

This technical query paper was submitted to Revenue in advance of the meeting of the TALC Direct and Capital Taxes Sub-Committee Meeting on 29 February 2024. This technical query paper was discussed at the meeting of the TALC Direct and Capital Taxes Sub-Committee meeting on 29 February 2024. The discussions are reflected in the Minutes. Revenue responded to the queries raised by the Institute on 17 April 2024. Revenue's written replies are denoted in red font below.



Special Assignee Relief Programme (SARP) calculation in tax equalisation cases

Revenue [eBrief No. 265/23](#) dated 20 December 2023 inserted a new sub-paragraph 7.1 on the calculation of SARP in tax equalisation cases. We understand the update has been made in the context of a Tax Appeals Commission determination (143TACD2023). However, the position from 2024 stated by Revenue represents a departure from previous established practice in respect of tax equalised individuals since the inception of SARP and from the fundamental principle of calculating a gross-up for tax purposes under Re-Grossed Pay less PAYE/USC/PRSI deducted should equal Net Pay.

Revenue response: Sub-paragraph 7.1 was inserted into TDM Part 34-00-10 to provide clarification on the calculation of SARP in tax equalisation cases, on foot of Tax Appeals Commission determination 143TACD2023. The inclusion of the sub-paragraph was considered necessary to provide certainty to employers/agents on the correct methodology to use when re-grossing the net employment income of a tax equalised employee, where SARP is claimed on the re-grossed income. This is the first time that Revenue has issued TDM guidance on the matter. There was no "established practice", all be it Revenue is aware that there were a number of methodologies being applied to the calculation. The TAC determination is clear that the approach used in that case is incorrect. Recognising the fact that previous Revenue guidance was not prescriptive in relation to this issue, the TDM confirmed that the correct methodology was required to be followed from 1 January 2024 and not for previous years.

Practitioners would welcome Revenue's view on this and have set out further context below:

- It is generally accepted that for tax equalised arrangements, gross income less tax should equal an individual's net pay. When regrossing an individual's net pay, all reliefs, credits and standard rate bands etc would be incorporated into the calculation of determining net pay.

Revenue response: Guidance on the calculation of re-grossed employment in tax equalisation cases is provided in [TDM Part 02-04-01 - Tax Equalisation Arrangements](#). A detailed example is provided in Appendix I on the calculation of re-grossed net income for Irish tax purposes, which allows for the inclusion of tax credits and standard rate bands in the calculation. Revenue does not agree that a tax relief such as SARP, can be incorporated into the calculation of re-grossed income, given that the relief operates by reducing the level of employment income which is chargeable to income tax. The relief must therefore be applied as such and there is not basis for its inclusion in a re-grossing calculation which determines the level of assessable employment income in the first instance.

- Up to 31 December 2023, when calculating gross-up liabilities on relevant net earnings, SARP relief has been incorporated into the gross-up calculation. This had the effect of reducing the gross-up cost.
- From 2024, the updated guidance now provides that SARP relief should not be included in the initial gross-up calculation. Instead, the gross-up calculation should first be performed, and SARP relief applied only to the re-grossed earnings. Under this revised methodology, while SARP is still beneficial, the benefits are diminished given the higher gross-up.
- The change arises on foot of a recent Tax Appeal Case (TAC) which considered SARP relief in the context of a tax-equalised assignee on secondment to Ireland in 2013. In that case, the Irish shadow payroll calculations did not incorporate SARP relief at the time of processing. The assignee subsequently filed a 2013 personal tax return, reporting recalculated gross earnings incorporating SARP relief, using the same net income base. The recalculation was to reflect the tax-equalisation agreement in place between the parties.

Revenue response: In accordance with paragraph 85 of the determination, the Commissioner found as a material fact that the appellant was a party to a tax equalisation agreement with her employer in 2013. For that year, the net employment income of the appellant was re-grossed for Irish PAYE purposes by her employer, thereby giving effect to the tax equalisation arrangement in place at that time. The appellant's agent sought to re-calculate the 2013 employment income by taking account of SARP relief in a revised regrossed calculation. The purpose of the calculation was to reduce the level of the appellant's taxable employment income for 2013 and not to reflect the tax equalisation agreement in place between the parties.

- The refund was refused by Revenue on the basis that the 2013 shadow payroll earnings reflected the actual gross income received in the tax year. The Appeal Commissioner concluded that a tax-equalisation agreement between an employer and an employee is a private contractual matter and has no legislative effect for the purposes of SARP relief.
- The updated guidance does not distinguish between the position for shadow payroll purposes where a gross-up occurs in real-time or a recalculation of earnings on a tax return (which was the focus of the TAC case).

Revenue response: The guidance does not need to distinguish between the position for shadow payroll purposes where a gross-up occurs in real-time or a recalculation of earnings on a tax return, as the same re-grossing principles apply. Guidance on the calculation of re-grossed employment income in tax equalisation cases is provided in [TDM Part 02-04-01 - Tax Equalisation Arrangements](#).

- In addition, the approach outlined in the guidance results in an unsatisfactory outcome whereby the assignees' net pay for Irish tax purposes is higher than their actual net pay i.e., their gross income for Irish tax purposes, less Irish taxes, does not correspond to the employees actual net pay (i.e., the net pay that has been delivered via the home-country payroll). As a result, adjustments to net pay figures are required through the payroll system to ensure additional payments are not due to the assignee. Using the example of an employee

on a net pay arrangement of €125,000, this can result in an additional tax cost of approx. €7,400.

Revenue response: Revenue's position, as per the TAC determination, is that tax equalisation is a contractual matter between an employer and an assignee. Under tax equalisation, an assignee receives an agreed net pay amount while working in Ireland, which is typically delivered through the home country payroll, i.e., the employee's net pay through the Irish shadow payroll is nil. In such circumstances, the foreign employer will be required to process a net pay adjustment through the Irish shadow payroll, and this applies regardless as to whether SARP applies to the employment income or not.

- The revised guidance could now result in two people, both qualifying for SARP who have the same net pay, having different gross pay due to the fact one is tax equalised.

Revenue response: This follows from the re-grossing requirements arising from tax equalisation arrangements, where the employer funds the Irish tax liability of the assignee, which is a taxable benefit in the hands of the employee, which should lead to a higher taxable employment income figure.

- As such, the revised guidance is not in line with Regulation 21 of the Income Tax Regulations Part 42-04-71, which states:
Where payment is made to an employee on a net pay basis, the "pay" for income tax purposes is the amount which, after deduction of tax, would give the amount received by the employee.
- Such regulations were not considered as part of the TAC case, and there does not appear to be any legislative reason why Regulation 21 could not apply for tax equalised SARP calculations processed through the payroll system.

Revenue response: The TDM guidance referenced here applies to situations where an employer wishes to provide a taxfree emolument to an employee and this is referenced as such in the TDM ([link](#)).

The Income Tax (Employments) Regulations 2024 prescribe the manner in which the deduction of tax from salaries and wages operate under the PAYE system. Regulation 21([link](#)) states that where an employer pays an amount to or for the benefit of the employee in respect of the employee's tax, this amount is deemed to form part of the emoluments on which PAYE deductions are due. In effect, the employee is assessed to PAYE on the payment of tax which is made on his/her behalf by the employer. Revenue does not agree that the treatment in the TDM guidance is in any way ultra vires the Regulations.

The rules relating to SARP relief must be construed in accordance with the provisions of section 825CTCA 1997. The section provides relief on "income...for the tax year from the employment" (per section 825C(2B)(b) TCA 1997). In effect, the relief reduces the amount of income on which a "relevant employee" for SARP purposes is chargeable to income tax and there is no legislative provision in section 825C TCA 1997, which also allows the relief to be factored into the calculation of the income upon which the relief is calculated.

- As noted above, the Appeal Commissioner concluded that a tax-equalisation agreement between an employer and an employee is a private contractual matter and has no legislative effect for the purposes of SARP relief. What has not been considered in the case is the position where the employee subsequently repays the refund received from Revenue to its employer under the tax-equalisation agreement. Per Revenue Tax and Duty Manual Part 42-04-70, “Recoupment of Overpayments of Salary by an Employer from an Employee”, repayments of net income to an employer should give rise to a reduction in gross earnings. Not only should such reductions in gross income be available through personal tax returns, where net pay deductions are processed through the payroll to ensure the employee remains on the agreed net pay, this would reduce the overall gross pay and ultimately result in the same gross pay that would be expected under the method applied up to 31 December 2023.

Revenue response: TDM Part 42-04-70 sets out Revenue’s position regarding the recoupment of an overpayment of emoluments by an employer from an employee. The examples provided in the TDM apply to situations where an employee is paid in accordance with the wrong pay scale or receives payment to which he/she is not entitled (e.g., holiday pay). These scenarios differ to tax equalisation scenarios where an assignee is placed on a shadow payroll in Ireland, through which he/she does not receive any net pay (the net pay is delivered through the home country payroll). For Irish shadow payroll purposes, a net pay adjustment is required to be processed through the Irish shadow payroll to ensure that the assignee’s net pay is nil.

- This approach is also out of sync with how gross income is calculated for tax equalised individuals in other jurisdictions, which will create some unusual scenarios when looking at cross border cases.
- Furthermore, while the updated guidance explicitly refers to tax-equalised employees, we expect that Revenue intends this methodology to be applied in all instances where an employee qualifies for SARP, and grossing up of a net payment or benefit applies. Therefore, this change could also impact employees who are not tax equalised but are in receipt of net paid allowances/benefits.

Revenue response: The treatment in other jurisdictions is not relevant for the purposes of applying the relevant Irish legislative provisions. Revenue can confirm that the above approach is confirmed. Where a SARP claimant is not tax equalised but is in receipt of a net allowance/benefit, then the employer will be required to re-gross the net allowance/benefit for Irish tax purposes, however, SARP relief should not be incorporated into the calculation of the re-grossed income. TDM Part 34-00-10 will be updated to reflect this position.

Please note that a re-gross will not be required where the benefit to be provided to the assignee is not chargeable to tax, whether under SARP (e.g., the payment of an annual home leave cost) or where the costs of relocation to the State are considered to be tax-free under [TDM Part 05-02-03 Removal and Relocation Expenses](#).