Short Term Business Visitors (STBV)

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Eleanor Meredith looks at the issues of concern for STBVs to the UK and how to report them
Over the last few years, the trend among multinational groups has been towards increasing numbers of business visitors and having fewer (and usually shorter) formal assignments. This article considers some of the challenges this presents to employers and the potential easements we can expect following the summer consultation on this area.

At the most basic level, organisations with internationally mobile employees face a huge logistical exercise in tracking where everybody is and when, broadly what they are doing, and whether any treaty exemption may be in point. This will include consideration of the "home" country and any treaty that may be relevant. An analysis of which entity the individuals are economically employed by will also be needed; this aspect is relevant both for taxing the individuals and for considering any permanent establishment issues for the entity concerned. However, more sophisticated tracking systems and technology solutions have gone a long way to ease this logistical burden.

Reporting STBVs for tax is a completely separate burden, though especially when related issues for those from non-treaty countries and groups using a branch structure, rather than separate companies, are also considered.

"Working for" a UK host employer

Before going any further, we should acknowledge that a PAYE obligation will not arise for a UK entity just because an individual from a related organisation visits the UK on business, but only where such an individual "works for" it within the meaning of s689 ITEPA 2003.

An analysis for STBV reporting will often start with whether someone is economically employed in the UK, but should instead consider whether there is a PAYE obligation that an Appendix 4 agreement would be needed to displace. "Works for” will usually require a degree of management and control that is not necessarily required for economic employment (see meeting notes of the Joint Expatriate Forum on Tax and NICs on 7 July 2014 for further detail). “Economic employment” is really a test of integration and which entity bears the risks and rewards associated with an employee’s service. Although the two concepts often apply concurrently, they need not, and many UK organisations will gather data on all STBVs without checking if the individuals are “working for” them, which may make the associated reporting more onerous than it needs to be.

Once a PAYE obligation is accepted, host employers will want to identify those individuals who are exempt from UK tax under the provisions of a relevant treaty and for whom the PAYE obligation may be lifted by applying an Appendix 4 agreement.

Economic employer and Appendix 4

In June 1995’s Tax Bulletin the then Inland Revenue set out its intention to require reporting in respect of STBVs who were economically employed in the UK. The reporting adopted at that stage, Appendix 4 in the Employer Procedures Manual (EPM), continues in broadly the same form to this day, albeit with a few embellishments (and a new home in the PAYE Manual).

The disclosures required divided STBVs into different categories, depending on whether or not their costs were borne in the UK and the number of days of UK presence that the employees had. In its current form, which dates from July 2014, the Appendix divides individuals into the following four key categories:

Test	**Reporting required**
Employees covered by the 60 day rule	None – see below for further commentary on how the rule applies.
Other employees with between 1 and 90 days of UK presence in the tax year	Confirmation that the costs of the assignment are not borne in the UK and the UK host does not function as the economic employer, plus: • Full name of employee • Last known UK and overseas addresses of employee • Nature of duties undertaken • Date commenced • Date ceased • To which country a tax return covering worldwide income is submitted
Employees with between 91 and 150 days of UK presence in the tax year	As above plus a statement confirming tax residence from the relevant tax authority for all taxpayers bar US nationals and green card holders. They have to confirm that they meet the substantial presence test.
Employees with between 151 and 183 days of UK presence in the tax year	As above plus personal statement of treaty residence provided by taxpayer. Cases to be considered on an individual basis.

The “60 day rule” in practice applies for up to 59 days only, as it has always covered “less than 60 days” and is open to interpretation, as explained below. It derives from a statement made by the then Financial Secretary to the Treasury in July 1996, during a Standing Committee debate on the proposed UK/Argentina double taxation agreement. Tax Bulletin 10/96 provides the following overview:

“The Minister indicated that the Inland Revenue would not consider that a short term business visitor was sufficiently

integrated into the business of a UK company for it to be regarded as the employer where the employee concerned is in the UK for less than 60 days in a tax year and that period does not form part of a more substantial period when the taxpayer is present in the UK."

Further commentary in Tax Bulletin 68 sets out various examples and questions that should be considered in determining whether an individual visiting the UK over a number of tax years has to combine those periods in the UK in applying the 60 day rule. The questions include whether there is any expectation that the employee will return to the UK on departure, how long the gap between visits is compared with the length of those visits, how frequently the employee returns to the UK and how integral the duties performed are to the UK business.

Neither the questions nor the examples included are conclusive, as the approach adopted is to consider the overall picture of the individual's role with any UK host, which makes it quite difficult to apply in practice, because it will be so variable. Employers could, perhaps, be forgiven for assuming that individuals will be covered by the 60 day rule, except where they either exceed the 59 days in the tax year concerned, or where it is clear that a role is ongoing in a way which means the limit will be exceeded in a future tax year.

Notwithstanding what is said above about where costs are borne, it is also possible to make an application for a particular employee to be included on an Appendix 4 agreement despite his/her costs being borne in the UK, **provided that** he/she can be shown to be economically employed outside the UK. Such applications have to be made by employers on a case by case basis, before the employees may be covered by the Appendix 4 agreement, so that the old OECD model test (where costs are actually borne) and the new test (where the individual is economically employed) are both effectively applied before treaty exemption is allowed. The emphasis is on economic employment, though, and having costs borne in the UK can only create a presumption of UK economic employment, which is rebuttable if it can be shown the individual remains economically employed outside the UK. Identifying exactly where costs are borne and who is the economic employer can be fraught with difficulty, however.

Having the cost of benefits such as accommodation borne by a UK entity will not invalidate an Appendix 4 arrangement, but just mean those costs cannot be covered by it, and they may fall out of UK tax for some other reason. For example, accommodation and travel costs that are exempt as business expenses will not normally need to be reported separately to HMRC; nor will any Appendix 4 arrangement be affected by them being borne by a UK entity.

It is worth noting that for any individual who is in the UK for more than 90 days Appendix 4 requires a formal statement of residence from the other taxing authority, which can be both time consuming and expensive to obtain.

For the purpose of the agreement itself, a UK tax year based test is applied, largely because Appendix 4 allows for a relaxation of PAYE, which is applied by tax year. The UK tax year is now largely irrelevant for treaty exemption, as most treaties apply a rolling twelve month period in considering the day limit test. This also figures in the Appendix 4 agreement, as it requires the UK host to monitor the 183 day limit across any 12 month period. Considering this on a real time basis is challenging for host employers, although technology solutions and the possibility of remote working may allow individuals to manage their time physically spent in the UK more proactively than in the past.

The Statutory Residence Test (SRT)

SRT introduced some further complexities, because it made it far easier for an individual visiting the UK for more than 45 days in any particular tax year to become UK tax resident domestically. This caused a shift in emphasis, because historically the reporting broadly assumed that the employee would remain resident and treaty resident in the home country, only rarely establishing tax residence in the UK. Under SRT, if the employee became UK tax resident, and gave up his permanent home in his home country he could easily tie break to the UK and become both domestically and treaty resident here.

The fact that there was a much higher possibility of an individual becoming UK tax resident and treaty resident caused some changes to the Appendix 4 agreement. What had been a single category of visitors spending between 91 and 183 days in the UK was divided into two groups, and from 2014/15 onwards, applications for anyone spending at least 151 days in the UK have to be on an individual named basis.

Other changes were made to the format of the agreement at the same time. Firstly, the updated agreement set out some limited circumstances in which the arrangement can apply to UK employees assigned abroad. The situation envisaged is for individuals economically employed outside the UK, who remain integrated into their host non-UK employer, for whom any UK workdays are undertaken – in practice, the UK workdays are often undertaken for the individuals' own convenience.

Secondly, the agreement is also now explicit about not applying to individuals who are employed by non-UK branches of a UK company. The rationale for this was that the individuals in this scenario were ultimately employed by a UK employer; therefore, the remuneration could not be borne on behalf of a non-UK employer as required by the employment income article, and treaty exemption could never be in point.

This was hugely disappointing to many UK headquartered groups that are structured with overseas branches rather than with separate subsidiaries abroad because of regulatory issues. It is difficult to argue with HMRC's stance that with a single legal UK entity a treaty exemption cannot be in point, but many organisations saw this as a change of approach that was both surprising and unwelcome. Regardless of whether or not it really was a change, it is fair to say that payroll compliance for STBVs from non-UK branches of UK employers began to be enforced more vigorously than it had been in the past.

Finally, HMRC took a harder line regarding the submission of Appendix 4 data, indicating that a PAYE failure would occur if reporting with supporting treaty data was not submitted by the 31 May deadline; it was no longer acceptable for host employers to gather and retain all the relevant data without submitting it formally to HMRC. In practice, if an employer was able when challenged to evidence and support treaty exemption claims as needed the impact of this change in approach was minimal. It could, though, be more significant where there was some difficulty in substantiating a historic treaty claim, perhaps because the individual had left group employment in the meantime.

Non-treaty countries

The UK's network of double tax treaties is extensive, but not universal, and where an employee from a non-treaty country, such as Brazil, works for a UK host employer in the UK, a PAYE obligation arises from the first UK workday. Even here the tax cost can pale into insignificance alongside the administrative complexities associated with RTI for PAYE, especially if the employee is entitled to personal allowances and/or not highly remunerated.

Special reporting arrangement – PAYE 81950

HMRC recognised this and in the summer of 2015 announced a special reporting arrangement that could apply from the 2015/16 tax year and was intended to offer a pragmatic solution for those visiting the UK for very limited business trips who could not benefit from a treaty exemption. Employers can now apply for the arrangement by completing and submitting the form on page 81950 of the PAYE Manual.

The agreement imposes a hard cut off, whereby any individual with more than 30 UK workdays in the tax year cannot be included, but as a test of workdays it can be easier for an employer to manage than the days of presence that count for treaty purposes. An employer may only have one of these schemes but it can cover any number of employees, provided they all meet the relevant criteria. It also applies an annualised, month 12 cumulative PAYE calculation, which minimises the need for payment of any tax which isn't ultimately due. A gross up is not typically required, other than for UK provided benefits, unless the individual is subject to formal tax equalisation.

There are some less helpful aspects, however. The deadline for submission of all relevant data and payment of tax is

19 April (22 April for payment if not made electronically), which is a tight timeframe, especially where difficulties in gathering data are exacerbated because STBVs come from many territories across different time zones. In some cases the tax cost can be a real burden, too, and because the paperwork is, by design, kept at minimal levels, evidencing UK tax paid in order to be able to claim a tax credit elsewhere can be difficult.

Summer consultation

It was against this background that HM Treasury and HMRC launched a joint consultation in May 2018 to consider whether some treaty style exemption could be extended to non-UK branches of UK employers and/or whether any pragmatic improvements could be made to the special reporting arrangement discussed above. The consultation closed on 6 August.

The outcome was announced on Budget Day 29 October 2018, the same day that the formal consultation response was published. The proposed reform is limited in scope, compared to the alternatives that the consultation offered, and will have disappointed many, but HMRC/HMT may have been equally disappointed by the limited number of responses they received (only 31 in total). The scale of response is not suggestive of a significant problem for the UK economy as a whole.

The response document confirms that the idea of a treaty style exemption where branch structures apply is not to be taken forward. While it recognises that a unilateral exemption for STBVs from branches would benefit particular business sectors, such as financial services and asset management, it goes on to highlight that the tax cost of the exemption would be high and largely about the UK giving up primary taxing rights. The conclusion reached is that the significant cost would benefit relatively few businesses and does not currently represent value for money (though this conclusion will apparently be kept under review).

More usefully two easements will be adopted for the special reporting arrangement, although both have, strangely, been deferred until 2020/21. The first is to extend the PAYE reporting and payment deadlines to 31 May following the end of the tax year. The second is to double the limit for the maximum number of UK workdays an employee may have and remain covered by the arrangement from 30 days to 60 days or less per tax year.

HMRC has indicated that the long lead in time is required because of changes needed to their own PAYE and accounting systems and to third party payroll software. While changes to systems may be needed to protect against erroneous penalty and interest charges associated with the deadlines being pushed back, there is no obvious reason why this would be true for an increase in the maximum number of workdays to which the agreement can apply. The special arrangement is covered only in a page in HMRC's PAYE Manual, which would seem to be easily changed.

The Budget also announced a plan to put the arrangement on a statutory footing, and shortage of Parliamentary time would be a reasonable excuse for the delay; but the legislative aspect could presumably be deferred until 2020/21, with the increased maximum number of days remaining a matter of HMRC practice in the meantime. This could be a win/win, encouraging individuals currently within the arrangement to spend more days working in the UK, giving rise to more UK tax on their employment income, while also offering an administrative easement for employers.
