

Off-Payroll Working (IR35) – calculation of PAYE liability in cases of non-compliance

Response by the Chartered Institute of Taxation

1 Executive Summary

- 1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.
- 1.2 We welcome this consultation, which proposes a set-off for taxes already paid by a worker and/or their intermediary against taxes due from a deemed employer in cases involving a compliance settlement where it is adjudged that an end client has mis-categorised a worker's deemed employment status as outside the Off-Payroll Working (OPW) rules when it is subsequently agreed that they should have been within the OPW rules. In our view this set-off approach would be much fairer than the current approach of having HMRC notify affected workers/their intermediaries of the status recategorisation and then requiring the worker/their intermediary to recalculate their taxes, amend tax returns and submit claims for overpayment relief. Essentially the current approach means that the worker/intermediary ends up paying no tax on the amount paid by the end client, with the end client bearing that tax as an additional cost.
- 1.3 The proposed set-off solution, which is akin to that enacted following the *Demibourne*¹ case, is we believe the appropriate way forward. We also agree that HMRC should have some flexibility in determining the amount of the set-off, including estimating the amount from information and data at its disposal. Albeit that this should be tempered with a right for the deemed employer to challenge HMRC's calculations and provide more accurate figures if it can obtain the necessary detail from the deemed worker and their intermediary.
- 1.4 We also think that the set-off approach would be much fairer on the Exchequer as regards cases that involve public bodies, in that the taxes paid by the relevant workers/intermediaries would be retained by the Exchequer and only the difference would be settled by the public bodies out of their government funding. At present, and further to paragraph 1.2 above, the full tax cost is borne by the Exchequer and the worker/intermediary makes a windfall gain at the Exchequer's expense.

¹ [Demibourne Ltd v Revenue and Customs \[2005\] UKSC 00486 \(23 June 2005\) \(bailii.org\)](https://www.bailii.org/uk/cases/UKSC/2005/486.html)

1.5 We note that, if adopted, the legislation for this new approach will take effect from 6 April 2024 in relation to all open compliance settlement cases. We agree with this approach. Furthermore, early confirmation that the new approach will be legislated for, and that ongoing compliance cases can be provisionally negotiated (but not finalised) on the basis of this new approach being adopted, would be appreciated. This would enable payments on account to be made ‘now’ rather than having to wait until next April to negotiate the set-off and pay the resultant net liability.

2 About us

2.1 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. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

2.2 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.

2.3 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.

2.4 Our members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

2.5 Our stated objectives for the tax system include:

- A legislative process that 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.

3 Introduction

3.1 This consultation concerns a change to allow HMRC to take into account taxes already paid by a worker and/or their intermediary (typically a Personal Service Company (PSC)) when calculating PAYE/NIC due from the deemed employer where the end client has incorrectly determined the deemed employment status of a worker further to the Off-Payroll Working (OPW) rules introduced in 2017 and extended in 2021.

3.2 The CIOT has previously suggested that, for ease of administration and fairness, a *Demibourne* style offset (as legislated for under Regulations 72E-G of the PAYE Regulations 2003 (SI 2003/2682)²) for taxes, including Corporation Tax and NICs, that have already been paid by a worker/their intermediary be permitted in compliance settlement cases and we therefore welcome this consultation. We also welcome HMRC's previous informal consultation on this issue in response to the issues that we and other representative bodies have raised on this matter. HMRC's consultative approach and willingness to engage is a good example as to how government bodies and external representative bodies should work together to find solutions to commonly identified issues.

3.3 This said, there is a related point where we would welcome clarification from HMRC. This is on the question of which party is liable for any taxes due as a result of a worker's deemed employment status being incorrectly characterised where the end client has taken reasonable care but, nevertheless, has got their status determination wrong. Our reading of the legislation is that the client is not liable in these circumstances, but that where an agency is involved that pays the PSC then *prima facie* liability sits with the agency as the deemed employer. But this seems inappropriate as the agency has simply done what the end client has told it to do, ie not PAYE deduct, and it would not generally have any reason to second guess this. Indeed, we consider that the agency would be able to argue in defence that Regulation 72(3) of the PAYE Regulations applies (reasonable care and acting in good faith). The same point arises where the client contracts directly with the PSC, ie we consider that a Regulation 72 defence would apply. In overall terms we think that where reasonable care has been taken then PAYE liability should rest with the PSC. A parallel issue also arises in relation to NIC, albeit the analysis is less clear. We would value HMRC's comments on this point and suggest that the Employment Income and National Insurance Manuals are updated accordingly.

3.4 The consultation proposes that new legislation would be introduced to allow HMRC to set-off amounts of tax and employee NICs already paid by a worker and their intermediary against the PAYE and employee NIC liability of the deemed employer. In effect, the PAYE income tax and employee NICs liability would be shared between the client (deemed employer), worker and the worker's intermediary, rather than the client bearing all the liability and the worker and their intermediary being entitled to reclaim taxes already paid. It is proposed that no set-off would apply in relation to employer NIC and Apprenticeship Levy. In the case of a client being a public body this set-off will mean that the burden for these taxes will not fall solely on the public purse. We comment in more detail below but, in principle, we are very supportive of this approach, we believe that it would mean that tax is borne appropriately by the client and the worker/intermediary and indeed that it reflects the approach already legislated in individual status cases further to the *Demibourne* case.

4 Notifying customers of potential overpayments

4.1 We are concerned here with the situation where the worker's deemed employment status has been wrongly assessed, such that on review it is accepted that the worker should be deemed an employee rather than self-employed under the OPW rules. We agree that, absent legislation to permit a set-off for amounts of tax and NICs already paid by a worker and their intermediary against the PAYE liability of the deemed employer, the deemed employer (whether the end client or an agency paying the worker's intermediary) would be liable for the full amount of PAYE and NICs that would have been due on the deemed employment payment to the intermediary. Additionally, the worker and their intermediary would have a claim for repayment for overpaid taxes/NICs already paid arising, and HMRC would have a duty under its Charter to identify these taxpayers (the worker and their intermediary) and notify them of the potential overpayment and invite them to amend

² [The Income Tax \(Pay As You Earn\) Regulations 2003 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

tax returns/submit claims for overpayment relief. This said, we note HMRC's comment (in Section 4 of the consultation document) and as regards '*setting off of taxes already paid*') that a set-off of PAYE may currently be possible further to existing Regulations 72E-G of the PAYE Regulations.

- 4.2 The result of this is that the end client (deemed employer) bears all of the cost of the worker's tax burden and the worker (and their intermediary) bears none of it. In the case of the end client being a public body this means that the tax burden is met out of public funds and that, effectively, the 'taxpayer' (worker and their intermediary) pays no (or very little) tax.
- 4.3 Additionally, this notification approach places a significant administrative burden on HMRC, the worker, their intermediary and their tax advisers. Firstly, HMRC must identify and notify the worker and their intermediary of the potential overpayment, then the worker/their intermediary (or their tax advisers) need to recalculate their tax liabilities, amend in date tax returns and/or submit overpayment claims, and claims for NIC refunds, to HMRC, and then HMRC has to process and check the amended returns and overpayment claims and NIC refund claims, and issue tax refunds.
- 4.4 An alternative solution is therefore required that both reduces the overall administrative burden on all parties and ensures that the 'right amount of tax' is paid in aggregate and by the right parties.

5 Possible alternative option

- 5.1 HMRC has identified the following objectives that any solution should aim to achieve, and which we support:
 1. A solution must continue to incentivise compliance with the off-payroll working (OPW) rules and encourage clients to take reasonable care and make correct status determinations from the outset.
 2. A solution must not result in the client gaining an economic advantage from getting the status determination wrong.
 3. The amount to be set against the deemed employer's PAYE liability must be calculable, either exactly or approximately, using information that is currently available to HMRC or that can be provided by the deemed employer.
 4. A solution should share the tax burden more equitably between the deemed employer and worker.
 5. HMRC should not collect more tax and NICs than is necessary to achieve the key principles of the OPW rules.
 6. A solution should not give rise to obligations and rights that are too difficult to exercise or implement in practice, both for HMRC and taxpayers.
 7. A solution should minimise the administrative burden of correcting errors for all parties.
 8. A solution should encourage co-operation between HMRC and taxpayers.
- 5.2 **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.**
- 5.3 We agree that the following taxes should be included:
 - Corporation Tax paid by a worker's intermediary (where the worker's intermediary is a PSC) on the income from the OPW engagement
 - Income Tax and employee NICs paid on a salary to the worker from the worker's intermediary, where the salary is paid out of income from the OPW engagement

- Classes 2 and 4 NICs paid by the worker with respect to income from the OPW engagement (where the worker's intermediary is a partnership or another individual)
- Tax paid on dividends received by a worker from their PSC, where the dividends are paid out of income from the OPW engagement

5.4 We also agree that the following taxes should be excluded:

- Employer NICs and Apprenticeship Levy paid by the worker's intermediary
- Class 3 NICs payments made by the worker
- Tax and NICs paid on any salary and dividends received by any other employees, directors or shareholders of the worker's intermediary

5.5 In relation to employer NIC and Apprenticeship Levy, HMRC make the point that they are distinct and separate charges on the employer, rather than deductions from earnings such as PAYE and employee NIC. We accept this argument in that essentially these charges are incremental costs that arise for the client in cases where OPW applies, and that an offset would reduce the client cost to below that which it would have been in the first place.

5.6 ***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.***

5.7 HMRC proposes that the calculation of the amount of taxes already paid to be set off would be undertaken by them on a reasonable basis using information that is already available to HMRC such as relevant tax return data, and that any assumptions and best judgements would be explained to the deemed employer.

5.8 Given that HMRC will explain how it has reached its figures to the deemed employer, we do not see any adverse impacts as a result of HMRC estimating the amount of the set-off. Indeed a similar point already arises further to PAYE set-off claimed under Regulations 72E-G. This said, we think that the deemed employer should be able, under the legislation, to appeal against the amount of set-off if it believes it has not been calculated reasonably. While the deemed employer is unlikely to have all the information that HMRC has at its disposal, we nevertheless think that the deemed employer should be able to object if it thinks HMRC has got its figures wrong. An objection might relate to anything from a mathematical error to an assumption not being realistic/reasonable. We suggest that HMRC includes in guidance how the amount of the set-off will be calculated and what representations the business can make if it considers the HMRC figure is incorrect, and that the guidance discusses the nature of the dialogue between business and HMRC in this context.

5.9 ***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?***

5.10 We do not believe that giving a set-off will have any adverse impacts on other parts of the tax system. We are not aware of any particular problems with this set-off approach arising from the Regulation 72F process. The worker and their PSC should not be impacted provided it is made clear they cannot reclaim any taxes or employee NIC due to the worker's mis-categorisation. And the deemed employer simply pays less by way of PAYE and employee NIC under the contract settlement than they otherwise would.

5.11 ***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?***

5.12 HMRC proposes that where a deemed employer is eligible for a set-off that they will notify this fact to the worker and their intermediary via a direction notice. HMRC also proposes that the deemed employer would not have a right to appeal the direction notice or HMRC's refusal to make a direction - but that the worker and their intermediary would have a right of appeal against a direction notice on specific grounds. In particular, such as where the deemed employer considers that the information contained in the direction notice is incorrect, but not where they disagree with HMRC's deemed employment status conclusion. The deemed employer would, however, still be able to appeal against the determination for the PAYE liability due.

5.13 We agree that the grounds for appeal for the worker and their intermediary should provide sufficient safeguards. Indeed the proposed grounds for appeal appear to be modelled on the existing set-off legislation at Regulation 72G(1) and (2) of the PAYE Regulations in relation to individual mis-categorisation (outside of OPW), and which we are not aware has caused any issues in practice.

5.14 We do, however, think that the deemed employer should have a right of appeal if it believes that the amount HMRC calculate as being set-off is less than the deemed employer believes it should be. We refer to this above at paragraph 5.8. In particular, the proposals presently include nothing tangible to safeguard the rights of the deemed employer if it disagrees with the amount being set off. We believe that existing Regulations 72E-G should also be amended accordingly.

5.15 **Question 5:**

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

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.

5.16 A: We understand from our members that the information the end client would gather when engaging an OPW worker will depend on the circumstances. For example, whether the end client is using an agency or engaging directly with the worker and/or their intermediary. Where there is a 'supply chain' the end client may only need to collect details of the agency and the name of the worker; they may not collect details concerning the intermediary (although the agency contracting with the intermediary and worker would be expected to collect this information). Equally, where the end client is contracting directly with the intermediary then they would be expected to have the intermediary's name and company registration number (in the case of a PSC), their VAT number (if registered for VAT), the address of the intermediary's registered office and the name of the worker. We would not expect the end client to uniformly collect personal information such as the worker's address, date of birth, and National Insurance Number (NINO), since that is information you would normally collect from an employee not an outside contractor, although in some situations they may choose to do so (for example, to comply with UK right to work obligations, to monitor for age discrimination, etc).

5.17 B. We would expect either the end client or the agency supplying the worker/intermediary to already be collecting and retaining details in respect of the intermediary's name and address, their VAT registration number and company registration number, and the worker's name. Absent a requirement to account for PAYE and NICs on payments to the intermediary it would not normally be necessary to hold details of the worker's address, date of birth or NINO (unless for identification purposes, such as admission to site). Therefore, it may be more difficult for the client, or deemed employer if not the client, to obtain the latter information. This said, if the set-off legislation is enacted we think clients (or agencies on their behalf) would take care to gather as much information as is required upfront such as to enable them to obtain a set-off

should a compliance failure be identified going forward. We do not think this would be regarded as unduly burdensome in this context.

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

5.19 We do not believe that there would be any adverse incentives if a set-off is permitted. If anything, there is a perverse incentive under the current rules to defer challenging an 'outside scope' of OPW' status determination. This being in order to saddle the deemed employer with the full tax liability, ie with the worker/their intermediary reclaiming taxes paid and, effectively, paying no or little tax on the engagement. Our understanding is that the similar legislation at Regulation 72F of the PAYE Regulations, which applies a set-off in relation to direct engagements between workers and a business, and which has been in place for some years, has not given rise to any adverse incentive amongst clients and workers as regards non-compliance with the PAYE Regulations.

5.20 We also note that the consultation document proposes that any set-off that reduces the deemed employer's PAYE and NICs liability will not be taken into account when assessing any appropriate penalties under the penalty regime for inaccuracies. The consultation document notes that this approach is in line with HMRC's existing standard approach to penalties in employer compliance cases. This seems a reasonable approach to take. The OPW rules require the end client to undertake a status determination (and provide a Status Determination Statement (SDS)) and to do so carefully with a view to PAYE and NICs being deducted as and where appropriate. Where there is a mis-categorisation and the worker is subsequently viewed as within the OPW rules instead of outside them, we consider it is then fair enough that any penalties should be geared to the tax put at risk by that mis-categorisation, rather than as subsequently mitigated by taxes paid by the intermediary and worker. This said, it is important that where a reasonable excuse applies, or where a special reduction should apply, this is properly taken into account in arriving at the penalty to be charged. This approach on penalties/set-off would be consistent with that taken under the Construction Industry Scheme (CIS) further to an HMRC direction for set-off under Regulation 9(4) (Condition B) of the CIS Regulations³.

6 Application

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

6.2 The consultation document proposes that a legislative solution will be implemented from 6 April 2024 and that the new approach will be applied to PAYE and NIC liabilities assessed on or after 6 April 2024, in respect of deemed direct payments made from 6 April 2017. It also states that the new approach will not be applied to any compliance check concluded before 6 April 2024 and where the deemed employer has agreed to settle the PAYE liability based on the legislation at the time. In these cases, HMRC will notify the worker and their intermediary of their potential entitlement to claim a repayment of overpaid taxes.

6.3 Our understanding of HMRC's proposed approach is that provided there has been no contract settlement or other binding agreement to settle prior to 6 April 2024 then HMRC will apply the proposed approach on set-off outlined in the consultation document. In particular, that all open cases at that date will benefit from the proposed approach. We agree with this approach. This said, we should like HMRC to make clear in guidance that merely because HMRC has issued a Regulation 80 determination this does not mean that any binding

³ [The Income Tax \(Construction Industry Scheme\) Regulations 2005 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

agreement to settle has been reached with the taxpayer and that the proposed approach would therefore apply.

6.4 This said, a point to consider is that settlement of open compliance will likely be delayed until on/after 6 April 2024, as otherwise the settlement cost to the deemed employer will invariably be higher (as no set-off would apply). Accordingly, we would encourage the government to confirm as soon as possible that (a) this new approach will be legislated for and (b) to clarify that HMRC may provisionally agree settlements in open cases on the basis that final settlement will occur on or after 6 April 2024. And furthermore to clarify that the deemed employer can make payments on account of the provisionally agreed liability sooner (without prejudicing set-off), rather than having to wait until next April to agree the set-off and pay the agreed liability.

7 Assessment of impacts

7.1 ***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?***

7.2 We understand from our members that while some changes to processes and procedures will be required there will be relatively little cost to this. For example, end clients and agencies would want to ensure that they are capturing the correct information in regard to intermediaries and workers to allow a set-off to apply if the need arose. So long as clear guidance is provided as to what information the businesses need to retain and provide to HMRC we think the costs of familiarisation should be minimal.

7.3 ***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?***

7.4 We think that end clients and agencies would adopt a 'best practice' of regularly checking and updating contact details and other relevant information of workers and their intermediaries in the event of a compliance failure that could give rise to a set-off, so that they are in a position to co-operate with HMRC and provide any necessary information to HMRC (and potentially allow for a more accurate calculation of the set-off amount). While this will involve time and effort for the businesses (and workers/intermediaries) we believe it is something that businesses would be prepared to do given the potential downsides to not having this information.

7.5 ***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.***

7.6 We are not aware of any other specific impacts that have not been considered in the consultation document.

8 Acknowledgement of submission

8.1 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.