Living Accommodation – Changes to the Tax Treatment for Employees and Retired Employees

Employment Tax | Tax voice



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Susan Ball and Lee Knight consider the benefit in kind treatment where an employer provides its staff, or their family or household, with living accommodation, both in respect of the living accommodation itself and the associated benefits (such as utilities, furniture, and other services paid for by the employer), as well as the treatment of former employees who remain in the accommodation after they have retired.

There are two significant recent developments that impact these individuals:

1. The change to the rules, from April 2021, whereby the ‘representative occupier’ (RO) concession has been removed, such that some employees will become taxable on accommodation benefits going forward.

2. The clarification from HMRC that the employer-financed retirement benefits scheme (EFRBS) regulations (SI 2007/3537) only extend to the statutory exemptions under s99 ITEPA 2003 for accommodation available by reason of employment to retirees (subject to certain conditions being met) did not and does not include those covered by the RO concession and has not since 2006.

What is the representative occupier concession?

The RO concession is an extra statutory concession based on the rules which applied prior to the current tax rules for accommodation coming into force in 1977, in line with discussions in Parliament at the time, as recorded in Hansard. These rules had applied to what were called representative occupier posts that existed before 6 April 1977. The concession allows the accommodation to continue to be treated as exempt in line with the pre 1977 rules, provided the post continues and circumstances remain unchanged. It also applies to new employees who take on an existing post regarded as carrying representative occupier status.

A representative occupier post is a post occupied by an employee who:

- resides in living accommodation provided rent-free by the employer (or by a third-party by reason of the employment);
- as a condition of their contract of employment, is required to reside in that particular living accommodation and is not allowed to reside anywhere else; and
- occupies the accommodation for the purposes 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.

Where the post meets these criteria and has continually done so since 1977, the concession has allowed for the accommodation concerned to be provided to the employee free of income tax and National Insurance contributions (NIC).

Many organisations that have been in continuous existence since 1977 could have agreements with HMRC that the concession applies and covers particular posts or groups of employees.

Whilst many employers had been expecting a review of the tax and NIC treatment of accommodation since the HMRC/HM Treasury call for evidence published in December 2015 and previous reports by the Office of Tax Simplification (OTS) on employee benefits and expenses, the change to remove the concession could not have come at a worse time for those adversely affected by it. Many readers will also remember requests made in responses to the call for evidence to have grandfathering provisions for the RO concession, but no such grandfathering rules will apply.

What statutory exemptions for accommodation are continuing?

The current statutory tax exemptions, which will continue to apply, cover situations where:

- the provision of accommodation is necessary for the proper performance of the employee's duties (s99(1) ITEPA 2003 – EIM11341 onwards);
- the accommodation is provided for the better performance of the duties of the employment and the employment is one where it is customary for employers to provide living accommodation for employees (s99(2) ITEPA 2003 – EIM11346 onwards); or
- there is a special threat to security and the employee resides in the accommodation as part of special security arrangements (s100 ITEPA 2003 – EIM11361 onwards).

The concern now is that HMRC is likely to challenge the use of the 'customary' exemption, as it has already done in the higher/further education sectors in 2019. Consequently, employers seeking to use the exemption are likely to face an uphill struggle in demonstrating that it applies, especially where they do not have adequate records of the duties undertaken to demonstrate better performance. We know from various HMRC reviews over the last 10 years that the odd evening of late-night working is not sufficient to meet the requirements.

How do employer's value the accommodation benefit?

The rules for valuing living accommodation for benefit in kind purposes are often complex and can depend on a number of factors, including whether the property is owned or rented by the employer, its gross rateable value under the old system of domestic rates, and whether it is considered an 'expensive' property for benefit in kind purposes.

For example, under the current rules, if a property is owned, the cost of the accommodation impacts the calculation of the taxable benefit. Where the cost is more than £75,000 (cost for this purpose includes expenditure incurred in acquiring the interest in the property, plus the cost of any improvements, less any contributions by the employee), the chargeable benefit is determined based on the old rating value, plus an additional charge relating to the cost over £75,000. See EIM11428 onwards.

So, to conclude, the removal of the concessionary tax exemption for representative occupiers from 6 April 2021 could result in a costly taxable benefit implication for employees, and costly NIC implications for employers.

Employer-financed retirement benefits schemes: excluded benefits: living accommodation and related benefits

Where the exemption in s99 ITEPA 2003 has operated to exclude accommodation as a taxable benefit for an employee, the provision is also an excluded benefit post retirement under SI 2007/3537, where:

- an employee continuously occupied the accommodation or similar accommodation for a period of five years immediately prior to retirement; and
- they continue to occupy the same or similar accommodation after retirement.

See EIM15022.

This rule applied from 2006 but had retrospective effect. It was long thought that this included those covered under the RO concession, but HMRC has confirmed, despite extensive representations by the CIOT and other representative bodies, that this is not the case, meaning that retired employees living in accommodation provided by their former employer who were only non-taxable because of the RO concession when they were an employee should have had a taxable benefit reported since 2006. See EIM11336.

The CIOT, with others, is now lobbying for a change to the EFRBS regulations (SI 2007/3537) to request that those previously covered by the RO concession remain exempt, but as it currently stands tax is due.

What should employers do now?

To recap, the removal of the concessionary tax exemption for representative occupiers from 6 April 2021 and the confirmation that the exemption in the 2007 EFRBS regulations (SI 2007/3537) does not extend to those who were exempt under the RO concession could result in costly tax implication for employers and employees, costly NIC implications for employers and potentially onerous reporting obligations.

We would recommend employers urgently:

- identify which employees were covered by the RO concession;
- review this group of employees to establish if any of them might be covered by one of the other statutory exemptions highlighted above (and check the evidence is available to support such a claim);
- review any HMRC agreements (or previous HMRC compliance review documentation) on accommodation and associated costs to check what exemptions apply – i.e., who was covered by the s99(1) & (2) ITEPA 2003 rules and whether the same conditions still apply, as well as the basis of any chargeable benefit;
- identify which employees have been offered a cash alternative or different pay scales to live in/out and when, and make sure it is clear how the optional remuneration (OpRA) rules might apply;
- ascertain records of the costs of all accommodation provided (identifying each property separately), including details of any improvements made over the years;
- consider whether they need to amend any employees' contract terms (employment contracts or licences to occupy) or move people to different accommodation;
- consider what records are needed to demonstrate, in the future, why the exemption continues to apply, such as rotas, call out logs etc;
- review long-term accommodation plans and objectives and plan future accommodation provision remembering that it is possible, in a few years time, that the taxable benefit calculation might be amended to be based on market value/market rent;

- make sure they communicate what is happening to all relevant employees; and, of course
- keep an eye out for further developments.