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Oifig na gCoimisinéirí Ioncaim
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An Linn Dubh
Corcaigh, Éire

Ms Cora O'Brien
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South Block
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Dublin 2

27 November 2013

Re: Revenue's National Contractors Project

Dear Ms O'Brien,

Thank you for your submission of 11 November. In responding, I will also address the issues raised by you in your letter of 14 August. Regarding the earlier letter, I regret the delay in responding formally.

You have raised issues and questions in relation to the treatment of expenses (especially travel and subsistence); the procedure for applying penalties; the administration of the Contractors Project; and situations where there is hardship or inability to pay. You have also included comments of a more general nature which do not appear to have immediate bearing on the current project, and while they are of course noted, I do not propose to deal with them directly in this letter.

As a general comment, I would like to emphasise that Revenue has not changed its interpretation of the law in relation to the tax treatment of the expenses of travel and subsistence. Some issues do arise in the special case of a person providing service through an intermediary, but our intention is to apply the law and practice as it exists, not to introduce new interpretations. In the interests of greatest possible clarity, we are issuing a further Tax Briefing Article No. 4 of 2013, which deals with most of the issues you have raised, and I attach a copy at Appendix 2. It is worth reiterating that the arrangements which are the focus of both Tax Briefings (3 and 4 of 2013) are those where the intermediary enters into a contract, either directly with the end-user or via an agency, under which it agrees to supply the services of an individual.

While I think the Tax Briefings cover most of the situations raised by you, I recognise that principles are sometimes best understood through examples, and I will therefore comment on each of the examples and issues you have raised in your letter and submission. In the following pages, words and phrases in italics are taken from the ITI communications.

To begin with, I would like to address the issues of **inability to pay and consistency** (issues 5 & 6 of the November submission). Revenue's position on inability to pay is set out at paragraph 4.9 of the Code of Practice for Revenue Audit, and we are of course always willing to discuss appropriate means of payment of liabilities. The quantum of liability is not affected by the financial circumstances of the taxpayer however, so the details given in *Case 1* and *Case* 2 of *Issue* 5 are not relevant. In general, our experience is that a suitable schedule of payment can be found.

On *Issue* 6 (inconsistent treatment) I know that you are in contact with Mr Eoin O'Domhnaill, who is manager of the Contractors Project, in relation to possible inconsistency, and the complaints and review procedures are available to any case where the taxpayer feels unfairly treated. The specific questions you pose are:-

The number of years under audit.

Comment: For consistency of treatment, and as a concession in the case of disclosures, we undertook to deal with a specified four-year period, 2008 to 2011 inclusive. As you know, we have said that disclosures covering those four years would be accepted where the resulting disposal of income falls within sectoral norms and there is no specific reason to question the disclosure. I am aware of a very small number of letters that issued in error specifying a two-year period. This was an error, not an inconsistency. Of course, where there is reason to suspect fraud or negligence, and particularly where there is no disclosure, the audit may be extended in accordance with the Code of Practice.

Expense deductions

Comment: We have had many queries around the statement that we expected disclosures to be within sectoral norms. In an effort to be helpful, we may have given broad indications of the picture emerging from the Project. <u>This is **not** a suggestion that there is a percentage of expenses that will go unquestioned</u>. The circumstances of each case determine what expenses are reasonable, and unsupported claims for expenses will always result in challenges.

Salary of Spouse

Comment: This is dealt with in some detail in the Tax Briefing Article. There is no barrier to payment of a salary to a family member for services or duties performed in the business. If, services or duties are not performed however, the fact is that the "salary" payment is actually an application of a portion of the contractor's taxable income and must be treated as such.

Penalties

Comment: The application of penalties is also clarified in the Tax Briefing Article. The purpose of this Project is to deal with abuse. It is not intended as a routine check on the expenses of contractors. Those selected for intervention typically exhibit exceptionally high expenses in their Revenue records. For that reason, the opening position is that deliberate behaviour is suspected. Inevitably, innocent error, technical adjustment and careless behaviour occur in some of the cases, and the appropriate penalty is then applied. The reason for requiring a statement in writing as to the appropriate penalty to be applied, and for approval of the penalty at Assistant Secretary level, was purely to ensure consistent treatment. In all cases, there is a recommendation from the caseworker/auditor who is familiar with the details of the case.

Making a disclosure

Comment: The process of disclosure, and our expectations within this Project, were set out in detail in the ITI Bulletin published on 9 July 2013 (copy of text at Appendix 1). The cases detailed in the submission are necessarily stated in summary fashion and it is not possible to give a detailed response. We have however checked, and have found no case where detailed material was insisted upon without specific reason. In that context, our experience to date has been that where disclosures have been challenged there is a tendency for the liability to be significantly revised upwards. As you know, it is common practice to indicate in the initial audit notice all of the material that may be required, to avoid complaints about subsequent requests. Your members are however well aware that if there are difficulties in producing material, timely engagement with the auditor will almost always achieve a reasonable resolution.

Consistency is very important to Revenue and we have a formal project structure involving representatives of each Region to ensure good internal communication and governance. Each case is however unique in some respects, and the appearance of inconsistency can result from crucial differences in the detail of cases.

Specific Cases and Scenarios

Letter of 14 August 2013:

Scenario 1

Alice is a director of a start-up company which provides architectural services. She has a purpose-built office at the end of her garden, in which she carries out the vast majority of her

design work. She has secured a contract to provide architectural services to AB Ltd. She attends the premises of AB Ltd for 2 hours every Friday to provide work updates and discuss the project. Any other time away from her home office is spent meeting potential clients to develop her business further.

Is it Revenue's view that the premises of AB Ltd, where she spends 2 hours per week (5% of her time), is her normal place of work?

Comment: The key issue is not entirely clear from this summary. It appears that Alice is required to attend and perform work for AB on site for two hours a week. If so, then she is not entitled to any travel cost for that purpose. For the remainder of her week, she is an architect in business in the normal way, and Tax Briefing 3 of 2013 does not apply to her. Practice under IT51, IT54 and SP/2/2007 apply. If her business with AB Ltd is of the nature that architectural services (not specifically Alice's services) are required, it may be that all of her business is outside Tax Briefing 3 of 2013. The facts of her relationship with AB Ltd must determine which is applicable.

Scenario 2

Brendan is a director of a company with a contract to provide services to CD Ltd and EF Ltd. He previously had an office in the nearby town, in which he carried on the vast majority of his duties, with one or two visits per month to the premises of CD Ltd and EF Ltd. Due to the economic downturn, he was forced to give up the lease on his office and he transferred his office equipment and activity to a home office. It seems to be Revenue's view that the premises of CD Ltd and EF Ltd have now become Brendan's normal place of work. This is despite the fact that his office in town would previously have been considered his normal place of work, and he is carrying on the same duties from his home office as he previously did from his office in town.

Comment: The change of location of Brendan's office has no bearing at all on the allowability of his travel expenses. His work appears to consist entirely of contracts with CD Ltd and EF Ltd. The precise nature of the services that are being provided to CD Ltd and EF Ltd are not stated. Nor is it clear whether his work would normally be carried out on the premises of CD Ltd and EF Ltd and the circumstances in which he carries out the work at another location. The fact that he had his own office and equipment could be evidence that he is not working under the general direction and control of CD Ltd and EF Ltd in which case Tax Briefing 3 of 2013 is not relevant. On the other hand, it could be that the normal place of delivery of the service is the premises of both CD Ltd and EF Ltd but Brendan does his work at a different location for convenience and with the agreement of CD Ltd and EF Ltd, in which case the Tax Briefing applies.

Scenario 3
We understand from follow-up correspondence with Revenue, your view is that the same principles apply regardless of whether the expenses of travel and subsistence are incurred on a return journey to a location inside or outside the State. This gives rise to the following scenario:
David is a director of a company with a number of contracts to provide services to A Ltd (located in Cork), B Ltd (located in Limerick), C Ltd (located in Brussels) and D Ltd (located in Paris). His home office is based in Dublin. Under these contracts, Kevin is required to work two days per month at the premises of each of A Ltd, B Ltd, C Ltd and D Ltd.

Is it Revenue's view that the premises of D Ltd in Paris is considered to be his normal place of work for the two days of the month which he spends there? If so, is it the case that he is then not entitled to tax-free reimbursement of the cost of his flights to and overnight accommodation in Paris?

Comment: The Tax Briefing Article is quite clear on the issue of foreign versus domestic travel. There is no difference. The position dealt with in IT54 relates to someone with a fixed base of employment in Ireland.

David's situation is not entirely clear, in that the nature of his contracts could make a difference. If they are contracts for the delivery of his services, he could be in the situation that his travel expenses are not reimbursable free of tax. However, the number of contracts suggests that his company is in fact in the business of providing a service, for which it currently has a number of clients. As such David's expenses may be paid tax-free. As with Alice, the facts would determine which treatment applies.

We are also unclear as to whether the position would be different in relation to expenses incurred in visiting the premises, of, say D Ltd, if D Ltd was a potential client of David, rather than a current client. In these circumstances, the premises of D Ltd could not be David's normal place of work. Non-deductibility of travel and subsistence expenses in these circumstances would be a serious impediment to those seeking to expand their businesses abroad.

Comment: It would seem that such expenditure would be wholly and exclusively laid out for the purposes of the company's trade and, therefore, deductible in computing its profits assessable under Schedule D. Revenue also accepts that tax-free reimbursement of travel and subsistence expenses can be made in these circumstances.

At this point, a more general comment seems appropriate:

You expressed particular concern about the interpretation outlined in Example 9 in the Tax Briefing. This interpretation is based on the well accepted view that if an employee has no fixed base then he or she cannot claim a tax deduction in respect of the expenses of travelling to a job under section 114 of

the Taxes Consolidations Act 1997. You asked whether this applies only to taxpayers whose services are provided to end-users via intermediaries or to all taxpayers. The implication in this question is that taxpayers in the same situation are being treated differently. Any difference in treatment arises simply because the situations are different. In the scenarios set out in IT54 which you quote, the taxpayer has a fixed base so the expenses of travel incurred on temporary absences may be reimbursed free of tax. As I have already indicated, there is no change to Revenue's existing interpretation.

You raised the question of the long standing concession re "country money" in the building and allied trades. "Country money" applies to employees and not to contractors. Contractors in the building and allied trades are treated the same way as contractors in other sectors. This concession for employees applies in situations where the employee generally has no choice over the location at which the work takes place. It is dictated by the employer. It is very different to the situation dealt with in the Tax Briefing, where the individual often controls the intermediary.

Submission of 11 November:

Issue 1 – Revenue previously gave a clean bill of health to the taxpayer

Comment: This issue is specifically dealt with in Tax Briefing Article No. 4 of 2013. Persons who feel they were given comfort in relation to their practices in relation to expenses should make their cases known, and cases will be considered in the light of the Tax Briefing.

Issue 2 – Bona fide travel expenses are being disallowed

Case 1

The contractor based in South West travelled from home to a pharmaceutical plant in the South West four days a week. He was required by his work to travel to Dublin to perform his work duties one day each week.

He did not claim expenses for the travel between his home and the engineering plant. He claimed travel expenses for travel between his home and the Dublin office once a week, in line with the practice in place for employees of the engineering plant.

He is now under audit and Revenue is seeking a penalty for deliberate default of 50% in addition to tax and interest on the expenses claimed for the four years from 2008 to 2011.

Comment: Assuming that the work requirements all arise from a single contract, the contractor is entitled to travel expenses for his one day per week in Dublin, calculated from home or the pharmaceutical plant, whichever is the lesser distance. We would need details of the case in order to comment on the penalty being sought, because it is not clear from the summary that there is additional tax liability.

Case 2

This contractor is involved in providing project management services to companies in Ireland, UK and USA. His company has 3 sources of work:

1. The provision of consultancy services to a range of pharmaceutical companies in Ireland, Europe & Asia. This role involves:

- *Travelling to work with clients at their sites, with no fixed routine.*
- *Working on projects from a home office.*
- *Visits to the Head offices of the companies for meetings.*

2. Acting as Irish agent for a European company. This involves installation, calibration and maintenance of equipment at client sites in Ireland

3. Consultancy services for certain products that are manufactured at Irish sites. Most of this work is performed at the home office.

He also provides consultancy services to companies in the US, which requires working at home and calling into meetings during normal US hours.

He has received an audit letter. His reading of Tax Briefing No.3/2013 is that any of the travel from his home office is not allowable, which is clearly an inequitable position for him to be in.

Comment: The contractor is clearly not within the category to which the recent Tax Briefings apply.

Issue 3 – Genuine salary expenses are being disallowed

Revenue is seeking to disallow the salary of a spouse working in the business and paying PAYE on their salary.

A contractor company acts as an intermediary for a number of contractors (12+) for whom the company obtains project work around the country.

The spouse of the owner of the contractor company is heavily involved in the business, preparing invoices, billing and cash collection, yet Revenue is seeking to disallow the tax deduction for her salary.

Comment: The comment given under "*Salary of Spouse*" on page 2 above applies here.

The current project has also made it more difficult to obtain work for these contractors. If they cannot claim travel expenses, this cost of travel will have to be factored into their charge out rate to the contracting company. Instead of paying the increased cost of engaging a contractor, companies are sending their employees to the locations around the country.

Comment: I believe that the Tax Briefing makes it clear that contractors are no worse off generally than employees in terms of the treatment of travel expenses.

Issue 4 – Guidance on foreign travel and subsistence is contradictory

Case 1

This contractor is working for one company in the South West. The nature of his work as a project manager means that he is required to travel to Germany regularly for 2/3 days at a time.

He had been claiming motor expenses on travel from his home to the Irish plant, and occasional subsistence when staying overnight in the South West. He also claimed his travel and subsistence expenses for his business trips to Germany.

Comment: The contractor has a single contract in Ireland. His travel to and from the work location in the South West, and subsistence at that location, may not be claimed. His travel to Germany, which is part of his duty under the Irish contract, may be claimed, along with necessary subsistence.

Case 2

This contractor is an engineer based in Dublin whose company has a contract with a large Irish company. His work requires him to regularly travel to Asia to install machinery in plants. He could spend a number of weeks or a number of months at a time in Asia, depending on the nature of the installation.

He has always claimed his travel and subsistence expenses for this foreign travel based on the guidance in IT54. He had an audit in the 1990s and was given a clean bill of health by Revenue on his expense claims.

Comment: As with the preceding case, the contractor has a single contract which requires him to travel away from the premises of the end-user. Such travel may be claimed in accordance with IT54.

I hope that these detailed responses dispel any remaining lack of clarity. Of course, in a situation where the facts of each case must determine its precise treatment, there will always be some debate, but I am sure that the main issues have now been fully explored.

In closing, I would like once again to reiterate that the Contractors Project is focused on cases where it appears from Revenue's records that an individual may be using the delivery of his/her services through an intermediary to incorrectly deem a portion of income to be tax-free. While it is understandable that wider issues in relation to travel expenses have arisen in the context of the project, the Contractors Project is not however a general check on travel expenses, nor does it represent any change in Revenue's interpretation of the law and practice relating to expenses generally.

Yours Sincerely

Anthony Buckley
Assistant Secretary
South West Region.

APPENDIX 1

Text of ITI Bulletin

Contractors Project – Latest Update 09 July 2013

Contractors Project – Now Active in All Regions

As highlighted in Friday's TaxFax, audit letters in relation to the "national contractors' project" have now issued from all the 4 regions - South West (SW), Border Midlands West (BMW), East South East (ESE) and Dublin. These desk audit letters are issuing to both the companies under audit and to their directors.

In today's bulletin we focus on:

- The Institute's work on behalf of members, including key issues raised and Revenue's response.

- Resources for members.

Institute Work on Behalf of Members

The Institute has been engaging intensively with Revenue over a number of months on issues arising for members from this project. We have had Branch meetings with the SW, BMW and ESE regions recently and discussions with Dublin Region. We have also discussed the issues at TALC Audit and Main TALC, at the Joint Conference and directly with senior Revenue officials.

The most recent issues we raised with Revenue and their responses are summarised below:

Issue 1

The scope of the audit letters is very broad in applying a 4-year audit period to all contractors and there is no mention in the letters of the "60 day extension" to prepare a qualifying disclosure.

Revenue Response

"The four-year approach is to ensure consistency. You may recall that in the early stages in the South West there was some concern about variation or lack of clarity in the number of years covered. Clearly, where there are no issues, the audit intervention should be short and not unduly onerous.

If there is a disclosure to be made, that fact must be notified within the 14 days indicated in the audit letter. As stated previously, Districts will be reasonable in response to genuine difficulties experienced by taxpayers and agents, and will allow the normal 60 days for completion of disclosure, as well as co-operating with genuine efforts to make a qualifying disclosure."

Issue 2

Where no disclosure is being made the taxpayer is required to provide a very large amount of information to Revenue, within a short timeframe.

Revenue Response

"If the taxpayer decides not to make a disclosure, or that there is no disclosure to be made, we agree as a concession applying to this project only that, rather than sending all documentation to the District within 21 days, a letter from the taxpayer saying that there is nothing to disclose, and enclosing a brief reconciliation for the four years in question will be acceptable. **A taxpayer should make their best efforts to comply with this requirement within the timeframe. Revenue will not rule out discussion on the contents where that would be helpful.**

The reconciliation is required to reflect the fact that these cases have been selected because of the apparently high levels of tax-free deductions from gross income. The reconciliation should show, for each year, the major (5% or more) deductions from gross income to arrive at the salary paid to the contractor(s). A note explaining unusually high expenses should also be included. It may be that the nature of a business is such that expenses that would otherwise appear high are fully justified. We will then consider these reconciliations, and revert with more specific requirements to allow the audit to be conducted."

Issue 3

The issue of audit letters to the second director of the company appears to be change from previous practice in this project.

Revenue Response

"With regard to the 2nd director receiving an audit letter, this is standard practice in such cases to provide for situations where the personal affairs of a director may be inextricably linked with the company, and does not necessarily mean that separate full audits will be conducted."

There are a number of other key matters that the Institute has been actively pursuing over recent weeks. These are:

- **Guidance** - we have asked that Revenue, as a matter of urgency, issue further guidance on their position in relation to the treatment of travel and subsistence expenses in common scenarios arising and we have provided some scenarios for consideration e.g. where there is regular intra-site travel by contractors, where a contractor must spend some months working in different locations, scenarios where multiple contracts are in place etc.

  We understand clarification via eBrief on a number of aspects of the project is to issue.

- **Penalties** - we have sought that cases be judged on their merits in determining what penalty is appropriate and pointed out that some taxpayers genuinely thought they were operating within industry norms in relation to expenses claimed.

  Revenue has stated that exceptional cases will be considered, but these will have to be signed off at Assistant Secretary level.

- **Unprompted disclosures** - As noted in our earlier bulletins on the contractors' project, Revenue has clarified that taxpayers who choose to make an **unprompted disclosure** in advance of receiving an audit letter, will be able to avail of a 60 day period to prepare a disclosure, beginning from the date on which the notice of intention to make a disclosure is provided to Revenue.

Resources for Members

The Institute has developed a dedicated webpage, which we will be updating with further developments as they arise. This webpage includes our 3 bulletins on the roll out of the projects in the SW, the BMW and the ESE regions. Also included are links to current guidance Revenue has referred to date – e.g. IT51 (Employees' motoring/bicycle expenses), IT54 (Employees' subsistence expenses) and Statement of Practice IT/2/07 (Tax treatment of the reimbursement of expenses of travel and subsistence to officeholders and employees).

Our CTA Chartered Tax Adviser Linked In forums provide an opportunity for you to discuss your issues and experiences with other members in your locality and countrywide. Click on the button below to join the network.

Appendix 2

Revenue's Contractors Project – Tax Briefing 04/2013

Background

Revenue's National Contractors Project is aimed at addressing very specific problems that emerged through audit activity. A succession of tax audits had revealed that individuals were providing their services to clients ("end-users") via intermediaries - often, but not exclusively, personal service companies. The intermediary treats the individual as an employee and operates PAYE on the remuneration which it pays to the individual. An assumption underlying these arrangements is that the individual is not an employee of the end-user. While this may be true in the generality of cases, the facts will determine whether or not there is an implied contract of employment between the individual and the end-user.

The tax audits have revealed that in some instances the use of intermediaries has resulted in evasion, which arose when intermediaries paid tax-free "expenses" in circumstances where the expenditure had not actually been incurred. In other circumstances, the expenses had no relation to the business. It was clear that some contractors were using the device of an intermediary company (which they usually owned or controlled) to contend that they are compliant PAYE taxpayers, while actually extracting a large part of the company's contract income from the company free of tax in circumstances where such income should have been taxed. In some of the worst cases encountered, up to 70% of income was extracted in this manner

While the project was intended to be narrowly focused, there are many different circumstances arising, which give rise to requests for clarification. The purpose of this article is to address the treatment of expenses and the procedures which Revenue is adopting for this project.

Revenue's approach

Revenue's Contractors Project is designed to deal quickly and cleanly with the particular problem. Contractors whose accounts show unusually high proportions of expenses are being identified for compliance intervention.

To facilitate **disclosure**, we adopted the practice of providing assistance to those who were experiencing difficulty, and where a genuine effort is being made, we accept amendment of disclosures following discussion. At the same time, tax agents have been invited through their professional organisations to encourage their clients to consider whether they should make an unprompted qualifying disclosure.

We are also ready to discuss **methods of paying** the disclosed amounts where there is an inability to pay in one sum. Within the disclosure itself, we undertook to accept disclosures that dealt with the four specified years provided the resulting level of expenses was within industry norms, and provided we had no specific knowledge that the declaration was likely to be false. This is a considerable concession, because Revenue routinely checks disclosures in some detail. Finally, for the purposes of this project we advised that Revenue would not seek to "re-gross" expenses in calculating the tax underpayment. We have adopted this approach on the understanding that the

parties concerned will comply strictly with the law in future. In the event of a future re-audit discovering this not to be the case, then Revenue will not feel bound by the approach adopted to date in relation to re-grossing, and future tax underpayments, and associated interest and penalties will be pursued.

Treatment of expenses of travel and subsistence where the services of an individual are provided through an intermediary to an end-user

The publicity attracted by the National Contractors Project has caused some questions to be raised about the application of tax rules, and has led to requests for general rulings from Revenue about hypothetical cases in a wide variety of situations.

The basic legal provisions are in the Taxes Consolidation Act, which provides in Section 81 that a business may not deduct expenses that are not "wholly and exclusively" incurred for business purposes. Section 117 provides that sums paid as expenses are assessable as emoluments of the office or employment, while Section 114 provides for a deduction in respect of expenses which an employee or office-holder is necessarily obliged to incur in travelling in the performance of the duties of the office or employment or other expenses wholly, exclusively and necessarily incurred in the performance of the duties of the office or employment.

The Act does not make specific provision for the payment of tax-free expenses. However, to avoid the operation of PAYE on expenses which would then lead to repayment claims on foot of deductions due under Section 114, Revenue has long accepted that expenses which meet certain conditions may be reimbursed tax free in certain circumstances. Revenue has given detailed guidance on the circumstances in which tax-free reimbursement of expenses may be made in its Statement of Practice SP/IT/2/2007, in information leaflets IT51 and IT 54, and in this year's Tax Briefing 3 of 2013, all available at: www.revenue.ie.

The guidance given in Tax Briefing 3 of 2013, entitled "Reimbursement of Travel and Subsistence Expenses by Intermediaries", clarifies the Revenue position on the circumstances in which expenses of travel and subsistence may be reimbursed free of tax ***where the services of an individual are provided through an intermediary to an end-user,*** generally at the premises of the end-user. Services provided through an intermediary include services provided through a personal service company, a managed service company or an agency.

The key characteristic of the arrangements which are the subject of Tax Briefing 3 of 2013 is that the end-user is acquiring the services of a specific individual who will work under the general direction and control of the end-user. In some instances, the contract between the end-user and the intermediary will be explicit in identifying the individual whose services are being acquired by the end-user. In others, it will be apparent from the nature of the services, the manner in which they are provided and the conduct of the parties, that what is being provided is the services of a specific individual.

The main point which Tax Briefing 3 of 2013 sought to clarify is that, in applying previous Revenue guidance to the arrangements referred to in the Tax Briefing, **home cannot be treated as a "normal place of work"**. Revenue does not accept that the fact that administrative work is carried out at

home, or that home is the registered office of the intermediary alters this position. It follows that the cost of travel to and from home ***may not*** be reimbursed free of tax. As Tax Briefing 3 of 2013 points out, in most instances, the end-user premises is the normal place of work and expenses of travel and subsistence may be reimbursed free of tax in respect of necessary business absences from this normal place of work.

In referring to the "normal place of work", Tax Briefing 3 of 2013 was picking up the terminology of previous Revenue guidance. At the same time, it is important to bear in mind that "normal place of work" is not mentioned at all in statute. ***The true test of whether the cost of travel is allowable for Schedule E purposes is whether the journey was necessarily incurred in the performance of the duties of the office or employment.*** This is a test which has repeatedly been recognised in various judicial pronouncements as narrow and hard to meet.

Some of the scenarios in the examples in Tax Briefing 3 of 2013 would be rather unusual in the context of an intermediary which provides the services of an individual to an end-user. Nevertheless, they are intended to bring out the circumstances in which Revenue will accept that the cost of travel and subsistence may be paid tax free to an individual whose services are being provided via an intermediary.

Applying the foregoing test to the scenarios in Tax Briefing 3 of 2013, Revenue's view is that a journey from the person's home to a job is not a journey necessarily undertaken in the performance of the duties of the employment. The person is simply travelling from home. The length and cost of the journey is not imposed by the office or employment but is dictated by the choice of place of residence of the individual concerned. Similarly, an individual whose services are provided via an intermediary and who incurs expenses in living away from home cannot claim the cost of living away from home.

The fact that an intermediary may provide the individual's service under a series of short-term contracts does not alter the position. Each location at which the individual provides services becomes a "normal place of work" while the services are being provided to that end-user. The expenses of travelling from home to each of these locations or the expenses of living at those locations cannot be reimbursed tax-free.

Treatment of expenses of travel and subsistence in other cases

The situations dealt with in Tax Briefing 3 of 2013 are to be distinguished from situations where a company provides goods or services, other than the services of a specific individual, to its customers or clients. There is no change in Revenue's interpretation or application of the law in relation to such cases. Previous Revenue published practice as set out in Revenue leaflets IT 51 and IT 54 and Statement of Practice SP IT/02/2007 continues to apply.

Family members as employees

The question of whether any individual is an employee of an intermediary company can only be determined in the light of the particular facts. This applies equally to the engagement of family members of directors. Revenue has found that, in some of the cases examined in the course of the

project, alleged employments of family members were not bona-fide. Revenue will continue to examine such arrangements to determine whether they have been put in place on an arm's length basis. This means that the family member must be performing services or duties in the business and rates of pay must be similar to the rates paid to other employees doing the same type of work. If the pay is for technical work, the employee (payee) should have the skills, qualifications and experience necessary to carry out that work and to justify the rate of pay.

Penalties

As outlined in the Code of Practice for Revenue Audit, auditors will exercise care in considering whether penalties arise in any particular case, and in considering the appropriate category of tax default. Because of our experience with early cases encountered, Revenue's view is that the type of activity being targeted in this project is in the deliberate behaviour category. Of course, the circumstances of each case will inform the level of penalties being proposed. The deliberate behaviour category is fully appropriate where the claimed expenses are not incurred, or not incurred in connection with the business. A lower penalty is appropriate where it is clear that the practice at issue resulted from a reasonable interpretation of the law or practice which turned out to be incorrect.

Where a taxpayer does not agree to the level of penalties being proposed, Revenue may seek to have the penalty determined by a relevant Court [Paragraph 4.5.3 of the Code of Practice contains more details]. Where the default is in the deliberate behaviour category, ***and if a 'Notification of a Revenue Audit' has not issued***, the penalty level proposed is 10%. A taxpayer ***who has received a 'Notification of a Revenue Audit'*** still has an opportunity to make a prompted qualifying disclosure, and the penalty payable will be 50%, where the default is in the deliberate behaviour category. Where any default is shown to be due to careless behaviour or innocent error, much lesser penalties, if any, will apply. Finally, those who have a liability to additional tax, due to deliberate behaviour, and make no effort to make a disclosure (or make a false disclosure) are liable to penalties ranging from 75% to 100%, and to audit of several years if evidence of possible tax fraud is discovered. In particularly serious situations, consideration will be given to investigating with a view to prosecution.

Protocols in relation to the making of disclosures

All matters in relation to qualifying disclosures are dealt with in accordance with legislation and the Code of Practice for Revenue Audit.

Who is being audited?

In general the focus of the audit will be on the intermediary company and the individual. It may be necessary in some cases to extend the scope of the intervention to other directors to verify particular aspects of the matters under review. All taxpayers who are to be audited will receive a 'Notification of a Revenue Audit'.

How many years are being audited?

In order to deal quickly with the problems identified Revenue decided not to launch an open-ended audit programme, but instead to focus on just four years – 2008 to 2011 – and to encourage tax agents to advise their contractor clients to review those years and make disclosures where appropriate.

Previously audited

The fact that a case was previously audited [Comprehensive or PAYE (Employers)] and the matter of the tax-free reimbursement of expenses was not raised does not preclude Revenue from raising the matter in the course of an audit under the Contractors Project. The fact that deliberate default was not discovered on an earlier audit does not mean that Revenue has approved or excused the default. Where the treatment of expenses was specifically raised during an earlier audit, Revenue will consider accepting any subsequent adjustment as a ***Technical Adjustment***, without penalty. For a technical adjustment not to attract a penalty, the auditor must be satisfied that due care has been taken by the taxpayer and that the treatment concerned was based on a mistaken interpretation of the law or practice, and did not involve deliberate behaviour. However, an exception to this treatment might be where the level of expenses which should have been taxed increased substantially in years subsequent to the audit.

Inability to Pay

Claims to Inability to Pay are dealt with in accordance with Paragraph 4.9 of the Code of Practice.

No Liability

Many individuals are satisfied that they have no need to make a disclosure because their affairs are in order. While we do our best not to trouble such people, some may receive audit notices, normally where the expenses appear high for the business in question. In that case, it will save a great deal of trouble if the contractor writes to Revenue stating why he/she believes there is no outstanding liability, and briefly explaining why the nature of the actual business generates unusually high expenses.

Review/Complaint

For those who feel they have been unfairly treated, the procedures for seeking a review are set out at Revenue's website http://www.revenue.ie/en/about/custservice/how-complain-revenue.html.

Progress to date

Well over a thousand audit letters have been issued by Revenue, and the response has generally been engagement by the contractor to discuss the making of a disclosure (Revenue officials offer advice if required), or to explain why they have no need to do so. There is also a steady flow of disclosures from those who have not yet been selected for intervention. The small group who have decided not to engage have entered the audit process.

Revenue has met with companies, tax agents and representatives of both contractors and recruitment agencies to discuss the project, and to allay some ungrounded fears about Revenue's intentions. Revenue has not changed its interpretation of tax law. It is focussed on dealing with tax evasion which, if left unchecked, will result in unfairness to other compliant taxpayers and a loss to the Exchequer.

The national project has identified a very wide range of structures and practices being used by contractors, and it has become clear that this project (or a successor) may need to continue for some time, to deal with issues specific to subsets of the contracting sector, and with connected issues.