



HM Revenue  
& Customs

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

## **Consultation document**

Publication date: 02 October 2014

Closing date for comments: 27 November  
2014

<b>Subject of this consultation:</b>	Consultation on draft legislation to preserve the effect of two HM Revenue and Customs (HMRC) extra-statutory concessions (ESCs).
<b>Scope of this consultation:</b>	Draft legislation designed to preserve the effect of two ESCs - D40 and F15.
<b>Who should read this:</b>	Businesses and other taxpayers who currently benefit from the ESCs and their advisors.
<b>Duration:</b>	02 October 2014 - 27 November 2014.
<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, requests for hard copies etc should be sent to:</p> <p>Stephanie Allistone, HMRC Central Policy, Room 1C/06, 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 the earlier consultations to alert them to the publication of this further 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 case HMRC has been reviewing its ESCs. This is the seventh 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>Consultations on ESCs can be found on the HMRC website. (<a href="http://www.hmrc.gov.uk/consultations/index.htm">http://www.hmrc.gov.uk/consultations/index.htm</a>)</p>

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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>1</sup> and the former HM Customs and Excise booklet Notice 48<sup>2</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 began 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 the scope of HMRC's discretion its effect will be maintained by putting it on to a legislative basis where it is appropriate to do so.

1.4 Section 160 FA 2008<sup>3</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 the sixth consultation (which closed on 15 March 2013) and were legislated via statutory instrument number 211 of 2014 (SI 2014/211).

## 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 two 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. A Treasury Order giving effect to these ESCs is expected to be laid in 2015.

1.6 ESC D40 is concerned with the charge to capital gains tax (CGT) under sections 86 and 87 of the Taxation of Chargeable Gains Act 1992 (TCGA 1992) in respect of gains made by the trustees of a non-resident trust. ESC D40 ensures a beneficiary is not treated as a participator in a company controlled by the trustees merely because of their status as beneficiary.

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<sup>1</sup> [Former Inland Revenue booklet IR1](#)

<sup>2</sup> [Public Notice 48](#)

<sup>3</sup> [Section 160 Finance Act 2008](#)

1.7 ESC F15 restricts the scope of a deferred estate duty charge for inheritance tax purposes in certain cases involving woodlands.

### **Impact of the proposed changes**

1.8 As the primary intention is to do no more than ensure that the existing concessionary tax treatment is put on a statutory basis, there should be no, or only a negligible, impact as a result of the proposed legislation.

### **Way forward**

1.9 The review by HMRC of its ESCs has identified the need to legislate the two concessions included in this technical consultation. As the review continues we expect further such consultations on other ESCs that appear to exceed the scope of HMRC's discretion. In each case, we will consult on the draft legislation to ensure it gives effect to the existing concessionary tax treatment.

1.10 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.

<b><u>ESCs to be legislated by order under section 160 FA 2008</u></b>	<b>Tax/Duty</b>	<b>Page</b>
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## 2. Text of ESCs and draft legislation

### ESC D40: Non-resident trusts: definition of participator

#### ESC text

Section 86 and Schedule 5, TCGA 1992 provide for a charge to capital gains tax on settlors of certain non or dual resident trusts arising on trust property which originated from the settlor. Paragraph 8 of the Schedule defines what property originates from the settlor and provides that property put into trust by certain companies is treated as originating from those who control the company in question. Paragraph 9 of the Schedule sets out conditions under which trusts created before 19 March 1991 may fall within the scope of the charge on the settlor, some of which may apply to companies controlled by defined persons.

Sections 87-88 charge UK resident beneficiaries to capital gains tax on certain capital payments received from non- or dual resident settlements. Section 96 is concerned with the application of these provisions to capital payments made by companies which are controlled by the trustees and capital payments received by certain non-resident companies.

For the purpose of determining who controls such companies ‘participator’ is defined in Section 417(1), ICTA 1988. In applying the provisions of paragraphs 2A(10), 8 and 9(11) of Schedule 5 and section 96 a beneficiary of the trust, by concession, is not regarded as a participator in the company solely because of his status as beneficiary.

#### Draft Legislation

##### **Non-resident or dual resident settlements: meaning of “participator”**

In section 96<sup>(4)</sup> of the Taxation of Chargeable Gains Act 1992 (payments by and to companies) in subsection (10) after paragraph (a) insert—

“(aa) a person is not to be regarded as a participator in a company controlled by the trustees of a settlement if the person has a share or interest in the capital or income of the company merely because of an interest which the person has under the settlement;”.

—a) Schedule 5<sup>(5)</sup> to the Taxation of Chargeable Gains Act 1992 is amended as follows.

In paragraph 2A (settlements created before 17<sup>th</sup> March 1998) after sub-paragraph (9) insert—

“(9A) For the purposes of sub-paragraphs (8) and (9) above a person is not to be regarded as a participator in a company controlled by the trustees of a settlement if the person has a share or interest

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<sup>(4)</sup> Section 96 of the Taxation of Chargeable Gains Act 1992 (c. 12) derived from section 82A of the Finance Act 1981 (c. 35). Section 82A was inserted in the Finance Act 1981 by section 91 of, and paragraph 4 of Schedule 18 to, the Finance Act 1991 (c. 31) and was later repealed and re-enacted as section 96 of the Taxation of Chargeable Gains Act 1992 by sections 289 and 290 of, and Schedule 12 to, that Act.

<sup>(5)</sup> Paragraph 2A of Schedule 5 was inserted by section 131 of, and paragraph 2 of Schedule 22 to, the Finance Act 1998 (c. 36). Sub-paragraph (10) of paragraph 2A was amended by section 1177 of, and paragraphs 225 and 266(1) and (3)(c) of Schedule 1 to, the Corporation Tax Act 2010 (c. 4). Other relevant amendments have been made to sub-paragraph (9) of paragraph 8 of Schedule 5 which was amended by section 1177 of, and paragraphs 225 and 266(1) and (4)(b) of Schedule 1 to, the Corporation Tax Act 2010 and sub-paragraph (11) of paragraph 9 of Schedule 5 which was amended by section 131 of, and paragraph 4 of Schedule 22 to, the Finance Act 1998 and section 1177 of, and paragraphs 225 and 266(1) and (5)(c) of Schedule 1 to, the Corporation Tax Act 2010.

in the capital or income of the company merely because of an interest which the person has under the settlement.”

In paragraph 8 (meaning of “originating”) after sub-paragraph (8) insert—

“(8A) But a person is not to be regarded as a participator in a company controlled by the trustees of a settlement if the person has a share or interest in the capital or income of the company merely because of an interest which the person has under the settlement.”

In paragraph 9 (qualifying settlements, and commencement) after sub-paragraph (10) insert—

“(10ZA) For the purposes of sub-paragraphs (9) and (10) above a person is not to be regarded as a participator in a company controlled by the trustees of a settlement if the person has a share or interest in the capital or income of the company merely because of an interest which the person has under the settlement.”

The amendments made by articles 2 and 3 have effect—

for corporation tax purposes, for accounting periods ending on or after 6<sup>th</sup> April 2015, and  
for capital gains tax purposes, for the tax year 2015-16 and subsequent tax years.

### **Explanation**

ESC D40 is concerned with the charge to CGT under sections 86 and 87 of the TCGA 1992 in respect of gains made by the trustees of a non-resident trust. Section 86 and Schedule 5 TCGA 1992 attribute the gains to a settlor of the trust if the settlor has an interest in the trust. Section 87 TCGA 1992 attributes the gains to beneficiaries who receive capital payments from the trustees.

For section 86, a person is treated as a settlor if trust property originates from them. This includes indirect provision through a company they control. If a company provides property to the trust Schedule 5 treats any person who controls the company as a settlor in relation to that property. For section 87, section 96 of TCGA 1992 treats a capital payment received by a non-resident close company as received by persons who control the company.

Schedule 5 and section 96 invoke the rules in sections 450 and 451 of the Corporation Tax Act 2010 (CTA 2010) to determine who controls a company. These include the rule that a person may have attributed to them all the rights and powers of their associates. The effect of these rules is that a beneficiary of a trust may be treated as controlling a company controlled by the trustees.

For the purposes of the CGT provisions the CTA 2010 attribution rules do not apply unless the person is also a participator in the company as defined in section 454 CTA 2010. This provision is of limited effect as a beneficiary may be treated as a participator in a company controlled by the trustees merely because of their status as beneficiary and not because they have any other interest in the company.

ESC D40 resolved this difficulty by not regarding a beneficiary of the trust as a participator in the company solely because of their status as a beneficiary.

This draft legislation is intended to achieve the same effect as ESC D40 by insertions into the parts of TCGA 1992 impacted by the ESC: section 96 and paragraphs 2A, 8 and 9 of Schedule 5 to TCGA 1992.

## ESC F15 - Woodlands

### ESC text

Paragraph 46 Schedule 19 Finance Act 1986 denies potentially exempt transfer treatment for inheritance tax purposes to all property comprised in a single transfer any part of which, however small, is woodlands subject to a deferred estate duty charge. By concession the scope of this paragraph will henceforth be restricted solely to that part of the value transferred which is attributable to the woodlands which are the subject of the deferred charge.

### Draft legislation

#### **Transitional provisions for woodlands subject to a deferred estate duty charge**

At the end of paragraph 46 of Schedule 19 to the Finance Act 1986<sup>(6)</sup> insert “to the extent that the value transferred is attributable to the land concerned.”.

The amendment made by article 2 has effect in relation to transfers of value made on or after 6th April 2015.

### Explanation

Under the former Estate Duty (ED) rules at section 61(5) of Finance (1909-10) Act 1910, as amended by section 9 of the Finance Act 1912, the tax charge on death for woodlands forming part of the estate excluded the value of standing timber. Instead, ED was deferred and charged on the net value of the proceeds ‘from the sale of timber, trees, or wood when felled or cut’. A charge also arose if the timber, trees or wood were sold standing.

When Capital Transfer Tax (CTT) replaced ED (so that there was now an immediate charge to tax on lifetime transfers as well as on death) provision was made that on the first transfer of value after CTT came in, the CTT charge would supersede the deferred ED charge (section 49(4) of Finance Act 1975). There was an exception where the property passed to the heir’s spouse, because that would be an exempt transfer, meaning there would be no compensatory CTT charge.

When Inheritance Tax (IHT) replaced CTT a lifetime transfer between individuals was no longer immediately chargeable but was a potentially exempt transfer (PET) which only became chargeable in the event of the donor’s death within 7 years. Provision was therefore made to ensure that any lifetime transfer of woodlands where there was a deferred ED charge would continue to be an immediately chargeable transfer.

However, the wording used to achieve the immediately chargeable transfer in Paragraph 46 of Schedule 19 to Finance Act 1986 (paragraph 46) meant that all property comprised in a single transfer of which any part, however small, consists of woodlands subject to a deferred ED charge is incapable of being a PET and so the whole transfer is subject to an immediate IHT charge.

The concession ensures that a compensatory charge only arises where it should and that a transfer that should otherwise be entitled to PET treatment enjoys that treatment

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<sup>(6)</sup> 1986 c. 41.



by restricting the operation of paragraph 46 to the part of the value transferred which is attributable to the woodlands subject to the deferred estate duty charge.

The draft legislation is intended to replicate the effect of the concession by an insertion into paragraph 46.

## 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 27 November 2014, by:

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

or by post to: Stephanie Allistone, HMRC Central Policy, Room 1C/06, 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.

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

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