



An Roinn Airgeadais
Department of Finance

Trans-Border Workers' Relief Tax Strategy Group – 21/04

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1 Introduction

1. The matter of trans-border workers was raised during the Finance Bill 2020 debates, specifically in the context of people who reside in the State but who work in Northern Ireland and who avail of a domestic tax relief, known as Trans-Border Workers' Relief as provided for by section 825A of the Taxes Consolidation Act 1997 (TCA 1997).
2. In general terms, Trans-Border Workers' Relief is for people who are resident in the State, but travel daily or weekly to work in another country and pay tax in that other country. This tax relief is not normally available for Irish residents who work from home in the State. In light of the unprecedented circumstances arising due to the Covid-19 pandemic and the resulting public health restrictions to limit movement, for the tax years 2020 and 2021, Revenue confirmed that a concessional treatment for this relief would apply, whereby if employees are required to work from home in the State due to Covid-19, such days working at home in the State will not preclude an individual from being entitled to claim this relief, provided all other conditions of the relief are met.
3. There have been calls to place this concessional treatment on a statutory footing so that individuals who are resident in the State but work outside the State for a non-resident employer, can continue to avail of the relief if they exercise their duties of employment in the State.
4. The Minister for Finance undertook that the operation of the Trans-Border Workers' Relief would be examined as part of the Tax Strategy Group (TSG) 2021 process, which would encompass consideration of all relevant matters including the equity of treatment between Irish residents who pay tax in the State, the competitive position of Irish employers, and the established principles of international tax.

2 Background

2.1 Liability to Irish Tax

5. The matter of an individual's liability to income tax is dependent on an individual's tax residence status for a particular tax year and the source of the income. This applies equally to both EU and non-EU citizens.

TAX RESIDENCY

6. An individual's liability to Irish income tax is dependent on whether the individual is resident, ordinarily resident, and/or domiciled in Ireland.

Resident

7. A statutory test applies to determine an individual's residence for tax purposes and this statutory test applies notwithstanding the current Covid-19 situation. For completeness it is worth noting that Revenue did, however, provide some element of relief in respect of force majeure circumstances arising due to Covid-19. Broadly, this applies where an individual who had a planned departure from the State but was prevented from leaving the State due to Covid-19, to disregard such residence days in 2020, for the purpose of the residence test, subject to a number of conditions applying.
8. Section 819 TCA 1997 sets the statutory test and provides that an individual will be regarded as resident in the State for tax purposes, in a tax year (a calendar year), if he or she is present in the State for:
 - 183 days or more in that tax year; or
 - 280 days between that tax year and the previous tax year, with a minimum of 30 days in any year.
9. An individual is deemed to be present in the State for a day if he or she is present in the State at any time during that day. An individual must be present in the State for at least 30 days in any year to be considered resident in Ireland for that year.
10. An individual may also, in certain circumstances, elect to be resident in the State for a particular tax year.

Ordinarily Resident

11. Section 820 TCA 1997 sets out the requirements of ordinary residence and provides that an individual will be considered ordinarily resident in the State if the individual has been resident in the State for each of the three years preceding that year – i.e. the individual is considered ordinarily resident from the beginning of the fourth tax year.
12. Similarly, an individual ordinarily resident in the State shall not cease to be ordinarily resident in the State unless the individual has not been resident in the State in each of the three years of assessment preceding that year – i.e. the individual is considered non-ordinarily resident in the fourth tax year.

Domicile

13. Domicile is a legal concept and every person must have a domicile but a person can only have one domicile at any particular time. There are three types of domicile; domicile of origin, domicile of choice and domicile of dependence.

Determining an individual's liability to income tax in Ireland

14. An individual can be resident, ordinarily resident, domiciled or any combination of the three. The individual's particular circumstances, determines the scope of their liability to Irish income tax.

SOURCE OF THE EMPLOYMENT INCOME

15. As outlined above the individual's tax residence status and the source of the income determines whether the income from an employment is liable to Irish tax. Where some of the duties of employment are exercised in another jurisdiction the individual may also be liable to pay tax on his or her employment income in that other jurisdiction. All scenarios are subject to the taxing rights as allocated and any corresponding relief from double taxation that arises as provided by the terms of a relevant Double Taxation Agreement.

SUMMARY

16. The following table provides a summary of the liability to Irish income tax based on an individual's residence, ordinary residence and domicile.

Resident	Ordinary Resident	Domiciled	Liability to Irish Income Tax
Yes	Yes / No	Yes	Worldwide income
No	Yes	Yes	Worldwide income with the exception of: <ul style="list-style-type: none">• Income derived from a non-public office or a non-public employment, all the duties (except incidental duties) of which are performed outside the State;• Income derived from a trade or profession, no part of which is carried on in the State;• Other foreign income which, in the tax year, does not exceed €3,810
No	No	Yes / No	<ul style="list-style-type: none">• Irish source income, including income from an Irish public office• Income derived from any trade, profession or employment exercised in the State

2.2 Overview of Trans-Border Workers Relief

17. Section 825A TCA 1997, which provides for Trans-Border Workers' Relief, was introduced in Finance Act 1998. The measure is designed to give income tax relief to individuals who are resident in the State but who work wholly outside the State, in a country with which Ireland has a Double Taxation Agreement (DTA).
18. It applies to individuals who commute daily or weekly to their place of work outside the State and who pay tax in the other country on the income from their employment. While it would appear that individuals who have UK or Northern Ireland based employments typically benefit from this relief, the relief has a broader applicability across Ireland's DTA network.
19. The relief effectively removes the earnings from a qualifying foreign employment from the liability to Irish tax where foreign tax has been paid on those earnings and such tax is not refundable. In simple terms, the effect of the measure means that individuals who qualify for the relief will not pay any Irish tax on their employment income. Irish tax will only arise where the individual has income other than income from the qualifying foreign employment.
20. The Universal Social Charge (USC) does not apply to the part of the income to which Trans-Border Workers' Relief applies i.e. the earnings from a qualifying foreign employment.

QUALIFYING CONDITIONS

21. In general, in order to qualify for Trans-Border Workers' Relief, an individual must satisfy the following conditions:
 - Be tax resident in the State;
 - The individual must have earnings from a qualifying employment, which is defined as an office or employment held outside the State in a country with which Ireland has a DTA and which is held for a continuous period of at least 13 weeks in a tax year;
 - The employment duties must be exercised wholly outside of the State in a country with which Ireland has a DTA. None of the duties of employment can be performed in the State, save for duties considered incidental to the performance of the duties outside the State;
 - The income from that employment must be subject to tax in the other country and must not be exempt or relieved from tax in that country.
 - The foreign tax due on the income must have actually been paid to the relevant authorities and must not be repaid or be eligible to be repaid;
 - For every week during which the individual works outside the State, he or she must be present in the State for at least one day that week. Since 2010, an individual is regarded as being present in the State for a day if he or she is present at any time during the day.

Incidental Duties

22. The duties of the qualifying employment must be exercised wholly outside the State in a country with which Ireland has a DTA. In determining whether the duties of a qualifying employment are performed wholly outside the State, any duties performed in the State which are “merely incidental” to the performance of the duties outside the State, are effectively regarded as performed outside the State for the purposes of this relief.
23. In this context, Revenue considers the question of whether the performance of duties in the State is “merely incidental” to the exercise of the duties of the office or employment abroad is one of fact. To determine whether duties performed in the State are “merely incidental” to duties performed outside the State, it is necessary to consider both the nature of the duties performed in the State and their relationship to the duties performed outside the State.
24. Having regard to the requirement that the employment must be held for at least thirteen weeks, it is not simply a matter of applying a day’s test when examining the merely incidental condition (i.e. say allowing thirty days to be regarded as merely incidental). The correct approach is to examine the precise nature of the duties performed in the State, which must be subservient or ancillary in nature, to be regarded as “merely incidental” for the purpose of this relief.
25. Ultimately each case will depend on its particular facts, but the types of activities, if performed in the State in relation to the duties of a foreign employment, which could potentially be regarded as “merely incidental” duties, may include administration type activities which are ancillary to the overall role. For example, arranging meetings and business travel and providing feedback on employee performance.
26. Duties are not “merely incidental” if they form an essential or critical element of the employment duties, notwithstanding the short duration¹.

EXCLUSIONS

27. There are certain exclusions and the relief does not apply where the income from the qualifying employment:
- Is subject to the ‘remittance basis’ of taxation;
 - Is subject to the ‘split year’ treatment, where a taxpayer in the year of arrival, or departure from the State, is deemed resident for part of the year only, and is thus already entitled to favourable tax treatment;
 - Is income paid by a company to one of its proprietary directors or to the spouse/civil partner of one of its proprietary directors;
 - Is subject to a claim for relief under the foreign earnings deduction provisions;
 - Is subject to a claim for relief in respect of the seafarer’s allowance.

¹ The leading case on this matter is *Robson v Dixon* (HM Inspector of Taxes) 48 TC 527.

HOW THE RELIEF OPERATES

28. Subject to meeting the qualifying conditions, an individual may have his or her income tax liability for a particular tax year reduced to the specified amount where liability would otherwise exceed that amount. The specified amount is the income tax which would be payable for a tax year, before credit for any foreign tax paid, reduced in the proportion that the total income excluding income from a qualifying employment bears to the total income. This can be expressed by way of the following formula:

$$\text{Total tax liability under Irish Tax Rules} * \frac{\text{Income other than foreign employment income}}{\text{Total Income}}$$

29. Where an individual only has income from a non-Irish based employment, it operates in such a way that only foreign tax is charged on the employment income and there is no charge to Irish tax on the same income.

30. Appendix 1 sets out a number of examples demonstrating how the relief operates.

STATISTICS

31. The table below provides information of the number of individuals who have availed of Trans-Border Workers' Relief in the recent years, the gross foreign employment income of which the relief was claimed and the amount of the relief claimed. For indicative purposes, details of the average foreign employment income and average claim for relief are also provided. The data is based on the Form 11s that were filed by individuals who claimed TBR. There is no available means to establish the quantum of non-filers. Also, it should also be noted that the data does not include claims that may have been made by tax-payers who filed a Form 12, as opposed to a Form 11.

Year	Number of individuals who claimed TBR	Gross Foreign Employment Income [FEI] on which TBR was claimed	Average Gross FEI	Transborder Relief claimed	Average TBR claim
		€ million	€	€ million	€
2019	1,716	107.35	62,558	28.51	16,614
2018	1,908	110.05	57,678	30.74	16,111
2017	1,960	110.98	56,622	31.04	15,837
2016	1,907	108.42	56,854	29.84	15,648
2015	1,837	113.32	61,688	32.29	17,578
2014	1,695	89.91	53,044	24.16	14,254
2013	1,636	78.15	47,769	20.81	12,720
2012	1,554	73.50	47,297	19.27	12,400
2011	1,454	55.57	38,219	12.85	8,838
2010	1,133	43.32	38,235	9.32	8,226
2009	1,017	32.84	32,291	6.51	6,401
Total	17,817	923.41	51,827	245.34	13,770

32. As shown in the table above, the average gross foreign employment income on which Trans-Border Workers' Relief was claimed has increased over the period, with a corresponding increase in the average amount of relief claimed.
33. Trans-Border Workers' Relief operates in such a way that only foreign tax is charged on the employment income. Any additional Irish tax that may be due is forgone under the domestic Irish legislation. Therefore, if Trans-Border Relief were not available to Irish resident individuals, their foreign employment income would be subject to Irish tax and USC. However, if foreign tax is paid in a country with which Ireland has a DTA, relief would be given against the Irish tax, in accordance with the relevant double tax agreement.
34. The table above shows the amount of the relief claimed annually for years 2009 to 2019 to the extent that the information is available. The amount of the relief claimed is not a true reflection of the cost to the exchequer of the relief. In order to calculate that cost, USC and Foreign Tax Credits (FTC) should be taken into account.
35. USC is forgone where Trans-Border Relief applies. It is estimated that the minimum amount of USC forgone is €46m for 2009 to 2019 of which €5.6m relates to 2019. This figure was calculated by applying the prevailing USC rates for each year to the gross foreign employment income on which Trans-Border Relief was claimed. However, this

amount could be understated, since it is calculated on the assumption that the only income the claimants had was their foreign employment income. If they had other income, the higher USC rate bands may apply.

36. It is not possible to reliably estimate the FTC that would have applied for the years prior to 2019. This is because to calculate the FTC, the country where the foreign employment income arises and the amount of the foreign tax paid must be known. That information was not an Income Tax filing requirement until 2019.
37. From the data that was provided in 2019, the foreign tax paid was €23.7m. However, this is not a true reflection of the amount of the FTC that would be available, since not all taxpayers provided this information on their tax return. Furthermore, the FTC credit, where it applies, is the lesser of the foreign tax paid or a figure that is calculated using the lower effective rate of tax of this State or the foreign jurisdiction. Therefore, the actual foreign tax credit could be a lower amount than the foreign tax paid in some cases.

3 Trans-Border Workers Resident in the State

38. This section will primarily focus and discuss matters relevant to trans-border workers who are resident in the State and work in Northern Ireland, given that the issues raised which give rise to this review have been voiced in respect of those workers. However, it should be noted that this relief applies not only to persons with a Northern Ireland based employment, but also for employments in all countries with which Ireland has a DTA.
39. In the case of a person who lives in the State but who works in another jurisdiction, the general tax position is that, as an Irish resident, they would be subject to Irish tax on their worldwide income from any source, including the employment exercised outside of the State. At the same time, the employment may also be subject to tax in the country in which the work is carried out.
40. In accordance with general principles of international tax, where instances of double taxation arise on the same income, relief against Irish tax may be claimed by way of a credit for any foreign tax already paid, subject to the terms of any applicable DTA. The DTA generally operates to allocate taxing rights between the respective jurisdictions and to set out the circumstances for relief in the event that tax is chargeable in both jurisdictions. If tax is charged in a country with which Ireland has a DTA, relief is given as specified in the agreement. This is generally provided by either:
- crediting the foreign tax paid against the Irish tax liability on that same income; or,
 - in certain circumstances, by exempting that income from tax in Ireland or the other country.
41. Trans-Border Workers' Relief is a domestic provision, provided for by section 825A TCA 1997. It operates in such a way that only foreign tax is charged on the employment income. Any additional Irish tax that may be due is foregone under the domestic Irish legislation. It should be noted that the individual is required to file a Form 11 in order to claim the relief.
42. As outlined previously, one of the qualifying conditions for Trans-Border Workers' Relief is that the employment duties must be wholly exercised outside of the State with none performed in the State, save for duties considered incidental to the foreign employment. This tax relief is not normally available for Irish residents who work from home in the State.

However, in light of the exceptional circumstances associated with the COVID-19 pandemic, Revenue confirmed that if employees are required to work from home in the State due to COVID-19, such days spent working at home in the State will not preclude an individual from being entitled to claim this relief, provided all other conditions of the relief are met. This concession applies for the tax years 2020 and 2021².

² <https://www.revenue.ie/en/covid-19-information/temporary-concessions-reliefs-and-exemptions/transborder-workers-relief.aspx>

The effect of this concessional treatment allowed individuals resident in the State and working for a non-resident employer, carry out their employment duties in the State and to pay employment tax to the UK only with no employment tax paid to the Exchequer.

43. There have been calls to place this concession on a permanent legislative basis. In particular, there have been requests to allow persons resident in the State, working for a Northern Ireland based employer, to carry out their employment duties in the State with no restriction on the number of days worked in the State, and only pay tax to HMRC with no additional tax payable to the Irish Exchequer.
44. In recognition of the potential concerns regarding the governance of the Irish tax system, it has been suggested that the following controls could be introduced to allow individuals resident in the State and working for a Northern Ireland based employer to continue to avail of Trans-Border Workers' Relief while performing some of their duties of employment in the State:
- Limit the number of days an individual can work from the State to 183 days³ (in line with OECD international tax residency standards).
 - Limit the scope of the exemption to individuals in non-executive roles, i.e., those whose role in the company does not involve strategic corporate or board-level decision making.
 - Consideration of a salary threshold, where individuals must earn below a stipulated amount to avail of the exemption.
45. This section considers the issue having regard to the following relevant matters; equity of treatment between Irish residents who pay tax in the State, the competitive position of Irish employers, and the established principles of international tax.
46. At the outset, it is important to underline that the matter of trans-border workers is complex. It involves international tax considerations, including the allocation of taxing rights as set out in the relevant DTA.

3.1 Principle of territoriality and taxing rights

47. As outlined above, where a person who lives and is tax resident in the State and works in Northern Ireland, the general tax position is that, as an Irish resident and domiciled individual, they would be subject to Irish tax on their worldwide income from any source, including the employment exercised outside of the State. At the same time, the employment may also be subject to tax in the country in which the work is carried out.
48. Under domestic legislation, section 112 TCA 1997, every person having exercised an office or employment of profit in the State is chargeable to income tax under Schedule E in respect of such employments. This includes any earnings of a foreign employment where the duties are performed in Ireland. Therefore, Ireland's domestic tax code provides for a taxing right under Schedule E in regard to duties of employment exercised in the

³ This would equate to approximately over 75% of the average working days in a year.

State. The extent to which the income from the foreign employment is chargeable to Irish tax is dependent on how much of the employment duties are performed in the State.

49. Where the foreign employment is exercised wholly in the State, all of the income would be chargeable to tax in the State. Where the foreign employment is exercised partially in the State and partially outside the State, it may be necessary to determine the portion of income attributable to the performance of duties in the State as this income is within the charge to Irish tax.
50. The request to place the Covid-19 related concessional treatment on a statutory basis to allow individuals in the State to avail of Trans-Border Workers' Relief while carrying out their employment duties for a non-resident employer and pay no employment tax to the Exchequer is asking the State to give up a taxing right it rightfully has under the Irish tax code.
51. From a UK perspective, in broad terms, if an individual is UK resident they are liable to UK taxation on income from employment duties performed both in the UK and abroad. Whereas, if an individual is not UK resident they are liable to UK taxation on income from employment duties performed in the UK (unless those UK duties 'merely incidental' are to an employment outside the UK)⁴.
52. While it is not possible to provide a definitive position as each situation depends on the facts and circumstances, such as the residence and domicile of the individual and the nature of the duties performed in the UK and outside of the UK, it is unclear if the UK would in fact have a taxing right over employment income arising from duties performed in the State if that individual is resident in the State and not UK resident.
53. If the UK could not or did not exercise a taxing right over this employment, this would result in no UK tax being paid on the employment income, which would result in the individual being ineligible to claim Trans-Border Workers' Relief in any event as it is a mandatory condition of the relief that the employment income must be subject to tax in the other jurisdiction and that foreign tax on the income must have actually been paid.

3.2 Equity

54. Irish residents who live in the State and work for an employer based in the State are liable to Irish income tax, including USC and PRSI on their employment income. Income is taxed at 20% up to the standard rate band cut off point, and 40% tax is applied to the balance. The standard rate band varies depending on the individual's circumstances; single €35,300; married couples / civil partners with one income €44,300 and married couples / civil partners with two incomes €44,300 plus an increase capped at the lower of €26,300 or the income of the lower earner⁵.

⁴ <https://www.gov.uk/hmrc-internal-manuals/residence-domicile-and-remittance-basis/rdrm10425>

⁵ <https://www.revenue.ie/en/personal-tax-credits-reliefs-and-exemptions/tax-relief-charts/index.aspx>

55. USC is payable on total income, the standard rates and thresholds of USC for 2021 are set out in the table below.

Universal Social Charge (USC)⁶:

2021	Rate
First €12,012	0.5%
Next €8,675	2%
Next €49,357	4.5%
Balance	8%

56. Irish residents who live in the State but who work in Northern Ireland are subject to Irish tax on their worldwide income. However, in circumstances where Trans-Border Workers' Relief applies, if the employment income is their only source income, then they only pay UK tax on their employment income based on the rates applicable in the UK.

The table below sets out the applicable rates applying as of 1 April 2021⁷.

UK Income Tax Rates and Bands applying as of 1 April 2021

Band	Taxable income	Tax Rate
Personal Allowance	Up to £12,570	0%
Basic Rate	£12,571 to £50,270	20%
Higher Rate	£50,271 to £150,000	40%
Additional Rate	Over £150,000	45%

57. Trans-Border Workers' Relief is generally more favourable than availing of relief under a DTA, particularly in cases where the Irish tax rate is higher than the tax rate applying in the other country where the duties are performed. The relief operates so that those availing of the relief only pay tax in the other jurisdiction and that they do not pay any further tax (income tax or USC) to Revenue on their foreign employment income. This is principally relevant and beneficial for individuals in cases where the rates of income tax in Ireland are higher than those in the other country, the UK being such an example as outlined above in incomes below £150,000.

58. As a result of Trans-Border Workers' Relief, only UK tax is charged on the employment income and there is no charge to Irish tax on the same income. Any additional Irish tax that may be due is foregone under the domestic Irish legislation.

59. The following examples are provided for illustrative purposes to show the estimated tax liability of individuals on certain salaries when their employment is with an Irish based employer or where their employment is with a Northern Ireland based employer. As shown in the examples, the Northern Ireland based employments result in a lower tax liability,

⁶ <https://www.revenue.ie/en/jobs-and-pensions/usc/standard-rates-and-thresholds-of-usc.aspx>

⁷ <https://www.gov.uk/income-tax-rates>

with a lower effective tax rate than that which would occur if the same employment was performed for an employer based in the State.

Example 1

A single person who lives in that State and employed in Northern Ireland. He/she is liable to UK PAYE on all their earnings. He/she returns home every evening after finishing work.

The table below compares the tax payable by him/her with that of an individual on the same salary working in the State.

Please note that PRSI has been ignored for the purpose of the illustration. 2021 tax rates have been applied.

Tax Liability of an Irish Employee compared to an Irish resident individual employed outside the State claiming FTC or TBR

	Irish Employment		NI Employment					
	Irish Tax & USC	Effective Tax/USC	NI PAYE	Effective Tax	Irish Tax/USC due after relief		Total Tax for NI employee	
					FTC	TBR	With FTC	TBR
	€	Rate %	€	Rate %	€	€	€	€
Employment income only								
Salary of €30,000 (€33,350)	4,173	12.51%	3,875	11.62%	298	-	4,173	3,875
Salary of €60,000 (€66,701)	18,624	27.92%	12,709	19.05%	5,916	-	18,625	12,709
Salary of €150,000 (€166,752)	66,532	39.90%	58,319	34.97%	10,216	-	68,535	58,319

Example 2

The table below updates the above example and shows the position for a married couple / civil partnership where one person is performing the duties in Northern Ireland and the spouse / civil partner is employed in the State on a gross salary of €50,000.

Please note that PRSI has been ignored for the purpose of the illustration. 2021 tax rates have been applied.

	Both spouses with ROI employment income	One spouse with NI Employment and the other with ROI employment					
			Irish Tax/USC due after relief		Total Tax [NI & Irish]		
	Irish Tax & USC	NI PAYE	FTC	TBR	With FTC	TBR	
	€	€	€	€	€	€	
Employment income only							
Salary of £30,000 (€33,350) and €50,000	14,976	3,891	11,085	9,123	14,976	13,014	
Salary of £60,000 (€66,701) and €50,000	29,817	12,709	17,109	12,675	29,817	25,384	
Salary of £150,000 (€166,752) and €50,000	77,725	58,319	21,409	16,773	79,727	75,092	

60. While in general terms, for taxable incomes of less than £150,000 (€175,000 approx.), the rates of personal income tax in the UK are lower than in the State, social insurance contributions are also a relevant consideration. Both employees and employers make social insurance contributions, with differing rates applying in the State and in the UK as outlined in section 6 below.

61. Notwithstanding the differences in tax liabilities outlined above applying to Irish residents, resulting in an Irish resident with a Northern Ireland based employment having a lower effective tax rate than an Irish resident with an employer based in the State, the key distinguishing factor is the fact that the employment duties are exercised outside the State for a non-resident employer. As such individuals satisfying the requisite conditions can avail of Trans-Border Workers' Relief, which effectively removes their foreign employment from the scope of Irish tax and enables those individuals to only pay UK tax.

62. If Trans-Border Workers Relief was to be relaxed to allow for work carried out in the State to qualify for the relief, there would no longer be a distinguishing factor between Irish residents as both sets of Irish residents would be exercising their employment duties in the State, with some (those with Irish resident employers) liable to tax at the Irish tax rates (income tax and USC) and a higher effective tax rate and others (those with non-resident employers) liable to tax at the UK tax rates and a lower effective tax rate.
63. This would give rise to a question as to how Irish income tax rules could apply a different Irish income tax treatment to an Irish resident solely because of the location of their employer, as opposed to the location of where they carry out their duties as is the current position.
64. From the perspective of all resident employees in the State, it would raise issues of equity which is a guiding principle of Ireland's income tax system. For employees with Irish based employments they would be paying a higher rate of income tax than those with Northern Ireland based employments, solely as a result of the residency of their employer. This is because those with a non-resident employer could potentially avail of Trans-Border Workers' Relief, which has the effect of reducing the effective rate of tax paid when compared to an Irish resident with an Irish based employment. It is unclear how this would be sustainable and acceptable from the perspective of all Irish resident taxpayers.

3.3 Competition

65. There have been some suggestions that if Trans-Border Workers' Relief is not available, it would have implications for employers in Northern Ireland with regard to their competitiveness and their ability to attract and retain staff and also the potential to attract further employers to Northern Ireland.
66. The competitive position of Irish based employers or Irish based activities also needs to be considered in the context of Trans-Border Workers' Relief, in particular where the salaries paid by Northern Ireland or UK based employers are subject to lower rates of tax. The competitive position of Irish based employers could be undermined if employees of non-resident employers could carry out their employment duties in respect of the foreign based employment in the State, while availing of the lower tax rates applicable to UK based employments.
67. It would potentially place Irish based employments at a competitive disadvantage in terms of the need to offer a higher salary to employees so that employees would receive the same net income as those who are employed by a non-resident employer. It may also have implications for Irish based employments with regard to competing for the available talent pool and make Irish based employment appear less attractive due to higher tax rates.
68. As such, the availability of Trans-Border Workers' Relief may in fact make it more attractive for Irish residents to work for employers based outside the State in order to avail of the relief and the lower tax rate available in Northern Ireland.

3.4 Complexity

69. As outlined, the matter of trans-border workers is complex. It involves the taxing rights between different countries depending on the tax residence and domicile of the individual and the source of the income. Trans-Border Workers' Relief is broader than Northern Ireland or UK based employments, as it applies in respect of any qualifying employment in a country with which Ireland has a DTA. Ireland has a comprehensive network of DTA partners, with 73 out of 74 DTAs in effect.
70. It is not possible to grant preferential treatment to UK or Northern Ireland based employments only, therefore any change to Trans-Border Workers' Relief must be considered in the context of Ireland's membership of the European Union and the necessity to comply with EU law, as well as having regard to Ireland's DTA obligations.

3.5 Cost to the Exchequer

71. As outlined above, Trans-Border Workers' Relief results in an annual cost to the Exchequer due to the Irish tax revenue foregone by virtue of the relief. The annual cost to the Exchequer may vary each year depending on the number of individual's claiming the relief and the amount of the relief claimed. As previously stated in the paper it is not possible to reliably estimate the exact cost to the Exchequer as to calculate this would require the amount of foreign tax paid which was not a filing requirement prior to 2019.
72. Changes along the lines of those sought as outlined above, would have no additional Exchequer cost as the tax is foregone in any event due to the operation of section 825A.

3.6 Other Considerations

73. This paper focuses on the issue of Trans-Border Workers' Relief from the perspective of employees and their eligibility, or otherwise, for the relief. Where an employee performs their duties of employment in Ireland on behalf of a non-resident employer, there may be tax consequences for the employer also. For example, depending on the precise nature of the duties performed by the employee, it may result in the non-resident employer creating a permanent establishment with a taxable presence in Ireland, with the potential for additional tax and reporting requirements. The employer may also be liable to deduct PAYE in respect of the employment income exercised in Ireland.

4 Tax Treatment Where Trans-Border Workers' Relief does not apply

74. There have been some suggestions that if Trans-Border Workers' Relief is not available it gives rise to double tax. This position has not been substantiated. While each scenario depends of the individual facts and circumstances, it is difficult to see how such a position could arise having regard to the objectives and operation of a DTA.
75. As set out above, a person who lives in the State but who works in Northern Ireland, as an Irish resident and domiciled individual, is subject to Irish tax on their worldwide income, including employment exercised outside the State. At the same time, the employment income may be subject to tax in the UK as the duties of employment are carried out there.
76. DTAs operate to avoid international double taxation on income and property. The terms of the Ireland/UK DTA⁸ sets out the taxing rights and any corresponding relief from double taxation.
77. Article 15 of the Ireland/UK DTA relates to employments and provides for the allocation of taxing rights in respect of employments, other than pensions (article 17) and government functions (article 18).

Article 15(1) states: "Subject to the provisions of Articles 17 (pensions) and 18 (government functions), salaries, wages and other similar remuneration by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State".

78. In other words, an Irish resident and domiciled individual is liable to tax in respect of their employment income in the State only, unless the employment duties are exercised in the UK and in such circumstances the remuneration may be taxed in the UK.
79. The employment income may be liable to tax in both jurisdictions and the DTA operates to provide for relief from any double taxation by allowing the Irish resident to claim a credit for the UK tax paid against any Irish tax that may be due on the same income. Paying tax in more than one jurisdiction arises because the individual has a presence and/or operations in more than one jurisdiction.
80. In practice, how this operates is where an Irish tax resident is employed by a UK employer and carries out those duties in the UK, the UK employer operates payroll taxes on the income and the employee pays their UK taxes in the period in which they fall due in the UK. However as the employee is tax resident in the State, the income is also chargeable to tax in the State under Irish tax laws. The employee must file an Irish income tax return

⁸ <https://www.revenue.ie/en/tax-professionals/documents/double-taxation-treaties/u/uk.pdf>

to declare the income earned and claim back the foreign tax credit due. This cannot be completed until after the end of the tax year in which the UK employment income was earned. As such, in this scenario there is no double taxation as the balance of tax due to the State is not paid until after the UK tax year has ended, Irish tax and UK tax are not charged concurrently.

81. As the UK rate of income tax is generally lower than that in the State, Ireland would seek to collect additional Irish tax due. While this may result in an additional tax liability for individuals, it is not the same as being subject to double taxation.
82. In the case where some of the duties are carried out in the State for a UK employer the portion of the duties carried out in the State, become chargeable to tax in the State under Schedule E in real time. Such income is considered emoluments and is taxable under the Irish PAYE system. This would be the case regardless of the tax residency of the employee as the duties of the employment are being performed in Ireland
83. Payroll taxes in Ireland would be deducted at source by the UK employer, who is now obliged to register as an employer in Ireland for PAYE purposes (or engage an agent as the case may be). The provisions of the DTA may still be applied and the individual should file their Irish income tax return to offset the UK tax deducted against their Irish income tax liability.
84. The additional payment of tax would bring the individual's tax liability on par with other individuals who are resident in the State and pay tax in the State⁹. If the situation was reversed and the tax rates were higher in the UK, there would be no additional Irish tax due.

⁹ This is the case for salaries up to €100,000, as there is a 3% USC levy on non-Irish PAYE income in excess of €100,000, which an individual employed in Northern Ireland would be liable to but which would not be payable by an individual employed in the State.

5 Non-Residents Working in the State

85. The tax treatment of non-residents working in the State is dependent on a range of factors, including the location of the employer, the nature of the employment and the duration that the person is working in the State.

Irish Based Employment

86. Where an individual is not resident in Ireland for tax purposes, the taxation of any income earned from an Irish office or employment will depend on the nature of the office or employment and where the duties of that office or employment are exercised as follows:

- where the individual holds or exercises a public office, such as a director of an Irish incorporated company, they will be liable to Irish income tax on all income earned from holding that office, irrespective of where their duties are exercised
- where the office or employment does not relate to a public office, broadly the individual will be liable to Irish income tax only on the portion of income which relates to the duties exercised in Ireland.

Non-Irish Based Employments

87. Where an individual (resident or non-resident) performs duties of employment in respect of a non-Irish based employment in the State, the income attributable to that employment is chargeable to income tax and is within the scope of the PAYE system of deduction at source.

88. In circumstances where the non-Irish employment is exercised partially in the State and partially outside the State, it is necessary to determine the portion of the income attributable to the performance in the State of the duties of that employment as this income is within the scope of the PAYE system of deduction at source. The ultimate tax position of the individual will depend on their personal circumstances. For example if resident and domiciled he/she will be subject to Irish tax on his/her worldwide income. This is, of course, subject to any relief under the terms of a DTA.

Temporary Assignee

89. A temporary assignee includes both a short-term business visitor and an individual temporarily assigned to the State. In the case of a temporary assignee there are occasions where the employer can be released from the obligation to operate the PAYE system of deduction. The application or otherwise of PAYE, depends on a number of tax issues such as whether the individual has come to Ireland from a country with which Ireland has a DTA and if so, which country has taxing rights on the foreign employment income.

90. In the case of UK residents who come to Ireland on a short-term basis as a temporary assignee, notwithstanding that the income from the foreign employment is within the charge to Irish tax, Revenue may not enforce the operation of PAYE in certain circumstances.

91. Firstly, the conditions set out in Article 15(2) of the Ireland/UK DTA must be met, i.e.:
- the individual is present in the State for less than 183 days in a tax year;
 - the remuneration is paid by, or on behalf, of an employer who is not resident in Ireland; and
 - the remuneration is not borne by a permanent establishment which the employer has in Ireland.
92. Where the above conditions are met, and the individual is in the State on a temporary basis for less than 60 days, Revenue will not enforce the operation of PAYE. If the temporary assignee spends more than 60 days but less than 183 days in a tax year in Ireland, the employer must apply to Revenue for a dispensation from the operation of PAYE.
93. The requirement not to operate PAYE deductions at source, only applies in respect of non-resident individuals who work in the State on a temporary basis and where the relevant conditions have been met.

6 Social Insurance

94. In the State, Pay Related Social Insurance (PRSI) is deducted from most PAYE incomes. It is a payment made by an employer and their employees. The value of this payment is based on the amount of an employee's pay. Most employees pay Class A contributions at the following rates.

Weekly Income Band	PRSI Subclass	Employee Contribution	Employer Contribution
€38 - €352	AO	Nil	8.80%
€352.01 - €398*	AX	4%	8.80%
€398.01- €424*	AL	4%	11.05%
More than €424	A1	4%	11.05%

* An employee PRSI credit applies to people earning between €352.01 and €424 per week which reduces the amount of PRSI payable. The credit is tapered and the amount of the credit depends on a person's weekly earnings. The maximum credit is €12.

95. In the UK, a similar payment is deducted from most incomes referred to as National Insurance. It operates similar to PRSI with payments from both employer and employee depending on the category / class and the amount of income earned. The rates applicable in the UK are set out in the table below¹⁰.

National Insurance Rates and Bands (Category A)

Weekly Income Band	Employee Contribution	Weekly Income Band	Employer Contribution
£120 to £184	0%*	£120 to £170	0%
£184.01 to £967	12%	£170.01 to £967	13.8%
Over £967	2%**	Over £967	13.8%

*Regardless of amount earned no National Insurance on first £184

** For incomes greater than £967, 2% is paid on earnings above £967

96. In the case of individuals living in the State and working in Northern Ireland, national insurance is deducted from the pay at source. As illustrated above, the rates of national insurance in the UK are higher than those in the State.
97. In general, the country in which the individual works is responsible for paying social welfare benefits. For example, for individuals working in Northern Ireland who reside in the State and are entitled to Child Benefit payments and the UK may be the competent state to make these payments. However in such a situation if the rate of child benefit in the UK is less than the rate in the State, an individual may apply for a top up to this payment from the State in order to match the amount of payment.

¹⁰ <https://www.gov.uk/national-insurance-rates-letters>

7 International Comparison

98. The issue of trans-border workers is one not unique to the State and Northern Ireland. From a sample of other countries that may experience trans-border workers, it appears that Ireland is unique with regard to the domestic provision of Trans-Border Workers' Relief. Other countries appear to operate within the parameters of their Double Taxation Agreements and/or Bilateral Arrangements. Some countries have introduced concessions on temporary basis due to the Covid-19 pandemic.

7.1 Belgium

99. Belgium has no specific domestic relief similar to the Trans-Border Workers' Relief and Article 15 of the OECD Model Tax Convention and the principles underlying this Article are applicable for trans-border workers.

100. Specific Covid-19 Mutual Agreement Procedures (MAP's) were concluded with neighbouring countries, such as the Netherlands, Germany, France and Luxembourg, in order to manage the tax implications of trans-border workers working from home due to the pandemic. The agreements operate so that trans-border workers may opt to remain taxable in the State in which they usually worked before the pandemic. This allows the country of employment to continue taxing the income of trans-border workers who are working from home during the pandemic. The agreements have been extended until 31 December 2021.

7.2 Germany

101. Germany has dealt with the issue of cross border workers during the pandemic in a similar manner. Temporary mutual agreements are in place with neighbouring countries, such as Austria, Belgium and the Netherlands, in relation to the tax status of cross-border workers who work from home during the pandemic. The agreements stipulate that days spent working remotely from home because of the pandemic measures would be considered working days in the country in which the work would normally have been carried out. The agreements have been extended until 30 September 2021.

102. Germany's tax code does not provide for specific relief applying to cross-border workers only.

7.3 Luxembourg

103. Luxembourg's DTAs follow the OECD Model Tax Convention with respect to the taxation of employment income, pursuant to which employment income is taxable in the contracting state where the employment is physically carried out.

However, for administrative purposes, Luxembourg has agreed with its neighboring countries to introduce tolerance thresholds of respectively 19 days (Germany), 24 days (Belgium, increasing to 34 in 2022) and 29 days (France) during which employment

income remains taxable in the country of the employment (in this case Luxembourg meaning that the Luxembourgish employer withholds the share of income tax related to the respective employment income) provided that the amount of days that an employee has worked outside of the country of employment, i.e. in his/her country of residence or in third countries, do not exceed these thresholds.

When these are exceeded, the entire employment income in relation to the days worked in the country of residence or in third countries is taxable in the employee's country of residence.

104. As a result of the COVID-19 pandemic and the Government's recommendations to have recourse to teleworking for public health reasons, Luxembourg has concluded agreements with the three neighbouring countries pursuant to which the tolerance thresholds are put on hold despite the presence of the employee (and the pursuit of his/her work) in his/her state of residence. It is expected that these agreements will expire at the end of 2021.

105. Luxembourg does not have other reliefs for cross border workers separate to those available under DTA.

7.4 United Kingdom

106. The UK does not have an equivalent to Trans-Border Workers' Relief in its tax code. Relief for any double taxation in the UK is subject to the terms of the relevant DTA.

7.5 OECD Guidance

107. The OECD issued guidance on the impact of the Covid-19 pandemic on tax treaties¹¹, however, the guidance represents the views of the OECD Secretariat on the interpretation of the provisions of the tax treaties and each jurisdiction may adopt its own guidance. The guidance is only relevant to circumstances arising due to the pandemic and when public health measures are in effect. The guidance covers the following aspects:

Creation of a Permanent Establishment

108. The creation of a permanent establishment by a business due to employees working in a jurisdiction other than the one they regularly work in, should not arise. Due to the exceptional nature of Covid-19, temporary change of location employees exercising their employment duties should not create new permanent establishments for the employer.

Change of Residence

109. The relocation, or inability to travel, of board members or other senior executives, is unlikely to result in a change in the place of "effective management" of a company, due to the temporary change in the location of board members or other senior executives.

¹¹ https://read.oecd-ilibrary.org/view/?ref=1060_1060114-o54bvc1ga2&title=Updated-guidance-on-tax-treaties-and-the-impact-of-the-COVID-19-pandemic&_ga=2.71592912.2123566328.1626088634-1637016150.1622554779

Concerns related to a change to the residence status of individuals

110. The OECD notes the complexity of the rules and their application to a wide range of potentially affected individuals, but considers it unlikely that the Covid-19 restrictions to travel would affect the treaty residence position.

Concerns related to income from employment

111. Specifically in the context of cross-border workers, the OECD states a change of place where cross-border workers exercise their employment may give rise to a change in the allocation of taxing rights under the current treaty rules. It can impact where the cross-border worker's employment income is taxed. It may also create new taxing rights over the employee's income in another jurisdiction which may displace the existing taxing rights.

8 Conclusion

112. This review of Trans-Border Workers' Relief was conducted to fulfil a commitment given by the Minister of Finance during the Finance Bill 2020 debates. The main issue at hand is the continued availability to claim the relief while working from home in the State but employed by a company outside the State.

113. While this tax relief would not normally be available for Irish residents who work from home in Ireland while employed by a company resident outside of the State, Revenue introduced a concession for 2020 and 2021 on foot of the Covid-19 pandemic and the necessity to work from home to comply with public health restrictions.

114. There have been calls to place this concessional treatment on a statutory footing so that individuals who are resident in the State but work outside the State for a non-resident employer, can continue to avail of the relief if they exercise their duties of employment in the State.

Cost

115. There would be no additional Exchequer cost arising from the changes sought. This is because the tax and PRSI that would be collected, in the absence of the measure, is foregone in any event due to the operation of the relief, however, there are other relevant issues that require consideration.

Taxing Rights

116. The matter is complex as it involves operations across two jurisdictions which by its nature, involves the issue of taxing rights as allocated by the respective DTA. Where a person carries out their employment duties in Ireland, even for a non-resident employer, Ireland has taxing rights on that income.

117. The request to place the Covid-19 related concessional treatment on a statutory basis to allow individuals in the State to avail of Trans-Border Workers' Relief while carrying out their employment duties for a non-resident employer and pay no employment tax to the Exchequer is asking the State to give up a taxing right it rightfully has under the Irish tax code. There is a domestic right to tax this income under Schedule E S112 TCA 1997. It is unclear why Ireland would not exercise those taxing rights and it also unclear how another jurisdiction would then have taxing rights over income earned in the State in respect of duties carried out in State.

Equity and Fairness

118. The relief operates to effectively remove foreign employment income from the scope of Irish tax and enables individuals to only pay tax in the other jurisdiction, which is particularly beneficial when the rates of tax are lower there than in the State. While this may result in different tax liabilities and different effective tax rates between those Irish residents who can avail of the relief as compared to those who cannot avail of the relief,

there is a key distinguishing factor in that the employment duties are exercised outside the State for a non-resident employer.

119. If Trans-Border Workers Relief was to be relaxed to allow for work carried out in the State to qualify for the relief, there would no longer be a distinguishing factor between Irish residents as both sets of Irish residents would be exercising their employment duties in the State, with some (those with Irish resident employers) liable to tax at the Irish tax rates (income tax and USC) and a higher effective tax rate, and others (those with non-resident employers) liable to tax at the UK tax rates and a lower effective tax rate.

120. This would give rise to a question as to how Irish income tax rules could apply a different Irish income tax treatment to an Irish resident solely because of the location of their employer, as opposed to the location of where they carry out their duties as is the current position.

121. From the perspective of all resident employees in the State, it would raise issues of equity and fairness which are fundamental features of Ireland's income tax system. It is unclear how this would be sustainable and acceptable from the perspective of all Irish resident taxpayers.

Competitiveness of Irish Based Employers

122. From the perspective of employers, any change to the relief to allow individuals carry out their duties of employment in the State, could potentially undermine the competitive position of Irish based employers or Irish based activities. This is particularly the case where salaries would be subject to lower rates of tax and may have implications as regards Irish based employers' cost base and ability to attract and retain employees from the talent pool.

123. Trans-Border Workers' Relief in its current form may in fact make it more attractive for Irish residents to work for employers based outside the State in order to avail of the relief and the lower tax rate available in Northern Ireland. Any further enhancements to the relief, may exacerbate this point.

Conclusion

124. Taking all of the above factors into consideration, it appears impracticable from a legal perspective, in terms of taxing rights, as well as challenging from a policy perspective when having regard to the interests of the wider body of taxpayers encompassing all Irish resident employees and employers, to place the concessional treatment on a statutory footing.

International Landscape

125. More generally across many countries, working arrangements have shifted significantly over a relatively short period precipitated by the Covid-19 pandemic and the public health restrictions. It may be the case that global mobility and remote working arrangements become the norm and a permanent feature of many organisations. This would have implications for individuals and businesses, as well as the taxing rights of the respective

countries. However, at present the remote working environment is still evolving as companies adopt to the recent changes, consider their business practices and develop policies most suited to their needs.

126. The taxation of trans-border workers involves international tax law with the allocation of taxing rights generally negotiated and agreed between respective countries as part of their DTAs. This is a complex matter in the first instance, which has been compounded by the sudden move to remote working necessitated by the pandemic.
127. The structural effects that the pandemic is having on employment and the prevalence of remote working remains an evolving situation. At this point it is unclear the extent to which those changes will become permanent and the precise future of work arrangements is not yet known. This presents challenges in terms of assessing if there is a need for an immediate policy response or if it would be preferable to continue to monitor developments as they emerge and engage in international fora as appropriate.
128. It is understood that this issue of global mobility of individuals may feature on the OECD's agenda in due course. As always, Ireland will participate in any discussions and continuously assess developments in the wider international landscape.

Appendix

Examples of Trans-Border Workers' Relief

Example 1

Single person resident in the State in 2019, employed in Northern Ireland earning £20,000 sterling with Irish rental income of €5,000.

	Value
Northern Ireland Employment Income (£20,000)(£1 = €1.168)	€23,360.00
Irish Rental Income	<u>€5,000.00</u>
Total Income	€28,360.00
Taxable @ 20%	€5,672.00
Personal Tax Credit	€1,650.00
Employee Tax Credit	<u>€1,650.00</u>
Irish tax due	€2,372.00
Less credit for UK tax paid (£1,530)(£1 = €1.168)	<u>€1,787.04</u>
Tax now due	€584.96

Trans-Border Workers' Relief

$$\text{Specified amount: } €2,372.50 * \frac{€5,000}{€28,360} = €418.19 \text{ tax due}$$

Benefit of Trans-Border Workers' Relief

The relief gives a saving of €1,953.81 (€2,372 - €418.19).

If the taxpayer had no rental income, the specified amount would be zero, with no additional liability to Irish tax.

Example 2

Married couple/civil partners resident in the State in 2020 with both spouses/civil partners earning. Individual A is employed in the State and earns €40,000. Individual B is employed in Northern Ireland and earns £20,000 sterling.

	Value
Individual A	€40,000.00
Individual B (£20,000)(£1 = €1.168)	<u>€23,360.00</u>
Total Income	€63,360.00
Taxable @ 20%	€12,672.00
Married Persons/Civil Partners Credit	€3,300.00
Employee Tax Credit * 2	<u>€3,300.00</u>
Irish tax due	€6,072.00
Less credit for UK tax paid (£1,530)(£1 = €1.168)	<u>€1,787.04</u>
Tax now due	€4,284.96

Trans-Border Workers' Relief

$$\text{Specified amount: } €6,072 * \frac{€40,000}{€63,360} = €3,833 \text{ tax due}$$

Benefit of Trans-Border Workers' Relief

The relief gives a saving of €2,238.67 (€6,072 - €3,833.33).



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