



Association of Accounting Technicians response to Employment intermediaries and tax relief for travel and subsistence

Association of Accounting Technicians response to Employment intermediaries and tax relief for travel and subsistence

1. Introduction

- 1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to the consultation paper on Employment intermediaries and tax relief for travel and subsistence, released on 8 July 2015 (condoc).
- 1.2. AAT is submitting this response on behalf of our membership and from the wider public benefit of achieving sound and effective administration of taxes.
- 1.3. AAT has added comment in order to add value or highlight aspects that need to be considered further.
- 1.4. AAT has focussed on the operational elements of the proposals and has provided opinion on the practicalities in implementing the measures outlined.
- 1.5. Furthermore, the comments reflect the potential impact that the proposed changes would have on SMEs and micro-entities, many of which employ AAT members or would be represented by our operationally skilled members in practice.

2. Executive summary

- 2.1. AAT notes that the government is proposing (para 1, page 11, condoc) to remove tax relief for ordinary commuting (in general, home-to-work travel and subsistence expenses) for workers who are:
 - 2.1.1. supplying personal services
 - 2.1.2. engaged through an employment intermediary (including umbrella companies, certain employment businesses and personal service companies); and
 - 2.1.3. subject to (or to the right of) the supervision, direction or control of any person.
- 2.2. AAT also notes that, "The effect of this will be that individuals whose relationship with their engager is such that they look and act like employees, cannot claim relief on the everyday cost of travelling to work, when employed through an intermediary. This will ensure a level playing field for access to tax relief for travel and subsistence" (paragraph 2, page 11, condoc).
- 2.3. AAT is of the opinion that the problem should be approached from the perspective that an individual is, or is not, an employee in respect of tax and employment law (4.5, below).
- 2.4. AAT believes that the proposal will not meet the requirement outlined in the Foreword (para, 4, page 4, condoc) of "ensuring fairness within the tax system" (4.11, below). Therefore, AAT recommends that HMRC defer this consultation until the Intermediaries Legislation (IR35) has been concluded as the outcomes may resolve many of the issues identified in this consultation document (5.6, below).

3. Initial observations and additional comments not covered by the consultation questions

- 3.1. AAT fully supports any attempts to clarify the rules and ensure only those entitled to relief for personally incurred costs receive that relief. AAT notes, however, the proposals contained within the consultation document clearly do not present anything fundamentally different to the criteria that currently exist and are contained within HMRC booklet 490 Employee travel - A tax and NICs guide for employers¹.
- 3.2. While being supportive of the aim AAT does have a number of concerns with the proposals contained within the condoc. For instance; the numerous references to employment-businesses when the condoc is actually commenting upon temporary workers without employment contracts.
- 3.3. Similarly, it should be noted that umbrella billing and payment facilities do not engage employed labour. The workers concerned are the same as temporary workers who do not have employment contracts.
- 3.4. Furthermore, those who operate through Personal Service Companies (PSCs) are in the same position as temporary and umbrella workers in that there is an absence of an employment contract.
- 3.5. Such arrangements are not employment businesses, they supply labour, specialised resources and, as such, their engagement is more akin to the purchasing of goods and services than any form of employment.
- 3.6. Mindful of the observations made in 3.2– 3.5 (above) AAT considers that the consultation is concerned with the supply of labour rather than employment.
- 3.7. AAT is concerned that the consultation is seeking to place workers who supply their skills, both specialised and routine, through an agency, umbrella company or PSC in the same position as those on full employment contracts, who enjoy all of the benefits associated with being employed.
- 3.8. AAT is disappointed that there is nothing within the condoc that seeks to address the move by would-be-employers to encourage those who would otherwise be employees to enter into non-employment arrangements for the specific purpose of cutting costs. AAT considers that this, ultimately, is the root cause of the problem that the condoc is seeking to address.
- 3.9. Furthermore, the proposals fail to tackle the issue faced by workers of often finding themselves classified as employed for the purposes of PAYE but not employed for the purposes of the Employment Rights Act 1996. This creates the same situation as referred to in 3.7 (above). The result is that such workers suffer the same level of deductions as an employee but denied the benefits an employee would enjoy.
- 3.10. AAT remains to be convinced that transferring the responsibility for determining the application of these new rules for deductions to be applied presumably in a similar manner to the construction Industry Scheme (CIS) withholding tax, to the engager will address the real issue.
- 3.11. Indeed, in various guises CIS has been around for many decades and yet it still does not seem to work properly for sub-contractors. These workers receive their income net of deductions made but often without the required documentation being issued and then struggle to obtain the refund of tax that they are so often due at the end of the related tax year.

¹ [Booklet 490](#)

- 3.12. It is AAT's view that a robust mandatory status check and a statutory right to employment, should the status indicator deem an arrangement to be employment could address the issues that are the subject matter of this consultation. Sadly, there appears to be nothing within the condoc along such lines.
- 3.13. The employment status tool and the rules it uses have been around for some time and generally follow the principles highlighted in the Hall v Lorimer case of 1994. Engagers are supposed to assess external contracts using the rules originally laid down in this case and yet consistently fail to do so, often leaving the specialist contractor to deal with any challenges from HMRC. AAT is unconvinced that these new proposals will result in any significant changes to this situation.
- 3.14. AAT fully supports the principal that for tax relief to be granted in respect of travel and subsistence costs it should depend, largely, on an assessment of the supervision and control exercised over an external resource. Such an approach has been the mainstay of status checks for many years and it would seem appropriate that it continues to form the basis of assessment into the future.
- 3.15. The status of an individual worker (4.3, below) is determined by a variety of factors, none of which can be taken in isolation. Instead when they are viewed together they allow both engager and specialist to determine if an individual is employed or self-employed and subject to the separate rules which determine the existence of a non-employed but temporary worker.
- 3.16. Leaving the status checks to unchanged, places an external specialist in the position of being classed as an external, non-employed person and hence denied access to rights and privileges as afforded to employed persons and temporary workers, yet subject to costly deductions on travel and subsistence costs incurred as though they were employed.
- 3.17. There also appears to be an intention to exclude tax relief for travel and subsistence where IR35 rules apply, para 1-3 page 16 (condoc), even if a worker satisfies the control and supervision test as set out in the condoc.
- 3.18. AAT believes the situation, set out in 3.17 above, to be grossly unfair and would prefer there to be one set of rules to apply consistently to determine the treatment of a worker.
- 3.19. Such an approach would mean a worker is either employed, a temporary worker or an external contractor for all purposes and not a mixture depending on the purpose of the check.
- 3.20. AAT is concerned that what is being proposed will result in engagers and workers applying different tax rules to payments depending on the assessment of the individual contract, possibly even with the same engager.
- 3.21. To apply the different rules, as indicated in paragraph 3.20 above, in such a variety of circumstances merely confuses the whole issue and will lead to error and omission. A single determination and statutory requirement to carry out proper checks will result in a single set of rules which will be clearer and easier to comply with.

4. AAT response to the consultation paper on Employment intermediaries and tax relief for travel and subsistence

- 4.1. The following paragraphs outline AAT's response to the proposals outlined in the consultation paper. Only those questions where AAT has a comment to make have been listed.

Question 1: Do you agree that the structure of the proposed legislative changes will achieve the policy objectives?

- 4.2. In general AAT is of the view that the proposals could work as intended. However given that the aim of the proposals², to restrict tax and NIC relief on travel and subsistence to those workers who genuinely trade their services and expertise, but picking out just one part of the status checks, that of supervision, control and direction, making this the sole measure of compliance will not facilitate a clear and unambiguous process for engagers and workers to follow.
- 4.3. The generally held view is that determination of a worker's status should be made on a much wider set of criteria and this was confirmed in the opinion laid down in Hall v Lorimer 1994³. AAT is of the opinion that such criteria and a system of stringent monitoring and checking by HMRC will be much more effective than relying simply on the supervision, direction and control criteria as set out in the "Proposal Overview" (Part 3, page 11, condoc).
- 4.4. A worker who satisfies the whole set of requirements of being in business who is subject to no, or minimal, supervision and control and supplies own equipment and tools as well as being clearly and openly separate from the engager's employed workforce both at the start of the engagement and at all times during it, should be more entitled to the same tax relief on costs as a person who satisfies only the supervision, control and direction rule.
- 4.5. AAT believes that a single set of criteria for all purposes, as is currently used to determine employment status, is the most appropriate way of determining a worker's status. If an arrangement fails the selection of tests within the status indicator tool resulting in an indication that an individual is an employee then the engager should be required to employ that person.
- 4.6. AAT is concerned that the current proposals fail to address the problem of a worker's status and instead address a much narrower requirement for the restriction of tax relief, which in our opinion should not be dealt with in isolation.
- 4.7. For example, example 2 on page 15 (condoc) describes a person engaged in a temporary capacity, whose working arrangement fails the supervision and control test and therefore would be denied tax relief on the travel and subsistence costs incurred personally. While AAT agrees with this assessment, the condoc proposals fail to tackle the fact that the engaging authority should be required to justify why it deems it necessary to keep this person as an external worker when they are in fact treating them no differently to their employees.
- 4.8. It seems unreasonable that if an arrangement fails the employment status checks, for supervision, integration and workplace reasons, then the person involved will face identical tax and NI deductions to an employee and yet be denied access to the employment benefits enjoyed by the ordinary employees.
- 4.9. Of greater concern is the fact that this one item is being taken out of context in advance of a full consultation on IR35 which is not expected until 2016.

² Paragraph 1 and 2, page 11, condoc

³ <http://www.hmrc.gov.uk/manuals/esmmanual/esm7160.htm>

- 4.10. In response AAT would prefer to see legislation which goes further than that which has been proposed in order to make the type of engagement clear and unambiguous. It should specify what each of the three types of provision of service mean and ensure a worker is treated as one of these. It would mean that those working under close supervision are denied tax relief but gain the benefits of being an employed or a temporary worker.
- 4.11. In summary, the proposal will not meet the requirement outlined in the Foreword (para, 4, page 4, condoc) of “ensuring fairness within the tax system” as it takes too narrow a view in focussing on the impact on tax revenue, rather than the holistic approach that is required to resolve the cause of the issue, which is employment status.

Question 2: Will there be any consequential difficulties in administrating each engagement as a separate employment?

- 4.12. AAT's is concerned by the reference in the question to “each engagement as a separate employment”. If an engagement is deemed to be employment then why not make it mandatory for the engager to take the person on as an employee as such an action removes the problem of tax relief immediately.
- 4.13. AAT believes that if the proposals are taken forward as they are, then an engager would be able to continue to avoid the employment route, and yet leave the contractor to declare that they have to submit to PAYE levels of deductions of income tax and NICs, and/or be denied relief for costs incurred in travel and subsistence. Overall the position ought to be that an engagement is either employment or it is not, and as a result a worker should not be declared employed for the purposes of tax and NI but not for employes purposes.
- 4.14. Undoubtedly there will be practical difficulties, particularly since the arrangement has to be assessed in different ways for different purposes. In order to determine if the contract is one of service or for services the full criteria of status has to be used. If as a consequence of using the ESI tool the engager and worker successfully determine that this is a contract for services they then have to reassess it to determine if the travel and subsistence costs will be tax deductible or not.
- 4.15. AAT is of the opinion that there will be an unnecessary and costly administrative burden for all parties concerned if the proposals are taken forward that the assessment will be on a worker-by-worker and contract-by-contract basis.
- 4.16. Furthermore, many engagers will continue to seek to avoid the whole issue in case they might be found to be the employers of the worker and workers will find their trading status compromised by these mixed status decisions.
- 4.17. Inevitably many who are truly trading will be affected by the proposed new rules, a situation that could be avoided if engagers were made to follow strict procedures when engaging a worker. HMRC and the DWP should give specific and enforceable rulings on the status of individual contracts. By doing so many of those in pseudo self-employment arrangements could be forced into full employment. Indeed, they should be classed as such, preventing their engagers avoiding the normal costs associated with employment in such cases.
- 4.18. Such a system would have the benefit of leaving many genuine trading structures in place that should be permitted to enjoy the status of business activity which compensates for them being denied the benefits of employment.

Question 3: Are there any particular professions who will be significantly affected by these proposals?

- 4.19. AAT does not see any particular profession being affected unnecessarily and unduly by these proposals. While there could be a potential issue for some of our self-employed members who provide bookkeeping services to their clients; an engagement which often involves significant involvement with their clients and requires them to work alongside their client's employees. However AAT is confident that it can provide the necessary guidance to them in order that they can make the correct judgements as to their true status.
- 4.20. It is inevitable also that true contracting, unsupervised specialists will be affected by the proposals in that they will be required to complete numerous assessments in order to first establish and then preserve their true status. AAT does consider, however, that there are considerable advantages to the proposals which, if AAT's members and those contracting in this way, use correctly will help towards a better contractual relationship.
- 4.21. By implementing a mandatory supervision, direction and control statement which is required by the engager true contracting individuals will have greater certainty in their trading. This is implied in the condoc at the Transfer of Liability section, Options 1 and 2. This is particularly important considering the fact that our members report engagers consistently failing to complete the ESI tool assessment as part of the engagement process, despite it being required by HMRC.
- 4.22. The existence of the variety of employment and contracting arrangements will mean that those acting through agencies and umbrella company structures may mask the existence of true specialists who carry out work for clients on a completely unsupervised and uncontrolled manner. Such contractors will always use their extensive skills and expertise to aid clients to change process, identify problem areas, install infrastructure and systems which are needed and they will very rarely be controlled, except in terms of the agreed deliverables. Since the client lacks such specialist skills it is always clear that it is those skills which are being engaged and not the person.
- 4.23. Through a requirement for the engager to make a mandatory statement that describes and specifies the degree of supervision and control being exercised and insisting this be a part of the engagement agreement, such specialists will retain their business structure and will pass the tests necessary to retain relief for costs. This will be self-evident both on paper and in practice.
- 4.24. AAT considers that such workers may derive considerable benefit from the new rules as long as they are mandatory on the engager and enforced properly by HMRC. The risk is that many engagers seeking to preserve the situation where they can continue to avoid employing workers will simply write in a non-supervision clause to maintain their position.
- 4.25. It is clear that such engagers will become liable for the full cost of any relief obtained; however this will only happen if the requirement for a supervision declaration is mandatory and it is enforced by a robust regime of compliance checking. If this does not happen then very little will change and all external workers will continue to suffer.

Question 4: Will these changes result in a significant shift in the way those affected are employed? If so, what would this shift be and what would be the impact for the workers concerned?

- 4.26. AAT cannot see anything within the proposals which will have a significant effect on the employment of individuals. Those engagers wishing to avoid the costs of true employment will not be affected. They will see that HMRC are seeking restitution, through either the deemed employment calculation or restriction of tax relief, from the individual and not the engager who will remain insulated from any costs.

- 4.27. It is likely that many public and private sector organisations will see this as a further opportunity for engineering the avoidance of employment costs by moving more workers outside the business knowing that it is the worker who will be targeted by HMRC. The engager and former employer will only change their behaviour if HMRC targets them on the basis that it can be found that the employer has made a false declaration concerning supervision.
- 4.28. As observed earlier in our response (3.12, above) it is AAT's view that if a mandatory robust status check was introduced many of the problematic engagements which HMRC is seeking to deal with in this this consultation document would no longer exist.
- 4.29. Furthermore, many workers who are in the predicament of not being employed, nor being a temporary worker and not knowing how to run a proper business would find themselves being employed or being engaged through an agency as a temporary worker.
- 4.30. Those who have specialist skills that can only be delivered through a business structure will remain outside the employment and temporary worker categories, which is appropriate to their circumstances.
- 4.31. Furthermore, many formerly non-compliant arrangements would therefore become compliant as a consequence and HMRC may be in a better position to see that tax reliefs are more appropriately given.

Question 5: Would the definition of employment intermediary as proposed cause any practical difficulties? Please provide details and examples.

- 4.32. AAT does not consider a PSC to be an employment intermediary. Most workers who offer their specialist skills and knowledge via PSCs are not and never would be employed because, for example, of age discrimination⁴.
- 4.33. All agencies and umbrella businesses are clearly employment intermediaries and ought to be applying the correct PAYE rules to payments as required. AAT encourages HMRC to undertake compliance checking of such organisations to ensure that they do so in all cases.
- 4.34. If a PSC is classified as an employment intermediary it immediately challenges the true status of the business. Throughout this consultation exercise there are references to employment status and the employment status manual. The employment status manual, however, determines only the tax status of an individual worker and seeks to apply some form of PAYE to persons' payments, it does not determine their true employment status and AAT believes this ought to change⁵.
- 4.35. AAT proposes that the ESI tool should be enhanced and strengthened, and have DWP input. AAT also considers that it should be a mandatory requirement for an engager to complete the tool and issue an employment contract to a person where the status tool determines their arrangement to be one of employment and not self-employment. The current rules mean a person can be subjected to PAYE deductions without enjoying the employment rights they ought to have as a consequence of the classification.

⁴ Article - [Does Age Discrimination in Employment Exist?](#)

⁵ <http://www.hmrc.gov.uk/manuals/esmmanual/ESM2029.htm>

Question 6: Do you agree with the definition of the terms supervision, direction and control and will these definitions cause any practical or commercial difficulties? If so, what will these difficulties be?

- 4.36. The definitions shown are acceptable to AAT. They define quite specifically the types of supervision and control AAT would expect and mirror the tests applied in the employment status tool and therefore satisfies our requirement for consistency in compliance.
- 4.37. The proposed criteria for retaining tax relief for travel and subsistence payments is, however, inconsistent with the employment status indicator tool checks, which looks at the wider context of running a business and is more realistic for determining the arrangements which should retain the tax relief.
- 4.38. AAT is satisfied with the proposal that the control, supervision and direction test will apply to the specific contract. AAT is, however, disappointed that there appears to be no specific requirement for engagers to make any statement regarding this. AAT recommends that a statement regarding supervision, direction and control be made a statutory requirement of engagers.
- 4.39. Engagers should also be required to keep a statement covering the reasons why they are not employing the individual.

Question 7: Which option for a transfer of liability would work best to ensure future compliance, Option 1 or 2?

- 4.40. AAT considers that Option 2 best fulfils the requirement, but only if HMRC subsequently enforces the requirement.
- 4.41. Any failure by HMRC to enforce compliance will simply allow engagers and intermediaries to escape liability knowing that the worker is likely to be the one who faces the challenge, penalty and interest for restitution.
- 4.42. It is AATs opinion that the control, supervision and direction statement has to be a statutory requirement in any situation where the engager is hiring a worker but not under an employment contract, nor as a temporary worker where it is clear that the agency will apply PAYE to the worker's payments.
- 4.43. AAT considers that it should be mandatory for engagers to go through a status check as part of the engagement process and that the status tool be endorsed and policed jointly by HMRC and DWP in order to ensure that employment decisions are implemented by the engager if that is the determination of the checks.
- 4.44. The above would mean only a small proportion of engagements will require the more involved checks as required by these proposals and it will make it much easier to ensure compliance is enforced.
- 4.45. AAT believes that the proposals contained in the condoc should go further and any evidence of false control assessments by an engager should render them liable to a lot more than just the income tax and NIC which should have been due. The engager should face the full weight of compliance attention as a consequence of giving a false statement.

5. Conclusion

- 5.1. AAT believes that the proposal will not meet the requirement outlined in the Foreword (para, 4, page 4, condoc) of “ensuring fairness within the tax system” (4.11, above).
- 5.2. AAT is of the opinion that the problem should be approached from the perspective that an individual is, or is not, an employee in respect of tax and employment law (4.5, above).
- 5.3. Therefore, AAT recommends that HMRC defer this consultation until the Intermediaries Legislation (IR35) has been concluded as the outcomes may resolve many of the issues identified in this consultation document (4.5, above).
- 5.4. There is a clear link between applying more stringent tests when determining that a business has a right to tax relief (4.37, above), the requirement for a definitive supervision statement from engagers (4.2, above) and the transfer of liability (4.40, above) where an abuse has been detected.
- 5.5. As observed in (3.13, 3.18 and 4.5, above) taking the supervision criteria out of context from the whole range of status checks adds complexity and cost to the whole process of obtaining specialist resources and leaves engagers and contractors with extra checks and controls to manage, none of which give any real benefit to the business transaction.
- 5.6. AAT is concerned that the condoc proposals fail to acknowledge the abuse of the employment process by many engagers⁶, which is prevalent in the engagement process and shows itself in the predominance of comments regarding agencies and umbrella companies within the condoc (4.26, above).
- 5.7. AAT is of the opinion that if the proposals were to be changed in order to provide for the introduction of a statutory employment test, set, managed and enforced by HMRC and DWP together, with engagers having to justify their decision not to employ an individual then all of the problematic engagements would become either employment or agency worker arrangements⁷. It would leave real businesses to trade in the manner that befits their position and advisers to work for them in the proper manner.

6. About AAT

- 6.1. AAT is a professional accountancy body with over 49,300 full and fellow members⁸ and 76,400 student and affiliate members worldwide. Of the full and fellow members, there are over 4,100 members in practice who provide accountancy and taxation services to individuals, not-for-profit organisations and the full range of business types.
- 6.2. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

⁶ Article - [Should I hire employees or self-employed staff?](#)

⁷ Paragraphs 4 and 5, page 8 condoc

⁸ Figures correct as at 30 June 2015

7. Further information

If you have any questions or would like to discuss any of the points in more detail then please contact AAT at:

email: consultation@aat.org.uk and aat@palmerco.co.uk

telephone: 020 7397 3088

Aleem Islam
Association of Accounting Technicians
140 Aldersgate Street
London
EC1A 4HY