IBC CONFERENCE:

UNDERSTANDING THE STATUTORY RESIDENCE TEST

KEY CONCEPTS FOR PRACTITIONERS

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SECTION I

INTRODUCTION

1.1.1 On 11th December 2012 the Government published the latest draft of a schedule (the "*DraftSchedule*") creating a statutory residence test (the "SRT").

1.1.2 Part 2 of the *DraftSchedule* defines various key concepts which are used in the detailed provisions of the Automatic Residence Test. In this lecture we examine these key concepts in detail except that we do not look at UK Ties which will be covered by Keith Gordon later in the morning. That leaves me to look at:-

(a) days spent (paras 21 and 22)[1] and days spent in a period (para 23);

(b) home (para 24);

(c) work (para 25), location of work (para 26) and full-time work (para 27); and

(d) International Transportation Workers (para 28)

[1] All references are to the *DraftSchedule* unless otherwise stated

SECTION II

DAYS SPENT AND DAYS SPENT IN A PERIOD

DAYS SPENT

Relevance of the Concept

2.1.1 Determining whether a day has been "spent" in the United Kingdom is the key component of the First Automatic UK Test, and is one of the key components of all Four Automatic Overseas Tests. In the Sufficient Ties Test, it determines how many Ties are sufficient for the purposes of that Test and it is the key component of the definition of the 90-Day Tie. It is also used in determining whether there is a Family Tie. In respect of Split Year Treatment it is used in Case 1, Case 2 and Case 3.

The Basic Day Count Rule

2.1.2 The basic rule (the "Basic Day Count Rule") is given in para 21(1) which provides:-

> "If P is present in the UK at the end of a day, that day counts as a day spent by P in the UK."

2.1.3 This reproduces the rule which was introduced for limited statutory purposes by FA 2008 s.24 which had effect from the tax year 2008/09.

2.1.4 The phrase "counts as a" appears to be otiose and should have been a simple "is". The general rule is subject to two exceptions and to a deeming rule.

The First Exception

2.1.5 The First Exception is where:-

> "(a) P only arrives in the UK as a passenger on that day;
>
> (b) P leaves the UK the next day; and
>
> (c) between arrival and departure, P does not engage in activities that are to a substantial extent unrelated to P's passage through the UK."[2]

2.1.6 What is meant by the end of the day? One presumes that it means midnight although the legislation does not say so expressly. The Summary of Responses to the June 2012 Consultation which was published on 11th December 2012 (the "*DecemberResponse*") refers to this rule as the "Midnight Rule"[3] but that description does not form any part of the legislation.

2.1.7 The First Exception also largely reproduces the exception to the rule introduced by FA 2008 s.24 which has caused considerable difficulties over the last four years. On the 11th December 2012 the Government also published draft Guidance (the "*DraftGuidance*") on the *DraftSchedule*. The *DraftGuidance* does not demonstrate any awareness of the difficulties posed by the First Exception. Indeed, it does not mention the exception.

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2 Para 21(3)

3 *DecemberResponse* para 3.67

2.1.8 In respect of the existing exception to the general ruling introduced by the Finance Act 2008 s.24 the current version of HMRC 6 says that the exception does not apply:-

> "… if you engage in any activities while in the UK that are not substantially related to completing travel to a foreign destination. So if you attend a business meeting, visit a property you own, arrange to meet people socially or attend social activities, you must count that day as a day of presence if you are in the UK at the end of the day.
>
> **Example**
>
> You are resident of [sic] the Isle of Man and travel to the UK as part of a journey to the USA. You have to stay overnight in the UK before catching a flight to the USA the following day. Your being in the UK for that one night would **not** count as a day of presence in the UK. But, if you were to carry out an activity such as attending a business meeting, visiting the theatre or visiting family before catching the flight to the USA, the exception **would not** apply and the night spent in the UK **would** be counted as a day of presence."

2.1.9 It may be that this view will continue to be taken by HMRC in respect of the First Exception to the Basic Day Count Rule under the SRT.

2.1.10 It is arguable that it is unduly restrictive. If my passage through the UK is for the purpose of flying from one foreign country to another but due to the timings of my flights I decide

to fill some of my waiting time by making a visit to the theatre it is surely arguable that my activity of theatregoing is related to my passage through the UK. It is not the purpose of my passage and I would not have undertaken it had I not been passing through. One can make a similar argument about fitting in a visit to one's family or a business meeting which is not the purpose of the journey concerned but which fills time which would otherwise be wasted.

2.1.11 Of course in planning one's activities, one would take account of HMRC's likely view but if a situation has arisen where the difference between the two constructions has a material effect on one's residence status, it may well be worth contending that the Revenue's narrow construction of the First Exception is incorrect.

The Second Exception

2.1.12 The Second Exception to the Basic Day Count Rule is where:-

> "(4) ….
>
> (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 to which sub-paragraph (2) may apply in reliance on sub-paragraph (4) is limited to 60; and

(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."

2.1.13 The Second Exception ought to have provided that it is satisfied if the individual is prevented from reaching his country of destination rather than if he is prevented from leaving the United Kingdom. As the CIOT pointed out in its response[4] to the Government's Consultation Document on the SRT of June 2012 (the "*June 2012ConDoc*"):-

> "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."[5]

[4] Referred to in these notes as the "*CIOTResponse*"
[5] The *CIOTResponse* para 13:6

2.1.14 Of course, it may be that the Court, may correct this fault by applying a radically purposive interpretation and it may be that, in practice, HMRC will not take the point (the *DraftGuidance* does not seem to do so) [6] but the legislation here does not meet the SRT's purpose of providing rules which are "clear, objective and unambiguous."[7]

2.1.15 It is not clear to what extent one can take into account circumstances which affect other people and which indirectly prevent one from travelling. For example, would the exception apply if a brother or close friend were suddenly taken ill or a spouse or adult child were injured in an accident or were required to remain in the UK because he was a witness to a crime?

2.1.16 The *DraftGuidance* says:-

> "There may also be limited situations where an individual who needs to stay in the UK to deal with a sudden life threatening illness or injury to a spouse, person with whom they are living as husband and wife, civil partner or dependent child can have those days spent in the UK disregarded under the SRT subject to the 60-day limit.[8]
>
> …….
>
> There may also be limited situations where an individual who comes back to the UK to deal with a sudden life threatening illness or injury to a spouse, person with

[6] *DraftGuidance* Annex B, para B15 and Example B5
[7] *June2012ConDoc* Foreword

whom they are living as husband and wife, civil partner or dependent child can have those days spent in the UK disregarded under the SRT subject to the 60-day limit."[9]

2.1.17 If the intention of this is to limit the exceptional circumstances exception to circumstances primarily effecting a "husband, wife" etc, there seems to be no basis in the draft 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 affect another person, even if that person is, for example, an adult child, brother or close friend.

Paragraph 21(5)

2.1.18 Paragraph 21(5), which provides a restrictive list of examples of exceptional circumstances, arguably restricts the extent of the exception and certainly makes its scope less easily determined. That is because 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 sub-para (5). 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 emergencies which were not of the same degree of extremity as

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8 *DraftGuidance* Annex B, para B9
9 *DraftGuidance* Annex B, para B15

those listed in sub-para (5)(a), such as transport strikes, are not "exceptional" for this purpose.[10]

The Wrong Concept

2.1.19 More fundamentally, it is not clear that "exceptional" is the appropriate concept to be used in this relaxation. It may be that it would have been better to define its scope by reference to unforeseen circumstances. Frequent travellers will not consider a French transport strike exceptional but a particular strike may well be unforeseen.

The Government's Response

2.1.20 The *DecemberResponse* does not note any of these difficulties of the legislation and proposes no changes in respect of them. This is particularly unfortunate in respect of the limitation of the exception to 60 days. The *June2012ConDoc* explained that this provision was to be adopted "to minimise the risk of the provision being used too widely."[11] The most likely circumstance, however, in which a person will be prevented from leaving the UK for a period of more than two months is where he is subject to a long-term incapacitating injury or illness. Indeed, the examples given in the *DraftGuidance* of the operation of this restriction includes one of an individual who is injured in a car crash, suffers multiple injuries and returns to France as soon as he is discharged.[12] It is difficult to imagine the policy reasons which justify subjecting an individual's worldwide income and gains to taxation because he has been unfortunate

[10] It is notable that all of the examples given in the *DraftGuidance* are in respect of very extreme circumstances. *DraftGuidance* Annex B, paras B7-B16

[11] *June2012ConDoc*, para 3.158

[12] *DraftGuidance* Annex B, para B11

enough to suffer multiple injuries in a car crash whilst making a short-term visit to the UK.

2.1.21 In response to the criticism of the exceptional circumstances exception which had been made by respondents to the *June2012ConDoc,* the *DecemberResponse* said that:-

> "Guidance will be available to explain how HMRC will apply these provisions. The Guidance will also cover some of the concerns which were raised in consultation."[13]

2.1.22 It needs to be said that poorly drafted legislation cannot be corrected by any amount of "Guidance".

The Deeming Rule

2.1.23 Para 22(1) provides the obverse of the Basic Day Counting Rule as follows:-

> "If P is not present in the UK at the end of a day, that day does not count as a day spent by P in the UK."

2.1.24 This is expressly subject, however, to a rule which deems certain days to count as days spent in the UK ("the Deeming Rule"). The Deeming Rule applies if:-

[13] *DecemberResponse* para 3.66

"(a) P has at least 3 UK ties for a tax year;

(b) the number of days in that tax year when P is present in the UK at some point in the day but not at the end of the day ("qualifying days") is more than 30; and

(c) P was resident in the UK for at least one of the 3 tax years preceding that tax year.

The deeming rule is that, once the number of qualifying days in the tax year reaches 30 (counting forward from the start of the tax year), each subsequent qualifying day in the tax year is to be treated as a day spent by P in the UK.

The deeming rule does not apply for the purposes of sub-paragraph (3)(a) (so, in deciding for those purposes whether P has a 90-day tie, qualifying days in excess of 30 are not to be treated as days spent by P in the UK)."

2.1.25 In the consultation document which it published in June 2012 (the "*June2012ConDoc*") the Government suggested that a special rule would be required for those who regularly move in and out of the UK on the same day in order to manipulate the residence rules.[14] This would either seem to require a taxpayer to fly in and out of the country on a large number of days or else to be based in Northern Ireland and to regularly cross and recross the border with the Irish Republic before and after midnight (and, of course, in the latter case one would have to consider the effect on one's Irish residence status). It is difficult

[14] *June2012ConDoc* para 3.153

to believe that the population of people sufficiently rich to make that worthwhile and sufficiently indifferent to their own comfort to be willing to do so will be large enough to justify the complication caused by including in the SRT specific provisions to frustrate such behaviour. Nonetheless, as we have seen, such provisions have been introduced in paragraph 22 modifying the Basic Day Count Rule that if a person is not present in the UK at the end of the day, that day does not count as a day spent by the individual in the UK.

2.1.26 It may be that because the rule can only apply where P has at least three UK Ties for a tax year, has been resident for at least one of the three tax years preceding that year and has had at least 30 days in which he has been present in the UK at some point in the day but not at the end of the day that the rule will have only limited effect. This may be so particularly because sub-paragraph (5) disapplies the Deeming Rule in determining the number of ties that an individual has for the purpose of determining whether the Deeming Rule applies. This prevents there being a circularity under which one would otherwise be required to apply the Deeming Rule in determining whether one has sufficient ties, and to determine how many ties are sufficient in determining whether the Deeming Rule applies.

2.1.27 It may be, therefore, that there will be very few individuals who find themselves resident in the UK because of the Deeming Rule but any person who has been resident in any one of the three previous fiscal years will have to determine whether or not he has three ties and, if he has, will then have to determine the number of days spent in the UK under the Deeming Rule. The example which follows demonstrates that the Deeming Rule can

result in a person becoming UK resident who is only physically present in the UK for a very short period of time and whose connections with the UK are insubstantial.

Example

Mr Ho was born in Hong Kong and has resided there for almost his entire life. He is a self-employed management consultant. He has never resided anywhere other than in Hong Kong except that in 2010/11 he spent seven months in the United Kingdom working on a consultancy contract. At no time has he held any UK situated assets except the short term tenancy referred to below. In 2013/14 he again wins a consultancy engagement which requires him to come to the UK both to undertake investigative work and to attend meetings. The meetings are held at his client's offices where he performs most of his investigative work. The journey from Heathrow to his client's premises takes one and three quarter hours. For a period of three and a half months in the early part of the fiscal year, he rents a flat for him to stay in whilst he is here so as to save on hotel bills. In the event, he spends only a few nights at this flat.

During the year he meets and marries Sophia in the UK. Sophia has always lived in the UK. Mr Ho makes a number of visits to the UK to visit her at her home and later to visit her parents.

During 2013/2014 he makes the following visits to the UK:-

- 18 visits in which he flies into and out of the UK on the same day in order to attend meetings at his client's premises.
- 12 visits where he flies into the UK on one day and flies out on the next in

order to meet Sophia.

- 10 visits where he comes to the UK to perform work in relation to his consultancy project and leaves on the day after the day following his arrival. On these visits, on each day on which he is physically present in the UK, he performs more than 3 hours of work taking into account the time spent travelling between the airport and his client's premises.
- 1 visit when he arrives on a Tuesday and leaves on a Friday in order to be married on the Thursday.
- 1 visit with his wife after their honeymoon to see her parents and to make arrangements to let her former home before flying to Hong Kong to make their home there. On this visit he arrives on a Monday and leaves on the following Wednesday.

Mr Ho has three UK Ties in 2013/14.

He has a Family Tie because during the fiscal year he has a wife, Sophia, who is resident in the UK.

He has an Accommodation Tie because during the fiscal year he has a place to live in the UK, the flat, which is available to him for a continuous period of at least 91 days and he spends at least one night in that accommodation in the year.

When he flies in and out of the UK on the same day to attend meetings, each day

counts as a day of work because his travel from the airport to his client's offices counts as work. These visits amount to 18 days of work. His 10 visits when he comes to the UK to work on his consulting engagement count as 3 days of work each because there are 3 days on each visit when he does at least 3 hours of work in the UK. Again his travel between Heathrow Airport and his client's offices counts as work for this purpose. So his 10 visits count as 30 days of work making 48 days in all.

He has a Work Tie because he does at least 40 days of work in the UK in the year.

Because he has three ties the first condition for the application of the Deeming Rule is satisfied.

The number of days in the tax year on which Mr Ho is present in the UK at some point in the day but not at the end of the day is more than 30 – it is in fact 42 (18 + 12 + 10 + 1 + 1). So the second condition for the application of the Deeming Rule is satisfied.

Mr Ho is resident in the UK for at least one of the three tax years preceding 2013/14 so the third condition for the application of the Deeming Rule is satisfied.

If the Deeming Rule had not applied, he would not have been resident in the United Kingdom. He does not satisfy any of the Automatic UK Tests nor would he have satisfied the Sufficient Ties Test. Because he would have had only 37 days that counted as a day spent in the UK and that is less than 46 days, the number of Ties

which would have been sufficient for the purposes of the Test, would have been four and he had only three Ties.

Because the Deeming Rule applies, however, he is treated as spending 12 days (42 – 30) in the UK on which he was not actually present in the UK at the end of the day. Therefore, 49 (37 + 12) days count as days spent in the UK. Because he has spent over 45 days in the UK in the year, the number of days which are sufficient for him to meet the Sufficient Ties Test is 3. He has three Ties, meets the Sufficient Ties Test and is therefore resident in the UK for 2013/14. What is more, he does not meet any of the conditions of the five Split Year Cases so split year treatment will not apply to him.

In 2013/14 Mr Ho spends only 37 nights in the UK. His only prior connection with the UK is a business visit of seven months, made three years before the fiscal year concerned. He has held no UK assets apart from his short term tenancy of a flat.

In the *June2012ConDoc* the Government rejected the representations which it had received that the test of residence should be based on a pure day-counting formula and said that it was committed to the structure which it had developed which it said "will not cause people to become resident if they have little connection to the UK."[15] "Little connection to the UK" is not a term which can be defined with precision, but surely it describes Mr Ho's circumstances.

[15] *June2012ConDoc* para 3.4

DAYS SPENT "IN" A PERIOD

2.2.1 Para 23 redundantly provides:-

> "Any reference to a number of days spent in the UK "in" a given period is a reference to the total number of days spent there (in aggregate) in that period, whether continuously or intermittently."

SECTION III

HOME

THE RELEVANCE OF THE CONCEPT

3.1.1 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,[16] the Fourth Automatic UK Test,[17] the Accommodation Tie[18] and Cases 2, 3, 4 and 5 of the Split Year Rules.[19]

ITS SUITABILITY FOR USE IN THE SRT

3.2.1 Home is a word which can bear a wide range of meanings with small areas of overlap between them. The Shorter Oxford English Dictionary gives nine major areas of meaning for 'home' used as a noun. Those meanings make it clear that a home is not necessarily a building or structure.[20]

3.2.2 The CIOT, the STEP and the ICAEW all strongly criticised the use of the concept of a "home" in the SRT in their submissions in response to the *June2012ConDoc*. As the CIOT said:-

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16 Para 8
17 Para 10
18 Para 32
19 Paras 42 - 45
20 They include "a collection of dwellings, a village, a town", "the country of one's origin", "a place or region to which one naturally belongs or where one feels at home"

" … "home" means different things to different people. To some people it means a building, to others a place (town/city), to others the country from which they come. Indeed there are ten different definitions in the OED!"[21]

3.2.3 In the *DecemberResponse* the Government said that it has:-

"… considered whether it would be possible to define in legislation what constitutes a home more precisely. It has concluded that it would be very difficult to set out every single scenario in legislation. … the Government continues to believe … that the vast majority of taxpayers will know whether and where they have a home."[22]

3.2.4 So the application of the SRT is by reference to a concept which the Government acknowledges is incapable of precise definition and yet it thinks that taxpayers will be able to identify what that concept means even though the Government, with all its vast resources, is unable to define it. To provide a statutory definition of a home the Government would not be required "to set out every single scenario in legislation". What is required is a definition which taxpayers can apply to their circumstances so as to determine their residence status. If that cannot be done, it is clear that the word "home" is not a suitable concept for use in the SRT, the aim of which is to provide a "clear, objective and unambiguous" test of residence.[23]

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[21] The *CIOTResponse* para 3.3
[22] *DecemberResponse* para 3.33

THE LEGISLATION – PARA 24

3.3.1 The draft of the legislation which was published in June (the "*JuneDraft*") had included at para 14 some provisions regarding the meaning of "home" which were of only the most limited help. An expanded version now appears as para 24:-

> "(1) A person's home could be a building or part of a building or, for example, a vehicle, vessel or structure of any kind.
>
> (2) Whether, for a given building, vehicle, vessel, structure or the like, there is a sufficient degree of permanence or stability about P's arrangements there for the place to count as P's home (or one of P's homes) will depend on all the circumstances of the case.
>
> (3) But somewhere that P uses periodically as nothing more than a holiday home or temporary retreat (or something similar) does not count as a home of P's.
>
> (4) A place may count as a home of P's whether or not P holds any estate or interest in it (and references to "having" a home are to be read accordingly).

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[23] *June2012ConDoc* Foreword

(5) Somewhere that was P's home does not continue to count as such merely because P continues to hold an estate or interest in it after P has moved out (for example, if P is in the process of selling it or has let or sub-let it, having set up home elsewhere)."

The Inadequacy of Para 24

3.3.2 It will be seen that these sub-sections are either truisms (sub-paras (4) and (5)), or they neither exclude anything from, nor significantly include anything within, the meaning of the term (sub-para (1)), or they assume an element of the definition without actually stating it (sub-para (2)) or they introduce further undefined concepts the meaning of which is just as difficult to define as that of "home" (sub-para (3)).

Sub-para (1)

3.3.3 The *DecemberResponse* says:-

> "The Draft Legislation now makes it clear that a home will generally be a structure or a building as opposed to a place such as a town or a country."[24]

3.3.4 It does nothing of the sort. Sub-para (1) does not tell us that a person's home will generally be a building etc but that it could be such an object.

Sub-para (2)

3.3.5 The *DecemberResponse* says:-

"The Legislation also indicates that a home will have a degree of stability or permanence for the individual …"[25]

3.3.6 If it does do that, it does so only obliquely. Sub-para (2) assumes that for a place "to count as P's home" "P's arrangements there" (note not the home) must have "a sufficient degree of permanence or stability". But that is an assumption. It does not provide that a home is a place which has a sufficient degree of permanence or stability.

Sub-para (3)

3.3.7 Sub-para (3) does exclude something, not from the definition of a "home", but from things which "count as a home". No indication of what the sub-paragraph means by a "holiday home" or "temporary retreat (or something similar)" is given by the legislation. So we have four uncertain concepts instead of one. What is more, it is implicit in the sub-paragraph that it is possible that a temporary retreat or something similar might be a home which is merely 'counted' by sub-para (3) as if it were not. That suggests that the word "home" is to be given the widest possible meaning. So while sub-para (3), excludes some undefined things from counting as a home, it actually widens the ambit of the term in a wholly unpredictable way.

3.3.8 Perhaps the most disappointing paragraph in the *DecemberResponse* is paragraph 3.39 which says:-

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[24] *DecemberResponse* para 3.35

"HMRC will publish detailed guidance setting out how they will interpret the legislative provisions and provide examples of different scenarios to show when a particular property would constitute a home and when it would not."

3.3.9 If it is impossible to define the limits of the concept of a 'home' how can examples show "when a particular property would constitute a home and when it would not" for the Government has failed to define the concept against which the facts in examples can be tested.

3.3.10 The *DraftGuidance*, in outlining the characteristics of a 'home', does little more than repeat paras 24(1)-(3).[26] It gives examples,[27] of things which HMRC do and do not accept are "homes" but the examples are lacking in detail and do not give the reasoning used to arrive at the conclusions as to whether the individuals in the various examples have a home and, if so, where it is. The *DraftGuidance* could hardly do so for if, as the Government considers, a 'home' is indefinable, it cannot relate the facts in the examples to principles by which what is a home can be distinguished from what is not.

3.3.11 The SRT was meant to be a solution to the situation which has existed until now in which HMRC attempt to repair the uncertainties of the existing law by setting out detailed guidance on their practice, a practice which is only loosely related to the law. Under the

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[25] *DecemberResponse* para 3.35. This is repeated in a slightly different formulation in the *DraftGuidance* Annex A, para A9

[26] *DraftGuidance* Annex A, para A9

[27] *DraftGuidance* paras Annex A, A9-A20

SRT the taxpayer is once again going to be in the position of relying on examples in 'guidance' which have only a loose relationship to the law which it purports to apply.

SECTION IV

WORK

THE MEANING OF WORK

The Relevance of 'Work' to the SRT

4.1.1 The concept of work is relevant to the Third Automatic UK Test (the "FTWUK Test"), to the Third Automatic Overseas Test (the "FTWA Test"), to the Work Tie and Cases 1, 2 and 4 of the split year provisions.

The Statutory Definition of Work

4.1.2 Work is defined in para 25 which provides:-

> "(1) P is considered to be "working" (or doing "work") at any time when P is doing something –
>
> (a) in the performance of duties of an employment held by P; or
>
> (b) in the course of a trade carried on by P (alone or in partnership).
>
> (2) In deciding whether something is being done in the performance of duties of an employment, regard must be had to whether, if value were received by P for doing the thing, it would fall within the definition of employment income in section 7 of ITEPA 2003.

(3) In deciding whether something is being done in the course of a trade, regard must be had to whether, if expenses were incurred by P in doing the thing, the expenses could be deducted in calculating the profits of the trade for income tax purposes.

(4) Time spent travelling counts as time spent working –

(a) if the cost of the journey could, if it were incurred by P, be deducted in calculating P's earnings from that employment under ITEPA 2003 or, as the case may be, in calculating the profits of the trade under ITTOIA 2005, or

(b) to the extent that P does something else during the journey that would itself count as work in accordance with this paragraph.

(5) Time spent undertaking training counts as time spent working if –

(a) in the case of an employment held by P, the training is provided or paid for by the employer and is undertaken to help P in performing duties of the employment, and

(b) in the case of a trade carried on by P, the cost of the training could be deducted in calculating the profits of the trade for income tax purposes.

(6) Sub-paragraphs (4) and (5) have effect without prejudice to the generality of sub-paragraphs (2) and (3).

(7) Assume for the purposes of sub-paragraphs (2) to (5) that P is someone who is chargeable to income tax under ITEPA 2003 or ITTOIA 2005.

(8) A voluntary post for which P has no contract of service does not count as an employment for the purposes of this Schedule."

Is Para 25 An Exhaustive Definition?

4.1.3 The first point to notice is that para 25(1), subject to the further provisions of the paragraph, looks like an exhaustive definition. The *DraftGuidance*, at para 43 says that "work takes its everyday meaning". That does not seem to be the effect of paragraph 25, which seems to define work in a very limited sense which is quite different to its use in everyday English.

Para 25 is Directed at Work by Persons

4.1.4 The second point to notice is that the definition is not of 'work' in the abstract but of whether a person is 'working' or 'doing work'. The test is firmly directed towards the activity of an individual.

Doing Something in the Performance of Duties of an Employment

4.1.5 When is an individual "doing something in the performance of duties of an employment held by [him]"?

4.1.6 The employment contracts of junior employees often require them to attend at a particular office, or other place at which they are instructed to do so, for particular hours. If such an employee stands at the photocopying machine gossiping is he doing something in the performance of the duties of his employment? He is certainly performing a duty of his employment by being at the office but he is not doing so by gossiping. Would it make a difference if he were doing something which he is specifically forbidden to do under the terms of his employment, such as accessing internet sites for non-working purposes?

4.1.7 It is not clear how sub-paragraph (2) interacts with sub-paragraph (1)(a). Sub-paragraph (2) requires us to make the hypothesis that P receives value for doing a thing. So in the example we gave above, we must have regard to whether, if the individual received value for accessing unauthorised websites, it would fall within the definition of employment income in s.7 of ITEPA 2003. Section 7 defines employment income for the purposes of the Tax Acts. That definition includes any amount treated as earnings under, inter alia, the benefits code found in Chapters 2 – 11 of Part 3 of ITEPA. Chapter 10 of that Part brings into charge any employment related benefits not otherwise charged under Part 3. Employment related benefits for this purpose means a benefit which, inter alia, is provided by reason of the employment. So in having regard to whether, in respect of something the individual does, if value were received by P for doing the thing, it would fall within the definition of employment income in ITEPA 2003 s.7 we have to know whether that value is a benefit or facility of any kind which is provided by reason of an employment. But we are not given the terms on which the value is given, nor are we told that the value is given under P's actual employment contract. If we are not given the

terms on which the value is given, how can we know whether it is provided "by reason of the employment"?

4.1.8 The Guidance shows no sign that HMRC are aware of the difficulty of this definition. At paragraph 46 it gives the following example:-

> "Paula works as an engineer and is contractually required to be on-call for four nights a month in addition to her normal full-time attendance. She is paid a retainer for those four nights, in addition to being paid for any work done if she is called out. The four nights are counted as working time."

4.1.9 What exactly is Paula doing in the performance of the duties of her employment in this example? She is simply available to be called out. Being available could not, under any ordinary English usage, be described, without something further, as doing something. It is a state not an act. It may be that Paula is required to have a mobile phone which is turned on during this period and to have given its number to her employer (although the example does not say so). One can see that she would be doing something when she buys the mobile phone, when she gives the number to her employer, when she pays her mobile phone subscription and when she answers it. But how is she doing something by simply having it in her pocket turned on?

4.1.10 Let us imagine that Paula is not required under her contact of employment to do any of these things although there is a non-binding expectation from both parties that she will do so. If we assume that in some way simply having a mobile in one's pocket which is

turned on is doing something she would still not satisfy the definition in paragraph 25(1) of "Work" because she would not be "doing" that "in the performance of [the] duties of an employment held by [her]".

4.1.11 Does para 25(2) help? That requires us to make the hypothesis that Paula receives value for keeping her phone turned on but nothing in it says that she is to be treated as receiving value from her employer for doing so. If one assumes, however, that the value is to be treated as having been received from her employer she would be treated, under that hypothesis, under Part 3 of ITEPA 2003, as receiving a benefit by reason of the employment. But even if the benefit is received by reason of her employment that does not of itself mean that it is received in respect of something done "in the performance of the duties of [the] employment".

4.1.12 Of course we can see the idea which the draftsman had in mind but he has failed to express it in a coherent test.

Doing Something in the Course of a Trade Carried on by P

4.1.13 The difficulty is perhaps not quite so great in respect of something done "in the course of a trade carried on by" the individual. The phrase, "the course of a trade" is used fairly widely in tax legislation but, even so, in respect of the activities of an individual it does pose problems. A trade for this purpose also includes a profession or vocation, anything treated as a trade for Income Tax purposes and the commercial occupation of woodland.[28]

[28] Para 131

4.1.14 If I sit in my office and allow my mind to wander to the play that I saw last night am I doing something in the course of my practice? If a client, whom I have known for years, telephones me to tell me about his daughter's wedding, is that in the course of my practice? If I spend time doing my Partnership's tax return, is that in the course of my practice? My practice isn't one of submitting returns to the Revenue. My duty to complete the return would not arise if I had not conducted my practice but is doing so something I do in the course of it? It is a duty which I should have even if the trade had ceased before I complied with it.

4.1.15 Does the rule in paragraph 25(3) help here? That is the rule that in deciding whether something has been done in the course of a trade, one must have regard to whether, if expenses were incurred by the individual in doing the thing, that expense could be deducted in calculating the profits of the trade for Income Tax purposes? Is this rule useful in construing sub-paragraph 25(2)?

4.1.16 If I paid somebody to do my daydreaming about my theatre visit for me it is difficult to see how it would be a deductible expense. What about the telephone call from my client? If I paid somebody to take calls to talk to my clients about their family affairs would the expense be deductible and, if it were, would that necessarily mean that I should be doing something in the course of a trade which I carry on? Even the time spent in preparing the partnership tax return is not absolutely straightforward. It is common to deduct fees charged for the preparation of tax computations but it has never been very obvious to me why such expenses are incurred wholly and exclusively for the purposes of the trade and therefore why they are not excluded by ITTOIA 2005 s.34.

4.1.17 In any event, paragraph 25(3) tells you to have regard to whether an expense would be deductible in deciding whether something is being done in the course of a trade but it does not tell you how regard should be had to it. If something which is done is not done in the course of a trade carried on by the individual the fact that if the individual paid somebody else to do it he would be able to deduct the payment in arriving at his trading profit as being wholly and exclusively incurred for the purposes of the trade, cannot, in itself, make it something done in the course of the trade.

The Variety of Activities which might Constitute Work

4.1.18 The *DraftGuidance* gives little indication that HMRC are aware of the variety of activities which might constitute work. As the CIOT said:-

> "[Work] takes so many forms … For example, which of the following are working:-
>
> (a) a vicar from overseas in the UK on holiday who prays for four hours a day for his congregation;
>
> (b) an overseas sportsman who takes a holiday in the UK but continues his training – but does not actually compete as it is out of season; and/or
>
> (c) an overseas sportsman who takes a holiday here in the UK and trains but as a specific part of a training plan for an upcoming tournament."

Travelling Time

4.1.19 As for the rule in sub-paragraph (4) in respect of travelling time, the Government received representations that treating travelling as work would mean that secondees to overseas

postings might find it difficult to meet the FTWA Test. The Government however refused to change the proposed rule. The *DecemberResponse* explained:-

> "Excluding time spent travelling from the definition of work would make it very easy for employees to travel into the UK specifically for a business meeting and leave again on the same day without being considered to have spent a day working in the UK."[29]

4.1.20 As we shall see, however, the FTWA Test and the FTWUK Test are framed by reference to days in which more than three hours work is done in the UK. Including travelling in the definition of work means that days will be taken into account where the actual amount of effective work is very small indeed. It is not entirely obvious, for example, why the Government should regard it as significant, in determining residence, that an employee spends 45 minutes attending a meeting in the UK where his journeys between the airport and the meeting take one and a quarter hours each.

Training

4.1.21 Sub-paragraph (5) treats certain time spent undertaking training as time spent working. It is worth noting that whereas the test in respect of employees is a factual test (is the training provided or paid for by the employer and is it undertaken to help the individual in performing the duties of his employment?) the Test in respect of a trader is partly an hypothetical one (could its cost be deducted in calculating the profits of the trade carried

[29] *DecemberResponse* para 3.26

on by P for Income Tax purposes?). It should also be noted that if the training is provided without charge by a third party it cannot count as time spent working.

4.1.22 The decision to treat training time as work was criticised by respondents to the *June2012ConDoc* on the basis that it might result in a large number of individuals failing to qualify under the FTWA Test. The *DecemberResponse* explains:-

> "This is because many employees posted abroad return to the UK for work-related training. Under the current rules, this might be treated as incidental duties in which case they will be allowed an unlimited number of days subject to an overall 90-day limit."[30]

4.1.23 The respondents therefore suggested that training should be excluded from the definition of work.[31] The Government declined to do so.[32] We shall see, however, in Peter Vaines' lecture that it did increase the number of work days allowed in the UK under the FTWA Test from the original 20 days which were proposed to 30.

The Paragraph 25(7) Hypothesis

4.1.24 It might also be noted that although paragraph 25(7) creates the hypothesis that the individual concerned is someone who is chargeable to Income Tax under ITEPA 2003 or

[30] *DecemberResponse* para 3.25
[31] *DecemberResponse* para 3.25
[32] *DecemberResponse* para 3.27

ITTOIA 2005 it does not specifically treat the individual as being chargeable to Income Tax in respect of the particular employment or trade concerned.

Paragraph 25(8)

4.1.25 Finally, paragraph 25(8) is puzzling. Any post in respect of which the holder does not have a contract of service cannot be an employment under normal employment law principles because an employment is a contract of service. Paragraph 131, however, extends the meaning of an employment for the purpose of the *DraftSchedule* to include an office. A holder of an office, whether remunerated or not, will not necessarily be subject to a contract of service. Such an office would not count as an employment for the purposes of the *DraftSchedule* if it were a "voluntary post". In what circumstances can one regard an office as voluntary? Of course, an office is likely to be voluntarily taken on but that is true of almost all employments and offices. Once one is in office and until one resigns it, the office is likely to impose duties on one which are involuntary in the sense that one is bound to their performance. The duties are, in that sense, involuntary, but is the office also involuntary?

LOCATION OF WORK

The Relevance of the Location of Work

4.2.1 The location of work forms a key component of the Third Automatic UK Test (the "FTWUK Test"), the Third Automatic Overseas Test (the "FTWA Test"), the Work Tie and Cases 1, 2 and 4 of the Split Year Rules.

The Statutory Provisions

4.2.2 The location of work is defined in paragraph 26 which provides:-

> "(1) Work is done where it is actually done, regardless of where the employment is held or the trade is carried on by P.
>
> (2) But work done by way of or in the course of travelling to or from the UK by air or sea or via a tunnel under the sea is assumed to be done overseas even during the part of the journey in or over the UK.
>
> (3) For these purposes, travelling to or from the UK is taken to -
>
> (a) begin when P boards the aircraft, ship or train that is bound for a destination in the UK or (as the case may be) overseas; and
>
> (b) end when P disembarks from that aircraft, ship or train.
>
> (4) This paragraph is subject to express provisions in this Schedule about the location of work done by international transportation workers."

4.2.3 It cannot be said that the general rule in para 26(1) is very helpful. Nonetheless, it seems to me clear that working requires there to be a person who works and, where that person

is an individual, that he must work where he is physically. One might think that in an age of electronic communication there may be some doubt as to whether work is performed where the communication is created or where it is received. If one imagines that oral advice is being given over the telephone, for example, is the activity of giving advice taking place where the person is speaking or where the advice is heard? To take another example, if one is updating an electronic document remotely, is the updating done where the updater is or where the server is? It seems to me clear that the work must be performed where the adviser makes the call in the first example and where the updater is, while he performs the updating, in the second. Otherwise, the location of the activity would be dependant upon whether or not the call actually got through or the changes were actually successfully made to the document on the server.

4.2.4 The *DraftGuidance* does no more than repeat the words of the statute without explicating them. It does, however, provide three examples to illustrate the application of the definition:-

> "In most cases work is considered as being done at the location where it is actually done rather than where an employment is held or a trade is carried on. There is a different rule for international transportation workers.
>
> **Example 14**
>
> Robert is an employee of a French clothing manufacturer and he is based in Paris. He spends two days each month working in Glasgow to meet company clients. For

those two days Robert is working in the UK, regardless of where he is usually based.

Any work you do during your journey to or from the UK is counted as overseas work if you travel by air, sea or through a tunnel under the sea.

For journeys to the UK, the overseas work period ends when you disembark from that aircraft, ship or train in the UK.

For journeys from the UK, the overseas work period starts when you get on the aircraft, ship or train taking you out of the UK.

Example 15

Shirley flies from Spain to Heathrow Airport where she disembarks her plane and transits to catch a second flight from Heathrow to Glasgow.

Her journey from Spain to Heathrow is work done overseas. Once she disembarks the plane, the time she spends in the airport terminal and flying to Glasgow is work done in the UK.

Example 16

Robert travels to the UK from Paris by Eurostar and leaves the train at London, St Pancras to catch connecting trains to Glasgow. The costs of his journey are met by his employer. His train journey from Paris to St Pancras counts as work done

overseas. After disembarking at St Pancras, the rest of his journey counts as work done in the UK."[33]

FULL-TIME WORK

The Relevance of the Definition of Full-Time Work

4.3.1 Whether or not work is full-time is relevant to the Third Automatic UK Test (the FTWUK Test), to the Third Automatic Overseas Test (the FTWA Test) and to Case 1, Case 2 and Case 4 of the Split Year provisions.

The Statutory Definition

4.3.2 Paragraph 27 provides that:-

> "(1) P works "full-time" in the UK or, as the case may be, overseas "for" a period if the number of hours per week that P works there, on average across the period, is 35 or more.
>
> (2) In determining whether that test is met, the length of the period may be reduced to take account of –
>
> (a) reasonable amounts of annual leave or parenting leave taken by P during the period, and

[33] *DraftGuidance* paras 55-58

(b) absences from work at times during the period when P is on sick leave and cannot reasonably be expected to work as a result of the illness or injury.

(3) But no reduction is to be made for week-ends or public holidays.

(4) "Reasonable" amounts of annual leave or parenting leave are to be assessed having regard to (among other things) –

(a) the nature of the work; and

(b) the country or countries where P is working.

(5) If P holds more than one employment or carries on more than one trade during the period (whether consecutively or concurrently), the hours worked in the UK or, as the case may be, overseas with respect to each employment or trade are to be aggregated in determining whether P works there full-time for the period.

(6) If –

(a) P changes employment during the 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 gap may be deducted from the length of the

period in determining whether the test in sub-paragraph (1) is met, subject to a maximum deduction of 15 days."

The *DraftGuidance*

4.3.3 The *DraftGuidance* contains the following explanation:-

"You are considered to be working full-time in the UK, or overseas, for any given period if you work there for an average of at least 35 hours per week, whether you are an employee or self-employed. It is not necessary to work at least 35 hours every week during the period; it is enough that this average figure is met over the period in question. So for example a rotational worker might work every day continuously for three weeks and take every fourth week as a rest period, but still average 35 hours a week over the period.

The length of the period over which you calculate your average weekly hours should not be adjusted for weekends, public holidays or days you are not required to be at work because of your working pattern.

Example 12

Kim's contract of employment is to work 40 hours a week as a nurse in a hospital. However she works those 40 hours over four days and has one scheduled rest day each week. That scheduled rest day is still counted when working out the average time worked.

When working out the average time worked, you should reduce the length of the period to account for:-

- sick leave where you cannot work as a result of your sickness or injury, and
- reasonable amounts of –
  - annual leave
  - parenting leave.

What is a reasonable amount will depend on your situation, including the nature of your work and the standard number of annual leave days in the country in which you are working. Additionally:-

- if you have more than one job or trade, you should aggregate the hours worked in each when calculating your average hours;
- for the purposes of the third automatic overseas test (full-time work overseas) time spent working in the UK will not count towards your average hours; and
- for the purposes of the third automatic UK test (full-time work in the UK), time spent working overseas will not count towards your average hours.

If you change employment, or finish one contract to start another, and there is a gap in your working life, you can deduct up to 15 days from the period over which you calculate the average. If the gap is longer, any days over the 15 cannot be

deducted. You should also read the significant break from overseas work information below.

Example 13

MayLing is considering whether she meets the third automatic overseas test in respect of her work in Italy in the last tax year. She worked for her first employer there for an average of eight hours on each working day for the first 20 weeks of the tax year, during which she took nine days annual leave. She then ceased that employment and took a break of four weeks, when she toured the country. She then took up a new employment, again in Italy, for the remaining 28 weeks of the tax year. During those 28 weeks she worked for nine hours and 30 minutes from Monday to Thursday and for four hours on a Friday, and she also took two weeks annual leave and one week sick leave.

Employer 1: 18 weeks and one day at (5 days x 8 hours) = 728 hours

Employer 2: 25 weeks at ((4 days x 9.5 hours) + 4 hours) = 1050 hours

Total time worked is 1778 hours.

Total period over which the average weekly hours are to be calculated is 45 weeks. This is 18 weeks and one day for the first employment (20 weeks less the nine days annual leave) plus 25 weeks for the second employment (28 weeks less the three weeks annual and sick leave) plus the 13 days excess over 15 days for the four week gap between employments.

Average time worked per week: (1778 hours/45) = 39.51 hours a week.

MayLing meets the third automatic overseas test for the tax year."[34]

Areas of Difficulty

4.3.4 The attentive reader will notice that all of the Revenue's examples are in respect of work performed under an employment. Obviously, it is much more difficult to apply these conditions to a trade. The ICAEW said in its response (the "*ICAEWResponse*") to the *June2012ConDoc*:-

> "We are also concerned that such a test is very focussed on the position of employers and employees. It does not cater satisfactorily for someone who may be self-employed where work patterns can be very different."[35]

4.3.5 The *DecemberResponse* recorded that:-

> "Concerns were … raised about whether the test was appropriate for the self-employed and entrepreneurs, as well as part-time and rotational workers."[36]

4.3.6 The Government's response, however, was not to propose any fundamental changes to the test because it asserted that:-

[34] *DraftGuidance* paras 48-52
[35] *ICAEWResponse* para 25

"The legislation as drafted should work for rotational and self employed workers."[37]

4.3.7 The concepts used in the test, however, are concepts drawn from employment contracts. What can the phrase "annual leave" mean in relation to a sole trader? An employment contract will provide for a right to paid leave to accrue in respect of a period. A sole trader will decide to take such time for relaxation as he feels he needs and the exigencies of his trade allow. It is arguable that the periods he spends not working is not "leave" because he needs no-one's permission not to work and that it is certainly not "annual" because it is not defined by reference to a yearly period. As to what are "reasonable amounts of annual leave" in respect of a trade, how is one to determine the question? The time traders spend doing something other than work will depend on their personal circumstances and the particular circumstances of their trade. As to sick leave, once again the difficulty is in the word "leave". That word makes sense in relation to a contractual obligation to work for another person but not in respect of a personal decision to perform work in order to earn profits for oneself.

4.3.8 Para 132, which has been considerably changed from the equivalent paragraph[38] in the draft legislation (the "*JuneSchedule*") published in June, seems to be meant to take account of the difficulty of relating employment concepts to the self employed. It provides:-

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[36] *DecemberResponse* para 3.77
[37] *DecemberResponse* para 3.81

"In relation to an individual who carries on a trade -

(a) a reference in this Schedule to annual leave or parenting leave is to reasonable amounts of time off from work for the same purposes as the purposes for which annual leave or parenting leave is taken, and

(b) what are "reasonable amounts" is to be assessed having regard to the annual leave or parenting leave to which an employee might reasonably expect to be entitled if doing similar work."

4.3.9 That does not entirely, however, deal with the problem. What is "time off from work" in respect of a self employed person? To what extent does one take account of the differences between employed and self employed work when "having regard to" reasonable arrangements for employees in assessing what is reasonable for the self employed?

4.3.10 It will also be noted that paragraph 27(6) provides an extremely limited relief for gaps in employment but allows no similar relief for gaps between conducting trades or for moving from conducting a trade to being employed or vice versa.

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[38] *JuneSchedule* para 103

SECTION V

INTERNATIONAL TRANSPORTATION WORKERS

THE RELEVANCE OF THE DEFINED PHRASE

5.1.1 The phrase "International Transportation Worker" is used in the Third Automatic UK Test (the FTWUK Test), the Third Automatic Overseas Test (the FTWA Test) and the Work Tie.

THE STATUTORY PROVISIONS

5.2.1 Paragraph 28 provides:-

> "(1) An "international transportation worker" is someone who –
>
> (a) holds an employment, the duties of which consist of duties to be performed on board a vehicle, aircraft or ship as it makes international journeys; or
>
> (b) carries on a trade, the activities of which consist of the provision of services on board a vehicle, aircraft or ship as it makes international journeys.

(2) But a person is not an international transportation worker by virtue of sub-paragraph (1)(b) unless, in order to provide the services, he or she has to be present (in person) on board the vehicle, aircraft or ship as it makes those journeys.

(3) In deciding whether the duties of an employment or the activities of a trade consist of duties or activities of a kind described in sub-paragraph (1)(a) or (b) -

(a) it is sufficient that substantially all of the duties or activities consist of duties or activities of that kind (even if, for example, the person occasionally performs duties or provides services on board a vehicle, aircraft or ship as it makes domestic journeys); and

(b) duties or activities of a purely incidental nature are to be ignored."

THE DRAFT GUIDANCE

5.3.1 The *DraftGuidance* says:-

"You are an international transportation worker (ITW) if your job consists substantially of duties performed on board a vehicle, aircraft or ship as it makes international journeys. This includes pilots, airline cabin crew, ferry staff, mariners and lorry drivers. It does not matter whether you are an employee or are self-employed: provided that substantially all of your duties are carried out during international journeys, you will be treated as an ITW.

Whether you carry out substantially all your duties on board a vehicle, aircraft or ship as it makes international journeys will depend on all the facts in each case. However, where 80% or more of your job consists of duties performed on a vehicle as it makes international journeys, you will generally be an ITW.

You should ignore any incidental duties which you might perform, such as delivering or receiving training or attending trade union meetings [sic] when applying the substantially all test.

Example 17

Pria is cabin crew working on board flights between London and Switzerland for a short haul airline. For one month during the year, she changes her shifts and works on UK domestic flights. As substantially all of her duties throughout the year are performed on planes as they make international journeys, she will be treated as an ITW.

You will not be an ITW if you are otherwise working during a journey from one country to another, for example if you are a businessman catching up on emails during a flight from your base in one country to visit a client in another country.

If your job involves working on vehicles, aircraft or ships but you are not required to be present on board during a journey in order to provide those services, you will not be an ITW.

Example 18

Liam works on board cross channel ferries for ten months of the year as a steward. However, for eight weeks of the year he is office based, dealing with administrative duties. As substantially all of Liam's employment duties are carried out on board ships as they make international journeys, he is an ITW.

Example 19

Angela is an aircraft engineer whose job is to carry out safety checks on aircraft at Heathrow airport. She does not travel with the aircraft after she has done her work. As Angela's employment duties are not performed while the aircraft is making an international journey, she is not an ITW."[39]

5.3.2 As Peter Vaines will explain, neither the FTWUK Test nor the FTWA Test will apply if an individual is an International Transportation Worker at any time in the year.

5.3.3 The CIOT has said:-

"We can understand why HMRC want to have special rules for drivers of trains, lorries, planes, etc who spend time in the UK and elsewhere. It would seem

logical that a lorry driver who lives in the UK and drives from and returns to the UK as his work pattern should be resident and taxed in the UK, and of course vice versa.

We therefore think that the definition should exclude transport workers who do not actually spend any time driving in the UK. The obviously example would be an international transport worker based solely in North or South America but who nevertheless crosses international boundaries. The same should be true within Europe if the UK is never a part of the international journey.

If the intention was to deny FTWO to workers whose journey starts or ends in the UK, the legislation should make this clear."[40]

5.3.4 The *DecemberResponse* does not record that the Government received this representation from the CIOT and the changes made to the *DraftSchedule* do not address it.

[39] *DraftGuidance* paras 59-63
[40] *CIOTResponse* paras 15.2 and 15.3