



HYBRID AND DISTANCE WORKING: OTS REVIEW

Issued 28 October 2022

ICAEW welcomes the opportunity to comment on the Review of Hybrid and Distance Working published by the Office of Tax Simplification on 31 August 2022, a copy of which is available from [this link](#).

The pandemic caused an explosion in the number of individuals working from home and even from different countries. Employers not previously allowing remote working were forced by the pandemic quickly to adapt. It is unlikely that there will be a return to previous working patterns. Tax and social security contributions law do not align with current working practices.

The law and HMRC's policy on hybrid and home working, benefits-in-kind and expenses need updating. The distinction in earnings and benefits-in-kind tax law between reimbursement and provision by employers should be reviewed.

Social security agreements and certificates need to be updated to cover the position of people who are not posted but decide to work elsewhere for a limited period.

A review of visas is required to cover nomad visas, business visas, alongside an exemption from taxation as a benefit-in-kind of the cost of obtaining visas provided by employers.

A clearance process as to whether a permanent establishment exists, safe harbour tests, better guidance and international agreement via the OECD are required.

HMRC needs to do more to help businesses meet their compliance obligations efficiently and cost effectively and thereby make the UK a more attractive place in which to run and grow businesses.

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Who we are

This response of 28 October 2022 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in [Appendix 1](#).

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 157,000 chartered accountant members in over 147 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

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KEY POINTS

1. The pandemic caused an explosion in the number of individuals working from home and even from different countries. Employers not previously allowing remote working were forced by the pandemic quickly to adapt. It is unlikely that there will be a return to previous working patterns.
2. Tax and social security contributions law do not align with current working practices.
3. The law and HMRC's policy on hybrid and home working, benefits-in-kind (BiK) and expenses need updating. The distinction in earnings and BiK tax law between reimbursement and provision by employers to employees should be reviewed.
4. Social security agreements need to be updated to cover the position of people who are not posted but decide to work elsewhere for a limited period.
5. A review of visas is required to cover nomad visas, business visas alongside an exemption from taxation as a BiK of the cost of obtaining visas provided by employers.
6. There needs to be a system of clearances as to whether a permanent establishment (PE) exists and clear safe harbour tests. Clearer guidance and international agreement via the OECD are required. Perhaps HMRC could take the lead here.
7. HMRC needs to do more to help businesses meet their compliance obligations efficiently and cost effectively and thereby make the UK a more attractive place in which to run and grow businesses.

GENERAL COMMENTS

8. Please see our answer to Question 3 of call for evidence document for General Comments.

ANSWERS TO SPECIFIC QUESTIONS IN THE **CALL FOR EVIDENCE DOCUMENT**

GENERAL

Q1 Please provide background information on the size of your business, the sector, the number of employees, and number of countries you currently operate in.

9. Please see the "Who we are" paragraphs above.

Q2 If your answers only relate to certain parts of the business, please provide details of any differences elsewhere. For example, distance working may only be allowed for certain job roles, levels of seniority, or types of contracts. Where distinctions have been made, it would be helpful to understand the reasoning.

10. We are responding as a representative body, so our answers are expressed in general terms based on the observations of our members in practice and working in industry rather than specific to the circumstances of ICAEW.
11. Our members have a wide range of experience in dealing with both employed and self-employed individuals covering both domestic UK scenarios, issues with internationally mobile individuals and hybrid working.

Q3 Please provide details of any trends you are seeing in the areas covered by this review, even if emerging or high level. We would be grateful for any supporting data, and please highlight if the insights are anecdotal.

Generally

Categories of employee and employer that need to be considered

12. There are a lot of different categories of employees and employers that need to be considered, so not only employees working in a country different from that of their employer and employees working remotely in the UK for UK employers as noted in the call for evidence document containing the questions but also, for example, expatriate employees (UK resident or non-UK resident) coming to the UK to work for a UK employer. Contractors, whether or not working through a personal service company (PSC), cause particular difficulties.

Recent trends overview

13. The pandemic caused an explosion in the number of individuals working from home. Employers not previously allowing this practice were forced by the circumstances of the pandemic quickly to make available IT software and hardware and office equipment and implement new procedures to allow remote working. Whilst many employees worked in the same country as where they were office-based, a not insignificant number began working in countries other than their formal work location.
14. Now that such remote working has been shown not only to be possible but is widely accepted in certain jobs and certainly now expected by employees, it is unlikely that there will be a complete return to previous working practices.
15. Working from home in the UK when previously office-based in the UK highlighted deficiencies in our current tax and social security legislation as evidenced by the need to issue temporary Covid-19 easements to enable employers to support employees working from home.
16. If employees working in the same country, albeit remotely, caused issues, they were minor compared with the issues caused by employees working remotely in other countries. These issues included
- withholding obligations on the employer;
 - double taxation of the employee, which has not yet been resolved due to different easements and interpretations in different countries;
 - changing social security liabilities, if not in certain cases double social security liabilities; and
 - creation of permanent establishments (PE) leading to corporate tax implications for the employer.

In addition, immigration/work permit issues, and certain other regulatory issues, for example in banking where the individual is not permitted to work in the other country. The off-payroll rules applying in cross-border situations can cause unrelieved double taxation.

17. We are now seeing the development of special tax breaks and visas for “digital nomads”. These remain rare, although more are being introduced (see for example [48 countries with digital nomad visas – the ultimate list](#)), and, in most instances, working across international borders remains problematic for employers, employees and tax and social security authorities.
18. “Digital nomad” visas are aimed at longer periods of remote working, mainly lasting for a year. They are not a solution to shorter periods of working remotely in another country, for example an extension of a holiday or unplanned stays when a family member is ill, etc. A new type of business visa should be considered.
19. The current system of social security certificates does not adequately deal with employees who are not “posted”. A certificate, which for the purposes of this paper we are calling an

“A2” certificate, needs to be introduced to deal with employees who voluntarily work across borders so they do not have multiple liabilities to social security contributions.

20. If the UK is to become a more attractive base in which to run a business, the hybrid and remote working tax and NIC rules and the way in which they are applied need to change to conform with our *Ten Tenets for a Better Tax System* (summarized in [Appendix 1](#)) by which we benchmark the tax system and changes to it, in particular Tenets 2: Simple; 3: Easy to collect and to calculate; and 6: Competitive. Additionally, the administration of the tax system needs to be improved – waiting six months to a year for resolution is not acceptable. Turnaround times should be a month.

Cross border aspects (where not covered below) including incoming expatriate employees coming to work in the UK

Tax and social security contributions law

21. Tax and social security laws no longer align with modern day working practices.
22. The definition of seconded employees in (SI 2003/268, reg 2(1), ITEPA s 689) and the relief for chargeable overseas income and overseas workday relief (ITEPA 2003, ss22, 26A) rely on the performance of physical duties in a particular location. Similarly, the 52-week rule for NIC in the Social Security (Contributions) Regulations 2001 (SI 2001/100), reg 146 speaks to employee presence.
23. This location-based approach is no longer appropriate for modern day remote working where duties of employment can be performed from anywhere.
24. We suggest some alternative options to simplify and modernise this approach:
25. Option1: The employee is simply taxed on the basis of statutory residence test (SRT) residence in the UK, regardless of the employer location and the nature/location of their duties. Where there is no employer presence direct collection is enforced. Existing rules for double taxation relief remains unchanged, i.e., the employee can make an appropriate claim if taxed in more than location.
- OR
26. Option 2: The employee is asked to provide evidence of the nature of their duties, and self assess whether or not they are related to the UK. The employer could also be given responsibility to make a declaration of whether the local UK labour market is being impacted. If there is an impact, or if the nature of duties is UK related, then the employee is taxed on the arising basis. If the self assessment and appropriate evidence shows that there is no local UK labour market impact, then reliefs in place for chargeable overseas earnings earning and overseas workday relief for non-UK domiciled individuals apply to those duties as *if* they were being performed physically elsewhere.
- OR
27. Option 3: Expand the scope of the foreign earnings exemption in ITA 2007 ss 828A-828D, so that it
- applies to more than £10,000,
 - can be claimed via a self-assessment return if necessary,
 - is not limited to “relevant foreign earnings” based on location, but can be used to exempt earnings that relate to offshore duties (as evidenced and self assessed), and
 - remove the restriction to basic rate band taxpayers based on earnings on an arising basis.
28. Option1 is simple and provides immediate clarification that would be easily understood by employers. It would create greater equality between UK domiciled and non-UK domiciled residents. Greater use of direct collection (and simplification of the process) will be essential for this approach. If necessary, a de minimis number of workdays could be applied to avoid impacting short term business visitors.

29. Option 2 is onerous and can be easily abused. It also does nothing to address the current inequity of the application of the relief for “relevant foreign earnings”, to UK domiciled and non-UK domiciled individuals. It would also need further definitions of what is considered to be a UK duty, and this has inherent problems when applied to modern way in which we work.
30. Option 3 seems to be the simplest and easiest approach. Whilst it will still need some definitions around “remote/ UK duties”, it will reflect modern day working and help keep the UK globally competitive and attractive. It will also preserve the existing legislative relief for those who do work physically offshore.

Overseas workday relief

31. Overseas workday relief as currently framed disincentivises beneficial economic activity and is over-complex.
32. To benefit from the relief, the employees’ remuneration for overseas duties must be kept outside the UK. Whilst many other countries have reliefs for employees for a period following first arrival in the country, it is not a requirement for the funds to be kept offshore, which enables the funds to be brought in and spent in the county.
33. The UK relief also does not benefit and therefore does not attract to the UK individuals who have to work in the UK, for example, doctors and nurses working for the NHS.
34. It is not an environmentally sustainable relief as it encourages travel rather than remote working.
35. Furthermore, it is extremely complicated which makes it time-consuming for HMRC to administer.
36. To benefit from the simplified version of the relief under the special mixed fund rules a crystal ball is often needed. At the time that an employee’s bank account needs to be opened, it may not be possible to determine whether that is the correct time for the nomination rules. This is because of the difficulty in determining the employee’s residence status and particularly the split year date. These may not be known until after the end of the tax year but owing to the rules regarding what income can be added to the account it is necessary to know them in year in order to be able to ensure that a bank account can be nominated. Earnings added to the account before the split year date can invalidate the nomination.
37. It would be an improvement if overseas workday relief was revised. Consideration might be given to a flat rate percentage relief or the tax relief for remuneration in respect of overseas workdays not being dependent on the funds being kept outside the UK.

HMRC guidance

Paying the right amount of tax and social security: direct collection processes

38. Direct collection of PAYE liabilities from employees of foreign employers with no place of business in the UK involves the employee entering into a written agreement with HMRC or HMRC sending a notification to the employee.
39. Direct collection is an invaluable process but HMRC’s guidance on, for example, when should it be used and what the process involves, and when it is compliant to pay via a self-assessment tax return, and, after year one, payments on account, could be clearer.

Cross-border directorships

Better guidance is also needed to cover cross-border directorships, for example a UK company with a Swiss resident director – is the employer obliged to withhold income tax, social security contributions, etc., and, if so, in respect of which country or countries? What is the position if the director receives no remuneration for the directorship but is paid as an employee? What are the implications if the individual sits on the board of a UK company but merely as a representative of foreign overseas investor?

Relief for tax and social security contributions paid in more than one country

40. When expatriate employees create tax liabilities in more than one country which includes the UK, the UK law allows a tax credit against the overseas tax. Whilst offsetting should be simple, in practice the legislation is not clear, the UK’s non-calendar tax year-end adds complications, and it can be very difficult for UK employers to receive an offset for the overseas tax.

41. This results in UK employers having to bear a double tax liability which creates cash flow difficulties until the employees' self-assessment tax returns are processed. HMRC discourages employers from taking a credit against PAYE to avoid double taxation when the employer has had to pay the foreign tax even though the modified Appendix 6 agreement is clear that relief should be due.
42. The other foreign tax credit problem is that when the employer pays the foreign taxes to relieve employees' cash flow, HMRC insists that the payment of the foreign tax is earnings subject to UK tax and NIC. When the foreign tax is refunded, HMRC often does not refund NIC paid on the amount refunded. HMRC's argument is that the amounts paid at the time were liable to NIC – even though the money paid under deduction of PAYE is not income of the employee for UK tax and national insurance contributions purposes.
43. Both of these difficulties create unwarranted negative cash flows for UK employers and discourage them from bringing the top talent into the UK to work and sending UK employees abroad and inhibits growth.
44. Both could be resolved by HMRC processing refund requests quickly and taking a more practical approach to the operation of international payrolls.

Corresponding with HMRC

45. Resolving tax and social security contributions liabilities of cross-border employees is made more difficult than it should be because of HMRC's processes, notably for employers of incoming UK-resident and non-resident expatriate employees.
46. In particular, HMRC does not reply to correspondence within a timescale that fits in with the monthly payroll cycle and repayments get stuck in the system once the liability has been agreed.
47. Examples of delayed responses include applications for:
 - section 690 determinations (which once agreed enable employers to not account for PAYE on employment earnings that are not liable to UK tax – for more details please see under [Question 7d](#)),
 - no tax (NT) codes when employees move abroad (which when RTI was introduced HMRC undertook to issue within six weeks), and
 - unique taxpayer reference references (UTRs) for non-residents.
48. Forms 64-8 submitted with such applications are frequently separated within HMRC so the officer who deals with the application is unable to confirm to the agent that the application has been processed.
49. Where individuals do not have a UK tax reference, HMRC is unable easily to trace correspondence and applications for UTRs etc. that have not been processed.
50. HMRC's delays mean that employers and employees have to bear for unnecessarily prolonged periods the cost of tax and social security having been paid in more than one jurisdiction pending finalisation of tax or NIC liabilities. They also impose costs on businesses owing to the extra administration burden. These make UK businesses less competitive and the UK an unattractive destination for those considering doing business in the UK..
51. Possible solutions would be for HMRC to:
 - allow employers to account for PAYE on the basis of their application if HMRC has not responded within 30 days of the employer or agent posting it,
 - provide application forms for UTRs, NT codes, etc which are combined with an agent authorisation form and process both parts at the same time, and
 - issue a correspondence tracking reference similar to an order reference number provided by online retailers (but not to obtain refunds) for individuals with neither a NIC number (NINO) nor a UTR.
52. For further examples of PAYE operational deficiencies please see our response to the OTS evaluation of improvements to the operation of PAYE ([ICAEW REP 35/22](#)).

Nomadic employees

53. The number of nomadic employees has risen post-pandemic, with employees working from, for example, overseas holiday homes, which may result in employment tax liabilities unwittingly being created. Tax and social security contributions arrears often only come to light several years later.
54. We are now seeing a growth in the number of countries that offer “nomad visas” (see for example *48 countries with digital nomad visas – the ultimate list*).
55. We suggest that the UK should consider the case for offering the equivalent, for a limited period of time.
56. In addition, we recommend that safe harbour rules are introduced so that it is clear that a business visitor can work in the UK for a limited period with no tax consequences provided that they have a correct “business visitor visa” or other right to work.
57. It is a common misunderstanding that individuals can come and work in the UK tax-free if they are in the UK for less than 183 days. The confusion covers both the 183-day statutory residence test rule and the 183-day double taxation treaty employment income article rule. Part of the issue is that an individual may meet the 183-day treaty rule but fails to get exemption if HMRC views the individual as economically employed in the UK.
58. If the UK introduced a business visitor visa then as part of that introduction it should be made clear when these rules apply and that there is a separate exemption to simplify the administration.
59. A similar exemption should apply to NIC.
60. Visa fees for employees posted to the UK paid by employers and reimbursements by employers of the costs of visas applied for by employees are presently considered by HMRC to be a benefit-in-kind (BiK) but exempt if certain conditions are met. This is administratively burdensome to get right. To help employers attract top talent to work (and to pay tax and to spend money) in the UK we suggest that the cost of a visa paid for by an employer is exempted from being a BiK.
61. For NIC the current 52-week exemption on arrival is not fully defined, in that the gap that can restart the 52-week clock is not objective but is open to interpretation.
62. The 52-week continuing liability also not appropriate. Why should it be possible to be ordinarily resident for NIC but not for tax? Consideration should be given to abolishing ordinary residence for NIC.
63. Currently when visas are issued the government sometimes also issues national insurance numbers (NINOs) to individuals who have no right to such a number because they are not currently liable to NIC.
64. The administration of the issuing of NINOs needs to be improved, not only to eliminate the issuing of NINOs to those who are not entitled to one but also to improve the process of acquiring one, particularly for high-profile internationally mobile business people
“Employers of record”
65. There has been a growth of “employers of record”, who act as the legal employer of a worker in a particular country, taking care of all compliance aspects of employment, including payroll, taxes, statutory benefits, employment contracts, etc. They can be used to help employees who work from a holiday home from unwittingly accruing an employment taxes liability. Due diligence needs to be carried out when using an employer of record to ensure that they comply with anti-money laundering, banking, and client money requirements, especially where payments are made by way of cryptocurrency.
66. While an employer of record may help to resolve many issues, complications arise where workers can be employed and work cross border.
67. It would be helpful if HMRC could issue guidance on the use of such entities.
Cross border off payroll working (OPW) via a personal service company
68. The off payroll rules cause unrelieved double taxation because the UK OPW rules deem the tax withheld on the fee payments to the PSC to be payments of UK income tax on employment income of the individual. However, in the overseas country, the fee payments to the PSC are income of the PSC. As the tax is not viewed in the overseas country as paid in

respect of corporation tax of the PSC, there is no double tax relief. A solution is required to eliminate this double taxation.

69. We suggest that it needs to be possible to “undeed” the operation of the OPW rules so that the tax is treated as corporation tax to relieve double taxation.
70. As a general point, clearer guidance is required regarding the tax treatment of contractors working internationally through personal service companies (PSCs). Clear guidance needs to be provided in one place covering:
 - the continuing operation of the off-payroll rules in different scenarios,
 - the application of host employer rules in respect of payments made by the PSC,
 - interaction with double taxation treaties,
 - when the original IR35 rules apply to the PSC, and
 - the meaning of “outsourced services” and “statement of work” from the perspective of falling in or out of the off-payroll rules.

Making tax digital (MTD)

71. MTD is also going indirectly to cause issues for employers trying to attract talent to the UK because HMRC has designed MTD to require a NINO. Foreign nationals coming to the UK may have an MTD filing obligation but are not eligible to have a NINO.
72. Another difficulty is that it will not be possible for some members of foreign partnerships to be able to obtain the information required for quarterly reporting.
73. Making employees who are working overseas comply with MTD obligations will also raise issues. Typically such employees return to the UK at the end of their assignment and HMRC has not clarified how the changing residence position is dealt with.
74. UK employees sent abroad also frequently start letting their home in the UK and this will generate an MTD quarterly filing requirement.

EMPLOYERS – EMPLOYEES WORKING IN A DIFFERENT COUNTRY TO THEIR EMPLOYER

Q4 Please note whether the business you are responding for or about is based overseas or in the UK.

75. We are responding as a representative body so our answers are expressed in general terms based on the observations of our members in practice and working in industry rather than specific to the circumstances of ICAEW.

What is happening and how have things changed

Pre-pandemic

Q5 Did the business have employees working across borders before the pandemic that were not on traditional expatriate assignments? If so, please provide details of:

a. numbers (relative to the whole business),

76. Pre-pandemic many businesses had a small number of individuals working across borders to a small extent, for example dealing with emails while on holiday, adding a couple of work days to the end of a vacation, and working weekends in a different country.
77. During the pandemic some employees who were based in the UK and not their home country decided to work from their home country to ensure that they could see family members despite any international travel restrictions. Having seen that it was possible to work in this way they are now requesting such work arrangements on a more frequent basis.

78. The other change is that prior to the pandemic a few individuals were working across borders without their employer's knowledge but now they are making formal requests for cross border remote working arrangements.
79. Employers have responded by implementing formal remote working policies to enable them to manage the compliance risks and associated unexpected tax and social security bills together with minimising the administrative costs of investigations and enquiries from the tax and social security authorities.
80. Although such policies may be described as working from anywhere, the reality is that the vast majority of employers have now realised that such an approach is highly risky, from an immigration, regulatory and tax and social security perspective. Such policies, therefore, are designed to allow flexibility where the likelihood of immigration regulatory or tax and social security issues are low. For example, most policies would limit working across borders to a country where the employee has a right to work. Other restrictions include only working in countries where the employer already has a tax presence, working in jurisdictions for a very limited period, etc.

b. types of roles, seniority, or other relevant distinctions for those who did, and why those distinctions were made,

81. Initially probably not because the overwhelming prerequisite was to keep the business running.
82. It is probably true to say that businesses then realised that, as Covid-19 easements ended, senior individuals were more likely to create a PE where one previously did not exist and consequently employers were less likely to allow such individuals to work remotely across borders. The main exception is where an individual is so senior that they can make the organisation allow them and others to work in such circumstances.

c. details of how the business managed the tax and payroll reporting and other compliance requirements for these employees or officers.

83. Initially it can be true to say in many cases they did not. Fortunately, in many cases temporary easements brought in by governments to deal with the pandemic removed the obligations.
84. Unfortunately, some of the easements have caused a mismatch in approach by differing tax authorities. Where employees were forced to work remotely because they were stuck in another country, some countries take the view that the resulting employment income should be sourced based on where the duties would have been performed rather than where they were actually performed.
85. HMRC does not agree with this approach and says that the appropriate double taxation treaty should be interpreted based on where the duties were actually performed rather than where the duties should have been performed.
86. This difference in approach to the pandemic results in unrelieved double taxation. The only way to resolve this is to go through the mutual agreement procedure which currently takes two to four years.
87. In other cases, the employers had to rectify the lack of withholding, etc.
88. One reaction by employers when easements ceased was to demand that employees return to working in the country in which they were based prior to the pandemic.

During the pandemic

Q6 How did the pandemic change this?

- a. **Did the business have employees working from home in other countries for the first time?**
and
- b. **Was this the first time the business had people working in the UK?**
and

a. Did the company's business' procedures and policies change?

and

d. Did the pandemic make it harder to keep track of employees' working locations, and did that cause any tax, social security, payroll or other compliance issues?

89. Many businesses discovered that they did have individuals working in other countries for the first time or at least for the first time that they were aware of. Some businesses had individuals working in the UK for the first time and as explained above the pandemic resulted in the implementation of remote working policies.
90. Somewhat counterintuitively the pandemic has probably helped employers to track employees' working locations because the pandemic has highlighted the immigration, regulatory and tax and social security risks that remote working can cause and consequently has caused businesses to focus resources on dealing with the issue.
91. That said, the fact that tracking may have improved does not mean that the resulting issues can be dealt with easily or quickly.

Emerging from the pandemic

Q7 Where are your employees now working, what are the location arrangements (contractual or casual), and are these trends for short-term working (such as after a holiday), or long-term relocation (such as to where family are located)?

b. If employees working in different countries to their employer is new to the organisation, how easy has it been to understand the tax, social security, payroll and other implications of this?

92. This in part depends on the country concerned. For example, the UAE does not have an income tax which makes understanding that part easy, or the other country may share a common language which would help with the understanding, but in general it is not easy to understand a new country's tax and social security legislation.

c. If the organisation always had employees working in different countries, have any new tax, social security, and payroll compliance issues arisen?

93. Yes, new issues can arise because for example they may have found that they now have a PE in a new country and that the PE gives rise to corporation tax as well as income tax and social security issues. Additionally, an employer will have planned assignments to minimise any unexpected risks.
94. As remote working in the pandemic was essentially unplanned it can cause issues which the employer has not previously had to deal with, for example backdating withholding, retrospectively applying social security certificates of coverage, and discussing with the authorities why they have not met their compliance obligations.
95. Now employers are trying to ensure that remote working, like assignments, is "planned" by introducing remote working policies.

c. Have you had to consider the possibility of new permanent establishments due to the changes in working arrangements?

96. Many businesses have had to consider whether a permanent establishment has been created by the activities of their employees.
97. There is no satisfactory way of obtaining a PE ruling in the UK. Some of the temporary easements due to Covid-19 have cast doubt on previously held positions, such as whether the use of an employee's home can be viewed as a PE of the employer. For example, can the employee's home be regarded as being at the disposal of the employer? Does it matter whether the home is the employee's or accommodation provided by the employer?
98. The government says that it wishes to make the UK an attractive place for businesses. It would help if the UK had clearer guidance on the establishment of a PE and a system of clearances/ rulings.

99. A simpler system would have safe harbour rules and it would be helpful if there was a PE tool (like CEST) that businesses could use to determine on the basis of the facts presented to the tool and record whether they had a PE.
100. As so much of tax is data collection we recommend that when any new policies are announced and developed the IT implications of those rules should be considered at the same time.

d. Have there been any impacts on reporting obligations or claiming reliefs and allowances such as overseas workday relief, temporary workplace (detached duty) relief, modified payroll reporting and short-term business visitor reporting?

101. The short answer is yes.
102. For example, if overseas workday relief is being given by way of a s690 determination (which authorises the employer to operate PAYE based on its best estimate of the employee's remuneration liable to UK taxation), the determination percentage would need to be varied to accommodate the changing working pattern. Unfortunately, the pandemic has highlighted problems with the HMRC process for issuing determinations. S690 determinations need to be granted in time for the payroll to operate – in practical terms this needs to be within a month but during the pandemic the determinations could take a year to be issued.
103. Post pandemic HMRC's target for issuing s690 determinations is four months but this is not being met.
104. HMRC's view is that pending the issue of a direction the employer can either loan the employee the cost of the tax and NIC that will not ultimately be due, or pay the tax and NIC that will not be due on behalf of the employee. Both these options impose unnecessary adverse cash flow burdens on businesses.
105. In addition, if the employer pays the tax that will not be due on the employee's behalf, the tax must be grossed up. This grossed up tax is also subject to NIC. The tax can eventually be reclaimed but HMRC's view is that the NIC is not refundable because it was correctly due when paid.
106. We believe that the NIC paid on the payment of tax by the employer which is then repaid at a later date should be refundable because the payment to the employee on which the NIC was charged was never earnings.
107. Another issue with s690 determinations is the way HMRC records the determination. The application is an employer application. An employee cannot make such an application. However, in HMRC's database the determination is linked to the employee's self-assessment record. This causes problems when agents chase delayed s690 determinations because they will be authorised to act for the employer but unless the agent is also authorised to act for the employee HMRC will not discuss the s690 application and determination with the agent because of the link to the employee's self-assessment record.
108. An employer may not have found out about the alteration in the individual's working patterns by the end of the tax year meaning that the tax withheld during the year could be inaccurate when compared with the final liability on the self-assessment return.
109. In addition, where a s690 determination has not been issued due to delay in HMRC's agreeing the direction, the employee can be liable to PAYE withholding in both the UK and another country and there may be a very large repayment due. This has highlighted problems with HMRC's repayment processes.
110. There appears to be a system flaw whereby repayments are set as "pending" and prima facie should be made but get stuck.
111. The other issue is that when the repayment is marked as having been sent for a security check that security check is frequently not completed. Again, the process appears to get stuck.
112. HMRC also does not track progress of an issue from the initial contact by the taxpayer or agent. Consequently, when more information is requested as part of that security check the refund is sent to the back of the queue when the extra information is received. This means that repayments can still take over a year to be processed.

113. When operating in modified payroll, overseas workday relief can be estimated. If the employer is not aware of the changing working patterns then the estimate will be incorrect which may lead to issues similar to those above, with large underpayments and delayed repayments.
114. To simplify the administration of these determinations, we suggest that s690(2)(c) ITEPA 2003 is amended to provide that if an HMRC officer has not issued a direction within 30 days of the employer or agent posting the application, the “appropriate person” (eg the employer or payroll agent) may operate PAYE as if a direction had been issued in accordance with the original application.
- e. *Have there been any impacts on pension and share scheme policies and tax reporting requirements***
115. Again, the short answer is yes.
116. Due to working in a different country, pension tax relief may not be due because the pension scheme is not recognised in that country. Similarly, where in the home country there is a tax advantaged share scheme, such tax advantages may not be recognised in the other country.
117. Working in more than one country can also multiply the reporting requirements.
118. Not many UK double tax treaties have articles that grant relief for pension contributions. In addition, some of those treaties, eg [Chile](#), [Faroe Islands](#), [Moldovia](#), [Netherlands](#) and [Switzerland](#), also have a condition that relief can be given only in one country.
119. It is not clear why relief should not be granted in both.
120. It would be helpful if tax treaties gave greater consideration to tax relief for pension contributions in both countries.
121. On auto-enrolment, the Pensions Regulator at [Auto enrolment guidance | The Pensions Regulator](#) provides some helpful guidance. It used to be clearer regarding the position of secondees. The situation regarding nomads is very unclear. We think it would be useful if there were specific sections in respect of employees who are respectively:
- seconded to the UK,
 - seconded from the UK, and
 - digital nomads.

Policies and procedures

Since the pandemic

Q8 Have you changed your policies and procedures regarding employees working from other countries to where their employer is based? If so:

a. *What was your reason for doing so?*

122. Many employers have had to implement policies because so many employees either started working in another country or expressed their desire to do so once it became apparent that it was possible to work from another location – ignoring any immigration, regulatory, and tax and social security implications.
123. Some employers particularly those in regulatory businesses do not allow employees to work in another country without a formal assignment.

b. *What are your new policies and procedures?*

124. Many employers now have a remote working policy to manage the risk of employees working where they like. For example, some businesses state that unless going on a business trip, working abroad is not allowed at all. Others, in order to manage the risk, have within their policies day restrictions such as 30 days or two weeks whatever the country.

c. *Do you specify certain countries in your policies and if so, what checks did you do when compiling the list of countries?*

125. Many employers do specify certain countries as, variously:

- “no go” countries,
- acceptable to work in, and
- needing approval.

126. The reasons for these distinctions can be whether:

- the employer is allowed to do business in those countries, or
- the employer has a PE or other entity in that country that could deal with any withholding requirements etc

Another factor is whether the other country levies any income tax.

d. To what extent has your ability to recruit and employees’ requests for flexible terms driven changes to policies?

and

e. Does the policy state who will pay the tax and social security in the other country if any is triggered?

127. An employer’s policy may well say that an employee will have to pay tax and social security, particularly if the employee has not requested the appropriate permission. Unfortunately, that does not mean that the employer will not face penalties and further scrutiny from the tax authorities. Differences between withholding and final income tax position or reporting in countries can be difficult to ascertain without significant input from professional advisers.

f. Who will pay the travel expenses of the employee?

128. Frequently, it will be the employee which has to bear the cost of travel. It does, however, depend on the bargaining position of the employee, and if a business is particularly dependent on an employee’s skill it may feel that it has no option but to pay the employee’s expenses.

g. Who will consider any visa or other immigration issues?

129. An employer will not allow an employee to work in a country without the relevant visas. Post Brexit, this presents greater challenges.

130. Problems usually arise due to the employee not following the appropriate procedures.

h. Are there any restrictions in employees taking equipment overseas and accessing data from overseas locations?

131. It varies between employers, the market sector of the employer and the consequent regulatory environment, for example banking, and the particular country

i. How confident are you that you know where your employees are choosing to work? What steps are you taking to monitor the location of your employees? Have you had to implement new procedures/technology to be able to do this or have you been able to do this through existing means?

132. It varies for different employers. It is difficult to track and rely on employees informing the business. A limited number of employers are able to track employees via their IP addresses.

Looking forwards

Q9 Do you expect to continue to evolve your approach to overseas working over the coming months?

a. Do you have any plans to constrain overseas working and if so, how?

and

b. What factors are you expecting might alter your approach?

and

c. Do the current tax rules allow you to change your approach when there is a business need?

133. Business policies are evolving post pandemic and post Brexit.
134. Some employers who originally might not have countenanced cross-border working and consequent withholding and other obligations have had to accept it to retain valued staff. There was some truth in the headlines that people were working anywhere, but many employers now are prescribing the countries in which employees can and cannot work.
135. It will become, if not already, rare that an employer will have a policy that says an employee can work anywhere.
136. A prerequisite for an employee being allowed to work in a country is the employee having the right to work there. Brexit has changed the rules in this regard – in the EU the right to work is now a requirement but in many countries in the rest of the world it still is not. Many employees and some employers have not yet caught up with this EU rule change.
137. Individuals confuse the ability to visit for a short period with the ability to work in that location.
138. Remote working policies are evolving as the employer gains experience of the issues arising in different countries. They are also evolving as new visas and new approaches to taxation evolve such as visas and tax breaks for digital nomads.
139. The UK, if it wishes to remain competitive, needs to review the operation of overseas workday relief and consider implementing a digital nomad visa. When considering this, the UK should consider implementing a “business visitor” visa for shorter periods.
140. The UK should also consider exempting from taxation the payment of visa fees by the employer. As explained earlier, the current rules are complicated for employers to administer.

EMPLOYERS – EMPLOYEES BASED IN THE UK WORKING REMOTELY IN THE UK

What is happening and how have things changed

Pre-pandemic

Q10 Where were your employees working – wholly remotely, hybrid, or wholly in the office? How did this vary by seniority, role or other distinctions, and why?

141. Pre-pandemic that most employees were working wholly or almost wholly in the office. There were some employees working almost wholly at home, but such home-based employees were the exception.
142. The extent to which home-based working was possible clearly does depend on the employee’s role. A front-line employee such as a shop assistant or a factory production line worker cannot work at home but individuals in the same company’s finance team for example would be able to work at home if that business made available to its employees the necessary equipment.

During the pandemic

Q11 How did the pandemic change this?

a. Did the company’s business procedures and policies change?

143. Lockdowns during the pandemic meant that most employees could not travel to their workplaces but had to work remotely. Businesses who wanted to continue to carry on as near as possible to normal provided equipment to employees or authorised them to buy necessary equipment and reimbursed them.
144. The lockdown required many businesses to adopt new procedures to enable their employees to work at home. The provision of desks, chairs, monitors, computers, etc. highlighted how unsuitable our current legislation is. Many employers could not purchase and deliver even Covid-19 tests etc to their employees within the necessary timeframes. They had to, through

necessity to keep the business running, allow employees to purchase desks etc. and then claim reimbursement.

145. Economically it is the same result whether the employer buys and delivers for example a desk or reimburses the employee.

146. The tax result should be the same.

147. The extra administration and consequent extra compliance costs make UK businesses less competitive and less attractive to overseas investors considering whether to do business in the UK. A review of HMRC's approach is needed.

b. *What was your policy during the pandemic in terms of claiming working from home allowance? Did you pay it as a business expense to your employees or did they claim it directly from HMRC?*

148. Some businesses paid the working from home allowance, but many did not. The easement introduced during the pandemic enabled employees to claim a sum equal to the working from home allowance as a deduction, which helped them to alleviate their additional costs. HMRC helpfully provided a tool to enable taxpayers not in self assessment to make a claim.

149. As HMRC's tool initially allowed the working from home deduction to be claimed for the 2022/23 year, many users were given to understand that the easement continued to apply to this year too throughout the UK. The allowance can be claimed in this year due to different lockdown conditions in some of the devolved nations.

c. *What expenses and allowances did you pay directly to employees when they worked from home, or did you provide them with equipment or an allowance to buy equipment?*

150. Different businesses took different approaches, but many businesses had no option but to allow the employees to purchase equipment and be reimbursed in order to keep the businesses running. Mainly the expenses were monitors, laptops, routers, connectors, desks and chairs. Occasionally broadband was provided but that was a rarity.

d. *Did the new arrangements give rise to any tax or payroll reporting issue, for example, in relation to the treatment of expenses and allowances?*

151. Yes, they have highlighted that our current legislation needs to be improved in a number of areas. Issues include:

- i. why is there a difference in tax treatment between provision by the employer and reimbursement by the employer of costs incurred by the employee as explained above?
- ii. the temporary workplace rules do not fit with remote working and arguably a lack of a permanent workplace in addition to the issue highlighted above regarding not stopping the 24-month temporary workplace clock;
- iii. even if an employee's employment contract is changed to homeworking, HMRC's position is that they are not a home worker if it is their choice. We believe that this should not matter – tax liabilities should be based on how and where the work is performed;
- iv. UK tax legislation has many differing travel expense rules which we suggest should be simplified;
- v. the employment status test was under strain prior to the pandemic but now needs a complete review and revision. Cases take many years to pass through the courts and businesses cannot wait to see how case law evolves to deal with modern working practices. With greater flexibility many employees are becoming more like self-employed gig workers. The pandemic has given many employees more bargaining power in the employment relationship. A statutory test is required that deals with the reality of the current employer/ employee relationship including remote working, and which is much simpler to understand.

Emerging from the pandemic

Q12 Where are your employees now working: wholly remotely, hybrid, or wholly in the office? How does this vary by seniority, role or other distinctions, and why?

a. Have the new working arrangements given rise to any tax or payroll compliance challenges, including in relation to the treatment of employee expenses?

152. Yes, more employees are working from home and are claiming for the cost of equipment to support this.
153. Businesses are having to cope with the challenge of the inequity between existing employees working from home, and who may have moved a long distance away from the office during the pandemic, who are not able to claim travel to the office, or can but it is taxable, versus new employees engaged as home workers who want to recover from their employer travel costs, which are non-taxable, to the office when they visit occasionally.
154. Deficiencies in the law governing tax relief and deductions for home and hybrid working that were evident pre-pandemic were highlighted by the need for easements during the pandemic.
155. The law on how expenses and BiK are assessed to tax needs to be reviewed to reflect the fact that, post pandemic, many employees continue and will continue to work remotely.
156. We suggest that consideration be given to treating reimbursements to employees by employers of business-related expenses incurred by employees, for example on the cost of using the home as an office and office equipment (furniture, computers, etc.) used for working at home, in the same way as business-related and therefore tax-free benefits provided by employers.
157. In economic terms the outcome is the same (the employee is enabled to perform the duties of their employment and is not out of pocket), but under current law the tax and national insurance contributions implications depend on whether the employer provides the equipment, pays an allowance, etc., or reimburses employees for costs incurred.
158. We assume that this distinction is intended to prevent directors of owner-managed companies from providing themselves with unnecessarily expensive furniture and equipment, but this could be prevented by having separate rules for close companies.
159. There are also potential transfer of asset benefit-in-kind charges that may arise when an employee stops working from home or leaves the employment. The tax valuation of the benefit-in-kind is disproportionate to the commercial value of the assets.
160. We also suggest that it would be helpful to define “home worker”. HMRC’s guidance distinguishes between employees who choose to work from home and employees whose employers have told them to work from home. This is even in cases where the employment contract is varied. Many employees who now work at home but previously worked in an office believe the rules have changed and they should be able to claim travel expenses. HMRC’s view of a “home worker” is not well understood. We suggest that consideration be given to the tax rules following what is happening in practice i.e., whether the employee is working at home or in the office.

b. What specific issues have you identified with the interaction between the existing permanent workplace rules and any new hybrid working pattern? Are any changes to the guidance needed to make things clearer?

161. Guidance is the not the answer. The law needs to be clearer.
162. The rules assume that an employee spends set amounts of time in the workplace and/or at home.
163. The 40% test is probably not appropriate to many employees’ present-day patterns of working and can work capriciously where an employee happens to spend more than 40% of their time in their old office.
164. The 24 months temporary workplace rule also needs to be reviewed as 24 months is too short to incentivise workforce mobility. Preferably it should be lengthened to say 36 or even 48 months to reflect the increased length of projects, particularly those relating to infrastructure, for example, power stations, wind farms, roads and railways.

165. HMRC did not stop the 24 months temporary workplace clock during the pandemic despite the fact that employees were not allowed to work.
166. We suggest that to simplify compliance the intention rule is replaced so that the first 24/36/48 months is covered rather than the number of months during which the assignment is anticipated to last if less than or equal to 24 months. Determining when an intention changed can be difficult – exactly when did an assignment of 18 months, which was qualifying, become an assignment of 36 months, which is not qualifying? Such difficulty was one reason why the former “not ordinarily resident” rule for tax was abolished.
167. The number of months under this rule does not need to be the same as for overseas assignments as the tax and social security rules for UK and overseas temporary assignments (eg, for detached workers in the EU) are in separate legislation.
168. The definition of a “temporary workplace” might also benefit from review.

c. *What expenses and allowances are you still paying/equipment you are still providing in relation to working from home? Are you clear on the tax treatment of these?*

169. Where employees have continued to work from home expenses have in general continued to be paid.
170. The difference between provision and reimbursement is not well understood and as the economic effect is the same the two should be aligned in tax law.

d. *Do individuals still have working from home allowance in their PAYE codes?*

171. We believe that some do, in particular where in some of the devolved nations the pandemic lockdown restrictions extended into this year.

Policies and procedures

Since the pandemic

Q13 *Have you changed your policies and procedures regarding employees working location? If so:*

- a. *What was your reason for doing so?***
and
- b. *What are your new policies and procedures?***
and
- c. *To what extent has your ability to recruit and employees’ requests for flexible terms driven changes to policies?***
and
- d. *What steps are you taking to monitor the location of your employees? Have you had to implement new procedures/technology to be able to do this or have you been able to do this through existing means?***
172. Many employers have had to introduce policies to deal with remote working to not only manage immigration tax and social security risks but also regulatory risks.
173. This has been driven by more employees discovering they could work remotely, for example, because the employer had to set up home working due to lockdown and home working now becoming a requirement before new employees will accept a position. Employees are driving this change and are able to do so because there is a lack of and consequently competition for skilled employees.
174. Some employers have closed offices so home working has become the normal place of work. We expect further rationalisation of office space to continue as leases come up for renewal. We are also seeing an increase in subletting as business try to reduce the cost of their office space whilst tied into a current lease.

Looking forward

Q14 Are you likely to continue to evolve your approach to hybrid and distance working over the coming months?

- a. **Do you have any plans to constrain working from a non-office location and if so, how?**
and
- b. **What factors are you expecting might alter your approach?**
and
- c. **Do the current tax rules allow you to change your approach when there is a business need?**

175. It is inevitable that policies will change as the immigration, regulatory, tax and social security rules change.

SELF-EMPLOYED

General comments

- 176. Determining whether someone is employed or self employed in the UK has always been difficult as evidenced by a long line of cases.
- 177. HMRC's statistics demonstrate a history of non-compliance with rules aimed at disguised employment, in particular the original IR35 rules.
- 178. The tax and social security differential between engaging someone as self employed and as employed needs to be addressed. Employer NIC is a tax on jobs.
- 179. In other countries, for example the USA, the fiscal differential between the self employed and the employed is not so great, so it is not necessary to have such a strong focus on disguised self employment.
- 180. Overseas the rules governing the meaning of self employed may be different from in the UK.
- 181. In particular, in the UK a company director is deemed to be an employee for tax and NIC purposes whereas in other countries a company director may be self employed for tax and social security contributions purposes.
- 182. In the UK employee status does not apply to company directors in all branches of the law, for example a company director without a service contract is not within the national minimum wage rules, and sole directors of owner-managed companies do not have to be auto-enrolled into a pension scheme unless the business has another employee.
- 183. We have mentioned earlier the difficulties of obtaining double tax relief when an individual is caught by the off payroll working rules in the UK and the deemed employment is not recognised as such in the overseas jurisdiction.

Q15 Have your practices in terms of where you perform your work changed since the pandemic, and if so, how?

and

Q16 Have you seen any new trends in self-employed working since the pandemic?

and

Q17 Have any changes to your working practices given rise to new income tax, social security, or permanent establishment risks or issues? Or have changes in others' practices done so? If so, please explain.

and

Q18 If you are currently working abroad, do your customers/clients prevent you from performing certain activities or taking data overseas?

and

Q19 If you receive work through one or more online platforms (gig workers, for example), or represent those who do, do you consider work through online platforms is more mobile or

flexible in terms of location now? Do the platforms or the end customers know where people are working?

184. Please see General Comments immediately preceding these questions.

PERMANENT ESTABLISHMENT AND CORPORATE RESIDENCE

General comments

- 185. HMRC has no process to enable employers to obtain rulings.
- 186. Clearer and more comprehensive guidance is required.
- 187. There are different implications of working in different countries. In some countries one needs to form a company even if a business's employee is working there for a day whereas others have a direct collection system like the UK.
- 188. Simplifications are needed and some safe harbour rules. For example, why should one or two employees working in a particular country create a permanent establishment or a corporate tax liability?
- 189. Different countries have different interpretations. Greater international alignment would help, with for example common safe harbours.
- 190. This needs to be resolved via OECD. HMRC should be encouraged to take the lead on this.

Q20 Has your business had to consider whether the activities of employees or officers might create new permanent establishments in other territories?

- a. What happened to make this a consideration and***
- b. Did you consider this a risk or an opportunity, and***
- c. What actions if any were taken to mitigate or prevent it?***

191. Many businesses have discovered that due to the pandemic and in response to lockdown certain employees were working in a country in which the employer had no premises. They have then had to consider whether the work that their employee/s is/are performing could give rise to a PE. The response to such reviews range from allowing the work to continue when there was a low risk of creating a PE and when any withholding requirements could be managed, to accepting that there is a PE and meeting the reporting and filing obligations of such a PE, to banning the employee(s) from working there to stop a PE being formed.

Q21 Has your business had to consider whether the location of senior staff might change the corporate tax residence of the company?

- a. What happened to make this a consideration and***
- b. Did you consider this a risk or an opportunity, and***
- c. What actions if any were taken to mitigate or prevent it?***

192. There were concerns during lockdown that owing to those working for the business being unable to travel, the corporate tax residence status of a business may change. HMRC helpfully provided guidance explaining that there would not be an impact on company residence provided the changes were temporary and only for the duration of the pandemic/ lockdown and that the location and attendance of board meetings etc. returned to the pre-pandemic norm.

193. In most cases business have ensured that the corporate tax residence has remained the same by ensuring that the central management and control of the company/ business has returned to the pre-pandemic location.

194. We do, however, expect there to be more cases of company relocations as boards realise that they can work just as effectively remotely.

APPENDIX 1

(PARA 19)

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see <https://goo.gl/x6UjJ5>).