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INFORMA CONFERENCE: TAX UPDATE FOR FOREIGN DOMS AND NON-RESIDENT CLIENTS

'LATEST PROBLEM AREAS IN RESIDENCE AND THE SRT: INTRA-UK RESIDENCE'

Simon McKie

MA (Oxon), FCA, CTA (Fellow), TEP

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McKie & Co (Advisory Services) LLP
Rudge Hill House
Rudge
Somerset
BA11 2QG

Tel: 01373 830956
Email: enquiries@mckieandco.com
Website: www.mckieandco.com

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SECTION I

THE IMPORTANCE OF INTRA-UNITED KINGDOM RESIDENCE

SCOTTISH AND WELSH TAXPAYERS

1.1.1 The Scotland Act 1998 as amended by the Scotland Act 2012 and the Wales Act 2014 defines a 'Scottish taxpayer'.[1] Similarly, the Government of Wales Act 2006 as amended by the Wales Act 2014 defines a 'Welsh taxpayer'.[2] Both are, in effect, definitions of fiscal residence; of fiscal residence in Scotland and Wales respectively. The Scotland Act has had a definition of a 'Scottish taxpayer' since its enactment in 1998 and there have already been three major versions of it. Until now, however, it has been of only theoretical importance.

THE SCOTTISH RATES

Not a Devolved Tax

1.2.1 The Scotland Act provides for the Scottish Parliament to have power to make legislative provisions in respect of devolved taxes. Currently, the devolved taxes are tax on transactions involving interests in land, tax on disposals to landfill[3] and tax on carriage of passengers by air. Tax on income is not a devolved tax. Its scope will continue to be determined by the UK Parliament and it will continue to be administered by HMRC alone.

1 Scotland Act 1998 ss.80D – 80F
2 Government of Wales Act 2006 ss.116E – 116H
3 Scotland Act 1998 ss.80I – 80L

1.2.2 The Scottish Parliament has had certain limited powers in respect of Income Tax since the fiscal year 2016/17 onwards.

The Original Scottish Rate

1.2.3 In 2016/17 it had power to set a Scottish Rate of Income Tax (the 'Original Scottish Rate') for the purposes of calculating the rate of Income Tax to be paid by Scottish taxpayers on certain income.[4]

1.2.4 The Original Scottish Rate was not actually a rate which was charged on any income. The rates which were charged on the relevant income of Scottish taxpayers in 2016/17 were the Scottish Basic Rate, the Scottish Higher Rate and the Scottish Additional Rate.[5] These rates were found by deducting 10% from the general UK rates (that is from the Basic Rate, the Higher Rate and the Additional Rate) (the 'General UK Rates') and adding the Scottish Rate.[6]

1.2.5 So in 2016/17 the Scottish Parliament had the power to set the Income Tax rates applicable to certain income of Scottish taxpayers, but all rates had to deviate from the normal UK rates by the same amount and applied to the same bands of income as in the UK generally.

1.2.6 In fact the Scottish Parliament chose to set the Original Scottish Rate at 10% for 2016/17 so that Scottish taxpayers paid Income Tax on all their income at the same rates as their English, Welsh and Northern Irish counterparts.

4 Scotland Act 1998 s.80C
5 Income Tax Act 2007 (the 'Income Tax Act 2007') s.11A
6 ITA 2007 s.6A (before its repeal by the Scotland Act 2016 s.13(5))

The Scottish Rates

1.2.7 The Scotland Act 2016 amended and extended the Scottish Parliament's powers in respect of Income Tax by providing that certain income of Scottish taxpayers is not to be charged at the Basic, Higher and Additional rates of Income Tax but to a Scottish Basic Rate and at other rates set by a resolution (a 'Scottish Rate Resolution') of the Scottish Parliament.[7] In these notes we refer to these rates as the 'Scottish Rates'.[8] The Scotland Act 1998, as amended by the Scotland Act 2016, provides that:

> 'Where a Scottish rate resolution sets more than one rate it must also set limits or make other provision to enable it to be ascertained, for the purposes of that section, which rates apply in relation to a Scottish taxpayer'[9]

1.2.8 This provision enables the Scottish Parliament not only to set different rates of tax but also to set different bands of tax to which the rates are to apply.

2017/18

1.2.9 In 2017/18 the Scottish Parliament made only moderate use of this power, setting identical rates to the General UK Rates but setting the Scottish Basic Rate Limit at £31,500 whereas the Basic Rate Limit was £33,500. The result was that higher rate taxpayers in Scotland were £400 worse off than their counterparts in the rest of the United Kingdom.

7 ITA 2007 s.11A
8 A phrase which occurs in the ITA 2007 (amended by the Scotland Act 2016)
9 Scotland Act 1998 s.80C(2A)

2018/19

1.2.10 The Scottish Government has announced that in 2018/19 it will impose Income Tax based on rates and bands significantly different from those which apply to the UK generally. They are as follows:-

	Scottish Rates on Income between £	**%**
Scottish tax rate	0 – 2,000	19
Scottish Basic Rate	2,001 – 12,150	20
Scottish Inheritance Tax Rate	12,151, - 31,580	21
Scottish Higher Rate	31,581 – 150,000	41
Scottish Top Rate	150,000 +	46

1.2.11 This may be compared to the simplier structure of the General UK Rates which is as follows:-

	Rates on Income up to £	**%**
UK Basic Rate	0 – 34,000	20
UK Higher Rate	34,501 – 150,000	40
UK Additional Rate	150,000 +	46

1.2.12 In future years Income Tax bands and rates in Scotland can be expected to diverge further from the rest of the UK.

Income Subject to the Scottish Rates of Tax

1.2.13 The income to which the Scottish Rates of Tax apply is the non-savings income of the Scottish taxpayer concerned.[10]

Definition of non-savings income

1.2.14 Non-savings income is income which is not dividend income, other than relevant foreign income, and which is not savings income.[11]

Definition of Savings Income

1.2.15 Savings income is, loosely, income which falls into one of the following categories:-

- interest;
- purchased life annuities with certain exceptions;
- profits on deeply discounted securities;
- accrued income profits;
- certain chargeable event gains.[12]

1.2.16 So all relevant foreign income charged under the remittance basis is subject to the Scottish Rates regardless of whether it would otherwise fall within the categories of income listed above.[13] Thus interest income, most purchased life annuity income and profits on deeply discounted securities but not accrued income profits or chargeable event gains (to which the remittance basis does not apply in any event) will be chargeable to the Scottish Rates of Tax if the remittance basis applies but will not be if it does not.

[10] ITA 2007 s.11A(1A)
[11] ITA 2007 s.11A(4)
[12] ITA 2007 s.18
[13] See paras. 1.2.3 and 1.2.4 above

1.2.17 Income nominated in a remittance basis claim under ITA 2007 809H(2) (income nominated as being treated as remitted to the UK) and income treated under ITA 2007 s.809H(4) as if it had been so nominated, is not subject to the Scottish Rates but is subject to the General UK Rates.

Trading and employment income

1.2.18 Obviously the most important categories of income of Scottish taxpayers[14] which will be subject to the Scottish Rates will be employment and trading income. If the individual concerned is a Scottish Taxpayer it will be possible for income consisting of the profits of a trade, or of earnings from an employment, to be assessable to the Scottish Rates even if the trade or employment is carried on entirely outside Scotland.[15]

THE WELSH RATES

1.3.1 Provisions in respect of Welsh Rates of Income Tax (the 'Welsh Rates) were inserted into the Government of Wales Act 2006 and the Income Tax Act 2007 by the Wales Act 2014.[16] These provisions allow separate Welsh rates to be set for the purposes of calculating the Welsh Basic Rate, the Welsh Higher Rate and the Welsh Additional Rate.[17] So these powers would allow the Welsh Assembly to vary the rates applying to the three tax bands by different amounts. When they have come into effect it will be possible for the Welsh Assembly to create, for example, a Welsh Basic Rate of 10%, a

[14] And of Welsh taxpayers which will be subject to the Welsh Rates (see paras. 1.3.1 – 1.3.2 and Section IV below)
[15] The same point applies to the application of the Welsh Rates to Welsh taxpayers
[16] Government of Wales Act ss.6&8
[17] Government of Wales Act 2006 s.116D

Welsh Higher Rate of 40% and a Welsh Additional Rate of 90% but not to vary the bands to which these rates apply.[18]

1.3.2 When the Wales Act 2014 was first enacted, however, the power to set the Welsh Rates was only to come into force after a referendum had been held in which a majority of those casting their votes had voted in favour of its being so.[19] The Wales Act 2017 removed this requirement and the power for the Welsh assembly to set Welsh Rates of Income Tax will come into force in respect of the fiscal year 2019/20.[20] Just as the Scottish Rates apply to the non-savings income of a Scottish taxpayer so the Welsh Rates will apply to the non-savings income of a Welsh taxpayer.[21]

1.3.3 The First Minister of the Welsh Assembly has said that the Welsh Government will not vary any of the Welsh Rates from the General UK Rates before the next Assembly elections which are due to take place in 2021.

EVER LOOSER UNION?

1.4.1 In 2014 the Smith Commission Report[22] in respect of the devolution of further powers to the Scottish Parliament recorded that the Smith Commission had agreed that all other aspects of Income Tax would remain reserved to the UK Parliament including the imposition of the annual charge to Income Tax, the personal allowance, the taxation of savings and dividend income; the ability to introduce and amend tax reliefs and the

[18] So that the powers of the Welsh Assembly in respect of Income Tax are more restricted than those of the Scottish Parliament
[19] Wales Act 2014 ss.12 - 14
[20] Welsh Act 2017 s.17
[21] ITA 2007 s.11B(1)
[22] A Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament: 27th November 2014

definition of income. The whole of Income Tax, including that paid by Scottish taxpayers, would continue to be administered by HMRC. All aspects of Inheritance Tax, Capital Gains Tax, Corporation Tax, National Insurance Contributions and oil and gas receipts would continue to be reserved to the UK.[23]

1.4.2 This is, however, unlikely to mark the final position on fiscal devolution within the UK.

1.4.3 For there is a wider tendency, affecting a much broader range of matters than just fiscal ones, which is loosening the legal bonds which bind together the constituent countries[24] of the United Kingdom. The Scottish National Party has said that it wishes the Scottish Parliament to have 'fiscal autonomy'. In 2015 it moved an amendment to the Scottish Bill[25] then before Parliament to achieve that and, when that amendment was defeated, sent a letter to the Scottish Secretary calling for more fiscal powers to be devolved to the Scottish Parliament. The powers it demanded included powers to control Corporation Tax, Capital Gains Tax and National Insurance contributions.[26] Plaid Cymru has said that it will seek to obtain the same 'deal' on taxation for Wales as Scotland.[27]

1.4.4 Although powers over Income Tax analogous to those granted to the Scottish Parliament and the Welsh Assembly have not been devolved to the Northern Ireland Assembly, the

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[23] A Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament: 27th November 2014

[24] The term 'countries' has no role in the statutory definition of the constituent parts of the United Kingdom. The 'United Kingdom' in a statute means Great Britain and Northern Ireland (Interpretation Act 1978 Sch. 1). The Kingdom of Great Britain consists of the Kingdoms of England and Scotland (Union with Scotland Act 1706 Article 1). England for this purpose includes Wales (Interpretation Act 1978 ss.22 and 23, Sch. 2 para. 5(a)). The term 'Wales' in a statute simply means the combined area of the counties which were created by s.20 of the Local Government Act 1972, as originally enacted, but subject to any alteration made under s.73 of that Act (Interpretation Act 1978 Sch. 1). There is no statutorily defined term to mean each of Northern Ireland, the Kingdom of Scotland, Wales and the part of the Kingdom of England which is not Wales. We have, therefore, used the phrase,' the constituent countries of the United Kingdom' to mean this

[25] Which became the Scotland Act 2016

[26] See BBC news report of 15th June 2015

[27] *Tax Journal* 1 May 2015. *Briefing* by Tina Riches

Corporation Tax (Northern Ireland) Act 2015 confers on that Assembly power to set its own rate of Corporation Tax. If further powers were devolved to Scotland and Wales over direct taxation there would seem to be no principled basis on which to deny the Northern Ireland Assembly similar powers.

1.4.5 Of course all this raises the question of taxation in England, which is part of the issue which has been dubbed, perhaps rather unfortunately, EVEL, 'English Votes for English Laws', a demotic acronym used even by Her Majesty's Government. In October 2015 the then newly elected Conservative Government introduced a set of revisions to the standing orders of the House of Commons which were said to be designed to ensure that on certain matters relating only to England (or to England and Wales in certain cases), MPs representing constituencies in the relevant part or parts of the UK are given greater prominence during parliamentary proceedings. A central feature of the reform was the creation of new 'legislative grand committees', composed of all English (or all English and Welsh) MPs, with the capacity to debate and veto legislative provisions, even if these command the support of the whole House.[28] These procedures, however, have not, so far, been applied to fiscal legislation because, for example, the General UK Rates continue to determine the Income Tax liabilities of Scottish and Welsh taxpayers in respect of their income which is not non-savings income.

[28] A report published in *Parliamentary Affairs* (pub. Oxford Academic) on 17th February 2018 by Daniel Gover and Michael Kenny concluded that:-

'EVEL has not eliminated the basic territorial anomaly associated with legislative voting in the House of Commons, which has been exacerbated by devolution. Nor has this new system managed to provide a more visible kind of symbolic representation for the English'

CONCLUSION

1.5.1 All in all, then, it seems clear that the taxation systems of the constituent countries of the United Kingdom are likely to diverge increasingly in the future. Intra-UK Residence will, therefore, be of increasing importance. It is always more difficult to change an existing system than to construct a new one *ab initio* and so the method of defining a Scottish Taxpayer under the Scotland Act 1998 and a Welsh Taxpayer under the Government of Wales Act 2006 is likely to remain the pattern for determining Intra-UK Residence. For that reason, those who advise on residence, in addition to understanding the rules of UK residence, need to be familiar with the rules of Intra-UK Residence.

SECTION II

SCOTTISH AND WELSH TAXPAYERS

TWO TESTS AND COUNTING

2.1.1 As we have seen,[29] if one is a Scottish Taxpayer the rates which will apply to one's non-savings income will be Scottish Rates. From 2019/20, if one is a Welsh Taxpayer the rates which will apply to one's non-savings income will be the Welsh Rates.[30] If one is a UK resident but neither a Scottish nor a Welsh Taxpayer, the rates which will apply to one's non-savings income will be the General UK Rates.[31] One might ask, what will happen if one is both a Scottish and a Welsh Taxpayer? The legislation is silent on the matter. It appears to have been designed on the basis that it is not possible to be a Scottish and a Welsh taxpayer in respect of the same year.

2.1.2 So an individual who wishes to know what rates of Income Tax will apply to his income will have first to consider whether he is a Scottish Taxpayer and, from the UK fiscal year 2019/20 onwards, whether he is a Welsh Taxpayer. If, in due course, the Northern Ireland Assembly is granted similar powers in respect of Income Tax he will have to consider, in addition, whether he is a Northern Irish Taxpayer. It may be that in due course there will be a fourth status, that of being an English Taxpayer.

[29] See paras. 1.2.7 & 1.2.8 above
[30] See paras. 1.3.1 & 1.3.2
[31] ITA 2007 s.10

A LABYRINTHINE PROCESS

2.2.1 Creating two or, perhaps, in due course, three or four, interlocking tests is a very inefficient way of formulating a test to allocate taxing rights amongst the constituent countries of the United Kingdom and one which is dependent on the individual tests dovetailing exactly. One would have thought that there would be a single test to determine in which constituent country of the United Kingdom one is resident and that such a test would be found in one place in fiscal legislation which applied to the UK generally. Unfortunately that has not been the Government's approach.

2.2.2 As we have said,[32] there have been three major versions of the definition of a Scottish Taxpayer since the enactment of the Scotland Act 1998. It seems clear that the Government originally approached the task simply by considering the problem of allocating taxing rights between Scotland and the rest of the United Kingdom and only found later that the same issue applied in respect of Wales. Instead of recasting the test in a rational form, it chose to create a second version of it in respect of Wales based on the Scottish Taxpayer Test. The process of doing so, forced modifications to the Scottish test because, before the passing of the Wales Act 2014, tie breaks were simply resolved in Scotland's favour. Where this had been so, the Wales Act 2014 revised the Scottish Taxpayer Test to provide equality between Wales and Scotland.

2.2.3 So we shall follow the process which the unfortunate taxpayer will have to follow by examining first, by reason of its chronological seniority, the definition of a Scottish Taxpayer and then the definition of a Welsh Taxpayer. Finally, we shall consider whether

[32] See para. 1.1.1 above

there are any overlaps between the two and where is the borderline between these two status and the status of not being either a Scottish or a Welsh Taxpayer.

SECTION III

SCOTTISH TAXPAYERS

TWO DEFINITIONS OF A SCOTTISH TAXPAYER

3.1.1 There are in fact two definitions of a Scottish taxpayer.

THE GENERAL SCOTTISH TAXPAYER TEST

3.2.1 The first (which we shall call the 'General Scottish Taxpayer Test') can apply to any individual except one who is a Welsh Parliamentarian for any part of the year.[33] It is therefore the test which will be relevant to most individuals considering the matter. Under the General Scottish Taxpayer Test, section 80D provides that:-

> '(1) For any tax year, a Scottish taxpayer is an individual … -
>
> (a) who is resident in the UK for income tax purposes ... and
>
> (b) who, for that year, meets condition A, B or C.'

3.2.2 One might make three observations.

3.2.3 First, it will be seen that, as one does for residence in the United Kingdom, one determines whether an individual is a Scottish taxpayer in respect of a whole fiscal year. Unlike residence in the UK,[34] however, there are no split year rules[35] to take account of

[33] Scotland Act 1998 s.80D(4A) – see below

[34] In the remainder of these notes we refer to the rules for determining whether one is resident in the UK in FA 2013 Sch 45 as the 'UK SRT'

[35] FA 2013 Sch 45 Part 3

the special circumstances which rule in the first and last year of 'residence'. The result of that is, perhaps surprisingly, that the Scottish Rates might apply to income arising in the overseas part of a split year. The specific rates determining the chargeability of particular categories of income, however, which operate to exclude income of a split year from charge will usually apply regardless of whether or not the taxpayer concerned is a Scottish (or, indeed, a Welsh) taxpayer.

3.2.4 Secondly, one will only be a Scottish Taxpayer for a year for which one is UK resident.

3.2.5 Thirdly, the legislation makes no distinction between Scottish Taxpayers who are domiciled in Scotland and those who are domiciled in the other constituent countries of the United Kingdom.

Condition A – Close Connection with Scotland

3.2.6 An individual meets condition A if he has a close connection with Scotland.[36]

Defining a close connection

3.2.7 Section 80E states the circumstances in which an individual has a close connection 'with a part of the UK'.

3.2.8 This provision is in two limbs. The First Limb applies where the individual has only one place of residence in the UK and the Second where he has two or more places of residence in the UK.

[36] Scotland Act 1998 s.80D(2)

A place of residence

3.2.9 Right at the heart of the definition of a Scottish Taxpayer, therefore, is the concept of a 'place of residence'. What does this phrase mean?

3.2.10 Interestingly, the phrase does not appear at all in the UK SRT and the word 'residence' is never used in it in the sense of a physical place but only in the sense of a tax status.

3.2.11 The term 'residence' is, of course, important in the CGT relief for disposals of main residences.[37] But its use there is in respect of a different tax and for a very different purpose. What is more, the phrase 'place of residence' is nowhere used in the legislation conferring that relief. Any conclusions as to the meaning of the phrase 'place of residence' drawn from the meaning of the word 'residence' or the phrase 'main residence' in the CGT main residence relief legislation must be very tentative.

3.2.12 In the UK SRT the draftsman's decision to use the concept of a 'home' rather than the phrase 'main residence' with its long history in CGT main residence relief appears to have been a deliberate one.[38] It is clear that although the word 'home' and the phrase 'main residence' may be related, their meaning in these statutory contexts cannot be exactly the same. Still less, can the meaning of the word 'home' in the UK SRT be equivalent to the meaning of the word 'residence' without qualification in the CGT main residence relief.

3.2.13 Whatever a 'place of residence' may mean in the Scotland Act's definition of a Scottish Taxpayer, therefore, it plainly does not mean exactly the same as a 'home' in the UK SRT or of a 'main residence' in the CGT main residence relief.

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[37] TCGA 1992 ss.222 - 226B

[38] See *McKie on Statutory Residence* (publisher CCH – 2014) at para. 5.8.73

3.2.14 HMRC's manuals include a volume entitled *Scottish Taxpayer Technical Guidance* (the 'STTG'). It should be used with caution because its statements of the law are often inaccurate. It says of the meaning of the phrase 'place of residence':-

> 'In the vast majority of cases the key aspect of the test for Scottish taxpayer status rests on establishing an individual's place of residence.
>
> This term is not defined by the legislation so must be given its ordinary meaning. For an individual its ordinary meaning is the dwelling in which that person habitually lives: in other words his or her home. As such, it should be regarded as having similarities to the concept of 'home' within the Statutory Residence Test.
>
> This interpretation is supported by considerable case law, albeit relating to similar but not identical concepts elsewhere in law.'[39]

3.2.15 The STTG goes on to say:-

> 'Based on case law, this part of the guidance provides information about how HMRC interprets the term 'place of residence' in the context of applying the definition of a Scottish taxpayer to an individual's circumstances.
>
> For the purpose of Scottish taxpayer status HMRC consider that an individual's 'place of residence' is a place that a reasonable onlooker, with knowledge of the material facts, would regard as the dwelling in which that person habitually lives: in other words his or her home.'[40]

[39] STTG para. STTG3100
[40] STTG para. STTG3400

3.2.16 If the draftsman had wished to utilise the concept of a 'home' it seems strange that he should not have adopted that word rather than another phrase. This is particularly so as the Scotland's Act 1998's first definition of a Scottish Taxpayer, before it was amended by the Scotland Act 2012, did utilise the concept of a home in the concept of 'a principal UK home' which was then defined by reference to a place of residence. What is more, the substantial amendment of the definition of a Scottish Taxpayer made by the Wales Act 2014 was made after the enactment of the Finance Act 2013 which contained the UK SRT. It would be odd if in two Acts, where the later Act utilised the earlier, the draftsman should have chosen to express the same concept in different words.

3.2.17 So, it is clear that at the heart of the test for determining whether an individual is a Scottish Taxpayer, and of that in the equivalent Welsh provisions for determining whether an individual is a Welsh taxpayer, is an imprecise and uncertain concept which makes the application of these provisions fundamentally uncertain.

Places on board means of transport

3.2.18 The one definitional provision relating to the phrase 'place of residence' which the statute does contain is that in s.80E:-

> ' … "place" includes a place on board a vessel or other means of transport.'[41]

3.2.19 The STTG says, apparently in respect of this provision, that[42]:-

[41] Scotland Act 1998 s.80E(4)
[42] Draft Guidance para. 29

'A place of residence can be … a vehicle vessel or structure of any kind as long as it is used by an individual with a sufficient degree of regularity and permanence'[43]

3.2.20 This is clearly incorrect for Scotland Act 1998 s.80E(4) does not say that the vessel or other means of transport is a place but rather that a place *on board* a vessel or other means of transport may be a place for the purposes of the section. What the legislation can mean by this is very unclear and the STTG does not make its meaning any clearer.

The First Limb of Close Connection – a single place of residence in the UK

3.2.21 Where an individual has only one place of residence in the UK he:-

' … has a close connection with a part of the UK if in that year -

(a) [he] has only one place of residence in the UK,

(b) that place of residence is in that part of the UK, and

(c) for at least part of the year, … [he] lives at that place.'[44]

3.2.22 Here we have another imprecise concept, that of 'living at a place'. No definition, exhaustive, inclusive or indicative, is given of this phrase. The draft guidance has no discussion of what it may mean.

3.2.23 What is clear from the First Limb is that it is possible to have a place of residence, in which one does not live, even if one does not live in it for an entire year, for if that were not the case the condition in (c) would be redundant.

[43] STTG para. STTG3500
[44] Scotland Act 1998 s.80E(2)

The Second Limb of Close Connection – two or more places of residence in the UK

3.2.24 If the individual has two or more places of residence in the UK in the year he has a close connection with a part of the UK if in that year:-

> '(b) for at least part of the year … [his] … main place of residence in the UK is in that part of the UK,
>
> (c) the times in the year when … [his] … main place of residence is in that part of the UK comprise (in aggregate) more of the year than the times when … [his] … main place of residence is in each other part (considered separately), and
>
> (d) for at least part of the year, … [he] … lives at a place of residence in that part of the UK.'[45]

3.2.25 It seems that the intention of (c) is that one should look at each of Wales, England and Northern Ireland separately and compare each number of days in which the individual's place of residence is in each one of those constituent countries of the United Kingdom with the number of days on which it is in Scotland. The difficulty of that is that nowhere else in the legislation is it clear that the phrase 'part of the UK' does not mean any part rather than the discrete parts which constitute the constituent countries of the United Kingdom.

Condition B – Day Counting

3.2.26 An individual meets Condition B if:-

[45] Scotland Act 1998 s.80E(3)

'(a) … [he] … does not have a close connection with England, Wales or Northern Ireland (see section 80E), and

(b) … [he] … spends more days of that year in Scotland than in any other part of the UK.'[46]

3.2.27 If the individual has a close connection with Scotland he will be a Scottish Taxpayer under the General Scottish Taxpayer Test whether or not he meets Condition B. If he does not have a close connection with Scotland and has a close connection with England, Wales or Northern Ireland he will not meet Condition B. Condition B will only be met, therefore, in circumstances where it is significant whether it is met, where the individual does not have a close connection with any of the constituent countries of the United Kingdom. In that case he will meet Condition B if he spends more days of the year in Scotland than in any other part of the UK.

Day counting

3.2.28 An individual spends more days of the year in Scotland than in any other part of the UK if (and only if):-

' … the number of days in the year on which … [he] … is in Scotland at the end of the day exceeds each of the following -

(a) the number of days in the year on which [he] is in England at the end of the day;

(b) the number of days in the year on which [he] is in Wales at the end of the day;

[46] Scotland Act 1998 s.80D(3)

(c) the number of days in the year on which [he] is in Northern Ireland at the end of the day.'[47]

3.2.29 This gives a 'midnight rule' akin to the rule of the UK SRT found in FA 2013 Sch. 45, para. 22. It is then provided that the individual:-

' … is treated as not being in the UK at the end of a day if -

(a) on that day … [he] … arrives in the UK as a passenger,

(b) … [he] … departs from the UK on the next day, and

(c) during the time between arrival and departure … [he] … does not engage in activities which are to a substantial extent unrelated to … [his] … passage through the UK.'[48]

3.2.30 This closely follows the transit exception to the day counting rule provided in the UK SRT by para. 22(3). It is surely odd that it acts only by reference to journeys in and out of the UK.

3.2.31 The UK SRT also contains an exception to the general day counting rule for exceptional circumstances.[49] There is no equivalent to that exception in the definition of a Scottish Taxpayer.

3.2.32 Similarly, the UK SRT contains a special deeming rule which applies in certain circumstances, where an individual enters and leaves the UK on the same day on more

[47] Scotland Act 1998 s.80F(1)
[48] Scotland Act 1998 s.80F(2)
[49] FA 2013 Sch 45 para. 22(4)-(6)

than 30 days in the year.[50] There is no equivalent to that deeming rule in determining whether an individual is a Scottish Taxpayer.

Condition C – Scottish Parliamentarians

3.2.33 An individual meets Condition C if, for the whole or any part of the year, he is:-

> '(a) a member of Parliament for a constituency in Scotland,
>
> (b) a member of the European Parliament for Scotland, or
>
> (c) a member of the Scottish Parliament.'[51]

We shall refer to this as being a 'Scottish Parliamentarian'.

THE WELSH PARLIAMENTARIAN TEST

3.3.1 We have seen[52] that Scottish Parliamentarians are, under the General Scottish Taxpayer Test always Scottish Taxpayers. As we shall see, the equivalent Welsh provisions provide that Welsh Parliamentarians are always Welsh Taxpayers. If Welsh Parliamentarians, therefore, were subject to the General Scottish Taxpayer Test[53] it would be possible for them to be both Scottish Taxpayers and Welsh Taxpayers. One presumes that it is for this reason that Welsh Parliamentarians are excluded from the General Scottish Taxpayer Test and that there is a specific test (which we have called the 'Welsh Parliamentarian Test') which applies only to Welsh Parliamentarians who are also Scottish Parliamentarians.

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50 FA 2013 Sch 45, para. 23(2)-(5)
51 Scotland Act 1998 s.80D(4)
52 See para. 3.2.30 above
53 And, of course, vice versa

3.3.2 Scotland Act 1998 s.80DA(1) provides that:-

> 'An individual … who is a Welsh parliamentarian for the whole or any part of a tax year is a Scottish taxpayer for that tax year if -
>
> (a) ... [he] … is resident in the UK for income tax purposes for that year (see Schedule 45 to the Finance Act 2013),
>
> (b) … [he] … meets condition C in section 80D for that year, and
>
> (c) … [he] … meets either of the following conditions for that year.'[54]

3.3.3 The first Condition under (c) above is that:-

> '(a) the number of days in that year on which … [he] … is a member as described in any of paragraphs (a) to (c) of section 80D(4) [ie, is a Scottish Parliamentarian] [exceeds],[55]
>
> (b) the number of days in that year on which … [he] … is a Welsh parliamentarian.'[56]

3.3.4 The second Condition under (c) above is that:-

> '(a) the number of days in that year mentioned in paragraphs (a) and (b) of subsection (2) are the same, and

[54] Scotland Act 1998 s.80DA(1)

[55] It will be seen that the word 'exceeds', which is essential to make sense of the provision is in square brackets. This section is inserted by the Wales Act 2014 s.11(5). The text of that sub-section on *legislation.gov.uk* does not contain this word

[56] Scotland Act 1998 s.80DA(2)

(b) … [he] … meets condition A or B in section 80D for that year.'[57]

3.3.5 Thus a Welsh Parliamentarian will be a Scottish Taxpayer only if the number of days in the fiscal year on which he is a Scottish Parliamentarian exceeds the number of days on which he is a Welsh Parliamentarian or, if those numbers are equal, he has a close connection with Scotland or spends more days in Scotland than in any other part of the UK.

[57] Scotland Act 1998 s.80DA(3)

SECTION IV

WELSH TAXPAYERS

THE EQUIVALENT WELSH PROVISIONS

4.4.1 The Government of Wales Act 2006 contains provisions defining who is a Welsh Taxpayer which are the same as the provisions in the Scotland Act 1998 defining who is a Scottish Taxpayer with the substitution of Welsh Taxpayer, Wales, Welsh, Assembly and Welsh Parliamentarian for Scottish Taxpayer, Scotland, Scottish, Scottish Parliament and Scottish Parliamentarian and vice versa. The Government of Wales Act sections and their equivalent in the Scotland Act of 1998 are as follows:-

SECTION NO. OF THE GOVERNMENT OF WALES ACT 2006	SECTION TITLE OF GOVERNMENT OF WALES ACT 2006	SECTION NO. OF THE SCOTLAND ACT 1998	SECTION TITLE OF SCOTLAND ACT 1998
Section 116E	Welsh Taxpayers	Section 80D	Scottish Taxpayers
Section 116F	Welsh Taxpayers: Scottish Parliamentarians	Section 80DA	Scottish Taxpayers: Welsh Parliamentarians
Section 116G	Close Connection with Wales or another part of the UK	Section 80E	Close Connection with Scotland or another part of the UK
Section 116H	Days spent in Wales or another part of the UK	Section 80F	Days spent in Scotland or another part of the UK
Section 116I	Supplemental powers to modify enactments	Section 80G	Supplemental powers to modify enactments

SECTION V

INTERACTION OF THE SCOTTISH AND WELSH DEFINITIONS

THE GENERAL TAXPAYER TESTS

5.1.1 The rules for determining whether or not a UK resident individual, who is not either a Welsh or Scottish Parliamentarian during a year, is a Scottish or Welsh Taxpayer may be summarised as follows:-

(a) If he has only one place of residence in which he lives for at least a part of the year and that place of residence is in Wales or Scotland he will be a taxpayer of the country where that place of residence is.

(b) If he has more than one place of residence in the UK and he lives in a place of residence in the UK for at least a part of the year he will be a Scottish or Welsh Taxpayer, as the case may be, if he has a place of residence in Scotland or Wales, as the case may be, for longer than he has a place of residence in any other part of the UK.

(c) If neither (a) nor (b) above applies, if he does not have a close connection with England or Northern Ireland and he spends more days of the year in either Scotland or Wales than in any other constituent country of the United Kingdom he will be a taxpayer of the country in which he spends the most days.

THE PARLIAMENTARIAN TESTS

5.2.1 In respect of Scottish and Welsh Parliamentarians:-

(a) If the individual is a Parliamentarian during the year in respect only of Wales or only of Scotland he will be a taxpayer of the country of which he is a Parliamentarian.

(b) If at a time in the year he is a Scottish Parliamentarian and at the same or another time in the year he is a Welsh Parliamentarian he will be a taxpayer of the country of which he is a Parliamentarian for the greater number of days in the year or, if he is a Parliamentarian of the two countries for an equal number of days, the country of which he is a taxpayer is determined under the General Test place of residence (Condition A) and day count (Condition B) tests.

SECTION VI

AN IRREMEDIABLE MISTAKE

WHAT IS WRONG?

6.1.1 There are only two things wrong with the Intra-UK Residence Tests; their structure and their content.

Structure

6.1.2 Their structure is wrong because they consist of two interlocking tests which require anybody who wishes to determine his Intra-UK residence to look in two separate pieces of largely non-fiscal legislation and then to work out how they interact. This is going to become even more complicated if the Northern Ireland Assembly is granted similar powers and more complicated still if equivalent provisions are made for England.

Content

6.1.3 Their content is wrong because we now have two tests of residence in UK fiscal law which are both based on imprecise, indeed indefinable, concepts but on different ones. The Government's decision to adopt soft concepts incapable of precise definition in the UK SRT was criticised strongly by the professional bodies.[58] Having chosen to ignore that criticism, there was even less reason for the Government to have used the similarly imprecise, but different, concepts of a 'place of residence' and 'living in' a place of residence in the definitions of a Constituent Country Taxpayer. For the Intra-UK

[58] See *McKie on Statutory Residence* paras. 1.2.3 – 1.3.5 and 1.4.7 – 1.4.12

Residence Tests apply only to those who are UK resident under the UK SRT and so they will, by definition, meet the soft criteria by reference to which the latter test applies.

HOW MIGHT IT BE REPAIRED?

6.2.1 What is required, therefore, is a single test to allocate fiscal residence amongst the constituent countries of the UK contained in one place in UK fiscal legislation and based on a simple arithmetical day counting formula. A day counting test based on Scotland Act 1998 s.80D(3)(b) and s.80(F) coupled with an exceptional circumstances exception and a transit exception operating in respect of each constituent country of the UK would appear to be all that is required.

THE FAILURE OF THE PROFESSIONAL BODIES TO ACT

6.3.1 It is fair to say that when the Scotland Act 1998 was enacted and even when it was amended in 2012 the professional bodies did not realise the potential future significance of the definition of a Scottish Taxpayer so that the position largely went by default. No professional body has made representations to the Government pointing out the fundamental faults in the structure and content of the statutory provisions governing intra-UK resident and suggesting that they should be corrected.

6.3.2 It is clear that the taxation systems of the constituent countries of the UK are likely to diverge increasingly in the future and that, therefore, intra-UK residence will be of increasing importance. It is always more difficult to change an existing system than to construct a new one *ab initio.* Through the professional bodies' passivity, UK taxpayers

find themselves, by default, with a highly dysfunctional statutory test of intra-UK residence which is likely to be a permanent feature of our tax system.