When the board are abroad

Employment Tax | International Tax | Large Corporate



03 November 2021

Lee Knight and Chris Gore consider the issues affecting the payment of PAYE and NIC for non-resident directors working in the UK

Key Points

What is the issue?

Non-resident directors of UK companies working in the UK will be subject to PAYE. UK companies can’t rely on them being in the UK for less than 183 days and they can’t be included under any PAYE relaxations available from HMRC for regular short term

business travellers. The NIC position needs to be considered separately as the rules are very different. Care should be taken when bearing the cost of a non-resident director's travel, accommodation and subsistence expenses.

What does it mean for me?

Many companies fail to recognise the PAYE reporting obligations in respect of non-resident directors working in the UK. UK companies with non-resident directors should review their payroll compliance in respect of these directors' UK duties.

What can I take away?

Exercising reasonable care to apply the correct tax and NIC treatment to non-resident directors is key. The rules can be complex and there is scope for UK companies to miss the issue or reach the wrong conclusion.

Now the world is starting to return to some form of normality and people are returning to offices, we expect to see a return of short-term business travellers to the UK, including directors of UK companies who are resident overseas.

Often, a UK company appoints a director who is not tax resident in the UK (a 'non-resident director'). This might be because the company wants to utilise talent from overseas, or it might just be that a previously UK based director has relocated and become resident overseas. Whatever the reason, when the non-resident director starts to work in the UK, the UK company will quickly acquire obligations under PAYE, irrelevant of the duration of their stay.

This PAYE obligation is often missed by UK companies, and this makes it an area of interest for HMRC, which can readily spot non-resident directors by reviewing Companies House records.

Failure by a UK company to operate PAYE could expose it to underpaid liabilities, including income tax, employee's and employer's NIC, the apprenticeship levy, and HMRC interest charges and penalties. The increases to NIC from 6 April 2022, and introduction of the Health and Social Care Levy from 6 April 2023 could also increase costs. This, together with the reputational risks of non-compliance and the cost of dealing with a HMRC enquiry, makes getting this right from the beginning crucial.

The UK income tax position

Non-resident directors of UK companies are office holders, and the employment income parts of the Income Tax (Earnings and Pensions) Act (ITEPA) 2003 that apply to employments also apply to offices.

Double tax treaties generally do not offer non-resident directors (of the UK company) working in the UK protection from UK tax. To illustrate this, Article 15 of the double tax treaty between the UK and the US states the following:

‘Directors’ fees and other similar payments derived by a resident of a contracting state for services rendered in the other contracting state in his capacity as a member of the board of directors of a company that is a resident of the other contracting state may be taxed in that other state.’

This lack of protection in double tax treaties means that a Short Term Business Visitors Arrangement (HMRC’s EP Appendix 4) cannot be applied in respect of non-resident directors.

Non-resident directors are also specifically excluded from the PAYE Special Arrangement for Short Term Business Visitors introduced in October 2015 for individuals who cannot meet the strict terms of EP Appendix 4.

Therefore the key issue for income tax purposes is that the earnings of a non-resident director of a UK company working in the UK will be liable to income tax in the UK. The UK company will invariably be required to operate tax under PAYE on the director’s earnings.

Establishing the non-resident director’s earnings liable to UK tax under PAYE

Where the UK directorship is commercially remunerated, and those earnings have been documented, it is straightforward to establish the earnings liable to UK tax.

However, it is more complex where we are told that the UK directorship is unremunerated, the UK company is part of an overseas group, and the non-resident director has other duties for the overseas group that are remunerated. In these circumstances, and depending on the facts, it may be appropriate to allocate a proportion of their total remuneration to the UK directorship role.

It will then be a case of considering where those directorship duties are performed. If the duties of the directorship are performed only in the UK, then the UK company will need to subject all the non-resident director’s earnings from the directorship to tax under PAYE in the normal way.

However, if the duties are performed in the UK and overseas, the UK company may want to obtain an ITEPA 2003 s 690 direction, allowing it to operate tax under PAYE only on the estimated percentage of the director’s total earnings relating to UK workdays. The director will need to record their actual UK workdays and submit a personal UK tax return following the end of the tax year to reconcile their UK taxable earnings.
Is the director also performing the duties of a wider separate employment in the UK?

If the non-resident director is also performing substantive duties of a separate employment with the overseas group in the UK, it is important to consider how this affects PAYE compliance for the UK company.

For example, can a Short Term Business Visitors Arrangement under HMRC’s EP Appendix 4 or a PAYE Special Arrangement for Short Term Business Visitors be applied in respect of the duties performed under this separate employment? If these relaxations cannot be applied, it may be appropriate to add a proportion of the salary from the overseas employment to the earnings for directorship duties being subjected to tax in the UK.

It may be contended that, despite the non-resident director performing substantive duties of a separate wider employment in the UK, they are not working for the benefit of the UK company in respect of this wider role, and that the UK company therefore has no PAYE obligations in this regard. If this is the case, care should be taken to ensure that this can be substantiated.

National Insurance

NIC must be considered separately to the UK tax position. NIC applies where an individual is gainfully employed and is also either resident, present (but for any temporary absence) or ordinarily resident in the UK. Gainful employment includes an office or directorship. With some limited exceptions, payments to a director, for acting as a director, are therefore treated as earnings for Class 1 NIC purposes.

For a non-resident director of a UK company, it is therefore possible that Class 1 NIC could be due on their earnings from the directorship if they perform any of those duties in the UK.

The social security coordination provisions of the EU-UK Trade and Cooperation Agreement or a reciprocal agreement with the director's home country might apply. This could mean that the non-resident director is subject only to the social security regulations of their home country (and not the UK).

If the social security coordination provisions of the EU-UK Trade and Cooperation Agreement or a reciprocal agreement do not apply, use of an HMRC concession might be possible. Under the concession, no UK NIC liability applies to such a director's earnings where the director only visits the UK to attend board meetings and:

- the director attends a maximum of ten board meetings in a tax year, and each visit lasts no more than two nights at a time; or
- if the director only attends one board meeting in a tax year, the visit lasts no more than two weeks.

If the social security coordination provisions of the EU-UK Trade and Cooperation Agreement, a reciprocal agreement, or the above HMRC concession do not apply then a liability to NIC in the UK could arise.

Non-resident directors' expenses

The UK company must also apply the correct tax and (where relevant) NIC treatment to expenses payments. The UK company may, for example, meet the cost of a non-resident director's travel expenses between their home country and the UK, plus the cost of UK subsistence and overnight accommodation.

A key consideration is whether the non-resident director's workplaces in the UK are (for tax and NIC purposes) temporary or permanent workplaces. Generally if travel, subsistence and accommodation expenses are attributable to the non-resident director's necessary attendance at a UK temporary workplace, tax relief will be available on these expenses.

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But if these expenses are attributable to their attendance at a permanent workplace, those expenses could be taxable and (where relevant) liable to NIC. The UK company will then need to report the expenses to HMRC in the appropriate way. Depending on the facts, that might involve:

- adding expenses to their other earnings reported under PAYE; and/or
- reporting expenses on a form P11D for the director; or
- utilising a PAYE Settlement Agreement (PSA) if the UK company agrees to settle the liabilities due, and subject to the conditions for PSA inclusion being met.

The following are examples of questions that might need to be asked to establish whether a workplace is a temporary or permanent one:

- What does the director’s service agreement say about their places of work and where their duties are performed?
- What is the purpose of the director’s visits to the UK?
- What is the nature of the work undertaken by the director in the UK?
- Where are the duties of the UK directorship normally performed?
- How much of the director’s overall working time is spent at each workplace?
- Are their UK duties defined by reference to a geographical area?

Where a non-resident director attends a workplace regularly for a period exceeding (or expected to exceed) 24 months and they spend 40% or more of their working time (in respect of that directorship) at that workplace, HMRC will deem the workplace to be a permanent workplace. Travel, subsistence and accommodation expenses attributable to their attendance there will therefore be taxable and (where relevant) liable to NIC.

However, there is a limited exception to the temporary and permanent workplace rules. Where the workplace in the UK is treated as a permanent workplace, tax relief may still be available for travel expenses between the director’s home country and the UK for five years from their qualifying arrival date in the UK.

This relief is given under ITEPA 2003 s 373 but is only available if the non-resident director is also not domiciled in the UK for tax purposes and has not been resident in the UK for two years before the qualifying arrival date.

Summary

The complex nature of the rules surrounding non-resident directors, with different considerations for tax and NIC, and ambiguous rules around expenses, makes the issue of tax and NIC compliance challenging. It is easy for UK companies to reach the wrong conclusion, or not keep suitable records which substantiate the position taken. Exercising reasonable care to comply is therefore key.