

## United Kingdom's proposed statutory residence test

### Comments on the proposed test by Finers Stephens Innocent LLP

In June 2011 HM Revenue & Customs ("HMRC") published a consultative document on the new statutory test for tax residence ("SRT") in the UK. If enacted by Parliament, this SRT will largely supplant over 100 years of Judge made case law in establishing the rules for tax residence in the UK. The closing date for responses to the consultation is 9 September 2011 and the consultative document itself can be downloaded as a PDF file from the HM Treasury website at [HM Treasury website](#).

The consultative document is 41 pages long and for a full view of the proposed new SRT you should read the document itself. The purpose of this flyer is to alert you to the proposed changes and to provide a brief summary of how they are proposed to work. In particular, only the main points raised, and definitions used, in the consultative document are discussed here.

We emphasise that this exercise by HMRC is a consultation and there is no guarantee that the proposals will be enacted in the Finance Bill 2012 in exactly the form set out in the consultative document. This Government appears to be more willing to listen to representations than the previous Government and whilst a couple of years ago if this document had been published we would have said it would have been enacted on terms exactly as shown in the consultative document, that is no longer the case. Having said that, it is to be hoped that any changes improve the working of the test rather than make it worse!

Turning now to the consultative document itself, the new SRT is proposed to take effect from 6th April 2012, i.e. with effect for tax year 2012/13 and thereafter. It will have no effect for determining tax residence in the UK for any tax year earlier than 2012/03.

#### Basics of the proposed statutory test

- There are 3 tests set out in the document and referred to as parts A, B, and C. Part A establishes conclusive non-residence (in other words if any of the conditions set out in Part A are satisfied then an individual is conclusively non-resident). Part B establishes conclusive residence (i.e. if any of the tests in Part B are met then an individual is conclusively resident in the UK). Part C establishes a number of graded tests which effectively are tie breakers for an individual who passes none of the conditions in either Part A or Part B.
- In considering the three parts to the new SRT, you will see that the tests depend heavily on the number of days an individual spends in the UK. Therefore, it is crucial to understand what constitutes a day spent in the UK for the purpose of the SRT. At present, an individual spends a day in the UK if they are present here at midnight on that day, subject to a relaxation for transit passengers who during their time in the UK do not engage in any activity substantially unrelated to their passage through the UK. That definition remains for the SRT but there is a new definition of a person or an individual spending a "working day" in the UK and for this an individual need spend only in excess of three hours working in the UK, even if that individual is not present in the UK at the end of the day. Therefore, an individual could fly into the UK at 10.00am for an 11.00am meeting

which lasts until 3.00pm and then fly out again at 4.00pm and they will have spent a working day in the UK.

#### Part A

- The conditions in Part A depend on whether or not an individual applying the conditions has been resident in the UK in any of the previous 3 tax years (i.e. the 3 tax years prior to the tax year in which the condition is being tested). The appropriate Part A condition for an individual who has been non-tax resident in the UK for the 3 previous tax years is a test of presence in the UK for fewer than 45 days in the tax year being tested.
- The condition for a person who was resident in the UK for at least one of the three previous tax years is to spend fewer than 10 days in the UK in the tax year under consideration.
- Part A contains a third test for individuals leaving the UK to carry out full time work abroad and such persons may spend less than 90 days in the UK in the tax year providing no more than 20 of those days are working days.
- If an individual meets any of the above conditions then they will have satisfied the Part A test and will be regarded conclusively as non-resident in the UK.
- If the Part A test is not met then it is necessary to turn to Part B of the SRT.

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## Part B

- Part B establishes conditions any one of which if met conclusively proves UK tax residence. The tests are:
- an individual is present in the UK for 183 days or more in a tax year;
- an individual has only one home and that home is in the UK, or has two or more homes and all these are in the UK; or
- the individual carries out full-time work in the UK. Full-time work is based on a working week of 35 hours or more carried out over a continuous period of more than 9 months (excluding short breaks such as illness or holidays).
- If none of the conditions in either Part A or Part B of the test are met then it is necessary to turn to Part C of the SRT.

## Part C

Part C sets out five connection factors with the UK (see below). The idea of Part C is that the more of those factors which apply to an individual then a fewer number of days the individual can spend in the UK before becoming tax resident for a tax year.

### The five factors are:

- family - the individual's spouse (which includes a civil partner or even a simple living together partnership arrangement) or minor children are resident in the UK;
- accommodation - the individual has accessible accommodation in the UK and makes use of it during the tax year in question;
- substantive work in the UK - the individual does substantive work in the UK. This test falls short of working full-time in the UK but will be met if an individual has 40 or more working days in the UK during a tax year;
- previous UK presence - the individual spent 90 days or more in the UK in either of the previous two tax years; or
- more time spent in the UK than in other countries - the individual spends more days in the UK in the tax year in question than in any other single country.

The purpose of these factors is to provide a strong indication of the location of the "centre" of a person's life and will be largely familiar from current case law on UK tax residence. The consultative document then goes on to combine these factors with the number of days an individual actually spends in the UK in a tax year to produce a "scale" to determine whether or not the individual is tax resident. The consultative document proposes separate scales for people who are arriving in the UK (i.e. were not previously tax resident here) and individuals who are trying to establish that they have left the UK (i.e. who were previously UK resident).

Therefore, under Part C if less than 45 days (for arrivers) or 10 days (for leavers) are spent in the UK an individual cannot be tax resident. If more than 182 days are spent in the UK an individual definitely will be UK tax resident. Between those two extremes the scales set out in the consultative document will provide a sliding number of days an individual can spend in the UK without establishing tax residence for certain.

### Scale for individuals not UK tax resident within the three previous tax years

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

### Scale for individuals UK tax resident in one or more of the three previous tax years

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

## Ordinary Residence

The consultative document also proposes a definition of "ordinary residence". HMRC estimates that ordinary residence status has an impact only on a relatively few number of taxpayers and the proposed changes are not discussed in this flyer. Readers are referred to section 6 of the consultative document.

## Summary

The proposed SRT attempts to establish a "safe harbour" of circumstances which will always produce UK tax non-residence (Part A), a test which will always establish UK tax residence (Part B) and scales which set out a sliding number of days which can be spent in the UK without establishing tax residence according to the number of lifestyle/working factors connecting an individual with the UK. Not surprisingly, the more factors connecting an individual with the UK the fewer number of days that individual can spend in the UK in a tax year without establishing UK tax residence.

In our view the proposed SRT introduces a measure of certainty which does not presently exist in establishing definitively whether or not an individual is, or is likely to be, tax resident in the UK for any particular tax year.

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