Response from ICAS to the HMRC Consultation

‘Legislating Extra Statutory Concession D33’

15 September 2014
About ICAS

1. The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants. We represent over 20,000 members who advise and lead businesses. Around half our members are based in Scotland, the other half work in the rest of the UK and in almost 100 countries around the world. Nearly two thirds of our members work in business, whilst a third work in accountancy practices. ICAS members play leading roles in around 80% of FTSE 100 companies. ICAS is also a public interest body.

General comments

2. ICAS welcomes the opportunity to comment on the consultation ‘Legislating Extra Statutory Concession D33’ (ESC D33), issued by HMRC on 31 July 2014. The treatment of compensation and damages is an important issue and it is right that the principles of the tax treatment of compensation and damages is included in primary legislation and moved from their current status as an Extra Statutory Concession. It is also important that the codification of the rules is not used to restrict existing practice which is clearly understood and working well and that taxpayers can continue to have certainty about the way in which the tax rules are applied.

3. The proposed changes see the imposition of a limit of £1 million on amounts received as compensation or damages where there is no underlying asset and outlines the reasons for applying the limit. The rationalisation for setting the limit at this level appears solely pragmatic yet the major issue cited for an absolute limit on the level of receipt to be taxed is to “avoid adding complexity to the tax code” which is misguided.

4. ICAS believes the use of the financial limit of £1 million is misguided, a leftover remedy from a concern of the lack of HMRC care and management powers. Such concerns will be removed by these provisions being enacted, as will the need for any financial limit. In a principles based system, for what band is not taxable, where taxpayers should expected to be taxed fairly, such a limit is simply unnecessary.

5. Simply imposing a limit will not solve the issue of complexity in this area. As HMRC will be aware, the amounts paid out as compensation comprise various elements and some elements – interest – will be taxable even if the underlying compensation is not. There is guidance about the issue on the HMRC website but not all taxpayers will research the issue in such depth, and concerns remain amongst ICAS members that the transition to GOV.UK is making existing guidance much more difficult to find.

Specific questions

1. Is £1 million the right level of exemption? If not, what would be a more appropriate amount and why?

As indicated above ICAS questions if this is the right approach as it does not treat all taxpayers equally and is in contravention of the Taxpayer’s Charter. The limit of £1 million is arbitrary and appears to have been set largely on the mistaken premise a limit was needed rather than some genuine desire for simplification. A principles based approach to legislation would suggest the alternative option, of legislating the exemption without any financial limit, was preferable.

2. Are you aware of any cases which would be taxable under the proposed changes which would result in hardship?

ICAS members’ views have not been canvassed on this.

3. Should the exemption in section 51(2) TCGA include compensation paid for any wrong or injury suffered by an individual in their trade or employment?
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4. **Should the exemption in section 51(2) TCGA include compensation paid:**
   - to a person other than the individual who suffered the wrong or injury, such as relatives or personal representatives of a deceased person?
   - to compensation for emotional distressed caused by the death of another person
   - to compensation for loss of financial support?

   The exemption in section 51(2) TCGA should include compensation paid in the circumstances outlined.

5. **Do you agree that section 49(1)(c) TCGA should include indemnities?**

   Yes, Section 49 should be amended such that indemnity payments made by the seller to the buyer will adjust the original price of the property for the buyer and not be taxable on the buyer. This aligns tax legislation to commercial realities, and aligns the tax treatment of payments in respect of either a breach of a warranty or a claim under the tax covenant indemnities.

   This is a commercially important matter in corporate transactions, such as in share acquisitions where reliance is placed upon paragraph 13 of ESC D33.

   If the concession is withdrawn then these provisions must be put onto a statutory footing to provide continuing certainty (and consistency) of treatment. If it is decided not to legislate for the existing concession it will be important that transitional arrangements are permitted, so that indemnity payments under recent corporate agreements (generally with a fixed life) can be treated under the provisions of ESC D33 prevailing when they were entered into. A grandfathering basis – continuing to exempt under D33 agreements entered into prior to change would be essential.

6. **Do you have any comments on the assessment of equality and other impacts?**

   We have no comments on the assessment of equality and other impacts.