



ICAEW REPRESENTATION 156/16

TAX REPRESENTATION

SALARY SACRIFICE FOR THE PROVISION OF BENEFITS IN KIND

ICAEW welcomes the opportunity to comment on the consultation document [Salary sacrifice for the provision of benefits in kind](#) published by HMRC on 10 August 2016.

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

This response of 19 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.

On 5 September 2016 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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ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 145,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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GENERAL COMMENTS

1. We recommend that the proposals be dropped. They will make employment more difficult at a time when the government is trying to attract investment into UK business. They are fundamentally unfair, in that two employees doing the same job in the same business could be taxed on different bases. They will complicate the taxation of earnings for employers, employees and HMRC. They will force employers to withdraw flexible benefits schemes and simply provide tax-free or tax-advantaged benefits instead, without options, so as to minimise the cost of paying staff, without increasing materially the Exchequer revenue.
2. We are puzzled by the approach, which contradicts government policy in certain areas. If it is government policy to charge no tax on, eg, a mobile phone, or workplace parking, or job-related accommodation, or a works bus, why should this apply only to those who have no choice about it? If there is a policy to incentivise the use of ever greener vehicles, why block it with this proposed change?
3. We recommend that the logic should be re-examined and a different approach found to the perceived loss of revenue from salary sacrifice. The major 'drain' from salary sacrifice is in the area of pensions, and we welcome the fact that this is to remain unchanged, because every incentive is needed to encourage more pension saving. The other problem area is childcare vouchers, but this will be closed anyway in 2017/18 as parents opt for tax-free childcare, which gives them much better tax relief but offers no opportunity for salary sacrifice. We question whether the extra expected revenue from changing the basis of taxing flexible benefits is worth the associated upheaval and complexity.
4. Furthermore, if the proposals are proceeded with, then implementation needs to be delayed until at least April 2020 to give time to assimilate the new rules (which must not be a moving target), develop robust IT (which ideally needs at least eighteen months from Royal Assent of the primary legislation), new processes and comprehensive guidance and the renegotiation of contracts with employees and suppliers of benefits-in-kind (BiKs). We urge that an announcement be made to this effect quickly, ie before the Autumn Statement.
5. The proposals in the consultation document appear to contradict established government policy and if they are taken forward, their complexity will impose increased tax/NIC costs and compliance burdens on businesses. They are also contrary to several of our *Ten Tenets for a Better Tax System* summarized in Appendix 1, notably being other than simple, easy to collect and calculate, properly targeted, constant, subject to proper consultation, and competitive.
6. Flexible benefits and cash alternatives are an established part of the employment remuneration scene in the UK and have been in place for more than 25 years. If the proposals are introduced from April 2017, then in short order employment contracts will need to be rewritten, which particularly in the public sector where workplace parking and medical benefits via salary sacrifice are prevalent will necessitate negotiations with unions, contracts with BiK providers will need to be rewritten, employers will need to change their software and HR processes and inform staff, and IT will need to be redesigned, written, built, tested and operators trained. It is too now late to do this satisfactorily by April 2017, and to implement from that date would both be contrary to the recommendations in Lord Carter of Coles' March 2006 [*Review of HMRC Online Services*](#) and lead to widespread unintentional non-compliance because business systems simply cannot react that quickly to such a fundamental change.
7. Furthermore, many flexible benefits schemes operate on a calendar year basis, so decisions are likely already to have been made by employers as to what benefits-in-kind will be provided and how they will be priced from January 2017; many employees are currently being invited to choose but because of this consultation cannot make an informed decision. Other employees will be making 'lifestyle choices' and again are unable to do so on an informed basis.
8. The proposals appear to contradict established government policy, which has long been to influence taxpayer behaviour by allowing a generous NIC regime for BiK (when compared with

cash remuneration) to boost sectors of the economy involving products and services which can conveniently be used by employers to incentivise employees, and, in respect of cars, to encourage employers to provide environmentally-friendly cars to their employees. However the consultation document proposals will not differentiate between cars that are 'green' and those that are 'gas guzzlers', which seems to indicate an inconsistent approach to this matter by government considering that HM Treasury is currently **consulting** on how to encourage employers to provide employees with ultra-low emission company cars.

9. The Foreword and para 3.1 of the consultation document express the wish to 'level the playing field' between employers who offer salary sacrifice and those who do not. Under the proposals, if two employees are provided with the same salary and the same BiK but one receives their BiK under salary sacrifice and the other does not, they and their employers will be subject to different tax and NIC bills. For example, where a remuneration package negotiation is undertaken during recruitment it cannot be said to be a sacrifice as the parties will settle on a cash amount plus additional benefits. However, if this takes place during employment it is deemed to be a sacrifice so the outcome is very different. The proposals in the consultation document will not level the playing field; instead they will introduce unfairness. Nor will they simplify the tax system.
10. Presently, an employee who is entitled to a cash alternative or has access to a 'flex ben' scheme (collectively referred to here as salary sacrifice) and who opts for an employer-provided BiK instead of cash remuneration will be in receipt of cash plus a BiK, and this final outcome is what income tax and Class 1A NIC are charged on. However, under the proposals, a BiK obtained via salary sacrifice will be valued at the higher of the amount of salary sacrificed and the cash equivalent of the BiK even if currently exempt. The employer will have to do more work than presently when accounting for the BiK to HMRC as they will need to know for each employee whether or not any BiK is provided via salary sacrifice and, if so, undertake two calculations, to compare the salary sacrificed with the value of the BiK, including where a BiK is presently exempt but is not exempted under the new rules.
11. Businesses need certainty, and change costs time and money and not fully specifying changes and not producing timely guidance all add to the uncertainty and cost.
12. In the past few years, employers have had imposed on them PAYE in real time (which has still not bedded down), and from April 2016 new rules for expenses for which complete guidance easily accessible to the average employer is still awaited. A first instalment has been published very late in HMRC's October 2016 Employer Bulletin, but the CWG2, 480 and 490 currently available to employers still do not cover the rules that have been in force for more than six months. All but a tiny number of employers still do not know that all expense advances are now subject to NIC, even if expenses are subsequently incurred, because of a rule that was introduced on 6 April 2016 but has not been publicised in any way. If HMRC cannot issue timely guidance on changes that were a year in the pipeline, how is it sensible for employers – many of which have overseas IT systems – to be told to completely change their flex schemes, based on a rough template rather than detailed rules, at six months' notice? Voluntary payrolling of BiK (in respect of which the law is still being added to) was also introduced in April 2016, with so little notice that two-thirds of employers formerly payrolling BIKs voluntarily have not registered to continue payrolling under the new regime because they were unable to comply with the new requirements. Big employers are also faced in April 2017 with the new apprenticeship levy, for which the law and proper IT specifications have still not been finalised. As well as these salary sacrifice proposals, there is a raft of other payroll and BiK changes proposed in consultation documents published alongside the salary sacrifice consultation document.
13. Business confidence has been ebbing and flowing since the Brexit referendum result. On the international scene, proposals such as in the consultation document (even if not taken forward) when considered in the light of other recent, prospective and proposed changes make

internationally mobile businesses wonder whether the UK is becoming a more 'difficult' location in which to employ staff and run a business.

14. We suggest that if the government is concerned about certain BiKs being provided by salary sacrifice then it targets them specifically.

SPECIFIC COMMENT

15. The examples at paragraphs 2.1 and 2.2 are misleading as they do not mention that income tax and Class 1A NIC will be charged on the BiK.

RESPONSES TO CONSULTATION QUESTIONS

Chapter 3: Proposed approach

Question 1: Alongside annual leave, are there any other salary sacrifice arrangements that the government should be made aware of that do not strictly involve receipt of a benefit?

16. There is a benefit to employees not just from annual leave but for any leave, eg, time off to deal with family matters that is required by legislation, flexible hours, compassionate leave, and even zero hours contracts for those workers who like flexibility.

Question 2: What are the likely impacts on employers and employees of limiting the scope of BiKs that can obtain tax advantages when offered through salary sacrifice arrangements?

17. Employees and employers will be unable to decide on their benefit packages in an informed way due to the uncertainty caused by the lack of draft legislation and the April 2017 implementation date.
18. The car research & development and manufacturing sectors are likely to suffer the most from these proposals as there is likely to be a drop in demand for new and greener cars owing to the extra tax and NIC costs imposed on employers and employees. This will result in older and less efficient cars remaining on the roads for longer, which (as noted in the General Comments above and in the light of HM Treasury's concurrent consultation on [Company car tax for ultra-low emission cars](#)) seems contrary to government policy.
19. There is also the possibility that the proposed change will tip the balance in favour of employees changing jobs more frequently, pushing up recruitment and training costs for no good reason. A new recruit will be able to choose how to structure a remuneration package without the new rules impacting, as there can be no 'sacrifice' when there is no entitlement. In contrast, an existing employee who is offered the chance to change his or her remuneration structure will be taxed on a different basis, with even BiKs that would otherwise be tax-free (parking near work, mobile phones, etc) becoming taxable simply because of the availability of choice. If that employee has the option of moving to another job where the parking and mobile phone can be taken tax-free because there is no sacrifice, there could be a big incentive to move on, to the detriment of both old and new employers – both will incur recruitment and training costs unnecessarily.

Question 3: Are these impacts different, or are there different considerations, for large/small businesses or particular business sectors?

20. The proposals will probably have a greater impact on larger employers as they are more likely to have flexible benefit schemes. However, the proposals are likely to hit all sectors.

21. We would mention in particular the impact on the public sector, which is severely constrained in terms of total salary packages. The public sector has made significant use of salary sacrifice for workplace parking which is one of the few benefits that sites such as local authorities and hospitals have at their disposal. If these proposals go ahead, employees can still save NIC on the workplace parking sacrifice but will find there is no benefit from a tax perspective. They may therefore wish not to participate in the sacrifice any longer. The employer will still have to maintain the car park as previously with no contribution from the employee. If the employee does wish to continue sacrifice in order to make NIC savings, the employer will find that they are simply substituting Class 1 NIC for Class 1A. The likely outcome for employees is that workplace parking will have to be paid for out of net pay at an increased cost for the employees, possibly leading to industrial relations problems.

Question 4: Are the impacts different for particular BiKs?

22. Yes, because, for example, different benefits are provided for different periods. Medical benefit is typically provided on an annual basis, but cars are provided for three or four years. Taxpayers who have a company car will be hit with a new charge from 6 April 2017. This seems against the principle explained in HM Treasury's consultation document [Company car tax for ultra-low emission cars](#) which states at paragraph 3.1 that:

'The government is aware of the strong demand from key stakeholders for predictability in the company car tax system. This is why the government committed to announcing rates three years in advance and has set out the rates for all cars up to the fiscal year 2019-20.'

23. The impact of the change is also proportionately greater for the greener (less CO₂ and consequently smaller BiK charge) cars, which seems to go against the government's policy of encouraging the use of such cars.

Question 5: Do you think that the government needs to take any steps to mitigate any negative consequences of this change for employees and employers, such as those who may be locked into salary sacrifice arrangements? If responding, it would be helpful to understand specific examples and factors the government should take into consideration.

24. As noted in our General Comments, we recommend that the proposals be dropped and that the government makes an announcement quickly to this effect, ie before the Autumn Statement.

25. If the proposals are implemented, the start date should be deferral until at least April 2020, to give time for contracts to be renegotiated and IT, processes and guidance to be rewritten.

26. The government should also consider exempting company cars from this proposal in view of the detrimental impact on the use of green cars these proposals will have.

Affected legislation and BiKs which would retain their current tax treatment under salary sacrifice

Question 6: Do you consider that the approach proposed for legislation would work as intended?

27. As noted in the consultation document, certain BiK are presently exempt from tax and NIC. It seems inconsistent with existing government policy that, under the proposals, whether or not a BiK is exempt will in future depend on whether or not it is provided to the employee under salary sacrifice. This sends mixed messages and is likely to be confusing for employers and employees. It is also blatantly unfair for two colleagues to be taxed at different levels on the same BiK just because their contracts were negotiated at different times or in different ways.

Question 7: Are there any consequences the government has not considered in proposing to legislate in this way?

28. Please see our General Comments. The government seems not to have considered the impact on UK plc within the wider economic context when framing these proposals, nor the contradiction with its stated policy of making the tax system fairer, so that all who earn the same pay the same tax.

Implementation

Question 8: Would this timeline present employers with difficulty, for example with updating payroll software?

29. Please see our General Comments. An implementation date of April 2017 will make it impossible for HMRC to provide comprehensive software specifications based on final law, which will make it extremely difficult for software developers (including HMRC's) to design, build, test and install robust software guaranteed to work first time and for operators to be trained. This is contrary to the recommendations in Lord Carter of Coles' March 2006 [*Review of HMRC Online Services*](#). Employers whose flexible benefits schemes run on a calendar year basis employers and employees choosing BiKs will already be making decisions in the dark owing to this consultation document. For those who are mid-way through a (typically) three or four year car contract, in practical terms it is too late to change.
30. In bigger companies it may take years to unwind BiK salary sacrifice arrangements which may have taken years to implement, particularly if union negotiations are required. They are also likely to have bespoke HR and payroll systems, possibly run by overseas providers in global enterprise resource planning systems, that will require rewriting, which will take time and cost a lot of money.
31. The Government should quickly announce a delay for further consultation.

Question 9: Are there any other changes that employers would need to make?

32. Employers will need to renegotiate terms with their BiK suppliers as well as employees. See also our General Comments above.

Compliance

Question 10: Are there any other compliance considerations which HMRC should be aware of?

33. In order realistically to enable employers to comply, HMRC needs to publish very clear guidance well in advance of the implementation date so employers have all the wherewithal to design compliant BiK packages and inform employees (unlike for the payroll/ BiK/ expenses measures that came into effect in April 2016 for which full guidance is still awaited). See also our General Comments.

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>).