

## Tax hits the headlines again

Two cases on residence of individuals for tax purposes have recently been widely reported in the national press; in each case, the cases reveal what are generally considered to be new developments, although HMRC denies that this is the case.

One of the cases is *Gaines-Cooper v CIR* in which Mr. Gaines-Cooper sought judicial review of the decision of HMRC that he was resident and ordinarily resident in the United Kingdom from 1993/94 onwards. He argued that he had relied on HMRC's guidance in their own booklet IR20 and HMRC were now applying principles which were not set out in that booklet. Furthermore, they were applying those principles retrospectively in his case.

To a certain extent, the problems which Mr. Gaines-Cooper and numerous other taxpayers are experiencing in relation to tax residence date back to 1993 when the 'available accommodation rule' was abolished. Under this rule, any person who visited the UK for just one day and who had available accommodation here would be treated as resident for the whole tax year in which the visit was made.

The abolition of this rule was made in a rather unsatisfactory fashion. The only statutory change was in section 336, Taxes Act 1988 which relates to temporary visitors to the United Kingdom. Under the amendment to section 336, the residence status of visitors is to be decided from 1993/94 onwards without regard to any living accommodation available in the United Kingdom for their use. So if a visitor to the United Kingdom has a home here, he or she may now come to this country for a short stay (under 91 days) and will not simply by virtue of having the home here be resident in that year. This left open the question of to what extent the available accommodation rule had been abolished on a wider basis – for example did the rule still apply to those who had a previous history of residence in the United Kingdom (and so were not just visitors to the United Kingdom), or had it equally been abolished in these cases as well? It was generally thought that the rule had been abolished for all purposes, and that was certainly how the press releases at the time seemed to read.

Mr. Gaines-Cooper had a substantial house in the United Kingdom and his wife and children also lived there. He was an international businessman and spent most of the year out of the country. His days of presence in the United Kingdom were always below 91 days per annum on average. He therefore contended that he should be treated as not resident in the United Kingdom for 1993/94 onwards and the Revenue guidance in booklet IR20 did nothing to suggest that this would not be the case. Unfortunately, HMRC said that he had misunderstood the guidance and they considered that he remained resident here because he had substantial family and social ties with the United Kingdom.

You will look in vain through booklet IR20 for the words 'family and social ties'. They do not appear at all. So it is hardly surprising that Mr. Gaines-Cooper is very bitter about his treatment by HMRC.

In the judicial review application at the Court of Appeal, it is gratifying to see that the Court examined IR20 in great detail and listened attentively to the expert witnesses from the profession who all with one voice said that they had thought that there had been a change of policy by HMRC in relation to residence issues at some time after 2000. That however is as far as any satisfaction goes for taxpayer. The Court constructed a huge inverted pyramid on small nuances and one or two vague expressions in IR20 in order to find for HMRC. If the tax professionals had not spotted the importance of these nuances and expressions, what hope could there possibly be for the ordinary individual for whom tax is one of the most bewildering topics in the world?

The principles governing tax residence in the UK, as we now understand them from this decision, are as follows:

1. The abolition of the 'available accommodation rule' was effective for all tax purposes. As a result, from 1993/94 onwards anyone (not just a temporary visitor) who comes to the United Kingdom for a short stay during any tax year will not automatically be resident for that year if he or she has a home here. But that does not mean (as one might otherwise have thought) that one simply determines residence by counting the number of days spent in the United Kingdom in each fiscal year. Residence is to be determined by reference to a number of factors, of which the number of days spent in the United Kingdom is just one. Exactly what the factors are is still not clearly defined.
2. Where booklet IR20 used to refer to the requirement that you must have left the UK permanently, what this meant was that you must sever your social and family ties which you previously maintained within the United Kingdom. This means that, although it was previously thought that tax residence is decided on a completely individual basis, if the taxpayer's spouse, partner or infant children remain in the UK, it will be very difficult if not impossible to claim that he or she has become resident abroad.
3. The easiest way to become non resident has always been, and still is, to take up full time employment abroad. In this case, it is not necessary to sever UK social and family ties. However if someone goes abroad for full time employment, but the employment does not commence immediately after departure, he or she will not start the non-resident period until the full time employment starts (a point which might be of crucial significance for capital gains tax purposes where in most cases no split year treatment applies).
4. As regards ordinary residence, in the separate appeal case of Dr Andreas Tuczka also recently reported, it was held that a person who came to the United Kingdom to work became ordinarily resident in the UK soon after

arrival here even though at the time it was not clear that he would remain in the UK for 3 years or more.

The significance of all the foregoing cannot be overstated. There have been many instances of wealthy people of high profile (e.g. businessmen, pop stars and film stars) who have in the past taken up residence overseas, but have retained a home in the United Kingdom which they visit for less than 91 days per annum. We can expect such individuals to be next on HMRC's list for review of their residence status.

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