

Applying section 334 ICTA (Commonwealth citizens and others temporarily abroad) in cases where an individual goes abroad permanently, but does not settle in any particular territory

by John Walters

1. The revenue are using section 334 ICTA¹ to charge persons who have (on a broad view of the matter) left the UK to income tax in years after their departure, on the grounds that they have left “for the purpose only of occasional residence abroad”.
2. They have succeeded in this argument before the Special Commissioner (Dr. Nuala Brice) in the case of *Shepherd v R & C Commissioners* [2005] STC (SCD) 644.
3. That case concerned a long haul airline pilot employed by British Airways, who, in anticipation of his retirement, had rented a flat in Cyprus and cut down the number of his days in the UK (as the Commissioner found) to 80 days, not including days of arrival and departure, in the year of assessment in issue, 1999-2000.
4. In other cases, the revenue have argued that it is section 334 which imposes the requirement on a Commonwealth citizen or citizen of the Irish republic leaving the UK that in order to be no longer ordinarily resident in the UK such a person must not only be physically absent from the UK for the appropriate length of time, but also have settled purpose for absence from the UK, such as permanent residence in a foreign territory.
5. Enquiries in these cases have therefore featured very burdensome requests for information as to the particular accommodation taken in different territories as well as other details surrounding the individuals’ bases and connections in particular foreign countries.
6. However, it is clear from the language of section 334 ICTA that it raises the question as to whether a particular individual has or has not left the UK “for the purpose only of occasional residence *abroad*”. The enquiry is simply whether he has gone abroad (which must mean anywhere in the world except the UK) and whether he has gone abroad for the purpose only of occasional residence.
7. In particular section 334 ICTA does *not* raise enquiry as to which countries a person who has left the UK has established residence in. Thus, the question of whether an individual has established permanent residence specifically in any particular territory is not raised by section 334. All that an individual must show, in order to establish that section 334 ICTA does not apply to him, is that he has not left the UK for the purpose only of occasional residence abroad, or, putting it in the positive sense, that he has left the UK for the purpose of ordinary (or permanent) residence *outside the UK*. Since the wording of section 334 ICTA posits the concept of “occasional residence abroad”, without indicating that a particular territory abroad is to be specified, it is clear that “ordinary residence abroad” – the antithesis of “occasional residence abroad” – is likewise a concept that relates to territories outside the UK generally, and does not require ordinary or permanent residence in any specific territory to be demonstrated.

8. The antithesis of occasional residence and ordinary residence for the purposes of section 334 ICTA was established by the only reported case on the section before *Shepherd*, which was *Reed (Inspector of Taxes) v Clark* [1985] STC 323 at 345a/b, a decision of Nicholls J (as he then was – now Lord Nicholls of Birkenhead).

9. *Reed v Clark* was a case where the taxpayer (Dave Clark) departed on 3 April 1978 intending to return to the UK a little over a year later, and in the event did so. Thus he was outside (and entirely absent from) the UK for the whole of the tax year 1978-1979. The period of absence was chosen with the motive of avoiding UK tax on significant profits which would otherwise have been taxable in that year (on the preceding year basis). He lived during his period of absence in or near Los Angeles, mostly in one fixed place of abode, and he worked from there.

10. Nicholls J decided that Dave Clark did not leave the UK for the purpose only of occasional residence abroad. Because he had gone to the USA, the argument in the case was whether he had remained ordinarily resident in the UK or had established ordinary residence in the USA.

11. Neither *Reed v Clark* nor *Shepherd v R & C Commissioners* raised the point that can arise in cases where an individual goes abroad and lives temporarily in two or more territories, for example to oversee businesses in various territories abroad, which is that where a person's absence from the UK includes time spent in two or more countries it is not necessary, in order that section 334 ICTA should not apply, to show ordinary residence in any specific foreign country.

12. Although ordinary residence has traditionally been a concept related to a particular territory, in the conditions of modern international travel and business, and in the context of a provision (section 334 ICTA) which specifically refers to "occasional residence abroad", it will, I suggest, be enough to show a settled purpose to be absent from the UK for permanent residence abroad, i.e. in one or more foreign territories taken overall.

¹ The current text of section 334 ICTA is as follows:

"Every Commonwealth citizen or citizen of the Republic of Ireland–

- (a) 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, and
- (b) shall be charged as a person actually residing in the United Kingdom upon the whole amount of his profits or gains, whether they arise from property in the United Kingdom or elsewhere, or from allowance, annuity or stipend, or from any trade, profession, employment or vocation in the United Kingdom or elsewhere."