IBC CONFERENCE:

UNDERSTANDING THE STATUTORY RESIDENCE TEST

AN OVERVIEW OF THE STATUTORY RESIDENCE TEST

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SECTION I

INTRODUCTION

On 11th December 2012, the Government published amended draft legislation (the "December Draft Legislation") to enact the Statutory Residence Test (the "SRT"), some explanatory notes and a Paper (the "December Response") which summarised the responses which had been made to the June 2012 Consultation Document (the "June 2012 ConDoc"), the Government's responses to them and the most significant changes which are to be made to the draft legislation published in June.

Before considering the aim and structure of the SRT, the significance of residence and the background to the SRT will be considered.

WHY A TEST OF RESIDENCE AT ALL?

CONNECTING FACTORS

Governments do not impose tax on every item of income, or on every person, in the world but only on that income and those persons which or who satisfy some form of connection criteria. The connection criteria applied to individuals tend to fall into two categories:-

- tests of long-term connection; and
- tests of short-term connection.

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On individuals who have neither a short nor long-term connection with the country concerned, governments normally impose taxation only on income, and sometimes on gains, which arise from sources situated in that country. On those with both a long and short-term connection, most governments impose taxation on their worldwide income and many also impose taxation on their worldwide gains. On those who have a short-term but not a long-term connection, a charge is usually imposed on worldwide income and gains but with reliefs to restrict the charge according to further criteria.

UK CONNECTING FACTORS

That is the system which applies in the UK. Broadly, long-term connection is determined through the concept of domicile and short-term connection through residence and, until 5th April this year, ordinary residence. Again, very broadly, those who are not resident or ordinarily resident in the UK are assessable only on their UK source income[1] and on gains arising on the disposal of a limited class of UK assets.[2] Those who are resident in the UK are charged on their worldwide income and gains[3] but if they are not domiciled in the UK[4] their non-UK income and gains will normally only be taxable if they are remitted to the UK although, for longer term residents, that privilege may only be attained at the price of paying the Remittance Basis Charge.[5]

1 Simon's Taxes E6.101; *Colquhoun v Brooks* (1889) 2 TC 490 HL
2 TCGA 1992 ss.2 and 10
3 Simon's Taxes E6.101. TCGA 1992 s.2
4 Actually one is domiciled in a country of the UK not in the UK but in these notes this form is adopted as a convenient abbreviation
5 ITA 2007 Part 14 Ch A1

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This general approach is relatively new. It was not until 1940 that even UK residents were liable to UK Income Tax on their non-UK income which was not remitted to the UK.

The Underlying Justification of Long and Short Term Connecting Factors

The theoretical justification of this general pattern is derived from ideas of 'fairness' and a consideration of economic practicality.

Fairness

It is widely felt that it is fair that those who have a long-term connection with a country should contribute financially to its common life even if that contribution is more than the economic value of the benefits of their connection. It is no doubt for this reason that the UK has adopted the concept of domicile as its criterion for long-term connection. In a similar way, the United States uses citizenship, or the holding of a Green Card conferring the right of long-term residence, as its primary test of long-term belonging.

The Economic Argument

The practical economic justification of differentiating between those with long- and short-term connections with a country is that those who have a long-term connection will not easily move to another country. Those who only have a short-term connection with a country will move to other countries much more easily and so they will be given tax privileges, in competition with other countries, in order to provide an incentive for them to stay.

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Whether or not one accepts the argument in respect of 'fairness', economic practicalities mean that if the taxes imposed on those who only have a short-term connection with a country are disproportionate to the advantages of that connection judged against competing jurisdictions, the test will have the effect of depriving the country concerned of capital, expertise and business activity.

Drawing the Dividing Line

Defining an appropriate test of short term connection poses a further practical problem. Income Tax is primarily imposed by reference to fiscal years and a key ingredient of determining residence has always been physical presence in the UK. It is thought impractical to impose taxation on a person's income in proportion to the time within a fiscal year that he is present in the UK. That being the case, short-term connection tests based on residence need to provide a single dividing line between residence and non-residence for a whole year. Drawing a single hard line will always risk that those who fall just over or just before the line are either taxed disproportionately highly or disproportionately lightly. All jurisdictions tend to draw that line heavily in their own favour by regarding somebody as resident for a complete year who is physically present in it only for a small part of it. That has the effect that such persons tend to be resident in two or more jurisdictions according to the particular rules of the jurisdictions concerned and that in turn requires special rules to provide for relief from double taxation by prioritising the taxation rights of competing jurisdictions.

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THE COST OF UNCERTAINTY

With so much depending upon whether or not a person satisfies the short-term connection test, if it is difficult to predict how the test will apply that uncertainty will deter people from bringing their capital, businesses and expertise to the country concerned. For that reason some countries have been careful to create simple tests, based on objective arithmetical criteria. Both Ireland and the United States, for example, base their tests of residence on averaging days of presence in those countries.

WHY IS A STATUTORY RESIDENCE TEST PROPOSED?

No Existing Statutory Rule

There is no statutory definition of residence to be found in the UK tax legislation. Because of the lack of a general definition, the meaning of residence has to be determined from the provisions of the Taxes Acts to the extent that they provide particular rules. The nearest we get to a statutory definition is found in ITA 2007 ss.831 and 832 which provide, loosely, that in taxing an individual's foreign income, an individual will be treated as non-resident where:-

(a) he is in the UK for some temporary purpose only and with no intention of establishing his residence here; and

(b) he spends less than 183 days in the UK in any relevant tax year.

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This test, however, does not cover the situation of a person who is in the UK for some purpose which is not temporary.

As the legislation does not provide a comprehensive test of tax residence, one has to turn to case law.

The Present Test of Residence is Primarily based on Case Law

There is a great deal of case law concerning the residence of individuals for tax purposes as well as in relation to non-tax cases. Some cases which are still relevant to determining a person's tax residence were decided before the First World War.[6] Indeed, two important cases of *Levene*[7] and *Lysaght*[8] which are the basis of modern decisions were decided in the 1920s. The courts have proceeded, in the main,[9] not by attempting to formulate a general test of residence, but by asking of the particular person whose circumstances were at issue in the case whether they were resident or not. The result of this is that it is hard to extrapolate general principles from these cases by which to determine any particular person's tax residence.

The case law was summarised by Malcolm Gunn writing in *Taxation* magazine in 1992 and echoing a point made 65 years earlier by Viscount Sumner in *Levene v IRC*:-[10]

[6] For example, *Re Norris* (1888) 4 TLR 452; *Cadwalader v Cooper* CE (1904) 5 TC 101
[7] *Levene v IRC* [1927] 13 TC 486
[8] *IRC v Lysaght* [1928] 13 TC 511
[9] Although attempts were made to summarise the case law in *Grace v Revenue & Customs Commissioners* [2009] EWCA Civ 1082
[10] *Levene v IRC* [1927] 13 TC 486

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> "Residence is a question of fact. There are very few rules. Cases are decided as and when they arise and without much reference to any other previous decisions. The decisions might well conflict with each other but that is just tough luck and there is nothing anybody can do about it."

Indeed, the topic of residence has been a perennial area of difficulty. The Income Tax Codification Committee in 1936, found it "remarkable" that the Taxes Acts gave no more assistance than the rules (now found in ITA 2007 ss.829 – 832) which are of limited application. In addition, they concluded that "nor [were] the decisions of the Courts very helpful." The Committee concluded:-

> "The present state of affairs, under which an enquirer can only be told that the question whether he is resident or not is a question of fact for the Commissioners but that by the study of the effect of a large body of case law he may be able to make an intelligent forecast of their decision, is intolerable, and should not be allowed to continue."[11]

The issue was considered by the Royal Commission on Income Tax[12] in 1955. They concluded that "there ought to be certain principles laid down by Parliament as legal principles governing the question of residence" and drew up a set of rules. The Royal Commission did not recommend that there should be an exhaustive definition of residence and in fact, doubted whether it would be possible to formulate one.

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[11] Income Tax Codification Committee Report CMD.5131 pp 34-39

[12] Royal Commission on Income Tax, Final Report, Cmd.9474, Chapter 14

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From the end of the 1920's there have been very few reported cases on residence, the only exception being *Reed v Clark*.

The Development of Revenue Guidance

This was probably because the Inland Revenue had set out its practice, only loosely based on the law, providing rules of thumb which allowed advisers to predict whether the Revenue would challenge an individual's residence status or not. The guidance later found in IR20 "*IR20 Residents and Non-Residents – Liability to Tax in the UK*", was based on guidance issued by the Revenue before 1936. The Royal Commission considered this to be "unsatisfactory" and noted that the "rules are regarded by the [Revenue] as either deduced from legal decisions or as representing what would be fair and in accordance with the spirit of the tax code." The lack of a precise legal test of residence was unsatisfactory but advisers adapted pragmatically and indeed applied the Revenue's guidance as if it were a code of law.

Recognition of the Need for Reform

Although the need for reform was recognised in 1936 and again in 1955, it was not forthcoming.

In 1988 the Government published a consultative document entitled "Residence in the United Kingdom – the Scope of UK Taxation for Individuals" was published. In the light of the responses received, however, the Government announced that they did not intend pursuing these proposals.[13] The Law Society said that the subject had been approached with "undue haste" and pointed out that "the existing rules of … residence

[13] This was announced by the Government on 15th March 1989

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[had] been built up over a long period of time: about 190 years." The Law Society was concerned that no attempt had been made to evaluate the extent of the effect of the changes proposed.

In his 2002 Budget Speech the then Chancellor announced that he was 'reviewing the complex rules of residence and domicile'. A background paper entitled '*Reviewing the residence and domicile rules as they affect the taxation of individuals*' was issued by the Treasury in April 2003 but it contained no specific proposals, nor any timetable, for change. Various professional bodies submitted their comments on the paper to which there was little or no response. In October 2006, in response to an enquiry as to whether there were any changes to be made to the residence and domicile rules in the light of the 2003 Review, the Paymaster-General simply replied that the 'review [was] ongoing'.

<u>HMRC's Change of Practice</u>

Subsequently, however, HMRC began to challenge the non-resident or non-ordinarily resident status claimed by the taxpayer concerned and cases on residence began to reach the Courts in which, in the main, HMRC were the victors.[14] Advisers had always been aware that HMRC's summary of their practice contained in their booklet IR20, was an overgenerous view of the law[15] but it was thought that it could be relied

[14] For example, *Gaines-Cooper v HM Revenue & Customs Commissioners* [2007] EWHC 2617 (Ch); *Grace v HM Revenue & Customs Commissioners* [2009] EWCA Civ 1082; *Hankinson v HMRC* [2009] UKFTT 384 (TC); *Farquhar v HM Revenue & Customs Commissioners* [2010] UK FTT 231 (TC); *Broome v HM Revenue & Customs Commissioners* [2011] UKFTT 760 (TC) and *Kimber v HM Revenue & Customs Commissioners* [2012] UKFTT 107 (TC)

[15] HMRC withdrew IR20 with effect from 6th April 2009 and replaced it with a new statement of their view of the law of residence and domicile and of their practice in a document entitled "HMRC6: Residence, Domicile and the Remittance Basis" which is no more accurate in its summary of the law than IR20 had been but is considerably less helpful in respect of HMRC's practice

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upon. In the view of many, in cases such as *Gaines-Cooper*[16] and *Farquhar*[17] HMRC departed from their established practice.

The difficulty faced by the taxpayers concerned was that, even if that were the case, if they were resident in the UK under the law but not under HMRC's practice the only way in which they could take advantage of the more generous practice was by establishing, in judicial review proceedings, that they had a legitimate expectation that HMRC would not apply the full rigour of the law. Mr Gaines-Cooper attempted to do just that in 2010.[18] To the general surprise of the tax profession, however, the Court of Appeal held, and the Supreme Court subsequently confirmed, that HMRC were, indeed, bound to apply the practice set out in IR20, for periods up to its withdrawal, but that they had actually done so.

Calls for a Statutory Residence Test

Whilst the *Gaines-Cooper* cases proceeded, advisers had to warn their clients that they could not rely on what had been thought to be HMRC's practice. The result was a general concern that individuals were being deterred from coming to the UK and from bringing to it their capital, businesses and expertise or were deciding to leave it. At the time of the "Residence and Domicile Review" in 2007 (which introduced the Remittance Basis Charge) STEP called for the introduction of a statutory residence test using the day counting test. On 26th November 2007, Emma Chamberlain, speaking on behalf of the CIOT, reiterated STEP's call for the introduction of such a test. Before the House of Lords Select Committee, representatives of the various

[16] *Gaines-Cooper v HM Revenue & Customs Commissioners* [2007] EWHC 2617 (Ch)
[17] *Farquhar v HM Revenue & Customs Commissioners* [2010] UKFTT 231 (TC)
[18] *R (on the application of Davies & Another) v HM Revenue & Customs Commissioners; R (on the Application of Gaines-Cooper) v HM Revenue & Customs Commissioners* [2011] UKSC 47

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professional bodies called for a comprehensive legislative definition and the Committee agreed with them.[19] The professional bodies continued to repeat these calls at every available opportunity.

Government Consultations

Finally, in the debates on the Finance Bill 2008 Jane Kennedy, the then Financial Secretary to the Treasury, said she "was not unsympathetic to the case being made for a statutory residence test" and that she had requested that work be undertaken to determine if one could be developed.[20] It was the professions' hope was that the test would be a simple, objective test based on days of presence in the United Kingdom and probably following the US model.[21] The Government entered into a long period of confidential discussions with "external bodies and representative groups".[22]

In the 2011 Budget Speech, it was announced that the Government would publish a Consultation Document in June 2011, with the aim of introducing legislation in the Finance Act 2012 to take effect from 6th April 2012.[23] When the Consultation Document was published on 17th June 2011 (the "June 2011 ConDoc"), the test proposed was very far from a simple one. Considerable criticisms were made in representations by the professional bodies.[24] Both the STEP and the CIOT indicated

19 Select Committee on Economic Affairs, 2nd Report of Session 2007-2008, The Finance Bill 2008
20 Finance Bill Debates 22nd sitting on the afternoon of 17th June 2008
21 Letter from the CIOT to HMRC headed "Residence for Tax Purposes: Comments of the Chartered Institute of Taxation" dated 14th November 2007
22 June 2011 ConDoc p.2
23 Budget Report 2011 para 2.41
24 See for example the CIOT's paper entitled "Statutory Definition of Residence: A Consultation Response by the Chartered Institute of Taxation" (the "CIOT 2011 Response"), the Society of Trust and Estate Practitioners' (referred to in this Paper as the "STEP") paper entitled "Statutory Definition of Tax Residence: A Consultation HMT/HMRC Consultation Document issued on 17th June 2011" (the "STEP 2011 Response") and the ICAEW's paper entitled "Tax Rep 48/11" (the "ICAEW 2011 Response")

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that the proposed test was an improvement on the current position but that a test based purely on counting days of presence in the UK was the best option.[25]

In December 2011 the Financial Secretary to the Treasury announced that the introduction of the test would be delayed until 6th April 2013 to allow for further consultation.

In June 2012, a further document entitled ‘Statutory Definition of Tax Residence and Reform of Ordinary Residence: A Summary of Responses’ (the “June 2012 ConDoc”) which included draft legislation was published. That made various minor changes to the proposals but the broad outline and most of the detail of the proposals made in the June 2011 ConDoc were retained.

The revised draft legislation was published in draft on the 11th December 2012 which is subject to further consultation. Following this further consultation it is intended that the legislation will be published in the Finance Bill shortly after the Chancellor delivers his 2013 Budget Speech on 20th March this year.[26]

THE AIMS AND OBJECTIVES OF THE NEW SRT

The Exchequer Secretary to the Treasury in his Foreword to the June 2012 ConDoc said that:-

[25] The CIOT 2011 Response, paras 5.1 and 8.1 and the STEP 2011 Response, para 1
[26] Foreword to the December Response

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> “We made clear our desire that the rules for determining whether an individual is tax resident in the UK should be clear, objective and unambiguous.”

He said that:-

> “… for the vast majority of people, a Statutory Residence Test would not change their residence status. The clarity and certainty a Statutory Test would bring will also improve the predictability of this area of the UK tax system, making the UK a more attractive place for investors.”

He went on to say that the draft legislation included in the June 2012 ConDoc:-

> “… aims to be transparent, objective and simple to use. It is intended to leave the residence status of the vast majority of people unaffected, but to bring greater clarity to individuals with more complex circumstances.”

One presumes that in saying that the legislation will “bring greater clarity to individuals” he meant that individuals with complex circumstances should be able to predict the application of the draft legislation to their circumstances with a higher probability than they could under the current situation.

In the December Response the Exchequer Secretary said:-

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"We have developed a statutory residence test which, whilst it will not change the residence position for the majority of individuals, will provide a greater degree of certainty and clarity to internationally mobile individuals and their employers. This is intended to increase the UK's reputation as a good place to invest in and do business, whilst continuing to ensure that those with close connections to the UK continue to pay their fair share of tax.

…………..

Taken together, these reforms represent a significant step forward in clarity, predictability and simplicity in this area of the personal tax code."

THE STRUCTURE OF THE UK STATUTORY RESIDENCE TEST

The SRT determines whether an individual is resident in the UK or not for the purposes of Income Tax, Capital Gains Tax and (where relevant), Inheritance Tax and Corporation Tax.[27] The SRT does not apply for the purposes of National Insurance contributions.

The rules do not apply in determining whether an individual is resident or not in England, Wales, Scotland or Northern Ireland.[28]

An individual is resident in the UK for a given tax year if he:-

[27] Sch 1, para 1
[28] Sch 1, para 1(3)

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(a) satisfies the Automatic Residence Test; or

(b) satisfies the Sufficient Ties Test.[29]

If neither of these Tests are met, then the individual is not resident in the UK.[30]

AUTOMATIC RESIDENCE TEST

The Automatic Residence Test will be met if:-

(a) one of the Automatic UK Tests is met; and

(b) none of the Automatic Overseas Tests are met.[31]

AUTOMATIC OVERSEAS TESTS

An individual will be automatically non-resident if he meets any of the four Automatic Overseas Tests.

The First Automatic Overseas Test

The First Automatic Overseas Test is met if the individual was resident in the UK for one or more of the three tax years preceding the tax year concerned and the number of days spent in the UK is, in the year concerned, less than 16.

This test does not apply if the individual dies during the tax year.[32]

[29] Sch 1, para 3
[30] Sch 1, para 4
[31] Sch 1, para 5
[32] Sch 1, para 12

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The Second Automatic Overseas Test

The Second Automatic Overseas Test is met if the individual was not resident in the UK for any of the three tax years preceding the year concerned and the number of days spent in the UK in that year is less than 46.[33]

The Third Automatic Overseas Test

The Third Automatic Overseas Test is met if the individual works full-time overseas for the relevant year without any significant breaks from that overseas work and:-

(a) the number of days in that year on which the individual does more than three hours work in the UK is less than 31;[34] and

(b) the number of days spent in the UK in the relevant tax year is less than 91 (excluding deemed days).[35]

Full-time work is an average of 35 hours per week over a period, taking into account reasonable amounts of annual leave. What is reasonable will depend on the individual's situation which may cause difficulties.

The Fourth Automatic Overseas Test

The Fourth Automatic Overseas Test applies only where an individual has died during the relevant tax year.

If none of the Automatic Overseas Tests are satisfied then the Automatic UK Tests need to be considered.

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[33] Sch 1, para 13

[34] The number of days has been increased from 21 to 31

[35] Sch 1, para 14

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THE AUTOMATIC UK TESTS

An individual will be resident in the UK if he satisfies one of the four Automatic UK Tests.

The First Automatic UK Test

The First Automatic UK Test is met if the individual spends at least 183 days in the UK in the tax year concerned.[36]

The Second Automatic UK Test

The Second Automatic UK Test is met if:-

(a) the individual has a home in the UK for more than 90 days;

(b) he is present at that home on at least 30 separate days (individual or consecutive days and regardless of the amount of time spent at his home on a day) during the tax year;

(c) while he has that UK home there is at least one period of 91 consecutive days some or all of which falls within the tax year in question when he has no home overseas or he has one or more homes overseas but in none of which is he present for more than 29 days during the tax year.

Where the individual has more than one home in the UK, each home must be considered separately to determine if the test is satisfied.

[36] Sch 1, para 7

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The use of the concept of a "home" has been the subject of much criticism because it is a word of broad and imprecise meaning. The draft legislation contains no exhaustive definition of what is a home and the Guidance issued by HMRC on 18th December 2012 provides little or no assistance.

The Third Automatic UK Test

The Third Automatic UK Test is met if the individual works full-time in the UK for 365 days or more with no significant break from UK work and:-

(a) all or part of that period falls within the tax year; and

(b) more than 75% of the total number of days in the tax year when the individual does more than 3 hours work are days when he does more than 3 hours work in the UK.[37]

The Fourth Automatic UK Test

The Fourth Automatic UK Test applies only where the individual has died during the relevant tax year.

Where an individual satisfies one of the Automatic UK Tests and none of the Automatic Overseas Tests, then he will be resident in the UK for tax purposes for that tax year.

[37] Sch 1, para 9

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SUFFICIENT TIES TEST

Where none of the Automatic Overseas Tests nor any of the Automatic UK Tests are satisfied, the Sufficient Ties Test should be considered.

What is a UK tie and whether or not an individual has sufficient UK ties in a relevant tax year will depend upon whether the person was resident in the UK for any of the previous three tax years and the number of days the individual has spent in the UK in the relevant tax year. The relevant bands are shown below.

Days spent in the UK in the relevant tax year	**Number of ties that are sufficient where an individual has been UK resident in one of the 3 years preceding the relevant year[38]**	**Number of ties that are sufficient where an individual has not been UK resident in one of the 3 years preceding the relevant year[39]**
More than 15 but not more than 45	At least 4	
More than 45 but not more than 90	At least 3	All 4
More than 90 but not more than 120	At least 2	At least 3
More than 120	At least 1	At least 2

Special rules apply where the individual has died during the year to proportionately reduce the number of days.[40]

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[38] Sch 1, para 17
[39] Sch 1, para 18
[40] Sch 1, para 19

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Where the individual was resident in the UK in one or more of the three tax years preceding the relevant year there are five ties which are:-

(a) the Family Tie;

(b) the Accommodation Tie;

(c) the Work Tie;

(d) the 90-day Tie; and

(e) the Country Tie.[41]

Where the individual has not been so resident, the Country Tie is omitted so only the following are UK ties:-

(a) the Family Tie;

(b) the Accommodation Tie;

(c) the Work Tie; and

(d) the 90-day Tie.[42]

The Family Tie

An individual has a Family Tie if in that year there is a relevant relationship between that individual and another person and that other person is resident in the UK for that year which includes:-

(a) their husband, wife or civil partner (unless they are separated);

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41 Sch 1, para 29

42 Sch 1, para 29(3)

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(b) their partner if they are living together as husband and wife or as civil partners;

(c) their children under the age of 18.[43]

Special rules apply where a child is in full-time education in the UK at any time in the relevant tax year.[44]

The Accommodation Tie

An individual has an Accommodation Tie if they have a place to live in the UK and:-

(a) it is available to him for a continuous period of at least 91 days during the relevant tax year and he spends at least one night there during that tax year;[45] or

(b) if it is the home of a close relative he spends at least 16 nights there during that year.[46]

There is a particularly nasty trap for those taxpayers who make regular trips to the UK staying at the same hotel. There is a rule which applies where there are fewer than 16 days between the periods in which a particular place is available which treats that place as being available to the individual for that period.

43 Sch 1, para 30
44 Sch 1, para 31(4)
45 Sch 1, para 32(1)
46 Sch 1, para 32(6)

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The Work Tie

An individual has a Work Tie if he works in the UK for at least 40 days in the relevant tax year. He is treated as working for a day if he does more than three hours work in the UK on that day.

The 90-Day Tie

An individual has a 90-Day Tie for the relevant tax year if he has spent more than 90 days in the UK in either the tax year preceding the relevant year, the tax year preceding that year or each of those tax years.

The Country Tie

An individual has a Country Tie for a relevant year if the country in which he spends the greatest number of days in that year is in the UK.

SPLIT YEAR TREATMENT

The current position is that an individual is either UK resident or not UK resident for a full tax year. By concession,[47] however, a tax year can in certain circumstances be split. This concessionary treatment is now to be put on a statutory footing.

Under the SRT, it will be possible for a tax year to be split into two parts namely the UK part in which an individual is charged to UK tax as a UK resident and an overseas part in which he is charged to UK tax as a non-UK resident.

[47] Extra Statutory Concessions A11 and D2

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This split year treatment is available where the individual is resident in the UK for that year and he falls within one of the five Cases.[48] Essentially, these cover situations where the individual leaves the UK partway through a tax year or where he comes to the UK partway through the tax year:-

- Case 1 applies where an individual starts full-time work overseas.[49]

- Case 2 applies where an individual is a partner of someone who starts full-time work overseas and that person goes to live with the worker.[50]

- Case 3 applies where an individual leaves the UK to live abroad.[51]

- Case 4 applies where an individual comes to live or work full-time in the UK.[52]

- Case 5 applies where an individual starts to have a home in the UK during the tax year and continues to do so until the end of the following tax year.[53]

[48] Sch 1, para 40
[49] Sch 1, para 41
[50] Sch 1, para 42
[51] Sch 1, para 43
[52] Sch 1, para 44
[53] Sch 1, para 45

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ANTI-AVOIDANCE

Part 4 of the legislation introducing the SRT contains almost 20 pages of anti-avoidance measures designed to prevent individuals from using short periods of non-residence to receive income or gains free of UK tax. The charge will apply to income from closely controlled companies, lump sum benefits from employer financed retirement benefit schemes and chargeable event gains from life assurance contracts. The provisions will apply if the period of temporary non-residence is five years or less. The current temporary non-residence rules which apply for Capital Gains Tax purposes apply if there are no more than five tax years between the year of departure and the year of return. These rules are to be harmonised with the new Income Tax rules.

ABOLITION OF ORDINARY RESIDENCE

The concept of ordinary residence is to be excised from the tax code.

Currently, individuals who are not ordinarily resident in the UK are taxed on the remittance basis on income from foreign employment duties where the income is paid by the UK employer provided the individual intends to leave the UK within 3 years of arrival. This is known as "overseas work day relief".

Overseas workday relief will be retained and put on a statutory footing which does not use the concept of ordinary residence. The relief will now be available to all non-

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domiciled individuals arriving in the UK who have not been resident in any of the previous three tax years.[54]

RESIDENCE STATUS ELECTION

The individual considering his residence status for the tax years 2013/14, 2014/15 or 2015/16 under the Automatic Overseas Tests or the Sufficient Ties Test will need to know his residence status for one or more of the prior three years. His prior residence status will also be relevant in determining whether the split year treatment is available.

It is proposed that an individual may elect (for these purposes only) to determine his residence status for one or more of the three tax years prior to 2013/14 by reference to the SRT rather than in accordance with the current rules. The election will not change an individual's actual tax residence status nor will it affect their tax liability in those years.

AN IMPROVEMENT?

The SRT is undoubtedly an improvement on the current situation. The majority of taxpayers will be able to determine their residence status to a high degree of probability. A significant minority of taxpayers, however, will be unable to do so. The proposed SRT is far from simple, a point which was made by the professional bodies who called for further simplification. This has not happened. The SRT uses a

54 Sch 1, paras 9 and 10

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number of concepts the meanings of which are extremely uncertain and which require a large number of subjective judgments to be made. We are living in a mobile society where people have global roles and move jurisdictions easily. Practitioners advising clients with anything other than the most simple of circumstances may well find that it is still difficult to give unequivocal advice as to their likely future residence status.

AREAS OF DIFFICULTY

It is already possible to identify various areas of difficulty in the SRT, some of which have been criticised by the professional bodies, and others, and include:-

- the lack of a definition of 'home';
- the use of the concept of 'a place to live in the UK';
- the definition of 'work';
- what constitutes 'exceptional circumstances' in determining if someone has spent a day in the UK;
- the operation of the Full-time Working Abroad Test, including how the 35 Hours Test will operate in various circumstances and its application in relation to the self-employed;
- the operation of the Split Year Treatment;
- the application of the SRT to part-time workers; and
- the application of the SRT to international transportation workers.

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