THE STATUTORY RESIDENCE TEST

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of the
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AN INTRODUCTION

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SECTION I

THE STATUTORY RESIDENCE TEST

Good evening everybody.

This evening I'm going to talk to you about the Statutory Residence Test which was introduced by the Finance Act 2013 with effect from 6th April last year. I'm going to start by giving you an overview of the SRT and then look in more detail at its key concepts. Finally, if we have time, I shall look at the difficult question of disclosure and the SRT.

I hope you have copies of Schedule 45 to the Finance Act 2013 which contains the relevant legislation and I shall be referring to it from time to time. You also have copies of the slides. I shan't talk for the entire time for I shall pause for questions and for a comfort break from time to time.

The residence status of an individual is a key element in determining the tax liability of individuals and trustees. For years there had been no statutory definition of residence and so one had to turn to the Taxes Acts to the extent that they provided particular rules, Revenue practice and case law.

The Government said that the aim of the SRT was to be 'clear, objective and unambiguous' and the legislation 'simple to use.' You can judge whether their aims were met at the end of our session.

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As I have said the SRT is found in FA 2013 Sch 45 and that is divided into five parts. Part 1 contains the SRT, Part 2 defines a number of 'key concepts', Part 3 sets out the Split Year Rules (and makes consequential amendments), Part 4 contains various anti-avoidance rules (and also makes consequential amendments) and Part 5 is the sweep up section which includes the transitional provisions.

In addition, another Schedule, Sch 46, abolished the status of ordinary residence.

The SRT determines whether an individual is resident in the UK or not for the purposes of Income Tax, Capital Gains Tax and (where relevant), Inheritance Tax and Corporation Tax. It does not apply for the purposes of National Insurance contributions. Nor does it apply in determining whether an individual is resident or not in England, Wales, Scotland or Northern Ireland.

The basic rule is that an individual is resident in the UK for a given tax year if he satisfies the automatic residence test or satisfies the sufficient ties test.

If neither of these tests are met, then he is not resident in the UK.

The Automatic Residence Test will be met if none of the Automatic Overseas Tests are met and one of the Automatic UK Tests is.

The order of priority of the SRT's major tests is, therefore, that if an individual meets any of the Automatic Overseas Tests, he is not UK resident. If he does not meet any of the Automatic Overseas Tests, but he meets any of the Automatic UK Tests he is UK resident. If he does not

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meet any of the Automatic Overseas Tests, or any of the Automatic UK Tests, but he meets the Sufficient Ties Test, he is UK resident. If he does not meet any of the Automatic Overseas Tests, any of the Automatic UK Tests or the Sufficient Ties Test, he is not UK resident.

Although the legislation is not set out in this order, it is easier to consider the automatic overseas tests first because if one of those 5 tests is met then an individual will automatically be non-resident.

The First Automatic Overseas Test is met if an individual was resident in the UK for at least one of the three tax years preceding the fiscal year concerned and the number of days spent in the UK is, in the year concerned, less than 16. This test does not apply if the individual dies during the fiscal year. I will discuss what constitutes a 'day spent' in the UK later in this talk.

The Second Automatic Overseas Test is met if an individual was not resident in the UK in any of the three tax years preceding the fiscal year concerned and he spends less than 46 days in the UK.

The Third Automatic Overseas Test is met if the individual works sufficient hours overseas assessed over the relevant year without any significant breaks from that overseas work, the number of days in that year on which he does more than 3 hours work in the UK is less than 31 and he spends less than 91 days in the UK in the relevant year. In applying this limit one ignores deemed days of presence in the UK which we shall discuss later.

A significant break from overseas work is any period of at least 31 consecutive days during which, on each of those days, the individual does no more than 3 hours work overseas or would

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not have done so but for being on annual leave, sick leave or parenting leave. Work is not defined in the legislation but para. 26 outlines when an individual is considered to be worked or doing work which I will come to later.

To determine whether an individual works sufficient hours overseas, there is a 5 step process to 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 6 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.

The Fourth and Fifth Automatic Overseas Tests apply only where the individual has died during the relevant tax year.

As we have seen, 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 that tax year.

The First Automatic UK Test is met if an individual spends at least 183 days in the UK in the fiscal year concerned.

The Second Automatic UK Test is the most unsatisfactory part of this very unsatisfactory legislation. This test is met if the individual has a home in the UK during all or part of the tax year, that home is one where he spends a sufficient amount of time in that year and there is at

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least one period of 91 consecutive days, at least 30 days of which fall within the relevant fiscal year, in which certain conditions are satisfied The conditions are that throughout that 91-day period either the individual has no home overseas or he has one or more homes overseas but he is not present in them for more than 29 days during the tax year.

A 'sufficient amount of time' is spent in the home if there are at least 30 days in the relevant fiscal year on which the individual is actually present in the home on that day regardless of the length of time that he is there on any particular day.

Where the individual has more than one home in the UK, each home must be considered separately to determine if the test is satisfied.

The Third Automatic UK Test is met if an individual works sufficient hours in the UK assessed over a period of 365 days with no significant breaks from UK work and further conditions are satisfied. The conditions are that all or part of that period falls within the fiscal year, more than 75% of the total number of days in the 365-day period when the individual does more than 3 hours work are days when he does more than 3 hours work in the UK and at least one day which falls in both the 365-day period and in the fiscal year is a day on which he does more than 3 hours work in the UK.

Again a significant break from UK work, is a period of 31 days or more.

Paragraph 9(2) details the steps to be taken to calculate whether an individual has worked sufficient hours in the UK. These follow the same pattern as the Third Automatic Overseas Test modified to apply to UK work.

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The Fourth Automatic UK Test applies where the individual dies during the year.

Where none of the Automatic Overseas Tests nor any of the Automatic UK Tests are satisfied, one moves to the Sufficient Ties Test.

An individual will be resident in the UK for a year if they have sufficient UK ties for that year.

What is a UK tie and whether or not an individual has sufficient UK ties in a relevant fiscal year depends, first, upon whether the individual was resident in the UK in any of the previous three fiscal years and, secondly, on the number of days the individual has spent in the UK in the relevant year. You will see that the more time spent in the UK the fewer the UK Ties that need to be satisfied in order for the individual to be UK resident.

Special rules apply where the individual has died during the year to proportionately reduce the applicable number of days.

Where the individual was resident in the UK in at least one of the three tax years preceding the relevant year there are 5 Ties which may be satisfied.

They are:-

(a) the Family Tie;

(b) the Accommodation Tie;

(c) the Work Tie;

(d) the 90-day Tie; and

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(e) the Country Tie.

Where the individual has not been so resident, the Country Tie is omitted so there are only 4 UK ties which may be satisfied.

An individual has a Family Tie if in the fiscal year there is a relevant relationship between that individual and another person and that other person is resident in the UK for that year. An individual has a relevant relationship with their husband, wife or civil partner (unless they are separated), their spouse or partner if they are living together as husband and wife or as civil partners and their children under the age of 18.

The question of whether 2 people are living together is one of fact.

A person does not have a Family Tie in respect of his child if he sees the child in the UK on fewer than 61 days in total in the fiscal year concerned. Special rules apply where a child is in full-time education in the UK at any time in the relevant tax year.

An individual has an Accommodation Tie if he has a place to live in the UK and it is available to him for a continuous period of at least 91 days during the relevant fiscal year and he spends at least one night there during that fiscal year or, if it is the home of a close relative, he spends at least 16 nights there during that year.

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. This can be a nasty trap

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for those taxpayers who make regular trips to the UK staying at the same hotel or other accommodation.

An individual has a Work Tie if they work in the UK for at least 40 days in the relevant fiscal year. He is treated as working for a day if he does more than three hours work in the UK on that day.

Special rules apply to individuals who have a relevant job on board a vehicle, aircraft or ship.

An individual has a 90-Day Tie for the relevant fiscal year if he has spent more than 90 days in the UK in either the tax year preceding the relevant year or the tax year preceding that year.

An individual has a Country Tie for a relevant year if the country in which he meets the midnight test (as defined) for the greatest number of days in that year is the UK.

The SRT legislation uses various key concepts which I shall run through briefly. We shall return in more detail to some of these later in the talk.

The Basic Day Count Rule provides that where an individual is present in the UK at the end of a day, that day counts as a day spent by him in the UK.

This 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, he leaves the UK the next day and between arrival and

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departure, he does not engage in activities that are to a substantial extent unrelated to his passage through the UK.

Unless the individual leaves the UK on the day after his arrival, the Transit Exemption cannot apply.

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 he would not be present in the UK at the end of that day if it were not for exceptional circumstances beyond his control that prevent him from leaving the UK and he intends to leave the UK as soon as those circumstances permit.

There is a restriction to this Rule in that only 60 days may be excluded in any one fiscal year under the Exceptional Circumstances Exception. Any subsequent midnights will count as a day spent in the UK.

The legislation gives examples of circumstances that may be 'exceptional'; they are national or local emergencies such as war, civil unrest or natural disasters and a sudden or life-threatening illness or injury.

The extent of the exception is unclear.

There is also a deeming rule which deems certain days to count as days spent in the UK that applies where the individual has at least three UK ties in a fiscal year, the number of days in the fiscal year when he is present in the UK at some point in the day but not at the end of the

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day is more than 30; and he was resident in the UK for at least one of the three preceding fiscal years.

Where para. 23 applies, the excess of the deemed days over 30 is counted as days spent in the UK.

'Work' is not actually defined in the legislation but para 26, defines when an individual 'is considered to be "working" (or "doing work").' An individual is working at any time when he is doing something in the performance of duties of an employment held by him; or in the course of a trade carried on by him (alone or in partnership).

Travelling time will count as time spent working as will time spent undertaking training provided certain conditions are satisfied.

The general rule is that work is treated as being done where it is actually done, regardless of where the employment is held or the trade is carried on. This is modified in two circumstances. Work done in the course of travelling to or from the UK by air, sea or the Channel Tunnel is assumed to be done overseas even during the part of the journey which is in the UK. Travelling to or from the UK is taken to begin when the individual boards the aircraft, ship or train bound for the UK or overseas, and ends when the individual disembarks.

Special rules apply to individuals with a relevant job on board a vehicle, aircraft or ship.

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Under Part 3 of the SRT Schedule, a tax year for which an individual is UK resident may be split into 2 parts; the UK part and the overseas part. Loosely an individual will be charged on the income and gains arising in the overseas part as if he were non-resident.

This split year treatment is available where the individual is resident in the UK for that year and he falls within one of 8 Cases. Very loosely, these cover situations where the individual leaves the UK partway through a tax year or where he comes to the UK partway through the tax year.

Part 4 of the SRT Schedule contains 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, inter alia, to income from closely controlled companies, lump sum benefits from employer financed retirement benefit schemes and chargeable event gains from life assurance contracts as well as to Capital Gains. The provisions apply where the period of temporary non-residence is five years or less.

As we have seen, an individual considering their residence status for the tax years 2013/14, 2014/15 or 2015/16 will need to know their residence status for one or more of the three years prior to 2013/14. In addition, the application of the Split Year Rules in 2016/17 will be partly dependent upon an individual's residence status in 2011/12 and 2012/13 and in 2017/18 on his residence status in 2012/13.

An individual may elect for the purposes of determining his tax residence for any of the years 2013/14 to 2017/18 to determine their residence status for one or more of the years prior to 2013/14 (that is called a 'pre-commencement year') by reference to the SRT rather than in accordance with the prior law. The election does not change an individual's actual tax residence

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status for the pre-commencement year or years nor will it affect his tax liability in that year or those years.

The election must be made in writing and is irrevocable and must be made within specified time limits.

For example, an individual wishing to make an election that their residence status for 2010/2011 should be determined in accordance with the SRT for the purposes of determining their residence in 2013/2014 must make the election before 6th April 2015.

To apply the SRT to the fiscal years 2010/11 – 2012/13, one needs to know the individual's residence status for 2007/08 and the following two years. To apply the SRT to 2007/08 – 2009/10 one needs to know the individual's residence status for 2004/05 and the following two years and so on, to his year of birth. One can apply the SRT to any, or all, of the pre-commencement years which are relevant to determining an individual's residence status for the fiscal year in respect of which the election is made.

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.

The following example of Peggy and Milo illustrates the operation of the SRT.

Milo and Peggy were resident in the UK until they retired to Cyprus many years ago. They return to the UK each year to visit their family. Until 2011/12 they had spent less than 80 days per year in the UK. Since then they have spent the following days in the UK:-

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2011/12	94 days
2012/13	72 days

It is assumed that they have not been UK resident for any year since they moved to Cyprus and before 2010/11.

They have a property, 'The Old Manor' in the UK. The Old Manor has been furnished to a high specification and when they are in the UK they spend most of their time there. It is also used by their children from time to time. They also have an apartment in Florida (in which they spend about one month a year). They consider the Florida apartment to be their holiday home and it is worth considerably less than their other properties. They are currently renting an unfurnished property in Cyprus on a 2 year lease having sold their Cypriot Villa prior to the economic crisis there. They had owned the Cypriot Villa for many years before it was sold and had always regarded it as their home. It too was furnished to a high specification. They replaced it with the leased property into which they have moved their furniture from the Cypriot Villa. They regard the leased property as their home. It is the property in which they spend most of their time. All of their properties have been available for them to occupy at all relevant times.

They wish to determine how many days they could spend in the UK in 2013/14 without becoming UK resident.

In order to determine this, we need to know their residence status for 2010/11, 2011/12 and 2012/13. This could be determined under the law current at those times or an election could be

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made for the SRT to apply to those years. Ideally, Milo and Peggy wish to have certainty and we need to consider the application of the SRT.

The First Automatic Overseas Test was not satisfied for each year because they had spent more than 16 days in the UK in each fiscal year.

The Second Automatic Overseas Test was not satisfied for each year because they had spent more than 45 days in the UK in each year.

The Third, Fourth and Fifth Automatic Overseas Tests were not applicable to them because they had neither worked overseas nor had they died.

On looking at the Automatic UK Tests, the First Automatic UK Test was not satisfied because they had not spent 183 days in the UK in any of those years.

Turning to the Second Automatic UK Test.

Milo and Peggy had a property, The Old Manor in the UK but was it their home? It was available to them at all times should they wish to use it, it was furnished to a high specification and when they were in the UK they spent most of their time there. This would seem to suggest that it was a home. On the other hand one might argue that it was a holiday home in which case, if it could be said to be used periodically, it was specifically excluded from the definition of a home. For prudence's sake, we shall assume that The Old Manor was their home throughout. They have spent sufficient time at The Old Manor. There was a period of at least 91-days falling wholly or partly in each fiscal year during which, the Old Manor, was their

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home and at least 30 days of that period fell within the relevant fiscal year. During those 91-day periods did they satisfy the condition that either they had no home overseas or they had one or more such homes but spent no more than 29 days in each of them?

We'll consider first whether Milo and Peggy had a home overseas?

They had regarded their Cypriot Villa as their home, it was where they spent most of their time and it was furnished to a high standard. All of this was also true of the leased property. The only characteristics which distinguished the two were the nature and duration of their interest in the properties. We shall assume that both Cypriot properties have been their homes.

The property in Florida was of a more temporary nature than their other properties, they spent only a short time there and it had a much lesser value. That property might have been a holiday home and not a home.

On that basis they had an overseas home in Cyprus where they spent 30 or more days in each fiscal year, they did not satisfy the Second Automatic UK Test.

The Third and Fourth Automatic UK Tests were not applicable to Milo and Peggy because neither had worked or died in the relevant period.

One must now consider the Sufficient Ties Test. Milo and Peggy had a relevant relationship with each other because they were married to each other and were not separated. In order to have a Family Tie the person to whom they had such a relationship must be resident in the UK. As their circumstances were identical if one was resident the other would also have been

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resident. One only has a Family Tie if the other would be resident ignoring that Family Tie so that we can ignore this Tie for the moment.

Milo and Peggy had an Accommodation Tie because they had a place to live, The Old Manor which was available to them for a continuous period of 91 days and where they had spent at least one night during each year.

They had no Work Tie as they were both retired.

The 90-Day Tie was satisfied for 2012/13 and 2013/14 because they were present in the UK for 94 days in 2011/12.

Whether or not they had been resident in the UK in the 3 preceding tax years they did not have a Country Tie in any of the years 2010/2011-2012/13 because they had spent a greater number of days in Cyprus than in the UK in those years.

Have they satisfied the Sufficient Ties Test?

In 2010/11 they both had just 1 Tie, the Accommodation Tie, they spent less than 183 days in the UK and therefore did not meet the Sufficient Ties Test and so were not resident in that year.

The same was true of 2011/12, again they both had just 1 Tie and spent less than 183 days in the UK so they were not resident in that year.

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In 2012/13, they had 2 Ties, an Accommodation Tie and a 90-Day Tie (because they had spent 94 days in the UK in preceding tax year) but had spent less than 121 days in the UK and did not satisfy the Sufficient Ties Test so they were not resident.

In 2013/14, the year for which we are attempting to determine their actual residence, they would again have the same two Ties. They had not been resident in the UK in any of the preceding 3 tax years which meant that they could spend up to 120 days in the UK without becoming UK resident.

The SRT has many difficulties in construction leading to practical difficulties. They include:-

- the lack of a definition of 'home';
- the use of the concept of 'a place to live in the UK';
- the definition of 'work';
- what constitutes 'exceptional circumstances' in determining if someone has spent a day in the UK;
- the operation of the 'sufficient hours' test including its application in relation to the self-employed;
- the operation of the Split Year Treatment; and
- the application of the SRT to part-time and voluntary workers.

We shall break for five minutes before we resume to look at some of the key concepts of the SRT in more detail. Before we do so, are there any questions on what we have covered so far?

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KEY CONCEPTS

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Having given you a whistle stop tour of the Statutory Residence Test, we shall now look in more detail at some of the key concepts and the difficulties they present.

The development of the SRT began in 2008 and quickly went off the rails. For reasons which are complicated and can still not be made public, the Government decided not to implement a test based on a simple arithmetical formula as both the STEP and the CIOT had recommended, but instead chose to use a series of qualitative criteria which were incapable of precise definition.

The legislation is less uncertain than the previous chaos of ancient case law but there are enough areas of uncertainty to ensure that taxpayers will easily fall into unnecessary tax charges and that there will be many areas of construction for HMRC and the taxpayer to dispute before the Tribunal and the Court. Indeed, over the last year we have been consulted on many difficult situations which do not fall neatly into the SRT structure and we are currently working on several such cases.

I have brought with me some copies of the book which I wrote with my wife, Sharon McKie, *McKie on Statutory Residence*, the size of which bears witness to the difficulties of construction which the SRT raises. There are also a number of order forms with the display copies.

I shall make only a small selection of the many points which could be made. The sheer complexity of the SRT means that many of its anomalies can only really be appreciated by looking at detailed examples. Our book contains a multitude of such examples but in this talk I shall try to explain the nature of the anomalies and their significance in outline so that they can be examined by you in more detail at your leisure.

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We turn first to the rules to determine whether a day is spent in the UK.

Paragraph 22(1) of the SRT Schedule provides the 'Basic Day Count Rule' that if an individual:-

> 'is present in the UK at the end of a day, that day counts as a day spent by [him] in the UK'.

There are two exceptions to the Basic Day Count Rule as we have seen. The first exception is the 'Transit Exception' which applies where:-

(a) the individual only arrives in the UK as a passenger on the day concerned;

(b) he leaves the UK the next day; and

(c) between arrival and departure, he does not engage in activities that are to a substantial extent unrelated to his passage through the UK.

You will see that the Transit Exception only applies where the individual arrives in the UK 'as a passenger'. So, on a strict construction, a person who arrives in the UK by driving a vehicle or piloting a plane will not qualify for the exception.

Unless the individual leaves the UK on the day after his arrival, the Transit Exception cannot apply. So if one arrives, for example, by air on Saturday evening and there are no onward flights until early on Monday morning the Transit Exception will not apply.

The view of the Transit Exception taken by HMRC is unduly restrictive.

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It seems to be HMRC's view that going to a theatre or cinema, having a meal outside one's hotel or with a friend, acquaintance or business colleague or holding a business meeting will prevent the transit exception applying as those activities will be substantially unrelated to one's passage through the UK.

You will see that the test is not whether the activities are part of the individual's passage through the UK but whether they are related to them. In deciding whether activities which are not part of the passage itself, are related to that passage, is the purpose of the activities relevant?

The most apposite definition of 'related' given by the *SOED* is; 'having relation; having mutual relation; connected'.

How must the activities which are not part of the individual's passage through the UK be connected to that passage in order to be related to it? The question of purpose is surely a major consideration in establishing whether there is a relation to the passage or not. If waiting in an airport lounge is related to one's passage through the UK even if one entertains oneself by reading a newspaper or book or by viewing a film on one's laptop, then on what principle can one say that filling time by going to a cinema or theatre and being entertained by the film or play is not also so related? That is quite clearly different to a situation where, for example, one takes a later plane in order to make one's visit to the cinema or theatre where the difference in purpose would seem to break the relationship between the passage and the activity. So in my opinion the purpose of the activities in question is highly relevant to whether or not they are related to the individual's passage through the UK and, indeed, that question is primarily to be decided by reference to that purpose.

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The *Guidance* gives no indication of how one distinguishes between activities which are 'to a substantial extent unrelated to [the individual's] passage through the UK' and activities which are to some, but not to a substantial extent, so unrelated. It may be that the reason that it regards visiting the theatre or having dinner with a business colleague as falling outside the exception but staying in a hotel room as falling within it is based on the view that the former is substantially unrelated to the passage and the latter is to some extent unrelated, but not substantially unrelated to it. That, however, is mere speculation as the *Guidance* does not explain its reasoning.

If, as I have argued, the relation of the activities to the passage through the UK is primarily to be determined by purpose, then, where the purposes are mixed, whether or not activities are substantially related to the passage through the UK would be determined by the preponderance of purpose.

Paragraphs 22(4)-(6) give the second exception, known as the 'Exceptional Circumstances Exception'. Please would you now turn to paragraph 22 in the SRT Schedule?

It may be seen that paragraphs 22(4) & (5) state the elements which must be satisfied for the Exception to apply whilst the number of days which may be discounted under the Exception is restricted by paragraph 22(6). The Elements of the Exception are that:-

- the individual would not be present in the UK but for, that's the 'First Element';
- exceptional circumstances, that's the 'Second Element';
- beyond the individual's control, that's the 'Third Element'
- that prevent the individual from leaving the UK, that's the 'Fourth Element' <u>and</u>

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- the individual intends to leave the UK as soon as those circumstances permit, that's the 'Fifth Element'.

The *Guidance* tends to elide these Elements so that it is difficult to discern the reasoning on which its conclusions on its examples are based.

The First Element of the test requires a counter-factual hypothesis: would the individual be present in the UK if the exceptional circumstances had not occurred?

The *SOED* defines 'Exceptional' as meaning primarily the quality of being unusual or out of the ordinary or not following a general rule. 'Unusual' and 'out of the ordinary', however, are of lesser force than 'exceptional'. So one might say that a thing is only exceptional if it is 'unusual' or 'out of the ordinary' to a significant degree. Defining the necessary degree, however, is not straightforward.

You will see that paragraph 22(5), provides a restrictive list of examples of exceptional circumstances. It might be argued that the meaning of exceptional circumstances is to be restricted to items which are *ejusdem generis* to the examples given in that list.

The Exceptional Circumstances Exception applies where exceptional circumstances prevent an individual from leaving the UK. The legislation ought to have provided that the exception is satisfied if the individual is prevented from reaching his country of destination. The recent events in Syria will prevent one from travelling there but they don't prevent one from leaving the UK and going to France, Germany or Italy. Of course, the Court might apply a radically

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purposive interpretation to correct this fault but such uncertainty of construction does not meet the SRT's purpose of providing rules which are 'clear, objective and unambiguous.'

It is clear that one can be prevented from leaving the UK by an exceptional circumstance even where one has come to the UK because of it. Example B5 in the *Guidance* indicates that HMRC accepts that this is so.

The legislation does not expressly state the time at which the intention to leave the UK must exist but it seems to me that the relevant intention must exist on each day in relation to which it is to be determined whether the Exceptional Circumstances Exception applies and that view seems to be reflected in the *Guidance*. It has harsh consequences. The *Guidance* contains a composite example, Examples B3 & B4, in which the protagonist, Claude, is involved in a serious accident. Had the accident not occurred, Claude would have left the UK on the 31st October. On 1st December he accepts an invitation from his nephew in Wales to stay with him when he is discharged from hospital which happens only in January. In forming an intention to go to his nephew, Claude no longer intends to leave the UK as soon as circumstances permit and so the Exceptional Circumstances Exception does not apply from 1st December onwards. In the example, Claude seems to be prevented from leaving the UK by the physical result of his accident until he is discharged from hospital in January and, it seems, he changes his plans only in the light of the changed circumstances caused by his accident. Yet forming an intention on the 1st December to visit his nephew when he is discharged from hospital which does not take place until January, prevents the Exception from applying to the days from 1st December until his discharge, days when he is prevented by the results of his accident from fulfilling his original intention of leaving the UK on 31st October. That surely is very odd.

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If it is true that the intention must be held throughout the period during which the Exceptional Circumstances Exception applies, this requirement poses a particular problem where the exceptional circumstances cause the individual to go into a coma or such severe brain damage as vitiates his power of decision making. Of course the Courts will strain to construe the exception in such a way as to allow it to such individuals, but to do so would require considerable violence to the statutory words.

We shall now turn to the concept of a 'home' in the SRT.

The Government has acknowledged that what is a home is incapable of precise definition. Nonetheless, taxpayers will be required to identify whether or not they have a home or homes and where it or they are.

There is no exhaustive definition of a 'home' in the SRT. The only definitional provisions (in paragraph 25 to which I ask you to turn now) are extremely vague and limited. In *McKie on Statutory Residence* we have made an exhaustive examination of the meaning of a 'home' in ordinary usage and in statute and case law. On the basis of that examination it is clear that the Court is likely to consider that 'home' in the *SRT Schedule* is to be construed in its natural, ordinary meaning in English usage. Considering the breadth of its range of meanings in ordinary usage that does not take us very far. The Court is likely to regard a finding by the FtT that a putative home is a 'home' to be a finding of fact with which it will interfere only if it is clearly a view at which no reasonable Tribunal could have arrived. The Tribunal is unlikely to articulate the principles by which it determines whether or not a putative home is a 'home'. It is likely to be extremely difficult, if not impossible, therefore, to demonstrate that the Tribunal's decision is manifestly wrong on the primary facts found simply because, in the absence of clear

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principles to apply to those facts, there will be no standard by which to judge the correctness of the decision. That is not to say that the Upper Tribunal or the Court will not interfere with the FtT's findings on the matter from time to time but whether or not they will do so and in what circumstances is unpredictable.

To adopt a phrase of Lord Wilson's in the Supreme Court in *Gaines-Cooper*, describing the approach necessary to determine residence before the introduction of the SRT, determining whether, and where, a person has his home is likely to require of the Tribunal a 'multi-factorial enquiry'.

It is clear from the SRT Legislation that for the purposes of the SRT an individual may have more than one 'home' at the same time and that a home may be a home even if the individual is absent from it more than he is present at it. Paragraph 25 also tells us, not very helpfully, that:-

(a) a 'home' can be a building, a part of a building, a vehicle, vessel or structure;

(b) a putative home which an individual uses periodically as nothing more than a holiday home or temporary retreat will not 'count as' a 'home' whether or not it is a 'home' in fact;

(c) a place may count as a 'home' of an individual whether or not the individual holds any estate or interest in it; and

(d) something which has been an individual's home may cease to be his 'home' even if he continues to own an estate or interest in it.

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That doesn't take us very much further. In my view it is unlikely that, except in very unusual circumstances, a Tribunal would find a person's home to be a country, region or other area not defined by reference to a particular dwelling or that a putative home where an individual did nothing more than sleep at night for a period of a few weeks would be the individual's 'home'.

In deciding whether or not a putative home is a 'home' within this very broad range, the Tribunal is likely to have regard to a range of factors. They might include:-

(a) the length and depth of the individual's connection with it, particularly his personal and family connections and the length of his occupation of it;
(b) the nature of his estate or interest in it, if any;
(c) if he does not have an estate or legal interest in it, the nature of the estate or legal interest of the person who enables him to occupy it and his relationship with that person;
(d) the length of the individual's periods of absence from it;
(e) the stability and permanence of the arrangements under which he occupies it or will occupy it in the future;
(f) the reasons for his occupation or otherwise of it;
(g) whether the individual has another home and the reasons why he has that other home;
(h) whether the putative home is occupied by his spouse, civil partner, infant children or other dependents;
(i) if he is not in occupation of the putative home, the reasons why that is so, the duration during which he does not occupy it, whether or not he will re-occupy it and, if so, in what circumstances;

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(j) what he does whilst he is in occupation of the putative home and whether he normally sleeps and eats his evening meals, spends his leisure time, entertains his friends and undertakes his hobbies there.

None of those factors is likely to be determinative on its own. The list is not exhaustive. It is difficult to predict what factors the Tribunal might find relevant to the sort of multi-factorial enquiry that the breadth and imprecision of the concept requires.

The *Guidance*, in outlining the characteristics of a 'home', does little more than repeat paragraphs 25(1) and (2). It gives examples, of things which HMRC does and does not accept are 'homes' but the examples are lacking in detail and do not give the reasoning used to arrive at their conclusions. The Guidance could hardly do so for if, as the Government considers, a 'home' is indefinable, it cannot relate the facts in the examples to principles by which what is a 'home' can be distinguished from what is not.

Although the *Guidance's* consideration of what is a 'home' is not very helpful, we can extract from it some propositions which bear on the subject. A home may include:-

- One which is a building, a part of a building, a vehicle, a vessel or a structure of any kind which is used as a home.
- One where the individual 'lives' but from which he 'moves out' temporarily.
- One that his family does not visit at all. It is unclear what is meant by 'family' in this context but it may be limited to the individual's spouse and minor children.
- One which he cannot occupy because it is unavailable to him for a temporary period.

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- One in which the individual's wife and children reside but in which he only 'joins' them on a later date.
- One which the individual does not 'own'.

It is ironic, I think, that the SRT was introduced in response to the general acknowledgement that the need to make a wide ranging multi-factorial enquiry in order to determine one's residence was entirely unsatisfactory and yet HMRC has produced a test which requires a multi-factorial enquiry to be made as to whether one has a home in order to determine one's residence.

We shall now turn to the concept of work.

'Work' is not actually defined in the legislation but, as I have explained, paragraph 26, which is headed 'work', defines when an individual 'is considered to be "working" (or "doing work").' I should be grateful if you would turn to paragraph 26 now.

Is paragraph 26(1) an exhaustive or an inclusive definition? 'To work' in ordinary usage has a far wider meaning than that given by paragraph 26(1) (if one assumes for the moment that that paragraph is an exhaustive definition).

The fact that paragraph 26(1) seems to define 'work' in a highly specified way suggests that it is an exhaustive definition; that is, that anything which does not fall within its terms, construed in accordance with the remainder of the paragraph will not be 'working' (or doing 'work') regardless of whether it would fall within the ordinary use of that word or that phrase.

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A literal reading of paragraph 26(1), however, is not entirely incompatible with its being an inclusive definition. It provides that if the conditions in paragraph 26(1)(a) or (b) are met an individual is considered to be ‘working’. It does not provide that the individual is not considered to be ‘working’ if the conditions are not met. To put the matter beyond doubt the draftsman might have used the formula ‘when, and only when, P is doing something etc’.

The *Guidance* does not say whether HMRC consider paragraph 26 to be an exhaustive or inclusive definition of work but in my view the definition is exhaustive.

There are many activities which, in ordinary English usage, would be characterised as ‘work’ but which are not done either in the performance of duties of an employment or in the course of a trade. If, as we have concluded, paragraph 26 is an exhaustive definition of ‘work’ such activities will not be ‘work’ for the purposes of the *SRT Schedule*. Examples are voluntary work, activities in the course of managing one’s investments or one’s UK or overseas property business and activities in respect of transactions in land.

The consequence of the definition of ‘working (or doing “work”)’ in respect of an employment in paragraph 26(1)(a) is that anything which is not done ‘in the performance of duties of an employment’ cannot be ‘work’ under its provisions. So, for example, if an individual’s duties under his employment are to attend an office and to keep books between 9.00am and 5.00pm any book-keeping he does before or after that period is not ‘work’ for the purposes of the SRT. Of course, it may be that under the employment law of the country concerned habitual performance of additional activities may modify the employment contract between the employee and his employer but only doing something in performance of the duties of the employment, whatever they may be, will be ‘work’ for the purposes of the SRT. Determining

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when an individual is working for the purposes of the SRT, therefore, will require a technical understanding of the application of the relevant employment law to the activities of the individual concerned.

It is not clear how paragraph 26(2) interacts with paragraph 26(1)(a). Paragraph 26(2) does not say that if, on the hypothesis that, if value were to be received by the individual for the activity, that value would be employment income for tax purposes, the activity is to be treated as something done by the individual in the performance of duties of his employment. Rather, it says that regard must be had to whether, on that hypothesis, the receipt of the value would be employment income. It does not tell us how regard is to be had to that fact.

Plainly, one cannot simply assume that, if one performs an activity in respect of which, if one received value for it, the value would be employment income for UK tax purposes, that activity is in the performance of the duties of one's employment. If one could make that assumption, there would be no reason for the draftsman not to have provided that anything falling within paragraph 26(2) was working. So there must be activities which fall within paragraph 26(2) yet are not 'work' for the purposes of paragraph 26(1). On the other hand, at least some activities in respect of which value received under the paragraph 26(2) hypothesis would be employment income must fall within paragraph 26(1)(a) or paragraph 26(2) would be redundant. One imagines that in most circumstances in which the paragraph 26(2) conditions are fulfilled, the Tribunal and the Court will find that the activity is 'work' within paragraph 26(1)(a) but the legislation gives no clue as to how to distinguish circumstances in which they should do so from those in which they should not. The *Guidance* doesn't discuss this issue.

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Consider an employee accessing an unauthorised website during work time. We are to have regard to whether, if the individual received value for accessing unauthorised websites, it would fall within the definition of employment income for the purposes of the Tax Acts. Employment income includes any amount treated as earnings under, *inter alia*, the benefits code which brings into charge any 'employment-related benefits' not otherwise charged. 'Employment-related benefits' for this purpose means benefits which, *inter alia*, are provided by reason of the employment.

So in having regard to whether, in respect of our hypothetical employee's accessing of unauthorised websites, if value were received by him for accessing the sites, it would fall within the definition of employment income we have to know whether that value is a benefit or facility of any kind which is provided by reason of his employment. We are not given, however, the terms on which the value is given, or what form it takes, nor are we told that the value is given under the individual's actual employment contract. Without that additional information it is difficult to see how we can answer the statutory question.

It may be that, by applying a broadly purposive construction, the Court will correct the deficiencies of the legislation here but it is not obvious, what construction it will adopt.

The Court could not simply assume that the value was provided under an employment contract because the breadth of the definition of employment income would then have the result that all or virtually all of the individual's actions would then fall within paragraph 26(2).

A construction which simply assumed that the value was received from the individual's actual employer would not answer the statutory question of whether the value was provided 'by reason

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of the employment.' If, the Court were to look at the actual relations between the employer and the employee to answer that question, it would find in most cases that the value would fall within the definition of employment income because no other relationship would exist between the two to explain the nature of the transaction. That would have the odd result that paragraph 26(2) would suggest that even activities which are clearly not part of the duties of an employment (such as my example of the unauthorised accessing of websites) fall within the definition of 'working'.

Another interesting question is whether passive activities are work. If a plumber keeps his mobile turned on from 8.00am to 8.00pm every day so that clients can call him is he 'doing something in the course of a trade carried on by [him]'? Can a passive state be said to be 'doing something'? It seems that, in respect of an employee, HMRC's view is that it can be. The *Guidance* gives the example of 'Paula' who is said to be 'working' while on call. In respect of the self-employed, however, it gives the following example:-

> **'[*Guidance*]: Example 22**
>
> Franek is a self-employed locksmith who keeps his mobile phone switched on 24 hours a day to receive customer calls. For the purposes of calculating working time, Franek should only include the time spent carrying out his jobs and the related travelling time.'

The *Guidance* does not give any indication of how its conclusion on this example has been reached. If being on call in Paula's case is 'doing something' why then is Franek not also doing something when he is available to receive calls? If he is doing something why is that activity not something done in the 'course of a trade' carried on by him. Paragraph 26(3) clearly applies

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to Franek. If Franek incurs a monthly tariff in respect of his mobile it is clearly an expense incurred in being available to receive calls which, provided that the mobile is reserved for use in his trade, will be a deductible expense in arriving at the profits of his trade. HMRC's conclusion on this example seems to be inconsistent with its conclusion on the example of Paula.

Finally, in respect of the concept of work, paragraph 26(8) is puzzling. Any post in respect of which the holder does not have a contract of service cannot be an employment under normal employment law principles because an employment is a contract of service. Paragraph 145, however, extends the meaning of an employment for the purpose of the *SRT Schedule* to include an office. A holder of an office, whether remunerated or not, will not necessarily be subject to a contract of service so perhaps paragraph 26(8) has effect in respect of offices so that an office which is not coupled with a contract of service would not count as an employment for the purposes of the SRT if it were a 'voluntary post'.

In what circumstances can one regard an office as voluntary? Of course, an office is likely to be voluntarily taken on but that is true of almost all employments and offices. Once one is in office and until one resigns it, the office is likely to impose duties on one which are involuntary in the sense that one is bound to their performance. The duties are, in that sense, involuntary, but is the office also involuntary? Perhaps the draftsman has confused the concept of 'being voluntary' with the concept of being 'provided for consideration'.

We shall now turn to the concept of the Reference Period.

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The Third Automatic Overseas Test is met if four conditions are satisfied, one of which is that the individual concerned ‘works sufficient hours overseas’ in the fiscal year for which his residence is to be determined. Whether he ‘works sufficient hours overseas’ in the fiscal year is found by applying five steps. They are set out at paragraph 14(3) of the SRT Schedule. Please would you turn to it now?

You will see that Steps 1 and 3 are steps leading to the determination of the Reference Period.

The Third Automatic UK Test works in a similar way but reversing the references to the UK and overseas and applying the test to a 365-day period ending in the fiscal year. The rules for calculating whether an individual has worked sufficient hours overseas are also applied, with modifications, to determine whether Case 1 of the Split Year Rules applies.

Paragraph 28 provides the rules which apply in calculating the Reference Period under Step 3 of the 5 step process. Please would you turn to paragraph 28 now?

You will see that deductions from the given period are made for various items including annual leave. No exhaustive statutory definitions of ‘leave’ or ‘annual leave’ are given in the *SRT Schedule*, although a special rule governs the application of the phrase ‘annual leave’ to trades. ‘Annual leave,’ is a phrase which, although it is widely used in legislation, has no general statutory definition. Because the term must be applied for the purposes of the SRT to arrangements in any country of the world, specific uses of the term in UK statutes will not be of much force in construing the term in the *SRT Schedule*. The most apposite definition of ‘leave’ given by the *SOED* is ‘permission to be absent from one’s normal duties, employment etc.’ The most apposite meaning of ‘annual’ which it gives is ‘reckoned, payable or engaged

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by the year.' In my view the term must indicate permission to be absent from work for an amount of time that is calculated by reference to an annual period. It would, therefore, exclude leave taken by ad hoc arrangement, whether paid or unpaid, and sabbatical leave except, arguably, where the sabbatical leave is an entitlement calculated by reference to the period of employment. In my view, leave taken where an annual leave entitlement is carried forward to the following year and taken in that year, will be annual leave for this purpose.

HMRC seem to take the view, erroneously, that unpaid leave is not annual leave.

How are public holidays to be treated? There is no general right not to work on public holidays in the UK although a worker's employer may, by notice, require the worker to take annual leave on particular days including public holidays. This would suggest that when an employment contract gives a right to paid leave on public holidays, that is 'leave' for the purpose of the SRT and 'annual leave' within paragraph 28(2)(a) because public holidays are set by reference to the calendar year.

Under the draft of the *SRT Schedule* which was published in December 2012 the equivalent provisions to paragraph 28 allowed a deduction for reasonable amounts of annual leave in determining whether a person worked full-time. For this purpose, no deduction was allowed for public holidays. There is no equivalent provision in the *SRT Schedule*. There seems nothing in the legislation to treat leave which is required to be taken on public holidays as anything other than 'annual leave' like any other component of leave given by reference to an annual period. The *Guidance* seems to assume, however, that 'public holidays' are not 'annual leave' but non-working days which are dealt with under the more restrictive rules for embedded days.

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Turning now to paragraph 28(4) you can see that it provides that reasonable amounts of annual leave or parenting leave are:-

> ‘to be assessed having regard to (among other things) -
>
> (a) the nature of the work, and
>
> (b) the country or countries where P is working.’

How is the nature of work to be taken into account? In the UK, it was, and probably still is, generally the case that leave entitlement increases with seniority and the duration of employment, that manual and factory workers receive less leave than those engaged in clerical, managerial or professional work and that private sector employees have lesser leave entitlements than public sector workers. Arguably, none of these differentials result from an inherent difference in the nature of the work but are the result of historical factors.

Are these differences to be taken into account in judging what are reasonable amounts of annual leave? Does one take into account the nature of the work concerned in determining what is a reasonable amount of leave by reference to inherent differences between categories of work or by reference to common practice?

A similar issue arises in determining how, under paragraph 28(4)(b), one has regard to the countries where the individual works. Does one take account only of objective differences between the countries requiring differences in the amount of annual and parental leave taken or does one apply local ideas of reasonableness?

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The Third Automatic Overseas Test and the Third Automatic UK Test do not expressly take account of weekends. They do so in effect, however, because they are satisfied if the average amount of hours worked per week of the relevant period is 35; a modest weekly amount of work which is commonly required of many workers in the UK who do not work at weekends. In allowing deductions to be made for annual leave, parenting leave and sick leave, previous drafts of the SRT had not made proper allowance for related weekends (or, indeed, for public holidays) or for patterns of working other than a pattern of five working days per week of an even number of working hours per day. The two Tests were radically revised and an important element of that revision was the introduction of the provisions of paragraphs 28(5) and (6) relating to non-working days 'embedded within' a block of leave. There are a number of difficulties with these provisions.

The definition of a non-working day is very restrictive. Days on which an individual is required to do small amounts of work will increase the length of the Reference Period and therefore reduce the number of hours resulting from the calculation of whether an individual works sufficient hours. The requirement that the embedded days must be preceded and followed by minimum periods of three days of leave will prevent many weekends being included in embedded days which one would think of as clearly related to leave.

Where one has a period which satisfies the conditions of paragraphs 28(5)(a) and (b) is it possible that the non-working days in that period will still not be embedded within a block of leave because the period itself does not form a block? That is, does the phrase 'a block of leave' have an independent meaning or is it wholly defined by the conditions of paragraphs 28(5)(a) and (b)? The fact that paragraph 28(5) takes the form of defining when 'non-working days are

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"embedded within" a block of leave' and not of defining what is a 'block of leave', might suggest that the phrase 'a block of leave' is a freestanding concept.

As we have seen, reductions under paragraph 28(2) can only be made for annual leave, parenting leave, sick leave and related embedded non-working days. So leave which is given for other reasons will not reduce the period. This will include compassionate leave, leave to participate in sporting or charitable events and examination leave unless, in the case of employees, the activities are undertaken in the performance of the duties of the employment in which case they are, strictly, not leave at all.

Paragraphs 28(8) and (9) which are found at para 6.2.1 of your notes provides a very limited relief where an individual changes employments during the period.

It will be seen that the relief does not apply to changes of trade or to moving from employment to self-employment or vice versa. Where it applies, the number of days in the gap may be deducted from the period concerned for the purposes of the calculation under Step 3 in the five step calculation but this is subject to a maximum which is calculated both per gap and in aggregate for the year; this maximum is 15 days per gap and 30 days in aggregate.

Because a requirement of the relief is that the individual 'changes employments during the given period' it appears that there cannot be relief for a gap between employments which straddles the beginning or the end of the period. To change employments must surely require one to cease one employment and to commence another. The *Guidance*, however, says the opposite.

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Although the *Guidance* is incorrect here it may be sufficiently precise to found a claim, in judicial review proceedings, that HMRC has created a legitimate expectation that it would not resile from this view in respect of periods in which it allows it to remain uncorrected.

We shall now look at the concept of a 'significant break'.

Whether there has been a significant break from (overseas or UK work) is one of the conditions of the application of the Third and Fifth Automatic Overseas Tests, the Third Automatic UK Test and Cases 1, 5 and 6 of the Split Year Rules.

Paragraph 29, to which I ask you to turn now, defines when there is a 'significant break from UK work and from overseas work'.

Does the use of the term 'break' in paragraph 29 indicate that the break must be preceded and succeeded by a period of work? It would appear not because the definitions of significant breaks given in paragraphs 29(1) & (2) merely require periods of 31 days which satisfy their conditions and not periods which are succeeded by a period of work. On the other hand, it might be argued that the definitions in paragraph 29 are of whether or not a 'break' is 'significant' and therefore that unless there is a 'break' within the general meaning of the word there cannot be a 'significant break' within the definition in paragraph 29. In my view, the definitions in paragraph 29 are exhaustive and, therefore, there can be a significant break for the purposes of that paragraph even where there is no period of work following a non-working period. It may be worth considering advancing the opposing argument, however, in the appropriate circumstances.

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Forms of leave other than annual leave, sick leave or parenting leave do not prevent a day being a day which is taken into account in calculating the length of the break from work.

The last concept at which we shall look is that of a 'relevant job on board a vehicle, aircraft or ship.'

Neither the Third Automatic Overseas Test nor the Third Automatic UK Test will apply to an individual who has a Relevant Job at any time in the fiscal year concerned and who makes, in the year concerned, at least six cross border trips as part of that job that either begin or end in the UK. The Work Tie also contains a special rule which utilises the concept.

The definition of a Relevant Job is found in paragraph 30 to which I ask you to turn now.

In respect of an employment, Condition A is met if the individual:-

> 'holds an employment, the duties of which consist of duties to be performed on board a vehicle, aircraft or ship while it is travelling.'

Are the duties of the employment to be determined by reference to:-

(a) the present duties ruling at that particular point in time. I shall call this the First Construction; <u>or</u>

(b) the general duties of the employment, present or future, arising under the employment which the employee holds at that particular time, which I shall call the Second Construction?

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The first construction would have the most peculiar results. If one considers, for example, a lorry driver who is driving his lorry in France in accordance with the dates of his employment he cannot simultaneously be under a duty to be doing so in the UK. If one determines the duties of an employment at a particular moment, therefore, the entirety of his duties at that moment would be to drive his lorry in France. He may, however, at other times drive almost exclusively in the UK. The example surely suggests that the Second Construction is correct and that is confirmed when one considers that the reference in Condition B to 'those duties' must refer to the duties referred to in Condition A and that Condition B envisages that a number of trips will be made in fulfilment of them. The duties referred to in Condition A, therefore, cannot be the present duties which rule at a particular moment because one cannot have a duty to make different journeys at the same time. So, it appears that the duties referred to in Condition A must be the general duties arising under the employment contract including present and future duties.

If one adopts the Second Construction, however, whether or not Condition A will be satisfied will depend on the mere form of the individual's contract and the condition will be satisfied in some cases and not in others where the actual activities undertaken are identical.

As we have seen, under Condition A in respect of an employment, the duties of the employment must 'consist of duties to be performed on board a vehicle, aircraft or ship'. This is subject only to paragraph 30(5) which provides that 'duties or activities of a purely incidental nature are to be ignored in deciding whether the duties of an employment … consist of duties or activities of a kind described in sub-paragraph (2)(a) …'. Does 'consist' here mean 'consist wholly of' or 'consist wholly or partly of'? In my view, 'consist' here must mean 'consist wholly of.' That is because, if 'consist' were construed to mean 'consist wholly or partly of', paragraph 30(5)

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would be redundant because incidental duties within paragraph 30(5) would not have prevented the duties of the employment consisting of ‘duties to be performed on board a vehicle, aircraft or ship’.

A third possibility that it means ‘consists substantially’ can surely be dismissed. It would be odd if the draftsman chose to take account expressly of incidental duties in paragraph 30(5) and to use an express ‘substantially all’ condition in paragraph 30(3) but to introduce a substantially condition into paragraph 30(2) only by implication.

Construing ‘consist’ to mean ‘consist wholly’ does have the result that Condition A would not be satisfied in some situations where the preponderance of an employee’s duties are to be performed on board a vehicle etc.

In order to consider whether Condition A applies in respect of an employment one must identify when one employment ceases and another begins. Employment law, under which an employee’s rights generally increase with length of employment, tends to presume continuity of employment. Even within a single employment, it may not be straightforward to determine when the duties of an employment change.

The duties under paragraph 30(2)(a) must be performed ‘while [the vehicle etc] is travelling.’ So a person who is employed, for example, to clean a train whilst it is in the station or a ship whilst it is still in dock between journeys or to load a plane with supplies before it takes off from an airport does not satisfy Condition A.

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When do the activities of a trade 'consist of work to be done or services to be provided on board a vehicle [etc]'. Consider, for example, an individual who conducts a trade of 'crew chartering' a luxury yacht and who himself acts as captain of the yacht overseeing a crew made up of his employees. If a vessel or 'ship' in the *SRT Schedule* includes a yacht the activities of the trade in this example includes services to be provided on board a vehicle etc within paragraph 30(2)(b). But the primary element of the trade is surely the provision of the yacht itself which can hardly be said to take place upon it. The same argument surely applies to a lorry or a van supplied by an owner-driver.

Examples of trades which are clearly within paragraph 30(2)(b) are self-employed entertainers operating on cruise ships and a trade consisting of the provision of emergency engineering services while the vehicle is travelling. It is likely, however, that most individuals falling within Condition A will be employees rather than traders.

As you can see, paragraph 30(5) provides:-

> 'Duties or activities of a purely incidental nature are to be ignored in deciding whether the duties of an employment or the activities of a trade consist of duties or activities of a kind described in sub-paragraph (2)(a) or (b).'

If the Courts follow the airline pilot case, *Robson v Dixon,* in construing 'duties or activities of a purely incidental nature' in paragraph 30(5) it is clear that the exclusion which it provides is a narrow one. How narrow will only emerge when it has been the subject of consideration by the Courts.

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You can see that 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 ...'

The legislation gives no indication as to how what is 'substantially all of the trips made in performing those duties' is to be determined. The use of the word 'substantially' in paragraph 30(3) and of the phrase 'activities of a purely incidental nature' in paragraph 30(5) may indicate that paragraph 30(3) is concerned with quantitative, and paragraph 30(5) with qualitative, differences.

The *Guidance* suggests that the condition will be satisfied where '80% or more of [the individual's] trips involve cross-border trips.' It does not, however, say what is to be measured or how it is to be measured. The 80% figure is simply an arbitrary limit chosen by HMRC.

This relaxed view of the 'substantially all' criterion will not necessarily be favourable to the taxpayer. It will have the result that taxpayers will have relevant jobs during the year and so will be excluded from being automatically non-resident under the Third Automatic Overseas Test.

That brings to an end my jog through a very small selection of the uncertainties of construction presented by the key concepts set out in Part 2 of the *SRT Schedule*. I hope that I have done enough to convince you that the use of these concepts in the SRT is far from straightforward. Rumours of the demise of litigation on tax residence are much exaggerated. We can all look forward to a swathe of interesting cases reaching the Tribunal and the Court in future years.

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We shall now take a short break. When we resume I shall look briefly at the difficult question of how one makes adequate disclosure in respect of one's residence status.

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DISCLOSURE AND THE SRT

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As I have said, there is a, perhaps, enjoyable irony in the very form of the SRT. It was the unsatisfactory position that determining residence required a broad-ranging multi-factorial enquiry which, even when it was performed, could not give a certain or even highly probable result which lead to the enactment of the statutory residence test. That test, however, itself requires a broad-ranging multi-factorial enquiry to determine what homes the individual concerned has so that one will often not be able to determine the individual's residence status with anything more than probability.

Where liability to taxation is determined by making an evaluative judgement of complex facts, the result will always be difficult to predict. That difficulty is compounded in relation to residence for two reasons.

First, because residence is in part determined by the individual's residence status for a prior year.

As we have seen, under the SRT one needs to know whether the individual was resident in the United Kingdom in the three preceding fiscal years. Indeed where an election under paragraph 154 is made under the SRT's general transitional provisions one may need to trace back an individual's residence status in a continual series of prior three year periods to his birth. In order to determine deemed domicile for inheritance tax purposes under IHTA 1984 s.267 one needs to determine where the individual was resident in the 20 years ending with the fiscal year which includes the time of determination.

So in determining residence and, indeed, domicile in respect of a particular fiscal year or of a point in time in that year one may have to consider events and circumstances ruling many years

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before it. That will mean keeping information and documents for many years and where, it has not been kept, trying to obtain information in respect of a time which is years in the past.

Secondly, the nature of the information which is relevant to determining residence and domicile, information concerning people's personal lives, their relationships, intentions, whereabouts and journeys, is not the sort of information which people normally preserve.

Most individuals feel a moral obligation to determine their tax liabilities accurately and to pay the tax that is due from them. Part of the process of doing so is to provide complete and accurate information to HMRC. As well as being morally correct it is also in the interests of taxpayers that they should do so. We shall consider the relationship between assessment and penalties on the one hand and disclosure on the other by reference to Income Tax and Capital Gains Tax but similar points will apply to the equivalent Inheritance Tax legislation.

TMA 1970 s.29 allows the Board of HMRC, or an officer of the Board, to make an assessment where they discover, or he discovers, that any income which ought to have been assessed to Income Tax or chargeable gains which ought to have been assessed to Capital Gains Tax has or have not been assessed, or that any assessment to tax is or has become insufficient or that any relief which has been given is or has become excessive. We shall call these circumstances the discovery of an insufficiency.

Such an assessment cannot be made, however, unless one of two conditions is fulfilled. The conditions are that the insufficiency was brought about carelessly or negligently by the taxpayer or a person acting on his behalf and that when the enquiry window closed without an enquiry being raised or, if an enquiry was raised, when a closure notice was issued, the officer could

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not have been reasonably expected on the basis of the information made available to him before that time, to be aware of the insufficiency.

This is subject to the further exception that no assessment may be made if the return was made in accordance with the practice generally prevailing at that time when it was made. This condition is for the taxpayer to prove.

We shall not examine the extensive case law on discovery. In general, it is probably true to say that where there has been an insufficiency in an assessment, attempts by the taxpayer to assert that there has not been a discovery of that insufficiency are usually unsuccessful. In effect then the taxpayer needs to show, if he is to resist a Discovery Assessment, both that the insufficient assessment was not due to his careless or deliberate act and that the Officer of the Board making the assessment had sufficient information either at the closure of the enquiry window or on the issue of the closure notice (as the case may be) to identify that there was an insufficiency.

A taxpayer submitting a return on one view of the relevant law or of the relevant facts may find in due course that he is assessed by HMRC under a different view. Even if the Tribunal or the Court were to find for HMRC on the substantive issue, sufficient disclosure may allow him to resist a discovery assessment if HMRC cannot show that the taxpayer carelessly or deliberately adopted an incorrect view of the matter and the taxpayer can show that the disclosure in his return was sufficient to alert the tax officer that an insufficiency existed.

That is all very well in theory but where whether and to what extent a tax liability arises is to be determined by an overall assessment of a wide range of relevant facts, it is very difficult to make a disclosure which will satisfy the requirements of s.29(5). Many of the factual issues

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relevant to determining residence are matters which can only be determined by reference to a broad range of factual information.

An individual's self-assessment can only be amended if an enquiry has been opened into the return in which the self-assessment is made. Where the return has been submitted in time, of course, the enquiry cannot be opened after the end of the period of 12 months after the return was submitted. If no enquiry is opened an assessment by HMRC can be made only under a discovery assessment and, as we have seen, if there is an insufficiency of which the inspector at the relevant time could not reasonably have been expected to be aware, a discovery assessment may be made even if the taxpayer's actions were neither careless nor deliberate.

Where this insufficiency was not due to the careless or deliberate act of the taxpayer, a discovery assessment may only be made in the period of 4 years after the end of the year of assessment to which it relates. Where the taxpayer's actions were careless but not deliberate it may only be made in the period of 6 years of the end of that year of assessment. Where the action was both careless and deliberate it may be made in the period of 20 years following the period of assessment to which it relates. Although the burden of proving that the taxpayer's action was careless or deliberate lies with HMRC, in practice, in the absence of evidence to the contrary, even a small amount of evidence suggesting carelessness or deliberateness will satisfy that burden of proof.

Obviously, it is good practice to preserve full records of the deliberations which lead to the adoption of a particular treatment in a self-assessment return but a full, truthful and considered disclosure of the relevant facts and of the application of the relevant law to the facts made with a tax return provides material to rebut an assertion of careless or deliberate error.

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If a discovery assessment is made and upheld in respect of a period for which a self-assessment return has been made, a penalty may be exigible. That is because a penalty is payable by a person who, inter alia, gives HMRC a return under TMA 1970 s.8 which contains an inaccuracy which was careless or deliberate and which amounts to or leads to an understatement of a liability to tax. Again an honest and comprehensive disclosure including a considered analysis of the relevant law is a convenient protection against the imposition of a penalty on the basis of a careless or deliberate inaccuracy.

Such an honest, accurate and comprehensive disclosure including a considered analysis of the relevant law, therefore, can prevent a discovery assessment and so provide the taxpayer with finality of assessment and, in the event that an assessment is made during or on the closure of an enquiry, prevent the imposition of a penalty.

As I have said, however, because of the nature of the factual tests by which it is determined, residence raises difficult issues as to the nature and extent of the disclosure to be made. Where a person considers that he was non-resident in a year or, was resident in a year in which the Split Year Rules apply to him for the year, he will need to complete form SA 109 with his self-assessment return. That form includes a box 39 for what we have come to call the 'white space' disclosure. That it allows for the provision of any other information for which there is no place elsewhere in the return and which the taxpayer considers to be relevant.

So we shall now turn to consider particular areas of the tests of residence which pose problems as to the nature and extent of the disclosure.

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Where residence is relevant to a person's Income Tax or Capital Gains Tax liability the Government's decision to place the concept of a home in the centre of the Second Automatic UK Test, the Fourth Automatic Test and Cases 2, 3, 4, 7 and 8 of the Split Year Rules and, in addition, to make it an important element of the Accommodation Tie, means that whether one is resident or not and whether a year is a Split Year is often dependent upon whether and when one has a home or homes. As we have seen, that involves a wide-ranging multi-factorial enquiry.

We looked earlier at the factors to which the Tribunal is likely to have regard in deciding whether or not a dwelling is a particular individual's home. Some of those factors are relatively easy to determine, for example, the nature of the taxpayer's estate or interest in the dwelling, if he has any such and if he does not the nature of the estate or legal interest of the person who enables him to occupy it. Other factors require the consideration of more amorphous matters such as the length and depth of the individual's connection with the dwelling, particularly his personal and family connections with it, his reasons for his occupation or otherwise of the dwelling and, if he is not in occupation of the dwelling, the reasons why that is so and whether or not he will re-occupy it and in what circumstances. The complexity of the factual background which might be relevant is shown by the long list of information which HMRC's Guidance says will help to determine the facts in relation to whether or not a dwelling is a home, which runs to twenty separate categories.

This factual background is further complicated by paragraph 25(3) which provides that somewhere that the taxpayer uses periodically as nothing more than a holiday home or temporary retreat (or something similar) does not count as his home.

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M^c^Kie on Statutory Residence, includes a number of detailed examples where whether or not a dwelling is a particular individual's home depends upon a complex factual situation. Presenting such situations objectively and clearly in a manner that not only supports the view of it taken in the return but also gives the HMRC Officer sufficient information on which to base a contrary view, if such a view is arguable, requires careful and exact drafting.

The Accommodation Tie also poses difficulties in this way. It is not only that one of the conditions of the tie is that the individual concerned has a place to live in the UK and that the definition of a place to live includes a home. It is also that included in the definition of a place to live is a holiday home or temporary retreat or something similar and accommodation which is otherwise available to the taxpayer.

There is no statutory definition of when property is available to a person and very little relevant case law. The SRT specifically provides that accommodation may be available to the taxpayer even if he holds no estate or interest in it and 'even if [he] has no legal right to occupy it'. That last provision is very puzzling. If a person occupies property with the owner's permission, the owner has given him a non-exclusive licence to occupy. That is a legal right. It may be withdrawn but while it exists it is good against any other person who does not have a superior interest or right. A person who occupies property without any legal interest or right is a trespasser. If a property can be available to a person who is a trespasser it is difficult to see on what criteria one can distinguish situations in which the property is available from those in which it is not. It is a further condition of the tie applying that the place must be available to the individual during the fiscal year for a continuous period of at least 91 days. It is difficult to give any meaning to that requirement in relation to a potential trespasser.

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Now, it is fairly obvious to what sort of situations the legislation is meant to apply; situations where a relative or friend makes a room available to an individual in their house. But because the legislation is so poorly drafted, knowing the boundaries of the provision is difficult.

If one wants to protect one's self from a discovery assessment it is not sufficient to give only the information which is relevant to one's own view of the construction of the provision but one must also give that information which would be necessary in respect of alternative viable constructions.

The Family Tie is another area of difficulty in respect of disclosure. As we have seen there is a relevant relationship for the purposes of the Family Tie at any time if at that time the taxpayer and another person are, *inter alia*, living together as husband and wife or, if they are of the same sex, as if they were civil partners. There are many problems in applying these concepts to same sex marriage but even leaving those difficulties aside, determining whether a couple are living together as husband and wife involves a consideration of their whole manner of life together. If one decides that a relevant relationship does not exist one would still, if one is prudent and the matter were not beyond doubt, not only set out in one's disclosure the information on which one has relied in coming to that conclusion but also any information which might support the opposite view. That would require a very detailed disclosure and even then one would find it difficult to know whether one had produced every piece of relevant information. If the determination of a matter requires an evaluative judgement leaving out some information whilst providing other information might disturb the balance of the judgement which is made.

One would think that the various day-counting tests would not produce problems with disclosure and, in the main, they do not. One simply has to determine, under paragraph 22,

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whether a taxpayer is present in the UK at the end of a day and under paragraph 23, in respect of days when he was not so present, whether he was present in UK at some point on those days. That should be relatively straightforward apart from some very rare situations where the extent of the UK and what being in the UK means might be in issue.

The Exceptional Circumstances Exception does present a number of areas of difficulty. We looked at some of the difficulties of the construction of that exception earlier. Those difficulties create strong evidential problems.

We saw that it is a condition of the Exception that the taxpayer would not have been present in the UK at the end of the day concerned but for exceptional circumstances beyond the taxpayer's control that prevent and the taxpayer from leaving the UK. So the disclosure which the taxpayer makes must be sufficient for the HMRC officer to determine a hypothetical state of affairs; where the taxpayer would have been but for the exceptional circumstances.

We have also seen that what constitutes an exceptional circumstance is unclear. So in order to provide protection against a discovery assessment, it would not be sufficient to provide an outline description of the circumstance but rather one would supply sufficient detailed information for the HMRC officer to determine whether or not the circumstance was exceptional in respect of a number of different possible constructions of the word.

One will also have to demonstrate why the exceptional circumstance was beyond the taxpayer's control. In determining whether a circumstance is beyond a person's control it is likely that there is some limitation on the phrase to its being beyond his practical control because a person determined to leave a country at any cost or any risk will probably be able to do so. But what

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is the nature of that practical restriction? If the taxpayer draws the line at a particular point and the Tribunal later disagrees with him, to be protected from a discovery assessment he must have provided the information which would have allowed the HMRC officer to appreciate that the line had been drawn in the wrong place.

A further condition of the exception is that the taxpayer must intend to leave the UK as soon as the exceptional circumstance permits. Read literally it is highly unlikely that this condition can be satisfied and so it requires a purposive construction to make it effective. Even ignoring that difficulty, the disclosure needs to provide evidence of the individual's intention. If it merely asserts that he had that intention and it turns out that the Tribunal in due course concludes that the taxpayer has not discharged the burden of proof of showing that he did, the disclosure will not protect against a discovery assessment.

Where one is working is relevant to the Third Automatic Overseas Test, to the Third Automatic UK Test, to the Work Tie, to determining whether an individual has a relevant job on board a vehicle, aircraft or ship and to Cases 1, 2, 5, 6 and 7 of the Split Year Rules. As we have seen, work is not actually defined in the legislation but paragraph 26 is headed 'work' and defines when an individual is 'considered to be working' or 'doing work'. Again the paragraph is drafted in an unsatisfactory manner and raises numerous problems of construction which are examined in detail in *M^c^Kie on Statutory Residence*.

One particular issue is in respect of employments. Paragraph 26(1) provides that an individual is considered to be working at any time when he is doing something in the performance of the duties of an employment. Subject to the special deeming provisions in relation to time spent travelling and training, therefore, as we have seen, it seems clear that unless an activity is a

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contractual duty of the employment it will not be work. It is not clear, however, from the Guidance that HMRC accepts this. In any event, the exact nature of a person's contractual duties under an employment contract is not always easy to determine particularly in respect of employments under the law of other countries. Simple statements that a particular activity was or was not work therefore can disguise very complex issues. Again, the disclosure necessary to provide protection from a discovery assessment in the event that the Tribunal or a court disagrees with the taxpayer's analysis must be very detailed and precisely drafted.

In respect of Discovery Assessments, TMA 1970 s.29(6) defines the information which is deemed to be available to an officer of the Board for the purposes of deciding whether the officer could not reasonably be expected, on the basis of the information made available to him before the relevant time, to be aware of the insufficiency. That information includes any self-assessment return for either of the two immediately preceding chargeable periods. So once a taxpayer has made a full and comprehensive disclosure in respect of facts in his self-assessment return for a year, his returns in the next two years need, in respect of those facts, only to refer to that disclosure and to update it as necessary.

Once two years have passed, however, one cannot assume that the information given in the previous return is available to the Inspector with the result that it will need to be submitted again. It is not, I suggest, sufficient that the white space disclosure should merely refer to the previous return. That is because the condition would still be satisfied that the HMRC officer, based on the information made available to him at the relevant time, could not have been reasonably expected to have been aware of the insufficiency. The reference will merely tell the HMRC officer that some information has been submitted in the past not what that information was or that it did not support the position taken in the current return.

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I hope that I have defined the problem of disclosure for you. But I have not given you the solution. That is because there is not an ideal solution. One cannot, I think, eradicate the risk that a disclosure will turn out to have been inadequate. What one can do is to minimise the risk and to do that I think that there are some important rules of thumb.

First, one should err on the side of too much detail and too much analysis. At worst, if one does so, one may perform some unnecessary work. To err on the other side could have a disastrous effect on the client's liabilities.

Secondly, one needs to carefully relate the facts to the relevant legal question.

Thirdly, one needs to take an objective view of the strengths and weaknesses of the client's case and to include in the disclosure the factual information which it would be necessary for the HMRC officer to consider to arrive at an alternative view less favourable to one's client than the one that one has adopted. One must not be tempted to take an over optimistic or unrealistic view of the relevant facts.

Fourthly, one needs to carefully collect and preserve the evidence which underpins the narrative one submits and to consider carefully whether to submit some or all of the underlying evidence with the return.

Lastly, drafting a disclosure in relation to residence or domicile is a skilful and difficult task requiring the most careful thought and the most precise drafting.

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That brings my talk on the Statutory Residence Test to an end. I should be happy to attempt to answer, to the best of my ability, any questions which you may have.

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