Department of Finance

Response to consultation on tax treatment of expenses of travel and subsistence for employees and office holders

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Table of contents

1. Introduction .................................................................................................................. 2
2. Background ................................................................................................................... 3
3. Specific items for consideration ...................................................................................... 4
   3.1 Tax treatment of home to work travel generally .......................................................... 4
   3.2 Non-Executive Directors ........................................................................................... 4
      3.2.1 The Irish PLC perspective ...................................................................................... 4
      3.2.2 The FDI company perspective .............................................................................. 5
      3.2.3 The SME company perspective .............................................................................. 6
      3.2.4 Proposed treatment of certain non-executive directors ............................................ 6
   3.3 Employees and office holders of home based businesses .............................................. 6
   3.4 Home Based Workers .............................................................................................. 7
4. Other matters raised in the Consultation Paper ................................................................. 8
   4.1 Definition of a temporary workplace .......................................................................... 8
   4.2 Reimbursement of travel expenses to non-resident employees ..................................... 8
   4.3 Reimbursement of travel expenses to Irish resident employees working outside the State 8
   4.4 Tax treatment of ‘Country Money’ .............................................................................. 9
   4.5 Attendance at work related training courses ............................................................... 9
   4.6 Use of public transport ............................................................................................. 9
   4.7 Vouched versus flat rate reimbursement .................................................................... 9
5. Conclusions ................................................................................................................. 10
1. Introduction

Ernst & Young (‘EY’) welcomes the publication of the consultation paper and the opportunity to offer proposals and feedback in relation to the consultation process. As a leading professional service firm, our client base represents both Irish indigenous business at all levels as well as multinational foreign direct investment businesses with significant operations in Ireland. The commentary set out in this paper reflects our own analysis and conclusions, as well as feedback received from our client base in response to the consultation paper. We believe that the launch of the consultation is timely and offers the opportunity to ensure that the tax code as it relates to the treatment of travel and subsistence is up to date, fair to all stakeholders, and reflective of modern business practices.

The treatment of travel and subsistence expenses has generated considerable interest and impacts on businesses at every level, including Irish SME’s, listed Irish companies and FDI companies headquartered in Ireland. The level of controversy attaching to this issue is, in our view, disproportionate to the actual amounts of tax involved. Nonetheless, it has come to dominate much of the discussion in the FDI space, often in a way that is not helpful to the broader FDI agenda. This reflects in part a strong feeling that some aspects of the present treatment are inherently unfair and out of step with modern business practice. For this reason we believe it is essential that Ireland is seen to engage with this issue in a constructive way and to implement changes that produce an outcome which is fair and takes account of the concerns of all the relevant stakeholders.
2. Background

The existing rules governing the deductibility of expenses incurred by employees and office holders in respect of travel and subsistence are set out in S.114 of the Taxes Consolidation Act 1997. The deductibility of such expenses (and, by extension, the tax treatment of any reimbursement made my employers to office holders and employees in respect of such expenses), is subject to the overriding requirement that the expenses are necessarily incurred ‘in the performance of the duties of that office or employment’. The rule is a long standing one which has been subject to much judicial interpretation; the decided case law indicates that only so much of the expense which is incurred in the actual performance of the duties of the employment or office may be deducted. Expenses which are merely preparatory in nature, and which serve only to put the individual in a position to perform the duties at a given location, are excluded. Thus, by reference to this rule, normal ‘commuting’ costs are not deductible since they are preparatory only and not incurred in the actual performance of the duties. This position has pertained since the earliest days of the income tax legislation and the principle is well established. Much of the basic case law in this area is however quite old and dates back to the early part of the 20th century. Business practices and technology have evolved considerably in the intervening period, to the extent that the structure of many present day employments, the influence of technology and the inherent flexibility demanded of modern employees would not be recognisable to those who drafted the legislation. It is therefore appropriate that the tax treatment of travel and subsistence expenses should be reviewed in light of present day realities and updated as necessary.
3. Specific items for consideration

Having regard to the criteria specified in the consultation paper, and based on our direct experience of matters which we believe give rise to current concerns, we have set out below our comments on a number of issues.

3.1 Tax treatment of home to work travel generally

The established treatment of these expenses referred to in Paragraph 2 above appears to be generally accepted, and there does not appear to be a widespread demand at this time for a change which would allow for a general deduction in respect of the cost of home to work travel. Such a change would most likely have significant implications for the Exchequer and is unlikely to be affordable, irrespective of policy considerations.

It should however be noted that the Irish tax code has in a practical sense, and for some time, departed from a blanket application of the rule that commuting costs incurred by employees are non-deductible. The ‘Revenue Approved Salary Sacrifice’ provisions contained in S.118B TCA 1997 effectively grant employees a full deduction in respect of income tax, PRSI and USC for the cost of a commuter travel pass. As the ‘approved salary sacrifice’ has the effect of reducing gross taxable income before the application of PAYE, the net effect is the same as granting a deduction equal to the cost of the travel pass. The point is notable as it establishes a significant policy variation from the historic rule and indicates that any variation in the established rule should not automatically be regarded as a ‘step too far’.

However, having regard to the likely cost implications and the need to target tax expenditures to achieve specific aims, we do not propose any changes to the existing tax treatment of non-business related travel and subsistence expenses at this time.

3.2 Non-Executive Directors

The tax treatment of travel and subsistence expenses paid to non-executive directors in respect of attendance at board meetings has been a matter of concern since the publication of Revenue’s ‘eBrief 61/2014’. This issue is significant for both Irish public companies and FDI companies headquartered in Ireland and our comments below reflect input received from our clients.

3.2.1 The Irish PLC perspective

Most leading Irish publicly quoted companies operate in the internationally traded sector. There is an expectation in the markets that the boards of these companies will include persons with appropriate knowledge and experience of the markets that the companies operate in. Consequently, in line with best practice, the boards of most Irish PLCs include non-Irish directors who are recognised as persons of standing in their particular sectors. Such individuals are required to travel to Ireland to attend board and other meetings. A further consideration for Irish companies with multi-national operations is that it is important for the company to hold a number of board meetings overseas each year to maximise the effectiveness of the Board. These overseas board meetings are usually located in a strategically important region/market for the business and demonstrate to the markets that the board has first-hand knowledge of the markets in which the business operates. Attendance at such board meetings by Irish resident directors may give rise to the same issues which arise for non-Irish resident directors who attend board meetings held in Ireland.
The publication of Revenue eBrief 61/2014 has given rise to significant concerns for Irish PLCs. This is not solely a cost issue. There is a genuine concern that if marginal rate tax of up to 52% is to be deducted from amounts paid to cover travel costs, which most such directors would regard as a legitimate business expense, that this will deter suitably qualified individuals from taking up board appointments with Irish companies. It is not an option for Irish companies to increase board remuneration to cover the additional cost, since S.156 of the Companies Act 2014 makes it unlawful for a company to pay a director of the company remuneration:

- ‘Free of income tax or the universal social charge

Or

- Otherwise calculated by reference to or varying with the amount of his or her income tax or to or with the rate of income tax.’

It is not therefore an option for companies to simply ‘gross up’ expenses payments so as to leave the individual with the required net amount after deduction of tax.

The guidance set out in the Revenue eBrief also seems to be premised on the assumption that the role and responsibilities of company directors consist solely of attending board meetings and that the ‘normal place of work’ for a director is therefore the place where board meetings are held. This is not a correct assessment of the role of company directors. The legal position is that directors are accountable to the company for their duties at all times, and are answerable equally for their actions in relation to the company within and outside of board meetings. Furthermore, many active boards delegate other responsibilities to board members through committees of the board, as well as special projects which the directors undertake outside of board meetings. This work may be undertaken in various locations, including where the director resides, at their office or in other locations determined by the company. Travel necessarily undertaken by company directors occurs within this overall nexus, and should therefore be seen as arising in the performance of the duties of their office rather than as an external adjunct to it.

The suggestion that a non-executive directors’ regular place of work is where board meetings are held, reflects an outdated view of the role of non-executive directors and fails to recognize the global nature of business today. A non-executive director will put in a considerable amount of work between board meetings. Directors are required to undertake a large amount of preparation and reading of board materials in advance of participation at a board meeting. ‘Board packs’ are substantial documents and will often run to several hundred pages, dealing with a full range of issues for the company at the highest level. The board packs are issued in advance of board meetings to brief the directors in detail on the business to be discussed, to set out matters for consideration and to enable the directors to form a view as to how the company should act. This work would not necessarily be done in Ireland. Having regard to the above, we submit that it should not be automatically assumed that the location of the board meeting in Ireland is the non-executive directors’ ‘normal place of work’.

3.2.2 The FDI company perspective

The concerns outlined above applied equally to FDI companies headquartered in Ireland. The point has been made that the pool of available experience in Ireland is simply too small and that while the boards will have some Irish members, of necessity such boards need to have members who are based abroad. It is simply neither relevant nor valid to compare this scenario with that of an employer reimbursing an employee for the cost of travelling from home to work. These companies are global operations and international travel is an integral aspect of their operations. Furthermore, unlike the situation of an employee who is typically attached to a specific location, directors need to be available to the company wherever and at such times as the company requires.
3.2.3 The SME company perspective

The treatment of travel and subsistence expenses for directors of small businesses was highlighted in the course of the recent Revenue ‘contractors project’. In our experience, many of the businesses that fell within the scope of the review were small entrepreneurial businesses, typically in the ICT sector, very often ‘punching above their weight’ in securing contracts from major international companies in Ireland and overseas. These small and medium enterprises are essential to the broad development of an indigenous ICT sector in Ireland.

Feedback received suggests that there is a strong sense of grievance among SMEs’ particularly companies which have their place of business at the director’s home address (a common feature of startup companies), that a rigid interpretation of S.114 is causing considerable difficulties. This is particularly the case in relation to the treatment of travel from the company’s place of business to client sites. Some of the examples quoted to us included instances where companies had secured contracts overseas, including in the Far East, and settlements had been sought from them in relation to expenses incurred by the directors in carrying out these contracts, including air fares. This approach seems to run contrary to the wider policy of promoting the activities of Irish companies in overseas markets. We have set out elsewhere in this submission our proposals in relation to the treatment of duties at a temporary place of work, which we consider would go some way towards addressing these issues.

3.2.4 Proposed treatment of certain non-executive directors

In light of the above, we consider that specific provision needs to be made in order to address the position of individuals serving as members of the board of an Irish company, who are required to undertake international travel. Recognising that it would be difficult to target any change to the provisions of S.114 at a specific group, and that such directors would normally be reimbursed by the company rather than seeking a deduction themselves, we would propose that provision be made by way of an exemption from the benefit in kind charging provisions of S.118 TCA 1997. This would be along the lines that:

‘The provisions of S.118(1) shall not apply to payments made by a company to or on behalf of a director in respect of the reasonable cost of expenses of travel and subsistence incurred where the expenses are incurred in connection with the attendance of the individual at relevant meetings’

The term ‘relevant meetings’ could be defined by reference to the provisions of the Companies Act so as to ensure that such reimbursement would only relate to attendance at board meetings and similar occasions where the business of the company is being considered. To prevent abuse, provision could be made for apportionment of the relief on a just and reasonable basis in circumstances where there are reasonable grounds to believe that a personal benefit is a significant or predominant element of the expense incurred.

3.3 Employees and office holders of home based businesses

The position of directors and employees of companies whose place of business is also the location of the individual’s private residence has been highlighted in the course of the Revenue Commissioners recent ‘Contractors Project’. Revenue guidance provided in respect of travel expenses incurred by the directors of such companies in the course of travel from the company’s place of business to client sites indicates that such travel does not qualify for a deduction under S.114. We understand that this is on the basis that the individual’s home, which is also the place of business of the company, is not regarded as the individual’s ‘normal place of work’, which, in Revenue’s view, should be considered to be the client site. Consequently, travel to and from the client site would not be considered to be travel in the performance of the duties.

The treatment of such expenses will depend to some extent on the exact nature of the relationship with the client and the terms of the contract. In many such cases substantive work may be performed off the client site. We do not consider that it is appropriate to form a blanket assumption that an individual’s home can never be considered to be their normal place of work, nor do we
accept that the legislation as it presently stands points towards such an assumption. This is particularly the case where international travel is involved. It is not comparing like with like to suggest that where such a company wins an overseas contract that travel by the directors of the company to the location where the contract is being performed is on all fours with the situation of an individual who is reimbursed by their employer for costs incurred on daily commuting. Travel to the client site in such instances clearly has a business character and should be viewed as such. The treatment of domestic travel depends on how the term ‘normal place of work’ is interpreted. In summary, it is our view that while travel by the directors or employees of home based business to client sites may not qualify as business travel in every instance, neither should there be an automatic assumption that such travel does not qualify. We believe that this matter can best be addressed in the context of a statutory definition of what constitutes a ‘normal place of work’ and a ‘temporary place of work’. We consider this issue at Paragraph [ ] below.

3.4 Home Based Workers

Work practices have evolved considerably in recent years and it is now commonplace to find employees working from home for some or even all of their working day. Technology has made it possible for many roles to be performed entirely away from the employer’s place of business. We have also seen evidence of an evolving trend which is influenced by the high cost and limited availability of office space in prime locations. In such cases employees may only be permitted to work from the office location for part of their time, ‘hot desking’ at the office location on certain days and working from home on others. It seems clear that where:

- The employee is required to work from home
  
  Or

- The employer does not provide a fixed place at which the work is to be performed

That the home location should be regarded as the employee’s normal place of work.

Another group that should be considered in this category are company representatives who spend substantially all of their time ‘on the road’ meeting clients etc. In our experience, it is not uncommon for such employees to only rarely visit their employer’s offices, perhaps just a few times per year for meetings etc. Notwithstanding this, current guidance indicates that the employer’s office should be considered their normal place of work. We do not consider that it is appropriate to deem the employer’s place of business to be the normal place of work if in fact the employee performs little or no work there.
4. Other matters raised in the Consultation Paper

4.1 Definition of a temporary workplace

Given its central importance to this issue, it is surprising that there is no statutory definition of the terms ‘normal place of work’ and ‘temporary place of work’. Much of the confusion surrounding the treatment of travel expenses could, we believe, be resolved if such a definition were to be put in place. Reliance on legislation and case law that is in some cases more than one hundred years old does not appear consistent with a modern tax system.

In this regard, we note that the UK has for some time now had a system in place which provides a useful framework for determining in what circumstances an employee may be considered to be working at a ‘temporary place of work’. Under the UK legislation\(^2\), a workplace that an employee attends for the purpose of performing a task of limited duration or for some other temporary purpose is a temporary workplace. However a workplace will not be considered a ‘temporary workplace’ where an employee attends it in the course of a period of continuous work that lasts, or is likely to last, more than 24 months. The term ‘continuous work’ is defined as spending 40% or more of the working time at the location. Where this further rule applies the workplace will be a permanent workplace and no relief is available in respect of the cost of travel to such a workplace.

We consider that the UK model provides a useful example for a system based on statutory rules and should be considered as the basis for a similar system in the Irish tax code.

4.2 Reimbursement of travel expenses to non-resident employees

The consultation paper asks whether employers should be allowed to reimburse free of tax the reasonable vouched cost of travel for employees who work in the State but live outside the State.

While this may depend to some extent on the facts of the particular case, as a general principle there would not appear to be grounds for the payment of tax free expenses in cases where all of the duties are performed in the State and the decision to live outside the State is a choice made by the employee.

Different considerations would apply in a case where the non-resident employee also performs duties outside the State and from time to time may be required by the employer to travel to Ireland to perform work here. In such cases we would consider that the reimbursement of the costs of travel should be reimbursed on a tax free basis.

4.3 Reimbursement of travel expenses to Irish resident employees working outside the State

The consultation paper asks whether employers should be allowed to reimburse free of tax the reasonable vouched cost of travel for employees who work outside the State but live in the State.

We consider that in cases where the work outside the State is performed at a temporary place of work (defined in accordance with the proposed basis outlined in Para 4.1 above), the costs incurred in travel to such a location should be permitted to be reimbursed free of tax.

\(^2\) Section 339 Income Tax Employments and Pensions Act 2003
4.4  Tax treatment of ‘Country Money’

The consultation paper asks whether there is a continued justification for the payment tax free of ‘country money’ as permitted in paragraph 4.6 of Statement of Practice SP IT/02/2007 and what tax free expenses should employers be authorised to pay or reimburse free of tax to site based employees who go to work abroad?

Having regard to the fact that the payment of ‘country money’ is a practice which evolved to address the specific position of site based construction workers, we would be of the view that the continued payment of ‘country money’ on a tax free basis is justified and should continue.

With regard to site based employees who go to work abroad for an Irish employer, we believe it would be appropriate to permit employers to pay tax free allowances or vouched reimbursement to their site-based employees in the same manner as for other employees/directors who temporarily work for their employer outside the State.

4.5  Attendance at work related training courses

Where attendance at a work related training course requires employees to attend at a temporary place of work, we would consider that the reimbursement of travel expenses to the employees should be allowed to be made free of tax, in line with current practice.

4.6  Use of public transport

Should expenses of travel which are quantified by reference to a mileage rate for a business journey be restricted to the cost of public transport for the same journey?

In our experience, employers maintain strict controls over travel costs and will typically require employees to use the most economic transport option. We do not therefore consider it would be helpful to be prescriptive in this regard. It must also be recognised that such a rule is premised on the assumption that all employees would have equal access to adequate public transport facilities. This may not always be the case, particularly outside the main urban areas in Ireland. We would not therefore favour such a proposal.

4.7  Vouched versus flat rate reimbursement

Should circumstances be identified where employers would be permitted to reimburse only vouched expenses of travel?

Employees who incur travel costs have a reasonable expectation that they should be fully reimbursed for the costs incurred. In the case of mileage incurred for use of a private vehicle, this includes wear and tear, fuel and an appropriate portion of road tax, insurance and maintenance costs. Given the inherent difficulty in measuring these costs on a case by case basis, we consider that there is much to recommend the continued use of fixed mileage payments based on a standard scale, provided that the mileage rate is measured by reference to average motoring costs and that the scale rates are updated from time to time to take account of prevailing costs.
5. Conclusions

The traditional working environment has changed radically in recent years. Improved communications, access to technology and changes in employment practices are reshaping the workplace. We welcome the present consultation process and consider it timely and appropriate that the legislation governing the tax treatment of travel and subsistence expenses should be reviewed and amended as necessary to address the realities of modern work practices, both now and into the future.

We have offered a number of proposals, which we consider essential to the continued promotion of Ireland as a place in which to do business, as well as providing a logical, fair and cohesive basis for the treatment of travel and subsistence expenses generally. We recognise that in some instances, this may require putting particular rules in place for specific categories of employees or office holders. The reality however is that differential treatment may already be found in the tax code, for example in relation to certain categories of directors and office holders or the treatment of foreign service allowances paid to State employees and employees of certain agencies.

We would be pleased to provide any further information or clarification that may be required in relation to this submission.

Ernst & Young
21 August 2015

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3 S.195A TCA 1997
4 S.196A and S.196B TCA 1997
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