



Edition 1
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Tax Bites

Welcome to the first edition of RPC's Tax Bites - providing monthly bite-sized updates from the tax world.

As always, if there are any areas you would like more information on, or if you have any ideas on how we might improve this update, do please let us know, or get in touch with your usual RPC contact.

News



COVID-19: HMRC issues guidance on 'exceptional' circumstances under the statutory residence test

HMRC has issued guidance for non-UK residents on circumstances that will be considered 'exceptional' under the statutory residence test (SRT) during the COVID-19 pandemic.

The SRT provides that an individual is considered to have spent a day in the UK if they are in the UK at the end of the day (midnight) subject to several exceptions, one of which is exceptional circumstances. However, the exception only applies for 60 days in any tax year (counting forward from the start of the tax year on 6 April).

HMRC's new guidance states that whether days spent in the UK can be disregarded due to exceptional circumstances will of course depend on the facts and circumstances of each individual case. However, during the COVID-19 pandemic, the following circumstances are considered exceptional:

- an individual is quarantined or advised, by a health professional or public health guidance, to self-isolate in the UK as a result of COVID-19;
- an individual is advised by official government advice not to travel from the UK as a result of COVID-19;
- an individual is unable to leave the UK as a result of the closure of international borders; or
- an individual is asked by their employer to return to the UK temporarily as a result of COVID-19.

The updated guidance can be viewed [here](#).



COVID-19: HMRC issues guidance on implications for company residence and permanent establishments

On 7 April 2020, HMRC added new pages to its International Manual (IM) containing its approach to company tax residence and permanent establishments (PEs) in response to the COVID-19 pandemic.

In relation to the corporate residence and PE challenges, specifically the consequential presence of individuals in the UK, the guidance explains HMRC's views that:

- existing legislation and guidance on company residence and PEs provides flexibility to deal with changes in business activities necessitated by the response to the COVID-19 pandemic;
- a company will not necessarily become UK resident because a few board meetings are held in the UK, or some decisions are taken in the UK over a short period of time, citing existing guidance (including examples) at IM120130 to IM120180. The new guidance also emphasises the significance of double tax treaty residence tie-breakers (where applicable), whether based on the place of effective management (which can only be in one place) or agreement by

competent authorities, and explains that in the latter case HMRC takes into account the factors listed at IM120085;

- a non-UK resident company will not automatically have a PE after a short period of time (IM264430), whether contracts are "habitually" concluded in the UK is a matter of fact and degree, and the existence of a UK PE does not in itself mean that a significant element of the profits of the non-UK resident company would be taxable in the UK. In relation to the latter, the new guidance refers to IM26700 onwards.

Although providing some comfort, the assurances are couched in general terms and unlikely to be enforceable in the event of a dispute (possibly long after the current crisis has passed). The caveats to the examples at IM120150 also should be borne in mind.

The new pages can be viewed at IM120185 and INTM261010.

Separately, the OECD has published an "analysis" of the impact of COVID-19 on double tax treaties, which is concerned with the inadvertent creation of a PE due to COVID-19 travel restrictions.

The OECD's analysis can be viewed [here](#).



Law Society asks HMRC to defer commencement of DAC 6 and Trust Registration Service rules

The Law Society has asked HMRC whether it would consider deferring the commencement dates of the DAC 6 and the Trust Registration Service rules (under Directives 2018/822 and 2018/843) in the UK. The Law Society believes that there is a strong case for deferral of both in the current circumstances, given the burden they will place on both private and public sectors.

HMRC is considering whether implementation of these rules should be delayed in light of the COVID-19 pandemic.

The Law Society's request can be viewed [here](#).

Case reports



Higgs - FTT lacks jurisdiction to disapply PAYE Regulations

In *Philip Higgs and Others v HMRC* [2020] UKFTT 117 (TC), the First-tier Tribunal held that it did not have jurisdiction to determine whether HMRC is entitled to exercise a discretion under section 684(7A), ITEPA, to disapply the PAYE Regulations.

The FTT's decision in this appeal follows that in *Hoey v HMRC* [2019] UKFTT 489 (TC) last year, which raised similar issues, and will be of interest to those taxpayers who utilised similar 'contractor' structures. Unfortunately, for those taxpayers, the FTT has again concluded that it does not have jurisdiction to determine issues relating to the exercise of HMRC's purported discretion to disapply certain PAYE obligations.

Our commentary on the decision can be viewed [here](#).



Fisher - TOAA rules not applicable to sale of business from a UK company to a Gibraltar company

In *S Fisher and Others v HMRC* [2020] UKUT 62 (TCC), the Upper Tribunal allowed the taxpayers' appeals and held that the transfer of assets abroad (TOAA) rules did not apply to the sale of a business from a UK company to a Gibraltar company, which was under the control of the same directors and shareholders.

The decision of the Upper Tribunal is to be welcomed, confirming as it does that the circumstances in which the courts will pierce the corporate veil and attribute the acts of a company to its controller (or controllers) in order to enable HMRC to levy a tax under the TOAA code, will be rare.

Our commentary on the decision can be viewed [here](#).



Davies - Taxpayers unable to benefit from motive exemption in TOAA

In *Andrew Davies & Others v HMRC* [2020] UKUT 67 (TCC), the Upper Tribunal (UT) held that the taxpayers did not satisfy the 'motive exemption'

in the TOAA legislation and could not benefit from treaty relief.

It would appear from this decision that it is not necessary for an allegation of tax avoidance to be specifically put to a taxpayer in evidence and if a taxpayer wishes to rely on a lack of a tax avoidance motive he will need to, in effect, establish a negative.

Our commentary on the decision can be viewed [here](#).



And finally...

Jim Harra, Chief Executive and Permanent Secretary of HMRC, has informed a Treasury Committee meeting that he expects the government's multi-billion pound employee furlough scheme to be targeted by criminals seeking to exploit the £60 billion pledged in Chancellor Rishi Sunak's unprecedented coronavirus protection package.

HMRC and the courts may seek to make an example of anyone found to have abused the furlough scheme and deprived the public purse at a time of national emergency. In the present climate, the reputational risk to businesses from any such prosecution is likely to be significant, not to mention the potential for a large fine should the business be convicted.

Our commentary can be viewed [here](#).

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