RESIDENCE: IR20 - ARRIVALS AND DEPARTURES

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The latest version of the Inland Revenue booklet IR20 *Residence & Non Residence* published in October 1996 contains a number of changes to its immediate predecessor, one of which concerns the position of an individual who leaves the UK for a comparatively short time - although for a period which extends for more than one tax year.

Paragraph 1.2 of IR20 sets a familiar scene. It explains that to be regarded as resident in the UK an individual needs to be physically present in the UK for 183 days or more in the tax year. That is no more than an acknowledgement of the statutory position under section 336 TA 1988. However, paragraph 1.2 goes on to say that presence in the UK for less than 183 days may still render the individual resident if he satisfies the tests in paragraph 3.3, that is to say he makes regular visits to the UK which average 91 days or more each year for 4 tax years. In that case the individual will be resident here from the 5th year.

It is obviously important to ascertain what represents a day of presence in the UK for this purpose. Paragraph 1.2 of the booklet gives us the following explanation:

> "The normal rule is that days of arrival in and departure from the UK are ignored in counting the days spent in the UK, in all the various cases where calculations have to be made to determine your residence position."

Reference is then made to various examples in the booklet where those calculations are relevant. One of these examples is paragraph 2.2 which refers to an individual who leaves the UK to work full time abroad under a contract of employment. In that event the individual is treated as not resident and not ordinarily resident if:

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(a) His absence in the UK and the employment abroad both last for at least a whole tax year; and

(b) During the period of absence, any visits to the UK total less than 183 days in any tax year and average less than 91 days in a tax year.

Paragraph 2.3 says that where the conditions in paragraph 2.2 are satisfied, the individual is treated as not resident from the day *after* he leaves the UK to the day *before* his return at the end of the employment abroad.

Returning to paragraph 1.2, there is a new passage added in parentheses which places a restriction on its operation. The new passage reads as follows:

> "(This rule is not relevant to the concessionary split year treatment ... where a person coming to or leaving the UK part way through a tax year is resident from the date of arrival to the date of departure.)"

It is this new restriction which causes the problem.

Let us consider the position of a man who goes to work abroad on (say) 1st July 1995 for a contract which extends until (say) 1st February 1998. Providing his visits to the UK average less than 91 days, paragraph 2.3 will cause him to be regarded as not resident nor ordinarily resident from the day after his departure until the day before he returns to the UK.

But what if he were to return to the UK each weekend, arriving every Friday night and leaving every Sunday night? In the Tax Faculty technical release Tax 11/94 this very point was raised and the Revenue's response was that the individual would not be regarded as UK resident if his visits were "within the prescribed limits". The whole question, of course, is what are those prescribed limits.

If in the above example we can ignore the days of departure and arrival, the position would seem to be that he would be treated as spending only 39 days in the UK during 1995/96 (assuming that there are 39 Saturdays between 1st July 1995 and 5th April 1996); in 1996/97 he would be in the UK only on Saturdays and this would give rise to 52 UK days; in 1997/98, the UK days would be 43, there being 43 Saturdays between 6th April 1997 and 1st February 1998. His average UK days would be less than 91 and he would therefore be regarded as not resident nor ordinarily resident for the duration.

However, the new passage in paragraph 1.2 of IR20 would seem to interfere with this reasoning because the years of departure and return are split years. If we cannot disregard the days of arrival and departure in 1995/96 and 1997/98 on the grounds that they are split years, we would have to count each Friday, Saturday and Sunday as days of UK presence, thereby increasing the UK days to 117 in 1995/96 and 129 for 1997/98. This would take the average way over 91 days and

he would remain resident for the whole period. This would seem to be rather harsh and not at all what one might have expected.

The unfairness is highlighted if we look at an alternative situation of a man who leaves the UK on 1st April 1996 to take up a bona fide foreign employment which lasts until 30th June 1997. Such an individual would be away for a much shorter period than in the first example and might therefore be said to be less deserving of non-resident treatment, the circumstances otherwise being the same. But if he comes back every Friday night and leaves every Sunday night in the manner envisaged above, he would only have one UK day in 1995/96 and 37 in 1997/98 even if you count all the days of arrival and departure. This would be an average of less than 91 days per annum and he would be entitled to non-resident treatment for the whole of his period of absence.

Enquiries with FICO helpfully confirm that non-resident status would not be prejudiced in either of the above examples. They say that the practice of disregarding both the day of arrival and the day of departure when computing the level of the individual's visits to the UK also applies in the year of departure and the year of return. The explanation for this apparent inconsistency is that the passage at the end of paragraph 1.2 is intended to emphasise that, when splitting a tax year into periods of residence and non-residence, the day of departure for residence abroad and the day of return from residence abroad are treated as days of residence. In other words, the practice of treating days of arrival and days of departure as days outside the UK only applies to the computation of visits, it does not apply when deciding when a period of residence or non-residence commences in a split year situation.

This is easily comprehensible in the case of the 91 day average test because during the 4 year averaging period the individual is not resident and split year treatment does not arise. Even when the 91 day limit has been breached, this does not render the individual resident immediately but only from the beginning of the following tax year. Again, no question of any split year arises.

However, in the application of the 183 day test a problem does arise because as soon as the 183 day test is breached the individual becomes resident for the whole of that year. Accordingly it has been suggested that a difficulty could arise in the following circumstances:

> Helmut comes to the UK on 1st October 1996. He is present in the UK for the remainder of the tax year except for two trips to Europe of 2 days each (i.e. he leaves one day and returns the next) before 5th April 1997.

The period from 1st October 1996 to 5th April 1997 is 187 days inclusive. However, we can ignore the 4 days spent on the European trips because they consist of days of arrival and departure. This leaves 183 days during which he is present in the UK and this will cause him to be resident - but only if we include

1st October 1996, the day of his arrival. If this day of arrival is ignored, the number of days in the UK in 1996/97 is reduced to 182 and Helmut will not be regarded as resident for that year. If, however, the day of arrival is counted in accordance with the concessionary split year treatment, his days in the UK would be 183 and he would be regarded as resident here from 1st October 1996. The two parts of paragraph 1.2 would seem therefore to give rise to a circular argument. Helmut will only be resident in the UK if the day of arrival is counted, but the day of arrival is only counted to determine when he becomes resident.

It is suggested that the answer here is the same as the earlier example, which is to read the requirements in paragraph 1.2 of IR20 in sequence and to determine first whether the periods in the UK (ignoring days of arrival and departure) cause the individual to be resident. Only if residence has been established does it become necessary to determine when it starts and finishes, and that will be from the date of arrival to the date of departure inclusive, in accordance with the concessionary split year treatment.