ICAEW

REPRESENTATION 97/18

OPTIONAL REMUNERATION ARRANGEMENTS: CARS & VANS (CL1, F3B17-19)

Issued 24 August 2018

ICAEW welcomes the opportunity to respond to the consultation on draft Finance (No.3) Bill 2017-19 legislation: Clause 1: *Optional remuneration arrangements: arrangements for cars and vans* published by HMRC on 6 July 2018.

This response of 24 August 2018 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

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EXECUTIVE SUMMARY

1. This clause will impose unexpected costs on businesses and their employees. For this reason, and as new vehicles are normally kept by businesses for at least three years, we consider that vehicles acquired by employers under contracts entered into before the date the measure was announced, ie, 6 July 2018, should be excluded from these changes until the end of 2021/22.

2. The proposed draft clause itself needs amending to eliminate a tax charge that it introduces, for example, where emergency repairs to a company car or van are initially paid for or arranged by an employee and then met by the employer.

3. Where comments are invited on proposed legislation which will make substantial changes to existing legislation, as in this case, the government should publish the existing legislation incorporating the proposed amendments in track changes. Indeed, this would be good practice even where comments are not invited.

THE MEASURE

4. This clause is to address two mistakes in the optional remuneration arrangements (OpRA) rules. It introduces legislation to:

   - ensure that when a taxable car or van is provided through OpRA, the amount foregone, which is taken into account in working out the amount reportable for tax and NIC purposes, includes costs connected with the car or van (such as insurance) which are regarded as part of the benefit-in-kind under normal rules, and

   - adjust the value of any capital contribution towards a taxable car when the car is made available for only part of the tax year.

5. This clause has effect from 2019/20.

6. Unfortunately, we believe that the proposed clause introduces a new defect and itself needs amending.

TAXPAYERS IN EXISTING CONTRACTS - and - EMERGENCY REPAIRS

Our concerns

Taxpayers in existing contracts

7. Where vehicles with allowed private use are provided to employees under OpRA, this clause will impose unexpected increases in the tax and NIC charges on employees and employers respectively. The only way to avoid the charges in any particular case will be for the employer to dispose of the vehicle. This is likely to result in the employer receiving lower than expected proceeds if the vehicle is owned outright or suffering financial penalties if the vehicle was acquired under an ongoing contract. It could also upset the employer/employee relationship.

8. Many businesses which remunerate their employees using OpRA will have calculated and worked with their employees to help them to understand the financial implications of a company car or van where private use is allowed, explaining the option and consequences of making a capital contribution to obtain a better vehicle. Employers

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will have invested in vehicles in good faith on the basis of these calculations, together with comments from HMRC that this was the correct way to calculate the charges.

9. Many businesses acquire cars and vans on hire purchase or contract hire or leases rather than pay for them outright. The new clause introduces additional costs which will change the cost model on which the acquisition finance model was based, however it may not be financially viable for businesses which have bought new vehicles or which have entered into agreements with third parties, to return or sell on the vehicle for the first three years.

10. We welcome the fact that the clause is not retrospective, but we consider that imposing a charge on existing circumstances entered into in good faith and which may be costly to reverse is not in accordance with our *Ten Tenets for a Better Tax System* (summarized in Appendix 1), in particular Tenets 2: *Certain* and 6 *Constant*.

Emergency repairs

11. This draft clause will lead to a tax charge where, for example, emergency repairs are initially paid for or arranged by an employee and then met by the employer. This is because sub-section (6) of the proposed clause will disapply s239(1) and s239(2) ITEPA 2003 (which exempt from an income tax charge reimbursements by employers to employees for expenses they incur in connection with a company car or van).

Comment

12. Paragraph 13 of the Explanatory Note to this clause observes that neither of the mistakes being corrected by the current draft clause was identified during consultation on the original legislation. The mistakes in the original measure were due to the legislation being introduced with inadequate time allowed for proper consultation and discussion. The potential danger of this was explained to HMRC at that time. This area is complex and we note that there have also been two iterations in the discussions on this amending legislation; the first included omitting to deal with the interaction of OPRA with the payrolling of benefits. We welcome the opportunity for earlier and more frequent discussion on draft provisions, and hope that lessons are learnt and that future policy changes and legislation are given more time for consideration.

13. Our recommendation at the time was to delay the introduction of the OpRA provisions until 6 April 2018, which would have given HMRC time to make employers aware and ensure that official guidance, including P11D calculation worksheets, had been tested to ensure that all variants were covered. As it was, guidance was published only two weeks (20 March 2017) before the date from which employers had to implement the provisions, and for which legislation had still not been enacted (Royal Assent: 27 April 2017).

14. There was consultation and we were grateful to be involved, but in contrast to Tenet 7: *Consultation* of our *Ten Tenets for a Better Tax System*, comments from representatives were not taken into account. Our comments were in ICAEW REPs 156/16, 16/17 and 51/17 and at meetings in September 2016 and January 2017 where the topics that are the subject of the current draft clause were raised by representatives. At that time, the discussion went little further than HMRC noting that these were matters that needed to be considered and on which guidance would be provided in its *Employer Bulletin*.

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Our recommendations

Taxpayers in existing contracts

15. As new vehicles are normally kept by businesses for at least three years, we consider that there should be grandfathering until the end of 2021/22 for vehicles acquired under contracts entered into before the date that the measure was announced, ie, 6 July 2018.

Emergency repairs

16. The draft clause should be amended so that an employee is not penalised for paying for or for arranging emergency repairs. Sections 239(1) and (2) should continue to apply to OpRA cars and vans.

Suggested amendments

Taxpayers in existing contracts

17. In sub-section (7), after 'subsequent tax years' insert:

> 'save that for vehicles acquired by employers under contracts entered into before 6 July 2018 the amendments made by this clause have effect for 2022/23 and subsequent tax years.'.

Emergency repairs

18. Delete sub-section (6).

HELP US TO HELP YOU

Our concerns

19. We welcome the government making available draft legislation for technical comment in advance of publication of the Finance Bill.

20. However, the proposed legislation substantially amends existing legislation, and the consultation papers do not include amended versions with tracked changes of the existing legislation in sections 120A, 121A, 132A, 154A and 239 ITEPA 2003 which is to be changed.

21. Working out how the existing legislation will read if the proposed legislation is enacted is time consuming, and not supplying amended drafts with tracked changes of the current legislation when seeking comments on changes discourages many from responding to the consultation.

Our recommendation

22. Where proposed legislation will make substantial changes to existing legislation (as in this case), the published documentation should include the existing legislation amended in track changes to show how it will read if the proposed legislation is enacted.

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23. This would be good practice even when comments are not invited, and, we believe, would also be welcomed by MPs when considering Bills.

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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 https://goo.gl/x6UjJ5).

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