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Off-payroll working rules from April 2020

Response by the Chartered Institute of Taxation (CIOT)

1 Introduction

- 1.1 The Chartered Institute of Taxation (CIOT) sets out below its response to the draft legislation which will introduce off-payroll working rules to the private sector and amend the off-payroll working rules currently applying to the public sector from April 2020.
- 1.2 The extension of the off-payroll working rules (commonly known as IR35) to the private sector (other than those private sector entities which are 'small') mean that:
 - Clients will need to determine whether the IR35 rules apply rather than the worker and his/her intermediary vehicle (typically a personal service company (PSC)).
 - Clients will need to consider the status of existing workers before 6 April 2020 for all existing contracts extending beyond April 2020 (or where an invoice may be raised on or after April 2020), in addition to considering the status of workers for contracts entered into or amended on or after 6 April 2020.
 - Clients (including public sector bodies) and agents will face new obligations in respect of accounting for PAYE and NIC where a worker is a 'deemed employee' for IR35 purposes, including the potential transfer of liability up the supply chain where there is non-compliance.
 - Where the off-payroll working rules apply clients (including public sector bodies) will be required to pass on their formal status determination, and the reasons for reaching it, to the worker and to any agent they may contract with in relation to the worker's services (and an agent will be obliged to pass on the determination to any agent they contract with further down the supply chain).
 - Clients (including public sector bodies) will need to establish an appeals process, so that workers can challenge the client's determination, with a 45-day timescale in which to respond where a determination is disputed.
- 1.3 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. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 1.4 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.

2 General comments

- 2.1 A key aspect to the implementation of the new off-payroll working rules from April 2020 will be the publication of guidance. In this respect, we note that HMRC has published, on 22 August 2019, introductory guidance on the April 2020 changes to off-payroll working rules (see <https://www.gov.uk/money/business-tax-ir35-off-payroll-working-rules>). While the publication of this guidance is very welcome, detailed technical guidance is still needed as soon as possible.
- 2.2 The 'gateway' conditions as to (i) when the new IR35 off-payroll working rules apply, or (ii) when the old IR35 rules apply, or (iii) when IR35 does not apply to an engagement are very complex and much better guidance is needed to help clients, agencies and workers/PSCs to navigate this area.
- 2.3 For example, the guidance should explain (i) when the existing IR35 rules (Chapter 8 of Part 2 of ITEPA 2003) continue to apply (eg because the private sector entity that is 'small'), (ii) when IR35 does not apply at all (eg because the client has fully outsourced a service (or services) and the workers do not personally perform services for that client (but also identifying that IR35 may apply to an entity further down the supply chain that engages a worker to personally perform services in order to fulfil an outsourced service)), and (iii) when the agency worker legislation (ITEPA 2003, section 44) applies (eg where a worker is directly engaged by an agency (absent a PSC)).
- 2.4 Many organisations have already made or are now making decisions regarding activities which will either continue beyond April 2020 or commence after April 2020. While the recently published guidance provides an introduction of the changes, technical guidance is needed now to help those organisations, and the agents and workers/PSC's they are engaging with, or will potentially be engaging with, assess whether the new off-payroll working rules will apply to those engagements.
- 2.5 For example, clients need to determine as soon as possible (i) which current contracts will fall within the new rules (and notify workers etc. accordingly so that any disputes can be resolved before the new rules apply) and (ii) which future contracts are likely to fall within the scope of the new rules (so that they can advertise them accordingly). Agencies also need to understand what existing and future contracts will require them to account for PAYE and NIC. And workers/PSCs need to understand where the responsibility for assessing whether IR35 applies lies and who will be responsible for deduction where the off-payroll working rules apply. Clearly all parties will be concerned to establish the resulting cost implications and how these will be addressed between them.
- 2.6 The draft legislation refers to the client needing to take 'reasonable care' when reaching status decisions and guidance will be needed as to what this means in practice. This could, for example, include 'safe harbours' (ie actions which clients can take which HMRC would ordinarily accept as taking reasonable care). For example,

this could include using HMRC's Check Employment Status for Tax (CEST) Tool. Also, with regard to CEST, will there be a process in place to obtain 'advice' from HMRC where CEST is unable to reach a decision?

- 2.7 Another 'safe harbour' might be a client 'advertising' an engagement as within the off-payroll working rules (because on a simple assessment of that engagement it would typically be within the rules). This said, what happens if on a reassessment of the facts (ie based on day-to-day practice) such a contract is found to be outside the scope of the new rules. Would HMRC accept that the client took reasonable care? Will clients face penalties for being prudent?
- 2.8 Finally, our detailed comments on the draft Finance Bill legislation are set out below. These include comments on (i) the small entity exception, (ii) the status determination statement, (iii) the status disagreement process and (iv) the recovery of PAYE.

3 Amendments to Chapter 8 of Part 2 of ITEPA 2003 – small public sector entities exception

- 3.1 The carve-out for small public sector entities is welcome, although we think it would have been better also to have excepted small public sector bodies from having to operate the off-payroll working rules.

3.2 Independent limited companies

Section 60A sets out the basic conditions for when a company qualifies as small for a tax year with section 60A(2) providing that a company will always be small for its first financial year and section 60A(3) adding that a company is small if the '*small companies regime applies to the company for its last financial year that is relevant to the tax year*'. While we understand this phrase to mean that the definition of 'small' in the Companies Act 2006 (CA06) applies to determine whether a company is small the specific reference in CA06 is not identified in the draft legislation. We would recommend amending the draft legislation so that it specifically signposts the relevant CA06 definitions.

- 3.3 We also recommend that HMRC guidance sets out precisely how these rules will operate in practice, particularly as regards any shortened periods of account.

3.4 Notification that small

We note that while new section 61TA provides for a requirement for a client to notify workers and agencies where the entity moves from being medium or large-sized to small, there appears to be no provision requiring an existing small entity in the private sector to notify an agency or worker that it is small and that therefore the onus on determining whether IR35 applies falls on the worker/PSC. Given that there may be some confusion as to whether an entity is small or whether the entity is in the public or private sector (especially where a private sector or voluntary sector entity is carrying out public duties) we wonder whether there should be an obligation on the client to notify workers/agencies if it qualifies as small? We would certainly expect to see requests from workers for clients to confirm that they are small.

- 3.5 HMRC guidance will also be required as to who is liable where an incorrect assumption is made that an entity is small. For example, if a 'fee-payer' does not receive a status notification – and so assumes (incorrectly) that the client is small – will the fee-payer be held liable for non-compliance because they should have enquired whether a status determination has been issued?

4 Amendments to Chapter 10 of Part 2 of ITEPA 2003 – status determination statement

- 4.1 Section 61NA provides that a status determination statement issued by the client to state the client's decision as to whether an engagement falls within the off-payroll working rules and to also include the reasons for reaching that decision. The legislation also requires the client to take reasonable care in reaching its decision. However, what is the position where a client has taken reasonable care but unfortunately come to the wrong conclusion? Where, for example, the client considers that IR35 does not apply, so that no PAYE/NIC is accounted for, is the comeback to the client, or does the worker/PSC also have a responsibility to consider whether IR35 applies?
- 4.2 Also, we note that the form of the statement (ie whether it needs to be in writing) is not prescribed. We suggest that the legislation be amended to require that the statement be in writing (and for HMRC's guidance to clarify that this includes electronic notification).
- 4.3 The legislation then provides that the statement be passed direct to the worker by the client in order for the client not to be treated as the fee-payer (see amended section 61N(5)). However, it does not appear to explicitly require the client to issue a determination statement to the worker if the client has determined that the off-payroll working rules do not apply. Is this the policy intention? In our view it is important that a statement is issued either way so that there is no doubt as to the position from the worker's (and, where relevant the agency's) perspective. Furthermore, draft section 61T(2)(b), which deals with amended decisions under the disagreement process, implies that statements are envisaged in cases where the off-payroll rules do not apply. Clarification on this point would be helpful.
- 4.4 Additionally, the legislation does not appear to explicitly require the client to provide the determination to the next entity in the chain with whom the client contracts (ie the first agency), although it is our understanding that this is what is intended. Section 61T currently provides that a client in the public sector must pass on a determination to the person with whom they contract, but this requirement is not included in new section 61T as this only deals with the status disagreement process. New sections 61N(5), (5A) and (8)(za) seem to imply that the statement will be passed down the chain (in order to pass on liability for accounting for PAYE and NICs to parties further down the chain) but there does not appear to be an explicit requirement to do so.
- 4.5 Also, while we understand that any entity in the supply chain that has received a determination is then required to pass it on to the next entity further down the supply chain (until the determination reaches the entity prior to the worker/her or her PSC), it is again not apparent that the new legislation specifically requires this. As noted above, without a specific obligation there does not seem to be any adverse consequences in a client not providing a determination, or an entity in the supply chain not passing it on, if the determination is that the off payroll working rules do **not** apply. Again, clarification on this point would be helpful.

5 Amendments to Chapter 10 of Part 2 of ITEPA 2003 – status disagreement process

- 5.1 New section 61T introduces a client-led status disagreement process. This permits a worker or the deemed employer (fee-payer) to dispute the client's determination (typically where the client has determined that the off-payroll working rules apply but the worker disagrees).
- 5.2 Section 61T does not include any timespan in which the worker (or fee-payer) has to dispute a status determination. It would seem sensible to require a worker (or fee-payer) to notify a dispute to the client

within, say, 45 days of receipt of the status determination as otherwise the worker could, for example, leave disputing the status determination until the end of the contract (or, possibly, even later).

- 5.3 Also, section 61T does not provide what happens while the client is considering the worker's appeal? While the recently published guidance¹ explains what a client should do when a worker disagrees with a client's determination, it does not address what to do while the client reviews the original determination. For example, the original status determination will have been notified to an agency who will have passed it down the supply chain. Is that original determination still valid while the appeal is determined (the guidance implies that it is)? If so, the guidance should specifically say that the fee-payer must apply the originally notified determination to any payments to be made in the intervening period until notified otherwise, even if they are aware that the determination has been appealed.
- 5.4 Where the client decides its original decision was incorrect section 61T(2)(b) requires a new status determination to be issued. If this results in a worker's status falling outside of the off-payroll working rules but in the intervening period a payment has been made to the worker/PSC from which PAYE and NIC has been deducted will there be a process to recover the tax/NIC incorrectly paid?
- 5.5 Furthermore, what happens if the client and worker remain in dispute after the appeal process is concluded? There does not appear to be any interaction between this dispute process and the normal Tax Tribunal appeal process? We assume that this means that the worker/PSC will have to wait until after their SA returns are submitted, then file those returns on the basis of what they think is the correct status and wait for HMRC to open an enquiry? Clarification on this point would be helpful.
- 5.6 Also, there does not appear to be any requirement for the client to exercise reasonable care in considering the representations made by the contractor, both in cases where a decision that the off-payroll working rules apply is affirmed and where it is reversed. We would suggest that a requirement for reasonable care be incorporated in the same way as is prescribed for the original decision-making process at section 61NA(2).
- 5.7 Finally, we would suggest that HMRC publish a template status determination statement to assist clients in understanding the level of detail required in the statements they issue. This said, would the current output from the CEST tool be sufficient?

6 New S688AA – workers' services provided through intermediaries: recovery of PAYE

- 6.1 Section 688AA contains powers for HMRC to amend the Income Tax (PAYE) Regulations 2003 to allow for the transfer of liability when there is non-compliance in the labour supply chain. We consider that section 688AA is very widely drawn. In particular, 'relevant person' is defined 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 would seem to provide HMRC with an unlimited discretion as to whom to pursue for the PAYE and NIC that should have been accounted for by one or other entities in the labour supply chain.
- 6.2 We think that where the client/agency has taken reasonable care to ensure the integrity of the supply chain but, for some reason, there is a default and HMRC is unable to recover the PAYE and NICs from the party concerned it would not be fair and proportionate for the liability to be transferred to the client/agency. And

¹<https://www.gov.uk/guidance/april-2020-changes-to-off-payroll-working-for-clients> and <https://www.gov.uk/guidance/fee-payer-responsibilities-under-the-off-payroll-working-rules#disagree-with-decision>.

that in these circumstances we suggest the power to transfer liability should be tempered by a defence of having taken reasonable care.

- 6.3 For example, consider the position where the client/agency has passed on determination statements in good time, has received undertakings that those determinations have been acted on and that PAYE/NIC has been deducted as appropriate but, for some reason, the fee-payer further down the supply chain has not paid those monies to HMRC, eg due to genuine business failure. In this situation we do not think that the client/agency further up the supply chain should be liable for the PAYE/NIC.

7 Acknowledgement of submission

- 7.1 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.

8 The Chartered Institute of Taxation

- 8.1 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 18,500 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation

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