JOINT EXPATRIATE FORUM ON TAX AND NICS: 4 February 2015
Chancellor's Room, HMRC, 100 Parliament Street, London, SW1A 2BQ

Chair: Mary Aiston (HMRC) and Philip Paur (Deloitte LLP)
Secretary: Owen Price (HMRC)

MEETING NOTE

1. Introductions

1.1 Introductions were given.

2. Note of July meeting and Q and A log

2.1 The minutes of the July meeting were reviewed. There were no action points arising from the previous meeting. The Q&A log was reviewed.

3. CGT & Non Residents

3.1 HMRC provided an update on developments since this measure was last discussed at the July forum.

3.2 Draft legislation, comprising of two schedules (the main schedule and a separate schedule for private residence relief), was published in September. The main schedule also interacts with a third schedule, containing changes to thresholds for ATED-related CGT.

3.3 Further meetings have taken place between the Government and stakeholders, which have identified issues requiring further consideration. With these issues in mind, HMRC is continuing to finesse the legislation.

3.4 HMRC confirmed that the new rules will apply to temporary non-residents. However, where a charge also arises on return to the UK, an individual will not be liable to that charge to the extent that CGT was chargeable when non-resident.

3.5 HMRC explained the proposed payment on account mechanism. An exception will be put in place for customers already within the Self Assessment system, who will be able make payments in line with the existing Self Assessment deadlines. However, HMRC confirmed that these customers will still need to notify HMRC of any chargeable events within the same time limit as non Self Assessment customers.

3.6 Forum members raised concerns about the absence relief rules and the affect the change would have on expatriates working abroad. HMRC invited forum members to put their concerns in writing.

3.7 Forum members asked about the situation where an individual works abroad and is non-resident but their spouse remains resident in the UK. HMRC advised that this issue will be considered further.

4. Autumn Statement Announcements

Restricting the Personal Allowance for Non-Residents

4.1 HMRC provided an update on the proposal to restrict the personal allowance for non-residents.

4.2 Whilst the Government continues to believe there is a strong rationale for doing this, it recognises it is a complex change for both employers and individuals who may be affected. It is difficult to create an acceptable decision logic on whether an allowance should be given under PAYE at the point that a foreign employee enters the UK tax system.

4.3 The Government will continue to keep this area under review and continue its dialogue with representative bodies on how it could be implemented but any change will not be implemented before April 2017 at the earliest.

Remittance Basis Charge extension

4.4 The Government announced changes to the remittance basis charge at the Autumn Statement.

4.5 The announcement makes changes to the annual charge paid by non-domiciled individuals resident in the UK who wish to retain access to the remittance basis of taxation. The changes will take effect from 6 April 2015.

4.6 The charge for individuals who have been UK resident for at least 12 of the last 14 years will be increased to £60,000 and a new charge of £90,000 will be payable by individuals who have been resident in the UK in at least 17 of the last 20 tax years. The charge for individuals who have been UK resident for at least seven of the last nine tax years remains unchanged.

4.7 The Government believes that the changes will ensure that non-domiciled individuals who have been resident in the UK for the longest time make a fair contribution to the Exchequer.

Consultation on introducing a minimum claim period for the RBC

4.8 A consultation was published on 22 January exploring the proposal that the remittance basis charge will become an election that instead of being made on an annual basis, can only be made once every three years.

4.9 HMRC explained that concerns had been raised that some non-domiciled taxpayers were able to manage their affairs in a way that allows them to dip in and out of the remittance basis charge in a manner that minimises their UK tax liabilities. The consultation will consider the likely impacts of moving from an annual election to one which is made every three years.

4.10 Forum members expressed the view that some taxpayers have “lumpy” income and that remitting income at irregular periods is not necessarily the result of

tax planning. HMRC stated that they would be interested in hearing genuine examples and urged forum members to include them in any consultation response.

Use of foreign income and gains as collateral

4.11 HMRC advised that draft FAQs have been prepared about the changes to the guidance for foreign income and gains used as collateral. HMRC agreed to share them with the forum for comment before publication.

5. Double Taxation issues

5.1 HMRC provided an update on several double taxation matters.

5.2 HMRC advised that there is a 10 year time limit for foreign tax credit claims by US citizens. However, non US citizens may need to claim relief by exemption in the US which can have a two or three year time limit.

5.3 HMRC advised that it will not give relief in cases where this time limit has expired. In these circumstances individuals should apply for the mutual agreement procedures. Provided that invoking the mutual agreement procedures is in time, the US will then give exemption if it is due notwithstanding the US statute of limitations.

5.4 HMRC advised forum members that the Italian office dealing with claims for refunds of Italian tax by non-residents, *Centro Operativo de Pescara*, appears to have a backlog of claims. Given the short time limits for invoking the mutual agreement procedures under the UK Italian double taxation agreement, HMRC advised making a protective request if refunds are outstanding.

5.5 HMRC is aware of issues some UK residents are having claiming exemption from South African tax on pensions. HMRC advised forum members to contact PT International if they are aware of any cases.

5.6 HMRC were asked whether US net investment tax is creditable for treaty purposes against UK tax. HMRC agreed that it can be, to the extent the tax is charged on US source trade or business or real estate income.

5.7 HMRC discussed the added OECD Commentary on termination payments. HMRC's view is that the OECD Model Article has not changed and the revised Commentary clarifies how it has always applied. Whilst Courts may be less willing to look at a Commentary produced after a double taxation agreement was negotiated, the revised Commentary does fill in the gap between the types of termination payments considered in the Squirrel and Resolute Management cases and so may be something the Courts would be happy to consider.

5.8 This means that HMRCs approach has changed over time. Before Squirrel HMRC had the view that the similarity between our charging legislation and the wording of the employment income Article meant that only "earnings" fell within the employment income Article and anything charged under s401 ITEPA would not. That point was not argued in Squirrel so even though the Squirrel decision applied

the employment income Article to a payment falling within s401 ITEPA it was not seen as a decision that set a precedence or was necessarily correct.

5.9 However, when the decision in Resolute Management both considered the point and also held the Squirrel decision to be correctly decided that left us in a period of uncertainty where we knew that payments charged under s401 ITEPA could fall within the employment income Article if there was sufficient connection to the employment but it was not clear what sorts of connection were sufficient. The revised Commentary has now given us some welcome clarity on that point.

5.10 This will still leave us with the existing difficulties in determining why a termination payment was paid and how the finally agreed "compromise" payment is broken down into various elements. This may now be something that employers and employees would wish consider and record at the time the compromise is being reached.

5.11 Forum members asked about the treatment of pension lump sums in the light of pensions flexbility. HMRC felt that one issue is defining exactly what a "lump sum" is. From a double taxation agreement point of view lump sums are not "pensions" but are "other similar remuneration". If there is no "other similar remuneration" provision win the pensions Article and nothing specific to lump sums then lump sums will usually go into the other income Article.

5.12 HMRC explained that as a general rule a lump sum is something permitted by the pension scheme that is not capable of being repeated. As such, flexible drawdowns for example would not be lump sums.

5.13 Some forum members queried this interpretation and suggested that in some cases lump sums could take the form of repeat payments. Forum members felt that it would be useful to have an agreed definition of lump sum for these purposes.

5.14 A forum member reminded HMRC that there were still some outstanding issues from the Pensions subgroup meetings held in 2013. HMRC agreed to revisit these issues.

Action Point – HMRC to revisit Pensions subgroup issues.

6. Update on RTI and Penalties

6.1 RTI late filing penalties went live for larger employers from 6 October 2014. Smaller employers will come on board from 6 March 2015. The first tranche of penalty letters went out in early February and HMRC advised that the volume issued is lower than expected.

6.2 Late payment penalties for 2013-14 have been issued and 2014-15 cases are now being risk assessed.

6.3 HMRC explained that one of the key features of the RTI system is "generic notification service" (GNS) messaging, messages which are generated to prompt

users to take action. These GNS alerts recognise when employers have made an error and allow users to take corrective action before penalties are issued.

6.4 HMRC reminded forum members of the importance of using late reporting reason codes. HMRC stated that the Department does not want penalties; it wants employers to comply with their obligations.

6.5 HMRC has established a new online appeal system, accessed via PAYE online, which can, in many cases, provide a decision instantly without the need for manual intervention by an Officer.

6.6 Forum members had experienced some confusion when challenging or clarifying disputed charges, particularly around the supply of disputed payment references. HMRC agreed to clarify the process.

Action Point – HMRC to clarify disputed charges process and improve communications with those customers on the list.

7 Compliance and procedural matters

7.1 HMRC reminded Forum members that for modified PAYE schemes, Late Reporting Code A must be entered against each individual employee in the FPS.

7.2 Forum members stated that it would be useful for an employer to be able to make a declaration at the scheme level, rather than having to enter a code for each individual employee. HMRC replied that third party developers had been advised that they may choose to build this functionality into their payroll software.

7.3 HMRC reminded Forum members that from 6 April 2015 EP Appendix 5 users must use payroll software that properly reports UK tax after foreign tax credits have been taken into account. POST MEETING note – HMRC confirmed that EP Appendix 5 can be used where the employer pays UK and foreign income taxes under tax equalisation arrangements and these taxes are included in the gross pay.

7.4 HMRC explained that S690 ITEPA directions for non-PTI customers are being re-directed from the Portsmouth team. They should now be sent to HMRC, PAYE & Self Assessment, BX9IAS.

7.5 HMRC has recently reviewed the wording of the standard letter issued to inbound assignees. It is proposed that the new letter will include links to important information about residence, overseas workday relief and remittances.

7.6 Forum members suggested that a line be included advising customers to share the letter with their agent. HMRC confirmed that where a valid 64-8 is in place, a copy of the letter will be issued to an acting agent. Another suggestion was too include reference to situations where personal allowances are not due.

Action Point – HMRC to circulate the new letter, with electronic links, to Forum members.

8 AOB

8.1 A forum member raised a question about restricted stock units. Philip Paur agreed to raise the issue with the HMRC Employment Related Securities forum.

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 – 4 February 2015

No	Question	Answer
1.	**Qualifying Accounts** If an amount is credited to the account which is in fact a refund of an expense paid out of the account, is this a prohibited sum? For example, if a utility bill is paid out from the account but is then partly refunded by direct payment back into the account. Our interpretation is that this is not a prohibited sum as it does not represent a deposit by the individual but a refund of an expense paid from the account.	A prohibited sum is defined in section 809RC(6) ITA 2007. A repayment of an expense paid from the qualifying account will be derived (directly or indirectly) from the income that was used to pay the expense in the first place. Assuming that income was not itself a prohibited sum, the repayment will not be a prohibited amount as it is derived from the original income.
2.	**Overseas Workdays Relief** 1) If an individual arrives in the UK during 2014/15 and they are domestic resident in the UK but treaty non resident in the UK 14/15, for overseas workdays relief, does this count as one of the 3 years of residence for overseas workdays relief, or could they claim OWDR for 15/16, 16/17 and 17/18. 2) Can HMRC extend the nominated qualified bank account rules, where an individual receives RSUs or a bonus after OWDR has ended, but the bonus and RSUs still qualify for OWR as they relate to the earlier period when OWR was available. If not we are in a position of having to tell clients to set up an account for a bonus, set up an account for RSU vest so that they do not have to go through the complicated OWDR	1. Section 26A ITEPA 2003 only mentions years of UK residence. Any year in which the individual is UK resident, even if dual resident and treaty non-resident, will count as a year of residence for the purposes of that section. 2. The special mixed fund rule only applies to a year when the individual is eligible for overseas workday relief under section 26A ITEPA 2003 (which mirrors SP01/09 in this respect). HMRC have no plans to extend the period the special mixed fund rules operate.

No	Question	Answer
	calculations, that you have to use if you do not have a qualified bank account. An example: Joe is entitled to OWR for 14/15, 15/16 and 16/17 and has OWDR and a nominated qualified bank account throughout. On 28 February 2018, he receives a bonus that relates to Calendar year 2017, so he can claim OWDR on the bonus period 1 January 17 to 5 April 17 BUT if this is paid into the nominated account, you cannot use the simplified method to calculate OWDR, as April 17 to February 18 wages that have been paid into the account have made the account non qualified, the same applies to future RSU payments.	
3.	**High Income Child Benefit Charge** We have a query in relation to the High Income Child Benefit Charge (HICBC) and whether it can potentially apply to foreign child benefit (assuming adjusted net income thresholds exceeded etc). UK child benefit is exempt income by virtue of its inclusion in Table B of s.677 ITEPA. Foreign child benefit (e.g. Kindergeld in Germany) is also exempt income as s.681(2) extends the exemption to foreign equivalents of benefits listed in Table B. The HICBC in s.681B is a standalone income tax charge on child benefit arising in the tax year. Condition A states "P is entitled to an amount in respect of child benefit for a week in the tax year". Condition B mirrors this for the claimant's partner. The term "child benefit" in s.681B is not defined, so it is not completely clear from the wording whether this is purely UK child benefit (as defined in Table B, i.e. claims under SSCBA 1992) or if it is child benefit in general (i.e. including foreign equivalents such as Kindergeld). Further provisions in s.681D and s.681E specifically refer to SSCBA provisions (e.g. claimants not living with children and the election not to receive UK child benefit payments). The term "week" used throughout the chapter is also referring to the UK child benefit	The High Income Child benefit charge (HICBC) only applies to UK Child Benefit.

No	Question	Answer
	period, which determined weekly, with each week starting on a Monday (s.681H(3)). Nor is there any suggestion in the Foreign Pages of the Self Assessment return than individuals should be self assessing foreign child benefit to the HICBC. Based on the overall contents of the chapter and the purpose of the charge, it would appear that "child benefit" only means UK child benefit within the definition in Table B. Foreign equivalents would therefore be ignored. Do you agree?	
4.	**Termination Payments** **1 - New para 2.6: employee told not to work during the notice period, i.e. 'garden leave'.** Non-resident individuals who have been working outside of the UK may be put on garden leave while on assignment. They may return to the UK and spend all or part of their garden leave period in the UK. If the individual is regarded as tax resident for this period, the earnings will be liable to UK tax under S15, ITEPA 2003. However, the updated Commentary states that the earnings for a period when the employee is told not to work are regarded as 'derived from the State where it is reasonable to assume that the employee would have worked during the period of notice. … In most cases this will be the last location where the employee worked for a substantial period of time'. a- Our understanding is that if the employee was treaty resident in the treaty partner country immediately prior to being put on garden leave, then by virtue of the provisions of Article 15(1) the UK's taxing rights over the remuneration received for the garden leave period is restricted to taxing any UK workdays the employee would have had had the employment not been terminated and that where either no duties would have been performed in the UK or any duties performed would have been exempt under Article 15(2), no UK tax would be payable	**1)** a- No – the provision preserves a Source State right to tax and does not in any way limit Residence State taxing rights. If the individual has returned to the UK when the garden leave payments are brought into charge to UK tax then we are taxing as the State of Residence. The UK would retain the right to tax all remuneration but how much is actually brought into charge will be determined by UK tax law. b- The look back period should be long enough to be a reasonable guide as to where the duties would have been performed. As a rule of thumb 12 months is probably enough in most cases but there is no reason why a longer or shorter period could not be considered if it gives a fair outcome. c- I think it depends on the circumstances. If these clearly indicate that a person would not have continued to work in a particular State even if the employment duties had continued then it may be difficult to assert source State taxing rights in that State. However, if it is not clear where any duties would have been performed if the duties had carried on then it may be reasonable for paragraph 2.6 to apply. Looking back where duties were performed would then be as fair way of allocating taxing rights on the income as any other. **2)** d- I think this needs more information about what is meant by a contractual PILON. A PILON is generally a form of damages for not getting a period of

No	Question	Answer
	notwithstanding the UK domestic law position. Please confirm that HMRC agrees this analysis. b- Assuming that HMRC agrees the basic analysis outlined in a above, please let us have any comments you may have regarding how long the 'look back' period should be in order to ascertain whether any of the duties would have been performed in the UK, e.g. the length of the garden leave period (so if the garden leave period is 3 months, the 'look back' is three months), 12 months, some other period. c- In some cases individuals who have completed an overseas assignment may be put on garden leave as there is no job for them to go to either in the UK or overseas. In this case it is not clear how the guidance in paragraph 2.6 is to be applied. The individual would not have continued to work in the assignment location as the assignment has come to a natural end. Is it HMRC's view that if the employee was expected to return to the UK at the end of their secondment that the remuneration for the garden leave period should be regarded as derived from the UK? If so, what is the position where the secondment agreement is either silent on the question of where the employee is expected to work after completion of the assignment or the agreement makes clear that the employee could be sent anywhere? **2- New para 2.7: severance and other payments an employer is required to make by law or contract** d- Please confirm that the guidance in new para 2.7 will be applied to 'contractual Pay In Lieu Of Notice (PILON)', i.e. a payment made to an individual where the individual's contract of employment states that the employer may make a payment in lieu of allowing the individual to work their notice period. e- Please confirm that where a redundancy payment is made and it is calculated by reference to total length of service, the payment received will be regarded as for the last 12 months of employment rather than the total period of employment, i.e. that this would not be regarded as falling within the exception of 'Absent facts and circumstances indicating otherwise …'.	notice that is contractually required and so not normally something with the same character as redundancy payment. It is possible that the contractual terms does give it the same nature but I am not sure why it would make much difference. The only difference in treatment between paragraphs 2.6 and 2.7 is that paragraph 2.7 has a rebuttable presumption that sourcing it over the last 12 months is a reasonable approach. e- In the absence of any facts or circumstances indicating otherwise we would expect to regard the payment as for the last 12 months of the employment. If the payment is clearly referable to the total length of service then this could be an indicator that allocation by reference to the last 12 months of employment only may not be appropriate. If the pattern of the employment was consistent over the whole period, it may not make any significant difference what period is used. f- I think this will be something that is determined by the facts. Once it has been established why it is being paid then the most appropriate way to treat it will follow from that. If the payment is more like a redundancy payment than anything else then paragraph 2.7 may be most appropriate. **3)** g- The commentary provide guidance on payments for a wide range of damages. Whether any payments for damages that are not covered by the commentary fall within Article 15 will be something that can only be determined once the nature of the damages is identified. Given that we are looking at damages paid because a contract of employment has been violated it seems likely that most damages will relate to the employment. h- The Resolute Management Services Ltd v HMRC case established that the test is whether a payment taxed under s401 ITEPA has sufficient connection to the employment to fall within Article 15. The commentary has now provided more details of what types of payment have that sufficient connection to the employment. i- It depends on the facts. As such I would think that if no facts can be established, Article 15 will be appropriate in the absence of any facts and circumstances indicating otherwise.

No	Question	Answer
	f- Please confirm whether HMRC regards non-statutory redundancy payments as falling within new para 2.7 even though the employer is not required by law or contract to pay more than statutory redundancy pay. If HMRC does not regard non-statutory redundancy payments as falling within new para 2.7, please advise which paragraph of the guidance HMRC will seek to apply. **3- New para 2.8: damages and other payments made because the contract has been violated** g- Our expectation is that the updated Commentary intends most damages payments to fall within Article 15 rather than Article 21. Please confirm. h- In addition, our expectation is that HMRC will regard most payments falling within S401, ITEPA as falling within Article 15 including and in particular 'compensation for loss of office'. Please confirm. i- On the basis that we have understood the position correctly, this suggests that compensation for loss of office will 'be treated like the remuneration that these damages replace'. In many cases it will not be possible to determine what remuneration a compensation for loss of office payment is intended to replace. The amount paid may have been the subject of protracted negotiation. The employer may have agreed to pay more than they would wish in order to bring the matter to a conclusion, the employee may settle for more or less than the employer would settle for depending on the advice they receive and their negotiating skills. Is HMRC able to provide any guidance on the factors we should look at to ascertain what remuneration a compensation payment is treated as replacing and therefore which State or States this type of payment is derived from? **4- Interaction between different paragraphs**	**4)** j- I agree. The commentary appears to be looking at where duties were performed as a guide to where they would have been performed has they continued. As such garden leave does not assist and should be disregarded. If there employment finished with a long period of garden leave then taking the last 12 months of employment as ending with the start of the garden leave will enable a reasonable estimate of where duties would have been performed to be made. **5)** k- I am having some trouble identifying what this question relates to. There was an expat meeting on 21st June 2012 and the minutes are in the archive. However, there doesn't seem to be anything on termination payments in the minutes. Does it relate to the January 2012 minutes where a question was raised regarding the memorandum of understanding in force between Germany and the UK where we confirmed that the memorandum would not apply to any other treaties? I would agree that the minutes are not particularly well drafted but given that HMRC has never taken the view or had any practice that all termination payments fall outside the Employment Income Article I can't see how the minutes could give rise to any legitimate expectation that anything else was meant by this. If anyone considers that they have a legitimate expectation for a different treatment then it is for that party to make the case that the requirements for creating a legitimate expectation have been met. **6)** l- This memorandum has not been withdrawn and therefore continues to apply. We would not expect it to give a significantly different result to the revised commentary.

No	Question	Answer
	j- There will be occasions when the interaction between different paragraphs needs to be considered. We have outlined above our understanding of how new paragraph 2.6 is intended to apply. In effect our understanding is that the period of garden leave is ignored in determining which State the remuneration paid during the garden leave period is regarded as derived from. Assuming our understanding is correct, we need to understand whether the period of garden leave is also ignored when applying the other paragraphs which refer to, for example, 'the last 12 months of employment' (unused holiday/sick days and severance payments made in accordance with law or contract) or 'the State where the employment was exercised when the employment was terminated' (the reimbursement of pension contributions and post-cessation benefits). In both cases, our view is that the period of garden leave is also ignored for the purposes of applying these other paragraphs. Our rationale is that the relevant paragraphs specifically refer to where the employment was exercised and we do not think the period of garden leave is intended to be included as a period when the employment is exercised. Furthermore, any alternative interpretation would create a mismatch between paragraph 2.6 and other relevant paragraphs. Please confirm that this is your understanding also. **5- Date from which revised guidance is to apply** k- HMRC indicated in previous correspondence on this with John Havard (see attached) that in the absence of a mutual agreement on the point the revised Commentary would be used as the preferred interpretation of the treaty article, despite the fact that the Commentary may have changed. Some taxpayers will have relied on HMRC's previous interpretation (e.g. as set out in the minutes of the Expatriate Forum meeting on 12 June 2012) and consider that they have a legitimate expectation that they should be able to	

No	Question	Answer
	rely on the practice prevailing up to the time the Commentary changed on 15 July 2014. Does HMRC agree that prevailing practice and legitimate expectation should be taken into account in interpreting the operation of treaty provisions in relation to a tax return filed prior to the date a change in the Commentary is agreed by the OECD? Further, if a tax return has not yet been filed but advice was sought and given by HMRC prior to 15 July 2014 (for example in relation to PAYE withholding requirements), does HMRC agree that individuals should be able to reply on the advice given when filing their Self-Assessment tax return? This is most likely to impact individuals whose employment terminated during 2013/14 for whom the normal tax return filing deadline is 31 January 2015 and individuals whose employment terminated between 6 April 2014 and 14 June 2014 inclusive who will file their Self-Assessment tax return some time on or after 6 April 2015. **6- UK/Germany memorandum of understanding** I- As you know, the UK signed a memorandum of understanding with Germany regarding the tax treaty treatment of termination payments on 8 December 2011. Can HMRC please confirm the status of this memorandum bearing in mind that it focuses on a more limited number of possible payments made following the termination of employment than the revised OECD Model Commentary addresses.	
5.	**Statutory Residence Test – Gardening Leave** If there is a full time contract (say for working five days a week Monday to Friday) and a period when the employee is paid to stay away from work and he or she does this outside of the UK then it would seem that the standard hours must count for the purposes of time spent working overseas (and equally if the time is spent in the UK it would be time spent working in the UK). Given the employee does nothing else for the employer under the terms of the contract the	As stated in our published guidance RDR3 HMRC takes the view that 'Gardening Leave' can be regarded as work for the purpose of S26(2) Sch 45 FA13. HMRC's further thinking on this matter is as follows: For the purposes of S28(2)Sch45 FA13, days spent on ‘gardening leave’ are treated as annual leave. These days do not therefore count toward a significant break because they will satisfy S29(1)(b) & 2(b) Sch45 FA13 provided that more than 3 hours’ work would normally have been performed. However, HMRC does not consider these to be

No	Question	Answer
	staying away and (where this is also specified in the contract) not working anywhere else must represent his or her duties and if this is done outside of the UK then it would seem that it must be seen as work taking place overseas. I think from the comment at 3.13 of RDR 3 that HMRC would agree with that analysis. Generally periods when an employee is paid to stay at home are not that long (one to three months). However, where the employee has a key role (and the employer wants to prevent them going to the competitor for a sustained period of time after leaving) the period of time that the employee is paid to stay away from work and not work for anyone else (or at least not specified competitors) can be for a year of even two years. In such a case, if sufficient time during the standard working hours is spent overseas to satisfy the working hours test and all the other conditions are met, would HMRC accept that the employee meets the third automatic overseas test (the corollary of course is that if the time were to be spent in the UK and all other conditions were met the third automatic UK test would be met)?	days on which more than 3 hours work is done and so such days will not count toward the >3 hours workday limits at paragraph S9(d) or S14(c) Sch 45 FA13 unless, as a question of fact more than 3 hours work is done on a day. An individual's physical location for the purposes of the day counting/days of presence rules in the SRT is a matter of fact. For example - midnights spent in the UK by someone who is contracted to work overseas but who has been placed on 'garden leave' and who returns to the UK will count as UK days of presence for the purposes of the 90 day limit at paragraph S38 Sch45 FA13 I have considered the scenario you set out, ie an individual who is on gardening leave for an entire year and I am unable to agree that such an individual would meet the 3rd Automatic Overseas test. They would be required to calculate their reference period in the normal way and as stated above would be able deduct the days spent on gardening leave as such days are treated as annual leave. However, the number of days that can be deducted is restricted to the number of days they would have otherwise worked but for being on gardening leave. Similarly, they would be required to calculate the total number of hours worked overseas. As I see it, unless there were any actual hours worked (which of course would bring into question whether they were on gardening leave at all) the answer would be Nil. This is because there is no notional credit given for the hours that might have been worked but for being on gardening leave. In a very simple example the position would be as follows: **Reference Period** 365 days less Gardening Leave Days <u>240 days</u> (I have used 240 days as it roughly equates to normal working year) Balance 125 days ÷ 7 = 17.85 rounded down to **17**

No	Question	Answer		
		Hours Worked	0	
		Sufficient Hours Calculation	0 ÷ 17 = 0	Therefore the test is not met.