



RUDGE REVENUE REVIEW

ISSUE XXXII

AN EXCEPTIONALLY RESTRICTED VIEW

**McKie & Co LLP
Rudge Hill House
Rudge
Somerset
BA11 2QG**

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INTRODUCTION

1.1 The case of *A Taxpayer v. HMRC*¹ is the first case directly² considering the provisions of the Statutory Residence Test (the 'SRT'³) which was enacted over nine years ago in the Finance Act ('FA'⁴) 2013 s.218 and Sch 45.⁵ It concerns the Exceptional Circumstances Exception (the 'Exception'⁶) to the Basis Day Count Rule.⁷ It was a robust decision in favour of the taxpayer in which HMRC's asserted construction of the Exception was comprehensively rejected by the Tribunal and it is extremely helpful in throwing light on a number of issues in respect of the Exception including a number which have been matters of controversy since the SRT's enactment.

THE EXCEPTIONAL CIRCUMSTANCES EXCEPTION

The relevance of whether a day is spent in the UK

2.1 In determining whether a person is resident in the UK under the SRT the number of days spent in the UK is important in many contexts.

¹ *A Taxpayer v. HMRC* [2022] UKFTT 00133 (TC) ('*A Taxpayer v. HMRC*'). We refer to the published report of the Case as the 'Case Report'. See Appendix

² In two other cases residence under the SRT has been in issue. In each case the question was decided primarily by reference to antecedent matters. In *Ernest Batten v. HMRC* [2022] UKFTT 199 (TC), which was an appeal against an assessment for 2014/15, the appellant's case was based on the grounds that he was not resident in the UK for fiscal purposes in that year. Whether he was UK resident was in turn dependent on whether he was UK resident in 2012/13 when the SRT was not in force. In *Oppenheimer v. HMRC* [2022] UKFTT 112 (TC) the appellant accepted that he was resident for UK fiscal purposes in the UK fiscal years 2010/11 – 2016/17 but claimed to be resident in South Africa throughout that period under the UK/South Africa Double Tax Treaty

³ See Appendix

⁴ See Appendix

⁵ Unless otherwise stated all statutory references in this Review are to the FA 2013 Sch 45

⁶ See Appendix. Under FA 2013 Sch 45 paras. 22(4)-(6)

⁷ The rule under FA 2013 Sch 45 para. 22(1) that if an individual is present in the UK at the end of a day, that day counts as a day spent by the individual in the UK. See Appendix

2.2 Whether a day is spent in the UK is relevant to the First,⁸ Second,⁹ Third¹⁰ and Fourth¹¹ Automatic Overseas Tests, to the First Automatic UK Test,¹² to how many ties must be satisfied to meet the Sufficient Ties Test,¹³ to the Family Tie¹⁴ and the 90-Day Tie¹⁵ and to Cases 1,¹⁶ 2,¹⁷ 3,¹⁸ 6¹⁹ and 7²⁰ of the Split Year Rules.

The Basic Day Count Rule

2.3 Paragraph 22(1) sets out the 'Basic Day Count Rule'²¹ that if an individual:

'is present in the UK at the end of a day, that day counts as a day spent [by the individual] in the UK.'

The condition of the Exceptional Circumstances Exception

2.4 The Basic Day Count Rule is subject to two exceptions and to a deeming rule.²² One of those exceptions is the Exception which is set out in para. 22(4)-(6). It provides that a day does not count as a day spent by an individual,²³ in the UK:

'(4) where

(a) P would not be present in the UK at the end of that day but for exceptional circumstances beyond P's control that prevent P from leaving the UK; and

(b) P intends to leave the UK as soon as those circumstances permit.

(5) Examples of circumstances that may be "exceptional" are -

⁸ Para. 12

⁹ Para. 13

¹⁰ Para. 14

¹¹ Para. 15

¹² Para. 7

¹³ Paras. 18 and 19

¹⁴ Paras. 32 and 33

¹⁵ Para. 37

¹⁶ Para. 44

¹⁷ Para. 45

¹⁸ Para. 46

¹⁹ Para. 49

²⁰ Para. 50

²¹ See Appendix

²² Para. 22

²³ Referred to in the legislation as 'P'

- (a) *national or local emergencies such as war, civil unrest or natural disasters, and*
- (b) *a sudden or life-threatening illness or injury.*

(6) *For a tax year-*

- (a) *the maximum number of days [which may be treated as days which do not count as days spent in the UK] in reliance on sub-paragraph (4) is limited to 60, and*
- (b) *accordingly, once the number of days within sub-paragraph (4) reaches 60 (counting forward from the start of the tax year), any subsequent days within that sub-paragraph, whether involving the same or different exceptional circumstances, will count as days spent by P in the UK.'*

2.5 As we noted in '*McKie on Statutory Residence*'.²⁴

'The formulation of the Exceptional Circumstances Exception had been the subject of substantial criticism by the professional bodies during the development of the SRT. These criticisms have not led to significant changes in the enacted legislation.'

HMRC's desire to restrict the scope of the extension

2.6 The problems and anomalies which the restricted scope of the Exception has caused have been exacerbated by HMRC's approach to its construction which has been designed to restrict its application as far as, and indeed farther than, possible.

²⁴ *McKie on Statutory Residence: The Residence of Individuals and Trustees* by Sharon and Simon McKie (Pub CCH – 2013 para. 4.5.51). See Appendix I. A second edition of *McKie on Statutory Residence* is expected to be published next year. Readers of this article who would like to be alerted when a publication date has been set should email administrator@mckieandco.com putting 'SRT 2nd Edition' followed by their name and organisation name in the subject box

A TAXPAYER v. HMRC

The facts

- 3.1 *A Taxpayer v. HMRC*, was decided on 19th April of this year. It concerned an Appellant who appears to have become non-resident in order that a UK resident company might pay her, in the fiscal year 2015/16, a dividend of £8,000,000²⁵ without her being chargeable to Income Tax on the dividend.²⁶ Had she been resident in the UK for that year the tax chargeable would have been £3,142,551.²⁷
- 3.2 The Appellant had been resident in the UK in at least one of the three fiscal years preceding 2015/16²⁸ and in 2015/16 she had three UK Ties.²⁹ Neither the Automatic UK Test³⁰ nor the Automatic Overseas Test³¹ applied to her in that year. Therefore, if she spent 46 days or more in the UK in 2015/16, she would have been UK resident for, *inter alia*, the purposes of UK Income Tax and, if she did not, she would not be so resident.³²
- 3.3 By 21st November 2015 she had spent 44 days in the UK in the period after 5th April 2015.³³ After that date she was present in the UK at midnight, for two days in December, being 18th and 19th December 2015, and for four days in February, being 15th – 18th February 2016.³⁴ We refer to these days in December 2015 and February 2016 on which she was present at midnight in the UK as the 'Disputed Days'³⁵. Unless the Exception applied to treat the Disputed Days as not counting as days spent by the Appellant in the UK she would have spent 50 days (44 + 2 + 4) in the UK in the fiscal year 2015/16 and

²⁵ See Case Report para. 23

²⁶ See Case Report paras. 23 and 104

²⁷ See Case Report para. 23

²⁸ See Case Report paras. 20 and 22

²⁹ See Case Report para. 20

³⁰ See Case Report para. 20

³¹ See Case Report para. 20

³² See Case Report para. 20

³³ See Case Report para. 104

³⁴ See Case Report paras. 46, 57 and 78

³⁵ See Appendix

would, therefore, have been resident in the UK in that fiscal year for, *inter alia*, Income Tax purposes³⁶ and would have been assessable to Income Tax on the £8,000,000 dividend which she had received in that year.³⁷ Five excess days in the UK would have proved to be very expensive indeed.

3.4 There is no evidence in the Case Report that HMRC, in assessing the Appellant on the basis that she was UK resident in 2015/16 and in deciding to oppose her appeal against the assessment, considered the inherent improbability of an individual, who, one presumes, on expert advice, moved abroad in order to avoid an Income Tax charge of over £3,000,000, visiting the UK for six days relying on the inherently uncertain application of the Exception to relieve them from the charge which would otherwise be the result of her visit unless the circumstances requiring her presence in the UK were truly exceptional.³⁸

3.5 Fortunately for the Appellant, and for justice, the Tribunal found, in a careful and comprehensive analysis of the evidence and the applicable law, that on the Disputed Days the conditions for the Exception to apply, set out in para. 22(4)³⁹ were satisfied. In doing so, it noted some weaknesses in the Appellant's evidence⁴⁰ and rejected some of her assertions of fact.⁴¹ It also, however, rejected some of HMRC's factual assertions⁴² and it drew the clear conclusion that the Appellant's presence in the UK was occasioned

³⁶ See para. 3.2 above

³⁷ See para. 3.1 above

³⁸ The Appellant had stated in evidence that: '*she knew that at 20 December 2015 she would be seeking to rely on the "exceptional circumstances" exception, but this was not at the forefront of her mind at the time.*' She did say, when re-examined that: '*she was not familiar with the rules in Schedule 45 FA 2013 nor with the rules about "exceptional circumstances".*' The Tribunal referred to this as: '*appearing to contradict her earlier answer*' but there is a difference between being aware of the existence of a rule and being familiar with it in the sense of having its detailed provisions at the forefront of one's mind. See Case Report paras. 104 - 106

³⁹ See para. 2.4 above

⁴⁰ See Case Report paras. 162 - 167

⁴¹ See Case Report paras. 168 - 178 and 183

⁴² See Case Report para. 160

by the fact that her sister, an alcoholic and depressive,⁴³ was incapable on the Disputed Days of looking after her minor children,⁴⁴ that the Appellant was the only person able or likely to provide the care that the children needed,⁴⁵ that these were exceptional circumstances,⁴⁶ that the Appellant was prevented from leaving the UK on the Disputed Days because of the exceptional circumstance that she needed to provide that care⁴⁷ and that, on each of the Disputed Days, she intended to leave the UK as soon as the exceptional circumstances permitted her to do so.⁴⁸

Issues as to the law

Tribunal's summary of the relevant principles of construction

3.6 The Tribunal began its consideration of the issues as to the law by setting out a number of general principles:

'As we have explained, the "exceptional circumstances" exemption provided for by paragraph 22(4) constitutes a relaxation (albeit it a tightly drawn relaxation) from the prescriptive provisions of Schedule 45 which contain the rules relating to the SRT. Those rules are intended to provide certainty. Paragraph 22(4) was intended, as HMRC acknowledged, to provide a measure of relief from those prescriptive rules where, otherwise, injustice may result.

This is an entirely common statutory format in the context of tax legislation. As we mentioned in the course of argument, there are many contexts in tax legislation where strict and prescriptive rules also contain defences or ameliorating provisions which Parliament intended to prevent injustice or unfairness. For example, various tax penalty provisions are prescriptive (indeed punitive), but enable a taxpayer to

⁴³ See Case Report para. 179

⁴⁴ See Case Report paras. 184 and 185

⁴⁵ See Case Report paras. 184 and 185

⁴⁶ See Case Report para. 185

⁴⁷ See Case Report para. 185

⁴⁸ See Case Report para. 185

avoid a penalty if it is possible for the taxpayer to demonstrate that there was a reasonable excuse for the default. Parliament has, broadly speaking, entrusted this Tribunal with the task of deciding what constitutes a reasonable excuse. It has not sought, with a few specific exceptions, to define what constitutes a “reasonable excuse”.

In our view, paragraph 22(4) follows a similar format, although of course the statutory language and context are very different. Parliament has charged this Tribunal, in its role as a primary finder of fact, with the duty of determining whether the “exceptional circumstances” test in paragraph 22(4) has been satisfied. This is an evaluative exercise to be determined in the light of all the relevant facts and circumstances.

*The words used by Parliament in paragraph 22(4) are clear and are non-technical; they are not ambiguous or obscure and they do not give rise to absurdity. There is no justification, as HMRC accepted, for looking at Parliamentary material under the rule in *Pepper v Hart*.*

*The language of paragraph 22(4) consists of ordinary English words. Those words do not need the deployment of numerous synonyms or the use of a Thesaurus. The dangers of using synonyms, which can carry different shades of meaning from the statutory language, in substitution for the words used by Parliament were clearly explained by Richards LJ in *Raftopoulou v HMRC* [2019] 1 WLR 1528 at [41].⁴⁹*

⁴⁹ See Case Report at paras. 138 - 142

3.7 In the course of *A Taxpayer v. HMRC*, HMRC put forward several restrictive constructions of the provisions of para. 22(4) which the Tribunal roundly rejected.

HMRC's First Construction Argument: foreseeable circumstances

3.8 The decision records that:

*'First, HMRC submitted that in construing the expression "exceptional circumstances" it was necessary to exclude foreseeable circumstances because where circumstances were foreseeable a taxpayer could plan ahead to avoid those circumstances from preventing them from leaving the UK – as well as not being exceptional, the circumstances would also not then be beyond a person's control.'*⁵⁰

3.9 Writing in 2014, in *M^cKie on Statutory Residence*, we said:

*'Unforeseeability does not form a necessary part of the concept of the "exceptional" in ordinary usage. The appearance of Haley's Comet or a solar eclipse would clearly be exceptional although they are predictable.'*⁵¹

3.10 We explained, however, that:

*'Para. B18 of the Guidance'*⁵² says: *'Days spent in the UK will not be considered exceptional where the circumstances are not beyond the individual's control, or where they could reasonably have been foreseen or predicted'. This might suggest that HMRC does not accept that exceptional circumstances may be foreseeable. It might be, though, that the comment is simply imprecisely phrased and that the Guidance's author does not intend to import the concepts of foreseeability and*

⁵⁰ Case Report at para. 146. We refer to this argument as 'HMRC's First Construction Argument'. See Appendix

⁵¹ *M^cKie on Statutory Residence* at para. 4.5.14

⁵² In *M^cKie on Statutory Residence* we referred to HMRC's Guidance on the SRT, which is now found in the HMRC's Residence, Domicile and Remittance Basis Manual at paras. RDRM11000-RDRM13540, as the 'Guidance'. We also adopt that description in this Review. See Appendix and *M^cKie on Statutory Residence* page xxiv

*controllability into the meaning of exceptional. Rather, he is referring to the Third and Fourth Elements of the Exception.*⁵³

3.11 The Third Element⁵⁴ of the Exception is that exceptional circumstances must be *'beyond P's control'*.⁵⁵

3.12 In *McKie on Statutory Residence* we pointed out that:

'The Guidance says:

*"In order to be ignored as days spent in the UK, there must be exceptional circumstances beyond the control of the individual. In other words, the event or situation in question must be one over which the individual has no control or influence and which cannot reasonably have been foreseen."*⁵⁶

3.13 In respect of this we commented:

*'It is clear that the exceptional circumstances which prevent the individual leaving the UK must be beyond his control because para. 22(4)(a) specifically provides that that is the case but there is no express statutory requirement that they must not have been foreseen. Is such a requirement implicit? If a person comes to the UK for an operation knowing that there is a chance that, if the operation does not go well, he will be unable to travel, and it does not, he will have been prevented by an exceptional circumstance beyond his control from leaving the UK even though he need not have had the operation in the UK and its risks were known to him.'*⁵⁷

⁵³ *McKie on Statutory Residence* at Footnote 43 of para. 4.5.19

⁵⁴ See para. 3.9 above

⁵⁵ *McKie on Statutory Residence* at para. 4.5.19

⁵⁶ *McKie on Statutory Residence* at para. 4.5.20

⁵⁷ *McKie on Statutory Residence* para. 4.5.21. We qualified this comment by noting in Footnote 48 that it:

'... assumes that the operation not going well is an exceptional circumstance. Of course, it may well be that a Court would hold that an unfavourable outcome to an operation was not an exceptional circumstance. As has been seen, para. B19 of the Guidance says that "choosing to come to the UK for medical treatment ... will not be regarded as exceptional circumstances" but

3.14 The Fourth Element⁵⁸ of the Exception is that the exceptional circumstances should ‘prevent P from leaving the UK’. In *M^cKie on Statutory Residence* we asked whether ‘foreseeability form[s] part of the concept of being prevented?’. In respect of this we asked:

*‘If an individual is in the UK when it declares war on another country and all civilian flights are suspended, if the declaration and suspension have been foreseeable for some weeks in advance is he yet prevented by exceptional circumstances beyond his control from leaving the UK? The Authors consider that, for as long as the suspension continues, he is.’*⁵⁹

3.15 The Tribunal’s conclusion in *A Taxpayer v. HMRC* on HMRC’s First Construction Argument is consistent with our analysis in *M^cKie on Statutory Residence*. The Tribunal rejected HMRC’s contention that circumstances which are foreseeable cannot be ‘exceptional circumstances’:

‘There is no requirement in the statutory language for foreseeability or non-foreseeability to determine whether circumstances are “exceptional”. Foreseeability is not the statutory test. It is true that foreseeability may be an element of exceptionality, but it is not a determining factor which, of itself, excludes the application of the exemption. For example, it may be (and this assumes an issue which is in dispute and which we discuss below) that a non-resident has a UK-located family member who has a long-term degenerative disease. It may be foreseeable that that condition may worsen and become life-threatening. That does not, however, lead to the conclusion that when the condition worsens and becomes life-threatening the circumstances become non-exceptional simply because they

in our hypothetical circumstances it is the outcome of the operation which may (or may not) be exceptional not the journey to the UK to enable the operation to take place.’

⁵⁸ See para. 3.9 above

⁵⁹ *M^cKie on Statutory Residence* at para. 4.5.29

were foreseeable. We therefore reject the submission that foreseeability is, of itself, a factor which excludes the application of the “exceptional circumstances” test.

Furthermore, the fact that some or all of the circumstances claimed to be exceptional may be foreseeable does not necessarily mean that those circumstances are within the control of the taxpayer. Whether those circumstances are beyond the taxpayer’s control is a matter to be determined in the light of all the relevant facts. Certainly, foreseeability may be a relevant factor in this context but it is not a determining factor.⁶⁰

HMRC’s Second Construction Argument: moral obligation

3.16 The Case Report records that:

‘Secondly, HMRC submitted that the “exceptional circumstances” test did not encompass a person who came to the UK under a moral obligation or an obligation of conscience to care for a family member or other person. Instead, HMRC argued that the “exceptional circumstances” test only applied where a person came to and remained in the UK either under a legal obligation (e.g., to care for their minor child) or was physically prevented from leaving the UK (e.g. by a volcanic eruption which made flights impossible).’⁶¹

3.17 HMRC’s submission on this issue is based on the use in para.22(4) of the word:

‘...“prevent” which, so the argument ran, should be construed so as to preclude a moral obligation or an obligation of conscience. Mr Stone argued that the word “prevent” in paragraph 22(4)(a) should be given “real teeth”.’⁶²

⁶⁰ See Case Report at paras. 147 and 148

⁶¹ See Case Report at para. 149. We refer to this argument as ‘HMRC’s Second Construction Argument’. See Appendix

⁶² See Case Report at para. 149

3.18 This construction of the Exception is more restrictive than that adopted in HMRC's original, or current, *Guidance*.

3.19 On this construction the Tribunal said:

*'We reject that submission. There is no justification for such a restriction in the statutory language. If, as we find as a fact,⁶³ Parliament intended to avoid injustice in the application of the SRT by excluding exceptional circumstances beyond a taxpayer's control, then it would be hard to imagine a more unjust conclusion than that advocated by HMRC. To conclude otherwise, would favour the kind of injustice that Parliament intended to avoid. It could hardly have been Parliament's intention to have required the "exceptional circumstances" test to be failed if, for example, a taxpayer thought it necessary to be present because of serious illness or at the death bed of a close relative. The word "prevent" can encompass all manner of inhibitions – physical, moral, conscientious or legal – which cause a taxpayer to remain in the UK. To read in the restriction that HMRC suggests, is not an exercise in statutory interpretation (purposive or otherwise) but rather an exercise in reading words into a statute which are not there.'*⁶⁴

HMRC's Third Construction Argument: being prevented from leaving the UK by an exceptional circumstance that has brought one to the UK

3.20 The Case Report records that HMRC:

'... argued that the "exceptional circumstances" exemption applied only to persons who were already in the UK and, while they were in the UK, were overtaken by "exceptional circumstances" which prevented them from leaving. The exemption did not, according to HMRC, apply to a taxpayer who came to the UK because of

⁶³ The Case Report includes a footnote at this point saying:

'The FTT's finding as to the purpose of a statutory provision is essentially a finding of fact: see [25] Fowler v. HMRC [2020] UKSC 22 per Lord Briggs delivering the judgment of the Court'

⁶⁴ See Case Report at para. 150

*the “exceptional circumstances” and who was then prevented from leaving by those same circumstances.*⁶⁵

3.21 At the time that we wrote *M^cKie on Statutory Residence* HMRC clearly accepted that the Exception could apply where one was prevented from leaving the UK by an exceptional circumstance even where one has come to the UK because of it. As we pointed out:

‘ ... Example B5 in the Guidance indicates that HMRC accepts that this is so.

[Guidance] Example B5

Philip is a structural engineer and has worked full-time abroad for many years. He is currently working on a project in Africa. His wife and children live in the UK.

In May the Government of the country in which he is working is overthrown in a military coup. This initially gave rise to peaceful protests but soon developed into increasing levels of civil unrest. In early July the Foreign and Commonwealth Office (FCO) issued advice against all but essential travel to the country. Philip continued to work there.

By mid-October the country was on the verge of civil war and the FCO upgraded their advice, advising against all travel to the country. Philip returned to the UK on 21 October.

Due to international intervention, by the end of January the following year political stability had returned to the country. On 29 January the FCO downgraded their advice to avoid all but essential travel to the country. Philip took the first available flight back and resumed work on 31 January.

⁶⁵ See Case Report at para. 151 We refer to this argument as ‘HMRC’s Third Construction Argument’. See Appendix

*The days Philip spent in the UK were due to an exceptional circumstance beyond his control and can be ignored for the purpose of the day counting tests of the SRT. However, the maximum period that can be ignored due to exceptional circumstances is 60 days. Philip was in the UK for 103 days during this period which means Philip must count 43 days as days spent in the UK for the purposes of the SRT day counting tests.*⁶⁶

3.22 In respect of this Example we said:

*‘If we accept that the circumstances in the African country are exceptional, the conclusion reached in the Guidance’s Example B5 that the Exceptional Circumstances Exception applies to Phillip’s circumstances is correct. Subject to the ... consideration ... [which followed in our text] ... of the meaning of being prevented from leaving the UK, Philip is prevented from leaving the UK and returning to the African country by an exceptional circumstance. It is irrelevant to that test that Philip has only come to the UK because of the exceptional circumstance.*⁶⁷

3.23 So HMRC’s argument in *A Taxpayer v. HMRC* that *‘the exemption did not ... apply to a taxpayer who came to the UK because of the “exceptional circumstances” and who was then prevented from leaving by those same circumstances*⁶⁸ was an attempt to further restrict the construction of the Exception beyond even the restrictive view taken in the *Guidance*.⁶⁹

⁶⁶ See *McKie on Statutory Residence* at para. 4.5.36

⁶⁷ See *McKie on Statutory Residence* at para. 4.5.37

⁶⁸ See para. 3.19 above

⁶⁹ The current version of the Guidance says: *‘There may also be limited situations where an individual who comes back to the UK to deal with a sudden or life threatening illness or injury to a partner or dependent child, can have those days spent in the UK ignored under the SRT subject to the 60 day limit.’* HMRC’s Residence, Domicile and Remittance Basis Manual para. RDRM13240

3.24 The Tribunal in *A Taxpayer v. HMRC* roundly rejected HMRC's contentions on this matter:

*'... we consider that there is no statutory justification for such a limitation of the test. Interpreted in its statutory context, paragraph 22(4) looks at why a taxpayer is in the UK at the end of a particular day and whether a taxpayer is prevented from leaving the UK at that time in order to determine the number of days spent in the UK. It does not look at why the taxpayer came to the UK in the first place or whether the taxpayer was already in the UK. It seems to us that HMRC's view was entirely unsupported by the statutory language. Moreover, as Mr Kessler QC (appearing with Ms Sheldon for the Appellant) submitted, it was also contrary to HMRC's own published practice.'*⁷⁰

HMRC's Fourth Construction Argument: a general principle that the Exceptional Circumstances Exception should be narrowly construed?

3.25 The Case Report records that:

*'Finally, HMRC argued that the examples of circumstances that may be "exceptional" given in paragraph 22(5) suggested that "exceptional" should be given a narrow meaning.'*⁷¹

3.26 Again⁷² this argument went beyond HMRC's published view in its own *Guidance*.

3.27 In considering HMRC's Fourth Construction Argument the Tribunal began by acknowledging that:

⁷⁰ See Case Report at para. 151

⁷¹ See Case Report at para. 152. We refer to this argument as 'HMRC's Fourth Construction Argument'. We refer to HMRC's First Construction Argument, HMRC's Second Construction Argument, HMRC's Third Construction Argument and HMRC's Fourth Construction Argument together as 'HMRC's Construction Arguments'. See Appendix

⁷² See para. 3.20 above

*'First, it must be pointed out that the examples set out in paragraph 22(5) are simply examples – they do not purport to be exhaustive. Nonetheless, they do provide some guidance. For example, they indicate that a life-threatening illness may be an “exceptional circumstance”, indicating perhaps that an illness of a lesser severity, by itself, may not be. Secondly, paragraph 22(5) simply states that the illustrated examples “may” constitute an exceptional circumstance – it does not provide that the examples will, in every circumstance, constitute an exceptional circumstance.'*⁷³

3.28 Having done so, however, the Tribunal commented robustly that:

*' ... HMRC have misapplied the concept of purposive construction by seeking, in effect, to read in limiting words into paragraph 22(4). The words used by Parliament in this statutory provision are, as we have been at pains to point out, entirely clear.⁷⁴ Whilst a court or tribunal is not confined to a literal interpretation of the statutory words, but must consider the context and scheme of the Act as a whole, purposive construction cannot be used to give effect to a perceived different or wider (or narrower) policy objective in cases where the words used by Parliament do not bear that meaning: see *Flix Innovations Limited v HMRC* [2016] STC 2206 (Mann J and Judge Brannan) at [42] and *HMRC v Michael and Elizabeth McQuillan* [2017] UKUT 344 (Rose J and Judge Berner) at [34]-[38].⁷⁵*

3.29 The Tribunal went on to say that HMRC's construction:

' ... is not a purposive interpretation of paragraph 22(4) but a re-writing of the statutory language in a way that is, in our view, entirely unjustified. It has infected

⁷³ See Case Report at para. 152

⁷⁴ See para. 3.6 above

⁷⁵ See Case Report at para. 153

HMRC's approach to this appeal from the outset. For example, in a letter dated 20 September 2018 HMRC said:

"It is agreed the legislation relating to exceptional circumstances (s22 (4) and (5) Sch45 FA13) is silent on who the person, suffering the sudden or life-threatening illness or injury, must be. At the time the legislation was enacted HMRC's view was that the legislation [paragraph 22(4)] was intended to apply to the individual, the individuals' spouse, civil partner, person they live with as a partner or dependent child."

In other words, HMRC interpret paragraph 22(4) as not providing an exemption for, amongst others, siblings. No matter how many times we read paragraph 22(4), it is impossible to derive this limitation from the words actually used by Parliament. Whether "exceptional circumstances" can arise in relation to a sibling is a question of fact and degree to be determined in the light of all the circumstances of the particular case.⁷⁶

3.30 In support of its view the Tribunal quoted the words of Lewison LJ in the Court of Appeal in the case of *Hyman & Ors v. HMRC*⁷⁷:

'For a court to construe a statute is one thing but to graft a provision on to it on the ground that the court thinks it is reasonable to do so would bring the law into chaos ... For the courts to graft a provision on to a statute or a contract is a practice which is entirely foreign to our jurisprudence and, as far as I know, to any other.'⁷⁸

⁷⁶ See Case Report at para. 155. HMRC has asserted, without statutory authority that the persons whose sudden illness and injury could constitute an exceptional circumstance are restricted to this narrow class of persons since the Guidance was first published. See *M^cKie on Statutory Residence* at para. 4.5.17

⁷⁷ *Hyman & Ors v. HMRC* [2022] EWCA Civ 185 (Lewison, Simler and Snowden LJJ)

⁷⁸ See Case Report at para. 157

Conclusion

3.31 The Tribunal in *A Taxpayer v. HMRC*, therefore, robustly rejected HMRC's construction of the Exception as an attempt to substitute its own view of what the Exception ought to be for the statutory words enacted by Parliament.

3.32 The Tribunal endorsed a statement which was, ironically, made in HMRC's skeleton argument that:

' ... the flexibility contained in the exceptional circumstances test was "included for the purposes of ensuring that the predictability and certainty in the SRT did not create injustice, by being resistant to an individual being unable to leave the UK for reasons out of that individual's control."⁷⁹

3.33 It went on to say that:

'It seems to us that that encapsulates Parliament's intention in enacting paragraph 22(4) Schedule 45 FA 2013. That provision is intended to prevent the injustice which HMRC identify. Against the background of prescriptive rules concerning residence and days spent in the UK, paragraph 22(4) provides a measure of relief against the hard edge of those "bright line" rules."⁸⁰

An Appeal

3.34 HMRC has appealed against the Tribunal's decision in *A Taxpayer v HMRC*. As appeals from decisions of the First Tier Tribunal must be on points of law it would seem that the primary issues in the appeal must be HMRC's Construction Arguments. All Government departments have a duty to act not by reference to their own narrow interests but in the public interest. On what grounds can HMRC have concluded that it is in the public

⁷⁹ See Case Report at para. 131

⁸⁰ See Case Report at para. 132

interest for the Exception to be construed more narrowly than the construction adopted in its own guidance?

A lack of moral propriety?

3.35 The Exception was indeed intended to operate to relieve taxpayers in circumstances where the mechanical application of the Basic Day Count Rule would result in injustice including circumstances involving war, unexpected death, serious physical illness, catastrophic injury, accident, family trauma, the immediate results of mental 'illness' and the emergency care of the disabled, minors and other vulnerable persons. *A Taxpayer v. HMRC* is an example of the last of these circumstances. It is concerning that a department of Government should be so lacking in a sense of moral propriety that it regards the case as an opportunity to reduce the scope of the relief available to taxpayers in such unfortunate circumstances.

APPENDIX
GLOSSARY OF WORDS AND PHRASES

In this **Review** we use various words and phrases in special senses which we define in this Appendix. This Appendix lists those words and phrases and gives their definitions and the paragraphs in which they are first used.

DEFINED WORD OR PHRASE	DEFINITION	PARAGRAPH OF THE REVIEW IN WHICH THE DEFINED WORD OR PHRASE IS FIRST USED
<i>A Taxpayer v. HMRC</i>	The case of <i>A Taxpayer v. HMRC</i> [2022] UKFTT 0133 (TC)	1.1
Basic Day Count Rule	The rule provided by FA 2013 Sch 45 para. 22(1) that if an individual: <i>'is present in the UK at the end of a day, that day counts as a day spent by the individual in the UK.'</i>	1.1
Case Report	The published report of <i>A Taxpayer v. HMRC</i>	1.1
Disputed Days	The days in December 2015 and February 2016 on which the Appellant in <i>A Taxpayer v. HMRC</i> was present in the UK at midnight	3.3
Exception	The Exceptional Circumstances Exception to the Basic Day Count Rule which is under the provisions of FA 2013 Sch 45 para. 22(4)-(6)	1.1
FA	Finance Act	1.1
Guidance	HMRC's Guidance on the SRT from time to time	3.10
HMRC's Construction Arguments	HMRC's First Construction Argument, HMRC's Second Construction Argument, HMRC's Third Construction Argument and HMRC's Fourth Construction Argument together	3.25
HMRC's First Construction Argument	HMRC's argument, advanced in <i>A Taxpayer v. HMRC</i> , as to the construction of the Exception which is recorded in para. 3.8 hereof	3.8
HMRC's Second Construction Argument	HMRC's argument, advanced in <i>A Taxpayer v. HMRC</i> , as to the construction of the Exception which is recorded in para. 3.16 hereof	3.16

APPENDIX
GLOSSARY OF WORDS AND PHRASES

HMRC's Third Construction Argument	HMRC's argument, advanced in <i>A Taxpayer v. HMRC</i> , as to the construction of the Exception which is recorded in para. 3.20 hereof	3.20
HMRC's Fourth Construction Argument	HMRC's argument, advanced in <i>A Taxpayer v. HMRC</i> , as to the construction of the Exception which is recorded in para. 3.25 hereof	3.25
<i>McKie on Statutory Residence</i>	<i>McKie on Statutory Residence: The Residence of Individuals and Trustees</i> by Sharon and Simon McKie (Pub CCH - 2013)	2.5
SRT	The Statutory Residence Test under FA 2013 s.218 and Sch 45	1.1