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'INTRA-UNITED KINGDOM RESIDENCE'

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SECTION I

THE IMPORTANCE OF INTRA-UNITED KINGDOM RESIDENCE

SCOTTISH AND WELSH TAXPAYERS

1.1.1 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; 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.

1.1.2 It will become, however, of practical importance on 6th April 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

1.2.1 The Scotland Act provides for the Scottish Parliament to have power to make legislative provisions in respect of devolved taxes. Currently, the devolved taxes are tax on transactions involving interests in land and tax on disposals to landfill.³ Tax on income is

¹ Scotland Act 1998 ss.80D – 80F

² Government of Wales Act 2006 ss.116E – 116H

³ Scotland Act 1998 ss.80I – 80K

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.

Using the SRIT

1.2.2 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 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% 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

1.2.3 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 So it is not charged on dividend income which would otherwise be charged at the various general UK dividend rates⁹ except dividend income charged on the remittance basis

⁴ Scotland Act 1998 s.80C

⁵ See <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/89882.aspx>

⁶ ITA 2007 s.11A

⁷ ITA 2007 s.6A

⁸ ITA 2007 s.11A(1)-(3)

⁹ ITA 2007 s.13(1)

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

1.2.4 Income within s.18(3) comprises:-

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

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

1.2.5 So 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.¹³ Thus interest income, most purchased life annuity income and profits on deeply discounted securities but not accrued income profits or chargeable event gains (to which

¹⁰ ITA 2007 s.13(1)

¹¹ ITA 2007 s.11A(4)

¹² ITA 2007 s.18(2)

¹³ See paras. 1.2.3 and 1.2.4 above

the remittance basis does not apply in any event) will be chargeable to the SRIT if the remittance basis applies but will not be if it does not.

1.2.6 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 because income nominated under s.809H(2) is not treated as remitted but is treated as not being subject to the remittance basis.¹⁴

1.2.7 There is a further anomaly.¹⁵ 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 applies¹⁶, the detailed calculation of the charge and whether or not the tax paid is income of the Scottish Government or the UK Government.¹⁷

THE WRIT

1.3.1 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

¹⁴ ITA 2007 s.809H(2)

¹⁵ HMRC doesn't 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.'

¹⁶ 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)

¹⁷ ITA 2007 s.809H(2). A Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament: 27th November 2014, para. 78

Welsh Basic Rate, the Welsh Higher Rate and the Welsh Additional Rate.¹⁸ So these powers would allow the Welsh Assembly 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%, a Welsh Higher Rate of 40% and a Welsh Additional Rate of 90% but it will not be possible for the Scottish Government to create the equivalent Scottish rates. If the Scottish Basic Rate were 10%, the Scottish Higher Rate would be 30% and the Scottish Additional Rate 35%.

- 1.3.2 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 its being so.¹⁹

THE IMMINENT EXTENSION OF THE TAXING POWERS OF THE SCOTTISH PARLIAMENT

- 1.4.1 So 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 Report²⁰ records that the Smith Commission 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-

¹⁸ Government of Wales Act 2006 s.116D

¹⁹ Wales Act 2014 ss.12 - 14

²⁰ A Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament: 27th November 2014

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.²¹

1.4.2 The Scotland Bill 2015 currently before Parliament contains provisions to achieve this.²²

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

1.5.1 Before the recent General Election, the Scottish National Party, which controls the Scottish Parliament, advocated an increase of the Additional Rate of tax to 50%²³ 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% is unclear.

²¹ A Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament: 27th November 2014, paras. 76 and 77

²² Scotland Bill 2015 Part 2

²³ *Tax Journal* 1 May 2015. *Briefing* by Tina Riches

A CONTINUING PROCESS

- 1.6.1 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.²⁴
- 1.6.2 This is, however, unlikely to mark the final position on fiscal devolution within the UK.
- 1.6.3 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 United Kingdom. The Scottish National Party has said that it wishes the Scottish Parliament to have 'fiscal autonomy'. It moved an amendment to the Scottish Bill presently 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.²⁵ In its Election Manifesto, Plaid Cymru said that it would seek to obtain the same 'deal' on taxation as Scotland.²⁶

²⁴ A Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament: 27th November 2014, paras. 76 & 77

²⁵ See BBC news report of 15th June 2015

²⁶ *Tax Journal* 1 May 2015. *Briefing* by Tina Riches

- 1.6.4 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.
- 1.6.5 Of course all this 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. At the moment its chosen 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.²⁷ 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.²⁸

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

²⁸ The Cabinet Office paper entitled '*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 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'

CONCLUSION

1.7.1 All in all, then, it seems clear that the taxation systems of the constituent countries²⁹ of the United Kingdom 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 the rules of Intra-UK Residence.

²⁹ The term 'countries' has no role in the statutory definition of the constituent parts of the United Kingdom. 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 Article 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 to mean each of Northern Ireland, the Kingdom of Scotland, Wales and the part of the Kingdom of England which is not Wales. We have, therefore, used the phrase, 'the constituent countries of the United Kingdom' to mean this

SECTION II

SCOTTISH AND WELSH TAXPAYERS

TWO TESTS

2.1.1 As we have seen,³⁰ if one is a Scottish Taxpayer the rates which will apply to one's non-savings income will be the Scottish Basic, Higher and Additional Rates. Similarly, if one is a Welsh Taxpayer the rates which will apply to one's non-savings income will be the Welsh Basic, Higher and Additional Rates.³¹ If one is a UK resident but neither a Scottish nor a Welsh Taxpayer, the rates which will apply to one's non-savings income will be the Basic, Higher and Additional Rates.³² One might ask, what will happen if one 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, we shall examine in due course.

2.1.2 So 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.

³⁰ See para. 1.2.2 above

³¹ Subject to an affirmative vote in a Welsh referendum (see para. 1.3.1 above).

³² ITA 2007 s.10

A LABYRINTHINE PROCESS

2.2.1 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 United Kingdom and one which is dependent on the individual tests dovetailing exactly. One would have thought that there would be a single test to determine in which constituent country of the United Kingdom one is resident and that such a test would be found in one place in fiscal legislation which applied to the UK generally. Unfortunately that has not been the Government's approach.

2.2.2 As we have said,³³ 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 United Kingdom and only found later that the same issue applied in respect of Wales. Instead of recasting the test in a rational form, 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.

2.2.3 So we shall follow the process which the unfortunate taxpayer will have to follow by examining first, by reason of its chronological seniority, the definition of a Scottish Taxpayer and then the definition of a Welsh Taxpayer. Finally, we shall consider whether

³³ See para. 1.1.1 above

there are any overlaps between the two and where is the borderline between these two status and the status of not being either a Scottish or a Welsh Taxpayer.

SECTION III

SCOTTISH TAXPAYERS

TWO DEFINITIONS OF A SCOTTISH TAXPAYER

3.1.1 There are in fact two definitions of a Scottish taxpayer.

THE GENERAL SCOTTISH TAXPAYER TEST

3.2.1 The first (which we shall call the 'General Scottish Taxpayer Test') can apply to any individual except one who is a Welsh Parliamentarian for any part of the year.³⁴ It is therefore the test which will apply in respect of the vast majority of individuals. Under the General Scottish Taxpayer Test, section 80D provides that:-

- '(1) For any tax year, a Scottish taxpayer is an individual ... -
- (a) who is resident in the UK for income tax purposes ... and
 - (b) who, for that year, meets condition A, B or C.'

3.2.2 One might make three observations. First, it will be seen that, as one does for residence in the United Kingdom, one determines whether an individual is a Scottish taxpayer in respect of a whole fiscal year. Unlike residence in the UK,³⁵ however, there are no split year rules³⁶ to take account of the special circumstances which rule in the first and last year of 'residence'. The result of that is, perhaps surprisingly, that the SRIT may apply

³⁴ Scotland Act 1998 s.80D(4A) – see below

³⁵ In the remainder of these notes we refer to the rules for determining whether one is resident in the UK in FA 2013 Sch 45 as the 'UK SRT'

³⁶ FA 2013 Sch 45 Part 3

to income arising in the overseas part of a split year. Secondly, one will only be a Scottish Taxpayer for a year for which one 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 United Kingdom.

Condition A – Close Connection with Scotland

3.2.3 An individual meets condition A if he has a close connection with Scotland.³⁷

Defining a close connection

3.2.4 Section 80E states the circumstances in which an individual has a close connection 'with a part of the UK'.

3.2.5 This provision is in two limbs. The First Limb 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.

A place of residence

3.2.6 Right at the heart of the definition of a Scottish Taxpayer, therefore, is the concept of a 'place of residence'. What does this phrase mean?

3.2.7 Interestingly, the phrase does not appear at all in the UK SRT and the word 'residence' is never used in it in the sense of a physical place but only in the sense of a tax status.

³⁷ Scotland Act 1998 s.80D(2)

3.2.8 The term 'residence' is, of course, important in the CGT relief for disposals of main residences.³⁸ 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 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.

3.2.9 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.³⁹ 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.

3.2.10 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.

3.2.11 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.'⁴⁰

³⁸ TCGA 1992 ss.222 - 226B

³⁹ See *M^cKie on Statutory Residence* (publisher CCH – 2014) at para. 5.8.73

⁴⁰ Scotland Act 1998 s.80E(4)

3.2.12 HMRC have released draft guidance (the 'Draft Guidance') on the definition of a Scottish taxpayer for which it has asked for comments by 31st July 2015. It 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.⁴¹

3.2.13 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 Scotland's Act 1998's first definition of a Scottish Taxpayer, before it was amended

⁴¹ *Scottish rate of Income Tax - technical guidance on Scottish Taxpayer status* (published by HMRC 11th June 2015)

by the Scotland Act 2012, did utilise the concept of a home in 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.

3.2.14 So, it is clear that at the heart of the test for determining whether an individual is a Scottish Taxpayer and of that in the equivalent Welsh provisions is an imprecise and uncertain concept which will make the application of these provisions fundamentally uncertain.

The First Limb of Close Connection – a single place of residence in the UK

3.2.15 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 -

- (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.⁴²

3.2.16 Here we have 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.

⁴² Scotland Act 1998 s.80E(2)

3.2.17 What is clear from the First Limb is that it is possible to have a place of residence, in which one does not live, even if one does not live in it for an entire year, for if that were not the case the condition in (c) would be redundant.

The Second Limb of Close Connection – two or more places of residence in the UK

3.2.18 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.⁴³

3.2.19 It seems that the intention of (c) is that one should look at each of Wales, England and Northern Ireland separately and compare each number of days in which the individual's place of residence is in each one of those constituent countries of the United Kingdom with the number of days on 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 United Kingdom.

⁴³ Scotland Act 1998 s.80E(3)

Condition B – Day Counting

3.2.20 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.'⁴⁴

3.2.21 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. Condition B will only be met, therefore, 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 United Kingdom. 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.

Day counting

3.2.22 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 -

⁴⁴ Scotland Act 1998 s.80D(3)

- (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.⁴⁵

3.2.23 This gives a 'midnight rule' akin to the rule of the UK SRT found in FA 2013 Sch. 45, para. 22. 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.⁴⁶

3.2.24 This closely follows the transit exception to the day counting rule provided in the UK SRT by para. 22(3). It is surely odd that it acts only by reference to journeys in and out of the UK. If I am a Frenchman with a place of residence at which my family live in London and another place of residence in Edinburgh and I regularly fly from London to Edinburgh and back staying overnight, my days in Edinburgh would count as days in Scotland. If I also had a place of residence in Paris and I flew from Paris to Edinburgh and back staying overnight, they would not. It is difficult to see the rationale of this.

⁴⁵ Scotland Act 1998 s.80F(1)

⁴⁶ Scotland Act 1998 s.80F(2)

3.2.25 The UK SRT also contains an exception to the general day counting rule for exceptional circumstances.⁴⁷ 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.⁴⁸ There is no equivalent to that deeming rule in determining whether an individual is a Scottish Taxpayer.

Condition C – Scottish Parliamentarians

3.2.26 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.⁴⁹

We shall refer to this as being a 'Scottish Parliamentarian'.

THE WELSH PARLIAMENTARIAN TEST

3.3.1 We have seen⁵⁰ that Scottish Parliamentarians are, under the General Scottish Taxpayer Test always Scottish Taxpayers. As we shall see, 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.⁵¹ It is, one

⁴⁷ FA 2013 Sch 45 para. 22(4)-(6)

⁴⁸ FA 2013 Sch 45, para. 23(2)-(5)

⁴⁹ Scotland Act 1998 s.80D(4)

⁵⁰ See para. 3.2.1 above

⁵¹ And, of course, vice versa

reason that Welsh Parliamentarians are excluded from the General Scottish Taxpayer Test and that there is a specific test (which we have called the 'Welsh Parliamentarian Test') which applies only to Welsh Parliamentarians who are also Scottish Parliamentarians.

3.3.2 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.⁵²

3.3.3 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],⁵³

... the number of days in that year on which ... [he] ... is a Welsh parliamentarian.⁵⁴

⁵² Scotland Act 1998 s.80DA(1)

⁵³ 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

⁵⁴ Scotland Act 1998 s.80DA(2)

3.3.4 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.’⁵⁵

3.3.5 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.

⁵⁵ Scotland Act 1998 s.80DA(3)

SECTION IV
WELSH TAXPAYERS

THE EQUIVALENT WELSH PROVISIONS

4.4.1 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
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

SECTION V

INTERACTION OF THE SCOTTISH AND WELSH DEFINITIONS

THE GENERAL TAXPAYER TESTS

5.1.1 The rules for determining whether or not a UK resident individual, who is not either a Welsh or 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.
- (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 United Kingdom he will be a taxpayer of the country in which he spends the most days.

THE PARLIAMENTARIAN TESTS

5.2.1 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.
- (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.

SECTION VI

AN IRREMEDIABLE MISTAKE

WHAT IS WRONG?

Wrong Structure, Wrong Content

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

- (a) their structure; and
- (b) their content.

Their Structure

6.1.2 Their structure 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.

Their Form

6.1.3 Their form is wrong because we now have two tests of residence in UK fiscal law which are both based on imprecise, indeed indefinable, concepts but on different ones.

6.1.4 The Government's decision to adopt soft concepts incapable of precise definition in the UK SRT was very properly criticised strongly by the professional bodies.⁵⁶ 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

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

6.2.2 I think it is 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.

6.2.3 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, we believe that the professional bodies ought to do their best to repair what is, in part, the result of our own inaction.

⁵⁶ See *M^cKie on Statutory Residence* paras. 1.2.13 – 1.3.5 and paras. 1.4.7 – 1.4.12

6.2.4 As we have said, HMRC have published Draft Guidance on the meaning of a Scottish Taxpayer for consultation with responses required by the end of this month.⁵⁷ That Guidance 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 which require fundamental redrafting.

⁵⁷ Our own response is on our blog for July entitled 'Intra-UK Residence' at http://www.mckieandco.com/Our_Blog/our_blog.html

APPENDIX I



**SUBMISSION IN RESPONSE TO THE DRAFT GUIDANCE PUBLISHED
BY HM REVENUE & CUSTOMS
ON 11 JUNE 2015 ENTITLED
*SCOTTISH RATE OF INCOME TAX – TECHNICAL GUIDANCE ON SCOTTISH
TAXPAYER STATUS***

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23rd July 2015

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SECTION I

THE PURPOSE OF THIS PAPER

- 1.1.1 In this Paper we give this Firm's response to HMRC's request for 'views' on HMRC's draft guidance '*Scottish rate of Income Tax – technical guidance on Scottish taxpayer status*'¹ which was published on 11th June 2015.

¹ Referred to in this paper as the 'Draft Guidance'

SECTION II

OUR APPROACH ON THIS PAPER

INTRA-UK RESIDENCE

2.1.1 Although the Draft Guidance only concerns Scottish Taxpayer status there are, of course, two sets of rules to allocate taxing rights amongst the constituent countries of the United Kingdom.² Just as the Scotland Act 1998 ss.80C – 80G contains provisions conferring a power on the Scottish Parliament to set a Scottish Rate of Income Tax to be used in calculating the rate charged on certain income³ of Scottish Taxpayers and defining for this purpose a ‘Scottish Taxpayer’, so the Government of Wales Act 2006 ss.116D – 116I contains provisions conferring a power on the Welsh Assembly to set Welsh Rates of Income Tax to be used in calculating the rate charged on certain income of Welsh Taxpayers and defining for this purpose a ‘Welsh Taxpayer’. In respect of the Welsh Assembly, however, that power is only to come into effect after an affirmative referendum of the Welsh electorate.⁴

2.1.2 In effect, these definitions of Scottish and Welsh Taxpayers are definitions of residence in those countries for the purpose of imposing Income Tax on individuals who are residents of the countries concerned within the definitions. So UK fiscal law now has, in effect, three definitions of fiscal residence which are relevant to allocating taxing rights

² The term ‘countries’ has no role in the statutory definition of the constituent parts of the United Kingdom. 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 Article 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 to mean each of Northern Ireland, the Kingdom of Scotland, Wales and the part of the Kingdom of England which is not Wales. We have, therefore, used the phrase, ‘the constituent countries of the United Kingdom’ to mean this

³ Scotland Act 1998 s.80A

⁴ Wales Act 2014 ss.12 - 14

amongst the constituent countries of the United Kingdom, the UK SRT and the definitions of a Scottish Taxpayer and a Welsh Taxpayer.

2.1.3 We shall refer to these two sets of rules, and to similar rules which may be introduced in respect of Northern Ireland and England (excluding Wales), as the 'Intra-UK Residence Tests'.⁵

2.1.4 If in due course the Northern Ireland Assembly is granted similar rights and the same legislative approach is used, the number of definitions of fiscal residence in UK fiscal law will increase to four and, if rules specific to England are also introduced that number will become five. It clearly does not make sense for there to be separate tests of residence for each constituent country of the United Kingdom requiring each taxpayer, in considering their application, to work out how the tests dovetail with one another. Nor is it appropriate for these tests to be found in, what is, primarily non-fiscal legislation and in separate acts. It appears that the present legislative position has grown piecemeal without the Government considering how a system based on both UK residence and on Intra-UK Residence might operate as a whole.

2.1.5 The definitions of Scottish and Welsh Taxpayers have, up to now, been of only theoretical importance. It seems, however, that that will change in the next fiscal year. If the Scotland Bill 2015 is enacted, as seems likely, the importance of these Intra-UK Residence rules will increase and it is likely that, in the future, their importance will increase still further.

⁵ We shall refer to a taxpayer of any of the Constituent Countries of the United Kingdom and the Intra-UK Residence Tests as a 'Constituent Country Taxpayer'

2.1.6 At this point, therefore, there is little point in commenting purely on the Guidance when it deals with only a part of the current legislation affecting Intra-UK Residence. The structure of that legislation clearly needs rethinking. For that reason, we start in Section III with a preliminary consideration of the legislation and only then comment on the Guidance in Sections IV and V.

SECTION III

**POINTS ON THE CURRENT LEGISLATION CONTAINING
THE INTRA-UK RESIDENCE TESTS**

IMPRECISE CONCEPTS

3.1.1 The test of residence in the UK in FA 2013 Sch. 45 (the 'UK SRT') was very properly criticised by the professional bodies, the Chartered Institute of Taxation and the Society of Trusts and Estate Practitioners in particular, for its use of a series of imprecise, and indefinable concepts such as 'home', 'exceptional circumstances', 'temporary retreat', 'living together as if they were civil partners', 'available accommodation' and many others⁶ instead of a test based on a simple day counting formula as those bodies had recommended.⁷ The Government chose to ignore this recommendation so that UK residence is determined under the UK SRT by reference to a broad range of imprecise concepts. That decision having been made, it is all the more inexplicable that the draftsman of the Intra-UK Residence Test should have chosen to use the similarly imprecise, but different, concepts of a 'place of residence' and 'living in' a place of residence in the definitions of a Constituent Country Taxpayer.

THE NEED FOR A SIMPLE ARITHMETICAL FORMULA

3.2.1 Indeed, there seems to have been very little consideration of the way the UK SRT fits with the Intra-UK Residence Tests. If an exceptional circumstances exception was required for the UK SRT's day counting rules, for example, it was surely also required for

⁶ A longer list is provided in *M^cKie on Statutory Residence* (pub. CCH 2014) at para. 1.4.3

⁷ See *M^cKie on Statutory Residence* at paras. 1.2.13 – 1.3.5 and paras. 1.4.7 – 1.4.12

the Intra-UK Residence Rules. Taking that, however mistakenly, the Government wished to define UK Residence in relation to the vague concepts which are used in the UK SRT a more exact arithmetic day counting formula should have been used in the Intra-UK Residence Tests. For the Intra-UK Residence Tests apply only to those who are UK resident under the UK SRT and so will already have met the soft criteria by reference to which the latter test applies.

REDRAFTING AS A SINGLE INTEGRATED TEST OF INTRA-UK RESIDENCE

3.3.1 So it is clear that before the tests of Intra-UK Residence begin to have real, practical effects on individual taxpayers' tax liabilities, the Government needs to repair the faults which have arisen from the piecemeal approach which it has taken until now to defining Intra-UK Residence. Thus a single test should be drafted to allocate fiscal residence amongst the constituent countries of the United Kingdom contained in one place in UK fiscal legislation and based on a simple arithmetical day counting formula. The day counting test in Scotland Act 1998 in s.80D(3)(b) and s.80(F)⁸ coupled with an exceptional circumstances exception and a transit exception operating in respect of each constituent country of the UK would appear to be all that is required.

3.3.2 That is the most important comment to be made in respect of this Consultation. If the fundamental problem of the legislation is put right in this way, the Draft Guidance will need to be redrafted.

⁸ And the equivalent provisions of the Wales Act 2006 being s.116E(3)(b) and s.116H

THE STRUCTURE OF OUR COMMENTS ON THE GUIDANCE

- 3.4.1 We go on, however, in the following two Sections to make some points on the Draft Guidance in the hope that, in due course, they will inform the drafting of guidance on revised legislative provisions and, if those revised legislative provisions are not made, that the quality of the current Draft Guidance may at least be improved.
- 3.4.2 In Section IV we give our general comments on the Draft Guidance and in Section V we give our specific comments on it.
- 3.4.3 The Draft Guidance does not contain page or paragraph numbers making it difficult to give exact references to its contents. We have attached to this Response a copy of the Draft Guidance with paragraph numbers inserted. Where we refer to a paragraph number of the Draft Guidance it is to these inserted paragraph numbers to which we refer.

SECTION IV

GENERAL COMMENTS ON THE DRAFT GUIDANCE

INACCURATE, SIMPLISTIC AND MISLEADING

- 4.1.1 The Draft Guidance is in many areas inaccurate, simplistic, and misleading, particularly in its discussion of the meaning of 'place of residence' on which we comment below.

FAILURE TO DEAL WITH THE DEFINITION OF A WELSH TAXPAYER AND THE INTERACTION OF THE TWO CURRENTLY ENACTED TESTS OF INTRA-UK RESIDENCE

- 4.2.1 The Guidance contains no reference to the definition of a Welsh Taxpayer in the Government of Wales Act 2006. Although those provisions will only be brought into force when, and if, a positive vote to do so has been made in a Welsh referendum, the two sets of provisions have been enacted and have been designed by reference to one of them. It would have been helpful to explain, by reference to the Welsh provisions, why it was necessary to exclude Welsh Parliamentarians from the General Scottish Taxpayer Test in Scotland Act 1998 s.80D and to have the test, in s.80DA, which applies only to Welsh Parliamentarians. It would also have been helpful to say whether, in HMRC's view, an individual can be both a Scottish Taxpayer and a Welsh Taxpayer for the same fiscal year.

TARGET READERSHIP

- 4.3.1 It is apparent that the author of the Draft Guidance has not properly considered its target readership. The Draft Guidance says that:-

‘This draft guidance is of a technical nature and intended for HMRC officials administering SRIT and the external tax advisory and business community. A wider range of simpler, general guidance and advisory products to assist taxpayers in understanding what [sic] SRIT might mean for them, will be provided later in the year.’

4.3.2 Most members of the business community will be advised by tax advisers. A document aimed at both businessmen and tax advisers will not serve the needs of either. There is a need for proper technical guidance to help HMRC Officials understand the legislation they are administering and to indicate to advisers HMRC’s view of the construction of that legislation and, where it requires judgements to be made, how HMRC will exercise that judgement. That requires a level of detail which would be entirely inappropriate for a guide aimed at businessmen. In fact, much of the Draft Guidance is so simplistic that it would seem too simple even if it were aimed only at the business community.⁹

INSUFFICIENT DETAIL IN THE EXAMPLES

4.4.1 We have said that it is a fault of the Intra-UK Residence Tests that they are based on two concepts which cannot be defined with precision. It would be helpful to have examples which explored the limits of these concepts in ways which showed HMRC’s view of where those limits are. Such examples, however, are only helpful if they provide enough detail of the hypothetical factual background to allow conclusions to be drawn from them and if the grounds of those conclusions are clearly set out. The examples given neither set out

⁹ The use of demotic language and phrases (such as ‘mum’, ‘got round to’, ‘the commute’, ‘mum’s house’) in a paper with a target readership including professionals and HMRC officers is inappropriate and sloppy

the hypothetical factual background with sufficient detail nor provide a sufficient, or indeed in some cases, any, explanation of the grounds for the conclusions given.

DUAL NATURE OF SCOTTISH TAXPAYER TEST

4.5.1 The Guidance does not properly explain that there are, in effect, two definitions of a Scottish Taxpayer: the general test in s.80D (the 'General Scottish Taxpayer Test') which does not apply to Welsh Parliamentarians and the test in s.80DA which applies only to Welsh Parliamentarians (the 'Welsh Parliamentarian Test'). Because it fails to do so and because it does not structure its discussion by first dealing with the General Scottish Taxpayer Test¹⁰ and then the Welsh Parliamentarian Test¹¹ it is often misleading and sometimes inaccurate.

DUAL RESIDENCE AND DOUBLE TAX TREATIES

4.6.1 The Guidance does not deal at all with the situation of taxpayers who are resident in the UK under the SRT but who are treated as resident in another country under a double tax treaty between that other country and the UK. If such a taxpayer spends some time in the UK living in a place of residence in Scotland but most of his time living in a place of residence in the other country, and those are his only places of residence, he will have a close connection with Scotland¹² and he will, therefore, be a Scottish Taxpayer.¹³

¹⁰ The conditions in the Scotland Act 1998 s.80D

¹¹ The conditions in the Scotland Act 1998 s.80DA

¹² Scotland Act 1998 s.80E(2)

¹³ Scotland Act 1998 s.80D(1) and (2)

4.6.2 It may be that the Double Tax Treaty will give relief on his income subject to the Scottish Rates of Income Tax¹⁴ but he will still have to determine whether or not that is the case and, if relief is given by way of credit rather than exemption, he will have to determine the Income Tax suffered on his income and, therefore, whether that is subject to the UK rates or the Scottish rates. HMRC officers and Tax Advisers need to be made aware that this may be the case.

SPLIT YEARS

4.7.1 The Guidance does not explain that in the Intra-UK Residence Tests there is no equivalent to the Split Year Rules which apply under the UK SRT. The Split Year Rules will, of course, be relevant to determining what income is subject to Income Tax but even tax experts may not appreciate that it is possible for the Scottish Rate of Income Tax to apply to income arising in the overseas part of a split year.

TYPOGRAPHICAL AND GRAMMATICAL ERRORS

4.8.1 The Draft Guidance is written in an inaccurate and sometimes ungrammatical manner which obscures its meaning. It also contains a large number of typographical errors and omissions which in a Government document, even one published in draft, shows an inattention to detail which is very disappointing.

¹⁴ By which phrase we refer to the Scottish Basic Rate, the Scottish Higher Rate and the Scottish Additional Rate (ITA 2007 s.6A)

PARAGRAPH NUMBERING

4.9.1 Finally it would have helped those referring to, or commenting on, the Draft Guidance if it had been provided with paragraph numbers so that particular paragraphs could be easily identified.

SECTION V
SPECIFIC COMMENTS

5.1.1 In this Section we give our comments on the individual paragraphs, and examples in the Draft Guidance.

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
Paragraph 1	' ... will start from April 2016' should be amended to ' ... will start from 6 th April 2016'.
Paragraph 2	<p>This paragraph is very imprecise. It might have been better expressed, 'the phrase 'a Scottish Taxpayer' is defined by reference to where an individual has a place of residence and, subject to that, to where he spends his midnights during the fiscal year'.</p> <p>The word 'lives' forms only a subsidiary part of the test of a close connection and it is certainly not a synonym for 'resides'.</p>
Paragraph 3	Again, this paragraph uses the word 'live' rather than referring to 'a place of residence'. Its simplistic summary is likely to mislead.
Paragraph 4	What is the purpose of the adjective 'initial' in this paragraph? If it is the intention that the Draft Guidance is to be revised it should say so

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
	<p>and indicate why it has not been fully set out and in what areas the Guidance is provisional and incomplete and requires revision.</p>
<p>Paragraph 5</p>	<p>We have already said that one cannot write guidance which is useful for HMRC Officials and tax advisers and also useful for businessmen generally. We presume that in due course this guidance will be included in the Manuals. In that case its target readership is surely HMRC Officials and tax advisers. For that readership it is inadequate.</p>
<p>Paragraph 6</p>	<p>No guidance can provide 'clarity on how the SRIT will apply' to a taxpayer's circumstances. Whether it is clear or not how a piece of tax legislation applies is dependent upon the nature of the legislation. What guidance can do is to express clearly HMRC's construction of the legislation and, where the law requires it to make judgements, the principles that it will apply in making those judgements.</p>
<p>Paragraph 7</p>	<p>What is involved in providing 'clarity'? This would be better expressed as 'whether this draft guidance accurately summarises the legislative provisions defining a Scottish Taxpayer in a form useful to' its target readership.</p>
<p>Paragraph 8</p>	<p>The Guidance has previously referred to the Scottish Rate of Income Tax (and to the SRIT). It now refers to the 'Scottish rate'. One</p>

<p>PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED</p>	<p>COMMENT</p>
	<p>presumes that the same meaning is intended so why is a different phrase used?</p>
<p>Paragraph 10</p>	<p>The remaining parts of the definition are only in part based on the location of an individual's place of residence and that phrase is used in determining whether a person has a close connection with Scotland or another of the constituent countries of the United Kingdom.</p>
<p>Paragraph 11</p>	<p>The second sentence of this paragraph mixes the concept of a place of residence with 'moving house'. Whatever moving house may mean it does not necessarily indicate acquiring or abandoning a place of residence although it may do so.</p> <p>This paragraph only deals with the situation where a person has a place of residence in Scotland for a longer period in the fiscal year than in any other part of the UK. It does not deal with a situation where the amounts of time are equal.</p>
<p>Paragraph 12</p>	<p>Similarly this paragraph does not deal with the situation where the amounts of days spent in Scotland and in another constituent country of the United Kingdom are equal.</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
<p>Paragraph 14</p>	<p>This paragraph is incorrect. Those who are both Scottish and Welsh Parliamentarians during the fiscal year will not necessarily be Scottish Taxpayers.</p>
<p>Paragraph 15</p>	<p>The final part of this paragraph should be rephrased ‘for part only of a tax year’.</p> <p>The first sentence is ambiguous and inaccurate. It is unclear whether the phrase ‘or resides’ is an explication or definition of the word ‘lives’ or it means that the definition of a Scottish Taxpayer is focused on where an individual lives and is also focused on where he resides; the word and the phrase being alternatives.</p> <p>In fact, a ‘Scottish Taxpayer’ (other than in respect of a Scottish or Welsh Parliamentarian) is defined by where he has a place of residence, which is not necessarily the same as a place where he resides, and by where he spends his midnights.</p>
<p>Paragraph 16</p>	<p>This paragraph is inaccurate. A Scottish Parliamentarian will not necessarily be a Scottish Taxpayer if he has also been a Welsh Parliamentarian in the year.</p> <p>The paragraph doesn’t refer to the Welsh Parliamentarian Test at all.</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
	It would be far better to distinguish between the General Scottish Taxpayer Test in s.80D and the Welsh Parliamentarian Test in s.80DA.
Paragraph 17	The question of whether any individual will be a Scottish Taxpayer can never be a simple one because it will require him to understand the definition of a Scottish Taxpayer which is complex requiring as it does a substantial amount of legislation. It may be that the application of those rules to his own circumstances will be simple but he cannot understand how they apply without understanding complex rules.
Paragraph 18	The second sentence of this paragraph appears to be confused. What is the subject of the verb 'explained'? It seems intended to be the word 'terms' but grammatically that cannot be the case.
Paragraph 19	This paragraph is incorrect. Scottish Parliamentarians who are Welsh Parliamentarians may not be Scottish Taxpayers.
Paragraph 20	The indefinite articles in the bullet points should be 'an' and not 'a'.
Paragraph 21	This would be better expressed as either, 'a close connection is defined in Scotland Act 1998 s.80E' or 'whether an individual has a

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
	<p>'close connection' with any part of the UK is determined under Scotland Act 1998 s.80E'</p>
<p>Paragraph 22</p>	<p>This paragraph seems to suggest, without saying so expressly, that the phrase 'where an individual lives' means the location of that individual's 'place of residence'. That is at least doubtful as a construction of the legislation, but if it is HMRC's view, the Draft Guidance should say so, expressly. In general all HMRC guidance should distinguish between statements of the law which are entirely uncontroversial and statements of the law in which HMRC takes one of two or more possible views and the Draft Guidance should do so here.</p>
<p>Paragraph 23</p>	<p>There is an indefinite article missing before 'Scottish' in this sentence.</p> <p>The sentence is not entirely accurate because an individual who is a Welsh Parliamentarian for part of the year but does not have a place of residence in Wales and has one in Scotland will still be a Welsh Taxpayer unless he is also a Scottish Parliamentarian for part of the year.</p>
<p>Paragraph 24</p>	<p>This statement will not always be true of an individual who is a Scottish Parliamentarian during part of the year.</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
	<p>This paragraph and the preceding one show why the Guidance should distinguish between the General Scottish Taxpayer Test and the Welsh Parliamentarian Scottish Taxpayer Test.¹⁵</p> <p>As the sentence is considering an hypothetical individual, 'they' should be replaced by 'he'.</p>
<p>Paragraph 25</p>	<p>Again, this does not take account of the rules in respect of Welsh Parliamentarians.</p> <p>The second bullet point is inaccurate. It does not seem to reflect the changes made by the Wales Act 2014 and it suggests that a comparison is to be made with the whole of the rest of the UK instead of with 'each other part of the UK (considered separately)'.¹⁶</p> <p>In both bullet points the word 'of' is missing from the phrase 'main place residence'.</p>
<p>Paragraph 26</p>	<p>The first sentence is perhaps uncontroversial.</p>

¹⁵ Found in the Scotland Act 1998 s.80DA

¹⁶ Scotland Act 1998 s.80E(3)(c)

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
	<p>The words of the second sentence to the colon are probably incorrect and are at best merely arguable.</p> <p>The words after the colon, in as much as they suggest that the phrase 'place of residence' and 'home' are synonymous are incorrect. We refer you to the discussion at paras. 3.2.6 to 3.2.13 of the attached article forming Issue XXI of the Rudge Revenue Review entitled 'Intra-UK Residence' which makes it clear that the two cannot be synonyms of one another although the two concepts which they represent may overlap.</p> <p>The statement in the third sentence that 'This interpretation [one presumes the one given in the previous two sentences] is supported by considerable case law' is seriously misleading. There has been no case law on the construction of Scotland Act 1998 Part 4A and the examples to which the Draft Guidance later refers of 'relevant' case law in fact do not contain a single example of the judicial consideration of the meaning of the phrase 'place of residence'. What there is, is a considerable body of judicial consideration of a word 'residence' used in a number of different statutory contexts. That may be helpful in considering the meaning of the phrase 'place of residence' but it can hardly be said to support it. At the least, the statement in the third sentence should have made clear that the case</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
	<p>law referred to may at best, provide an indication of the meaning of the phrase 'place of residence' and that the sentence reflects only HMRC's view of what that phrase might mean.</p> <p>The fourth sentence in this paragraph is of little use to the reader unless some consideration is given to what is meant by 'temporary accommodation'. It seems unlikely that it is impossible for all hotels and all holiday homes (whatever a holiday home may be) to be places of residence within the legislation.</p>
<p>Paragraph 27</p>	<p>The importance of whether a place is ' ... [an individual's] ... 'home', where they habitually live' is difficult to understand. As we have said, it is clear that the phrase 'place of residence' is not a synonym for 'home' and, even if it were, the reader would be no further forward because the meaning of home would be unclear as it is qualified by the phrase 'where they habitually live' the meaning of which is itself unclear.</p>
<p>Paragraph 28</p>	<p>This fails to distinguish between the concept of 'residence' without a preceding indefinite article which is a state in respect of an individual person and the concept of a place of residence which must indicate a physical location of some sort and probably a physical object.</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
<p>Paragraph 29</p>	<p>This paragraph should make clear that this is HMRC's construction of the law and it is not necessarily uncontroversial. The final bullet point does not reflect the statutory wording to which it seems to refer. Scotland Act 1998 s.80E(4) says:-</p> <p style="padding-left: 40px;">'In this section "place" includes a place on board a vessel or other means of transport'.</p> <p>It does not say that the vessel or other means of transport is a place. It is clear from s.80E(4) that the 'place' is a location on the vessel or other means of transport. What the legislation can mean by this is very unclear and this Guidance does not make understanding it any easier.</p> <p>It may be that the Guidance is not here referring to s.80E(4), in which case it is not helpful in any way. It seems unlikely that 'any form of transport', which would include, for example, a bike, can be a place of residence. That is the case, not because there is another test which has to be passed, that of being a home, but because it is clearly not in ordinary usage a thing which could ever be called 'a place of residence'.</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
<p>Paragraph 30</p>	<p>One presumes that ‘individual’ here should, be ‘individuals’ and ‘circumstance’ should be ‘circumstances’.</p> <p>Of course whether an individual’s circumstances falls within a statutory description is ‘dependent on the facts’. Whether any particular set of facts does fall within the statutory description, however, requires the statute to be construed and it is HMRC’s construction of this legislation which the Draft Guidance is meant to be summarising. Paragraph 30, therefore, adds nothing and should be deleted.</p>
<p>Paragraph 31</p>	<p>The reference to s.80C(3) is incorrect. Presumably the reference should be s.80E(3).</p>
<p>Paragraph 32</p>	<p>The second sentence of this paragraph introduces a test which is not found in the legislation and, because it uses a term, ‘connection’, which is part of the statutory test but uses it with a different meaning, it is misleading.</p>
<p>Paragraph 33</p>	<p>This adds nothing and should be deleted.</p>
<p>Paragraph 34</p>	<p>These bullet points require question marks and the last of them requires further explanation.</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
	<p>Should not the first bullet point also refer to unmarried partners?</p>
<p>Paragraph 35</p>	<p>In general these examples, as we have said, do not give sufficient detail of the hypothetical facts and sufficient explanation of the grounds of the conclusion to be of use. We comment on the examples below.</p>
<p>Example 1</p>	<p>This Example is of little use because it does not say what is involved in Sharon living in a flat.</p> <p>The statement that the location of your employer or where you work is not relevant to deciding whether you are a 'Scottish Taxpayer' is too broad. If the matters set out in para. 34 are of relevance to determining whether a place is one's place of residence then surely the location of the work to which one repairs regularly must be so also.</p> <p>If Sharon sleeps every night at the Dumfries flat it is probably true that she will not have a place of residence in England but one cannot determine that from the facts given.</p>
<p>Example 2</p>	<p>This Example serves no useful purpose because it does not explain what is involved in 'living in' Liverpool.</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
<p>Example 3</p>	<p>The same point applies to this Example. If what is meant is that Mohammed sleeps only in a house or flat which he occupies in Huddersfield with his wife or in his lorry or in hotel rooms which he occupies whilst on his trips the Example's conclusion may be true. But if, a lorry can be a place of residence and Mohammed slept, say, 350 days of the year in his lorry it might be that his lorry is his main place of residence.</p>
<p>Example 4</p>	<p>The first sentence requires commas after 'worked' and 'flat'.</p> <p>What if Bob's wife and children live in Oban? What if most of his possessions are in the Oban house? What if the Oban house is also the address used for his correspondence with his bank, building society, credit card issuer, HMRC and utility suppliers?</p>
<p>Example 5</p>	<p>This Example should make clear that it is the job that is based in Dundee and not just the firm.</p> <p>The Example is not of much use unless one knows what is a 'London home' and what is involved in living in it. What if Sally had lived with her parents and had only recently bought the London home which she sold quickly afterwards and having done so, had moved most of her possessions back to her parents' house and occupied it</p>

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	<p>regularly? In that case one might argue that the parents' house had become her home again and the rented house in Dundee had not. Whether that makes either or both of them a place of residence is another matter.</p>
<p>Example 6</p>	<p>The conclusion to this Example appears to be correct but it would be helpful to say that there was no time in the fiscal year when the oil rig was Jack's main place of residence and whether the author of the Example thinks that the oil rig is his residence for part or all of the year.</p>
<p>Example 7</p>	<p>Even if one assumes that it is true that these are the criteria by reference to which it is to be determined whether the various places mentioned in the Example are places of residence in respect of Ruth, why does the author think that there is little permanence or continuity in Ruth's occupation of either her accommodation on the oil rig or her work-related accommodation near Aberdeen? If, for example, she kept clothes in both places and some possessions such as books, photographs, music and video players and had done so for twenty years having been employed by the company for that length of time it is not at all clear that this accommodation could not be characterised as a place of residence in which case, subject to our</p>

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	<p>remarks on her mother’s home below, one or the other must be her main place of residence.</p> <p>It is also not clear why she does not reside at her mother’s home in Belfast in which she does spend time (the word ‘visits’ begs the question) and at which she keeps most of her possessions. If, for example, that had been her home and the place where she usually slept for many years and her contract with the oil company was a short-term one, one would probably characterise it as her place of residence.</p> <p>So the Example is too truncated to be of very much use to the reader.</p>
<p>Example 8</p>	<p>It is clear that one may have a place of residence, as that phrase is used in the Scotland Act 1998, even though one does not live at that place of residence for a year.¹⁷ So it is not necessarily the case that Tom’s Birmingham property does not continue to be a place of residence in respect of him throughout the period of his secondment. In that case, unless he can be said to have ceased living in it before 6 April and has not started to live in it again before the following 5 April he will have had a place of residence in Birmingham during the fiscal year. For part of that year could it have been his main place of</p>

¹⁷ See Scotland Act 1998 s.80E(2)(c) and (3)(d)

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	<p>residence? Probably not as it is let but if 'main place of residence' is, as the Draft Guidance suggests, synonymous with 'home' it is arguable that, depending upon the more detailed facts, it might be. At least the Example's conclusion requires considerably more explanation.</p>
<p>Example 9</p>	<p>Unless the reader knows what is meant by the phrase 'family home' this Example does little to explain how one decides whether a place of residence is a main place of residence.</p> <p>The word 'Sarah's' should, one presumes be 'Jane's'.</p>
<p>Example 10</p>	<p>What is involved in 'living in house'? Is there an indefinite article missing here? What is indicated by the phrase 'he never got round ..'?</p> <p>This example fails to explain its conclusion that Solomon's main place of residence is the family home. It does not show the connection between the facts stated and that conclusion. If Solomon is in his first year at University and has previously lived independently for some years in a house in Glasgow which he has now relinquished would it be true to say that his main place of residence is the house which his parents occupy?</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
Example 11	<p>As we have said, it is clear that a place of residence within Scotland Act 1998 can be a place in which one does not live.¹⁸ Why then is it concluded that Rebecca has only one place of residence? What is it that demonstrates that her parents' residence in Cardiff is not also a place of residence in respect of her?</p> <p>"Parent's" in the final line of the first paragraph should be 'parents'.</p> <p>In the next paragraph, 'he parent's' should be 'her parents').</p>
Example 12	<p>Without further details of Meera's, and her husband's, use of their various places of residence in the UK it is not clear why it 'is not possible to identify one of these as their "main place of residence"'. </p>
Example 13	<p>Unless Javier arrives in the UK (whatever 'arrives' may mean) on 6 April it is not true that he 'will be a UK resident under the Statutory Residence Test (SRT) on the date of his arrival in the UK'. Residence under the UK SRT is determined for a whole fiscal year.</p> <p>There is not enough detail given about his use of the property which he rents in Scotland to determine whether it is his place of residence.</p>

¹⁸ See Scotland Act 1998 s.80E(2)(c) and (3)(c)

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
	Does he ever occupy it? Does he rent any other property elsewhere in the UK?
Paragraph 36	'Residence' is a concept used in Capital Gains Tax but not specifically in Capital Gains Tax Main Residence Relief which utilises the concept of 'a residence' (that is a physical thing) rather than an abstract quality.
Paragraph 37	<i>Sansom v Peay</i> did not summarise Main Residence Relief in the words quoted but the purpose for which the relief was introduced.
Paragraph 38	This is seriously misleading. <i>Frost v Feltham</i> was a case which concerned interest relief. It did not concern Capital Gains Tax Main Residence Relief.
Paragraph 39	The quotation from <i>Frost v Feltham</i> is not to do with whether a residence is an individual's home or not. It is to do with whether it is a place where he lives. <i>Sansom v Peay</i> did not find that the phrase 'main residence' means a home. It merely stated that the purpose of introducing the relief was, loosely, to exempt from liability to Capital Gains Tax the proceeds of sale of a person's home. It is clear from the context that this was a wide statement of purpose and not an attempt to define 'main residence'.

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
<p>Paragraphs 40 & 41</p>	<p>Just because it is clear from the cases in respect of Capital Gains Tax Main Residence Relief that a place can be a 'main residence' with quite short degrees of residence it is unlikely that 'main residence' in that relief is a synonym for a 'home'.</p>
<p>Paragraphs 43 – 45</p>	<p>Without relating the summary of <i>Goodwin v Curtis</i> and the quotations from the High Court's and Court of Appeal's decisions in that case to the phrase 'place of residence' as used in Scotland Act 1998 these paragraphs are of very little use to the reader of the Guidance.</p>
<p>Paragraph 46</p>	<p>HMRC may consider that the cases cited illustrate important factors that should be considered when determining whether a location constitutes 'a place of residence' under Scotland Act 1998 but that is only one of several possible views on the matter. The Guidance should indicate that that is the case and that HMRC have adopted one particular view out of several possible ones.</p>
<p>Paragraphs 47 – 49</p>	<p><i>Fox v Stirk, Ricketts v Registration Officer for the City of Cambridge</i> concerned the meaning of being resident in an area and not of whether a particular dwelling is a residence. The extracts from Lord Denning and Lord Widgery need to be read in that context.</p>

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
Paragraph 50	The final part of this paragraph is at least misleading. It is ambiguous as to whether the comparison is with time spent in all other parts of the UK or with each other part of the UK. In fact, s.80F(1)(b) makes clear that the comparison is with each of the numbers of days on which the individual is in each of the other constituent countries of the United Kingdom at the end of the day.
Paragraph 52	This paragraph seems not to take account of the amendments made by Wales Act 2014.
Paragraph 54	<p>This suggests that the transit exception looks at the purpose for which the individual concerned is in the United Kingdom at midnight. That is not the case. It is an objective test of whether the individual arrives on one day and departs on the next and to what his activities in the meantime are related. That only becomes clear when one reads paragraph 55 which to that extent contradicts paragraph 54.</p> <p>'If the UK' should be 'of the UK'.</p>
Paragraph 56	This paragraph repeats the erroneous guidance given in respect of the UK SRT. The reasons why that guidance is erroneous is given in <i>M^cKie on Statutory Residence</i> paras. 4.4.6 – 4.4.23.

PARAGRAPH/EXAMPLE NO. IN ANNOTATED COPY OF DRAFT GUIDANCE ATTACHED	COMMENT
<p>Paragraph 57</p>	<p>This paragraph suggests that an individual is under a duty to keep the records and documents listed. That is not the case although it is prudent for him to do so, not primarily when he is considering his Scottish Taxpayer status, but when he is completing and submitting the self-assessment return to which it is relevant and thereafter.</p>
<p>Paragraph 58</p>	<p>Such a broad statement is dangerous. Determining whether one is a Scottish Taxpayer will always be complex and not retaining the information on which one's judgement is based may be dangerous.</p>
<p>Paragraph 59</p>	<p>This list is very loosely expressed. What information, for example, relating to 'membership of clubs' would help to establish the facts (by which is presumably meant the relevant facts)? What is meant by 'having your house cleaned more frequently'? More frequently than what? Can one assume that the readers of the Draft Guidance will know what the initials SORN are short for?</p>
<p>Paragraph 60</p>	<p>Evidence does not 'establish a place or main place of residence'. It establishes 'whether an individual has a place or main place of residence'.</p>

APPENDIX II



- HM Revenue & Customs (<https://www.gov.uk/government/organisations/hm-revenue-customs>)

See more information about this Guidance (<https://www.gov.uk/government/publications/scottish-rate-of-income-tax-technical-guidance-on-scottish-taxpayer-status>)

Guidance

Scottish rate of Income Tax - technical guidance on Scottish taxpayer status

Published 11 June 2015

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Introduction

1. The Scottish rate of Income Tax (SRIT), as introduced by the Scotland Act 2012, will be charged on the non-savings and non-dividend income of those defined as Scottish taxpayers and will start from April 2016.
2. The definition of a Scottish taxpayer is focused on where an individual lives, or resides, in the course of a tax year. Scottish taxpayer status applies for a whole tax year - it's not possible to be a Scottish taxpayer for part of a tax year.
3. For the vast majority of individuals, the question of whether or not they're a Scottish taxpayer will be a simple one – they will either live in Scotland and be a Scottish taxpayer or live elsewhere in the UK and not be a Scottish taxpayer.
4. Whether or not an individual is a Scottish taxpayer will not, however, be simple in all cases. This draft technical guidance provides initial detail on the manner in which HM Revenue and Customs (HMRC) will interpret some of the terms used in the sections of the Scotland Act 2012, which set out the definition of a Scottish taxpayer.
5. This draft guidance is of a technical nature and intended for HMRC officials administering SRIT and the external tax advisory and business community. A wider range of simpler, general guidance and advisory products to assist taxpayers in understanding what SRIT might mean for them, will be provided later in the year.

6. HMRC is also currently working closely with the Ministry of Defence on the preparation of separate guidance to ensure that all service personnel will have clarity on how the SRIT will apply to their individual circumstances prior to its introduction. This guidance will be available later this year.
7. HMRC are seeking views on whether this draft guidance provides clarity on the principles by which Scottish taxpayer status should be decided. If you would like to comment responses should be sent by 31 July 2015 to email: sritguidancejune15.technicalnoteresponses@hmrc.gsi.gov.uk or by post to:

HMRC Devolution Team
Room 1/73
Parliament Street
London
SW1A 2BQ

Definition of a Scottish taxpayer

8. The Scotland Act 2012 inserts new sections 80D-80F into the Scotland Act 1998 which define who will be a Scottish taxpayer for the purposes of the Scottish rate. There are a number of steps to determine this.
9. Firstly, in order for an individual to be a Scottish taxpayer, they must be UK resident for tax purposes – an individual who is not UK tax resident cannot be a Scottish taxpayer.
10. The remaining parts of the definition are based on the location of an individual's sole or main place of residence. If they have one place of residence and this is in Scotland, they are a Scottish taxpayer.
11. Individuals who have more than one place of residence in the UK need to determine which of these has been their main place of residence for the longest period in a tax year - if this is in Scotland, they're a Scottish taxpayer. For example, if an individual with a single place of residence moves house into or out of Scotland part way through a tax year, whether they'll be a Scottish taxpayer in that year will depend upon which house is their main place of residence for the longer amount of time.
12. Individuals who cannot identify a main place of residence will need to count the days they spend in Scotland and elsewhere in the UK - if they spend more days in Scotland, they'll be a Scottish taxpayer.
13. An individual who meets the definition of a Scottish taxpayer will be a Scottish taxpayer for a whole tax year.
14. There are separate rules which apply to Members of the Scottish Parliament (MSPs), MPs representing a constituency in Scotland and Members of the European Parliament (MEPs) representing Scotland. Such individuals will automatically be treated as Scottish taxpayers,

irrespective of where their sole or main residence is located or of where they spend the most days in the UK.

Draft technical guidance

Introduction

15. The definition of a Scottish taxpayer is focused on where an individual lives, or resides, in the course of a tax year, not where they work. Scottish taxpayer status applies for a whole tax year - it's not possible to be a Scottish taxpayer for part of a tax year.
16. An individual will be a Scottish taxpayer if they're resident in the UK for tax purposes and, in the course of a tax year, they satisfy any of three tests:
 - they're a Scottish Parliamentarian
 - they have a "close connection" to Scotland, through either:
 - having only a single "place of residence", which is in Scotland
 - where they have more than one "place of residence", having their "main place of residence" in Scotland for at least as much of the tax year as it has been in another part of the UK
 - where no "close connection" to Scotland (or any other part of the UK) exists - through day counting- if the individual spends at least as many days in Scotland as elsewhere in the UK
17. For the vast majority of individuals, the question of whether or not they're a Scottish taxpayer will be a simple one - they will either live in Scotland and be a Scottish taxpayer or live elsewhere in the UK and not be a Scottish taxpayer.
18. Whether or not an individual is a Scottish taxpayer will not, however, be simple in all cases. Further guidance on some of the terms used in the sections of the Scotland Act 2012, which set out the definition of a Scottish taxpayer are explained below.

"Scottish Parliamentarian"

19. All Scottish Parliamentarians will be Scottish taxpayers regardless of where they live.
20. An individual is a Scottish Parliamentarian for a tax year if, for the whole or any part of that tax year, they are:
 - a MP for a constituency in Scotland
 - a MEP for Scotland
 - a MSP

"Close connection"- "place of residence" in the UK

21. The means by which "close connection" can be established are set out by section 80E of Scotland Act 1998.

22. Key to establishing whether a “close connection” exists is where an individual lives - the location of an individual’s “place of residence”.

Single place of residence in the UK

23. Where an individual has just one place of residence in the UK in the course of a tax year and that place of residence is in Scotland, they will have a “close connection” to Scotland and be Scottish taxpayer for that tax year.
24. Where that place of residence is located in another part of the UK they will have a “close connection” to that part of the UK and will not be a Scottish taxpayer.

Two or more places of residence in the UK

25. Where, in the course of a tax year, an individual has more than one place of residence in the UK, they will have a “close connection” with Scotland and be a Scottish taxpayer, if their main place of residence has been in Scotland for more of the tax year than in any other part of the UK. So:
- where, in the course of a tax year, an individual has had more than one “main place residence” but all in the same part of the UK, they will have a “close connection”, to that part of the UK - if that part of the UK is Scotland they will be a Scottish taxpayer
 - where, in the course of a tax year, an individual has a “main place residence” in Scotland and elsewhere in the UK, then whether a “close connection” with Scotland exists will be determined by whether their main place of residence was in Scotland for at least as much of the year as it was elsewhere in the UK

Meaning of “place of residence”

26. This term 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”
27. 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.
28. The concept of residence is used elsewhere in tax and non-tax legislation and case law relating to these rules provides useful additional indication as to which factors are illustrative of whether a location constitutes “a place of residence” in the context of deciding Scottish taxpayer status.
29. Based on this case law, when considering whether a location constitutes a “place of residence” for the purposes of Scottish taxpayer status one should bear the following factors in mind:
- it’s possible for an individual to have more than one “place of residence”, for example a flat in town and a house in the country

- an individual must have actually lived in a place for it to constitute a “place of residence”. For example, owning a property, without ever visiting or staying at it, will not make it an individual’s “place of residence”
- living in a place only occasionally or for a short period of time doesn’t preclude it constituting a “place of residence”; however a degree of permanence or continuity is required to turn occupation into residence. For example occasionally staying as a guest at the house of a friend will not make it a “place of residence”
- ownership by the individual is not required for a dwelling to be a “place of residence”, rented or work provided accommodation can be where an individual habitually lives – their home
- a “place of residence need not be a building – boats, caravans, lorries, any form of transport or mobile home can constitute a “place of residence”, if that is the individual’s home

30. Ultimately, however, whether a place constitutes a “place of residence”, for the purposes of Scottish taxpayer status, will be dependent on the facts of an individual circumstance.

Meaning of “main place of residence”

31. Where, in a tax year, an individual has two or more “places of residence” in the UK, section 80C (3) applies to decide if a “close connection” with Scotland or another part of the UK exists. Central to that test is establishing an individual’s “main place of residence”.

32. A “main place of residence” is not necessarily the residence where the individual spends the majority of their time, although it commonly will be. A “main place of residence” is the “place of residence” with which the individual can be said to have the greatest degree of connection.

33. Whether a place constitutes a “main place of residence” is a matter of fact and all of the facts and circumstances of the particular case must be considered to arrive at a conclusion.

34. The following list, although not exhaustive, may be useful in establishing whether a place constitutes a “main place of residence”:

- if the individual is married or in a civil partnership, where does the family spend its time
- if the individual has children, where do they go to school
- at which residence is the individual registered to vote
- how is each residence furnished
- where are the majority of the individual’s possessions kept
- which address is used for correspondence for banks and building societies, credit cards, HMRC and utility bills
- where is the individual registered with a doctor / dentist
- at which address is the individual’s car registered and insured
- which address is the main residence for council tax

Close connection - examples

35. 1. Throughout the whole of the tax year Sharon lives in a flat in Dumfries but is employed by a company based in Carlisle, where her office is situated.

“The location of your employer or where you work is not relevant to deciding whether you’re a Scottish taxpayer. Although Sharon works in England, her place of residence is in Scotland, so Sharon is a Scottish taxpayer.”

2. Ravi is retired and lives in Liverpool. As well as his state pension Ravi also has a monthly income from a private pension with an Edinburgh based pension firm.

“The location of the pension provider from whom a pension is received is not relevant to deciding whether you’re a Scottish taxpayer. Ravi’s place of residence is in England so he’s not a Scottish taxpayer.”

3. Throughout the whole of a tax year, Mohammed lives with his wife in Huddersfield and works as a long distance lorry driver. His work regularly takes him away from home for days at a time, travelling across the UK, driving overnight, often in Scotland.

“Notwithstanding the fact that he spends considerable time in many different parts of the UK, especially in Scotland, Mohammed has only one place of residence in the UK. Since that place of residence is in England he’s not a Scottish taxpayer.”

4. Bob has worked and owned a flat in Bristol for many years. He spends the working week in the Bristol flat but he spends each weekend at a house he owns outside of Oban, where he likes to go walking and fishing. Both properties are furnished with Bob’s possessions but his doctors, electoral and car registration are all in Bristol.

“Bob has two places of residence but his main place of residence is in Bristol, as this is the residence with which he has the closest connection and in which he spends the most time. Bob is therefore not a Scottish taxpayer.”

5. Sally is single with no children and has lived and worked in London for a number of years. In May she’s offered a new job with a firm based in Dundee and decides to accept the offer. She sells her London home and starts the new job in July, moving to a rented house close to her new office.

“Sally has two main places of residence in the tax year but her main place of residence was in Scotland for more of that year than it was in England. A “close connection” with Scotland exists, so Sally is a Scottish taxpayer for the whole of that tax year.”

6. Throughout the tax year, Jack is employed by an oil company working four weeks on/four weeks off, on a rig in Scottish waters. When not working Jack lives at the house he owns with his long-term partner and children in Leicester. All of his possessions are in Leicester, his car is registered and he is registered to vote in Leicester.

“Jack’s main place of residence is in Leicester. His family and his possessions are there and he spends all his non-working time there - he is therefore not a Scottish taxpayer.”

7. Ruth is employed by an oil company working four weeks on/four weeks off, on a rig in Scottish waters. Ruth is single and has no children. When not on the rig she stays in work-related accommodation near Aberdeen but spends most of her non-working time visiting friends or on

holiday. She keeps some of her possessions in storage near Aberdeen but the majority are at her mum's home in Belfast which she also uses as her address for bank and other correspondence, although she seldom visits.

"Ruth has no place of residence. Mum's house is not a "place of residence" as Ruth does not reside there. Neither the rig nor the on-shore work accommodation are places of residence as there is little permanence or continuity in their occupation – none of her possessions are sited in them – there is no close connection. Ruth's Scottish taxpayer status will be decided by day counting."

8. Tom has lived and worked in Birmingham for a number of years. In March he is offered a fixed one year secondment by his employers, starting in April, at their branch in Glasgow. Tom rents out his Birmingham home and moves into a house provided by his employer just outside of Glasgow. He changes his home address for bank, credit card and energy suppliers to the new house and registers with a doctors' surgery and to vote in Glasgow.

"Despite still owning a house in Birmingham and intending to return there once his one year secondment has ended, Tom does not live there during the year. Tom's sole main place of residence is in Glasgow, so he has a close connection with Scotland and is thus a Scottish taxpayer."

9. Jane has a family home in Kilmarnock with her husband and children but works in Cardiff. To avoid the commute she rents a flat in Cardiff which she furnishes herself and where she keeps some of her possessions and stays during the week, returning to the family home in Kilmarnock each weekend. Sarah's Kilmarnock address is where she is registered with a doctor and to vote and is used for all personal matters and correspondence.

"Despite having a place of residence in Cardiff throughout the tax year, Jane's main place of residence is her family home in Kilmarnock. Jane therefore has a "close connection" to Scotland and is thus a Scottish taxpayer."

10. Solomon is a student at university in Glasgow, living in house with friends from his course. He works part-time to help cover his rent and tuition fees and his name is on the phone and utility bills for the house. His parents live in Norwich and he returns to the family home outside of every term time. He never got round to changing the correspondence address on his bank and credit card accounts from the family home in Norwich, most of his possessions are there and his electoral and doctors registration are also in Norwich.

"Solomon's main place of residence, the place with which he has closest connection, is his parent's house, his family home in Norwich. Solomon is not a Scottish taxpayer."

11. Rebecca is a student at university in Stirling and lives in a shared house with friends from the course. She works part-time to help cover rent and tuition fees and her name is on the phone and utility bills for the house. Her parents live in Cardiff. The correspondence address on her bank and credit card accounts is still at her parents' house and many of her possessions are there, however, Rebecca spends her university holidays in the house in Stirling, working full-time, only occasionally staying at her parent's house.

“Rebecca has only one place of residence – Stirling. While she uses her parent’s home for correspondence and many of her possessions are there she spends very little time there so it can’t constitute her place of residence.”

12. Meera and her husband own and run a successful multi-national business. They have no children or close family. Both travel extensively on business, occasionally staying in hotels but usually basing themselves at houses they own in a variety of UK and overseas locations. Despite this travel both are resident in the UK for tax purposes. They are registered to vote at their London residence but have numerous bank accounts and cars registered at different addresses.

“Meera and her husband have numerous “places of residence” but it is not possible to identify one of these as their “main place of residence” – Scottish taxpayer status should be decided for each by a day count for days spent in Scotland and elsewhere in the UK.”

13. Javier is a US Citizen, employed by a US Company. He is sent on a 2 year assignment to work for a company in Scotland. Javier will be a UK resident under the Statutory Residence Test (SRT) from the date of his arrival in the UK. Javier rents a house in Scotland for 2 years for himself. His family remain in the US throughout the assignment and Javier returns home to the US for holidays.

“Since Javier is UK resident for tax purposes and his place of residence in the UK is in Scotland, he has a close connection with Scotland and is therefore a Scottish Taxpayer.”

“Residence” - relevant tax case law

36. Residence is a concept used in Capital Gains Tax private residence relief, in relation to which there are many tax cases, which are of relevance to interpreting “residence” in the context of Scottish taxpayer status.
37. In *Sansom v Peay* (52TC1) Brightman J summarised the relief as,
- “To exempt from liability to Capital Gains Tax the proceeds of sale of a person’s home.”
38. In *Frost v Feltham* (55TC10), where the Court was asked to decide which of an individual’s residences was his main residence, Nourse J stated,
- “A residence is a place where somebody lives.”
39. These quotations emphasise the point that a residence is an individual’s ‘home’. There is, however, no minimum period of occupation that would enable an individual to establish a residence.
40. This was confirmed by Millet J in *Moore v Thompson* (61TC15) where he stated,
41. “It is clear that the Commissioners were alive to the fact that even occasional and short residence in a place can make that a residence; but the question was one of fact and degree for the Commissioners.”

42. Every case must be decided upon its own particular facts. The meaning of the word 'residence' was considered further in the case of *Goodwin v Curtis* (70TC478).

43. In 1983 Mr Goodwin set up a company to acquire Hazleton Manor Farmhouse. At that time he was buying it with a view to making it a home for himself and his family. On 1 April 1985 Mr Goodwin acquired the farmhouse from the company, but prior to completion of his purchase he'd instructed agents to sell the farmhouse. At the time of his acquisition he'd separated from his wife and he took up temporary residence in the farmhouse until 3 May 1985 when the farmhouse was sold. Mr Goodwin contended that the farmhouse was his only or main residence.

44. In the High Court, Sir John Vinelott drew heavily on the observations of Lord Denning and Widgery L.J. in *Fox v Stirk*, *Ricketts v Registration Officer for the City of Cambridge* [1970] 3 All ER 7 and he also quoted with approval the line taken by Brightman J in *Sansom v Peay* (52TC1). Sir John said,

"Amongst the factors to be weighed by the Commissioners are the degree of permanence, continuity and the expectation of continuity. On the facts found by the Commissioners in this case... ..in my judgment, they were fully entitled to take the view that the farmhouse was used not as a residence but as mere temporary accommodation for a period that the taxpayer hoped would be brief and which in fact lasted some 32 days between completion of the sale to him and the completion of the sale by him."

45. The Court of Appeal upheld the decision of the Commissioners and the High Court that Mr Goodwin hadn't established a residence in the farmhouse; it had merely provided temporary accommodation. Millett L J stated in the Court of Appeal,

"What I derive from Viscount Cave's speech is that the word 'reside' is an ordinary word of the English language and is eminently suitable for a lay tribunal such as the General Commissioners to apply." He went on,

"they (the Commissioners) must be taken to have accepted the Revenue's submission that the quality of the taxpayer's occupation of the farmhouse did not have a sufficient degree of permanence, continuity or expectation of continuity to justify its description as residence." And later,

"Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the Commissioners to decide." He went on to say,

"The substance of the Commissioners' finding taken as a whole, in my judgment, is that the nature, quality, length and circumstances of the taxpayer's occupation of the Farmhouse did not make his occupation qualify as residence." Schiemann LJ added,

"I agree with the judgment that has just been delivered. I accept, as did the Commissioners, the Crown's contention that in order to qualify for the relief a taxpayer must provide some evidence that his residence in the property showed some degree of permanence, some degree of continuity or some expectation of continuity."

“Residence”: relevant non tax case law

46. Outside the field of taxation there are many circumstances in which the identification of an individual’s residence is important. Whilst the meaning of a word must always be considered by reference to the particular context in which it’s used, the following cases illustrate important factors that should be considered when considering whether a location constitutes “a place of residence” for the purposes of Scottish taxpayer status.

47. One such example is the identification of the constituency in which an individual is resident for the purpose of voting. Under the Representation of the People Act 1948, entitlement to vote was given to persons resident in a constituency on a qualifying date. In the case of *Fox v Stirk, Ricketts v Registration Officer for the City of Cambridge* [1970] 3 All ER 7 the Court of Appeal considered whether students should be resident in the constituency of the University that they attended. In his judgment, Lord Denning M.R. cited a passage from the speech of Viscount Cave L.C. in *Levene v. Inland Revenue Commissioners* [1928] AC 217.

“... the word ‘reside’ is a familiar English word and is defined in the Oxford English Dictionary as meaning ‘to dwell permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place’.”

48. Lord Denning went on to say,

“I derive three principles. The first is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.”

49. Further to this Lord Widgery commented,

“This conception of residence is of a place where a man is based or where he continues to live, the place where he sleeps and shelters and has his home. It is imperative to remember in this context that ‘residence’ implies a degree of permanence. In the words of the Oxford English Dictionary, it is concerned with something which will go on for a considerable time. Consequently a person is not entitled to claim to be a resident at a given town merely because he pays a short, temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence.”

No “close connection”- “days spent” in Scotland or another part of the UK

50. Where an individual doesn’t have a “close connection” with Scotland or another part of the UK, they may still be a Scottish taxpayer if they satisfy the requirements of section 80F which operates by way of a test of the number of days spent in Scotland against those spent in other parts of the UK.

51. It's important to remember that day counting is only required where it's proved impossible to identify any "place of residence" which was an individual's "main place of residence" for at least part of a tax year. Where a "main place of residence" can be established a "close connection" will exist, either with Scotland or another part of the UK and Scottish taxpayer status will be established in this manner.
52. Where an individual spends at least as many days in Scotland as elsewhere in the UK they're a Scottish taxpayer.

What is meant by a "day spent"?

Where an individual has spent a day is decided by where they are at the end of the day (midnight).

53. However, where an individual is in a part of the UK at midnight merely because they are in transit, that day doesn't count as a "day spent" in that location.
54. An individual is considered to be in transit when travelling from one country outside the UK to another country outside the UK, and whilst en route:
- they arrive in the UK as a passenger
 - leave the UK the next day
 - do not, between their arrival and departure, engage in any activities that are to a substantial extent unrelated to their passage through the UK
55. For example - merely taking dinner or breakfast at a hotel, in the normal course of events, would be related to their passage. In contrast enjoying a film at the local cinema, taking part in a work meeting or catching up with friends or work colleagues should be considered substantially unrelated to the individual's passage through the UK.

Record keeping

What records should I keep for Scottish taxpayer purposes?

56. You'll need to keep records and documents to support the statements you make when you're considering your Scottish taxpayer status.
57. In many cases your circumstances will be straightforward and you'll not need to retain paperwork over and above any documentation you might normally be expected to keep for your own or your employer's purposes.

Place of residence and main place of residence

58. When considering whether you had a place of residence or main place of residence in the UK, HMRC would look for evidence to establish your presence at a particular home and whether or not a home existed. The following information would help establish the facts:

- general overheads - utility bills that may demonstrate you've been present in that home, for example, telephone bills or energy bills, which demonstrate usage consistent with living in the property
- tv/satellite/cable subscriptions
- local parking permits
- membership of clubs, for example sports, health or social clubs
- mobile phone usage and bills pointing to your presence in a country
- lifestyle purchases pointing to you spending time in your home – for example, purchases of food, flowers and meals out
- presence of your spouse, partner or children
- increases in maintenance costs or the frequency of maintenance, for example having your house cleaned more frequently
- insurance documents relating to that home
- SORN notification that a vehicle in the UK is 'off road'
- re-directed mail requests or the address to which you have personal post sent
- the address to which your driving licence is registered
- bank accounts and credit cards linked to your address and statements which show payments made to utility companies
- evidence of local municipal taxes being paid
- registration, at your address, with local medical practitioners
- credit card and bank statements which indicate the pattern and place of your day by day expenditure

59. The above list is not definitive; no one piece of evidence will demonstrate the existence of a place or main place of residence. HMRC will consider the weight and quality of all the evidence as, taken together, a number of pieces of evidence may be sufficiently strong to establish a place or main place of residence.