UK: Individual tax residency clarifications for COVID-19 remote workers

August 13, 2020

In brief

COVID-19 travel restrictions have triggered a multitude of complex remote working scenarios that UK organisations and employees are facing. These include:

- Business travellers - 'Stranded' in the UK who may or may not now wish to leave the UK once borders reopen;
- Planned moves on hold - Employees who were due to leave the UK to start a new role overseas and have instead started their new role remotely from the UK; and
- UK returners - Employees who may have previously left the UK to work abroad but have spent the COVID-19 lockdown back in the UK and may continue to work remotely from the UK.

On August 11, 2020 the UK tax authorities published a Q&A to respond to the most common questions that have been put to them in respect of the impact of COVID-19 on UK individual tax residence.

Her Majesty's Revenue and Customs (HMRC) guidance and clarifications on the individual tax residence implications are welcome but in essence, their Q&A demonstrates they intend to apply the UK tax residency rules as per the legislation and are not looking at further relaxations.

Employees and employers should be aware that much will depend on the individual facts and circumstances and those impacted will need to carefully review their positions.

In detail

UK individual tax residency rules

An individual's UK tax residency status is determined by the Statutory Residence Test (SRT). Most of the tests under the SRT operate by looking at a combination of days spent in the UK and connections to the UK.

Under 'exceptional circumstances' where an individual is prevented from leaving the UK, the SRT allows up to 60 days per tax year (i.e., between April 6 and April 5 of the following year) to be ignored from certain day counts.

COVID-19 exceptional circumstances

HMRC have confirmed that 'exceptional circumstances' apply when:

- An individual is quarantined or advised by a health professional or public health guidance to self-isolate in the UK as a result of COVID-19;
- An individual has been advised by official government advice not to travel from the UK as a result of COVID-19 (e.g., the Foreign and Commonwealth Office advised British nationals on March 17, 2020 against all but essential international travel during the pandemic);
- An individual is unable to leave the UK as a result of the closure of international borders (i.e., individuals must be able to demonstrate that they have made every effort to leave once those restrictions have been lifted); or
- An individual has been asked by their employer to return to the UK temporarily as a result of COVID-19.

HMRC also have clarified the following:

- Whether or not days spent in the UK can be disregarded as exceptional circumstances will always depend on the facts and circumstances of each individual case;
- The new COVID-19 guidance on exceptional circumstances must be considered with existing guidance (e.g., the individual must leave the UK when the circumstances permit; if the individual already had planned to be in the UK, these days cannot count as exceptional circumstances);
- Individuals must keep records and documents to support any claims due to exceptional circumstances; and
- Exceptional circumstances only apply to certain SRT tests as per the legislation.

Impact on individuals with children studying in the UK

One of the connection factors relevant to the SRT and 'sufficient ties test' is the family tie (i.e., UK resident spouse, civil/common law partner, and minor children). As part of this tie test, children are disregarded as a tie if they are only in the UK in full-time education and spend fewer than 21 days in the UK outside of term-time.

HMRC have clarified that, even if UK schools are closed, they will accept full-time education continuing in a different environment. However, there is no relaxation for the 21 day count itself. Exceptional circumstances do not apply to this test.

Employee considerations

One of the common ways individuals become tax non-resident of the UK is under full-time work abroad. There are various conditions to be met for this test, but two particularly relevant to COVID-19 remote workers are that the individual must not work in the UK for more than 30 days (a workday is more than three hours of work) and also that the individual must not have a significant break from overseas work (a continuous period of at least 31 days excluding certain leave days without a non-UK workday). Given travel restrictions, it is likely that employees stranded in the UK will have spent sufficient time working in the UK to fail these two tests.

HMRC have confirmed in the Q&A that exceptional circumstances still do not apply to these two tests and anticipate that each individual's tax residence position under full-time work abroad both for the current tax year and potentially the year before (in split year cases) could change as a result.

However, it still may be possible for an individual to remain a tax non-resident of the UK under other parts of the SRT or be a UK tax non-resident under the terms of a Double Taxation Agreement (DTA) but this will depend on the individual's personal circumstances.

Double Taxation Agreement (DTA)

Individuals temporarily spending time in the UK may look at determining their treaty tax residency status under the terms of a DTA (i.e., looking at the 'tie-breaker' tests such as permanent home, centre of vital interests, habitual abode, and nationality). HMRC have stated in their Q&A the expectation that tax treaty residence will not change as a result of a

temporary dislocation, which is in line with OECD guidance (please refer to our publication dated April 13, 2020 for more details).

In addition, HMRC have recognised that employees and employers may look at the employment income article of any relevant DTA for a short period of dislocation to determine the UK's taxing rights on employment income. HMRC have not provided any more guidance other than the usual rules apply based on the individual's circumstances.

The takeaway

Based on the Q&A published by HMRC, the UK tax authorities expect individuals to carefully assess their UK tax residence position in light of COVID-19. In particular, individuals should be aware that HMRC may review the facts and circumstances surrounding any claim for exceptional circumstances.

Employers and employees should review the compliance obligations of any international remote work.

Employees

The longer employees remain working remotely, the greater chance that the individual's UK tax residency status will switch as a result of COVID-19 displacement. In addition, six months (i.e., 183 days) is the tipping point adopted by many countries and DTAs in determining both residence and employment income tax liabilities.

As travel restrictions kicked off in March and we are now in August, employees who are still working remotely internationally are more at risk of triggering compliance implications. It is an ideal time for employers and employees to review the compliance obligations of any international remote work.

Employees should keep records of any flights booked, cancelled, and rearranged and any government/employer advice to remain in the UK.

Employers

With individual tax residency likely to switch for their employees, employers should be aware about the following compliance implications:

- Auditing and documenting where employees are located and the time spent working remotely/plans to return;
- Review of home/host tax, social security liability, and tax residency positions both under domestic rules and under DTAs;
- Greater complexity in tax return filing and perhaps the need to amend prior year returns;
- Employment tax and payroll considerations in the home and host locations;
- Immigration considerations;
- Corporate tax challenges; and
- Employment law policy and process considerations.

Let's talk

For a deeper discussion of how this impacts your business, please contact your Global Mobility Services engagement team or one of the following professionals:

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