



OFF-PAYROLL WORKING IN THE PUBLIC AND PRIVATE SECTORS

Issued 28 June 2018

TEXT OF LETTER SENT ON 28 JUNE 2018 TO THE FINANCIAL SECRETARY TO THE TREASURY BY ICAEW TAX FACULTY

Internationally recognised as a source of expertise, ICAEW Tax Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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Text of letter sent on 28 June 2018 to the Financial Secretary to the Treasury by ICAEW Tax Faculty

Following a meeting with HMRC officials last week to discuss the HMT/HMRC [consultation](#) on off-payroll working in the private sector, and in advance of our formal response to that consultation, we are writing to express our concerns about how the changes have been rolled out to the public sector.

Our understanding is that the preferred option is to roll out to the private sector an off-payrolling regime similar to that recently implemented in the public sector. While we appreciate the difficulty that HMRC has in policing IR35, we are concerned about whether this is the right approach given that there are a number of concerns about off-payroll working in the public sector that we think need to be resolved first. Accordingly, the current focus should be to resolve these issues before deciding whether or not the changes should be extended to the private sector:

The online employment status tool

The check employment status tool (CEST) is designed for public sector contracts with the result that is not suitable for use in the private sector. Even though HMRC has undertaken to be bound by CEST decisions, we are concerned that as currently designed it does not command public confidence and needs further work. In particular:

- HMRC has confirmed that CEST does not cover all scenarios, in particular mutuality of obligation (MOO), on the grounds that all contracts need MOO between the parties. However, CEST needs to cover the specific master and servant MOO test prescribed by the courts, namely whether there is an obligation on the worker to work and an obligation on the other party to pay the worker and to continue to make work available during the time of the contract.
- CEST does not take account of being in business on one's own account.
- In too many cases that are seen by our members, CEST does not make a decision. This does not help the worker.

Other issues that need to be resolved

- Workers classified as being inside IR35 have limited rights of appeal. We need more clarity about the rights of workers in these circumstances and whether these rights need to be strengthened.
- The default tax code for 'deemed employees' on a payroll is basic rate (BR). In the majority of cases, this results in tax arrears. We note that this is also a longstanding problem for all secondary jobs.
- HMRC needs to provide payroll software specifications to enable 'deemed employees' to be distinguished from true employees in payroll submissions to HMRC. One consequence of this is that automatic deductions for student loan repayments are being made when no such deductions should exist. Incorrect tax codes are also issued.
- Accounting by workers' personal service companies for fees from deemed employments which have been subject to PAYE, in a way that complies with the Companies and Taxes Acts and financial reporting standards, has proved problematic. We understand that the ongoing discussions involving the FRC and HMRC, facilitated by ICAEW, should soon resolve this, but this should have been resolved before the changes were implemented.
- Accounting by the public sector body remains problematic. The gross invoice received, including VAT, the net amount paid to the worker and the resulting VAT and PAYE deductions do not reconcile, creating difficulties for accounting systems.
- HMRC's track record on IR35 in the tax tribunals and courts is of concern. The fact that it has won only 11 cases out of 25 since IR35 became law, and just one out of four in the last eighteen months, highlights that there are fundamental problems with policing this legislation which need to be addressed.

It is too early to assess the success or otherwise of the public sector off-payrolling changes as there has not yet been a full year's cycle of compliance; PSC accounts and corporation tax computations and workers' self-assessment tax returns are not yet due for submission and HMRC has yet to issue workers' end-of-year tax calculations. This is work in progress affecting many workers who may not have chosen to work through a PSC of their own volition. It is therefore very important that the system supporting this change is reliable and that those using it can do so with confidence.

We should welcome the opportunity to discuss these issues with you and to work with your officials to help resolve the problems we have highlighted, both within the public sector and more generally.

APPENDIX 1

ICAEW Tax Faculty's ten tenets for a better tax system

The tax system should be:

- **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
- **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.
- **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
- **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
- **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.
- **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.
- **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.
- **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.
- **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.
- **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 <https://goo.gl/x6UjJ5>).