Proskauer

COVID-19: UK Tax Residence for Companies and Individuals

Tax Talks Blog on **March 27, 2020**

Introduction

In these testing times the ramifications of COVID-19 continue to be felt in every area of personal and corporate life. With lockdowns announced around the world, including in the UK on 23 March 2020, travel has been severely curtailed and business practices are having to change accordingly. Below we discuss what this means for determining the tax residency of companies and individuals.

Companies

UK Tax Residence – "central management and control"

As a reminder, a company will be UK tax resident if it is either (a) incorporated in the UK or (b) centrally managed and controlled in the UK. When a company is resident in both the UK and another jurisdiction, if a double tax treaty exists between the UK and that other jurisdiction, the treaty may contain a residence tie breaker clause which is usually based on either the place of effective management (an objective test) or a mutual agreement procedure (setting out the process for resolution between the contracting states).

For UK tax purposes, a company is resident where its "real business is carried on" and this is "where the central management and control actually abides" as established in the case of *De Beers Consolidated Mines v Howe.* The place of central management and control will be where the highest level of control of the business of the company is, and this will usually be the location where board level decisions are made unless the decision taking role of the board has been usurped. Case law has shown that this will often be where the board physically meets. However, central management and control could be exercised by one individual and it is ultimately a question of fact. Generally, a company should (a) ascertain whether the directors in fact exercise central management and control and, if so, (b) ascertain where the directors exercise this control.

In light of the above, when considering the tax residence a non-UK incorporated company one should usually consider factors including, but not limited to, the following to try to ensure that the company retains its non-UK tax residency: (a) the board's role as the actual decision taking body; (b) the location of board meetings (meetings should not be held in the UK); (c) the frequency of board meetings; (d) board composition (limit the number of UK resident directors or those based in the UK); (e) attendance at board meetings (directors should attend in person as far as possible / should not attend remotely from the UK); and (f) voting / resolutions (these should be done outside the UK).

Consequences of COVID-19

For non-UK resident companies with directors in the UK who are unable to leave the country because of the virus and associated travel restrictions, the risk if they are making decisions from the UK is that the company becomes UK tax resident under the "central management and control" test. Ordinarily, to ensure retention of non-UK tax residence, advisers would recommend that directors should not participate in a meeting remotely while they are in the UK. However, in light of COVID-19 that might not be a practical solution. So what now?

We consider that what is important for the company residence test is the pattern of decision taking over the life of the company and the relative importance of the decisions taken, so management should think carefully about what the board is discussing in any particular meeting and potentially manage the board meeting procedure accordingly. For example:

1. An obvious initial option is the postponement of any non-essential meetings.
2. If it is an important decision (as reaction to COVID-19 might well be) allowing UK directors to attend and speak at the meeting but not to vote or adopting some other compromise to normal practices should be considered.
3. UK directors (subject to a company's articles or local laws) could be replaced with alternate directors resident in the company's home jurisdiction (provided those alternatives do not just mirror the decisions of the UK directors).
4. Where a virtual meeting occurs and UK directors participate remotely from the UK the expertise and influence over the board's decisions of those directors relative to non-UK directors should be assessed and taken into account in assessing where the decision is actually being made. As far as possible, the meeting's chair should be a non-UK resident and a quorum should exist irrespective of any UK director's

attendance.

Other jurisdictions

Other jurisdictions have issued guidance with regards to residence and the associated question of economic substance.

In Luxembourg the relevant authorities have published a regulation which permits Luxembourg resident companies to hold virtual meetings instead of physical meetings. This provision is irrespective of any contrary provision in a company's articles. The new regulation allows for board meetings to be held by way of written resolution or videoconference (or other means of telecommunication enabling participants to be identified). Under the new Luxembourg law, meetings held by video conference (or other permitted means of telecommunication) are deemed held at the registered office of the company.

In Jersey the Controller of Revenue has published guidance confirming that where a company's operating practices are adjusted to combat COVID-19 the Controller will not determine that the company has failed Jersey's economic substance requirements. For example a company will not fail to meet the tests where board meetings are temporarily held virtually to enable those subject to travel restrictions or in self-isolation to attend (where the meetings would usually be held in Jersey). A similar pragmatic approach has been adopted by the relevant authorities in Guernsey with statements from the Guernsey Society of Chartered and Certified Accountants and the Guernsey International Business Association. The authorities also suggest that adjustments made by companies in response to COVID-19 should be proportionate therefore if, for example, board meetings are held virtually usual protocol should be followed as far as possible.

In these extraordinary times it is expected (and hoped) that more jurisdictions, including the UK, will follow suit to provide comfort to companies affected by COVID-19.

Individuals

UK Tax Residence – Statutory Residence Test

The UK statutory residence test (SRT) applies to determine whether an individual is resident in the UK or not. The SRT contains so-called automatic UK tests (if an individual satisfies one of these they are automatically UK resident) and so-called automatic overseas tests (if an individual satisfies one of these they are automatically not UK resident). If an individual spends at least 183 days in the UK in a tax year then they are automatically UK resident for that year. If an individual is not automatically UK resident and not automatically non-UK resident then they have to consider the so-called "sufficient ties" test. The more "ties" an individual has to the UK the fewer days they can spend in the UK before becoming UK resident. The "ties" are (a) the work tie, (b) family tie, (c) accommodation tie, (d) 90 day tie and (e) country tie. Please contact any member of the UK Tax group if you have any questions on how these ties might apply to you or your employees.

HMRC's updates in response to COVID-19

The tests above look at the number of days spent in the UK. Any day spent in the UK can, under the relevant provisions, be disregarded if the day is spent in the UK due to "exceptional circumstances". Exceptional circumstances are circumstances beyond an individual's control and include local or national emergencies (such as civil unrest, natural disasters and the outbreak of war) or a sudden serious or life threatening illness or injury. HMRC recently updated its guidance on the SRT to cover the exceptional circumstances of COVID-19 (https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm11005). HMRC will accept that a day will be spent in the UK due to exceptional circumstances as a result of COVID-19 where an individual is:

1. quarantined or advised by a health professional or public health guidance to self-isolate in the UK as a result of the virus;
2. advised by official government advice not to travel from the UK as a result of the virus;
3. unable to leave the UK because of international borders closing; or
4. asked by their employer to return to the UK temporarily because of the virus.

This updated guidance from HMRC is a welcome source of clarity in this current area of uncertainty. In this regard, it is expected that HMRC will adopt a common sense approach to each individual's circumstances. However, questions remain. HMRC itself has noted that the "guidance may change at short notice as situations change". Individuals travelling to, or being forced to remain in, the UK should clearly document their reasons for travel to and/or stay in the UK and the details of their trip/stay to show the exceptional nature of their presence in the UK. Notwithstanding HMRC's latest guidance, a couple of points of caution should be noted:

1. the 60 day annual limit on the number of "exceptional" days in the UK in a tax year still applies; and
2. although the relief discussed above applies when counting the number of days in the UK it does not apply to the work tie. This means that if an individual is in the UK because of exceptional circumstances and the individual works on those days then those days are included in any assessment of whether they satisfy the work tie. This tie will be satisfied if an individual works for more than three hours a day in the UK for at least 40 days (continuous or separate) in that tax year.

Please contact any member of our UK Tax group if you have any queries about how any of the above or how COVID-19 will affect your business.