

THE 91 DAY MYTH

Keith Gordon¹

Introduction

For many years, certainly as long as I have been practising in the tax field, HMRC (and its predecessor, the Inland Revenue)² have used a leaflet, popularly known as IR20, as its guide to the taxation of non-residents and non-domiciliaries³. Whilst it is accepted that the law could never be properly expressed in a short leaflet⁴, IR20 did provide a workable guide as to when an individual would be treated, for tax purposes, as either resident or non-resident in the United Kingdom.

In the past three years, three cases have been heard by the Special Commissioners concerning the claimed non-resident status of individual taxpayers. Two have been controversial – one of which has already been heard by the High Court and the second is widely believed to be following suit. In all three cases, the taxpayer had claimed to be non-resident; in all three cases, the Special Commissioners dismissed the taxpayer's appeal.

In the first two of those cases⁵, the principal controversies centred on HMRC's apparent divergence from the IR20 guidance when dealing with the facts of the case. Much has been written about whether and, if so, the extent to which HMRC's practice deviated from their published guidance and I do not propose to comment

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² For simplicity, I shall refer exclusively to HMRC even if referring to an event occurring prior to 18 April 2005.

³ a term I shall employ, admittedly incorrectly, to describe all individuals whose domicile is not in one of the constituent jurisdictions of the United Kingdom

⁴ The latest edition (published in December 1999 and a little out of date) is effectively 64 pages in length. To contrast, the latest edition of James Kessler's *Taxation of Foreign Domiciliaries* numbers over 1200 pages before one even reaches the appendices.

⁵ *Shepherd v HMRC* [2006] EWHC 1512 (Ch) and *Gaines-Cooper v HMRC* (2006) SpC 568

any further, at least until the higher courts have pronounced on the second of the two cases.

Instead, this article will consider one of the two asserted methods of becoming either resident or non-resident in respect of any particular tax year.

Becoming non-resident

Paragraph 2.2 of IR20 advises readers that individuals who leave the UK⁶ to work full-time abroad will be treated as if they were neither UK resident nor ordinarily resident if the absence and the employment last for at least the whole of a tax year and both the following conditions are met:

1. during the period of absence, UK visits total fewer than 183 days and
2. during the period of absence, UK visits average less than 91 days.

Later paragraphs (2.8 and 2.9) provide similar conditions for those whose period of absence covers a longer period but who are not working full-time overseas.

Becoming resident

Similarly, short-term visitors to the UK are advised in paragraph 3.3 of IR20 that they will be treated as resident in a tax year if:

1. they are present in the UK for 183 or more days or
2. after four years, UK visits average 91 days or more.

Paragraph 3.4 declares that individuals will be treated as ordinarily resident in the UK if visits average 91 days or more.

The authority for IR20

It is trite to state that IR20 is of no statutory authority. Equally, it is of little value to say that the guidance contained therein has no basis in law. However, given the proposed change in the law to take effect from 6 April 2008, it is imperative that the basis for the guidance in IR20 is fully understood.

⁶ It was this precondition, requiring the taxpayer first to have *left the UK*, that proved to be stumbling blocks for Captain Shepherd, in particular, and also for Mr Gaines-Cooper.

The 183-day rule

The 183-day rule is statutory. Until 5 April 2007, statute provided that an individual who was only temporarily in the UK would be taxed as a resident if and only if actual residence during the course of the year amounted to at least six months in aggregate.⁷

The meaning of the ‘six month’ test was clarified in *Wilkie v CIR*⁸. In that case, Mr Wilkie’s actual presence in the United Kingdom was a few hours short of 183 full days in the 1947/48 tax year and he was therefore claiming that he thereby succeeded to be treated as not resident in that year. The Crown was suggesting that, by counting days present in the UK (Mr Wilkie had arrived on 2 June 1947 and left on 2 December later that year), Mr Wilkie had in fact been present in the UK for six months and a day (184 days, in fact). Donovan J held that the statutory test permitted taxpayers to discount fractions of days not spent in the UK and allowed the taxpayer’s appeal.

Given the practical difficulties that this decision could cause, the HMRC practice, as published in IR20, is a little more liberal. IR20 prominently announces in paragraph 1.2 “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 – see for example paragraphs 2.2, 3.3 and 3.4”.

Although six calendar months could in fact mean anything from 179 days to 186 days, HMRC practice has tended to treat this as a 183-day test. When the provisions of ICTA were rewritten into the Income Tax Act 2007, this simpler test was formally adopted.⁹

The 91-day rule

Finding the authority for the 91-day rule can be more problematic. However, its origins can be found in one of the string of residence cases which were heard by the Courts in the 1920s, *Lysaght v CIR*¹⁰.

The case concerned an individual who, having previously lived in England, retired to the Irish Free State. However, he continued to spend time as a director of the company in England and attended regular meetings, staying at hotels or at his

⁷ Income and Corporation Taxes Act 1988, section 336(1), with a similar test for employment income purposes in section 336(2)

⁸ (1951) 32 TC 495

⁹ See sections 831(1) and 832(1).

¹⁰ (1928) 13 TC 511

brother's house. For the four tax years in question, Mr Lysaght spent, respectively, 101, 94, 84 and 48 days in the UK.¹¹

Summarising the history of the *Lysaght* case, one could say that the decision of the Special Commissioners, that Mr Lysaght had remained resident in the UK by virtue of his repeated return visits, was upheld by the House of Lords. This summary could justify the HMRC approach in treating the 91-day rule as a further test that has the force of law.

Of course, extra-statutory guidance has to be read with a critical eye. So that, unlike the 183-day rule which is fixed, an individual taxpayer's 91-day presence in the UK might have a very different quality from that of Mr Lysaght and, in the eyes of the Courts, should be interpreted differently.¹² For example, therefore, HMRC's 'concession' in overlooking extended stays in the UK because of illness or bereavement is, in fact, reflecting the flexible nature of the 91-day test. However, for the purposes of this article, that point is not made any more strongly.

In particular, a slightly more critical analysis of the *Lysaght* decision tells a tale and one, which is definitely slightly different and, I would submit, significantly different. It is undeniable that Mr Lysaght was held to have been resident by the Special Commissioners. However, the result in the House of Lords was not an overwhelming victory for the Crown.

The principal reason for this is that the judgments in the Crown's favour focused more on the right of the Special Commissioners to reach the conclusion that they did rather than the principles to be followed in reaching such a conclusion.

Viscount Sumner, for example, held:

"It is attractive to say, as in substance was the opinion of the Court of Appeal, that 'resident' in this case is a matter of law, as being a matter of interpretation, but that does not cover the ground. Interpretation only says what the Act itself refrains from telling us, namely, the meaning of the word 'resident', but, as that meaning is its meaning in the speech of plain men, the question still remains, whether plain men would find that the result of

11 It is not clear what combination of these figures gives rise to the 91-day figure harvested from the case. It is presumed that the 91 day threshold represents Mr Lysaght's habitual weekly visit every four weeks. The facts as found by the Special Commissioners note that Mr Lysaght's visits were actually *monthly*; however, as this would give rise to a lower threshold, perhaps one should not object too vociferously. Alternatively, the 91 days represent the average of Mr Lysaght's stays if one omits the two periods of illness which delayed Mr Lysaght's returns to Ireland.

12 For an example of how different results can ensue despite a similarity in the duration of visits, compare the cases of *CIR v Zorab* (1926) 11 TC 289 and *Levene v CIR* [1928] AC 217 (1928) 13 TC 486.

the facts found was ‘residence’ in its plain sense, and I do not doubt that the Commissioners understood the word not otherwise than in its correct legal signification and so applied it. Accordingly, I do not think that their decision can be interfered with.”

And Lords Atkinson and Buckmaster held that:

“... if the circumstances found by the Commissioners in the Special Case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials upon which that conclusion could depend. But if the incidents relating to visits in this country are of such a nature that they might constitute residence, and their prolonged or repeated repetition would certainly produce that result, then the matter must be a matter of degree; and the determination of whether or not the degree extends so far as to make a man resident or ordinarily resident here is for the Commissioners and it is not for the Courts to say whether they would have reached the same conclusion.”

Lord Warrington of Clyffe went further when he said:

“I cannot say that there was no evidence on which the Commissioners could properly arrive at their conclusion though I am not sure I should have taken the same view.”

Finally, the Lord Chancellor (Viscount Cave) held in a dissenting judgment that the decision of the Special Commissioners was one “showing no evidence upon which that finding could properly be based”.

Given the borderline nature of the decision, the 91-day figure is probably a good indicator of the correct threshold. However, as noted above and as emphasised in their Lordships’ speeches in *Lysaght*, the status of an individual is a matter of fact and degree.

The real target of HMRC’s wrath

Although HMRC won the first of the two recent key cases and have so far won the second, the Government is not satisfied and wishes to close down what they perceive to be a loophole in the application of the IR20 guidance.

Their first target was long-distance lorry drivers who traditionally leave for the Continent on a Sunday evening, returning on a Friday. By ignoring days of arrival and departure, such lorry drivers would count only one day a week as present in the UK and would fall below both the 183 and 91-day thresholds. My view has always been that such working habits would not satisfy the wording in IR20, which refers to

individuals having left the UK and therefore making the numerical tests irrelevant.¹³ The lorry drivers' plan would also seem to ignore the decision in *Rogers v IRC*¹⁴, which shows that it is not necessary to spend any time in the UK whilst still being considered resident in a tax year. Subject to any future reverses in the High Court (or beyond), it appears that the recent case law would support my stance.

However, the Government is now targeting the regular visitors to the UK, who spend the majority of the working week in the UK, but who typically time their visits so as to be present for only two days a week if one ignores days of arrival and departure.¹⁵

Thus in the Pre-Budget Report last October, it was announced that the law would be changed with effect from 6 April 2008 so as to ensure that days of arrival and departure would be including when counting days for the purposes of the 91 and 183-day tests.

The proposed new rules

Further guidance was issued by HM Treasury on 6 December although this did not include the draft legislation which was not published until January 2008. I shall try to ignore the spin contained in the consultation and to focus on the statements of law. The guidance shows two examples of how the new rules would be expected to work.

Changing arrangements on day counting

Ms Y lives in the Isle of Man and normally works there. In 2007-08, she begins a three-year project in London for her Isle of Man employer which involves spending three working days in London each week. She arrives on Monday evening, works a full day on Tuesdays, Wednesdays and Thursdays, and returns to the Isle of Man on Thursday evening. Under normal practice during the year her days of arrival and departure are not counted, so each week spent in the UK counts as 2 days. Over her working year of 46 weeks, she thus spends 92 days in the UK. This is not enough to make her a UK resident under either the 183 days in one-year rule, or over the 90-day average over 4 years.

¹³ See, for example, the first edition of my book (published in 2002), *Guide to the Tax Treatment of Specialist Occupations*, then published by LexisNexis Tolley, para 8.32.

¹⁴ (1879) 1 TC 225

¹⁵ The often quoted case is someone who flies in on a Monday morning and leaves late on the Thursday. Provided that this is done for no more than 45 weeks in the year, the taxpayer ensures that only 90 days are counted as spent in the UK.

Under the changes from 2008-09 onwards her days of arrival and departure will be counted. Each working week she will the[n] be counted as spending 4 days in the UK. So the same working pattern for 2008-09 will mean 184 days are spent in the UK, and Ms Y will be regarded as resident in the UK.

Mr Z lives in Monaco. He works in Monaco and for some years has also worked part weeks in the City of London in a second employment. He arrives in London on Tuesday evening, works Wednesday and Thursday and returns to Monaco on Thursday evening. Under the normal practice his days of arrival and departure are not counted with the result that only 1 day a week (46 days a year) is spent in the UK when he is working, and even with some holiday in the UK, spends over 90 days here in any tax year.

From 6 April 2008, days of arrival and departure are no longer ignored. If he continues this pattern of working each week will count as 3 days, so that he will spend at least 138 days a year in the UK working. He would therefore become UK resident as over a 4 year period he would spend an average of over 90 days a year in the UK.

The conclusion reached in Ms Y's case is fully supported by the draft legislation. That is because it includes proposed amendments to ITA 2007, sections 831 and 832. However, the draft legislation makes no reference to the 91-day test and, in particular, no reference to the method of counting days for the purposes of the test. In truth, it would be difficult for statute to modify an extra-statutory test without codifying the test at the same time. However, given the fact that there have been (and continue to be) many calls for the residence test to be codified in the interests of certainty for taxpayers, there was the possibility that this would happen.

Government publicity¹⁶ however makes no reference to the different sources for the 91 and 183-day tests and proceeds on the assumption that the proposed changes in the law will affect both. This is, to give the Government the benefit of the doubt, misguided. The 91-day test, to the extent that it exists, will continue unamended. The Government is, of course, at liberty to change its internal guidance and to tell taxpayers and advisers its new approach. However, it would be wrong to suggest that the law has changed in this regard.

Finally, it should be noted that the Special Commissioners in *Gaines-Cooper* and the High Court in *Shepherd* made no reference at all to the 91-day test.¹⁷ They, quite properly, assessed the case on the basis of the facts before them and applied the law (rather than extra-statutory guidance) to those facts.

¹⁶ Some might prefer the term 'propaganda'.

¹⁷ The Special Commissioner in *Shepherd* made only a passing reference to the test inasmuch as she commented on Captain Shepherd's desire to follow the IR20 guidance.