ICAEW

REPRESENTATION 16/18

TERMINATION PAYMENTS: GUIDANCE ON NEW TAX & NIC RULES

Issued 2 February 2018

TEXT OF LETTER SENT ON 2 FEBRUARY 2018 TO HMRC BY ICAEW TAX FACULTY

Internationally recognised as a source of expertise, ICAEW Tax 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.

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We are concerned that businesses and advisers are unclear about how the new termination payment regime works. Our members are now being asked to advise on terminations which may be impacted by the new rules and, as explained below, it is not always clear when the new law applies. We, therefore, recommend that HMRC publishes clear and complete guidance as a matter of urgency on the new termination payment tax and NIC provisions.

Despite the government's original intention in 2016 that there should be a long lead time for businesses to prepare for the new termination payment rules, with all changes having been consulted on and legislation enacted long before the intended go-live date of April 2018 to give HMRC time to produce payroll IT specifications and guidance well in advance and businesses to prepare, two months before go-live employers are faced with:

- legislation which has not been fully consulted on going through parliament after the date on which it came into force (F2B17-19) or not even having been introduced (no NICB or NIC SI) so some NIC measures will be introduced in April 2018 and others in April 2019, and
- no guidance other than technical and similar notes published alongside budget and other announcements.

We suggest that HMRC's guidance for employers should cover in particular the following:

a) The timing of the new rules commencing, with examples, clarifying how the rules are intended to apply at different times, ie, up to and after 13 September 2017, 6 April 2018 and 6 April 2019, especially where notice periods straddle these dates. The amendments to termination payments in section 5 F2A17 are expressed as having effect from the tax year 2018/19. Does this refer to terminations and changes on or after 6 April 2018, or payments made on or after 6 April 2018, or both?

   We would mention that the changes to FSR in F2B17-19 are expressed in clause 10(5) as applying to terminations or changes on or after 6 April 2018 and payments received after 13 September 2017. As this legislation is not yet in force, we should welcome confirmation that employers who apply the legislation that is currently in force will not be liable to interest and penalties on tax and NIC found with the benefit of hindsight to be underpaid under the new rules.

b) How the new rules for post-employment notice period earnings will work, with examples.

c) How employers should assess employees' residence status in-year for termination payments given that residence under the statutory residence test can only be ascertained for sure after the tax year has ended, and confirmation that employers who take a view in-year on an employee's residence status which turns out to be incorrect will be not liable to interest and penalties on tax and NIC found to be underpaid with the benefit of hindsight.

d) Confirmation that termination payments subject to employer-only NIC will not be included within the pay bill for apprenticeship (AL) purposes, i.e. will not also be subject to the apprenticeship levy.

e) Guidance on the various NIC charges on termination payments and from when they will apply. In other words include the April 2019 changes.

As a point of policy, we question calling the employer-only NIC on termination payments "Class 1A". This is because we anticipate that using the same nomenclature as NIC on employer-provided benefits-in-kind (BiK) for NIC on termination payments that will have different reporting processes (ie, via payroll rather than form P11D(b)) and payment due

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dates (alongside PAYE monthly rather than on 19/22 July following the year end) will confuse both employers and HMRC and generate otherwise avoidable mistakes.

Given that the NIC legislation has not yet been laid, we suggest that the opportunity be taken to allocate a different class name to the new employer-only NIC on termination payments, say Class 1C, to distinguish it from NIC on BiK.

We would also mention that if software developers are going to deliver this class of NIC by April 2019 they will need a signed off IT specification by July 2018 at the latest.

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APPENDIX 1

ICAEW Tax Faculty's ten tenets for a better tax system

The tax system should be:

- Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
- 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.
- Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
- Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
- 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.
- 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.
- 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.
- 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.
- 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.
- 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).