RESIDENTS AND NON-RESIDENTS: NEW IR 20 AND THE DEMISE OF "AVAILABLE ACCOMMODATION"

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This article was originally conceived as a comparison between the Revenue practice in determining residence as set out in the new version of the Inland Revenue Pamphlet IR 20 ("Residents and Non-Residents: Liability to Tax in the United Kingdom") and the previous edition of that booklet. However, events have somewhat overtaken that original plan. In a Press Release issued immediately after the Budget statement on 16th March[2], the Inland Revenue announced plans to abolish the "available accommodation" rule. This article therefore examines both the implications of that announcement as well as the tests for residence in the new IR 20.

New IR 20

The publication of a new version of IR 20 in October 1992, if not cause for celebration, is at least cause to examine the UK rules for determining the residence status of individuals. It is unlikely that any other Inland Revenue pamphlet contains so many detailed practices with such a direct effect on so many taxpayers and potential taxpayers. The statutory material on the determination of residence of individuals remains very thin - essentially ss.334 to 336 ICTA 1988. Sections 334 and 336 date from the Income Tax Act 1842[3]. Section 335 (discussed briefly below) was added in 1956[4]. There are few recent cases; IR 20 purports to be largely based on rulings of the Courts. In fact, the pamphlet contains a generally workable series of tests based very loosely on the few reported cases. Perhaps the most anomalous of these rules was the "available accommodation" rule.

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[2] and not actually referred to in the Budget.

[3] They were originally enacted as a single section, s. 39 of that Act.

[4] FA 1956 s.11.

The new IR 20 is the first new edition of that pamphlet since 1986. The 1986 version was, however, identical to the 1983 version in its discussion of the tests of residence and non-residence. The new IR 20 is, therefore, the first restatement of the Inland Revenue practice for almost ten years.

New IR 20 adopts the modern, easier-to-read approach of many recent Revenue publications. One helpful change is that references to a number of months have been changed to references to a fixed number of days. Thus, an individual who is present for 183 days or more in a year is always resident (previous editions referred to six months, but then stated that this was regarded as equivalent to 183 days)[5]. A visitor who makes regular visits averaging more than 91 days a year over a four year period will be regarded as resident from the beginning of the fifth year (previous editions referred to visits of three months)[6]. This change follows the case of *Wilkie v IRC*[7] which held that months meant calendar months and that six months was equivalent to 183 days. It also makes it clear that the process of determining residence involves an exact count of the number of days of absence or presence[8]. The Revenue have maintained their practice that, in calculating the 183 days, days of arrival and departure will normally be ignored.

5 See New IR 20, para. 1.2.

6 New IR 20, para 3.3.

7 (1952) 32 TC 495.

8 A matter which is becoming increasingly difficult as the Immigration Service stamp less and less passports on entering and leaving the UK. An individual for whom the number of days is critical must retain the airline ticket stubs as proof of entry and exit.

It is quite interesting in this context to note a study[9] carried out by the OECD in connection with the "183 day" rule for employment income in tax treaties[10]. In response to a questionnaire sent to all OECD Member States, the UK stated that, in calculating the 183 days in this context, the Inland Revenue include days of arrival and departure, as well as any weekends, national holidays and individual holidays spent inside the UK[11]. It might be helpful if the Revenue were to adopt a uniform practice for all purposes of computing days; for example, including days of arrival but not days of departure[12]. It might also be helpful if this were in statutory form[13].

Aside from matters of presentation, the principal changes in the new IR 20 have been made so as to take account of Extra-Statutory Concessions and Statements of Practice issued since the pamphlet was last revised, and to include an elaboration of the "available accommodation" concept. Since the last edition of the pamphlet, the Revenue have amended ESC A11 on the splitting of years of assessment. They have also issued ESC A78 on accompanying spouses; full account of this is taken in the new IR 20[14]. Two Statements of Practice have been issued - SP 2/91 on visits extended because of exceptional circumstances, such as illness[15], and SP 17/91 on the time at which ordinary residence commences[16].

The Development of a "Property Ownership" Test

There has been an interesting but worrying progression with respect to the acquisition of property in the UK. Inland Revenue Statement of Practice SP 3/81 ("Individuals coming to the UK: ordinary residence") treated an individual as *ordinarily resident* if "he has, or acquires during the year of arrival,

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9 "The 183 Day Rule: Some Problems of Application and Interpretation" in OECD; Model Tax Convention: Four Related Studies (Paris, 1992).

10 Under Art. 15 of the OECD Model Treaty, an employee from one state is not taxable in the other state on income earned there unless, inter alia, the employee spends 183 days in the other state.

11 Ibid., p.21.

12 Which appears to be the Irish practice - see ibid.

13 As it is, for example, with respect to the foreign earning deduction - see Sch 12 para 4 ICTA 1988 which contains the rule that, for that deduction, an individual is only regarded as absent from the UK on a day if he is absent at the end of that day.

14 See para 2.4.

15 Reflected in new IR 20, para 3.3

16 New IR 20, para 3.5.

accommodation for his use in the UK which he occupies on a basis that implies a stay in this country of three years or more". This was included in the 1983 and 1986 versions of IR 20[17]. SP 17/91 then referred, in the context of the time when ordinary residence commences, to accommodation being bought or being acquired on a lease of three years or more: where an individual bought a property or acquired a lease for three years or more, then ordinary residence began from the start of that year. New IR 20 follows this by similarly referring to an individual becoming ordinarily resident if he buys accommodation or leases it on a lease of three years or more[18]. Thus there has been a move from the acquisition of property as an indicator of an intention to reside for three years to a new position where the acquisition of property for more than three years is one of the tests of ordinary residence. As will be seen, Notes to the March 1993 Press Release indicate that this test will also apply in future to determine residence (rather than ordinary residence). The Revenue seem to be moving towards a "property ownership" rule for determining residence in place of the "available accommodation" rule.

Available Accommodation

The issue of acquisition of property leads on to the issue of "available accommodation". The Revenue have long held the view that an individual is to be regarded as resident if he or she has accommodation available in the UK and visits the UK, no matter how short the visit[19]. The rule is excluded by statute where the individual works full time outside the UK[20].

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17 Para 27 of each edition.

18 See paras 3.9 and 3.11.

19 See, for example, New IR 20, para 3.3.

20 s.335 ICTA 1988. It is also excluded in determining residence for inheritance tax deemed domicile purposes - see s.267(4) IHTA 1984.

The basis for the available accommodation rule was cases such as *Cooper v Cadwalader*[21] and *Lowenstein v de Salis*[22]. In the first case, the taxpayer leased a shooting lodge in Scotland for an initial three years, and then renewed that lease for one year and subsequently for two more; he spent on average two months a year in the UK. The Scottish court confirmed that he was resident in the UK. In the second case, the taxpayer was the principal shareholder in a company which owned a hunting box; the taxpayer visited the UK in the years in question, and stayed in the box, for approximately four months each year. Rowlatt J confirmed that the taxpayer was resident in the UK in the years in question.

It has been pointed out[23] that none of the cases go as far as the Revenue practice in deeming any visit to the UK - however short - while there is accommodation available to be sufficient to make an individual resident. Being on slightly thin ice may be one of the reasons why the Revenue have now abandoned the concept of available accommodation. The Revenue obviously considered, however, that this rule was based on law and not merely on Revenue practice; the Press Release indicates that it will be reversed by legislation and not simply by a change in Revenue practice. The United Kingdom and Ireland were also the only countries to adopt the "available accommodation" rule in this form. The UK was therefore out of line with most other states in maintaining this somewhat aberrant rule. The Press Release indicates that the change is intended to bring the UK into line with other countries.

One of the most significant features of new IR 20 (now largely redundant, however, since the Budget day Press Release) was an elaboration of the concept of "available accommodation". Thus, the pamphlet spelt out for the first time that accommodation which you own might not be available for your use if, for example, it was only available for the part of the year you were not in the UK, or was owned as an investment and not used by you, or was too far away from the place you were visiting[24]. Greater prominence was also given to two rules which were contained in previous versions of the pamphlet - that rented accommodation could be ignored if it was rented furnished for less than two years or rented unfurnished for less than one year[25]. The source for these rules, rather like the source for the "one visit is enough" rule, was obscure.

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21 (1904) 5 TC 101 (Court of Exchequer (Scotland)).

22 (1926) 10 TC 424 (High Court).

23 See Whiteman, *Income Tax*, p.126.

24 See para 4.3.

25 Ibid.

The Press Release

The Inland Revenue Press Release of 16th March has now swept away the "available accommodation" rule. The new IR 20 may, therefore, prove to be one of the shortest-lived Inland Revenue publications: the abolition of the rule necessitates a new edition of the pamphlet with references to that rule deleted. The change is to take effect for income tax and capital gains tax from 6th April 1993.

The reason for the change is expressed in the Press Release to be that of making the United Kingdom an attractive business location, from the point of view both of international companies and their employees. It is a little hard to understand quite why this change was needed to achieve that purpose. If a foreign employee is seconded to the UK for more than 183 days in a tax year, or more than 91 days on a regular basis, he or she will become resident under the remaining tests. If he or she is also resident in another state with which the UK has a tax treaty in force, then the "tie-breaker" clause of that treaty[26] would usually regard the individual as resident for treaty purposes in the state in which his permanent home is located - generally the other state. Thus the only employees who might be significantly affected by the change are those who have accommodation available, who come once for less than 183 days or frequently for less than 91 days, and come from states with which the UK has no treaty. Perhaps the only sense in which the change achieves the stated objective is that it will make it more attractive for foreign companies to acquire accommodation in this country which they would then make available to employees seconded for a single visit of less than 183 days or regular short visits. The individual employee would never become resident in the UK and would, therefore, never even have to claim the protection of the relevant treaty.

The actual text of the Press Release begins as follows:

> "The Chancellor proposes in his Budget to abolish the "available accommodation" rule. This rule treats individuals in the United Kingdom for a temporary purpose only as resident for tax purposes for any tax year in which they visit this country - no matter how short the visit - and have accommodation available for their use here."

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[26] Art 4(2) of the OECD Model.

The Notes[27] to the Press Release make it clear that this change does not apply to a person who comes to the UK for permanent residence or with an intention to stay for at least three years. It will affect only those who come for a temporary purpose[28].

Perhaps more important, the Notes to the Press Release also contain the following paragraph:

> "There will be no change in the practice of treating as *resident and ordinarily resident* an individual who comes to and remains in the UK where he or she owns or acquires on a lease of 3 years or more accommodation in this country. Similarly, where an individual leaves the UK, the retention of a home here will continue to be a factor in considering whether he or she has left the UK permanently." (emphasis added)

This statement raises a number of problems. Firstly, note the extension of the property ownership rule from a factor indicating ordinary residence to a determinant of residence itself. Despite what the Note says, this is not the existing Revenue Practice, at least not the published practice[29].

Secondly, there is no explanation at all of the meaning of owning property. Clearly it covers the situation where the individual is the sole owner or a co-owner of the freehold. But what if the property is owned by the individual's spouse, or a company in which the individual is the major shareholder, or a trust of which the individual is a beneficiary? Are all or any of these situations to be regarded as ones where the individual is treated as owning the property? If they are, then what is the difference between this "property ownership" rule and the "available accommodation" rule?[30]

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27 The Notes are actually "Notes to Editors" and are issued along with each Press Release.

28 See Para 4 of the Notes to Editors attached to the Press Release.

29 This may simply be an error; Notes to Press Releases are not generally issued to be relied upon by taxpayers.

30 With respect to property owned by the taxpayer's spouse, a useful case is *Derry v IRC* (1927) 13 TC 30 where the taxpayer's wife owned a house in England in which he stayed during his visits to the UK: the husband was found not to be resident in the UK.

The third series of problems concerns the three year lease test; how are the three years to be calculated? Suppose that an individual takes a one year lease which is renewable, does the individual satisfy the three year lease test from the outset, or only after the lease has been renewed for three years, or never? What if different members of the taxpayer's family each take a lease of the same property for one year at a time; when (if at all) is the three year test satisfied?

A final problem touches on the difference between the property ownership test and the available accommodation test. Accommodation was not available if it was uninhabitable or if it was occupied by others who could exclude the owner. Ownership is not so limited. Is an individual to be regarded as ordinarily resident (and, possibly, resident) if he owns a property in the UK which is leased out or which is unfurnished and has had the power supply disconnected? The answer to this issue may lie in the word "accommodation"; a property owned by an individual but which is leased out to others or cannot be occupied is surely not "accommodation".

All these difficulties arise, of course, from the fact that the Revenue have extended an indicator of ordinary residence to become a test of ordinary residence and then a test of residence, but that test is not based upon any specific statutory provision or case law. Rather, the test is based entirely on a gradual extension of Revenue practice without any basis in law.

It is as well to take stock of the exact impact of the Press Release. It applies only to individuals who visit the UK for a temporary purpose for less than 183 days in one tax year or regularly for less than 91 days in a year. Such an individual may now acquire a property on a lease of less than three years, or otherwise have accommodation available, without becoming resident in the UK. The individual must not acquire a freehold property or a lease of more than three years. Quaere whether the individual is safe if the freehold or long lease is acquired by a company or trust on his behalf.

The Press Release has implications for the two groups for whom accommodation in the UK may be most important. Firstly, those non-residents who wish to purchase a property in the UK as an investment and also as a base for occasional visits. If the individual purchases a freehold property or long leasehold in his own name, he will be regarded as ordinarily resident and (possibly) resident as well. If, however, the property is acquired by a company on behalf of that individual then, if ownership by the company is not regarded as ownership by the individual[31], he will not be regarded as resident. This may be the answer to the

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[31] and it would be very helpful if the Revenue would clarify this, perhaps during the Committee stage of the proposed legislation.

perennial "shadow director's deemed benefit" issue[32]; the individual can be an actual director of the company (so long as this does not result in the management and control of the company moving to the UK), and enjoy the benefit of occupation. Since he is a non-resident, he can only be taxed under Sch E Case II in respect of duties performed in the UK; and since none of the duties of the office are performed in the UK[33], no charge to tax arises[34].

The second group for whom the ownership of accommodation is important are those who are seeking to become non-resident. The Notes to the Press Release indicate that the ownership of accommodation will continue to be a factor in determining whether the individual has ceased to be resident. In the future, that individual may be advised to dispose of his home in the UK, or (possibly) transfer the ownership to a spouse, trust or company.

Conclusions

The available accommodation rule may have been aberrant and not based on the case law, but it had the advantage of being clear. The Revenue's proposed practice following the Press Release seems, if anything, to be rather less clear, particularly with respect to the ownership of property in the UK. The change indicates that it is high time that the test of residence in the UK were reduced to a statutory form. Since we seem to be moving towards a numerical test - where an individual is resident if he is either present for more than 183 days in one tax year or more than 91 days on average (tested over four years) - there seems absolutely no reason why this could not be stated in legislation. A numerical test would allow all reference to available accommodation or property ownership to be dropped. Non-residents could then purchase properties in the UK and know that, provided they spent less than 91 days here on average, they would not become resident in the UK; this simplification in the position of non-resident property owners might give the UK property market a lift. As a final advantage, future versions of IR 20 could be much shorter and simpler.

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32 i.e., the Revenue argument that the person who in reality controls the company is a shadow director and is deemed to enjoy a benefit in kind from occupation of the property.

33 It is rather hard to see how one can perform the duties of a shadow office.

34 In most cases the emoluments would also be foreign emoluments - see s. 192 ICTA 1988.