



UK Employees Seconded Overseas

The secondment of an employee overseas can become a particularly challenging project for an SME to contend with, especially if it is the first time such an arrangement has been attempted. There are a number of layers that need to be dealt with and some of these layers interact with one another. Before we examine these layers it is important to set out that the core fundamentals dictate tax can be levied on a person by virtue of residence or source.

Employment income is considered active income and so the basic position is that the primary right to tax is where the employee carries out his duties. He may then be taxed again in his country of residence (and double tax relief given) if the jurisdictions of source and residence are different.

Residence is now determined for UK tax purposes according to the new statutory residence test, and for employees there are specific rules to determine whether UK residency is retained or broken. The basis of establishing an individual's tax residence status in other tax jurisdictions is likely to be determined in different ways and it is possible for an individual to be resident in more than one country under local rules. If that happens, a treaty will normally determine where the individual is treaty resident, which will take priority over the local residence status.

Notwithstanding the above, it was recognised that short trips to a foreign country would create onerous compliance obligations and so a mechanism was built into the OECD model treaty on income and gains which exempts a person from source state tax on employment income,

providing the stay is short (usually less than 6 months), and is not connected with a local permanent establishment of the employer. If the criteria are breached then the treaty will not protect the employee from local source state taxation.

Social security is also a concern. Ordinarily for relatively short secondments it is possible for both the employer and employee to continue to pay UK social security even though the employee is not a UK tax resident and is subject to foreign income taxes.

Travel and subsistence costs also need some thought. Generally speaking for a secondment of less than 2 years the employee will not be taxed for his out of pocket expenses incurred nor the employer incurred expenses - however, where the secondment lasts for more than 2 years the situation becomes complex and the relief does not apply at all if the employee is engaged to work in another location from the outset, and is not treated as having a temporary workplace. Similarly the source state may operate similar rules regarding temporary workplaces, but use a different time period to determine when temporary becomes permanent - the US threshold is just 12 months.

It may be helpful to consider two typical scenarios as follows:

- a) An employee of a UK company is sent to France to work on a short project for three months
 - he will remain UK resident throughout the project because he is not considered to be working sufficient hours abroad required by the new statutory residence test
 - the UK - France tax treaty will likely exempt the individual from income tax on his employment income in France
 - his wages will continue to be taxed in the UK and he will continue to be liable to UK social security
 - travel & subsistence costs should be considered as non-taxable provided they are incurred as a result of the secondment.
- b) An employee of a UK company is seconded to a US subsidiary for a period of 2 years to oversee the set-up of a new business unit. He will not return to the UK for work purposes but may return occasionally
 - the employee is likely to cease to be UK tax resident because he is working full time overseas for a sufficient period

- his salary will not be taxed via PAYE in the UK;
- his salary will be subject to US income taxes, and he will not benefit from the exemption in the US-UK treaty as his posting lasts for more than six months, and in any event his salary is charged to a permanent establishment in the US
- because his posting is less than 5 years the UK-US social security agreement provides that the employee and employer can continue to pay NIC in the UK (and in doing so the US will not seek the payment of US social security)
- from a UK perspective travel and subsistence costs are unlikely to cause an issue given the temporary nature of the posting, however in the US 'temporary' is defined as less than 12 months - and so some travel and subsistence expenses may be taxable.

Specific complexities arise where a person works part of his week in the UK and part in another jurisdiction, and this ordinarily requires some dialogue with HMRC.

The issue of visas should not be forgotten either, as this has the ability to undermine any secondment plans if overlooked.

The above scenarios are very basic and broad assumptions are made - specific advice should be taken in all circumstances.

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