

Joint expatriate Forum on tax and NICS: 26 May 2010

Meeting note

1. Introductions and apologies

HMRC explained that NICs and double taxation items would have to be deferred until a later meeting because specialists from relevant teams were unable to attend today.

HMRC also explained that Bank Payroll Tax (BPT) was beyond the remit of the Forum and that any queries should be directed to the banking sector Customer Relationship Managers who are resourced to deal with such queries.

Post meeting note: Detailed guidance on the BPT has now been published on the HMRC website in the [Bank Payroll Tax Manual](#).

2. New PAYE penalty regime

HMRC gave a presentation on the implementation of the new penalties regime for PAYE late payments which apply to monthly, quarterly and annual periods of PAYE starting on or after 6 April 2010. This covered a range of matters including:

- how the penalties worked and how they would be implemented
- whether new penalties would apply where modified PAYE was operated
- whether penalties charged in EP Appendix 5 cases would be charged net of foreign tax deduction
- the introduction of a system of warning letters

HMRC also pointed out the guidance on this topic published in April 2010 and which can be found at:

[PAYE/National Insurance late payment penalties](#).

During a detailed discussion a number of questions were raised, including:

- whether a penalty would be charged where a foreign tax deduction had been overclaimed
- the way in which the payments received by HMRC were allocated - the concern being that, where a payment was outstanding for one month, subsequent payments might be allocated to the earlier month, making it appear that there was not one but several late payments

HMRC agreed to provide a response to these points when they were in a position to do so.

HMRC suggested that where an employee went abroad expecting to become non-resident, but he returned early to the UK and remained resident, any PAYE found to be due and accounted for on his or her assignment remuneration shortly after return to the UK would not attract a late payment penalty.

HMRC sought feedback on how the warning letter process worked and invited suggestions for its improvement.

Post meeting note: A draft of the warning letter has been circulated with these minutes and HMRC would welcome feedback on ways it could be improved.

3. FOREX gains and losses

HMRC summarised the actions they had taken to date to minimise the complexities of dealing with capital gains/losses arising from transfers from foreign currency bank accounts. Since last autumn, HMRC had:

- published a simplified method for establishing the acquisition costs of non-sterling bank accounts using average rates;
- introduced a simplified approach to calculating gains and losses based on a monthly aggregation of account debits and credits, thereby reducing the number of separate calculations required to twelve per year;
- amended guidance on the application of share matching and part disposal rules when calculating FOREX gains and losses from overseas accounts;
- published a Ministerial statement to confirm there was no double tax charge when a transfer is made from a non-sterling account when the currency in question has appreciated against sterling;
- included legislation in the 2010 Finance Act to clarify the scope of section 37 TCGA;
- announced the extension of Statement of Practice 10/84 to foreign currency bank accounts held by non-domiciled individuals;
- introduced a non-statutory de minimis of £500 for net gains arising from transfers from overseas non-sterling bank accounts

More recently, a sub-group had met to identify the issues which remained outstanding. These included scenarios involving more than one non-sterling currency, the use of overseas income to purchase a depreciating asset which

was subsequently remitted to the UK and the interaction of the foreign currency rules with mixed funds. HMRC were working on detailed commentary on these scenarios and would circulate them to members of the Forum when they were able to do so.

In response to specific requests, HMRC said it was not in a position to give any view at this stage on whether the new Government might be minded to introduce legislation to resolve concerns arising from FOREX transactions.

HMRC also confirmed that they would be expecting taxpayers to take reasonable care to ensure that FOREX gains were accounted for fully and correctly on their 2009-10 returns.

4. Residence issues

Volcanic Ash

HMRC confirmed that, where individuals had planned to leave the UK but were genuinely prevented from doing so because of the recent travel disruption caused by the Eyjafjallajökull volcano eruption, they would treat the situation as an exceptional circumstance and therefore covered by existing guidance in paragraph 2.2 of HMRC6. This meant that any additional days spent in the UK purely as a consequence of this disruption may be disregarded when considering whether an individual is resident in the UK.

However, where an individual is present in the UK for 183 days or more in the year, including any days spent here because of exceptional circumstances, including this travel disruption, then they will be resident in the UK for that year.

HMRC also confirmed that individuals who wished to claim that any days spent in the UK were due to exceptional circumstances should keep sufficient evidence to support their claim as they would for similar claims.

HMRC were asked for further comment on duties performed whilst stranded in the UK. They confirmed they would adopt a reasonable approach to this matter and would need to consider the facts of each specific case as the assessment of incidental duties needed to consider their quality as well as the quantity.

Statutory Residence Test (SRT)

The latest draft of a possible SRT had been shared on a confidential basis with a number of external stakeholders. The overall feedback from external members of the Forum was generally positive but they felt it could be made simpler and easier to operate. Some doubts were also expressed at the claim that the draft test was revenue neutral, since some individuals might become or remain resident under the proposed model.

HMRC stressed that the SRT was still work in progress and that more would be needed before a proposed test could be shared more widely. HMRC also expressed thanks to all those who have provided feedback on the test and agreed to involve external stakeholders as the work develops.

Recent residence cases

HMRC said that the recent First Tier Tribunal decision in the **Tuczka** case confirmed their interpretation of guidance on ordinary residence, building on the decision last year in **Genovese** which confirmed their interpretation of IR20 and SP 17/91 on the same matter. This meant that individuals originally intending to leave the UK within three years would be ordinarily resident from the beginning of the year in which that intention changed. At what point the decision was made to remain in the UK would always be a question of fact. The Tribunal decision in **Turberville** also confirmed HMRC's published position.

HMRC were asked whether a work permit constituted an indicator of an intention to work permanently in the UK. HMRC replied that it would be one of a series of facts about an individual's circumstances which needed to be considered in their entirety. HMRC stressed that guidance could not be read as if it were legislation: it cannot provide a definitive answer to every situation which might arise in practice, but instead seeks to deal with the most common cases. Whether a taxpayer's circumstances fit within these common cases will be determined by the facts.

A discussion followed on the precise meaning of full-time work abroad and incidental duties, neither of which are defined in statute, and which had been the source of some confusion. HMRC said that the revised HMRC6 will seek to clarify this matter further.

HMRC were asked for clarification of paragraph 7.7.3 of HMRC6 (ordinary residence in the year of arrival in the UK). They explained that it sought to make clear that an individual's circumstances could change twice within three years

and that there could be no guarantee that residence in the UK for less than three years will in all cases result in a not ordinarily resident status. For instance, a trainee could be offered a permanent job in the UK which they hadn't anticipated after completing a one year placement in the UK, only to be made redundant 20 months later at which point they depart from the UK. The final paragraph of 7.7.3 makes clear that such situations might be unusual, and residence status will always depend on the actual facts of each case.

5. Revised guidance

HMRC thanked members of the Forum who had commented on the draft Tier 0 guidance which had been circulated for comment in advance of the meeting. The intention was to publish a final version in the summer. Work is continuing on revised and updated HMRC6 which would be circulated for comment in the near future with a view to its publication in the autumn.

6. Economic employer test

HMRC were asked to clarify the way in which the economic employer test applies in a number of scenarios in which employment costs are recharged to a UK employer. In each scenario, an individual has a formal employment contract with a person resident outside the UK and is seconded to work in the UK.

The economic employer test is set out in the commentary to Article 15 of the OECD Model Tax Convention on Income and Capital which, subject to certain conditions, enables an overseas employee who comes to the UK to work on a short-term basis to be taxed only in his or her home country. HMRC confirmed that it is not practice to restrict this test for UK resident employers.

This means that, where an employee is present in the UK for less than 60 days and is not on the payroll of a UK resident employer, the 60-day rule set out in Tax Bulletin 68 will normally apply: the individual will not be considered to have an economic employer without any further consideration of the facts being necessary. In other situations, it will be necessary to examine the facts to determine who has the rights on the work produced and bearing the relative responsibility and risks. Where the employee is a resident in another contracting State and is seconded to the UK for a short period, the economic employer will not depend on whether the UK employer is entitled to a Corporation Tax deduction for the remuneration costs: the UK employer might be entitled to a deduction even where they are not the economic employer.

HMRC referred to the recent publication on 21 May 2010 by the OECD of proposed revisions to the Model Treaty Commentary on employment relationships for the purposes of Article 15.

In response to a query, HMRC agreed to report back on progress on mutual agreement procedure (MAP) cases relating to the UK/US DTA and the economic employer test.

7. Pensions

In advance of the meeting, HMRC had circulated a summary of its response on Migrant Member Relief to the European Commission. They also referred members of the Forum to revised guidance on the HMRC internet site which had been published since the last meeting which can be found at: [Registered Pension Scheme Manual 500000](#) HMRC were also asked to clarify their approach to low-level checks and agreed to report back on this point.

HMRC reported that Finance Act 2010 contained legislation restricting High Income Excess Relief Charge (HIERC) but a number of issues remained outstanding on which the Government was considering the position.

Post meeting note: The June 2010 emergency Budget announced that the Government is considering restricting pensions tax relief by reforming the existing pensions savings allowances from April 2011. These reformed allowances, if they go ahead, will replace the HIERC.

In response to consultation earlier in the year, a number of representations had been made on overseas pension schemes, mainly concerning the difficulties of obtaining information from overseas schemes. HMRC suggested that the most effective way to deal with these issues would be through a sub-group of the Forum. This approach was supported by members of the forum.

8. Compliance/procedural matters

PTI update

HMRC reported that, from 1 April 2010, Personal Tax International (PTI) is a new business stream within CAR bringing together the former Manchester Expats Unit and the specialist residency teams in Bootle. Its role will be to deal with the tax

and NICs affairs of foreign national employees who have been seconded to work in the UK whilst retaining a relationship with their overseas employer. In partnership with PTI policy, it is responsible for the effective administration of UK tax legislation relating to residence and domicile, involving matters such as enquiries into non-UK athletes, artists and entertainers performing in the UK, managing the tax affairs of remittance basis users and non-resident landlords.

Hypotax

HMRC confirmed that hypothetical tax and NICs are calculated by some employers operating a tax equalisation policy and will in most cases equate to the liability which would have arisen had the employee stayed at home. The hypothetical liability might therefore equal 50 per cent Income Tax and, where appropriate, 1 per cent NICs. Likewise, where the employee would have been liable to Income Tax at less than 50 per cent then the hypothetical tax would be correspondingly lower.

Employment Procedures Manual App 6

The EPM Appendix 6 provides modified PAYE in cases where employees are fully tax equalised on the cash elements of their remuneration package. HMRC agreed to report back on a proposed update.

Security checking

HMRC explained that two different types of security checklist are created when a repayment is due under SA. The first is triggered by a number of risks rules: in the case of expats, the main trigger is where a No Repayment Signal is on record. This can be for a variety of reasons, including where there is an open enquiry or where the return has been filed by a Filing Only Agent (FOA) where the agent files their client's return using a different agent code to that which is attached to the individual's SA record. Manual intervention is then needed to review each case.

The second security list is a more robust check of risk triggers. Cases cleared from the first list are often placed automatically on to the second which creates a more lengthy process to clear.

A large percentage of repayments for expats appear on the second checklist: during the peak SA filing period, several hundred can appear daily and there

were 182 cases awaiting review on the first list at 25 May and 317 on the second list. Increased resources are allocated to repayment checklists during peak periods but the sheer volume mean that delays are sometimes inevitable.

HMRC underlined the problems created by FOA cases. Where, as is common in expat cases, the repayment is mandated to a third party nominee, HMRC need to issue form R38 to obtain the individual's signed mandate and a significant number of cases still require a form R38 to be issued. This creates a variety of problems both for HMRC and for agents.

A suggestion was made that HMRC could tell the agent when they had sent an R38 to the individual and HMRC agreed to give this idea further consideration.

Post meeting note: After further discussion, HMRC agreed to revise their process to ensure that the R38 is issued to the acting agent rather than the individual. They will also advise the agent of the code attached to the individual's SA record and provide guidance on how to request repayment using a Structured Action Request (SAR) via the HMRC Gateway and how to change the agent code via SA.

P85/86

HMRC circulated a revised P85 and invited members of the Forum to send any substantive comments they might have on the draft by email to: [Paula Ciuraj](#).

Sections 828A-D ITA 2007

One of the qualifying conditions for the exemption in section 828A ITA 2007 et seq was that the individual does not file a SA return. However, there are difficulties, both for HMRC and for agents and employers, in identifying individuals who qualify for the exemption before they are issued with a return. As a consequence, they fail to meet all the conditions in s828B and therefore do not qualify for the exemption. HMRC proposed that an ad hoc sub-group should convene to address this problem.

Post meeting note: A meeting of the sub-group was held on 28 June 2010 in Euston Tower.

P46 (Expat) and withdrawal of personal allowances

Employers have expressed concern that the P46 (Expat) does not allow them to operate a 0T code (no personal allowance) even where they are aware that the employee will claim the remittance basis or has income in excess of £100K. HMRC said that it was not the responsibility of employers to withdraw personal allowances and, if they did so, the New PAYE System (NPS) might reinstate the allowances when the P14 is filed and make a repayment to the individual.

HMRC said that, if employers agree with their employee that they will claim the remittance basis or if the individual's earnings will exceed £100K, they should request a formal change of code number from the Expat Team. This would ensure that HMRC records mirror those of the employer when the P14 is submitted.

HMRC confirmed that the Modified PAYE rules in EPM6 allows PAs to be withdrawn from remittance basis users but it would be sensible for Employers to notify the Expat Team of situations where that applies. They agreed to make the necessary changes to the EPM6 agreement to make this clear.

9. AOB

HMRC said they had identified a significant number of cases where individuals were nominating income on their SA returns but not ticking the box to make the election to use the remittance basis. This was creating some problems and asked members of the Forum to ensure that the remittance basis election box was ticked where appropriate.

A suggestion was made that a sub-group should be created to consider the possible extension of Appendix 7B of the EPM to UK residents abroad. This will be considered further by the relevant HMRC specialists not present at the meeting.