JOINT EXPATRIATE FORUM ON TAX AND NICS: 29 January 2014
Auditorium, 1 Horse Guards Road, London SW1A 2HQ

Chair: Mary Aiston (HMRC) and Philip Paur (Deloitte LLP)
Secretary: Elisabeth Adams (HMRC)

MEETING NOTE

1. Apologies

1.1 Mary Aiston had replaced David Richardson as Director of Specialist Tax and taken on the role of joint Chair but sent her apologies for this meeting. In her absence Melissa Giordano, jointly chaired the meeting with Philip Paur.

2. Note of October meeting and Q and A log

2.1 The meeting noted that Paragraph 2.1of the Minutes was incorrect as the guidance on Overseas Workday Relief (RDR4) had not been republished on 28 August 2013. The content of RDR4 published in May 2013 was still correct and the caveat regarding Finance Bill would be removed as part of the transition of these pages to the Gov.UK pages in spring.

2.2 Members noted that the Q & A log contained answers to Action Points 1.2, 1.5 and 3.3. Action Points 1.3, 1.7 and 8.3 would be dealt with in substantive agenda items. The sub-group to discuss Statutory Residence Test (SRT) issues (Action Point 2.8) had been held and a Q & A log produced which had been circulated to members and published alongside these Minutes.

2.3 HMRC had not received evidence of difficulties with RTI faced by non-UK employers based in other EU states who have no UK presence (Action Point 5.3) but were happy to receive any representations.

2.4 Following members concerns over the issue of demands (Action Point 6.9), HMRC had advised members that:
2013/14 is a year of transition and our approach is to be supportive and educational as both employers and HMRC get used to reporting in real time. This approach also extends to pursuing underpayments. Where an underpayment is identified, we will contact the employer by phone or letter (or both) to try and establish why amounts are showing as underpaid. If employers have not been contacted, and Debt Management is pursuing a debt the employer believes is incorrect, they should contact us as soon as they can to discuss it.

2.5 A sub-group to discuss pensions issues (Action Point 7.5) had been held on 11 December. Several questions arising from that meeting had been answered in the January Q & A log.

3. Dual Contracts

3.1 HM Treasury (HMT) outlined the intention behind the Autumn Statement announcement. Draft legislation had been published and consultation will close on 13 February 2014. Meetings with representative bodies and some employers have

been arranged. Written representations are also welcome and should be sent to PTIConsultation.SpecialistPersonalTax@hmrc.gsi.gov.uk (or sent to Simon Galloway at HMRC).

3.2 The legislation uses a number of hallmarks to identify artificial dual contracts and to fall within the scope of the legislation an individual's employment arrangements will have to meet all of these tests. Members expressed concerns that non–artificial arrangements would also be captured and that because of the way in which the comparative tax rates hallmark was set many dual contract holders would not be paying sufficient tax abroad to fall outside the measures. HMT advised members to submit written comments with examples which would be considered alongside other responses to the consultation.

4. Short-term business visitors and operation of PAYE in cases where there is no "Appendix 4" agreement with HMRC

4.1 HMRC clarified current practice and acknowledged that this had been discussed by the Forum on previous occasions.

4.2 Appendix 4 allows employers to not operate PAYE on earnings for short-term business visitors (STBVs) subject to certain conditions. Providing the terms are met, HMRC does not require employees to make formal claims for treaty relief. As previously advised, from 6 April 2013, HMRC requires employers to have a signed Appendix 4 agreement in order to take advantage of this relaxation. Employers without agreements must operate PAYE on the earnings of STBVs who are paid by, or work on behalf of, or for them in the UK. The UK entity is not however required to operate PAYE or track other STBVs who come to the UK, e.g. those who continue to work for their home country employer and not for the UK entity.

4.3 HMRC confirmed that claims for treaty exemption can be made by a letter outside of a tax return. A certificate of tax residence from the overseas tax authority will be required to finalise the claim, except for US citizens who are only required to provide evidence of continuing residence in the US.

4.4 Applications for 2013-14 can be made by 5 April 2014 and applications for later years will also be accepted as long as applications are received by the relevant 5 April. Once agreed, arrangements will remain in force for later years, unless exceptionally HMRC withdraws agreement for the employer to operate the arrangement. HMRC agreed to extend the deadline for 2013-14 to 31 May 2014 provided the report due by 31 May 2014 is also received by that date.

4.5 HMRC confirmed that an agreement is required for each employer/PAYE scheme for group companies. If one group company is responsible for collating details on behalf of visitors across the group, one agreement signed by all group companies will be accepted. The report should identify the group company which the STBV visited wherever possible. The agreement should be updated when participating companies join or leave a group.

4.6 One member noted a mismatch between the "exceptional circumstances" rule for disregarding days of presence in the UK as applied by the OECD (for the purposes of Article 15(2) treaty relief) and the equivalent UK rule for the statutory residence

test (SRT). The result is that an STBV may be UK resident for the SRT (over 183 days) but under 183 days for the purposes of Article 15(2) treaty relief.

4.7 Members asked HMRC to confirm

(i) How STBVs covered by example 6 in the OECD commentary should be reported going forward. In the UK context this refers to situations where an executive is clearly not employed in the UK for Article 15(2) treaty purposes but some of his remuneration costs are nonetheless ultimately borne in the UK under group recharge policies. HMRC confirmed current arrangements can continue for 2013-14. The position for 2014-15 will be considered.

(ii) Whether, in situations where EP Appendix 4 does not apply and PAYE is accounted for, repayments can be made where valid treaty claims are made after the tax has been paid by the employer via a contract settlement or formal determination. Concern was expressed that by making personal treaty claims STBVs might claim repayment of PAYE paid by the host employer when the refund is due to the employer.

(iii) Whether employees covered by the 60 day rule can be included in EP APP4 where the costs are recharged to the UK company. HMRC confirmed that they could be but agreed that EP APP4 is not clear on this point.

Action Point: HMRC to consider these questions and report back at the next meeting

5. Changes to the taxation of agency staff: impact on certain short-term expatriate secondments

5.1 HMRC explained that the policy is aimed at attempted avoidance schemes using offshore intermediaries and at closing down arguments about composite supply. It is not intended to disturb in any significant way the normal "host employer" arrangements for seconded workers within international groups.

5.2 HMRC did not consider that the current regulations would need amendment but would be tweaked accordingly if it was found that any issues could not be addressed by other means e.g. FAQs. HMRC also confirmed that there was no intention to broaden the base of National Insurance Contributions (NIC) but was attempting to ensure that some complex agency structures involving secondary contributors (particularly within the construction industry) were still required to pay NICs. Following representations from industry, HMRC was engaging with stakeholders concerned at interactions with EU law to discuss whether any exceptions were required.

5.3 The timetable for legislative change was tight but HMRC hoped to provide further guidance in February. HMRC would welcome any technical views or comments from members.

Action Point: Any comments to be sent to Mark Frampton.

6. Draft Finance Bill/ NIC changes to the taxation of employment-related securities for globally mobile employees

6.1 HMRC explained the effect of the draft legislation which removes the special employment-related securities residence rules, which attach the application of the provisions in Part 7 of ITEPA to the residence status of the employee at the time he

or she acquires the securities or the securities option. Instead, the Part 7 rules will apply generally, with income tax liability depending on the extent to which the employee can be regarded as having earned the share-related income while UK-resident or from UK employment in broadly the same way that income tax is charged on general earnings by sections 15, 22, 26 and 27.

6.2 The legislation was published on 10 December and the consultation on it ends on 4 February. HMRC would welcome any representations, although it appreciated time was limited.

6.3 These changes will require some amendment to NICs regulations and HMRC hopes to publish draft regulations for consultation in March 2014 that would apply income recognition to NICs, enabling matching to periods of UK employment but in a way which then takes account of days in or out of NICs under bi-lateral agreements. HMRC would be interested in hearing views form members on how this policy outcome may be best achieved and would be prepared to hold a sub-group meeting. Members suggested there may be issues around apportionment and also practical difficulties for employers.

Action Point: Members interested in attending a sub-group should contact Mark Frampton.

7. Double tax treaties: OECD proposed additional commentary on termination payments

7.1 HMRC delegates to the OECD Working Party 1 on tax treaties and related matters confirmed that the discussion draft document issued in June 2013 had been discussed at the September Working Party and would be discussed again in February. Assuming delegates can reach agreement on a final text the additional commentary would be included in the scheduled 2014 update to the OECD Model. HMRC explained that the aim was to provide a workable, coherent set of rules in an area where very little guidance was currently available. The UK was broadly in support of the commentary and while appreciating that some inconsistencies may occur, considered that these may have to be accepted in order to deliver the overall aim.

7.2 Members were concerned that the commentary reinforced the source state's taxing rights on termination payments. HMRC confirmed that the intention of the exercise was not to alter the balance between source and residence state taxation but to come up with a coherent and consistent approach. It was acknowledged though that some change in UK practice may occur if the revised commentary is adopted by the OECD. Members also raised concerns about apportionment when a period of service covered two or more countries.

7.3 HMRC understood the section on pay in lieu of notice had caused some confusion as it actually dealt with gardening leave and would suggest this section needed clarification. Other areas which members though were unclear included damages, ex gratia payments, non-compete payments and severance pay. Members thought it would be useful to include some examples and discussion of the withholding tax position. Employers' representatives commented that it is much easier for them where tax liabilities on cessation arise in a single country. HMRC noted these points and acknowledged that there may be possibility for some refinement but

stressed that this document was designed to set a common framework within which countries could work.

8. Tax codes.

8.1 HMRC understood the difficulties of employees faced with substantial underpayments through not realising early that their income has exceeded £100,000 causing their personal allowance to be withdrawn and was exploring opportunities to use estimated pay reported via RTI to increase the accuracy of codes. Members suggested some possible solutions including (i) linking this with Self Assessment which also uses a £100,000 threshold; (ii) adding a note to tax codes (HMRC); (iii) adding a note to payslips (payroll companies).

8.2 Members explained that it was often difficult for expat employees to contact HMRC themselves with coding enquiries and although HMRC appreciated this, our duty of confidentiality meant that although we could take information from a third party, we cannot comment to that third party and may not be able to act on that information.

8.3 Members also expressed concern at the use of P11d data to change tax codes as this sometimes meant tax refunds due to the employer were passed through to the employee through a revised tax code. HMRC reminded employers that it was very important to contact HMRC before submitting form P11d which would prevent automatic re-coding. The notification can now be made on line. Further information is available on the HMRC website using this link http://www.hmrc.gov.uk/payerti/exb/forms.htm

8.4 Members advised that auto coding of expenses claimed on Self Assessment tax returns causes underpayments where temporary workplace relief is not available for the later year. Whilst acknowledging the responsibility of assignees to check tax codes, members agreed that individuals often did not do so.
Action Point: HMRC to consider this issue and report back at the next meeting.

8.5 HMRC confirmed that where NT tax codes were issued by HMRC, they apply to all earnings paid whilst the code is in operation. This does include bonuses which may in part relate to a period before the overseas assignment commenced. HMRC does offer an alternative approach which employers may operate voluntarily. The employer uses 2 payroll IDs to separate pre and assignment earnings. This prevents unexpected underpayments for employees.

8.6 A member mentioned difficulties with tax codes for employees who return to the UK where tax equalisation is relevant to the assignment period. HMRC recommended that employers help the employee to draft a suitable request to HMRC where there are complex tax code issues.

9. Compliance and procedural matters

Accountancy Fees - levels of benefits in kind on which HMRC will not enquire into

9.1 HMRC has decided to keep the current levels for 2013-14 of £650 and £250 as the level of benefit reported which would not be enquired into as part of a Compliance

Check. However, it is proposed to increase the levels for 2014-15, that is benefit in kind reportable on the 2014-15 forms P11D and Self Assessment tax returns or in a PAYE Settlement Agreement. Some members doubted an increase was justified by reference to changes in fee levels. Members are requested to provide details of changes in levels of fees charged between December 2010 and December 2013 if they have not already done so to Pam Hughes by 14 March 2014.

Action Point: Members to provide details as requested and HMRC to provide update at the next meeting.

EP Appendix 7A and 7B - new method of accounting for reconciliation payments and repayments in March 2015

9.2 HMRC explained that the 7A and 7B arrangements had not changed but that the accounting method had following introduction of new software used internally for accounting for income tax and NICs paid by employers. It applies to both RTI and non- RTI customers and as such the schemes used to account for residual payments on 7A and 7B schemes. However, these schemes are neither compatible with the software nor necessary to account for the payments for the 2013-14 tax year or later years. As such, the schemes have been closed at 5 April 2013. Any payments due on 31 March 2014 for 2012-13 will however be accepted. The 13 character Accounts Office reference should be followed by the year 13 and month 13 for example 123PA000123451313.

9.3 Reconciliation payments for later years will be paid under a reference linked to the main PAYE scheme known as the SAFE reference. Employers will be notified of the reference in due course. We are currently looking at how HMRC will generate the repayments shown on the NICs Settlement Returns.

Action Point: HMRC will provide an update at the next meeting.

Forms 64-8

9.4 All forms 64-8 sent to Personal Tax International (PTI) for PTI customers which related to 2012-13 were prioritised and processed by mid January. We have continued to identify and prioritise those that have arrived since and will continue to do so throughout February before returning to business as usual.

10. AOB.

10.1 Members were invited to submit any comments on the SRT Q & A log in writing to Philip Paur or Elisabeth Adams.

10.2 As the Forum covers both employer issues and tax technical details, it was acknowledged that some members may be more interested in one or other area rather than both. A proposal was therefore made to split future meetings and take topics of particular interest to employers earlier on the Main Forum agenda, and allow for a 5 minute break before the more “technical” topics later in the meeting, which would give members the option of leaving the meeting then if they wanted to.

Action Point: Members to submit views ahead of the next meeting to Philip Paur or Elisabeth Adams.

10.3 Members were also reminded to send ideas for agenda items they wish included at future meetings to Philip Paur or Elisabeth Adams.

10.4 Members were advised that Elisabeth Adams would be stepping down as Secretary and that this was her last meeting in that role. Owen Price will takeover this role.

11. Date of next meeting

11.1 The next meeting will be held in the Auditorium on 29 April 2014 at 2:45pm.

HM Revenue & Customs Joint Forum on expatriate tax and National Insurance contributions Q & A Log: introduction

These logs contain answers prepared by HM Revenue & Customs (HMRC) staff in response to questions raised by members of the Forum.
Where possible these answers will refer to guidance published elsewhere. The responses given in these logs are not expected to be comprehensive or provide a definitive answer in every case. If you have a specific query about a particular case you should contact HMRC in the normal way.
HMRC base these answers on the law as it stood at date of publication and will incorporate answers given into the appropriate guidance manuals where necessary. HMRC will publish amended or supplementary guidance if there is a change in the law or in the department's interpretation of it. HMRC may give earlier notice of such changes through a Revenue & Customs Brief or press release. Taxpayers and their advisors should check that the answers given in this log have not been superseded by amended or supplementary guidance.
Subject to those qualifications readers may assume the answers apply in the normal case; but where HMRC considers that there is, or may have been, avoidance of tax the answers will not necessarily apply.
Neither this log nor its publication affects any right of appeal a taxpayer may have.

Expats Forum: Q & A Log – 29 January 2014

No	Question	Answer
1.	**Short term business visitors** With reference to the previous question and answer given in October (*i.e. "With reference to the previous question and answer given in July i.e. 'Some of my UK employees were assigned to a separate foreign legal entity overseas, but continued to hold contracts of employment with the UK Company. Some of those employees subsequently returned to the UK as short term business visitors working for and at the expense of that foreign employer. Can Article 15(2) (b) be satisfied in these situations?'* *could HMRC:* *(i) expand the answer to explain the word entity and* *(ii) if an overseas branch of a UK parent company is regarded as an overseas entity.")* can HMRC further clarify whether a branch of a branch would be considered to satisfy the 60 day rule if in example 2, the overseas employee of an overseas employer comes to work in the UK branch?	A branch is simply a place where a company carries out its business and as such a 'branch of a branch' remains a branch of the original company. In the scenario described, an overseas branch of a UK company can not be regarded as the employer. The employer will be the UK company regardless of how many branches there may or may not be. The 60 day rule will not therefore apply.
2.	**Foreign Service Relief** Can HMRC clarify why foreign service relief on termination payments is restricted for days worked in the UK where the individual is UK resident under the SRT but treaty resident abroad (and income for that period would be treaty exempt under Article 15(2))? How is foreign service relief calculated in circumstances where transitional relief applies after 5 April 2013?	If someone is resident under the SRT but treaty resident in another country then question in relation to FSR being restricted for days worked in UK is irrelevant. We tax under domestic law and then give relief under the treaty, so if the individual is resident under the SRT then all of the termination payment is taxable in the UK. But if we apply the treaty (because the individual is treaty resident elsewhere) then depending on the wording of the treaty all of the payment may or may not be exempt from UK tax. (The OECD are proposing further guidance on the treatment of termination payments under

No	Question	Answer
		a double taxation treaties) As regards to how FSR is calculated in circumstances where transitional relief applies, then the relevant legislation is at S73 of Schedule 46 FA2013. But basically if an individual was resident in the UK but not ordinarily resident for 2012/13 and the employment in question commenced before the tax year 2013/14 then the individual can be treated for the purpose of S413 ITEPA 2003 as he would have been before Schedule 46 FA2013 came into effect. (see S73 (5) of Sch 46)
3.	**<u>Special Mixed Fund rules</u>** **Remittances from a non-qualifying account only** <u>Assumptions</u> Individual is paid £120,000 p.a., £10,000 pcm via the US payroll. He is paid 60% into a qualifying US account (US$) and 40% into a non-qualifying account in Jersey (GBP) Despite the fact that the Jersey account is non-qualifying, the only monies that have ever been paid into the account are assignment related earnings The individual is entitled to OWR and performs 20% of his duties outside of the UK The only money remitted to the UK is £3,600 pcm. from the Jersey account <u>Assumed UK tax position</u> There are no remittances from the US qualifying account so the SMFRs are not in point Per HMRC's analysis, the amount credited to each account would, in the first instance be: • US qualifying account - £4,800 of S15 income and £1,200 of S26 income pcm.	We would agree with the analysis on the facts given and the assumption there are no "other transfers" from the qualifying account. However there may be a different result if there were "other transfers" from the qualifying account. Because the qualifying account must be looked at in priority to the non qualifying account "other transfers" would reduce the amount of section 15 and section 26 income available to remit from the non qualifying account. To take an example, if you assume that all of the payments made to the qualifying account were spent overseas in the year (£72,000 in total) it would remove £57,600 section 15 income and £14,400 section 26 income as an "other transfer" within section 809RA(2) ITA. The only monthly amounts available for remittance from the non qualifying account would be £3,200 section 15 income and £800 section 26 income credited to it. Each monthly remittance of £3,600 on a transactional basis would therefore consist of £3,200 section 15 income and £400 section 26 income.

No	Question	Answer
	• Jersey non-qualifying account - £3,200 of S15 income and £800 of S26 income pcm. However, £3,600 is remitted to the UK from the Jersey account each month so S809R(4) is overridden by S809R(5) such that the rules in S809Q are applied. The remittance of £3,600 pcm. is less than the amount of S15 received each month and so all of the amount remitted is regarded as S15 income This analysis is repeated each month so the balance on the Jersey account is: **Month** **S15** **S26** April £3,600 £400 Less remittance (£3,600) Balance £0 £400 May £3,600 £400 Less remittance (£3,600) Balance £0 £800 Etc The amounts remaining is each account at the end of the tax year are: • US qualifying account – £52,800 of S15 income and £19,200 of S26 income • Jersey non-qualifying account - £0 of S15 income and £4,800 of S26 income The above assumes that you do not re-apportion the balance of the two accounts at year end.	

No	Question	Answer
4.	**<u>Special Mixed Fund rules</u>** **Remittances from both qualifying and non-qualifying accounts** <u>Assumptions</u> Individual is paid £120,000 p.a., £10,000 pcm via the US payroll. He is paid 60% into a qualifying US account (US$) and 40% into a non-qualifying account in Jersey (GBP) Despite the fact that the Jersey account is non-qualifying, the only monies that have ever been paid into the account are assignment related earnings The individual is entitled to OWR and performs 20% of his duties outside of the UK The individual remits £3,600 pcm. to the UK from the Jersey account and also makes a one-off remittance of £20,000 to the UK from the qualifying US account in December after the earnings for November have been paid into the account but before the earnings for December have been added. <u>Assumed UK tax position</u> There is a remittance from the US qualifying account so the SMFRs are in point Per HMRC's analysis, the amount credited to each account would, in the first instance be: • US qualifying account - £4,800 of S15 income and £1,200 of S26 income pcm. or £57,600 of S15 income and £14,400 of S26 income per annum • Jersey non-qualifying account - £3,200 of S15 income and £800 of S26 income pcm.	Our analysis of the example is as follows; a) We agree you must look at the qualifying account first b) After the £20,000 condition A transfer has been accounted for, the balance of income remaining is £76,000 section 15 income and £24,000 section 26 income (£100,000 total) - assuming there are no "other transfers" (see example (a)). c) HMRCs view is the income is apportioned between the 2 accounts proportionately (see the final example in the FAQs) following the offshore transfer rule in section 809R ITA. Of course that will only total £100,000 (£76,000 + £24,000) so the £20,000 already identified as a remittance from the qualifying account must be included to match the apportionment with the amounts paid into the 2 accounts on a monthly basis. For the purposes of this example we will call this "remitted income" as it has already been identified as remitted section 15 income. d) Each monthly salary payment to the qualifying account will consist of • £3,800 section 15 income • £1,200 section 26 income • £1,000 "remitted income" e) Each monthly salary payment to the non qualifying account will consist of; • £2,533 section 15 income • £800 section 26 income • £667 "remitted income" f) There is enough section 15 income in the monthly payments to the offshore accounts to ensure the £3,600 monthly remittance is entirely of section 15 income. This is the same result as CIOTs calculation, but arrived at via a slightly different methodology. g) We believe this methodology ensures the transfers identified by the special mixed fund rules are not double counted when looking at remittances from the non qualifying account and the transaction by transaction basis of the normal mixed fund rules can be calculated accurately. h) For example, if the condition A transfers from the qualifying account totalled £72,000 rather than £20,000 the monthly payments to the qualifying account would be

No	Question	Answer
	The SMFRs take precedence over the normal MFRs and so the position on the US account needs to be analysed first. **S15** **S26** Apportionment of earnings for the year £57,600 £14,400 Less remittance £20,000 Position after applying S809RA but before applying S809R £37,600 £14,400 The next step is to analyse the Jersey account which must be analysed on a month by month basis. he starting point for the Jersey account is that £3,200 of S15 and £800 of S26 income is paid into the account each month. However, S809R(4) is overridden by S809R(5) which allows us to apply S809Q to the monthly remittance. This is where we run into difficulty because of the interaction with the SMFRs that have been applied to the US qualifying account. We do not know how HMRC intend to apply the rules but one possible approach is to say that if you ignored the SMFRs there would have been £38,400 of S15 income in the US qualifying account immediately prior to the one-off remittance of £20,000. This leaves £18,400. The amount of 'extra' S15 income we need to allocate to the non-qualifying Jersey account is £400 per month and £18,400/8 is £2,300 which is more than £400 and so the amount remitted each month from the Jersey account is regarded as S15 income only, i.e. **Month** **S15** **S26** April £3,600 £400 Less remittance (£3,600)	• £1,200 section 15 income, • £1,200 section 26 income and • £3,600 "remitted income" Monthly payments to the non qualifying account would be • £800 section 15 income, • £800 section 26 income and • £2,400 "remitted income". The £3,600 monthly remittance from the non qualifying account would consist of £2,000 section 15 income (£1,200 + £800) and £1,600 section 26 income.

No	Question	Answer
	Balance £0 £400 May £3,600 £400 Less remittance (£3,600) Balance £0 £800 Etc. The amounts remaining in each account at the end of the year are: • US qualifying account – £32,800 of S15 (£57,600 - £20,000 – (£400 x 12*)) and £19,200 of S26 • Jersey account - £0 of S15 and £4,800 of S26 *£400 is the amount reallocated each month from the US account to the Jersey account as a result of S809R(5).	
5.	**Statutory Residence Test (SRT)** Can HMRC provide the revised wording for the caveat that applies to the Tax Residence Indicator (TRI)?	The revised wording which will appear on the next version of the TRI is as follows: Your residence status can only be decided by reference to established facts and circumstances. You can use this tool retrospectively or to predict what your residence status will be in future years, however HMRC will not be bound by the results where the information you provide does not accurately reflect your facts and circumstances.
6.	**EP Appendix 4** Can an employer operate the arrangements detailed in PAYE82000 known as EP Appendix 4 without written agreement from HMRC?	Prior to 2013-14 HMRC did allow employers to rely on the terms of the arrangement without making a formal application to HMRC to use it. This practice was withdrawn from the 6 April 2013. As such, the statements published following the Forum meetings on 30 November 2006 and 18 April 2007 no longer apply.

No	Question	Answer
		Employers must put an agreement in place with HMRC to operate The PAYE relaxation known as EP Appendix 4 for the tax year 2013-14 onwards. Applications for 2013-14 onwards should be made by 5 April 2014. Employers who already hold agreements signed by HMRC do not need to sign new application forms but should apply the revised terms in the current version on the HMRC website using the link below: http://www.hmrc.gov.uk/manuals/pommanual/PAYE82000.htm Employers without signed agreements must operate PAYE on the earnings of all their short term business visitors unless they receive a tax code NT from HMRC for the named individual. Those employees may make a claim to HMRC for treaty relief if they meet the relevant criteria in the relevant Double Taxation Agreement.
7.	**Questions arising from the pensions sub group meeting**	
8.	**UK tax charges and transfers to US** It is common practice for funds to be transferred between US pension schemes, particularly from a 401(k) to an IRA (individual retirement account). Although it is not necessarily a requirement, most people transfer their pension savings when they move employment. Article 18(1) of the UK/US double taxation convention provides: "Where an individual who is a resident of a Contracting State is a member or beneficiary of, or participant in, a pension scheme established in the other Contracting State, income earned by the pension scheme may be taxed as income of that individual only when, and, subject to paragraphs 1 and 2 of Article 17 (Pensions, Social Security, Annuities, Alimony, and Child Support) of this Convention, to the extent that, it is paid to, or for the benefit of, that individual from the pension scheme (and not transferred to another pension scheme)." Where Article 18(1) is otherwise in point, is it HMRC's position that any unauthorised payments charge applies to the whole of the UK tax-relieved contributions deemed to be transferred to the IRA, treating	The provisions of the UK/US double taxation convention will not apply where both the individual and the pension scheme are in the US. Where a member of a US pension scheme is resident in the UK and receives UK tax relief on their pension savings that part of their pension savings will be subject to the provisions of Schedule 34 Finance Act 2004 (the member payment provisions). If a transfer is made between a 401(k) and an IRA and the IRA is not a qualifying recognised overseas pension scheme (QROPS), the transfer will be an unauthorised payment. Any tax charge will be on the UK element of the pension savings and not to the investment growth in relation to the contributions. The wording of Article 18 refers to "income earned by the pension scheme" (in this case the US 401(k)). However, the income earned by the pension scheme would not be subject to UK tax charges. We do not see a transfer between pension schemes as being within Article 17 of the UK/US double taxation convention.

No	Question	Answer
	those as transferred in priority to any fund income, or does Article 18(1) somehow confer total or partial exemption from this charge (if so, how)? The cumulative rate of charge on UK tax-relieved contributions (unauthorised payment charge and surcharge) is 55%, which is more than the tax relief originally given on the contributions. Does this mean that part of the tax represents a charge on fund growth, which would be prevented by Article 18(1) if the treaty is allowed to have any application to Schedule 34 Finance Act 2004 charges? Or is Article 17 the provision that would relate to a transfer from a 401(k) to an IRA?	
9.	**Asian Provident Funds** Asian Provident Funds do not appear to be used in abusive cases and they generally fit within the category of provision for retirement. Although it is possible to access funds early in limited circumstances (such as buying a home). The employer has to make the same judgement as the UK scheme administrator in deciding whether the overseas scheme is an "overseas pension scheme" under regulation 2 of SI 2006/206. If he decides it is, but that turns out to be incorrect, he is liable to PAYE under the Part 7A disguised remuneration rules on the full amount of the employer contribution. There is no guarantee that the unexpected additional tax (and perhaps NIC) liability can be recovered from the employee.	If contributions provide for benefits other than for retirement and/or death then the position has not changed with the introduction of Part 7A. This is because unless those contributions were made to a registered pension scheme or to a qualifying overseas pension scheme, the exemptions in Chapter 9 Part 4 (Exemptions: Pensions Provision) ITEPA (sections 307 to 308A) would not apply to the contributions. If PAYE has not been applied to earnings from which contributions were made the employer should amend their RTI and/or end of year returns as they would in any other case where there has been an under deduction.
10.	**Migrant members – proportion of employer contribution to be taxed under Part 7A** It appears anomalous that where the migrant worker receives specific employment income in the same tax year as an employer contribution but before that contribution is paid, interactions between migrant member relief and Part 7A mean that only part of the contribution is subject to the annual allowance and the balance is taxed Part 7A. The system works fairly for split years and overseas workday relief but not in this case. The issue may be made worse by pre-arrival grants	The provision works as intended in most cases and it is difficult to justify a legislative change based on the current information we have. We will contact colleagues dealing with the Finance Bill measure on pre-arrival grants to consider the link.

No	Question	Answer
	provision for which is in the draft Finance Bill 2014.	
11.	**Fixed protection 2012** This was very little publicity given to the revision of Fixed Protection 2012 to treat funding in relevant non-UK schemes a disqualifying event from 6 April 2013.	Individuals who were members of a qualifying overseas pension scheme (QOPS) but not a registered pension scheme could not apply for fixed protection before the changes in Finance Act 2013. However, the provisions also closed a loophole which enabled an individual who was a member of both a registered scheme and a QOPS to contribute more in a QOPS than would be allowed in a registered pension scheme without tax charges. There was no prior announcement to prevent forestalling.
12.	**OTHER ISSUES**	
13.	**Relevant overseas individual – LTA enhancement factor** It is unfair that an individual cannot meet the requirements to be a relevant overseas individual where they are resident outside the UK but have employment income (for example, trailing compensation). Their income is not taxable because they are resident outside the UK so they do not get relief on contributions. This does not seem to meet with the policy that pension savings that are subject to the LTA would have received UK tax relief.	The current legislation to define relevant overseas individuals seems consistent. If an individual receives UK employment income they cannot be an relevant overseas individual. If the member hadn't been chargeable to tax on those earnings he wouldn't have been a relevant UK individual and so would be relevant overseas individual. The individual is taxable in the UK even when not resident as he had received employment income in that year, albeit earned in a previous tax year when he was UK resident. If the member is not taxed on that income in practice it will be as a result of another tax relief. Therefore it seems that the current position is the right one.

HM Revenue & Customs

HM Revenue & Customs Expats Forum - Statutory Residence Test (SRT) Q&A log

Introduction

- This log contains answers prepared by HM Revenue & Customs (HMRC) in response to questions on the Statutory Residence Test (SRT) raised by members of the Expats Forum.
- Wherever possible these answers refer to published guidance. The responses given in these logs are not expected to be comprehensive or provide a definitive answer in every case. If you have a specific query about a particular case you should contact HMRC in the normal way.
- HMRC base answers on the law as it stood at date of publication and will incorporate answers given into appropriate guidance manuals where necessary. HMRC will publish amended or supplementary guidance if there is a change in the law or in the department's interpretation of it. HMRC may give earlier notice of such changes through a Revenue & Customs Brief or press release. Taxpayers and their advisors should check that the answers given in this log have not been superseded by amended or supplementary guidance.
- Subject to those qualifications readers may assume the answers apply in the normal case; but where HMRC considers that there is, or may have been, avoidance of tax the answers will not necessarily apply.
- Neither this log nor its publication affects any right of appeal a taxpayer may have.

Statutory Residence Test (SRT) Q&A log

No	Question	Answer
1.	**Formal review of the SRT** Will the Government commit to formally reviewing the SRT legislation? Taxpayers and advisors are struggling with the complexity of the legislation and the administration burden that it produces.	Ultimately, this is a matter for Ministers. At present, the Government has no plans for further changes to residence rules. But it will keep them under review as with any other tax policy. The legislation will be kept under review both in terms of its effect on Exchequer yield and taxpayer behaviours as well as in terms of the effect on administration burdens for individuals and for employers. This will be done by HMRC working with advisers, employers and representative bodies in the normal course of their communications.
2.	**What records?** Would it be possible to get an indication of what records are going to be acceptable for the purposes of residence enquiries?	HMRC has issued guidance on record keeping at page 80 of RDR3.
3.	**Transit days and "substantially related" – general clarification** If the statutory phrasing is viewed narrowly, whatever [an individual] is likely to do, whether watching a film in his hotel room, telephoning	HMRC confirms that it will not interpret "substantially related" narrowly. It is reasonable to expect that, for example, anyone who chose to stay in a hotel to avail themselves of

No	Question	Answer
	family, reviewing work e-mails, catching up with friends on Facebook or going to the hotel gym or pool could be viewed as "substantially unrelated" to passage through the UK because it is not an intrinsic part of the journey.	the facilities, to check Facebook and so on. The facts in each case will be important. In the final analysis we would consider whether a person was in fact enjoying the benefit of being in the UK – for example by going to the theatre – which is out with the spirit of a transit day. However it is true that doing any work, including reviewing emails, is unrelated to P's passage through the UK and the day would result in a day spent in the UK. Action point – HMRC to expand guidance to include examples of using Facebook, dealing with emails, watching Netflix etc.
4.	**Transit days and "substantially related" – work of any sort and alternative approaches** A restriction on doing work of any sort means individuals cannot check work emails (e.g. on smartphones and tablets) which is unreasonable. Can a more pragmatic interpretation be struck? e.g. US Treasury Regulations 301.7701(b)-3(d) covering Days in Transit, which hinges on whether or not there has been a business meeting.	HMRC interprets the term "substantially unrelated" with reference to what the transit day provisions are there to achieve – to allow leeway for day counting purposes for those passing through the UK who carry out no work. A simple reading means there is can be no debate around the degree and nature of work done.
5.	**Departure days and deemed days** Are departure days that are disregarded under the transit rule counted for the deeming rule? In other words, do transit departure days count towards an excess over 30 days, as per in para 23(3)?	Departure days, following a day in transit, are not disregarded under the transit rules and may count towards the deemed days rule. A day of departure may be a "qualifying day" under the terms of para 23(3)(b). The intention is to minimises the scope for the deemed days rule to be circumvented
6.	**Sufficient hours – finding the statutory start date** The split year date for those leaving the UK/arriving in the UK to work full time can diverge from the date an employee leaves to start his assignment. The divergence could be significant where there are several non-working days (e.g. weekends, public holidays) in the period immediately following the employee's arrival in the host country. In effect, you need a spreadsheet to calculate precisely when you hit or exceed the 35 hours average, and so when the residential arrival or departure date falls. This is a burdensome requirement, especially for an unrepresented employee.	It is true that the SRT is a more mechanical test than the old rules and that rolling calculations may be needed – particularly for FTWUK. The SRT uses mechanical rules to provide greater certainty for taxpayers than was possible under the old system. The Government thinks that in most cases people will start full time work on their first 3hr + work day and the calculation will flow naturally from there. This is likely to be more true for unrepresented taxpayers who will typically have more straightforward affairs. HMRC accepts it is possible to construct difficult scenarios but the legislation aims to strike a balance between length/complexity and catering for every possible outcome. Action point – HMRC to include in guidance an example to illustrate Case 1 or Case 5 where the split year starts before P has left/arrived (e.g. secondee comes to UK on 1 Aug, works 8 hours then goes back to home country. Returns to UK within 30 days to take up secondment).

No	Question	Answer
7.	**Sufficient hours – non alignment of Case 5 and FTWUK** These tests diverge insofar as, for Case 5, the period starts with a day on which the individual works for three or more hours in the UK, but this is not a requirement for the third automatic UK test. You could therefore find that an individual is resident under the third automatic UK test in the tax year following return to the UK, but does not meet the Case 5 condition to split the arrival year, which would be seen as odd. Could this be addressed?	HMRC agrees these dates can differ and this is because the two tests are testing different things. If an individual meets the FTWUK test for a year they will be resident here. Case 5 then determines if they are entitled to split year tax treatment in that tax year. The Case 5 3hr requirement is there to ensure that the UK part of a split year does not start before the individual has done any UK work – which would otherwise be possible under the 35hr averaging requirement. Not setting it as a requirement does not seem to make sense for a split on the basis of FTWUK. The Government believes that for the majority of people the 365 day period they identify for FTWUK is likely to start with a day on which they worked more than 3 hours in the UK even though it is not a requirement for the 3rd automatic UK test.
8.	**Sufficient hours - simultaneous FTWUK and FTWO** Because of the way in which working days are disregarded for both the numerator and denominator of the sufficient hours test where the employee has worked for more than three hours in the "wrong" country (e.g. worked for more than three hours in the UK on some days when working all day abroad on most other days) it is possible to be employed full-time simultaneously in both the UK and an overseas work country for a period. This might happen where an individual transitions into a new cross-border role over a short period. This is not an intuitive outcome and will confuse taxpayers. Could there be a rule to prevent it? Action point – Steve Wade to provide real life scenarios where this is creating problems.	Because the FTW tests are mechanical, HMRC agrees it is possible to be simultaneously FTWUK and FTWO. In reality this is likely to happen in a small number of cases and for a very short period of time. The SRT provides a tie-breaker in this scenario, with those meeting automatic overseas tests becoming definitively non resident. The split year cases have also been drafted so there is a priority rule between Case 5 (starting FTWUK) and Case 6 (ceasing FTWO).
9.	**Sufficient hours – interaction with significant breaks** Can a non-working period of up to 31 days (i.e. a lesser period than a significant break) preceding or following a period of full-time work can be included as part of that period (assuming that the 35 hours test is met)?	Provided the FTW test is met over the period by the calculations that are set out, it does not matter if there is a non-working period of up to 31 days at the start or end of the period. An individual would need to work significantly more than 35hrs a week in order to do enjoy periods off from work (which were not annual, sick or parenting leave) and still meet the FTW tests.
10.	**Full time work in the UK – highlighting new nature of test** Why is the FTWUK the way it is and can this (the effects and the fact the test is new) be highlighted in guidance?	The rolling nature of the FTWUK 365 test reflects the fact employers wanted to have more confidence, when taking on previously overseas staff, that they can be treated as UK tax resident from the outset (i.e. for PAYE purposes). Responses to the consultation strongly pointed toward this being a desirable feature.

No	Question	Answer
		Action point – HMRC to expand introductory section of guidance on FTWUK in guidance and to highlight that individuals may not know whether or not they meet this test until after the filing date of their return and so need to submit a provisional return.
11.	**Accommodation** It would be useful to have some guidance as to what arrangements HMRC perceive to be continuously available for a consecutive period of 91 days – e.g. a situation where "your room" in your parents' home is always potentially available but is not maintained for your exclusive use. If the parent has other visitors, they may also be put in that room. Consequently, it will always necessary to check in advance of each visit whether it will be possible to stay on specific dates. Can HMRC confirm this type of arrangement would not constitute continuously available accommodation for purposes of the SRT?	HMRC can confirm that accommodation availability has to be more than ad hoc or casual. Arrangement can be tacit, verbal or written but the availability itself will be a question of fact and every case will be determined by reference to the available facts and circumstances of each case. Situations where availability is agreed but on a particular occasion it cannot be used - perhaps because some else is using it – will often be rendered irrelevant by the 'gaps of fewer than 16 days are ignored' rule at 34(2). Action point – HMRC to expand accommodation guidance in guidance to cover the point raised, and on interaction with temporary accommodation (e.g. employer provided accommodation).
12.	**Mixed fund rules under Remittance Basis** It is virtually impossible under SRT to determine an arrival date on a real time basis. This has an impact on the special mixed fund law, since it introduces guesswork in terms of when the nomination needs to be made from and making sure the account has the right sort of monies only in it at that point. The potential relaxation is therefore difficult to apply in year of arrival.	HMRC accepts that there may be uncertainty in real time as to whether an individual is UK resident and the date at which a year is split, although in most cases of becoming UK resident the position will be clear. The option to use an existing account is a relaxation from the position under SP1/09 and it comes with the £10 condition. If the circumstances are such that the condition cannot in practice be met, then the rule reverts to a new account being required. HMRC is not persuaded that the problem is so great that amending legislation is required.
13.	**Record keeping and interaction with Section 41ZA ITEPA income apportionment rules** Can there be clarification on record keeping for SRT purposes and in particular the sort of records HMRC will want to evidence when a day is a workday for SRT and for income apportionment, as the rules are different. The travel aspects make the rule especially counter-intuitive. It would be helpful to explore exactly what sort of evidence of work HMRC is likely to require in both contexts.	Whilst the SRT is new legislation and there may be occasions where a workday will not be the same for SRT and apportionment purposes (e.g. if an individual spends 4 hours working in France in the morning and 4 hours working in the UK in the same afternoon, that day is a UK workday for SRT purposes but would be regarded as half an overseas workday and half a UK workday when apportioning earnings) we do not see that the record keeping requirement is fundamentally different. If for apportionment purposes individuals will need to demonstrate that 4hrs were spent working in France in the morning and 4hrs working in the UK in the afternoon and will presumably rely on the much same information in order to establish that there has

No	Question	Answer
		been a (3hr plus) UK workday. Travel as work that is tax deductable is a new element to residence testing under the SRT, but the rules follow established tax principles and the need to be able to establish how long travel has taken you. HMRC has issued guidance on record keeping at page 80 of RDR3.
14.	**1st & 2nd automatic tests and late arrivals in tax year** People arriving in the UK and taking employment in the later part of a tax year may not be able to say for definite whether or not they were resident at the time an SA return needs to be filed (e.g. application of the 3rd auto UK test). More guidance on the filing provisional returns needed.	Action point – HMRC include provisional ITSA filing in guidance
15.	**Foreign Service Relief** Can HMRC clarify why foreign service relief on termination payments is restricted for days worked in the UK where the individual is UK resident under the SRT but treaty resident abroad (and income for that period would be treaty exempt under Article 15(2))? How is foreign service relief calculated in circumstances where transitional relief applies after 5 April 2013?	If someone is resident under the SRT but treaty resident in another country then question in relation to FSR being restricted for days worked in UK is irrelevant. We tax under domestic law and then give relief under the treaty, so if the individual is resident under the SRT then all of the termination payment is taxable in the UK. But if we apply the treaty (because the individual is treaty resident elsewhere) then depending on the wording of the treaty all of the payment may or may not be exempt from UK tax. (The OECD are proposing further guidance on the treatment of termination payments under a double taxation treaties) As regards to how FSR is calculated in circumstances where transitional relief applies, then the relevant legislation is at S73 of Schedule 46 FA2013. But basically if an individual was resident in the UK but not ordinarily resident for 2012/13 and the employment in question commenced before the tax year 2013/14 then the individual can be treated for the purpose of S413 ITEPA 2003 as he would have been before Schedule 46 FA2013 came into effect. (see S73 (5) of Sch 46)
16.	**TRI caveat** Can HMRC provide the revised wording for the caveat that applies to the Tax Residence Indicator (TRI)?	Action point – HMRC to include revised wording in the next version of the TRI as below: Your residence status can only be decided by reference to established facts and circumstances. You can use this tool retrospectively or to predict what your residence status will be in future years, however HMRC will not be bound by the results where the information you provide does not accurately reflect your facts and circumstances.