Working in Ireland

Vahan Tchrakian and Audrey Kean discuss the possible payroll tax pitfalls for UK employers sending short-term assignees to work in Ireland.

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Brexit planning should be in full swing for businesses with operations that straddle, or have any interests in, both the UK and the EU. This untrodden path is difficult to negotiate and the parameters are far from settled. In some cases, Brexit planning has led to increased operations in Ireland and, in this context, we are receiving many queries relating to short-term assignees (STAs) posted from UK employers to work in Ireland and the associated Irish payroll tax obligations.

Advising on these arrangements has become more complex because of recent changes to Irish Revenue practice, with updated guidance having been published in December 2016 (tinyurl.com/irdec2016) and April 2018 (tinyurl.com/irdec2018). The 2018 guidance aims to provide a greater level of clarity after the uncertainty caused by that published in 2016, but it can result in either Irish payroll tax withholding obligations or an obligation to obtain Irish Revenue clearance for UK employers sending STAs to Ireland in some unexpected circumstances.

This article seeks to provide UK employers that are sending an STA to Ireland with an understanding of the circumstances in which:

- they are obliged to register for and operate Irish payroll taxes;
- an Irish payroll tax exemption should be available without a requirement to obtain clearance; or
- clearance must be obtained to obtain an Irish payroll tax exemption.

As well as setting out a summary of the key principles and pitfalls, the ***Decision Tree*** will help UK employers to understand the key considerations. It would be worth discussing the issues with an Irish tax adviser because the area is complex and each case will have to considered on its own facts.

Key points

- An Irish payroll tax exemption can be obtained for three categories of short-term assignees.
- Remuneration must be paid by a non-Irish resident employer for there to be any scope to obtain an Irish payroll tax exemption.
- Irish Revenue 2018 guidance transposes much of the OECD Model Convention in determining the economic employer for Irish tax.
- Less stringent conditions apply to the 60 workday exemption.
- When Irish Revenue clearance is required, employers have 30 days to obtain it.

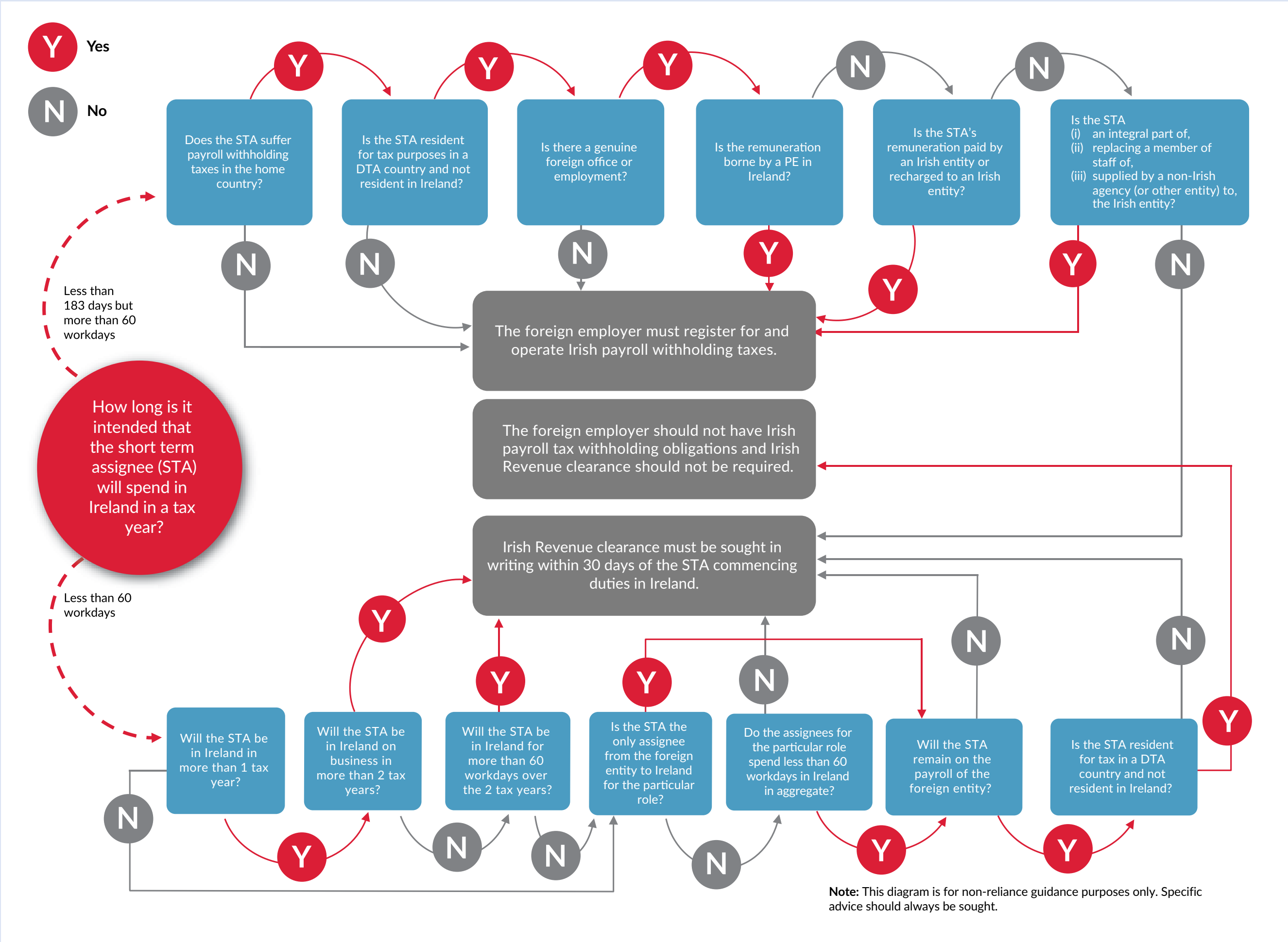
Revised Irish position

For Irish payroll tax purposes, as long as specific conditions are met, an Irish payroll tax exemption can be obtained for three categories of STA: those assigned for less than 183 days, 60 workdays, and 30 workdays (applicable to non-treaty countries and outside the scope of this article). For these purposes, a day in Ireland is one during any part of which the STA is present in Ireland, and a workday is any day in which any work is performed in Ireland. The conditions that must be satisfied to obtain a payroll tax exemption become more onerous as the day count increases, with no scope for an exemption when an STA is in Ireland for more than 183 days in a tax (calendar) year.

The combined effect of the 2016 and 2018 guidance was to instigate significant changes to the payroll tax implications for STAs assigned to Ireland. In summary:

- The 2016 guidance signalled Irish Revenue's intention to look past an STA's formal employment arrangement and adopt the economic employer principle. This was a first in terms of published guidance, but practitioners had been reporting an inconsistency of approach between different Revenue districts with some appearing to look past the formal employment arrangement.
- The 2016 guidance was met with concern by industry and professional groups and the 2018 guidance was, in part, brought in to loosen the strict application of the economic employer principle when the 60 workdays exemption was being relied on. This bears some resemblance to a similar safe harbour from the economic employer principle applied in the UK by HMRC. However, the Irish provisions could, in some instances, be seen to go further in curtailing the application of the exemption to assignments or business visits that are not isolated to one tax year.

Decision Tree



Irish payroll tax position

The Irish payroll tax position typically mirrors the underlying Irish income tax position for the individual under the terms of Ireland's tax treaties. Accordingly, in an 'inbound to Ireland' context, an employer should generally be relieved of its obligation to apply Irish payroll taxes to remuneration attributable to Irish duties in circumstances where the corresponding treaty exception applies. The payroll obligation and the underlying tax position applying to income tax extends to Ireland's universal social charge. However, different principles apply to govern the social security position, which is outside the scope of this article.

The starting point under tax treaties and article 15 of the Organisation for Economic Co-operation and Development model convention is that employment income may be taxable in the country where the employment is exercised, so that the host country may tax the income attributable to duties carried on there by an inbound STA.

However, an exception to this provides, broadly, that any employment income remains taxable only in the employee's state of residence (the home country) for assignments not exceeding 183 days in duration, as long as key conditions are satisfied. One of these is that the remuneration is paid by, or on behalf of, an employer who is *not* a resident of the host country. Accordingly, to satisfy this condition, an STA assigned to Ireland must not have an Irish-resident employer or be paid by an Irish resident employer.

The 183 day exemption

This exemption broadly follows the exception under article 15 of the OECD convention. However, the 2016 guidance initiated a significant change in interpreting the requirement that the remuneration must be paid by, or on behalf of, an employer who is *not* a resident of the host country. Whereas, previously, the continuation of the STA's formal employment (and payment) by the home country employer should have satisfied this condition, the guidance shifted the interpretation of this section towards an economic employer test. This position was maintained in the 2018 guidance – both sets stating that this revised position was 'in line with OECD guidance'.

It is certainly open to question whether adopting the economic employer principle was necessary to bring Irish Revenue practice 'in line with OECD guidance'. The OECD commentary on the convention states that 'the concept of employment' is to be determined according to the domestic law of the relevant country – being the host country (Ireland in this case) – and that the home country must respect this determination in applying the treaty provisions and apply treaty relief if applicable, regardless of its own domestic law position on the concept of employment. Irrespective of such arguments, the effect of the 2016 and 2018 guidance is to adopt the economic employer principle in Ireland.

The 2018 guidance clarifies that the non-resident employer condition will not be satisfied in several circumstances, most notably when the remuneration is paid by a foreign employer and the cost is recharged to an Irish employer. The guidance also notes that a recharge will not be the only determining factor and states that the non-resident employer condition is not satisfied if the STA is:

- 'working for an Irish employer where the duties performed by the individual are an integral part of the business activities of the Irish employer';
- replacing a member of staff of an Irish employer; or
- supplied and paid by an agency (or other entity) outside Ireland to work for an Irish employer.

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On the first of these circumstances, the guidance provides a non-exhaustive list of factors in considering whether an STA is an integral part of the business activities of an Irish employer, namely:

- who bears the responsibility or risk for the results produced by the STA;
- who authorises, instructs or controls where, how and, or when the work is performed;
- to whom the STA reports or who is responsible for assessing performance; and
- whether the role or duties performed by the STA are more typical of the function(s) of the overseas employer or of the Irish entity.

The examples set out in the 2018 guidance make it clear that, when the remuneration is directly recharged to an Irish employer, this is a redline issue resulting in the non-resident employer condition not being satisfied. Accordingly, the analysis as to whether an employee is integral to an Irish employer's business is likely to be relevant only when there is no recharge. Against this, however, the guidance makes clear that the mere absence of a recharge in and of itself does not automatically result in the non-resident employer condition being satisfied.

The 2018 guidance is helpful in clarifying some of the uncertainty that the 2016 guidance caused with the non-resident employer condition. It is clear from the 2018 guidance that Irish Revenue has looked to place weight on many of the factors that the OECD commentary on the convention lists in determining the economic employer. There are some distinguishing features though, most notably that the 2018 guidance views the presence of a recharge as a determinative factor.

The OECD commentary also lists additional factors in determining whether the STA forms an integral part of the business activities carried on by the host country company. However, broadly, the 2018 guidance can be seen as an attempt to transpose much of the commentary on determining the economic employer into Irish Revenue practice.

When the 183 day exemption applies, clearance is required to be obtained from Irish Revenue.

The 60 workday exemption

The 60 workday exemption provides a less stringent set of conditions to obtain an Irish payroll tax exemption. The economic employer principle does not need to be considered, and no clearance is required.

There are three conditions that must be met for this exemption to apply. Two are straightforward: the STA is not on the payroll of an Irish entity and is resident in a treaty country and not resident in Ireland. The third condition, the workdays condition, however, has been made very cumbersome. In summary, the 2018 guidance represents a novel departure in that the period that must be analysed is no longer confined to the tax year in question, but extends to considering multiple tax years.

When an STA has an Irish presence only during one tax year, the position is confined to analysing that tax year. However, when the presence extends to two *consecutive* tax years, the aggregate workdays over that two-year period must not exceed 60 for the exemption to apply. When the presence extends to more than two tax years – the word 'consecutive' is not used here, it is implied by the phrase 'recurring annual basis' – the 60 workday exemption does not apply. In such circumstances, reliance on the 183 day exemption may be available, subject to the additional conditions being satisfied, and clearance being sought.

The new twist on the workdays condition leads to some unusual results. For example, an STA could spend 40 workdays in Ireland in 2019 and 20 in 2020 without triggering Irish payroll taxes or a requirement to obtain a clearance. However, when an STA intends to spend 60 days or fewer (in aggregate) over a three-year period, say ten workdays in three consecutive years, the 60 workday exemption is not automatically available and clearance must be obtained. The guidance is not clear on whether the economic employer principle applies to these clearance applications – although when an individual is likely to be in Ireland for only ten or 20 days a year, this is unlikely to be relevant because one would expect that the formal (foreign) employer would also be the economic employer.

A final point worth noting is that, buried within the multiple illustrative examples contained in the 2018 guidance, is a scenario that illustrates a further way in which Revenue view the 60 workdays exemption being limited. Broadly, the example illustrates that when several STAs are coming to Ireland to fulfil the same role over a year, one must look to the aggregate workdays spent in Ireland by all of the STAs combined. We assume that this would also apply when STAs are in Ireland fulfilling the same role in two or more consecutive tax years.

In short, the new formulation of the workdays condition sets an extremely low bar for the requirement to obtain a clearance, illustrating the potential pitfalls that can arise unintentionally for UK employers.

Clearance

The 2018 guidance states that, when Irish Revenue clearance is required, it must be obtained within 30 days (previously 21 days) of the STA starting their duties in Ireland. Given this tight timeline, it is important that UK employers sending STAs to Ireland engage early with Irish advisers.

In practice, the 30 day deadline may be difficult to meet, in particular when, as is often the case, the length of an assignment is not known at the outset. Helpfully, the 2018 guidance states that employers will not be penalised for failure to give timely notice when it was not expected or readily apparent that the individual will be present in Ireland for more than 60 workdays.

Nonetheless, it is important that the UK employer considers whether clearance is required at an early stage and continually monitors any change in circumstances that might give rise to a clearance obligation.

Comparison with the UK

Given the influence that UK tax law and practice has had historically on Irish tax law, it is useful to briefly compare the Irish approach with the equivalent UK approach. The UK, like Ireland, adopted the economic employer principle by way of published guidance in 1995. Like Irish Revenue, in adopting the economic employer principle, HMRC placed particular significance on the existence of a cross-charge between the companies. Although the HMRC guidance did not address the other factors listed in the OECD commentary to the convention, the First-tier Tribunal in the case of *Kljun* (TC1226) considered these factors in determining that the UK company constituted the economic employer of the employee in that case.

Further, HMRC has like Irish Revenue provided a 'safe harbour' from applying the economic employer test. This applies, broadly, if the employee is in the UK for fewer than 60 days (not workdays) in the tax year and this is not part of a more 'substantial period' of UK presence. The guidance notes that 'PAYE will apply from when it is clear that visits will recur as part of a regular and integrated pattern'. Similar to the Irish rule, it is necessary to show that the employee is paid via a non-resident employer's payroll.

A review of the UK position shows that Irish Revenue has been influenced by the equivalent HMRC guidance. The main point of difference between the positions is that the UK guidance appears to involve a degree of subjectivity in determining whether the 60 day exemption applies, whereas the more stringent Irish 60 workdays exemption leaves no room for subjective discretion. In Ireland, once an STA enters a third consecutive year with a presence in Ireland, a clearance obligation is triggered, irrespective of the number of workdays spent there.

Planning point

When Irish Revenue clearance is required for UK employees on short-term assignments, the UK employer must obtain it within 30 days.

Conclusion

By adopting the economic employer principle and considering multiple tax years for the 60 workdays exemption, the key takeaways from Irish Revenue's revised approach to STAs is to reduce the occasions in practice when a payroll tax exemption can be obtained and to increase the occasions in which Irish Revenue clearance is required to obtain an exemption.

When payroll tax exemptions are no longer available, this may result in:

- greater administrative burdens for employers;
- an increased incremental tax cost for STAs – or employers if tax equalisation agreements are in place – even after any treaty relief in the home country given Ireland's high income tax rates; and
- potential cashflow issues for the STA if the salary attributable to their Irish duties is also subject to payroll withholding in the home country.

In a Brexit-planning context, the low bar for the requirement to obtain a clearance seems to be taking UK companies by surprise. Many employees may travel to Ireland only on a sporadic basis but, if the intention from the outset is for this to be recurring in nature, taking place over more than two consecutive tax years, the 2018 guidance in strictness appears to suggest that a clearance is required, and should be obtained within 30 days of the start of duties in Ireland.

Some soundings from Irish Revenue suggest that they do not expect this clearance requirement to be triggered in year one in these circumstances, but a strict reading of the 2018 guidance would suggest an early application is required when the recurring nature of the duties is immediately foreseeable.

The key recommendation is, therefore, to engage with Irish advisers early and not to assume that visits to Ireland that previously may have been seen as incidental do not trigger any Irish payroll tax obligations.

Author details

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