Introduction

The Chartered Institute of Taxation (CIOT) sets out below its response to the call for evidence published on 9 December 2015.

The call for evidence follows on from the Office of Tax Simplification’s (OTS) review of employee benefits and expenses. The OTS’s third report, published in July 2014, indicated that there was scope to improve and simplify the current rules on accommodation benefits.

In particular, the OTS highlighted the following:
- difficulties in defining ‘living accommodation’;
- difficulties in applying the current tests for exemptions;
- the ‘grandfathering’ of occupations exempt prior to 1977; and
- that the calculation of the tax charge is complicated.

The OTS recommended that the most basic accommodation is taken out of the tax charge entirely and that the existing exemptions are reformulated with the aim of distinguishing more accurately between what is really a ‘perk’ and what is needed to get the job done.

Generally, we agree with the OTS’s recommendations, although we accept, as did the OTS, that there is no easy solution. Accordingly, the government’s call for evidence to understand:
- the complexities faced by employers;
- who receives employer provided accommodation, and why;
- what simplification to the tax rules could be made; and
- who may be affected as a result is welcome.
2 Executive summary

2.1 Employer-provided accommodation

Accommodation is generally provided to employees because the nature of the employment duties requires it. For example, because the role involves caring for someone or something, or providing services to someone or something (often outside normal working hours or as a result of regulatory requirements), or providing security. It is the role not the employee’s status that necessitates the accommodation.

2.2 While custom and practice may have evolved, as industries appear, change, and disappear, there remains a need for certain exemptions where the accommodation is necessary to perform the duties of the employment. The exemptions should encompass both the provision of ‘independent living’ accommodation and ‘board and lodging’ accommodation.

2.3 Similarly, there remains a requirement for exemptions where accommodation continues to be provided to retired employees (where the accommodation was exempt whilst employed).

2.4 Valuation

The current approach to valuing the cost of living accommodation is complicated, uncertain, unclear, difficult, out-dated, time-consuming and burdensome. The system is long due an overhaul.

2.5 In our view, the simplest, most straightforward and easiest to understand option for reform would be to take the open market rental value as the benefit cost for tax purposes of all non-exempt employer provided accommodation.

2.6 To mitigate administrative burdens on employers and HMRC, the rental value should be fixed for, say, 5 years.

2.7 Exempt accommodation

The two main current tests for exemption of ‘necessary for proper performance’ and ‘customary and for the better performance’ have proved difficult to meet.

2.8 The bar for the ‘necessary for proper performance’ test, whilst simple, has been set too high with its reliance on ‘that property and no other’.

2.9 The ability for employers to prove that it is ‘customary’ for accommodation to be provided for a particular role, has resulted in few new roles being added to HMRC’s list of agreed roles, even when the role is very similar to that of an occupation already on the list.

2.10 However, as noted above at paragraph 2.2, there remains a need for certain accommodation to be exempt.

2.11 The exemptions should be reformulated to focus on the objective requirements of performing the duties of the employment to the standards expected, taking account of the location of the employment, and any regulatory requirements. In essence, whether there is an expectation, obligation, or desire for the employee to live at a particular place or within a certain vicinity in order to perform the role.
2.12 In such circumstances, there should be a full exemption from tax on the cost to the employer of providing the accommodation.

3 Employer provided accommodation

3.1 1. Why is accommodation provided to employees and how have changes in working practices affected this provision?

3.2 As the OTS report identified, there are many reasons why an employer may provide an employee with accommodation. These range from the availability and cost of properties in the locality to working patterns and the mobility of employees.

3.3 Examples include the temporary secondment of employees to another work place (whether within the UK or as regards assignees into the UK, where there is travel and subsistence tax relief), nurses and police living in hostels, farm workers, domestic servants (typically those employed on landed estates), wardens in sheltered housing for the elderly or those with special needs, etc.

3.4 There have been changes over time driven by the changing nature of society (eg more sheltered housing) and changes in technology or modernisation (eg reduced use of canals, automation of lighthouses and railway crossings, etc).

3.5 However, in our experience the fundamental principle remains that accommodation is generally provided to employees only as and when the nature of the employment requires it. Hence, in our view, there remains a requirement for a tax exemption where accommodation is a necessity for getting the job done.

3.6 2. Is accommodation provided to people who are no longer employees (because they have retired, have left the employment but by agreement can stay in the accommodation for a period of time etc) and why?

3.7 Typically, accommodation may be provided to retired domestic servants and agricultural workers who have spent their working lives working on landed, farm or agricultural estates. These workers, whilst employees, will have been provided with accommodation (which will normally have been an exempt benefit) during their working lives. Often, rates of pay in these sectors is not great and there is a reasonable expectation that the former employer will take care of the worker in retirement.

3.8 This is the reason why exceptions were made when legislating for the pensions A-day changes in relation to Employer-Financed Retirement Benefit Schemes (EFRBS) which potentially brought continuing benefits within the scope of an income tax charge. The exemptions are currently contained in Part 1 to the Schedule in Statutory Instrument (SI) 2007/3537 (Employer-Financed Retirement Benefits (Excluded Benefits for tax purposes) Regulations 2007). We think that there remains a requirement for the exemptions provided in SI 2007/3537.

3.9 3. Is the accommodation provided always a reflection of what is needed for the employee to undertake the role, or is it based on what is available or the status of the employee within the company?

3.10 In our opinion, employer-provided living accommodation is typically a reflection of the role required of the employee rather than the status of the employee.
3.11  **4. Do the current categories of accommodation cover the circumstances of employers and employees today? Are there arrangements which don’t fit these categories? How often are employees provided with ‘other’ accommodation?**

3.12 The call for evidence highlights three categories:

- Living accommodation provided as part of a main employment (e.g. houses, flats, houseboats, holiday villas and apartments, etc where the employee can live independently);
- Accommodation provided as part of the travel and subsistence rules (e.g. hotels, bed and breakfast accommodation, etc, provided when temporarily working at another workplace);
- Other accommodation (such as board and lodging, etc, where the employee cannot live independently).

3.13 We think these three categories encapsulate today’s cases of employer-provided living accommodation.

3.14 As the OTS highlighted in its report, because board and lodging cannot benefit from the exemptions provided for living accommodation, employees receiving board and lodging are often in an unfair position. Typically, board and lodging arose in cases where domestic servants are provided with rooms, e.g. in a stately home, but where meals are provided in a dining area. More recently we have seen the rise of live-in home care workers which has led to a specific exemption being enacted in Finance Act 2015 (by the insertion of section 306A into Part 4 of ITEPA 2003).

3.15 We believe that there should be similar exemptions for employees in receipt of ‘board and lodging’ as there are for employees who receive ‘living accommodation’.

3.16  **5. Are there other circumstances when employers provide accommodation to employees – for example, do they ever share the purchase of a property?**

3.17 We are not aware of other circumstances when employers provide accommodation to employees, such as a shared purchase. If an employer wants to help an employee to live locally, but the employee simply cannot afford to purchase a property in that locality, we consider that the form any ‘subsidised accommodation’ would take is more likely to be a loan from the employer rather than a shared purchase.

3.18  **6. In your business/profession/sector, how many (or what proportion of) employees receive accommodation? Are there any roles which always have accommodation provided, or particular types of employment, or roles within a sector which always provide accommodation?**

3.19 This question is not relevant to the CIOT.

3.20 Within the tax profession, we do not believe that it is typical for living accommodation to be provided. However, we are aware that some business do permit staff to stay in corporate residential property (e.g. a London flat) overnight, as an alternative to staying in a hotel, where it is impractical for the employee to return home (e.g. where the employee is attending an evening business function). In such circumstances, the overnight stay does not qualify as tax relievable travel and subsistence because of the rules around being near the main place of work. Complications then arise for the calculation and allocation of the benefit cost around who uses the accommodation, for what period, etc. We think that this is an area that could be looked at.
3.21 More generally, we believe that accommodation is provided to those in ‘caring’, ‘service’ and ‘security’ roles, including, for example, personal needs carers, nurses, caretakers (of buildings or operational equipment), etc.

4 Valuation

4.1 7. When accommodation is provided to employees, is it usually owned or rented by the employer? Does this vary across different types of employment?

4.2 We think that situations vary as to whether accommodation is owned or rented and that it is not possible to say that one is more ‘usual’ than the other. Historically, it was probably the case that the accommodation was typically owned by the employer (or leased at a peppercorn rent) but, circumstances have changed, and business are more likely to rent properties (business and residential) these days.

4.3 In our view, the issue that arises is that it is often not entirely clear how the tax charge is calculated where, for example, there is a lease and rent combination, or a purchase by one group company and a sale to another group company, or a purchase by one group company and a lease or renting to another, or a renting by one and a sub-letting to another. These arrangements do not correlate to particular types of employment; they can present practical problems for all types of employers.

4.4 8. How easy is it for employers or tax advisors to calculate the taxable value of accommodation provided to employees? How often are values sought from the District Value? How easy is that to do?

4.5 As noted above, even a simple matter as to who owns or rents the accommodation can present uncertainties. For example, if one company purchases the accommodation and sells it to another group company, is the cost the latter or former (or both)? And what if one company purchases the accommodation and rents it to another group company, is the property owned or rented (and if the taxable value is based on the cost do you take account of the rent)?

4.6 The method of calculating the benefit charge can be very uncertain and complex. If there is no rent, we have to consider how long the property has been owned, when it was first made available, the annual value, whether the employee first occupied the accommodation after 30 March 1983, whether the cost of the property (including improvements) exceeds £75,000 and the number of employees occupying the accommodation.

4.7 Determining the cost of acquisition of the accommodation can be difficult to ascertain, particularly where ownership has changed within a group of companies, and where there has been improvement expenditure. For example, determining whether expenditure was an improvement or repair and, if both, how the expenditure is to be apportioned between the two, can be time-consuming and complex.

4.8 Then there is the issue of who exactly is ‘providing the accommodation’ (section 112, ITEPA 2003), particularly when one starts to apply the connected persons rule, and where ownership within a group of companies has been transferred. Where ownership has changed deciding which costs and which improvement expenditures are to be taken into account, to avoid a double-up on the expenditure arising, can be difficult. If the property was purchased many years ago, just establishing the original cost can prove time-consuming.
4.9 We also have the 6-year rule (at section 107, ITEPA 2003), which deems the ‘cost’ to be market value when the employee first occupies the accommodation, if an interest in the accommodation was held by the employer, or a person connected to the employer, for more than 6 years prior to the employee’s first occupation. This, again, can prove difficult to administer for groups of companies in terms of the record-keeping requirements. Especially as the rule is only relevant where the original cost, plus improvements, was ‘over £75,000’.

4.10 As noted above, establishing the history of the accommodation and the relevant cost and improvements to be taken into account can be very difficult. If the accommodation is part of a building (factory, flats/apartments, etc) or land or estate (farm-workers house on farm, a separate lodge, etc) all purchased at the same time, or the building has multiple occupants with material common parts, then establishing the cost and improvements attributable to a particular accommodation is very challenging (and, ultimately, may prove irrelevant if the relevant cost does not exceed £75,000).

4.11 Even where the accommodation is rented difficulties can arise. If the rental agreement is with an unconnected third party it is generally assumed that the rent paid is an open market fair rent. However, it is unclear what the position is if the rent is depressed by, for example, a restrictive covenant, eg the property has an agricultural tie. Also, issues arises as to what is a fair rent where there is an intra-group rental agreement.

4.12 The above illustrates some of the difficulties faced by employers under the current system when attempting to calculate the taxable value of employer-provided accommodation.

4.13 In our view, the system for determining the taxable value is due an overhaul. A key aspect of reform would be to at least change the reliance on the annual value (the 1973 rateable value), which was deemed to be outdated in 1983 as it did ‘not effectively tax the true measure of the benefit’. Since properties built after 1973 do not have a 1973 rateable value, the reliance on the 1973 value then requires a value to be agreed with the District Valuer. The use of a 40+ year old practice that was deemed outdated over 30 years ago clearly needs to be changed!

4.14 The OTS also noted that the definition of annual value in the legislation essentially refers to the market rent, rather than the ‘gross rateable value’ (see section 110, ITEPA 2003).

4.15 There is also ESC A91 which says that for property costing over £75,000 then if the benefit cost is calculated by reference to the ‘annual rent that the property might fetch on the open market’ there is no ‘additional charge’ to be calculated.

4.16 It therefore seems to us that one option for reform would be to effectively use ESC A91 in all cases, ie to take the open market rental value of the property as the basis of the tax charge (see below).

4.17 **9. What proportion of employees provided with accommodation pay rent for their accommodation? How much rent do they pay (proportionate to**

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1 The annual value is taken as follows:
   - England and Wales: 1973 gross rating value
   - Northern Ireland: 1976 gross rating value
   - Scotland: 1985 gross rating value divided by 2.7.
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the value of the benefit)? How is the value paid as rent calculated (do employers reference the market value for example?)

4.18 We are not in a position to provide a definitive answer to this question. In our members’ experience there is quite a lot of variation as to whether an employee will or will not pay rent.

4.19 We believe that, often, rent is paid to reduce the taxable value (possibly to nil) where the employer has been unable to demonstrate to HMRC’s satisfaction that either of the exemptions (ie the ‘necessary for the proper performance of the duties’ test or ‘the better performance’ test) apply.

4.20 We do not hold any data on how much rent is paid and how this is calculated. Generally, though, where the employee does pay an amount we would expect the cost of the accommodation to be subsidised by the employer.

4.21 10. Do you agree that using market rental value would provide a simplification to the tax rules on providing living accommodation? How could such a system work and what would be the impacts on both employers and employees? Please provide reasons, including data/examples.

4.22 We think that an alternative to the current, often complicated and administratively burdensome, approach to establishing the taxable value would be to use the rental cost to the employer, where the accommodation is rented from an unconnected third party, or the open market rent, where the property is owned outright by the employer (or a connected party) or where rent is paid to a connected party.

4.23 While this may mean that the employer has to obtain a rental valuation from a surveyor or estate agent (or, possibly, from two or three agents), we think this would be simpler, less time-consuming and burdensome than the existing rules on rateable value, more/less than £75,000, etc.

4.24 Clearly, the open market rental value should have regard to any terms on which the tenant(s) (employee and his or her family or household) take the property, eg restrictive covenants in the lease or deeds.

4.25 To avoid the need to re-value and agree the rental value each year, where the taxable value is based on the open market rental value rather than the actual rent paid, employers could be permitted to base the taxable value on a valuation for, say, 5 years.

4.26 Such an approach would also minimise any burdens that could, potentially, be placed on the District Valuer if rental values had to be agreed annually.

4.27 11. Are there other ways to simplify how the taxable value of living accommodation is calculated?

4.28 We think that a process based on rental value (as described above) presents the best method to simplify how the taxable value is calculated.

5 Exempt accommodation
5.1 **12. Are there situations where employees, despite having very similar roles are treated differently for tax purposes, because of the way the rules currently work? Please provide examples.**

5.2 We believe that bar for the ‘necessary’ test, which requires residence in this accommodation and no other, is set too high and restricts availability of the exemption where it is necessary for the proper performance of an employee’s duties to reside in employer-provided accommodation.

5.3 Traditionally, exempt employees were agricultural workers living on the farm or estate, lighthouse keepers, lock-gate and level-crossing gate keepers, caretakers living on the premises, etc. As noted above, times have changed and many of these roles have become largely obsolete, either through changes in society (move to road-transport rather than canal) or automation (lighthouses, level-crossings, etc).

5.4 One consequence has been that HMRC often refuses to accept that newer roles (eg sheltered housing wardens) meet the necessary test, even though there may be, for example, a similar necessity to live on the premises as there is for, say, caretakers.

5.5 Also, where the duties do not require residence on the premises but nearby, even though it can be demonstrated that residence nearby is necessary for the proper performance of the employees duties, exemption may be denied because the employee could live in ‘other’ nearby accommodation.

5.6 We also believe that the ‘better performance’ test, which requires the employer to demonstrate that it is customary for the employer to provide accommodation, is difficult to pass and prevents employees who, reasonably, ought to expect the accommodation provided to be exempt from tax from qualifying for the exemption. For example, it may be customary for a particular subset to be provided with accommodation (eg hospitality staff working early morning or late at night, or staff employed in isolated areas) but as on the whole a majority of employees undertaking the role do not receive accommodation, it is not accepted that the exemption should apply to the subset.

5.7 Although HMRC does publish a list of customary employments it is not clear what evidence this is based on or when the roles were last reviewed and the list updated. The impression given is that this is a ‘closed’ list of roles accepted as qualifying in 1977 and that it is almost impossible to establish that there should be new roles added (and, if appropriate, removed). The racehorse trainer example on page 12 of the call for evidence illustrates the apparent intransigency, even where the roles are essentially the same.

5.8 Furthermore, it is very difficult for an employer to show that sufficient numbers of employers have, for a sufficiently long period of time, provided accommodation to employees undertaking a particular role. For example, page 11 of the call for evidence refers to a need for the employer ‘to demonstrate that more than 2/3 of employers (nationally) provide accommodation for people in that role and that they have been doing so for some time (this means a number of years)’.

5.9 As a result, if a role is not on the list of classes of employees HMRC accept as customarily in receipt of employer provided accommodation, it is very onerous, if not nigh on impossible, for the employer to gather in the evidence to demonstrate that there is a custom of providing employees with accommodation. In many cases, the cost of gathering the evidence and obtaining agreement that the custom exists would be greater than the Class 1A NICs the employer has to pay as a result of the accommodation not being exempt!
Consequently, we think both the necessary test and the better performance/customary test need to be reformulated, so that they take account of today’s working environment to exempt from tax roles that are traditionally provided with accommodation and which can evolve over time to reflect future customs and needs.

5.11 13. What circumstances exist today where accommodation is needed in order to do a job? Why is the accommodation needed? For example, is it purely about the job itself (the duties), or to comply with legal requirements, or because of the location of the job? Please provide examples.

5.12 As noted above, we think that the circumstances where accommodation is needed in order to do a job are those situations where the role involves ‘caring’, ‘service’ and ‘security’. Examples include, domestic servants, carers, scientific research (involving 24-7 attention), house-masters/mistresses at boarding schools, wardens in sheltered accommodation, caretakers, emergency/on-call doctors and nurses, hotel staff (working in isolated areas).

5.13 The circumstances where accommodation is needed for a role will vary depending on the nature of the role (eg caretaker), the location of the employment (eg as isolated hotel or farm/agricultural estate), the business’ legal requirements and responsibilities (eg to residents in sheltered accommodation, boarding-school children, etc), as well as more generally to the proper discharge of the employers’ responsibilities to the employee (eg on-call doctors and nurses).

5.14 14. Is it appropriate that certain accommodation is completely exempt from tax? How can we create a balance between the need for accommodation to be provided to enable a job to be performed and the advantage gained by that provision?

5.15 We believe that there is good justification for retaining a complete exemption for the provision of certain accommodation.

5.16 In our view, the existing exemptions were originally aimed at taking an objective view of the requirements of the employment duties (eg to protect buildings, people or assets, or working outside normal hours), the standards expected of the employment (eg regulatory requirements), and whether there is therefore an expectation (eg nature of role, location of employment, etc), obligation (eg regulatory), or desire for the employee to live at a particular place or within a certain vicinity.

5.17 While there may be an advantage gained by the accommodation’s provision (eg an incidental benefit of a roof being provided over his/her head), the employee may not necessarily have chosen to live in that place. If the driver for living in the accommodation is the employer’s and not the employee’s then it would be unfair to impute a value on the ‘benefit’ and tax the employee. Indeed, in many cases employers factor in the cost of the accommodation as part of the ‘package’ and pay the employee a lesser wage, which can then prevent the employee from getting him/her-self on the property ladder.

5.18 15. Are there any ‘representative occupiers’ who would not fit within the current statutory exemption? If yes, please provide details of the employment and job role.

5.19 HMRC operates an extra-statutory concession under which ‘roles’ agreed as exempt in 1977 can continue to be exempt if unchanged, although many roles that might have been exempt cannot be exempted because the role has changed since 1977 or
did not exist with that employer in 1977. In most cases these ‘representative occupiers’ (ROs) would probably fit within the current exemptions. But not all ROs will meet the current exemptions. This is because there is no customary test involved in the ROs test.

5.20 For example, an employee’s duties may involve running a household, office, farmland, or agricultural business on a landed estate. This requires the employee to be available more or less around the clock. The employee could live within the estate in employer-provided accommodation or elsewhere within, say, a 5 minute drive. Although the employment contract requires the former, the accommodation fails the ‘necessary’ test (the employee could, objectively, live elsewhere so long as within a 5 minute drive), and may or may not pass the better performance and customary test (better performance can be satisfied but the benchmark for customary is unclear). However, if the role dates back, on similar terms, to before 1977 the accommodation is exempt because the customary test is not applied, thus, the ROs concession helpfully puts the matter beyond doubt and the accommodation is exempt.

5.21 The above example illustrates the subjectivity and uncertainty of the customary test, as it is currently applied.

5.22 **16. To what extent do employees/different types of employment rely on the current rules and exemptions? Where employees live in accommodation which is currently exempt, what is the value of the exemption to them?**

5.23 As illustrated in all the examples above, employees and employers both rely on the current exemptions in a variety of different situations. For example, an employee relies on the exemptions to protect against an employment income charge and the employer for protection against a liability to Class 1A NICs.

5.24 The value to the employee of the current exemptions equates to the tax charge he/she would otherwise way (or the decrease in wage he/she would suffer if the employer paid the tax). If the exemptions did not exist then the cost of employment would rise, which would drive down wages, or the numbers employed, or both.

6 **Acknowledgement of submission**

6.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the CIOT is included in the List of Respondents when any outcome of the consultation is published.
The Chartered Institute of Taxation

7 The Chartered Institute of Taxation

7.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,500 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

The Chartered Institute of Taxation
9 February 2016