

STATUTORY RESIDENCE TEST – AN UPDATE

Background

In the summer of 2011 the Government published a consultation document with the intention of introducing a statutory definition of residence to provide clarity for individuals. Following the consultation process the Government has recently published a further paper which includes a summary of responses to last year's consultation, raises further issues in an additional consultation period and sets out the draft legislation. The additional consultation period will continue until 13 September 2012 with a view to the publication of a Finance Bill this autumn.

We commented on the 2011 consultation in our Briefing Note of September 2010 entitled "Residence and Ordinary Residence: Proposed Changes". This Note updates the position.

Modifications following the Consultation

Part A (formerly factors establishing non-residence, now the automatic overseas test) has been slightly modified. An individual is non-resident if that individual:-

- was not resident in all the previous three tax years and is present in the UK for fewer than 45 days in the current tax year; or
- was UK resident in one or more of the previous three tax years and present in the UK for fewer than 15 days (formerly 10 days) in the current tax year; or
- leaves the UK for full-time work abroad, provided they are present in the UK for fewer than 90 days in the tax year and no more than 25 days (formerly 20 days) are spent working in the UK in the tax year.

Further consultation is being undertaken on the definition of the term "full time work abroad". The number of hours qualifying as a working day may be increased to 5 hours (from 3 hours) and the number of working days allowed in the UK may be increased from 20 to 25.

This note is intended for general guidance only and it is important to consider the effect of the provisions with reference to the facts of each particular case. Whilst every effort has been made to ensure that the information contained in this briefing is correct it is intended as a guide only and should not be relied upon when embarking on any tax or estate planning exercises. Specialist legal advice should always be sought so that all the factors specific to your circumstances can be taken into account.

Part B (formerly factors establishing residence, now the automatic residence test) survives largely unchanged, i.e. an individual will be considered resident if that individual:

- is present in the UK for 183 days or more in any tax year; or
- has only one home and that home is in the UK (or has two or more homes and all of those are in the UK); or
- works full-time in the UK.

The Government has confirmed that a “home” need not be a property an individual owns but could, for example, be a rented property. The Government has also confirmed that an individual would not fall under the “only home” condition if his only home (or homes) is in the UK for a period of under 91 days (for example if a foreign property is being sold). However, if there is a continuous period of at least 91 days during which the individual’s only home is in the UK and that period covers two separate tax years, that individual will be treated as having an “only home” in both tax years (although in some cases split year treatment may apply).

The rules on full-time work in the UK differ from the rules under Part A (which relate to full-time work abroad). Broadly the Government is considering a definition which would class an individual as working full time in the UK if he is employed or self-employed in the UK over a continuous period of 12 months and no more than 25 per cent of his duties are carried on outside the UK during the period of full-time work.

An individual who does not meet any of the conditions in Part B will not necessarily be non-UK resident; instead he would need to consider Part C of the test.

In exceptional cases an individual may satisfy the conditions of both Parts A and B. In such circumstances, it is proposed that non-UK resident status would prevail.

Part C – the sufficient ties test

Part C – only applies to those individuals whose residence status is not determined by parts A or B and therefore whose situation is more complicated. Residence is determined by considering how many ties or “connection” factors an individual has with the UK, together with the number of days he spends in the UK.

This note is intended for general guidance only and it is important to consider the effect of the provisions with reference to the facts of each particular case. Whilst every effort has been made to ensure that the information contained in this briefing is correct it is intended as a guide only and should not be relied upon when embarking on any tax or estate planning exercises. Specialist legal advice should always be sought so that all the factors specific to your circumstances can be taken into account.

This part of the proposed test reflects the principle that the more time someone spends in the UK, the fewer ties he can have with the UK if he wants to be non-UK resident. In consequence, it puts forward different rules for those arriving in the UK (who have been non-UK resident in all of the three tax years preceding the year under consideration) (“**Arrivers**”) and those leaving the UK (who have been resident in one or more of the previous three tax years) (“**Leavers**”) so it is harder to become non-resident when leaving the UK after a period of residence than it is easy to become resident when arriving in the UK.

The connection factors summarised below will be combined with days spent in the UK to form a “scale” as shown below to determine whether the individual is UK-resident:

- Family – the individual has a spouse, civil partner or common law equivalent (provided they are not separated from the individual) or minor children resident in the UK. It is accepted that children being educated in the UK should not be deemed a family connection, providing that the minor child spends less than 21 days in the UK outside term time.
- Accommodation – the individual has accommodation or a place to live available to them in the UK for a continuous period of at least 91 days in a tax year and spends at least one night in that place during the tax year. A place to live includes, but is not limited to, a home in the UK, a holiday home, weekend home, temporary retreat or something similar. (There will be an exception for accommodation held by relatives (other than the individual’s spouse, partner or minor children). In theory such accommodation (e.g. the parental home) may be available continuously and therefore accommodation held by relatives will only count as a connection factor if the individual spends more than 15 nights there during the tax year.
- Substantive work in the UK – the individual does substantive work in the UK but does not carry out full-time work in the UK.

This note is intended for general guidance only and it is important to consider the effect of the provisions with reference to the facts of each particular case. Whilst every effort has been made to ensure that the information contained in this briefing is correct it is intended as a guide only and should not be relied upon when embarking on any tax or estate planning exercises. Specialist legal advice should always be sought so that all the factors specific to your circumstances can be taken into account.

- previous UK presence – the individual spent more than 90 days in the UK in either of the previous two tax years

and, for the purposes of Leavers only:

- More time in the UK than in other countries – the individual spends more days in the UK in the tax year than in any other single country.

Adjustments have been made to the day counting tables previously published.

For individuals UK resident in one or more of the previous three tax years (“**Leavers**”):

Days spent in the UK

Fewer than 16 days (formerly fewer than 10 days)
 16 to 45 days (formerly 10 to 44 days)
 46 to 90 days (formerly 45 to 89 days)
 91 to 120 days (formerly 90 to 119 days)
 121 to 182 days (formerly 120 to 182)
 183 or more (no change)

Impact of connection factors on residence status

Always non-resident

 Resident if 4 factors or more
 Resident if 3 factors or more
 Resident if 2 factors more
 Resident if 1 factor or more
 Always resident

For individuals not resident in the UK in all the previous three tax years (“**Arrivers**”)

Days spent in the UK

Fewer than 46 days (formerly fewer than 45 days)
 46 to 90 days (formerly 45 to 89 days)
 91 to 120 days (formerly 90 to 119 days)
 121 to 182 days (formerly 120 to 182 days)
 183 or more (no change)

Impact of connection factors on residence status

Always non-resident

 Resident if 4 factors or more
 Resident if 3 factors or more
 Resident if 2 factors or more
 Always resident

This note is intended for general guidance only and it is important to consider the effect of the provisions with reference to the facts of each particular case. Whilst every effort has been made to ensure that the information contained in this briefing is correct it is intended as a guide only and should not be relied upon when embarking on any tax or estate planning exercises. Specialist legal advice should always be sought so that all the factors specific to your circumstances can be taken into account.

Other aspects worth noting include:

Transitional Rules

Transitional rules will apply in cases where an individual needs to establish their residence status in years prior to the introduction of the residence test, when it is necessary to determine their residence in future tax years.

Day Counting in Exceptional Circumstances

A new rule will be introduced so that days spent in the UK in “exceptional circumstances”, i.e. beyond the individual’s control, will be disregarded for day counting purposes (up to a maximum of 60 days in any tax year).

Split Year Treatment

Currently, an individual is either resident in the UK for a full tax year or non-UK resident for a full tax year. However, by concession, it is possible to split a tax year so that an individual is treated as UK-resident for only part of the tax year.

The proposed test incorporates a split year test, but whereas the current test relies on the vague concept of a person becoming “permanently” resident in the UK or elsewhere, the new rules will treat a tax year as being split into periods of UK residence and non-UK residence if an individual:

- Becomes resident by virtue of their only home being in the UK (arriving or returning);
- Becomes resident by starting full-time employment in the UK (arriving or returning);
- Establishes their only home in a country outside the UK and becomes tax resident in that country and does not come back to the UK in that tax year for more than 15 days (leaving); or
- Loses UK residence by virtue of working full-time abroad (leaving).

This note is intended for general guidance only and it is important to consider the effect of the provisions with reference to the facts of each particular case. Whilst every effort has been made to ensure that the information contained in this briefing is correct it is intended as a guide only and should not be relied upon when embarking on any tax or estate planning exercises. Specialist legal advice should always be sought so that all the factors specific to your circumstances can be taken into account.

A tax year will not be treated as split where the residence status of an individual changes due to changes in the number of connection factors under Part C, such as the arrival or departure of his family.

If an individual becomes non-UK resident by virtue of leaving the UK to work full-time abroad and is accompanied by his spouse, civil partner or common law partner, split year treatment would also apply to the spouse, civil partner or common law partner (subject to certain conditions).

The Government has confirmed that it will be possible for an individual to have split year treatment in consecutive tax years, provided that they meet the other relevant conditions. However, it will not be possible for the same tax year to be split more than once or for individuals to elect for split year treatment not to apply.

Anti-avoidance provisions

An individual will continue to be treated as being in the UK on any day where they are in the UK at midnight. However, the Government is concerned that this rule is open to manipulation and consequently it is considering a targeted supplementary rule which would apply only to those who are present in the UK on a large number of days without ever being in the UK at midnight on those days.

As proposed a new income tax anti-avoidance rule will be introduced in relation to some forms of investment income. This is similar to the existing capital gains tax temporary non-UK residence provision, which broadly allows chargeable gains realised while an individual is non-UK resident for a period of less than five years to be taxed in the year of his return to the UK. This is to deter people from becoming non-UK resident for short periods of time to avoid UK tax liability on expected income.

Abolition of Ordinary Residence

It is proposed that ordinary residence will be abolished for tax purposes as part of the Government's aim to simplify the tax system. However, overseas work days relief will remain for not ordinarily resident employees but will be put on a statutory footing.

This note is intended for general guidance only and it is important to consider the effect of the provisions with reference to the facts of each particular case. Whilst every effort has been made to ensure that the information contained in this briefing is correct it is intended as a guide only and should not be relied upon when embarking on any tax or estate planning exercises. Specialist legal advice should always be sought so that all the factors specific to your circumstances can be taken into account.

Transitional provisions will be introduced to ensure that those individuals who currently benefit from being not ordinarily resident are not disadvantaged as a result of the abolition. Thus they will be able to continue to receive their particular tax treatment for up to two tax years following commencement.

Conclusion

The long awaited statutory residence test, if adopted, is likely to provide a higher degree of certainty for individuals in determining their tax residence. However, the new test will not be able to provide absolute certainty for all taxpayers and the application of Part C, in particular, is unlikely to be straightforward. Accordingly, obtaining detailed advice well in advance of the introduction of the new rules in April 2013 is strongly recommended in the majority of cases.

August 2012

This note is intended for general guidance only and it is important to consider the effect of the provisions with reference to the facts of each particular case. Whilst every effort has been made to ensure that the information contained in this briefing is correct it is intended as a guide only and should not be relied upon when embarking on any tax or estate planning exercises. Specialist legal advice should always be sought so that all the factors specific to your circumstances can be taken into account.

If you would like any more information or would like to discuss any of the issues raised, please contact any of the following:



Christopher Cooke
Senior Partner
Corporate & Wealth Planning
+44 (0)20 7689 7110
ccooke@rooksriders.co.uk



Karen Methold
Partner
Head of Wealth Planning
+44 (0)20 7689 7112
kmethold@rooksriders.co.uk

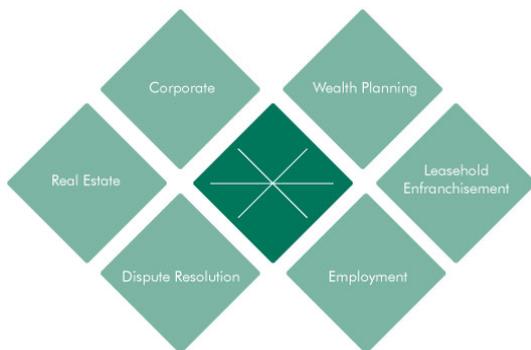


Robert Drysdale
Associate
Wealth Planning
+44 (0)20 7689 7168
rdrysdale@rooksriders.co.uk



Jeremy Duffy
Solicitor
Wealth Planning
+44 (0)20 7689 7185
jduffy@rooksriders.co.uk

CREaTe[©]



Rooks Rider Solicitors LLP
Challoner House
19 Clerkenwell Close ■ London ■ EC1R 0RR

This note is intended for general guidance only and it is important to consider the effect of the provisions with reference to the facts of each particular case. Whilst every effort has been made to ensure that the information contained in this briefing is correct it is intended as a guide only and should not be relied upon when embarking on any tax or estate planning exercises. Specialist legal advice should always be sought so that all the factors specific to your circumstances can be taken into account.