Analysis
FB 2013: the statutory residence test

SPEED READ **The draft Finance Bill contains a new draft of the proposed statutory residence test which is to be enacted with effect for 2013/14 onwards. The government has ignored the fundamental criticisms made by the professional bodies of the structure of the test and of the definitions it provides, choosing instead to make many small changes and to enact some unnecessary anti-avoidance legislation. Significant anomalies are found, for example, in key concepts such as 'home', 'available accommodation', the 'exceptional circumstances exemption' and the phrase 'living together as husband and wife or … as if they were civil partners'. The new test is an improvement on the current situation but is far from fulfilling the aims of the reform.**

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The draft Finance Bill which was published on 11 December contains updated draft legislation (the 'new draft') to implement the statutory residence test (the 'SRT'). It supersedes the last draft which was published last June (the 'June draft') together with a consultation document (the 'June condoc'). The draft legislation has swollen from 39 to 55 pages but the changes are primarily of detail rather than of structure and principle. Indeed, what is most important is what has not been changed rather than what has.

In this article we concentrate on the first two parts of the draft Schedule which implements the SRT and which contains the fundamental principles of the new test with Part 1 (all references in this article are to the new draft unless otherwise stated) being headed 'The rules' and Part 2 'key concepts'.

A disappointing outcome

Although it has been recognised for many years that the lack of an exhaustive statutory definition of residence for tax purposes is highly unsatisfactory it was only in November 2007 that the pressure for reform began to build. At that time the taxation profession hoped that the test would be a simple, objective test based on days of presence in the UK probably following the US model (see the CIOT's letter to HMRC, dated 14 November 2007). That hope has been disappointed. The draft legislation is complex and in parts highly uncertain in its scope. The reason for that is that the government has chosen to use concepts which are incapable of precise definition instead of finding arithmetical tests which can stand as reasonable proxies for them.

A home

The most important of these is the use of the concept of a 'home' in the second automatic UK test (para 8), the accommodation tie (para 32) and the split year provisions (Part 3). Home is a word of broad and imprecise meaning. The professional bodies have strongly criticised its use in the SRT as undermining the aim of the new legislation to provide a 'clear, objective and unambiguous' test of residence (see the foreword to June condoc). At the very least, they said that the legislation should combine an exhaustive definition of what is a home. In spite of this, the new draft legislation does not contain one. A new para 24 slightly expands para 14 of the June draft but does not change its approach of avoiding definition. So, for example, sub-s (1) now says:

'A person's home can be a building or part of a building or, for example, a vehicle, vessel or structure of any kind.'

That says no more than that it is possible for the items enumerated to be a home but not how one determines whether they are a home or not. A new sub-s (2) provides that:

'Whether, for a given building, vehicle, vessel, structure or the like, there is a sufficient degree of permanence or stability about P's arrangements there for the place to count as P's home (or one of P's homes) will depend on all the circumstances of the case.'

This assumes that to be a home P's arrangements must have a 'sufficient degree of permanence or stability'. It does not even say that the arrangements which must have permanence or stability are arrangements in relation to the building etc which may or may not be P's home but only that the arrangements must be 'there'. It is as if the draftsman has had the elements of a definition in the back of his mind but could not bring himself to set it down expressly.

The June condoc which accompanied the June draft said that: '… the government does not consider a holiday home, weekend home or temporary retreat should count as a "home"' (June condoc, para 3.89).

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modified form in a new sub-s (3) which provides:

'But somewhere that P uses periodically as nothing more than a holiday home or temporary retreat (or something similar) does not count as a home of P's.'

That raises more uncertainties than it settles. For it implies that without this specific provision a 'temporary retreat' might be a home which suggests that 'home' in the SRT should be interpreted widely rather than narrowly. What is more, it requires the taxpayer to be able to determine what is a 'holiday home or temporary retreat (or something similar)'.

The second automatic UK test

The second automatic UK test, which utilises the concept of a home, has been substantially recast (para 8). It is now a condition of the test that P must be present at the home (whilst it is his home) for at least 30 separate days in the year (para 8(1)(b)). This does not mean that a place cannot be one's home for the purposes of the legislation if one never enters it at all during the fiscal year. It merely means that in those circumstances one would not satisfy the second automatic residence test.

Another change to the second automatic UK test makes it easier for one to be resident here. In the June draft one could only satisfy the automatic residence test by reference to a period or periods of at least 91 days in which one's only home was in the UK. Under the new draft, it will be possible to pass the test in respect of a period of more than 90 days in which one has a home in the UK and also overseas if one is present in the overseas home on fewer than 30 separate days in the year (para 8(3)).

The accommodation tie

As we have seen, the concept of home is also relevant to the accommodation tie. The draft of the accommodation tie contained in the June draft had also been severely criticised for its imprecision. Only one minor change has been made to it. It still contains a host of concepts of uncertain meaning for which no statutory definition has been provided. Most importantly it preserves the concept of available accommodation (para 32(3)(c)) which has always caused immense problems in respect of the existing concept of residence.

Other areas of difficulty

Days spent

The exceptional circumstances exception: Another area of difficulty which has not been addressed is the exceptional circumstances exception in determining the days spent in the UK. Paragraphs 21(4)–(5) have been taken over unchanged, but renumbered, from the June draft. They provide that a day does not count as a day spent in the UK where:

'… (a) [the individual] would not be present in the UK at the end of that day but for exceptional circumstances beyond [this individual's] control that prevent [him] from leaving the UK, and

(b) [he] intends to leave the UK as soon as those circumstances permit.

'(5) Examples of circumstances that may be "exceptional" are:

(a) national or local emergencies such as war, civil unrest or natural disasters, and

(b) a sudden or life-threatening illness or injury.'

One of the difficulties of this provision is that exceptional circumstances must 'prevent [the individual] from leaving the UK' rather than prevent him from going to his intended destination. If an individual is in London and had intended to return to a Near Eastern country suddenly engulfed in civil war he would not be prevented from leaving the UK and travelling to a peaceful country such as France. Of course, the courts might repair the legislation's deficiency through a radical purposive construction but the whole point of the SRT is that the taxpayer should be able to determine his residence status with certainty without having to guess how the courts will repair the inadequacies of the government's legislation.

Another anomaly which survives from the June draft is the provision that the maximum number of days which will be treated as days which are not spent in the UK because of the exceptional circumstances exception is sixty (para 21(6)). It is not clear why it is necessary to place a maximum here. The most likely circumstance in which a person will be prevented from leaving the UK for more than two months is where they are either seriously ill themselves or are caring for somebody who is seriously ill.

Unlikely avoidance: In the June condoc the government suggested that a special rule would be required for those who regularly move in and out of the UK on the same day in order to manipulate the residence rules (June condoc, para 3.153). This would either seem to require a taxpayer to fly in and out of the country on a large number of days or else to be based in Northern Ireland and to regularly walk across the border with the Irish Republic and back shortly before and after midnight. It is difficult to believe that the population of people sufficiently rich to make that worthwhile and sufficiently indifferent to their own comfort to be willing to do so will be large enough to justify the complication caused by specific provisions to frustrate such behaviour. Nonetheless such provisions have been introduced in para 22 modifying the general rule, stated in para 22(1), that if a person is not present in the UK at the end of the day, that day does not count as a day spent by the individual in the UK. The new rule will apply if:

- the individual has at least three UK ties for a tax year;
- the number of days in that tax year when the individual is present in the UK at some point in the day but not at the end of the day is more than 30; and
- the individual was resident in the UK for at least one of the three tax years preceding the tax year concerned.

Where these conditions are satisfied and the number of such qualifying days in the tax year reaches 30, each subsequent qualifying day in the tax year is to be treated as a day spent by the individual in the UK.

'Living together as husband and wife or, if they are the same sex, as if they were civil partners'

The new draft utilises, in the family tie (para 30(2)(b)) and in the split year provisions (para 42(9)), the phrase 'living together as husband and wife or, if they are the same sex, as if they were civil partners'.

The phrase 'living together as husband and wife' is found elsewhere in tax and other legislation and has been considered judicially on a number of occasions. A civil partnership is a creation of statute and the Civil Partnership Act 2004 does not limit civil partnerships to any particular form of relationship between two persons entering into such a partnership. It is difficult to see, therefore, how two people can live together as civil partners who are not civil partners. The phrase is used in a number of other statutory contexts, but in those contexts it is invariably used subject to a statutory definition usually providing that two people of the same sex are to be treated as living together as if they were civil partners if, and only if, they would be treated as living together as husband and wife were they of the opposite sex. There is no such deeming provision in the new draft legislation and no indication why the draftsman has not followed the normal statutory form.

Both an improvement and a wasted opportunity

An improvement: It is clear that the SRT has now almost reached the form in which it will be enacted. The government has made only minor changes to the most important provisions of the test and has largely ignored the fundamental criticisms of structure and of definition which were made by the professional bodies. The new test, when it is enacted, will be an improvement on the current situation but it will be very far from fulfilling the aims for the draft legislation set out in the June 2012 condoc that it should: 'Be transparent, objective and simple to use'.

A wasted opportunity: Once enacted the SRT is unlikely to be recast significantly for many years. It will no doubt provide, in the future, considerable occupation for the courts and the Revenue Bar but the government has wasted an opportunity for significant and cost free simplification of a key element of the tax code.

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