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Calculating PAYE liabilities in cases of non-compliance for off-payroll working (IR35)

Response by the Chartered Institute of Taxation

1 Introduction and 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 nearly 20,000 members, and extensive volunteer network, in providing our response.

1.2 Our response to the technical consultation setting out the mechanism by which HMRC will be able to account for taxes already paid by individuals and their intermediary on income received from off-payroll working when recovering the tax due under PAYE from the employer is set out below.

1.3 We welcome these regulations which remedy the present situation whereby in Off-Payroll Working compliance settlements between HMRC and public bodies, the result is that the public body effectively bears all the tax out of public funds and the worker (and their limited company) is entitled to reclaim the corporation tax, income tax (usually dividend tax) and (in certain circumstances) NICs they have paid.

1.4 We think it would be better to reframe the Regulation 80 and recovery notice trigger events so that only determinations/recovery notices that have become final/are not under appeal are excluded from these new provisions. We also suggest confirming in guidance that letters of offer that have not been finalised are not excluded from benefitting from the set-off.

1.5 We think it would be better if separate notices are issued to the deemed employer noting the name(s) of the payee involved, or at least a breakdown of the relevant amounts. We think that this would make it easier for the deemed employer to check whether the notice is correct and complete.

1.6 We also think that the deemed employer should have a right to appeal the set-off direction figure, since the deemed employer clearly has a financial interest in the set-off amounts.

1.7 Lastly, we welcome HMRC's initiative in publishing draft guidance alongside the draft regulations. We make a few observations below on the draft guidance aimed at ensuring it is clear and complete.

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.

3 The Income Tax (Pay As You Earn) (Amendment) Regulations 2024 – Draft

3.1 The draft regulations make amendments to the Income Tax (Pay As You Earn) Regulations 2003 ('PAYE Regulations'), inserting new regulations regarding the recovery of PAYE following a compliance check into the application of the off-payroll working rules.

3.2 ***Regulation 72GA***

Regulation 72GA sets out the conditions for set off or recovery in relation to deemed direct payments made on or after 6 April 2017, and provides for certain trigger events.

3.3 We assume that at Regulation 72GA(1)(c) the singular ('a tax return') can be read as including the plural ('tax returns')?

3.4 Regulation 72GA(2)(a) provides that a trigger event is HMRC serving notice of a determination under regulation 80 that includes tax in respect of the deemed direct payment. However, under Regulation 72GA(1)(e) that trigger event must occur on or after 6 April 2024. This would imply that where a protective assessment has been issued before 6 April 2024 it will not be possible to request a set-off. If correct, this would appear to mean that the new regulations may not help many public bodies that are in the process of agreeing compliance settlements back to 6 April 2017. We think it would be better to reframe the trigger point so that only determinations that have become final/ are not under appeal are excluded from these new provisions.

3.5 Similarly, where a recovery notice has been issued under Chapter 5 of Part 4 (Regulation 72GA(2)(c)) prior to 6 April 2024, it would appear that it is not possible to request a set-off. We think it would be better to reframe the trigger point so that only recovery notices that have become final/ are not under appeal are excluded from these new provisions.

3.6 We also suggest clarifying in guidance that where HMRC has received a letter of offer (under Regulation 72GA(2)(b) and (3)) that has not been finalised and accepted by all parties prior to 6 April 2024, the deemed employer can request a set-off under Regulation 72GB.

3.7 ***Regulations 72GB***

Regulation 72GB sets out provisions for the set off of the tax paid or assessed. This includes service of a direction notice. It also provides that neither the worker nor the intermediary can make a claim for repayment or relief of, or deduct or set off against, the amount of tax already paid and referred to in regulation 72GA.

3.8 It is not clear to us that regulation 72GB(1) will include cases where the fee-payer is not responsible for accounting for and paying the PAYE. For example, where ITEPA 2003, section 61N(5) (which deems the client to be the fee-payer as no status determination statement has been issued) or section 61N(6) (no other persons in the chain other than the client and intermediary) or section 61N(7) (the lowest 'qualifying person' in the chain above the intermediary) applies. In all these examples it is someone other than the fee-payer that is treated as if they are the fee-payer under section 61N(3). We think this should also be covered in the guidance.

3.9 In regulation 72GB(2) we suggest adding to the start of the paragraph the words 'If not precisely ascertainable…' to clarify that a best estimate may be made by HMRC where the taxes paid by the 'payee' cannot be accurately determined.

3.10 Regulation 72GB(5) provides for one or more directions being combined and issued as a single notice to the deemed employer (or relevant person) as well as requiring separate notices to be issued to each payee. We think it would be better if separate notices are also issued to the deemed employer (or relevant person) noting the name(s) of the payee (that is, the personal service company (or partnership) and worker) involved. We think that this would make it easier for the deemed employer to check whether the notice(s) is correct and complete. As a minimum there should be a requirement (in guidance) to provide a supporting schedule to the notice confirming the names of the intermediary/ worker and their set-off figures so that the deemed employer can confirm that all relevant workers have been included when calculating the net taxes due.

3.11 Regulation 72GB(8)(b) provides that the payee may not deduct or set off the amount of tax referred to in regulation 72GA. Regulation 72GA(1)(a) defines this as the income tax or corporation tax paid or assessed in respect of a payment received by the intermediary that is now to be treated as a deemed direct payment. We think that the reference should be to regulation 72GB(1), being the amount of tax that HMRC directs as to be treated as having been recovered from the payee.

3.12 ***Regulation 72GC***

Regulations 72GC provides the grounds under which an appeal against a direction notice may be made.

3.13 We note that regulation 72GC(1)(a) requires the appeal notice to be in writing. Does this include any online or other electronic appeal method that may be or become available? (We note, for example, that the appeal mechanism provided for in Regulation 72G of the PAYE Regulations does not require the notice to be 'in writing'.)

3.14 It is unclear to us how a payee would know whether a trigger event (as defined by regulation 72GA) has occurred, as the trigger events relate to the payer. What is HMRC's thinking on this point? (Albeit for completeness we note that the grounds of appeal provided for in existing regulation 72G of the PAYE Regulations (dealing with non-intermediary (*Demibourne)* cases) include where a trigger event occurred

before that legislation had effect. Should similar grounds be included here, ie where a trigger event within regulation 72GA(2) occurred before 6 April 2024?)

3.15 We think it would be helpful to clarify in guidance who will notify the tribunal of an appeal (see regulation 72CG(3)) and when, as the appeal under regulation 72GC(1) is to HMRC.

3.16 We note that regulation 72GC(3)(c) provides that a tribunal may '*if it appears that the direction was correctly made, uphold the direction*'. We note that a similar provision is not included in existing Regulation 72G(3) – does regulation 72G(3) require amending to provide for a similar outcome?

3.17 We think that the payer/ deemed employer should have a right to appeal the set-off direction figure. While we note HMRC guidance that '*if a deemed employer disagrees with the amount of set-off which has been calculated, it can provide evidence that a different amount of set-off is due*' and that '*HMRC will review any information supplied and consider amending the direction notice*', we do think that since the deemed employer has a financial interest in the set-off amounts, perhaps more so than the intermediary/ worker, they should have a right of appeal.

4 Draft ESM guidance – ESM10037, ESM10038 and ESM10039

4.1 *ESM10037 - Off-payroll working – setting off Tax and National Insurance contributions already paid: When the legislation applies and commencement*

The draft guidance initially distinguishes between cases 'settled' pre/post 6 April 2024 but then later refers to 'liabilities assessed' pre 6 April 2024. We think that the terminology should be consistent. Based on the legislation as drafted reference should be to 'liabilities assessed', albeit as noted above at paragraphs 3.4 and 3.5 we do believe that where HMRC have merely raised a provisional/protective assessment but the case is not 'settled' prior to 6 April 2024 then, to be fair to end clients (numbers of whom will be public bodies), a set off should be permitted.

4.2 *ESM10038 - Off-payroll working – setting off Tax and National Insurance contributions already paid: The set-off process*

The draft guidance (second bullet point in the first section entitled '*Information to be provided by client or deemed employer*') refers to '*the intermediary's or partnership's name*' (emphasis added). However, 'intermediary' is a collective term and can be a company, partnership or individual. We assume that this is intended to read 'the personal service company's (PSC) or partnership's name'? A similar point arises in respect of the third bullet point that refers to '*the intermediary's Company Reference Number …*' (emphasis added). Should this read 'the PSC's Company Reference Number…'? Also, under the fourth bullet point we assume that '*the partnership's reference number …*' means the partnership's Self Assessment unique taxpayer reference number?

4.3 Furthermore, in the first section we assume that the 'and' in 'HMRC must be able to satisfy itself that an amount of Income Tax, NICs, and corporation tax' should be an 'and/ or'?

4.4 In the second section (entitled '*Identifying a set-off amount*') should the Apprenticeship Levy be included as an amount that should or should not be included in the set-off? Also, we think it would be helpful to clarify that 'corporation tax' includes the section 455 tax charge on directors' loan accounts.

4.5 In the third section (entitled '*Method of calculation*') it is said that '*only tax and NICs paid or assessed in the relevant periods will be considered for a set-off in any tax year*'. What is the position if, for some reason, they were paid/assessed later than the relevant periods?

4.6 Under the fourth section (entitled '*Action following calculation of set-off*') it states that the payer will be provided with an overall amount, not split between each worker/intermediary. While this is consistent with the draft legislation, we would query why this is so (see our comments at paragraph 3.10 above)? It will mean that the payer will not be able to sense check the figures. We think that for transparency in how HMRC have reached their figure in the set-off direction, the payer should at least be provided with a breakdown of the set-off amount per intermediary/worker. Providing this breakdown is likely to reduce the number of potential disagreements, as all parties will be clear on the figures.

4.7 ***ESM10039 - Off-payroll working – setting off Tax and National Insurance contributions already paid: appeals***

For the first section entitled '*Worker/intermediary*' we suggest, for clarity, re-titling this as 'Grounds of appeal by worker/intermediary'. Also, reference is made to trigger events in this section but, as noted above at paragraph 3.14, it is unclear to us how the worker/intermediary would know if a trigger event has occurred?

4.8 Under the third section (entitled '*National Insurance contributions (NICs*)') the guidance states that where the NIC set-off amount is disputed a formal decision under Section 8 decision will be issued which is appealable by any person named in it. We assume that this would be the worker/intermediary but suggest that the guidance clarifies this.

4.9 We would also query the policy rationale for excluding employer (secondary) Class 1 NICs paid by the intermediary (personal service company) as, often, by the time a worker is re-categorised as an employee the PSC will be closed. If the employer NIC paid by the now closed PSC is not available for set-off there will be a double charge to employer NIC. The alternative is keeping the PSC open to re-file returns to claim relief which is costly and time consuming for the worker, and presumably would mean additional work for HMRC.

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.

The Chartered Institute of Taxation

22 February 2024