



HM Revenue
& Customs

Taxation of performance linked rewards paid to asset managers

Consultation document

Publication date: 8 July 2015

Closing date for comments: 30 September
2015

Subject of this consultation:	This consultation is to determine the criteria for determining when rewards arising to investment fund managers are to be taxed as income
Scope of this consultation:	The government announced at Summer Budget 2015 that it would consult to understand the trading and investing activities performed by collective investment schemes. This consultation aims to ensure that individuals who manage funds where the underlying activities are more aligned with trading than investing continue to pay full income tax on any performance fee/carried interest they receive.
Who should read this:	HM Revenue & Customs (HMRC) would like to hear in particular from tax practitioners, fund managers, representative bodies, administrators and other interested parties.
Duration:	8 July to 30 September
Lead official:	HM Revenue & Customs: Richard Rogers, Head of Specialist Policy Team, Corporation Tax, International and Stamps. HM Treasury: Joanna Yearley, Senior Tax Policy Advisor, Business and International Tax
How to respond or enquire about this consultation:	Enquiries and comments can be sent: <ul style="list-style-type: none"> • by email to fundmanager.consultation@hmrc.gsi.gov.uk; or • by post to Asset Manager Reward Consultation, Specialist Policy Team, CTIS, HM Revenue & Customs, 3C/04 100 Parliament Street, London SW1A 2BQ <p>More information about this consultation can be obtained by telephoning 03000 579560</p>
Additional ways to be involved:	HMRC will consider holding meetings with interested parties to discuss the proposals in this consultation. The timing, format and venue of meetings will be informed by expressions of interest received.
After the consultation:	A summary of responses together with draft legislation and guidance will be published in autumn 2015. The legislation itself will take effect from 6 April 2016.
Getting to this stage:	This consultation follows an announcement at Summer Budget 2015. This is the first stage in the formal consultation process.
Previous engagement:	The government announced in the 2015 Summer Budget that this measure would be the subject of consultation.

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1. Introduction

Tax rules applicable to UK investment managers

- 1.1 The government recognises the vital role played by the asset management sector in the UK economy and is determined that the UK remains Europe's leading centre for fund management. The government believes that everyone in the industry should pay a fair and correct amount of tax on the rewards they receive, accepting that the type of tax chargeable will depend on the type of reward received. It is committed to maintaining the current tax treatment of some performance related rewards (for example, carried interest in private equity funds which should continue to be taxed as capital gains, as reflecting the underlying long term performance of a fund's investments). At the same time, annual fund performance fees that have typically been a reward for services, and taxed as income, should continue to be charged as such.
- 1.2 There has been a long standing assumption that the activities of many alternative funds amount to a trade for tax purposes. Accordingly the investment manager exemption¹ (IME) has become one of the key components in the UK's continuing attraction for the managers of alternative funds. The IME allows a fund which is trading to appoint a UK based investment manager without creating a risk of UK taxation for the fund via a permanent establishment.
- 1.3 The government has become aware that some asset managers are re-assessing the activities of the funds they manage with a view to arguing that the funds are investing for tax purposes rather than trading. These asset managers, who historically received a performance fee charged to tax as income, are then seeking to restructure their performance fees as performance linked interests in the underlying funds so that those fees obtain the same tax treatment as carried interest.
- 1.4 This is designed to reduce the rate of tax they pay on the sums they receive by bringing their remuneration into tax as capital gains instead of income. This is achieved on the assumption that their performance linked interest in the fund entitles them to a proportion of the gains realised from the fund's investment activity, rather than a share of its trading profit.
- 1.5 For this reason, the government announced at Summer Budget 2015 that it would launch a consultation on the circumstances in which fund managers' performance linked rewards are to benefit from capital gains tax treatment. The tests developed in this consultation will determine when a fund manager can access capital gains tax treatment for any performance linked reward ('carried interest') he/she receives. It is not anticipated that the treatment of performance

¹ As provided for by section 1146, Corporation Tax Act 2010, section 818, Income Tax Act 2007 and explained in more detail in Statement of Practice 1/01.

related rewards which have historically been subject to capital gains tax will change as a result of this consultation.

Background to this consultation

- 1.6 The tax paid by managers of collective investment schemes (CISs) depends upon the type of reward they receive.
- 1.7 The Disguised Management Fee legislation introduced from 6 April 2015² puts beyond doubt that the 'management fee' remuneration received by fund managers is always subject to income tax. It is a fee calculated on the value of the assets under management and bears no risk related to the performance of the fund.
- 1.8 These rules do not determine the tax treatment for the performance element of a fund manager's reward.
- 1.9 At Summer Budget 2015, the Government introduced legislation to ensure that investment managers pay the full rate of capital gains tax on 'carried interest' receipts. Carried interest is a form of performance linked reward, contingent upon the assets in the fund making a specified level of return over the life of the fund. This change prevents taxpayers from using the tax rules to reduce the effective rate of capital gains tax they pay on the sums they receive in respect of their carried interest.
- 1.10 The government believes that investment managers should not automatically be able to access capital gains tax treatment on the performance linked reward they receive from the fund. The ability for investment managers to obtain this treatment should be dependent upon their fund's activities clearly being of an investing nature.
- 1.11 Currently, there are no special tax rules specific for the asset management sector to determine whether managers' performance linked rewards should be treated as capital in nature. Applying normal investment/trading principles to the activities undertaken by a typical fund can be difficult and resource intensive. This can result in inconsistent treatment of managers who are carrying out broadly similar investment activity, and could also be exploited by taxpayers seeking to use the uncertainty in the system in order to access preferential tax treatment.
- 1.12 This consultation therefore proposes statutory tests to set out, and thereby clarify, the circumstances in which performance fees arising to fund managers from their fund management activities may be treated as capital in nature. These tests will not affect the tax treatment of investors in the funds.

² New sections 809EZA to 809EZH introduced by [section 21, Finance Act 2015](#).

Interaction with the published “white list”.

- 1.13 The published white list³ is a list that provides certainty that specified transactions will not be treated as trading activities, and also acts to determine the types of investment transactions that may qualify for the investment manager exemption.
- 1.14 Although this consultation builds on the work done in the white list, as already stated it does not affect the classification of a transaction for an investor, or for a fund vehicle. It is concerned instead – and only - with the tax treatment of performance fees from funds, paid to asset managers.
- 1.15 It is not uncommon for transactions to be treated differently in the hands of different taxpayers. For private investors, transactions such as buying and selling shares are generally considered to be investment activities. Gains or losses on disposal are therefore treated as capital for tax purposes. By contrast, similar transactions would be taxed as income for financial traders.
- 1.16 The published white list will continue to determine the tax treatment for investors and funds, but the tax treatment of the fund manager will be determined by the proposals that result from this consultation.
- 1.17 This consultation is seeking views on the test used to determine the treatment of performance linked rewards on the part of fund managers.
- 1.18 HMRC welcomes full and open engagement with the sector in developing the options outlined in this consultation. It is the Government's intention to publish draft legislation at Autumn Statement 2015 with a view to legislating in Finance Bill 2016 with an April 2016 commencement.

³ The published ‘white list’ is contained in [the Investment Transactions \(Tax\) Regulations 2014](#) and is relevant to secondary legislation governing the investment manager exemption, authorised investment funds, investment trusts, offshore reporting funds and unauthorised unit trusts.

2. The proposal

Background

- 2.1 The reward paid to many asset managers comprises two elements:
- an amount determined by reference to the assets under management or funds invested (often termed the “management fee”); and
 - an amount calculated by reference to the performance of the underlying investments over a given period or the life of the fund (the “performance fee” or “performance linked reward”).
- 2.2. For some asset managers, the performance linked return is not structured as a fee. Instead, the individual managers are given a direct participation in the underlying vehicle which shares in the profits once an agreed level of performance has been reached (a “performance linked interest”). An example of such a performance linked interest is the “carried interest” awarded to private equity executives.
- 2.3 Whether a fee or performance linked interest is used can have significant tax consequences. Generally a fee will be charged to tax as income. Where the asset manager is structured as a partnership or limited liability partnership (LLP), individual members of that asset management firm will be charged to income tax on their share of the profits derived from these fees. For an additional rate taxpayer these profits will be charged to income tax at a rate of 45%, with further National Insurance contributions of 2% being due.
- 2.4 The taxation of other performance linked rewards is more complex. The starting point is that the manager is sharing the same rewards as the investors, so the manager’s return should be taxed in the same way as the investors’ returns. Therefore, if the fund is trading, the profits accruing to the participators and to the manager will be trading profits and should be taxed as income. However, if the fund characteristics are such that it is more in the nature of a longer term investment fund, then the returns to the investors and the manager may be capital in nature and taxed as chargeable gains. For a higher or additional rate taxpayer, the sums received will be charged at a rate of 28%⁴.
- 2.5 The government accepts that the case law and the so-called “badges of trade”⁵ which are applied to determine whether an entity is trading or investing are

⁴ As a result of a measure included in Finance (No.2) Bill 2015, which will ensure that the full sum received by an investment fund manager in respect of their carried interest is charged to capital gains tax with only limited deductions being allowed. Historically, the operation of the previous law in this area, combined with other aggressive tax planning, could result in fund managers paying a lower effective rate of tax on these receipts.

⁵ The so-called badges of trade are derived from the Final Report of the Royal Commission on the Taxation of Profits and Income (1955, Cmnd 9474). Further guidance on the badges of trade and associated case law can be found in HMRC Manual [BIM 20000](#) and at [BIM 56800](#) for financial traders.

complex and difficult to apply to modern financial markets and to the complex strategies and instruments used by asset managers. This makes the task of distinguishing between the two a difficult one, both for the fund managers involved and for HMRC staff who are working to ensure that the correct tax treatment is applied.

- 2.6 This means that some fund managers see scope to push the boundaries and try to obtain favourable tax treatment. The government has become aware that some asset managers, who historically received a performance fee charged to tax as income, are seeking to restructure their performance linked rewards to reduce the rate of tax they pay. This runs counter to the accepted model of remuneration for fund managers in certain sectors and could undermine recently introduced anti-avoidance legislation, such as the mixed membership rules⁶.
- 2.7 In summary, this planning replaces the performance fee previously paid to the fund managers with a performance linked interest. It is then argued that the underlying fund vehicle is investing rather than trading for tax purposes. That performance linked interest, it is claimed, gives rise to capital receipts in the hands of the individual fund managers. As such sums are charged to capital gains tax rather than income tax, this reduces the amount of tax paid.
- 2.8 HMRC does not agree that this planning is effective. In the majority of cases, HMRC considers that the underlying fund is trading, with the result that any sums paid in respect of the performance linked interest represent trading profits. Any return flowing to individual fund managers in respect of their performance linked interest should therefore be taxed as trading income. However, as outlined above, the correct position is difficult to establish as it is fact dependant, and challenging the tax position would be very time consuming and resource intensive for both HMRC and others.
- 2.9 The legal position also creates uncertainty for the asset management sector around when performance linked interests can give rise to chargeable gains in the hands of fund managers. This allows more aggressive firms to put this planning in place when it may be arguable that the underlying fund is investing, while more cautious managers continue to receive fee income from funds undertaking similar activity. This can create a significant competitive disadvantage. The changes proposed in this consultation will remove this uncertainty and ensure fund managers are treated consistently by reference to the investments they manage.

Proposal - General

- 2.10 The government therefore proposes to introduce a specific tax regime for performance linked rewards paid to individuals performing investment management services. This will ensure that individuals are taxed appropriately in light of the underlying activity of the investment vehicle and that asset

⁶ Introduced at sections 850C – 850E, Income Tax (Trading and Other Income) Act 2005 by section 74 and [Schedule 17](#), Finance Act 2014 with effect for periods of account beginning on or after 6 April 2014.

managers cannot adopt planning to unfairly reduce the rate of tax on their performance linked rewards. This regime will also provide compliant taxpayers with certainty as to the rate of tax they have to pay and prevent their being at a disadvantage to their competitors.

- 2.11 The proposed rules will only apply to the performance linked rewards paid to investment managers. It will not apply to any genuine co-investment in the fund made on the same terms as those made by third party investors. It will also have no impact on the treatment of the investment vehicle or investors (for example, as regards the IME or the Offshore Funds rules⁷).
- 2.12 The overarching approach of the new legislation will be to establish a default rule that all performance linked rewards paid to an individual performing investment management services are charged to tax as income. However, the government proposes that the performance linked interests in vehicles that undertake specified activities may give rise to capital gains rather than income. It is expected that private equity carried interest will continue to be taxed as a gain, though that is dependent upon the investment strategy of the fund. The government invites comments on two options for achieving this:
- 2.12.1 Option 1 would list particular activities which are, in the government's view, clearly investment activity such that a performance linked interest in a fund vehicle performing such activities may be charged to tax as chargeable gains provided certain conditions are met;
- 2.12.2 Option 2 would focus on the length of time for which the underlying investments are held.

Question 1: Respondents' views are sought on the two proposals which are explained in more detail below and their respective merits.

Question 2: Do Respondents believe that the above proposals will successfully prevent fund managers adopting carried interest planning in respect of funds which the government considers to be trading?

Proposal – Option (1)

- 2.13 Under this option the government would set out in legislation activities which are to be treated as long-term investment activities. This would be subject to review over time as new forms of fund activity are developed.
- 2.14 Where the fund is wholly, or substantially wholly, carrying on such activity and an individual fund manager receives a performance linked interest in the fund subject to a sufficiently challenging performance requirement, then any subsequent return would be treated as investment proceeds chargeable to capital gains tax.

⁷ See Part 8 of the Taxation (International and Other Provisions) Act 2010 and The Offshore Funds (Tax) Regulations 2009.

2.15 The government invites comments on which activities should be included. Its initial proposal would be to include funds which invest directly or indirectly in the asset classes listed below.

- Controlling equity stakes in trading companies intended to be held for a period of at least 3 years.
- The holding of real property for rental income and capital growth where, at the point of acquisition, it is reasonable to suppose that the property will be held for at least 5 years.
- The purchase of debt instruments on a secondary market where, at the point of acquisition, it is reasonable to suppose that the debt will be held for at least 3 years.
- Equity and debt investments in venture capital companies, provided they are intended to be held for a specified period of time.

2.16 The government accepts that some of the activities listed above would need to be expanded to cover associated investments and particular situations. Taking the first, for example, the government considers that provision may need to be made for where a controlling equity stake is taken by a series of investment funds acting in concert, and to cover associated debt investments into the underlying company.

Question 3: Respondents' views are sought on the above activities. In particular, comments are sought on whether there are any further long-term investment activities which should be considered for inclusion and whether the definitions above are sufficient to cover the intended activities.

Question 4: Comments are sought, in particular, in relation to how "venture capital company" should be defined, what investments in venture capital companies should be included and what further conditions should be met.

2.17 The government invites comments on whether this approach will need to be modified to cater for funds which invest in multiple asset classes. In particular, the government is alive to the problems and distortions that may be introduced if the legislation provides a "cliff edge" level of specified activities which would allow a performance linked interest to qualify for capital gains tax treatment. The government is therefore prepared to consider providing that a proportion of the performance linked rewards payable to fund managers would be eligible for taxation as a chargeable gain determined by the proportion of the fund's investments which comprise assets listed above. Such an approach would potentially specify several bands of specified activity. Depending on the band which applied to any fund, a different proportion of the performance linked reward would be eligible for capital treatment.

Question 5: Comments are sought on whether provision should be made for funds carrying on different activities, not all of which will qualify as long-term

investment. If so, would a series of bands representing different levels of long-term investment activity be workable?

Question 6: Could a test which listed particular activities distort commercial decisions by fund managers around what investments a fund should make and how those investments should be structured?

Question 7: Is it common for funds to carry on more than one of the activities listed above? If so, and different individuals are responsible for managing different assets, how is their performance linked reward determined and in what form is it paid?

Question 8: Comments are sought on how the proportion attributable to each activity could be determined.

Proposal – Option (2)

- 2.18 This option would focus on the average length of time for which the fund holds investments.
- 2.19 One of the badges of trade is the length of period of ownership. In some investment structures, taxpayers have sought to rely on case-law to move away from the various factors reflected in the badges of trade and instead argue that the focus should just be on the intentions of the parties to the transaction. The government considers that this approach would not provide a robust and principled basis for taxing performance linked rewards. Instead, the government would propose to apply a test which based on the average length of time for which investments are held by the fund.
- 2.20 The government considers that this provides a more objective, and simple, test to determine whether a performance linked interest in the fund gives the individual managers a stake in underlying long-term investments such that capital treatment is appropriate.
- 2.21 To be effective, it is envisaged that this test would look at individual investments to avoid any argument that the total exposure taken by the fund through various instruments should be considered as a whole when determining the holding period.
- 2.22 If this proposal were adopted, the government considers that a graduated system should be used to avoid overly drastic changes in the rate of tax applied along the following lines.

Average period investments held	Proportion of return eligible for taxation as chargeable gain
Less than six months	0%
At least six months but less than one year	25%
Between one year and 18 months	50%
Between 18 months and two years	75%

Over two years	100%
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Question 9: Comments are sought on whether this proposal would be practical, and on the proposed graduated system above.

Question 10: Respondents' views are sought on how the average holding period for a fund should be determined and whether this would be difficult to calculate in practice or likely to produce a misleading result.

Question 11: Could the use of a "time held" test distort commercial decisions around when an investment should be sold?

Employees

2.23 The government is aware that performance linked rewards paid to investment fund managers who are employees will generally come within the employment related securities rules in Part 7 of the Income Tax (Earnings and Pensions) Act 2003. The government currently considers that these rules will provide the correct result in many cases and that the proposed changes will not need to apply in those situations.

Question 12: Comments are invited on how this proposal should interact with the employment related securities rules and whether the employment related securities rules are effective in preventing performance linked interests being granted to employees where the investment vehicle is not carrying on long-term investment activity?

Commencement

2.24 The government proposes to publish a response document at Autumn Statement 2015. It also plans to publish draft legislation at that time, with a commencement date of 6 April 2016.

3. Assessment of Impacts

Summary of Impacts

Exchequer impact (£m)	2014-15	2015-16	2016-17	2017-18	2018-19
	+/-	+/-	+/-	+/-	+/-
	This measure is expected to increase receipts. Estimates of these will be subject to scrutiny by the OBR.				
Economic impact	The measure is not expected to have any significant macroeconomic impacts.				
Impact on individuals and households	<p>This measure will have an impact on, at most, several thousand individuals in the investment management sector who are currently in arrangements which result in capital returns on performance-linked interests where the fund is arguably trading.</p> <p>The measure is not expected to impact on family formation, stability or breakdown.</p>				
Equalities impacts	This measure will affect individuals receiving carried interest from investment funds. These are likely to share protected characteristics with others of above average means, and equality groups represented in lower income groups are less likely to be affected.				
Impact on businesses and Civil Society Organisations	<p>This measure will have no direct impact on business and civil society organisations. It will impact indirectly on the investment fund businesses that use the services of individuals who are affected by this measure.</p> <p>Such individuals may have to pay a higher rate of tax on their performance linked rewards but this is not expected to result in any material increase in the costs borne or compliance required by investment funds or their investors. It may, however, increase the compliance costs of the fund management businesses.</p>				
Impact on HMRC or other public sector delivery organisations	The costs to HM Revenue & Customs of implementing this change are not expected to be significant.				
Other impacts	<u>Small and micro business assessment:</u> investment fund management business which are small and micro businesses will be affected to the extent that the individuals involved in those				

	<p>businesses benefit from performance linked rewards giving rise to capital receipts when the underlying fund is arguably trading. Those individuals may have to pay a higher rate of tax on their performance-linked rewards.</p> <p>Other impacts have been considered and none have been identified.</p>
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4. Summary of Consultation Questions

Question 1: Respondents' views are sought on the two proposals which are explained in more detail below and their respective merits.

Question 2: Do respondents believe that the above proposals will successfully prevent fund managers adopting carried interest planning in respect of funds which the government considers to be trading?

Question 3: Respondents' views are sought on the above activities. In particular, comments are sought on whether there are any further long-term investment activities which should be considered for inclusion and whether the definitions above are sufficient to cover the intended activities.

Question 4: Comments are sought, in particular, in relation to how "venture capital company" should be defined, what investments in venture capital companies should be included and what further conditions should be met.

Question 5: Comments are sought on whether provision should be made for funds carrying on different activities, not all of which will qualify as long-term investment. If so, would a series of bands representing different levels of long-term investment activity be workable?

Question 6: Could a test which listed particular activities distort commercial decisions by fund managers around what investments a fund should make and how those investments should be structured?

Question 7: Is it common for funds to carry on more than one of the activities listed above? If so, and different individuals are responsible for managing different assets, how is their performance linked reward determined and in what form is it paid?

Question 8: Comments are sought on how the proportion attributable to each activity could be determined.

Question 9: Comments are sought on whether this proposal would be practical, and the proposed graduated system above.

Question 10: Respondents' views are sought on how the average holding period for a fund should be determined and whether this would be difficult to calculate in practice or likely to produce a misleading result.

Question 11: Could the use of a "time held" test distort commercial decisions around when an investment should be sold?

Question 12: Comments are invited on how this proposal should interact with the employment related securities rules and whether the employment related securities rules are effective in preventing performance linked interests being

granted to employees where the investment vehicle is not carrying on long-term investment activity?

5. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

- Stage 1 Setting out objectives and identifying options.
- Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
- Stage 3 Drafting legislation to effect the proposed change.
- Stage 4 Implementing and monitoring the change.
- Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals.

How to respond

A summary of the questions in this consultation is included at chapter 4.

Responses should be sent by 30 September 2015, by e-mail to fundmanager.consultation@hmrc.gsi.gov.uk

or by post to: Asset Manager Reward Consultation, Specialist Policy Team, CTIS, HM Revenue & Customs, 3C/04 100 Parliament Street, London SW1A 2BQ

Telephone enquiries: (from a text phone prefix this number with 18001) 03000 579560

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from [HMRC's GOV.UK pages](#). All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Principles

This consultation is being run in accordance with the Government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

If you have any comments or complaints about the consultation process please contact:

Oliver Toop, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Please do not send responses to the consultation to this address.