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Mr. Gary Tobin
Assistant Secretary
Tax Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2, D02 R583

25 January 2017

Dear Mr. Tobin

**Re: Tax policy on short-term business travellers to Ireland**

On 22 December 2016, Revenue released revised guidance on the operation of PAYE on the employment income of non-resident individuals in Ireland on short-term business visits[1]. This guidance fundamentally changes the tax treatment of business travellers sent to Ireland from Tax Treaty jurisdictions. These individuals will now have to pay Irish income tax under the PAYE regime, if they are in Ireland for more than 30 days in a tax year. This is notwithstanding the fact that, under the terms of our Double Tax Agreements, no Irish income tax liability may ultimately be due.

Article 15(2) (Income from Employment) (and equivalent where applicable) of our Double Tax Agreements provide that a non-resident individual who is in Ireland for less than 183 days in a year will not be liable to Irish income tax on their employment income (provided that their salary is not paid by an Irish entity or borne by an Irish Permanent Establishment of their foreign employer).

[1] Paragraph 4.2.1 Note (1), Page 16 - Income Tax Statement of Practice – SP IT/3/07

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Revenue's new guidance reflects a stricter interpretation of Article 15(2) (Income from Employment) than has been the case heretofore. Where a business traveller is sent to Ireland to work in, or gain experience with an Irish company, Revenue now treats the Irish company as their employer (notwithstanding that the Irish entity is not their legal employer). In our view, Revenue's interpretation does not accord with Irish tax legislation or Case Law, nor is it in line with the accepted international rules for interpreting Double Tax Agreements [2].

Furthermore, this interpretation has serious cost implications for multinational companies that send staff to Ireland, often for short periods. This may be to set up a business function, support a business-critical project, provide training or implement group policies.

Revenue's new interpretation will result in:

- Increased compliance costs for these businesses without a corresponding increase in revenue for the Exchequer. This arises because PAYE is being deducted in circumstances when no Irish income tax is ultimately due (as the individual will not be Irish tax resident). Multinational businesses already incur significant costs in complying with detailed and complex tax and reporting rules for mobile employees, outlined in tax legislation and in Revenue guidance.
- Increased employment costs, where the business compensates an employee who has been sent to Ireland on business for the cash-flow impact on their salary. This arises because of the simultaneous deduction of payroll taxes in two jurisdictions.
- Other administrative difficulties, as all affected business travellers must personally attend a Department of Social Protection office to apply for a Personal Public Service Number (PPSN). A PPSN is required to ensure that tax deducted under the PAYE regime is correctly allocated.

[2] The Vienna Convention on the Law of Treaties

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**Confirmation requested**

The Institute is seeking to clarify the policy intent regarding the tax treatment of individuals working in Ireland on a short-term basis. If the intent is that Irish income tax is to apply to non-resident employees who are sent to Ireland on business for between 31 and 183 days, and that PAYE must be operated, then in our view a change in Irish tax legislation is required.

The implications of any change in legislation in this area would need to be fully considered. The ability for multinationals to second staff to Ireland in a cost-effective manner is important. It facilitates sharing of the expertise and know-how that is needed to develop global businesses in Ireland. It is essential that Irish tax policy continues to support this activity. This is particularly important given the requirement to align the taxation of profits with economic substance arising from OECD developments and also because of the challenges emerging in a post Brexit environment.

We would welcome the opportunity to meet with you to discuss the matters above in further detail. To assist the discussion, we attach a background technical analysis of the application of Article 15 (Income from Employment) in an Irish context, which we provided to Revenue in 2015.

Yours sincerely,

**Cora O' Brien**
**Director**

Cc Mr. Brian Boyle,
Assistant Secretary – Personal Taxes Policy and Legislation Division, Revenue

**18 December 2015**

# Background Technical Analysis

# Article 15 OECD Model Tax Convention – Application in an Irish Context

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## Background

### Article 15 OECD Model Agreement – Income from Employment

This article provides for the taxation of income from employment (other than pensions). It provides that remuneration in respect of an employment derived by an individual who is a resident of a Contracting State may be taxed only in that State unless the employment is exercised in the other Contracting State. In that event, the other State may tax the remuneration derived from the exercise of the employment in its territory.

However, Article 15 (2) provides that the remuneration will be taxable only in the State of residence if;

1. The recipient is present in the other State for less than 183 days in any twelve-month period/the fiscal period concerned and;
2. The remuneration is paid by an employer who is not resident in the other State, and
3. The cost of the remuneration is not borne by a permanent establishment or fixed base which the employer has in the other State.

Following changes in the OECD Commentary on Article 15 post 2010, our members have encountered differing interpretations being applied by Revenue districts, specifically in relation to the interpretation of the term 'employer' in Article 15 (2). The view expressed by some Revenue districts is that the term 'employer' should be interpreted not as the actual or 'legal' employer of the individual, but rather the Irish entity which has the use of the individual's services. This potentially renders the article redundant for all practical purposes, and makes every short term assignee to Ireland liable to Irish tax, regardless of the duration of their visit.

The Irish Tax Institute (ITI) has questioned this interpretation both by reference to the wording of the Article itself, Irish tax law and accepted principles of statutory interpretation. It is the view of the Institute that, in Ireland, the wording must take its normal meaning and that any change in interpretation would require legislative support.

The adoption of an approach which interprets 'employer' as a person other than the actual or 'legal' employer has wider implications for a range of Irish domestic provisions. These include the application of PAYE to employment earnings, the operation of foreign work-days relief and the application of the remittance basis of taxation to foreign employment contracts (where no duties are performed in Ireland).

As the matter of interpretation both of Article 15 and the meaning of 'employer' for domestic tax purposes arises frequently in the context of internationally mobile executives moving in and out of Ireland, the ITI considers it essential that a consistent interpretation is adopted and applied by all Revenue districts. This should be based on the wording of the Article and in accordance with accepted principles of statutory interpretation.

## Executive Summary

1. The ITI believes that in interpreting Article 15, the term employer must be given its ordinary meaning, which is the legal or formal employer.

2. At the present time there is no express statutory provision in Irish legislation that would permit references to 'employer' in Article 15(2) to be interpreted as meaning any entity other than the legal or formal employer.

Having regard to the provisions of the Irish Interpretation Act 2005, and the Vienna Convention, words are to be given their ordinary meaning, unless otherwise defined. In the absence of any specific definition that would permit the host entity to be considered as the employer, the term 'employer' can only be interpreted as meaning the actual legal employer.

The ITI submits that the proposed approach to interpretation is consistent with the approach adopted by the Irish Courts.

**Analysis**

Under the provisions of most of Ireland's Double Taxation Agreements ('DTAs'), relief from Irish taxation is available for residents of other contracting States who carry out short term employment duties in Ireland, provided the following conditions are fulfilled;

1. The recipient is present in [Ireland] for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned; and

2. The remuneration is paid by, or on behalf of, an employer who is not a resident of [Ireland}; and

3. The remuneration is not borne by a permanent establishment or a fixed base which the employer has in [Ireland].

We understand that some Revenue districts are applying an 'Economic Employer' interpretation to Article 15(2) in cases involving international assignees posted to Ireland and are denying the relief provided by Article 15 (2) on the basis that the Irish host entity is the 'employer' for the purposes of the DTA.

The term 'Economic Employer' is not used in the DTAs or in Irish legislation, but is generally understood to refer to the situation where;

1. An individual renders services in the course of their employment to a person other than their 'legal' or 'formal' employer and that person, directly or indirectly, supervises, directs or controls the manner in which those services are performed; and

2. Those services constitute an integral part of the business activities carried on by that other person, and that person bears the responsibility and obtains the benefit for the individual's work.

In previous discussions, Revenue indicated that that it does not apply the economic employer approach. However, it was also that stated that in interpreting Article 15, Revenue will be guided by the examples set out in the OECD Commentary to Article 15 (referring to the 2010 version of the Commentary). The ITI believes that this amounts to the same thing.

The OECD Commentary envisages two possible approaches to the interpretation and application of Art 15(2).

Para. 8.5 of the Commentary relates to the scenario where the domestic legislation of the host State permits that services rendered by an individual to an enterprise may be considered to be employment services with that entity, notwithstanding that the individual has no contract with the host entity, and that the services are provided under a formal contract between the enterprise that receives the services and the enterprise which employs the individual.

Para. 8.8 deals with the case where the domestic law of the host State does **not** offer the possibility of questioning a formal contractual relationship so as to recharacterise the arrangement as an employment with the host entity. In such cases it is still possible for the host State to deny relief, but only *'where the arrangements constitute an abuse of the Convention'*. Para 8.9 cautions however that *'. . . it should not be lightly assumed that this is the case"*.

There are currently no express provisions in Irish tax law which deem an individual to be an employee of a third party to which he or she provides services in the course of a contract between their legal

employer and the third party. Consequently, it appears that Ireland falls within the scope of Para. 8.8.

We are not aware of any decided Irish tax cases on the specific point (i.e. whether an employment relationship can be deemed to exist in a case where there is in fact no contractual relationship between the parties). However, the issue has been considered by the High Court in the context of agency workers hired out to third parties, and the Court has concluded that in such cases, no contract of employment may be implied between such a worker and the third party, regardless of how closely the worker is integrated into its operations, or that they may indeed be indistinguishable from the hirer's own employees[3].

Fundamentally, the issue is one of interpretation, concerning the meaning to be given to the term 'employer'. The approach proposed by Revenue appears to rely on a purposive interpretation of the term 'employer', based on the 2010 OECD Commentary. However, in an Irish context, the law generally requires that in the absence of a specific definition, words in legislation are to be given their ordinary meaning, and it is not normally permissible to impute any other meaning. The Interpretation Act 2005 does however permit a purposive approach in certain limited circumstances. This is permitted where;

*"In construing a provision of a statutory instrument . . . .*

*(a) that is obscure or ambiguous, or*

*(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,*

*the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment*.[4]

This approach is only permitted in the circumstances specified above. It is submitted that in the present context, there is nothing obscure or ambiguous in the term 'employer'. Equally, no absurdity is produced by interpreting the term 'employer' as meaning the legal or formal employer.

As regards reflecting the 'plain intention of the instrument' it is notable that many Irish DTAs substantially predate the 2010 OECD Commentary, with several dating from the 1970's. In the intervening years, it was accepted that 'employer' in this context meant the legal employer. There is no reason to believe that this has changed.

[3] Minister for Labour V PMPA ITR Vol III, P.505

[4] S.5(2) Interpretation Act 2005

**Interpretation of Tax Treaties**

Many of Ireland's Double Taxation Agreements contain a provision within Article 3 ('Definitions') to the effect that;

'*As regards the application of the Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of the Convention*.'

This point was considered in the case of *John Travers v Sean O'Siochain (Inspector of Taxes*) V ITR 54. Carroll J. in the High Court commented that;

*'While the model treaties are intended to be used between a wide range of countries, nevertheless it finally comes down to a bilateral treaty. In my opinion the language must be interpreted not in any global sense, which might be appropriate for a multilateral treaty, but rather as it would be interpreted in each of the jurisdictions involved.'*

The approach to interpretation of tax treaties was also considered in the case of *Kinsella v The Revenue Commissioners*: [2007] ITR 151.

Kelly J, commenting on the principles of interpretation to be adopted noted that;

*'This State acceded to the Vienna Convention on the Law of Treaties with effect from the 6th September 2006. Even before that event it is clear from the decision of Barrington J in McGimpsey v Ireland [1988] IR 567 that in interpreting an international treaty the court ought to have regard to the general principles of international law and in particular the rules of interpretation of such treaties as set out in Articles 31 and 32 of the Vienna Convention.*

*<u>The Vienna Convention</u>*

*Article 31 of this Convention provides as follows:*

*"Article 31: General Rule of interpretation.*

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> - *a.any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
> - *b.any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> - *a.any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

- *b.any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; c.any relevant rules of international law applicable in the relations between the parties.*

*4. A special meaning shall be given to a term if it is established that the parties so intended."*

*Article 32 is headed "Supplementary means of interpretation". It reads as follows:*

*"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

- *a.leaves the meaning ambiguous or obscure; or*
- *b.leads to a result which is manifestly absurd or unreasonable."*

*In accordance with what is prescribed by the Vienna Convention, I must therefore interpret the Convention in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Convention's object and purpose. Where such an interpretation leaves the meaning of the Convention ambiguous or obscure or leads to a manifestly absurd or unreasonable result then recourse can be had to supplementary means of interpretation. These means of interpretation could, in an appropriate case, include the OECD Model Convention with respect to Taxes on Income and Capital (the Model Convention) as well as the commentaries thereon*.'

Having regard to the principles set out above, it seems that the term employer, in the context of Article 15, should be given its ordinary meaning. Consequently, this means that the 'employer' for the purposes of Article 15 is the foreign 'legal' employer and not the Irish entity to which the individual is assigned.

**Conclusions**

The treatment of individuals on short-term business visits in Ireland is an important issue for many Irish and international companies with operations here. We believe it is essential that companies which assign employees to work in Ireland on a temporary basis have a clear and consistent understanding of the Irish Revenue's approach to the application of Article 15, and that Revenue's approach is based on an interpretation of the Article which is consistent with and supported by Irish legislation, and the approach of the Courts to the interpretation of tax treaties.