IBC CONFERENCE:

THE PRACTICAL APPLICATION OF THE STATUTORY RESIDENCE TEST

KEY CONCEPTS FOR PRACTITIONERS

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SECTION I

INTRODUCTION

1.1.1 The process which has resulted in the introduction of the Statutory Residence Test in the Finance Bill 2013 began with the announcement by Jane Kennedy on the debates of the Finance Bill 2008 that she ‘was not unsympathetic to the case being made for a statutory residence test’. The process of development quickly went off the rails when, for reasons which can still not be made public, the Government decided not to implement a test based on a simple arithmetical formula that 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 result is that Schedules 45 and 46 of the Finance Act 2013, which introduced the SRT and abolished Ordinary Residence, have in aggregate 306 paragraphs and run to 88 pages in the HMSO Edition of the Finance Act.

1.1.2 The result is that the legislation is very far from fulfilling the Government’s stated desire that:-

> ‘... the rules determining whether an individual is tax resident in the UK should be clear, objective and unambiguous.’

1.1.3 They are, in fact, in many areas opaque, subjective and capable of multiple interpretations. They are 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

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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.

1.1.4 Patrick Way, speaking at the IBC Conference 'Understanding the Statutory Residence Test' in January of this year, described HMRC's objective in creating a statutory test as being 'to enact the previous case law position in statutory form'. When one considers the horrid mess of the previous case law that is a bizarre objective. HMRC in dealing with taxpayers has a tactical advantage when legislation is uncertain. No individual taxpayer has the financial resources which the Government can command and so tax litigation is always weighted against the taxpayer. Have such considerations cannot have influenced HMRC in formulating the SRT?

1.1.5 The Government's Guidance, the most recent version of which was published on 28th August, mostly adds to the confusion. Of course, ambiguities in the legislation cannot be removed by any amount of Government guidance. One can, however, expect Guidance to summarise legislation accurately and even-handedly and to distinguish between an uncontroversial statement of the law and a practice based upon one of several possible applications of it. Most importantly, when dealing with areas of uncertainty, Guidance needs to show the process of reasoning by which it reaches its conclusions. The Guidance on the SRT fails in all of these areas.

1.1.6 In this lecture I have attempted to highlight some of the difficulties of construction of the key concepts (excluding the UK Ties) in Part 2 of the SRT Schedule which are of

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practical importance in giving advice on UK tax residence. They are only a small selection of the many points which could be made. The sheer complexity of the SRT means that many of the anomalies can only really be appreciated by looking at detailed examples in a way which would be extremely tedious in a public lecture. Our book contains a multitude of such examples but in this lecture I try to explain the nature of the anomalies and their significance in outline so that they can be examined in more detail later.

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SECTION II

‘DAYS SPENT’ AND ‘DAYS SPENT IN A PERIOD’

THE RELEVANCE OF WHETHER A DAY IS SPENT IN THE UK

2.1.1 Whether a day is spent in the UK is relevant to the First, Second, Third and Fourth Automatic Overseas Tests, to the First Automatic UK Test, to how many Ties must be satisfied to meet the Sufficient Ties Test, to the Family Tie and the 90-Day Tie and to Cases 1, 2, 3, 6 and 7 of the Split Year Rules.

THE BASIC DAY COUNT RULE

2.2.1 Paragraph 22(1) 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 [the individual] in the UK’.

2.2.2 The UK for the purposes of the SRT Schedule means the United Kingdom including its territorial sea. The sovereignty of a coastal state extends to the airspace over its territorial sea. It appears that the for the purpose of the SRT, therefore, a person is in the UK when he is on or under its territorial sea and, arguably, when he is in the airspace above it. It therefore appears that if he is on a plane or ship which strays into UK territorial waters or UK airspace at midnight he will be present in the UK. Because day

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count is so important there will be cases where it will be important to discover when exactly an individual left UK airspace and its international waters.

THE TRANSIT EXCEPTION: PARA 22(3)

2.3.1 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.

'...as a passenger ...'

2.3.2 The Transit Exception only applies where the individual arrives in the UK 'as a passenger'. There is no special definition of a 'passenger' so its usage in normal English will apply. The *SOED* gives a number of meanings for 'passenger' of which the most apposite is:-

> 'A traveller in or on a public or private conveyance; any occupant of such a conveyance other than the driver, pilot, crew, etc.'

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2.3.3 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[1] but it is less clear whether a person sailing his own boat or a captain of a ship will qualify.[2] One presumes that the formulation of the Transit Exception is primarily designed to stop commercial pilots and drivers benefitting from it but individuals who fly their own aeroplanes or helicopters to the UK or drive through the Channel Tunnel or across the border with the Republic of Ireland in order to catch a flight or other form of transport to another country will also be excluded.

<u>'The Next Day'</u>

2.3.4 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 leaves early on Monday morning the Transit Exception will not apply even if there were no flight from one's place of departure to the UK arriving on Sunday and no flight leaving the UK on that Sunday for one's destination.

<u>'... activities that are to a substantial extent unrelated to his passage through the UK'</u>

2.3.5 It appears from the Guidance, that it is 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 to the UK.

[1] It may be that HMRC might accept a looser construction treating a driver as also being a passenger although nothing in their published material suggests that that will be the case

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

2.3.7 The test is not whether the activities are part of the individual's passage to 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?

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

2.3.9 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? It seems to the speaker that 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 the speaker's view the purpose of the activities in question is highly relevant to whether or not the

[2] Neither 'driver' nor 'pilot' is an apt description of a solo sailor or the captain of a ship and the most apposite meaning of 'crew' given by the SOED is 'A body of people manning a ship, boat, aircraft, spacecraft, train etc; such people other than the officers. Also a person single-handedly manning a yacht etc'

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activities are related to the individual's passage through the UK and the question of whether the individual's activities concerned are related to his passage through the UK is primarily to be decided by reference to that purpose.

'Substantial Extent'

2.3.10 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 a substantial extent, so unrelated. It may be that the reason that the author of the *Guidance* 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 not. That, however, is mere speculation as the *Guidance* does not explain the reasoning leading to the conclusions in its examples.

Mixed Purposes

2.3.11 If, as we 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 or are not substantially related to the passage through the UK would be determined by the preponderance of purpose.

THE EXCEPTIONAL CIRCUMSTANCES EXCEPTION

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The Legislation (Paras. 22(4) – (6))

2.4.1 Paragraphs 22(4)-(6) gives the second exception (the 'Exceptional Circumstances Exception') to the Basic Day Count Rule and provides that a day does not count as a day spent by an individual, P, in the UK:-

> '(4) …. where
>
> (a) P would not be present in the UK at the end of that day but for exceptional circumstances beyond P's control that prevent P from leaving the UK; and
>
> (b) P intends to leave the UK as soon as those circumstances permit.
>
> (5) Examples of circumstances that may be "exceptional" are -
>
> (a) national or local emergencies such as war, civil unrest or natural disasters, and
>
> (b) a sudden or life-threatening illness or injury.
>
> (6) For a tax year-
>
> (a) the maximum number of days [which may be treated as days which do not count as days spent in the UK] in reliance on sub-paragraph (4) is limited to 60, and
>
> (b) accordingly, once the number of days within sub-paragraph (4) reaches 60 (counting forward from the start of the tax year), any subsequent days within that sub-paragraph, whether involving the same or

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different exceptional circumstances, will count as days spent by P in the UK.'

The Elements of the Exceptional Circumstances Exception

2.4.2 It may be seen that paras. 22(4) & (5) state the elements (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 para. 22(6). The Elements are:-

- the individual would not be present in the UK but for (the 'First Element');
- exceptional circumstances (the 'Second Element');
- beyond the individual's control (the 'Third Element')
- that prevent the individual from leaving the UK; (the 'Fourth Element') and
- the individual intends to leave the UK as soon as those circumstances permit (the 'Fifth Element').

2.4.3 The *Guidance* tends to elide these Elements so that it is difficult to discern the reasoning on which the *Guidance's* conclusions on its examples are based. The result is that the *Guidance* provides little help in construing the Elements of the Exception which present many difficulties of construction.

The First Element – 'would not be present ...'

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2.4.4 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 Second Element – 'Exceptional Circumstances'

The Dictionary Definition

2.4.5 If one looks at the *SOED* definition 'Exceptional' means, 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 argue 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.

2.4.6 As we have seen, para. 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. 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.[3]

The Third Element – 'Beyond the Individual's Control'

[3] It is notable that all of the examples given in the *Guidance* are in respect of very extreme circumstances. *Guidance* Annex B, paras. B8-B17

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2.4.7 It is the exceptional circumstances which must be beyond the individual's control. At what point must one judge whether they are beyond his control? The answer must surely be at the point in time at which one determines whether or not the circumstance prevents the individual leaving the UK.

<u>The Fourth Element-'... that Prevent P from Leaving the UK'</u>

2.4.8 It has been seen that 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 rather than if he is prevented from leaving the UK. As the CIOT pointed out in their *CIOT 2012 Response*:-

> '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.'[4]

2.4.9 Of course, the Tribunal and the Court may correct this fault by applying a radically purposive interpretation and, in practice, HMRC may not take the point (the *Guidance* does not seem to do so).[5] Such uncertainty of construction, however, does not meet the SRT's purpose of providing rules which are 'clear, objective and unambiguous.'[6]

[4] The *CIOT 2012 Response* para. 13.6
[5] *Guidance* Annex B, paras. B16 and B17 and Example B5

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Being Prevented from Leaving the UK by an Exceptional Circumstance that has Brought One to the UK

2.4.10 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.

<u>The Fifth Element: The Individual Intends to Leave the UK as soon as those Circumstances Permit</u>

2.4.11 The legislation does not expressly state the time at which the intention to leave the UK must exist. The Guidance, without saying so expressly, seems to assume that the relevant intention is the intention existing on each day in relation to which it is to be determined whether the Exceptional Circumstances Exception applies. That does seem to be consistent with the legislation which is entirely directed at considering the situation ruling on a particular day but it is particularly harsh. The Guidance contains an example, Examples B3 & B4, in which 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 Claude accepts an invitation from his nephew in Wales to stay with him when he is discharged from hospital which happens in January. According to the Guidance, and this seems to be correct, 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. Claude seems to be prevented from leaving the UK by the physical result of his accident until he is

[6] Foreword to the *June 2012 ConDoc*

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discharged from hospital in January and it seems that Claude changes his plans 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.

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SECTION III

HOME

THE RELEVANCE OF THE CONCEPT

3.1.1 Whether and where an individual has a 'home' or 'homes' is fundamental to the SRT forming a key element of the Second Automatic UK Test, the Fourth Automatic UK Test, the Accommodation Tie and Cases 2, 3, 4, 7 and 8 of the Split Year Rules.

3.1.2 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 those homes are.

'HOME' IN ORDINARY ENGLISH USAGE

3.2.1 There is no exhaustive definition of a 'home' in the SRT. The only definitional provisions (in para. 25) 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 statutes and cases concerning Revenue, and many other areas of, law.

THE MEANING OF 'HOME' IN THE SRT

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3.3.1 Our conclusions on the meaning of 'home' in the SRT, based on that exhaustive examination, are set out below. It should be emphasised that because it is clear that the meaning of 'home' in ordinary usage is heavily dependent upon its context in the absence of any decided cases on its meaning in the *SRT Schedule* any statements as to its meaning must be extremely tentative.

3.3.2 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 the Court will interfere only if it is clearly a view at which no reasonable Tribunal could have arrived. The Tribunal is unlikely to articulate principles by which to determine 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 principles to apply to the primary facts, there will be no standard by which to judge the correctness of the decision. That is not to say that the higher Courts will not interfere with the FtT's findings on the matter but, whether or not they will do so is likely to be unpredictable.

3.3.3 To borrow a phrase of Lord Wilson's in the Supreme Court describing the approach necessary to determine residence before the introduction of the SRT,[7] determining

[7] *R (on the Application of Davies and another) v HMRC; R (on the Application of Gaines-Cooper) v HMRC* [2011] UKSC 47 at para. 20

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whether, and where, a person has his home is likely to require of the Tribunal a 'multi-factorial inquiry'.[8]

3.3.4 It is clear 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. Para. 25 also tells us that:-

(a) a 'home' can be a building, a part of a building, a vehicle, vessel or structure;[9]

(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;[10]

(c) a place may count as a 'home' of an individual whether or not the individual holds any estate or interest in it;[11]

(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.[12]

3.3.5 In the speaker's 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

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8 It is ironic that the SRT was introduced in response to a general recognition that the uncertainty resulting from the need to undertake a multi-factorial enquiry in order to determine an individual's residence was damaging the UK economy.

9 See para. 25(1)

10 See para. 25(3)

11 See para. 25(4)

12 See para. 25(5)

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nothing more that sleep at night for a period of just a few weeks would be the individual's 'home'.

3.3.6 In deciding whether or not a putative home is a 'home' within the very broad range, the Tribunal is likely to have regard to such factors as:-

(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.

3.3.7 None of these features is likely to be determinative on its own of whether or not a putative home is a 'home'.

3.3.8 This is not an exhaustive list as 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 HMRC GUIDANCE

Introduction to the *Guidance* and the Meaning of 'Home'

3.3.9 The *Guidance*, in outlining the characteristics of a 'home', does little more than repeat paras. 25(1) and (2).[13] It gives examples,[14] 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 the conclusions as to whether the individuals in them have a 'home' and, if so, where it is. 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.

[13] *Guidance* Annex A, para. A9
[14] *Guidance* Annex A, paras. A9-A22

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<u>HMRC's View of What is a 'Home'</u>

3.3.10 As I have said, because the Guidance does not give the reasoning which leads to its statements in respect of the meaning of 'home' and to its conclusions on whether or not the facts in its examples constitute a 'home', it is of little practical use to an individual who wishes to determine whether HMRC are likely to regard his putative home as a 'home' or not. Nonetheless, we can extract from the Guidance some propositions which bear on the subject some of which are of limited use.

Putative Homes which HMRC seems to Consider can be Homes

3.3.11 HMRC seems to accept that, in respect of an individual, the following putative homes can be 'homes':-

- 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.[15]
- One where the individual 'lives' but from which he 'moves out' temporarily.[16]
- 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.[17]
- One which he cannot occupy because it is unavailable to him for a temporary period.[18]

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[15] *Guidance* Annex A para. A9 and Example A1
[16] *Guidance* Annex A, para. A11
[17] *Guidance* Annex A, para. A12
[18] *Guidance* Annex A para. A14

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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.[19]
- One which the individual does not 'own'.[20]

[19] *Guidance* Annex A Example A7
[20] *Guidance* Annex A para. A22

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SECTION IV

THE MEANING OF 'WORK': PARA 26

THE RELEVANCE OF 'WORK' TO THE SRT

4.1.1 The concept of 'work' 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.

THE LEGISLATIVE DEFINITION: PARA. 26

4.2.1 '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").' It provides:-

> '(1) P is considered to be "working" (or doing "work") at any time when P is doing something –
>
> (a) in the performance of duties of an employment held by P, or
>
> (b) in the course of a trade carried on by P (alone or in partnership).
>
> (2) In deciding whether something is being done in the performance of duties of an employment, regard must be had to whether, if value were received by P

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for doing the thing, it would fall within the definition of employment income in section 7 of ITEPA 2003.

(3) In deciding whether something is being done in the course of a trade, regard must be had to whether, if expenses were incurred by P in doing the thing, the expenses could be deducted in calculating the profits of the trade for income tax purposes.

(4) Time spent travelling counts as time spent working –

(a) if the cost of the journey could, if it were incurred by P, be deducted in calculating P's earnings from that employment under section 337, 338, 340 or 342 of ITEPA 2003 or, as the case may be, in calculating the profits of the trade under ITTOIA 2005, or

(b) to the extent that P does something else during the journey that would itself count as work in accordance with this paragraph.

(5) Time spent undertaking training counts as time spent working if –

(a) in the case of an employment held by P, the training is provided or paid for by the employer and is undertaken to help P in performing duties of the employment, and

(b) in the case of a trade carried on by P, the cost of the training could be deducted in calculating the profits of the trade for income tax purposes.

(6) Sub-paragraphs (4) and (5) have effect without prejudice to the generality of sub-paragraphs (2) and (3).

(7) Assume for the purposes of sub-paragraphs (2) to (5) that P is someone who is chargeable to income tax under ITEPA 2003 or ITTOIA 2005.

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(8) A voluntary post for which P has no contract of service does not count as an employment for the purposes of this Schedule.'

IS PARA. 26 AN EXHAUSTIVE DEFINITION?

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

4.3.2 The fact that para. 26 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 the terms of para. 26(1), construed in accordance with the remainder of para. 26 will not be 'working' (or doing 'work') regardless of whether it would fall within the ordinary use of that word or phrase.

4.3.3 A literal reading of para. 26(1), however, is not entirely incompatible with its being an inclusive definition. It provides that if the conditions in para. 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'.

4.3.4 The Guidance does not say whether HMRC consider para. 26 to be an exhaustive or inclusive definition of work.

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4.3.5 In my view the definition is exhaustive.

ACTIVITIES WHICH ARE NOT IN PERFORMANCE OF EMPLOYMENT DUTIES OR IN THE COURSE OF A TRADE

4.4.1 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, para. 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 one's management of one's investments (but not in the course of an investment dealing trade), or of a UK or overseas property business[21] including one in respect of commercial letting of furnished holiday accommodation,[22] and activities in respect of transactions in land.[23]

DOING SOMETHING IN THE PERFORMANCE OF DUTIES OF AN EMPLOYMENT: PARA. 26(1)(a)

4.5.1 When is an individual 'doing something in the performance of duties of an employment held by [him]'?

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[21] ITTOIA 2005 ss.264 and 265
[22] ITTOIA 2005 Part 3, Chapter 6
[23] ITA 2007 Part 13, Chapter 3

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4.5.2 The consequence of the definition of 'working (or doing "work")' in respect of an employment in para. 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 Schedule.*[24] 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 when an individual is working for the purposes of the *SRT Schedule*, therefore, will require a technical understanding of the application of the relevant employment law to the activities of the individual concerned.

The Interaction of Paras. 26(1)(a) and 26(2)

4.5.3 It is not clear how para. 26(2) interacts with para. 26(1)(a). Paragraph 26(2) does not say that if, on the hypothesis that value were received by the individual for the activity, that value would be employment income then 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 provide how regard is to be had to that fact.

[24] It is not clear that HMRC accept this (see the *Guidance* at para. 1.10 and its explanation there of Step 2 of para. 14(3))

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4.5.4 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 the purposes of ITEPA 2003 s.7 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 para. 26(2) was working. So there must be activities which fall within para. 26(2) yet which are not 'work' for the purposes of para. 26(1). On the other hand, at least some activities in respect of which value received under the para. 26(2) hypothesis would be employment income must fall within para. 26(1)(a) or otherwise para. 26(2) would be purposeless. One imagines that in most circumstances in which the para. 26(2) conditions are fulfilled, the Tribunal and the Court will find that the activity is 'work' within para. 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* has no discussion of this important issue.

4.5.5 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 in ITEPA 2003 s.7. Section 7 defines employment income for the purposes of the Tax Acts. That definition includes any amount treated as earnings under, *inter alia*, the benefits code found in ITEPA 2003, Part 3, Chapters 2 – 11. Chapter 10 of Part 3 brings into charge any 'employment-related benefits'[25] not otherwise charged under Part 3. 'Employment-related benefits' for this purpose means benefits which, *inter alia*, are provided by

[25] ITEPA 2003 s.201

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reason of the employment.[26] 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 in ITEPA 2003 s.7 we have to know whether that value is a benefit or facility of any kind which is provided by reason of an 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.

How could the Court correct the Legislation's Deficiency?

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

4.5.7 The Court could not simply assume that the value was provided under an employment contract because the breadth of the definition of employment income in ITEPA 2003 s.7 would then have the result that all or virtually all of the individual's actions would then fall within para. 26(2).

4.5.8 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 of the employment.' If, having made that assumption, the Court went on to look at the actual relations between the employer and the employee to answer

[26] ITEPA 2003 s.201(2)

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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 para. 26(2) would suggest that even activities which are clearly not part of the duties of an employment (such as our example of the unauthorised accessing of websites) fall within the definition of 'working'.

Passive Activities

4.5.9 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 could be. The *Guidance* gives the example of 'Paula'[27] who is said to be 'working' while on call. In respect of the self-employed, however, it gives the following example:[28]

> **'[*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.'

[27] *Guidance* Example 21
[28] *Guidance* para. 3.18

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4.5.10 The *Guidance* does not give any indication of how this conclusion 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?[29] 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 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 it's conclusion on the example of Paula.

Training Time –Para. 26(5)

4.5.11 Paragraph 26(5) treats certain time spent undertaking training as time spent 'working'. Whereas the test in respect of employees is a factual test (is the training provided or paid for by the employer and is it undertaken to help the individual in performing the duties of his employment?) the test in respect of a trader is partly an hypothetical one (could its cost be deducted in calculating the profits of the trade carried on by the individual for Income Tax purposes?). It should also be noted that in respect of the training of employees, if the training is not provided by the employer or is not paid for by the employer it cannot count as time spent 'working' unless it falls within the general provisions of para. 26(1). So where, as in many industries, time is spent in training

[29] It might be argued that Paula is 'doing something' simply by complying with the duties of her employment in contrast to a trader who cannot owe a duty to himself. If that argument were accepted, however, employees who owed a duty of confidentiality to their employer or a duty unlimited in time to use their best endeavours on behalf of their employing company and who did not breach those duties would be working continuously

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which is provided, without charge by a person other than the employer,[30] it cannot be counted 'as time spent working' under para. 26(5).

4.5.12 In respect of an employment, time spent undertaking training counts as time spent 'working' only if it is to 'help [the individual] in performing duties of the employment'.[31] If activities are not contractually required, therefore, however useful they may be to the employer, training in respect of them will not be 'work' unless undertaking the training is itself a contractual requirement.

VOLUNTARY POSTS – PARA. 26(8)

4.6.1 Finally, para. 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.[32] 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 para. 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 Schedule* if it were a 'voluntary post'.

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[30] As is often done in wine distribution for marketing reasons

[31] Para. 26(5)(a)

[32] *Fall (Inspector of Taxes) v Hitchin* [1973] 1 All ER 368 @ p. 374

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4.6.2 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.[33] 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'.

[33] A director of a company governed by the Companies Act 2006 for example, is subject to the general duties of a fiduciary nature set out in CA 2006 ss.171 – 177

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SECTION V

THE LOCATION OF WORK: PARA. 27

THE RELEVANCE OF THE LOCATION OF WORK

5.1.1 The location of work forms a key component of the Third Automatic Overseas Test, the Fifth Automatic Overseas Test, the Third Automatic UK Test, the Work Tie and Cases 1, 2, 5, 6 and 7 of the Split Year Rules.

THE STATUTORY PROVISIONS: PARA. 27

5.2.1 The location of work is defined in para. 27 which provides:-

> '(1) Work is done where it is actually done, regardless of where the employment is held or the trade is carried on by P.
>
> (2) But 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.
>
> (3) For these purposes, travelling to or from the UK is taken to -
>
> (a) begin when P boards the aircraft, ship or train[34] that is bound for a destination in the UK or (as the case may be) overseas, and
>
> (b) end when P disembarks from that aircraft, ship or train.

[34] The *SRT Schedule* does not contain a definition of an aircraft or a train but s.145 defines a ship as including 'any kind of vessel (including a hovercraft)

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(4) This paragraph is subject to express provisions in this Schedule about the location of work done by people with relevant jobs on board vehicles, aircraft or ships.'

Para. 27(2)

5.2.2 Paragraph 27(2) provides that 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 which is in or over the UK. So a businessman 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 he disembarks at Heathrow.[35]

5.2.3 It will be noticed that this rule does not apply to those driving a vehicle, bicycling or walking. So if a businessman takes a taxi from the Republic of Ireland to Northern Ireland in the performance of the duties of his employment he will begin to work in the UK as he crosses the border.[36]

[35] This rule is illustrated in Examples 18 and 19 at para. 3.17 of the *Guidance*

[36] The taxi driver himself, though, would hold a relevant job. For the purposes of the Work Tie (see Chapter 24) the location of his work would be determined by reference to the special rules in para. 36

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SECTION VI

RULES FOR CALCULATING THE REFERENCE PERIOD: PARA. 28

THE RELEVANCE OF THE RULES FOR CALCULATING THE REFERENCE PERIOD

6.1.1 The reference period (the 'Reference Period') is used to determine whether the Third Automatic Overseas Test applies and whether the Third Automatic UK Test applies.

The Five Step Calculations

The Third Automatic Overseas Test's Five Step Calculation

6.1.2 As we shall see, 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.[37] Whether he 'works sufficient hours overseas' in the fiscal year is found by applying five steps.[38] They are:-

> '**Step 1**
>
> Identify any days in year X on which P does more than 3 hours' work in the UK, including ones on which P also does work overseas on the same day.
>
> The days so identified are referred to as "disregarded days".
>
> **Step 2**

[37] Referred to in the *SRT Schedule* as 'Year X'

[38] Para. 14(3)

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Add up (for all employments held and trades carried on by P) the total number of hours that P works overseas in year X, but ignoring any hours that P works overseas on disregarded days.

The result is referred to as P's "net overseas hours".

Step 3

Subtract from 365 (or 366 if year X includes 29 February) -

(a) the total number of disregarded days, and

(b) any days that are allowed to be subtracted, in accordance with the rules in paragraph 28 of this Schedule, to take account of periods of leave and gaps between employments.

The result is referred to as the "reference period".

Step 4

Divide the reference period by 7. If the answer is more than 1 and is not a whole number, round down to the nearest whole number. If the answer is less than 1, round up to 1.

Step 5

Divide P's net overseas hours by the number resulting from step 4.

If the answer is 35 or more, P is considered to work "sufficient hours overseas" as assessed over year X.'

6.1.3 It will be seen that Steps 1 and 3 are steps leading to the determination of the Reference Period.

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6.1.4 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.

THE STATUTORY RULES FOR CALCULATING THE REFERENCE PERIOD: PARA. 28

6.2.1 Paragraph 28 provides the rules which apply in calculating the Reference Period under Step 3 of para. 14(3) for the purposes of the Third Automatic Overseas Test and under Step 3 of para. 9(3) for the purposes of the Third Automatic UK Test. Paragraph 28 provides:-

> '(1) This paragraph applies in calculating the "reference period" (which is a step taken in determining whether P works "sufficient hours in the UK" or "sufficient hours overseas" as assessed over a given period of days).
>
> (2) The number of days in the given period may be reduced to take account of -
>
> (a) reasonable amounts of annual leave or parenting leave taken by P during the period (for all employments held and trades carried on by P during the period, whether in the UK or overseas),
>
> (b) absences from work at times during the period when P is on sick leave and cannot reasonably be expected to work as a result of the illness or injury in question, and

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(c) non-working days embedded within a block of leave for which a reduction is made under paragraph (a) or (b).

(3) But no reduction may be made in respect of any day that is a “disregarded day” (see paragraphs 9(2) and 14(3) in Part 1 of this Schedule).

(4) For any particular employment or trade, “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.

(5) Non-working days are “embedded within” a block of leave only if there are, as part of that block of leave -

(a) at least 3 consecutive days of leave taken before the non-working day or series of non-working days in question, and

(b) at least 3 consecutive days of leave taken after the non-working day or series of non-working days in question.

(6) A “non-working day” is any day of the week, month or year on which P -

(a) is not normally expected to work (according to P’s contract of employment or usual pattern of work), and

(b) does not in fact work.

(7) In calculating the reductions to be made under sub-paragraph (2) -

(a) if it turns out, after applying sub-paragraph (3), that the reasonable amounts of annual leave or parenting leave or, as the case may be, the absences from work on sick leave do not add up (across the period) to

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a whole number of days, the number in that case is to be rounded down to the nearest whole number, but

(b) any such rounding is to be ignored for the purposes of sub-paragraph (2)(c).

(8) If -

(a) P changes employment during the given period,

(b) there is a gap between the two employments, and

(c) P does not work at all at any time between the two employments, the number of days in the given period may be reduced by the number of days in that gap.

(9) But -

(a) if the gap lasts for more than 15 days, only 15 days may be subtracted, and

(b) if there is more than one change of employment during the period, the maximum number of days that may be subtracted under sub-paragraph (8) for all the gaps in total is 30.'

ANNUAL LEAVE & PARENTING LEAVE: PARA. 28(2)(a)

Annual Leave

6.3.1 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. Although 'annual leave' is a term widely used in areas of law other than

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taxation,[39] it has no general statutory definition, nor any general statutory definition for taxation purposes. 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.'[40] The most apposite meaning of 'annual' which it gives is 'reckoned, payable or engaged by the year.' In the Authors' view the term must indicate permission to be absent from work 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 the Authors' 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.

Public Holidays

6.3.2 How are public holidays to be treated? There is no general right not to work on Public Holidays in the UK[41] although a worker's employer may, by notice, require the worker to take annual leave on particular days including public holidays.[42] This would suggest that when an employment contract gives a right to paid leave on public holidays, that is

[39] For example, it is widely used in the Working Time Regulations 1998 (SI 1998/1833). For an example in primary legislation see Banking and Diligence Etc (Scotland) Act 2007 s.200(2)

[40] Plainly that definition can have little relevance to a sole trader who needs nobody's permission to cease working. Paragraph146 provides a special definition of 'annual leave' and 'parenting leave' in respect of an individual who carries on a trade

[41] See Tolley's Employment Law Service para W7022 and the Working Time Regulations 1998 (SI 1998/1833) Regs. 13 & 13A

[42] Working Time Regulations 1998 (SI 1998/1833) Reg. 15

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'leave' for the purpose of the SRT and 'annual leave' within para 28(2)(a) because public holidays are set by reference to the calendar year.

6.3.3 Under the *Draft December 2012 SRT Schedule* the equivalent provisions to para. 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.[43] There is no equivalent provision in the *SRT Schedule*. The *Guidance* seems to assume, however,[44] that what it calls 'bank holidays' are not 'annual leave' for the purposes of the SRT and in respect of 'public holidays' it says at para. 1.20:-

> '... public holidays might also be regarded as a non-working day if you are not normally expected to work on them.'

'... reasonable amounts'

6.3.4 We have seen that para. 28(4) 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.'

[43] *Draft December 2012 SRT Schedule* para. 27(3)
[44] See Example 2 at para. 1.21 of the *Guidance*

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6.3.5 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.

6.3.6 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?

6.3.7 A similar issue arises in determining how, under para. 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?

<u>Embedded Days</u>

Why are Special Provisions for Embedded Days Necessary?

6.3.8 The Third Automatic Overseas Test and the Third Automatic UK Test do not expressly take account of weekends and public holidays. 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

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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 and 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 between the *Draft December 2012 SRT Schedule* and the Finance Bill 2013 and an important element of those revisions was the introduction of the provisions relating to non-working days 'embedded within' a block of leave. As we have seen, paras. 28(5) and (6) provide:-

> '(5) Non-working days are "embedded within" a block of leave only if there are, as part of that block of leave -
>
> (a) at least 3 consecutive days of leave taken before the non-working day or series of non-working days in question, and
>
> (b) at least 3 consecutive days of leave taken after the non-working day or series of non-working days in question.
>
> (6) A "non-working day" is any day of the week, month or year on which P -
>
> (a) is not normally expected to work (according to P's contract of employment or usual pattern of work), and
>
> (b) does not in fact work.'

Difficulties

6.3.9 There are a number of difficulties with these provisions.

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6.3.10 Does one determine what is 'expected' both from the individual's contract of employment if he has one and from his usual pattern of work or does one determine it only from the individual's employment contract if he has one and from his 'usual pattern of work' if he has not? If the latter were the correct construction, why has the draftsman not made that explicit by providing a definition of a 'non-working day' in respect of an employment and a further definition of a non-working day in respect of trading activities so as to mirror the structure of the definition of work in para. 26?

6.3.11 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 five step calculation which is used to determine whether an individual works sufficient hours.

6.3.12 Is a 'block of leave' in para. 28(5), necessarily the same as 'a block of leave for which a reduction is made under paragraph (a) or (b)' which is referred to in para. 28(2)(c)? If it is not, one could have non-working days 'embedded' within days some of which do not reduce the 'given period' under para. 28(2) because although those days are leave they are not all annual leave, parenting leave or sick leave under para. 28(2)(a) or (b).

6.3.13 If that were correct, it would still not be possible to reduce the given period in respect of non-working days embedded in a block of leave none of which was leave within para. 28(2)(a) and (b) because the reduction for non-working days under para. 28(2)(c) is for:-

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> 'non-working days embedded within a block of leave for which a reduction is made under paragraph (a) or (b).'

6.3.14 It might, however, be possible to make a reduction for non-working days embedded within a block of leave some of which were leave within para. 28(2)(a) or (b) and some of which were not.

6.3.15 In the Authors' view, the most natural reading of para. 28(5) is that 'non-working days will be "embedded within" a block of leave' even if that leave is not leave within para. 28(2)(a) or (b) but that the requirement of 28(2)(c) is that the non-working days must be embedded within a block of leave for which '*a reduction is made under paragraph (a) or (b)* [emphasis added]' in respect of all and not just part of the leave.[45] The matter is, however, not beyond doubt.

6.3.16 Where one has a period which satisfies the conditions of para. 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 paras. 28(5)(a) and (b)? The fact that para. 28(5) takes the form of defining when 'non-working days are "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.

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Other Reasons for Special Leave

6.3.17 As we have seen, reductions under para. 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.

RELIEF FOR GAPS BETWEEN EMPLOYMENTS: PARA. 28(8) & (9)

6.4.1 Paragraph 28(8) and (9) provides a very limited relief where an individual changes employments during the period:-

> '(8) If -
>
> (a) P changes employment during the given period,
>
> (b) there is a gap between the two employments, and
>
> (c) P does not work at all at any time between the two employments, the number of days in the given period may be reduced by the number of days in that gap.
>
> (9) But -

[45] It appears, although it is not entirely clear that this is the case, that HMRC shares this view (see the *Guidance*, para. 1.15 third bullet point)

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(a) if the gap lasts for more than 15 days, only 15 days may be subtracted, and

(b) if there is more than one change of employment during the period, the maximum number of days that may be subtracted under sub-paragraph (8) for all the gaps in total is 30.'

6.4.2 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 calculations made to determine whether the first conditions of the Third Automatic Overseas Test and the Third Automatic UK Test are met. 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.

Gaps Straddling the Beginning or End of the Given Period

6.4.3 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. It appears from the *Guidance*, however, that HMRC does not currently take this point. Para 1.11 of the *Guidance* says:-

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> 'If the gap spans the end of the tax year you may subtract from your reference period the part of the gap that falls within the tax year, subject to the other conditions above.'

6.4.4 That view is not a correct construction of the legislation but it may be that it is of sufficient precision to found a claim, in judicial review proceedings, that HMRC has created a legitimate expectation that it would not resile from it in respect of periods in which it allows it to remain uncorrected.

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SECTION VII

SIGNIFICANT BREAKS FROM THE UK OR OVERSEAS WORK: PARA. 29

THE RELEVANCE OF THE PHRASE A 'SIGNIFICANT BREAK' FROM OVERSEAS OR UK WORK

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

THE RELEVANT LEGISLATION

7.2.1 Paragraph 29 defines when there is a 'significant break from UK work' and when there is a 'significant break from overseas work' as follows:-

'(1) There is a "significant break from UK work" if at least 31 days go by and not one of those days is -

(a) a day on which P does more than 3 hours' work in the UK, or

(b) a day on which P would have done more than 3 hours' work in the UK but for being on annual leave, sick leave or parenting leave.

(2) There is a "significant break from overseas work" if at least 31 days go by and not one of those days is -

(a) a day on which P does more than 3 hours' work overseas, or

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(b) a day on which P would have done more than 3 hours' work overseas but for being on annual leave, sick leave or parenting leave.'

ARE THE DEFINITIONS OF PARA. 29 EXHAUSTIVE?

7.3.1 Does the use of the term 'break' in para. 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 para. 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 para. 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 para. 29. In my view, the definitions in para. 29 are exhaustive and, therefore, there can be a significant break for the purposes of para. 29 even where there is no period of work following a non-working period in the period concerned. It may be worth considering advancing the opposing argument, however, in the appropriate circumstances.

A DAY ON WHICH [THE INDIVIDUAL] DOES MORE THAN THREE HOURS WORK OVERSEAS OR IN THE UK AS THE CASE MAY BE

7.4.1 We have seen that travelling can count as work and, therefore, that it is possible to work overseas or in the UK on a day when very little actual work takes place.

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A DAY ON WHICH [AN INDIVIDUAL] WOULD HAVE DONE MORE THAN THREE HOURS WORK [OVERSEAS OR IN THE UK AS THE CASE MAY BE] BUT FOR BEING ON ANNUAL LEAVE ETC.

‘But for’

7.5.1 The requirement that the individual ‘would have done more than 3 hours’ work [overseas or in the UK as the case may be] requires a counterfactual hypothesis. What would the employee have been doing had he not been on leave? That is a question of fact, and like all questions of fact in civil matters, it is to be determined on the balance of probabilities. It may be that in many cases it will be clear what the individual would have been doing had he not been on leave but in others it will not.

Annual Leave, Sick Leave or Parenting Leave

7.5.2 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.

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SECTION VIII

RELEVANT JOBS ON BOARD VEHICLES, AIRCRAFT OR SHIPS

THE RELEVANCE OF THE PHRASE

8.1.1 The phrase 'relevant job on board a vehicle, aircraft or ship'[46] is used in the Third Automatic Overseas Test, the Third Automatic UK Test and the Work Tie. 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.[47]

8.1.2 The Work Tie contains a special rule, which applies only for the purposes of that Tie, that where an individual makes a cross border trip which begins in the UK, the individual is deemed to do more than 3 hours work in the UK on that day. Where such a trip ends in the UK the individual is deemed to do fewer than 3 hours work in the UK on that day.[48]

THE STATUTORY DEFINITION: PARA. 30

8.2.1 The definition of a Relevant Job is found in para. 30:-

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[46] In this lecture we use 'Relevant Job' to mean a relevant job on board a vehicle, aircraft or ship within para. 30

[47] Paras. 9(3) & 14(4)

[48] Para. 36.

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‘(1) P has a “relevant” job on board a vehicle, aircraft or ship if condition A and condition B are met.

(2) Condition A is that P either -

(a) holds an employment, the duties of which consist of duties 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.

(3) 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 at sea, in the air or on land (referred to as “cross border trips”).

(4) Sub-paragraph (2)(b) is not satisfied unless, in order to do the work or provide the services, P has to be present (in person) on board the vehicle, aircraft or ship while it is travelling.

(5) 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).’

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DETERMINING WHETHER AN INDIVIDUAL HAS A RELEVANT JOB AT A PARTICULAR POINT IN TIME

8.3.1 Under the Third Automatic Overseas Test and the Third Automatic UK Test one has to determine whether or not the individual concerned has a Relevant Job 'at any time in' the fiscal year concerned. So one has to determine when an individual has a Relevant Job at a series of points in time over a period. It can be seen, that a person has a Relevant Job if both of two conditions, Condition A and Condition B, are satisfied. Neither condition refers to a period over which it is to be determined whether it is met. It appears, therefore, that in order to determine whether at any particular point in time, an individual has a Relevant Job one has to ask whether at that point in time these two conditions are satisfied.

CONDITION A

Condition A: Employments

8.4.1 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.'[49]

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Does One Look at the Duties Ruling at a Particular Point in Time?

8.4.2 Are the duties of the employment to be determined by reference to what an employee has a duty to do at the point in time when the duties are to be determined? Does one determine the duties:-

(a) ruling at that particular point in time (the 'First Construction'); <u>or</u>

(b) by reference to the general duties of the employment which the employee holds at that particular time (the 'Second Construction')?

8.4.3 The first construction would have the most peculiar results. If one considered a lorry driver, for example, if he is driving his lorry in France he cannot simultaneously be under a duty to be doing it in the UK. If you determine the duties of an employment at a particular moment, therefore, the entirety of his duties would be to drive his lorry in France. He may, however, 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[50] 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 duties which rule at a particular moment in time 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.

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[49] Para. 30(2)(a)
[50] Para. 30(3)

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The Meaning of 'Consist'

8.4.4 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'.[51] This is subject only to para. 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 the Authors' view, 'consist' here must mean 'consist wholly of.' That is because, if 'consist' were construed as to 'consist wholly or partly of', para. 30(5) would be redundant because incidental duties within para. 30(5) would not have prevented the duties of the employment consisting of 'duties to be performed on board a vehicle, aircraft or ship'.

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

8.4.6 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.

Identifying When Employments Change and When the Duties of an Employment Change

[51] Para. 30(2)(a)

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8.4.7 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.

8.4.8 Unless one can take account of the actual activities which a person performs in applying Condition A, whether or not it will be satisfied will depend on the mere form of the individual's contract and Condition A will be satisfied in some cases and not in others where the actual activities undertaken are identical.

'While it is Travelling'

8.4.9 The duties under para. 30(2)(a) must be performed 'while [the vehicle etc] is travelling.'[52] 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.

The Activities of a Trade

8.4.10 What are the 'activities' of a trade? One presumes that they are actions which have to be performed by the trader, or his employees in conducting the trade. When do such activities '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'[53] a

[52] Para. 30(2)(a)
[53] Under a crew charter, in contrast to a bare charter, the charterer supplies a captain and crew for the vessel

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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 'ship' within para 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.

8.4.11 Examples of trades which are clearly within para. 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.

Incidental Duties

8.4.12 As we have seen, para 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).'

8.4.13 If the Courts follow the airline pilot case, *Robson v Dixon,* in construing 'duties or activities of a purely incidental nature' in para. 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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CONDITION B

Condition B

8.5.1 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 at sea, in the air or on land (referred to as "cross-border trips").'[54]

'Substantially All'

8.5.2 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 para. 30(3) and of the phrase 'activities of a purely incidental nature' in para. 30(5) may indicate that para. 30(3) is concerned with quantitative,[55] and para. 30(5) with qualitative, differences.

8.5.3 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

[54] Para. 30(3)
[55] However one determines what is, and how it is, to be measured

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measured or how it is to be measured. The 80% figure is simply an arbitrary limit chosen by HMRC.

8.5.4 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-residence under the Third Automatic Overseas Test.

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