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Legal Memorandum

- ***Tipps zur Nachlassplanung und Testamentsgestaltung bei Vermögen in Deutschland und UK (England & Wales, Schottland und Nordirland),***
- ***Was bedeutet der Rechtsbegriff „Domicile" und was sind die Auswirkungen auf die Erbschaftssteuer?***

I.
„Domicile" ist aus britischer Sicht das zentrale Kriterium für die Erbschaftsteuer

War jemand im Zeitpunkt seines Todes aus Sicht des englischen Rechts „domiciled in UK", dann erhebt das englische Finanzamt Erbschaftssteuer (Inheritance Tax, im Folgenden: IHT) auf dessen gesamtes Weltvermögen (worldwide assets). Und zwar satte 40% auf alles, was den Steuerfreibetrag (nil-rate band) von derzeit 325.000 englischen Pfund übersteigt.

Dies gilt auch für Nicht-Briten, wenn diese dauerhaft in UK leben und dort ihr „domicile" haben. Der Rechtsbegriff „domicile" ist nicht völlig identisch mit dem deutschen Begriff Hauptwohnsitz (main residence), wobei domicile und main residence in der Praxis natürlich meist doch Hand in Hand gehen, d.h. dort wo jemand seinen Hauptwohnsitz hat, ist in aller Regel auch sein „domicile".

Wegen der hohen Erbschaftssteuersätze in UK und weil in UK nur ein einziger pauschaler Steuerfreibetrag für den gesamten Nachlass zur Verfügung steht, ist es für Personen, die sowohl in Deutschland wie in Britannien Vermögen haben, verlockend, der UK-Gesamtbesteuerung im Erbfall dadurch zu entgehen, dass sie steuerlich „domiciled outside the UK" gelten („non-dom"). Das englische Finanzamt (HM Revenue & Customs, im Folgenden: HMRC) ist hier aber sehr streng und prüft genau, ob der Erblasser nicht doch als „domiciled in UK" einzustufen ist.

Bei allen Erbfällen, in denen der Verstorbene entweder britischer Staatsbürger war oder in UK geboren wurde oder (unabhängig von der Staatsbürgerschaft) irgendwann einmal in UK gelebt oder gearbeitet hat, verlangt HMRC, dass der Nachlassverwalter (Executor oder

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Administrator) eine spezielle Anlage zur Steuererklärung ausfüllt, das Formular **IHT 401**: (https://www.gov.uk/government/publications/inheritance-tax-domicile-outside-the-united-kingdom-iht401).

Darin werden die Lebensumstände des Verstorbenen abgefragt und der Nachlassverwalter muss dezidiert begründen, warum der Erblasser sein domicile nicht in UK gehabt hat.

II.
Definition des Rechtsbegriffs „Domicile" insbesondere im englischen Steuerrecht

Aus Sicht des HMRC ist die Ausgangsbasis stets das „**Domicile of Origin**", das durch die Abstammung erworben wird. Die Kurzbeschreibung des englischen Chartered Institute of Taxation hierzu lautet:

> Domicile is a concept under UK law and is separate from residence or nationality. It is acquired at birth from your father. It is possible to lose a domicile of origin and obtain a domicile of choice by forming an intention to remain permanently and indefinitely in another jurisdiction, whilst simultaneously being physically present in that jurisdiction.

Aus den in Ziffer I genannten Gründen ist es manchmal gewünscht, dass HMRC ein anderes Land, etwa Deutschland, als „**Domicile of Choice**" anerkennt. In den Anwendungsrichtlinien für englische Finanzbeamte (HMRC Manual) finden sich dazu folgende Erläuterungen und interne Anweisungen (www.hmrc.gov.uk/manuals/rdrmmanual/RDRM22300.htm):

> **Acquisition of domicile of choice**
> A domicile of choice is an inference that the law makes from the facts. A domicile of choice can only be acquired where an individual is both:
> - resident within a territory subject to a distinctive legal system or 'municipal law' (refer to RDRM22310) (siehe *) and
> - intends to reside there indefinitely (refer to RDRM22320) (siehe **)
>
> The intention required is not an irrevocable one.
>
> Acquisition of a domicile of choice requires the concurrence of residence and intention, although either may exist independently prior to the other.

(*) Domicile of choice - Residence

The first condition to acquire a domicile of choice is that an individual must be resident in the law territory. Unlike a domicile of origin or dependence, it is impossible to acquire a domicile of choice in a territory in which the individual has never resided.

The type of residence required for the purposes of the law of domicile is a physical presence in a country as 'an inhabitant of it'. This is a question of fact and will exclude casual visitors, e.g. a traveller. Residence is a question of fact; for the purposes of domicile it does not matter whether that 'residence' is legally recognised or is somehow restricted or illegal.

(**) Intention to Reside Indefinitely

The requisite intention involves the contemplation of an unlimited period of residence. In this context 'unlimited' corresponds to 'indefinite'.
The intention must be formed independently of external pressure. This does not mean that an individual has to be free of any practical constraints or limits upon his or her actions before such an intention can be formed.
The intention is a present one, which might be past or present relative to the enquiry. In some cases the relevant 'present' could be around the time that the individual acquired legal capacity.
A wide range of evidence has to be examined in evaluating intention. No single act or circumstance is determinative; all facts, including apparently trivial ones, have to be considered.
Factors vary in significance in different areas and within the factual context of any given case.
Intention does not depend on the individual's wishes in respect of his or her domicile; it is not an intention to acquire a domicile but the intention to reside in a particular territory indefinitely.
Each case has to be decided on its facts. An individual sent to a territory on military or diplomatic service might subsequently decide to remain there indefinitely. A fugitive from justice could decide that what began as a flight from the law continues as a matter of choice. A refugee might decide to remain indefinitely in a new country. On the other hand a refugee or fugitive could simply be living in a country with no intention to remain there indefinitely.
All the facts have to be taken into account and should be considered together.
An important aspect of the existence, or otherwise, of the necessary intention is whether or not there is a contingency upon the occurrence of which the individual's residence in a particular territory is anticipated to end. If there is an intention to return to the domicile of origin on a clearly foreseen and reasonably anticipated contingency, there is no intention to remain indefinitely. However, if the contingency is vague or sufficiently conditional, an intention to remain indefinitely could exist and a domicile of choice be acquired.

Statements of Intention

Statements of intention have to be considered in the context of all the evidence relevant to establishing an individual's intentions. Mere statements are generally less important than actual conduct and may carry little weight if the statement does not correlate with actions taken.

The possibility of the existence of a natural bias, which the UK courts have indicated is likely to affect an individual's mind when stating his or her intentions, cannot be overlooked. An individual might genuinely believe he or she is domiciled in a particular territory, but objective analysis of the facts could prove that belief to be wrong.

In a situation where testimony is unsupported by other evidence, it is necessary to consider in an objective manner the veracity and accuracy of the witness. If the testimony relates to an individual's intentions, the reality of the intentions is a relevant point.

An individual's motives should also be borne in mind when evaluating his or her statements relating to other relevant matters. Motives, such as avoidance of family or creditors, or tax mitigation or avoidance, can shed light on intended permanence.

A declaration of domicile may be disregarded if there is evidence that the declarant did not understand the relevant law and what their statement meant. This is not to say that evidential statements are to be ignored, merely that an explicit declaration, especially if it uses the term 'domicile' or is deliberately made about a person's domicile, is only to be given weight where the individual making it can show that he or she understood the relevant law at the time the statement was made.

Sind die Voraussetzungen des „domicile of choice" eindeutig gegeben, muss HMRC dies anerkennen.

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Weitere konkrete Informationen finden sich in einer „UK.GOV-Broschüre" zu Domicile (im Kontext Familienrecht, aber dennoch allgemein einschlägig). Die Broschüre ist auf Anfrage verfügbar.

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Ein sehr hilfreicher Beitrag ist der Artikel des englischen Barrister Howard Bilton in „The Telegraph" vom 22 Februar 2013 (www.telegraph.co.uk/finance/personalfinance/expat-money/9883829/Inheritance-tax-u-turn-expats-must-plan-ahead.html).

Insbesondere zur Frage, ob es überhaupt möglich und sinnvoll ist, die Status des Domicile of Choice für künftige Erbfälle vorab verbindlich zu klären bzw. sich von HMRC bestätigen zu lassen. Ein Auszug aus dem Artikel:

"… The legal test of domicile is one of intent alone. If the expat has established a new permanent home in another country and intends to remain in his new country indefinitely he or she will have established a new domicile. HMRC would look for this intent to be evidenced by a show of real commitment to the new country. They look for factors such as, the purchase of a house; taking steps to become a national/permanent resident of and a long period of residency; establishment of a business and other financial ties; establishment of social, religious and political ties in or with the new country; disposal of the family home in the UK; ownership of a burial plot in and making one's main will under the law of the new country; education of children in the new country; relinquishing the right to vote in the UK and taking up such rights in the new country; severance of business and social ties within the UK.

Unhelpfully HMRC will not give rulings on domicile or give any indication of what they think about a person's domicile. If an expat were to write to HMRC outlining their facts and circumstances and asking them whether they think they were domiciled or not they either won't reply or will just tell them to consult a tax expert. What a service!

It used to be possible to force a ruling by filing a return reporting a "chargeable transfer" and forcing them to decide on the matter. This was done by transferring an amount in excess of the lifetime and annual exemptions - say £400,000 - into a discretionary trust. The excess is taxable at 20pc if the transferor is domiciled. If HMRC agreed no tax was due they had effectively agreed that you were no longer domiciled in the UK.

HMRC were reluctant to give these rulings and many who had gone to the trouble of making and reporting the chargeable transfer waited many months or even years for a reaction. Now HMRC refuses to react at all unless "there is considerable tax at stake". Again unhelpfully, HMRC won't confirm how much that is. Suffice it to say that it is a lot and the risk is not unacceptable so this procedure is no longer recommended. The alternative is to obtain counsel's opinion. This can be done quickly and relatively cheaply.

Once a new domicile has been obtained, UK IHT liability disappears on all but UK assets. It is relatively easy to convert UK assets into non-UK assets and eradicate UK IHT on those as well. Be aware, though, that just because UK IHT may not apply there may still be liability to IHT or estate duty in the new country and individual assets may be subject to IHT in their country of situs.

And there is an additional danger. UK IHT no longer applies only for as long as that new domicile is retained. If for any reason the non-dom moves country it is often the case that the new foreign domicile is lost and the UK domicile of origin is

> revived. The good news is that anything transferred into trust remains outside the scope of IHT so standard planning is to transfer as much as possible into trust immediately after obtaining opinion. This should get rid of IHT forever. However transfers into trust would attract a lifetime IHT charge of 20pc if the transferor is domiciled. Hence the need for certainty on this issue.

Eine abstrakte Vorab-Klärung des Domicile-Status wird also in aller Regeln nicht möglich sein. In Erbfällen stellt sich die Frage nach dem Domicile daher erst, wenn HMRC zur Abgabe einer IHT Steuererklärung auffordert. Dann müssen die Erben den Nachweis bringen, dass der Erblasser Deutschland als Domicile of Choice wollte. Eine schriftliche Stellungnahme des Erblassers hierzu (etwa ein Absatz in dessen Testament, dass er/sie sich als domiciled in Deutschland betrachtet) ist in solchen Fällen sinnvoll, als Beleg für die „Intention".

In manchen Konstellationen kann es sinnvoll sein, die von Barrister Bilton erwähnte „erzwungene Entscheidung" der Finanzbehörden auch auf einem anderen Steuergebiet herbeizuführen, etwa wenn in UK eine Einkommensteuererklärung abgegeben wird.

III.
Deemed Domicile

Vermutetes Domicile während einer Übergangszeit: In der Wegzugsphase versuchen die britischen Steuerbehörden, durch die sogenannten „deemed domicile rules" den wegziehenden Steuerschuldner so lange wie möglich an das Vereinigte Königreich zu binden, insbesondere durch die „17 out of 20 years rule" sowie durch die „3 years rule". Die Intention ist – wie bei der 5-Jahres-Frist des § 2 (1) Ziff. 1. b) des deutschen Erbschaftssteuergesetzes (www.gesetze-im-internet.de/erbstg_1974/__2.html): Der Fiskus will vermeiden, dass sich jemand kurzfristig der Erbschaftssteuer entziehen kann, etwa weil der Eintritt eines Todesfalls wegen schwerer Krankheit absehbar ist. Ferner ist es ein gewisser Ernsthaftigkeitstest.

Um die Besteuerung des weltweiten Vermögens zu vermeiden, muss der Erblasser also seit mindestens drei Jahren sein Domicile außerhalb UK gehabt haben und er muss mindestens 17 der letzten 20 Jahre außerhalb des UK gelebt haben.

Im englischen O-Ton der offiziellen GOV.UK-Website (https://www.gov.uk/inheritance-tax/when-someone-living-outside-the-uk-dies) liest sich das wie folgt:

When someone living outside the UK dies

When someone living abroad dies, the rules for paying Inheritance Tax usually depend on:

- how long they lived abroad
- whether their assets (property, money and possessions) are in the UK or abroad
- if their assets in the UK are 'excluded assets'
- if their assets were put into a trust

How long the deceased lived abroad

For Inheritance Tax purposes HM Revenue and Customs (HMRC) can treat someone who had their permanent home ('domicile') abroad as if it was in the UK (known as 'deemed domicile') if they had either:

- had their permanent home in the UK at any time in the 3 years before they died
- been resident in the UK for at least 17 of the 20 Income Tax years up to their death

If the deceased is deemed domiciled in the UK, their estate has to pay UK Inheritance Tax on all their assets.
If they aren't deemed domiciled, their estate:

- has to pay Inheritance Tax on their assets in the UK - except excluded assets
- won't have to pay UK Inheritance Tax on their assets outside the UK

HMRC only recognises a change of domicile if there's strong evidence that someone has permanently left the UK and intends to live abroad indefinitely.

UK assets you don't pay Inheritance Tax on

The estate doesn't have to pay Inheritance Tax on some assets in the UK if the deceased was domiciled abroad. These are known as 'excluded assets'.

They include:

- holdings in authorised unit trusts and open-ended investment companies (OEICs)
- foreign currency accounts with a bank or the Post Office
- UK government gilts which were issued 'free of tax to residents abroad'
- overseas pensions
- pay and possessions of members of visiting armed forces and staff of allied headquarters

Das englische Finanzamt defininiert die „Deemed Domicile“ Regel auf der HMRC-Website (www.hmrc.gov.uk/cto/customerguide/page20.htm#5) wie folgt:

> For inheritance tax purposes, there is a concept of '**deemed domicile**'. This means even if you are not domiciled in the UK under general law we will treat you as domiciled in the UK at the time of a transfer if
>
> - ***you were domiciled in the UK within the three years immediately before the transfer***, or
> - you were resident in the UK in at least 17 of the 20 income tax years of assessment ending with the year in which you make a transfer.

IV.
Erbschaftssteuern in Deutschland und UK

Nachfolgend ein grober Überblick über die Ausgangslage in Sachen Erbschaftssteuer in Deutschland und UK.

Die Erbschaftssteuersysteme in D und UK sind völlig unterschiedlich. ***In UK*** wird der Estate als solches besteuert und es steht nur ein einmaliger Steuerfreibetrag (nil-rate band) von derzeit 325k GBP zur Verfügung; dafür erbt die Ehefrau weitgehend unbegrenzt steuerfrei, allerdings nur, wenn der empfangende Spouse domiciled in UK ist.

Seit dem Finance Act 2013 gilt nun eine erhöhte Inheritance Tax Threshold von 650.000 GBP für den Non-UK Domiciled Spouse, dies aber wiederum nur, wenn der verstorbene Ehegatte domiciled in UK war (mehr dazu hier: www.farrer.co.uk/News/Briefings/Inheritance-Tax-Changes-for-Non-UK-Domicilied-Spouses-and-Civil-Partners/).

Das darüber hinaus gehende Nachlassvermögen wird aber nach wie vor mit 40% IHT besteuert und etwaige lebzeitige Schenkungen an den Ehegatten reduzieren den Freibetrag, wenn die Schenkungen innerhalb der letzten sieben Jahre vor dem Tod erfolgt sind (Details http://www.murraybeith.co.uk/blog.php?id=1).

In Deutschland dagegen wird der Zufluss beim einzelnen Empfänger besteuert und jeder Begünstigte hat einen persönlichen Freibetrag, der vom Grad der Verwandtschaft abhängt. Im Wesentlichen sind das:

- der Ehegatte: 500k EUR
- jedes Kind: 400k EUR

Daneben (also zusätzlich zu den obigen Freibeträgen) hat der Ehegatte und jedes Kind einen Versorgungsfreibetrag sowie das Familienheimprivileg. Details auf Seite 7 der beigefügten Broschüre „Fakten zum Erbrecht".

Wenn der Nachlass also auf mehrere Empfänger verteilt wird, sind die Freibeträge nach deutschem Recht massiv höher als in UK. Zudem sind die Erbschaftssteuersätze (IHT Tax Rates) in Deutschland bei nahem Verwandten viel niedriger als die 40% in UK, nämlich bei Ehegatten und Kindern – je nach Höhe des vom individuellen Empfänger geerbten Vermögens – zwischen 7 und maximal 30%. Details auf Seite 6 der Broschüre „Fakten zum Erbrecht: Steuerfreibeträge und Steuerklassen" (www.grafpartner.com/publikationen/downloads/Fakten_zum_Erbrecht_2012.pdf).

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In vielen Fällen, die unsere Kanzlei bearbeitet, sind die Mandanten deutsche Staatsangehörige, die auch in Deutschland leben, so dass auf deren gesamten Nachlass die deutsche Erbschaftssteuer anwendbar ist (Steuerinländer gemäß § 2 Abs. 1, Ziff. 1a) Erbschafts- und Schenkungssteuergesetz: www.gesetze-im-internet.de/erbstg_1974/__2.html), prinzipiell also der gesamte, weltweite Nachlass der deutschen Erbschaftssteuer unterfällt (wobei eine in UK gezahlte Inheritance Tax unter bestimmten Voraussetzungen auf die deutsche Erbschaftssteuer angerechnet werden kann, § 21 Abs. 1 Erbschaftssteuergesetz, siehe: www.gesetze-im-internet.de/erbstg_1974/__21.html).

Falls der Erblasser in dieser Konstellation Vermögen (Assets) in UK besaß, so würden diese (unabhängig von der deutschen Erbschaftssteuer) auch in UK besteuert, selbst wenn der Erblasser als UK **non-domiciled** anerkannt wird. Dazu ein kurzer Auszug der HMRC-Website www.hmrc.gov.uk/cto/customerguide/page20.htm#7

> **Which assets are taxable in the UK?**
> Generally, if you are domiciled, or deemed to be domiciled, in the UK, inheritance tax applies to your assets wherever they are sited.
>
> If you are domiciled abroad, inheritance tax applies only to your UK assets. However, if you are domiciled abroad there is no charge on excluded assets and we may remove certain other types of UK assets from the tax charge. For more information on excluded property see 'What is excluded property?'

Es ist daher in vielen Fällen sinnvoll, solche Assets frühzeitig von UK nach Deutschland zu transferieren, um der 40%-Besteuerung in UK zu entgehen, vor allem wenn die Erben nahe Verwandte sind, und daher aus deutscher Perspektive nur 7 oder 11% Steuern zahlen müssen.

Graf & Partners Rechtsanwälte

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BLOG MurrayBeith (17.3.2014)
http://www.murraybeith.co.uk/blog.php?id=1

IHT for Non-UK Domiciled Spouse

It is well known that transfers between UK domiciled spouses and civil partners are exempt from Inheritance Tax. However, prior to the introduction of the Finance Act 2013, if a UK domiciled spouse or civil partner died leaving their entire estate to a non-domiciled spouse or civil partner, the Inheritance Tax threshold was limited to the available nil rate band (currently £325,000) and an additional £55,000. This meant that the maximum tax free amount a non-UK domiciled spouse or civil partner could receive was £380,000, with the balance subject to Inheritance Tax at the rate of 40%. The rationale was that as the non-UK domiciled spouse would pay Inheritance Tax in their country of domicile, with the UK only receiving Inheritance Tax on assets situated in the UK, the immediate charge to Inheritance Tax on the UK domiciled spouse's death ensured that all of the assets above the threshold suffered a charge to UK Inheritance Tax.

The Finance Act 2013 has increased the Inheritance Tax threshold for assets to be received by a non-UK domiciled spouse or civil partner to £650,000. This is an increase of £270,000, resulting in a potential Inheritance Tax saving of £108,000. Assets above the tax threshold will still be subject to Inheritance Tax at 40% and the value of any gifts made by the UK domiciled spouse to the non-UK domiciled spouse within seven years of death will reduce the tax threshold (unless these are eligible for any other exemptions).

The Act has also introduced the flexibility to allow non-UK domiciled spouses or civil partners to elect to be treated as if they are UK domiciled for Inheritance Tax purposes. The election can be made by an individual during their lifetime, or by their representatives within two years of their death. An election would allow the non-UK domiciled spouse or civil partner to benefit from the same Inheritance Tax relief as UK domiciled spouses and civil partners, resulting in them receiving all assets from their spouse or civil partner free of Inheritance Tax. On the non-UK domiciled spouse's death, his or her worldwide assets would be subject to UK Inheritance Tax.

An election cannot be revoked. However, the election would cease to have effect if the individual was not resident in the UK for Income Tax purposes for a period of four successive tax years. In these circumstances, the individual's estate would be subject to Inheritance Tax in the country in which they are domiciled at the time of their death and the UK would only charge Inheritance Tax on assets situated in the UK.

The Finance Act 2013 has introduced significant flexibility for Inheritance Tax planning for mixed domicile couples. Whether or not an election to be UK domiciled for Inheritance Tax purposes will result in an Inheritance Tax saving will depend on where the non-domiciled spouse's assets are situated. It is therefore important that mixed domicile couples receive advice on the potential impact an election would have before deciding how to proceed.