

COVID-19: PRESSURE POINTS: WHAT TAX ISSUES SHOULD I BEAR IN MIND? (UK)

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Legal Briefings

COVID-19 poses significant challenges to both people and businesses around the world. First and foremost, we hope all those reading this briefing, and their families, are well. This briefing provides a summary of the key tax issues that businesses should consider in the context of the pandemic and the unravelling impact on life and on business.

TAX RESIDENCY

Companies

Where, and how much tax, is paid by a company relies heavily on its tax residency. Broadly speaking, companies incorporated in the UK are resident for tax purposes in the UK by virtue of incorporation. Companies which are not incorporated in the UK may become tax resident in the UK if their central management and control (in practice, the place where board meetings take place) is exercised in the UK. Other jurisdictions and some provisions set out in double tax treaties are similarly sensitive to the place where the board of a company, or its management, are seated.

It is therefore common practice for companies whose directors and management are not necessarily resident in the tax jurisdiction of their companies, to require relevant individuals to attend and discharge board and management functions in the correct jurisdiction. The travel restrictions which COVID-19 has placed on the international community may limit the ability of board members and management to continue to meet such requirements, and this may as a matter of principle lead to change of corporate residence. The consequent tax implications can be significant, and include charges to tax in the new jurisdiction of residence, the incidence of migration charges in the former jurisdiction of residence, and loss of access to double tax treaties.

Directors of international enterprises that are currently unable to travel offshore or are caught outside their usual jurisdiction of choice due to travel restrictions must take care to avoid actions which may adversely affect the tax residence position of their companies, both under UK law and under international tax treaties.

Longer term, if travel restrictions remain, it may in theory be possible to consider the appointment of directors and management who are present in the right jurisdiction. In practice that may not always be possible, or effective.

As a matter of pure analysis the presence of some board members in the UK for a limited period may not immediately lead to the company acquiring UK residence. Similarly, a single board meeting in the UK may not give rise to UK tax residence. That said, we consider it unlikely that HMRC will adopt a flexible stance in this context if restrictions persist for longer: the question of corporate residence has been receiving significant attention in the context of international tax planning at both OECD and local tax authority level, and whilst it may be hoped that common sense can prevail, directors should be aware of the risks associated with more prolonged periods of travel disruption and the impact on their group's tax status.

Related risks may arise elsewhere within groups and companies: employees who travel and work away from their home jurisdiction may through their activities in another jurisdiction give rise to a permanent establishment ("PE"), and hence tax charges, in that jurisdiction. As a matter of relevant legislation and the operation of double tax treaties, a short presence need not give rise to a PE, but longer term travel restrictions may pose a greater risk.

Again it is hoped that for as long as COVID-19 travel restrictions are transitory in nature common sense will prevail. Companies and relevant individuals should however be attentive to the risk, and consider carefully whether any revisions to rules or operations are mandated, particularly if travel restrictions remain in place in the medium and longer terms.

Individuals

Individuals, and the businesses for which they work, should also be mindful of the impact that travel restrictions can have on an individual's tax residency. In the UK, the introduction of the statutory residence test has helped provide greater certainty in establishing when is an individual resident in the UK. But the relevant tests are based in part on day counts, broadly irrespective of whether the presence in the UK is voluntary or forced. Travel restrictions may therefore have an impact on individuals' tax residence. Common sense may prevail where HMRC are willing to apply the certain element of discretion which the legislation mandates, but this is a matter which may only be applied on a case by case basis, and does not form a complete solution in all cases.

A similar exposure may arise under the provisions of many double tax treaties which exempt employees who are present in the jurisdiction for fewer than 183 days in a given year from paying tax in the jurisdiction. If travel restrictions remain in place employers may need to review the impact on employees as well on the employing company, given payroll and social security obligations.

TIME LIMITS

Notwithstanding these challenging times, the deadlines for tax filings, and of tax, should still be monitored (noting the announcements today relating to VAT and self-assessment discussed under the Tax Compliance heading below). It is in this context also relevant to recall that the current legislative cycle gives rise to a number of additional “one off” filing deadlines:

- **Transparency elections** - the recently enacted NRCGT rules include the ability to elect for tax transparency of certain off shore entities. Under the original legislation existing entities had until the 5 April 2020 to make the relevant election to HMRC. At the timing of writing, we understand that a statutory instrument extending the 5 April deadline has been issued. This is a welcome development, given in particular that Government’s guidance on the effect of the elections has only been issued in final form last week. We note that transparency election are of particular interest to the real estate sector given its use of off shore based property unit trusts.
- **DAC6** - The EU mandatory disclosure regime for reporting cross-border arrangements with certain hallmarks is still currently required to be implemented by 1 July 2020. Entities in member states will be required to file the first automatic exchange of information by 31 October 2020 in relation to reportable information during the first quarter from July 2020. This includes reportable transactions implemented in the period commencing two years prior to July 2020. At the time of writing there has not been any indication from Government that implementation of the DAC6 rules in the UK may be deferred.

It is relevant to note that other countries, in particular within the EU, have already moved to introduce new legislation to delay or extend both filing deadlines and the date for payment of tax. Comments from Government suggest that the UK too is assessing the position: evidently some action is already being adopted (see the comment above in relation to transparency elections, and below in relation to IR35).

IMPACT ON AGM SEASON

As AGM season approaches, it is likely that many companies will choose to postpone their meetings until a later time. These companies may risk running against the 6-month deadline if they do so; particularly for companies whose articles do not allow virtual or hybrid AGMs. Singapore has already extended the deadline for AGMs from four to six months for companies with a year-end of 31 December 2019; it remains to be seen whether the UK will take similar measures. The time at which an AGM takes place can impact on taxation. By way of example only, a UK REIT will need to meet the statutory requirement of distributing 90% of its annual profit shareholders within the timeframe allowed in the legislation, but a delay in shareholders meetings required to approve dividends may in turn impact on compliance with this rule.

IR35 POSTPONED

The Government has announced a postponement to the implementation of the IR35 reforms in the private sector in light of COVID-19. The legislation, previously due to be implemented from April 2020, will now be introduced with effect from April 2021. Whilst this is only a delay, and not a cancellation, it will provide a welcome respite to many in the private sector.

TAX COMPLIANCE

In light of COVID-19, several jurisdictions have chosen to allow companies to defer the payment of direct taxes. Responses have varied across jurisdictions, with some countries – such as the USA and France – allowing all corporate income tax payments due this quarter to be deferred, while others – such as Belgium – are allowing deferrals on a case-by-case basis.

In the UK, the Chancellor today announced that the next quarter of VAT payments are to be deferred and that self-assessment payments are not due until January 2021. HMRC is also using its discretionary powers to agree instalment arrangements and to settling penalties and interests in certain circumstances. HMRC have set up a phone helpline to support business struggling to pay tax due to COVID-19, details of which can be found [here](#).

The rest of the UK regulatory & judicial space has in general terms taken measures to continue business as usual. Despite closing its London office, Companies House is still accepting paper filings for the time being, encouraging paper documents to be delivered to its Cardiff address instead. It has also issued [guidance](#) on how to apply for an extension if annual accounts will be late due to the effect of COVID-19. The Courts and Tribunals Judiciary has also confirmed that cases will continue to be heard, and it has issued a [contingency practice direction](#) encouraging cases to be decided on the papers or remotely if in accordance with the Overriding Objective. This approach is also being applied to the tax tribunals system.

Finally, as Government seeks to bolster the economy with fiscal measures during these challenging new trading and investment conditions for many businesses, it is important to note that existing legislation provides numerous tools for assisting companies and businesses facing financial difficulties, including through debt restructuring, corporate reorganisations and capital raising. Companies should consider resorting to such tools and the associated reliefs, in addition to any other external and government assistance that may be available.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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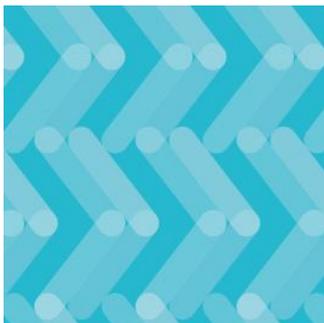
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