Extra-Statutory Concession A37 etc

Employment Tax

01 January 2018

The CIOT has welcomed HMRC's intention to preserve in legislation the effect of ESC A37 and the administrative practices at EIM03002, EIM01120 and EIM61030.

The draft legislation contained in HMRC's eighth technical consultation is designed to preserve the effect of:

- ESC A37, which allows directors' fees received by partnerships and companies to be treated as trading income rather than employment income subject to certain conditions;
- The administrative practice at EIM03002, which allows professional practitioners to treat incidental employment income as part of their trading or professional income for tax purposes;
- The administrative practices at EIM01120 and BIM40475, which relate to the Financial Loss Allowance (FLA) and provides that the FLA is not taxable where it replaces lost salary but is a taxable receipt where paid to the self-employed; and
- The administrative practice at EIM61030, which relates to different types of payments made by Local Medical Committees (LMCs) to GPs elected as part-time committee members.

Broadly, the CIOT considers that the proposed legislation achieves its objectives.

ESC A37 enables an individual in receipt of fees paid in respect of a directorship to treat that income as trading income of a partnership or a company rather than as his or her employment income provided certain conditions are satisfied and broadly mirrors the existing NIC rules contained in Regulation 27 of the Social Security (Contributions) Regulations 2001. In this way the relevant payments are treated similarly for PAYE and NIC purposes. While the draft legislation also broadly mirrors the NIC rules we have asked for some additional guidance on the interpretation of existing terms such as 'normal incident' and 'insubstantial'. For example, a payment

may be insubstantial so far as the receiving firm's overall income is concerned but may not be small in amount. We have also asked HMRC to provide guidance on the corporation tax treatment for the paying company (for example whether a deduction is available for directors' emoluments provided the emoluments are paid to the director within nine months of the year end (or in the year when paid if later)).

EIM03002 enables an individual (or an individual in partnership) to treat certain employment income as trading income for income tax and corporation tax purposes, but not for NIC purposes, provided certain conditions are satisfied. In our opinion, the draft legislation broadly achieves its purpose of enacting EIM03002 albeit the term 'small' in EIM03002 has been replaced by 'insubstantial' in the draft legislation (as above, guidance on the interpretation of 'insubstantial' has been suggested). We have also suggested that a disregard for NICs purposes should be enacted, in the same way that Regulation 27 operates alongside ESC A37.

A FLA may be paid to voluntary office-holders and other volunteers to replace lost earnings. Although employment income, or miscellaneous income, the payment is not taxable if received by an employed person, so long as the amount does no more than replace lost net salary, but is taxable if received by a self-employed person (unless the payment purely meets personal expenses of the individual in undertaking the voluntary work). In our view the draft legislation achieves its purpose of enacting EIM01120 and BIM40475 for tax purposes, although we have requested guidance on how to calculate 'lost employment income' and 'lost profits'.

EIM61030 provides guidance on the tax and NICs consequences where LMCs make payments to part-time committee members representing their practice. No new legislation is proposed to enact EIM61030 on the basis that the legislation being introduced to enact the administrative practices at EIM03002 and EIM01120 will meet the circumstances described in EIM61030. While we agree with HMRC's reasoning for not introducing specific legislation dealing with payments from LMCs, we have again suggested enacting a NICs carve out similar to Regulation 27 of the Social Security (Contributions) Regulations 2001.

The CIOT's full response can be found on the CIOT website.