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The meaning of residence

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Eesha Arora and Sophie Wettern Kirk explore the different forms of ‘residence’ for UK tax and immigration purposes

Key Points

What is the issue?

The different meanings of ‘residence’ for UK tax and immigration purposes may cause confusion for international clients.

What does it mean for me?

STEP members should be alert to the risks and consequences of clients spending time in (and outside) the UK from a tax and immigration perspective.

What can I take away?

An understanding of the key factors to be aware of for international clients spending time in the UK.

‘Home is where the heart is’. This saying is generally attributed to Pliny the Elder, the Roman author who died in the Vesuvius eruption of AD 79. However, though Pliny may have been correct from an emotional perspective, the UK tax authorities would take a different view. This article explores the different concepts of ‘residence’ for UK tax and immigration purposes, which may lead to confusion and complications for international clients.

UK tax residence

The best-known concept is that of UK tax residence. Historically, whether someone was UK-tax-resident was based on a combination of case law and guidance from Her Majesty’s Revenue and Customs (HMRC).

However, since 6 April 2013, UK tax residence has been determined by a day count test, broadly based on the number of days an individual spends in the UK in any UK tax year qualified by that person's links with the UK. When we say 'days', we actually mean 'nights'; i.e, an individual is resident on a day if they are in the UK at midnight. However, even here, one needs to take care. More draconian rules apply to 'leavers' (an individual who has been UK–tax-resident in one of the previous three tax years) meaning that presence in the UK on a day may be counted even if they are not present at midnight.

Under this test, known as the 'statutory residence test', the position is clear at either end of the spectrum. An individual who spends 183 days or more in the UK in any UK tax year will be UK-tax-resident for that year, whereas an individual new to the UK who spends fewer than 45 days in the UK will not be UK-tax-resident. For those who fall between these two extremes, it is necessary to consider the 'sufficient ties' test. This involves considering what connections an individual has with the UK (for example, close family living in the UK, a place available to live in, or whether they spend time working in the UK). The number of ties that an individual has to the UK will then affect how many days they may spend in the UK in any given tax year before becoming UK-resident for tax purposes. UK-tax-residence has several consequences, the most significant being that a person who is UK-tax-resident is subject to UK income tax and UK capital gains tax (CGT) on a worldwide basis.[1] The number of years of UK-tax-residence is also used to establish when a person becomes deemed domiciled in the UK, which is important for inheritance tax (IHT).

Immigration continuous residence

The number of days spent in the UK can also be significant for immigration purposes. An overseas citizen who has been living in the UK for some time may be eligible to settle in the UK. This right to stay in the UK indefinitely is known as 'indefinite leave to remain' (ILR) and is an essential precondition for applying for UK citizenship.[2]

An individual will only be able to apply for ILR if they can demonstrate that they have five years' 'continuous residence' in the UK, meaning that they have not been outside the UK for more than 180 days in any 12-month period in the preceding five-year period.[3] Unlike for UK-tax-residence, any time spent in the UK on a particular day will be counted as a 'day', regardless of whether the person is in the UK at midnight.

SDLT residence

Since 1 April 2021, individuals who are not UK-resident are subject to an additional stamp duty land tax (SDLT) surcharge when purchasing residential property in England or Northern Ireland. This means that the SDLT rates for non-UK residents are 2 per cent higher than those for UK residents. The surcharge applies to all residential

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[1] Unless claiming the remittance basis of taxation.

[2] EU, Swiss, Norwegian, Icelandic or Liechtenstein citizens may be eligible to apply for settled status under the EU Settlement Scheme provided they applied for pre-settled status before 30 June 2021.

[3] Or for settled status under the EU Settlement Scheme.

property purchases by non-UK residents, even if the individual intends to live in the purchased property and regardless of whether they already own another residential property.

The test for SDLT-residence is different to that for UK-tax-residence. For these purposes, an individual will be non-UK-resident at the point of purchase of the property (and, therefore, required to pay the surcharge) if they have not been present in the UK for at least 183 days (where a day again means being present in the UK at midnight) in the 12 months immediately prior to the date of purchase. Note that although the day count is the same, the period is not calculated by reference to the tax year. However, it may be possible for the non-resident surcharge to be reclaimed if that individual is present in the UK for at least 183 days in any continuous 12-month period that falls within the two years either side of the purchase date.

Therefore, it would be entirely possible for an individual to be UK-tax-resident (because they have spent a sufficient number of days in the UK in that UK tax year) but to be non-UK-resident for SDLT purposes, because they have spent less than 183 days in the UK in the preceding 12 months. It is, therefore, essential that advisors consider whether an individual meets the SDLT residence test when purchasing UK residential property.

Residence for UK CGT

The concept of 'residence' is also important in determining the tax due on the sale of land. Subject to the availability of private residence relief (PRR), when a person disposes of a UK property, they are subject to CGT on any gain.[4] However, where an individual has occupied a property as their main home, PRR may apply such that they are not subject to CGT on any gain.

The question of whether a property should be considered an individual's 'main residence' is a qualitative rather than a quantitative one. It depends on the facts in each specific case, including whether the individual's occupation of the property showed some degree of permanence.

Where an individual owns more than one residence, they can elect for one property to be treated as their main home for PRR purposes by notifying HMRC within two years of any change of ownership. If no election is made, it will be a question of fact which residence is considered to be their main home. Foreign properties are also relevant.

For international individuals, their tax-residence position and how many nights they spent in the property in each tax year will also be important for PRR. Therefore, advisors should check the position carefully and, depending on the circumstances, consider submitting a PRR election.

[4] A non-UK resident will be subject to non-resident capital gains tax (NRCGT) on any gain since April 2015.

Domicile

Whether a person has acquired a domicile of choice under UK law is crucial for IHT purposes. Based on case law, the test includes a 'residence' limb that may be met by little more than presence in the UK.

Treaty-residence

Where an individual is resident for tax purposes under the domestic law of two jurisdictions, any double tax treaty between those two countries will set out how to determine where the individual is resident for the purposes of that treaty. This process typically takes the form of a tie-breaker test, looking at factors such as the individual's permanent home, personal and economic relations, and nationality.

Although Pliny may have lived his life and left his heart in southern Italy, for modern clients it is vital to determine the nature of the residence they are trying to establish and for what purpose.

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