to term the charge a 'poll tax' given that "no one need pay this levy":

> It is difficult to find a precedent for this peculiar tax. It parodies the US alternative minimum tax, which was intended to prevent tax breaks such as mortgage interest relief wiping out the tax liability of high-earners, by imposing a floor on income tax due. In this case if your overseas income is high enough then you can choose to place a ceiling on your tax bill, giving yourself a marginal rate of 0 per cent on gross foreign income above about £75,000. The levy is certainly very regressive: not because it is forced upon the groaning non-dom poor, but because it exempts the non-dom rich for a flat fee. Perhaps it should be referred to as the voluntary maximum offshore tax? The simplest and fairest solution would be to remove any tax break for long-term residents, and place them on the same footing as citizens, in the same manner as the US.[87]

The paper's economics commentator Martin Wolf argued that that complaints about the charge would have a disastrous impact on the economy were "subversive of any enduring political compact among citizens":

> Certainly, the plans should have been better thought through … Yet the experience also shows that the case for a simple, neutral and stable fiscal system, which taxes the worldwide incomes of all long-stay residents on the basis of ability to pay, is overwhelming. As soon as one departs from that principle one enters in a maze of special pleading or invidious distinctions, in which failed ideas of industrial policy - subsidising winners through the tax system - return to the fore. If the application of that great principle means some rich people leave the country, so be it.[88]

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86 "Non-doms must be made to pay up or pack up", Financial Times, 14 February 2008

87 "Letter: Don't forget that non-domiciled status is voluntary", Financial Times, 20 February 2008

88 "Leona Helmsley is alive in Britain", Financial Times, 7 March 2008

5 Budget 2008

The then Chancellor Alistair Darling presented the Budget on 12 March 2008. In his Budget speech he confirmed that the government would introduce the new £30,000 charge for non-domiciles who wished to use the remittance basis, but had lived in the UK for more than seven years:

> We welcome the contribution made by people born outside the UK who choose to come and work here. They are an important and central contributor to our economy's growth and prosperity. They pay their taxes on their earnings here; they also pay tax on the money they bring into this country from abroad. But for those non-domiciled individuals or families who have chosen to make Britain their home, I believe that it is right and fair that they should, after seven years, pay a reasonable charge to maintain the right to be taxed differently from other UK residents.
>
> Beyond that, as I have said before, we will not seek to charge UK tax on offshore income or capital gains that are not brought into the UK. This new charge will be implemented from April. There will be no further changes to this regime for the rest of this Parliament or the next.[89]

The Budget report confirmed a number of changes to the proposals, primarily in respect of a higher de minimis limit for unremitted income and gains, and the exclusion of children from the new charge. In addition the annual charge would be a tax charge on unremitted income and gains, not a 'stand alone' charge: as a consequence it should be treated as tax for the purposes of Double Taxation Agreements. This section of Budget 2008 is reproduced below:

> Residence and domicile consultation
>
> The package of changes to the rules on residence and domicile announced in the 2007 Pre-Budget Report was intended to strike the right balance between fairness and competitiveness. The special remittance basis rules, which help to attract international talent and investment, are important to UK competitiveness, but can only be sustainable in the longer term if they are fair. It is right that people who decide to make their home in this country should pay their fair share of tax.
>
> Having consulted on these proposals, the Government intends to implement the following changes from April 2008:
>
> - the special remittance basis of taxation will continue for non-domiciled UK residents;
>
> - adults using the remittance basis of tax, who have been resident in the UK for longer than 7 out of the past 10 tax years, will be subject to an annual

[89] HC Deb 12 March 2008 c292

tax charge of £30,000 a year as regards the foreign income and gains they leave outside the UK, unless their unremitted foreign income and gains are less than £2,000 a year. This means that adults who continue to benefit from the special remittance basis rules after 7 years in this country will make an additional contribution through the charge;

- people using the remittance basis of taxation will no longer be entitled to personal allowances, unless they have unremitted foreign income and gains of less than £2,000 a year. This means that people in this group will have a choice between tax free allowances (on the same basis as other UK taxpayers) or enjoying the special remittance basis rules which keep the foreign income and gains that they leave abroad outside the UK tax system;
- the residence rules will be changed so that any day when a person spends midnight in the UK counts towards establishing UK residence. This means that residents cannot opt out of paying their fair contribution by saying they are not resident in the UK; and
- loopholes and anomalies in the remittance basis rules will be removed, to ensure that the remittance basis works as originally intended and can no longer be used as a vehicle for avoiding UK tax. Income and gains of offshore trusts will be taxed only when they are remitted to the UK, even if these relate to UK assets.

> The Government is grateful to all those who took part in the consultation and has addressed their concerns in finalising the changes, including about art. The Government has decided that there is no case for considering further changes to increase the contribution of non-domiciles. Therefore the changes announced above mark the end of the residence and domicile review and offer a package of reforms that will both protect UK competitiveness and deliver greater fairness. They will not be revisited for the rest of this Parliament or the next.[90]

It had been a particular concern of American citizens that they would not be able to write off the £30,000 charge against US federal taxes, and thus be liable to double taxation on this amount. Alongside the Budget report HMRC published a detailed legal opinion commissioned by the Treasury which suggested that the charge "should be treated … as a foreign tax creditable against United States federal income tax."[91]

Initial reaction from the City to the Chancellor's statement seems to have been quite positive.[92] The Times reported that "leading City figures said the

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[90] Budget 2008, HC 388 (PDF), March 2008 p68 (Box 4.3). See also, HMRC, Budget Note BN102: Residence and Domicile: The Residence Test and Day Counting Rules; Budget Note BN103: Residence and Domicile: Personal Allowances and the Remittance Basis; Budget Note BN104: Residence and Domicile: Closing Loopholes in the Remittance Basis; Budget Note BN105: Residence and Domicile: Remittance Basis and Art for Public Display; Budget Note BN106: Residence and Domicile: Changes for Employment-Related Securities; Budget Note BN107: Residence and Domicile: Annual £30,000 Charge for Some Users of the Remittance Basis, (PDF) 12 March 2008.

[91] HMRC, Budget Note BN102-107: Residence and domicile: annual £30,000 charge for some users of the remittance basis, (PDF), 12 March 2008 (see Annex)

[92] For example, "Corporate leaders welcome concessions over controversial plans to tax non-doms", Financial Times, 13 March 2008

Chancellor had probably just done enough … to prevent a mass exodus of talented entrepreneurs."[93] In evidence to the Treasury Committee John Whiting of PricewaterhouseCoopers said, "undoubtedly the changes announced in the Budget have reassured a cadre of people …[though] whether they have gone far enough to really stem any exodus remains to be seen."[94] In their Budget briefing the Institute of Chartered Accountants stated, "it is heartening that [the Government] have listed to the concerns raised and made quite extensive changes to mitigate the detailed impact of these rules."[95]

The Chartered Institute of Taxation was positive about the changes that had been made, though pointed out that they "could easily have been avoided if proper consultation had been undertaken at the beginning of the process before the Government announced its proposals in the Pre-Budget Report." It also suggested that there remained a number of "rough edges" to the proposals:

> These include the retrospective nature of the charges where the source of income has ceased many years ago, the lack of detailed rules for mixed funds, and the continued lack of a proper statutory residence test. One of the worst remaining aspects of the proposals will be for low-earners, for instance seasonal agricultural workers from other parts of Europe. While they will now be allowed up to £2,000 of foreign income without jeopardising their tax position, as soon as their income exceeds this figure they may end up losing their personal allowance.[96]

Others were more critical. The Trade Unions Congress, which had argued for the wholesale reform of the domicile rules, stated that the Chancellor "was wrong to rule out further changes when the threatened talent exodus fails to materialise."[97]

In their report on the Budget the Treasury Committee raised concerns about the potential impact of this reform on "the middle and lower income groups of non-domiciled taxpayers", especially in relation to the proposal to withdraw personal allowances from anyone using the remittance basis:

> In looking at the revised policy on residence and domicile announced in the 2008 Budget, it is important to distinguish between the two key aspects of the change—the £30,000 annual charge and the loss of personal tax allowance. Both of these measures affect those who have over the de minimis limit of annual unremitted foreign income and gains over £2,000, but there are different qualifying periods of residence. The £30,000 charge is payable only by adults who have been resident in the UK for more than seven of the last 10 tax years and meet the de minimis limit.
>
> However, the loss of personal tax allowance affects all who meet the unremitted foreign income limit without reference to any minimum period of

93 "Concessions over non-doms policy allay fears in the City", Times, 13 March 2008
94 Treasury Committee, Ninth report: The 2008 Budget, HC 430, (PDF) 7 April 2008 Q105 Ev18
95 ICAEW Tax Faculty, Budget Report 2008, 14 March 2008 p2
96 CIOT press notice, CIOT welcomes Budget changes to non-resident rules, 17 March 2008
97 TUC press notice, Budget - resilient economy but not enough for children, 12 March 2008

> residence in the UK. Consequently, anyone who has unremitted foreign income and gains of over £2,000 would lose the right to a personal tax allowance on their UK earnings ... [This] limit does not only apply to interest on capital savings or investments overseas, but could also be breached from letting a property in a foreign country, or from relatively short periods of temporary work in the home country, for example, in a summer job.[98]

In evidence to the Treasury Committee John Whiting suggested that the scheme would be "an extremely difficult measure to run", though not for the very wealthy – on whom the debate has focused – given they "have their advisers will make sure they comply and they will pay the £30,000 on a self-assessment basis":

> The middle rank, very often employed, will be dealt with in many cases by their employer who is going to have to shoulder the burden of asking, "Have you made an election? You do realise you have to sort out whether you are actually now non-domiciled, on a remittance basis, whatever" and then start amending the PAYE code or reimbursing, so there is a huge burden there for the employer.
>
> Then the biggest cadre of non-domiciles are those who many of us see every day—the archetypal Polish plumber or the Romanian farm worker or the sandwich bar worker—who are employed, paying their UK taxes but probably do not even know they are non-domiciled because they do not know the term, they do not realise potentially they are about to lose their personal allowance, they certainly do not have any advisers, and if they were to go to HM Revenue & Customs—and let us be realistic we are talking about potentially millions of them—I very much doubt whether HM Revenue & Customs are the least bit geared up to help them. In other words, what we are looking at is unwitting non-compliance by a large group of people at the bottom end of the income scale.[99]

In its report on the Budget the Treasury Committee made a series of recommendations, highlighting concerns about the impact of the new rules on non-domiciles on middle and lower incomes:

> We are concerned that, as a result of the focus on wealthy individual non-domiciles, there has been insufficient consideration of the possible impact of tax changes announced in the Budget on the middle and lower income groups of non-domiciled taxpayers. Due to the complex nature of the policies on domicile and residence, and the distinction between how liability is incurred for the annual £30,000 charge and the loss of personal tax allowances, we are concerned that the new policies will create a group of non-domiciled taxpayers who would be unwittingly in breach of the new law.
>
> We are also not convinced that sufficient consideration has been given to the possible further burden that the measure will place on HM Revenue & Customs. We recommend that the Government, in its response to this Report, summarise the steps being taken by HM Revenue & Customs to deal with the potentially large number of foreign workers who may be seeking tax advice, following the implementation of the new policy.

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98 Treasury Committee, Ninth report: The 2008 Budget, HC 430, (PDF) 7 April 2008 para 85
99 as above Q107 Ev18

> We intend to monitor the tax domicile regimes now proposed to be, or actually, created in a number of other tax jurisdictions. We believe that the Government should undertake a wider review of the off-shoring of both individuals and companies.[100]

The Government's response to the committee's report was published in June that year – and on this issue, the Government made the following points:

> The Government continues to believe that the changes contained in the Finance Bill make the system fairer while maintaining competitiveness of the UK economy.
>
> In answer to the issue of the impact of the measures on low paid migrants, the Government has taken significant steps to ensure that most low paid non-domiciled individuals will not be affected by the reforms. The de minimis threshold for unremitted offshore income, after which remittance basis users lose access to personal allowances or are affected by the charge, has been doubled since The Pre-Budget Report to £2,000. Low income migrant workers who have more than £2,000 unremitted foreign income and gains for the year are unlikely to pay more tax as a result of the new rules on domicile because even if they move to the arising basis they will be able to claim relief for foreign tax paid under double taxation agreements.
>
> Turning to the subsequent concern that there is a risk that low-income migrant workers will become unintentionally non-compliant with this legislation, it should be noted that HMRC applies a risk-based approach to compliance. Low-income migrant workers are likely to be relatively low risk. As regards managing enquiries from migrant workers, HMRC is also currently developing specific guidance and support, and working with external stakeholders, to encourage compliance by low income migrant workers.
>
> HMRC will also monitor the impact of the new rules and develop new procedures as necessary to support this group of customers. It is important to note that not all people who have a foreign domicile or come from abroad fall under the category of non-domiciles under the tax system. The vast majority of those with a foreign domicile do not claim the remittance basis, and would get no financial benefit from doing so, unless they have significant foreign-source income and gains. These people are not affected by the changes and this will remain the case.
>
> Turning to the possibility a further review of off-shoring, the Government has made a clear commitment that the tax rules on residence and domicile will not be revisited for the rest of this Parliament or the next. The Government published a consultation paper Paying a fairer share: a review of residence and domicile in October 2007 on the tax regime for UK investors, including individuals and companies, investing into offshore funds.[101]

Provisions to implement the Government's proposals were included in the Finance Bill 2008, published on 27 March.

Prior to these reforms the tests for determining whether someone is resident in this country for tax purposes were based primarily on case law and departmental practice, with one important exception: the '183-day test' (that

[100] Treasury Committee, Ninth report: The 2008 Budget, HC 430, (PDF) 7 April 2008 para 88
[101] Treasury Committee, Tenth special report, HC 689 (PDF) 16 June 2008 pp18-19

is, that someone is resident if they have spent 183 days or more here in any tax year). Under the current rules, all days spent in the UK are normally counted, except for days on which the individual arrives in, or departs from, the UK. **Clause 22** of the Bill provided that any day where someone is present in the UK at midnight will be counted, unless they simply here as a passenger in transit. Details of the new rules were given in the relevant Budget Note:

> [Under this provision] on and after 6 April 2008, any day where the individual is present in the UK at midnight will be counted as a day of presence in the UK for residence test purposes.
>
> There will be an additional exemption for passengers who are in transit between two places outside the UK. The exemption is wider than [initially proposed in the 2007 PBR] … as it caters for people who have to change airports or terminals when transiting through the UK. It will also allow people to switch between modes of transport, so they could fly in but leave by ferry or train for example. Days spent in transit, which could involve being in the UK at midnight, will not be counted as days of presence in the UK for residence test purposes so long as during transit the individual does not engage in activities that are to a substantial extent unrelated to their passage through the UK. So, for example, if they take time out to attend a business meeting then the transit exemption will not have effect.[102]

The Explanatory Notes to the Finance Bill underlined the point that this provision would simply amend the 183-day test, though HMRC would apply this principle more widely:

> Although case law precedent from the 1950s (Wilkie v CIR, 32 TC 495) established the principle that in computing the length of time spent in the UK it was correct to take hours into account, that approach was thought to be too much of an administrative burden both for the individuals concerned and for the Department in terms of investigating compliance. HMRC therefore continued its normal practice of ignoring days of arrival and departure except where the facts in an individual case predicated a different approach.
>
> Such treatment meant that the UK is now out of step with many of its international partners in determining the issue of an individual's residence for tax purposes. Recent case law has indicated that HMRC's guidance on 'day-counting' as it stands creates a degree of uncertainty. The Government considers that legislation is required and that the treatment of days of arrival and departure should reflect the growing ease of international travel and an increasingly global workforce.
>
> The changes to the legislation introduced in the clause are in respect of the 183-day test only. However, where current HMRC practice requires the use of day-counting to determine residence for tax purposes, that practice will also be changed in line with the statutory amendment introduced in this clause.
>
> From 6 April 2008 all day-counting tests, such as the non-statutory 91-day test, will follow the same principle that any day where the individual is in the UK at the end of the day will be included as a day of residence. The same exception from that general rule will apply where the individual is a passenger

[102] HMRC, Budget Note BN102: Residence and Domicile: The Residence Test and Day Counting Rules, (PDF) 12 March 2008

> in transit and their activities whilst in the UK are not substantially unrelated to that travel.[103]

In their initial briefing on the Bill, the Institute for Chartered Accountants argued that a full statutory test for residence should be introduced:

> This appears a very narrow amendment but the issues it raises are of considerable importance to UK plc. Given the fundamental importance of establishing whether a person is resident in the UK for tax purposes, this change highlights the fact that the existing residence test, which is based primarily on old case law and HMRC practice, no longer provides a satisfactory basis for establishing liability to UK tax … Current HMRC practice in this area is unclear, often ambiguous and highly uncertain in application. The result is that individuals can be present in the UK without knowing if they are or are not tax resident. The lack of certainty puts the UK at a disadvantage as compared to our competitors …
>
> The UK is now one of very few developed countries (if not the only one) that does not have a statutory test. It is for this reason that the UK is out of step and this issue must now be addressed. We believe that there are suitable models of statutory residence tests that the UK could use to develop its own rule. A suitable example is the Irish statutory residence rule, which was first introduced in 1994 (subsequently consolidated in 1997) and which we understand works well. We would be happy to assist in the drafting of a suitable test.[104]

Clause 23 and schedule 7 of the Bill covered the introduction of the £30,000 remittance basis charge (RBC), the removal of personal allowances for those using the remittance basis, and the operation of the £2,000 de minimis limit. The Explanatory Notes to the Bill set out how individuals could apply to be taxed under the remittance basis:

> At present the remittance basis has to be claimed in the case of relevant foreign income, but is applied automatically for both employment income and capital gains. With effect from 6 April 2008 a claims mechanism will be extended to apply to all three categories of charge. It will therefore be up to taxpayers who are UK resident but not domiciled or not ordinarily resident to decide whether they wish to be taxed on the remittance basis for each tax year. Self assessment returns will allow those who are entitled to the remittance basis to make a claim if they so wish.
>
> Those eligible will be able to choose from one tax year to the next whether they wish to be taxed on this basis. However, this will not apply to those non-UK domiciled individuals whose unremitted income and/or gains for a tax year are less than £2,000 (see below). They will be taxed on the remittance basis for that year automatically without the need for a claim.
>
> In addition, individuals entitled to claim the remittance basis who have no UK income or gains, and who don't remit any foreign income or gains, won't have to claim the remittance basis in years they are not liable to the RBC. This

[103] HM Treasury, Finance Bill 2008: Explanatory Notes, March 2008 (Clause 22, paras 15-17)

[104] Institute for Chartered Accountants (Tax Faculty), TAXREP 27/08 - Finance Bill 2008: ICAEW priority issues, 3 April 2008 p4

> avoids them having to complete a self assessment return only so they can claim the remittance basis and then have no tax to pay.[105]

The Institute for Chartered Accountants raised a number of concerns about these changes:

> - As far as we know the £30,000 levy to access the remittance basis has no international precedent and there remain concerns that the levy may not be creditable in other jurisdictions for double tax relief purposes. It was recognised that this may be a particular problem for US tax purposes and the Budget Notes included a helpful opinion from a firm of US lawyers that the levy would be creditable for US tax purposes. Nevertheless, the fact remains that until the US revenue authorities have agreed to this treatment the issue is not free from doubt. This needs to be clarified.
> - The focus of these changes is on extracting more tax from the 'super rich' but the need to formally claim the remittance basis and the loss of personal allowances and the CGT annual exemption will increase the tax rate on all non domiciles, for example migrant workers, many of whom will not be particularly well off and who may not even realise that they face an increased tax bill in the UK.
> - In addition to the increased tax charges, the changes will also impose significantly higher administrative burdens and associated costs on many non-domiciles. This is because they will now need to take advice on their UK tax position and they may now need to complete a UK tax return whereas currently many non-domiciles do not need to do so. The raising of the de minimis limit from £1,000 to £2,000 announced in the Budget was a welcome announcement and this will help to alleviate some of the compliance burdens that this change introduces, but we remain of the view that the de minimis should be set at a higher level.
> - We remain concerned that HMRC will also need extra resources to implement and monitor these changes and that the strains that will be imposed could be considerable at a time when HMRC's budget is being cut in real terms over a three-year period.[106]

These provisions were debated at some length at the Committee stage of the Bill.[107] In the case of the new residence test, the provisions were agreed without amendment, while there was some debate as to the case, made by the ICAEW, for a statutory residence test. On this occasion the then Financial Secretary Jane Kennedy said the following:

> I am aware that a number of representative bodies have argued the case for a statutory residence test for tax purposes. I have met a number of those organisations, and having listened to their representations, it is clear that there is currently no agreement on what form a statutory residence test should take.

105 HMRC, Finance Bill 2008: Explanatory Notes, (PDF) March 2008 (Clause 23, paras 8-10)

106 TAXREP 27/08 - Finance Bill 2008, 3 April 2008 pp5-6

107 Public Bill Committee (Finance Bill), Twenty-second and twenty third sittings, 17-19 June 2008 cc780-802 (clause 22); Public Bill Committee (Finance Bill), Twenty-third and twenty-fourth sittings, 19 June 2008 cc780-887 (clause 23 and schedule 7).

> I have asked officials to consider the representations that have been made and to work with those groups to see whether consensus can be reached on what the best test would be for the UK environment, bearing in mind that our circumstances are different from those of other economies in which those tests already exist. However, I am not prepared to allow the whole debate about residence, non-domiciles and the remittance basis to be opened up, because that is not in the UK's interests.[108]

In the case of the new rules for non-domiciles, the government tabled a very large number of amendments to deal with various technical issues raised during the consultation,[109] including changes to clarify the position of US citizens wishing to offset the £30,000 charge.[110] On the wider aspects of the reform the then Financial Secretary Jane Kennedy noted that HMRC had lowered its rough estimate of the numbers of non-domiciles expected to leave the UK – put now at around 2,400.[111] The Minister went on to contrast the Government's approach with that sketched out by the Opposition, underlining that, in seeking a balance between the wish to remove anomalies from the system but to retain the attractiveness of the UK as a place of residence and business, the government were seeking to raise far less money from its reform than anticipated by the Shadow Chancellor:

> The Conservative proposal … would have been for the flat rate charge of £25,000. Once a charge had been paid, no more questions would have been asked about an individual's worldwide income. Their proposal would not have addressed the issue of fairness …
>
> It is also important to bear in mind that the Conservative proposal, unlike our proposal, would have charged people from the day they arrived … We very much want to encourage people of quality from around the world to come here. We would want them to come and, having worked here, perhaps to stay longer. That is why we believe that beyond seven years it is right to invite remittance users to make a greater contribution.
>
> That brings me back to the other main difference between the two proposals. The Conservative proposal would have raised in the region of £3.5 billion from a group of people—roughly 120,000—whereas the tax take already is around £13 billion. It is around £500 million now. We were inviting a greater contribution, but a much more modest one than the Conservatives proposed … That is not widely appreciated.
>
> The current arrangements for the taxation of non-domiciled people in the UK are very generous. They serve the British economy well. In terms of attracting the world's best talent to the UK we have now arrived at a balance which maintains that.[112]

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108 Public Bill Committee, 19 June 2008 c800. As noted above, in 2013 the Coalition government introduced a statutory residence test (Budget 2013, HC 1033, (PDF) March 2013 para 2.48).

109 The Minister tallied 135 government amendments to schedule 7 – the previous 'record' being 200 tabled to a Finance Bill in 1995 (Public Bill Committee, 19 June 2008 c840)

110 This point was explained by the Minister (Public Bill Committee, 19 June 2008 cc805-6).

111 Public Bill Committee, 19 June 2008 cc840-1

112 Public Bill Committee, 19 June 2008 cc841-2. The provisions now form sections 24-25 and schedule 7 of the Finance Act 2008.

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