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## Member Brief No 84

# Travel and Subsistence Schemes

### Background and Introduction

This Brief updates and replaces ALP Brief 69.

Essentially, travel and subsistence schemes increase workers' take home pay and reduce tax and National Insurance Contributions (NICs) due to HMRC via a salary sacrifice arrangement whereby pay is irrevocably sacrificed in lieu of travel and subsistence expenses incurred by the individual. Salary sacrifice schemes are commonly operated directly by employment businesses whilst umbrella companies operate by identifying expenses which are available for tax relief.

Such schemes are lawful if the relevant contractual arrangements are properly constructed and implemented and the schemes are operated in accordance with relevant tax and social security legislation, individual agreements in place with HMRC and all other relevant employment legislation. In the GLA regulated sector such schemes must also comply with the GLA Licensing Standards.

Towards the end of 2008 HMRC/HM Treasury undertook a consultation on travel and subsistence expenses, [Tax relief for travel expenses: temporary workers and overarching employment contracts](#). The outcome of the Consultation was reported on page 104 in the November 2008 [HM Treasury Pre-Budget Report](#) as follows:

**5.104** Following the consultation *Tax relief for travel expenses: temporary workers and overarching employment contracts*, the Government have decided to leave the current rules unchanged. However, in the light of evidence from the consultation confirming poor levels of compliance in this area HMRC will refocus its efforts to ensure that the current regime is properly applied. If compliance does not improve, the Government may return to this at a later date.

On 11th February 2010 HM Treasury published a [consultation](#) "National Minimum Wage workers: Travel and Subsistence Expenses Schemes". On 27th July it published the [summary of responses](#) and its decision to include an additional reduction at Regulation 31(1) of the National Minimum Wage Regulations 1999:

"(j) any money payments paid by the employer to a worker in the pay reference period in respect of expenses, subsistence or accommodation that are allowed as deductions from earnings under section 338 Income Tax (Earnings and Pensions) Act 2003."

[The National Minimum Wage \(Amendment\) \(No.2\) Regulations 2010](#) introduced a new regulation into Regulation 31(1) of the National Minimum Wage Regulations 1999 on 1 January 2011 and mean that travelling and associated subsistence expenses eligible for tax relief under section 338 Income Tax (Earnings and Pensions) Act 2003 no longer count when calculating national minimum wage (NMW) pay. Guidance on the application of these Regulations can be found on the [Business Link website](#). Essentially this means that the use of salary sacrifice schemes for workers, who are paid at or around the NMW and involving the “payment” of expenses, will come to an end.

A Department of Business, Innovation and Skills (BIS) [notice](#) issued on 30 December 2010 states:

The National Minimum Wage (Amendment) (No.2) Regulations 2010 came into force with effect for pay periods starting on or after 1 January 2011 and will mean that travelling and subsistence expenses eligible for tax relief under section 338 Income Tax (Earnings and Pensions) Act 2003 will overall not count when calculating national minimum wage (NMW) pay.

The Department for Business, Innovation and Skills and HM Revenue & Customs are aware that a number of travel schemes and umbrella business models are being marketed which claim to continue to provide savings for the employer and be compliant with the NMW from 1 January 2011. These include:

- Paying subsistence expenses rather than travelling expenses;
- Classifying workers as directors;
- “Holiday Pay adjustments”; and
- Under recording hours worked

None of the models seen by BIS and HMRC, including those listed above, would comply with the requirements of NMW legislation for workers paid at, or close to, the NMW. They have clearly been constructed with the express intention of operating contrary to the intention of Parliament and as such HMRC will identify businesses seeking to circumvent the NMW and take appropriate action.

Where compliance action also identifies non-compliance with tax legislation, Employment Businesses and umbrella companies run the risk of having their dispensation revoked in addition to paying arrears of tax and National Insurance together with interest and, where appropriate, penalties.

HMRC will work with the Gangmasters Licensing Authority in the GLA-licensed sectors to address issues of non-compliance in those sectors.

Workers who believe that the business paying them is doing so in a manner which may contravene national minimum wage or tax legislation are advised to provide details, in confidence, to [HMRC here](#). Similarly, Employment Businesses which believe competitors may be contravening national minimum wage or tax legislation are also advised to provide details to HMRC.

The Gangmasters Licensing Authority approach to how it will apply the licensing standards to licence holders who operate a travel and subsistence scheme directly or through an umbrella company is contained in GLA Brief 12 entitled [“Travel Schemes and Umbrella Companies”](#) issued in January 2011.

The ALP is supportive of HMRC and GLA activity to ensure that any schemes operated are fully compliant with legislation.

## Legislative Background

With effect from 6th April 1998 new legislation was introduced governing the manner in which travel and subsistence expenses, incurred in connection with business travel, could be disregarded from Class 1 NICs and may be claimed as tax deductible by employees. Basically, the rules which give relief for expenses are as follows:

- Journeys which employees have to make in the performance of their duties, and
- Journeys which employees make to and from a place they have to attend in the performance of their duties – but not journeys which are ordinary commuting or private travel.

The first type of tax relief available is for journeys between one workplace and another and for business journeys made by employees for whom travel is an integral part of their duties. The second gives relief for business journeys between an employee's home and work places which have to be attended on an irregular basis for a limited time or for some other temporary purpose to carry out the duties of employment. No relief is available for the cost of ordinary commuting or private travel.

There are complex rules to determine whether attendance at a particular workplace is deemed to be permanent or temporary. The position for some site-based employees (those who attend a series of temporary workplaces which are not likely to exceed 24 months in duration) is that they do not have a permanent work place and thus they do not have an ordinary commuting journey. Accordingly, they will be entitled to full relief on all journeys made from home to the site and return to home.

The tax treatment of subsistence expenditure follows that of travelling expenses as it is specifically treated as a product of business travel if it is incurred during the attendance at the temporary workplace for which tax relief is claimed. Subsistence includes accommodation, food and drinks costs incurred throughout the period of attendance.

The new rules determine the tax relief available for employee travel and subsistence. In order to justify the level of travelling expenses that may be permissible, it is advisable to seek HMRC approval by way of an expenses dispensation.

The statutory rules are in Section 336 to 342 of the Income Tax (Earnings and Pensions) Act 2003. Guidance on how the employment income travel expense rules work can be found in HMRC's Booklet 490 [Employee travel – A tax and NICs guide for employers](#).

## Dispensation Agreements

Companies operating travel and subsistence arrangements can apply for a dispensation which removes the requirement to report expenses on end of year returns (P11D). This is an agreement whereby HMRC confirms that the processes and procedures in place at the employer are sufficient to determine the tax position of expenses which are incurred.

General information regarding Dispensation Agreements is in HMRC's Booklet 490 [Employee travel – A tax and NICs guide for employers](#). Paragraph 10.6 on page 60 states:

“A dispensation can cover any travel expenses and benefits for which there is a matching tax deduction. The officer of HMRC has to be satisfied that travel expenses and benefits covered by a dispensation are calculated and paid on the basis that they are clearly intended to do no more than reimburse employees for expenses actually incurred in making genuine business journeys.”

## **Umbrella Companies**

The Department of Business, Innovation and Skills (BIS) describes an umbrella company as follows:

“An umbrella company acts as employer to independent contractors who work under temporary contract. The worker has an employment contract with the umbrella company. The worker is not a director, nor does he own any shares in the umbrella company.

The worker works for end clients but rather than working directly for them, he provides his services through the umbrella company. Umbrella workers range from highly skilled professionals commanding high rates for their work, to low-skilled, low-paid workers. Low-skilled workers are likely to have an employment business finding them work, acting as an intermediary between the hirer and Umbrella Company. In this case the hirer pays the agency, which deducts its fee and in turn pays the umbrella company for the worker's services. Generally many employees will provide their services through the same umbrella company.

Workers tend to use umbrella companies because they offer tax advantages i.e. the ability to claim expenses, with relatively low cost administration for the worker.”

Any labour provider considering using the services of such a company should:

1. Ensure that the umbrella company has its own GLA licence. As the umbrella company will employ workers directly and so is involved in the supply of labour, it must hold a GLA licence.
2. Undertake due diligence on the umbrella company through independent specialist advice. The ALP advisor on these matters is Alan Nolan of Aspire Business Partnership LLP who can be contacted via the Aspire website at [www.aspirepartnership.co.uk](http://www.aspirepartnership.co.uk) or on 07979 541405.
3. Specifically ensure that the umbrella is operating with a dispensation and that expenses incurred are included within the dispensation. In the event that the umbrella company is not operating with a dispensation, members should ensure P11Ds are being prepared and submitted to HMRC. Care should be taken to ensure that employees include expenses on personal tax returns in the event that expenses are declared on forms P11D.

Members who are aware of schemes that they believe to be tax evasion may contact the Association and/or submit them to the Tax Evasion Hotline via the website <https://www.taxevasionhotline.co.uk> or by calling 0800 788 887.

Information regarding a fraud should be reported to the Customs Hotline at <http://www.hmrc.gov.uk/customs-hotline/> or by calling 0800 595000 or to Freepost SEA 939, PO Box 100, Gravesend, Kent, DA12 2BR.

### **Travel Schemes offered by Employment Businesses**

Many larger employment businesses have determined it to be commercially advantageous to operate their own travel and subsistence schemes. Such schemes are complex to set up and run and tend to require the ongoing involvement of taxation specialists, usually from large accountancy practices. These schemes require the employment businesses to create an employment relationship with the temporary worker rather than engaging the worker under a contract for services.

Employment Businesses operating these schemes are likely to have obtained a dispensation agreement with HMRC containing what are described as “benchmark scale rate” payments. These scale rate payments do not require the individual to produce a receipt to the employer although, where possible, receipts should be retained by the employee and may be subjected to periodic checks by the employer. They are considered to be highly advantageous, and treated as commercially sensitive. However, care should be taken in administering such rates.

HMRC has issued guidance which requires the employer to keep sufficient records to demonstrate that the employee was entitled to receive the expenses and be able to demonstrate that regular checks are undertaken to ensure that the rules are being followed.

Participation in the schemes is optional for workers who in most, but not all, circumstances will be financially better off by being in the schemes.

In many cases, employment businesses operating travel and subsistence schemes are subject to detailed review by HMRC to monitor that the schemes are being operated in accordance with the agreed dispensation.

### **Application of GLA Licensing Standards to Travel Schemes**

GLA Brief 12 entitled [“Travel Schemes and Umbrella Companies”](#) advises that those licence holders currently operating a travel scheme should ensure that their schemes are compliant with the GLA Licensing Standards and that the GLA and HMRC will review schemes in joint inspections with particular regard to the following standards:

LS 2.1 Accurately calculate and pay tax and NI.

- To confirm that expenses paid to workers have actually been incurred.
- To confirm correct application of HMRC dispensations
- To confirm that licence holders only use dispensations that they have been granted by HMRC and not dispensations granted to other licence holders or employers.

LS 2.2 Payment of minimum wage

- To confirm that expenses which are in connection with the employment are

not counted as part of the national minimum wage.

- To confirm that such schemes do not reduce pay below minimum wage through charges for operating the scheme.

#### LS 7.1 Prohibition of work-finding fees

- To confirm that any fee workers' pay for use of the travel scheme is not in fact a fee for work-finding services.

As all of these three Licensing Standards are Critical then the GLA has advised that they will normally revoke the licence of any licence holder who is in breach.

Labour providers operating such schemes should check that their expenses arrangements are compliant under the licensing standards.

Labour users who use labour providers that operate such schemes should seek confirmation of this compliance.

### **Avoidance of Tax and National Insurance**

The Association has previously advised members that the option of individuals working through limited companies does not work within the GLA licensed sector as with this arrangement each company will be deemed to be a labour provider providing a single worker and will require its own GLA licence.

It may also be suggested by some agencies or employment businesses that providing a worker on a self-employed basis will enable NI contributions to be avoided. As a general rule this cannot be done, as special rules exist for both Income Tax and National Insurance Contributions where a person is engaged through a third party ("the agency").

Under Section 44 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) the special rules enable the remuneration receivable by workers working through an agency to be treated as though they were earnings from an employment with the agency. The legislation broadly states that where:

- an individual personally provides, or is under an obligation to provide, services to another person; and
- the services are supplied by or through a third person ("the agency") under the terms of an agency contract; and
- that person is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided; and
- remuneration receivable under or in consequence of the agency contract does not constitute employment income of the worker,

those services are to be treated for income tax purposes as duties of an employment held by the worker with the agency. PAYE should be operated on all remuneration receivable by the individual under the agency contract.

For National Insurance purposes Paragraph 2 of Part 1 of Schedule 1 to the Social Security (Categorisation of Earners) Regulations 1978 (the Regulations) works in a similar fashion to Section 44 of ITEPA. It provides for a person working through an agency to be treated as an employed earner. Paragraph 2 of Schedule 3 to the Regulations also provides for the agency to be treated as the secondary contributor.

### **The Current Situation**

The first ALP Brief on Travel and Subsistence Schemes, issued in July 2009, concluded as follows –

“Members need to be aware of how HMRC and The Treasury handle schemes which are seen to push the limits of tax legislation. As long as they are small scale and have no significant effects on either tax revenue or competition they may well be tolerated, simply because resource constraints mean that HMRC’s efforts are directed towards schemes which have a bigger impact. However, as schemes become more prevalent they naturally attract more attention, as those adversely affected complain about them and as the potential loss of tax revenue increase. What sometimes happens is that there is a clampdown at little or no notice, sometimes with retrospective effect. Such action may well lead to a legal challenge. Members operating travel and subsistence schemes need to be aware of that risk, and the impact of any clampdown on existing contracts.”

This has proved a very accurate prediction.

A number of travel and subsistence schemes are being marketed which claim to continue to provide savings for the employer and be compliant with the NMW from 1 January 2011. BIS, HMRC and GLA have sounded a warning note in stating that none of the models seen would comply with the requirements of the NMW legislation for workers paid at, or close to, the NMW.

ALP members considering such schemes will no doubt be receiving professional, independent legal and due diligence advice.

The continuing scrutiny being applied to travel schemes and umbrella companies will mean that labour providers who are party to such arrangements for workers paid at, or close to, the NMW can expect to have a high risk profile in the eyes of compliance officers from HMRC and the GLA.

The Association will continue to monitor the position closely, maintaining contact with BIS, HMRC and GLA as necessary.