



HM Revenue  
& Customs

# Extra-statutory concessions – eighth technical consultation on draft legislation

## **Consultation document**

Publication date: 14 September 2017

Closing date for comments: 09 November 2017

<b>Subject of this consultation:</b>	Consultation on draft legislation to preserve the effect of a number of HM Revenue and Customs (HMRC) extra-statutory concessions (ESCs).
<b>Scope of this consultation:</b>	Draft legislation designed to preserve the effect of four ESCs: A37, EIM03002, EIM01120 and EIM61030.
<b>Who should read this:</b>	Businesses and other taxpayers who currently benefit from the ESCs and their advisors.
<b>Duration:</b>	14 September 2017 - 09 November 2017.
<b>Lead official:</b>	Stephanie Allistone, HMRC.
<b>How to respond or enquire about this consultation:</b>	<p>Responses to the consultation and queries about the content or scope of the consultation and requests for hard copies should be sent to:</p> <p>Stephanie Allistone, HMRC Tax Administration Policy &amp; Strategy Team, Room 1C/04, 100 Parliament Street, London SW1A 2BQ.</p> <p>Telephone 03000 586496</p> <p>e-mail: <a href="mailto:tap@hmrc.gsi.gov.uk">tap@hmrc.gsi.gov.uk</a>.</p>
<b>Additional ways to be involved:</b>	This is a technical issue with specialist interests so the consultation will involve only written responses. Where there are known representative bodies HMRC will contact them regarding this consultation. HMRC will also contact respondents to earlier similar consultations to alert them to the publication of this draft legislation.
<b>After the consultation:</b>	HMRC will publish a summary of responses in due course, if appropriate.
<b>Getting to this stage:</b>	Following the House of Lords judgment in the Wilkinson <sup>1</sup> case HMRC has been reviewing its ESCs. This is the eighth consultation on legislation to be made under the power provided at section 160 Finance Act (FA) 2008.
<b>Previous engagement:</b>	<p>Explanatory notes on section 160 FA 2008, which provides the vires to enact existing concessions by Treasury Order, can be found on the HM Treasury website.</p> <p>Previous consultations on ESCs can be found on the government website:  <a href="http://www.gov.uk/government/publications?publication_filter_option=consultations">www.gov.uk/government/publications?publication_filter_option=consultations</a></p>

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<sup>1</sup> R v HM Commissioners of Inland Revenue ex p Wilkinson [2005] UKHL 30

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**On request this document can be produced in Welsh and alternate formats including large print, audio and Braille formats**

# 1. Introduction

## Background

1.1 ESCs have been a feature of the UK's tax system for decades and will continue to be made and withdrawn as necessary. For this purpose the term 'extra-statutory concession' refers to any published concession that departs from the statutory tax treatment. It is not limited to ESCs published in the former Inland Revenue booklet IR1<sup>2</sup> and the former HM Customs and Excise booklet Notice 48<sup>3</sup>.

1.2 The House of Lords' decision in the Wilkinson case clarified the scope of HMRC's administrative discretion to make ESCs that depart from the strict statutory position.

1.3 In light of that decision, HMRC has been reviewing its ESCs. Most ESCs can continue in their current form as they are within the scope of HMRC's administrative discretion. But where an existing ESC exceeds that scope its effect will be maintained by putting it onto a legislative basis where it is appropriate to do so.

1.4 Section 160 FA 2008<sup>4</sup> provides an enabling power which allows the tax treatment afforded by existing ESCs to be legislated by Treasury Order. This enabling power has been used to legislate a number of ESCs, most recently those included in statutory instrument number 495 of 2017 (SI 2017/495).

## Scope of this consultation

1.5 The purpose of this consultation is to expose for comment draft legislation needed to enact the existing tax treatment of four ESCs. The consultation, which is of a technical nature, is designed to ensure that the legislation as drafted will ensure that HMRC maintains the purpose and effect of the existing ESCs. HMRC welcomes comments on whether the draft legislation will achieve that aim. HMRC would specifically welcome responses to the particular question at page 19 in relation to the concessionary treatment provided by EIM<sup>5</sup>01120 and a similar question at page 23 in relation to EIM61030.

1.6 ESC A37 allows directors' fees received by partnerships and companies to be treated as trading income for income tax purposes rather than employment income, subject to certain conditions. The concession also applies where a company A has the right to appoint a director to the board of another company B. Where this is the case and the director is required to hand over to company A any fees received for the directorship of B, and does so, (and company A is subject to Corporation Tax), those fees are treated as the income of company A and not the director, and tax is not deducted under Pay As You Earn (PAYE).

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<sup>2</sup> [Former Inland Revenue booklet IR1](#)

<sup>3</sup> [Public Notice 48](#)

<sup>4</sup> [Section 160 Finance Act 2008](#)

<sup>5</sup> Employment Income manual

1.7 EIM03002 is an administrative practice allowing professional practitioners to treat incidental income from an office or employment as part of their trading or professional income for tax (but not National Insurance) purposes.

1.8 EIM01120 is an administrative practice related to Financial Loss Allowance (FLA). FLA is paid to members of various bodies as recompense for any loss of income while they undertake their public duties. For employees, HMRC's published practice is that provided the payment does no more than replace the salary that the recipient would otherwise have received from their employer, FLA is not taxable. BIM<sup>6</sup>40475 is an administrative practice related to FLA paid to the self-employed. Where a voluntary office-holder is otherwise self-employed, FLA is treated as a taxable receipt of the business.

1.9 EIM61030 is an administrative practice concerned with the tax treatment of payments from Local Medical Committees to part-time committee members. Rather than dealing with a particular payment, EIM61030 covers different types of payments made by Local Medical Committees (LMCs) to GPs who are elected to represent the interests of GPs in the area covered by the LMC. Elected committee members are office-holders.

## Impact of the proposed changes

1.10 As the intention is to replicate the existing concessionary tax treatments in legislation, there should be no, or only a negligible, impact as a result of the proposed legislation.

## Way forward

1.11 The review by HMRC of its ESCs has identified the need to legislate the four concessions included in this technical consultation. As stated above, following this consultation the legislation will be refined if necessary.

1.12 This document sets out:

- (a) The text of the existing ESC;
- (b) Draft legislation needed to give legislative effect to the tax treatment afforded by the ESC; and
- (c) An outline explanation of the draft legislation.

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<sup>6</sup> Business Income Manual

**ESCs to be legislated by order under section 160 FA 2008**

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## 2 Text of ESCs and draft legislation

Note: The draft legislation set out at pages 8 – 11 below is designed to cover both ESCA37 and EIM03002.

### ESC A37: Directors' Fees

#### ESC text

#### **A37. Tax treatment of directors' fees received by partnerships and other companies**

1. Where fees are received in respect of directorships held by members of a professional partnership they are in strictness assessable on the individual partners as employment income. It is however the practice of HM Revenue & Customs (HMRC) to accede to a request from the partnership for the inclusion of the fees as receipt of the profession provided that –

(a) the directorship is a normal incident of the profession and of the particular practice concerned;

(b) the fees are only a small part of the profits; and (c) under the partnership agreement the fees are pooled for division among the partners.

Partnerships seeking such treatment are expected to provide HMRC with a written undertaking that directors' fees received in full will be included in the gross income or receipts of the basis period, whether or not the directorship is still held in the year of assessment and whether or not the partner concerned is still a partner.

2. It is also the practice of HMRC that, where a company has the right to appoint a director to the board of another company, by virtue of its shareholdings in, or a formal agreement with, the second company then, provided the director is required to hand over to the first company any fees or other earnings received in respect of his directorship with the second company and does so, and the first company is chargeable to corporation tax and agrees to accept liability on the fees, those fees are treated as income of the company and not of the director, and tax is not deducted from the fees under PAYE. Where the first company is chargeable not to corporation tax but to income tax (for example, if it is a non-resident company not trading through a branch or agency in the United Kingdom) and agrees to accept liability, tax is deducted at the basic rate of income tax from the fees.

3. With effect from 6 April 1980, the practice described in the previous paragraph will be extended to the case where the first company has no formal right to appoint the director to the board but the director is nevertheless required to (and does) hand over his fees to that company, provided it is –

(a) a company resident in the United Kingdom liable to United Kingdom corporation tax or, if non-resident, is trading through a branch or agency in the United Kingdom so

that its income is chargeable to corporation tax under Section S11 ICTA 1988 and the fees are included in that income; and

(b) not a company over which the director has control. (For this purpose 'control' has the meaning given to it by section 840 ICTA 1988, but in determining whether the company is controlled by the director the rights and powers of his spouse or civil partner, his children and their spouses or civil partners and his parents will also be taken into account).

## **EIM03002: Professional remuneration administrative practice**

### **ESC text**

It is permissible to allow employment income to be treated as ordinary professional receipts within the Trading Income rules and to allow any expenses admissible under those rules. This treatment should however only be applied where all the following conditions are met:

- there would be practical difficulties if the fees were treated as employment income
- the duties of the office or employment (in terms of time taken) are small in relation to other practice work (of the individual or partner) that is treated for income tax as giving rise to Trading Income
- the office or employment is in a field related to the profession and particular practice concerned (see EIM03004)
- in a case involving a partner, there is an agreement between the partners that the fees are included as income of the partnership and pooled for division amongst the partners and that agreement is acted upon
- the individual and any partners agree that the income should be treated for tax purposes in this manner and agree to pay tax on the fees on that basis (where appropriate as part of the partnership profits). Written confirmation should be obtained from all concerned to this effect.
- the fees are not derived from the directorship of a company and are small in relation to the receipts of the practice generated by the individual or partner.

This practice only applies for tax purposes and has no effect for National Insurance purposes, so Class 1 NICs should be collected in the normal way.

### **Draft Legislation**

#### **1. Amendment of the Income Tax (Earnings and Pensions) Act 2003**

—(1) Chapter 2 of Part 2 of the Income Tax (Earnings and Pensions) Act 2003<sup>(7)</sup> (tax on employment income) is amended as follows.

In section 6(5) (nature of charge to tax on employment income) for “Part 2” to the end substitute—

“(a) Part 2 of ITTOIA 2005 (trading income) by virtue of section 15 (divers and diving supervisors), 16B (payments to company directors) or 16C (professionals in practice: incidental income from an office or employment) of that Act, or

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<sup>(7)</sup> 2003 c. 1.

- (b) Part 3 of CTA 2009 (trading income) by virtue of section 40A (payments to company directors) or 40B (professionals in practice: incidental income from an office or employment) of that Act.”.

## **2.Amendment of the Income Tax (Trading and Other Income) Act 2005**

—(1) The Income Tax (Trading and Other Income) Act 2005<sup>(8)</sup> is amended as follows.

In Chapter 2 of Part 2, after section 16A (voluntary office-holder: compensation for financial loss)<sup>(9)</sup> insert—

### **“Payments to company directors**

**16B.**—(1) This section applies where—

- (a) a company (“the paying company”) makes a payment to, or for the benefit of, a director of the paying company in respect of the director’s employment as a director of the paying company,
  - (b) the payment would otherwise be employment income of the director chargeable to tax under Part 2 of ITEPA 2003,
  - (c) the director was or is a member of a firm, or was appointed by a company (“the appointing company”) other than the paying company, and
  - (d) condition A or B is met.
- (2) The payment is to be treated for income tax purposes as a receipt of—
- (a) a trade carried on by the firm, or
  - (b) a trade carried on by the appointing company.
- (3) Condition A applies where the director is a member of a firm, and is that—
- (a) the director carries on a profession,
  - (b) being a director of a company is a normal incident of that profession and of membership of the firm,
  - (c) the director is required by the terms of the partnership agreement to account to the firm for the payment, and
  - (d) the amount of the payment is insubstantial, compared with the total amount brought into account as receipts when calculating the firm’s profits.
- (4) Condition B applies where the director is appointed by a company, and is that—
- (a) the profits of the appointing company are within the charge to income tax,
  - (b) by virtue of an agreement with the appointing company, the director is required to account for the payment to that company, and
  - (c) either subsection (5) or subsection (6) applies to the appointing company.
- (5) This subsection applies if the appointing company had the right to appoint the director by virtue of its shareholding in, or an agreement with, the paying company.
- (6) This subsection applies if the appointing company is not one over which—
- (a) the director has control, or
  - (b) any person connected with the director has control, or
  - (c) the director and any persons connected with him together have control.
- (7) For the purposes of subsection (6), the following persons are connected with the director: the spouse, civil partner, parent, child, son-in-law or daughter-in-law of the director.

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<sup>(8)</sup> 2005 c. 5.

<sup>(9)</sup> Section 16A was inserted by S.I. xxxx/xxxx.

### **Professionals in practice: incidental income from an office or employment**

**16C.**—(1) This section applies where—

- (a) a payment is received by an individual who carries on a profession (alone or in partnership),
- (b) the payment is made to the individual in his or her capacity as an employee or office-holder, but is not made in respect of employment as a director of a company,
- (c) the payment would otherwise be employment income of the individual chargeable to tax under Part 2 of ITEPA 2003,
- (d) the conditions in subsection (3) are met, and
- (e) where the individual carries on the profession in partnership, the condition in subsection (4) is also met.

(2) The payment is to be treated for income tax purposes as a receipt of a trade carried on by the individual or, where the individual carries on the profession in partnership, by the firm.

(3) The conditions referred to in subsection (1)(d) are that—

- (a) the time spent by the individual in performing the duties of the office or employment is insubstantial compared with the time spent by the individual in carrying on the profession,
- (b) the office or employment is related to the profession carried on by the individual,
- (c) the amount of the payment is insubstantial compared with—
  - (i) the total amount brought into account as receipts when calculating the individual's trade profits; or
  - (ii) where the individual carries on a profession in partnership, so much of the total amount brought into account as receipts when calculating the firm's profits as is attributable to the individual.

(4) The condition referred to in subsection (1)(e) is that the individual is required by the terms of the partnership agreement to account to the firm for the payment and does so.”.

### **3.Amendment of the Corporation Tax Act 2009**

—(1) The Corporation Tax Act 2009<sup>(10)</sup> is amended as follows.

In Chapter 1 of Part 2, after section 40 (credit unions) insert—

#### **“Payments to company directors**

**40A.**—(1) This section applies where—

- (a) a company (“the paying company”) makes a payment to, or for the benefit of, a director of the paying company in respect of the director's employment as a director of the paying company,
- (b) the payment would otherwise be employment income of the director chargeable to tax under Part 2 of ITEPA 2003,
- (c) the director was or is a member of a firm, or was appointed by a company (“the appointing company”) other than the paying company, and
- (d) condition A or B is met.

(2) The payment is to be treated for corporation tax purposes as a receipt of—

- (a) a trade carried on by the firm, or
- (b) a trade carried on by the appointing company.

(3) Condition A applies where the director is a member of a firm, and is that—

- (a) the director carries on a profession,

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<sup>(10)</sup> 2009 c. 4.

- (b) being a director of a company is a normal incident of that profession and of membership of the firm,
  - (c) the director is required by the terms of the partnership agreement to account to the firm for the payment, and
  - (d) the amount of the payment is insubstantial, compared with the total amount brought into account as receipts when calculating the firm's profits.
- (4) Condition B applies where the director is appointed by a company, and is that—
- (a) the profits of the appointing company are within the charge to corporation tax,
  - (b) by virtue of an agreement with the appointing company, the director is required to account for the payment to that company, and
  - (c) either subsection (5) or subsection (6) applies to the appointing company.
- (5) This subsection applies if the appointing company had the right to appoint the director by virtue of its shareholding in, or an agreement with, the paying company.
- (6) This subsection applies if the appointing company is not one over which—
- (a) the director has control, or
  - (b) any person connected with the director has control, or
  - (c) the director and any persons connected with him together have control.
- (7) For the purposes of subsection (6) the following persons are connected with the director: the spouse, civil partner, parent, child, son-in-law or daughter-in-law of the director.

**Professionals in practice: incidental income from an office or employment**

**40B.**—(1) This section applies where—

- (a) a payment is received by an individual who carries on a profession in partnership,
  - (b) the payment is made to the individual in his or her capacity as an employee or office-holder, but is not made in respect of employment as a director of a company,
  - (c) the payment would otherwise be employment income of the individual chargeable to tax under Part 2 of ITEPA 2003, and
  - (d) the conditions in subsection (3) are met.
- (2) The payment is to be treated for corporation tax purposes as a receipt of a trade carried on by the firm.
- (3) The conditions referred to in subsection (1)(d) are that—
- (a) the time spent by the individual in performing the duties of the office or employment is insubstantial compared with the time spent by the individual in carrying on the profession,
  - (b) the office or employment is related to the profession carried on by the individual,
  - (c) the amount of the payment is insubstantial compared with so much of the total amount brought into account as receipts when calculating the firm's profits as is attributable to the individual, and
  - (d) the individual is required by the terms of the partnership agreement to account to the firm for the payment and does so.”.

**Explanation**

ESC A37 allows fees received by directors to be treated as trading income for income tax purposes. Without the concession, as company directors are office-holders their income is employment income and the payer would be required to deduct income tax under the PAYE system as set out in provisions within the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682).

The conditions under which A37 is treated as met are that:

- the directorship is a 'in a related field to the profession and practice normally undertaken';
- the fees are a small part of the profits; and
- under the partnership agreement the fees are pooled for division among the partners.

The concession also applies where a company A has the right to appoint a director to the board of another company B. Where this is the case and the director is required to hand over to company A any fees received for the directorship of B, and does so, (and company A is subject to Corporation Tax), those fees are treated as the income of company A and not the director, and tax is not deducted under PAYE.

The ESC only deals with tax. The National Insurance position is covered in regulation 27 of the Social Security (Contributions) Regulations 2001 (SI 2001 No 1004).

The administrative easement set out at EIM03002 allows professional practitioners to treat incidental income from an office or employment as part of their trading or professional income for income tax purposes.

The draft legislation is intended to have the same effect as the concessions and for ESC A37 broadly mirrors the NICs regulations. It amends the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) to add reference to sections 15, 16B and 16C, inserting sections 16B and 16C into ITTOIA 2005, and inserting section 40A in CTA 2009.

Article 1 amends section 6(5) of ITEPA so that employment income is not charged to income tax under Part 2 of ITEPA if it is within the charge to tax under Part 2 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA), due to new sections 16B and 16C of ITTOIA.

Article 2 inserts new sections 16B and 16C into ITTOIA. New section 16B enables certain payments received by directors of companies or partnerships to be treated as trading income rather than employment income for income tax purposes, provided that the conditions specified in new section 16B(3) to (5) of ITTOIA are met.

New section 16C of ITTOIA enables certain payments received by professional practitioners by way of incidental income from an office or employment to be treated as trading income rather than employment income for income tax purposes, provided that the conditions specified in section 16C(3) of ITTOIA are met.

Article 3 inserts new sections 40A and 40B into the Corporation Tax Act 2009 (CTA) enabling certain payments received by directors of companies or partnerships to be treated as trading income rather than employment income for corporation tax purposes provided that the conditions specified in new section 40A(3) to (5) of CTA are met.

## EIM01120 (and BIM40475): Financial Loss Allowance

### ESC text

Financial loss allowance, sometimes called a payment for loss of earnings, is paid to members of various public bodies such as those in the National Health Service. Such payments are also made to magistrates and persons on jury service.

Provided that the payment is calculated to do no more than replace the salary that the recipient would otherwise have received from their employer, a financial loss allowance is not taxable as employment income. However, if the recipient is self-employed the allowance is taxable as Trading Income as a receipt of the business. See also BIM40475.

### BIM40475

Financial loss allowances, sometimes known as payment for loss of earnings, are paid to members of various public bodies for loss of remunerative time and, in some cases, for additional expenses, incurred while engaged on the duties of those bodies.

Where the recipient is self-employed, the amounts received are made for the purpose of filling a hole in the profits of the trade, profession or vocation and are taxable receipts of the business. This follows the principles set out in *London & Thames Haven Oil Wharves Ltd v Attwooll* [1966] (43TC491).

Payments that do not fill 'a hole in the profits' of the trade, profession or vocation are not taxable receipts of the business.

For example a day subsistence allowance may be received. This is not a payment to make up for the loss of profits, nor does it cover additional expenses of the business. It covers additional personal expenses. It will not be a taxable receipt of the business.

Examples of people who may receive financial loss allowances include:

- Members of certain local authorities and similar bodies in Great Britain
- People serving as jurors in Great Britain
- Members of certain National Health Service bodies
- Magistrates or Justices of the Peace.

### Draft legislation

#### **Compensation for financial loss of voluntary office-holders and volunteers: income tax**

2.—(1) Chapter 8 of Part 4 of the Income Tax (Earnings and Pensions) Act 2003<sup>(1)</sup> (exemptions: special kinds of employees) is amended as follows.

(2) After section 299 (Crown employees' foreign service allowances) insert—

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<sup>(1)</sup> 2003 c. 1.

*“Voluntary office-holders*

**299A Voluntary office-holders: compensation for lost employment income**

(1) No liability to income tax arises in respect of a payment made by a relevant authority to a person if—

- (a) the person holds a voluntary office with the authority,
- (b) the person carries out duties of the office in a period in which he or she is also employed, and
- (c) the payment is made solely to compensate the person for lost employment income for the period (and accordingly does not exceed the amount of that income).

(2) For the purposes of subsection (1) a person holds a voluntary office if, at the time the payment referred to in that subsection is made, the person—

- (a) is not entitled to any payment or benefit in connection with carrying out the duties of the office,
- (b) has not received any such payment or benefit, and
- (c) does not expect to receive any such payment or benefit.

(3) For the purposes of subsection (2)(a), (b) and (c) disregard—

- (a) a payment in respect of reasonable expenses incurred in carrying out the duties of the office, and
- (b) a payment to which subsection (1) or section 16A of ITTOIA 2005 applies.

(4) In subsection (1)(c) “lost employment income” means the difference between—

- (a) the amount of employment income, after deduction of tax and national insurance contributions, that the person would have received from the employment for the period if he or she had not carried out the duties of the office, and
- (b) the amount of employment income, after deduction of tax and national insurance contributions, that the person did receive from the employment for the period.

(5) In subsection (1) “relevant authority” means any of the following—

*Government*

A Minister of the Crown or government department

The Welsh Ministers and the Counsel General to the Welsh Government

The Scottish Ministers

The holder of an office in the Scottish Administration which, for the purposes of the Scotland Act 1998, is not a ministerial office (see section 126(8) of that Act)

A Minister within the meaning of the Northern Ireland Act 1998 (c. 47)

A Northern Ireland department

*Local government*

A county, district or parish council in England

The council of a London borough

The Common Council of the City of London

The Greater London Authority

The Council of the Isles of Scilly

A county, county borough or community council in Wales

A council constituted under section 2 of the Local Government etc. (Scotland) Act 1994<sup>(12)</sup> or community council in Scotland

A district council in Northern Ireland

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<sup>(12)</sup> 1994 c. 39.

*Trade unions*

An organisation the name of which is entered in the list maintained by the Certification Officer under section 2 of the Trade Union and Labour Relations (Consolidation) Act 1992<sup>(13)</sup>

An organisation the name of which is entered in the list maintained by the Certification Officer for Northern Ireland under Article 5 of the Industrial Relations (Northern Ireland) Order 1992 (S.I. 1992/807 (N.I. 5))

*Other public bodies*

A body (other than a company) that is established by or under a statutory provision for the purpose of carrying out functions conferred on it by or under a statutory provision.

(6) In subsection (5)—

“company” means a company as defined by section 1 of the Companies Act 2006<sup>(14)</sup>, and

“statutory provision” includes any provision made by or under an Act of Parliament, an Act of the Scottish Parliament, any Northern Ireland legislation, or any Act or Measure of the National Assembly for Wales.

(7) Section 16A of ITTOIA 2005 (voluntary office-holders: compensation for lost profits) contains equivalent provision for holders of a voluntary office who carry on a trade, profession or vocation.”

**3.—**(1) The Income Tax (Trading and Other Income) Act 2005<sup>(15)</sup> is amended as follows.

(2) In Part 1, in section 2(4) for “is one example” substitute “and section 16A (voluntary office-holders: compensation for lost profits) are each an example”.

(2) In Chapter 2 of Part 2, after section 16 (oil extraction and related activities) insert—

**“16A Voluntary office-holders: compensation for lost profits**

(1) This section applies if a payment is made by a relevant authority to a person where—

- (a) the person holds a voluntary office with the authority,
- (b) the person carries out the duties of the office in a period in which he or she also carries on a trade, profession or vocation,
- (c) the payment is made solely to compensate the person for lost profits for the period (and accordingly does not exceed the amount of those profits), and
- (d) the payment would otherwise be dealt with under Part 2 of ITEPA 2003 by virtue of section 4(2)(b).

(2) The payment is dealt with under this Part.

(3) In subsection (1)(c) “lost profits” means the difference between—

- (a) the amount of profits that the person would have received from the trade, profession or vocation for the period if he or she had not carried out the duties of the office, and
- (b) the amount of profits that the person did receive from the trade, profession or vocation for the period.

(4) For the purposes of subsection (1)—

- (a) “relevant authority” has the meaning given by section 299A(5) and (6) of ITEPA 2003;
- (b) references to a person holding a voluntary office are to be construed in accordance with section 299A(2) and (3) of that Act.”

(3) In Chapter 9 of Part 6, after section 782B (renewables obligation certificates for domestic microgeneration) insert—

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<sup>(13)</sup> 1992 c. 52.

<sup>(14)</sup> 2006 c. 46.

<sup>(15)</sup> 2005 c. 5.

**“782C Volunteers etc: compensation for lost employment income**

- (1) No liability to income tax arises in respect of a payment by a relevant authority to a person if—
- (a) the person performs services for the authority for no financial benefit in a period in which he or she is also employed,
  - (b) the payment is made solely to compensate the person for lost employment income for the period (and accordingly does not exceed the amount of that income), and
  - (c) the person does not perform the services as the holder of an office with the authority (as to which, see section 299A of ITEPA 2003).
- (2) For the purposes of subsection (1) a person performs services for no financial benefit if, at the time the payment referred to in that subsection is made, the person—
- (a) is not entitled to any payment or benefit in connection with performing the services,
  - (b) has not received any such payment or benefit, and
  - (c) does not expect to receive any such payment or benefit.
- (3) For the purposes of subsection (2)(a), (b) and (c) disregard—
- (a) a payment in respect of reasonable expenses incurred in performing the services,
  - (b) a payment compensating the person for loss of social security income arising as a result of performing the services, and
  - (c) a payment to which subsection (1) applies.
- (4) In subsection (1)(b) “lost employment income” means the difference between—
- (a) the amount of employment income, after deduction of tax and national insurance contributions, that the person would have received from the employment for the period if he or she had not performed the services, and
  - (b) the amount of employment income, after deduction of tax and national insurance contributions, that the person did receive from the employment for the period.
- (5) In this section—
- “employment” has the meaning given by section 4 of ITEPA 2003;
  - “relevant authority” has the meaning given by section 299A(5) and (6) of ITEPA 2003;
  - “services” includes services as a juror;
  - “social security income” has the meaning given by section 657 of ITEPA 2003.”

**Explanation**

FLA paid to voluntary office-holders (such as magistrates) is employment income and should be subject to tax through PAYE, irrespective of whether the recipient is otherwise employed or self-employed. However, the ESC at EIM01120 means that where the voluntary office-holder is otherwise employed and the FLA does no more than replace the salary that they would otherwise have received from their employer, the FLA is not taxable. Where the voluntary office-holder is otherwise self-employed FLA is treated as a taxable receipt of the business.

Where payment of FLA is made to volunteers who do not hold an office (such as jurors) and who are otherwise employed, no liability to tax as employment income arises but the payments should, strictly, be subject to tax as miscellaneous income. Where FLA is paid to volunteers who are otherwise self-employed, no liability to tax as employment income arises and the payments are treated as compensation for a loss of profit and as a taxable receipt of the business.

The draft legislation is designed to put the existing treatment onto a statutory footing so that where FLA is paid to:

- a voluntary office-holder by a specified organisation (a 'relevant authority'), and the payment does no more than compensate for loss of employment income incurred while the individual carries out voluntary duties for the relevant authority, and the payment is based on net income, no further income tax is due;
- a voluntary office-holder by a specified organisation (a 'relevant authority'), and the payment does no more than compensate for the loss of trading income incurred while the individual carries out voluntary duties for the relevant authority, and the payment will be brought into account as a receipt in calculating the taxable profits of the trade, the employment income charge will be dis-applied; or
- a volunteer by a specified organisation (a 'relevant authority'), and the payment does no more than compensate for loss of employment income incurred while the individual carries out voluntary duties for the relevant authority, and the payment is based on net income, no further income tax is due.

Legislating the ESCs for FLA appears to deliver a mismatch in tax treatments for voluntary office-holders because the otherwise employed receive a tax free payment of FLA and the otherwise self-employed pay tax and NICs through Self-Assessment. However, the otherwise self-employed should receive a payment for gross lost profits, whereas the otherwise employed should receive a payment representative of lost employment income after a hypothetical deduction of tax and NICs (so net earnings). Therefore, we believe the end result in the hands of the recipient is broadly similar.

The draft legislation inserts section 299A *Voluntary office-holders: compensation for financial loss* into Chapter 8 of Part 4 of ITEPA; section 16A *Voluntary office-holder: compensation for financial loss* into Chapter 2 of Part 2 of ITTOIA and Section 782C *Volunteer: compensation for financial loss* into Chapter 9 Part 6 of ITTOIA.

Section 299A ITEPA *Voluntary office-holders: compensation for lost employment income*

This new section is designed to enact the concession in EIM01120, insofar as this deals with payments of FLA made to an office-holder.

Section 299A(1) removes any liability to income tax where a payment is made by a relevant authority to person where the following conditions are met:

- (a) is that the person holds a voluntary office with the authority;
- (b) is that the voluntary office-holder has other employment at the time of undertaking the duties of the voluntary office; and
- (c) is that the payment is solely to compensate for loss of employment income from the other employment, and does not exceed the net amount of this loss.

New section 299A(2) defines a 'voluntary office' as an office where the office-holder is not entitled to and does not receive, or expect to receive, any payment or other benefit for carrying out the duties of the office. The meaning of 'payment' for the purposes of this definition is set out in section 299A(3) ITEPA.

New section 299(4) defines ‘lost employment income’ for the purpose of section 299A(1)(c). This is the net amount of employment income that the office-holder would have received but didn’t receive from their employer, after a hypothetical deduction of tax and NICs.

New sections 299A(5) and (6) contain a definition of ‘relevant authorities’.

New section 229A(7) directs voluntary office-holders who carry on a trade, profession or vocation to new s16A of ITTOIA for an equivalent provision.

Section 16A ITTOIA *Voluntary office-holders: compensation for lost profits*

This new section is designed to enact the concession in BIM40475.

New section 16A removes any liability to tax on employment income where a payment is made by a relevant authority to a voluntary office-holder for carrying out their voluntary duties and where certain conditions are met:

- (a) is that the person holds a voluntary office with the authority;
- (b) is that the voluntary office-holder also carries on a trade, profession or vocation at the time of undertaking duties of the voluntary office; and
- (c) is that the payment is solely to compensate for lost profits for the period, and does not exceed the amount of those profits.

The charge to employment income is removed by dis-applying the priority rule in section 4(2)(b) ITTOIA which would usually require the payment to be dealt with as employment income under Part 2 ITEPA. This enables the office-holder to include the payment in their profits from self-employment.

New section 16A(3) defines ‘lost profits’ for the purposes of section 16A(1)(c) ITTOIA. This is the difference between the amount of profits the person would have received and the amount of profits that the person did receive from the trade, profession or vocation.

The definitions of “relevant authority” and “voluntary office” are taken from new section 299A ITEPA.

Section 782C ITTOIA *Volunteers: compensation for lost employment income*

This new section is designed to enact the concession in EIM01120, insofar as this deals with payments of FLA made to a volunteer who is otherwise employed.

New section 782C(1) removes any liability to income tax where a payment is made by a relevant authority to a volunteer for carrying out voluntary services and certain conditions are met:

- (a) is that the person performs services for the authority for no financial benefit and is otherwise employed;
- (b) is that the payment is made solely to compensate the person for lost employment income for the period and does not exceed the net amount of this loss; and

- (c) is that the person is not an office-holder with the authority (if so, see s299A ITEPA).

New section 782C(2) defines 'no financial benefit' for the purposes of section 782C(1)(a) as not entitled to, in receipt of, or expecting to receive any payment or other benefit for performing services for the authority. The meaning of 'payment' for the purposes of this definition is set out in section 299A(3) ITEPA.

New section 782C(4) defines 'lost employment income' for the purposes of section 782C(1)(b). This is the net amount of employment income that the volunteer would have received, but didn't receive, from their employer after a hypothetical deduction of tax and NICs.

New section 782C(5) provides that 'services' includes services as a juror. The definition of 'relevant authority' is taken from new s299A ITEPA. The definition of 'employment' is taken from section 4 ITEPA. The definition of 'social security income' is given by section 657 ITEPA.

### **Question for consultees**

We would welcome comments on whether, for the purposes of these Regulations, the definition of 'relevant authorities', which excludes companies as defined by the Companies Act, captures all relevant bodies.

## EIM61030: Tax treatment of payments from Local Medical Committees to part-time committee members

### ESC text

Doctors (GPs) may be invited to sit on a Local Medical Committee (LMC) to represent the views of their Practice. The LMC may make payments to the part-time committee members. The following tax treatment of those payments was agreed with HM Revenue & Customs in Spring 2006.

### **Introduction**

These notes provide guidance on the tax and NICs consequences where Local Medical Committees (LMCs) make payments to elected committee members.

### **Background**

There are approximately 126 LMCs in the United Kingdom (although there is likely to be a reduction in numbers following a reconfiguration of boundaries and consolidation of LMCs); one for every Health Authority/ Board. Similar arrangements also exist with the corresponding Boards in Northern Ireland. LMCs represent the interests of General Practitioners (GPs) locally. They are required to negotiate and consult with the Health Authorities on a wide range of issues that may have an impact on all GPs (directly and indirectly) and ultimately their patients. LMCs are bodies defined by statute (in England and Wales) and their functions based upon a model constitution. In Scotland, the equivalent body is an Area Medical Committee although there may be some differences in composition.

A LMC may appoint staff and appoint GPs from the committee to act as Chairman/woman, Treasurer and Secretary (if the Secretary is not already employed). However, most members of a LMC are part-time committee members who only attend LMC meetings for a few hours each month. These part-time members are normally local GPs who are self-employed professionals drawn from local medical practices. They are elected to represent the interests of GPs in the area covered by the LMC.

Many LMCs pay their elected members for attendance at meetings. Payments are made to defray the expenses of committee members and to provide some incentive for GPs who undertake such work, which does, necessarily, involve them in some absences from their practices. Over recent years, the proportion of LMCs making payments to their elected members for their committee and other work has increased. These payments are generically referred to as "honoraria".

Some LMCs, recognising the increasing workload falling on busy GPs, have appointed full-time Chief Executives or full-time Secretaries employed under written employment contracts. Such Chief Executives and full-time Secretaries are not LMC members and are, as appropriate, subject to PAYE and Class 1 NICs.

## **Nature of the appointment**

Elected LMC members give their time voluntarily and are not employed under contracts of employment. However, because of the way LMCs are set up HM Revenue & Customs considers that elected committee members are office holders.

## **Tax consequences**

The strict legal position is that payments to office holders by LMCs are taxable as employment income. PAYE should be operated.

However, difficulties can arise where a partner holds an office or employment and the fees are to be included with partnership income and pooled amongst the partners. This includes the situation where a member of a GP partnership provides his or her services as a member of a LMC. In such circumstances, and provided certain assurances are given, you can accept that payments to a part-time member of a LMC can be taxed as trading income as part of the partnership profits. Further guidance on this and the correct procedure to follow when asked for such treatment can be found at EIM03000 onwards.

In legal terms, HM Revenue & Customs, under the powers in Regulation 141 SI 2003/2682 (the PAYE regulations) is authorising the payer not to operate PAYE. The use of Regulation 141 means that the recipient cannot, at a later date, claim that there has been a PAYE failure and claim a PAYE tax credit. But HM Revenue & Customs will only act under Regulation 141 where the recipient agrees in writing to include the fees as self-employed receipts.

This administrative practice only applies where the LMC fee is paid into the partnership accounts and pooled for division amongst the partners. Where the LMC fee is retained as personal income of the individual committee member it should be taxed as employment income under PAYE. Any honoraria should also be taxed under PAYE.

As noted above, LMCs may also employ a full-time chief executive and other staff. The administrative practice outlined above does not apply to payments to full-time members of staff which should be taxed as normal.

## **NICs consequences**

The administrative practice that applies for tax purposes does not apply for NICs purposes. The normal NICs rules apply to payments from LMCs to committee members. Where committee members are paid for providing their services as office holder to the LMC the payments are liable for Class 1 NICs.

Most LMC members provide their services on a part-time basis. Typically, this might be for a few hours each month. Daily rates of payment to a LMC member range up to £400, or pro-rotta for the time of less than one day. The amounts that are repaid are subject to review on an annual basis.. Therefore most part-time LMC members will be paid less than the earnings threshold, in which case there will be no Class 1 liability.

From April 2003, where payments that are earnings for Class 1 NICs purposes are introduced into the profits of the GP's partnership they do not need to be included in profits subject to Class 4 NICs. This follows the introduction of Regulation 4 of The Social Security (Contributions) (Amendment No. 7) Regulations 2003 (SI 2003/2958).

### **Financial Loss Allowance**

Rather than paying remuneration to committee members for providing their services, LMCs may pay a financial loss allowance. Where a financial loss allowance is paid then, for tax purposes, the treatment at EIM 01120 can be applied to the payment. Any such payments to the GP's practice should be taxed as part of the partnership profits. For NICs purposes there is no Class 1 liability on a financial loss allowance although the payment should be taken into account in working out any Class 4 NICs due. Where the payment is not actually a financial loss allowance but rather remuneration calculated to include an amount to cover the cost of providing a locum the whole amount is subject to Class 1 NICs.

Whether a payment is a financial loss allowance or something else, will depend upon the particular facts. Very broadly, we view remuneration as something paid to a committee member as a reward for services. This is different from a financial loss allowance which is either paid to an individual GP to compensate him or her for the reduction in earnings due to his or her absence while carrying out LMC duties; or is a payment made to the practice to cover a hole in the partnership's profits caused by the GP's absence on LMC business. In order to be treated as a financial loss allowance there must have been a financial loss. So there must have been a loss of fee income because the GP was not available for work

### **Draft legislation**

No legislation drafted (see explanation below).

### **Explanation**

HMRC believes that the treatment afforded by this guidance is also covered by that at EIM03002 and EIM01120. EIM61030 describes three tax treatments for payments from LMCs to part-time committee members:

1. LMC fee is included with partnership income and pooled amongst partners – we believe this is covered by legislation for EIM03002 'professional remuneration' and the payment can be taxed as trading income as part of the partnership profits, providing certain conditions are met;
2. The LMC makes a payment of compensation for a loss of earnings – the FLA rules will apply providing certain conditions are met (including that the LMC qualifies as a 'relevant authority');
3. LMC fee is retained by the individual, including honoraria – normal rules apply and it should be taxed as employment income under PAYE.

The concessions covered at bullet points 1 & 2 above are provided for in the draft legislation covering EIM03002 and EIM01120. The situation described at 3 above is, and will continue to be, taxable.

### **Question for consultees**

As part of this consultation, we would welcome comments on whether the definition of 'relevant authorities' is sufficient to capture all bodies who currently pay FLA to office-holders or volunteers. In particular, our definition excludes companies. This may have ramifications for some LMCs. Therefore, we would like to hear whether our legislation will exclude any paying organisations who currently rely on the FLA concession (so companies established to perform some or all of the statutory functions of a public or other statutory body).

## 3. 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 3 of the process. The purpose of the consultation is to seek views on draft legislation in order to confirm, as far as possible, that it will achieve the intended policy effect with no unintended effects.

### How to respond

Responses should be sent by 09 November 2017, by:

e-mail to [tap@hmrc.gsi.gov.uk](mailto:tap@hmrc.gsi.gov.uk) , or

post to: Stephanie Allistone, HMRC Tax Administration Policy & Strategy Team, Room 1C/04, 100 Parliament Street, London SW1A 2BQ.

Telephone enquiries 03000 586496 (from a text phone prefix this number with 18001).

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 Inside Government](#). 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. If you wish to explain your choice of consultation period, this is the place. Also, if you are holding additional meetings or using alternative means of engaging, please mention this here.

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:

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

Email: [hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk](mailto:hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk)

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