

STRATEGIC TAX PLANNING

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NON-RESIDENCE - LATEST DEVELOPMENTS

GAINES-COOPER in the SUPREME COURT

The long awaited Judgment in the Gaines-Cooper Supreme Court Case was finally released on Wednesday 19th October 2011.

This links in with my previous Articles of 1st March 2010 and my last Article on Non-Residence Latest Developments on 20 September 2010 (see previous Articles on our website: www.stratax.co.uk).

First the outcome.

As I correctly predicted previously, there were very few surprises in the Supreme Court decision and the Appeals of both *Davies and James* and *Gaines-Cooper* were both dismissed. (This might not be the end of Litigation as Gaines-Cooper has been reported as intending to appeal to the European Court of Justice).

The leading Judgment of the Court was given by Lord Wilson who went into a deep and stringent analysis of the basis on which any Appeal could be successful. That basis would be that the statements in IR20 (the Booklet of Guidance on Residence) deviated so substantially from the actual law and constituted clear representations of HMRC practice, that gave rise to a Legitimate Expectation that they could be relied on. In other words, whether or not on a Case Law basis either of the Appellants were Resident in the UK and had failed to sever their ties or taken sufficient steps towards a “Distinct Break” that would make them non-Resident; on the basis of the Guidance in IR20 there was a Legitimate Expectation that in spite of the Law HMRC would just apply their own more lenient practice and this could be relied upon.

Lord Wilson, after analysing the facts, the Case Law and details of HMRC practice, felt that overall there wasn't enough evidence to substantiate the Appellants' claim even though IR20 was not well written and therefore, their case should be dismissed.

He was also critical of the approach taken by Gaines-Cooper in that there had been previous determinations of the Special Commissioners in relation to the facts with regard to his case, where in contrast in the *Davies and James* Case, any hearing in the Special Commissioners (now the First Tier Tax Tribunal) was stayed until the outcome of this Case.

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There is therefore a very faint glimmer of hope for both *Davis and James* in that they could be successful at the First Tier Tribunal. However, that decision would also be capable of appeal all the way back up to the Supreme Court.

As I mentioned in my previous Article of March 2010, it was my impression that there was sufficient difference in the *Davies and James* Case that they had a far better chance than Mr Gaines-Cooper and it appears that Lord Wilson found this too.

There is also of interest a dissenting Judgment from Lord Mance who actually took a rather more practical approach to the basis of IR20 and viewed it as being so woolly, unclear, contradictory and at odds with the Law that really it could create a Legitimate Expectation sufficient for the Appellants to win. He also saw greater strength in the Case of *Davies and James*.

That being said, all the other Law Lords sided with Lord Wilson and Lord Mance's Judgment is therefore a dissenting Judgment which though not as Legally erudite and detailed as Lord Wilson has a far more common sense and real world approach to reaching its conclusion.

Many may view the Judgment in this Case as merely academic as they will be aware that there are new proposals awaiting the outcome of a Consultation to alter the Residence Rules with a Three Fold test coming into force from 6th April 2012. However, as can be seen from my Article dated 27 June 2011 (UK Tax Residence – Consultation Paper), it will not be until 6th April 2015 that the old principles (confirmed by this Judgment) cease to have any practical relevance going forward.

Therefore, the decision in the Judgment has far reaching implications for those who will leave the UK up to 6th April 2015.

There are also a substantial number of cases that are under Enquiry or about to go to Litigation based on the existing Rules and on which this Judgment will have a huge impact. In addition, this Judgment gives HMRC a potential Bonanza, if it chooses to launch Enquiries into all High Net Worth Taxpayers who have claimed Non-Residence in the last few years.

The real question is now whether those cases that have still not been settled will benefit from the new pragmatism in HMRC as regards raising money rather than the ability (based on this Judgment) to pursue multiples cases and extract maximum tax and interest from many apparently (Former!) UK Tax Residents.

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