IBC CONFERENCE:

OFFSHORE TAXATION: A NEW ERA BEGINS

ASSESSING PROBLEM AREAS UNDER THE NEW STATUTORY RESIDENCE RULES

RESIDENCY AND ASSOCIATED ISSUES AND CHALLENGES

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SECTION I

SPLIT YEAR TREATMENT: AN INTRODUCTION

AN INTRODUCTION

1.1.1 Until the introduction of the SRT, a person who was resident at any time during a tax year was generally subject to Income Tax and CGT on his worldwide income and gains subject to specific reliefs for persons who were either not domiciled in the UK or not ordinarily resident here. In certain circumstances, however, when an individual came to, or left, the UK during a tax year, concessionary treatments enabled the tax year to be split into periods before and after arrival or departure.[1] UK tax on most income and gains arising before a person had become UK resident or after he had ceased to be so resident was limited to the tax which, loosely, would have been due if the individual had been non-resident throughout the year.

1.1.2 Broadly equivalent provisions are now contained in Part 3 of the *SRT Schedule.*

[1] This was not simple generosity on the Government's part. In many circumstances the individual to whom the concessions applied would have been resident in the split year for the purposes of the relevant double tax treaty in the other countries to which they were departing or from which they were returning. The concessions spared HMRC the administrative burden of dealing with returns and enquiries where the amount of UK tax at stake was reduced to nil or to very small amounts by the application of the relevant double tax treaty

THE EFFECT OF THE SPLIT YEAR RULES

The Split Year Rules Do Not Affect an Individual's Residence

1.2.1 The Split Year Rules apply only to years in which the individual is UK resident. They do not affect the residence of the individual concerned.[2] Rather they modify the taxation of specific types of income and capital gains where that income or those gains arise in the overseas part of the year. Provisions which apply purely by reference to residence and the operation of which is not specifically modified by the Split Year Rules, are unaffected by them. So, for example, the application of IHTA 1984 s.267 which, for Inheritance Tax purposes, treats a person who is not domiciled in the UK as being so domiciled at a particular time if he was resident in the UK in not less than 17 of the 20 years of assessment ending with the year of assessment in which the relevant time falls,[3] is unaffected by the Split Year Rules.

1.2.2 Because the Split Year Rules operate by providing specific exemptions from Income Tax and CGT one cannot simply assume that in respect of the overseas part of the year the individual will be assessed as if he were not resident in the UK. One has to consider each item of income and gains which would normally be assessable on a UK resident and determine how their treatment is modified by the Split Year Rules. The Split Year Rules do not modify the taxation of all types of income and gains. Income deemed to be

[2] Except that their application to years before the year concerned is relevant to the application in that year of the Fourth Automatic Overseas Test, the Fifth Automatic Overseas Test and the Fourth Automatic UK Test

[3] The effect of this rule is that, where it applies, an individual will first be treated as domiciled in the UK under its provisions at the beginning of a fiscal year

a transferor's under the provisions governing income arising on certain assets transferred abroad,[4] for example, is unaffected by the Split Year Rules.

THE STRUCTURE OF PART 3 OF THE *SRT SCHEDULE*

1.3.1 Part 3 is structured in the following way:-

(i) Paragraphs 39 – 42 contain general provisions as to the scope of the Split Year Rules which are primarily 'signposting' provisions.

(ii) Paragraph 43 defines a split year.

(iii) Paragraphs 44 – 51 set out eight cases specifying eight sets of circumstances in which the Split Year Rules apply.

(iv) Paragraphs 52 – 56 set out various general rules in respect of the split year provisions.

(v) Paragraphs 57 – 108 make amendments to other taxing statutes to modify the taxation of specific categories of income and of capital gains and of trustees as follows:-

[4] ITA 2007 s.721 and s.728

DESCRIPTION	PARAGRAPH NUMBERS IN *SRT SCHEDULE*
Special charging rules for employment income	57 – 71
Special charging rules for pension income	72
PAYE income	73
Special charging rules for trading income	74-80
Special charging rules for property income	81
Special charging rules for savings and investment income	82 – 88
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SECTION II

THE GENERAL PROVISIONS OF THE SPLIT YEAR RULES

SIGNPOSTING PROVISIONS AND PROVISIONS AS TO SCOPE

Signposting

2.1.1 Since the Tax Law Re-write Project began[5] many taxing statutes have included what are known as 'signposting provisions'; these are provisions which are not intended to have substantive effect but rather to explain to a reader of legislation its effect in general terms and to direct his attention to particular features of it. Such 'signposting' provisions are at best redundant and at worse create uncertainty and confusion when it is unclear whether particular provisions are intended to be mere 'signposts' or to have substantive effect. They pose the danger that they may conflict with the substantive provisions to which they are meant to be signposts.

Unhelpful Signposts

2.1.2 Paragraphs 39 and 40 are signposting provisions.

[5] The Tax Law Rewrite Project was established in 1997 in fulfilment of a pledge made by the then Chancellor of the Exchequer in his Budget Statement of November 1995 which itself was in response to the report on tax simplification made by the Revenue under FA 1995 s.160. Its task was to rewrite primary direct tax legislation. A large volume of legislation was rewritten and enacted starting with the CAA 2001 and ending with the TIOPA 2010. The Project ended before its target of rewriting all direct tax legislation was achieved (in spite of the claim on HMRC's website that 'the work of the project to rewrite the *main* [emphasis added] direct tax legislation' was completed) but its drafting practices continue to influence the drafting of new tax legislation. Simon McKie, was a member, throughout the Project, of the 'Tax Law Consultative Committee', a Committee charged with reviewing and commenting upon, but not revising, the Project's work

Summarising Part 3: Para. 39

2.1.3 Paragraph 39 provides:-

> 'This Part of this Schedule –
>
> (a) explains when, as respects an individual, a tax year is a split year,
>
> (b) defines the overseas part and the UK part of a split year, and
>
> (c) amends certain enactments to provide for special charging rules in cases involving split years.'

2.1.4 It can be seen that the paragraph attempts to summarise what is contained in Part 3. This summary is unexceptionable as to what it says adding nothing to the legislative provisions which it summarises.

Summarising the effect of a split year: Para. 40

2.1.5 Paragraph 40 is another such signposting provision:-

> '(1) The effect of a tax year being a split year is to relax the effect of paragraph 2(3) (which treats individuals who are UK resident "for" a tax year as being UK resident at all times in that year).
>
> (2) When and how the effect of paragraph 2(3) is relaxed is defined in the special charging rules introduced by the amendments made by this Part.
>
> (3) Subject to those special charging rules (and any other special charging rules for split years that may be introduced in the future), nothing in this Part

alters an individual's residence status for a tax year or affects his or her liability to tax.'

2.1.6 The effect of this provision is more difficult to gauge than that of para. 39. If the natural construction of a provision of Part 3 cannot be characterised as a relaxation of para. 2(3)[6] is it to be interpreted as if it were?

2.1.7 Arguably, Part 3 does not relax the effect of para. 2(3) at all. Paragraph 2(3) provides that a person who is resident (or not resident) under the SRT for a fiscal year is to be 'taken for the purposes of any enactment relating to relevant tax to be resident (or not resident) there at all times in that tax year'. Nothing in Part 3 abrogates or modifies this rule. Part 3 does not affect a person's residence status at all. What it does is to modify, in specified ways, the taxation of the income and gains of a person who is UK resident in the fiscal year concerned and who falls within one of the Split Year Cases.

2.1.8 Sometimes this is done by restricting the charge to income arising in the UK part of the year and excluding from the charge income arising in the overseas part of the year,[7] and sometimes by treating income arising in the overseas part of the year as if it arose to a person who is not UK resident.[8]

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6 Which provides:-
'An individual who, in accordance with the statutory residence test, is resident (or not resident) in the UK "for" a tax year is taken for the purposes of any enactment relating to relevant tax to be resident (or not resident) there at all times in that tax year.'

7 See, for example, ITEPA 2003 ss.15(1), 23(3), 24(2A), 26(1)(b), 421E(1B), 474(1B), 575(1A) and ITTOIA 2005 ss. 270(3), 465(1A), 467(4)(aa), 528A(2A)(b), 832(2)(b)

8 See, for example, ITTOIA 2005 ss. 6(2A), 243(6), 368(2A), 577(2A), 849(3A), 854(5) & (5A)

2.1.9 Of course one can guess at the meaning which the draftsman intended and it is possible that the Courts will, in effect, give little or no weight to para. 40 in construing Part 3. But this unnecessary paragraph introduces another small element of uncertainty into the construction of the *SRT Schedule* which is riddled with difficulties of construction.

The Residence Status of Personal Representatives and Trustees: Para. 41

2.1.10 Paragraph 41 provides that Part 3:-

> '(a) does not apply in determining the residence status of personal representatives, and
>
> (b) applies to only a limited extent in determining the residence status of the trustees of a settlement (see section 475 of ITA 2007 and section 69 of TCGA 1992, as amended by this Part).'

2.1.11 Again this is a signposting provision. Nothing in Part 3 affects the residence status of individuals who may be personal representatives or trustees except in as far as the Split Year Rules are relevant to provisions in other parts of the SRT.[9] Nothing in Part 3 affects the residence of personal representatives[10] in that capacity or whether or not an estate is a foreign or a UK estate[11] for Income Tax purposes. The residence of a body of trustees is affected by Part 3 but only in paras. 102 and 103 which set out express deeming provisions in respect of the residence of an individual trustee. Paragraph 41

[9] Such as paras. 10(1)(c), 15(2)(b) and 16(2)(b)
[10] Under ITA 2007 s.834 and TCGA 1992 s.62(3)
[11] Within ITTOIA 2005 s.651

seems to add nothing to the provisions of paras. 102 and 103. All that one can say is that there is not an obvious contradiction between para. 41 and those paragraphs.

Intention in Respect of Double Taxation Arrangements: Para. 42

2.1.12 Paragraph 42 provides:-

> 'The existence of special charging rules for cases involving split years is not intended to affect any question as to whether an individual would fall to be regarded under double taxation arrangements as a resident of the UK.'

2.1.13 This is not a mere signposting provision although the extent to which it has substantive effect is unclear. The intention of Parliament in enacting legislation is relevant to construing its meaning.[12] Double taxation arrangements, however, for the purpose of the SRT, are 'arrangements that have effect under section 2(1) of TIOPA 2010'[13] and such arrangements are arrangements declared by the Sovereign by Order in Council and will be made in respect of double tax treaties with other sovereign nations. It is difficult to see, therefore, how the statement of intention in para. 42 could affect the interpretation of such treaties which are in force in English Law by reason of statute but which are independent agreements between sovereign nations. It would seem, therefore, that para. 42 can have effect only in construing a UK legislative provision which is relevant to the application of a double tax treaty. Double tax treaties based on the OECD Model Treaty, however, proceed by first determining where a person is resident under the law

[12] Authorities for this proposition are legion, but in respect of taxing statutes, perhaps the leading authority is *Barclays Mercantile Business Finance Limited v Mawson (Inspector of Taxes)* HL [2004] 76 TC 446

of each contracting state.[14] They then give rules to determine that person's residence for the purposes of the treaty only[15] and assign the priority of taxing rights between the contracting states taking account of that deemed treaty residence.[16]

2.1.14 If para. 42 cannot, as we have said, modify the interpretation of the Treaty itself, therefore, it is difficult to see how it can modify an individual's residence for UK taxation purposes only for the purpose of a double tax treaty because double tax treaties refer, not to a special residence status under the law of a contracting state which is to apply for treaty purposes only, but to his general residence status for the purposes of imposing taxation under those laws.

DEFINITION OF A SPLIT YEAR: PARAS. 43(1) & (2)

2.2.1 Paragraph 43 provides:-

> '(1) As respects an individual, a tax year is a "split year" if –
>
> (a) the individual is resident in the UK for that year, and
>
> (b) the circumstances of the case fall within –
>
> (i) Case 1, Case 2 or Case 3 (cases involving actual or deemed departure from the UK), or

[13] Para. 145
[14] OECD Model Tax Convention on Income and Capital 2010. Art. 4(1)
[15] OECD Model Tax Convention on Income and Capital 2010. Arts. 4(2) & (3)
[16] OECD Model Tax Convention on Income and Capital 2010. Arts. 6 – 24

(ii) Case 4, Case 5, Case 6, Case 7 or Case 8 (cases involving actual or deemed arrival in the UK).

(2) The 8 Cases are described in paragraphs 44 to 51.

(3) In those paragraphs, the individual is referred to as "the taxpayer" and the tax year as "the relevant year".

(4) In applying Part 2 of this Schedule to those paragraphs, for "P" read "the taxpayer".'

'The Individual is resident in the UK for that year': Para. 43(1)(a)

2.2.2 This is an important provision. The Split Year Rules cannot apply in a fiscal year in which the individual is not resident in the UK. The Split Year Rules do not, as para. 40(3) says they do, 'relax' the effect of para. 2(3) which treats individuals who are UK resident 'for' a fiscal year as being UK resident at all times in that year, but they do provide relief from the taxation which would otherwise be charged on the UK resident individuals who fall within the Split Year Cases.

Signposting Again

2.2.3 Most of para. 43 has a straightforward substantive effect but the words in brackets in para. 43(1)(b) are another example of signposting provisions and, once again, they introduce an unnecessary element of uncertainty into the construction of the provisions to which they refer. What is 'actual or deemed departure from' or 'arrival in' the UK? If departure and arrival simply mean any departure from the territory of the UK or arrival in the territory of the UK at any time in the fiscal year then it is likely that most people falling into any of the eight cases will have departed or arrived in the UK in the

year concerned and it is quite likely that they will have done both. Indeed, anybody who has taken a foreign holiday who lives in the UK or who lives in a foreign country and takes a holiday in the UK will also have done so. If these phrases are intended to indicate some more substantial change of condition it is unclear of what that change consists or whether it aptly characterises falling into one of the cases set out in the paragraphs which follow para. 43. It may be that the words in brackets are simply a loose summary of the overall effect of the Split Year Cases but to what extent are they to be taken into account in construing those cases? Could they found an argument, for example, that although an individual's circumstances fall within the express provisions of Case 1 (Starting full-time work overseas), his circumstances do not amount to an 'actual or deemed departure from the UK' and therefore that he does not fall within Case I construed in the light of para. 43(1)(b)(i)?

2.2.4 In the Authors' view, it is probable that the Court will give little or no weight to the words in the brackets in para. 43(1)(b) in construing the cases which follow. Whether or not that is actually the case will not be known with certainty until the provisions are actually considered by the Courts.

TERMINOLOGY: PARAS. 43(3) & (4) AND 52(1) – (4)

The 'Taxpayer' and the 'Relevant Year': Paras. 43(2) and (3)

2.3.1 It can be seen from para. 43(3) and (4) that in the Split Year Rules, the draftsman abandons his convention of referring to the individual concerned as 'P' and the fiscal year concerned as 'Year X' and refers instead to the individual as the 'taxpayer' and the

putative Split Year as the 'relevant year'.[17] We have continued to refer to the 'individual' but we have adopted the 'Relevant Year' (with initial capitals) to refer to the putative split year.

'The Previous Tax Year' and 'the Next Tax Year': Para. 52(2) and (3)

2.3.2 Paragraph 52(2) and (3) provide that for the purposes of paras. 44 – 51, which set out the eight Split Year Cases, the fiscal year preceding the Relevant Year is referred to as 'the previous tax year'[18] and the year following the Relevant Year is referred to as 'the next tax year'.[19] These phrases are rather cumbersome for use in a commentary and we have therefore adopted the terms 'Preceding Year' and 'Succeeding Year'.

'Partner': Para. 52(4)

2.3.3 Also for the purposes of the Split Year Cases in paras. 44 – 51:-

> ' "Partner", in relation to the taxpayer, means -
>
> (a) a husband or wife or civil partner,
>
> (b) if the taxpayer and another person are living together as husband and wife, that other person, or
>
> (c) if the taxpayer and another person of the same sex are living together as if they were civil partners, that other person.'[20]

[17] Para. 43(3)
[18] Para. 52(2)
[19] Para. 52(3)

2.3.4 This is similar to the first two categories of a 'relevant relationship' for the purposes of a Family Tie[21] except that for a relevant relationship to exist between an individual and his wife, her husband or his or her civil partner they must not be separated. We shall see, however, that where the term is used in the Split Year Cases, in Cases 2 and 7 continuing to live with the partner is one of the circumstances which must exist to fall within those cases.

CALCULATIONS RESULTING IN A NUMBER OF DAYS: PARA. 52(5)

2.4.1 Also for the purposes of the Split Year Cases in paras. 44 – 51, para. 52(5) provides a special rule:-

> 'If calculation of the appropriate number results in a number of days that is not a whole number, the appropriate number is to be rounded up or down as follows-
>
> (a) if the first figure after the decimal point is 5 or more, round the appropriate number up to the nearest whole number,
>
> (b) otherwise, round it down to the nearest whole number.'

2.4.2 As we shall see,[22] calculating the 'appropriate number' is a step in calculating permitted limits under all eight of the Split Year Cases except Case 3.

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[20] We have examined the difficulties of construction which the terms used in this sub-paragraph pose in the context of the Family Tie (see para. 32(2))

[21] Paras. 45(4) & 50(4)

[22] Paras. 44(9), 45(10), 47(7), 48(6), 49(9), 50(10) and 51(7)

SUCCESSIVE YEARS AND THE SPLIT YEAR RULES

2.5.1 As we have seen, none of the Split Year Cases applies in the year in which the individual is not resident in the UK. We shall also see, that it is a condition of each of Cases 1 – 3 (the Ceasing UK Residence Cases) that the individual was resident in the UK in the Preceding Year and was not resident in the UK in the Succeeding Year. We shall also see that it is a condition of each of Cases 4 – 8 (the Becoming UK Resident Cases) that the individual was not resident in the Preceding Year and that additionally, it is a condition of Cases 6 – 8 that the individual should be resident in the Succeeding Year. It is also a condition of Case 8 that the Succeeding Year should not be a split year. The result of these rules is that where one or more of Cases 1 – 3 (the Ceasing UK Residence Cases) apply in the year, none of the Cases can apply in either the Preceding Year or in the Succeeding Year except that Cases 4 – 7 (the Becoming UK Resident Cases except Case 8) may apply in the Preceding Year. Conversely, where one or more of Cases 4 – 7 applies in the Year, one or more of Cases 1 – 3 may apply in the Succeeding Year.

Diagrammatic Representation of the Interaction of the Split Year Cases

An explanation of the diagram

2.5.2 We have represented this in the diagram below. The middle row of each set of boxes shows for the cases under examination (the 'Examined Cases') the residence status required in the Preceding, Relevant and Succeeding Years for those cases. The boxes above show, for the cases with which a comparison is being made (the 'Compared Cases'), the residence status required under the Compared Cases where the Relevant

Year of the Compared Cases is the Preceding Year of the Examined Cases. The rows below the middle row, show, for the Compared Cases, the residence status required under the Compared Cases where the Relevant Year of the Compared Cases is the Succeeding Year of the Examined Cases. In this way conflicts between the groups of cases are identified so as to show where it is possible for the conditions of the Compared Cases to be met for a year preceding or succeeding the Relevant Year of an Examined Case. Italics are used in the diagram to indicate where there is a conflict between the rules of the Case Categories preventing particular Split Year Cases from applying in either the Preceding Year or the Succeeding Year.

The diagram

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

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

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

Can one of Cases 4 or 5 apply in the Preceding Year?

Preceding Year	Relevant Year	Succeeding Year
Non-Resident	Resident	No requirement

One of Cases 1-3 applies in the Relevant Year

	Preceding Year	**Relevant Year**	**Succeeding Year**
	Resident	**Resident**	**Non-Resident**

Can one of Cases 4 or 5 apply in the Succeeding Year?

	Preceding Year	*Relevant Year*	Succeeding Year
	Non-Resident	*Resident*	No Requirement

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

Can one of Cases 6-8 apply in the Preceding Year?

Preceding Year	Relevant Year	Succeeding Year
Non-Resident	Resident	Resident[23]

One of Cases 1-3 applies in the Relevant Year

	Preceding Year	**Relevant Year**	**Succeeding Year**
	Resident	**Resident**	**Non-Resident**

Can one of Cases 6-8 apply in the Succeeding Year?

	Preceding Year	*Relevant Year*	Succeeding Year
	Non-Resident	*Resident*	Resident

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

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

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

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

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

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

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

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

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

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

Can one of Cases 6-8 apply in the Preceding Year?

Preceding Year	*Relevant Year*	Succeeding Year
Non-Resident	*Resident*	Resident

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

Can one of Cases 6-8 apply in the Succeeding Year?

Preceding Year	Relevant Year	Succeeding Year
Non-Resident	Resident	Resident

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

Can one of Cases 1-3 apply in the Preceding Year?

Preceding Year	*Relevant Year*	*Succeeding Year*
Resident	*Resident*	*Non-Resident*

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

Can one of Cases 1-3 apply in the Succeeding Year?

Preceding Year	Relevant Year	Succeeding Year
Resident	Resident[24]	Non-Resident

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

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

Can one of Cases 4 or 5 apply in the Preceding Year?

Preceding Year	*Relevant Year*	Succeeding Year
Non-Resident	*Resident*	No requirement

One of Cases 6-8 applies in the Relevant Year

Preceding Year	**Relevant Year**	**Succeeding Year**
Non-Resident	**Resident**	**Resident**

Can one of Cases 4 or 5 apply in the Succeeding Year?

Preceding Year	Relevant Year	Succeeding Year
Non-Resident	Resident	No Requirement

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

Can one of Cases 6-8 apply in the Preceding Year?

Preceding Year	*Relevant Year*	Succeeding Year
Non-Resident	*Resident*	Resident

One of Cases 6-8 applies in the Relevant Year

Preceding Year	**Relevant Year**	**Succeeding Year**
Non-Resident	**Resident**	**Resident**

Can one of Cases 6-8 apply in the Succeeding Year?

Preceding Year	Relevant Year	Succeeding Year
Non-Resident	Resident	Resident

PRIORITY BETWEEN CASES: PARAS. 54 & 55

2.6.1 As we have said, the Split Year Cases can only apply to a year in which the individual concerned is resident in the UK.[25] As we have seen, para. 43 refers to Cases 1 – 3 as 'involving actual or deemed departure from the UK' and as we shall also see it is a condition of the application of these three Cases that the individual concerned was resident in the UK in the Preceding Year[26] and should not be resident in the UK in the Succeeding Year.[27] We have also seen that para. 43 refers to Cases 4 – 8 as '… involving actual or deemed arrival in the UK, and as we shall see it is a condition for the application of each of these five Cases that the individual has not been resident in the UK in the Preceding Year.[28] An individual, therefore, who falls within any one of Cases 1 – 3 in respect of a year cannot fall within any one of Cases 4 – 8 in respect of the same year and, therefore, the reverse is also true.

2.6.2 As an aside, one might note that these rules have the interesting result that a child, in the fiscal year of his birth, cannot fall within any of Cases 1 – 3 of the Split Year Rules but he can fall within Cases 4 and 8.[29]

2.6.3 It is possible, however, for an individual, in respect of the same year, to fall within two or more cases of Cases 1 – 3 or of Cases 4 – 8. Because the cases define the overseas

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[25] Para. 43(1)(a)
[26] Paras. 44(2), 45(2) and 46(2)
[27] Paras. 44(4), 45(6) and 46(5)
[28] Paras. 47(2), 48(2), 49(2)(a), 50(2) and 51(2)
[29] One presumes that such an infant cannot fall within Case 5 (starting full-time work in the UK), Case 6 (ceasing full-time work overseas) or Case 7 (the partner of someone ceasing full-time work overseas)

part of the split year in different ways it is necessary for the legislation to provide rules as to priority amongst Cases 1 – 3 and amongst Cases 4 – 8. There is no need for priority between the Ceasing UK Residence Cases and the Becoming UK Resident Cases.

2.6.4 If an individual's circumstances fall under more than one case in respect of a year, the overseas part is that part defined for the case which has priority.[30] This priority is important because it may have the result, for those leaving the UK, that the overseas part of their split year starts later than they would suppose and, for those coming to the UK, that the UK part of their split year begins earlier than they suppose.

Priority Between Cases 1 – 3: Para. 54

2.6.5 Paragraph 54(1) provides:-

> '(1) This paragraph applies to determine which Case has priority where the taxpayer's circumstances for the relevant year fall within two or all of the following –
>
> Case 1 (starting full-time work overseas);
>
> Case 2 (the partner of someone starting full-time work overseas);
>
> Case 3 (ceasing to have a home in the UK).
>
> (2) Case 1 has priority over Case 2 and Case 3.
>
> (3) Case 2 has priority over Case 3.'

[30] Para. 53(1)(b)

2.6.6 This would seem to provide a simple hierarchy as follows:-

Case 1
Case 2
Case 3

Priority Between Cases 4 – 8: Para. 55

2.6.7 The priority rules in respect of Cases 4 – 8 are rather more complicated. Paragraph 55 provides:-

> '(1) This paragraph applies to determine which Case has priority where the taxpayer's circumstances for the relevant year fall within two or more of the following –
>
> Case 4 (starting to have a home in the UK only);
>
> Case 5 (starting full-time work in the UK);
>
> Case 6 (ceasing full-time work overseas);
>
> Case 7 (the partner of someone ceasing full-time work overseas);
>
> Case 8 (starting to have a home in the UK).
>
> (2) In this paragraph "the split year date" in relation to a Case means the final day of the part of the relevant year defined in paragraph 53(5) to (9) for that Case.
>
> (3) If Case 6 applies –
>
> (a) if Case 5 also applies and the split year date in relation to Case 5 is earlier than the split year date in relation to Case 6, Case 5 has priority;
>
> (b) otherwise, Case 6 has priority.

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

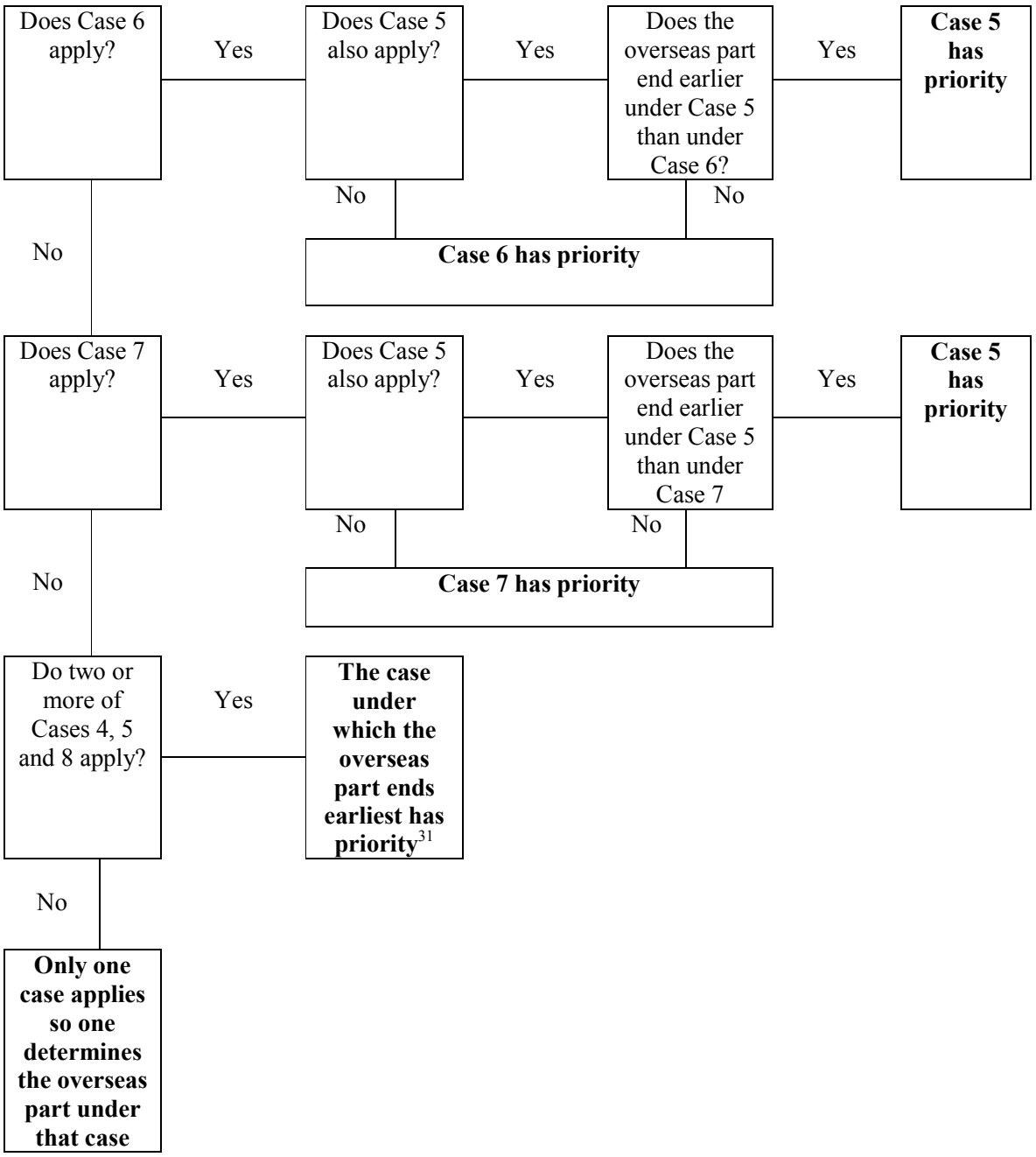
(a) if Case 5 also applies and the split year date in relation to Case 5 is earlier than the split year date in relation to Case 7, Case 5 has priority;

(b) otherwise, Case 7 has priority

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

(6) But if, in a case to which sub-paragraph (5) applies, two or all of the Cases which apply share the same split year date and that date is the only, or earlier, split year date of the Cases which apply, the Cases with that split year date are to be treated as having priority.'

2.6.8 This might be represented diagrammatically as follows:-



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

2.6.9 The diagram above is, we hope, simpler to understand than the legislation but the logic of this order of priority is not easily explicable. The following rules, while not a substitute for the detailed diagram, may help to explain the draftsman's rationale:-

(a) the 'work' cases (Cases 5, 6 and 7) generally have priority over the 'home' cases (Cases 4 and 8);

(b) within the 'work' cases, the earliest date prevails.[32] Similarly within the 'home' cases the earliest date prevails;

(c) the only exception to (a) and (b) is where the only 'work' case is Case 5 but one of the 'home' cases is earlier. In that case, the earliest 'home' case trumps Case 5.

2.6.10 Chapter 30 of *McKie on Statutory Residence*, which sets out the rules of Cases 4 – 8 has an example illustrating the application of these priority rules.

TRANSITIONAL PROVISIONS AND THE SPLIT YEAR RULES GENERALLY: PARA. 155

2.7.1 In addition to the General Transitional Provisions in para. 154(1) – (4), paras. 154 – 156 contain further transitional provisions which are specific to particular provisions of the SRT including the Split Year Rules. Some of these rules are relevant only to particular

[32] This is not immediately apparent from the structure of para. 55 but para. 50(7) makes it clear that Case 7 (Accompanying Spouse) will never be earlier than Case 6

cases and are dealt with in our consideration of those cases.[33] Para. 155, however, has a transitional rule which applies to the Split Year Rules generally:-

'(1) This paragraph applies if -

(a) year X or, for Part 3 of this Schedule, the tax year for which an individual's liability to tax is being calculated is the tax year 2013-14 or a subsequent tax year, and

(b) it is necessary to determine under a provision of this Schedule, or a provision inserted by Part 3 of this Schedule, whether a tax year before the tax year 2013-14 (a "pre-commencement tax year") was a split year as respects the individual.

(2) The provision is to have effect as if -

(a) the reference to a split year were to a tax year to which the relevant ESC applied, and

(b) any reference to the UK part or the overseas part of such a year were to the part corresponding as far as possible, in accordance with the terms of the relevant ESC, to the UK part or the overseas part of a split year.

(3) Where the provision also refers to cases involving actual or deemed departure from the UK, the reference is to be read and given effect so far as possible in accordance with the terms of the relevant ESC.

[33] Paras. 154(5)(c) (Case 6) and 156 (Case 7)

(4) "The relevant ESC" means whichever of the extra-statutory concessions to which effect is given by Part 3 of this Schedule is relevant in the individual's case.'

2.7.2 How is one to determine what is the part of a year '... corresponding as far as possible, in accordance with the terms of the relevant ESC, to the UK part or the overseas part of a split year'? One might conjecture that, in respect of ESC A11 and ESC A78, where the individual 'comes to the UK'[34] the overseas part will be the period from the start of the year to the day before the day on which the individual first becomes resident in the UK[35] and that where he 'leaves the UK'[36] the overseas part will be the period from the day after the day when he is last resident in the UK until the end of the year. ESC D2 is less obvious but one might guess that where an individual 'comes to live in the UK'[37] the overseas part of the year will end on the day before the date of his arrival and that where an individual 'leaves the UK'[38] the overseas part will begin on the day after the individual's departure from the UK which, it appears, under the ESC will be the day on which he has ceased to be resident or ordinarily resident in the UK.

2.7.3 Although such imprecision may cause difficulties it is the understandable, indeed inevitable, result of referring back to the period before the introduction of the SRT when residence was determined by case law, the uncertainties of which the SRT was designed

34 ESCs A11 and A78
35 See ESC A11 and ESC A78, para. 2. Before the introduction of the SRT an individual became resident or ceased to be resident in the UK at a particular time in the fiscal year. That creates the possibility that a person might have changed his residence status more than once in the year but the legislation does not provide for that possibility
36 ESCs A11 and A78
37 ESC D2

to remedy, and the Split Year Rules rested on extra-statutory concessions which were not drafted with statutory precision.

2.7.4 What is difficult to understand, however, is the Parliamentary draftsman's approach in para. 155(4) to defining the extra-statutory concessions to which the paragraph refers. Part 3 of the *SRT Schedule* does not give effect to any extra-statutory concessions. It contains no provisions referring to such concessions. What the draftsman appears to mean is that a relevant ESC is one the effect of which in years before 2013/14 Part 3 is designed to replicate in that year and thereafter. The reader of the legislation is left to guess what those provisions are by reference, not to the legislation, but to extra-statutory materials. It seems that they are ESCs A11, A78 and D2 but the extent to which Part 3 replicates their provisions is obviously only approximate. The provisions of Part 3 take a very different form to that taken by these concessions.[39]

[38] ESC D2
[39] Para. 155(4) is really appallingly bad legislation

SECTION III

THE SPLIT YEAR CASES: CEASING TO BE UK RESIDENT

CASE 1 - STARTING FULL-TIME WORK OVERSEAS:[40] PARA. 44

The Ambit of Case 1

3.1.1 Case 1 is aimed at individuals starting full-time work overseas.[41]

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

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

(a) the individual was resident in the UK for[42] the Preceding Year.[43]

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

  (a) begins with a day that -

    (i) falls within the relevant year, and

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

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

  (c) satisfies the overseas work criteria.[44]

(c) the individual is not resident in the UK for the next fiscal year because he meets the Third Automatic Overseas Test for that year (see paragraph 14).[45]

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[40] This is the heading of para. 44. The main body of the legislation does not use the phrase 'full-time work'
[41] Although, as we have said, 'full-time work' is not a phrase used in the main body of the legislation
[42] For the application of provisions as to residence 'for' a fiscal year to years before the commencement of the SRT
[43] Para. 44(2)

Examining Case 1

The Consideration Period: Para. 44(3)

3.1.3 It will be seen that para. 44(3) refers to a period. That period is not given a title in the paragraph but in modifying the terms of para. 14(3) for the purposes of Case 1, para. 44(7)(b) refers to the period under consideration which is a period in respect of which it is to be determined whether it is a period within para. 44(3). We shall therefore refer to any period in respect of which it is to be determined whether it falls within para. 44(3) as the 'Period Under Consideration' or as a 'Consideration Period'. It will be seen that there may be more than one Consideration Period in the year which satisfies the conditions of para. 44(3) and whether there is at least one period which satisfies those conditions may be tested by reference to more than one period beginning in the fiscal year. If one assumes that it is in the individual's interest for the Consideration Period to start at the earliest possible date in the year so as to have the longest possible overseas part of the year, one would choose to examine the period starting on the earliest date on which the conditions of para. 44(3) are likely to be satisfied.

The overseas work criteria: Paras. 44(3)(c), (5) & (6)

3.1.4 A Consideration Period satisfies the overseas work criteria if:-

> '(a) the taxpayer works sufficient hours overseas, as assessed over that period,[46]
>
> (b) during that period, there are no significant breaks from overseas work,[47]

---

[44] Para. 44(3)
[45] Para. 44(4)
[46] Para. 44(5)(a)
[47] Para. 44(5)(b)

(c) the number of days in that period on which the taxpayer does more than 3 hours' work in the UK does not exceed the permitted limit,[48] and

(d) the number of days in that period falling within sub-paragraph (6) does not exceed the permitted limit.'[49]

Days falling within para. 44(6)

3.1.5 It will be seen that in order to determine whether a period satisfies the overseas work criteria, para. 44(5)(d) requires one to determine the number of days in the Consideration Period which fall within para. 44(6). A day falls within para. 44(6) if:-

'(a) it is a day spent by the taxpayer in the UK, but

(b) it is not a day that is treated under paragraph 23(4)[50] [that is, under the Deeming Rule] as a day spent by the taxpayer in the UK.'

Sufficient hours overseas: Para. 44(7)

3.1.6 An individual works sufficient hours overseas, as assessed over the Relevant Period if para. 14(3), which sets out the rules for determining whether an individual works sufficient hours overseas for the purposes of the Third Automatic Overseas Test,[51] is met when it is modified in certain ways. The modifications are that:-

'(a) for "P" read "the taxpayer",

[48] Para. 44(5)(c)
[49] Para. 44(5)(d)
[50] Para. 23(4) contains the Deeming Rule which treats certain days on which an individual is present in the UK but on which he is not present at midnight as days spent in the UK

(b) for "year X" read "the period under consideration",

(c) for "365 (or 366 if year X includes 29 February)" read "the number of days in the period under consideration", and

(d) in paragraph 28(9)(b), as it applies for the purposes of step 3, for "30" read "the permitted limit".'[52]

The Permitted Limit: Para. 44(8)

3.1.7 Various provisions in para. 44 refer to the 'permitted limit'. Para. 44(5)(c) places a limit on the number of days which the individual can work in the UK in the Consideration Period, para. 44(5)(d) places a limit on the number of days which the individual can spend in the UK in the Consideration Period and para. 44(7)(d) places a limit on the aggregate deduction which can be made in calculating the Reference Period for gaps between employments. All of these limits are referred to as the 'Permitted Limit'.

3.1.8 The 'Permitted Limit' varies according to whether one is dealing with para. 44(5)(c) and (7)(d), in which case it is the number found by reducing 30 by the appropriate number, or with para. 44(5)(d) in which case it is the number found by reducing 90 by the appropriate number.

3.1.9 The appropriate number is the result of the formula:-

$$\text{'A} \times \frac{B}{12}$$

[51] Para. 14
[52] Para. 44(7)

where "A" is -

(a) 30, for sub-paragraphs (5)(c) and (7)(d), or

(b) 90, for sub-paragraph (5)(d), and

"B" is the number of whole months in the part of the relevant year before the day mentioned in sub-paragraph (3)(a) [that is the first day of the Consideration Period]."[53]

3.1.10 If the result of calculating the appropriate number is not a whole number it is to be rounded up or down according to whether the number after the decimal point is 0.5 or more or is less than 0.5.[54]

3.1.11 The result of this formula is that the Permitted Limits progressively reduce month by month, the later the Consideration Period begins. If the Consideration Period begins in April at the end of the fiscal year, the limits are reduced to nil.[55]

Restriction on aggregate, not individual, limits: Para. 44(7)(d)

3.1.12 It is anomalous that although the aggregate limit imposed, by para. 28(9)(b), on reductions in the Reference Period for gaps between employments where there is more than one such gap must be pro-rated in this way, the limit for each gap under para. 28(9)(a) is not. That means that if the period begins in November or later in the fiscal

[53] Para. 44(9)
[54] Para. 52(5)
[55] *Guidance*, at para. 5.13, has a useful table showing the Permitted Limits according to in which month of the fiscal year the Consideration Period begins

year, an individual will receive a lesser reduction where he has more than one gap between employments which amount in aggregate to 15 days or more than he would if he had only one gap of the same length as that aggregate amount.

Fractions of days

3.1.13 As in the calculation[56] of the Reference Period for the purposes of the Third Automatic Overseas Test and the Third Automatic UK Test which paras. 44(7) – (9) modify, it is arguable that the deduction for gaps between employments may include fractions of days. In the Authors' opinion, however, the better view is that a reduction can only be made for an amount of whole days.

Significant break period not pro-rated

3.1.14 Although the calculation pro-rates the aggregate limit for gaps between employments it does not similarly pro-rate the 31-day period which counts as a significant break.

Whole months: Para. 145

3.1.15 What is the 'number of whole months in the part of the Relevant Year before' the start of the Consideration Period?[57] A whole month:-

> '…means the whole of January, the whole of February and so on, except that the period from the start of a tax year to the end of April is to count as a whole month.'[58]

[56] Para. 28
[57] Para. 44(9)

'Not resident in the UK for the next tax year because the taxpayer meets the third automatic overseas test for that year': Para: 44(4)

3.1.16 It has been seen that para. 44(4) provides that the individual concerned must be 'not resident in the UK for the next tax year *because the taxpayer meets the third automatic overseas test for that year'* [emphasis added]. The difficulty, here, is the word 'because'. What if the individual concerned would not be resident in the UK even if he did not meet the Third Automatic Overseas Test because, for example, he met the First Automatic Overseas Test or, not meeting any of the other Automatic Overseas Tests, he also did not meet any of the Automatic UK Tests or the Sufficient Ties Test?

3.1.17 The *Guidance* does not discuss this issue. One of the examples which it provides, however, of the operation of Case 1 of the Split Year Rules is of Amanda[59] who in the Succeeding Year spends only 14 days in the UK. She would, therefore, not be resident in the UK under the First Automatic Overseas Test in the Succeeding Year even if she did not meet the Third Automatic Overseas Test. Perhaps this indicates that HMRC will accept that the condition of para. 44(4) will be satisfied even where the individual does meet the Third Automatic Overseas Test in the Succeeding Year but would not have been resident in the UK in the Succeeding Year even if he had not done so.

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[58] Para. 145
[59] *Guidance* para. 5.15 and Example 34

3.1.18 Whether or not that is HMRC's view, read literally, the conditions of para. 44(4) are not satisfied where the individual concerned would not be resident in the UK in the Succeeding Year even if he did not meet the Third Automatic Overseas Test.

3.1.19 Of course, the Tribunal or Court might refuse to follow the literal construction preferring a broadly purposive approach but there does not seem to be any reason why one should assume a purpose which is at odds with the literal meaning of the legislation here rather than one which is consistent with it.

3.1.20 In the event that HMRC did adopt the more rigorous, literal construction and were found, in a later case, to be correct, an individual wishing to rely on the *Guidance* would have to establish a legitimate expectation that HMRC would apply the less rigorous construction. In the Authors' view, that would be difficult to do because it would have to be established simply on an inference from the facts given in the *Guidance's* example.

3.1.21 If the less rigorous construction gives a more favourable result then the strict, literal construction, an individual might adopt it but, to protect himself from penalties[60] and discovery,[61] it would be sensible for him to disclose that he has adopted the wider construction, that it differs from a literal construction, to refer to Example 34 of the *Guidance* and to summarise the different results of the two constructions.

[60] FA 2007 Sch 24 para. 1
[61] TMA 1970 s.29

Determining the Overseas and UK Parts: Paras. 53(2) & 56

The overseas part

3.1.22 Where Case 1 applies the overseas part is:-

(a) if there is only one Consideration Period, the part beginning with the first day of that period, and

(b) if there is more than one such period, the part beginning with the first day of the longest of those periods.

and, in either case, ending with the last day of the fiscal year.[62]

The UK part

3.1.23 The UK part, therefore, is the inclusive period from the 6th April in the Relevant Year to the day before the start of the overseas part.[63]

CASE 2 – THE PARTNER OF SOMEONE STARTING FULL-TIME WORK OVERSEAS:[64] PARA. 45

The Ambit of Case 2

3.2.1 Case 2 is aimed at individuals who leave the UK to live with their spouses etc. who have left the UK to work full-time abroad.[65]

[62] Para. 53(2)
[63] Para. 56
[64] This is the heading of para. 45. The main body of the legislation does not use the phrase 'full-time work'
[65] As we have said, 'full-time work' is not a phrase used in the main body of the legislation

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

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

(a) the Accompanying Spouse[66] was resident in the UK for the Preceding Year;[67]

(b) the Accompanying Spouse has a Partner whose circumstances fall within Case 1 of the Split Year Rules for the Relevant Year or for the Preceding Year;[68]

(c) on a day in the Relevant Year the Accompanying Spouse moves overseas so the Accompanying Spouse 'and the Partner can continue to live together while the Partner is working overseas';[69]

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

(i) the Accompanying Spouse has no home in the UK at any time, or has homes in both the UK and overseas but spends the greater part of the time 'living in the overseas home'; and

(ii) the number of days that the Accompanying Spouse spends in the UK does not exceed the Permitted Limit.[70]

(e) the Accompanying Spouse is not resident in the UK for the Succeeding Year.[71]

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66 In the discussion which follows we use 'Accompanying Spouse' to refer to the person in respect of whom it is to be determined whether a putative split year is a split year within Case 2 and 'Partner' to refer to the person in respect of whom, in deciding that matter, it is to be determined whether his circumstances fall within Case 1 for the 'Relevant Year' or for the Preceding Year. In order, to avoid the repetition of 'he' or 'she', 'him or her' etc we assume that the Partner is male and the Accompanying Spouse is female

67 Para. 45(2)

68 Para. 45(3)

69 Para. 45(4)

70 Para. 45(5)

Examining Case 2

'Partner': Para. 45(3)

What is a 'partner'?

3.2.3 A partner for this purpose is:-

(a) a husband, wife or civil partner;

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

(c) if the individual and another person of the same sex are living together as if they were civil partners, that other person.[72]

3.2.4 The *June 2012 ConDoc* said:-

'As the Government intends to recognise common-law partners for the purposes of a family connection to the UK … it is right that such relationships are also recognised for the purposes of split year treatment.'[73]

At what time must the putative partner be the Accompanying Spouse's 'Partner'

3.2.5 The legislation does not say expressly when the putative Partner must be the Accompanying Spouse's Partner. It imposes two conditions in respect of the Partner.

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[71] Para. 45(6)
[72] Para. 52(4)
[73] *June 2012 ConDoc* para. 3.178

First, that the Accompanying Spouse has a Partner whose circumstances fall[74] within Case 1 of the Split Year Rules either for the Relevant Year or for the Preceding Year. Secondly, that the Accompanying Spouse 'moves overseas so the taxpayer and the partner can continue to live together'. One might argue that the putative Partner must be a Partner throughout the period during which these conditions are to be fulfilled. That is, throughout either the Relevant Year or the Preceding Year whichever is the year by reference to which the former condition is satisfied and also at the time of the Accompanying Spouse's move under the latter condition. Alternatively, it may be that the putative Partner need only be the Accompanying Spouse's Partner at the time of the Accompanying Spouse's move. On balance, the Authors consider the latter to be the more probable construction but the matter is not free from doubt.[75]

3.2.6 The *Guidance* says:-

> 'If you separate from your partner after the deemed date of departure (i.e. the day the overseas part of the split year started from), you will still be given split year treatment, provided you meet all the other conditions for Case 2.'[76]

---

[74] The legislation uses the present case here. Even if the Partner's Relevant Year for the purposes of Case 1 of the Split Year Rules is the Accompanying Spouse's Preceding Year he will still have to satisfy the condition at the time of the spouse's move to qualify for split year treatment. He will have not to be resident in the UK for what is for him the Succeeding Year and for the Accompanying Spouse the Relevant Year. Does this support the view that in determining whether the putative Partner is the Accompanying Spouse's Partner one looks at their circumstances at the time of the Accompanying Spouse's move?

[75] Of course, the condition that the Accompanying Spouse must move 'overseas so the taxpayer and the partner can continue to live together' will mean that they will normally have been partners for at least some time before the move. We say 'normally' because it is possible for a couple to live together without living together 'as husband and wife' or if they are of the same sex, 'as if they were civil partners'

[76] *Guidance* para. 5.21

The *Guidance's* comment is unexceptionable but it casts no light on when the condition that the putative Partner is the Accompanying Spouse's Partner must be satisfied. In particular, it casts no light on whether it must be satisfied for the fiscal year in which the Partner falls within Case 1 of the Split Year Rules.

'Moves overseas so that the [Accompanying Spouse] and the partner can continue to live together while the partner is working overseas: Para. 45(4)'

3.2.7 In previous drafts of the *SRT Schedule* the requirement of the equivalent provision to para. 45(4) was that the Accompanying Spouse 'joins the partner overseas so they can live together while the partner is working full-time overseas.'[77] The STEP pointed out that the requirement that the Accompanying Spouse must join the Partner overseas would seem to 'imply that the employed partner must be overseas before the [Accompanying Spouse]'.[78] The *December 2012 ConDoc* took no account of this representation. When the Finance Bill 2013 appeared, however, the provision had taken its current form requiring that the Accompanying Spouse 'moves overseas so the [Accompanying Spouse] and the partner can continue to live together while the partner is working overseas'.

3.2.8 That change dealt with the problem identified by the STEP in as much as the Accompanying Spouse and the Partner could now go abroad simultaneously. It did not, however, solve another difficulty which existed in the draft provisions in a slightly

[77] *June 2012 Draft SRT Schedule* para. 31(4). This provision reappeared as para. 42(4) of the *Draft December 2012 SRT Schedule*

different form, that if the Accompanying Spouse moves abroad for some reason other than so that she and her Partner can continue to live together, such as because of a desire to live in a foreign country, the conditions of Case 2 will not be satisfied. As the burden of proof in any appeal against an assessment is borne by the individual, that leaves the Accompanying Spouse in the position of having to prove her motivation.

'Continue to live together'

3.2.9 Arguably, it also creates a further anomaly. It was arguable that under the previous drafts of the *SRT Schedule*, a person who moved abroad in order to join an individual who became that person's 'Partner' at the time of the move could satisfy the conditions of Case 2. [79] Under para. 45(4), however, an individual who moves abroad to marry or live with another person who has not previously been their Partner would not satisfy the condition of para. 45(4).

'Moves overseas'

3.2.10 What is involved in moving overseas? Does it imply anything more than complying with all of the other conditions of para. 45? One of the definitions of 'move' used as an intransitive verb given by the *SOED* is to 'change one's place of residence'. The *SOED* also gives a variety of related meanings where 'move' is used with a preposition including:-

[78] *STEP 2012 Response*, para. 7.1. That might have over-stated the matter but the wording used in the *Draft December 2012 SRT Schedule* certainly suggested that the two could not travel together to their overseas destination

'move about'	-	'keep changing one's place of residence'
'move in'	-	'take possession of a new place of residence, occupy new premises; begin a new job etc; take up residence *with* …'
'move out'	-	'… leave a place of residence to live elsewhere, end one's occupancy of premises …'.

3.2.11 It is very unfortunate that the draftsman has used a phrase which is so closely related to 'residence' and the phrase 'to reside'. The purpose of introducing the SRT was to escape from the uncertainties of the concept of residence by defining residence by reference to other, it was hoped, more precisely defined concepts. Whether, in what way and to what extent the use of the word 'moves' imposes significant additional conditions for the application of Case 2 is unclear and will remain so at least until the Courts have had a chance to consider the matter.

Living together

3.2.12 What is involved in living together for the purposes of para. 45(4)? The requirement of para. 45(4) is not expressly that the Accompanying Spouse should move overseas so that she or he and her or his Partner can continue to live together as a married couple, civil partners or the unmarried 'equivalents'. He or she merely has to move overseas so that they can 'continue to live together'. As we have seen, in order to be a Partner of the

[79] *June 2012 Draft SRT Schedule* para. 31(4). This provision reappeared as para. 42(4) of the *Draft December 2012 SRT Schedule*

Accompanying Spouse, however, the individual must be the Accompanying Spouse's husband, wife or civil partner or, loosely, be living together with her as such. For a person to be living together as husband and wife more is required than simply residing in the same dwelling. There must be the sort of tie which normally exists between spouses. It may be that the factors discussed at length in Chapter 22 of *McKie on Statutory Residence* in respect of both living together as man and wife and as to whether a married couple, or civil partners, are separated will be taken into account by the Court in determining whether the putative Accompanying Spouse and the Partner have previously been living together and whether the Accompanying Spouse moves overseas so as to continue to do so. It may be, however, that the couple's relationship before the move was not sufficiently established for them to be living together as husband and wife or as if they were civil partners but that it was sufficiently established for them to be described as living together and that on the move it is sufficiently established for them to be living together as husband and wife or as if they were civil partners. In these circumstances it appears that the condition of para. 45(4) will be met.

The Home and Days Spent in the UK Conditions: Paras. 45(5) & (9)

The deemed departure day: Para. 45(7) & (8)

3.2.13 If the Partner's circumstances fall within Case I for the Relevant Year the 'deemed departure day' is the later of:-

(a) the day on which the Accompanying Spouse 'moves overseas so the [Accompanying Spouse] and the partner can continue to live together while the partner is working overseas'; and

(b) the first day of what is, for the Partner, the overseas part of the Relevant Year as defined for Case I.[80]

3.2.14 If, however, the Partner's circumstances fall within Case 1 for the Preceding Year, the deemed departure day is the day on which the Accompanying Spouse 'moves overseas so the [Accompanying Spouse] and the partner can continue to live together while the partner is working overseas'.[81]

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

3.2.16 In order to know what is the deemed departure day, therefore, one needs to know when the Accompanying Spouse moves overseas.

3.2.17 Because of the uncertainty as to what is involved in moving overseas within para. 45(4), however, it will not always be obvious when the deemed departure day occurs.

[80] Para. 45(7)
[81] Para. 45(8)

Para. 45(5)(a)

3.2.18 It will be seen that para. 45(5)(a) contains conditions as to the Accompanying Spouse's home or homes. It may be analysed into two limbs. The conditions of para. 45(5)(a) will be met if the conditions of either limb are satisfied.

3.2.19 The First Limb is:-

> 'In the part of the Relevant Year beginning with the deemed departure day … the [Accompanying Spouse] has no home in the UK at any time.'

3.2.20 Does this mean that the Accompanying Spouse will satisfy the condition if he has no home in the UK throughout that period or that he will satisfy the condition if he does not have a home in the UK at any point of time in the period? On balance, it seems to the Authors that, although either reading is possible, the first is more likely to be correct because the First Limb is directed at the period as a whole. It appears in the *Guidance* that this may be HMRC's view too although the relevant passage is ambiguous.[82]

3.2.21 The Second Limb is:-

> 'In the part of the Relevant Year beginning with the deemed departure day … the [Accompanying Spouse] … has homes in both the UK and overseas but spends the greater part of the time living in the overseas home.'

3.2.22 Does this mean that he must have a home in the UK and overseas simultaneously or can the condition be satisfied serially so that, for example, it will be satisfied where an Accompanying Spouse has a UK home and no overseas home in one month within the period and an overseas home and no UK home in the next month in the period?

3.2.23 In the Authors' opinion, if they are right as to the construction of the First Limb, the Second Limb will also look at the situation in the period as a whole and so can be satisfied serially. If they are wrong as to the construction of the First Limb, however, so that it is satisfied if at any point of time in the period the Accompanying Spouse has no home in the UK, circumstances of serial ownership will fall within the First Limb and so one would not also expect them also to fall within the Second. In that case, the conditions of the Second Limb could only be satisfied simultaneously.[83]

3.2.24 The *Guidance* does not give any indication as to which of the two possible constructions of the Second Limb HMRC is likely to adopt.[84]

'Spends the greater part of the time living in the overseas home': Para. 45(5)(a)

3.2.25 We have already seen the difficulty caused by the imprecision of the concept of a home. Where the Accompanying Spouse has homes both in the UK and overseas, Case 2 requires one to determine whether the Accompanying Spouse 'spends the greater part of the time living in the overseas home' during the part of the year beginning with the

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[82] *Guidance* para. 5.16

[83] Of course, they could not spend time in both homes simultaneously. One would have to determine the period throughout which they had both a UK and an overseas home and then determine over that period, in which home they lived for the greater part of the time

'deemed departure day'. The use of the phrase 'living in' implies that there is a distinction between having a home (relevant to the Second Automatic UK Test and the Accommodation Tie) and living in a home; that it is possible to have a home without living in it so that 'living in' imposes an additional requirement. What is that requirement? Can one be said to be living in a home in a period when one is away from it? If not, then there must be a minimum period during which one may be physically present somewhere other than the home or else one would not be 'living in' a home when, for example, one was away from it at work. In the Authors' view the phrase probably indicates that an individual sleeps at the property with some regularity over a period which is not merely short. What degree of regularity is required and over what period is unclear. Neither the *SRT Explanatory Notes* nor the *Guidance*[85] cast any light on the matter.

3.2.26 Para. 45(5)(a) refers to the individual spending 'the greater part of the time living in the overseas home'. Clearly an individual might have more than one home overseas or more than one home in the UK or more than one home both in the UK and overseas. As the legislation provides no method of choosing a single UK or a single overseas home to be the subject of the comparison, in the Authors' view, where there is more than one UK home or more than one overseas home, the aggregate time spent living in all of the overseas homes is to be compared with the aggregate time spent living in all of the UK

[84] *Guidance* paras. 5.16 – 5.21
[85] *Guidance* paras. 5.16 – 5.20

homes. That view is taken on the basis of the rule of statutory construction that the singular includes the plural.[86]

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

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

3.2.29 'Somewhere that ... [the individual] ... uses periodically as nothing more than a holiday home or temporary retreat (or something similar) does not count as a home' of the individual.[87] Where the Accompanying Spouse and her Partner spend only a few weeks a year in a property which has been their home does it remain their home or has it become a holiday home? Unfortunately, there are no clear principles by which this question may be decided but it is surely arguable that its function determines its nature and that if the couple use the property for the purposes of taking holidays, it is a holiday home during the period when that is the case.[88]

[86] Interpretation Act 1978 s.6(c)
[87] Para. 25(3)

3.2.30 The *Guidance*, however, contains two examples where its author assumes that properties have continued to be the homes of people who now spend most of their time overseas, in circumstances where it is not at all clear why the properties should have continued to be their 'homes'.[89]

'Does not exceed the Permitted Limit': Para. 45(5)(b

3.2.31 We have seen that para. 45(5)(b) provides that the Accompanying Spouse must not spend more than the Permitted Limit of days in the UK. Paras. 45(9) and (10), which are similar in form to the rules for the calculation of the Permitted Limit under Case I, provide that:-

> 'The permitted limit is the number found by reducing 90 by the appropriate number.
>
> The appropriate number is the result of –
>
> $$A \times \frac{B}{12}$$
>
> Where –
>
> "A" is 90, and
>
> "B" is the number of whole months in the part of the relevant year before the deemed departure day.'[90]

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[88] Although, as a matter of ordinary English usage in conversation a couple, in such circumstances might well continue to refer to the property as their home rather than their holiday home, what would they reply if asked the question 'is this property now your home or your holiday home?'

[89] See *Guidance* Annex A para. A13 and Example A5 and para. A17 and Example A9

[90] The *Guidance*, at para. 5.13, has a useful table showing the Permitted Limits according to in which month of the fiscal year the Consideration Period begins

'The taxpayer is not resident in the UK for the next tax year': Para. 45(6)

3.2.32 It will be noticed that whereas Case 1 applies only where the individual concerned is not UK resident in the Succeeding Year 'because he meets the Third Automatic Overseas Test', under Case 2 the Succeeding Year condition is simply that the individual must not be 'resident in the UK' for the Succeeding Year. To that extent, therefore, Case 2 is more flexible than Case 1.

3.2.33 There is, however, a particularly nasty trap here. If, as events turn out, the Partner does not satisfy the condition that he is not resident in the UK in the Succeeding Year because he meets the Third Automatic Overseas Test, not only will his Relevant Year turn out not to be a split year but so too will his Accompanying Spouse's Relevant Year.

Determining the Overseas and UK Parts: Paras. 53(3) & 56

The overseas part

3.2.34 In respect of Case 2, the overseas part of a split year is the part of that year which starts with the deemed departure day and ends with the last day of the fiscal year.[91]

The UK part

3.2.35 The UK part, therefore, is the inclusive period from the 6th April in the Relevant Year to the day before the start of the overseas part.[92]

[91] Para. 53(3)
[92] Para. 56

CASE 3 – CEASING TO HAVE A HOME IN THE UK: PARA. 46

The Ambit of Case 3

3.3.1 Case 3 is aimed at individuals who leave the UK, make a substantial break in their connection with it and create a sufficient link with another country.

Circumstances Falling within Case 3

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

(a) the individual was resident in the UK for the Preceding Year;[93]

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

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

(ii) from that time, he has no home in the UK for the rest of that year.[94]

(c) in the part of the Relevant Year beginning with the day on which he ceases to have any home in the UK, the individual spends fewer than 16 days in the UK;[95]

(d) the individual is not resident in the UK for the Succeeding Year;[96]

(e) at the end of the period of six months beginning with the day in the year when he ceases to have any home in the UK, the individual has a sufficient link with a country overseas.[97]

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93 Para. 46(2)
94 Para. 46(3)
95 Para. 46(4)
96 Para. 46(5)

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

(a) the individual is considered for tax purposes to be a resident of that country in accordance with its domestic laws, or[98]

(b) the individual has been present in that country (in person) at the end of each day of the six month period mentioned in para. 46(6)[99] (that is the period of six months beginning with the day in the year when he ceases to have any home in the UK),[100] or

(c) the individual's only home is in that country or, if the individual has more than one home, they are all in that country.'[101]

Examining Case 3

The individual was resident in the UK for the Preceding Year: Para. 46(2)

Children born in the year

3.3.4 It seems clear that a child cannot fall within Case 1 or Case 2 of the Split Year Rules in the fiscal year of his birth. He could, however, fulfil the condition of para. 46(3) that he comes to have a home in the UK during the fiscal year and from then on, has no home in the UK for the rest of that year. So one might think that such a child could fall within Case 3 of the Split Year Rules. He could not, however, not having been in existence in

97 Para. 46(6)
98 Para. 46(7)(a)
99 See (e) above
100 Para. 46(7)(b)
101 Para. 46(7)(c)

the Preceding Year, have met the condition of para. 46(2) that '... he was resident in the UK for the previous tax year ...'.

Para. 46(3)

'Ceases to have any home in the UK': Para. 46(3)(a)

3.3.5 Obviously one cannot cease to have a home in the UK, if one has not already got one and yet a person may be resident here who has no home here.

'No home in the UK for the rest of the year' Para. 46(3)(b)

3.3.6 Case 3 is aimed at those who make a substantial break with the UK. If for any reason the individual comes to have a home in the UK again within the fiscal year he will not satisfy the conditions of the Case. If, however, he comes to have a home in the UK in the Succeeding Year or in a year after that he will still meet the conditions of the case provided he is not resident in the UK in the Succeeding Year.

'Spends fewer than 16 days in the UK': Para. 46(4)

3.3.7 The limit in para. 46(4) does not vary according to the part of the year in which the individual concerned ceases to have a home in the UK, so that when he does so in the early part of the year it is extremely restrictive.

'Has a sufficient link with a country overseas': Para. 46(6)

3.3.8 The individual has a sufficient link with a country overseas for this purpose in three circumstances.

'The period of six months': Para. 46(6)

3.3.9 The SRT contains a definition of a 'whole month'[102] which applies for the purposes of the *SRT Schedule*. There is a no definition of a month however, nor any rule as to how you calculate a period of a stated number of months. The Interpretation Act 1978 provides, however, that 'in any Act, unless the contrary intention appears,[103] and provided the Act was enacted after the year 1850,[104] 'month' means calendar month.'[105]

3.3.10 Paragraph 46(6) prescribes that the period of six months begins with the day when the individual ceased to have any home in the UK but when does it end? The general rule is:-

> 'When the period prescribed is a calendar month running from any arbitrary date the period expires upon the day in the succeeding month corresponding to the date upon which the period starts, save that, if the period starts at the end of a calendar month which contains more days than the next succeeding month, the period expires at the end of that succeeding month.
>
> If a period of one calendar month includes the last day of February there must be 29 or 28 days, according as the year is or is not a leap year.'[106]

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102 Para. 145
103 Interpretation Act 1978 s.5
104 Interpretation Act 1978 s.22 and Sch. 2 Part 1
105 Interpretation Act 1978 Sch. 1
106 *Halsbury's Laws of England*, Time (Volume 97 (2010) 5th Edition), para. 311

3.3.11 If this 'corresponding date' rule applied to para. 46(6) it would seem to have the effect that where an individual ceases to have a home anywhere in the UK at, say, 9.00am on the 31st March, the period expires on the 30th September. That would have the rather strange result that to meet the condition of para. 46(7)(b) he would have to be present in his home on the 31st March as well as on every day in April, May, June, July, August and September, which appears to be a period of six months and one day rather than of six months. In the Authors' view the corresponding date rule is to be understood as referring to a period where a condition must be satisfied after an event, such as notice having been given rather than a period including such an event. So, for example, the case of *EJ Riley Investments Ltd v Eurostile Holdings Ltd*[107] concerned an application for a new tenancy which was to be made 'not less than two months' after the giving of the landlord's notice. The landlord's notice was given on the 23rd May 1983 and the application was made on the 23rd May 1983. The corresponding date rule was held to apply so that the notice complied with the requirement. In *Dodds v Walker*,[108] Lord Russell explained:-

> 'For example, in a four-month period, when service of the relevant notice was on 28th September, time would begin to run at midnight on 28th – 29th September and would end at midnight on 28th – 29th January, a period embracing four calendar months.'

[107] *EJ Riley Investments Ltd v Eurostile Holdings Ltd* [1985] 3 All ER 181
[108] *Dodds v Walker* [1981] 2 All ER 609

3.3.12 In the Authors' opinion, where, as in para. 46(6), the period is set, not by reference to an event happening before, albeit immediately before, the beginning of the period, but by reference to an event within the period, that period includes the day on which the event occurs. If this is correct, the period in para. 46(6) begins immediately after midnight on the day on which the condition of s.46(3)(a) is satisfied with the result that where that condition is satisfied on 1st March 2014, to adopt Lord Russell's explanation, time would begin to run at midnight on 28th February/1st March 2014 and would end at midnight on 31st August/1st September 2014. So one would express this as being the period 1st March 2014 – 31st August 2014 (inclusive). When the period begins on, say, 31st March 2015, it will end at midnight on the 29th September 2015. Where it begins on the 29th February 2016 it will end on the 30th August 2016. Where it begins to run on the 1st March it will end on 31st August. All of these periods would be inclusive. Although in the Authors' opinion that is the most likely construction of the provision, it is clearly not beyond doubt.

'Considered for tax purposes to be a resident of that country in accordance with its domestic laws': Para. 46(7)(a)

3.3.13 The individual will not satisfy this condition where the country concerned does not use residence to determine chargeability to tax.

3.3.14 What happens if the country concerned determines an individual's residence by criteria which cannot be fulfilled by reference only to the six month period but does so by reference to a period which includes that time?

'... has been present in that country (in person)[109] at the end of each day of the 6-month period': Para. 46(7)(b)

3.3.15 This is a very restrictive provision. It must be satisfied for every day of the six months beginning on the day on which the individual ceases to have a home in the UK. An individual who ceases to have a UK home before he arrives in the overseas country because, for example, he has completed its sale a few days before leaving or he has taken a brief holiday in a third country after ceasing to have a UK home will not satisfy the condition. Indeed, the individual who flies to the new country leaving the UK before midnight on the day that he ceases to have a UK home and arriving in the new country after midnight will not do so. Nor does it matter why he is absent from his new country for there is no relief for exceptional circumstances.

'The [individual's] only home is in that country or ... are all in that country': Para. 46(7)(c)

3.3.16 The acquisition of a home in a third country before the end of the six month period will prevent an individual from having a sufficient link with a country by virtue of satisfying para. 46(7)(c). If for some reason, on the crucial day at the end of the six month period, an individual happens to be between homes or has not yet acquired one he will also not satisfy this condition.

[109] Surely these words are redundant for it is difficult to see how a person can be present in a country without being there in person

Determining the Overseas and UK Parts: Para. 53(4) & 56

The overseas part

3.3.17 In respect of Case 3, the overseas part of a split year is the part of that year which begins with the day on which the individual ceases to have any home in the UK and ends with the last day of the fiscal year.[110]

The UK part

3.3.18 The UK part, therefore, is the inclusive period from the 6th April in the Relevant Year to the day before the start of the overseas part.[111]

[110] Para. 53(4)
[111] Para. 56

SECTION IV

THE SPLIT YEAR CASES: BECOMING UK RESIDENT

INTRODUCTION

4.1.1 The Split Year Cases have their origin in the *Draft June 2012 SRT Schedule*.[112] In that draft there were essentially the same three Split Year Cases applying to those becoming non-UK resident as have now been enacted in the *SRT Schedule* and the equivalent of Cases 4 and 5 in the *SRT Schedule* for those becoming UK resident but combined in a single case. A further case, equivalent to Case 8 in the *SRT Schedule*, was added in the *Draft December 2012 SRT Schedule*.[113] In the Finance Bill the eight Cases appeared in the form in which, subject to minor drafting amendments made at the Report stage, were enacted in the *SRT Schedule*.[114]

4.1.2 These piecemeal changes were made in response to the substantial criticisms of the professional bodies.[115] In spite of the changes made in response to the criticisms of these bodies many difficulties remain.

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112 *Draft June 2012 SRT Schedule* paras. 26-35

113 *Draft December 2012 SRT Schedule* para. 45

114 Substantial amendments were made at the same time to the priority rules now found in paras. 54 & 55 (Parliamentary Debates, HOC Official Report, Public Bill Committee, Finance Bill Tuesday 18th June 2013 pp. 617-625)

115 *CIOT 2012 Response* paras. 16.1–16.9, *STEP 2012 Response* paras. 7–7.3, *ICAEW 2012 Response* paras. 34-35, *LawSoc 2012 Response* paras. 9-18, *STEP 2013 Response* paras. 14-17

CASE 4 - COMING TO HAVE A HOME IN THE UK ONLY: PARA. 47

The Ambit of Case 4

4.2.1 Case 4 of the Split Year Rules is aimed at those who become resident in the UK and come to have a home or homes only in the UK.

Circumstances Falling within Case 4

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

(a) the individual was not resident in the UK for the Preceding Year;[116]

(b) at the start of the Relevant Year, the individual did not meet the only home test, but he begins to meet the test during the Relevant Year and continues to do so for the rest of that year;[117] or

(c) for the part of the Relevant Year before the day on which he meets the conditions of (b) above (which we shall called the 'Non-UK Part of the Year')[118] the individual does not have sufficient UK ties.[119]

Examining Case 4

The Only Home Test: Para. 47(3)

4.2.3 The Only Home Test is met if the individual has only one home and that home is in the UK or he has more than one home and all of them are in the UK.[120]

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116 Para. 47(2)
117 Para. 47(3)
118 We shall see that this is actually exactly the same period as the 'overseas part of the year' in respect of Case 4
119 Para. 47(4)

Sufficient Ties Test: Para. 47(4)

Modifications to paras. 17 – 20 and Part 2: Para. 47(6)

4.2.4 To determine whether the individual has sufficient UK ties one applies the rules which apply generally in respect of the Sufficient Ties Test in paras. 17 - 20[121] and the rules in respect of specific UK ties in Part 2 but subject to the following modifications:-

(a) References to 'Year X', that is to the fiscal year concerned, are to be read as references to what we have called the Non-UK Part of the Year.

(b) Each number of days mentioned in the Tables in paras. 18 and 19 (the Tables used to determine how many ties are sufficient in respect of an individual) are to be reduced by the appropriate number.[122]

The 'Appropriate Number'

4.2.5 The appropriate number is found by multiplying the number of days in each case by the following fraction:-

The number of whole months in the part of the Relevant Year

following the Non-UK Part of the Year

12[123]

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120 Para. 47(5)

121 Para. 20 applies where the individual dies in the year. An individual's circumstances may fall within Case 4 of the Split Year Rules in the year of his death

122 Para. 47(6)

When the modifications do not apply

4.2.6 The modifications set out in (a) above do not apply in determining whether a person with whom the individual might have a relevant relationship is resident for the fiscal year nor do they apply in determining of such a person whether the special rules in paras. 33(3) – (6) concerning children in full-time education, apply.

4.2.7 It will be noticed that this exclusion of the apportionment rules does not apply to the special rules which concern situations where the individual sees his child in the UK on fewer than 61 days in total.[124] Unlike the special rules concerning children in full-time education, restricting the period over which one determines on how many days the individual sees his child in the Non-UK Part of the Year will have the result that it will be less likely that he meets the Sufficient Ties Test for the purposes of Case 4 of the Split Year Rules and, therefore, that it is more likely that his circumstances will fall within that Case.

4.2.8 Whether a day is spent in the UK is relevant to how many ties must be satisfied to meet the Sufficient Ties Test, to the Family Tie and to the 90-Day Tie. A special rule applies, called the Deeming Rule, to treat days on which an individual is present in the UK but is not present there at midnight as days spent in the UK. That rule applies only to the excess, in the fiscal year, of the number of such days over 30. This 30-day limit is not pro-rated for the purpose of Case 4 of the Split Year Rules.

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123 Para. 47(7)
124 Paras. 32(3) & (4)

Determining the Overseas and UK Parts: Paras. 53(5) and 56

The overseas part

4.2.9 In respect of Case 4 of the Split Year Rules, the overseas part of a year is the period ending on the day before the individual first meets the Only Home Test; in other words, it is the Non-UK Part of the Year.[125]

The UK part

4.2.10 The UK part, therefore, is the inclusive period starting on the day after the end of the overseas part and ending on the 5th April at the end of the Relevant Year.

CASE 5 – STARTING FULL-TIME WORK IN THE UK: PARA. 48

The Ambit of Case 5

4.3.1 Case 5 is aimed at those who become resident in the UK and begin to work here. Although the legislation contains the heading 'Case 5: Starting full-time work in the UK' it is not a requirement of Case 5 that an individual should work 'full-time' which is a phrase used in previous drafts of the *SRT Schedule*[126] but rather that he should work 'sufficient hours'.

Circumstances Falling within Case 5

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

[125] Paras. 47(3)(a) & 53(5)
[126] See the *June 2012 SRT Schedule* para. 33(3)(b) and the *December 2012 SRT Schedule* para. 44(3)(b)

(a) the individual was not resident in the UK for the Preceding Year.[127]

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

(i) the period begins with a day that falls within the Relevant Year and is a day on which the individual does more than 3 hours work in the UK;[128]

(ii) in the part of the Relevant Year before the period begins (which we shall again call the 'Non-UK Part of the Year'), the individual does not have sufficient UK ties;[129]

(iii) the individual works sufficient hours in the UK as assessed over the Period under Consideration;[130]

(iv) during the period there are no significant breaks from UK work;[131] and

(v) at least 75% of the total number of days in the period on which the individual does more than 3 hours work are days on which he does more than 3 hours work in the UK.[132]

Examining Case 5

4.3.3 It can be seen that these conditions are closely modelled on the Third Automatic UK Test.

127 Para. 48(2)
128 Para. 48(3)(a)
129 Para. 48(3)(b)
130 Para. 48(3)(c)
131 Para. 48(3)(d)
132 Para. 48(3)(e)

Sufficient UK ties: Para. 48(3)(b)

Modifications to paras. 17 – 20 and Part 2: Para. 48(5)

4.3.4 The rules for determining whether the individual has sufficient UK ties are modified in the same way as they are under Case 4 except that the period for which one is required to find the number of whole months is the one in the part of the Relevant Year beginning with the day 'on which the 365-day period in question begins'.

4.3.5 So, to determine whether an individual has Sufficient Ties, one applies the general Sufficient Ties rules in paras. 17-20[133] and Part 2 subject to the following modifications:-

(a) References to 'Year X', that is to the fiscal year concerned, are to be read as references to what we have called the Non-UK Part of the Year.

(b) Each number of days mentioned in the Tables in paras. 18 and 19 (the Tables used to determine how many ties are sufficient in respect of an individual) are to be reduced by the appropriate number.[134]

4.3.6 The appropriate number is found by multiplying the number of days in each case by the following fraction:-

$$\frac{\text{The number of whole months in the part of the Relevant Year following the Non-UK Part of the Year}}{12}$$[135]

[133] Para. 20 applies where the individual dies in the year. An individual's circumstances may fall within Case 4 of the Split Year Rules in the year of his death

4.3.7 The modifications set out in para.(a) in para. 4.3.5 above do not apply in determining whether a person with whom the individual might have a relevant relationship is resident for the fiscal year nor do they apply in determining of such a person whether the special rules in para. 33 apply.

4.3.8 It will be noticed that this exclusion of the apportionment rules again does not apply to the special rules which concern situations where the individual sees his child in the UK on fewer than 61 days in total. Unlike the special rules concerning children in full-time education restricting the period over which one determines on how many days the individual sees his child in the Non-UK Part of the Year will have the result that it will be less likely that he meets the Sufficient Ties Test for the purposes of Case 5 Split Year Rules and, therefore, that it is more likely that his circumstances will fall within that Case.

Sufficient hours: Para. 48(3)(c)

4.3.9 The normal rules for calculating whether the individual works sufficient hours in the UK apply.[136]

4.3.10 Once again the 30-day period, which is used, under the Deeming Rule, to determine the number of days on which an individual is present in the UK but on which he is not present at midnight which count as days spent in the UK, is not pro-rated.

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134 Para. 48(5)
135 Para. 48(6)
136 Paras. 9(2), 48(3)(c) & (4)

Determining the Overseas and UK Parts: Paras. 53(6) and 56

The overseas part

4.3.11 In respect of Case 5 of the Split Year Rules, the overseas part of a split year is:-

(a) if there is only one period which meets the conditions set out at (b) of para. 4.3.2 above, the part before that period begins; and

(b) if there is more than one such period, the part before the first of those periods begin.[137]

The UK part

4.3.12 The UK part, therefore, is the inclusive period starting on the day after the end of the overseas part and ending on the 5th April at the end of the Relevant Year.

CASE 6 – CEASING FULL-TIME WORK OVERSEAS: PARA. 49

The Ambit of Case 6

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

Circumstances Falling within Case 6

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

(a) the individual was not resident in the UK for the Preceding Year because he met the Third Automatic Overseas Test for that year.[138]

(b) he was resident in the UK for one or more of the four fiscal years immediately preceding that year.[139]

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

(i) begins with the first day of the Relevant Year;[140]

(ii) ends with a day that falls within the Relevant Year and is a day on which the individual does more than 3 hours work overseas;[141] and

(iii) satisfies the overseas work criteria.[142]

(d) the individual is resident in the UK for the Succeeding Year.[143]

Examining Case 6

4.4.3 We shall call the period by which one tests whether (c) above is satisfied the 'Period under Consideration'.

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137 Para. 53(6)
138 Para. 49(2)(a)
139 Para. 49(2)(b)
140 Para. 49(3)(a)
141 Para. 49(3)(b)
142 Para. 49(3)(c)
143 Para. 49(4)

Compliance with EU law?

4.4.4 The well-known Revenue Law specialist, Mr Gordon, has suggested that, because Case 6 of the Split Year Rules will only apply to those who have been resident for one or more of the four fiscal years preceding the Relevant Year,[144] the provisions may be susceptible to challenge under EU law on the basis that they discriminate against non-UK nationals.[145]

UK residence and non-residence: Paras. 49(2) & (4)

4.4.5 The individual must have been resident in the UK for one or more of the four fiscal years before the Preceding Year,[146] non-UK resident in the Preceding Year[147] and UK resident in the Relevant Year.[148] The circumstances of the Case, therefore, include two changes of residence status.

A transitional provision

4.4.6 Where the Preceding Year is 2012/13 and the individual has not made a General Transitional Election under para. 154(3) in respect of it, the requirement that the individual must meet the Third Automatic Overseas Test for the Preceding Year is omitted and replaced by the requirement that he must have been 'working overseas full-time for the whole of that year'.[149] There is no statutory definition of what 'working full-time' means for this purpose but the *Guidance* refers to HMRC's guidance on the

144 Para. 49(2)(b)
145 See Keith Gordon's *Residence: The Definition in Practice 2013/14,* 2nd Edition Claritax Books 2013 at p.101
146 Para. 49(2)(b)
147 Para. 49(2)(a)
148 Para. 49(4)
149 Para. 154(5)(c)

matter in *HMRC6*.[150] In respect of leaving the UK to work abroad full-time, *HMRC6* says:-

> '... (*What we mean by full-time employment*) UK tax law does not give a definition of full time employment. The decision on whether or not you are employed abroad full-time will depend on the particular circumstances of your case.
>
> If you say that you are working abroad full-time, we would expect you to be able to show that your employment:
>
> - has a standard pattern of hours which can be compared to a typical UK working week;
> - or if your employment does not have a formal structure or fixed number of working days, it can, by looking at the local conditions and practices of the particular occupation, be compared to similar full-time employment in the country where you are working.

The Period under Consideration: Para. 49(3)

4.4.7 As we have said, the circumstances of Case 6 require there to be a period of overseas work which ends in the year and which satisfies certain conditions. Although the heading to Case 6 refers to 'Ceasing full-time work overseas' it is not an express requirement that the individual should cease to meet those conditions when the period ends. If, however, the individual were to continue to do so until the end of the Relevant

[150] *Guidance* para. 5.33. *HMRC6* has been withdrawn and replaced by *RDR1* in respect of 6th April 2013 onwards. The guidance in *HMRC6* continues to apply for all fiscal years ending on or before 5th April 2013 and thus applies to pre-commencement years (*RDR1* paras. 2 & 3)

Year he would meet the Third Automatic Overseas Test, be automatically non-resident and the Split Year Rules would not be in point.

4.4.8 As we have seen[151] for the period to satisfy the conditions of para. 49(3) it must begin with the first day of the Relevant Year[152] on which the individual does more than 3 hours work overseas,[153] end with a day within the Relevant Year[154] and satisfy the overseas work criteria.[155]

The overseas work criteria: Para. 49(3)(c) and (5)

4.4.9 A period 'satisfies the overseas work criteria' if:-

(a) the individual works sufficient hours overseas, as assessed over the Period under Consideration;[156]

(b) during that period, there are no significant breaks from overseas work;[157]

(c) the number of days in that period on which an individual does more than 3 hours work in the UK does not exceed the permitted limit;[158] and

(d) the number of days in that period which the individual spends in the UK, ignoring the Deeming Rule,[159] does not exceed the permitted limit.[160]

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151 See paras. 14(3) and 49(7)
152 Para. 49(3)(a)
153 Para. 49(3)(b)(ii). It is interesting that there is no requirement that no work should be performed in the UK on this day so the day with which the period begins could be a disregarded day (see paras. 14(3) and 49(7))
154 Para. 49(3)(b)(i)
155 Para. 49(3)(c)
156 Para. 49(5)(a)
157 Para. 49(5)(b)
158 Para. 49(5)(c)
159 Para. 49(5)(d) & (6)
160 Para. 49(5)(d)

Sufficient hours: Para. 49(7)

4.4.10 In working out whether the individual works sufficient hours overseas over the Period under Consideration, one applies para. 14(3)[161] (which provides a 5-step calculation for the purposes of the Third Automatic Overseas Test) with certain modifications.

4.4.11 The modifications are that one does not apply the 5-step calculation to the fiscal year but to the Period under Consideration and references to 365 are replaced by 'the number of days in the Period under Consideration'. The deduction which is made under Step 3 of the 5-step calculation for gaps between employments is not limited to 30 days in aggregate but to the 'Permitted Limit'.[162]

The Permitted Limit: Para. 49(8) & (9)

4.4.12 The test utilises the phrase 'the permitted limit' (the 'Permitted Limit') in three places. First, under para. 49(5)(c) there is a limit on the number of days in the Period under Consideration on which the individual does more than 3 hours work in the UK. Secondly, under para. 49(7)(d) the limit on the aggregate deduction to be made in calculating whether the individual has worked sufficient hours overseas in the Period under Consideration for gaps between employment is restricted to the Permitted Limit. Finally, under para. 49(5)(d) the number of days which the individual can spend in the UK in the Period under Consideration is restricted to the Permitted Limit.

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161 Para. 49(7)

162 Para. 14(3) is also to be read as if references to 'P' are references to the 'taxpayer', a provision that is necessary because in the split years the draftsman abandons the terminology which he has adopted for referring to the individual concerned and adopts a new convention

4.4.13 The Permitted Limits under paras. 49(5)(c) and (7)(d) are calculated by reducing 30 by the appropriate number. In this case the appropriate number is the result of the formula:-

$$\frac{A \times B}{12}$$

Where A is 30 and B is the number of whole months in the part of the Relevant Year after 'the 365-day period in questions ends'.[163]

4.4.14 In respect of para. 49(5)(d) the Permitted Limit is the number found by reducing 90 by an appropriate number. The appropriate number is again the result of a formula:-

$$\frac{A \times B}{12}$$

Here A is 90 and B is again the number of whole months in the part of the Relevant Year after' the 365-day period in question ends.[164]

4.4.15 What is the '365-day period in question' referred to in the definition of 'B' which is referred to in para. 49(9)? As we have seen, the only period forming part of the circumstances defined in respect of Case 6 is a period, the Period under Consideration, which begins with the first day of the year and ends with the day in the Relevant Year

[163] Paras. 49(8)(a) & (9)
[164] Paras. 49(8)(b) & (9)

when the individual first does more than three hours of work overseas. The only reference to 365 is the instruction in para. 49(7)(c) that in working out whether the individual has worked sufficient hours in the Period under Consideration one applies para. 14(3) as if "365 (or 366 if year X includes 29 February)" read the "number of days in the period under consideration". The only actual period of 365 days which is relevant to Case 6 is the period by which one determines whether the condition is met that the individual 'was not resident in the UK for the previous tax year because the taxpayer met the third automatic overseas test for that year' and that is a period defined by reference to the Preceding Year.

4.4.16 The reference to 'the 365-day period in question' in para. 49(9) would appear to be a drafting error.

4.4.17 How then is one to construe it? It must be a period which ends in the fiscal year concerned. The only such period referred to in para. 49 is the Period under Consideration which is to be substituted for the 365 (or 366) day-period referred to in para. 14(3). It may be that the Courts will, therefore, construe the phrase 'the 365 day period' as referring to the Period under Consideration which, of course, will not be a period of 365 days because, if it were, the Third Automatic Overseas Test would apply and the Split Year Rules would not be in point. That could not be supported as a literal reading but it appears to be the only way of giving a sensible effect to the statutory words.[165]

Determining the Overseas and UK Parts: Paras. 53(7) & 56

The overseas part

4.4.18 In respect of Case 6 of the Split Year Rules, if there is only one period that satisfies the conditions of para. 49(3), the overseas part of a year is the part ending with the last day of that period. If there is more than one such period, it is the part ending with the last day of the longest of those periods.

The UK part

4.4.19 The UK part of the year is the part beginning with the day after the end of the overseas part and ending with the last day of the fiscal year.

CASE 7 - THE PARTNER OF SOMEONE CEASING FULL-TIME WORK OVERSEAS: PARA. 50

The Ambit of Case 7

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

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[165] The *Guidance* does not reveal that HMRC are aware of this fault in the legislation

Circumstances Falling Within Case 7

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

(a) the individual, who in respect of this Case we shall refer to as the Accompanying Spouse, was not resident in the UK for the Preceding Year;[166]

(b) the Accompanying Spouse has a Partner whose circumstances fall within Case 6 for the Accompanying Spouse's Relevant Year or Preceding Year;[167]

(c) on a day in the Relevant Year, the individual moves to the UK so the individual and the Partner can continue to live together on the Partner's return or relocation to the UK.[168]

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

(i) the Accompanying Spouse has no home in the UK at any time, or has homes in both the UK and overseas but spends the greater part of the time living in the overseas home; and

(ii) the number of days that the Accompanying Spouse spends in the UK does not exceed the Permitted Limits.[169]

(e) the Accompanying Spouse is resident in the UK for the Succeeding Year.[170]

166 Para. 50(2)
167 Para. 50(3)
168 Para 50(4)
169 Para. 50(5)

Examining Case 7

A comparison with Case 2

4.5.3 It will be seen, that Case 7 has many similarities with Case 2 which applies, loosely, to an Accompanying Spouse of someone starting full-time work overseas. In examining that Case, we discussed the meaning of 'Partner'.

Para. 50(4)

4.5.4 We also discussed the difficulties which arise from the requirement of that case that the Accompanying Spouse should move overseas 'so the taxpayer and the Partner can continue to live together'. The equivalent condition of Case 7, however, is expressed rather differently from that in Case 2. In respect of Case 2, as we have seen, para. 45(4) requires the individual to move 'overseas so the taxpayer and the Partner can continue to live together *while the partner is working overseas* [emphasis added]'. Para. 50(4) requires that the Accompanying Spouse move 'to the UK so the taxpayer and the Partner can continue to live together *on the partner's return or relocation to the UK*'.

4.5.5 There are considerable difficulties where there is a large gap between the Partner moving to the UK and the putative Accompanying Spouse doing so at a later date. It is also difficult to see how para. 50(4) can be satisfied where the putative Accompanying Spouse's move to the UK precedes the Partner's return or relocation.

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[170] Para. 50(6)

'The Partner's return or relocation to the UK'

4.5.6 What is the Partner's return or relocation to the UK? As we have seen, in order to fall within Case 6, the Partner must have been resident in the UK for one or more of the four fiscal years immediately preceding the Preceding Year in respect of him, non-resident for his Preceding Year and resident in the UK for his Relevant Year. For the Partner to have a 'return or relocation to the UK' is anything more required than compliance with these conditions and with the other conditions of Case 6? Paragraph 50(4) assumes that there is such a return or relocation as it refers to. Perhaps, therefore, there being such a return or relocation is an inevitable consequence of the other conditions of Case 7 being met? But if that is the case, one wonders why the draftsman did not adopt some such form as 'so the taxpayer and the Partner can continue to live together after the end of the period referred to in para. 49(3)' (which is the overseas part of the year in respect of the Partner) in respect of the year in which para. 49 applies to the Partner. If the Partner has met the conditions of Case 6 for the Accompanying Spouse's Preceding Year it is difficult to characterise the Accompanying Spouse as meeting the condition of Case 7 that in the next year she moves 'to the UK' so the [Accompanying Spouse] and the Partner can 'continue to live together *on* [emphasis added] the partner's return or relocation to the UK'.

4.5.7 A further puzzle is why the draftsman provides the alternative descriptions 'return or relocation'. A relocation indicates a change of place but not necessarily a return to the same place. So the natural distinction between the two terms would be that a return indicates that the Partner has been in the UK before and a relocation does not. As we have seen, however, Case 6 requires that the individual should have been resident in the

UK for one or more of the four fiscal years immediately preceding the Preceding Year. In what circumstances will the Partner have a 'relocation' and not a return? Is this a mere redundancy?

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

4.5.9 If the Partner's circumstances fall within Case 6 for the Accompanying Spouse's Relevant Year the deemed arrival day is the later of:-

(a) the day in the Relevant Year when the individual moves to the UK in conformity with condition (c) above; and

(b) the first day of what is, for the Partner, the UK part of the Relevant Year as defined for Case 6.[171]

4.5.10 If the Partner's circumstances fall within Case 6 for the Accompanying Spouse's Preceding Year, the deemed arrival day is the day on which the Accompanying Spouse moves to the UK in conformity with condition (c).[172]

[171] Para. 50(7)
[172] Para. 50(8)

4.5.11 We have already examined the difficulties which arise in determining the 'deemed departure day' under Case 2 of the Split Year Rules. Similar issues will arise in respect of the meaning of the 'deemed arrival day'.

'Spends the greater part of the time'

4.5.12 Similarly, we have examined the difficulty of the requirement of Case 2 of the Split Year Rules in para. 45(5)(a) that the Accompanying Spouse should spend 'the greater part of … [his] … time living in the overseas home'. Similar issues arise in respect of the requirement in para. 50(5)(a) that the Accompanying Spouse should spend 'the greater part of … [his] … time living in the overseas home'. The use of the phrase 'living in' would seem to import a requirement for some quality which is beyond mere presence, but what that quality is and how it is to be determined is unclear.

The Permitted Limit: Para. 50(5)(b), (9) & (10)

4.5.13 The Permitted Limit referred to in para. 50(5)(b) is found by reducing 90 by the appropriate number. The appropriate number is a result of the following formula:-

$$\frac{A \times B}{12}$$

Where A is 90 and B is the number of whole months in the part of the Relevant Year beginning with the deemed arrival day.

Transitional provision: Para. 156

4.5.14 Because the condition of para. 50(3), that the Partner's circumstances fall within Case 6 of the Split Year Rules may be satisfied in respect of the Accompanying Spouse's Preceding Year, that condition could relate to 2012/13 if the Accompanying Spouse's Relevant Year is 2013/14. The SRT was not in force in 2012/13 so there is a need for a transitional provision which is found in para. 156:-

> '(2) The circumstances of a partner of the taxpayer are to be treated as falling within Case 6 for the previous tax year if the partner was eligible for split year treatment in relation to that tax year under the relevant ESC on the grounds that he or she returned to the United Kingdom after a period working overseas full-time.
>
> (3) Where the circumstances of a partner are treated as falling within Case 6 under sub-paragraph (2), the reference in paragraph 50(7)(b) to the UK part of the relevant year as defined for Case 6 is a reference to the part corresponding, so far as possible, in accordance with the terms of the relevant ESC, to the UK part of that year.
>
> (4) "The relevant ESC" means whichever of the extra-statutory concessions to which effect is given by Part 3 of this Schedule is relevant in the partner's case.'[173]

[173] Paras. 156(2) – (4)

4.5.15 Just as it fails to do so in respect of para. 155, so the legislation does not specify which Extra Statutory Concessions 'to which effect is given by Part 3 of this Schedule is relevant in the Partner's case' nor any principle by which one could determine which concession is so relevant.

Determining the Overseas and UK Parts: Para. 53(8) and 56

The overseas part

4.5.16 In respect of Case 7 of the Split Year Rules the overseas part of a year is the part before the deemed arrival day.[174]

The UK part

4.5.17 The UK part of the year is the part beginning with the day after the end of the overseas part and ending with the last day of the fiscal year.[175]

CASE 8 – STARTING TO HAVE A HOME IN THE UK: PARA. 51

The Ambit of Case 8

4.6.1 Case 8 is aimed at individuals who start to have a home in the UK. Unlike Case 4 it is not necessary for the individual to come to have a home only in the UK.

Circumstances Falling Within Case 8

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

[174] Para. 53(8)
[175] Para. 56

(a) the individual is not resident in the UK for the Preceding Year;[176]

(b) at the start of the Relevant Year, the individual had no home in the UK but during that year, he starts to have a home in the UK and continues to have a home in the UK for the rest of the Relevant Year and for the whole of the Succeeding Year.[177]

(c) for the part of the Relevant Year before the day on which he begins to have a UK home within (b), which we shall call the 'Non-UK Part of the Year,' he does not have sufficient UK ties;[178]

(d) the individual is resident in the UK for the Succeeding Year and that year is not a split year in respect of the individual.[179]

Examining Case 8

Para. 51(3)(b)

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

176 Para. 51(2)
177 Para. 51(3)
178 Para. 51(4)
179 Para. 51(5)

Para. 51(4) & (6)

4.6.4 Once again, to determine whether the individual has Sufficient UK ties one applies the rules which apply generally in respect of the Sufficient Ties Test in paras. 17 - 20[180] and the rules in respect of specific UK ties in Part 2 but subject to the following modifications:-

(a) References to 'Year X', that is to the fiscal year concerned, are to be read as references to what we have called the Non-UK Part of the Year;

(b) Each number of days mentioned in the Tables in paras. 18 and 19 (the Tables used to determine how many ties are sufficient in respect of an individual) are to be reduced by the appropriate number.[181]

4.6.5 The appropriate number is found by multiplying the number of days in each case by the following fraction:-

$$\frac{\text{The number of whole months in the part of the Relevant Year following the Non-UK Part of the Year}}{12}$$[182]

4.6.6 The modifications set out in (a) in para. 4.6.2 above do not apply in determining whether a person with whom the individual might have a relevant relationship is resident for the

[180] Para. 20 applies where the individual dies in the year
[181] Para. 51(6)
[182] Para. 51(7)

fiscal year nor do they apply in determining of such a person whether the special rules in para. 33 apply.[183]

4.6.7 It will be noticed that this exclusion of these apportionment rules does not apply to the special rules which concern situations where the individual sees his child in the UK on fewer than 61 days in total.[184] Unlike the special rules concerning children in full-time education, restricting the period over which one determines on how many days the individual sees his child in the Non-UK Part of the Year will have the result that it will be less likely that he meets the Sufficient Ties Test for the purposes of Case 4 of the Split Year Rules and, therefore, that it is more likely that his circumstances will fall within that case.

4.6.8 Paragraph 20 applies where the individual dies in the year. As we have seen, an individual's circumstances can only fall within Case 8 of the Split Year Rules where the individual is resident in the UK in the Succeeding Year. A person who is dead cannot be resident in the UK so it appears that the inclusion of para. 20 in the list of paragraphs to which para. 50(6) is to apply is a redundancy. The same point does not apply to Cases 4 or 5 which also modify the Sufficient Ties Test but which do not include a condition that the individual be resident in the UK in the Succeeding Year.

183 Para. 51(8)
184 Paras. 32(3) & (4)

'The taxpayer is resident in the UK for the next tax year and that tax year is not a split year as respects the taxpayer': para. 51(5)

4.6.9 We have seen that it is possible for a split year within Cases 4 – 8 (the Split Year Cases which concern becoming UK resident) to be succeeded by a split year within Cases 1 – 3 (the Split Year Cases concerning ceasing to be UK resident). Were it not for para. 51(5), therefore, it would be possible for a year which is a Relevant Year in respect of Case 8 to be succeeded by a year which is a Relevant Year in respect of Cases 1 – 3. Para. 51(5) provides, however, that the individual must be resident in the year for the Succeeding Year and that year must not be a split year.

Determining the Overseas and UK Parts: paras. 53(9) and 56

The overseas part

4.6.10 In respect of Case 8 of the Split Year Rules, the overseas part of a year is the part ending with the day before the individual first comes to have a home in the UK within para. 51(3)(a).[185]

The UK part

4.6.11 The UK part of the year is the part beginning with the day after the end of the overseas part and ending with the last day of the fiscal year.[186]

[185] Para. 53(9)
[186] Para. 56

SECTION V

TEMPORARY NON-RESIDENCE: AN INTRODUCTION

WHY A TEMPORARY NON-RESIDENCE CHARGE?

5.1.1 Part 4 of the *SRT Schedule*, which contains thirty-six paragraphs covering 23 pages in the HMSO Edition of FA 2013, is headed 'Anti-Avoidance'. In fact its provisions are not restricted to transactions effected in order to reduce or eliminate taxation but, rather, bring into charge in a subsequent sole residence period certain income arising, and capital gains realised, in a preceding temporary period of non-residence regardless of the motivation of the person to whom the income and gains arise.[187]

The *June 2011 ConDoc*

5.1.2 The *June 2011 ConDoc* explained:-

> '... Ceasing to be UK resident means that an individual is no longer liable to UK tax on income from non-UK sources. In many instances there can also be a reduced tax liability on income from UK sources. This can result in people finding it advantageous to become not resident for a short period of time[188] if

[187] We call the provisions relating to temporary non-residence in the *SRT Schedule* the 'TNR Provisions'

[188] It is clear that, under the law in force before the introduction of the SRT, where a person had been resident in the UK he was unlikely to have ceased to reside in the UK unless there was a distinct break in the pattern of his life (*Re Combe* (1932) 17 TC 405 at p.411, *Grace v HMRC* [2009] EWCA Civ 1082). It is also clear that a person could continue to be resident in the UK even when he spent most of his time over several years outside it (*Lysaght v CIR* HL [1928] 13 TC 526, *Yates v HMRC* TC 2220 [2012] UK FTT 568 (TC)). One could not, therefore, become resident for a 'short period of time' without a considerable disruption, or a distinct break in the pattern, of one's life. The same is true under the SRT because of the Sufficient Ties Test and the regard which the test has to previous periods of UK residence

they expect substantial amounts of income to arise which otherwise would be liable to tax in the UK. This leads to a cost to the Exchequer.

... A similar position used to arise for capital gains tax (CGT). It was possible for individuals to leave the UK temporarily and realise capital gains in the period of non-residence and therefore be exempt from liability to UK tax on those gains. Legislation was enacted in Finance Act 1998 to counter such avoidance of CGT.

... Introducing a statutory definition will make it clearer when a person is tax resident or not resident in the UK. This could enable those who want to avoid liability on substantial amounts of income to plan short periods of temporary non-residence with more certainty.'[189]

5.1.3 The Consultation Document went on to assert that:-

'... The SRT rules will therefore need to counteract the risk of individuals creating artificial short periods of non-residence, during which they receive a large amount of income (which accrued during periods of UK residence) free of UK tax and then bring the income back into the UK tax-free. This activity would undermine the effectiveness of an SRT and present an unacceptable risk to the Exchequer.'[190]

[189] *June 2011 ConDoc* paras. 3.47 – 3.49
[190] *June 2011 ConDoc* para. 3.50

The STEP's response

5.1.4 In its response the STEP pointed out that:-

> ' … individuals are no likelier to become non-resident for this purpose than they were under the current rules. We do not agree that the introduction of the statutory residence rules create an added risk to the Exchequer, that risk has always been there.'[191]

5.1.5 The Government ignored the STEP's response in the *June 2012 ConDoc* asserting that:-

> 'Respondents were generally content in principle with this proposal.'

THE PRE-COMMENCEMENT TNR PROVISIONS

5.2.1 As the *June 2011 ConDoc* said, there were temporary non-residence rules before the introduction of the SRT which had grown piecemeal over time. We shall call these the 'Pre-Commencement TNR Provisions'.

The Statutory Provisions

5.2.2 In 1998, a new section 10A[192] was inserted into TCGA 1992 creating a temporary non-residence charge in respect of capital gains. Ten years later, in 2008, ITTOIA 2005

[191] *STEP 2011 Response* para. 7
[192] FA 1998 s.127(1)

s.832A[193] was introduced imposing a temporary non-residence charge in respect of relevant foreign income charged on the Remittance Basis. Finally FA 2011[194] introduced ITEPA 2003 s. 576A imposing a temporary non-residence charge on withdrawals from foreign pensions and s.579CA imposing such a charge on withdrawals from registered pension schemes.

The Regulatory Provisions

5.2.3 Temporary non-residence charges were also created by statutory instrument in respect of pension schemes by the Pensions Schemes (Taxable Property Provisions) Regulations 2006 (SI 2006/1958) and by the Offshore Funds (Tax) Regulations 2009 (SI 2009/3001).[195]

Differences between the Pre-Commencement TNR Provisions and the New Provisions

5.2.4 There are significant differences between the Pre-Commencement TNR Provisions and the TNR Provisions in the *SRT Schedule*. The new versions of what were the Pre-Commencement TNR Provisions have been harmonised and included within the much broader range of provisions imposing charges in respect of income and gains arising in temporary periods of non-residence under Part 4.

193 FA 2008 s.25 and Sch 7 paras. 46 and 53
194 FA 2011 Sch 16 paras. 21(1) and (4) and 22(1) and (3)
195 These provisions have been amended and harmonised with the temporary non-residence provisions of Part 4 by the Temporary Non-Residence (Miscellaneous Amendments) Regulations 2013 (SI 2013/1810)

DEFINITIONS

5.3.1 Paragraphs 109-115, after another signposting provision in para. 109, contain the general definitions in respect of the TNR Provisions which are then used in the substantive provisions which follow. As we have said, in addition to the terminology used in the legislation which we discuss below, in our discussion of the provisions of Part 4 we use the term the 'TNR Provisions' to refer to the substantive charging provisions relating to periods of temporary non-residence determined under Part 4.

Temporarily Non-Resident

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

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

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

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

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

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

(d) the temporary period of non-residence is five years or less.[196]

[196] Para. 110

Residence Period

5.3.3 For this purpose a 'residence period' is:-

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

(b) the overseas part or the UK part of a fiscal year that, as respects the individual, is a split year.[197]

Sole UK residence

For a fiscal year

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

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

(b) there is no time in that year when the individual is Treaty non-resident.[198]

For a part of a split year

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

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

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197 Para. 111

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

(b) there is no time in that part of the year when the individual is Treaty non-resident.[199]

Treaty non-resident

5.3.6 An individual is 'Treaty non-resident' at any time 'if at the time the individual falls to be regarded as resident in a country outside the UK for the purposes of double taxation arrangements having effect at the time.'[200]

Double taxation arrangements

5.3.7 'Double taxation arrangements' are arrangements that have effect under TIOPA 2010 s.2(1)[201] which gives effect to arrangements where:-

'...Her Majesty in Council declares –

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

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

Temporary Period of Non-Residence

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

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

[200] Para. 112(3)

(a) 'the end of period A, and

(b) the start of the next residence period after period A for which the individual has sole UK residence.'[202]

The Year of Departure

5.3.9 For the purposes of these provisions 'the year of departure' is the fiscal year consisting of or including Period A.[203]

The Period of Return

5.3.10 The 'period of return' is the first residence period after Period A for which the individual has sole UK residence.[204]

TRANSITIONAL PROVISIONS

Differences between the Pre-Commencement TNR Provisions and the TNR Provisions

5.4.1 There are two important differences between the methods of determining the temporary period of non-residence[205] under the TNR Provisions and under the Pre-Commencement TNR Provisions. First, the Pre-Commencement TNR Provisions applied where there were '*fewer than five years* [emphasis added] of assessment falling between the year of departure and the year of return'[206] whereas under the TNR Provisions the equivalent

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201 Para. 145
202 Para. 113. For the meaning of 'Period A' see para. 5.3.2 above
203 Para. 114
204 Para. 115
205 This phrase is not used in the Pre-Commencement TNR Provisions
206 See for example TCGA 1992 s.10A(1)(c) before amendment by para. 119 of the *SRT Schedule*

requirement is that the 'temporary period of non-residence is 5 years or less'.[207] Thus the Pre-Commencement TNR Provisions used fiscal years rather than calendar years and the requirement was for fewer than five such years rather than five calendar years or less.

5.4.2 Where the temporary period of non-residence spans the introduction of the SRT on 6 April 2013 which rules apply?

Para. 158

5.4.3 Paragraph 158(1) provides that:-

> 'The existing temporary non-resident provisions,[208] as in force immediately before the day on which this Act is passed, continue to have effect on and after that day in any case where the year of departure (as defined in Part 4 of this Schedule) is a tax year before the tax year 2013-14.'

[207] Para. 110(1)(d)

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

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

5.4.4 Although para. 158(1) provides that in the circumstances it sets out 'the existing temporary non-resident provisions, as in force immediately before the day on which [FA 2013 was] passed, continue to have effect', it does not expressly say that the TNR Provisions of Part 4 do not have effect. Paragraph 153(3) provides, however, that Part 4 'has effect if the year of departure (as defined in that Part) is the tax year 2013-14 or a subsequent tax year'. As we have seen, the year of departure is a fiscal year consisting of or including Period A. Period A is the final period of sole UK residence before a temporary period of non-residence. If the year of departure is the fiscal year 2013/14[209] the temporary period of non-residence cannot begin before that year.

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

5.4.6 There is undoubtedly a difficulty here on a close reading of the provisions but the Courts may well take a broad approach to their construction in order to avoid redundancy and

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

determine what is a year of departure in respect of a fiscal year before 2013/14 in accordance with the provisions of Part 4 in spite of the express words of para. 153(3).

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

> '... (a) the question of whether a person is or is not resident in the UK for the tax year 2013-14 or a subsequent tax year is to be determined for the purposes of those provisions in accordance with Part 1 of this Schedule, [210] but
>
> (b) the effect of Part 3 is to be ignored.' [211]

Direct and indirect effect of the Split Year Rules

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

5.4.9 The Split Year Rules do indirectly affect an individual's residence status because they form an element of the Fourth[212] and Fifth[213] Automatic Overseas Tests and the Fourth

[210] Para. 158(2)(a)
[211] Para. 158(2)(b)
[212] Para. 15(2)(b)
[213] Para. 16(2)(b)

Automatic UK Test.[214] One might think that the exclusion of Part 3 by para. 158(2)(b) in determining residence in 2013/14 onwards for the purpose of the Para. 158 Pre-Commencement Provisions is of significance because it requires these tests to be applied without reference to the Split Year Rules.

5.4.10 As we have seen, however, under para. 158(1), the Para. 158 Pre-Commencement Provisions can only have effect where the year of departure, that is the last fiscal year which contains a period of sole UK residence, is before 2013/14. It must be succeeded by a period of non-UK residence and will only affect the taxation liabilities arising in the first period of UK residence after this period of non-residence. A split year is a year in which an individual is UK resident. Where the Para. 158 Pre-Commencement Provisions apply to a period of non-residence straddling 6 April 2013 there cannot be a part of that period falling after 5 April 2013 which is a split year because under the Pre-Commencement TNR Provisions a temporary non-residence period comprises complete fiscal years in which the individual concerned was not UK resident. Therefore, in determining residence for the period following the temporary period of non-residence there cannot be a preceding year starting after 5 April 2013 which is a split year. How can it matter, therefore, that, where the 'existing temporary non-resident provisions ... continue to have effect', 'Part 3 is to be ignored' in determining 'the question of whether a person is or is not resident in the UK for the tax year 2013-14 or a subsequent year'?

[214] Para. 10(1)(c)

Pre-Commencement Years: Para. 157

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

'(c) at least 4 out of the 7 tax years immediately preceding the year of departure was a tax year meeting the following conditions –

(i) the individual was resident in the UK for that year, and

(ii) there was no time in that year when the individual was Treaty non-resident (see paragraph 112(3)).'

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

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

5.4.13 This presents two interesting points.

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

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

'... for that ... year'

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

> 'An individual who, in accordance with the statutory residence test, is resident (or not resident) in the UK "for" a tax year is taken for the purposes of any enactment relating to relevant tax to be resident (or not resident) there at all times in that tax year.'

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

AN EXAMPLE

5.5.1 Example 5.1 illustrates the application of the TNR Provisions:-

Example 5.1

The Situation

Mr A was an investment banker who had always lived in the UK. On his retirement, tired with the constant denigration of his profession in the UK, he decided to move with his family to Shangri-La where the contribution of bankers to the world economy was respected. On 1st June 2013 he moved with his wife, infant son and daughter and widowed mother to take up residence in a house in Shangri-La, which he owned and which had previously been let to tenants, as his home. On 30th August 2013 he sold his home in the UK. It is assumed that this UK property ceased to be his home on that day. He had no other homes than these at any time relevant to this example.

From moving to Shangri-La on 1st June 2013 until the end of the fiscal year 2017/18 he spent just 14 days in the UK in each year visiting it in November to see friends and staying in hotels when he did so.

On 30th April 2015 he sold some shares in a UK company which he had acquired many years before, making a gain of £20 million.

On 1st August 2018 his mother, on a visit to the UK, was involved in a serious car accident. She was in a coma until 31st December 2018, was in serious danger of her life until 28th February 2019 and was convalescing until 3rd April 2019. Mr A and his wife flew to the UK on 2nd August 2018 and stayed in hotels near to the hospital to be near Mr A's mother until 3rd April 2019. It is assumed that none of the hotels in which they stayed became their home. On 3rd April 2019, Mr and Mrs A, his mother and children returned to Shangri-La together.

Mr A was not Treaty non-resident at any time.

Mr A's wife was not an employee or director or conducting a trade at any time relevant to this example.

Analysis

Para. 110(1)(a)

All years up to and including 2012/13 were years when Mr A had sole UK residence.[215] In respect of Mr A, 2013/14 was a split year under Case 3 of the Split Year Rules.[216] The overseas part of that year began on 30th August 2013 when Mr

[215] Para. 112(1)
[216] Para. 46

A ceased to have any home in the UK and so the period up to 29th August 2013 was a sole UK residence period.[217] So Mr A had a sole UK residence period (Period A) which ran from 6th April 2013 to 29th August 2013 (inclusive).

Para. 110(1)(b)

Immediately following the ending of Period A on 29th August 2013 Mr A did not have sole UK residence. In respect of a residence period which is a part of a split year, an individual can have sole UK residence only in the UK part.[218]

Para. 110(1)(c)

His year of departure was the fiscal year which included Period A; that is, 2013/14. At least 4 of the 7 years immediately preceding his year of departure had been years in which Mr A had sole UK residence. He had in fact been resident in the UK in all 7 of those years.

Para. 110(1)(d)

Mr A became UK resident again in 2018/19 under the First Automatic UK Test because he spent more than 183 days in the UK in that year. This was so even if his entire stay in the UK in the fiscal year 2018/19 was due to exceptional circumstances within paras. 22(4) and (5).[219] He spent 244 days in the UK in that

[217] Paras. 46(3)(a), 53(4) and 112(2)
[218] Para. 112(2)
[219] In respect of fiscal years before 2013/14 the Authors' understand that HMRC has not normally accepted that an individual who travelled to the UK to be with such a relative falls within the non-statutory exceptional circumstances exception. The *Guidance* says, however, in respect of the SRT that '... there may also be limited situations where an individual who comes back to the UK to deal with a sudden life threatening illness or injury

fiscal year and only 60 of these could be disregarded under the Exceptional Circumstances Exception. So at least 184 days were counted as days spent in the UK and he was UK resident under the First Automatic UK Test.

He did not meet the conditions of Cases 4 – 8 of the Split Year Rules in that year (the cases which apply to persons becoming resident in the UK) because he did not have a home in the UK in the year,[220] he did not work at all in the year[221] and he did not move to the UK with a partner whose circumstances fell within Case 6.[222]

His temporary period of non-residence, therefore, began on 30th August 2013 and ended on 5th April 2018 (inclusive).[223] That was a period of five years or less and so he was temporarily non-resident.[224]

The result of this was that the gain he made on 30th April 2015 was deemed to accrue on 6th April 2018 under TCGA 1992 s.10A and he was chargeable to UK CGT.[225]

His care for his mother had proved to be very costly indeed.

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to a partner or dependent child can have those days spent in the UK ignored ...' (see *Guidance* paras. B11 & B12)

220 Paras. 47 & 51

221 Paras. 48 & 49

222 Para. 50

223 Para. 113

224 Para. 110(1)(d)

225 Para. 119 and TCGA 1992 s.10A