

Foreign Affairs

The New Statutory Residence Test for Individuals: A Practical Guide, by Malcolm Finney, (London: Sweet & Maxwell, 2013, £87, ISBN: 9780414030954.

Residence: The Definition in Practice 2013/14, 2nd, by Keith Gordon, (Chester: Claritax Books, 2013, £48.50, ISBN: 978-1-908545-44-2.

When in 2007 the CIOT and the STEP called for the introduction of a statutory test of residence they expressed the view that it should be based on the sort of simple arithmetical day counting test that had been used for many years in Ireland and the United States. The definition of residence for Irish tax purposes is set out in just one section of legislation and amounts to a mere 356 words.¹ It provides quite simply that a person is resident in Ireland for a year if he spends 183 days in Ireland in that year or 280 or more days in Ireland in that and the preceding year unless he is present in Ireland in the current year for less than 31 days. An individual can also elect to be resident in Ireland.

Six years after the CIOT and the STEP called for a statutory residence test, such a test was enacted in Sch.45 to last year's Finance Act. After five years of detailed consideration, three consultation documents, two sets of draft legislation followed by a Finance Bill, the submission of successive sets of detailed representations by the professional bodies and the normal process of parliamentary scrutiny, the enacted Schedule ran to over 27,500 words and gave effect to a test of labyrinthine complexity and obscurity.

That the busy practitioner should need a short practical guide through the maze of this new legislation is, therefore, unsurprising. Two of the most distinguished practitioner writers on taxation have produced just such guides.

Malcolm Finney, former Head of Tax at Nabarro Nathanson who now runs his own tax consultancy and training firm has written *The New Statutory Residence Test for Individuals: A Practical Guide* for Sweet & Maxwell. Keith Gordon is Head of Chambers at Atlas Tax Chambers, a tenacious champion of the taxpayer in contentious tax litigation, including in a number of cases in which he has appeared pro bono, and a writer whose articles in the technical press communicate the practical implications of complex tax provisions in a clear and concise style. Mr Gordon's skills as a writer on taxation were recognised when he was named "Tax Writer of the Year" in the most recent *Taxation Awards*. He has written *Residence: the Definition in Practice 2013/14* for Claritax Books.

Although Mr Finney's book is 266 pages long compared to Mr Gordon's 137, they are aimed, or at least so it appears to the reviewer, at a similar readership. They seem to be intended to give an overview of the major elements of the Statutory Residence Test and of those areas of uncertain construction in that test which are of most practical importance without swamping the general reader with detailed considerations of alternative constructions. Here, the reviewer must declare an interest. He is the joint author, with Sharon McKie, of *McKie on Statutory Residence* published by CCH. That is a more detailed consideration of the Statutory Residence Test which engages more deeply with the detail of the test than is appropriate for texts designed to be short guides for general practitioners as well as tax specialists. There is a need for both types of book and it should be said at once that both Mr Finney's and Mr Gordon's books are first rate general guides to the Statutory Residence Test.

Mr Finney starts with an overview of the test and of its key concepts and then examines the automatic tests, starting, as is logical, although it does not follow the order of the legislation, with the Automatic Overseas Tests and only then considering the Automatic UK Tests. He then examines the Sufficient Ties

¹ Republic of Ireland Taxes Consolidation Act 1997 s.819.

Test, residence in the year of death (following the structure of the Revenue's Guidance in this regard), looks at the Split Year Rules and then at the rules on temporary non-residence. Here he adopts the Revenue's terminology referring to them as "anti-avoidance" even though the provisions are not restricted to transactions entered into with a tax avoidance motive and will apply in many circumstances where the taxpayer has no intention of avoiding tax whatsoever. He then goes on to consider Ordinary Residence although strictly that is not part of the Statutory Residence Test at all. As his book is a practical guide, however, the decision to deal with Ordinary Residence at some point in the book is sensible because the proposals for the abolition of the status of Ordinary Residence were formulated together with the proposals for a new Statutory Residence Test. He then goes on to consider various topics to which both residence and domicile are relevant and then gives a chapter to record keeping. The book concludes with a chapter on the law of domicile and with two Appendices which give the Supplementary Pages to the self-assessment return on "Residence, Remittance Basis etc", but for 2012/13 the year before the test came into force, and the notes to those Supplementary Pages.

In general Mr Finney's book is well constructed but the concluding chapters and appendices have a slight feeling of padding. The chapter on "Domicile and the Statutory Residence Test" starts with a section headed Background and then one headed The Common Law Governing a Domicile of Choice which begins by quoting the Revenue's summary of the law of domicile in HMRC6 and its predecessor IR20 and then extracts a few principles in respect of domicile from the leading cases. It is not clear why this material has been placed within this chapter when a separate chapter is provided on the law of domicile. Nor is it very obvious that a person wanting a guide to the statutory test of residence should also want a very short explanation of the treatment of domicile in the common law and yet not, for example, an examination of the use of the status of residence in the imposition of income tax and capital gains tax. In truth, in a short general guide, both are superfluous.

Mr Gordon's book is more tightly structured. It starts by introducing the historical background to the test and then provides a short but useful overview of it. It leaves the key concepts to be examined later in the book and jumps straight into the Automatic Overseas Tests in a chapter entitled "When an Individual is always non-resident in the UK". Like Mr Finney, Mr Gordon goes on to examine the Automatic UK Tests and the Sufficient Ties Test. He then explains the key concepts, the Split Year Rules, the rules in relation to temporary non-residence, looks briefly at the abolition of Ordinary Residence and then looks at the transitional provisions. As one would expect of Mr Gordon, his presentation is admirably clear.

One of the difficulties about writing briefly on the Statutory Residence Test is how one deals with the many areas of uncertainty in the legislation. In generalist books such as these, the reader will not wish to be given too much detail of alternative constructions but he needs to be alerted to significant areas of uncertainty so that, in particular areas, he can research the matter more deeply himself, with the help of a more detailed work, or take expert advice. One of the most unsatisfactory parts of the Statutory Residence Test was caused by the decision of the Government to utilise the word "home" as a key component of the Test. A "home" is a concept of protean meaning. The CIOT, STEP and ICAEW all strongly criticised the use of the concept of a "home" in the Statutory Residence Test in their submissions in response to the June 2012 Consultation Document. As the CIOT said:

"... 'home' means different things to different people. To some people it means a building, to others a place (town/city), to others the country from which they come."²

Mr Gordon explains the difficulties with admirable brevity:

"One of the biggest drawbacks of the statutory residence test is that many cases will be dependent on whether or not a place represents an individual's home, but there is no clear meaning of the term.

² *Statutory Definition of Tax Residence and Reform of Ordinary Residence: Response by the Chartered Institute of Taxation* dated September 12, 2012 para.3.3.

Essentially, it will be for the First-tier Tribunal to decide on a case-by-case basis whether a place represents an individual's home in accordance with the normal meaning of the word, based upon the facts of the particular case before it."³

Mr Finney also alerts the reader to the fact that the concept of a home may cause difficulties but with rather less precision. He starts by saying:

"The term 'home' is defined in the legislation ... somewhat unsatisfactorily and leaves a lot to be desired."⁴

In fact the legislation contains no exhaustive definition of a home. It does give some indicators of what a home "could be", an oblique reference to the need for "a sufficient degree of permanence or stability about [the taxpayer's] arrangements" at the home, a reference to things which do not count as a home and things which "may count" as a home and a truism that what was the taxpayer's "home" does not count as such "merely because [he] continues to hold an estate or interest in it".⁵ A reader going to the legislation for an exhaustive definition of the home, unsatisfactory or not, would be disappointed.

Mr Finney goes on to say that:

"The term 'home' refers to a building or part of a building or, for example, a vehicle, vessel or structure of any kind (rather than an area, eg a town or county) ...".⁶

It is certainly arguable that that is the case but the legislation actually says only that "a person's home *could* [emphasis added] be a building or part of a building or, for example, a vehicle, vessel or structure of any kind ...". It does not expressly say that it cannot be an area and in ordinary usage the word "home" is sometimes used of an area, region or country. Indeed, as we have seen, that is one of the difficulties to which the CIOT called attention in its representations.

The *Gaines-Cooper*⁷ cases demonstrate the importance of distinguishing clearly between the law and HMRC's published summaries of the law and of its practice. Of course it is important in practice to know what construction of the law HMRC says that it will adopt but if that construction is incorrect, particularly if it is, as is sometimes the case, unduly favourable to the taxpayer, it is important that the adviser should know that that is so for, if HMRC renege on their published view, the taxpayer will be left only with the uncertain remedy of Judicial Review. In general, both Mr Finney and Mr Gordon do distinguish the law from HMRC's published views on the law.

The Second Automatic UK Test, concerning whether an individual has a UK home, contained an ambiguity which led to an important uncertainty of construction. Explaining the alternative constructions would be inappropriate for a short book review but it is sufficient to say that the ambiguity was raised by the CIOT and the STEP in representations made last year. Instead of removing the ambiguity in the legislation before its enactment in the Finance Act 2013, HMRC merely stated in its Guidance that one of the two possible constructions was correct without giving any grounds for that view or, indeed, acknowledging that there was an alternative construction. Mr Finney sets out the alternative constructions clearly and concisely and the fact that HMRC has stated its view of the legislation's construction so that the reader is aware that the legislation is here capable of alternative constructions and that HMRC has chosen to regard one of those alternatives as correct.

Both of these books are excellent short guides for the non-specialist and both more than justify their expense. The reviewer found Mr Gordon's book rather the easier to use because there was no extraneous

³ Gordon, *Residence: The Definition in Practice 2013/14* (2013) p.54.

⁴ Finney, *The New Statutory Residence Test for Individuals: A Practical Guide* (2013) p.50.

⁵ FA 2013 Sch.45 para.25.

⁶ Finney, *The New Statutory Residence Test for Individuals: A Practical Guide* (2013) p.51.

⁷ *R. (on the application of Davies) v Revenue and Customs Commissioners* [2011] UKSC 47; [2011] S.T.C. 2249.

material, it was very clearly structured and Mr Gordon writes in a straightforward style, which yet never sacrifices precision for simplicity. He would have no hesitation, however, in recommending either book.

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