MBL SEMINARS

THE STATUTORY RESIDENCE TEST

Simon M^c^Kie

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

M^c^Kie & Co (Advisory Services) LLP
Rudge Hill House
Rudge
Somersetshire
BA11 2QG

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

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simon@mckieandco.com
01373 830956

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simon@mckieandco.com
01373 830956

SECTION I

WHY A TEST OF RESIDENCE AT ALL?

CONNECTING FACTORS

1.1.1 Governments do not impose taxation on every item of income, or on every person, in the world but only that income and those persons which or who satisfy 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.

1.1.2 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.

simon@mckieandco.com
01373 830956

1.2.1 That is the system which applies in the United Kingdom (the "UK"). Broadly, long-term connection is determined through the concept of domicile and short-term connection through residence and, until next 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 disposals 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 of £50,000 per annum.[5]

1.2.2 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

1.2.3 The theoretical justification of this general pattern is composed of rather inchoate popular ideas about the demands of 'fairness' and a consideration of economic practicality.

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 United Kingdom not in the United Kingdom but in this Paper this form is adopted as a convenient abbreviation
5 ITA 2007 Part 14 Ch A1

simon@mckieandco.com
01373 830956

Fairness

1.2.4 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 that connection. It is no doubt for this reason that the UK has adopted as its criterion for long-term connection the concept of domicile which is a rather imprecise concept of long-term belonging. 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

1.2.5 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. They may, therefore, safely be taxed more highly than those with only a short term connection because it is less likely that they will move elsewhere taking their capital, wealth and expertise with them and that others will be deterred from coming to the country in the first place. Those who only have a short-term connection with a country will move to other countries much more easily and so they must be given tax privileges, in competition with other countries, in order to provide an incentive for them to stay. This essentially pragmatic view of the short-term connecting factor, however, is not accepted by all and at the present time there is considerable public hostility to conferring special tax privileges on those without the long-term connecting factor to this country conferred by a UK domicile.

simon@mckieandco.com
01373 830956

1.2.6 Whether or not one accepts this 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. In an attempt to be 'fair' the result of imposing uncompetitive taxation burdens on the internationally mobile will be to make the country that does so poorer than it otherwise would be.

Creating a Cliff Edge

1.2.7 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.

simon@mckieandco.com
01373 830956

THE COST OF UNCERTAINTY

1.3.1 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?

The Present Test of Residence is Primarily based on Case Law

1.4.1 The UK's Test of Residence was developed not by statute but through case law. Some cases which are still relevant in determining a person's tax residence in the UK were decided before the First World War.[6] The courts have proceeded 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. A person deciding whether or not to come to the UK has to take this uncertainty into account.

[6] For example, *Re Norris* (1888) 4 TLR 452; *Cadwalader v Cooper* CE (1904) 5 TC 101

simon@mckieandco.com
01373 830956

The Development of Revenue Guidance

1.4.2 In an attempt to remedy that situation, the Inland Revenue had set out its practice, only loosely based on the law, in its booklet *IR20 Residents and Non-Residents – Liability to Tax in the UK*, providing rules of thumb which allowed advisers to predict whether the Revenue would challenge an individual's residence status or not. The lack of a precise legal test of residence was unsatisfactory but advisers adapted pragmatically.

Developing Recognition of the Need for Reform

1.4.3 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 the Revenue 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 is ongoing'.

HMRC's Change of Practice

1.4.4 It appeared that the Government had very little appetite for reform. The pressure on the Inland Revenue, to produce additional tax income to fund the Government's ever increasing expenditure, however, led to what most practitioners maintain was a change in its practice. Cases began to reach the Courts in which HMRC challenged, almost always successfully, the non-resident or non-ordinarily resident status

simon@mckieandco.com
01373 830956

claimed by the taxpayer concerned.[7] Advisers had always been aware that the Revenue's summary of their practice contained in their booklet IR20, was an overgenerous view of the law[8] but it was thought that it could be relied upon. In the view of many, in cases such as *Gaines-Cooper*[9] and *Farquhar*[10] HMRC departed from its established practice.

1.4.5 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 the Revenue'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 the Revenue would not apply the full rigour of the law. Mr Gaines-Cooper attempted to do just that in 2010.[11] 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 it had actually done so.

Calls for a Statutory Residence Test

1.4.6 Whilst the *Gaines-Cooper* cases proceeded, advisers warned their clients that they could not rely on what had been thought to be HMRC's practice. The result was a

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7 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)

8 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

9 *Gaines-Cooper v HM Revenue & Customs Commissioners* [2007] EWHC 2617 (Ch)

10 *Farquhar v HM Revenue & Customs Commissioners* [2010] UKFTT 231 (TC)

11 *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

simon@mckieandco.com
01373 830956

general concern that valuable 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. On 26th November 2007, Emma Chamberlain, speaking on behalf of the Chartered Institute of Taxation,[12] reiterated the Institute's call for the introduction of a statutory residence test with renewed urgency and the CIOT repeated this call on the 14th and 29th February 2008 and again in its response, on the 18th March 2008, to that year's Budget Speech.

Government Consultations

1.4.7 In the debates on the Finance Bill in that year the Government announced a "willingness to consider the possibility of a statutory residence test." The professions' hope was that the test would be a simple, objective test based on days of presence in the United Kingdom probably following the US model.[13] The Government entered a long period of confidential discussions with "external bodies and representative groups".[14] At the time of the Budget Speech in 2011, the Government announced that it would publish a Consultation Document on the matter, with the aim of introducing legislation in the Finance Act 2012 to take effect from 6th April 2012. When the Consultation Document was published on 17th June 2011, the test proposed was very far from a simple one. Considerable criticisms were made in representations by the professional bodies.[15] The STEP and the CIOT

12 Referred to in this Paper as the "CIOT"

13 Letter from the CIOT to HMRC headed "Residence for Tax Purposes: Comments of the Chartered Institute of Taxation" dated 14th November 2007

14 June 2011 Condoc p.2

15 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")

simon@mckieandco.com
01373 830956

both indicated 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.[16]

1.4.8 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 Consultation Document entitled 'Statutory Definition of Tax Residence and Reform of Ordinary Residence: A Summary of Responses'[17] 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. Revised draft legislation will be published in a draft Finance Bill on the 11th December 2012 and will be subject to a further consultation period of twelve weeks. 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.[18]

THE AIMS AND OBJECTIVES OF THE NEW SRT

1.5.1 The Exchequer Secretary of the Treasury in his Foreword to the June 2012 Condoc said that in the June 2011 Condoc:-

> "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."

1.5.2 He said that:-

[16] The CIOT 2011 Response, paras 5.1 and 8.1 and the STEP 2011 Response, para 1
[17] Called in this Paper the "June 2012 Condoc"
[18] June 2012 Condoc para 5.5

simon@mckieandco.com
01373 830956

> "… 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."

1.5.3 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."

1.5.4 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 can under the existing law.

A COMPLEX TEST

1.6.1 As we shall see, the test which is proposed is very far from a simple one. It uses a number of concepts the ambits of which are extremely uncertain and which will require a large number of subjective judgments to be made. The test proposed is a three-part test, each of which involves a number of complex subsidiary tests. Practitioners advising clients with anything other than the most simple of circumstances will find it difficult to give unequivocal advice as to their likely future

simon@mckieandco.com
01373 830956

residence status. Such clients will have to consider the application of the proposed new statutory test to their circumstances in detail and, because the test will apply from 6th April 2013,[19] they cannot wait to do so until the legislation is enacted. They must plan on the basis of the information which is available today.

1.6.2 In the remainder of this Paper, therefore, we examine the proposed Statutory Residence Test in detail.

[19] And in some circumstances may be dependent upon applying it to 2011/2012 and 2012/2013 in order to determine an individual's residence status for the fiscal years 2013/2014 and 2014/2015

simon@mckieandco.com
01373 830956

SECTION II

THE STRUCTURE OF THE DRAFT LEGISLATION

TWO LARGE SCHEDULES

2.1.1 The draft legislation setting out the SRT is contained in a Schedule[20] which is thirty nine pages long. In addition, a further draft Schedule of twenty one pages abolishes the status of ordinary residence. The SRT Schedule is divided into five parts. Part 1 sets out the SRT, Part 2 defines a number of 'key concepts', that is terms and phrases used in the Schedule. Part 3 sets out the rules governing split year treatment and Part 4 sets out various anti-avoidance rules. Part 5 contains miscellaneous provisions on interpretation, consequential amendments and transitional provisions. Parts 3 and 4 make consequential amendments to other parts of the tax legislation. As they are currently drafted it does not appear that the provisions will be inserted into ITA 2007 Part 14 Ch 2 which currently contains the few limited statutory provisions regarding residence. Rather it is a freestanding Schedule which, because it includes consequential amendments, appears to be designed to be a schedule to the Finance Act 2013 rather than a schedule to the ITA 2007.

2.1.2 In this Paper I examine in detail the SRT Schedule except the anti-avoidance provisions which are a self-contained topic in themselves.

[20] Called in this Paper the "SRT Schedule"

simon@mckieandco.com
01373 830956

SECTION III

PART 1 OF THE SRT SCHEDULE – THE RULES

THE SCOPE OF THE SRT

3.1.1 The SRT applies 'for determining for the purposes of relevant[21] tax whether individuals are resident or not resident in the UK'.[22] 'Relevant tax' for these purposes means:-

(a) Income Tax;

(b) Capital Gains Tax; and

(c) (so far as the residence status of individuals is relevant to them) Inheritance Tax and Corporation Tax.

3.1.2 The most notable absentee from this list is National Insurance which also uses residence as a key concept in determining its territorial scope. Although residence for National Insurance purposes is not necessarily the same as residence for tax purposes, the accepted meaning of the term for tax purposes carries great weight in construing the term in National Insurance legislation.[23] So in practice, the National Insurance concept largely follows that of Income Tax. That link will now be broken.

3.1.3 The Government claims that the fact that "NICs are usually assessed on a pay period basis rather than annually … means that an individual's residence position needs to

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[21] An indefinite article before 'relevant tax' appears to have been omitted in the draft legislation

[22] Para 1(1). All statutory references in these Notes are to the Draft Schedule entitled 'Statutory Residence Test' set out in Chapter 6 of the June 2012 Condoc

[23] *Goodman v J Eban Limited* QB [1954] 1 All ER 763

simon@mckieandco.com
01373 830956

be considered in a particular week or month" and that this would make it "impractical to apply the statutory residence test to NICs".[24] In effect though, because the NIC residence test has, in practice, followed the Income Tax test, NIC residence has always been determined by considering an extended period of time and then applying the resulting status in determining liability in respect of particular pay periods. What is more, the split year concession and the provisions of Part 3 of the new Schedule are a response to the need to consider changes of circumstances within a fiscal year for Income Tax purposes. There appears to be no insuperable difficulty in creating a common test and it seems unfortunate that two forms of taxes on income (for that is what National Insurance Contributions are) should be imposed by reference to a concept for which the same word is used but without a common definition.

3.1.4 The SRT rules "do not apply in determining for the purposes of relevant tax whether individuals are resident or not resident in England, Wales, Scotland or Northern Ireland specifically (rather than in the UK as a whole)."[25] This provision is necessary because the Scotland Act 2012, which devolves powers to the Scottish Parliament to set the Scottish rate of Income Tax which is to apply to 'Scottish taxpayers' inserts its own definition of a Scottish taxpayer into the Scotland Act 1998.

[24] June 2012 Condoc para 3.205
[25] Para 1(3)

simon@mckieandco.com
01373 830956

SECTION IV

THE BASIC RULE AND THE AUTOMATIC RESIDENCE TEST

THE BASIC RULE

4.1.1 The basic rule is that an individual is resident in the UK for a tax year if:-

(a) the Automatic Residence Test is met for that year; or

(b) the Sufficient Ties Test is met for that year.[26]

4.1.2 It should be noted that under the new SRT one cannot be resident for part of a year. Currently one can be resident for part of a year but most tax charges on income and capital gains apply if one is resident in the year at any time during that year. So for example Capital Gains Tax under TCGA 1992 s.2 is chargeable on a person "in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom." It appears that the Government's intention is that this change of methodology will not result in any change in the incidence of Income Tax and Capital Gains Tax, but whether or not that is the case will only emerge with experience of the new test.

THE AUTOMATIC RESIDENCE TEST

4.2.1 The Automatic Residence Test is met for a year if an individual meets:-

[26] Para 3

simon@mckieandco.com
01373 830956

(a) at least one of the Automatic UK Tests; and

(b) none of the Automatic Overseas Tests.[27]

[27] Para 5

simon@mckieandco.com
01373 830956

SECTION V

THE AUTOMATIC OVERSEAS TESTS

INTRODUCTION

5.1.1 The three Automatic Overseas Tests are as follows.

THE FIRST AUTOMATIC OVERSEAS TEST

5.2.1 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 year concerned and the number of days that he spends in the UK in the year concerned is less than sixteen.[28]

'A Day Spent'

5.2.2 For this purpose a day "counts as a day spent by [a taxpayer] in the UK" if the taxpayer "is present in the UK at the end of [that] … day …".[29]

5.2.3 This is subject to two exceptions.

5.2.4 The first exception is where:-

(a) the person concerned only arrives in the UK as a passenger on that day;

(b) the person concerned leaves the UK the next day; and

[28] Para 6(2)
[29] Para 12(1)

simon@mckieandco.com
01373 830956

(c) between arrival and departure, the person concerned does not engage in activities that are to a substantial extent unrelated to his passage through the UK.[30]

5.2.5 The second exception is where:-

(a) the person concerned would not be present in the UK at the end of that day but for exceptional circumstances beyond his control which prevent him from leaving the UK; and

(b) the person concerned intends to leave the UK as soon as those circumstances permit.[31]

5.2.6 The legislation gives no definition of 'exceptional circumstances' but it does give "examples of circumstances that may be exceptional". These are:-

(a) national or local emergencies, such as war, civil unrest or natural disasters; and

(b) a sudden or life threatening illness or injury.[32]

5.2.7 There are a number of difficulties with this exception.

5.2.8 First, it requires the person concerned to be prevented from leaving the UK rather than to be prevented from reaching his destination. If I come from Uganda to the UK

[30] Para 12(3)
[31] Para 12(4)
[32] Para 12(5)

simon@mckieandco.com
01373 830956

and there is civil unrest in Uganda I am not prevented from leaving the UK because I could go, for example, to France.

5.2.9 Secondly, if exceptional circumstances is to be construed *ejusdem generis* with the examples that are given, it would seem that more mundane reasons preventing travel, such as a strike, pilots or train drivers failing to turn up to work or high winds in the channel preventing ferries from sailing would not be covered. At the least, there will be some uncertainty as to whether they are or not.

5.2.10 Thirdly, 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?

5.2.11 Finally, the maximum numbers of days in a year to which the exceptional circumstances exception may apply is limited to sixty.[33] Any days above that number will count as days spent in the UK even if they are due to exceptional circumstances. The June 2012 Condoc explains that this provision is adopted "to minimise the risk of the provision being used too widely."[34] It is difficult to imagine any circumstances in which a taxpayer could show that he was confined to the UK by exceptional circumstances for a period exceeding sixty days artificially. The most likely circumstance in which he would be confined to the UK for a very long period is if he were to contract a long-term, incapacitating illness. It is difficult to imagine

[33] Para 12(6)
[34] June 2012 Condoc, para 3.158

simon@mckieandco.com
01373 830956

any circumstances in which such a situation could be used to manipulate the exceptional circumstances exemption.

Death in the Year

5.2.12 If the individual dies in the year, the First Automatic Overseas Test does not apply.[35] This has the rather unusual result that a person who leaves the UK on 7th April, does not return to it and dies on the following 31st March may yet be treated as having been resident in the UK in that fiscal year.[36]

THE SECOND AUTOMATIC OVERSEAS TEST

5.2.1 The Second Automatic Overseas Test is that the individual was resident in the UK for none of the three tax years preceding the year concerned and the number of days that he spends in the UK in that year is less than forty-six.[37]

5.2.2 Combining these First and Second Automatic Overseas Tests, therefore, they provide that if an individual spends less than a minimum amount of time in the UK in the year he will not be resident here and that minimum depends upon his residence history in prior years.

Effect of Years Prior to the Introduction of the SRT

5.2.3 It will be noticed that a person's residence in 2013/14 and 2014/15 may be dependent upon his residence status in 2011/12 and 2012/13. As we have said, the application of the existing case law test of residence is extraordinarily uncertain and this is

35 Para 6(5)
36 Although the split year rules may apply in these circumstances. See Part 3
37 Para 6(3)

simon@mckieandco.com
01373 830956

compounded by the fact that HMRC may challenge a self-assessment which is based on a particular view of residence many years after the self-assessment is made. Without a further provision, therefore, the determination of residence up to 5th April 2015 will be similarly uncertain. In response to representations,[38] the Government proposes that there will be a transitional rule for the purpose of the first two automatic non-residence tests (and for the purposes of paragraph 19 which is part of the Sufficient Ties Test which we consider below) which will allow individuals to elect to apply the new test in determining their residence to these preceding years for this specific purpose only.

5.2.4 This will not entirely answer the difficulty, however, if the election time limits are the conventional ones. That is because the need for the election may not emerge until after the time limit has expired. Of course, the well-advised will make the election protectively wherever the application of the new rules to the prior years will result in them being regarded as non-resident for those years for this purpose.

5.2.5 There will be circumstances in which a person who would be non-resident under the previous law will be resident under the new law without any change in his circumstances. As we shall see, a person's residence status will be dependent upon matters which are not easily changed within a short period of time so that may pose difficulties for particular individuals. The CIOT has suggested that some form of grandfathering rule is required here.[39]

[38] June 2012 Condoc, para 3.198
[39] CIOT 2011 Response, para 12

simon@mckieandco.com
01373 830956

THE THIRD AUTOMATIC OVERSEAS TEST

5.3.1 The Third Automatic Overseas Test is that:-

(a) the individual works full-time overseas for the year concerned;

(b) the number of days in that year on which the individual does more than three hours work in the UK is less than 21; and

(c) the number of days in that year that the individual spends in the UK is less than 91.[40]

5.3.2 The Third Automatic Test does not apply if the individual is an international transportation worker.[41]

5.3.3 We shall not look at the definition of 'work' and 'full-time work' later in this Paper but we should note at this point that those definitions have been the subject of significant criticism by the professional bodies and because of their difficulties this test poses a number of traps for the unwary.

[40] Para 6(4)
[41] Para 6(6). This phrase is defined in para 18

simon@mckieandco.com
01373 830956

SECTION VI

THE AUTOMATIC UK TESTS

THE FOUR TESTS

6.1.1 There are four automatic UK tests.

THE FIRST AUTOMATIC UK TEST

6.2.1 The First Automatic UK Test is that the individual spends at least 183 days in the UK in the year concerned.[42]

6.2.2 That replicates the effect of ITA 2007 s.832(1)(b) as extended by case law.[43] Although this may be an old rule it shows the rough justice which is an inevitable part of determining residence for an entire tax year rather than from day-to-day. An individual who spends 183 days in the UK in a fiscal year will pay tax on his worldwide income as will an individual who spends 365 days here. If they have the same income, they will pay the same amount of tax. Yet the first will only enjoy the benefits of presence in the UK for approximately half the time that the other does.

THE SECOND AUTOMATIC UK TEST

6.3.1 The Second Automatic UK Test is that the individual's only home is in the UK (or, if he has more than one home, all of them are in the UK) and that remains the case for:-

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[42] Para 5(3)

[43] *Levene v IRC* [1928] 13 TC 486, *Lysaght v IRC* [1928] 13 TC 511, *Wilkie v IRC* [1951] 32 TC 495

simon@mckieandco.com
01373 830956

(a) a period of at least 91 days, all or part of which falls within the year; or

(b) two or more separate periods within the year that together add up to at least 91 days.[44]

What is a 'Home'?

6.3.2 One of the great causes of uncertainty in the application of the proposed legislation, which has been strongly criticised by the professional bodies, is the decision to use the concept of a 'home' as a key ingredient of the SRT.[45] It 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. They make clear that a home is not necessarily a building.[46] In their Consultation Document, HMRC say:-

> "The Government has carefully considered whether to further define in legislation what is meant by a home. It has concluded that it would be extremely difficult to provide a precise definition given the wide variety of living patterns adopted by individuals and their families. Any detailed definition would run the risk of inadvertently including or excluding certain individuals from the test because of the way in which they chose to live their lives. The Government is confident however, that the vast majority of people

[44] Para 5(4)
[45] It reappears in the Sufficient Ties Test as we shall see
[46] 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"

simon@mckieandco.com
01373 830956

will know where their home is and whether that home is in the UK or overseas."[47]

6.3.3 How one is to identify a concept which the Government, with all of its resources, is unable to define is unclear.

6.3.4 The only help that the legislation gives in defining a 'home' is provided by para 14 which provides that:-

> "(1) A 'home' may be any place (including a vehicle or vessel).
>
> (2) A place may be [a person's] home whether or not [he] holds any estate or interest in it (and references to "having" a home are to be read accordingly).
>
> (3) A place that was [a person's] home does not continue to count as such merely because [he] continues to hold an estate or interest in it after [he] has moved out."

6.3.5 This paragraph only adds to the confusion. It does not provide, for example, that a home must be a place and in ordinary English usage we often speak of our home as a large area such as a county, region or country and sometimes as one which is not precisely delineated for which the term 'place' is inapt. How can a vehicle or vessel be a place? What function does sub-section (3) serve? It surely does not need saying that a place will not continue to be an individual's home merely because he continues

[47] June 2012 Condoc para 3.87

simon@mckieandco.com
01373 830956

to hold an estate or interest in it but in what circumstances will it do so? What is involved in 'moving out' of a home?

6.3.6 In ordinary English we often speak of our home as being somewhere where we have not been for years. But in the Statutory Test, can a home be a residence which we haven't been physically present in at anytime in the fiscal year? The Consultation Document says that:-

> "... the Government does not consider that a holiday home, weekend home or temporary retreat should count as a 'home' for the purposes of this condition.
>
> The Government does not intend to stipulate that a property must be used by the individual during the tax year in order to count as a home. However, in general it is unlikely that a place would be considered a home if it is not actually used by the individual."[48]

6.3.7 It is not clear whether this is a statement of what the Government thinks the draft legislation means or what they intend to achieve as its effect when the legislation is finalised. In any event, it cannot determine the construction of the legislation itself.

6.3.8 A further difficulty is that for the purposes of deciding the period during which the taxpayer concerned has a home there is no equivalent of the 'Midnight Rule' so one has to determine at what time on a day one begins or ceases to have a home.

[48] June 2012 Condoc paras 3.89 & 3.90

simon@mckieandco.com
01373 830956

Single Periods of at least 91 Days Straddling the Fiscal Year

6.3.9 It should be noticed that in respect of a single period of at least 91 days that period need not fall wholly within the fiscal year concerned. So it is possible for somebody to meet the Second Automatic UK Test even though he has a home in the UK for only a short period of the year. Of course, he may then be relieved from liability in respect of the period before he acquires his home in the UK or after he relinquishes it under the split year rules.

THE THIRD AUTOMATIC UK TEST

Full-time Work in the UK ("FTWUK")

6.4.1 The Third Automatic Residence Test is satisfied if:-

(a) an individual works full-time in the UK for a period of 276 days;[49]

(b) during that period he has no significant breaks from work;

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

(d) more than 75% of the total number of days in the relevant year when he does more than 3 hours work per day are days when he does that work in the UK.[50]

6.4.2 Following representations from the professional bodies, 'work' and 'working' include both employed and self-employed work.[51] A significant break from work is a period of 31 days or more where there is no day on which the individual does more

[49] Although the Government is consulting on extending this to 12 months
[50] Para 5(5)
[51] Para 15

simon@mckieandco.com
01373 830956

than 3 hours work in the UK and the reason for his absence is not because he was on annual leave or sick leave.[52]

6.4.3 Full-time work is defined as thirty five hours per week or more on average over the period. The length of the period may be reduced to take account of reasonable amounts of leave taken during the period and periods of sick leave when an individual cannot be reasonably expected to work as a result of injury or illness.[53] A number of respondents had objected that there are professions where the normal working week is less than 35 hours but the limit has not been changed.[54]

6.4.4 An individual is working at any time when he is doing something in the performance of the duties of his employment or in the course of a trade carried on by him.[55] This definition is deliberately wide but it will not encompass gossiping at the photocopying machine, day dreaming or making coffee. Time spent travelling will count as time spent working if the cost can be deducted from earnings or profits or the individual does something else during the journey which would itself count as work; for example making telephone calls or emailing people.[56] Unhelpfully, the legislation provides that "Work is done where it is actually done" except where work is done in the course of travelling.[57] Work done in the course of travel by sea, air or the Channel Tunnel from overseas to the UK or from the UK to overseas is assumed to be done overseas.[58] Travel starts at the 'embarkation point.'[59] It is not clear

[52] Para 5(6)
[53] Para 17(2)
[54] June 2012 Condoc, para 3.46
[55] Para 15(1)
[56] Para 15(4)
[57] Para 16(1)
[58] Para 16(2)
[59] Para 16(2)

simon@mckieandco.com
01373 830956

whether that is when an individual reaches the airport, when he passes through customs or when he boards his plane.

THE FOURTH AUTOMATIC UK TEST

Death During the Year

6.5.1 The Fourth Automatic UK Test is satisfied if:-

(a) the individual dies in the relevant year;

(b) he had, for each of the previous three tax years, been resident in the UK because he had satisfied the Automatic Residence Test;

(c) when he died his normal home was in the UK; and

(d) the preceding tax year would not be a split year for the individual even on the assumption that he was not resident in the UK in the relevant tax year.[60]

[60] Para 5(8)

simon@mckieandco.com
01373 830956

SECTION VII

THE SUFFICIENT TIES TEST

THE TEST

7.1.1 The Sufficient Ties Test is met for a relevant year where the individual meets none of the Automatic UK Tests nor any of the Automatic Overseas Tests but has sufficient UK ties for that year.[61] 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.[62]

Days spent in the UK in the relevant tax year	Number of ties that are sufficient where an individual has been UK resident in the 3 years preceding the relevant year	Number of ties that are sufficient where an individual has not been UK resident in the 3 years preceding the relevant year
More than 15 but fewer than 46	At least 4	
More than 45 but fewer than 91	At least 3	All 4
More than 90 but fewer than 121	At least 2	At least 3
More than 120	At least 1	At least 2

7.1.2 Special rules apply if the individual dies during the relevant year.[63]

[61] Para 7(1)
[62] Para 7(3)
[63] Para 10

simon@mckieandco.com
01373 830956

UK TIES

7.2.1 The legislation differentiates between what is a UK Tie on the basis of whether or not an individual was resident in the UK in one or more of the three tax years preceding the relevant year. If he was so resident, there are five UK 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.[64]

7.2.2 If that is not the case the Country Tie is omitted and so only the following count as UK ties:-

(a) the Family Tie;

(b) the Accommodation Tie;

(c) the Work Tie; and

(d) the 90-day Tie.[65]

[64] Para 19(2)
[65] Para 19(3)

simon@mckieandco.com
01373 830956

THE FAMILY TIE

7.3.1 An individual has a Family Tie for a year if in that year a 'relevant relationship' exists at any time between that individual and another person and that other person is someone who is resident in the UK for that year.[66]

7.3.2 There is a relevant relationship at any time between an individual and another person if at that time:-

(a) the individual has a husband or wife or civil partner and they are not separated at the time;

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

(c) the individual is a parent of a child under the age of 18.[67]

A Drafting Error

7.3.3 It will be noticed that read literally each of these conditions can be satisfied by reference to a person other than the person with whom one needs to decide whether a relevant relationship exists. So, for example, on a literal reading if an individual has a spouse he will have a relevant relationship with every other person in existence. This drafting error has been pointed out to HMRC by the STEP and is expected to be corrected before the legislation is enacted.

[66] Para 20(1)
[67] Para 20(2)

simon@mckieandco.com
01373 830956

Living Together as Husband and Wife

7.3.4 The phrase 'living together as husband and wife' is found elsewhere in legislation including in some recent tax legislation.[68] The June 2012 Condoc comments with Orwellian menace:-

> "Although there can be some difficulty in determining when a relationship becomes a 'common-law' equivalent to a marriage, with the introduction of tax credits there are existing legal definitions of common-law partners and HMRC have significant experience of making such determinations."[69]

7.3.5 In fact the term 'common-law partners' is not one which is used in statute. It is similar to the phrase 'common-law marriage,' but that phrase does not refer to a relationship between two people who are not married but rather to a marriage recognised as valid at common law although not complying with the usual formal requirements.[70] The phrase 'living together as husband and wife' is used repeatedly in the Tax Credits legislation but is not statutorily defined. Similarly, it is widely used in many other legislative contexts including statutes concerned with Social Security, Family, Pension and Housing Law. I have been unable to find, however, any statutory definition of it.

7.3.6 The phrase has been considered in a number of cases.[71]

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

[69] June 2012 Condoc para 3.124

[70] *Oxford Dictionary of Law* Ed E A Martin OUP 2003

[71] See for example *Amicus Horizons Limited v Brand* [2012] EWCA Civ 817; *Re Watson* [1999] 3 FCR 595, [1999] 1 FLR 878 ChD; *Westminster City Council v Peart* [1991] 24 HLR 389

simon@mckieandco.com
01373 830956

7.3.7 In *Crake v Supplementary Benefits Commission*; *Butterworth v Supplementary Benefits Commission*[72] which was a case concerning the Supplementary Benefits Act 1976, it was held that in order to establish that a man and woman were 'living together as husband and wife', for the purposes of para 3(1)(b) of Schedule 1 of that Act, it was not sufficient merely to show that they were living together in the same household. Although in many circumstances that might be strong evidence that they were living together as husband and wife, it was necessary in each case to go on to ascertain the manner in which and why they were living together in the same household. The presiding judge referred to a Supplementary Benefits Handbook which set out guidelines to claimants to determine whether a couple were living together as husband and wife which he said were:-

> "admirable signposts to help a tribunal, or indeed the [Supplementary Benefits] Commission, to come to a decision whether in fact the parties should be regarded as being within the words 'living together as husband and wife'. They are: whether they are members of the same household; then there is a reference to stability; then there is a question of financial support; then there is the question of sexual relationship, the question of children; and public acknowledgement.
>
> Without setting out that part of the Handbook in full in this judgment, it appears to me that the approach indicated in that Handbook cannot be faulted."

[72] *Crake v Supplementary Benefits Commission; Butterworth v Supplementary Benefits Commission* [1982] 1 All ER 498, (1981) 2 FLR 264

simon@mckieandco.com
01373 830956

Living Together as Civil Partners

7.3.8 A civil partnership is a creation of statute and the Civil Partnership Act 2004 does not limit civil partnership to any particular form of relationship between two persons entering into such a partnership. It is difficult to see, therefore, how two people can live together as civil partners who are not civil partners. The phrase is used in a number of other statutory contexts,[73] but in those contexts it is invariably used with a further statutory rule usually providing that two people of the same sex are to be treated as living together as if they were civil partners if, and only if, they would be treated as living together as husband and wife were they of opposite sexes. There is no such deeming provision in the draft legislation. Perhaps the omission will be corrected in the next draft.

Minors in Full-time UK Education

7.3.9 For the purpose of deciding whether a person with whom a taxpayer has a relevant relationship is resident in the UK a special rule applies. A family member who satisfies certain conditions is to be treated as being not resident in the UK for the year if the number of days he or she spends in the UK in the part of the year outside term time is less than twenty one.[74] The conditions are that the family member is:-

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

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

[73] For example in the Welfare Reform Act 2012 s.39(2)
[74] Para 21(3)

simon@mckieandco.com
01373 830956

(c) resident in the UK for that year but would not be so resident if the time spent in full-time education in the UK in that year were disregarded.[75]

7.3.10 For this purpose reference to the time spent in full-time education in the UK is to the time spent there during term time. That would appear to suggest that all time during term time is time spent in full-time education for this purpose but what is 'term time'? Are half terms and leave week-ends part of term time? The Shorter Oxford English Dictionary includes amongst the meanings given for the noun 'term':-

> "each of the periods (usu. three or four in the year) appointed for the sitting of Courts of Law, or for instruction and study in a University or School."

7.3.11 A school term, therefore, appears to include periods of half term holidays and weekends but not to include the long Christmas, Easter and Summer vacations.

7.3.12 The June 2012 Condoc says that:-

> "… weekends or other occasional days during term-time spent away from the educational establishment will not be taken into consideration."[76]

7.3.13 In informal conversations with HMRC spokesmen, however, they seemed to indicate that they do not consider half term holidays to be part of term time. Whatever HMRC's view may be, in my opinion term time includes half terms and weekends.

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[75] Para 21(4)
[76] June 2012 Condoc para 3.130

simon@mckieandco.com
01373 830956

Avoiding a Circularity

7.3.14 Paragraph 21(2) prevents there being a circularity under which the residence of a taxpayer is to be determined by reference to the residence of a relevant person and the residence of that relevant person is to be determined by reference to the residence of the taxpayer. It provides that:-

> "A Family Tie based on the fact that a family member has, by the same token, a relevant relationship with [the person whose residence status is to be determined] is to be disregarded in deciding whether that family member is someone who is resident in the UK for [the year]."

THE ACCOMMODATION TIE

7.4.1 A person has an Accommodation Tie for a year if:-

(a) he has a place to live in the UK;

(b) that place is available to him during the year for a continuous period of at least 91 days; and

(c) he spends at least one night at that place in that year.[77]

7.4.2 If there is a gap of fewer than sixteen days between the periods in which a particular place is available to a taxpayer it is treated as continuing to be available to him during that period.[78]

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[77] Para 22(1)
[78] Para 22(2)

simon@mckieandco.com
01373 830956

7.4.3 The taxpayer is considered to have a 'place to live' in the UK if:-

(a) he has a home in the UK;

(b) he has a holiday home, a week-end home, a temporary retreat or similar in the UK; or

(c) other accommodation where he can live when he is in the UK.[79]

7.4.4 Accommodation may be available to a person even if he holds no estate or interest in it and has no legal right to occupy it.[80]

7.4.5 It appears from the reference to 'that place' that the ninety one day period has to be satisfied in respect of each 'place to live' and not merely in respect of all the places to live which a taxpayer has in the tax year. So, for example, if a person had accommodation available to him in one house for sixty days and in another house for thirty five days, the Accommodation Tie would not be satisfied even though, in total, he had had accommodation available to him for ninety five days.

7.4.6 If the accommodation belongs to a close relative of the individual then the requirement to spend one night there is increased to a total of at least 16 nights at that place in that year.[81] A close relative is defined as a parent, grandparent, brother, sister, or a child or grandchild aged 18 or over.[82]

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79 Para 22(3)
80 Para 22(4)
81 Para 22(5)
82 Para 22(6)

simon@mckieandco.com
01373 830956

7.4.7 It would have been more sensible for the 16 night increase to apply when no consideration is given for the accommodation. As it stands, if a good friend will always be willing to put up the individual the Accommodation Tie will be satisfied if he spends even one night at his friend's house.

7.4.8 It can be seen that the Accommodation Tie uses a number of concepts which, unfortunately, are not defined. So, for example, one has to know what is a home, a holiday home, a weekend home, a temporary retreat and what it means to be able to live at a place and yet none of these terms and phrases are defined.

THE WORK TIE

7.5.1 An individual has a Work Tie if he works in the UK for at least 40 days in the relevant tax year. He is considered to work for a day if he does more than three hours work in the UK on that day.[83] The Government is consulting on increasing the number of hours worked per day to 5 hours.

THE 90-DAY TIE

7.6.1 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.[84]

[83] Para 23
[84] Para 24

simon@mckieandco.com
01373 830956

THE COUNTRY TIE

7.7.1 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 the UK. In the event that he spends the same number of days in two or more countries in a year and that number is the greatest number of days spent by him in any country he will have a Country Tie if one of those countries is the UK.[85]

[85] Para 25

simon@mckieandco.com
01373 830956

SECTION VIII

SPLIT YEARS

REPLACING CONCESSIONARY RELIEF

8.1.1 As we have seen, under the current system, a person who is resident at any time during a tax year is generally subject to Income Tax and Capital Gains Tax on his worldwide income and gains subject to specific reliefs for persons who are either not domiciled in the UK or not ordinarily resident here. In certain circumstances, however, when an individual comes to, or leaves, the UK during a tax year, a concessionary treatment enables the tax year to be split into periods before and after arrival or departure. UK tax on most income and gains arising before a person has become UK resident or after he has ceased to be so resident is limited to the tax which, loosely, would have been due if the taxpayer had been non-resident throughout the year. The Government intends to give a statutory relief broadly similar to this concessionary relief.[86]

THE STRUCTURE OF THE DRAFT LEGISLATION

8.2.1 The draft legislation to achieve this is contained in Part 3 of the SRT Schedule. Paras 26-35 define the circumstances in which there is a 'split year' and how the overseas and UK parts of the split years are to be determined. Paras 36 to 79 amend other parts of the tax legislation, utilising these defined terms, with the intent that

[86] June 2012 Condoc, paras 3.166 and 3.167

simon@mckieandco.com
01373 830956

income and gains arising in the overseas part of a split year are only taxed to the same extent as they would be taxed on a non-resident.

THE DEFINITION OF A SPLIT YEAR

8.3.1 In respect of an individual, a tax year is a split year if:-

(a) the individual is resident in the UK for that year; and

(b) the conditions of one of four cases are satisfied.[87]

THE FOUR CASES

Case 1: Starting Full-time Work Overseas

The Conditions of Case 1

8.4.1 The conditions of Case 1 will be satisfied where:-

(a) the taxpayer was resident in the UK for the previous tax year;

(b) on a day in the relevant year the taxpayer starts to work full-time overseas for a period that continues to the end of the relevant year;

(c) in the part of the relevant year beginning with that day:-

(i) the number of days in which the taxpayer does more than three hours work in the UK does not exceed a permitted limit; and

[87] Para 29(1)

simon@mckieandco.com
01373 830956

(ii) the number of days that the taxpayer spends in the UK does not exceed a permitted limit.

(d) the taxpayer is not resident in the UK for the next tax year because he meets the Third Automatic Overseas Test (the FTWA test).[88]

8.4.2 The permitted limit in respect of working in the UK is 20 days multiplied by a proportion found by dividing the number of whole months before the taxpayer starts to work full-time overseas by 12. The permitted limit in respect of the number of days spent in the UK is 90 days multiplied by that proportion.[89]

8.4.3 So Case 1 is aimed at individuals leaving for full-time work abroad.

Determining the Overseas and UK Parts

8.4.4 Where Case 1 applies, the overseas part of the split year is the part of the year which begins on the day when the taxpayer starts to work full-time overseas.[90]

8.4.5 In respect of all four cases, the UK part of a split year is the part of that year that is not the overseas part.[91]

Case 2: Accompanying Spouses

The Conditions of Case 2

8.4.6 The conditions of Case 2 will be satisfied where:-

88 Para 30
89 Para 30(6) and (7)
90 Para 35(1)(a)
91 Para 35(2)

simon@mckieandco.com
01373 830956

(a) the taxpayer was resident in the UK for the previous tax year;

(b) the taxpayer has a partner whose circumstances fall within Case 1 of the split year rules for the year concerned;

(c) in the relevant year 'the taxpayer joins the partner overseas so they can live together while the partner is working full-time overseas';

(d) in the part of the relevant year beginning with the 'deemed departure day':-

(i) the taxpayer has no home in the UK at any time, or has homes in both the UK and overseas but spends the greater part of the time living in the overseas home; and

(ii) the number of days that the taxpayer spends in the UK does not exceed the permitted limit (that is the same limit that applies for the purposes of Case 1).

(e) the taxpayer is not resident in the UK for the next tax year.[92]

8.4.7 The deemed departure day is the later of:-

(a) the day on which 'the taxpayer joins the partner overseas so that they can live together while the partner is working full-time overseas'; and

(b) the day on which the partner starts to work full-time overseas.[93]

8.4.8 A partner for this purpose is:-

[92] Para 31
[93] Para 31(7)

simon@mckieandco.com
01373 830956

(a) a husband, wife or civil partner;

(b) if an individual and another person are living together as husband and wife, that other person; or

(c) if an individual and another person of the same sex are living together as civil partners, that other person.[94]

8.4.9 The June 2012 Condoc says:-

> "As the Government intends to recognise common-law partners for the purposes of a family connection to the UK … it is right that such relationships are also recognised for the purposes of split year treatment."[95]

8.4.10 We have already seen the difficulties of construction caused by the inclusion of what the June 2012 Condoc inaccurately refers to as common-law partners.

8.4.11 It has been pointed out by the STEP that the requirement that the taxpayer must join the partner overseas would seem to require the employed partner to be overseas before the accompanying partner[96] or at least, that they cannot go overseas together. It also appears that if the taxpayer joins their partner overseas for some reason other than in order that they may live together, such as because of a desire to live in a foreign country, the conditions of Case 2 will not be satisfied. As the burden of proof in any appeal against an assessment is borne by the taxpayer, that leaves the taxpayer in the position of having to prove his motivation.

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94 Para 31(9)
95 June 2012 Condoc, para 3.178
96 The STEP 2012 Response, para 7

simon@mckieandco.com
01373 830956

8.4.12 We have already seen the difficulty caused by the imprecision of the concept of a home. Case 2 requires one to determine the period during which one lives in a home. The use of the phrase implies that there is a distinction between having a home (relevant to the Second Automatic UK Test and the Accommodation Tie) and living in a home; that it is possible to have a home without living in it so that 'living in' imposes an additional requirement. What is that requirement? Can one be said to be living in a home in a period when one is away from it? If not, it is clear that there must be a minimum period of absence for this purpose or else one would not be living in a home when one was at work.

Determining the Overseas Part

8.4.13 In respect of Case 2, the overseas part of a split year is the part of that year which starts with the Deemed Departure Day.[97]

Case 3: Leaving the UK to Live Abroad

The Conditions of Case 3

8.4.14 The conditions of Case 3 are satisfied where:-

(a) the taxpayer was resident in the UK for the previous tax year;

(b) at the start of the relevant year the taxpayer's normal home is in the UK but:-

(i) he ceases to have any home in the UK during the year; and

(ii) from that time, he has no home in the UK for the rest of that year.

[97] Para 35(1)(b)

simon@mckieandco.com
01373 830956

(c) neither Case 1 nor Case 2 is satisfied;

(d) in the part of the year beginning with the day on which he ceases to have any home in the UK, the taxpayer spends fewer than 16 days in the UK;

(e) the taxpayer is not resident in the UK for the next tax year;

(f) by the end of the period of six months beginning with the day in the year when he ceases to have any home in the UK, the taxpayer's normal home is overseas.[98]

8.4.15 For these purposes at any given time:-

(a) A person's 'normal home' is in the UK if the UK is where the person generally lives at the time (even if the person occasionally lives overseas or is living temporarily overseas at the time); and

(b) A person's 'normal home' is overseas if overseas is where the person generally lives at the time ((even if the person occasionally lives in the UK or is living temporarily in the UK at the time).[99]

8.4.16 So here the legislation introduces another imprecise concept; that of where a person generally lives with no further statutory guidance as to what that phrase may mean.

Determining the Overseas Part

8.4.17 In respect of Case 3, the overseas part of a split year is the part of that year which begins with the day on which the taxpayer ceases to have any home in the UK.[100]

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98 Para 32
99 Para 34(4)
100 Para 35(1)(c)

simon@mckieandco.com
01373 830956

Case 4: Coming to Live or Work Full-time in the UK

The Conditions of Case 4

8.4.18 The conditions of Case 4 will be satisfied where:-

(a) the taxpayer was not resident in the UK for the previous tax year.

(b) either or both of the following descriptions apply to the taxpayer:-

(i) at the start of the relevant tax year, the taxpayer did not meet the only home test, but he begins to meet the test during the tax year concerned and continues to do so for the rest of that year; or

(ii) on a day in the relevant year the taxpayer starts to work full-time in the UK for a period that continues to the end of that year.

(c) for the part of the relevant year before the day on which he meets the conditions of (b) above the taxpayer does not have sufficient UK ties. That is, looking only at that period, he does not meet the Sufficient Ties Test. In determining whether that is the case or not, all references in the Sufficient Ties Test to the year are to be read as references only to the overseas part of the year. The various daily limits in the Sufficient Ties Test are to be reduced by the proportion which the number of whole months in the UK part of the year bears to 12.

(d) the taxpayer meets the Second Automatic UK Test (the only home) or the Third Automatic UK Test (FTWUK).[101]

8.4.19 The Only Home Test is met if the taxpayer has only one home and that home is in the UK or he has more than one home and all of them are in the UK.[102]

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[101] Para 33
[102] Para 33(6)

simon@mckieandco.com
01373 830956

8.4.20 It will be seen that Case 4, cannot be satisfied by someone who does not satisfy the Automatic Residence Test even though he is UK resident in that year by virtue of meeting the Sufficient Ties Test.

Determining the Overseas Part

8.4.21 In respect of Case 4, the Overseas Part of a split year is the period ending on the day before he ceases to have sufficient UK ties.[103]

[103] Para 35(1)(d)

simon@mckieandco.com
01373 830956

SECTION IX

CONCLUSION

A MISSED OPPORTUNITY

9.1.1 There is no doubt that a logical, well-structured and concisely drafted statutory residence test would enable most taxpayers to determine their residence status to a high probability and that this predictability would be beneficial to the UK economy and to Government tax revenues. After so many years of consultation there was an opportunity for the Government to produce just such a test. Most informed commentators from the tax profession take the view that a simple weighted average day count test, similar to the one used in the US, would be the best form of statutory residence test.[104]

DESERVING OF A FEEBLE CHEER

9.2.1 The proposed test is better than the chronic uncertainty of the current situation but by how much? It is highly complex and involves concepts which are by their nature subjective and which have not been, or have been inadequately, defined. The draft legislation runs to some 60 pages and will, no doubt, expand further. When the review process began in 2002 an experienced observer might well have predicted that whatever emerged would be far from transparent, objective and simple to use and it appears that they will be proved right. Yet the new SRT, however inadequate,

[104] In the June 2012 Condoc this view was dismissed as the view of a "few [respondents who] argued that a pure day counting test would be preferable …" but those few respondents included the CIOT and the STEP who, between them, represent over 30,000 professionals and comprise most of those with high level tax expertise in the UK

simon@mckieandco.com
01373 830956

will be an improvement on the current law. For that at least it deserves a feeble cheer.

simon@mckieandco.com
01373 830956