

TAXATION UPDATE - SEPTEMBER 2009



Overseas visitors could now face unexpected tax obligations on visiting the UK

HMRC have recently reinforced their view that the lifestyles of those claiming to be non-residents of the UK need to be examined to see if they retain strong UK associations and might therefore be tax resident here.

A new guidance document, HMRC 6, has been published, primarily to take into account the changes in the day counting rules and the remittance basis which took effect from 6 April 2008. However at the same time the Revenue has taken the opportunity to amend their guidance on the factors which need to be considered when assessing whether an individual is tax resident in the UK.

The principal change is that the 91 day count test is no longer a valid measure to be applied in isolation from wider lifestyle factors. This change in emphasis follows recent successes HMRC has had when challenging tax payers' claims to non-residence through the courts.

The new guide does not provide details of the factors HMRC will consider in assessing lifestyle "association". However, factors

likely to be considered are the availability of residential property in the UK, family presence here, carrying out work in the UK on a regular basis, or maintaining strong social ties such as the membership of clubs.

Surprisingly, given the UK's strong international ties, the issues of whether an individual is tax resident in the UK has never been fully set down in legislation. Professionals, the Revenue and taxpayers have relied heavily on the Revenue's old published guidance, IR20, which has been replaced as from 6 April 2009 by the new guidance.

Whilst most of the changes set out in the HMRC 6 do not constitute a change either in the law or in HMRC's interpretation of it, it is the first time their guidance has been explicit on the impact of lifestyle choices. HMRC's interpretation will impact on the individuals who have left the UK but continue to spend some time here.

The method of day counting changed from 6 April 2008. Previously the Revenue used in most circumstances to ignore days of arrival and departure. However from 6 April 2008 a new "midnight" rule applies so that presence in the UK at midnight will count as a day. There are very limited exemptions for international travellers in transfer and in certain cases for medical reasons.

Individuals who have been trying to maintain their non-resident status

will be familiar with the two day counting tests from the previous Revenue guidance IR20. These were:

- the 91 day test - If an individual spends at least 91 days in the UK on average over a period of four tax years then they would have been regarded as being resident in the UK.
- the 183 day test - If an individual spends at least 183 days in the UK during any UK tax year then they will have been resident in the UK.

The 91 day test whilst not statutory was easy to understand and apply. However, a number of recent high profile cases have highlighted HMRC's view that the rules were being abused, and UK tax was being avoided. It is clear that HMRC will now clamp down on individuals who had previously relied on the 91 day test to maintain their non residence if, in HMRC's view, the individual's intentions, actions and lifestyle choices makes them resident.

The strict position is that even one day spent in the UK during a tax year may render an individual tax resident. The new test of residence set out in HMRC 6 brings in the concept of intention. However, while HMRC has not yet published the criteria they will be using to determine whether an individual's intentions and actions makes them resident, they have indicated that the following factors may be considered when determining an individual's residency:

- retaining a property in the UK. Keeping a home in the UK for use when visiting or occupied by members of your immediate family
- conducting business in the UK. If an individual still visits the UK to carry out work here particularly if the UK business remains a principal source of income for the non resident
- social connections. Immediate family in the UK and social ties such as membership of clubs and societies may indicate that an individual continues to be resident in the UK.

The new guidance will make it more difficult for individuals to form a definite view on whether they are resident or not in the UK. In particular the new guidance may make it more difficult for someone to become non-resident whilst maintaining associations with the UK. It will be important to be able demonstrate a clear break from their lifestyle in the UK.

In many cases professional advice will be required to assess the position on the basis of the facts so that self assessment tax returns can be prepared correctly. Where individuals incorrectly assess their status as being non-resident it is likely that HMRC would seek to

collect penalties in addition to any outstanding tax. The level of the penalty will depend on the circumstances of the case but can be up to 100% of the tax underpaid. The Revenue no longer provides a view on individual's tax residence in advance of any enquiry into a tax return.

Whether it matters if an individual is tax resident in the UK may depend on the other country, if any, in which they are also resident. The UK's extensive network of Double Tax Agreements will in many cases provide protection from UK tax under the "tie breaker" clauses. The tie-breakers will operate if an individual is resident in two countries at the same time under each jurisdiction's domestic legislation. The "tie-breaker" questions are asked in a set order until there is only one "winner" and the "winning" country has primary taxing rights. The common order of questions can be summarised as:

- Does the tax payer have a permanent home available in each country?
- Can the centre of vital interests be ascertained?
- Of which country is he/she a national?

Finally, it is important to understand that becoming resident in the UK

may give rise to a liability to tax on foreign income and gains in addition to sources of income and gains directly connected to the UK. The remittance basis of taxation for foreign income and gains may be available to individuals either not domiciled or not ordinarily resident in the UK.

Our advice to visitors to the UK or those who have set up home elsewhere and who might find themselves targeted by the revised guidance from HMRC is to:

1. continue to maintain a clear record of the time spent in the UK and the purpose of the visits to the UK;
2. consider the facts which indicate that they are resident in another jurisdiction, such as ownership of available residential accommodation, social and family ties and, the place where a business is managed or controlled;
3. take professional advice on the potential exposure to UK tax. This will vary between individuals based on their actual sources of income or gains liable to tax in the UK;
4. seek professional advice on action that can be taken to substantiate a continued claim to be not resident in the UK

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