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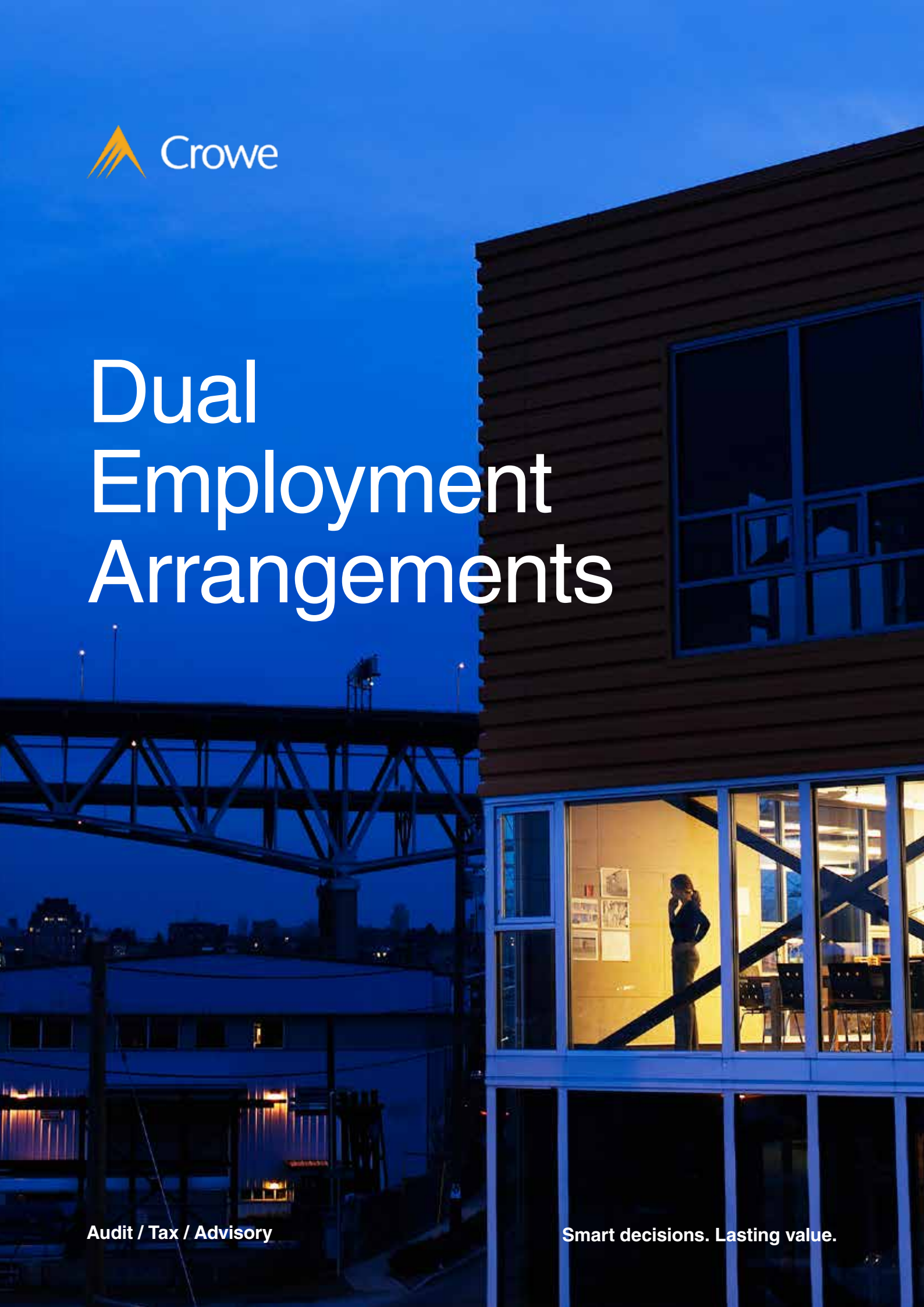
Dual Employment Arrangements



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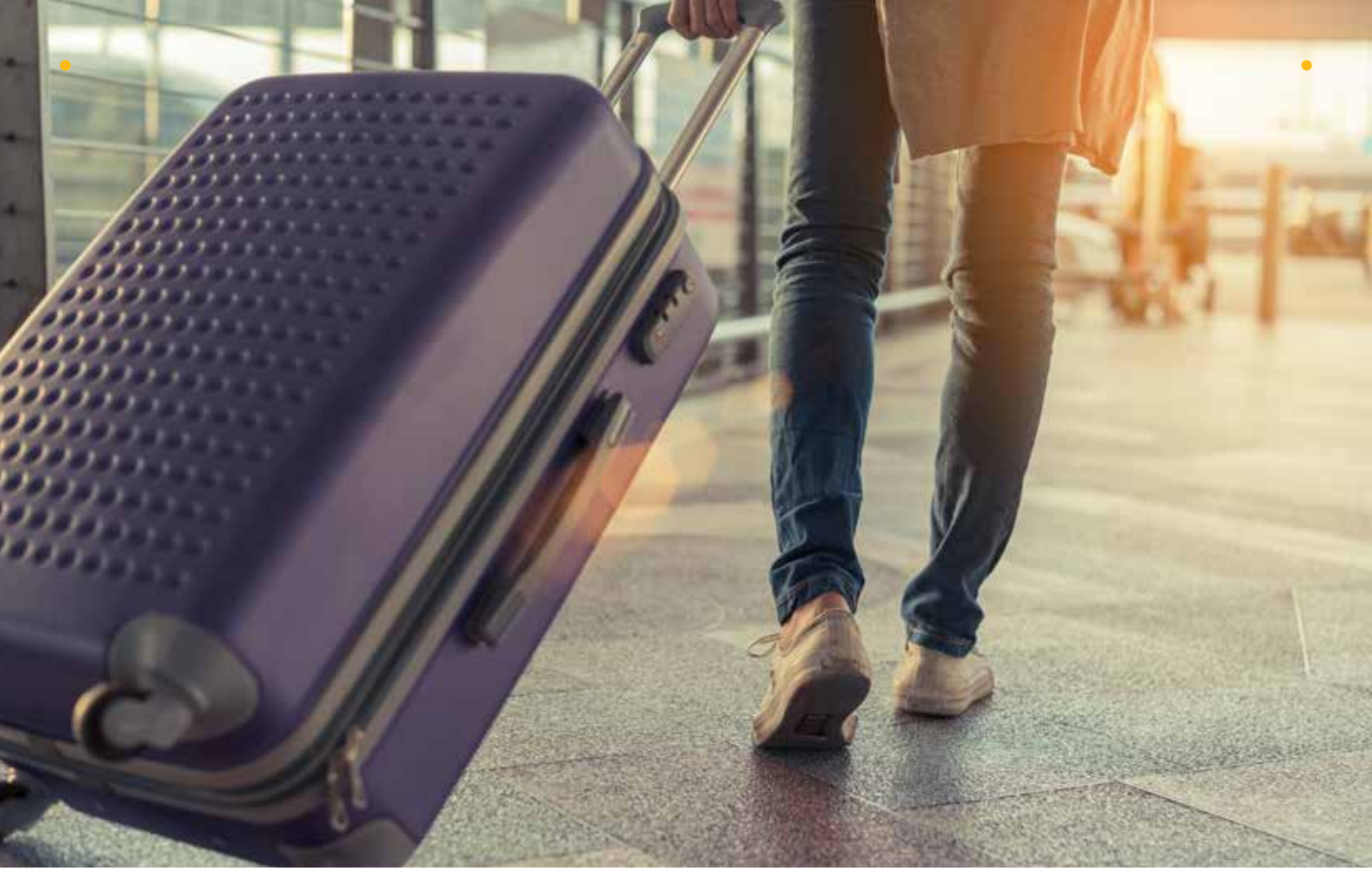


Introduction

As Singapore is a regional hub to many multinational companies, employees based in Singapore may have regional roles that require them to travel and perform services in multiple countries across Asia. In some instances, the regional role may only extend to one other country. For example, an employee while being employed by a company in Singapore is also required to physically work in another country.

If the employee of a Singapore company works in another country, the Singapore company may be exposed to corporate tax in the other country. If this corporate tax risk is a concern, there are several ways to manage the tax risks. If the employee is required to physically work in 2 countries and there are group companies in both locations, the dual employment contractual arrangement ("DE arrangement") could be considered to mitigate the tax risks.

While DE arrangements are often viewed from an individual tax planning perspective, this article focuses on cross-border corporate tax implications.

What is a DE Arrangement?

The DE is an arrangement whereby an individual has separate employment agreements with two employers in two jurisdictions. Generally, a DE arrangement can be implemented for individuals who have distinct reporting obligations to more than one entity in a group of companies.

For example, a senior field engineer with specialised skills may be employed by a Singapore company. Due to the specialised skills of the individual and the geographic proximity of Singapore and Malaysia, a related company in Malaysia also wishes to employ him to assist in complex technical projects undertaken by the Malaysian company. If the duties and responsibilities of the engineer when he is Singapore and Malaysia are distinct, the DE arrangement can be implemented by instituting two separate employment contracts with two separate employing entities for the employee concerned.

How does a DE Arrangement Mitigate Corporate Tax Risk?

From a corporate tax perspective, if an employee of a Singapore company (Company S) works in Country A for extended periods of time, the nature of services rendered by that employee in Country A may potentially deem Company S to have a taxable presence in Country A. This may give rise to tax obligations for Company S in Country A depending on the domestic tax law of Country A. It is also possible that the provisions of a tax treaty between Country A and Singapore may not mitigate such tax risks due to the duration and/or the type of activities undertaken by the employee in Country A.

In such a situation where there is no treaty relief, if a DE is implemented, the risks could be mitigated by ensuring that the services rendered by the individual is, legally and in substance, solely for a separate employer in the same jurisdiction and the individual is not concurrently working for a foreign employer in that jurisdiction. Referring back to the example above, this means that the employee will not be working in Country A as an employee of Company S. Thus, this can mitigate the risk of Company S being seen as carrying on business activities that create a taxable presence in Country A.

On the flipside, the employing entity in Country A should also not have a corporate tax risk in Singapore.

Comparatively, a DE differs from a normal secondment arrangement whereby an employee is only on an interim "loan" to the receiving entity for likely a pre-defined period of time whilst his original employment with the seconding entity remains on a "hibernation" mode. Citing the example above in this instance, the employee of Company S is seconded to and is legally an employee of its related entity in Country A for a pre-set timeframe. However, if during his secondment, the employee continues to directly or indirectly, in substance,

i. perform services for,

ii. derive remuneration in part or full from without the relevant costs' recharge to, and/or

iii. report in one way or another to

Company S, this may then expose Company S to potential corporate tax risks in Country A.

A DE arrangement is not simply having two separate employment contracts in two separate jurisdictions. It is advisable to do an impact assessment, taking into account various issues such as tax, legal, immigration, operational and HR processes before implementing DE arrangements.

Elements of a DE Arrangement

Where a DE arrangement is deemed suitable after an analysis of the non-tax issues, it must be ensured that the DE arrangement can be robustly defended when challenged by tax authorities.

Such challenges could be from both the corporate and individual tax perspectives. For example, the Inland Revenue Authority of Singapore (IRAS) may scrutinise a DE arrangement to ensure that it is not used to reduce the individual's tax liability in Singapore. The foreign tax authority may scrutinise the DE arrangement to determine if the employer in that country is indeed the employer in substance.

The following key factors should be considered when structuring a DE arrangement:

Commercial Justification

There must be valid commercial reason(s) for implementing a DE arrangement and they must be in line with the business operations of the two employers or employing entities involved. This also means that the hiring entities must be carrying on bona-fide business activities. Having in place documentation that facilitates substantiation of a DE arrangement is equally important. In the first example above, the engineer may be deployed to render his employment services to two separate employers due to his specialised skills and to achieve cost efficiency. As such, from a group perspective, it may be more viable to hire only one such engineer.

Employment Contracts Must be Distinct with No Overlapping Roles and Responsibilities

For a DE arrangement to work, the employment contracts should be distinct with no overlapping roles and responsibilities. The two employment contracts should encompass separate spheres of job scope, responsibilities, and lines of reporting towards each employing entity without any co-mingling of services rendered by the employee.

This means that, the employee when exercising an employment in the jurisdiction of the first employer should strictly be providing services that only benefit the first employer. The first employing entity must also be both the legal and economic employer of the employee while he or she works in the jurisdiction of the first employing entity. The same should also apply for the employee's employment with the second employing entity.

Where the employee performs any services outside the jurisdictions of the two employing entities, the benefits of the services to the corresponding employing entity, should be documented.

Remuneration that Commensurate with Employment Services

The allocation of the employee's remuneration between both jurisdictions where the individual has a DE arrangement, should be fair and reflective of his or her:

- level of expertise and experience,
- the amount of time that he or she spends in each jurisdiction,
- the amount of effort he or she expends in each jurisdiction, and
- the benefits directly attributable to each employer.

The employers must maintain records to substantiate the split of remuneration in the event of a tax audit by the tax authorities.

Employer in Substance

In a DE arrangement, the two employers or employing entities concerned, in substance, should:

- have practical and legal control and direction of the employee;
- make decisions about the employee's hiring and termination, job duties and responsibilities, disciplinary issues, and the level of remuneration; and
- directly communicate with the employee.

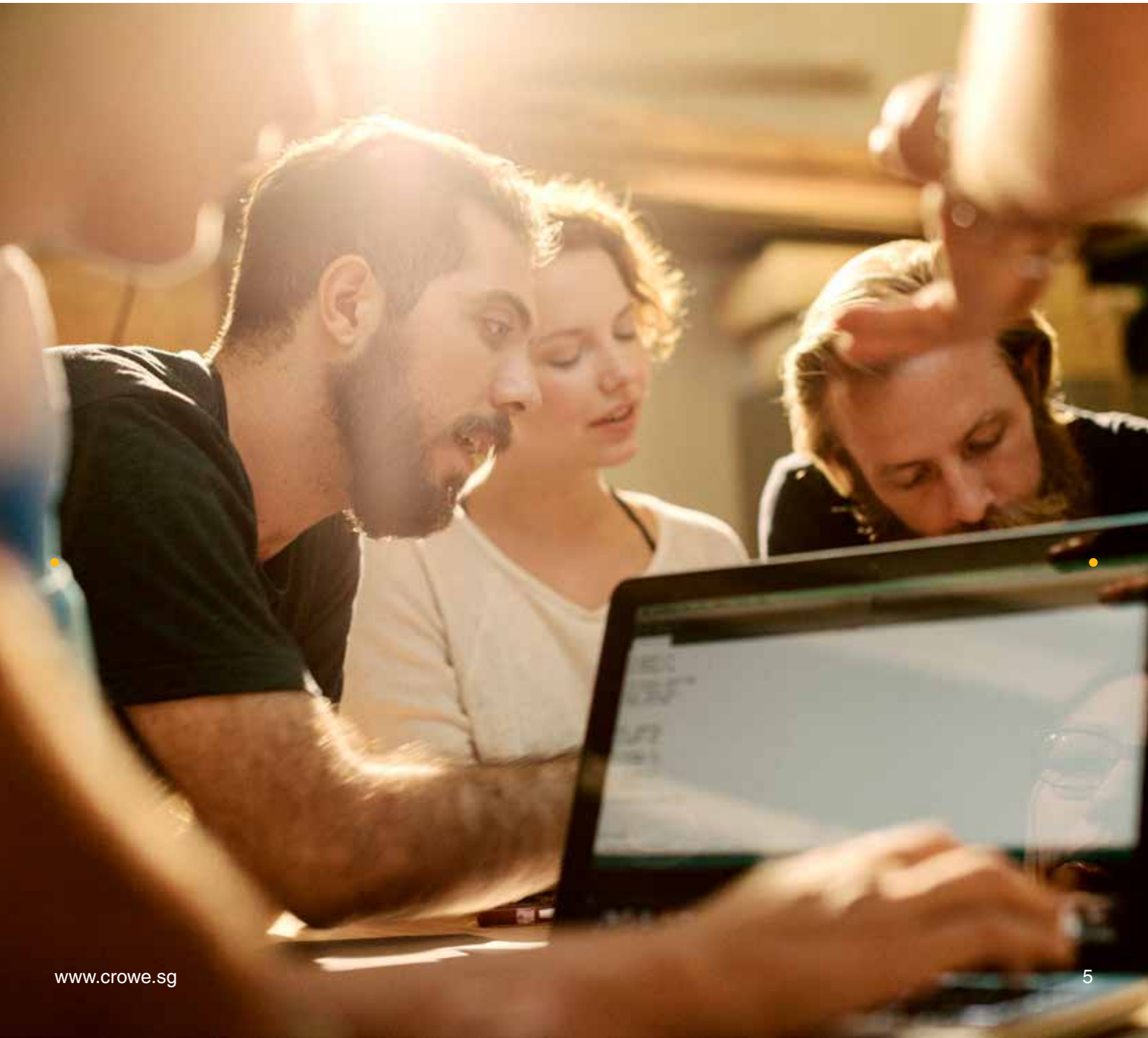
The allocated remuneration of the individual should be borne by the respective employing entities. For the convenience of payroll administration, where only one employing entity bears the entire costs of the remuneration, that employing entity should recharge at cost the portion of the individual's remuneration that is attributable to the individual's employment with the other employing entity.

The salient factors tabulated above are not exhaustive but sets the core framework for any possible consideration of a DE arrangement.

It should be noted that the concept of a DE arrangement can be challenged by the IRAS and the tax authorities of other jurisdictions. It is therefore imperative that any DE arrangement be properly instituted and documented.

Concluding Remarks

While remote working is likely to retain its luster in the post-Covid world, the need to be physically present on-site to undertake critical functions will not fade away totally. As such, the DE arrangement will remain relevant to mitigate any adverse corporate tax implications of employees working in more than one jurisdiction.



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