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DRAFT SECONDARY LEGISLATION: OFF-PAYROLL WORKING RULES FROM APRIL 2020

Response by Association of Taxation Technicians

1 Introduction

- 1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to provide comments on the draft *The Income Tax (Pay As You Earn) (Amendment) Regulations 2020* ('the PAYE Regulations') and *The Social Security Contributions (Intermediaries)(Miscellaneous Amendments) Regulations 2020* ('the NIC Regulations') both issued on 22 January 2020¹ (together 'the Draft Legislation').
- 1.2 The primary charitable objective of the ATT is to promote education and the study of tax administration and practice. We place a strong emphasis on the practicalities of the tax system. Our work in this area draws heavily on the experience of our members who assist thousands of businesses and individuals to comply with their taxation obligations. This response is written with that background.
- 1.3 We have arranged our comments around specific topics and areas covered by the Draft Legislation, rather than considering it clause by clause. Sections 2 and 3 address our primary concerns regarding the potentially wide scope of the Draft Legislation, Section 4 discusses the proposed appeals process, and Section 5 includes our other comments. Our overall summary and conclusions can be found in Section 6.
- 1.4 In addition to our detailed comments below on the Draft Legislation and given the extremely short period of time remaining until the proposed commencement of these rules on 6 April 2020, we urge HMRC to issue updated legislation and supporting comprehensive guidance as a matter of priority.
- 1.5 We would be pleased to discuss any aspect of this response further. Contact details are in Section 7.
- 1.6 For simplicity, all specific references below are to the PAYE Regulations. Many of these are reproduced in substantially the same form in the NIC Regulations. Where this is the case, our comments will apply equally to both pieces of the Draft Legislation.

¹ <https://www.gov.uk/government/consultations/draft-secondary-legislation-off-payroll-working-rules-from-april-2020>

2 Scope of Draft Legislation: application in cases of business failure where there is no tax avoidance

- 2.1 Our primary concern is the scope of the Draft Legislation, which leaves HMRC with a high level of discretion as to when unpaid PAYE and NIC liabilities can be transferred within a labour supply chain.
- 2.2 The details as to when liabilities can be transferred in this way are important to the risk analysis and preparations of businesses affected by the off-payroll rules. In particular, it will be vital in framing the level and nature of due diligence which needs to be carried out in a labour supply chain before the rules come into force in April 2020. The potentially wide application of the draft legislation, and resulting uncertainty, are therefore concerning.
- 2.3 In our earlier comments on the draft Finance Bill 2019-20 provisions for off-payroll working in the private sector released in July 2019², we welcomed HMRC's acknowledgement of concerns regarding the application of the transfer of liability rules. In particular, we noted that page 5 of *Off-payroll working rules from April 2020 – summary of responses* ('the Consultation Response') published on 11 July 2019³ stated that:
- "The proposals are not intended to transfer liabilities in cases of genuine business failure, where deliberate tax avoidance has not occurred. Draft legislation will set out conditions under which the liability may be transferred to the top parties in the labour supply chain. Supporting guidance will clarify the steps HMRC expect clients and agencies at the top of the supply chain to demonstrate they have exercised reasonable care".*
- 2.4 This reassurance is partially repeated in the technical note⁴ published alongside the Draft Legislation, which states at paragraph 10 that *"HMRC will not exercise this power in the case of genuine business failure of the party ordinarily liable for the income tax and NICs"*.
- 2.5 We welcome these statements from HMRC, but are disappointed to see that they are not reflected anywhere in the Draft Legislation. In particular, although Regulation 97LC sets out a number of conditions which need to be met for unpaid PAYE debts to be recovered from another person, none of these address the reason for those debts being unpaid.
- 2.6 As they do not have the force of law, the statements HMRC have made to date regarding the scope and application of these provisions provide only limited comfort. In addition, we note that the latest statement in the technical notice (see 2.4 above) appears to be narrower in scope than that in the earlier Consultation Response, as it only appears to only cover business failure of the body responsible for applying PAYE and NICs (the 'fee-payer'), and not any intermediate agency in the supply chain. It also does not include the restriction to cases where *deliberate tax avoidance* has occurred which was referred to in the Consultation Response (see 2.3 above).
- 2.7 We are uncomfortable with the current approach of the legislation having a potentially broad application that is then narrowed by guidance. Whilst guidance can provide some comfort to taxpayers, it does not deliver certainty as it lacks statutory authority and is subject to change at short notice and without Parliamentary scrutiny.
- 2.8 It is therefore important that the key areas of the scope of the transfer of liability provisions (including that they will not apply in cases of genuine business failure where tax avoidance is not in point) are set out clearly

² <https://www.att.org.uk/technical/submissions/rules-payroll-working-april-2020>

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822204/Off-payroll_working_rules_consultation_summary_of_responses.pdf

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860278/Technical_note_draft_secondary_legislation_for_off-payroll_working_from_April_2020.pdf

in the final version of the Draft Legislation, with guidance then acting to clarify potential points of any remaining uncertainty and give practical advice.

3 Scope of provisions: terminology used

- 3.1 The potentially wide scope of the Draft Legislation is exacerbated by the repeated use of undefined, subjective and vague terms at important points.
- 3.2 In particular, new Regulation 97LA sets out that the legislation applies where a HMRC officer considers there is “*no realistic prospect*” of recovery from the fee-payer “*within a reasonable period of time*”. These terms are used elsewhere in key parts of the Draft Legislation, including new Regulations 97LB and 97LD. However, there is no indication as to how they are to be interpreted, and they remain highly subjective. This is unhelpful given that, as noted above, the potential application of this legislation will be important in framing the due diligence undertaken by agencies and clients.
- 3.3 In order for businesses to understand the legislation and plan accordingly, they need to know when they may be at risk of having liability transferred to them. This is currently not the case, due to the use of subjective terms such as *realistic prospect* and *reasonable period of time*, which may mean very different things to different people.
- 3.4 Our preference would be to remove such subjective language and instead include clearly defined terms and time limits. If this is not possible then, as a minimum, HMRC should issue clear guidance as to their interpretation of these terms as soon as possible.

4 Appeal rights

- 4.1 Regulation 97LI sets out the grounds on which a recovery notice may be appealed. One of these grounds, set out in 97LI(3)(b) and (c), is that there *is* a realistic prospect of recovering the PAYE from the fee-payer (and, if a client is receiving the notice, the first agency in the chain) within a reasonable period.
- 4.2 New Regulation 97LG sets out that a recovery notice must include a statement by an HMRC officer to the effect that they are of the view there is no realistic prospect of recovering the PAYE in this way. We believe that this requirement should be extended to include some explanation as to *why* the officer believes this to be the case. Without knowing the basis of the decision made by the officer, it is difficult to see how the right of appeal under 97LI(3)(b) and (c) can be exercised in practice.
- 4.3 Regulation 97LI(4) acts to limit the right to appeal a recovery notice on the grounds that an amount mentioned is not a relevant PAYE debt if it has already been determined, on an appeal, that the amount is a relevant PAYE debt. Our understanding is that this effectively means that, if the fee-payer has already unsuccessfully appealed a determination (that the amount in question relates to a relevant PAYE debt), then the first agency in the chain or client cannot make the same argument again on receiving a recovery notice.
- 4.4 Whilst this Regulation 97LI(4) limitation on appeal rights may initially appear sensible, we have concerns as to how it may limit rights of appeal in practice. We understand the term *determined on an appeal* to embrace three distinct situations:
 - where an appeal has been decided by the Tribunal;

- where, following receipt of an appeal, HMRC have undertaken a statutory review which upheld their original decision and the fee-payer has not then pursued their appeal [see s.49F, TMA 1970];
 - where, following an appeal but without a statutory review, the fee-payer and HMRC reach agreement so that there is a deemed determination [see s.54 TMA970].
- 4.5 If the 97LI(4) appeal restriction applied in situations where there has been no hearing by the tribunal (the second and third bullet scenarios in 4.4 above), we are concerned that the person in receipt of a recovery notice could effectively be prevented from appealing the recovery notice because of the circumstances, poor judgement or lack of action of the fee-payer.
- 4.6 Even where a statutory review had been diligently undertaken, it would necessarily have considered only such information as had been provided by HMRC and the fee-payer. It is difficult to see why the client (or the first agency in the chain) should be denied the opportunity to appeal by reference to any additional information in their possession.
- 4.7 We therefore recommend that the restriction in Regulation 97LI(4) should only apply where an appeal had actually been heard and determined by the Tribunal.
- 4.8 In passing, we note that Regulation 97LI(4) does not identify the nature of the matter previously determined. We think it would be helpful if guidance could illustrate the types of prior determinations which would bring the 97LI(4) restriction into play.

5 Other comments

- 5.1 The Draft Legislation refers at several points to sections of primary legislation which do not appear in the draft Finance Bill legislation published in July 2019⁵. For example new Regulations s97LD and 97LG refer to a definition of *relevant person* in s688AA(3) ITEPA 2003, but this section is not included in the draft Finance Bill legislation. This makes a comprehensive review of the Draft Legislation difficult, though it is possible to infer which parties are being referred to from the wider context of the legislation.
- 5.2 New Regulation 97LE defines the relevant period in relation to a PAYE debt (that is, the period in which a recovery notice can be issued to another person). This sets out that the relevant period begins either:
- 30 days after the day on which the regulation 80 PAYE determination becomes *final and conclusive*;
or
 - When a HMRC officer becomes aware of sufficient information to make a regulation 80 determination but it would be *impractical to make such determination on account of the liquidation, dissolution or other incapacity* of the fee-payer.
- 5.3 With regards to the first of these possible commencement points, we understand that a determination would become *final and conclusive* when either an appeal is finalised, or no appeal has been made within the 30-day time limit which applies. However, it would be helpful for this point to be confirmed in guidance.
- 5.4 With regards to the second point, we understand the reference to liquidation or dissolution of the fee-payer, but are unsure as to what is intended by *other incapacity*. As this could be interpreted quite broadly, specific examples should be included in guidance.

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816295/Rules_for_off-payroll_working_from_April_2020_-_Draft_legislation.pdf

- 5.5 Regulation 97LG sets out the contents of a recovery notice. This includes the name and address of the “*person to whom the relevant PAYE debt relates*”. We assume that this is a reference to the fee-payer (i.e. the business that should have withheld PAYE on the payment to the intermediary), rather than the individual worker, but it would be helpful for this to be confirmed in guidance.
- 5.6 Finally, we think that it would be useful if Regulation 97LG required the recovery notice to identify the relevant contract(s) or worker(s). That would be essential where a client has a number of workers engaged through intermediaries and some, but not all, are determined to fall within the off-payroll rules.

6 Summary and conclusions

- 6.1 A clear understanding of how the transfer of liability rules could be applied by HMRC in practice will be key to the due diligence and other preparations of businesses who may be affected by the off-payroll rules. The current wide scope of the Draft Legislation, together with a lack of detailed guidance, means that significant uncertainty remains thereby preventing such clear understanding.
- 6.2 To provide certainty and clarity, the Draft Legislation needs to clearly set out the scope of the transfer of liability rules. Guidance, though it undoubtedly has its place in aiding interpretation and understanding, should not be used as a means of narrowing the scope of potentially wide ranging legislation.
- 6.3 In particular, we believe that the Draft Legislation should be updated to:
- Make it clear that liabilities will not be transferred in cases of genuine business failure, where deliberate tax avoidance has not occurred.
 - Reduce the use of subjective and undefined terms such as ‘realistic prospect’ and ‘reasonable period of time’.
 - Extend the requirement in Regulation 97LG for a recovery notice to include a statement by a HMRC officer to the effect that they are of the view there is no realistic prospect of recovering the PAYE to include some explanation as to *why* the officer believes this to be the case.
 - Restrict the scope of regulation 97LI(4) (which limits the right to appeal a recovery notice on the grounds that an amount mentioned is not a relevant PAYE debt) so that it only applies where a Tribunal has determined that an amount is a relevant PAYE debt.
- 6.4 Given the extremely short period of time remaining until the proposed commencement of these rules on 6 April 2020, and the extensive preparations businesses need to make, we would urge HMRC to issue updated legislation and such comprehensive guidance as is needed as soon as possible.

7 Contact details

- 7.1 We would be pleased to join in any discussion relating to this consultation. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Emma Rawson on 07773 087111 or erawson@att.org.uk

8 Note

- 8.1 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has more than 9,000 members and Fellows together with over 6,000 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.