BLACKROCK

6 August 2018

STBV Consultation
HM Revenue & Customs
Income Tax Policy Team
Room 3E/14
100 Parliament Street
London
SW1A 2BQ

Submitted via email to: incometax.structure@hmrc.gsi.gov.uk

RE: Tax and Administrative Treatment of Short Term Business Visitors from Overseas Branches

Dear Mr Chipperfield,

BlackRock[1] is pleased to have the opportunity to respond to the consultation document released by HM Revenue & Customs ("HMRC") on 14 May 2018 in respect of the taxation of Short Term Business Visitors from Overseas Branches (STBVs).

We welcome the opportunity to comment on the issues raised by this consultation paper and will be pleased to continue to contribute to the thinking of HMRC on any issues that may assist in the final outcome.

Yours sincerely,

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[1] BlackRock is one of the world's leading asset management firms. We manage assets on behalf of institutional and individual clients worldwide, across equity, fixed income, liquidity, real estate, alternatives, and multi-asset strategies. Our client base includes pension plans, endowments, foundations, charities, official institutions, insurers and other financial institutions, as well as individuals around the world.

Executive summary

BlackRock's conducts business activities in numerous countries. In order to perform those activities, we are frequently required to establish a local presence. The legal form of this presence (e.g. branch or subsidiary) will be determined by commercial considerations as well as local regulatory requirements. In the European Union, the passporting of regulatory permission encourages the creation of branch networks in the region, but conversely in certain cases regulatory or other considerations require the creation of a local subsidiary.

Accordingly, whether our non-UK operations are conducted through a local branch or subsidiary will generally be driven by commercial and regulatory (i.e. non-tax) considerations. As set out in the Consultation Document (paragraphs 1.3 to 1.6) the tax rules applying to the UK workdays of employees of non-UK branches ("branch visitors") are different to those applying to the UK workdays of employees of non-UK subsidiaries. Since 2013 HMRC has taken the view that a non-UK branch is legally part of the UK head office company for these purposes, whereas a subsidiary is an entity legally separate from the UK head office. Paragraph 3.10 of the Consultation Document highlights that Short Term Business Visitor Arrangements ("STBVAs") are not available to branch visitors. This tax distinction between the branch and subsidiary of a UK head office leads to unfounded inconsistencies for multi-country companies such as BlackRock. For example, the employee of a German subsidiary can benefit from an STBVA and spend up to 183 days in the UK without triggering UK taxation whereas an employee of a German branch of the same company becomes immediately taxable on *any* UK workday. We therefore believe that the right way forward is to align the treatment of branch and subsidiary employees by providing the exemption as set out in paragraph 4.8 and 4.9 for various reasons set out below in this document.

Paragraph 3.11 points out that Short Term Business Visitor Arrangement eligibility for branches "this will also apply where the UK company has made an election for exemption for profits or losses of foreign permanent establishments under section 18A Corporation Tax Act 2009." Where this election is made, no UK tax deduction can be achieved for branch costs. It is notable that in almost all other respects (with the notable exception of the lack of STBVAs for branches), the UK tax system is now designed to make the UK taxation of non-UK branches almost identical to that of non-UK subsidiaries. Paragraph 1.6 acknowledges that "this means that a UK company with an STBV from an overseas branch will incur costs and administrative burdens that a UK company with an STBV arriving from an overseas subsidiary may not."

In our view, this different treatment of STBVs is not in accordance with Article 49 of the Treaty on the Functioning of the European Union. The UK is placing tax obstacles in the way of a decision to conduct operations in the commercially appropriate legal form, and the difference of treatment by the UK of non-UK branches and subsidiaries is not justified by any objective rationale .

The UK is unfortunately not alone in applying this tax treaty interpretation– some other EU Member States seek to tax UK branch employees on their work days in that country, subject in some cases to exemptions or relaxations where days under certain limits are ignored. Thus the UK and these jurisdictions are achieving no greater overall tax yield. as branch visitors on workdays in their country are taxed, but credit is given for foreign tax levied on their residents on their foreign workdays In contrast, compliance costs and administrative burdens for both employers and employees are increased, and the personal tax affairs of the employees involved are significantly complicated To illustrate the increased complication arising from this treatment, in addition to a cash flow burden for STBV non-UK branch employees subject to PAYE, there is foreign exchange rate exposure because their pending home country tax credit refund is likely in a different currency.

To be clear, tax avoidance is not in point. Rather the rules currently applied create significant risk of double taxation for branch employees. The issues we would like HMRC to address is the complex administrative and compliance burdens placed on employers and employees and the risk of double taxation.

It is important to note that the applicable tax rules, the basis of calculation of income, even the tax years, vary between jurisdictions. It is common for compensation to be deferred, and to vest at future dates if and when certain conditions are met. Each subsequent vesting event technically creates a further UK liability, to the extent the deferred compensation is paid in respect of a period when there were workdays in the UK. Pension contributions and other deductions may be available in the home territory may be undermined by the shift in taxation from that country to the UK. Finally, certain workdays (which are "incidental" to the individual's employment) are not subject to UK tax according to the UK tax rules, but the definition of "incidental" is extremely unclear. We are aware that there is a significant variance in the types of days that HMRC has been willing to qualify as "incidental". This is understandable, given that circumstances can vary considerably, but it undermines the fairness of the UK tax system.

Until 2013, UK businesses believed that HMRC's practice was to treat non-UK branches of UK companies as separate employers for these purposes. Thus, the UK has only been seeking to collect tax revenue in respect of visiting branch employees from approximately 2010/11 (since years prior to this were closed for assessment by the time HMRC articulated their new interpretation).

Administrative relaxations, such as set out in paragraphs 4.3 to 4.6, would be welcome, but would not address the fundamental issues. They may marginally decrease the compliance costs to employers, but would not address the overall administrative and compliance issues nor alleviate the manner in which the personal taxation affairs of the relevant employees are inappropriately complicated.

Finally, seeking to tax visiting branch employees undermines the attractiveness of the UK as a place to do business, and encourages companies to block all but strictly essential business travel to the UK. Aside from the cost to the UK in terms of reduced travel (decreased expenses on accommodation, restaurant etc.) it places UK headquartered businesses at a competitive disadvantage and increases governance challenges.

We therefore believe that the right way forward is to align the treatment of branch and subsidiary employees by providing the exemption as set out in paragraph 4.8 and 4.9 on the following grounds:

1. This accords with the government's policy objectives as stated in paragraph 2.2 and 2.3 of the Consultation Document;
2. The discriminatory taxation of branch employees is contrary to EU law;
3. The increased compliance costs and administrative burdens for both employers and employees, and significant complication of the personal tax affairs of the employees involved, is disproportionate to any increased UK tax revenue;
4. This has not historically been a source of revenue to the UK in any event; and
5. Reducing branch visitor travel to the UK has other costs to the UK that should be included in any costing of the exemption.

Responses to questions

1. ***How many of your staff/your clients staff visited the UK from overseas branches in the 2016-17 tax year? For each visitor:***
    a. ***What was the length of the visit?***
    b. ***Which country did the individual visit from?***

BlackRock is an international firm and has overseas branches located throughout the world, including in Europe and the US. BlackRock had overseas branch employees travel into the UK during the 2016-17 tax year and the length of the visit was less than 60 days for each employee in total for the large majority.

2. Do you agree that the PAYE special arrangement is an effective simplification of PAYE procedures for STBVs? Please explain why you think this is the case.

An administrative relaxation, such as set out in paragraphs 4.3 to 4.6, would be welcomed as compared to the status quo. While it may marginally decrease employers' compliance costs, the suggested relaxation would not address the fundamental issue nor alleviate the manner in which the personal taxation affairs of the relevant employees are inappropriately complicated by subjecting them to UK tax on UK workdays.

This option also does not address other complications, such as the taxation of pension contributions, deferred compensation, different tax years and the identification of "incidental" days.

Furthermore, applying UK PAYE annually imposes difficult hurdles, in that full normal payroll deduction is likely to have already taken place in the employee's home country. Cash flow difficulties will arise if the UK liability for the past year is deducted in one annual process, unless loans are made which must then be subsequently recovered from the employee.

3. Did you/your client apply for, or operate, a PAYE special arrangement in the 2016-17 tax year? If so:

- ***a. How many STBVs benefitted from the arrangement?***
- ***b. How many STBVs had to be excluded from the arrangement?***

BlackRock operated the PAYE special arrangement in 2016-17 and all our UK STBV benefitted.

4. Do you think an extension of the 30 UK workday rule will make a worthwhile difference to you or your clients?

No, it may marginally decrease the compliance costs to employers, but would not address the overall administrative and compliance issues nor alleviate the manner in which the personal taxation affairs of the relevant employees are inappropriately complicated.

5. How many STBVs could have benefitted from the PAYE special arrangement in 2016-17 if the 30 UK workday rule had been:

- **a.** ***60 days or less?*** A: 97%
- ***b. 90 days or less?*** A: 99%
- ***c. 120 days or less?*** A: 99%

6. Do you experience any problems when applying for or operating PAYE special arrangements?

It is administratively burdensome to collect the miscellaneous data required, such as "Last Known UK and Overseas Address", from each STBV. The additional data required differs based on the number of total days in the UK.

7. What changes, if any, would you make to improve PAYE special arrangements?

To ease compliance, we recommend eliminating or limiting the additional data required from each STBV beyond UK travel date information.

8. Do you agree that a new tax exemption will help align the effective tax treatments of STBVs from overseas branches to those eligible for STBVAs?

Yes. If the UK is willing to apply the treatment provided by its tax treaty network to employees of subsidiaries, there is no policy justification for this treatment to be denied to employees of branches.

9. Do you think a new tax exemption will help reduce the administrative burdens on UK companies with STBVs from overseas branches?

Yes.

10. Do you have any objections to the introduction of a new tax exemption for STBVs from overseas branches of UK companies?

No.

11. Are there any other conditions that would be needed to ensure a new tax exemption is targeted and effective?

Other EU Member States apply this tax only to employees whose visits to that jurisdiction exceed, say, 30 days. While this retains a discriminatory treatment as compared to employees of subsidiaries, it enables a larger number of employees to travel before any personal tax reporting requirements are met. However, this is arguably still not in accordance with Article 49 of the Treaty on the Functioning of the European Union.

12. Are there any circumstances that should be excluded from a new tax exemption?

It is logical to argue that branch employees should be taxed in respect of UK workdays where a tax deduction has been obtained in respect of the related compensation cost. Of course, this cannot occur where a UK company has made the election for exemption for profits or losses of foreign permanent establishments under section 18A Corporation Tax Act 2009. However, it can (partially) occur where this election is not made and the corporate tax rate where the branch is located is materially lower than the UK rate.

However, it would be administratively unsatisfactory for certain branch employees to be taxable while others would not, and the fundamental question of breaching the EU Treaty and discrimination would remain. Furthermore, it is likely that the above fact pattern will occur infrequently.

13. Are there any circumstances in which the outlined conditions could be abused or misused?

Given that employees of subsidiaries already benefit from an exemption (broadly) for up to 183 days of UK presence, and that the UK taxation outcome for the UK company is broadly the same (except as regards the STBV point) whether they operate through a non-UK branch or subsidiary, it seems unlikely that the proposed exemption could be misused. Companies that for commercial reasons would prefer to use a branch structure would no longer be disadvantaged by that commercial requirement.

Hypothetically, transferring a commercial activity to a branch located in a low-taxed jurisdiction, from where the activity would need to be in substance conducted, may allow some activity to be performed in the UK by STBVs while achieving a lower overall tax outcome. However, in practice this would appear extremely difficult to arrange, and so complex avoidance rules may not be necessary.

14. Should a new tax exemption require that a reasonable rate of tax is paid by the STBV in their country of residence?

No. This is not relevant in the context of an employee of a subsidiary, and hence should not be relevant for an employee of a branch. There are also likely to be differences in the timing and manner of taxation between the UK and the employee's country of residence that would make any rule of this type extremely difficult to apply.

15. Overall, which of the two options listed at 4.2 would deliver the government objectives most effectively? Please elaborate.

The Consultation Document set out the Government's objectives in paragraph 2.2 "… to ensure the UK is, and remains, an attractive place to headquarter and do business". Paragraph 2.3 then states "This government supports UK companies operating with overseas branch structures and is consulting on ways to simplify the tax and administrative treatment of their STBVs."

The treatment that HMRC has been seeking to apply since 2013 imposes considerable burdens on companies operating with overseas branch structures, and the Consultation Document makes it clear at paragraph 4.5 that the first proposed option would deliver only small cost savings for UK companies and affected individuals.

Given the exemption already available for employees of subsidiaries, it appears that a similar exemption for branch employees delivers the government's policy objectives as described above in an appropriate manner.

Conclusion

We appreciate the opportunity to address and comment on the issues raised by the Consultation Document and will continue to work with HMT and HMRC on the issues raised by this important matter.