3.9 Temporary non-residence – principles

3.9.1 Introduction

Anti-avoidance legislation exists in respect of non-residents who return to the UK within a certain time of leaving. The main aim of this legislation is stop individuals becoming non-resident for a short time during which they receive income or gains that escape taxation because the person was non-resident. For example, an individual might sell assets other than UK land and property while non-resident, and whilst therefore outside the scope of UK capital gains tax, before returning to the UK.

3.9.2 Conditions

An individual will be treated under the legislation as a temporary non-resident if:

(a) the individual has sole UK residence for a residence period;

(b) immediately following that period (referred to as "period A"), one or more residence periods occur for which the individual does not have sole UK residence;

(c) at least four out of the seven tax years immediately preceding the year of departure were either:

  (i) a tax year for which the individual had sole UK residence; or

  (ii) a split year that included a residence period for which the individual had sole UK residence; and

(d) the temporary period of non-residence is five years or less.

When looking at tax years before 2013-14, and at (c) above, the legislation goes on to state:

"(1) This paragraph applies in determining whether the test in paragraph 110(1)(c) [of FA 2013, Sch. 45] is met in relation to a tax year before the tax year 2013-14 (a "pre-commencement tax year").

(2) Paragraph 110(1) is to have effect as if for paragraph (c) there were substituted—

'(c) at least 4 out of the 7 tax years immediately preceding the year of departure was a tax year meeting the following conditions—

  (i) the individual was resident in the UK for that year, and

(ii) there was no time in that year when the individual was Treaty non-resident (see paragraph 112(3)).'

(3) Whether an individual was resident in the UK for a pre-commencement tax year is to be determined in accordance with the rules in force for determining an individual's residence for that pre-commencement tax year (and not in accordance with the statutory residence test)."

The residence period referred to in the legislation above is either:

(i) a tax year which is not a split year; or

(ii) the overseas or UK part of a split year.

Sole UK residence for the residence period is when the individual is resident in the UK for all of the tax year or the UK part of a split year, and at no time during these periods is treaty non-UK resident. An individual is treaty non-resident if he is dual resident (see **3.8**) and is regarded as resident in another country other than the UK under the relevant double tax agreement as a result of the tie-breaker clause (see **4.3.3**).

The temporary period of non-residence is from the end of period A until the start of the next period of residence for which the individual has sole residence in the UK.

In order for these anti-avoidance provisions not to apply, the individual's period of non-residence must be for more than five years (i.e. at least five years plus one day).

Example

Ella has spent all her life living in the UK and so has always been resident for UK tax purposes. Her UK employer assigns her to work in Belgium for a few years and she leaves for her overseas assignment on 1 September 2020, but visits friends in France first over the weekend before arriving in Belgium and starting work there on 4 September 2020.

Split-year treatment applies under Case 1, with the overseas part of 2020-21 starting on 4 September 2020. Two residence periods therefore exist, (i) the UK part of 2020-21 up until 3 September and (ii) the overseas part from 4 September 2020 until 5 April 2021.

Ella returns to the UK after her overseas assignment finishes on 30 November 2023, with Case 6 split-year treatment applying to split 2023-

24, the UK part of the year starting on 30 November 2023, the day after she stops working overseas.

While working full-time in Belgium she satisfies the third automatic overseas test. As a result she is non-resident for 2021-22 and 2022-23 for UK tax purposes. She is regarded as resident for tax purposes in Belgium from when she arrives there, so from 4 September 2020, and so is a dual resident for treaty purposes from this date until 5 April 2021. Under the tie-breaker clause of the double tax treaty between the UK and Belgium, she is regarded as treaty resident in Belgium from 4 September 2020 and so treaty non-resident in the UK from this date until 5 April 2021.

Ella is a sole resident in the UK up until 3 September 2020 (the end of Period A which is from 6 April to 3 September 2020). Therefore the maximum temporary period of non-residence is from 4 September 2020 until 3 September 2025. As Ella returns to the UK within this five-year period, she will be temporarily non-resident, and any income or gains she receives while living and working in Belgium, if covered by these provisions (see **3.10**), will become taxable in the UK in the tax year of her return when she becomes a sole resident again in the UK, so during 2023-24.

Say, though, that Ella's circumstances were different, and that she had previously been on assignment to France where she had been resident for four years, and was not resident in the UK for the tax years 2014-15 through to and including 2017-18. This would mean that of the seven tax years before the year of departure of 2020-21 (2013-14 to 2019-20) she was resident only for three of these tax years and not the required four years for the temporary non-residence rules to apply. In this situation, the temporary non-residence rules would not apply and so any income or gains affected by these rules which Ella received during her time in Belgium would not become taxable when she returns to the UK from her assignment there on 30 November 2023.

3.9.3 Year of departure

The legislation refers to the "year of departure". However, for the purposes of temporary non-residence, this may be before the individual actually leaves the UK, as shown in the example below, as it is defined as the tax year consisting of or including period A.

One such scenario is if an individual does not qualify for split-year treatment for the tax year he leaves the UK, in which case the start of the period of temporary non-residence may be dependent on when he

becomes resident in the country he has moved to and the effect of any double tax treaty in place.

Example

Say that Ella, in the above example, leaves the UK on 1 September 2020, having lived in the UK all her life.

She keeps her home in the UK available for her own use while away and does not satisfy the third automatic overseas test, working full-time overseas, so does not qualify for split-year treatment (so the residence period is the whole of the 2020-21 tax year, as opposed to the UK part up until 3 September 2020) and she does not become resident in Belgium until 1 January 2021. If she is treaty resident in Belgium from this date (and so treaty non-resident in the UK) her period of temporary non-residence will commence on 6 April 2020, the start of 2020-21, as she will have been treaty non-resident for part of the 2020-21 tax year, the residence period, and so does not have sole UK residence for all of this residence period, the 2020-21 tax year.

Ella's "year of departure" for these provisions is therefore 2019-20. Her period of temporary non-residence is from 6 April 2020 until 30 November 2023. If, say, Ella is not resident in Belgium until after 5 April 2021, then she will have sole residence in the UK for all of 2020-21 and so the period of temporary non-residence will potentially not start until after 5 April 2021.

Example 1 at RDRM 12650 also shows the effect of not qualifying for split-year treatment in the year of departure from the UK.

Tax treaties may also have an effect even when split-year treatment is applicable. For example, if an individual moved overseas and became treaty non-resident in the UK before the start of the overseas part of the split tax year, then for part of the UK part he would have been treaty non-resident and so cannot be a sole resident for the UK part.

The "period of return" is defined in the legislation as "the first residence period after period A for which the individual has sole UK residence". Again, as with the year of departure, this may not be in the same tax year as the individual's actual return to the UK, depending on the situation.

These anti-avoidance rules are likely to affect individuals who live overseas for a short time, so anyone intending to live overseas for potentially less than six years and with any of the income below (at