TAXREP 26/01

TAX TREATMENT OF MOBILE WORKERS

Memorandum submitted in October 2001 to the Inland Revenue by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to a consultation announced in July 2001

CONTENTS

	Paragraph(s)
INTRODUCTION	1
GENERAL COMMENTs	2 - 6
SPECIFIC COMMENTS	7 - 35

`

TAX TREATMENT OF MOBILE WORKERS

Comments on the Consultation announced by the Inland Revenue in July 2001.

INTRODUCTION

1. This paper is produced in response to the Inland Revenue statement published in the April 2001 edition of Tax Bulletin and the subsequent invitation to comment on the 'basket of key indicators' intended to distinguish mobile workers from genuine secondees working abroad.

GENERAL COMMENTS

2. We cannot seriously disagree with the Inland Revenue's wish to look more critically at the residence status of certain workers who, perhaps by choice, have no connections with an overseas jurisdiction beyond a place of work. There is, however, considerable concern that the Inland Revenue's attempt to review the status of those individuals may adversely affect others who have little choice in the matter.

3. The principal difficulties perceived are that residence is not a matter which easily lends itself to an objective critique by reference to a set of rules and definitions, however carefully worded, and there is concern that - especially with the passage of time - the Revenue's proposed criteria may begin to be applied in that way.

4. What is to be the effective date of application of the criteria? Employees already abroad will be relying on the existing text of IR20 to determine their residence status. Is it proposed to review those status once more criteria have been published and, if so, will any re-determination be retrospective?

5. Is it proposed to apply like criteria to determining the residence status of foreign nationals coming to work in the UK?

6. This is a matter which has caused considerable concern and anxiety since the publication of the original statement.

7. It is unfortunate that in dealing with a relatively minor problem (transport and cross- channel workers) the Inland Revenue has considerably complicated the residence rules for everyone by its Tax Bulletin article. The proposed basket of indicators makes things even worse. If it persists with this approach the Inland Revenue should re-introduce residence rulings. There would be no logic in offering employment status rulings and denying residence rulings when the approach taken by the Inland Revenue is so similar.

8. Situations that are regarded as abusive should be dealt with as far as possible within the existing rules, rather than by making up new ones. For instance, 183

and 90 days should, according to the courts, be counted in hours. If the disregard of days of arrival and departure were made an extra-statutory concession (which it is) the Inland Revenue would be free to withhold it where absences from the UK were being arranged to minimise UK tax. This would be far simpler than the approach now being adopted.

9. If there has been a policy decision to tighten up the UK residence rules for people leaving the UK, this is a matter for ministers and Parliament.

SPECIFIC COMMENTS

Clean break

10. The reference to a 'clean break' in paragraph 5 seems to be moving the goalposts. Paragraph 2.2 does not and never has specifically or explicitly said that making regular return trips was a problem nor indeed said anything about a 'clean break' being required. This is entirely new and represents a clear change in policy. This is wholly unfair to practitioners who have advised on the basis of what para 2.2 actually says and to taxpayers who have taken it at face value. Tax districts have for years been happy to give NT codings to taxpayers who work the pattern mentioned (out on Monday/back on Friday) with knowledge of the full facts.

Leaving the UK: Previous Practice and IR20

11. With the abolition of the 'available accommodation' rule in 1993 it was widely assumed that the retention of not just UK accommodation, but a UK lifestyle, was irrelevant to determining residence status (except for dual resident treaty claims). For a UK resident moving abroad, the key questions were perceived as being whether:

- He was in full-time employment abroad for at least a complete tax year
- He visited the UK for 183 days or more
- Return visits exceeded 91 days on average

12. As a result, it was relatively straightforward to determine whether an employee leaving the UK was tax resident. This was particularly helpful with the introduction of Self Assessment, when residence rulings were abolished and it was left to the taxpayer to assess his residence position in his tax return. The 'day-counting' approach was strengthened by the insertion of paragraphs 2.10 and 3.6 in the October 1996 edition of IR20.

13. It is true that the 1993 change only affected the position of temporary visitors to the UK, and that if you had not 'left' the UK you would not qualify as a temporary visitor. However, that was generally regarded as an unusual scenario, which did not affect the normal determination of an individual's residence status according to the three rules above.

14. A relaxed view was taken by FICO as to whether an employee who was 'mobile' internationally was in full-time employment abroad. He did not need to remain in

the same job, in the same country, for the required complete tax year of absence. This is also reflected in the comments of Dawn Primarolo in the 1998 Finance Bill debate on Clause 63 (withdrawal of Foreign Earnings Deduction), when she responded to concerns about the impact on charity workers:

"*A continuous period spent outside this country by aid workers in the field, they may not necessarily be working in the same country or for the same charity, will be treated by the Revenue as one employment. Such workers may be working for different employers, in different countries and responding to different disasters, examples of which were given by hon. Members. Those workers would not have been using FED anyway: they would be non-resident.*"

15. Until news of the lorry-drivers' dispute became public last year, which prompted this year's Tax Bulletin article, there was no apparent problem. In particular, we could not detect that any particular emphasis was being given to the interpretation of IR20 paragraph 2.2 as outlined in the article and in the Revenue's letter of 30 July. It was widely assumed that if you worked abroad under a full-time contract of employment and met the other explicit conditions, you would have 'left' the UK. There was nothing to indicate that 'leave' was itself a substantive condition.

16. Against this background, the Tax Bulletin article and the 'basket of key indicators' outlined in the letter of 30 July amount to a change of policy by the Inland Revenue in the interpretation of the residence rules. This is not to deny that the Inland Revenue may be able to rely on existing law to counter obvious cases of abuse, such as the UK-based lorry drivers. But to promulgate a generalised re-interpretation of the residence rules, such as is now proposed, is a different matter. The new rules would have to be expressed in IR20. Very many individuals leaving the UK would be affected, in the sense that they will have to review the potential application of the 'indicators' to their position. This is much more onerous than counting days spent in the UK. Why should this be necessary because a relatively small number of lorry drivers have been trying to get out of paying UK income tax? Why is the Inland Revenue apparently going back on previous ministerial assurances given in 1998? Does it realise that by claiming its new policy is consistent with IR20, it is undermining the credibility of that publication, which over the years has been widely accepted as an invaluable distillation of the residence rules because it is clear, stable and on the whole generous to the taxpayer by reference to the strict legal position?

The Basket of 'Key Indicators'

17. The Inland Revenue's 'basket of key indicators' as appended to the letter amounts to a 'residence status checklist' similar in approach to their 'employment status checklist'. While it is possible to see how at least some of the residence indicators have been taken from decided cases, not all of them have. Some factors which were highly relevant to the decided cases, e.g. the length of time spent in the UK in the tax year, and the availability of accommodation in the UK, do not appear in the list. Presumably this is because time spent in the UK is catered for under the 90 days test, and the retention of accommodation in the UK is not a relevant factor

because of s335. Yet the overall effect is likely to be to distort the criteria the courts have found relevant in the past.

18. Therefore, in its current form the basket is not at all helpful, because there is no indication of how the various factors would be weighted. The courts have never propounded such a schematic series of tests. To reflect with any approximation of accuracy the previously decided cases, there would have to be a very high degree of flexibility. Even then, an approach which, for instance, ignores the retention of accommodation in the UK but brings in the retention of accommodation outside the UK seems unbalanced.

Specific comments on the table of indicators

19. How many of the criteria for non-residence must an employee meet before being accepted as no longer resident in the UK?

Indicators 1 & 2 (continuity of employment)

20. These indicators are at variance with the previous FICO interpretation of full-time employment abroad and the ministerial statement above.

Secondment

21. Will the Inland Revenue confirm that ‘employment’ abroad includes secondment from UK employer, not just local employment in the overseas location? Would there be a requirement for a secondment letter as evidence if the employer continues to be a UK person? Many employees perform duties in so many countries that the ‘employment country’ is not necessarily the one with which the employee has the closest links.

Indicator 3 (performance of duties in the UK)

22. What is meant by 'duties ‘regularly’ performed in UK'?

23. This is significantly more restrictive than the penultimate paragraph in RI40, and seems unjustified. The Courts have generally taken the view that time spent in the UK is a more important factor than duties performed. The Inland Revenue seems to be suggesting that individuals may visit the UK for up to 90 days per annum without becoming UK resident, but that despite this they may be resident if they perform non-incidental duties here. So one individual may be non-resident despite spending 80 days pa in the UK, while another may be resident, despite spending only 5 days in the UK, because he performs non-incidental duties here. While Lysaght indicates that the performance of duties in the UK can be a factor in establishing residence, that was a borderline decision and we feel that not too much emphasis should be placed on it.

24. The criteria seem to exclude the possibility of non-incidental duties being performed in the UK. Is the Inland Revenue really saying that 1 day of non-

incidental duties would deny non-residence? If not 1 day, then at what point does it draw line?. 91/183 days would be sensible logical & consistent.

Indicator 4 day to day management and control

25. We fail to see how the location of day to day management and control is relevant. Why should an English employee of a UK business who reports to an English expatriate manager outside the UK be any less UK resident than one who reports to an English manager in, say, Swindon? It would be anomalous to treat the expatriate employee as passing a residence test, when the expatriate manager himself may fail it if he himself is under supervision from the UK. Conversely, we would find it surprising if, say, an employee living and working permanently in the UK should be regarded as in any sense at all as non-resident merely because the day to day control and management of his activities is located abroad.

26. What is meant by 'day to day control and management of employment' in the case of, for example, a member of the Board of a UK company and who may well be performing the day to day management and control of an overseas branch or associated company?

Indicator 5 overseas accommodation)

27. No comment

Indicators 6 & 7 (residential accommodation outside the UK; hotel accommodation)

28. Again, we have the problem of seeing how these indicators reconcile with the cases. According to the House of Lords, Lysaght was UK resident and ordinarily resident despite having his home in Ireland. Lord Cave said he might have been UK resident even if he had stayed in different hotels on an ad hoc basis. This shows how difficult it is to arrive at a series of indicators without propounding residence tests for which there is no judicial support. The circumstances of the particular employment may well be that the duration of the contract is uncertain or the location is uncertain or that the employee hopes to find better accommodation.

Indicator 8 (settled domestic life)

29. What is meant by 'settled domestic life'? This would appear to seek to address a subjective concept by the objective test of where it 'appears' to be. Will the Inland Revenue be publishing a further list of criteria for this test?

30. Many families who remain in the UK (especially for schooling or personal choice reasons) whilst the breadwinner is abroad would appear to prejudice the 'settled domestic life abroad' criterion. This test appears to be inappropriate, if not unjust, given the unacceptable disruption to education/personal lives that would be required, or the costs to British business, if families were relocated to ensure the non-residence of the employee. Those most affected would be those on the Continent of Europe - most particularly, those who travel extensively, who can

more satisfactorily return to the UK to visit their families at weekends than their families can set up a home in an overseas work location.

31. Where all duties, other than incidental ones, are performed outside the UK there is a statutory disregard in s335 for 'any place of abode maintained in the UK for his use'. The wording suggests disregard not just of a house owned, but a home maintained, whether by family or servants. In view of this, it seems doubtful whether Parliament intended that other lifestyle factors, such as the location of family, investments etc should continue to play a significant role in determining residence, as they did in the early cases.

Indicator 9 (liability to tax in other states)

32. There appears to be no judicial precedent for this. It is true that Viscount Sumner said in Lysaght, 'A man is taxed where he resides. I might also say he resides wherever he can be taxed'. But surely the latter comment was a joke?

33. There are a number of countries in which an employee might find himself resident where it can be only humane for the employer to assist him in avoiding at least some of the impact of local taxes, and the availability of tax-haven based employment contracts has largely been a response to excessive local taxation. It is not so many years since employees coming to live in the UK demanded, and received, help from their employers in avoiding what were then regarded as uncivilised levels of taxation.

34. Use of the 'paying local taxes' criterion must therefore be applied with real caution. We suggest that it be inapplicable where local taxation levels are higher than the EU average.

35. Confirmation is sought that being 'liable to tax' on emoluments in the other State is not limited to being subject to payroll withholding in that State. Will any distinction be made between liability as a resident and liability as a non resident of that State?

AM
16 October 2001