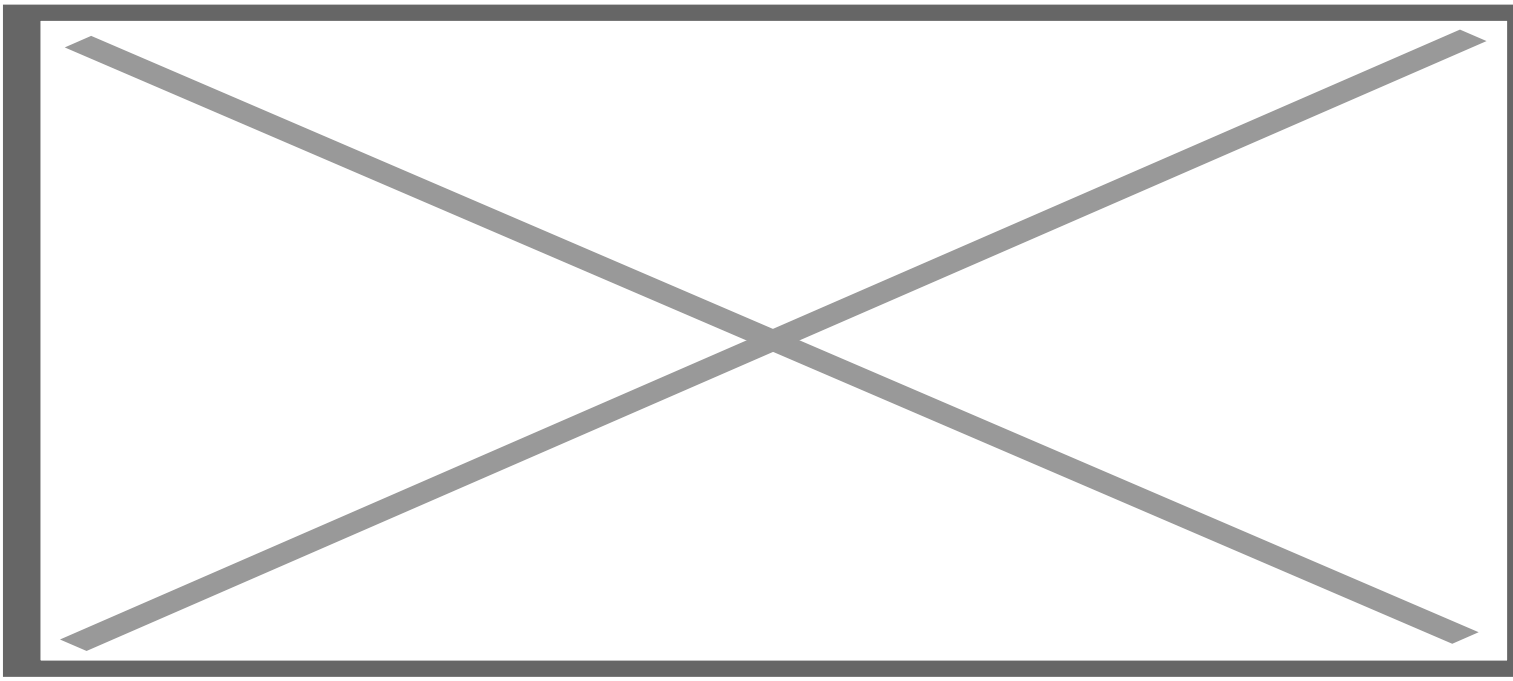
The statutory residence test: defining ‘exceptional circumstances’

Personal tax



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In the case of two twins with contrasting fortunes, the First-tier Tribunal considers the ‘exceptional circumstances’ rule in the statutory residence test.

Key Points

What is the issue?

The taxpayer would be treated as UK resident for the 2015/16 tax year if the day count exceeded 45 in the year. She had spent 44 nights in the UK, when the need to care for her suicidal sister meant that she exceeded the allowance.

What does it mean for me?

Although the tribunal dismissed the taxpayer’s account of what happened, it recognised that the statutory conditions were met by her decision to remain in the UK in order to assist with her sister’s children.

What can I take away?

The tribunal’s firm rejection of HMRC’s approach to the statutory words will be welcomed by many advisers as a much-wanted dose of common sense.

The circumstances underlying this case concern a series of family tragedies which I do not wish to belittle in any way.

Background

After a series of relatively high profile residence cases over the past 15 years, litigation in this field has generally shifted to domicile disputes following the introduction of the statutory residence test with effect from 6 April 2013.

Although the statutory residence test is intended to reduce the question of an individual's residence status to a more quantitative and less qualitative exercise, with the number of days spent in the UK at the heart of the rules, it was always known that there were still some subjective elements within the new test and also areas where the statutory wording might well lead to differing opinions.

The first published decision on the new rules has now appeared in the anonymised decision of *A Taxpayer v HMRC* [2022] UKFTT 133 (TC). It concerns the question of how to count the number of days spent by the individual in the UK in any one tax year. The ordinary rule is that a day is counted if the individual is present in the UK at midnight at the end of that day. However, if the individual is in the UK at midnight due to exceptional circumstances beyond his or her control that prevent them that individual from leaving the UK, then (for up to 60 such occasions in the year) the day is not counted.

The facts of the case

The two main characters at the heart of this case are twin sisters, described here as 'the taxpayer' and 'the twin sister'. However, it is fair to say that their contrasting fortunes could fit within the well-known phrase: it was the best of times, it was the worst of times.

The taxpayer's lifestyle could be described as luxurious, with access to a private jet and a husband who was due to retire within a couple of years. In the tax year in question (2015/16), the taxpayer had received £8 million in dividends from a shareholding that had been transferred to her by her husband in September 2014, which was shortly before the taxpayer moved from the UK to Ireland. Her husband remained living in the UK, proposing to join his wife abroad once he had himself retired.

However, not everything had been easy. The taxpayer's childhood and that of her four siblings had involved physical and mental abuse at the hands of their father: although all five siblings forged a close emotional bond with each other, this was particularly the case in relation to the taxpayer and her twin sister. Furthermore, one of their brothers developed a history of drug misuse, addiction and mental health issues, before he took his own life in 1996, at the age of 29, whilst living in New York.

The twin sister was also living in New York at the time and had the task of identifying her brother's body. It was the taxpayer's view that this episode marked the beginning of her twin's own problems with alcohol and mental health issues. The twin's marriage broke down in 2010 and in 2011 she moved away from her home in the south of England to live closer to the taxpayer's family home in the Manchester area, together with her young children, who by the 2015/16 tax year were aged 11 and 13.

During that five-year period, the twin's mental and physical health gradually worsened, with suggestions of both alcohol and drug addiction. In 2015, she became involved in an acrimonious custody dispute with her ex-husband over their two children. The taxpayer considered herself the only person who could and would provide

the emotional support her twin sister needed. Although the twin sister lived close to the taxpayer's family home (where the taxpayer's husband still lived), the husband had his own crisis (resisting a criminal investigation, which was subsequently dropped) which took up all his available time.

By November 2015, the taxpayer had spent 44 nights in the UK. It was common ground that she would be treated as UK resident for the 2015/16 tax year if the day count exceeded 45 in the year. In December 2015 and February 2016, the taxpayer made two further visits to the UK, amounting to six days, prompted by telephone calls alerting her to a deterioration of her twin sister's condition. These visits would ordinarily take her over the 45-day limit and make her resident, thereby bringing the £8 million dividends into the scope of UK tax. However, the taxpayer argued that those days (strictly, the corresponding midnights) were spent in the UK because of exceptional circumstances, due to the need to care for her suicidal sister.

The case proceeded to the First-tier Tribunal. The case turned on whether at least five of six additional days spent in the UK could be disregarded.

The First-tier Tribunal's decision

The case was heard by Tribunal Judge Guy Brannan and Member Ann Christian.

The tribunal considered the two visits separately.

The December visit started on the Friday evening and the taxpayer returned on the Sunday night. The taxpayer used the private jet available to her and travelled both ways with her school-aged daughter. The tribunal noted that the prompt for the visit was apparently a worried call from her twin sister's solicitor (who was dealing with the custody dispute). However, that call took place in November, some three weeks earlier.

The tribunal also heard evidence about the taxpayer's lunch on the Saturday and Sunday and that, following the visit, she went skiing in the Alps, without having put in place any arrangements to ensure the wellbeing of her twin sister.

In February, whilst in Rome, the taxpayer received a call from her brother asking her to visit her twin sister, as he was worried that their sister was suicidal. The taxpayer explained to the tribunal that she was originally planning to return to Dublin via Manchester, so she could drop her husband off at home. However, the call from her brother caused her to change her plans.

The tribunal also heard that the taxpayer did not leave Rome any earlier than anticipated, enjoyed a lunch for £68 near Manchester and then (probably) visited a Vision Express near her sister's home.

The tribunal also had access to the twin sister's medical records, following her admission to The Priory Clinic in April 2016. Those records appear to dispel the suggestions that the twin sister had suicidal tendencies at that stage.

On the basis of the evidence before the tribunal, it felt that if the visits in December and February were occasioned by the need to care for the consequences of her twin sister's alcoholism and depression, then they did not constitute exceptional circumstances for the purposes of the statutory residence test. As the tribunal continued, 'there were a number of flaws in the appellant's evidence' and the tribunal 'did not find her evidence concerning the twin sister's threats to commit suicide credible'.

However, the tribunal did not stop there. Contrary to its general dismissal of the taxpayer's account of what had happened, the tribunal did accept the taxpayer's description of the state of the sister's home on her visits. As the

tribunal concluded, ‘she found a dysfunctional household in which her twin sister was drunk and incapable of caring for herself or her children, both her sister and her children were unkempt and in need of care … the house was filthy … there was nobody else who could provide the care needed’. In other words, the tribunal felt that the visits to the twin sister were not themselves as urgent as the taxpayer had argued. However, the situation encountered upon her two visits and the urgent care that the taxpayer needed to give to her sister and, in particular, the sister’s two children did amount to exceptional circumstances that prevented the taxpayer from leaving the country.

For these reasons, the taxpayer’s appeal was allowed.

Commentary

It was of little surprise that HMRC expressed some cynicism with the taxpayer’s basic case. The taxpayer was, after all, giving the impression that she was on an urgent mercy mission to help her sister, whereas a close analysis of the timeline and the taxpayer’s actual activities suggests a much more laissez-faire attitude. The tribunal’s decision to reject the taxpayer’s basic case was therefore unexpected.

However, the tribunal was clearly aware of the underlying personal tragedy affecting all members of the family and the taxpayer’s desire to assist her twin and her twin’s children in their desperate situation. Whilst it does not appear to reflect the taxpayer’s main argument, the tribunal recognised that the statutory conditions were met by reference, not to the purpose of the taxpayer’s visits to the UK, but by her decision to remain in the UK to assist with the children.

Given how hard HMRC fought this case, I can imagine that it will be disappointed by the outcome and will be considering whether or not to appeal. The tribunal’s decision will be one of fact, against which appeals are notoriously difficult as they require the unsuccessful party to argue that the tribunal reached a decision which was unsustainable on the evidence before it.

Whilst I would not wish to give HMRC high odds of success, I do wonder whether it will try to argue that, once the tribunal had decided that the taxpayer’s visits to her twin sister were planned and not emergency trips, the fact that the taxpayer then encountered reasons that justified her presence cannot give rise to an exceptional circumstance preventing the taxpayer from leaving the UK.

Indeed, particularly in relation to the December 2015 visit, I am somewhat doubtful as to whether the sister was ever planning to leave the UK on the day of arrival. Adding just those two midnights to the day count, would make all the difference. Furthermore, it might even be possible for HMRC to frame the question as one of law, which could make any procedural difficulties of any appeal somewhat easier to overcome.

It should at this stage be mentioned that much of the tribunal’s decision was actually taken up with its firm rejection of HMRC’s arguments as to how the exceptional circumstances test should operate.

HMRC had tried to argue that:

1. foreseeable circumstances could not be exceptional;

2. visits to fulfil a moral obligation or an obligation of conscience fell outside the scope of exceptional circumstances;

3. to be exceptional, a circumstance had to arise only once the individual was already in the UK; and

4. the rule had to be applied narrowly.

The tribunal responded to these arguments by describing HMRC's approach as one of rewriting rather than interpreting the statutory provisions, adding that it was 'entirely unjustified' and that this had 'infected HMRC's approach to [the case] from the outset'.

In relation to the fourth point, the tribunal did make clear that the legislation (in its use of certain examples) hinted that, as serious illnesses were mentioned, lesser ailments might fall outside the scope of the exceptional circumstances rule. Furthermore, the tribunal noted that the use of the word 'may', prefacing those examples, meant that even serious illnesses would not necessarily constitute exceptional circumstances. However, such general guidance can be taken only so far: each case must be considered on its own facts.

Furthermore, the tribunal emphasised that those statutory examples were just that: examples. They did not circumscribe the scope of the rule.

What to do next

The tribunal's firm rejection of HMRC's approach to the statutory words will be welcomed as a much-wanted dose of common sense. Even though the tribunal's decision is not binding, it would be surprising if any other judge were to take a different view as to the meaning of the paragraph 22(4) test. It must be hoped that HMRC will revise its approach in other cases.

Of course, there is always the possibility that HMRC will rerun the arguments in the course of an appeal; however, even if they were to challenge the tribunal's ultimate decision, I cannot see that it can seriously expect the Upper Tribunal to take a different view as to the interpretation of paragraph 22(4).

What I hope will not happen is that HMRC might choose not to appeal against the decision but then proceed without any change of policy, as if the First-tier Tribunal's decision can simply be ignored. If HMRC is unhappy with the outcome, there would be every good reason for it to take the case further.

If it doesn't, it is fair to assume that it (at least privately) concedes that its approach to the exceptional circumstances rule has previously been erroneous.

What would be particularly welcome, however, would be if HMRC were then to make a public statement making clear its revised approach. That would be a far, far better thing to do, than what has often happened in the past.