



OFF PAYROLL WORKING (IR35): CALCULATING PAYE LIABILITIES IN CASES OF NON-COMPLIANCE

Issued 22 February 2024

ICAEW welcomes the opportunity to comment on the *Calculating PAYE liabilities in cases of non-compliance for off-payroll working (IR35)* consultation and draft regulations and guidance published by HMRC on 25 January 2024, a copy of which is available from this [link](#)

A single determination covering both tax and NIC would simplify the offsetting process, especially if one of tax and NIC is an overpayment and the other an underpayment. There needs to be a right of appeal by the deemed employer against a determination.

For questions or comments on this response, please contact ICAEW's Tax Faculty on taxfac@icaew.com.

This response of 22 February 2024 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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ICAEW

Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
icaew.com

GENERAL POINTS

1. A single determination covering both tax and NIC would simplify the offsetting process, especially if one of tax and NIC is an overpayment and the other an underpayment.
2. There needs to be a right of appeal by the deemed employer against a determination.

DRAFT REGULATIONS

3. In Regulation 72GA(1)(c), “a tax return” should be “a tax return or tax returns”.
4. Regulation 72GA(2) defines trigger events. The new regulations do not appear to be available to public bodies or private sector clients that are in the process of appealing a determination issued before 6 April 2024. We suggest that the trigger point be redefined to include determinations under appeal.
5. Regulation 72GA(2)(c) should say “HMRC serve a recovery notice under Chapter 5, Part 4 ITEPA 2003”, (ie, when HMRC has taken action, not when merely considering it).
6. When HMRC estimates the amount of tax to be set off in accordance with Regulation 72GB(2), HMRC should explain that (a) the amount is estimated and (b) how the estimate has been made.
7. In previous discussions, there has been consideration of using various amounts as an appropriate estimate. Has HMRC reached a final conclusion? The guidance states that the same estimate methodology will not be used for all taxpayers. Will there be various methods depending on, for example, the sector and/ or the size of the of the deemed employer? ICAEW recommends that shortly after the Regulations are laid, HMRC should issue a statement on how it will calculate such estimates.
8. ICAEW thinks that it would be helpful if Regulation 72GB(4) included a statement of who the payments subject to the notice were made to and confirmation of whether each recipient’s tax and NIC has been taken into consideration when calculating any set off.
9. Regulation 72GB(8) prevents the payee from reclaiming tax that has been set off. The tax that is set off is covered by Regulation 72GB, not 72GA.
10. In Regulation 72GC the deemed employer should be able to appeal against the determination because they will be the one paying the liability. The payee will have little incentive to appeal, and in fact has an incentive not to appeal in certain cases because any increase in the set off could restrict the payee’s repayment.
11. In Regulation 72GC, following on from the point at para 8 above recommending that the determinations should list the names of the payees so the deemed employer can check whether all payees have been considered, the grounds for appeal in Regulation 72GC(2) should include that not all intermediaries have been considered when calculating the amount of set off.

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12. In the second para, there should be an “or” after the second bullet. In line with the point made at para 5 above, the third bullet should say just “HMRC serve a recovery notice under Chapter 5, Part 4 ITEPA 2003”.
13. The following para under the heading “Post 6 April 2024” suggests that there is one amount assessed for tax and NIC:

”From 6 April 2024, the liability for Income Tax and NICs arising from the deemed direct payment will continue to be the responsibility of the deemed employer. Where HMRC is satisfied that the conditions for a set-off have been met and makes a direction, the liability of the deemed employer will be reduced by the set-off to take

account of Income Tax, NICs and corporation tax paid on the income from the OPW engagement by the worker or intermediary.”

However, the draft regulations suggest that the income tax and NIC are set off separately. Should not the guidance and the regulations be consistent with one another (ie, should not the regulations deem NIC to be a tax for this purpose)?

14. The fifth paragraph of the draft guidance, “For clients who are public authorities...”, suggests that determinations under appeal qualify for set off. To enable this to be the case, please see ICAEW’s para 4 above suggesting amendments of the trigger definitions in Regulation 72GA(2).
15. The above point at para 14 of this response applies equally to the sixth paragraph of the draft guidance “For medium and large...”.
16. The first paragraph under Pre-6 April 2024 of the guidance needs to include a link to guidance on how to make the relevant repayments.

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Information to be provided by client or deemed employer

17. The second paragraph of the guidance states that HMRC will need
“the worker’s full name or National Insurance Number (NINO)”.
18. ICAEW suggests that both are requested because we have seen an increase in incorrect NINOs being associated with tax records. In rare cases where the worker is not liable to NIC and does not have a NINO, the guidance should tell the deemed employer to explain why it is not possible to provide a NINO.
19. In the paragraph “HMRC must be able to...” there needs to be “and” between the two bullets. The “By” that follows the bullets should read “by”.
20. In the paragraph “Where the conditions...”, “from” should read “on”.

Method of calculation

21. It would be helpful for this section to include a link to the statement (requested above at para 8 in our comments on Regulation 72GB(2)) of how the calculations will be made.

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Worker/intermediary

22. ICAEW considers that the last sentence in this section would be improved if it said: “The appeal must be made within 30 days of the date of HMRC’s decision.”.

Deemed employer

23. ICAEW considers that a deemed employer should be able to appeal. See ICAEW’s general comments at para 2 and on Reg 72GC at para 10.

National insurance contributions (NICs)

24. It would be preferable if there were one appeal against both the tax and the NIC determinations. Would it be possible to deem the NIC due and set off to be tax for these regulations?

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>).