

TAXREP 84/08

REPLACEMENT GUIDANCE ON RESIDENCE AND DOMICILE

Comments submitted in December 2008 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to HM Revenue & Customs in response to the invitation published on 15 September 2008 to comment on the replacement guidance to be issued on residence and domicile.

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REPLACEMENT GUIDANCE ON RESIDENCE AND DOMICILE

INTRODUCTION

1. In this document we present the comments of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) on the invitation published on 15 September 2008 to comment on the scope and format of the replacement guidance to be issued on residence and domicile.
2. We are pleased to have the opportunity to provide our comments and we should be happy to discuss any aspect of them. We should also like to be offered the opportunity to comment on all sections of the draft legislation before publication.
3. Information about the Tax Faculty and the ICAEW is given in Annex B. We have also set out, in Annex C, the Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals to change the tax system.

KEY POINTS

4. We should like a statutory definition of the term 'residence' introduced.
5. The ambiguities in the current guidance, for example in the use of the word 'permanent', must be eliminated.
6. In addition to the existing guidance in the current IR20, the new guidance needs to address better the position of internationally mobile individuals including those whose work or personal circumstances result in a presence in several countries during the course of the year.
7. We should like to see the new guidance give illustrative practical examples such as the ones included in Annex A so that individuals may be clear about their UK residence status.
8. The new rules on the remittance basis need to be set out clearly. Given the complexity of these rules, we believe that the replacement guidance should include an overview of the options available which should then be cross-referenced to a separate guide or chapter on the detailed rules including nomination.

GENERAL COMMENTS

9. We wish to re-iterate our desire to have a statutory residence test. The current reliance on case law is unsatisfactory and inevitably results in guidance which lacks precision and certainty. The existence of a statutory test of residence would mean that any guidance should be more precise and provide greater certainty to taxpayers.
10. With international mobility increasing, the current IR20 guidance needs updating significantly. In particular, more guidance is required on situations which used to be rare but are now increasingly common, for example, individuals maintaining homes in more than one country, those commuting to the UK to work and seasonal migrants.

SCOPE OF GUIDANCE

11. Various sections of the guidance need expanding and clarifying, particularly those relating to residence. We have identified specific areas in the following paragraphs.
12. There are many ambiguities within the guidance which should be eliminated. For example the word 'permanently' needs clarifying. It is used to mean different things within the existing guidance (for example in para 2.3 and para 4.5).
13. The sections on residence and ordinary residence need improving and would benefit from including illustrative examples covering not only straightforward situations but also more complex ones. We have previously submitted common scenarios which we believe should be addressed by the guidance and these are included in Annex A, together with our views of the residence position of the individuals concerned.
14. HMRC distinguish between 'going abroad permanently or indefinitely' (as in para 2.7), 'going abroad for a settled purpose' (as in para 2.9, although by the context it may mean the same as permanently or indefinitely) and 'leaving the UK' (as used for para 2.12). This distinction and the factors which are relevant should be explained, particularly given that HMRC appears to consider that a person can go abroad for an extended period averaging in excess of 275 days a year, and remain UK resident.
15. The concept of 'leaving the UK permanently or indefinitely' has a legal significance because going to a country with the intention of 'staying there permanently or indefinitely' is the test as to whether one has acquired a domicile of choice in that country. Domicile and residence are different so using the same wording for both is considered misleading.
16. Given that many individuals maintain a 'pied-à-terre' in the UK, we should like to see para 2.8 provide details of the type of circumstances which HMRC regard continuing to have property in the UK for one's use as 'consistent with your stated aim of living abroad permanently or for three years or more' and what is the significance of 'three years or more'. The available accommodation rule causes uncertainty and inconsistency and individuals in apparently similar circumstances can be treated very differently.

I wondered if the guidance ought to at least mention that there are separate rules for national insurance?

17. Para 3.2 distinguishes between short term and long term visitors on the basis of an intention to remain for an extended period without defining or giving examples of what is meant.
18. We consider that para 3.7 is misleading because it implies that having accommodation available in the UK would make someone resident here, whereas the accommodation only becomes relevant once it is known that the person will be here for two years or more.

19. The guidance should include examples of what HMRC would consider to be, and not to be, 'exceptional circumstances beyond your control'. For example, if an individual is advised to have certain medical treatment which is available only in the UK and not in the home country, would staying in the UK for this treatment be considered 'beyond their control' and therefore ignored? Who qualifies as close family (para 2.2) and why are close friends, partners etc excluded? How long a stay is ignored?
20. We believe that new guidance should clearly explain what the purpose of forms such as DOM1, P85, P86 and P46 (or the proposed Form P46(Expat)) are and when each of these should be submitted.
21. The non resident landlord scheme and the associated forms (NRL1 and NRL3 are likely to be most relevant) should be mentioned in the chapter on 'leaving the UK' and other relevant sections, for example as a footnote to a table on the tax liability of non residents.
22. The chapter on Double Taxation Relief would benefit from more detail and from cross referencing to other guidance available. For example, paragraph 9.15 lacks detail and does not indicate where it may be found.
23. The paragraph on the treatment of foreign currency bank accounts (para 8.9) for capital gains tax could be improved. Most taxpayers will not understand the term 'disposal in return for any other asset' in the context of bank accounts and an illustrative example would be helpful.

STRUCTURE OF GUIDANCE

24. We have only one specific comment on the structure of the guidance and consider the order proposed for the chapters to be logical.
25. We believe that the guidance on the remittance basis would benefit from being dealt with in two parts. There should be an overview which sets the scene and deals with straightforward situations such as an immigrant with a bank account or rental property abroad. Detailed guidance on the more complex aspects of the remittance basis should be dealt with separately, perhaps in a separate guide.

GUIDES

26. We suggest that guides covering the following may be helpful:
 - i. Tax equalised employees.
 - ii. Pensioners.
 - iii. Self-employed consultants working in UK.
 - iv. Foreign tax relief for individuals.
 - v. The remittance basis of assessment.
 - vi. Non resident landlord scheme.

ANNEX A

EXAMPLES

1. This annex sets down a number of common scenarios where in our view the residence position of the individual is uncertain under current tax law. HMRC comments on these situations were requested in April 2007. Our view on the residence position in each scenario are given in italics.

2. We should like any guidance issued to include examples such as these with HMRC's view of the individual's residence status.

3. Alan retired from his job at 65 and he and his wife bought a villa in Spain where they now live. Alan retains his UK house. He and his wife visit the UK several times a year to see their children and grandchildren and stay at their UK house when they visit. Their visits always total well under 91 days a year.

Alan has fairly clearly left the UK as an emigrant so is not UK resident subject to the 91-day test.

4. As Alan at 3 above, except that the villa in Spain is rented.

As Alan has made a distinct break it should make no difference whether he chooses to rent or buy the house.

5. Ben also retired to Spain four years ago and with his wife bought a flat there. They sold their UK house. They visit the UK frequently to see their children and grandchildren but their visits do not exceed in total 91 days a year. They always stay with their daughter when they visit the UK.

Ben has also fairly clearly left the UK as an emigrant. The fact that they frequently visit the UK to see their children does not change the position. He clearly comes as a visitor not as a resident as his retirement to Spain was a clear change in his pattern of life.

6. As Ben at 5 above, except that the villa in Spain is rented.

It ought to make no difference that the house is rented. Retiring to Spain is a complete break. There may be a risk though that HMRC could regard renting the Spanish villa as suggestive that Ben has not yet made up his mind to make a clean break. We assume that the sale by Ben of his UK house means there is less of a risk of such an HMRC argument than if he had retained the UK house and rented it out.

7. Clive is an avid cricket fan. He retired to South Africa five years ago and has bought a large house there. He sold his house in the UK when he emigrated and bought a small flat in St John's Wood in which to stay when he visits London. Clive comes to the UK for test matches and also for some Middlesex home games. He keeps his visits under 91 days a year.

Clive has also left the UK as an emigrant so is non-resident subject to the 91-day test.

8. Ellen is a partner in a large firm of civil engineers. Her firm asked her to set up an office for them in Saudi Arabia. It is likely that Ellen will be based in Saudi Arabia for three years and will then return to the UK. She has rented an apartment there under a three-year lease. She visits the UK for partner meetings four times a year and also comes to the UK to visit her parents at Christmas and Easter. In total she spends about 30 days a year in the UK and when in the UK she uses the house she has owned since before she left.

Ellen has left the UK to work full-time abroad. Accordingly she has ceased to be UK resident subject to the 91-day test.

9. Ellen in the example at 8 above managed to recruit a good local manager and returned to the UK after two years. Her time in Saudi included a complete UK tax year.

As Ellen left the UK to work full-time abroad and her time in Saudi Arabia included a complete tax year she is non-UK resident throughout her time there.

10. Fiona built up a successful business in the UK. She moved to Monaco six years ago. She has an apartment in Monaco and a large villa in the South of France. She spends most of her time in one or other of these. Her main source of income is the dividends from her UK business. She still controls the business. She phones her UK managing director nearly every day and important papers are faxed or e-mailed to her for comment. She goes back to the UK for board meetings and stays three days a month. Fiona has retained her house in the UK and her two daughters who are in their twenties live there. Fiona also visits the UK for her daughters' birthdays and at Christmas and Easter. Her total visits to the UK do not exceed 91 days a year.

Fiona has almost certainly left the UK as she spends most of her time in her homes in Monaco and France. However the position is not clear-cut because she has retained her UK business and UK house and she stays in the house when she visits the UK.

11. Giorgio is a Greek Cypriot. He first came to the UK 20 years ago. He is an accountant and came to work for a firm of accountants. He left them 12 years ago and set up his own practice. He has regularly visited Cyprus for 10 weeks a year for the last 8 years. He would like to spend more time in Cyprus. Now his mother is getting old and he wants to be near her. He has moved to Cyprus. He has good staff, including his son and runs his practice from Cyprus via telephone, fax and e-mail. He has some Cypriot clients and UK clients who visit him in Cyprus and stay with him if they need to meet. Giorgio could well return to the UK when his mother dies but until then will probably spend his time partly in Cyprus and partly in the UK. He has not sold his UK house. His two sons, one of whom works in the business, and one of whom is at boarding school live there or stay there in the holidays. Giorgio visits the UK to see his son at school each half term and some holidays but his total UK visits for the next three tax years at least, will be well under 91 days a year.

Giorgio has left the UK for full-time work abroad. However, his residence status could be jeopardised if his visits to the UK include meeting clients or other work in

relation to his practice. Visiting solely for non-business reasons ought not to do so even though Giorgio stays in his UK house.

12. As 11 above except that Giorgio is married. His wife spends much of the time in Cyprus with Giorgio but is in the UK using the UK house for more than 91 days per tax year.

Giorgio's residence falls to be determined separately from his wife's. As he has gone abroad for full time employment the fact that his wife is UK resident should not affect his own residence status. If Giorgio were to work when he visits the UK his wife's residence would be a factor to take into account. Combined with his retention of the UK house and the fact that he intends to spend a significant amount of time in the UK after his mother dies could well tempt HMRC to claim that Giorgio has never left the UK.

13. Harold has built up a profitable UK company. He has had several offers from would be purchasers. He is getting bored with running it. He has good friends in Australia who constantly urge him to come out and enjoy the climate. He has decided to sell his company and to move to Australia. He has been told that this sale will attract UK tax if he returns to the UK within five years, so will stay in Australia for at least five years. After that he may stay there or may return to the UK. His visits to the UK will be well under 91 days on average, but will probably be around 130 days in the year that he sells the company as he will need to introduce the purchaser to the major customers. He will rent a property in Australia.

Harold has left the UK as an emigrant. It is irrelevant that what has prompted him to live in Australia is the avoidance of UK tax. Again, if he comes to the UK for business purposes that might compromise his non-resident status, particularly if he retains his UK house. The specific visit back to sell the business ought not to cast doubt on the fact that he left the UK as an emigrant.

14. Ian has built up a substantial UK company. It has a number of overseas subsidiaries. The US subsidiary has a good chance of getting a major contract from the US government but Ian will need personally to supervise the contract, which will require him to base himself in Houston for three years. Ian has no wish to emigrate and will return to the UK on completion of the contract.

Curiously although Ian has no intention of emigration he has probably ceased to be UK resident by reason of leaving to work full-time abroad. If he visits the UK to run his UK company, that might however cast doubt on whether he has left to work "full-time" abroad. It will probably not do so if he works a full day for the US company and in effect uses his normal holiday entitlement to cover the days working in the UK.

15. Jane has left university having studied archaeology and has no clear idea what to do. She comes from a monied family and has decided to see the world. She plans to tour Europe, move on to Asia spend a year in Australia and then spend a year in the USA. She will be out of the UK for at least three years. She will live on distributions from family trusts. It is unlikely that she will come back to the UK at all during her very extended trip. She retains a flat in London which she will rent out.

Jane has made a clean break in her life and accordingly had probably ceased to be UK resident. However the position is not clear cut. She has neither left the UK as an emigrant or for a settled purpose. It is arguable that seeing the world is a settled purpose but HMRC's three-year test seems to apply only to emigration, not also to leaving for a settled purpose (other than full-time employment).

16. As Jane at 15 above, except that Jane went abroad for two tax years and stayed in one place for that period with the settled purpose of doing some field work. She visits the UK for about 50 days each year when she stays with her parents.

Jane's position is likely to depend on whether she can establish that the field work amounts to a full time job. If she cannot do so she is likely to be regarded as remaining UK resident. 50 days is around six weeks which could be viewed as too long for holiday periods from a full time job.

17. Kelly emigrated to Australia with her boyfriend four years ago. She has visited the UK on average about 60 days a year and retained a property here which she has used on visits. She has now split up with her boyfriend and has returned to the UK.

Kelly left the UK as an emigrant for a period of over three years. The fact that she has subsequently returned to the UK should not affect the position.

18. Larry built up a successful business in the UK which he sold three years ago for a substantial sum of money. He now spend roughly two months a year in his house in the UK, two months in his house in the US, five months at his house in Bermuda and three months on his yacht, mainly sailing around the Caribbean and South America. He envisages enjoying this lifestyle indefinitely.

Larry has left the UK as an emigrant so is non-resident subject to the 91-day test. He has probably also left for a settled purpose. The fact that he may well not be resident anywhere for tax purposes does not mean that he has not ceased to be UK resident.

19. Mary used to live in the UK. However she has moved with her boyfriend to Mexico where she lives with him in a house owned wholly by him. Mary's mother is in poor health. Mary is torn between her boyfriend and her mother. She has kept her UK flat which is fairly close to her mother's house and frequently stays there to be on hand should something happen to her mother. Mary's visit average less than 91 days a year – but not a lot less.

Mary has probably left the UK permanently as an emigrant. She has moved the centre of her life to Mexico. However HMRC may well regard her frequent visits to her mother in the UK as casting doubt on whether she has genuinely emigrated. The facts suggest that if her mother became seriously ill Mary would spend as much time as necessary in the UK.

20. Naomi owns 70% of Megabusiness. This is her husband, Norman's company. He put the shares in Naomi's name 10 years ago, as he knew he would have to give personal guarantees and wanted to preserve the family fortune. Norman is fed up with high UK personal tax rates so he and Naomi have emigrated to Switzerland.

They have sold their UK house but bought a flat for Norman in London. Norman flies to the UK every Monday morning and flies back every Thursday night (apart from holidays) and keeps his full days in the UK under 91. Naomi does not visit the UK regularly. She comes back 15-20 days a year for personal reasons such as friend's wedding or to visit her parents. When she comes to the UK she stays with Norman in his flat.

Naomi probably left the UK as an emigrant when she moved to Switzerland so is non-UK resident subject to the 91-day test. However, Norman is probably UK resident. In Gaines-Cooper the Special Commissioners seem to have regarded the fact that his wife was UK resident as one of the factors that pointed to him being UK resident. As Naomi's visits to the UK are of short duration, her husband's UK residence will probably not taint her own non-residence status. It might well do so if her visits to the UK were of greater duration.

21. Oliver is a pilot, a senior captain with an airline based in Hong Kong. He used to live with his wife in their home which was located close to Heathrow airport. His intention for some time has been to retire to southern Spain. With less than five years to go to his retirement, he acquired a villa in Spain with his wife, sold the house in the UK and rebased the family home in Spain. He commutes from Spain to the UK to fulfil his flying duties which usually start and finish at Heathrow. He flies into Heathrow the day before he is due to start his flying duties and with occasional stopovers in London between duties, to meet the CAA and airline requirements with regard to rest periods between flying duties, as well as the occasional visit with his wife to see family and friends, spends approximately 75 days in the UK. He stays in hotels and has no accommodation available for his use.

Oliver has made a distinct break in the pattern of his life and will therefore have ceased to be UK resident from the time that moved his family to Spain, albeit that as he works in the UK he will be taxable here on his salary for work done in the UK

22. Peter is a senior captain with British Airways. Like Oliver he used to live in the UK but he has acquired a villa in Spain where he intends to retire with his wife. He has retained his UK house for use on visits to the UK. He intends to sell the UK property once he has retired from his employment. Apart from that his position is similar to Oliver's. He and his wife are living in Spain and Peter visits the UK when his duties require him to do so.

Peter's position is less clear cut. It is questionable whether he has yet made a distinct break in his pattern of life. It is arguable that he has as the centre of his life has moved to Spain. As against that, his employment is with a UK employer, his work is based in the UK and he has retained available accommodation for when he comes to the UK.

23. Quentin is in his twenties. He wants to see the world. His UK employer had branches throughout Europe, and offered him maintenance work on the continent. On leaving the UK he rented out his UK house on a 12 month renewable contract. Due to the nature of the work his employment consisted of a long series of 2 to 8 week employment contracts, often working whole weeks on and a week off. Each contract could be at a different location on mainland

Europe. In between contracts, Quentin occasionally took work at ski centres, took holidays outside the UK and sometimes visited the UK. When he visited the UK he stayed either with his parents or friends. Due to the nomadic lifestyle Quentin lived in B&B type accommodation on the continent, depending upon where he was working. His visits to the UK were always under 91 days on average and the highest in any one year was 61 days (and less than 91 if days of arrival and departure included), and no more than 10 visits in any one tax year. After 3 years he was offered a permanent contract abroad in the Caribbean, and stayed abroad for a further three years, including one whole tax year in which he had no visits to the UK.

Quentin's position is not clear cut. He is probably non-UK resident from the time that he left the UK . He has left the UK indefinitely for a period of three years or more. He has made a distinct break in so far as he has left the UK to work his way around Europe and when there is no contract work available he does not come back to the UK to await the next assignment but seeks alternative work in Europe. He comes to the UK only to visit friends and relatives. Quentin may however have difficulty in evidencing that when he left the UK he intended to emigrate for at least three years. Some of the facts suggest that at the time he went abroad he was leaving open the possibility of returning after 12 months. The problem arises with the first three years only. In the second three years he was working abroad under a contract of employment spanning at least one complete tax year so satisfies the test of leaving to work full time abroad.

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ANNEX B

THE ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department for Business, Enterprise and Regulatory Reform through the Financial Reporting Council. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter TAXline to more than 11,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on +44 (0)20 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

ANNEX C

THE 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 <http://www.icaew.com/index.cfm?route=128518>).