THE RESIDENCE OF INDIVIDUALS - SOME CONSIDERATIONS IN LIGHT OF RECENT CASE LAW AND CHANGES IN HMRC PRACTICE

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Introduction

Residence is fundamental for many tax purposes of which the most important are (1) the charge to income tax on foreign income which applies to residents; (2) the exemption for certain UK source income of non-residents; and (3) capital gains tax. Therefore residence is of importance in the context of a number of different UK taxes and a number of different situations and circumstances.

There are four tiers of "rules" in relation to residence. These are:

(1) case law;

(2) statutes: ITA, sections 831, 832 (the first statutory rule) and 829 (the second statutory rule);

(3) IR20; and

(4) double tax treaties.

In this article I look at the different tiers of rules in the context of recent developments, especially in case law and by the replacement of IR20 with HMRC6 from 6th April 2009.

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Case law

Most recently, the case of *Gaines-Cooper* has fundamentally altered the position in relation to residence. When heard before the Special Commissioners in *Gaines-Cooper v Revenue and Customs Commissioners* [2007] STC (SCD) 23 the following reasons were given for deciding that Mr. Gaines-Cooper was resident in the UK for the years 1993 to 2007:

> "*Applying those principles to the facts of the present appeal we find that the appellant had a settled abode in Old Place, Henley-on-Thames.*
>
> *There he dwelt permanently and had dwelt in that locality for a considerable time. The day count figures indicate that he spent more time in the United Kingdom each year than he spent in the Seychelles (or any other particular jurisdiction).*
>
> *He made regular and frequent visits to the United Kingdom and had birth, family and business ties here. He was born and went to school here; his mother and sister lived here; after 1993 his wife and later his son lived here; his wife has been settled in the United Kingdom since 1977 and considers herself resident here.*
>
> *His business ties are such that he spent three years working here and the companies with which he was concerned purchased and restored expensive business property here.*"

The Special Commissioners clearly found more than one reason on which to base their decision and, further, they did not prioritise their reasons. Accordingly, it is hard to gauge the comparative weight attributed to each of the various factors set out above. In this respect, the *Gaines-Cooper* case is less illustrative than cases like *Cooper v Cadwalader* 5 TC 101 and *IRC v Zorab* 11 TC 289 where, whilst some factors were indicative of UK residence, others were not. It is therefore useful to consider these cases and to consider whether one can extract any principles from them. As will appear, it is hard to create a code from the principles – because whilst certain factors were prioritised over others in many of the cases, there does not appear to be any consistency (among the cases) as to which are the prior factors. Unfortunately, a hierarchy of factors is just what the tax advisor needs – as in most cases there will be a mix of conflicting factors.

In *Gaines-Cooper*, the Special Commissioners discussed *Cooper v Cadwalader*:

> "*The first authority cited to us was Cooper (Surveyor of Taxes) v Cadwalader (1904) 5 TC 101. There a citizen of the United States, who resided in New York, rented a house (Millden Lodge) and shooting rights in Scotland for the whole of a term of three years, later extended to six years.*

> *The house was kept available for his use at all times and he spent two months continuously each year there. He was held to be resident in the United Kingdom. The Lord President (at 105) referred to the lease and to the occupation which was not casual or temporary but substantial and continuous.*"

It follows from this case that the presence of a **place of abode** and the overall **duration of stay** in the UK are both important. This is more determinative than the **reason for being in the country**. In the *Gaines-Cooper* case, the Special Commissioners found that there was a place of abode in the UK and, further, that the duration was sufficient to make him resident in the UK – as Mr. Gaines-Cooper spent more time in the UK than in any other place:

> "*Applying those principles to the facts of the present appeal we find that the appellant had a settled abode in Old Place, Henley-on-Thames. There he dwelt permanently and had dwelt in that locality for a considerable time. The day count figures indicate that he spent more time in the United Kingdom each year than he spent in the Seychelles (or any other particular jurisdiction). He made regular and frequent visits to the United Kingdom…*"

The Special Commissioners also considered *IRC v Zorab*:

> *"IRC v Zorab (1926) 11 TC 289 concerned a British subject who was born in Calcutta and who for thirty years lived all his life in India generally in hotels. In 1920 he left India and thereafter lived in hotels in the United Kingdom, Paris and Belgium. Between November 1920 and May 1925 he lived in the United Kingdom for approximately two-and-a-half years (being about six months of each year) for the purpose of seeing friends. He was assessed to income tax for the year 1924-25 but the Special Commissioners held that he was not resident in the United Kingdom for that year. On appeal Rowlatt J held that there was evidence on which the Commissioners could come to their decision and that they had not misdirected themselves in law. He said (at 291-292):*
>
> > *"Of course it is perfectly right to say that a man has not got to have a residence in the shape of a building to be resident in this country. That is quite clear. But I think that one has to consider not only the time that he is in this country but the nature of his visit and his connection with the country. … Because the question to be solved is not whether he is resident for the five months he is here, but whether he is resident for the whole year during the time he is not here. … This gentleman seems to be a mere traveller. … All that can be said about it is that in the course of his habitual travels he spends a considerable period every year in England.""*

The tenor of this conclusion is in conflict with the grain of the *Cooper v Cadwalader* decision. It follows from it that the reason for one's presence is more important the duration or frequency. So a `traveller' who stays in the country for five months every year for 5 years is not necessarily resident **but**:

(a) a person who comes to shoot for two months every year is (*Cadwalder*);

(b) and a pilot who is resident in the country primarily for the purposes of work is; (consider the *Grace* case below);

So, how does one acquire the advantageous label of `traveller'? It cannot be the **intention of the person**. It follows from the *Gaines-Cooper* decision that one can be resident in a country without have the intention to establish a residence within it (see paragraph 182 of the Special Commissioners decision, discussed below. The converse is also true - there can be no argument that one can simply be resident purely by having the intention to be resident).

However, the question remains: on what basis was the individual in *Zorab* characterised a traveller? If it isn't intention, what is meant by the `nature of connection'. An idea of the `nature of connection' is also to be found in the decision of *Levene* which is discussed by the Special Commissioners in paragraph 162. *Levene v IRC* [1928] 1 AC 217, 13 TC 486 concerned a British subject who lived in London until 1919 when he left with the intention of living abroad. He returned to the United Kingdom for five months each year but had no fixed residence either in the United Kingdom or abroad.

> "*If, for instance, such a man is a foreigner who has never resided in this country, there may be great difficulty in holding that he is resident here. But if he is a British subject the Commissioners are entitled to take into account all the facts of the case, …*"[2]

So, among other things, it is necessary to look to the **personal characteristics** of the individual concerned. This seems correct. This was followed by the Special Commissioners in *Gaines-Cooper* too:

> "*The day count figures indicate that he spent more time in the United Kingdom each year than he spent in the Seychelles (or any other particular jurisdiction). He made regular and frequent visits to the United Kingdom and had birth, family and business ties here. He was born and went to school here; his mother and sister lived here; after 1993 his wife and later his son lived here; his wife has been settled in the United Kingdom since 1977 and considers herself resident here. His business ties are such that he*

2 Paragraph 163 of the *Gaines-Cooper* Special Commissioners decision

> *spent three years working here and the companies with which he was concerned purchased and restored expensive business property here.*

Corroboration for this principle is also found in *Coombe*, mentioned in *Grace v Revenue and Customs Commissioners* [2008] STC (SCD) 531 case:

> "*(3)(xiii) Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have "left" the United Kingdom) unless there has been a definite break in his pattern of life: Re Combe (1932) 17 TC 405, 411*."

On reflection, this is what Justice Rowlatt seems to have done in *Zorab*. So, in granting the individual the label of traveller, he has considered what that person did during the period he was not in the UK – and this led him to his conclusion that the person was a bona fide `traveller'.

Of course, it is important that the individual has **a place of abode in the country**. Among others, this follows from the *Gaines-Cooper* case:

> "*Fifthly, that in general the availability of living accommodation in the United Kingdom is a factor to be borne in mind in deciding if a person is resident here (Cadwalader (1904) 5 TC 101) (although that is now subject to s 336(3))…*
> *166. Applying those principles to the facts of the present appeal we find that the appellant had a settled abode in Old Place, Henley-on-Thames.*"

However, there is the question of the person who has **more than one residence**. Each can constitute a home for the purposes of tax. If each home is in the UK (as was in *Levene*), then he is clearly resident in the UK for tax purposes. Viscount Cave LC said ([1928] AC 217 at 222-223, 13 TC 486 at 505):

> "*My Lords, the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." … In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. … But a man may reside in more than one place. Just as a man may have two homes-one in London and the other in the country-so he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country.*"

It is worth asking whether the nature of the **place of abode** has any place in determining whether there is residence. In *Rogers v Inland Revenue* 1 TC 225 concerned a master mariner, Captain Rogers, who had a house in Fife where his family lived. He had no other home. He was absent for the tax year 1878/79 whilst working on a ship. It was assumed that the ship could not constitute his home and, accordingly, that this house in Fife constituted his residence.

> "*Every sailor has a residence on land…and the question is, Where is this man's residence? The answer undoubtedly is that his residence is in Great Britain. He has no other residence…*"

This assumes (a) that an individual must have a residence; (b) that a ship cannot constitute a residence; and (c) that the `residence' of the individual must be inferred by what remains after the process of the deduction (i.e. of the ship).

Point (b) seems to be discredited since the decision in *Grace*. In her decision, another reason the Special Commissioner gave for finding that the pilot's house in England was not a home was because it `was a substitute for hotels'. Justice Lewison (in the High Court [2008] STC 1665) dealt with this as follows:

> "*Why, then, did the Special Commissioner conclude that it was not "a home"? The only explicit reason she gave was that the Horley house was "a substitute for hotels". But as Viscount Cave explained in Levene, and as Mr Lysaght found to his cost, living in a hotel or a series of hotels can amount to residence, particularly if (as in Lysaght) the stays in hotels are attributable to a continuous business obligation and the sequence of visits excludes the elements of chance and of occasion. Mr Grace's stays in the Horley house were attributable to performance of his employment duties; and they were regular and predictable. Moreover, unlike a hotel room, the Horley house actually belonged to him; and unlike a hotel room no one else used it.*[3]"

Finally, it should be considered whether residence can be determined by eliminating whatever is not the residence of the individual and then considering what is left. I refer to this as the **first process of elimination**. However, in the *Grace* case the Special Commissioner did not use that process because the individual had more than one residence (see paragraph 18 of that case). However, Justice Lewison appears to have misunderstood her. He states at paragraph 39:

> "*The ground on which she distinguished Re Young (§ 31) was that whereas Mr Young had only one residence which was in Glasgow, Mr Grace had a residence in South Africa. This could only have been a relevant ground of*

3 Paragraph 40. See also *Grace* paragraph 3(ix): `It is wrong to conduct a search for the place where a person has his permanent base or centre adopted for general purposes; or, in other words to look for his "real home"': *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 345 and 348.

> *distinction if either a taxpayer could have only one residence or a taxpayer could have only one real home*."

It does not appear that Justice Lewison's comments have overridden the first process of elimination applied in *Young*:

> "*… I find that after 1997 the Appellant did not dwell permanently in the United Kingdom as his permanent residence was in South Africa. Also the United Kingdom was not where he had his settled or usual abode as that was in South Africa*."

This is the **second process of elimination**. Rather than weeding out the non-residences and asking what is left, the Special Commissioner here asks whether there is an abode which constitutes a residence for the entirety of the relevant period and, having found that there is, then excludes any other abodes from constituting a residence during that period. Clearly, this is not a correct method when it has been established that a person can have more than one residence simultaneously (see *Levene* above).

Whilst the **second process of elimination** was rejected in principle by the Special Commissioners in *Gaines-Cooper*, it is not entirely clear that they entirely excluded it from their thought process. They concluded:

> "*The day count figures indicate that he spent more time in the United Kingdom each year than he spent in the Seychelles (or any other particular jurisdiction).*"

The first statutory rule: section 831 ITA

The first statutory rule provides:

> *"(1) Subsection (2) applies in relation to an individual if-*
>
> *(a) the individual is in the United Kingdom for some temporary purpose only and with no view to establishing the individual's residence in the United Kingdom, and*
>
> *(b) during the tax year in question the individual spends (in total) less than 183 days in the United Kingdom.*
>
> *In determining whether an individual is within paragraph (a) ignore any living accommodation available in the United Kingdom for the individual's use.*
>
> …

> *(4) Subsection (5) applies in relation to an individual if subsection (2) would have applied in relation to the individual but for subsection (1)(b).*
>
> *(5) Apply the rules set out in subsection (2) in determining the individual's liability for income tax.*
>
> *But-*
>
> *(a) instead of treating the individual as non-UK resident in relation to the income and for the purposes mentioned in those rules, treat the individual as UK resident, and*
>
> *(b) ignore subsection (3).*"

Thus under subsection (1), where a person is only in the UK for a temporary purpose and is in the UK for fewer than 183 days, then the individuals income tax liability will be determined in accordance with the rules in section 831, and not otherwise. However it is necessary to consider section 831(4) ITA: what would be the position if subsection (2) would have applied in relation to the individual but for subsection (1)(a)? In such cases, one would have to consider whether residence was deemed by the second statutory test or under case law.[4]

It is worth noting that section 832 ITA provides a similar set of residence rules in relation to employment income. The main difference is that section 832 ITA does not contain the deemed residence rule for cases where the 183 day mark has been met.

The availability of living accommodation is not to be taken into account when considering whether the individual was in the UK for a temporary purpose and whether he had the intention to establish a residence here. This follows from section 831(1) ITA. This rule is slightly anomalous but is advantageous to the taxpayer. It should follow that an individual can purchase a property in Kensington Palace Gardens and still be found not resident under the first statutory rule.

In the *Gaines-Cooper* case, the Special Commissioners placed particular emphasis on two (conflicting cases) when considering the nature of a "temporary purpose":

> "*Thus the relevant authorities are Cooper (Surveyor of Taxes) v Cadwalader (1904) 5 TC 101 and, to a limited extent, IRC v Brown (1926) 11 TC 292. We conclude that a temporary purpose is a purpose lasting for a limited time; a purpose existing or valid for a time; a purpose which is not permanent but transient; a purpose which is to supply a passing need.*

4 See *Grace v HMRC*, paragraph 8

> *'Temporary purpose' means a casual purpose as distinguished from the case of a person who is here in pursuance of his regular habits of life.*
>
> *Temporary purpose means the opposite of continuous purpose. A decision to visit the United Kingdom for a few months each year to shoot (ignoring the availability of living accommodation) is not a temporary purpose (Cadwalader).*[5]
>
> *Applying those principles to the facts of the present appeal we find that the appellant's purpose in visiting the United Kingdom was not a purpose which lasted for a limited time; the purpose was to visit his wife and son, his mother and, to a lesser extent, his other friends. This was a permanent and not a transient purpose nor was it simply a passing need. Neither was it a casual purpose but rather it was in pursuance of the regular habits of the appellant's life. A decision to visit the United Kingdom on a large number of days each year to be with one's wife and child is not a temporary purpose.*"

There is a distinction to be made between a temporary *trip* and a temporary *purpose*. In Mr. Gaines-Cooper's case, whilst **the duration of many of the trips** may have been short, the purpose itself was enduring rather than temporary.

In the *Grace* case, the Special Commissioner seemed to have concluded that the fact that the pilot stayed in the UK only for the purposes of his employment meant that his purpose was temporary. Justice Lewison states at paragraph 41:

> "*She referred also in the summary of her reasons for deciding that Mr Grace was not resident to "the temporary nature of his ties with this country", which must have been a reference to his ties by reason of his employment. I agree, therefore, with Ms Simler that the Special Commissioner's error about the meaning of "temporary purpose" fed in to her ultimate conclusion on the question whether Mr Grace was resident in the United Kingdom. In my judgment the explicit reason that the Special Commissioner gave cannot be sustained.*"

In other words, instead of first asking whether there was a residence in the UK and then asking whether it was for temporary purposes, the Special Commissioner made the mistake of assuming that (a) the taxpayer's residence in South Africa meant that he had no residence in the UK (discussed above); and (b) that the taxpayer's presence in the UK **for the purposes of employment** meant that he was here for a temporary purpose. Under the second line of defence (had it been accepted), even if the taxpayer had been found resident under the general case law, he would have been able to place reliance on the first statutory test.

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5 See paragraph 159 too.

IR20 previously provided at paragraph 1.2:

> "*For periods prior to 6 April 2008, 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.*"

Finance Act 2008 introduced some changes to the existing practice through the insertion of the following two sub-sections:

> "*(1A) In determining whether an individual is within subsection (1)(b) treat a day as a day spent by the individual in the United Kingdom if (and only if) the individual is present in the United Kingdom at the end of the day.*
>
> *(1B) But in determining that issue do not treat as a day spent by the individual in the United Kingdom any day on which the individual arrives in the United Kingdom as a passenger if-*
>
> *(a) the individual departs from the United Kingdom on the next day, and*
>
> *(b) during the time between arrival and departure the individual does not engage in activities that are to a substantial extent unrelated to the individual's passage through the United Kingdom.*

This applies to periods from 2008-09 onwards. In the case of periods straddling 2007-08 and 2008-09 one must apply both sets of rules depending upon when the arrival or departure occurred.

The second statutory rule: section 829 ITA

Section 829 ITA provides:

> *"829 Residence of individuals temporarily abroad*
>
> *(1) This section applies if-*
>
> *(a) an individual has left the United Kingdom for the purpose only of occasional residence abroad, and*
>
> *(b) at the time of leaving the individual was both UK resident and ordinarily UK resident.*

> *(2) Treat the individual as UK resident for the purpose of determining the individual's liability for income tax for any tax year during the whole or a part of which the individual remains outside the United Kingdom for the purpose only of occasional residence abroad.*"

This was formerly section 334 ICTA. The Special Commissioners in *Gaines-Cooper* had this to say on this provision:

> "*We first comment that, in our view, it is s 334 which applies to the appellant rather than s 336 [now section 831 ITA]*."

This seems to imply that only the first or the second statutory rules can apply to a given scenario. This seems correct. The Special Commissioners then seem to adumbrate their reasons as to why section 831 ITA does not apply:

> "*We do not, for the reasons set out below, regard the appellant as a temporary resident in the United Kingdom. He is a British subject and, at the times relevant for these appeals, had a residence in the United Kingdom. Even when he went to the Seychelles and established a residence there he, at all times which are the subject of these appeals, retained a residence in the United Kingdom.*"

This is a problem: it suggests that the first statutory rule does not apply in cases where there is no `distinct break'.[6] This seems to conflict completely with what was said in the *Grace* case:

> "*It was common ground that Mr Grace was a Commonwealth citizen. Since the Special Commissioner had found that Mr Grace's ordinary residence was in the United Kingdom between 1990 and 1997, the question arising under section 334 was whether he had left the United Kingdom for the purpose only of occasional residence abroad. The Special Commissioner concluded (§ 55):*
>
> *"However, in my view his presence abroad after that date was not for the purpose only of occasional residence abroad but for the purposes of continuous and settled residence in his house in Cape Town punctuated only by the need to visit the United Kingdom for the purposes of his work."*"

However, in the High Court, Justice Lewison decided that before the second statutory rule could be considered, **one had to first ask as to whether there had been a `distinct break'**:

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6 What the Special Commissioners may have meant is that the second statutory rule does not apply here because the individual is not a temporary resident in the country and, accordingly, is not there for a temporary purpose only. However, they then go on to deal with the temporary purpose element separately in the paragraphs that follow.

> "*The phrase "distinct break" does not feature in the Act. What it means is not therefore a question of statutory construction. It is an idea that has been developed in the application of section 334 and its predecessors, which requires determination of the questions whether the taxpayer has "left" the United Kingdom and, if he has, whether he has left for "occasional residence" abroad.*"

So (according to Justice Lewison in *Grace*) before one considers whether the individual has only left the country for the purposes of occasional residence abroad, it is first necessary to ask whether he has `left' the country in the first place. It was held by Justice Lewison that the pilot had not in fact left the country. So, there seems to be a conflict between:

(a) *Gaines-Cooper* – which implies that a distinct break is necessary if the first statutory rule is to apply (and, also, that such a break is not necessary for the second statutory rule to apply); and

(b) *Grace* – which expressly states that a distinct break is necessary if the second statutory rule is to apply.

Given the rank of the courts involved, *Gaines-Cooper* is clearly wrong on this point. The better view is that it is the application of the second rather than the first statutory rule which is contingent upon there being a distinct break.

IR20

IR20 was first published in 1973 and continued to represent HMRC practice up till the 6th April 2009 – after which is has been replaced with HMRC6. It had no statutory basis but the taxpayer's arguments based on it were accepted on good faith by HMRC until recently. The main areas of relevance of IR20 were:

(a) elaborating on the statutory rules discussed above – so, for instance, the exclusion of the days of arrival or departure when considering the 183 days test in the first statutory rule; and

(b) to the extent that residence was not deemed under the 183 day test, elaborating on the principles governing residence. The cornerstone of this was the 91 day test.

The '91 day test' is mentioned in the "work full time abroad" exemption:

> "*If you leave the UK to work full-time abroad under a contract of employment, you are*

treated as not resident and not ordinarily resident if you meet all the following conditions

- *your absence from the UK and your employment abroad both last for at least a whole tax year*

- *during your absence any visits you make to the UK*

  - *total less than 183 days in any tax year, and*

  - *average less than 91 days a tax year. (The average is taken over the period of absence up to a maximum of four years - see paragraph 2.10. Any days spent in the UK because of exceptional circumstances beyond your control, for example the illness of yourself or a member of your immediate family, are not normally counted for this purpose.)*

If you meet all the conditions in paragraph 2.2, you are treated as not resident and not ordinarily resident in the UK from the day after you leave the UK to the day before youreturn to the UK at the end of your employment abroad. You are treated as coming to the UK permanently on the day you return from your employment abroad and as resident and ordinarily resident from that date."

The 91 day test is relevant to the following rules: work abroad in employment for a year rule (para. 2.2) – deemed non-resident; work abroad in trade for a year rule (para. 2.4) – deemed non-resident; accompanying spouse extension (para 2.6) – deemed non-resident; leaving the UK permanently or indefinitely (para.2.7) – deemed resident; leaving the UK permanently or indefinitely (para. 2.8) – deemed non-resident; and short-term visitors (para. 3.3) – deemed resident.

Elaboration on the `91 day rule' is provided at para.2.10. One looks at **the last four years on a rolling basis**:

"*Calculating annual average visits*

2.10 If it is necessary to calculate your annual average visits to the UK, the method is as follows:

Total visits to the UK (in days) x 365 = annual average visits

Total period since leaving (in days)

For this purpose, days spent in the UK in the tax year before the date of your original departure are excluded.

> *Suppose, for example, you leave the UK on 5 October 2003. The first review of the average of your visits is made after 5 April 2005, and takes account of your visits between those two dates. If you visited the UK for 30 days between 6 October 2003 and 5 April 2004 and for 50 days in 2004-2005, the annual average is*
>
> *30 + 50 x 365 = 80 x 365 = 53.38 days*
>
> *182 + 365 = 547*
>
> *If you continue to remain outside the UK, the annual average is calculated as follows in reviews after 5 April in subsequent years*
>
> - *after 5 April 2006 - include visits from 5 October 2003 to 5 April 2006*
> - *after 5 April 2007 - include visits from 5 October 2003 to 5 April 2007*
> - *after 5 April 2008 - include visits from 6 April 2004 to 5 April 2008.*
>
> *After the third review the year of departure is dropped from the calculation. At each subsequent review the oldest year is dropped, so that there is a rolling period of four years being reviewed.*"

Another important aspect is **the exclusion of the days of arrival and departure**. Para.1.2 provides:

> "*For periods prior to 6 April 2008, 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.*"

It is important to note that IR20 has always been a double-edged sword. The `91 day test' is useful to the taxpayer because it provides a better defined test than is available under the case law and a person may be non-resident under this test when he might not be resident under the case law. For instance, if I left the UK to work abroad for a year, then following *Levene* or *Gaines-Cooper*, I might be considered resident in the UK because of my `personal circumstances'. Alternatively, I might be deemed resident under the second statutory rule. Under the `work abroad' test above, there is no danger of this happening.

On the other hand, IR20 can also work to the taxpayer's disadvantage as it can treat him as being resident in certain cases where he might not be resident in the UK

under the case law: consider the short term visitors rule in 3.3 – in the *Zorab* case, the individual would stay in the UK for five months a year or a taxpayer may place reliance on it (especially if he has planned on the basis of it) and then find that HMRC do not allow this.

Relying on IR20

The second problem with IR20 has not really been a real consideration until HMRC recently decided to restrict the application of the IR20 day-counting rule in the case of *Gaines-Cooper*. The case concerned the years 1993 till 2004. If one applied the IR20 day-counting rule, then the average number of days in the UK from 1999 till 2004 fell within 91. On the other hand, if one counted the days of arrival, then the average exceed 91 days. They thus chose to forsake the IR20 day-counting rule (whilst applying the IR20 `91 day' rule).[7] The Special Commissioners had this to say on the matter:

> "*We begin with the later years, namely 1996-97 to 2003-04. The Revenue argued that if one ignored both the dates of arrival and departure, and also single days, a distorted picture emerged. For example, if the appellant arrived in the United Kingdom on one day and left on the next he recorded that no days were spent in the United Kingdom. The Revenue argued that such a visit should count as one day.*
>
> *We accept that the appellant used the London airports as a hub to change aeroplanes but the Revenue's schedules did not include any figure for a flight which left on the same day as the previous flight arrived. For all these reasons we are of the view that the Revenue's figures for these later years are to be preferred.*"

On the question of IR20 in general, they stated:

> "*The appellant's figures were based upon the principles in the Revenue's publication 'IR 20 Residents and Non-Residents-Liability to tax in the United Kingdom'. That is, the appellant's figures ignored the dates of arrival and departure and they also ignored unusual events. As far as the days of arrival and departure are concerned many of the days which the appellant spent in the United Kingdom were single days (where arrival was one day and departure on the next) which, therefore, were not included at all in his figures. Also, three of the years were modified to take account of the heart bypass operation in 1992 and the birth of James in early April*

7 HMRC committed a similar bouleversement in the *Grace* case: see paragraph 15 of the High Court decision.

> *1998. However, in this appeal we must apply the law rather than the provisions of IR 20.*"

On the whole, the Special Commissioners had very little regard for IR20. Whilst they discounted the IR20 day-counting rule, it is important to note that they did not award much importance to the IR20 91 day rule either. They held at paragraph 166:

> "*Applying those principles to the facts of the present appeal we find that the appellant had a settled abode in Old Place, Henley-on-Thames. There he dwelt permanently and had dwelt in that locality for a considerable time. The day count figures indicate that he spent more time in the United Kingdom each year than he spent in the Seychelles (or any other particular jurisdiction). He made regular and frequent visits to the United Kingdom and had birth, family and business ties here. He was born and went to school here; his mother and sister lived here; after 1993 his wife and later his son lived here; his wife has been settled in the United Kingdom since 1977 and considers herself resident here. His business ties are such that he spent three years working here and the companies with which he was concerned purchased and restored expensive business property here.*"

The day-count (on whatever basis that was calculated) was clearly not conclusive in them arriving at their conclusion. However, the point of IR20 had never been that it would sway the courts. Rather, its had stood as a guarantee by HMRC that it would not move to seek tax in cases where one was deemed non-resident under the test contained therein. In fact, there is authority to suggest that once the courts have decided that there is residence, then HMRC must move to collect tax. Even if the individual previously had any legitimate expectation – it is converted to an illegitimate expectation on such a finding by the courts.[8] The judicial review claim is thus pre-empted by the finding of the court.

In light of the furore surrounding the reversal made by HMRC in the *Gaines-Cooper* case, HMRC have taken two steps. Firstly, they published a Brief (now appended to IR20, which still applies for periods prior to April 2009). This states:

> "*There was no change to HMRC practice about residence and the '91-day test', either in relation to the Gaines-Cooper case or as a result of it. HMRC will continue to:*
>
> - *follow its published guidance on residence issues, and apply this guidance fairly and consistently;*

8 *Davies and another v Revenue and Customs Commissioners* [2008] EWCA Civ 933

- *treat an individual who has not left the UK as remaining resident here;*

- *consider all the relevant evidence, including the pattern of presence in the UK and elsewhere, in deciding whether or not an individual has left the UK;*

- *apply the '91-day test' (where HMRC is satisfied that an individual has actually left the UK) as outlined in this guidance, normally disregarding days of arrival and departure in calculating days under this 'test'.*

This claim seems facetious as HMRC have neither honoured the 91 day rule nor the `exclusion of the days of arrival and of same-day departure' rule. The thrust of their argument seems to be that these rules were never absolute. Though if they weren't, then it seems to undermine the point of having guidance which purports to provide a concrete alternative to the case law. As to whether this argument succeeds must depend upon the outcome of the Gaines-Cooper judicial review."

Secondly they withdrew IR20 and published HMRC6, which applies from the 6th April 2009. This is expressly qualified at paragraph 1:

"*This guidance outlines our (HMRC) view and interpretation of legislation and case law. The material is guidance only. It has no legal force, nor does it seek to set out regulation or practice. When it seeks to give practical examples of what the relevant law means, it contains HMRC interpretation of that law.*"

So, as for periods from the 6th April 2009, it is even less likely that reliance can be placed on the 91 day rule and other rules.

Conclusions

The author has always shirked from placing reliance on IR20 unless absolutely necessary. Even while IR20 was in force, his view has been that the individual must ideally attempt to remain non-resident as the case law understands it to be. So, the individual must spend as little time in the UK and have as few connections with the UK (as few family and friends in the UK as possible). These appear to be the dominant factors. It is appreciated that this is especially hard in cases where the individual is originally from the UK. Other factors such as having another house abroad or not having a house in the UK are unlikely to tilt the balance in favour of non-residence.

A second option would be for the individual to make a `distinct break' – so that he can then place reliance on the first statutory rule. It would be important in such cases that if he did return to the UK for occasional visits, to ensure that these were not made for a permanent purpose. So, if the individual had a mother residing in the country and he came to see her every summer, this would constitute a permanent purpose – as he wishes to maintain a longstanding relationship with her. However, if he returned for one-off projects (for instance, a one-off business project or to spend time with a brother who was visiting from the US), then it could be argued that the purpose of his trips was only temporary.

A third option might be for the individual to resident in another jurisdiction (under the laws of that jurisdiction) whilst being resident in the UK (under the UK laws) at the same time. Care would then have to be taken to ensure that the individual was deemed to be resident in the other jurisdiction on the basis of the tie-breaker in the relevant double tax treaty.