By 22 February 2024

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Calculating liabilities in cases of non-compliance for off-payroll working (IR35): ICAS response

ICAS response to HMRC consultation: Calculating liabilities in cases of non-compliance for off-payroll working (IR35)

About ICAS

1. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants. We represent over 23,000 members working across the UK and internationally. Our members work in the public and not for profit sectors, business and private practice. Approximately 10,000 of our members are based in Scotland and 10,000 in England. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good.

2. The following submission has been prepared by the ICAS Tax Board. The Tax Board, with its six technical Committees, is responsible for putting forward the views of the ICAS tax community; it does this with the active input and support of over 60 committee members.

General comments

3. ICAS welcomes the opportunity to feed into this HMRC consultation on calculating liabilities in cases of non-compliance for off-payroll working (IR35). We generally welcome the proposals to introduce the Statutory Instrument.

4. We have some comments on the provisions as they relate to trigger events and the commencement date of 6 April 2024 which does not appear to make allowances or contain transitional provisions relating to disputes which have not yet been finalised or are already under ongoing appeal procedures prior to that date.

5. ICAS considers that the deemed employer should not receive single notices when there is more than one intermediary as this is likely to lead to confusion and is going to be difficult to maintain an audit trail on. Deemed employers should be able to correlate HMRC's notice to their own records.

6. Further clarity on certain elements such as appeals, Apprenticeship Levy and secondary NICs would be appreciated.

7. We have queried some aspects of the guidance.

Specific Responses to Questions

8. Moving through the provisions as they arise: How does HMRC propose to notify intermediaries that a Regulation 72GA “trigger event” has occurred? We would appreciate further clarity on this.
9. In terms of the two references to “trigger events” in the legislation at Regulation 72GA(2)(a) and 72GA(1)(e), ICAS considers that there may be a disadvantage to some taxpayers by way of a qualifying event being one which takes place post 6 April 2024. Regulation 72GA(2)(c) also deals with recovery notices in the same way. Would it be possible to reconsider this to allow for cases where protective assessments have been issued, or where assessments/recovery notices are the subject of an ongoing appeal or not yet fully finalised before that date?
10. ICAS disagrees that a single notice be issued to the deemed employer under Regulation 72GB(5). It is essential that the deemed employer can clarify in each case which details of the notice pertain to which intermediary. The deemed employer must be able to check that the entries correspond to their own records and that they are correct. If not, how can the deemed employer demonstrate that they disagree with the notice in whole or in part? How can the deemed employer communicate to an intermediary what relevant amounts have been paid?
11. Moving through the guidance elements: Please could you clarify as to whose responsibility it is to notify the Tribunal of an appeal? Does the deemed employer have the right to appeal? Can this be clearly set out in guidance? Similarly, for NICs purposes where a Section 8 decision has been issued due to a dispute, is it the intermediary who will receive the notice and is it them who will appeal? Ideally, this could be explained in the guidance in a reasonable amount of detail.
12. We do not consider that there is sufficient clarity on the inclusion or exclusion of the Apprenticeship Levy in the set-off value. Please could this be clarified further?
13. Please could you explain the reasoning behind not allowing for secondary NICs which has been paid by the intermediary to be offset? ICAS considers that any income tax, corporation tax or NICS (primary or secondary) should be capable of being offset - the purpose of the legislative provisions is surely to avoid double taxation.
14. Finally, ICAS considers that throughout all the stages of the offsetting Regulations, the accompanying guidance should take the reader through each stage step-by-step to eliminate misunderstanding and reduce queries, mistakes and cost and admin burdens. It is vital that all aspects of when deemed employers can and cannot request a set-off. ICAS is happy to work with HMRC to ensure the guidance is as clear and unambiguous as possible and leaves the reader in no doubt as to what they can and cannot do.

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