A distinct break

RORY COCHRANE considers the importance of the Upper Tribunal's decision in a recent case concerning UK resident status.

The question of whether a person is resident in the UK is of fundamental importance in many instances. Before 2013/14, this important question fell to be determined by reference to common law. As many advisers will know, it is a fact-sensitive enquiry and can be difficult to apply. Nevertheless, many cases remain to be resolved under the common law rules that were in force before the statutory residence test was introduced by FA 2013, Sch 45. On 12 October 2015, the Upper Tribunal handed down its judgment in *CRC v James Glyn* [2015] UKUT 0551 (tinyurl.com/hv6dsqc). This allowed HMRC's appeal and set out useful guidance on the determination of residence under common law.

Background

The case in question centred on whether James Glyn, a British citizen, had ceased to be resident in the UK before 2005/06. From 1993, Mr and Mrs Glyn had lived in St John's Wood, London, in a house that they and their children (adults at the time) regarded as the family home. In 2004/05, Mr Glyn made the decision to become non-resident before receiving a "special dividend", paid after the liquidation of assets held by his company (at least in part because of the tax advantages that would ensue).

Mr and Mrs Glyn leased a property in Monaco and Mr Glyn moved there in April 2005, but retained the family's home in St John's Wood.

KEY POINTS

- There may remain cases where UK residence status has yet to be determined for years before 2013/14.
- In 2004/05, the taxpayer sought to become non-resident before receiving a special dividend.
- The taxpayer returned to the UK 22 times in 2005/06.
- To become not resident in the UK requires a distinct break in their pattern of life.
- *Reed v Clark* confirmed that the concept of "settled purpose" did not determine UK residence status.
- Whether a person has ceased to be resident in the UK is to be determined by reference to the common law test, not by *IR20*.

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Mr Glyn made 22 visits to London (during which he stayed in the family home) during 2005/06. These visits were for various reasons including birthdays, travel and business meetings. In 2010, Mr Glyn returned to the UK permanently.

The sole issue for determination by the First-tier Tribunal (TC03029 at tinyurl.com/oj2kgxk) was whether Mr Glyn had ceased to be resident in the UK for 2005/06. The tribunal concluded that he was not resident. The Upper Tribunal allowed HMRC's appeal and remitted the case for rehearing by a differently constituted First-tier Tribunal.

HMRC advanced five grounds of appeal, which the Upper Tribunal dealt with out of sequence. The most important findings are dealt with below in the order the tribunal considered them.

HMRC argued that the First-tier Tribunal had made findings that were contrary to contemporaneous documents, witness evidence and the parties' submissions. These indicated that Mr Glyn's "dominant real reason" for the retention of the family home was the desire to live there at the end of the intended five-year period of claimed non-residence. It had "nothing or at least very little to do with interim use whilst [Mr Glyn] and Sarah were in Monaco".

The Upper Tribunal affirmed that the approach to challenging findings of fact on appeal was as set out in *Georgiou v CCE* [1996] STC 463 at 476. In that case, Evans LJ established that the appropriate test was whether there was enough evidence to support the finding made by the tribunal: "…if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled." Paragraph 55 of the judgment set out four steps that must be taken for a question of law to arise. The appellant must:

- identify the finding that is challenged;
- show that it is significant in relation to the conclusion;
- identify the evidence that was relevant to the finding; and
- show that the finding, on the basis of that evidence, was one the tribunal was not entitled to make.

The Upper Tribunal considered that the evidence showed that there were various reasons why the family home was retained, including Mrs Glyn's desire to remain resident in the UK. The tribunal therefore agreed with HMRC that there was "no proper basis in the evidence for a conclusion that there was a single, dominant or fundamental reason for the retention" of the family home.

Distinct break and settled purpose

The Upper Tribunal then examined the First-tier Tribunal's consideration of Mr Glyn's visits to the UK – whether there was a "distinct break" and the relevance of "settled purpose".

The lower court made many references in its decision to "settled purpose". It took account of whether the family home was a habitual abode in the UK for a settled purpose, as well as whether Mr Glyn's returns to the UK were for a settled purpose. The Upper Tribunal concluded that none of the purposes for which Mr Glyn visited the London house was "settled".

The Upper Tribunal first considered the Supreme Court's decision in *R (oao Gaines-Cooper) v CRC* [2011] STC 2249 on the question of residence. In that judgment, Lord Wilson pointed out that, to become non-resident in the UK, the law requires that a person effect a "distinct break" in their pattern of life here. In *Reed v Clark* [1985] STC 323, Nicholls J pointed out that the concept of residence for a "settled purpose" had been invoked in the context of determining whether a taxpayer previously resident in the UK had acquired more than "occasional residence" abroad: it was not a test to determine whether the taxpayer had retained residence in the UK. The Upper Tribunal confirmed that the presence or absence of a "settled purpose" was not determinative of whether a person resident in the UK had ceased to be so resident.

HMRC submitted that the First-tier Tribunal impermissibly applied a test of whether return visits to the UK were for a single settled purpose, which was legally irrelevant. Further, although the existence of one or more settled purposes may be relevant to determine whether a person is "ordinarily resident", it is not relevant when considering whether a person resident in the UK has ceased to be so resident. Mr Glyn did not dispute that it was irrelevant to ask whether he had a settled purpose, or a single or dominant purpose, for his return visits to the UK. He argued, however, that the phrase was simply "unfortunate" shorthand for a factual assessment and had not been used to suggest the application of a legal test. However, the Upper Tribunal was not persuaded that the many references in the decision to "settled purpose" could be explained away. It was clear that the First-tier Tribunal had indeed adopted and applied a legally irrelevant test.

HMRC further argued that the First-tier Tribunal had focused on the wrong issues in relation to Mr Glyn's retention of the family home. It made findings on the "dominant reason" for Mr Glyn's retention of the property, as well as considering the significance of what it thought Mr Glyn would have done had he believed that the continued use of the family home would undermine his tax planning. These were irrelevant issues – in particular, his motivation for retaining a house in the UK. The question was whether the frequency and nature of Mr Glyn's visits, and generally the quality of his presence in the UK, meant that he continued to be resident in the UK.

Defining a distinct break

HMRC argued that, in considering whether Mr Glyn had made a distinct break with the UK when he took up residence in Monaco in April 2005, the First-tier Tribunal had taken into account irrelevant considerations and ignored relevant considerations. Thus, the lower tribunal made findings not justified by the evidence. The Upper Tribunal agreed with HMRC that the First-tier Tribunal had made errors. For example, it had failed to be "balanced" in its assessment of the evidence on the "loosening" of Mr Glyn's social ties. More importantly, the First-tier Tribunal had erroneously focused on the "purpose" for which Mr Glyn visited the UK rather than consider whether "what he did while he was in London and where he did it" implied he had "ceased to be resident in the UK".

HMRC's guidance

A final point relates to the treatment of HMRC's booklet: *IR20: Residence and non-residence: Liability to tax in the UK*. HMRC argued that the First-tier Tribunal was impermissibly influenced by the booklet in its determination of this case.

As is well known, *IR20* was the subject of judicial review proceedings in *Gaines-Cooper*. The Supreme Court, affirming the Court of Appeal, established that the question of whether a person has ceased to be resident in the UK is to be determined by reference to the common law test, not by *IR20*. In particular, the limit on return visits to the UK of fewer than 91 days was not relevant to determining whether UK residence had ceased, although clearly the fact of the visits is relevant.

Mr Glyn submitted that his case had always been put on the basis of the law rather than *IR20*. However, his case had referred to *IR20* because it "explained Mr Glyn's actions and showed that his intention was always to become non-resident". The Upper Tribunal noted that the First-tier Tribunal did in fact state that the booklet had only "one marginal relevance", which related to the family home. However, the Upper Tribunal concluded that Mr Glyn's intention was not a relevant factor of any significance in determining whether, as a matter of fact and law, he had become non-resident from April 2005. However, the First-tier Tribunal had repeatedly referred to the booklet, and it was clear from its conclusion (with regard to the 91-day limit in it) that it had been materially influenced by *IR20*, and it should not have been.

Conclusion

With this decision, the Upper Tribunal made clear that it would not hesitate to intervene in the findings of the First-tier Tribunal if things went wrong. The decision also affirmed that, for return visits to the UK by a taxpayer claiming to have become non-resident, the enquiry must focus on the frequency and nature and the quality of the taxpayer's presence in the UK rather than on whether the trips were for any "settled" purpose. The final outcome of this case will now depend on a re-hearing before the First-tier Tribunal. ■

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