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TAXATION

CIOT/ATT East Midlands Branch

“Residence & Domicile – the Changing Landscape”

**Presented by Mike Truman LLB FCA CTA (Fellow) MSFA
Editor of Taxation Magazine**

Date: Wednesday 22 October 2008

Venue:

The Quality Hotel
Junction 23 M1
New Ashby Road
Loughborough

Timetable:

1.30pm – Branch AGM
1.45pm - Refreshments and registration*
2.00pm – Lecture begins
3.30pm – Break for refreshments*
3.45pm – Lecture resumes
5.00pm - Questions
5.15pm – Close

CPD Hours: 3

*Refreshments sponsored by:



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Residence & domicile - the new landscape

Mike Truman LLB CTA (Fellow) FCA

Editor, *Taxation* magazine

Notes of this nature are necessarily a summary, and do not provide a complete and comprehensive coverage of the subject. No liability is accepted for losses arising from any action taken or refrained from on the basis of material herein.

Statutory provisions

- ss 334-336 ICTA 1988
 - almost identical provisions in TCGA 92
- Consolidated with little amendment from Income Tax Act 1842
 - but sections split and reordered
- Concepts originate in statute of 1799

s 334 ICTA 1988

- Commonwealth & RoI citizens (now changed)
- Shall be charged to tax IF:
 - had ordinary residence in UK
 - left for occasional residence abroad
- Shall be charged to tax AS a person actually residing in the UK
- Shall be charged to tax ON whole amount of profits or gains

s 336 (1 & 2) ICTA 1988

- Here for some temporary purpose only
 - not to establish his residence here
- Not in the country for more than 6 months
 - in a tax year
 - made up of one or several trips
- Then not resident
 - but if here for MORE than 6 months, then definitely resident

s 336 (3) ICTA 1988

- Available accommodation not to be taken into account
- Introduced w.e.f. 6.4.93.
- But ignored only for this section?
 - not necessarily for whether someone is resident under s 334

s 335 ICTA 1988

- More recent section
- Working full time abroad and not in UK
- Except for incidental duties
- Residence decision is taken without reference to accommodation
 - DOES therefore cover s334 as well as s336

183 day rule

- Set out clearly by statute - s 336 (1)(b)
- NRN Q 2 asks whether taxpayer in the UK for 183 days
 - if yes, resident
 - if no, consider other questions (91 day rule)

Arrival and departure

- IR 20 says days of arrival and departure are not to be included when counting days
- Inspector's Manual only confirms this for 183 day test
 - looking at missing paragraphs (?) there might be restrictions for the 91 day test
- Case law says use fractions:
- *Wilkie v CIR* (1951) 32 TC 495

Wilkie v CIR - Facts

- Mr Wilkie lived in India
- 1947, visited UK for the first time since the war
 - arrived 2 June 1947 early afternoon
- Planned to leave mid-November
 - but operation went wrong, then
 - plane due out on 30th November cancelled
 - finally left mid-morning, 2 Dec

Wilkie v CIR - Revenue argument

- High Court - different argument before Commissioners
- Month means a lunar month
 - because otherwise how many days does a month have?
- Fractions of days should be included as complete days

Wilkie v CIR - Taxpayer's argument

- 336 (1) relieves from tax anyone
 - here for a temporary purpose
 - with no place of abode
 - not here for six months
- On time spent here, either:
 - use fractions of days - hours, minutes
 - or that if days alone are used he has spent more than 6 months out of the UK

Wilkie v CIR - Decision

- Taxpayer is right about s 336
- Only question is whether he is here for six months
- Cannot use whole days: being chargeable AND not-chargeable is an absurdity 'remarkable even in an Income Tax Act'!
- Can use fractions, half the days in a year
- This year was a leap year - 182.5 days..?

New test

Physically present for 183 days or more

Visited the UK on average for 91 days or more over four years

Resident from 6 April of year 5

Days of arrival/departure practice now replaced with a statutory "midnight" rule

Exemption for those in transit through the UK

– But must not be in the UK for any other purpose

Peter

- Lives in Jersey
- Flies to Frankfurt through UK
 - Lands at Gatwick
 - Flies out of London City
- Has a meeting with other HSBC colleagues in Canary Wharf
- Transit exemption will not apply

John

- Lives in Jersey and flies to Frankfurt through UK
- He spots a colleague at Gatwick and they have a drink and chat about some business issues
- This is incidental to main purpose of travel
 - Transit exemption will apply

Shirley

- Lives in Guernsey and flies to New Zealand via Gatwick
- Spends the night with her daughter who lives in Crawley who drives her to Heathrow for connecting flight
- Shirley has another reason for being in the UK
 - The transit exemption will not apply

Phil

- Phil travels through the UK on an onward journey to New Zealand
- His son meets him at Gatwick and takes him to Heathrow and dines with him at the hotel
- The transit provisions should apply

91 day test

- Distinction between those:
 - leaving for full-time work abroad
 - leaving 'permanently' in other circumstances
- Distinction is:
 - partly statutory,
 - partly that work is evidence of 'permanent' departure

IRC v Lysaght - Background

- Heard on the same day as *Levene*, below
- Clear from *Levene* that standard advice was:
 - don't have a UK home
 - don't be here more than 183 days
- These two cases make a significant change
- See later for possible political reasons

IRC v Lysaght - Facts

- Lived in the Irish Free State
- Came to the UK for a week a month
- Had no home in the UK
 - stayed in hotels
- Averaged 90 days a year here
- Was he ordinarily resident?
 - and therefore liable to tax on his War Loan interest

IRC v Lysaght - Decision

- House of Lords said ordinarily resident
 - overturned Appeal Court
- Having a home overseas did not stop him being resident in the UK
- It was solely the number of days spent in the UK that mattered, not the reason for being here

Shepherd – the facts

- BA pilot
- Rented house in Cyprus Oct 1998
- Retired June 2002 and went on round world sailing trip
- 1999/2000 spent 80 days in UK, 180 days flying, most of rest in Cyprus
- Non-resident?

Problematic evidence

- ‘Separated’ after an affair
 - but seemed on very good terms
 - ‘my dearest wife’ in will
- ‘Stayed with parents’ when about to fly out
 - only occasionally
 - mostly in family house
- He and wife were ‘good friends’
 - so by implication still had home as residence

Decision

- UK was still his base
- S 334 – did have ordinary residence there, has gone abroad for occasional residence only
- S 336 – could have exempted, but here for more than ‘temporary purpose’
- to exercise duties of employment, *Lysaght*

Gaines-Cooper - facts

- In the 1970s he spent no more than two months each year in the UK
 - ...and 5 months in the Seychelles
- In the 1980s he made short trips to the Seychelles
- From 1990 to 2000 he made many short trips to the UK
- His average days were below 90 provided days of arrival and departure are ignored

Residence

- IR20 approach was ruled out and days of arrival and departure were taken into account
- Increasing UK days to an average of 130 per tax year
- He had a “*settled abode*” in the UK and spent more time here than anywhere else

After 2000

- His UK time dropped dramatically and he spent more time in Jersey than anywhere else
- SpC held he was resident under S.334
- Commonwealth citizen having occasional residence abroad
- Also resident under s.336 as residence in UK to be with his wife and child is not a “*temporary purpose*”

Grace

- Another pilot case
- Originally South African
- Came to UK as a BA pilot in 1987 and bought a house here
- Bought a house again in Cape Town in 1997 and says he left

Decision

- His count, on an IR 20 basis was 41, 71, 70
- HMRC count, including sick days and arrival & departure, 86, 146, 139
- Commissioners find he is not resident – distinct break temporary purpose
- Note on original proposals for 2008, guidance would have him resident!

The future – a statutory test?

- Not closed off by latest changes
 - specific mention in Hansard
- Everyone agrees there should be a change
 - no-one agrees what it should be!
- Irish solution? Based on midnights.
 - 183 days a year, 280 days over two years, min 30 days each year

Presence in the UK during the year

- IR 20 says 'Normally' be physically present
- NRN says definitely have to be physically present
 - answer 'no' and it concludes you are not resident
- Based on *Reed v Clark*

Reed v Clark - Background

- Of the Dave Clark Five
- Owned the rights to the songs
- Made a \$450,000 deal in 1977
 - taxable in 1978/79
 - on a prior year basis
- Took advice on tax minimization

Reed v Clark - Facts

- Left UK on 3rd April 1978
 - tried to let his flat, but not his house...
- Returned 2nd May 1979
- Spent all but a few days in the LA area
 - at first in a friend's house
 - then in a rented property
- Claimed not resident for 1978/79
- NB could not work now

Reed v Clark - Revenue argument

- Has not ceased to be resident
- Therefore liable to tax under Schedule D charging section
- Alternatively:
 - that under what is now s 334
 - he has left for only occasional residence abroad
- Cited *Rogers v IR* 1 TC 255

Rogers v IR - Facts

- Mr Rogers was a master mariner
- Absent throughout 1878/9 on board ship
 - had not returned when case heard
 - would not have got salary if he had died!
- Family remained at home in Fife throughout the period

Rogers v IR - decision

- Has to have a residence somewhere
- Only home is in Fife
- Being away for a year is irrelevant
- Taken away by the 'exigencies of business' only
- Covered by *Re Young* where captain away for 9 months was resident

Reed v Clark - Decision

- Not 'residing' under normal meaning
 - because judge is 'so persuaded'...
 - distinguishes Rogers but no reason
- Not caught by s 334
 - because gone for a year
 - with a settled intention
 - so couldn't be temporary

Using *Reed v Clark*

- Do not set foot in the UK during a tax year
- Have a demonstrable settled intention not to do so at outset
- Go to a particular settled location for the year
- Make any UK residence unavailable for the year

Domicile

- Has its origins in Roman law
 - conflict of jurisdictions
- Now found mainly in common-law countries
- Three main types of domicile:
 - origin
 - dependence
 - choice

Domicile of origin

- Fixed at birth
- Your father's if legitimate or adopted
- Your mother's if illegitimate
- Domicile of origin reverts on abandonment

Udny (1869) – rake's progress...

- Born Scottish
- Left for London
- Returned to Scotland to evict his wife and children...
- Ran off to France, had a child, then married (in that order)
- Legitimation depended on domicile

Udny - decision

- Arguable whether he had ever abandoned Scottish domicile
- But if he had, for English d.o.c., that had since been abandoned
- 'Man has to have a domicile somewhere'
 - so died domiciled in Scotland

Domicile of dependence

- If your father's domicile changes, so does yours
 - your mother's if divorced and living with her
- Children under 16 (Scotland different)
- Does not mean that the domicile of origin is now irrelevant
 - it is in abeyance

Domicile of choice

- Settle in another country AND
- Want to stay there permanently or indefinitely
- Mere passage of time is not enough
- Cases:
 - *Bullock*
 - *Re F*

Bullock v IRC

- Canadian joins RAF in 1932
- Marries an Englishwoman in 1946
 - but still intends to return to Nova Scotia
- Goes back with wife but she doesn't want to stay
 - return to UK, but he will go back 'after wife dies'
- He dies first – still non dom 40 years later

F v HMIT

- Came from Iran aged 19 to study
- Married Englishwoman, returned to Iran 1960
- Arrested for a night in 1979 revolution
- A year later overstays in Germany then comes to UK
- 'Untrue' statements for passport
- Still non-dom when he died

Domicile in federal states

- In federal jurisdictions it is the state you are domiciled in
 - therefore in 'Rhode Island' not 'USA'
- Intention to return to ANOTHER state is not maintenance of domicile of choice
 - which can cause problems
 - see next slide

Remittance basis

- Non UK domiciled taxpayers resident 7 out of last 10 years will have to pay £30k per annum to use the remittance basis for overseas income and gains
 - With no entitlement to personal allowances or the CGT annual exemption
- Those who choose not to will be liable to UK tax on all worldwide income/gains
 - Subject to normal DTR rules
- Exemption where offshore income/gains arising are not above £2,000
 - Originally this was going to be £1,000

Who does this apply to?

- Non-doms who have been UK resident in 7 out of the last 10 years
 - Excluding the current year
- Applies to all adults
 - Transfer assets to one or other of parties in a marriage/civil partnership to avoid one lot of £30k?
- Payment dates
 - 31 January 2010: £30k
 - Payment on account of £15k for 2009/10??

Other detail

- Tax will still be due on any remittances
- Taxpayer may nominate which income/gains the £30k will apply
 - Which *might* enable the IRS in the USA to grant double tax relief
 - Many US citizens are choosing the arising basis given the question mark hanging over this
- £30k remitted to pay the tax will not be treated as a remittance
 - Provided it is remitted directly to HMRC

Offshore trusts

- Assets transferred to offshore trust
- Gains realised over a number of years...
- ... then remitted to UK resident beneficiary
- £30k is due
 - But only for year of remittance
- LIFO matching of gains and capital payments
- No tax on gains prior to 5.4.08

Rebasing election

- Uplifts base cost of offshore trust assets to MV as at 6 April 2008
- Election ensures any pre 5.4.08 gains are not taxed
- Must be made by 31 January following end of tax year in which a capital payment is made
 - Or trust assets are transferred to a new trust

Lee Barrett

- Claimed he had left for a year before 6 April 1998
- But even on his figures he had been in the UK some days
- Trying to use *Dave Clark* case to show that he was non-resident
 - distinct break principles
- If you are going to become non-resident you've got to do it properly!

The diary

- Said he had no diary, just notes
- On second day produced 'a small black book with Rymans on the back and 1998 on the front...'
- Not musings or jottings on the day 'a la Pepys'

Distinct break

- Continued in employment, doing same work
- No permanent home or HQ abroad
- Family stayed in UK
- No overseas bank account(?), driving licence, doctor, etc
- Centre of interests still in UK
- No ticket stub or boarding pass

Thank you for listening

Mike Truman LLB FCA CTA (Fellow)
Editor, *Taxation* magazine

THE ADVISER.

Sense newsletter Oct 2008

Welcome to the latest edition of The Adviser, Sense Financial Solutions' update on developments in the world of financial services.

Please see www.itmakessense.net for more details about Sense FS and for CIOT lecture notes etc

Bank Guarantee Scheme

Since the collapse of Northern Rock, and the continuing effects of the “credit crunch”, a lot of people have had concerns about whether money in the bank is safe. The Financial Services Compensation Scheme protects deposits, insurance policies, insurance broking, investment business and mortgage advice. It means that bank deposits up to a specified maximum amount are guaranteed by the FSCS. Since the 7th October 2008 the amount guaranteed was limited to £50,000 per person per authorised institution. The scheme applies to some business accounts, as well as personal accounts. There is no reason to assume that any more banks will collapse, but the more risk-averse depositor may decide that it would be prudent to deposit amounts larger than £50,000 with more than one institution. If a decision is taken to spread deposits amongst different banks, it is important to establish that each bank is an “authorised institution”. If you hold multiple accounts in banks that are covered by one parent company's authorisation, the FSCS would pay compensation up to the limit of £50,000 once, irrespective of how many different institutions a person held accounts with.



IHT Seminar

We will be presenting a lecture on Thursday 6th November 2008 at The Comfort Inn, on the A46 Fosse Way, Upper Broughton

Topic - Inheritance Tax – latest changes and rules from the viewpoint of both the Inland Revenue and the Adviser.

HMRC - Tony Key presents IHT - current issues, forms, problems and help

Aegon - Phil Boyd, Offshore Trust manager, presents IHT and trusts

Sense - Neil Marshall presents current background to IHT

Starting at 6pm for 6.30pm start till 8.15pm with 1.5hrs CPD

Cost: Free to CIOT members

www.itmakessense.net for more details

Contact Us:

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Sense
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- Do you have multiple old pension plans that you would like to tidy up into one provision making it easier to review and much easier when you come to retire?
- Is your present provider closed to new business and therefore limiting your opportunities for growth of your pension plan?
- Is your pension invested in an under performing with profit fund – some are paying little or no bonuses at all?
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- Disabled Discretionary Trusts – allow you to provide for any disabled individual without leaving them in control of their inheritance or affecting their right to benefits.
- Inheritance Tax Saving Wills– now that Nil Rate bands are transferable, are Discretionary Trusts still important in your will? We think they are for protecting family assets
- Advance Directives – also known as ‘Living Wills’. These are used to communicate your wishes regarding advanced refusal of treatment.
- Children’s Trusts and Guardianship – through your will you can nominate who you wish to look after your children when you’re no longer around.
- Death in Service trusts – These trusts provide flexibility to the intended benefactor of the death in service payments and can significantly reduce an inheritance tax liability.

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The next move

Interest rates had been on hold for five months - and many were fearing the next move would be upwards. However, that was before the events of mid September changed the complexion somewhat. The Bank of England now puts the Consumer Price Index at 5.2% - almost three times its 2% target. However, UK GDP is zero (and may in reality already be negative), the oil price has fallen back and the housing market has completely stalled. Couple this with investment bank failures, the merger between HBOS and Lloyds and now the nationalisation of Bradford & Bingley: the outlook is bleak. Consequently, on 8 October, in came the Bank of England with a 0.5% cut.



EAST MIDLANDS CIOT & ATT – Events for 2008/2009

Date	Details	Timetable	Venue
Thursday 6 November 2008 6.00pm – 8.00pm Cost: Free CPD Hours: 1.5	Inheritance Tax – the latest changes from the viewpoint of HMRC & the Adviser Phil Boyd – Offshore Trust Development Manager at Scottish Equitable, Tony Key – HMRC Trusts Office &, Neil Marshall – Sense Finacial Solutions	6.00pm - Registration & refreshments 6.30pm - Lecture starts 7.45pm - Questions & informal discussion 8.00pm – Close	Best Western Leicester North (formerly the Comfort Inn) A46 Fosse Way Upper Broughton Leicestershire
Wednesday 26 November 2008 4.00pm – 8.00pm Cost: £40.00 CPD Hours: 3	Latest tax issues affecting owner-managed businesses Chris Jones BA CTA (Fellow) ATT Lexis Nexus	4.00pm - Registration & refreshments 4.30pm - Lecture starts 6.00pm - Break for refreshments 6.15pm - Lecture resumes 8.00pm – Close	The Novotel Nottingham/Derby Junction 25 M1 Bostock Lane Long Eaton Nottingham
Tuesday 9 December 2008 6.00pm – 8.00pm Cost: £15.00 CPD Hours: 1.5	The New Penalty Regime & Tax Investigations Update Paul Lynam Lynam Tax – Positive Tax Solutions	6.00pm - Registration & refreshments 6.30pm - Lecture starts 7.45pm - Questions & informal discussion 8.00pm – Close	PricewaterhouseCoopers Offices Donington Court Pegasus Business Park Castle Donington, Derbyshire
Tuesday 10 February 2009 4.00pm – 8.00pm Cost: £40.00 CPD Hours: 3	Charity Update – accounts, law & tax Rebecca Benneyworth BSc FCA Tax writer & lecturer Lexis Nexis Tax Lecturer of the year 2007	4.00pm - Registration & refreshments 4.30pm - Lecture starts 6.00pm - Break for refreshments 6.15pm - Lecture resumes 8.00pm – Close	The Novotel Nottingham/Derby Junction 25 M1 Bostock Lane Long Eaton Nottingham
Tuesday 10 March 2009 4.00pm – 8.00pm Cost: £40.00 CPD Hours: 3	Property Tax Update By Brian Ogilvie FCCA CTA Freelance Tax Lecturer & Consultant	4.00pm - Registration & refreshments 4.30pm - Lecture starts 6.00pm - Break for refreshments 6.15pm - Lecture resumes 8.00pm – Close	Best Western Leicester North (formerly the Comfort Inn) A46 Fosse Way Upper Broughton Leicestershire
Wednesday 22 April 2009 4.00pm – 8.00pm Cost: £40.00 CPD Hours: 3	The Interaction between Accounting Standards & Tax By Andrew Guntert MSc FCA Lecturer for Mercia	4.00pm - Registration & refreshments 4.30pm - Lecture starts 6.00pm - Break for refreshments 6.15pm - Lecture resumes 8.00pm – Close	Premier Inn, Braunstone Lane East Leicester
Wednesday 20 May 2009 4.00pm – 8.00pm Cost: £40.00 CPD Hours: 3	Finance Bill 2009 Mark Morton BA ATII ATT Senior Tax Lecturer for Mercia	4.00pm - Registration & refreshments 4.30pm - Lecture starts 6.00pm - Break for refreshments 6.15pm - Lecture resumes 8.00pm – Close	Best Western Leicester North (formerly the Comfort Inn) A46 Fosse Way Upper Broughton Leicestershire
Date to be advised 6.00pm – 8.00pm Cost: £15.00 , CPD Hours: 1.5	Topical Tax Issues Andrew Hubbard BMus PhD ATT CTA (Fellow) Tax Director, Tenon Group PLC	6.00pm - Registration & refreshments 6.30pm - Lecture starts 8.00pm – Close	PricewaterhouseCoopers Offices Donington Court, Pegasus Business Park, Castle Donington, Derbyshire

The Branch Committee reserves the right to alter the above programme without prior notice.
For more details of any of the above events or to book a place please contact the Branch Secretary, Martin Tomes at
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