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## The UK Statutory Residence Test

In its 2011 budget, the UK Government announced that it intended to introduce a statutory residence test (SRT). This move was broadly welcomed by the industry as a necessary step in bringing much-needed certainty to questions of residence which are fundamental to any consideration of the tax position of individuals with any kind of UK connection.

### Background

It was recognised at the time that whilst the concept of an SRT was seen as a good thing, it was always going to be difficult to create a test that was sufficiently clear to remove uncertainty but flexible enough to cover a wide variety of situations.

Having gone through two periods of consultation, the Government has now published what it hopes will be the final form of the SRT and whilst some of the features of the original draft have been retained, it has been improved in a number of ways to give more certainty on some points as well as giving marginally more generous allowances in other situations.

That said, it is likely that a number of individuals who might not have been UK resident under the old rules will find that they are regarded as UK resident once the SRT comes into play from 6th April 2013. As the test will apply retrospectively, it is imperative that individuals consider their current circumstances in the light of the new test and take appropriate advice if they are in any doubt as to whether or not they are going to be UK resident under the SRT.

### How the SRT works

The starting point under the SRT is to see if the individual concerned is automatically resident or non-resident under the tests set out in the law.

The legislation then sets out the framework for assessing the residence status of individuals who do not fall within either automatic residence or non-residence.

### Automatic residence

There are 4 separate automatic residence tests.

1. This is essentially the test that anyone who has looked at their residence position previously will recognise. An individual will be automatically UK resident if they are present in the UK for 183 days in any tax year. For the purposes of the test, with one or two exceptions, "present" is based on the "midnight test", i.e. was the individual present in the UK at the end of the day in question.

2. The second test applies where the individual has a home in the UK for more than 90 days and is present there for 30 days or more during the tax year. Provided one of two conditions are met for at least one period of 91 consecutive days (at least one day of which is in the tax year concerned), such an individual will be UK resident.

The conditions are:

- a) They have no home anywhere outside the UK; or
- b) If they do have homes overseas, they don't spend 30 days or more in any one of those other properties in the tax year. The meaning of "home" for these purposes includes any building or part building and would include a vehicle or vessel and applies wherever there is a degree of permanence. The question of whether there is the necessary degree of permanence is to be determined on a case-by-case basis so it is not fully prescribed under the law.

A home does not necessarily have to be a place that you own, but it does not include anywhere that is "nothing more than a holiday home or temporary retreat": clearly that will be open to interpretation and potential dispute.

If you own a property in United Kingdom but it is sublet, that will not be a home for the purposes of the legislation.

3. The third test applies where the individual has been employed on a full-time basis in the UK for 365 days consecutively. Such an individual will be resident automatically in the UK if 75% of his total work days in the tax year in question were spent in the UK. The definition of a work day under the legislation is any day where the individual spends more than 3 hours working. There is obviously an issue here if the number of work days spent in the UK in the relevant tax year is low.
4. The final automatic residence test applies where an individual dies in the tax year. Such an individual will be UK resident in the year of death if they were automatically resident in the UK in each of the 3 previous years, and his home (or one of them) was in the UK.

## Automatic non-residence

Again there are 4 separate tests under the legislation, which in many ways are a mirror image of the automatic residence test.

1. If an individual has been resident in the UK in any one or more of the previous three tax years, they will automatically be non-resident in UK if they have spent less than 16 days in the UK in the tax year in question. Again, a day in the UK will be recorded when the individual is present in the UK at midnight.
2. The second test comes into effect if the individual has not been resident in the UK in any of the previous 3 years. In such a case, the individual will be automatically non-UK resident in the tax year if they have spent less than 46 days in the UK in the year in question.
3. The third test applies where an individual is employed on a full-time basis outside of the UK for a period of 365 days or more (what the legislation refers to as full time work abroad, a familiar concept for residence). Such an individual will be automatically non-resident provided that they spend less than 91 days in the UK in the tax year.
4. Finally, if the individual dies during the tax year they will be automatically non-resident if they have:
  - a) Not been UK resident in the previous 2 years; and
  - b) Spent less than 46 days in the UK during the year in question.

## The sufficient ties test

Having set the boundaries for automatic residence and non-residence, the legislation then deals with the criteria that will apply in order to determine with certainty whether an individual will be regarded as resident or otherwise during the tax year.

This is essentially based on a combination of three key factors.

1. The first factor is whether the individual is a "Leaver" or an "Arriver" as regards the UK. Are they residents who are seeking to establish residence outside of the UK, or are they someone who has been non-UK resident and who is now coming to the UK?
2. Having established whether they are a Leaver or an Arriver, the legislation then considers the extent to which the individual has sufficient ties that connect them to the UK.

3. Finally, having established how many such ties the individual has, the legislation allows a defined range of days during which the individual may be present in the UK without becoming UK resident.

A Leaver is someone who has been UK resident (and from 6th April 2013, that will be resident under the SRT) in any one of the three tax years immediately prior to the year under consideration. An Arriver is quite simply anyone who doesn't qualify as a Leaver under the definition above.

For Leavers, there are five ties to the UK that need to be considered:

1. Family
2. Accommodation
3. Work
4. 90 days
5. Country.

For Arrivers, only the first four ties above are taken into account.

## 1. The family tie

An individual will have a family tie to the UK if they have a relevant relationship.

A relevant relationship is to any one of the following:

- a) They are the individual's spouse or civil partner.
- b) They are living with the individual as their spouse or civil partner even if they are not formally married or in a civil partnership. Unlike the remainder of UK tax code, co-habitation is treated the same as formally recognised relationships.
- c) A child under the age of 18. In this respect, the relevant relationship only counts as a family tie if the individual sees their child in the United Kingdom for 61 days or more during the tax year outside of term time. One of the changes that was brought in during the second consultation period was to specifically exclude half term and the equivalent from the definition of "outside term time". Nonetheless, under the SRT, there is a price to pay for someone spending "too much" time with their UK educated child.

## 2. The accommodation tie

An individual will have an accommodation tie to the UK if the following test is met:

- a) They have a place to live in the UK.
- b) That place is available for their use for 91 days or more consecutively.
- c) The individual spends at least one night in that place. There is one minor exemption if the place in question belongs to a close relative of the individual. In those circumstances the accommodation tie is only met after 16 nights of presence. Close relationship is defined as a parent or grandparent, brother or sister and child or grandchild over 18.

Unlike the test for automatic residence, for the purposes of the accommodation tie "home" includes any home in UK even if it is no more than a holiday home or temporary retreat.

## 3. The work tie

An individual will have a work tie if they work in the UK for 40 days or more during the tax year. For the purposes of the legislation, a work day is any day in which the individual works for more than 3 hours.

## 4. The 90 day tie

An individual will have a 90 day tie to the UK if they spent more than 90 days in the UK in any of the 2 previous tax years. This is obviously less generous than the current 90 day rule that applies to residence, but it is only one factor amongst four (or five if you are a Leaver) relevant factors to be taken into account.

## 5. The country tie

This test, as noted above, only applies for Leavers. An individual will have a country tie to the UK if, having considered all of the countries where the individual has been present at midnight during the tax year, the UK is the place where they have spent the most (or the joint most) number of nights.

## The daily allowance

The legislation then sets out the mechanism for calculating whether or not the individual is UK resident in the tax year. Essentially, this is a factor of the number of ties to the UK that the individual has and allowing them a number of nights presence in the UK before they become UK resident. The more factors that an individual has connecting them to the U K, the fewer the number of nights they are allowed to spend in the UK without becoming UK resident. Again, Leavers have a tougher time of it than Arrivers, which is consistent with HMRC's view that it should be more difficult to cease to be UK resident (and therefore in many cases taxable) than it is to become UK resident.

The number of nights allowed per UK tie for Leavers and Arrivers respectively is set out in the table below.

### Leavers

Days in the UK	Test
Less than 16	Always non-resident
16 - 45	4 factors = resident
46 - 90	3 factors = resident
91 - 120	2 factors = resident
121 - 182	1 factor = resident
183 +	Always resident

### Arrivers

Days in the UK	Test
Less than 46	Always non-resident
46 - 90	4 factors = resident
91 - 120	3 factors = resident
121 - 182	2 factors = resident
183 +	Always resident

Whilst it is fair to say that the SRT will give a greater degree of certainty than has been the case in the past, it is also equally the case that many individuals who might not have been UK resident under the old law will find themselves resident under the new legislation.

Whilst the new rules will perhaps remove uncertainty for some, they will require a great deal more planning for many, as the examples below illustrate.

## Case Study 1 - Leaver

Sebastian is a hedge fund manager. He left the UK last year to take up a new position in Singapore, and believes that he is no longer resident in the UK. The following facts are relevant:

He was certainly resident in the UK for two of the previous three years. *[90 Day Tie]*

He has kept his UK house, although he does have a home in Singapore. *[Accommodation Tie]*

His children have stayed at school in the UK and his wife spends 7 months of the year in the UK house during term-time so that their education is not disrupted. *[Family Tie]*

Sebastian's new role involves a substantial amount of travel and he expects that he will only spend 90 days in Singapore in the year.

He will spend 91 days in the UK in the year for work purposes. He will be based in the UK home for most of those days. *[Combined with the above, this means he has the Work Tie and the Country Tie]*

*Whilst Sebastian is not automatically resident, he will clearly be resident under the sufficient ties test. In fact, he has all 5 ties so will become UK resident after only 16 days presence in the UK. He will have to make some changes to his current planning to shake UK residence.*

*Actually, if he reduces the amount of time he spends in the UK to 90 days or less, he will qualify for automatic non-residence status, as long as he has been employed on a full time basis (35 hours a week) for 365 days or more.*

## Case Study 2 - Arriver

Alison is a consultant and works less than 35 hours a week.

She has been UK non-resident for 5 years.

Her children are about to start boarding school in the UK.

She has bought a property in Surrey. *[Accommodation Tie if she spends at least 1 night there]*

She intends to spend 90 days in the UK each year.

This will be mainly during the school holidays so she can spend time with the children. *[Family tie if she spends 61 days with them outside term-time]*

However, she will be working (for more than 3 hours a day) for 60 of those days. *[Work tie once she spends 40 days or more working]*

*Alison is not engaged in Full Time Work Abroad as the law requires, so, unlike Sebastian, does not benefit from the automatic non-residence test.*

*Initially, Alison will have 3 UK ties.*

*She will not therefore be UK resident as long as she spends no more than 90 days in the UK. If she actually spends 91 days in the UK, then she will exceed her allowance and become resident.*

*However, if she maintains this pattern for 2 years, she will meet the requirements of the 90 Day tie - a fourth connecting tie - and her daily allowance for avoiding UK residence in year 3 will fall to 45 days only.*

*Worse still, she will no longer be an Arriver in the following tax year: as someone who was UK resident in the prior year, she will now be classed as a Leaver - and accordingly will find it harder to avoid being classed as UK resident on an on-going basis.*