



ICAEW TAX REPRESENTATION

STATUTORY DEFINITION OF TAX RESIDENCE

Comments submitted in September 2011 by ICAEW Tax Faculty in response to a joint HM Treasury and HMRC consultation *Statutory definition of tax residence: a consultation* published in June 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Statutory definition of tax residence: a consultation* published jointly by HM Treasury and HMRC on 17 June 2011 at http://www.hm-treasury.gov.uk/d/consult_condoc_statutory_residence.pdf.
2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. On 19 July 2011 we attended a meeting with HM Treasury and HMRC, in which we were able to put forward some key comments and concerns and discuss aspects of the discussion document.
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 world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 136,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
6. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create 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. In summary we welcome the introduction of a statutory residence test and the proposed approach to ordinary residence.. We also appreciate the open and constructive approach that has been adopted during the consultation process and the willingness of the part of Government to take into account our suggestions and recommendations. The proposed residence test is a significant improvement on the current position and on previous proposals that we have seen.
9. The Tax Faculty has an established measure for any proposed legislation contained in our Ten Tenets – these are set out at Appendix 1. We are pleased that, for the most part, the proposed residence test is consistent with the aims set down in the Ten Tenets.
10. The aim of the Government is that the statutory test should be transparent, objective and easy to use. We welcome and agree with that aim. However, there remain some areas of inconsistency and uncertainty that we consider should be amended. Further detail on these

points is given below. We are also anxious that maximum clarity should be afforded by the legislation. This would avoid the need for copious additional guidance and thus a return to the uncertainty that the statutory test aims to remove. We hope that any draft guidance will be issued before April 2012 and would be happy to comment on such guidance.

11. Our main areas of concern are that:

- the day limits in Part A of the test are too short;
- there needs to be a simplified procedure for those individuals who are dual resident and treaty resident outside the UK;
- the concept of 'home' in Part B of the test is too subjective and should be replaced by 'accessible accommodation';
- there is double-counting and circularity in the connection factors in Part C of the test;
- the definition of full-time working abroad should permit an individual to be both employed and self-employed to satisfy the rule and the 35 hour working week requirement is too rigid;
- the definition of a 'working day' is unrealistic and in part unworkable;
- the definition of a family should only include minor children for whom the individual has parental responsibility;
- the requirement to have regard to the number of days a parent spends with a minor child should be removed;
- days spent in the UK because of exceptional circumstances beyond an individual's control should be disregarded; and
- The new definition of ordinary residence is not satisfactory and should be amended.

MAJOR POINTS

Part A:conclusive non-residence

12. In Part A of the test we suggest that the fewer than 10 days limit is unnecessarily short for those making a clean break from the UK and that 30 days is a more appropriate level. We understand that this is consistent with many other jurisdictions, for example the Republic of Ireland. For those who were not previously resident in the UK we suggest that 45 days is too few and that this should be increased to 90 days.

Part B: conclusive residence

13. In Part B our concern centres on the use of the word 'home'. This is a subjective term which we think should be avoided. We suggest that there should be consistent terminology throughout the test and that 'accessible accommodation' is more appropriate, although the definition at 4.21-4.22 needs to be more precise. We are content that there should be very few factors in this part of the test.

Part C: other connection factors and day counting

14. Part C is a welcome compromise and we are relieved that the connecting factors have been reduced to a sensible level. We have no difficulty with the majority of factors, although see para 18 below, but there are points of detail that need to be clarified.

15. It is the combination of factors that causes us most difficulties. For 'arrivers', the problem is less marked, which may be as intended, but certainty is equally crucial for 'leavers'. There is a category of persons, for example retirees, who do not fall within the working abroad rules but are nonetheless non-resident by any common sense understanding. The first year may well be difficult to prove. There is circularity in the test between spouses. It appears to be the case that a husband's residence can depend in part on his wife's and vice versa. We suggest that the spouse's position should be disregarded.

16. Similarly, we find it difficult to envisage a situation where there is a UK resident family but not accessible accommodation. This is two connection factors in the test but it should in fact be one for leavers.
17. It could also be argued that these measures are discriminatory against families and we suggest that they are moderated to ensure that this is not the case.
18. We do not understand why spending more days in the UK than in any other single country in a tax year should be a connection factor. An individual who spends 80 days in the UK but travels the balance of the time around the United States for work would not have this as a connection factor. An individual in identical circumstances whose job entailed him travelling around Europe may well spend less than 80 days in any one country and so would have this as a connection factor. We find this inequitable and suggest that this connection factor be discarded. It is possible for an individual to be not resident in any one country.
19. We remain concerned that those individuals who are most economically active and already have some connections with the UK might find the UK a less attractive place to work. We consider that the circularity and double counting of connection factors may undermine the Government's stated aim of making the UK more attractive to those who are internationally mobile.

Definitions for the statutory residence test

20. It appears from the definition of full-time work abroad (FTWA), at para 4.2, that an individual would not be able to combine the hours of an employment and a self-employment to reach the requisite 35 hours a week to qualify under the third condition of Part A. We suggest that the condition should be amended to permit this. As the working week varies between countries we also think that the 35 hour requirement is too rigid. We suggest that this requirement is qualified to take account of the local conditions and practices of that particular occupation in the country where the individual is working. The definition should also include a provision for holiday entitlement of, say, 25 days in a year.
21. The definition, at paras 4.7-4.10, of a working day, that is one where more than three hours work is carried out, is not as simple as it might appear. In practice this would be extremely difficult for HMRC to police or for the taxpayer to prove or disprove. There are today, such diverse occupations and ways of working that any definition may be faulty but we suggest that there may be some alternative in considering the distinction between active and passive work. Passive work would include thinking, research, checking emails and casual responses or conversations and could be ignored. Active work such as attending meetings, productive writing or time spent in an accountable way, eg on a time sheet etc, could be included. We recognise that this list also contains faults and omissions but we feel strongly that mere time is not something that can be defined or proven. It may be that, given the difficulties in defining this part of the test, it should be reconsidered by the Government. In our view the record-keeping requirement in Paragraph 4.10 to demonstrate that the individual did not work more than 3 hours a day in the UK is unsustainable.
22. We think it would be helpful if the legislation clearly defined what an individual can and cannot do when they are in transit through the UK, see para 4.17.
23. We note that the first part of the definition of 'family', at para 4.19, includes the 'common law equivalent' of spouse or civil partner. This needs to be more clearly defined. Generally the term would be used for those who co-habit but this would be unlikely to apply in the circumstances where an individual is working abroad and has a partner living in the UK.
24. We find the second part of the definition of family flawed. We understand the need to consider parental responsibility but to ask people to log the time spent with their children seems to us intrusive. If, in the extreme, all of the 60 days were spent outside the UK we find it difficult to see how this could be said to affect the parent's UK residence status. There will also be cases

where a parent does not have custody of a child and thus has no control over where the child lives; it would be inequitable in these circumstances for this to be a connection factor. We would prefer this definition to simply refer to minor children for whom the individual has legal parental responsibility, whether sole or shared.

25. We note that the situation where an individual spend days in the UK because of exceptional circumstances beyond their control does not appear in the document. We recognise that day counts are now only a part of the whole test but we feel that there should be recognition that days spent in the UK due to circumstances beyond the control of the individual should be disregarded and that this exception should be in the legislation.

RESPONSES TO SPECIFIC QUESTIONS

Residence test – Part A

Q 1: Do you think there are any other circumstances in which an individual should be conclusively non-resident? If so, what are those circumstances?

26. We refer you to our proposals in para 12 in connection with the day count in the first two legs of the test.
27. We consider that there should be a simplified procedure for those individuals who are dual resident and treaty resident outside the UK. Currently an individual has to file a tax return to make a claim under the relevant double tax agreement. A procedure which did not require the filing of a full tax return would represent a significant simplification and a reduction in unnecessary tax returns, thus reducing the administration burden for both the taxpayer and HMRC.

Residence test – Part B

Q 2: Do you think there are any other circumstances in which an individual should be conclusively resident? If so, what are those circumstances?

28. We are content with this part of the test, although see our comments at para 13 on the use of the word 'home'.

Residence test – Part C

Q 3(a): Do you think that these connection factors are appropriate and are there other connection factors that should be included?

29. We refer you to our comments at paras 15-18. We do not consider that any further connection factors should be included.

Q 3(b): Does this part of the test provide a fair outcome? If not, why not?

30. We refer you to our detailed comments at paras 15-19.

Residence test

Q 4: Would the lack of a transitional rule as described in paragraph 3.57 leave significant uncertainty?

31. There are mixed views amongst our membership on this point but there is a particular concern where, for example, individuals are caught in the middle of the four year 91-day averaging test. It is also the case that aspects of the test depend on an individual's residence in years prior to 2012/13. We suggest that in these situations an individual could elect to consider their

residence in prior years in accordance with the new proposals. This would afford them the certainty that they would otherwise lack.

Residence definitions

Q 5(a): Do you think that the proposed definitions are appropriate?

32. Please refer to our detailed comments at paras 13 and 20-25.

Q 5(b): Would these definitions have an adverse impact for particular groups? If so, which groups and what would the impacts be?

33. We refer you to our comments at paras 15, 17, 18, 19, and 24.

Ordinary residence

Q 6(a): Should ordinary residence be abolished for all tax purposes other than overseas workday relief?

34. We agree with Option 1 of the proposals. We note, at para 6.25, that other references to ordinary residence in other parts of the legislation will be replaced by a reference to residence.

Q 6(b): If a new definition of ordinary residence was introduced, should it be restricted to non-domiciled individuals only?

35. We are content that the new definition of ordinary residence under Option 1 should be restricted to non-domiciled individuals.

Q 6(c): Is the proposed definition of ordinary residence appropriate? If not, are there alternatives that would not have a material Exchequer cost?

36. We do not agree with the proposal at para 6.16. We suggest that the proposed definition should apply to individuals who have been resident in the UK in less than three of the five preceding tax years.

37. The proposal at 6.17, to exclude from being not ordinarily resident those individuals who have their only home(s) in the UK, could deter certain individuals from coming to work in the UK. In many European countries, for example, it is the norm to rent rather than buy property. We suggest that this part of the definition is removed.

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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/~media/Files/Technical/Tax/Tax%20news/TaxGuides/taxguide-4-99-towards-a-better-tax-system.ashx>).