

Off-payroll working (IR35) – calculation of PAYE liability in cases of non-compliance

The Institute of Financial Accountants welcomes the opportunity to comment on the [Consultation](#) published on 27 April 2023.

We would be happy to discuss any aspect of our response and to take part in any further consultations in this area.

Established in 1916, the Institute of Financial Accountants (IFA) is an internationally recognised professional accountancy membership body. Our members work within micro and small to medium-sized enterprises or in micro and small to medium-sized accounting practices advising micro and SME clients. We are part of the Institute of Public Accountants (IPA) of Australia Group, the world's largest SME-focused accountancy group, with more than 49,000 members and students in 100 countries.

The IFA is a full member of the International Federation of Accountants (IFAC), the global accounting standard-setter. We are recognised by HM Treasury to supervise our members for the purposes of compliance with the Money Laundering Regulations, and by the Financial Services Authority in the Isle of Man.

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Questions raised in the Consultation

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.

1. As a general point, the IFA approves of the rationale and intent behind this consultation document. The double taxation on businesses currently occurring is widely recognised as being unfair on businesses being served tax bills significantly larger than the perceived underpayment of tax. The current administration of IR35 is also a hindrance to genuine contractors, some of whom are facing inaccurate assessment as deemed employees by businesses lacking the confidence to accurately assess employment status. We would suggest that this consultation is overdue, and ask HMRC to act promptly on stakeholder representations.
2. Regarding the taxes to be included in the proposed set-off: as the consultation document acknowledges these are consistent with the 72E-G amendment to PAYE regulations, which allow the offsetting of taxes already paid in certain circumstances where HMRC discovers that a directly engaged worker has been incorrectly classified as self-employed for tax purposes. The IFA agrees with all taxes proposed for inclusion.
3. Regarding the taxes to be excluded from the proposed set-off: the IFA agrees that class 3 NICs made by the worker should not be included, due to these being voluntary payments. We also agree that tax and NICs paid on remuneration received by other employees of the worker's intermediary are not relevant to the tax liability of the deemed employer, and should not be included in the proposed set-off.
4. Regarding employer NICs paid by the worker's intermediary: the consultation document states that "employer NICs is a distinct and separate charge levied on the employer" and "The worker's intermediary is not the employer for the purposes of the off-payroll working rules" are accurate. However, excluding employer NICs from the proposed set-off would result in the partial continuation of the current double taxation. It is also unclear whether and how the intermediary would be made aware of the possibility of claiming a refund from HMRC. Excluding employer NICs from the proposed set-off therefore appears contrary to its purpose, and could result in the perception that HMRC aims to retain some element of double taxation.

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. The extent and severity of any adverse impacts arising from HMRC estimating the set off will depend in large part on how true, fair and accurate said estimates are. The assumptions referenced in the consultation document – based on personal allowance, business expenses, other sources of income, available reliefs etcetera – are a logical evidence base that should be available to HMRC assessors. Where assessment is instead based on historic patterns of behaviour, accuracy will suffer. Therefore, the IFA would request transparency from HMRC about the data used, assumptions made and final set off calculated.
6. Ideally, the deemed employer should have the opportunity to challenge HMRC's final PAYE liability assessment (including set off) – and if they have supporting evidence which would alter HMRC's set off assessment, they should be able to make this challenge without resorting to a formal appeal. This would go some way to reducing small business anxiety about employing contractors in light of IR35, and would be a positive example of HMRC working with taxpayers to get their tax right.¹

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?

7. In terms of calculating a set off against the deemed employer's tax liability, and assuming any refunds due to workers and their intermediaries are promptly and fairly communicated (see paragraph 4),

¹ [The HMRC Charter - GOV.UK \(www.gov.uk\)](http://www.gov.uk) – "Working with you to get tax right."

there should be no additional impact on other parts of the tax system for the worker or their intermediary.

8. For the deemed employer, some thought ought to be given to potential interactions with other contractor-related taxes and reliefs. In particular, the R&D relief schemes (RDEC and SME) and the Construction Industry Scheme (CIS) could complicate HMRC's set off calculations. Subcontractor deductions under CIS, and R&D relief claims (by the deemed employer under the SME scheme, by the contractor under the RDEC scheme) should be considered by HMRC to ensure that the estimated set off is as true, fair and accurate as possible.

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?

9. The consultation document acknowledges the right to appeal is preserved via Regulation 80(5) for the PAYE liability due, on the grounds that HMRC's information (used to estimate the proposed set off) is incorrect – not on the grounds that they disagree with HMRC's conclusion regarding the status of the worker.
10. However, given HMRC's stated intent to estimate the amount of set off that will be given, and with reference to paragraph 6, the IFA would suggest a preliminary engagement period where the deemed employer is given an opportunity to provide further supporting information that might improve the accuracy of HMRC's estimate. This might involve an additional period of time to contribute additional information, and for HMRC to review said information, following which the set off assessment would be confirmed and the 30 day right-to-appeal window would open.
11. As a general point, the effectiveness of safeguards will depend in large part on how they are administered. Effective communications to business owners and decision-makers; proactive education for employers, contractors and tax agents; and trained HMRC staff with a grounded understanding of relevant policy and regulations will all contribute to the proposed safeguards working in practice and the PAYE liability set off working as intended.

Question 5: What information do you, as the client, routinely gather as part of your hiring practices for off-payroll workers? Please provide your views on how easily a client would be able to obtain the above information and provide this to HMRC if requested.

12. The IFA is a professional body for SME and small-to-medium practice (SMP) accountants. We do not, and most of our members do not, hire off-payroll workers ourselves. Our members do however work with and for SMEs, some of whom hire off-payroll workers, and the prevailing view among our membership is that most of the information listed in the consultation document should be easily obtainable by employers which are proactive in gathering said information.
13. The need for proactive information gathering on the part of employers emphasises the importance of communication and education from HMRC, discussed in paragraph 11. If business owners are well-informed as to their obligations, and the benefits of protecting themselves from double taxation by making sure HMRC has the requisite information to calculate a set off, they are more likely to gather the requisite information as a matter of course. This is particularly true for small business owners, who lack dedicated HR or payroll staff.
14. Further, it should be noted that an individual can start work in the UK without a permanent NINO, so long as they can prove they are eligible to work in the UK. In some industries (for example healthcare), temporary or locum staff from outside the UK might not have a NINO at the point of beginning employment, so this may not always be possible to gather.

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

15. As it is currently administered, IR35 is arguably not fit for purpose. Historic collection of double taxation is unfair and undermines confidence in HMRC from all affected professional communities. The current notification process places the burden solely on the deemed employer, which is unfair and

further erodes HMRC's image in the eyes of affected businesses and their agents. Risk-averse businesses are excessively cautious in making off-payroll assessments, unduly impacting genuine contractors.

16. The IFA does not see how the proposed (and welcomed) changes in this consultation document could create adverse incentives or changes in behaviour, as their primary purpose is to remove a form of (unfair and unethical) double taxation and, in a cost-effective manner, spread the tax burden more equitably than the current notification process does.

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

17. As stated in paragraphs 15 and 16, the proposed set off to the deemed employer's PAYE liability is a welcome change to IR35 implementation, and marks a real improvement on historic and current IR35 administration.
18. Regarding settled compliance checks which concluded before implementation, while it is logical to maintain a consistent "cut off" point at which the new policy comes into effect, HMRC should consider the implication in terms of open compliance check cases. Feedback from members suggests that some such cases can take as long as 2 years to conclude, so applying a hard cut off from date of implementation could incentivise organisations to delay and obfuscate HMRC compliance checks until implementation, in order to take advantage of the new PAYE liability set off once it comes into effect.
19. Further, and in relation to the proposal that workers and their intermediaries will be notified of their entitlement to claim repayment of taxes overpaid (where a compliance check has already concluded and the PAYE liability set off will not be applied retrospectively), the consultation document is ambiguous as to the safeguards and measures which will be in place to ensure workers and intermediaries are promptly notified. The caveat that they will be notified "where the information is available" is unclear and noncommittal, and care should be taken to avoid the perception that HMRC would be looking to "hold onto" any element of historic double taxation.

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?

20. With reference to paragraph 12, the IFA is a professional body for SME and SMP accountants. From the perspective of most of our members, their business clients typically depend on their accountant to keep them up to date with legal and regulatory changes relating to their tax obligations and finances in general. The cost in these cases therefore falls primarily on the accountant, and it is a cost in terms of (non-billable) time spent familiarising themselves with changes so they can continue to provide their clients with high-quality accountancy services.
21. The proposed implementation date of 6th April 2024 is welcome inasmuch as the current implementation of IR35 is not fit for purpose, but it does represent a relatively short turnaround time for our members to update their own knowledge and in turn educate their business clients. With reference to paragraph 11, effective communication from HMRC will be invaluable in making sure businesses and accountants at large are aware change is coming and have access to easily-digestible education on the new policy.

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?

22. With reference to question 5, the information required (particularly worker's NINO and intermediary's VRN and/or CRN) should not incur significant initial costs, beyond the time and training cost involved in adjusting processes to ensure requisite information is captured.
23. Any further information beyond this might incur additional time and financial costs, and the consultation document is non-committal on what further information might be required.

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.

24. As a professional body for SME and SMP accountants, we invite HMRC to reflect on the impact of IR35 on small businesses, particularly those whose business plans are reliant on outsourced services at different stages in their life cycle. The PAYE liability set off calculation proposed by this consultation document is a positive move for UK businesses in general, by reducing the potential tax burden and risk on the deemed employer. However, it remains the case that the cost of off-payroll assessments, and the pain resulting from getting it wrong, puts some small businesses off employing contractors entirely. In prior IR35 consultations the IFA has suggested HMRC consider simplification or partial exemption from off-payroll regulations for small and micro businesses; and we remain ready and willing to discuss this suggestion further at HMRC's request.

General comments

25. The IFA would like to raise a concern about the volume and proximity of HMRC consultations opened on "Tax Administration and Maintenance Day", 27th April 2023. In total 11 consultations were opened 27th April, with deadlines falling in either June or July. This gives professional bodies and other interested parties approximately 8-12 weeks to respond to up to 11 consultations.
26. For professional bodies, providing meaningful representation requires engagement with members (which itself takes time, as members cannot be expected to respond immediately upon their professional body's request), collation of member responses and internal deliberation before a representation can be written, assured and submitted.
27. Professional bodies like the IFA are therefore left facing difficult decisions over where to focus attention and resource – decisions which would not be necessary if HMRC consultations were spaced more evenly throughout the year, and/or deadlines were extended where necessary in recognition of the proximity of so many consultations opening at once.
28. Labelling 27th April "Tax Administration and Maintenance Day" suggests that HMRC are considering making this mass release of consultations a regular annual event. The IFA would strongly caution against this, and request HMRC consider a more reasonable approach to stakeholder consultation. If this approach is maintained over time, inevitably consultation responses will skew further towards the largest professional bodies, whose interests are not always necessarily aligned with smaller accountancy practices and their small business clients who are the backbone of the UK economy.

Contact details

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