THE STATUTORY RESIDENCE TEST: LATEST DEVELOPMENTS

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In June 2012 HMRC published a summary of the responses to the proposals for the statutory residence test. This new test had been announced in June 2011 and is now intended to come into force on 6 April 2013[2]. This is an impressively weighty document of 130 pages which covers all the responses to the issues raised in the original consultation paper and includes detailed comments by HMRC. It also includes the draft legislation which perhaps indicates that there are unlikely to be many further revisions to the test before it reaches the statute book. There will however, be some changes because there are points which have been specifically highlighted by HMRC where they have not yet made up their mind.

Some of the criticisms raised by the professional bodies (and others) have been accepted, but most have been rejected. Apart from a few areas which are still under consideration (such as whether a work day should be 3 hours or 5 hours) we now have a reasonable idea about how the rules will be next year.

I will not set out all the details of the proposed statutory test as they have been set out *in extenso* elsewhere but will concentrate on the main problem areas which have been addressed by the consultation process.

The principal changes which arise as a result of the consultation process are as follows:

Minimal days in UK

In Part A (the set of rules which give rise to conclusive UK residence), one of the tests is that the individual was resident in the UK in any of the last three years and

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2 It had been proposed that the statutory test would come into form on 6 April 2012 but the date of introduction was deferred until 6 April 2013 possibly as a result of the extensive and perceptive comments made by the professional bodies and others on the detailed proposals.

spent no more than 9 days in the UK during the tax year. This is being increased to 15 days.

This increase to 15 days will also be reflected in the day count for the table in Part C which relates to "leavers" – that is, those who have been resident in the UK for any of the last three years.

UK visits by those working full time abroad

Another of the tests in Part A is where the individual leaves the UK to carry out full time work abroad, spending fewer than 90 days and no more than 20 working days in the UK in the tax year. HMRC are still wondering whether this should be increased to 25 days.

Exclusion of exceptional days in UK

HMRC have accepted the need to include an exclusion for exceptional days – those spent in the UK for reasons outside your control. However, the test is not the same as applied for IR20 or HMRC6. It may be remembered that the rule in IR20 was that 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, were not normally counted. This was subtly changed in paragraph 8.9 of HMRC6 which referred only to "an illness which prevents your family travelling".

The statutory rule will be:

i. The individual would not be present in the UK at the end of that day but for exceptional circumstances beyond his control that prevent him from leaving the UK; and

ii. He intends to leave the UK as soon as those circumstances permit.

The legislation refers to "examples of circumstances that may be exceptional" which are national or local emergencies such as war, civil unrest or natural disasters, or a sudden or life threatening illness or injury. These are only examples and I wonder whether the previous examples which had long been accepted by HMRC – the illness of the taxpayer or a member of his immediate family - will still apply. As it stands, a person remaining in the UK to be with a sick or dying relative would probably fail this test. He would be in the UK voluntarily and nothing except compassion would be preventing him from leaving the UK.

Interestingly, the new rule will apply for all day counting tests even where the 182 day limit is exceeded – which is a blessing, having regard to what happened in the

case of *Ogden v HMRC TC 1077*. However, no more than 60 exceptional days will be permitted for any year.

Working days in UK

The definition of a working day was always problematic – and whether it is 3 hours or 5 hours the problems are the same. The question is what constitutes work? Does it include travelling to a meeting and what about lunch or dinner with a client - and what about using your Blackberry. Regrettably, HMRC seem not to understand any of these difficulties. They are going to exclude nearly all travelling from the definition of work – unless during your journey you are sending emails. What about receiving emails, working on your emails, drafting documents, or being on the telephone for the entire journey? The idea of explaining to a client that he can do all these things on his journey to London, but if he sends an email he will be in trouble. It may be laughable - I don't think that it helps to laugh at HMRC any more than it does at Immigration.

If that journey is being undertaken by train, the individual will usually be working the whole time (such is the joy of WiFi) so if it takes more than 1.5 hours to get to your meeting (and therefore 1.5 hours back) a 5 minute meeting will breach the 3 hour limit. This is ridiculous and they might as well say that being in the UK for the purpose of work of any description for any period is going to count as a day. At least everybody would know where they were instead of thinking they have a 3 (or 5) hour time limit when obviously they don't.

Draft clause 15(4) might provide an unexpected answer in this context. Time spent travelling counts as working if the cost of the journey could, if it were incurred by the individual, be deducted in taxing his earnings. We know that such a deduction is virtually impossible because the expenditure has to be incurred wholly exclusively and necessarily in the performance of the duties. There is an abundance of authority to the effect that an expense incurred by the employee to put him in the position of being able to perform his duties is not allowable.

This looks helpful because it would enable travelling to be excluded. However, these is a second part to draft clause 15(4) which says that the travelling will count as work if the individual does something else during the journey that would itself count as "work". This is defined in draft clause 15(1) as doing something in the performance of duties of the employment.

This is where the above HMRC examples become relevant – although the draft legislation seems to be a great deal wider that HMRC suggest in their comments and explanations.

I appreciate this is difficult but it reveals an obsessive anxiety about the possibility of a few people gaining an advantage. In any event, the whole idea that you should be disadvantaged by working harder or longer is so obviously back to front.

Journeys via the UK

There remains an issue with people in transit. Days in the UK will not be counted if a person arrives one day and leaves the next and in the meantime "does not engage in activities that are to a substantial extent unrelated to his passage through the UK". What on earth does this mean? I cannot imagine the HMRC would have any difficulty in suggesting that whatever the individual did (such as watching a movie in the airport hotel – or perish the thought, looking at his Blackberry) it would be an activity unrelated to his passage through the UK.

Definition of 'home'

There was no definition of "home" in the original proposals – but we have one now. Actually we don't just have one – we have lots. (Be careful what you wish for). The idea is that a home is anywhere where the individual can live and is available for a continuous period of more than 90 days (and he actually spends 1 night there) during the year. A hotel room will not be a home but it can be counted as accommodation, as long as it is booked.

Furthermore, the continuous period is not really a continuous period – it includes gaps of up to 15 days between visits. So if a person has a hotel room booked for him 1 day a fortnight for 3 months and turns up only for 1 of those days, he will breach the 91 days rule because this would be regarded as a continuous period of more than 90 days. Only HMRC could regard the booking of a hotel room for 7 separate days, and only occupying the room once, as representing a continuous period of 91 days.

How about a holiday home? Better not to ask. For the purposes of Part B a holiday home is to be ignored – although there is nothing to support that in the draft legislation. However, for Part C a holiday home is to be counted (and that is in the draft legislation). This is hardly consistent with the claim by HMRC that these are clear and consistent rules.

Ordinary residence

It is now clear that ordinary residence as a concept is going to be abolished. Well, sort of. HMRC suggest that the abolition of ordinary residence will represent a major simplification which is of course an excellent and unarguable justification – although the justification rather evaporates when it is revealed that it is not being

abolished for NIC and IHT purposes. HMRC have admitted that by removing the ordinary residence test, some rules (for example those relating to transfer of assets abroad which only apply to persons who are ordinarily resident) will now have a much wider catchment area as all the references to ordinary residence will be replaced by residence.

Clearly there is some way to go with all this but we should know the outcome by the end of the year. It is hoped that when these new rules are eventually enacted, they will provide a degree of clarity which taxpayers deserve so that they can be sure of complying fully with their tax obligations.