The Chartered Institute of Taxation

Application and Professional Skills

Human Capital Taxes

May 2022

Suggested solution

Draft report to Milly Coule

Report prepared by F&C LLP for Cable plc on 12 May 2022 in relation to the impact of Tom Crip working in the UK

Introduction

Further to our recent emails, please find below our advice and recommendations relating to Tom Crip, an employee of Eirepipe Ltd who has been working in the UK.

This report provides advice and recommendations on the UK PAYE obligations, UK corporate tax and UK VAT implications for Cable plc and Eirepipe Ltd, based on the information provided. The advice is based on the tax legislation applicable at the moment. It is intended for the use of Cable plc only.

Executive summary

Whilst Tom may legally continue to work in the UK whilst employed by Eirepipe Ltd, this would create additional PAYE obligations for Eirepipe Ltd. There is also a high risk that a permanent establishment ("PE") is created meaning that the profits generated by Tom's activities in the UK would be liable to UK corporation tax which is 6.5% higher than Irish tax rates. There would be UK VAT obligations for Eirepipe Ltd under this arrangement.

Considering whether Tom should remain employed by Eirepipe Ltd and work remotely in the UK, be seconded to Cable plc or employed by Cable plc directly, it's recommended that either Tom becomes an employee of Cable plc and is paid through the UK payroll or his role is significantly changed to avoid a PE. Avoiding a PE risk minimises the VAT risk and means that an additional PAYE scheme is not needed for Eirepipe Ltd in the UK, whereas adding Tom to the UK payroll would be a small additional cost given the size of your existing UK workforces.

If Tom becomes a UK employee, this means that his sales of ecopipes are moved under Cable plc. Despite higher UK corporate tax being due, it aligns with your ultimate aim to restructure some of the Cable plc and Eirepipe divisions whilst using Tom's strengths in this area.

Whilst Tom would be liable to UK tax regardless of the structure, it's recommended that a calculation of Tom's net pay is carried out as some of the benefits he currently receives tax-free in Ireland would be taxable here. Whilst the UK tax due on the benefits will be lower than the cost of the benefit, there may be alternative ways to provide those benefits more tax efficiently in the UK. It's recommended that employment law and other legal advice is considered when moving Tom onto a UK contract of employment.

You may wish to support Tom with some personal UK and Irish tax advice to ensure that he only pays what's necessary in the UK and Ireland. Tom may experience some initial cashflow difficulties as he transitions to the UK but we suggest Cable plc could support him on that by way of a loan.

Analysis

Tax residence rules

Tom's key dates are:

- Arrival in the UK 20 December 2020
- 38 days spent in the UK each year up to 2019/20 for personal reasons
- Time spent in the UK in 2020/21 = approximately 125 days (2 days per weekend April to December 2020 2 x 9 = 18 + 107 days from 20 December 2020 to 5 April 2021 = 125)
- Time spent in the UK in 2021/22 = 365 days
- Going forward Tom will live full-time in the UK

Tom will spend more than 183 days here in 2021/22 so would be UK resident and liable to UK tax on his worldwide earnings. We do not have sufficient information to assess whether he is entitled to split year treatment but for the purposes of this report, we assume Tom is liable to UK tax for 2020/21 at least from his arrival in December 2020.

With more than 183 UK days, exemption under Article 15 of the UK/Irish double tax treaty would not be possible. Whilst under Article 4 Tom may have a permanent home in both countries, it's likely that his centre of vital interests is in the UK so the treaty does not offer any relief for him being resident in Ireland.

As Tom is subject to tax on his employment income in the UK and it's expected he will be non-resident in Ireland so it's recommended Tom seeks Irish tax advice to claim a refund of Irish taxes since January 2021.

Permanent Establishment
We should first consider the UK domestic law and Article 5 of the UK/Irish double tax treaty (which follows the OECD model) which both consider whether a permanent establishment (PE) exists in the UK of Eirepipe Ltd. This is a fixed placed where a business is partly or wholly carried out.

Whilst Eirepipe Ltd's business remains in Ireland, Tom's presence in the UK could create a PE which means that profits generated by Tom's activities are liable to UK corporation tax. We usually consider a physical office or site but it's also possible that an employee's home or office in a shared workspace could be considered a PE especially if Tom started selling in the UK or acts as an agent of Eirepipe Ltd in the UK with the ability to conclude contracts on their behalf.

There is a possibility to reduce the PE risk by changing the way Tom operates in the UK by significantly restricting his activities, ensuring that negotiations and client discussions are carried out by colleague from Ireland and Eirepipe Ltd's management be more involved in the sales process.

Given that Tom's role is Head of Sales and he's personally developing relationships with UK customers for ecopipe products, significant changes would be needed to make this viable. Perhaps ecopipe sales could be made by colleagues in Ireland and Tom joins Cable plc's sales team instead.

If a PE is created, corporation tax is due nine months following the end of the accounting year and separate accounts would need for the PE with corporation tax returns due annually. Assuming Tom's activities generate sales of £4.5m with a 40% profit margin, this could mean gross profit for the PE of £1.8m although of course other costs would apply to achieve the overall profit for the PE.

As Irish tax would also be due on the same profit the UK/Irish double taxation treaty could be used to provide allow credit for the UK tax paid, however, only up to the rate of Irish tax. As UK corporation tax is currently 19% and Irish is 12.5%, UK tax of £117,000 (6.5% of £1.8m) would be an additional cost.

A PE is unlikely to have started yet as Tom has been concentrating on Irish sales to date but if Tom remained in the UK whilst employed by Eirepipe Ltd and his activities generated UK sales of the ecopipe, it would create a PE in the UK.

PAYE and National Insurance obligations
You have advised that Eirepipe Ltd has asked you to assist in paying Tom as a temporary measure before the UK and Irish divisions merge.

PAYE

As a resident in the UK, Tom would be liable to UK tax. We therefore have to consider who is responsible for operation of PAYE alongside the options as follows:

1) Tom works remotely in the UK as an employee of Eirepipe Ltd
2) Tom remains an Eirepipe Ltd employee and seconded to Cable plc to work in the UK
3) Tom becomes a Cable plc employee

Working Remotely in the UK as an employee of Eirepipe Ltd

Under this arrangement, Tom would continue to be employed by Eirepipe Ltd and work in the UK selling Irish products.

The business renting an office from April 2021 created a physical place of business resulting in a need to operate a PAYE scheme.

Cable plc does not currently have a PAYE obligation for Tom if he's not working "for" you so it would not be appropriate to simply pay him for Eirepipe Ltd.

Eirepipe Ltd would be obliged to register for a separate PAYE scheme. This could be run from Ireland with the help of Cable plc's finance team or through a UK payroll agent.

It's not possible to retrospectively register a PAYE scheme, so there is a failure to register for PAYE from April 2021 and a disclosure is recommended to HMRC regardless of the option chosen going forward. Interest and penalties from the original due dates will be charged.

Accounting for corporate tax and annual tax returns for the PE as well as a payroll for Tom would lead to professional fees disproportionate for one employee.

Given the exposure for Eirepipe Ltd for creating a permanent establishment and the professional and admin requirements of setting up a separate payroll, this option is not recommended going forward.

National Insurance

The original aim was for Tom to work here temporarily so the EU social security regulations would have kept him within Irish social security. Eirepipe Ltd should have applied for an A1 certificate of coverage for Tom to remain in the Irish PRSI system whilst temporarily working in the UK.

Retrospective applications for A1s are permitted so it's recommended that an A1 is requested effective from December 2020 to the date Tom joins Cable plc, confirming that he stays within Irish social security for the historic period.

If an A1 certificate cannot be obtained, then UK NIC should have been paid. Eirepipe Ltd, as an EU employer, is deemed to have a place of business in the UK for NI purposes under UK's withdrawal agreement from the EU. This means Eirepipe Ltd would have had an obligation to operate a UK NI-only PAYE scheme, which is a PAYE scheme but only NI should be deducted and paid to HMRC. Both employee's and employer's contributions would be due.

Going forward, however, we know this is not a temporary arrangement so UK NI would become due from the point the intention to remain in the UK changed. Again, an A1 certificate is needed from the UK authorities to ensure NI is not due in Ireland.

Secondment to Cable plc

Under this arrangement, Tom would remain employed by Eirepipe Ltd and be seconded to Cable plc, working in the UK selling Eirepipe or Cable's products on a temporary basis until your legal restructure takes place. Perhaps an agreement could be made whereby Cable plc sells Eirepipe Ltd's products as an agent.

As Tom is working "for" Cable plc you would be responsible for operating PAYE on Tom's remuneration from the date of the secondment.

When on secondment, it's typical to keep pay the same. Tax equalisation is a concept where a seconded employee suffers the same tax as their "stay at home" position. A deduction would be made from Tom's salary as "hypothetical tax" equivalent to the usual Irish tax withheld by Eirepipe Ltd. These funds would be used towards the UK taxes paid by the company on behalf of Tom. Tax would be calculated on a grossed-up basis.

Tax equalisation can be expensive so a full costing is recommended before this option is considered.

A secondment letter would be needed to set out the terms under which Tom would work and his role in the UK and when he would return to Ireland. It would be a possible opportunity to offer Tom a benefits package that would be more aligned to UK policy. Eirepipe Ltd and Cable plc would also need an inter-company agreement to ensure that the recharge of costs between the two companies was clear and met transfer pricing requirements for corporation tax.

However, the reality of the situation is that Tom wishes to remain in the UK indefinitely so a secondment as a temporary arrangement does not fit the fact pattern as there is no expectation that Tom would return to Ireland. Therefore a secondment to Cable plc is not recommended.

Tom becomes employed by Cable plc

As it is planned for some of the operations to eventually merge, we agree with your idea to hire Tom directly.

This would mean bringing forward some of your plans to restructure the way Eirepipe's products are sold in the UK, including Tom reporting to UK management. By selling Eirepipe products through Cable plc as a distributor instead of directly by Eirepipe Ltd, the profit generated will form part of Cable plc's profit.

This will remove the need for Eirepipe Ltd to operate a separate UK payroll as Tom would join Cable plc's UK payroll and be liable to UK tax and NI. It would also avoid the PE issue with the need for separate annual filings and corporation tax registrations, until the more formal restructure takes place.

We recommend legal and corporate tax advice is sought in the UK and Ireland to ensure the structure is commercial and achieves the desired outcome.

We recommend that Tom becomes a Cable plc employee as soon as possible, say from July 2022 and a new remuneration arrangement is agreed with him as a UK local employee as some of the Irish tax-free allowances and benefits would be liable to UK tax. This could of course involve similar benefits in Ireland such as company car and medical insurance but perhaps use could be made of UK tax efficient benefits such as travel and subsistence, relocation, low or no emission company cars and whether private fuel should be provided (see section on Structure of Employment Package below).

<u>Conclusion</u>

Overall given Tom's role, his integral part of the sales strategy for expansion of ecopipe products and the inability to separate Tom to avoid a PE, it's recommended that sales to UK customers are made through Cable plc instead of directly through Eirepipe Ltd, and Tom becomes an employee of Cable plc.

<u>Employment Law</u>
It's recommended that an employment lawyer reviews Tom's contract if you are removing lunch and pension allowances and ensuring that holiday entitlement and sick pay entitlement is in line with the UK standard terms.

Items such as annual holiday and bonus arrangements should be reviewed to ensure that they are aligned to UK policies. Also, it should also be clear on what basis future bonuses are to be paid and by which entity, including reference to his previous Eirepipe Ltd employment in his total length of service.

As a UK employee Tom would also be eligible for auto-enrolment pension so Eirepipe Ltd would need to register him in the UK pension.

<u>Transfer pricing & inter-company agreements</u>
Transfer pricing would also have to be considered to ensure that costs were recharged between Eirepipe Ltd and Cable plc in accordance with each country's transfer pricing regulations with the necessary mark-up.

There should also be an inter-company agreement especially for any costs which continue to be paid by Eirepipe Ltd (for example if Tom's company car continues to be owned by Eirepipe). Again, legal and corporate tax advice in both the UK and Ireland is recommended to ensure that costs and profit are correctly allocated in each location and a PE in the UK is avoided for Eirepipe Ltd.

<u>VAT</u>
If Eirepipe Ltd is deemed to be trading through Tom's activity in the UK, UK VAT would need to be charged to UK clients by Eirepipe on any ecopipe sales so would involve a UK VAT registration and regular accounting for VAT.

Input VAT on expenses could be claimed, but needing a UK VAT registration would lead to additional administration and something which could potentially be avoided by having all trade through Cable plc. We can support you to register Eirepipe Ltd for UK VAT and file tax returns due if you wished to create a PE for Eirepipe Ltd.

However, we recommend that the UK sales activities for Eirepipe Ltd are included within Cable plc's trade so that an additional VAT registration for Eirepipe Ltd is not needed at this stage. We recommend you seek additional VAT support to ensure your VAT obligations are met.

Income tax for Tom
From December 2020 to the date Tom moves onto the UK payroll, UK tax due would need to be paid via UK self-assessment returns. This would be on his total salary package with the exception of bonuses earned before his arrival in the UK. For example, the bonus paid in February 2021 would relate to the 2020 calendar year so would mostly be taxed in Ireland.

Tom should register for self-assessment and obtain a Unique Taxpayer Reference (UTR) and file returns. For 2020/21, Tom would have three months from the date of issue of a 'notice to file' to file a return. As tax would have been due by the normal due dates interest would be charged on 2020/21 tax from 31 January 2022 and penalties for failing to notify chargeability by 5 October 2021.

Payments on account would also likely be needed for 2021/22 on Tom's income before joining the UK payroll.

UK tax would be based on Tom's current package, valued according to UK tax rules so his company car and fuel, pension allowance and lunch allowance would be liable to UK tax whereas they were tax-free in Ireland. Regardless of the option chosen going forward, an agreement would have to be reached as to who would bear the taxes in the UK on these items for the past.

You may wish to provide Tom with support to file UK tax registration, obtain his UTR and file UK returns.

We can certainly provide UK tax support to Tom but our engagement letter would need to be amended to provide those services.

You may also want to appoint Irish tax advisers to help Tom claim any appropriate refunds from Ireland.

Please bear in mind, however, that fees for tax services are benefits in kind which, alongside any other benefits in kind like private medical insurance and company car, should be reported on form P11D.

Cashflow issues for Tom
Claiming a repayment of the Irish taxes will enable Tom to fund his UK tax, however he may experience cashflow issues if an Irish repayment is not received until after the UK taxes are due.

We recommend that Cable plc loan him funds to pay his UK tax which would be repaid when he's able to obtain a repayment of his Irish tax. As the loan is likely to exceed £10,000 beneficial loan interest would have to be reported on Tom's P11D which would also be liable to Class 1A NI.

It's recommended that legal advice is obtained to draw up a loan agreement with Tom to ensure clarity on when and how the loan is repaid and what happens to the balance if the amount of Irish tax repaid is less than the loan or if Tom leaves the business before the loan is repaid. If any of the loan is waived, this would have to be reported in the UK payroll as earnings.

Structure of employment package
You asked whether Tom could switch onto a UK contract and he wishes to be on the same terms as his Irish employment. This is possible but Tom's Irish contract contains items which are not UK tax efficient.

Round sum expenses such as lunch allowances are not typically paid in the UK and unlikely to be agreed by HMRC as tax-free. Also pension allowances are not tax-free in the UK even if used to fund a personal pension, however tax reliefwould be available if Tom invested in a UK personal pension. Auto-enrolment would be compulsory for Tom to be registered in Cable plc's pension scheme which potentially could mitigate the cost of grossing-up the allowances but would of course involve an employer matching contribution cost.

The largest difference is the company car and private fuel which under Ireland's rules are tax-free but here would generate a significant car and private fuel benefit.

If Cable plc hires Tom directly, you have the opportunity to renegotiate Tom's employment contract in line with your UK remuneration structure and tax treatment. If you wished, Tom's company car could continue. Use of a low or no emission company car could reduce Tom's benefit in kind. You may also wish to consider whether to stop providing private fuel to further reduce costs and NI for Cable plc and the tax for Tom.

The housing allowance which Doug agreed with Tom would also be liable to tax and NI. As an alternative you may wish to offer Tom to reimburse his relocation costs which could be tax-free up to £8,000.

It's possible that Tom's happy to bear the UK rates of tax and NI, however, this would all impact his net pay expectations. The Irish tax rates on his salary are higher than the UK's. You may wish to gross-up items so that Tom is compensated for the additional tax/NI liability, however, this would increase the costs for Cable plc and attract employer's NI.

For example, if you pay the grossed-up tax and NI on the lunch allowance, pension allowance, company car and fuel this could be expensive. Looking at a worst case scenario costs would be as follows (using 2021/22 rates):

Lunch allowance £40 per day		
Works outside the office 50% of the time/		
Assume 240 workdays each year		
50% x 240 = 120 workdays		
£40 x 120		4,800
Tax gross-up at 47/53 (45% tax plus 2% employee NI)	**£**	**4,257**
Pension contribution is £727 per month		
£727 x 12 per year		8,724
Tax gross-up at 47/53 (45% tax plus 2% employee NI)	**£**	**7,736**
Company car and fuel calculation		
Audi A5 Coupe 1.9l petrol & private fuel		
List price when new in 2020 £45,250		
CO_2 is 145g/km		
Company car benefit £45,250 @ 34%		15,385
Fuel benefit £24,600 x 34%		8,364
		23,749
Tax gross-up at 47/53 (45% tax plus 2% employee NI)	**£**	**21,060**
Total:		
Lunch allowance	£	4,257
Pension	£	7,736
Company car and fuel	£	20,441
Total	**£**	**32,434**
Employer NI @ 13.8%	£	4,476
Estimated annual total cost to Cable plc	**£**	**36,910**

Corporation tax relief would be available for Cable plc for these additional costs but this is significant additional cost for the company. It's also may not be sustainable in the long-term as it would differ to the typical package offered to Tom's UK colleagues.

We recommend you discuss with Tom a fresh salary and benefits package. Auto-enrolment makes it necessary for Tom to be offered UK pension which could mean a significant cost for Cable plc. He may seek financial advice and opt-out if he wished, however it's certainly more tax efficient for him to join the UK pension scheme compared to a cash allowance.