



The Law Society

Statutory definition of tax residence

Response of the Law Society of England and Wales

February 2013



Statutory Residence Test

Comments of Tax Law Committee of the Law Society of England & Wales

Introduction

1. The Law Society is the representative body for over 166,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others.
2. This response has been prepared on behalf of the Society by members of the Tax Law Committee, which is made up of senior and specialist tax lawyers practising in this field.
3. The Law Society welcomes this opportunity to comment on the draft clauses to establish a statutory test of residence.

General observations

4. We are disappointed to note that it will not be possible for an individual to elect to be conclusively UK resident. We maintain that this would provide certainty as to residence status for some individuals at the margins whose residency status might otherwise be difficult to determine.

Automatic overseas tests - FTWA

5. While we welcome the increase in the number of work days allowed in the UK from 20 to 30 days we are still concerned about the record keeping requirements imposed upon taxpayers who will need to evidence the fact that they are *not* working 3 or more hours on any day in the UK other than a UK work day.

Automatic UK tests – ‘home’

6. The definition of ‘home’ provided by paragraph 24 of the draft legislation is inadequate. We infer from paragraph 3.33 of the published summary of responses to the June 2012 consultation that the Government considers that it would be difficult to provide a precise or exhaustive definition of the concept. Nonetheless, we would suggest that clarity and certainty could be improved in a number of ways.
 - a. The addition of a new introductory paragraph containing a general definition of "home", which the existing paragraphs could supplement, would be welcome. We would suggest that a "home" could be defined in principle as a self-contained space or place where the individual in question lives otherwise than on a temporary basis.
 - b. What amounts to a "sufficient degree of permanence or stability" (paragraph 24(2)) is not set out in the draft legislation. There is no relevant case-law on the point of which we are aware in the context of residence. Annex A to the SRT Guidance Notes (the "**Guidance Notes**") does not assist with the meanings of any of the three key concepts ("sufficient", "permanence" or "stability") but instead suggests, at A.4 that an informed "reasonable onlooker" test should be applied. The

divergence between the Guidance Notes and the draft legislation on this point is unwelcome. We would suggest reworking both to ensure that the meaning of these concepts is clarified and that the tests outlined in the draft legislation and the Guidance Notes are more clearly aligned.

- c. We note that paragraph A.9 of the Guidance Notes refers to an additional concept, not used in the draft legislation, when discussing the characteristics of a home for the purposes of the SRT: that paragraph refers to use of the building, vehicle etc as a *dwelling*. We would suggest that this concept is added to the legislation and properly defined for the purposes of the SRT (the Guidance Notes currently contain no definition of "dwelling").
 - d. Paragraph A.16 of the Guidance Notes adds a further welcome clarification which is not reflected in the draft legislation at present. We would suggest that a provision to that effect be added to the legislation (or that the Guidance Notes be expressed to be legally binding).
7. The concepts of "holiday home", "temporary retreat" (and "something similar") in paragraph 24(3) are also not defined in the draft legislation. Definitions would be welcome, although these points may be discrete enough to warrant being addressed in guidance rather than in the legislation.
8. We would also propose some drafting clarifications, related to the use of "home" in the draft legislation, as follows:
- e. In paragraph 24(4), the reference to "*after P has moved out*" should be deleted as it is, in our view, unnecessary. The statement should hold true without those words (especially if the test of what is a "home" is based on all the facts and circumstances).
 - f. In paragraph 32(3), we would suggest deleting (a) and (b) and the word "otherwise" in (c). It is not clear why these sub-paragraphs are necessary given the breadth of what is at present sub-paragraph (3)(c).
9. We reiterate our concerns previously expressed about the confusion that flows from the use of the different concepts such as 'home' and 'accommodation'. It is not helpful that where 'home' is used in the split year cases the test differs from that used in the context of the 'home' in the second automatic UK test.

Automatic UK tests – FTWUK

10. While we welcome the increase of the qualifying period to 12 months (which not only fits in with employment practices but makes the FTWUK text symmetrical with the FTWA text) we have concerns about the requirement that no more than 25% of the duties be undertaken outside the UK. In our view, the legislation dealing with the "25%" limb of the test is drafted incorrectly.
11. The original consultation document (June 2011) stated that the 25% test was to be applied by reference to the period of full-time work in the UK, not the tax year. This was repeated in the summary of responses dated June 2012 at paragraph 3.95. However, the draft legislation published in June 2012 provides that the 25% test should be applied by reference to the tax year, not the period of full-time work. The draft legislation published in December 2012 also states that the 25% test is applied by reference to the tax year. We cannot find an explanation for this change in approach in

the various consultation documents, and in our view the change gives rise to anomalous results.

12. The problems caused by this drafting are best illustrated by way of an example.

Assume that:

- An individual works full-time abroad for the first ten months of the tax year (year X). He does no work at all in the UK during this period.
- The individual moves to the UK and works full-time in the UK for the last two months of the tax year and continues to work in the UK for a further period of at least ten months (so that the total period of full-time work in the UK is at least 12 months).

We expect that this individual is supposed to be tax resident in the UK for year X under the FTWUK condition, probably with the benefit of “split year” treatment so that he is only resident for the last two months. However, this would not be the case, because the condition in paragraph 9(1)(d) would not be met.

The total days in year X when he does more than 3 hours’ work would include workdays during the ten months of non-residence. The UK workdays would not comprise more than 75% of the total workdays, as they would be “swamped” by the non-UK workdays during the first ten months.

13. This could impact on the application of the split year rules. If the individual leaves the UK in the year following year X, he would not be able to obtain “split year” treatment for the tax year of departure, unless he is resident in year X under one of the other tests. The relevant cases (1 and 3) both require tax residence for the year prior to the year of departure.
14. We do not believe the legislation is intended to apply in this way. The FTWUK condition can only affect a taxpayer’s residence status for short periods at either the end of a tax year of arrival, or the beginning of a tax year of departure. If a taxpayer spends more than six months working in the UK during a tax year, he will be resident under the 183-day condition, irrespective of whether the FTWUK condition applies. If paragraph 9(1) were enacted in its present form, the FTWUK condition could potentially have no effect at all for taxpayers who are in full-time work outside the UK during the tax year of arrival (i.e. before they come to the UK), or during the tax year of departure (i.e. after they leave).
15. The FTWUK condition would apply differently to taxpayers who do not work outside the UK prior to their arrival; we cannot see any reason for this distinction.
16. Example 5 on page 8 of the draft guidance published on 18 December 2012 suggests that the Government intends the test to be applied in a way which is not consistent with the legislation. In this example, it seems that the test is being applied by reference to the workdays which fall both within the tax year in question and the period of full-time work in the UK. The example does not take into account whether the taxpayer (Henri in the example) has any non-UK workdays for the remainder of the 2014/15 tax year (i.e. during the period 6 August 2014 – 5 April 2015). This approach differs both from the draft legislation (which applies the test solely by reference to workdays in the tax year) and the proposal in the original consultation (which states that the test is to be applied solely by reference to the period of FTWUK).

17. In our view, paragraph 9(1)(d) should be amended as follows (new drafting in italics):

“more than 75% of the total number of days *which fall both in that period and in year X* when P does more than 3 hours’ work are days when P does more than 3 hours’ work in the UK.”

Sufficient ties - ‘accommodation’

18. Paragraph 32(1) & (2) of the draft legislation: We consider that if a person reserves a hotel room for one day a fortnight for three months but only actually spends one night in the accommodation, that place should not be regarded as being continuously available for a period of 91 days. We consider that if consideration is payable for occupation of the accommodation, the person must actually spend the night in the accommodation in order for it to count towards the 91 days.
19. Paragraph 32(6): The draft legislation should be amended to include a ‘close relative’ who is adopted.
20. It would be helpful if the examples in Annex A designed to illustrate the principle and characteristics of accommodation as a UK tie could give a fuller explanation as to why different types of accommodation would or would not be an accommodation tie. For example, in Example A12 it would be helpful to confirm at the end of the second paragraph that Mary had no accommodation tie because the accommodation was not available to her for more than 90 days. It is assumed that in the third paragraph to that example that Mary’s accommodation tie arises by virtue of the fact that she spent time on her uncle’s houseboat. The reference to her spending time with her parents is irrelevant.

Exceptional circumstances

21. Examples of ‘exceptional circumstances’ which would lead to a day spent in the UK not counting are set out at paragraph 21(5) and further guidance is provided at Annex B of the draft guidance.
22. We note that while paragraph B9 of Annex B of the draft guidance indicates that the exceptional circumstances exception can extend to the sudden life threatening illness of or injury to a close family member, paragraph 21(5)(b) does not make it this clear. It would be helpful if at least one of the examples in Annex B of the draft guidance referred to such a situation to provide guidance regarding events which would morally (as well as physically) oblige a person to remain in the UK.
23. Paragraph 21(4) of the draft legislation requires that the exceptional circumstances prevent P from leaving the UK. Example B5 seems to confirm that if P is prevented from travelling to or being present in another country e.g. because of civil unrest days spent in the UK will be considered to be days spent in exceptional circumstances notwithstanding the fact that P could have left the UK to go somewhere other than the country suffering unrest. For this reason we consider the words ‘that prevent P from leaving the UK’ should be omitted from this paragraph.

Split year concession

24. In our view, the split year rules as presently drafted still produce anomalous results.

25. One anomaly is that, where a taxpayer works full-time in the UK for a period of fewer than twelve months which straddle two tax years, split year treatment may be unavailable. We have illustrated this with two examples.

EXAMPLE 1

P arrives in the UK on 1 March in a tax year and works full-time in the UK for a continuous period of eight months from the date of arrival.

The FTWUK automatic residence condition is not met, because the period of FTWUK in the UK is fewer than twelve months.

26. The individual is not resident during the year of arrival; he only spends a single month in the UK and is not resident under any of the other tests. However, he is resident in the year of departure under the first automatic residence test (over 183 days).
27. He cannot split the year of departure, because none of the Cases will apply.
- g. Cases 1, 2 and 3 all require the taxpayer to be resident for all or part of the previous tax year, which will not be the case.
 - h. Case 4 will not apply because it requires the taxpayer either to continue full-time work in the UK, or to meet the only home in the UK test, until the end of the year of departure.
 - i. Case 5 will not apply because it requires the taxpayer to be resident in the next tax year.
28. The taxpayer would be able to split the year of departure if the period of FTWUK lasted for 12 months or more, resulting in UK residence for the final month of the year of arrival.
29. The Government has recently agreed to increase the qualifying period for the FTWUK automatic residence condition from 9 months to 12 months. One of the stated reasons for this change (given in the Government's summary of responses document from July 2012 – see paragraph 3.100) was to allow more taxpayers to qualify for split year treatment. In fact, the change has the opposite effect. The above facts can be used as one example of this.
30. If the taxpayer in the above example worked full-time in the UK for a continuous period of nine months, rather than eight, then (before the change from 9 to 12) he would meet the FTWUK automatic residence condition and so would be resident for the last month of the year of arrival, subject to the point raised above on the application of the 75% test. However, with the period set at 12 rather than 9 months, he will not be resident for the last month of the year of arrival and so cannot split the year of departure.
31. We note that the time limit for making representations on the change from 9 months to 12 months has expired and we do not propose returning to a 9 month period. There were other good reasons for changing the period from 9 months to 12 months. Instead, we suggest addressing the above issue by amending paragraph 43(2) (Case 3) and the corresponding provisions in Cases 1 and 2 as follows (new drafting in *italics*): "The taxpayer was *either* resident in the UK for the previous tax year (whether or not it was a split year) *or started to work full-time in the UK during that year for a period which continued to the end of that year.*"

EXAMPLE 2

P arrives in the UK on October 1 in a tax year (i.e. with just over six months of the tax year remaining). He works full-time in the UK for a continuous period of eight months from the date of arrival.

32. P is resident for the year of arrival under the first automatic residence test (over 183 days) but is not resident for the year of departure.
33. The FTWUK automatic residence condition is not met, because the period of FTWUK is fewer than twelve months.
34. P will not qualify for split year treatment for the year of arrival under Cases 1, 2 or 3 (must be resident for previous tax year) or under Case 5 (must be resident for whole of next tax year). He will look to qualify under Case 4.
35. In order to qualify under Case 4, he must either meet the FTWUK automatic residence test or the “UK home” automatic residence test (see paragraph 44(5)). He does not meet the former test for the year of arrival and will need to rely on the latter test.
36. This test is unlikely to be met, as it will be failed if the taxpayer has a non-UK home and spends more than 30 days in that home during the tax year (see paragraphs 8(2) and 8(3)).
37. Again, the change in the FTWUK automatic residence condition from 9 to 12 months makes it harder, not easier, to qualify for split year treatment, because it has become more difficult to fall within paragraph 44(5). This is contrary to the Government’s stated intention.
38. In our view, this issue should be addressed by deleting paragraph 44(5). It seems that paragraph 44(5) is intended to limit Case 4 to taxpayers who are coming to live or work in the UK. Although this is a legitimate aim, it is already addressed in paragraph 44(3).
39. Finally, where a taxpayer comes to the UK to work full-time after the start of a tax year, and leaves again before the end, he will not be able to split the year.
 - j. Cases 1, 2 and 3 will not apply as they require residence for the previous tax year;
 - k. Case 5 requires residence for the next tax year.
 - l. Case 4 will not apply because it requires the taxpayer either to meet the only home test, or to continue working full-time in the UK, until the end of the tax year.
40. In our view, this issue should be addressed by removing the requirement in paragraph 44(3)(b) for the full-time work in the UK to continue to the end of the tax year.
41. There are specific provisions about how the split year applies to Part 7 and Part 7A ITEPA income but there is no reference to Part 6. One would expect the split year treatment to apply to employment income under Part 6 (EFRBS) in a similar way to that which applies for Part 7 purposes, but there is no mention of Part 6. We have also raised similar concerns in our comments on the pensions aspects of the draft Finance Bill.

42. In addition to the above we observe that paragraphs 41(3) and (4) taken together impose a cliff-edge test: Case 1 will not be available unless the taxpayer starts full-time work overseas and from that date onwards does not exceed the permitted limits relating to days worked or spent in the UK. In a transition period between UK and overseas duties, individuals could be required to spend time physically handing over or briefing colleagues in the UK even after they have started their full-time work overseas. Those individuals in particular would be at risk of exceeding the working day limits (or not complying with their contractual obligations).
43. Paragraph 41(3) should therefore be amended to ensure that the split-year treatment is available to those individuals from a date after that on which their full-time work begins, as follows:
- "There is a period during the relevant tax year during which the taxpayer works full-time overseas from a day until the end of the relevant tax year."*
44. Alternatively, on the basis that the maximum day-count limit imposed by paragraph 41(4)(a) was not present in ESC A11, it would help to simplify Case 1 if paragraph 41(4)(a) were omitted in its entirety.
45. Paragraph 41(5) requires the taxpayer not to be resident in the UK in the year following the split year because the full-time work overseas conditions of the automatic overseas tests are met. (We note that not all of those conditions were set out in ESC A11.) We believe that it would be more appropriate for paragraph 41(5) to require the taxpayer not to be resident in the UK in the year following the split year because any of the automatic overseas tests are met: for example, an individual who takes up full-time work overseas and takes early retirement or is made redundant during the following tax year would not appear to qualify even if the individual had established himself abroad and does not come back to the UK.
46. It would be helpful to clarify, in connection with the application of Case 2, whether a taxpayer who meets the conditions of paragraphs 42(2), (4), (5) and (6) will be entitled to split year treatment if the taxpayer and the partner split up after the deemed departure day but before the end of the relevant tax year. We acknowledge that such a clarification may be more suited to guidance than legislation.