

**Board of Tax Residency call with the UK HMRC (26 October 2016)**

**Attendees:**

UK:

s 47F

Australia: s 22

**Summary:**

- The SRT was not implemented because of any perceived "flaws" or legal shortcomings etc in the former residency rules, or to enhance integrity with regard to manipulation of the rules.
- The objective of the SRT was simply to codify existing case-law precedent into the tax legislation to make compliance with the residence rules simpler.
- For the most part, outcomes pre and post the SRT are expected to remain the same.
- Although a process of simplification, drafting and implementing the SRT proved much more difficult than envisaged and took a considerably longer time than expected.
- The final SRT product is considered to provide less flexible application of the rules by the HMRC. This was not necessarily an intended feature of the drafting or implementation.
- HMRC consider the application of the SRT to be very clear and able to be worked through with a very clear outcome for taxpayers and the HMRC.
- The SRT has reduced the level of compliance activity and litigation to unprecedented low levels.

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**Discussion:**

All attendees introduced themselves.

### Background to BoT project:

The Australian tax residency rules rely on ~~the many~~ common law definitions. We are interested in the UK's ~~perspective reasons for the move to statutorily based rules from the former given that the UK used to have the~~ common law approach and perspective from the first few income years since the SRT's implementation.

### **HMRC:**

In 2008, the UK government introduced a major reform to the remittance basis of taxation system. They also introduced special rules for individuals who were non-UK domiciled but resident in the UK.

As part of the process, the government agreed ~~that they to~~ adopt ~~the a~~ statutory definition of residence into the legislation.

### **What was the driver?**

At the time, the objective was to codify existing case-law precedent into the tax legislation. replicate the old existing rules as much as possible into the statute. That is, the outcomes under the common-law based old rules themselves were not considered an issue, it was just the level of complexity created for taxpayers that was considered could be reduced.

The former tests were only 3 or 4 clauses, and the entirety of the analysis was essentially in case law.

HMRC had published guidance on residency and were ~~The HMRC is bound by its~~ published guidance. However, where a case was disputed and it was heard in Court or Tribunal, the HMRC guidance had no weight, so happens and cases are taken to the tribunals, the tribunals we are not bound by the guidance. Even though the guidance had been prepared based on principles from case law, HMRC applied it flexibly/pragmatically. Naturally, the tribunals could arrive at different conclusions from the same set of circumstances. This results in uncertainties for the public and even officials across the department.

There was a high profile case where the HMRC was taken through the judicial review for not applying the guidance correctly. Although the decision at the end was favourable to the HMRC, it was the pivotal moment for adoption of a statutory definition.

### **Law design process:**

The "arduous" consultation for the SRT started in 2011, and the legislation was deferred for 12 months from the originally proposed commencement date.

Although the objective was to replicate/codify the old existing rules as much as possible, at the end of the drafting and implementation, the SRT, in HMRC's view, is a "very different creature".

When the UK developed the rules, they aimed to have a very as simple a test as possible – almost a tick the box exercise. However, as the legislation was constructed and safeguarded, it became clear that they could not merely rely on the mathematical, days count aspect alone (Noting, that the automatic tests are not merely day-count). The HMRC actually allowed the parties being consulted to attempt to design the SRT. They produced a draft which was based only on days count. HMRC

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thought this was overly simplistic and felt that significant ties to the UK remained relevant in some circumstances. So they compromised with an objective days count test that reverts to more analysis of significant ties (but only where needed).

It was a deliberate decision to split the rules into two: incoming individuals and outgoing individuals – to make it easier to become UK resident ~~but~~ and harder to break UK residence for a former a non-resident in an outgoing context. HMRC noted that from their perspective, there was no concern with someone becoming UK resident earlier than anticipated but that they did consider that once an individual was UK resident, it should be harder to cast off than to gain.

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They did not consider the social security aspect when drafting the rules ~~when drafting the rules~~. Essentially because of their relationship with the EU, it is very common ~~not unheard of~~ for someone to work outside the UK then come back and rely on social security in the UK (or other EU countries).

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This issue was in some ways less relevant than in Australia (including in the context queried regarding individuals who had worked outside the UK in the “accumulation phase” of their life but then retired to the UK) because their “national insurance” is available across the EU and not just in the UK.

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The ‘ties’ were also codified from common law, and the ‘topics’ are not controversial. The ties in the SRT continued to be those which were the ties given relevance by case law precedent.

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The ‘home’ test is very relevant, but ownership is not important ~~determinative~~. What is important is the quality of use of the home.

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Benefit:

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HMRC consider that in some respects the SRT has lost some of the leeway and flexibility that the HMRC were previously able to apply under the former guidance. Further, they note the legislation grew from 3 or 4 clauses for the old rules to now >160 clauses for the SRT (plus 102 pages of guidance). Once all guidance and case law were moved into the legislation to gain clarity, they lose flexibility. They replaced 3 or 4 clauses with 56 clauses of legislation plus further guidance.

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However, they consider the application of the SRT it is to be very clear, and can be worked through with a very clear outcome —this is, something which HMRC could not achieve under the previous rules.

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There was strong agreement that, the SRT has reduced the level of compliance activity and litigation to the level they never have not seen saw before. They believe there ares also compliance savings for the advisers. s 47 mentioned that the majority of his litigation and audit activity on residency issues continues to be cases under the old rules. He noted that at this stage, the number of enquiries had reduced dramatically, and the queries that had been received were far less technical.

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[RG: There was a short discussion on P85 and P86 forms. P86 form went out some time ago, but it was a form that people used to complete to tell HMRC when they arrived in the UK. People complete a Form P85 upon leaving the UK. HMRC noted that a Although P85 is a useful tool and still exists, HMRC does not insist on them; they are optional to facilitate tax refunds.]

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#### Integrity issue:

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The measure was developed as a revenue neutral (but it was deemed maybe too early to say whether this was the case at this stage).

They HMRC have developed specific SRT compliance activities, to look whether there are areas that allow is room for manipulations.

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There are specific anti avoidance rules in the SRT however that essentially claw back capital gains and other various ranges of income sources gains when a UK resident leaves the country UK and comes back returns (within 5 years).

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#### Reception:

Majority of advisers and taxpayers are happy with the SRT.

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In the initial six months, the HMRC received a lot of inquiries, but mainly due to externals having to learn the new rules.

**Unintended consequence:**

There are unintended consequences: some groups who were previously always considered to be residents for a long time, now no longer constitute a resident in some cases – for example, teachers. HMRC noted that they had rationalised this that the rules were making compliance easier for the majority and that there may be some perceived “losers” as a consequence of the change but that these should not be significant instances.

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HMRC noted that they have also ~~They~~ inserted specific rules for people working in relevant jobs: international transport workers, fishermen working offshore, lorry drivers.

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