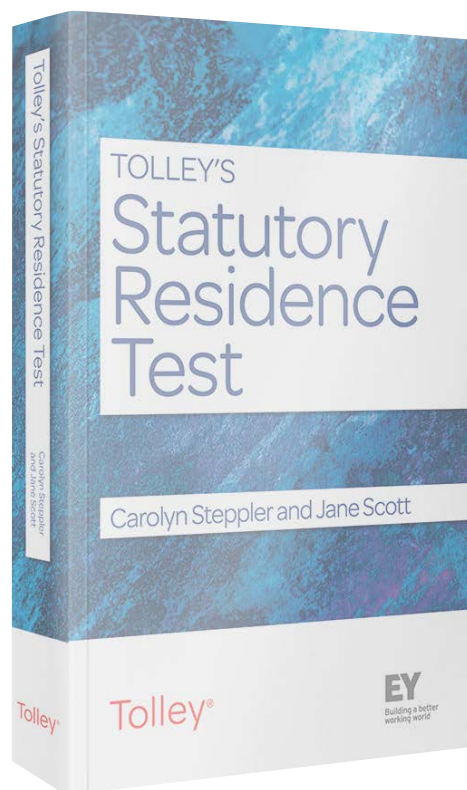


# TOLLEY'S STATUTORY RESIDENCE TEST

Chapter 5:  
Leaving the UK – high net worth  
individuals



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# Chapter 5

## Leaving the UK – high net worth individuals

### Introduction

**[5.01]** This chapter forms the companion to CHAPTER 4 in so far as they both consider the residence position for individuals leaving the UK. While CHAPTER 4 covers those individuals who fall within the SRT definition of full-time work abroad, this chapter considers all other individuals.

Since there is more to leaving the UK than the year of departure, and indeed the position for that year is likely to depend upon the position in subsequent years, this chapter considers the full cycle: the year of departure; the period of non-residence and the year of return.

By way of overview, while the new SRT does increase certainty for those leaving the UK and seeking to become non-UK resident, the new test is no less complex than the former regime based on case law (indeed arguably more so) and in many ways the new test makes breaking UK residence harder for those who are already resident here, certainly for the initial year.

### Year of departure

**[5.02]** Having decided to leave the UK an individual must then consider what steps are necessary in order for him to cease to be UK resident for tax purposes. Prior to the introduction of the SRT it was necessary to look at case law for the answer to this question and an individual would have been well advised to make a ‘distinct break’ in the pattern of their life. The degree of change necessary to effect this (eg selling of UK home, moving of family) was then the subject of much debate.

Following the introduction of the SRT, the individual can at least be clear that, whilst he may choose to retain some or all of his ties to the UK, he will have to do so in exchange for fewer days spent here. In theory, at least, this is intended to reflect a position similar to that which would have been arrived at under the old case law, although there are bound to be some differences.

It is worth noting that UK connections other than those appropriate for the sufficient ties test (eg credit cards, cars, investments etc) now no longer have any relevance for determining the residence status of individuals.

### **When does non-UK residence begin?**

[5.03] UK residence has always been assessed on a whole tax year basis, and that remains the case under the SRT. However, as with the previous regime in certain circumstances, where an individual is UK resident, he can be taxed *as though he is* non-UK resident for part of the year, where he meets the criteria of the split-year provisions. The RDR3 sets this out at para 5.1:

- ‘5.1 Under the SRT, you are either UK resident or non-UK resident for a full tax year and at all times in that tax year. However, if during a year you either start to live or work abroad or come from abroad to live or work in the UK the tax year will be split into two parts if your circumstances meet specific criteria:
- a UK part for which you are charged to UK tax as a UK resident;
  - an overseas part for which, for most purposes, you are charged to UK tax as a non-UK resident.’

Split-year treatment and the tax consequences are now set out in the SRT statute (*part 3, Sch 45, FA 2013*). See CHAPTER 8.

Assuming that an individual leaves the UK part way through a tax year, although he will not technically begin to be non-UK resident until the following tax year, in determining his tax position for the year of departure he will nevertheless need to know whether the split-year treatment will apply to his circumstances. A detailed exploration of the new split-year provisions is included in CHAPTER 8. However, an overview of the provisions as they relate to those leaving for reasons other than full-time employment or self-employment is provided here.

The new split-year test is divided into a number of different sets of circumstances, or ‘cases,’ the conditions of which an individual must fulfil in order for the split-year provisions to apply.

Those leaving the UK for a reason other than full-time work abroad (either their own or their partner’s) can only qualify for split-year treatment under ‘Case 3’, which is in *para 46, Sch 45, FA 2013*. Case 3 provides as follows:

**‘Case 3: ceasing to have a home in the UK**

- 46(1) The circumstances of a case fall within Case 3 if they are as described in subparagraphs (2) to (6).
- (2) The taxpayer was resident in the UK for the previous tax year (whether or not it was a split year).
  - (3) At the start of the relevant year the taxpayer had one or more homes in the UK but—
    - (a) there comes a day in the relevant year when P ceases to have any home in the UK, and
    - (b) from then on, P has no home in the UK for the rest of that year.
  - (4) In the part of the relevant year beginning with the day mentioned in subparagraph (3)(a), the taxpayer spends fewer than 16 days in the UK.
  - (5) The taxpayer is not resident in the UK for the next tax year.
  - (6) At the end of the period of 6 months beginning with the day mentioned in sub-paragraph (3)(a), the taxpayer has a sufficient link with a country overseas.
  - (7) The taxpayer has a “sufficient link” with a country overseas if and only if—
    - (a) the taxpayer is considered for tax purposes to be a resident of that country in accordance with its domestic laws, or

- (b) the taxpayer has been present in that country (in person) at the end of each day of the 6-month period mentioned in sub-paragraph (6), or
- (c) the taxpayer's only home is in that country or, if the taxpayer has more than one home, they are all in that country.'

Thus in order for Case 3 split-year treatment to apply, an individual must:

- have been UK resident in the previous tax year (although this can be a split year);
- have a UK home which they give up (so that they then have no UK home);
- be non-UK resident for the following tax year (in this case the non-residence must apply for the whole of the tax year).

In addition, the individual must then spend fewer than 16 days in the UK in the part of the tax year during which they are treated as non-resident and must establish a 'sufficient link' with a new country (this latter requirement is explored further in para 5.07).

The 16-day test is a very strict limit and contrasts with the position in the split-year test for coming to the UK which applies a version of the sufficient ties test with a reduced day count. Here it is instead a straight day-count test (other ties with the UK during this period of the year of departure are irrelevant). For those leaving the UK towards the end of a tax year (after say, January), the 16-day test may be easy to meet, but for those leaving in the early part it may prove too onerous.

### ***Increased importance of UK home***

[5.04] Prior to the introduction of the SRT, an individual was dependent upon an extra-statutory concession (ESC A11) in order to obtain split year treatment for income tax in the year of departure (an extra-statutory concession, D2, could also apply for CGT but in much more restricted circumstances). If the individual was not leaving the UK for full-time employment or self-employment abroad, then he was only eligible for split-year treatment if he was leaving the UK 'for permanent residence abroad.' As with achieving non-UK resident status, what precisely was involved in permanent residence abroad was a matter of some debate. However, it was generally agreed to be dependent upon a number of factors and involved the breaking of existing ties with the UK. This normally included, but was not limited to, losing the tie of one's UK home either through sale or renting it out.

By contrast, the new test concentrates solely on the whereabouts of the individual's home. CHAPTER 3 explores in detail the definition of 'home' for the purpose of the SRT, so far as there is one, but it is worth reminding ourselves here that this definition can be extremely broad and there is no requirement for an individual to have any legal interest in the property for it to be considered his home. Indeed it may even be someone else's home, for example that of his parents. How one would cease to have a home in the UK in these circumstances would be an interesting question – but perhaps statements of intent together with removing one's belongings would be indicative.

Assuming the tests are satisfied, then the day that the individual gives up their home will be key, since the overseas part of the year starts from that date and so they will be taxed as though they are not UK-resident from that day, regardless of the day on which they actually leave the UK (*para 53(4), Sch 45, FA 2013*).

### **When does a home cease to be a home?**

[5.05] What is not clear is precisely when an individual can be said to have given up their UK home – for example, do they need to have moved all of their possessions out of the property, or is it merely enough to have put the property up for sale and not to return there? It would certainly be common practice to leave one's furniture in a property until it is sold, but then, by extension, it might be normal practice to use the UK property as overnight accommodation on return visits to the UK until such time as any sale has been completed and HMRC guidance suggests that this, at least, may be sufficient to ensure a property remains a home. See, for example, HMRC comments in paras A10, A13, A17 and A19 of Annex A of RDR3 (also covered in CHAPTER 3). Indeed, example A5 in Annex A of the guidance deals with a situation in which a property is not occupied at all but simply kept empty and available for use:

#### **'Example A5**

Asif has lived and worked in the UK for many years, occupying the same apartment in Liverpool since the day he arrived here. Asif's father lives in Sweden and is seriously ill. Ten months ago Asif decided to take a career break to care for his father and moved to Sweden. He does not know how long he will be out of the UK.

Since moving to Sweden Asif has not returned to Liverpool, but his apartment remains empty and available for him to return to whenever he wants. In this situation Asif will have a home in both Liverpool and Sweden even though he is spending all of his time in Sweden.'

It is interesting that HMRC consider the property remains a home even though Asif does not visit it, even for one night for a ten-month period. This seems to set the bar for a home very low (possibly lower than a court would do). This example, like many in the HMRC guidance, deals with a case that is much more clear cut than would often arise in real life. It would have been more interesting to know HMRC's view, for example, if Asif had put the flat up for let but failed to find a tenant, although some further information on this is provided at A17 (see below). It would also be interesting to know whether the property would still be considered by HMRC to be his home if he did not return to it for a full tax year and, if not, on what date it ceases to be his home.

The HMRC guidance, RDR3, gives one example of home in the context of the application of Case 3:

#### **'Example 36**

Maureen has been based in the UK for most of her working life, and has been resident here for tax purposes. On holiday in Bali in the summer of 2013 she meets Maurice, who lives and works in the United Arab Emirates.

Some twelve months later, they marry. Maureen resigns from her job and moves out of her home on 24 September 2014. She spends the nights of 24 and 25 September

in a hotel and flies out to the UAE to live with Maurice on 26 September 2014. She has no close family in the UK and does not return to the UK in the remainder of the tax year. She does not take up any employment in the UAE. Maurice and Maureen plan to live in the UAE for at least another five years.

Maureen will receive split year treatment for 2014-15 as she meets the Case 3 conditions.

- She was UK resident for 2013-14
- She is non-UK resident for 2015-16
- From 24 September 2014 until 5 April 2015 she has no home in the UK and spends fewer than 16 days in the UK
- She had established her only home is in UAE within six months.’

For Maureen, the overseas part of the tax year will start on 24 September 2014, the day she no longer had a home in the UK. In this example, Maureen ‘moves out of her home’ and moves into a hotel. It must be assumed that the home is either sold or let out (although this is not stated in the example) particularly given the comments above regarding Example A5.

HMRC suggest at A17 that a property will cease to be an individual’s home if he moves out of it completely and ‘makes it available to let commercially on a permanent basis.’ It is not clear how long ‘a permanent basis’ is in this context – however, in Example A9 (Ivan – reproduced in para 8.17) Ivan lets out his property on a two-year lease and this is sufficient for HMRC to state that it is not his home.

The safest course of action for those looking to qualify for split-year treatment under Case 3 would be to sell their home or arrange for it to be let out commercially for a period of two years or more. This is in line with HMRC guidance at A19 and Example A10:

‘A19 If an individual completely moves out of a dwelling and makes no further use of it whatsoever it will no longer be their home.

#### **Example A10**

Harry’s new job requires him to travel extensively around Europe. He spends some time working in the UK but most of his work is carried out in other countries. He decided to sell his UK property. On 3 June he put his furniture and belongings in storage and two weeks later he handed the keys to his estate agent. He did not return to his UK property after 3 June and stayed in hotels or with friends on the occasions when he came back to the UK. The property is not his home from 3 June, the date he put his furniture and belongings in storage.’

In this example, the individual has not sold his property at the time it ceases to be his home but he has removed all his personal belongings and put all of his furniture into storage. An individual wishing to be sure that he ceases to have a home in the UK on a particular day might follow the same course, but in the ordinary course of events, where a property is on the market, larger items of furniture at least will remain there until it is sold. Where property is let out, often it will be let out on a furnished basis. It is suggested that provided the individual does not spend time at the property the removal of furniture should not always be necessary to show that a property has ceased to be his home.

In spite of suggestions to the contrary in RDR3, it does not seem necessary that the property is sold or even let; simply that it ceases to be an individual's home. However, it is considered that where the property is not at least advertised for sale or letting, the circumstances in which it would cease to be an individual's home for this purpose must be very limited. To strengthen the argument an individual should consider removing all their furniture and belongings and make no further use of the property.

An individual who leaves the UK without taking their spouse or family is extremely unlikely to qualify for split-year treatment under Case 3, since a property in the UK in which they have lived and which their family continue to occupy is unlikely to cease to be their home for this purpose, even if they do not return to it for the rest of the tax year. See also HMRC comments in para A11 of Annex A:

'A11 A place can still be a home even if an individual does not stay there continuously. If, for example they move out temporarily but their spouse and children continue to live there, then it is still likely to be their home.'

### **Holiday homes**

[5.06] Where an individual has more than one home in the UK, they will need to consider letting or selling all of those homes to qualify for split-year treatment. However, the exclusion of holiday homes from the definition of home (at *para 25, Sch 45, FA 2013*) should be noted:

'(3) But somewhere that P uses periodically as nothing more than a holiday home or temporary retreat (or something similar) does not count as a home of P's.'

So, if the individual has, say, a family home in Birmingham in which he lives on a day-to-day basis and also a cottage in the Lake District that he uses, say, one weekend a month, then arguably he need not dispose of the cottage. Precisely where the line falls between what is a 'home' and what is a 'holiday home' will be an interesting question for this purpose.

There may, for example, be an argument that when an individual goes to live overseas, his main home in the UK then becomes a temporary retreat that is used only for short holidays to the UK. If that argument holds, the home would cease to be a home and there would be no need for the individual to sell or let the property. However, it seems unlikely that HMRC would accept this argument.

For more details on 'holiday homes', see paras 3.07 and 7.05.

### **Establishing a 'sufficient link'**

[5.07] Assuming that an individual has ceased to have a home in the UK, they must then fulfil the next part of the test. In addition to spending fewer than 16 days in the UK during the 'overseas part' of the year and remaining non-UK resident for the whole of the next tax year, the individual must, at the end of a six-month period, establish a 'sufficient link' with a country overseas (*para 46(7), Sch 45, FA 2013*). The HMRC guidance, RDR3, gives very little assistance here, effectively only repeating the legislation:

- 5.23 From the point you cease to have a home in the UK you must:
- spend fewer than 16 days in the UK
  - in relation to a particular country, either:
    - become resident for tax purposes in that country within six months
    - be present in that country at the end of each day for six months, or
    - have your only home, or all your homes if you have more than one, in that country within six months.’

The concept of a sufficient link is dealt with more fully at para 8.13. However, this need to establish a sufficient link with another country is likely to have a significant bearing on the timing of an individual’s departure so a brief exploration is included here.

Taking the last part of the test first – since we have already been considering an individual’s home – in order to qualify for split-year treatment, an individual must, by definition, have given up their UK home so having all his homes in other countries is unlikely to prove a problem. However, the individual must have all his homes in the same other country which, for some taxpayers, may prove more difficult. Here the line between a ‘holiday home’ and a ‘home’ may prove crucial since any home which is only a ‘holiday home’ can be ignored for this purpose and this may be an area in which we see developing case law in the next few years. If the individual is able to meet this test, then there will be no need to consider either of the two more difficult parts of the sufficient link test.

Assuming that the individual retains homes in more than one country, then he is left having to meet one of the other two parts of the test. The first alternative is that he must be ‘considered for tax purposes to be a resident of that country in accordance with its domestic laws.’ This is where the timing of departure may prove crucial, since with the UK having such an unusual tax year, an individual might have left the UK, say in October 2013, be present in the other country for the following six months, but not yet be tax resident there: since he has effectively spent three months there in each of the calendar years 2013 and 2014. It is assumed that it is not necessary to take a snapshot at the six-month point.

So in the example of the individual leaving in October 2013, it is assumed that if the individual proves to be resident for the whole of 2014 for the purpose of that country’s domestic law this will be sufficient, and it will be possible to look back to April 2014 with hindsight with no need to take the test as at April 2014, when the individual may not yet have done enough to make himself resident in his destination country. From a self-assessment perspective, in most cases this should not give rise to problems since the individual would usually know the position by the time of submitting his return for the split year. However, in cases of uncertainty he would presumably have to self-assess based on the most likely outcome and then revise his return if necessary.

Finally, if neither the only home nor the residence condition is fulfilled, an individual must be present in his destination country on every single midnight between his date of the departure from the UK and the end of the six-month period. This may prove difficult for many – it allows for no return visits to the



UK whatsoever during this six-month period, but also it allows for no overnight visits to any other country, whether on business or as part of a holiday. Note also that there is no ‘exceptional circumstances’ concept for this rule.’

### ***Timing is everything***

[5.08] In view of the above factors, particularly the ‘sufficient link’ test, individuals will need to give careful consideration to the timing of their departure. If there is any doubt about their being able to meet the ‘only home in the new country’ test, then in most cases, they may wish to ensure that they will meet the requirements to be considered resident in their destination country since the alternative, that of spending every single midnight for six months in that country, is likely prove too onerous for most.

In making their decision about the timing of their departure, however, individuals will also need to consider, for example, whether they will be able to restrict their return visits to the UK to just 16 days for the remainder of the tax year and, also, whether they are likely to be able to sell their UK property, or at least cease to occupy it in such a way that it could no longer be regarded as a home.

A further alternative, of course, is to take the old-fashioned route of leaving the UK towards the end of March and so not needing to rely on the split year and, in view of the restrictive nature of the split-year provisions, this is likely to be the approach taken by many. Such individuals will remain subject to UK tax on income and gains arising during the final few weeks of the tax year when they are no longer in the UK, but may well either be in a position to take advantage of a Double Tax Treaty (see below and CHAPTER 12) or may not yet be subject to tax in their destination country. Those individuals will need to think quite carefully about possibly planning to defer income and gains until the following tax year (but see the five-year trap at 5.24 below).

### ***Double Tax Treaties***

[5.09] Individuals leaving the UK to take up residence in another country should always give consideration to any double tax agreement between the UK and their destination country, particularly in the year of departure. An individual may not meet the stringent tests under the split-year provisions, but may still benefit from a favourable form of taxation due to being treaty resident in another jurisdiction.

Assuming that the individual is resident in both the UK and the destination country under the two countries’ respective domestic laws, then it will be necessary to consider the tie-break provision of the relevant Treaty to determine in which country the individual is Treaty resident. For more detailed commentary on double taxation agreements in this context, see CHAPTER 12.

## Maintaining non-residence

**[5.10]** Whatever timing the individual decides on with regard to leaving the UK, they will then need to ensure that they maintain their non-residence status throughout the period overseas. The most straightforward way to do this would be to ensure that they pass one of the automatic non-residence tests. Failing this, they will then need to consider what ties they have retained with the UK and then limit the days they spend in the UK accordingly.

### **Automatic non-residence**

**[5.11]** Since this chapter deals with those who have gone overseas for a purpose other than full-time working abroad, we can assume that the third automatic test (full-time working abroad) will not be relevant. We can also assume that the individual does not die in the year and so the fourth test equally need not be considered.

We are then left with the first and second automatic tests. Assuming that the individual was resident in the UK in the previous tax year (ie we are looking at the tax year after departure) then the first and not the second automatic overseas test will apply. This test is in *para 12(1), Sch 45, FA 2013*:

- ‘12 The first automatic overseas test is that –
- (a) P was resident in the UK for one or more of the 3 tax years preceding year X,
  - (b) the number of days in year X that P spends in the UK is less than 16, and
  - (c) P does not die in year X.’

So the most straightforward way for an individual who is seeking to remain non-UK resident to achieve this would be for them to limit their days spent in the UK to 15 or fewer. Broadly, a day is a day of UK presence if the individual is here at midnight, but see *para 3.02ff* for a fuller definition. In particular, if an individual spends a number of days in the UK, but is not present at midnight the deemed days rule (see *para 3.06*) may apply.

Many will find spending only 15 days in the UK too restrictive, especially if they have maintained business interests in the UK or have family here.

### **Avoiding automatic UK residence**

**[5.12]** Clearly the individual will need to avoid being resident in the UK under any of the automatic residence tests. For this purpose, it is assumed that the individuals who are the subject of this chapter will not work sufficient hours in the UK to meet the third automatic test (although see *para 5.16* below) and it should be a fairly straightforward matter to ensure that the number of days spent in the UK will be less than 183.

The individual will nevertheless need to take care that they do not meet the ‘UK home’ test at any point – see *para 2.08*. This would be on the basis that they have not given up their UK home and qualified for split year treatment on departure under Case 3. The difficulty here is that the definition of home is very broad (see *para 3.07*). The definition for the purpose of this test is

narrowed such that the home must be the individual's home for a period of more than 91 days (not necessarily in the same tax year) and they must be present there for a total of at least 30 days within the tax year. However, where an individual's family remain in the UK, this test could easily be met. If this should coincide with a period of at least 91 days when they have no home outside the UK, they will be automatically UK resident.

**Example 5.1: Bob**

Bob is self-employed and decides to expand his business into Europe. He decides to base himself in Germany for this purpose and spends six months there in a rented flat getting settled. Bob has young children who are in school in the UK and he and his wife do not wish to disturb their education so his wife decides to remain in the UK in the family home. Bob employs a manager to look after his existing UK business.

Bob leaves the UK on 30 March 2013 and rents a flat in Hamburg on a six-month lease (from 1 April 2013 to 30 September). During that time, Bob does not return to the UK. At the end of the six months, Bob's business in Germany is well established and he decides to spend some time in the UK with his family (from 6 November). He then returns to Germany for the rest of November spending time in a hotel before spending the following two months (December and January) travelling in France, Italy and Spain to further expand the business. He returns to Germany during this time, but in view of the amount of time spent travelling he chooses to stay in a number of different hotels. He also spends a further five nights with his family over Christmas.

Since Bob's family remain in the UK, he will have a home in the UK. As he chooses to spend five weeks in October and November with his family, the UK family home will pass the 30-day test and the family home will count as his home throughout the tax year 2013/14 for the purpose of the second automatic test. Note that although in this example the 30 days are consecutive there is no need for them to be so.

Since Bob gives up his German flat and does not establish another home for a period of four months, there will be a period of at least 91 days when his only home is in the UK. Bob would therefore be resident in the UK during 2013/14 under the second automatic residence test, despite only spending 40 nights in the UK.

The 'UK home' test is a rolling one and the 91 days need not all fall within one tax year, so careful monitoring here will be essential. In addition, although the individual must spend 30 days in a property for it to be considered his home for the purposes of the test, these days could fall outside the 91-day period during which he has no home outside the UK. So in the above example if Bob had spent 25 days in the family home during the period when he was also renting the Hamburg flat, this together with the five days at Christmas would also have been sufficient for him to meet the 'UK home' test and be automatically UK resident.

### Sufficient ties test

[5.13] Assuming that the individual spends more than 15 days in the UK and has successfully negotiated the automatic residence test, he will then need to consider the sufficient ties test. As with the automatic overseas test, it is assumed that initially the individual will have been UK resident in the previous three tax years, so it is the table of connections and days in *para 18, Sch 45, FA 2013* which needs to be considered. More detail on this test is included in CHAPTER 2 and for more detail on the definitions of the connecting factors or ties see CHAPTERS 2 and 3.

Note that if the individual has the number of ties shown in the second column he *will* be resident in the UK.

Days spent by P in the UK in year X	Number of ties that are sufficient
More than 15 but not more than 45	At least 4
More than 45 but not more than 90	At least 3
More than 90 but not more than 120	At least 2
More than 120	At least 1

For an individual seeking to establish himself as non-UK resident it will be a matter of balancing those ties which he cannot or does not wish to give up with the number of days which he needs or wishes to spend in the UK. In many ways this does not differ from the advice which an individual would have been given under the old regime using limited statute and HMRC practices derived from case law – effectively: minimise your connections with the UK and minimise the number of days spent here. However, under the SRT this basic principle now assumes some hard edges.

For an individual who has been previously UK resident, now seeking to become non-resident, it is exceedingly likely that he will have the 90-day tie – ie he will have been present in the UK for 90 days in one, if not both, of the preceding two tax years. This is not a tie which he will be able to give up, so for the first two years of his non-residence at least he will have at least one tie (he is therefore immediately limited to spending fewer than 120 days in the UK if he wishes to be non-UK resident).

The individual will then need to consider whether there are any other ties which he has or is likely to have with the UK and which he cannot or does not wish to give up and then manage the time he spends in the UK accordingly.

### Maintaining a UK property

[5.14] Those who wish to maintain their property in the UK may wish to consider whether it will be possible to do this without that property being treated as a connection factor. The criteria for the accommodation tie are in *para 34, Sch 45, FA 2013* and a detailed discussion of this tie is included at para 3.18.

Many individuals seeking to become non-UK resident do not wish to surrender their UK property permanently and for them it will be important to decide whether they are happy for the property to remain their ‘home’ – in which case it will be a further tie as an accommodation tie. Assuming that the property is available for a period of 91 days continuously during the tax year then the individual need only spend one night in that place for it to be ‘available’ and therefore give the individual the accommodation tie. If a property is occupied by their immediate family, then it will be assumed to be available. The HMRC guidance RDR3 gives the following example:

**‘Example A19**

Peter and his civil partner Andrew share an apartment in London. Last year Andrew moved to the USA to take up a university place to study marine biology.

This year Andrew came back to the UK for a three-week holiday which he and Peter spent in Scotland. Andrew spent the first night and last night of his holiday in their London apartment.

This year Andrew has an accommodation tie.’

It is not clear from this example whether Peter and Andrew own or are renting their apartment. However, the key point here is that, although Peter is only in the UK for three weeks, the apartment is considered available to him continuously and his spending two nights there is enough to give him an accommodation tie.

Thus, if an individual wishes to maintain their UK property, they must either ensure that it is unavailable to them for the majority of the year or they must spend no time in that property at all during the tax year in question.

The simplest way to ensure that a UK property is not available is to let it out. The HMRC guidance confirms that this will be sufficient, as well as the treatment outlined above – ie when the individual does not occupy the property at all:

**‘When accommodation is not considered to be a connection factor**

A40 Accommodation owned by an individual but which they have wholly let out commercially would not be considered as available to live in unless they retained the right to use the property or part of the property.

A41 Accommodation that is available to an individual but in which they have not spent at least one night in the tax year will not be an accommodation tie.’

What the HMRC guidance does not deal with is when an individual has made a property available for letting but has failed to actually let it. Presumably such accommodation would still be available to him, and he would therefore need to avoid spending any nights in the property if he did not wish to have an accommodation tie.

If the individual’s family lives in the property, he must either accept that he has an accommodation tie or ensure that he does not spend even one night there in the tax year.

**Example 5.2: Matthew**

At the end of 2012/13 Matthew moves to Spain for work and remains there throughout 2013/14 and 2014/15. As he will be spending more than 30 days working in the UK he will not meet the third automatic overseas test with regard to full-time working abroad.

Matthew's wife and 14-year-old daughter remain in the UK in the family home because his daughter is at school here and the family do not want to disrupt her education.

In 2013/14, he returns to the family home for two nights over the Christmas period. He therefore has available accommodation for 2013/14 and will have an accommodation tie for that year.

In 2014/15, he and his family decide to spend Christmas with his parents and they stay there for seven nights. Even though his parents would be happy for Matthew to stay with them whenever he wishes, because the period he in fact spends in their home is less than 16 days and they meet the definition of a close relative (*para 32(6), Sch 45, FA 2013*), this accommodation will not be available to him.

Although Matthew's wife and daughter remain in the family home throughout 2014/15 and Matthew could return to it whenever he wishes, because he does not spend even one night in the property it will not be available accommodation for 2014/15 and Matthew will not have an accommodation tie for that year.

It is important to note that visiting the property (without spending the night there) will not make it an accommodation tie, nor will keeping furniture and other personal belongings in the property. An individual who wished to maintain his UK property, therefore, and did not wish to let it out, could choose to leave the property furnished and empty and could even visit the property to pick up post and perform maintenance tasks, provided he spent the night elsewhere. Indeed, an individual whose family lives in the UK could even, in theory, spend time with his family in the family home during the day time provided he spent the night elsewhere. If an individual did wish to take this approach it would be important to document carefully the arrangement to ensure that there is clear evidence that the individual had spent the night elsewhere.

**Accommodation traps**

[5.15] The way in which the available accommodation tie works can give some odd results and there are some traps into which the unwary can fall. The biggest trap probably comes as a result of the deeming rule which comes into play when there is a gap of fewer than 16 days between periods of occupation of the same property. As the HMRC guidance RDR3 identifies, this can even give rise to a hotel room being treated as available and therefore an accommodation tie (see para 3.18). There is a hotel example in the guidance (reproduced in CHAPTER 3) which considers an individual who comes to the UK

over an extended period with short breaks but, as identified in CHAPTER 3, even a fortnightly return to the same hotel can be enough to give an individual available accommodation if there are enough return visits.

There seems to be at least a theoretical trap where an individual stays the night with a good friend, if that friend is sufficiently close that they would always make their home available should the individual need it. This is because, although there is an exception for close family that requires an individual to spend 16 nights there, as opposed to just the one night needed for most properties, there is no such exception for close friends. Although a theoretical problem, provided the friend does not put the sentiment into writing and there are not regular return visits, it is difficult to see how HMRC would prove that the accommodation is available and the fact there is no 16-day additional rule for close friends suggests there is no presumption of accommodation being available in such cases as there might be with family. The same would apply to relatives who do not meet the definition of a ‘close relative.’

However, RDR3 gives an example in Annex A of an uncle (who would not meet the definition of a close relative):

**‘Example A14**

Mary has lived and worked in the USA for many years. Her uncle has a holiday houseboat in the UK where he has agreed Mary can stay any time she wishes, for as long as she wishes, when she comes here. Mary’s uncle does not allow other people to stay in the houseboat.

Last year Mary came to the UK twice. She made arrangements to stay for three weeks with a friend and for four weeks with her brother. Although the houseboat was available for a continuous period of at least 91 days, Mary did not use it at all. Therefore, she had no accommodation tie in respect of the houseboat last year.

This year Mary again visited the UK twice, spending her five-week summer holiday on her uncle’s houseboat. This year Mary has an accommodation tie as the houseboat is available for a continuous period of at least 91 days and she has stayed on it for at least one night.’

In this example, Mary spends five weeks on the boat, but in fact if the boat is available for a period of 91 days, she need only have stayed on the boat for one night for it to be ‘available’.

RDR3 does make clear, however, that accommodation being available involves more than a casual offer of accommodation or an open invite for a social visit:

‘A33 Accommodation is regarded as available to you for a continuous period of 91 days if you are able to use it, or it is at your disposal, at all times throughout that period (subject to the 16 day gap rule covered below). If a relative were to make their home available to you casually, for a social visit, say, it will not mean that the accommodation would be regarded as being available to you. However, if it is available to you for a continuous period of 91 days and you use it casually, it will be a tie.

A34 Similarly, a casual offer from a friend to “stay in my spare room any time” will not constitute an accommodation tie unless your friend really is prepared to put you up for 91 days at a time (whether he actually does so or not).

**Example A16**

Sacha visits the UK on business and usually stays in different hotels. On one of these visits he takes an opportunity to attend the Wimbledon Tennis Championships. A business associate who lives in Wimbledon invites Sacha to stay at his flat for three nights rather than use a hotel. The arrangement is a one-off invitation and the accommodation is not available to Sacha for 91 days. It is not an accommodation tie.’

The example given here is not very illuminating (especially as the Wimbledon Championships only last two weeks!). The comments do nevertheless suggest that there would need to be a high level of use of a friend’s property (or perhaps some formal agreement or other arrangement) before it was assumed by HMRC to be ‘available’ for 91 days.

Although the 16-day limit for staying with close family may seem generous, there will be times, for example a family illness, when the 16-day limit could become quite restrictive. If an individual remains in the UK to care for a suddenly and seriously ill parent or other close relative, or is taken ill himself while visiting a relative, he might expect those days in the UK not to count as days of presence due to the exceptional circumstances provisions in *para 22(4)–(6), Sch 45, FA 2013* (see *para 3.06*). However, the exceptional circumstances provisions *only* relate to days of presence in the UK and not to determining whether any of the sufficient ties tests applies. So, if the individual were to stay in their sick parent’s home for more than 16 days then they may be treated as having available accommodation and so have an accommodation tie for that tax year.

**Example 5.3: Mary**

Mary took early retirement from her job and moved to Spain with her husband in March 2012/13, where they have a property on the Costa del Sol. She has sold her UK property and therefore does not have available accommodation in the UK. Her children are all over 18 so she has no family tie.

When she retired from her job she was asked if she would be able to work on a consultancy basis for her old employer from time to time, which she agreed to do. During 2013/14 she returns to the UK eight times, each for a period of one week (seven days) and she spends five days of each week working for more than three hours. In total, therefore, Mary works 40 days in the UK and has the work tie. Since Mary was resident in the UK in 2012/13 she also has the 90-day tie.

Mary also returns to the UK in December 2013 for seven days when she stays with her parents over the Christmas period. Unfortunately on the day when Mary intended to fly back to Spain, she develops appendicitis. After a brief (three-day) stay in hospital, Mary returns to her parents’ house to recuperate for 14 days before returning to Spain.

At the beginning of the tax year Mary expects to have two ties under the sufficient ties test – the 90-day tie and the work tie. She therefore expects to be able to return to the UK for up to 90 days without being treated as UK resident. Before her illness, Mary had spent 63 days in the UK – well under the 90 days.

The exceptional circumstances provisions should apply to the additional 17 days which Mary spends in the UK as a result of her illness. In any case, in the



absence of a further tie, the days would only take Mary's total day count to 80 – still well under the 90 days permitted for someone with two ties. However, Mary has now spent a total of 21 days staying in her parents' house during the tax year. This is sufficient to give Mary an accommodation tie to the UK. Mary now has three UK ties and will therefore be UK resident for 2013/14.

In the above example, if Mary were to have stayed elsewhere during the period of recuperation – eg with a sibling – because this was for fewer than 16 days, she could have avoided having an accommodation tie and would not, therefore, have been UK resident. Similarly, she could have stayed with a close friend, potentially for more than 16 days, provided that the friend was not prepared to offer her accommodation for a period of at least 91 days.

It is worth reiterating that it is not sufficient simply to spend more than 16 days in the property in order for an individual to have available accommodation – the property must also be available to the individual for a continuous period of at least 91 days. However, it is likely that in respect of the home of a close relative the onus will be on the individual to prove that the accommodation was not available.

### **Working in the UK**

**[5.16]** When a HNWI is considering maintaining his non-residence position he will often need to factor in the need to work in the UK. In these circumstances, there are two tests which must be considered. First, the third automatic UK residence test of full-time working in the UK and, assuming that is not met, the work tie in the sufficient ties test. The rules for workers with a 'relevant job' are different, and are considered in **CHAPTER 3**.

It is not uncommon for a HNWI seeking to become non-UK resident to have a business interest in the UK, or to be a director of a UK company. Prior to the introduction of the SRT, many advisors would have been concerned that maintaining a position as director of a UK company would have had a negative impact on the individual's residence position, when balancing all the relevant factors, and common advice would have been to surrender that position if at all possible.

Following the introduction of the SRT, retaining the position as director of a UK company, or maintaining UK business interests, in itself, will have no impact on an individual's residence position. However, the duties which the individual must perform as a result of, for example, holding the office of director, and where those duties must be performed will need to be considered in order to ascertain whether that will be sufficient to meet the two work-related tests.

### **Full-time working in the UK**

**[5.17]** Assuming the individual wishes to remain non-UK resident, he will obviously need to ensure that he does not pass the third automatic UK test by working full time or 'sufficient hours' (as defined) in the UK. A detailed explanation of working sufficient hours in the UK is included at para 2.09.

However, due to the fact that the bar for full-time working is set quite high (at an average of 35 hours per week over the period), it should usually be relatively easy for an individual to avoid working sufficient hours in the UK to be treated as working full time here. Care may be needed in the initial period, however, if the individual has been working full time in the UK before the date of their departure. The full-time working in the UK test considers a 365-day period and not a tax year, so an individual who has been working long hours in the UK prior to leaving could continue to be working full time in the UK on an averaging test.

#### **Example 5.4: Stephanie**

Stephanie left the UK to live in France at the end of March 2013. She has worked in the UK all her life and built several successful businesses and decides to retire overseas. She sells her UK property (the sale completes in March 2013) and buys a property in France.

Stephanie owns a software development company in the UK and has worked full time for that company for 12 years as CEO. However, over the last two years she has been working in the business with her eldest daughter and now decides it is time to pass the baton to her daughter and step down herself from her active role. She is to remain as President of the company for the foreseeable future.

Stephanie has to-date taken a very hands-on attitude to management and commonly works a 45 to 60-hour week. For the tax year 2012/13 her average weekly hours were 48. Following her departure in March, there is a funding crisis in the company and despite her retirement Stephanie returns to the UK two days a week for four weeks in April 2013 to help manage the crisis and works for ten hours on each of those days.

Stephanie's circumstances are such that she was not seeking to become non-resident in 2012/13 and so 2013/14, the first year of the SRT, is the first year for which she would expect to be non-resident. Assuming that she will spend more than 16 days in the UK in 2013/14, Stephanie will not be automatically non-resident. She will therefore next need to consider the automatic residence tests.

In order to be resident in the UK under the third automatic test, Stephanie only needs a 365-day period, one day of which falls into the 2013/14 tax year, during which she meets the conditions. Broadly these conditions require that she averages 35 hours per week under the complex averaging calculation and 75% of her workdays in the period are UK workdays. The day which falls within 2013/14 must be a day on which she does more than three hours' work in the UK.

The first week of April 2013 falls within the 2012/13 tax year. However, Stephanie also does more than three hours' work on 11 April 2013. If we take a 365-day period from 12 April 2012 to 11 April 2013, Stephanie will almost certainly work more than an average of 35 hours per week in the UK – since this will include the period during which she worked long hours.

Stephanie must then consider whether any of the split-year Cases will apply to her. As she has not gone abroad for full-time work, the only case which could apply would be Case 3 which, as considered in para 5.03 above, will only apply

in the year the individual ceases to have a home in the UK. Stephanie ceased to have a home in the UK in 2012/13 so the split-year test cannot apply to her for 2013/14. Stephanie is therefore likely to be resident in the UK under UK domestic law for the whole of 2013/14.

For a more detailed explanation of the sufficient hours calculation, together with worked examples, see CHAPTER 2.

Wherever possible, when the individual intends to continue to work in the UK after moving abroad, he should aim to have a break of at least 31 days when he does no work (or less than three hours' work per day) in the UK. In Stephanie's case, if the crisis at her company had happened in, say, May, and she had been able to have a break of 31 days she could then have returned to the UK in exactly the same manner and avoided being treated as working full time here.

### Work tie

[5.18] Difficulties with the third automatic residence test in the first year of non-residence aside, an individual who remains a director of a UK company or maintains a business interest in the UK is much more likely to need to consider whether he has a work tie with the UK. So, in Example 5.4 above, Stephanie will need to consider whether her activities as President of her company create a work tie.

The definition of 'work tie' is at *para 35, Sch 45, FA 2013* (for those who do not have a 'relevant' international transport job):

- (1) P has a work tie for year X if P works in the UK for at least 40 days (whether continuously or intermittently) in year X.
- (2) For these purposes, P works in the UK for a day if P does more than 3 hours' work in the UK on that day.'

*Paragraph 36, Sch 45, FA 2013*, concerned with those with a 'relevant job', is not explored in this chapter.

So, on first glance, avoiding having a UK work tie should be fairly straightforward – it is simply a matter of ensuring that fewer than 40 days of work are done in the UK – this amounts to approximately eight working weeks. There are nonetheless a couple of areas worthy of consideration in the context of an individual remaining a UK director: the three-hour rule and the location of work.

#### *The three-hour rule*

[5.19] As noted in CHAPTER 3 (see *para 3.08ff*), the term 'work' is interpreted quite broadly. In summary, 'work' will include time spent in training and travel time. The most pertinent of these to a HNWI continuing a UK directorship or maintaining a UK business interest would almost certainly be travel.

Travel time counts as time spent working where the cost of the travel would be a deductible expense had the individual incurred it himself. In these circumstances, the whole of the journey will count as work, even where no actual work is done. Otherwise, travel time only counts as time spent working to the extent that the individual actually is working.

Time spent working on a flight, ferry or train journey to the UK from overseas will count as overseas work (see location of work, below). Once an individual has disembarked from the plane, boat or train, any further time spent travelling – including negotiating passport control and baggage handling – will count as time spent travelling in the UK.

In view of the fact that only three hours' work is needed to count as a day of working in the UK, an individual may wish to think quite carefully about the timing of his travel to the UK and also, possibly, the method of travel since, for example, travelling by Eurostar would not involve a need to collect baggage and in some circumstances may allow for a shorter amount of time spent travelling in the UK. This will only be relevant where the cost of the journey would be tax deductible, so is most likely to be of relevance to those who are employed abroad and need to return to carry out some duties in the UK but who do not (for whatever reason) meet the full-time working abroad test.

### **Example 5.5: George**

George has left the UK to set up a new branch of his business in Germany. He has to report back to the board of the UK company. He returns to the UK for monthly board meetings throughout 2013/14. In addition, he returns to the UK for a two-week (ten working day) period in June to train his successor in the UK.

The board meetings tend to last for a full afternoon – between three and four hours. However, George likes to make a trip of it and flies to the UK the day before, staying in a hotel close to the office and spending time with friends or family. He then stays overnight to have dinner with his work colleagues and flies home the following day. The UK company meets all of his travel costs for attending the board meeting. George's office is a two-and-a-half hour journey from the nearest airport and clearing passport control and collecting his luggage usually takes approximately one hour.

George will have three days of UK working for every board meeting in the UK – since he will have three hours of work on each of his days of travel (assuming that on the day of his return flight he arrives at the airport at least half an hour before his journey). He will therefore have 36 UK workdays in respect of the board meetings. This, taken together with his ten days in June, will amount to 46 UK workdays and will be sufficient for George to have a work tie.

The above example illustrates how easily an individual can accumulate UK workdays – especially if their office is a long way from the nearest airport. Individuals wishing to continue working in the UK, but not wishing to have a UK work tie, will need to consider how they can do this efficiently. For example, in the case of George, if he had flown into the UK on the morning of the board meeting and left the same evening, he would only have a total of 22 workdays and would not have a UK work tie.

Patterns of working will also be important – so, once an individual passes the three-hour threshold, he has nothing to lose by working the rest of that day in the UK. Similarly, if an individual can keep his working hours below this threshold on a given date, he might avoid a UK workday altogether – for example if he limits his work on a given day to one two-hour meeting. As discussed at para at 3.10, there will be a practical point in these circumstances

about keeping records to prove that the individual is not working. HMRC guidance currently gives only very limited assistance as to the kind of records which would be acceptable (see CHAPTER 12).

It is important to remember that journey time only counts as work where the cost of travel would be tax deductible or where the individual actually works during the journey.

If, for example, George had simply retired overseas from his main ‘occupation’ and was returning to the UK for director’s duties then, assuming he does not work on the journey, these days will not count as UK workdays. For many HNWI’s retaining UK directorships, therefore, travel time may not be a concern. George will, of course, still need to watch his days of presence in the UK.

Thus, where travel costs are not tax deductible, the individual will still need to consider whether they have actually worked during the journey as this will bring the travel time back into the definition of work. So if, for example, Stephanie of Example 5.4 reads company papers or emails while travelling back to the UK in her role as President, this will count as time spent working, with the relevant portion treated as time spent working in the UK. Conversely, if the journey time is counted as travel because of the tax deductibility rule, an individual has nothing to lose by working during the journey.

Those who have their travel costs met by their employers may wish to try to keep a few UK workdays ‘in hand’ – ie limit their UK workdays to, say, 35 days to allow for problems with baggage handling or other delays at airports which may result in their having unexpected, additional UK workdays.

#### *Location of work*

**[5.20]** Another practical issue for those continuing with UK employments or UK business interests will be the location of the work they carry out. See para 3.04 for a more detailed explanation of the location of work.

Location of work is defined in *para 27, Sch 45, FA 2013* and states helpfully that ‘work is done where it is actually done.’ In other words, it does not matter in which country an individual is employed or the residence of the company that pays their wages – it is where they are physically located when carrying out the work which is significant when it comes to counting UK workdays.

RDR3 gives an example to illustrate this:

- ‘3.21 In most cases work is considered as being done at the location where it is actually done rather than where an employment is held or a trade, profession or vocation is carried on.

#### **Example 23**

Robert is an employee of a French clothing manufacturer and he is based in Paris. He spends two days each month working in Glasgow to meet company clients. For those two days Robert is working in the UK, regardless of where he is usually based.’

This may present an opportunity for those wishing to continue to have a hand in running UK businesses, either as an employee or in a self-employed capacity. Where it is possible for an individual to carry out any part of their work overseas, this will allow them to minimise both their UK workdays and also their days of presence in the UK.

Looking at the example of George again, if he had been able to attend half of the UK board meetings by phone, only attending in person every other month, for example, this would have allowed him to almost halve his UK workdays. In some circumstances it may also be possible and desirable to hold board meetings overseas to assist a non-resident director seeking to avoid a UK work tie, although this may give other tax considerations that would need to be taken into account.

As noted above, there is a specific rule regarding work done as part of international travel – by air, sea or ‘via a tunnel under the sea’ (in other words Eurostar). Any work carried out until the individual disembarks in the UK or from the time of boarding when travelling to or from the UK in this way is treated as being done overseas.

Paragraph 3.04 contains a detailed discussion regarding the effect that this may have on an individual’s travel choices. However, there may be other considerations – for example, an individual who has a certain amount of preparation to do for a UK meeting might choose to do that preparation on the plane as opposed to on the train journey from the airport to the meeting (assuming that the travel from the airport will not otherwise count as work time).

Today’s technology means it is often possible to do the same work from anywhere in the world and this will present an opportunity to minimise workdays in the UK, but may also present a problem with record-keeping to prove one’s location when the work was completed. For example, if an individual writes a report on the plane and it takes him six hours, but does not email that report until he gets into the office in the UK (after a further two-hour train journey), how does he prove that he did not, in fact, continue to write the report while on the train in the UK?

## **Family**

[5.21] The definition of a family tie is in *paras 32 and 33, Sch 45, FA 2013* of the SRT and is explored in more detail at para 3.17. However, RDR3 contains a fairly good summary of the rules, in Part 2:

- ‘2.2 You have a family tie for the tax year under consideration if any of the following people are UK resident for tax purposes for that year:
  - your husband, wife or civil partner (unless you are separated)
  - your partner, if you are living together as husband and wife or as civil partners
  - your child, if under 18-years-old.
- 2.3 For the purpose of the SRT, HMRC will use the same principles applied to tax credits to determine if people are living together as husband and wife or civil partners. You will find further guidance on this point in our manual TCTM09330.
- 2.4 You will not have a family tie with a child who is under the age of 18 if you spend time with the child in person in the UK on fewer than 61 days (in total) in the tax year concerned. If your child turns 18 during that tax year you will not have a family tie in respect of that child if you see that child in the UK on fewer than 61 days in the part of the tax year before their eighteenth birthday.
- 2.5 Any day or part of a day that you see your child in person in the UK counts

- as a day on which you see your child in the UK.
- 2.6 Partners can be living together either in the UK or overseas, or both, and still meet this test.
- 2.7 Separated means separated:
- under an order of a court of competent jurisdiction
  - by deed of separation, or
  - in circumstances where the separation is likely to be permanent.’

The position with regard to children is slightly more complicated as they will not be treated as UK resident for this purpose if they are in the UK for full-time education and they spend fewer than 21 days in the UK outside term time.

If the individual seeking to become non-UK resident does not take his family with him when he leaves the UK, then this will obviously result in him having the family tie and will mean he can spend fewer days in the UK before being treated as UK resident.

As far as the traditional UK nuclear family is concerned, there may be nothing that can be done in the way of planning from a tax perspective. However, where the individual has children from a previous marriage, for example, so that he has children who are UK resident but no UK resident spouse, he may consider limiting the amount of time he spends with that child in the UK. There is no limit to the amount of time he can spend with the child in his destination country or in another location (eg on holiday). It is worth noting that there is no midnight test with regard to time spent with children – so, for example, if the individual and his daughter both sleep over at grandma’s house for one night he will very likely see the child in the evening of the first day and the following morning, so this will count as two days.

There will also be interesting questions about when a partner who is neither a spouse nor civil partner should be treated as such in view of the fact that the individuals are living in separate locations, and this is explored at para 3.17.

Where an individual has UK resident family it may be difficult for them to avoid also having available accommodation (see para 5.14 above). An individual whose family remains in the UK is therefore likely to have at least three ties in the first two years of residence – the family tie, the accommodation tie and the 90-day tie. Such an individual will be restricted to just 45 days in the UK if they do not wish to become UK resident and must avoid acquiring a work tie.

### **Country tie**

[5.22] It is important not to overlook the country tie.

An individual will have the country tie where he ‘meets the midnight test’ for the greatest number of days in the UK; in other words, if the individual is present in the UK (at midnight) for more days than he is present in any other country. Theoretically, this could be a very low number if the individual spends a lot of the year travelling and visits many different countries, but in practice is more likely to mean that the individual spends the majority or at least a significant proportion of his time in the UK.

Where the individual spends the same number of days in more than one country and one of those countries is the UK, if that is also the greatest number of days the individual spends in any country then he will have the country tie for that year.

## Year of return

[5.23] Assuming that the individual has not left the UK permanently (which some will have done), there will come a time when they need to consider their return. Many of the considerations for those returning to the UK will be exactly the same as for those coming to the UK for the first time, and these are dealt with in CHAPTER 7. However, there will be some additional concerns specific to those who have had a period outside the UK and are returning and these are considered in this chapter.

### *The five-year trap*

[5.24] HMRC were concerned that the increased certainty of a statutory residence test might give rise to additional avoidance activity, and specific anti-avoidance legislation was therefore introduced to combat this. Anti-avoidance along the lines of that which has applied to capital gains since *Finance Act 1998* (in the shape of *s 10A, TCGA 1992*) has now been introduced for certain forms of income, which it is assumed HMRC consider would be easy for an individual to manipulate. In addition, *s 10A* itself has been rewritten. A detailed consideration of the anti-avoidance legislation is contained in CHAPTER 11.

In summary, the rules will apply where an individual is temporarily non-resident and the period of their non-residence is five years or less. A period of non-residence for this purpose can include a period where the individual is resident in the UK, but also resident in another country. Like the previous CGT anti-avoidance, the rules will only apply to individuals who have been resident in the UK for four out of the seven tax years immediately preceding the year of their departure. The period of non-residence is calculated by reference to actual years and not tax years. There are, however, some complications where either or both of the individual's year of arrival or departure do not qualify for split-year treatment (see para 11.02).

The following types of income (or amounts treated as income) will be affected in addition to capital gains:

- Pensions (withdrawals, lump sums and certain other charges)
- Relevant foreign income which is remitted to the UK during the period of temporary non-residence
- Certain amounts taxable under the disguised remuneration provisions
- Dividends or other distributions from close companies (or companies which would be close if they were UK resident)
- Chargeable event gains
- Offshore income gains



There are different specific rules in relation to each of the different types of income, but, broadly, each of these treats income which arose during the period of non-residence as arising in the period after the individual returns to the UK (or ceases to also be resident in another country). This will be the case even if the income has been subject to tax in another country and if it would otherwise be protected by a Double Tax Treaty. An individual returning to the UK who is close to the five-year limit will therefore wish to give careful consideration to the timing of his return, as far as possible, to prevent triggering these anti-avoidance provisions. This may affect certain decisions regarding particular actions – for example, the purchase of a property in the UK – which would result in the split-year provisions applying and may affect the date from which the individual is treated as becoming UK resident.

### **When does UK residence begin?**

[5.25] As with the period of non-UK residence, the time at which UK residence begins will depend on whether the split-year provisions apply in the year of return to the UK; although, again, it is worth saying that if the individual is resident at all in the year of return, then he will be resident for the whole tax year. If he also qualifies for split-year treatment, then he will be *taxed* broadly as though he is non-resident for the overseas part of the year.

Assuming that the individual has not worked full time abroad and is not coming to the UK for reasons connected with his own or his spouse's employment, the relevant cases for the split-year test will be Cases 4 and 8. In both cases the crucial question is concerned with the individual's home, and individuals who have previously been UK resident, but had a period of non-residence, may have some particular concerns here.

Under Case 4 (*para 47, Sch 45, FA 2013*), the individual will qualify for split-year treatment if he does not meet the 'only home' test at the beginning of the tax year, and at some point during the tax year he begins to meet this test and he does so for the remainder of the tax year. It is worth noting that this is a different test to the test under the automatic UK tests and there is no minimum availability or minimum occupation required for property to be a home. To qualify under this test, the individual must also be not resident under the sufficient ties test for the period of the year before he met the only home test. More details on this element of the test are given at para 8.19.

Case 8 is also concerned with a home, but here the taxpayer must begin the year with no home in the UK and then end the year with such a home. He will also need to have a home for the remainder of that tax year and the whole of the following tax year. Again, it will be necessary for the taxpayer not to have been resident in the UK under the sufficient ties test for the period of the year before he acquires a home.

The returning taxpayer who has retained property in the UK must therefore make a qualitative judgement about the nature of that property – is it a 'home' or is it merely 'available accommodation' (it could in fact be one, both or neither). The significance of the question is that, if the property that the individual maintained while he was overseas remained his home then any accommodation which he has overseas will need to cease to be his home in

order for split-year treatment under Case 4 to apply. If, on the other hand, he maintained a property which was not his home, he need only begin to live there again as though it were his home in order to qualify for split-year treatment under Case 8 (assuming, of course, that he meets the other conditions).

**Example 5.6: Marianne**

Marianne is French, but has lived and worked in the UK since she came here to attend university and married her husband, Steve. In March 2014 her mother became ill and Marianne chose to leave the UK and move back to Nice to care for her. Her mother's condition deteriorated and, after 18 months, Marianne decided that she would need to arrange for her mother to go into a nursing home in the UK. Marianne therefore returned to the UK in September 2015. During the period of her non-residence, Marianne returned to the UK for a number of weekend visits, always staying with Steve in their home.

Given that the property that Marianne occupied with Steve was her home before she left to go overseas, it is likely that the property continues to be her home (rather than merely 'available accommodation') during the period of her non-residence, particularly since she returns to the home at weekends. In addition, it is likely that while Marianne lives with her mother in France, that property is also her home.

Since Marianne has maintained a home in the UK, she will therefore need to cease to have the home in France in order to qualify for split-year treatment. See para 5.05 for a detailed discussion of when a home ceases to be a home. The timing of her UK residence for split-year purposes will be dependent on the timing of her French home ceasing to be her home, rather than on her return to the UK.

Where an individual's immediate family continue to live in the UK in what was previously the family home and that individual spends some nights in the home during their period of non-residence, it seems reasonable to conclude that the property remains their home throughout that period and this is certainly HMRC's interpretation, borne out by numerous examples in RDR3. In order to qualify for split-year treatment, therefore, the individual will need to have had a home overseas (which is likely if they have been non-UK resident) and will need to cease to have that home (ie they will need to seek to fall within Case 4).

By contrast, if the individual had rented out their UK property while they were non-UK resident, it is clear that they had no home in the UK during their period of non-residence and they need only either re-occupy that property or occupy another UK property as their home in order to qualify for split-year treatment under Case 8 (provided the other conditions, including the sufficient ties test, are also met).

What is less clear is a case where an individual leaves family in the UK in what was previously their home but either does not return to the UK at all during his period of non-UK residence or does return, but does not sleep at the property (perhaps to avoid having an accommodation tie). It is tentatively suggested that if an individual does not sleep at a property for a prolonged period it cannot be his home, but in a case where his family remain there and he keeps

property there, it is far from clear cut. Indeed, Example A5 in RDR3 suggests that HMRC would not agree with this view (see para 5.05 above for a detailed discussion of ceasing to have a home in the UK).

**Example 5.7: James**

James leaves the UK in March 2014 to spend two years writing a novel on a small Greek Island. James does not spend enough hours per week working on the novel to meet the full-time working abroad test. He rents a villa on a long lease for the time he is in Greece.

James has a UK resident son from a previous relationship and returns to the UK for several weekends and during school holidays to spend time with him. James spends sufficient time with his son to have a family tie. As he had lived in the UK for a number of years before his departure he also has the 90-day tie.

In order to be able to spend as much time as possible in the UK with his son, James decides that he will aim to avoid having the accommodation tie. However, James does not want to give up his UK property and does not like the idea of renting it out. He therefore maintains the property, but does not sleep there when he returns to the UK (although he does visit the property to mow the lawn, pick up post and carry out small maintenance tasks).

The novel takes slightly longer than expected and James returns to the UK in June 2015. James re-occupies his UK property on 3 June 2016, but decides to keep his Greek property for a further six months in order to have a couple of holidays with his son, as well as spend some time there making final revisions to the book. He finally gives up the lease on the property on 30 November 2016.

James will certainly be resident in the UK for 2016/17. However, how the split-year provisions will apply will depend on whether he falls within Case 4 or Case 8. In order to fall within Case 8, James must not have a home in the UK at the beginning of the tax year and must start to have one during the tax year. In this case, that means the UK property must not be his home on 2 June and must begin to be his home on 3 June. It certainly seems possible to argue that a property that James maintains and keeps his belongings in but in which he does not sleep for a period of over two years has ceased to be his home (in spite of Example A5 in RDR3). If this is correct, and assuming the other part of the test regarding sufficient ties is met, James will begin to have a home in the UK on 3 June and will qualify for split-year treatment.

However, HMRC might well wish to argue that keeping furniture and personal belongings in a property that has been your home is sufficient for it to remain so (especially in view of James's visits to the property). On this basis, James would need to consider the test in Case 4, and would begin to have an only home on 1 December. If this is the case, he may have difficulty meeting the sufficient ties test (see para 5.26 below) and may be treated as resident throughout the tax year.

If James wants certainty about his residence position for 2015/16, he will need to give up his Greek property when he returns to the UK, so that he can meet the test either way. However, in the real world it is unlikely that he will be able to arrange for this to happen on the precise day that he begins to reoccupy his UK property.

An individual returning to the UK and his advisor will need to give careful consideration to the quality of any accommodation which that individual has, both in the UK and overseas, and may wish to adjust his plans depending upon how sure they can be about the status of his UK property.

### **Timing**

**[5.26]** A decision about when to return to the UK will be dependent on a number of factors. From a tax perspective, a large part of this decision is likely to be based upon the operation of the split-year tests. As identified above, many of the issues with regard to the split-year test will be the same for those returning to the UK as for those coming here for the first time, and these are dealt with in detail in CHAPTERS 7 and 8. The two additional complications for those returning to the UK will be whether they have retained a UK property (and the issues relating to this as outlined above) and the five-year trap.

Assuming that the five-year trap is not a consideration (either because an individual needs to return well within the limit or because he is, in any case, outside of it) then the main driver from a tax perspective is likely to be the application of the split-year test (with the possible complications regarding UK property). As well as understanding whether he needs to consider Case 4 or Case 8 of the split-year test (see para 5.25 above), an individual will need to consider whether he is likely to be resident under the sufficient ties test for the ‘overseas period’ of the split year. Again, this is likely to be more of an issue for those returning to the UK than for those coming for the first time, as they are more likely to have maintained some UK ties and may well have more days of presence in the UK.

The sufficient ties test is applied to the overseas part of the tax year by reducing the days of presence allowed in the UK on a pro-rata basis, based on the number of whole months in the UK part of the year. These are whole calendar months (eg June) as opposed to whole months counting from the day of non-residence (eg 28 May – 28 June). The calculation works by calculating the days which would apply to the UK part of the year and reducing the total days for the year by this amount. The actual calculation is likely to be academic, however, since there is a useful table (Table F) at paragraph 5.26 of RDR3 (reproduced at para 8.19) which shows the number of days which an individual can have in the UK under the sufficient ties test for each of the relevant numbers of ties – it is set out as a substitution (eg an individual whose overseas part of the year ends on or before 30 April, must substitute one day for 15 days, four days for 45 days and so on). The date on which the overseas part of the year comes to an end will depend on which of the two tests (Case 4 or Case 8) is relevant.

In considering returning to the UK then, as well as considering his UK property and whether it could be considered a home, an individual must consider the sufficient ties test for the period before his return. In a sense, therefore, an individual must begin planning for his return to the UK in the tax year before that in which he wishes to return, if he wishes to ensure that the sufficient ties test is not breached and the split-year test will apply.

An individual returning to the UK in the early part of the year can have a very limited number of days of presence in the UK without being treated as UK resident (and thus failing the test and not qualifying for split-year treatment). For example, an individual with three UK ties returning to the UK on 28 June after two years overseas, would only be able to have 11 days in the UK before failing to meet the test.

The fact that the sufficient ties test applies on a whole-month basis means that the exact day on which the UK home is acquired (or the overseas home is given up) can be quite crucial. For example, if the individual with three UK ties had returned three days later on 1 July, he would have been able to have 15 days in the UK and still meet the sufficient ties test for the overseas portion of the year.

It is also worth remembering that if an individual meets the ‘only home’ test in Case 4 he is likely to be automatically resident in the UK. So, if the split-year treatment does not apply, the individual will be taxed as a UK resident for the whole tax year – even if he does not meet the ‘only home’ test until March. Therefore, if the individual is unlikely to be non-UK resident under the sufficient ties test for the overseas period, but would be so for the full tax year, as far as possible they should avoid meeting the only home test at all during the year – perhaps by delaying their return; by maintaining an overseas property; or by staying with friends or relatives for short periods before acquiring a UK home.

In conclusion, the timing of an individual’s return will be crucial for their residence position for the year of return to the UK – even down to the exact day of their return. This will be an area which an individual will need to explore very carefully with his advisor, and as early as possible before return. In cases of uncertainty, and where it is possible in view of other considerations, the safest course may be to avoid returning to UK residence until early April (ie after April 6) thus removing the danger of being considered resident in the UK throughout the immediately preceding tax year as a result of meeting the only home test, despite only having spent a small number of days in the UK.

## **Conclusion**

[5.27] For those individuals leaving the UK other than for full-time work abroad, the circumstances surrounding their ownership or use of any UK property are likely to be key, especially in the years of departure and return. For the intervening years, where the individual wishes to spend more time in the UK than is permitted under the first or second automatic overseas tests, it is likely that it will be important to monitor very carefully the application of the sufficient ties test.

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