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IBC CONFERENCE

OFFSHORE TAXATION: MAJOR CHANGES TO THE DOMICILE RULES AND WHAT ACTION TO TAKE

SESSIONS 8 & 9
'THE STATUTORY RESIDENCE TEST: SPLIT YEARS, TEMPORARY NON-RESIDENCE and TREATY NON-RESIDENCE'

** SPEECH **

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Good afternoon ladies and gentlemen. You will see from your Agenda that I am scheduled now to give two consecutive sessions on the Statutory Residence Test. The time allowed for the two sessions is 55 minutes so I propose, rather than to divide the sessions formally into two, to talk without a break for the whole time but to encourage you to ask questions as we go. From time to time I am going to ask you to read materials in your delegate pack. Patrick, when I do so, please may I ask you to tell me when you have read them so that I can gauge when our audience has had sufficient time to do so?

This talk and the materials which are in your delegate's pack are based on the book which I wrote with my wife and professional partner, Sharon McKie, '*McKie on Statutory Residence*' which is published by CCH. There is a display copy of the book on the reception desk for you to look at and order forms if you wish to order a copy. If you leave completed order forms with reception I shall ensure the publishers receive them.

In spite of its long gestation period, the legislation in the Finance Act 2013 Schedule 45 which contains the Statutory Residence Test is very poorly drafted and contains numerous difficulties of construction. I am going to point out some of these difficulties as we go. Almost without exception HMRC's Guidance either does not examine these difficulties or is expressed with such imprecision as to be of no practical use to an adviser in dealing with them. For that reason I shall not be referring to the Guidance very often this morning. The Guidance is, however, discussed in detail in '*McKie on Statutory Residence*'.

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The Statutory Residence Test has been with us, now, for a year and a half and I should imagine that most of us are now very familiar with its general provisions. Of course, we are normally asked to advise when clients are intending either to cease or to become UK resident and so, today, I am going to concentrate on the rules which are of most relevance to doing so: the Split Year, Temporary Non-Residence and Dual Residence Rules.

I am going to start with the **SPLIT YEAR RULES**.

Perhaps the most important thing to say about the Split Year Rules is that they only apply in a year for which an individual is UK resident. They have no effect whatsoever on the residence status of the individual concerned. Rather, where a taxpayer's circumstances fall within one of eight Split Year Cases and the taxpayer is UK resident for the relevant fiscal year, they divide that fiscal year into a UK part and an overseas part and modify the taxation of specific types of income and capital gains, normally, where that income or those gains arise in the overseas part of the year. Provisions which apply purely by reference to residence and the operation of which is not specifically modified by the Split Year Rules, are unaffected by them. So, for example, the application of IHTA 1984 section 267, which contains the deemed domicile rules, is unaffected by the Split Year Rules and it appears that, even if the proposals set out in the consultation document 'Reform of the Taxation of Non-Domiciles' are enacted, it will continue to be so.

The materials which you will find in your delegate's pack include an example at pages 2 and 3, Example **1.0**, which illustrates the danger of overlooking the fact that a split year is a year for the whole of which the taxpayer concerned is UK resident. It is for you to read at your leisure after this talk.

Because the Split Year Rules operate by providing specific exemptions from Income Tax and Capital Gains Tax one cannot simply assume that in respect of the overseas part of a split year an individual will be assessed as if he were not resident in the UK. One has to consider each item of income and gains which would normally be assessable on the UK resident and determine how that treatment is modified by the Split Year Rules. The rules do not modify the taxation of all types of income and gains. Income deemed to be a transferor's under the provisions governing income arising on certain assets transferred abroad, for example, is unaffected by the Split Year Rules.

Three Split Year Cases apply where the taxpayer has been resident in the UK for the preceding fiscal year and is not resident in the UK for the succeeding year. We shall call these the 'Ceasing UK Residence Cases'. There are five Split Year Cases which apply where the taxpayer was not resident in the UK for the preceding year. We shall call these the 'Becoming UK Resident Cases'. It is a condition of three of the five Becoming UK Resident Cases that the taxpayer should be resident in the UK for the succeeding year. It is also a condition of Case 8 that the Succeeding Year should not be a split year.

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The Ceasing UK Residence Cases, loosely, may be, characterised as follows. Case 1 concerns starting to work overseas. Case 2 concerns someone who ceases to be UK resident because they are the partner of someone starting to work overseas. Case 3 concerns individuals who cease to have a home in the UK.

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The Becoming UK Resident Cases may be characterised, similarly loosely, as follows. Case 4 concerns individuals who come to have a home in the UK only. Case 5 concerns individuals who start to work in the UK and Case 6 concerns individuals who cease working overseas. Case 7 concerns individuals who are spouses or partners of individuals who cease working overseas under Case 6. Case 8 concerns individuals who start to have a home in the UK without, necessarily, not also having a home overseas.

As I have said, none of the Split Year Cases applies in a year in which the individual is not resident in the UK. It is a condition of each of the Ceasing UK Residence Cases that the individual was resident in the UK in the Preceding Year and was not resident in the UK in the Succeeding Year. It is a condition of each of Cases 4 – 8 (the Becoming UK Resident Cases) that the individual was not resident in the Preceding Year and Cases 6 – 8 have the additional condition that the individual should be resident in the Succeeding Year. The result of these

rules is that where one or more of the Ceasing UK Residence Cases apply in the year, none of the Cases can apply in either the Preceding Year or in the Succeeding Year except that Cases 4 – 7 (that is, the Becoming UK Resident Cases excluding Case 8) may apply in the Preceding Year. Conversely, where one or more of Cases 4 – 7 applies in the Year, one or more of the Ceasing UK Residence Cases may apply in the Succeeding Year. This is represented diagrammatically for you at pages 4 to 7 of your delegate's pack for you to look at at your leisure after this talk.

One interesting result of these rules is that, in the fiscal year of his birth, a child cannot fall within the Ceasing to be UK Resident Cases, because he will not fulfil the condition that he was resident in the United Kingdom in the previous fiscal year. In respect of the becoming UK resident cases, such a child can fall within Cases 4 and 8 but, one presumes, not within Cases 5, 6 or 7 because those cases concern starting or ceasing work.

It is possible for an individual, in respect of the same year, to fall within two or more cases of the Ceasing UK Residence Cases or within two or more cases of the Becoming UK Resident Cases. Because the cases define the overseas part of the split year in different ways it is necessary for the legislation to provide rules as to priority amongst the Ceasing UK Residence Cases and amongst the Becoming UK Resident Cases. There is no need for rules as to the priority between these two categories because, as I have said, the Ceasing UK Residence Cases cannot apply in a year in which a Becoming UK Resident Case applies, and vice versa.

If an individual's circumstances fall under more than one case in respect of a year, the overseas part is determined for the case which has priority. This priority is important, therefore, because it may have the result, for those ceasing UK residence, that the overseas part of their split year starts later than they would suppose and, for those becoming UK resident, that the UK part of their split year begins earlier than they suppose.

Advisers often assume that if one meets the conditions of a Split Year Case that one will determine the beginning or end of the overseas part of the Split Year by reference to that case. As I have said, however, under the priority rules that may not be the case and the effect of one's mistake may be that income or gains which one thought would be relieved as arising in an overseas part of the year are unrelieved because they arise in the UK part of the year. Example **2.0** at pages 8 and 9 in your delegate's pack illustrates this pitfall. Again, it is for you to read at your leisure after this talk.

Paragraph 54 sub paragraph (1) of the SRT Schedule provides a simple hierarchy of priority of the Ceasing UK Residence Cases in numerical order; so Case 1 takes priority over Case 2 which, in turn, takes priority over Case 3.

The priority rules in respect of the Becoming UK Resident Cases are rather more complicated. Your delegate's pack, at pages 10 to 12, contains a detailed explanation and diagram of the priority rules which apply to them. I have to say that the logic of the order of priority which applies to the Becoming UK Resident Cases is not easily explicable. As a rough rule of thumb, one can say that the Work Cases, Cases 5, 6 and 7, generally have priority over the Home Cases, Cases 4 and 8. Within the Work Cases, the earliest date normally prevails. Similarly within the Home Cases, the earliest date normally prevails. The only exception to these two rules of thumb is where the only 'work' case is Case 5 but one of the 'home' cases is earlier. In that case, the earliest 'home' case trumps Case 5. These are, however, as I say, only rough rules of thumb. There is no substitute for working through the detailed rules of priority.

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We shall now look at the Split Year Cases in turn, looking primarily for difficulties of construction or points of practical difficulty. We shall begin with the Ceasing to be UK Resident Cases.

CASE 1 of the Split Year Rules is aimed at individuals starting full-time work overseas. Its conditions are set out for you in your delegate's pack on page 13. Please would you turn to those conditions and read them now? **PAUSE** You will see that Case 1 operates by reference to a period which I shall refer to as the 'Period under Consideration' or the 'Consideration Period'. You will also see that there could be more than one period in the year which satisfies the conditions which apply in determining whether a period is a Consideration Period. If one assumes that it is in the individual's interest for the Consideration Period to start at the earliest possible date in the year so as to have the longest possible overseas part of the year, one would choose to examine the period starting with the earliest date on which those conditions are likely to be satisfied.

Perhaps the most important difficulty with Case 1 is the condition that the individual concerned must be 'not resident in the UK for the next tax year' because he meets the Third Automatic Overseas Test for that year.

The difficulty, here, is the word 'because'. What if the individual concerned would not be resident in the UK even if he did not meet the Third Automatic Overseas Test because, for example, he met the First Automatic Overseas Test or, not meeting any of the other Automatic Overseas Tests, he also did not meet any of the Automatic UK Tests or the Sufficient Ties Test?

Read literally, it seems that this condition is not satisfied where the individual concerned meets the Third Automatic Overseas Test but would not be resident in the UK in the Succeeding Year even if he did not.

Of course, the Tribunal or Court might refuse to follow the literal construction preferring a broadly purposive approach but there does not seem to be any reason why one should

assume a purpose which is at odds with the literal meaning of the legislation here rather than one which is consistent with it.

CASE 2 of the Split Year Rules concerns, loosely, an individual who is the partner of someone starting work overseas. The circumstances which fall within Case 2 are given in your delegate's pack at pages 14 and 15. Please would you turn to them and read them now? **PAUSE**

The legislation does not say expressly when the putative Partner must be the Accompanying Spouse's Partner. It imposes two conditions in respect of the Partner. First, that the Accompanying Spouse has a Partner whose circumstances fall within Case 1 of the Split Year Rules either for the Relevant Year or for the Preceding Year. Secondly, that the Accompanying Spouse 'moves overseas so the taxpayer and the partner can continue to live together'. One might argue that the putative Partner must be a Partner throughout the period during which these conditions are to be fulfilled. That is, throughout either the Relevant Year or the Preceding Year whichever is the year by reference to which the former condition is satisfied and also at the time of the Accompanying Spouse's move under the latter condition. Alternatively, it may be that the putative Partner need only be the Accompanying Spouse's Partner at the time of the Accompanying Spouse's move. On balance, I think the latter is the more probable construction but the matter is not free from doubt.

The requirement that the Accompanying Spouse 'moves overseas so the [Accompanying Spouse] and the partner can continue to live together while the partner is working overseas' poses a difficulty. If the Accompanying Spouse moves abroad for some reason other than so that she and her Partner can continue to 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 proof in any appeal against an assessment is borne by the individual, that would leave the Accompanying Spouse in the position of having to prove her motivation.

Arguably, there is also a further anomaly. An individual who moves abroad to marry or live with another person who has not previously been their Partner would not satisfy the condition that he moves so that he and the Partner can continue to live together. Your delegate's pack contains an example at page 16, Example **3.0**, illustrating this anomaly.

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 and ends with the last day of the fiscal year.

Whether the Partner's circumstances fall within Case I for what is the Preceding Year or the Relevant Year in respect of the Accompanying Spouse, the deemed departure day will be the later of the first day of what is for the Partner the overseas part of the Relevant Year, as defined under Case 1 and the day on which the Accompanying Spouse 'moves overseas' in accordance with paragraph 45 sub-paragraph (4).

In order to know what is the deemed departure day, therefore, one needs to know when the Accompanying Spouse moves overseas. If what is involved in moving overseas is uncertain, therefore, it will not be clear when the deemed departure day occurs and, therefore, when the overseas part of the split year begins.

What is involved in moving overseas? Does it imply anything more than complying with all of the other conditions of paragraph 45? One of the definitions of 'move' used as an intransitive verb given by the *SOED* is to 'change one's place of residence'. The *SOED* also gives a variety of related meanings of phrases, combining the word 'move' with a preposition, which refer to residence.

It is very unfortunate that the draftsman has used a phrase which is so closely related to 'residence' and the phrase 'to reside'. The purpose of introducing the SRT was to escape from the uncertainties of the concept of residence by defining residence by reference to other,

more precisely definable concepts. Whether, in what way and to what extent the use of the word 'moves' imposes significant additional conditions for the application of Case 2 is unclear and will remain so at least until the Courts have had a chance to consider the matter.

Example **4.0** on pages 17 to 19 of your delegate's pack illustrates the difficulty of determining when a person has moved overseas. Please read it at your leisure after this talk.

Where the Accompanying Spouse has homes both in the UK and overseas, Case 2 requires one to determine whether the Accompanying Spouse 'spends the greater part of the time living in the overseas home' during the part of the year beginning with the 'deemed departure day'. The use of the phrase 'living in' 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, this must be subject to a minimum period during which one may be physically present somewhere other than the home or else one would not be 'living in' a home when, for example, one was away from it at work. In my view the phrase probably indicates that an individual sleeps at the property with some regularity over a period which is not merely short. What degree of regularity is required and over what period is unclear.

Obviously it is crucial to the application of Case 2 of the Split Year Rules to determine whether or not the Accompanying Spouse has a home or homes and where that home or those homes are. Unfortunately, what is and is not a home is not at all clear.

In respect of Accompanying Spouses, these issues are likely to be particularly difficult. Such spouses will often continue to own interests in, and have available to them, properties which were their homes when they were in the UK and which will be their homes if, and when, they return to the UK. Do they continue to be their homes when they are abroad?

Somewhere that ... [the individual] ... uses periodically as nothing more than a holiday home or temporary retreat (or something similar) does not count as a home of the individual. Where the Accompanying Spouse and her Partner spend only a few weeks a year in a property which has been their home does it remain their home or has it become a holiday home? Unfortunately, there are no clear principles by which this question may be decided but it is surely arguable that its function determines its nature and that if the couple use the property for the purposes of taking holidays, it is a holiday home during the period when that is the case.

The *Guidance*, however, contains two examples where its author assumes that properties have continued to be the homes of people who now spend most of their time overseas, in circumstances where it is not at all clear why he has made that assumption.

It will be noticed that whereas Case 1 applies only where the individual concerned is not UK resident in the Succeeding Year 'because he meets the Third Automatic Overseas Test', under Case 2 the Succeeding Year condition is simply that the individual must not be 'resident in the UK' for that year. To that extent, therefore, Case 2 is more flexible than Case 1. There is, however, a particularly nasty trap here. If, as events turn out, the Partner does not satisfy the condition that, because he meets the Third Automatic Overseas Test, he is not resident in the UK in the Succeeding Year, not only will his Relevant Year turn out not to be a split year but so too will his Accompanying Spouse's Relevant Year. Example **5.0** at pages 20 and 21 in your delegate's pack illustrates this trap. You may like to read it after this talk at your leisure.

CASE 3 is aimed at individuals who leave the UK, make a substantial break in their connection with it, by ceasing to have a home in the UK, and create a sufficient link with another country. The circumstances which fall within Case 3 are set out in your delegate's pack at pages 22 and 23. Please would you turn to them and read them now? **PAUSE**

Obviously one cannot cease to have a home in the UK, if one has not already got one and yet a person may be resident here who has no home here as Example **6.0** at pages 24 and 25 of your delegate's pack illustrates.

You will see that if for any reason the individual concerned comes to have a home in the UK again within the fiscal year he will not satisfy the conditions of the Case. If, however, he comes to have a home in the UK in the Succeeding Year or in a year after that he will still meet the conditions of the case provided he is not resident in the UK in the Succeeding Year.

The sixteen day limit does not vary according to the part of the year in which the individual concerned ceases to have a home in the UK, so that when he does so in the early part of the year it is extremely restrictive.

You will also notice that a person may have a sufficient link with a country overseas if he meets any one of three conditions.

One of those three conditions is that he is considered for tax purposes to be a resident in that country in accordance with its domestic laws. The individual will not satisfy this condition where the country concerned does not use residence to determine chargeability to tax.

Can one say that a person is 'considered for tax purposes to be a resident of [a] country in accordance with its domestic laws' at a time when the country's law determines whether he is resident at that time by reference to events some of which have not yet occurred? Does he satisfy the condition, for example, where a foreign country's tax law regards an individual as resident in it if he spends 183 days there but he has not done so by the last day of the six month period but that day does form part of the 183 day aggregate period by reference to which his fiscal residence in the foreign country is determined?

The key word in paragraph 46 sub paragraph (7)(a) is, I think, 'considered'. In the context of a system of law, to say of a person that he is 'considered' to be something is to employ a metaphor, for only beings capable of conscious thought can 'consider'. In reality, rather than metaphorically, an abstraction such as a legal system cannot do so. In view of the fact that the legislation here employs a metaphorical use of the verb it seems to me that it would be an exercise in excessive literalism to require that the hypothetical entity considering the individual's circumstances should have the facts available to it at the time of the hypothetical consideration from which to determine whether or not he is resident at that time rather than simply requiring that the individual should in due course prove to have been resident at that time.

It seems to me, therefore, that an individual will satisfy the condition of paragraph 46, sub-paragraph (7)(a) where the individual is treated under the country's domestic laws as resident for a period which includes the end of the six month period even if, at that time, all of the events have not occurred by reference to which the domestic law determines whether or not he is resident for that period. Your delegate's pack includes an example on pages 26 to 28, Example **7.0**, which illustrates the point and which, again, you can read at your leisure after this talk.

You will see that the third condition by which a person may have a sufficient link with a country overseas is that he has been present in that country (in person) at the end of each day of the six month period. This is a very restrictive provision. It must be satisfied for every day of the six months beginning on the day on which the individual ceases to have a home in the UK. An individual who ceases to have a UK home before he arrives in the overseas country because, for example, he has completed its sale a few days before leaving or he has taken a brief holiday in a third country after ceasing to have a UK home will not satisfy the condition. Indeed, the individual who flies to the new country leaving the UK before midnight on the day that he ceases to have a UK home and arriving in the new country after midnight will not do

so. Nor does it matter why he is absent from his new country for there is no relief for exceptional circumstances.

As for the condition that the individual's only home is in that country or all of his homes are in that country at the end of the six month period, the difficulty is that the acquisition of a home in a third country before the end of the six month period will prevent an individual from having a sufficient link with a country by virtue of satisfying para. 46 sub paragraph (7)(c). Also, if for some reason, on the crucial day at the end of the six month period, an individual happens to be between homes or has not yet acquired one he will not satisfy this condition.

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We shall now turn to the **BECOMING UK RESIDENT CASES**, Cases 4 to 8.

CASE 4 of the Split Year Rules is aimed at those who become resident in the UK and come to have a home or homes only in the UK. **CASE 5** is aimed at those who have become resident in the UK and begin to work here. The circumstances that fall within Cases 4 and 5 of the Split Year Rules are set out for you in your delegate's pack at pages 29 and 30.

Both Cases 4 and 5 can require very complex calculations. Your delegate's pack gives examples at pages 31 to 41, Examples **8.0 and 9.0**, which illustrate the complexity of the calculations. You may wish to look at these at your leisure after this talk.

CASE 6 of the Split Year Rules is aimed at those who, having been UK resident, have gone to work abroad, meeting the Third Automatic Overseas Test, and have then become resident again in the UK. In contrast to Case 5, which looks at a period of work in the UK which begins in the Relevant Year, Case 6 looks at a period of overseas work which ends in the Relevant Year. There is also no equivalent to the requirement of Case 5 that in the overseas part of the year the individual should not have sufficient UK Ties.

The circumstances which fall within Case 6 of the Split Year Rules are set out for you at page 42 of your delegate's pack. Please would you turn to them and read them now? **PAUSE**

You will see that the individual concerned must have been resident in the UK for one or more of the four fiscal years before the Preceding Year, non-UK resident in the Preceding Year and UK resident in the Relevant Year. The circumstances of the Case, therefore, include two changes of residence status.

Keith Gordon has suggested that, because Case 6 of the Split Year Rules will only apply to those who have been resident for one or more of the four fiscal years preceding the Relevant Year, the provisions may be susceptible to challenge under EU law on the basis that they discriminate against non-UK nationals.

Once again, the calculations required by Case 6 are of the utmost complexity. Your delegate's pack, at pages 43 to 50, contains an example, Example **10.0**, illustrating that complexity which, again, you may wish to look at after this talk.

CASE 7 of the Split Year Rules is aimed at those who move to the UK so that they can continue to live with a Partner whose circumstances fall within Case 6 because he has ceased to work overseas. It is not aimed at those who move to the UK so that they can continue to live with a Partner who has met the conditions of Case 5, starting work in the UK, rather than Case 6. Thus the Partner must have been resident in the UK before becoming non-UK resident.

The circumstances which fall within Case 7 of the Split Year Rules are shown in your delegate's pack at page 51. Please would you turn to them and read them now? **PAUSE**

It will be seen, that Case 7 has many similarities to Case 2 which applies, loosely, to an Accompanying Spouse of someone starting work overseas. In examining that case, we discussed the difficulties which arise from its requirement that the Accompanying Spouse should move overseas 'so the taxpayer and the Partner can continue to live together' while the partner is working overseas. The equivalent condition of Case 7, however, is expressed rather differently to that in Case 2. Paragraph 50 sub paragraph (4) requires that the Accompanying Spouse move 'to the UK so the taxpayer and the Partner can continue to live together *on the partner's return or relocation to the UK*'.

This causes considerable difficulties where there is a large gap between the Partner moving to the UK and the putative Accompanying Spouse doing so at a later date. It is also difficult to see how the condition can be satisfied where the putative Accompanying Spouse's move to the UK precedes the Partner's return or relocation.

What is the Partner's return or relocation to the UK? As we have seen, in order to fall within Case 6, the Partner must have been resident in the UK for one or more of the four fiscal years immediately preceding the Preceding Year in respect of him, non-resident for his Preceding Year and resident in the UK for his Relevant Year. For the Partner to have a 'return or relocation to the UK' is anything more required than compliance with these conditions and with the other conditions of Case 6? Paragraph 50 sub paragraph (4) assumes that there is such a return or relocation as it refers to. Perhaps, therefore, there being such a return or relocation is an inevitable consequence of the other conditions of Case 7 being met? But if that is the case, one wonders why the draftsman did not adopt some such form as 'so the taxpayer and the Partner can continue to live together after the end of the overseas part of the year in respect of which Case 6 applies to the Partner'. If the Partner has met the conditions of Case 6 for the Accompanying Spouse's Preceding Year it is difficult to characterise the Accompanying Spouse as meeting the condition of Case 7 that in the next year she moves 'to

the UK' so the [Accompanying Spouse] and the Partner can 'continue to live together *on* the partner's return or relocation to the UK'.

A further puzzle is why the draftsman provides the alternative descriptions 'return or relocation'. A relocation indicates a change of place but not necessarily a return to the same place. So the natural distinction between the two terms would be that a return indicates that the Partner has been in the UK before and a relocation does not. As we have seen, however, Case 6 requires that the individual should have been resident in the UK for one or more of the four fiscal years immediately preceding the Preceding Year. In what circumstances will the Partner have a 'relocation' and not a return? Is this, perhaps, a mere redundancy?

These are difficult questions of construction but it may be that the Courts, in order to give a sensible meaning to the legislation, will in effect ignore them, finding that there is always a return or relocation where the other conditions of Case 7 are met. I think that that is likely but not certain. It is always dangerous to rely, however, on the Courts finding statutory words to be redundant.

An example, Example **11.0**, illustrating these and other difficulties found in Case 7 is included in your delegate's pack at pages 52 to 56 for you to read at your leisure after this talk.

CASE 8 is aimed at individuals who start to have a home in the UK. Unlike Case 4 it is not necessary for the individual to come to have a home only in the UK. He can have a home overseas as well and yet fall within the case. The circumstances which fall within Case 8 of the Split Year Rules are set out for you at page 57 of your delegate's pack. Please would you read them now? **PAUSE**

Even the smallest gap in the period when the individual has a UK home after the individual first has a UK home either in the Relevant Year or in the Succeeding Year will prevent Case 8 of the Split Year Rules from applying.

We have seen that it is possible for a split year within the Becoming UK Resident Cases to be succeeded by a split year within the Ceasing to be UK Resident Cases. Were it not for the rule that the succeeding year must not be a split year, therefore, it would be possible for a year which is a Relevant Year in respect of Case 8 to be succeeded by a year which is a Relevant Year in respect of Cases 1 – 3.

TEMPORARY NON-RESIDENCE

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We shall now turn our attention to Part 4 of the *SRT Schedule* which contains the provisions relating to temporary non-residence to which I shall refer as the 'TNR provisions'. This afternoon we are going to examine their effect primarily by reference to Capital Gains Tax.

Paragraphs 109 to 115 of the *SRT Schedule* contain general definitions in respect of the TNR provisions. The key phrases are 'Temporarily Non-Resident' and the 'Period of Return'. The definitions of these phrases and subsidiary definitions are set out for you at pages 58 to 60 of your delegate's pack. Please would you turn to them and read them now? **PAUSE**

Before the enactment of the SRT, there were temporary non-residence provisions in respect of capital gains and of certain income which were significantly different to the SRT's provisions. Because both the old provisions and the new ones operate in respect of five-year periods, albeit different ones, it was necessary to have transitional provisions defining when the old rules apply to a person returning to the UK and when the new ones do so. As five years have not yet elapsed since the SRT came into effect these transitional provisions continue to be

important. We shall not be looking at them in this talk but a consideration of them is set out for you at pages 61 to 66 of your delegate's pack.

You will see from the definitions at pages 58 to 60 of your delegate's pack that an individual is temporarily non-resident if his temporary period of non-residence is five years or less. A temporary period of non-residence can include an overseas part of a split year, or two overseas parts of two split years. If it does not, however, the temporary period of non-residence will be a whole number of fiscal years. If the period is five fiscal years or less, the individual will be temporarily non-resident. That means that in such circumstances, to avoid the various charges imposed on individuals who are temporarily non-resident, an individual will have to be non-resident for six fiscal years.

We shall now look at the Capital Gains Tax provisions relating to temporary non-residence. They are found primarily in TCGA 1992 sections 10A, 10AA and 86A.

The main charging provision is section 10A, which applies if an individual is temporarily non-resident.

Where it applies an individual is chargeable to CGT as if gains and losses within section 10A subsection (3) were chargeable gains or, as the case may be, allowable losses accruing to the individual in the period of return. This is subject to section 10AA which contains supplementary provisions and to section 86A which reduces the amount of chargeable gains treated by section 10A as accruing to a settlor under the Offshore Settlor Charge to take account of the interaction of that provision with the Capital Payments Charge.

The gains and losses which are within section 10A sub section (3) are set out for you at page 67 of your delegate's pack. I should be grateful if you would turn to that page and read the relevant information. **PAUSE**

Gains are treated as accruing under the Offshore Settlor charge imposed by TCGA 1992 section 86 only if the settlor of the settlement concerned is domiciled in the UK at some time in the year and is resident for the fiscal year concerned. Similarly, under TCGA 1992 section 13, gains are treated as accruing to participators in the company concerned only if the participator is resident in the UK when the gain accrues to the company. Thus section 13 and section 86 gains do not fall within s.10A(3)(a) as 'chargeable gains ... that accrued to the taxpayer in the temporary period of non-residence'. It is for this reason that special provision is made in section 10A subsections (3)(b) and (c). The Capital Payments Charge imposed by TCGA 1992 section 87, however, can treat gains as accruing to non-residents, and so section 87 gains will be included within the gains treated as accruing in the period of residence because they fall within section 10A subsection(3)(a).

You will notice that section 10A subsection (3)(d) contains an alternative assumption as to residence to the 'residence assumption' utilised by subsections (b) and (c). Because of this alternative residence assumption, subsection (d) will not include gains accruing to the trustees in the overseas part of a split year forming part of a temporary period of non-residence. That split year will not be a fiscal year falling wholly in the temporary period of non-residence. Gains that would accrue under TCGA 1992, section 86 in the overseas part of the split year if the residence assumption were made are within TCGA 1992, section 10A subsection(3). That is because under section 86 subsection (4)(a), where the settlor is resident in the UK for a year but that year is a split year, an amount equal to all of the gains on which the trustees would have been chargeable for the year had they been UK resident is deemed to accrue in the UK part of the year. If, therefore, the gains under TCGA 1992 section 10A subsection (3) had included gains in respect of a part of a fiscal year which was a split year the gains would have been doubly assessed.

If the Remittance Basis applies to an individual for the 'year of return', any foreign chargeable gains falling within section 10A subsection (3) by virtue of being chargeable gains that accrued

to the individual in the temporary period of non-residence and that were remitted to the UK at any time in the temporary period of non-residence are to be treated as remitted to the UK in the period of return. The 'year of return' for this purpose is the fiscal year that consists of or includes the period of return. We have seen, that gains under sections 13 and 86 do not accrue to individuals who are non-resident so this deemed remittance rule will not apply to such gains. It will, however, apply to gains under TCGA 1992 sections 87 which has its own special rules in respect of remittances.

Section 10AA, as we have seen, contains various supplementary provisions. Section 10AA subsection (1) provides that section 10A subsection (2) does not treat a gain or loss as accruing in the year of return where it accrues on the disposal by the individual concerned of an asset which was acquired by him in the temporary period of non-residence, subject to various exceptions. The detailed provision is set out for you in your delegate's pack at pages 68 and 69. I should be grateful if you would turn to it and read it now. **PAUSE**

An example of a transaction which is prevented from falling within section 10AA subsection (1) by section 10AA subsection (1)(b) is as follows.

An individual's wife acquired an asset when she was UK resident and gave it to the individual. He was deemed to have acquired it at such a consideration as gave rise to neither a gain nor a loss on his wife's disposal. If his wife gave it to him during a temporary period of non-residence and he disposed of it during that period, were it not for TCGA 1992 section 10AA subsection (1)(b), section 10AA subsection (1) would apply to prevent TCGA 1992 section 10A subsection (2) treating him as if the gain on his disposal had arisen in his period of return. Because of section 10AA subsection (1)(b), however, the gain does fall within section 10AA subsection (1) and so it does fall within section 10A subsection (3) and is therefore treated as accruing in the individual's period of return under section 10A subsection (2).

Were it not, therefore, for section 10AA subsection (1)(b), the effect of the wife's gift would have been to allow an asset acquired by the couple whilst the wife was UK resident to be the subject of a disposal by the husband in a non-resident period without the resultant gain being brought into charge in the period of return. Section 10AA subsection (1)(b) prevents that. Section 10AA subsection (3) then excludes section 10AA subsection (1) from applying to gains that (ignoring section 10A) would fall to be treated by virtue of certain provisions as accruing on the disposal of the whole or part of another asset. The exclusion only applies where that other asset meets the requirements of section 10AA subsection (1) but the asset in respect of which the gain actually accrued or would actually accrue does not.

The provisions are section 116 subsections (10) and (11) (reorganisations, conversions, reconstructions and exchanges involving qualifying corporate bonds), section 134 (exchanges of gilt-edged securities for shares in pursuance of any enactment) and section 154 subsections (2) and (4) (roll-over relief on business assets where the acquired asset is a depreciating asset).

An example of a gain to which section 10AA subsection (1) does not apply because of section 10AA subsection (3) with the result that section 10A subsection (2) applies to treat the disponer as if the gain were a chargeable gain accruing to him in the period of return is as follows.

An individual disposes of shares to a company in exchange for a qualifying corporate bond ('QCB') during a temporary period of non-residence. TCGA 1992 section 116 subsection (10) applies so that the exchange is treated as not involving any disposal of the shares but the gain that would have accrued if the shares had been disposed of for a consideration equal to their market value immediately before the disposal is calculated. If the QCB is disposed of at a later date which is in a temporary period of non-residence, the gain calculated under section 116 subsection (10) would be deemed to accrue at that time. The gain which accrues in the

temporary period of non-residence is one which under TCGA 1992 section 116 subsection (10) is treated as accruing on the disposal of another asset (the QCB). Because the QCB was acquired in the temporary period of non-residence, were it not for TCGA 1992 section 10AA subsection (3), the gains arising on its disposal would fall within section 10AA subsection (1) and would therefore be excluded from being deemed to accrue in the period of return under section 10A subsection (2). Because the asset, the shares, in respect of which the gain actually accrued, however, did not meet the requirements of section 10AA subsection (1), section 10AA subsection (3) applies so as to exclude the application of section 10AA subsection (1) with the result that the gain is treated by section 10A subsection (2) as accruing in the period of return.

TREATY NON-RESIDENCE

SLIDE 6

In the final few minutes of this talk I am going to return briefly to the subject of 'treaty non-residence'.

We have seen that a temporary period of non-residence is a period between two periods of sole UK residence. One of the conditions for a period being one in which an individual has sole UK residence is that there is no time in that period when the individual is treaty non-resident. We have seen that an individual is treaty non-resident at any time the individual falls to be regarded as resident in a country outside the UK for the purposes of double taxation arrangements having effect at the time.

Thus, if there were a fiscal year for which an individual was UK resident but he was resident in another country for the purposes of a double tax treaty in any part of that fiscal year, the fiscal year would not be a period for which he had sole UK residence and therefore that fiscal year would extend his period of temporary non-residence perhaps to beyond the five year

limit. The same point will apply where at any time in the UK part of a split year the individual is resident in another country for the purposes of a double tax treaty.

In this way, being treaty resident for a period when one is UK resident can be beneficial to a taxpayer in respect of the temporary non-residence rules.

A comprehensive example of the TNR CGT provisions, Example **12.0** is given at pages 70 to 75 of your delegate's pack for you to read at your leisure after this talk.

McKie&Co

IBC CONFERENCE:

OFFSHORE TAXATION: MAJOR CHANGES TO THE DOMICILE RULES AND WHAT ACTION TO TAKE

SESSIONS 8 & 9
'THE STATUTORY RESIDENCE TEST: SPLIT YEARS, TEMPORARY NON-RESIDENCE and TREATY NON-RESIDENCE'

** DELEGATES' MATERIALS **

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Wednesday 25th November 2015

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Example 1.0

The Situation

Mr A, who was not domiciled in the UK at any time, became resident here in 1998/99 and continued to be so. From this time, he had a home in the UK and nowhere else until, on 10th May 2014, he left the UK to live in Shangri-La, the country of his domicile. He completed the sale of his home in the UK on that day and he shortly afterwards acquired a Shangri-Layan home. He died on 31st March 2015 leaving an estate consisting entirely of non-UK situated assets with a value of £20 million which did not qualify for any IHT reliefs.

On every day that he was present in the UK in 2014/15 he spent some time in his home.

After arriving in Shangri-La on 10th May 2014 he did not leave that country at any time. He spent all but 5 nights from 10th May 2014 onwards in his Shangri-Layan home. He had no minor children or spouse, civil partner or unmarried equivalent.

Analysis

In 2014/15, Mr A did not meet any of the Automatic Overseas Tests. He met the Second Automatic UK Test because he had a home in the UK for part of the fiscal year and there was a 91-day period (for example, the 91-day period ending on 10th May 2014) during which he had that home and no other, 30 days of which fell within 2014/15 and he spent at least 30 days (in fact 35) in that home in 2014/15. He was therefore resident in 2014/15.

He fell within Case 3 of the Split Year Rules because:-

- during the fiscal year there was a day (10th May 2014, 'that day') on which he ceased to have a home in the UK;

- he had no UK home thereafter;
- he spent fewer than 16 days in the UK in the period beginning with that day (in fact he spent no days in the UK at all in that period);
- he was not resident in the UK in the following fiscal year (being dead);
- at the end of six months beginning with that day he had a sufficient link with Shangri-La.

2014/15 was, therefore, a split year in respect of Mr A and the overseas part of that year was 10th May 2014 to 5th April 2015 (inclusive). That did not, however, affect his residence status. The time immediately before his death was the key time for determining his estate by reference to which IHT was charged on his death.[1] That time fell in 2014/15 for which he was UK resident. He had been resident in the UK for 17 of the 20 years of assessment ending with the year assessment (2014/15) in which he died and so was deemed to be domiciled in the UK under IHTA 1984 s.267 immediately before his death.[2]

His entire estate was, therefore, not excluded property[3] and was charged to Inheritance Tax of £7,870,000 ((£20 million - £325,000) @ 40%). Had he died on 6th April 2015 no IHT would have been chargeable on his estate because he would have been UK resident for only 16 out of the previous 20 years at the point immediately before his death.[4]

1 IHTA 1984 ss.4 – 6
2 IHTA 1984 s.4
3 IHTA 1984 s.6
4 Unless, arguably, he died at the first instant of that day

Diagrammatic Representation of the Interaction of the Split Year Cases

An explanation of the diagram

We have represented this in the diagram below. The middle row of each set of boxes shows for the cases under examination (the 'Examined Cases') the residence status required in the Preceding, Relevant and Succeeding Years for those cases. The boxes above show, for the cases with which a comparison is being made (the 'Compared Cases'), the residence status required under the Compared Cases where the Relevant Year of the Compared Cases is the Preceding Year of the Examined Cases. The rows below the middle row, show, for the Compared Cases, the residence status required under the Compared Cases where the Relevant Year of the Compared Cases is the Succeeding Year of the Examined Cases. In this way conflicts between the groups of cases are identified so as to show where it is possible for the conditions of the Compared Cases to be met for a year preceding or succeeding the Relevant Year of an Examined Case. Italics are used in the diagram to indicate where there is a conflict between the rules of the Case Categories preventing particular Split Year Cases from applying in either the Preceding Year or the Succeeding Year.

The diagram

If one of Cases 1-3 apply in a year, can one of Cases 1-3 apply in the Preceding or Succeeding Year?

Can one of Cases 1-3 apply in the Preceding Year?	Preceding Year	Relevant Year	*Succeeding Year*
	Resident	Resident	*Non-Resident*

One of Cases 1-3 applies in the Relevant Year	**Preceding Year**	**Relevant Year**	**Succeeding Year**
	Resident	**Resident**	**Non-Resident**

Can one of Cases 1-3 apply in the Succeeding Year?	Preceding Year	*Relevant Year*	Succeeding Year
	Resident	*Resident*	Non-Resident

If one of Cases 1-3 apply in a year, can one of Cases 4 or 5 apply in the Preceding or Succeeding Year?

Can one of Cases 4 or 5 apply in the Preceding Year?	Preceding Year	Relevant Year	Succeeding Year
	Non-Resident	Resident	No requirement

One of Cases 1-3 applies in the Relevant Year	**Preceding Year**	**Relevant Year**	**Succeeding Year**
	Resident	**Resident**	**Non-Resident**

Can one of Cases 4 or 5 apply in the Succeeding Year?	Preceding Year	*Relevant Year*	Succeeding Year
	Non-Resident	*Resident*	No Requirement

If one of Cases 1-3 apply in a year, can one of Cases 6-8 apply in the Preceding or Succeeding Year?

Can one of Cases 6-8 apply in the Preceding Year?	Preceding Year	Relevant Year	Succeeding Year
	Non-Resident	Resident	Resident[5]

One of Cases 1-3 applies in the Relevant Year	**Preceding Year**	**Relevant Year**	**Succeeding Year**
	Resident	**Resident**	**Non-Resident**

Can one of Cases 6-8 apply in the Succeeding Year?	*Preceding Year*	*Relevant Year*	Succeeding Year
	Non-Resident	*Resident*	Resident

[5] Case 8 has an additional condition, however, that the Succeeding Year must not be a split year and, therefore, a year in which Case 8 applies cannot be succeeded by a year in which Cases 1 – 3 apply

If one of Cases 4-5 apply in a year, can one of Cases 1-3 apply in the Preceding or Succeeding Year?

Can one of Cases 1-3 apply in the Preceding Year?	Preceding Year	*Relevant Year*	*Succeeding Year*
	Resident	*Resident*	*Non-Resident*

One of Cases 4-5 applies in the Relevant Year	**Preceding Year**	**Relevant Year**	**Succeeding Year**
	Non-Resident	**Resident**	**No Requirement**

Can one of Cases 1-3 apply in the Succeeding Year?	Preceding Year	Relevant Year	Succeeding Year
	Resident	Resident	Non-Resident

If one of Cases 4-5 apply in a year, can one of Cases 4 or 5 apply in the Preceding or Succeeding Year?

Can one of Cases 4 or 5 apply in the Preceding Year?	Preceding Year	*Relevant Year*	Succeeding Year
	Non-Resident	*Resident*	No requirement

One of Cases 4-5 applies in the Relevant Year	**Preceding Year**	**Relevant Year**	**Succeeding Year**
	Non-Resident	**Resident**	**No Requirement**

Can one of Cases 4 or 5 apply in the Succeeding Year?	*Preceding Year*	Relevant Year	Succeeding Year
	Non-Resident	Resident	No Requirement

If one of Cases 4-5 apply in a year, can one of Cases 6-8 apply in the Preceding or Succeeding Year?

Can one of Cases 6-8 apply in the Preceding Year?	Preceding Year	*Relevant Year*	Succeeding Year
	Non-Resident	*Resident*	Resident

One of Cases 4-5 applies in the Relevant Year	**Preceding Year**	**Relevant Year**	**Succeeding Year**
	Non-Resident	**Resident**	**No Requirement**

Can one of Cases 6-8 apply in the Succeeding Year?	*Preceding Year*	Relevant Year	Succeeding Year
	Non-Resident	Resident	Resident

If one of Cases 6-8 apply in a year, can one of Cases 1-3 apply in the Preceding or Succeeding Year?

Can one of Cases 1-3 apply in the Preceding Year?	Preceding Year	*Relevant Year*	*Succeeding Year*
	Resident	*Resident*	*Non-Resident*

One of Cases 6-8 applies in the Relevant Year	**Preceding Year**	**Relevant Year**	**Succeeding Year**
	Non-Resident	**Resident**	**Resident**

Can one of Cases 1-3 apply in the Succeeding Year?	Preceding Year	Relevant Year	Succeeding Year
	Resident	Resident[6]	Non-Resident

If one of Cases 6-8 apply in a year, can one of Cases 4 or 5 apply in the Preceding or Succeeding Year?

Can one of Cases 4 or 5 apply in the Preceding Year?	Preceding Year	*Relevant Year*	Succeeding Year
	Non-Resident	*Resident*	No requirement

One of Cases 6-8 applies in the Relevant Year	**Preceding Year**	**Relevant Year**	**Succeeding Year**
	Non-Resident	**Resident**	**Resident**

Can one of Cases 4 or 5 apply in the Succeeding Year?	*Preceding Year*	Relevant Year	Succeeding Year
	Non-Resident	Resident	No Requirement

If one of Cases 6-8 apply in a year, can one of Cases 6-8 apply in the Preceding or Succeeding Year?

Can one of Cases 6-8 apply in the Preceding Year?	Preceding Year	*Relevant Year*	Succeeding Year
	Non-Resident	*Resident*	Resident

One of Cases 6-8 applies in the Relevant Year	**Preceding Year**	**Relevant Year**	**Succeeding Year**
	Non-Resident	**Resident**	**Resident**

Can one of Cases 6-8 apply in the Succeeding Year?	*Preceding Year*	Relevant Year	Succeeding Year
	Non-Resident	Resident	Resident

[6] Case 8 has an additional condition, however, that the Succeeding Year must not be a split year and, therefore, a year in which Case 8 applies cannot be succeeded by a year in which Cases 1 – 3 apply

Example 2.0

The Situation

Mr A, who had been resident and domiciled in the UK in all years up to and including 2013/14, decided, after his retirement, to make a new life in Shangri-La. He left the UK on 6th May 2014 having contracted to sell his house, which had been his only home, on the previous day. The sale was completed on 31st May 2014 and it is assumed that the house ceased to be his home on 6th May 2014.[7] This property had been his only residence throughout his period of ownership of it. He spent at least some part of every day in the fiscal year 2014/15 in this UK house up to and including the day of his departure on 6th May 2014.

He spent his first few weeks in Shangri-La staying in hotels, but on 30th June 2014 he purchased a house to be his home. It is assumed that it was his home from this date. He continued to own and live in this property for several years and it is assumed that it continued to be his home at all relevant times.

After leaving the UK on the 6th May 2014 he did not set foot in the UK again.

On 30th September 2014 he sold various investments realising aggregate capital gains of £2 million assuming that he would fall within Case 1 of the Split Year Rules and that the overseas part of the year in respect of him would begin on 6th May 2014 so that the disposal of his investments would be relieved from CGT under TCGA 1992 s.2(1B).[8]

Growing rather bored in his retirement and wishing to make a contribution to his adopted country, Mr A took employment as the Chief Executive of a Shangri-Layan charity on 30th

[7] One might have chosen the 31st May 2014 or even the 5th May 2014 but on whichever of those days it ceased to be his home, the basic point illustrated in this example would not be affected

[8] Inserted by para. 93(2)

March 2015. His duties required him to work 8 hours a day for 5 days a week entirely in Shangri-La and he was allowed up to 30 days of annual leave per year. He carried on this employment until 30th March 2017 during which period he worked in accordance with his contract and had no time off other than his permitted annual leave.

Analysis

Mr A did not meet any of the Automatic Overseas Tests in 2014/15.

He met the Second Automatic UK Test because he had a home in the UK in that year in which he spent a sufficient amount of time in the year (he spent 31 days there, 30 days being sufficient) and there was a period of 91 days (the period ended 6th May 2014) whilst he had that home during which he had no overseas home and at least 30 days of which fell within 2014/15.

He was, therefore, resident in the UK.

He did, however, fall within Case 3 of the Split Year Rules. In respect of Case 3 the overseas part of the year did indeed start on 6th May 2014. Unfortunately he also met Case 1 of the Split Year Rules.[9] The overseas part of the year in respect of Case I began when he first did more than 3 hours work overseas which was on 30th March 2015. Case 1 takes priority over Case 3 with the result that the overseas part of the year in respect of Mr A did not start until that date. The gain he made on 30th September 2014 was not, therefore, removed from the charge to CGT by TCGA 1992 s.2(1B) and so he had realised a chargeable gain on that day of £2million.[10]

[9] Subject only to the argument that he did not satisfy the condition of para. 44(4) that he was 'not resident in the UK for the next tax year because … [he met] … the Third Automatic Overseas Test' because, although he met that test he also met the First Automatic Overseas Test

[10] Even if Mr A ceased to be domiciled in the UK when he left the UK to live in Shangri-La, the Remittance Basis would not apply to his gain. For the Remittance Basis to apply, ITA 2007 ss. 809B, 809D or 809E must apply to the individual for the year. All of those sections require that the individual is not domiciled in the UK in the year concerned. Mr A was domiciled in the UK at least up to the time that he left the UK on the 6th May 2014

Priority Between Cases 4 – 8: Para. 55

Paragraph 55 provides:-

'(1) This paragraph applies to determine which Case has priority where the taxpayer's circumstances for the relevant year fall within two or more of the following –

Case 4 (starting to have a home in the UK only);

Case 5 (starting full-time work in the UK);

Case 6 (ceasing full-time work overseas);

Case 7 (the partner of someone ceasing full-time work overseas);

Case 8 (starting to have a home in the UK).

(2) In this paragraph "the split year date" in relation to a Case means the final day of the part of the relevant year defined in paragraph 53(5) to (9) for that Case.

(3) If Case 6 applies –

(a) if Case 5 also applies and the split year date in relation to Case 5 is earlier than the split year date in relation to Case 6, Case 5 has priority;

(b) otherwise, Case 6 has priority.

(4) If Case 7 (but not Case 6) applies –

(a) if Case 5 also applies and the split year date in relation to Case 5 is earlier than the split year date in relation to Case 7, Case 5 has priority;

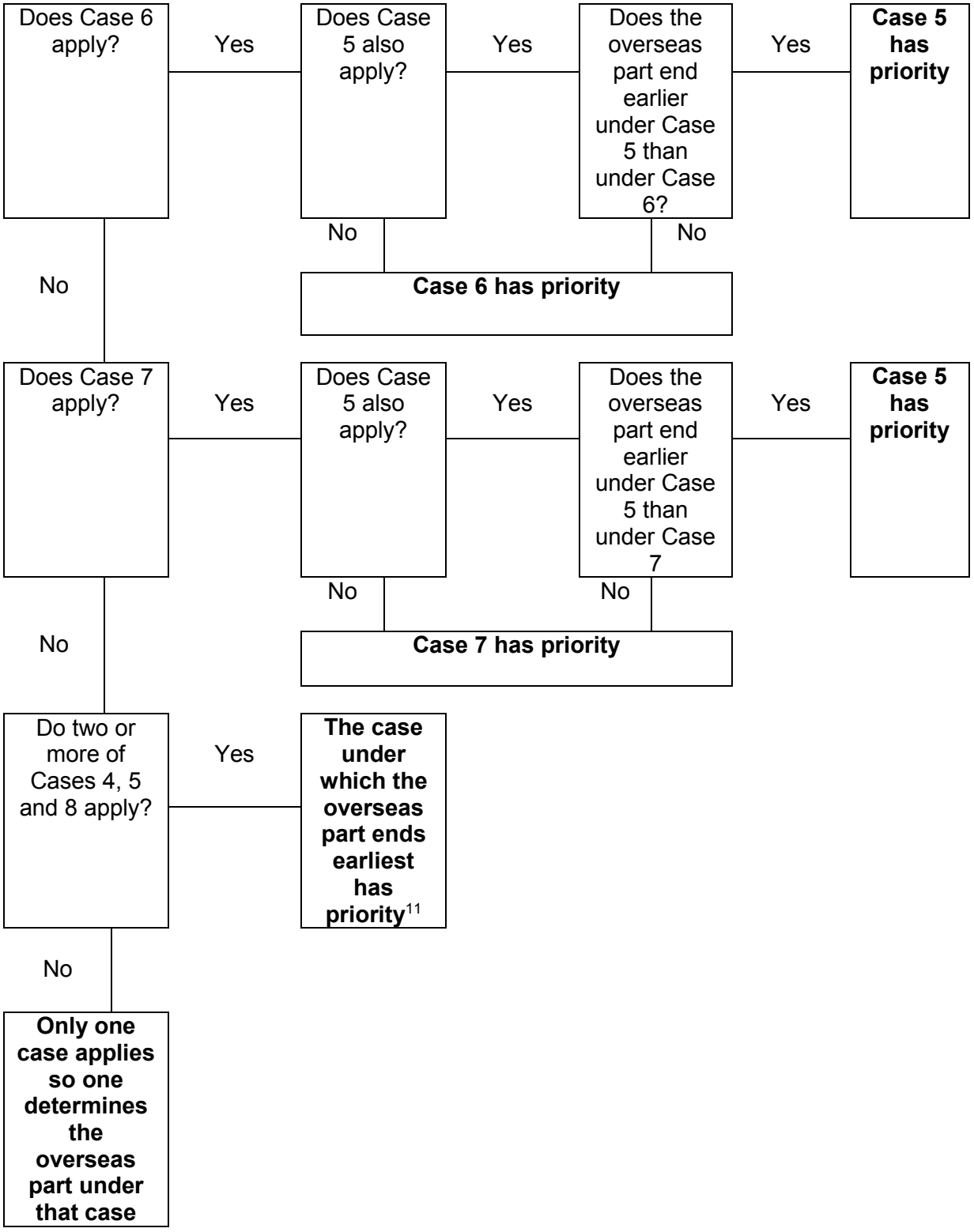
(b) otherwise, Case 7 has priority

(5) If two or all of Cases 4, 5 and 8 apply (but neither Case 6 nor Case 7), the Case which has priority is the one with the earliest split year date.

(6) But if, in a case to which sub-paragraph (5) applies, two or all of the Cases which apply share the same split year date and that date is the only, or

earlier, split year date of the Cases which apply, the Cases with that split year date are to be treated as having priority.'

This might be represented diagrammatically as follows:-



[11] Where there are two or more cases which share the same split year date and that date is the earliest date of the cases which apply (where Cases 6 and 7 do not apply), the cases with the earliest split year date have priority. The effect is the same as if only one of those cases had priority (see para. 55(6))

Circumstances falling within Case 1: Para. 44(2) – (4)

The circumstances that fall within Case 1 of the Split Year Rules are that:-

(1) the individual was resident in the UK for the Preceding Year.[12]

(2) there is at least one period (consisting of one or more days) that -

(a) begins with a day that -

(i) falls within the relevant year, and

(ii) is a day on which an individual does more than 3 hours' work overseas,

(b) ends with the last day of the relevant year, and

(c) satisfies the overseas work criteria.[13]

(3) the individual is not resident in the UK for the next fiscal year because he meets the Third Automatic Overseas Test for that year (see para. 14, overseas work).[14]

[12] Para. 44(2)
[13] Para. 44(3)
[14] Para. 44(4)

Circumstances Falling within Case 2: Para. 45(2) - (6)

The circumstances that fall within Case 2 of the Split Year Rules are that:-

(a) the Accompanying Spouse was resident in the UK for the Preceding Year;[15]

(b) the Accompanying Spouse has a Partner whose circumstances fall within Case 1 of the Split Year Rules for the Relevant Year or for the Preceding Year;[16]

(c) on a day in the Relevant Year the Accompanying Spouse moves overseas so the Accompanying Spouse 'and the Partner can continue to live together while the Partner is working overseas';[17]

(d) in the part of the Relevant Year beginning with the deemed departure day:-

(i) the Accompanying Spouse 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'; and

(ii) the number of days that the Accompanying Spouse spends in the UK does not exceed the Permitted Limit.[18]

(e) the Accompanying Spouse is not resident in the UK for the Succeeding Year.[19]

[15] Para. 45(2)
[16] Para. 45(3)
[17] Para. 45(4)
[18] Para. 45(5)
[19] Para. 45(6)

'Partner': Para. 45(3)

What is a 'partner'?

A partner for this purpose is:-

(a) a husband, wife or civil partner;

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

(c) if the individual and another person of the same sex are living together as if they were civil partners, that other person.[20]

[20] Para. 52(4)

Example 3.0

Situation

Mr A moved to Shangri-La in 2013/14 to take up employment. He was resident in the UK in 2013/14 but Case I of the Split Year Rules applied. In 2014/15 he was not resident in the UK because he met the Third Automatic Overseas Test. On his visits to the UK he met Miss A and they became engaged. In 2014/15, not having previously 'lived together',[21] they married on a beach in Erewhon and, after spending their honeymoon travelling in the Holy Land, made their matrimonial home in Shangri-La.

Miss A was resident in the UK in 2013/14.

Analysis

Case 2 of the Split Year Rules did not apply to Miss A. Before moving overseas she had not lived with her Partner and so she cannot have moved overseas 'so [that she] and the partner can continue to live together'.

[21] Within the meaning of this phrase in para. 45(4)

Example 4.0

The Situation

Mr A satisfied the conditions of Case 1 of the Split Year Rules in 2013/14 having taken up employment in Shangri-La on 8th July 2013. That of course meant that he was not resident in the UK in 2014/15 because he met the Third Automatic Overseas Test in that year.

Miss B had lived with Mr A in the UK for several years but she was unsure whether she could settle happily in a foreign country and she continued to live in their home in the UK visiting him at weekends once or twice a month for the rest of 2013/14.

In 2014/15 Miss B remained in the UK until she flew to Shangri-La on 12th May 2014 for a visit which lasted until she flew back on 25th May 2014. During this time, the couple agreed that she would come to Shangri-La for an experimental period to consider whether she could live there during Mr A's employment there. Mr A had rented a flat in Shangri-La and they agreed that they would not seek a larger property until Miss B was certain that she would be able to stay in Shangri-La.

On 6th June 2014 Miss B packed some of her clothes and personal possessions, such as jewellery and books, and sent them to the flat in Shangri-La. She flew to Shangri-La on 13th June 2014. At first, she was very homesick and was unsure whether she would be able to live in Shangri-La. She then began to enjoy herself more and returned to the UK on 20th July 2014 to pack various pieces of furniture and other possessions so as to send them to Shangri-La. She was still unsure whether she would be able to stay for a long period of time, however, and so the couple did not begin to look for a larger property in Shangri-La. She returned to Shangri-La on 1st August 2014. Shortly afterwards, feeling homesick, she decided she would return to live in the UK and began to make arrangements to do so. On 22nd August 2014, however, she had a sudden change of heart which resulted in her deciding to stay after all.

On 1st October 2014, Mr A and Miss B began to look for a house in Shangri-La in the expectation that they would stay for some years. In the event, they did purchase a house, on 15th November 2014, and Miss B was not resident in the UK in 2015/16.

Analysis

Did Mr A and Miss B live together before her move overseas or was their 'living together' interrupted by Mr A's absence abroad? If they were not living together before her move, it is difficult to see how Miss B could have moved abroad so that they could 'continue to live together'.[22] Assuming that they could be said to have continued to live together when, if at all, did she move abroad for the purpose of doing so?

When she flew to Shangri-La on 12th May 2014 she does not seem to have yet formed an intention of moving to be with her Partner. When she flew to Shangri-La on 13th June 2014 her move was still only experimental. When she flew to Shangri-La on 1st August, she still does not seem to have made a decision that she would stay in Shangri-La and she later positively decided to leave. Arguably, none of her flights to Shangri-La could be said to be a decisive 'move'. It was only at some point between 22nd August 2014 and 1st October 2014 that she positively decided to stay with her Partner in Shangri-La and it was only on 1st October 2014 that they took a decisive step based on that decision. She was overseas throughout this period so in what sense could she be said to have 'moved overseas' during it? One might say that 'moving' can be a process taking place over time, but if that is correct, do we determine the deemed departure day as being the beginning or end of that process or being at a time during the process when it has been sufficiently completed?

[22] One might ask whether they lived together at all between 8th July 2013 and 12th May 2014. The case of *Nugent-Head v Jacob (HM Inspector of Taxes)* HL (1948) 30 TC 83 suggests that a married couple may be in different countries for several years and yet not be separated. Whether in respect of Mr A and Miss B's less formal relationship they could be said still to have been living together when most of their time was spent in different countries is another matter

In practice, no doubt, both HMRC and individuals will usually fix on a particular time marked by a journey from the UK as the time of a move within para. 45(4). In circumstances where there is a considerable amount of tax dependent upon when the departure date takes place, however, and in the absence of clear principles to determine when an Accompanying Spouse 'moves', the question is likely to be the subject of an appeal to the Tribunal. On what basis the Tribunal will decide the matter is unclear.[23]

[23] In my view, the approach which the Tribunal may well take is to identify the first point in time at which the Accompanying Spouse is overseas having acquired the intention of living overseas with her Partner. If that were the Tribunal's approach Miss B would have 'moved overseas' within para. 45(4) when, on some date between 22nd August 2014 and 1st October 2014, she positively decided to stay with her Partner in Shangri-La. It must be admitted, however, that that would have the rather strange result that she would have 'moved' on a date when she did not travel at all. Another approach which the Court might take would be to identify the date when she acquired the necessary intention and then to look back to the last journey from the UK before that. That would give the odd result that Miss A would have 'moved overseas so [she] and [her] Partner could continue to live together' on a date when she did not have an intention to actually live with him overseas

Example 5.0

The Situation

Mr A was seconded by his employer from the UK to Shangri-La on a posting expected to last for three years. He arrived in Shangri-La on 1st June 2014. He expected to be non-resident in 2015/16 by virtue of meeting the Third Automatic Overseas Test. His wife and son joined him in Shangri-La on 15th July after the end of his son's summer term. On arrival in Shangri-La he lived in hotels but in preparation for his wife and son's arrival he acquired a Shangri-Layan home on 10th July 2014.

Mr and Mrs A both submitted their tax returns for 2014/15 on 25th January 2016 on the basis that that year was a split year.

On 28th February 2016, Mr A was unexpectedly made redundant and his employment terminated immediately. Employment prospects in the UK were bad and so he decided to stay in Shangri-La and to seek employment there hoping to stay for a couple of years after which he expected that the UK employment situation would have improved. He was successful in finding other employment in Shangri-La and began his new job on 10th April 2016.

On every day in 2014/15 before their departures for Shangri-La, Mr and Mrs A had spent at least some of their time in their house in the UK which was their home. They kept that property furnished but unoccupied after their departure so that they could use it on their visits to the UK and resume residence in it when they returned to the UK permanently. It is assumed that this property remained their home.[24] In 2015/16 Mr and Mrs A and their son spent only 15 days in the UK.

[24] In fact, of course, determining what is and what is not a home at any time is a matter of great uncertainty

Analysis

Mr A did not meet the Third Automatic Overseas Test in 2015/16 because in that year he had a significant break from overseas work (the period from 28th February 2016 to the end of that fiscal year). He did, however, meet the First Automatic Overseas Test and was therefore non-resident in that year because he spent less than 15 days in the UK in that year (as of course did his wife).[25] Because he did not meet the Third Automatic Overseas Test in 2015/16, however, he did not meet the conditions of Case 1 of the Split Year Rules in respect of 2014/15. Because he did not meet the conditions of the Third Automatic Overseas Test in 2014/15 he did not meet the conditions of Case I of the Split Year Rules in 2013/14. This meant that Mrs A did not meet the conditions of Case 2 of the Split Year Rules in 2014/15. She did not meet the conditions of any of the other cases. In particular she did not meet the conditions of Case 3 of the Split Year Rules because she did not cease to have a home in the UK during that year.

Both Mr and Mrs A's tax returns for 2014/15 were, therefore, incorrect.

[25] It is arguable that had he met the Third Automatic Overseas Test in 2014/15 and had still only spent 15 days the UK in that year, then he would not have satisfied the condition of para. 44(4) in any event and, therefore, would not have met the rules of Case 1 in respect of 2013/14 with the result that his wife would not have done so either

Circumstances Falling within Case 3

The circumstances that fall within Case 3 of the Split Year Rules are that:-

(a) the individual was resident in the UK for the Preceding Year;[26]

(b) at the start of the Relevant Year the individual had one or more homes in the UK but:-

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

(ii) from that time, he has no home in the UK for the rest of that year.[27]

(c) in the part of the Relevant Year beginning with the day on which he ceases to have any home in the UK, the individual spends fewer than 16 days in the UK;[28]

(d) the individual is not resident in the UK for the Succeeding Year;[29]

(e) 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 individual has a sufficient link with a country overseas.[30]

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

(a) the individual is considered for tax purposes to be a resident of that country in accordance with its domestic laws, or[31]

(b) the individual has been present in that country (in person) at the end of each day of the six month period mentioned in para. 46(6) (that is the

[26] Para. 46(2)
[27] Para. 46(3)
[28] Para. 46(4)
[29] Para. 46(5)
[30] Para. 46(6)
[31] Para. 46(7)(a)

period of six months beginning with the day in the year when he ceases to have any home in the UK),[32] or

(c) the individual's only home is in that country or, if the individual has more than one home, they are all in that country.'[33]

[32] Para. 46(7)(b)
[33] Para. 46(7)(c)

Example 6.0

The Situation

Mr A had been resident in the UK all his life. He lived with his wife in a freehold house in Streatham in London. A developer obtained planning permission to develop a site of which he owned the greater part but of which Mr A's house formed a small corner. The developer made Mr A an offer for his house which he found impossible to refuse and the sale was completed on 31st March 2014.

Mr and Mrs A stayed with their friends in the UK while they decided what to do with their new found wealth. On 31st July 2014 they decided to go travelling, visiting various South American and African countries but staying in no single country for more than 30 days. On 1st February 2015 they went to Shangri-La, fell in love with the country and decided to stay there permanently. They did not set foot in the UK in 2015/16. From 1st July 2015 Mr A began employment as a journalist on the *Shangri-La Herald* and Mrs A began to practice as a portrait painter.

Analysis

Neither Mr A nor Mrs A met any of the Automatic Overseas Tests or any of the Automatic UK Tests in 2014/15. Because they had spent over 90 days in the UK in 2014/15 the number of ties which was sufficient for them to pass the Sufficient Ties Test in that year was 2. They both had a 90-Day Tie because they had both been resident in the UK in the previous two fiscal years and a Country Tie because they had spent more midnights in the UK in 2013/14 than in any other country. They also had a Family Tie, although, in deciding whether one had a Family Tie by reference to the other, the Family Tie of the other was to be ignored in deciding the other's residence.

They were resident in the UK in 2014/15.

They were not resident in the UK in 2015/16 because they satisfied the First Automatic Overseas Test.

Case 3 of the Split Year Rules could not apply to them in 2014/15 because they had not ceased to have a home in the UK in that year. Case I and 2 of the Split Year Rules could not apply to them in 2014/15 because the reason they were not resident in the UK in 2015/16 was not because either of them met the Third Automatic Overseas Test.

Example 7.0

The Situation

Up to and including the fiscal year 2013/14 Mr A had always lived in the UK and owned a freehold house in Somersetshire which had always been his only home. He decided to emigrate to Erewhon and on 1st September 2014 he sold his home in the UK and moved to Erewhon. At first he stayed in a variety of hotels and short lets until on 3rd April 2015 he purchased a house in Erewhon which immediately became his home. It is assumed that none of the hotels and short lets in which he stayed in the interim became his home.

He spent 5 days in the UK in the six month period 1st September 2014 to 28th February 2015. Erewhon imposes taxes only on those who are resident in the country in a fiscal year. An individual is resident in Erewhon under its domestic law for a fiscal year if he spends at least 244 midnights in Erewhon in that year. The Erewhonian fiscal year runs from 1st July to the following 30th June.

In the period 1st July 2014 to 30th June 2015 Mr A spent 298 midnights in Erewhon.

Analysis

Mr A did not meet any of the Automatic Overseas Tests in 2014/15. He met the Second Automatic UK Test in that year.

Did he fall within Case 3 of the Split Year Rules? He met all of the conditions of para. 46(2) – (5). Did he meet the condition of para. 46(6) that he had a sufficient link with a country overseas at the end of the period of six months beginning with the day on which he ceased to have a home in the UK; that is a period beginning on 1st September 2014 and ending on 31st March 2015?

He did not have such a sufficient link by virtue of paras. 46(7)(b) or (c) because he did not meet their conditions.

Did he have a sufficient link by reason of meeting the conditions of para. 46(7)(a)? He will have done so if, on 31st March 2015, he met the condition that he was 'considered for tax purposes to be a resident of [Erewhon] in accordance with its domestic laws'.

On 31st March 2015 he had not yet spent sufficient time in Erewhon for him to be resident for the Erewhonian fiscal year 1st July 2014 to 30th June 2015. In the event, he did spend sufficient time there so that he later proved to be a resident of that country in accordance with its domestic laws for the period 1st July 2014 to 30th June 2015. Can one say that a person is 'considered for tax purposes to be a resident of [a] country in accordance with its domestic laws' at a time where the country's law determines whether he is resident at that time by reference to events some of which have not yet occurred?

The difficulty is in the word 'considered' in para. 46(7)(a). In the context of a system of law, to say of a person that he is 'considered' to be something is to employ a metaphor, only beings capable of conscious thought can 'consider'. In reality, rather than metaphorically, an abstraction such as a legal system cannot do so. In view of the fact that the legislation here employs a metaphorical use of the verb it seems to me that it would be an exercise in excessive literalism to require that the hypothetical entity considering the individual's circumstances should have the facts available to it at the time of the hypothetical consideration from which to determine whether or not he is resident at that time rather than simply requiring that the individual should in due course prove to have been resident at that time.

I therefore consider that an individual will satisfy the condition of para. 46(7)(a) where the individual is treated under the country's domestic laws as resident for a period which includes that time even if, at that time, all of the events have not occurred by reference to which the domestic law determines whether or not he is resident for that period.

I therefore consider that Mr A met the condition of para. 46(7)(a) and fell within the circumstances of Case 3 of the Split Year Rules in 2014/15.

Circumstances Falling within Case 4

The circumstances that fall within Case 4 of the Split Year Rules are that:-

(a) the individual was not resident in the UK for the Preceding Year;[34]

(b) at the start of the Relevant Year, the individual did not meet the only home test, but he begins to meet the test during the Relevant Year and continues to do so for the rest of that year;[35] or

(c) for the part of the Relevant Year before the day on which he meets the conditions of (b) above (which we shall called the 'Non-UK Part of the Year') the individual does not have sufficient UK ties.[36]

[34] Para. 47(2)
[35] Para. 47(3)
[36] Para. 47(4)

Circumstances Falling within Case 5

The circumstances that fall within Case 5 of the Split Year Rules are that:-

(a) the individual was not resident in the UK for the Preceding Year.[37]

(b) there is at least one period of 365 days, which we shall call the 'Period under Consideration' in respect of which the following conditions are met:-

(i) the period begins with a day that falls within the Relevant Year and is a day on which the individual does more than 3 hours work in the UK;[38]

(ii) in the part of the Relevant Year before the period begins (which we shall again call the 'Non-UK Part of the Year'), the individual does not have sufficient UK ties;[39]

(iii) the individual works sufficient hours in the UK as assessed over the Period under Consideration;[40]

(iv) during the period there are no significant breaks from UK work;[41] and

(v) at least 75% of the total number of days in the period on which the individual does more than 3 hours work are days on which he does more than 3 hours work in the UK.[42]

[37] Para. 48(2)
[38] Para. 48(3)(a)
[39] Para. 48(3)(b)
[40] Para. 48(3)(c)
[41] Para. 48(3)(d)
[42] Para. 48(3)(e)

Example 8.0

The Situation

Mr A, who had always lived and worked in Shangri-La, retired. As their children were grown up and had left home, Mr A and his wife decided that they would sell their large house in Shangri-La and buy a smaller one. They also decided that they would make an extended visit to the UK to see the sights and to visit their cousins who lived here.

On 31st May 2014 they sold their house in Shangri-La intending to buy a new one after their visit to the UK. They flew to the UK on that day and stayed in an hotel until, on 30th June 2014, they purchased a flat (the 'UK Flat') in Central London to use whilst they were here and to let, as an investment, after they left. It is assumed that this property became their home when they acquired it and continued to be so throughout the period of their visit to the UK.[43]

They stayed in the UK until 31st October 2014 when they returned to Shangri-La. During that period they spent the whole of August, the first 10 days of September and 20 days in October at the UK Flat. The remainder of their stay was spent with their various cousins.

Analysis

Residence status

In 2014/15 Mr and Mrs A did not meet any of the Automatic Overseas Tests but met the Second Automatic UK Test because:-

(a) they had a home in the UK during part of 2014/15;[44]

[43] It is, perhaps, unlikely that this property would, in ordinary English, be described as their home as they intended to stay in it only for a short time and for a temporary purpose. The *Guidance*, however, includes an example (para. 1.30, Example 8) of a lady cricket professional who comes to play cricket in the UK for a season, continues to own her former home in New Zealand (although she lets it) and who takes a lease for four months on a house in the UK in which to stay whilst she is here. In spite of the short term of the lease and the temporary nature of her presence in the UK the author of the *Guidance* makes the assumption that this house is her home. The *Guidance*, of course, cannot determine the construction of the word 'home' in the *SRT Schedule* but for the purposes of our example I have made the assumption that the UK Flat becomes Mr and Mrs A's home

[44] Para. 8(1)(a)

(b) in that year they spent more than 29 days in that home[45] (in fact 61 days);

(c) in respect of that year there was at least one period of 91 consecutive days;

(i) which occurred whilst they had the UK home;

(ii) at least 30 of which fell within the Relevant Year;

(iii) during which they had no home overseas.[46]

In fact there were many such periods but, as an example, the earliest such period was the period 30th June 2014 – 28th September 2014.

They were, therefore, both resident in the UK in 2014/15.

Was 2014/15 a split year?

Was 2014/15 a split year in respect of Mr and Mrs A?

- They were not resident in the UK in the Preceding Year (2013/14).[47]
- At the start of the Relevant Year they did not meet the Only Home Test because they had a home in Shangri-La. They began to meet the Only Home Test on 30th June 2014 when they acquired the UK Flat and they continued to do so for the remainder of the fiscal year.[48]
- For the part of the Relevant Year before the day on which they began to meet the Only Home Test, that is in the period 6th April 2014 – 29th June 2014[49] (inclusive), did they not have Sufficient UK Ties?[50]

45 Para. 8(1)(b)
46 Para. 8(1)(c)
47 Para. 47(2)
48 Para. 47(3)
49 I have called this period the 'Non-UK Part of the Year'
50 Para. 47(4)

Sufficient UK ties

The number of days in the Table in para. 19, which gives the number of ties which are sufficient, was to be reduced by the 'appropriate number'.[51]

The first column of the Table in para. 19 is headed 'Days Spent by P in the UK in year X'. The second line[52] in the column reads 'More than 90 but not more than 120'. The numbers in the first column of this table are reduced by deducting from them the number found by multiplying the number concerned by:-

$$\frac{\text{The number of whole months in the part of the Relevant Year following the Non-UK Part of the Year}}{12}$$

In respect of Mr and Mrs A there were 9 such months, so the numbers in the second line of the first column of the Table became:-

$$90 - \frac{(90 \times 9)}{12}[53][54] = 22$$

$$120 - \frac{(120 \times 9)}{12}[55] = 30$$

So the entry in the first column on the second line becomes more than 22 but not more than 30.

[51] Para. 47(6)
[52] Excluding the heading
[53] If the result of the calculation in brackets is not a whole number it is rounded (para. 52(5)
[54] The appropriate number is rounded up to 68
[55] If the result of the calculation in brackets is not a whole number it is rounded (para. 52(5)

Where the second line of the column applies the individual must have at least 3 UK ties to meet the Sufficient Ties Test.

Mr and Mrs A were present in the UK on 30 days in the Non-UK Part of the Year and so it is this line of the Table which was relevant to them. Looking at the fiscal year as a whole, as one does for the purposes of the Sufficient Ties Test, they had both an Accommodation Tie and a Family Tie. For the purposes of Case 4 of the Split Year Rules, however, subject to exceptions,[56] one looks only at the Non-UK Part of the Year.[57] In that part of the year, although Mr and Mrs A had accommodation available to them in the UK, being the hotel in which they stayed from the 31st May 2014 to 30th June 2014 inclusive, that accommodation was not available for a continuous period of 91 days. For this purpose, therefore, they did not have an Accommodation Tie.

In determining whether Mr and Mrs A have a Family Tie, however, one determines the residence of the person to whom the individual has a putative relevant relationship by reference to the whole fiscal year and not just to the Non-UK Part of the Year. Both Mr and Mrs A were UK resident in 2014/15. Each, therefore, had a relevant relationship by reference to the other and therefore both had Family Ties for the purposes of Case 4 of the Split Year Rules.

Each had only one UK tie, therefore, so they did not have Sufficient UK Ties for the purposes of determining whether they met the conditions of Case 4 of the Split Year Rules and they did not do so.[58]

[56] See para. 30.2.6 above
[57] Para. 47(6)
[58] It is also likely that 2015/16 will also be a split year in respect of them under Case 3 of the Split Year Rules

The overseas part of the year was the period from the beginning of the fiscal year to the day before they met the Only Home Test; that is from 6th April 2014 – 29th June 2014 (inclusive) and the UK part of the year was the period from 30th June 2014 – 5th April 2015.

Example 9.0

The Situation

Mr A had lived in Shangri-La all of his life, except that he had been resident in the UK in 2011/12. In 2014/15 his employing company seconded him to its UK subsidiary. He flew to the UK on 18th September 2014 and began work on 22nd September 2014.

Under his employment contract he was required to work 9 hours per day, Monday to Friday, and such other hours on those days as his employer should require. He could take up to 30 days of annual leave. Shangri-La had no Public Holidays but when an employee was seconded to a company which did have such holidays, annual leave was to be taken on all such holidays.

During his secondment Mr A took annual leave on the following dates:-

Dates	**Number of Days**
19th September 2014	1
22nd December 2014 to 2nd January 2015	10
30th March 2015 to 10th April 2015	10
25th May 2015	1
28th August 2015 to 8th September 2015	8
	30

On Monday 11th May 2015 he flew to Shangri-La to attend a sales conference which took place from that day until Friday 15th May 2015. He stayed in Shangri-La over the weekend and attended business meetings on Monday 18th May and Tuesday 19th May 2015. He flew back to the UK on the evening of 19th May 2015. Both during the conference and on the days he attended the meetings he worked his accustomed 9 hours. Apart from this, all of his work during his secondment was performed in the UK.

His secondment came to an end on 23rd October 2015 and he flew back to Shangri-La on 24th October 2015 attending his Shangri-Layan office again on 26th October 2015.

His holiday over the Christmas period was spent in Shangri-La and he flew to Shangri-La on the evening of 19th December 2014 and flew back to the UK on the afternoon of 4th January 2015. Apart from this, all of his annual leave was spent in the UK.

Mr A was unmarried and had no children. He had a good friend who lived in the UK who had said to him in 2013/14 that he could stay at his house at any time and for an indefinite period.

Analysis

Residence status in 2014/15

Mr A did not meet any of the Automatic Overseas Tests in 2014/15. He met the First Automatic UK Test because he spent 183 days or more in the UK[59] and was, therefore, resident in the UK in 2014/15.

Case 5 of the Split Year Rules

Did Mr A's circumstances fall within Case 5 of the Split Year Rules in respect of 2014/15? That depended upon whether he met the conditions of para. 48(2) and (3).

Para. 48(2)

Mr A was not resident in the UK in 2014/15.[60]

[59] In fact he spent 184 days in the UK in 2014/15
[60] Para. 48(2)

Para. 48(3)

There was at least one period of 365 days in respect of which the conditions of s.48(3) were met. We shall test these conditions by reference to the period 22nd September 2014 to 21st September 2015.

The Period under Consideration began with a day that fell within 2014/15 and was a day on which Mr A did more than 3 hours work in the UK.[61]

To work out whether Mr A had sufficient UK ties we must look at the Period Under Consideration in the fiscal year ending on 21st September 2015.

Because he had been resident in the UK in 2011/12, the Table showing the number of UK ties which were sufficient which applied to his circumstances was the Table in para. 18. The first column of this Table is headed 'Days Spent by P in Year X'. The line of that Table with the smallest number of days in the first column is the first line which reads:-

'More than 15 but not more than 45'

These numbers are to be reduced by the appropriate number.[62] The appropriate number is to be found by multiplying the number concerned by:-

$$\frac{\text{The number of whole months in the period from the start of the Period under Consideration to the end of the Relevant Year}}{12}$$

So in respect to the minimum number of days in line one of the Table in para. 18 the appropriate number was:-

[61] Para. 48(3)(a)
[62] These numbers can be found in the *Guidance* at para 5.26

$$15 \times \frac{6}{12}^{63} = 7.5 \text{ which was rounded to } 8$$

So the minimum number of days in line one of the Table therefore became:-

$$15 - 8 = 7$$

In the part of 2014/15 before the Period under Consideration began, that is the period from 6th April 2014 to 21st September 2014, Mr A spent 4 days[64] in the UK and, therefore, regardless of how many UK ties he had, he could not have had Sufficient UK Ties for the purposes of Case 5 of the Split Year Rules.

In determining whether or not Mr A worked sufficient hours in the UK one has to apply para. 9(2) which sets out a five-step process.

Step 1

Identify any days in the period on which the taxpayer does more than 3 hours' work overseas, including ones on which the taxpayer also does work in the UK on the same day.

The days so identified are referred to as "disregarded days".

During the period 22nd September 2014 to 21st September 2015 Mr A worked more than 3 hours overseas on 7 days. There were therefore 7 Disregarded Days.

Step 2

Add up (for all employments held and trades carried on by the taxpayer) the total number of hours that the taxpayer works in the UK during the period, but ignoring any hours that the taxpayer works in the UK on disregarded days.

63 That is October, November, December, January, February and March
64 Being 18th, 19th, 20th and 21st September 2014

The result is referred to as the taxpayer's "net UK hours".

Mr A worked for 2,016 hours in the UK in this period.

Step 3

Subtract from 365 -

(a) the total number of disregarded days, and

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

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

Days in Period		365
Disregarded Days	(7)	
Annual Leave	(30)	
Parental Leave	(0)	
Sick Leave	(0)	
Embedded Days:-		
27th & 28th December 2014		
4th & 5th April 2015	(4)	
		(41)
Reference Period		324

Step 4

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

$\frac{324}{7}$ = 46 (rounded down)

Step 5

Divide the taxpayer's net UK hours by the number resulting from step 4.

$\frac{2{,}016}{46}$ = 43.82

Mr A therefore worked sufficient hours in the Period under Consideration.

During the period Mr A had no significant breaks from UK work.

At least 75% of the total number of days in the period on which Mr A did more than 3 hours work were days on which he did more than 3 hours work in the UK.[65]

Mr A's circumstances therefore fell within Case 5 of the Split Year Rules and 2014/15 was a split year in respect of him.

As the start of the period which we have used, 22nd September 2014, was the earliest day on which he performed more than 3 hours of work in the UK there cannot have been an earlier period which met the conditions of para. 48. Therefore the overseas part of Mr A's split year was the period from 6th April 2014 to 21st September 2014 (inclusive). The UK part was, therefore, the period from 22nd September 2014 to 5th April 2015 (inclusive).

[65] $\frac{\text{Days of work in the UK in the period}}{\text{All days of work in the period}} \times 100$

$\frac{224}{231} \times 100 = 97.0\%$

Circumstances Falling within Case 6

The circumstances that fall within Case 6 of the Split Year Rules are that:-

(a) the individual was not resident in the UK for the Preceding Year because he met the Third Automatic Overseas Test for that year.[66]

(b) he was resident in the UK for one or more of the four fiscal years immediately preceding that year.[67]

(c) there is at least one period (consisting of one or more days) that:-

(i) begins with the first day of the Relevant Year;[68]

(ii) ends with a day that falls within the Relevant Year and is a day on which the individual does more than 3 hours work overseas;[69] and

(iii) satisfies the overseas work criteria.[70]

(d) the individual is resident in the UK for the Succeeding Year.[71]

66 Para. 49(2)(a)
67 Para. 49(2)(b)
68 Para. 49(3)(a)
69 Para. 49(3)(b)
70 Para. 49(3)(c)
71 Para. 49(4)

Example 10.0

The Situation

Mr A had been seconded by his employing company to Shangri-La in 2010/11 although he was UK resident in that year immediately before his secondment. His secondment in Shangri-La continued until his retirement in 2015.

Under his employment contract he was to use his best endeavours to advance the interests of his employer during such hours and at such places as he was instructed and, in the absence of such instruction, as he should decide was appropriate. In fact he worked 10 hours per day Monday to Friday. All of his work was performed in Shangri-La except that on the first Friday of each month he attended a Group Board Meeting in the UK. When he did so he flew to Heathrow Airport on a Friday morning and flew back to Shangri-La on the following Sunday evening. His journey between Shangri-La and Heathrow took 3.75 hours. The journey from Heathrow to the Board Meeting took 1 hour and the Board Meeting lasted 6 hours.

He stayed in his house during these trips. The journey from his house to Heathrow took 1 hour.

Mr A continued to own the house in which he had lived when he was in the UK. He had not let it so as to make it available to his two adult daughters when they wished to use it and so that he could use it when he visited the UK. It is assumed that this property continued to be his home throughout.

In 2011/12 – 2013/14 he was not resident in the UK. In 2013/14 he had met the Third Automatic Overseas Test.

On 30th January 2015 he reached his 60th Birthday and retired from his employment. He sold his house in Shangri-La on 2nd February 2015 and on 3rd February 2015 he flew back to the UK. This was the first time he had been in the UK in the fiscal year other than when he had attended the Group Board Meetings. From 3rd February 2015 he remained in the UK for the rest of the fiscal year.

He spent more than 200 days in the UK in 2015/16.

The only annual leave which he took in the period 6th April 2014 to his retirement on 30th January 2015 was during the entire month of August which he spent in Erewhon and the period from 22nd December until 2nd January. He flew to the UK on the evening of 19th December and flew back to Shangri-La on the afternoon of 4th January.

Analysis

Residence status

Mr A did not meet any of the Automatic Overseas Tests in 2014/15. He met the Second Automatic UK Test[72] and was therefore resident in the UK in that year. Did he meet the conditions of Case 6 of the Split Year Rules in that year?

Para. 49(2)(a)

He was not resident in the UK for the previous fiscal year (2013/14) because he met the Third Automatic Overseas Test for that year.[73]

He was resident in the UK for one (actually 2010/11) or more of the four fiscal years immediately preceding that year.[74]

[72] Because there was a 91-day period where Condition A was satisfied (from 2 February 2015)
[73] Para. 49(2)(a)
[74] Para. 49(2)(b)

Para. 49(4)

He was resident in the UK in the next fiscal year (2015/16)[75]

Para. 49(3)

He will, therefore, have met the conditions of Case 6 in 2014/15 if there was at least one period that:-

(a) began with the first day of the fiscal year (6th April 2014); and

(b) ended with a day that:

(i) fell within the Relevant Year; and

(ii) was a day on which the individual did more than 3 hours work overseas.

(c) satisfied the overseas work criteria.

There was a period which satisfied the conditions of (a) and (b). That was the period from 6th April 2014 until 30th January 2015. Was this a period which met the condition of (c) above that it satisfied the overseas work criteria?

Para. 49(5)(a)

Did Mr A work sufficient hours overseas as assessed over the Period under Consideration? In order to determine that we apply the 5-step calculation in para. 14(3) as modified by para. 49(7)-(9).

[75] Para. 49(4)

Step 1

Identify any days in the Period under Consideration on which the taxpayer does more than 3 hours' work in the UK, including ones on which the taxpayer also does work overseas on the same day.

The days so identified are referred to as "disregarded days".

Mr A worked in the UK in respect of his attendance at Board Meetings on the first Friday of May, June, July, September, October, November and December (that is on 7 trips).

Under his employment contract he was to use his best endeavours to advance the interests of his employers at such times and at such places, in the absence of specific instruction, as he should decide appropriate. Because of this his journeys back to Shangri-La on the Sunday were, arguably, work even though he might, one presumes, have travelled to Shangri-La on the Friday evening. Only his journey from his UK home to Heathrow on these Sundays was work performed in the UK, however, so that the Sundays during these trips were not days on which he did more than 3 hours work in the UK.

On the Fridays when he attended the Group Board Meetings he did perform more than 3 hours work in the UK. He had, therefore, seven disregarded days.

Step 2

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

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

Mr A worked 1,803.25 hours[76] overseas in the period under consideration.

Step 3

Subtract from the number of days in the Period under Consideration -

(a) the total number of disregarded days, and

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

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

The number of days in the Period under Consideration		300
Disregarded Days	7	
Annual Leave	31	
Parental Leave	0	
Sick Leave	0	
Embedded Days:-		
9th & 10th, 16 & 17th, 23rd & 24th August 2014 27th & 28th December 2014	8	
Reference Period		46
		254

Step 4

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

$$\frac{254}{7} = 36 \text{ (rounded)}$$

[76] ((Working days in Period Under Consideration) – disregarded days and annual leave) x normal hours) + (hours worked on 7 Sundays travelling back to Shangri-La. (((215) – (7 + 31)) x 10) + (4.75 x 7)

Step 5

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

If the answer is 35 or more, the taxpayer is considered to work "sufficient hours overseas" as assessed over the Period under Consideration.

$$\frac{1{,}803.25}{36} = 50.09 \text{ hours}$$

Mr A therefore worked sufficient hours overseas in the Period under Consideration.

Para. 49(5)(b)

During the Period under Consideration Mr A had no significant breaks from overseas work.

Para. 49(5)(c)

The Permitted Limit on the number of days on which Mr A could do more than 3 hours work in the UK was calculated as follows:-

$$30 - \left(30 \times \frac{\text{the number of whole months in the year after the end of the Period under Consideration}[77]}{12}\right)$$

$$30 - \left(30 \times \frac{2}{12}\right) = 25$$

[77] It is assumed that the phrase 'the 365-day period in question' in para. 49(7) is to be read as referring to the Period under Consideration

Mr A worked in the UK for more than 3 hours on only 7 days so he satisfied the condition that the number of days in the Period under Consideration on which he did more than 3 hours work in the UK was less than the Permitted Limit.

Para. 49(5)(d)

The Permitted Limit on the number of days in the Period under Consideration which Mr A could spend in the UK ignoring the Deeming Rule was calculated as follows:-

$$90 - \left(90 \times \frac{\text{the number of whole months in the year after the end of the Period under Consideration}[78]}{12}\right)$$

$$90 - \left(90 \times \frac{2}{12}\right) = 75$$

During the Period Under Consideration Mr A spent the following days in the UK, being 30 days in total:-

2nd & 3rd May 2014;

6th & 7th June 2014;

4th & 5th July 2014;

5th & 6th September 2014;

3rd & 4th October 2014;

7th & 8th November 2014;

5th & 6th December 2014; and

19th December 2014 – 3rd January 2015.

[78] It is assumed that the phrase 'the 365-day period in question' in para. 49(7) is to be read as referring to the Period under Consideration

So Mr A satisfied the condition that the number of days which he spent in the UK (ignoring the Deeming Rule) in the Period under Consideration was less than the Permitted Limit.

Mr A's circumstances, therefore, fall within Case 6 of the Split Year Rules.

The overseas part of the year in relation to him under Case 6 was the period 6th April 2014 – 30th January 2015 (inclusive).

The UK part of the year was the period 31st January 2015 – 5th April 2015 (inclusive).

Circumstances Falling Within Case 7

The circumstances that fall within Case 7 of the Split Year Rules are that:-

(a) the individual, who in respect of this Case we shall refer to as the Accompanying Spouse, was not resident in the UK for the Preceding Year;[79]

(b) the Accompanying Spouse has a Partner whose circumstances fall within Case 6 for the Accompanying Spouse's Relevant Year or Preceding Year;[80]

(c) on a day in the Relevant Year, the individual moves to the UK so the individual and the Partner can continue to live together on the Partner's return or relocation to the UK.[81]

(d) in the part of the Relevant Year before the 'deemed arrival day';

(i) the Accompanying Spouse 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; and

(ii) the number of days that the Accompanying Spouse spends in the UK does not exceed the Permitted Limits.[82]

(e) the Accompanying Spouse is resident in the UK for the Succeeding Year.[83]

[79] Para. 50(2)
[80] Para. 50(3)
[81] Para 50(4)
[82] Para. 50(5)
[83] Para. 50(6)

Example 11.0

The Situation

Miss B had lived in Shangri-La all of her life. She had an apartment in Shangri-La which was her home.

On 30th June 2014 she met Mr A, a British expatriate coming to the end of his secondment to Shangri-La. By 31st August 2014 she was spending 5 or 6 nights a week at Mr A's company flat, spending the remaining nights at her own apartment.

Mr A returned to the UK on 15th September 2014. Until 1st July 2015, Miss B visited him on the second and fourth weekends of each month, arriving on Friday evening and leaving again on Sunday evening. Mr A had a house in the UK and gradually over these weekends she installed more and more of her clothes and other possessions in his house.

On 1st July 2015, Miss B flew to the UK and moved into Mr A's UK house which became her home. For the rest of the fiscal year she spent only 30 days outside the UK and there were only 14 nights on which she did not sleep at her new UK home.

Miss A did not work within the SRT definition at all in the fiscal year 2015/16 after arriving in the UK on 1st July 2015.

Analysis

Residence status

Miss B did not meet any of the Automatic Overseas Tests in 2015/16. In that fiscal year she spent 280 days in the UK and so she met the First Automatic UK Test and was resident here.

Case 7 of the Split Year Rules

Did her circumstances fall within Case 7 of the Split Year Rules in that year?

Para. 50(2)

Miss B was not resident in the UK for the Preceding Year.

Para. 50(3)

Did she fulfil the condition that she had a Partner whose circumstances fall within Case 6 either for her Relevant Year or her Preceding Year?

The first question to ask is whether Mr A was Miss B's Partner for this purpose and for that we need to know when he had to be her Partner. Was it at the time of her move to the UK or was it at that time and during the year in which he met Case 6 of the Split Year Rules by reference to which, the condition of Case 7 in respect of Miss B might be satisfied.

We shall assume that para. 50 only requires that he be her Partner at the point at which he moved to the UK. He will have been her Partner if at that time they were living together.

When does a person move? If we assume for the moment that they were not living together before the move and were living together after the move, was Mr A, Miss B's Partner at the time of the move?

Interesting though that question may be, it is, arguably, of purely academic interest because Case 7 cannot apply unless the Accompanying Spouse 'moves to the UK so the taxpayer and the partner can continue to live together'. If they were not living together immediately before the move, therefore, it is difficult to see how they could fulfil this condition.

We shall assume that Mr A was Miss B's Partner at the time of her move and that this is sufficient for him to be a Partner for the purposes of Case 7. The condition was therefore fulfilled that Miss B had a Partner whose circumstances fell within Case 6 for the Preceding Year.

Para. 50(4)

It is unclear whether Miss B's circumstances up to the time of the move could be characterised as living together with Mr A and so the question is whether she could be said to have moved so they could 'continue to live together'. It certainly appears that she moved so that they could live together but it is surely arguable that it is only on her arrival in the UK that they began to live together. We shall assume, however, that they were living together before her arrival in the UK and that she fulfilled the condition that she moved 'to the UK so … [Mr A] … and … [she could] … continue to live together'.

Was it however so that they could continue to live together 'on the Partner's return or relocation to the UK'. Mr A had not set foot outside the UK after 15th September 2014. Could one say that by Miss B's move she and Mr A could continue to live together on Mr A's return or relocation to the UK? He seems to have returned or relocated a considerable time before Miss A's move.[84]

We shall assume, however, that the conditions of para. 50(4) were satisfied on the 1st July 2015.

[84] The *Guidance* at para. 5.43 gives an example of Joan who moves to the UK after her husband and yet, the *Guidance* says that she fulfils the conditions of Case 7. The delay in her case, however, is only 5 days as she has to work out her notice at her part-time job

Para. 50(5)(a)

We shall assume that the 1st July 2015 is Miss B's deemed arrival day. She fulfilled the condition of para. 50(5)(a) that in the part of the Relevant Year before that day she had no home in the UK. That is because in our statement of the situation we have said that Mr A's house became her home on that day. Of course, had that not been the case, the house might have become her home before that time because of the quality of her occupation of it on her trips to the UK.

Para. 50(5)(b)

The Permitted Limit on the days that Miss B could spend in the UK is calculated as follows:-

$$90 - \text{the appropriate number}$$

The appropriate number is the result of:-

$$90 \times \frac{\text{The number of whole months in the part of the Relevant Year beginning with the deemed arrival day}}{12}$$

So the appropriate number is:-

$$90 \times \frac{9}{12} = 68 \text{ (rounded up)}^{85}$$

So the Permitted Limit is:-

$$90 - 68 = 22.$$

She spent 12 days[86] in the UK before 1st July 2015.

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85 Para. 52(5)

86 They were 10th & 11th and 24th & 25th April and 8th & 9th, 22nd & 23rd May 2015 and 12th & 13th and 26th & 27th June 2015

She therefore fulfilled the condition that the number of days that she spent in the UK in the Relevant Year before the deemed arrival day did not exceed the Permitted Limit.

Para. 50(6)

Miss A fulfilled the condition that she was resident in the UK for the Succeeding Year (2015/16).

Miss A's circumstances therefore fell within Case 7 of the Split Year Rules.

The overseas part of the year in respect of Miss B is the part before the deemed arrival day and is, therefore, 6th April 2015 – 30th June 2015 (inclusive).

The UK part is the period after the overseas part and is therefore the period from 1st July 2015 – 5th April 2016 (inclusive).[87]

[87] Miss B may also meet the conditions of Case 8 of the Split Year Rules. If that were the case, Case 7 would have priority

Circumstances Falling Within Case 8

The circumstances that fall within Case 8 of the Split Year Rules are that:-

(a) the individual is not resident in the UK for the Preceding Year;[88]

(b) at the start of the Relevant Year, the individual had no home in the UK but during that year, he starts to have a home in the UK and continues to have a home in the UK for the rest of the Relevant Year and for the whole of the Succeeding Year.[89]

(c) for the part of the Relevant Year before the day on which he begins to have a UK home within (b), which we shall call the 'Non-UK Part of the Year,' he does not have sufficient UK ties;[90]

(d) the individual is resident in the UK for the Succeeding Year and that year is not a split year in respect of the individual.[91]

[88] Para. 51(2)
[89] Para. 51(3)
[90] Para. 51(4)
[91] Para. 51(5)

DEFINITIONS USED IN THE TNR RULES

Temporarily Non-Resident

An individual is 'temporarily non-resident' if:-

(a) the individual has sole UK residence for a residence period;

(b) immediately following that period ('period A'), one or more residence periods occur for which the individual does not have sole UK residence;

(c) at least four out of the seven fiscal years immediately preceding the year of departure were either:-

(i) a fiscal year for which the individual had sole UK residence; or

(ii) a split year that included a residence period for which the individual had sole UK residence; and

(d) the temporary period of non-residence is five years or less.[92]

Residence Period

For this purpose a 'residence period' is:-

(a) a fiscal year that, as respects the individual, is not a split year; or

(b) the overseas part or the UK part of a fiscal year that, as respects the individual, is a split year.[93]

Sole UK residence

For a fiscal year

An individual has 'sole UK residence' for a residence period consisting of an entire fiscal year if:-

[92] Para. 110
[93] Para. 111

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

(b) there is no time in that year when the individual is Treaty non-resident.[94]

For a part of a split year

An individual has 'sole UK residence' for a residence period consisting of part of a split year if:-

(a) the residence period is the UK part of that year; and

(b) there is no time in that part of the year when the individual is Treaty non-resident.[95]

Treaty non-resident

An individual is 'Treaty non-resident' at any time 'if at the time the individual falls to be regarded as resident in a country outside the UK for the purposes of double taxation arrangements having effect at the time.'[96]

Double taxation arrangements

'Double taxation arrangements' are arrangements that have effect under TIOPA 2010 s.2(1)[97] which gives effect to arrangements where '...Her Majesty in Council declares –

[94] Para. 112(1). The effect of excluding periods when the individual is UK resident but Treaty non-resident can be to bring forward the start of the period of temporary non-residence. Example 42 at para. 6.10 of the *Guidance* illustrates this

[95] Para. 112(2). The effect of excluding periods when the individual is UK resident but Treaty non-resident can be to bring forward the start of the period of temporary non-residence. Example 42 at para. 6.10 of the *Guidance* illustrates this

[96] Para. 112(3)

[97] Para. 145

(a) that arrangements specified in the Order have been made in relation to any territory outside the United Kingdom with a view to affording relief from double taxation in relation to taxes within subsection (3), and

(b) that it is expedient that those arrangements should have effect...'

Temporary Period of Non-Residence

A 'temporary period of non-residence' in relation to an individual is the period between:-

(a) 'the end of period A, and

(b) the start of the next residence period after period A for which the individual has sole UK residence.'[98]

The Year of Departure

For the purposes of these provisions 'the year of departure' is the fiscal year consisting of or including Period A.[99]

The Period of Return

The 'period of return' is the first residence period after Period A for which the individual has sole UK residence.[100]

[98] Para. 113
[99] Para. 114
[100] Para. 115

TRANSITIONAL RULES IN RESPECT OF THE TNR PROVISIONS

There are two important differences between the methods of determining the temporary period of non-residence[101] under the TNR Provisions and under the Pre-Commencement TNR Provisions. First, the Pre-Commencement TNR Provisions applied where there were '*fewer than five years* [emphasis added] of assessment falling between the year of departure and the year of return'[102] whereas under the TNR Provisions the equivalent requirement is that the 'temporary period of non-residence is 5 years or less'.[103] Thus the Pre-Commencement TNR Provisions used fiscal years rather than calendar years and the requirement was for fewer than five such years rather than five calendar years or less.

Para. 158

Paragraph 158(1) provides that:-

> 'The existing temporary non-resident provisions,[104] as in force immediately before the day on which this Act is passed, continue to have effect on and after that day in any case where the year of departure (as defined in Part 4 of this Schedule) is a tax year before the tax year 2013-14.'

Interaction of Paras. 158(1) and 153(3)

Although para. 158(1) provides that in the circumstances it sets out 'the existing temporary non-resident provisions, as in force immediately before the day on which [FA 2013 was] passed, continue to have effect', it does not expressly say that the TNR Provisions of Part 4

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101 This phrase is not used in the Pre-Commencement TNR Provisions

102 See for example TCGA 1992 s.10A(1)(c) before amendment by para. 119 of the *SRT Schedule*.

103 Para. 110(1)(d)

104 Para. 158(3). The existing temporary non-resident provisions are TCGA 1992 s.10A, ITEPA 2003 ss.576A, s.579CA and ITTOIA 2005 s.832A (see para. 35.2.2 above). Interestingly, they do not include the provisions contained in the Pension Schemes (Taxable Property Provisions) Regulations 2006 (SI 2006/1958) or the Offshore Funds (Tax) Regulations 2009 (SI 2009/3001). (See para 35.2.3). So one must distinguish the Pre-Commencement TNR Provisions as a whole from those Pre-Commencement Provisions which are referred to in para. 158(1) as the 'existing temporary non-resident provisions'. I call these provisions the 'Para. 158 Pre-Commencement Provisions'

do not have effect. Paragraph 153(3) provides, however, that Part 4 'has effect if the year of departure (as defined in that Part) is the tax year 2013-14 or a subsequent tax year'. As we have seen, the year of departure is a fiscal year consisting of or including Period A. Period A is the final period of sole UK residence before a temporary period of non-residence. If the year of departure is the fiscal year 2013/14[105] the temporary period of non-residence cannot begin before that year.

Because the year of departure must precede the period of temporary non-residence, where a period of temporary non-residence begins on or before 6 April 2013, Part 4 cannot apply because of para. 153(3): in such a case the year of departure cannot be 'the tax year 2013-14 or a subsequent tax year.' Paragraph 158 tells us that the Para. 158 Pre-Commencement Provisions will continue to have effect but only where the year of departure (as defined in Part 4 of the *SRT Schedule*) is a fiscal year before 2013/14. But Part 4 does not have effect for fiscal years before 2013/14 so it is difficult to see how there can be a year of departure as defined by Part 4 which is a year before 2013/14.

There is undoubtedly a difficulty here on a close reading of the provisions but the Courts may well take a broad approach to their construction in order to avoid redundancy and determine what is a year of departure in respect of a fiscal year before 2013/14 in accordance with the provisions of Part 4 in spite of the express words of para. 153(3).

Paragraph 158(2) provides that where para. 158(1) applies, so that the Para. 158 Pre-Commencement Provisions continue to have effect:-

> '... (a) the question of whether a person is or is not resident in the UK for the tax year 2013-14 or a subsequent tax year is to be determined for the

[105] The earliest period in respect of which Part 4 could have effect because of para. 153(3)

purposes of those provisions in accordance with Part 1 of this Schedule, [106] but

(b) the effect of Part 3 is to be ignored.' [107]

Direct and indirect effect of the Split Year Rules

It is not clear what is the effect of para. 158(2)(a), that the Split Year Rules in Part 3 are to be ignored, because the Split Year Rules do not directly determine an individual's residence. Rather, one determines an individual's residence in the normal way and then, if he is UK resident in the year, one determines whether the Split Year Rules apply. Where they apply, certain income and capital gains are taken out of the charge to tax.

The Split Year Rules do indirectly affect an individual's residence status because they form an element of the Fourth[108] and Fifth[109] Automatic Overseas Tests and the Fourth Automatic UK Test.[110] One might think that the exclusion of Part 3 by para. 158(2)(b) in determining residence in 2013/14 onwards for the purpose of the Para. 158 Pre-Commencement Provisions is of significance because it requires these tests to be applied without reference to the Split Year Rules.

As we have seen, however, under para. 158(1), the Para. 158 Pre-Commencement Provisions can only have effect where the year of departure, that is the last fiscal year which contains a period of sole UK residence, is before 2013/14. It must be succeeded by a period of non-UK residence and will only affect the taxation liabilities arising in the first period of UK residence after this period of non-residence. A split year is a year in which an individual is UK resident. Where the Para. 158 Pre-Commencement Provisions apply to a period of non-residence straddling 6 April 2013 there cannot be a part of that period falling after 5 April 2013 which is

106 Para. 158(2)(a)
107 Para. 158(2)(b)
108 Para. 15(2)(b)
109 Para. 16(2)(b)
110 Para. 10(1)(c)

a split year because under the Pre-Commencement TNR Provisions a temporary non-residence period comprises complete fiscal years in which the individual concerned was not UK resident. Therefore, in determining residence for the period following the temporary period of non-residence there cannot be a preceding year starting after 5 April 2013 which is a split year. How can it matter, therefore, that, where the 'existing temporary non-resident provisions ... continue to have effect', 'Part 3 is to be ignored' in determining 'the question of whether a person is or is not resident in the UK for the tax year 2013-14 or a subsequent year'?

Pre-Commencement Years: Para. 157

It has been see that fiscal years before the year of departure are relevant to the application of the rules of Part 4 because one of the elements of the definition of being 'temporarily non-resident' is that at least four out of the seven fiscal years immediately preceding the year of departure were either a fiscal year for which the individual had sole UK residence or a split year that included a residence period for which an individual had sole UK residence. Thus if the year of departure is any of the years from 2013/14 to 2019/20 one will have to determine the individual's residence in a Pre-Commencement Year in order to determine whether an individual is temporarily non-resident within Part 4. Paragraph 157 provides that in determining whether the test in para. 110(1)(c) is met in relation to a Pre-Commencement Year para. 110(1) is to have effect as if for para. (c) there was substituted:-

> '(c) at least 4 out of the 7 tax years immediately preceding the year of departure was a tax year meeting the following conditions –
>
> (i) the individual was resident in the UK for that year, and
>
> (ii) there was no time in that year when the individual was Treaty non-resident (see paragraph 112(3)).'

Paragraph 157(3) then goes on to provide:-

> 'Whether an individual was resident in the UK for a pre-commencement tax year is to be determined in accordance with the rules in force for determining an individual's residence for that pre-commencement tax year (and not in accordance with the statutory residence test).'

This presents two interesting points.

The interaction of paras. 157(3) and 154(3)

First, what is the relationship between para. 157(3) and the General Transitional Election provided for by para. 154(3)? If para. 154(3) had priority then para. 157(3) would be redundant. It is clear, in any event, that absent an election under para. 154(3), one must determine an individual's residence for any year before 2013/14 under the Pre-Commencement TNR Provisions. If para. 157(3), however, takes priority over an election under para. 154(3), one would be in the odd position that, in determining one's residence in, say, 2015/16, one determined one's residence in, say, 2012/13 under the SRT but under the law in force before 6th April 2013 for the purposes of determining whether 2015/16 formed part of a temporary period of non-residence.

'... for that ... year'

A further difficulty with para. 157(3) is that before the introduction of the SRT, as we have seen, the relevant law did not attempt to determine whether an individual was resident 'for' a fiscal year. It determined his residence from time to time and then subjected him to CGT, for example, if he were resident at any time in the fiscal year concerned. So it is unclear how one determines what were 'the rules in force for determining an individual's residence for that pre-commencement year …'. Paragraph 2(3) says:-

> 'An individual who, in accordance with the statutory residence test, is resident (or not resident) in the UK "for" a tax year is taken for the purposes of any

enactment relating to relevant tax to be resident (or not resident) there at all times in that tax year.'

This does not solve the difficulty. It tells us that where a person is resident 'for' a fiscal year he is resident there at all times in the year. It does not tell us the opposite, that where a person is resident in the UK at a time in the fiscal year he is resident 'for' the fiscal year. Again it is likely that the courts will repair the deficiency of the legislation with a broadly purposive construction but here is yet another example in the *SRT Schedule* of deficient legislation requiring repair by loose construction.

TCGA 1992 s. 10A(3): Gains and Losses

The gains and losses within s.10A(3) are:-

(a) chargeable gains and losses that accrued to the individual in the temporary period of non-residence[111];

(b) chargeable gains that would be treated under s.13[112] as having accrued to the individual concerned in that period if the 'residence assumption' were made[113];

(c) losses that would be allowable in respect of the individual concerned under s.13(8)[114] in that period if that assumption were made[115]; and

(d) chargeable gains that would be treated under s.86[116] as having accrued to the individual in a fiscal year falling wholly in that period if the individual had been resident in the UK for that year.[117]

TCGA 1992 s. 10A(4): The Residence Assumption

The residence assumption is:-

(a) that the individual had been resident in the UK for the fiscal year in which the gain or loss accrued to the company; or

(b) if that fiscal year was a split year as respects the individual, that the gain or loss had accrued to the company in the UK part of it.[118]

111 TCGA 1992 s.10A(3)(a)
112 TCGA 1992 s.13 attributes the gains of a non-resident company which would be a close company if it were UK resident to participators in the company
113 TCGA 1992 s.10A(3)(b)
114 TCGA 1992 s.13(8) allows a limited relief for losses arising to companies to which s.13 applies
115 TCGA 1992 s.10A(3)(c)
116 TCGA 1992 s.86 imposes the Offshore Settlor Charge
117 TCGA 1992 s.10A(3)(d)
118 TCGA 1992 s.10A(4)

TCGA 1992 S.10AA(1)

Section 10AA(1) provides that s.10A(2) does not treat a gain or loss as accruing in the year of return where it accrues on the disposal by the individual concerned of an asset where:-

(a) the asset was acquired by the individual in the temporary period of non-residence[119];

(b) it was so acquired otherwise than by means of a relevant disposal that by virtue of TCGA 1992 s.58,[120] s.73[121] or s.258(4)[122] is treated as having been a disposal on which neither a gain nor a loss accrued;[123]

(c) the asset is not an interest created by or arising under a settlement;[124] and

(d) the amount or value of the consideration for the acquisition of the asset by the individual does not fall, by reference to any relevant disposal, to be treated as reduced under the following provisions:-[125]

(i)	ss.23(4)(b) or (5)(b)	(receipt of compensation and insurance moneys not treated as a disposal);
(ii)	s.152(1)(b)	(roll-over relief on business assets where assets are wholly replaced);
(iii)	s.153(1)(b)	(roll-over relief on business assets where assets are only partly replaced);

119 TCGA 1992 s.10AA(1)(a)
120 Disposals between spouses and between civil partners
121 Deemed disposal by a body of trustees on the death of a person entitled to an interest in possession
122 Certain disposals of works of art and other national heritage property
123 TCGA 1992 s.10AA(1)(b)
124 TCGA 1992 s.10AA(1)(c)
125 TCGA 1992 s.10AA(1)(d)

(iv)	s.162(3)(b)	(roll-over relief on the transfer of a business);
(v)	s.247(2)(b) or (3)(b)	(roll-over relief on the compulsory acquisition of land).

A relevant disposal for the purposes of TCGA 1992 s.10AA(1) is a disposal of an asset acquired by the person making the disposal at a time when he was resident in the UK and was not Treaty non-resident.

An Example

There follows a comprehensive example of the TNR CGT Provisions.

Example 12.0

The Situation

Mr A and his wife had been resident and domiciled in the UK throughout their lives up to and including the fiscal year 2012/13. After Mr A's retirement, they decided to emigrate to Shangri-La to live there permanently.

2013/14 was a split year in respect of them both and the overseas parts of the year in respect of both of them began on 1st June 2013.

In 2018/19 their adult son, who lived in the UK, became seriously ill. Fortunately he recovered but as a result Mr and Mrs A spent a considerable amount of time in the UK in that fiscal year, met the First Automatic UK Test and were therefore resident in 2018/19 which was not a split year in respect of either of them.

Mr and Mrs A were not Treaty non-resident at any relevant time.[126]

The Stevens Painting

On 15th June 2013 Mrs A had given her husband a painting for his birthday present which she had bought for £10,000 on 10th June 2013. In January 2015 it was discovered that the picture was by the famous artist, Cory Stevens, and Mr A sold it, on 31st March 2015, for £210,000.

[126] Para. 112(3). See TCGA 1992 s.10AA(2)

The Offshore Trust Gain

A few years before these events, Mr A had settled moneys on trusts primarily intended for his daughter, Jasmine, who lived in Erewhon. The settlement was on discretionary trusts for a beneficial class including his daughter, any spouse of his daughter and her issue born in the trust period. On 6th June 2015 the trustees sold an asset realising a gain of £50,000. On 31st December 2015, the trustees advanced £10,000 to Jasmine.

The trustee of the settlement was a trust company, resident and incorporated in Erewhon.

The Sale of ACo Limited Shares

On 31st May 2013 Mr A acquired a shareholding in ACo Limited for £100,000. On 1st June 2013, the shareholding's market value remained at £100,000. On 31st January 2018, Mr A sold the shareholding for £250,000.

The Sale of BCo Limited Shares

On 27th June 2013 Mr A acquired a shareholding in BCo Limited for £250,000. He sold the shareholding on 31st January 2017 for £100,000.

The DCo Limited Loan Notes

For some years Mr A had held a shareholding in CCo Limited. On 15th May 2014 CCo was taken over by a larger company, DCo Limited, in exchange for an issue of loan notes. Mr A's gain on the exchange, calculated under TCGA 1992 s. 116(10)(a), was £75,000. On 31st May 2016, the loan notes were redeemed in accordance with their terms.

Analysis

Defined periods

Mr A and Mrs A were temporarily non-resident.

The temporary period of non-residence in respect of them was 1st June 2013 – 5th April 2018 (inclusive).

Their year of departure was 2013/14.

Their period of return was 6th April 2018 – 5th April 2019 (inclusive)

The Stevens Painting

Mr A had acquired and disposed of the picture during his period of temporary non-residence. Section 10AA(1) did not apply, however, to prevent s. 10A(2) from applying because it was acquired by means of a relevant disposal that by virtue of s. 58 was treated as having been a disposal on which neither a gain nor a loss accrued. His acquisition of the painting was by means of a relevant disposal because the disposal by his wife was a disposal of an asset acquired by her at a time when she was resident in the UK and was not Treaty non-resident even though that was in the overseas part of a split year which was a temporary period of non-residence in respect of Mrs A.[127] Section 10A(2) therefore applied to treat the gain as having arisen in the period of return.

If we assume that the painting's increase in value arose only when its true author was discovered, the painting only rose above its original value during Mr A's period of ownership of the asset and during his temporary period of non-residence. Nonetheless the gain was chargeable on him in his period of return.

[127] The fact that a relevant disposal will include a disposal of an asset acquired in the overseas part of a split year is, one presumes, an oversight by the draftsman

The Offshore Trust Gain

It appears that Mr A was domiciled in the UK when he made the settlement of assets on trust. Mr A had an interest in the settlement because his daughter could benefit from it.[128] In any year when he was resident in the UK, therefore, TCGA 1992 s.86 would apply to the settlement. Therefore the gain made by the trustee of £200,000 on 6th June 2015 fell within s.10A(3)(d). Mr A was therefore chargeable to CGT as if this gain were a chargeable gain of the year of return subject to the provisions of TCGA 1992 s.86A. Section 87 also applied to the settlement because throughout the time concerned there was no time when the trustees were resident in the UK.[129]

The gain made by the trustees on 6th June 2015, therefore, was a trust gain and £10,000 of it was matched with the capital payment made to Jasmine on 31st December 2015. The amount of the matched gain was therefore deducted from the gains otherwise falling within s.10A(3)(d) and therefore Mr A was chargeable under s.10A(2) on £40,000 in respect of these gains.[130]

The Sale of ACo Limited Shares

Because the shareholding in ACo Limited was acquired before the temporary period of non-residence and disposed of within it, s.10A(2) applied to treat the gain arising on the disposal as if it accrued in the period of return. This was in spite of the fact that the value of the asset increased over its base cost only during the temporary period of non-residence.

128 TCGA 1992 Sch.5 para. 2
129 TCGA 1992 s.87(1)
130 TCGA 1992 s.86A

The Sale of BCo Limited Shares

Because Mr A both acquired and sold his shareholding in BCo Limited within his temporary period of non-residence the loss was not deemed to accrue in the period of return and was, therefore, not an allowable loss.

The Redemption of DCo Limited Loan Notes

Mr A had acquired the DCo Limited Loan Notes in his temporary period of non-residence. Because of this, s.10AA(1) would have prevented s.10A(2) applying were it not for s.10AA(3). The gain arising on his disposal of the shares was treated as accruing on the disposal of the DCo Limited Loan Notes. That was a gain which fell to be treated under TCGA 1992 s.116(10) as accruing on the disposal of another asset (the Loan Notes) which met the conditions of s.10AA(1) but the asset, the shares, on which the gain actually accrued, did not. TCGA 1992 s.10AA(3) prevented TCGA 1992 s.10AA(1) applying to exclude the gain from being treated as accruing in Mr A's period of return. The gain calculated on the exchange of CCo Limited shares for DCo Limited Loan Notes, therefore, was deemed to accrue in Mr A's period of return under TCGA 1992 s.10A(2).

A Summary

In 2017/18, therefore, Mr A was assessable in respect of the following gains under TCGA 1992 s.10A(2).

DESCRIPTION	AMOUNT
Painting	£200,000
Gain of offshore trustees	£ 40,000
Gain on disposal of ACo Limited shares	£150,000
Gain on redemption of Loan Note in DCo Limited	£ 75,000
Total	**£465,000**

The Reader will have noticed that the events which gave rise to these gains took place over 4 fiscal years but because the gains were all treated as arising in the year of return Mr A had only had one annual allowance to set against them. In determining the rate of tax, they were all aggregated whereas if they had arisen over several years the gains arising in one year would not have been aggregated with the gains arising in the other years. Mr A received no relief for his loss in respect of his shareholding in BCo Limited.

The misfortune of his son's illness had proved to be very costly indeed.