THE INCOME TAX (RECCOMENDED MEDICAL TREATMENT) REGULATIONS 2014

Response by the Association of Taxation Technicians

1 Introduction

1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to respond to the consultation on the *Income Tax (Recommended Medical Treatment) Regulations 2014* (the Consultation) published by HMRC on 17 September 2014 alongside the draft statutory instrument (the Draft Regulations).

1.2 The Draft Regulations are designed to introduce the "requirements" which the Treasury is empowered to make by section 320C(3)(c) ITEPA 2003. As currently drafted, they provide:

- A definition of the term "health care professional";
- A definition of the qualifying period of expected absence;
- The mechanics for the provision of a recommendation for medical treatment.

1.3 In our response[11] to the draft legislation published in December 2013, we expressed concern that the qualifying conditions in relation to what is a relatively modest tax exemption for any individual employee may prove disproportionately restrictive and so limit take-up. If that proves to be the case, the benefits to the national economy that might be expected from the Health and Work Service (HWS) in conjunction with the proposed Income Tax and NIC exemption will not be realised. Our comments on the draft regulations reflect that same central concern.

1.4 We think that it is imperative that access to HWS and the accompanying Income Tax and NIC exemptions is as straightforward as possible. We see the possibility of mutual benefits for employers, employees and the Exchequer from a successful implementation of HWS but those will only be achieved if employers find the scheme simple to operate.

1.5 Our comments in 1.3 and 1.4 above have particular relevance to smaller businesses. We understand that such firms tended to make greater use of the previous Percentage Threshold Scheme (PTS) than larger businesses. If the new scheme involves the imposition of tight and complex regulations for what is a relatively modest tax exemption, we are concerned that it will

1 http://www.att.org.uk/technical/submissions/health_related_interventions.htm?WBCMODE=PresentationPublishedyear year.rss%22+and+%22x%22

only be used by the largest employers – those with HR departments and many employees. If that were to be the case, smaller employers would be adversely impacted not only by the withdrawal of PTS but also by the inaccessibility of HWS and the associated tax and NIC exemptions for their employees.

1.6 It is critical that the objective of HWS is the paramount consideration. It is intended to contribute to the economic wellbeing of UK plc. Utilisation of HWS and the exemptions is accordingly good news to the Exchequer. Everything should therefore be done to facilitate access to the scheme.

1.7 Before responding to the Consultation questions, we need to make the general point that the responsibilities of the various parties (employee, employer, health care professional, HWS and employer-arranged occupational health service) and their inter-relationship remain unclear. We had anticipated that the Draft Regulations would provide some clarity and fill in some of the gaps in the legislative framework. We certainly think this should be done by regulation rather than in departmental guidance.

By way of example of the lack of clarity, we draw attention to the use in the primary legislation (section 320C, ITEPA) of the term "recommended medical treatment" when apparently referring to treatment which attracts the exemption. By contrast, the Draft Regulation 4 uses the term "recommendation for medical treatment" when apparently referring to the initial advice from the health care professional which we understand to be at a preliminary stage and prior to any reference of the employee's health position to either HWS or an employer-arranged health service. The HWS itself is invisible in both the primary legislation and the Draft Regulations.

We note that the Consultation itself makes it very clear that "Expenditure qualifying for the exemption must be on treatment that is recommended by either the HWS or an employer-arranged occupational health service." It is apparent from this that the health care professional's recommendation is not the same as recommended medical treatment. The confusing similarity in terminology is unhelpful.

1.8 We respond in section 2 below to the specific Consultation questions.

2 Response to the Consultation Questions

Our comments in this section 2 follow the numbering of the Consultation questions so that our 2.1 is in answer to question 1 and so on.

Where there is an element of overlap in our answers to the questions we make cross-references.

2.1 *Question One*

Do you think that these requirements will impose any significant administrative burden on either the occupational health service provider or employers? If so, how could this be lessened, while bearing in mind that employees and employers who benefit from the tax and NICs exemption may

be required to demonstrate that they are entitled to the exemption on the basis the eligibility requirements have been met.

2.1.1 The simple answer to the question as posed is "No". The requirements contained in the Draft Regulations appear to concern only the employee and their health care provider. As such, the only administrative burden at that stage falls on the health care provider who has to provide their written recommendation for medical treatment.

2.2 *Question Two*

Will the requirement that an employee must be assessed as unfit for work by a health care professional restrict access to the exemption unnecessarily? If so, how could this impact be lessened?

2.2.1 The Consultation indicates that the health care professional must provide their written recommendation for medical treatment to both the employee and the employer. It is, however, unclear how that written recommendation is communicated either initially to the employee and employer or onward to HWS or (as the case may be) the employer-arranged occupational health service. If it requires the health care professional to write a letter which is then posted to the initial recipients who then forward it, there is an inbuilt delay in the commencement of medical treatment which appears to be at odds with the fundamental objective of enabling the employee's early return to work. We think there must be scope for the initial recommendation to be made electronically and in such a manner that it is accessible to all entitled parties. That could enable the initial recommendation to be available by the time that the employee left the health professional's premises and to be accessible to the relevant parties even if they were geographically remote from each other.

2.2.2 If electronic access to the recommendation is practical, the Regulations might need to include specific supporting provisions.

2.3 *Question Three*

The definition of a health care professional set out in the legislation relies on an individual being registered with an appropriate regulatory body. Do you think that this is a suitable approach to defining a health care professional? If not, how could health care professionals be otherwise defined?

2.3.1 We think that the basic definition of a health care professional is appropriate. We cannot, however, see that the Draft Regulations cater for the situation where the employee in question is out of the UK. With UK-based employees increasingly having to travel and work abroad, we think that provision should be included for that situation, particularly as such employees may not have ready access to state-funded health care when out of the country.

2.3.2 We suggest that the draft regulation should be extended to include assessment by an appropriate medical practitioner who practices outside of the UK. A possible model (subject to relevant amendment) for such an extension can be found in the *Pensions Schemes (Application*

of UK Provisions to Relevant Non-UK Schemes) Regulations 2006 (2006/207) where Regulation 15(4) provides:

> (4) In paragraph 4—
>
> (a) in sub-paragraph (1)(a) after "registered medical practitioner" insert "or a recognised medical practitioner";
>
> (b) at the end of the paragraph add—
>
> "[(4)] In sub-paragraph (1) "recognised medical practitioner" means a medical practitioner practising outside the United Kingdom who is authorised, licensed or registered to practise medicine in the country or territory, outside the United Kingdom, in which either the scheme or the member is resident."

2.4 *Question 4*

Do you think 14 days would generally provide sufficient time to arrange and commence recommended medical treatment?

2.4.1 Given that the Consultation concerns draft regulations, we are surprised that the opportunity is not being taken to specifically cater for the intervening return to work scenario which the 14-day guidance is intended to address. While any easing of the requirements is of itself helpful and therefore welcome, introducing this by way of non-statutory guidance that has to be read alongside primary legislation and regulations can only add to the complexities and uncertainties that could undermine the effectiveness of HWS and the related tax and NIC exemptions.

2.4.2 Noting the wording of the question ('generally') and the Consultation ('usually'), we question whether reference to any specific number of days will be helpful. We can envisage a variety of circumstances when it might not be possible for treatment to commence within 14 days of an employee's return to work such as:

- Unavailability of practitioner of choice;
- Unrelated health condition of employee (eg flu);
- Pre-booked holiday / Christmas and New Year period;
- Family event/crisis.

2.4.3 Given that employers are likely to exercise sound commercial judgement in deciding whether to finance relevant treatment for an employee, we think that a more practical solution would be for any guidance to simply emphasise that the treatment must be for the purpose of assisting the employee's return to work. We consider that the wording of section 320C (3)(b) is sufficiently wide to encompass both the situations referred to in the section of the Consultation headed *Return to Work*. Both examples involve treatment to assist the employee's return to work. The precise timing of the treatment is irrelevant; it is its purpose that is important. Even if

the treatment starts some time later, if its purpose is to ensure that the return is effective, that should be sufficient.

2.5 *Question Five*

Are there any other aspects that you think should be reflected in the regulation or in HMRC guidance?

2.5.1 As a matter of principle, we do not think that any aspects should be included in HMRC guidance that are not contained in either the primary legislation or the regulations. Guidance should assist its readers to understand the application of the primary and secondary legislation; it should not be used to augment or modify the provisions.

2.5.2 We have already commented in section 1.5 above that the HWS is invisible in both the primary legislation and the draft regulations. It is difficult to see how the process leading to medical treatment that qualified for Income Tax and NIC exemption could be set out in the regulation. We think therefore that the process should be spelt out in clear and readily accessible guidance on the GOV.UK website (whether in HMRC or DWP pages) in a manner that is easily understood by any relevant party (employee, employer or health care professional).

2.5.3 We note that draft regulation 4(1) refers to a recommendation for medical treatment being required to be given after the employee has been assessed as unfit for work for at least 28 days. Example 1 in the Consultation (consistent with previous indications by HMRC) makes it clear that the provision is intended to apply when the health care professional's assessment is that the employee is ***likely*** (emphasis supplied) to be absent from work for at least 28 days. We think there is a subtle difference between the two wordings. If, as we understand it, the intention is that the expectation of a 28 day absence is sufficient, we think the regulation should state this and not be worded in a manner that could be read to impose a more stringent test.

2.5.4 We note that draft regulation 4(1) (a) stipulates an absence period of 28 days but without indicating the starting point from which the days are to be counted. Consistent with draft regulation 4(3), we think the starting point is the factual date when the absence started regardless of the point in time when the assessment is made by the health care professional. On this basis, it would be irrelevant whether the assessment was closer to the beginning of the period of absence or closer to the end of the qualifying period of at least 28 consecutive days. We think it would be helpful if the regulation clarified this point.

2.5.5 We find the wording of draft regulation 4(3) rather opaque. We read the provision to mean that there is no requirement for an assessment by a health care professional if the employee has already been absent from work for 28 days. If that is indeed the intention, why is 4(3) not more simply worded to simply state that no assessment is required where the employee has been absent for 28 consecutive days. The use of a deeming provision adds an unnecessary complication.

2.5.6 We have indicated our understanding of the meaning of regulation 4(3) in 2.5.5 above. However, if that understanding is correct, we cannot see how HWS could prepare a Return to Work Plan without the benefit of a health care professional's assessment? We wonder whether 4(3) is really intended only to remove the requirement for the health care professional to

forecast the employee's likely period of absence. If that is the case, we think that the intention would be better expressed by deleting 4(3) completely and amending 4(1) to read:

> *"4.—(1) A recommendation by a health care professional for medical treatment is required to be given after either—*
> *(a) the employee has been assessed by the health care professional as unfit for work for at least 28 consecutive days, or*
> *(b) the employee has already been absent from work for at least 28 consecutive days."*

Whatever the intended meaning of regulation 4(3), we think that wording needs to be made much clearer.

3 Summary

3.1 Our focus in this response has been to try to make the tax and NIC exemptions for recommended medical treatment as accessible as possible for employees and employers – particularly smaller employers who will not have the resources to deal with complex rules and regulations.

3.2 We have indicated in this response how we think the draft regulations might be improved. We have also commented that it remains unclear from reading both the primary and secondary legislation exactly how the employee, the employer, the health care professional and HWS (or the employer-provided occupational health service) are meant to interact. We are concerned that this lack of clarity will discourage use of HWS and the associated tax and NIC exemptions.

3.3 We would be pleased to join in any discussion with HMRC in relation to this Consultation. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Will Silsby, on 01905 612098 or at: wsilsby@att.org.uk

Yours sincerely

Paul Hill

Chairman, ATT Technical Committee

4 Note

4.1 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has over 7,500 members and Fellows together with over 5,000 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.