

Points which HMRC said they would consider further and provide further guidance on

1. *How mandatory employer contributions to foreign social security systems should be treated for UK tax purposes – (Points 4.5 – 4.7 in the notes of meeting)*

Answer – The records for last November’s meeting of the HMRC Expat Forum included the following answers:

“In principle, does HMRC regard foreign mandatory and social security arrangements as being “pension schemes” under FA 2004, s150?”

It is possible in principle for foreign mandatory and social security arrangements to be “pension schemes” under s150 FA 2004. They would need to meet the requirements of s150(1). In broad terms they will do so if they provide benefits to or in respect of persons –

- (a) on retirement,
- (b) on death,
- (c) on having reached a particular age,
- (d) on the onset of serious ill-health, or
- (e) in similar circumstances.

It does not matter if the scheme also provides benefits in other circumstances.

Has HMRC considered any such schemes specifically?

HMRC has not considered whether or not any such schemes are “pension schemes”. The “pension scheme” definition is of limited significance. It merely provides a ground in which to anchor such key definitions as “registered pension scheme” and “overseas pension scheme”. Hence a “pension scheme” will only be an “overseas pension scheme” if it meets certain conditions under section 150(7) and SI 2006/206. As explained in the Registered Pension Schemes Manual at 13101070-85, those conditions relate to the regulation and tax-recognition of the scheme in the country in which it is established. HMRC has not considered whether or not any such schemes are “overseas pension schemes”.

Does HMRC consider that employer contributions to such schemes fall within s307(1), ITEPA 2003?

Whether or not employer contributions to foreign mandatory and social security arrangements fall within s307(1) will depend on the nature of the scheme. Broadly, schemes will only be covered if they provide for the payment of retirement and/or death benefits but not for any other benefits. Where a scheme covers more than retirement and death benefits and the premium applicable to the retirement and death benefits is not clearly separable from the rest the exemption does not apply.”

2. *Whether or not it is acceptable for employers to estimate the CT deduction available in accordance with Schedule 24, FA 2003 when pension benefits start to be paid from an EFRBS – (Point 5.2 of the notes of meeting)*

Answer – Schedule 24 FA2003 is clear that a deduction is only available when qualifying benefits are provided out of the contributions. The Schedule applies equally to employee benefit trusts and to EFRBS. An MMR claim entitles the employer to a deduction for all contributions when they are paid. If no such claim for a deduction is made by the employer this is, as for payments for EBTs, in the full knowledge that a CT deduction may not arise for some time, if at all. How the employer chooses to track the funds and payments and their ultimate destination is

a matter for the employer to decide how they will comply with the deduction rules in schedule 24.

3. *The CT position where an employer makes a contribution to an EFRBS but either ceases to trade or transfers its business before the commencement of pension benefits – (Point 5.3 of the notes of meeting)*

Answer – As with EBTs, it is always the company that made the contribution that is entitled to the deduction under Schedule 24, even if the trade is transferred or sold or discontinued. Again, following the MMR procedures created to enable employers to claim relief for contributions to overseas pension schemes when they are paid would avert the possibility of not getting a full tax deduction.

4. *The CT position of UK companies with branches overseas that have employees working wholly outside the UK who are members of non-UK retirement benefit schemes – (Point 5.4 of the notes of meeting)*

Answer – There is transitional provision so that employers making contributions for employees before A Day can continue to get relief for future contributions to the overseas scheme in respect of those employees. This is in paragraph 15 SI2006/567.

Apart from the transitional provisions for pre-A Day arrangements, the previous regime for corresponding schemes has been replaced with the rules for registered pension schemes and MMR, although the place of Section 615 schemes has also been carried over.

The legislation provides several ways in which UK employers can continue to get relief for contributions for new employees working wholly outside the UK by

- Accepting them as members of the UK registered occupational pension **scheme** the employer operates
- Registering the overseas scheme in the UK or
- Setting up a section 615 trust scheme for those employees.

For employers who choose not to follow any of the means provided for under the legislation, the tax rules will apply in the same way as for other retirement benefit schemes to which neither the registered pension scheme nor schedule 34 recovery rules apply.

5. *The potential application of the EFRBS taxing and reporting regime to employees regarded as RNOR whilst in the UK – (Point 6.2 of the notes of meeting)*

Answer – I understand from the meeting that an R and NOR individual is only taxable on employment income relating to duties wholly outside the UK if these are paid in or remitted to the UK. Benefits chargeable under Schedule 34 are not “relevant benefits” for Section 393B ITEPA. Benefits from an RNUKS are only within Schedule 34 if they are referable to a member’s UK tax-relieved fund or transfer fund.

Section 307 would not apply to non-taxable overseas earnings. Assuming none of the other reliefs mentioned in paragraph 1 Sch 34 are due or claimed, the benefits provided out of that contribution will therefore not be subject to the member payment provisions in Schedule 34 and may be liable as employment income under section 394. In such circumstances, it seems to be the case that there will be a reporting requirement for relevant benefits provided to the individual, even though other benefits provided by the scheme to the same person in respect of

contributions by the same employer will be chargeable by virtue of Schedule 34 (and so excluded from S394).

Under Schedule 34 benefits are treated as being paid first out of the tax-relieved fund or relevant transfer fund.

6. *Why a former employer that had established an EFRBS has a prior reporting obligation by virtue of the provisions in S399A, ITEPA 2003 compared to a current employer, even though the former employer might no longer be involved with the scheme – (Point 7.2 of the notes of meeting)*

Answer – The order of precedence for which body is responsible for reporting is a modification of section 611AA ICTA that applied for FURBS and keeps the same order as in that section. These rules were put in place in 1994. Although the position was obviously reviewed when putting the EFRBS regime in place, it was decided that there was no reason to alter the structure that was already in place.

With an overseas pension scheme the reporting requirements for section 394 benefits will generally fall on the persons who control the management of the scheme.

7. *The reasons, if any, why S307 provides an exemption under the benefits code whereas S308 and S308A provide exemption from a general earnings charge (S62) – (Points 8.4 and 8.5 of the notes of meeting as expanded in the main body of this letter)*

Answer – The apparent inconsistency has been brought out by the Tax Law Rewrite which brought together in one place the existing provisions exempting employees on the provision of retirement and death benefits by employers. Section 307 rewrote section 155(4) ICTA 1988 and ESC A72 which was only concerned with ensuring the benefit in kind charge did not apply in the specified circumstances. Section 308 on the other hand was a rewrite of section 643(1) ICTA 1988 which addressed the possibility that otherwise an employer contribution to an approved personal pension scheme would be taxable as an emolument.

8. *The NIC position where benefits are paid to an individual who has benefited from UK tax relief under the provisions of a relevant double tax agreement – (Point 8.6 of the notes of meeting)*

Answer - If scheme is not a QOPS, it will be treated as an EFRBS for the NIC disregard rules in Part 6 Schedule 3 of the Social Security (Contributions) Regulations 2001. Benefits paid out of contributions to an overseas scheme that are UK earnings from an employer from an earner's employment here will therefore be disregarded for NIC purposes provided they satisfy the conditions of new paragraph 10 in Part 6. Broadly the conditions of paragraph 10 require that the benefits are of the same nature as that which can be provided by a registered pension scheme as an authorised payment.

Additional question not discussed at the meeting on 14 May

9. *The NIC position of a plan which is subject to the recovery charges in Schedule 34 by virtue of having relied upon S307 in respect of contributions at a time when it was an overseas pension scheme. Part VI of SI 2001/1004 does not appear to include a disregard for NIC purposes in respect of contributions to such plans. Para 2 covers contributions to registered pension schemes and para 9 covers contributions to EFRBSs. However, if a scheme is not an EFRBS because the benefits arising under the scheme are chargeable under Schedule 34, then neither of the disregards in paras 2 or 9 would appear to be in point.*

Answer - Any overseas pension scheme is potentially an EFRBS and it would only be prevented from being an EFRBS for the purposes of the NIC disregards if all of the benefits it provides to all of its members are excluded from being relevant benefits by s393B(2) ITEPA.

A multi-member overseas pension schemes will consequently be an EFRBS at scheme level, although the benefits provided to certain individual members may not be chargeable to tax under the EFRBS rules due to statutory exceptions in those rules operating at the level of the individual member.

The disregards in paragraphs 8 to 10 of part 6 of Schedule 3 will therefore apply to an overseas pension scheme in the circumstances you describe in the same way as in Question 8 above.

Response to points made in letter from Rosemary Martin

Section 307 and 308A

Section 308A provides an exemption for all income tax in respect of earnings where an employer makes a contribution to a QOPS. "Earnings" is defined in Section 7 ITEPA and has three components:

- Earnings section 62
- Amounts treated as earnings, (benefits are amounts treated as earnings) and
- Amounts which count as employment income

It follows that we do not agree with the interpretation of the section 308A exemption as set out in your letter.

The context within which I used the words "sensible and pragmatic" during the meeting was in relation to compliance activity by HMRC. It does not and was never intended to be applied to the interpretation of the plain words of section 307 which clearly do not support the introduction of a "main purpose test".

Short term business visitors who are members of a relevant non-uk scheme

The member payment charges only apply to payments referable to the member's UK tax-relieved fund, which comprises contributions that have received relief from UK tax under schedule 33, a DTA or section 307. (There is further provision for the relevant transfer fund in Schedule 34 as well.) The member payment charges only apply to an individual who is or has been resident in the past 6 years.

Other aspects on which HMRC said it would report back

Penalties for late reporting of section 394 benefits or 2006-07 (7.5)

The penalties for late reporting lie within HMRC's discretion and in determining the amount of any penalties HMRC will as normal take into account all the appropriate circumstances.

Difficulties of setting up detailed tracking mechanisms (8.1)

MMR of course gives a tax deduction straight away and requires no tracking mechanisms for the business deduction. The comments were therefore directed at the reporting of LTA liabilities. However the legislation does not impose the LTA reporting obligations on the UK employer but on the overseas pension scheme. If the employer assumes these obligations this would seem to be a choice it makes for commercial reasons and is not a statutory imposition.