

# THE STATUTORY RESIDENCE TEST CONSULTATIVE DOCUMENT<sup>1</sup>

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## Foreword

**In the Spring 2012 Budget** the Government confirmed its intention to implement the statutory residence test in Finance Bill 2013 to take effect from 6 April 2013. This was originally announced in a Written Ministerial Statement made by David Gauke MP, the Exchequer Secretary to the Treasury, on 6 December 2011. It is understood that a formal response to the 2011 Consultation document discussed in the article that follows will be published, together with draft legislation, on an unspecified date after the Budget. It is hoped that the publication will allow practitioners sufficient time to scrutinise the draft legislation and to make representations to the Treasury/HMRC either directly or through their representative bodies.

## The Statutory Residence Test Consultative Document

In this note the writer reviews the merits of the consultative document (the ConDoc) recently issued by HM Treasury and HMRC on their proposal for a Statutory Residence Test.<sup>2</sup>

## Introduction

Practitioners in the field of UK tax have long recognised the fact that the law for establishing an individual's residence status is far from satisfactory. The statutory rules contained in section 829 et seq of the Income Tax Act 2007 (ITA 2007) (and its predecessors) do not apply for all purposes and, more importantly, do not set out tests for determining whether an individual is resident in the UK. The task of determining an individual's place of residence for tax purposes has historically been carried out by the courts. However, many of these cases were decided against a background when global travel was not frequent, fast or, generally, of short duration. The relevance of such cases is, therefore, arguably limited. Further, the limitations of the courts' appellate jurisdiction have not been conducive to the formulation of a clear and practical test for determining an individual's residence status: the appellate courts have, in general, been unwilling to disturb the findings of fact made by the courts of first instance (the Special Commissioners, General Commissioners and, latterly, the First-tier Tribunal).

Against this background, HMRC Booklet IR20, "Residents and non-residents: liability to tax in the United Kingdom",<sup>3</sup> provided a practical *modus vivendi* for HMRC (or the Inland Revenue as they then were) and for practitioners: it introduced a 91-day test and the "full time employment abroad" concession both of which formed the backbone of many practitioners' advice in this area.<sup>4</sup> However, the approach taken by HMRC before the Special Commissioners in *Gaines –Cooper v HMRC (Gaines-Cooper)*<sup>5</sup> cast doubt on practitioners' ability to rely on HMRC's published practice in IR20. HMRC stated that they continued to apply the published practice set out in IR20.<sup>6</sup>

Judicial review proceedings were instituted by the taxpayer in *Gaines-Cooper* which were heard, on appeal from the Court of Appeal, by the Supreme Court in the summer of 2011. The Supreme Court's judgment is expected imminently. Whatever the judgment of the Supreme Court, the fact remains that IR 20 (and its successor HMRC6<sup>7</sup>) cannot safely be

relied upon by practitioners. As a result, practitioners have once more been forced to revert to, and rely upon, the case law in this area.

All parties recognise the central importance to an individual of that individual's residence status. It is, therefore, imperative that an individual (or at least his tax adviser) should be able to determine that individual's residence status with some degree of certainty. For the reasons discussed above, the case law does not provide the requisite certainty.

In answer to the clamour from practitioners for greater certainty, HM Treasury and HMRC have put forward (or, perhaps more accurately, have dusted off) their proposals for a statutory residence test (SRT) in a public consultation document.

This note seeks to discuss the merits/demerits of the proposed SRT.

### **The proposed SRT: stated aims and approach**

The aim of the proposed SRT is stated to be to introduce a test “that is transparent, objective, and simple to use”<sup>8</sup> with the aim of allowing “taxpayers to assess their residence status in a straightforward way”<sup>9</sup> and of enabling “those who come to the UK on business, as employees or as investors to have a clear view of their tax treatment.”<sup>10</sup>

The proposed framework for the proposed SRT is set out in Chapter 3 of the ConDoc.

Paragraph 3.2 of the ConDoc states:

“The SRT is designed to provide a simple process and clear outcome for the vast majority of people whose circumstances are straightforward.”<sup>11</sup>

Paragraph 3.4 of the ConDoc states:

“To provide a fair way of determining residence for those with more complicated affairs the Government proposes that the SRT should take into account both the amount of time the individual spends in the UK and the other connections they have with the UK. However, to avoid the complexity of current case law:

- the test should not take into account a wide range of connections;
- relevant connections should be simply and clearly defined; and
- the weight and relevance of each connection should be clear.”<sup>12</sup>

Paragraphs 3.5 and 3.6 of the ConDoc clearly indicate the anti-avoidance thinking behind the proposed SRT:

“3.5 The Government wants to ensure that introducing a statutory test does not lead to situations where individuals can become and remain non-resident without significantly reducing the extent of their connection with the UK. Equally, the Government is clear that individuals should not be resident if they have little connection with the UK.

3.6 The Government also believes it is beneficial to encourage individuals to come to the UK and spend a limited amount of time here

without necessarily becoming resident, such as investors assessing investment opportunities. The proposed test has been designed so that it is harder to become non-resident when leaving the UK after a period of residence than it is to become resident when an individual comes to the UK. Once an individual has become resident and built up connections with the UK, they should be required to scale back their ties to the UK significantly or spend far less time here or a combination of the two before they can relinquish residence. This is consistent with the principle, reflected in case law, that residence should have an adhesive nature.”<sup>13</sup>

The proposed SRT therefore intends to distinguish between “arrivers” (said to be individuals who were not UK resident in all of the previous three tax years) and “leavers” (said to be individuals who were resident in one or more of the previous three tax years) and intends to make it more difficult to for a “leaver” to become non-resident than it is for an “arriver” to retain non residence.<sup>14</sup>

### **The proposed SRT: essential features**

Paragraph 3.10 of the ConDoc makes it clear that the proposed SRT will supersede all existing legislation, case law and HMRC guidance on determining individual residence, it will only apply to individuals and not to companies<sup>15</sup>; it will apply for the purposes of income tax, capital gains tax and inheritance tax but will not apply for National Insurance Contributions purposes.

The test is made up of three parts:

Part A – which lists factors that, when present, conclusively render an individual non-UK resident;

Part B- which lists factors that, when present, conclusively render an individual to be UK resident;

Part C – which lists day counting rules and connection factors that may render an individual UK resident.<sup>16</sup>

The framework stipulates clear rules for the priority given to each of Parts A, B and C:

1. Where both Part A and Part B could apply to an individual, Part A takes priority and the individual will be regarded as non-resident<sup>17</sup>;
2. If Part A does not apply, the individual is not necessarily UK resident: that would depend on whether he is conclusively resident under Part B or, failing that, under Part C<sup>18</sup>;
3. Part C only applies where none of the conditions in Part A or Part B is satisfied.<sup>19</sup>

#### *Part A : Conclusive Non-Residence*

Paragraph 3.17 of the ConDoc provides:

“Therefore, Part A of the test will conclusively determine that an individual is not resident in the UK for a tax year if they fall under any of the following conditions, namely they:

- were not resident in the UK in all of the previous three tax years and they are present in the UK for fewer than 45 days in the current tax year; or
- were resident in the UK in one or more of the previous three tax years and they are present in the UK for fewer than 10 days in the current tax year; or
- leave the UK to carry out full-time work abroad, provided they are present in the UK for fewer than 90 days in the tax year and no more than 20 days are spent working in the UK in the tax year.”<sup>20</sup>

Broadly, an individual has “full time work abroad” if:

1. If the individual is employed or carries on a trade or profession abroad; and
2. The hours he works in that employment, trade or profession total at least 35 hours per week<sup>21</sup>; and
3. The employment, trade or profession is carried out for at least one full tax year<sup>22</sup>; and
4. That no more than 20 “working days” are “performed”<sup>23</sup> by that individual in the UK (reduced pro rata in cases where the split year rules apply); and
5. The individual must be present in the UK for fewer than 90 days in that tax year (reduced pro rata in cases where the split year rules apply).<sup>24</sup>

In essence, a “working day” is any day on which an individual works for three or more hours<sup>25</sup>: the onus is on the individual to prove that he has worked fewer than three hours in a day if he wishes to have that day excluded as a “working day”.<sup>26</sup>

### *Part B: Conclusive Residence*

Paragraph 3.22 of the ConDoc provides that:

“Provided Part A of the test does not apply, an individual will be conclusively resident for the tax year under Part B if they meet any of the following conditions, namely they:

- are present in the UK for 183 days or more in a tax year; or
- have only one home and that home is in the UK (or have two or more homes and all of these are in the UK); or
- carry out full-time work in the UK.”<sup>27</sup>

The term “days of presence in the UK” is defined (subject to an exception for transit passengers at paragraph 4.17) at paragraph 4.16 as:

“...A person will be treated as being in the UK on any day where they are in the UK at midnight at the end of that day.”<sup>28</sup>

The term “only home” is defined at paragraphs 4.12 and 4.13 as:

“4.12 If a person has only one home and that is in the UK or they have more than one home and all of these are in the UK, this will constitute an ‘only home’.

4.13 Residential accommodation is not treated as an individual’s home if that accommodation is being advertised for sale or let and the individual lives in another residence.”<sup>29</sup>

Of note, however, is that the term “home” is not defined.

The term “full time work abroad” is defined at paragraphs 4.14-4.15 and requires that:

1. The individual is employed or carries on a trade; and
2. The individual works in the UK for at least 35 hours per week;<sup>30</sup> and
3. The work is carried out in the UK for a continuous period of more than nine months (excluding short breaks such as ill health or holidays); and
4. No more than 25 per cent of the duties of the employment, trade or profession are carried on outside the UK in that period.<sup>31</sup>

#### *Part C: Other connection factors and day counts*

Paragraph 3.28 of the ConDoc sets out the rationale for the Part C test:

“Part C reflects the principle that the more time someone spends in the UK, the fewer connections they can have with the UK if they want to be non-resident. It also incorporates the principle that residence status should adhere more to those who are already resident than to those who are not currently resident.”<sup>32</sup>

Paragraph 3.30 of the ConDoc sets out the five connecting factors that are relevant for determining residence:

**“Family** – the individual’s spouse or civil partner or common law equivalent (provided the individual is not separated from them) or minor children are resident in the UK;

• **Accommodation** – the individual has accessible accommodation in the UK and makes use of it during the tax year (subject to exclusions for some types of accommodation);

• **Substantive work in the UK** – the individual does substantive work in the UK (but does not work in the UK full-time);

• **UK presence in previous year** – the individual spent 90 days or more in the UK in either of the previous two tax years;

• **More time in the UK than in other countries** – the individual spends more days in the UK in the tax year than in any other single country.”

“Family” is defined in paragraph 4.19 -4.20 of the ConDoc as:

“4.19 An individual has family in the UK in a tax year if either of the following applies:

- the individual’s spouse, civil partner or common law equivalent is resident in the UK in that tax year or any part of that tax year. This does not include a spouse, civil partner or common law equivalent if they are separated from the individual under a court order or a separation agreement or where the separation is likely to be permanent; or
- the individual has children under the age of 18 who are resident in the UK and the individual spends time with those children (one to one or with others present), or lives with them, for all or part of 60 days or more during the tax year. It would not matter whether these days were spent with the child in the UK or elsewhere.

4.20 A child will not be treated as being resident in the UK for these purposes if their residence is mainly caused by time spent at a UK educational establishment. This will be when the child spends fewer than 60 days in the UK not present at the educational establishment and the child’s main home is not in the UK.”<sup>33</sup>

“Accommodation” is defined at paragraphs 4.21-4.22 of the ConDoc as:

“4.21 An individual has UK accommodation if residential property:

- is accessible to be used by them as a place of residence; and
- is used by them or their family in the year as a place of residence. Family has the same meaning as in paragraphs 4.19 and 4.20.

4.22 The following categories of accommodation are not included as UK accommodation:

- accommodation provided by an individual’s employer where the accommodation is also accessible to, and used by, other employees of that employer who are not connected to the individual. For example, premises owned or rented by the company that is used by all employees visiting the country while on company business;
- any accommodation held on a lease of six months or less, except where there are consecutive leases taking place. For example, if an individual moves from house A, with a six month lease to house B with a six month lease, and there are fewer than six weeks between leaving one house and living in the other, they will be considered to have UK accommodation;
- accommodation accessible to a child of the individual under the age of 18 where that accommodation is provided in relation to the child being a student at a UK educational establishment;
- short-term accommodation in hotels; and
- lodging with relatives, where staying in the home of a relative is for a temporary short-term visit only.”<sup>34</sup>

“Substantive work in the UK” is defined at paragraphs 4.23-4.24 of the ConDoc:

“4.23 An individual has substantive employment or self-employment in the UK if they work in the UK for 40 or more days in the tax year.

4.24 The definition of a working day is any day on which more than three hours of work is undertaken. This includes any day where the person is not in the UK at the end of that day.”<sup>35</sup>

“Days of presence in the UK” bears the meaning it has for Part B (see paragraphs 4.16, 4.17).

Paragraphs 3.34- 3.35 of the ConDoc<sup>36</sup> set out the day counts for “arrivers”:

“3.34 If the individual was not resident in all of the three tax years preceding the year under consideration, the following connection factors may be relevant to their residence status, if they occur at any point in the tax year, namely the individual:

- has a UK resident family;
- has substantive UK employment (including self-employment);
- has accessible accommodation in the UK;
- spent 90 days or more in the UK in either of the previous two tax years.

3.35 The way these connection factors are combined with days spent in the UK to determine residence status is as follows:

<b>Days Spent in the UK</b>	<b>Impact of connection factors on residence status</b>
Fewer than 45 days	Always non-resident
45-89 days	Resident if individual has 4 factors (otherwise not resident)
90-119 days	Resident if individual has 3 factors or more (otherwise not resident)
120-182 days	Resident if individual has 2 factors or more (otherwise not resident)
183 days or more	Always resident”

Paragraphs 3.36- 3.37 of the ConDoc<sup>37</sup> set out the day counts for “leavers”:

“3.36 If the individual was resident in one or more of the three tax years immediately preceding the tax year under consideration, the following connection factors may be relevant to their residence status, if they occur at any point in the tax year, namely the individual:

- has a UK resident family;

- has substantive UK employment (including self-employment);
- has accessible accommodation in the UK;
- spent 90 days or more in the UK in either of the previous two tax years;
- spends more days in the UK in the tax year than in any other single country.

3.37 The way these connection factors are combined with days spent in the UK to determine residence status is as follows:

<b>Days Spent in the UK</b>	<b>Impact of connection factors on residence status</b>
Fewer than 10 days	Always non-resident
10-44 days	Resident if individual has 4 factors or more (otherwise not resident)
45-89 days	Resident if individual has 3 factors or more (otherwise not resident)
90-119 days	Resident if individual has 2 factors or more (otherwise not resident)
120-182 days	Resident if individual has 1 factor or more (otherwise not resident)
183 days or more	Always resident"

In essence, the same factors are taken into account as connecting factors for “arrivers” and “leavers” except that the “adhesive quality” of residence (at least in HMRC’s view) is reflected in the fact that “leavers” are permitted to spend significantly fewer days in the UK when compared to “arrivers” where both types of person retain/ have the same number of connecting factors.

#### *Split year treatment*

This will be put onto a statutory footing.

#### *Anti- Avoidance*

It is intended that temporary non residence rules, similar to those that apply for capital gains tax purposes (section 10 (1) (a) of the Taxation of Chargeable Gains Act 1992) will apply to some forms of investment income, e.g. dividends from close companies but will not apply to earnings from employment, self-employment, bank interest or dividends from listed companies.

#### *Transitional Rules*

There is no present intention to have transitional rules.

## *Ordinary Residence*

Chapter 6 of the ConDoc deals with the concept of ordinary residence and indicates that, since the Government intends to retain the concept of ordinary residence for “overseas workday relief”<sup>38</sup>, it does not wish to abolish the concept for other purposes. It proposes, at paragraph 6.16 of the ConDoc, that:

“The Government’s proposed definition is that individuals who are resident in the UK should also be treated as ordinarily resident unless they have been non-resident in the UK in all of the previous five tax years. If they meet this condition, they may be not ordinarily resident. The status of being not ordinarily resident should be available in the tax year in which the individual arrives in the UK and for a maximum of two full tax years following the tax year of arrival.”<sup>39</sup>

The document sets out two options for reforming ordinary residence:

1. Abolish the concept for all tax purposes except overseas workday relief;
2. Retain the concept for all tax purposes but create a statutory definition.

In the Spring 2012 Budget, the Government announced that it intended to abolish the concept of “ordinary residence” for tax purposes but retain Overseas Workdays Relief. It is understood that Overseas Workday Relief will be put it on a statutory footing.

## **Comments**

### *General Points*

The first general point to make is that it is laudable that the aim of the proposed SRT is to enable “taxpayers to assess their residence status in a straightforward way”.<sup>40</sup> However, it is somewhat disappointing that the test proposed does not apply for all purposes: note the express exclusion of NICs which will retain their own rules. So, it appears that an employee will have to determine his residence status separately for tax and NICs purposes. In the writer’s view, this hardly creates a straightforward way for a taxpayer to determine his residence status.

Further, the writer wonders whether the proposed SRT will apply for the purposes of determining the jurisdiction of the UK courts. It will be recalled that the jurisdiction cases (e.g. *High Tech and others v Deripaska*<sup>41</sup> and *OJSC Oil Company Yugraneft v Abramovich*<sup>42</sup>) have hitherto applied the long established residence cases. It would certainly aid simplicity if the same test were to apply for jurisdiction purposes as well or if it were made clear that the jurisdiction jurisprudence was entirely separate from the jurisprudence henceforward relating to tax residence.

Further still, it is disappointing that the consultation document has missed the opportunity of abolishing the nebulous concept of “ordinary residence” given that it adds little to the concept of “residence” and given also the rising trend of litigation to determine its meaning (e.g. *Genovese v HMRC*<sup>43</sup>, *Tuczka v HMRC*<sup>44</sup>). To the extent that there are tax provisions that include the concept of “ordinary residence”, e.g. the transfer of assets provisions, it would arguably be preferable for those provisions to be amended so that they refer only to “residence”.

What is also disappointing is that HM Treasury and HMRC have missed the chance of achieving true simplicity by replacing the current system with a simple day count rule, i.e. rolling day counts which take into account presence in the UK (other than for closely defined “exceptional circumstances”) over a number of consecutive years. For example, a person would be regarded as resident in the UK if he was present in the UK for 90 days or more in the current year, 45 days or more in the year immediately preceding the current year, and 25 days or more in the year immediately prior to the year immediately preceding the current year.

The rationale behind rejecting this simpler system is, arguably, unconvincing. It has been suggested in the past that there would be loss of revenue if a simple day count were to be introduced. Presumably the fear is that individuals would be able to manipulate their presence in the UK to ensure that their days of presence in the UK were left out of account when determining their statutory days of residence in the UK. One way of dealing with such avoidance is by reducing the level of days required – e.g. 45 days or more in the current year, 25 days or more in the year immediately preceding the current year, 15 days or more in the year prior to the year immediately preceding the current year. Anti-avoidance measures could also be included to distinguish between “leavers” (who will by definition have greater connections with the UK) and “arrivers”: for instance, as envisaged in the consultation document, the days of presence could be set much lower for “leavers” than for “arrivers”.

Further, it is said that there would be avoidance by persons who retained their connections with the UK while simply reducing their days of presence. It is arguable that an individual who is, in actuality, not present in the UK is not “avoiding” UK residence at all but is in fact not resident. However, the approach adopted by HM Treasury and HMRC is, apparently, to regard residence as something akin to domicile: see the references to the adhesive quality of residence (a concept that is much more familiar in the context of domicile) and the insistence that connecting factors in the UK are strong indicators of residence in the UK. This approach, of muddying the boundary between residence and domicile, has met with success before the courts – see, for example, Moses LJ in *R (on the application of Davies and another) v HMRC*; *R (on the application of Gaines-Cooper) v HMRC (Davies and Gaines-Cooper)*<sup>45</sup> in which he considered that, in the context paragraphs 2.7-2.9, of IR20 (1999 version), a severance of all ties with the UK was necessary where an individual claimed to have become non-resident. With respect, the approach taken in both IR20 and in *Davies and Gaines-Cooper*<sup>46</sup> is, in the writer’s view, misguided because it fails to appreciate the distinction between domicile (which is based on where a person intends to make their permanent home/to re-settle) and residence (which is based on where a person is living for the time being).

### *Specific Points*

The three-part design of the proposed SRT is helpful: it gives safe harbours within which an individual is or is not conclusively resident. However, it is arguable that more thought needs to be given to clarify who falls within these parts. For example, it would be appropriate for armed forces personnel on active service abroad to be regarded as conclusively non-resident throughout the tax year concerned. Similarly, diplomats posted abroad could also be regarded as conclusively non-resident for the tax year concerned. Further, Part B (conclusive residence) should expressly include those persons who are regarded as resident for the purposes of the Constitutional Reform and Governance Act 2010 (e.g. Members of Parliament).

The crux of the proposed SRT is Part C. A few points may be made in relation to the list of connecting factors set out in Part C:

1. The list appears to be exhaustive so that only the factors appearing on the list and no other factors are taken into account in determining an individual's residence status;
2. In the absence of any indication to the contrary, it appears that all the listed factors carry equal weight. This is particularly helpful because it puts to bed the concerns of practitioners that the retention of available accommodation in the UK was *de facto* given more weight by HMRC;
3. The last factor (relating to the factor of spending more time in the UK, etc.) recognises the increasingly mobile nature of life and work. However, this factor (which features in the "leavers" category) arguably focuses on the wrong issue – it is the writer's view that an individual may become non-UK resident (by virtue of spending fewer than the maximum permissible days in the UK) without becoming resident anywhere else. As an indicator it is, therefore, weak.

These points apart, the real concern with Part C is the vagueness of the definitions. Much greater clarity is needed in order to increase ease of application of the proposed SRT.

Terms that could do with greater clarification are "family"<sup>47</sup>, "available accommodation"<sup>48</sup>, "substantive employment"<sup>49</sup> and "days of presence in the UK."<sup>50</sup>

In relation to "family" it should be noted that there is no definition of "common law equivalent" of a spouse. It is open to doubt whether such a concept exists in other legal fields. Arguably this concept is meant to apply to some cohabitantes who operate as a family unit, i.e. not merely boyfriend/girlfriend relationships. In the writer's view, this concept ought to be statutorily defined in order to avoid uncertainty.

Further, focusing on paragraph 4.20 of the ConDoc: it is helpful that a child whose presence in the UK is mainly caused by time spent at a UK educational establishment is not regarded as UK resident. However, paragraph 4.20 gives no indication whether "child" here refers to a minor child only (reflecting the second bullet point at paragraph 4.19) or whether any child, i.e. offspring of whatever age, is included. Further, since "educational establishment" is undefined, it is not clear whether it includes an establishment providing tertiary education. If it did, and if "child" were not merely restricted to minor children, then a child in full time university education would not be regarded as UK resident. Some clarification would be helpful.

Further, paragraph 4.20 only permits a child to spend fewer than 60 days in the UK "not present" at the educational establishment. Its aim appears to be to require children to spend school holidays outside the UK. Quite apart from the expense involved, this stipulation fails to recognise the modern reality which is that children at secondary school often spend their half term and end of term holidays bolstering their CVs by undertaking work experience and other extracurricular activities. It seems harsh that time spent on such activities should be included in the 60 day count.

In relation to "available accommodation", it is not clear:

1. What “short term” in “short term accommodation in hotels” covers: five days, ten days? Presumably, it excludes having a floor or a suite on retainer at a hotel;
2. The term “lodging with relatives” category throws up further uncertainties:
  - a. Who are “relatives” for this purpose?
  - b. Is “lodging” intended to convey payment for staying at the “relatives” home?
  - c. What is a “temporary short term visit”? For example, does it include/exclude the situation where the individual visits the UK for two days a month, for mixed business and non business purposes, and invariably stays in his brother’s home on his visits to the UK? Does it matter if he needs to ask permission to stay before each visit?

Further, the writer questions the inconsistency of approach in paragraph 4.19: on the one hand it recognises alternative family structures, e.g. same sex couples and unmarried co-habitees (first bullet) but yet it ignores the familiar structure of second families (second bullet). This failure could produce harsh outcomes: a parent whose child lives with the estranged spouse in a separate family unit and who spends any time with that child in the UK or elsewhere could be regarded as UK resident. This rule appears to be based on the fact that the ability to see the child and to decide where the child is seen are within the parent’s control. In reality, the parent may have no control over where he sees the child.

Turning to the definition of “substantive employment”, further clarification is needed of the term “work”: does it exclude incidental duties or are all duties included? If so, a person who carries out incidental duties (e.g. administration, reporting to the Board) in the UK rather than carrying on any profit earning activities could exceed the permissible work days in the UK. Further, does “work” include a dinner with a client? Does it make any difference if the dinner follows on from a business meeting with the client? Where an individual travels to the UK to attend a client meeting, does “work” include travel time to and from that meeting?

In relation to “days of presence in the UK”, there is a notable lack of “exceptional circumstances” that result in days of presence in the UK being left out of account. The writer suggests that presence in the UK which is unanticipated/ is outside the individual’s control should be disregarded. Examples include the sudden ill health of the individual or a close relative or delays caused by Acts of God, e.g. volcanic ash clouds, or by industrial action.

## **Conclusion**

The proposed SRT is a step in the right direction. However, there are still several aspects that need to be remedied before the test can be said to be simple and straightforward. The simplest system for determining an individual’s residence would be one which reposes little discretion in HMRC’s hands. However, such a system has clearly been rejected in favour of one which still requires judgment calls to be made by HMRC and the taxpayer. The corollary is that there is a commensurate reduction in certainty.

Until the uncertainties are clarified, the self assessment online tool suggested by the consultation document (paragraph 3.39<sup>51</sup>) is unlikely to be of any practical use.

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<sup>1</sup> This article first appeared in the *British Tax Review*, Issue 5, 2011

<sup>2</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011. Available at: [http://www.hm-treasury.gov.uk/d/consult\\_condoc\\_statutory\\_residence.pdf](http://www.hm-treasury.gov.uk/d/consult_condoc_statutory_residence.pdf) [accessed September 26, 2011].

<sup>3</sup> HMRC “IR20 - Residents and non-residents. Liability to tax in the United Kingdom” March 2009. Available at: <http://www.hmrc.gov.uk/pdfs/ir20.pdf> [accessed September 26, 2011].

<sup>4</sup> HMRC “IR20 - Residents and non-residents. Liability to tax in the United Kingdom”, above fn. 2, Chs 2 (Leaving the UK) & 3 (Coming to the UK) and Ch 1.6.

<sup>5</sup> *Gaines –Cooper v HMRC* [2007] STC (SCD) 23 affd [2007] EWHC 2617 (Ch), [2008] STC 1665.

<sup>6</sup>

“Where an individual has lived in the UK, the question of whether he has left the UK has to be decided first. Individuals who have left the UK will continue to be regarded as UK-resident if their visits to the UK average 91 days or more per tax year, taken over a maximum of up to 4 tax years...There was no change to HMRC practice about residence and the ‘91 day test’...” HMRC Brief 01/07- found as an Appendix to HMRC “IR20 - Residents and non-residents. Liability to tax in the United Kingdom”, above fn. 3.

<sup>7</sup> HMRC “Residence, Domicile and the Remittance Basis”, June 2010. Available at: <http://www.hmrc.gov.uk/cnr/hmrc6.pdf> [accessed September 26, 2011].

<sup>8</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Introduction” [1.7].

<sup>9</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Introduction” [1.7].

<sup>10</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Introduction” [1.8].

<sup>11</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.2].

<sup>12</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.4].

<sup>13</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.5] and [3.6].

<sup>14</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.7].

<sup>15</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.10]. Although not expressly stated, the writer assumes that the proposed SRT will not apply to determine trustee residence.

<sup>16</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.11].

<sup>17</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.13].

<sup>18</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.19].

<sup>19</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.12].

<sup>20</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.17].

<sup>21</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.2].

<sup>22</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.3].

<sup>23</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.4]. This is oddly phrased given that it is more usual to speak of duties being performed rather than days being performed.

<sup>24</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.5].

<sup>25</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.7].

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- <sup>26</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.10].
- <sup>27</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [3.22].
- <sup>28</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.16].
- <sup>29</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.12] and [4.13].
- <sup>30</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.14].
- <sup>31</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.15].
- <sup>32</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.28].
- <sup>33</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.19] and [4.20].
- <sup>34</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.21] and [4.22].
- <sup>35</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.23] and [4.24].
- <sup>36</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.34] and [3.35].
- <sup>37</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.36] and [3.37].
- <sup>38</sup> This relief is provided for by the Income Tax (Earnings and Pension) Act (ITEPA) 2003, s.26.
- <sup>39</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Ordinary residence” [6.16].
- <sup>40</sup> P HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Introduction” [1.17].
- <sup>41</sup> *High Tech and others v Deripaska* [2006] EWHC 3276 (QB).
- <sup>42</sup> *OJSC Oil Company Yugraneft v Abramovich and others* [2008] EWHC 2613 (Comm).
- <sup>43</sup> *Genovese v Revenue and Customs Commissioners* [2009] STC (SCD) 373.
- <sup>44</sup> *Tuczka v Revenue and Customs Commissioners* [2011] STC 1438, [2011] All ER (D) 52 (Apr).
- <sup>45</sup> *R (on the application of Davies and another) v HMRC; R (on the application of Gaines-Cooper) v HMRC (Davies and Gaines-Cooper)* [2010] EWCA Civ 83 at [44]-[47].
- <sup>46</sup> *Davies and Gaines-Cooper*, above fn.45, [2010] EWCA Civ 83.
- <sup>47</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.16] to [4.19].
- <sup>48</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.21] to [4.22].
- <sup>49</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.23] to [4.24].
- <sup>50</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Definitions for the statutory residence test” [4.16] to [4.17].
- <sup>51</sup> HM Treasury and HMRC “Statutory definition of tax residence: a consultation” June 2011, above fn.2., “Proposed framework for a statutory residence test” [3.39]. The prototype is available at: [http://www.hm-treasury.gov.uk/consult\\_statutory\\_residence\\_test.htm](http://www.hm-treasury.gov.uk/consult_statutory_residence_test.htm)