



# Extra statutory concessions – eighth technical consultation on draft legislation

**Summary of Responses**  
06 February 2018

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# Executive summary

1.1 The eighth technical consultation on draft legislation for extra statutory concessions<sup>1</sup> (ESCs) was published on 14 September 2017 and concluded on 9 December 2017. It exposed for comment draft legislation designed to legislate the effect of four existing ESCs and sought views on whether the draft legislation successfully maintained the effect of these ESCs.

1.2 The consultation arose from HM Revenue and Customs' Review of ESCs following the *Wilkinson*<sup>2</sup> case. This document sets out the responses received and the Government's response to the consultation.

1.3 Respondents provided specific comments on particular aspects of the draft legislation. The responses have been carefully considered and where appropriate changes to the draft legislation have been made.

1.4 The amended draft legislation was laid before Parliament on 15 January 2018. The legislation will come into effect 6 April 2018.

1.5 HMRC wishes to thank those who responded to the consultation document. We recognise the time and effort that went into the comments and contributions and believe that where changes have been made the legislation has improved as a result. A list of respondents to the consultation can be found at the Annex.

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<sup>1</sup> Extra statutory concessions: eighth technical consultation on draft legislation  
<https://www.gov.uk/government/consultations/extra-statutory-concessions-escs-technical-consultation-on-draft-legislation>

<sup>2</sup> *R v HM Commissioners of Inland Revenue ex p Wilkinson* [2005] UKHL 30

## 2. Introduction

2.1 An ESC is a relaxation which gives taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law. ESCs have been a feature of the UK's tax system for decades and will continue to be made and withdrawn as necessary.

2.2 ESCs are published by HMRC. Most are listed in the former Inland Revenue booklet 'Extra-Statutory Concessions'<sup>3</sup> and the former HM Customs and Excise booklet Notice 48<sup>4</sup> but some are published elsewhere, such as in HMRC guidance products.

2.3 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.

2.3 The majority of ESCs can continue in their current form as they are within the scope of HMRC's administrative discretion.

2.4 Where an ESC exceeds the scope of HMRC's administrative discretion, as clarified in the *Wilkinson* judgment, the effect of the ESC may be maintained by legislating to retain its effect using a specific power at section 160 of the Finance Act (FA) 2008<sup>5</sup>. Such legislation allows a Treasury Order to be used to retain the effect of ESCs which existed in July 2008.

2.5 Not all ESCs that need to be legislated will make use of the power at section 160 FA 2008. For certain ESCs, powers existed before FA 2008 to legislate their effect, and it may make sense to use these existing powers to avoid possible legislative complications in the future. Other ESCs may be legislated in Finance Bills; this avenue is likely to be appropriate where the scope or nature of the relief is significantly altered.

2.6 This document sets out the responses received when HMRC published draft legislation in September 2017 designed to preserve the effect of four ESCs.

2.7 We received four responses to the consultation from representative bodies and accountants/agents.

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<sup>3</sup> <http://www.hmrc.gov.uk/specialist/esc.pdf>

<sup>4</sup> [Public Notice 48](#)

<sup>5</sup> <http://www.legislation.gov.uk/ukpga/2008/9/section/160>

# Responses

- 3.1 This chapter summarises the representations received during the consultation.
- 3.2 Overall the responses to the consultation were positive. Contributors recognised the need for HMRC to review its published ESCs following the *Wilkinson* judgment and welcomed the decision to legislate to maintain the effect of these four concessions, along with the certainty that this gave them for the future.
- 3.3 Respondents generally approved of the draft legislation, and agreed that the effect of the ESCs had been successfully replicated.
- 3.4 Specific comments were received in relation to the drafting of all four ESCs and the comments received and the Government's response is set out below.

## **Section 1: ESC A37 – Directors Fees EIM<sup>6</sup>03002 – Professional Remuneration**

- 3.5 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 company 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).
- 3.6 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.
- 3.7 Given their similarity, one piece of legislation was drafted to cover both ESCs.
- 3.8 Respondents commented on the wording used in the legislation compared to the ESCs. For example both ESCs refer to the fees being a "small" part of the overall receipts of the business but the legislation uses the term "insubstantial". Respondents were concerned this change could narrow the scope of the relief and asked that the term "insubstantial" is defined in guidance.
- 3.9 The term "insubstantial" is used in the associated National Insurance Contributions (NICs) regulations<sup>7</sup> and was adopted here for consistency. There is no intention to narrow the scope of the relief and HMRC will make this clear in guidance.
- 3.10 One respondent stated that the legislation adopts a comparison with receipts rather than profits, which could widen the application of the relief. The intention here was to find a way of identifying the income attributable to the particular partner's work and HMRC consider "receipts" best covers this, and using that term does not widen the relief.
- 3.11 Respondents commented that the legislation should indicate how the paying company is to be notified that this relief applies, so they are aware they don't have to apply PAYE to the relevant payments, or that this should at least be set out in guidance. HMRC considers practical issues such as this are more suitable for inclusion in guidance rather than legislation and will cover this point in guidance.

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<sup>6</sup> Employment Income Manual

<sup>7</sup> [Social Security \(Contributions\) Regulations 2001 \(SI 2001 No 1004\)](#)

3.12 One respondent was concerned that the legislation does not allow relief to be claimed where payment for services is made from one entity within a group to another. HMRC has included this to maintain the provision in the concession that the company appointing the director is not one over which the director or anyone connected with the director has control. There is potential for this to happen within a group of companies so this has been excluded.

3.13 One respondent asked HMRC to clarify the following points in guidance:

- the fact that the director is required to hand over any fees received to the company;
- the tax treatment of these payments (so whether a CT deduction is available or whether these sums should be treated in line with other expenses of the business); and
- if the receiving firm is to be treated as receiving the payment for tax purposes.

3.14 HMRC confirms that these points will be covered in guidance.

## **Section 2: EIM01120 and BIM40475 – Financial Loss Allowance EIM61030 – Payment from Medical Committees to Members**

3.15 EIM01120 is an administrative practice related to Financial Loss Allowance (FLA). FLA can be paid to members of various bodies as recompense for a loss of income while they undertake their public duties. HMRC's published practice is to accept that FLA paid to an individual who is otherwise employed is not taxable, provided the payment does no more than replace the salary the recipient would otherwise have received from their employer.

3.16 BIM<sup>8</sup>40475 is an administrative practice relevant to circumstances where FLA is paid to voluntary office holders who are otherwise self-employed. In such circumstances FLA is treated as a taxable receipt of the individual's business.

3.17 EIM61030 is an administrative practice concerned with the tax treatment of payments from Local Medical Committees (LMCs) to part-time committee members. Rather than dealing with a particular payment, EIM61030 covers different types of payments made by 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.

3.18 One piece of legislation was drafted to give effect to all three FLA ESCs.

3.19 Consultees suggested that the definition of "relevant authority" be broadened to including companies who are undertaking administrative activities on behalf of an LMC, and in support of its obligations under the National Health Service Act 2006. One suggested that the definition include corporate bodies established to perform some or all of the functions of a public or statutory body. The draft legislation has been amended to broaden the legislative definition of "relevant authority" to capture companies carrying out the functions of a relevant authority.

3.20 One respondent suggested including a power to amend the definition of "relevant authority" by statutory instrument to ensure the legislation can capture all appropriate bodies. The powers for making this Order (section 160 Finance Act 2008) do not allow for the creation of delegated powers so HMRC is not able to adopt this suggestion.

3.21 One consultee recommended a change to section 16A and the rules surrounding payments of FLA to the self-employed. They recommended that the legislation be redrawn to determine that payments of a personal nature, such as subsistence, be specifically excluded from the scope of the tax exemption. HMRC has not amended the legislation because a subsistence payment cannot be a payment to compensate a person for lost profits, and so cannot fall within the scope of the tax exemption provided by this legislation. HMRC will underline this point in the associated guidance.

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<sup>8</sup> Business Income Manual

3.22 One consultee suggested a NICs carve out is necessary in respect of FLA payments made by LMCs to members. HMRC consider that a genuine payment of FLA is compensatory in nature and so not liable to Class 1 NICs. As such, no specific NICs disregard is necessary.

## 4. Next steps

4.1 All the responses received have been carefully considered, amendments to the draft legislation have been made, and points noted for inclusion in HMRC guidance in due course. A Statutory Instrument setting out the draft legislation was laid before Parliament on 15 January 2018. It is anticipated this legislation will come into effect on 6 April 2018. In the meantime these ESCs continue to operate in their current form.



# Annex: List of stakeholders consulted

HMRC would like to thank those who took the time to consider the draft legislation and submit their comments.

Responses were received from:-

Chartered Institute of Taxation (CIOT)  
Deloitte LLP  
GP Defence Fund  
Institute of Chartered Accountants of Scotland (ICAS)