

TAX

Treaty residence of mobile South Africans – An interesting UK tax case

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Treaty residence of mobile South Africans

The tax residence status of a natural person with a mobile lifestyle recently formed the subject matter of a tax court dispute in the United Kingdom (UK). The first-tier tribunal tax chamber, in the matter of *Oppenheimer v HMRC* [2022] UKFT 00112 (TC) considered, in detail, the tiebreaker test in the double tax agreement between South Africa and the UK, and the findings of the court are significant and relevant for South African tax purposes.

The taxpayer's position was that he was tax and treaty resident in South Africa, and he accepted that he was also tax resident, but not treaty resident, in the UK. In the UK, unlike in South Africa, the fact that an individual is treaty resident elsewhere does not override UK tax residence under domestic law – although the treaty may limit the UK's taxing rights. HMRC (the UK revenue authority) alleged that the taxpayer was treaty resident in the UK.

The tiebreaker provision in the double tax treaty between South Africa and the UK determines that a natural person who is tax resident in both South Africa and the UK, is treaty resident:

- In the jurisdiction where he has a permanent home available;
- If he has a permanent home available in both South Africa and the UK, in the jurisdiction with which the taxpayer's personal and economic relations are closer (centre of vital interests);
- If the centre of vital interests cannot be determined, in the jurisdiction in which the taxpayer has an habitual abode; and
- If he has an habitual abode in both South Africa and the UK, his nationality will determine his treaty residence.

The taxpayer had a permanent home available in both South Africa and the UK, and he accepted the view of HMRC that he had an habitual abode in the UK.

The taxpayer's case was that he is treaty resident in South Africa because his personal and economic relations (centre of vital interests) are closer to South Africa than to the UK. Alternatively, if it is found that the centre of vital interests cannot be determined, the taxpayer relied on his treaty residence being South Africa on the basis that he also had an habitual abode in South Africa, which means that his South African nationality will determine his treaty residence.

The court found in favour of the taxpayer, and indeed that:

- His personal and economic relations were closer to South Africa, and on that basis he was treaty resident in South Africa during the period in dispute.
- Even if his centre of vital interests would not have been in South Africa, then it would have been undetermined (it was not in the UK), so that it became relevant to determine whether the taxpayer had an habitual abode in South Africa. It was found that, despite his having an habitual abode in the UK, he also had an habitual abode in South Africa, such that his South African nationality would result in the tiebreaker breaking in favour of South African treaty residence.

The judgment was detailed, and the court carefully considered, and acquainted itself with, the taxpayer's circumstances in respect of numerous aspects of his life – a thoroughly holistic approach was adopted. The court considered the evidence of witnesses and the taxpayer, but measured their testimony against documentary evidence which was available following a lengthy and ongoing investigation launched by HMRC as far back as 2013.

The judgment thoroughly analysed the taxpayer's lifestyle, family history and relationships, economic interests, hobbies, philanthropic causes supported, political involvement, health service providers, and many more. It demonstrates how strongly the residence status of a taxpayer depends on the facts.

Although each enquiry into a person's tax residence is heavily dependent on its own unique set of facts, the broad categories of the aspects of the taxpayer's life, lifestyle, activities and wealth considered give a flavour of how multi-dimensional such an enquiry can be.

Aspects considered by the court included:

Family

The taxpayer and his family had a long and deep-rooted relationship with South Africa.

His family has a history of attending secondary school and university in the UK. Although the taxpayer and his wife had put their first child's name down for schools in South Africa and the UK, the eventual decision to educate their children in the UK triggered their move to the UK. The move did not result in their uprooting from South Africa – their South African homes, possessions and pets were retained.

The taxpayer is a family man and his movements during the period under consideration were, to a large extent, informed by his wife and children's presence in the UK for purposes of the children's education. The taxpayer spent as much time as possible with them in the UK during school term, and regularly attended their school activities over weekends. The reason for moving to the UK, being the children's education, was regarded as temporary in nature "in the whole scheme of things", and it became more complicated when one of the children attended school in the US and the taxpayer's wife fell ill. The reason for regarding the purpose for moving to the UK as temporary is because there was no cutting of ties with South Africa.

Given the close relationship between the taxpayer and his wife, the court looked closely at the taxpayer's wife's interests and activities and took account of the fact that, despite her stay with the children in the UK during school term, and despite her involvement in setting up an extensive home for the family in the UK, she was also very involved in the family's homes in South Africa, she had a keen interest in the South African conservation projects of the family, her charitable activities were focussed on South Africa and Africa – it was clear that, although she was American, she adopted South Africa as her home.

Work

The taxpayer is not a typical employee, and his income from employment was very modest in the context of the family wealth from which he benefited. He never derived a salary from the UK, but he paid UK tax on his salary due to his residence in the UK.

The allocation of taxing rights in respect of a person's salary takes account of the jurisdiction where the employment services are physically rendered, but that test is inappropriate when a taxpayer's economic relations are determined for purposes of the tiebreaker – the latter looks at where the work done has an impact, and the relationships created by, and inherent to, the work, rather than the place where the work is performed.

The taxpayer was involved in a variety of work-related activities. During the period under consideration, he held at least 18 directorships in South African companies and two in UK companies.

When the family moved to the UK for purposes of the children's education, he continued to do what he did before, often working remotely from his house in the UK.

He did not go to the UK to work. The court found that he worked in, and from, the UK "doing what he has previously done in, and from, the RSA simply because of his children's education and his wife's presence in the UK supporting that...". The court found that, all that changed, was his physical location.

His involvement in a variety of South African family businesses (as customer, as director, as family member looking after the family's interests) was found to constitute close economic ties with South Africa, even if the taxpayer may have been involved in these while he was physically present in the UK.

Homes

The main homes of the taxpayer in both South Africa and the UK were fully staffed, excellently maintained, they offered similar facilities and were always available for the taxpayer and his family to occupy. The taxpayer and his wife were both very involved in making all the homes occupied by the family, "homes".

Time spent

During the period under consideration, and due to his wife and children's presence in the UK, the taxpayer spent more time in the UK than in South Africa. Due to further complications in personal circumstances, there were times when the taxpayer spent more limited time physically in South Africa.

When the court considered his economic and personal ties, it focussed on the contact which the taxpayer kept with his South African family and family businesses, flying interests, philanthropic involvement, investment team in relation to private equity projects focussed on Africa, other recreational interests, etc. rather than the place where he was present in doing so. The fact that the taxpayer was in regular contact with South African friends and business associates was important – even if the taxpayer was outside South Africa at the time when he was in contact with the South Africans.

In determining whether the taxpayer could have retained an habitual abode in South Africa even if he spent much more time in the UK, the court found that in the context of the taxpayer's mode of life, which entailed frequent travelling to numerous jurisdictions, his returns to South Africa for family, business, philanthropic, political and social purposes was a normal, regular and important part of his life.

Assets and wealth

The value of the UK assets owned by the taxpayer in his own name exceeded the value of all other assets held by the taxpayer. That had to be seen, though, in the context of the taxpayer's family wealth from which he benefited, being much more significant than the assets owned by him outright.

The court found that, when a person's "economic relations" are to be considered, the phrase should be given a broad meaning by looking at the way in which the taxpayer is connected to things – and it is not necessarily limited to employment or ownership of assets.

Significant events and friendships

The taxpayer got married to his wife, a US citizen, in the UK, not so much because of a strong relationship with the UK but more so because the UK was roughly equidistant between his South African family and his wife's American family.

Their children were born in South Africa (the first two whilst the family lived in Zimbabwe), and all the children have South African nationality.

The taxpayer's wife's funeral took place in the gardens at their UK family home, and memorial services were held in SA, the UK and the US. The number of people attending her memorial service in SA was significantly more than the people in the UK and the US.

Landmark birthdays of the taxpayer were celebrated to a much more significant extent in South Africa than in the UK.

The taxpayer and his wife had a large number of close friends in South Africa, and this was also where the taxpayer's extended family lived. They also had a number of friends in the UK but on a much smaller scale.

Hobbies

Consideration was given to the taxpayer's activities such as flying, shooting, golf (member of clubs in both jurisdictions, but he played more golf in South Africa), cricket (he played more regularly in South Africa but practised at home in both the UK and South Africa, he has a cricket team in South Africa, he sponsors a cricket week in South Africa for top school cricket teams, he has been a patron of the Gauteng Cricket Umpires Association) and squash.

Political, Philanthropic, Cultural, and Business involvement

The taxpayer never voted in the UK but does vote in South Africa. He had significant contact with politicians in South Africa, but minimal in the UK.

The taxpayer and his wife were very involved in philanthropic initiatives in relation to how South Africa could deal with economic transformation, as well as dialogues amongst African political leaders. The court found these activities to constitute family, social and political relationships with South Africa.

He was a member of 3 business advisory councils/boards in the UK, two of which are registered charities in the UK to address key issues of human lives in Africa.

The taxpayer's wife was somewhat involved in UK cultural events, but the taxpayer was not. By contrast, he supported and actively promoted South African cultural initiatives and took concrete steps in this regard.

Health service providers

The taxpayer had his primary doctor and dentist in South Africa, although he has used UK-based health services.

Take aways from the case

The case demonstrates that a person's tax residence status should be determined by taking account of all relevant facts and circumstances. Time spent in a jurisdiction may not be the key factor. For a mobile taxpayer who does not cut ties with a jurisdiction, it is important to determine the reasons for spending more time in another jurisdiction, the mindset and emotional attachments of the taxpayer, the relationships between the taxpayer and the competing jurisdictions, etc. The enquiry entails a comprehensive and personal exercise.

SARS recently increased its focus on taxpayers claiming to cease their South African tax residence, asking for additional information before it will recognise the cessation of residence. More frequent and detailed enquiries in relation to the tax residence status of natural persons can thus be expected, especially with the impact which a change in tax residence status nowadays has on a person's exchange control status. This UK court decision demonstrates just how comprehensive, intrusive and complicated such an enquiry can be.



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