C-Suite On The Move: Tax And Social Security Risks For Frequent Business Travellers

Senior Executives and C-Suite individuals working in high profile, demanding roles in international organisations are often performing roles with an international dimension. The tax exposure of short-term (including frequent business travellers) and long-term assignments is both at an employee level and at corporate level.

Although there have been increased cross border initiatives by global revenue authorities in recent years and the ensuing legislation has made corporate and employment taxes more inter-related, the fundamental problem remains that the tax treatment of the employee in the host country will often not be consistent with the treatment available in their home country. Therefore, it is important that the tax issues are identified early on, preferably in advance of substantive international travel, to avoid unnecessary exposure.

Income Tax Issues

When employees spend short periods of time, or travel to a country on an ad hoc basis for work, there is often a default assumption that trips of a short duration will not trigger any tax consequences. In many cases this is true, but we should consider the reasons behind that conclusion to understand when it is not.

In some cases, employees visiting a jurisdiction for short periods may be eligible for a domestic exemption under local tax rules, such as de minimis thresholds for earnings or number of days spent without any reporting requirement. By definition, these are local rules and must be considered on a country-by-country basis and may also require consideration of the employee's personal circumstances for eligibility (e.g. based on nationality or entitlement to allowances).

Where employees travel for business on behalf of their employer they will typically be hoping – whether they realise it or not - to rely on protection from a Double Taxation Agreement (DTA) that that country has in place with the UK. These agreements are designed to protect taxpayers from double taxation where they may otherwise be in scope of more than one country's tax system. The first issue is that not every country has a DTA with the UK, although the vast majority do and the number has increased over time, including some newer ones such as UAE (since 2017) and Brazil (not in force, pending final agreement at time of writing).

If there is no DTA in place, then there can be no assumed protection or exemption from taxes in the host country. Even if there is a DTA, the specific terms of that agreement must be considered to determine if it results in exemption from income tax in the host location. This is not always a given for executive employees in particular. Again, we must explore in more detail the wording of the agreement to better understand this; although each agreement will vary, for the purposes of this article we will consider the fairly 'standard' wording found in the UK/US DTA:

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Remuneration derived by a resident of a Contracting State (UK) in respect of an employment exercised in the other Contracting State (US) shall be taxable only in the first-mentioned State (UK) if:

(a) The recipient is present in the other State (US) for a period or periods not exceeding in the aggregate 183 days in any 12-month period commencing or ending in the taxable year or year of assessment concerned

(b) The remuneration is paid by, or on behalf of, an employer who is not a resident of the other State (US); and

(c) The remuneration is not borne by a permanent establishment which the employer has in the other State (US).

In simplified terms, as long as the employee spends no more than 183 days in the other jurisdiction in any given 12-month period, the remuneration continues to be paid by the home employer in the UK, and none of the costs of the individual's employment are recharged to a permanent establishment in the host country, then there should be no income tax liability triggered in the host country.

However, there is complexity to some of these terms, particularly where it comes to executive employees, that may require further consideration:

- In addition to the legal employer, some countries will require that the individual's 'economic employer' is also considered, i.e. the entity that bears the risks and rewards of the employee's work, who controls or directs the employee's activities, how integrated the employee is in the organisation etc. For executive employees, it is perhaps more likely that they may be undertaking activities in roles that entail risk in respect of multiple global entities, and if they have a senior (possibly Board level) role then it is also more likely that tax authorities will view them to be integrated into the host country organisation. If that is the case, then the second condition of the DTA article may be breached, and therefore no exemption from host country income taxes available
- On condition (c) there is another potential risk, in that it is possible that by virtue of the employee's activities in the host location they could trigger the creation of a permanent establishment of their home country employer in that jurisdiction for corporate tax purposes. This risk is elevated for senior individuals who are more likely to have the right to negotiate commercial terms, bind the company, sign contracts, and act as an agent of the company. If a permanent establishment is created then that may also entail an obligation under Transfer

Pricing requirements to recharge a portion of the employee's costs to that overseas permanent establishment, on the basis that they are carrying out valuable duties there (which may, for example, correspond to increased revenues in that jurisdiction).

The OECD commentary on international Double Taxation Agreements provides various additional guidance and examples on the interpretation of the conditions for exemption from income tax in a host location as set out above. For example, one scenario relates to centralised functions where employees perform global roles with costs of those centralised functions allocated around the Group. Where the work that an employee performs is an activity that is typically centralised within a large multinational group of companies (eg corporate communication, finance, tax and treasury) it suggests that this should not preclude the income tax exemption, provided the other conditions are being met.

The guidance also states that if the fees charged by the employing entity correlates to the remuneration/benefits/other costs of that individual for the services provided to the other entity, either with no profit element or a fixed percentage profit element, that would be indicative that the remuneration of the individual is directly charged by the employer to the end user. However, this should not be considered to be the case if the fee charged for the services bears no relationship to the remuneration of that individual or if the remuneration is only one of many factors taken into account in the fee charged for what is really a contract for services.

Even if the conditions of the DTA for exemption from income tax in the host location are satisfied, that is not necessarily the end of the story. In many cases there are still compliance obligations that the employee and/or employer may need to satisfy.

Country Example - USA

There is a domestic exemption available for employees on short visits to the US, which applies if the individual:

(i) performs personal services for a foreign employer not engaged in a US trade or business,

(ii) is present in the US for less than 90 days in the tax year, and

(iii) receives $3,000 or less for the services performed in the tax year.

No reporting or filing is required from either employee or employer if this domestic exemption applies. Point (iii) is often the most problematic as, taking an example of an individual who earns £150,000 per tax year, if they spent 10 days working in the US in a year this would equate to roughly £6,250 of earnings (10/240 days) so approximately $7,800 (fx rate 1.25 at time of writing). This exemption may be helpful in limited circumstances.

Alternatively, the employee can make use of Double Taxation Agreements, as set out above. If the above criteria (broadly) are satisfied, then the individual can be exempt from US income tax on the earnings in relation to their US workdays. Strictly speaking, the individual should file a US tax return to claim exemption under the DTA. In addition, the employer should file relevant forms for US payroll purposes in respect of the claim for exemption.

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Directorships In Other Jurisdictions

Against the backdrop of a sharpened focus on tax governance of global businesses, compliance for non-resident directors is an important area to get right. With the details of board members public domain information in many territories, this can be a very visible area to local tax authorities. Common misconceptions are that a board member cannot be subject to tax in a territory where they are non-resident, that directors are always treated in the same way as employees (for domestic tax purposes as well as DTA purposes) or that board members can only be subject to tax if they receive a directorship fee payable by the entity on whose board they sit and not if they are remunerated fully by a group company in a different jurisdiction.

It is important to review this position and any reporting requirements on a case-by-case basis to appropriately take account of local tax and social security rules and, in light of the home/host country combination, to determine the correct application of the relevant DTA. Helpfully, in most cases, DTAs will have a specific article determining the tax treatment of directors' fees, separate to the article determining the tax treatment of employment income.

Country Example – Singapore

Directors' fees paid to non-residents of Singapore are subject to Singapore withholding tax at 24% (tax rate effective from Year of Assessment 2024), with payment to be settled via withholding tax filings. This is a different position than for employees in Singapore where withholding taxes are not usually payable. Generally speaking, social security contributions will not be applicable on the basis that only Singapore citizens and permanent residents are required to contribute. Names of statutory directors of Singapore companies are available on the Register of Directors with the Accounting and Corporate Regulatory Authority (ACRA), available for public access for a nominal fee.

Social Security

In general terms, the default rule for social security is that an employee should pay contributions where they work. Where someone is a frequent traveller for business purposes this answer may seem less clear cut. The final answer will depend on where they are travelling to, as well as the nature of their working pattern. Similar to tax, the UK has social security agreements in place with many countries, although these are distinct from the tax agreements and the existence of a DTA does not necessarily imply the existence of a social security agreement. Conversely, there is no DTA with Bermuda, but there is a social security agreement. The UK also has agreements with the EU (collectively), the US, Canada, Jersey and Japan amongst others, but there are fewer of these agreements with many notable exceptions such as UAE, Brazil, Hong Kong, Singapore and Australia.

All of the social security agreements provide for short-term postings to the other country, whereby it is confirmed that social security coverage in the home country should continue throughout the posting. A certificate can be obtained from the UK tax authorities to evidence this position, which may need to be presented to the host country authorities as evidence of exemption. There is no de minimis number of days that these certificates should apply to, although for practical purposes a threshold of 4-6 weeks of work in the host location is often applied.

In Europe, there is another possible set of rules that may apply to frequent travellers around the EU, called 'multi state worker' rules. These apply to individuals who spend at least 5% of their working time in at least two of the UK or EU member states where they effectively simultaneously work

across multiple (but at least two) countries. Generally, the 5% is measured against working time, so assuming an annual average of 240 working days then approximately 12 working days in a 12-month period. These rules provide that as long as the employee works a substantial part of their duties (broadly defined as 25% of their working time) in their country of residence then they should continue to be covered for social security purposes in their home country. An A1 certificate should be obtained from the UK tax authorities to evidence this position where employees are spending time working in other EU countries regularly. New rules were also introduced from 1 July 2023 within the EU for teleworkers that slightly adapted these provisions and increased the amount of time that employees could spend working in their home country without triggering a social security liability. These rules only apply if both relevant EU states are signatories to the framework; some EU countries have not agreed to this, and the UK did not sign up.

Some countries more actively request evidence of A1 certificates and social security coverage in another country. In some cases, these are required before work permits will be issued by the authorities, so timely applications are advised to minimise possible delays to travel.

Summary

Cross-border employment situations for senior executives and directors can be more complicated than for a broader employee base. This is partly because of their remuneration levels, seniority and risk profile, and also because of specific rules that may apply to particular roles they engage in, like directorships of other group entities overseas. Reviews of their circumstances may not be as clear-cut (e.g. on a days basis only) and would likely require deeper more detailed consideration. Failing to consider these situations on a case-by-case basis to ensure that relevant compliance obligations in all jurisdictions are identified and dealt with on a timely basis can quickly trigger additional costs.

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