

## Domicile and Residence Update and the impact of COVID-19

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**Speaker: Amanda Hardy QC (5 Stone Buildings)**

**Chair: Fiona McFarlane (RBC)**

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*Domicile and Residence:  
Update including the impact of  
Covid 19*

Amanda Hardy QC

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## OVERVIEW

- What is going on in the First-tier Tribunal?
- Other tax litigation: the Upper Tribunal, the Chancery Division and the Administrative Court.
- Recent cases and hot topics in domicile.
- Residence and revenue matters in the light of COVID-19.

## The FTT

- Existing litigation with existing directions on 24/3/20
- Stayed for 30 days – 24/3/20
- Additional stay to 30 June & extended deadlines by 70 days – 21/4/20
- Statement by Chamber President – 11/5/20

## The FTT

- Avoiding the stay: bespoke directions.
- Missing out on the stay: appeals brought after 24/3/20 or those with bespoke directions agreed after 24/3/20.

## The FTT

- Judge Sinfield's statement of 11/5/20
- *“Contrary to the impression given ... the Tax Chamber is open for business and working both remotely and in person at its administrative centre in Birmingham to process new appeals and list existing appeals to be dealt with by judges either without a hearing on the papers or at a hearing by telephone and video.”*

## The FTT

- Judge Sinfield's statement of 11/5/20
- *"The Tax Chamber is not geared up to hear cases involving many witnesses remotely."*
- *"The Tax Chamber has held video hearings with 15 or more participants."*

# The UT and High Court

- Business as normal, but directions providing for flexibility.
- Chancery Division: deadlines as normal. The Chancellor is keen to stress that business is very much continuing.
- Administrative Division: deadlines as normal. Remember: judicial reviews against HMRC can be heard by the Upper Tribunal for judges with tax expertise. The strict 3 month limit for J.R. actions remains firmly in place. Note Independent Review of Administrative Law: Lord Faulks



## Recent cases and hot topics

- Domicile remains a target area.
- *Epaminondas Embiricos v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 236 (TC) is currently under appeal (closure notice application: hearing expected in October 2020). The issue is how much information HMRC need to close domicile enquiries, e.g. do they need figures?

## Recent cases and hot topics

- Domicile remains a target area.
- *Henkes v HMRC* [2020] UKFTT 159 (TC). Closure notice application – Judge Tony Beare held he could decide domicile at the application as a preliminary matter, and proceeded to do so.

## Recent cases and hot topics

- *Henkes*

Fundamentally, the judge accepts the propositions that a taxpayer ***needs to have formed an intention to remain indefinitely in the UK before he acquires a domicile of choice here; and that in the absence of a domicile of choice in most cases the domicile of origin will revive.***

## Recent cases and hot topics

- *Henkes*

And yet on the facts of *Henkes*, the judge found that a taxpayer had acquired a domicile of choice here when his sworn evidence was that he intended to leave; when he had a house in Spain where he spent time with his family; when he had never acquired UK citizenship or a passport; and when the taxpayer asserted that he intended to leave the UK on a given contingency - when he stopped working.

## Recent cases and hot topics

- *Henkes*
- Multifactorial approach is confirmed.
- Questionable approach to balancing factors – e.g. weight placed on connections to jurisdiction of domicile of origin.
- Sceptical of statements of intention: too sceptical without good reason to doubt sworn evidence?
- Note HMRC carry burden of proof in proving domicile of choice in the UK.
- Note *Henkes* not binding at this level (FTT).

## Residence

- SRT day counts can disregard days spent here in exceptional circumstances.
- Statutory limit of 60 exceptional days.
- What is exceptional in the current climate?
- What if you are stuck here for more than 60 days?

## Residence

- Exception for people here to work on COVID—19 treatments, etc. by letter of the Chancellor of the Exchequer 9 April 2020:

*“We will amend the Statutory Residence Test (SRT) to ensure that any period(s) between 1 March and 1 June 2020 spent in the UK by individuals working on COVID-19 related activities will not count towards the residence tests.”*

- What is a “related activity”?

## Residence

- For other people the 60 day limit remains but the guidance (RDRM 13200) says:

*“Whether days spent in the UK can be disregarded due to exceptional circumstances will always depend on the facts ...However, if you are quarantined or advised by a health professional or public health guidance to self-isolate in the UK as a result of the virus, find yourself advised by official Government advice not to travel, are unable to leave the UK as a result of the closure of international borders, or are asked by your employer to return to the UK, the circumstances are considered as exceptional.”*



## Residence – Q & A's

- HMRC issued on 11 August Q & A's in relation to the SRT and Covid 19.
- *HMRC recognise that the COVID-19 pandemic may impact on your ability to move freely to and from the UK or, require you to remain here unexpectedly. The SRT legislation allows for a day spent in the UK due to exceptional circumstances beyond your control, which prevents you from leaving the UK, to be disregarded. Whether days spent in the UK can be disregarded due to exceptional circumstances will always depend on the facts and circumstances of each individual case.*

## Residence – Q & A's

- *The maximum of 60 days in a tax year that can be disregarded due to exceptional circumstances will continue to apply.*
- *You will need to keep records and documents in support of any claim you make to have days spent in the UK disregarded due to exceptional circumstances.*
- *Later point crucial*

## Residence – Q & A's

### ***1. Are travel restrictions due to the COVID-19 pandemic counted as exceptional circumstances for the statutory residence test?***

- *Whether days spent in the UK can be disregarded due to exceptional circumstances will always depend on the specific facts and circumstances of your case. There is guidance at RDRM11005.*
- *Circumstances are considered exceptional where you find yourself advised by official government advice not to travel from the UK as a result of the virus. For example, on the 17 March 2020 the Foreign and Commonwealth Office (FCO) advised British nationals against all but essential international travel during the pandemic.*

## Residence – Q & A's

### ***2. What does HMRC mean by closure of international borders?***

- Circumstances are considered exceptional where you are unable to leave the UK as a result of the closure of international borders.*
- Many territories will continue to allow citizens, permanent residents or nationals to return to those territories even with wider border restrictions in place. However, if you are unable to leave the UK as a result of the closure of international borders, for exceptional circumstances to apply, you must be able to demonstrate that you have made every effort to leave once those restrictions have been lifted.*

## Residence – Q & A's

***3. What happens if I spend more than 60 days in the UK because of COVID-19, will I become UK resident for tax purposes?***

- The SRT legislation sets out how tax residence is determined. There are several tests to be considered, most of which contain clear limits on the number of days that you can spend in the UK. In addition, for several of these tests, a maximum of 60 days spent in the UK due to exceptional circumstances beyond your control, which prevents you from leaving the UK, may be disregarded. Guidance on the legislation can be found at RDRM11000 onwards.*

## Residence – Q & A's

### ***4. Does UK wide Government advice on self-isolation mean that exceptional circumstances apply?***

- *If you are self-isolating in line with government advice, the period of self-isolation will be covered by exceptional circumstances.*

### ***5. I've had to work remotely in the UK because I could not get back to my country, do the exceptional circumstances apply to me?***

- *Whether days spent in the UK can be disregarded due to exceptional circumstances will always depend on the facts and circumstances of each individual case.*
  - *Any day on which you work in the UK for more than 3 hours will count as a UK workday, even if they are days which have been disregarded for other tests due to exceptional circumstances. Guidance is available at RDRM11760.*
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## Residence – Q & A's

***6. I am non-UK tax resident, but my parents, spouse and children live in the UK, Will I be made tax resident in the UK if I come to the UK during the COVID-19 pandemic?***

- If you are coming to the UK you should refer to the current SRT rules which sets out how tax residence is determined. In addition, there is further guidance at RDRM11000.*
- Exceptional circumstances will normally apply where you have no choice concerning the time you spend in the UK, or in coming to the UK. Your presence in the UK must be beyond your control and you must be prevented from leaving the UK.*

## Residence – Q & A's

***7. I came to the UK to support my vulnerable family members who needed assistance during the COVID-19 pandemic. Would this be considered an exceptional circumstance?***

- Certain vulnerable people have been asked to 'shield' or 'self-isolate' due to the COVID-19 pandemic. Whether or not the impact of those circumstances is exceptional to you, will depend on the facts and circumstances of your case. You will need to be able to demonstrate why it was necessary for you to come and remain in the UK to provide support for a vulnerable member of your family.*



## Residence – Q & A's

***8. For the purposes of the family tie, are children under 18 years old still considered in full-time education although schools were currently shut due to the COVID-19 pandemic?***

- For the purpose of the family tie a child who is in full-time education in the UK and as a result is resident here will not be treated as resident if they spend less than 21 days in the UK outside of term time.*
  - As a result of the COVID-19 pandemic many schools closed, other than for vulnerable children or the children of key workers. However, there was a clear expectation that children's full-time education would continue albeit in a different environment. Therefore, they are considered to still be in full time education for this period.*
  - If due to travel restrictions a child in full time education spends 21 days or more in the UK outside of term-time they cannot be treated as non-UK resident (assuming they are otherwise UK resident) for the purposes of the "family tie". This is because these days are not covered by the exceptional circumstances exception.*
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## Residence – Q & A's

***9. I am normally non-resident for UK tax purposes. My company have asked me to come to the UK to work because of COVID-19. How will this impact my residence status?***

- Returning to the UK may result in a significant break in your overseas work (see RDRM11760) and you may no longer meet the 3rd automatic overseas test (working full-time abroad). Any day on which you work in the UK for more than 3 hours will count as a UK workday, even if they are days which have been disregarded for other tests due to exceptional circumstances.*
- It is necessary to consider the facts and circumstances of your individual case and look at the whole year when determining your residence status. A change in anticipated residence in 2020-2021 may affect the prior year if it was a split year, see RDRM13230.*

## Residence – Q & A's

***10. How will exceptional circumstances apply to individuals working abroad on a split tax year basis, where their employer has told them to come back to the UK?***

- *Split year treatment is only available if you are resident in the UK for a tax year. You will need to consider your circumstances across the entire tax year before you consider if you qualify for split year treatment and from what date the year will be split.*

## Residence – Q & A's

***11. As a trustee of a non-UK resident trust, if I am unable to leave the UK due to COVID-19 travel restrictions, how will my presence in the UK affect the trust?***

- There are no special rules for determining the residence status of a trustee, the SRT rules apply. Days spent in the UK as a result of exceptional circumstances will be considered in determining whether you have become UK resident. If you become UK resident, this could affect the residence of the trustees as a body.*

## **Residence – Q & A's**

### *Company residence*

***12. Have HMRC considered the situation where people are working in a country they are not usually in and their company changing residence as a result of place of central management and control?***

- HMRC does not believe such travel restrictions will necessarily result in a change of a company's tax residence, or cause there to be a UK permanent establishment and has published guidance in INTM120185 and INTM261010. HMRC believes the guidance is consistent with the Analysis of Tax Treaties and the Impact of the COVID-19 pandemic guidance published by the OECD Secretariat on 3 April 2020.*

## Residence – Q & A's

### ***Domicile and deemed domicile***

- *If you aren't domiciled in the UK under common law, you are treated as domiciled in the UK for all tax purposes if either Condition A or Condition B is met.*
  - *Condition A - to meet this condition you must:*
    - *be born in the UK*
    - *have the UK as your domicile of origin*
    - *be resident in the UK for 2017-2018, or later years*
  - *Condition B is met when you've been UK resident for at least 15 of the 20 tax years immediately before the relevant tax year.*
  - *If you are deemed domiciled in the UK, you will no longer be able to claim the remittance basis of taxation and will be assessed on your worldwide income and gains on the arising basis. Guidance on domicile and deemed domicile is available at RDRM20000 onwards.*
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## Residence – Q & A's

***13. If I was planning to leave the UK during 2020-2021 so that I do not become deemed domiciled in 2021-2022, but I am unable to do so because of the restrictions currently in place, how am I affected?***

- There have been no changes to the deemed domiciled rules. Deemed domicile does not turn on the residence of any one tax year, but the pattern of residence over a 20 year period. You will not become deemed domiciled in the UK in 2021-2022, unless prior to 2020-2021 you were tax resident for an additional 14 of the immediately previous 19 years.*

## Residence – Q & A's

### *Remittance basis*

***14. Is there any relief for non-UK domiciled UK tax residents who need to bring foreign income or gains (FIG) taxed on the remittance basis to the UK to support their business?***

- *FIG brought to the UK to support an eligible target company during the COVID-19 restrictions can benefit from Business Investment Relief (see RDRM34300 onwards). FIG brought to the UK to support your self-employment business is a chargeable remittance.*



## Residence – Q & A's

***15. I usually carry out the duties of my employment both in the UK and abroad. I am non-UK domiciled and the duties I carry out abroad are taxed on the remittance basis. If I am unable to travel due to travel restrictions, how will I be taxed if I carry out my overseas duties in the UK?***

- There have been no changes to the current legislation. The earnings for the duties you perform in the UK will be treated as earnings in respect of UK duties. These earnings will not be eligible for the remittance basis and they will be taxed on the arising basis.*

## Residence – Q & A's

### *Double Taxation*

***16. I live abroad with my family and I am treaty resident in an overseas country. Will there be any impact on me as I have been stranded in the UK due to travel restrictions?***

- *Treaty residence is determined using a series of tie breaker tests (for example, permanent home, centre of vital interests, habitual abode and nationality). Although you may become resident in the UK under the statutory residence test, your residence under a treaty will not change due to your temporary dislocation.*

## Residence – Q & A's

***17. How will the employment article within a treaty be applied while I am working in the UK but for an overseas employer?***

- *There is no change to the employment article and how it applies will depend on your circumstances.*

## Residence – Q & A's

- Analysis.
- Further changes?
- Other jurisdictions?

## Dealing with HMRC

- Much publicised delays in public facing roles.
- Suspension of some enquiries. In particular, there is a concessionary delay in expecting people to comply with information notices.
- But, time limits for filing remain and there is a lack of clarity about the effect of time limits in specific cases: do you have a reasonable excuse on the facts of a case?
- Payment deadlines unaffected except VAT payments and July self employment instalment payments.

## Thank you ... and Disclaimer

- **DISCLAIMER:** Neither these notes nor the talk based on them nor anything said in the discussion session constitute legal advice. They are simply an expression of the speaker's views, put forward for consideration and discussion. No action should be taken or refrained from in reliance on them but independent professional advice should be taken in every case. Neither the speaker nor 5 Stone Buildings accepts any legal responsibility for them.

**THANK YOU FOR YOUR ATTENDANCE**

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