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United Kingdom Short-Term Business Visitor Arrangements

1 May 2015

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Employers who have a Short-Term Business Visitor Arrangement (**STBVA**) with Her Majesty's Revenue & Customs (**HMRC**) will need to comply with their annual reporting obligations by 31 May 2015. These obligations vary, depending on the length of the employee's annual business trip(s) to the United Kingdom. Companies should consult the guidance contained in HMRC's Pay As You Earn (**PAYE**) Manual.

The standard form STBVA was amended in September 2014 and existing arrangements were automatically rolled over to the new basis. The reporting obligations remain the same. However, the potential scope of the STBVA is extended. Where, previously, any charging back to the UK host of the employee remuneration expense prevented the STBVA from applying to individuals who spent more than 60 days in the UK, the new rules allow the STBVA to operate in such circumstances if treaty exemption is, nevertheless, expected to be available.

Overview of STBVAs

Under UK domestic tax law, employment income earned from working in the UK is subject to UK income tax.

However, most double tax treaties to which the UK is a party contain an exemption for individuals who are resident in the other contracting state if:

(a) the individual is present in the UK for a period not exceeding 183 days in any 12-month period;

(b) the remuneration of the individual is paid by, or on behalf of, an employer who is not resident in the UK; and

(c) the remuneration is not borne by a permanent establishment of the employer in the UK.

The strict legal position is that employees are not permitted to self-assess the application of the treaty exemption, but must file a tax return with HMRC requesting treaty relief. Nor may any UK entity, for whom the individual is working, unilaterally decide not to deduct and account for the income tax under the PAYE system. This potentially imposes a significant compliance burden on employees who visit the UK for a short period of time, and on their UK host employers.

To alleviate this burden, HMRC has established an administrative relief, the STBVA, which is set out in HMRC's PAYE Manual under *PAYE82000 – PAYE operation: international employments: EP appendix 4: criteria for short-term business visitors*.

The relief is an agreement between HMRC and the UK host entity. It applies to visitors who are resident in a country with which the UK has a double tax treaty and who would fall within the exemption in the treaty. It effectively operates as a short-cut, bulk treaty exemption application. However, as this is an administrative relief, it applies in a narrower range of circumstances than the treaty and there are recording and reporting obligations on the UK entity.

Revised STBVA terms

The standard form STBVA was amended in September 2014. Existing arrangements were automatically rolled over to the new terms, on the basis that they were considered to be more generous.

To obtain the benefit of the STBVA, it is essential to be able to show that, in the light of the Commentary of the Organisation for Economic Co-operation and Development (**OECD**) on Article 15 (Income from Employment) of the Model OECD Convention (the **Commentary**), exemption under the relevant treaty would be likely to apply.

The key question is usually whether condition (b) of the typical treaty exemption conditions, as set out under "Overview of STBVAs" above, is satisfied.

HMRC have clarified that an STBVA does not apply where the remuneration expense is paid by an overseas branch of a UK company.

In addition, even though a foreign company is and remains the individual's formal legal employer, the question is whether the individual is really working for a UK business during his/her UK visits, such that the UK company/branch is his/her economic employer for the purposes of those UK activities, in which case condition (b) is not satisfied. In other words, is (s)he still functioning as an employee of his/her legal employer and providing services that are an integral part of its business?

Previously, if the UK visits totalled no more than 60 days (and were not part of a more substantial period of presence in the UK) and the individual was physically paid by a foreign employer, HMRC did not seek to examine any re-allocation of the associated costs, on the basis that, for such short visits, the individual could not be integrated sufficiently into the host's business for it to become his/her economic employer anyway. However, the STBVA did not apply if the remuneration cost of a specifically named employee, whose annual business trips exceeded 60 days in aggregate, was ultimately borne by a UK company or branch. "Ultimately borne" was (and still is) widely defined, in the HMRC guidance, to include re-charges of any nature.

HMRC are now being more vigilant on the "60 day rule", checking that any period of UK work of up to 59 days does not form part of a longer period.

On the other hand, HMRC's approach to individuals who spend 60 days or more in the UK has been relaxed, initially for a trial period.

Extended STBVA scope for re-charge situations

HMRC's new practice is that where the remuneration cost of a named employee is borne by a UK company or UK branch, even where that individual visits the UK for 60 days or more during the relevant 12-month period, provided that, nevertheless, no UK company is the economic employer (and so the treaty should exempt the individual from UK income tax), the UK business may request agreement from HMRC for the STBVA to apply. In other words, HMRC are prepared to widen the scope of the STBVA to match more closely the scope of the corresponding treaty relief.

In the discussion on condition (b), the Commentary distinguishes between what is, in substance, a contract of service, i.e. an employment relationship between the individual and the UK business, and a contract for services, i.e. an agreement for services, entered into between the foreign and UK enterprises. The former would not fall within the treaty exemption.

According to the OECD, it is important to determine whether the services rendered by the individual constitute an integral part of the business of the formal employer or of the enterprise to which the services are provided. A key consideration is which enterprise bears the responsibility or risk for the results of the individual's work. Other factors include consideration of which entity has authority to instruct and discipline the individual, which entity provides the equipment necessary for the performance of the services, and the financial arrangement between the formal employer and the entity receiving the benefit of the services.

In terms of re-charges that represent, or that include, remuneration expense, the Commentary observes that, where the fee is a direct re-charge of, or a mark-up solely on, the remuneration of the individual in question, this may indicate an economic employment relationship between the individual and the UK business. However, this would not always be the case; for example, in an outsourcing context. Conversely, where the individual's remuneration is only one of various costs of the foreign entity that are taken into account in calculating the fee, this financial arrangement may indicate that there is a contract for services between the foreign entity and the UK business, such services being delivered via the activities of the individual.

The Commentary also contains examples of fact scenarios. Example 3, for instance, concerns a worldwide hotel business. One hotel company in the chain seconds its employee to another (short-staffed) hotel company in another country to act as a receptionist, and the fee is a simple re-charge of the individual's payroll cost. In that case, the employee forms an integral part of the operations of the hotel to which the employee is providing services. This indicates an economic employment relationship between the individual and the host business.

By contrast, in Example 6, a multinational organisation is structured along cross-border functional lines and certain administrative functions (such as H.R., finance, treasury, legal support and I.T. management) are centralised. One member of the group acts as a cost centre and sends employees to its fellow group companies around the world to perform such functions in return for a re-charge of the payroll costs. In that scenario, the employee is actually performing a core function of the legal employer entity, rather than acting as an employee of the affiliates. Accordingly, treaty exemption and the STBVA may be available.

Next steps

In the lead up to 31 May, companies should not only gather the necessary information to report to HMRC, but should also consider whether, in the light of the extended scope of the STBVA, there are more employees to whom the STBVA could now apply, in which case, a request for that additional dispensation should be submitted to HMRC.

If you have any questions regarding this memorandum, please contact Judith Harger in London (+44 20 3580 4705, jharger@willkie.com) or the Willkie attorney with whom you regularly work.

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1 May 2015