Optional remuneration arrangements (salary sacrifice for the provision of benefits-in-kind)

Employment Tax

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New rules contained in the Finance Bill are designed to remove the tax advantages that arise when certain non-cash benefits-in-kind are provided as part of a salary sacrifice or flexible benefit arrangement. The changes affect more than traditional salary sacrifice so that, broadly, where an employee has an option to receive cash or benefits, the new rules may be relevant. If the new rules apply then the higher of the cash equivalent of the benefit-in-kind and the amount of salary forgone, less any amounts made good by the employee, is subject to tax and employer's NICs.

New rules on 'optional remuneration arrangements' (ORA) took effect from 6 April 2017. An article on the government's original proposals was included in March's Employment Taxes Voice (this was published before the Budget).

ORA is a new term and you might be forgiven for thinking it just means salary sacrifice arrangements and flexible benefit schemes that contain a cash option. Unfortunately not. ORA includes any arrangement where an employee either gives up a right to 'cash' pay in return for a benefit or has the option of receiving cash pay instead of a benefit. For example, an option to receive a cash allowance instead of a company car is an ORA.

Thus, the definition of an ORA means that many employers ought to have been reviewing the terms of employees' pay arrangements prior to 6 April 2017. Of course, it would have been quite difficult for employers and employees to understand the new rules before then with only December's draft legislation to go by – the Finance Bill and draft guidance was not published until 20 March 2017.

So what has the CIOT been doing? Our recommendation that the government not proceed with implementing these changes having been ignored, we met HMRC in January to discuss the draft legislation and highlight the areas we thought either urgently needed clarification or where the legislation would unfairly apply. Subsequent to that we raised further points with HMRC (e.g. ORA treatment of group income protection polices and charitable donations) and wrote to HMRC with our concerns around the lack of guidance and clarity as to precisely what arrangements fall within the new rules. One of the biggest issues being the transitional reliefs as employees needed to know how agreements can or should be worded, given that 'arrangements' had to have been in place by 5 April in order to qualify.

Among other things, we recommended amendments to the legislation to include appropriate deductions for amounts made good by employees, capital contributions by employees and private use reimbursements by employees, and an adjustment where a benefit is only partly funded through an ORA by an employee (e.g. where the employee uses an arrangement to improve or increase the benefit provided to him or her).

So where do we stand now? The publication of the Finance Bill and draft guidance has clarified that tax exempt benefits received via ORA will always have a taxable value equal to the amount of salary forgone, that employee payments for both private use and capital contributions towards a company car will continue to reduce the value of the taxable benefit even if calculated under ORA, and that any amounts made good by an employee will continue to reduce the taxable value.

We continue to raise points with HMRC with a view to them improving their guidance and, as appropriate, amending the legislation included in the Finance Bill. For example, the guidance is deficient on what constitutes the actual situations in which the rules will apply, e.g. does a conversation during the job interview about the desired package result in an ORA if cash or benefit-in-kind options were discussed?

A major point of concern is the tax treatment of Approved Mileage Allowance Payments (AMAPs) under ORA. This is where an employee undertakes business mileage and he/she gives up pay (e.g. part of a monthly cash allowance) in return for receiving a tax-free AMAP. HMRC have said that where AMAPs are utilised as part of an ORA the AMAP amounts will be subject to tax and employers NIC as though they were cash. What is not clear from the guidance or Finance bill is when AMAP arrangements fall within the ORA rules and, if they do, whether the employee can

then claim tax relief under section 231 of ITEPA 2003 given that the employer has made a mileage allowance payment to the employee (albeit one that has lost its tax relief status under the ORA rules).

One issue that HMRC has clarified is the position where an asset is made available to the employee without transfer of ownership. Under normal rules there is a benefit-in-kind and the value of that benefit is 20% of market value. Where the asset is provided under ORA the amount treated as earnings is the greater of the cost of the benefit-in-kind (which will be 20% of market value when first applied) and the amount forgone (the amount of salary given up). This is the basis on which the benefit-in-kind is taxed going forward. If the asset is subsequently transferred to the employee then there may be a charge to tax under section 206 ITEPA, and this is separate to the tax charges under ORA. So, there is the potential for the total amount on which tax is charged to be greater than the original cost of the asset. This will depend on how long the asset is used for and the market value on transfer.

If members encounter any issues with administering the new ORA rules that you think need to be raised with HMRC please do let us have appropriate details.