

**Scottish Rate of Income Tax – Technical Guidance on Scottish Taxpayer Status  
Response from the Low Incomes Tax Reform Group (LITRG)**

**1 Executive Summary**

- 1.1 LITRG welcomes the opportunity to respond to HM Revenue & Customs' (HMRC) Technical Note of 12 June 2015 containing technical guidance on Scottish taxpayer status for the Scottish Rate of Income Tax (SRIT).
- 1.2 LITRG is an initiative of the Chartered Institute of Taxation (CIOT) and we support the CIOT response. Our submission has been informed by stakeholder meetings attended by our representatives to discuss the draft technical guidance. Our response focuses on points of concern for the low-income individual. We note that this guidance is aimed at HMRC officials, tax advisers and business – it is likely therefore that volunteer advisers may also make use of this guidance when assisting low-income individuals.
- 1.3 As noted above, the draft technical guidance was originally published as a pdf HMRC Technical Note. This has subsequently been replaced on GOV.UK with a version in html, and the pdf version no longer appears to be available. This type of unannounced and undocumented change is unhelpful. We would ask that as a matter of policy both formats are available: please bear in mind that many users will want to print off the document to refer to and that a pdf is much easier to print. In addition, it is far easier to refer to a pdf when commenting on draft guidance, since it has page numbers.
- 1.4 We think there are several ways in which the draft technical guidance could and should be improved. For example, the style of the guidance does not consistently reflect the audience and in certain places, for example in the section on record keeping, this could create confusion. One key area in which the guidance could be improved is in providing guidance on what action taxpayers can take if they disagree with HMRC about their decision concerning Scottish taxpayer status, that is, the appeals process.

- 1.5 In addition, we think attention needs to be drawn more frequently to the essential point that in order to be a Scottish taxpayer, one must first be resident in the UK for tax purposes under the UK Statutory Residence Test (SRT).<sup>1</sup>
- 1.6 We note that HMRC are currently creating a range of simpler, general guidance and advisory products aimed at unrepresented taxpayers, and that they are working with the Ministry of Defence on guidance for service personnel. We welcome this work and would like the opportunity to comment on draft guidance and products, to assist their development. We note that the products aimed at the taxpayer, while simpler, should nevertheless accurately reflect the law and enable taxpayers to interpret the law correctly. We would stress that there is a clear need for both the current type of guidance, covering more involved situations, and the general guidance to assist ordinary taxpayers.
- 1.7 We think HMRC should also produce separate guidance for employers. Although employers do not have a role to play in determining Scottish taxpayer status of their employees, it is important that they also have guidance. In particular, they will need to understand the payroll procedures required of them. They also are likely to receive queries from their employees and therefore need sufficient understanding to enable them to direct queries appropriately. They may also be able to assist HMRC by encouraging employees to let HMRC know when they change address, for example. In addition, it is essential that employer guidance and this technical guidance stress the message that employers (and pension providers) do not determine Scottish taxpayer status and should not take action in this regard independently of HMRC.
- 1.8 Although we naturally hope HMRC will amend the draft guidance in the light of comments we and others make, we think it is important that it is not viewed as the final definitive product. HMRC have done a creditable job with this draft but it is inevitable that more situations are going to emerge as SRIT gets properly under way. We think it is vital that this guidance is viewed as a “rolling” document, to be added to with further examples from time to time. It is important that any changes to guidance are however dated and shown clearly, something which we understand is possible when working with GOV.UK.
- 1.9 We think it would be helpful for this technical guidance to include a section containing the relevant legislation, that is, sections 80D-80F of the Scotland Act 1998, incorporating all amendments. It is otherwise difficult to find an up-to-date version, since it has not yet been fully amalgamated on legislation.gov.uk.

## **2 About Us**

- 2.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving

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<sup>1</sup> Schedule 45, Finance Act 2013: <http://www.legislation.gov.uk/ukpga/2013/29/schedule/45/enacted>

the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

- 2.3 In recent years LITRG has engaged with the Scottish Government concerning the setting up of Revenue Scotland, including the development of the Revenue Scotland website, and has responded to consultations on the Revenue Scotland and Tax Powers Act 2014. We have been involved in discussions on issues relating to the Scottish Rate of Income Tax and have given evidence to the Finance Committee of the Scottish Parliament on tax management issues relating to low income individuals.
- 2.4 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

### **3 Does the guidance provide clarity on the principles by which Scottish taxpayer status should be decided?**

- 3.1 We think there are areas in which the clarity of the draft technical guidance could be improved. We provide more detail below.
- 3.2 A key concern is that there is no guidance on what taxpayers should do if they disagree with HMRC. We think there needs to be clear information, both in this technical guidance and in various other guidance yet to be published (including the guidance for unrepresented taxpayers), on what actions taxpayers can and should take. For example, the guidance needs to set out which documents they can appeal, whether the notification letters or PAYE coding notices; it also needs to set out how the process will work for taxpayers within self assessment.<sup>2</sup> A linked concern is the lack of detail in the guidance as to how HMRC will make their initial assessment of an individual's taxpayer status, i.e. what information they will use; in addition, it would also be helpful to understand how HMRC will go about ascertaining the facts when the position is unclear.
- 3.3 According to section 80D of the Scotland Act 1998,<sup>3</sup> an individual is a Scottish taxpayer if they pass two tests. Firstly, they must be resident in the UK for tax purposes. Secondly, they must meet one of three conditions. Therefore, it is unnecessary to consider the three conditions if an individual is not resident in the UK under the SRT. Although this key point is noted in the section "Background – Definition of a Scottish Taxpayer" on page 4 of the pdf version of the guidance and in the "Introduction" of the draft technical guidance itself, it does not receive any further references, other than brief mentions in examples 12 and 13. This is likely to cause significant confusion, since many users of the guidance will be unfamiliar with the legislation and will not read the guidance from cover to cover. If a user misses this key, first test, or looks at a later section of the guidance in isolation, when considering whether they (or someone they are assisting) are a Scottish taxpayer, they could

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<sup>2</sup> As an aside, we would also expect the notification letters and PAYE coding notices to include clear information on what to do if the taxpayer thinks they are incorrect.

<sup>3</sup> As inserted by section 25 of the Scotland Act 2012, amended by Finance Act 2014 and the Wales Act 2014.

come to completely the wrong conclusion. This is particularly likely to be an issue for those on lower incomes, who may not be able to afford to pay for specialist tax advice, for example, low-income migrant workers.<sup>4</sup>

- 3.4 Examples of when and where such confusion could occur relate to page 7 and page 17 of the pdf version of the guidance, under the headings of “‘Close Connection’ – ‘place of residence’ in the UK” and “No ‘close connection’ – ‘days spent’ in Scotland or another part of the UK” respectively. At page 7 for example, under the section on a “Single place of residence in the UK”, an individual could read the two paragraphs in isolation and reach the conclusion that they are a Scottish taxpayer simply because they have a place of residence in the UK, which happens to be in Scotland, even though they only reside in it for say ten days in the tax year, and are not actually resident in the UK under the SRT.
- 3.5 In the “Introduction”, the guidance states that “Scottish taxpayer status applies for a whole tax year”. Although this is also normally the case for UK residence for tax purposes, under the SRT it is possible for someone to be eligible for “split year treatment” in certain circumstances.<sup>5</sup> The guidance omits to explain how someone who qualifies for split year treatment under the SRT and is deemed to be a Scottish taxpayer will be treated. We would expect this position to be discussed and clarified in this technical guidance. Similarly, we would expect there to be clarification of the position of individuals who are UK resident under the SRT, but due to the terms of a Double Taxation Treaty, are not UK taxpayers (treaty non-resident).
- 3.6 A further omission that could cause some confusion, particularly for small employers, is the failure to state where the responsibility for the determination of Scottish taxpayer status lies. It is our understanding that for PAYE taxpayers HMRC will determine Scottish taxpayer status, but that under self assessment, the individual will declare their status. At no point is an employer (or pension provider) expected to make a decision concerning an individual’s status, nor should they take any action independently – they are simply to operate the PAYE code<sup>6</sup> provided by HMRC. We understand that messaging is being provided to employers via methods such as the HMRC Employer Bulletin in this regard. Despite this, there will be some employers, especially small employers who may not have time to absorb all the material sent to them, that have concerns as to their responsibilities in relation to Scottish taxpayer status. Given this technical guidance is aimed at businesses, we think it should explicitly set out the operation of the decision-making process and the respective responsibilities of different parties, including employers. In particular, such an explanation should include details of how in year changes in status will be managed, for PAYE taxpayers and self assessment taxpayers. One option might be to insert an extra section into the guidance entitled “Obligations under SRIT”. This could have sub-sections dealing with each party and their obligations. It is essential that there are clear answers to the types of questions that people will inevitably ask, concerning respective responsibilities, what to do in particular circumstances and in what situations penalties might arise.

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<sup>4</sup> One option might be to define a term (for the purposes of the guidance) for an individual who is resident in the UK under the SRT, and then use that term throughout the document.

<sup>5</sup> Paragraphs 39 ff., Schedule 45, Finance Act 2013:

<http://www.legislation.gov.uk/ukpga/2013/29/schedule/45/enacted>

<sup>6</sup> HMRC will provide “S codes” for Scottish taxpayers.

- 3.7 The guidance uses the phrases “any other part of the UK” and “elsewhere in the UK”, to explain sections 80D (3), 80E and 80F of the Scotland Act 1998.<sup>7</sup> The guidance does not clarify, however whether it is necessary to compare days spent in Scotland with days spent in the rest of the UK in aggregate, or whether it is necessary to consider each constituent part of the UK separately.<sup>8</sup> The phrase “any other part” suggests the need to consider the separate parts of the UK separately, whereas the phrase “elsewhere” is suggestive of aggregation. Section 80E (3)(c) of Scotland Act 1998 refers to a comparison between one part of the UK and “any one other part of the UK”, which suggests the need to consider each constituent part separately. The guidance should therefore ensure that any ambiguity as to HMRC’s interpretation is removed.
- 3.8 By way of example, the guidance on page 17 under the heading “No ‘close connection’ – ‘days spent’ in Scotland or another part of the UK” refers to the need to compare the “number of days spent in Scotland against those spent in other parts of the UK.” It then goes on to say “Where an individual spends at least as many days in Scotland as elsewhere in the UK they are a Scottish taxpayer.” Both phrases are used in discussing the same context and it is not entirely clear in the guidance how an individual with days of residence in three or more parts of the UK should go about determining their position. For example, if the individual splits their time in the UK (say 185 days) roughly equally between three parts of the country, say Scotland, England and Northern Ireland, in the ratio 62:61:62, it is not clear from the guidance how HMRC will interpret this or how the taxpayer should interpret it. Would the individual be a Scottish taxpayer, because they spent at least as many days in Scotland as in any other individual part of the UK, or would it be in the rest of the UK, because in aggregate, the taxpayer spent more days in the rest of the UK than in Scotland?
- 3.9 Point three of the “Introduction” to the draft technical guidance (page 5 of the pdf version) should be rephrased, as currently it could suggest that someone who is not resident in the UK for tax purposes can be a Scottish taxpayer – in particular to a user that does not appreciate that “close connection” is being given a special meaning for the purposes of the legislation. The current wording in the guidance provides no additional clarification over and above the actual legislation. It would be more helpful to say something along the lines of “where an individual is resident in the UK for tax purposes, but does not meet condition A, the close connection test, through day counting.” Or, perhaps “where it is not immediately clear with which part of the UK the taxpayer has the closest connection or where the taxpayer has connections with more than one part of the UK.”
- 3.10 The meaning of the phrase “Place of residence” is discussed on page 8 of the pdf version. At the second bullet point, it indicates that an individual must have lived in a place in order for it to be a place of residence. At no point is there any mention of exceptional circumstances beyond the taxpayer’s control. For example, it may be the case that the individual intends to live at a place for several months, but due to circumstances beyond their control, such as

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<sup>7</sup> As inserted by section 25 of the Scotland Act 2012 and amended by Finance Act 2014 and the Wales Act 2014.

<sup>8</sup> It is also unclear in the guidance whether the same method applies both when considering day counting for multiple main places of residence and day counting for taxpayers with no close connection.

hospitalisation, they are unable to do so. We think that the guidance should deal with such situations.<sup>9</sup>

- 3.11 The third paragraph of the explanation under the heading “Meaning of ‘Place of Residence’”, on page 8 of the pdf version, should be rewritten, as the phrasing is ambiguous. In particular, it is not immediately clear what the subject of the verb “provides” in line two is. In addition, the phrase “useful additional indication” in line two of this paragraph is awkward.
- 3.12 The fourth bullet point under the heading “Meaning of ‘Place of Residence’”, on page 8 of the pdf version, is phrased incorrectly. The use of a comma in the second line is incorrect: “‘place of residence’, rented or work...” The comma should be replaced by either a dash or a full-stop, with the word “rented” commencing the new phrase or sentence.
- 3.13 On page 9 of the pdf version, the list of points to consider when trying to establish whether a place constitutes a “main place of residence” could usefully be expanded to include aspects of an individual’s social life, for example, club membership, hobbies etc.

#### **4 Examples**

- 4.1 We welcome the inclusion of examples in the technical guidance as these can be useful. We are, however disappointed that all the examples focus on the issue of determining whether or not there is a “close connection” with Scotland, or another part of the UK. There should be examples that explore in more detail other key issues such as day counting where there is more than one main place of residence, day counting where there is no close connection, and perhaps the interaction with split year treatment under the SRT. Some of the answers to the examples are thin on detail and should be expanded. We think the examples could also include some other groups, such as seasonal workers.
- 4.2 In the examples that involve a change of address during the tax year, we think it would be helpful to emphasise the importance of individuals notifying HMRC about address changes.<sup>10</sup> Indeed, this message is one that the technical guidance currently omits and could usefully feature, perhaps in the “Introduction”.
- 4.3 As noted above (paragraph 3.3), the need to be resident in the UK for tax purposes is mentioned at the start of the guidance, but is then only referred to again in examples 12 and 13. This key test could usefully be included in several of the other examples, either as part of the initial facts or within the “answer”.<sup>11</sup> This would help raise awareness of this key point.
- 4.4 Example 1 uses the phraseology “your” and “you”. It is our understanding that this draft technical guidance is not aimed at the general public. We would not expect the use of this informal wording in technical guidance aimed at HMRC officials, advisers and employers.
- 4.5 There are three examples that could usefully be extended. The answer to example 8 could be extended to cover the following tax year, once Tom has returned to Birmingham after the completion of his secondment. Example 12 refers to day counting – the facts could be expanded to include some dates. In addition the answer could be expanded to explore how

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<sup>9</sup> We appreciate that there is no mention of exceptional circumstances in the legislation either.

<sup>10</sup> Examples 5 and 8 in particular could include this message.

<sup>11</sup> Examples 6 and 7 in particular should refer to this point, but other examples could mention it too.

to count and compare days spent in Scotland with those spent in other parts of the UK – this would also enable the guidance to address the issue of whether days spent in other parts of the UK (for example Wales and Northern Ireland) should be aggregated or considered separately. Finally, although example 13 does not explicitly mention split year treatment, it indicates that Javier will be resident in the UK for tax purposes “from the date of his arrival”, which equates to this. The answer is lacking in detail, and should be expanded to explore the interaction of Scottish taxpayer status and split year treatment under the SRT.

- 4.6 We also think it would be helpful to make use of hyperlinks with the examples, such that relevant text in the guidance includes links to an appropriate example.

## 5 Record keeping

- 5.1 We welcome the inclusion of guidance as to what records an individual should keep to assist in the determination of Scottish taxpayer status. Given the guidance is directed at HMRC officials, tax advisers and the business community, we find the use of the phraseology “I” and “you” and the question and answer format slightly odd. This is the type of style and format we would expect in guidance directed at the general public and individual taxpayers. Moreover, given the intended audience, it could even cause some confusion – it might lead some employers to believe that they have to determine their employees’ Scottish taxpayer status. For this technical guidance therefore, we suggest a change in the style and a clear indication that these are the records HMRC expect individual taxpayers to retain in order to consider their own Scottish taxpayer status.
- 5.2 A useful addition might be for the guidance on record keeping to make reference early on to the need for taxpayers that may not have a main place of residence to keep records that would assist them in counting days, for example a diary noting where midnights have been spent. In addition, the guidance should probably indicate for how long taxpayers should retain records.
- 5.3 Bullet point 14 uses the term “local municipal taxes”. We question whether this is a phrase that people will understand in connection with the UK. Presumably it is intended to refer to Council Tax at present, which is currently the subject of a review by the Commission on Local Tax Reform in Scotland.<sup>12</sup> While we can understand the hesitation to use “Council Tax”, given the ongoing review, the phrase “local municipal taxes” is not commonly used in the UK, and we therefore suggest replacing it with “local taxes”.

## 6 Typographical errors and omissions

- 6.1 We support the comments noted at paragraph 6 ff. of the CIOT submission. Although many of these are minor, it is important that they are rectified, as even small errors of punctuation can prevent correct understanding of the guidance.
- 6.2 In addition, we note that the html version of the guidance makes frequent use of contractions, such as “they’re”, “it’s”, “they’ll” and “you’re”. This was not the case in the pdf

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<sup>12</sup> <http://localtaxcommission.scot/>

version of the guidance. LITRG has created many guides for its website, aimed at the general public. It is our understanding that it is best to avoid the use of contractions, as they can cause confusion, particularly for non-native speakers of a language and for those with lower reading ages. We therefore recommend a return to the more formal style of the pdf version of the guidance.

LITRG  
29 July 2015