

HR & Tax Alert



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UK – Initial Guidance from Her Majesty’s Revenue & Customs on Recent Residency Case Decision

December 2006

Executive summary

Our Alert of 16th November 2006 explained the reasoning behind the decision made by the Special Commissioners against Mr Robert Gaines-Cooper in determining his residency for UK tax purposes. As that Alert explained, the decision could have resulted in fundamental changes to the manner in which UK residency is determined for tax purposes if the Commissioner’s approach was adopted by Her Majesty’s Revenue & Customs (HMRC). HMRC have now indicated that they will not in fact seek to apply the ruling of the case in a wider context, meaning that the majority of UK taxpayers will be unaffected by the decision.

Decision in the Gaines-Cooper case

Mr Gaines-Cooper was a British national, who retained property in the UK but also established residency in the Seychelles. During some of the period under review his wife and son had been living in the UK, and Mr Gaines-Cooper spent substantial time in the UK. Mr Gaines-Cooper contended that he was a Non-Resident in the UK under domestic law on the basis that he had left the UK permanently for the Seychelles and thereafter spent less than 91 days on average in the UK per year (the “90 day rule”). The average day count was arrived at by following the Revenue practice of ignoring days of arrival and departure when counting days in the UK.

The Special Commissioners however held that Mr Gaines-Cooper was in fact resident in the UK

throughout this period, and instead chose to count days of presence based on the number of nights spent in the UK.

Implications of the Gaines-Cooper case and HMRC position

If this alternative day count were to be adopted by HMRC in determining taxpayers’ residency, it would potentially result in a large number of taxpayers being deemed UK resident who were previously Not Resident.

However, HMRC have now indicated that they will not be seeking to apply the ruling for general residency purposes. This is because in the decision against Mr Gaines-Cooper, the Special Commissioners held that he had never in fact left the UK and broken UK residency. This meant that having never ‘left’ the UK, Mr Gaines-Cooper could not rely on the 90 day rule to maintain Non Residence as his UK residency had never ceased.

Next steps

HMRC are planning to issue a Tax Bulletin during December explaining in more detail their interpretation of the case and the application of the 90 day rule. Assuming this interpretation follows the position outlined above, the UK residency of most employees assigned to and from the UK will not be affected. This is because these individuals will normally be able to prove that they are clearly leaving the UK for residency purposes, and so will be able to

continue to discount days of arrival and departure in determining their ongoing UK residency status.

It is clear that individuals who break the “90 day” rule will be regarded as resident but simply meeting the test will not always mean the individual is regarded as

non resident. In particular British nationals who have been resident in the UK for some time, will need to be mindful of the ruling and ensure that they seek further specialist advice on whether the ruling could apply to their circumstances.

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