

# NO PLACE LIKE HOME?

The statutory residence test raises concerns about the day count test but there is a degree of clarity, says **Andrew Murray**

**C**entral to a tax authority's ability to levy taxation is the residence status of an individual or company. As such, it is surprising that UK tax law has, until now, relied on HMRC guidance, interpretation and case law rather than a statutory test of residency. The result, as one would expect, has been largely unsatisfactory.

However, HMRC and the Treasury started a consultation procedure on the proposal to adopt a Statutory Residence Test (SRT) in 2011 with further consultation in June 2012 in an attempt to provide clarity to this area of tax practice. The new rules will come into effect from April 2013.

The SRT comprises three parts and is similar to the approach of the new controlled foreign companies (CFC) regime, essentially focusing on the nature, form and quality of a taxpayer's connection to the UK. Accordingly, an individual will be either automatically non-resident, automatically resident or resident based on having sufficient ties to the UK. It is an individual's connection to the UK that is the predominant focus of the test.

The purpose of this article is not to explain the principal mechanics of the SRT (as these have been widely covered elsewhere), but rather to identify some issues that may cause a potential headache for taxpayers and others that are, perhaps, more welcome.

## AUTOMATIC NON-RESIDENCE

For those who wish to remain non-UK resident, the SRT, albeit more tightly framed than existing guidance, provides that an individual

will be automatically non-resident where the *de minimis* day limit (now increased to 15 days from the original 10) is not exceeded, or where limited work is actually performed in the UK (if working full-time abroad).

The original 10-day limit meant that an individual would be in danger of having to consider their connection to the UK where they, for example, came to the UK for a two-week holiday. Any further days spent in the UK would then exclude them from being automatically non-resident.

Under the revised proposals an individual may now visit the UK for 15 days and continue to be automatically non-resident (despite any connections they may have to the UK). This is a welcome, though not overly generous, amendment to the SRT.

Additional consultation is also being sought on what constitutes a day spent working in the UK for those who work full-time abroad.

The current subjective approach of considering whether work undertaken in the UK is 'incidental' or 'substantive' will instead be replaced with a fixed three-hour (or five-hour, as this is currently being reviewed) test to determine a working day.

## AUTOMATIC RESIDENCE

Automatic UK-residence will now, rather arbitrarily, consist of having an 'only home' in the UK. Concerns that the test might make a large number of individuals automatically UK resident even where they do not have any other connection to the UK have not been resolved.

### NUMBERS GAME

STATUS	AUTOMATIC NON-RESIDENCE	AUTOMATIC RESIDENCE
<b>Arrivers to the UK</b> Persons not resident in UK in any of previous three tax years	In UK for less than 46 days	Present in UK for 183 days or more
<b>Leavers from UK</b> Persons resident in UK in any of previous three tax years	In UK for less than 16 days	Only one home in UK (or two or more homes all in UK) and this remains the case for a total of 91 days in the year whether continuous or not
<b>Full-time work</b>	Full-time work abroad but in UK for less than 91 days, and working in UK for up to 20 days only	Full-time work in UK

**SUFFICIENT TIES TEST**

**Number of days in UK**

**Arrivers**

*Persons not resident in the UK in previous three tax years*

**Leavers**

*Persons resident in at least one of previous three tax years*

Less than 16 days

Always non-resident

Always non-resident

16 – 45 days

Always non-resident

Resident if at least four factors apply

46 – 90 days

Resident if at least four factors apply

Resident if at least three factors apply

91 – 120 days

Resident if at least three factors apply

Resident if at least two factors apply

121 – 182 days

Resident if at least two factors apply

Resident if at least one factor applies

183 days or more

Always resident

Always resident



However, the government's response has been to emphasise that the 'only home' test is relevant only where that home is used for more than 91 days in a tax year.

**SUFFICIENT TIES TEST**

Where a taxpayer is neither automatically resident nor automatically non-resident, the nature of an individual's connection to the UK needs to be considered. The subjective criteria of ascertaining a 'sufficient tie' to the UK is likely to compound a taxpayer's compliance headache. Not only will this require consideration of how many of the factors apply, but also an account of the number of days spent in the UK each year. Note that as a nod to common sense, the day count tests change depending on the extent to which an individual is deemed to be connected to the UK. Perhaps the only concern is the government's attitude to what constitutes a 'sufficient tie' to the UK.

For example, the government views the residence status of a spouse or partner as a significant connecting factor. Concerns were raised during the consultation period about how to distinguish between casual or committed relationships. The government has decided not to amend the scope of this test because it 'could be seen to give some unmarried couples a tax advantage'. This stance seems at odds with the UK's individual basis of UK taxation.

That said, the government has recognised that including time spent with a child in the UK within the scope of the connection, tests could act as a disincentive for parents to return to the UK. Similarly, children resident in the UK will not be a 'connection' where they spend less than 21 days (down from 60 under the original proposal) in the UK during school holidays. These amendments reflect, perhaps, a more pragmatic approach to modern familial arrangements.



**The government has emphasised that the 'only home' test is relevant only where that home is used for more than 91 days in a tax year**

The sufficient ties tests will require individuals to be more diligent about their connections to the UK and bear the administrative burden of accurate record keeping.

**ORDINARY RESIDENCE**

One significant amendment to the residency rules will be the removal of the concept of ordinary residence. Although the abolition will simplify the rules, consequential changes to various legislative provisions (particularly the scope of individual anti-avoidance provisions) will also follow. This will mean more taxpayers will be caught by the provisions for the transfer of assets abroad. More importantly, the general remittance basis will now only be available to non-UK resident or non-UK domiciled individuals. Alongside this, the government has decided to give a statutory footing to overseas workday relief which will now only apply to non-UK domiciles.

While tax is not the only consideration for wealthy, highly mobile individuals in considering their length of stay in the UK, the current rules do not allow sufficient certainty. So the SRT is a welcome development. In particular, the increased emphasis on the nature of a taxpayer's connection to the UK recognises the global nature of many individuals' living and working practices. In the absence of a clear determination of residence or non-residence, the day count tests are relatively complicated and will place a compliance burden on taxpayers to support their position. On balance though, the connection tests are likely to provide a fair and balanced result.



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