Construction Industry Scheme: HMRC’s new guidance on payments made by a landlord to a tenant

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HMRC’s new guidance on the application of the Construction Industry Scheme to payments made by a landlord to a tenant for construction operations in connection with a lease is causing some uncertainty. The CIOT has discussed these concerns with HMRC.

The Income Tax (Construction Industry Scheme) (Amendment) Regulations 2024 (SI 2024/308) came into force on 6 April 2024. As the tax information and impact note sets out, the regulations amend the Income Tax (Construction Industry Scheme) Regulations 2005 to:

- make sure that minor VAT compliance failures will not result in gross payment status refusal or removal; and

- to remove most payments made by landlords to tenants from the scope of the Construction Industry Scheme (CIS).

The new guidance at CISR14048-14049 covers landlord payments to a tenant. The CIOT is concerned that the guidance, although helpful, does not fully reflect the objective to remove most such payments from CIS and is causing uncertainty in practice about how HMRC apply the tests.

In order to be outside the scope of CIS, the payment by the landlord to the tenant must be for construction operations relating to works intended primarily for the benefit and use of the tenant (Regulation 20A(1)(e)).

A fundamental practical difficulty in applying the condition (e) test, as interpreted in the guidance, arises because although the works are for the immediate primary benefit of the tenant (as the building is completed to their specification), there is also some potential benefit to the landlord, in terms of relieving the landlord of the need to carry out the works and a potential increase in the reversionary value or the potential market rent.

We think it would be helpful, as a starting point for the guidance, to define Category A works (works that are the responsibility of the landlord or would otherwise have been carried out by the landlord) and other terms used in the guidance. The table of examples in the guidance of where the conditions are met or not met is helpful but introduces additional (non-statutory) concepts such as minor or major structural changes and ‘incidental benefits’ to the landlord or other tenants. If these tests are retained, we think these concepts need to be defined with more examples of common scenarios.

One such scenario is where the tenant wants to finish the fit-out with an enhanced specification. For example, the landlord is going to put in a lift dedicated for the use of the tenant’s demise. The tenant wants a more impressive-looking glass lift. The landlord contributes to the extent of a basic lift and the tenant pays the rest. The short-term benefit is to the tenant, but in the long term the landlord benefits from a more impressive lift in the building (thereby potentially making it more attractive to future tenants). Is the payment outside the scope of CIS?

Example 3 at CISR14049 (Work on common areas) could be expanded to provide an example of ‘incidental benefit’ to other tenants, for example if the bike racks and lockers are available to another tenant but the majority of the work benefits the

tenant receiving the contribution only.

We understand that HMRC encourage taxpayers to contact the CIS Helpline or make a non-statutory clearance application in cases of uncertainty. This will help HMRC to explore areas where this CISR guidance could be clearer. We have pointed out that the non-statutory clearance route may not always be viable given commercial time constraints.

The CIOT continues its engagement with HMRC on CIS uncertainties through our representation on HMRC's Construction Forum.

Kate Willis *kwillis@ciot.org.uk*
Matthew Brown *mbrown@ciot.org.uk*