Employment status consultation

Employment Tax

01 May 2018

The government published its response to the Taylor review of modern working practices in February 2018. As part of that response a consultation on employment status was published, to which the CIOT and ATT will be responding.

On 7 February 2018 the government published its response to the Matthew Taylor Review of Modern Working Practices along with four related consultations. The publication of the 'Good work plan' (*Good Work: The Taylor Review of Modern Working Practices*) and the release of a consultation on simplifying employment status were welcomed by the CIOT and ATT. Although changes to the rates of National Insurance Contributions (NICs) in relation to employment and self-employment have been ruled out – which we think is a mistake as the Government risks ignoring the vulnerability of the tax base to changing patterns of work and are denying themselves a means to tackle the issues Taylor identified around employment status – the employment status consultation does not just focus on employment rights but also considers employment status for tax purposes.

Employment status consultation

The consultation seeks views on how to make the employment status rules for both employment rights and tax clearer for individuals and businesses. The CIOT and ATT will be responding to this consultation (which closes on 1 June 2018), and we would welcome input from members.

The consultation document highlights that while in the vast majority of cases it is relatively straight forward to establish a worker's employment status, for a small minority it can be very difficult to do so. The current regimes for establishing employment status are dependent on the interpretation and application of case law against the specific facts of each case, which means that establishing status is not only complex but the rules are open to interpretation and disputes can be both

costly and time consuming. A worker's employment status is crucial to both determining his or her employment rights and the taxes the worker and engager pay hence the Taylor review identified a need to make it easier and simpler to establish employment status.

One approach put forward by the government is to legislate for the current case law derived tests for employment. For example, mutuality of obligation, control and personal service were established as the irreducible minimum for a contract of service to exist in the 1968 case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*. But would codification of the current tests make it easier to establish status and is it relevant for tax purposes?

Alternatively, could the current principles used by the courts to establish status be refined into a simpler, clearer and more coherent test? A 'statutory employment status test' could have a more precise criteria or structure than the current case law tests. For example, it could include factors such as length of contract, or weight particular factors, such as the percentage of a worker's income from a particular engager, or it could simply consider one aspect of the worker-engager relationship, such as whether the engager exercises supervision, direction or control. A simplified test would probably result in 'winners and losers' (depending on one's view point and which side of the line an engagement fell) but is this a price worth paying for simplicity?

Alignment between tax and rights?

From a taxation point of view, should tax liabilities, including National Insurance, still depend on whether a worker is an employee? Should the definitions be aligned for employment law and tax law purposes? Alternatively, given the differences in the way that the employed and the self-employed are taxed, should the boundary be based on something other than the worker being an employee?

In this regard, the current difficulties of having two classifications for tax law (employed or self-employed), but three in employment law (which also includes 'worker' or 'deemed contractor') are also considered in the consultation. While having the same classifications for both tax and employment law purposes might simplify matters and provide clarity, it could also cause problems. Aligning definitions across the two systems could create steeper cliff edges and stronger incentives for mis-categorisation. For example, if 'gig economy' workers who are

currently classed as self-employed for tax purposes were to be treated as employees for tax purposes (and ‘workers’ for employment law purposes) this would increase National Insurance contribution costs both for the workers and the businesses they work for.

Equally, while the possibility of developing a new test for tax purposes which is not based on employment is tempting, care would have to be taken that this does not result in an even more complicated test, higher tax burdens for the low paid, or a greater divergence between employment and tax law.

If you, or colleagues, have experience of difficulties in applying the current employment status tests or views on how status, and the taxation of workers, should be reformed we would welcome your input.