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Office of Tax Simplification (OTS) Review of Hybrid and Distance Working - Call for Evidence

Response by the Chartered Institute of Taxation

1 Executive Summary

1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.

1.2 The CIOTs response to the call for evidence is set out below. Our comments should be read in conjunction with our oral comments from our meeting with the OTS on 15 September 2022.

1.3 It is becoming increasingly common for employees to want to work more flexibly and to choose where they work from. This leads to both the employer and the employee facing tax compliance issues in respect of (i) for employees temporarily working in a country other than where they normally work (ie internationally mobile employees), how tax and social security in that country comes into play, (ii) for a UK resident employee working from home or hybrid-working (ie working partly from home and partly from their employer's business premises), what expenses and benefits-in-kind are taxable or tax exempt, and (iii) for an overseas business with a UK-based employee(s), when could the employee's presence in the UK cause a UK Permanent Establishment (PE) to be established.

1.4 Our response considers the current trend towards a more flexibly based workforce, for previously office-based staff, and looks at a number of the practical issues that our members report are arising in relation to working across international borders, including short term business visitor rules and modified payrolls, travel and other expenses, and PEs. Many of these issues could be addressed either through (a) improved guidance or (b) using technology to speed up HMRC decision-making so that employers can account for the correct taxes from the outset. This should allow HMRC to focus their limited resources on higher-risk areas.

2 About us

2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.

2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

3 Introduction

3.1 The CIOT is responding to an OTS review looking for evidence of trends in relation to increasing numbers of people choosing to work in different ways, including across borders. Our response also considers whether current tax and social security rules are flexible enough to cope, as new ways of working become business as usual.

3.2 Our stated objectives for the tax system include:

- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

4 Response to consultation questions

4.1 General (Questions 1-3)

4.2 The CIOT is responding to this call for evidence in its capacity of representative body. Information about the CIOT, our work, and how we draw on our members' experiences to inform our responses can be found above at paragraphs 2.1 to 2.4. Questions 1 and 2 of the Call for Evidence are not directly relevant to the CIOT but

are relevant to the businesses and sectors in which our members have clients operating, and this response is informed by our members' experiences. In respect of question 3, we include below details of trends our members have reported in response to the other questions posed in the Call for Evidence.

4.3 ***Employers – employees working in a different country to their employer (Questions 4-7)***

4.4 *General observations*

Our members are reporting an increasing demand on businesses from employees to perform work remotely across a border for short term and indeed longer periods of time. This extends to both 'UK resident' employees wanting to work from a non-UK location and 'non-UK residents' wanting to work in the UK. Anecdotal evidence would suggest more UK employees desiring to work overseas for all or part of the year than non-UK employees wanting to work similarly in the UK, albeit the UK remains attractive for those spending longer periods of time here on secondment etc.

4.5 Businesses want to attract the best talent they can, so being flexible on where a potential or existing employee wants to work from is important. In cross-border situations this then leads to questions around where taxes, including social security contributions, are payable. For tax this may arise due simply to spending time working in another country or, where there is a tax treaty, triggering tax because the terms of the treaty are not satisfied (eg due to breaching the 183 day rule) or indeed because someone triggers tax residence overseas. For social security, the position is complex having to marry domestic rules, reciprocal agreements, the position with the EU etc. We are not commenting here on the visa and work permit issues but clearly there are fundamental questions which need to be addressed here in framing policy and practicalities around cross-border working.

4.6 Existing income tax and social security rules are built around traditional secondments, that is, placements from the home country employer to the overseas employer for fixed periods (eg one, two or more years). This usually means a change of tax residence for the employee, and tax responsibilities being met by the local host employer. Since these placements are usually for lengthy periods there would typically be careful consideration as to where tax (and social security) is to be accounted for and pre-planning to put the necessary arrangements in place with the relevant tax authorities. They are also unlikely to give rise to any issues around Permanent Establishments and corporate residence since the employer will already have a presence in the country the employee is going to work from.

4.7 *International mobility*

The rise in mobility, allowing an employee to work from anywhere whether for a few days, weeks, months, or years, requires much more rapid decisions to be made as to whether any particular employee is taxable in the country they are working from, their 'home' country, or both. Whilst there are scenarios which prima facie may fit within the same theme, each case nevertheless needs to be dealt with on its own facts as subtle variations can change the answers.

4.8 It also needs to be recognised that in some cases the employer will not be aware where the employee is working from, which not only potentially presents non-tax issues such as visa rules and regulatory issues, but also complicates tax compliance.

4.9 We think there is an opportunity for the UK to take a lead internationally in trying to streamline the practicalities around tax and social security relating to cross-border workers – particularly where (a) the worker is choosing to come to visit the UK and work here on a temporary or hybrid-working basis and there

is no employer presence in the UK, and (b) the worker is leaving the UK to work for a spell overseas while remaining an employee of a UK business.

4.10 In the meantime, guidance should be improved to assist employees working in the UK, or working abroad for short periods, to understand what their UK residence status is, and what liability the employee (and their employer) has to UK taxes, including social security (NIC). In this respect we would suggest that HMRC uses technology to create an interactive hub to allow workers/employers to input their circumstances which returns basic information on liability to UK tax, social security, payroll obligations and associated reporting - and, where appropriate, which forms or elections may be required.

4.11 *Current issues*

We have listed below a number of current issues that have been identified in respect of more traditional arrangements where an employee is temporarily working in a country other than the employee's 'home' country where the business has an existing presence in the UK.

4.12 *1) Employees visiting the UK for short periods*

There is an established UK tax regime for short term business visitors (STBVs), who are not resident in the UK for tax purposes, but who make business trips to the UK to work for a UK-based employer for less than 60 days in the tax year (ie so that any treaty relief would not apply). In this case the associated UK business can use a PAYE special arrangement ('Appendix 8'). This allows collection of tax on an annual basis rather than monthly. This approach to determining UK tax liabilities works relatively smoothly.

4.13 This said, a different situation arises when it is known that the 60-day threshold will be breached so that accounting for PAYE annually under Appendix 8 is not possible. For example, because the employee has elected for personal reasons to work in the UK for one week in every six. In these circumstances PAYE has to be applied on a payday-by-payday basis, but the employer may nevertheless apply for a direction from HMRC under Section 690 ITEPA 2003 whereby they are permitted to operate PAYE only on the percentage of the employee's total earnings that are for work in the UK. In the example on c17%. However, the experience of our members is that it can take an inordinate amount of time to obtain a Section 690 agreement from HMRC.

4.14 As it is now quite common for non-UK resident employees to elect to spend short periods of time working in the UK in the above-mentioned circumstances, we think it is important that HMRC are able to accommodate issuance of Section 690 directions much more swiftly than at present. Indeed, it is sometimes the case that directions are delayed to such an extent that the tax year ends before this happens, which means the UK entity has to account for PAYE in full at the same time as withholding tax is being applied overseas. This is clearly very unhelpful in terms of cash-flow.

4.15 HMRC already has a dedicated Expatriate Tax Team, to deal with the tax issues arising from non-domiciled employees who are assigned to work in the UK by their non-UK employers. We suggest creating a distinct 'Inpatriate' tax team to address the tax issues arising from UK employees who leave the UK to work abroad, and from non-UK resident employees and directors working in the UK who are not regarded as expatriates in HMRC's terms. This would allow HMRC to focus, for example, on issuing section 690 directions more quickly for that population.

4.16 There is also an opportunity to use technology to provide rapid responses to applications for specific PAYE agreements, such as under Section 690. For example, the application could either be approved by a computer-bot (subject to the relevant criteria being met) or employers could be permitted to self-certify that the criteria for a Section 690 agreement are met, with the onus and responsibility for getting it right transferring to the

employer. Digitalising many of the application processes and permitting self-service, or auto-approval of the 'simple' cases, would allow HMRC's limited resources to focus on the higher-risk cases.

4.17 *2) Employees leaving the UK*

There is an established process when an employee is sent on an assignment outside of the UK and they are no longer a UK tax resident, of contacting HMRC prior to employee commencing their overseas assignment to obtain an NT (no tax) code to take effect from the departure date to prevent double taxation. The NT code means that the employer does not have to operate PAYE on employment income relating to non-UK work duties. However, the experience of our members is that at present it can take too long to obtain this code. While this may be manageable where the application to HMRC is significantly ahead of the departure date, in an era of greater international mobility and secondments that used to be settled months in advance being implemented in a matter of weeks or even days, there is a need for a quicker response from HMRC.

4.18 *3) Social Security (NIC)*

It is important to recognise that social security obligations do not necessarily follow the income tax obligations. While there is a general principle of contributing where you work there are many social security agreements that allow employees to remain in their 'home' country's social security system where they temporarily work 'overseas'.

4.19 Unfortunately, it is not always clear when an employee can or cannot stay in their 'home' country's social security system, and it can take a long time to agree with the relevant tax authorities which social security system(s) should apply and to what. We think the time taken in obtaining A1 statements or certificates of coverage confirming which social security rules apply to an employer and employee can be problematic given today's much more agile workforce. While for income tax purposes any mistakes in the deduction of income tax at source from earnings can be corrected via the Self-Assessment process, there is no similar simple mechanism for social security.

4.20 We suggest that guidance is improved on to explain when UK NIC is due on earnings, including decision-making trees that will allow employees and employers to 'self-assess' when UK NIC deduction is in point. In addition, that a digitalised end-of- year process is introduced to allow employees (and employers) to 'true-up' any mistakes made during a tax year.

4.21 *4) Travelling to/from the UK*

An issue that often arises is what travel costs are tax deductible or reimbursable tax-free where an employee is based in one country but travels and undertakes work in another country. The tax rules at Sections 370 and 373 of ITEPA 2003 are relatively straightforward where an employee is seconded on a 'permanent' basis. For example, under Section 370 Case B where duties of the employment are performed partly outside the UK, such as travelling overseas for a meeting, and the journey is to the place where the non-UK duties are to be performed, and the journey is wholly and exclusively for the purposes of performing those duties (or returning to the UK after performing them), then the payment or reimbursement by an employer of the travel costs incurred is not taxable.

4.22 What is less clear is whether overseas travel costs may be reimbursed tax-free where an employee chooses to, for example, work in the UK for a non-UK employer and travel to meetings at their employer's premises. Anecdotally we understand that it is often difficult to obtain HMRC's agreement that the travel costs are tax exempt.

4.23 *5) Residency tests and working full-time abroad*

The UK's statutory residence test provides that an individual can be automatically non-resident for tax purposes if they work abroad full-time and spend fewer than 91 days in the UK, of which no more than 30 are spent working. This leads to questions as to the location of work[1] in an era of mobile technology. For example, clearly an employee visiting the UK to visit clients for 2 days will be carrying out work in the UK on those days. But what if the employee's visit is to attend a concert and the employee conducts business via, for example, their mobile phone, or tablet or laptop whilst in the UK? Noting also that where there is a foreign employer, a dual contract and the requirement for duties of the employment to be performed wholly outside the UK, that in some circumstances using a mobile phone for work purposes whilst in the UK may be regarded as 'merely incidental' duties performed in the UK and, thus, regarded as performed outside the UK[2]. More prominent guidance on what work constitutes a 'day of work' in the UK or 'UK duties', and the consequences of this, would be helpful.

4.24 ***Employers – employees based in the UK working remotely in the UK (Questions 10-12)***

4.25 *General observations*

It is evident that 'working from home' and 'hybrid-working' (working some of the time from home and the rest of the time at the employer's premises) has increased significantly for office-based and similar employees as a result of the pandemic. Pre-pandemic it was the norm to commute and work from the office, with a minority of employees adopting hybrid-working arrangements and few employees permanently working from home. Post-pandemic it appears that working from home and hybrid-working arrangements have become much more the norm. This said, the rising cost of living may see some employees reassessing whether the extra heating and lighting costs of working from home are offset by commuting costs, and this may see some employees that have currently opted to work from home returning to the office, especially if they have low commuting costs (such as being able to walk or cycle to the office).

4.26 At the same time employers want to ensure that they are compliant with tax rules and to have policies in place that are tax compliant, albeit we are in something of a twilight zone at present and the experience of our members is that employers are waiting for things to settle down before finalising policy and updating things like employment contracts and employee handbooks.

4.27 *Current issues*

The existing expenses and benefits-in-kind rules do, however, give rise to some challenges for employers, such that employers sometimes have to jump through hoops to ensure that work-related expenses incurred by employees, or benefits-in-kind provided to employees, remain tax exempt. We have listed below a number of the issues that have been identified in this respect.

[1] RDRM11770 - Residence: The SRT: Days spent in the UK: Location of work - HMRC internal manual - GOV.UK (www.gov.uk)
[2] EIM77030 - Appendix 3: Non domiciled employees: dual contract arrangements - HMRC internal manual - GOV.UK (www.gov.uk), EIM40203 - Employee resident or domiciled outside the United Kingdom: location of duties: 'merely incidental' duties - HMRC internal manual - GOV.UK (www.gov.uk), and EIM40204 - Employee resident or domiciled outside the United Kingdom: location of duties: 'merely incidental' duties: examples - HMRC internal manual - GOV.UK (www.gov.uk)

4.28 *1) Travel expenses*

One of the issues to arise with the rise in working from home and hybrid-working is in what circumstances are an employee's travel costs exempt from tax? For the avoidance of doubt we are referring here to cases where both the employee's home and the employer's office premises are in the UK.

4.29 In general, there is no tax relief for the cost of travel between an employee's home and their permanent workplace (eg the employer's premises). This includes having to attend a permanent workplace outside of normal working hours (eg being called in for weekend overtime).

4.30 Where an employee's home is their permanent workplace[3], and they attend a temporary workplace to perform the duties of their employment, then tax relief for the cost of travel from home to that temporary workplace is available. Similarly, where an employee is required to travel between two places of work (neither of which are their home), in the same employment, in order to carry out the duties of that employment, the cost of travel is incurred in the performance of the duties and are therefore normally allowable.

4.31 Whereas, where an employee who works from home attends another workplace for the same employer regularly (ie attendance is frequent or follows a pattern) then it may be treated as a second permanent workplace and any travel from home to that workplace is treated as ordinary commuting and the expenses of travelling are not normally allowable.

4.32 With working from home and hybrid-working now seen as both very doable and desirable, the tax rules around what is business travel and what is ordinary commuting need to keep pace with this change in working practices. This is not just in the context of employee choice around where they work, but also in cases where the employer has down-sized office space so that it is no longer physically possible for all employees to attend their workplace at the same time and a rota therefore operates.

4.33 HMRC's 490 booklet[4] (Chapter 3) provides an example at paragraph 3.36 of a typical hybrid-working arrangement. The travel to the employer's premises on the days normally worked at that workplace is classed as ordinary commuting. However, there are going to be days when an employee would normally be working from home that they are required to attend their employer's premises. If such occasions are irregular then, we believe, that the journey on those days would be for allowable business purposes rather than ordinary commuting. This view appears to be borne out by the example at paragraph 3.38 of the 490 booklet.

4.34 We recommend that the opportunity is taken to review and clarify the exemptions and deductions for employee's travel expenses to ensure that they are fit for purpose in a new era of hybrid working from home arrangements. As a minimum, the opportunity should be taken to improve existing guidance on allowable/non-allowable business travel.

4.35 *2) Household expenses*

There is an existing exemption[5] under which employers can make a tax-free payment to an employee to meet the reasonable extra household expenses (ie costs connected with the day to day running of the employee's home) which their employee incurs in carrying out duties of the employment at home under a homeworking

[3] EIM32760 - Other expenses: home: working from home - HMRC internal manual - GOV.UK (www.gov.uk), EIM32370 - Travel expenses: travel in the performance of the duties: travel to and from home where it is a place of work - HMRC internal manual - GOV.UK (www.gov.uk), and Ordinary commuting and private travel (490: Chapter 3) - GOV.UK (www.gov.uk)

[4] Ordinary commuting and private travel (490: Chapter 3) - GOV.UK (www.gov.uk)

[5] See EIM01472 - Employment income: household expenses: payments to reimburse additional costs: introduction - HMRC internal manual - GOV.UK (www.gov.uk)

arrangement. However, the exemption does not provide the employee with a right to claim a deduction for tax purposes for the extra household expenses if the employer does not reimburse that expense.

4.36 For an employee to be able to claim a deduction for the extra cost of working from home the expense must be claimed under Section 336 of ITEPA (Deductions for expenses: the general rule), which requires the taxpayer to demonstrate that they were obliged to incur the expense as holder of the employment and that the extra household costs were incurred wholly, exclusively and necessarily in the performance of the duties of their employment. However, a claim for these costs under Section 336 is normally refused unless the taxpayer can demonstrate that (a) there are no appropriate facilities available to them at their employer's premises and (b) that at no time before or after the employment contract was drawn up is the taxpayer able to choose between working at the employer's premises or elsewhere. While this rule was relaxed for the pandemic, a return to the strict application of Section 336 post-pandemic will see many existing employees who choose homeworking arrangements to improve their work-life balance being unable to claim a deduction for any employer unreimbursed additional costs of working from home because they have the choice to work from their employer's premises so the conditions of Section 336 are not met - when their new colleagues, engaged under a contract to work from home, may be able to.

4.37 With increasing numbers of employees choosing to carry out some or all their duties of their employment from their own home, we think that consideration should be given as to whether a tax deduction for the extra cost to an employee of working from home should be permitted in these circumstances.

4.38 This could be achieved either by extending Section 316A to provide an allowable deduction for non-reimbursed extra costs or via a parallel provision providing for a deduction for the reasonable extra costs of working from home.

4.39 *3) Equipment*

Where an employee works from home the employer will usually provide the equipment necessary for the employee to perform their duties. It is normal for the employer to provide equipment such as laptops. However, an employee is also likely to require other equipment, such as a desk and chair, in order to perform their duties. For necessary equipment to be tax exempt the employer must directly incur the expense. However, it is often more practical for the employee to directly purchase such equipment, as it is more practical for the employee to arrange delivery etc. Unfortunately, under existing legislation where the employee directly incurs the cost of the equipment, and the employer then reimburses that cost (even where the employer provides the same benefit directly to other employees), the reimbursement is taxable.

4.40 The issue manifested itself at the start of the pandemic when employees were first starting to work from home and needed to quickly obtain equipment to enable them to work from home. Where the employee directly purchased the equipment any reimbursement by the employer would have been taxable, and to address this the government introduced a time-limited exemption to deal with precisely this issue. This exemption applied from 16 March 2020 to 5 April 2022.

4.41 It seems to us that whether something is a taxable benefit or exempt from tax should not hinge on whether the employer directly or indirectly incurs the cost of that item. For example, for NIC purposes it is possible to substitute an employer's liability for that of their employee's if the employee explains in advance that they are contracting on behalf of their employer (known as 'the litany') and the supplier accepts this[6]. We also

[6] See, for example, NIM02191 - - Class 1 NICs : Earnings of employees and office holders : Goods and/or services purchased by directors and other employees : Background - The 'Overdrive' case - HMRC internal manual - GOV.UK (www.gov.uk), and

note that use of 'the litany' is not addressed in HMRC's Employment Income Manual and it would be helpful if HMRC confirmed that they agree that use of the litany applies for income tax as well as NIC purposes.

4.42 We would recommend removing the distinction between employer pays and employer reimburses so that businesses can arrange for employees to receive the equipment they need to perform their duties without having to worry about the method of acquiring the equipment.

4.43 *4) Christmas parties*

The £150 exemption for annual social functions and parties, such as a Christmas party, requires that either the party be open to all employees or that the event is open to all employees at a specific location. While it has been confirmed that the exemption also applies to online or virtual parties, it is unclear how the exemption would work in relation to employees who are full-time working from home. For example, is each employee's home a separate location? Some clarification in how this exemption is intended to operate in the context of working from home arrangements would be welcome.

4.44 *5) Cycle to work schemes*

The tax exemption for the employer provision of cycles and cyclist's safety equipment requires, as one of the conditions for exemption, that the cycling equipment provided should be used mainly for qualifying journeys (to or from work or in the course of work). This has generally been accepted as at least 50% of the cycles' use should be for qualifying journeys although it is quite difficult to assess this in practice. During the pandemic, a time limited exemption was introduced, and which was in place to 5 April 2022 for cycles etc purchased on or before 20 December 2020, to disapply the qualifying journeys condition.

4.45 It has always been accepted that employees working from home full-time cannot meet the qualifying journeys exemption. Where there is uncertainty is in respect of hybrid working employees that use their 'Cycle to work scheme' cycles to commute to work on days that they are working at their employers' premises (or at another business premises other than their home). For example, if a hybrid worker spends 3 days a week at their employer's premises and 2 days a week working from home, and on days when the employee commutes to the employer's premises they commute by cycle, is the 'mainly' qualifying condition met (ie qualifying journeys on 3 out of 5 working days), or does the fact that the employee could use the cycle every day of the week mean that the mainly condition is failed (ie the qualifying journeys are only on 3 of 7 week days)? Clarity around this point would be helpful.

4.46 ***Permanent establishment and corporate residence – Questions 20-21***

4.47 *General observations*

As noted above, our members are reporting increasing demand on businesses from employees to perform work remotely across borders for short term and indeed longer periods of time. As a result, businesses now have the challenge of applying the Permanent Establishment (PE) regulations in the context of remote work and more guidance from HMRC (and the OECD) on this would be welcomed, both by businesses and advisers.

4.48 For example, with traditional mobility (formal secondments) and business travel it is, generally, clearer that an employee will be working for the benefit of an entity in the destination country, including time physically in an office location there, working on projects with local staff, or meeting local customers. In turn, these arrangements are more clear-cut and managed through secondment agreements clarifying that the employee

NIM06054 - - Class 1 NICs: Expenses and Allowances: Petrol: Purchasing fuel on behalf of the employer - The Overdrive Case - HMRC internal manual - GOV.UK (www.gov.uk)

is working for the benefit of the local entity, transfer pricing arrangements, payroll withholdings in the destination and so on. As such, the business will usually have an existing presence in the country the employee is going to work from and the employee's move to that country does not give rise to any new issues around PE and corporate residence.

4.49 However, in remote work situations, and in contrast to the PAYE obligations discussed at paragraphs 4.11 to 4.15 where there are local entities to deal with PAYE etc issues, the above hallmarks tend not to be present. In these cases, the employees work from a home or holiday accommodation in the destination country and often have no interaction with the local entity, local teams or local customers.

4.50 *Current issues*

In our members' experience one of the difficulties that arises in remote work situations is that different countries take different interpretations of remote worker situations (and of the OECD guidance contained at paragraph 18 of the commentary) – some countries appear to have a default position that an office at a worker's home cannot be at the disposal of the individual's employer, whilst other countries take the opposite view[7]. This inconsistency can make it difficult for UK businesses operating with international remote workers to understand their PE risk globally.

4.51 In our view the OECD commentary stating (emphasis added): *'… Where, however, a home office is used on a continuous basis for carrying on business activities for an enterprise and it is clear from the facts and circumstances that the enterprise has **required** the individual to use that location to carry on the enterprise's business (eg by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise*' is not particularly helpful in the vast majority of situations that have arisen following the pandemic. This is because in these cases the choice to work remotely is the employee's, not the employer's, and it may only be for limited periods of time and not continuously, although many employees are now opting to work from home on a permanent basis.

4.52 In our view, the OECD commentary did not envision the current reality of employees choosing to work remotely and it would be helpful if the commentary was expanded to also cover the situation where working at home was not 'required' but the employee's choice/was not continuous.

4.53 Consequently, understanding whether a PE may or may not be established in remote working situations can be quite challenging and international cooperation is needed to ensure a consistent approach.

4.54 Another aspect of remote working that we understand businesses find challenging is global, regional or dual roles that involve time spent working across two or more countries. Articulating and in turn managing the split of activities across jurisdictions to mitigate creating multiple PEs can be complex. Therefore, increased clarity on the PE and income tax/payroll requirements specific to remote work examples, reflecting these newer ways of working, in the regulations and/or guidance would be welcomed. This is particularly relevant as there is such a strong connection between the PE outcome and the requirement to manage any income tax through a payroll.

[7] For example, we understand that local advice received by a member in relation to Germany and Spain is that in general, the tax authorities would not consider a home office to be at the disposal of the business, and therefore the risk of triggering a fixed place PE is low; whereas local advice received in relation to Switzerland is that whenever a home office significantly replaces a permanent workplace in an office for a longer period, it is generally assumed, for Swiss tax purposes, that the home office is at the disposal of the employer.

4.55 This said, many non-UK businesses will 'voluntarily' manage the UK payroll tax implications of an employee working remotely in the UK either in-house or via outsourcing to a UK-payroll provider. For example, for European-based businesses there is often an obligation under the EU social security regulations to register and account for social security (NIC) in an overseas country for an employee resident in that overseas country even though the business has no 'presence' in that country. Similarly, where an employee is liable to income tax on their earnings in the UK, rather than require their employee to register for PAYE with HMRC, the overseas business will usually take on the reporting and deduction obligations (via a UK agent) despite not having a 'PAYE presence' in the UK. As such registering as an employer with HMRC should not, of itself, be an indicator that an overseas business has established a PE in the UK.

4.56 On a practical level, issues that must be considered include, inter alia, what activities an employee will be undertaking, how long for, whether other staff will be doing similarly in the same location, where the individual will be based. Where individuals are more senior and/or are front office staff then clearly the potential PE issue is accentuated. We recognise that the reality is that all the circumstances need to be worked through to determine the degree of risk in triggering a PE in the country concerned (and indeed in the UK when things are the other way round). Unfortunately, it is difficult to say what can be done to avoid the need for this sort of in-depth analysis, time-consuming and potentially costly as it is.

4.57 The existing OECD guidance on PEs is potentially contradictory in places and more detail and clarification would be welcome. For example, the guidance currently suggests that if there are relatively senior people in a territory making a significant contribution to the business, this activity cannot be preparatory or auxiliary in nature. Nevertheless, if they are working from home in that country including on a permanent basis, instead of being based in an office there, the guidance separately implies that cannot usually be a fixed place of business.

4.58 What would assist businesses would be a 'safe harbour' within the OECD commentary. Therefore, we would suggest that the UK government works through the OECD to seek to achieve a revision to the commentary that makes it clear that if, say, conditions (a), (b) and (c) apply then a PE will not arise. A collective simplification measure would be particularly helpful where the tax at stake is not material and would relieve companies and tax authorities of a significant compliance burden, reduce uncertainty, and manage costs.

4.59 For example, HMRC have been prepared to offer a safe harbour for many years on the related matter of 'economic employer', Article 15 (the Employment Article), and the 60-day rule. If all OECD countries could be persuaded to do something along these lines for PE/remote working that would certainly be extremely helpful.

5 Acknowledgement of submission

5.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation

6 December 2022