

Residence Rules

"Gaines–Cooper" and Revenue Guidance

In *Gaines-Cooper*, the Court of Appeal considered the position of individuals who limit their time in the UK to 90 days or less per annum in an effort to establish non-resident status. It sent a clear message that this is often insufficient.

The case follows an effective change of practice by the Revenue and is of concern for any individuals who have left the UK and attempted to establish non-resident status, or plan to do so, while retaining links to the country.

There is no statutory definition of "residence", despite calls for codification since 1936. The rules are mostly derived from over a century of precedents (much preceding the days of available air travel), which are often unclear or contradictory and so individuals have had to rely on guidance published by HMRC. This was known as "IR 20" but was recently updated and renamed "HMRC 6".

In general, a person is "UK resident" if they are physically present in the UK for:

- 183 days in any one year; or
- 91 days per year on average over a four year period.

Since 1993, the availability of accommodation in the UK was generally considered to be of little relevance and so the consensus developed that counting days would ensure non-resident status. *Gaines-Cooper* was a successful challenge to this consensus.

The appellants countered that whatever the underlying law, HMRC should be bound by its published guidance. The Court of Appeal ruled that HMRC should indeed be bound but only where an individual fell squarely within

the rules. Taxpayers had a legitimate expectation that they could rely on the guidance but not any common practices or consensus as to how the guidance should be interpreted. In particular,

"there is no public law obligation of fairness which prevents the Revenue from increasing, without warning, the intensity of inquiry or scrutiny of claims to be non-resident. That the Revenue, in the past, may have adopted an attitude of laissez-faire, is not and ought not to be a guarantee that it will continue to do so, even without any prior warning of a change in attitude."

Mr Gaines-Cooper was a good test case from the perspective of HMRC. He retained his home in the UK and his family lived here for long periods.

Application of the new guidance – becoming non-resident

Wider issues than day-counting become significant where a UK resident individual seeks to become non-resident. Here, the Court found that more than day-counting was required but that the guidance was not clear enough to establish a bright line test of other factors, giving the Revenue room to challenge arrangements that they considered unacceptable. They are likely to take advantage of this in the coming years.

The Revenue have added some detail to their new guidance in HMRC6 but left it vague, avoiding the creation of a reliable test. That said, the additional detail is helpful and the findings in

Gaines-Cooper give us more insight into the two principle methods of reliably obtaining non-residence status. These are described below.

Full time employment

HMRC6 confirms that an individual can become non-resident if they take full-time employment overseas. This category does **not** require the severing of links to the UK. It is available where an individual:

- has left to work abroad under a contract of employment for at least a whole tax year
- has physically left the UK to begin employment abroad and not, for example, to have a holiday until they begin their employment
- will be absent from the UK for at least a whole tax year and
- keeps their visits to the UK after they have left to begin overseas employment within the day counting rules

These rules will apply to the self-employed in a trade or profession provided they can show that the same working circumstances apply.

The employment (and, by extension, self-employment) must be in place from the start of the tax year in which the individual is claiming non-residence. Mr Davies and Mr James, the co-appellants in *Gaines-Cooper* had left the UK in March but did not begin their employment until mid-April. This prevented them becoming non-resident until the following tax year.

Leaving the UK permanently or indefinitely

Alternatively, an individual able to sever their links to the UK can leave the UK **permanently or indefinitely**. HMRC6 now provides:

"By leaving the UK 'permanently' we mean that you are leaving the country to live abroad and will not return here to live. By leaving 'indefinitely' we mean that you are leaving to live abroad for a long time (at least three years) but you acknowledge that you might eventually return to live here.

After you leave the country, your UK residence and ordinary residence position will be affected by a number of factors which include:

- the reason you have left the UK (for example to work or live abroad permanently)
- what visits you make to the UK after you have left
- what connections you keep in the UK such as family, property, business and social connections."

Any individual wishing to become non-resident but not taking up full-time employment will have to ensure that they minimise all of the above factors. The rules are likely to be interpreted strictly and so a person should ensure that they acquire accommodation before leaving the UK and occupy their new home as soon as possible.

Conclusions / Action

The changes are not entirely new as many of the facts in *Gaines-Cooper* were identified at the Special Commissioners tribunal but the Court of Appeal hearing brings the appeal process to an end. Individuals leaving the UK but retaining some connections must take much greater care to ensure that they lose their residence status.

In particular:

- The newly non-resident and particularly the self employed or happily unemployed should retain clear evidence of:
 - the date they left the UK (e.g. boarding cards)
 - when they acquired their new home (purchase or rental agreements)
 - when they began their new occupation (employment contract or initial steps in business)
 - the movement of possessions from the UK to the new country (e.g. transport invoices)
 - time spent in the UK, particularly during the first few years of non-residence and
 - the reasons for each visit to the UK
- Those not taking up full-time employment of self-employment abroad should minimise their links with the UK and take their family with them (they may wish to do this for reasons other than tax planning).
- Ideally, UK homes should be sold or at least let so that they are no longer available as accommodation.
- Individuals who have recently left the UK or who are wishing to leave should expect greater scrutiny of their circumstances. In the event of doubt in the light of the ruling and new guidance, they should take advice immediately.

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