International Remote Working during the pandemic

Employment Tax | Tax voice

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Matthew Fox considers some of the impacts that have materialised for employers with employees working away from their usual country of employment.

It was on 11th March 2020 that the World Health Organisation declared the COVID-19 a global pandemic. Very soon after that many countries introduced national lockdowns and other public health restrictions leading to significant business disruption. International travel restrictions made it impossible for business travel to carry on as usual. Office attendance has been largely curtailed as employees were advised by their Governments to work from home where possible to maintain social distancing.

Employers and employees embraced the challenges of remote working. However, some employees returned to their home countries to work from home, often without informing their employer, and have not returned to the country of employment whilst public health measures remain in effect and international travel remains difficult. This has ultimately led to some unintended tax and legal complexity which employers are having to identify, deal with and establish policies around.

In the early days of the pandemic, many Governments announced easements to avoid unintended tax and social security consequences that could arise from the temporary dislocation of employees. As temporary dislocations have extended any temporary easements cease to be effective and the tax and social security position of the employee may shift.

Some examples of where the tax position needs to be reviewed include:

- International assignees returned to their ‘home’ country to work remotely.
- International commuters who are not currently commuting.
- Individuals employed in one country have returned to their country of nationality, where the employer does not have a presence.
- Directors attending Board meetings remotely
- New hires unable to relocate to a new country to start a new role and so are working from home in their home country.

All of these are examples where the residence status of the employee and where they need to pay tax could be impacted. Tax and social security may have been withheld in the wrong country. For displaced workers, this can lead to tax

adjustments being required when completing tax returns after the end of the tax year. It can also lead to common cash-flow issues, such as where a tax liability becomes due in the ‘home’ country before a repayment can be claimed from the country where the tax is withheld. Employees faced with such an outcome are likely to be looking for support from their employer.

The compliance aspects are not just restricted to individuals’ tax return compliance. There is often a responsibility for employers to register and account for tax and social security withholdings. Even where an employee is working from home in another country, their activities should also be monitored, as they can create a corporate presence or a permanent establishment in the country where work is performed. This could trigger further filing requirements and tax obligations for the employer. What constitutes a presence or permanent establishment varies by country. Although governments have been encouraged by the OECD to consider the temporary and exceptional change of location due to the pandemic the risk, for now and the future, will need to be considered as there is currently no uniform approach. It is likely permanent establishment risks will increase once international travel restrictions are relaxed where employees do not return to work in the country of employment as soon as it becomes practical to do so.

What announcements have been made in the UK?

Broadly speaking an individual who is tax resident in the UK is liable to tax on their worldwide income and gains. Non-UK tax residents are liable to UK tax on UK source income which includes earnings in respect of UK duties unless such duties are incidental or exempt under the provisions of a double tax agreement.

An individual’s tax residence position is determined under the statutory residence test (SRT) which largely provides a series of objective tests in determining an individual’s tax residence. Many of these involve assessing the number of days an individual spends in the UK (midnights). Individuals who have come to the UK to work remotely in the pandemic will need to assess if they have become tax resident in the UK as a result and similarly individuals who left the UK to work remotely elsewhere may not currently be tax resident in the UK. In both scenarios the UK and overseas tax position is likely to change or could result in potential double taxation for which relief can be sought under the relevant double taxation agreement.

The Government introduced some changes to the SRT to ensure that care workers and health professionals temporarily working in the UK would not become tax resident but for other individuals, the SRT rules still apply. HMRC has nevertheless announced some measures that may impact some individuals' UK tax position. These may help with short-term displacements but are not likely to be relevant for longer term remote working.

Exceptional circumstances

Up to 60 days spent in the UK during each tax year for exceptional circumstances can be ignored for some but not all of the SRT's day counts.

In the early stages of the pandemic, HMRC provided some helpful guidance on the application of exceptional circumstances as a result of COVID-19, which can be found in its Residence, Domicile and Remittance Basis Manual at RDRM11005.

Unfortunately, many employees working overseas use the third automatic overseas test to claim to be not resident in the UK by working full-time abroad. Many employees failed this simply by working more than 30 days in the UK or having a significant break from overseas work by being displaced in the UK. In the absence of meeting the full time work abroad test, those with a family home in the UK could easily be tax resident in the UK both under the SRT and the tax treaty with the other country, leaving them liable to tax in the UK on their worldwide income and claiming a credit for overseas tax on overseas source income.

Non-UK tax resident working whilst stranded in the UK

As set out above, a non-UK resident is liable to UK tax on UK source earnings unless such duties are incidental to those done overseas or are exempt under the terms of a double tax agreement. The amount of earnings that relate to UK duties are calculated using a just and reasonable apportionment which will usually be based on a working time apportionment. HMRC have announced that earnings of a non-UK tax resident unexpectedly stranded in the UK can be just and reasonably excluded provided it remains liable to tax in the home country of tax residence.

It is important to note, this approach only applies to the earnings of a non-UK tax resident. The same just and reasonable apportionment rule also applies to UK resident individuals claiming overseas workdays relief in assessing how much an eligible individual's earnings but HMRC has confirmed it will not apply to such cases.

National Insurance Contributions ('NICs') – countries where the UK has no social security agreement

Where a UK employee is assigned overseas to a country where there is no social security agreement, NICs are required for the first 52 weeks of that assignment. After the 52 week continuation period, contributions may become due again if the employee comes to work in the UK. HMRC has announced that it will disregard the first 6 weeks of non-incidental work undertaken in the UK before NICs are due.

Some examples of international remote workers

UK employee working from home overseas

There are many UK employees who have been working from 'home' overseas for the duration of the pandemic. These individuals may be not tax resident in the UK in 2020/21 either under the first automatic overseas test (spending less than 16 midnights in the UK in 2020/21), by meeting the third automatic overseas test by working full-time overseas or by other areas of the SRT. Such individuals will only be subject to UK tax on UK source income including earnings for UK duties. Pay As You Earn ('PAYE') and NICs are likely to have been applied throughout on all of their earnings unless they have requested and received a NT code ('No Tax'). In the absence of a NT code they will need to file a return to claim a repayment. Such individuals will also need to consider their residence status and filing position in the home country and may need to fund that overseas tax before they receive a repayment from HMRC.

The UK employer may also have registration, withholding and filing responsibilities in the employee's home country. The employer will also need to understand if there is also a risk of creating a permanent establishment there too.

Commuters

A commuter is someone who may typically be tax resident in their home country but spends a significant percentage of time working in another state. Usually, commuters pay tax on their worldwide income and gains in their home country and tax in the other state on earnings related to duties performed in the other state. They claim relief from double taxation in their home country so that they are not doubly taxed.

From a UK perspective, where someone is commuting to the UK and therefore subject to taxes in both the UK and their home country their employer will usually apply PAYE. In such cases, HM Revenue and Customs (HMRC) will issue a ‘s690’ direction for a tax year based on a reasonable percentage of estimated UK workdays with the final position calculated in the self-assessment return.

Where an individual is resident in the UK and commutes overseas such that tax is due in that country, HMRC will allow the UK employer to operate an Appendix 5 scheme (net of foreign tax credit relief) to provide foreign tax credit relief in the payroll. In the absence of this, individuals claim relief in their income tax returns.

One of the consequences of the travel restrictions is that commuters are currently working exclusively in their home country but withholdings may have continued to be applied as they always have done. Commuters may therefore owe tax in their home country and need to seek a refund of tax from the country where duties are not currently being performed.

Some countries have sought to resolve the administrative burden of this by introducing a deeming rule, this being that duties are deemed to have been performed where they would have reasonably expected to have been performed. Such a rule may be agreed on bilateral basis between two countries as a practical way of easing the compliance and potential cash-flow burden. There have been several such announcements between EU/EEA countries but the UK has not agreed to any such arrangement with any treaty partner. Should a country unilaterally apply a deeming rule to a UK resident commuter who has not been working in that country during the pandemic this could lead to a risk of double taxation arising because the UK would have taxing rights on earnings from work done in the UK.

Non-resident non-executive directors of UK companies

Non-resident non-executive Directors of UK companies are liable to UK tax on their income for work performed in the UK. Prior to the pandemic the Directors travelled to the UK to attend the board meeting of the UK company. PAYE, and if appropriate, NICs are deducted from their fees. During the pandemic, the Directors have not travelled to the UK and board meetings have been taking place using audio or video conferencing facilities. If such Directors have not visited the UK in 2020/21 they are not liable to UK tax on their fees as they have not performed any duties in the UK. This means they will need to claim a repayment of PAYE but they will also need to

fund any tax due in their home country.

New hires from overseas

It is quite common for employers to hire new recruits from overseas. This has continued during the pandemic and some new hires have been unable to travel to start their role in the new location. They may therefore be working on their new role from home in the country of their tax residence for the time being. This means their earnings are likely to be subject to tax in their home country and home country social security is also likely to be due. This may result in the obligations for the employer to register and account for home country tax and social security withholdings.

For a new UK employee commencing work in their home country, the UK employer will still have its requirements to deal with under the PAYE regulations. However, it can use a NT code for PAYE purposes if the facts of the employee meet the following conditions in HMRC's guidance:

'Where a business in the UK or the UK branch or office of an overseas business employs someone who's non-resident, and the employee:

- is working wholly outside the UK
- has not been resident in the UK before
- employee does not intend to and will not perform any duties in the UK'

No NICs will become due until the employee starts to work in the UK. Once the individual does eventually arrive in the UK, PAYE and NICs will need to be applied.

Summary

This article highlights some of the potential tax and social security considerations for employers who have employees working remotely away from the country of employment during the pandemic. There are other considerations around employment law, data protection and immigration. Whilst employers have been broadly supportive to support international remote working as a result of the exceptional circumstances of the pandemic, the identification and resolution of employee tax positions and employer obligations is likely to result in policy and process tightening. Nevertheless, with appropriate policies and processes in place, it does open the discussion around the possibility of post-pandemic flexibility for employees and access to a wider global talent pool for employers.