

INDIVIDUAL RESIDENCE AND HMRC6

by Aparna Nathan

Introduction

Practitioners approaching the question of determining an individual's residence status are faced with the task of grappling with case law, legislation and HMRC6 and hopefully arriving at an answer. This is far from satisfactory because it is an impressionistic test and requires the weighing up of various "connectors": and as with all impressionistic tests, one person's view may well vary from another person's view. So how do we use the current tools available to us to arrive with some degree of certainty at an individual's residence status?

Although in most areas of tax law, the starting point would be the applicable legislation, this is arguably not the best starting point for this exercise for a few reasons.

First, there is no universal statutory definition of "residence".

Second, s.829 ITA 2009 is based on the premise that someone who is resident and ordinarily resident has left the UK for the purpose of occasional residence abroad. So, the starting point is that we have to determine whether the person who has purportedly left was actually resident and ordinarily resident at the time that they left.

Third, s.831 ITA 2007 is based on the premise that someone who is either resident on common law grounds or because of s.829 or who is **not** already resident and ordinarily resident in the UK comes to the UK for a temporary purpose only. Here again we are required to determine the individual's residence status before we can seek to apply this particular piece of legislation.

Fourth, s.831, where it applies to treat someone as resident, does not do so for the purposes of all taxes but only for the purposes of the taxes listed in s.830(2) ITTOIA 2005 (see s.831(2) Rule 2).

So, given the incompleteness of the statutory provisions, one turns to the case law – that being the only other source of law (as opposed to practice) available. The problem we are faced with in relation to the case law is created by to some extent by the limitations of the courts' appellate jurisdiction. Very often, higher courts declined to disturb the findings of fact made by the first instance tribunal. This approach has not, therefore, been conducive to the formulation of a clear and practical test for determining an individual's residence status.

It is against this background that Revenue Booklet IR20 was welcomed by practitioners – with its introduction of a simple and practical 91-day test- and formed the backbone of most practitioners' advice. However, the *Gaines-Cooper* case cast doubt on practitioners' ability to rely on the Revenue's published practice in IR20 and its successor HMRC6. As a result, practitioners are once more forced to revert to, and rely upon, the case law in this area.

The Case Law

The recent cases contain a useful summary of the principles established by the case law. These principles are:

1. The word “reside” is a familiar English word which means “to dwell permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place”: *Levene v Commissioners of Inland Revenue* (1928) 13 TC 486, 505;
2. Physical presence in a particular place does not necessarily amount to residence in that place where, for example, a person’s physical presence there is no more than a stop gap measure: *Goodwin v Curtis* (1998) 70 TC 478, 510. This principle was applied in the First-tier Tribunal case of *Turberville* [2010] UKFTT 69 (TC), [2010] STI 1619 in the context of ordinary residence: Judge Avery-Jones held that an individual:
 - who had left the UK to take up employment in the States,
 - but who returned to the UK for a brief period on the termination of his employment,
 - and under a separate consultancy contract with his ex-employer to assist the UK administrators of the ex-employer

was in the UK as a stop gap measure, that he had no regular order of life anywhere and that this was a time of transition for him;

3. In considering whether a person’s presence in a particular place amounts to residence there, one must consider the amount of time that he spends in that place, the nature of his presence there and his connection with that place: *Commissioners of Inland Revenue v Zorab* (1926) 11 TC 289, 291. Put another way, no duration is prescribed by statute and it is necessary to take into account all the facts of the case (*Zorab; Brown*);
4. Further, that the availability of living accommodation in the United Kingdom is a factor to be borne in mind in deciding if an individual is resident here (*Cooper*) (although that is subject to s.831 ITA 2007);
6. Residence in a place connotes some degree of permanence, some degree of continuity or some expectation of continuity: *Fox v Stirk* [1970] 2 QB 463, 477; *Goodwin v Curtis* (1998) 70 TC 478, 510;
7. However, short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation (such as business obligations) and the sequence of visits excludes the elements of chance and of occasion: *Lysaght v Commissioners of Inland Revenue* (1928) 13 TC 511, 529;
8. An individual may simultaneously reside in more than one place, or in more than one country: *Levene v Commissioners of Inland Revenue* (1928) 13 TC 486, 505. In other words, the fact that an individual has a home elsewhere is “of no consequence”; a person may reside in two places but if one of those places is the United Kingdom he is chargeable to tax here (*Cooper* and *Levene*). At para 8 of the Court of Appeal judgment in *Grace*, Lloyd LJ was at pains to point out that the proposition that a home elsewhere is “of no consequence” is not to be

understood as meaning that the other home is entirely irrelevant to the necessary enquiry. What is meant is that the existence of another home elsewhere is not decisive given that it is possible to be simultaneously resident in several places;

9. “Ordinarily resident” refers to a person’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life, whether of short or long duration: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 343. In *Turberville*, the Tribunal judge stated that when seeking to apply this test one must take into account events that upset the regular order;
10. Just as a person may be resident in two countries at the same time, he may be ordinarily resident in two countries at the same time: *Re Norris* (1888) 4 TLR 452; *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 342;
11. It is wrong to conduct a search for the place where a person has his permanent base or centre adopted for general purposes; or, in other words to look for his “real home”: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 345 and 348;
12. There are only two respects in which a person’s state of mind is relevant in determining ordinary residence. First, the residence must be voluntarily adopted; and second, there must be a degree of settled purpose: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 344. *Turberville* and *Tuczka* [2010] UKFTT 53 (TC) [2010] STI 1594, shed further light on this principle.
 - In *Turberville*, Tribunal Judge Avery Jones stated that in determining whether an ordinarily resident individual is in a place with a settled purpose, the fact that he knows that at a fixed future date he will cease to be resident in that place does not alter his previous ordinary residence until such time as he actually leaves.
 - In *Tuczka*, the Tribunal stated:
 1. That *Genovese* was not correct in suggesting that a longer period of time would be necessary to establish that a pattern of residence had become habitual (para 55);
 2. That the taxpayer, although intending at some point to leave the UK, also intended to carry on his employment while that employment continued;
 3. That the taxpayer’s purpose can be said to have become settled when, after about 9 months of being in the UK, the taxpayer and his fiancée set up home in London and continued to be in the UK to carry out their employment commitments;
 4. The decision to purchase a flat in London was a factor in determining whether the taxpayer’s purpose of living in the UK for the time being was settled. Importantly it was not determinative of the issue;

5. That since the taxpayer had adopted an unchanged pattern of living which continued for many years, the commencement date for that pattern was the first date for which it could be shown – this seems to import hindsight;
13. Although residence must be voluntarily adopted, a residence dictated by the exigencies of business will count as voluntary residence: *Lysaght v Commissioners of Inland Revenue* (1928) 13 TC 511, 535;
14. The purpose, while settled, may be for a limited period; and the relevant purposes may include education, business, employment or profession as well as a love of a place: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 344;
15. Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have “left” the United Kingdom) unless there has been a definite break in his pattern of life: *Re Combe* (1932) 17 TC 405, 411. This principle requires some further elucidation. There is some concern following the CA judgment in *ex parte Davies & James and Gaines Cooper* that this test cannot be fulfilled unless there is a complete severance of all social and family ties in the UK (see in particular paras 45, 47, 53). This is arguably an incorrect interpretation of the *Re Combe* test that it seeks to apply: what is required is a break in the pattern of a person’s life before and after departure from a territory and that such a change in pattern should be clear. So if a person’s life before departure revolves around living in London, going to the theatre, eating out in central London and seeing his family and friends on a weekly basis but after his departure to, say, New York or Singapore his life revolves around those places and he sees his family less, there will, in my view, be a clear change in the pattern of his life. And this is so even if he comes back to the UK to see his family or go to the theatre. What Moses LJ seems to consider necessary is a severance of links of a standard necessary to establish a change of domicile – but there must in my view be a distinction between domicile and residence – one is a concept of greater permanence, a life changing event, the other is simply a change of locality in which an individual chooses to carry on his day to day activities for the time being. Ward LJ was troubled by the high standard of severed links postulated by Moses LJ: he could understand, in the context of IR20, that total severance might be justified in relation to a permanent departure but that it was more difficult to justify in the context of an indefinite one because an indefinite departure raised the possibility of that individual returning to the UK at some future date (para 116). However, he stepped back from what, to the author, is an eminently sensible objection, and held that the Revenue were entitled to expect a severance of social, domestic and family ties with the UK if a taxpayer claimed to have ceased to be resident in the UK.

On a happier note, in *Turberville*, the Tribunal held that:

“...in deciding whether there was a distinct break one should look at the position as it was [at the time of the purported distinct break] without the benefit of hindsight.”

This is a relief given that the Revenue tend to argue cases on the basis of hindsight: in the taxpayer's defence, however, the fact that a state of affairs subsists in year 4 does not mean that the taxpayer knew at year 1 that that would be the state of affairs.

The Legislation

Section 829

“Residence of individuals temporarily abroad

(1) This section applies if—

(a) an individual has left the United Kingdom for the purpose only of occasional residence abroad, and

(b) at the time of leaving the individual was both UK resident and ordinarily UK resident.

(2) Treat the individual as UK resident for the purpose of determining the individual's liability for income tax for any tax year during the whole or a part of which the individual remains outside the United Kingdom for the purpose only of occasional residence abroad.”

Grace has confirmed that s.829 ITA applies only where the taxpayer has “left” the UK and if he has “left” the UK the taxpayer must have left for the purpose of occasional residence abroad.

In determining whether the taxpayer has “left” the UK, one employs the concept of a “distinct break”.

This provision, of course, begs the question what is “occasional residence”? There is no statutory definition. Helpfully, in *Grace*, the Revenue conceded that if the taxpayer had “left” the UK by reason of having set up home in Cape Town, he had left for more than occasional residence abroad.

Clearly, going abroad on holiday will fall within the concept of “occasional residence” abroad. But what about a gap-year (whether pre-university or pre-first job)? What about a sabbatical from work that, say, lasts over 12 months and includes a whole tax year?

Whether these instances amount to more than “occasional residence” abroad will depend on many factors and not merely the time spent abroad. Where there is a “distinct break”, it should follow that the taxpayer has both “left” and has gone abroad for more than occasional residence. The case of *Barrett v HMRC* [2008] STC (SCD) 268 at para 48, provides a useful checklist of factors which the Special Commissioners considered to be relevant when determining whether there had been a “distinct break”. The factors were:

1. Whether the taxpayer was employed under the same contract of employment both before and after his purported departure from the UK; [*Barrett*: yes]
2. Whether the taxpayer's duties and place of performance of those duties changed; [*Barrett*: no]
3. Whether the taxpayer had established a permanent residence abroad; [*Barrett*: no]

4. Whether the taxpayer's partner and family continued to live in the UK in the same family home both before and after his purported departure from the UK; [*Barrett*: yes]
5. Whether the taxpayer made special financial arrangements for his time abroad e.g. bank accounts, credit cards, medical insurance. [*Barrett*: no] He maintained and used his UK bank accounts and credit cards;
6. Whether special arrangements were made in relation to his car, driving licence, residence permits, foreign identity card; [*Barrett*: no]
7. Whether there was certainty about the date of departure from the UK. In particular, the taxpayer did not have his ticket, boarding pass stub or similar evidence of date of departure; [*Barrett*: no]
8. Whether the taxpayer's diary evidenced a "distinct break". [*Barrett*: no]

To this list one can add the following factors:

9. Whether the taxpayer has items in storage in the UK;
10. Whether the taxpayer has club or other memberships in the UK;
11. Whether the taxpayer is on the electoral roll in the UK;
12. Whether the taxpayer maintains a property in the UK and, if so,
 - a. Whether it is let out ;
 - b. Whether it is fully furnished;
 - c. Whether it is fully staffed;
 - d. Whether all the utilities are connected.

Where most of these factors point offshore, there is likely to have been a "distinct break". For the reasons discussed earlier, it is my view that it should not be necessary to sever all social and family ties with the UK in order to show a distinct break in the pattern of a individual's life in the UK.

Section 831

"Foreign income of individuals in the United Kingdom for temporary purpose

(1) Subsection (2) applies in relation to an individual if—

(a) the individual is in the United Kingdom for some temporary purpose only and with no view to establishing the individual's residence in the United Kingdom, and

[(b) during the tax year in question the individual spends (in total) less than 183 days in the United Kingdom.]¹

In determining whether an individual is within paragraph (a) ignore any living accommodation available in the United Kingdom for the individual's use.

(2) Apply the following rules in determining the individual's liability for income tax.

...

Rule 2 In relation to income arising from a source outside the United Kingdom, treat the individual as non-UK resident for the purposes of any charge under a provision mentioned in [section 830\(2\)](#) of ITTOIA 2005 (which contains a list of provisions under which relevant foreign income is charged)..."

We know from Lewison J's judgment in *Grace* that s.831 ITA 2007 operates an exemption for someone who would otherwise be resident whether on common law grounds or because the taxpayer falls within s.829 ITA 2007. It is clearly also relevant when looking at the position of someone who is non-resident when they come to the UK.

So assuming that a hypothetical taxpayer was truly non-UK resident before his entry into the UK, he will continue to be non-resident if:

1. He is in the UK for some temporary purpose only; and
2. Not with a view to establishing his residence in the UK; and
3. Is not present in the UK for 183 days or more in that tax year.

The legislation does not define the term "temporary purpose" and it has been left to the courts to work out what that means. *Cooper v Cadwalader* indicates that coming to the UK every year for 2 months in order to shoot is not a temporary purpose. As Lord McLaren said (p109) in that case:

"... I don't think that Mr. Cadwalader is in a position to affirm, when he comes year after year during the currency of his lease to spend the shooting season in Scotland, that he is here for a temporary purpose only. ... taking the ordinary meaning of the word, I should say that temporary purposes means casual purposes as distinguished from the case of a person who is here in pursuance of his regular habits of life. Temporary purpose means the opposite of continuous and permanent residence."

But it must not be forgotten that in *Cooper v Cadwalader* the taxpayer had a three year lease of property to which he could come at any time; he travelled over with his valet; he stayed there continuously for 2 months, had food and servants provided by a London caterer, he hosted resident guests while he stayed in the property. Therefore, there were many factors in operation which created the impression of "residence" – of having set up an establishment in the UK- as opposed to presence in the UK for temporary purposes only.

We also know from *Lysaght* and *Grace* (para 30, CA) that the taxpayer's regular presence in the UK for the purpose of conducting his business obligations or employment is not a "temporary purpose". From *Gaines-Cooper v HMRC* we know that the taxpayer's regular visits to the UK to spend time with his family did not amount to a "temporary purpose". The Special Commissioners observed at paras 178 and 179:

“178. We conclude that a temporary purpose is a purpose lasting for a limited time; a purpose existing or valid for a time; a purpose which is not permanent but transient; a purpose which is to supply a passing need. ‘Temporary purpose’ means a casual purpose as distinguished from the case of a person who is here in pursuance of his regular habits of life. Temporary purpose means the opposite of continuous purpose. A decision to visit the United Kingdom for a few months each year to shoot (ignoring the availability of living accommodation) is not a temporary purpose (*Cadwalader*).

179. Applying those principles to the facts of the present appeal we find that the appellant’s purpose in visiting the United Kingdom was not a purpose which lasted for a limited time; the purpose was to visit his wife and son, his mother and, to a lesser extent, his other friends. This was a permanent and not a transient purpose nor was it simply a passing need. Neither was it a casual purpose but rather it was in pursuance of the regular habits of the appellant’s life. A decision to visit the United Kingdom on a large number of days each year to be with one’s wife and child is not a temporary purpose.”

We also know from *Cooper v Cadwalader* (p108 per Lord McLaren) and *Gaines-Cooper* (para 171) that s.831 ITA 2007 stipulates two cumulative tests: first, the taxpayer must be here for some temporary purpose; and, second, he must have no view to establishing residence in the UK. The importance of the cumulative requirement is that if one is failed then s.831 ITA cannot apply. For example, assuming that the taxpayer does not remain in the UK for 183 days or more per tax year:

1. if the taxpayer has a temporary purpose **and** has no view to establishing his residence in the UK, then he will fulfil the requirements of s.831 ITA and will remain non-UK resident;
2. if the taxpayer has a permanent purpose and has no view to establishing his residence in the UK, he will not fulfil the requirements of s.831 ITA and will not retain his non-UK residence (see *Gaines-Cooper*).

HMRC6

Status of HMRC6

The first point to consider is the status of HMRC6. We know that it is guidance rather than law: if it were law, both the Revenue and the taxpayer would be bound by it and the taxpayer might even be better off. Given that it is guidance, and in the Revenue’s own words “has no legal force, nor does it seek to set out regulation or practice”, can a taxpayer ignore it or, conversely, rely on it against the Revenue?

The author’s view is that a taxpayer would be ill-advised to ignore HMRC6: even though it does not purport to set out the Revenue practice, the Revenue will look to apply the guidance in HMRC6 when looking at claims of non-residence in Tax Returns. So, for a taxpayer to act contrary to its terms is unwise.

Can a taxpayer rely on it to the detriment of the Revenue? In relation to IR20, the Court of Appeal in the *Gaines-Cooper* judicial review proceedings, stated clearly that:

“But the undoubted need to recognise how dependent questions of residence are upon the facts of individual cases does not and should not detract from

the utility and effect of the guidance the Revenue chose to promulgate. IR20 contains statements of normal practice, as acknowledged by the Revenue in its Brief 01/07, following reports of the Gaines-Cooper decision. It sets out a limited number of specific situations in which a taxpayer will be treated as non-resident. If a taxpayer falls within the situation described by the Revenue, the Revenue has given an assurance that it will treat the taxpayer in accordance with the terms of the guidance. If a taxpayer comes, for example, within the terms of 2.2, the Revenue has given an assurance that it will treat that taxpayer as not resident and not ordinarily resident. It will not be permitted to resile from that assurance, unless and until it announces that it proposes, for the future, to alter the circumstances in which it will accept non-resident status.”

In coming to this conclusion, the Court relied on the statement of Judge J in *ex parte MFK* (1572F-H and 1574H to 1575B, that the Revenue could be bound, through the medium of JR, to honour statements made to the public as to how it would treat a taxpayer in particular, defined circumstances.

From this judgment, it is clear that where clear assurances are given by IR20, it is possible for a taxpayer to rely on them and expect HMRC to apply its published treatment.

However, what is the position of HMRC6? The Court of Appeal did not expressly extend their gaze to the status of HMRC6. On the one hand, it is arguable that HMRC6 is a published document that contains some, now very few, clear statements of practice e.g. para 7.5 for short term visitors or para 7.7.3 re ordinary residence. Applying the Court of Appeal’s reasoning, it seems that a taxpayer should be able to rely on those assurances provided he falls clearly within the defined circumstances.

On the other hand, given the extensive “get-out” clauses used by HMRC in chapter 1 of HMRC6 (stating that it is of no legal effect and does not set out practice) it could be argued that a taxpayer cannot legitimately expect to rely on any statement, however clear, in HMRC6.

One undermining feature to this argument is that despite these disclaimers, HMRC expressly state at chapter 1 that they still expect the taxpayer to take the guidance into account in deciding his own tax position.

My own view is that labels are not conclusive so even where the Revenue expressly state that HMRC6 does not set out the Revenue practice but it, in fact, does so because they also say that the guidance tells the taxpayer, “the main factors that we at HMRC take into account when deciding your residence, ordinary residence and domicile status for UK tax purposes” (Chp 1), the Revenue ought, in theory, to be bound. To hold otherwise would, using Moses LJ’s words in *ex parte Davies & James* and *Gaines-Cooper*, “detract from the utility and effect of the guidance the Revenue chose to promulgate”. Nevertheless, it is not outwith the realms of possibility that the reality may be somewhat different.

Coming to the UK

On the assumption that a taxpayer can rely on HMRC6, the crucial question is whether the taxpayer needs to trawl through the cases and determine his/ her residence that way or can he/she short-cut it by applying a simple test set out in HMRC6? Apart from the case of an individual who is present in the UK for 183 days or more in a tax year, there are no universally applicable short cuts in HMRC6. Everything else depends on weighing up factors

such as the location of his family, his property, his business or social connections. HMRC6 still contains the 91 day test but it is unclear whether it is to be regarded as an “instead of” test or an additional test. In the current climate it may be prudent to regard it as an additional test.

Example

A non resident individual comes to the UK because he is independently wealthy and likes what London has to offer. It would be best for him to ensure that he is non-resident under common law and also ensure that visits to the UK do not, over 4 tax years, average more than 91 days per tax year. Strictly speaking, it is arguable that the individual should be able to rely on para 7.5 (short term visitors) alone given its clear statement of circumstances in which visitors will become UK resident. But in the current climate it may be best to ensure that the individual is also non-resident on common law principles.

In the context of ordinary residence, a possible island of certainty in the otherwise uncertain sea of HMRC6 is the following statement at para 7.7.3:

“If the only reason for you becoming ordinarily resident is because you have accommodation here, then as long as you dispose of the accommodation and leave the UK within three years of your arrival, you will not be ordinarily resident.”

It is unlikely to be the case that the only factor that makes a person UK ordinarily resident will be available accommodation, but assuming that someone falls into this category, he can avoid ordinary residence by disposing of the property and leaving the UK within three years of arrival.

Leaving the UK

At para 8.1 the Revenue state:

“When you have been resident and/ or ordinarily resident in the UK you will have many links to this country and you might find that some of these links continue after you leave the country and will mean that you remain resident or ordinarily resident here.”

This seems to suggest that the continuation of any links, however slight, with the UK will jeopardise a taxpayer’s claim to non-residence. This seems contrary to most of the case law (with the possible exception of *ex parte Davies & James*) which requires a weighing up of factors in order to determine whether there has been a distinct break. In fact, this stark statement is tempered by what follows in para 8.1.

Para 8.2 tells us that a person will only become NR and NOR the day after the date of his departure if:

1. He has physically left the UK and
2. He has left for the stated purpose; and
3. He can provide the Revenue with evidence that he has left the UK permanently or indefinitely. For example, useful evidence would be the lease, or deeds of purchase, of a property that will be his main home abroad; evidence that his

family is accompanying him; school enrolment information for his children in schools abroad.

Such a person is permitted to visit the UK after his purported departure but his visits must not average more than 91 days or more a tax year over four years. **Note:** the real problem with this is that it appears that even if an individual and his wife and children leave with the necessary evidence on 1 April 2010 (2009/2010 tax year) so that he is NR/ NOR on 2 April 2010, but he comes back to visit his mother or siblings on 15 June 2010 for 15 days and on 20 December 2010 for 15 days and continues this practice for three years, the Revenue are likely to say that he has never “left” the UK permanently or indefinitely. This is far from fanciful – one simply has to look at *Gaines-Cooper* in the years before his Seychellois wife came to the UK. The counsel of perfection has to be to make no visits at all in the year following permanent departure thereby evidencing a clean break.

This approach also opens up the possibility of relying on *Reed v Clark*. But it is important, in my view, that the individual has set up his permanent base abroad if he wishes to rely on *Reed v Clark*. HMRC6 accepts that this type of planning can achieve non-residence: see para 1.5.15.

Full Time Employment Abroad

Further, turning what HMRC6 states in relation to an individual who leaves the UK pursuant to a full-time contract of employment or for full-time work, such a person, according to para 8.5, will be regarded as NR/NOR from the day after the day of his departure if he satisfies all of the following conditions:

“• you are leaving to work abroad under a contract of employment for at least a whole tax year

• you have actually physically left the UK to begin your employment abroad and not, for example, to have a holiday until you begin your employment

• you will be absent from the UK for at least a whole tax year

• your visits to the UK after you have left to begin your overseas employment will

- total less than 183 days in any tax year, and

- average less than 91 days a tax year. This average is taken over the period of absence up to a maximum of four years – see 8.3 which will show you how to work out this average. Any days you spend in the UK because of exceptional circumstances beyond your control, for example an illness which prevents you from travelling, are not normally counted for this purpose.

If you do not meet all of these conditions, you will remain resident and ordinarily resident in the UK unless paragraph 8.2 applies to you.

If your employment comes to an end and you do not return to the UK it will be necessary to consider if you continue to be not resident and not ordinarily resident in the UK.”

So it is important that the contract is a full-time employment contract that lasts at least a whole tax year. Also make sure that the individual leaves the UK and goes directly to join his duties – no holidaying on the way.

Where a full-time employee's employment ends at the contractual end-date, the employee is not regarded as becoming UK resident/ordinarily resident unless and until the day he returns to the UK. But he may not even then be regarded as becoming resident and ordinarily resident if he can satisfy the Revenue that his visit to the UK is simply a between jobs break. This all sounds feasible but, in practice, it would be advisable for any individual to secure another contract of employment before he even considers returning to the UK and ideally he should not return to visit the UK until he has commenced his duties under the new full-time employment.

Similar treatment applies to persons going abroad for full time trade, profession or vocation. However, it is imperative that it is possible to show that the self-employed person's working life involves a full time commitment. As is well-known, this is usually a little more difficult to achieve in practice.

Relevance of Jurisdiction Cases

Of what relevance to the determination of residence for tax purposes are the jurisdiction cases of *Deripaska* and *Abramovich*? In particular, do we have two different tests of residence- one for tax and another for Jurisdiction purposes? At para 461 Christopher Clarke J observed that:

“Resident for jurisdiction purposes but not resident for tax purposes is a distinction to be avoided if possible.”

However, it seems that the First tier Tribunal is not similarly minded. Note the attempt by counsel for the taxpayer in *Hankinson* [2009] UKFTT 384 (TC) to recommend the approach of the judge in *Deripaska*. The Tribunal Judge sidelined *Deripaska* by stating that that case had a different emphasis to the *Hankinson* case because the former was not concerned with the shedding of an existing status but the acquisition of residence with a degree of permanence and continuity. This begs the question whether a non-resident could seek to rely on *Deripaska* and whether the Tribunal would have to apply a similar approach.

The author's view is that while the sensible approach of the judges in *Deripaska* is to be welcomed, jurisdiction cases have historically been viewed differently. Also, tax residence has repercussions for the exchequer and is therefore likely to be viewed differently from a private action between private parties.

Conclusion

In my view, the tests for determining residence are based on case law and on the statutes and for the most part HMRC6 adds little to those principles other than the 91 day test. The one exception is in relation to full-time employment contracts. Subject to that one exception, it is my view, that all efforts to establish the retention or acquisition by a client of non-UK residence should be aimed at satisfying first, the case law requirements, then the statutory requirements and finally the 91 day test in HMRC6.

As readers will be aware, there are currently moves afoot to introduce a statutory residence test. In the light of the current uncertainty in this area, the certainty introduced by a properly drafted statutory residence test must be a cause for celebration.