Low Incomes Tax Reform Group.

A voice for the unrepresented.

Office of Tax Simplification – Call for Evidence: Review of hybrid and distance working
Response from the Low Incomes Tax Reform Group (LITRG)

1 Executive Summary

1.1 We are pleased to provide input into this call for evidence reviewing the trends and tax implications of hybrid and distance working. Our comments are based on an increasing number of queries we have received from members of the public in respect of a wide range of cross-border working arrangements.

1.2 Our evidence shows a high level of confusion and uncertainty among unrepresented taxpayers in understanding the tax and related consequences of cross-border working. In particular, unrepresented taxpayers can find it difficult to determine their own residence position and understand the 'source' of income in a cross-border working situation. Social security is also often overlooked and can be incorrectly assumed to follow the tax position.

1.3 In some cases, we expect the complexity and lack of guidance in this area leads to non-compliance, or otherwise decisions taken by employers based on a misunderstanding of the risks involved. We hope that this review will prompt HMRC to fill this general guidance gap so that, should current trends continue, cross-border working generates less of a compliance 'headache' for all concerned.

2 About Us

2.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998, LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and carers.

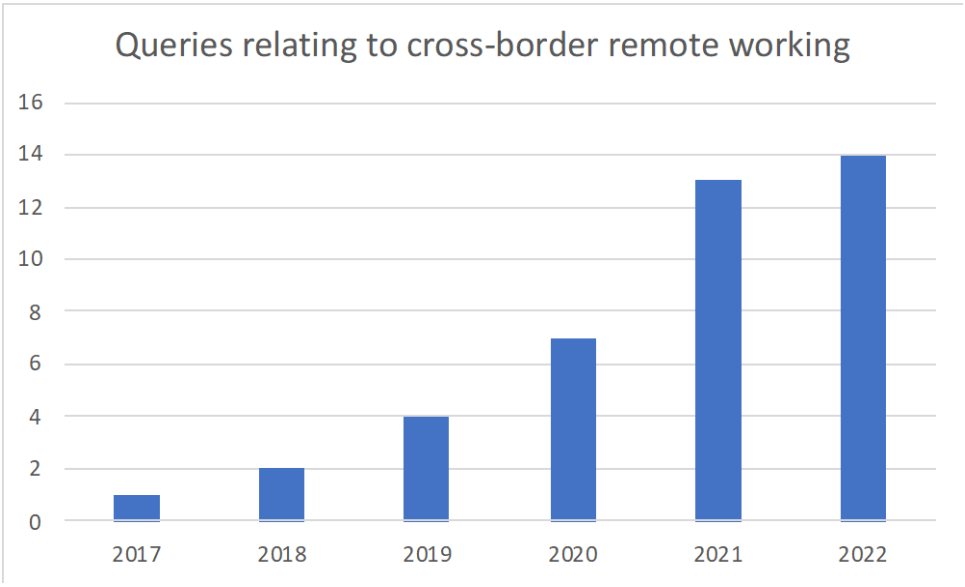
2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and

practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

3 General comments

3.1 Owing to time constraints and the fact that the deadline for this call for evidence has been brought forward, our comments are limited to situations involving some cross-border element. On this topic, we have received an increasing number of queries from members of the public wishing to understand the tax, social security and immigration rules around an existing or proposed cross-border working arrangement.[1] This increase is demonstrated by the below chart:



3.2 Prior to the pandemic, the queries we received on this topic would most often relate to cross-border workers who were resident in Northern Ireland with an employer in the Republic of Ireland (or vice versa). Occasionally, we would also be contacted by self-employed individuals who were resident in the UK with overseas clients (or vice versa).

3.3 Employees with working arrangements across the Northern Ireland/Republic of Ireland border tended, generally, to involve the employee living in one country and physically working in the other, at least for some period of time. However, in line with the general trend of increased remote working, such arrangements now involve a greater proportion of living *and working* in one country for an employer based in the other.

3.4 The types of queries referred to in paragraph 3.2 have continued, but the pandemic has seen a rise in employees wishing to work remotely in a cross-border arrangement involving the UK and other countries across the world, from EU countries to countries in the Far East and Australia. Our

[1] Queries are received via the Contact Us page of our website: https://www.litrg.org.uk/contact-us.

evidence suggests a slight bias towards queries from individuals working overseas for a UK employer, but the sample size is relatively small (in the past six years we have identified 44 queries on the topic).

3.5 The reasons for these arrangements are varied – occasionally an employee normally based in the UK may wish to return to their country of origin, having come to the UK initially because of work. Others had been displaced because of the pandemic and international travel restrictions (in other words, the arrangements were not originally intended by either party). Some will be tempted by the opportunity to work overseas remotely by the lifestyle offered in that overseas country.

3.6 LITRG has responded to the increase in queries in this area by publishing guidance aimed at individuals who are working, or wish to work, remotely for their UK employer while overseas.[1] Since we published this page in November 2020, it has had over 270,000 views and our users have spent an average of around eight minutes on the page (this compares an average page 'dwell time' across all industries of less than a minute). So far in 2022, it has ranked as our second most visited page across our entire website. We have also published guidance aimed at helping unrepresented taxpayers understand their UK social security position if they are self-employed in an international context.[2] We plan to publish further guidance for individuals working in the UK for an overseas employer.

Misconceptions of unrepresented taxpayers

3.7 In our experience from the queries we have received, unrepresented taxpayers find cross-border working arrangements very confusing. This is unsurprising, given the complexity of the issues – not just those involving tax, but also social security, payroll, immigration, employment law, data protection and other considerations. It is generally necessary to consider each of these areas in isolation when identifying the consequences and considerations of a given working arrangement – but a common theme among unrepresented taxpayers is an assumption that everything is aligned.

3.8 Some misconceptions we have seen on this theme are:

- that immigration status determines where someone is taxed;
- that the country where someone is taxed is the same as the country where they are liable to social security;
- that registration status (e.g. being registered in the UK as self-employed), or even simply 'maintaining a UK address', drives a UK tax liability;
- that you can only be tax resident in one country at a time;
- that the location where you pay tax and/or social security is a matter of choice; and/or
- that double taxation is not possible.

[1] https://www.litrg.org.uk/tax-guides/employment/working-remotely-your-uk-employer-while-overseas

[2] https://www.litrg.org.uk/tax-guides/migrants/national-insurance-migrants/international-social-security-self-employed-workers

Residence status

3.9 Another major area of confusion for taxpayers relates to their residence status for tax purposes. In any cross-border situation, the first thing to understand is whether an individual is tax resident in any of the countries involved and, if they are resident in more than one country, where they are resident in accordance with the terms of the treaty (if one exists) between those two countries. This can be a complex assessment: the UK's Statutory Residence Test can be difficult to work through if a person's circumstances do not fall neatly into one of the automatic UK or overseas tests (and even some of the automatic tests can be tricky depending on your pattern of work or presence, or location of your homes). HMRC has recently introduced a 'Check your UK residence status' tool, which is welcome, but it is of limited application when a person's UK residence status is only part of the picture.[1] The tool does not, for example, mention treaty-residence when giving its conclusion, nor does it clearly state the consequences of being either resident or non-resident in the UK.

3.10 The UK's Statutory Residence Test has its benefits in terms of being able to provide a definitive answer in most cases, but this certainty comes at a cost in terms of its complexity. Many other countries have much simpler, but vaguer, approaches to determining residence status (similar to a 'centre of vital interests' test). In addition, the "183-day test" is a common feature of many countries' domestic tax codes as well as many tax treaties (in the context of the employment income article). The Statutory Residence Test does feature a 183-day test but it is only definitive in one direction – so if you spend *fewer* than 183 days in the UK, you cannot assume that you will be non-resident in the UK. This is a major misconception of unrepresented taxpayers.

3.11 However, residence status is just the starting point. For example, if living overseas and working remotely for a UK employer, while spending some of their working time in the UK, some unrepresented taxpayers mistakenly assume that if they are not resident in the UK under the Statutory Residence Test then they will not be taxable in the UK on any of their income.

3.12 Similarly, a common misconception of those working remotely overseas for a UK employer is that provided the period spent overseas is less than six months, then no overseas obligations are triggered. While in many cases six months *will* be the point at which the double tax agreement no longer provides protection from overseas taxes on that individual's employment income[2], it cannot be assumed that no obligation arises at all in the other country prior to that point. For example, there may be payroll, social security, immigration, employment law and corporation tax obligations well before the six-month point.[3] An individual may also trigger domestic tax residence in the other

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[1] https://www.gov.uk/tax-foreign-income/residence

[2] Exceeding six months in a particular country will mean generally mean that the part of the relevant double tax treaty corresponding to Article 15(2)(a) of the 2017 OECD Model Tax Convention on Income and on Capital will no longer be met.

[3] We do not cover these points in this submission, though we do comment briefly on social security at paragraph 3.17.

country before being there for six months (as is possible in the UK in the reverse situation), meaning that they need to consider a potential tax exposure on each source of UK income (not just employment income) against the relevant treaty article.

Income source

3.13 In a cross-border remote working situation, in the context of employment income, the country in which the person physically carries out their duties is generally the principal determining factor in where the income for those duties is taxed. The location of the employer, or the payroll, or the bank account into which the earnings are received – can be relevant in certain situations.[1]

3.14 It can be confusing, therefore, to simply talk of 'UK income', or 'income from the UK' in a cross-border employment context.[2] The correct interpretation, at least from a UK tax perspective, in relation to employment income for these phrases is likely to be 'income for duties performed in the UK' – yet we think that unrepresented taxpayers are more likely to assume that it means 'income from a UK employer' or 'income paid in the UK'. We envisage this misunderstanding could lead to the wrong conclusion of where employment income is taxed, leading to non-compliance.

3.15 Similarly, determining the source of income where someone is self-employed in a cross-border context is not straightforward. UK domestic law says that non-resident individuals are only taxed in the UK on profits from a trade which arise either from a trade "carried on" wholly in the UK, or if "carried on" partly in the UK and partly elsewhere, then the part which is "carried on" in the UK.[3] We are not aware of any public-facing guidance of how to interpret the phrase "carried on".[4] Similarly, a non-domiciled UK resident individual needs to determine where their trade is carried on for the purposes of understanding whether the remittance basis applies to that income.

3.16 For example, suppose a self-employed individual with a UK-based business and UK-based clients decides to relocate overseas and continue this business remotely from the other country – perhaps they also retain a base in the UK from which they work occasionally when they return to visit family. Are their profits taxable in the UK? The law is unclear, and we suspect the lack of guidance in this area is potentially leading to significant non-compliance if the legal answer is 'yes', but this is neither transparent nor intuitive.

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[1] For example, the residence status of the employer is relevant for determining whether the conditions for treaty relief for employment income are met. Whether or not earnings are paid and retained overseas is relevant if the remittance basis of taxation and overseas workday relief applies to the employee.

[2] https://www.gov.uk/tax-foreign-income/residence says "Non-residents only pay tax on their UK income".

[3] ITTOIA 2005, s6(2).

[4] Though https://www.gov.uk/hmrc-internal-manuals/international-manual/intm262200 discusses various case law and the importance of where contracts are made. Double tax treaties often provide protection from domestic charge where no permanent establishment exists.

Social security

3.17 As mentioned above, the social security position is often assumed to follow the tax position – but this is not always the case. The general principle for social security is that you 'pay where you [physically] work'. Although bilateral and multilateral agreements often offer protection from social security obligations arising in a second country for temporary cross-border arrangements (postings) – in order to prevent a fragmented contribution record – it is not entirely clear how these apply in the case where the working arrangement is at the employee's request.

3.18 We understand that if the arrangement is by mutual agreement then it can be considered, in practice, that the employer can agree to send the employee overseas at the employee's request. Nevertheless, explicit guidance on this point would be welcome.

Employer approach

3.19 We have also seen evidence of businesses or individuals taking decisions because of the complexity of cross-border working and a misunderstanding of the risks involved. In one case, we were contacted by an employee who was stranded overseas during the pandemic. The employee was informed by their UK employer, without notice, to 'stop working immediately' (it is not clear whether they were dismissed from their role) because they had exceeded six months in that particular location – despite the individual having received confirmation from the local tax authority that no local taxes were due in that location.

3.20 In other cases, we understand many employers have introduced policies which allow some degree of cross-border working within certain limits (for example, 30 days or six weeks a year), to be agreed on a case-by-case basis. This can be a sensible approach where an employer has the resources to make a realistic assessment of the risk involved in a proposed arrangement.

Conclusion

3.21 In conclusion, the existing landscape points to the need for simplification, as part of a wholesale policy review of how the UK treats remote cross-border working generally. This should be carried out as part of a co-ordinated international effort in co-operation with organisations like the OECD. In tandem, there should be better guidance about cross-border working arrangements (for employees, employers, and the self-employed) so that individuals and organisations can better determine their liabilities, or at least have a better understanding of the risk of cross-border compliance obligations being triggered.

3.22 The general lack of public-facing guidance in this area leaves unrepresented taxpayers confused about, or otherwise unaware of, the issues.[1] Where professional advice cannot be afforded, these

[1] There is some high level guidance published at https://www.gov.uk/guidance/paying-taxes-in-the-uk-if-you-work-for-an-employer-based-in-ukraine aimed at displaced Ukrainian employees in the UK working remotely for their Ukrainian employer.

individuals are forced to make decisions following their intuition. And where the correct answer is not intuitive, non-compliance results – either from that answer being wrong, or a mistaken assumption that no obligations are triggered at all.

3.23 A final observation is in relation to record-keeping. If HMRC decide to run a compliance campaign in this area, we suspect unrepresented taxpayers may be unlikely to have kept sufficient records of their days of presence in the UK and where they are working. For example, the Statutory Residence Test defines a workday as a day on which three or more hours of work is carried out (either in the UK or overseas, as the case may be) – with detailed rules for work carried out during travel to and from the UK. It is likely to be challenging, if not impossible, to reconstruct the necessary detail from emails and calendars several months or years after the event. Where this exercise is simply to demonstrate that no liability exists, this might be a questionable use of resources for both HMRC and the taxpayer. Raising awareness and education will go some way to ensuring that these records are maintained contemporaneously, which is likely to be easier to do and the records are likely to be more accurate.

LITRG
17 October 2022