Low Incomes Tax Reform Group

A voice for the unrepresented

Extra-statutory Concession A19 review
HM Revenue and Customs consultation

Response by the Low Incomes Tax Reform Group

1. Executive summary

1.1. We welcome the opportunity to respond to the consultation document 'Extra-statutory Concession A19 review'.

1.2. Extra-statutory concession A19 (ESC A19) performs a very important function, serving to provide fairness to taxpayers when HM Revenue and Customs (HMRC) have made a mistake. In particular, it is often the unrepresented taxpayer who is affected by the problems which lead to claims under ESC A19. Any review of the concession must take this fact into account.

1.3. We raise at the outset the question of whether the concession needs to be revised in the manner proposed. The revised text will make significant changes to the concession and the circumstances in which it will apply. Our response strongly reflects the fact that we do not believe there should be changes to when ESC A19 should apply; rather there should be improvements in its operation.

1.4. The text of ESC A19 could be left as it stands and function well, provided the key issues are dealt with:

1.4.1. Interpretation of the concession correctly (with particular reference to the 'exceptional circumstances' test).

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1.4.2. More realistic interpretation of the reasonableness test by HMRC, in particular by taking into account actual levels of comprehension of tax law of unrepresented taxpayers.

1.4.3. Acceptance of employer submissions P35, P14 and Full Payment Submissions as 'information' for the purposes of the concession.

1.4.4. Adherence to the PAYE Regulations by HMRC, that is, pursuit of employers and pension providers where they are at fault for under-deductions of tax.

1.4.5. Dealing with the concession at the right level within HMRC.

1.5. In order to follow 'Your Charter',[1] HMRC should publicise ESC A19 much more widely, as those unrepresented taxpayers to whom it is often relevant are in many cases unaware of the concession's existence.

1.6. Since the alteration in wording and form of the tests as laid out represents a change in the application of ESC A19, although it is not primary legislation, we think that HMRC should carry out an Equality Impact Assessment. This is especially important as this concession mainly affects the unrepresented.

1.7. We believe it would be premature to replace the reasonableness test with a responsibilities test, until all taxpayers receive sufficient information to enable them to carry out the checks required.

1.8. Besides, we do not believe that the responsibilities tests as currently set out will be effective:

1.8.1. The taxpayer responsibilities are too onerous. They also make unjustified assumptions about the level of taxpayer knowledge of the tax system.

1.8.2. The HMRC responsibilities are too vague.

1.9. Once the clarity and transparency of explanatory material and information given to the taxpayer about PAYE coding has been substantially improved[2], we would not object to replacing the reasonableness test with an objective responsibilities test, but such a test must be even-handed as between HMRC and taxpayer. The current draft falls well short of that. Any taxpayer responsibilities must comply with 'Your Charter'.

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[1] 'Your Charter' – HM Revenue & Customs (November 2009).

[2] Such improvements could usefully form part of any work programme following the consultation document 'Modernising the administration of the personal tax system' (November 2011).

1.10. We believe strongly that the exceptional circumstances test should be retained, and should be interpreted correctly, according to the current wording of ESC A19.

1.11. ESC A19 should remain available for capital gains tax (CGT) as well as income tax.

1.12. We would expect the general four year time limit for claims (from the end of the tax year of the underpayment) to form the basis of any time limit for ESC A19 claims. In addition, the taxpayer should have at least one year from receipt of notification of an underpayment of tax to apply for ESC A19.

1.13. It is important that guidance is available to all taxpayers in a manner that best suits their needs. As ESC A19 often affects unrepresented taxpayers, it is important that particular thought is given to ensuring guidance is available in a variety of media and formats, making that guidance as user friendly as possible, and effectively publicising the guidance and ESC A19 itself. Otherwise, it is likely that HMRC will not be fulfilling their duties under 'Your Charter'.[1]

1.14. We would strongly recommend that guidance concerning ESC A19 should be sent out with all notifications of underpayments of tax, all P800s and all PAYE coding notices.

2. Introduction

2.1. *About us*

2.1.1. The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes.

2.1.2. The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

2.2. *General Comments*

P800 tax calculations

2.2.1. At para 2.6 of the consultation document, it states that ESC A19 is relevant to individuals who have received a P800 tax calculation. We of course acknowledge the view expressed by

[1] 'Your Charter' – HM Revenue & Customs (November 2009).

the First-tier Tribunal that the P800 is not an assessment.[1] But in our view it is sufficiently like an assessment to merit being accorded the status of an assessment. As such, taxpayers should be able to appeal against a P800 that they believe is incorrect.

2.2.2. We find it odd that this is not the case at present, as in practice, it is not uncommon to see a self-assessment taxpayer receive a P800. In addition, P800 calculations often miss out or change information that has been provided correctly by the taxpayer, producing what can only be described as fictional accounts of their tax position.

2.2.3. We note that in HMRC's view, it is the PAYE coding notice that is the assessment and can be appealed. The PAYE coding notice lacks clarity, however, and for many taxpayers, even those with relatively simple affairs, is completely incomprehensible. For HMRC to view a relatively clear P800 calculation as not subject to appeal and an incomprehensible tax code as appealable is extremely unfair on the taxpayer. Unless their tax code consists simply of the basic Personal Allowance, most taxpayers are unable to tell whether or not their tax code is accurate, or contains the correct information. It is therefore almost impossible for them to determine whether or not to appeal it.

PAYE Regulations

2.2.4. Along with any changes in the wording of ESC A19, we trust that HMRC will amend their approach to align it with the PAYE Regulations.

2.2.5. Currently, HMRC often act contrary to the PAYE Regulations in respect of HMRC procedure.[2] They do this when they pursue employees or pensioners for income tax when the under-deduction has arisen through the fault of the employer or pension provider. In such cases, it is the employer or pension provider that is liable to make good the under-deduction, unless they can satisfy HMRC on two points:

2.2.5.1. That they took reasonable care to comply with the regulations.

2.2.5.2. That the failure was due to an error made in good faith.

2.2.6. Only if the employer or pension provider satisfies HMRC on these points can HMRC direct that the employee or pensioner is liable to pay the tax. The employee or pensioner has the right to appeal against the decision.

2.2.7. In some cases that we have come across, HMRC have ignored this clear process. It is a grave concern that HMRC pursue employees and pensioners without first making any attempt to

[1] Prince, Bunce and Coaker vs. HM Revenue & Customs [2012] UKFTT 157 (TC).

[2] Income Tax (PAYE) Regulations 2003, Reg. 72ff.

contact the employer or pension provider.[1] In the vast majority of cases the employee or pensioner is not even aware that their employer or pension provider might have made an error or can be pursued in relation to the underpaid tax.

2.2.8. We have been advised that there would be a good chance of success in litigation against HMRC by a professional or representative body with sufficient standing in a case in which the PAYE procedures were applicable and were not followed.

Belated issue of PAYE coding notices

2.2.9. An example of how ESC A19 is not currently operated in an equitable manner is when HMRC issue a PAYE coding notice belatedly, after there has been a continuous error for almost two full tax years.

2.2.10. We have been made aware of several cases in which the code has been issued in mid-March 2012, which was too late for the employer or pension provider to implement in that tax year. HMRC have used the issue of this code to argue that the underpayment has not built up over two complete tax years, and have therefore refused to apply ESC A19.

2.2.11. However, it is our view that HMRC have not made proper and timely use of information, having failed to issue a coding notice as soon as they could have done. Despite the issue of the code, the arrears of tax have in fact built up over two tax years, because there was no means of implementing the code in the second tax year. In addition, there was no notice to the taxpayer that an underpayment had been building up.

2.2.12. HMRC's refusal to apply ESC A19 in such situations goes against the spirit and purpose of ESC A19. In relation to this, we would raise the question of whether there is a final date for the issue of coding notices. It does not appear reasonable to us for a coding notice issued in mid-March for the current tax year to be viewed as a valid notice, as it cannot be implemented.

Exceptional circumstances test

2.2.13. It is extremely disappointing that the consultation document imposes a spurious 'and' between the two alternate limbs of the exceptional circumstances test at para 2.8, when explaining this test.

2.2.14. As HMRC will note from the actual text of ESC A19, there is no connective between the limbs of the test, and the natural reading of the concession indicates that the two limbs are alternatives. The test clearly envisages two situations, which are not logically connected or dependent on one another.

[1] Anonymised examples can be found in the appendix to this response document.

2.2.15. The interpretation of the two limbs as alternatives has been upheld by the courts.[1]

2.2.16. We are disappointed that HMRC have chosen to misrepresent the test in this way; we would hope that this has not been done with the aim of ensuring that the majority of respondents to the consultation agree to the removal of the exceptional circumstances test.

Lack of equality impact assessment

2.2.17. Although ESC A19 is not primary legislation, and although the stated aim is to improve the clarity and objectivity of ESC A19, rather than to change it, we think that HMRC should carry out an Equality Impact Assessment.

2.2.18. This course of action would be highly appropriate in the interests of fairness, transparency and integrity. This is because the change in wording and form of the tests as laid out represents a change in the application of ESC A19.

2.2.19. In addition, this concession mainly affects the unrepresented, because of its nature. An Equality Impact Assessment would help to identify whether or not any special provisions are required in relation to disadvantaged groups, such as older people, those with learning difficulties and those with disabilities.

3. Taxpayer responsibilities

3.1. ***5.1 Do you agree with the removal of 'reasonable belief' to be replaced with an objective test based around 'taxpayer responsibilities'?***

Comparison with tax credits model

3.1.1. We refer you to earlier submissions we have made to HMRC regarding whether it was feasible to replace the 'reasonable belief' test with a test based around 'taxpayer responsibilities', modelled on that in COP 26 (tax credits overpayments).

3.1.2. As we observed in our earlier submissions, the COP 26 test was developed over a long time period; much time and effort was expended in ensuring that the award notice and accompanying documentation was clear and transparent.

3.1.3. In addition, we noted that there are two key differences between the areas of PAYE and tax credits. Firstly, the tax credit claimant receives far superior documentation (award notice and accompanying information) to that received by the PAYE taxpayer (PAYE coding notice and explanatory documentation). Secondly, while PAYE taxpayers are expected to check that

[1] Robert E Clark vs. CTC (TC 1164).

their PAYE coding notice will result in them paying the correct amount of tax, a tax credit claimant does not have to check that their award is correctly calculated.

3.1.4. In light of these two major differences, we concluded that it was premature to compile a comprehensive set of taxpayer responsibilities, until all taxpayers receive sufficient information and sufficiently clear and transparent explanatory material to enable them to carry out the checks required. This is still our position. Any taxpayer responsibilities must comply with 'Your Charter'.[1]

Reasonable belief

3.1.5. We agree that there are difficulties with the reasonable belief concept in ESC A19 currently. Firstly, there is the problem of what is reasonable? Secondly, who decides what is reasonable – should it be the taxpayer or HMRC or someone else? Thirdly, what yardstick should be applied – is it the same for everyone or is it different for each taxpayer? Does it depend, for example, on your age, education, career, or life experiences?

HMRC decision-making and training

3.1.6. Currently, we feel that ESC A19 decisions are taken at too low a level within HMRC.

3.1.7. Some HMRC officers seem too often to make assumptions regarding taxpayer knowledge, in particular, that all taxpayers should have the same level of tax knowledge as a trained HMRC officer. This position lacks common sense. Instead, HMRC officers should, in our view, try to 'step into the shoes' of the taxpayer. It should be borne in mind that it is hard to assess what is reasonable for a particular taxpayer without meeting or talking to them.

3.1.8. In addition, we are concerned that there is inadequate training of HMRC staff. There must be proper training, so that HMRC staff can assist taxpayers more effectively in dealing with ESC A19, and can recognise situations to which the concession may apply, even when they are not labelled as such by the taxpayer or agent.

Unrepresented taxpayers

3.1.9. Currently, taxpayers who obtain representation for their ESC A19 claim are more likely to be successful than taxpayers who are unrepresented, because success depends on the quality of the argument put forward.

3.1.10. Given that ESC A19 is meant to provide fairness to and consistency of treatment for taxpayers when HMRC have made a mistake, it is not ideal for there to be such a discrepancy in success rates. Part of the discrepancy may result from the fact that comparatively few

[1] 'Your Charter' – HM Revenue & Customs (November 2009).

taxpayers are prepared to challenge an initial adverse decision, and this may be the case especially for unrepresented taxpayers. It is therefore important that the decision made at the initial stage is properly considered and transparently and fully explained to the taxpayer.

Taxpayer responsibilities

3.1.11. The replacement of reasonable belief with taxpayer responsibilities would in theory remove the element of value judgement. This should make it simpler for an HMRC officer to determine whether or not ESC A19 applies to a case, as they would simply have to check whether or not certain factual conditions were met. In addition, it should help to remove the discrepancy in success rates between represented and unrepresented taxpayers.

3.1.12. In order for this to work, the responsibilities must be clearly defined and also accessible or achievable by all taxpayers. The responsibilities must be factual; they must not demand any element of interpretation of tax law or anything more than a superficial understanding of calculations.

3.1.13. As currently drafted, the taxpayer responsibilities are far too onerous. They also make unjustified assumptions about the level of taxpayer knowledge of the tax system.

3.1.14. In particular, we would raise the following questions:

3.1.14.1. 'changes in their circumstances' – how will a taxpayer know whether or not a change is relevant? Relevant changes in circumstances must be defined and set out clearly, so that the taxpayer can easily decide whether or not they need to tell HMRC about a change.

3.1.14.2. 'check their tax code' – how can a taxpayer check their tax code effectively, and how can they identify that the information contained is correct and up to date, when tax codes are impenetrable to most taxpayers? Checking a code also implies that the taxpayer has the numerical skills to be able to calculate what their code should be.

Guidance

3.1.15. In order for the taxpayer responsibilities to be equitable, HMRC will have to provide much improved guidance when sending out tax codes. Taxpayers without representation currently have very little assistance from HMRC to help them to understand their tax codes. If HMRC wish to impose such demands on taxpayers, they will have to provide far more help and guidance.

3.1.16. In particular, HMRC must tell taxpayers clearly and accurately the types of changes and information that they wish to receive from taxpayers. In the case of pensioners, for example, they would have to provide clear explanations of how tax on the State Pension is collected (through the reduction of allowances in the code for a separate source of income).

PAYE coding notices

3.1.17. HMRC will have to amend the format of tax coding notices and the information they contain, so that taxpayers have a chance of understanding how their tax affairs are represented by the code. Tax codes need to be much more comprehensible before taxpayers can be expected to check their tax code.

3.1.18. Given the current complexity of tax codes, it is not an objective test to ask taxpayers to check their tax code, because this requirement imposes a subjective idea of what is basic tax knowledge onto taxpayers. In addition, the wording suggests it is a simple task, but in fact checking a tax code can often involve many processes and complex calculations.

3.1.19. A taxpayer may currently be able to check that the income from another source contained in a tax code matches the actual income from that source. However, it is not possible for taxpayers to check whether or not a code will result in them paying the correct amount of tax. The information currently contained on PAYE coding notices is often perceived as poor and in some cases, cryptic. The accompanying explanatory documents are also poor.

Form P46 (car)

3.1.20. Since April 2011, employers have no longer had to inform HMRC about changes of company cars occurring in a tax year, other than first-time provision of a car or complete withdrawal of a company car benefit. Since form P46 (car) cannot be filed electronically in year, HMRC expect only the P11D from the employer. This will result in more underpayments in the future. Employers are unlikely to provide affected employees with the details necessary to inform HMRC of the change.

3.1.21. If a taxpayer does have a company car, it is particularly difficult for them to determine whether or not their tax code is correct. The PAYE coding notice does not contain details of how the car or fuel benefit has been calculated, or details of the car involved. Very few employees would know how to calculate the car benefit even if they had the P46 (car) details.

Taxpayer understanding

3.1.22. The proposed taxpayer responsibilities suggest that HMRC believe that all taxpayers understand tax coding notices, as a minimum requirement. When a taxpayer has a very simple tax code, and only one source of PAYE income, and therefore their code is simply the basic Personal Allowance, this is perhaps a reasonable assumption. However, this is not the case for the vast majority of taxpayers.

3.1.23. We would highlight especially: taxpayers with more than one source of PAYE income, who have multiple PAYE coding notices to deal with; taxpayers who change jobs frequently; people moving from employment into retirement, and who have more than one pension

provider; taxpayers with K codes; taxpayers with untaxed income included in their tax code; taxpayers with Married Couple's Allowance. In cases such as these, we would argue strongly that it might not be reasonable to expect the taxpayer to understand how their tax code is calculated or their PAYE coding notice.

Taxpayer competence

3.1.24. Another factor to consider when devising taxpayer responsibilities is the competence of the taxpayer. There are many taxpayers who do not have sufficient numeracy skills to understand a tax code.

3.1.25. According to a recent survey carried out for the Department for Business Innovation & Skills, only 22% of adults aged 19 to 65 have numeracy skills equivalent to GCSE grades A* to C.[1] Taxpayers below this level of numeracy would struggle to work out a household budget. Although another 29% have numeracy skills equivalent to GCSE grades D to G, and are therefore likely to be able to check pay and deductions on a payslip, it is far simpler to understand a payslip than a PAYE coding notice.

3.1.26. As shown by the survey, people with a wide range of intellectual abilities and educational background do not necessarily have the numeracy skills to enable them to understand and check their tax code.

Taxpayer education

3.1.27. The UK school curriculum has never included income tax and PAYE, and therefore there might not be any basis on which to automatically assume that a taxpayer has any level of understanding of the UK tax system. This must be taken into account when formulating taxpayer responsibilities.

3.1.28. Some requests for ESC A19 treatment fail on the basis that a taxpayer has not spotted that they have been given double personal allowances; HMRC's view is that they should reasonably have done so. Given the lack of tax education, it is debatable how much a taxpayer should be expected to know about the personal allowance and its variants. This is particularly the case, since taxpayers do not receive any information about personal allowances unless they receive an explanatory booklet with their coding notice. For someone with multiple PAYE income sources, it is not easy to spot double personal allowances, especially when codes are issued at different times in the year.

[1] BIS Research Paper Number 57 – 2011 Skills for Life Survey: Headline findings (December 2011).

3.1.29. If HMRC wish to continue to hold the position that taxpayers must a have a basic level of tax knowledge, they must set out clearly what this level is and how a taxpayer is to acquire this knowledge.

Complexity of UK tax legislation

3.1.30. HMRC must also take into account the complexity of UK tax legislation.

3.1.31. The majority of taxpayers cannot afford to pay for tax advice. The only assistance available to them is HMRC's website (if they have access to a computer and the internet) or helpline (if they can afford the cost of the lengthy telephone call that is currently the norm); some groups may also be able to approach tax charities (for example Tax Help for Older People), but such charities cannot be used as a defence by HMRC for shirking their responsibilities in assisting taxpayers properly.

3.1.32. Just because a taxpayer cannot afford tax advice, it does not automatically follow as a consequence that their tax affairs are simple or that they find them easy to understand, or that the PAYE system deals with their affairs adequately. The gap between represented and unrepresented taxpayers has widened with the cutback in HMRC resources.

3.1.33. Given that ESC A19 is, in the main, of relevance to unrepresented taxpayers it is important that any assumptions of knowledge, competence and understanding of the tax system are based on those of the unrepresented taxpayer.

'Refund companies'

3.1.34. By way of illustration of the points made above, we refer you to the use by some taxpayers of refund companies on the internet.[1] The very existence and survival of these organisations demonstrates the inability of many taxpayers to understand PAYE, its operation, PAYE codes and how they work, and what triggers a tax refund.

Telephone communications

3.1.35. HMRC indicate that taxpayers should keep records of telephone calls made to HMRC. We recommend that this is advisory and not a responsibility or requirement for the taxpayer. Furthermore, we recommend that HMRC record telephone calls to their helpline.

3.1.36. In terms of telephone calls, given that the taxpayer needs to tell HMRC of changes, there seems to be an underlying assumption within the proposed revised text of ESC A19 that it is possible for a taxpayer to get through by telephone to HMRC, then inform them of any

[1] A few examples are: Taxrefunds.co.uk; 1st Contact Tax Refunds; TaxRebateServices.co.uk; The Entitlements Agency; TaxDay.co.uk; TaxRefund.co.uk; The Bettertax Organisation Ltd.

changes, and not have to expend a significant amount of time or money in doing so. We trust that this will be the case in practice.

3.1.37. We welcome the recent announcement of diversion of investment into contact centre staff. If the onus falls on taxpayers to inform HMRC of relevant changes, this will have a major effect on whether or not a taxpayer is able to contact HMRC and therefore make a valid claim under ESC A19 in the future. It is absolutely essential that telephone lines are manned properly, so that 100% of calls are answered promptly, and without callers having to hang on the line for several minutes.[1] Otherwise, the equity of ESC A19 will be undermined.

4. HMRC responsibilities

4.1. ***5.2 Do you think that the introduction of HMRC responsibilities makes it clearer in regards to what information HMRC must act on? Has HMRC identified the correct responsibilities and / or are there others that should be included?***

HMRC responsibilities

4.1.1. We agree that HMRC must have responsibilities, if ESC A19 is reworded.

4.1.2. As currently drafted, the responsibilities are far too vague; they need to be clearer and more specific. In addition, there needs to be a strong focus on timeliness as part of HMRC's responsibilities. We set out some ideas below of how these responsibilities could be improved to make them workable.

Recommended responsibilities

4.1.3. We would suggest the following responsibilities for HMRC as a minimum, in addition to those set out:

4.1.3.1. HMRC must publicise ESC A19 widely, in a variety of media, so that all taxpayers are aware of the concession.

4.1.3.2. Prior to pursuing the taxpayer for an underpayment of income tax, HMRC must carry out checks to ensure that the underpayment has not arisen through the fault of the taxpayer's employer or pension provider, and act in accordance with the PAYE regulations.[2]

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[1] We are aware of many cases when callers to HMRC have been kept on hold for 20 minutes or more. See http://www.litrg.org.uk/News/2012/promises.

[2] Income Tax (PAYE) Regulations 2003, Reg. 72ff.

4.1.3.3. There should be a legal obligation on HMRC to issue / amend an accurate tax code within a specified period of receiving the information, for example thirty days. HMRC should have to make timely use of information received from the taxpayer and third parties, and they should do so accurately, that is by reflecting information accurately in coding instructions and coding notices.

4.1.3.4. The test should set out clearly the types of information required from taxpayers, such as details of their income or age, employer or pension provider.

4.1.3.5. HMRC should be required to calculate the liability correctly, taking into account all sources of income and all other information available to them. In particular, they must ensure a taxpayer receives the correct personal allowance, based on age and income.

4.1.3.6. HMRC should be required to record accurately and act on any additional information provided by the taxpayer, whether by telephone or letter, within a specified time limit, for example thirty days.

4.1.3.7. HMRC should have to record telephone calls. The record should include the date and the time of call, taxpayer name and reference, details of the change reported and the action advised.

4.1.3.8. HMRC should have to provide clear and transparent information and explanations on PAYE coding notices, so that a taxpayer is told what each number relates to.

4.1.3.9. HMRC should have to send out guidance on ESC A19 and details of how to claim for it to apply with all notices and assessments to which ESC A19 is of relevance, for example, with each P800 and coding notice that they send out.

4.1.3.10. Often when taxpayers ask for ESC A19, the response is a standard refusal letter, with no explanation as to why HMRC believe that it does not apply in that particular case. In future they should have to provide a clear explanation of the rationale for their decision, so that the taxpayer can see why their claim has failed. It is hoped that the need to provide such an explanation will oblige the HMRC officer to consider the position rationally, in accordance with the wording of ESC A19, resulting in a more transparent and efficient process. It should also mean the taxpayer is more likely to accept the decision if it is well-reasoned.

Information

4.1.4. Within the section ‘What counts as “information”?’ we would strongly advocate that the end of year return forms P35 and P14, and all Full Payment Submissions under Real Time Information (RTI) are counted as information for the purposes of the concession.

4.1.5. These forms clearly provide information about a taxpayer's income to HMRC – they are the main source of information on taxable income and income tax deducted. Presumably, they are the basis for HMRC's reconciliations, which enable them to issue a refund or a revised tax code for the following tax year.

4.1.6. We cannot see any justification for not including these forms as information, and indeed there never has been.

4.1.7. The result of the current practice is that taxpayers who would qualify for ESC A19 treatment are denied relief because the information provided to HMRC has been contained within a P14. This is very arbitrary. It lacks consistency with the treatment of similar forms, for example, forms P11D.

4.1.8. The current policy makes a distinction between taxpayers, apparently on the basis of information that can be handled by HMRC's systems. This is not equitable.

Receipt of information

4.1.9. We are aware of cases of HMRC denying that they have received correspondence or that they have a record of information from a taxpayer, even though the taxpayer has written to or telephoned HMRC on more than one occasion. This produces a position whereby it is the taxpayer's word against that of HMRC.

4.1.10. The success of a taxpayer's claim for the concession relies on HMRC capturing and recording information properly. Even where the taxpayer has the ability to understand their PAYE calculation or that a change is relevant to their PAYE code, they are still reliant on HMRC fulfilling their responsibilities.

4.1.11. HMRC must give the benefit of doubt to taxpayers who claim to have written to or telephoned HMRC providing information. After all, HMRC automatically assume that if they have issued a document to a taxpayer, the taxpayer has received it.

Digital channels

4.1.12. In terms of the methods available to taxpayers for providing information to HMRC, it would be useful for there to be a digital channel (in addition to being able to write to or telephone HMRC). This could generate a reference, providing an audit trail and evidence of the information being provided to HMRC.

4.1.13. There should also be a digital channel available for submitting a claim under ESC A19. This could generate a reference and receipt, providing an audit trail.

5. 'Exceptional Circumstances' test

5.1. ***5.3 Do you agree that the 'Exceptional Circumstances' section is now redundant and can be removed from ESC A19? If not, for what circumstances do you think it should be retained?***

5.1.1. We do not agree that the exceptional circumstances test is redundant. We are firmly of the view that it should be retained.

5.1.2. We reiterate the point that the purpose of ESC A19 is to protect the taxpayer when an underpayment of tax has occurred because of an error or failure of HMRC. To remove the exceptional circumstances test would be to remove one of the key elements of the protection afforded to the taxpayer by ESC A19.

5.1.3. At para 4.8 of the consultation document, we note that it is HMRC's opinion 'that there will be fewer instances' to which this test may apply. We too hope that there will be fewer cases in which this test needs to be invoked by a taxpayer in the future. Nevertheless, the key point here is that while the hope or belief is that there will be 'fewer' cases to which the exceptional circumstances test applies, there will inevitably be 'some' cases.

5.1.4. There is the possibility of error in RTI data. Unless and until all possible cases can be removed, which is not the position currently, there will be a role for the exceptional circumstances test and it must be retained. Indeed, if such cases become rarer, when they do occur, it will suggest an even greater failure on HMRC's part, and therefore a stronger reason for having an exceptional circumstances test, to protect those taxpayers affected.

5.1.5. It must be retained with its current wording, and from now on, it should be interpreted correctly, that is, noting that the two limbs are alternatives, not connected by an 'and'.

6. Capital gains tax

6.1. ***5.4 Can you identify any issues with the removal of CGT from ESC A19? HMRC would be particularly interested to hear examples of where a recent request has been made in relation to CGT and ESC A19.***

6.1.1. ESC A19 must remain available for CGT cases.

6.1.2. We are aware of cases in relation to CGT having been dealt with by the charity Tax Help for Older People.

6.1.3. We detail some scenarios when ESC A19 might be applicable to CGT:

6.1.3.1. A taxpayer enters details of a disposal in their tax return, and includes further information in the white space on the return. HMRC fail to make use of the information, which results in an underpayment of CGT that HMRC only notice and

try to collect more than twelve months after the end of the tax year of submission of the return.

6.1.3.2. A taxpayer telephones the helpline, and gives full details of a disposal. The HMRC officer, in full possession of the facts, indicates that there is no CGT liability and no requirement to report the disposal on a tax return. The call is recorded. At a later date HMRC attempt to collect the tax, as in fact there is a CGT liability.

6.1.3.3. A PAYE taxpayer notifies HMRC of a gain in the previous tax year by 6 October as required. HMRC fail to issue a tax return or take action at this point. The taxpayer assumes there is no need to report the gain or pay any CGT.

6.1.3.4. A self-assessment taxpayer submits a correct paper return including a gain. HMRC issue a calculation, which either omits the CGT altogether or incorrectly calculates the tax liability. The taxpayer does not appreciate the inaccuracies in the calculation.

6.1.3.5. A taxpayer writes to HMRC providing full details of a property disposal, for example periods of occupation, ownership and the like, in accordance with their understanding of the legislation.[1] HMRC conclude no tax is due. At a later date, HMRC review the information, realise they were wrong and in fact CGT is due.

6.1.4. In similar vein to the exceptional circumstances test, since HMRC are unable to categorically state and prove that there will never be any cases in the future in which ESC A19 might apply to CGT, then CGT must be retained within the scope of the concession.

7. Time limit for requesting HMRC looks at ESC A19

7.1. ***5.5 Do you agree with introducing a time limit for individuals to contact HMRC? Can you identify any issues with HMRC adopting this approach?***

7.1.1. Although it is not unreasonable to expect an individual to approach HMRC sooner rather than later, we believe there should be a reasonable time limit for individuals to contact HMRC to make an application under ESC A19.

7.1.2. HMRC have four years (from the end of the tax year for which the unpaid tax is payable) in which to assess underpaid tax. We suggest that if there is to be a time limit to govern claims under ESC A19, it should be in line with this four year time limit.

7.1.3. There should be an additional proviso. In all cases the taxpayer should have at least one year (twelve months) from the receipt of notification of the underpayment to claim ESC A19.

[1] Taxation of Chargeable Gains Act (1992), ss. 222 – 224.

7.1.4. We would expect this to operate as follows: for example, an underpayment to which ESC A19 applies arises in the tax year ended 5 April 2009. HMRC issue a demand for the tax, which is received by the taxpayer 31 March 2013. Under the four year time limit, the taxpayer only has until 5 April 2013 to claim for ESC A19 to apply. Due to the minimum one year limit (from receipt of notification), they have until 31 March 2014 to make the claim.

7.1.5. If the new wording of ESC A19 imposes a time limit, HMRC must provide clear information and guidance regarding ESC A19 with every P800 they issue, and also with every notification of an accrued underpayment.

7.1.6. The current suggestion means that HMRC could effectively prevent some taxpayers from requesting ESC A19 to be considered. HMRC can issue P800s at any time during a tax year. If HMRC issue a P800 very close to, but before 5 April, a taxpayer whose underpayment cannot be collected through a change to their tax code for any reason will not be able to ask for ESC A19 to be considered once the 5 April deadline has passed. This could leave some taxpayers with far fewer than 30 days (the normal appeal time limit) to initiate a request for ESC A19 to apply.

7.1.7. Not only is this inequitable, but this would be totally inadequate in many cases, particularly for taxpayers who are unrepresented. They may need to seek advice, and the 5 April deadline could easily be passed by the time they have managed to see a potential agent or obtain assistance from HMRC. Given the length of time it can take to obtain advice, this could be an issue for any taxpayers who receive a P800 after 1 January in a tax year.

7.1.8. At para 4.14 it is stated that the time limit proposed 'gives the majority of taxpayers sufficient time'. It is worrying that the consultation is not seeking to provide fairness for **all** taxpayers, especially given the nature of ESC A19 – a concession designed to protect taxpayers. A majority can be as few as 51%. If one considers the proposal with the percentage '51%' in the place of 'the majority', it becomes clear that this proposal is grossly unfair, and sets only very low standards in terms of protecting the taxpayer.

7.1.9. It is extremely disappointing that HMRC wish to limit a taxpayer's ability to claim ESC A19 by time (and other means), but are not willing to apply any time limits or deadlines to their own responsibilities. This is not equitable and, in light of the purpose of ESC A19, this uneven approach is disappointing and worrying, and damages HMRC's reputation.

8. Other considerations

8.1. ***5.6 HMRC plans to issue supporting guidance alongside the revised wording. What format would be the most appropriate for this? For example, online guidance, a Question and Answer document or updates in the PAYE Online Manual.***

8.1.1. Any guidance and changes to ESC A19 must be publicised widely.

8.1.2. Guidance must be available in various formats and media including paper, to ensure all taxpayers affected are fully aware of ESC A19 and the protection it offers them. We would suggest that the guidance is available in all of the formats suggested, but in addition others too, such as Help sheets. It must be clear and simple to understand, to ensure that it is user-friendly.

8.1.3. It should not just be online, because of the significant numbers of taxpayers that are digitally excluded. It must be remembered that many of those taxpayers for whom ESC A19 is relevant are unrepresented. They may not have access to the internet, and may not be computer literate. Nor can it just be in HMRC's PAYE Manual, as most unrepresented taxpayers will not use HMRC manuals, even if they go to the HMRC website for guidance.

8.1.4. We would suggest that clear information and guidance on ESC A19 is sent out with all notifications of underpayments, PAYE coding notices and P800s, for example in the form of Help sheets.

8.1.5. It is essential, in particular if ESC A19 is amended to include taxpayer and HMRC responsibilities, that these changes and responsibilities are communicated to all taxpayers well in advance of their introduction. This is especially important in the case of taxpayer responsibilities. It is not acceptable to prevent a taxpayer from claiming ESC A19 on the basis that they have not met their responsibilities, if the taxpayer is not aware that they had certain responsibilities or what they are, because HMRC have not taken sufficient care to publicise these responsibilities properly.

8.1.6. If HMRC do not publicise the concession and associated responsibilities properly, they will not reasonably be able to demand that a taxpayer meets the responsibilities. Under the rights set out in 'Your Charter',[1] the taxpayer can expect HMRC to treat them even-handedly. This includes the requirement that HMRC will make taxpayers aware of their rights and responsibilities in a manner that suits the taxpayer.

8.2. ***5.7 Are there any terms within the revised concession which you feel require further explanation or expansion?***

8.2.1. Within taxpayer responsibilities, there is the requirement to tell HMRC about 'any changes in their circumstances'.[2] The text goes on to say that if an individual does not know whether a change is relevant or not, they should contact HMRC. If this responsibility is included, we think HMRC should set out in the text of the concession the type of change they need to know about, especially with regards to 'personal' circumstances.

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[1] 'Your Charter' – HM Revenue & Customs (November 2009).

[2] 'Extra-statutory Concession A19 review' – consultation document (3 July 2012) p. 9.

8.2.2. Otherwise, there will be two main problems:

8.2.2.1. Taxpayers who are unaware of the concession and the responsibilities will not bother to contact HMRC about any changes, because there is no suggestion as to the types of change that are relevant.

8.2.2.2. Some taxpayers will be aware of their responsibilities, and will telephone HMRC every time there is a change they think might be relevant even when of no relevance, leading to HMRC being inundated with avoidable telephone calls.

8.2.3. If the text of the concession includes a list of changes that HMRC need to know about, these can be publicised clearly and easily. This will help to ensure that only relevant changes are notified, easing the pressure on telephone lines, but also that more taxpayers keep HMRC informed of relevant changes.

8.2.4. Within the section on time limits, the second paragraph commences 'If underpaid tax cannot be reflected in a change to their tax code',[1] suggesting that it is up to the taxpayer to know whether or not this is the case. It is not reasonable to assume that a taxpayer has enough understanding of the tax system to enable them to judge whether or not this will be the case, see paras 3.1.22. to 3.1.33. above.

8.2.5. It is important that the wording is chosen carefully (throughout the concession) so as not to introduce new concepts which cannot be explained within the context of the concession and not to place additional demands on the taxpayer.

LITRG
24 September 2012

[1] 'Extra-statutory Concession A19 review' – consultation document (3 July 2012) p. 10.

Appendix

Regulation 72 case studies (contributed by Tax Help for Older People)

Mrs P

Mrs P, a widow aged 63, received a County Council (CC) pension inherited from her late husband and earnings from a Primary Care Trust (PCT) on returning to work, having cared for her husband for 5 years until his death. Dual allowances, however, were given to both sources of income and consequently a large underpayment of tax arose. In reply to a challenge, HMRC replied 'During our enquiries we contacted Mrs P's employer, the PCT. Our records show that her pension provider used the code we issued for all years since 5 April 2005, therefore we did not need to contact the CC.' This demonstrates that HMRC made no attempt to ask the CC why they were also applying the full personal allowances. If an HMRC enquiry to both income providers reveals that they were both following HMRC instructions, then clearly Reg 72 is not in point and the attention turns to why HMRC issued those codings, but the necessary first step has not been taken to ascertain the codes issued to and applied by the employers. This is a current Tax Help case.

Mrs R

Mrs R, aged 64, is married and still working. Her income was a little more complicated. She worked mainly for Company A but did a little extra with Company H, while receiving a small pension from a previous employer, Company B. Mrs R agreed to have an underpayment of some £2,000 from 2007/08 collected by coding out from her small pension, unaware that 1) she was entitled to challenge the attribution of arrears to her and 2) that the small pension of £1,500 a year was quite inadequate to collect the full amount. In a telephone conversation with HMRC, Mrs R was told, quite wrongly, that all had now been collected. They then subsequently sent her a calculation showing four figures still owing. Mrs R fortunately stumbled across TOP. An examination of her ample records immediately revealed that the underpayment had been caused by Company H applying a code 262T, rather than the BR issued. (Companies A & B had been operating the correct codes). At no point over the last 5 years have HMRC bothered to enquire of Company H why they were operating the wrong code. They merely put the liability straight onto Mrs R without giving her any idea that there might be an alternative route. This is a clear example of HMRC failing to operate the regulations. Another current case.

Mrs O

Mrs O's employer did not operate the codes issued by HMRC. TOP struggled to get HMRC to consider Reg 72, starting in February 2010. There was no action for 18 months. Eventually in August 2011 HMRC yielded, but in December 2011 replied 'I have looked carefully at the information and believe the employer operated PAYE correctly.' This presumably meant that

they believed the employer had acted in good faith, but there was no direction to pay with right of appeal issued to the taxpayer. TOP pressed harder and in February 2012 the case was re-examined. On 26 April HMRC decided to seek recovery of the arrears from the employer, i.e. over two years of procrastination before eventual admission that Reg 72 applied and that employer error was to blame. No new facts were provided, so the evidence for the failure was there all along.

Mr W

Mr W received a pension from the Civil Service of which HMRC were unaware, leading naturally to an underpayment. In August 2011 HMRC state they will not look at Reg 72 even though it is clear that CSP did not follow Reg 58(3), since Reg 58 (2) was followed as CSP had applied an emergency code. The HMRC letter states, 'Whilst the civil service provider did not comply with 58(3) because they did not send in P46 and had no good reason for them not doing so, this is not sufficient grounds for us to take recovery action against them. As they applied an emergency code, as per regulation, they have met their obligation to deduct and pay tax under the regulations'. Apparently failure by the pension provider to operate PAYE correctly is cancelled out by selecting which clause the employer chooses to operate (even though the provider could be fined a maximum of £3,000 for failing to send the P46 at commencement of pension). This is an unfinished case a year later.