UK residency update

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CATEGORY:
ARTICLE

On Monday the Court of Appeal released its decision in the judicial review of the Robert Gaines-Cooper case. The appeal was heard together with two other similar appeals by Robert Davies and Michael James.

Background

The saga of Mr Gaines-Cooper began in October 2006, when the Special Commissioners (now part of the Tax Tribunals) determined that despite him seeking to claim residency in the Seychelles, he had remained resident in the UK.

A key part of Mr Gaines-Cooper's case was that he had relied on guidance issued by HMRC (known as IR20) that set out the circumstances in which an individual would, or would not, be treated as resident in the UK and therefore liable to UK income and capital gains tax. A key part of the guidance that Mr Gaines-Cooper relied on was that spending less than 91 days a year in the UK would mean that he could not be treated as UK resident. In particular he had relied on days of arrival in and departure from the UK not being counted for the purposes of the 91-day test to spend the weekend in the UK, flying in on Saturday and out on Sunday to avoid the visit being counted. This led to the Special Commissioners deciding that in his case the number of nights in the UK should be counted rather than the number of days, an approach that has since been enshrined in HMRC guidance, with a 'day' now meaning presence at midnight.

Davies and James relied on different guidance in IR20 that individuals who go abroad to work under a full-time contract of employment would also not be treated as resident in the UK.

The taxpayers all claimed that they had a legitimate expectation that the guidance set out in IR20 would be applied to them and as such, if they followed it, it gave them a binding assurance that they would not be treated as UK resident.

The decision

The Court of Appeal decided that a statement formally published by HMRC can be regarded as binding, subject to its terms, in relation to any case falling clearly within the terms of that statement. IR20 set out a limited number of specific situations in which a taxpayer would be treated as non-UK resident. If the taxpayer fell within those situations then HMRC had said that they would treat the taxpayer as falling within that guidance and would not resile from this.
However, a taxpayer had to fall clearly with the terms of the guidance, Messrs Gaines-Cooper, Davies and James had not.

Comment

There has been a great deal of interest in this case and in particular that Mr Gaines-Cooper was found to have never left the UK, notwithstanding that he claimed to have spent less than 91 days a year in the UK (although the facts were disputed).

However, one of the great myths of tax planning is that spending less than 91 days (or nights) in the UK is sufficient for an individual not to be treated as resident here. The reality is that this is not and never has been the case and the test of whether or not an individual should cease to be treated as UK resident is much more complicated and uncertain, as Mr Gaines-Cooper has found to his cost.

In order to cease to be treated as UK resident, a taxpayer has to make a distinct break of his ties with the UK and to properly establish himself in another jurisdiction. As such it is a question of fact in each case and a question of all the facts of an individual's lifestyle, not simply the number of days spent in the UK. As the Court of Appeal noted, while an individual who spends more than 91 days a year in the UK will be treated as UK resident (although this is not always the case), spending less than 91 days a year in the UK does not necessarily mean that he will be non-resident. In fact it is apparent from case-law that it may be possible for a taxpayer who does not step foot in the UK for a whole tax year still to be treated as UK resident for tax purposes if they have not properly established themselves abroad.

This case does not represent a change in the law but reinforces what has always been good advice to individuals seeking to lose UK residency. They should make a complete break with the UK and keep their visits to a bare minimum, well below 91 days and not to exploit perceived loopholes in HMRC's guidance.

Although these cases deal with individuals who were seeking to lose UK residency and are not directly applicable to those who are non-UK resident and are trying to avoid becoming so, they are perhaps emblematic of an increasingly aggressive approach by HMRC in enforcing the UK's residency rules. While it is easier for those who have never been UK resident to remain so, non-residents should still ensure that they come well within the 91-day test and maintain strong links with their home jurisdiction.

The future

IR20 was withdrawn following the decision in the earlier Gaines-Cooper case and has since been replaced with HMRC6, which sets out HMRC's current guidance for taxpayers seeking to establish residence in or out of the UK. This guidance makes it clear that it is only HRMC's interpretation of the law and cannot be relied on in court.

The uncertainty in the UK residency rules that has given rise to this case is unhelpful and is one of the main factors that is increasingly driving wealth creators away from the UK and is placing the UK at a competitive disadvantage in an international context. HMRC confirmed earlier this week that despite extensive consultation they would not be introducing a statutory residence test in the Finance Bill this year, which would remedy the uncertainty. Instead they are allowing this unsatisfactory position to continue, so that even an individual who leaves the UK for a whole tax year and does not return for a single day cannot definitively be said to be non-UK resident.

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