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NEW RULES FOR DUAL CONTRACTS: 'PUZZLING ON A NUMBER OF LEVELS'

In last week's *Tax Journal* (see the article 'FB 2014: Use of dual contracts by non-domiciliaries'), Andrew Roycroft explained the proposed new rules for dual contracts of foreign domiciled employees which are likely to come into force on 6 April 2014.

It is not unusual for somebody to come to work in the UK and also to have significant responsibility for other parts of the group elsewhere in the world. It makes sense for him to have one contract for his UK work and another contract for his foreign work. In these circumstances, the foreign earnings (in respect of duties performed wholly outside the UK for a foreign employer) will be chargeable to tax on the remittance basis. If he were to have one omnibus contract covering the whole of his worldwide work, all the earnings would be fully chargeable to UK tax, notwithstanding that he may spend (say) two thirds (or more) of his time working overseas.

In the Autumn Statement, it was announced that there would be legislation to counteract the artificial division of duties between UK and overseas employments. This is puzzling on a number of levels. The first is that it seems to be in direct conflict with the Treasury commitment that there will be no further changes to the remittance basis during this parliament. In any case, HMRC seems to have ample powers to deal with any abuse in this area. Where the division of earnings between such UK and overseas contracts is not genuine, HMRC has power under ITEPA 2003 s 24 to make the necessary adjustments to ensure that the earnings in respect of each employment are allocated in a proper manner.

However, a closer reading of the proposals reveals their view that 'in most cases, separate contracts will have been artificially arranged in order to obtain a tax advantage'. Accordingly, the proposals go way beyond avoidance and artificial arrangements and will catch many innocent employees. This collateral damage seems rather unnecessary, because a modest strengthening of s 24 is all that is needed to deal with any perceived artificiality.

Some employees (and employers) will question the fairness of these proposals. Anyway, fair or not, the remittance basis will probably no longer apply in respect of the overseas employment income after 5 April 2014 if the individual has both UK and overseas employments with the same or associated employers (like different members of the same group) and the foreign tax which applies to the overseas employment is less than 75% of our top rate of 45% – that is to say, 33.75%. We are not talking headline rates here. We are looking at real foreign tax paid, for which a foreign tax credit is available against the income.

Furthermore, in those cases where the foreign employer has no UK presence or intermediary, it will not be possible to operate PAYE against those earnings. ITEPA 2003 s 689 will not apply in these circumstances to place an obligation on a UK employer. Accordingly, the employee will face the administrative burden of dealing with all the UK tax consequences of this foreign employment. Bienvenue.

These proposals will not affect the overseas work day relief which will continue to apply the remittance basis to the foreign earnings of foreign domiciled employees coming to work in the UK for the year of arrival and the following two years. Although this is welcome, it must be a serious disincentive for anybody working here or conducting their business here (and employing people here) to stay for much longer than that.

Peter Vaines
Partner
T +44 20 7655 1780
E peter.vaines@squiresanders.com

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