



# ICAEW REPRESENTATION 149/16

## TAX REPRESENTATION

### TERMINATION PAYMENTS - SIMPLIFICATION

ICAEW welcomes the opportunity to comment on the consultation document [Simplification of the tax and national insurance treatment of termination payments: government response and consultation on draft legislation](#) published by HMRC and HM Treasury on 10 August 2016.

The timing of this consultation document, issued in a similar time frame to about thirty other papers seeking comments, has restricted the time we have been able to spend on this response.

This response of 7 October 2016 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.

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## GENERAL COMMENTS

1. Whilst we are pleased to see steps being taken to align tax and NIC rules on termination payments, we are very disappointed that there is no real simplification of taxation and NIC taking place, as distinct from changing the rules. Indeed there is even a new calculation of a notional sum in some cases which adds to the complexity. As such we are concerned that promises of simplification are not being put into practice.
2. Paragraph 2 of Part 1 of the consultation document explains that three of the aims of the proposals are that the rules should:
  - continue to provide support to those who lose their job;
  - provide certainty for employees and employers; and
  - be simple.
3. Furthermore, paragraph 1 of Part 2 provides the following criteria:
  - simplicity: the system must be simpler for employers and employees to understand;
  - clarity: the system must be clearer and therefore provide more certainty for employees about the tax and NICs treatment to avoid additional distress at a difficult time; and
  - administrative simplicity: for both employers and HMRC;
4. All these criteria chime with our *Ten Tenets for a Better Tax System* summarised in Appendix 1.
5. However, the draft legislation does not meet these criteria. The proposals are extremely complicated – indeed, considerably more complicated than the current system.
6. Elsewhere in the condoc (Part 2D, paragraph 24) a criticism levelled at foreign service relief is that “some employers do not apply it even when employees meet the criteria”.
7. We believe that an unintended consequence of the complexity of the new proposals is that many employers will not apply any relief but just operate PAYE income tax and NIC in full on the total of any termination payments and leave the employee to claim relief on their self-assessment tax return or as a separate claim if not in self-assessment. There will be added complications if NIC refunds are sought. This will not only defeat the government’s objective of providing support to those who lose their job but create additional work for HMRC.

## SPECIFIC COMMENTS

8. Abolishing foreign service relief is likely to create taxable liabilities because the absence of a source for termination payments may result in double tax treaties not being able to be applied.
9. The new payment in lieu of notice rules and damages rules will be more complex than previously as they replace established practice and case law, eg under the new rules ex-employees will be taxed up to the end of their notice period on employer-provided benefits-in-kind (BiK) for which they are being given compensation for losing by leaving early.
10. “Employer” NIC will be imposed on payments over £30k. We should welcome clarification of what sort of NIC this will be – a secondary Class 1 liability without a primary liability, Class 1A, or a new Class (1C)?
11. We should also welcome clarification of the expected exchequer impact of withdrawing the exemptions and imposing NIC.

## RESPONSES TO CONSULTATION QUESTIONS

**Q1. Is it appropriate to use a period of 12 weeks to calculate the cash and benefits element of the ‘post-employment notice income’? Are there any circumstances where this could lead to unfair outcomes?**

12. These proposals are over complicated and we believe practically unworkable. They do not accord with our *Ten Tenets for a Better Tax System*, in particular the ones which require measures to be simple, understandable and clear in their objectives and that a person's tax liability should be easy to calculate and straightforward and cheap to collect. They also do not accord with the aims outlined in the consultation document at paragraph 1 of Part 2 (see above).
13. Better solutions would be (in our order of preference) to:
- not have a deemed notice period,
  - base post post-employment notice income on base salary, and
  - base post post-employment notice income on fixed pay.
14. We would also suggest that, given the complexity of this legislation and as these proposals developed from suggestions made by the Office of Tax Simplification (OTS), in future the OTS looks at all draft legislation and particularly at draft legislation that has arisen from their suggestions.
15. Many employers will avoid the complexity of the legislation by subjecting payments in full to PAYE income tax and NIC to avoid the risk of having a PAYE failure. The ex-employee will need to work out the relief that is due and claim a refund of tax and NIC from HMRC. This seems to go against the government's objective of providing support to those who lose their job. It will also create extra work for HMRC.
16. Pulling all the information together in time for payroll deadlines will be very difficult for some employers. So will explaining to an employee that they are taxable on a car benefit in respect of a car that they did not have.

**Q2. We have given bonus a wide meaning in this legislation. Is this appropriate?**

17. No, it is not appropriate and is too wide and over complicated. Estimating what an employee could reasonably expect to receive is going to be very difficult. Explaining to employees that they are being taxed on something that they had no right to receive and how the tax and NIC has been calculated will also be difficult for the employer. Again, employers may well decide instead to subject the whole payment to PAYE income tax and NIC and leave the employee to work out and claim any relief due, which seems to go against the government's objective of providing support to those who lose their job.
18. We should welcome clarification of whether or not amendments will need to be made if future payments that are made are not in line with the original estimations. How will an employer evidence an estimate in response to an employer compliance review at a later date?

**Q3. We have used a wide interpretation of 'arrangements' in the anti-avoidance provision at s402D(9). Is this sufficient?**

19. The interpretation of arrangements is very wide and is more than sufficient.

**Q4. We are considering what other anti-avoidance provisions may be needed in the legislation. Are there other aspects of the policy might require anti-avoidance safeguards and how should these be targeted?**

20. There is no need for more legislation. Legislation is not a substitute for enforcement.

**Q5. To comply with this draft legislation, are there any additional pieces of information that employers and payroll managers would need to identify beyond what they already have available?**

21. We suggest that a more appropriate question would say "... beyond what they have readily available?". Obtaining the information from different departments, different group companies,

different countries, etc will make this very time consuming. As noted above, many employers are likely to just withhold PAYE income tax on the full amount of payments and then leave the employee to resolve the amount of relief due with and reclaim the overpaid tax and NIC from HMRC.

**Q6. Are there other aspects of the termination payments legislation that the government should address while we have this opportunity?**

- 22.** The draft legislation is incomplete in that it does not explain how the issues that arise because of the abolition of foreign service relief are to be dealt with.
- 23.** ITEPA 2003 treats termination payments as “Specific Employment Income”. Sourcing principles do not apply to Specific Employment Income, in contrast to “General Earnings”. Consequently the consultation document does not explain how to deal with situations where there is double taxation. The OECD commentary guidance applies only in respect of treaty countries and then not in respect of state and city taxes. We should welcome clarification of how a payment to a non-resident should be treated if there will be no territorial limitation on the taxation of the payment.

## 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>).