IBC CONFERENCE:

THE PRACTICAL A – Z OF RESIDENCE AND DOMICILE

PLANNING FOR THE UNEXPECTED: BIRTH, RELATIONSHIPS, NEW DIRECTIONS, ACCIDENT, ILLNESS AND DEATH

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INDEX

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SECTION NO.	SECTION

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SECTION I

INTRODUCTION

THE VICISSITUDES OF LIFE

1.1.1 One does not, in general, change one's country of residence lightly. Such a change involves major changes to one's mode of life.

1.1.2 Because the SRT is so complex and contains many uncertainties of construction, it is difficult for taxpayers, indeed for their advisers as well, to predict the effects on their residence of changes in their personal circumstances.

THE SCOPE OF THIS PAPER

1.2.1 In this paper we look at each stage of a person's life to identify particular difficulties, anomalies and traps.

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SECTION II

PRE-EXISTENCE

INTRODUCTION

2.1.1 The draftsman of the SRT seems to have been a believer in the doctrine of pre-existence.

THE ANOMALY

2.2.1 Para. 2(3)[1] provides that:-

> 'An individual who … 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.'

2.2.2 An individual born in a fiscal year and UK resident for that year, therefore, is in the anomalous situation that he is to be treated as resident in the UK at a time before he exists.

[1] All references in these notes are to FA 2013 Sch. 45 unless otherwise stated

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PRACTICAL EFFECT?

2.2.3 Pleasing though this anomaly is for those who enjoy logical quirks, it does not appear that it has any practical effect. That is because a person will only normally be chargeable to Income Tax on income which arises, or is deemed to arise, to him and to CGT on disposals made, or deemed to be made, by him. Similarly, it seems to have no effect for IHT purposes. The provisions of IHTA 1984 s.267, for example, operate by reference to residence at any time in a year of assessment rather than at any particular time.

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SECTION III

BIRTH

INTRODUCTION

3.1.1 The SRT contains a number of provisions modifying its effect when an individual dies during the fiscal year concerned but it contains no specific provisions relating to the birth of the individual. The provisions of the SRT, however, include many that require conditions to be satisfied in the Preceding Year[2], or the Succeeding Year[3] or over a period or at a particular time in the fiscal year concerned. Birth is preceded by a time when the individual concerned is not in existence. Death is, at least in law, succeeded by such a time. When a person does not exist he cannot meet a positive condition such as that he is 'resident in the UK' although arguably he can meet a negative condition or, perhaps to put it more accurately, a condition may be satisfied that at a particular time a state of affairs in relation to him did not exist. So for example a person who is born and dies in the year may, arguably, meet the condition of the Fourth Automatic Overseas Test that he 'was resident in the UK for neither of the 2 tax years preceding' the year concerned.[4]

3.1.2 A person who is born in a fiscal year will not fulfil any positive condition in respect of a prior year. They may also not be able to fulfil positive conditions in respect of a period

[2] See for example para. 13(a)
[3] See for example para. 44(4)
[4] Para. 15(1)(b). This is not a well drafted provision. Surely it should have been that he 'was not resident in the UK for either of the two tax years preceding' the year concerned

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ending in the relevant year which begins before their birth and, of course, there will be conditions, such as the requirement to work sufficient hours[5] either in the UK or overseas, which is relevant to various tests in the SRT which an infant cannot fulfil.[6]

UK RESIDENCE

The Automatic Overseas Tests

The First and Second Automatic Overseas Tests

3.2.1 Thus a child born in the fiscal year cannot meet the First Automatic Overseas Test because he will not meet the positive condition that he 'was resident in the UK for one or more of the 3 tax years preceding' the fiscal year concerned. If he spends less than 46 days in the UK in the fiscal year of his birth he will be automatically non-resident because he will meet the Second Automatic Overseas Test because the negative condition will be met that he 'was resident in the UK for none of the 3 tax years preceding' the fiscal year concerned. If he was born on or after 20th February[7] in the fiscal year he cannot have spent 46 days or more in the UK in that year and so he must be automatically non-resident. That of course will mean that such a child could not meet the First Automatic Overseas Test in the fiscal year after the year of his birth because again he could not meet the condition that he 'was resident in the UK for one or more of the 3 tax years preceding' the year concerned.

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5 Paras. 9(1)(a), 14(1)(a), 44(5)(a), 48(3)(c) and 49(5)(a)

6 The only circumstances in which this might not be the case is in respect of an hereditary office

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The Third Automatic Overseas Test

3.2.2 One assumes that a child born in the fiscal year cannot meet the Third Automatic Overseas Test which requires that the individual concerned 'works sufficient hours overseas, as assessed' over the fiscal year.[8]

The Fourth Automatic Overseas Test

3.2.3 An individual born in the year can meet the Fourth Automatic Overseas Test because it will be possible for the negative condition to be fulfilled that he 'was resident in the UK for neither of the 2 tax years preceding' the year concerned.[9]

3.2.4 If such an individual meets the Fourth Automatic Overseas Test he will also meet the Second Automatic Overseas Test, because he will meet the requirement of both tests as to prior non-residence and as to spending less than 46 days in the UK in the fiscal year concerned.

The Fifth Automatic Overseas Test

3.2.5 An individual born in the fiscal year, indeed any young child, will not meet the condition that he 'would meet the third automatic overseas test for [the fiscal year concerned] if [that Test] were read with the relevant modifications' because he will not be able to fulfil the conditions as to working sufficient hours overseas.[10]

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7 Or the 21st February in a leap year
8 Para. 14(1)(a)
9 Para. 15(1)(b)
10 Paras. 14(1)(a) & 16(1)(c)

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3.2.6 Even if that were not the case, a child born in the fiscal year concerned or in the Preceding Year will not meet the condition that he either 'was resident for neither of the 2 tax years preceding ... [the fiscal year concerned] ... because … [he] … met the third automatic overseas test for each of those years' or alternatively [his] case falls within [para. 16(2)]'. The conditions of para. 16(2) are that he was not resident for the Preceding Year because he met the Third Automatic Overseas Test and that the year before that was a split year in respect of him because his circumstances in that year fell within Case 1 of the Split Year Cases. As he would not have been in existence in the Preceding Year, or in the year before that, he could not have met the Third Automatic Overseas Test or the conditions of Case 1 of the Split Year Rules in those years.

3.2.7 Indeed, because of the requirement in respect of the Preceding Year and the year preceding that year that the individual should either meet the Third Automatic Overseas Test (with the relevant modifications) or fall within Case 1 of the Split Year Rules (involving 'starting work full-time overseas'),[11] it is unlikely that an individual could meet the Fifth Automatic Overseas Test until he was of an age very near to his majority.

A summary of the application of the Automatic Overseas Tests in the year of birth

3.2.8 So a person born in the fiscal year concerned can only meet the Second and Fourth of the Automatic Overseas Tests, and, if he meets the Fourth Automatic Overseas Test, he will also meet the Second Automatic Overseas Test.

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The Automatic UK Tests

The First Automatic UK Test

3.2.9 A child born on or after 6th October[12] cannot meet the condition that he spends at least 183 days in the UK in the fiscal year concerned and so cannot meet the First Automatic UK Test.

The Second Automatic UK Test

3.2.10 We have already seen that a child born on or after 20th February (in a year which is not a leap year) cannot be resident in the UK in that fiscal year because he will not have been resident in any previous year and he would not have spent at least 46 days here. When a child is born in the year and does not meet the Second Automatic Overseas Test it will always be possible for him to meet the Second Automatic UK Test. That is because that test applies by reference to a 91-day period but one which need only have at least 30 days falling in the fiscal year concerned. If a child is born before 20th February in a fiscal year it will be possible for there to be such a 91-day period. In practice, it is likely that most children who are automatically resident in the UK in the year of their birth will meet the Second Automatic UK Test because the only other test under which they can be automatically UK resident is the First Automatic UK Test and that test requires them to spend at least 183 days in the UK. The circumstances in which a baby will be in the UK for 183 days and yet not have a home here will be very rare.

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[11] This is a phrase used in the headnote to para. 44. It does not appear in the main body of the *SRT Schedule*
[12] Or 7th October in a leap year

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The Third Automatic UK Test

3.2.11 The Third Automatic UK Test requires there to be a period of 365 days all or part of which falls within the fiscal year concerned in which the individual works sufficient hours in the UK. It is highly unlikely, at the least, that a child born in the fiscal year could fulfil this condition.

The Fourth Automatic UK Test

3.2.12 For the first three fiscal years during which an individual is alive and, in the case of a person born between 20th February and 5th April (inclusive) in the fourth fiscal year as well, he cannot meet the Fourth Automatic UK Test because he will not meet the condition that 'for each of the previous 3 tax years [he] was resident in the UK by virtue of meeting the automatic residence test'.

A Summary of the Application of the Automatic UK Tests in the Year of Birth

3.2.13 In the year of his birth, an individual cannot meet the Third or Fourth Automatic UK Tests. It will be very rare for such a child to meet the First Automatic UK Test and not also to meet the Second Automatic UK Test.

The Sufficient Ties Tests

The number of ties which are sufficient

3.2.14 When a person dies during the year the number of days set out in the Sufficient Ties Tables in paras. 18 and 19,[13] which determine how many UK Ties are sufficient in

[13] Also, in respect of death the minimum period of 16 days of presence in the UK below which the Sufficient Ties Test cannot be met is removed from the Table in para. 18. Para. 20(1)

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respect of an individual, are pro-rated according to the number of whole months in the fiscal year after the month of death. There is no equivalent pro-rating for the year of birth. The table which applies in the year of birth, and in the two succeeding fiscal years, will always be the table in para. 19 which applies where the individual was resident in the UK for none of the three fiscal years preceding the fiscal year concerned.

<u>The UK ties</u>

The Family Tie

3.2.15 A parent has a relevant relationship to his minor child but the minor child does not have a relevant relationship to his parent. As, in the year of his birth, an individual cannot fall within para. 32(2)(a) or (b) by being a spouse, civil partner or 'unmarried equivalent', he cannot, therefore, have a Family Tie in that year.

The Accommodation Tie

3.2.16 An individual in the year of his birth who is born on or after 6th January (7th January in a leap year) in a fiscal year cannot have an Accommodation Tie for that year. That is because to have an Accommodation Tie for a year the individual must have a place to live in the UK and that place must be available to him during the fiscal year for a continuous period of at least 91 days. It cannot have been available to him when he did not exist.

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The Work Tie

3.2.17 One presumes that an individual born in the year cannot have a Work Tie because he cannot fulfil the condition that he has worked in the UK for at least 40 days in the fiscal year.

90-Day Tie

3.2.18 An individual born in the year cannot have a 90-Day Tie because he will not fulfil the condition that he has spent more than 90 days in the UK in the Preceding Year, the year preceding that or in each of those years separately.

Country Tie

3.2.19 A Country Tie only counts as a UK Tie if the individual concerned was resident in the UK for one or more of the three fiscal years preceding the fiscal year concerned. Therefore a Country Tie will not count as a UK Tie in respect of an individual who is born in the fiscal year concerned.

A Summary of the application of the Sufficient Ties Test in the year of birth

3.2.20 A person born in the year will not have Family Tie, a Work Tie or a 90-Day Tie and the Country Tie will not count in respect of him as a UK tie for the purposes of the Sufficient Ties Test. He cannot, therefore, have more than one UK tie. Because it is the table in para. 19 which is relevant to such a person, he cannot meet the Sufficient Ties Test because the minimum number of ties which can meet the Sufficient Ties Test under that table is 2.

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A Summary of UK Residence in the Fiscal Year of Birth

3.2.21 A person born in the year, therefore, will only be resident in the UK if either he is in the UK for 46 days or more and meets the Second Automatic Test (in respect of a UK home) or he spends more than 182 days in the UK. He cannot be resident in the UK if he is born on or after 20th February[14] in the fiscal year concerned.

THE SPLIT YEAR RULES

3.3.1 A person who is born in the fiscal year concerned cannot meet any of Cases 1 – 3 of the Split Year Rules because all of those Cases require that the individual 'was resident in the UK for the previous tax year'.[15] Nor can he meet the conditions of Case 5 or Case 6 because both of those Cases require him to work 'sufficient hours' in the UK (Case 5) or overseas (Case 6) as assessed over a period. He cannot meet the conditions of Case 7 because, *inter alia*, that Case requires him to have a partner, in the sense of a husband, wife or civil partner or, loosely, an unmarried equivalent, at a point in the fiscal year. He could, however, fall within the circumstances of Case 4 (Starting to have a home in the UK only) or of Case 8 (Starting to have a home in the UK). Both of those Cases have a condition in respect of the Preceding Year but it is the negative condition that the individual 'was not resident in the UK for the previous tax year'.[16]

3.3.2 In most cases, whether or not an individual born in the fiscal year concerned satisfies the Split Year Rules will be of no practical effect because income cannot normally arise to a

[14] Or the 21st February in a leap year
[15] Paras. 44(2), 45(2) and 46(2)

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person who is not in existence at the time it arises and a non-existent person cannot make a disposal of an asset. In one circumstance, at least, the difference can be significant.

3.3.3 Where a settlement is within TCGA 1992 s.87 and a beneficiary of the settlement, in a split year, receives a capital payment from it which is matched with trust gains, it does not matter when the gain which was matched with the capital payment arose or whether or not the capital payment was made in the overseas part of the split year. Instead the legislation provides a rough and ready apportionment of the gain dividing it between a chargeable and non-chargeable portion on the basis of the portion attributable to the UK part of the split year. So, if a capital payment is made to a beneficiary which is matched with the trust gain and if the year is a split year in relation to the beneficiary, a part of the gain treated as arising to him will not be chargeable to CGT. If the year is not a split year, however, the whole gain will be chargeable. The difference could be significant.

TEMPORARY NON-RESIDENCE

3.4.1 The temporary non-residence provisions cannot apply in respect of any period which would otherwise be a temporary period of non-residence beginning in any fiscal year earlier than the fourth fiscal year following the fiscal year in which the individual concerned is born.

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[16] Paras. 47(2) and 51(2)

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3.4.2 That is because it is one of the conditions for an individual to be regarded as temporarily non-resident that at least four out of the seven fiscal years immediately preceding the year of departure were either fiscal years for which the individual had sole UK residence or a split year that included a residence period for which the individual had sole UK residence.[17] So the year of departure must follow a period in which there are at least four fiscal years in which the individual was UK resident. That condition cannot be satisfied until the fourth fiscal year following the fiscal year of birth.

AN ILLUSTRATIVE FLOWCHART

3.5.1 The following flowchart illustrates the application of the SRT where the individual is born in the fiscal year concerned.

[17] Para. 110(1)

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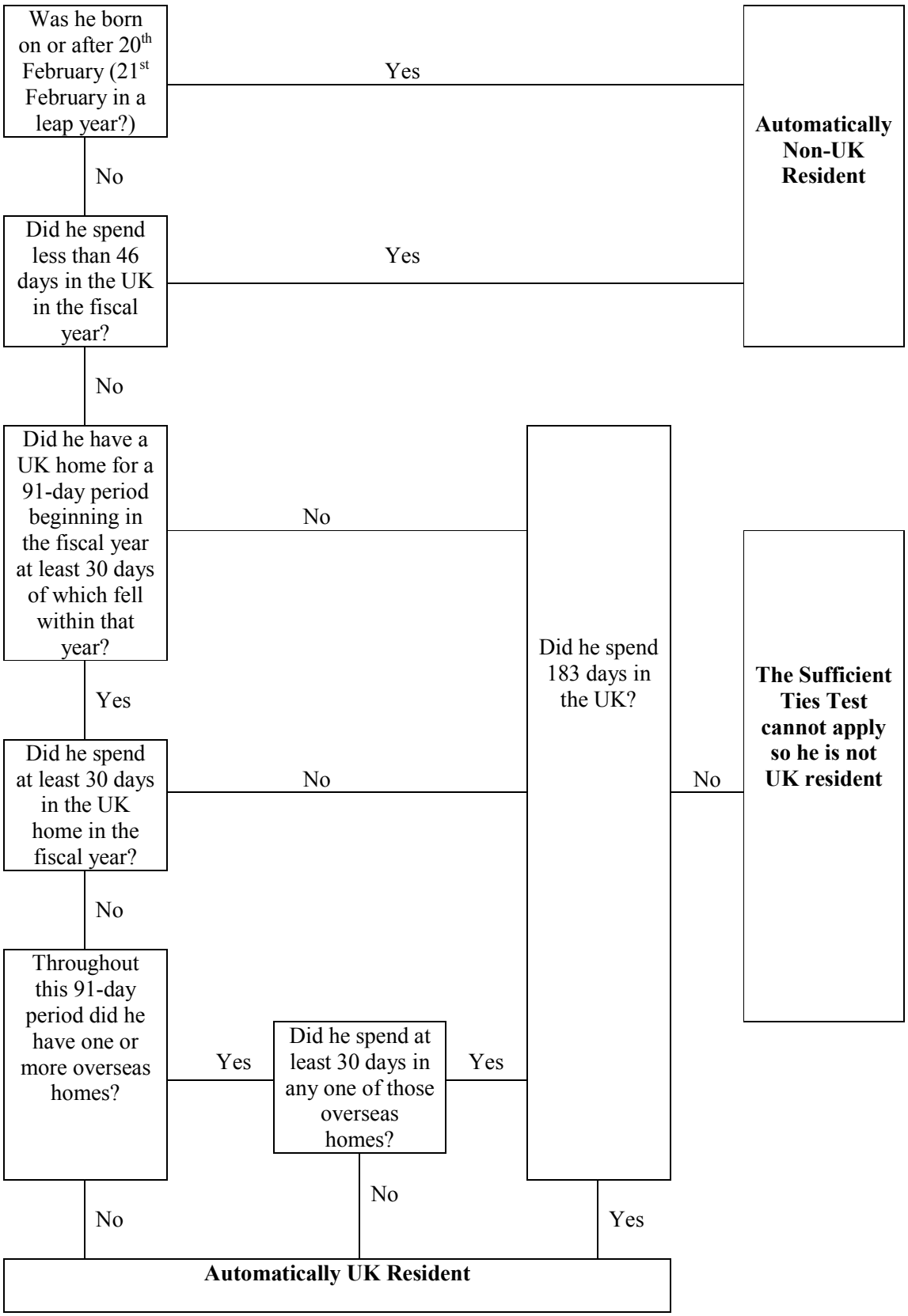

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SECTION IV

NEW JOBS AND OCCUPATIONS

CALCULATING THE REFERENCE PERIOD: RELIEF FOR GAPS BETWEEN EMPLOYMENTS

4.1.1 It will normally be advantageous for a person to fall within the Third Automatic Overseas Test. To do so he must have worked sufficient hours overseas which is determined in respect to a period called the 'reference period'. Periods when he is not working in the reference period will reduce the number of working hours and therefore the chance that he has worked sufficient hours.

4.1.2 The rules for calculating the reference period contain very limited relief, in paras. 29(8) and (9) where an individual changes employments during the period:-

'(8) If -

(a) P changes employment during the given period,

(b) there is a gap between the two employments, and

(c) P does not work at all at any time between the two employments, the number of days in the given period may be reduced by the number of days in that gap.

(9) But -

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(a) if the gap lasts for more than 15 days, only 15 days may be subtracted, and

(b) if there is more than one change of employment during the period, the maximum number of days that may be subtracted under sub-paragraph (8) for all the gaps in total is 30.'

4.1.3 It will be seen that the relief does not apply to changes of trade or to moving from employment to self-employment or vice versa. Where it applies, the number of days in the gap may be deducted from the period concerned for the purposes of the calculation under Step 3 in the five step calculations made to determine whether the first conditions of the Third Automatic Overseas Test and the Third Automatic UK Test are met. This is subject to a maximum which is calculated both per gap and in aggregate for the year; this maximum is 15 days per gap and 30 days in aggregate.

4.1.4 Such gaps include weekends. It does not matter that had the taxpayer been employed he might not have been required to work on those days. Those days are part of the gap between two employments.

4.1.5 It is arguable that reductions made under para. 28(8) may include part days. In the Authors' opinion, however, the better view is that reductions must be in whole days. The statutory phrase used is 'the number of days' and a fraction of a day is not a day and not aptly described as a part of a number of days.

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4.1.6 What is more, if one were to make deductions for part days a method of calculating the fraction would be needed; the statute does not provide one. If an individual's employment were terminated at the end of his working hours at 5.00pm, for example, would the reduction include a fraction of a day to take account of the seven hours before midnight when he was not employed?[18]

4.1.7 In the Authors' view it is most likely that the method of calculation to be used is simply to calculate the whole period of the gap and to allow a reduction for the number of whole days in the period. Thus if an individual's employment was terminated at 5.00pm on Tuesday 15th April 2014 and he started a new employment at 9.00am on Monday 28th April 2014, the gap between employments would be twelve days and sixteen hours and the reduction in the Reference Period would be for twelve days.

Gaps Straddling the Beginning or End of the Given Period

4.1.8 Because a requirement of the relief is that the individual 'changes employments during the given period' it appears that there cannot be relief for a gap between employments which straddles the beginning or the end of the period. To change employments must surely require one to cease one employment and to commence another. It appears from the *Guidance*, however, that HMRC does not currently take this point. Para 1.11 of the *Guidance* says:-

[18] It is not clear what is HMRC's view on this matter. The example in the *Guidance* (Example 1 at para. 1.12 – see para. ??? below) relates to a gap of an exact number of days

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'If the gap spans the end of the tax year you may subtract from your reference period the part of the gap that falls within the tax year, subject to the other conditions above.'

4.1.9 That view is not a correct construction of the legislation but it may be that it is of sufficient precision to found a claim, in judicial review proceedings, that HMRC has created a legitimate expectation that it would not resile from it in respect of periods in which it allows it to remain uncorrected.

'SIGNIFICANT BREAKS'

4.2.1 The Third Automatic Overseas Test (overseas work) and the Fifth Automatic Overseas Test (overseas work in the year of death) will not be met if there has been a significant break from overseas work. Whether there has been a significant break from overseas work is also one of the criteria for the application of Case 1 and Case 6 of the Split Year Rules.

4.2.2 Whether there has been a significant break from UK work is one of the conditions for the application of the Third Automatic UK Test. It is also one of the criteria for the application of Case 5 of the Split Year Rules.

The Relevant Legislation: Para. 29

4.2.3 Paragraph 29 defines when there is a 'significant break from UK work' and when there is a 'significant break from overseas work' as follows:-

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'(1) There is a "significant break from UK work" if at least 31 days go by and not one of those days is -

(a) a day on which P does more than 3 hours' work in the UK, or

(b) a day on which P would have done more than 3 hours' work in the UK but for being on annual leave, sick leave or parenting leave.[19]

(2) There is a "significant break from overseas work" if at least 31 days go by and not one of those days is -

(a) a day on which P does more than 3 hours' work overseas, or

(b) a day on which P would have done more than 3 hours' work overseas but for being on annual leave, sick leave or parenting leave.'

Are the Definitions of para. 29 Exhaustive?

4.2.4 Does the use of the term 'break' in para. 29 indicate that the break must be preceded and succeeded by a period of work? It would appear not because the definitions of significant breaks given in para. 29(1) & (2) merely require periods of 31 days which satisfy their conditions[20] and not periods which are succeeded by a period of work. On the other hand, it might be argued that the definitions in para. 29 are of whether or not a 'break' is 'significant' and therefore that unless there is a 'break' within the general meaning of the word there cannot be a 'significant break' within the definition in para. 29. In the Authors' view, the definitions in para. 29 are exhaustive and, therefore, there can be a significant break for the purposes of para. 29 even where there is no period of work following a non-working period in the period concerned. It may be worth

[19] For a discussion of the meaning of 'annual leave, sick leave or parenting leave' see ????
[20] See para. ??? above

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considering advancing the opposing argument, however, in the appropriate circumstances.

A day on which [an individual] would have done more than three hours work [overseas or in the UK as the case may be] but for being on annual leave etc.

'But for'

4.2.5 The requirement that the individual 'would have done more than 3 hours' work [overseas or in the UK as the case may be][21] requires a counterfactual hypothesis. What would the employee have been doing had he not been on leave? That is a question of fact, and like all questions of fact in civil matters, it is to be determined on the balance of probabilities.[22] It may be that in many cases it will be clear what the individual would have been doing had he not been on leave but in others it will not.

THE THIRD AUTOMATIC UK TEST: DIFFICULTIES TURNED INTO OPPORTUNITES

4.3.1 Normally, but not invariably, individuals will wish to meet the Third Automatic Overseas Test (so as to be automatically non-resident). Some individuals will wish to meet the Third Automatic UK Test either to take advantage of a Tax Treaty between the UK and another country or simply in order to be able to determine their residence with reasonable probability rather than relying on the less precise Sufficient Ties Test.

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[21] See para. ??? above

[22] Halsbury's Laws of England Civil Procedure (Vol. 11 (2009)) para. 775 citing Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373–374; *Newis v Lark* (1571) 2 Plowd 408; *Cooper v Slade* (1858) 6 HL Cas 746; *Lancaster v Blackwell Colliery Co Ltd* (1919) 89 LJKB 609, HL; *Bonnington Castings Ltd v Wardlaw*

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Others, however, will not wish to meet the test because they will wish to avoid being automatically UK resident. For this latter group, some of the features which are difficulties in respect of the Third Automatic Overseas Test will be opportunities in respect of the Third Automatic UK Test.

4.3.2 So, for example, the fact that anything done other than 'in performance of duties of an employment held by' the individual will not be work in respect of the individual's employment[23] may enable the individual to minimise his UK hours. So an employment contract might specifically provide that the employee is not to perform his duties in the UK or not to perform more than, say, two hours of work in the UK. Of course, one must not create a sham contract,[24] but, subject to that, a contract which contains these provisions will prevent a person who falls into the habit of perusing work emails and documents at odd times when he is in the UK without those habitual behaviours affecting the actual terms of his contract, from inadvertently performing the duties of his employment when doing so.

4.3.3 Similarly, the fact that days of leave which are not annual leave, sick leave or parenting leave, will form part of a 'significant break' from UK work may prevent the Third

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[1956] AC 613, [1956] 1 All ER 615, HL and *Dingwall v J Wharton (Shipping) Ltd* [1961] 2 Lloyd's Rep 213, HL

[23] Para. 26(1)(a). See ??? in which we argue that the definition of 'work' in para. 26 is an exhaustive and not an inclusive one

[24] The Court is particularly alert to the possibility that the express terms of employment contracts may be an attempt to disguise the true relationship between the parties and therefore be shams. See *Protectacoat Firthglow Ltd v Szilagy* [2009] EWCA Civ 98 and *Autoclenz Ltd v Belcher and Others* [2011] UKSC 41. There are, however, clear limits to their willingness to find that an employment contract is a sham. See *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367 and *Kalwak & Another v Consistent Group Ltd* [2008] EWCA Civ 430

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Automatic UK Test being met. Leave arranged ad-hoc, for example, may result in a break from work being 'a significant break'.

4.3.4 Another example of a difficulty in the Third Automatic Overseas Test presenting an opportunity in the Third Automatic UK Test is that an individual who can show that he had a relevant job at some point in the fiscal year concerned which falls within para. 9(3) will not meet the Third Automatic UK Test.

LEAVING THE UK AND THE SPLIT YEAR CASES

Priority between the Split Year Cases: Paras. 54 & 55

4.4.1 The Split Year Cases can only apply to a year in which the individual concerned is resident in the UK. Para. 43 refers to Cases 1 – 3 as 'involving actual or deemed departure from the UK' and it is a condition of the application of these three Cases that the individual concerned was resident in the UK in the Preceding Year[25] and should not be resident in the UK in the Succeeding Year.[26] Para. 43 refers to Cases 4 – 8 as '… involving actual or deemed arrival in the UK,[27] 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.

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[25] Paras. 44(2), 45(2) and 46(2)
[26] Paras. 44(4), 45(6) and 46(5)
[27] Para. 43(1)(b)(ii)

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4.4.2 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 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 for the reasons given in para. 28.6.1 above.

4.4.3 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.[29] 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

4.4.4 There is a simple hierarchy in Split Year Cases 1 – 3 as follows:-[30]

Case 1
Case 2
Case 3

[28] Paras. 47(2), 48(2), 49(2)(a), 50(2) and 51(2)
[29] Para. 53(1)(b)
[30] Para. 54(1)

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Example

The Situation

Mr A, who had been resident and domiciled in the UK in all years up to and including 2013/14, decided, after his retirement, to make a new life in Shangri-La. He left the UK on 6th May 2014 having contracted to sell his house, which had been his only home, on the previous day. The sale was completed on 31st May 2014 and it is assumed that the house ceased to be his home on 6th May 2014.[31] This property had been his only residence throughout his period of ownership of it. He spent at least some part of every day in the fiscal year 2014/15 in this UK house up to and including the day of his departure on 6th May 2014.

He spent his first few weeks in Shangri-La staying in hotels, but on 30th June 2014 he purchased a house to be his home. It is assumed that it was his home from this date. He continued to own and live in this property for several years and it is assumed that it continued to be his home at all relevant times.

After leaving the UK on the 6th May 2014 he did not set foot in the UK again.

On 30th September 2014 he sold various investments realising aggregate capital gains of £2 million assuming that he would fall within Case 1 of the Split Year Rules and that the overseas part of the year in respect of him would begin on 6th

[31] One might have chosen the 31st May 2014 or even the 5th May 2014 but on whichever of those days it ceased to be his home, the basic point illustrated in this example would not be affected

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May 2014 so that the disposal of his investments would be relieved from CGT under TCGA 1992 s.2(1B).[32]

Growing rather bored in his retirement and wishing to make a contribution to his adopted country, Mr A took employment as the Chief Executive of a Shangri-Layan charity on 30th March 2015. His duties required him to work 8 hours a day for 5 days a week entirely in Shangri-La and he was allowed up to 30 days of annual leave per year. He carried on this employment until 30th March 2017 during which period he worked in accordance with his contract and had no time off other than his permitted annual leave.

Analysis

Mr A did not meet any of the Automatic Overseas Tests in 2014/15.

He met the Second Automatic UK Test because he had a home in the UK in that year in which he spent a sufficient amount of time in the year (he spent 31 days there, 30 days being sufficient) and there was a period of 91 days (the period ended 6th May 2014) whilst he had that home during which he had no overseas home and at least 30 days of which fell within 2014/15.

He was, therefore, resident in the UK.

[32] Inserted by para. 93(2)

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He did, however, fall within Case 3 of the Split Year Rules. In respect of Case 3 the overseas part of the year did indeed start on 6th May 2014. Unfortunately he also met Case 1 of the Split Year Rules.[33] The overseas part of the year in respect of Case I began when he first did more than 3 hours work overseas which was on 30th March 2015. Case 1 takes priority over Case 3 with the result that the overseas part of the year in respect of Mr A did not start until that date. The gain he made on 30th September 2014 was not, therefore, removed from the charge to CGT by TCGA 1992 s.2(1B) and so he had realised a chargeable gain on that day of £2million.[34]

The Split Year - Case 3 – Ceasing to have a Home in the UK: Para. 46

The Ambit of Case 3

4.4.5 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

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

[33] Subject only to the argument that he did not satisfy the condition of para. 44(4) that he was 'not resident in the UK for the next tax year because … [he met] … the Third Automatic Overseas Test' because, although he met that test he also met the First Automatic Overseas Test

[34] Even if Mr A ceased to be domiciled in the UK when he left the UK to live in Shangri-La, the Remittance Basis would not apply to his gain. For the Remittance Basis to apply, ITA 2007 ss. 809B, 809D or 809E must apply to the individual for the year. All of those sections require that the individual is not domiciled in the UK in the year concerned. Mr A was domiciled in the UK at least up to the time that he left the UK on the 6th May 2014

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(a) the individual was resident in the UK for[35] the Preceding Year;[36]

(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.[37]

(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;[38]

(d) the individual is not resident in the UK for the Succeeding Year;[39]

(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.[40]

4.4.7 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[41]

(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)[42] (that is the period of

[35] For the application of provisions as to residence 'for' a fiscal year to years before the commencement of the SRT, see ???
[36] Para. 46(2)
[37] Para. 46(3)
[38] Para. 46(4)
[39] Para. 46(5)
[40] Para. 46(6)

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six months beginning with the day in the year when he ceases to have any home in the UK),[43] 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.'[44]

Examining Case 3

Para. 46(3)

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

4.4.8 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)

4.4.9 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.

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41 Para. 46(7)(a)
42 See (e) in para. ??? above
43 Para. 46(7)(b)
44 Para. 46(7)(c)

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

4.4.10 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)

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

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

4.4.12 The individual will not satisfy this condition where the country concerned does not use residence to determine chargeability to tax. It may also be that it uses the word 'resident' for a foreign language equivalent) in a sense which is so different from its meaning in English that there is a doubt whether this condition is fulfilled. For example, it is possible to be 'resident' in Gibraltar without being physically present in the territory.

4.4.13 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?

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'... has been present in that country (in person)[45] at the end of each day of the 6-month period': Para. 46(7)(b)

4.4.14 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)

4.4.15 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.

[45] 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

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SECTION V

COHABITATION, MARRIAGE AND CIVIL PARTNERSHIP

TERMINOLOGY

5.1.1 The SRT employs the words and phrases 'husband', 'wife', 'civil partner', 'married', 'marriage,' 'civil partnership' and 'living together' in a number of contexts. These concern the Family Tie,[46] the Accommodation Tie[47] and Cases 2 and 7 of the Split Year Rules.[48]

THE FAMILY TIE: PARA. 32

5.2.1 An individual has a Family Tie for a year if:-

(a) in that year, a relevant relationship exists at any time between that individual and another person; and

(b) that other person is someone who is resident in the UK for that year.[49]

5.2.2 A relevant relationship exists at any time between an individual and another person if at that time the individual and the other person:-

[46] Para. 32(2)
[47] Para. 34(6)
[48] Paras. 45, 50 and 52(4)
[49] Para. 32(1)

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(a) are husband and wife or civil partners and in either case are not separated;

(b) are living together as husband and wife or, if they are of the same sex, as if they were civil partners; or

(c) the other person is a child of the individual and is under the age of 18.[50]

'... At any time ...': Para. 32(1)(a)

5.2.3 Because there is a Family Tie if an individual has a relevant relationship with another person at any time in the fiscal year, where the relationship breaks down during the year there will still be a Family Tie by reference to the relationship provided the other person is resident in the UK in the fiscal year. A relationship will break down during a fiscal year, for example, where a married couple separate in circumstances where the separation is likely to be permanent or where two people living together as husband and wife or as if they were civil partners cease to do so.

A Two Part Tie

5.2.4 The Family Tie may be divided into two categories.

5.2.5 The First Category is of a Family Tie existing by virtue of the individual having a relevant relationship with his or her husband, wife or civil partner etc. The Second Category is of a Family Tie existing by virtue of a relevant relationship with the individual's minor child.

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The Two Parts

5.2.6 The First Category itself subdivides into two parts.

> 'A relevant relationship exists at any time between P and another person if at the time -
>
> (a) P and the other person are husband and wife or civil partners and, in either case, are not separated [the 'First Part'], [or]
>
> (b) P and the other person are living together as husband and wife or, if they are of the same sex, as if they were civil partners ...' [the 'Second Part'][51]

The First Part: Para. 32(2)(a)

5.2.7 In turn, the First Part can be divided into two limbs. They are where the individual and the other person are:-

(i) Husband and wife (Limb I); or

(ii) Civil partners (Limb II).

The First Part: Limb 1 – Husband and Wife

Marriages of same-sex couples in England and Wales

5.2.8 Until the coming into force of the Marriage (Same Sex Couples) Act 2013 ('M(SSC)A 2013') marriage was only possible between persons of the opposite sex.[52] That Act provides that:-

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[50] Para. 32(2)
[51] Para. 32(2)

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'Marriage of same sex couples is lawful.'[53]

5.2.9 A 'reference to marriage of same sex couples is a reference to-

(a) marriage between two men, and

(b) marriage between two women.'[54]

5.2.10 Can a party to a same sex marriage[55] be a relevant person within para 32(2)(a)? Such a person cannot be a civil partner[56] and so he could only be a relevant person under this sub-paragraph if he or she and the individual concerned could be said to be 'husband and wife'.

5.2.11 The M(SSC)A 2013 Sch 3 contains provisions as to the interpretation of other legislation for the purposes of Schs. 3 and 4 which distinguish between 'Existing England and Wales Legislation' and 'New England and Wales Legislation'. For this purpose, England and Wales legislation includes 'primary legislation ... which forms part of the law of England and Wales.'[57] Primary legislation is:-

- an Act of Parliament;
- an Act of the National Assembly for Wales;

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52 Halsbury's Laws of England Matrimonial and Civil Partnership Law (Volume 72 (2009) 5th Edition) para. 1
53 M(SSC)A 2013 s.1(1)
54 M(SSC)A 2013 Sch 3 Part II para. 5(3)
55 This is not a phrase found in the M(SSC)A 2013 but it is a convenient shorthand for a 'marriage of a same sex couple'

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- a Measure of the National Assembly for Wales;
- an Act of the Scottish Parliament;
- an Act of the Northern Ireland Assembly;
- a Measure of the Church of England.[58]

5.2.12 For this purpose, England and Wales legislation which is primary legislation, is Existing England and Wales Legislation for the purposes of the M(SSC)A 2013 Sch 3 and 4 if it was passed[59] before the end of the Session in which the M(SSC)A 2013 was passed and New England and Wales Legislation if it was not.[60]

5.2.13 Both FA 2013 and M(SSC)A 2013 received the Royal Assent on 17th July 2013. FA 2013 is therefore Existing England and Wales Legislation for the purposes of the M(SSC)A 2013 Schs 3 and 4. In respect of Existing England and Wales Legislation, M(SSC)A 2013 Sch 3 para. 1(1) provides that:-

> '(a) a reference to marriage is to be read as including a reference to marriage of a same sex couple;
>
> (b) a reference to a married couple is to be read as including a reference to a married same sex couple; and

---

56 Matrimonial Causes Act 1973 s.11 and Civil Partnership Act 2004 s.3(1)
57 M(SSC)A 2013 s.19
58 M(SSC)A 2013 s.19(1)
59 M(SSC)A 2013 ss.11(7) & 19(2)
60 M(SSC)A 2013 ss.11(7) & 19(2)

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(c) a reference to a person who is married is to be read as including a reference to a person who is married to a person of the same sex.'

5.2.14 Para. 32(2)(a), however, does not refer to a 'marriage', a 'married couple' or to a 'person who is married' but to the individual and another person being 'husband and wife'. Without a further provision, therefore, Sch 3 para. 3(1) is insufficient in itself to result in Limb I applying to a same sex couple.

5.2.15 M(SSC)A 2013 ss.11(1) and (2) provides:-

'(1) In the law of England and Wales, marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples.

(2) The law of England and Wales (including all England and Wales legislation whenever passed or made) has effect in accordance with subsection (1).'

5.2.16 It is clear, however, that in some important aspects[61] there are significant differences between the treatment of same sex marriages and heterosexual marriage. In the Authors' opinion it is doubtful whether M(SSC)A 2013 ss.11(1) and (2) are sufficient to allow para. 32(2)(a), which applies where the individual concerned and another person 'are husband and wife', to apply where they are members of a same sex couple.

[61] Such as the grounds for dissolution. See Matrimonial Causes Act 1973 s.1 as amended by M(SSC)A 2013 Sch 4 para. 3

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5.2.17 That view gains force when one considers the interpretative provisions of M(SSC)A 2013 Sch 3 para. 5 which apply to New England and Wales Legislation but not to Existing England and Wales Legislation and provide, *inter alia*, that:-

> 'The following expressions have the meanings given -
>
> (a) "husband" includes a man who is married to another man;
>
> (b) "wife" includes a woman who is married to another woman;
>
> (c) "widower" includes a man whose marriage to another man ended with the other man's death;
>
> (d) "widow" includes a woman whose marriage to another woman ended with the other woman's death;
>
> and related expressions are to be construed accordingly.'[62]

5.2.18 First, this suggests that M(SSC)A 2013 ss.11(1) and (2) would not of themselves be sufficient to extend the meaning of husband, wife, widower, widow and related expressions as Sch 3 para. 5 does. Secondly, even if this provision applied to the *SRT Schedule,* which it does not, it does not appear sufficient to include within a reference to a 'husband and wife' a reference to a 'husband and husband' or to a 'wife and wife'.

5.2.19 The cases of *Fitzpatrick v Sterling Housing Association Limited*[63] and *Ghaidan v Godin-Mendoza*[64] provide a further indication that a same sex couple will not fall within Limb I of para. 32(2)(a). *Ghaidan* concerned a claim to succeed to a statutory tenancy by the

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62 M(SSC)A 2013 Sch 3 para 5(2)
63 *Fitzpatrick v Sterling Housing Association Limited* [1994] 4 All ER 705

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homosexual partner of the deceased tenant under Rent Act 1977 Sch 1 paras. 2 and 3. The persons who at that time could succeed to such tenancies under the Act included 'a person who was living with the original tenant as his or her wife or husband'. The Court accepted the correctness of the decision of the House of Lords in *Fitzpatrick v Sterling Housing Association* that, applying normal rules of statutory construction, the phrase was gender specific and could not be extended to homosexual couples. The Human Rights Act 1998, however, had been passed between the decisions in *Fitzpatrick* and in *Ghaidan.* The House of Lords found in *Ghaidan* that the difference in the treatment under Rent Act 1977 Sch 1 paras 2 and 3 of surviving spouses and surviving members of homosexual couples infringed Mr Godin-Mendoza's right to respect for a person's home under Article 8 of the European Convention on Human Rights. Founded upon this breach of a convention right, the difference in treatment constituted discrimination which was prohibited under Article 14 of the Convention. The majority, therefore, held that the Human Rights Act 1998 s.3 required the phrase to be read in a way which was compliant with the Convention so as to apply to homosexual couples 'whose relationship is marriage-like'.[65]

5.2.20 *Ghaidan* concerned whether legislation which conferred a valuable right to succeed to a tenancy should extend to homosexual couples. It is difficult to imagine circumstances in which it would not be advantageous to the survivor of such a couple for this legislation to apply to him. Whether a Family Tie is met, by contrast, is relevant to whether the person is or is not UK resident. To be UK resident will sometimes be to an individual's

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[64] *Ghaidan v Godin-Mendoza* [2004] UKHL 30
[65] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 per Baroness Hale at para. 143

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advantage but will often be disadvantageous. It is not clear what convention right would be breached if an individual who was a member of a same sex couple could not have a relevant relationship to his husband or her wife for the purposes of the SRT.[66] Without such a breach, both *Fitzpatrick* and *Ghaidan* suggests that the statutory language of para 32(2)(a) could not be extended, under conventional principles of statutory interpretation, to cover same sex couples.[67]

5.2.21 There seems, however, no rational reason, now that the law has provided that couples of the same sex may marry, why an individual should not have a relevant relationship to his same sex spouse. The draftsmen of the two Acts seem not to have taken account of one another's work. It may be that the courts will repair this oversight through a radically purposive construction of para. 32(2)(a) but how they are to do so within the conventional canons of statutory interpretation is unclear.

<u>The First Part: Limb II – Civil Partnership</u>

The nature of a civil partnership

5.2.22 Because a civil partnership under the Civil Partnership Act 2004 is formed by registration, it will usually be clear whether or not a person is a civil partner of the individual concerned and so in most cases the only area of uncertainty in relation to para. 32(2)(a) in respect of civil partners is likely to be whether or not they are separated within the definition in para. 32(5).

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[66] Using the terms defined in M(SSC)A 2013 Sch 3, para. 5(2)

[67] Similar arguments apply to the question of whether same sex couples can fall within para. 32(2)(b) as persons 'living together as husband and wife'. A related issue arises as to whether a same sex couple can fall within para. 32(2)(b) as persons 'living together ... as if they were civil partners'

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Separated

5.2.23 Paragraph 32(5) provides that:-

> '"Separated" means separated -
>
> (a) under an order of a court of competent jurisdiction,
>
> (b) by deed of separation, or
>
> (c) in circumstances where the separation is likely to be permanent.'[68]

5.2.24 The phrase 'in circumstances where the separation is likely to be permanent' has a long history in the Income Tax and CGT legislation. The phrase now forms part, negatively, of the definition in ITA 2007 s.1011 of individuals 'who are married to, or are civil partners of, each other … [who] … are treated for the purposes of the Income Tax Acts as living together unless …'. TCGA 1992 s.288(3) provides that references in that Act to an individual living with his spouse or civil partner should be construed in accordance with ITA 2007 s.1011.

5.2.25 Separated for this purpose is the obverse of living together and does not connote a mere physical separation but requires in addition a 'rupture of marital relations'. Where there is no such rupture, spouses and civil partners may be physically apart for long periods of time and yet not be separated for this purpose.[69]

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[68] This is a similar definition to those found in ICTA 1988 s.379, TCGA 1992 s.169F(4), ITTOIA 2005 s.625(4) and ITA 2007 s.1011

[69] *Nugent-Head v Jacob (HM Inspector of Taxes)* HL (1948) 30 TC 83, *Holmes v Mitchell (Inspector of Taxes)* [1991] ChD 63 TC 718, *Hopes v Hopes* [1949] P227 and *Santos v Santos* [1972] Fam 247

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The Second Part: Living Together – Para. 32(2)(b)

5.2.26 The Second Part can also be sub-divided into two limbs, the First Limb being 'living together as husband and wife' and the Second Limb being 'or, if they are of the same sex, as if they were civil partners'.

In Respect of What Time or Period is the Matter to be Determined?

5.2.27 Before we look at these two limbs we shall first consider at what period one must look in order to decide whether para. 32(2)(b) is satisfied.

5.2.28 The Family Tie requires one to determine whether:-

> 'In year X, a relevant relationship exists at any time …'[70]

5.2.29 It will therefore be satisfied if a relevant relationship exists at any moment in the fiscal year. It therefore requires one to consider whether a state of affairs (that there is a relevant relationship) existed at any one of a sequence of individual moments. Some of the legislative provisions that make use of the same, or a similar, phrase and that have been the subject of consideration in the case authorities require one to consider whether a state exists at a particular moment[71] whilst others ask whether a state of affairs existed for a defined period.[72]

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[70] Para. 32(1)
[71] See, for example, the provisions of Supplementary Benefits Act 1976 Sch 1 para. 3(1)
[72] See, for example, the provisions of the Inheritance (Provision for Family and Dependants) Act 1975 s.1 and the Fatal Accidents Act 1976 s.1(3)(b)

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5.2.30 In asking whether this state of affairs exists at a particular moment, however, one is not confined to looking narrowly at the situation at that particular time.[73]

5.2.31 So although the Family Tie requires one to determine whether a relevant relationship, including a de Facto Marriage,[74] exists at any moment in the fiscal year, in respect of any particular moment one can, if *Gully v Dix* is followed, determine that question in respect of a de Facto Marriage by reference to any period during which 'the individuals' behaviour casts light on the relationship existing at that particular moment.

The Second Part: Limb I - 'Living Together as Husband and Wife'

5.2.32 The phrase 'living together as husband and wife' is found elsewhere in legislation including in some recent tax legislation.[75]

5.2.33 The phrase 'living together as husband and wife' is used repeatedly in the Tax Credits legislation but is not statutorily defined. Similarly, it is widely used in many other legislative contexts including statutes concerned with Social Security, Family, Pension and Landlord and Tenant Law. We have been unable to find, however, any statutory definition of it.

5.2.34 What is involved in persons living together as husband and wife? It must involve a relationship which is analogous to marriage but which is not actually marriage; having

[73] *Gully v Dix* [2004] EWCA Civ 139

[74] This is the term which, for the sake of brevity, we use to refer to the relationship within para. 32(2)(b) which exists when persons live together as husband and wife or, if they are of the same sex, as if they were civil partners

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similarities to marriage but also dissimilarities which may or may not be confined to the fact that the parties are not actually married in law.

5.2.35 What are the elements held in common with marriage which must be present for two persons to be living together as husband and wife?

5.2.36 This phrase, and similar phrases, have been considered in a number of cases in other statutory contexts. Although care must always be taken when applying case authority on the meaning of words or phrases used in other statutory contexts to a particular statutory use, the relevant case law in general applies similar constructions of the phrase to its use in various contexts. Some of the leading cases concern legislation which imposed additional conditions to those of the First Limb of para. 32(2)(b).

5.2.37 For the First Limb of para. 32(2)(b) to be satisfied the parties to a 'de Facto Marriage' must be:-

(i) living together;

(ii) as husband and wife.

Living together

5.2.38 What is involved in living together?

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[75] See for example ITEPA 2003 ss.61, 61I and 681G; FA 2005, s.103; ITA 2007 ss.809ZQ and 809M; CTA 2010 s.939H

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Santos v Santos

5.2.39 Sachs LJ said in *Santos v Santos*[76] that '"living together" [is] a phrase which is simply the antithesis of living apart'.

Gully v Dix

5.2.40 It is clear from *Gully v Dix*[77] that persons may be 'living together' even when they are in different locations for an extended period and they can be living together as husband and wife even where there are extreme difficulties in the relationship which has caused them to live in separate houses.

5.2.41 From *Kotke v Saffarini* it is clear that persons who live 'in the same household' must have some form of relationship, a tie, with each other beyond mere physical presence in the same dwelling. In *Santos v Santos*, Sachs LJ observed that:-

> 'Household [is] a word which essentially refers to people held together by a particular kind of tie'.[78]

5.2.42 *Kotke v Saffarini* concerned a provision which required the individual concerned both to have been living in the same household as the deceased and to have been living as the person's husband or wife. *Santos v Santos* concerned divorce proceedings. In those contexts the tie between persons living in the same household would be constituted by the relationship of de Facto Marriage (*Kotke*) and actual marriage (*Santos*). Plainly,

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[76] *Santos v Santos* [1972] 2 All ER 246 at p. 255
[77] *Gully v Dix* [2004] EWCA Civ 139

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however, the tie between persons living in the same household may not necessarily be analogous to living together as husband and wife.

'As husband and wife'

5.2.43 The essential elements of de Facto Marriage which emerge from the case law can be divided between internal and external factors.

Internal factors

5.2.44 On the whole, in identifying internal factors which determine whether the individual concerned and another person 'are living together as husband and wife', the Courts have taken a touchingly positive view of the nature of the marriage relationship by reference to which the existence of a de Facto Marriage is to be identified. The internal factors which the Courts have identified as indicating a de Facto Marriage are all qualities which most people would consider positive. That creates the, perhaps, slightly anomalous position that in order to fall within the First Part[79] all one has to be is married or a member of a civil partnership regardless of the quality of one's relationship with one's spouse or civil partner whereas a key determinant of whether there is a relationship within the Second Part[80] is its quality. As Lord Millett explained in his dissenting speech in *Ghaidan v Godin-Mendoza*:-[81]

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78 *Santos v Santos* [1972] 2 All ER 246 at p. 255
79 Para. 32(2)(a)
80 Para. 32(2)(b)
81 *Ghaidan v Godin-Mendoza* [2004] UK HL 30

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'Marriage is the lawful union of a man and a woman.[82] It is a legal relationship between persons of the opposite sex...[83]

It is an important feature of [the Rent Act 1977 which was under consideration in the case] that [a] widow succeeded to the [secured] tenancy [of her deceased husband] by virtue of her status, much as she would succeed to her late husband's estate on intestacy. She merely had to produce her marriage certificate. She did not have to prove that the marriage was happy, or stable, or long-lasting, or that the parties had been faithful to each other. The marriage could have been unhappy, tempestuous, or very recent; she could have been unfaithful; her husband could have begun divorce proceedings. Provided that she was living *in the dwellinghouse* (not necessarily with her husband) at the date of the tenant's death and he was still her husband, she was entitled to become the statutory tenant. She did not have to prove that she deserved to do so. Merit did not come into it.'[84]

5.2.45 By contrast, the internal factors which the Courts have identified as indicating the existence of a de Facto Marriage may be grouped under the headings of:-

(a) emotional intimacy;

(b) mutual dependence, financial and otherwise;

(c) long-term commitment;

[82] Now modified by the Marriage (Same Sex Couples) Act 2013
[83] *Ghaidan v Godin-Mendoza* [2004] UK HL 30 at para. 78
[84] *Ghaidan v Godin-Mendoza* [2004] UK HL 30 at para. 84

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(d) intention to live together as husband and wife.[85]

5.2.46 It is clear that a couple may have abandoned all sexual activity by the time their status is to be determined and yet still be in a de Facto Marriage.[86] It seems unlikely that, except in very unusual circumstances, a relationship which has never been a physically sexual one could be a de Facto Marriage.[87]

External factors

5.2.47 The Courts have also placed weight on external factors in determining whether there is a de Facto Marriage asking to what extent the couple:-

(a) have held themselves out to the world as having the necessary relationship;

(b) have been seen, or would be seen by an hypothetical onlooker, as having that relationship.

Can a party to a same sex marriage fall within the first limb of para. 32(2)(b)?

5.2.48 We have seen that it is doubtful whether members of a same sex couple will fall within para. 32(2)(a) as having a relevant relationship to their spouse by virtue of their being 'husband and wife'.

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[85] *Churchill v Roach and Others* [2002] EWHC 3230 (Ch), *Southern Housing Group Ltd v Nutting* [2004] EWHC 2982 (Ch), *Ghaidan v Godin-Mendoza* [2004] UK HL 30, *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, *Re Watson* [1999] 1 FLR 878 and *Amicus Horizon Ltd v The Estate of Judy Mabbott Deceased and Another* [2012] EWCA Civ 895

[86] *Re Watson* [1999] 1 FLR 878 at pp. 879D and 883H

[87] *Crake v Supplementary Benefits Commission; Butterworth v Supplementary Benefits Commission* [1982] 1 All ER 498

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5.2.49 Similar arguments will apply in respect of the provisions of Limb I of para. 32(2)(b). It is difficult to see how two individuals who are members of a same sex couple could be said to be living together as husband and wife where the law specifically provides a form of marriage which applies to two individuals of the same sex.

Unmarried homosexual partners who are not civil partners

5.2.50 For similar reasons, in the absence of a breach of a right under the European Convention on Human Rights, in the Authors' view it is unlikely that unmarried homosexual couples who are not civil partners will be living together as husband and wife for the purposes of the First Limb of the Second Part.[88]

5.2.51 The M(SSC)A 2013, Sch 3 para. 3 provides:-

> '(1) This paragraph applies to existing England and Wales legislation which deals differently with -
>
> (a) a man and a woman living together as if married, and
>
> (b) two men, or two women, living together as if civil partners.
>
> (2) If two men, or two women, are living together as if married, that legislation applies to them in the way that it would apply to them if they were living together as civil partners.'

5.2.52 At first sight it might be thought that this paragraph would have effect in respect of para. 32(2)(b) to a homosexual couple who are living together as if they were parties to a

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same sex marriage. The comparison made by M(SSC)A 2013 Sch 3, para. 3, however, is between legislation dealing differently with 'a man and woman living together as if married' and 'two men, or two women, living together as if civil partners'. Para. 32(2)(b) does not deal differently with such persons.

<u>The Second Part: Limb II - 'Living Together as Civil Partners'</u>

What is the nature of the required relationship?

5.2.53 Civil partnership is a creature of statute and the Civil Partnership Act 2004 does not limit a civil partnership to any particular form of relationship between two persons entering into such a partnership. It is difficult to see, therefore, how two people can live together as civil partners who are not civil partners. This point was made by the STEP in the *STEP 2012 Response*[89] and yet, no reference to the STEP's comment was made in the *December 2012 ConDoc*.

5.2.54 The phrase or a similar phrase is used in a number of other statutory contexts, but in those contexts it is often used with a further statutory rule usually providing that two people of the same sex are to be treated as living together as if they were civil partners if, and only if, they would be treated as living together as husband and wife were they of opposite sexes.[90] The *SRT Schedule* contains no such deeming provision.

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[88] That is within para. 32(2)(b)

[89] See the *STEP 2012 Response* para. 6.1

[90] For example in the Welfare Reform Act 2012 s.39(2). Examples of a provision where the phrase is used without such a statutory rule is Corporation Tax Act 2010 s.939H(10)(b)

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5.2.55 With the passing of M(SSC)A 2013 the provision becomes even more difficult. It is now possible for a homosexual relationship to be a same sex marriage, a civil partnership or neither. In what circumstances will a couple who are neither married nor civil partners have a relationship analogous to a civil partnership rather than to a same sex marriage?

Members of same sex married couples

5.2.56 Just as we concluded that it is doubtful whether members of a same sex married couple will fall within the First Limb of para. 32(2)(b) as living together as man and wife, similarly it is difficult to see how members of such a couple can be 'living together … as if they were civil partners'. As we have seen, a civil partnership is a different legal relationship to that of being members of a same sex couple. The Civil Partnership Act 2004 expressly provides that those who are married, which includes same sex couples, may not form civil partnerships[91] and that civil partners cannot form a valid marriage.[92] The M(SSC)A 2013 s.9 provides a power for the Secretary of State to make regulations creating a procedure for the partners of a civil partnership to convert their civil partnership into a marriage. The law makes a clear distinction between the marriage of a same sex couple and a civil partnership and so it is difficult to see how the parties to a same sex marriage who are married to one another and who must, therefore, be living together as a married couple,[93] can be living together as if they were civil partners.

[91] Civil Partnership Act 2004 s.3(1)(b)
[92] Matrimonial Causes Act 1973 s.11(b)
[93] But not as 'husband and wife'

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THE SPLIT YEAR RULES: CASE 2 – THE PARTNER OF SOMEONE STARTING FULL-TIME WORK OVERSEAS:[94] PARA. 45

The Ambit of Case 2

5.3.1 Case 2 of the Split Year Rules is aimed at individuals who leave the UK to live with their spouses etc. who have left the UK to work full-time abroad.[95]

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

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

(a) the Accompanying Spouse[96] was resident in the UK[97] for the Preceding Year;[98]

(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;[99]

(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';[100]

---

94 This is the heading of para. 45. The main body of the legislation does not use the phrase 'full-time work'

95 As we have said, 'full-time work' is not a phrase used in the main body of the legislation

96 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

97 For the application of provisions as to residence 'for' a fiscal year to years before the commencement of the SRT, see ???

98 Para. 45(2)

99 Para. 45(3)

100 Para. 45(4)

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(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.[101]

(e) the Accompanying Spouse is not resident in the UK for the Succeeding Year.[102]

Examining Case 2

'Partner': Para. 45(3)

What is a 'partner'?

5.3.3 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.[103]

5.3.4 This is similar to the first two categories of a 'relevant relationship' for the purposes of a Family Tie[104] except that for a relevant relationship to exist between an individual and

[101] Para. 45(5)
[102] Para. 45(6)
[103] Para. 52(4)
[104] Paras. 45(4) & 50(4)

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his wife, her husband or his or her civil partner they must not be separated. Where the term is used in the Split Year Cases, however, in Cases 2 and 7, continuing to live with the partner is one of the circumstances which must exist to fall within those cases.

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

5.3.5 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. First, that the Accompanying Spouse has a Partner whose circumstances fall[105] 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.[106]

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105 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?

106 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'

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

5.3.6 The difficulty posed by this provision is 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'

5.3.7 Arguably, it creates a further anomaly. Under para. 45(4) an individual who moves abroad in order 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'

5.3.8 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:-

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'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 …'.

5.3.9 It is very unfortunate that the draftsman has used a phrase which is so closely related to 'residence' and the phrase 'to reside'. 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.

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

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

5.3.10 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

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(b) the first day of what is, for the Partner, the overseas part of the Relevant Year as defined for Case I.[107]

5.3.11 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'.[108]

5.3.12 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).

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

5.3.14 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.

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107 Para. 45(7)
108 Para. 45(8)

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

5.3.15 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.

5.3.16 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.

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

The Ambit of Case 7

5.4.1 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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Circumstances Falling Within Case 7

5.4.2 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;[109]

(b) the Accompanying Spouse has a Partner whose circumstances fall within Case 6 for the Accompanying Spouse's Relevant Year or Preceding Year;[110]

(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.[111]

(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.[112]

(a) the Accompanying Spouse is resident in the UK for the Succeeding Year.[113]

[109] Para. 50(2)
[110] Para. 50(3)
[111] Para 50(4)
[112] Para. 50(5)

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Examining Case 7

A comparison with Case 2

5.4.3 It will be seen, that Case 7 has many similarities to Case 2.

Para. 50(4)

5.4.4 In examining that Case, we 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*'.

5.4.5 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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[113] Para. 50(6)

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

5.4.6 What is the Partner's return or relocation to the UK? 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'.

5.4.7 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

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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?

5.4.8 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.

5.4.9 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.[114]

5.4.10 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).[115]

[114] Para. 50(7)
[115] Para. 50(8)

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5.4.11 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'

5.4.12 The requirement in para. 50(5)(a) that the Accompanying Spouse should spend 'the greater part of … [his] … time living in the overseas home' creates a difficulty. 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.

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SECTION VI

SETTLING DOWN

THE RELEVANCE OF CONCEPT OF THE HOME

6.1.1 Whether and where an individual has a 'home' or 'homes' is fundamental to the SRT forming a key element of the Second Automatic UK Test, the Fourth Automatic UK Test, the Accommodation Tie and Cases 2, 3, 4, 7 and 8 of the Split Year Rules.

ITS SUITABILITY FOR USE IN THE SRT

6.2.1 'Home' is a word which can bear a wide range of meanings with small areas of overlap between them. The *SOED* gives nine major groups of meaning for 'home' used as a noun.

6.2.2 The use of such an imprecise concept was rightly criticised by all of the major professional bodies during the consultation process on the SRT, particularly in the light of the Government's refusal to provide an exhaustive statutory definition of the word. The use of this word as a key element of the test has placed a significant uncertainty of construction at its heart.

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THE MEANING OF 'HOME' IN THE SRT

6.3.1 The Authors set out below their view of the meaning of 'home' in the SRT, based on the detailed review of the meaning of the term which we have made in *McKie on Statutory Residence*. It should be emphasised that because it is clear that the meaning of 'home' in ordinary usage is heavily dependent upon its context in the absence of any decided cases on its meaning in the *SRT Schedule* any statements as to its meaning in that Schedule must be extremely tentative.

6.3.2 The Court is likely to consider that 'home' in the *SRT Schedule* is to be construed in its natural, ordinary meaning in English usage. Considering the breadth of its range of meanings in ordinary usage that does not take us very far. The Court is likely to regard a finding by the FTT that a putative home is a 'home' to be a finding of fact with which the Court will interfere only if it is clearly a view at which no reasonable Tribunal could have arrived. The Tribunal is unlikely to articulate principles by which to determine whether or not a putative home is a 'home'. It is likely to be extremely difficult, if not impossible, therefore, to demonstrate that the Tribunal's decision is manifestly wrong on the primary facts found simply because, in the absence of clear principles to apply to the primary facts, there will be no standard by which to judge the correctness of the decision. That is not to say that the higher Courts will not interfere with the FTT's findings on the matter but whether or not they will do so is likely to be unpredictable.

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6.3.3 To borrow a phrase of Lord Wilson's in the Supreme Court describing the approach necessary to determine residence before the introduction of the SRT,[116] determining whether, and where, a person has his 'home' is likely to require of the Tribunal a 'multi-factorial inquiry'.[117]

6.3.4 It is clear that, for the purposes of the SRT an individual may have more than one 'home' at the same time and that a 'home' may be a 'home' even if the individual is absent from it more than he is present at it. It is also clear that, for the purposes of the SRT:-

(a) a 'home' can be a building, a part of a building, a vehicle, vessel or structure;[118]

(b) a putative home which an individual uses periodically as nothing more than a holiday home or temporary retreat will not 'count as' a 'home' whether or not it is a 'home' in fact;[119]

(c) a place may count as a 'home' of an individual whether or not the individual holds any estate or interest in it;[120]

(d) something which has been an individual's home may cease to be his 'home' even if he continues to own an estate or interest in it.[121]

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116 *R (on the Application of Davies and another) v HMRC; R (on the Application of Gaines-Cooper) v HMRC* [2011] UKSC 47 at para. 20

117 It is ironic that the SRT was introduced in response to a general recognition that the uncertainty resulting from the need to undertake a multi-factorial enquiry in order to determine an individual's residence was damaging the UK economy

118 See para. 25(1)

119 See para. 25(3)

120 See para. 25(4)

121 See para. 25(5)

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6.3.5 In the Authors' view it is unlikely that, except in very unusual circumstances, a Tribunal would find a person's 'home' to be a country, region or other area not defined by reference to a particular dwelling or that a putative home where an individual did nothing more than sleep at night for a period of just a few weeks would be the individual's 'home'.

6.3.6 In deciding whether or not a putative home is a 'home', the Tribunal is likely to have regard to such factors as:-

(a) the length and depth of the individual's connection with it, particularly his personal and family connections and the length of his occupation of it;

(b) the nature of his estate or interest in it, if any;

(c) if he does not have an estate or legal interest in it, the nature of the estate or legal interest of the person who enables him to occupy it and his relationship to that person;

(d) the length of the individual's periods of absence from it;

(e) the stability and permanence of the arrangements under which he occupies it or will occupy it in the future;

(f) the reasons for his occupation or otherwise of it;

(g) whether the individual has another 'home' and the reasons why he has that other home;

(h) whether the putative home is occupied by his spouse, civil partner, infant children or other dependents;

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(i) if he is not in occupation of the putative home, the reasons why that is so, the duration during which he does not occupy it, whether or not he will re-occupy it and, if so, in what circumstances;

(j) what he does whilst he is in occupation of the putative home and whether he normally sleeps and eats his evening meals, spends his leisure time, entertains his friends and undertakes his hobbies there.

6.3.7 None of these features is likely to be determinative on its own of whether or not a putative home is a 'home'.

6.3.8 This is not an exhaustive list as it is difficult to predict what factors the Tribunal might find relevant to the sort of multi-factorial enquiry that the breadth and imprecision of the concept requires.

The *Guidance*

6.3.9 The burden this is likely to impose on individuals is illustrated by the information which the *Guidance* says 'would help establish the facts' and which, therefore, it implicitly suggests an individual should keep for all periods when the question of whether a 'putative home' was his 'home' might be relevant to his residence status.

'• General overheads - utility bills which may demonstrate that you have been present in that home, for example, telephone bills or energy bills, which demonstrate usage commensurate with living in the property.

• TV/satellite/cable subscriptions.

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- Local parking permits.
- Membership of clubs, for example sports, health or social clubs.
- Mobile phone usage and bills pointing to your presence in a country.
- Lifestyle purchases pointing to you spending time in your home – for example, purchases of food, flowers and meals out.
- Presence of your spouse, partner or children.
- Engagement of domestic staff or an increase in their hours.
- Home security arrangements.
- Increases in maintenance costs or the frequency of maintenance, for example having your house cleaned more frequently.
- Insurance documents relating to that home.
- SORN notification that a vehicle in the UK is "off road".
- Re-directed mail requests.
- The address to which you have personal post sent.
- The address to which your driving licence is registered.
- Bank accounts and credit cards linked to your address and statements which show payments made to utility companies.
- Evidence of local municipal taxes being paid.
- Registration, at your address, with local medical practitioners.
- What private medical insurance cover you have, is it an international policy?
- Credit card and bank statements which indicate the pattern and place of your day by day expenditure.'[122]

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THE SECOND AUTOMATIC UK TEST

6.4.1 The Second Automatic Test is satisfied where in a fiscal year a person has a UK home and either no overseas home or he does not spend more than a permitted amount of time in an overseas home.

Homes and Holiday Homes

6.4.2 One issue which is particularly acute in respect of the Second Automatic UK Test is the distinction between a 'home' for the purposes of the SRT and 'somewhere that … [the individual concerned] … uses periodically as nothing more than a holiday home or temporary retreat (or something similar)' which 'does not count as a home of' the individual.[123] The use of the phrase 'count as' suggests that something which is a 'home' may also be a 'holiday home or temporary retreat (or something similar)' in fact although it is not counted as a home because of para. 26(3).

6.4.3 Paragraph 8(1)(c), *inter alia*, concerns situations where the individual concerned has homes both in the UK and overseas. In such a situation he will usually spend time in both homes. Where significantly more time is spent in the UK home or homes, it may be that the overseas home might aptly be described as 'nothing more than a holiday home' which is used 'periodically'. It may be that in other situations, an overseas property which an individual thinks is a home in respect of him will turn out not to be a home at all.

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122 *Guidance* para. 7.2
123 Para. 25(3)

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6.4.4 It may be that in such situations the conditions of the Second Automatic UK Test would not have been fulfilled if the overseas property had been the individual's home and was not a holiday home, but because it either is not his home or, being his home, is also a holiday home, the test is fulfilled.

6.4.5 The difficulty for individuals attempting to determine their residence status is, of course, that what is and is not a home and what is and is not a holiday home, temporary retreat (or something similar) is unclear.

A Home Unexpectedly Ceasing To Be A Home

6.4.6 The CIOT has pointed out that the unexpected destruction of an overseas home could have unforeseen tax results:-

> 'We also think that something needs to be done about the situation where a person finds that their only 'home' is in the UK because of some exceptional event. The obvious recent example here would be a Libyan national whose main home was clearly in Libya, but who might have a small flat in London. If the Libyan home was destroyed in the recent Arab Spring, that person could – through no fault – and without setting foot in the UK – find that their 'only' home was now in London.'[124]

[124] *CIOT 2012 Response* para. 3.5

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SECTION VII

CHILDREN

'A CHILD OF P'S': PARA. 32(2)(C)

7.1.1 There is a Family Tie where a relevant relationship exists at any time between an individual and another person if at that time the individual and the other person is a child of the individual and is under the age of 18.[125]

7.1.2 A child of the individual includes an illegitimate child[126] and an adopted child of the individual but not a stepchild who has not been adopted by the individual.

SEEING ONE'S CHILD: PARA. 32(3) & (4)

7.2.1 An individual does not have a Family Tie by reference to his minor child if he sees the child in the UK on fewer than 61 days (in total) in:-

(a) the relevant year; or

(b) if the child turns 18 during the relevant year, the part of the year before the day on which the child becomes 18.[127]

7.2.2 A day counts as a day on which the individual sees the child if he sees him in person for all or part of the day.[128]

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125 Para. 32(2)
126 Family Law Reform Act 1987 s.1 and Adoption and Children Act 2002 s.67

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The function of para. 32(3)

7.2.3 Para. 32(3) prevents there being a Family Tie in circumstances where the individual sees his minor child predominantly overseas and only occasionally in the UK but it also performs an important wider function. The requirement in s.32(2)(a) in respect of a relevant relationship with a spouse is that the individual and the wife, husband or civil partner must not be separated, and in s.32(2)(b) that the individual and the other person must be 'living together as husband and wife or, if they are of the same sex, as if they were civil partners' means that it is unlikely that a person could be unaware that there is such a person with whom he has a relevant relationship.

7.2.4 There are no such restrictions in respect of a child within para. 32(2)(c) so it would be quite possible that an individual could have a relevant relationship with a person of whose circumstances, or even existence, he has no knowledge.[129] Para. 32(3), however, will normally[130] ensure that the individual does not have a Family Tie in respect of his child.

Year in which the child becomes 18

7.2.5 It will be seen that in the fiscal year in which the child becomes 18, one looks only at the period ending immediately before his birthday to see if the 61-day limit is breached. So

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127 Para. 32(3)
128 Para. 32(4)
129 Particularly as a child for this purpose will include an illegitimate child
130 There might be a rare situation where an individual has an illegitimate child about whom he does not know and with whom he later forms a married relationship without knowing the blood relationship between them. That would be quite close to the situation of Oedipus and Jocasta in Sophocles' 'Oedipus the King'. Such complications are not necessarily confined to the modern world

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one cannot have a relevant relationship to a child whose eighteenth birthday falls on or before 4th June in the fiscal year.

'Sees the child'

7.2.6 What is involved in seeing one's child? The CIOT commented:-

> 'Blind people cannot "see" their child so paragraph 30 is meaningless for them. Perhaps we could use less discriminatory language like "spends time with". This should also avoid silly debates about Skype, etc.'[131]

7.2.7 The use of the phrase 'sees a child' is certainly infelicitous but a Court is unlikely to construe it narrowly so as to confine it to physical sight. The *SOED* includes amongst the meanings of 'see' used as a verb:-

> 'Be in the company of, meet and converse with, visit socially.'

7.2.8 Nonetheless in our view the word requires some degree of physical proximity so that observing one's child by means of Skype over the internet would not satisfy the conditions of para. 32(3).[132]

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131 *CIOT February 2013 Response* para. 4

132 A more difficult question is posed by the parent who leaves the family home to go to work before his children are awake and returns after they have gone to sleep. Does whether para. 32(3) applies in such a situation depend on whether he peeks into their bedroom to see them asleep?

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MINORS IN FULL-TIME UK EDUCATION: PARA. 33(3) - (6)

7.3.1 For the purpose of deciding whether a person to whom an individual has a relevant relationship (referred to as a 'family member')[133] is resident in the UK, a special rule applies. A family member who satisfies certain conditions is to be treated as being not resident in the UK for the year if the number of days he or she spends in the UK in the part of the year outside term time is less than twenty one.[134]

7.3.2 The conditions are that the family member:-

(a) is a child of the individual whose residence is to be decided by reference to the Family Tie and who is under the age of 18;

(b) is in full-time education in the UK at any time in the year concerned; and

(c) is resident in the UK for that year but would not be so resident if the time spent in full-time education in the UK in that year were disregarded.[135]

What is full-time education?

7.3.3 Although there is a definitional provision in respect of 'full-time education in the UK'[136] it does not state what is 'education' or what is 'full-time'. It simply states:-

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133 Para. 33(1)

134 Para. 33(3)

135 Para. 33(4). It is doubtful if the residence requirements of para. 33(4) will be of great significance in many situations. A child in full-time education in the UK is likely to be automatically UK resident under the First Automatic UK Test because he will spend 183 days or more in the UK. Ignoring the time spent here in term time, he is very unlikely to be UK resident if the number of days he spends in the UK outside term-time is less than twenty one. It seems that the relief might have been simplified, therefore, by providing that it applied to any child of the individual concerned who is in full-time education and who spends fewer than twenty one days in the UK outside term-time without materially increasing the number of individuals to whom it applied

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'In sub-paragraph (4) -

(a) references to full-time education in the UK are to full-time education at a university, college, school or other educational establishment in the UK …'

7.3.4 Although the phrase 'full-time education' may not pose any problems in respect of most schools and most degree courses at universities it may do so in respect of short-term courses and sandwich courses. Similarly the term 'education' may pose difficulties particularly in relation to the sort of courses offered at summer camps.

[136] Para. 33(5)

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SECTION VIII

ACCIDENT AND ILLNESS

THE EXCEPTIONAL CIRCUMSTANCES EXCEPTION

The Legislation (Paras. 22(4) – (6))

8.1.1 Paragraphs 22(4)-(6) gives the second exception (the 'Exceptional Circumstances Exception') to the Basic Day Count Rule and provides that a day does not count as a day spent by an individual, P, in the UK:-

> '(4) …. where
>
> (a) P would not be present in the UK at the end of that day but for exceptional circumstances beyond P's control that prevent P from leaving the UK; and
>
> (b) P intends to leave the UK as soon as those circumstances permit.
>
> (5) Examples of circumstances that may be "exceptional" are -
>
> (a) national or local emergencies such as war, civil unrest or natural disasters, and
>
> (b) a sudden or life-threatening illness or injury.
>
> (6) For a tax year-
>
> (a) the maximum number of days which may be treated as days which do not count as days spent in the UK in reliance on sub-paragraph (4) is limited to 60, and

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(b) accordingly, once the number of days within sub-paragraph (4) reaches 60 (counting forward from the start of the tax year), any subsequent days within that sub-paragraph, whether involving the same or different exceptional circumstances, will count as days spent by P in the UK.'

The Elements of the Exceptional Circumstances Exception

8.1.2 It may be seen that paras. 22(4) & (5) state the elements (the 'Elements') which must be satisfied for the Exception to apply whilst the number of days which may be discounted under the Exception is restricted by para. 22(6). The Elements are:-

- the individual would not be present in the UK but for (the 'First Element');
- exceptional circumstances (the 'Second Element');
- beyond the individual's control (the 'Third Element')
- that prevent the individual from leaving the UK; (the 'Fourth Element') and
- the individual intends to leave the UK as soon as those circumstances permit (the 'Fifth Element').

8.1.3 The *Guidance* tends to elide these Elements so that it is difficult to discern the reasoning on which the *Guidance's* conclusions on its examples are based. The result is that the *Guidance* provides little help in construing the Elements of the Exception which present many difficulties of construction.

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The First Element – 'would not be present ...'

8.1.4 The First Element of the test requires a counter factual hypothesis: would the individual be present in the UK if the exceptional circumstances had not occurred?

The Second Element – 'Exceptional Circumstances'

The dictionary definition

8.1.5 The *SOED* defines 'exceptional' as:-

> 'Of the nature of or forming an exception; unusual, out of the ordinary; special; (of a person) unusually good, able, etc.'

8.1.6 The most apposite meanings of an 'exception' listed by the *SOED* are:-

> 'The action of excepting someone or something from a group, the scope of a proposition, etc.; the state or fact of being so excepted.
>
> ….
>
> A person who or thing which is excepted; *esp*. a particular case or individual that does not follow some general rule or to which a generalization is not applicable.'

8.1.7 So 'exceptional' means primarily the quality of being unusual or out of the ordinary or not following a general rule. 'Unusual' and 'out of the ordinary', however, are of lesser force than 'exceptional'. So one might argue that a thing is only exceptional if it is 'unusual' or 'out of the ordinary' to a significant degree. This element of degree is

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reflected in the SOED's definition of 'exceptional' in reference to a person. Defining the necessary degree, however, is not straightforward.

What is the applicable norm?

8.1.8 Although 'exceptional' plainly includes the idea of departing from a norm against what norm is one to judge whether an event is or is not exceptional? Contracting a terminal illness, for example, may be said to be an unusual or out of the ordinary event in the life of an individual but in respect of human beings in the mass it occurs with statistical regularity. For many years civil unrest was common in Northern Ireland at a time when it was rare in the UK as a whole. Common sense suggests that the norm must be related to the particular circumstances of the individual concerned but how it is related must await explication by the Courts. The *Guidance* says:-

> 'Life events such as birth, marriage, divorce and death are not routinely regarded as exceptional circumstances. Choosing to come to the UK for medical treatment or to receive elective medical services such as dentistry, cosmetic surgery or therapies will not be regarded as exceptional circumstances.
>
> Travel problems, for example a delayed or missed flight due to traffic disruption, train delays or cancellations, or a car breakdown, will not be considered as exceptional circumstances.'[137]

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8.1.9 The *Guidance* gives an example, Example B5, in which there is a gradual deterioration in public order in an African country leading to the Foreign and Commonwealth Office (the 'FCO') issuing a warning against travelling to the country. Are the exceptional circumstances the warning or the entire situation? Does one test them against the normal situation in the African country (where periods of instability may or may not be frequent) or against African countries generally or simply against all countries generally?

8.1.10 In this example, the *Guidance* accepts that the breakdown in public order in the country is an exceptional circumstance but it does not explain the reasoning leading to its conclusion that it is.

Statutory examples of exceptional circumstances: para. 22(5)

8.1.11 As we have seen, para. 22(5), provides a restrictive list of examples of exceptional circumstances. It might be argued that the meaning of exceptional circumstances is to be restricted to items which are *ejusdem generis* to the examples given in that list. That might suggest, for example, that an injury which was neither sudden nor life-threatening but which was sufficient to prevent one's travelling, such as the development of severe back pain, would not be an exceptional circumstance. Similarly, it might be argued, that

[137] *Guidance* paras. B19 and B20. Yet the Exchequer Secretary to the Treasury said at the Report Stage debate on the Finance Bill 2013: 'Adverse weather conditions that tend to happen frequently in Winter will not usually fall under the definition, but it is at least in theory possible for them to apply'

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emergencies which were not of the same degree of extremity as those listed in para. 22(5)(a), such as transport strikes, are not 'exceptional' for this purpose.[138]

Foreseeability and exceptional circumstances

8.1.12 Unforeseeability does not form a necessary part of the concept of the 'exceptional' in ordinary usage. The appearance of Haley's Comet or a solar eclipse would clearly be exceptional although they are predictable.[139]

Exceptional circumstances affecting other people

8.1.13 To what extent can circumstances which affect other people and which indirectly prevent one from travelling be taken into account? For example, would there be an exceptional circumstance within the Exception if a brother or close friend were suddenly taken ill or a spouse or adult child were injured in an accident?

8.1.14 Some comments in the *Guidance*[140] would seem to limit the Exceptional Circumstances Exception in respect of circumstances involving another person to circumstances primarily affecting a 'husband, wife' etc. There seems to be no basis in the legislation for that limitation. There does not seem to be any reason why an individual may not be said to be prevented from leaving the UK by exceptional circumstances which primarily

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138 It is notable that all of the examples given in the *Guidance* are in respect of very extreme circumstances. *Guidance* paras. B8 - B17

139 Para. B18 of the *Guidance* says: 'Days spent in the UK will not be considered exceptional where the circumstances are not beyond the individual's control, or where they could reasonably have been foreseen or predicted'. This might suggest that HMRC does not accept that exceptional circumstances may be foreseeable. It might be, though, that the comment is simply imprecisely phrased and that the *Guidance's* author does not intend to import the concepts of foreseeability and controllability into the meaning of exceptional. Rather, he is referring to the Third and Fourth Elements of the Exception

140 *Guidance* paras. B11 & B12

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affect another person, even if that person is, for example, an adult child, brother or close friend.

The Third Element – 'Beyond the Individual's Control'

8.1.15 It is the exceptional circumstances which must be beyond the individual's control. At what point must one judge whether they are beyond his control? The answer must surely be at the point in time at which one determines whether or not the circumstance prevents the individual leaving the UK.

Foreseeability and control

8.1.16 Comments in the *Guidance* suggest that the exceptional circumstances must be both beyond the individual's control and unforeseeable.[141] Paragraph 22(4)(a) specifically provides that the exceptional circumstances must be beyond the individual's control but there is no express statutory requirement that they must not have been foreseen. Is such a requirement implicit? If a person comes to the UK for an operation knowing that there is a chance that, if the operation does not go well he will be unable to travel, and it does not go well, he will have been prevented by an exceptional circumstance[142] beyond his control from leaving the UK even though he need not have had the operation in the UK and its risks were known to him.

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141 *Guidance* para. B13

142 This assumes that the operation not going well is an exceptional circumstance. Of course, it may well be that a Court would hold that an unfavourable outcome to an operation was not an exceptional circumstance. Para. B19 of the *Guidance* says that 'choosing to come to the UK for medical treatment ... will not be regarded as exceptional circumstances' but in our hypothetical circumstances it is the outcome of the operation which may (or may not) be exceptional not the journey to the UK to enable the operation to take place

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The Fourth Element – that Prevents the Individual from Leaving the UK

Is intention a part of the statutory concept of being prevented?

8.1.17 What is involved in being prevented from leaving the UK? The most apposite meanings of 'prevent' given by the *SOED* are:-

- 'cause to be unable to do or be something, [the "First Meaning"];
- to stop … from doing or being [the "Second Meaning"].'

8.1.18 The First Meaning suggests that a person can be prevented from doing something which he does not intend to do. If an individual is subject to an exclusion order forbidding him to go to Wembley Football Stadium, in the First Meaning of 'prevent' he is prevented from going to the stadium whether he actually intends to go there or not. In the Second Meaning, he is not prevented from going to Wembley Stadium unless he had intended to go to the stadium until forbidden to do so by the Order because one cannot be stopped from going somewhere if one has no intention of actually going there.

8.1.19 If intention does form a part of the statutory concept of being prevented, what is the nature of the required intention and at what time must it be held?

8.1.20 The *Draft 2012 Guidance's* example B2 concerned Henrik who came to the UK on 20th December intending to return on 3rd January. He had already spent 68 days in the UK in the fiscal year. He suffered a heart attack on the 31st December and for medical reasons stayed for a further forty two days, so he had spent 122 days in the UK in the fiscal year

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in total. Was Henrik prevented from travelling to Germany after 3rd January, the date on which he originally intended to travel to Germany? The only day on which he ever intended to travel to Germany was on that day and not on the succeeding days. If intention is a necessary element of being prevented, he was not prevented from travelling to Germany on 4th January and thereafter.

8.1.21 Perhaps the answer to this apparent conundrum is that he only abandoned his intention of travelling to Germany because of the exceptional circumstances of his illness and that the provision works by looking back at the original intention to see whether it can be fulfilled. Yet his original intention was to leave on 3rd January and not on succeeding days. So it can only be on 3rd January that he was prevented from travelling to Germany if intention is an essential element of the statutory concept of being prevented.

8.1.22 Another possible answer to the conundrum is that once his original intention was defeated, we are to hypothesise a revised plan or plans to leave on the succeeding days which was or were successively defeated by Henrik's medical condition. That is surely a very artificial hypothesis. On the 4th January, in the example Henrik was in intensive care. He can hardly have formed an intention of leaving on that day or, indeed, on any day before the end of his estimated convalescence period.[143]

[143] The *Guidance's* example B5 also provides another example indicating that intention cannot form part of the statutory concept of being prevented. There cannot have been a time, before the civil unrest had reduced to an acceptable level, when Philip could have formed an intention to return to the African country if we assume that his intention is determined by the FCO's advice. His intention is surely to return when the civil unrest ceases and so the civil unrest cannot prevent him from fulfilling that intention

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8.1.23 Having regard to such difficulties, it seems that the only way of construing the provisions which is consistent with their statutory purpose is to conclude that intention to leave does not form an element of being prevented from leaving. Intention is only relevant to the Fifth Element of the Exception.[144] In considering the Fourth Element one merely asks of any particular day on which the individual is present in the UK at midnight whether he would have been able to leave were it not for the exceptional circumstances.

Does foreseeability form part of the concept of being prevented?

8.1.24 If an individual is in the UK when it declares war on another country and all civilian flights are suspended, if the declaration and suspension have been foreseeable for some weeks in advance is he yet prevented by exceptional circumstances beyond his control from leaving the UK? The Authors consider that, for as long as the suspension continues, he is.

8.1.25 Of course, the First Element of the Exception would still have to be present. The individual would have to satisfy the condition that if the exceptional circumstance had not occurred he would not have been present in the UK. In many situations that may very well have been the case. The fact that an individual was willing to accept that, in the event of war being declared, he would be unable to leave the UK, does not mean that if war had not been declared he would have remained in the UK.

[144] It is also indirectly relevant to the First Element, because in determining whether the individual would have been present in the UK if the exceptional circumstance had not occurred one would have regard to his intentions before those circumstances arose

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Degree and being prevented

8.1.26 Circumstances in which it is impossible for an individual to leave the UK who is willing to shoulder any risk or loss in order to do so will be very rare.

8.1.27 It is implicit in the *Guidance*[145] that HMRC accepts that in deciding whether or not a person is prevented from leaving the UK one takes into account matters of degree; that circumstances that do not exclude all possibility of a person leaving the UK may yet prevent a person doing so within the meaning of the legislation. They are surely correct to do so but yet another example in the *Guidance* suggests that they will not do so consistently.

Being prevented from leaving the UK by an exceptional circumstance that has brought one to the UK

8.1.28 It is clear that one can be prevented from leaving the UK by an exceptional circumstance even where one has come to the UK because of it. Example B5 in the *Guidance* indicates that HMRC accepts that this is so.

'... That prevent P from leaving the UK'

8.1.29 The Exceptional Circumstances Exception applies where exceptional circumstances prevent an individual from leaving the UK. The legislation ought to have provided that the exception is satisfied if the individual is prevented from reaching his country of

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[145] See *Guidance* para. B14

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destination rather than if he is prevented from leaving the UK. As the CIOT pointed out in their *CIOT 2012 Response*:-

> 'Someone in the UK at the time of the Arab Spring might have been prevented from going back to their home in Libya. But there would be nothing to stop them taking a ferry to France.'[146]

8.1.30 Philip in the *Guidance's* example, Example B5 is not prevented from leaving the UK by the situation in the African country in which he has been working; he is prevented from going to that country.

8.1.31 Of course, the Tribunal and the Court may correct this fault by applying a radically purposive interpretation and, in practice, HMRC may not take the point (the *Guidance* does not seem to do so). [147] Such uncertainty of construction, however, does not meet the SRT's purpose of providing rules which are 'clear, objective and unambiguous.'[148]

The Fifth Element: The Individual Intends to Leave the UK as soon as those Circumstances Permit

At what time must the intention be held?

8.1.32 The legislation does not expressly state the time at which the intention to leave the UK must exist.

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146 The *CIOT 2012 Response* para. 13.6
147 *Guidance* paras. B16 and B17 and Example B5

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8.1.33 Examples in the *Guidance*,[149] without saying so expressly, seem to assume that the relevant intention is the intention existing on each day in relation to which it is to be determined whether the Exceptional Circumstances Exception applies. That does seem to be consistent with the legislation which is entirely directed at considering the situation ruling on a particular day but it seems particularly harsh where the change of intention is formed when the person has incapacitated by the exceptional circumstances but relates to a later time.[150]

Coma and brain damage

8.1.34 If it is the case that the intention must be held on each day on which the Exceptional Circumstances Exception applies then it causes a particular difficulty where the exceptional circumstances cause the individual to fall into a coma or such serious brain injury as to destroy his power of decision-making. How can an individual in such a condition form an intention to 'leave the UK as soon as those circumstances permit'? Of course, the Court is likely to strain to so construe the Exceptional Circumstances Exception as to allow it to apply in such circumstances but it is difficult to see on what basis it could do so without doing very considerable violence to the statutory words.[151]

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148 Foreword to the *June 2012 ConDoc*

149 Examples B3 & B4

150 See the *Guidance* B14

151 One cannot determine HMRC's view of this anomaly from the *Guidance*. One of its examples concerns an individual who suffers a serious accident and is found unconscious but the example does not make it clear whether he is unconscious on the days in respect of which the Exceptional Circumstances Exception is said to apply. See *Guidance* para. B9, Example B1

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Does the individual have to make efforts to overcome the exceptional circumstances if the Exceptional Circumstances Exception is to apply?

8.1.35 The Exchequer Secretary speaking in the Report Stage debates seemed to suggest that an individual who considers that the exception applied to his circumstances 'would need to demonstrate that they [sic] made every possible effort to get out of the United Kingdom by any means.' It may be that the Minister meant that taking such steps would provide evidence that the exceptional circumstances did indeed prevent him from leaving (the Fourth Element) and that he did indeed intend to leave the UK as soon as those circumstances permitted (the Fifth Element).

8.1.36 If, however, one knows, for example, that an airport is closed by civil unrest there is no requirement in the statute that one must go to the airport in the hope that it is re-opened. If one does not, however, and the airport is re-opened then, at least from the time one is aware of the re-opening, one is not prevented from using the airport to leave the country (the Fourth Element) and it may be that one does not intend to leave the UK as soon as circumstances permit (the Fifth Element).

'... those circumstances permit ...'

8.1.37 If the Fifth Element is read literally it is likely that it could never be satisfied. 'Those circumstances' in para. 22(4)(b) must refer to the 'exceptional circumstance beyond [the individual's control] that prevent [him] from leaving the UK' referred to in para. 22(4)(a). For as long as those circumstances exist, the individual must be prevented from leaving the UK. It is difficult to imagine circumstances in which an individual would no longer be prevented by the exceptional circumstances from leaving the UK in

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which the exceptional circumstances would continue to exist. For example, if one is prevented by the state of one's body after an accident from travelling, as soon as one's body has repaired itself sufficiently for one to travel, the circumstances which have prevented you from travelling no longer exist. How then could one form an intention to 'leave the UK as soon as those circumstances permit' as opposed to when the circumstances no longer exist?

8.1.38 Although the draftsman has undoubtedly fallen down here, a Tribunal or Court would surely repair the difficulty by applying the maxim *ut res magis valeat quam pereat*[152] and reading the provision as 'P intends to leave the UK as soon as he is (practically?) able to do so'.

8.1.39 The Exceptional Circumstances Exception is not claimed. Where the conditions of the exception are met, the exception will apply whether the individual concerned wishes it to do so or not. Sometimes it may be advantageous for an individual to be resident in the UK[153] but the effect of the Exceptional Circumstances Exception will prevent him being so.

[152] It is better for a thing to have effect than to be made void

[153] In order to take advantage of a double tax treaty with another country, for example, in order to obtain relief under that treaty for income otherwise taxable in that other country

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SECTION IX

DEATH

THE AUTOMATIC OVERSEAS TESTS

The First Automatic Overseas Test

9.1.1 The First Automatic Overseas Test is specifically excluded from applying to an individual in the fiscal year of his death.[154]

The Second Automatic Overseas Test

9.1.2 The Second Automatic Overseas Test can apply in the fiscal year in which the individual dies.[155] Where it applies, however, the Fourth Automatic Overseas Test will also always apply.[156]

The Third Automatic Overseas Test

9.1.3 The Third Automatic Overseas Test can also apply in the year of death. Because of its provision that during the fiscal year there must be no significant break from overseas work,[157] however, it can only apply if the death occurs on or after 7th March in the fiscal year. Otherwise the condition will always be satisfied that 'at least 31 days go by and not one of those days is:-

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154 Para. 12(c)
155 Para. 13
156 Para. 15
157 Para. 14(1)(b)

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(a) a day on which [the individual] does more than 3 hours work overseas, or

(b) a day on which [the individual] would have done more than 3 hours work overseas but for being on annual leave, sick leave or parenting leave.'[158]

The Fourth Automatic Overseas Test

9.1.4 The first condition[159] of the Fourth Automatic Overseas Test is that the individual dies in the year. Where the Second Automatic Overseas Test is satisfied in respect of an individual who dies in the year, the Fourth Automatic Overseas Test will always be satisfied.

9.1.5 The second condition[160] of the Fourth Automatic Overseas Test is that either the individual 'was resident in the UK for neither of the 2 tax years preceding' the fiscal year concerned or para. 15(2) is satisfied. Para. 15(2) will be satisfied if the individual was not resident in the UK in the Preceding Year and, in the year before that, the individual's circumstances fell within Cases 1, 2 or 3 (Cases concerning the cessation of UK residence) of the Split Year Rules. We shall call this second condition of the Fourth Automatic Overseas Test, the 'Prior Non-Residence Condition'.

9.1.6 The third condition of the Fourth Automatic Overseas Test is that the individual spends less than 46 days in the UK in the fiscal year concerned. Where, therefore an individual dies in the year who meets the Prior Non-Residence Condition, an individual who dies on or before 21st May in a fiscal year will not be resident in the UK for that year. A

158 Para. 29(2)
159 Para. 15(1)(a)

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person who does not satisfy the Prior Non-Residence Condition can satisfy none of the Automatic Overseas Tests except the Third Automatic Overseas Test which, as we have seen, he will not do if he dies before 7th March in the fiscal year. He will, therefore, be non-resident only if he does not meet any of the Automatic UK Tests or the Sufficient Ties Test.

The Fifth Automatic Overseas Test

9.1.7 The Fourth and Fifth Automatic Overseas Tests differ in that the Fourth Test has a limit on the number of days which the individual can spend in the UK in the fiscal year whereas the Fifth Test does not. The Fifth Test, however, requires that the individual should meet the Third Automatic Overseas Test with certain modifications for the fiscal year concerned[161] and also should meet the Prior Non-Residence Condition either by reason of meeting the Third Automatic Overseas Test in the prior years or, where the year before the Preceding Year is a split year, by reason of meeting the Third Automatic Overseas Test for the Preceding Year and the conditions of Case 1 (Starting full-time work overseas[162]) for the year before that.[163]

A summary of the application of the Automatic Overseas Tests in the year of death

9.1.8 A person who satisfies the Prior Non-Residence Condition will not be resident in the UK by reason of meeting one of the Automatic Overseas Tests if he:-

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160 Para. 15(1)(b)
161 Paras. 16(1)(c) and 3
162 The phrase 'full-time work' appears in the head note to para. 44 but is not a phrase which appears in the main body of the *SRT Schedule*

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(a) meets the Second and Fourth Automatic Overseas Tests because he dies before 20th May in the fiscal year or dies after that date and still spends fewer than 46 days in the UK; or

(b) meets the Third Automatic Overseas Test which he can do only if he dies on or after 7th March in the fiscal year; or

(c) meets the Fifth Automatic Overseas Test which requires him, *inter alia*, to work sufficient hours overseas as assessed over the period from the beginning of the fiscal year to the day before his death.

9.1.9 A person who does not meet the Prior Non-Residence Condition cannot meet any of the Automatic Overseas Tests except the Third Automatic Overseas Test which he cannot do if he dies before 7th March in the fiscal year concerned.

THE AUTOMATIC UK TESTS

The First Automatic UK Test

9.2.1 As we have seen, the First Automatic UK Test is met where the individual spends at least 183 days in the UK in the fiscal year concerned.[164] It therefore cannot be met where the individual dies on or before 5th October in the fiscal year.

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[163] Paras. 16(1)(b) & (2)
[164] Para. 7

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The Second Automatic UK Test

9.2.2 *Inter alia*, the Second Automatic UK Test requires that the individual have a UK home for a period at least 30 days of which fall within the fiscal year.[165] It cannot, therefore, be met where the individual dies on or before 5th May in the fiscal year.

The Third Automatic UK Test

9.2.3 To meet the Third Automatic UK Test an individual must work sufficient hours in the UK, assessed over a period of 365 days.[166] It is sufficient, however, if only a 'part of that period falls within' the fiscal year.[167] So there might be only one day in the fiscal year forming part of that period. There must, however, be one day in the period which also falls in the fiscal year on which the individual does more than 3 hours work in the UK.[168] So it would be possible for an individual to meet the Third Automatic UK Test if he died on 6th April having done three hours of work in the UK. Of course in those circumstances, if he met the Prior Non-Residence Conditions he would meet the Fourth Automatic Overseas Test and be automatically non-resident. If he did not meet the Prior Non-Residence Conditions, however, he would not meet any of the Automatic Overseas Tests and so would be resident for the fiscal year concerned.

165 Para. 8(1)(c)(ii)
166 Para. 9(1)(a)
167 Para. 9(1)(c)
168 Para. 9(1)(e)

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The Fourth Automatic UK Test

9.2.4 The Fourth Automatic UK Test specifically applies to individuals who die in the fiscal year concerned.[169] The test can only be met where the individual concerned had a UK home at the time of his death.[170] There is no requirement that the individual should have been present in the UK at any time in the fiscal year.

The Sufficient Ties Test

9.2.5 In contrast to the position where an individual is born in the year, where he dies in the year the number of days in the first column of the tables in paras. 18 and 19, which determine how many ties are sufficient, are reduced.[171] The amount of the reduction is found by pro-rating those numbers by a fraction which takes account of the number of whole months in the year after the month in which the individual dies.[172] The result is that the earlier he dies in the year the smaller the number of ties which are required for him to meet the Sufficient Ties Test. The *Guidance* contains two useful tables showing for each month in which an individual might die the number of ties required for him to meet the Sufficient Ties Test after pro-rating.[173] In addition to this pro-rating, the table in para. 18 which applies where the individual has been resident in the UK for one or more of the three fiscal years preceding the year concerned is adjusted so that there is no

169 Para. 10(1)(a)
170 Para. 10(1)(d)
171 Para. 20
172 Paras. 20(2) – (4)
173 *Guidance* para. 4.11. Although these are useful tables, the table in respect of a person who has not been UK resident in any of the three fiscal years before the year of his death is very misleading. It fails to reflect the fact that a person who has not been resident in the UK for any of the three preceding fiscal years and who spends less than 46 days in the UK will be non-resident under the Second Automatic Overseas Test (see para. 13). A person who meets any of the Automatic Overseas Tests cannot meet the Sufficient Ties Test (see para. 17(1)(a))

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minimum level of days below which he will not pass the Sufficient Ties Test however many ties he has.[174] This is in contrast to a year in which the individual does not die.

9.2.6 What is, perhaps, slightly surprising is that none of the limits in the UK ties themselves which are set by reference to periods of time or to a number of days are pro-rated.

9.2.7 So for example if an individual sees his child in the UK on less than 61 days he will not have a Family Tie by reference to that child and this number is not pro-rated in the year of death. A family member of the individual within para. 33(4) will be treated for the purpose of the Family Tie as being resident if the number of days which he spends in the UK outside term time is less than 21.[175] Again, this number is not pro-rated. The various limits as to numbers of days in the Accommodation Tie, the number of days for which a person must work in order to have a Work Tie and the number of days which a person must spend in the UK in order to have a 90-Day Tie are all not pro-rated.

The Split Year Rules

Case 1: Starting full-time work overseas

9.2.8 When a person dies in the year his circumstances cannot fall within Case 1 of the Split Year Rules.[176] That is because one of the conditions of Case 1 is that the individual must not be resident in the UK for the Succeeding Year 'because [he] meets the third

[174] Para. 20(1)
[175] Para. 33(3)
[176] Para. 44

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automatic overseas test for that year'.[177] Being dead, he cannot meet that test in that year.

Case 2: The partner of someone starting full-time work overseas

9.2.9 In contrast an individual who has died in the Relevant Year can fall within the circumstances of Case 2.[178] This is so even if the partner of the Accompanying Spouse falls into Case 1 in the Accompanying Spouse's Relevant Year, thus satisfying para. 55(3)(a). That is because, even though it is a condition that for the partner to satisfy the conditions of Case 1 he should meet the Third Automatic Overseas Test for the Succeeding Year[179] when the Accompanying Spouse will be dead, there is no requirement for the Accompanying Spouse to be alive when he meets that condition.[180] Nor does it matter that there is a requirement under Case 2 that the Accompanying Spouse should be 'not resident in the UK for the next tax year'.[181] As a negative condition, this can be satisfied when the Accompanying Spouse is dead.

Case 3: Ceasing to have a home in the UK

9.2.10 A person who dies in the Relevant Year may yet fall within the circumstances of Case 3[182] but, if he dies on or before 5th October in the fiscal year he will not be able to meet the condition of para. 46(6) that 'at the end of the period of 6 months beginning with the

177 Para. 44(4)
178 Para. 45
179 Para. 44(4)
180 Para. 45
181 Para. 45(6)
182 Para. 46

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day [when he ceases to have any home in the UK he] … has a sufficient link with a country overseas'.[183]

Case 4: Starting to have a home in the UK only

9.2.11 The circumstances of a person who dies in the fiscal year concerned cannot fall within Case 4[184] as he cannot meet the condition that he 'continues to meet the only home test for the rest of that year'.[185] A person cannot have a home when he is dead.

Case 5: Starting full-time work in the UK

9.2.12 The circumstances of a person who dies in the Relevant Year may fall within Case 5[186] but only if he dies on or after 6th March in the fiscal year. That is because there must be a 365-day period which begins with a day within the fiscal year in which there is no significant break from UK work.[187] A significant break from UK work is a period of 31 days or more in which not one of the days is a day on which the individual does more than three hours of work in the UK or on which he would have done so but for being on annual leave, sick leave or parenting leave.[188] Obviously the earliest such 365-day period there can be, must be from the 6th April at the beginning of the year to the 5th April at the end of the year. If that period ends more than thirty days after his death, therefore, there must be a significant break from work.

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183 That is on the assumption that a person will not be 'considered for tax purposes to be a resident of that country in accordance with its domestic laws' (para. 46(7)(a)) at a time when he is dead. That does not seem to be the position in the UK (see Section X below) which may suggest that there may be other jurisdictions in which it is possible to be tax resident at a time when one is not alive

184 Para. 47

185 Para. 47(3)

186 Para. 48

187 Para. 48(3)(d)

188 Para. 29

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Case 6: Ceasing full-time work overseas

9.2.13 The circumstances of an individual who dies during the relevant year cannot fall within Case 6[189] because a condition of that Case is that the individual 'is resident in the UK for the next tax year'.[190]

Case 7: The partner of someone ceasing full-time work overseas

9.2.14 The circumstances of an individual who dies during the fiscal year concerned cannot fall within Case 7[191] because one of the conditions of Case 7 is that the individual 'is resident in the UK for the next tax year'.[192]

Case 8: Starting to have a home in the UK

9.2.15 The circumstances of an individual who dies during the fiscal year concerned cannot fall within Case 8[193] because one of the conditions of that Case is that the individual 'continues to have a home in the UK for the rest of that year and for the whole of the next tax year'.[194]

The Split Year Rules: A Tabular Summary of their Application in the Year of Death

9.2.16 The application of the Split Year Rules to an individual who dies in the Relevant Year is summarised in the following table:-

189 Para. 49
190 Para. 49(4)
191 Para. 50
192 Para. 50(6)

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CASE	DESCRIPTION	APPLICATION
1	Statutory full-time work overseas.	Cannot apply.
2	The partner of someone starting full-time work overseas.	Can apply.
3	Ceasing to have a home in the UK.	Can apply only if he dies on or after 6th October in the fiscal year.
4	Starting to have a home in the UK only.	Cannot apply.
5	Starting full-time work in the UK.	Can apply but only if he dies on or after 6th March in the fiscal year.
6	Ceasing full-time work overseas.	Cannot apply.
7	The partner of someone ceasing full-time work overseas.	Cannot apply.
8	Starting to have a home in the UK.	Cannot apply.

Temporary Non-Residence

9.2.17 A fiscal year in which an individual dies may be a period of return for the purposes of the temporary non-residence rules.[195] It cannot form part of the temporary period of non-residence[196] except in one set of circumstances because such a period must be followed by a residence period for which the individual has sole residence.[197] The one set of circumstances is where the year of death is a split year in which the overseas part precedes the UK part.[198] That can only be where Case 5 applies in the year of death and

193 Para. 51
194 Para. 51(3)
195 Para. 115
196 Para. 113
197 Para. 113(b)
198 Paras. 111, 112(2) & 113

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as we have seen that can only be the case where the individual dies on or after the 6th March in the Relevant Year.

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SECTION X

THE AFTERLIFE

10.1.1 Just as in a fiscal year in which an individual is born and in which he is UK resident he would appear to have been resident before he was born,[199] so in a fiscal year in which an individual dies and is UK resident he would appear to be UK resident after his death.[200] Once again, it is not apparent that this peculiar anomaly has any practical consequences.

[199] See Section II above
[200] Para. 2(3)

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