MOBILE WORKERS

Peter Vaines[1]

On 2nd February 2001 the Inland Revenue issued a press release explaining how they consider the rules relating to residence and ordinary residence apply to mobile workers – that it is say individuals who usually live in the UK but make frequent and regular trips abroad in the course of their employment or business. The substance of their new approach is to regard individuals who make such regular trips in the course of their work as remaining resident in the UK. They take a broadly analogous view about individuals who live abroad but come here during the week for their work and return home at weekends.

The Inland Revenue are specifically targeting those people who usually live in the UK in the sense that their central domestic life remains here but their work pattern is such that they make trips abroad every two or three weeks. This is said to include someone travelling to France most Sundays or Mondays in connection with their employment but returning to the UK the following weekend and professional drivers who regularly drive vehicles to and from various European destinations.

It is easy to see why the Inland Revenue have revised their approach. If one merely looks at IR20 it is clear that such persons would be regarded as not resident in the UK. Paragraph 2.2 specifically sets out two conditions:

(a) the absence from the UK and the employment abroad must both last for at least a whole tax year

(b) during the absence, the visits to the UK must

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1 Peter Vaines FCA, Barrister, Haarmann Hemmelrath, 28th floor, Tower 42, Old Broad Street, London EC2N 1HN. Tel: (020) 7382 4800 Fax: (020) 7382 4833.

(i) total less than 183 days in any year, and

(ii) average less than 91 days a tax year.

Paragraph 2.3 goes on to say that:

> "If you meet all the conditions in paragraph 2.2, you are treated as not resident and not ordinary resident from the day after you leave the UK to the day before you return to the UK at the end of your employment abroad."

It is reasonable for an individual whose absence abroad satisfies these conditions to conclude that the Inland Revenue should regard them as not resident. IR20 is effectively a detailed practice statement which in part sets out the strict legal position, part applies an interpretation which may or may not be generous and the remainder is pure concession. In any event, the taxpayer is entitled to the benefit of this public statement.

The press release says that the treatment under paragraph 2.2 "is aimed at individuals who leave the UK for a complete tax year to live and work on assignments abroad". Whether or not that was the aim, it is certainly not reflected in the wording of paragraph 2.2 which is expressed in wider terms. They go on to treat this aim as representing a strict test by insisting that unless a person has "genuinely left the UK in a residence sense or can be said to be working full time abroad ... they could not satisfy the condition that their absence and the employment abroad both last for a whole tax year. They have not in our view made a clear break with the UK that the practice in paragraph 2.2 requires."

This seems to go rather too far because paragraph 2.2 does not require a clear break with the UK. This is probably a reference to a "distinct break" referred to in *Reed v Clark* [1985] STC 323 and in *IRC v Combe* 17 TC 405 but that does not really help in interpreting paragraph 2.2. The reference to working full time abroad seems unnecessary because the mobile worker will inevitably be working full time abroad or he would not fall within paragraph 2.2 in the first place.

The statement sets out the Inland Revenue's new approach as under:

> "Section 334 broadly provides that Commonwealth citizens who have ordinarily been resident in the UK remain UK resident until they leave the UK "for the purpose of only occasional business abroad" on the basis of case law, we consider that individuals who have no settled residence abroad have no intention to stay abroad indefinitely, and return to a UK base and a UK abode at the end of each assignment, are unlikely to show that they are

absent for other than "occasional residence" abroad".

This statement is expressed with unusual diffidence which is emphasised in later paragraphs where it is said that:

> "These guidelines are **general**. We accept that it might be possible for individual taxpayers to show that not resident status was correct on the facts of their particular case."

It could be said that this new statement is little more than a clear acknowledgement or notice that the Inland Revenue propose in all future cases to apply section 334 TA 1988 (Commonwealth citizens and others temporarily abroad) whenever mobile workers leave the UK. The approach will be that they are leaving for the purpose of occasional residence abroad and remain within the charge to tax in respect of income arising during their absence. The tests advanced by the Inland Revenue for occasional residence are generally supported by the authorities but the suggestion that the taxpayer should have an intention to stay abroad indefinitely almost certainly goes too far. However, for those individuals who leave the UK on a Monday morning to work abroad, returning home to the UK at the weekend are clearly at risk under section 334 although where a person works in another territory where he has a second home it is by no means clear that section 334 can have any application.

Section 334 contains a curious limitation. It applies only to Commonwealth citizens or citizens of the Irish Republic so its effect (and the effect of this new practice) can only apply to part of the population. It seems odd that citizens of Australia, Kenya or Canada who are ordinarily resident in the UK would be treated disadvantageously compared with citizens of France, Spain or Germany. It is therefore necessary before advising on a person's residence position to enquire into their nationality.

The statement also goes on to deal with mobile workers who travel in the opposite direction, that is to say individuals who normally live abroad but come to the UK for the purposes of their work and travel back at the weekends. It is clearly the intention of the Inland Revenue to treat them as UK resident by an analogous (but arguably inconsistent) approach.

Such individuals need to consider the terms of section 336 which reads as follows:

> "1. A person shall not be charged to income tax under Schedule D as a person residing in the UK in respect of profits or gains received in respect of possessions or securities out of the United Kingdom if:

(a) he is in the UK for some temporary purpose only and not with any view or intent in establishing his residence there and ;

(b) he has not actually resided in the UK at one time or several times for a period equal in the whole to six months in any assessment.

But if any such person resides in the UK for such a period he shall be so chargeable for that year.

2. For the purposes of Cases I, II and III of Schedule E, a person who is in the United Kingdom for some temporary purpose only and not with the intention of establishing his residence there shall not be treated as resident in the UK if he has not in the aggregate spent at least six months in the UK in the year of assessment but shall be treated as resident there if he has."

Leaving aside those individuals who come to the UK and spend more than 183 days here, we are left with the proposition for both Schedule D and Schedule E that the individual will not be charged to income tax as a UK resident if he is "in the UK for some temporary purpose only and not intending to establish his residence here."

The Inland Revenue statement provides:

> "Section 336 broadly provides for individuals to be treated as not resident in the UK if they are here "for some temporary purpose only and not with any view or intent of establishing ... residence there" and have not actually spent six months here in the relevant tax year. Case law has indicated that all the facts and circumstances of a case must be considered and not merely the number of days spent in the UK. We consider that the individuals who have a UK based employment or business, have strong ties with the UK and spend a sufficient amount of time in the UK in a tax year are unlikely to show that they are in the UK only for the "temporary purpose" specified in the statute."

In the case of an individual who lives outside the UK but comes to the UK each week to work, perhaps arriving Monday morning and returning home on Friday evening, it is difficult to see how the Inland Revenue's new approach can be justified in terms of section 336. Such authorities as there are on the meaning of temporary purpose would certainly be against them. More importantly, the statement does not really express the test fairly. It is not enough for the individual to fail the

"temporary purpose" test; it is also necessary for him to be here with a view or interest of establishing his residence in the UK. That is a much taller order and a mobile worker coming to UK in the circumstances envisaged would certainly not fall within the scope of section 336.

In any event, the tests suggested by the Inland Revenue are so vague as to be devoid of any real substance. The statement merely says that where such workers "have strong ties with the UK here and spend a sufficient amount of time in the UK they will be caught by section 336. But "strong ties" (whatever that means) can only be marginally relevant in identifying whether the visit is for a temporary purpose or whether there is a view or interest to establish residence. Worse is the phrase "spend a sufficient amount of time in the UK". This phrase is circular and does not take the matter further at all. It is submitted that providing the six month limit is not breached a person coming to the UK to work in the circumstances envisaged should continue to be regarded as non resident.