

# STRATEGIC TAX PLANNING PARTNERSHIP

International & UK Tax Consultants

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## **NON-RESIDENCE - LATEST DEVELOPMENTS AN UPDATE**

Since my last Article, there have been more twists and turns (in the form of two big cases) on the issue of how to achieve Non-Residence.

This is both troubling and unhelpful, since Non-Residence is perhaps the most effective way for High Net Worth Individuals to avoid the 50% Tax hike coming in April and is under consideration by many City Workers, Entrepreneurs and High Income earners.

Over Christmas, the First Tier Tax Tribunal Decision in the case of *Hankinson –v- HMRC 2009 TC 00319* was published.

This concerned a successful Entrepreneur who held his shares in Bison Limited (his UK Company) via Non-Resident Trusts.

The method chosen to extract the gain tax free was for Mr Hankinson to spend 15 months working full-time in a Dutch Subsidiary of the Company.

The Capital Gains Tax at stake was just over £30m without adding a penalty and 11 years of interest!

The principal issue in the case was whether Mr Hankinson was Ordinarily Resident in the UK at the time the capital gains crystallised in March 1999.

Mr Hankinson would need to rely on Section 2.2 of IR20 that would treat him as Non-Resident and Ordinarily Resident if he was working abroad full-time for a period covering a whole tax year.

On the facts, the Tribunal found that he did not appear to work full-time for the Dutch Subsidiary and continued to do work in England for the main Bison Company and his other investment Companies. Further, on 2<sup>nd</sup> January 1999 he took ill on a flight to Barbados and returned to the UK on 30<sup>th</sup> April 1999 and never returned to the Netherlands to work.

His appeal on these issues were dismissed.

Yet again, this case (which came to light by means of a discovery assessment made in January 2005) demonstrates evidence of bad advice and poor execution.

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This case is the product of an approach by some Advisors (I'm still seeing today) that Clients only had to pay "Lip Service" to being Non-Resident and that sticking to "*day counting*" would suffice.

The only glimmer of hope for Mr Hankinson is that the Tribunal Judge appears to have made a clear "faux pas" in relying not on the Opinion of the Dutch Tax Authorities or an Independent local Tax Lawyer as to their rules on Tax Residence, but on a letter from the Client's Dutch Tax Advisors written in March 1998. (That letter should in my view, never have been seen by the Tribunal, anyway).

Although the Tribunal Judge then gives Mr Hankinson the *benefit of the doubt* and proceeds to analyse whether the Tie-breaker Clause in the Treaty would protect him; his conclusion, (probably correct) is that it would not.

Mr Hankinson has already embarked on a Judicial Review and will no doubt appeal this decision.

There is a clear lesson here that taking good advice and sticking to it can pay dividends, especially where large amounts of tax are at stake.

The long running saga of *Robert Gaines-Cooper (Davies & Anor, R (on the application of) –v- HM Revenue Customs [2010] EWCA Civ 83 (16 February 2010)* culminated in the Court of Appeal dismissing his Judicial Review application on the ability to rely on HMRC's Guidance Booklet on Residence (IR20) as to the treatment of Taxpayers claiming Non-Residence.

Gaines-Cooper joined forces with two other appellants Davies and Wilkie (UK Property Developers) who were claiming to be Non-Resident for 2001-2002 on the same grounds as Mr Hankinson; full-time work abroad but this time in Belgium.

Gaines-Cooper's case revolved around whether he needed to make a "*Distinct Break*" with the UK or could rely on the Guidance in IR20 which appears to refer only to the number of days spent in the UK in a tax year.

Whilst Davies and Wilkie's issue, the ability to rely on IR20 appeared identical (from the greater sympathy for Davies and Wilkie particularly from Lord Justice Ward) it appears that joining their appeals with Gaines-Cooper may not have been the wisest strategy, except of course from a costs perspective.

Gaines-Cooper is someone who maintained a large house, collection of cars, guns, a wife and child in the UK and, in my view did not have any realistic chance of success as the finding of facts against him in the Special Commissioners were essentially fatal to his case.

There was a claim (backed up by several expert witnesses) that HMRC changed their approach to Residence Cases and in particular IR20 from the tax year 2004-2005.

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In fact, the evidence points (and my personal experience concurs with this) that the change in policy occurred in 2001 and in particular, from the April 2001 publication of an Article (*Personal Residence "Mobile Workers" Living in the UK in Tax Bulletin 52*) on Mobile Workers. This supposedly impacted on those claiming Non-Residence under Section 2.2 but the reality is that this is when HMRC changed their approach on the "*Distinct Break*" issue as well!

Lord Justice Moses did not think this amounted to sufficient grounds to protect any of the Clients and the confusion of the expert witnesses in focussing on the wrong dateline was not (in my view) helpful.

The Appellants will appeal to the Supreme Court but hopefully separately!

HMRC will no doubt see this as an absolute victory and it will lead to more Enquiries and Challenges on Residence status where Capital Gains Tax and Income Tax from UK activities are at stake.

My view is that the Court of Appeal has actually made it clear that HMRC must stick to their position as stated in IR20 (or HMRC 6 its successor), if the Taxpayers fall within the relevant section. Falling within the terms of either full-time employment or achieving the "*Distinct Break*" are therefore critical.

The other problem I have with the Court of Appeal Decision is that HMRC's Counsel has persuaded the Courts that the old and contradictory cases on Residence have clear and consistent principles that are of wide application and that IR20 (and HMRC 6) accord (more or less) with those principles. That is just simply not true and it seems only the Supreme Court will be able to clarify that. Hopes of a statutory definition on Residence as an alternative is extremely unlikely.

## Conclusion

The end result is that any Client contemplating Non-Residence for tax purposes needs clear Tax Law advice from an Expert on the "Distinct Break" (as I advocated in my earlier Article dated 1st December 2009 ). Another level of protection can be added by making sure that the Client is Resident under local Tax Law in a Country with a Double Tax Treaty with the UK: And would be treated as such under the Tie-breaker Clause on Residence, in that Treaty!

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