

Residence – light at the end of the tunnel

Long term readers of this newsletter may be familiar with the difficulties currently attached to determining whether an individual is resident in the UK for income and capital gains tax purposes.

In HMRC's previous guidance (IR20), HMRC stated an individual will not be UK resident if they leave the UK permanently and their absence covers at least a whole tax year (three if there is a lack of other evidence) and visits to the UK are less than 183 days in any tax year and average less than 91 days per tax year.

Enter the now infamous case of Mr Gaines-Cooper. Mr Gaines-Cooper left the UK in 1976 with the purpose of establishing himself as an international businessman. He was absent for at least a whole tax year and his return visits never exceeded the specified number of days. After four years, HMRC checked that he was not in the UK for more than 91 days a year. Mr Gaines-Cooper declared that he was not and continued on his way, secure that under HMRC's own guidance at the time (encapsulated in IR20), he was not UK resident.

Over twenty years later, HMRC then sought to claim that he was UK resident after all, on the basis that he had not sufficiently severed his ties to the UK. Although Mr Gaines-Cooper had purchased a house abroad, he had also retained a house in the UK for the years in question and purchased an estate in addition. It was later held "England remained the centre of gravity of his life and his interests."

When it was pointed out that HMRC's claims conflicted with their published guidance, HMRC initially said that Mr Gaines-Cooper's interpretation of IR20 had been incorrect. The Court did not accept this argument so HMRC then admitted that his interpretation wasn't incorrect but went on to claim that they weren't bound by their own guidance anyway

An understandably irate Mr Gaines-Cooper took the case to the Court of Appeal. HMRC then switched tack to announce that their guidance was binding on them after all but that the rule for individuals leaving permanently contained an implied term – an individual had to sever his social and family ties with the UK to be non UK resident. Such an implied term came as news to the individuals and tax practitioners who had relied on the guidance for decades (and possibly also to the Revenue officers!). Unfortunately for Mr Gaines-Cooper, the Court of Appeal agreed with this new argument.

Undeterred, Mr Gaines-Cooper has appealed; the case has now been heard by the Supreme Court (formerly the House of Lords) with the decision expected in Autumn.

In the meantime, HMRC's latest guidance simply lists a range of factors (including among others family, property and work life) and the less than helpful information that 'if the nature and degree of your ties to the UK show that it is usual for you to live in the UK, you are resident in the UK'. In respect of permanent leavers, the

latest guidance states that as well as establishing a permanent home elsewhere, you must also make a definite break from the UK and any remaining ties you have with the UK must be consistent with not being resident here.

Into this mess wades the government, with the admirable intention of making it possible for an individual to determine with clarity their own residence status. New legislative rules are proposed distinguishing between 'arrivers' and 'leavers,' with it being harder to lose residence status than to gain it.

The new proposed rules come in stages:

1. Stage One – individuals who are conclusively non resident

An individual will be conclusively non UK resident if:

- 1.1 They were not resident in the UK in all of the previous three tax years and they are present in the UK for fewer than 45 days in the current tax year, or
- 1.2 They were resident in the UK in one or more of the previous three tax years and they are present in the UK for fewer for 10 days in the current tax year, or
- 1.3 They leave the UK to carry out full time work abroad and they are present in the UK for fewer than 90 days in the tax year and no more than 20 days are spent working in the UK in the tax year

If an individual meets any of the above criteria – stop – they are not UK resident. If none of the above criteria applies, it is necessary to look at stage two.

2. Stage Two – individuals who are conclusively resident

An individual will be conclusively UK resident if they:

- 2.1 Are present in the UK for 183 days or more in a tax year, or
- 2.2 Have only one home and that home is in the UK (or more than one and all are in the UK), or
- 2.3 Carry out full time work in the UK

If an individual meets any of the above criteria – stop – they are UK resident.

If none of the above criteria applies, it is necessary to look at stage three.

3. Stage Three – other connecting factors

Where an individual is neither conclusively non-resident nor conclusively resident, it is necessary to add up the number of 'connecting factors' they have.

The connecting factors are:

- 3.1 Family – if the individual's spouse or minor children are resident in the UK
- 3.2 Accommodation – if the individual has accessible accommodation in the UK and makes use of it during the tax year (subject to some exclusions)
- 3.3 Substantive work in the UK - the individual does substantive (but not full time) work in the UK
- 3.4 UK presence in previous years – the individual spent 90 days or more in the UK in either of the previous two tax years
- 3.5 More time in the UK than in other countries – if the individual spends more time in the UK in any tax year than in any other single country.

The factors are then applied as follows:

For arrivers (i.e. individuals not resident in all the three previous tax years), the first four factors above are applied as follows:

Days spent in UK	Impact of connection factors on residence status
Fewer than 45 days	Always non resident
45 – 89 days	Resident if individual has 4 factors (otherwise not resident)
90 – 119 days	Resident if individual has 3 factors or more (otherwise not resident)
120 – 182 days	Resident if individual has 2 factors or more (otherwise not resident)
183 days or more	Always resident

For leavers (i.e. individuals resident in one or more of the three previous tax years), all five factors above are applied as follows:

Days spent in UK	Impact of connection factors on residence status
Fewer than 10 days	Always non resident
10 – 44 days	Resident if individual has 4 factors or more (otherwise not resident)
45 – 89 days	Resident if individual has 3 factors or more (otherwise not resident)
90 – 119 days	Resident if individual has 2 factors or more (otherwise not resident)
120 – 182 days	Resident if individual has 1 factor or more (otherwise not resident)
183 days or more	Always resident

As the process of determining residence therefore becomes a matter of answering a series of questions, a computer program has been created to assist: - try it at http://www.hm-treasury.gov.uk/consult_statutory_residence_test.htm

The above is still at the consultation stage and may yet be changed. As for Mr Gaines-Cooper, it is probably little consolation that under the new rules, he might have been non-resident after all!

Lisa deals with the administration of all types of taxable and non taxable estates including those with an agricultural, business or international element. She also advises on Wills, estate planning, lifetime settlements and Will trusts, lasting powers of attorney and tax planning for a wide range of clients.



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