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Draft Income Tax (Pay As You Earn) (Amendment) Regulations 2020

Draft Social Security Contributions (Intermediaries) (Miscellaneous Amendments) Regulations 2020

Response by the Chartered Institute of Taxation

1 Introduction

- 1.1 The Chartered Institute of Taxation (CIOT) sets out below its response to the technical consultation on draft secondary legislation for Off-Payroll Working (OPW) from April 2020.
- 1.2 The draft Income Tax (Pay As You Earn) (Amendment) Regulations 2020 ('the draft PAYE Regulations') contain the provisions for allowing HMRC to recover uncollected PAYE income tax liabilities from a third party where the deemed employer (ie the party that is treated as making a payment of deemed earnings to a worker's intermediary under the OPW rules) has not accounted to HMRC for the PAYE income tax deductions due on the deemed earnings. We note that it is the government's intention that the transfer of the PAYE liability to a third party will only arise where there is no realistic prospect of recovering the tax from the deemed employer within a reasonable period of time. We also note that the draft PAYE Regulations provide for the reporting of an OPW indicator on PAYE Real Time Information (RTI) returns.
- 1.3 The draft Social Security Contributions (Intermediaries) (Miscellaneous Amendments) Regulations 2020 ('the draft NIC Regulations') legislate for the new OPW rules for National Insurance Contributions (NIC) purposes and make similar provisions to those included in the draft Finance Bill legislation and draft PAYE Regulations for NICs purposes.
- 1.4 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities.
- 1.5 Our stated objectives for the tax system include:
 - A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences.
 - Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
 - Greater certainty, so businesses and individuals can plan ahead with confidence.
 - A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).

- Responsive and competent tax administration, with a minimum of bureaucracy.

1.6 Our comments and recommendations below on the two draft statutory instruments are made solely in order to achieve the CIOT's aims, as set out above; we are a non-party-political organisation.

2 Technical Note and General Comments

2.1 The Technical Note published alongside the two sets of draft regulations notes (at paragraph 10) that HMRC will not exercise the power to transfer unpaid PAYE and NIC debts from the deemed employer to a third party (usually the first agency in the supply chain but potentially the client) in cases of genuine business failure of the deemed employer. This reflects the government's position as set out in the OPW consultation response¹ published on 11 July 2019 which stated that *'The proposals are not intended to transfer liabilities in cases of genuine business failure, where deliberate tax avoidance has not occurred'* (paragraph 1.21 on page 5). We agree that it would not be right to transfer liabilities in such circumstances.

2.2 However, we do not consider that the draft legislation adequately reflects this position. In particular, we suggest that it be made clear in the legislation that a recovery notice cannot be issued in cases of genuine business failure of the deemed employer (or the first agency where debt would otherwise be transferred to the client) and, for completeness, that the grounds for appeal against a recovery notice be expanded accordingly.

2.3 Furthermore, we consider that the transfer of debt provisions should be tempered in cases where a third party has taken reasonable care to ensure that the deemed employer complies with their obligations. We therefore recommend that the draft legislation is amended to prohibit the transfer of a tax debt to a third party that has taken reasonable care to ensure the integrity of their supply chain and compliance with the OPW rules by other parties in that supply chain but, notwithstanding this, the deemed employer has for some reason (other than as a result of a genuine business failure) failed to pay the relevant tax debts. We are concerned that to do otherwise will leave third parties such as the first agency or the client in a very uncertain position and with the risk of significant potential liabilities which arise by virtue of matters which are outside their control.

2.4 The Technical Note confirms (at paragraph 12) that the PAYE RTI Full Payment Submission (FPS) return will include an indicator requiring deemed employers to identify which payments arise from the OPW rules. The indicator is a welcome addition to the RTI return as it will allow HMRC to identify which payments arise from a deemed employer/deemed employee situation and, thus, suppress unwanted notifications from HMRC, for example, student loan deduction start notices.

2.5 We think it would be helpful if HMRC could provide further information as to which HMRC staff will and will not be able to access information on the OPW RTI indicator, and the use to which they will put that access. This is in light of HMRC's assurance that enquiries into a Personal Service Company's (PSC) IR35 compliance for the period prior to 6 April 2020 will not be raised as a result of an end client's application of the OPW rules from that date.

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822204/Off-payroll_working_rules_consultation_summary_of_responses.pdf

3 Draft Income Tax (Pay As You Earn) (Amendment) Regulations 2020

Recovery from relevant person

- 3.1 Draft regulation 97LA provides that *'where an office of Revenue and Customs considers there is no realistic prospect of recovery of a relevant PAYE debt from the person mentioned in regulation 97LB(a) within a reasonable period of time the officer may recover it from a relevant person.'*
- 3.2 We think that this regulation should also require HMRC to use its reasonable endeavours to recover a relevant PAYE debt from the person ordinarily liable (or liable as a result of a previous exercise of the transfer of debt provisions) prior to being able to transfer debt to another party. Furthermore, that if HMRC has not used reasonable endeavours then this should be grounds for appeal in regulation 97LI(3).
- 3.3 It is not clear from the draft legislation what *'no realistic prospect of recovery'* will mean in practice. For example, does the deemed employer's business have to have failed completely before HMRC considers it not realistic to collect the tax debt from that business? If so, at what point in, say, an insolvency would HMRC consider that it will be unrealistic to recover the debt? The term is very subjective particularly since it would appear that the transfer of debt provisions can be used where an HMRC officer believes (*'considers'*) that there is no realistic prospect of recovery from the deemed employer. There is, therefore, a risk that in future HMRC could seek to pursue a third party simply because it becomes too difficult to pursue the deemed employer (or other relevant party) and it is easier to pursue agency one (or the client).
- 3.4 Additionally, does no *'realistic prospect of recovery'* of a relevant PAYE debt mean non-recovery of the whole debt or part of the debt? For example, where it is expected that a failed business will be able to settle 50% of their tax debts, at what point is there no realistic prospect of recovery of the other 50%? Regulation 97LD envisages that part of the debt can be transferred but it is not clear how one would ascertain when there is no realistic prospect of recovery of that part of the debt.
- 3.5 We would also suggest making it clear in regulation 97LA that *'a relevant PAYE debt'* includes *'a part thereof'*.
- 3.6 It is not apparent from the draft legislation what *'within a reasonable period of time'* means in practice. For example, if the deemed employer's business is suffering a significant cash-flow problem and has asked HMRC for Time To Pay (TTP) but it appears apparent that the tax debt will not be paid for, say, 6 months does that mean there is *'no realistic prospect of recovery'* *'within a reasonable period of time'*?
- 3.7 We suggest that HMRC expand on the draft guidance contained in ESM10031 and ESM10032, including additional examples, explaining not only when regulation 97LA (and the similarly worded regulation 97LD) will be used but also what each of the operative terms with regulation 97LA mean in practice, especially the terms mentioned above.
- 3.8 The draft Finance Bill legislation introducing Section 688A defines *'relevant person'* as any *'person who is a party to the arrangements mentioned in section 61M(1)(c) in connection with which the deemed payment was treated as made'*. This is, of course, a much wider definition of relevant person than simply agency one and the client. We note that the guidance at ESM10031² would seem to indicate that the *'other persons'* would be agency one and the end client. However, it is unclear whether there are other *'other persons'* that could receive a recovery notice, and indeed the guidance at ESM10031 implies that this might be so. We would welcome further clarification on this point, noting that it would seem that section 688AA(2) is in fact to be amended to confine the persons concerned to the first agency and the client (see also paragraph 3.14 below).

² <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10031>

3.9 We would also welcome clarification as to whom, if anyone, HMRC would seek recovery of PAYE (and NIC) from prior to issuing a recovery notice under the proposed transfer of debt provisions in cases involving tax avoidance or evasion or phoenixism by a deemed employer or other party? For example, directors and shadow directors of the deemed employer or any other persons involved in such avoidance or evasion or phoenixism. In particular, there are existing powers to recover NICs at section 121C of the Social Security Administration Act 1992 where there is fraud or neglect by ‘culpable officers’. How would these and other recovery powers, including the proposed new powers to tackle tax abuse relating to company insolvency³, be operated in light of the proposed transfer of debt legislation? Would multiple courses be pursued at the same? It also occurs to us that where a party has been party to tax abuse and is still solvent, surely it would be more appropriate for recovery action to be taken against that party than agency one or the client where neither agency one nor the client have been a party to that abuse.

Relevant PAYE debt

3.10 Draft regulation 97LB defines what a relevant PAYE debt is for the purposes of the OPW transfer of debt provisions. While we have no comments regarding this provision, we would appreciate HMRC clarifying the interaction of the OPW transfer of debt provisions and the draft Finance Bill legislation published on 11 July 2019 in relation to HMRC becoming a preferred creditor⁴. In particular, does HMRC acquire and/or retain preferred creditor status for PAYE (and NIC) debts arising under Regulation 80 Income Tax (PAYE) Regulations 2003 (and Section 8 Social Security Contributions (Transfer of Functions) Act 1999) which are subsequently transferred in accordance with the OPW transfer of debt rules?

Conditions for recovery of relevant PAYE debt

3.11 Draft regulation 97LC(b) prevents the transfer of the PAYE debt to a third party where the deemed employer responsible for accounting for PAYE under section 61N(3) is the client. Can HMRC confirm that the reason no transfer is permitted in these circumstances is because (a) the client will be the fee payer and (b) it is on the line for the PAYE in any event in these circumstances so that there is no other party to whom the debt could be transferred?

Order in which debts may be recovered

3.12 Draft regulation 97LD appears to simply reword regulation 97LA and provide for ‘part thereof’ of the PAYE debt. Our comments on regulation 97LA in respect of ‘*no realistic prospect of recovery*’ and ‘*within a reasonable period of time*’ apply equally to regulation 97LD.

3.13 Can HMRC clarify whether successive recovery notices could be issued? For example, firstly to agency one and then, if it looks like there is no realistic prospect of recovery from agency one within a reasonable period of time, subsequently to the client? We assume that two recovery notices cannot be in force at the same time, because the PAYE must be paid within 30 days per regulation 97LH and this would double count the PAYE. Is this correct and, if so, does HMRC need to withdraw the recovery notice issued to agency one before issuing a recovery notice to the end client? If it later transpires that agency one could pay the PAYE, ie before the end client has settled, will HMRC then withdraw the recovery notice to the end client and reissue it to agency one?

3.14 We also assume the reference to paragraphs (a) and (b) in section 688AA(3) ITEPA, which do not appear in the draft Finance Bill legislation published in Summer 2019, means that the draft Finance Bill legislation has

³ <https://www.gov.uk/government/publications/tax-abuse-using-company-insolvencies>

⁴ <https://www.gov.uk/government/publications/changes-to-protect-tax-in-insolvency-cases>

been amended. We think it would be helpful to publish the revised draft primary legislation as soon as possible (and before the Finance Bill is laid before Parliament) in order that businesses grappling with the new OPW rules can see how the revised new rules are currently intended to apply and can adapt any processes accordingly.

Beginning of relevant period

3.15 Draft regulation 97LE provides for the earliest point in time in which a recovery notice can be issued to a third party. While the legislation appears to achieve its aim, we think that the language at regulation 97LE(b) could be simplified. In particular, instead of providing that *'when an officer of Revenue and Customs becomes aware that the officer has sufficient information...'*, we think this could be simplified to say *'when it becomes apparent to an officer of Revenue and Customs that there is sufficient information...'*

3.16 We also note that under draft regulation 97LE(b) HMRC has the power to transfer the debt where it is *'impractical'* to make a determination on account of the liquidation, dissolution *'or other incapacity'*, but that no further definition is given of what it is intended *'impractical'* means or the circumstances which it is considered *'other incapacity'* would be relevant. We suggest that this aspect is dealt with via guidance.

End of relevant period

3.17 Draft regulation 97LF provides for a 2-year period in which HMRC can issue a recovery notice from the beginning of the recovery period. We consider that this is an overly long period for businesses that require certainty as to their liabilities (not least in order to return accurate accounts). Businesses should not be subject to lengthy periods of uncertainty as to whether they will be liable for potentially significant sums for which they could not possibly have made a provision for (the monies on which the relevant PAYE debt arises having been passed down the line without any requirement to make a withholding provision). This is particularly important in relation to corporate acquisitions and the due diligence process involved in ascertaining any material tax exposure of the target.

Appeals

3.18 Draft regulation 97LI provides for grounds of appeal where an officer of HMRC issues a recovery notice to a third party. As noted above at paragraph 2.3 we think that the grounds of appeal should include that the *'relevant person'* has taken reasonable care. Otherwise we consider that the client or agency is being penalised unfairly, ie what more could they have done to ensure that the deemed employer accounted for PAYE on the deemed payment of earnings?

3.19 We note that a similar reasonable care defence is allowed in the existing PAYE Regulations under regulation 72(3) (Condition A) in respect of a recovery of PAYE from an employee where PAYE income tax is not deducted by the employer. We would also refer to the Construction Industry Scheme (CIS) Regulations (Statutory Instrument 2005/2045) at regulation 9(3) (Condition A) (Recovery from sub-contractor of amount not deducted by contractor) which again revolves around reasonable care, error in good faith and genuine belief.

3.20 Our comments on regulations 97LA and 97LD in respect of requiring clarification of the meaning of *'no realistic prospect of recovery'* and *'within a reasonable period of time'* are relevant to regulation 97LI too.

Withdrawal of recovery notice

3.21 Draft regulation 97LJ(2) permits an officer of HMRC to withdraw a recovery notice if the officer considers it appropriate to do so. Our comments on regulation 97LD in relation to withdrawals of recovery notices to third

parties are also relevant here (see paragraph 3.13 above). We assume that HMRC would consider it appropriate to withdraw a recovery notice in circumstances where HMRC has issued it to a client when it later transpires recovery is possible from agency one or the initially defaulting party. However, we would appreciate clarification of this point?

4 Draft Social Security Contributions (Intermediaries) (Miscellaneous Amendments) Regulations 2020

Amendment of the Social Security Contributions (Intermediaries) Regulations 2000

4.1 The amendments to the Social Security Contributions (Intermediaries) Regulations 2000 and their Northern Ireland equivalent make similar provisions to those provided for in the draft Finance Bill legislation published in Summer 2019 for NICs purposes. The CIOT has previously commented on the draft Finance Bill legislation⁵ and we would refer you to our comments in respect of the equivalent income tax provisions.

4.2 Our further comments on the NIC specific draft OPW legislation are set out below.

Citation, commencement, effect and interpretation

4.3 We note that draft regulation 1(3) refers to *'deemed direct earnings treated as paid on or after the time at which these Regulations come into force even if relating to services provided before that time'*. We assume that the regulations will not come into force until 6 April 2020 at the earliest. We also assume that the regulation 1(3) will be amended following the announcement on 7 February 2020 that the new OPW rules *'will now apply only to payments made for services provided on or after 6 April 2020'*⁶.

Worker treated as receiving earnings from employment

4.4 The amended regulation 14 of the Intermediaries Regulations (and the Northern Ireland equivalent) introduces a new paragraph (5) which says that *'unless and until the client gives a status determination statement to the worker'* the client will be treated as the deemed employer. We note that no reference is made in regulation 14 to the client giving a status determination statement (SDS) to agency one. While this is mentioned in new regulations 20(1) and 20A(1)(b) the rationale for not mentioning agency one in regulation 14 is unclear. We would expect regulation 14 to include an obligation on the client to pass an SDS to both the worker and agency one in order to discharge the client's obligation to account for NIC (and PAYE) where there is are deemed earnings. We would appreciate HMRC's clarification on this point.

4.5 The draft NIC Regulations amend paragraph (8) of regulation 14 and add that a *'qualifying person'* is a person who *'has been given by the person immediately above them in the chain the status determination statement...'* (emphasis added). Is it envisaged that the original SDS must be passed down the chain? If so then presumably it is sufficient for the relevant parties in the chain to retain a copy, with conveyance down the chain being evidenced by appropriate correspondence. Further clarification on this point would be helpful.

Meaning of status determination statement

4.6 New regulation 14A(1)(a) and (b) provides that an SDS is either a statement by the client that the OPW rules apply or an incorrect statement by the client that the OPW rules do not apply. This would suggest that a statement that the client has assessed the contract and concluded that the contract is one of self-

⁵ [Off-payroll working rules from April 2020 - Draft Finance Bill legislation](#)

⁶ <https://www.gov.uk/government/news/hmrc-announces-change-to-the-off-payroll-working-rules>

employment, and not employment, is not in fact an SDS. But it is not clear why a statement that the OPW rules do not apply is not an SDS and certainly the draft guidance at ESM1013⁷ seems to envisage that an SDS which includes a statement of deemed employment or self-employment is a valid SDS. We would therefore appreciate HMRC clarifying the position on this and that the legislation and/or the draft guidance be amended accordingly. See also our comments at paragraph 4.9 in relation to the client-led disagreement process.

Application of Social Security Contributions and Benefits Act 1992 to deemed employment

- 4.7 Regulation 18(2)(d) of the Intermediaries Regulations is being amended so that the person treated as making the payment of deemed direct earnings is also to be treated as the secondary contributor for NIC purposes. This is regardless of whether or not that person fulfils the conditions as to residence or presence in Great Britain (GB) of the secondary contributor at section 1(6)(a) of the Social Security Contributions and Benefits Act 1992. But we are unclear how in practice the OPW rules can apply where the deemed employer has no residence or presence in GB? In particular, and in the light of the *Oceanic Contractors* case⁸ how does HMRC envisage this provision will operate for an end client that is resident outside the UK (and with no UK presence), that contracts with an agency that is also resident outside the UK (with no UK presence) and where the agency in turn contracts with a UK resident PSC and where the worker is resident/working in the UK?

Client-led status disagreement process

- 4.8 New regulation 20 provides for a dispute process for NIC purposes (the draft Finance Bill legislation included an equivalent process for PAYE purposes). Where there is a dispute, this process requires that within 45 days the client must either (a) give a statement to the worker or the deemed employer (as the case may be) that it has concluded the original SDS is correct, or (b) if the original SDS was incorrect, then give the worker and the deemed employer a new SDS and state that the original SDS is withdrawn.
- 4.9 We note that the meaning of SDS in regulation 20 is, by virtue of regulation 20(5), the same as its meaning in regulation 14A. In particular, this suggests that where the original decision was that the worker's status was akin to an employee (such that NIC (and PAYE) is applied) and on further reflection the decision was reversed such that his or her status was akin to self-employment the statement issued by the end client is being characterized as an SDS. But this seems to conflict with the definition of SDS at regulation 14A which does not include cases where the decision is (correctly) that the worker's status is akin to self-employment. It would be helpful if HMRC could clarify this point.
- 4.10 Where there is a change in the end client's view then, as noted, regulation 20 requires the end client to communicate accordingly with both the worker and the deemed employer. In longer contractual chains the client will not necessarily know who the deemed employer is, albeit they will know the identity of agency one. The issuing of the original SDS envisages the client passing appropriate information to agency one and that agency (and subsequent agencies) passing information down the chain until it is received by the deemed employer in order to discharge each party's obligations. Accordingly, we suggest that, where an appeal is lodged by the worker (as opposed to the deemed employer) then the end client can pass the outcome of the appeal to agency one and for that agency (and subsequent agencies in the chain) to pass it on down the chain until it reaches the deemed employer. Furthermore, it is unclear in these circumstances whether a requirement to communicate with the deemed employer directly would be consistent with the Data Protection Act.

⁷ <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10013>

⁸ *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1982] UKHL TC_56_183 (16 December 1982)
(http://www.bailii.org/uk/cases/UKHL/1982/TC_56_183.html)

- 4.11 Regulation 40(3) transfers responsibility for accounting for NICs from the deemed employer to the client if the client has not responded to the status appeal within 45 days, unless the PSC provides a fraudulent document (regulation 22). We note that the draft guidance in ESM10023⁹ includes examples as to what amounts to a fraudulent document in this context. This guidance is very welcome.

Duty for client to withdraw status determination statement if it ceases to be medium or large

- 4.12 Where a non-public body end client ceases to be a medium or large new regulation 20A requires the end client to notify 'the relevant person' that it is no longer medium or large before the beginning of the tax year concerned. The 'relevant person' is defined to be the worker and the deemed employer. As mentioned in paragraph 4.10, in longer contractual chains the end client may not necessarily know who the deemed employer is. We would suggest that instead the end client should be required to notify agency one, agency one to notify the next agency lower in the chain and so on until the notification is received by the deemed employer. As noted above, this is the mechanism by which the SDS itself flows down the chain.

Amendment of the Social Security (Contributions) Regulations 2001

- 4.13 The amendments to the Social Security (Contributions) Regulations 2001 make similar provisions for the transfer of NIC debts as the draft PAYE regulations make for PAYE income tax debts. Our comments above on the draft PAYE regulations on transfer of PAYE debt apply also to the draft NIC regulations on transfer of NIC debt.

5 Acknowledgement of submission

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

6 The Chartered Institute of Taxation

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

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

The CIOT's 19,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

⁹ <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10023>

The Chartered Institute of Taxation

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