



IBC CONFERENCE:

PREPARING FOR THE 'D' DAY

SESSION EIGHT

THE STATUTORY RESIDENCE TEST: CURRENT PROBLEM AREAS

EXAMPLE: THE SITUATION

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Tuesday 15th March 2016

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EXAMPLE

The Situation

Mr Stuart

Mr Stuart has a domicile of origin in Shangri-La where he was born on 11th December 1950. He came to the UK on 14th November 2003 and has been resident in the UK for UK tax purposes at all times from that date. He has retained his domicile of origin in Shangri-La and has always taken advantage of the remittance basis. His normal habits of life, which he will continue to follow in the UK fiscal year 2016/17, are as follows.

He spends about 120 days a year in the UK, 140 days in Shangri-La, and 105 days (or 106 days in a leap year) in various other countries.

He owns a large house and estate in Inverness-shire where he spends approximately 70 days of the year and a house in Knightsbridge in London where he spends the remainder of his time whilst in the UK. He works on the affairs of various UK and overseas companies and partnerships of which he is a director or partner for five hours per day on 45 days whilst he is in the UK. He also spends the same amount of hours working in his role as a trustee of a conservation charity.

He owns a large residential estate in Shangri-La at which he resides when he is in that country and large apartments in Paris and in Manhattan in New York at which he stays on his occasional visits there. Whilst outside the UK he spends five hours per day on 90 days working on the affairs of the firms and partnerships of which he is a director or partner and five hours a day on

20 days in his role as a trustee of the conservation charity.

Shangri-Layan law provide that an individual is tax resident only if he spends 183 or more days in the country in the calendar year.

Mrs Stuart

Mr Stuart married Mrs Stuart, who was born on 27th November 1955, on 30th November 1973 and he remains married to her. Mrs Stuart does not undertake paid work but she is a trustee of several charities in the UK and Shangri-La. She has substantial independent wealth. She spends all her time with her husband except that she spends an additional 20 days of the year in the UK where her parents live and 20 less days per year than her husband in countries other than the UK and Shangri-La.

Mrs Stuart was born in the UK and had a domicile of origin in England. On her marriage she ceased to be resident in the UK and was not resident here again until she came here with her husband on 14th November 2003. She acquired a domicile of dependency in Shangri-La on her marriage which became a domicile of choice on 1st January 1974. She continues to have a domicile of choice in Shangri-La.

Their children

Mr and Mrs Stuart have three adult children. Charles is married, is the father of two children and lives and works in Shangri-La. Thomas is married, has no children and also lives and works in Shangri-La. William is unmarried, has no children and lives in the UK.

Natural alarm

Mr and Mrs Stuart are alarmed at the proposals as to deemed domicile which have been made by the UK Government and wish to consider what changes in their habits of life they would have to make in order to ensure that by ceasing to be UK resident they can escape the effect of the Government's proposals. In giving advice on this their advisers are instructed to assume that they will not die in the years in respect of which the advice is to be given.

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The Analysis

When should they cease to be UK resident?

Under Clause 43 of the Draft Finance Bill 2016 published on 9th December 2015, IHTA 1984 s.267 is to be amended 'in relation to times after 5 April 2017'.¹ Section 267(1)(b) is to be amended so that a person who is not domiciled in the UK will be treated as if he were if he has been resident in the UK for at least fifteen of the twenty UK fiscal years immediately preceding the fiscal year in which falls the time when his domicile is to be determined.² Equivalent provisions are to be enacted for Income Tax and Capital Gains Tax.³

If Mr and Mrs Stuart are resident in the UK in fiscal year 2017/18 they will still only have been resident in the UK for the 14 UK fiscal years preceding that year and so they will not be treated under the new proposals as domiciled in the UK in 2017/18. One might think, therefore, that they could put off their change of residence until 2018/19. One would be wrong. If they did so, so that they continued to be UK resident for 2017/18, they would be treated under the Government's proposals as domiciled in the UK in 2018/19 exposing their worldwide estates to Inheritance Tax.

So they are advised to consider being non-resident for the UK fiscal year 2017/18 and for future years.

Their Residence in 2016/17

We shall first consider Mr and Mrs Stuart's residence in the UK fiscal year 2016/17.

¹ Draft Finance Bill 2016 Clause 43(11)

² Draft Finance Bill 2016 Clause 43(1)(c)

³ See draft legislation published by HMRC on 2nd February 2016 and in a corrected form on 5th February 2016

The Automatic Overseas Tests

Mr Stuart will not meet the First Automatic Overseas Test because he will be present in the UK for more than 15 days in the UK fiscal year.⁴ He will not meet the Second Automatic Overseas Test, *inter alia*, because he has been resident in the UK in one or more of the fiscal years 2013/14 – 2015/16,⁵ in fact for all of them. He will not meet the Third Automatic Overseas Test because he will not work sufficient hours overseas in the fiscal year.⁶ He will not meet the Fourth or Fifth Automatic Overseas Tests because we are to assume that he will not die in the year.⁷

The Automatic UK Tests

He will not meet the First Automatic UK Test because he will not spend at least 183 days in the UK during all or part of the fiscal year.⁸ He will not meet the Second Automatic UK Test if his Shangri-Layan residence is a home in respect of him.⁹ We shall assume that it is. He will not meet the Third Automatic UK Test because there will be no period of 365 days part of which falls in the fiscal year during which he will work sufficient hours in the UK.¹⁰ He will not meet the Fourth Automatic UK Test because we are to assume that he will not die in the year.¹¹

He will not, therefore, meet the Automatic Residence Test¹² because he will not meet any of the Automatic UK Tests.¹³

⁴ Para. 12. All references in these notes are to the Finance Act 2013, Schedule 45, unless otherwise stated

⁵ Para. 13

⁶ Para. 14

⁷ Paras. 15 & 16

⁸ Para. 7

⁹ Para. 8

¹⁰ Para. 9

¹¹ Para. 10

¹² Para. 5

¹³ Para. 5(a)

The Sufficient Ties Test

Will he meet the Sufficient Ties Test?¹⁴

He will have a Family Tie if Mrs Stuart is UK resident.¹⁵ We shall assume that she is UK resident in 2016/17 and would be so even if Mrs Stuart did not have a relevant relationship to Mr Stuart¹⁶ so that Mr Stuart will have a Family Tie.

He will have an Accommodation Tie because he has a place to live in the UK (in fact at both the Inverness-shire and Knightsbridge residences) which is available to him for a continuous period of 91 days or more and in which he spends at least one night in the fiscal year.¹⁷

He will have a Work Tie because he will work in the UK for at least three hours a day on at least 40 days in the fiscal year.¹⁸ In fact he works for five hours on 45 days, the time spent on the charity's affairs not being work for the purposes of the Statutory Residence Test.¹⁹

He will have a 90-Day Tie because he has spent more than 90 days in the UK in one or both of the two fiscal years preceding the fiscal year concerned (in fact, in both of them).²⁰

In respect of Mr Stuart a Country Tie can count as a UK Tie because he was resident in the UK for one or more of the fiscal years 2013/14 – 2015/16 (in fact for all of them).²¹ He will not have

¹⁴ Para. 17

¹⁵ Para. 32

¹⁶ Para. 33(2)

¹⁷ Para. 34

¹⁸ Paras. 35 & 36

¹⁹ Para. 26(8)

²⁰ Para. 37

²¹ Para. 31

a Country Tie, however, because he will be present in Shangri-La on more midnights in the fiscal year than the number of midnights on which he will be present in the UK.²²

He will therefore have four UK Ties and meet the Sufficient Ties Test because he will have spent more than 15 days in the UK.²³

Scottish Taxpayers

Mr Stuart will be a Scottish taxpayer subject to the Scottish rates of tax if he has a close connection with Scotland in the fiscal year.²⁴ He will have that close connection if either the Inverness-shire property is his place of residence and the Knightsbridge property is not or both are places of residence in respect of him but the Inverness-shire property is his main place of residence for as long or longer an aggregate period in the year as the Knightsbridge property and, in either case, he 'lives' at a place of residence in the UK.²⁵ We shall assume that both properties are his places of residence, and that the Inverness-shire property is his main place of residence in the fiscal year for at least as long a period in aggregate as is the Knightsbridge property and that he 'lives' at the Inverness-shire property for at least some time in the year. On these assumptions he will be a Scottish taxpayer.

Variations in respect of Mrs Stuart

The above analysis will also apply to Mrs Stuart except that she will not have a Work Tie but instead she will have a Country Tie because she will be present in the UK on a number of midnights equal to the number of midnights she is present in Shangri-La. So she too will have four UK Ties and will meet the Sufficient Ties Test and therefore be resident in the UK in

²² Para. 38

²³ Para. 18

²⁴ Scotland Act 1998 s.80D(2)

²⁵ Scotland Act 1998 s.80E

2016/17 by virtue of spending more than 15 days in the UK in the fiscal year. She too will be a Scottish taxpayer in 2016/17.

Changing their mode of life to avoid UK residence?

What were the minimum changes Mr and Mrs Stuart would have to make to their mode of life so as not to be UK resident in 2017/18 and future years? The key to that question is reducing their number of UK Ties.

Mr Stuart

We shall first consider Mr Stuart.

We shall assume that he will no longer have a Family Tie because his wife will not be resident in the UK in 2017/18.

It would almost certainly be impractical for him to continue to spend substantial periods in the UK without having an Accommodation Tie and so we shall assume that he will continue to have one.

If he reduces the number of days on which he works in the UK for more than three hours to below 40 days, he will not have a Work Tie. If he needs to maintain the aggregate amount of work he does he might work a longer time on the days he does work in the UK or he might perform some of the work which he has previously performed in the UK when he is overseas. We shall assume he will be able to reduce the number of days on which he performs work in the UK for more than three hours in one or both of these ways so as not to have a Work Tie.

He will have a 90-Day Tie at least until the UK fiscal year 2019/20 because he will have spent

more than ninety days in the UK in 2016/17. He will not have a Country Tie because he will be present in Shangri-La for more midnights than he will be present in the UK. So in these circumstances he would have just two UK Ties in 2017/18 and in 2018/19, an Accommodation Tie and a 90-Day Tie, and he would not be resident in the UK in those years, provided he did not spend more than ninety days in the UK which he is advised that he should not do.

If he continued to regulate his life in this way he would cease to have a 90-Day Tie in 2019/20 in which case, only having one UK Tie, he could spend up to 120 days in the UK without being resident in the UK for that year.²⁶ If he did so, however, he would have a 90-Day Tie in 2020/21. In that year, however, the table which would apply for determining how many Ties are sufficient in respect of particular levels of days spent in the UK would change from that in paragraph 18 to that in paragraph 19 because he would not have been resident in the UK in the UK fiscal years 2017/18 – 2019/20.²⁷ So he would have two Ties in 2020/21 but could still spend up to 120 days in the UK in the fiscal year.²⁸

So by reducing his days in the UK to ninety or below in 2017/18 and 2018/19 Mr Stuart could be not resident in the UK and thereafter he could increase his days in the UK to the 120 days which he currently spends here whilst still not being resident in the UK.

A person will not be a Scottish taxpayer for any fiscal year in which he is not resident in the United Kingdom.²⁹ So Mr Stuart would also cease to be a Scottish taxpayer for 2017/18 and thereafter.

²⁶ Para. 18

²⁷ Para. 19

²⁸ Para. 19

²⁹ Scotland Act 1998 s.80D(1)(a)

Mrs Stuart

Our analysis of Mr Stuart's route to losing his UK residence is dependent on his wife not also being resident in the UK. How would she need to modify her behaviour in order to ensure that that was the case?

As we did with Mr Stuart, we shall assume that she will not have a Family Tie because Mr Stuart, her spouse, will not be resident in the UK in 2017/18 and thereafter. If she were to reduce her time in the UK to ninety days she would not have a Country Tie³⁰ so she would then have just two UK Ties, an Accommodation Tie and a 90-Day Tie. As we have seen in respect of Mr Stuart, a person with two UK Ties who has been resident in the UK in any of the preceding three UK fiscal years will not satisfy the Sufficient Ties Test if he spends less than ninety one days in the UK.³¹

Like Mr Stuart, and for the same reason, Mrs Stuart could increase her time in the UK to 120 days in 2019/20 and maintain that level without resuming UK residence. She too would cease to be a Scottish taxpayer from 2017/18 when she would cease to be UK resident.

Temporary non-residence

An important practical consideration is that if Mr Stuart or Mrs Stuart were to resume UK residence before the fiscal year 2023/24³² the period of non-residence of the individual concerned would be a temporary period of non-residence³³ in which case various categories of income and gains arising or accruing in the non-resident period would be brought into charge in 2023/24.³⁴ It would be wise, therefore, to ensure that they do not become UK resident

³⁰ Para. 38

³¹ Para. 18

³² Except, in certain circumstances, if 2016/17 were a Split Year

³³ Para. 113

³⁴ Part 4

inadvertently, for Mr and Mrs Stuart to leave a margin of error in relation to all relevant Tests. Thus they might limit themselves to eighty five days in the UK in years when the strict limit was ninety days and to 115 days in the UK for years in which the strict limit was 120 days and Mr Stuart might limit himself to working in the UK on just thirty five days in the year rather than aiming to work on the full thirty nine days on which he could work in the UK without having a Work Tie.

A Split Year?

Where an individual is resident in the UK in one fiscal year and not resident in the UK in the succeeding fiscal year it is possible for the first of those years to be a Split Year in respect of the individual if the other conditions of Cases 1 – 3 of the Split Year Rule are satisfied.³⁵ As neither Mr nor Mrs Stuart work sufficient hours to fall within Case 1,³⁶ Case 2 is dependent on the application of Case 1³⁷ and Case 3 requires the individual to cease to have a home in the UK³⁸ it appears that the UK fiscal year 2016/17 will not be a split year in respect of either Mr Stuart or of Mrs Stuart.

Their adviser's conclusion

The net result of all this is that instead of being resident in the UK in 2017/18 and future years and therefore deemed to be domiciled in the UK for most purposes of Income Tax, Capital Gains Tax and Inheritance Tax under the Government's deemed domicile proposals, Mr and Mrs Stuart would not be resident for 2017/18 or for future years. To achieve this they need only reduce the number of days which they spend in the UK by the following amounts:-

³⁵ Paras. 44(2), 45(2) and 46(2)
³⁶ Para. 44
³⁷ Para. 45
³⁸ Para. 46

Year	Mr Stuart			Mrs Stuart		
	Original pattern - days spent in the UK	Revised pattern – days spent in the UK	Reduction	Original pattern - days spent in the UK	Revised pattern – days spent in the UK	Reduction
2017/18	120	85	35	140	85	55
2018/19	120	85	35	140	85	55
2019/20 and thereafter	120	115	5	140	115	25

In addition, Mr Stuart would have reduced the days on which he did more than three hours work in the UK from forty five to thirty five.