



ICAEW REPRESENTATION 107/16

TAX REPRESENTATION

EMPLOYEE SHARE SCHEMES: NIC ELECTION

ICAEW welcomes the opportunity to comment on the consultation document [*Employee share schemes: NIC elections*](#) published by HMRC on 20 April 2016.

This response of 13 July 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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MAJOR POINTS

Key point summary

1. We consider that the ability to make NIC elections under para 3B of Schedule 1 to the Social Security (Contributions & Benefits) Act 1992 (SSCBA 1992) should be retained, because:
 - NIC elections provide certainty to all parties that the NIC liability is that of the employee. Certainty, which is one of our *Ten Tenets for a Better Tax System* (summarised in Appendix 1), was the original rationale for introducing the right to enter into NIC elections in 2000;
 - three elections per week is not insignificant and this number justifies retaining the right to enter into elections, especially when coupled with the relatively short 1½ hours average approval time per election by HMRC which seems a small price to pay for the benefit of certainty for all parties provided by elections;
 - we are not aware of changes to accounting rules since 1990 that would obviate the need to continue to allow NIC elections; and
 - if NIC elections were abolished then to provide equivalent protection to employers HMRC would need to be party to NIC agreements between employees and employers which is likely to involve HMRC spending more time, eg getting legal advice, than simply approving elections.

General comments

2. We believe that the ability for employers and employees to enter into NIC elections under para 3B of Schedule 1 to SSCBA 1992 should be retained. A NIC election provides certainty to all parties that the NIC liability is that of the employee. Certainty is one of our *Ten Tenets for a Better Tax System*.
3. Indeed, the purpose of introducing the election was to give certainty to business. When para 3B was introduced, the Inland Revenue press release dated 19 May 2000 said:

“Companies with very volatile share prices have expressed concern that their exposure to unpredictable NICs liability on unapproved share options could endanger their investment strategies, damage their future growth by deterring investors or even make them insolvent”.

Without the ability to make a joint election to pass the liability to the employee, there was a huge deterrent, particularly to IT start-ups, against granting shares to employees. Accounting issues (cited in para 2.4 of the condoc) were secondary. The real problem for employers – as the Inland Revenue recognised – was the deterrent effect of a possible huge unquantifiable future liability.
4. We consider that the reason cited by the former Inland Revenue for introducing the NIC election remains as valid today as it was in 2000 and would welcome clarification of whether, and if so how, HMRC thinks that things have changed in this respect.

RESPONSES TO SPECIFIC QUESTIONS

Question 1 – are there any continuing accounting or other advantages to companies of NIC elections as opposed to NIC agreements? If so, what are they?

5. Despite what is suggested in para 2.4 of the condoc, we are not aware of changes to accounting rules since 1990 that would obviate the need to continue to allow NIC elections, and we should welcome clarification of the changes that HMRC has in mind here.
6. Para 3B provides for an election to be made by the employer and employee and approved by HMRC whereas para 3A prohibits an employer from deducting or recovering by other means secondary Class 1 NIC from the employee save in prescribed circumstances. Thus, the two paragraphs are drafted from opposite viewpoints: para 3B to protect the employer and para 3A to protect the employee. If there is a need to enforce an agreement or an election, the divergent approaches of the two paragraphs will affect the way in which the courts interpret the respective provisions.

7. Another advantage for an employer of an election over an agreement is that where an election is entered into, the employee will know that if he does not settle the liability he will be facing the might of HMRC rather than just his employer.
8. If elections are abolished, then agreements will need to be entered into. For an agreement to provide the same protection for employers as an election, HMRC would have to be a party to the agreement. Unless HMRC provides a standard agreement template, HMRC's participation in such an agreement is likely to necessitate HMRC's taking legal advice, which is likely to involve more work for HMRC than simply approving an election.
9. An election under para 3B means that the liability transfers to the employee, so, if a liability is not settled, HMRC knows to pursue the employee in the first instance. In the case of an agreement under para 3A, unless the agreement includes HMRC as a party, the employer is still liable for any unpaid liability. This means that in the absence of payment HMRC will presumably pursue the employer in the first instance before being made aware that the agreement provides otherwise, which will waste time. If HMRC is successful in getting the employer to pay the NIC, the employer will need to take recovery action against the employee. Although employers usually try to ensure that an amount to cover NIC is deducted from the sale proceeds so the liability can be met whoever is responsible, this may not always be possible.

Question 2 – are secondary Class 1 NIC liabilities in connection with securities options usually handled through the payroll?

10. Yes, secondary Class 1 NIC is usually handled through payroll.

Question 3 – Should the ability to make NIC elections be removed?

11. No; we believe that the ability to make NIC elections should be continued.

Question 4 – What are the benefits in retaining a NICs agreement only? Would this create any problems for the employer and/or employee?

12. Apart from obviating the need for HMRC to write software to convert into an online process what the Department currently runs as a paper-based operation, we cannot see any benefits in abolishing the NIC election and retaining the NIC agreement only.

Question 5 – Do you have any comments on the assessment of impacts set out in Chapter 3 of this document, and in particular the equality impacts?

13. We note that the impact assessment says that abolishing NIC elections would save HMRC the time taken to review three NIC elections per week, equating to approximately 225 person hours per year.
14. We recognise that HMRC is under pressure to save resources, but from a customer viewpoint three elections per week is not insignificant and we feel that this number justifies retaining the ability to make an election, especially when coupled with the relatively short 1½ hours average approval time per election, which seems a small price to pay for the benefit of certainty provided by an election.

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>).