

# Inconvenient circumstances

**Simon McKie and Sharon McKie** consider the shortcomings in the relief for exceptional circumstances in the statutory residence test. Its deficiencies have been exposed by the coronavirus pandemic.

**T**he Covid-19 virus has brought into the limelight, from relative obscurity, a little relief, which, in various forms, has been with us for decades, and has given it a suddenly increased importance. The statutory residence test (SRT) gives relief for exceptional circumstances (see FA 2013, Sch 45 para 22(4) – (6)). It is a very limited, inadequate and, in parts, highly irrational relief, but is worthy of examination by way of a case study, given the circumstances brought about by the pandemic.

## The relevant facts

James had lived, worked and been resident for fiscal purposes in the UK all his life until he left the UK on 11 March 2019 to work in Houston. In every relevant fiscal year for which he was UK resident, he spent at least 320 days in the UK. James was not resident in the UK for the UK year 2019-20 and 2018-19 was not a split year in respect of him.

Immediately before James left the UK he was living with his fiancée, Sophie, in their home in Newcastle which they own as joint tenants, in a manner equivalent to that of a husband and wife. On moving to work in Houston, James acquired an additional home there to which he will return when he goes back to Houston. He will spend at least 190 nights at his Houston house in 2020-21.

### Key points

- A case study illustrates the difficulties of international movement and its effect on the statutory residence test.
- The exceptional circumstances relief will often fail to alleviate problems.
- The exception has five separate elements.
- Automatic residence and overseas tests.
- The impact of carrying out work in the UK for more than three hours each day.
- The exceptional circumstances exception applies only to modify the basic day count rule and not for other purposes of the statutory residence test.



While James has been in Houston, Sophie has remained in the UK living at their joint home in Newcastle and has been resident here for fiscal purposes in all relevant years. James and Sophie's relationship has remained essentially unchanged while he has been working in the US – they have lived in different countries only because of the exigencies of their careers.

The couple were due to marry in Portugal in May 2020. James had intended to fly to the UK on 25 March 2020 to complete the arrangements for his planned wedding and to return to Houston on 7 April. He planned to return to the UK again on 18 May 2020 and to fly to Portugal on 20 May 2020 for his wedding, returning to the UK on 9 June 2020 and flying to Houston on 14 June 2020.

## Change of plan

Because of the imminent lockdown James accelerated his trip to the UK to complete his wedding arrangements, flying to the UK from Houston on 14 March 2020 and intending to return there on 7 April and, from then on, to conform to his original timetable. Due to the Covid-19 pandemic, however, the US government imposed restrictions on persons entering the US from the UK on 16 March 2020, so he was unable to return to Houston. Thus, since 14 March 2020 he has been in the UK living with Sophie at their home in Newcastle and he will continue to do so until he returns to Houston. On every day since 7 April 2020, James has maintained an intention that, if it were possible to do so, he would leave the UK and return to Houston immediately. It is hoped that he will return to the US on or before 31 August and we assume that he will fly to Houston on 31 August and will not leave Texas again at least until 6 April 2021.

James did not perform any work in the UK in 2019-20. While here in 2020-21, he has carried out more than three hours of

work under his employment contract on every Monday to Friday other than at weekends and on 10 and 21 April and 25 May 2020 (which were Texan bank holidays). He will continue to work to this pattern until he returns to Houston. After his return to the US he will do no work in the UK in the remainder of 2020-21 and 2021-22.

### Exceptional circumstances exception

For SRT purposes, a day counts as a day spent in the UK by an individual if at the end of a day he is present here. This is usually referred to as the basic day count rule.

There are two exceptions to this rule and a third is introduced by FA 2020, s 109. The exception relevant to James is often called the 'exceptional circumstances exception'. For a day to fall within that exception in respect of an individual five elements must exist:

- (i) the individual would not be present in the UK at the end of that day but for;
- (ii) exceptional circumstances;
- (iii) beyond his control;
- (iv) which prevent him from leaving the UK; and
- (v) he intends to leave the UK as soon as those circumstances permit.

On 8 March 2020, HMRC published guidance in respect of coronavirus which said:

'If you:

- are quarantined or advised by a health professional or public health guidance to self-isolate in the UK as a result of the virus;
  - find yourself advised by official government advice not to travel from the UK as a result of the virus;
  - are unable to leave the UK as a result of the closure of international borders; or
  - are asked by your employer to return to the UK temporarily as a result of the virus;
- the circumstances are considered as exceptional.'

That said, it should be noted that HMRC warns: 'Whether days spent in the UK can be disregarded due to exceptional circumstances will always depend on the facts and circumstances of each individual case.' (See the *Residence, Domicile and Remittance Basis Manual* at RDRM11005.)

Strictly, in James' situation one should consider the application of the exception for at least three alternative putative exceptional circumstances: that the pandemic alone, the imposition of travel restrictions alone, or the pandemic and the imposition of travel restrictions taken together, constitute the relevant exceptional circumstances. For the sake of brevity, we only consider the exception on the basis that the imposition of travel restrictions is the relevant exceptional circumstance.

The exceptional circumstances exception only applies to treat 'a day spent in the UK' as not counting as such a day. It does not apply, for example, to treat a day on which an individual performs work in the UK for more than three hours as being a day on which he does not. The number of days in a fiscal year that may be discounted under the exceptional circumstances exception is limited to 60 (the '60-day limit').

### Application of the exception to James

To decide whether the exceptional circumstances exception applies to James in 2020-21, we need to consider the exception's five elements in turn.

- (i) Would James have been present in the UK if the exceptional circumstances had not occurred? Had the entry restrictions not been introduced James would have been in the UK from 14 March (as he actually was) but he would have left on 7 April. He would then have returned to the UK on 18 May and left again on 20 May. Finally, he would have returned to the UK on 9 June and left again on 14 June. Thus, in 2020-21, there will have been eight days (6 April, 18 and 19 May and 9 to 13 June inclusive) when he did not satisfy the first element because he would have been in the UK even if the entry restrictions had not been imposed.
- (ii) Are there exceptional circumstances? It seems clear that the imposition of entry restrictions by the US in response to a worldwide pandemic is an exceptional circumstance.
- (iii) Were the exceptional circumstances beyond James's control? The imposition of entry restrictions by the US government was clearly beyond James' control.
- (iv) Do the exceptional circumstances prevent James from leaving the UK? Strictly, James is not prevented from leaving the UK by the imposition of entry restrictions into the US; rather he is prevented from returning to Houston. He could, for example, have travelled to another country which had not imposed entry restrictions. Although the fourth element is clearly not satisfied if an individual could leave the UK even if he could not enter the country to which he wishes to go, it seems from its guidance that HMRC applies this element as if it required only that the individual be prevented from reaching his intended destination in another country. We shall assume that the requirements of the fourth element are satisfied in relation to James.
- (v) Does James intend to leave the UK as soon as the exceptional circumstances permit? This raises the question as to the time at which this intention must exist. It would appear 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. James satisfied this element for every day from the 6 April to the present time except for the days on which he had planned to be in the UK.

James will have spent 147 days in the UK in 2020-21 (6 April to 30 August 2020 inclusive). Of those, eight days (as in (i) above) do not satisfy the first element of the exceptional circumstances exception so there are 139 days which, were it not for the 60-day limit, would not count as days spent in the UK for the purposes of the SRT. Because of the 60-day limit, only 60 of the days that James has spent in the UK do not count as days spent in the UK under the exception. So, in 2020-21 there will have been 87 days (6 April, 18 and 19 May, 8 to 30 June, the whole of July and 1 to 30 August) which have counted as days he has spent in the UK.

The days that qualify for James' use of the 60-day exceptional circumstances exception can be summarised as follows:

Dates(s)	Intention	Number of days in UK	
		Omit	Include
6 Apr	Intended to be in UK		1
7 Apr – 17 May	Intended to be in US	41	
18/19 May	Intended to be in UK		2
20 May – 7 Jun	Intended to be in Portugal	19	
8 June	Intended to be in Portugal, but 60-day limit now used		1
9 – 13 Jun	Intended to be in UK		5
14 – 30 Jun	Intended to be in US, but in UK	17	
1 – 31 Jul	Intended to be in US, but in UK	31	
1 – 30 Aug	Intended to be in US, but in UK	30	
31 Aug	Leaves UK to return to US		
Totals	Days in UK treated as not being in UK	60	
	Remaining days in UK		87

### Automatic residence and overseas tests

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.

James will not meet the first, second, fourth and fifth automatic overseas tests.

Will he meet the third automatic overseas test? This is met if the individual works sufficient hours overseas assessed over the fiscal year concerned 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 fewer than 31; and
- (b) the number of days spent in the UK in the relevant year is fewer than 91.

Work includes the performance of duties of an employment held by the individual.

James has worked in the UK under his employment contract in 2020-21. Except on three days he has done more than three hours work on all weekdays in the fiscal year to date and he will continue to do so until he returns to Houston. That amounts to 102 days on each of which he will have worked more than three hours in the UK in 2020-21 so he will not satisfy the third automatic overseas test for that year.

### Automatic UK tests

It is clear that James will not meet the first or fourth automatic UK tests. But will he meet either the second automatic UK test or the third?

The second automatic UK test is met if:

- (a) the individual has a home in the UK during all or part of the fiscal year concerned – James has a home in Newcastle with Sophie;
- (b) that home is one where he spends a sufficient amount of time in the fiscal year concerned. He spends a 'sufficient amount of time' there in the year if there are at least 30 days in the year when he is present there on that day for at least some of the time. James will have spent considerably more than 30 days at his home in Newcastle in 2020-21;

- (c) there is at least one period of 91 (consecutive) days in respect of which the following conditions are met:
  - (i) the 91-day period in question occurs while the individual has that home;
  - (ii) at least 30 days of that 91-day period fall within the fiscal year concerned; and
  - (iii) throughout that 91-day period, condition A or condition B is met or a combination of those conditions is met (FA 2013, Sch 45 para 8).

So one has to consider whether this test is satisfied in respect of any 91-day period falling in the period 5 February 2020 to 5 June 2021 inclusive.

Condition A is that the individual has no home overseas. James has, and will continue to have, a home in Houston so this condition is not satisfied.

Condition B is that:

- (a) the individual has one or more homes overseas; but
- (b) each of those homes is a home where he spends no more than a permitted amount of time in the fiscal year concerned. In relation to a home of the individual overseas he 'spends no more than a permitted amount of time' there in the year if there are fewer than 30 days in the year when he is present there on that day for at least some of the time. Condition B will not be met because James will spend 30 days or more at his Houston home in this fiscal year.

James will not, therefore, satisfy the second automatic UK test.

The third automatic UK test is met if the individual works sufficient hours in the UK assessed over a 365-day period falling, wholly or partly, in the fiscal year concerned and over that period:

- (a) there are no significant breaks from UK work; and
- (b) more than 75% of the total number of days in the fiscal year when the individual does more than three hours work are days when he does more than three hours work in the UK (FA 2013, Sch 45 para 9).

So one needs to consider whether this test is satisfied in respect of any 365-day period falling wholly in the period 7 April 2019 to 4 April 2021.

For this test to apply there must be no 'significant breaks from UK work' in the period considered. The legislation provides that there is such a break 'if at least 31 days go by and not one of those days is a day on which [James] does more than three hours work in the UK or a day on which he would have done so but for being on annual leave, sick leave or parenting leave'.

Because James will not work in the UK for more than three hours on any day in 2021-22, did not do so in 2019-20 and will have had a significant break from UK work in 2020-21, there will be a significant break from UK work in respect of any 365-day period which will be relevant to the application of this test to James in 2020-21. So James will not satisfy the third automatic UK test.

It can be seen that James does not satisfy the automatic residence test because he does not satisfy any of the automatic overseas tests nor any of the automatic UK tests.

## Sufficient ties test

Where none of the automatic overseas tests nor any of the automatic UK tests are met, the sufficient ties test must be considered. An individual will meet this test and therefore be resident in the UK for a year, if he has sufficient UK ties for that year (FA 2013 Sch 45 para. 3).

What is a UK tie in a relevant fiscal year depends on whether the individual concerned was resident in the UK for any of the previous three fiscal years. James was UK resident for 2017-18 and 2018-19. If an individual was resident in the UK for at least one of the three fiscal years preceding the relevant year there are five ties (FA 2013, Sch 45 para 31 ) which the individual may have.

They five ties are as follows:

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

An individual has a family tie if, in the year concerned he has a relevant relationship with another person and that other person is resident in the UK for that year. An individual has a relevant relationship with, among others, 'their partner if they are living together as husband and wife...'

The legislation provides no definition of the phrase 'living together as husband and wife'. It is probable that a couple who are present in different countries for a substantial period for work reasons without that separation affecting the fundamental nature of their relationship can be living together as husband and wife in spite of the long period spent physically apart.

James and Sophie were living together in a manner equivalent to a husband and wife when James began to work in the US and it seems that there have been no fundamental changes to the nature of their relationship since then. This is in spite of the fact that they have been physically present for long periods of time in different countries due to the exigencies of their careers. It is likely, therefore, that they are still living together as husband and wife and so it is probable that James has a family tie. We shall assume he does.

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.

James has a house with Sophie in Newcastle which is available to him and in which he has stayed since his return to the UK in March 2020 and in which he will stay until 31 August. James, therefore, has an accommodation tie.

### Planning point

When considering the statutory residence test, advisers should remember that a UK tie for a relevant fiscal year depends on whether the individual was UK resident in any of the previous three fiscal years.

An individual has a work tie if he works in the UK for at least 40 days in the relevant fiscal year. He is treated as working for a day if he does more than three hours work in the UK on that day. James will have worked in the UK for more than three hours on 102 days in this fiscal year so he will have a work tie.

An individual has a 90-day tie for the relevant fiscal year (2020-21) if he has spent more than 90 days in the UK in either of the two fiscal years preceding the relevant year. James was resident in the UK in 2018-19 and spent more than 90 days in the UK in that year. He will therefore have a 90-day tie.

An individual has a country tie for a relevant year if the country in which he spends the greatest number of days in that year is the UK. There is some uncertainty whether the relevant 'country' for this purpose is the US or the state of Texas. In either case, the condition of the country tie will not be satisfied. In 2020-21 James will spend a greater number of days in the state of Texas in the US than in any other country. He will not, therefore, have a country tie.

It can be seen that James has four UK ties in this fiscal year: a family tie, an accommodation tie, a work tie and a 90-day tie.

An individual who has been resident in the UK for any one or more of the three fiscal years immediately preceding the year concerning will meet the sufficient ties test in 2020-21 if they have spent more than 15 days in the UK in that year. James has done so (87 days count as days he has spent in the UK) and so he will meet the sufficient ties test.

## Conclusion on 2020-21 residence status

James will, therefore, be resident in the UK for 2020-21 for UK fiscal purposes.

The exceptional circumstances exception, because it applies only to modify the basic day count rule and not for other purposes of the SRT (such as determining where James has worked and whether he has been present in accommodation) and because of the 60-day limit, has not prevented James having become unexpectedly UK resident as a result of the pandemic. The professional bodies brought such anomalous results to the government's attention when the SRT was enacted and have done so again now that the pandemic has increased the number of taxpayers to whom they are relevant. The government refuses, however, to provide a remedy. ●

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