Off-payroll working in the private sector consultation response

Employment Tax

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The ATT, CIOT and LITRG have separately responded to the government's off-payroll working in the private sector consultation and urged the government to rethink its approach

In responding to the government's consultation on off-payroll working in the private sector, the CIOT, ATT and LITRG all questioned the 'success' or otherwise of the public sector changes, before going on to examine the government's lead option of extending the public sector rules to the private sector. The CIOT suggested that there was a better option which may be equally, if not more, effective in tackling the estimated £1.2bn a year leakage by 2022/23. The ATT and LITRG focused their comments on looking at what the impact of extending the public sector reform to the private sector would be on small businesses and workers.

The CIOT put forward an alternative approach to tackling non-compliance with IR35 – one that (i) builds on existing record-keeping requirements and a requirement to secure supply chains but (ii) which also requires the business to e-file a report of payments made to personal service companies (PSCs) to HMRC on a regular basis (and perhaps also to provide a Check Employment Status for Tax (CEST) tool report to evidence whether or not the business considered that the PSC should be applying IR35).

The CIOT suggested that this could prove a much less administratively burdensome and more cost-effective alternative. The information from the business would allow HMRC to focus its efforts and follow-up directly with the PSC immediately after the end of the tax year to check up on the position. And by also expanding the existing self-assessment tax return question on PSCs to include a much greater information requirement where the worker is employed by a PSC but not operating IR35 and a

significantly increased penalty for non-compliance, this would signal HMRC's resolve in enforcing IR35.

Furthermore, the CIOT thought that if the worker is made jointly liable for PSC debts of PAYE/NIC that would also concentrate the individual's mind much more on ensuring that due attention is paid to IR35.

In their response, the ATT flagged the recently concluded consultation on employment status as being inextricably linked to the intermediaries' legislation for off-payroll working and questioned why the two issues were seemingly being considered in isolation. This was also raised by the CIOT and LITRG.

The ATT went on to highlight the difficulties that private sector businesses will have in complying with the new rules. For example: the one-off set-up costs (noted by the public sector in the research report into the public sector experience) which will be felt more keenly in a smaller business and the fact that smaller businesses may lack the internal resources and expertise needed in understanding and applying the new rules. The concern is that end clients will decide that the off-payroll rules apply in a greater number of situations than they truly do and that, unless the PSC has a very strong bargaining position, they will not be in a position to challenge such decisions.

The CIOT's views in this area included that roll out to the private sector would affect many times more entities than those impacted by the public sector reforms and that HMRC will not have the time and resources to help those businesses in the way they did with the larger public bodies. LITRG argued that if the public sector changes go ahead in the private sector, there is both principled and practical reasons for granting an exemption to small businesses.

Limitations with the CEST tool were also raised by ATT, who asked that a forum of HMRC, professional and trade bodies is set up to review the operation of the CEST tool and identify and resolve any operational issues. The CIOT also thought changes were needed to the CEST tool, in particular to reduce the circa 15% of cases which are 'not possible to determine', for example by providing the option to users in those cases to provide extra details. LITRG added that the CEST tool was too technical in its language and concepts to be easily useable by private sector small businesses with non-specialist staff.

LITRG's response largely focussed on what the impact of any changes to the private sector might have on low-income workers, who often find themselves offered work in

the private sector on the basis that they will structure their work through a PSC. While this can offer both the engagers and workers tax ‘advantages’; the attendant administrative considerations means this is generally not a suitable way for the low-paid to trade.

While extending the IR35 public sector reforms to the private sector could help remove the PSC ‘incentive’ in time, LITRG are concerned about what impact the changes will have on workers already in PSCs. For example, with the tax advantage gone, it is likely that many workers will be pulled out of PSCs and put into PAYE umbrella arrangements. However, there are many non-compliant models out there and depending on whether the PSC is closed down correctly, this could leave the worker with messy PSC compliance issues that they do not understand.

Furthermore, the application of the new rules would see an overall reduction in the income to the PSC and so to the worker (made worse where the employer NIC cost is passed to them) – a point also noted by the ATT. Low-income workers, who probably had little choice but to work through a PSC in the first place, are unlikely to be in a position to insist on higher gross pay rates to compensate for this; so the effect of the new rules will be to generate more revenue from some of the lowest paid and most vulnerable workers in society.

All three bodies noted that with the changes to tax on dividends, it is the National Insurance differential that drives the creation of many PSCs and thus, many of the problems the government is now trying to tackle. Ideally, the government needs to undertake a broader debate on the taxation of employment and, pending this, the bottom line is that this legislation should not be rushed through.

The CIOT’s response can be read on the CIOT website.

ATT’s response can be found on the ATT website.

LITRG’s response can be found on the LITRG website.