



TAXREP 9/13

(ICAEW REP 13/13)

ICAEW TAX REPRESENTATION

TAX RESIDENCE AND ORDINARY RESIDENCE

Comments submitted on 6 February 2013 by ICAEW Tax Faculty in response to the *Statutory definition of tax residence and reform of ordinary residence* summary of responses to the June 2012 consultation and draft legislation published in December 2012 by HM Revenue and Customs

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the [Statutory definition of tax residence and reform of ordinary residence: summary of responses](#) to the June 2012 consultation and [draft legislation](#) published by HM Revenue & Customs (HMRC) on 11 December 2012.
2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. This latest consultation document builds two earlier consultations on the statutory definition of tax residence that ICAEW responded to in [TAXREP44/12](#) and [TAXREP48/11](#).
4. Information about the Tax Faculty and ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's Ten Tenets for a Better Tax System by which we benchmark proposals to change the tax system.

WHO WE ARE

5. ICAEW is a professional membership organisation, supporting over 140,000 chartered accountants around the world. Through our technical knowledge, skills and expertise, we provide insight and leadership to the global accountancy and finance profession.
6. Our members provide financial knowledge and guidance based on the highest professional, technical and ethical standards. We develop and support individuals, organisations and communities to help them achieve long-term, sustainable economic value.
7. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

KEY POINT SUMMARY

8. We are pleased to note that some of the points raised by ICAEW have been taken into account in producing this revised draft legislation but disappointed that other points have been passed over.
9. We are still very concerned about the length and complexity of the legislation (54 pages of draft legislation and 38 pages of explanatory notes for the statutory residence test alone). It is doubtful that an unrepresented individual will be able to navigate the legislation correctly particularly if they are not definitely resident and not definitely non-resident but in the middle ground.
10. The stated aim of the legislation is to provide certainty but because of the complexity and the provision that the rules can be changed by statutory instrument, possibly without consultation, it does not achieve that aim.
11. We welcome the changes to the overseas workday relief.

MAJOR POINTS

12. We are still concerned that the full time working abroad test does not cater satisfactorily for self-employed individuals. The draft legislation is framed by reference to the working patterns of employees which can be very different to those of a self-employed person. .
13. Whilst we welcome the increase in the number of work days in the UK from 20 to 30, the definition of a working day being any day where three or more hours are worked is unnecessarily restrictive, particularly as the definition of work is unclear. It will be very difficult for individuals to correctly record and monitor their work time.
14. Automatically including travel time as UK working where it is funded by the employer or could be claimed as a business expense is inappropriate; it should only be included to the extent that the individual is working whilst travelling.
15. The definition of a home still lacks precision and certainty. Given that “home” is used in the automatic residence test, the accommodation tie and the split year provisions it is our view that the definition should be clear, unambiguous and without any subjectivity.
16. The second automatic residence test (see para 8 of the draft Schedule) of an only home in the UK can result in some anomalies. As currently drafted it appears to apply if there is a 91 day period wholly or partly in the tax year where there is no overseas home. For example: Jane has a house in the UK where she spends the month of August and two weeks in March each year, a total of 46 days but otherwise lives in Brazil (with which the UK does not have a double tax convention). She decides to sell her home in Brazil and the sale is completed on 1 April (year 1) but her replacement home she wants to buy, still in Brazil, is under construction and will not be completed until mid-July in that same calendar year (year 2). She goes on a cruise for the period April to June. However it would seem that under the second automatic residence test she will be treated as automatically resident for both years 1 and 2.
17. We welcome the modification that half terms holidays will be treated as term time but our view is that the restriction to 21 days for other holidays is too short.

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APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see icaew.com/en/technical/tax/tax-faculty/-/media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)