

## COVID-19 - Tax Considerations in Light of Travel Restrictions

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The ongoing COVID-19 health crisis has resulted in significant changes to working practices in the United Kingdom (U.K.) and elsewhere. With a number of territories moving into aggressive suppression phases to halt the acceleration of the spread of COVID-19, including introducing lockdown measures and restrictions on international travel, it becomes increasingly important to monitor the approach taken to decision-making activities undertaken by businesses and their directors and employees in order to minimize the risk of unintentionally creating a taxable presence outside a company's jurisdiction of tax residence.

### A New Taxable Presence?

A company will generally be tax resident in the U.K. if it is incorporated in the U.K. or if its place of central management and control is in the U.K. However, this treatment may be displaced by the terms of a double tax treaty that the U.K. has entered into if it contains a "tie-breaker" article. In addition, a non-U.K. company carrying on business through employees or others located in the U.K. could create a taxable presence in the U.K. Other jurisdictions have similar rules on tax residency and creating a taxable presence.

International tax structuring therefore often relies on key decision-makers (primarily directors) making their decisions at board meetings in the jurisdiction in which that company is tax resident to limit the risks associated with central management and control moving abroad. However, with limits on international travel and a number of countries introducing lockdown measures for indefinite periods of time, businesses will need to carefully consider their business activity to ensure that, for example, individuals currently located in the U.K. do not unintentionally move the residence of a non-U.K. company to the U.K. or cause that non-U.K. company to have a taxable presence in the U.K. Similarly, if strategic business decisions of a U.K. company are made, or new contracts are entered into, outside the U.K., that other jurisdiction could potentially seek to assert taxing rights over the profits generated as a result of that activity.

In the absence of new Her Majesty's Revenue and Customs (HMRC) or other tax authority guidance in light of the current global health crisis, directors (and other key

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staff) must be mindful of the U.K. and overseas tax ramifications that could arise as a result of their activities over the coming period.

Certain qualifying offshore undertakings for collective investment in transferable securities (UCITSs) and alternative investment funds (AIFs), established as body corporates, are excluded from the U.K.'s central management and control test for tax residence, which means that they can be managed and controlled from the U.K. without becoming U.K. tax resident. However, permanent establishment issues (as well as other tax issues, such as creating a fixed place of business for value-added tax (VAT) purposes) may still be of concern.

It will therefore be important for businesses to take steps now to consider (and limit) the impact of remote working and coronavirus-centric measures on their business and tax structures.

## Mitigation

While it may not be possible to follow the usual recommendations (such as ensuring that the majority of the attendees of board meetings are physically present in the relevant jurisdiction) during this period, it is worth noting that the factors relevant to a company's tax residency status will often be tested over a period of time, rather than isolated, one-off events.

Nonetheless, it may be prudent to take steps to improve the position, such as:

- Noting in the relevant board minutes the current situation, which has resulted in travel restrictions.
- Appointing alternate directors for those who reside outside of the tax residence jurisdiction (for U.K. fund managers with directorships of fund or portfolio companies; this may include appointing alternate directors in the jurisdiction in which the relevant fund or portfolio company is currently tax resident).
- Having directors who are located outside the relevant tax residence jurisdiction join meetings as an observer rather than as a decision-maker or not join at all.

Companies may also wish to check their constitutional documents to ensure that any decisions made at the relevant meetings are validly made.

We would also recommend that fund managers monitor how jurisdictions like the Cayman Islands, the Channel Islands and others will operate their new economic substance rules during this period.

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