

## UK Government Consults On Statutory Residence Test

6 July 2011

### Background

In recent years, UK law on tax residence has become increasingly problematic following a number of high-profile cases and changes to the UK Revenue's published guidance. Although for most people living and working full-time in the UK the application of the residence rules is straightforward, individuals coming here for short periods of time (up to two or three years), not working full-time in the UK, and/or spending significant days out of the UK have faced increasing uncertainty about their residence status. The position of individuals who want to cease UK residence but maintain some ties to the UK has been especially difficult. For a number of years members of the legal and tax professions have been calling for the introduction of a clear and objective statutory residence test ('SRT').

### Overview

On 17 June 2011, the long-awaited consultation documents on the SRT and changes to the tax treatment of non-domiciled UK residents ('NDR's) were published. The deadline for responses to the questions raised in the consultation documents is 9 September 2011. Once the consultation is completed, it is anticipated that the SRT and the changes to NDR taxation will take effect from 6 April 2012. McDermott has published a separate On The Subject on the remittance basis consultation, available [here](#).

### Statutory Residence Test

The intention is to replace the current historic rules, based on a combination of partial statutory rules and case law developed over a number of decades, with a clear SRT which provides certainty for the individual taxpayer and which is simple to use, without providing opportunities for tax avoidance.

In recent years both case law and Revenue guidance have emphasised that a person's tax residence status depends not only on the amount of time spent in the UK (day count) but also on that individual's personal connections with the UK (connecting factors). The terms of the SRT proposed in the consultation document follow this dual approach. The proposed SRT also follows the recent practice that it is harder for a person who has been resident in the UK to lose UK residence when compared with someone coming to the UK for the first time in a number of years. The key points of interest for clients are set out below.

The proposed test is in three parts. Part A sets out the circumstances in which a person is conclusively not UK resident. This includes safe harbours so that a person who wishes to avoid being UK resident in a year can keep below a fixed day count and ensure he will not be resident. Persons who have been non-resident in all three of the preceding UK tax years would be able to spend up to 44 days in the UK without becoming resident, but persons who have been resident in any of the three preceding years, may spend no more than 9 days in the UK to be conclusively non-resident. The 9 day maximum in particular appears unduly restrictive, but at least enables an individual to determine his status with certainty. Persons who leave the UK for full-time work abroad are also conclusively non-resident.

If an individual would face uncertainty in determining his residence status under the current rules, this could lead to problems for determining which part of the SRT day count provisions would apply to him. The consultation currently proposes that there will be no transitional rules but this seems unsatisfactory when the overall aim of the SRT is to remove the uncertainty of the current rules.

Part B sets out the circumstances in which a person is conclusively resident. These apply where a person is present in the UK for 183 days or more in a tax year, where he has only one home and that home is in the UK (or several homes all in the UK) or where he works full-time in the UK. In the unlikely event a person meets one of the criteria in Part A and one in Part B, Part A takes precedence.

Part C deals with persons who do not fall in either Part A or Part B. It is here that the combination of day count and connecting factors determines the outcome. As in Part A, different day count tests are applied, in conjunction with connecting factors, depending on whether the individual has been non-resident in all of the preceding three tax years (referred to as 'arrivers'), or resident in one or more of the preceding three tax years (referred to as 'leavers'). Broadly speaking, the more days spent in the UK the fewer connecting factors are needed to make the individual UK resident.

The connecting factors are limited to five and are intended to be relatively straightforward for the individual to determine. They are:

- Family – if the individual's spouse, civil partner or common law equivalent (provided that they are not separated), or if the individual's minor children (under 18) are resident in the UK and the individual spends time with those children or lives with them for all or part of 60 days or more during the tax year anywhere in the world;
- The individual has accessible accommodation in the UK and the individual (or any of his Family) makes use of it in the tax year. For this purpose accessible accommodation has a wide meaning

but would not include lodging with relatives for a temporary short-term visit or short-term accommodation in hotels;

- The individual has substantive work in the UK, but not full-time work, broadly this is met where the individual works in the UK for 40 days or more, doing at least 3 hours of work in the UK on the day in question and this includes any day where the person is not in the UK at the end of the day – an individual who is monitoring his connecting factors and day count and making a number of short trips to the UK in the tax year will need to keep a record of any occasional work undertaken in the UK, particularly on days of departure, as dealing with work emails or calls in an airport departure lounge if this is for at least three hours, will count as a day's work for this connecting factor even if it will not count towards his day count;
- The individual spent 90 days or more in the UK in either of the two previous tax years; and
- The individual spent more time in the UK than in any other single country. This connecting factor is relevant only for leavers.

In practical terms individuals will need to keep a number of detailed records relating to the days spent in the UK by both themselves and their spouse/civil partner or common law equivalent. For this purpose days which are counted are those on which the person is in the UK at midnight. They will also need to keep records of any days (including, presumably, part days) spent with their minor children anywhere in the world and days on which they work in the UK for 3 hours or more (regardless, in the latter case, of whether they are in the UK at midnight).

### **Ordinary Residence**

The Government are also consulting on ordinary residence, which is a separate concept from tax residence. Broadly speaking, however, it only affects the tax treatment of a small minority of individuals, particularly arrivals in their first few years after arrival. The consultation considers whether to scrap ordinary residence altogether except in the limited case of overseas workday relief, or to retain it and create a statutory test.

### **Comments and conclusion**

The proposed SRT is still subject to consultation on a number of questions and the detail of the various tests and connecting factors is likely to change before it is enacted, however the overall approach is encouraging and it seems likely that the individual and his advisers will at last be able to determine the individual's tax residence status with certainty, albeit that the 9-day safe harbour feels very ungenerous

and the lack of transitional rules may create problems for a minority of clients in the first three years of the new SRT.

McDermott anticipates that it will submit a response to the consultation on a number of the detailed points, either via one of the professional bodies, or independently and will monitor the consultation and subsequent developments closely.

The full consultation document can be downloaded from the [HM Treasury website](#)

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