Short-Term Business Visitor Update

Introduction

We continue to see an increase in the number of short-term assignments, cross-border commuter roles and international business trips. This global trend is gathering pace with far fewer longer-term assignments. In line with this trend, globally tax authorities are taking an increasing interest in the compliance issues arising for both employers and employees from these shorter arrangements. Do remember, it is not just the wage withholding/PAYE equivalent issue that tax authorities are concerned about as corporate tax, transfer pricing, permanent establishment issues and immigration are a few associated additions to their 'hit list'.

Recent initiatives such as Common Reporting Standards (CRS), allowing for the automatic exchange of information between jurisdictions and institutions, and Corporate Criminal Offence (CCO) legislation in the UK making it a criminal offence not to put in place necessary measures to prevent the facilitation of tax evasion globally, make it even more important for employers to be compliant. Despite the difficulties in tracking an internationally mobile employee population there is now an onus on employers taking all appropriate measures and utilising technology to do so, thus remaining compliant globally.

This article will revisit the issue and look at the latest updates from a UK perspective, as well as compliance issues arising from business travel for multinational employers.

Background

The legislation governing compliance for Short-Term Business Visitors (STBVs) in the UK is nothing new. A disconnect between the income tax rules, their interaction with Double Taxation Agreements (DTAs), and PAYE regulations, often mean that an individual working in the UK for a period of less than 183 days can be subject to tax in the first instance even if ultimately exempt once all facts are known and all filings concluded.

Even in cases where the individual is ultimately exempt from UK income tax, an obligation to withhold PAYE can still arise on the UK host employer from as early as the first day that the individual is present in the UK for work purposes.

In recognition of the administrative burden placed on UK host employers in adding STBVs to the UK onto a payroll, and in many cases then filing a UK self-assessment tax return to reclaim the PAYE in full, HMRC introduced a relaxation to the strict rules via the Short-Term Business Visitor Agreement (STBVA or EP Appendix 4).

This agreement allows for a relaxation of the PAYE requirements when an individual will ultimately be exempt from UK income tax under a DTA. As part of the agreement, the UK host employer makes a commitment to track all STBVs into the UK and file an annual report containing all specified details with HMRC by 31 May following the end of each tax year.

A further relaxation was introduced with effect from the 2016/17 UK tax year, in the form of a PAYE special arrangement (PAYE Manual para 81950) for STBVs where no exemption from income tax is available under a DTA. This may apply to STBVs from a country with which the UK does not have a DTA, but more commonly applies for STBVs employed by a non-UK branch of a UK company. These STBVs are deemed by HMRC to have a UK legal employer and therefore do not meet the exemption test contained within most DTAs.

This relaxation allows for a single payroll submission to be made by 19 April, following the end of the UK tax year for any of these STBVs who had no more than 30 workdays in the UK during the tax year, rather than being added to the payroll in the first month that they have taxable duties in the UK. In May 2018, HMRC launched a consultation with a view to extending this relaxation, with HMRC providing an update in the November 2018 budget, which is considered later in this article.

Employer Compliance Obligations, Risks And Challenges

The categories of individuals who could potentially create a PAYE withholding requirement by working in the UK are wide ranging and include, but are not limited to:

- Employees employed in one country who travel to the UK for work purposes
- Commuters, who live outside the UK but travel to the UK in a settled pattern or for a defined period or project
- Employees who have a regional role (e.g. EMEA wide) and spend time working in the UK
- Secondees or assignees, whether seconded into the UK, or are on secondment outside the UK and return to the UK for work purposes
- Contractors who are resident outside the UK (please note this complicated area is not covered by this article)
- Non-resident directors and non-executive directors (however, again this is a complicated issue and additional care should be taken).

In order for a PAYE obligation to arise, it is first necessary to assess whether the business that the individual is working for the benefit of has a presence in the UK (PAYE Manual para 81610) or if the individual is deemed to have a UK host employer (s.689 ITEPA 2003). Typically, this will be the case, however; this should be the first consideration.

If a PAYE obligation exists, then PAYE should be operated on taxable earnings in the UK under the usual RTI rules unless an STBVA or PAYE special arrangement is entered into with HMRC. Failure to do so constitutes a PAYE failure and penalties of up to 100% of the underpaid PAYE, along with interest, can be levied for non-compliance. Advance approval for the STBVA must be sought from HMRC, and it is insufficient to merely self-assess or self-determine that there is no PAYE liability nor an eventual personal tax liability.

We are seeing HMRC undertake an increasing number of employer compliance reviews, each review including an increased focus on internationally mobile employees. Whereas previously employers may have taken a light touch to STBV compliance due to perceived difficulty in remaining compliant, HMRC are now expecting all employers to take all necessary steps to track and report on their STBVs into the UK.

STBVA And Treaty Exemption

In order to be included on an STBVA for a tax year and therefore exempt from PAYE, the STBV must meet the relevant conditions of the employment income article in the DTA that the UK has with the STBV's home country.

The wording in each treaty can differ and needs to be read on a case-by-case basis; however, the Organisation for Economic Co-operation and Development (OECD) model treaty is more typically being followed and sets out the conditions as:

- The employee is present in the UK for a period not exceeding 183 days in any 12-month period starting or ending in the fiscal year, or 183 days in the fiscal year concerned depending on the applicable treaty, AND
- Remuneration is paid by, or on behalf of, an economic employer that is not resident in the UK, AND
- Remuneration is not borne by a permanent establishment that the employer has in the UK.

For treaty purposes, presence at any point that day, no matter how brief or for what purpose, counts as one day.

By concession, HMRC will not consider the economic employer or recharge position for any STBVs that are in the UK for 59 days or

less (more commonly known as the '60 day rule'), whether in that UK tax year in isolation or as part of a more substantive period.

For individuals who spend 60 or more days in the UK, then both the economic employer and the recharge position must be considered. Whereas HMRC have always looked at who is the economic, and not just the legal employer of an STBV, we are increasingly seeing overseas jurisdictions following the OECD model, and this may need to be considered for your STBVs to other countries who may create a tax and reporting liability.

Which entity is acting as the economic employer is subjective and needs to be reviewed on a case-by-case basis. When considering who is the economic employer consideration must be given to factors such as:

- Who bears the risk and benefits from the reward of the duties being undertaken?
- Who has control over the duties performed?
- Who does the individual report to?
- If performing duties for a client, whom is the client engagement held with?

If it is deemed that the individual is economically employed in the host country then treaty exemption is no longer available. For UK purposes, this would mean the individual would then need to be added to a UK payroll and PAYE withheld in line with the RTI regulations.

Whether or not remuneration costs are met by a permanent establishment in the host country is also not always straight forward. This does not have to be a direct recharge of salary costs, a recharge can also occur where it is included in a larger management charge for a project, or in arrangements such as cost plus where an individual is working for a client.

The introduction of Base Erosion Profit Shifting (BEPS) now puts increasing focus on where costs are ultimately borne for cross-border workers. While predominately a corporate tax and transfer pricing initiative, BEPS seeks to ensure that revenue and costs are recognised for corporation tax purposes in the jurisdiction that they arise.

Previously, a commercial decision may have been made to keep remuneration costs in the home country; whether for tax or other reasons. BEPS will result in recharges having to be made to the country in which the duties are performed, therefore eliminating any potential income tax exemption under a DTA. Again, for UK purposes this would result in a PAYE obligation arising for the STBV in question.

PAYE Special Arrangement

For varying reasons, a common corporate structure for UK companies is to have branches outside the UK. For UK tax purposes, a non-UK branch of a UK company is considered an extension of the UK company. As a result, any employees of the non-UK branch are considered to have a UK legal employer, meaning that treaty exemption is therefore not available under a DTA. Similarly, if the STBV is visiting the UK from a country with which the UK does not have a DTA (e.g. Brazil), then there is no exemption available from UK income tax (and therefore PAYE).

In recognition that this is a common occurrence and administratively burdensome to be compliant, HMRC introduced the PAYE special arrangement scheme with effect from the 2016/17 UK tax year. This allows for a single RTI submission to be made by 19 April, following the end of each tax year, rather than captured on a monthly basis under the usual RTI provisions for any STBVs in this category who have spent no more than 30 workdays in the UK in the tax year.

> Under current EC regulations an A1 certificate can be obtained for anyone working within the European Economic Area

While a welcome relaxation, employers and advisers felt that this did not go far enough. In May 2018, HMRC launched a consultation seeking to either align the rules for non-UK branches with non-UK companies, or to potentially extend the PAYE special arrangement further.

In the November 2018 budget, it was announced that as a result of the consultation, despite representations made to align the rules for branches with companies, that the PAYE special arrangement would be extended so that STBVs from non-UK branches, or non-DTA countries, could be included as long as they had spent no more than 60 workdays in the UK during the year. Additionally, an extension of the deadline to 31 May to make a submission under RTI is to be introduced, providing welcome additional time for a submission to be made and to align it with the annual STBVA reporting. These changes will take effect from the 2020/21 tax year.

Social Security

This article has focused on income tax requirements; however, social security is also an important consideration. Under current EC regulations an A1 certificate can be obtained for anyone working within the European Economic Area. In light of Brexit, at the time of writing we are awaiting confirmation of any changes to this approach.

For individuals from outside the EEA but from a country with which the UK has a bi-lateral social security agreement, then a Certificate of Coverage can be obtained to keep that individual in their home country social security system and exempt from UK contributions; and vice versa.

Individuals coming to the UK from non-agreement countries may benefit from a 52-week exemption from UK National Insurance. While this should cover most STBVs, it is important that this is tracked, notably for regular visitors to the UK.

There is nothing in the regulations providing a de-minimis period for when a certificate should be obtained. For EC workers, any individual working at least 5% of their time outside their country of habitual residence falls into the multi-state working rules and an A1 should be obtained.

For STBVs it is typically recommend that a certificate is applied for any visits in excess of 30 days; however, if in doubt, it is prudent to obtain a certificate.

Employer Considerations

While entering into an STBVA or PAYE special arrangement with HMRC is relatively straight forward, complying with the obligations remains complex, with there being no 'one size fits all' solution suiting all multinational employers.

Tax and payroll withholding are not the only issues arising from international business travel. Immigration compliance to ensure the right to work in a location is key, alongside the welfare of the employee undertaking the travel and the ongoing duty of care that the employer retains over their employee.

The most challenging aspect of STBVs and the resulting reporting requirements is the actual tracking of the STBVs themselves. In order to be compliant an employer must have accurate records of who is travelling, and for what purposes. Where travel booking is centrally managed this can assist; however, this may not provide completely accurate information should any bookings be made personally, or if, for example, travel is made by car and several borders can be crossed in one day in an EMEA wide role.

Additionally, for treaty purposes, presence in a country for any reason counts as one day towards the 183 day count. It is therefore also important to be able to capture any personal trips such as holidays, as thresholds may be unwittingly breached.

Increasingly, there is now an expectation from tax authorities that employers will seek to use the latest technology in order to assist them with their STBV obligations. In their commentary on tracking travellers (in the context of BEPS) the UN offered their view that "requiring enterprises, even large enterprises with multiple projects, to keep records with regard to the countries in which their employees and independent contractors are working does not appear to be unduly onerous or unreasonable – especially in light of technological advances".

It is recommended that potential solutions to assist with tracking, STBV reporting and compliance be explored. There are many potential solutions, which assist with tax, social security, immigration and duty of care, and link in with smartphone technology and GPS to ensure that all global travel is captured in real time. For example BDO's QuickTrip.

Once data is captured it must also be analysed in order to assess what compliance actions are required. As well as STBV reporting this can include visa or work permit applications or renewals, requirements for social security certificates to be obtained, payroll withholding, income tax return filings etc.

Often this data is analysed after the event and this can be too late for certain compliance actions. Having a solution to provide you with real time information and pre-trip assessments can help flag potential risks and action required in advance, adding significant value to your STBV compliance and helping you proactively manage any potential risks or associated costs for non-compliance.

Summary

As internationally mobile employees and cross-border working becomes more common, the compliance headaches arising from them will not disappear, merely increase. Despite STBVs being a challenging area to get right, technology solutions exist in order to help manage and track your employees and proactively assist your management of such employees.

Initiatives such as Common Reporting Standards, Base Erosion Profit Shifting and Corporate Criminal Offence Legislation, highlight the focus with which tax and immigration authorities will exchange information and expect employers to be taking steps to be compliant globally. Historically, this issue this may have been perceived as a 'low risk' area of compliance but those days are now gone.

ANDREW BAILEY

Andrew Bailey is Global Leader for BDO International's Global Employer Services team. He has over 30 years' experience in the field of expatriate taxation. BDO is present in over 162 countries and is able to provide global assistance for all your international assignments. Andrew is indebted to Daniel Howse for his significant contribution to this article. If you would like to discuss any of the issues raised in this article or any other expatriate matters, please do not hesitate to contact:
Andrew Bailey on +44 (0) 20 7893 2946, email Andrew.Bailey@bdo.co.uk or Daniel Howse on +44 (0) 20 7893 2915, email Daniel.Howse@bdo.co.uk