

Chartered Institute of Taxation – Written evidence (OPR0037)

1 Executive Summary

- 1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.
- 1.2 Further to the invitation to provide oral evidence to the Lords Finance Bill Sub-Committee for its follow-up inquiry into Off-Payroll Working (OPW), we set out below some initial written comments. In particular, we would draw your attention to our comments on HMRC's CEST tool, the use of umbrella companies, and HMRC's approach to compliance settlements.

2 About us

- 2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
- 2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

3 Off-Payroll Working (OPW) – response to call for evidence questions

- 3.1 **Question 1. Has the recent extension of the off-payroll working rules to the private sector made it more difficult for engagers to hire people with the right skills and expertise? To what extent has its introduction contributed to job vacancies?**
- 3.2 We think that organisations like the CBI will be better placed than the CIOT to provide evidence in this respect. This said, we are aware that the new OPW rules have changed how many engagers hire workers. For example, some businesses have opted not to engage workers via Personal Service Companies (PSCs) wherever possible, albeit that this can depend on the skills required and the natural forces of supply and demand. In particular, where skills are in limited supply, the worker will have a significant say in how they contract with the business and so exceptions will invariably be made in these circumstances.
- 3.3 In addition, it has still been necessary for such businesses to look closely at work which, in broad-brush terms, they might have considered to comprise contracted-out services but which in fact constitute, at least in part, a supply of labour. And then to

determine whether any of that labour is provided via PSCs. This requires a contract-by-contract review involving multiple stakeholders and can be very time-consuming. Furthermore, as the position may not be straightforward it may be necessary to take professional advice, so the associated costs also need to be factored in. Contracts may also need to be modified to reflect the position being adopted and to ensure that the business and the vendor are clear on their respective responsibilities given the repercussions if the OPR rules are breached.

- 3.4 **Question 2. For those engagers (and their advisers) who use the CEST (Check Employment for Tax Status) tool to assess employment status, how effective do you consider it to be? Do you have confidence in its results? If not, what further improvements need to be made to it?**
- 3.5 The CEST tool works effectively in assessing employment status where the fact pattern points towards one/other end of the spectrum of employed or self-employed (or deemed employed/self-employed under the OPW/IR35 rules). The problem is that it is less effective in determining cases in the middle of the spectrum. HMRC's own testing¹ of CEST against litigated cases indicates a 'unable to determine' outcome in 15% of those cases and more recent statistics suggest that CEST is unable to determine status in 21% of cases. Albeit that this is significantly better than the first version of CEST when Freedom of Information data suggested that CEST was unable to determine the correct outcome in 37% of cases².
- 3.6 It should be recognised that since 2017 HMRC has engaged extensively with stakeholders to improve both the CEST tool and its guidance. However, while the guidance is accessible from the CEST 'start' page it is not interactive, so a user cannot directly access the relevant guidance from each question in the tool. For example, when answering the question 'Do you have a right to reject a substitute?', it would be helpful to be able to link to (i) the overview CEST guidance on the meaning of 'substitute' and (ii) the detailed guidance in HMRC's Employment Income Manual on this question which goes into the specifics of what things like a 'right to reject' actually means. This can be problematic, particularly where the tool is being used by project managers, supervisors or team leaders who are not well-versed in the nuances of employment status for tax purposes. Whilst an answer may seem 'obvious' it is easy to arrive at the wrong conclusion unless the associated guidance is read carefully and properly applied to the particular case in hand. On a similar note, the question 'Does your organisation have the right to move the worker from the task they originally agreed to do?' has answers that include 'no, they would have to agree' and 'no, that would require a new contract or normal working arrangement' which even to the initiated can cause some confusion.
- 3.7 We think that there are also some other issues with the current version of CEST which can lead to (i) errors in answering questions, and (ii) incorrect or 'unable to determine' outputs. For example, (a) the questions on worker costs (tools and equipment, transport, materials) raise the issue of where to draw the line on whether costs are or are not significant, particularly for those working in the construction industry, (b) there are no questions addressing 'mutuality of obligation' (MOO), which we believe is an important case law test to be applied in judging whether an engagement is akin to employment or self-employment for OPW purposes (the point has been argued most recently in the PGMOL case³, albeit this involved the tax status of workers engaging

¹ [Enhancement to CEST. Technical testing.pdf \(publishing.service.gov.uk\)](#)

² [HMRC holds no detailed evidence to prove CEST accuracy claims, reveals FOI requests \(contractorcalculator.co.uk\)](#)

directly with PGMOL not via PSCs), (c) the question on 'Has the worker had a previous contract with your organisation?' doesn't distinguish between employment and self-employment contracts, leaving aside whether the contract was via a worker's PSC, (d) where there was a previous contract, the next question is whether the contracts are successive without a gap – but even if they are, surely it all depends on the nature of the previous and current contracts?, (e) there is a further question asking 'Has the worker done any self-employed work of a similar nature for other clients in the last 12 months work?' – but the engager is unlikely to know this, and even if they ask the worker how can they rely on the answer? (And, of course, the worker could have concurrent contracts but not be willing to divulge that fact).

- 3.8 A further consideration is what a user is to do if CEST is unable to determine the status of an engagement. HMRC direct a user to their helpline but it is unclear how much help HMRC's staff can be unless they have time to review contracts and discuss working arrangements with both the engager and the worker. The point being that to arrive at a determination in more difficult cases requires a lot of fact finding and then application of case law to 'paint a picture'⁴ of the relationship between the individual and the business for OPW purposes. This can be particularly difficult in the modern world of work where, for those earning a living in the gig economy and so doing more than one thing at the same time and essentially left to their own devices, many of the traditional hallmarks of employment for tax purposes may not be so easy to apply.
- 3.9 HMRC has stated that it will stand by CEST determinations but, understandably, this comes with a proviso. This being that all questions are answered correctly in light of the particular facts and in accordance with HMRC's published guidance. But as noted above it is not always easy to determine precisely what the correct answer is to some of the CEST questions, particularly where, say, the business operates in a specialised sector (for example, media), or it deals with gig workers etc. It may then consider that the calibration and focus of a different status tool means that tool is more appropriate than CEST. It may feel that more emphasis needs to be given to MOO which the CEST tool does not directly address. Furthermore, difficult cases will in any event need a more bespoke analysis, often requiring that the business takes professional advice (albeit at a cost). The key is that the businesses take 'reasonable care' in arriving at determinations because only in that way can they manage their exposure if HMRC decide to challenge the result.
- 3.10 **Question 3. What changes have engagers had to make to apply the off-payroll rules to contractors, in terms of systems, personnel and training? By reference to your own experience, to what extent (if any) do you consider that compliance costs have increased because of the changes?**
- 3.11 We think that organisations representing businesses will be better placed to provide evidence in this respect. This said we are aware that some businesses have moved away from contracting with PSCs and instead insist on contracting workers via umbrella companies. This means that it falls to the umbrella company to deduct income tax on earnings under PAYE and pay Class 1 (employer and employee) NICs. Contracting in this way via an umbrella company comes at an extra cost, mostly to the business but, sometimes, by way of a reduction in net pay received by the worker, which can have knock-on effects for low income workers. There are also unfortunately

³ *Professional Game Match Officials Ltd v Revenue and Customs Commissioners* - [2021] STC 1956 (PGMOL)

⁴ [Hall \(HM Inspector of Taxes\) v Lorimer \[1993\] EWCA Civ 25 \(05 November 1993\) \(bailii.org\)](#)

numbers of 'non-compliant' umbrella companies operating models of pay that do not properly account for PAYE and NIC (ultimately to the detriment to the worker). It is therefore key that the business performs appropriate due diligence on an umbrella company before adopting this approach.

- 3.12 Where businesses have continued to engage workers via PSCs, our feedback is that they have invariably incurred additional time/costs on, for example, performing status assessments, arbitrating on disputes and appeals, updating contracts, licensing status tools (where using CEST is not considered appropriate), staff training, taking professional advice, dealing with specific issues arising where PSCs/workers are resident abroad etc. In addition, businesses have also had to spend time and resources in reviewing outsourced services to determine whether there are any PSCs involved and, if so, deciding whether OPW/IR35 applies or renegotiating the arrangement to remove the PSC. In any event contracts have needed amendment to confirm the approach being adopted and to make clear the responsibilities of business and vendor in the context of the OPW rules.
- 3.13 **Question 4. How well has HMRC supported engagers, contractors, and their advisers with the implementation of the new rules and is any further or different type of assistance needed?**
- 3.14 We think that experience from the public sector roll-out and the additional year's delay in implementing the new rules for large and medium-sized entities (due to the pandemic) meant that HMRC was in a much better position to provide support than it was in dealing with the 2017 public sector OPW changes. Certainly, the guidance on the OPW rules has been much improved: it is more extensive and includes many more examples. HMRC has also put a lot of effort into communicating the changes more effectively – for example, by way of webinars. Compared with the rushed implementation of the public sector rules, and the subsequent need to engage directly with many public bodies to help them understand their obligations, we think that the private sector rollout (which included new obligations on the public sector too) has been significantly better. This is a good thing, not least as the reported OPW/IR35 settlements at some of the larger public sector bodies are very concerning. We note in particular the reported large settlements with government departments where we understand that the Home Office, DWP, and Courts and Tribunal Service are each facing potential IR35 bills totalling more than £120m⁵. We also note that since April 2021 HMRC have taken steps to stay close to businesses in terms of how they are addressing OPW – for example, HMRC's recent nudge letters to the finance and oil & gas sectors to remind businesses of the need to have the appropriate systems/processes in place and take stock of progress. This said, we are conscious nevertheless of the continued numbers of IR35 cases coming to the courts and the reality that this often remains a very difficult and contentious area.
- 3.15 **Question 5. To what extent has the introduction of the new rules generated disputes between engagers and contractors concerning the status of contractors vis à vis the rules and how successfully or otherwise have these been resolved?**
- 3.16 We understand from our members that numbers of workers, engaged through PSCs, are disputing businesses status decisions and, indeed, professional advisers are often being asked to adjudicate. What is unclear at present is how many disputes will arise with HMRC when the PSCs and workers file their respective Self-Assessment returns.

⁵ [UK government departments underpaid contractors' taxes by over GBP100 million | STEP](#)

Given that the most recent tax status case⁶ (PGMOL) heard by the Court of Appeal has been remitted back to the First Tier Tax Tribunal to be reheard it is perhaps not surprising that the IR35/OPW rules are generating disputes – if three levels of the judiciary cannot reach a definitive conclusion on status then businesses will often face a real challenge.

3.17 Question 6. What behavioural effects have resulted from the introduction of the new rules in the private sector in terms of the arrangements adopted in hiring contractors?

3.18 As noted above, one behavioural effect has been for more workers to be engaged via umbrella companies rather than PSCs. While this might be considered a positive behavioural change, given that the worker becomes an employee of the umbrella company, the concern is that some umbrella companies, typically based outside the UK, are not compliant with their tax obligations. While we know that HMRC is challenging non-compliant arrangements and trying to raise the profile of ‘too good to be true’ schemes with workers (for example, encouraging them to check their payslips and report/leave any non-compliant umbrella company), this is clearly still work in progress. It also remains a challenge to hold non-UK based umbrella companies and their owners to account in relation to non-compliant behaviour, albeit that further action has been taken in relation to promoters and facilitators based in the UK. As we have said earlier, it is key that businesses do proper due diligence in deciding whether they will engage with a particular umbrella company.

3.19 Question 7. The Government is proposing a new employment body with powers to enforce employment rights, including for those engaged by agencies and umbrella companies. How effective do you think such a body will be in ensuring workers, particularly the lower paid, are treated fairly?

3.20 We think that bodies representing businesses will be better placed to provide evidence in this respect. While we are very supportive of anything done to ensure that workers are treated fairly, from a tax perspective this is unlikely to assist businesses in addressing the sort of issues that arise in relation to OPW/IR35. The issues here are not generally an unwillingness to comply but the inherent challenges in doing so, particularly given the variety of working arrangements that exist day-to-day across UK plc.

3.21 We note that ‘The Taylor Report’⁷ discussed these issues and also the difficulties of determining employment status. The then government’s response⁸ indicated, in the example of gig economy workers, that ‘we should make it easier for individuals and businesses to distinguish workers from those who are legitimately self-employed’. It also indicated

⁶ *Professional Game Match Officials Ltd v Revenue and Customs Commissioners* - [2021] STC 1956 (PGMOL)

⁷ [Independent report overview: Good work: the Taylor review of modern working practices - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/92122/independent-report-overview-good-work-the-taylor-review-of-modern-working-practices)

⁸ [Government response to the Taylor review of modern working practices - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/92122/government-response-to-the-taylor-review-of-modern-working-practices)

that it would consult 'to explore the best way to improve clarity for those on the boundary between employment and self-employment, including options for legislative reform'. Unfortunately, in many situations whether an individual is employed or self-employed for the purposes of either employment law or tax law (including OPW/IR35 in the latter case) is not clear and we believe this should also be addressed as a priority.

3.22 Question 8. How successful will the draft Finance Bill proposals for earlier publication of information about promoters and avoidance schemes be in protecting individuals from being drawn into such schemes?

3.23 We very much welcome the government's continued commitment to clamping down on abusive tax arrangements. In terms of employment these principally involve 'disguised remuneration' (DR) schemes in the context of payments to workers, often those engaged via non-compliant umbrella companies. However, our concern is that many of these abusive arrangements are in fact little more than a sham. But more than that they often rely on misleading workers into believing that payments are 'fully taxed' when in fact they are not. While the new legislation will enable HMRC to name promoters, details of the way they promote tax avoidance, and the schemes they promote, at the earliest possible stage, to warn taxpayers of the risks and help those already involved to get out of avoidance⁹ we worry that ordinary taxpayers may simply not be aware that the non-compliant umbrella company they engage through is linked to a promoter that has been 'named and shamed'.

3.24 Additional matters

3.25 We would also take this opportunity to draw the attention of the Finance Bill Sub-Committee to three further matters in relation to the OPW rules.

3.26 Settlements with HMRC where status is incorrectly determined

We are concerned that tax already paid by a worker and his/her PSC is not being offset against tax due from a business where, following HMRC enquiry, it is determined that OPW/IR35 should have applied, ie where the original status determination was incorrect. This matter has been discussed at length with HMRC via the IR35 Forum and has also been the subject of correspondence with the Financial Secretary to the Treasury. We believe that HMRC have a statutory duty to 'make sure everyone pays the right amount of tax' pursuant to the HMRC Charter – and that this includes an obligation to ensure fairness in determining who pays what in OPW settlement cases. In our opinion, a legislative resolution is required to allow for tax already paid by the PSC/worker to be offset against tax assessed as due from the business. This would reflect the position that already applies where there is misclassification of workers in cases not involving PSCs¹⁰.

⁹ [New proposals to clamp down on promoters of tax avoidance - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

¹⁰ Regulation 72E of the PAYE Regulations – see, for example, explanation at [COG915260 - Compliance Operational Guidance - HMRC internal manual - GOV.UK \(www.gov.uk\)](http://www.gov.uk) and examples at [DMBM523298 - Debt Management and Banking Manual - HMRC internal manual - GOV.UK \(www.gov.uk\)](http://www.gov.uk).

3.27 Engagers taking 'reasonable care' – liability in settlement cases

Connected to the above point is a more fundamental issue as to who is liable in cases where the business has acted in good faith and taken 'reasonable care' in determining the employment status of a worker under the OPW/IR35 rules but, nevertheless, inadvertently gets it wrong. HMRC guidance presently indicates that, whilst penalties may be mitigated in this situation, liability nevertheless still rests with the business. However, our reading of the legislation is that, in common with the position that applies for non-PSC employment status cases, where a business acts in good faith and with reasonable care then liability moves to the worker in relation to whom the earnings are paid¹¹. We are in dialogue with HMRC on this matter and would welcome early clarification of the position.

3.28 PSCs/workers based abroad – relief for OPW/IR35 tax in the worker's home country

We understand that where PSCs/workers are based abroad but spend time in the UK working for a business here and OPW/IR35 applies there can be difficulty for the worker in obtaining tax relief in their home country for the UK PAYE deducted at source under the OPW rules. This is because the OPW rules 'deem' payments to the PSC as being as if they were being made to the worker, with a determination being needed as to whether the worker would/would not be an employee for UK tax purposes in these circumstances. Where they would be PAYE then applies. But in non-UK jurisdictions this 'deeming' will not generally be recognized and so there is a potential mismatch in the analysis such that, even where a tax treaty exists with the UK, it is unclear whether the home country will allow a credit for the UK tax against the tax payable by the worker in that country. Given that workers are often based abroad we think it would be helpful for businesses to have clarification on this matter as soon as possible.

22 November 2021

¹¹ Regulations 72 and 72A of the PAYE Regulations – see, for example, HMRC's internal guidance at [PAYE92060 - PAYE Manual - HMRC internal manual - GOV.UK \(www.gov.uk\)](#).