



## LITRG guide to Extra-statutory Concession A19

2019/20

If HM Revenue & Customs (HMRC) have delayed using information in their possession, and this results in you paying too little tax, HMRC will sometimes write off the arrears of tax under Extra-Statutory Concession (ESC) A19. This guidance is to help you consider whether you can challenge HMRC under this policy.

This guide is set out as follows:

1. What is ESC A19?
2. Some examples of situations which may give rise to tax being written off
3. The 'reasonable belief' test
4. What should you do?
5. What happens next? And information about your rights

Appendix: The concession itself, HMRC guidance and a sample letter

### 1. What is ESC A19?

Extra-Statutory Concession A19 (ESC A19) is a practice developed by the former Inland Revenue to cover situations where an error or administrative failure of theirs resulted in someone paying too little income tax or capital gains tax.

Devised to ensure fairness for taxpayers where the strict law says that they owe tax but it would be unfair to pursue payment, its use can alleviate worry and concern for vulnerable taxpayers presented with large, unexpected demands for arrears of tax.

The concession provides for tax to be written off, that is, not collected, in certain circumstances. It has a factual element and a subjective element.

It is generally easy enough to work out whether the purely factual conditions are satisfied. Arrears of tax must have arisen because HMRC have delayed in using information about you which they have had in their possession, and the arrears must usually be at least one year old. Sometimes, the concession can be used to write off arrears which are less than a year old where HMRC's failure to make use of information has been persistent.

There is an ongoing debate with HMRC about what they consider to be 'information' for this purpose, but we understand that HMRC agreed to treat P14 information from employers as relevant for the purposes of the 2012/13 tax year onwards, and we would argue this should have been extended to include the current end of year submissions sent by employers.

The subjective element is less easy to satisfy: whether HMRC write off the tax depends on whether they think it was reasonable for you to have believed your tax affairs were in order – see heading 3 below.

## **2. Some examples of situations which may give rise to tax being written off**

So when might you be justified in asking for your tax to be written off under ESC A19?

First, bear in mind that ESC A19 usually only applies to underpayments for tax years ending more than 12 months ago – for example, you cannot normally use ESC A19 to ask for tax owing for 2019/20 to be written off if HMRC are advising you of the underpayment in, say, June 2020.

However, if HMRC have persistently got something wrong year after year, we would expect them to consider writing the tax off for all years up to and including 2019/20 unless they corrected the error before the end of the 2019/20 tax year. So if you underpaid tax in earlier tax years, and an underpayment in 2019/20 occurred for the same reasons, ESCA19 might apply.

It might help to ask:

- Did HMRC have all the information they needed to get your tax right in the past? HMRC should have received details of taxable state benefits from the Department for Work and Pensions (DWP) and pay and pension details from employers/pension payers.
- You might have provided HMRC directly with information that they have failed to use – for example, by letter or telephone call.
- Particularly where you have various sources of income, HMRC should send you a 'P2' notice of coding each year. Recently these should show all of your employers and pension providers and how your tax allowances have been allocated. Before 2016/17 you may have received separate notices of coding for each PAYE source. Did you receive notices of coding?
- Perhaps you contacted HMRC about your tax codes and they failed to act on the information you provided or told you everything was correct?

### 3. The 'reasonable belief' test

For ESC A19 to apply, it must have been reasonable for you to have believed that your tax affairs were in order. The question is not whether you did in fact believe that your affairs were in order, but whether it was reasonable for you to believe they were.

Importantly, this 'reasonable belief' test should be applied by looking at you as an individual. HMRC's internal guidance<sup>1</sup> requires their officers to consider the following factors when applying the reasonableness test:

- The size of the arrears and what caused them;
- What information HMRC has sent the taxpayer over the years, such as coding notices, explanatory leaflets, etc.;
- Whether HMRC has given the taxpayer wrong or misleading advice;
- Whether HMRC's actions have muddled the case or made it hard to follow, for example, issuing multiple or incorrect coding notices;
- Whether the taxpayer has been professionally represented, in which case it may be harder to argue that they reasonably thought their affairs were in order;
- Reasonable belief may change over time, that is, it may be reasonable for a taxpayer to think their affairs are in order in one year, but if circumstances change the question may have to be considered again;
- The taxpayer's likely level of understanding of tax, taking into account factors such as the taxpayer's background, age, state of health, etc.

The Manual instructions conclude: 'if the issue is so finely balanced that it is hard to form a judgement, always give the taxpayer the benefit of the doubt'.

So what factors should be considered? Drawing on the criteria set out in the HMRC official manual, some examples are:

- If you are a pensioner and have been employed all your working life, with PAYE taking care of your tax, it is perhaps reasonable that you should not have understood all that might go wrong with your taxes on retirement, or failed to identify errors in your tax across multiple sources of income.
- You might have received numerous tax coding notices, which you found incomprehensible, or no coding notices at all.
- Your age, state of health, other problems in your life – such as a bereavement, or ill-health of a close family member – educational background, literacy and numeracy skills, and disability all might have had an impact on your ability to cope with tax matters.

### 4. What should you do?

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<sup>1</sup> HMRC's PAYE Manual 95081: <http://www.hmrc.gov.uk/manuals/pommanual/PAYE95081.htm>

If you think your situation fits in with the concession, make contact with HMRC as soon as possible – their telephone number and address will be given on the tax calculation you have received.

If you think they have made mistakes and you have evidence to support that, set out the details in your letter or when you telephone. Whenever you contact HMRC, keep a record – that is, keep a note of the date and time of telephone calls, to whom you spoke and what was said; and keep copies of any letters and documentation sent to HMRC with proof of postage.

Make sure you mark your letter as claiming ESC A19 – we have provided an example letter in the appendix below to give you an idea of what to write, subject to tailoring it to your own circumstances as appropriate.

We also suggest you make it clear when you contact HMRC that you wish them to suspend any action to collect the tax they say you owe while they review your case.

## **5. What happens next? And information about your rights**

HMRC will, in due course, come back to you with their decision. There are several possibilities here:

- They might have investigated your case and considered that your employer or pension payer is at fault and they should seek to recover all or part of the tax from them. HMRC's guidance, see appendix below, says that they should consider this point as part of their ESC A19 review. At this point you should read our guide to employer or pension payer error.
- They might decline ESC A19 treatment.
- They might decide to allow ESC A19 in part and write off part of the tax.
- They might allow ESC A19 treatment in full and write off all of the tax. If they do agree to write off the tax, check your PAYE coding notices to ensure that HMRC have not still inadvertently included it for collection.

If they decline ESC A19 or only allow it in part, you do have other options to get your case reviewed further. First, you can submit a formal complaint asking to have your case reviewed again, giving details of why you feel you have received inadequate help and care from HMRC.

HMRC should agree to suspend collection of any arrears while a claim for relief under ESC A19 is being considered. We do not recommend that you make a payment towards the PAYE arrears before your ESC A19 application has been considered. The reason is that if you clear the arrears, HMRC will claim that there are no longer any arrears in respect of which ESC A19 can apply, and refuse to consider the concession. You should read our separate guide 'Complaining about misleading information from HMRC'. This explains more about how to complain to HMRC and onwards to the Adjudicator and Ombudsman if you are still not satisfied.

The only route to the courts in ESC A19 cases is to seek what is called a 'Judicial Review', but unfortunately this is beyond the means of most ordinary taxpayers, particularly as it carries with it the downside of HMRC potentially seeking to recover their costs from you should your case fail. If you do wish to consider this route, you would need to take advice and act quickly as there are strict time limits to request the review which apply from the date of HMRC's decision.

## APPENDIX

### Extra-statutory Concession A19

The full text of the concession is as follows:

#### **A19. Giving up tax where there are Revenue delays in using information**

Arrears of income tax or capital gains tax may be given up if they result from HMRC's failure to make proper and timely use of information supplied by:

- a taxpayer about his or her own income, gains or personal circumstances
- an employer, where the information affects a taxpayer's coding; or
- the Department for Work and Pensions, about a taxpayer's State retirement, disability or widow's pension.

Tax will normally be given up only where the taxpayer:

- could reasonably have believed that his or her tax affairs were in order, **and**
- was notified of the arrears more than 12 months after the end of the tax year in which HMRC received the information indicating that more tax was due, **or**

In exceptional circumstances arrears of tax notified 12 months or less after the end of the relevant tax year may be given up if HMRC:

- failed more than once to make proper use of the facts they had been given about one source of income
- allowed the arrears to build up over two whole tax years in succession by failing to make proper and timely use of information they had been given.

## HMRC Guidance

HMRC's guidance to individuals on the GOV.UK website:

<https://www.gov.uk/hmrc-did-not-act>. HMRC's internal staff guidance can be found in their procedural manuals. It is too long to reproduce here, but if you wish to read it all, you can find it on their website: <http://www.hmrc.gov.uk/manuals/pommanual/pay95000.htm>

## Example letter

It is always dangerous to try and draft letters without knowing the context. Nevertheless, the following letter (on page 7 to 8) might help to give you an idea of what to write and how to present your points. If you do use it, you do so at your own risk as we cannot give any guarantees.

Where you need to insert some text we have shown in square brackets the information you need to insert. *For example:* [your own name].

But do bear in mind that you may also need to tailor the letter further to your individual situation and ideally you should take advice from someone knowledgeable in tax matters. If you already have a tax agent, it is advisable to consult them. If not, but the amounts underpaid are significant, you may wish to appoint a tax adviser, who may charge you a fee.

**We stress again that using letters which are not appropriate to your own circumstances can do you more harm than good.**

HM Revenue and Customs

[Address from P800]

Dear Sir

**[Your own name]**

**[Your National Insurance number]**

**[Any other HMRC reference shown on the P800]**

**P800 tax calculation and claim for Extra-Statutory Concession A19**

I have received your tax calculation suggesting that I have underpaid tax for [insert tax year(s)].

Not being an expert in tax matters, I was unaware that my tax affairs were not in order. I had thought that all the tax that I was due to pay was deducted under PAYE. I believe that the underpayment has arisen because you failed to take action upon relevant information already in your possession for the year[s] in question. [For example, if you changed jobs and HMRC failed to act on new starter/P45 information, or you telephoned them to query your tax, give details here.]

[Insert here any details you feel relevant to why you would not have understood there might be a problem with your tax, for example:

*"I retired X years ago due to ill-health after working all my life in employment where my tax was dealt with under PAYE and never received any information from HMRC or government that I would need to check the tax on my pensions."*

*Other examples could include mentioning if someone has helped you in writing the letter if you were not able to do so yourself, any disabilities/health issues affecting your ability to deal with your taxes, your educational background and so forth.]*

[For the tax year 2019/20, I appreciate that you are not notifying me of the arrears more than 12 months after the end of the tax year in which you received the information indicating that more tax was due. However I feel that the 'exceptional circumstances' condition applies because you:

- failed more than once to make proper use of the facts you had been given about my sources of income
- allowed the arrears to build up over two whole tax years in succession by failing to make proper and timely use of information that you had been given.]

I therefore request that under the provisions of ESC A19 that the whole of the underpayment as shown on the P800 should be remitted. Pending consideration of my case, I would be grateful if you would suspend any action to collect the tax you say I owe, either by way of direct demand or via my PAYE coding.

Yours faithfully

[Sign and date your letter in ink]