

**Private and confidential**

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Dear Stephen

### **Non-UK pension schemes: notes of meeting**

Firstly may I thank you and your colleagues for making the time to attend the meeting with representatives of the Big 4 professional services firms on 14 May 2007. Secondly, may I apologise that it has taken so long to get the notes of that meeting to you. However, these are now enclosed for your attention as Appendix 1 to this letter. I should be grateful if you would circulate the notes to your colleagues as I have not sent copies to them separately.

In reviewing the notes of meeting I should be grateful if you would consider the following additional points.

#### **Application of S307 and S308A, ITEPA 2003**

Since we met, the Big 4 have discussed further the comments made at the meeting as recorded at points 8.4 and 8.5 of the notes. The points in question relate to the exemptions provided by S307 and S308A, ITEPA 2003. We asked why S308A was needed in light of the comments you had made in relation to the broad application of S307. Your response at the meeting was that S307 provides an exemption in respect of retirement and death benefits only whereas S308A provides an exemption in respect of total contributions irrespective of what benefits those contributions secure provided the scheme into which they are paid is a Qualified Overseas Pension Scheme (QOPS) and the employee a relevant migrant member. We then asked why S307 provides an exemption from a benefits in kind charge whereas S308A provides an exemption from a general earnings charge. You said that you had not considered the issue but would do so and report back to us.

Having considered the point further, whilst we do not disagree with the comment you made about the exemption provided by S308A applying to contributions to a QOPS irrespective of what benefits they secure, we think the application of S308A is rather narrower than suggested at the meeting. Our reading of the legislation suggests that S308A secures an exemption from a charge to tax under S62 only and that, as such, it secures an exemption only where the contribution made by the employer is a payment made to meet the employee's pecuniary liability. We do not believe it secures an exemption in respect of an employer contribution to an occupational pension scheme with QOPS status where there is no possibility of a S62 charge, only a potential benefit in kind charge. The Registered Pension Scheme Manual appears to support this analysis and in this regard I would refer you to HMRC's comments at RPSM 13101020 and RPSM 13101115.

If, having considered the matter further you are able to agree that S308A does not provide an exemption from anything other than a charge under S62, then we can see a potential issue where an employer makes contributions into an occupational pension scheme with QOPS status where the scheme in question provides benefits other than retirement and death benefits. If we have understood HMRC's position correctly, then whether or not the employer contribution into the scheme is taxable as a benefit in kind depends on whether there are additional costs associated with the provision of the additional benefits and, where there is an additional cost then whether or not this additional cost can be identified separately to the cost of providing the retirement and death benefits (points 4.3 and 4.4 of the notes of meeting).

If HMRC were to pursue a benefit in kind charge on all or part of the contribution made, then we would be left with a somewhat unexpected result. Any employee contributions into the QOPS would be tax deductible for income tax purposes (para 1 of Schedule 33), the employer contributions would be tax deductible for corporation tax purposes at the point of contribution (para 2 of Schedule 33), but some or all of the employer contributions would be taxable on the employee as a benefit in kind. Businesses will not be expecting this and will be concerned by the result.

As recorded in the notes of meeting, we understand that HMRC intend to be sensible and pragmatic when considering whether or not exemption under S307 is in point and as such we would welcome confirmation from you that where contributions are paid into a QOPS the main purpose of which is the provision of retirement and death benefits, the whole contribution will be accepted as exempt from a benefit in kind charge by virtue of S307. This will remove the anomaly referred to above.

Of course, if HMRC is prepared to accept the above, then it would need to accept a similar approach in relation to schemes which do not have – and perhaps could not have – QOPS status as the legislation in point – S307 – applies irrespective of whether or not the scheme in question is a QOPS.

As such, we should be grateful if you would confirm that you are prepared to accept that S307 exempts any and all provision made by an employee's employer where that provision is mainly for the purpose of securing retirement and death benefits. For the avoidance of doubt, we should be grateful if you would confirm that where a scheme meets the "main purpose" test, you will not seek to charge any or all of the cost to the employer as a benefit in kind on the employee.

To the extent it makes any difference to your consideration of the above request, we would point out that HMRC did not take the point under the pre-A Day legislation. As you know, prior to A Day, S386, ITEPA 2003 charged to tax any sum paid by an employer in accordance with a non-approved retirement benefits scheme and with a view to the provision of relevant benefits for or in respect of an employee of the employer. Provided the scheme was accepted as corresponding, employees could make a claim under S390 to remove them from a charge under S386. However, the charge under S386 was a charge to tax as specific employment income only. As a result, all a claim under S390 did, was remove a specific employment income charge, it did not remove a charge under either S62 or Chapter 10 of Part 3. However, HMRC did not take the point prior to A Day and we would welcome confirmation that you do not intend to take it now.

Of course, where exemption is provided under S307, the employee will be within scope of the recovery charges in Schedule 34 to the extent that the provision is made under an overseas pension scheme, as defined. As a result, we hope you can agree our request is not unreasonable and has the potential to bring a good deal of certainty to the business community.

**Short term business visitors to the UK**

Point 8.3 of the notes of meeting records what was discussed in relation to short term business visitors to the UK. In considering how what was said might apply to a short term business visitor who subsequently establishes residence in the UK, it seems to us that your comments can be interpreted as meaning that the recovery charges will not apply to any portion of the individual's overseas pension benefits insofar as these benefits accrued during a period or periods when the employer provision giving rise to the benefits was made at a time when the individual was non-UK resident. We should be grateful if you would confirm that we have understood your comments correctly.

**Points which HMRC said they would consider further and provide further guidance on**

Appendix 2 contains a summary of the points you said you would consider further and provide guidance on. We have taken the liberty of adding an additional point relating to NIC which we have clearly marked as "additional point".

We very much look forward to receiving your comments on each of the following:

- Whether or not you can agree the notes of meeting and, if not, confirmation of the changes you would like to see made.
- Whether or not you are prepared to apply the "main purpose" test outlined above in the section entitled "Application of S307 and S308A, ITEPA 2003".
- The various points discussed at the meeting in respect of which further clarity is awaited as summarised in Appendix 2.

We should be grateful if you would provide confirmation and/or clarification on each point separately rather than delay responding until you are ready to do so in respect of them all.

**Future dialogue**

We would reiterate that whilst we appreciate the explanation you gave about the trade-off between exempting employer contributions and taxing the later benefit distributions, and whilst we understand what you said about Schedule 34 having a "light touch" reporting regime, we still believe that employers who take responsibility for their expatriate assignees' personal tax liabilities are going to face administrative difficulties in organising compliance. We suggest that we review the position again informally with you next year in light of our collective experience at that time.

In the meantime, I look forward to hearing from you in response to this letter. We would happily make ourselves available for a further meeting should you think this an appropriate way to progress matters further.

Yours sincerely

For and on behalf of Ernst & Young LLP

Rosemary Martin  
Senior Manager Ernst & Young