Employer-provided living accommodation: representative occupier concession withdrawn from April 2021

Employment Tax

01 June 2020

HMRC is withdrawing the 'representative occupier' exemption from the employer-provided accommodation benefit-in-kind charge with effect from April 2021.

HMRC has announced that the concession from the employer-provided accommodation benefit-in-kind tax charge exempting 'representative occupiers' will be withdrawn from April 2021.

HMRC has identified the current tax treatment of individuals provided by their employers or by reason of their employment with living accommodation as 'representative occupiers' as an extra statutory concession (ESC).

The concession for representative occupiers relates to posts which existed before 6 April 1977 where an employee:

- resides in living accommodation provided rent-free by the employer (or by a third party by reason of the employment);
- is required, as a condition of their contract of employment, to reside in that particular living accommodation and is not allowed to reside anywhere else; and
- occupies the house for the purpose of the employer, the nature of the employment being such that the employee is reasonably required to reside in it for the better and more effective performance of the duties.

In correspondence, it was noted that the call for evidence on employer-provided accommodation commented that there are a significant number of employers who are reliant on this exemption. It is particularly relevant to those employing staff undertaking household/domestic duties on estates or who work in an agricultural, farm businesses etc., where their work frequently requires them to work out of hours and where the position has existed prior to 1977.

In reply HMRC has said that:

'The types of employment mentioned were unexpected as our guidance clearly states that these categories of employee fall within the following statutory exemption:

[ITEPA 2003] s 99(1)

- *agricultural workers who live on farms or agricultural estates;*
- *lock-gate and level crossing gatekeepers;*
- *caretakers living on the premises (with a genuine full time caretaking job who are on call outside normal hours);*
- *stewards and green-keepers (living on the premises);*
- *wardens of sheltered housing schemes (depending on whether they are on call outside normal working hours);*
- *in addition, managers of public houses were formerly recognised as falling within this category (though are now more likely to fall within the exemption in s 99(2).*'

HMRC also said that they may only use concessionary treatment which effectively provides a reduced tax liability if the concession is to deal with minor or transitory anomalies and meeting hardship at the margins. Unfortunately, in HMRC's opinion, the ESC on representative occupiers does not meet these conditions and is being withdrawn with effect from 6 April 2021.

HMRC were asked about the timing of the announcement on withdrawal of the representative occupier exemption and what had prompted the decision:

1. to withdraw (and not legislate) the exemption;
2. to announce the decision at this point; and
3. to effect the change from 6 April 2021.

In response, HMRC said that:

'*It is only in recent years (following publication of the Call for Evidence) that we have identified this long-standing practice as an extra statutory concession which is not compatible with our powers of collection and management. Once that position was established we had to take action – April 2021 was felt to be the longest extent that we could allow this concession to run on in its present form.*

We decided to withdraw it as legislating would enshrine unfair practices. For example, the representative occupier exemption would not apply to the stewards and green-keepers living on the premises of any golf course established after April 1977. The exemption relies on the actual post having been in existence at that point rather than looking at the type of employment. We think most would consider legislating on this basis is not fair and there is no wish to expand the scope of the c oncession.

We would like to have given notice at an earlier point as we were aware that some employers may either need to make changes to contractual arrangements or wish to consult with us to confirm whether any other of the statutory exemptions apply and that this needed a period of at least 12 months. Therefore notification at the end of March 2020 was the latest point at which we could let you know of the change.'

HMRC believe that in announcing this policy change at the end of March, this should allow both employers and employees affected by the ESC's pending withdrawal to make the necessary contractual arrangements, and that it will also give time for employers to consult with HMRC on possible entitlement to existing statutory exemptions who may be affected by this change.

The current statutory exemptions from the employer-provided accommodation charge cover the following situations:

- the provision of accommodation is necessary for the proper performance of the employee's duties (ITEPA s 99(1) – EIM 11341 onwards);
- the accommodation is provided for the better performance of the duties of the employment, which is one of the kinds of employment in the case of which it is customary for employers to provide living accommodation for employees (ITEPA 2003 s 99(2) – EIM 11347 onwards);
- there is a special threat to security and the employee resides in the accommodation as part of special security arrangements (ITEPA 2003 s 100 –

EIM 11362); or

- a local authority provides accommodation to an employee on the same basis as to an ordinary member of the public (ITEPA 2003 s 98).

The relevant guidance at EIM11336 onwards on representative occupiers has been amended to reflect this change. For those who will need to engage with HMRC on the withdrawal of the representative occupier exemption and whether one or other of the statutory exemptions may apply, HMRC has said that:

'*Any queries should be addressed to your own HMRC Customer Compliance Manager if appropriate, or the Employer Helpline . ...These teams also have access to escalation routes if more detailed information is required to ensure that you get answers as quickly as possible.*'

The CIOT would be interested to learn of members' experiences in relation to any engagement with HMRC by them or their clients as regards whether any other statutory exemption applies, and whether any particular problem areas arise.