A helping hand

Large Corporate | Personal tax



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Bill Dodwell explains how HMRC is providing useful guidance to businesses and individuals.

I’ve been hugely impressed with everything HMRC has done since the start of the coronavirus pandemic.

The Office of Tax Simplification effectively stopped going to the office from Tuesday 17 March, shortly before lockdown was declared, and we held a board meeting by video conference on Thursday 19 March. Everyone is working from home and we all have access to our file store and email from home. However, there are just a dozen or so in the OTS team.

It’s a much greater endeavour to move tens of thousands of HMRC staff out of their offices and allow them to operate remotely. Remarkably, this has been achieved, alongside HMRC implementing the major new relief programmes for employers and the self-employed, to help reduce the financial impact to many millions of the pandemic.

HMRC’s guidance

Alongside the high-profile Coronavirus Jobs Retention Scheme, the Coronavirus Self-Employment Income Support scheme, and the deferral of VAT and Self Assessment payments, HMRC has also found time to issue new guidance on residence for individuals and companies.

The guidance is intended to help those who find themselves in different locations to those they’d expected, due to the impact of COVID-19 on travel.

The UK’s statutory residence test applies from 6 April 2013 (see bit.ly/34Tp2I6). A key aspect of the law is that the individual must count the number of days spent in the UK and overseas. However, for many parts of the test (but not all), days spent in the UK may be ignored due to ‘exceptional circumstances’. Up to 60 days spent in the UK due to exceptional circumstances may be ignored. HMRC’s new guidance in its Residence, Domicile and Remittance Basis Manual (see bit.ly/3cxoDh8) states:

‘The coronavirus (COVID-19) pandemic may impact your ability to move freely to and from the UK or, require you to remain unexpectedly in the UK.

Whether days spent in the UK an be disregarded due to exceptional circumstances will always depend on the facts and circumstances of each individual case.

However, if you:

- are quarantined or advised by a health professional or public health guidance to self-isolate in the UK as a result of the virus
- find yourself advised by official Government advice not to travel from the UK as a result of the virus
- are unable to leave the UK as a result of the closure of international borders, or
- are asked by your employer to return to the UK temporarily as a result of the virus the circumstances are considered as exceptional.'

Company residence is a harder topic, since it mainly depends on principles set out in case law and is of course a matter of fact. However, HMRC have sought to be helpful in their comments in its International Manual (see bit.ly/2S1emCe):

> 'We do not consider that a company will necessarily become resident in the UK because a few board meetings are held here, or because some decisions are taken in the UK over a short period of time. HMRC guidance makes it clear that we will take a holistic view of the facts and circumstances of each case.'

HMRC draw attention to double tax treaties, which typically have a tax residence tie breaker clause, where a company is regarded as resident in both territories under their domestic law. Newer, or amended UK treaties have a clause which allows the residence to be determined by the competent authorities; older ones allocate residence based on the place of effective management.

Of course, overseas companies could find that they create a UK taxable presence, or permanent establishment, without any change of corporate residence. HMRC is helpful here, too (see bit.ly/2Vqr3Zf):

'…we consider that the current legislation, treaties and related guidance provides sufficient flexibility with regard to whether a permanent establishment has been created in the UK. In particular, s 1141(1) CTA 2010 requires either that a business is carried on through a fixed place of business in the UK, or that an agent acting on behalf of the company has and habitually exercises authority to carry out the company's business in the UK.

As INTM264430 makes clear, HMRC considers that a non-resident company will not have a UK fixed place of business PE after a short period of time, as a degree of permanence is required. Similarly, whilst the habitual conclusion of contracts in the

UK would also create a Dependant Agent PE in the UK, it is a matter of fact and degree as to whether that habitual condition is met. Furthermore, the existence of a UK PE does not in itself mean that a significant element of the profits of the non-resident company would be taxable in the UK. The attribution of profits to a UK PE would depend on the level of activity in the UK, and the relative value of that activity, in accordance with the guidance at INTM26700 onwards.'

This new guidance will help companies (and especially their advisers) from worrying too much about the corporate tax aspects of coronavirus limitations on travel or location. Naturally, at the same time those in business will need to pay attention to residence and taxable presence issues to make sure that overseas companies continue to minimise their UK presence in a sensible fashion.