Special report

The statutory residence test

This report examines the operation of the new statutory residence test (SRT), covering, in particular: how to determine UK tax status; identifying what is a 'home'; how to handle split years for SRT purposes; issues for international executives and overseas workday relief; and the SRT rules on death.

Determining UK tax residence under the new rules


William Arrenberg
Tax partner, Herbert Smith Freehills
Email: william.arrenberg@hsf.com; tel: 020 7466 2574

Casey O'Hara
Tax associate, Herbert Smith Freehills
Email: casey.o'hara@hsf.com; tel 020 7466 2630

With effect from 6 April 2013, the long awaited statutory residence test (SRT) replaced the myriad of fact specific case law and HMRC guidance (which itself could not always be relied on) that had previously been used to determine an individual's residence status.

First announced in the 2011 Budget, and subject to a lengthy consultation, the SRT has received a cautious welcome from tax practitioners. The chief aim of the reform is to provide taxpayers with certainty as to their residence status by providing a definition of tax residence which (in the words of the HMRC policy objective) is 'transparent, objective and simple to use'.

Whilst the test is relatively mechanical in nature, it still requires a detailed assessment of the connections with the UK (the 'UK ties') that an individual has, albeit within a clearer and more rigid framework than is currently the case.

Detailed day count records will still need to be kept, as well as information relevant to the existence of UK ties. In short, the amount of information that will need to be gathered and retained under the new regime should not be underestimated. Even with the required information, the tests, particularly in 'borderline' cases, remain complex and are likely to be time consuming. In certain circumstances (for example, around whether an individual has a 'home' in the UK), there will inevitably still be some uncertain cases, so whilst the new rules will increase certainty in many cases, there will likely remain a number of 'hard' cases that do not fit easily into the legislative framework.

The flowchart (opposite) provides an overview of the operations of the SRT and the key principles which apply. That said, each condition involves its own nuances and complexities. The legislation is detailed and should always be reviewed, alongside HMRC guidance and examples, when considering the residence status of an individual. Special rules can apply where an individual dies during a tax year (and these are not dealt with in the flowchart).

Even once the position under the SRT is established, it is important to note that a separate analysis of double tax treaties may be required in order to finally determine an individual's tax position. Similarly, the position under related rules, such as 'split year treatment' and 'overseas workday relief' will often need to be considered.

Guide for using the flowchart (the tests need to be applied each UK tax year from April 2013):

First, apply the 'conclusive non-residence test'. If that is satisfied, there is no need to go further and the individual will not be UK tax resident.

Otherwise, refer to the 'conclusive residence test'. If that is satisfied, the person will be UK tax resident.

If neither of the 'conclusive non-residence' or 'conclusive residence' tests are satisfied, one has to examine the 'sufficient ties' tests which look at the level of connection with the UK and the days spent in the UK. Different tests and thresholds apply for those individuals who were non-resident in all of the previous three tax years ('arrivers') and those who were resident in one or more of the previous three tax years ('leavers').

Key definitions

'**Sufficient hours**': an average of 35 hours a week, judged over the course of a year (and in accordance with detailed computational rules).

'**Working day**': more than three hours a day. Individuals who spend less than three hours per day working in the UK will not be required to count that day as a work day.

'**Home**': intended to identify an individual who normally lives in the UK. The individual need not own the home, but there must be a sufficient degree of permanence or stability about the arrangements. It does *not* include accommodation which is being advertised for sale or let and where the taxpayer lives in another residence. It does not include accommodation in the nature of a holiday home.

'**Accommodation**': available for the taxpayer or family to use (i.e. available for a continuous period of at least 91 days in a tax year) as a place of residence and the individual sleeps at that place for at least one night a year (or 16 nights if the accommodation belongs to a close relative of the individual). There is no requirement that the individual holds a legal interest in the accommodation or holds a right to occupy it. The 'continuous period' test ignores gaps of fewer than 16 days when the place to live is not available to the taxpayer; a detailed analysis will often be needed.

'**Family**': spouse/partner and minor children (who the taxpayer sees in the UK more than 60 days in a tax year). A day counts as a day that the individual has spent with the child for all or part of the day. A child will not be treated as creating a family connection factor for the individual if they are in full-time education in the UK and spend fewer than 21 days in the UK outside term time.

'**Day spent in the UK**': will require an individual to count a day as spent in the UK when he was in the UK at the end of the day (midnight), save for a situation where the individual: (a) is in the UK at the end of the day because of circumstances beyond his control (up to a maximum of 60 days per tax year); or (b) arrives in the UK as a passenger and leaves the next day and, in the intervening time, engages in activities relevant only to his time in transit through the UK. However, if an individual has three UK ties and is a 'leaver', then once he/she has been present in the UK for 30 days (though not at the end of the day), each subsequent day of presence (at any time) counts as a day spend in the UK.

'**Work**': includes time spent travelling and on work-related training.

Flowchart to determine UK tax residency under the statutory residency test

Conclusive non-residence

An individual will be non-UK tax resident for a tax year if he or she is:

- UK resident in one or more of the previous three tax years and present in the UK for fewer than 16 days in the current tax year;
- Not UK resident in all of the previous three tax years and present in the UK for fewer than 46 days in the current tax year; or
- Leaves the UK to carry out full-time work abroad (i.e. working **sufficient hours** overseas), provided the individual is present in the UK for fewer than 91 days in the tax year *and* the individual spends fewer than 31 working days in the UK.

Conclusive residence

An individual will be UK resident for a tax year if he or she:

- Spends 183 days or more in the UK in a tax year;
- Has a **home** in the UK which is available to the individual for a continuous period of at least 91 days (and of which at least 30 days fall in that tax year) and in which that individual is present on at least 30 days in that tax year and, throughout that 91 day period, either he or she has no home overseas or, if he or she does have a home overseas, he or she is present in that overseas home for fewer than 30 days in that tax year; or
- Carries out full-time work in the UK (i.e. working **sufficient hours** in the UK) for at least 12 months without any significant breaks (31 days) from work and at least one day of that period falls in the tax year and the individual has a **working day** in the UK in that tax year. 'Full time work in the UK' denotes employment or self-employment in the UK over a continuous period of 12 months, where a maximum of 25% of the duties were carried out abroad during this time.

'Arrivers' sufficient ties test

Examine the number of UK ties that exist for the individual:

- **Family**: the individual has a UK resident family (spouses, common and civil law partners and minor children).
- **Accommodation**: a place to live in the UK available to the individual for a continuous period of at least 91 days and where at least one night is spent during the tax year.
- **Work** (including self-employment): the individual spends at least 40 days (comprising more than three hours' work a day) in the UK over the tax year.
- **90 days**: the individual has spent more than 90 days in the UK during either or both of the last two tax years.

'Leavers' sufficient ties test

Examine the number of UK ties that exist for the individual:

- **Family**: the individual has a UK resident family (spouses, common and civil law spouses and minor children).
- **Accommodation**: a place to live in the UK available to the individual for a continuous period of at least 91 days and where at least one night is spent during the tax year or, if owned by a close relative, 16 nights.
- **Work** (including self-employment): the individual spends at least 40 days (comprising more than three hours' work a day) in the UK over the year.
- **90 days**: the individual has spent more than 90 days during either or both of the last two tax years in the UK.
- **Country tie**: the individual spends more days in the UK than any other country or where, if he/she spends an equal number of days in two countries, one of them is the UK.

Count how many factors are satisfied and how many days are spent in the UK then apply the tables

Individuals who were not resident in all of the previous three tax years ('arrivers')

Days spent in the UK	No. of connection factors present	Result
Fewer than 46 days	Connection test not applicable	Always non-resident
46–90 days	4 factors	Resident
91–120 days	3 factors or more	Resident
121–182 days	2 factors or more	Resident
183 days or more	Connection test not applicable	Always resident

Individuals resident in one or more of the previous three tax years ('leavers')

Days spent in the UK	No. of connection factors present	Result
Fewer than 16 days	Connection test not applicable	Always non-resident
16–45 days	4 factors or more	Resident
46–90 days	3 factors or more	Resident
91–120 days	2 factors or more	Resident
121–182 days	1 factor or more	Resident
183 days or more	Connection test not applicable	Always resident

In order to decide whether an individual is a 'leaver' or 'arriver' on 6 April 2013, HMRC has accepted that an individual may elect to apply either the current law or may apply the SRT on the assumption it was in place for tax years commencing 6 April 2012, 6 April 2011 and/or 6 April 2010.

This flowchart is intended to provide a summary of the rules. The detailed provisions should always be considered.
Source: Herbert Smith Freehills, June 2013.

The tax impact of residence and non-residence status

	Domiciled	Non-domiciled
Resident	Individual taxed on arising basis (i.e. liable to UK tax on all worldwide income and gains whenever they arise).	Eligible for remittance basis on non-UK income and capital gains (i.e. liable to UK tax only on the income/gain 'brought' into the UK). Non-UK income and capital gains left outside the UK are not liable to UK tax (provided certain conditions are met). Eligible non-domiciled individuals may claim overseas work day relief (OWD). In consequence, they will be taxed in the UK broadly only on their UK employment earnings. Earnings in respect of duties not performed in the UK must be paid and retained outside the UK. Overseas workday relief is (at least for individuals not previously UK resident) likely to be available for the first three years in the UK.
Non-resident	No UK tax on non-UK income and capital gains (i.e. taxed only on UK source income and gains).	No UK tax on non-UK income and capital gains. This means that, subject to the provisions of the relevant UK double tax treaty, the individual will generally be: (i) liable to UK tax on UK trade, rental and employment income; (ii) liable to UK tax on income from savings and investments where they arise from a source in the UK, limited to the amount of withholding tax deducted; (iii) not chargeable to capital gains tax on the disposal of UK assets unless the gain is made on the disposal of assets situated in the UK that are used or held for the purposes of a UK trade; and (iv) not liable to UK tax on their overseas income and gains.

Source: Herbert Smith Freehills.

What is a 'home'?

Richard Harryman
Manager, international assignment services, PwC
Email: richard.harryman@uk.pwc.com; tel: 020 7212 1189

Mike Haynes
Manager, international assignment services, PwC
Email: mike.j.haynes@uk.pwc.com; tel: 020 7212 5974

What constitutes a 'home' will be straightforward in most instances, but the absence of a clear definition in the legislation could cause some difficulties in borderline cases.

Back in the heady days of 1983, Paul Young famously told us that 'wherever I lay my hat, that's my home.' Thirty years on, the introduction of the statutory residence test from 6 April means defining one's home is slightly less black or white than where one lays down one's Akubra.

> There is little explanation of what a home actually is, other than indicating that there must be sufficient 'permanence' and 'stability'

The term 'home' is used throughout the SRT and is an important part of determining tax residence, and when it is possible to split a tax year of residence into a UK part and an overseas part. Determining the existence of a home will be straightforward in most instances, but for more complicated cases there remains uncertainty in determining when accommodation becomes more than just a place to sleep and becomes a 'home'.

Finance Bill 2013 explains what a home could be and what it is not. However, there is little explanation of what a home actually is, other than indicating that there must be sufficient 'permanence' and 'stability'. HMRC guidance does not take us much further, referencing what a 'reasonable onlooker with knowledge of the material facts would regard as that person's home'.

Defining a 'home': As a starting point, we can narrow the concept down by explaining what we know a home cannot be, and what factors are irrelevant. We know that accommodation is not a home if it is:

- let out or otherwise made unavailable; or
- used as a holiday home or temporary retreat.

We also know that the nature of the accommodation is largely irrelevant. Canal boats, caravans and sheds could all potentially be a home. Whether the property is owned does not determine whether it is a home, but that ownership may form part of the wider circumstances considered when reaching a conclusion.

For example, consider Mary, who lives in a rented flat with her partner and children. She also owns a cottage in Norfolk which is used for family holidays. The legal title to the flat and holiday home is irrelevant; the flat will be a home, but the cottage is used as a holiday home and is therefore not a home.

A home can also exist even where the individual is not there continuously. This principle extends to the situation where the home becomes temporarily unavailable (for example through flood damage).

Continuing our example, if Mary moves to France for three months but her family remain in the flat, she will continue to have a UK home. Although not physically present in the flat during those three months, it is clear that HMRC would regard her as continuing to have a home in the UK. She may also have a home in France.

'Accommodation' vs 'home' – an objective test?: The factors turning 'accommodation' into a 'home' are not considered in the legislation or guidance. It is likely that a personal, subjective connection between the individual and accommodation creates the stability/permanence which would lead a reasonable onlooker to regard it as being a home. The legislation attempts to make this an objective test, but one would expect that by looking at 'all the circumstances of the case' some regard will be given to what subjective factors turn accommodation into a home.

Prove it!: HMRC's guidance suggests a range of evidence that individuals can retain to help establish the facts of each case, some of which touch on the individual's 'lifestyle' in a location, such as club memberships. Such documents will be more helpful in demonstrating that a home exists than in showing it does not. As residence is self-assessed and the concept of a home is subjective, one would hope that HMRC takes a sensible approach when auditing in this area.

Although the vast majority of situations will be straightforward, the inherently subjective nature of the term 'home' could lead to some difficult cases being taken to the tribunal. This may in turn give us a helpful steer about when 'accommodation' becomes a 'home' in these borderline cases.

How to handle split years for SRT purposes

David Smith
Senior associate, Eversheds
Email: davidcarlsmith@eversheds.com
Tel: 0845 498 4349

Under the new rules, split year treatment will apply in eight 'cases'. The focus now is on meeting prescriptive, objective conditions, rather than the more subjective concepts that were previously used.

Under the pre-6 April 2013 rules, once an individual was treated as UK resident in a tax year, he was treated as UK resident for the whole of that tax year, regardless of when during that year he came to, or left, the UK. To mitigate the harsh consequences that could flow from this treatment, HMRC introduced a number of extra statutory concessions which effectively allowed the year to be split into two parts – a UK part (when the individual would be treated as UK resident), and an overseas part (when the individual would not) – provided certain conditions were satisfied.

This approach, of treating an individual as UK resident for the whole of a tax year, but allowing it to be split into two parts in certain circumstances, has been replicated under the SRT rules, with the various split year extra statutory concessions (namely A11, A78 and D2) withdrawn with effect from 6 April 2013 and replaced with new statutory formulations. These formulations are intended to mirror, as closely as possible, the extra statutory concessions that they replace. However, in line with the SRT generally, since the new statutory split year rules focus heavily on prescriptive, objective conditions, rather than the more subjective concepts that were used in some of the replaced extra statutory concessions, it will be vital that individuals closely follow and monitor their compliance with the new statutory conditions to ensure that split year treatment is obtained.

When does split year treatment apply?: As a preliminary point, it is worth noting that split year treatment only applies to individuals in their capacity as individuals. It does not apply to individuals acting as personal representatives and only applies in a limited form where an individual is acting as a trustee.

There are eight circumstances (or 'cases') where split year treatment will apply. These break down into three cases which cover situations where an individual leaves the UK part-way through a tax year and five cases where an individual arrives in the UK part-way through a year. Where an individual's circumstances fall within more than one of these cases, perhaps unsurprisingly, the case in which the overseas part of the year is the shortest takes priority.

The three cases which cover departures from the UK apply, in very broad terms, where an individual starts full-time work overseas; where an individual accompanies their partner who is starting full-time work overseas; and where an individual leaves the UK to live overseas and ceases to have a UK home. The five cases dealing with arrivals in the UK largely mirror the departures rules and so (again, broadly speaking) cover situations where an individual starts to work full time in the UK; where an individual returns to the UK following a period of full-time work overseas; where an individual is the accompanying partner of a person returning to the UK following a period of full-time work overseas; where an individual starts to have a home in the UK; and where an individual starts to have their only home in the UK.

It will be vital that individuals closely follow and monitor their compliance with the new statutory conditions to ensure that split year treatment is obtained

All of the cases have one common condition, which is that the individual must be UK resident (under the SRT) for the tax year in which split year treatment is sought. However, other than this, each of the cases are subject to a number of different (and highly prescriptive) conditions which the individual will need to satisfy in order to secure split year treatment. To illustrate the complexities involved, some of these conditions are explored in more detail below for one of the most common situations where split year treatment is sought, namely departures in connection with full-time work overseas.

Technical analysis for case 1: Individual starts full-time work overseas

Under case 1, in order to benefit from split year treatment for tax year X, a person (P) must:

- be UK resident for the previous tax year;
- be automatically non-UK resident for the following tax year (on the basis of the full-time work overseas test); and
- satisfy the 'overseas work criteria' in respect of one or more relevant period.

A 'relevant period' for these purposes is one which begins on a day on which P does more than three hours of work overseas and ends on the last day of year X.

To determine whether the 'overseas work criteria' has been satisfied, there are a number of steps which need to be considered.

Step 1: Determining if P has worked sufficient hours overseas: The purpose of this step is to determine whether the individual is working full-time overseas during the relevant period. Unlike under ESC A11, where the concept of full-time work was (subject to the application of *Revenue Interpretation 40*) largely subjective and fact specific, the new statutory test is more objective and formulaic.

To establish whether P has worked sufficient hours overseas there are a number of additional steps to work through:

- Step 1A: Identify any 'disregarded days'. These are days in the relevant period on which P does more than three hours' work in the UK, regardless of whether they also work overseas on that day.
- Step 1B: Work out 'net overseas hours'. This is the total number of hours worked overseas in the relevant period but ignoring any hours worked on any disregarded days.
- Step 1C: Establish the 'reference period'. This is the total number of days in the relevant period less the total number of disregarded days and less any other days which are deductible under the SRT legislation to take account of periods of leave and gaps between employment.
- Step 1D: Divide the reference period by 7. If the answer is more than 1 but is not a whole number, round down to the nearest whole number; if the answer is less than 1, round up to 1.
- Step 1E: Divide the net overseas hours by the number resulting from step 1D.

If the answer at Step 1E is 35 or more, P will have worked sufficient hours overseas.

Step 2: Determining if P has had a significant break from overseas work: P will have had a significant break from overseas work, and as a result will fail the overseas work criteria, if P has an unbroken period of at least 31 days without an overseas work day (that is a day on which they do more than three hours' work overseas) or a day that would have been an overseas work day but for P being on annual, sick or parenting leave.

Step 3: Determining if P has exceeded the number of days permitted to be worked and spent in the UK: During the relevant period P must not exceed the maximum number of days to be worked and spent in the UK, being 30 (worked) and 90 (spent) as reduced proportionately by reference to the whole number of months in the part of year X before the relevant period (see the table below).

Summary: As will be clear, in order to demonstrate that the above conditions have been satisfied (and this applies across all of the cases, not just case 1), it is imperative that P closely monitors his or her compliance with the various conditions and keeps detailed records evidencing this compliance. In particular, in the context of case 1, evidence should be retained regarding the time and dates spent both in the UK and overseas, the nature of activities undertaken and, perhaps most importantly, the number of hours spent working both in the UK and overseas. HMRC guidance includes a non-exhaustive list of the types of information and records that P should keep in this context, which includes details of breaks from working (for example, between jobs or on annual, sick or parental leave) and copies of any work diaries, calendars or timesheets to demonstrate the nature and duration of work activities.

Case study: Full-time work overseas (case 1)

Amelia has been living in the UK since she was born and is UK resident for tax purposes. During the summer of 2013 her employer takes over a rival company in Germany and with effect from 7 October 2013 she is seconded to Germany to assist with the integration of the new business into her employer's network. The secondment will last for 18 months during which she will work a standard day of seven hours a day, five days a week.

On 14 December 2013, she returns to the UK and works in her employer's UK offices during the following week before commencing her Christmas leave on 21 December 2013, which she spends with her family in Leeds. She returns to Germany on 5 January 2014 where she remains until 5 April 2014.

Does Amelia qualify for split year treatment under case 1?

The relevant period commences on 7 October 2013 and ends on 5 April 2014. We assume that Amelia will satisfy the full-time work overseas test and will be non UK resident in the tax year 2014/15.

Step one – Determining if Amelia has worked sufficient hours overseas:

- Step 1A: Identify any 'disregarded days'. Amelia works in the UK offices from 16 December through to 20 December 2013 (5 days) and therefore these days will be disregarded.
- Step 1B: Work out 'net overseas hours'. The total number of hours worked by Amelia overseas during the relevant period is 805.
- Step 1C: Establish the 'reference period'. The total number of days in the relevant period is 181. There are 5 disregarded days and 16 deductible days. The reference period is therefore 160.
- Step 1D: Divide the reference period by 7 (and round as necessary). 160 divided by 7 rounded down to the nearest whole number is 22.
- Step 1E: Divide the net overseas hours by the number resulting from step 1D. 805 divided by 22 is 36.59.

As the result of step 1E is higher than 35 Amelia has worked sufficient hours overseas.

Step two – Determining if Amelia has had a significant break from overseas work: Amelia has not had an unbroken period of at least 31 days without an overseas work day and therefore has not had a significant break from overseas work.

Step three – Determining if Amelia has exceeded the number of days permitted to be worked and spent in the UK: The permitted number of days spent in the UK during the relevant period is 45 (of which Amelia spends 22) and the permitted number of days working in the UK is 15 (of which Amelia spends 5).

Amelia therefore qualifies for split-year treatment which would operate with effect from 7 October 2013.

Table showing maximum permitted time spent and working in UK (case 1)

P's start date in year X falls in the period:	6–30 Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	1-5 Apr
Maximum number of days P is permitted to work in the UK	30	27	25	22	20	17	15	12	10	7	5	2	0
Maximum number of days P is permitted to spend in the UK	90	82	75	67	60	52	45	37	30	22	15	7	0

Issues for international executives & overseas workday relief

Steve Wade
Director, International executive services practice, KPMG
Email: steve.wade@kpmg.co.uk
Tel: 020 7311 2220.

There are a number of practical considerations for executives, not least extensive record keeping.

Working full-time abroad

It has long been HMRC's practice to accept that employees assigned abroad could break UK residence by being regarded as 'working full-time abroad' (WFTA) without the need to sever all their ties with the UK. Unfortunately, exactly when an employee passed this test was never completely defined. The SRT maintains this route to non-residence but with substantial differences in the detail. An individual must have 'sufficient hours' working overseas and be present in the UK for fewer than 91 days in the tax year, with fewer than 31 days spent working in the UK (FB 2013 Sch 43 para 14(1)).
Differences from the previous practice include:

- the 91 day test being per year, not an average. In the year of departure, the 91 and 31 day tests use an apportioned number of days;
- a day of working in the UK being more than three hours of work;
- 'working' including substantive and incidental duties, i.e. with no exemptions for training, etc. The distinction between substantive and incidental duties remains important for determining a non-resident's liability; and
- 'sufficient hours' as calculated using a five-step calculation, and if the answer is 35 hours or more, the 'sufficient hours' criteria is met. This seems very complicated and may prove administratively burdensome, but this level of detail is intended to provide certainty.

Sufficient hours working in the UK

One of the automatic tests for UK residence depends on whether the individual works sufficient hours in the UK (Sch 43 para 9(1)). This is assessed over a 365-day period where over 75% of the days worked are days worked in the UK. For this purpose, a work day is a day of more than three hours' work. Two significant changes from the version published in the draft Finance Bill have been made to this test, namely:

- the 75% test is now determined over the 365-day period and not the tax year being considered; and
- the test now includes a five-step calculation (as set out in Sch 43 para 9(2)) to determine if sufficient hours are worked.

Split years

Under previous rules, an individual was either resident or non-resident in the UK for the whole tax year. However, under extra statutory concession (ESC) A11, when an individual arrives in or leaves the UK part-way through the tax year, the taxpayer has the option of splitting the tax year into periods of residence and non-residence in certain circumstances.

As part of the SRT, the split years are incorporated into statute with eight cases when the year is split into a UK and an overseas part (Sch 43 Part 3). This split year treatment is no longer optional; it must be applied. If one of the cases applies, the year is split and the individual is resident throughout the year, albeit they are taxed as though non-resident during the overseas part of the year. The Finance Bill states that if the conditions of more than one case are met, the UK part of the tax year is the longest UK part under any of the cases that are met (Sch 43 paras 53(1) and 54). It is hoped this rule will be changed as it gives some unexpected and inequitable results.

The rules are deceptively similar in places to current practices but there are differences in the detail

Practical considerations for executives

These will include the following:

- How do you demonstrate that you have not worked more than three hours? HMRC's guidance note *RDR3*, which was published on 8 May 2013, states (at 2.19) that: 'You will need to *keep records* which allow you to identify the number of hours you have worked in a given day.' The section on record-keeping suggests that taxpayers 'should keep information and records relating to the split in your working life between the UK and overseas, particularly noting days where you worked (including training, being on stand-by and travelling) for more or less than three hours'. Suggested records include a work diary, but readers should note that HMRC's suggestion that: 'You may find it would be beneficial to ensure that your diary is sufficiently detailed, maybe reflecting hours worked and the nature of your work, for example reviewing and responding to emails, meetings or filing travel claims.' Even from this limited extract, it is clear that HMRC will expect extensive records to be kept.
- Remembering that although the difference between incidental and substantial duties is not relevant for the purpose of the three-hour work tests, the distinction remains crucial when determining whether duties are taxable for a non-resident.
- Work includes tax deductible travel, so limits on working in the UK need to consider travel after disembarkation. Workday limits may not be as generous as they may seem.
- The rules are deceptively similar in places to current practices but there are differences in the detail. Executives and employees currently regarded as non-resident under the full-time abroad test should review their travel patterns under the new rules to determine whether they will qualify for the 'overseas criteria'.
- The cases where you can split the year do not refer specifically to when an individual arrives in or departs from the UK. An individual may become resident before they arrive and remain resident after they depart.
- It is likely that some executives will become resident, not from when they have arrived in the UK on assignment, but from the start of the following tax year.

- An individual may be resident or not for tax purposes under the SRT, but they will still have to base residence on case law for NIC purposes. This will be particularly relevant for individuals arriving from or departing to non-agreement countries.

There is a perception that the UK overcomplicates its tax legislation. The provisions on the overseas workday relief are no exception

Overseas workday relief

Resident but not ordinarily resident employees were previously taxable on their general earnings for UK duties, whether or not these earnings were paid in the UK. If such employees elected for the remittance basis, their general earnings for non-UK duties were only liable to UK taxation if they were remitted to the UK. The unremitted earnings not being taxed in the UK is commonly described as 'overseas workdays relief' (OWR). OWR will continue under the proposed SRT, despite the proposal to abolish ordinary residence for most tax purposes.

From 6 April 2013, resident employees will be able to claim relief for a particular tax year if they are non-UK domiciled, claim the remittance basis, and meet one of the following conditions:

- non-UK resident for the whole of the previous three tax years;
- UK resident for the previous tax year, but non-UK resident for the whole of the three tax years before that;
- UK resident for the previous two tax years, but non-UK resident for the whole of the three previous tax years before that; or
- non-UK resident for the previous tax year, UK resident for the tax year before that, but non-UK resident for the three tax years before that.

Employees who were resident for 2012/13 but not ordinarily resident at 5 April 2013 may be able to continue to claim relief under transitional provisions if they meet certain conditions, including remaining resident but not ordinarily resident under the pre-SRT 6 April regime (FB 2013 Sch 44 para 26 (1)).

The amount of the relief depends on the number of non-UK workdays and the amount of the earnings remitted to the UK. The calculation of remittances before 6 April 2013 is described in Statement of Practice 1/09. This provided for a simplified calculation to determine remittances by reference to the total amounts transferred to the UK during the whole tax year, rather than by reference to individual transfers on a transfer-by-transfer basis throughout the year under the mixed funds rules of ITA 2007 s 809Q. The Finance Bill includes legislation to incorporate the broad principles of SP1/09 into the legislation. There are, however, significant differences from the current practice.

The special mixed fund rules

If an employee qualifies for OWR, claims the remittance basis and has earnings for UK and non-UK work-days ('mixed employment income'), he will be able to nominate an account for use as a mixed fund, to which the special mixed fund rules will apply. These special mixed fund rules broadly take the simplified approach previously described in Statement of Practice 1/09, whereby the transaction-by-transaction basis of the normal mixed fund rules are set aside, and the employee will be able to aggregate transfers from the account on an annual basis (or for part of a year, if the account is not a qualifying account for the whole of the UK tax year).

Nomination of the account

HMRC has recognised the difficulties that arose with the original draft legislation on nominating an account. The revised legislation in the Finance Bill (Sch 6 para 6 inserting s 809RB(8)) allows employees to nominate an account up to 31 January following the tax year in which sums are paid into the account, with the nomination being made in the white space of a tax return.

It is possible to nominate joint accounts, but if the account contains the employment income of two individuals, neither can nominate the account.

When an existing account is nominated, the cash balance in this account must be below £10 immediately before the 'qualifying date'. The qualifying date is the first date on which general earnings exceeding £10 are paid into the account. The general earnings must relate to the tax year during which the individual qualifies for OWR and has some UK and non-UK duties. The result of this is that the nomination may not be possible unless a new account is opened when the individual arrives in the UK.

Issues for executives

Many of the issues that exist under the previous practice will remain issues under this legislation. For example, ensuring sufficient earnings are kept offshore when benefits paid in the UK are considered, maintaining sufficiently robust records to justify any overseas workdays and tracking remittances.

Apart from the transitional provisions, arguments over whether the individual is ordinarily resident or not (at least for tax purposes) and therefore entitled to the relief, will fortunately disappear, which is an advantage of the new legislation.

UK domiciled individuals can no longer qualify for relief and non-domiciled individuals have to have been non-resident for three tax years, unless they qualify for the transitional provisions. Some employees returning for a second assignment will be denied relief.

Care will need to be taken over when the nomination can be made and the contents of the account, particularly when an employee does not have any overseas workdays when they first arrive and when an employee is not considered resident when they first arrive. Employees should where possible ensure they qualify for the simplified mixed fund rules.

There is a perception that the UK often overcomplicates its tax legislation. The legislation on OWR is no exception, having such complicated rules that the legislation needs 'special mixed fund' rules to simplify the normal basis of calculation. It is a pity that the opportunity to introduce a simpler relief, that allowed the funds to be brought to the UK for the benefit of the UK economy, wasn't taken.

The SRT and death

Malcolm Finney
Author, *The Statutory Residence Test: A Practical Guide 2013/14* (Sweet & Maxwell)
Email: malcfinney@aol.com.

Death complicates matters.

The residence status (and indeed domicile status) of an individual in the tax year of death is important. Inter alia, it impacts on the:

- exposure to UK income tax and CGT for the period from the prior 6 April to the date of death (ITA 2007 s 834) and, on the part of the personal representatives, for the period post death (TMA 1970 ss 40, 74 and 77);
- remittance basis charge for the non-UK domiciled (ITA 2007 s 809C); and
- the deemed domicile rules for IHT purposes (IHTA 1984 s 267).

Provisions applicable to the tax year of death

Specific provisions apply in the tax year of death, namely: the fourth and fifth automatic overseas tests (AOTs) (FB 2013 Sch 43 paras 15 and 16); the fourth automatic UK test (AUKT) (FB 2013 Sch 43 para 10); and the sufficient ties test (STT) (FB 2013 Sch 43 para 20).

Although perhaps not clear from the SRT legislation, other provisions, although of more general application, may also apply in the tax year of death, namely, the third AOT (FB 2013 Sch 43 para 14) and the first, second and third AUKT (FB 2013 Sch 43 paras 7, 8 and 9).

Only the first and second AOTs (FB 2013 Sch 43 paras 12 and 13) have no application to the tax year of death.

Precedence

Because of the precedence provisions (FB 2013 Sch 43 paras 5 and 17), in practice, the order of consideration of the relevant tests applicable in the tax year of death should be: first, the AOTs; then, if necessary, the AUKTs; and finally, if necessary, the STT.

Non-UK residence

Individuals are protected from automatic UK residency (i.e. are automatically non-UK resident) in the tax year of death if the fourth, fifth or third AOT is satisfied. Even if none of these three AOTs is satisfied, non-UK residence status may still apply (although not automatically) if none of the AUKTs or STT apply (para 4).

Fourth AOT (para 15): The fourth AOT offers protection from UK residency if an individual spends no more than 45 days in the UK (excluding the day of death (para 22)) in the tax year of death and is non-UK resident for the prior two tax years (or non-UK resident for the prior tax year and split year treatment (para 43) applies for the tax year before that under case 1, 2 or 3 (para 15)).

Example 1

P was non-UK resident in 2013/14 and 2014/15 and spent 40 days in the UK in 2015/16 before dying.
P died non-UK resident since the fourth AOT is satisfied.

Fifth AOT (para 16): The fifth AOT (formerly, 'working full-time overseas', now 'working sufficient hours overseas') is more restrictive than the fourth AOT requiring that the individual satisfied the third AOT in the tax year of death (para 16(1)(c)) and also in the previous two tax years (para 16(1)(b)); note para 16(2)).

Third AOT (para 14): Non-UK residency may also be possible under the third AOT. Prima facie, this requires that the individual dies towards the end of the tax year in order to ensure that the 'working sufficient hours overseas' requirement (para 14(1)(a)), as measured over the whole of the tax year of death, is satisfied.

Example 2

P died on the 31 March 2014. During the period from 6 April 2013 to 5 April 2014, P worked an average of 42 hours per 7 days (para 14(3)); P had no significant breaks (para.14(1)(b)); and P spent 65 days in the UK of which 30 days comprised work (para 14(c), (d)).
P died non-UK resident.

STT (para 16): The STT aims to catch those individuals with 'ties' (i.e. connections; para 17(2)) to the UK who do not satisfy any of the AOTs or AUKTs.

The STT applies to so-called 'leavers' or 'arrivers', albeit slightly differently (paras 17 and 18). The STT applies by way of a correlation of the number of days spent in the UK with the number of UK ties, although the precise correlation varies according to the date of an individual's death within the tax year (paras 18, 19 and 20). The later in the tax year an individual dies, the fewer the number of UK ties necessary to precipitate UK residency. Indeed, where in the tax year of death an individual (a leaver) has at least four UK ties UK residency occurs irrespective of the number of days spent in the UK in that tax year.

Example 3

P dies on 31 May 2013 having spent 55 days in the UK. P had been UK resident in 2010/11 but non-UK resident for 2011/12 and 2012/13 (para 18).
P's only UK tie was the accommodation tie (para 34).
Adjustment of the table in para 18 results in a revised table:

Days spent by P in the UK in year X sufficient	Number of ties that are sufficient
Not more than 7	At least 4
More than 7 but not more than 15	At least 3
More than 15 but not more than 20	At least 2
More than 20	At least 1

For example, '45 days' in original table becomes [45 – [[A/12] x 45]] where 'A' is the number of whole months in the tax year of death after the month in which P dies (para 20(3)), i.e. A = 10. 45 days is thus adjusted to: [45 – 10/12 x 45] = [45 – 38] = 7 days.
P died UK resident.
In the absence of the required adjustment to the table in para 18 (para 20), P would not have been 'caught' by the SRT.

Escaping UK residence

In short, an individual it seems could die non-UK resident in the tax year immediately following a tax year of UK residency if the third AOT could be satisfied.

Otherwise, it is necessary for an individual to be non-UK resident for at least the two tax years prior to the tax year of death (subject to split year treatment for the pre-penultimate year). ■