Tax Treatment of Flight Crew Members

Part 05-05-29

This document should be read in conjunction with section 127B of the Taxes Consolidation Act 1997

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1. Introduction

Section 16 Finance Act 2011 inserted section 127B into the Taxes Consolidation Act 1997. The section provides for the taxation under Schedule E (and, therefore, within the scope of the PAYE system) of employment income arising to a flight crew member in respect of an employment exercised aboard an aircraft operated in international traffic where the place of effective management of the enterprise operating the aircraft is in this State.

2. Background

Some double taxation agreements (DTAs) grant sole taxing rights on the income of flight crew (including non-resident flight crew) operating in international traffic to the jurisdiction or country where the enterprise operating the aircraft has its place of effective management.

To give effect to a 'taxing right' granted under a double taxation agreement, a charge to tax must be found in domestic tax legislation. Prior to 2011, where a relevant DTA granted such a "taxing right", no domestic legislation existed to bring such cases within the charge to Irish tax. Section 16 Finance Act 2011 introduced such a charge by inserting section 127B into the Taxes Consolidation Act 1997. Section 127B provides for the taxation under Schedule E of income arising to individuals who exercise their employment aboard an aircraft that is operated in international traffic where the enterprise operating the aircraft has its place of effective management in the State. Such income is within the scope of the PAYE system. With effect from 1 January 2022, non-resident flight crew will not be within the charge to Irish income tax and USC under section 127B TCA 1997 if all the conditions included in section 127B(1A) TCA 1997, as introduced by section 8 of Finance Act 2021, are satisfied.

3. Members of flight crews - Position from 1 January 2011

3.1. Irish resident individuals

The extent to which Irish resident flight crew are liable to Irish income tax depends on whether they are domiciled in the State.

Irish resident and domiciled flight crew are chargeable to tax on their worldwide income subject to any DTA relieving provisions.

Irish resident but not domiciled flight crew are liable to tax on their Irish source income (e.g. income from employment exercised in the State) together with foreign income to the extent it is remitted to the State.

Following the introduction of section 127B TCA 1997, flight crew, whether resident in the State or not, are also liable to Irish income tax and USC on income arising from an employment which is exercised aboard an aircraft-

(i) that is operated in international traffic; and

(ii) where the aircraft is operated by an enterprise that has its effective place of management in the State.

For the purposes of Section 127B TCA 1997, "international traffic", in relation to an aircraft, does not include an aircraft operated solely between places within the same state (domestic traffic).

For employment income to be chargeable under Section 127B, both of these conditions must be satisfied. As such, the charge to Irish income tax and USC under Section 127B TCA 1997 will not apply to income from an employment exercised aboard an aircraft which is operated solely in domestic traffic.

Where Section 127B TCA 1997 applies to the employment income of flight crew, this income is within the charge to tax under Schedule E and is therefore within the scope of the PAYE system.

3.2. Non-resident individuals

An individual who is not resident and not ordinarily resident in the State is, in general, liable to Irish income tax and USC only on income arising in the State.

Following the introduction of Section 127B, non-resident flight crew are also liable to Irish income tax and USC on income arising from an employment exercised aboard an aircraft operated in international traffic where the place of effective management of the enterprise operating the aircraft is in the State. Such income is within the charge to tax under Schedule E and, therefore, within the scope of the PAYE system.

With effect from 1 January 2022, non-resident flight crew will not be within the charge to Irish income tax and USC on this income if all the conditions included in Section 127B(1A) TCA 1997 are satisfied (Refer to 4.1 below).

3.3. Relief for Double Taxation

Under Section 127B, non-resident flight crew are liable to Irish income tax and USC on income arising from an employment exercised aboard an aircraft operated in international traffic where the place of effective management of the enterprise operating the aircraft is in the State. In some instances, a non-resident flight crew member may remain within the charge to Irish income tax and USC on their employment income under Section 127B(1A) TCA 1997 if all of the conditions included in Section 127B(1A) TCA 1997 are not satisfied. However, the charge to Irish income tax and USC may be relieved under the terms of a relevant DTA, as per the following example.

Example 3.1

Pierre is tax resident in a DTA country. He exercises his duties of employment aboard an aircraft which operates in international traffic and the aircraft is operated by an enterprise that has its place of effective management in the State. Pierre does not exercise any of his employment duties in the State.

Pierre is not subject to income tax on his flight crew income in the DTA country in which he is tax resident. On this basis, he will remain within the charge to Irish income tax and USC under Section 127B(1A) TCA 1997. Consequently, his employer is obliged to withhold Irish income tax and USC from his employment income under section 127B TCA 1997. However, the charge to Irish income tax and USC may be relieved under the terms of the relevant DTA that is in place between the State and the country in which Pierre is tax resident.

Where the Employment Article of the relevant DTA contains a paragraph specifically dealing with income arising to flight crew the position as outlined in 3.3.1, 3.3.2 or 3.3.3 will apply.

Where the Employment Article of the relevant DTA does not contain a paragraph specific to flight crew, the charge to income tax in the State may be relieved under paragraph 1 or 2 of the relevant DTA.

Where no DTA is in place, the position is set out at 3.3.4.

3.3.1. DTA grants sole taxing rights to the State

Where the relevant DTA grants sole taxing rights to the State in respect of income from an employment exercised aboard an aircraft operated in international traffic where the place of effective management of the enterprise operating the aircraft is in this State, the charge to Irish tax is not relieved.

In this instance, flight crew are chargeable to Irish income tax and USC under Schedule E and will pay their taxes through the PAYE system.

On the basis that the DTA has granted sole taxing rights to the State, this income should not be subject to tax in the other country. A double taxation situation should not therefore arise but is dependent on the operation of domestic tax legislation in the other jurisdiction.

3.3.2. DTA grants sole taxing rights to country of residence

Where the relevant DTA grants sole taxing rights to the country of residence in respect of income from an employment exercised aboard an aircraft in international traffic where the place of effective management of the enterprise operating the aircraft is in this State, then the charge to Irish tax is relieved.

In this instance, a non-resident flight crew member may not satisfy all of the conditions included in Section 127B(1A) TCA 1997 and his/her employer will be obliged to withhold Irish income tax and USC from the non-resident flight crew member's employment income under Section 127B TCA 1997.

The non-resident flight crew member can file an Irish income tax return following the end of the tax year in which a claim for relief under the terms of the particular DTA will be made.

On the basis that the State has relieved this income from the charge to Irish tax a double tax situation does not arise.

3.3.3. DTA does not grant sole taxing rights to either country

Where the relevant DTA does not grant sole taxing rights to either country, then each country may consider that such income is within the charge to tax. In such cases, the DTA would generally state that remuneration for personal services performed aboard an aircraft in international traffic may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.

In this instance, where a domestic tax charge arises under Section 127B TCA 1997, flight crew are chargeable to Irish income tax and USC on this income under Schedule E and will pay their taxes through the PAYE system.

Such flight crew will claim relief from double taxation in the country in which they are considered a resident of under the terms of the relevant DTA. Relief will be provided to the individual there by either exempting the income from tax or by allowing a credit for taxes paid in the other country.

3.3.4. No DTA in place

Where a DTA is not in place between the State and the country in which the flight crew member is a resident or where a flight crew member is not resident in any state, the charge to Irish tax imposed by section 127B TCA 1997 is not relieved.

Please refer to Example 4- Appendix 1.

4. Members of flight crews –Finance Act 2021 amendment

4.1. Finance Act 2021 amendment

From 1 January 2022, with the enactment of section 127B(1A) of the Taxes Consolidation Act 1997, as inserted by section 8 Finance Act 2021, a non-resident flight crew member will not fall within the scope of the charge to Irish tax, where, for the year of assessment 2022 and subsequent years of assessment, he/she:

- is not resident in the State; and
- is resident for the purposes of tax in a territory with which the State has a DTA; **and**
- is subject to tax on the income, which would otherwise be liable to taxation under section 127B TCA 1997, in a territory with which the State has a DTA.

4.2. PAYE withholding position

Where the conditions under s.127B(1A) TCA 1997 are met, then with effect from 1 January 2022 the employment income of the flight crew member is not subject to Irish income tax and USC and the employer will not have a PAYE withholding obligation in respect of this income.

Where individuals do not fall within the scope of Schedule E by virtue of s.127B(1A) TCA 1997, it is the responsibility of an employer to ensure that such an employee is correctly removed from the charge to Irish income tax and USC, taking account of the conditions provided for in the legislation. In practice, this will require an employer to self-assess whether the flight crew member satisfies the conditions of the s.127B(1A) TCA 1997 relating to (i) residence and (ii) the requirement that the income is subject to tax in a DTA jurisdiction. Guidance as to how these requirements may be satisfied is outlined below.

4.2.1. Residence

If the employee's habitual abode i.e. the address of the employee's permanent home (as retained in the employer's HR records) is located outside the State and the employee carries out the employment duties wholly outside the State, then an employer can use this as a basis for determining that the employee is not resident in the State for tax purposes. The provision of addresses in short-term or temporary accommodation will not be sufficient to establish an individual's place of residence for the purpose of applying section 127B(1A)(a) TCA 1997. Examples of such addresses include, but are not limited to, 'care of' and 'PO Box' type addresses, and

addresses in hotels, hostels and similar establishments. Where such addresses have been provided by the employee, the employer is obliged to withhold Irish income tax and USC from his/her employment income under section 127B TCA 1997.

With respect to determining whether the employee is resident or not in a DTA jurisdiction, the employee's home address as retained in the employer's HR records will be considered to be sufficient to confirm this position.

The employer should re-evaluate an employee's entitlement to be removed from the charge to Irish income tax and USC in cases where the employee changes their home address to a different jurisdiction.

4.2.2. Subject to tax in a DTA jurisdiction requirement

This requirement prevents double non-taxation of the employment income by ensuring that, where the income falls outside of the scope of Irish tax, in accordance with the provisions of section 127B(1A) TCA 1997, tax is actually payable on the income in a DTA jurisdiction.

In the absence of any proof to the contrary, where the employment income is subject to non-refundable payroll withholding tax by the employer in a DTA jurisdiction, Revenue is prepared to accept that this requirement is satisfied.

It is acknowledged that difficulties may arise with respect to the review of this condition where the employer is not required to operate payroll withholding tax on the income abroad, that is, where local tax rules in the employee's country of residence require the employee to pay tax on the income under self-assessment rules. In some cases, the payment of tax on the income may be due in the year following the payment of the employment income in real-time by an employer. As the requirement to operate PAYE withholding arises in real-time, an employer will not be in a position to determine in real-time that this condition will ultimately be satisfied by the employee.

In this scenario, Revenue is prepared to accept that the 'subject to tax' requirement can be satisfied in a number of different ways, including as follows:

- the employee confirms to the employer in good faith that the income is subject to tax in a DTA jurisdiction and this confirmation is retained on file by the employer. In keeping with human resources practice, Revenue expect that the employee will inform the employer, at the earliest available opportunity, of any change to his/her tax residence and will provide the employer with the address of his/her new habitual abode.

and/or

- Subject to prior agreement between employer and employee, the employer may seek further assurance from an employee by requesting a copy of a statement(s)/ tax residence certificate from the employee's tax authority in a DTA jurisdiction as evidence that the

employment income is subject to tax in that jurisdiction (e.g. an overseas tax assessment).

Such documentation should be retained by the employer in the event of a compliance intervention being initiated by Revenue.

Please refer to Example 1- Appendix 1.

5. Other matters

5.1. Non-residents: Tax Credits and Reliefs

Section 1032 TCA 1997 outlines a non-resident's entitlement to allowances, deductions, reliefs and tax credits - see Tax and Duty Manual (TDM) Part 45-01-01. As regards the personal tax credits, TDM Part 44-01-01 deals with the taxation of married couples/civil partners and, in particular, the credits that are due where aggregation of the income of a married couple/civil partners, where one or both spouses/partners are not tax resident in the State.

5.2. Contributions to foreign pension schemes

Individuals brought into the charge to Irish tax by virtue of section 127B TCA 1997 may be members of, and contribute to, a pension scheme in their country of residence.

With effect from 1 January 2011, relief will be available in respect of contributions made directly by such a non-resident individual into a foreign pension scheme where:

(a) the non-resident employee

  (i) has income within the charge to tax by virtue only of section 127B;

  (ii) is making contributions to the foreign pension scheme referred to in (c) below; and

(b) the employer

  (i) is resident for tax purposes in an EU Member State or in a country with which the State has a DTA;

  (ii) is making contributions to the foreign pension scheme on behalf of the employee; and

(c) the foreign pension scheme is a statutory scheme in a state or country mentioned in (b)(i) above, other than a State Social Security scheme, or is a scheme in respect of which tax relief is available in such a state or country; and

(d) both the employer and employee contributions comply with the rules of that foreign pension scheme.

Revenue will also treat contributions made by the employer to the pension scheme, for the benefit of the employee, as not being taxable.

Note: Relief will be granted on the employee's pension contributions to the foreign scheme to the extent that relief would have been granted in the State if the contribution had been made to an Irish pension scheme. The normal age-related income percentage limits on contributions, fund threshold and aggregate earnings cap apply. Relief will not be due if the employee is excluded from the charge to Irish income tax and USC under section 127B(1A) TCA 1997.

6. Emergency or incidental flights

Income arising to an employee engaged in emergency or incidental flights may be disregarded for the purposes of the operation of PAYE/USC where the employment income of such an employee with that employer is not otherwise within the charge to tax by virtue of section 127B TCA 1997. For example, this would apply to non-resident flight crew who exercise employment duties aboard an aircraft which is operated by an enterprise that has its place of effective management in the State. Emergency or incidental flights in this context should be taken to mean no more than 5 return flights in any tax year.

Please refer to Example 6- Appendix 1.

Appendix 1

Example 1

Maria is tax resident in the Netherlands in 2022. She exercises the duties of her employment aboard an aircraft which operates between the Netherlands and Germany (international traffic) and her home address on her employer's HR records is located in the Netherlands. Her home base for flight purposes is also located in the Netherlands. The enterprise that operates the aircraft has its place of effective management in this State, however, she does not spend any time performing duties of employment in the State.

Maria is tax resident in the Netherlands (a jurisdiction with which the State has a DTA) and is subject to tax on this income in the Netherlands. Under the Ireland/ The Netherlands Double Tax Agreement, the Netherlands has taxing rights on Maria's income under the DTA. Additionally, under local payroll withholding tax rules in place in the Netherlands, her employer is not required to operate payroll withholding tax in the Netherlands to account for the Dutch income tax liability on her employment income. Instead, Maria is subject to tax on this income under self-assessment rules, meaning that she is required to submit an annual tax return to the Netherlands' tax authority and pay the resulting income tax liability on this income by the applicable income tax filing deadlines in the Netherlands.

As the enterprise has its place of effective management in the State, Section 127B brings such income within the charge to tax under Schedule E and the PAYE system of deductions at source, unless removed from the charge to Irish income tax and USC under section 127B(1A) TCA 1997. Her employer assesses that Maria is excluded from the scope of section 127B from 1 January 2022 in accordance with the amendment introduced by Finance Act 2021 and, as such, it does not operate Irish PAYE withholding on her employment income from this date. Her employer carries out the following steps before making this assessment:

- As Maria's home address is located in the Netherlands, it concludes that she is tax resident in that jurisdiction for 2022. In addition, as Maria does not spend any time working in the State and will be not required to do so at any future date, her employer can reasonably conclude that she is not tax resident in the State for 2022 and will not be for future years.
- In considering whether Maria is subject to tax on this income in the Netherlands, she provides a once-off written confirmation to her employer that she will be subject to income tax in the Netherlands on this income for 2022 and future years, as long as she remains tax resident in the Netherlands.

Maria agrees to notify her employer of any change in her residence position which may result in her ceasing to be subject to tax on this income in the Netherlands, at which point her employer must then review whether she is entitled to be removed from the charge to Irish income tax and USC under section 127B(1A) TCA 1997.

Example 2

Joe is not tax resident under the domestic tax laws of any state. He exercises a foreign employment aboard an aircraft that operates within both international traffic and foreign domestic traffic. The enterprise that operates the aircraft has its place of effective management in this State.

As the enterprise has its place of effective management in the State, section 127B brings such income to the extent it relates to international traffic, within the charge to tax under Schedule E and the PAYE system of deduction at source. As Joe is not tax resident in a DTA jurisdiction, he remains within the charge to Irish income tax and USC under section 127B TCA 1997.

The portion of Joe's income arising in respect of his employment exercised aboard the aircraft in foreign domestic traffic is not within the charge to Irish tax.

Example 3

Karl is tax resident in Germany. He exercises the duties of his German employment aboard an aircraft that operates between Frankfurt and Berlin (domestic traffic). The enterprise that operates the aircraft has its place of effective management in this State.

As Karl works aboard this aircraft in foreign domestic traffic only, his German employment income is not within the charge to Irish tax imposed by section 127B TCA 1997.

Example 4

Elena is tax resident in Brazil. She exercises the duties of her Brazilian employment aboard an aircraft that operates between Brazil and Argentina (international traffic). The enterprise that operates the aircraft has its place of effective management in the State.

As the enterprise has its place of effective management in the State, section 127B brings such income within the charge to tax under Schedule E and the PAYE system of deductions at source. As Elena is not tax resident in a DTA jurisdiction, she is unable to claim exemption from Irish tax under section 127B(1A) TCA 1997.

As a DTA is not in place between the State and Brazil, any question concerning relief for double taxation suffered is a matter for the tax authorities in Brazil.

Example 5

Leo is tax resident in Brazil. He exercises the duties of his Brazilian employment aboard an aircraft that operates between Brasília and São Paulo (domestic traffic).

The enterprise that operates the aircraft has its place of effective management in the State.

As Leo works aboard this aircraft in foreign domestic traffic only, his Brazilian employment income is not within the charge to Irish tax imposed by Section 127B TCA 1997.

Example 6

Peter is an airline pilot who is tax resident in the United States. He exercises the duties of his employment aboard an aircraft that operates between the United States and Germany. The enterprise that operates the aircraft does not have its place of effective management in the State and as such, Peter's employment income is not within the charge to Irish tax imposed by Section 127B TCA 1997.

During a routine cross-Atlantic flight between the United States and Germany, the aircraft encounters an emergency and is required to land in Shannon, after which it makes a departure. As employment duties were exercised by Peter in the State, his employment income attributable to these duties is taxable here and is subject to PAYE withholdings by his foreign employer. However, as the duties were necessitated due to an emergency landing here, this income may be disregarded for PAYE/USC purposes.