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Salary Sacrifice Consultation on Draft Legislation

Response from the Employment Lawyers Association

1 February 2017

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee ("the L&P Committee") is made up of both Barristers and Solicitors, working in private practice and in-house, who act for both Claimants and Respondents. The L&P Committee meets regularly for a number of purposes including to consider and respond to proposed new legislation.

Definition of "optional remuneration arrangements"

The legislation applies to "optional remuneration arrangements" defined as:

- Type A arrangements under which in return for the benefit the employee gives up the right (or a future right) to receive an amount of earnings: and
- Type B arrangements under which the employee "agrees to be provided with the benefit rather than an amount of earnings".

Type A arrangements would cover normal salary sacrifice and flexible benefit arrangements. Type B arrangements are intended to cover situations where an employee is offered the alternative of a benefit or a cash allowance in lieu of the benefit.

It was not very clear in the original consultation that Type B arrangements would be included. It is a very wide provision and would catch all sorts of arrangements (eg cash allowance or company car) where the intention is simply to offer the employee flexibility (eg in negotiations on the remuneration for a new hire) rather than obtain a tax or NI advantage. It seems to me that a cash alternative arrangement is fundamentally different from a salary sacrifice.

Amount foregone

Where the legislation applies, there is a tax charge on the greater of the modified cash equivalent of the benefit and the amount foregone. The fact that the draft legislation is modifying how the cash equivalent of some of the benefits are calculated for these purposes adds to the complexity of the legislation. .

Loans

The draft legislation extends to beneficial loans which again wasn't part of the original consultation. The proposed effect is that the amount foregone (which will presumably be equal to the principal of the loan) will be taxable if it exceeds the interest that would have been payable on the loan calculated using HMRC's official rate of interest. There doesn't seem to be any express provision which would enable the employee to reclaim the tax paid if he subsequently repays the loan. The employee may be able to claim tax relief on the amount repaid relying on general provisions and the *Julian Martin* case but express provisions would be preferable.

Grandfathering

Arrangements which take effect prior to 6 April 2017 are grandfathered for a period, depending on the benefits provided this is a welcome provision given the tight timescale for introducing these changes. However, it is not clear how it will be applied in practice eg if an employee sacrifice salary in return for a car and the car is ordered pre 6 April 2017 but is only delivered after 6 April 2017 will the grandfathering apply?

The benefit of the grandfathering provisions is lost if the arrangements are renewed or varied post 6 April 2017. Certain variations are ignored for these purposes such as variations for reasons beyond the control of the parties or a variation which occurs in connection with an individual's entitlement to various statutory payments (such as SSP and SMP). Again, it would be good for HMRC to confirm how this will apply in practice.

James Davies, Lewis Silkin

Chair of ELA's working party which responded to the HMRC Consultation on Salary Sacrifice for the Provision of Benefits-in-Kind in October 2016. ELA's response can be found here:

<https://www.elaweb.org.uk/resources/responses-to-consultations/ela-response-hmrc-consultation-salary-sacrifice-provision>