Public sector off-payroll rules into the private sector?

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With almost a year's experience, Paul Mason of Abbey Tax assesses the impact of the public sector changes and suggests what we should be asking the Government to consider.

In the Autumn Budget documents, the section on *Off-payroll working in the private sector* advises us that the government "reformed" the off-payroll working rules (known as IR35) for engagements in the public sector in April 2017. Clearly, the rules have been changed, but why handing the tax status decision to public authorities without any tax expertise is 'reform', has me scratching my head.

Let us consider the reform of IR35 in the public sector and its (unintended?) consequences:

- Contractors no longer determines their tax status; the public body now decides. Many have done so on a purely arbitrary basis.
- There is no right of appeal against that decision; however, the contractor can ask their Self Assessment Return to be amended at the year-end. But will HMRC accept any amendments without going through an enquiry process? Not surprisingly, many contractors have opted for the simple option of refusing the engagement and looking for work elsewhere.
- Unless the public body has failed to take reasonable care in arriving at its decision ('reasonable care' apparently does not need to be considered when a public body just declares all engagements as "caught"), the tax liability falls to the 'fee-payer', which, if agencies are being used, is the agency that pays the contractor's Personal Service Company (PSC).
- HMRC want all the parties to use its Check of Employment Status for Tax (CEST) tool despite it ignoring the test for mutuality of obligations AND being open to interpretation. We have seen examples where a public body determines an engagement as 'caught', but the contractor taking the same test, gets a 'not caught' decision.

Back to the document: "Early indications are that public sector compliance is increasing as a result" (no surprise there – see comments above). Indeed, a Sunday Times article on 29th October last year suggested that the Chancellor could expect an additional £265m in 2017/18 – but whether it is "compliance" because people are more paying tax due to public sector bodies simply deeming everyone as "caught" is highly questionable.

The section ends: "Therefore the government will carefully consult on how to tackle non-compliance in the private sector, drawing on the experience of the public sector reforms, including through external research already commissioned by the government and due to be published in 2018."

The consultation is expected early this year, and one can safely assume that the change will happen – perhaps in 2019 or 2020 – and whether you agree with the current off-payroll working rules in the public sector or not, there is no denying the logic that we need one set of rules on IR35 for **all** contractors. Not least from the public sector's point of view is a level playing field desperately needed; there is

considerable evidence that some of the best contracting talent has headed off to the greener grass in the private sector, resulting in delayed project delivery

I believe that the private sector will react to this inevitable change somewhat differently and based on commercial reality. Large engagers of contractors will want the best talent to bring home their projects and whilst they may decide to take a view on ‘lower-skilled’ resources, they will look at each key or senior engagement to determine it status. They have to or they will lose the best talent.

Agencies may also see the changes as an opportunity if they can help their clients with this status decision. Moreover, if the rules follow those of the public sector, then the agency has its own liability to consider as the fee-payer.

Whilst these commercial considerations will not form part of HMRC’s consultation, it must address the following points to avoid a repeat of the lack of joined-up decision-making in the public sector:

- Overhauling CEST so that it reflects case law or make it abundantly clear that it is only an indicator and that the private sector should take specialist advice if unsure about the status of the engagement.
- Provide clear guidance about the consequences of an engagement being deemed caught by IR35; i.e. if the client can only afford a particular day rate, then the contractor must be advised that this day rate this will include Employer’s NICs thus reducing the actual day rate paid to the PSC. And it is from that lower rate that the payment will suffer tax and NICs and that Travel and Subsistence cannot be claimed. Contractors need to know the true cost!
- Clarity about how the PSC’s accounts should be drawn up. Simply stating that turnover is reduced from the amount invoiced to the net taxed amount actually received goes against all generally accepted accounting principles. It also means that the contractor appears to be charging VAT at a rate closer to 30%.
- An explanation of how the costs of running a company – including company pension contributions – can be claimed if the 5% notional allowance is also removed in the private sector and all of the PSC’s engagements are caught.

We welcome a consultation and will respond when it is issued. But, as ever, the question is will the government listen?