

# The statutory residence test and Covid-19

Claire Weeks

Emma-Jane Weider\*

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## Legislation cited

Finance Act 2013 (c.29) Sch.45

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**\*P.C.B. 280** The coronavirus disease (Covid-19) has led to far-reaching restrictions on travel and the ability of individuals to move freely to and from the UK. For individuals reliant on spending a limited number of days in the UK to avoid becoming UK tax resident under the statutory residence test (SRT), this could prove costly.<sup>1</sup> The purpose of this article is to consider the "exceptional circumstances" in which days spent in the UK as a result of the pandemic can be disregarded when applying certain aspects of the SRT. For completeness, the proposed changes to the SRT for individuals present in the UK to work on Covid-19 related activities are mentioned.

## Background to the statutory residence test

From 6 April 2013 the tests for determining whether an individual is resident in the UK for tax purposes have been contained in Schedule 45 to the Finance Act 2013 (collectively referred to as the "statutory residence test"). We refer to paragraphs from this legislation below.

The SRT is structured in three parts:

- (1) The first part identifies when an individual is conclusively UK tax resident (the "automatic UK" tests): paras 6-10.
- (2) The second part identifies when an individual will be conclusively non-UK tax resident (the "automatic overseas" tests): paras 11-16.
- (3) The third part is the tie-breaker. If an individual does not meet any of the above tests, his residence is assessed in accordance with the "sufficient ties" test. This involves a consideration of the time an individual physically spends in the UK and his ties or connections to the UK: para.17.

It is not the intention of this article to explore the SRT in detail, suffice to say that the basic premise is that an individual will be tax resident in the UK if he or she meets any of the automatic UK tests or the sufficient ties test for that tax year and does not meet any of the automatic overseas tests.

## Day counting and exceptional circumstances

For each of the above tests, an important factor is the number of days "spent" in the UK. Paragraph 22(1) provides:

22. "If P is present in the UK at the end of a day, that day counts as *a day spent* by P in the UK." (emphasis added)

The so-called "midnight rule" is subject to a number of exceptions, the most important of which for the purposes of this article is para.22(4), which provides that a midnight in the UK can be disregarded where:

- (a) "P would not be present in the UK at the end of that day but for exceptional circumstances beyond P's control that prevent P from leaving the UK, and
- (b) P intends to leave the UK as soon as those circumstances permit."

Paragraph 22(5) provides two examples (non-exhaustive) of circumstances that may be "exceptional":

- (a) "national or local emergencies such as war, civil unrest or natural disasters, and
- (b) a sudden or life-threatening illness or injury."

HMRC's published guidance on exceptional circumstances can be found at RDRM13220 et seq. (previously Annex B of RDR3). The guidance suggests that where an individual needs to stay in or travel to the UK to deal with a sudden or life-threatening illness or injury to a spouse, person who they are living with as husband or wife, civil partner or dependent child, then this *may* be an exceptional circumstance.

#### **Covid-19**

On 19 March 2020 (shortly after the Foreign and Commonwealth Office updated the Exceptional Travel Advisory Notice advising all British people against all "non-essential" travel worldwide on 17 March and shortly before the UK entered full lockdown on 23 March), HMRC issued the following specific guidance on the circumstances that will be considered "exceptional" for the SRT in the context of the pandemic (RDRM11005):

"Whether days spent in the UK can be disregarded due to exceptional circumstances will always depend on the facts and circumstances of each individual case.

However, if you:

- are quarantined or advised by a health professional or public health guidance to self-isolate in the UK as a result of the virus,
- find yourself advised by official Government advice not to travel from the UK as a result of the virus,
- are unable to leave the UK as a result of the closure of international borders, or
- are asked by your employer to return to the UK temporarily as a result of the virus,"

the circumstances are considered as exceptional.

#### **The limitations of exceptional circumstances**

Although helpful, the rules and guidance on exceptional circumstances will not assist in all cases.

#### ***Tests where exceptional circumstances cannot be taken into account***

The first point to note is that the exception does not apply to all parts the SRT. Paragraph 22 is limited to the concept of "a day spent" in the UK, which is relevant, by way of example, in the following cases:

- (1) First automatic UK test—satisfied if an individual spends 183 days or more in the UK.<sup>2</sup>
- (2) First automatic overseas test—satisfied if an individual spends fewer than 16 days in the UK. *\*P.C.B. 281*<sup>3</sup>

- (3) Second automatic overseas test—satisfied if an individual spends fewer than 46 days in the UK.
- (4) Third automatic overseas test (an individual works sufficient hours overseas)—requires, inter alia, that the number of days an individual spends in the UK is fewer than 91.<sup>4</sup>
- (5) Sufficient ties—assesses the number of days an individual spends in the UK compared against the number of ties they have.<sup>5</sup> In addition, the "90-day tie" applies where an individual spent more than 90 days in the UK in either or both of the previous two tax years.

By contrast, there are further circumstances where day counting is relevant under the SRT, but not by reference to the para.22 definition of a day spent in the UK. As a result, days attributable to exceptional circumstances cannot be discounted. For example:

- (1) Second automatic UK test (colloquially referred to as the "only home" test)—considers whether an individual had a home in the UK for a period of 91 consecutive days *and* is present in their home on at least (for UK homes), or fewer than (for overseas homes) 30 separate days, at least 30 of which fall within the tax year.<sup>6</sup>
- (2) Third automatic UK test (an individual works sufficient hours in the UK)—requires, inter alia, that at least one day in the tax year is a day on which an individual does more than three hours of work in the UK.<sup>7</sup>
- (3) Third automatic overseas test (an individual works sufficient hours overseas)—requires, inter alia, that the number of days on which an individual does more than three hours work in the UK is fewer than 31.<sup>8</sup>
- (4) Family tie—exception for minor children whom the individual sees on fewer than 61 days in a tax year.<sup>9</sup>
- (5) Work tie—an individual works in the UK for at least 40 days in a tax year.<sup>10</sup>

The potential impact of this limitation is best demonstrated by way of example.

#### **Example 1**

Maurice, a UK citizen, lives and works in Dubai, but has a flat in London. In the 2019/2020 tax year, he planned to spend 120 days in the UK (working on 39 of those days) and remain non-UK tax resident on the basis that he did not meet any of the automatic UK tests or automatic overseas tests and has only two ties (the 90-day tie and the accommodation tie).

Following a skiing holiday in Austria, Maurice travelled to London on 14 March 2020. He planned to stay for 10 days, working on only one day, taking his 2019/2020 day-count to 120 with 39 work days. However, he was immediately taken ill with suspected Covid-19 and, in accordance with UK government advice, self-isolated for seven days. Although well enough to travel by the end of March, the closure of Dubai's international border meant that he was unable to return home. The pressure of Maurice's job meant that he was required to restart work from his London flat on 1 April. His total day count for the year was therefore 133, with 43 days of work.

When completing his 2019/2020 tax return, Maurice can rely on FA 2013 Sch.45 para.22 to disregard the days he spent in London from 14 March to 5 April (23 days) for the purposes of para.19. As a result, the number of days spent in the UK remains 110. However, he cannot disregard the *\*P.C.B. 282* additional five days of work for the purposes of para.35 (the work tie), with the result that he has three ties (rather than the two he had planned). He is therefore tax resident in accordance with the sufficient ties test.

#### **60 day limit**

The maximum number of days spent in the UK in any tax year that may be ignored due to exceptional circumstances is 60. This is a statutory limit that could not be modified by HMRC discretion and there has been no indication that the government is minded to amend this aspect of the SRT. Given the period of UK lockdown measured from 6 April far exceeded 60 days, this limit may be inadequate for some for the 2020/2021 tax year.

## Example 2

Turnor was tax resident in 2019/2020 but hoped to become non-UK tax resident in 2020/2021. Having three ties (the accommodation tie, the 90-day tie and the family tie), Turnor's maximum day count to avoid UK tax residence under the sufficient ties test in 2020/2021 is 45: FA 2013 Sch.45 para.18.

Turnor planned to leave the UK on 31 March, but contracted Covid-19 in late March and was hospitalised from 1 April to 31 July (117 days of the 2020/2021 tax year). Although Turnor can disregard 60 days pursuant to para.22, the remaining time spent in the UK exceeds 45 days and Turnor is therefore tax resident for the 2020/2021 tax year.

### *Intention*

In addition to there being exceptional circumstances beyond the individual's control, the second limb of the test in para.22 requires that the individual "intends to leave the UK as soon as those circumstances permit". HMRC's guidance makes clear that the facts and circumstances of each case must be considered. Given the global nature of the pandemic, this intention will need to be assessed by reference to factors both in the UK and in an individual's home country. It remains to be seen whether HMRC will seek to draw a distinction between individuals who were already in the UK when the FCO guidance on non-essential travel changed on 17 March 2020 and anyone travelling to the UK for non-essential purposes after this date.

### *The breadth of the guidance*

The current guidance is by no means comprehensive and there are a wide variety of circumstances that may not be covered. Cases we have already seen in practice include those: (a) where an individual could not return to his home country (due to border closures) but could travel to (or via) another country; (b) where the costs of travel were prohibitively high; and (c) where the individual was required to care for an elderly parent.

It is also possible to foresee debate in relation to the FCO's guidance to avoid all "non-essential" travel. Could leaving the UK to avoid tax residence under the SRT be considered "essential"?

### **The status of HMRC guidance**

Experience tells us that, whilst HMRC will typically honour their guidance, they do not always do so. It is therefore essential to exercise caution in any case where a taxpayer wishes to rely on the RDRM. *\*P.C.B. 283*

As a matter of public law, HMRC (like any public authority) must exercise its statutory discretions reasonably and not unfairly.<sup>11</sup> The principle of legitimate expectation is based on the proposition that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so.<sup>12</sup> The principle is, however, subject to important limitations.

In the *Gaines Cooper* case in 2011,<sup>13</sup> one of the leading cases on the interpretation of public HMRC statements (which is itself a case on the tax residence of individuals), the court made clear that for guidance to create a "legitimate expectation" that HMRC would act in accordance with their stated position the statement must be "clear, unambiguous and devoid of relevant qualification". In that case it was considered important that the rubric to the relevant guidance (IR20) said that its relevance in any case would depend on "all the facts of that case". In the context of HMRC's guidance on Covid-19, the guidance is qualified by the introductory words "will always depend on the facts and circumstances of each individual case".

Furthermore, in order to establish that it would be unfair for HMRC to depart from a representation, the taxpayer must be able to show that he relied on HMRC's representation to his detriment. It is therefore important to retain contemporaneous evidence of such reliance.

Should a taxpayer wish to rely on public law arguments in a dispute with HMRC, it will not be possible to do so in the First-tier Tax Tribunal, which does not have jurisdiction to consider public law arguments.<sup>14</sup> It would instead be necessary to commence a judicial review claim in the High Court.

### **The importance of record keeping**

From a practical perspective, the importance of record keeping cannot be underestimated. In the event of a residence enquiry, it can be anticipated that HMRC will require the best possible evidence to establish the presence of "exceptional circumstances".

### Dual tax residence

An individual who finds himself unexpectedly UK tax resident may also wish to rely on the provisions of a double tax treaty to determine the right to tax between countries. On 3 April 2020 the OECD issued guidance dealing with the impact of Covid-19 on international tax treaty rules.

Section 5 of the guidance explains that "it is unlikely that the Covid-19 situation will affect the treaty residence position". In a situation where an individual is resident in two countries, it seems likely that the "tie-breaker" rules<sup>15</sup> would award treaty residence to the home country.

#### Example 3

Gardner is an Australian national and tax resident but has a holiday home in the UK. During a two-week break in the UK in March 2020 Gardner contracted Covid-19, and the extensive health problems that he now suffers mean it is unlikely he will be well enough to travel until the end of the calendar year. Even discounting 60 days as "exceptional" (FA 2013, Sch.45 para.22), Gardner's day-count will still exceed 182 such that he is automatically UK tax resident: para.8. *\*P.C.B. 284*

Pursuant to art.4 of the UK/Australia Double Tax Agreement,<sup>16</sup> Gardner has a "permanent home" available to him in both countries, but it seems likely that the other tie-breaker tests (centre of vital interests, place of habitual abode and nationality) would award tax residence to Australia.

### Individuals present in the UK to work on Covid-19 related activities

The draft Finance Bill 2020 includes limited modifications to the SRT to address the position of individuals present in the UK:

- (a) as a medical or healthcare professional for purposes connected with the detection, prevention or treatment of Covid-19; or
- (b) for purposes connected with the development or production of medicinal products, devices, equipment or facilities related to the detection, prevention or treatment of Covid-19.

FA 2013 Sch.45 para.22 is amended so that time spent in the UK by an individual in the above categories between 1 March 2020 and 1 June 2020 is disregarded. The disregard in this case is much wider than in the case of "exceptional circumstances".

### An aside—corporate and trust residence

Travel restrictions do not only affect the tax residence of individuals. From a corporate perspective the inability of directors to leave the UK gives rise to the risk that central management and control of a company is exercised from the UK, with the result that the company also becomes UK tax resident. See INTM120185 for HMRC's guidance on the risk, including the conclusion that:

"We do not consider that a company will necessarily become resident in the UK because a few board meetings are held here, or because some decisions are taken in the UK over a short period of time. HMRC guidance makes it clear that we will take a holistic view of the facts and circumstances of each case."

See INTM261010 for related guidance in relation to permanent establishments.

Finally, the tax residence status of trusts depends (in part) on the tax residence of the trustees (whether individual or corporate) and it is therefore vital for trustees to consider whether a change of residence as a result of Covid-19 will also impact the tax position of the trust.

### Claire Weeks

### Emma-Jane Weider

## Footnotes

- 1 Equally at risk are those who, for non-UK tax reasons, are reliant on becoming UK tax resident, but who have been unable to travel to the UK.  
For example, an individual who wishes to be UK tax resident for international tax planning purposes.
- 2 FA 2013 Sch.45 para.7
- 3 FA 2013 Sch.45 para.12
- 4 FA 2013 Sch.45 para.14.
- 5 FA 2013 Sch.45 para.18.
- 6 FA 2013 Sch.45 para.8.
- 7 FA 2013 Sch.45 para.9.
- 8 FA 2013 Sch.45 para.14.
- 9 FA 2013 Sch.45 para.32.
- 10 FA 2013 Sch.45 para.35.
- 11 HMRC's power of collection and management gives them discretion as to which arguments to pursue when collecting tax.
- 12 *Re Funicane's Application for Judicial Review (Northern Ireland)* [2019] UKSC 7 per Lord Kerr at [62].
- 13 *R (Davies & Anor) v HMRC; R (Gaines-Cooper) v HMRC* [2011] UKSC 47, [2011] 1 W.L.R. 2625, [2011] S.T.C. 2249.
- 14 *Saxton 4 x 4 Limited v HMRC* [2019] UKFTT 9 (TC), TC06918.
- 15 OECD Model Tax Convention art.4.
- 16 Convention between the United Kingdom of Great Britain and Northern Ireland and Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains signed on 21 August 2003.