

We have considered the proposals set out by HM Revenue and Customs in the consultation document which was published on 18<sup>th</sup> June 2014 and set out our responses to the questions raised.

### Overview

We fully support the proposal to replace the existing dispensation regime with an “exemption” which would eliminate inconsistencies in the approach taken by Inspectors who need to be “satisfied” that no additional tax will become due as a consequence of granting a dispensation. Currently, there is no opportunity to appeal against an Inspectors decision to deny a dispensation – apart from making application for a judicial review of the decision.

We agree that many businesses seek the comfort of having HMRC review their expenses policy prior to granting a dispensation. Removing such assurance in favour of an exemption may mean that some employers will prefer to disclose expenses payments on forms P11D just to be on the safe side of the law. This may cause an increase in returns and additional work for an already overstretched HMRC.

We consider that the automatic availability of Benchmark Scale Rates (BSR's) for subsistence as part of the exemption is a positive measure. Currently, HMRC's stance is that BSR's can only be used when the dispensation has been approved. Such an approach has been divisive and has, in part, caused businesses to call for a “level playing field”. By making BSR's available to all employers (subject to meeting certain criteria), this will reduce administration, improve fairness for all sizes of employer and prevent BSR's from being seen as some kind of special privilege only available to larger businesses.

In order to discourage unnecessary reporting, HMRC will need to actively promote the exemption, provide clear and unambiguous guidance and consider re-designing the form P11D.

We agree that the exemption should cover all employers and should not be implemented on an “opt-in” basis.

We consider that the exemption should be extended to include expenses paid by employees but not paid by employers. This would enable employers who are not in a position to make a payment of expenses to allow employees to make a claim for qualifying expenses which would be subject to appropriate relief in an earnings period including the ability to claim relief for subsistence expenditure on the basis of BSR's.

We are concerned that HMRC has used this consultation to attack what it considers to be abusive salary sacrifice arrangements which involve a payment of expenses. Whilst the OTS identified the need to protect the exemption, we feel that this aspect should be addressed as part of a wider consultation on the use of salary sacrifice in general.

It is possible for a salary sacrifice arrangement to be implemented without a dispensation/exemption due to the fact that the payment of expenses can be reported on forms P11D. It is also worth mentioning here that salary sacrifice is a matter of employment law as it involves a variation to a contract of employment.

Salary sacrifice is currently used in a variety of ways which reduce tax and National Insurance Contributions i.e. salary sacrifice for pension contributions where the employee gives up part of his salary in lieu of receiving an employer based contribution. Such an arrangement benefits both the employer and employee similar to that achieved by a salary sacrifice for a payment of expenses.

We do not consider that removing a payment of expenses from the exemption will serve any purpose other than increasing the number of applications to approve scale rate payments and the number of P11D's which will be submitted.

We would, however, support a reform of how salary sacrifice arrangements operate which would include a requirement that employees receive the full benefit. This could be undertaken as part of the proposed reform of travel and subsistence expenditure.

### Response to Questions

**Q1: If the Government were to provide 'models' of acceptable record keeping and checking processes would this be helpful for employers? Where the models are not appropriate for employers, would those employers feel disadvantaged, even if it is made clear that they are not exhaustive?**

Any assistance HMRC can provide in providing assurance on record-keeping and checking procedures would be beneficial to all employers. However, such guidance should not be over-prescriptive as this may cause an administrative problem to the larger employer trying to meet what it considers to be a requirement.

Standard procedures which could be adopted by smaller employers would reduce the possibility of marginalisation.

**Q2: Are you aware of any types of arrangement that seek to replace taxable pay with payments of non-taxable expenses which the Government should focus on in particular when tackling this issue? Are you aware of any types of these arrangements where tackling them might disturb business practices that are not tax or NICs motivated?**

We do not consider that perceived abuse in the operation of salary sacrifice schemes is a matter that can or should be addressed in this consultation.

The consultation implies that, were the exemption to be denied to employers operating a salary sacrifice scheme, they would cease to operate it. In our opinion this is unlikely to be the case and rather, salary sacrifice schemes would continue to operate but would involve actual subsistence costs or applications for bespoke scale rate payments.

Whilst administratively burdensome, we do not consider this would negate use of such schemes and it would produce the continued burden of P11D and s336 claims for HMRC.

Salary sacrifice is a matter of employment law. Provided that the sacrifice is effective it would be to the detriment of the workforce (which the consultation document identifies as "often..... low paid employees") to deny this facility and would be seem particularly harsh in

light of the prevalence of salary sacrifice for higher paid workers for benefits such as pension, company cars and childcare vouchers, all of which could be viewed as “tax and NICs motivated”.

If salary sacrifice arrangements for expenses were to be outlawed as a consequence of the exemption, employers may consider outsourcing measures including the use of third-party intermediary structures (umbrella companies).

**Q3: In what circumstances would an employer currently apply for a custom scale rate? Other than the expenses covered by the benchmark scale rates, which expenses do employers commonly request a scale rate for?**

BSR's for subsistence were introduced in 2009 but have not been updated. Having regard to the rate of inflation since introduction, a £5 scale rate would now need to have increased to £5.85 to retain the same spending power.

In our experience an employer will usually apply for a scale rate where a significant proportion of its employees incur expenses for the same item which is either not covered by a statutory scale rate or is incurred at a rate higher than the statutory scale rate. This will often be for items such as public transport (where most use a specific form of travel at a set cost), accommodation (where most stay in a particular location/group of hotels which incurs a set charge) or meals where the average cost incurred by employees is demonstrably higher than that afforded by the use of BSR's.

The consultation document identifies that only 1% of dispensation applications currently include a request for custom scale rates however, this could potentially still apply to a significant number of employees. We consider it would be to the detriment of such employees to remove the use of custom scale rates and so, would suggest that clear guidance on the calculation and evidence requirements in calculating such a scale rate should suffice as a method to continue the practice in the least administratively onerous way.

**Q4: Are there any examples of particular industries or types of employer who would be affected if custom scale rates could not be used with the proposed exemption? What would the impact be on those employers?**

In our experience, the construction industry has often relied on bespoke scale rates for subsistence and accommodation due to working in high cost areas. By restricting scale rates this may involve such employees having to make a claim to HMRC at the end of the year for additional relief.

**Q5: Would employers be disadvantaged if a process to apply for custom scale rates were not retained? If such a process were retained, would it be seen as additional complexity by those employers who do not need it?**

We consider that the ability to apply for custom scale rates should be retained to avoid unnecessary reporting. Whilst it would be available, we do not foresee many employers making an application due to the administrative burden. We consider that only employers who genuinely require bespoke rates will choose to make an application.

**Q6: Would employers welcome the ability to self-certify the sampling exercise undertaken to support a custom scale rate? If so, would a sampling process set out in**

**guidance or regulations provide sufficient certainty for employers what wish to use a custom scale rate?**

We consider that employers would feel empowered where they to be allowed to self-certify a custom scale rate provided that HMRC set out a sampling process which would need to be adopted. It is often the case that employers rely too heavily on HMRC approval and have a tendency to allow things to slide. Self-certification will generate greater ownership and on-going audit procedures rather than relying on an ever-aging agreement.

**Q7: What are the reasons form one person companies and very small, close companies paying scale rates to directors in respect of expenses? Would such employers be disadvantaged if they were not permitted to pay scale rates to their directors under the proposed exemption? If so, in what way?**

We consider that the use of scale rates is to prevent an administrative burden arising for the employer. Therefore, we do not consider that if the exemption to remove scale rates for one man limited companies was to be removed, this would cause such an employer to be disadvantaged.

With regard to small closed companies, we consider that the ability to pay scale rates to directors should be retained due to the ease of administration for such companies.