

## TAXREP 2/10

### NATIONAL INSURANCE CONTRIBUTIONS: CATEGORISATION OF LECTURERS, TEACHERS OR THOSE IN A SIMILAR CAPACITY

*Memorandum submitted in January 2010 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to a consultation document published on 9 October 2009 by HMRC*

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## INTRODUCTION

1. We welcome the opportunity to comment on the proposals published by HMRC on 9 October 2009 at [http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal? nfpb=true& pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_029879](http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal? nfpb=true& pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_029879) and the impact assessment at <http://www.hmrc.gov.uk/ria/ss-regs1978.pdf> .
2. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in Annex A. Our Ten Tenets for a Better Tax System which we use as a benchmark are summarised in Annex B.

## KEY POINT SUMMARY

3. We consider that:
  - HMRC are starting from the wrong point by concentrating on first aiders.
  - HMRC should be ensuring that their application of the rules fits the policy intention.
  - HMRC's proposals should be withdrawn as they do not fulfil their stated intention of keeping to the original policy intent of the Cat Regs – which was to provide equality of NIC treatment of school teachers – but will draw many more people with questionable justification into the regs.
  - The Cat Regs are fine as they are, based on original policy – it is their application by HMRC, inter alia to include training rather than accord with the original policy objective of targeting the education sector, which is causing confusion and uncertainty, so amendments to HMRC guidance to comply with the original policy is all that is needed.
  - If HMRC wish to amend the Cat Regs then they should do so either in accordance with original policy or state their new policy going forward by way of a public announcement, which if it is intended to widen the scope of Class 1 NIC to include the training sector as well as the education sector, should be approved by a Minister.

## COMMENTS

4. We consider that the correct approach to the difficulties of applying the Social Security (Categorisation of Earners) Regulations 1978 (SI 1978 no. 1689) ('Cat Regs') to lecturers, teachers, instructors and those in a similar capacity ('LTI') is no different from applying other legislation, ie, decide what policy objective one wants to achieve, ensure that the legislation is fit for purpose and apply it consistently and fairly so that the policy objective is achieved.
5. HMRC in para 2.15 say that the purpose of their proposals is not to widen or narrow the scope of the Cat Regs but to seek views on how they should be amended to clarify those to whom it is intended they apply. We welcome this approach.

6. Our recollection is that the original policy behind the Cat Regs as they apply to LTI was to ensure that certain teachers at private schools were properly treated as employees, and thereby provide equality of NIC treatment of all teachers in schools. This was because some teachers were treated as employed earners and others as self-employed earners (for example, NI status sometimes seemed to depend on whether or not the teacher lived in premises provided by the school). This is why the Cat Regs were drafted in terms of employment in an 'educational establishment' by a 'person providing education'.
7. The unreported case of *St John's College School, Cambridge v Secretary of State for Social Security* dated 12 June 2000 (CO/3246/99) concerned visiting instrumental teachers giving music lessons to pupils of St John's College School – an institution that we consider, and we think that the man on the Clapham omnibus would consider, and which was confirmed by the judge, falls squarely within the definition of an 'educational establishment'. In our view, this was the sort of situation that the Cat Regs were intended to cater for, and we think that HMRC should not try to extend the application of this case into situations that the Cat Regs were not intended to address, nor into areas which were not the subject of the case.
8. We therefore question HMRC's statement in para 7.1 about the purpose of the Cat Regs which does not refer to where the instruction was taking place. We consider that HMRC's proposals in para 7.6 are not the right answer because they ignore the fact that these provisions in this part of the Cat Regs were intended to clarify the NIC treatment of school teachers.
9. We also question in the context of LTI the statement in para 2.7 that the purpose of the Cat Regs is to ensure that those persons receive entitlement to benefits. Our recollection from our regular meetings with the former Department of Social Security and Contributions Agency is that it was only resting thespians for whom this benevolent intention was the stated primary rationale for bringing them within Class 1 NIC and hence inclusion in the Cat Regs.
10. The application of the Cat Regs to LTI and especially those in the first aid sector is proving difficult, partly because the definition of 'educational establishment' is based on words such as 'certificate' that are themselves open to different interpretations, and partly because the Cat Regs are being applied by HMRC to try and include those who were never intended to be within their scope, ie those other than LTIs engaged by persons providing education. We therefore disagree with the comments at para 2.12 – our members see regular problems, partly in the education field where some schools, colleges and universities are unaware of the provisions and partly owing to HMRC trying to extend the boundaries of what is meant by 'education' and 'educational establishment'.
11. We also think that it is significant that the Cat Regs in Column A of Schedule 1 use the word 'education' in the phrase 'by any person providing education' rather than the much wider 'training'. The word 'education' is likely to have been selected deliberately by the draftsman so as to tie in with the Education Acts which dealt principally with primary, secondary, further and higher education.
12. We think that the crux of the difficulty in applying the Cat Regs is that HMRC have over time widened their interpretation of the nature of the education provided to include training. Most would agree that the difference between education – say, going to university – and training – say, to be a plumber – is pretty clear. The St

John's case does not extend the meaning of education to include training; rather, it does not limit the location of where education is provided to, say, a school building. HMRC's condoc makes many references to vocational and non-vocational training, but neither the condoc nor the St John's case establish that training is 'education' and we cannot see that the Cat Regs as currently worded, nor the original policy, intended that training should be included within education.

13. In addition, it is not the giving of a certificate that brings a course within the definition of education; there needs to be an educational establishment before one considers the end result.
14. The definition of 'educational establishment' includes the word 'certificate'. Under normal legal interpretation conventions, 'certificate' should be read in the context of the other nearby words, in this case 'diploma, degree or professional qualification', but members have seen HMRC arguing that a certificate of attendance is enough for the provisions to apply. We consider that a certificate in this context refers to a piece of paper which recognizes an educational achievement that is generally accepted as an indication of having a level of proficiency that qualifies the holder to be able to perform particular tasks. We consider that the meaning of 'certificate' when taken in the context of the policy behind the Cat Regs excludes certificates of attendance or for personal benefit or the like, for example, for having undertaken classes in cookery or salsa or first aid or has attended a course by the end of which the attendee has lost two stone in weight.
15. We therefore have difficulty in accepting that the provisions were intended to be applied anywhere but in schools, colleges, universities and similar establishments. The St John's College School case decided as two separate issues that St John's College School was an 'educational establishment' and that the visiting instrumental teachers were employees of St John's. The St John's case was dealing with teachers in a school. In our view, HMRC are reading too much into the words of the judge who we think was trying to be helpful in explaining why he disagreed with the arguments put forward by counsel for the school. We do not think that this case can justifiably be used as the rationale for rewriting the Cat Regs to make them apply more widely, and consider that in doing so HMRC are going beyond the original policy intention of the Regs.
16. In our view, the wording of the Cat Regs continues to achieve the original policy intention, namely equality of treatment of those providing education instruction in educational establishments. However, the way in which HMRC interpret the definitions and apply the Regs has diverged from this aim and now seems to include training instruction. The application of the Regs (including the meanings of terms such as 'education', 'educational establishment' and 'certificate') needs to be in line with the spirit of the legislation as intended by Parliament . – in short, in accordance with our Ten Tenets for a Better Tax System (see Annex).
17. We think that HMRC proposals go against the original policy intention of the Cat Regs and foresee that if the proposals are translated into law then they have the potential to create absurdities. We feel that if the policy intention had been to disregard whether the employer was an educational establishment as most people would understand the term, eg a school, college or university, then the draftsman would not have taken the trouble not only to specify in para 4 of Column A of Schedule 1 that the employment is 'in an educational establishment' but to include some additional information in Reg 1(2) as to what the term means.

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18. For example, HMRC's proposals would mean that freelance lecturers who lecture frequently for organizations such as CCH and Tolley's who run continuing professional development training courses for professionals in hotels and conference centres would be deemed employed for the purpose of the Cat Regs. CCH and Tolley's would have to include such people in their payrolls in order to account for Class 1 NIC. Furthermore, the firms of which the lecturers are members would have to exclude the fees subjected to Class 1 from their profits for Class 4 purposes, with an increased need for deferments and refunds, which would create extra work for HMRC as well as taxpayers and their agents. A similar problem would arise for experienced self-employed plumbers, bricklayers, joiners, etc who give part-time instruction in their trade to apprentices, partly on building sites and partly in college workshops.
19. Also attempts to define 'academic' and 'vocational' instruction are likely to create uncertainty.
20. If first aid trainers are a problem case, it is a problem created by unwarranted extension of the scope of the words. First aid trainers working in a college and offering vocational qualifications are teachers and can expect to be treated as such, but if they are peripatetic, say visiting a series of employer premises, then they are no different from, for example, lecturers who every month visit professional firms of accountants to provide employees with a tax or audit update training course, who are clearly self-employed on every measure that has ever been litigated and are not disadvantaged in the social security system.
21. We therefore consider that HMRC's proposal to eliminate the limitation to educational establishments is not the answer to the problem – 'educational establishment' is the connecting factor that justifies the regulation in the first place. For example, we think that it is clear that the playing fields of Eton are an 'educational establishment' even though they are outdoors, but we consider that the wall along the side of a lane near Malham where an instructor teaches dry-stone walling for the Dales National Park is not.
22. In conclusion, the optimal solution is for HMRC to apply the Cat Regs so as to comply with the original policy and clarify their guidance to suit.
23. An alternative if HMRC wish to adopt a revised policy might be to extend in the Cat Regs the definitions of 'education', 'educational establishment' and 'certificate' to encompass what HMRC think it should cover. We consider this would be more sensible than rewriting the Cat Regs on the lines of the proposals in section 7 of the condoc.
24. If HMRC choose to implement a revised policy, then as this would involve a change that will result in taxpayers paying more NIC, then it would be appropriate to make a public announcement to warn people of the intention to impose an additional charge, which as this would represent a change from the policy underlying the existing Cat Regs, should be made or at least sanctioned by the Minister.

## **ANSWERS TO QUESTIONS**

25. Please see above for more detail.

*8.1 Does any sector other than the First Aid Training sector, currently have difficulties in applying the Regulations?*

26. The way in which HMRC applies the Cat Regs causes problems for private schools, colleges and businesses providing vocational training.

*8.2 If, other than the First Aid Training sector, difficulties are currently being experienced, what specific aspects of the Regulations are causing problems?*

27. The misapplication of the terms 'providing education' to include the provision of training and 'educational establishment' to places where training takes place which the average person would not consider to be such an establishment. Even taking into account the extended definition provided in Reg 1(2), the extension of the meaning of 'certificate' to mean something wider than a document to recognise an educational qualification results in application of the Cat Regs to those to whom they were not intended to apply.

*8.3 Will the proposals to clarify the Regulations result in the inclusion of sectors or groups of individuals currently excluded from the Regulations?*

28. Yes – it will include for example both lecturers currently treated correctly as freelance and those who are engaged to provide training (as opposed to educational) instruction.

*8.4 Do the proposals to remove reference to educational establishment and define the nature of the instruction within the scope of the Regulations (academic and vocational), remove perceived ambiguities?*

29. No. The proposals will enormously increase the scope of the regulations which will be contrary to their original intention, create absurdities, attempts to define 'academic' and 'vocational' instruction are likely to introduce ambiguities and unless they are tightly worded include training as well as education, and the proposal to remove 'educational establishment' will be contrary to the original policy intent.

*8.5 Do the proposed changes to the Regulations remove perceived ambiguities regarding who is the secondary contributor for the purpose of the Regulations?*

30. No. In the absence of draft wording it is difficult to tell for sure but the proposals also will widen the scope to include those providing training as well as education, contrary to the original intention.

*8.6 Do you have any comments on the consultation stage Impact Assessment at annex B?*

31. We see no justification for introducing a proposal that will give rise only to costs (estimated one-off costs of £0.5m and recurring costs of £0.5m) and no monetised benefits whatsoever (total benefits £zero). Given that this is supposed to be a clarification measure and the current economic climate, we are surprised that HMRC are even considering such a course of action.

PCB  
12.1.10

## ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) is the largest accountancy body in Europe, with more than 130,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department for Business, Innovation and Skills through the Financial Reporting Council. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 10,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at [taxfac@icaew.com](mailto:taxfac@icaew.com) or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

## THE TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. **Constant:** Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as **TAXGUIDE 4/99**; see [www.icaew.co.uk/index.cfm?route=128518](http://www.icaew.co.uk/index.cfm?route=128518).