



## OFF-PAYROLL WORKING (IR35): CALCULATION OF PAYE LIABILITY IN CASES OF NON-COMPLIANCE

Issued 14 June 2023

ICAEW welcomes the opportunity to comment on the consultation *Off-payroll working (IR35): calculation of PAYE liability in cases of non-compliance* published by HMRC on 27 April 2023, a copy of which is available from this [link](#).

For questions on this response, please contact the ICAEW Tax Faculty at [taxfac@icaew.com](mailto:taxfac@icaew.com) quoting REP 56/23.

We welcome the proposals in this consultation as its aim is to make the system more workable and equitable. We hope that the government will move swiftly to consulting on draft legislation so that there is time for a thorough review before enacting with effect from 6 April 2024.

Rights of appeal need to be extended and legislated for alongside the consultation proposals. The worker should have a 60 day rather than a 30 day period to appeal against the direction; the tribunals and courts need to be able to adjudicate on PAYE tax credits rather than this having to be considered by the county court, and the worker should have a right of appeal once the employment status determination disagreements process between client and worker has been exhausted rather than the worker having to wait until HMRC reviews the worker's SA return.

If this rather complicated direction can be given in respect of set offs under part 2 chapter 10 of ITEPA, we believe that HMRC ought also to consider providing something similar in cases that fall under chapter 8 (the old IR35 rules still applicable where there are small or foreign clients) and chapter 9 (managed service companies).

As an overarching point, we continue to believe that a review of employment status and the difference between tax and social security contributions paid by the employed and self employed is needed to resolve the issues of off-payroll working. The number of tax employment status cases and the different decisions reached as the cases pass through the judicial system illustrates that the current system is too complicated and difficult to understand, administer and police.

This response of 14 June 2023 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

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## GENERAL COMMENTS

1. Although we do not believe that the off-payroll regulations should have been introduced we welcome the proposals in this consultation (on which we have been involved in discussions with HMRC) as its aim is to make the system more workable and equitable.
2. We hope that we can move swiftly to consulting on draft legislation incorporating our suggestions below so that there is time for a thorough review before enacting with effect from 6 April 2024.
3. Rights of appeal need to be extended. We recommend that the following three matters are legislated at the same time as the consultation proposals:
  - the deadline by which the worker can appeal against the direction notice should be 60 rather than 30 days, because 30 days is too short a time in which to check what will be intricate calculations given that the direction will likely come out of the blue and an adviser will probably need to be instructed to help check the figures;
  - the tribunals and courts need to be able to adjudicate on PAYE tax credits, ie how much tax someone should pay, rather than this having to be considered by the non-tax specialist county court, and
  - there should be a right of appeal once the employment status determination disagreements process between client and worker has been exhausted, rather than the worker having to wait until HMRC reviews the worker's SA return.
4. If this rather complicated direction can be given in respect of set offs under part 2 chapter 10 of ITEPA, we believe that HMRC ought also to consider providing something similar in cases that fall under chapter 8 (the old IR35 rules still applicable where there are small or foreign clients) and chapter 9 (managed service companies).
5. As an overarching point we continue to believe that a review of employment status and the difference between tax and social security contributions paid by the employed and self employed are needed to resolve the issues of off-payroll working. The current system is too complicated and difficult to understand, administer and police. This is demonstrated by the number of tax employment status cases and the different decisions reached as the cases pass through the judicial system.

## ANSWERS TO SPECIFIC QUESTIONS

### Chapter 4: Possible alternative option

#### What taxes will be in scope

**Question 1: Do you agree with the taxes that would be included in and excluded from a set-off? If you do not agree, please explain why.**

6. Yes, we agree that the proposal includes the correct taxes in the set-off.

#### Calculating the tax and NIC already paid

**Question 2: Are there any adverse impacts on the deemed employer, the worker or their intermediary as a result of HMRC estimating the amount of the set off that would be given? If so, please provide details of these impacts.**

7. An estimate is an estimate and by its very nature may be inaccurate. Any legislation should allow for the deemed employer to request that actual amounts are used when they are able to provide HMRC with details of the amount and sufficient information to enable HMRC to check the employer's estimate.

8. Whilst we agree with the proposal in principle, there could be adverse impacts on the worker and their intermediary if the amount is incorrectly calculated, in that they would have no remedy for this and HMRC would still benefit from collecting tax twice on the same income, and in some cases the contracts between the clients/ deemed employer and the worker's PSCs would give the client/ deemed employer the right to recover the excess tax from the worker. For this reason, the worker must have a right of appeal on the quantum.
9. We believe that a 60-day period to appeal would be appropriate. We believe that 60 days rather than the more normal 30 is warranted here on the basis that:
  - receiving the notice of direction would likely be the first that the worker has heard of the issue and it would take time for them to get their accountant to work on some fairly intricate figures; and
  - too short a period to appeal could lead to:
    - workers being adversely affected by an inability to get their calculations done on time, and
    - unmeritorious appeals being filed, and later withdrawn, simply to get something done in time to comply with the deadline. This latter issue would create extra work for HMRC in responding to the appeals.
10. Please see answer to next question for more detail.

**Question 3: Would giving a set-off have any impacts on other parts of the tax system for either the deemed employer, worker or their intermediary?**

11. Yes, there is a current problem which we think is equally relevant to the set off, which is how to resolve a disagreement about the amount of the set off.
12. In the case *Stephen Hoey v HMRC [2021] UT 0082* the FTT and the UT agreed that neither tribunal had jurisdiction over certain questions that relate to how much tax someone has to pay – the UT held that the matter is one of debt collection so needed to be taken to the county court.
13. We question why the county court, which is non-specialist, should have to consider complex PAYE regulations to establish whether or not a debt is due.
14. The tax tribunals and courts need to be given specific authority to rule on all tax-related matters, including PAYE and NIC, as well as judicial reviews of HMRC decisions.
15. We recommend that the law is redrafted so it is clear that an assessment not only determines liability but also the amount due after credit, so that jurisdiction over the full range of PAYE credits can be given to the FTT and UT and higher courts.
16. We suggest further that the opportunity is taken to legislate to resolve this lacuna at the same time as legislating for the proposals in the consultation. It is not appropriate that disputes over the amount of PAYE credit that should be allowed must be dealt with by the county court.

## Directions and appeals

**Question 4: Do these grounds for appeal provide sufficient safeguards for deemed employers, workers and their intermediaries where they disagree with the direction to set off amounts already paid against their deemed employer's PAYE liability?**

17. No, we do not agree. The section entitled Directions and appeals states that:

*“The worker or their intermediary would not be able to appeal a direction notice on the basis that they disagree with HMRC’s conclusion regarding the status of the worker.”*

*“The worker or their intermediary would have 30 days from the date the direction notice is issued to appeal. If they do not appeal within this time limit, the direction will be treated as agreed and the deemed employer’s PAYE liability will be reduced by the amount of the set-off.”*

18. We believe that the worker/ PSC should have the right of appeal on the basis that the status determination is incorrect. The worker/ PSC may have information that was not available to the deemed employer or HMRC particularly regarding being in business on their own account.
19. We also continue to believe that the current legislation needs to introduce a right of appeal to HMRC when the current disagreements process with the end client over status determination statements has been exhausted. HMRC’s position is that any dispute about PAYE withholding that should not in the worker’s view have been withheld can be resolved after the filing of tax returns for the year. This is not acceptable because it leaves a contractor suffering incorrect withholding with no form of remedy for too long a period.

#### Information required for a set-off

##### **Question 5:**

##### **A: What information do you, as the client, routinely gather as part of your hiring practices for off-payroll workers?**

20. We imagine that most end clients would adopt a multi-stage process. They would start by obtaining sufficient information to review the employment status of the worker under the engagement. As standard, this first stage of the process would not need to capture:
  - the worker’s address (unless this was the same as the intermediary’s business address),
  - the worker’s date of birth, and
  - the worker’s national insurance number (NINO).
21. Indeed, we question whether end clients would be allowed to capture this information at the status determination stage, because, under GDPR, the client would not have a legitimate business need for it unless it knew that it was going to need to operate payroll.
22. If an engagement is found to be within the OPW rules, a client would then need to obtain sufficient information to set up the worker on payroll.

##### **B: Please provide your views on how easily a client would be able to obtain the above information and provide this to HMRC if requested.**

23. When it is known that this information is likely to be required in future we believe that engagers would change their processes to ensure that this information is collected.
24. We would expect that engagers would know the VAT registration number (VRN) when VAT was being charged on the fees paid to the PSC.
25. We have been informed by members that some workers are reluctant, or simply refuse, to provide date of birth and national insurance numbers. This is because where they consider themselves outside the off-payroll rules, they view the collection of this information as:
  - unnecessary, so there are data protection issues, and they do not want to provide personal information that is not needed (despite employment intermediaries reporting being necessary since 2015 under SI 2003/2682, regs 84E–84H, which requires a report to be sent to HMRC with details of all payments made where PAYE has not been operated, and why, with details of the individuals, this is not always familiar to the individuals needing to provide the information); and
  - a threat to their position as self-employed, or as an employee of an intermediary outside the off-payroll rules.

26. Will the draft legislation include a requirement to provide the data, albeit it would have to be drafted to cater for individuals who do not have a national insurance number and cannot acquire one because they are not subjected to NIC? We would expect the number of contractors in this category to be very low.

### Impacts on compliant behaviour

**Question 6: Would allowing a set-off create any adverse incentives or changes in behaviour amongst clients, or other parties in the labour supply chain, when determining whether the off-payroll working rules should apply?**

27. We would expect there to be a delay in settling current disputes to ensure that the new rules could apply.
28. As responsible engagers try to comply, we do not believe that the reduction in the amount of the tax due would cause any change in behaviour.

### Chapter 5: Application

**Question 7: Do you agree with how the government intends to apply this policy?**

29. We agree that settled cases should not be re-opened.
30. Penalties should be levied on the amount of tax payable after the direction is issued, ie after giving credit for the tax paid by the PSA/ worker as outlined in the proposals.

### Chapter 6: Impacts

**Question 8: We expect that businesses would need to spend time familiarising themselves with the changes. Can you provide an estimate of the costs your business would expect to incur to familiarise itself with the legislation?**

31. This is difficult to determine without seeing the draft legislation and the fine detail of the proposals but we would not expect it to be significant when compared to the cost of implementing the off-payroll rules.

**Question 9: Would asking for further information about the worker and their intermediary result in additional ongoing costs to your business? If so, can you provide an estimate for these costs?**

32. There would be a cost but the deemed employer would be able to make a commercial decision whether to provide the details or not claim any credit, in which case they would not be any worse off.

**Question 10: Please tell us if you think there are any other specific impacts on other groups or businesses that we have not considered above.**

33. If this rather complicated direction can be given in respect of set-offs under part 2 chapter 10 of ITEPA, we believe that HMRC ought also to be able to give something similar in cases that fall under chapter 8 (the old IR35 rules still applicable where there are small or foreign clients) and chapter 9 (managed service companies).
34. In these cases one is dealing with parties all under the control of the same person or a small group of people, so it ought to be considerably simpler. It would:
- reduce the amount of work done by HMRC substantially (in that they would not have to call in corporation tax or self-assessment inspectors to issue refunds);
  - protect the tax base (in that HMRC would not be at risk of paying out corporation tax reclaims whilst being uncertain as to whether they were going to be able to collect PAYE determinations); and
  - automatically rectify an injustice in the charging of interest on balances that do not exist in any meaningful economic sense.



## APPENDIX 1

### ICAEW 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 <https://goo.gl/x6UjJ5>).