Client Alert.

February 22, 2010

UK Residence and the Gaines-Cooper Case

By Trevor James and Sonia Grigis

On 16 February 2010, the Court of Appeal released its decision in *R (on the application of Davies, James & Gaines-Cooper) v HM Revenue & Customs ("HMRC").* The Court of Appeal unanimously dismissed the claim of the taxpayer that HMRC failed to interpret IR20 (which was the former HMRC guidance to determine whether an individual was resident in the UK for tax purposes), in the correct manner and unlawfully refused to apply it. It was held that on a proper interpretation of IR20 the taxpayer was resident in the UK for capital gains tax purposes.

It is worthwhile noting that IR20 only applies to the tax affairs of individuals prior to 6 April 2009. The guidance was replaced by new guidance - HMRC6. Although it has been replaced, this decision is of wider importance and will also be relevant to the interpretation of HMRC6. Further reference to HMRC6 is made below. This note outlines three of the most important outcomes of the *Gaines-Cooper* case.

Paragraph 2.2 of IR20 sets out the guidelines to determine whether an individual should be treated as resident and ordinarily resident for tax purposes. The case determined that properly construed, the guidance does not entitle a person non-resident status unless he left the UK to work in full-time employment either before or by the start of the relevant tax year. If an individual began full-time employment abroad within a tax year, then he remains resident in the UK for that tax year for the purposes of paragraph 2.2.

Secondly, it was also held that if a taxpayer claimed to have left the UK permanently or indefinitely and thus claimed to have ceased residency and ordinary residency in the UK, he had to demonstrate a clear break from former social and family ties within the UK. Although not specifically mentioned in the guidance, the court determined that this must be the case as a result of the force of the words "permanently and indefinitely" used in the guidance.

Finally, the case also reminds taxpayers that HMRC, when determining residence, will often consider the particular facts of each case and make a determination of residency or non-residency based on those facts and surrounding circumstances. As expected, it was determined that IR20 offers only general guidance and should not be relied on unless the individual facts fit squarely within the statements made in the guidance.

The new HMRC6 provides clearer guidance for individuals, and amongst other criteria, specifically mentions that HMRC may look at family ties and social connections of the individual when determining an individual's residency. There is also a concession provided by *Extra Statutory Concession D2,* allowing split-year treatment as an exception from the general rule, so that if an individual leaves the UK to work in full-time employment abroad part way through a tax year, then he will only be liable to pay capital gains only in respect of those gains arising in the period during which he is UK resident.

clients count on us for innovative and business-minded solutions. Our commitment to serving client needs has resulted in enduring relationships and a record of high achievement. For the last six years, we've been included on *The American Lawyer*'s A-List. *Fortune* named us one of the "100 Best Companies to Work For." We are among the leaders in the profession for our longstanding commitment to pro bono work. Our lawyers share a commitment to achieving results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.