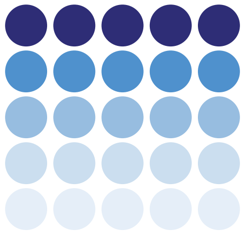

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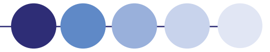

Planning for non UK residence

Individuals who are not resident in the UK for tax purposes do not pay tax on income arising outside the UK and currently do not pay UK capital gains tax (CGT) on the disposal of assets anywhere in the world. For those who can organise their residence position there are clear potential advantages, subject, of course to checking out the tax position in the country in which they choose to be resident. (It should be noted that non-resident status may not reduce inheritance tax liability because that is primarily dependent upon the individual's domicile status which is determined in a very different way.)

The Statutory Residence Test

From 6 April 2013 the determination of tax residency in the UK has become a much more certain process following the introduction of the Statutory Residence Test (SRT) which has replaced the dependence on case law guidance which had been in place for many years. This Briefing summarises the key issues of the SRT as it affects individuals planning to leave the UK. The comments are of a general nature and any individual planning such a move should take detailed advice in relation to their own situation.

The SRT operates around three tests which have to be applied in a specific order. The Automatic Overseas Test (AOT) is the starting point and a favourable result under this test will mean that the individual will be not resident in the UK and there is no need to consider the remaining two tests. If no definitive answer is obtained on the AOT, attention switches to the Automatic Residence Test (ART) where a definitive result will mean that the individual is resident in the UK. The final test which will be needed if no definitive answer arises under the first two tests is known as the Sufficient Ties Test (STT) and it will provide an answer on the individual's residence status. Each test has a series of subtests to consider and these will be briefly examined from the point of view of the person who is currently UK resident but who wishes to become non-resident.

The AOT

An individual who wishes to guarantee non-resident status can do so by the simple expedient of spending no more than 15 days in the UK in a tax year. For the purposes of the SRT a day counts as being in the UK if the person is present in this country at midnight on that day. In some situations it may also be necessary to take into account the number of days where the person is physically present in the UK at some time during the day but not at midnight.

If the person spends more than 15 days in the UK they can still achieve non-resident status by demonstrating that they have worked sufficient hours overseas during the tax year. There are three parts to this test all of which must be satisfied.

They must:

- not be in the UK for more than 90 days in total
- not have more than 30 UK working days (defined as at least three hours work)
- demonstrate that they have worked on average at least 35 hours a week overseas over the year having taken into account work in the UK, annual and other leave and gaps between employments.

It is worth making one very important point at this stage – record keeping is vital. A claim for non-resident status can be challenged by HMRC and without evidence to support the claim HMRC could insist that the individual has to be regarded as resident here with potentially disastrous financial consequences.

If you are planning to be non-resident make sure you have the following minimum records:

- days counting as present in the UK taking into account both days when here at midnight and any other days where there was a UK presence
- hours worked in the UK each day
- hours worked overseas and where those hours were worked
- holidays and other days of absence and
- any exceptional circumstances which may cause UK days to be discounted.

The ART

The purpose of the ART is to establish UK residence so a former UK resident needs to ensure that they do not pass any of the four tests which can apply. One test only applies on death and another deals with individuals who essentially work full time in the UK. The overriding test of 183 days in the UK should be easy to avoid. The test which may cause problems is the home test.

If the departing individual leaves a home in the UK then this test must be considered. A home is not defined in the law but is taken by HMRC to be a place which a layman would recognise as being the person's home. It does not have to be owned by them so a rented property or the use of a parent's home would count. Expressed in its starkest way the test says that if the individual has a home in the UK which is available to them for a continuous period of at least 90 days of which at least 30 days are in the tax year concerned and they use the property on at least 30 days in the year, then that home will satisfy the home test provided that either:

- the home is the only home they have anywhere in the world or
- if they have a home or homes overseas they have spent less than 30 days in each of those properties in the year.

The interpretation of this test by HMRC suggests that if there is any period of 90 days where there is no other property in the world that would be called home then the test is satisfied. So to avoid having a problem with this test the clear position must be to dispose of any property which could be regarded as a UK home before the start of the tax year in which non-residence is being claimed.

If that is not possible or desirable then an overseas home must be in place before the start of the year where non-resident status is being sought.

The STT

Provided that the ART has not tripped up the individual their residence status will now be decided by the STT. This test requires that the individual considers up to five specific ties with the UK and then considers the number of counting days in the UK. In simple terms the more ties the individual has then the fewer the number of days required to make them resident in the UK. These ties can vary from year to year and must be considered for each year in isolation. Briefly the ties are:

- Family tie – if the spouse or partner of the individual is resident in the UK that will be a tie. In some cases the residence status of a minor child may have to be considered.
- Accommodation tie – having a property available to live in for a period of at least 90 days any part of which falls in the tax year and where at least one night has actually been spent.
- Work tie – having 40 working days of at least three hours in the UK in the tax year.
- 90 day tie – the individual with a UK residence history has spent at least 90 days in the UK in either or both of the two preceding UK tax years. This will be a question of historical fact.
- Country tie – the individual has spent more time in the UK than any other single country.

The ties and days in the UK then combine to treat the individual as resident in the UK if they spend:

- between 16 and 45 days and have four ties
- between 46 and 90 days and have three ties
- between 91 and 120 days and have two ties and
- between 121 and 182 days if they have a single tie.

So an individual dependent on the SRT needs to establish how many ties they have and then ensure that they are present for a lower number of days than is needed to be resident. So a person with say three ties can spend up to 45 days in the UK and will be not resident under the STT.

Sustaining non-resident status

The SRT has been drafted in a way which makes it impossible for very short periods of non-residence to be effective for tax planning purposes. It is not possible for example to go non-resident for one year, sell a significant asset in that year and completely avoid CGT on the disposal. The legislation includes a concept of temporary non-residence and provides that if the person returns to the UK within that period of temporary non-residence then in certain circumstances they will be liable in their year of return, to UK tax on income and gains made in the period of non-residence.

Where a person has been resident in the UK in four of the seven years before they become non-resident then they must be out of the UK for five complete calendar years from the day of departure to avoid being caught under the temporary non-resident rule.

The rule applies to capital gains on assets held before the date of departure, to certain dividends received after the date of departure out of profits earned before that date and also to situations where loans to a company are written off after departure from the UK. Certain other situations may also be caught.

Before embarking on a plan to establish non-resident status with a view to mitigating a specific tax liability an individual needs to ensure that their personal circumstances will be such that they are able to sustain the non-resident status for the minimum five year period. Any number of factors such as family pressures, health, security, employment or just sheer boredom, might cause the individual to spend more days in the UK than would be desirable to sustain non-resident status. The reasons for becoming resident again are immaterial but the fact of resuming residence could be financially difficult.

Future HMRC plans

Just as a footnote, HMRC are currently considering plans to tax non-residents to CGT where they dispose of residential property in the UK. The rules are likely to apply from April 2015. We will be pleased to provide further information on this if it is of interest to you.

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