The big question?

Personal tax

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Peter Vaines highlights some issues with the statutory residence test

Key Points

What is the issue?

The meaning of a ‘home’ and the circumstances of a spouse can create serious problems when determining an individual’s residence

What does it mean for me?

If an individual has a UK home available to them for more than 90 consecutive days, they can become UK resident by spending just 30 days in the country if they spend that time in their home

What can I take away?

Some think that they do not need to consider the residence of a spouse before marriage –not so. The issue is whether they were resident in the earlier years by reference to their own circumstances – irrespective of their marital status at the time

We are gradually starting to understand the statutory residence test (SRT) but, although some of the habitual areas of uncertainty have been clarified, new ones pop up all the time. The meaning of a ‘home’, for example, is difficult and creates serious problems because it is a fundamental element in determining an individual’s residence for the tax year.

The automatic residence test

This is particularly important in connection with the automatic residence test. Under this you will be conclusively UK resident – and can forget about UK ties– if you have a UK home that is available to you for more than 90 consecutive days and you spend more than 29 days in it. So being in the UK for 30 days can be enough to make you resident.

However, this will not apply if you also have an overseas home. If you have a home abroad where you spend more than 29 days during the year, this element of the automatic UK residence test will not apply and you will be back to looking at UK ties and the day counts in the arriver and leaver tables.

The meaning of a home

That seems simple enough until we consider the meaning of a home. However, ‘home’ is defined neither in the legislation nor in the HMRC guidance, although we have a few pointers. For example, it includes a building, part of a building, a vehicle, vessel or structure of any kind, whether or not the individual holds any estate or interest in it. However, a holiday home or temporary retreat does not count for this purpose (see FA 2013 Sch 45(25)). This is likely to confuse because the accommodation tie, which is often described as having a home in the UK, is not that at all. The accommodation tie merely involves having a place to live, which is a different concept and can include a holiday home as well as a hotel room or the opportunity of staying with friends or relatives.

Putting these things together, if you have a home abroad where you spend more than 29 days and a home in the UK where you spend more than 29 days, you will be safe from the application of the automatic residence test. But, and there is always a ‘but’ with the SRT, the foreign property must be a ‘home’. A holiday home does not count; so if HMRC can argue that your foreign home is only a holiday home, it will not represent a home for this purpose – even though it would be a place to live for the purposes of the accommodation tie. If the foreign holiday home does not count as a home, you have only one home, and that is in the UK where 30 days’ presence in that property will make you resident under the automatic residence test. End of story. You can forget about the UK ties and whether you are an arriver or a leaver and being here for 90 or 120 days. Thirty days and you are done.

This is clearly a serious trap but at least if you know it is there and can take steps to avoid a difficulty arising – although quite how far you can go without straying into areas of moral repugnance is not clear.

The spouse test

There are some circumstances in connection with the SRT where planning is rather more difficult. If we look at the UK ties, the first is whether you have a spouse who is resident in the country for the year. That creates its own difficulties because you have to investigate carefully the circumstances of your spouse to make sure that you do not inadvertently have an extra UK tie. In fact, it does not have to be a spouse; it can be someone with whom you are living as husband and wife – which is thought to mean that you live together not as husband and wife, but in a way that looks like husband and wife. To whom, I wonder? The man on the Clapham omnibus, the ‘officious bystander’ suggested by McKinnon LJ, or perhaps the ‘moron in a

hurry’, so beloved by Foster J; or perhaps the latest incarnation from the First-tier Tribunal, the ‘intelligent businessman’. Who knows? Similar but more difficult rules apply to those in civil partnerships. Anyway, I digress.

If you have a place to live in the UK and spent more than 90 days here last year, you will have two UK ties. As an arriver, you could spend 120 days in the UK in the tax year without becoming resident. However, it would be a problem if you were to discover that your spouse was UK resident, thereby giving you an additional UK tie and reducing your allowable days to only 90. Clearly, communication between couples takes on a whole new dimension.

Let us look at a straightforward example. You made a capital gain in 2014/15. You were not resident because you had insufficient UK days or ties to become UK resident and, subject to the temporary non-residence rules, the capital gain will be free of tax. However, if your wife was resident during that year, that would give you an additional UK tie which would cause you to be UK resident and a substantial charge to capital gains tax would arise.

The residence of your wife is therefore crucial. Whether she was resident will depend on her day count and this will depend on which day count table applied to her for the year. This in turn will depend on whether she was an arriver or a leaver – that is to say, whether she was resident in the UK for any of the previous three years. Establishing her residence for those earlier years would be difficult under the old rules, but we can make the election under FA 2013 Sch 45(154) to apply the new rules for this purpose. We therefore need to look at her day count for the years 2011/12 and 2012/13.

Before they were married

However, you might not even have met her by then – let alone married her – so your liability to UK capital gains tax for 2014/15 could depend on the number of days that somebody whom you did not know in 2011 had spent in the UK during that year. If she had spent more than the relevant number of days in 2011, that could have made her resident for 2011/12 for the purposes of the statutory residence test which would make her a leaver and subject to the less generous day count table causing her to be resident in 2014/15.

You may think that, because you tend to spend the same number of days in the UK together, if you were non-resident so was she. But not if she is an arriver and you are a leaver. You would be subject to different day count tables.

Of course this is all the fault of her advisers. They should have told her in 2011 to be careful how many days she spends in the UK because in a few years' time she might marry somebody who might make a capital gain and the number of days she spent in the UK in 2011 could cost him millions of pounds in capital gains tax in January 2016. So they should have advised her to keep her UK days down to … well, who knows?

What about your advisers? They are seriously at fault. They should have told you that if you meet somebody you had better find out before you marry, or give the impression of being married, how many days she spent in the UK in the previous three years, just in case you make a capital gain in due course. They should have advised you to insist on a pre-nuptial agreement which included a specific warranty on the days spent in the UK in the preceding three years.

It might be thought that if they were not married in the earlier year it should not matter because she would not have been a spouse in that earlier year and could not therefore represent a family tie at that time. This is not the case. The issue here is whether she was resident in the earlier years by reference to her own circumstances – irrespective of her marital status at the time.

This is all so capricious that one might hope that some amending legislation or concessionary treatment might be forthcoming – but in the current environment I would not hold my breath.

There are many issues like this and we are in for a period of considerable uncertainty until the courts provide the clarification that is so badly needed in this area.