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COVID-19: DISPLACED EXPATRIATE EMPLOYEES: STATUTORY RESIDENCE TEST AND SOCIAL SECURITY CONTRIBUTIONS: CORRESPONDENCE WITH FST & HMRC

22 March 2021

Text of a letter containing representations and questions sent on 28 August 2020 to the Financial Secretary to the Treasury and HM Revenue & Customs by ICAEW Tax Faculty and replies dated 10 September 2020 from the Financial Secretary to the Treasury, 22 January 2021 from HMRC on the tax issues and 16 March 2021 from HMRC on social security contributions

This guidance note supersedes TAXguide 06/21 which predated HMRC's reply on social security.

TAXguides are published by the Tax Faculty to provide practical guidance to businesses and tax practitioners on important developments to tax practice and policy.

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COVID-19: STRANDED EXPATRIATE EMPLOYEES: STATUTORY RESIDENCE TEST & SOCIAL SECURITY CONTRIBUTIONS

INTRODUCTION

This guidance note contains correspondence sent by ICAEW Tax Faculty to the Financial Secretary to the Treasury and HM Revenue & Customs, and their replies.

We initiated the correspondence in response to HMRC publishing guidance on coronavirus and the statutory residence test (SRT) as Annex D of Residence Domicile & Remittance Manual RDRM13400 on 17 August 2020 at https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm13400 and on social security *Employees Working Abroad* on 19 August 2020 at https://www.gov.uk/guidance/paying-employees-working-abroad.

Our letters dated 28 August 2020 to the FST and HMRC:

- requested amelioration of the impact of the strict application of the statutory residence test on the remuneration of employees who have been unable to leave the UK owing to covid-19 and made recommendations as to how the this might be achieved, and
- drew attention to the limitations of HMRC's Annex D guidance and suggested further and improved guidance.

In summary, we requested:

- an exemption for displaced workers temporarily working in the UK due to the pandemic;
- a change in law to increase the 60-day Exceptional Circumstances threshold;
- an extension of Exceptional Circumstances to include the 30 workday and 31-day significant break thresholds of the 3rd Automatic overseas residence test;
- an extension of Exceptional Circumstances to cover Workday and Family ties;
- a report on any discussion with the OECD regarding displaced workers;
- further guidance aimed at non-tax professionals on tax, NIC and PAYE, including easements on s690 determinations and to relieve double taxation gross-ups;
- comment on the impact of the pandemic on Appendix 4 reporting;
- guidance on the taxability of remuneration of furloughed employees under domestic law and under treaties.
- guidance on tax treatment of available accommodation unable to be used;
- clarification regarding the 52-week social security contributions exemption and the 52-week continuing liability for displayed workers from non-agreement countries;
- guidance on non-resident directors stranded in the UK after a board meeting;
- guidance on displaced workers from social security agreement countries; and
- guidance in respect of new hires who cannot start work in the relevant country due to travel restrictions.

The FST in his reply dated 10 September 2020 expressed sympathy about the concerns that we raised but said that government did not feel that there was a compelling case for change. He did however ask HMRC to consider our points about providing further guidance.

HMRC's detailed replies dated 22 January and 16 March 2021 include clarifications and explanations that we believe will help expatriate employees and their employers settle income tax and social security contribution liabilities.

TEXT OF LETTER DATED 28 AUGUST 2020 FROM ICAEW TAX FACULTY TO THE FINANCIAL SECRETARY TO THE TREASURY

First, I would like to thank you for your participation at ICAEW Virtually Live last week. I have heard from many of our members who benefited from hearing your thoughts on the future of tax policy, especially following the impact of coronavirus. I hope that we will be able to continue to provide an avenue for you to reach our members in the tax profession working across the economy.

As we collectively begin to return to normal and HMRC specialists are returning to their usual duties, I am writing further to your reply to Frank Haskew dated 24 July in response to our pre-Summer Economic Update representations in which you inter alia commented on ‘Exceptional Circumstances’ in the context of expatriate employees stranded as a result of coronavirus lockdown measures.

I thought it would be useful to suggest areas that still need to be covered following HMRC having updated its guidance, in particular because ‘Exceptional Circumstances’ is too narrow, both in terms of what it covers and the length of time for which it can be applied, to cater for the international travel restrictions that have been imposed.

I have attached a paper (see Appendix 1) that we are sending to HMRC which is a comprehensive summary of issues – from requests to law changes to suggestions on how guidance could be improved for non-tax professionals by adding clarity. These include:

1. an exemption for displaced workers temporarily working in the UK due to the pandemic;
2. a change in law to increase the 60-day Exceptional Circumstances threshold;
3. an extension of Exceptional Circumstances to include the 30 workday and 31-day significant break thresholds of the 3rd Automatic overseas residence test;
4. an extension of Exceptional Circumstances to cover Workday and Family ties;
5. a report on any discussion with the OECD regarding displaced workers;
6. further guidance aimed at non-tax professionals on tax, NIC and PAYE, including easements on s690 determinations and to relieve double taxation gross-ups;
7. comment on the impact of the pandemic on Appendix 4 reporting;
8. guidance on the taxability of remuneration of furloughed employees under domestic law and under treaties.
9. guidance on tax treatment of accommodation unable to be used;
10. clarification regarding the 52-week social security contributions exemption and the 52-week continuing liability for displayed workers from non-agreement countries;
11. guidance on non-resident directors stranded in the UK after a board meeting;
12. guidance on displaced workers from social security treaty agreement countries; and
13. guidance in respect of new hires who cannot start work in the relevant country due to travel restrictions.

I hope that we can in partnership with HM Treasury and HMRC officials support businesses and their displaced workers as we all strive to recover from this unprecedented pandemic.

We look forward to discussing these issues with the relevant officials in due course.

(*Note: a corresponding letter with the papers in Appendices 1 and 1.1 was sent on the same day to HMRC.*)

REPLY DATED 10 SEPTEMBER 2020 FROM FINANCIAL SECRETARY TO THE TREASURY

Thank you for your letter of 28th August on the subject of the Statutory Residence Test (SRT).

In your letter you suggest that the Statutory Residence test (SRT) should be amended so that individuals who have been displaced by the travel restrictions imposed as a result of the Coronavirus pandemic do not become resident in the UK.

The Government is sympathetic to the concerns that the ICAEW has raised, and recognises that individuals will find themselves in situations that they did not plan for which for some will lead to additional tax complexity. However, the Government does not agree that this makes a compelling case for changing the rules. The SRT allows for up to 60 days to be disregarded where an individual is in the UK due to exceptional circumstances, and HMRC have made clear that the Coronavirus pandemic is such a circumstance.

The Government believes that the existing rules provide an appropriate level of protection. Of course, it is in the nature of an evolving pandemic that circumstances may change, but the Government wishes to adhere to the basic principle that an individual who lives in the UK during the tax year should be treated as a resident for tax purposes.

Thank you for your continued support and engagement with the Government at this difficult time. I have passed a copy of your letter on to HMRC for them to consider the points you have raised about providing further guidance.

REPLY DATED 22 JANUARY 2021 FROM HMRC ON INCOME TAX

Thank you for your correspondence dated 28 August 2020. I apologise for the delay in providing a response. As explained to you in our conversations towards the end of 2020, a draft reply was ready to be sent to you in October 2020 but before it was sent, HMRC issued revised guidance which caused me to amend the content of my original draft response.

I have referred the different sections of your letter to different colleagues within HMRC, depending on the nature of the issue being raised. As you have acknowledged, some of the issues had been raised previously and were already under review, whilst others have needed to be considered for the first time.

I am not able to provide responses to all of the issues that were raised in your correspondence at this time, as some issues remain under review. The outstanding issues not covered in my response will have their own responses provided in due course, under separate cover. I am currently liaising with my colleagues to facilitate this.

For ease of reference, I use the numbering system used in the Contents section of your paper of 28 August 2020. …

(*Note: for convenience, the intervening paragraphs of HMRC's letter are included in Appendix 1 below in italics under the headings* Reply from HMRC.)

… We appreciate the feedback provided in your correspondence, and your open and honest dialogue with us. We hope to continue to work collaboratively with you to assist you, your members and our customers during these difficult times, and of course in the future.

If you would like to provide any further feedback, please feel free to contact me…

REPLY DATED 16 MARCH 2021 FROM HMRC ON SOCIAL SECURITY

Thank you for the correspondence of 28 August 2020. Please accept my apologies for the delay in responding in full. I can now provide an update on the Social Security issues you raised in relation to our COVID-19 NICs guidance. A separate response was issued to you on 22 January 2021 regarding the other issues you raised on 28 August 2020.

I have provided a response to each of the questions raised and advice on each of the examples.

(*Note: for convenience, the subsequent paragraphs of HMRC's letter are included in Appendix 1 below in italics under the headings* Reply from HMRC: social security*.*)

APPENDIX 1

COVID-19: DISPLACED EXPAT EMPLOYEES: STATUTORY RESIDENCE TEST AND SOCIAL SECURITY: ICAEW RECOMMENDATIONS AND QUESTIONS

1 Introduction

This paper sets out our recommendations and questions in response to HMRC publishing guidance on coronavirus and the Statutory Residence Test (SRT) as Annex D of the Residence Domicile and Remittance manual RDRM13400 on 17 August 2020 at https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm13400 and on social security *Employees Working Abroad* on 19 August 2020 at https://www.gov.uk/guidance/paying-employees-working-abroad.

2 Executive Summary

We set out in this memorandum areas that still need to be covered following HMRC's publishing its guidance. We therefore request:

1. an exemption for displaced workers temporarily working in the UK due to the pandemic;
2. a change in law to increase the 60-day Exceptional Circumstances threshold;
3. an extension of Exceptional Circumstances to include the 30 workday and 31-day significant break thresholds of the 3rd Automatic overseas residence test;
4. an extension of Exceptional Circumstances to cover Workday and Family ties;
5. a report on any discussion with the OECD regarding displaced workers;
6. further guidance aimed at non-tax professionals on tax, NIC and PAYE, including easements on s690 determinations and to relieve double taxation gross-ups;
7. comment on the impact of the pandemic on Appendix 4 reporting;
8. guidance on the taxability of remuneration of furloughed employees under domestic law and under treaties.
9. guidance on tax treatment of available accommodation unable to be used;
10. clarification regarding the 52-week social security contributions exemption and the 52-week continuing liability for displayed workers from non-agreement countries;
11. guidance on non-resident directors stranded in the UK after a board meeting;
12. guidance on displaced workers from social security agreement countries;
13. guidance in respect of new hires who cannot start work in the relevant country due to travel restrictions.

We also have suggestions as to how the current guidance could be improved by adding clarity for non-tax professionals.

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3 Exempting Remuneration of Displaced Employees

The Australian Government has taken a proactive response to coronavirus and effectively exempted the income of non-Australian resident displaced employees, who are temporarily working in Australia because of the coronavirus, from Australian Tax. Details can be found at: https://www.ato.gov.au/General/COVID-19/Support-for-individuals-and-employees/Residency-and-source-of-income/#Sourceofemploymentincomeearnedwhileworki – see Appendix 1.

Relief is only available if the displaced employee continues working for the employee's foreign employer and does not start working for a related Australian entity.

This proactivity contrasts sharply with the UK approach of mainly issuing an explanation of the current rules. Could HMRC/Government adopt a more proactive approach to relieving the administrative burden of displaced employees temporarily working in the UK for their overseas employer due to coronavirus?

Reply from HMRC: social security

We've considered your suggestion and can confirm that extending the current concession was considered as a result of the pandemic but was found to be at the limit of HMRC's discretionary powers.

Can you please let HMRC know how many customers are affected by this situation?

Could, for example, HMRC issue guidance stating that whilst remote employees continued an overseas employment, albeit remotely in the UK, then HMRC would consider any duties performed in the UK as incidental. They would then under s39 ITEPA 2003, providing the employee remains non-resident, be viewed as performing employment duties overseas and not taxable.

In any event, further guidance on HMRC's view of incidental duties during coronavirus would be helpful. This is particularly relevant as a non-tax professional's view of incidental to overseas duties would be quite different to HMRC strict interpretation.

Reply from HMRC

HMRC released guidance on this on 20 October 2020 (Tax on your UK income if you live abroad), and this can be found on gov.uk at www.gov.uk/tax-uk-income-live-abroad.

This explains that the extent to which general earnings are in respect of duties performed in the UK is to be determined on a just and reasonable basis, as per s41ZA ITEPA 2003.

For non–residents carrying out employment duties in the UK, if COVID-19 has prevented them leaving, HMRC will treat earnings for a day worked in the UK as overseas earnings, if certain conditions are met. Broadly, these are that individuals genuinely have to be prevented from leaving the UK by COVID-19 measures, and they have paid tax on the earnings in their home state. The guidance covers this fully.

Since this guidance was released, we have received several further queries. We provided a verbal update to forum members at the Joint Forum on Expatriate Tax and NICs (Expat Forum) meeting on 10 December 2020, and I provide some of that update here.

We plan to add an appendix to the guidance in the Employment Income Manual (EIM). The purpose of the appendix will be to provide additional clarity for our customers.
(Note: see EIM77045 Appendix 5: Covid-19: considerations for non-resident and non-domiciled employees for 2020/21 at https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim77045 released on 22.1.21.)

I am providing a summary of the expected content of the appendix. I hope that the main principles will remain in the appendix, although I cannot fully guarantee the wording will remain the same, as this will need to be authorised before it is communicated officially.

S41ZA applies to the whole of Chapter 5 Part 2 of ITEPA 2003. The application of the charge to tax, however, is different for residents than for non-residents.

We use s41ZA to determine how much of an individual's general earnings are in respect of UK duties performed in the UK. For non-UK residents, s41ZA determines the earnings that are taxable in the UK. For individuals who are able to make a claim for foreign earnings not taxable in the UK (Overseas Workday Relief - OWR), s41ZA determines the amount of earnings that are taxable on the arising basis and the amount that are taxable on the remittance basis.

The extent to which earnings are in respect of duties performed in the UK is to be determined on a just and reasonable basis. HMRC has accepted, for quite some time now, a time apportionment, based on the number of days worked abroad and in the UK, except where this would clearly be inappropriate for apportioning general earnings.

The guidance clarifies the meaning of 'just and reasonable' in the context of COVID-19 travel restrictions and time apportionment. It explains that if a non-resident is stranded in the UK due to COVID-19, any employment income earned here while unexpectedly stuck in the UK can be justly and reasonably excluded, if taxed in their home state and the other conditions met.

Non-UK residents with employment income from a period when they were stranded in the UK are therefore able to submit a claim through Self-Assessment that this income is not liable to UK Income Tax. They will have to provide evidence that they were prevented from leaving the UK during this period, as well as proof that they were taxed on this income in their home state.

For UK residents eligible for OWR (that is UK resident employees with a period of non-residence within the 3 previous tax years), a day spent working in the UK will continue to be treated as a UK workday, even if they have been prevented from leaving the UK as a result of COVID-19 travel restrictions.

This is because the UK has a claim to tax the worldwide income of UK resident employees but has chosen to restrict that right for those who meet the conditions of section 26 ITEPA, allowing them to receive OWR. This relief allows for employment income which relates to duties performed overseas to be taxable only to the extent that it is remitted to the UK, provided certain relevant conditions are met.

It is a condition of s26(1)(a) that the income eligible for OWR cannot be 'general earnings in respect of duties performed in the United Kingdom'. Therefore, if a UK resident performs duties related to their employment in the UK, even if they are stranded in the UK as a result of COVID-19 travel restrictions, the requirements of s26 will not be met and they will be ineligible for OWR on income earned during those days.

Only the UK can establish any rights to tax the income for the period, or periods, the UK resident taxpayer spends in in the UK. It is therefore reasonable for the UK to charge tax on its residents for work performed in the UK, as no other state will have a claim to tax any earnings for such work.

With regards to taxpayers chargeable under section 22 with a dual contract, the duties of the overseas employment cannot be performed in the UK without removing the earnings from treatment as overseas chargeable earnings (subject to sections 38 and 39). As this is, effectively, an all or nothing charge, section 41ZA is not relevant.

If only incidental duties are performed in the UK, taxpayers can continue to rely upon section 39 where appropriate. If any taxpayers do perform UK duties of an overseas employment during periods in which they were unable to leave the UK due to travel restrictions, they will need to clearly demonstrate that the duties performed were purely merely incidental if they wish to rely on section 39 to avoid a charge to UK tax. HMRC's usual position on incidental duties will remain, in that it is the quality not the quantity of duties which will dictate whether section 39 can apply.

HMRC are not looking to pass comment on individual cases and scenarios, as we may not hold all the relevant facts and circumstances to enable us to do that. However, if a taxpayer could not leave the UK when they intended, because of COVID-19, then they should consider making a claim on their tax return.

HMRC may ask for proof / supporting evidence that individuals could not leave the UK when they intended, and that they left the UK as soon as they reasonably could.

Reply from HMRC: social security

Can you please provide some examples of the scenarios faced by your clients and where you have applied this guidance? If you could provide the number of individuals that are affected so that we can consider the matter further.

4 The SRT

4.1 The Exceptional Circumstances Disregard – A Change in Law is Required

The Joint Forum on Expatriate Tax and National Insurance Contributions (Expat forum) have been waiting for over 2 months for HMRC's response on a number of issues related to Coronavirus and displaced employees. We are disappointed that the guidance published to date is so limited both in scope and clarity.

The guidance does not address the fundamental point that the current Exceptional Circumstances rules are insufficient to deal with the pandemic. We understand that HMRC have expressed the view that the SRT is sufficiently flexible to deal with the pandemic and presumably this is because of the Exceptional Circumstances rules. We, however, disagree, because the Exceptional Circumstances Disregard does not apply in respect of:

- the 30-workday limit on working in the UK for the purposes of the 3rd Automatic overseas residence test;
- the 31-day significant break from overseas work condition;
- the 40-day work tie;
- the family tie; and
- National Insurance.

Certain displaced employees who would have been considered to be non-resident under the 3rd Automatic overseas residence test will now be regarded as resident during the pandemic. This is because the Exceptional Circumstances Disregard does not help them with the 30 workday and 31-day significant break conditions.

We understand that HMRC may feel that, because the SRT incorporated the concept of Exceptional Circumstances into legislation, HMRC does not have the power to relieve this difficulty through guidance. If this is the case, then the law needs to be changed to allow Exceptional Circumstances to apply to the 30 workday and the 31-day significant break thresholds.

Such changes would not make the UK workdays exempt from taxation, but they would prevent an individual becoming taxable on their worldwide income. Being UK resident would greatly increase the complexity of their affairs, especially where they have remained resident in another country. Claiming foreign taxes, in particular, is complex and the tie-break provisions of treaties will also have to be negotiated.

Many of these employees will be employed by UK multinationals. Those businesses will have to deal with this extra complexity and consequential cost when they should be focused on rebuilding their businesses. This extra complexity has been recognised in the OECD's report: '*OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis'* which states:

> *'Exceptional circumstances call for an exceptional level of coordination between countries to mitigate the compliance and administrative costs for employees and employers associated with involuntary and temporary change of the place where employment is performed. The OECD is working with countries to mitigate the unplanned tax implications and potential new burdens arising due to effects of the COVID-19 crisis'.*

The OECD report can be found at http://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/

Could HMRC please share with the Expat Forum the result of their discussion with the OECD?

The pandemic has lasted longer than anyone hoped or anticipated. Could HMRC also consider temporarily raising the 60-day Exceptional Circumstances threshold for as long as travel restrictions continue?

4.2 The 40-day Work Tie

The Exceptional Circumstances Disregard does not apply to the 40-day work tie. Therefore, those displaced employees now working in the UK will have an extra tie to the UK. This may make them UK resident and will entail all the extra administrative burden as explained above.

4.3 The Family Tie

The Exceptional Circumstances Disregard does not apply to the family tie. We think a change in law is required to deal with this. We discuss this further in the section on the Annex D guidance, namely Question 8.

Reply from HMRC

HMRC are sympathetic to the disruption individuals are facing during the COVID-19 pandemic, however we do not have discretion in legislation to relax the 60 day limit for exceptional circumstances.

5 The Annex D Guidance

5.1 Overview

The Annex D guidance is too limited and does not answer the questions that the members of the Expat Forum were expecting. We suggest how the guidance can be improved below.

Reply from HMRC

Thank you for your suggestions on how the guidance at RDRM13200 and the Q&A could be improved for taxpayers. The Q&A and update to the guidance issued in March 2020 to clarify circumstances in relation to COVID-19 that are considered exceptional, are designed to be read in conjunction with the related guidance on exceptional circumstances at RDRM13200 and the SRT rules.

5.2 Limitations of Annex D Guidance

Question 1. Are travel restrictions due to the COVID-19 pandemic counted as exceptional circumstances for the statutory residence test?

Does this supersede the previous advice given to the Joint Forum on Expatriate Tax and NIC? The Minutes of the 5 March meeting state:

> '*11.4 The circumstances have to be exceptional, beyond the individual's control and the circumstances must prevent the individual from leaving the UK. In relation to the coronavirus, we take into account the travel advice issued by the FCO – where this is to avoid all travel, this may meet the criteria for exceptional circumstances. However, current FCO advice to avoid all but essential travel would not meet the criteria. We make a distinction between the two levels in our guidance'*

Reply from HMRC

In relation to question 1, please treat the current published guidance as the most up to date position.

Question 2. What does HMRC mean by closure of international borders?

This question seems to suggest that individuals just need to:

(a) show they were unable to leave the UK as a result of the closure of international borders,

(b) demonstrate that they have made every effort to leave once those restrictions have been lifted.

Can you please confirm that this advice supersedes the advice given to the Joint Forum on Expatriate Tax and NIC. This advice stated that

> '*11.6 Self-isolation is not in itself relevant, it is why the individual is in the UK; the self-isolation may prevent him/her from leaving the UK but that is only one leg to the test for exceptional circumstances'*

Reply from HMRC

In relation to question 2, we do not plan to make any further changes to this answer. Self-isolation is dealt with separately in the Q&A by question 4. We intend to update the answer to question 4 to clarify that exceptional circumstances would cover the self-isolation period after the original planned departure date but not the planned part. This is in line with the previous advice as noted in your correspondence.

Question 3. What happens if I spend more than 60 days in the UK because of COVID-19, will I become UK resident for tax purposes?
It would have been helpful if the answer to this question highlighted when the Exceptional Circumstances do not apply. Is the link in the answer the correct link? A link to the contents of the Manual on the SRT is not particularly helpful.

Reply from HMRC

We have considered carefully the suggestions you have made concerning the link to the RDRM contents page (RDRM11000) in the answer to question 3 and we will change the link to provide more clarity for customers.

Question 5. I've had to work remotely in the UK because I could not get back to my country, do the exceptional circumstances apply to me?
We have mentioned above that we believe the response to this question is misleading. It can be interpreted to mean that if you work 2 hours per day in the UK you are not taxable. We think that HMRC's response: *'The guidance is clear on what counts as a workday, for the purposes* ***only*** *of workday tests within the SRT'* is not helpful. The guidance says: *'Any day on which you work in the UK for more than 3 hours will count as a UK workday, even if they are days which have been disregarded for other tests due to exceptional circumstances'.* This particular Q&A does not explain the position of fewer than 3 hours work per day in the UK. The link in the answer is to the Significant Break guidance and this Q&A does not explain that the workday concept of 3 hours is purely for the purposes of the SRT.

We think the guidance would be improved if it provided a link to an explanation of workdays for tax purposes. Much clearer guidance on what constitutes a taxable workday which is understandable and accessible to non-tax professionals is required in this case.

Reply from HMRC

We do not intend to make any other changes to the published guidance at this time.

Question 7. I came to the UK to support my vulnerable family members who needed assistance during the COVID-19 pandemic. Would this be considered an exceptional circumstance?
The answer does not really answer the question, as it basically states that HMRC consider all facts and circumstances. We should welcome further explanation as to the implications of: *'Whether or not the impact of those circumstances is exceptional to you, will depend on the facts and circumstances of your case'.*

The answer states that '*You will need to be able to demonstrate why it was necessary for you to come and remain in the UK to provide support for a vulnerable member of your family'.* The general public would consider, in the light of lockdown, that it was reasonable to return to the UK if their family was here. Is this sufficient to make the impact 'exceptional' in HMRC's eyes? What actual evidence will HMRC be requesting? We hope that HMRC will deal with such cases sympathetically.

Reply from HMRC

Regarding question 7, you asked about the evidence required to demonstrate why it was necessary for individuals to come and remain in the UK, and how HMRC will handle cases. We can confirm that each claim will be looked at on a case by case basis and that all cases will be handled in line with the HMRC Customer Charter. We are considering your suggestion of providing examples of evidence that may be required to support claims for exceptional circumstances.

Question 8. For the purposes of the family tie, are children under 18 years old still considered in full-time education although schools were currently shut due to the COVID-19 pandemic?
The answer correctly explains how the current legislation works. The issue is that we do not think it is reasonable that a child stuck in the UK due to travel restrictions is not covered by the Exceptional Circumstances. We believe that HMRC should take a more compassionate approach rather than merely stating that: *'If due to travel restrictions a child in full time education spends 21 days or more in the UK outside of term-time they cannot be treated as non-UK resident (assuming they are otherwise UK resident) for the purposes of the 'family tie'. This is because these days are not covered by the exceptional circumstances exception.'*

We consider that greater flexibility is required and that this could be achieved by amending the law to enable Exceptional Circumstances to apply to this family tie.

Reply from HMRC

Regarding question 8, you have made a request for parliament to change the SRT legislation in this area. The Government's position regarding changes to the SRT is set out in the letter of 10 September 2020 from Rt Hon Jesse Norman MP, Financial Secretary to the Treasury, to Anita Monteith, ICAEW. (Note: reproduced above.)

Question 9. I am normally non-resident for UK tax purposes. My company have asked me to come to the UK to work because of COVID-19. How will this impact my residence status?
We think this question also suggests that an individual is only taxable if they work 3 hours per day in the UK. If considered in isolation, this answer is misleading. It could be improved by mentioning the basis of taxation of remuneration for the performance of duties in the UK or having a separate question which deals with this.

Reply from HMRC

We do not intend to make any other changes to the published guidance at this time.

Question 16. I live abroad with my family and I am treaty resident in an overseas country. Will there be any impact on me as I have been stranded in the UK due to travel restrictions?
The answer to this question is potentially misleading because to avail yourself of the tie break tests, you have to remain domestically resident in the other country. In most cases this will not be an issue because the individual would have remained domestically resident in the other country. Despite this, in certain circumstances this would not necessarily be the case. We think this possibility should be mentioned for clarity.

Reply from HMRC

We do not intend to make any other changes to the published guidance at this time.

Question 17. How will the employment article within a treaty be applied while I am working in the UK but for an overseas employer?
We have mentioned above that we do not believe that this guidance is particularly helpful and we have quoted the OECD guidance regarding sickness. We note the response to this was that, *'There is no adjustment to the interpretation of the treaty in relation to the Income from Employment article. Following the existing guidance in the Commentary on Article 15, only days of sickness that prevent departure can be disregarded when calculating the 183 days.'.*

We think that it would be useful to have more guidance on this point. For example, where a person has undergone cancer therapy and is shielding from Coronavirus in line with Government guidelines: would this constitute 'sick' for this purpose? Equally if an employee is staying in the UK due to the illness of a family member, would that be considered sickness for this test?

We note that with respect to treaty residence, the *OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis* states that: *'Because the COVID-19 crisis is a period of major changes and an exceptional circumstance, in the short term tax administrations and competent authorities will have to consider a more normal period of time when assessing a person's resident status'.* Could HMRC please explain how they intend to follow this suggestion?

Reply from HMRC

We do not intend to make any other changes to the published guidance at this time.

6 Suggestions for further guidance and improvements

6.1 S690 Determinations

Many s690 determinations that were issued will now, with hindsight, be invalid due to stranded employees working in the wrong country. Could HMRC consider a temporary measure of allowing employers to adjust the determination percentage as they discover more accurate data regarding the location of their employees? There would obviously need to be an audit trail of why any revised percentage was used and the guidance could cover records that HMRC would expect to be kept if an employer used such a concession.

Reply from HMRC
HMRC published updated guidance at www.gov.uk/guidance/new-employee-coming-to-work-from-abroad on 20 October 2020.

This confirmed that, if there is already a s690 agreement with HMRC in place, a customer will be able to ask to amend it, if the measures that have been introduced to stop the spread of coronavirus mean an employee has been unable to leave or return to the UK.

This will mean if the employee:
- *has been unable to leave the UK in the 2020-2021 tax year, PAYE can be operated on 100% of their earnings (or another reasonable estimate)*
- *is unable to return to the UK indefinitely, UK tax could be reduced or may not be due, depending on the employee's circumstances.*

As you know, several other queries have been raised regarding s690 determinations, and we are reviewing these. We recognise that there are problems that need addressing with these, and we are trying to address these problems as soon as we can. When we have updates to provide, we will provide them to the wider Expat Forum membership for greater coverage.

6.2 Appendix 4 Reporting

It would be helpful if HMRC could confirm the position for Appendix 4 reporting. This guidance should answer the following questions:
1. Whether the normal thresholds should be applied to this year's reporting?
2. When counting days of presence, can days that qualify for Exceptional Circumstances be omitted?
3. Additionally, can days of sickness be omitted in line with the OECD guidance on article 15 of the model treaty?

Reply from HMRC

We have received similar queries via the Expat Forum membership, and provided similar updates to our members, via the forum meeting, on 23 September 2020.

For clarity, when looking at the method of counting the 183 days for individuals affected by COVID-19, the usual exceptions continue to apply. There is no intention to make any adjustments to the interpretation of the model treaty, in relation to the Income from Employment article (Article 15).

Following the existing guidance in the OECD Commentary on Article 15 (and in the Appendix 4 agreement itself), days of sickness that prevent departure can be disregarded when calculating the 183 days. At the Expat Forum meeting on 10 December 2020, I confirmed that periods where an individual is forced to self-isolate will count as days of 'sickness' for the purpose of counting the 183 days. As with all exemptions/relaxations, individuals should ensure they have evidence to support any position they take.

The length and impact of the pandemic is constantly changing, which could lead to the position on this needing to be re-assessed.

6.3 PAYE and Displaced Employees

In our experience, employers have been surprised to discover where some of their employees have been working. Employers expected their employees to work remotely at home in the work location. For example, if they were working in Spain, they would expect them to work remotely but still in Spain.

We presume that the normal rules for determining whether a PAYE obligation would apply are in point where, for example, an employee who is usually based in Spain works in the UK either because of family tie or being stranded due to coronavirus. In other words, if the employer did not have a PAYE presence, there would be no PAYE obligation. Does HMRC agree?

If the employer did have a PAYE presence would HMRC expect PAYE to be withheld? Would HMRC consider making a statement regarding waiving any penalties due to the pandemic where an employer corrects the position within a reasonable time?

If the employee remained subject to Spanish withholding on the basis that they were Spanish resident and normally working in that country, would HMRC consider any easements to ease the double withholding. For example, would HMRC in these unusual circumstances allow the employer temporarily to pay the excess tax arising from the double withholding without the need for a gross-up or a loan agreement? This could be on the proviso that when foreign tax credits are claimed on the Spanish and UK returns, any refunded tax that was originally paid by the employer is paid back to the employer.

Could the payment of any excess tax due to double withholding be viewed as a business expense? Double withholding could equally apply because a UK based individual was stranded in another country due to lockdown. Again, in such circumstances will HMRC consider relaxing the strict rules to allow the double withholding to be resolved as explained above without requiring extra gross-ups or loan agreements?

We are sure that HMRC will appreciate that it will be easier for employers, employees, agents and HMRC if positions are agreed so that any PAYE adjustments can be made in-year.

Reply from HMRC

If there is no PAYE presence for an overseas employer in the UK, there will be no requirement to operate PAYE. Where the employer does have a UK presence, PAYE should be operated if the employee is working in the UK for an employer with a PAYE presence.

We would need to have clarity on what penalties may be in point before we could consider this point further.

The circumstances of the pandemic continue to change, with individuals' own specific circumstances dictating their reasons for displacement. We would want to ensure that the correct amount of tax was paid for each individual and would need to consider the circumstances of each case before considering whether any easements are appropriate.

With regards to double withholding tax being considered as a business expense, we assume this is in terms of a deduction under section 336 ITEPA 2003. This is not appropriate, as it is not an expense incurred in the performance of duties – it is incurred as a result of being paid for performing duties and being subject to tax on those payments, but it is not incurred in the performance of duties.

6.4 Chargeable Overseas Earnings s23 ITEPA 2003

For earnings to qualify as 'chargeable overseas earnings', no employment duties should be carried out in the UK. Where, for example, an individual has a board role overseas and that role is normally carried out wholly overseas, provided the necessary conditions are met, i.e. being UK resident, being non-UK domiciled, the s24A restriction not applying etc. If such an individual, due to coronavirus travel restrictions, now has to perform that role remotely from the UK, for example, by dialling in to board meetings, what is the impact? Will HMRC accept that due to the exceptional circumstance of this pandemic, only earnings for the period during which work was performed in the UK should be taxable?

Reply from HMRC

For taxpayers seeking to apply section 22, work carried out in the UK for a foreign employment stops the earnings from the overseas employments being 'chargeable overseas earnings.' The whole of the income from the overseas employment would therefore be brought into UK charge.

The test at section 23 applies to earnings for a particular year – see section 23(1). If the earnings from the overseas employment are not factually capable of being chargeable overseas earnings for a particular year, that does not mean the same would apply in the next year, if the taxpayer is then capable of performing the duties of that employment abroad. The landscape of the pandemic changes frequently, impacting on the travel restrictions that may or may not be imposed on taxpayers.

The treatment of the earnings from an overseas employment for the tax year 2020-2021 is not determinative of the treatment for other years, if the facts show that the duties of the employment are wholly performed overseas in those years.

6.5 Taxation of Payment for Periods when Furloughed

6.5.1 Employees Treaty Resident Overseas

If an employee is unexpectedly stranded in the UK but furloughed, does HMRC agree that as the individual is not working, any remuneration for the furlough period is not taxable in the UK if the employee is treaty resident in the overseas country. This is because the remuneration is not for the performance of duties performed in the UK and so cannot be taxable under article 15(1) and article 15 (2) does not apply.

Additionally the '*OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis'* states that *'Where a government has stepped in to subsidise the keeping of an employee on a company's payroll during the COVID-19 crisis, the income that the employee receives from the employer should be attributable, based on the OECD Commentary on Article 15, to the place where the employment used to be exercised. In the case of employees that work in one state but commute there from another state where they are resident (cross border worker), this would be the state they used to work in'.*
Does HMRC intend to follow this OECD principle?

Reply from HMRC

The OECD analysis of treaties, covered in their article of 3 April 2020, is guidance that we are aware of and use to assist us when looking at such issues. It appears that Section 4 of this guidance, 'Concerns related to cross border workers' seems to be more specific to individuals who are resident in one country and regularly travel/commute across a border to work in a neighbouring country. Any such individuals would be covered by Article 15 (Income from Employment Article).

Paragraph 27, found in this section of the OECD guidance, recognises that there may be some compliance difficulties. In the UK, we have relaxations such as EP Appendix 4 which customers can utilise and, if required, HMRC will provide support through the mutual agreement procedure and endeavour to relieve double taxation.

HMRC would, in general, accept that in applying the Income from Employment article, payments paid by an employer to an employee who cannot work due to COVID-19 circumstances and who has been furloughed should be regarded as attributable to the place where the employment used to be exercised. These costs may be subsidised or met if they qualify for a wage subsidy scheme operated by a government, such as the UK's CJRS.

So if, as in the example given, an individual is stranded in the UK but not working here or treaty-resident in the UK, and receives furlough payments in respect of employment that used to be exercised in the other country, then we would accept that in applying the Income from Employment article those payments would be treated as derived from employment exercised outside the UK.

6.5.2 Non-UK Resident Employees Furloughed whilst in the UK

Does HMRC accept that under s38 ITEPA 2003 furlough pay would be apportioned based on the normal allocation of workdays that applied before furlough?

S38 ITEPA 2003 only applies if the *'person ordinarily performs the whole or part of their duties of employment in the United Kingdom'.* This is presumably because if a person does not perform any duties in the UK, the allocation of any earnings is not relevant. Consequently, if a displaced employee is furloughed in the UK when they have not performed any duties in the UK, the furlough pay would not be taxable provided the employee remained non-UK resident.
Does HMRC agree with this position?

Reply from HMRC

HMRC would only look to accept that an adjustment would be relevant if a UK company pays the furlough payment to a non-resident in circumstances where we are satisfied, under the SRT, that individual is non-resident within the year in question. Article 15(1) states that, salary paid to a resident of a country, in respect of an employment exercised in the country of residence, is taxed in that country unless exercised in the UK. In such a scenario, if the taxpayer is non-resident, then Article 15 (1) would apply. HMRC would need to look at the circumstances of each individual case, due to the conditions of the SRT, before being able to decide how to apply Article 15 in each case.

The UK has signed up to several treaties with other governments and, as such, HMRC will abide with the conditions within the treaty and apply them accordingly.

6.6 Accommodation

Where a worker is provided with accommodation overseas but they cannot use that accommodation due to coronavirus travel restrictions, will HMRC view the accommodation as unavailable and consequently non-taxable whilst the travel restriction apply?

Reply from HMRC

We know that the pandemic and its impact on individuals can vary dependent on a large number of variables. These variables include the dates, restrictions in place at specific periods of time, locations etc and all variables can and have changed on a frequent basis.

Should an employee consider that their employer provided living accommodation is not, or has not been, available to them as a result of coronavirus travel restrictions, we will consider and review each case on its own individual merits.

7 Social Security

7.1 The guidance on Employees returning to the UK from non-agreement countries (old NI132 provisions)

We note that HMRC published Coronavirus guidance in respect of employees returning to the UK on 19 August 2020. The guidance at: https://www.gov.uk/guidance/paying-employees-working-abroad states that:

> *'If the duties are incidental to overseas employment such as a briefing or further training for that employment then treat the employee as still abroad'.*

It would be helpful if HMRC considered temporary relaxing the duties considered as incidental as explained in *'Section 2 Exempting remuneration of displaced employees'.*

Reply from HMRC: social security

Although you refer to section 2, we assume you are referring to section 3. We've considered your suggestion and can confirm that extending the current concession was considered as a result of the pandemic but was found to be at the limit of HMRC's discretionary powers.

Can you please let HMRC know how many customers are affected by this situation?

Could HMRC also consider temporarily extending the 6-week concession highlighted in the guidance for employees solely working in the UK due to the coronavirus? If HMRC feels that they cannot do this by guidance, then a change in law will be required.

Reply from HMRC: social security

We've considered your suggestion and can confirm that extending the current concession was considered as a result of the pandemic but was found to be at the limit of HMRC's discretionary powers.

Can you please let HMRC know how many customers are affected by this situation?

It is unfortunate that the guidance regarding the 6-week concession was only published on 19 August after the 6 weeks has passed. It would have been more helpful to have published this at the start of lockdown. Please would HMRC confirm that any employers who were unaware of this concession may amend any payroll submissions already made.

Reply from HMRC: social security

Yes, current legislation provides that any employers who were unaware of this concession may amend a return already sent to HMRC, either in year or after the tax year has ended. If the adjustment results in an overpayment to HMRC, then the employer can either make the repayment to the employee themselves or write to HMRC to ask us to do so.

The guidance would be improved if there was more of an explanation or a link to a more detailed explanation of what is an incidental duty for NIC purposes.

Reply from HMRC: social security

Can you please provide some examples of the scenarios faced by your clients and where you have applied this guidance? If you could provide the number of individuals that are affected so that we can consider the matter further.

In addition, HMRC guidance suggests that any individual who returns to the UK for temporary duty and then returns to work overseas again should be assessed for a further period of 52 week liability under Regulation 146 SSCR 2001. Can HMRC confirm that a return to the UK for a limited period in relation to Coronavirus will not result in an individual becoming assessed as resident/ordinarily resident in the UK again (regardless of any UK ties) even where the UK employer condition is met?

Reply from HMRC: social security

HMRC would need to consider each case on its merits. There will be instances where an individual would be ordinarily resident, but that assessment should be made on the circumstances of the individual as it would for anyone, not just those using the easement.

We also believe that the guidance needs a number of examples to help support businesses at this difficult time including confirmation of the position relative to individuals who may never have fallen within Regulation 146 as not employed by an UK employer, but who have maintained UK ties when working wholly overseas and have been locked down in the UK for periods of more than six weeks.

Reply from HMRC: social security

You refer to 'not employed by a UK employer'. However Class 1 NIC liability under Regulation 146 of SSCR 2001 only arises when:

(a) the employer has a place of business in the UK;
(b) the earner is ordinarily resident in the UK; and
(c) immediately before the commencement of the employment the earner was resident in the UK.

If the individual has no UK employer then there would be no liability to pay Class 1 NIC for 52 weeks, when going abroad.

Examples
We should welcome HMRC's comments on the following scenarios.

Reply from HMRC: social security

In all these examples we have answered based on NICs residence rather than tax and have assumed these individuals are not working in an EU, EEA Country or Switzerland or a country with which the UK has a social security agreement.

7.2 Non Resident Foreign National who normally lives and works abroad in a non-agreement country

7.2.1 Never previously UK resident

Consider a foreign national who has always lived and worked abroad in a non-agreement country for an employer based in that country. The employee normally does not visit the UK but whilst on a short business trip to the UK the employee became stranded here due to the coronavirus. The employee was in the UK for more than 6 weeks but left the UK to return home as soon as flights were available and restrictions lifted.

We hope HMRC can agree that such an employee would not become ordinary resident of the UK because the employee did not come to the UK for a settled purpose. Such an employee would also not be liable to NIC because the employee would benefit from the 52-week exemption. Does HMRC agree?

Reply from HMRC: social security

In this scenario I agree the individual would be covered by the 52 weeks NICs exemption at Regulation 145(2) SSCR 2001.

7.2.2 Previously UK Resident but with a break in tax residence of a year

Where an individual has entered into a foreign employment contract (or has since moved onto a foreign employment contract) but maintains UK ties through family and property Regulation 146 SSCR 2001 may never have been in point but equally Regulation 145(2) may not be either.

Is the individual subject to the six-week concession only and then has to operate a direct collection employee-only NIC) DCNI scheme (as no employer presence in the UK) before returning overseas and ceasing to be liable to UK NIC again as Reg 146 SSCR 2001 does not apply, or, can HMRC accept that in such cases where the individual fell outside of Regulation 146 altogether that no subsequent liability arises and HMRC ignores the brief period of teleworking (as per EU accords)?

Reply from HMRC: social security

If the individual was abroad and had to return to the UK because of COVID-19 the 6-week easement applies and for any subsequent weeks in the UK they would need to operate the DCNI.

Where Regulation 145(2) could be in point, other than perhaps because the individual would be considered NIC ordinarily resident (OR) in the UK (as the individual kept some UK ties in terms of property and family), would HMRC agree that temporary presence in the UK that might lead to an assessment of settled status under normal circumstances can be ignored in the light of COViS-19?

Reply from HMRC: social security

Whether a person is ordinarily resident depends on the individual's personal circumstances. An individual is ordinarily resident in a country if they normally live there, apart from temporary or occasional absences. or have a settled or regular mode of life there. Regulation 145(2) of SSCR 2001 is not appropriate where a person is ordinarily resident in the UK.

As there is no reciprocation in point with the other non-agreement country this individual may now be subjected to a double social security contributions charge unless HMRC provides for a longer concession as 'home' payroll may continue to apply and temporary tele-working ignored in the reverse as far as the home authority is concerned.

Reply from HMRC: social security

If the person returned to the UK because of COVID-19 the 6-week exemption would apply and for any subsequent weeks in the UK they would need to operate the DCNI. As mentioned earlier, extending the existing concession was considered as a result of the pandemic but was found to be at the limit of HMRC's discretionary powers.

7.3 Inward Expats

What is HMRC's position regarding individuals who were in the UK on assignment from non-agreement locations and the operation of the 52 week exception provisions within Regulation 145(2) SSCR 2001? The guidance issued to date is silent.

Reply from HMRC: social security

If the individual satisfies the conditions of Regulation 145(2) SSCR 2001 then it would be appropriate to apply this regulation. If there are cases were you would like us to consider the specific circumstances, then please provide the details.

7.3.1 Individual in the UK on assignment for less than 52 weeks before going home because of Covid

Does HMRC agree that the 52 week exception period would restart on the individual's return to the UK as they have not been in the UK for a continuous period of 52 weeks?

Reply from HMRC: social security

Yes provided they satisfy the conditions under Regulation 145(2) SSCR 2001.

7.3.2 Individual in the UK on assignment for more than 52 weeks before going home because of Covid – NIC has been paid

Does HMRC agree that UK NIC should stop at the point at which the individual ceases to be present and gainfully employed in GB or NI and that the 52 week exception period would start again on return to the UK where continuous residence is broken?

Reply from HMRC: social security

If an individual satisfies the conditions of Regulation 145(2) of SSCR 2001 then it would be appropriate to apply this regulation. NICs would be due from week 53 if they are still in the UK. If they subsequently return overseas to work for a non-UK employer, then the NICs liability would end. Any further returns to the UK would be assessed on the facts that apply at that time.

What criteria would HMRC apply in regards to 'residence' in that regard – would an individual who for example was in the UK for 3 years pre Covid be considered resident and this purely temporary absence under Reg 145(1)(a) or would one have to reassess based on case law in terms of ordinary residence status and any ties in UK/home? What would be the outcome if the individual left the UK after just 15 months on assignment? What would HMRC look at in determining a continuous period of residence from the date of the last arrival into the UK?

Reply from HMRC: social security

In considering whether a person is 'ordinarily resident', we would take into account the following factors:

- *Will the person be returning to UK during the period of employment abroad?*
- *Will the person's family – spouse/partner and/or children – be staying in the UK?*
- *Will the person retain a home in UK during their period abroad?*
- *If the person retains a home, will it be available for their use when they return?*
- *Will the person be returning to UK at the end of their period abroad?*

The list is not exhaustive but answering 'yes' to any, or all, of the above questions is an indicator that the individual remains 'ordinarily resident'. Answers of 'no' would indicate that it is less likely that the person will remain ordinarily resident.

Additional questions we could consider include:

- *How long has the person lived in the UK prior to going abroad?*
- *What will be the purpose(s) of any return visit(s)?*

We would need to consider the facts of the individual cases.

7.3.3 Locally hired foreign national – non-agreement home country

Where a UK employee who is a foreign national goes home (to a non-agreement country) due to COVID-19 and as such there is no suggestion of any reciprocation in terms of concessions the individual may become subject to home country social security automatically. Does HMRC agree

that NIC ceases to be payable as the individual is no longer present or gainfully employed here or would this be considered temporary absence for the purposes of Regulation 145(1) SSCR 2001

Reply from HMRC: social security

Please see the response to the previous question. We would need to consider cases like this on a case-by-case basis.

Can you please confirm how many customers are in this situation?

7.4 Non-resident director attends UK board meeting, gets stuck in the UK so fails the concession

Under the current UK concession for limited attendance at board meetings provisions apply that exempt a non-resident director (NRD) from UK NIC if the attendance in the UK is for a limited period. Where a NRD becomes stuck in the UK having attended a board meeting are HMRC content that it is the period attending the board meeting that is definitive in terms of the concession and where the individual continues to pursue activity on behalf of other 'home country' interests/ employers, that does not result in the concession not being met and those other duties fall within the parameters of Reg 145(2) as applicable?

Reply from HMRC: social security

Information about the NRD Concession can be found in leaflet CA44. If they satisfy the conditions outlined in there it would be appropriate to apply the concession to the board meeting.

If an individual satisfies the conditions of Regulation 145(2) SSCR 2001 then it would be appropriate to apply this regulation for any work undertaken while in the UK. If there are cases where you would like us to consider the specific circumstances, then please provide the details.

7.5 Agreement countries

7.5.1 Current employees

Whilst the guidance published on 19 August 2020 did briefly cover agreement countries and the EU it did not explain for UK based employers how, in practical terms, any concessionary treatment would apply, what evidence of home country cover would be required, and how any healthcare access would be guaranteed and funded.

We are aware that the EU guidance offered some comfort around existing cross border workers, multi-state workers and seasonal operatives and some EU countries has stated that they will ignore temporary tele-working in such cases. Will the UK mirror this for these groups and then for others for whom there was no preCovid-19 cross-border or alternating pattern of work, i.e. individuals who have been caught in another EU/bilateral country while UK insured who were unable/are unable to return to the UK or workers that made the decision to return to families overseas at the outset/during the crisis?

What will be the UK approach to those workers in the UK in those circumstances who remain insured outside the UK in terms of employment/payroll but who have since worked in the UK for the benefit of their foreign employer during the Covid period (and how long would such concessions apply for)?

Some EU countries have negotiated reciprocal deals with near EU neighbours. Has the UK also committed to any such deals and if so for how long, i.e. UK and Republic of Ireland?

As a country of competence will HMRC issue an S1 or should the employee obtain an EHIC? What is the UK position?

While the EU state of work may exempt the individual from social security liability, that exemption may result in healthcare issues as most EU countries link health care to the payment of health insurance contributions (as part of the state social security scheme). Can HMRC issue an S1 in such circumstances to allow the individual to register with a local healthcare provider? Is an EHIC obtainable by an individual with no UK residential address?

Reply from HMRC: social security

We know that it may not always be possible to continue working as before due to COVID-19 related travel and work restrictions. Working patterns may have changed significantly as a result, especially for cross-border workers.

Customers do not need to contact HMRC if their circumstances have not changed – they will continue paying social security contributions (National Insurance contributions in the UK) as before. They do need to contact HMRC if their circumstances have changed, for example they have taken up a new job outside the UK or their country of residence has changed.

The social security coordination provisions in the Withdrawal Agreement and Trade and Cooperation Agreement continue to apply.

If they have an A1 certificate which has expired, they, or their employer, should contact HMRC if they require a renewal, for example if they have been sent by their employer to work temporarily outside the UK and they need to extend their stay. HMRC will assess their eligibility and make a decision on whether the validity of the A1 certificate can be extended.

Please follow the guidance below when applying for a new A1 certificate. An A1 certificate shows that a worker will continue paying social security contributions (National Insurance contributions in the UK) in the country where they normally work while temporarily working in another country, either in the UK, the EEA or Switzerland.

- *If they are working temporarily outside of the UK, they should follow the HMRC guidance on National Insurance for workers from the UK working in the EEA or Switzerland.*

- *If they are working temporarily in the UK, they should follow the HMRC guidance on social security contributions for workers coming to the UK from the EEA or Switzerland.*

More information can be found about working outside the UK, but not in one of the countries listed above, in our guidance on national insurance if you work abroad.

Please note we cannot advise on individual cases without having considered the facts in detail. If an individual is concerned that a change in their situation means that the social security rules of another country apply to them, please contact HMRC.

We will assess each case individually before making a decision on whether UK social security legislation applies and therefore whether the individual can start or continue paying National Insurance contributions in the UK.

Regarding healthcare in the EU, Norway, Iceland, Liechtenstein and Switzerland, please check the relevant guidance from the Department of Health and Social Care and HMRC:
- *Healthcare for UK nationals visiting the EU ;*
- *Information on accessing healthcare for UK nationals and residents living in or visiting the EU, Norway, Iceland, Liechtenstein or Switzerland ;*

- *Apply for healthcare cover in the EU, European Economic Area or Switzerland (CA8454)(Applying for Portable Document S1, E106 or E109 in the EU, Norway, Iceland, Switzerland or Liechtenstein).*

Advice on the issuing of National Insurance Numbers was provided in Employer Bulletin February 2021.

7.5.2 New Hires

Could HMRC provide guidance on the situation where a permanent new hire has had to start working remotely for a UK employer in an EU country. Normally, the employee would have moved to the UK and started working in the UK. They would be subject to UK NIC from day one.

Most EU countries are in general taking the position that during the coronavirus crisis you look at where the duties would have been performed, in this example the UK. Is this HMRC's view?

It is unlikely that the employee will have a national insurance number and, therefore, they will have no visible National Insurance record and is not truly a 'posted worker'. Will HMRC issue an A1 under such circumstances?

What is the National Insurance Number Application process for non-residents and how long does the application process take?

As per the above commentary, while the EU state of work may exempt the individual from social security liability, that exemption may result in healthcare issues as most EU countries link health care to the payment of health insurance contributions (as part of the state social security scheme). Can HMRC issue an S1 in such circumstances to allow the individual to register with a local healthcare provider? Is an EHIC obtainable by an individual with no UK residential address?

Conversely, what is the position of a new permanent hire of an EU employer who was due to work overseas but has started working remotely in the UK. What evidence of home country coverage will HMRC require?

The suggestion to contact an authority for advice from a bilateral or EU perspective is not overly helpful when many are still in lockdown themselves and cannot be contacted and have massive backlogs. Can HMRC offer any more compelling commentary on the approach to bilateral agreement scenarios for 'persons covered' along the lines of the displaced persons scenarios outlined above, especially for local hires who have gone home or to a third country and for new hires stuck in one of the parties to the treaty who are employed by an employer in the other party?

Reply from HMRC: social security

Please see reply to previous question in 7.5.1.

Appendix 1.1: Australian Response to Coronavirus

Salary or wages earned from continuing foreign employment working remotely while in Australia temporarily.

Whether employment income, including salary or wages, you earn is assessable depends on:

- whether it is from an Australian or a foreign source
- whether a double-tax agreement applies (see advice on double-tax agreements).

The source of income always depends on the facts. Usually the place where the employment is exercised is very significant when deciding the source of employment income. However, in certain circumstances other factors may be more significant.

COVID-19 has created a special set of circumstances that must be taken into account when considering the source of the employment income earned by a foreign resident who usually works overseas but instead performs that same foreign employment in Australia.

Working in Australia less than three months

We accept that if the remote working arrangement is short term (three months or less), the income from that employment will not have an Australian source.

Example: Short-term working arrangement for three-month period

Eric is a financial adviser who came to Australia for a holiday on 20 December 2019, intending to go home at the end of January 2020.

He decided not to leave because of COVID-19 but intended to return home as soon as it was safe.

He started working remotely in Australia on 1 February doing the same work he would do in his country of residency for his foreign employer.

The three-month period starts on 1 February and ends on 30 April 2020. It does not matter if Eric is a full-time or part-time employee. His employment income for this three-month period will not be considered to have an Australian source.

End of example

Working in Australia longer than three months

For working arrangements longer than three months, your circumstances need to be examined to determine if your employment is connected to Australia. This includes whether:

- the terms and conditions of your employment contract change;
- the nature of your job changes;
- you start performing work for an Australian entity affiliated with your employer;
- the economic impact or result of your work shifts to Australia;
- your economic employer – the entity for which you are providing services – is in Australia (see Taxation Ruling TR 2013/1);
- you perform work with Australian clients;
- the performance of your work is wholly or to a significant degree dependent on you being physically present in Australia to complete it;
- Australia becomes your permanent place of work;
- your intention towards Australia changes.

In some limited situations your employment income may not have an Australian source. This may be the case if all the following apply:

- the only thing that has changed about your employment is that you are now doing it from Australia as a result of COVID-19;
- there are no other connections to Australia;
- you intend to leave Australia as soon as you are able to do so.

Example: Circumstances of employment change to an Australian source

Jane is an IT professional residing overseas, servicing software applications for her employer.

She can undertake this work remotely anywhere in the world. On 1 March 2020 she returns to Australia temporarily due to COVID-19, continuing to work exclusively for her foreign employer from Australia for as long as she is able.

Nothing else about her employment changes until 1 May 2020. On this date, due to a shortage of work with her foreign employer, Jane begins similar work for a related Australian entity. For this work, she is assigned work by, and reports to, an Australian manager.

The employment income Jane earns between 1 March and 30 April 2020 is foreign sourced as it's not connected to Australia.

The employment income Jane earns from 1 May 2020 is Australian sourced due to the change in her employment circumstances.

From 1 May 2020, Jane's employment income is assessable in Australia, subject to the application of the 183-day exception (explained in the advice on double-tax agreements).

End of example

Example: Retention of foreign source as circumstances of employment remain unchanged

Katie is a graphic designer residing overseas undertaking graphic design work for a foreign employer relating to foreign clients.

On 1 February 2020 Katie came to Australia to visit relatives. However due to COVID-19, she remains in Australia but intends to return overseas as soon as it is safe.

Katie's employer agrees to temporarily allow her to work from Australia performing the same role for her foreign employer.

The only thing that has changed about Katie's employment is that she is temporarily performing the work in Australia until she is able to leave.

The employment income Katie earns – from when she comes to Australia on 1 February 2020 – continues to be foreign sourced.

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