Global governance

Employment Tax

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Charlene Wong Min and *Sophie Nash* consider the rules and reporting requirements for non-resident directors

Key Points

What is the issue?

Companies appoint directors to the board to provide oversight and governance and to contribute to the strategic direction of a company. In today’s globalised world, UK business often draws on global talent and experience to fulfil these roles. For non-UK tax resident directors of UK companies, both executive and non-executive, the tax and social security positions can be complex and the cross-border aspects should be considered

What does it mean to me?

Employer and employee tax compliance for non-resident directors is coming under increasing scrutiny from HMRC. Companies will need to be comfortable that they have reviewed their processes to ensure they comply from a UK PAYE and social security perspective and will want to ensure that overseas aspects have also been considered

What can I take away?

An understanding of the rules and reporting requirements for non-resident directors and an awareness of common areas of challenge that companies face

HMRC has increased their focus on non-resident directors through ‘Know Your Customer’ meetings and other forms of employer compliance reviews. This has put pressure on organisations to review their payroll and social security processes relating to their board directors. Managing the tax compliance position for directors can be complex if individuals are resident overseas, hold multiple appointments and if their circumstances often change.

The transparency on reporting has increased with the introduction of revised remuneration disclosures under the Department for Business, Innovation & Skills (BIS) and accountability for companies under the senior accounting officer regime. With the spotlight on executive pay and compliance, failure to review directors’ tax and National Insurance requirements can leave an organisation exposed to cost and reputational risks.

The rules – directors' fees

A non-resident director of a UK company is considered an office holder. The income received for the director's UK role, such as fees for attending board meetings, are subject to UK tax and the company has a UK PAYE withholding obligation on this income. In general, tax treaties between the UK and overseas territories do not offer exemption from UK tax, even if the director is resident in another country under the terms of a double tax treaty with the UK.

A letter of appointment will usually set out the remuneration for the role and the fees for UK duties.

Overseas employees with UK board duties

Some companies may appoint overseas employees to sit on a UK board alongside their employment duties. These individuals may visit the UK to conduct the duties of their employment and attend UK board meetings as a UK officer holder. This is a common area where companies may face uncertainty in terms of how to treat these distinctive duties.

Companies should be familiar with the HMRC reporting requirements for overseas employees visiting the UK under HMRC's Appendix 4 report (Short Term Business Visitor Arrangements). But they may need to more closely review whether a PAYE obligation arises if a visiting employee also sits on a UK board.

Indeed, HMRC's published view is that a director's attendance at a board meeting is never incidental. The contract may not refer to fees attributable to the board role itself. In this case, what basis should be adopted?

HMRC might look to an apportionment of total employment income the individual receives from that company for UK duties and allocate this as remuneration to the board role.

In particular circumstances it might be considered that the role is unremunerated, though this approach may be open to challenge by HMRC and will depend on the specific facts.

The rules – directors' expenses

Companies will typically reimburse expenses for non-resident directors that relate to their attendance at a UK board meeting, including flights to the UK, overnight accommodation and subsistence.

The UK tax treatment of these expenses would depend on whether the UK is considered a permanent workplace. HMRC has recently updated booklet *490: Employee travel – a tax and National Insurance contributions guide* to provide clarification in relation to the assessment of temporary workplace for a non-executive director. The updated guidance includes an example of a non-executive director who travels to board meetings at locations that can be considered temporary if they do not have a regular geographic location. This is likely to be a welcome clarification for many companies; some may consider assessing the locations where board meetings are held to determine whether it is possible to consider any as temporary workplaces.

Where tax relief for certain expenses do not apply under the temporary workplace rules, it may still be possible to claim it for travel costs from the home country to the UK for five years from the qualifying arrival date. For example, for flights to attend a UK board meeting (ITEPA 2003 s 373). This would be on the basis that director is non-UK domiciled and has not been resident in the UK for two years before the qualifying arrival date.

It is key to remember that this relief applies to travel costs only – additional expenses such as overnight accommodation or reimbursement of subsistence costs will be considered a taxable benefit if it is provided at a permanent workplace.

Expenses and benefits are frequent sources of misunderstanding in companies. It is important to:

- assess whether the UK (and overseas territories) are considered temporary or permanent workplaces;
- understand the tax treatment and reporting associated with the provision of expenses and benefits; and
- consider whether any UK tax relief is available.

Companies should also ensure they have in place the right processes and systems to track and report on directors’ expenses and benefits; whether for P11D reporting purposes or through a PAYE settlement agreement (PSA), under which it is agreed that the company will settle the tax directly with HMRC on behalf of the directors.

Social security

The UK National Insurance contributions (NICs) position for a board director can be complex – it may depend on whether they have appointments in other countries and how directorship fees are treated in them.

The UK does, however, have an administrative concession for non-resident directors of UK-registered companies. The following conditions must be met to exempt the director to from UK NIC:

- they attend a maximum of 10 board meetings in a tax year;
- each visit lasts no more than two nights at a time; or
- if the director attends only one board meeting in a tax year, the visit lasts no longer than two weeks.
- Care should be taken in applying the concession, in particular where the non-resident director holds multiple directorships in the UK that may affect the number of visits.

Notwithstanding the terms of the concession, if the director is resident in a country that has a social security agreement with the UK, it may be possible to apply for a certificate of coverage or A1 certificate that will continue to entitle them to social security in their home country.
In practice, social security is an area of risk that many companies face and there may be exposure when directors visit the UK from a country with which the UK does not have a reciprocal agreement.

Summary

The issue of tax compliance for board directors is complex from a tax and social security perspective. With the increased focus from HMRC and the open consultation on travel and expenses, it is a risk area whose guidance is evolving.

Companies will need to review their board director arrangements to ensure they are compliant and can mitigate the risks from a cost and reputational perspective. This requires co-operation between those responsible for on-boarding newly appointed directors (often the company secretary rather than human resources), the tax function and HR and payroll.