

# Tax Special

## Tax Residence



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### Are you a Tax resident in the UK?

**Recent tribunal decisions are worrying for both recent arrivals in the UK and people leaving. Arrivals may become fully taxable here sooner than they thought; leavers may remain taxable here many years after they leave.**

HM Revenue & Customs' pursuit of those claiming not to be domiciled in the UK has been widely reported. Previously the UK had been something of a tax haven for the internationally mobile. Now those resident here for seven years face UK tax on their worldwide income, or the £30,000 Remittance Basis Charge.

Less widely reported has been a parallel assault HMRC have mounted on those claiming to be not resident here, or at least not ordinarily resident in the UK.

**Ordinary residence is important in two distinct circumstances:**

- **For those coming to the UK** to work for a relatively short period, typically for an investment bank or other financial institution. To the extent such a worker's earnings arise from the performance of the duties of the employment outside the UK, he only pays tax on what he remits to the UK if he is not ordinarily resident. But he pays tax on the full amount he gets paid if he is ordinarily resident.
- **For those leaving the UK**, often to avoid paying capital gains tax on the sale of a business or other substantial asset. Such gains are exempt from UK capital gains tax if they are realised when the vendor is neither resident nor ordinarily resident (and remains so for 5 full tax years). But if he is either resident or ordinarily resident, such gains are taxed in the year they are realised.

Similarly, individuals who are domiciled in the UK and resident here pay UK tax on their worldwide income as it arises but if they are not resident, they only pay UK tax on their UK-source income.

In order to try and help in this uncertain area, HMRC published their IR20 booklet (now HMRC 6) which was thought to provide some practical guidance. Recent tribunal decisions have shown this document does not cover as many circumstances as previously thought. More worryingly, it seems it cannot be relied on unless the taxpayer's circumstances fall exactly within its scope.

#### Immigrants

Long standing case law established that an individual who comes to the UK voluntarily and for some settled purpose, such as education or employment, becomes ordinarily resident here as soon as he arrives. IR20 noted this but with the gloss that if, on arrival, the individual does not intend to remain in the UK for the long term, HMRC will not treat him as ordinarily resident here *until after the third anniversary of his arrival*.

In the first of the recent cases, the Special Commissioners decided there was no justification for waiting until after the third anniversary of the taxpayer's arrival; this particular Italian banker was seen as becoming ordinarily resident one year earlier, at the beginning of the year that included the third anniversary after his arrival.

Some seven months later, the very same judge (who had previously been a Commissioner) was invited to conclude that his approach to the earlier case had been mistaken. Whilst HMRC had alleged that an Austrian banker had become ordinarily resident because he had bought a property (rather than renting it), the judge ruled he had become ordinarily resident at the beginning of the tax year following his arrival. Judged, with hindsight, the banker is seen to have come to the UK to take up an employment which in fact lasted well over two years.

**A number of action points can be distilled from these cases for those who have come to work in the UK for a relatively short period:**

- You can at most be treated as not ordinarily resident in the UK for two years from the date of your arrival, as you will be ordinarily resident from the beginning of the tax year in which the third anniversary of your arrival falls (HMRC 6 now reflects this)

- Although the judge stated clearly in the second case that buying a property would not mean an individual became ordinarily resident providing the property were sold within the two-year period, HMRC can be expected to argue the individual has become ordinarily resident as soon as he acquires access to accommodation that will be available for more than two years
- It does not matter that you intend to leave the UK within two years after your arrival; what is much more important is that you actually do so – though there may be scope for a fairly prompt return to the UK if the job overseas doesn't come up to expectations
- Where relevant, the provisions of a double tax treaty (which normally prevent an individual being treated as dual resident for tax purposes) should be reviewed carefully to see if they will protect an individual from being treated as ordinarily resident in the UK.

Intending and recent arrivals in the UK should update their tax planning to take account of these points.

### Emigrants

Robert Gaines-Cooper's campaign to be treated as tax resident in the Seychelles has received wide coverage. Another case of an individual who sold his business and went to work for the purchaser's subsidiary in Holland has been less widely noticed. In both cases, the taxpayers have, thus far, been judged to have retained not only their status as ordinarily resident in the UK but as actually resident in the UK and so fully taxable here.

Again, a number of action points can be distilled from these decisions:

- Whether you leave the UK to take up full-time employment overseas or not has a large effect on the steps you have to take to substantiate non-residence.
  - If you do not leave to take up full-time employment, then you must make a "clear break" with your previous pattern of life, perhaps as extreme as cutting all your personal and social ties with the UK
  - If you do leave to take up full-time employment, then you do not need to achieve this same "clear break" but the employment must be genuinely full time
- Full-time employment outside the UK is exactly that. It is being contended that to meet the criteria, the job must either be yours or waiting for you at the time you leave and it must last for the whole of the following tax year. By implication, a replacement job will not suffice.

As an aside, this interpretation does not sit easily with those parts of HMRC 6 that suggest that a combination of jobs, or a combination of job and

self-employment may meet the criteria but, on the basis of these recent decisions, it would not be safe to rely on this apparent relaxation.

The taxpayer claiming to be working full-time must be able to produce credible evidence that what he is doing does actually represent full-time work, rather than something more relaxed. The Tribunal reviewed extensive evidence of one particular taxpayer's activities before concluding that, even though he had been working at his stated occupation, he had been doing too little to represent a "full-time" job.

Moreover, where the taxpayer retains business interests in the UK whilst he is abroad, these may be sufficiently extensive to cast doubt on whether his work overseas is full time. The transfer of a commercial property from one company to another together with the acquisition of another similar property by privately owned UK property companies seems to have had a damaging effect on the Tribunal's willingness to see one taxpayer's main job as "full-time".

- Where you are claiming to cease residence but not taking up full-time employment abroad, it is vital, not only to
  - Meet the physical absence criteria of no visits to the UK in the year following departure followed by three years in which days spent in the UK total less than 183 in any one year and less than 91 per year on average, but also to
  - Achieve a "clear break" with the previous pattern of life, most safely taken as the cutting of all social and personal ties with the UK. In this context, retaining residential accommodation available for private use, retaining public positions or directorships, leaving the spouse and family in the UK are all elements which, individually, could prove fatal to the argument that UK residence has been given up

### What to Do ?

Those who are coming to the UK to work, or have recently arrived here need to update the advice they have received on the extent of their UK tax liability before 6 April.

If you are proposing to leave the UK, perhaps to mitigate a substantial capital gains liability, you should be planning to abide by rather stricter criteria than some taxpayers have followed in the past. Hiring an experienced practitioner to present your case to HMRC would also be a wise investment.

At least one of the cases detailed above will be coming on for a further hearing in the next few months so there will no doubt be further development of the principles described above.

