Analysis

The statutory residence test: ten things we find very difficult about you

Speed read

It is anticipated that a new residence-based regime will replace the current non-dom rules with effect from 6 April 2025 (depending, of course, on the outcome of the 4 July election and any consultation by the new government). Although the SRT is undoubtedly a much clearer and more objective basis for determining an individual's liability to UK tax than domicile, and the statutory residence rules are better than the old common law, there are a number of inconsistencies and ambiguities in the legislation that can make it difficult to apply.

Claire Weeks
Maurice Turnor Gardner
Claire Weeks is a Partner at Maurice Turnor Gardner. Claire's main areas of practice are advising entrepreneurial high-net worth individuals on UK tax matters, particularly when they are planning their arrival to (or departure from) the UK, and advising trustees of offshore structures on UK tax issues.
Email: claire.weeks@mtgllp.com; tel: 020 7786 8727.

Aoife McCauley
Maurice Turnor Gardner
Aoife McCauley is an Associate in the Private Client team at Maurice Turnor Gardner LLP. She has experience advising high net worth individuals, families and trustees on tax, trusts and estate planning matters. Email: aoife.mccauley@mtgllp.com; tel: 020 7786 8733.

As everyone knows, both the Conservative government and the Labour party have proposed replacing the current rules for non-domiciliaries (i.e. the remittance basis and territorial rules for inheritance tax) with new residence-based regimes.

This will mean that the SRT assumes even greater importance in our tax code.

There is no doubt that the SRT is both a significant improvement on the old common law residence rules that applied before 6 April 2013 and the outdated and subjective concept of domicile.

However, the rules are often not as clear cut as they first appear. Below is an overview of ten recent difficulties that we have encountered in practice – there are more, but ten seemed a reasonable place to stop (and we quite like the title).

(The SRT is contained in its entirety in FA 2013 Sch 45. All paragraph references in this article are to paragraphs of that schedule.)

1. Full-time work in the UK: the 365 day rolling period

The third automatic UK test (para 9) is colloquially referred to as the 'full-time work in the UK test' (FTWUK). While this sounds simple, our experience is that it is unworkably complex.

Unless and until an individual knows exactly how many hours and days they will spend working in any 365 day period (both in the UK and abroad), it is not possible to apply the formula in the legislation to see if this test will apply.

For someone trying to cease UK tax residence, the main difficulty with this test is that it does not apply on a tax year basis: the reference period used to calculate whether an individual has been working full time is a rolling 365 day period that only needs to overlap with the relevant tax year by one day. This means an individual could inadvertently slip into becoming UK resident if they do more than three hours work on a day which is both in that 365 day period and the tax year and across that 365 day period they work 'sufficient hours' in the UK. The effect of this can be mitigated where split year treatment is available, but even so, the relevant tax year will still count as a year of residence.

However, the test will not be satisfied where the 365 day period includes a 'significant break'. There is a significant break from UK work (para 29) if at least 31 days go by and not one of those days is (a) a day on which the taxpayer does more than three hours' work in the UK or (b) a day on which the taxpayer would have done more than three hours' work in the UK but for being on annual leave, sick leave or parenting leave.

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In order to mitigate the risk of FTWUK where it could apply to an individual leaving the UK, we often recommend a 'significant break' from UK work immediately prior to 6 April in the first year that they want to be non-resident (i.e. they do not do any work from the UK and do not take any days of annual or sick leave). This will therefore mean that when they look back 365 days from any day up to 6 March in the following tax year, this period will always include a significant break.

2. Do family asset holding companies pose a risk of working in the UK?

The concept of 'work' is relevant not only to FTWUK, but also the third automatic overseas test (for individuals who work sufficient hours overseas) (para 14), five of the eight split year 'cases' (including Case 1: starting full-time work overseas (para 44); Case 5: starting full-time work in the UK (para 48) and Case 6: ceasing full-time work overseas (para 49)) and the 'work tie' for the purposes of the sufficient ties test.

The statutory definition of 'work' (paras 26 and 27) contemplates duties of employment (which encompasses employees and directors) and trading activities (to include self-employed individuals or partners in a partnership).

An area of difficulty that we have encountered in practice is roles with family investment holding companies.

A preliminary distinction can be drawn between shareholder duties, which should not be considered as employment or trading, and director/shadow director activities.

Where an individual is a director and is remunerated, that is clearly 'work' for these purposes in accordance with

the definition of 'employment' at para 145. But where the director receives no remuneration, the position is not clear-cut. Even more difficult is when the individual is not in fact a director, but could arguably be considered a 'shadow director'.

By contrast, where investments are held in the individual's own name, management activities do not count as work unless they amount to trading activities. Entrepreneurs who come to the UK to scope opportunities should also not be considered to work here, unless they are looking for opportunities on behalf of a company or partnership.

3. Multiple homes

The concept of 'home' is used in several places in the legislation, but is particularly relevant to the second automatic UK test (para 8) (colloquially referred to as the 'only home test') and three of the eight split year 'cases' (Case 3: ceasing to have a home in the UK (para 46); Case 4: starting to have a home in the UK only (para 47); and Case 8: starting to have a home in the UK (para 51)).

There is no definition of a 'home' in the legislation, although there are interpretive provisions in paragraph 25. These include confirmation that a person's home could be a building, vehicle, vessel or structure of any kind, but that there must be a 'sufficient degree of permanence or stability' and somewhere that an individual uses periodically as nothing more than a holiday home or temporary retreat does not count as a home. HMRC's guidance makes clear that an individual can have more than one home (see HMRC's *Residence, Domicile and Remittance Basis Manual* at RDRM13030).

But this can be very difficult to apply in practice where an individual could have two, three, four or more homes. For example, consider an individual who has a home in the UK, and also a yacht in the Caribbean. In many cases, the yacht will be 'nothing more than a holiday home or temporary retreat' (para 25(3)). But what if the individual spends considerable amounts of time on the yacht, entertaining business contacts as well as friends and family, in the same way as he may do at his UK home. It is arguable that these circumstances mean that the individual will also have a home outside the UK.

4. The accommodation tie: staying with family and friends

If a property does not qualify as a home, it can still result in an 'accommodation tie' for the sufficient ties test. RDRM13070 states that the main difference is that accommodation can be transient in nature and 'does not require the degree of stability or permanence that a home does'.

Paragraph 34 provides the requirements for an individual to have the accommodation tie: a 'place to live' in the UK, which is available for use for a continuous period of at least 91 days, and the individual does in fact make use of it at any time for at least one night during the relevant tax year (or a total of at least 16 nights in the case of a home of a close relative, being parents, grandparents, siblings or lineal descendants over the age of 18).

We are often asked by clients how they can stay with friends or relatives when visiting the UK without this being 'available accommodation'. The difficulty is how to ensure that this accommodation is not available for their use for a continuous period of 91 plus days.

RDRM13080 states that the offer of accommodation must be more than a 'casual offer' and the person making the offer must be 'prepared to put the individual up for 91 days at a time (whether they actually do so or not)'. This can be very tricky to determine.

The position is slightly better for close relatives than friends (or anyone else) because of the additional requirement for a close relative that the individual must spend at least 16 nights at that place. This can therefore be considered a form of 'safe harbour': if they spend less than 16 nights with that close relative, it cannot be considered 'available accommodation'. For anyone else (such as a partner, friend, business associate or more distant relative), this safe harbour is not available. Extreme caution is therefore advised when considering whether to stay with anyone other than a close relative.

5. Family tie: when is living together enough?

The family tie requires a 'relevant relationship' (para 32) and this includes a couple 'living together as if they were a married couple or civil partners'. Seeking to determine whether this is the case can involve some quite personal questions(!).

There is no statutory definition and no such thing in law as a 'common law' marriage/civil partnership in the UK, so that does not help.

In *Santos v Santos* [1972] 2 All ER 246 (a divorce case), Lord Justice Sachs said that '"living together" (is) a phrase which is simply the antithesis of living apart'. RDRM11530 directs us to the *Tax Credits Technical Manual* (at TCTM09330) that sets out a number of 'signposts' which include factors such as the stability of the relationship, public acknowledgement, financial support, sexual relationship and dependent children.

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6. Days spent in the UK: why midnight is not the only time of day to consider

Day-counting is central to the SRT. The general rule is that an individual is considered to have spent a day in the UK if they are present in the UK at the end of the day, i.e. at midnight (para 22) (subject to the special exceptions and deeming rule discussed below).

However, midnight is not relevant for all purposes. When assessing whether an individual has a 'work day', three hours spent working in the UK is enough, without presence at midnight. It is also irrelevant when counting days on which the individual has been present at a UK/overseas home for the second automatic UK test (para 8).

Many individuals will also be monitoring their day counts not only from a tax perspective, but also for immigration purposes. In the latter case, a day in the UK is counted whenever part of the day is spent in the UK (British Nationality Act 1981 s 50(10)(b)) for naturalisation applications, and the Home Office continues to apply this methodology when calculating absences for applications connected to long residence and indefinite leave to remain, as confirmed in their caseworker guidance *Continuous residence guidance, calculating absences*). Accordingly, individuals tracking both their UK tax residence and immigration positions must keep separate records for each purpose.

For example, an individual who leaves the UK at 11 am on Monday and returns to the UK at 11 am on Wednesday, has spent only one day in the UK for the purposes of the SRT (Wednesday), but two days for immigration purposes (Monday and Wednesday).

7. Days spent in the UK: hazards for frequent travellers

There are circumstances when a day can be counted even when the taxpayer is not in the UK at midnight. This is limited to 'leavers' with three ties and who are present in the UK, but leave before midnight, on more than 30 days in the tax year (para 23).

For example, a taxpayer wishes to cease UK tax residence in 2024/25 despite retaining the family tie, the accommodation tie and the 90 day tie, meaning a maximum day count under the sufficient ties test of 45. He spends 40 midnights in the UK and is present in the UK on an additional 36 days. Under the deeming rule, six of those 36 days are added to the 40 midnights, giving them a day count of 46 days and resulting in UK tax residence.

While flights and immigration records may be sufficient for demonstrating days spent in the UK, calculating work days can seem like an insurmountable task: how do you prove a negative, i.e. that an individual did *not* work more than three hours on any day?

8. Exceptional circumstances: a moral dilemma

A day does not count as a day spent in the UK if the person would not be present in the UK at the end of that day but for 'exceptional circumstances' beyond their control that 'prevent' them from leaving the UK (para 22(4)). Paragraph 22(5) provides a non-exhaustive list of examples of circumstances that may be exceptional, which includes war, civil unrest, natural disasters and sudden or life-threatening illness or injury. Clearly this is a high bar.

But what does this mean where a close family member is unwell and the taxpayer feels obliged to stay in the UK to be with them? This scenario arose in the case of *HMRC v A Taxpayer* [2023] UKUT 182 (TCC) (which is the first and only time the UT has considered this exception). The UT in that case found that the taxpayer's need to care for her sister (who suffered from alcoholism and depression) and for her sister's children (who required care as a result) did not constitute exceptional circumstances and did not prevent the taxpayer from leaving the UK. Moral or conscientious obligations to be in the UK will therefore seemingly not, by themselves, be sufficient to satisfy the statutory exception.

9. Day counting for passengers in transit: avoiding unrelated activities

A midnight spent in the UK will also not count where the individual arrives in the UK 'as a passenger' and leaves on the next day (para 22(3)). However, the individual must not engage in activities 'that are to a substantial extent unrelated to (their) passage through the UK' between arrival and departure.

HMRC's guidance at RDRM11730 gives rise to particular risks for individuals who are travelling on business. It makes clear that if an individual performs work while passing through the UK, this will be an activity substantially unrelated to his passage through the UK, and accordingly the relief will be unavailable (see example 3(b)).

In addition, whilst days spent in the UK as a passenger or under 'exceptional circumstances' may be excluded when calculating a person's days in the UK, they may still be relevant when assessing whether that person has a country tie, work tie or meets the criteria for full-time work overseas.

10. Record keeping

One of the major challenges for any individual relying on the SRT is the amount of record-keeping required to substantiate an individual's residence position. The difficulties lie not only in the volume of information to be managed, but also in the need for accuracy and consistency in presenting a credible case to HMRC when called upon to do so.

The different ways in which time spent in the UK can be relevant to the application of the SRT (including midnights, exceptional circumstances, transit days, deeming rules, work days and days of presence at a home) and also the separate immigration rules, can catch out practitioners relying on client or third-party record keeping. It is therefore important to ensure that clients keep separate running totals of their various UK 'days', taking into account each separate rule.

While flights and immigration records may be sufficient for demonstrating days spent in the UK, calculating work days can seem like an insurmountable task: how do you prove a negative, i.e. that an individual did *not* work more than three hours on any day? Where possible, we seek to avoid this difficulty by assuming that any day on which work is done in the UK is a work day.

Conclusion

The stated aim of the government when introducing the SRT was to 'give greater clarity and certainty for taxpayers'. There is certainly much to make the lives of advisers easier than under the old common law. In the right circumstances, we can help individuals to have absolute clarity on their residence position. But as with all UK tax legislation, practitioners must be alive to the nuances. There are also some cases where the nebulous nature of certain concepts can make it impossible to give certainty.

An aside: the continuing relevance of domicile for common law purposes

As much as we look forward to domicile no longer being used as a determining factor for UK tax purposes, it is very important not to lose sight of the fact that domicile is a general common law concept and will remain relevant in several contexts. These include succession law, the validity of wills and establishing jurisdiction. It will also remain relevant for all tax years pre-dating the introduction of the new rules and there is currently no indication in relation to what a future government will do about tax treaties. ■

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