3.4 "Sufficient" work overseas

3.4.1 Overview

The third situation in which an individual is automatically treated as not resident in the UK is designed to reflect the previous practice of treating as non-resident any individuals working full-time overseas. Indeed, the original draft of the legislation referred expressly to "full-time work overseas". However, the label has been removed and the legislation now requires the individual to work "sufficient hours overseas".

Under this rule, an individual will be able to be treated as non-resident if the following conditions are all satisfied. The individual must:

- work sufficient hours overseas as assessed for the tax year;
- not be subject to the exclusion for some transportation workers (see **3.4.3**);
- spend more than three hours working in the UK on fewer than 31 days in the tax year;
- not have any significant breaks from overseas work (see **3.4.4**) during the year; and
- spend fewer than 91 midnights in the UK during the tax year (see also **3.4.5**).

Law: FA 2013, Sch. 45, para. 14(1), (2)

3.4.2 Sufficient hours overseas

The sufficient hours test is complicated. In the legislation, it is set out in the form of a five-step "method statement". It is considered (and hoped) that a more formulaic approach (as set out below) will be clearer. Total clarity is impossible for the simple reason that the statute has opted for a ridiculously complicated test. The complexity is further compounded because the definitions are split across different paragraphs.

As an overview, the test tries to identify the average number of hours spent working overseas in a hypothetical week. If the average is 35 or more, then sufficient hours are deemed to have been worked

overseas (and the automatic test of non-residence is thereby satisfied).

More precisely, the test requires the fraction H/X to be calculated, where:

> **H** is the total number of hours in the year during which the individual works overseas (whether as an employee or carrying on a trade, profession or vocation), except on those days when the individual also carries out more than three hours' work in the UK; and
>
> **X** is defined as the higher of:
>
> - (365 – (D+L))/7 (rounded down, if necessary, to the nearest whole number); and
> - 1.
>
> In the calculation of X, 366 is used instead of 365 in tax years which include a 29 February.

For these purposes:

> **D** is the number of days in the tax year in which the individual does more than three hours' work in the UK (including those days in which overseas work is also performed); and
>
> **L** is the number of days to reflect periods of "leave" (see **6.4.9**).

If (and only if) the answer is 35 or more then the individual is considered to work sufficient hours overseas over the tax year in question.

Law: FA 2013, Sch. 45, para. 14(2)

3.4.3 Exclusion for some transportation workers

Certain workers are excluded from this automatic test of non-residence.

A worker is excluded if:

- he or she has what the legislation calls (rather unhelpfully) a "relevant job" (see **6.5**) on board a vehicle, aircraft or ship at any time in the tax year in question; and

- at least six of the trips that the worker makes in the tax year as part of that job are cross-border trips (see **6.5.3**) that either begin or end in the UK (or do both).

Law: FA 2013, Sch. 45, para. 14(4)

3.4.4 Significant breaks from overseas work

An individual has a significant break from overseas work if there is a period of 31 consecutive days during which:

- there is no day on which the individual performs duties overseas for three hours or more; and
- the reason for this is not absence from work due to annual leave, sick leave or parenting leave.

It appears that this last test is not extended to periods of compassionate leave or other exceptional absences.

This rule has been temporarily modified in the light of Covid-19.

Law: FA 2013, Sch. 45, para. 29(2); FA 2020, s. 109(7)

Covid-related absences

It can be seen from the above that there is deemed to be a significant break from overseas work if more than 30 days go by in which the individual does not spend more than three hours working overseas on any one day.

Routine absences from work (for example, a five-week return to the UK every summer) could inadvertently lead to there being a significant break from overseas work. To avoid this, the statute looks at the hours of overseas work that the individual would perform but for absence on annual leave, sick leave or parenting leave.

In the light of Covid-19, an additional class of absence has been added to this list. This modification applies:

- for the purposes of the 2019-20 tax year; and
- if the individual was not resident in the UK in the 2019-20 tax year (whether or not as a result of the FA 2020 modifications), for the purposes of the 2020-21 tax year.

Under this modification, one is also required to disregard an absence from work if it falls within a period specified in an emergency

volunteering certificate issued to the individual under Schedule 7 to the *Coronavirus Act* 2020.

Law: FA 2013, Sch. 45, para. 29(2)(b) (as assumed); FA 2020, s. 109(7)

3.4.5 Counting the 91 days in the UK

It will be seen from the above that an individual who works full-time abroad can generally be treated as automatically non-resident for the tax year.

The key condition is that the individual spends fewer than 91 days in the UK in the year. However, the legislation allows certain days to be ignored for the purposes of this calculation.

Under the definition of a day spent in the UK (see **6.2**), the general rule is that a day is treated as spent in the UK if and only if the individual is present in the UK at midnight at the end of that day. However, in certain limited situations, a leaver will be required to treat a day as spent in the UK even if he or she is not physically present in the UK at midnight at the end of that day (see **6.2.4**). Such days (which are deemed to have been spent in the UK) are excluded for the purposes of the 91-day rule.

Therefore, for the purposes of the rule which treats as non-resident any individual who is working full-time overseas, the 91-day test is effectively a 91-midnight test, because a day will not count unless the individual is present in the UK at the end of the day.

It should be noted that the rules (see **6.2.2**, **6.2.3** and **6.2.5**) which exclude from any day count certain days in which the individual is nevertheless present at midnight at the end of the day in question equally apply for the purposes of the 91-day rule.

Example

In a particular tax year, Raymond is classed as a leaver and has three UK ties.

During the course of the year, he makes 44 distinct business trips to the UK (each time arriving on a Monday and leaving two days later, as scheduled, on the Wednesday).

Raymond is therefore physically present in the UK for 88 midnights during the tax year. On the above facts, none of these midnights would be excluded under the rules set out in **6.2.2** and **6.2.3**.

However, under the rule set out in **6.2.4**, Raymond will be required to count some of his days of departure. There are 44 such days, but the first 30 are not counted.

Therefore, Raymond's total day count for the year is 102 (88 midnights plus 14 days of departure).

Nevertheless, for the purposes of determining whether or not Raymond is treated as automatically non-resident due to full-time work overseas, he is treated as spending only 88 days in the UK in the tax year.

Law: FA 2013, Sch. 45, para. 14(2), 23(3), (4)

3.4.6 The "sufficient hours" test in practice

The test puts an unrealistic burden on taxpayers – especially given the fact that they have to bear the burden of proof at any Tribunal proceedings.

It requires taxpayers to keep track of almost every hour spent working overseas – not just what many professionals might call "chargeable hours" but every hour at work. This can include some travel time (see **6.4.3**). The only hours that need not be recorded are those working hours spent on days when more than three hours' work is done in the UK.

The results can be startling, because even workers who spend every working day overseas will not necessarily be treated as non-UK resident under this test.

Example

Marie works for the Belgian government, working 7-hour days, 5 days a week in Brussels. She is entitled to five weeks' holiday which she takes in five discrete weeks to spend with her fiancé in the UK. She also has two weeks' worth of public holidays each year.

Therefore, Marie works for 45 weeks each year.

H is therefore 7×5×45 = 1,575.

X is (365 − 25)/7 = (when rounded down) 48.

H/X is therefore 32.8, considerably less than 35.

Marie will not be considered as working sufficient hours overseas.

Even if Marie worked 37-hour weeks, on the above facts, H/X would still be less than 35. However, in that situation, five embedded non-working days (see **6.4.9**) would change the outcome.

For a 37-hour working week, H becomes 1,665.

X is now (365 − 30)/7 = (when rounded down) 47.

H/X will then become 35.4.