JOINT EXPATRIATE FORUM ON TAX AND NICS: 28 February 2018

Chartered Institute of Taxation, 1st Floor Artillery House, 11-19 Artillery Row, London, SW1P 1RT
Chair: Bozena Hillyer (HMRC)
Secretary: Alan Higham (HMRC)

MEETING NOTE

1. Introductions

1.1 The chair Bozena Hillyer introduced herself and provided background as to her role within HMRC.

1.2 All other attendees introduced themselves.

2. Presentation on the Requirement to Correct (RTC) initiative

2.1 An introduction was given and handouts circulated to the attendees.

2.2 HMRC explained that the Requirement to Correct initiative was announced in 2015 with a public consultation in 2016. The legislation has been slightly later than expected as the General Election split the finance act of 2017 into two. The finance act 2017 received Royal Assent in November 2017 and HMRC published guidance the same day.

2.3 RTC applies to offshore tax non-compliance and covers Income Tax, Capital Gains Tax and Inheritance Tax. It applies to individuals, non-resident landlords, including companies and trusts, including their trustees, settlors and beneficiaries. How the non-compliance came about does not affect the application.

2.4 It is important that customers take action before 30 September 2018 as this is a firm deadline for the provision of information. HMRC will soon be in possession of data from the Common Reporting Standard (CRS) and so they expect it will be much easier to discover offshore non-compliance after this date.

2.5 HMRC expects taxpayers to plan ahead to meet the deadline and will not be allowing leniency if the customer has failed to allow sufficient time to complete the collection of information, for example.

2.6 There will be a significant increase in penalties charged from 1 October 2018, with a maximum penalty of 200% being applied. Any penalties charged will be no lower than 100%. The reduction form 200% to 100% can be brought about by the quality of disclosure. Currently the normal penalty range is 30-50% but after 1 October 2018 this is likely to be around 150% on average. There will be additional penalties if a customer attempts to move their assets to avoid detection and HMRC can publish the details of the most serious offenders.

2.7 There will be an appeal system and customers will be able to claim reasonable excuses, as defined by case law and previous enactments.

2.8 HMRC have drawn the exemptions to reasonable excuse tightly to close off the most obvious abuse.

2.9 HMRC are hoping that the majority of disclosures will come through the Worldwide Disclosure Facility but there are other methods available.

2.10 HMRC stated that links to the guidance will be provided by the forum secretary by email.

Questions

Q. How is the RTC initiative compatible with EU law? For example if a customer has a UK holiday let and a Dutch holiday let, the penalty could be higher for the EU let.

A. Whilst a margin exists, HMRC wouldn't have gone forward with the initiative if it believed it was incompatible with EU. HMRC believe that the big step up in penalties is justified.

Q. Do HMRC have any plans to send comms out more widely?

A. HMRC have a full communication plan and will endeavour to get the message out on websites, social media and the free press. There is, however, no evidence that a large-scale, paid advertising campaign would be able to reach the intended target customer population.

Q. It would be helpful to know what kind of advice HMRC consider to be avoidance. If, for example, a tax advisor advises a client regarding the Statutory Residence Test but HMRC later challenge this interpretation at tribunal and win, could a customer get a penalty?

A. HMRC accept that there are going to be some difficult cases in the future. HMRC are drawing the distinction between advisors who give advice after the avoidance arrangements have been completed and those who were involved in the facilitation. The former would essentially be new advisors and therefore not "interested persons". HMRC would advise that if in doubt customers should contact HMRC or make a disclosure which provides information but claims that there is nil tax due. On residency, the SRT now makes this black and white and so advising a customer that they are non-resident could constitute avoidance if this position is incorrect. There is also mention of established practice in the guidance which means that if something which was previously an established practice is later overturned at tribunal, there would be no failure to correct penalties.

Q. There seems to be a conflict and disconnect between the RTC and PAYE rules. PAYE disclosures cover 4 years and so 13/14 or 12/13 are no longer in the normal PAYE window but it might be within the RTC window.

A. PAYE returns are not included in the listed "relevant documents" within the legislation. PAYE is therefore not covered by the RTC.

3. Update on Deemed Domicile

3.1 Aidan Close of HMRC introduced himself.

3.2 HMRC have spent 2 and a half years working on the changes to Deemed Domicile and the legislation is now in, backdated to April 2017.

3.3 The next steps have been to issue the guidance. If members are wondering where the specific examples are within the guidance, HMRC do not own gov.uk and so must conform to their rules. Gov.uk aim for a reading age of 11 and they are not keen on long FAQs and examples. HMRC have lots of examples when it comes to cleansing of assets for example, so examples are there it's just they cannot all be included on gov.uk.

3.4 HMRC have managed to get the trusts section up in its entirety and external stakeholders are also preparing a series of Q and As aimed at higher levels. HMRC are

hoping that everything excluded from gov.uk can be uploaded to the technical manuals after the summer.

3.5 HMRC have a comms plan in place and feedback will be gathered. They have also been working closely with the Foreign Office and embassies in the Gulf States to provide guidance and information on the new rules.
3.6 All the new guidance for the non-dom changes has now been published on the Gov.UK website and can be found at the following link:

https://www.gov.uk/government/collections/deemed-domicile-changes-from-6-april-2017

Questions
Q. There appears to be a technical issue with the cleansing rules regarding transfers.

A. HMRC are aware of this and it has been discussed. This issue will be solved and covered by the FAQ documents.

4. Update on the changes to Foreign Service Relief

4.1 There are two changes to the Foreign Service Relief legislation within ITEPA and these take effect from 6 April 2018. Essentially termination payments from this date will be split into Post Employment Notice Pay (PENP) and Specific Employment Income.

4.2 PENP will be treated as general earnings with the rest treated as Specific Employment Income. This will apply from 6 April 2018.

4.3 HMRC are removing FSR exemptions for individuals who are resident in the UK when their employments are terminated. Sea farers will remain eligible for exemption under s413 and s414. Residence would be considered under the Statutory Residence Test as normal and we would expect employers to liaise with employees to determine their residency.

4.4 If an employee is terminated early on in a tax year employers should discuss tax consequences with the employee. HMRC would expect any changes to be dealt with via the individual's SA return where necessary if it is determined that the original PAYE treatment was incorrect.

4.5 The legislation had not yet received Royal Assent but HMRC expect that this will be given within the next month with guidance to follow by the start of the new tax year.

4.6 Some examples of how the legislation will work were given as follows: If the customer is not resident in the UK when their employment is terminated then they would receive a full exemption providing they qualify. If they don't qualify for a full exemption then they will receive a proportionate deduction.

4.7 If the customer is UK resident when their employment is terminated then both the exemption and the reduction no longer apply.

Questions

Q. How will the legislation apply if the individual has been repatriated to the UK upon termination and therefore is eligible to claim split year?

A. We would have to look at the split year and consider the appropriate DTA. If the customer is UK resident then we would apply to PENP legislation and apply section 15. In accordance

with that section we wold need to consider whether the payment is attributable to the overseas, or UK part of the split year.

Q. What if s15 does not apply because the payment relates to redundancy?

A. An element would be treated as PENP and taxed, the remaining balance would be treated as Specific Employment Income and the normal reductions and rules will apply.

Q. What will happen if a customer ends up paying withholding tax on everything (double withholding tax) caught as Specific Employment Income?

A. We would apply the relevant DTA to the double withholding tax along with Appendix 5.

Q. If we have a situation where a customer has been terminated then brought back home to the UK. The element treated as PENP is covered by ITEPA and treated as general earnings. Will this be treated as earned over the period of notice? If so then will Overseas Workdays Relief apply? We can also foresee problems with the Specific Employment Income.

A. HMRC will be doing an overview but examples are likely to be limited. HMRC will be looking at any amounts that are attributable to overseas. There will be a pragmatic approach to each case.

Forum members were invited to contact the secretary Alan Higham with any scenarios and questions, including those which have been asked previously but to which answers are still outstanding.

Q. Regarding the OECED guidelines, is the UK still signed up to this?

A. HMRC will need to confirm but they expect to still rely on the OECED commentary.

[POST MEETING NOTE: As far as we are aware, HMRC is still signed up to this and the principles will continue to apply to termination payments.]

5. Briefing on the abolishment of Class 2 voluntary NIC

This item was not included on the agenda at the meeting as HMRC specialist David Cowell was unable to attend. HMRC have agreed to share his briefing with the forum membership via email at a later date.

6. Appendix 5 and trailing benefits, HMRC response and discussion

6.1 HMRC provided background by explaining that an Appendix 5 scheme allows employers to give FTCR (Foreign Tax Credit Relief) through payroll where the individual is liable to pay tax both in the UK and abroad.

6.2 A forum member had previously raised this as an issue as the larger accountancy firms have taken the stance that the Appendix 5 scheme can apply to trailing benefits and HMRC have been asked to clarify if this is the case.

6.3 HMRC explained that they have now received a response from PAYE colleagues and they have confirmed that: HMRC can allow the Appendix 5 scheme to apply to trailing benefits as long as the foreign tax is paid during the tax year in which the income is taxable. Relief can be given through PAYE deductions in that year and not via an end of year adjustment in an EYU. This is consistent with the policy rationale for Appendix 5 to give provisional relief for double taxation via the PAYE system. If the benefits or tax are paid at

any other time, FTCR should be claimed through the employee's self-assessment return. If the employee is suffering hardship because their benefits are doubly taxed it may be possible to request a coding allowance in year by contacting their own tax office.

6.4 Future payments in relation to the same period of employment should not be covered by Appendix 5, such as share options which could be taxed 3 years after the scheme is applied.

6.5 This is the current policy stance and the one which HMRC would communicate if approached.

6.6 HMRC will arrange for the Appendix 5 guidance to be updated if the forum members feel that this would assist the understanding of the issue.

Questions

Q. Can the Appendix 5 scheme cover share options taxed within the relevant year?

A. HMRC would have to confirm but it appears that share options can be included in the scheme as long as they are not future payments and are taxed in the year.

Q. How does this apply to termination payments?

A. HMRC will check and confirm.

Q. It seems that this may cause hardship as customers may suffer double withholding tax and so it would make sense to allow them relief at source.

A. HMRC's PAYE colleagues have considered hardship and as discussed customers should contact their tax office to request a coding allowance if they are suffering hardship.

7. AOB

7.1 Members asked if there are plans for another FTCR (Foreign Tax Credit Relief) sub-group meeting.

7.2 HMRC stated that there are plans for another meeting. The forum secretary confirmed that he would speak to those involved.

7.3 The meeting notes for the last 2 pension's sub-group meetings are still outstanding despite the earliest meeting taking place in May 2016. The meeting chair stated that she will intervene to ensure the notes are provided.

7.4 Members asked if the consultation on STBVs had been concluded. HMRC stated that this is still ongoing as they are still looking into potential issues with employees of a branch and how this interacts with the various treaties.

7.5 There is still an outstanding question regarding NIC on cash incentives. How should they be treated? Are they liable to NIC on a cash receipts basis? HMRC to confirm.

Questions

Q. How will trailing payments exempt under a treaty be considered in the case of the UAE? For example if they were received and then the treaty came into force.

A. HMRC stated that this has been considered by their Operations team but broadly the treaty will not apply retrospectively but from the date in the treaty. It is necessary to look at

the rules in place during the earnings period, not at the date of receipt, to determine taxability. If the law was in force at that time then the treaty will apply. HMRC will speak to Operations and come back with a full response.

[POST MEETING NOTE: At the forum a question was raised regarding the UK/UAE Tax Treaty. James Archer (JA) is concerned the answer given at the forum could lead to some confusion so he would like to take this opportunity to clarify.
Article 26 of the UAE Treaty deals with 'Entry Into Force'. It tells us that the treaty has effect 'with regard to taxes withheld at source, in respect of amounts paid or credited on or after' 1 January 2017; and 'with regard to other taxes, in respect of taxable years… beginning on or after', in the UK's case, 6 April 2017 for income tax other than income tax withheld at source.

JA had interpreted the question at the forum to be one about employment income. As such the relevant article in the Treaty for apportionment would be Article 14. In the case of taxes withheld at source JA thinks Article 14 would apply to income earned before 1 January 2017 if the amount was paid or credited on or after this date, and subject at that point to PAYE, because this is when Article 26 says the Treaty applies. In the case of taxes not withheld at source JA thinks Article 14 would apply to employment income that is taxable in the UK in the fiscal years 2017/18 onwards.]

Q. Can there be any leeway on the timing requirements of getting PAYE corrected by March each year? Employers are finding it very difficult to get this done on time. Also, as EYUs are no longer appropriate this seems to be slightly at odds with Making Tax Digital.

A. HMRC agreed that this should be on the agenda at the next meeting and they will raise this issue with the Operations team.

Q. In regards to STBVs (Short Term Business Visitors) should employers be tracking their employees after they have left the UK to ensure any trailing payments taxable in the UK are caught?

A. HMRC will clarify but it is expected that employers will have an obligation to track any trailing payments.

End of meeting.