Response from ICAS to the HMRC consultation document

Employment Intermediaries and Tax Relief for Travel and Subsistence

29 September 2015
Employment Intermediaries and Tax Relief for Travel and Subsistence Consultation

About ICAS

The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants. We represent over 20,000 members who advise and lead businesses. Around half our members are based in Scotland, the other half work in the rest of the UK and in almost 100 countries around the world. Nearly two thirds of our members work in business, whilst a third work in accountancy practices. ICAS members play leading roles in around 80% of FTSE 100 companies. ICAS is also a public interest body.

General comments

ICAS welcomes the opportunity to comment on the consultation ‘Employment Intermediaries and Tax Relief for Travel and Subsistence’, issued by HMRC on 8 July 2015.

Specific questions

Question 1: Do you agree that the structure of the proposed legislative changes will achieve the policy objectives?

The policy objectives of the proposals include:

- Recognising the different ways individuals are now working, whilst ensuring the tax system provides no individual or business with an unfair advantage.
- Protecting the genuinely self-employed, who, per the foreword, ‘will be unaffected by these changes’.
- To change legislation where the rules are being used in a way it ‘was never Parliament’s intention to allow’.

The proposals are aimed to tackle artificial methods which have been used by some employment intermediaries. In particular, arrangements using umbrella companies with overarching contracts of employment (OACs). OACs have been used to ‘artificially’ create ‘temporary work places’ so that travel and subsistence relief is obtained under sections 338-339 Income Tax Earnings and Pensions Act 2003 (ITEPA 2003).

The proposals are a broad anti-avoidance measure which can be expected to significantly reduce the type of arrangements which have been used by some employment intermediaries to obtain tax relief for expenses in circumstances where it would not appear to be the intention of Parliament that relief should be obtained. Specifically, the type of arrangement which treats part of what is essentially the gross pay of an individual worker as tax deductible travel and subsistence costs; where in reality, the costs are ‘normal commuting’ and in extreme cases, the costs are fictitious.

In terms of meeting policy objectives of reducing the circumstances of ‘obtaining an unfair advantage’ or using rules in a way that was not intended by Parliament, the proposals appear effective. But in terms of protecting the ‘genuinely self-employed’ the broad nature of the proposals raises concerns.

Reliance on ‘supervision, direction or control’ as the main, or only arbiter, for application of the rules, extends their scope beyond arrangements which are artificial. Supervision, direction or control is not the dividing line between ‘genuine’ self-employed business arrangements and ‘artificial’ ones. Neither is it a sufficient distinction in the case of Personal Service Companies. The boundaries for employment/self-employment and independent contractor/IR35 treatment have always included a wider array of factors, looking to the badges of trade, including business risk and independence.
An alternative approach, along the lines suggested by the Office of Tax Simplification, including re-definition of ‘permanent’ and ‘temporary’ workplaces, and tax deductibility for expenses reimbursed by the engager (not by the employment intermediary), could achieve a similar policy objective in terms of artificial arrangements, while leaving genuine business arrangements unaffected.

The impact assessment suggests an expected yield from the proposals of £155m in 2016-17 with similar levels in later years. What is the evidence that the level of artificial arrangements are on this scale? Does this estimate include the impact on PSCs and other intermediaries where arrangements have been accepted as ‘genuine’ in the past?

Modern working patterns mean that the traditional concept of home to work travel is outmoded. For example:

- Workers on zero hours contracts can be required to incur significant ‘home to work’ travel, on occasion only to be sent home without having earned sufficient income to cover their expenses. Denial of home to work travel expenses in such cases may be inequitable and cause hardship.
- Peripatetic workers, such as providers of personal care, can have significant home to work journeys during, and at the start and close of, the working day. This would appear to be work travel in their particular industry. Indeed the European Court of Justice recently decided that that home to customer travel could be ‘working time’.  
- Remote or distance workers, where daily travel would be impracticable, but travel to an employer’s place of business could be disallowed under the proposed rules, though it would not normally be considered ‘normal commuting’.

The proposals bring in a blanket denial of relief for specific types of arrangement involving employment intermediaries, which in some cases may be inequitable. An approach to tackle artificial arrangements through closer definition of temporary and permanent workplaces could produce a fairer outcome.

Question 2: Will there be any consequential difficulties in administering each engagement as a separate employment?

A primary area of difficulty is that of certainty. This is exacerbated if engagers could find themselves liable to pay the income tax and National Insurance which should have been deducted by the employment intermediary (as the proposals suggest at page 16 ‘Transfer of Liability’), if HMRC takes a different view after the event.

Engager firms may opt for caution, and report to employment intermediaries that there is supervision, direction and control of workers as a default, rather than evaluate individual contracts and circumstances: this being the surest way of avoiding any potential liability for under-deducted tax and National Insurance.

Engager firms will now be responsible for supplying information about supervision, direction and control. While there are helpful examples in the Employment Status Manual pages ESM2056 to ESM2068, in practice there are likely to be many scenarios in between, where the decision will be subjective.

For the system to operate effectively, there will need to be a greater degree of clarity, with possible clearance procedures.

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Question 3: Are there any particular professions who will be significantly affected by these proposals?

There are a number of specific situations, some of which are mentioned on page 21 chapter 6 of the Consultation document 'Effect on Individual Sectors'.

Particular sectors which are likely to be affected include:

- Construction industry – particularly the proposal to set aside the long-standing Working Rule Agreement as it applies to travel and subsistence.
- Health professionals and care workers, where ‘work’ journeys during the working day may start and finish from home, due to timing or location of clients.
- Home-based workers and those working remotely.
- Personal Service Companies – particularly those where work can be home-based or based at the engager's premises.

Question 4: Will these changes result in a significant shift in the way those affected are employed? If so, what would this shift be and what would be the impact for the workers concerned?

It is difficult to forecast the impact of the changes. There are some employment intermediaries who operate at the margins of the law and appear ready to exploit any opportunity to gain a financial advantage through selective interpretation of the law.

The treatment of self-employed and employed workers on temporary engagements may differ under these proposals for certain groups.

A self-employed worker working on multiple sites (Horton v Young 47 TC 60), may be permitted a deduction for travel and subsistence from home, though the scope of the deduction needs to be viewed in the light of the Samadian case - Samadian v HMRC [2014] UKUT 0013 (TCC).

Many low-paid workers have little choice over the basis on which work is offered.

Question 5: Would the definition of employment intermediary as proposed cause any practical difficulties? Please provide details and examples.

It is unfortunate that there are now a number of different sets of rules with subtly different definitions relating to employment intermediaries.

The Agency rules in Chapter 7 of part 2 ITEPA 2003 were revised from April 2014. The revision removed the requirement for ‘personal service’, before a worker was taxed as an employee. Yet the proposed rule for travel and subsistence expenses, bring back ‘personal service’ as a requirement for denial of tax relief.

The ‘personal service’ rule was removed due to perceived circumvention of the rules through the use of substitution clauses. What guarantee is there that re-introducing a personal service requirement will not spawn another round of substitution clauses?

The intermediaries reporting requirement rules introduced from April 2015 (s716B ITEPA 2003), apply to ‘Specified employment intermediaries’. These apply to employment intermediaries which supply more than one worker. But other definitions apply irrespective of the number of workers.

The rules for IR35 Personal Service Companies are different again and potentially add yet another layer of complication.

The complication will potentially case confusion as workers may be accorded a different status under different rules.
The ‘exclusion clause’ of not being ‘substantially the supply of labour’ needs clarifying. While this may provide a needed exclusion for secondment of staff from, for example, professional partnerships, how will it work in the context of PSCs, where there may be a very small number of employees?

**Question 6: Do you agree with the definition of the terms supervision, direction and control and will these definitions cause any practical or commercial difficulties? If so, what will these difficulties be?**

Please see comments under question 2. Supply chains for workers can be complex, involving a number of intermediaries with different roles.

The intermediary nearest to the engager may not be the employer of the worker. This raises practical issues in the supply of information on supervision, direction and control, and in awareness of how expenses are being treated for tax and National Insurance purposes.

**Question 7: Which option for a transfer of liability would work best to ensure future compliance, Option 1 or 2?**

Option 1 would make the engager liable for any default by the employment intermediary in failing to account to HMRC for tax and National Insurance due on home to work travel expenses. While this may be administratively straightforward, it would not appear equitable.

Under Option 2, the engager would only be liable if the information supplied by the engager to the intermediary is incorrect. While this proposal seems fairer to the engager, there is still the difficulty outlined under question 2, that engagers may adopt a default position, rather than take the risk of an ‘incorrect answer’.