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GES NewsFlash United Kingdom – Gaines-Cooper V2

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Summary

In an important ruling on the status of HMRC's published guidance to taxpayers, the Court of Appeal has affirmed that HMRC is bound by assurances given in its published guidance on residence (booklet IR20). Taxpayers who fall within a situation set out by HMRC in that booklet are entitled to rely on the guidance, and HMRC must follow it. The Court found that HMRC's residence guidance in IR20 "was plainly within the Revenue's powers of providing statements of practice and identifying how it proposed to deal with the residential status of taxpayers in particular circumstances". It refused to endorse HMRC's assertion that IR20 is "no more than guidance" because it cannot bind HMRC to treat someone as non-resident if they are not.

Despite this initial encouragement, both Davies and James and Robert Gaines-Cooper lost their appeals against HMRC's refusal to apply IR20 in their favour. This was because evaluation of an individual's residence position involves difficult questions of fact and judgement, and the taxpayers could not show that HMRC had applied their guidance incorrectly in those cases. In particular, an employee is not treated in any year as non-resident because he has left the UK for full-time employment abroad unless the employment has commenced by the start of that tax year. Also, if a taxpayer claimed to be non-resident because he had left the UK permanently or indefinitely, that reasonably implied that he had made a clear break with his social and family attachments in the UK. In both cases the Court found that the Revenue's view of IR20 was the right one. When IR20 talks of "leaving" the UK, what that means is taken from the context. "Leaving" the UK to work abroad is not the same as "leaving" the UK to live abroad permanently or indefinitely. The latter implies a clear break, and reducing family and social ties. In cases where individuals are required to show a clear break from the UK, the Court noted that the quality of the links to the other country are relevant, but not determinative, since the extent of ties retained in the UK is also relevant.

One of the most interesting features for employers is the Court's clear finding that an employee who leaves the UK to work full-time abroad is not required by the IR20

guidance to have given up his social and family connections for the period that he is abroad. “There is no need to be concerned with any persisting social or family ties in the UK, unless those ties themselves cast doubt on whether the employment is genuinely full time”. The Court noted that following publication of a statement about the residence position of “mobile workers” in 2001, HMRC had assured tax advisers that long-distance commuters who worked full-time abroad would not be treated as remaining UK resident on account of their social and family ties in the UK.

Advisers complained that in recent years HMRC had re-interpreted IR20, so that it was more difficult for individuals going abroad to be treated as non-resident, but had not announced any change of practice. This had been described as a “betrayal of trust” making IR20 into a “trap”. Counsel for the taxpayers contended that in recent years HMRC had started to argue that employees working full-time abroad must have left the UK in the residential sense, i.e. made a clear break before they may be treated as non-resident. HMRC admitted that they had started to investigate non-residence claims more thoroughly, but stoutly denied any change of practice. On this issue the Court supported HMRC, noting that the evidence against HMRC was not conclusive.

Professional advisers may find it difficult to reconcile this conclusion with their own experience of residence challenges in recent years.

Deloitte's View

The Court of Appeal has made clear that it is both appropriate and desirable for HMRC to publish general taxpayer guidance on residence, such as IR20. The Court acknowledges, though, that the application of the guidance to the particular circumstances of a taxpayer is not necessarily straightforward – facts have to be weighed and value judgments made.

In the short-term this judgment could benefit employers and employees in two ways. First, it should (and may) stimulate HMRC to use the powers they have to make their published guidance on residence in HMRC 6 clearer and less caveated. HMRC have previously said they will revise HMRC 6 to take into account this awaited judgment. Secondly, the guidance supports employees claiming non-residence on the basis that they are employed full-time abroad over a complete tax year, in circumstances where they have retained accommodation and family connections in the UK (and return visits to the UK do not exceed 91 days average). Unfortunately, though, the Court does not properly explain the difference in the residence position of mobile workers (who are required to “leave” the UK to become non-resident, despite being in full-time employment abroad) and long-distance commuters (who are not). The Court agreed with HMRC that mobile workers remain resident because they continue to “live” in the UK and had not therefore “left”. But on what basis do you then

distinguish the position of long-distance commuters and mobile executives who work full-time abroad? The Court clearly approved of HMRC making the distinction, but failed to appreciate that it was fragile and unclear and was bound to lead to further difficulties, which persist.

The judgment offers little to individuals who are not employees and who leave the UK and claim non-residence. In particular, it affirms that HMRC are right to treat them as remaining resident if they have not made a clear break with their social and family connections in the UK. In particular, going abroad permanently or indefinitely and keeping return visits to under 91 days average is not enough to achieve non-residence.

In the longer term the clear difference in approach in the treatment of employees and other individuals highlighted by this judgment may call into question why such a distinction should continue.

People to Contact

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