

Resident or not?

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The concept of residence in the United Kingdom is fundamental to the determination of UK tax liability for any individual. For over 200 years the term 'residence' has never been defined in our tax laws and the issue of interpretation in any situation has been dependent upon considering case law and HMRC practice. All that is about to change with effect from 6 April 2013. On that date it is expected that a new Statutory Residence Test (SRT) will be introduced.

This will be written into law and will provide, through a series of tests, a definitive process to determine the UK residence status of any individual. That status will apply for income tax, capital gains tax and inheritance tax purposes. The Government wants to ensure that introducing a statutory test does not lead to situations where individuals can become and remain not resident without significantly reducing the extent of their connection with the UK. Equally, the Government is clear that individuals should not be resident if they have little connection with the UK.

Draft legislation has been published following a consultation process. There may be further changes to some of the detail but it is believed that the substance of the test is now known and individuals planning to change their residence status from 6 April 2013 need to have regard to the proposed new rules. Residence for UK tax years up to and including 2012/13 will continue to be determined on the current basis.

It should be pointed out that the proposed changes are to the rules which determine UK residence status. Once that status has been established then other rules determine the extent of an individual's liability to UK taxes. These other rules may include not just UK statute but also double tax treaties with other countries. These rules are not covered in this Briefing.

Counting days

The SRT relies heavily on the concept of counting 'days of presence' in the UK in the relevant tax year and so it is important to understand what this term means. A new definition was introduced in 2008 which introduced the basic concept of a day of presence being one where the individual was in the country at midnight. There will be two exceptions to that:

- the individual only arrives as a passenger on that day and leaves the UK the next day and in between does not engage in activities that are to a substantial extent unrelated to their passage through the UK and
- the individual would not be present in the UK at the end of the day but for exceptional circumstances beyond their control which prevent them from leaving and they would intend to leave as soon as those circumstances permit.

To prevent exploitation of this rule where an individual has been resident in the UK in at least one of the three previous tax years and has at least three 'ties' (this is explained later in this Briefing) with the UK it will be necessary to add to the total of 'midnight days' the excess over 30 of any other days where the individual spent any time at all in the UK.

Three tests

The SRT is based on a series of three tests which must be considered in a particular order in every case. The tests are applied to the facts in the

'relevant tax year' i.e. the year for which residence status is being determined and are applied as follows:

- first consider the Automatic Overseas Test (AOT). If this test is satisfied the individual will be not resident in the UK in the relevant tax year and no further tests are required. If the AOT is not satisfied then move on to
- the Automatic Residence Test (ART). If this test is satisfied the individual will be resident in the UK in the relevant tax year and no further tests are required. If the test is not satisfied move on to
- the Sufficient Ties Test (STT). If this test is satisfied the individual will be resident in the UK and if it is not satisfied they will be not resident.

The detailed conditions relating to each test are discussed below.

The Automatic Overseas Test

There are four possible tests in the AOT and if an individual satisfies any one of these they will be not resident in the UK in the relevant tax year. The conditions are that the individual:

- was resident in the UK in one or more of the previous three tax years and they are present in the UK for fewer than 16 days in the relevant tax year
- was not resident in the UK in all of the previous three tax years and they are present in the UK for fewer than 46 days in the relevant tax year

- works full time abroad for at least a complete tax year and they are present in the UK for fewer than 91 days in the relevant tax year and no more than 30 days are spent working (currently defined as more than 3 hours) in the UK in the tax year or
- died in the tax year and spent less than 46 days in the UK provided they were not resident in either of the two immediately preceding years.

The first two tests are simply based on a day count and ignore the existence of other factors such as other links with the UK like the availability of accommodation in the UK.

There are conditions for the third test which need to be considered by those planning to go abroad to work either as an employee or on a self-employed basis. Obviously the days of presence and the working days must be considered carefully. In addition it should be noted that:

- full time work is defined as an average of 35 hours a week over the whole period of absence. Account can be taken of a range of factors such as holidays and sick leave to effectively improve the average
- working days in the UK do not have to be the same as the days of presence so a day where there is UK work and the individual leaves the UK before the end of the day will count as a working day
- HMRC will expect evidence to be provided if it is claimed that the time limit for a working day has not been exceeded.

The way in which the subsequent tests are structured mean that it is really important that a working expatriate can pass the AOT and be treated as not resident otherwise they are likely to find a real problem under the later tests.

The Automatic Residence Test

If the AOT is not met then the individual must next consider the conditions of the ART. This test will be satisfied if any of the following apply to the individual for the relevant tax year:

- they are present in the UK for 183 days or more in a tax year or
- they have only one home, that home is in the UK, the home exists for a period of at least 91 days and the person is present at the home on at least 30 separate days in the tax year or
- they carry out full time work in the UK for a period of 365 days during which at least 75% of their time is spent in the UK or
- the person dies in the year having been resident in the UK for each of the three previous tax years and has a home in the UK.

The 'home' test may be of real significance because, if that test applies, the number of days in the UK is irrelevant. The legislation makes clear that a home can be a building or part of a building and can include a vessel or vehicle. It must have a degree of permanence or stability to count as a home but specific circumstances may have to be considered. A 'dwelling' abroad can only count as a home (and so negate the test) if the person spends more than 30 days at the 'dwelling' in the tax year.

The Sufficient Ties Test

If no conclusive answer to residence status has arisen under the first two tests, the individual must then look at how the STT applies to them for the relevant tax year. The test will be satisfied if the individual has sufficient UK ties for that year. This will depend on two basic conditions:

- whether the individual was resident in the UK for any of the previous three tax years and
- the number of days the individual spends in the UK in the relevant tax year.

The STT reflects the principle that the more time someone spends in the UK, the fewer connections they can have with the UK if they want to be not resident. It also incorporates the principle that residence status should adhere more to those who are already resident than to those who are not currently resident.

Under the STT an individual will simply need to compare the number of days of presence in the UK against five clearly defined connection factors. Individuals who know how many days they spend in the UK and how many relevant connection factors they have would find it straightforward to assess whether they are resident.

The five ties are summarily set out as:

- a family tie - this will apply if either a spouse or

minor child is resident in the UK in the relevant tax year

- an accommodation tie - where there is accommodation which is available for at least 91 days in the tax year and is actually used at least once
- a work tie - where there are at least 40 working days of three hours or more in the UK in the relevant tax year
- a 90-day tie - more than 90 days were spent in the UK in either or both of the two immediately preceding UK tax years and
- a country tie - more time is spent in the UK than in any other single country in the relevant tax year.

An individual who has been resident in the UK in any of the three preceding tax years must consider all five ties and they will be resident if any of the following apply:

Days in UK	Number of ties sufficient to establish residence
16 - 45	at least 4
46 - 90	at least 3
91 - 120	at least 2
121 - 182	at least 1

An individual who has not been resident in any of the three preceding years must consider all the ties apart from the country tie and they will be resident in any of the following situations:

Days in UK	Number of ties sufficient to establish residence
46 - 90	all 4
91 - 120	at least 3
121 - 182	at least 2

Special rules for international transport workers

This is defined as someone who:

- holds an employment, the duties of which consist of duties to be performed on board a vehicle, aircraft or ship (including any type of vessel), as it makes international journeys or
- carries on a trade, the activities of which consist of the provision of services on board a vehicle, aircraft or ship as it makes international journeys. The individual has to be present on board the respective carrier as it makes international journeys in order to provide those services.

An individual who has some duties on purely domestic journeys will still be regarded as within the definition provided that the international duties are substantial (probably at least 80%).

Where an individual falls within this group the implications for the SRT are as follows:

- the full time work abroad test for the AOT does not apply

■ the full time work in the UK test for the ART does not apply and

- in considering the work day tie for the STT an international transport worker is regarded as doing more than three hours work where any journey that day commences in the UK and fewer than three hours on any other day.

Split year rules

The basic rule will be that if an individual satisfies the conditions of the SRT to be treated as resident for a part of the UK tax year then they are resident for the whole of that year. Special rules will apply in certain circumstances to allow a year of arrival or departure to be split into resident and not resident parts as appropriate. We shall be pleased to discuss whether your plans or circumstances will be eligible for such treatment.

Anti-avoidance rules

The government wants to ensure that individuals are not able to exploit the rules to become not resident for a short period during which they receive certain types of income or make capital gains. Basically an individual with a history of at least four out of the previous seven years as a sole UK resident will need to maintain not resident status for at least five UK tax years otherwise certain income and all capital gains made in the period of absence will become taxable in the UK in the next year in which they are resident.

The key areas affected by these rules are:

- capital gains arising after the date of departure in respect of assets acquired before departure
- distributions of income from a close company where the amounts distributed were profits earned by the company before the individual departed from the UK
- loans to participators being written off after the date of departure
- lump sum payments under non registered pension schemes and
- chargeable event gains on certain life insurance policies and related products.

Seeking advice

A change of tax residence is always a major decision for any individual and the change in the rules means that detailed advice is going to be even more necessary. Please bear in mind that whatever your UK residence status may be in 2012/13, there is no automatic assumption that it will continue in future years. The facts will have to be separately considered each tax year and the change in 2013/14 means that great care must be taken in that year.

We are available to give you any advice you may need to consider your likely residence status and the UK tax implications that will flow from that status.

