Taxing Matters

Lockdown, tax residency and the law of unintended consequences

Alice	Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpc.co.uk/taxingmatters. Today we are joined by Nikita Cooper of Price Bailey to address a very topical question, tax residency changes and COVID. Or, more particularly, if you got stuck somewhere or went to stay with relatives for lockdown, what might the unintended consequences of that be? Nikita would like me to put you all on notice that she is, in fact Welsh, which you might notice for yourself from her accent and she indulges in that most Welsh of pastimes: going for long country walks with her very-large dog, Luna! Nikita, welcome to Taxing Matters!
Nikita	Thank you Alice, thanks so much for having me, it's a privilege!
Alice	**So, before I start. What exactly is tax residency and how is it determined?**
Nikita	Really good question. Quite a lot of people think, for tax purposes, that residency is quite easy, that if they arrive in the UK that means they are resident or if they are on a visa or via immigration that the rules for that are exactly the same as for tax purposes. However, unfortunately, like most things in the UK, it is not as straightforward as that. We do have a statutory residency test in the UK. What this means is that there are questions that an individual has to go through to determine if they are a UK resident for tax purposes or not. How the test works is that you either pass or fail the first test, if you fail it and answer "no", then you go on to the next test and so forth. So, there is really a step by step guide that you can follow to determine residency.
Alice	**And once you've determined it what does that affect?**
Nikita	So, for UK tax purposes we are in the minority at the moment that we only tax UK tax residents on their worldwide income, for example salaries, employment income, that is all taxable on the basis you are UK resident. We don't tax UK citizens that is outside the UK to income tax on their overseas income (only UK) so they really do have to be UK resident for income tax purposes for them to be assessable to UK tax on everything. The other tax is capital gains tax Capital gains tax means a tax on disposals of things like if you sold a residential property, you should some shares, generally if you are not resident you don't pay CGT tax, which is slightly more complicated but generally again you do not pay capital gains tax if you are not resident in the UK. However, there's a huge exception to that in relation to UK land.
Alice	**So, in terms of COVID - and thinking particularly over the last couple of years where we've been in and out of lockdown - what kind of impact might that have had on UK tax resident status?**
Nikita	That's a really good question and we have so many queries now from, firstly, individuals who have always been not-tax resident in the UK - for example, they limit the number of days they spend in the UK and they don't have any real ties to the UK. However, due to COVID - obviously it was such an exceptional time - and still is in quite a lot of cases that individuals found themselves either to be stuck, so to speak, in the UK, where they never intended to. They could be visiting a family member, or they just came for a holiday that never ended and therefore, as nice as that sounds, maybe the UK is not the country they would have picked for that to happen.

	So, what could happen is, they never wanted to be UK resident, they didn't decide to do it however circumstances may have actually led them to become UK tax resident instead - which can lead onto tax implications as I've discussed before.
Alice	**And what about businesses, what kind of impact might all of these matters have on businesses?**
Nikita	Exactly the same. Businesses usually have a five-year plan, a two-year plan, of what they intend for their business and their employees going forward. Unfortunately, COVID hit at a time when nobody expected it, it was something we could never plan for, especially in the business world. So, employees for example, again, may be stuck in a country that they didn't intend to be, they could be having to work in a different country - the UK or overseas - which will have huge impacts on the businesses and how they run their pay roll, how they interact with their staff, how they can even ensure their staff can continue to work if that is something that they need them to do while in a different country than intended.
Alice	**So, what is the impact of all of these unintended consequences on a person or a business's tax position?**
Nikita	For a UK individual, for example, we have a client who got stuck, literally absolutely stuck in the UK. He came for a long holiday and he couldn't leave. So what that meant is that he is now assessible for UK tax on his work days, he's working in the UK, he is going to have to pay income-tax on all of his earnings, his dividends and he also sold some shares - so now that is going to come into the UK tax-net and he is subject to capital gains tax. So, this can be a huge impact for an individual, especially when they never intended it. What also happened is he is now in the realm of self-assessment, so, the actual procedure and forms that you have to do to tell the Revenue that you do have a tax liability and that you do have to pay tax while you are UK resident.
Alice	**What about for businesses, what might the consequences there be?**
Nikita	So, similar in terms of any staff members that they have. Again, they've been stuck in the UK that, and luckily that employer is able to allow them to still to work, so without, you know, furlough, that they can still work while in the UK. Then they have international tax issues over payroll, for example, which country is going to pay for tax for that individual.
Alice	**You've talked about what might have happened as a result of COVID and the unintended consequences, is there any ability to get out of this tax-residency regime?**
Nikita	There is, potentially. As I discussed before, for UK individuals there is a residency test, we call it "Statutory Residency Test". So, what that does is it allows you to follow through the SRT, and determine if you are a resident or not. The UK government and HMRC have been aware of COVID, obviously, and they have therefore updated the residency test to help those individuals who actually do get stuck as we've said. However, the criteria is extremely limited. So, what happens is you if you are found to be in the UK for longer than you expected, you can claim exceptional circumstances - which makes sense - it is a very exceptional time at the moment!
Alice	**Absolutely!**
Nikita	But, the number of exceptional circumstances days that you are allowed in a tax year has always been a maximum of 60 days. So, what that means is, if you fall into these circumstances a maximum of 60 days in a tax year effectively discounted towards your-day count in the UK. So, a lot of the residency tests are determined by how many days you are **actually** in the UK. So, it's very important that you know when - at what point at midnight - were you in the UK. Was it a day of residency or not? And that is how the residency test is determined. Obviously to allow 60-days, potentially, to not be counted is great because it can, literally, mean somebody who is just over a threshold of 90-days, for example, or 183 days, then becomes below the threshold by applying the exceptional circumstances. The COVID issue however has been addressed by HMRC and it is only in limited circumstances that you can, effectively, claim "COVID" as an exceptional circumstance. And one of those is where there has been a health professional who has told you you have to stay in the UK. So, if you have been diagnosed or you've got it written in via a doctor's appointment - or something - that you have to stay in the UK, then those days could be counted as "exceptional circumstances". And another one - is probably the one we see most regularly - is where you are unable to fly. So, where you are unable to leave the UK due to international border closes. It's quite strict, it's not that you just don't want to leave the UK because you don't want to get on a flight, you don't really want to go to another country, you wanted to stay where you were, it actually has

	to be for a reason that you *cannot* leave the UK and that does need to be evidenced somehow you do need to show the international border has been closed and you, for example, were not able to fly to China, they shut their doors, you couldn't get back in.
Alice	**So, applying this to a practical situation: What about someone who was working for Chinese company, let's say, who came to the UK for business purposes and then wasn't able to return. How might they go about making this application or even realising that it applies?**
Nikita	Quite a lot of clients didn't know that this would happen to them, obviously, so it's with hindsight that we're having these discussions. So, with that client to arrive from China specifically they probably will have had to spend a significant amount of time in the UK due to the international borders being closed. So, they will have become UK tax resident if they spend over half the year here, over 183 days. So the first question is, "can any of those days be reduced to show that they weren't tax-resident" and we have the 60 day maximum. In order to show for COVID related items we would need to see, for example, the boarding passes - that they booked a flight but they couldn't get on the flight. The international updates - which were quite prominent back at the early COVID stage - where countries like China were closing their borders and there was evidence of this. There was documentation out there and it can still be found now if we need it, but a key question is the number of dates of when they should have flown; when they didn't fly; any other criteria that happened that they can clearly document - because the issue with this is, obviously, we offer self-assessment in the UK so that Chinese individual will have to prove - the burden of proof is on him - that he was not actually resident in the UK. In order to do that as much evidence is helpful to do it to show to the Revenue.
Alice	**And what about the reverse situation? What about a UK business whose employee travelled to say, for example, Ireland and for family reasons and then wasn't able to leave due to Ireland's restrictive lockdown?**
Nikita	Again, similarly, that individual, potentially, would be not UK resident. So, the onus there is slightly different that, obviously, potentially, they have ceased to be UK tax resident and become resident in another country. The first thing they would need to do is get Ireland's tax advice - because their rules might not be the same as ours in terms of COVID, in terms of statutory residency test - and determine are they actually resident in another country, first, and then, secondly, have they ceased UK tax residency? Which we in the UK would be able to help determine by the statutory residency test. However, it may not be as clear cut that, if they are not UK tax resident then they don't have to pay any UK tax anymore, because, for example, they might be working, as you said, so they are doing UK duties potentially, even though in another country. They may just be working all UK centric, travelling, if at all possible, as well as the onus on the employer who now is used to having all UK tax resident employees, has now all of a sudden become international which they never expected by virtue of their staff members working in another jurisdiction .We can talk about corporate residency later but that does have a huge impact especially if that member of staff was quite high in the company.
Alice	**You mentioned earlier the consequences on capital gains tax and what that might do for a non-resident, what are we talking about here, I remember you gave some examples about a client of yours who suddenly become liable to capital gains tax on the disposition of shares. What other kinds of property might it affect and what other considerations need to be taken into account?**
Nikita	Quite a new development in the UK is that we now tax any disposals in relation to UK residential property or UK land this is very recent, we didn't used to do this. We were one of the countries that didn't tax residential property and land automatically. However, the UK government soon realised that this is one of our hot commodities in the UK and it is something that does need to be assessable to tax. Therefore, as a non-resident individual - even if you dispose of UK residential property or land - it is subject to UK tax. Most clients now are, finally, aware of this. However, there is a very short window in terms of compliance. For example, if you own a residential property in the UK as a non-resident, and you sell it, you only have 30 days to tell the Revenue and pay any tax due. A consequence of being non-resident is that, because these rules are new, it means from the 6th April 2015 you have an automatic rebasing, effectively, on that residential property. For example, we had a client who owned a property in London, has always been non-resident and planned to sell the London property this year. That was always the plan and he sold it, because it was a London property he made a gain, only assessible from the data of 6th April 2015. So that meant a massive rebasing and a massive tax saving - residential property is taxable at 28% in the UK. However, he inadvertently became UK tax resident for the entire tax year. So, therefore, that rebasing election cannot apply to him., So, there is a lot of money that can be lost if at the time you are disposing of property your residency situation is not certain.

Alice	**It's something to definitely be aware of!**
Nikita	**Definitely** to be aware of. Especially if property is concerned!
Alice	**You mentioned earlier that inadvertent consequences for international businesses, if someone does become a UK resident due to COVID, what are these consequences?**
Nikita	As I alluded to earlier, you can have situations where senior members of staff - directors, chair persons, leaders of a company - have inadvertently become UK tax resident or not tax resident depending on their circumstances; and in the UK A corporate vehicle's residency is determined by where they are centrally managed and controlled. So, you can probably see where I'm alluding to here. If you have a very senior member of staff who's changed residence, not intentionally, then they can actually change the residency of the corporate at the same time.
Alice	**That seems like a disaster!**
Nikita	Yes, it does. Obviously if anybody was in this situation, hopefully they would already be taking advice - senior members of a board, for example, of a UK company - but more importantly they need to be aware of what are they doing while in a state of flux. So, are they attending board meetings via Skype? Are they actually working? Which country are they working in? The evidence, then, is quite high in terms of what is needed to show the interaction that they are having with their firm.
Alice	**So, that probably leads us on to your top tips.** **What are the practical steps that you can take if you are in this potential grey area or looking to confirm or deny UK tax residency?**
Nikita	One of the key things which is the more simple is data and the evidence of that data. You really need to keep track of flight logs - when you were going to board a flight. If a flight was cancelled, which helps show your intentions. If you were working you need to show your calendars - ideally on what meetings were you attending in which country were they relevant. You also need to think about if, unfortunately, COVID is a real issue for you, those steps that can help make exceptional circumstances potentially apply. So, showing things like you have been diagnosed, by a health professional, to self-isolate - any type of documentation that you can have for that; in terms of appointment logs or any written advice you could have from them. Sick notes would really be helpful, as well as the international environment in terms of your travel arrangements. So, as I alluded to before, if you were due to catch a flight next week but you, literally, could not fly because the borders were shut, the dates of when that happened, the dates of when the new rules for that particular country came into force; and also when they ended because you need to show, potentially, could you, or should you, have travelled if your intention was to leave the UK at some point in time.
Alice	**So, finally Nikita, what advice would you give to any business or individual who is concerned that they may have accidentally been visited by the law of unintended consequences?**
Nikita	I would say definitely take advice. Even if you don't think it applies to you, I would double check your residency situation. If you have become, to spend more time in one country than your usual home then in any jurisdiction I would say take professional tax advice. In addition, which we haven't talked about, is domicile situation. If you, as an individual are domiciled in different countries that can have specific impact on you in the UK because you have a slightly different taxing regime. So, so far, everything I've talked about has been more about UK residence and UK domiciled individuals. So, if you are non-domiciled then, again, you do need to take advice. Ideally the time to take advice on any of this is before it happens - so, before you become tax resident, we know that this doesn't always happen, so as soon as you can and you think it may happen to you, then seek advice. The UK tax year is strange in that it runs April to April so 6th of April to the 5th of April. So, for a particular tax year you can be resident and then for a subsequent year you can not be resident. So, you really need to keep track of all your dates.
Alice	Fantastic! Thank you so much Nikita. Unfortunately, that's all we've got time for in this week's episode, tune in next time to join David Allen of the Law Commission discussing the Law Commission's consultation on the reforms possible of the law of corporate-criminal liability.

Thank you, again, very much Nikita Cooper for sharing your insights on tax residency and COVID. You can contact Nikita through Price Bailey’s website, and while you are there, check out their blogs.

If you have any questions for me or for Nikita, or any topics you'd like us to cover in a future episode, please do email us on taxingmatters@rpc.co.uk. We'd love to hear from you.

As ever, a big thank you goes to Josh McDonald who does all the work pulling each episode together. Our music is from musical genius Andrew Waterson who also produces each episode; and, of course, a big thank you to all of our listeners for joining us.

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