HMRC Approach to Company Residence and Permanent Establishments in response to COVID-19 Pandemic

Background

The COVID-19 pandemic has resulted in significant disruption to international travel and business operations, including the locations of directors, employees and other individuals.

HMRC is very sympathetic to the disruption that is being endured.

We have been asked about HMRC's response to the corporate residence challenges posed by COVID-19. The presence of individuals in the UK as a consequence of COVID-19 raises questions about whether:

- the foreign companies, of which those individuals may be directors or employees, could become UK tax resident, or
- those foreign companies could establish a taxable permanent establishment for UK corporation tax purposes.

Overview

HMRC consider that the existing legislation and guidance in relation to company residence and permanent establishments, already provides flexibility to deal with changes in business activities necessitated by the response to the COVID-19 pandemic.

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. The existing HMRC guidance makes it clear that we will take a holistic view of the facts and circumstances of each case.

With regard to permanent establishments, we do not consider that a non-resident company will automatically have a taxable presence by way of permanent establishment after a short period of time. Similarly, whilst the habitual conclusion of contracts in the UK would also create a taxable presence 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.

Company Residence.

Where the central management and control (CMC) of a company actually abides is a question of fact. HMRC take the view that whilst the site of board meetings may be important in determining where CMC abides, it is not determinative (see INTM120130 and INTM120180). Each case turns on its own facts and circumstances which makes it difficult for HMRC to provide definitive guidance as to where CMC may abide in cases where businesses are forced to make changes in response to the COVID-19 pandemic.

However, our published guidance as to when we would not usually challenge a company's view on its residence will be relevant in the current circumstances. See in

particular INTM120140 and INTM120150 . Whilst the examples given in the latter are based on a number of assumptions being made, this guidance sets out HMRC's view that occasional UK board meetings, or participation in such meetings from the UK, does not necessarily result in CMC abiding in the UK. Similarly, INTM120160 provides guidance in respect of cases which fall outside the examples in INTM120150. This guidance makes it clear that HMRC's view will depend on the facts in particular situations.

It is also worth noting that even if CMC does abide in the UK, this does not necessarily mean that the company will be UK resident. If the company is also considered to be resident of another territory with which the UK has a Double Taxation Agreement (DTA), the corporate residence tie-breaker provisions of the DTA may result in the company being treated as non-UK resident. Most of the UK's DTAs include a place of effective management (POEM) or a competent authority based tie-breaker. POEM, like CMC, requires consideration of all the facts and circumstances. Unlike CMC however, the POEM can only be in one place at any one time. As such, even if CMC started to abide in the UK to a sufficient enough degree to result in UK residence under UK domestic law, it may be that after consideration of the activity in both territories, the POEM may be found to be in the other territory, and the company will therefore be treated as non-UK resident.

In cases where the DTA includes a competent authority based tie-breaker, the UK competent authority usually takes into account the factors as set out at INTM120085. Whilst it is not possible to predict the outcome of any discussions between the two competent authorities, the UK competent authority would take into account a wider range of factors than just CMC and POEM, and these will all be viewed in the round.

UK Permanent Establishments

With regard to Permanent Establishments (PEs), we consider that the current legislation, treaties and related guidance provides sufficient flexibility with regard to whether a PE has been created in the UK. In particular, s1141(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 the published guidance at INTM264430 makes clear, HMRC consider 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.