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IBC CONFERENCE: RESIDENCE AND DOMICILE UNDER THE NEW GOVERNMENT

SESSION 3

'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 SRIT.[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 rates[9] 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 a residual category; of income which is not savings income.[11] 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 applies[16], the detailed calculation of the charge and whether or not the tax paid is income of the Scottish Government or the UK Government.[17]

Unforeseen Practical Difficulties

1.2.8 It is clear that HMRC did not at first understand the complexities which will result from having different Income Tax rates on savings and non-savings income being set by, and the tax receipts therefrom accruing to, separate Parliamentary bodies. It published a technical note in May 2012.[18] That discussed various difficulties in respect of charitable

14 ITA 2007 s.809H(2)

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

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

18 *Clarifying the Scope of the Scottish Rate of Income Tax* – Technical Note May 2012

donations, relief for pension contributions, trust income, payments to foreign entertainers and sportsmen, the Non–Resident Landlord Scheme, the Construction Industry Scheme, PAYE Settlement Agreements, non-cash awards to employees, Real Estate Investment Trusts ('REITs'), Authorised Investment Funds, Property Authorised Investment Funds ('PAIFs'), payments subject to basic rate withholding tax, the set off of reliefs and allowances and deficiency reliefs in respect of life insurance and capital redemption contracts.

1.2.9 It is clear that the issues in these areas proved to be more difficult and more politically charged than HMRC had anticipated and it published a further paper[19] at the end of 2014, optimistically entitled *'Clarifying the Scope of the Scottish Rate of Income Tax',* modifying the 2012 proposals in respect of various areas which had proved more complicated than HMRC had at first thought including in respect of Periodic Income Distributions, REITs and PAIFs and payments from interest in possession trusts.

1.2.10 The Government had proposed that the amount paid in respect of Scottish Income Tax should be shown separately on employee's payslips and on forms P60. First, the former proposal was dropped[20] and then the latter.[21] As the CIOT commented:

> 'We are disappointed that HMRC and the Scottish Government have jointly agreed that it is not necessary to show the SRIT separately on form P60 – the form provided to employees showing their gross salary and income tax paid during the tax year. The CIOT had called for details about the SRIT to be shown

[19] *Clarifying the Scope of the Scottish Rate of Income Tax* – Technical Note 17th December 2014
[20] *Clarifying the Scope of the Scottish Rate of Income Tax* – Technical Note 17th December 2014
[21] *Scottish Rate of Income Tax – Call for Evidence*. *Response by the Chartered Institute of Taxation* para. 5.16

on the form P60 as a minimum – we have also raised the issue of SRIT being on payslips too. The decision not to mandate the inclusion of details of the SRIT on form P60 will significantly reduce transparency surrounding the SRIT for taxpayers, and will not assist them in understanding what tax they are paying and to whom.'[22]

1.2.11 It is clear that HMRC has still not yet identified all of the difficulties and anomalies that are created by charging separate rates of Income Tax on one category of income of one group of UK taxpayers and accounting for the tax received thereon to a separate governmental body.[23]

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 Welsh Basic Rate, the Welsh Higher Rate and the Welsh Additional Rate.[24] 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

22 *Scottish Rate of Income Tax – Call for Evidence. Response by the Chartered Institute of Taxation* para. 5.16
23 See para. 1.2.7 above
24 Government of Wales Act 2006 s.116D

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.[25]

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 Report[26] 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-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.[27]

1.4.2 The Scotland Bill 2015 currently before Parliament contains provisions to achieve this.[28] They are to come into force on such day as the Treasury appoints and will have effect in relation to a fiscal year beginning on or after that day and for subsequent fiscal years.[29]

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25 Wales Act 2014 ss.12 - 14
26 A Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament: 27th November 2014
27 A Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament: 27th November 2014, paras. 76 and 77
28 Scotland Bill 2015 Part 2
29 Scotland Bill 2015 Clauses 12(14) – (16) &13(15)

An article in the Daily Telegraph said that the Scottish Secretary, David Mundell, 'was hopeful that responsibility for Income Tax bands and rates on earnings would be devolved for the start of the 2018/19 tax year'.[30]

1.4.3 Local taxation powers are already devolved to the Scottish Parliament. The CIOT has pointed out that the Commission on Local Tax Reform is currently exploring various alternative proposals for local taxation including the possible imposition of a local Income Tax.[31] The CIOT has pointed out that a change to the system of local taxation in Scotland could create significant new interactions between Income Tax and the tax credits and benefits system.[32]

1.4.4 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%[33] as did the Labour Party, which currently controls the Welsh Assembly, and Plaid Cymru.

30 Daily Telegraph 26th June 2015 – article entitled *Scottish Parliament to Get Income Tax Powers in 2018*
31 http://loacltaxommission.scot/
32 *Scottish Rate of Income Tax – Call for Evidence. Response by the Chartered Institute of Taxation* para. 3.3
33 *Tax Journal* 1 May 2015. *Briefing* by Tina Riches

Whether the Scottish Parliament and/or the Welsh Assembly would go it alone if the UK's Additional Rate remained at 45% is unclear.[34]

EVER LOOSER UNION?

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.[35]

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

[34] Remarks by the Scottish First Minister, Nicola Sturgeon, emphasising the limitations of the Scottish Parliament's current powers in respect of Income Tax and the importance of the additional powers which will be conferred on the Scottish Parliament by the Scotland Bill 2015, if it is passed, have been taken by some commentators as an indication that Scottish Income Tax rates will not vary from UK rates at least until the powers under the Scotland Bill 2015 are activated. See The Scotsman 2nd September 2015 article entitled *Nicola Sturgeon 'No Income Tax Charge Next Year'*

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

Scottish Parliament in the Scotland Bill. These included powers to control Corporation Tax, Capital Gains Tax and National Insurance contributions.[36] In its Election Manifesto, Plaid Cymru said that it would seek to obtain the same 'deal' on taxation as Scotland.[37]

1.6.4 Although powers over Income Tax analogous to those granted to the Scottish Parliament and the Welsh Assembly have not yet 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 direct taxation there would seem to be no principled basis on which to deny the Northern Ireland Assembly similar powers.

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 the Government has adapted. 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.[38] 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 that apply to non-Scottish taxpayers.[39]

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[36] See BBC news report of 15th June 2015

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

[38] *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

[39] 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

CONCLUSION

1.7.1 All in all, then, it seems clear that the taxation systems of the constituent countries[40] 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.

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'

[40] 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 AND COUNTING

2.1.1 As we have seen,[41] 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.[42] 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.[43] 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.

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 Scottish Taxpayer and, when the Welsh Assembly's power to set the WRIT has been activated by a Welsh Referendum, whether he is a Welsh 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. It may be that in due course there will be a fourth status, that of being an English Taxpayer.

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41 See para. 1.2.2 above
42 Subject to an affirmative vote in a Welsh referendum (see para. 1.3.1 above).
43 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,[44] 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

[44] 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.[45] It is therefore the test which will be relevant to most individuals considering the matter. 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,[46] however, there are no split year rules[47] 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

[45] Scotland Act 1998 s.80D(4A) – see below
[46] 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'
[47] 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.[48]

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.

[48] 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.[49] 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.[50] 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, therefore, it plainly does not mean exactly the same as a 'home' in the UK SRT or of a 'main residence' in the CGT main residence relief.

3.2.11 HMRC, however, has released draft guidance[51] (the 'Draft Guidance') on the definition of a Scottish taxpayer on which it asked for comments by 31st July 2015. It says of the meaning of the phrase 'place of residence':-

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49 TCGA 1992 ss.222 - 226B

50 See *McKie on Statutory Residence* (publisher CCH – 2014) at para. 5.8.73

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

> '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.[52]

3.2.12 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 a phrase which does not contain it. This is particularly so as the Scotland's Act 1998's first definition of a Scottish Taxpayer, before it was amended 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

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

contained the UK SRT. It would be odd if in two Acts, where the later Act utilised the earlier, the draftsman should have chosen to express the same concept in different words.

3.2.13 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.

Places on board means of transport

3.2.14 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.'[53]

3.2.15 The Draft Guidance says, apparently in respect of this provision, that[54]:-

> '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.'

3.2.16 This is clearly incorrect for Scotland Act 1998 s.80E(4) does not say that the vessel or other means of transport is a place but rather that a place *on board* a vessel or other means of transport may be a place for the purposes of the section. What the legislation

[53] Scotland Act 1998 s.80E(4)
[54] Draft Guidance para. 29

can mean by this is very unclear and the Draft Guidance does not make its meaning any clearer.

3.2.17 It may be that the Draft Guidance is not here referring to s.80E(4) at all, 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'.

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

3.2.18 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.'[55]

3.2.19 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.

3.2.20 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.

[55] Scotland Act 1998 s.80E(2)

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

3.2.21 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.'[56]

3.2.22 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.

Condition B – Day Counting

3.2.23 An individual meets Condition B if:-

[56] Scotland Act 1998 s.80E(3)

'(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.'[57]

3.2.24 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

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

' … the number of days in the year on which … [he] … is in Scotland at the end of the day exceeds each of the following -

(a) the number of days in the year on which [he] is in England at the end of the day;

[57] Scotland Act 1998 s.80D(3)

(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.'[58]

3.2.26 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.'[59]

3.2.27 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 and not by reference to journeys in and out of Scotland

3.2.28 The UK SRT also contains an exception to the general day counting rule for exceptional circumstances.[60] 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

58 Scotland Act 1998 s.80F(1)
59 Scotland Act 1998 s.80F(2)
60 FA 2013 Sch 45 para. 22(4)-(6)

than 30 days in the year.[61] There is no equivalent to that deeming rule in determining whether an individual is a Scottish Taxpayer.

Condition C – Scottish Parliamentarians

3.2.29 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.'[62]

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

THE WELSH PARLIAMENTARIAN TEST

3.3.1 We have seen[63] 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.[64] One presumes that it is for this 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.

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61 FA 2013 Sch 45, para. 23(2)-(5)
62 Scotland Act 1998 s.80D(4)
63 See para. 3.2.1 above
64 And, of course, vice versa

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.'[65]

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],[66]
>
> … the number of days in that year on which … [he] … is a Welsh parliamentarian.'[67]

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.'[68]

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65 Scotland Act 1998 s.80DA(1)

66 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

67 Scotland Act 1998 s.80DA(2)

68 Scotland Act 1998 s.80DA(3)

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.

SECTION IV

WELSH TAXPAYERS

THE EQUIVALENT WELSH PROVISIONS

4.4.1 The Government of Wales Act 2006 contains provisions defining who is a Welsh Taxpayer which are the same as the provisions in the Scotland Act 1998 defining who is a Scottish Taxpayer with the substitution of 'Welsh Taxpayer', 'Wales', 'Welsh, Assembly' and 'Welsh Parliamentarian' for 'Scottish Taxpayer', '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 in which he lives for at least a part of the year and that place of residence is in Wales or Scotland 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?

6.1.1 There are only two things wrong with the Intra-UK Residence Tests; their structure and their content.

Structure

6.1.2 Their structure is wrong because they consist of two 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 even more complicated if the Northern Ireland Assembly is granted similar powers and more complicated still if equivalent provisions are made for England.

Content

6.1.3 Their content 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. The Government's decision to adopt soft concepts incapable of precise definition in the UK SRT was criticised strongly by the professional bodies.[69] Having chosen to ignore that criticism, there was even less reason for the Government to have used 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. For the Intra-UK Residence Tests apply only to those who are UK resident under the UK SRT and so such

[69] See *McKie on Statutory Residence* paras. 1.2.3 – 1.3.5 and 1.4.7 – 1.4.12

individuals will, by definition, meet the soft criteria by reference to which the latter test applies.

HOW MIGHT IT BE REPAIRED?

6.2.1 What is required, therefore, is a single test to allocate fiscal residence amongst the constituent countries of the UK contained in one place in UK fiscal legislation and based on a simple arithmetical day counting formula. A day counting test based on Scotland Act 1998 s.80D(3)(b) and s.80(F) 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.

THE NEED FOR THE PROFESSIONAL BODIES TO ACT

6.3.1 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. What is really disappointing, however, is that although the request for comments on the Draft Guidance was an opportunity for the professional bodies to raise the issue of the structure and content of the statutory tests their response was very muted. As far as we have been able to determine, of the major professional bodies concerned with taxation only the Association of Taxation Technicians, The Institute of Chartered Accounts in Scotland and the Chartered Institute of Taxation submitted comments. Moreover those comments were confined to the detail of the Guidance rather than the opportunity being taken to address the faults in the structure and content of the statutory provisions governing intra-UK residence.

6.3.2 It is clear that the taxation systems of the constituent countries of the UK are likely to diverge increasingly in the future and that, therefore, intra-UK residence will be of increasing importance. It is always more difficult to change an existing system than to construct a new one *ab initio*. If, as a profession, we do not give more active attention to the issue we shall find ourselves, by default, with a statutory test of intra-UK residence which is permanently dysfunctional.