Residue

Intra-United Kingdom Residence

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The importance of intra-UK residence

Scottish and Welsh taxpayers

The Scotland Act 1998 as amended by the Scotland Act 2012 and the Wales Act 2014 defines a "Scottish taxpayer".[1] Similarly, the Government of Wales Act 2006 as amended by the Wales Act 2014 defines a "Welsh taxpayer".[2] Both are, in effect, definitions of fiscal residence in Scotland and Wales respectively. The Scotland Act has had a definition of a "Scottish taxpayer" since its enactment in 1998 and there have already been three major versions of it. Until now, however, it has been of only theoretical importance.

It will become, however, of practical importance on April 6, 2016 when, for the first time, it will, in part, determine the tax liabilities of Scottish taxpayers and its importance is likely to increase substantially in the coming years.

The Scottish rate of income tax

Not a Devolved Tax

The Scotland Act provides for the Scottish Parliament to have power to make legislative provisions in respect of devolved taxes. Currently, the devolved taxes comprise a tax on transactions involving interests in land and a tax on disposals to landfill.[3] Tax on income is not a devolved tax. Its scope will continue to be determined by the UK Parliament and it will continue to be administered by HMRC alone.

[1] Scotland Act 1998 ss.80D–80F.
[2] Government of Wales Act 2006 ss.116E–116H.
[3] Scotland Act 1998 ss.80I–80K.

Using the SRIT

The Scottish Parliament has, however, the power to set a Scottish rate of Income Tax (the SRIT) for the purposes of calculating the rate of Income Tax to be paid by Scottish taxpayers on certain income.[4] It is expected to do so for the tax year 2016–17 but what rate it will set has not yet been determined.[5] The SRIT is not actually a rate which will be charged on any income. The rates which will be charged on the relevant income of Scottish taxpayers are the Scottish Basic Rate, the Scottish Higher Rate and the Scottish Additional Rate.[6] These rates are found by deducting 10 per cent from the general UK equivalent rates (that is from the Basic Rate, the Higher Rate and the Additional Rate) (the UK Equivalent Rates) and adding the Scottish Rate.[7] So the Scottish Parliament has the power to set the Income Tax rates applicable to certain income of Scottish taxpayers, but all rates must deviate from the normal UK rates by the same amount and will apply to the same bands of income as in the UK generally.

Income subject to the SRIT

The income to which these rates are to apply is the non-savings income of the Scottish taxpayer concerned which would otherwise be charged to the UK Equivalent Rates.[8] This means that it is not charged on dividend income which would otherwise be charged at the various general UK dividend rates[9] except dividend income charged on the remittance basis under ITTOIA 2005 s.832 which is not subject to the general UK dividend rates.[10] Non-savings income is defined as income which is not savings income.[11] Non-savings income is, therefore, a residual category. Savings income:

> "… is income —
> (a) which is within subsection (3) or (4) [of ITA 2007 s.18], and
> (b) which is not relevant foreign income charged in accordance with section 832 of ITTOIA 2005 (relevant foreign income charged on the remittance basis)."[12]

Income within s.18(3) comprises:

- interest;
- purchased life annuities with certain exceptions;
- profits on deeply discounted securities; and
- accrued income profits.

Income within s.18(4) comprises certain chargeable event gains.

Accordingly, all relevant foreign income charged under the remittance basis is subject to the SRIT regardless of whether it would otherwise fall within the categories of income listed above. Thus, in addition to dividend income, interest income, most purchased life annuity income and profits on deeply discounted securities (but not accrued income profits or chargeable event gains to which the remittance basis does not apply in any event) will be chargeable to the SRIT if the remittance basis applies, but if the remittance base does not apply, no such charge will apply.

Income which is nominated under ITA 2007 s.809H(2), if that income would be savings income if it were not subject to the remittance basis, will be savings income and therefore not subject to the SRIT

[4] Scotland Act 1998 s.80C.
[5] See *http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/89882.aspx* [Accessed October 21, 2015].
[6] ITA 2007 s.11A.
[7] ITA 2007 s.6A.
[8] ITA 2007 s.11A(1)–(3).
[9] ITA 2007 s.13(1).
[10] ITA 2007 s.13(1).
[11] ITA 2007 s.11A(4).
[12] ITA 2007 s.18(2).

because income nominated under s.809H(2) is not treated as remitted but, rather, as not being subject to the remittance basis.[13]

There is a further anomaly.[14] Foreign income which would be non-savings income whether or not it were remitted (such as rental income) and which is nominated under ITA 2007 s.809H(2), or which is treated as nominated under ITA 2007 s.809H(4), will be subject to the SRIT. This will not affect the amount of the remittance basis charge but it will affect to what income and gains it applies,[15] the detailed calculation of the charge and whether or not the tax paid is income of the Scottish Government or the UK Government.[16]

The writ

Provisions in respect of Welsh Rates of Income Tax (the WRIT) were inserted into the Government of Wales Act 2006 and the Income Tax Act 2007 by the Wales Act 2014. These provisions allow separate Welsh rates to be set for the purposes of calculating the Welsh Basic Rate, the Welsh Higher Rate and the Welsh Additional Rate,[17] giving the Welsh Assembly the right to vary the rates applying to the three tax bands by different amounts. When they have come into effect, and until the equivalent Scottish provisions are changed, it will be possible for the Welsh Assembly to create, for example, a Welsh Basic Rate of 10 per cent, a Welsh Higher Rate of 40 per cent and a Welsh Additional Rate of 90 per cent but it will not be possible for the Scottish Government to create the equivalent Scottish rates. If the Scottish Basic Rate were 10 per cent, the Scottish Higher Rate would be 30 per cent and the Scottish Additional Rate 35 per cent.

The power to set the WRIT, however, is only to come into force after a referendum has been held in which a majority of those casting their vote have voted in favour of such power.[18]

The imminent extension of the taxing powers of the Scottish Parliament

At this stage, subject to the holding of a referendum, the taxing powers of the Welsh Assembly in respect of Income tax are more extensive than those of the Scottish Parliament. That is not, however, likely to be the final position because the Smith Commission Report[19] agreed, in satisfaction of the promises made by the Conservative, Labour and Liberal Democrat Parties before the Scottish Independence Referendum, that the Scottish Parliament should have the power to set the rates of Income Tax and the thresholds at which they are paid for the non-saving and non-dividend income of Scottish taxpayers and that there should be no restrictions on the thresholds or rates which the Scottish Parliament could set.[20] The Scotland Bill 2015 currently before Parliament contains provisions to achieve this.[21]

No similar extension of the powers of the Welsh Assembly in respect of Income Tax has been proposed by the Government, but it has already been seen that, subject to a referendum, the Welsh Assembly does have the power to alter the differentials between the Welsh Basic, Higher and Additional Rates independent

[13] ITA 2007 s.809H(2).

[14] HMRC does not seem to be aware of this anomaly. In its Technical Note of May 2012 entitled *Clarifying the Scope of the Scottish Rate of Income Tax*, it says: "Long-term UK residents who are not domiciled here can pay an annual charge to be taxed under the remittance basis (currently £30,000). This will not be affected by the introduction of the Scottish rate of Income Tax. Payments of the charge due from Scottish taxpayers will continue to be paid direct to the UK Exchequer."

[15] This is significant because if nominated income or gains are remitted to the UK the deemed remittance rules of ITA 2007 s.809I may be brought into effect (ITA 2007 s.809I).

[16] ITA 2007 s.809H(2). See the Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (November 27, 2014), para.78.

[17] Government of Wales Act 2006 s.116D.

[18] Wales Act 2014 ss.12–14.

[19] See the Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament*.

[20] See the Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* at paras 76–77.

[21] Scotland Bill 2015 Pt 2.

of changes to the differentials between the UK Equivalent Rates, although it does not have the power to alter, or change the number of, the Income Tax thresholds.

How might these current and imminent powers be used?

Before the May 2015 General Election, the Scottish National Party, which controls the Scottish Parliament, advocated an increase of the Additional Rate of tax to 50 per cent[22] as did the Labour Party, which currently controls the Welsh Assembly, and Plaid Cymru. Whether the Scottish Parliament and/or the Welsh Assembly would go it alone if the UK's Additional Rate remained at 45 per cent is unclear.

A continuing process

The Smith Commission Report also recorded that all other aspects of Income Tax will remain reserved to the UK Parliament, including the imposition of the annual charge to Income Tax, the personal allowance, the taxation of savings and dividend income; the ability to introduce and amend tax reliefs and the definition of income. The whole of Income Tax, including that paid by Scottish taxpayers, will continue to be administered by HMRC. All aspects of Inheritance Tax, Capital Gains Tax, Corporation Tax, National Insurance Contributions and oil and gas receipts will continue to be reserved to the UK.[23] This is, however, unlikely to mark the final position on fiscal devolution within the UK, for there is a wider tendency, affecting a much broader range of matters than just fiscal ones, which is loosening the legal bonds which bind together the constituent countries of the UK. The Scottish National Party has said that it wishes the Scottish Parliament to have "fiscal autonomy". It moved an amendment to the Scottish Bill, currently before Parliament, to achieve that and, when that amendment was defeated, sent a letter to the Scottish Secretary calling for more fiscal powers to be devolved to the Scottish Parliament in the Scotland Bill. These included powers to control Corporation Tax, Capital Gains Tax and National Insurance contributions.[24] In its Election Manifesto, Plaid Cymru said that it would seek to obtain the same "deal" on taxation as Scotland.[25]

Although powers over Income Tax, analogous to those granted to the Scottish Parliament and the Welsh Assembly, have not been devolved to the Northern Ireland Assembly, the Corporation Tax (Northern Ireland) Act 2015 confers on that Assembly power to set its own rate of Corporation Tax. If further powers were devolved to Scotland and Wales over Income Tax (and even more so if powers were devolved over Capital Gains Tax and Inheritance Tax) it would be difficult to imagine any principle under which similar powers should not be devolved to the Northern Ireland Assembly.

This all raises the question of taxation in England, which is part of the issue which has been dubbed, perhaps rather unfortunately, EVEL, "English Votes for English Laws", a demotic acronym which has been adopted by the Government. Currently, the method for allowing matters affecting only England to be dealt with only by English MPs is through changes to the standing orders of the House of Commons rather than through legislation.[26] At the time of writing, it is not clear how matters which affect only England are to be defined, but it is difficult to see why, if the Scottish Parliament should have the power to determine the rates and bands of Income Tax which apply to Scottish taxpayers, Scottish MPs should have the right to vote on setting the rates and bands of non-Scottish taxpayers.[27]

[22] *Tax Journal* May 1, 2015. *Briefing* by Tina Riches.

[23] See the Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* at paras 76–77.

[24] See BBC news, June 15, 2015, *http://www.bbc.co.uk/news/uk-scotland-scotland-politics-33126122* [Accessed October 21, 2015].

[25] *Tax Journal* 1 May 2015. *Briefing* by Tina Riches.

[26] *English Votes for English Laws* published by the Cabinet Press Office on May 27, 2015 and updated in July 2015. Similar provision is to be made in respect of situations where the whole UK is not affected by a provision but two or three of its constituent countries are so affected to restrict voting to members with constituencies in those countries.

[27] *English Votes for English Laws: An Explanatory Guide to Proposals* says: "Finance bills, and bills that could usually be referred to as finance bills, are included in the new procedures. They will be subject to the same process as other bills, but with one change. The Legislative Grand Committee

Conclusion

It would appear that the taxation systems of the constituent countries[28] of the UK are likely to diverge increasingly in the future. Intra-UK Residence will, therefore, be of increasing importance. It is always more difficult to change an existing system than to construct a new one ab initio and so the method of defining a Scottish Taxpayer under the Scotland Act 1998 and a Welsh Taxpayer under the Government of Wales Act 2006 is likely to remain the pattern for determining Intra-UK Residence. For that reason, those who advise on residence, in addition to understanding the rules of UK residence, need to be familiar with those concerning Intra-UK Residence.

Scottish and Welsh taxpayers

Two tests

It has been seen that, for a Scottish Taxpayer, the rates which will apply to non-savings income will be the Scottish Basic, Higher and Additional Rates. Similarly, for a Welsh Taxpayer, the rates which will apply to non-savings income will be the Welsh Basic, Higher and Additional Rates.[29] For a UK resident who is neither a Scottish or a Welsh Taxpayer, the rates which will apply to non-savings income will be the Basic, Higher and Additional Rates.[30] It might be asked what will happen if a person is both a Scottish and a Welsh Taxpayer? The legislation is silent on the matter. It appears to have been designed on the basis that it is not possible to be a Scottish and a Welsh taxpayer in respect of the same year. Whether that is the case will be examined below.

It follows that an individual who wishes to know what rates of Income Tax will apply to his income will have first to consider whether he is a Welsh Taxpayer and whether he is a Scottish Taxpayer. If, in due course, the Northern Ireland Assembly is granted similar powers in respect of Income Tax he will have to consider, in addition, whether he is a Northern Irish Taxpayer. Whether there will ever be a fourth status, that of being an English Taxpayer, is impossible to forecast.

A labyrinthine process

Creating two or, perhaps, in due course, three or four, interlocking tests is a very inefficient way of formulating a test to allocate taxing rights amongst the constituent countries of the UK and one which is dependent on the individual tests dovetailing exactly. A better approach would be to develop a single test, applicable to the UK generally to determine in which constituent country of the UK a person is resident. This has not been the Government's approach.

There have been three major versions of the definition of a Scottish Taxpayer since the enactment of the Scotland Act 1998. It seems clear that the Government originally approached the task simply by considering the problem of allocating taxing rights between Scotland and the rest of the UK and only found later that the same issue applied in respect of Wales. Instead of recasting the test in a rational form,

for these bills may consist not only of English or English and Welsh MPs, but also English, Welsh and Northern Ireland MPs where relevant. This reflects the devolution of income tax rates and thresholds on earnings to Scotland. Relevant Budget Resolutions, on which Finance Bills are founded, will also be subject to the consent of these MPs, in a double majority vote. Any taxes which apply to Great Britain will continue to be considered on a UK-wide basis".

[28] The term "countries" has no role in defining the constituent parts of the UK. The "United Kingdom" in a statute means Great Britain and Northern Ireland (Interpretation Act 1978 Sch.1). The Kingdom of Great Britain consists of the Kingdoms of England and Scotland (Union with Scotland Act 1706 art.1). England for this purpose includes Wales (Interpretation Act 1978 ss.22 and 23, Sch.2 para.5(a)). The term "Wales" in a statute simply means the combined area of the counties which were created by s.20 of the Local Government Act 1972, as originally enacted, but subject to any alteration made under s.73 of that Act (Interpretation Act 1978 Sch.1). There is no statutorily defined term or phrase to mean each of Northern Ireland, the Kingdom of Scotland, Wales and the part of the Kingdom of England which is not Wales. The phrase, "the constituent countries of the United Kingdom" has been used to mean this.

[29] Subject to an affirmative vote in a Welsh referendum.

[30] ITA 2007 s.10

it chose to create a second version of it in respect of Wales based on the Scottish Taxpayer Test. The process of doing so forced modifications to the Scottish test because, before the passing of the Wales Act 2014, tie breaks were simply resolved in Scotland's favour. Where this had been so, the Wales Act 2014 revised the Scottish Taxpayer Test to provide equality between Wales and Scotland.

The next sections consider the process a taxpayer will have to follow by examining the definition of a Scottish Taxpayer and of a Welsh Taxpayer and, finally whether there are any overlaps between the two, and where the borderline is between these two and the status of not being either a Scottish or a Welsh Taxpayer.

Scottish taxpayers

Two definitions of a Scottish taxpayer

In effect, there are two definitions of a Scottish taxpayer, namely, what can be termed the general Scottish taxpayer test and the Welsh Parliamentarian test.

The general Scottish taxpayer test

Section 80(d), which applies to any individual except one who is a Welsh Parliamentarian for any part of the year[31] and thus will apply in respect of the vast majority of individuals, provides that for any tax year a Scottish taxpayer is an individual who (a) is resident in the UK for income tax purposes and (b) for that year, meets condition A, B or C.'

As for (a), three observations may be made. First, it will be seen that, as is the case for residence in the UK, it has to be determined whether an individual is a Scottish taxpayer in respect of a whole fiscal year. Unlike residence in the UK,[32] however, there are no split year rules[33] to take account of the special circumstances which apply in the first and last year of "residence". The result is, perhaps surprisingly, that the SRIT may apply to income arising in the overseas part of a split year. Secondly, a person will only be a Scottish Taxpayer for a year in which he is UK resident. Thirdly, the legislation makes no distinction between Scottish Taxpayers who are domiciled in Scotland and those who are domiciled in the other constituent countries of the UK.

The conditions provided for by (b) are:

Condition A: close connection with Scotland

An individual meets condition A if he has a close connection with Scotland.[34]Section 80E provides for the circumstances in which an individual has a close connection "with a part of the UK" and contains two limbs, the first of which applies where the individual has only one place of residence in the UK and the second where he has two or more places of residence in the UK.

At the heart of the definition of a Scottish Taxpayer, therefore, is the concept of a "place of residence". What does this phrase mean? Interestingly, the phrase does not appear at all in the UK SRT and the word "residence" is never used in the sense of a physical place but only in the sense of a tax status.

The term "residence" is, of course, important in the CGT relief for disposals of main residences,[35] but its use there is in respect of a different tax and for a very different purpose. What is more, the phrase "place of residence" is nowhere used in the legislation conferring that relief. Any conclusions as to the meaning

[31] Scotland Act 1998 s.80D(4A)—see below.
[32] In the remainder of this article, the rules for determining whether residence in the UK in FA 2013 Sch.45 will be referred to as the "UK SRT".
[33] FA 2013 Sch.45 Pt 3.
[34] Scotland Act 1998 s.80D(2).
[35] TCGA 1992 ss.222–226B.

of the phrase "place of residence" drawn from the meaning of the word "residence" or the phrase "main residence" in the CGT main residence relief legislation must be very tentative.

In the UK SRT the draftsman's decision to use the concept of a "home" rather than the phrase "main residence" with its long history in CGT main residence relief appears to have been a deliberate one.[36] It is clear that although the word "home" and the phrase "main residence" may be related, their meaning in these statutory contexts cannot be exactly the same. Still less, can the meaning of the word "home" in the UK SRT be equivalent to the meaning of the word "residence" without qualification in the CGT main residence relief. Whatever a "place of residence" may mean in the Scotland Act's definition of a Scottish Taxpayer, it plainly is not exactly the same as the meaning of a "home" in the UK SRT or of a "main residence" in the CGT main residence relief.

The one definitional provision relating to the phrase "place of residence" which the statute does contain is that in s.80E:

> "… 'place' includes a place on board a vessel or other means of transport."[37]

Draft guidance (the Draft Guidance) on the definition of a Scottish taxpayer, released in June 2015 and put out for consultation until the July 31, 2015, says of the meaning of the phrase "place of residence":

> "This term [sic] is not defined by the legislation so must be given its ordinary meaning. For an individual its ordinary meaning is the dwelling in which that person habitually lives: in other words his or her home. This interpretation is supported by considerable case law. Places of temporary accommodation, for example hotels and holiday homes don't constitute a 'place of residence'
>
> For the majority of individuals their place of residence will be simple to identify - not all individuals though have simple living arrangements. However, even for those with more complicated arrangements, whether a place is their home, where they habitually live, is central to establishing whether it constitutes a 'place of residence' for the purposes of Scottish taxpayer status.
>
> The concept of residence is used elsewhere in tax and non-tax legislation and case law relating to these rules provides useful additional indication [sic] as to which factors are illustrative of whether a location constitutes 'a place of residence' in the context of deciding Scottish taxpayer status."[38]

If the draftsman had wished to utilise the concept of a "home", it seems strange that he should not have adopted that word rather than another phrase. This is particularly so as the first definition of a Scottish Taxpayer in the Scotland Act 1998, prior to its amendment by the Scotland Act 2012, did utilise the concept of "a principal UK home", which was then defined by reference to a place of residence. What is more, the substantial amendment of the definition of a Scottish Taxpayer made by the Wales Act 2014 was made after the enactment of the Finance Act 2013, which contained the UK SRT. It would seem strange if in two Acts, where the later Act utilised the earlier, the draftsman should have chosen to express the same concept in different words.

It would appear that at the heart of the test for determining whether an individual is a Scottish Taxpayer is an imprecise and uncertain concept, which will make the application of these provisions fundamentally uncertain.

Condition A: the first limb—single place of residence

Where an individual has only one place of residence in the UK he:

> "… has a close connection with a part of the UK if in that year —

[36] See *McKie on Statutory Residence* (CCH, 2014), para.5.8.73.
[37] Scotland Act 1998 s.80E(4).
[38] *Scottish rate of Income Tax — technical guidance on Scottish Taxpayer status* (HMRC, June 11, 2015).

(a) [he] has only one place of residence in the UK,
(b) that place of residence is in that part of the UK, and
(c) for at least part of the year, … [he] lives at that place."[39]

This provision contains yet another imprecise concept, that of "living at a place". No definition, exhaustive, inclusive or indicative, is given of this phrase. The Draft Guidance has no discussion of what it may mean. It might be thought that to have a place of residence for a year one would have to live (reside) in it for at least some time in the year. This provision says, however, that a person does not have a close connection with a part of the UK even if that person has a place of residence in that part if one does not live in that place of residence for any part of the year. Ergo, it is possible to have a place of residence in a year even though one does not live in that place of residence at all in the year although in that case one will not have a close connection with that part of the UK. That is significant in deciding the extent of the concept of "a place of residence".

Condition A: the second limb—two or more places of residence in the UK

If the individual has two or more places of residence in the UK in the year he has a close connection with a part of the UK if in that year:

"(b) for at least part of the year … [his] … main place of residence in the UK is in that part of the UK,
(c) the times in the year when … [his] … main place of residence is in that part of the UK comprise (in aggregate) more of the year than the times when … [his] … main place of residence is in each other part (considered separately), and
(d) for at least part of the year, … [he] … lives at a place of residence in that part of the UK."[40]

It seems that the intention of (c) is that a comparison should be made between the number of days in which the individual's place of residence is in each one of the constituent countries of the UK with the number of days in which it is in Scotland. The difficulty of that is that nowhere else in the legislation is it clear that the phrase "part of the UK" does not mean any part rather than the discrete parts which constitute the constituent countries of the UK.

Condition B—day counting

An individual meets Condition B if:

"(a) … [he] … does not have a close connection with England, Wales or Northern Ireland (see section 80E), and
(b) … [he] … spends more days of that year in Scotland than in any other part of the UK."[41]

If the individual has a close connection with Scotland he will be a Scottish Taxpayer under the General Scottish Taxpayer Test whether or not he meets Condition B. If he does not have a close connection with Scotland and has a close connection with England, Wales or Northern Ireland he will not meet Condition B. Accordingly, Condition B will only be met in circumstances where it is significant whether it is met, where the individual does not have a close connection with any of the constituent countries of the UK. In that case he will meet Condition B if he spends more days of the year in Scotland than in any other part of the UK.

[39] Scotland Act 1998 s.80E(2).
[40] Scotland Act 1998 s.80E(3)
[41] Scotland Act 1998 s.80D(3).

Day counting

An individual spends more days of the year in Scotland than in any other part of the UK if (and only if):

> "… the number of days in the year on which … [he] … is in Scotland at the end of the day exceeds each of the following —
> (a) the number of days in the year on which [he] is in England at the end of the day;
> (b) the number of days in the year on which [he] is in Wales at the end of the day;
> (c) the number of days in the year on which [he] is in Northern Ireland at the end of the day."[42]

This gives a "midnight rule" akin to the rule of the UK SRT.[43] It is then provided that the individual:

> "… is treated as not being in the UK at the end of a day if —
> (a) on that day … [he] … arrives in the UK as a passenger,
> (b) … [he] … departs from the UK on the next day, and
> (c) during the time between arrival and departure … [he] … does not engage in activities which are to a substantial extent unrelated to … [his] … passage through the UK."[44]

This closely follows the transit exception to the day counting rule provided in the UK SRT.[45] It is surely odd that it acts only by reference to journeys in and out of the UK. Take a Frenchman with a place of residence at which his family lives in London and another place of residence in Edinburgh; he flies regularly from London to Edinburgh and back staying overnight. His days in Edinburgh would count as days in Scotland. If he also had a place of residence in Paris and he flew from Paris to Edinburgh and back staying overnight, they would not. It is difficult to see the rationale of this.

The UK SRT also contains an exception to the general day counting rule for exceptional circumstances.[46] There is no equivalent to that exception in the definition of a Scottish Taxpayer. Similarly, the UK SRT contains a special deeming rule which applies in certain circumstances, where an individual enters and leaves the UK on the same day on more than 30 days in the year.[47] There is no equivalent to that deeming rule in determining whether an individual is a Scottish Taxpayer.

Condition C: Scottish Parliamentarians

An individual meets Condition C if, for the whole or any part of the year, he is:

> "(a) a member of Parliament for a constituency in Scotland,
> (b) a member of the European Parliament for Scotland, or
> (c) a member of the Scottish Parliament."[48]

The Welsh Parliamentarian test

It has been seen that Scottish Parliamentarians are, under the General Scottish Taxpayer Test always Scottish Taxpayers. The equivalent Welsh provisions provide that Welsh Parliamentarians are always Welsh Taxpayers. If Welsh Parliamentarians, therefore, were subject to the General Scottish Taxpayer Test it would be possible for them to be both Scottish Taxpayers and Welsh Taxpayers.[49] It is for that reason that Welsh Parliamentarians are excluded from the General Scottish Taxpayer Test and that there

[42] Scotland Act 1998 s.80F(1).
[43] Found in FA 2013 Sch.45 para.22.
[44] Scotland Act 1998 s.80F(2).
[45] FA 2013 Sch.45 para.22(3).
[46] FA 2013 Sch 45 para.22(4)–(6).
[47] FA 2013 Sch 45, para.23(2)–(5).
[48] Scotland Act 1998 s.80D(4).
[49] And, of course, vice versa.

is a specific test (which we have called the "Welsh Parliamentarian Test"), which applies only to Welsh Parliamentarians.

Scotland Act 1998 s.80DA(1) provides that:

> "An individual … who is a Welsh parliamentarian for the whole or any part of a tax year is a Scottish taxpayer for that tax year if —
> (a) … [he] … is resident in the UK for income tax purposes for that year (see Schedule 45 to the Finance Act 2013),
> (b) … [he] … meets condition C in section 80D for that year, and
> (c) … [he] … meets either of the following conditions for that year."[50]

The first Condition under (c) above is that:

> "the number of days in that year on which … [he] … is a member as described in any of paragraphs (a) to (c) of section 80D(4) [ie, is a Scottish Parliamentarian] [exceeds],[51]
> … the number of days in that year on which … [he] … is a Welsh parliamentarian."[52]

The second Condition under (c) above is that

> "the number of days in that year mentioned in paragraphs (a) and (b) of subsection (2) are the same, and
> (b) … [he] … meets condition A or B in section 80D for that year."[53]

Thus a Welsh Parliamentarian will be a Scottish Taxpayer only if the number of days in the fiscal year on which he is a Scottish Parliamentarian exceeds the number of days on which he is a Welsh Parliamentarian or, if those numbers are equal, he has a close connection with Scotland or spends more days in Scotland than in any other part of the UK.

Welsh taxpayers

The equivalent Welsh provisions

The Government of Wales Act 2006 contains provisions which are the same as the provisions in the Scotland Act 1998 defining who is a Scottish Taxpayer with the substitution of Wales, Welsh, Assembly and Welsh Parliamentarian for Scotland, Scottish, Scottish Parliament and Scottish Parliamentarian and vice versa. The Government of Wales Act sections and their equivalent in the Scotland Act of 1998 are as follows:

SECTION NO. OF THE GOVERNMENT OF WALES ACT 2006	SECTION TITLE OF GOVERNMENT OF WALES ACT 2006	SECTION NO. OF THE SCOTLAND ACT 1998	SECTION TITLE OF SCOTLAND ACT 1998
Section 116E	Welsh Taxpayers	Section 80D	Scottish Taxpayers
Section 116F	Welsh Taxpayers: Scottish Parliamentarians	Section 80DA	Scottish Taxpayers: Welsh Parliamentarians

[50] Scotland Act 1998 s.80DA(1).

[51] It will be seen that the word "exceeds", which is essential to make sense of the provision is in square brackets to indicate that it was not in the edition of the Scotland Act 1998 from which the quotation is taken. That edition is that on the LexisNexis Legislation database. At the time of writing, the version of the Scotland Act 1998 on the Government's legislation website had not been updated to reflect the amendments made by Scotland Act 2012 and the Wales Act 2014.

[52] Scotland Act 1998 s.80DA(2).

[53] Scotland Act 1998 s.80DA(3).

SECTION NO. OF THE GOVERNMENT OF WALES ACT 2006	SECTION TITLE OF GOVERNMENT OF WALES ACT 2006	SECTION NO. OF THE SCOTLAND ACT 1998	SECTION TITLE OF SCOTLAND ACT 1998
Section 116G	Close Connection with Wales or another part of the UK	Section 80E	Close Connection with Scotland or another part of the UK
Section 116H	Days spent in Wales or another part of the UK	Section 80F	Days spent in Scotland or another part of the UK
Section 116I	Supplemental powers to modify enactments	Section 80G	Supplemental powers to modify enactments

Interaction of the Scottish and Welsh definitions

The general taxpayer tests

The rules for determining whether or not a UK resident individual, who is neither a Welsh or a Scottish Parliamentarian during a year, is a Scottish or Welsh Taxpayer may be summarised as follows:

(a) if he has only one place of residence which is in Wales or Scotland and in which he lives for at least a part of the year he will be a taxpayer of the country where that place of residence is;

(b) if he has more than one place of residence in the UK and he lives in a place of residence in the UK for at least a part of the year he will be a Scottish or Welsh Taxpayer, as the case may be, if he has a place of residence in Scotland or Wales, as the case may be, for longer than he has a place of residence in any other part of the UK; and

(c) if neither (a) nor (b) above applies, if he does not have a close connection with England or Northern Ireland and he spends more days of the year in either Scotland or Wales than in any other constituent country of the UK he will be a taxpayer of the country in which he spends the most days.

The Parliamentarian tests

In respect of Scottish and Welsh Parliamentarians:

(a) if the individual is a Parliamentarian during the year in respect only of Wales or only of Scotland he will be a taxpayer of the country of which he is a Parliamentarian; and

(b) if at a time in the year he is a Scottish Parliamentarian and at the same or another time in the year he is a Welsh Parliamentarian he will be a taxpayer of the country of which he is a Parliamentarian for the greater number of days in the year or, if he is a Parliamentarian of the two countries for an equal number of days, the country of which he is a taxpayer is determined under the General Test place of residence (Condition A) and day count (Condition B) tests.

An irremediable mistake

What is wrong?

There are two things wrong with the Intra-UK Residence Tests:

(a) their structure; and

(b) their content.

Structure

The structure of the Intra-UK Residence Tests is wrong because they consist of a couple of interlocking tests, which require anybody who wishes to determine his intra-UK residence to look in two separate pieces of largely non-fiscal legislation and then to work out how they interact. This is going to become far more complicated if the couple become a ménage à trois by the Northern Ireland Assembly being granted similar powers. If there is ever an English Parliament with similar powers the complexity will be multiplied still further.

Form

The form of the Intra-UK Residence Tests is wrong because we now have two tests of residence in UK fiscal law which are both based on imprecise (indeed indefinable) and different concepts.

The Government's decision to adopt soft concepts incapable of precise definition in the UK SRT was very properly criticised by the professional bodies.[54] Having done so, there was even less reason for it to have used imprecise concepts in allocating taxing rights amongst the countries of the UK particularly as the concepts adopted are different ones to the ones used in the UK SRT. Surely, there would be little room for manipulation if the Intra-UK Residence Rules were based on a simple arithmetical day counting formula rather than on concepts as vague as a "place of residence" and "living in" such a place of residence.

Putting it right

What is required is a single test contained in UK fiscal legislation to allocate taxing rights amongst the constituent countries of the UK based on a simple arithmetical day counting formula.

It may be fair to say that when the Scotland Act 1998 was enacted and even when it was amended in 2012, the professional bodies did not realise the potential future significance of the definition of a Scottish Taxpayer so that the position largely went by default. Anything to do with the devolution of powers is, of course, politically very controversial and any proposal, no matter how rational and necessary, to remove matter from the Scotland Act 1998 or the Government of Wales Act 2006 and place it into general UK legislation is likely to raise partisan feeling. Nonetheless, the professional bodies ought to do their best to repair what is, in part, the result of our own inaction.

The Draft Guidance on the meaning of a Scottish Taxpayer[55] is simplistic, inaccurate and misleading. No guidance, however accurate and comprehensive it may be, can repair bad legislation, and the Intra-UK Residence tests are bad legislation, the provisions of which require fundamental redrafting.

[54] See *McKie on Statutory Residence* (2014), paras 1.2.13–1.3.5, 1.4.7–1.4.12.
[55] See fn.26.