

OBSCURITY REMAINS

THE NEW UK STATUTORY RESIDENCE TEST

BY SHARON MCKIE AND SIMON MCKIE

As long ago as 1927 Viscount Sumner, in *Levene v IRC*,¹ expressed his dissatisfaction with the state of the law of residence in the UK. At last, after years of debate, the UK is to have a comprehensive, statutory test of residence (the ‘SRT’). The UK government has said that it is the aim of the SRT to be ‘clear, objective and unambiguous’ and of the legislation to be ‘simple to use’.

This article is based on the *Finance Bill 2013* (FB 2013) before amendment in Committee. It is likely that minor modifications will be made before the Bill is enacted in this year’s *Finance Act*.

The SRT is found in Schedule 43 FB 2013. Schedule 43 is divided into the following five parts:

- **Part 1 sets out the SRT.**
- **Part 2 defines ‘key concepts’: terms and phrases used in the SRT.**
- **Part 3 contains the rules governing the split-year treatment and makes consequential amendments to other parts of the tax legislation.**
- **Part 4 sets out anti-avoidance rules and makes consequential amendments to other parts of the tax legislation.**
- **Part 5 contains miscellaneous provisions on interpretation, consequential amendments and transitional provisions.**

In addition, Schedule 44 abolishes the status of ordinary residence.

THE STRUCTURE OF THE SRT

The SRT determines whether or not an individual is resident in the UK for the purposes of income tax, capital gains tax and, where relevant, inheritance tax and corporation tax.² It does not apply for the purposes of national insurance contributions or determining whether or not an individual is resident in England, Wales, Scotland or Northern Ireland.³

The basic rule of the SRT is that an individual is resident in the UK for a given tax year if they satisfy the automatic residence test or the sufficient ties test.⁴ If neither of these tests is met, the individual is not resident in the UK.⁵

The automatic residence test

The automatic residence test is met where:

- **one of the automatic UK tests is met; and**
- **none of the automatic overseas tests are met.**⁶

The automatic overseas tests

An individual will be automatically non-resident if they meet any of the five automatic overseas tests.⁷

1. *Levene v IRC* (1927) 13 TC 486 at pp486 and 502

2. Paragraph 1, Schedule 43, FB 2013

3. Paragraph 1(3), Schedule 43, FB 2013

4. Paragraph 3, Schedule 43, FB 2013

5. Paragraph 4, Schedule 43, FB 2013

6. Paragraph 5, Schedule 43, FB 2013

7. Paragraphs 3, 4 and 5, Schedule 43, FB 2013

The first automatic overseas test is met where an individual was resident in the UK for at least one of the three tax years preceding the fiscal year concerned and, in the year concerned, they spend fewer than 16 days in the UK.⁸ This test does not apply if the individual dies during the fiscal year.

The second automatic overseas test is met where an individual was not resident in the UK in any of the three tax years preceding the fiscal year concerned and they spend fewer than 46 days in the UK in that year.⁹

The third automatic overseas test is met where the individual works sufficient hours overseas, assessed over the relevant year, without any significant breaks from that overseas work, and:

- **there are fewer than 31 days in the year on which the individual does more than three hours of work; and**
- **fewer than 91 days are spent in the UK in the relevant year (excluding deemed days).¹⁰**

A significant break from overseas work is defined as any period of at least 31 consecutive days during which, on each day, the individual does no more than three hours of work overseas or would not have done so but for being on annual leave, sick leave or parenting leave.¹¹

To determine whether an individual works sufficient hours overseas, the steps in paragraph 14(3), Schedule 43, FB 2013 must be followed.

This test does not apply to an individual who has a relevant job on board a vehicle, aircraft or ship at any time in the relevant tax year if at least six of the trips made by the individual in that year as part of that job are cross-border trips that either begin in the UK, end in the UK or begin and end in the UK.¹²

The fourth automatic overseas test is met where:

- a. an individual dies in the relevant fiscal year;**
- b. the individual was either:**

- i. not resident in the UK in either of the two fiscal years preceding death; or**
- ii. not resident in the UK in the preceding fiscal year and the fiscal year before that was a split year within cases 1, 2 and 3 (involving departure from the UK, see below); and**
- c. the individual spends fewer than 46 days in the UK in the fiscal year.¹³**

The fifth automatic overseas test is met where:

- a. the individual dies in the relevant fiscal year;**
- b. the individual was not resident in the preceding two fiscal years because they met the third automatic overseas test for each of those two years or was not resident in the preceding fiscal year by reason of meeting that test, and the fiscal year before that was a split year within case 1 of the split-year rules; and**
- c. the individual would have met the third automatic overseas test in the fiscal year of death if that test were modified to apply to a person who dies during the year.¹⁴**

The automatic UK tests

If none of the automatic overseas tests are satisfied then the automatic UK tests need to be considered. Where an individual satisfies one of the automatic UK tests and none of the automatic overseas tests, they will be resident in the UK for tax purposes for that tax year.¹⁵

The first automatic UK test is met where an individual spends at least 183 days in the UK in the fiscal year concerned.¹⁶

The second automatic UK test is met where:

- **the individual has a home in the UK during all or part of the fiscal year;**
- **that home is one where they spend a sufficient amount of time in that fiscal year;**
- **there is at least one period of 91 consecutive days in which the 91-day period in question**

8. Paragraph 12, Schedule 43, FB 2013

9. Paragraph 13, Schedule 43, FB 2013

10. Paragraph 14, Schedule 43, FB 2013

11. Paragraph 29(2), Schedule 43, FB 2013

12. Paragraph 14(4), Schedule 43, FB 2013

13. Paragraph 15, Schedule 43, FB 2013

14. Paragraph 16, Schedule 43, FB 2013

15. Paragraphs 3 and 4, Schedule 43, FB 2013

16. Paragraph 7, Schedule 43, FB 2013

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Where the individual has more than one home in the UK, each home must be considered separately

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occurs while they have that home, at least 30 days of that 91-day period fall within the relevant fiscal year and throughout that 91-day period they have no home overseas or have one or more homes overseas but are not present in them for more than 29 days in the fiscal year.¹⁷

A ‘sufficient amount of time’ is at least 30 days on which the individual is present in the home regardless of the length of that presence.¹⁸

Where the individual has more than one home in the UK, each home must be considered separately to determine whether the test is satisfied.¹⁹ Paragraph 25, Schedule 43 provides a limited definition of ‘home’, which is discussed in more detail later in this article.

The third automatic UK test is met where an individual works sufficient hours in the UK assessed over a period of 365 days with no significant breaks from UK work and:

- **all or part of that period falls within the fiscal year; and**
- **more than 75 per cent of the days in the 365-day period when the individual does more than three hours of work are days when they do more than three hours of work in the UK; and**
- **at least one day in the fiscal year is a day**

on which the individual does more than three hours of work in the UK.²⁰

A significant break from UK work is a period of 31 days or more where there is no day on which the individual does more than three hours of work in the UK and the reason for this absence is not annual leave, sick leave or parenting leave.²¹

Paragraph 9(2), Schedule 43, FB 2013 details the steps to be taken to calculate whether an individual has worked sufficient hours in the UK.

The fourth automatic UK test is met where:

- a. **the individual dies in the fiscal year;**
- b. **for each of the previous three fiscal years the individual was resident in the UK by virtue of meeting the automatic residence test;**
- c. **even assuming the individual was not resident in the UK for the fiscal year concerned, the fiscal year preceding the year concerned would not be a split year for the individual; and**
- d. **when the individual died, they had either:**
 - i. **a home in the UK; or**
 - ii. **more than one home, at least one of which was in the UK.²²**

The sufficient ties test

Where none of the automatic overseas tests or automatic UK tests are met, an individual will be

17. Paragraph 8, Schedule 43, FB 2013

18. Paragraph 8(4), Schedule 43, FB 2013

19. Paragraph 8(8), Schedule 43, FB 2013

20. Paragraph 9, Schedule 43, FB 2013

21. Paragraph 29(1), Schedule 43, FB 2013

22. Paragraph 10, Schedule 43, FB 2013

resident in the UK for a fiscal year if they have sufficient UK ties for that year.²³

What is a UK tie and whether or not an individual has sufficient UK ties in a relevant fiscal year depends on whether the individual was resident in the UK in any of the previous three fiscal years and the number of days the individual has spent in the UK in the relevant year.²⁴ The relevant bands are:

Days spent in the UK in the relevant tax year	Number of ties that are sufficient where an individual has been UK-resident in at least one of the three years preceding the relevant fiscal year	Number of ties that are sufficient where an individual has not been UK-resident in one of the three years preceding the relevant year
More than 15 but not more than 45	At least 4	
More than 45 but not more than 90	At least 3	All 4
More than 90 but not more than 120	At least 2	At least 3
More than 120	At least 1	At least 2

Where the individual has died during the year, special rules apply to proportionately reduce the number of days.²⁵

Where the individual was resident in the UK in at least one of the three fiscal years preceding the relevant year, the ties that count as UK ties are:

- the family tie;
- the accommodation tie;
- the work tie;
- the 90-day tie; and
- the country tie.²⁶

Where the individual was not so resident, the country tie is omitted, so there are only four UK ties.²⁷

The family tie

An individual has a family tie if there is a relevant relationship between that individual and another person and that other person is resident in the UK for the relevant fiscal year.²⁸

Individuals have relevant relationships with:

- their husband, wife or civil partner (unless they are separated);
- their partner if they are living together as husband and wife or as civil partners;
- their children under the age of 18.

Paragraphs 33(1) and (2) of Schedule 43 are intended to prevent a circularity by which the residence of the individual is to be determined by reference to the residence of a relevant person and the residence of that relevant person is to be determined by reference to the residence of the taxpayer.

Special rules apply where a child is in full-time education in the UK at any time in the relevant fiscal year.²⁹ In addition, an individual does not have a family tie to a child if they see that child in the UK on fewer than 61 days in the fiscal year concerned or, if the child turns 18 during the fiscal year, in the part of that year before they turn 18.³⁰

The accommodation tie

An individual has an accommodation tie if they have a place to live in the UK and:

- it is available for a continuous period of at least 91 days during the relevant fiscal year; and
- the individual spends at least one night there during that fiscal year or, if it is the home of a close relative, spends at least 16 nights there during that year.³¹

Where there are fewer than 16 days between the periods in which a particular place is available, that place is treated as being available to the individual for that period.³² This can be a nasty

23. Paragraph 3(b), Schedule 43, FB 2013

24. Paragraphs 17, 18, 19 and 31, Schedule 43, FB 2013

25. Paragraph 20, Schedule 43, FB 2013

26. Paragraph 31(2), Schedule 43, FB 2013

27. Paragraph 31(3), Schedule 43, FB 2013

28. Paragraph 32, Schedule 43, FB 2013

29. Paragraph 33(4)-(5), Schedule 43, FB 2013

30. Paragraph 32(3), Schedule 43, FB 2013

31. Paragraph 34, Schedule 43, FB 2013

32. Paragraph 34(2), Schedule 43, FB 2013

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Split-year treatment covers where the individual leaves the UK or comes to the UK part-way through a tax year

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trap for those taxpayers who make regular trips to the UK and stay at the same hotel or in other accommodation.

The work tie

An individual has a work tie if they work in the UK for at least 40 days in the relevant fiscal year.³³ They are treated as working for a day if they do more than three hours of work in the UK on that day. Special rules apply to individuals who have a relevant job on board a vehicle, aircraft or ship.³⁴

The 90-day tie

An individual has a 90-day tie for the relevant fiscal year if they spend more than 90 days in the UK in either the fiscal year preceding the relevant year, the fiscal year preceding that year or each of those fiscal years.³⁵

The country tie

An individual has a country tie for a relevant year if, in that year, the country in which they meet the midnight test (as defined in paragraph 38(3)) for the greatest number of days is the UK.³⁶

SPLIT-YEAR TREATMENT

Before the introduction of the SRT, a person who was resident at any time during a tax year

generally paid income tax and capital gains tax on their worldwide income and gains subject to specific reliefs for persons who were either not domiciled or not ordinarily resident in the UK. In certain circumstances, however, when an individual came to or left the UK during a tax year, a concessionary treatment³⁷ enabled the tax year to be split into periods before and after arrival or departure. UK tax on most income and gains arising before a person had become UK-resident or after they had ceased to be UK-resident was limited to the tax that, loosely, would have been due if the taxpayer had been non-resident throughout the year. Schedule 43, Part 3 gives a statutory relief broadly similar to this concessionary relief.

This split-year treatment is available where an individual is resident in the UK for that year and falls into one of eight cases. These cover situations where the individual leaves the UK part-way through a tax year (cases 1–3) or comes to the UK part-way through a tax year (cases 4–8).³⁸

KEY CONCEPTS

In applying the SRT, the legislation uses various key concepts: days spent and days spent in a period; home; work; calculation of the reference period; and relevant jobs on board vehicles, aircraft or ships.

33. Paragraph 35, Schedule 43, FB 2013

34. Paragraph 36, Schedule 43, FB 2013

35. Paragraph 37, Schedule 43, FB 2013

36. Paragraph 38, Schedule 43, FB 2013

37. Extra-Statutory Concession A11 (split-year treatment)

38. Paragraphs 44–51, Schedule 43, FB 2013

Days spent and days spent in a period

Paragraph 22(1), Schedule 43 provides that if an individual is in the UK at the end of a day, that day counts as a day spent in the UK (the ‘basic day-count rule’). Although the legislation does not say so expressly, one presumes that the end of a day means midnight. The basic day-count rule is subject to two exceptions and to a deeming rule.

The first exception (the ‘transit exception’) is where:

- **the individual only arrives in the UK as a passenger on the day concerned;**
- **the individual leaves the UK the next day; and**
- **between arrival and departure, the individual does not engage in activities that are to a substantial extent unrelated to passage through the UK.**³⁹

So unless the individual leaves the UK on the day after their arrival, the transit exemption cannot apply: there will be no relief where one departs on a day after the day following arrival. HMRC’s guidance takes an unduly broad view of the construction of the phrase ‘activities that are to a substantial extent unrelated to [the individual’s] passage through the UK’ and should be used with caution.

The second exception (the ‘exceptional circumstances exception’) provides that a day does not count as a day spent in the UK by an individual where they would not be present in the UK at the end of that day were it not for exceptional circumstances beyond their control that prevent them from leaving the UK, and they intend to leave the UK as soon as those circumstances permit.⁴⁰

A limit of 60 days (midnights) may be excluded in any one fiscal year under the exceptional circumstances exception.⁴¹ Any subsequent midnight will count as a day spent in the UK. The legislation gives examples of circumstances that

may be ‘exceptional’, namely national or local emergencies such as war, civil unrest or natural disasters; and a sudden or life-threatening illness or injury.⁴²

This arguably restricts the extent of the exception and certainly makes its scope less easily determined. That is because it might be argued that the meaning of exceptional circumstances is to be restricted to items that are *ejusdem generis* to the examples given in paragraph 22(5), Schedule 43. That might suggest, for example, that an injury that was neither sudden nor life-threatening, but which was sufficient to prevent travel, such as severe back pain, would not be an exceptional circumstance. Similarly, it might be argued that emergencies which were not of the same degree of extremity as those listed in paragraph 22(5)(a), Schedule 43, such as transport strikes, are not ‘exceptional’ for this purpose.

The exceptional circumstances exception applies where circumstances prevent an individual from leaving the UK rather than prevent them from reaching their country of destination. As the Chartered Institute of Taxation has pointed out: ‘Someone in the UK at the time of the Arab Spring might have been prevented from going back to their home in Libya. But there would be nothing to stop them taking a ferry to France.’

Paragraph 23(1), Schedule 43 creates the obverse of the basic day-count rule, providing that if an individual is not present in the UK at the end of a day, that day does not count as a day spent in the UK. This is subject, however, to a rule that deems certain days to count as days spent in the UK (the ‘deeming rule’). The deeming rule applies where the individual has at least three UK ties for a tax year; the number of days in the fiscal year when the individual is present in the UK at some point in the day but not at the end of the day is more than 30; and the individual was resident in the UK for at least one of the three preceding tax years.⁴³

39. Paragraph 22(3), Schedule 43, FB 2013

40. Paragraph 22(4), Schedule 43, FB 2013

41. Paragraph 22(6), Schedule 43, FB 2013

42. Paragraph 22(5), Schedule 43, FB 2013

43. Paragraph 23(3), Schedule 43, FB 2013

Where paragraph 23, Schedule 43 applies, any days of departure above 30 counts as time spent in the UK.⁴⁴ The deeming rule does not apply in determining the number of ties that an individual has for the purpose of determining whether the deeming rule applies.⁴⁵

Home

The use of the concept of a 'home' in the SRT has been the subject of much criticism from professional bodies because the legislation contains no exhaustive definition of a 'home'. Rather, it provides that certain things can be a 'home' and other things not.⁴⁶ In ordinary use the word is of wide and uncertain ambit. It will be for the courts to determine, on the facts, whether a place is a person's home using its normal meaning.

Paragraph 25(1), Schedule 43 provides that a 'home' can be a building, part of a building or a vehicle, vessel or structure of any kind. Arguably, it is implicit in paragraph 25(2), Schedule 43 that there must be a sufficient degree of permanence or stability about the individual's arrangements there for the place to count as their home (or one of their homes). Under paragraph 25(3), Schedule 43 somewhere used by an individual periodically as nothing more than a holiday home or temporary retreat (or something similar) will not count as a home. Paragraph 25(4), Schedule 43 provides, surely redundantly, that it is not necessary for the individual to have any legal estate or interest in the place for it to be a home. Paragraph 25(5), Schedule 43 provides, again surely redundantly, that a place 'does not continue to count as [the individual's home] merely because [the individual] continues to hold an estate or interest in it after [moving] out (for example, if [the individual] is in the process of selling it or has let or sub-let it, having set up home elsewhere).'

The imprecision of the concept of a home is a major cause of uncertainty in the application

of the SRT, and requires particular care in giving advice on it.

Work

'Work' is not actually defined in the legislation, but paragraph 26, Schedule 43 is headed 'work' and defines when an individual 'is considered to be "working" (or "doing work")'. An individual is working at any time when they are doing something in the performance of duties of employment, or in the course of carrying on a trade (alone or in partnership).⁴⁷

Travelling time counts as time spent working when the cost of the journey, if it were incurred by the individual, could be deducted when calculating earnings from that employment or the profits of the trade, or the individual does something else during the journey that would itself count as work in accordance with paragraph 26, Schedule 43.⁴⁸

In some circumstances, time spent training counts as time spent working.⁴⁹ Not that a voluntary post for which an individual has no contract of service does not count as employment for the purposes of the SRT.⁵⁰

Calculation of the reference period

To satisfy either the third automatic UK test or the third automatic overseas test an individual must work sufficient hours, which are calculated by considering a 'reference period'.⁵¹ The reference period takes account of reasonable amounts of annual leave, parenting leave and sick leave, and what are called 'non-working days embedded within a block of leave' taken in the given period. What is reasonable will be assessed with regard to (among other things) the nature of the work and the country or countries where the individual is working.⁵² Periods of absence from work other than those specified, such

44. Paragraph 23(4), Schedule 43, FB 2013

45. Paragraph 23(5), Schedule 43, FB 2013

46. Paragraph 25, Schedule 43, FB 2013

47. Paragraph 26(1), Schedule 43, FB 2013

48. Paragraph 26(4), Schedule 43, FB 2013

49. Paragraph 26(5), Schedule 43, FB 2013

50. Paragraph 26(8), Schedule 43, FB 2013

51. Paragraph 28, Schedule 43, FB 2013

52. Paragraph 28(4), Schedule 43, FB 2013

as compassionate leave or leave agreed ad hoc, will not be deducted.

The legislation provides rules to determine when non-working days are 'embedded' in a block of leave; these are extremely restrictive.⁵³

Where:

- **an individual changes employment in the period;**
- **there is a gap between the employments; and**
- **the individual does not work at all at any time between the two employments**⁵⁴

the number of days in the gap may be deducted from the number of days in the reference period, subject to a maximum of 15 days in any one gap and a maximum of 30 days in all such gaps.⁵⁵

Relevant jobs on board vehicles, aircraft or ships

An individual has a 'relevant' job on board a vehicle, aircraft or ship if condition A and condition B are met.⁵⁶ Condition A is that the individual either:

- **holds an employment, the duties of which consist of duties which are to be performed on board a vehicle, aircraft or ship while it is travelling; or**
- **carries on a trade, the activities of which consist of work to be done or services to be provided on board a vehicle, aircraft or ship while it is travelling. This condition will not be satisfied unless, to do the work or provide the services, the individual has to be present (in person) on board the vehicle, aircraft or ship while it is travelling.**⁵⁷

Condition B is that substantially all of the trips made in performing those duties or carrying on those activities are ones that involve crossing an international boundary. Duties or activities of a purely incidental nature are ignored.

53. Paragraph 28(5), Schedule 43, FB 2013

54. Paragraph 28(8), Schedule 43, FB 2013

55. Paragraph 28(9), Schedule 43, FB 2013

56. Paragraph 30, Schedule 43, FB 2013

57. Paragraph 30(4), Schedule 43, FB 2013

ANTI-AVOIDANCE

Schedule 43, Part 4 contains almost 22 pages of anti-avoidance measures designed to prevent individuals from using short periods of non-residence to receive income or gains free of UK tax. The charge applies to income from closely controlled companies, lump-sum benefits from employer-financed retirement benefit schemes and chargeable event gains from life-assurance contracts. The provisions will apply if the period of non-residence is five years or less (the 'temporary non-residence rule'). The temporary non-residence rules that applied before the introduction of the SRT for capital gains tax purposes are harmonised with this rule.

TRANSITIONAL ELECTION

An individual considering residence for the tax years 2013/14, 2014/15 or 2015/16 in respect of the first, second, fourth and fifth automatic overseas tests, the fourth automatic UK test, the sufficient ties test, the split-year rules and the temporary non-residence rule will need to know their residence status for one or more of the prior three years.

Such an individual may elect (for these purposes only) to determine residence status for one or more years preceding 2013/14 (a 'pre-commencement year') by reference to the SRT rather than in accordance with the prior law.⁵⁸ The election will neither change an individual's actual tax residence status for the pre-commencement year or years nor affect tax liability in that or those year or years.

To apply the SRT to the fiscal years 2010/11–2012/13, one would need to know the individual's residence status for 2007/08–2009/10. To apply the SRT to 2007/08–2009/10 one would need to know the individual's residence status for 2004/05–2006/07 and so on, ad infinitum. Under paragraph 152, Schedule 43 one can apply the SRT to any or all of the years that are relevant to determining an

58. Paragraph 152, Schedule 43, FB 2013



The concept of ‘ordinary residence’ is to be excised from the tax code



individual’s residence status for the fiscal year in relation to which the election is made.

As the election may be made in respect of any ‘one or more pre-commencement years,’ it is possible to opt for a mixture of bases, applying the old rules to some years and the SRT to others, according to which basis provides the more favourable result.

This provision does not entirely answer the difficulties that taxpayers will face in this area, however, because the need to make the election may not emerge until after the time limit for making it has expired. Of course, the well-advised will make the election protectively wherever the application of the new rules to the prior years will result in them being treated as non-resident for those years for this purpose.

OVERSEAS WORKDAY RELIEF AND THE ABOLITION OF ORDINARY RESIDENCE

The concept of ‘ordinary residence’ is to be excised from the tax code.

Before 2013/14, individuals who were not ordinarily resident in the UK were taxed on the remittance basis on income from foreign employment duties where the income was paid by the UK employer, provided the individual intended

to leave the UK within three years of arrival. This was known as ‘overseas workday relief’. This relief has now been put on a statutory footing and is available to all non-domiciled individuals arriving in the UK who have not been resident in any of the previous three tax years.⁵⁹

CONCLUSION

The SRT will allow most individuals to determine their residence status to a higher probability than they were able to do previously. The SRT will not, however, meet the UK government’s stated aim for it to be ‘clear, objective and unambiguous’. Indeed, it is grossly complex and, in parts, very obscure. In many client situations its application will be highly uncertain. For those advising on the SRT, there will be no substitute for the closest of readings of the legislation and, even then, their advice will, in many cases, have to be expressed in terms of probability rather than certainty.



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59. Paragraphs 9 and 10, Schedule 44, FB 2013