

Dual contracts: record keeping, enquiries, completion of Self Assessment Returns and interpretation of “merely incidental” duties

1. HMRC’s policy in relation to dual contracts was explained in a Tax Bulletin article published in 2005. See [EIM77030 Appendix 3: Non domiciled employees: dual contract arrangements](#)
2. Questions have been raised recently with HMRC regarding two issues that arise in dual contract arrangements –
 - (i) what documents does HMRC expect employers and employees to retain and make available in response to enquiries into dual contracts; how does HMRC assess the relevant risks of these arrangements; how an employee should return income from dual contract employments; and
 - (ii) what is HMRC’s technical and policy interpretation of “merely incidental” duties?
3. This paper is intended to clarify HMRC’s view on these two issues. It is not intended to replace Tax Bulletin 76, which addresses other issues as well in relation to dual contract arrangements.

Record retention

4. For the purpose of enquiries into dual contract arrangements, HMRC considers it is reasonable to require access to the following documents, for some or all of the period under review:
 - diaries
 - e-mails
 - expenses claims and supporting receipts
 - telephone records
 - client files.
5. A document means anything in which information of any description is recorded. This includes records held on a computer, on magnetic tape, optical disk (CD-ROM/DVD), hard disk, memory stick, flash drive, floppy disk or other recording media.
6. Where such records are in the possession of the employee, HMRC would expect the individual to comply with Section 12B TMA 1970 and retain any documents or information that would have enabled him or her to deliver a complete and correct return, until the later of either the closure of the enquiry window or, if applicable, the date an enquiry into the return is closed.
7. However where the employee does not have power or possession of the documents, HMRC will consider approaching the employer for the records they hold.

8. HMRC has sometimes experienced difficulty in obtaining documents which have not been retained by the employer. In a spirit of collaborative engagement HMRC asks all employers who utilise dual contract arrangements to implement a retention policy that will retain relevant documents for at least two years from the end of the tax year to which the document relates.
9. HMRC has also sometimes experienced difficulties in obtaining documents which have been retained by the employer or the employee. HMRC will not hesitate to use the powers in Schedule 36 Finance Act 2008 to require production of documents. Where the individual is employed by an overseas employer and the information is not available to the individual, HMRC will make full use of Exchange of Information powers with the relevant overseas authorities.

Multiple risks

10. HMRC will address all avenues of enquiry into dual contract arrangements (e.g. those relevant to both employee and employer) as equal risks from the outset of the enquiry; no risks will be deferred pending the outcome of enquiries into others. This should serve to mitigate some of the delays and other problems sometimes faced in obtaining the relevant records.

Self Assessment

11. An employee who has dual (or multiple) contracts of employment is required to complete a separate Employment page of the Self Assessment Tax Return for each employment, as specified at page EN1 of the Tax Return Guide.

Merely incidental duties

12. Section 39 of the Income Tax (Earnings and Pensions) Act 2003 provides as follows -

“39 Duties in UK merely incidental to duties outside UK

(1) This section applies if in a tax year an employment is in substance one whose duties fall to be performed outside the United Kingdom.

*(2) Duties of the employment performed in the United Kingdom whose performance is **merely incidental to** the performance of duties outside the United Kingdom are to be treated for the purposes of this Chapter as performed outside the United Kingdom.*

(3) This section does not affect any question as to—

(a) where any duties are performed, or

(b) whether a person is absent from the United Kingdom, for the purposes of section 378 (deduction from seafarers' earnings: eligibility), and section 383 (place of performance of incidental duties) applies instead.”

13. The effect of s39 is to except from income tax earnings from duties of an employment performed in the United Kingdom, if those duties are in substance “merely incidental” to duties which are performed overseas.

Background to the exception for merely incidental duties

14. A Royal Commission on the Taxation of Profits and Income was established by Prime Minister Clement Attlee in 1950 to

“...inquire into the whole system of taxation of profits and income with particular reference to the taxation of business profits and the taxation of salaries and wages...for maintaining the revenue.”

15. The Royal Commission Report published in 1955 stated (paragraph 300) -

*“We recommend that work is not the less to be treated as performed wholly in one country because certain **merely incidental duties**, such as returning for report, to acquire samples, etc., are carried out in another.”*

16. Subsequently section 11(3) Finance Act 1956 addressed the circumstances where an employee would otherwise be chargeable to tax –

*(3) Where an office or employment is in substance one of which the duties fall in the year of assessment to be performed outside the United Kingdom there shall be treated for the purposes of this section as so performed any duties performed in the United Kingdom the performance of which is **merely incidental** to the performance of the other duties outside the United Kingdom.”*

17. However, the term “merely incidental” duties was not defined in FA1956 or in subsequent legislation. Following a common dictionary definition of “incidental”, as something that is minor, casual or subordinate in nature, the Inland Revenue (as it was at the time) considered that a duty that formed part of the essential or fundamental requirements of the employment could not be incidental.

Robson v Dixon (48TC527)

18. This is the only case where the courts have considered the meaning of “merely incidental” duties. It was decided in the High Court in 1972 and concerned section 10 and 11 of the Finance Act 1956. Mr Robson was an airline pilot who lived in the United Kingdom but commuted to work in Amsterdam, where he was employed by a Dutch airline.
19. Robson flew aircraft on scheduled flights from Amsterdam to various parts of the world, mainly North and South America. None of the flights in the years under appeal commenced in the United Kingdom but of 811 take-offs and landings, 38 were made in the United Kingdom of which 16 were charter flights, which were outside his normal duties (he made in total only 22 charter flight landings and take-offs).

20. Robson contended that as his duties were performed substantially outside the United Kingdom, any duties in the United Kingdom were therefore merely incidental to his substantive duties abroad. Pennycuick VC disagreed –

“The expression “merely incidental” is a striking one, and effect must be given to the natural meaning of the words. The words “merely incidental to” are upon their ordinary use apt to denote an activity (here the performance of duties) which does not serve any independent purpose but is carried out in order to further some other purpose.

The judge set out the duties performed by Robson and went on:

In the present case, the duties performed by the taxpayer, apart from his duties on the ground at Schiphol, mainly consisted (putting it shortly) of taking a plane up at Schiphol, flying it to whatever its destination was and then bringing it down. In the case of the flights from Schiphol to some destination (normally in America) on which there was a stop at England, his duties consisted of taking the plane up at Schiphol, flying it to England, bringing it down at Heathrow or elsewhere, and then taking it up again and flying it again to the next destination, in America. With the best will in the world, I find it impossible to say that the activities carried on in or over England are merely incidental to the performance of the comparable activities carried on in or over Holland or in or over the ultimate destination, in America. The activities are precisely co-ordinate, and I cannot see how it can properly be said that the activities in England are in some way incidental to the other activities. Going back to the words of the section, when one asks, ‘What exactly are the other duties outside the United Kingdom to which the performance of the duties are incidental?’, no satisfactory answer can be given. The other duties are simply co-ordinate duties.

21. Pennycuick was clear as well that the test of “merely incidental duties” is one of quality not quantity –

“Again, I think it is impossible to construe s 11(3) in the way in which it was sought to construe it in the taxpayer’s contentions in the case stated, as indicating merely relatively short periods of employment in the United Kingdom in relation to the period of employment outside the United Kingdom. It would have been quite simple for the section so to provide; and it may well be that if the condition were imported only by the expression ‘in substance’, that would be the result. But the second requirement is expressed in quite different terms and cannot, I think, be treated as referring merely to what has been described as a quantitative, in contra-distinction to a qualitative, basis.

.....
It would be tempting to say that all the duties performed by a pilot are incidental to the purpose of transporting passengers from one place to another, but that approach clearly would not help here. What has to be shown is that the particular duties in the United Kingdom are incidental to the performance of other particular duties outside the United Kingdom.”

22. Consequently duties performed in the United Kingdom that are the same or similar in nature to those performed overseas are not merely incidental to the overseas duties, even if performed for only a very short time. They are, in Pennycuick's words, "precisely co-ordinate" and therefore of equal importance to the duties performed overseas.

Tax Bulletin 76

23. Inland Revenue published a Tax Bulletin article in April 2005 titled "Non-domiciled employees: dual contract arrangements" which referred to a range of issues relating to dual contract arrangements, including "merely incidental" duties and to the decision in *Robson v Dixon*.
24. TB76 explained that given the ease and speed of twenty first century communications, an employee who performs duties of one employment overseas and another in the United Kingdom, is liable to find it increasingly difficult whilst working in the United Kingdom to avoid performing substantive duties of their overseas employment. For example, HMRC take the view that an employee working in the United Kingdom under a United Kingdom contract to service the needs of UK clients, but also responsible under their overseas contract for servicing the business needs of overseas clients, who responds to a telephone call or e-mail from an overseas client performs a substantive duty of the overseas employment. A response sent from the United Kingdom to an overseas client, is no different from a response sent from abroad to the same client. It represents a "precisely co-ordinate" duty.

Statement of Practice A10 – de minimis

25. In *Robson v Dixon*, Inland Revenue accepted that a landing in the United Kingdom caused by an emergency (e.g. due to weather conditions or mechanical trouble) might be regarded as incidental to duties performed outside the United Kingdom.
26. After the decision was handed down, counsel for *Robson* asked if the de minimis principle could apply to one of the years under appeal in which *Robson* completed only one take-off and landing in the United Kingdom. Despite his decision that the test of "merely incidental" duties was one of quality and not quantity, Pennycuick agreed that this would be "proper" for a single event in a year. SP A10 was published in 1975 as a response to Pennycuick's comments.
- "Where only a single take-off and landing in this country occurred in a year, the Inland Revenue will normally disregard this on de minimis grounds in considering whether any duties were performed in this country."*
27. However, in another year, in which *Robson* performed four take-offs and landings in the United Kingdom (two for emergencies, plus two others for unspecified reasons) the Judge declined to accept the request for a de minimis exclusion.

Director - duties never merely incidental

28. The general principle in relation to a company director is that the management of a company is vested collectively in the board of directors. Therefore when a director attends a meeting of the board, HMRC takes the view that he or she performs a fundamental duty which is not "merely incidental" to other duties.
29. Consequently a director who in substance performs his duties overseas, except for visits to the United Kingdom to attend a meeting (whether as part of a formal board meeting or otherwise) cannot, in the view of HMRC, be within the exception in s39. Attendance at board meetings is part and parcel of a director's core duties and therefore if performed in the United Kingdom cannot be incidental to duties performed abroad. A director's attendance at other meetings (e.g. finance, strategy, personnel) is also likely to represent a substantive duty, because the director would not attend these meetings unless participation was deemed necessary.

Section 830 Income Tax Act 2007 - Full-time work abroad

30. The concept of duties performed in the United Kingdom that are "merely incidental" to duties performed outside the United Kingdom, appears as well in section 830 Income Tax Act 2007. This section concerns residence status for individuals working overseas.

"830 Residence of individuals working abroad

- (1) *This section applies for income tax purposes if an individual works full-time in one or both of—*
- (a) *a foreign trade, and*
 - (b) *a foreign employment.*
- (2)
- (3)
- (4) *An employment is foreign if all of its duties are performed outside the United Kingdom.*
- (5) *An employment is also foreign if in the tax year in question—*
- (a) *the duties of the employment are in substance performed outside the United Kingdom, and*
 - (b) *the only duties of the employment performed in the United Kingdom are duties which are **merely incidental to** the duties of the employment performed outside the United Kingdom in the year.*
- (6) *In this section—*
- "employment" includes an office, and*
 - "trade" includes profession and vocation."*

31. The term “merely incidental” duties applies in s830 ITA in relation to determining an individual’s residence status and in relation to the interpretation of “full-time” work abroad. Whilst the interpretation of “merely incidental” duties in s830 is the same as in s39, the concept of “full-time” work abroad is confined to s830.
32. In relation to “full-time” work abroad, HMRC’s practice is to accept generally that non-United Kingdom residence can be demonstrated, even though some of the duties carried out in the United Kingdom are not incidental duties, as long as such duties are carried out on fewer than 10 days in one year. This is a practice agreed by HMRC in relation to s830 only. It has no relevance to s39.

Examples of duties that are “merely incidental”

33. To determine whether duties performed in the United Kingdom are “merely incidental” to duties performed overseas, it is necessary to consider both the nature of the duties performed in the United Kingdom and their relationship to the duties performed abroad.
34. Ultimately each case will depend on its particular facts but the types of activities, if performed in the United Kingdom in relation to the duties of an overseas employment, which can be regarded as “merely incidental” duties include –
 - arranging meetings and business travel;
 - feedback on employee performance and/or business results, if this does not involve the employee concerned in preparation or analysis whilst in the UK and as long as responsibility for these matters is not part of the employee’s core duties of employment;
 - input to team restructuring and staff matters, provided that the employee does not have a management role; and
 - reading generic business e-mails that do not relate directly to the employee’s role/responsibilities.
35. The examples below illustrate some situations where duties are regarded by HMRC as “merely incidental” -
 - A. A junior employee who works for an overseas subsidiary of a United Kingdom company who, on occasional visits to the UK headquarters, presents a report prepared by the overseas business to report on trade conditions or results overseas, and/or receive instructions for the next tour of duty overseas. The employee performs no other duties in the United Kingdom and has no control over the overseas activities on which he reports and is required only to pass on the report from his overseas employer and to take instructions from the United Kingdom company to take back to the overseas employer. These duties are regarded as “merely incidental” to his overseas duties.
 - B. An overseas employee visits the United Kingdom and whilst here arranges a meeting with a client overseas and the associated travel. As long as the employee does no more than arrange the meeting and travel, the duties performed are regarded as “merely incidental”.

- C. Whilst in the UK, an employee of an overseas subsidiary receives an e-mail documenting the employer's global business results for the year. The employee is provided with the results for his information and is not required to take any further action or feedback to the sender of the e-mail. The reading of such an e-mail is "merely incidental" to those duties performed overseas. However, if the employee had any role or responsibility in producing the global results, and/or was involved in feedback or in confirming the results, reading the e-mail is not a "merely incidental" duty.

Examples of duties that are not "merely incidental"

36. Types of activities performed by an employee that are not regarded as "merely incidental" duties include -
- instructions and/or guidance to colleagues and/or team members;
 - work carried out on issues or projects that do not come to fruition;
 - reporting on performance/business results where these matters are part of the employee's core duties;
 - analysis of reports/information with the intention to produce results/recommendations that can be reported upwards in the organisation;
 - preparation work carried out prior to discussions, meetings or presentations with customers/clients, colleagues, board members or shareholders and follow-up work after such discussions, meetings or presentations;
 - discussions and meetings (including by telephone, tele-conference or video conference) with customers/clients, colleagues, board members or shareholders; and
 - applying generally expertise in any role or function which the employee is contracted to perform in his or her duties for the employer.
37. The examples below illustrate some situations where duties are not "merely incidental" -
- A. A courier for a tour operator visits many countries in the course of the employment. Visits to the United Kingdom, however few and however short, are of the same nature to the job as visits to other countries and therefore cannot be "merely incidental".
- B. Preparation in advance of a presentation to, and/or a meeting/discussion with, customers or potential customers, or actions subsequently which result from decisions taken in the presentation or meeting/discussion are not merely incidental to other duties, as preparation in advance and follow-up work afterwards are essential to an employee's effective participation in a presentation and/or meeting/discussion.

- C. A company director, who works overseas for a United Kingdom based multinational company, usually participates by video conference in board meetings held each month in the United Kingdom. However, sometimes the director visits the company headquarters in the United Kingdom and attends in person at monthly board meetings. As attendance at board meetings is a core function and fundamental joint duty of a board of directors to manage the company, attendance at a board meeting cannot represent "merely incidental" duties, regardless of the fact that the director does not normally attend the meeting in person.
- D. A company director who is resident in the United Kingdom has two directorships within the same overseas based group. One role is as CEO of the United Kingdom subsidiary and the other as a board member of the overseas parent company. The parent company's board meetings are held monthly in the overseas location and the director usually attends in person. However, sometimes he participates in the board meetings by telephone or video conference from the United Kingdom. As attendance at board/directors' meetings is a fundamental and joint duty of a board of directors to manage the company, participation from the United Kingdom in the parent's board meetings can not be "merely incidental" to duties performed overseas.
- E. An employee of an international bank based in a city in mainland Europe, visits a UK branch of the bank. Whilst in the UK branch, the employee responds to an investment enquiry sent by email from a customer of the bank in Germany. This represents a duty of his employment in Europe and by answering the email from the UK he performs a duty that is "precisely co-ordinate" with his duties in Europe. Consequently this cannot be a "merely incidental" duty.

Merely incidental duties: HMRC policy

- 38. Over more than half a century since the Royal Commission Report was published in 1955 and the introduction of the term "merely incidental" duties in FA1956, working arrangements have changed considerably.
- 39. At that time it was unusual for one employee to perform duties of two or more employments in different countries. Where such arrangements existed, there was likely to be a physical separation of duties between the two roles because of the restricted availability of effective international communications.
- 40. Clearly that is no longer the case but should the enormous advances in communications which allow an employee now to perform duties of an overseas employment and an United Kingdom employment consecutively, if not concurrently, be sufficient reason for HMRC to change its interpretation of, and policy for, "merely incidental" duties? The Royal Commission provided the example of a junior employee working in one country, returning to another country to report or to collect samples, as the type of duties that it considered should be "merely incidental". These duties would be still regarded as such today – see Example A in paragraph 35 above.

41. On the other hand, where duties performed in the United Kingdom are the same as, or similar to, duties performed overseas, they cannot be “merely incidental” because they are “precisely co-ordinate” duties.
42. HMRC accepts that it may be difficult in some circumstances for an employee to avoid performing co-ordinate duties unless, for example, the employee declines whilst in the United Kingdom to answer a mobile telephone, or respond to an e-mail, from an overseas client.
43. However, to apply a broader interpretation of “merely incidental” to duties performed in the United Kingdom, than would apply otherwise to similar duties performed overseas, in HMRC’s view would be not consistent with the Royal Commission in 1955, the case law in *Robson v Dixon* or the legislation.
44. Consequently HMRC does not believe there is good reason to revise its interpretation of “merely incidental” duties set out in the Tax Bulletin in 2005 and reiterated in this paper.
45. Any comments or feedback on this paper may be submitted to graham.lewis@hmrc.gsi.gov.uk .

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