

Employment Tax Update

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PwC Contacts:

Gearóid Deegan

Partner

+353 1 792 6468

gearoid.deegan@ie.pwc.com

Ken O'Brien

Director

+353 1 792 6818

ken.obrien@ie.pwc.com

Annette Kelly

Senior Manager

+353 1 792 6773

annette.kelly@ie.pwc.com



A number of pronouncements were issued by the Irish Revenue in December which are of importance to employers. This bulletin summarises the main actions you may need to consider for your organisation. Also highlighted are some other actions to be considered in relation to employment taxes in 2012:

Directors Remuneration

- Income tax and USC treatment of directorships of Irish companies

Universal Social Charge

- Employees of Irish companies working in non tax treaty countries

Universal Social Charge

- Cross border workers

Severance Payments

Directors' Remuneration

Revenue has for the most part, re-stated well understood principles. In particular, that payments of emoluments arising from the holding of a directorship is liable in full to PAYE and USC, including payments –

- to non-resident directors (subject to any relief that might be available under a tax treaty);
- made in the form of shares;
- made in the form of other benefits in kind; or
- by way of “expenses” (other than where such expenses meet the criteria for tax-free payment under Revenue rules).

It is clear in the foregoing circumstances that companies have no discretion and the operation of PAYE/USC must apply.

The Revenue statement also addresses situations where partners in professional services firms (e.g. solicitors / accountants) hold “nominee” directorships in one or more companies. Revenue has modified its guidance and imposed a stricter set of criteria in this area. With effect from 1 January 2012, a partnership can apply for a PAYE Exclusion Order so that the fee income attributable to the holding of the office can be paid to the partnership as its income, without deduction of PAYE / USC. A number of conditions must be satisfied including:

- the partnership agreement must provide for the division of such directors’ fees between all the partners;
- the amount of the directors fees is insignificant when compared to the total partnership income;
- the individual partner is not a shareholder of the company in which he/she holds a directorship;
- the individual partner undertakes to ensure the fees are paid to each director in accordance with the partnership agreement and accept that the fees are taxable in full in their hands.

Finally, Revenue sets out its view in relation to the treatment of payments made to companies in respect of the provision of individuals to sit as directors on the boards of client companies. In particular, how the “mandating, allocating, directing, routing” of directors remuneration to third parties should be treated and to situations where the continued holding of a directorship by an individual is contingent on the payment of directors fees arising to a third party (e.g. to a service company).

The Revenue view is that where an individual holds a directorship but payments are made to a third party, the payments will always fall within the PAYE / USC net. It is likely that this will be true in the majority of cases (for instance, where directors fees have been voted by the company to the individual but the company agrees to pay the remuneration to a third party, either as a fee or simply on the mandate of the individual). However, it is not clear to us that an assumption can be made that such an outcome will automatically follow in all cases. Whether

this is so will depend on the facts and on the specific commercial arrangements in place between the parties. This is an area of significant interest to Revenue and taking professional advice is strongly recommended in cases involving these or similar circumstances.

PRSI and Directors

Separately, the Department of Social Protection (DSP) is currently reviewing its approach to determining the PRSI status of directors where it is asserted that Class S applies. The review follows UK case law and legal advice to the effect that Class S status cannot be automatically assumed and that the possibility of the existence of an employment must also be considered. This review is ongoing and PwC has been actively involved in representations to the DSP on the matter. Further information will be provided once the outcome of the review is known. In our representations we have made the case strongly that this review should not affect the Class S PRSI status of non-executive directors.

USC and employees working in non tax treaty countries

In a very welcome move, Revenue has reversed its position and confirmed PwC’s consistently held view that the USC does not apply where an employee is resident and working in a non tax treaty country and a PAYE Exclusion Order (EO) has been obtained.

What action is required?

You should now consider whether you have withheld USC from employees

working in such countries for whom an EO has issued, as they may be due a refund of the USC for 2011. The same principle equally applies to the income levy for 2009 or 2010 and refunds may be due for those years. If you have employees currently on assignment overseas and have an EO in place you may discontinue withholding USC effective 1 January 2012 and for the duration of the EO.

Cross Borders Workers and the USC

Where an individual is sent by his/her employer to work in Ireland from another EU state, EU legislation provides that the individual can remain in their home country social security position for up to 24 months (with the possibility that this may be extended). In such circumstances, the individual will retain the benefits of the home country system including access to healthcare services. As part of this, the employee will have an entitlement to apply for an Irish medical card. The “home” member state will issue an A1 certificate (previously an E106) and an S1 (previously an E101) to support this.

An individual who is entitled to a medical card is subject to a maximum USC rate of 4% for 2011 and 2012 compared with the 7% rate for other taxpayers. Revenue has now confirmed PwC’s consistently held view that in considering whether the reduced USC rate applies it is sufficient simply to demonstrate that there is entitlement to a medical card. Revenue will now accept forms A1 and S1 as evidence of entitlement.





For Irish resident individuals who work in another member state but return to Ireland at least once a week (generally referred to as “frontier workers”), the same provisions apply. However, the bilateral agreement with the UK provides that the A1/S1 form does not need to be produced and instead evidence of employment in the UK (e.g. in the form of a UK payslip) will generally suffice.

What action is required?

You should now consider whether you have withheld USC at the higher rate from employees on assignment to Ireland for whom an A1/S1 has been issued by their home state, as they may be due a partial refund of the USC for 2011. The same principle equally applies to the income levy for 2009 or 2010 and refunds may be due for those years. If you have employees on assignment to Ireland for whom an A1/S1 has been issued you may apply the 4% USC rate effective 1 January 2012.

Severance Payments

Revenue has also updated its IT21 leaflet on severance payments and a number of issues are worth highlighting.

Revenue states that where a contract of employment provides for a payment in lieu of notice (PILON), whatever the circumstances, then it is treated as normal salary. This is a very definitive statement but in practice we believe there is scope to treat the PILON amount as an ex-gratia payment, depending on the terms of the contract of employment. It is important to review the contract of employment with regard to any PILON clause when faced with a severance situation.

When looking at the potential tax-free exemption that may apply in respect of the severance payment to an individual, IT21 states that if the lump sum from the pension scheme is more than €10,000 an individual is not due the Increased Exemption. This is somewhat misleading as it ignores the option an individual generally has to waive their right to a tax-free pension lump sum and thus benefit from the additional €10,000 available

under the Increased Exemption. The lesson here is not to ignore the Increased Exemption option simply because the pension value is greater than €10,000.

A lifetime limit of €200,000 in respect of the tax-free exemption an individual can receive by way of a termination payment was introduced with effect from 1 January 2011. In the latest IT21, Revenue suggest that this lifetime limit only applies where the Standard Capital Superannuation Benefit (SCSB) is being claimed. The correct legislative position is that the lifetime limit applies to all severance payments regardless of the exemption being utilised (i.e. Basic Exemption, Increased Exemption, or SCSB). Employers will always need to take reasonable steps to verify the amount of tax-free exemption previously received by an employee to whom a severance payment is to be made.

Resolutions for 2012?

Remember that the 2011 P35 deadline is 15 February, but you can also self correct your 2010 P35 within the same deadline. So, if your organisation needs to take corrective action, there is a short window in which to act.

With effect from 1 January 2012 employee share awards are now liable to an employee PRSI charge, irrespective of when the share award may originally have been granted. The employee PRSI should be withheld along with the relevant PAYE deductions through payroll, but there is no employers PRSI due on share awards.

If you have any questions about the issues discussed in this bulletin, or about how PwC might assist your organisation in relation to employment taxes, please feel free to get in touch with your usual PwC contact or any of the people listed on the front page. Further information is also available at

and

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