



The Law Society

Arrangements made by intermediaries

Response of the Law Society of England and Wales

February 2013



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Comments of the Income Tax Sub-Committee of the Law Society of England and Wales

Introduction

1. The Law Society is the representative body for over 166,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others.
2. We are pleased to have the opportunity to respond to the draft Finance Bill clause amending the intermediaries rules in Chapter 8 of Part 2 of ITEPA 2003 (the Draft Clause).
3. This response has been prepared on behalf of the Law Society by members of the Income Tax Sub-Committee. The Sub-Committee is made up of senior and specialist tax lawyers from across the country.

General Comments

4. We understand the political pressure which has motivated the Government's proposed amendment to the intermediaries rules ("IR35") set out in the Draft Clause. As a general comment, we anticipate that businesses which receive the services of individuals through intermediaries will appreciate the restraint shown in preserving the principle that IR35 should impose tax and compliance burdens on the intermediary, rather than the end-user of the services.
5. The proposed new clause 49(1)(c) appears to align the income tax position with the National Insurance position, so that (i) a non-executive director and (ii) a director who artificially divides the services he provides between the holding of an office and the provision of executive services will always fall within IR35.
6. However, the proposed new clause 49(1)(c)(ii) seems to go further than this, in applying IR35 to all services provided through an intermediary where the individual involved holds an office with the ultimate client and the services "relate to" the office.
7. The use of the (undefined) phrase "relate to" in the second sub-clause is ambiguous. This is likely to cause uncertainty in cases where directors of companies (engaged directly and properly remunerated with tax collected through payroll in the usual way) are asked to provide additional services and choose to do so through an intermediary. For example, non-executive directors occasionally provide consultancy services in relation to particular projects, in circumstances where third party service providers have also been considered; while in that example it is anticipated that the services will not "relate to" the office, it will be difficult for advisers to give unqualified advice on the point. There is therefore potential for a greater number of situations than ought to be the case being directed into the IR35 regime. We would note that we believe the purpose of these changes is to bring IR35 and NI into line as regards directors. The NI provisions are to be found in Regulation 6 of the Social Security Contributions (Intermediaries) Regulations (SI2000/727) which reads:

- "6-(1) These Regulations apply where—
- (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services [for another person] ("the client"),
 - (b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and
 - (c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed earner's employment by the client.
- (2) Paragraph (1)(b) has effect irrespective of whether or not—
- (a) there exists a contract between the client and the worker, or
 - (b) the worker is the holder of an office with the client."

8. We believe the amendment we suggest below would achieve the result that NI and IR35 are broadly in line. Otherwise the system will go from a position where the NI intermediaries provisions are broader than IR35 to the reverse.

9. We suggest that the ambiguity is resolved by amending the Draft Clause so that 49(1)(c)(ii) reads along the following lines:

(ii) the worker is an office-holder who holds that office under the client and it is reasonable to assume that, if the services were not provided under arrangements involving an intermediary, they would be provided under or pursuant to that office.

Contact details:

If you have any questions concerning these representations or would like to discuss anything contained in them, please contact the Chair of the Income Tax Sub-committee Mr Richard Stratton (tel: 020 7295 3219, email: richard.stratton@traverssmith.com).