

## **Self Employed Workers in Building Industry – Experts Shock at Severity of HMRC Proposals**

### ***Accountants take the lead in lobbying Government on behalf of construction industry***

This summer the Treasury and HMRC jointly issued a consultative document provocatively entitled “False self-employed in construction: taxation of workers”. The consultation period is due to end on 12<sup>th</sup> October 2009 and Francis Clark, 2009 LexisNexis Best General Tax Practice along with associated construction tax specialist CIS Tax Advice Limited are leading a lobbying campaign on behalf of the construction industry in a bid to defend the rights of self-employed construction workers and those who contract them.

The effect of the issues covered by the consultative document will have a widespread effect on the construction industry if they are implemented. Some 300,000 construction workers around the UK would be affected, together with the businesses that contract them. Changes to the self-employed status of construction workers will mean more costs to them and to the construction industry as a whole at a time when it is universally acknowledged to be suffering under economic recession.

The motivation behind the production of the consultative document would appear to be the fact that HMRC has, in the last few years, lost a number of high profile cases where it has contended that certain workers in the construction industry were employees, but the Courts ruled against it and found that the workers were in fact self-employed.

The distinction between employed or self employed is important, as HMRC collects a lot more in terms of tax and national insurance where a worker is an employee.

The term “consultative document” could be seen as a little misleading, as the document makes it clear that the main decisions of principle have been settled. The consultative aspect appears to be limited to the fine detail of how to implement the government’s proposed solution to the problem of “false self employment”.

So first of all, what is “false self employment”?

There should really be no such thing. The law concerning whether or not a worker is self-employed has been established for a very long time, and where there has been a difference of opinion the Courts/employment tribunals have been asked to decide who was right, and who was wrong. Precedents and principles for guidance have been established in these contentious cases, and HMRC has won and lost cases by

applying precedents and established principles to the facts of the individual case, and accepting the outcome on a case-by-case basis.

Once either HMRC had agreed self employed status with the worker, or the Courts/tribunals had found that the worker was self employed, the worker would be genuinely self-employed in everyone's eyes, so what does the term "false self employment" actually mean? It would appear that "false self employment" refers to a situation where HMRC takes the view that the terms and conditions of a worker's engagement have been carefully arranged so that if the current case law is applied to it, the worker will be viewed as self employed, whilst in HMRC's view, the worker is really an employee, but HMRC is powerless to prevent the application of self employed status.

It appears from the consultative document that HMRC has become frustrated over a period of time with the existing system, and now wishes to 'move the goal posts' to give it a better chance of defeating arguments for self-employed status, and therefore generate increased tax revenues for the Treasury.

So what are the proposed "new rules"? The document suggests that there are three reliable indicators within the context of the construction industry, of a worker being in receipt of self-employment income. These are the provision by the worker of:

- a) Plant and equipment which is required for the job – this does not just mean traditional hand tools, but all major items.
- b) All materials required to complete a job.
- c) Other workers to carry out aspects of a job, but only where the worker is personally responsible for paying them.

If a worker can meet ANY ONE of these tests, he will be regarded as self-employed. These tests will be applied to each engagement undertaken by the worker, so that on one job he may be regarded as self-employed and on the next job he may be taxed as an employee.

Part of the argument put forward for the use of these key tests is that if any one of the tests were brought to a tribunal as evidence it would represent a "killer fact" that would almost inevitably lead to a status finding of self employment. It is difficult to follow the reasoning behind this argument. In recent status cases HMRC pursued arguments for groups of subcontractors to be reclassified as employees. In each case the status of almost all of these workers was held to be self employed. If the three "key tests" outlined above had been applied in these cases, every worker would have been treated as being in receipt of employment earnings. There appears therefore to be clear evidence that the three "key tests" proposed by the Treasury and HMRC are extraordinarily harsh compared to the well-established status tests that are applied in appeal cases.

Most surprising is that the new proposals totally ignore the concept of “control”. The courts have regarded “control” as a very important factor in deciding whether or not a person is self employed – indeed one of the most common reasons why a worker becomes self employed is a desire to be one’s own boss, and many cases have turned on the matter of whether or not a self employed worker has sufficient control over how and when a job is done to be regarded as genuinely self employed. The concept of control is however subject to degree and in proposing three tests, the government is avoiding any possibility of anything other than a “yes or no” response. Other EU countries, such as Germany, have introduced a similar system to what has been proposed, but crucially “control” has been included as one of the tests which gives a much fairer consideration of the working relationship and adheres much more closely to the main criteria established by the Courts over many years.

Confusingly, the new rules do not alter a worker’s actual status. These rules will “deem” any payments made to the worker as employment income and the income will be taxed accordingly, unless one or more of the “key tests” are met. “Deemed payments” will be liable to employees’ and employers’ national insurance.

**Dave Williams, managing director of CIS Tax Advice Limited and tax partner at Francis Clark, commented: “This will of course impact severely on a main contractor’s ability to trade profitably. Increased national insurance costs will remove a significant chunk of profit from a contract. Will the worker request more money to counter the effect of being unable to claim business expenses to offset against his earnings? What will the financial damage be to a business if HMRC applies these new rules to a large, previously self-employed workforce and charges penalties for failing to apply the new rules in addition to tax and national insurance?”**

**He added: “The Government does however state in the document that it recognises that the construction industry has been badly hit by the economic recession and it intends to introduce the new rules only when the industry is in a stronger position. Quite when that will be is anyone’s guess, but bearing in mind that the national press is now reporting on an almost daily basis that the UK is pulling out of recession, it may be sooner than expected.”**

Those involved in the construction industry and who are affected by the proposed measures can play an active role in the lobbying campaign by logging on at [www.cistaxadvice.com](http://www.cistaxadvice.com). **Said Mr. Williams: “The industry needs to make its voice heard if it hopes to sway opinion in Government and at the Treasury. If these measures go through unchecked the effect on the construction industry and the wider UK economy could be catastrophic.”**

So what can be done – is this the end of the self-employed construction industry worker? The answer is an emphatic “NO”! Assuming that the proposals are passed without change, it will be possible for a contractor to continue to engage a self

employed workforce, but the terms, conditions and working practices which apply to the engagement will have to be examined very carefully to ensure that an application of the new rules will result in a finding of self employment. There is no doubt, however, that if the proposals are passed without change, then a significant number of subcontractors WILL be caught .

Contractors MUST NOT think that because they have undertaken a review of working practices in the past and had a strong self employed contract put in place, they will be immune from the effect of the new rules. The new rules are exactly that – new – and provided that contractors take action quickly, problems and large, unexpected tax demands may be avoided.

More information is available by logging on at [www.cistaxadvice.com](http://www.cistaxadvice.com) or by calling 0207 205 5013.

Ends

29<sup>th</sup> September 2009.