



SPORTING TESTIMONIALS

ICAEW welcomes the opportunity to comment on the consultation document [Tax treatment of income from sporting testimonials – proposals for legislation](#) published by HMRC on 8 July 2015.

This response of 2 September 2015 has been prepared on behalf of ICAEW by the Tax Faculty. 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.

We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

On 26 August 2015 we attended a meeting with HMRC jointly with other professional bodies in which we were able to put forward some key comments and concerns and discuss aspects of the consultation document.

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MAJOR POINTS

Key point summary

1. We consider that as testimonial payments are in effect personal gifts from supporters and fans, they should continue to be treated as tax-free in the hands of the sportsman unless entitlement arises under a clause in the sportsman's employment contract. As HMRC has received legal advice that the employee benefit in kind (BiK) legislation and disguised remuneration legislation could be interpreted as treating testimonial payments as employment income even when they are not paid under the employment contract, and HMRC feels that following the *Wilkinson* case it cannot continue to apply its policy of pragmatism in the collection of tax described in EIM64120, and we do not believe that Parliament intended testimonials to be caught under either set of legislation, we recommend that the relevant law be amended to make it clear that testimonial payments are not employment income.

General comments

2. The original concept of the tax-free testimonial was to reward players who often earned very little from their career and to allow fans to 'contribute' to a pot to give them the means to do something when they retired from the professional game. The testimonial is today still hugely valuable for those in the lower echelons of their sport and can make a real difference to their future – particularly when the end of a sporting career is reached so young, compared to other careers. Having devoted their lives to date to a particular sport, a typical sportsman may need to 'buy some time' to retrain prior to finding gainful employment elsewhere. They may also need over the remainder of their lifetimes to deal with the effect of injuries, having lost any club-provided private medical insurance at retirement. Cash raised in a testimonial (either at retirement or previously) therefore offers a much-needed buffer for the future. Whilst the testimonial is perhaps a 'unique' thing for sportsmen, so is the set of circumstances which has given rise to them.
3. We therefore find it odd that HMRC is suggesting that what are in effect personal gifts from fans should be treated as subject to income tax when they have nothing to do with the employment contract, and the sportsman provides no personal service to the donor. HMRC has for many years, on the back of Court of Appeal and House of Lords judgments, correctly accepted that certain receipts from testimonials should not be taxable.
4. We can understand why Part 7A ITEPA 2003 might be thought to create a tax charge, but the disguised remuneration rules were clearly intended to tax payments made indirectly by an employer as a reward for carrying out the duties, not to catch gifts given freely by unconnected third parties who appreciate what the sportsman has achieved but have no legal or moral obligation to make any payments at all. Part 7A should have no application to such gifts, but since the point was not even in contemplation when Part 7A was drafted, it is understandable that the wording was not tight enough to exclude the possibility of personal gifts being caught by accident. The opportunity should be taken to rectify that oversight by excluding ex gratia payments by unconnected third parties from the scope of 'relevant third persons' in s 554A(7).
5. We agree that such receipts are taxable where the employee has a right to a testimonial in his employment contract, so that the payments are clearly 'from' the contract of employment.
6. However, where this is not the case, as a matter of law they are not taxable as employment income under the main legislative earnings charging provisions as tested in the courts (eg *Hochstrasser v Mayes* [1959] UKHL TC 38 673 and *Wicks v Firth* HL 1982, 56 TC 318). Furthermore, we believe that, although it can be argued (as in the consultation document which we understand is based on legal advice received by HMRC) that the wording of the law does not put the matter beyond doubt, we believe that Parliament did not intend a charge to tax to arise on testimonials under the benefits in kind (BiK) legislation or the disguised remuneration legislation.

7. We feel that it is right that as a matter of policy that the tax-free treatment of non-contractual testimonials should continue. HMRC has received legal advice on the application of the BiK and disguised remuneration legislation to testimonial payments which differs from our and other representative bodies' views. HMRC has said that following *R (oao Wilkinson) v CIR* HL 2005, 77 TC 78 it is precluded from continuing to apply its policy of pragmatism in the collection of tax described in [EIM64120](#). We therefore recommend that the BiK and disguised remuneration legislation should be amended (preferably following further consultation) to put beyond doubt that testimonial receipts are not employment income where a committee is formed, other than by the employer, to raise money to enable spectators and fans to make gifts to show their appreciation of the sportsman.

RESPONSES TO SPECIFIC QUESTIONS

Q1. Should the government introduce an exempt amount which is not subject to tax or NICs?

8. This question seems to assume that all testimonials are taxable as employment income, which as noted above we do not consider to be the case, nor to be a fair and reasonable policy given that testimonials are gifts from fans and other supporters.
9. However, if in a particular case the facts and circumstances of the testimonial render the payments to the sportsman taxable as employment income, then the payments should be treated for tax in the same way as other employment income. If it is employment income then the termination payments provisions at s401 ITEPA 2003 could apply, if appropriate.
10. If government decides as a matter of policy that testimonials should henceforth be treated as taxable in all circumstances, which we think would be retrograde, then we believe that there should be an exempt amount, which could be the same figure as the current entrepreneurs' relief threshold. There could also be other conditions, such as the sportsman having been at the club for a certain number of years, say ten, or the exemption applying only to one testimonial in a set period, say ten years. However, all this would add complications contrary to our Ten Tenets for a Better Tax System (see Appendix 1), and would discourage people from arranging testimonials.
11. As to NIC, potentially, if testimonials were employment income, liability to secondary NIC could lie with the club, rather than with the organising committee, which would lead to a mismatch.
12. We should welcome confirmation that benefit year proceeds still fall under the NIC exemption for gratuities not arranged by the employer.
13. If the public realised that part of what they donate is taken in tax or NIC, their support would evaporate.

Q2. If you consider that a tax and NICs free amount should be introduced, what level do you think that amount should be and why?

14. Please see answer to Q1.

Q3. Should any exemption apply to each sequence of sporting testimonials or should it be a lifetime exemption?

15. Please see answer to Q1.

Q4. Where a series of matches straddle more than one tax year do you agree there should be a single exemption?

16. Please see answer to Q1.

Q5. Do you agree that there should be an upper limit and if not, why not?

17. Please see answer to Q1.

Q6. If you agree there should be an upper limit, what amount should the limit be set at and why?

18. Please see answer to Q1.

Q7. If you agree there should be an upper limit, do you favour an automatic or a tapering exclusion?

19. Please see answer to Q1.

Q8. Do you agree that concerns about double taxation would be alleviated if the government introduced legislation which deemed an independent testimonial committee to be the legal employer for the purposes of the sporting testimonial?

20. Please see answer to Q1. Making the committee the legal employer would mean that the members of the committee would personally be taking on responsibility for PAYE obligations and employee/employer liability. This would discourage anyone from serving on such a committee, and would most likely mean that the opportunity for fans and supporters to demonstrate their appreciation by way of a testimonial for even the most deserving sportsman would cease.

Q9. Are there other options for reform which you think the government ought to consider?

21. Please see answers to Q1 and Q9. If testimonial payments were to be treated as employment income, then the committee would have to account for PAYE on payment(s) to the sportsman. We should welcome confirmation that if sporting testimonials are taxable under any new rules payments to the sportsman by the organising committee treated as earnings of the sportsman would be deductible for corporation tax, so that there is no double taxation.

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 via <http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax>).