

Statutory Residence Test

By

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Residue

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☞ Residence; Tax administration

The Government intends to introduce a statutory definition of individual tax residence with effect from April 6, 2013 onwards.¹ This article illustrates, by means of an example, how the rules, as set out in the draft legislation published in June 2012, will determine whether an individual coming to live in the United Kingdom in 2013/2014 will be tax resident in that year.

Under the draft legislation an individual will be resident in the United Kingdom for a tax year if:

- (a) the Automatic Residence Test is met for that year; or
- (b) the Sufficient Ties Test is met for that year.²

An example

Monsieur Michelin is a wealthy Frenchman who has not previously spent more than a few weeks in the United Kingdom in any fiscal year nor been UK resident. Until his move on January 4, 2014 (see below) Monsieur Michelin is based for most of the time in Paris and resides in a large Parisian house (the Paris Residence). He is a widower and has a son, Gérard, who is 13 years old, and has always lived in France where he is continuously from before April 6, 2013 until going to Eton College on September 4, 2013. Monsieur Michelin also owns a residential property in Provence at which he stays for two months in May and June 2013.

He decides that he will live in the United Kingdom for a few years to avoid President Hollande's tax increases and to be closer to Gérard whilst he is at school. Accordingly he makes three visits to London, staying on each occasion at the same hotel, whilst he searches for a new house. During these visits he spends midnight in the United Kingdom on the listed days except on the day of departure:

- (a) July 1, 2013–July 5, 2013.
- (b) July 20, 2013–July 26, 2013.
- (c) August 8, 2013–August 11, 2013.

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¹ Draft legislation was published in a consultation document in June 2012 (the "June Condoc"). Revised draft legislation will be published in a draft Finance Bill by December 11, 2012.

² Paragraph 3. All references in this Article are to the Schedule published in the June Condoc entitled "Statutory Residence Test" unless otherwise stated.

On December 1, 2013, Monsieur Michelin purchases a residential property in Kensington (the London Residence), with vacant possession. After minor refurbishment and redecoration he moves into the London Residence on January 4, 2014 and remains in the United Kingdom for the rest of the tax year.

The Paris residence is let on a one-year lease to an unconnected third party on April 1, 2014.

In the tax year 2013/14, Gérard's time is spent as follows:

- (a) 179 days in France;
- (b) nine days with his maternal Aunt in the United Kingdom in periods in which boys are allowed to be away from Eton in the Michaelmas term;
- (c) 13 days with his father at his London Residence during periods in which boys are allowed to be away from Eton in the Lent term;
- (d) nine days with his father at his London Residence during the Lent and Michaelmas vacations; and
- (e) 155 days at Eton.

Monsieur Michelin is substantially retired but he has a number of self-employed consultancies on which he spends about ten hours per week on average, working from wherever he happens to be based at the time.

The Automatic Residence Test

The Automatic Residence Test is met for a year if an individual meets:

- (a) at least one of the Automatic UK Tests; and
- (b) none of the Automatic Overseas Tests.³

The Automatic Overseas Tests

There are three Automatic Overseas Tests.

The First and Second Automatic Overseas Tests

The First and Second Automatic Overseas Tests are met if the individual has spent less than a certain number of days in the United Kingdom in the fiscal year concerned.⁴ That number varies according to whether the individual has been resident in the United Kingdom in any of the three preceding tax years (the First Automatic Overseas Test)⁵ or not (the Second Automatic Overseas Test).⁶ Monsieur Michelin has not been resident in the United Kingdom in any of the three years preceding 2013/14 and so he does not meet the First Automatic Overseas Test. He will meet the Second Automatic Overseas Test if he spends less than forty six days in the United Kingdom in the fiscal year 2013/14.⁷

A day counts as a day spent by an individual in the United Kingdom if that individual is present in the United Kingdom at the end of that day.⁸ It is likely that the courts will construe the end of a day to be midnight on that day.⁹

Monsieur Michelin is present at midnight in the United Kingdom on 105 days so he does not meet the Second Automatic Overseas Test.

³ Paragraph 5.

⁴ Paragraph 6(1)–(3).

⁵ Paragraph 6(2).

⁶ Paragraph 6(3).

⁷ Paragraph 6(3)(b).

⁸ Paragraph 12(1).

⁹ Certain exceptions for days spent in transit and days present in the United Kingdom by reason of exceptional circumstances are made which are not relevant to Monsieur Michelin.

The Third Automatic Overseas Test

The Third Automatic Overseas Test will be satisfied if Monsieur Michelin works full-time overseas for the year concerned.¹⁰ Without looking at that test in detail it is clear that it is not met.

So Monsieur Michelin meets none of the Automatic Overseas Tests. He will meet the Automatic Residence Test, therefore, if he meets at least one of the Automatic UK Tests.

The Automatic UK Tests

The First Automatic UK Test

This is that the individual spends at least 183 days in the United Kingdom in the fiscal year concerned.¹¹ Monsieur Michelin does not meet that condition.

The Second Automatic UK Test

The Second Test is that the individual's:

“... only home is in the UK (or, if [he] has more than one home, all of them are in the UK) and that remains the case for -

- (a) a period of at least 91 days, all or part of which falls within [the] year ... or
- (b) two or more separate periods within [the] year ... that together add up to at least 91 days.”¹²

The June Condoc explains that the Government does not think that it is possible to provide a definition of a “home” and so no statutory definition is given. The only help that the legislation gives in defining a “home” is in para.14:

- “(1) A ‘home’ may be any place (including a vehicle or vessel).
- (2) A place may be [a person’s] home whether or not ... [he]... holds any estate or interest in it (and references to having” a home are to be read accordingly).
- (3) A place that was [a person’s] home does not continue to count as such merely because ... [he] ... continues to hold an estate or interest in it after ... [he] ... has moved out.”

This section only adds to the confusion. It does not provide, for example, that a home must be a place. In ordinary English usage we often speak of our home as a large area, such as a county, region or country, and sometimes as one which is not precisely delineated for which the description a “place” is inapt. How can a vehicle or vessel be a place? What function does sub-section (3) serve? It surely does need saying that a place will not continue to be an individual’s home merely because he continues to hold an estate or interest in it but in what circumstances will it do so?

One can probably be confident that the Paris Residence was Monsieur Michelin’s home until January 4, 2014. Similarly, one can be confident that the London Residence was his home from January 4, 2014 until after the end of the fiscal year. Did the Paris Residence remain his home until it was let on April 1, 2014? Was the London Residence Monsieur Michelin’s home in the period from its purchase with vacant possession from December 1, 2013 until he moved into it on January 4, 2014? Is the Provençal Residence a home? Can a property in which one lives only for two months of the year be a home?

¹⁰ Paragraph 6(4).

¹¹ Paragraph 5(3).

¹² Paragraph 5(4).

For the purposes of reaching a conclusion on Monsieur Michelin's situation we shall assume that the Paris Residence ceases to be his home on April 1, 2014, that the London Residence begins to be his home on January 4, 2014 and that the Provençal Residence is his home throughout the year.

On that basis, the Second Automatic Residence Test is not met. That is because there is no period during which the London Residence is Monsieur Michelin's only home because throughout the period when it is his home the Provençal Residence is so also and that home is not in the United Kingdom.

The Third Automatic Residence Test

The Third Automatic Residence Test concerns full-time work in the United Kingdom.¹³ Paragraph 15 provides that an individual:

- “...is considered to be ‘working’ (or doing ‘work’) at any time when [he] is doing something —
- (a) in the performance of duties of an employment held by [him]; or
 - (b) in the course of a trade carried on by [him] (alone or in partnership).”¹⁴

An individual works “full-time” in the United Kingdom for a period if the number of hours per week that he works there, on average across the period, is 35 or more.¹⁵ Monsieur Michelin's only work is his work on a self-employed basis in respect of his consultancy appointments and on those he spends an average of only 10 hours per week. He will not, therefore, meet the Third Automatic UK Test.

Monsieur Michelin does not meet the Automatic Residence Test.

The Sufficient Ties Test

The Sufficient Ties Test is met for a year if:

- (a) the individual concerned meets none of the Automatic UK Tests and none of the Automatic Overseas Tests; but
- (b) he has sufficient UK ties for that year.¹⁶

The number of UK ties which are “sufficient” for this purpose varies according to whether or not the individual concerned was resident in the United Kingdom for any of the previous three tax years and according to the number of days that he spends in the United Kingdom in the tax year concerned.¹⁷ Monsieur Michelin spends 105 days in the United Kingdom in 2013/2014 and has not previously been resident in the United Kingdom. Because of this, the number of ties which would be “sufficient” in respect of Monsieur Michelin is three. The list of possible ties which a person might have with the United Kingdom varies according to his prior residence status.¹⁸ Because Monsieur Michelin was not resident in the United Kingdom in any of the three tax years preceding 2013/2014, there are four (rather than five) possible ties which might apply to Monsieur Michelin.¹⁹ They are the:

- (a) family tie;
- (b) accommodation tie;
- (c) work tie; and
- (d) 90-day tie.²⁰

¹³ Paragraph 5(5).

¹⁴ Paragraph 15(1).

¹⁵ Paragraph 17.

¹⁶ Paragraph 7(1).

¹⁷ Paragraphs 8 and 9.

¹⁸ Paragraph 9.

¹⁹ Paragraph 19(3).

²⁰ Paragraph 19(3).

If Monsieur Michelin is to meet the sufficient ties test he must have any three of these four ties or all of them.

The family tie

An individual has a family tie for a year if in that year a “relevant relationship” exists at any time between that individual and another person, and that other person is someone who is resident in the United Kingdom for that year.²¹ Paragraph 20(2) provides, inter alia, that there is a relevant relationship at any time between an individual and another person if at that time “the individual is a parent of a child under the age of 18”. In 2013/2014, therefore, a relevant relationship existed between Monsieur Michelin and Gérard. In order to decide whether a Family Tie exists, therefore, we must consider Gérard’s residence.

For this purpose only, in determining the residence of the persons with whom Monsieur Michelin has a relevant relationship, one ignores a family tie based on the fact that the family member has a relevant relationship with Monsieur Michelin.²²

Gérard satisfies the First Automatic Residence Test because he spends 186 days in the United Kingdom in the year. For the purpose of deciding whether a person with whom a taxpayer has a relevant relationship is resident in the United Kingdom, however, a special rule applies. A family member who satisfies certain conditions is to be treated as being not resident in the United Kingdom for the year if the number of days he spends in the United Kingdom in the part of year outside term time is less than 21.²³ The conditions are that the family member is:

- (a) a child of the person whose residence is to be decided by reference to the Family Tie Test and who is under the age of 18;
- (b) in full-time education in the United Kingdom at any time in the year concerned; and
- (c) is resident in the United Kingdom for that year but would not be so resident if the time spent in full-time education in the United Kingdom in that year were disregarded.²⁴

For this purpose, reference to the time spent in full-time education in the United Kingdom is to the time spent there during term time. Disregarding the time which Gérard spends in the United Kingdom during term time, he spends only nine days in the United Kingdom in 2013/14 and would thus have satisfied the Automatic Overseas Test on this hypothesis and been not resident in the United Kingdom.

Monsieur Michelin, therefore, does not have a Family Tie.

The Accommodation Tie

Monsieur Michelin will have an Accommodation Tie for 2013/2014 if:

- (a) he has a place to live in the United Kingdom;
- (b) that place is available to him during 2013/2014 for a continuous period of at least 91 days; and
- (c) he spends at least one night at that place in that year.²⁵

It appears from the reference to “that place” that the 91 day period has to be satisfied in respect of each “place to live” and not merely in respect of all the places to live which a taxpayer has in the tax year.

²¹ Paragraph 20(1).

²² Paragraph 21(2).

²³ Paragraph 21(3).

²⁴ Paragraph 21(4).

²⁵ Paragraph 22(1).

If there is a gap of fewer than 16 days between the periods in which a particular place is available to a taxpayer, it is treated as continuing to be available to him during that period.²⁶

The taxpayer:

“is considered to have a ‘place to live’ in the UK if —

- (a) he has a home in the UK;
- (b) he has a holiday home, a week-end home, a temporary retreat or similar in the UK; or
- (c) other accommodation where he can live when he is in the UK.”²⁷

Accommodation may be available to a person even if he holds no estate or interest in it and has no legal right to occupy it.²⁸

It can be seen that the Accommodation Tie uses a number of concepts which it does not define, including “a holiday home”, “a weekend home” and “a temporary retreat”. It does not define what it means to be able to live at a place.

If one can say that one “lives” at a hotel, it appears that when Monsieur Michelin stayed at a hotel in July and August he had accommodation available to him. If that is the case, because the two gaps between his visits were each less than 16 days, it appears that he will be treated as having had accommodation available to him at the hotel from July 1, 2013 to August 11, 2013. Because that is a continuous period of less than 91 days it will not result in his having an Accommodation Tie.²⁹

Was the London Residence available to Monsieur Michelin in the period between the completion of his purchase and his actually entering it on January 4, 2014? That must depend on the degree to which it was habitable during its refurbishment. At what stage did it become Monsieur Michelin’s home? If it was not his home, what state does the accommodation have to be in to be available to a person for him to live in?

We shall assume that the London Residence was available to Monsieur Michelin for him to live in from the completion of his acquisition of the property on December 1, 2013. There is no rule equivalent to the Midnight Rule in quantifying the time when a place is available for this purpose, so in determining the continuing period that a place is available to one, one must take account of the exact moment at which it either became or ceased to be available. On the assumption that the London Residence was available to Monsieur Michelin on the completion of his purchase, it was available to him for at least 125 days. He therefore has an Accommodation Tie.

The Work Tie

Monsieur Michelin will have a Work Tie if he works in the United Kingdom for at least 40 days (whether continuously or intermittently) in 2013/14.³⁰ Working in the United Kingdom for a day, for these purposes, is doing more than three hours of work³¹ in the United Kingdom on that day.³² Doing work is any time when a person is doing something:

- (a) in the performance of duties of an employment held by him; or
- (b) in the course of a trade³³ carried on by him (whether alone or in partnership).³⁴

²⁶ Paragraph 22(2).

²⁷ Paragraph 22(3).

²⁸ Paragraph 22(4).

²⁹ But what if he stayed in different rooms in the Hotel during his three visits? Does it make a difference if the rooms are or are not directly above one another?

³⁰ Paragraph 23(1).

³¹ The Government is consulting on whether to increase the three-hour limit to five hours.

³² Paragraph 23(2).

³³ The definition of which extends its meaning to include a profession or vocation or anything that is treated as a trade for Income Tax purposes (para.103).

³⁴ Paragraph 15(1).

In deciding whether something done by a person is being done in the course of a trade, regard must be had to whether, if expenses are incurred by that person in doing the thing, the expenses could be deducted in calculating the profits of the trade for Income Tax purposes (assuming the person were chargeable to Income Tax).³⁵

Whether the Work Tie is satisfied will depend on whether Monsieur Michelin's consultancy work is evenly spread over the week or bunched on particular days so as to exceed the three-hour limit. We shall assume that Monsieur Michelin exceeds the three-hour limit on two days per week. On that basis he will do only 26 days work in 2013/14 and he will not satisfy the Work Tie.

The 90-Day Tie

Monsieur Michelin will have a 90-Day Tie if he has spent more than 90 days in the United Kingdom in:

- (a) the preceding tax year;
- (b) the tax year preceding that tax year; or
- (c) each of those tax years.³⁶

Point (c) appears to be redundant.

Monsieur Michelin has not spent 90 days in the United Kingdom in either 2012/13 or 2011/12 and therefore does not satisfy the 90-Day Tie.

Conclusion on the Sufficient Ties Test

Monsieur Michelin has only one Tie in 2013/14 and therefore does not meet the Sufficient Ties Test.

Conclusion on Monsieur Michelin's residence status in 2013/2014

He is, therefore, not resident in the United Kingdom in that year.³⁷ Assuming that he spends more than 183 days in the United Kingdom in succeeding years he will be resident from 2014/15 onwards.³⁸

Is the Statutory Residence Test an improvement?

The Exchequer Secretary to the Treasury says in his Foreword to the June Consultation Document that the Government's "desire" was "that the rules ... should be clear, objective and unambiguous" and that the draft legislation should be "transparent, objective and simple to use". The legislation is clearly not simple to use and requires in several areas an exercise of highly subjective judgment. It is not unambiguous or clear. Nonetheless, if it is enacted it will be easier to determine Monsieur Michelin's residence status in 2013/2014 than under the status quo. For that it deserves a feeble cheer.

³⁵ Paragraph 15(3).

³⁶ Paragraph 24.

³⁷ Paragraphs 1 and 3.

³⁸ Paragraph 5(3).