



**IBC CONFERENCE:**

**THE PRACTICAL APPLICATION OF THE STATUTORY  
RESIDENCE TEST**

**AN OVERVIEW OF THE STATUTORY RESIDENCE TEST**

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## **SECTION I**

### **THE STATUTORY RESIDENCE TEST**

The residence status of an individual is a key element in determining UK direct tax liability of individuals and trustees. The Finance Act 2013 contained legislation introducing a statutory definition of ‘tax residence for individuals’ and the abolition of the concept of ordinary residence with effect from 2013/14.

### **THE BACKGROUND**

A statutory residence test (the SRT) has been a long time in coming. As long ago as 1927 Viscount Sumner in *Levene v IRC* [1927] 13 TC 486 expressed his dissatisfaction with the state of the law of residence.

The Government has said that the aim of the SRT is to be ‘clear, objective and unambiguous’ and the legislation ‘simple to use.’

### **THE STRUCTURE OF THE SRT LEGISLATION**

The SRT is found in FA 2013 Sch 45<sup>1</sup> which is divided into the following five parts:-

- Part 1 sets out the rules of the SRT;
- Part 2 defines a number of ‘key concepts’, that is terms and phrases used in the Schedule;

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<sup>1</sup> All references are to FA 2013, Sch 45 unless otherwise stated

- Part 3 sets out the rules governing split year treatment and makes consequential amendments to other parts of the tax legislation;
- Part 4 sets out various anti-avoidance rules and makes consequential amendments to other parts of the tax legislation;
- Part 5 contains miscellaneous provisions on interpretation, consequential amendments and transitional provisions.

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

### **The Structure of the UK SRT**

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.<sup>2</sup> The SRT 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.<sup>3</sup>

The basic rule is that an individual is resident in the UK for a given tax year if he:-

- (a) satisfies the automatic residence test; or
- (b) satisfies the sufficient ties test.<sup>4</sup>

If neither of these tests are met, then the individual is not resident in the UK.<sup>5</sup>

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<sup>2</sup> Para. 1

<sup>3</sup> Para. 1(3)

<sup>4</sup> Para. 3

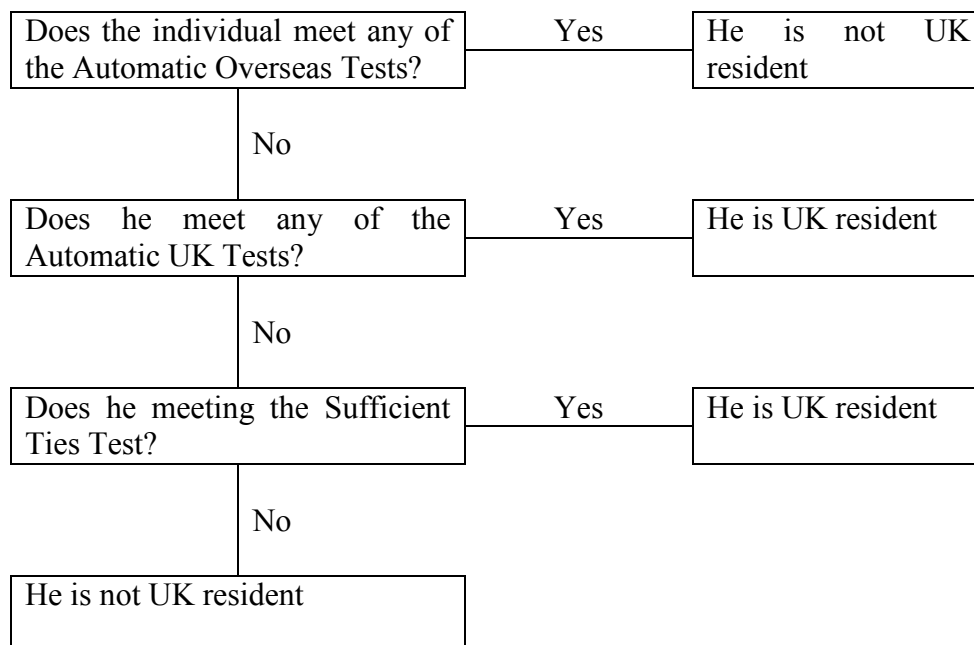
<sup>5</sup> Para. 4

## **The Automatic Residence Test**

The Automatic Residence Test will be met if:-

- (a) one of the Automatic UK Tests is met; and
- (b) none of the Automatic Overseas Tests are met.<sup>6</sup>

This is represented diagrammatically in the following flow chart:-



### **Automatic Overseas Tests**

An individual will be automatically non-resident if they meet any of the five Automatic Overseas Tests.

#### ***The First Automatic Overseas Test***

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

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<sup>6</sup> Para. 5

of days spent in the UK is, in the year concerned, less than 16.<sup>7</sup> This test does not apply if the individual dies during the fiscal year.

### ***The Second Automatic Overseas Test***

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 the number of days spent in the UK in that year is less than 46.<sup>8</sup>

### ***The Third Automatic Overseas Test***

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 and:-

- (a) the number of days in that year on which the individual does more than three hours work in the UK is less than 31; and
- (b) the number of days spent in the UK in the relevant year is less than 91 (excluding deemed days).<sup>9</sup>

A significant break from overseas work is defined<sup>10</sup> as any period of at least 31 consecutive days during which, on each of those days, the individual does no more than three hours work overseas or would not have done so but for being on annual leave, sick leave or parenting leave.

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<sup>7</sup> Para. 12

<sup>8</sup> Para. 13

<sup>9</sup> Para. 14

<sup>10</sup> Para. 29(2)

To determine whether an individual works sufficient hours overseas, the steps in para 14(3) must be followed.

Step 1 involves identifying any days in the relevant fiscal year on which the individual does more than three hours work in the UK, including days on which he also does work overseas on the same day. Such days are referred to as ‘disregarded days’.

Under Step 2 the individual’s ‘net overseas hours’ are calculated. That is the total number of hours that the individual works overseas for all employments held and trades carried on by him in the relevant fiscal year ignoring any hours that he works overseas on disregarded days.

Step 3 involves subtracting from 365 (or 366 if the fiscal year is a leap year) the total number of disregarded days, of days to be subtracted to take account of periods of leave and of days to take account of gaps between employments as defined in para 28. The result is referred to as the ‘reference period’.

Under Step 4 the reference period is divided by 7. If the answer is more than one and is not a whole number, it is rounded down to the nearest whole number. If the answer is less than one, it is rounded up to one.

The final step involves dividing the individual’s net overseas hours by the number resulting from Step 4. If the answer is 35 or more then the individual is considered to work ‘sufficient hours overseas’ for that relevant fiscal year.

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 and at least six of the trips made by the individual in that year as part of that job are cross-border trips that either begin in the UK, end in the UK or begin and end in the UK.<sup>11</sup>

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

#### ***The Fourth Automatic Overseas Test***

This test is met where:-

- (a) an individual dies in the relevant fiscal year; and
- (b) he was either:-
  - (i) not resident in the UK in either of the two fiscal years preceding death, or
  - (ii) was not resident in the UK in the preceding year and the year before that was a split year within Cases 1, 2 and 3 (involving departure from the UK), and
- (c) he spends less than 46 days in the UK in the fiscal year.<sup>12</sup>

#### ***The Fifth Automatic Overseas Test***

The Fifth Automatic Overseas Test is met where:-

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<sup>11</sup> Para. 14(4)

<sup>12</sup> Para. 15

- (a) the individual dies in the relevant fiscal year;
- (b) he was not resident in the preceding two tax years because he met the Third Automatic Overseas Test for each of those two years or he was not resident in the preceding tax year by reason of meeting that test and the fiscal year before that was a split year within Case 1 (starting full-time work overseas); and
- (c) he would have met the Third Automatic Overseas Test in the fiscal year of death if that test were modified so as to apply to a person who dies during the year.<sup>13</sup>

### **The Automatic UK Tests**

If none of the Automatic Overseas Tests are satisfied then the Automatic UK Tests need to be considered. Where an individual satisfies one of the Automatic UK Tests and none of the Automatic Overseas Tests, they will be resident in the UK for that tax year.<sup>14</sup>

#### ***The First Automatic UK Test***

The First Automatic UK Test is met if an individual spends at least 183 days in the UK in the fiscal year concerned.<sup>15</sup>

#### ***The Second Automatic UK Test***

This test is met if:-

- (a) the individual has a home in the UK during all or part of the tax year;

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<sup>13</sup> Para. 16

<sup>14</sup> Para. 5

<sup>15</sup> Para. 7



- (b) that home is one where he spends a sufficient amount of time in that tax year;
- (c) there is at least one period of 91 consecutive days in which the 91-day period in question occurs whilst they have that home, at least 30 days of that 91-day period fall within the relevant fiscal year and throughout that 91-day period he has no home overseas or he has one or more homes overseas but is not present in them for more than 29 days during the tax year.<sup>16</sup>

A 'sufficient amount of time' is 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 during the day when he is so present.<sup>17</sup>

Where the individual has more than one home in the UK, each home must be considered separately to determine if the test is satisfied.<sup>18</sup> Paragraph 25 provides limited definitional provisions in relation to the meaning of 'home'.

### ***The Third Automatic UK Test***

This 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:-

- (a) all or part of that period falls within the fiscal year; and

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<sup>16</sup> Para. 8

<sup>17</sup> Para. 8(4)

<sup>18</sup> Para. 8(8)

- (b) more than 75% of the total number of days in the 365-day period when the individual does more than three hours work are days when he does more than three hours work in the UK; and
- (c) 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 three hours work in the UK.<sup>19</sup>

A significant break from UK work is a period of 31 days or more where there is no day on which the individual does more than three hours work in the UK or the reason for their absence is not because they were on annual leave, sick leave or parenting leave.<sup>20</sup>

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 albeit as applied to UK work

#### ***The Fourth Automatic UK Test***

This test applies where:-

- (a) the individual dies in the fiscal year;
- (b) for each of the previous three fiscal years he was resident in the UK by virtue of meeting the Automatic Residence Test;

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<sup>19</sup> Para. 9

<sup>20</sup> Para. 29(1)

- (c) even assuming he was not resident in the UK for the fiscal year concerned, the fiscal year preceding the year concerned would not be a split year in respect of the individual; and
- (d) when the individual died, either:
  - (i) his home was in the UK; or
  - (ii) he had more than one home and at least one of them was in the UK.
- (e) if the individual had a home overseas during all or part of the fiscal year concerned, he did not spend a sufficient amount of time there in that year.<sup>21</sup>

A 'sufficient amount of time' is at least 30 days in the relevant fiscal year when the individual was present in the home on that day regardless of the length of time during the day when he was present or he was present there for at least some of the time (regardless of the length of time) on each day of the fiscal year concerned, and including the day on which he died. The 30 days can be consecutive or intermittent days.

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

### **The Sufficient Ties Test**

Where none of the Automatic Overseas Tests nor any of the Automatic UK Tests are satisfied, an individual will be resident in the UK for a year if they have sufficient UK ties for that year.<sup>22</sup>

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<sup>21</sup> Para. 10

What is a UK tie and whether or not an individual has sufficient UK ties in a relevant fiscal year depends upon whether the individual was resident in the UK in any of the previous three fiscal years and the number of days the individual has spent in the UK in the relevant year.<sup>23</sup> The relevant bands are shown below.

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

The table below rearranges the information shown in the table above to show the number of days required to be spent in the UK by an individual to meet the Sufficient Ties Test according to the number of ties they have.

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<sup>22</sup> Paras. 3 and 5

<sup>23</sup> Paras. 17, 18, 19 and 31

No. of UK ties	No. of days to be spent in a fiscal year in the UK for an individual to be UK resident in that fiscal year	
	Individual who has been UK resident in at least one of the three years preceding the relevant fiscal year	Individual who has not been UK resident in any of the three years preceding the relevant fiscal year
1	121 or more	N/A
2	91 – 120	121 or more
3	46 - 90	91 - 120
4	16 - 45	46 - 90

Special rules apply where the individual has died during the year to proportionately reduce the number of days.<sup>24</sup>

Where the individual was resident in the UK in at least one of the three tax years preceding the relevant year the ties which count as UK Ties are:-

- (a) the Family Tie;
- (b) the Accommodation Tie;
- (c) the Work Tie;
- (d) the 90-day Tie; and
- (e) the Country Tie.<sup>25</sup>

Where the individual has not been so resident, the Country Tie is omitted so only the following count as UK ties:-

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<sup>24</sup> Para. 20

<sup>25</sup> Para. 31(2)

- (a) the Family Tie;
- (b) the Accommodation Tie;
- (c) the Work Tie; and
- (d) the 90-day Tie.<sup>26</sup>

### ***The Family Tie***

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.<sup>27</sup> An individual has a relevant relationship with:-

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

Paragraphs 33(1) and (2) prevent there being a circularity under which the residence of the individual is to be determined by reference to the residence of a relevant person and the residence of that relevant person is to be determined by reference to the residence of the taxpayer. Special rules apply where a child is in full-time education in the UK at any time in the relevant tax year. 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

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<sup>26</sup> Para. 31(3)

<sup>27</sup> Para. 32

fiscal year concerned or, if the child turns 18 during the fiscal year, in the part of that year before they turn 18.<sup>28</sup>

### ***The Accommodation Tie***

An individual has an Accommodation Tie if he has a place to live in the UK and:-

- (a) it is available to him for a continuous period of at least 91 days during the relevant fiscal year; and
- (b) 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.<sup>29</sup>

There is a rule which applies where there are fewer than 16 days between the periods in which a particular place is available which treats that place as being available to the individual for that period.<sup>30</sup> This can be a nasty trap for those taxpayers who make regular trips to the UK staying at the same hotel or other place.

### ***The Work Tie***

An individual has a Work Tie if they work in the UK for at least 40 days in the relevant fiscal year.<sup>31</sup> 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.<sup>32</sup>

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<sup>28</sup> Para. 32(3)

<sup>29</sup> Para. 34

<sup>30</sup> Para. 34(2)

<sup>31</sup> Para. 35

### *The 90-Day Tie*

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, the tax year preceding that year or each of those tax years.<sup>33</sup>

### *The Country Tie*

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.<sup>34</sup>

## **SPLIT YEAR TREATMENT**

Before the introduction of the SRT, a person who was resident at any time during a tax year was generally subject to income tax and capital gains tax on their worldwide income and gains subject to specific reliefs for persons who are either not domiciled in the UK or not ordinarily resident here. In certain circumstances, however, when an individual came to, or left, the UK during a tax year, a concessionary treatment under ESC A11 enabled the tax year to be split into periods before and after arrival or departure. UK tax on most income and gains arising before a person had become UK resident or after they had ceased to be so resident was limited to the tax which, loosely, would have been due if the taxpayer had been non-resident throughout the

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<sup>32</sup> Para. 36

<sup>33</sup> Para. 37

<sup>34</sup> Para. 38



year. Part 3 of Sch 45 gives a statutory relief broadly similar to this concessionary relief.

This split year treatment is available where the individual is resident in the UK for that year and they fall within one of eight Cases. Essentially, 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:-

- Case 1 applies where an individual starts full-time work overseas.<sup>35</sup>
- Case 2 applies where an individual is a partner of someone who starts full-time work overseas and that person goes to live with the worker.<sup>36</sup>
- Case 3 applies where an individual ceases to have a home in the UK.<sup>37</sup>
- Case 4 applies where an individual comes to the UK and starts to have a home in the UK.<sup>38</sup>
- Case 5 applies where an individual comes to work ‘full-time’ in the UK.<sup>39</sup>
- Case 6 applies where an individual comes to the UK and ceases to work ‘full-time’.<sup>40</sup>

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<sup>35</sup> Para. 44

<sup>36</sup> Para. 45

<sup>37</sup> Para. 46

<sup>38</sup> Para. 47

<sup>39</sup> Para. 48

<sup>40</sup> Para. 49

- Case 7 applies where an individual is a partner of someone who has worked abroad but has come to the UK.<sup>41</sup>
- Case 8 applies where an individual starts to have a home in the UK during the tax year and continues to do so until the end of the following tax year.<sup>42</sup>

### **Key Concepts**

In applying the SRT the legislation uses various key concepts.

#### ***Days Spent and Days Spent in a Period***

Paragraph 22(1) provides that if an individual is present in the UK at the end of a day, that day counts as a day spent by them in the UK (the Basic Day Count Rule).

The Basic Day Count Rule is subject to two exceptions and to a deeming rule. The first exception (the Transit Exception) is 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.<sup>43</sup>

Unless the individual leaves the UK on the day after their arrival, the Transit Exemption cannot apply. So if one arrives for example on Saturday evening and

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<sup>41</sup> Para. 50

<sup>42</sup> Para. 51

<sup>43</sup> Para. 22(3)

leaves early on Monday morning the Transit Exception will not apply even if there were no later flight which one could have taken which would have allowed one to catch their onward flight out of the UK.

What constitutes ‘activities that are to a substantial extent unrelated to [the individual’s] passage through the UK’? HMRC’s Guidance takes an unduly broad view of the construction of this phrase and should be used with caution.

The second exception (the Exceptional Circumstances Exception) provides that a day does not count as a day spent in the UK by an individual where:-

- (a) 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
- (b) he intends to leave the UK as soon as those circumstances permit.<sup>44</sup>

The number of days (midnights) that may be excluded in any one fiscal year under the Exceptional Circumstances Exception is limited to 60.<sup>45</sup> Any subsequent midnights will count as a day spent in the UK.

The legislation gives examples of circumstances that may be ‘exceptional’, namely:-

- (a) national or local emergencies such as war, civil unrest or natural disasters; and
- (b) a sudden or life-threatening illness or injury.<sup>46</sup>

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<sup>44</sup> Para. 22(4)

<sup>45</sup> Para. 22(6)

This arguably restricts the extent of the exception and certainly makes its scope less easily determined. That is because it might be argued that the meaning of exceptional circumstances is to be restricted to items which are *ejusdem generis* to the examples given in para. 22(5). That might suggest, for example, that an injury which was neither sudden nor life-threatening but which was sufficient to prevent one's travelling, such as the development of severe back pain, would not be an exceptional circumstance. Similarly, it might be argued, that emergencies which were not of the same degree of extremity as those listed in para. 22(5)(a), such as transport strikes, are not 'exceptional' for this purpose.<sup>47</sup>

The Exceptional Circumstances Exception applies where exceptional circumstances prevent an individual from leaving the UK rather than prevent them from reaching their country of destination. As the CIOT has pointed out:-

'Someone in the UK at the time of the Arab Spring might have been prevented from going back to their home in Libya. But there would be nothing to stop them taking a ferry to France.'

To what extent can circumstances which affect other people and which indirectly prevent one from travelling be taken into account? For example, would the exception apply if a brother or close friend were suddenly taken ill or a spouse or adult child were injured in an accident.

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<sup>46</sup> Para. 22(5)

<sup>47</sup> That seems to be HMRC's view. HMRC Guidance, Annex B, para. B20

The Revenue's Guidance seems to limit the Exceptional Circumstances Exception to circumstances primarily affecting a spouse, person with whom they are living as husband and wife, civil partner or dependent child,<sup>48</sup> although there seems to be no basis in the legislation for that limitation.

Paragraph 23(1) provides the obverse of the Basic Day Counting Rule in that if an individual is not present in the UK at the end of a day, that day does not count as a day spent by them in the UK. This is expressly subject, however, to a rule which deems certain days to count as days spent in the UK (the Deeming Rule). This rule applies where the individual:-

- (a) has at least three UK ties for a tax year;
- (b) 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 day is more than 30;  
and
- (c) he was resident in the UK for at least one of the three preceding tax years.<sup>49</sup>

Where para. 23 applies, the excess of the number of days falling within (b) is counted as time spent in the UK.<sup>50</sup> The Deeming Rule does not apply in determining the number of ties that an individual has for the purpose of determining whether the Deeming Rule applies.<sup>51</sup>

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<sup>48</sup> See HMRC Guidance, Annex B, paras. B11 & B12

<sup>49</sup> Para. 23(3)

<sup>50</sup> Para. 23(4)

<sup>51</sup> Para. 23(5)

## *Home*

The use of the concept of a ‘home’ in the SRT has been the subject of much criticism from the professional bodies. The legislation contains no exhaustive definition of what is a ‘home’. The legislation only provides that certain things can be a ‘home’ and other things not.<sup>52</sup> In ordinary usage the word is of wide and uncertain ambit. It will be for the Courts to determine on the facts whether a place is a person’s home using its normal meaning.

Paragraph 25(1) provides that a ‘home’ can be a building, part of a building or a vehicle, vessel or structure of any kind. Arguably, it is implicit in para 25(2) that there must, however, be a sufficient degree of permanence or stability about the individual’s arrangements there for the place to count as his home (or one of his homes).

Under para 25(3), somewhere used by an individual periodically as nothing more than a holiday home or temporary retreat (or something similar) will not count as his home. It is not necessary for the individual to have any legal estate or interest in a place for it to be his home.<sup>53</sup> Paragraph 25(5) provides that a place ‘does not continue to count as [the individual’s home] merely because [he] continues to hold an estate or interest in it after [he] has moved out (for example, if [the individual] is in the process of selling it or has let or sub-let it, having set up home elsewhere).’

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<sup>52</sup> Para. 25

<sup>53</sup> Para. 25(4)

The imprecision of the concept of a home is a major cause of uncertainty in the application of the SRT requiring particular care when advice is being given on residence.

### ***Work***

‘Work’ is not actually defined in the legislation but para 26, which is headed ‘work’ defines when an individual ‘is considered to be “working” (or “doing work”).’ An individual is working at any time when he is doing something:-

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

‘Employment’ is defined in para 145 which incorporates the definition found in ITEPA 2003 ss.4 and 5. The meaning of a ‘trade’ is extended to include:-

- (a) a profession or vocation;
- (b) anything that is treated as a trade for income tax purposes; and
- (c) the commercial occupation of woodlands.<sup>54</sup>

In determining whether something is being done in the performance of duties of an employment, one has to consider whether if the individual received value for doing the thing, it would fall within the definition of employment income in ITEPA 2003 s.7.<sup>55</sup> Likewise, in determining whether something is being done in the course of a trade, one must consider whether, if expenses were incurred by the individual in doing

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<sup>54</sup> Para. 145

<sup>55</sup> Para. 26(2)

the thing, those expenses would be deductible in calculating the profits of the trade for Income Tax purposes.<sup>56</sup>

Travelling time counts as time spent working provided:-

- (a) the cost of the journey, if it were incurred by the individual, could be deducted in calculating his earnings from that employment or in calculating the profits of the trade, or
- (b) the individual does something else during the journey that would itself count as work in accordance with para. 26.<sup>57</sup>

Time spent undertaking training counts as time spent working in certain circumstances.<sup>58</sup> In relation to an employee the training time counts where the training is provided or paid for by the employer and is undertaken to help the employee in performing duties of his employment.<sup>59</sup> For individuals carrying on a trade, training counts as work provided the cost of the training could be deducted in calculating the profits of the trade for Income Tax purposes.<sup>60</sup>

It should be noted that a voluntary post for which an individual has no contract of service does not count as an employment for the purposes of the SRT.<sup>61</sup>

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<sup>56</sup> Para. 26(3)

<sup>57</sup> Para. 26(4)

<sup>58</sup> Para. 26(5)

<sup>59</sup> Para. 26(5)(a)

<sup>60</sup> Para. 26(5)(b)

<sup>61</sup> Para. 26(8)



## **Where Work is Performed**

Paragraph 27 provides a general rule that work is treated as done where it is actually done, regardless of where the employment is held or the trade is carried on subject to two exceptions:-

- (a) work done by way of or in the course of travelling to or from the UK by air or sea or via a tunnel under the sea is assumed to be done overseas even during the part of the journey in or over the UK;
- (b) travelling to or from the UK starts when the individual boards the aircraft, ship or train that is bound for a UK destination or overseas, and ends when the individual disembarks from that aircraft, ship or train.

So an individual travelling to the UK to attend a meeting in performance of the duties of his employment on a flight from Paris to Heathrow will be working overseas until they disembark at Heathrow. It will be noticed that this rule does not apply to those driving a vehicle, bicycling or walking. So if an individual takes a taxi from the Republic of Ireland to Northern Ireland in the performance of the duties of their employment they will begin to work in the UK as they cross the border.

This rule does not apply to an individual with a relevant job on board a vehicle, aircraft or ship.<sup>62</sup>

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<sup>62</sup> Para. 27(4)

### **Calculation of the Reference Period**

To satisfy either the Third Automatic UK Test or the Third Automatic Overseas Test an individual must work sufficient hours which are calculated by reference to a 'reference period'. The reference period takes account of reasonable amounts of annual leave, parenting leave and sick leave and what are called 'non-working days embedded within a block of leave' taken within the given period.

What is reasonable will be assessed having regard to (amongst other things) the nature of the work and the country or countries where the individual is working.<sup>63</sup> Periods of absence from work other than those specified, such as compassionate leave, other leave or agreed ad hoc leave, will not be deducted.

The legislation provides when non-working days are embedded within a block of leave. These provisions are restrictively drawn because they will not apply where the number of leave days which precede the putative embedded days and which succeed those days is less than six. They also do not take account of non-working days preceding and following a period of leave; for example, no reduction would be made for the weekends either side of ten days of annual leave covering two consecutive working weeks. It is only the weekend in the middle of the ten days that is taken into account. Nor do the provisions deal adequately with the self-employed.

There is a limited relief where an individual changes employments during the period. Intervals may be ignored if:-

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<sup>63</sup> Para. 28(4)

- (a) the individual changes employment in the period;
- (b) there is a gap between the two employments; and
- (c) the individual does not work at all at any time between the two employments.<sup>64</sup>

Where it applies, the number of days in the gap may be deducted from the reference period subject to a maximum of 15 days in respect of any one gap.<sup>65</sup> There is a further restriction of 30 days for the total reduction in respect of all such gaps.<sup>66</sup>

### **Relevant Jobs on Board Vehicles, Aircraft or Ships**

An individual has a 'relevant' job on board a vehicle, aircraft or ship if condition A and condition B are met.<sup>67</sup> Condition A is that the individual either:-

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

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<sup>64</sup> Para. 28(8)

<sup>65</sup> Para. 28(9)(a)

<sup>66</sup> Para. 28(9)(b)

<sup>67</sup> Para. 30

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

### **Anti-Avoidance**

Part 4 of Sch 45 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. The provisions will apply if the period of temporary non-residence is five years or less. The temporary non-residence rules, which applied before the introduction of the SRT for capital gains tax purposes, are harmonised with the new income tax rules.

## **ABOLITION OF ORDINARY RESIDENCE**

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

Prior to 2013/14 individuals who were not ordinarily resident in the UK were taxed on the remittance basis on income from foreign employment duties where the income was paid by the UK employer provided the individual intended to leave the UK within three years of arrival. This was known as ‘overseas work day relief’. This relief has now been put on a statutory footing and is available to all non-domiciled individuals arriving in the UK who have not been resident in any of the previous three tax years.<sup>68</sup>

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<sup>68</sup> Sch. 46, paras. 9 & 10

### **Transitional Election**

An individual considering their residence status for the tax years 2013/14, 2014/15, 2015/16 in respect of the First, Second and Fourth and Fifth Automatic Overseas Tests, the Fourth Automatic UK Test, the Sufficient Ties Test, the Split Year Rules and the temporary non-residence rules 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.

Such 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 (a 'pre-commencement year') by reference to the SRT rather than in accordance with the prior law.<sup>69</sup> The election will not change an individual's actual tax residence 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. It must be made by the first anniversary of the end of that year in respect of which the election is to apply or, if the year is a split year, the first anniversary of the end of the 'relevant year'. The relevant year is the year in respect of which the individual's residence is actually to be determined rather than the pre-commencement year to which, under the election, the SRT is to be applied only for the purposes of determining the individual's residence for the later, relevant year. For example, an individual wishing to make an election

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<sup>69</sup> Para. 154

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 6<sup>th</sup> April 2015.

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

If one is to apply the SRT to the fiscal years 2010/11 – 2012/13, one needs to know the individual's residence status for 2007/08 - 2009/10. To apply the SRT to 2007/08 – 2009/10 one needs to know the individual's residence status for 2004/05 – 2006/07 and so on, back to his fiscal year of birth. Under para. 154 one can apply the SRT to any, or all, of the years which are relevant to determining an individual's residence status for the fiscal year in relation to which the election is made.<sup>70</sup>

As the election may be made in respect of any 'one or more pre-commencement years,' it is possible to opt for a mixture of bases, applying the old rules to some years and the SRT to others according to which basis provides the more favourable result.<sup>71</sup>

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<sup>70</sup> It is not clear whether HMRC accept that this is the case. *Guidance* para 8.1

<sup>71</sup> Para. 154(3)

## EXAMPLE

### The Situation

Mr A wishes to determine whether he is UK resident in 2013/14.

In 2013/14 he spends 60 days in the UK and he has three UK Ties. If he has been UK resident for any of the 3 years preceding 2013/14, he will be UK resident in that year because the number of Ties which will be sufficient for him to meet the Sufficient Ties Test will be 3.<sup>72</sup> If he is not resident in any of those 3 preceding years, he will not be UK resident because the number of Ties which will be sufficient will be 4.<sup>73</sup>

Mr A was not actually resident in the UK in 2011/2012 and 2012/13 under the law in force in those years and would also have been non-resident in those years if the SRT had applied.

In 2010/11, however, he was actually resident in the UK but if the SRT had applied in that year, he would not have been UK resident provided he had not been resident in the UK for any of the preceding 3 years (2007/08, 2008/09 and 2009/10). In 2008/09 and 2009/10 he was actually non-resident and would also not have been resident had the SRT applied. In 2007/08, however, he was actually non-resident under the rules in force at that time but he would have been UK resident if the SRT had applied.

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<sup>72</sup> See Chapter 21

<sup>73</sup> See Chapter 21

### **Analysis**

Mr A makes an election under para. 154 in respect of all tax years from 2008/09 to 2012/13 but not in respect of 2007/08.

One might think that Mr A need only make the election in respect of 2010/11, being the only year in which he was actually resident in the UK but in which he would have been non-resident if the SRT had applied. Such are the uncertainties of the law ruling before the introduction of the SRT, however, that it is very rare that applying the law as it was will give a result with the same degree of probability that arises from applying the SRT. For that reason it is wise to make the election in respect of years in which the two bases both result in the individual being non-resident.

Mr A must make his election before 6<sup>th</sup> April 2015.

### **Practical Areas of Difficulty**

Various areas of difficulty in the SRT have been identified, some of which have been criticised by the professional bodies and others. 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 test for working ‘sufficient hours’ including how the test will operate in various circumstances and its application in relation to the self-employed;
- the operation of the Split Year Treatment; and
- the application of the SRT to part-time workers.

This lecture is based on material in *M<sup>c</sup>Kie on Statutory Residence* which is published by CCH. For more details please visit [www.cch.co.uk/mckie](http://www.cch.co.uk/mckie) or call 0844 561 8166.