



Supreme Court decision released on Gaines Cooper

The long awaited decision in the Supreme Court was handed down on 19 October 2011. The Supreme Court heard combined appeals from Robert Gaines-Cooper and two other taxpayers, Davies and James, against a decision of the Court of Appeal to dismiss their application for judicial review of HMRC's determination of their residence position. The appeals considered the application of the HMRC booklet, IR20.

The Court of Appeal found that while the taxpayers had a right to rely on the guidance in IR20, the practice adopted by HMRC with regard to the residence rulings for the three taxpayers was consistent with that guidance. Further, the court held that there was no evidence that HMRC had changed its practice with regard to residence, such that the taxpayers could have been said to have a legitimate expectation of being treated as non-resident which must be upheld by the court regardless of the legal position.

A majority decision 4-1 in the Supreme Court upheld the findings of the Court of Appeal and dismissed the appeals of all the taxpayers.

Background to the case

The Supreme Court considered two slightly different, but similar, cases.

The first case was brought by two taxpayers, Mr Davies and Mr James, who had gone abroad prior to 6 April 2001 and claimed to have left the UK for the settled purpose of establishing and working full-time for a Belgian company. They did not begin their employment until after 6 April 2001, but nevertheless contended that under IR20 they should be considered to be non-resident in the UK. This was despite the continued UK residence of their families and their frequent UK visits because, either, they had left the UK to take up full time employment abroad, or, failing that, they had left the UK for a settled purpose. The case of Davies and James has not yet been heard by the Special Commissioners (or the First Tier Tribunal as it now is) as the taxpayers contended that, because the content of IR20, HMRC had no right to make a determination of UK residence in their case.

The second, and probably better known, case was that of Robert Gaines-Cooper. The facts of Mr Gaines-Cooper's case are fairly well known -he left the UK in the 1970s and established a residence in the Seychelles and engaged in extensive international travel. However, he had already had a finding of fact from the Special Commissioners that he was resident and ordinary resident in the UK for the relevant tax years, largely based on the fact that he maintained two homes in the UK during the period and that his family remained here. The Commissioners held that he had failed to make a distinct break with the UK and indeed that he spent more time in the UK than any other jurisdiction and was, therefore, resident and ordinary resident for the period.

Application for Judicial Review

All three taxpayers contended that whatever their residence position in law, IR20, as published HMRC guidance, provided a clear set of rules on which they should be able to rely in determining their residence position and these rules were more generous than the strict position established by case law. The case is, therefore, hugely significant, not just as a residence case (since IR20 has since been superseded as guidance by HMRC 6 and a statutory residence test is expected to be introduced, subject to consultation) but also more generally with regard to the degree to which taxpayers can rely on guidance published by HMRC, even where that gives a more generous treatment than the strict letter of the law.

The position was very well summarised by Moses LJ in his judgement at the Court of Appeal "The importance of the extent to which thousands of taxpayers may rely upon guidance, of great significance as to how they will manage their lives, cannot be doubted. It goes to the heart of the relationship between the Revenue and taxpayer."

Furthermore, the three taxpayers argued that not only should they be able to rely on the guidance in IR20, but also that HMRC's practice with regard to the conditions needed to establish non-UK residence had changed and this change was both unannounced and so fundamental as to be unjust, since taxpayers had a legitimate expectation that their practice would continue and could be relied upon.

The point at issue was whether, essentially, to establish non-UK residence the taxpayers needed to make a distinct break or alteration to the pattern of their life (as case law suggests) or whether, as they claimed, IR20 permitted them to rely on certain mechanical tests of day counts and periods of total absence without having regard to matters such as retention of UK homes, the residence of their family and other ties to the UK.

The Supreme Court Judgement

Lord Wilson gave the lead judgement in the Supreme Court. In his judgement he was quite critical of IR20 as guidance on the basis that it was badly drafted and could have been much more clearly worded. Nevertheless he concluded (and the majority of the Lords agreed) that while it was common ground that the taxpayer should be able to rely on guidance, in order to rely on IR20 a taxpayer should read the whole booklet and, in so doing, could be expected to gain all the information

needed to help him decide whether he is resident or not resident in the UK.

Lord Wilson contended that while the relevant sections on leaving the UK, either to take up full time employment abroad or permanently or indefinitely, did not make specific reference to the need to have a distinct break from the UK, the need for this break should be inferred. The basis for this assessment was two-fold. First that elsewhere in the booklet it was made clear that an individual could be resident in more than one jurisdiction. Second, that the adverbs 'permanently or indefinitely' should suggest that the word 'leave' carried more weight than simply going abroad or "boarding the Eurostar train to Brussels or whatever airline flies to the Seychelles" (as Moses LJ put it at the Court of Appeal).

Lord Wilson conceded that IR20 might be ambiguously worded (although he felt the above meaning was clear). However, he stated that if the above were not clear, then contradictions elsewhere in the booklet would mean that IR20 was not sufficiently 'clear and unambiguous' as to create the legitimate expectation on which the taxpayer relied.

Finally, Lord Wilson concluded that the taxpayers had not been able to supply sufficient evidence to convince the court that there had been a change of practice at HMRC with regard to the interpretation of IR20 or the circumstances in which HMRC would treat an individual as non-UK resident.

The wider impact

HMRC guidance

The case highlights the need for care and professional assistance in interpreting HMRC guidance, particularly where it appears to differ from a strict reading of either legislation or case law. In this case, as in the Court of Appeal, the judges interpreted HMRC guidance with the stringency usually applied to the interpretation of legislation.

The case also highlights the need for clear, focused and unambiguous legislation which gives taxpayers certainty and reduces the need for HMRC guidance and, where guidance is produced, that guidance needs to be focused and not capable of many different interpretations. HMRC is now in the habit of consulting with the professions when writing guidance and circulating that guidance in draft before it is published and that practice is to be encouraged and needs to continue.

As the dust settles, consideration will need to be given to other HMRC guidance and to the degree to which it needs to be qualified by the backdrop of legislation and case law against which it has been drafted. This is particularly so in those cases where the wording of guidance is less than completely clear.

Residence

Against the backdrop of more recent cases, the findings of the Supreme Court are not a great surprise. Indeed, in recent years, professional advice to individuals seeking to become non-UK resident without taking up full time employment overseas has emphasised the need for a distinct break of the type envisaged in this case.

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For those with open enquiries into their residence position for earlier years (to which IR20 could potentially apply), when attempting to apply the guidance to their own situation consideration should be given to the whole booklet and, specifically, the finding of the Supreme Court that in its full context the words 'leaving the UK' could be considered to imply the need for a distinct break or change in the pattern of the taxpayer's life. However, Lord Wilson did state that a distinct break did not require a severing of ties, but rather a substantial loosening of them. He stated that the allowance of limited return visits to the UK in IR20 clearly foreshadows their continued existence in a loosened form.

In June this year, the Government published a consultation on a statutory residence test which closed at the beginning of September. The responses to this, and the draft test itself, are expected to be published in December. It is clear that the new test must be self-contained and not rely on additional guidance, the difficulties of which are amply shown by this case.

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