

High earners leaving the UK for tax reasons but continuing to do some work as an employee in the UK

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Please note that tax law is a complex subject and you should not rely on this article without professional advice on the facts of your case.

The well publicised 50% additional rate of UK income tax, due to come into effect in April 2010, will affect individuals earning in excess of £150,000 many of whom are considering moves to more favourable tax jurisdictions. Although there may be significant tax advantages in such moves, practical issues do arise, in particular for those who need to continue working for their UK based employer.

The first issue is with establishing non-UK residency. People will often be under the impression that so long as they have moved house to a foreign country that will be the end of the matter and they will have escaped the UK tax net. The truth is very different, with HMRC taking an increasingly hard approach to those individuals who seek to leave the country for tax purposes. Moving to a country which has a double tax treaty with the UK can be helpful in this regard as these treaties will generally contain a tie-breaker clause to determine in which country you are deemed to be resident. However, people are not as keen to move to these countries as they are less likely to offer the kind of tax exemptions which apply in havens such as Monaco.

The difficulty with a move to Monaco is that there is no treaty protection which establishes that you can only be resident in one or the other states. It is therefore possible to be a dual resident of the UK and Monaco for tax purposes and it is difficult to obtain HMRC's acceptance to the proposal that you have become resident only in Monaco. Becoming non-resident is not as simple as moving elsewhere and keeping your visits to the UK below 91 days per year. To cease to be UK resident, evidence will need to be put forward that you have had a clean break from the UK involving a genuine change in lifestyle. You would be well advised to cut as many ties with the UK as possible if seeking to establish non-residency. The difficulty of successfully establishing this has been highlighted by several high profile recent cases involving individuals claiming non-residency.

When an argument is put forward that an individual has ceased to be a UK resident, a balancing act would be required to determine where they are resident. Factors linking you to the UK will be used as evidence that you have maintained residency here and continue to be subject to tax here on your

worldwide earnings. This can pose particular problems for those individuals who wish to continue UK employment as the Revenue may, depending upon the particular facts, claim that this is sufficient for UK residency to remain. In particular those individuals who are directors of UK companies will find it difficult to contend the residency position as there is an attachment to a UK company which requires an element of presence here. It should be noted that simply resigning as a director does not mean you are no longer a director. If you continue to exercise control over the company you may well still be classed as a shadow director, which for company and tax law has the same effect as being a named director.

The idea of a move to Monaco is likely, therefore, to be more favourable for those individuals whose work is concerned more with international development and trade and who dispose of their main residences in the UK. This can fit well with the position of numerous companies who are seeking to expand their operations into new markets. It is sensible for any employment contract to clarify that duties are to be carried out abroad.

Even individuals who have been accepted as non-resident will be required to pay UK tax if they spend any time working in the UK, which is more than incidental to their non-UK duties. This will be based on the proportion of work carried on in the UK. Employers will be under a duty to make deductions under the PAYE and NIC systems from salaries paid to these individuals. These deductions will be in respect of the proportion of income attributable to the UK duties.

Where an individual who claims to be non-UK resident receives a salary from a UK company, the situation is likely to be scrutinised by HMRC. This is because they can result in a sum being paid which is deductible from a company's profits for corporation tax purposes but does not attract income tax in the hands of the individual.

It is advisable to approach HMRC voluntarily before beginning to work under such arrangements. Negotiations can then be entered into to determine the proportion of income which is attributable to the UK duties. The default position will be a time spent basis but a qualitative approach can be taken so that, if only less important duties take place here, this can be taken into account when negotiating the tax due. This will result in individuals accounting for some UK tax when they may previously have believed that they would escape this. However, it has the very helpful effect of making your position clear from the outset in that there is an acceptance from HMRC that you are non-resident. There is a much lower risk of HMRC approaching you later contending that you have remained UK resident and owe a large sum of income tax backdated to when you claimed to leave the country. It also makes it easier for your employing company to pay you without the worry of its corporation tax return being challenged or a PAYE investigation. Once your non-residency position has been accepted, you will need to remain non-resident by complying with the day counting tests and not re-establishing yourself here.

If any lump sum payments are received by employees for instance in respect of the employee entering into restrictive covenants with the company, care must be taken to determine whether these are taxable. Even if received in the year following departure from the UK, these can remain fully taxable in the UK as they will be deemed to be in respect of employment from the last tax year. These arrangements are probably best avoided.

Although there are clear benefits of a move to a low-tax or no-tax jurisdiction, careful planning should be undertaken before proceeding with such a move and the practical steps of establishing non-residency must be considered. To force the hand of HMRC, initiating negotiations to pay some UK income tax may be helpful. We are able to advise in the steps to take and the planning required in this position.

March 2010

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