



WITHDRAWAL OF EXTRA-STATUTORY CONCESSIONS

ICAEW welcomes the opportunity to comment on the technical note and call for evidence [*Withdrawal of extra-statutory concessions*](#) published by HMRC on 2 October 2014.

This response of 8 January 2014 has been prepared on behalf of ICAEW by the Tax Faculty, with the Healthcare Special Interest Group. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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INTRODUCTION

1. We welcome the opportunity to comment on the proposals in HMRC's technical note and call for evidence [Withdrawal of extra-statutory concessions](#) of 2 October 2014.
2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. The technical note covers three extra-statutory concessions, two for income tax, namely professional remuneration (EIM 03002) and sports testimonials (EIM 64120), and one for capital gains tax, namely roll-over into depreciating assets (ESC D45). We have no comments on sports testimonials.

MAJOR POINTS

4. We consider that the professional remuneration (EIM03002) concession should be retained, because it not only simplifies the calculation of tax and NIC liabilities on income from work done outside a sole trade/partnership/company where the income should be attributed to that business but also applies to a large number of individuals in a wide variety of professions, including doctors, dentists, solicitors, surveyors and accountants.
5. In the case of a partnership, the income from outside work is divided amongst the partners in accordance with agreed profit shares and liability to tax and NIC is computed on individual partners as partnership income (and *pari passu* for other types of business entities). Where the ESC is in operation, the individuals undertaking such outside work are allocated an NT code. Without the concession, finalising the tax positions of individuals who undertake outside work and their business partners would be far more complicated.
6. Although not part of this consultation, we also consider that similar extra-statutory concessions, for example that relating to the tax treatment of directors' fees received by partnerships and other companies (EIM02500 – ESC A37) which enables an individual in receipt of fees paid in respect of a directorship to treat that income as trading income of the sole trade or partnership or a company rather than as employment income, should be retained for similar reasons.
7. ESC D45 was introduced to ensure there was no charge to tax on the death of a trader where a gain had previously been rolled over into a depreciating asset. In our view this concession is still required and should be legislated rather than simply withdrawn.
8. If ESC D45 has to be withdrawn because it is *ultra vires* following *Wilkinson* then we believe that it needs to be legislated as there is considerable doubt that the point is covered by existing legislation. We understand that initially HMRC's view was that ESC D45 was not *ultra vires* and so did not need to be withdrawn. The view now seems to be that it is a concession and so has to be withdrawn but it is not required anyway as the position is covered by legislation. The technical note does not explain why HMRC believes that the ESC is no longer required and we are firmly of the opinion that the provisions of ESC D45 must be legislated to provide certainty that on death there is no charge to capital gains tax on rolled over depreciating assets.
9. Abolition without replacement of the professional remuneration (EIM03002) concession would conflict with tenets 3 (simplicity) and 4 (easy to collect and calculate) of our Ten Tenets for a Better Tax System, by which we benchmark the tax system, summarised in Appendix 1, and abolishing without replacing ESC 45 would conflict with tenet 2 (certainty).

SPECIFIC POINTS

PROFESSIONAL REMUNERATION (EIM03002)

10. This concession enables an individual to treat their employment income as trading income chargeable to income tax within their sole trader/partnership or corporation tax within their

company, and the individual payee is given an NT code to be applied by the payer of the remuneration.

11. The technical note says that Defra were the main users of the EIM03002 concession but following a changes in their procedures the concession is no longer needed and should be withdrawn.
12. Contrary to the statement in the technical note, we are aware of several groups of people of varying occupations who use the concession, and we therefore consider that it should be retained. Occupations that use the concession include:
 - General medical practitioners (GPs) – who work in community hospital clinics, hospices, etc,
 - Dentists – who work in hospital clinics,
 - Solicitors – who are also tribunal judges,
 - Surveyors – who also work for local councils,
 - Accountants and solicitors – who work as remunerated trustees and directors on limited company boards, and
 - Accountants – who act as auditors (the fee is technically income from an office).
13. Regarding healthcare, our members act for a large proportion of general medical practices in the UK and are of the view that the concessionary use of an NT tax code in cases where employment posts are held by GPs is extremely practical. It is used by a high number of those GPs. Therefore the assertion that it is only used by the veterinary industry is incorrect.
14. It is very common for GPs to have medical interests such as hospital clinics out of hours and hospice work carried out under an employment contract as well as income from their GP practice.
15. An application for an NT code will be made when a GP partner has employment income which is paid directly into their practice bank account and the income is pooled between the partners. This typically happens when the employment is exercised during partnership normal working hours and the earnings are not considered to belong to the one GP partner but the whole partnership and are shared in profit sharing ratios.
16. It is therefore appropriate to treat the income as self employed earnings rather than taxing them under PAYE. The negative effect of employee national insurance deductions can be counteracted with a deferment application but without an NT tax code there is no similar benefit for income tax purposes.
17. Where an NT code is not operated the PAYE tax deductions have to be accounted for in the GP's drawings and the need for this can be avoided by having the earnings paid gross. Where tax is deducted, the tax deductions then have to be entered on both the partnership and the GP's personal tax return in order to prevent the double taxation which would otherwise occur.
18. Within the medical sector this is a valued and well used practice. The concession is also used in the same way by dental practitioners, as well as solicitors, surveyors and accountants.
19. For GPs, the removal of the concession would also impact on the calculation of profits shown on the GPs superannuation certificate (GPs are responsible for the payment of both employees and employers superannuation contributions).
20. The superannuation certificate and its guidance notes are prepared by NHS Pensions and are used to calculate the GP's pensionable profits and pension contributions payable. There are currently two methods of calculating these profits, the first is the 'statutory method' and the second is the 'concessionary method'. The second method uses the concession which it is proposed will be withdrawn. This concessionary method has been in operation since 2004, when the NHS superannuation certificates were introduced. If the concession were withdrawn,

NHS Pensions would need to revise their guidance to reflect the change in tax method. The withdrawal of the concession could therefore have a detrimental impact on GPs pensions.

21. If the concession were removed, then the income from outside work would need to be shown on the individual's personal tax return and advisers would need to come up with a way to ensure that the tax and superannuation is shared fairly and correctly between all the partners who should benefit from the income.
22. For specialist medical advisers who understand the relationship between the figures on the tax return and those on the certificate it should be possible to find an equitable solution to prevent any impact on the GPs pensionable profits, although the fees charged by the adviser to calculate the best way to achieve this may be higher. This is an area that non-specialist advisers can easily get wrong and errors could result in incorrectly higher or lower pensionable pay figures for the GPs.

CGT ROLL-OVER INTO DEPRECIATING ASSETS (ESC D45)

23. When a trader dies his assets are disposed of so in general section 154(2)(a) Taxation of Chargeable Gains Act 1992 applies and as s62(1)(b) deems the assets not to be disposed of, no charge to capital gains tax arises. However, as the trader has ceased to use the asset for the purposes of his trade, s154(2)(b) is in point. If the event is not treated as a disposal under s154(a) but instead is a cessation of use for the purposes of a trade under s154(b), the exclusion in s62 does not apply and a capital gains tax charge is triggered. This uncertainty was why ESC D45 was introduced to make it clear that no charge arises where the occasion of charge is a death and s154(2)(b) applies.
24. We therefore consider that if ESC D45 is withdrawn, s154(2)(b) should be extended to make it clear that no charge applies where an asset ceases to be used in the trade on death, thereby replicating the effect of ESC D45.
25. The technical note says that HMRC has reviewed the technical position and takes the view that the concession is not necessary. We understand that HMRC has received legal advice that the concession is not required. If the withdrawal of ESC D45 goes ahead without being replaced by legislation, then for the avoidance of doubt and to obviate the need to spend time on inquiries following the death of traders, we recommend that the rationale for s154(2)(a) applying where an asset ceases to be used in a trade on death should be explained in HMRC's guidance.

PCB

APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see icaew.com/en/technical/tax/tax-faculty/-/media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)