

Item Response :

Report for Bob Robins of Navy AFT - For Review by Vanessa Brown

Prepared for: Bob Robins of Navy AFT Ltd

Prepared by: Vanessa Brown, Partner of Chartered Tax Advisors

Subject: Navy AFT Ltd's Proposed Offer of Employment Re. Jack Smith

Date: 12 May 2020

Dear Bob,

Navy AFT Ltd's Proposed Offer of Employment Re. Jack Smith

Thank you for your email dated 3 May 2020. I enclose for your review a report detailing the UK tax implications of the proposed offer of employment for Jack Smith. This report is based on the information provided in your email dated 3 May 2020 and is based on UK legislation currently in force. Please note the content of the report is for Navy AFT's consideration only and may not be relied upon by any third parties (including Ein SA). We have considered the UK implications only and recommend further advice is sought from qualified tax advisors in any relevant overseas territories, primarily Switzerland.

If you have any questions when reviewing the report, please do not hesitate to contact me.

Introduction

Navy AFT Ltd is planning to acquire Ein SA and has requested UK tax advice with regards to an offer of employment for Jack Smith, a project manager for Ein SA based in their Zurich offices. The offer of employment is being finalised and UK tax advice has been sought to explore a number of options.

Option 1 would involve Jack being seconded from Ein SA to Navy AFT Ltd, for the period 1 September 2020 to 30 June 2021. Jack would then become directly employed by Navy AFT on 1 July 2021.

Option 2 would see Jack's employment with Navy AFT Ltd starting on 1 September 2020 and he would have no ongoing connection with Ein SA.

Jack has previously been travelling to the UK from approximately September 2019.

Executive Summary & Recommendations

- Jack's pre-Sept 2020 travel to the UK should qualify for UK tax relief under the provisions of the UK/Swiss Double Taxation agreement (DTA) and therefore only be taxable in Switzerland. Navy AFT should not have any reporting/withholding requirements, but an App 4 arrangement could be explored if HMRC do not accept treaty relief is available. I recommend you write to HMRC to obtain clearance, as this will ensure there are no risks for Navy AFT going forward. In addition, I recommend Jack's travel during 2020/21 is carefully managed to ensure he does not exceed 183 days in the UK during the 2020/21 UK tax year.
- Option 1 (the secondment arrangement) should not cause any issues with the pre-September 2020 travel but option 2 (localisation from 1 Sept 2020) may invalidate the claim due to the additional time being spent in the UK during the 2020/21 UK tax year.
- Overall option 1 is recommended as the most beneficial approach for both Navy AFT and Jack personally. This will minimise the risk and cost to Navy, while enabling Jack to remain within Swiss social security while his family continue to reside there, which was his stated aim. Steps will be required to facilitate this option, as outlined below and in the body of the report.
- Option 1 - tax and withholding: From September 2020 to June 2021, Jack will have a UK tax exposure on his UK duties. Navy AFT will have a PAYE obligation, but can limit this to Jack's estimated UK workday percentage. I recommend an application is submitted to HMRC for a s.690 directive on basis Jack's UK workday percentage will be in the region of 55% and Navy should ensure steps are in place for the s.690 directive to be discontinued once Jack localises in July 2021. I also recommend Navy fund the UK withholding by way of a notional loan to Jack. This should be clearly documented in the assignment agreement and independent legal advice should be sought to project to company. Jack needs to file UK self-assessment returns while the s.690 directive is in place and should mandate the Swiss tax credits claimed via his Swiss tax returns to Navy AFT in order to offset the value of the notional loan. Again I recommend this is clearly documented in the assignment agreement and legally accepted by Jack in advance of undertaking the secondment. Future filing requirements once the s.690 directive and notional loan are no longer relevant would be a personal obligation for Jack and Navy would no longer be required to ensure he meets this.
- Option 1 - social security: Jack can remain within the Swiss social security system during his assignment, but will move to UK NIC once he localises. In respect of the assignment period, I

recommend Navy AFT apply for an A1 certificate, to ensure Swiss contributions can continue and Navy are not exposed to any compliance risks. This application should be submitted as soon as possible to allow for processing before the start of the assignment.

- Option 2 is not recommended for the reasons outlined in the report.
- Regardless of the option chosen, Jack's January 2021 bonus should continue to be paid by Ein SA. This will ensure the bonus can be sourced with reference to 2020 and will minimise the UK exposure that Jack will be funding personally (via a notional loan from Navy ANT). Otherwise, it is likely HMRC will seek to tax the full payment.
- It is strongly recommended Jack records his travel and Navy may wish to incorporate this as a requirement to his assignment agreement.
- It is strongly recommended Navy AFT take Swiss tax advice on the implications of the topics discussed in this report.

Jack Smith

Jack is a UK national, who has been living and working full time in Switzerland since August 2013. His suggestion is that he has been tax resident in Switzerland throughout this period and while this would seem likely on the face of the facts, you may wish to verify this position with a Swiss tax advisor.

As a UK national Jack will most likely have held a UK domicile of origin from birth. Should he elect for a domicile of choice in another country such as Switzerland and then return to the UK and acquire UK tax residence, his UK domicile of origin will resume. This is under the "deemed domicile" provisions for formerly UK domiciled individuals. As a result, Jack is not eligible to claim the remittance basis of taxation or any of the UK tax reliefs that are associated with such a claim, including Overseas Workday Relief.

A further consideration is the UK temporary non-residence rules, which apply to individuals who depart the UK and subsequently return, but do not have a period of non-residence of at least 5 years. Given the tax years in question, this would not appear to be applicable to Jack.

As these aspects are not relevant I do not propose to comment further, but please do let me know if you have any questions on this area.

Jack's Current Role

Jack has been travelling to the UK since September 2019 to assist with a joint project and this is expected to continue until the end of August 2020. The facts would suggest Jack was only working for Ein SA's part of the project and was not working for the benefit of Navy AFT Ltd. While he was using a free desk in Navy AFT's office, this was only because Ein SA do not have a place of business in the UK and his work was fully for the benefit of EIN SA.

Jack's UK tax residence position will be determined by the UK Statutory Residence Test (SRT). This is a series of tests laid out in UK legislation that are applied in order until one test is satisfied. Jack's travel pattern during the 2019/20 UK tax year would suggest he had approximately 99 UK workdays (defined as a day on which he worked more than 3 hours in the UK) and no further days of presence (any days where he was in the UK at midnight). This level of travel to the UK would not trigger UK tax residence under the SRT for an individual who has been non-UK tax resident in the previous 3 tax years. This is on the understanding he maintains an available home in Switzerland (where his family reside) and does not meet the full time working in the UK requirement of more than 75% of time in the UK. He would also not meet the sufficient ties test. While it is important to consider his UK residence position, as Jack remains tax resident in Switzerland and will be considered resident in Switzerland under the UK/Switzerland Double Taxation Agreement (DTA), there is little practical impact of the UK domestic rules. Jack will be resident in Switzerland under the treaty while his family remain there, as his permanent home and centre of vital interests both remain in Switzerland. This is expected to continue to 1 July 2021, regardless of the employment options chosen.

The general position is that an individual is taxable in the UK from their first UK workday. One exception to this would be if their UK workdays are incidental to an overseas role. HMRC define "incidental duties" extremely narrowly and given the level of information currently available, I would not expect this consideration to be relevant. The other exemption is provided by Article 15 of the UK/Swiss DTA and would mean Jack's UK duties are taxable only in Switzerland if the following conditions are met:

- a) Jack is present in the UK for a period not exceeding 183 days in the UK tax year (fiscal year); and
- (b) Jack's remuneration is paid by, or on behalf of, an employer who is not a resident of the UK; and
- (c) Jack's remuneration is not borne by a permanent establishment or a fixed base which the employer (Ein SA) has in the UK.

Applying the facts, Jack will spend less than 183 days in the UK during 2019/20 and the costs of his duties are fully met by Ein SA. Treaty relief will therefore be available provided Jack's role in the UK did not trigger a permanent establishment (PE) for Ein SA in the UK. Permanent establishments are complex and this would primarily be a consideration for Ein, so they may wish to take further advice from a corporate tax specialist in this area. On the basis of the facts available, as Ein do not have a permanent place of business in the UK and assuming Jack was not concluding contracts on Ein's behalf while in the UK, I would not expect a PE to be triggered by Jack's travel.

Jack's 2019/20 UK duties should therefore be taxable only in Switzerland, including the costs of his accommodation and flights (note I am not able to comment on Ein SA's position in Switzerland). From an employer reporting and withholding perspective, on the basis Jack was not working for the benefit of Navy AFT Ltd, was not under the supervision of a Navy AFT employee and was not integrated into the UK Navy AFT business, I would not expect the UK's "host employer" rules to extend to Navy AFT, meaning they are not required to operate UK PAYE. If withholding was required, this could be mitigated via an Appendix 4 arrangement as treaty relief is expected to be available. I would be happy to provide further information in this area if you wish to explore it further.

This position is expected to continue for the part of his role that falls into 2020/21 (April 2020 to August 2020 travel), provided Jack does not exceed 183 days in the UK.

Option 1 - Secondment Arrangement

From 1 September 2020, Jack's role will change significantly. Option 1 would involve Jack being seconded from Ein SA to Navy AFT Ltd, for the period 1 September 2020 to 30 June 2021. Jack would then become directly employed by Navy AFT on 1 July 2021. During his secondment he is expected to spend approximately 10 days working in the UK each month. The rest of his workdays and his weekends will be spent in Switzerland with his family. Assuming approximately 70 days therefore in addition to the travel before 1 Sept 2020, Jack will be close to the 183 day threshold. This should be managed carefully to ensure he does not exceed this limit as this will have implications for his previous role (as outlined above).

From 1 September 2020, Jack will be undertaking a new role, primarily for the benefit of Navy AFT, while remaining an employee of Ein SA. As the costs will be borne in the UK, relief under the treaty is no longer available and UK tax will be due. As he is working for the benefit of Navy AFT, a PAYE obligation will arise so Jack should be included in Navy AFT's UK payroll. As he is not subject to tax equalisation, an EP App 6 modified arrangement is not appropriate. Instead, I recommend Navy AFT submit a s.690 application to HMRC to request approval to limit the PAYE obligation to the proportion of Jack's workdays that will ultimately be taxable in the UK. This is on the basis he will remain tax resident in Switzerland under the terms of Article 4 of the DTA (as discussed above). As he intends to spend 10 days working in the UK and 9 days working in Switzerland each month, an appropriate UK taxable percentage would be in the region of 55% and we would be happy to assist with this application if helpful. Jack will then need to file self-assessment UK tax returns to reconcile the provisional PAYE under the s.690 agreement with his actual UK workday percentage (due by 31 January following the end of the UK tax year). I recommend this is written in as a requirement of any secondment agreement and we can also assist with the filing of any necessary UK tax return.

From a Swiss perspective, I recommend additional advice is sought to explore the overseas implications. As Jack will remain Swiss resident and employed by Ein SA, it is possible Ein SA will also have to operate withholding on his income. There is little scope to mitigate the UK PAYE obligation further, as UK tax will be due on his UK workdays. In the absence of domestic Swiss relief, I recommend Navy AFT fund the UK PAYE liability by way of a notional loan to avoid double taxation and assist with the cash flow disadvantage. Note this would amount to a taxable benefit if the value of the loan exceeds £10,000 on average during the tax year, which is likely to be the case given Jack's level of income. You may also wish to consider meeting the tax due on the value of the benefit and I can support further with this if helpful. The value of the loan would be offset by the value of the tax credit claimed in Switzerland. If any loan remains outstanding, Navy AFT would write off the balance, which is treated as additional income for Jack and taxable in the UK. Similarly, you may wish to consider if Navy AFT would also meet any UK taxes due on the value of potential write offs. Given you do not want to tax equalise I will assume Jack would meet the taxes due on these benefits personally, but please do let me know if you wish to explore alternative options, such as including the amounts in the Navy AFT PAYE Settlement Agreement (PSA).

From a social security perspective, Jack should be eligible to remain within Swiss social security under the EU/EEA framework. This is because his assignment to the UK is for a period of less than 2 years and he

remains habitually resident in Switzerland, where he is employed and his family continue to reside. That being said, this position may be challenged as Jack intends to localise in the UK at the end of the assignment term, so I recommend an application is submitted for an A1 certificate, in order to substantiate this position and ensure Navy AFT would not be required to deduct UK national insurance. We can assist with this application.

Localisation

From 1 July 2021, Jack will localise and transition to a UK contract of employment. He will spend most of his time in the UK so is expected to be UK tax resident under the SRT for the 2021/21 UK tax year, on the basis he will have more than 183 days in the UK. His family will also relocate to the UK, meaning he will be UK tax resident under the terms of the UK/Swiss DTA. Navy AFT should arrange for the s.690 application to be discontinued from this date, as it is no longer appropriate to claim the reduced PAYE obligation as the intention is for Jack to work primarily in the UK. UK PAYE will therefore be due in full.

In addition, Jack will default into the UK social security scheme as a local employee, so Navy AFT should ensure both tax and UK National Insurance Contributions (NIC) are deducted via payroll from this date. A 2021/22 UK tax return will be needed as part of the tax year covered the period where a s.690 directive and notional loan arrangement was in operation. From 2022/21 onwards, the s.690 directive and notional loan arrangement are no longer applicable, but due to Jack's level of earnings, he will need to continue filing UK tax returns.

Option 2 - Permanent Hire in the UK from 1 September 2020

Option 2 would see Jack's employment with Navy AFT Ltd starting on 1 September 2020 and he would have no ongoing connection with Ein SA. He would spend approximately 15 workdays in the UK and 4 workdays (and his weekends) in Switzerland while his family continue to reside there.

Option 2 presents a number of complications, including the fact that his additional time spent in the UK would mean he will likely exceed 183 days in the UK during the 2020/21 UK tax year. This may result in treaty relief for the pre-Sept 2020 travel being denied and a UK tax charge arising. This would have implications for Ein SA as his employer at the time, but there is also risk to Navy AFT if HMRC do not accept Jack was fully working for Ein.

In addition, Jack would default into UK NIC from 1 Sept 2020, as a UK local employee working in the UK. There would be little scope to apply Swiss social security, particular as his Swiss workday percentage is below the 25% requirement for the EU multi-state worker provisions to apply. This would frustrate Jack's intention for his Swiss social security benefits and healthcare entitlement to continue while his family remain in Switzerland.

January 2021 Bonus

With regards to the January 2021 bonus, in either scenario I recommend Ein SA continue to make payment to Jack. Typically the bonus will be pro-rated to account for the UK taxable portion and processed via the Swiss/UK payrolls with reference to the earnings period in 2020, however advice will be required in Switzerland to ensure this is appropriate. From a UK perspective, the payment could be fully reported in the UK and then taxed in line with the s.690 percentage, subject to a reconciliation as part of Jack's UK tax return submission.

Note that if the bonus is paid by Navy AFT, it is likely HMRC will treat this as a "spot" bonus and fully taxable in the UK. If Switzerland also tax in full, the cost to Jack could increase significantly, so I would not recommend this approach.

In addition, option 2 will mean the bonus is not subject to UK national insurance as Jack would not be within the UK social security system at the point of receipt.

Travel and Accommodation Costs

It is worth noting that as Jack is UK domiciled, he will not be able to claim tax relief for the accommodation or travel costs under the "home leave provisions".

Similarly, as his intention will be to localise and stay within the UK for more than 24 months, he will not be eligible to claim under the "Temporary Workplace Relief" provisions.

This is regardless of either option and I would be happy to provide further detail in these areas if helpful.

Other Implications & Taxes

I would also like to draw your attention to the fact that the costs for Navy AFT compensating Jack would generally be available as a deduction against your UK corporation tax (CT) exposure. The current rate of UK CT is 19%, meaning you can effectively deduct 19% of the costs as part of considering the commercial implications of bringing on Jack.

There is no suggestion that Jack would hold shares in Navy AFT, so I do not envisage any CT issues with the notional loan arrangement, however I would recommend legal advice is sought and a contract is drawn up to project Navy AFT's position and enable recovery of the Swiss credit.

Jack's personal position is complex, so I would recommend a tax briefing is offered to ensure he understands the tax and social security implications of the options. I would be happy to assist for the UK, but would recommend a Swiss tax advisor is engaged to cover the Swiss implications.

There are also employment law aspects to consider, such as the requirement to auto-enrol Jack in a UK workplace pension. This requirement would be due from the date Jack localises, as secondees are not captured by the auto-enrollment rules. Navy AFT would then need to ensure they notify Jack accordingly, make the employer contributions and will be required to re-enroll him every 3 years should he opt out. If you would like any further support in this respect please let me know.

I trust you have found the content of this report helpful, but please do let me know if any questions.

Kind regards,

Vanessa Brown

Partner of Chartered Tax Advisors