ICAS RESPONSE TO DRAFT LEGISLATION ON
A NEW STATUTORY DEFINITION OF TAX RESIDENCE FOR INDIVIDUALS

7 February 2013
The Institute of Chartered Accountants of Scotland (‘ICAS’) welcomes the opportunity to comment on the legislative proposals regarding the new statutory definition of tax residence for individuals.

At the outset, we should say that we find this version a major improvement on the earlier one. We have set out our detailed comments in the order in which the provisions appear in the draft legislation and added our comments on the response document published on 11 December 2012 and the draft guidance published on 18 December 2012 at appropriate points.

Notwithstanding that the provisions on statutory residence run to some 55 pages and have become complicated, we still feel that the introduction of a statutory residence test, even in this form, will be an improvement on the current position.

We make no comment on the provisions as they apply to international transport workers.

The examples in the guidance are helpful but could be clearer as to which of the factors is the deciding one in each case. For the guidance to be helpful, taxpayers and advisers must be able to look at examples in the guidance and be able to tell readily what the deciding factor is for each scenario.

1. **Second automatic UK residence test** – paragraph 8. Whilst we accept the idea that there should be some minimum period of presence in a home for this to count and that those with a UK home which they use on a regular basis and who spend a lot of time in the UK should automatically be UK resident, we are of the view that the second automatic residence test as currently drafted is not satisfactory. It could give rise to individuals being treated as UK resident even though they may have been in the UK for as little as 31 days in the tax year.

   We do not feel that presence in a UK home for a period which can be as short as 30 days should give rise to the application of an automatic residence test, particularly as split year treatment under cases 4 or 5 may not be available.

   As currently drafted, it is extremely difficult to follow how the 91 consecutive day periods and the 30 day period relate to each other, particularly where there may be more than one 91 day period in the tax year.

   We are concerned about the level of record keeping that is likely to be required by visitors to the UK who purchase homes here, even where they do not spend much time in those UK homes. We are also concerned that, right up until the end of a particular tax year, individuals may be unable to establish whether or not they are resident in the UK under this test. One aim of a statutory residence test has to be to provide individuals with certainty regarding their residence status. As currently drafted we do not feel that the second automatic residence test achieves this.

   We are also concerned that there may be individuals who are prevented from being present in an overseas home as an unavoidable result of political unrest or natural disaster. Such individuals may be inadvertently caught by this test, even though they may not have spent much time in the UK, and this seems inappropriate.

   More guidance should be given regarding what records taxpayers need to keep in order to establish presence for short periods in homes either in the UK or abroad.

   In paragraph 16 of the guidance, the reference in the third bullet point should be to more than 29 days, not 30 (paragraph 8(3)(b) states fewer than 30 separate days).

2. **Third automatic UK residence test** – paragraph 9. We welcome the extension of the number of days which have to be worked full time in the UK to 365 and the addition of the reference to parenting leave in paragraph 9(2)(b). We continue to feel that a work day should be longer than three hours of work.

3. **Fourth automatic UK residence test** – paragraph 10. We cannot see why it is necessary to make the rules more onerous in relation to someone who dies during the tax
year than in relation to others. There is no requirement to have spent any time at all in the UK in the year of death.

4. Third automatic overseas test - paragraph 14. We welcome the increase in the number of days that can be worked in the UK, but still feel that the minimum number of hours per day required for a work day should be more than 3.

5. Days spent - paragraph 21. In paragraph 21(4)(a), exceptional circumstances can only be relevant if these prevent the taxpayer from leaving the UK. However, in relation to war and civil unrest abroad, the circumstances may not actually prevent the taxpayer from leaving the UK but rather from travelling to their intended destination. In our view, this type of situation should be taken into account. We note from the guidance (Annex B, paragraph B9) that illness of or injury to, a spouse, civil partner or dependent child can give rise to exceptional circumstances; this should be included in the legislation rather than leaving taxpayers to have to rely on the guidance. Example B1 on page 47 of the guidance highlights the harshness of the 60 day limit in situations where very serious medical problems are at issue (and the individual concerned had no part in the decision as to which country’s hospital to go to). We would ask that the limit be extended in such cases as long as the individual leaves the UK as soon as possible after being discharged from hospital.

6. Home - paragraph 24. Although the provisions regarding what constitutes a home have been improved, we still have a strong preference for a statutory definition of home to be incorporated into the legislation. This is, in our view, too important an issue to be left to guidance.

In paragraph 24(3) it is unclear in relation to holiday homes, retreats etc what "uses periodically" means. What would be the position, for example, where an individual has moved abroad but has retained a property which was previously the main home, and uses that from time to time for holidays?

Paragraph A4 on page 38, of the guidance seeks to introduce a “reasonable onlooker” test which is not set out in the legislation. If this test is to be applied, we think it should be incorporated into the legislation.

Further details should be added to paragraph A13 regarding what constitutes a property being “temporarily unavailable”, particularly in relation to large renovation projects to existing homes which may take many months to complete and during which the property may be uninhabitable. The statement in paragraph A13 seeks to treat these differently from properties bought in a state of disrepair (see paragraph A16), and we view this as unfair.

7. Work - paragraph 25. We welcome the confirmation given in paragraph 45 on page 13 of the guidance that periods of “garden leave” count as time spent working. This should be included in the legislation.

8. Location of work - paragraph 26(3). We consider that the wording of paragraph 26 is an improvement on the previous draft. We are very concerned that there is a problem for individuals travelling from overseas to areas of the UK away from the South East of England, particularly, Scotland. The effect will be that London will not be an attractive hub for business travel. There may be an adverse effect on British Airways as an airline of choice given that it is necessary to fly from overseas to London and then on to other parts of the UK. It seems that it will be more appropriate for such travellers to use a hub outside the UK and, therefore, non-UK airlines. This is highlighted by examples 15 and 16 of the guidance on pages 16 and 17.

9. Family tie - paragraph 31(6) we welcome the clarification that half term breaks are to be considered to form part of term times.

10. Accommodation tie – paragraph 32. In relation to the accommodation tie and staying with close relatives, we are concerned that the requirement for the property to be available for a continuous period of 91 days and the limitation of accommodation to the
home of a close relative, will not be sufficient to avoid there being an accommodation tie in many cases.

Paragraph 3.56 of the response document published on 11 December 2012 states that accommodation will not be available “unless the individual would really be able to stay there for at least a three month period. A casual offer by a friend indicating that someone is welcome to stay with them at any time will not create an accommodation tie unless the offer would genuinely extend for a stay of at least three months”. However, offers of a place to stay are usually made orally and in many cases relatives and friends may make offers of a place to stay for as long as necessary without really expecting it to be taken up for a long period. What evidence will taxpayers require to keep and produce in order to establish or disprove the existence and nature of the agreement?

Example A11 indicates that the cousin with whom Peter stayed was prepared to put Peter up for several months at a time should he need it. However, the wording used in A12 is unclear and the facts in that example could give rise to a casual offer.

Example A13 – it would be helpful if the example could make clear whether or not the property is still available to Simone during any period when her brother is using it, as this could affect the outcome.

The wording of paragraph A38 on page 46 of the guidance, in relation to rooms booked at hotels for at least 91 days continuously, does not appear to be in line with paragraph 32(2) of the draft legislation.

11. **Country Tie** - paragraph 35. The definition of country still refers to state or territory. It is still not clear what the situation will be regarding time spent in different US states, Canadian provinces or Swiss cantons, for example. Do these periods need to be treated separately? This should be clarified as taxpayers with homes in, or who spend time in, countries with a federal system need to know how to apply the tests.

12. **Case 4 coming to live or work full time in the UK** - paragraph 44. The only home test in paragraph 44(6) does not fit well with the current wording of the second automatic residence test in paragraph 8. Table F, which relates to case 4, does not seem to have an entry for March.

13. **Case 5** – paragraph 45. In example 27 there is no mention of how many days Salvatore spends in his UK home after it has been acquired. It would be helpful to include this so that it is obvious why the second automatic test is satisfied.

14. **Temporary non-residence** paragraphs 98 – 130. It would be helpful for taxpayers to have more detail in the guidance about the types of income and gains which may be subject to these rules, particularly in relation to distributions and releases of loans to participators.

15. **Overseas work day relief.** We welcome the decision to change the overseas work day relief provisions so that they apply for the first three years of presence in the UK without reference to intention.

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