MBL SEMINARS

THE STATUTORY RESIDENCE TEST

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SECTION I

WHY A TEST OF RESIDENCE AT ALL?

CONNECTING FACTORS

1.1.1 Governments do not impose taxation on every item of income, or on every person, in the world but only that income and those persons which or who satisfy connection criteria. The connection criteria applied to individuals tend to fall into two categories:-

- tests of long-term connection; and
- tests of short-term connection.

1.1.2 In respect of individuals who do not have a short term connection with the country concerned, governments normally impose taxation only on income, and sometimes on gains, which arise from sources situated in that country. On those with both a long and short-term connection, most governments impose taxation on their worldwide income and many also impose taxation on their worldwide gains. On those who have a short-term but not a long-term connection, a charge is usually imposed on worldwide income and gains but with reliefs to restrict the charge according to further criteria.

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UK CONNECTING FACTORS

1.2.1 That is the system which applies in the United Kingdom (the "UK"). Broadly, long-term connection is determined through the concept of domicile and short-term connection through residence and, until next year, ordinary residence. Again, very broadly, those who are not resident or ordinarily resident in the UK are assessable only on their UK source income[1] and on gains arising on disposals of a limited class of UK assets.[2] Those who are resident in the UK are charged on their worldwide income and gains[3] but if they are not domiciled in the UK[4] their non-UK income and gains will normally only be taxable if they are remitted to the UK although, for longer term residents, that privilege may only be attained at the price of paying the Remittance Basis Charge of £50,000 per annum.[5]

1.2.2 This general approach is relatively new. It was not until 1940 that even UK residents were liable to UK Income Tax on their non-UK income which was not remitted to the UK.

The Underlying Justification of Long and Short Term Connecting Factors

1.2.3 The theoretical justification of this general pattern is composed of rather inchoate popular ideas about the demands of 'fairness' and a consideration of economic practicality.

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1 Simon's Taxes E6.101; *Colquhoun v Brooks* (1889) 2 TC 490 HL
2 TCGA 1992 ss.2 and 10
3 Simon's Taxes E6.101. TCGA 1992 s.2
4 Actually one is domiciled in a country of the UK not in the UK but in this Paper this form is adopted as a convenient abbreviation
5 ITA 2007 Part 14 Ch A1

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Fairness

1.2.4 It is widely felt that it is fair that those who have a long-term connection with a country should contribute financially to its common life even if that contribution is more than the economic value of the benefits of that connection. It is no doubt for this reason that the UK has adopted as its criterion for long-term connection the concept of domicile which is a rather imprecise concept of long-term belonging. In a similar way, the United States uses citizenship or the holding of a Green Card conferring the right of long-term residence as its primary test of long-term belonging.

The Economic Argument

1.2.5 The practical economic justification of differentiating between those with long- and short-term connections with a country is that those who have a long-term connection will not easily move to another country. They may, therefore, safely be taxed more highly than those with only a short term connection because it is less likely that they will move elsewhere taking their capital, wealth and expertise with them and that others will be deterred from coming to the country in the first place. Those who only have a short-term connection with a country will move to other countries much more easily and so they must be given tax privileges, in competition with other countries, in order to provide an incentive for them to stay. This essentially pragmatic view of the short-term connecting factor, however, is not accepted by all and at the present time there is considerable public hostility to conferring special tax privileges on those without the long-term connecting factor to this country conferred by a UK domicile.

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1.2.6 Whether or not one accepts this argument in respect of ‘fairness’, economic practicalities mean that if the taxes imposed on those who only have a short-term connection with a country are disproportionate to the advantages of that connection judged against competing jurisdictions, the test will have the effect of depriving the country concerned of capital, expertise and business activity. In an attempt to be ‘fair’ the result of imposing uncompetitive taxation burdens on the internationally mobile will be to make the country that does so poorer than it otherwise would be.

Creating a Cliff Edge

1.2.7 Defining an appropriate test of short term connection poses a further practical problem. Income Tax is primarily imposed by reference to fiscal years and a key ingredient of determining residence has always been physical presence in the UK. It is thought impractical to impose taxation on a person’s income in proportion to the time within a fiscal year that he is present in the UK. That being the case, short-term connection tests based on residence need to provide a single dividing line between residence and non-residence for a whole year. Drawing a single hard line will always risk that those who fall just over or just before the line are either taxed disproportionately highly or disproportionately lightly. All jurisdictions tend to draw that line heavily in their own favour by regarding somebody as resident for a complete year who is physically present only for a small part of it. That has the effect that such persons tend to be resident in two or more jurisdictions according to the particular rules of the jurisdictions concerned and that in turn requires special rules to provide for relief from double taxation by prioritising the taxing rights of competing jurisdictions.

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THE COST OF UNCERTAINTY

1.3.1 With so much depending upon whether or not a person satisfies the short-term connection test, if it is difficult to predict how the test will apply that uncertainty will deter people from bringing their capital, businesses and expertise to the country concerned. For that reason some countries have been careful to create simple tests, based on objective arithmetical criteria. Both Ireland and the United States, for example, base their tests of residence on averaging days of presence in those countries.

WHY IS A STATUTORY RESIDENCE TEST PROPOSED?

The Present Test of Residence is Primarily based on Case Law

1.4.1 The UK's Test of Residence was developed not by statute but through case law. Some cases which are still relevant in determining a person's tax residence in the UK were decided before the First World War.[6] The courts have proceeded not by attempting to formulate a general test of residence but by asking of the particular person whose circumstances were at issue in the case whether they were resident or not. The result of this is that it is hard to extrapolate general principles from these cases by which to determine any particular person's tax residence. A person deciding whether or not to come to the UK has to take this uncertainty into account.

[6] For example, *Re Norris* (1888) 4 TLR 452; *Cadwalader v Cooper* CE (1904) 5 TC 101

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1.4.2 Echoing a point made 65 years earlier by Viscount Sumner in *Levene v IRC*,[7] Malcolm Gunn summarised the situation in *Taxation* magazine in 1992 in the following way:-

> "Residence is a question of fact. There are very few rules. Cases are decided as and when they arise and without much reference to any other previous decisions. The decisions might well conflict with each other but that is just tough luck and there is nothing anybody can do about it."

1.4.3 Indeed, the topic of residence has been a perennial area of difficulty. The Income Tax Codification Committee in 1936, found it "remarkable" that the Taxes Acts gave no more assistance than the rules, which are now found in ITA 2007 ss.829 – 832, which are of limited application. They also commented that "nor [were] the decisions of the Courts very helpful." The Committee concluded:-

> "The present state of affairs, under which an enquirer can only be told that the question whether he is resident or not is a question of fact for the Commissioners but that by the study of the effect of a large body of case law he may be able to make an intelligent forecast of their decision, is intolerable, and should not be allowed to continue."[8]

1.4.4 The issue was considered again by the Royal Commission on Income Tax[9] in 1955. They concluded that "there ought to be certain principles laid down by Parliament as legal principles governing the question of residence" and drew up a set of rules. The

[7] *Levene v IRC* [1927] 13 TC 486
[8] Income Tax Codification Committee Report Cmd.5131 pp 34-39
[9] Royal Commission on Income Tax (1955), Final Report, Cmd.9474, Chapter 14

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Royal Commission, however, did not recommend that there should be an exhaustive definition of residence and in fact, doubted whether it would be possible to formulate one.

1.4.5 From the end of the 1920's up to 2008 there have been very few notable cases on residence, the only exception being *Reed v Clark*.

The Development of Revenue Guidance

1.4.6 This was probably because the Inland Revenue had set out its practice, only loosely based on the law, providing rules of thumb which allowed advisers to predict whether the Revenue would challenge an individual's residence status or not. The guidance later found in *IR20*[10] was based on guidance issued by the Revenue before 1936. The Royal Commission considered this to be "unsatisfactory" and noted that the "rules are regarded by the [Revenue] as either deduced from legal decisions or as representing what would be fair and in accordance with the spirit of the tax code." The lack of a precise legal test of residence was unsatisfactory but advisers adapted pragmatically and applied the Revenue's guidance as if it were a code of law.

Recognition of the Need for Reform

1.4.7 Although the need for reform was recognised in 1936 and again in 1955, no reform was undertaken despite the topic continuing to be a matter of public concern. In 1988 the Government published a consultative document entitled "Residence in the United Kingdom – the Scope of UK Taxation for Individuals". In the light of the responses it received, however, the Government announced that they did not intend

[10] Many of the documents referred to in this paper are given a statutory description in the Appendix. Where that is the case, they are referred to in this paper by their standard description

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pursuing its proposals.[11] Perhaps that was not surprising when one considers that the Law Society's response was that "the existing rules of … residence [had] been built up over a long period of time: about 190 years" and that the subject had been approached with "undue haste"!

1.4.8 In his 2002 Budget Speech the then Chancellor announced that he was 'reviewing the complex rules of residence and domicile'. A background paper entitled '*Reviewing the residence and domicile rules as they affect the taxation of individuals*' was issued by the Treasury in April 2003 but it contained no specific proposals, nor any timetable, for change. Various professional bodies submitted their comments on the paper to which there was little or no response. In October 2006, in response to an enquiry as to whether there were any changes to be made to the residence and domicile rules in the light of the 2003 Review, the Paymaster-General simply replied that the 'review [was] ongoing'.

HMRC's Change of Practice

1.4.9 Subsequently, however, HMRC began to challenge the non-resident or non-ordinarily resident status claimed by the taxpayer concerned and cases on residence began to reach the Courts in which, in the main, HMRC were the victors.[12] Advisers had always been aware that HMRC's summary of their practice contained in booklet *IR20*, was an overgenerous view of the law[13] but it was thought that it could be relied

[11] This was announced by the Government on 15th March 1989

[12] For example, *Gaines-Cooper v HMRC* [2007] EWHC 2617 (Ch); *Grace v HMRC* [2009] EWCA Civ 1082; *Hankinson v HMRC* [2009] UKFTT 384 (TC); *Farquhar v HMRC* [2010] UK FTT 231 (TC); *Broome v HMRC* [2011] UKFTT 760 (TC) and *Kimber v HMRC* [2012] UKFTT 107 (TC)

[13] HMRC withdrew *IR20* with effect from 6th April 2009 and replaced it with a new statement of their view of the law of residence and domicile and of their practice in *HMRC6* which is no more accurate in its summary of the law than *IR20* had been but is considerably less helpful in respect of HMRC's practice

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upon. In the view of many, in cases such as *Gaines-Cooper*[14] and *Farquhar*[15] HMRC departed from their established practice.

1.4.10 The difficulty faced by the taxpayers concerned was that, even if that were the case, if they were resident in the UK under the law but not under HMRC's practice the only way in which they could take advantage of the more generous practice was by establishing, in judicial review proceedings, that they had a legitimate expectation that HMRC would not apply the full rigour of the law. Mr Gaines-Cooper attempted to do just that in 2010.[16] To the general surprise of the tax profession, however, the Court of Appeal held, and the Supreme Court subsequently confirmed, that HMRC were indeed bound to apply the practice set out in *IR20*, for periods up to its withdrawal, but that they had actually done so.

<u>Calls for a Statutory Residence Test</u>

1.4.11 Whilst the *Gaines-Cooper* cases proceeded, advisers had to warn their clients that they could not rely on what had been thought to be HMRC's practice. The result was a general concern that individuals were being deterred from coming to the UK and from bringing to it their capital, businesses and expertise or were deciding to leave it. At the time of the "Residence and Domicile Review" in 2007 (which introduced the Remittance Basis Charge) STEP called for the introduction of a statutory residence test ("SRT") using the day counting test. On 26th November 2007, Emma Chamberlain, speaking on behalf of the CIOT, reiterated STEP's call for the introduction of such a test. Before the House of Lords Select Committee,

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14 *Gaines-Cooper v HMRC* [2007] EWHC 2617 (Ch)

15 *Farquhar v HMRC* [2010] UKFTT 231 (TC)

16 *R (on the application of Davies & Another) v HMRC; R (on the Application of Gaines-Cooper) v HMRC* [2011] UKSC 47

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representatives of the various professional bodies called for a comprehensive statutory definition of residence. The Committee expressed its agreement.[17] The professional bodies continued to repeat these calls at every available opportunity.

Government Consultations

1.4.12 Finally, in the debates on the Finance Bill 2008 Jane Kennedy, the then Financial Secretary to the Treasury, said she "was not unsympathetic to the case being made for a statutory residence test" and that she had requested that work be undertaken to determine if one could be developed.[18] It was the professions' hope that the test would be a simple, objective test based on days of presence in the UK and probably following the US model.[19] The Government entered into a long period of confidential discussions with "external bodies and representative groups".[20]

1.4.13 In the 2011 Budget Speech, it was announced that the Government would publish a Consultation Document in June 2011, with the aim of introducing legislation in the Finance Act 2012 to take effect from 6th April 2012.[21] When the *June ConDoc* was published on 17th June 2011, the test proposed was very far from a simple one. Considerable criticisms were made in representations by the professional bodies.[22] Both the STEP and the CIOT indicated that the proposed test was an improvement on the current position but that a test based purely on counting days of presence in the UK was the best option.[23]

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17 Select Committee on Economic Affairs, 2nd Report of Session 2007-2008, The Finance Bill 2008

18 Finance Bill Debates 22nd sitting on the afternoon of 17th June 2008

19 Letter from the CIOT to HMRC headed "Residence for Tax Purposes: Comments of the Chartered Institute of Taxation" dated 14th November 2007

20 *June 2011 ConDoc* p.2

21 Budget Report 2011 para 2.41

22 See for example the *CIOT 2011 Response*, the *STEP 2011 Response*, *ICAEW 2011 Response* and the *Law Soc 2011 Response*

23 The *CIOT 2011 Response*, paras 5.1 and 8.1 and the *STEP 2011 Response*, para 1

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1.4.14 In December 2011 the Financial Secretary to the Treasury announced that the introduction of the test would be delayed until 6th April 2013 to allow for further consultation.

1.4.15 In June 2012, the *June 2012 ConDoc*, together with the *June 2012 Draft Legislation*, was published. That made various minor changes to the proposals but the broad outline and most of the detail of the proposals made in the *June 2011 ConDoc* were retained.

1.4.16 The revised *December 2012 Draft Legislation* was published on the 11th December 2012 and is subject to further consultation. Following this further consultation it is intended that the legislation will be published in the Finance Bill shortly after the Chancellor delivers his 2013 Budget Speech on 20th March this year.[24]

<u>THE AIMS AND OBJECTIVES OF THE NEW SRT</u>

1.5.1 The Exchequer Secretary to the Treasury in his Foreword to the *June 2012 ConDoc* said that:-

> "We made clear our desire that the rules for determining whether an individual is tax resident in the UK should be clear, objective and unambiguous."

1.5.2 He went on:-

[24] Foreword to the *December 2012 ConDoc*

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> "… for the vast majority of people, a Statutory Residence Test would not change their residence status. The clarity and certainty a Statutory Test would bring will also improve the predictability of this area of the UK tax system, making the UK a more attractive place for investors."

1.5.3 He went on to say that the *June 2012 Draft Legislation*:-

> "… aims to be transparent, objective and simple to use. It is intended to leave the residence status of the vast majority of people unaffected, but to bring greater clarity to individuals with more complex circumstances."

1.5.4 One presumes that in saying that the legislation will "bring greater clarity to individuals" he meant that individuals with complex circumstances should be able to predict the application of the draft legislation to their circumstances with a higher probability than they could under the current situation.

1.5.5 In the *December 2012 ConDoc* the Exchequer Secretary said:-

> "We have developed a Statutory Residence Test which, whilst it will not change the residence position for the majority of individuals, will provide a greater degree of certainty and clarity to internationally mobile individuals and their employers. This is intended to increase the UK's reputation as a good place to invest in and do business, whilst continuing to ensure that those with close connections to the UK continue to pay their fair share of tax.

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…………..

Taken together, these reforms represent a significant step forward in clarity, predictability and simplicity in this area of the personal tax code."

A COMPLEX TEST

1.6.1 As we shall see, the test which is proposed is very far from a simple one. It uses a number of concepts the ambits of which are extremely uncertain and which will require a large number of subjective judgments to be made. The test proposed is a three-part test, each of which involves a number of complex subsidiary tests. Practitioners advising clients with anything other than the most simple of circumstances may find it difficult to give unequivocal advice as to their likely future residence status. Such clients will have to consider the application of the proposed SRT to their circumstances in detail and, because the test will apply from 6th April 2013,[25] they cannot wait to do so until the legislation is enacted. They must plan on the basis of the information which is available today.

1.6.2 In the remainder of this Paper, therefore, we examine the proposed SRT in detail.

[25] And in some circumstances may be dependent upon applying it to 2010/2011, 2011/2012 and 2012/2013 in order to determine an individual's residence status for the fiscal years 2013/2014, 2014/2015 and 2015/2016

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SECTION II

THE STRUCTURE OF THE DRAFT LEGISLATION

TWO LARGE SCHEDULES

2.1.1 The *Draft SRT Schedule* is fifty five pages long.[26] In addition, the *Draft OR Schedule* of twenty one pages abolishes the status of ordinary residence.

2.1.2 The *Draft SRT Schedule* is divided into five parts. Part 1 sets out the SRT, Part 2 defines a number of 'key concepts', that is terms and phrases used in the Schedule. Part 3 sets out the rules governing split year treatment and Part 4 sets out various anti-avoidance rules. Part 5 contains miscellaneous provisions on interpretation, consequential amendments and transitional provisions. Parts 3 and 4 make consequential amendments to other parts of the tax legislation. As it is currently drafted it does not appear that the *Draft SRT Schedule* will be inserted into ITA 2007 Part 14 Ch 2 which currently contains the few limited statutory provisions regarding residence. Rather it is a freestanding Schedule which, because it includes consequential amendments, appears to be designed to be a schedule to the Finance Act 2013 rather than a schedule to the ITA 2007.

2.1.3 In this Paper I examine in detail the *Draft SRT Schedule*.

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[26] It has grown from the thirty nine pages of the version published in the *Draft June 2012 SRT Schedule*

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SECTION III

PART 1 OF THE SRT SCHEDULE – THE RULES

THE SCOPE OF THE SRT

Relevant Tax

3.1.1 The SRT applies 'for determining for the purposes of relevant[27] tax whether individuals are resident or not resident in the UK'.[28] 'Relevant tax' for these purposes means:-

(a) Income Tax;

(b) Capital Gains Tax; and

(c) (so far as the residence status of individuals is relevant to them) Inheritance Tax and Corporation Tax.[29]

A Notable Absentee

3.1.2 The most notable absentee from this list is National Insurance which also uses residence as a key concept in determining its territorial scope. Although residence for National Insurance purposes is not necessarily the same as residence for tax purposes, the accepted meaning of the term for tax purposes carries great weight in construing the term in National Insurance legislation.[30] So in practice, the National Insurance concept largely follows that of Income Tax. That link will now be broken.

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[27] An indefinite article before 'relevant tax' appears to have been omitted in the *December 2012 Draft Legislation*

[28] Para 1(1). All statutory references in these Notes are to the *Draft SRT Schedule*

[29] Para 1(4)

[30] *Goodman v J Eban Limited* QB [1954] 1 All ER 763

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3.1.3 The *June 2012 ConDoc* records that:-

> "The consultation document stated that the Statutory Residence Test would not apply for the purposes of National Insurance Contributions (NICs). A number of respondents argued that the definition of residence should be the same for tax and NICs purposes and that there was an opportunity to align the definitions at this stage."[31]

3.1.4 The Government claimed that the fact that "NICs are usually assessed on a pay period basis rather than annually … means that an individual's residence position needs to be considered in a particular week or month" and that this would make it "impractical to apply the Statutory Residence Test to NICs".[32] In effect though, because the NIC residence test has, in the main, followed the Income Tax test, NIC residence has always been determined by considering an extended period of time and then applying the resulting status in determining liability in respect of particular pay periods. What is more, the split year concession and the provisions of Part 3 of the new Schedule are a response to the need to consider changes of circumstances within a fiscal year for Income Tax purposes. There appears to be no insuperable difficulty in creating a common test and it seems unfortunate that two forms of taxes on income (for that is what NICs are) should be imposed by reference to a concept for which the same word is used but without a common definition.

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[31] *June 2012 ConDoc* para 3.204. Representations to this effect with certain qualifications were made, inter alia, by the *CIOT 2011 Response* para 5.3 and the *STEP 2011 Response* page 2

[32] *June 2012 ConDoc* para 3.205

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Residence in Constituent Countries of the UK

3.1.5 The SRT rules "do not apply in determining for the purposes of relevant tax whether individuals are resident or not resident in England, Wales, Scotland or Northern Ireland specifically (rather than in the UK as a whole)."[33]

3.1.6 It might be thought that this provision is to take account of the provisions of the Scotland Act 1988 permitting the Scottish Parliament to set a Scottish rate for the purpose of the rates of Income Tax to be paid by Scottish taxpayers.[34] In fact, however, the definition of a Scottish taxpayer for this purpose does not require residence in Scotland but does require the individual concerned to be "resident in the UK for Income Tax purposes".[35]

3.1.7 A number of taxing provisions which utilise statutory provisions from other areas of law in defining the conditions for their effect refer to residence in Scotland and Northern Ireland determined for the purpose of those other areas of law.[36] The only substantive taxing provision which applies by reference to individual residence in a country forming part of the UK which we have been able to find, however, is ITTOIA 2005 s.693 which relieves, from Income Tax, income from authorised Ulster Savings Certificates if certain conditions are fulfilled.

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[33] Para 1(3)
[34] Scotland Act 1998 s.80D
[35] Scotland Act 1998 s.80D
[36] See, for example, the Individual Savings Account Regulations 1998 (SI 1998/1870) reg.2C(3) and ITTOIA 2005 s.40(3)(b)

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RESIDENCE IS DETERMINED IN RESPECT OF A FISCAL YEAR

3.2.1 Under the SRT one's residence is determined for a complete fiscal year.[37] The split year rules, however, disapply various charging provisions which would otherwise apply where an individual is UK resident for a fiscal year, in respect of income and capital and gains and losses attributable to what is called the "overseas part" of the split year.[38]

3.2.2 Currently one can be resident for part of a year but most tax charges on income and capital gains apply if one is resident in the year at any time during that year. So for example Capital Gains Tax under TCGA 1992 s.2 is chargeable on a person "in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom." It appears that the Government's intention is that this change of methodology will not result in any material change in the incidence of Income Tax and Capital Gains Tax,[39] but whether or not that is the case will only emerge with experience of the new test.

[37] Para 2(3)
[38] Para 2(4) and Part 3
[39] Foreword to the *June 2012 ConDoc*

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SECTION IV

THE BASIC RULE AND THE AUTOMATIC RESIDENCE TEST

THE BASIC RULE

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

(a) the Automatic Residence Test is met for that year; or

(b) the Sufficient Ties Test is met for that year.[40]

THE AUTOMATIC RESIDENCE TEST

4.2.1 The Automatic Residence Test is met for a year if an individual meets:-

(a) at least one of the Automatic UK Tests; and

(b) none of the Automatic Overseas Tests.[41]

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[40] Para 3
[41] Para 5

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SECTION V

THE AUTOMATIC OVERSEAS TESTS

INTRODUCTION

5.1.1 The four Automatic Overseas Tests are as follows.

THE FIRST AUTOMATIC OVERSEAS TEST

5.2.1 The First Automatic Overseas Test is met if:-

(a) the individual was resident in the UK for one or more of the three tax years preceding the year concerned; and

(b) the number of days that he spends in the UK in the year concerned is less than sixteen; and

(c) he does not die in the year.[42]

The Basic Day Count Rule

5.2.2 Paragraph 21(1) provides that if an individual is present in the UK at the end of a day, that day counts as a day spent by the individual in the UK (the "Basic Day Count Rule").

[42] Para 12

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5.2.3 This reproduces the rule, which had effect from the tax year 2008/2009, which was introduced for limited statutory purposes by FA 2008 s.24 by amendment to ITA 2007 ss.831 and 832 and TCGA 1992 s.9.

5.2.4 The phrase "counts as a" appears to be otiose and should have been a simple "is".

5.2.5 The Basic Day Count Rule is subject to two exceptions and to a deeming rule.

The First Exception

5.2.6 The first exception (the "First Exception") is where:-

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

(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.[43]

5.2.7 What is meant by the end of the day? One presumes that it means midnight although the legislation does not say so expressly. The *December 2012 ConDoc* refers to this rule as the "Midnight Rule"[44] but that description does not form any part of the legislation.[45]

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[43] Para 21(3)

[44] *December 2012 ConDoc* para 3.67

[45] It is odd that para 35 uses the "Midnight Test" for the purposes of the Country Tie but the Basic Day Count Rule has no reference to midnight

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5.2.8 The First Exception also largely reproduces the equivalent exception[46] to the existing day count rule introduced by FA 2008 s.24, an exception which has caused considerable difficulties over the last four years. On the 18th December 2012 the Government published the *Draft Guidance* which simply reproduces the First Exception without any further explanation.

5.2.9 In respect of the existing exception, the current version of HMRC 6 says that the exception does not apply:-

> "… if you engage in any activities while in the UK that are not substantially related to completing travel to a foreign destination. So if you attend a business meeting, visit a property you own, arrange to meet people socially or attend social activities, you must count that day as a day of presence if you are in the UK at the end of the day.
>
> **Example**
>
> You are resident of [sic] the Isle of Man and travel to the UK as part of a journey to the USA. You have to stay overnight in the UK before catching a flight to the USA the following day. Your being in the UK for that one night would **not** count as a day of presence in the UK. But, if you were to carry out an activity such as attending a business meeting, visiting the theatre or visiting family before catching the flight to the USA, the exception **would not** apply and the night spent in the UK **would** be counted as a day of presence."[47]

[46] ITA 2007 s.831(1B) and s.832(1B) and TCGA 1992 s.9(6)

[47] *HMRC6* para 2.3

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5.2.10 It may be that this view will continue to be taken by HMRC in respect of the First Exception to the Basic Day Count Rule under the SRT.

5.2.11 It is arguable that it is unduly restrictive. If my passage through the UK is for the purpose of flying from one foreign country to another but due to the timings of my flights I decide to fill some of my waiting time by making a visit to the theatre it is surely arguable that my activity of theatregoing is related to my passage through the UK. It is not the purpose of my passage and I would not have undertaken it had I not been passing through. One can make a similar argument about fitting in a visit to one's family or a business meeting which is not the purpose of the journey concerned but which fills time which would otherwise be wasted.

5.2.12 Of course in planning one's activities, one would take account of HMRC's likely view but if a situation has arisen where the difference between the two constructions has a material effect on one's residence status, it may well be worth contending that HMRC's narrow construction of the First Exception is incorrect.

<u>The Second Exception</u>

5.2.13 Para 21(4)-(6) gives the second exception (the "Second Exception") to the Basic Day Count Rule and provides that:-

"(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

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(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 to which sub-paragraph (2) may apply 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 different exceptional circumstances, will count as days spent by P in the UK."

5.2.14 The Second Exception ought to have provided that it 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 the *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."[48]

[48] The *CIOT 2012 Response* para 13:6

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5.2.15 Of course, it may be that the Courts, may correct this fault by applying a radically purposive interpretation and it may be that, in practice, HMRC will not take the point (the *Draft Guidance* does not seem to do so) [49] but the legislation here does not meet the SRT's purpose of providing rules which are "clear, objective and unambiguous."[50]

5.2.16 It is not clear to what extent one can take into account circumstances which affect other people and which indirectly prevent one from travelling. For example, would the exception apply if a brother or close friend were suddenly taken ill or a spouse or adult child were injured in an accident or were required to remain in the UK because he was a witness to a crime?

5.2.17 The *Draft Guidance* says:-

> "There may also be limited situations where an individual who needs to stay in the UK to deal with a sudden life threatening illness or injury to a spouse, person with whom they are living as husband and wife, civil partner or dependent child can have those days spent in the UK disregarded under the SRT subject to the 60-day limit.
>
> ………………….
>
> There may also be limited situations where an individual who comes back to the UK to deal with a sudden life threatening illness or injury to a spouse, person with whom they are living as husband and wife, civil partner or

---

[49] *Draft Guidance* Annex B, para B15 and Example B5
[50] *June 2012 ConDoc* Foreword

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dependent child can have those days spent in the UK disregarded under the SRT subject to the 60-day limit."[51]

5.2.18 If the intention of this is to limit the exceptional circumstances exception to circumstances primarily affecting a "husband, wife" etc, there seems to be no basis in the draft legislation for that limitation. There does not seem to be any reason why an individual may not be said to be prevented from leaving the UK by exceptional circumstances which primarily affect another person, even if that person is, for example, an adult child, brother or close friend.

Paragraph 21(5)

5.2.19 Paragraph 21(5), which provides a restrictive list of examples of exceptional circumstances, arguably restricts the extent of the exception and certainly makes its scope less easily determined. That is because it might be argued that the meaning of exceptional circumstances is to be restricted to items which are *ejusdem generis* to the examples given in para 21(5). That might suggest, for example, that an injury which was neither sudden nor life-threatening but which was sufficient to prevent one's travelling, such as the development of severe back pain, would not be an exceptional circumstance. Similarly, it might be argued, that emergencies which were not of the same degree of extremity as those listed in para 21(5)(a), such as transport strikes, are not "exceptional" for this purpose.[52]

[51] *Draft Guidance* Annex B, paras B9-B15

[52] It is notable that all of the examples given in the *Draft Guidance* are in respect of very extreme circumstances. *Draft Guidance* Annex B, paras B7-B16

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The Wrong Concept

5.2.20 More fundamentally, it is not clear that "exceptional" is the appropriate concept to be used in this relaxation. It may be that it would have been better to define its scope by reference to unforeseen circumstances. Frequent travellers will not consider a French transport strike exceptional but a particular strike may well be unforeseen.

The Government's Response

5.2.21 The *December 2012 ConDoc* does not note any of these difficulties of the legislation and proposes no changes in respect of them. This is particularly unfortunate in respect of the limitation of the exception to 60 days. The *June 2012 ConDoc* explained that this provision was to be adopted "to minimise the risk of the provision being used too widely."[53] The most likely circumstance, however, in which a person will be prevented from leaving the UK for a period of more than two months is where he is subject to a long-term incapacitating injury or illness. Indeed, the examples given in the *Draft Guidance* of the operation of this restriction includes one of an individual who is injured in a car crash, suffers multiple injuries and returns to France as soon as he is discharged.[54] It is difficult to imagine the policy reasons which justify subjecting an individual's worldwide income and gains to tax because he has been unfortunate enough to suffer multiple injuries in a car crash whilst making a short-term visit to the UK.

5.2.22 In response to the criticism of the exceptional circumstances exception which had been made by respondents to the *June 2012 ConDoc,* the *December 2012 ConDoc* said that:-

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[53] *June 2012 ConDoc*, para 3.158
[54] *Draft Guidance* Annex B, Example B3

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> "Guidance will be available to explain how HMRC will apply these provisions. The Guidance will also cover some of the concerns which were raised in consultation."[55]

5.2.23 It needs to be said that poorly drafted legislation cannot be corrected by any amount of "Guidance".

The Deeming Rule

5.2.24 Para 22(1) provides the obverse of the Basic Day Counting Rule as follows:-

> "If P is not present in the UK at the end of a day, that day does not count as a day spent by P in the UK."

5.2.25 This is expressly subject, however, to a rule which deems certain days to count as days spent in the UK ("the Deeming Rule"). The Deeming Rule applies if:-

> "(a) P has at least 3 UK ties for a tax year;
>
> (b) the number of days in that tax year when P is present in the UK at some point in the day but not at the end of the day ("qualifying days") is more than 30; and
>
> (c) P was resident in the UK for at least one of the 3 tax years preceding that tax year.

[55] *December 2012 ConDoc* para 3.66

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The deeming rule is that, once the number of qualifying days in the tax year reaches 30 (counting forward from the start of the tax year), each subsequent qualifying day in the tax year is to be treated as a day spent by P in the UK.

The deeming rule does not apply for the purposes of sub-paragraph (3)(a) (so, in deciding for those purposes whether P has a 90-day tie, qualifying days in excess of 30 are not to be treated as days spent by P in the UK)."

5.2.26 In the *June 2012 ConDoc* the Government suggested that a special rule would be required for those who regularly move in and out of the UK on the same day in order to manipulate the residence rules.[56] This would either seem to require a taxpayer to fly in and out of the country on a large number of days or else to be based in Northern Ireland and to regularly cross and recross the border with the Irish Republic before and after midnight (and, of course, in the latter case he would have to consider the effect on his Irish residence status). It is difficult to believe that the population of people sufficiently rich to make that worthwhile and sufficiently indifferent to their own comfort to be willing to do so will be large enough to justify the complication caused by including in the SRT specific provisions to frustrate such behaviour. Nonetheless, as we have seen, such provisions have been introduced in paragraph 22 modifying the Basic Day Count Rule that if a person is not present in the UK at the end of the day, that day does not count as a day spent by the individual in the UK.

5.2.27 It may be that because the rule can only apply where the individual has at least three UK Ties for a tax year, has been resident for at least one of the three tax years

[56] *June 2012 ConDoc* para 3.153

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preceding that year and has had at least 30 days in which he has been present in the UK at some point in the day but not at the end of the day that the rule will have only limited effect. This may be so particularly because sub-paragraph (5) disapplies the Deeming Rule in determining the number of ties that an individual has for the purpose of determining whether the Deeming Rule applies. This prevents there being a circularity under which one would otherwise be required to apply the Deeming Rule in determining whether one has sufficient ties, and to determine how many ties are sufficient in determining whether the Deeming Rule applies.

5.2.28 It may be, therefore, that there will be very few individuals who find themselves resident in the UK because of the Deeming Rule but any person who has been resident in any one of the three previous fiscal years will have to determine whether or not he has three ties and, if he has, will then have to determine the number of days spent in the UK under the Deeming Rule. The example which follows demonstrates that the Deeming Rule can result in a person becoming UK resident who is only physically present in the UK for a very short period of time and whose connections with the UK are insubstantial.

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Example

Mr Ho was born in Hong Kong and has resided there for almost his entire life. He is a self-employed management consultant. He has never resided anywhere other than in Hong Kong except that in 2010/11 he spent seven months in the UK working on a consultancy contract. At no time has he held any UK situated assets except the short term tenancy referred to below. In 2013/14 he again wins a consultancy engagement which requires him to come to the UK both to undertake investigative work and to attend meetings. The meetings are held at his client's offices where he performs most of his investigative work. The journey from Heathrow to his client's premises takes one and three quarter hours. For a period of three and a half months in the early part of the fiscal year, he rents a flat for him to stay in whilst he is here so as to save on hotel bills. In the event, he spends only a few nights at this flat.

During the year he meets and marries Sophia in the UK. Sophia has always lived in the UK. Mr Ho makes a number of visits to the UK to visit her at her home and later to visit her parents.

During 2013/2014 he makes the following visits to the UK:-

- 18 visits in which he flies into and out of the UK on the same day in order to attend meetings at his client's premises.
- 12 visits where he flies into the UK on one day and flies out on the next in order to meet Sophia.

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- 10 visits where he comes to the UK to perform work in relation to his consultancy project and leaves on the day after the day following his arrival. On these visits, on each day on which he is physically present in the UK, he performs more than 3 hours of work taking into account the time spent travelling between the airport and his client's premises.
- 1 visit when he arrives on a Tuesday and leaves on a Friday in order to be married on the Thursday.
- 1 visit with his wife after their honeymoon to see her parents and to make arrangements to let her former home before flying to Hong Kong to make their home there. On this visit he arrives on a Monday and leaves on the following Wednesday.

Mr Ho has three UK Ties in 2013/14.

He has a Family Tie because during the fiscal year he has a wife, Sophia, who is resident in the UK.

He has an Accommodation Tie because during the fiscal year he has a place to live in the UK, the flat, which is available to him for a continuous period of at least 91 days and he spends at least one night in that accommodation in the year.

When he flies in and out of the UK on the same day to attend meetings, each day counts as a day of work because his travel from the airport to his client's offices counts as work. These visits amount to 18 days of work. His 10 visits when he comes to the UK to work on his consulting engagement count as 3 days of work

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each because there are 3 days on each visit when he does at least 3 hours of work in the UK. Again his travel between Heathrow Airport and his client's offices counts as work for this purpose. So his 10 visits count as 30 days of work making 48 days in all.

He has a Work Tie because he does at least 40 days of work in the UK in the year.

Because he has three ties the first condition for the application of the Deeming Rule is satisfied.

The number of days in the tax year on which Mr Ho is present in the UK at some point in the day but not at the end of the day is more than 30 – it is in fact 42 (18 + 12 + 10 + 1 + 1). So the second condition for the application of the Deeming Rule is satisfied.

Mr Ho is resident in the UK for at least one of the three tax years preceding 2013/14 so the third condition for the application of the Deeming Rule is satisfied.

If the Deeming Rule had not applied, he would not have been resident in the UK. He does not satisfy any of the Automatic UK Tests nor would he have satisfied the Sufficient Ties Test. Because he would have had only 37 days that counted as a day spent in the UK and that is less than 46 days, the number of Ties which would have been sufficient for the purposes of the Test, would have been four and he had only three Ties.

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Because the Deeming Rule applies, however, he is treated as spending 12 days (42 – 30) in the UK on which he was not actually present in the UK at the end of the day. Therefore, 49 (37 + 12) days count as days spent in the UK. Because he has spent over 45 days in the UK in the year, the number of days which are sufficient for him to meet the Sufficient Ties Test is 3. He has three Ties, meets the Sufficient Ties Test and is therefore resident in the UK for 2013/14. What is more, he does not meet any of the conditions of the five Split Year Cases so the split year treatment will not apply to him.

In 2013/14 Mr Ho spends only 37 nights in the UK. His only prior connection with the UK is a business visit of seven months, made three years before the fiscal year concerned. He has held no UK assets apart from his short term tenancy of a flat.

In the *June 2012 ConDoc* the Government rejected the representations which it had received that the test of residence should be based on a pure day-counting formula and said that it was committed to the structure which it had developed which it said "will not cause people to become resident if they have little connection to the UK."[57] "Little connection to the UK" is not a term which can be defined with precision, but surely it describes Mr Ho's circumstances.

5.2.29 Para 23 redundantly provides:-

[57] *June 2012 ConDoc* para 3.4

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> "Any reference to a number of days spent in the UK "in" a given period is a reference to the total number of days spent there (in aggregate) in that period, whether continuously or intermittently."

THE SECOND AUTOMATIC OVERSEAS TEST

5.3.1 The Second Automatic Overseas Test is that the individual was resident in the UK for none of the three tax years preceding the year concerned and the number of days that he spends in the UK in that year is less than forty-six.[58]

5.3.2 Combining the First and Second Automatic Overseas Tests, they provide that if an individual spends less than a minimum amount of time in the UK in the year he will not be resident here and that minimum depends upon his residence history in prior years.

Effect of Years Prior to the Introduction of the SRT

5.3.3 It will be noticed that a person's residence in the years 2013/14 – 2015/16 may be dependent upon his residence status in some or all of the years in 2010/11 - 2012/13. As we have said, the application of the existing case law test of residence is extraordinarily uncertain and this is compounded by the fact that HMRC may challenge a self-assessment which is based on a particular view of residence many years after the self-assessment is made. Without a further provision, therefore, the determination of residence up to 5th April 2016 would be similarly uncertain. Para 140 contains a transitional provision under which, in respect of determining an

[58] Para 13

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individual's residence status for any of the tax years 2013/2014 – 2015/2016 (the "relevant years"), to the extent that it is necessary to determine whether the individual is resident or not in the UK in a year before 2013/2014 (a "pre-commencement year"), the individual may elect to apply the SRT. The election does not affect his actual residence status for any year before 2013/2014. It must be made by the first anniversary of the relevant year in respect of which the election is to apply.

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

5.3.5 There will be circumstances in which a person who would be non-resident under the previous law will be resident under the new law without any change in his circumstances. As we shall see, a person's residence status will be dependent upon matters which are not easily changed within a short period of time so that may pose difficulties for particular individuals. The CIOT has suggested that some form of grandfathering rule is required here.[59] The *December 2012 ConDoc* does not refer to these representations although it does refer to the possibility "that the SRT would be likely to make a greater number of short term visitors UK resident then was previously the case."[60] It proposes no substantive changes to the provisions to remedy this but is exploring some changes to the administrative arrangements to

[59] *CIOT 2011 Response*, para 12
[60] *December 2012 ConDoc* para 3.117

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PAYE to mitigate the administrative difficulties arising from this change, in the incidence of taxation.[61]

THE THIRD AUTOMATIC OVERSEAS TEST

5.4.1 The Third Automatic Overseas Test is that:-

(a) the individual works full-time overseas for the year concerned;

(b) during the year, there are no significant breaks[62] from overseas work;

(c) the number of days in that year on which the individual does more than three hours work in the UK is less than 31; and

(d) the number of days in that year that the individual spends in the UK is less than 91.[63]

5.4.2 The Third Automatic Test does not apply if the individual is an international transportation worker.[64]

5.4.3 We shall look at the definition of 'work' and 'full-time work' later in these Notes but we should note at this point that those definitions have been the subject of significant criticism by the professional bodies and because of their difficulties this test poses a number of traps for the unwary.

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[61] The *December 2012 ConDoc* paras 3.117 – 3.121

[62] This phrase is defined in para 14(3)

[63] Para 14. For this purpose, days treated as days spent in the UK under the Deeming Rule (see para 5.2.25 above) are ignored. Para 14(1)(d) and (2)

[64] Para 14(4). This phrase is defined in para 28

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THE FOURTH AUTOMATIC OVERSEAS TEST

5.5.1 The Fourth Automatic Overseas Test is met for a year if:-

(a) the individual dies in the year;

(b) he was either:-

(i) resident in the UK in either of the two preceding years; or

(ii) he was not resident in the UK in the preceding year and the year before that was a split year within the Cases[65] involving departure from the UK;

(c) the number of days that he spends in the UK in the year is less than 46.

[65] Cases 1, 2 or 3. See Section VIII below

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SECTION VI

THE AUTOMATIC UK TESTS

THE FOUR TESTS

6.1.1 There are four automatic UK tests.[66]

THE FIRST AUTOMATIC UK TEST

6.2.1 The First Automatic UK Test is met if the individual spends at least 183 days in the UK in the year concerned.[67]

6.2.2 That replicates the effect of ITA 2007 ss.831(1) and 832(1) as extended by case law.[68] Although this may be an old rule, it shows the rough justice which is an inevitable part of determining residence for an entire tax year rather than from day-to-day. An individual who spends 183 days in the UK in a fiscal year will pay tax on his worldwide income as will an individual who spends 365 days here. If they have the same income and circumstances, they will pay the same amount of tax. Yet the first will only enjoy the benefits of presence in the UK for approximately half the time that the other does.

[66] Para 6
[67] Para 7
[68] *Levene v IRC* [1928] 13 TC 486, *Lysaght v IRC* (1928) 13 TC 511, *Wilkie v IRC* [1951] 32 TC 495

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THE SECOND AUTOMATIC UK TEST

6.3.1 The Second Automatic UK Test is met if:-

(a) the individual has a home in the UK for more than 90 days;

(b) he is present at that home, while it is his home, on at least 30 separate days[69] during the tax year;

(c) while he has that UK home there is at least one period of 91 consecutive days throughout which one of the following two conditions is met:-

(i) the individual has no home overseas;

(ii) the individual has one or more overseas homes but each of those homes is a home at which he is present on fewer than 30 days in the year.

(d) at least one day of one of the 91 day periods referred to under (c) above, falls within the year.

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

Single Periods of at least 91 Days Straddling the Fiscal Year

6.3.3 It should be noticed that in respect of a single period of at least 91 days that period need not fall wholly within the fiscal year concerned. So it is possible for somebody to meet the Second Automatic UK Test even though he has a home in the UK for only 30 days in the year. Of course, he may then be relieved from liability in respect

[69] Individual or consecutive days and regardless of the amount of time spent at his home on a day

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of the period before he acquires his home in the UK or after he relinquishes it under the split year rules.

No Midnight Rule

6.3.4 A further difficulty is that for the purposes of deciding the period during which the taxpayer concerned has a home there is no equivalent of the 'Midnight Rule' so one has to determine at what time on a day one begins or ceases to have a home.

What is a Home?

The Relevance of the Concept

6.3.5 Whether and where an individual has a "home" or "homes" is fundamental to the SRT not only forming a key element of the Second Automatic UK Test,[70] but also of the Fourth Automatic UK Test,[71] the Accommodation Tie[72] and Cases 2, 3, 4 and 5 of the Split Year Rules.[73]

Its Suitability for use in the SRT

6.3.6 Home is a word which can bear a wide range of meanings with small areas of overlap between them. The Shorter Oxford English Dictionary gives nine major areas of meaning for 'home' used as a noun. Those meanings make it clear that a home is not necessarily a building or structure.[74]

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70 Para 8
71 Para 10
72 Para 32
73 Paras 42 - 45
74 They include "a collection of dwellings, a village, a town", "the country of one's origin", "a place or region to which one naturally belongs or where one feels at home"

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6.3.7 The CIOT, the STEP and the ICAEW all strongly criticised the use of the concept of a "home" in the SRT in their submissions in response to the *June 2012 ConDoc*. As the CIOT said:-

> " … "home" means different things to different people. To some people it means a building, to others a place (town/city), to others the country from which they come. Indeed there are ten different definitions in the OED!"[75]

6.3.8 In the *December 2012 ConDoc* the Government said that it has:-

> "… considered whether it would be possible to define in legislation what constitutes a home more precisely. It has concluded that it would be very difficult to set out every single scenario in legislation. … the Government continues to believe … that the vast majority of taxpayers will know whether and where they have a home."[76]

6.3.9 So the application of the SRT is by reference to a concept which the Government acknowledges is incapable of precise definition and yet it thinks that taxpayers will be able to identify what that concept means even though the Government, with all its vast resources, is unable to define it. To provide a statutory definition of a home the Government would not be required "to set out every single scenario in legislation". What is required is a definition which taxpayers can apply to their circumstances so as to determine their residence status. If that cannot be done, it is clear that the word

[75] The *CIOT 2012 Response* para 3.3
[76] *December 2012 ConDoc* para 3.33

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"home" is not a suitable concept for use in the SRT, the aim of which is to provide a "clear, objective and unambiguous" test of residence.[77]

The Legislation – Para 24

6.3.10 The draft of the legislation which was published in the *June 2012 Draft Legislation* had included at para 14 some provisions regarding the meaning of "home" which were of only the most limited help. An expanded version now appears as para 24:-

> "(1) A person's home could be a building or part of a building or, for example, a vehicle, vessel or structure of any kind.
>
> (2) Whether, for a given building, vehicle, vessel, structure or the like, there is a sufficient degree of permanence or stability about P's arrangements there for the place to count as P's home (or one of P's homes) will depend on all the circumstances of the case.
>
> (3) But somewhere that P uses periodically as nothing more than a holiday home or temporary retreat (or something similar) does not count as a home of P's.
>
> (4) A place may count as a home of P's whether or not P holds any estate or interest in it (and references to "having" a home are to be read accordingly).
>
> (5) Somewhere that was P's home does not continue to count as such merely because P continues to hold an estate or interest in it after P has moved out (for example, if P is in the process of selling it or has let or sub-let it, having set up home elsewhere)."

[77] *June 2012 ConDoc* Foreword

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The Inadequacy of Para 24

6.3.11 It will be seen that these sub-sections are either truisms (sub-paras (4) and (5)), or they neither exclude anything from, nor significantly include anything within, the meaning of the term (sub-para (1)), or they assume an element of the definition without actually stating it (sub-para (2)) or they introduce further undefined concepts the meaning of which is just as difficult to define as that of "home" (sub-para (3)).

6.3.12 The *December 2012 ConDoc* says:-

> "The draft legislation now makes it clear that a home will generally be a structure or a building as opposed to a place such as a town or a country."[78]

6.3.13 It does nothing of the sort. Sub-para (1) does not tell us that a person's home will generally be a building etc but that it could be such an object.

6.3.14 The *December 2012 ConDoc* also says:-

> "The legislation also indicates that a home will have a degree of stability or permanence for the individual …"[79]

6.3.15 If it does do that, it does so only obliquely. Sub-para (2) assumes that for a place "to count as P's home" "P's arrangements there" (note not the home) must have "a sufficient degree of permanence or stability". But that is an assumption. It does not

[78] *December 2012 ConDoc* para 3.35

[79] *December 2012 ConDoc* para 3.35. This is repeated in a slightly different formulation in the *Draft Guidance* Annex A, para A9

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provide that a home is a place which has a sufficient degree of permanence or stability.

6.3.16 Sub-para (3) does exclude something, not from the definition of a "home", but from things which "count as a home". No indication of what the sub-paragraph means by a "holiday home" or "temporary retreat (or something similar)" is given by the legislation. So we have four uncertain concepts instead of one. What is more, it is implicit in the sub-paragraph that it is possible that a temporary retreat or something similar might be a home which is merely 'counted' by sub-para (3) as if it were not. That suggests that the word "home" is to be given the widest possible meaning. So while sub-para (3), excludes some undefined things from counting as a home, it actually widens the ambit of the term in a wholly unpredictable way.

6.3.17 The *Draft Guidance*, in outlining the characteristics of a 'home', does little more than repeat paras 24(1)-(3).[80] It gives examples,[81] of things which HMRC do and do 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 the various examples have a home and, if so, where it is. The *Draft 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.

6.3.18 The SRT was meant to be a solution to the situation which has existed until now in which HMRC attempt to repair the uncertainties of the existing law by setting out

[80] *Draft Guidance* Annex A, para A9
[81] *Draft Guidance* Annex A, paras A9-A20

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detailed guidance on their practice, a practice which is only loosely related to the law. Under the SRT the taxpayer is once again going to be in the position of relying on examples in 'guidance' which have only a loose relationship to the law which it purports to apply.

THE THIRD AUTOMATIC UK TEST

6.4.1 The Third Automatic UK Test is met if:-

(a) the individual works full-time in the UK for a period of 365 days;

(b) during that period he has no significant breaks from work;

(c) all or part of that period falls within the relevant tax year; and

(d) more than 75% of the total number of days in the relevant year when he does more than 3 hours work per day are days when he does that work in the UK.[82]

6.4.2 Following representations from the professional bodies, 'work' and 'working' include both employed and self-employed work.[83] A significant break from work is a period of 31 days or more where there is no day on which the individual does more than 3 hours work in the UK and the reason for his absence is not because he was on annual leave or sick leave.[84]

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[82] Para 9
[83] Para 25(1)
[84] Para 9(2)

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The Meaning of Work

The Relevance of 'Work' to the SRT

6.4.3 The concept of work is not only relevant to the Third Automatic UK Test (often referred to as the "FTWUK Test"), but also to the Third Automatic Overseas Test (often referred to as the "FTWA Test"), to the Work Tie and Cases 1, 2 and 4 of the split year provisions.

The Statutory Definition of Work

6.4.4 Work is defined in para 25 which 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 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

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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.

(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 25 An Exhaustive Definition?

6.4.5 The first point to notice is that para 25(1), subject to the further provisions of the paragraph, looks like an exhaustive definition. The *Draft Guidance*, at para 43 says that "work takes its everyday meaning". That does not seem to be the effect of paragraph 25, which seems to define work in a very limited sense which is quite different to its use in everyday English.

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Para 25 is Directed at Work by Persons

6.4.6 The second point to notice is that the definition is not of 'work' in the abstract but of whether a person is 'working' or 'doing work'. The test is firmly directed towards the activity of an individual.

Doing Something in the Performance of Duties of an Employment

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

6.4.8 The employment contracts of junior employees often require them to attend at a particular office, or other place at which they are instructed to do so, for particular hours. If such an employee stands at the photocopying machine gossiping is he doing something in the performance of the duties of his employment? He is certainly performing a duty of his employment by being at the office but he is not doing so by gossiping. Would it make a difference if he were doing something which he is specifically forbidden to do under the terms of his employment, such as accessing internet sites for non-working purposes?

6.4.9 It is not clear how sub-paragraph (2) interacts with sub-paragraph (1)(a). Sub-paragraph (2) requires us to make the hypothesis that P receives value for doing a thing. So in the example we gave above, we must 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 Chapters 2 –

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11 of Part 3 of ITEPA 2003. Chapter 10 of that Part brings into charge any employment related benefits not otherwise charged under Part 3. Employment related benefits for this purpose means a benefit which, inter alia, is provided by reason of the employment. So in having regard to whether, in respect of something the individual does, if value were received by P for doing the thing, 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. But we are not given the terms on which the value is given, nor are we told that the value is given under the individual's actual employment contract. If we are not given the terms on which the value is given, how can we know whether it is provided "by reason of the employment"?

6.4.10 The Guidance shows no sign that HMRC are aware of the difficulty of this definition. At paragraph 46 it gives the following example:-

> "Paula works as an engineer and is contractually required to be on-call for four nights a month in addition to her normal full-time attendance. She is paid a retainer for those four nights, in addition to being paid for any work done if she is called out. The four nights are counted as working time."

6.4.11 What exactly is Paula doing in the performance of the duties of her employment in this example? She is simply available to be called out. Being available could not, under any ordinary English usage, be described, without something further, as doing something. It is a state not an act. It may be that Paula is required to have a mobile phone which is turned on during this period and to have given its number to her

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employer (although the example does not say so). One can see that she would be doing something when she buys the mobile phone, when she gives the number to her employer, when she pays her mobile phone subscription and when she answers it. But how is she doing something by simply having it in her pocket turned on?

6.4.12 Let us imagine that Paula is not required under her contact of employment to do any of these things although there is a non-binding expectation from both parties that she will do so. If we assume that in some way simply having a mobile in one's pocket which is turned on is doing something she would still not satisfy the definition in paragraph 25(1) of "Work" because she would not be "doing" that "in the performance of [the] duties of an employment held by [her]".

6.4.13 Does para 25(2) help? That requires us to make the hypothesis that Paula receives value for keeping her phone turned on but nothing in it says that she is to be treated as receiving value from her employer for doing so. If one assumes, however, that the value is to be treated as having been received from her employer she would be treated, under that hypothesis, under Part 3 of ITEPA 2003, as receiving a benefit by reason of the employment. But even if the benefit is received by reason of her employment that does not of itself mean that it is received in respect of something done "in the performance of the duties of [the] employment".

6.4.14 Of course we can see the idea which the draftsman had in mind but he has failed to express it in a coherent test.

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Doing Something in the Course of a Trade Carried on by the Individual

6.4.15 The difficulty is perhaps not quite so great in respect of something done "in the course of a trade carried on by" the individual. The phrase, "the course of a trade" is used fairly widely in tax legislation but, even so, in respect of the activities of an individual it does pose problems. A trade for this purpose also includes a profession or vocation, anything treated as a trade for Income Tax purposes and the commercial occupation of woodland.[85]

6.4.16 If I sit in my office and allow my mind to wander to the play that I saw last night am I doing something in the course of my practice? If a client, whom I have known for years, telephones me to tell me about his daughter's wedding, is that in the course of my practice? If I spend time doing my Partnership's tax return, is that in the course of my practice? My practice isn't one of submitting returns to HMRC. My duty to complete the return would not arise if I had not conducted my practice but is doing so something I do in the course of it? It is a duty which I should have even if the trade had ceased before I complied with it.

6.4.17 Does the rule in paragraph 25(3) help here? That is the rule that in deciding whether something has been done in the course of a trade, one must have regard to whether, if expenses were incurred by the individual in doing the thing, that expense could be deducted in calculating the profits of the trade for Income Tax purposes? Is this rule useful in construing sub-paragraph 25(2)?

[85] Para 131

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6.4.18 If I paid somebody to do my daydreaming about my theatre visit for me it is difficult to see how it would be a deductible expense. What about the telephone call from my client? If I paid somebody to take calls to talk to my clients about their family affairs would the expense be deductible and, if it were, would that necessarily mean that I should be doing something in the course of a trade which I carry on? Even the time spent in preparing the partnership tax return is not absolutely straightforward. It is common to deduct fees charged for the preparation of tax computations but it has never been very obvious to me why such expenses are incurred wholly and exclusively for the purposes of the trade and therefore why they are not excluded by ITTOIA 2005 s.34.

6.4.19 In any event, paragraph 25(3) tells you to have regard to whether an expense would be deductible in deciding whether something is being done in the course of a trade but it does not tell you how regard should be had to it. If something which is done is not done in the course of a trade carried on by the individual the fact that if the individual paid somebody else to do it he would be able to deduct the payment in arriving at his trading profit as being wholly and exclusively incurred for the purposes of the trade, cannot, in itself, make it something done in the course of the trade.

The Variety of Activities which might Constitute Work

6.4.20 The *Draft Guidance* gives little indication that HMRC are aware of the variety of activities which might constitute work. As the CIOT said:-

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"[Work] takes so many forms … For example, which of the following are working:-

(a) a vicar from overseas in the UK on holiday who prays for four hours a day for his congregation;

(b) an overseas sportsman who takes a holiday in the UK but continues his training – but does not actually compete as it is out of season; and/or

(c) an overseas sportsman who takes a holiday here in the UK and trains but as a specific part of a training plan for an upcoming tournament."[86]

Travelling Time

6.4.21 As for the rule in sub-paragraph (4) in respect of travelling time, the Government received representations that treating travelling as work would mean that secondees to overseas postings might find it difficult to meet the FTWA Test. The Government however refused to change the proposed rule. The *December 2012 ConDoc* explained:-

> "Excluding time spent travelling from the definition of work would make it very easy for employees to travel into the UK specifically for a business meeting and leave again on the same day without being considered to have spent a day working in the UK."[87]

6.4.22 The FTWA Test and the FTWUK Test are framed by reference to days in which more than three hours work is done in the UK. Including travelling in the definition of work means that days will be taken into account where the actual amount of

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86 *CIOT December 2012 Response* para 14.1
87 *December 2012 ConDoc* para 3.26

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effective work is very small indeed. It is not entirely obvious, for example, why the Government should regard it as significant, in determining residence, that an employee spends 45 minutes attending a meeting in the UK where his journeys between the airport and the meeting take one and a quarter hours each.

Training

6.4.23 Sub-paragraph (5) treats certain time spent undertaking training as time spent working. It is worth noting that 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 P for Income Tax purposes?). It should also be noted that if the training is provided without charge by a third party it cannot count as time spent working.

6.4.24 The decision to treat training time as work was criticised by respondents to the *June 2012 ConDoc* on the basis that it might result in a large number of individuals failing to qualify under the FTWA Test. The *December 2012 ConDoc* explains:-

> "This is because many employees posted abroad return to the UK for work-related training. Under the current rules, this might be treated as incidental duties in which case they would be allowed an unlimited number of days subject to an overall 90 day limit."[88]

[88] *December 2012 ConDoc* para 3.25

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6.4.25 The respondents therefore suggested that training should be excluded from the definition of work.[89] The Government declined to do so[90] although it did increase the number of work days allowed in the UK under the FTWA Test from the original 20 days which were proposed to 30.

The Paragraph 25(7) Hypothesis

6.4.26 It might also be noted that although paragraph 25(7) creates the hypothesis that the individual concerned is someone who is chargeable to Income Tax under ITEPA 2003 or ITTOIA 2005 it does not specifically treat the individual as being chargeable to Income Tax in respect of the particular employment or trade concerned.

Paragraph 25(8)

6.4.27 Finally, paragraph 25(8) is puzzling. Any post in respect of which the holder does not have a contract of service cannot be an employment under normal employment law principles because an employment is a contract of service. Paragraph 131, however, extends the meaning of an employment for the purpose of the *Draft 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. Such an office would not count as an employment for the purposes of the *Draft SRT Schedule* if it were a "voluntary post". In what circumstances can one regard an office as voluntary? Of course, an office is likely to be voluntarily taken on but that is true of almost all employments and offices. Once one is in office and until one resigns it, the office is likely to impose duties on one which are involuntary in the sense that one is bound to

[89] *December 2012 ConDoc* para 3.25
[90] *December 2012 ConDoc* para 3.27

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their performance. The duties are, in that sense, involuntary, but is the office also involuntary?

The Location of Work

The Relevance of the Location of Work

6.4.28 The location of work forms a key component of the Third Automatic UK Test, the Third Automatic Overseas Test, the Work Tie and Cases 1, 2 and 4 of the Split Year Rules.

The Statutory Provisions

6.4.29 The location of work is defined in paragraph 26 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 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.
>
> (4) This paragraph is subject to express provisions in this Schedule about the location of work done by international transportation workers."

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6.4.30 It cannot be said that the general rule in para 26(1) is very helpful. Nonetheless, it seems to me clear that working requires there to be a person who works and, where that person is an individual, that he must work where he is physically. One might think that in an age of electronic communication there may be some doubt as to whether work is performed where the communication is created or where it is received. If one imagines that oral advice is being given over the telephone, for example, is the activity of giving advice taking place where the person is speaking or where the advice is heard? To take another example, if one is updating an electronic document remotely, is the updating done where the updater is or where the server is? It seems to me clear that the work must be performed where the adviser makes the call in the first example and where the updater is, while he performs the updating, in the second. Otherwise, the location of the activity would be dependant upon whether or not the call actually got through or the changes were actually successfully made to the document on the server.

6.4.31 The *Draft Guidance* does no more than repeat the words of the statute without explicating them. It does, however, provide three examples to illustrate the application of the definition:-

> "In most cases work is considered as being done at the location where it is actually done rather than where an employment is held or a trade is carried on. There is a different rule for international transportation workers.

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Example 14

Robert is an employee of a French clothing manufacturer and he is based in Paris. He spends two days each month working in Glasgow to meet company clients. For those two days Robert is working in the UK, regardless of where he is usually based.

Any work you do during your journey to or from the UK is counted as overseas work if you travel by air, sea or through a tunnel under the sea.

For journeys to the UK, the overseas work period ends when you disembark from that aircraft, ship or train in the UK.

For journeys from the UK, the overseas work period starts when you get on the aircraft, ship or train taking you out of the UK.

Example 15

Shirley flies from Spain to Heathrow Airport where she disembarks her plane and transits to catch a second flight from Heathrow to Glasgow.

Her journey from Spain to Heathrow is work done overseas. Once she disembarks the plane, the time she spends in the airport terminal and flying to Glasgow is work done in the UK.

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Example 16

Robert travels to the UK from Paris by Eurostar and leaves the train at London, St Pancras to catch connecting trains to Glasgow. The costs of his journey are met by his employer. His train journey from Paris to St Pancras counts as work done overseas. After disembarking at St Pancras, the rest of his journey counts as work done in the UK."[91]

Full-Time Work

The Relevance of the Definition of Full-Time Work

6.4.32 Whether or not work is full-time is relevant to the Third Automatic UK Test, to the Third Automatic Overseas Test and to Case 1, Case 2 and Case 4 of the Split Year provisions.

The Statutory Definition

6.4.33 Paragraph 27 provides that:-

> "(1) P works "full-time" in the UK or, as the case may be, overseas "for" a period if the number of hours per week that P works there, on average across the period, is 35 or more.
>
> (2) In determining whether that test is met, the length of the period may be reduced to take account of –
>
> (a) reasonable amounts of annual leave or parenting leave taken by P during the period, and

[91] *Draft Guidance* paras 55-58

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(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.

(3) But no reduction is to be made for week-ends or public holidays.

(4) "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) If P holds more than one employment or carries on more than one trade during the period (whether consecutively or concurrently), the hours worked in the UK or, as the case may be, overseas with respect to each employment or trade are to be aggregated in determining whether P works there full-time for the period.

(6) If –

(a) P changes employment during the 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 gap may be deducted from the length of the period in determining whether the test in sub-paragraph (1) is met, subject to a maximum deduction of 15 days."

The DraftGuidance

6.4.34 The *Draft Guidance* contains the following explanation:-

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“You are considered to be working full-time in the UK, or overseas, for any given period if you work there for an average of at least 35 hours per week, whether you are an employee or self-employed. It is not necessary to work at least 35 hours every week during the period; it is enough that this average figure is met over the period in question. So for example a rotational worker might work every day continuously for three weeks and take every fourth week as a rest period, but still average 35 hours a week over the period.

The length of the period over which you calculate your average weekly hours should not be adjusted for weekends, public holidays or days you are not required to be at work because of your working pattern.

Example 12

Kim’s contract of employment is to work 40 hours a week as a nurse in a hospital. However she works those 40 hours over four days and has one scheduled rest day each week. That scheduled rest day is still counted when working out the average time worked.

When working out the average time worked, you should reduce the length of the period to account for:-

- sick leave where you cannot work as a result of your sickness or injury, and
- reasonable amounts of –
  - annual leave

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- parenting leave.

What is a reasonable amount will depend on your situation, including the nature of your work and the standard number of annual leave days in the country in which you are working. Additionally:-

- if you have more than one job or trade, you should aggregate the hours worked in each when calculating your average hours;
- for the purposes of the third automatic overseas test (full-time work overseas) time spent working in the UK will not count towards your average hours; and
- for the purposes of the third automatic UK test (full-time work in the UK), time spent working overseas will not count towards your average hours.

If you change employment, or finish one contract to start another, and there is a gap in your working life, you can deduct up to 15 days from the period over which you calculate the average. If the gap is longer, any days over the 15 cannot be deducted. You should also read the significant break from overseas work information below.

Example 13

MayLing is considering whether she meets the third automatic overseas test in respect of her work in Italy in the last tax year. She worked for her first employer there for an average of eight hours on each working day for the

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first 20 weeks of the tax year, during which she took nine days annual leave. She then ceased that employment and took a break of four weeks, when she toured the country. She then took up a new employment, again in Italy, for the remaining 28 weeks of the tax year. During those 28 weeks she worked for nine hours and 30 minutes from Monday to Thursday and for four hours on a Friday, and she also took two weeks annual leave and one week sick leave.

Employer 1: 18 weeks and one day at (5 days x 8 hours) = 728 hours

Employer 2: 25 weeks at ((4 days x 9.5 hours) + 4 hours) = 1050 hours

Total time worked is 1778 hours.

Total period over which the average weekly hours are to be calculated is 45 weeks. This is 18 weeks and one day for the first employment (20 weeks less the nine days annual leave) plus 25 weeks for the second employment (28 weeks less the three weeks annual and sick leave) plus the 13 days excess over 15 days for the four week gap between employments.

Average time worked per week: (1778 hours/45) = 39.51 hours a week.

MayLing meets the third automatic overseas test for the tax year."[92]

[92] *Draft Guidance* paras 48-52

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Areas of Difficulty

6.4.35 The attentive reader will notice that all of the Revenue's examples are in respect of work performed under an employment. Obviously, it is much more difficult to apply these conditions to a trade. The ICAEW said in the *ICAEW 2012 Response*:-

> "We are also concerned that such a test is very focussed on the position of employers and employees. It does not cater satisfactorily for someone who may be self-employed where work patterns can be very different."[93]

6.4.36 The *December 2012 ConDoc* recorded that:-

> "Concerns were … raised about whether the test was appropriate for the self-employed and entrepreneurs, as well as part-time and rotational workers."[94]

6.4.37 The Government's response, however, was not to propose any fundamental changes to the test because it asserted that:-

> "The legislation as drafted should work for rotational and self employed workers."[95]

6.4.38 The concepts used in the test, however, are concepts drawn from employment contracts. What can the phrase "annual leave" mean in relation to a sole trader? An

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[93] *ICAEW 2012 Response* para 25
[94] *December 2012 ConDoc* para 3.77
[95] *December 2012 ConDoc* para 3.81

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employment contract will provide for a right to paid leave to accrue in respect of a period. A sole trader will decide to take such time for relaxation as he feels he needs and the exigencies of his trade allow. It is arguable that the periods he spends not working is not "leave" because he needs no-one's permission not to work and that it is certainly not "annual" because it is not defined by reference to a yearly period. As to what are "reasonable amounts of annual leave" in respect of a trade, how is one to determine the question? The time traders spend doing something other than work will depend on their personal circumstances and the particular circumstances of their trade. As to sick leave, once again the difficulty is in the word "leave". That word makes sense in relation to a contractual obligation to work for another person but not in respect of a personal decision to perform work in order to earn profits for oneself.

6.4.39 Para 132, which has been considerably changed from the equivalent paragraph[96] in the *Draft June 2012 SRT Schedule* seems to be meant to take account of the difficulty of relating employment concepts to the self employed. It provides:-

> "In relation to an individual who carries on a trade -
>
> (a) a reference in this Schedule to annual leave or parenting leave is to reasonable amounts of time off from work for the same purposes as the purposes for which annual leave or parenting leave is taken, and
>
> (b) what are "reasonable amounts" is to be assessed having regard to the annual leave or parenting leave to which an employee might reasonably expect to be entitled if doing similar work."

[96] *Draft June 2012 SRT Schedule* para 103

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6.4.40 That does not entirely, however, deal with the problem. What is "time off from work" in respect of a self employed person? To what extent does one take account of the differences between employed and self employed work when "having regard to" reasonable arrangements for employees in assessing what is reasonable for the self employed?

6.4.41 It will also be noted that paragraph 27(6) provides an extremely limited relief for gaps in employment but allows no similar relief for gaps between conducting trades or for moving from conducting a trade to being employed or vice versa.

THE FOURTH AUTOMATIC UK TEST

Death During the Year

6.5.1 The Fourth Automatic UK Test is satisfied if:-

(a) the individual dies in the relevant year;

(b) he has, for each of the previous three tax years, been resident in the UK because he satisfied the Automatic Residence Test;

(c) the preceding tax year would not be a split year for the individual even on the assumption that he was not resident in the UK in the relevant tax year;

(d) when the individual dies, either:-

  (i) his home is in the UK;

  (ii) he has more than one home and at least one of them is in the UK.[97]

[97] Para 10

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SECTION VII

THE SUFFICIENT TIES TEST

THE TEST

7.1.1 The Sufficient Ties Test is met for a relevant year where the individual meets none of the Automatic UK Tests nor any of the Automatic Overseas Tests but has sufficient UK ties for that year.[98] Whether or not an individual has sufficient UK ties in a relevant tax year will depend upon whether the person was resident in the UK for any of the previous three tax years and the number of days the individual has spent in the UK in the relevant tax year.[99]

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

98 Para 16
99 Para 16(3)

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7.1.2 Special rules apply if the individual dies during the relevant year.[100]

UK TIES

7.2.1 The legislation differentiates between what is a UK Tie on the basis of whether or not an individual was resident in the UK in one or more of the three tax years preceding the relevant year. If he was so resident, there are five UK Ties which are:-

(a) the Family Tie;

(b) the Accommodation Tie;

(c) the Work Tie;

(d) the 90-day Tie; and

(e) the Country Tie.[101]

7.2.2 If that is not the case the Country Tie is omitted and so only the following count as UK ties:-

(a) the Family Tie;

(b) the Accommodation Tie;

(c) the Work Tie; and

(d) the 90-day Tie.[102]

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[100] Para 19
[101] Para 29(2)
[102] Para 29(3)

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THE FAMILY TIE

7.3.1 An individual has a Family Tie for a year if in that year a 'relevant relationship' exists at any time between that individual and another person and that other person is someone who is resident in the UK for that year.[103]

7.3.2 There is a relevant relationship at any time between an individual and another person if at that time the other person:-

(a) is a husband, wife or civil partner of the individual and they are not separated at the time;

(b) and the individual are living together as husband and wife, or if they are of the same sex, as civil partners; or

(c) is a child of the individual and is under the age of 18.[104]

Living Together as Husband and Wife

7.3.3 The phrase 'living together as husband and wife' is found elsewhere in legislation including in some recent tax legislation.[105] The *June 2012 ConDoc* comments with Orwellian menace:-

> "Although there can be some difficulty in determining when a relationship becomes a 'common-law' equivalent to a marriage, with the introduction of tax

[103] Para 30(1)
[104] Para 30(2)
[105] See for example ITEPA 2003 ss.61, 61I and 681G; FA 2005, s.103; ITA 2007 ss.809ZQ and 809M; CTA 2010 s.939H

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credits there are existing legal definitions of common-law partners and HMRC have significant experience of making such determinations."[106]

7.3.4 In fact the term 'common-law partners' is not one which is used in statute. It is similar to the phrase 'common-law marriage,' but that phrase does not refer to a relationship between two people who are not married but rather to a marriage recognised as valid at common law although not complying with the usual formal requirements.[107] The phrase 'living together as husband and wife' is used repeatedly in the Tax Credits legislation but is not statutorily defined. Similarly, it is widely used in many other legislative contexts including statutes concerned with Social Security, Family, Pension and Housing Law. I have been unable to find, however, any statutory definition of it.

7.3.5 The phrase has been considered in a number of cases.[108]

7.3.6 In *Crake v Supplementary Benefits Commission*; *Butterworth v Supplementary Benefits Commission*[109] which was a case concerning the Supplementary Benefits Act 1976, it was held that in order to establish that a man and woman were 'living together as husband and wife', for the purposes of para 3(1)(b) of Schedule 1 of that Act, it was not sufficient merely to show that they were living together in the same household. Although in many circumstances that might be strong evidence that they were living together as husband and wife, it was necessary in each case to go on to

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106 *June 2012 ConDoc* para 3.124

107 *Oxford Dictionary of Law* Ed E A Martin OUP 2003

108 See for example *Amicus Horizons Limited v Brand* [2012] EWCA Civ 817; *Re Watson* [1999] 3 FCR 595, [1999] 1 FLR 878 ChD; *Westminster City Council v Peart* [1991] 24 HLR 389

109 *Crake v Supplementary Benefits Commission; Butterworth v Supplementary Benefits Commission* [1982] 1 All ER 498, (1981) 2 FLR 264

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ascertain the manner in which and why they were living together. The presiding judge referred to a Supplementary Benefits Handbook which set out guidelines to claimants to determine whether a couple were living together as husband and wife which he said were:-

> "admirable signposts to help a tribunal, or indeed the [Supplementary Benefits] Commission, to come to a decision whether in fact the parties should be regarded as being within the words 'living together as husband and wife'. They are: whether they are members of the same household; then there is a reference to stability; then there is a question of financial support; then there is the question of sexual relationship, the question of children; and public acknowledgement.
>
> Without setting out that part of the Handbook in full in this judgment, it appears to me that the approach indicated in that Handbook cannot be faulted."

Living Together as Civil Partners

7.3.7 A civil partnership is a creation of statute and the Civil Partnership Act 2004 does not limit civil partnership to any particular form of relationship between two persons entering into such a partnership. It is difficult to see, therefore, how two people can live together as civil partners who are not civil partners. This point was made by the STEP in the *STEP 2012 Response*[110] and yet, no reference to it is made in the *December 2012 ConDoc*.

[110] See the *STEP 2012 Response* para 6.1

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7.3.8 The phrase is used in a number of other statutory contexts,[111] but in those contexts it is invariably used with a further statutory rule usually providing that two people of the same sex are to be treated as living together as if they were civil partners if, and only if, they would be treated as living together as husband and wife were they of opposite sexes. There is no such deeming provision in the draft legislation.

Minor Children

Seeing One's Child

7.3.9 An individual does not have a Family Tie by reference to his minor child if he sees the child in the UK on fewer than 61 days (in total) in:-

(a) the relevant year; or

(b) if the child turns 18 during the relevant year, the part of the year before the day on which the child becomes 18.

7.3.10 A day counts as a day on which the individual sees the child if he sees him in person for all or part of the day.

Minors in Full-time UK Education

7.3.11 For the purpose of deciding whether a person with whom a taxpayer has a relevant relationship is resident in the UK a special rule applies. A family member who satisfies certain conditions is to be treated as being not resident in the UK for the year if the number of days he or she spends in the UK in the part of the year outside term time is less than twenty one.[112]

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111 For example in the Welfare Reform Act 2012 s.39(2)

112 Para 31(3)

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7.3.12 The conditions are that the family member is:-

(a) a child of the person whose residence is to be decided by reference to the Family Tie and who is under the age of 18;

(b) in full-time education in the UK at any time in the year concerned; and

(c) resident in the UK for that year but would not be so resident if the time spent in full-time education in the UK in that year were disregarded.[113]

7.3.13 For this purpose reference to the time spent in full-time education in the UK is to the time spent there during term time. For this purpose "half term" breaks and other breaks when teaching is not provided during a term are considered to form part of "term time".[114]

Avoiding a Circularity

7.3.14 Paragraph 31(2) prevents there being a circularity under which the residence of a taxpayer is to be determined by reference to the residence of a relevant person and the residence of that relevant person is to be determined by reference to the residence of the taxpayer. It provides that:-

> "A Family Tie based on the fact that a family member has, by the same token, a relevant relationship with [the person whose residence status is to be determined] is to be disregarded in deciding whether that family member is someone who is resident in the UK for [the year]."

[113] Para 31(4)
[114] Para 31(6)

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THE ACCOMMODATION TIE

7.4.1 An individual has an Accommodation Tie for a year if:-

(a) he has a place to live in the UK;

(b) that place is available to him during the year for a continuous period of at least 91 days; and

(c) he spends at least one night at that place in that year.[115]

7.4.2 If there is a gap of fewer than sixteen days between the periods in which a particular place is available to a taxpayer it is treated as continuing to be available to him during that period.[116]

7.4.3 An individual is considered to have a 'place to live' in the UK if:-

(a) he has a home in the UK;

(b) he has a holiday home or a temporary retreat (or something similar) in the UK; or

(c) accommodation is otherwise available to him where he can live when he is in the UK.[117]

A Confused Structure

7.4.4 The structure of the Accommodation Tie is confused. It can be seen in sub-para (1) that three conditions must be satisfied for there to be an Accommodation Tie. The

[115] Para 32(1)
[116] Para 32(2)
[117] Para 32(3)

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first is that the individual must have a place to live in the UK and the second is that that place must be available to the individual for a minimum period. What then is a place to live? It is defined in sub-para (3). That is a three part definition and the third part is accommodation which "is otherwise available to" the individual. So if we insert this definition into the three part test of sub-para (1) that accommodation is available is both part of the definition of a place to live under para 32(1)(a) and an additional requirement in respect of the place to live under para 32(1)(b).

7.4.5 When we look at the definition of a place to live in para 32(3) either (3)(c) would, with appropriate adjustment, have been sufficient on its own or (a) and (b) will cover situations not covered by (3)(c). But (3)(c) covers all situations where accommodation is available to the individual so one might think that the homes covered by (3)(a) and the "holiday home, temporary retreat (or something similar)" covered by (3)(b) must extend to homes etc. which are not available to the individual for him to live in – a strange sort of home, holiday home or retreat indeed, and a very strange element of the definition of the phrase a "place to live"!

Uncertain Scope of Available Accommodation

7.4.6 In what circumstances accommodation is available is uncertain. The use of this concept in *IR20* caused considerable uncertainty. The STEP, in the *STEP 2012 Response*, commented on its width of meaning. The CIOT pointed out that a person could have an Accommodation Tie by reason of a friend being willing to put him up at any time and his actually spending just one night in the year at the friend's house.[118]

[118] The *CIOT 2012 Response* para 8.1

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7.4.7 The Government has persisted with the use of this concept in the Accommodation Tie in spite of this criticism.

Period Condition to be Satisfied in Respect of each Place to Live?

7.4.8 It appears from the reference to 'that place' that the ninety one day period has to be satisfied in respect of each 'place to live' and not merely in respect of all the places to live which a taxpayer has in the tax year. So, for example, if a person had accommodation available to him in one house for sixty days and in another house for thirty five days, the Accommodation Tie would not be satisfied even though, in total, he had had accommodation available to him for ninety five days.

Regular Bookings and Sub-Para 32(2)

7.4.9 Difficulty exists where a room is regularly booked at the same hotel for periods of less than 16 days or company accommodation is regularly made available. That is often the case where regular business trips are made to report back to a UK group or divisional head office. Because a gap of fewer than 16 days between periods in which a particular place is available is ignored, a person who books the same hotel room for one night per fortnight for eight fortnights (or who stays once a fortnight in a company flat for the same period) will find that he has an Accommodation Tie.

7.4.10 In the *December 2012 ConDoc*, the Government said:-

> "It is right that … very frequent and regular stays at the same hotel over a long period should be capable of being an Accommodation Tie."[119]

[119] *December 2012 ConDoc* para 3.58

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7.4.11 That does not explain why spending eight nights at the same hotel over a period of a little less than four months should result in one having an Accommodation Tie.

<u>The Close Relative Relaxation</u>

7.4.12 It will be seen that the conditions of the Accommodation Tie are relaxed in respect of accommodation made available by close relatives.[120] There seems no particular reason why one should have an Accommodation Tie when one stays for a night with one's closest friend and yet not have one when one stays with one's half-brother or -sister.

7.4.13 Under the *Draft June 2012 SRT Schedule* it was necessary for the accommodation to belong to the close relative; an arbitrary and imprecise requirement. The Government has changed this requirement to one requiring the accommodation to be the home of the close relative. The policy behind the change is opaque. It is not at all obvious why the relaxation should be available when I stay with my brother in his home but not when I stay with him in the flat which he uses on occasional visits to town. The Government has exchanged one arbitrary restriction for another.

7.4.14 It would have been more sensible for the 16 night increase to apply when no consideration is given for the accommodation. The point of the relaxation is surely to distinguish situations where accommodation is available because of a close personal relationship from other situations. It would be unusual for accommodation to be made available to someone without charge where there is not such a

[120] Para 32(5)

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relationship. As it stands, if a good friend will always be willing to put up the individual the Accommodation Tie will be satisfied if he spends even one night at his friend's house.

7.4.15 A "close relative" for this purposes is:-

(a) a parent or grandparent;

(b) a brother or sister;

(c) a child aged 18 or over; or

(d) a grandchild aged 18 or over,

in each case, whether by blood or half-blood or by marriage or civil partnership.[121]

<u>Sub-para 32(4) – What Does it Mean?</u>

7.4.16 Sub-para 32(4) is extremely puzzling. It provides that accommodation may be "available to [an individual] even if [he] holds no estate or interest in it and even has no legal right to occupy it". If a friend tells me that I can stay at his flat he gives me a non-exclusive licence to occupy it. That is a legal right. Is there any class of persons who occupy a property without a legal right to do so other than trespassers?

[121] Para 32(6). It is not clear what "by marriage or civil partnership" means

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THE WORK TIE

7.5.1 An individual has a Work Tie if he works in the UK for at least 40 days in the relevant tax year.[122] He is considered to work in the UK for a day if he does more than three hours work in the UK on that day.[123]

THE 90-DAY TIE

7.6.1 An individual has a 90-Day Tie for the relevant tax year if he has spent more than 90 days in the UK in either the tax year preceding the relevant year, in the tax year preceding that year or in each of those tax years.[124]

THE COUNTRY TIE

7.7.1 An individual has a Country Tie for a year if the country in which he meets the "midnight test" for the greatest number of days in the year is the UK.[125]

7.7.2 He also has a Country Tie if:-

(a) he meets the midnight test for the same number of days in a year in two or more countries;

(b) that number is the greatest number of days for which he meets the midnight test in the year;

[122] Para 33
[123] Para 33(2)
[124] Para 34
[125] Para 35

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(c) one of those countries is the UK.

7.7.3 An individual meets the midnight test in a country for a day if he is present in that country at the end of that day.[126]

[126] Para 35(3)

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SECTION VIII

SPLIT YEARS

REPLACING CONCESSIONARY RELIEF

8.1.1 As we have seen, under the current system, a person who is resident at any time during a tax year is generally subject to Income Tax and Capital Gains Tax on his worldwide income and gains subject to specific reliefs for persons who are either not domiciled in the UK or not ordinarily resident here. In certain circumstances, however, when an individual comes to, or leaves, the UK during a tax year, a concessionary treatment enables the tax year to be split into periods before and after arrival or departure. UK tax on most income and gains arising before a person has become UK resident or after he has ceased to be so resident is limited to the tax which, loosely, would have been due if the taxpayer had been non-resident throughout the year. Part 3 of the *Draft SRT Schedule*, gives a statutory relief broadly similar to this concessionary relief.[127]

THE STRUCTURE OF THE DRAFT LEGISLATION

8.2.1 Paras 36-47 define the circumstances in which there is a 'split year' and how the overseas and UK parts of the split years are to be determined. Paras 48-97 amend other parts of the tax legislation, utilising these defined terms, with the intent that income and gains arising in the overseas part of a split year are only taxed to the same extent as they would be taxed on a non-resident.

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[127] *June 2012 ConDoc*, paras 3.166 and 3.167

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THE DEFINITION OF A SPLIT YEAR

8.3.1 In respect of an individual, a tax year is a split year if:-

(a) the individual is resident in the UK for that year; and

(b) the conditions of one of five cases are satisfied.[128]

THE FIVE CASES

Case 1: Starting Full-time Work Overseas

The Conditions of Case 1

8.4.1 The conditions of Case 1 will be satisfied where:-

(a) the taxpayer was resident in the UK for the previous tax year;

(b) on a day in the relevant year the taxpayer starts to work full-time overseas for a period that continues to the end of the relevant year;

(c) in the part of the relevant year beginning with that day:-

(i) the number of days in which the taxpayer does more than three hours work in the UK does not exceed a permitted limit; and

(ii) the number of days that the taxpayer spends in the UK, excluding days deemed to be spent in the UK under the Deeming Rule, does not exceed a permitted limit.

[128] Para 40(1)

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(d) the taxpayer is not resident in the UK for the next tax year because he meets the Third Automatic Overseas Test.[129]

8.4.2 The permitted limit in respect of working in the UK is 30 days multiplied by a proportion found by dividing the number of whole months before the taxpayer starts to work full-time overseas by 12. The permitted limit in respect of the number of days spent in the UK is 90 days multiplied by that proportion.[130]

8.4.3 So Case 1 is aimed at individuals leaving for full-time work abroad.

Determining the Overseas and UK Parts

8.4.4 Where Case 1 applies, the overseas part of the split year is the part of the year which begins on the day when the taxpayer starts to work full-time overseas.[131]

8.4.5 In respect of all five cases, the UK part of a split year is the part of that year that is not the overseas part.[132]

Case 2: Accompanying Spouses

The Conditions of Case 2

8.4.6 The conditions of Case 2 will be satisfied where:-

(a) the taxpayer was resident in the UK for the previous tax year;

[129] Para 41
[130] Para 41(6) and (7)
[131] Para 47(1)(a)
[132] Para 47(2)

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(b) the taxpayer has a partner whose circumstances fall within Case 1 of the split year rules for the relevant year;

(c) on a day in the relevant year 'the taxpayer joins the partner overseas so they can live together while the partner is working full-time overseas';

(d) in the part of the relevant year beginning with the 'deemed departure day':-

(i) the taxpayer has no home in the UK at any time, or has homes in both the UK and overseas but spends the greater part of the time living in the overseas home; <u>and</u>

(ii) the number of days that the taxpayer spends in the UK does not exceed the permitted limit (that is the same limit that applies for the purposes of Case 1).

(e) the taxpayer is not resident in the UK for the next tax year.[133]

8.4.7 The deemed departure day is the later of:-

(a) the day on which 'the taxpayer joins the partner overseas so that they can live together while the partner is working full-time overseas'; and

(b) the day on which the partner starts to work full-time overseas.[134]

8.4.8 A partner for this purpose is:-

(a) a husband, wife or civil partner;

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133 Para 42

134 Para 42(7)

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(b) if an individual and another person are living together as husband and wife, that other person; or

(c) if an individual and another person of the same sex are living together as civil partners, that other person.[135]

8.4.9 The *June 2012 ConDoc* said:-

> "As the Government intends to recognise common-law partners for the purposes of a family connection to the UK … it is right that such relationships are also recognised for the purposes of split year treatment."[136]

8.4.10 We have already seen the difficulties of construction caused by the inclusion of what the *June 2012 ConDoc* inaccurately referred to as common-law partners.

8.4.11 It has been pointed out by the STEP that the requirement that the taxpayer must join the partner overseas would seem to require the employed partner to be overseas before the accompanying partner[137] or at least, that they cannot go overseas together. The *December 2012 ConDoc* took no account of this representation. The *Draft Guidance* provides no clue as to whether HMRC will or will not take this point.[138]

8.4.12 It also appears that if the taxpayer joins their partner overseas for some reason other than in order that they may live together, such as because of a desire to live in a foreign country, the conditions of Case 2 will not be satisfied. As the burden of

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135 Para 42(9)
136 *June 2012 ConDoc*, para 3.178
137 The *STEP 2012 Response*, para 7
138 The *Draft Guidance* para 87

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proof in any appeal against an assessment is borne by the taxpayer, that leaves the taxpayer in the position of having to prove his motivation.

8.4.13 We have already seen the difficulty caused by the imprecision of the concept of a home. Case 2 requires one to determine the period during which one lives in a home. The use of the phrase implies that there is a distinction between having a home (relevant to the Second Automatic UK Test and the Accommodation Tie) and living in a home; that it is possible to have a home without living in it so that 'living in' imposes an additional requirement. What is that requirement? Can one be said to be living in a home in a period when one is away from it? If not, it is clear that there must be a minimum period of absence for this purpose or else one would not be living in a home when one was at work.

Determining the Overseas Part

8.4.14 In respect of Case 2, the overseas part of a split year is the part of that year which starts with the Deemed Departure Day.[139]

<u>Case 3: Leaving the UK to Live Abroad</u>

The Conditions of Case 3

8.4.15 The conditions of Case 3 are satisfied where:-

(a) the taxpayer was resident in the UK for the previous tax year;

(b) at the start of the relevant year the taxpayer had one or more homes in the UK but:-

139 Para 47(1)(b)

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(i) he ceases to have any home in the UK during the year; and

(ii) from that time, he has no home in the UK for the rest of that year.

(c) neither Case 1 nor Case 2 is satisfied;

(d) in the part of the year beginning with the day on which he ceases to have any home in the UK, the taxpayer spends fewer than 16 days in the UK;

(e) the taxpayer is not resident in the UK for the next tax year;

(f) at the end of the period of six months beginning with the day in the year when he ceases to have any home in the UK, the taxpayer has a sufficient link with a country overseas.[140]

8.4.16 For these purposes an individual has a sufficient link with a country overseas if and only if:-

(a) the taxpayer is considered for tax purposes to be a resident of that country in accordance with its domestic laws; or

(b) the taxpayer has been present in that country (in person) at the end of each day of the 6 month period mentioned in sub-paragraph (7); or

(c) the taxpayer's only home is in that country or, if the taxpayer has more than one home, they are all in that country.[141]

Determining the Overseas Part

8.4.17 In respect of Case 3, the overseas part of a split year is the part of that year which begins with the day on which the taxpayer ceases to have any home in the UK.[142]

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[140] Para 43
[141] Para 43(8)
[142] Para 47(1)(c)

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Case 4: Coming to Live or Work Full-time in the UK

The Conditions of Case 4

8.4.18 The conditions of Case 4 will be satisfied where:-

(a) the taxpayer was not resident in the UK for the previous tax year.

(b) either or both of the following descriptions apply to the taxpayer:-

(i) at the start of the relevant tax year, the taxpayer did not meet the only home test, but he begins to meet the test during the tax year concerned and continues to do so for the rest of that year; or

(ii) on a day in the relevant year the taxpayer starts to work full-time in the UK for a period that continues to the end of that year.

(c) for the part of the relevant year before the day on which he meets the conditions of (b) above the taxpayer does not have sufficient UK ties. That is, looking only at that period, he does not meet the Sufficient Ties Test. In determining whether that is the case or not, all references in the Sufficient Ties Test to the year are to be read as references only to the overseas part of the year. The various daily limits in the Sufficient Ties Test are to be reduced by the proportion which the number of whole months in the UK part of the year bears to 12.

(d) the taxpayer meets the Second Automatic UK Test (the only home) or the Third Automatic UK Test (FTWUK).[143]

[143] Para 44

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8.4.19 The Only Home Test is met if the taxpayer has only one home and that home is in the UK or he has more than one home and all of them are in the UK.[144]

8.4.20 It will be seen that Case 4, cannot be satisfied by someone who does not satisfy the Automatic Residence Test even though he is UK resident in that year by virtue of meeting the Sufficient Ties Test.

Determining the Overseas Part

8.4.21 In respect of Case 4, the Overseas Part of a split year is the period ending on the day before either he first meets the only home test or he starts to work full-time in the UK.[145]

<u>Case 5: Starting to have a Home in the UK</u>

The Conditions of Case 5

8.4.22 The conditions of Case 5 will be satisfied where:-

(a) the taxpayer was not resident in the UK for the previous tax year;

(b) at the start of the relevant year, the taxpayer had no home in the UK but:-

  (i) there comes a day when, for the first time in that year, the taxpayer does have a home in the UK; and

  (ii) from then on, the taxpayer continues to have a home in the UK for the rest of that year and for the whole of the next tax year.

(c) for the part of the relevant year before the day when he begins to have a home in the UK the taxpayer does not have sufficient UK ties;

144 Para 44(6)
145 Para 47(1)(d)

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(d) the circumstances of the case do not fall within Case 4 for the relevant year;

(e) the taxpayer is resident in the UK for the next tax year and that tax year is not a split year as respects the taxpayer;

(f) the sufficient ties rules of paras 16-19 and the key concepts in Part 2 apply for this purpose subject to:-

    (i) references in those paragraphs and that Part to the relevant year are to be read as references to the part of the relevant year before the day on which he begins to have a home in the UK;

    (ii) each number of days mentioned in the first column of the Sufficient Ties Table[146] in paragraphs 17 and 18 is to be reduced by a proportion in which the numerator is the number of whole months in the year after the day on which he starts to have a home in the UK and the denominator is 12.

Determining the Overseas Part

8.4.23 In respect of Case 5, the Overseas Part of a split year is the period ending on the day before he first has a UK home.

[146] See para 7.1.1 above

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SECTION IX

ANTI-AVOIDANCE

A FIVE YEAR RULE

9.1.1 Part 4 of the legislation introducing the SRT contains almost 20 pages of anti-avoidance measures designed to prevent individuals from using short periods of non-residence to receive income or gains free of UK tax.

9.1.2 The charge will apply to income from closely controlled companies, lump sum benefits from employer financed retirement benefit schemes and chargeable event gains from life assurance contracts.

9.1.3 The provisions will apply if the period of temporary non-residence is five years or less. Because the non-resident period includes the overseas part of a split year it will not necessarily be co-terminus with a period of a complete fiscal year. The current temporary non-residence rules which apply for Capital Gains Tax purposes apply if there are fewer than five tax years between the year of departure and the year of return. These rules are to be harmonised with the new Income Tax rules.

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SECTION X

CONCLUSION

AN ALMOST FINAL FORM?

10.1.1 It is clear that the SRT has now almost reached its final form and that there are unlikely to be any significant changes before it is enacted.

A SIGNIFICANT IMPROVEMENT

10.2.1 It will be a significant improvement on the current law. Individuals will be able to determine their residence status with greater probability than they are able to do now.

A WASTED OPPORTUNITY

10.3.1 That is not saying very much. When one considers the early hopes for a simple, objective test based on days of presence in the UK following the US Model and one looks at the bloated *Draft SRT Schedule* of 55 pages, accompanied by the *Draft OR Schedule* of 21 pages, one wonders how we got to this position. That is a tale which, unfortunately, cannot be told in its entirety because most of the key discussions took place under Chatham House Rules, that is, on conditions of confidentiality.

10.3.2 What one can say is that, although an improvement, the SRT is a wasted opportunity. Once enacted, it is unlikely to be recast significantly for many years. The Government might have made a major, very significant and cost-free, simplification

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of a key element of the tax code. Instead, it has chosen to make a half-baked reform resulting in a grossly complex test which contains significant areas of uncertainty and which, therefore, does not meet the Government's own objectives for the reform. It will provide occupation for the Courts, the Revenue Bar and Tax Advisers for years to come.

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