

## **JOINT EXPATRIATE FORUM ON TAX AND NICS: 29 JULY 2010**

### **MEETING NOTE**

#### **1. Minutes and Q&A Log**

Since the last meeting of the Forum, the Government had published a discussion document setting out an alternative approach to the pensions High Income Excess Relief (HIER) charge, principally through a reduced Annual Allowance. Provisional analysis suggests that an allowance of around £30,000 to £45,000 would deliver the same level of savings as the HIER charge. Assuming this alternative approach is adopted, the Government would repeal the HIER legislation passed in the pre-election Finance Act 2010 and legislate the new approach in Finance Bill 2011.

The offer made at the last Forum to convene a subgroup to discuss the proposals remained open, but deadlines would be tight because responses to the discussion document are required by 22 August. That being the case, HMRC would welcome a single response from the Forum.

It was pointed out that the HMRC website contained guidance for members of US pension schemes, but none for any of the other countries with whom the UK has a bilateral agreement. HMRC said guidance is included in the Registered Pension Scheme Manual at and in the SA Helpsheets. The links are respectively: <http://home.inrev.gov.uk/rpsmmanual/RPSM00500600.htm> and <http://www.hmrc.gov.uk/helpsheets/hs344.pdf>.

The June emergency Budget confirmed that Employer Financed Retirement Benefit Schemes (EFRBS) were within the scope of the review announced in March 2010 into the use of trusts to reward employees. HMRC were asked whether there would be consultation on this matter and they explained that the review was intended to be wide-ranging, but they were not in a position to give further information at this stage.

HMRC was asked to confirm the definition of 'bona fide pension scheme' in relation to overseas schemes and said the answer would always depend upon the facts in each case. However, it is likely that FA 2004 'qualifying' schemes in respect of which migrant member relief is claimed would be included. A scheme operating to provide genuine pension benefits rather than a money box will probably be accepted as bona fide, but it will not be sufficient for a scheme

simply to be accepted as a pension scheme in the overseas country where it is established.

The modified PAYE arrangements for expatriate employees (Appendix 6) had been updated on the HMRC website (<http://www.hmrc.gov.uk/news/news-230710.htm>). Employers were now required to notify HMRC when they withdraw personal allowances and operate code OT within a Modified PAYE scheme.

## **2. Compliance and Procedural Matters**

### Amended Returns

HMRC were receiving a number of paper amendments to returns which were inadequately marked as such: as this created difficulties, agents were asked to make clear when submitting amendments on paper where they preferred them to online amendments. They were also encouraged to make clear when they made multiple amendments to a return.

### Expats Unit Reorganisation

HMRC reported that part of the work of the Expats Unit had been relocated from Manchester to Bootle office and agents would soon be receiving correspondence from both offices.

### Modified PAYE Arrangements and Distraint Action

It had been reported that distraint action had been taken against two employers where debt management officers were unaware that they were operating EMP6 Appendix 6 arrangements. Although isolated incidents, HMRC apologised for the inconvenience caused. They also agreed to investigate the specific cases if members of the Forum provided names of the employers concerned.

HMRC had issued an email to members of the Forum on 21 June about late payments and EPM App 6 where warning letters and demands for payment for the first month had been received by quarterly payers.

Newsboard message 318/10 had been published on 18 June giving guidance to Debt Management managers and staff when they are approached by employers claiming they are quarterly payers under Modified PAYE. HMRC advised that any employer operating modified PAYE and due to pay quarterly should cite this

message if they continue to receive monthly PAYE demands or are visited by distraint staff.

HMRC also advised that affected employers would need to contact HMRC debt management at the beginning of the tax year to ensure that the quarterly payments signal was correctly set on HMRC systems.

The problem cannot be fully resolved without changing the national PAYE system. The only certain way to prevent its reoccurrence would be by withdrawing the concession to pay quarterly entirely for EPM App 6 employers with less than 5 employees.

### Filing Only Agents and Repayment Claims

HMRC had issued an email on 14 June addressing concerns expressed at the last Forum meeting and setting out a simplified process for filing-only agents. Under this process, HMRC would issue the R38 direct to agents rather than to the individual taxpayer. This would allow agents to request a structured action repayment through the SA gateway.

Members of the Forum agreed that, despite some teething problems, including with batch filing, the filing only agents process was working more effectively due to recent changes.

### Telephone enquiries

HMRC said they had amended the agent briefing in response to comments from large agent firms operating from multiple addresses that HMRC security processes can be unnecessarily difficult to apply. This should mean that the problems of slightly different references or addresses within the same firm do not prevent telephone enquiries from being answered.

### Section 828A subgroup

A subgroup had been convened on 28 June to address difficulties in implementing the SA filing exemption in s828A ITA which was aimed at low income migrant workers from overseas. This proved useful in resolving a number of issues. HMRC stressed that, whilst the exemption was not designed for employees on inter-company transfers, it had become clear that the exemption could be applied to certain assignees, in particular those from India and China.

The main issue was the difficulty in identifying the relevant individuals. Unless informed that they qualify for filing exemption, HMRC would issue SA returns, thereby preventing them from taking advantage of s828A. HMRC had designed an election letter for Expats to meet this need: agents should submit this letter at the same time as the 64-8, and after the P46 (Expat) had been filed, which would ensure that no SA return is issued.

There was a separate issue with employers using EPM App 6 with a month 12 adjustment to eliminate any residual liability whose employees are required to submit a SA return. However, as some had very simple tax affairs, there was a case for allowing them to use s828A whilst remaining within EPM6. HMRC will seek to engage with such employers to reach a suitable agreement for their employee base. In such cases, the election letter will need to be completed but retained by the employer. If there are individuals who do not qualify, the employer or agent will need to submit an SA1 to request a return.

A similar case existed for NR individuals who submit SA returns to get personal allowances under DTAs.

Effective application of s828A would deliver significant benefits both to HMRC and to employers. HMRC estimated that it would mean that over 7,000 SA Expat returns could no longer need to be issued.

HMRC also confirmed that the £10,000 limit for relevant foreign earnings applied for the full year and was not affected by ESC A11 split year treatment. Therefore, an individual who had already earned more than £10,000 abroad in the UK tax year before he or she arrived would not be eligible.

Some members of the Forum suggested extending the exemption to individuals with income from pension schemes. HMRC said that this would require additional legislation.

HMRC would circulate the draft election letter with the minutes of the meeting and encouraged members of the Forum to publicise the process in TAXline and other vehicles.

#### EPM6 and Code OT

HMRC published a News Item on 23 July (<http://www.hmrc.gov.uk/news/news-230710.htm>) to confirm that, where EPM6 employers change an employee's

code to OT because they will be claiming the remittance basis, they should notify HMRC accordingly.

In response to a question, HMRC confirmed that, now that the P86 is abolished, agents should send a letter when their clients return to the UK and that PAs should be reinstated. HMRC agreed to check that this is covered in PAYE and employer guidance.

### Accountancy Fees

There was a discussion at the September 2008 Forum of the level of accountancy fee benefits which concluded that a reasonable level was £650 per head where a home and host country return is completed and £250 per head where only UK Return is completed. It had since been suggested that this should be increased as a consequence of the 2008 remittance basis changes.

HMRC would investigate this suggestion and report back to the Forum in 2011. Until that time, the existing limits of £650 and £250 would remain.

## **3. Residence Issues**

### HMRC6

HMRC said the revised draft of HMRC6 would be issued with the minutes, if not earlier, and would welcome comments and feedback from the Forum. As detailed consideration had been given to all comments already received, members were encouraged to provide any new comments they had rather than repeating those made previously.

### Full Time Work Abroad (FTWA)

HMRC said that there were issues concerning FTWA, stemming from three particular areas of uncertainty:

- How many days can be worked in the UK and claimed as merely incidental before they cease to be merely incidental?
- How many days can be worked in the UK alongside a separate FTWA employment?
- How many days of substantive duties can be undertaken in the UK without undermining a claim to be working full time abroad?

HMRC are aiming to publish a revised HMRC 6 and agreed that this will seek to set out more clearly the position on FTWA. However, this is difficult to achieve as it is very dependant on the facts and the degree of differences between each case. HMRC proposed establishing a subgroup which could meet in August or September to take this forward constructively, in particular, to take due account of the business and commercial drivers that result in duties being performed in the UK.

It was suggested that there were litigation cases pending on incidental duties and these might impact on HMRC6. HMRC said that this was always a risk with any rules that were dependent on case law, and should not delay publication of the guidance.

#### Review of the Taxation of Non Doms

The Government had announced a review of the taxation of non domiciliaries in the Coalition Agreement and the Emergency Budget in June. HMRC said that a more detailed announcement about the timing and scope of the review would be made at the appropriate time. A decision would need to be taken on how best to manage any interactions with the discussions which have taken place on a possible statutory residence test. Interested parties, including the Forum, would have the opportunity to comment on the review in due course as part of the Government's wider principles on tax policy making.

#### **4. NICs Issues**

##### Extension of Modified NICs under EP Appendix 7B

HMRC were considering whether changes can be made to modified NICs arrangements under EP Appendix 7B that would allow employers to include other groups of employees/directors assigned from the UK to work overseas, such as those with an NT code, even if not resident, or those remaining resident or ordinarily resident in the UK. In order to evaluate any change to the existing arrangements, HMRC needed to understand the problems faced by employers and their employees who are not covered by the arrangements.

Whilst there was no firm timetable for this review, HMRC encouraged members of the Forum to provide their views. It would also make the process easier to manage if these views were made in writing, although there would be the opportunity for a face to face meeting thereafter if appropriate.

## NICs treatment of bonuses

HMRC said that they have recently devoted more resources onto the issue of NICs on bonuses in order to resolve the current uncertainties. Work is progressing on this point and HMRC hope to publish an announcement and draft guidance in the near future.

## **5. Double taxation issues**

### Revised OECD Commentary on Article 15(2)

The OECD had recently published a revised commentary on Article 15(2). HMRC felt that the commentary was clear and simple to apply, and that it made no difference to the way in which they would apply the Article as it confirmed what they were already doing with respect to economic employers. Boundary issues still existed between employees and the self-employed, but this was an unavoidable consequence of domestic legislation and the facts in any specific case. Any difficulties which remained could be resolved through the mutual agreement procedure (MAP).

HMRC referred to a recent case where they had agreed that foreign consultants seconded by a foreign employer to perform duties in the UK were not economically employed in the UK. The staff were clearly not working under a contract of service with the end user and, although their remuneration costs had been borne in the UK, the fee basis of the charge made by the non-UK employer to the UK company was the same as to any other customer.

### Creditability of the Remittance Basis Charge against US tax

HMRC said they had been in contact with the IRS on this matter and they had declined to say whether the £30,000 charge will be creditable for US federal tax purposes.

### US Economic Employer Test/Update on Article 24(6) Cases

HMRC summarised the current position on US economic employers. The few MAP cases which remain outstanding depend on establishing the facts regarding the employer's recharge and can probably be resolved without the need for mutual agreement with the US. HMRC will reopen cases which have been left

temporarily on hold in anticipation of a MAP case to resolve the issue to generate either litigation or further MAP cases.

There has been no change to the green card holder position. The UK remains willing to give relief in the same way as if the individuals were US citizens, but whether this resolves double taxation depends on whether the US gives unilateral relief for tax paid in the UK. HMRC also said that this issue is ultimately for the IRS to resolve since it is their requirements which encourage green card holders to waive their treaty rights. It might therefore be useful if Forum members sought clarification from the IRS on their understanding of how to avoid double taxation in such cases.

## **5. India: Social Security Agreement**

India had recently introduced a new social security regime which applied, inter alia, to inbound assignees and in response a number of countries had entered into bilateral agreements with them. HMRC confirmed that Ministers were considering whether the UK should enter into a similar agreement.

## **6. AOB**

On 20 July, the Chancellor and Exchequer Secretary launched the Office of Tax Simplification (OTS) to provide the Government with independent advice on simplifying the UK tax system. Members of the Forum asked whether this would cover expat taxation matters, notably FOREX. HMRC said that the initial remit of the OTS was to look at tax reliefs and small business tax simplification, including IR35.

It was pointed out that the HMRC website still referred to P86s even though they had been withdrawn. HMRC agreed to look into this. They also confirmed that there would be no replacement for the P86.

HMRC were asked whether they planned to publish a statement on the economic employer test to take account of recent correspondence with members of the forum. HMRC confirmed that they do not intend to alter or extend existing guidance on the 60 day rule as the four examples already set out in guidance illustrate how the rule should be applied.