



# Setting up Business in the UK

A Guide for Foreign Corporations

Bircham Dyson Bell



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## Introduction

*The UK is the most popular location for inward investment in Europe: the government organisation UK Trade and Investment reports that the UK currently attracts approximately 40% of the US, Japanese and Asian investment into the EU.*

*Where a foreign corporation wants to trade in the UK it has a number of options as to how to structure its operation and this guide is designed as an introduction to some of those options. It should not be treated as exhaustive nor relied on to provide answers to detailed questions.*

*This guide assumes that in setting up a UK presence the foreign corporation intends to trade in the UK whether or not it also trades elsewhere. If it intends to have no physical location in the UK and merely to conduct its business through a UK resident agent it will not have to register with the UK Registrar of Companies although, as discussed below, it will still need to consider the tax consequences of its UK operations. However, where a decision has been made to establish a more substantial UK presence there are three possibilities for the foreign corporation to consider.*

*Depending on its specific circumstances and preferences most foreign corporations will operate in the UK through either a wholly-owned subsidiary or by registering under one of the two parallel regimes provided for in the UK Companies Act 1985; the establishment of a place of business or the establishment of a branch. Although taxation is likely to be the overriding consideration, the ability to isolate its assets from a UK operation will, for some foreign corporations, be an important factor. From the comparison of these different options set out below it will be seen that there are advantages and disadvantages in each form of operation and that it is often a fine choice as to which form of operation will be best.*



*Establishing a partnership may be a further option for some inward investors but this is unlikely to be the preferred choice for an existing corporate entity unless it is considering a joint venture. Therefore this guide does not address the structure or tax treatment of partnerships but Bircham Dyson Bell can offer further advice on this as required.*

*Although this guide refers to the UK, it reflects company law relating to England and Wales but not specifically Scotland and Northern Ireland even though they are very similar. References to taxation apply to the whole of the UK. However, as a general commentary, this guide makes no reference to specific Double Tax Treaties. Therefore, where a Double Tax Treaty applies the general tax comments in the tax sections may need to be varied to take into account the specific provisions in the treaty.*

*The law is as stated in June 2008. However, it should be noted that company law in the UK is in the process of being amended. The Companies Act 2006 is being introduced in stages and the detailed regulations relating to overseas companies are expected to come into force on 1 October 2009.*

*The guide is divided into the following sections:*

- *Form of Business Operation*
- *Corporate Taxation*
- *General Corporate Matters*
- *Employment*
- *Personal Taxation*
- *Procedure, Timetable and Conclusion*

# Form of Business Organisation

## Preliminary

It is not legally necessary for a foreign corporation to create a local UK organisation in order to sell or market its products or services in the UK. Instead the corporation may appoint a UK resident agent to represent it. However, if a more substantial presence than a mere agency arrangement with a third party resident in the UK is intended, the foreign company has the choice of establishing a place of business or a branch and incorporating a wholly-owned subsidiary. The establishment of a place of business or branch is characterised in each case by the foreign corporation extending its legal presence directly into the UK. Establishing a subsidiary involves the acquisition of a UK company controlled by the foreign corporation, which therefore does not necessarily have a direct presence of its own. A comparison of the more important advantages and disadvantages of each of these methods of doing business is made below.

## A Place of Business or a Branch under the UK Companies Act 1985

### Establishing a Place of Business

The first of the two options where a foreign corporation wishes to trade directly in the UK is for it to register a 'place of business'. Any foreign corporation is free to establish a place of business in the UK but the Companies Act 1985 imposes certain registration requirements on such corporations which are dealt with later in this guide under 'Procedure'.

In addition to the documents required to be filed with the Registrar of Companies when the place of business is established and which are open to public inspection, the corporation is required to prepare and deliver annual accounts in the form prescribed by section 700 Companies Act 1985. The accounts required are for the corporation as a whole, not merely the place of business. These accounts should be in broadly similar form to those filed by a company registered in England and Wales, although the requirements have been relaxed to some extent. The foreign corporation does not need to file a directors' or auditors' report, and matters such as the full details of directors' remuneration and loans and minority interests held in other companies, do not need to be disclosed in the accounts. The accounts have to be filed within thirteen months of the accounting reference date, which date is set by reference to the date of the establishment of the place of business in UK.

Whether or not a foreign corporation has established a place of business in the UK is a question of fact in each case: the expression is not defined in UK legislation. The condition will generally be fulfilled if the corporation occupies a place on a relatively permanent basis for the carrying out of its business. Usually this will mean there will be a physical or visible indication that the foreign corporation can be contacted there but a foreign corporation also has to register if it habitually conducts business from a particular location in the UK even if there is no physical sign of its connection with that location. If no business is intended to be carried out and none is in fact carried out then the foreign corporation's presence in the UK will



technically fall outside the filing and reporting requirements which apply when establishing a place of business. Even so, it is normally advisable for a foreign corporation to proceed on the basis that its presence in the UK will at least constitute establishing a place of business (and possibly a branch – see below), and to comply with the relevant requirements accordingly.

It should be noted though that even where a foreign corporation's presence in the UK does not constitute an established place of business, such presence as it has may be sufficient for other purposes, e.g. for the UK court to conclude that it has jurisdiction over that corporation to grant a petition for its winding up.

### Establishing a Branch

Following the incorporation into UK law of the Eleventh Company Law

Directive (89/666/EC) there is now a distinction between the establishment of a place of business within the UK and the establishment of a branch and there are differences in the filing and reporting requirements between the two procedures.

The term 'branch' is not defined in the legislation. However, case law has identified the essential features of a branch, as distinct from a place of business, as follows:

- a greater feeling of permanency than a place of business;
- a managerial presence on the branch premises;
- the ability to conduct business with customers on its own behalf, without the requirement to refer decisions back to the 'head office' abroad.

It can be seen, therefore, that in many cases a foreign corporation establishing a significant business presence in the UK will be establishing a branch rather than a place of business. However, in some circumstances, a foreign corporation is not permitted to register under the 'branch' regime.

These include:

- where the corporation is registered in Gibraltar or Northern Ireland;
- where the corporation is not a limited company;
- where the corporation's business activities and managerial presence in the UK are not sufficient to constitute a branch e.g. where the only activities are internal computer processing or warehousing.

The obligation on a corporation establishing a branch to file accounts



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in the UK depends on the parent law of the corporation. Where that law requires the corporation to produce audited accounts (this will apply to all companies from within the European Economic Area) a copy of those accounts must be delivered to Companies House, together with a certified translation where appropriate, within three months of their public disclosure in the parent country of the corporation. In all other cases the corporation must submit accounts that comply with the requirements of section 700 Companies Act 1985, in the same way as if it had established a place of business.

As for an established place of business, the section 700 accounts must relate to the corporation as a whole and not just the part of the corporation that operates in the UK.

### General

Apart from compliance with filing requirements, a foreign corporation is free to structure its branch or place of business and arrange for its management in such manner as it thinks fit, subject only to the points relating to the employment of foreign nationals mentioned elsewhere in this guide.

Where the foreign corporation's activities increase or decrease in the UK they should be considered to see whether they have changed to such an extent that a place of business should register as a branch or a branch should re-register as a place of business.

It may be desirable to form a new off shore incorporated subsidiary of the parent and to have that subsidiary establish the UK branch or place of business, rather than have the parent

do this. The main reasons for this are likely to be:

- UK filing requirements relate only to the corporation establishing the branch or place of business, and this procedure therefore reduces the amount of information publicly disclosed;
- the establishment of a branch or place of business in the UK automatically brings the foreign corporation within the jurisdiction of the English Courts;
- although the business profits attributable to the branch will be subject to UK tax, the rules for computing those profits may bring in a part of the business profits of the foreign corporation (as forming an integral part of the business carried on by the place of business in the UK).

- There are currently no exchange controls in relation to flows of money into the UK.

## Subsidiary Company

The other main alternative business model for a foreign corporation is to form a UK registered company. Trading companies incorporated in England and Wales are classified as either public limited companies (**PLCs**) or private companies. The main advantage of registration as a PLC is that it is able to offer its shares to the public and apply to be admitted to the Official List of the UK Listing Authority and admitted to trading on the Main Market or the AIM Market of the London Stock Exchange plc. However, because PLCs are subject to requirements as to minimum issued share capital and more onerous rules as to disclosure and management than private companies it is normal to incorporate a wholly owned subsidiary company as a private company. References in this guide to companies are therefore to private limited companies unless otherwise indicated.

A company is required to have a registered office in England or Wales as its official address at which service of process and other notices can be made. This may be at an office of the company or at the offices of the company's solicitors, accountants or any other suitable person.

A company is required to file details of its officers, the address of its registered office and details of its capital with the Registrar of Companies. Additionally, subject to the exemptions mentioned below, it must annually file an audited profit and loss account and balance sheet, a directors' report on the company's trading and financial position and a form (the **annual return**), the details of which will include the capital structure of the company. All of these documents, once filed, are open to inspection by the public. There are exemptions from these filing requirements for 'small' and 'medium-sized' companies:

- Small companies (being companies which meet two of the following conditions: turnover not more than £6.5m; balance sheet total not more than £3.26; not more than 50 employees) are permitted to file an abridged balance sheet and are not required to file a profit and loss account or directors' report.
- Medium-sized companies (for which the relevant conditions are: turnover not more than £25.9m; balance sheet total not more than £12.9m; not more than 250 employees) are permitted to omit details of turnover and gross profit margin.

A company is only required to have one shareholder who need not be a UK resident or national. It may be another company. There is no maximum number of permitted shareholders.

The management of a company is vested in the board of directors. The majority of the shareholders may always dismiss a director and the Articles of Association of a subsidiary company will normally provide for the appointment of the directors by the shareholders. A company must have at least one director and from October 2008 at least one director must be an individual. The directors need not be UK residents or nationals, although if they are not resident it is prudent



to appoint 'alternates' who are resident to act on their behalf in the execution of documents etc.

A company need only have one share in issue. There is no minimum requirement as to the paid-up share capital of private companies and no legal requirement that share capital bear any relation to the capital employed in its business. Third parties dealing with a company will sometimes wish to be sure that a certain proportion of the capital is paid in by way of share capital and not by way of loan capital as loan capital can (subject to the terms of the loan) be repaid whereas share capital can only be returned to shareholders subject to certain restrictions. Third parties can use the records held at Companies House to check on the amount of paid-up capital.

If the company should become insolvent members' liability is limited to the amount unpaid on the shares they hold. Funds contributed to a company in the form of share capital may not be returned to shareholders except on the liquidation of the company and after the payment of creditors, or by a reduction of capital (for which the consent of the UK Court is required) or by the purchase or redemption of shares by the company. This last possibility is limited in scope, as purchases may only be made out of capital if there are insufficient distributable profits available for the purpose, and only then subject to stringent conditions and with potentially disadvantageous tax consequences.

The procedure for setting up a UK registered subsidiary is not onerous – further details are set out under 'Procedure' later in the guide.

## Agency

A foreign corporation need not establish a place of business, branch or set up a subsidiary company in order to trade in the UK. It can instead appoint a third party already resident in the UK to act as its agent in its dealings with customers. In this arrangement the foreign corporation is referred to as the 'principal'.

Two types of agency agreement are generally recognised. Under a 'sales agency' agreement, the agent is given authority to find, negotiate terms and enter into binding contracts with customers on behalf of its principal: however the agent is not a party to the contract, which is viewed as being made between the principal and the customer. This should be contrasted with a 'marketing agency' agreement, where the agent is responsible for finding customers and introducing them to the principal, and possibly has the power to negotiate terms, but not to conclude the contract.

The contract between agent and principal should always be set out in writing, so that there is no misunderstanding about the extent of the agent's authority and to ensure the agent will be liable to the principal if the agent goes beyond that authority. This is important because a principal will be bound by a contract negotiated and entered into by a customer dealing in good faith with its agent, even though the agent was in fact acting beyond the scope of its authority.

Prior to 1994 the terms of an agency agreement were a matter of contractual freedom between the principal and agent. However on 1 January 1994 the

It should be noted though that the Regulations do not apply to all agency agreements: most notably all marketing agency arrangements are excluded from its terms.



Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053, implementing EC Directive 86/653/EC) (the **Regulations**) came into force. It should be noted though that the Regulations do not apply to all agency agreements: most notably all marketing agency arrangements are excluded from its terms.

Where the Regulations apply they impose statutory restrictions on certain terms of the agency agreement, in particular:

- the rights and duties of the parties (although the Regulations do not add significantly to the English law principle that each party must act dutifully and in good faith towards the other);
- provisions, some of which are mandatory, relating to the remuneration of the agent (for example the Regulations provide that in some instances the agent is entitled to commission even after the agreement has come to an end but this entitlement can be excluded); and
- the conclusion and termination of the agency agreement (the Regulations provide mandatory minimum notice periods to terminate an indefinite agreement and give the agent the right to compensation on termination of the agreement, even where the principal is not in breach of contract).

# Corporate Taxation

## UK Resident Company

A UK resident company (i.e. a company incorporated in the UK or, if incorporated elsewhere, the central management and control of which is exercised in the UK) is chargeable to UK Corporation Tax on its worldwide profits at the rate of 28% (for the year to 31 March 2009) both on its income profits and on its capital gains (subject to certain reliefs). If its taxable profits in any accounting period are less than £300,000 the rate of tax is 21%, while there is marginal relief for taxable profits up to £1,500,000 ('small companies relief'). The benefit of these marginal rates is reduced where a company is associated with other companies.

## Capital allowances and R&D expenditure

Certain capital expenditure (principally that on plant and machinery) is deductible for tax purposes. The relief takes the place of commercial depreciation. Where relief is available, it is given in the form of 'capital allowances'. The main relief is a 'writing-down allowance' which enables the expenditure to be written off over a period of years. However, in very limited circumstances 100% or 50% of the expenditure may be written off in the first year. If assets in respect of which a capital allowance has been claimed are sold for a price which is in excess of their written-down value the excess is subject to Corporation Tax by way of a 'balancing charge'.

More favourable relief is given to selected categories of expenditure. In particular, expenditure on 'environmentally friendly' items such as the thermal insulation of buildings, plant and machinery which qualifies as energy-saving, and cars with low carbon emissions.

The regime has been subject to review as part of a business tax reform. From 1 April 2008 the main rate at which qualifying expenditure is written down is reduced from 25% to 20% (subject to transitional relief). Also, from 1 April 2008, small and medium sized enterprises will not qualify for the main writing-down allowances. Instead they should be able to qualify for a new annual investment allowance on the first £50,000 of expenditure on plant and machinery.

Capital allowances are also available to a limited extent on industrial and agricultural buildings. However, this relief is being phased out with a view to it being abolished as from 1 April 2011.

In addition, certain capital expenditure incurred on the construction of buildings in Enterprise Zones may (during the first ten years in which the Zone exists) be deducted for tax purposes in full in the year in which the capital expenditure is incurred.

As for expenditure on research and development (which is defined by reference to UK GAAP), if a small or medium sized company meets all the conditions for the relief, and the expenditure is revenue in nature, it may deduct 150% (potentially rising to 175%) of the expenditure or claim an R&D tax credit. There is also a lesser relief for large companies.

### Trading losses

Tax losses of the trade of a UK resident company may be carried forward indefinitely and set against profits of the same trade of later years, subject to certain exceptions designed to prevent tax avoidance on a change of ownership of a company. It is also possible to use trading losses to reduce other profits (of whatever description) (a) of the year in which the losses are made and (b) of the previous year. Additionally, there are provisions permitting the surrender of losses between UK resident companies which are members of the same worldwide group. A UK resident company may also surrender its losses to a non-resident group member carrying on a trade in the UK through a permanent establishment.

Terminal losses of a UK resident company on discontinuance of a trade may be carried back and set against earlier profits of the same trade made by that company in accounting periods up to three years before the accounting period in which the trade is discontinued.

### CGT Groups

There is relief from Corporation Tax on capital gains arising on the transfer of assets between UK resident companies which are members of the same worldwide group (group relief). Group relief is also available to foreign members of the group if they carry on a trade in the UK through a permanent establishment so long as the asset being transferred is an asset for use in the trade or for the purposes of its permanent establishment.

### Value Added Tax

Value Added Tax (**VAT**) is payable on the supply by a taxable person within the UK of a wide range of goods and services and on the import of goods into the UK. A 'taxable person' is any person carrying on a business in UK, including foreign concerns and overseas residents, who supply goods and services in the course of business in the UK. Such a person must register for VAT if his turnover exceeds, or is likely to exceed, £67,000 per annum. The standard rate of VAT is at present 17.5%. There is a zero rate on certain supplies and some items are exempt. A review of the company's operations from the point of view of VAT is essential before activities commence. It is important to register as a taxable person as early as possible in order to recover the VAT incurred on the start-up of a business in the UK.

A taxable person must keep records of the VAT which he is charged on supplies of goods and services to him and on the importation of goods or services by him (**input tax**) in the course of his business and of the VAT which he, in turn, charges to his customers (**output tax**). Periodically (normally every three months) he must either account to HM Revenue and Customs for the excess of output tax over input tax in the relevant period or he will receive a refund of so much of input tax payable by him during the period as exceeds output tax which he has charged to his customers during the same period.

### Withholding tax

In principle, a UK resident company making payments of interest or royalties to a foreign recipient is obliged to withhold income tax at the rate of 20%. Accordingly,

if a UK subsidiary borrows money from its foreign parent, income tax will have to be withheld from payments of interest made to the parent unless there is an appropriate Double Tax Treaty. There is also a risk that interest paid to a parent company will be treated as a distribution (and will therefore not be deductible in computing the profits of the UK company). Subject to the provisions of an applicable Treaty, it may therefore be more advantageous for a UK subsidiary to borrow any working capital that it requires from a bank, to which payments of interest may be made gross. Where a Double Tax Treaty applies, payments of interest or royalties to a foreign parent may be exempt from withholding tax or subject to a reduced tax on such payments in its own country. Typical reduced rates are 15% in the case of interest payments and 10% in the case of royalties. The term 'royalties' refers to payments relating to patents, trade marks, designs etc, but commonly excludes copyright and 'know-how' royalties which are payable gross without deduction of tax and are taxable in the recipient's own country.

The obligation to withhold tax on interest and royalties may be relieved if the payment is made to an 'associated' EU company by a UK company or a UK permanent establishment of an EU company. Companies are associated if one holds 25% or more of the capital or voting rights in the other or if another company holds 25% of the capital or voting rights in them both. This relief is subject to transfer pricing rules.

#### The taxation of dividends

A UK resident recipient of a dividend paid by a UK resident company is entitled to a tax credit on the dividend received. For the year ending 31 March 2009 the tax credit is set at one-ninth of the amount of the dividend, so that a dividend of £90 carries a tax credit of £10. Most Double Tax Treaties provide that dividends paid by a UK resident company to a corporation or individual resident outside the UK are to be treated as a grossed-up sum, i.e. a sum equal to the aggregate of the dividend and the UK tax credit. Historically such Treaties have provided for the tax credit to be paid to the shareholder, subject to the deduction of UK income tax on the dividend (generally restricted to a maximum of 15%). However, since the tax credit has been reduced in recent years to the current amount of 10% of the gross sum, this leads to a position in practice under which the non-resident shareholder neither receives payment of a credit nor is liable to UK income tax to the extent that the tax exceeds the amount of the tax credit. It is therefore likely that the receipt of a dividend will be tax neutral for the non-resident shareholder.

#### Non-UK Resident Company

A non-UK resident company is only chargeable to Corporation Tax to the extent that it carries on a trade in the UK. If it does so through a permanent establishment, the foreign corporation will be chargeable to Corporation Tax on:

- trading income arising directly or indirectly through or from the permanent establishment; and
- income from property or rights used by or held by or for the permanent establishment.



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A permanent establishment is defined as:

- a 'fixed place of business' through which the business of the company is wholly or partly carried on (for example, a place of management, branch, office, workshop, mine, or building site); and
- an agent acting on behalf of the company which has authority from the company to do business in the UK on behalf of the company and habitually exercises it there (unless he is an agent of independent status acting in the ordinary course of his business).

A company does not have a permanent establishment if it maintains a fixed place of business or dependent agent solely for the purpose of carrying on activities of a preparatory or auxiliary nature (e.g., storage of stock in trade).

It is apparent that the UK legislation adopts much of the wording used in Article 5 of the OECD Model Tax Treaty. However, it must not be assumed that the definitions are identical in every case. It is possible for a company to have a UK permanent establishment for Corporation Tax purposes but not for the purposes of Double Tax Treaty Relief (so that the Treaty prevails) and vice versa.

To determine the profits 'attributable' to the permanent establishment on which Corporation Tax is charged the 'separate enterprise principle' is applied. Under this principle the profits of the permanent establishment are calculated for UK tax purposes as if it were a distinct and independent company from the overseas entity of which it forms part, dealing with it on arm's length terms. Royalties, interest and other financing costs made against it

by the overseas entity of which it is the permanent establishment for the purposes of internal accounting are not deductible. However, a deduction may be permitted for expenses (including interest) incurred by the permanent establishment or the head office for its purposes.

A permanent establishment is entitled to capital allowances on plant and machinery and industrial buildings in the same way as a UK resident company. To the extent that its trading profits are within the charge to Corporation Tax it may carry forward its trading losses to offset against profits of the same trade of later years, subject to certain exceptions designed to prevent tax avoidance on a change of ownership of a company. It may also use its trading losses to reduce profits of the year in which the losses are made and of the previous year.

'Small companies relief' does not apply to the profits of a permanent establishment which will be taxed at the full rate of Corporation Tax (28% for the year to 31 March 2009) regardless of the amount of annual profit of the branch. A permanent establishment is also chargeable to Corporation Tax on the relevant proportion of capital gains (so as to give an effective rate of tax of 28%) arising on the disposal of any asset situated in the UK which is used for the purposes of the permanent establishment or its trade.

However, there is an additional test to be satisfied before a liability arises on trading profits. Even if a foreign corporation has a permanent establishment in the UK that is not in itself sufficient to make the foreign corporation liable to Corporation Tax. The foreign corporation has to trade in, as opposed to with, the UK. The main test of this is whether trading profits of the foreign corporation in substance arise from operations within the UK. Therefore, if the foreign corporation sells in the UK goods made abroad, the crucial question is: where are the contracts of sale made?

The question of where a contract of sale is made is a matter of contract law. It is therefore important, if a liability to Corporation Tax is to be avoided, to ensure that the UK branch does not make contracts on behalf of the foreign corporation for the provision of goods in the UK. It is also advisable that the activities of the branch are clearly seen as merely ancillary to the main business of the foreign corporation conducted abroad. For instance, final negotiations for any contracts should be undertaken abroad, the payments arising under the contracts should be received abroad and the contracts should not be structured so as to permit profits accruing from them to arise in the UK. On the other hand, if the goods sold by the foreign corporation are manufactured in the UK, or if services are provided by the foreign corporation in the UK, it will be very difficult to show that the profits from the sale of such goods or the provision of such services do not in substance arise from activities carried on in the UK.

If a foreign corporation is trading in the UK through a permanent establishment its liability to Corporation Tax may nevertheless be relieved under a Double Tax Treaty. Where Treaty relief applies the foreign corporation is only liable to Corporation Tax if it carries on trade in the UK through a 'permanent establishment' situated in the UK. The standard 'industrial and commercial profits' Article in most Double Tax Treaties restricts the exposure to Corporation Tax to the profits 'attributable' to the permanent establishment. Clearly, the tests for Corporation Tax and Treaty relief are now very similar, however the differences between them mean that a Treaty can still reduce or extinguish a liability to Corporation Tax.

In the unlikely event that a non UK resident company is carrying on a trade in the UK without a permanent establishment, it would be liable to UK Income Tax on its trading profits (subject to Treaty relief).

The permanent establishment must register for VAT in the same way as a UK company.

## Agency

If a foreign corporation trades in, as opposed to with, the UK through a dependent agent, the profits and capital gains of the foreign corporation attributable to the trade are in principle taxable in the same manner as those of a branch or office and may be assessed in the name of the agent. In many cases this will mean that the foreign corporation has a permanent establishment in the UK for Treaty purposes where the agent has and habitually exercises authority to negotiate and conclude contracts on behalf of his principal or maintains a stock of merchandise for the purpose of fulfilling orders on behalf of the principal. It should be noted that in this area there are important differences between the various Double Tax Treaties.

## Corporate Tax Planning

The principal concerns in the corporate taxation field are to ensure, firstly, that the foreign parent does not become resident in the UK for tax purposes (and it should be noted here that under UK tax law, a corporation can be resident in more than one jurisdiction); and, secondly, to isolate, so far as possible, the profits of the parent from the charge to UK tax.

A company incorporated outside the UK is UK resident for tax purposes if its central management and control is exercised in the UK. The question of where the central management and control of a company is exercised has historically been determined by reference to where its board of directors meets or takes its decisions. If in practice the central management and control of the foreign parent takes place in the UK there is a risk that the UK tax authorities will claim that the foreign parent is for tax purposes centrally managed and controlled in the UK. It may therefore be prudent in such circumstances to arrange for a formal separation of the manufacturing and servicing/sales functions of the foreign parent by the creation of a separate corporate entity to perform the servicing/sales function within the UK.

The comments in the previous paragraph concerning the tax treatment of overseas companies which are managed and controlled in the UK should be read in the light of the Controlled Foreign Companies legislation found in Sections 747 of the Income and Corporation Taxes Act 1988. Although these provisions are unlikely to apply in the present context, they enable a charge to Corporation Tax to be imposed on certain UK resident companies with interests in a 'controlled foreign company' (**CFC**). The charge will be calculated by reference to the profits of the overseas company. It will apply only where:

- the overseas company is under overall UK control (including certain cases where there is a UK shareholder with at least 40% of the shares in the CFC); and
- the overseas company is subject to a lower level of taxation in its country of residence – i.e. the tax paid in the country of residence is less than half the amount which would have been payable had the company been resident in the UK; and
- a UK company, together with connected or associated persons, has at least a 25% stake in the overseas company.



Even where all of these conditions are present, no charge will arise if, for the particular accounting period, the CFC satisfies any one of the four tests for exclusion incorporated in the legislation. These are:

- the CFC has remitted by way of dividend a specified proportion of its profits to its UK, and in some cases non-resident, shareholders ('acceptable distribution policy' test); or
- it is engaged in any one or more of the range of trading and other activities which fulfil specified conditions for exemption ('exempt activities' test); or
- it has not been a main purpose of the CFC's transactions to achieve a significant reduction of UK tax, nor a main reason for the company's existence to divert profits from the UK ('motive' test); or
- the CFC's profits for a 12 month period are less than £50,000.

A foreign corporation which carries on trade in the UK through a permanent establishment such as a branch is chargeable to UK Corporation Tax on the profits arising directly or indirectly through or from the branch. The difficulty then will be to agree with the UK tax authorities the amount of the foreign corporation's profits which arise in that way. The danger of a charge on the foreign parent also exists where a subsidiary company is established on the basis that the subsidiary is the parent's agent in the UK, although in such a case it should be possible to argue (if careful internal procedures are followed) that it is the subsidiary rather than the parent that is trading in the UK and that therefore only the profits of the UK company, which are clearly identifiable, should be charged to UK Corporation Tax.

One advantage of a UK subsidiary rather than a branch (or other permanent establishment) is that if the UK subsidiary suffers trading losses, the losses may be surrendered to group members within the charge to Corporation Tax more freely than if it were a UK branch with losses. On the other hand, the foreign parent may prefer to set initial UK trading losses against its foreign tax and for this purpose a branch may be more appropriate. If the foreign corporation wished to hold all its UK resident subsidiaries through a UK holding company, the UK holding company could dispose of a subsidiary without any charge to Corporation Tax if substantial shareholding relief applies (broadly, this relief applies if the holding company owns at least 10% of the shares in the subsidiaries (which it will do) which are all trading companies of a trading group).

All transactions between the foreign parent and a UK subsidiary will be subject to scrutiny by the UK tax authorities to ensure that they are on an arm's length basis. Since they will be under common control the UK tax authorities will require the substitution for UK tax purposes of arm's length charges for services provided or goods supplied in place of those charges actually made in any case where to do so will increase the profits or reduce the losses liable to UK tax. For this purpose the UK applies the OECD rules relating to transfer pricing. Whether a branch or subsidiary is used, it will be important that its activities are clearly defined and preferably documented in an agreement with the foreign parent. It is particularly important that the UK operation does not have authority to conclude contracts on behalf of the parent.

## Impact of European Law

Taxpayers have been challenging domestic UK tax legislation where it appears contrary to Articles 43, 49 and 56 of the EC Treaty. Provisions subject to challenge by taxpayers include the CFC rules mentioned above. In a recent case the European Court held that the UK CFC rules could not be applied where it was proven on the basis of objective factors that were ascertainable by third parties, that, despite the existence of tax motives, the controlled company was actually established in the host member state and carried on a genuine activity there. What this decision means for the UK CFC legislation is currently being argued before the UK courts. It could mean that the UK CFC rules are wholly void. Or it could mean that the ECJ judgment should be 'read down' into the UK CFC rules so that the exception to the CFC rules should be replaced by the test laid down by the ECJ. We do not yet have the final answer.

Provision has been made to assist the tax-free creation of European companies (Societas Europaea) by the merger of UK companies with companies resident in other member states. Provision has also been made to assist the tax-free transfer of UK trades between companies resident in different member states so long as the transfer is wholly in exchange for shares or debentures and the recipient company would pay Corporation Tax on a disposal of the assets thereby transferred. Typically these reliefs are disapplied if the transfer is part of a tax avoidance scheme.

## Disclosure of tax avoidance schemes

A company which intends to implement a novel UK tax avoidance scheme is now obliged to notify the UK tax authorities of the details of that scheme, before or shortly after implementation (unless its advisers or the promoters of the scheme have already notified the tax authorities). The UK tax authorities will give the scheme a registration number. The scheme registration number must be included in any relevant tax return so that the tax authorities are alerted to the planning. Penalties are imposed for failure to comply with the rules. UK legal advisers and UK promoters of a scheme are the persons primarily liable to notify, particularly if the taxpayer is a company outside the jurisdiction.

## Reporting and records

The UK tax authorities have statutory powers to request information and documents relating to the tax affairs of taxpayers. They also have statutory powers to enquire into tax returns. A company which may be required to deliver a tax return must keep records sufficient for it to make such a return. Records should be preserved until at least 6 years from the end of the period for which it may be required to make the return.

# General Corporate Matters

## General Liability

An English company is a legal entity separate from its shareholders with its own rights and liabilities. As mentioned above, the liability of shareholders for the debts of the company, should it become insolvent, is generally limited to the amounts (if any) unpaid on their shares. A branch on the other hand, is not regarded in English law (except for the purposes of taxation) as separate from the foreign corporation which establishes it, so that rights and liabilities accruing to the branch are those of the foreign corporation itself (as would also be the case with a registered place of business in the UK). In theory, therefore, the only way of isolating the assets of the parent from a UK branch operation (or UK registered place of business) and of limiting its exposure in the UK to the amount of its assets invested or earned there by the local operation, is by the incorporation of a subsidiary. In practice, however, this separation of liability becomes somewhat less distinct: first, because of the points on jurisdiction mentioned below, and second, because in many circumstances when an insubstantial subsidiary company enters into contractual relations it will be required to provide a parent company or third party guarantees.

## Jurisdiction

An English company is automatically subject to the jurisdiction of the English Court and may be served with process at the registered office which it is required to maintain. In the case of a branch or place of business, the registration by the foreign corporation of a name and address in England for service of process there (which it is required to do) amounts to a submission to the jurisdiction of the English Court. Execution of a judgment against an English company may be levied against any of its assets, but not against the assets of its shareholders. Execution of a judgment against a foreign corporation may be levied against any of its assets and is not limited to the assets of the UK branch.

If assets of either the parent or a UK subsidiary are situated in a country with which the UK has a reciprocal enforcement of judgments treaty then a judgment of the English Court may be directly enforced in that other country. Judgments of the English Court are directly enforceable:

- in Scotland and Northern Ireland;
- within the EC (now including Denmark) under Regulations No. 44/2001 and No. 805/2004 (the **Brussels Regulation**);
- in countries (including Denmark) which are parties to the Lugano convention; and
- in certain circumstances in Commonwealth countries and other states (including Israel) where the UK has agreed reciprocal enforcement arrangements.

If there is no reciprocal enforcement of judgments treaty applicable, separate proceedings in the other country would have to be brought (assuming the other country accepted jurisdiction) claiming the amount as a debt (the judgment of the



English Court having given rise to an implied contract to pay). Most notably there is no reciprocal enforcement of judgements treaty with the USA.

As to the availability of local courts, a foreign corporation and its wholly owned subsidiaries have the same rights of access to the English Court and capacity to enforce contracts and other rights as any English company. However, where the foreign corporation's central control and management resides in a state outside the scope of the Brussels Regulation or the Lugano Convention, it may be subject to an order requiring it to provide security for a defendant's costs. Such an order is not made as a matter of course; much will depend on the whereabouts of its assets, the risk of dissipation of those assets and the practical difficulties of enforcing any orders for costs made in the defendant's favour.

### Trade Marks

The Trade Marks Act 1994 allows registration of trade marks and, like the national trade mark laws of other EC Member States, it is based on an EC Directive. Nationals of most countries of the world are able to register trade marks in the UK, so whether or not a UK subsidiary exists the trade mark rights can be held by the foreign parent or holding company. Alternatively, protection can be obtained by registering an International Trade Mark (UK) under the Madrid Protocol. Also, a European Community trade mark has the same effect in the UK as a national or international registration. When seeking protection in the UK for a trade mark already established abroad, consideration must always be given to the meaning of words. A foreign word trade mark may be descriptive of goods or services in English, and therefore

unregistrable. It may even be offensive or obscene, which could also lead to refusal.

UK Trade Mark registration fees are £200 for filing in one class plus a further £50 for each additional class in respect of which cover is sought. Registration takes about six months subject to there being no opposition proceedings. Registration gives the proprietor exclusive rights in the trade mark which are infringed by the use of the same or a similar sign for the same or similar goods or services. The UK Intellectual Property Office will no longer refuse applications ex officio where there are conflicting prior trade mark rights, so the UK system is similar to that for the European Community in this respect.

If the owner of a mark has not registered it, he may be able to bring

a common law action in passing off, although registration is always advisable. To succeed in a passing off claim the owner would have to demonstrate that he has acquired a trade reputation or goodwill in the UK in the mark in relation to the particular goods or services in respect of which he is claiming passing off. He would further have to show that another party has misrepresented himself in relation to the mark so as to cause damage to the owner of the goodwill.

A business's trade mark is often reflected in its company name. However, at present there is no systematic co-ordination between the Registrar of Companies and the Registrar of Trade Marks, and it is a common misconception to believe that incorporation of a company under a particular name gives useful protection. A change in the law governing company names will change this within the next few years, but trade mark registration will remain the most important source of protection.

### Data Protection

It is a requirement that all individuals or corporate entities that control how personal data are processed in the UK (**data controllers**) comply with the Data Protection Act 1998 (**the 1998 Act**). There are a number of exceptions as to the extent that compliance is required.

The principal exception is that if a corporate entity has an established place of business outside of the UK but within the European Economic Area (**EEA**) it is not required to comply with the 1998 Act but only with the data protection legislation of its home jurisdiction. Therefore, if the corporate entity is incorporated in the UK or if an entity's place of business is outside the EEA it must comply with the requirements of the 1998 Act.

In general terms the obligations on a data controller who is required to comply with the requirements of the 1998 Act are:

- to notify the Information Commission that it is processing personal data, the types of personal data processed, the purposes for which they are processed and to whom they may be transferred;
- to inform the individuals whose personal data are processed of the purposes for which the data are processed together with other specified information;
- to ensure that personal data are only processed if specified conditions are satisfied;
- to comply with the Principles of Data Protection as set out in the 1998 Act which include, but are not limited to, a requirement that personal data be kept up to date, accurate, not excessive, relevant for the purposes for which they are processed, secure and not kept for longer than is necessary; and
- to ensure that personal data are only transferred outside of the EEA if certain conditions are satisfied.

Any business established outside the UK that is proposing to undertake activity in the UK should seek legal advice about data protection.



# Employment

## Work Permits and Entry Requirements for Individuals

This guide explains what businesses need to know in order to bring employees to the UK and for those wishing to work in the UK.

From 29 February 2008 the Borders and Immigration Agency (**BIA**) began rolling out a new points based immigration system in the UK to ensure that only talented people with the right skills will be able to come to the UK to work and study. The new system replaces the more than 80 immigration categories previously in force. The Home Office describes it as the biggest shake-up of the immigration system in 45 years.

The new immigration system has five tiers. However, for most businesses it is only the first two tiers that will be of relevance.

### Tier 1 (General)

This tier is for highly skilled workers. It replaces the old immigration categories of 'investors', 'businesspersons', 'writers, composers and artists', those entering the UK under the 'International Graduate Scheme' and those under the 'Highly Skilled Migrant Programme'.

Tier 1 itself is split up into four separate categories:

- General: for those looking for highly skilled employment in the UK, or are self-employed or setting up a business;
- Investor: for those making a large investment in the UK;
- Entrepreneur: for those investing in the UK by setting up or taking over the running of a business; and
- Post-study: for those who are (or have been) in higher education in the UK.

In Tier 1, applicants will need to score at least 75 points (based on their qualifications, previous earnings, UK experience and age) as well as 10 points for 'English language' (which requires evidence of the ability to speak English to a required standard) and 10 points for 'Maintenance' (which requires evidence of a certain level of minimum funding to support the applicant whilst in the UK).

### Tier 2: (Skilled workers with a job offer)

This category effectively replaces the old work permit scheme. It will not go live until the autumn of 2008. In the meantime, the existing work permit scheme will continue.

Under the new scheme, businesses wishing to employ workers under this category must first apply for a licence from the BIA. Once licensed, the sponsor will then be able to apply for certificates of approval, which they can allocate to migrants they would like to employ.

Applicants coming to the UK under this tier, or wanting to remain in the UK, must have a certificate of sponsorship from a licensed sponsor. Like Tier 1 applicants,



Applicants coming to the UK under this tier, or wanting to remain in the UK, must have a certificate of sponsorship from a licensed sponsor.

those applying under Tier 2 will need to evidence their skills on a points-based basis, reflecting aptitude, experience, age and the demand for their skills in the marketplace.

#### Further Requirements on Businesses before employing migrants

Employers must carry out pre-employment checks to ensure that the employee has a right to work in the UK. The employer must ask for those documents that prove a person's entitlement to live and work in the UK. There will also be an onus on employers to ensure that the migrant worker meets the requirements of the immigration category under which they are applying prior to the issuing of that certificate.

#### New criminal and civil sanctions for getting it wrong

To deter businesses from employing illegal migrants, new criminal and civil penalties are now in force. For each illegal worker so employed, an employer may have to pay a fine up to £10,000. If an employer knowingly employs an illegal worker it could face an unlimited fine and possible imprisonment.

In addition to the civil and criminal penalties, sponsoring employers found to be dishonest or incompetent may have their licence to employ migrants withdrawn.

#### Employment Law

Contracts of Employment are regulated, like any other agreement, by the provisions of English common law. This applies whether they be set out in a formal



written contract, evidenced by written notification of the more important terms or inferred from evidence of verbal discussions and the conduct of the parties. The primary remedy for a breach of a contract of employment (e.g. dismissal without proper notice) is a Court action for damages.

Increasingly, however, employment law in the UK (and Europe) has been affected by an increased statutory regulation of employment matters – much of it EU driven. Breach of certain statutory requirements (in particular of the unfair dismissal provisions) results in disputes being heard before an Employment Tribunal, rather than a Court; the Employment Tribunal being less formal than the Court, both in its procedure and rules of evidence. The statutory provisions also govern various aspects of the employment relationship

and override contractual provisions. They apply to the employment of everyone, including all foreign nationals who ordinarily work in the UK regardless of whether the relevant contract of employment is governed by English law and regardless of whether the employer is a subsidiary of a foreign company or a foreign corporation which has set up a place of business or a branch in the UK. The more important statutory requirements are considered below.

#### Written Particulars of Terms

Written particulars of certain principal terms of employment (e.g. date when employment began, salary, working hours, notice period, holidays, disciplinary and grievance procedures and pensions) should be provided by the employer to each employee no later than 2 months after the beginning of

employment. Notice of any change in these particulars must be given to every employee as soon as possible and not later than one month after the change has been made. There is no statutory obligation to notify the employee of other contractual terms not covered by this disclosure requirement although in practice it is usual (and prudent for the employer) to do so in the same document.

#### Period of Notice

A contract of employment must specify the period of notice to be given by and to the employee. If the contract is silent on this point the law implies a 'reasonable period of notice'. There are also statutory minimum periods of notice depending upon the employee's length of service which must be given to an employee to terminate his contract. These statutory

notice periods may not be reduced, though they can be increased, by agreement. Generally, an employee must be given a minimum of one week's notice after one month's continuous employment increasing by one week for each full year of employment (subject to a maximum of 12 weeks' notice after 12 or more years of employment).

### Redundancy Payments

In the case of dismissal for redundancy (i.e. where the business is being shut down, where the place of work disappears or where the employee is surplus to requirements and is not being replaced directly or indirectly) statutory compensation is payable to employees who have been continuously employed for 2 years or longer. Redundancy compensation is calculated on a sliding scale by reference to the employee's age, length of service (up to a maximum of twenty years) and weekly salary (which is currently capped at £330). The current maximum statutory redundancy payment is £9,900 depending on these factors.

There are detailed consultation and notification requirements regarding proposed redundancies which an employer must follow whenever twenty or more people are to be dismissed on grounds of redundancy. If this is the case, the employer is required to consult employee representatives (or Trade Union representatives where the Trade Union has been recognised by the employer) regarding the proposed redundancies for minimum periods of time, depending on the number of employees involved. In addition, an employer must also notify the Department of Trade and Industry. Both of these requirements must be met before notice of dismissal is given.

In instigating a redundancy programme the employee must be given the appropriate notice of termination as specified in their employment contract and failure to do so constitutes a breach of contract. The employee can bring a claim for unfair dismissal if the employer does not instigate the redundancy programme in a manner which is procedurally correct.

### Unfair Dismissal

Every eligible employee has the right not to be unfairly dismissed. Under English common law, so long as the employer has complied with the contractual terms and given appropriate notice to the employee, the employee had no remedy. The statutory claim of unfair dismissal was introduced to give a measure of protection to employees by introducing the concept of fairness into the workplace. Now an employer must show not only that he had a lawful reason to dismiss an employee but also that he acted fairly in the procedural manner in which the dismissal was handled.

The five potentially lawful reasons open to the employer for dismissal are: capability, conduct, redundancy, statutory illegality or some other substantial reason. If the employer has a fair reason for dismissing the employee, it is important that the employer also handles that dismissal procedurally fairly otherwise the employee may well be entitled to bring a claim for unfair dismissal.



Normally, an employee must be employed for at least 52 weeks before he can bring a statutory claim of unfair dismissal though certain unfair dismissals, such as dismissals relating to pregnancy, Trade Union activities, dismissals on a discriminatory ground and Health and Safety dismissals, do not require the one year qualification period. These dismissals would also be automatically unfair.

If the dismissal is held to be unfair, then the employee is entitled to compensation made up of:

- a basic award which will in most cases be the same as that of a state redundancy payment and with the same maximum limits applied;
- a compensatory award which is based on the financial loss by the dismissed employee (up to a current maximum of £63,000).

The Employment Tribunal also has the power to make an order for reinstatement or re-engagement but this is rarely exercised.

There are also minimum statutory dismissal/disciplinary and grievance procedures which employers and employees must follow. A failure to follow these procedures can lead to awards of compensation against the employer being increased or may prevent the employee from filing a claim at the Employment Tribunal in the first place. Failure to follow the procedures also makes a dismissal automatically unfair.

#### Discrimination

There are various statutes and regulations which prohibit employers discriminating against employees (or potential employees) on grounds of their sex, race, disability, age, sexual orientation or religion or belief.

#### Miscellaneous

In addition to the above, recent important statutory controls on the contents of employment contracts include:

- National Minimum Wage. The adult rate for workers aged 22 and over is £5.52 per hour and £4.60 for workers aged 18 to 21 inclusive or workers aged 22 and over who are receiving accredited training in the first six months of a job with new employer. Workers aged 16 or 17 must be paid at least £3.40 per hour;
- Working Time Regulations which regulate, amongst other things, employees' maximum working hours (maximum 48 hours per week although the employee can opt out of this limit) and entitlement to holiday (minimum 24 days paid leave per annum including bank holidays);



There are various statutes and regulations which prohibit employers discriminating against employees (or potential employees) on grounds of their sex, race, disability, age, sexual orientation or religion or belief.

- Part-Time Workers Regulations which means that part time workers cannot be treated less favourably than equivalent full time workers in respect of their terms and conditions, unless such a difference is objectively justified;
- Fixed Term Employee Regulations which mean that fixed term (i.e. temporary) workers cannot be treated less favourably than comparable permanent employees in respect of their terms and conditions, unless such a difference is objectively justified; and
- 'Family Friendly' provisions, including maternity rights (relating to leave and pay), statutory paternity leave and pay, statutory adoption leave and pay and parental leave regulations which allow both parents time off work

to spend with their children. There is also a right available to parents of children under six and disabled children under eighteen to request flexible working arrangements in order to care for their children. When an employer receives such a request, it must consider it within the framework of a specified timetable and may only refuse the request for one of a few set reasons.

# Personal Taxation

## Tax relating to Foreign Employees

The position of foreign employees will depend upon a number of factors including: whether they become resident in the UK for tax purposes; whether they are domiciled abroad and the nature of their employer's business. A table showing the liability to income tax of employment income for persons domiciled either in or outside of the UK is shown on page 32.

A foreign national will be treated as resident in the UK for tax purposes for each tax year (6 April to 5 April) in which he:

- is physically present in the UK for an aggregate of 183 days during that tax year; or
- has accommodation in the UK available for his use (except that accommodation will be ignored for this purpose if he works full-time in an employment carried on abroad and any duties performed in the UK are merely incidental to his duties abroad); or
- visits the UK in circumstances where his visits have become habitual and substantial, e.g. over the four previous years such visits have averaged three months or more a year.

A foreign national will normally be treated as domiciled outside the UK unless and until he decides to make the UK his permanent home.

A UK or foreign national who is resident in the UK is liable to UK income tax in respect of his emoluments wherever arising. Also, a UK or foreign national, although not resident or, if resident, not ordinarily resident in the UK, is liable to UK income tax on any emoluments in respect of duties performed in the UK.

A UK or foreign national who is resident in the UK but is domiciled abroad and receives emoluments from a non-UK resident employer in respect of duties performed wholly abroad will escape UK income tax on such emoluments provided they are not remitted to the UK. This also, applies to an employee, wherever domiciled, who is resident but not ordinarily resident in the UK and who receives emoluments from either a resident or non-UK resident employer. In such a case, the employee will escape UK income tax on his emoluments attributable to those duties performed abroad provided the emoluments are not remitted to the UK.

From 6 April 2008 an individual who is not domiciled in the UK will be required to pay £30,000 p.a. if they have been resident in the UK for 5 out of the last 9 years and they wish to continue to not pay tax on emoluments received from a non-UK resident employer in respect of duties performed wholly abroad. This is a very complex area and it is essential that any foreign national intending to come to the UK take professional advice before arriving.

So far as personal tax planning is concerned, it is still desirable for non-UK domiciled executives seconded to work in the UK for any length of time to be engaged by the foreign corporation under split employment contracts. These should preferably be



with different employers, one of which should be for services rendered only in the UK and the other of which should be for services rendered wholly outside the UK (in respect of which any emoluments will escape UK income tax provided they are not remitted to the UK). However, it should be added that:

- there is a risk (which can be minimised by certain management controls) that such employees seconded to the UK will so conduct their duties as to render the foreign corporation taxable in the UK by constituting a branch or agency of the parent, notwithstanding the existence of a UK subsidiary;
- whether or not a person is employed by any particular company depends upon a number of factors, and the mere fact that he has an employment contract with a foreign corporation will not be conclusive for this purpose if in reality all or most of the functions of employer are performed by the UK subsidiary;
- the emoluments in respect of services rendered under the ex-UK employment contract should not be unduly high in proportion to the equivalent time spent in performing services under the UK employment contract although differences in the cost of living can be taken into account; and
- if the operation of split contracts is to be successful, the duties for the non-resident employer must be wholly carried out overseas. Incidental duties may be disregarded. This is an area which the UK tax authorities continue to monitor closely and may ask for very detailed records and information to support the claim that the duties are being performed abroad.

## Foreign Visitors

Foreign personnel who remain employed by the foreign corporation and who make only sporadic visits to the UK, and who remain resident abroad and do not have a house or apartment (whether owned or rented by them or not) available for their use in the UK, will not be liable to UK income tax on their remuneration so long as:

- the services which they render are performed wholly outside the UK (except that where the employment is in substance one in which the services fall in the year of assessment to be performed outside the UK, any duties performed in the UK which are merely incidental to the overseas duties are ignored); and
- the periods for which they are present in the UK do not exceed in the aggregate 183 days during any year of assessment; and
- their visits to the UK do not become habitual and substantial.

## Tax relating to Local Employees

UK nationals who are resident and domiciled in the UK will be taxed on the whole of their remuneration from their employment, whether employed by a branch of a foreign corporation or a UK subsidiary, where all their duties are performed in the UK.

Income tax for the current year of assessment, i.e. 6 April 2008 to 5 April 2009, is payable on chargeable income (that is, income after deducting certain allowances and reliefs,) at the following rates:

Chargeable Income	Rate
£	%
0 – 2,320	10 <sup>1</sup>
2,321-36,000	20 <sup>2</sup>
over 36,000	40 <sup>3</sup>

Care should be taken when applying these rates, as different tax rates may apply if an individual has income in the form of bank interest or dividends.

UK residents who are not domiciled in the UK may not be subject to UK income tax on foreign investments unless the income accruing is brought, or treated as having been brought, into the UK. Please see above regarding the possible £30,000 p.a. charge to treat foreign income not remitted to the UK as not taxable. It should be noted that the rates quoted above, and the various other rates referred to in this note, are subject to annual adjustments by statute.

### Footnotes

<sup>1</sup> Only applicable to dividends and savings income.

<sup>2</sup> Except dividends.

<sup>3</sup> Except dividends (32½%)

Any employer carrying on business in the UK, including a branch or a subsidiary of a foreign corporation, is obliged to deduct income tax from the remuneration paid to its employees under the P.A.Y.E. (**Pay as you Earn**) system. Each employee is 'coded' to take account of his personal reliefs and allowances and the amounts to be deducted are calculated in accordance with tax tables issued by local Inspectors of Taxes. The tax deducted must be remitted to the Inland Revenue. This machinery is also used for the payment of National Insurance contributions as well as collecting certain other deductions.

The National Insurance system provides a wide range of state benefits, including old age pensions and unemployment and sickness benefits. Both employers and employees must contribute to the system. The contributions are based on a percentage of the employee's salary. In addition, further National Insurance contributions are required to be paid if the employees are covered by the State earnings related pension scheme. Employers who contract out of the State pension scheme must provide their own occupational pension scheme which is at least as good as the State scheme.

## Basis of assessment

### Liability to UK income tax on employment income

	Services Performed			
Persons domiciled in UK	Wholly in UK	Partly in UK	Partly Abroad	Wholly Abroad
Non-resident	All	That Part	None	None
Resident but not ordinarily resident	All	That Part	Remittances	Remittances
Resident and ordinarily resident	All	All	All	All
<b>Persons domiciled outside UK</b> <i>UK employer</i> <i>Foreign employer</i> Non-resident Resident but not ordinarily resident Resident and ordinarily resident	As for person domiciled in UK  All UK Earnings All UK earnings and remittances for duties performed outside the UK Remittances for duties performed outside UK			

# Procedure, Timetable and Conclusions

## Procedure and timetable for establishing a Place of Business or a Branch within the UK

### Place of business

The procedure when a foreign corporation wishes to establish a place of business within the UK is that:

- within one month following the establishment of the branch, the foreign corporation is required to:
  - appoint a person or persons resident in Great Britain with authority to accept service of process and notices on behalf of the corporation, whose name(s) and address(es) must be notified to the Registrar of Companies;
  - file a certified copy of its constitutional documents with a certified translation of original documents which are not in the English language;
  - file a list of the directors (which includes any person occupying that position regardless of their title) and (if applicable) the company secretary or secretaries of the corporation showing prescribed particulars;
  - file a Statutory Return and declaration stating the date on which the place of business was established; and
  - submit the registration fee.
- within nine months following the establishment of the place of business the corporation must notify the Registrar of its accounting reference date, although this can be subsequently changed by notification

The control over corporate names of English companies applies similarly to the corporate names of foreign corporations establishing a place of business in the UK. Initially the place of business must be registered in the foreign corporation's corporate name but the Secretary of State can serve a notice within twelve months of filing particulars, requiring a corporation to adopt an acceptable business name for use in the UK if it does not meet the requirements, or if an objection to the name is received from a third party and accepted by him.

The costs involved in establishing a place of business are small and will consist principally of legal fees.

### Branch

The procedure when a branch of a foreign corporation is established is that:

- within one month of the establishment of the branch, the following must be disclosed to Companies House about the foreign corporation:
  - its corporate name and, if different, business name;
  - its legal form;

- the identity of the register, if any, on which the corporation is registered in the country of its incorporation, and the number with which its is registered;
- a list of the directors and secretary, whether individuals or corporations;
- the extent of the authority of the directors to represent the company in its dealings with third parties;
- a certified copy of the corporation's constitutional documents, together with a certified translation if necessary;
- if the corporation is required to produce them by the law of its home state, a certified copy of the corporation's most recent audited accounts, together with a certified translation if necessary;
- if the corporation is not incorporated in an EU Member State, the law under which it is incorporated, the address of its principal place of business in the country of incorporation, its objects, issued share capital, and its accounting period in the country of incorporation.
- within one month of the establishment of the branch, the following must be disclosed to Companies House about the branch:
  - its address;
  - the date on which it was opened;
  - the business carried out there;
  - the name under which business is carried out at the branch, if this is different from the corporate name;
  - the names and addresses of all persons resident in Great Britain authorised to accept service on behalf of the corporation;
  - the names and usual residential addresses of all persons authorised to act as representatives of the company for the purposes of the branch business and the extent of their authority.

As with a place of business a small registration fee, currently £20 must also be submitted to Companies House.

The control of corporate names of foreign corporations establishing places of business in the UK also applies as for corporations establishing branches in the UK.

As with the establishment of a place of business, the costs in establishing a branch will consist principally of legal fees.

### Requirements after registration

For both a place of business and a branch there are some company law requirements to file further documents at Companies House whenever there are changes to the original information filed at the time of registration. Generally these forms have to be filed within 21 days of the change. There are also some statutory requirements regarding the details that need to be shown on company stationery.



### Procedure and timetable for establishing a Subsidiary Company

A company is incorporated under English law by registration by the Registrar of Companies. The incorporation procedure may be summarised as follows:

- **Company Name:** The Registrar will accept for registration any name which is not identical to one already on the register and which does not contain any of a list of prohibited words and expressions. In addition, certain other words may only be used with the prior consent of a designated authority. However, the Secretary of State has power to direct a change of name within twelve months of registration if it is, in his opinion, 'too like' a name which is or should already be on the register.
- **Subscription of Memorandum and Articles:** The Memorandum and Articles of Association of the company must be signed by the natural or legal person or persons who is or are to be the first member or members and who must indicate opposite their names the number of shares which they agree to take.
- **Certificate of Incorporation:** After the requisite documents have been filed with the Registrar and the registration fee of £20 has been paid, a Certificate of Incorporation is issued. The Certificate is conclusive evidence of the incorporation and establishment of the company and entitles it to commence business immediately. An English company does not exist and, therefore, cannot function before



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the Certificate of Incorporation is issued by the Registrar. A contract which purports to be made by or on behalf of the company before incorporation has effect as the contract of the person who purported to act on the company's behalf and he is personally liable on the contract. Such a contract cannot be adopted by the company after its incorporation simply by ratification. It can only be transferred to the company with the agreement of the other party.

The costs of incorporating a company with a minimal issued share capital including registration fee and preparation of its statutory books are likely to be in the region of £750 plus VAT. Anything other than a trading company with Memorandum and Articles in standard form will involve further expense.

The time required to incorporate a company varies according to the pressure on the Companies Registration Office. A typical timetable would be:

- one day to carry out a name check through an agency searching service; and
- two to three working days after filing the incorporation documents for the issue of the Certificate of Incorporations (although electronic filing can speed up this process).

If a consent is needed to the proposed name from a designated authority, the time before documents can be filed may be considerably extended.

It is possible to have a company incorporated or its name changed using a 'same day' service provided by the Companies Registration Office. There is a higher registration fee of £50 for this service.

### Requirements after registration

As with a place of business and a branch there are on-going company law requirements to file further documents and there is also a more formal process for recording and filing decisions of the board and the shareholders. A company can employ another business, such as a law firm, to provide company secretarial services, the cost of which is likely to start at approximately £1,000 per annum.

### Conclusions

In deciding which form of organisation is most appropriate in a particular case, the overriding consideration is normally taxation, both of the organisation itself and of its employees. In the various other fields considered in this guide, it will be seen that the relative advantages and disadvantages are unlikely to be significant. Certain



disadvantages of a branch operation may be avoided by its establishment as a branch of a newly incorporated off-shore subsidiary of the parent corporation rather than of the parent itself. In the taxation field, the importance of the relative advantages and disadvantages will depend principally upon the expected size of the operation and of its profits and upon the intentions of the client as to the utilisation of those profits.

A summary of the comparative UK tax aspects are:

- Subsidiary Company:
  - greater ability to minimize the exposure of the foreign parent to UK tax;
  - eligibility for 'small companies relief';
  - liable to Corporation Tax on investment income;
  - group relief for losses.
- Branch or other permanent establishment:
  - more difficult to minimise exposure of foreign parent to UK tax;
  - trading profits determined on 'separate enterprise principle' with no tax relief for borrowing by branch from parent;
  - restricted opportunity to surrender losses within group.

Although it is difficult to anticipate the future, it is generally desirable to start with a business structure with which the foreign corporation intends to continue. However, in principle it should be possible to qualify for Capital Gains Tax group relief on a transfer of the business of a branch to a UK resident subsidiary within the same group, and may even be possible to preserve trading losses of the branch on such a transfer.

On balance, the potential advantage of 'small companies relief' for a UK subsidiary is likely to outweigh any advantages perceived in using a branch or other permanent establishment operation. However, it will be necessary to know more of the proposed operations in the UK before being in a position to make a firm recommendation one way or the other.

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