

Tax Representation



TAXREP 54/09

False self-employment in construction: taxation of workers

Representations submitted on 12 October 2009 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to a consultation paper published on 20 July 2009

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FALSE SELF-EMPLOYMENT IN CONSTRUCTION: TAXATION OF WORKERS

INTRODUCTION

1. We welcome the opportunity to respond to the consultation paper False self employment in construction: taxation of workers, published on 20 July 2009 at http://www.hm-treasury.gov.uk/consult_false_selfemployment_construction.htm.
2. Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in Annex 3. Our Ten Tenets for a Better Tax System by which we benchmark proposals to change the tax system are summarised at Annex 4.

KEY POINT SUMMARY

3. We understand from HM Treasury and HMRC that these proposals are not intended to redefine the boundaries between employment and self employment. Rather, the point being addressed is one of compliance. Construction workers are being treated as self employed when a correct interpretation of the law would be that they are employees.
4. We conclude that the proposals are designed to tackle tax evasion rather than avoidance. The solution should therefore be to refocus attention on tax compliance in this area and on helping employers and workers to ensure that they adopt the correct tax treatment.
5. If the intention is to tackle genuinely false self-employment, we do not think that case law can be replaced by three simple tests in statute. The proposals appear:
 - to wholly ignore case law on employment, and
 - to adopt an unrealistic assumption that, instead of looking at the overall position, one can somehow determine the existence of an employment by the existence or absence of a very small number of features.
6. The proposals will result in numerous cases of workers who were previously rightly classed as self employed being reclassified as employees.
7. The proposals will increase both the
 - the administrative burden of the tax system, and
 - the cost of construction.

which we believe will be disproportionate to the particular problem that has been identified.

8. The proposals would create a state of limbo for many vulnerable workers who would be taxed as employees without any of the legal protections that such status

would bring. If they are taxed as employees, they will think that they are employees.

DETAILED COMMENTS

What is this consultation aimed at?

9. The title of this consultation document, 'false self-employment in construction', suggests that the point at issue is one of compliance. Construction workers are being treated as self employed when a correct interpretation of the law would be that they are employees.
10. This is supported by the findings of the UCATT report 'The Evasion Economy' on which the proposals were based.
11. Taking this statement as our starting point, we conclude that the mischief which the current proposals are intended to solve is one of tax evasion rather than avoidance. The solution should be to refocus on compliance and helping employers and workers to adopt the correct tax treatment.
12. Unfortunately, the solution proposed is not one of compliance. Instead it suggests using tests which would oversimplify the task of deciding who is an employee and who is not. In so doing, it redefines the dividing line and will make many workers who were correctly treated as self employed into employees for tax purposes only.
13. Before preparing this response, the Tax Faculty had a meeting with HM Treasury and HMRC. We were told specifically that these proposals are not intended to move the goalposts currently defining the boundaries between employment and self employment.
14. Unfortunately, many years of case law is not easily codified into three short tests. If a new rule is added to existing law, it is bound to change things.

Establishing employment or self employment

15. The boundary between employment and self employment is set largely by case law. It is also summarised in the HMRC Employment Status Manual (ESM) and in numerous HMRC Helpsheets such as 'CIS349 Employed or self employed'.
16. The main factors to take into account when making a judgement about whether an individual is working as an employee or not can be listed as brief headings for simplicity. Not all of these factors are considered in every case, but the most commonly considered factors include:
 - 'In business on his own account '
 - Control
 - Right of substitution/personal service
 - Provision of equipment
 - Financial risk
 - Opportunity to profit from sound management
 - Basis of payment

- Mutuality of obligation
 - Sick pay, pensions
 - Paid leave
 - National Minimum Wage
 - Part and parcel of the organisation
 - Right to terminate
 - Intention of the parties
17. The ESM lists a number of other subsidiary factors, such as personal factors, exclusive contracts and the length of the engagement, but the detailed guidance indicates that these are frequently inconclusive, and as secondary factors are not considered here.
18. The three new tests must be judged against this list to see if they change things. If they do, then the goal posts have moved.

Replacing case law by ‘simple’ statute

19. At para 5.1, the consultation paper states that the government believes that introducing legislation to replace the current case law approach is the best way to address the issue of ‘false self employment’.
20. If it were this simple, we are sure that learned Judges who have heard so many cases over the years would have solved the problem for themselves. That they have not been able to do so and that each case has to be judged on its merits, is indicative of the extent of the problem.
21. The proposals appear
- to wholly ignore case law on employment, and
 - to adopt the facile assumption that instead of looking at the overall position, one can somehow determine the existence of an employment by the existence or absence of a tiny number of features.
22. The law is clear. There cannot be an employment unless:
- there is a contractual relationship between two persons, one of whom agrees to provide his own work and skill and the other of which agrees to pay a wage or other remuneration in consideration of the performance of such work, and
 - one agrees that in the performance of the service he will be subject to the other’s control in a sufficient degree to make that other the master, and
 - the other provisions of the contract are consistent with its being a contract of service.
- Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*
23. This decision has been consistently followed by the courts. Unless all of those features are present there cannot be an employment. It is only once those features have been identified that one then looks at the other provisions of the agreement to determine whether they are consistent with there being an employment.

24. Accordingly the three criteria in para 5.11 cannot be fair indicators of a person who is running his own business. It would be nonsensical to suggest that a householder's casual gardener who does the garden, using the householder's tools, and charging separately for plants bought as the householder's agent, is somehow an employee. The gardener comes when she pleases, stays as long as it suits her and invoices the householder at the end of the month for the number of hours she has worked. Yet if this was an arrangement within the construction industry she would not satisfy any of HMRC's three special tests so would have to be treated as the engager's employee. In law she is not an employee because the householder has no control over what she does.
25. In *Parade Park Hotel v HMRC (2007 STC (SCD) 430*, Mr May, the handyman, met none of the criteria in 5.11 yet most people would surely agree with the Special Commissioners that he was not an employee; he basically did what he wanted to do when he felt like it and was paid only for the hours that he chose to work.
26. Similarly with the bricklayers in *Castle Construction (Chesterfield) Ltd v CIR*. They did not provide their own tools (other than those normal and traditional in the industry), nor did they provide their own bricks, yet the Commissioners were surely right in holding them not to be employees.
27. Many self-employed building industry workers are itinerant workers. They go from site to site, often for very short periods, and are often free to decide to move elsewhere if they can find a better position, in the same way as the site manager is free to decide to stop using them without notice. That is a classic situation of a person in business on his own account. Even the small element of control over a skilled artisan is overridden by the *Hall v Lorimer* principle.
28. All of the above are examples where the usual case law tests would treat the person as self-employed (Question 3). Indeed many building industry workers work both for contractors and private individuals. The proposals in the consultation would suggest that every time they work for a contractor that is a deemed employment, but when they work for a private individual, it is a genuine self-employment.
29. There are examples of other industries where administrative arrangements are used to simplify the administration of tax collection. For example, when considering control within the Television and Film Industry a limitation rule of nine months is applied. Nevertheless, this does not override the application of normal rules which determine whether a worker is an employee or is self employed. Rather, it removes from the employer the burden of applying PAYE to earnings of a worker who is only engaged for a very short period.
30. We are not convinced that a similar system could be applied easily to the much larger construction industry, which already has its own Construction Industry Scheme to contend with.

The three tests

31. A worker will have to meet at least one of three criteria in order not to be deemed to be in receipt of employment income.
32. These tests would need to be applied on a contract by contract basis. This will be very onerous for the industry.
33. Whilst we accept that it may simplify the status decision for some workers, these are unlikely to be the difficult cases.
34. We are concerned that there may be some workers in the construction industry who would not meet any of these tests and yet who are clearly self employed under existing case law.
35. The Tax Faculty asked its members to provide examples of clients who would be adversely affected by the new legislation. We were provided with many illustrations which have been included as Annex 2. It is notable that many of these would be caught because they only provide 'basic tools of their trade'. In most cases, there seems little need for plant or equipment other than 'tools of the trade'. It is also clear that economics and the ability to buy in bulk make it uneconomic for them to supply their own materials.

Provision of plant and equipment test

36. There are many businesses engaged in equipment hire in construction. This is because it is uneconomic in many cases to purchase the equipment and hope it can be used to pay its way.
37. It will also be very difficult to decide where exactly to draw a line between plant and equipment and traditional tools. For example:
 - A carpenter who provides his own saw. This could be a handsaw, a power saw, a compound mitre saw or a chainsaw? A skilled cabinet maker or kitchen fitter will be very different from the carpenter who fits the timbers for internal walls, yet all could describe their work with wood as carpentry and all use saws. How is this definition to be policed in our time of rapidly changing technology?
 - A decorator may bring his own paintbrush or he could use a 10KW compressor and spraygun. A person who applies gold leaf may use neither.
 - A groundsman could dig holes with his own spade or could use a mini digger? This is not just a question of the size of the hole, but is also dependent on where the hole is and what is nearby.
 - A crane driver will need a crane, but although a traditional, indeed an essential, tool, it is more likely to be readily available on site as part of a larger lease arrangement organised by a main contractor.
38. In attempting to simplify one law, it is likely that more case law will be needed to sort out what is a traditional tool and what is plant and equipment.
39. What might be traditional in one part of the industry may not be in another. This will invite confusion as to what the control group is, and could lead to a *Vertigan v*

Brady type decision where the court came down in favour of a control group that had been argued for by neither party to the action.

Note. This is the definitive case on s99(2)(b), ITEPA 2003, which states that living accommodation is not a taxable benefit where 'the employment is one of the kinds of employment in the case of which it is customary for employers to provide living accommodation for employees'. 'Customary' in this instance having the same connotations as 'normal and traditional' in the consultation document.

40. We note also that it is more usual to use the term 'small tools' in this context, but that is not applied here.

Provision of all materials test

41. It is not practical in most instances for subcontractors to provide materials, nor is it economic to do so.
42. From the smallest one-man contractor to the largest construction company, procurement is in the control of the client, the architect and the contractor. Few clients or quantity surveyors would be happy with the piecemeal acquisition of materials in this fashion.
43. Being required to provide 'all' the materials is too harsh – it may well be the case that there is something provided by the main contractor to all sub-contractors, such as sand or gravel, which is already on site.
44. A few simple yet common place examples will illustrate the problems:
- Why should a painter be self-employed if he is allowed to buy the paint himself but a deemed employee if the contractor insists on the main client doing so because he can obtain economies of scale? The service provided by the worker is precisely the same in both cases.
 - Why should a bricklayer who provides his own bricks be a deemed employee merely because for convenience he uses the ready-mixed cement that has been brought onto the site for general purposes?
 - What happens if one self-employed carpenter runs out of screws so accepts a few from another? He is no longer providing 'all materials'.
 - Often the designer will specify what materials must be used. The subcontractor may not be able to obtain those materials if the supplier does not cooperate and grant an account.
45. Further information about what is meant by sourcing and supplying would be useful. For example, if a subcontractor organises for materials to be delivered to the main contractor, which are then paid for by the main contractor, perhaps helping to keep the subcontractor below the VAT net, would this be enough?

Provision of other workers

46. There is no such thing as a typical project. That is why there is a transient workforce in construction. Companies that undertake large projects cannot maintain that level of staff permanently, hoping that something else is there to do when the project finishes. Similarly, companies will engage workers with different skills and in different locations depending on the project.
47. The foreman will want some knowledge of the workers being used by a subcontractor. Whilst the right of substitution may exist, this is quite different from arbitrarily forcing the subcontractor to bring along help which he must then supervise when he may not want or need it
48. When budgeting for a job, it makes better business sense to pay a groundsmen a fixed price to dig a hole for a drain than it is to employ him and pay an hourly rate. If it rains and he can't dig, he is not paid any more under a fixed price arrangement. An employee must be paid regardless. Although the consultation paper says that this worker will not be given employment rights just because he is taxed as such, it is difficult to see how a groundsmen will accept this without arguing with the foreman on the building site.
49. There is also the problem of basic hours and overtime. Someone may be needed for 10 hours a day for 3 days in a week. With a subcontractor, you pay them for 3 days. An employee will be paid for 2 days - say 15 hours - for doing nothing, and then work overtime at time plus on the other days.
50. In the current economic climate, how many contractors are in a position to offer full-time permanent employment to their tradesman, with all the additional costs and commitments attached?

The compliance issue

51. The current problem is one of compliance and the application of existing law rather than a desire to redefine employment for a particular sector. Yet this is precisely what the proposals as currently drafted would do.
52. If workers are being incorrectly treated as self employed, then this is because
 - the rules are too complicated,
 - the administrative burden of employment is too great, and/or
 - the difference in cost between self employment and employment is large enough to make it worthwhile to risk being caught and break the law.
53. Understanding the problem should make it easier to identify possible solutions.
54. Any solution which changes the way that 'employee' is defined should be applied to all workers regardless of sector. The construction industry already has the Construction Industry Scheme (CIS) which uniquely to the building industry seeks to collect tax at source as a deduction made by the engager from the labour value of invoices from many self employed workers.
55. The very existence of the CIS already imposes an additional compliance burden on the construction industry, requiring a much higher standard of good compliance

behaviour from those seeking to retain their status within the scheme. It is the compliant majority who will bear the greater part of the administrative burden imposed by proposals in this consultation. This seems absurd given that as we have identified above, this is a legislative solution to a compliance issue.

The cost issue

56. The cost of engaging a worker through the payroll is almost certainly to be higher than using a self employed person. An important reason for this is higher taxes as employers' National Insurance is paid on any gross salary. However, this is not the only cost. Other significant costs may include:
- Holiday pay
 - Statutory sick pay, maternity and paternity pay and similar
 - Health and safety costs
 - Training costs
 - Pension costs
57. The take home pay of workers is likely to be greater if the individual is self employed as the rules for deducting expenses are more generous.
58. However, to consider only cost is too over simplify the matter. A closer look at the flexible working patterns which make our construction industry so competitive illustrates the point.
59. It is more difficult to draft a flexible employment contract than it is to use a subcontractor who is paid only for the job done. The problem with basic hours, overtime and idle time was explained [above](#).
60. Of course it is possible to engage an employee for just the 3 days work needed, but assuming a continuing relationship, they may be needed for a varying number of days from week to week. The administrative burden of operating PAYE on such a basis is obvious. On a practical level, the person would probably also work on other sites on the other days and would suffer PAYE on those jobs too. How would such an individual ever obtain a mortgage?
61. The PAYE obligations that will be imposed on many people who cannot reasonably be expected to be able to cope with them will cause chaos. The ground worker in the example in Box 5A is a good example. A ground worker is basically a person who digs holes. Typically a contractor has a list of people he knows and will ring round until he finds someone free ('the supervisor '). The supervisor will then put together a team of the required size from his own contacts. If a job will take several weeks the composition of his team could well vary from time to time as they are casual workers. It is not reasonable to expect the supervisor to cope with applying PAYE to payments to members of his team. His expertise is manual, not intellectual. And how is he to apply PAYE? Member X may work for him for two days in May on job A, three days in July on Job B and 1 day in December on Job C. Is that one deemed employment or three? If it is three can he apply in advance for a coding notice for Member X each time he works on one of his jobs or does he have to apply an Emergency Coding each time? Where a person works on 20 jobs in the course of a year, the tax deducted will bear no relationship to the tax that he

is due to pay. If he works on more than one site during a week it will be too little. If, as in most cases, there are gaps between jobs, it will be too high. This will cause hardship for the lower paid.

62. The relationship with CIS also seems unreasonable. The document says at 2.17 that if the deemed employee rules apply then CIS cannot apply. Which applies will depend on the facts and the application of the tests.
63. We will have two tax deduction schemes, neither of which is easy to apply in many cases, being applied by unsophisticated labourers.
64. Whilst deducting 20% on account of labour cost for CIS may be a reasonable approximation to tax due, applying the emergency rate code under the PAYE scheme will result in over deduction and many more employees would need to submit tax returns or repayment claim R40 forms at the end of the year. As the R40 must be submitted and processed manually, this will introduce a very significant administrative burden. The PAYE system is not designed to cope well with numerous short term and often simultaneous employments.
65. The standard tax return employment pages when downloaded assume only two employments in a year. Having to provide for an additional dozen or so, will again increase the administrative burden.

Other costs

66. We note that the impact assessment does not consider what extra costs might fall on those outside the construction industry, not least the Exchequer. The fact that the newly-deemed employees would be paying Class 1 national insurance contributions would entitle them to extra benefits. This has an obvious cost to the exchequer which is nowhere mentioned in the impact assessment, and we suspect that it will be substantial.
67. The second is the increased cost of construction. Labour in the construction industry is, extremely price-sensitive - and we refer here to the sub-contractors net pay, not their gross pay. One construction company reported to one of our members that pay rates for bricklayers had fallen from £16 an hour last year to £9 an hour now (something that would be a near-impossibility in a genuinely employed environment). Because of the recession, many have left the industry, often for other lower paid jobs. When rates rise, they will return.
68. If pay rates rise to maintain take home pay, the cost of construction will increase. We have not done an economic analysis of this, but our knowledge of the construction industry does suggest that this is so: it was certainly accepted as such by the Special Commissioner in the Castle Construction case (at paragraph 110: 'It was not quite proven that all the savings in this regard were enjoyed by the worker, rather than pocketed by the appellant, but there is certainly every indication that that was the result'). We do not at all accept the contrary assertion that 'the dominant effect is thought likely to be a decrease in post-tax wages' in paragraph 6.6 of the consultation document.

69. For a self-employed sub-contractor earning £25,000 a year, his net pay at present would amount to £19,627. To obtain the same net pay on an employed basis would require his wages to increase to £25,657, assuming that he only worked for one company. With the addition of secondary class 1 national insurance, this would increase the costs to his employer from £25,000 to £28,210 a year, an increase of 13%. As it well known that the construction industry works on tight margins, this would represent a significant increase in its costs which it will seek to pass on.
70. As we noted above, in practice many of these labourers are likely to be working for more than one person at the same time. Assuming they worked for two, a very little increase would be required in their pay, but there would still be the impact of employer's national insurance to consider and we calculate that the increase in the construction company's wage costs would be in the region of 9%.
71. As labour costs form a very large part of the construction industry's costs, and as they would seek to, and almost certainly succeed in, passing these costs on, there would be significant extra costs incurred by all buyers of construction services. Probably the largest of these in the country is the Government. We recommend that an impact assessment be done to include some serious research on the likely effect of this, not least on the public purse.

Timing of the introduction of these measures

72. We welcome the statement in paragraph 5.26 that the government recognises that getting the timing right for the implementation of the proposed solution is critical. At present there is a serious recession in the construction industry, and it is unlikely to be able to cope with any significant extra costs. If it is intended to go ahead with these proposals or anything similar, we suggest that they be not introduced until 6th April 2011 at the earliest, and that this should be reviewed in the light of the state of the economy at the time.

Fairness

73. Whilst the Tax Faculty embraces the tenet of 'simplicity' as one of its ten Tenets for a better tax system (see Annex), we also find that a simple tax law may not be a fair tax law.
74. It is clear that intentional or otherwise, the government's proposals are not built on established legal principles but seek to impose a completely different test of employment in the construction industry from the tests that have been established over many years in the Courts.
75. While the government is obviously entitled to create a separate tax system for self-employed people who work in the construction industry to the system that applies to other self-employed people, we think it important to the integrity of the tax system that there are not two parallel tests to determine whether an employment exists; one for the construction industry and the other for everyone else.

76. Accordingly we think it wrong to seek to pretend that the government's proposed tests are related to the tests of what is an employment.
77. The proposals would create a state of limbo for many vulnerable workers. They are being taxed as employees without any of the legal protections that such status would bring. Such individuals would be unlikely to take a case to an employment tribunal as they would lack the skill and professional advice to do so.
78. Paying tax as an employee would indeed bring rights such as entitlement to the second State pension (S2P) and Job Seekers' Allowance, but this would most likely serve to fuel their mistaken impression that they were employed for more than just tax purposes.
79. We find the idea that having forced engagers to operate PAYE for workers for tax purposes would also make them more likely to pay for training and grant other employment benefits, naive.

The questions for consultation

We respond as follows to the particular questions raised in section 7.1:

1 *Do these criteria represent fair indicators of a person who is running his own business and is therefore genuinely self-employed?*

No, and the court record contradicts this suggestion. The reasons given why labour-only sub-contractors can be running their own business were very cogently and lucidly given by Special Commissioner Howard Nowlan in the Castle Construction case. We refer HM Treasury in particular to paragraph 100 of that judgment:

'In my judgement however the bricklayers go yet further to satisfying the business requirement in a different respect. Bricklayers have all undergone a considerable training and a period of apprenticeship. Many are experienced and many are very good indeed at their trade. They often have great pride in their work. One of the remarks made by Mr Botham [for Castle Construction] that somewhat illustrate this was his remark that if you blindfolded the bricklayers, they would all be able to identify their own hand tools by feel. The point that I make from this pride and respect of their trade is that the 'brickies' do have their trade and that trade is likely to remain their trade whoever they happen to work for. Whilst if in a conversation with a bricklayer you asked him his job, I suggest that he would say 'I am a brickie', rather than refer to any firm for which he was currently working. If he worked man and boy, in the one firm, the answer might be different, but when the Appellant in this case is somewhat akin to a bricklayers' agency, for delivering services to numerous sites to various main contractors (possibly Wimpey, Barratts and others), I very much doubt whether a brickie would say 'I work for Castle Construction'. Illustrating the same point, if you asked a brickie how he viewed the prospect of a severe contraction in work in the building industry at present, I suggest that he would say, with concern, that 'work will be hard to come by'. He would not say that he was in fear of losing his job with Castle Construction'.

There is no recognition anywhere in this consultation document that people in that kind of position could possibly be self-employed. We recommend that HMRC review their criteria in the light of case law.

2 *Are there other indicators which ought to be considered?*

No.

3 *Are there instances when none of the criteria are met, but a worker would, by reference to the usual case law tests in respect of the true terms of an engagement, otherwise be treated as self-employed? If so, please provide examples.*

We believe that there are numerous instances of this, which may well include the majority of the 300,000 labour-only sub-contractors referred to in the consultation document. The courts and tribunals operate the same criteria in this and other industries and have found this over and over again, notably in the Castle Construction case referred to above, and in the case of *MAL Scaffolding v HMRC (2006 SPC 527)*.

4 *VAT registration can signal that the worker is in business in his own account, buying materials and investing in plant which takes the turnover of the business over the threshold for registration. Would it be helpful to include the criteria [sic] of VAT registration, which would need to be met in addition to one of the other three criteria?*

We do not see that this has any relevance at all. There is no requirement to register for VAT unless one has a turnover exceeding £68,000 a year, which many genuinely self-employed people - including those who supply materials - would not achieve. We feel that this would discriminate against small businesses.

5 *Is the payer the correct person to have the responsibility for applying the criteria and operating Pay as You Earn (PAYE) and NICs?*

Yes.

6 *Are there instances where the introduction of the deeming provision could bring about a significant administrative burden?*

It is not the introduction of the PAYE system to new companies that is likely to be burdensome here, but the operation of it in an environment where workers change 'employers' very frequently and often have more than one job on at the same time. As discussed, we are uncertain how this will actually work out in practice, but believe that the most likely result will be that described [above](#), which would result in a very significant burden being placed on HMRC.

7 *Are there occasions when the deeming provisions could impact on the adaptability and flexibility of the labour market? If so, please provide examples.*

This will depend on how the operation of PAYE works in practice, which as noted above is difficult to predict. That there will be a significant extra administrative burden cannot be in doubt, but we believe that one way in which the industry will seek to maintain its adaptability and flexibility will be by transferring this burden on to HMRC, as outlined [above](#).

8 *What avoidance routes might be available and how should these be countered?*

We do not consider that avoidance is taking place now – where there is a problem it is one of evasion.

The obvious avoidance route if these rules are implemented would be for workers to amend their contractual relationships so that the worker meets one of the tests in 5.11. It would not be difficult for a contractor to hire equipment as agent for the people who use it, provided that the contractor is prepared to guarantee payment of the fee. The worker is likely to be oblivious of, or unconcerned about, the financial risk that the government is forcing him to undertake if he wishes to continue to work in the industry.

It is also likely that there will be increased use of umbrella companies to service the construction industry, as this will be a very cost-efficient way of operating the PAYE system. As HMRC does not appear to view with favour the increase in umbrella companies that has taken place over the last fifteen years, we recommend that they do some research in this area to establish the likely extent of its happening and whether there are any policy implications.

Finally, we would expect a significant number of 'employers' and workers to do what is widely done in the retail and hospitality industries, which is that people would only be engaged for, say, half a week at a time, so as to cut down their national insurance bill. As self-employed individuals, the first £5,715 of an individual's earnings for the year is free of NI no matter where the money is earned, whereas as employees (or deemed employees) both primary and secondary NI contributions kick in after the equivalent weekly figure of £110 on each employment. Both parties could make significant savings by having two sets of 'employments' running at the same time.

AM
12/10/09

Examples of self employed persons who would become employees for tax purposes under the proposed legislation

The Tax Faculty asked its members to provide examples of clients who would be adversely affected by the new legislation. We were provided with many illustrations. It is notable that many of these would be caught because they only provide 'basic tools of their trade'.

In most cases, there is little need for plant or equipment other than 'tools of the trade'. Economics and the ability to buy in bulk make it uneconomic for them to supply their own materials.

As we have said in the main body of our response, we can see case law being needed to determine how these would be defined.

1. Carpenters. Plasterers. Bricklayers. For these trades to provide all the sand, cement and bricks, plaster, wood etc individually to each site would make the job unworkable and chaotic. Plasterers and bricklayers are often paid per square metre, which varies subject to negotiation before the contract starts.
2. The usual equipment for a bricklayer on a building site would be teleporters or cherry pickers and it would not be economic or practical for each individual bricklayer to finance such equipment nor would he have the chance to bring it on to site.
3. Materials are usually purchased in bulk by the main-contractor to a specified description and the mortar is usually mixed to a specific colour and consistency. It is bought in such quantities that a sub-contractor would have no chance of obtaining the material for that low price.
4. Stonemasons may be engaged for their specialist expertise.
5. Dryliners. These workers are usually paid by measured area, but would fail to meet any of the three criteria. Individual dryliners cannot be allowed to take delivery of, store or move around a building site, their own plasterboard, insulation sheets and other bulky materials.
6. A small speculative builder who usually buys sites for between 2 and 10 houses. Sub-contractors could be taken on as full time employees, but as there is not the continuity of production to keep all the various trades working simultaneously, they would need to employ different workers for varying amounts of time on and off as the houses are developed. It is often the practice to use say the groundworkers/ bricklayers for 4-6 weeks on perhaps 2 or 3 units, before production switches to roofers and glaziers. Next come the first fixes for plumbing and electrics etc etc. The groundworkers/bricklayers would depart for another site until such time as the construction of further units begins and the other tradesmen would follow on a similar rotation.

7. Labour only subcontractors get to their clients using their own cars and vans. Sometimes they get collected and go as a group in a single van. HMRC will need to allow this as 'use of own equipment' for the purposes of determining self employment.
8. Scaffolders usually employ a core level of staff. When awarded a large contract they may use sub contractors who supply nothing much except their labour and yet fulfil many of the criteria which currently indicate self employment.
9. Heavy plant drivers; fork lift trucks, diggers, dumpers, excavators, telehandlers, cherry-pickers etc. All these can be on very short-term contracts for service - just one day to clean the windows, for instance, or a couple of months at the Olympic site, but they are not necessarily employments. Such persons generally have to have certificates of proficiency from the Construction Industry Board, health and safety certificates etc, mostly taken at their own expense.
10. Gas mains service engineers. Work on roads servicing gas mains supplies. They are deemed to be self employed and are dealt with under CIS. However, the contractor's own main contractor supplies materials, as the gas pipes must be specific. Under the proposed rules, it seems these clearly self-employed people would be unusable, as the contractor cannot offer them full time work.
11. Double Glazing and Fascia fitters. In this industry workers all operate on the same basis which is a percentage of the contract price to the end user, typically 18% to 23%. There are no day rates or hourly rates. There are minimal tools involved apart from hand tools. The vehicles used are owned by the main company due to their size and to achieve maximum advertising by being sign written. Work can be intermittent particularly at the moment.
12. Internet Cabling. This is usually project based ie percentage of total contract value or socket based ie on the number of wall sockets installed. Minimal tools are needed but subcontractors could supply some materials although the end client would want some confidence in the quality of cable and sockets used.
13. A painter and decorator, who obtains contracts from house builders to paint houses on new developments. He has a team of subcontractors who carry out the work who are each engaged on a "priced work" basis. This lends itself very well to the type of work being undertaken. The prices paid to the subcontractors are based on the size and the different styles of house in the development. They are personally responsible for making good any defects in their work, and provide all their own (though limited) equipment. None of them provides their own materials, primarily because the contractor wanted to do so to control the quality of materials used. He could also buy in bulk at cheaper prices than the subcontractors themselves would be able to obtain.
14. A scaffolding subcontractor who is brought as required to erect/dismantled scaffolding. Usually uses the contractors tools and never uses anyone else to do

it. His is only selling his expertise and labour; there are no tools, there are no materials and he doesn't subcontract the work. He charges an hourly rate, works for various contractors where scaffolding is erected and dismantled. If he is offered work by two contractor clients on one day he will have to turn one or other of them down. Under the proposed rules he would be an employee on every job. There is no mutuality of obligation beyond payment for hours worked/services provided which is consideration as required by any commercial contract, he is not controlled by anybody and who is to say that if he was asked to do two jobs on one day he wouldn't at some point chose to sub-contract it, the contract for services he uses allows him to do this.

15. Installers of replacement windows and doors

16. Farms. In the case put to us, for the last 3 years the farm business has employed builders (currently a foreman, carpenter, labourer and two apprentices) who have been engaged on a variety of jobs around the estate and are paid through a payroll.

The situation was explained by the farm's accountant as follows:

The farm buildings include the ruins of a 13th Century Abbey that is listed by English Heritage as an ancient monument. In 2009 it was awarded a grant to renovate the Abbey and the farm's own building team won the £200,000 project by competitive tender. English Heritage and Natural England awarded the project based on technical competence as well as price so several specialist subcontractors were included in the bid for the project. All of the following five individuals were named in the bid, so English Heritage would have needed to approve any later substitutions.

- A semi retired consultant architect with many years of experience who has worked in the past for English Heritage and the National Trust. He has written several books on the renovation of ancient monuments and lime mortar. He helped draft our procedures, train our 5 builders and provided specialist technical guidance as required for a lump sum price. He did not provide tools, materials or other workers.
- A thatcher. The thatched roof needed to be repaired and not replaced so he provided a small amount of straw (so presumably falls within the new proposed HMRC definition). He did not provide plant (we had previously erected scaffolding as the flint walls and windows were also in the scope of work). He was a sole trader so could not provide staff. The scope of work was fixed by English Heritage so we could hire him on a fixed price lump sum basis
- A lead specialist. He was employed by a limited company (who also employed similar workers) and had many years experience working with lead. He provided a small portable crucible (for melting lead close to where it was required on the roof or scaffolding), so presumably falls within the proposed HMRC definition, and we provided the gas for the crucible. He helped develop procedures and trained our staff. He led our team of builders in this specialist task so it was not necessary for his employers to provide additional workers. We purchased the lead, so he did not provide materials. His employers could have provided other workers if necessary.

- A stone mason. He was recommended by our consultant architect and also had many years experience of working with ancient monuments. He trained some of our builders to mix and use lime mortar of various specifications and then led our building team in repointing the flint walls. English Heritage had to approve the specifications for the lime mortar so it could not be quoted on a lump sum basis. The scope of work included clearing old farm machinery and grain hoppers out of the main Abbey building and it was only once this was done that the walls could be exposed and English Heritage could decide the extent of the required renovation work. Because the scope of work was uncertain the stone mason billed us based on a daily rate. We purchased all ingredients to mix the lime mortar and replacement limestone. The stonemason only provided (very specialised) hand tools. We employed his limited company for this task, but he was the only employee approved by English Heritage as having the necessary experience so could not provide other workers.
- It was a condition of the bid that we pay for the architect / project manager who was appointed by English Heritage to oversee the work. The contract was presumably structured in this manner because it transferred cost from English Heritage to a different budget. The firm of architects who employ this named architect did not provide plant, materials or other workers for our project. His firm or architects have invoiced us for his time costs so the charges probably include secretarial and other office services, so perhaps fall within the new HMRC definition as he has provided ancillary staff.

We have hired two other subcontractors that were not specifically named in our bid:

- Before any work could start it was a legal requirement that we had to conduct a bat and owl survey. This involved finding an ecologist who could survey the abbey for signs of bats or owls. He found evidence of both so then had to write procedures and train our builders how to avoid disturbing either animal and thereby infringing the law. He also had to conduct a follow up survey. We paid him a lump sum for the initial survey and negotiated a second lump sum to cover the other work once he found evidence of bats and owls. He used our scaffolding and ladders to conduct the survey, I think the only "tools" he provided was a camera. He did not provide materials or staff.
- The scope of work included electrical work. Our subcontractor provided his own hand held testing meters (plant or tools of the trade?) and replaced cable at his cost so he will fall within HMRC's proposed definition of a self employed subcontractor. Had he merely been hired to check (and not replace the wiring) he may not fall within the new proposed HMRC definition. He works for a family firm and he is the only electrician, so he could not provide other workers.

WHO WE ARE

1. The Institute of Chartered Accountants in England & Wales is a professional body representing some 128,000 members. The Institute operates under a Royal Charter with an obligation to act in the public interest. It is regulated by the Department of Trade and Industry through the Accountancy Foundation. 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 (which includes taxation).
2. The Tax Faculty is the centre for excellence and an authoritative voice for the Institute on taxation matters. It is responsible for tax representations on behalf of the Institute as a whole and it also provides services to more than 11,000 Faculty members who pay an additional subscription.
3. Further information is available on the ICAEW Tax Faculty website at www.icaew.com/taxfac or telephone 020 7920 8646.

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 <http://www.icaew.co.uk/index.cfm?route=128518>.