TC02220

Appeal numbers: TC/2010/07884 & TC/2010/02716

CAPITAL GAINS TAX – appellant moved to Spain in 2000 and realised capital gains in 2003, 2004, 2005 and 2006 before returning to the UK in 2008 – whether at the times the gains were realised she was resident and ordinarily resident in the UK – held she was – guidance from* R (oao Davies and another) v Commissioners for HMRC *and* R (oao Gaines-Cooper) v Commissioners for HMRC *considered and applied – whether taxation of the capital gains in the UK was nonetheless precluded by her being a resident of Spain at the times the gains were realised, for the purposes of the UK/Spain Double Taxation Convention – held it was not because for the purposes of the Convention she was at those times a resident of the UK by reason of her personal and economic relations (centre of vital interests) being closer to the UK than to Spain – appeal dismissed – decision in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

LYNETTE DAWN YATES **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN WALTERS QC

Sitting in public at Birmingham on 8, 9 and 10 February 2012

Mr D. Powrie, Kibworth Tax Services Limited, for the Appellant

D.E. Tebbet and G. Boote, for the Respondents

DECISION

1. Ms Lynette Dawn Yates, the appellant, (whom I refer to hereinafter as "Ms Yates") disposed of 10,000 ordinary shares in a private company, Kingsbridge Asset Management Limited ("KAM") on 13 October 2003. As consideration for this disposal she received 15,851,677 ordinary shares in Proactive Sports Group plc ("PSG") and staged cash payments in October 2003, September and November 2004 and February 2005. On 10 May 2006, Ms Yates disposed of 3,750,000 ordinary shares in PSG (which had by then changed its name to Formation Group – see below) for a cash consideration of 8 pence per share.

2. The respondents in this appeal ("HMRC") have assessed Ms Yates to capital gains tax ("CGT") in respect of the gains arising on these disposals. The assessments are in respect of the years 2003-2004, 2004-2005 and 2006-2007 (referred to together as "the Relevant Years").

3. Ms Yates appealed against those assessments. At the appeal the only issue in dispute was whether or not Ms Yates was within the charge to CGT in the Relevant Years. Mr Powrie, her representative, submitted that she was not, on the basis that she was neither resident nor ordinarily resident in the UK in any of the Relevant Years and alternatively, if she was either resident or ordinarily resident in the UK in any of them, the UK/Spain Double Taxation Convention, effective in the UK for CGT since 6 April 1976 ("the DTA"), has the effect that the capital gains concerned are not taxable in the UK because Ms Yates was at all relevant times a resident of Spain.

4. The submissions made to me, therefore, were directed to two issues: first, was Ms Yates resident or ordinarily resident in the UK (or not) in the Relevant Years (or any of them)?; and secondly, was Ms Yates a resident of Spain (or not) for the purposes of the DTA at such times as would render the capital gains concerned (or any of them) not taxable in the UK?

5. I was told that the quantum of the assessments was not in issue and Mr Powrie asked in terms that I should give a final decision on the appeal. The tax charged by the assessment for the year 2003-2004 was £773,617.10; the tax charged by the assessment for the year 2004-2005 was £867,009.70; and the tax charged by the assessment for the year 2006-2007 was £113,566.53. However Mr Tebbet's Skeleton Argument stated that the assessments under appeal for a technical reason required amendment so that the assessment for the year 2003-2004 ought to be reduced, while the assessment for the year 2006-2007 ought to be increased. I did not hear oral argument on this issue.

The witnesses

6. I received witness statements from Ms Yates, her husband Mr David McKee ("Mr McKee"), Professor Timothy M. Cox ("Professor Cox") and Mr Miles Dean ("Mr Dean"). Mr Tebbet, for HMRC, did not require to cross-examine Professor Cox, and so his witness statement stood as evidence of the facts referred to in it. Ms Yates, Mr McKee and Mr Dean all gave oral evidence and were cross-examined by Mr Tebbet.

7. There was also a Statement of Facts Not in Dispute and extensive documentary evidence before me. At a fairly late stage, Mr Powrie and Mr Tebbet were able to agree a Schedule containing the numbers of days for the whole of which Ms Yates was physically present in the UK, Spain and other places in the world (respectively) and the numbers of days when she was travelling between the UK and Spain, and between the UK and other places in the world (respectively). I am grateful for their efforts in agreeing this Schedule (and for the help given by Mr McKee and Mr Boote) and I give the details of the Schedule below in this Decision.

8. From the evidence I find the following facts. Where the evidence is recounted, I accept it, except where there is an indication in this Decision to the contrary.

The facts

9. Ms Yates was born on 2 October 1955 near Manchester, in the north-west of England. She is and has at all relevant times been a national of the UK for the purposes of the DTA, that is, a citizen of the United Kingdom and Colonies who derives her status as such from her connection with the UK (article 3(c) of the DTA).

10. Ms Yates has one son, Richard Lawrence Yates, who was born on 29 August 1983. He has at all material times lived in the UK.

11. Ms Yates met Mr McKee in 1990 and went to live with him in Dublin, Ireland in January 1991. Mr McKee is about 2 years younger than Ms Yates. He was born near Glasgow, in Scotland. He was at all material times a director of a number of companies carrying on the business of independent financial adviser (IFA). He developed a speciality of advising sports personalities. At the time that Ms Yates went to live with him, he was employed by Bank of Ireland ("BoI"). BoI moved him from Dublin to Manchester. Ms Yates moved with him. In August 1992, Mr McKee left BoI to set up the Kingsbridge Partnership in Nottingham. Ms Yates moved with him from Manchester to Nottingham. At first, they lived in rented accommodation, but in 1996 they married and it was then that they purchased the residential property, 1 Kingston Hall, Kingston on Soar, near Nottingham ("Kingston Hall"). Kingston Hall was acquired by them jointly and their joint ownership of it has continued to the present time.

12. Ms Yates suffers from Gaucher disease. This is, according to Professor Cox's unchallenged evidence, an inborn error of metabolism affecting principally the macrophage system in adults and young children. Gaucher disease causes internal organs to become enlarged, swollen and scarred. It also compromises the bone marrow with anaemia and a tendency to bleed and failure to combat infections. It affects the growth of bones, leading to their thinning and also to episodes when bone dies, which causes extreme pain.

13. Professor Cox is one of the leading medical practitioners in the world specialising in research into and care of patients suffering from Gaucher disease. He may indeed by the leading specialist of this kind in the world. He is Professor of Medicine at the University of Cambridge, having been elected in 1988, and an Honorary Consultant at Addenbrooke's Hospital, Cambridge as a Consultant General Physician and

Metabolic Specialist. He has looked after patients with Gaucher disease since 1985 and has built up a national clinic for this disorder in Cambridge since 1989. He has cared for Ms Yates since early 1993.

14. Professor Cox states that Ms Yates is one of the worst affected of the many adult patients with Gaucher disease seen at his clinic. Her condition has been aggravated by intermittent illnesses and also by treatments she received in the past, including splenectomy (at the age of 12), radiation of the hip and orthopaedic interventions carried out at various times since her childhood. Professor Cox states that Ms Yates is severely disabled by her conditions, which will undoubtedly shorten her life and place her at risk from serious bacterial infections. She suffers, in particular, from discharging sinuses and pain in her bones (particularly of the left leg) and recurrent abscesses. She is at constant risk of infection.

15. Since 1993, when she first came to be under Professor Cox's care, she has been treated with enzyme replacement treatment, which is a definitive remedy for Gaucher disease if the condition is apprehended sufficiently early. This has led to an improvement in her health but has not led to substantial bone healing generally. Ms Yates is followed by Professor Cox and his colleagues at the Gaucher clinic at Addenbrooke's Hospital on a regular basis. She is prescribed enzyme therapy which is given by intravenous injection at home which, Professor Cox states, she manages commendably herself. She also receives, at times, supplemental Vitamin D.

16. In March 2000, Ms Yates rented an apartment in Estepona, on the southern coast of Spain, between Marbella and Gibraltar. It was a three-bedroom apartment in a development called Dominion Beach, and was taken on an 11-month lease, which was renewed until, in November 2003, she purchased another three-bedroom apartment in the same development (74 Palladio).

17. Her motivation for renting the apartment in Estepona in March 2000 was so that she would be able to benefit from the warm dry climate of that part of Spain. She thought that such a climate would be beneficial to her health. This view was supported by Professor Cox, who states that he agrees that 'from every aspect, a life in a warmer climate, without the intensified population density, particularly during the winter months, would be advantageous for someone stricken with a chronic illness and extreme pain and disability, such as Ms Yates'. And he adds that 'on general grounds I think it is easy to see that the various periods she has spent in Spain will have been beneficial for her'. He is 'strongly supportive of Ms Yates spending long periods of time in Spain, if she is able'.

18. The apartment was also suitable for her needs. It was on one floor and incorporated a lift connecting the apartment and the garage where Ms Yates kept her car, so that she could go straight to the car if the weather was bad. She felt much better while she was living at the apartment. Ms Yates's niece came to stay with her for the first 3 months she was there and she formed a friendship with a Spanish lady, Luisa, whom she met there. Luisa worked in the 'Community Office' and helped Ms Yates, whose command of Spanish was not good. There was a restaurant in the complex and many people who were not Spanish, particularly British and German

people were at the complex. A lot of English was spoken. Ms Yates was able to feel at home there.

19. She made quite lengthy (in aggregate) trips to the UK, as the day count schedules show. In 2003 her father was diagnosed as suffering from cancer and she came back to the UK to help him. Although Ms Yates has 3 sisters (two living in Manchester and one in Italy) it was easier for Ms Yates to help her father than for any of her sisters to do so. After the death of Ms Yates's father, her mother became ill and Ms Yates again returned to the UK to take care of her. She was in the UK over Christmas in 2003, 2004 and 2005 and in 2006 was in Dubai as well as the UK over Christmas. She spent these Christmases seeing Mr McKee and visiting family. She said under cross-examination that she felt it was important to be with her family at Christmas. In re-examination she said that of her 4 sisters not all could afford to travel and all of them wanted to be with their parents at Christmas. When she came to the UK she stayed at Kingston Hall.

20. In 2008, Ms Yates returned to live permanently in the UK because she felt that her relationship with Mr McKee was suffering from their separation. It had been their intention that Mr McKee would join Ms Yates and live with her in Spain when his business commitments made that possible, but in the event this did not happen.

21. Mr McKee was not able to join Ms Yates in Spain while she was there (except for occasional but regular visits) because of his business commitments in the UK. Ms Yates spent time in Spain and the UK (with holiday visits to third countries) as the following Schedules (agreed, as stated above, between the parties) show. Two Schedules are given because (as Mr Dean said, and Mr Tebbet agreed) for Spanish tax purposes the tax year is the calendar year, whereas for CGT purposes in the UK it is, of course, the year running from 6 April to the following 5 April.

FIRST SCHEDULE (CALENDAR YEARS)
DAYS OF MS YATES'S PHYSICAL PRESENCE

Year	In the UK	In Spain	Elsewhere	Travelling UK-Spain or Spain-UK	Travelling UK-elsewhere or elsewhere-UK
2000	127	223	NIL	11	NIL
2001	128	205	8	21	3
2002	191	137	15	18	4
2003	123	215	9	16	2
2004	72	264	9	17	4
2005	111	224	8	19	3
2006	94	215	24	26	6
2007	104	161	71	18	11

SECOND SCHEDULE (UK CGT YEARS)
DAYS OF MS YATES'S PHYSICAL PRESENCE

Year	In the UK	In Spain	Elsewhere	Travelling UK-Spain or Spain-UK	Travelling UK-elsewhere or elsewhere-UK
2000-01	60	279	8	14	4
2001-02	141	191	9	22	2
2002-03	220	121	6	16	2
2003-04	72	265	9	18	2
2004-05	83	242	17	16	7
2005-06	107	223	11	22	2
2006-07	108	206	21	24	6
2007-08	145	127	66	18	10

22. Some of the days shown as days when Ms Yates was present in the UK were days of transit, because Ms Yates would regularly fly to the UK (and stay at Kingston Hall) when she was *en route* to a holiday in a territory other than the UK or Spain. This was a cost-effective way to travel.

23. While Ms Yates was living in Spain she became a director of a Spanish company called Ogreda SA ("Ogreda"). Ogreda was a property investment company run by Mr McKee, which needed to have a Spanish resident director. Ms Yates filled this rôle. She carried out functions in relation to Ogreda's property investments which, being 'on the spot', she was able to do. These included being a key holder. She said she received no remuneration from Ogreda. Ogreda owned a small upmarket apartment block of 10 apartments. Mr McKee was unsure who owned the shares in Ogreda – he said under cross-examination that he thought Ms Yates owned them.

24. The transactions in the shares in KAM were as follows. On 10 October 2003, Ms Yates acquired 10,000 ordinary shares from Mr McKee. On 13 October 2003, she sold these shares to PSG in exchange for 15,851,677 ordinary shares of £0.01 each in PSG and payments of cash as follows: £906,000 on 14 October 2003, £87,824 on 15 October 2003, £400,000 on 7 September 2004, £667,000 on 24 November 2004 and £1,110,000 on 25 February 2005. Between 10 and 13 October 2003 (on 12 October 2003), KAM had acquired the business and assets of Kingsbridge Nottingham Limited ("KNL"), which appears to have been the entity holding the IFA business or businesses in which Mr McKee was interested at the time. Ms Yates's evidence was that her participation in these transactions was on the advice of Mr McKee, which she accepted and implemented without question – as she did in all business matters. PSG changed its name to Formation Group plc ("FG"). Ms Yates sold 3,750,000 ordinary shares in FG on 10 May 2006 to a Mr David Kennedy at 8p per share, reducing her holding to 11,596,667 shares in FG. That reduced shareholding represented, at 10 May 2006, 9.18% of the issued share capital of FG and Mr McKee, at 10 May 2006, was interested in an additional 390,000 ordinary shares in FG, representing 0.31% of FG's issued share capital.

25. Ms Yates retains a property in Spain which she visits when she can.

26. Ms Yates opened a bank account in her own name with National Westminster Bank ("NatWest") at their Loughborough branch in 1992 or thereabouts. That account is still maintained by her. In January and March 2007 she opened two accounts with Coutts & Co at 440 Strand, London, which were joint accounts with Mr McKee. In August 2000 she opened an account with Skipton (Guernsey) Limited ("Skipton Guernsey") in her own name. This account was closed in June 2005. In June 2005 she opened an account in her own name with Bradford & Bingley at a post office box address in Newcastle. This account was closed in February 2007. In April 2000 she opened an account at Banco Atlantico (now Banco Sabdell) locally to her apartment. When opened, this was a joint account with Mr McKee, but it was changed to an account in her own name in August 2004.

27. NatWest corresponded with Ms Yates at the Kingston Hall address. Skipton Guernsey also corresponded with Ms Yates at the Kingston Hall address according to documents dated from May 2003 to June 2005. Ms Yates recalled in evidence that most letters from Skipton Guernsey came to her Spanish address, but I infer that they were forwarded from Kingston Hall by or at the direction of Mr McKee. Bradford & Bingley also corresponded with Ms Yates at the Kingston Hall address. In particular, I saw a letter dated 6 June 2005 addressed to her there, in which her application to open an account was acknowledged.

28. Ms Yates had credit cards with BoI (in her own name, opened in 1991 or thereabouts), with Barclaycard in her own name, with Coutts & Co (jointly with Mr McKee, opened in January 2007) and with American Express (jointly with Mr McKee and opened in December 2005). Ms Yates said she had not used the BoI card for a long time, but it was registered to her Kingston Hall address. In the documents before me there were BoI credit card statements addressed to Ms Yates at Kingston Hall covering the period between 8 May 2003 and 8 May 2008. There was substantial activity on the account in that period. The Barclaycard was also registered to Ms Yates at Kingston Hall (under the name of Mrs L D McKee). In the documents before me were Barclaycard statements covering the period from 19 January 2004 to 16 April 2008. Again, there was substantial activity on the account in that period. Regular monthly payments of the full balance on the Barclaycard were made up to 25 May 2006 and thereafter by direct debit. Ms Yates said in evidence that she didn't know how the bills were paid. I infer that Mr McKee organised the payments for her.

29. Ms Yates said that Mr McKee would forward to her in Spain any important post delivered for her at Kingston Hall, or bring it out with him when he came to visit her.

30. Ms Yates informed her English doctor that she had a property in Spain, but did not inform her English dentist of that fact. She remained on the electoral roll for Kingston Hall although she never filled in a form relating to her entry on the electoral roll. She removed all her clothes and 'anything I needed' to Spain. She left her coats in England.

31. Benefits payments were made into her NatWest account. When asked under cross-examination whether she had told the Department of Work and Pensions ("DWP") that she was living in Spain, she replied that in 1999 and 2000 she had told them that she was thinking of going to Spain. In the documents before me there is a note of a telephone call between an officer of the DWP and an officer of HMRC (which Ms Yates said she had never seen) in which the DWP officer said that there was a note on the DWP's file which stated that Ms Yates's 'address in Nottingham was confirmed on 15.09.02'. According to the note, since 1992 Ms Yates has been receiving disability living allowance and the DWP's records indicate that Ms Yates has been a UK resident throughout her period of benefit.

32. The note also said that the DWP officer stated that Ms Yates had submitted an application for a mobility car by a claim dated 19 February 2007. The application was signed by Ms Yates and gave her address as Kingston Hall.

33. In the documents before me there is a letter from Ms Dawn Lyons, an administrative officer at the DWP to HMRC stating that Ms Yates was entitled to disability living allowance (DLA) from December 2002 to January 2004 at the highest rate relative to the mobility component and the lower rate relative to the care component. The letter states:

> 'If the customer had gone abroad on a permanent basis this would have affected her DLA. If she had gone to an EEC country for less than 26 weeks, this wouldn't usually effect [*sic*] her DLA.'

34. When Mr Tebbet showed Ms Yates that letter in cross-examination, he put to her the suggestion that the DWP had remained unaware that she was out of the country. Ms Yates gave no response to this.

35. In the documents before me was a copy of the application for a mobility car, signed by Ms Yates on 19 February 2007. This was an application to enter into an agreement under the Motability Scheme to start on 21 December 2007, for the supply of a vehicle for delivery then. The application gives Ms Yates's address as Kingston Hall, and a UK telephone number for her.

36. Ms Yates said in cross-examination that the mobility car was not intended for her own use and that she was paying for it out of her benefits. It was, I understood, for Ms Yates's mother's use, although she could not drive and one of Ms Yates's sisters would drive the car. As I understood her evidence, neither Ms Yates's mother nor the sister concerned would have been entitled to the mobility car and that is why Ms Yates made the application. She said she thought she was entitled to make the application. She was asked in re-examination whether she had taken professional advice regarding the conditions for various disability benefits. Ms Yates said she had not. She had tried to read written information about the conditions, but had found it very difficult.

37. Ms Yates claimed in her evidence that there was a distinct break in her pattern of life when she went to Spain in 2000.

38. When Ms Yates was shown a phone bill addressed to her (at her Spanish address) by Telefónica de España for the period from 7 June to 6 August 2004, which had many phone calls of short duration to UK telephone numbers listed, she explained that she had telephoned family and friends in the UK and that she later used Skype for this kind of contact. When shown a bill from Telefónica de España which showed that she had spent more time on international calls and calls to mobile telephones than on domestic Spanish calls, she explained that she made more local Spanish calls on a pay-as-you-go Spanish mobile phone, as it was cheaper to do so if one was telephoning to people who were in Spain.

39. Ms Yates explained that she attended Professor Cox (in the UK) every 6 to 9 months, depending on how she was feeling. She controlled her own medical condition with medication prescribed by Professor Cox.

40. In the documents before me was an attendance note, apparently by Professor Cox, dated 9 December 2001 in which he notes that Ms Yates was 'still living in Spain' and that she 'may move or return to the UK or elsewhere'. Ms Yates explained in cross-examination that at that time any move she was contemplating would have been to Italy and she was not intending to return to the UK.

41. Ms Yates was asked various questions in cross-examination by Mr Tebbet regarding business transactions undertaken by her and payments made by and received into her various bank accounts. She could not give certain explanations in answer to these questions and from what she said I formed the view that Mr McKee organised her financial affairs in some detail.

42. Mr McKee's evidence was that his business commitments in the end prevented him from joining Ms Yates to live permanently in Spain. In 1999, when Ms Yates's move to Spain was under active contemplation, Mr McKee considered that his business had stabilised and was becoming relatively profitable and that it was reasonable for him to plan a move to Spain himself when it 'became financially possible' to do so. He gave some thought to the property he would like to live in in Spain. He designed a house for the purpose. He would not have wanted to live long term in either of Ms Yates's apartments. In 2000 there was a prospect of his company being floated on the AIM. In 2000 the family wealth was, according to Mr McKee, about £4m, a large proportion of which was tied up in shares which he needed to hold in order to grow the company. His plan was to be bought out by a bank or a large financial institution.

43. He visited Spain as often as his business commitments allowed – he suggested this was 6 or 7 weekends a year with another 10 to 14 days taken as annual leave in Spain. Ms Yates came to see him in the UK less often.

44. His business interests suffered a reverse in 2002, when a company which had been purchased failed to perform. The share price 'tumbled'. He was involved in a buy-back of part of the business (eventually contained in KAM), which he nursed and, in October 2003, sold to PSG (having transferred shares to Ms Yates as indicated above).

45. The cash proceeds achieved on the sale of KAM enabled Mr McKee's debts of about £500,000 to be repaid and a property in Spain to be bought (for another £550,000). Mr McKee also bought an investment property (two condominiums) in Florida.

46. PSG (renamed FG) did well – the share price rose from 6p at October 2003 to 30p 18 months later, but then a sports athlete identified with the business attracted some unfavourable publicity and FG suffered connected reputational damage and the share price began to fall. Mr McKee left to start again with his own clients.

47. This was the position in 2008 when, according to Mr McKee, his business setbacks were damaging his relationship with Ms Yates. He realised at that stage that he was unlikely to be able to build up enough capital (at least in the foreseeable future) to enable him to retire to Spain. This was a disappointment to him as he had hoped to build an active retirement lifestyle based in Spain, but also spending time in Guatemala, where he was connected with a Foundation helping underprivileged children.

48. Mr McKee confirmed that Ms Yates relies on his (Mr McKee's) advice in all financial matters. They treated their funds as 'family money'. Mr McKee acknowledged that Ms Yates had been very supportive to him in his business life. Mr McKee confirmed that he had dealt with the form regarding entries on the electoral register.

49. Mr McKee transferred shares in KAM to Ms Yates before onward sale by her to PSG on advice to minimise capital gains tax.

50. The sale by Ms Yates of the shares in KAM was not returned to the tax authorities in Spain by Ms Yates because, Mr McKee said, he had received advice from Grant Thornton that no tax was payable. Mr McKee said that his recollection was that Grant Thornton had advised him orally that Ms Yates would be deemed to have acquired the shares for Spanish tax purposes at their full market value.

51. Mr McKee also said that the gross interest received by Ms Yates from Skipton Guernsey had not been returned to the tax authorities in Spain because he assumed that a remittance basis applied and that if the interest was not remitted to Spain it was not taxable there.

52. Miles Dean is an international tax practitioner who has specialised in cross border taxation for 20 years. He does not have any relevant professional qualification, but gave evidence from his experience of giving Spanish tax advice.

53. His evidence on Spanish tax did not prove to be controversial and so I did not feel it necessary to scrutinise his qualification to appear as an expert witness.

54. Mr Dean explained that Spain operates a 'bright line' residence test, by which a person is resident in Spain for tax purposes if he or she is physically present there for more than 183 days in a calendar year. There is a subsidiary test whereby if a person is not physically present in Spain for that length of time in a calendar year, he or she

may still be regarded as resident in Spain for tax purposes if his or her 'centre of vital interests' is regarded as being in Spain. To ascertain whether this is so, one looks at the person's professional, economic and social connections to Spain and forms a judgment. Mr Dean was not sure what relative weight was put on each of these factors in applying the test.

55. Mr Dean told the Tribunal that Spain does not have a concept analogous to the UK concept of ordinary residence, nor does Spain have a concept analogous to the UK concept of 'occasional residence abroad'.

56. The status of residence in Spain for tax purposes brings with it liability to Spanish income tax, even if, on the facts, there is no obligation to pay any amount of tax. Spain operates a world-wide system of taxation and not a remittance basis.

57. The Tribunal had no evidence before it of any view taken by the Spanish authorities on the question of whether Ms Yates was resident in Spain in any of the years in issue.

The law

The first issue – whether Ms Yates was resident or ordinarily resident in the UK in any of the Relevant Years

58. By section 2(1) Taxation of Chargeable Gains Act 1992 ("TCGA") chargeability to CGT in respect of chargeable gains accruing in a year of assessment is conditional on the person to whom the chargeable gains accrue being resident in the UK in any part of the year of assessment or being ordinarily resident in the UK during the year of assessment.

59. For these purposes 'resident' and ordinarily resident' have their meanings for the purposes of income tax (section 9 TCGA).

60. Section 334 of the Income and Corporation Taxes Act 1988 ("ICTA") provides that a commonwealth citizen or citizen of the Republic of Ireland:

> 'shall, if his ordinary residence has been in the United Kingdom, be assessed and charged to income tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad …'

61. The issue of residence in the UK for tax purposes was recently the subject of authoritative analysis in the decision of the Supreme Court in the joined cases of *R (oao Davies and another) v Commissioners for HM Revenue and Customs* and *R(oao Gaines-Cooper) v Commissioners for HM Revenue and Customs* [2011] UKSC 47 – to which I shall refer as '*Gaines-Cooper*' – in which judgment was given on 19 October 2011. Both parties referred me to this decision.

62. Lord Wilson's judgment in *Gaines-Cooper* notes that since the decision of the House of Lords in *Levene v Inland Revenue Commissioners* [1928] AC 217, the hallmark of residence in the UK has been a 'settled or usual abode' here. Lord Wilson also notes that for a cessation of a taxpayer's settled or usual abode in the UK to take

place a 'distinct break' in the sense of a change in the pattern of the taxpayer's life in the UK will be necessary (*ibid.* [14] – and see: per Lord Hope at *ibid.* [63]).

63. Lord Wilson described as 'a second hurdle' in the way of a taxpayer escaping liability as a resident of the UK that he must have left the UK otherwise than for the purpose only of occasional residence abroad. This is the effect of section 334 ICTA (*ibid.* [16]).

64. A 'multifactorial inquiry' is necessary in order to determine, in any particular case, whether there has been a distinct break in the pattern of a taxpayer's life for these purposes. Although a severance of social and family ties (with the UK) is not necessary for there to have been a distinct break, a substantial loosening of such ties is to be expected (*ibid.* [20]). A 'reasonably accurate' definition of 'leaving' the UK (and therefore of effecting a distinct break in the pattern of a taxpayer's life) is that the taxpayer's home and settled domestic life should not remain here (*ibid.* [44]).

65. The inquiry required is 'essentially one of evaluation'. It looks to what the taxpayer actually does or does not do to alter his or her life's pattern. The taxpayer's intention is relevant to the inquiry but is not determinative. What is being examined is the quality of the taxpayer's absence from the UK (per Lord Hope at *ibid.* [63]).

66. Mr Powrie, for Ms Yates, expressly disclaimed any reliance on 'some alleged concession in [the HMRC booklet] IR20 ["Residents and non-residents – Liability to tax in the United Kingdom"]'. He submitted that Ms Yates was, from 2000 (when she first rented the apartment in Estepona) neither resident nor ordinarily resident in the UK as a matter of law. Nevertheless, in his submissions, he placed emphasis on Lord Wilson's conclusions on the meanings of the key paragraphs in IR20 applying to persons leaving the UK in circumstances which amount to ceasing to be resident in the UK and becoming resident somewhere else (Spain). In his Skeleton Argument he quoted in full, paragraph [45] of the Supreme Court's Judgment in *Gaines-Cooper* in which Lord Wilson said:

> 'At last comes the moment in which to stand back from the detailed textual analysis of the booklet and to survey the wood instead of the trees. Unlike – so it seems – its successor, namely HMRC6, the exposition in the booklet of how to achieve non-resident status should have been much clearer. My view, however, is that, when all the passages in it to which I have referred were considered together, it informed the ordinarily sophisticated taxpayer of maters which indeed were unlikely to come as a surprise to him, namely that:
>
> a. he was required to "leave" the UK in a more profound sense than that of travel, namely permanently or indefinitely or for full-time employment;
>
> b. he was required to do more than to take up residence abroad;
>
> c. any subsequent returns on his part to the UK were required to be no more than "visits"; and
>
> d. any "property" retained by him in the UK for his use was required to be used for the purposes only of visits rather than as a place of residence.
>
> He will surely have concluded that these general requirements in principle demanded – and might well in practice generate – a multifactorial evaluation of his circumstances on the part of

> the Revenue albeit subject to appeal. If invited to summarise what the booklet required, he might reasonable have done so in three words: "a distinct break".'

67. Mr Powrie also referred me to *Shepherd v CIR* (78 TC 389) and *Grace v CIR* [2009] EWCA Civ 1082 for statements of the principles to be considered in deciding whether a move from the UK to another country is sufficient to constitute a change of residence. The taxpayers in *Shepherd* and *Grace* were airline pilots who continued to have a working base at an airport in the UK. Mr Powrie, in distinguishing Ms Yates's case from those taxpayers' cases, stresses that Ms Yates did not work in the UK or retain any working connection with the UK after she moved to Spain.

68. He also referred me to *Shah v Barnet LBC* [1983] 2AC 209 for Lord Scarman's summary of what in law the term 'ordinary resident' connotes. He said (*ibid.* at 343):

> ' "Ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether or short or long duration.'

69. He also cited *Gubay v Kington* (57 TC 601) and *Lord Inchiquin v Commissioners of Inland Revenue* (31 TC 125) for the proposition that it is possible for a husband and wife to live (and be resident in) different jurisdictions while at the same time living together 'in the matrimonial sense as a married couple'.

70. Mr Tebbet, for HMRC referred me to the decision of the Special Commissioners in the Gaines-Cooper appeal (SpC 568), as well as to the Supreme Court's Judgment in *Gaines-Cooper* and *Levene* and *Cooper v Cadwalader* (1904) 5 TC 101.

The second issue – whether the DTA has the effect that the capital gains concerned are not taxable in the UK because Ms Yates was at all relevant times a resident of Spain

71. Mr Powrie's case is that whatever Ms Yates's residence status in the UK may have been in 2000 and the years following, she was certainly then resident in Spain (according to UK principles) and that article 13(4) of the DTA applies with the effect that capital gains arising from the disposals in issue are taxable only in Spain. Mr Tebbet's response is that article 13(4) gives the UK taxing rights because Ms Yates was a resident of the UK (according to the DTA) in 2003-2004, 2004-2005 and 2006-2007.

72. Article 13 of the DTA is in the following terms:

> '(1) Capital gains from the alienation of immovable property, as defined in paragraph (2) of Article 6, may be taxed in the Contracting State in which such property is situated.
>
> (2) Capital gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing professional services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in the other State.
>
> (3) Notwithstanding the provisions of paragraph (2) of this Article, capital gains derived by a resident of a Contracting State from the alienation of ships and aircraft operated in international

traffic and movable property pertaining to the operation of such ships and aircraft shall be taxable only in that Contracting State.

(4) Capital gains from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this Article shall be taxable only in the Contracting State of which the alienator is a resident.'

73. The parties are agreed that paragraph (4) of article 13 of the DTA is in issue, which, on the facts, is clearly correct. The concept of a resident of a Contracting State is governed by article 4 of the DTA ('Fiscal Domicile'), whose terms are as follows:

'(1) For the purposes of this Convention, the term "resident of a Contracting State" means, subject to the provisions of paragraphs (2) and (3) of this Article. Any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature; the terms does not include any individual who is liable to tax in that Contracting State only if he derives income from sources therein. The terms "resident of the United Kingdom" and "resident of Spain" shall be construed accordingly.

(2) Where by reason of the provisions of paragraph (1) of this Article an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:

a. He shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of viral interests);

b. If the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;

c. If he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national;

d. If he is a national of both Contracting States or of neither of them. The competent authorities of the Contracting States shall settle the question by mutual agreement.

(3) Where by reason of the provisions of paragraph (1) of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated.'

74. Since there is no doubt that Ms Yates is a 'national' of the UK and not a 'national' of Spain for the purposes of article 4(2)(c), Mr Powrie agrees that if Ms Yates is not determined to be a resident of Spain under either paragraph (2)(a) or (b) of article 4 of the DTA, then she would be deemed to be a resident of the UK under paragraph 2(c) of article 4.

75. Mr Powrie referred me to the decision of the First-tier Tribunal (Judges Avery Jones (Chairman) and Clark) in *Hankinson v HMRC* [2010] TC 00319, in which the

question of how the provisions of a double taxation agreement should be judicially construed and applied was addressed. Judge Avery Jones is of course well known for his learning, in particular in the area of international taxation.

76. I was also referred by Mr Powrie to a two-part article in the British Tax Review, entitled 'Dual Residence of Individuals' (unfortunately the reference for the article was not given), written by an international panel of authors headed by Dr Avery Jones.

77. I was also referred by Mr Powrie to the OECD Commentary on article 4 of the Model Convention, concerning the definition of 'resident'.

78. Mr Powrie referred me to the decision of the US Tax Court in the case of *Stephen D. Podd et al v Commissioner* Case Number: 20225-93; Date of Decision: 18 November 1998, where Wells J stated that 'where doubt exists as to an individual's "[center] of vital interest", the commentary tips the balance in favour of the country where the individual stays most frequently" and the day-counts for the respective competing territories were determinative.

79. Mr Powrie also referred me to the decision of the Tax Court of Canada in the case of *Hae S Yoon v The Queen* Case Number: 2004-175(T)G; Date of Decision 22 July 2005, where Justice T. O'Connor (in similar fashion to the decision in *Podd*) held that where doubt exists as to an individual's center of vital interest, the balance is tipped in favour of the country where the individual stays more frequently – i.e. that is where his habitual abode should be held to be.

80. I was also referred to the Canadian case of *Lingle v The Queen*, both at first instance in the Tax Court of Canada (2009 TCC 435) and also, on appeal, in the Federal Court of Appeal (2010 FCA 152). Again, in this case, the place of the 'habitual abode' of the taxpayer was in issue and the judgments contain helpful learning on how the construction and application of article 4(2)(c) should be approached.

81. Mr Tebbet referred me to *Bayfine UK v HMRC* [2011] EWCA Civ 304 for the proposition that a purposive approach should be taken to the interpretation of the DTA. He also made submissions on the authorities and other materials cited by Mr Powrie.

The rival submissions, discussion and conclusions on the first issue – whether Ms Yates was resident or ordinarily resident in the UK in any of the Relevant Years

82. In relation to the multifactorial inquiry necessary to determine whether there was a distinct break in the pattern of Ms Yates's life in March 2000, when she rented the apartment in Estepona and moved there, Mr Powrie's submission was that, with the agreement of Mr McKee, she went there because of the great benefit to her health to be derived from living in a warmer and drier climate. From that time on, Mr Powrie submitted, Ms Yates's home and settled life was in Spain and not in the UK.

83. Her marital relationship with Mr McKee was of the highest importance to her and in going to Spain she was not intending to compromise or impair it. Their joint plan

was that Mr McKee would realise the value of his business interests in the UK as quickly as that could be achieved and eventually that Mr McKee would come to Spain to live with Ms Yates, making such return visits to the UK as might be necessary to service the significantly reduced amount of business that he would then be carrying on.

84. Mr Powrie submitted that Ms Yates's residence in Spain from March 2000 was not 'occasional residence' so that section 334 ICTA had no application to her. 'Occasional residence' is the converse of 'ordinary residence' (see *Gaines-Cooper* at [18]) and Ms Yates's residence in Spain was 'ordinary residence' as that expression is understood in English law, that is to say, it was adopted voluntarily by Ms Yates and for settled purposes as part of the regular order of her life for the time being (see: the citation from *Shah* at paragraph 68 above). The 'settled purposes' in question were Ms Yates's purpose of alleviating her health condition long-term by residence in the warm and dry climate of southern Spain.

85. Mr Powrie accepted that Mr McKee was resident and ordinarily resident in the UK in the Relevant Years. Kingston Hall was his home during that time, it was not Ms Yates's home – her home was in Spain. Ms Yates, in his submission, had no need for Kingston Hall, which was retained entirely for Mr McKee's purposes.

86. In 2008, in Mr Powrie's submission, events had taken such a course that Ms Yates felt that she had to choose to return to England for the sake of her marriage at whatever cost to her health, and that is why she came back. The background to that choice, of course, was that Mr McKee's business fortunes had developed in such a way that the likelihood of their plan for him to sell up and retire to Spain being put into effect was becoming ever more remote.

87. Mr Powrie placed some reliance on the evidence that Ms Yates had established a social life in Spain after 2000, and that she had taken up the rôle of Spanish resident director of Ogreda.

88. Mr Tebbet was at first reluctant to accept that the evidence showed that Ms Yates's acquisition of the apartment in Estepona in March 2000 and her going there constituted the acquisition in Spain of a settled abode, as opposed to a holiday home. However, on being pressed, he did concede that the evidence did point in that direction.

89. The agreed day-counts show that Ms Yates was physically present in Spain for considerably more than 183 days in each of the Relevant Years and I conclude that, for the purposes of UK tax law, she was resident and, adopting the *Shah* test, ordinarily resident in Spain in each of them.

90. That, of course, does not resolve the issue because a person can be resident in two or more territories in the same period (see: *Levene*). It does, however, dispose in Ms Yates's favour of the 'second hurdle' in her way, presented by section 334 ICTA.

91. There remains the question of whether she has established that she effected a distinct break in the pattern of her life when she went to Spain in March 2000.

92. Mr Powrie submitted that in 2000 – to quote from his Skeleton Argument – Ms Yates's social life in the UK, albeit limited, ceased and she continued her life in Spain as it was in the UK. He referred to the evidence that she had changed her financial arrangements in 2000 in that she had opened an off-shore bank account (Skipton Guernsey) and had opened a Spanish Bank account with the Banco Atlantico. He explained her return visits to the UK as consistent with the continued existence of family ties with the UK in a 'loosened form' – to quote Lord Wilson in *Gaines-Cooper* at [20] – and covered by the allowance of 90 days' visits to the UK (excluding days spent here because of exceptional circumstances for example illness or the illness of immediate family) referred to at paragraph 2.7 of IR 20. His case was that the 90 days' allowance (for which there was no statutory basis) was an administrative recognition that a person in Ms Yates's situation who had become not resident and not ordinarily resident in the UK might nonetheless have continuing family commitments here which necessitate her being 'more or less regular, to this country' (another citation from his Skeleton Argument – paragraph 21).

93. He stressed that Ms Yates's return trips to the UK were not driven by continuing obligations tying her to be in the UK from time to time, but were 'driven by chance and occasion' (his Skeleton Argument, paragraph 38).

94. Looking at the day-count, Mr Powrie submitted that the duration of Ms Yates's physical presence in Spain indicated permanent residence there.

95. Mr Tebbet relied on the evidence of the maintenance of Ms Yates's ties with the UK to support his submission that there had been no distinct break in the pattern of Ms Yates's life in March 2000 sufficient to establish that she had then ceased to be resident and ordinarily resident in the UK. He submitted that over a period of 48 months there were only 5 in which Ms Yates was not in the UK at any point. He also submitted that in the year of assessment 2002-2003 she had been present in the UK for more than 183 days (albeit that these days included days spent caring for her sick parents) and that in that year she had been resident in the UK on that basis alone.

96. He referred to the fact that her name continued to be on the electoral register at Kingston Hall throughout the period to 2008. She had continued throughout that period to operate her bank account with the Loughborough branch of NatWest, giving them Kingston Hall as her address.

97. The address given for the Skipton Guernsey account was also Kingston Hall address, as was the address given for her Barclaycard and BoI credit card, and her Bradford & Bingley account.

98. He also referred to Ms Yates's receipt of Incapacity Benefit from the DWP, which was credited to her NatWest account, and the evidence from contact with the DWP that the address they held for her was Kingston Hall. He also referred to Ms Yates's application under the Motability scheme in February 2007 giving her Kingston Hall address and a UK telephone number.

99. Mr Tebbet submitted that the strong links retained by Ms Yates with her family militated against her having made the necessary distinct break. She returned to the UK to see them even in the winter months when her health issues made time spent in the UK particularly difficult.

100. He submitted that the centre of Ms Yates's financial and economic interests remained in the UK (particularly her operation of the NatWest bank account). The dividends received from FG were credited to her NatWest bank account. The proceeds of the sale of her shares in KAM were deposited directly with Skipton Guernsey rather than being remitted to Spain. Mr Powrie replied on this point stressing that this was motivated by the high rate of interest being offered by Skipton Guernsey.

101. In my judgment the necessary multifactorial inquiry shows that there was not a distinct break in the pattern of Ms Yates's life in March 2000, sufficient to establish that she then ceased to be resident and ordinarily resident in the UK. Although much of the argument focussed on how strong Ms Yates's commitment to life in Spain was, it is useful to recall that Lord Hope in *Gaines-Cooper* said that what is being examined is *the quality of the taxpayer's absence from the UK* (*ibid.* [63]) (emphasis added).

102. I entirely accept that Ms Yates's health issues prompted and motivated her move to Spain in 2000, and that she then and later intended or hoped that Mr McKee would eventually join her to live in southern Spain.

103. But although there was undoubtedly in 2000 a change in the pattern of Ms Yates's life, as the acquisition of the apartment in Estepona and the day-count show, the evidence persuades me that she retained such substantial connections with the UK that it would be wrong to conclude, having regard to the authorities, that she then ceased to reside in the UK.

104. Although outside the UK for extended periods, she did make frequent return trips to the UK. Whether they should be regarded as 'visits' is, of course one of the touchstones of the inquiry and it would be wrong to prejudge the issue by describing the trips as being, or not being, 'visits'. When she came to the UK she stayed at Kingston Hall.

105. I have concluded that it would be wrong, on the evidence, for me to accept Mr Powrie's submission that after 2000 Kingston Hall was Mr McKee's home and not Ms Yates's home. Not only did she often stay at Kingston Hall but also she used the Kingston Hall address for important correspondence. I refer to her dealings with NatWest regarding her main bank account, and her dealings with Skipton Guernsey, Barclaycard, BoI and Bradford & Bingley.

106. The evidence pointed overwhelmingly to a very close relationship between Ms Yates and Mr McKee (which neither of them in any way denied) and, in such circumstances, it seems to me that it would be unreal to regard Mr McKee's home, which was jointly owned by him and Ms Yates, as not being her home as well.

107. I do not place much emphasis on Ms Yates continuing to be on the electoral roll as being resident at Kingston Hall. I quite accept that she did not apply her mind to the question of whether or not she ought to remain on the roll, given her extended absences in Spain. But the information retained by the DWP regarding Ms Yates's address in connection with her entitlement to disability living allowance, and her application from Kingston Hall to enter into an agreement under the Motability Scheme in February 2007 seem to me to carry more significance. By not informing the DWP that she had moved her permanent residence to Spain in 2000, and by making the application in February 2007 from Kingston Hall, Ms Yates was by implication, and expressly, informing an interested third party that she continued to be resident in the UK.

108. I was not persuaded that Ms Yates had created for herself a Spanish-based social life that in any way excluded or replaced her UK-based connections. I attach importance to her repeated return trips to the UK at Christmas (in the winter months) and the evidence of her close family ties with her parents and sisters, if not her son, who was rarely mentioned in the evidence. I cannot regard her relationship with Luisa as any substitute for her deeper social and family ties with the UK. The evidence from the phone bills of the telephone calls she made reinforced my impression that her most substantial social ties were with English people, whether in England or in Spain. Her command of Spanish was (at any rate initially) not good and I infer that it was important to Ms Yates that at the complex in Estepona a lot of English was spoken.

109. Likewise, her work for Ogreda is not a matter which weighs heavily in the multifactorial inquiry. It far from being full-time and it was unpaid. On the other hand all her financial resources continued to be derived from the UK throughout the period of her residence in Spain.

110. For these reasons I find that the quality of Ms Yates's absence from the UK was not such as to support the conclusion that she had made a distinct break in the pattern of her life for the purpose of relinquishing her status as UK resident and ordinarily resident. I therefore hold that she was resident and ordinarily resident in the UK in all of the Relevant Years.

The rival submissions, discussion and conclusions on the second issue – whether the DTA has the effect that the capital gains concerned are not taxable in the UK because Ms Yates was at all relevant times a resident of Spain

111. I accept the evidence of Mr Dean, with which Mr Tebbet in argument also agreed, that a person who is physically present in Spain for at least 183 days in a calendar year is regarded for Spanish tax purposes as being resident in Spain in that year. It follows from the agreed day-count, that Ms Yates was for Spanish tax purposes resident in Spain in 2000, 2001, 2003, 2004, 2005, and 2006 (i.e. in 2000 to 2006 inclusive, except for 2002). These periods of residence in Spain cover all the disposals in issue in this appeal. Therefore, my having held that Ms Yates was resident and ordinarily resident in all of the Relevant Years, it is necessary for me to decide whether article 13(4) of the DTA has the effect that the capital gains in issue are taxable only in Spain.

112. This turns on whether or not article 4 of the DTA has the effect that for the purposes of the DTA Ms Yates is to be considered to be a resident of Spain in the Relevant Years.

113. I bear in mind the purposive approach appropriate to the interpretation of the DTA as an international instrument, as explained by Arden LJ in *Bayfine*. A strictly literal approach is not appropriate. What is required is an approach 'on broad principles of general acceptation' (per Lord Wilberforce in *Fothergill v Monarch Airlines* [1980] 1 AC 251 at 281-282), giving the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty.

114. The DTA, of course, has the stated purpose of the avoidance of double taxation and the prevention of fiscal evasion. Mr Tebbet in his written submissions urged me not to seek to apply the DTA because on the facts there is no prospect of double taxation, because the gains in question have not been declared to the Spanish tax authorities, and that if the DTA were to be applied with the result that Ms Yates was found to be a resident of Spain on the tests laid down by article 4, then there was a prospect of the DTA being used (contrary to its stated purpose) to assist, rather than prevent, fiscal evasion. However, in oral argument, he retreated from this submission on the basis that the evidence would not support an allegation that Ms Yates had sought to evade tax on the gains. This was, in my judgment, on any view a correct course to take, because it seems to me that, given the existence of mutual assistance arrangements between the UK and Spanish revenue authorities, the fact that the Spanish tax authorities have not (as yet) expressed any intention to examine whether any liability to Spanish tax arises from the facts of the case, is no reason for this Tribunal to refrain from even examining the DTA which is, after all, incorporated into UK tax law by virtue of section 788 ICTA.

115. I turn, therefore, to consider article 4 of the DTA.

116. For Ms Yates it is argued that in the Relevant Years she had a permanent home available to her in both Spain and the UK. Mr Tebbet, in his written submissions, accepted that Ms Yates's Spanish apartments were both permanent and available to her, but would not accept that they were 'homes' because they did not have the quality of being 'the seat of domestic life' inherent in the French word '*foyer*', which is used to distinguish a house from a home. I find on the facts that Ms Yates had a permanent home available to her in both Spain and the UK in the Relevant Years. It is clear to me that the Spanish apartments had the quality of being her 'homes'.

117. Therefore, pursuant to paragraph 2(a) of article 4, I must examine whether in the Relevant Years Ms Yates's personal and economic relations (centre of vital interests) were closer to Spain or to the UK.

118. The OECD Commentary (referred to at paragraph [66] of the First-tier Tribunal's Decision in *Hankinson*, expands the reference in article 4(2)(a) to personal and economic relations as follows (see: *ibid.* at [15]):

> 'Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his

> property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.'

119. Following consideration of this text, the First-tier Tribunal in *Hankinson* considered the location of those persons with whom the taxpayer's main personal relations were maintained and of the assets representing his economic relations (*ibid.* [68]).

120. In the relevant passage in the article in the British Tax Review entitled 'Dual Residence of Individuals' it is observed that in view of the reference to both personal and economic interests in the OECD Model Treaty, there can be no implication that economic interests are to be preferred to personal ones. It is also observed that in cases in Switzerland and the Netherlands, where a conflict between the location of a person's economic and personal relations has been found 'personal relations in general prevail over business ties' (*ibid.* at p.107).

121. Mr Powrie, for Ms Yates, submits that 'the centre of vital interest test is marginally but only marginally in favour of Spain. [Her] family life was carried on in both Spain and the UK … more of private life took place in Spain where she was active, as far as she wished to be, in the local community whereas she was not so active at all in Nottinghamshire and her limited business activities [in connection with Ogreda] were in Spain' (paragraph 11 of his Supplementary Skeleton Argument).

122. Mr Tebbet, on the other hand submitted that the only reasonable conclusion on the balancing exercise required would be that the UK was the state with which Ms Yates's personal and economic relations were closer in the Relevant Years. He emphasised that Ms Yates retained a permanent home available for her use in the UK (Kingston Hall), she had always (before 2000) lived in the UK, her family was in the UK, her possessions were in the UK (with the exception of the Spanish apartment(s)). He recalls that her family relations were of sufficient importance to Ms Yates to make her spend 191 days in the UK in the calendar year 2002 (as against only 137 days in Spain) and that later, in 2008 when her marriage was threatened she chose to return to her husband in the UK rather than to remain in Spain – despite the benefits to her health of Spanish residence.

123. In the necessary examination of Ms Yate's personal and economic relations which I must conduct, I see no conflict between the location of her personal and economic relations. In my judgment her personal and economic relations were closer in the Relevant Years with the UK than with Spain. In the Relevant Years her centre of vital interests was the UK.

124. In reaching this decision I broadly accept the submissions of Mr Tebbet. The main factor connecting Ms Yates to Spain was the desirability of residence there for health reasons. This was the factor that led her to acquire the first apartment in Estepona. This factor is recognised by my decision that she had a permanent home

available to her in Spain. It is not a factor of importance to consider in locating Ms Yates's centre of vital interests.

125. It is very significant that she retained a permanent home available to her at Kingston Hall. This points, as the OECD Commentary states, to her having retained a centre of vital interests in the UK.

126. However in my judgment the evidence is much stronger than the mere retention of Kingston Hall. It does not overemphasise the position to say that Mr McKee was the centre of Ms Yates's vital interests. And Mr McKee was resident in the Relevant Years in the UK (at Kingston Hall).

127. Her personal relationship with Mr McKee was fundamental to her decision to move to Spain in 2000. She did so on the basis that eventually he would join her in living in Spain. I infer that if he had not entertained that idea should would probably not have moved to Spain. When it became clear, in 2008, that Mr McKee would not in the reckonable future join her in living in Spain and given that her relationship with him was then under strain, she returned to live in the UK (notwithstanding the deleterious effect this had on her health).

128. Furthermore, Mr McKee was central to her economic relations. Apart from her work at Ogreda (which apparently was provided for her by Mr McKee), I am not aware of any employment or professional activity in which Ms Yates engaged in the Relevant Years which could have generated an income for her. She relied on financial support directly or indirectly derived from Mr McKee. The shares in KAM, the disposal of which was the source of the capital gains realised in October 2003, September and November 2004 and February 2005were acquired (3 days before they were disposed of) from Mr McKee. The shares in PSG, the disposal of which was the source of the capital gain realised in May 2006, were derived from the shares in KAM, and thus from Mr McKee.

129. Not only were these gains derived from assets provided by Mr McKee, but Ms Yates realised them on the advice, or direction, of Mr McKee. The evidence was that he managed her important financial affairs and arranged payment of her credit card debts, from the UK, forwarding important post delivered for her at Kingston Hall, or bringing it with him when he came to visit her.

130. Her banking arrangements were in the UK (the NatWest account, the accounts with Coutts & Co and Bradford & Bingley) or offshore (Skipton Guernsey). I infer that the Banco Atlantico account was used only for her local needs in Spain. The same point can be made with reference to her credit cards, with BoI, Coutts & Co, Barclaycard and American Express. It is significant that she used the Kingston Hall address in relation to so many of these financial relationships.

131. Apart from gains and income (dividends from FG and interest) derived directly or indirectly from her relationship with Mr McKee, she did of course receive disability living allowance which was paid by the DWP into her NatWest bank account in the UK.

132. Her personal relationship with Mr McKee was, I find, the most important personal relationship which Ms Yates had in the Relevant Years. Beyond that, however, the evidence shows that her relationships with her parents (who lived in the UK) and her siblings (who lived in the UK, except for a sister in Italy) were of great significance to her. The evidence relative to her application for a car under the Motability Scheme emphasises this. None of these relationships constituted personal relations with Spain. On the contrary, they were personal relations with the UK. They far outweighed in significance and importance any social ties she may have formed in Spain.

133. As I have concluded that the centre of Ms Yates's vital interests was in the UK, not Spain, in the Relevant Years, I must apply article 4(2)(a) of the DTA to hold that Ms Yates was a resident of the UK for the purposes of the DTA in the Relevant Years. This disposes of the appeal, which I accordingly dismiss.

134. I heard argument relevant to the next 'tie-breaker' test in the DTA – whether Ms Yates had an habitual abode in the UK rather than Spain (or *vice versa*). Had it been necessary for me to apply that test, I would probably have held that she had an habitual abode in the Relevant Years in Spain, and not the UK, having regard to the day-count.

135. For the reasons given above I hold that Ms Yates was resident and ordinarily resident in the UK in the Relevant Years (because she has not established that she made a distinct break in the pattern of her life on moving to Spain in 2000) and that she was a resident of the UK for the purposes of the DTA in the Relevant Years and that consequently the capital gains with which this appeal is concerned are taxable in the UK.

136. As stated above (at paragraph 5) Mr Powrie asked that I should give a final decision on the appeal, but Mr Tebbet's Skeleton Argument stated that the assessments under appeal for a technical reason required amendment so that the assessment for the year 2003-2004 ought to be reduced, while the assessment for the year 2006-2007 ought to be increased. I did not hear oral argument on the technical issue referred to and consider that the appropriate course is for me to issue this Decision as a decision in principle on the issues which I was asked to determine and to direct the parties to re-address the figures in the light of this Decision. If the appeal cannot thereafter be disposed of by agreement, the parties have liberty to apply to the Tribunal for a final determination of the appeal. If the parties are able to dispose of the appeal by agreement, they should inform the Tribunal as soon as possible that this has happened. I direct accordingly.

137. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN WALTERS, QC
TRIBUNAL JUDGE

RELEASE DATE: 22 August 2012