

TAXREP 21/03

TAX LAW REWRITE: DRAFT PAYE REGULATIONS AS AT 16 APRIL 2003

Memorandum submitted in July 2003 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to an invitation to comment issued in April 2003 by the Revenue

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A Introduction

1. We welcome the opportunity to comment on the full Draft Income Tax (Pay As You Earn) Regulations 1-190 published on 16 April. We note that you expect to revise the draft regulations in the light of consultation, your further work and changes made in the normal course of the continuing development of the PAYE system; in particular, any introduction of new rights of appeal against directions under Regulations 42 and 49 of SI 1993/744 and having regard to current consultation on the detailed terms of regulations for e-filing by employers and others. We note also that changes in the powers for PAYE regulations in the Finance Bill have been anticipated for illustrative purposes, and we agree that it is appropriate to assume for the purposes of the draft Regulations that the primary legislation will be modernised in this way.
2. The Changes proposed are mostly based on bringing the legislation into line with practice, and we support this approach in the context of rewriting Regulations whose practicality is of primary importance.
3. We have previously responded to the related 2nd-7th Progress Reports, issued during the period April 2002 – January 2003. Our responses were published as TAXREP 20/02 (July 2002), TAXREP 27/02 (October 2002), TAXREP 31/02 (November 2002), TAXREP 34/02 (December 2002), TAXREP 3/03 (February 2003) and TAXREP 4/03 (February 2003).

B General comments

4. We have not previously seen Regulations 1-12 in Part 1 (Introduction). Having now reviewed them, we confirm that we are content with the Part 1 structure.
5. As regards the use of the term ‘relevant payments’, its lack of colour and obvious meaning is arguably offset by the requirement which it places on the reader to focus upon what it does mean. The supporting definitions in Regulations 3 and 4 clearly explain this in adequate detail to the user of the Regulations. We note the alternative approach commented upon in Commentary 77; but the perceived benefit identified in Commentary 78 does not appear to justify the additional complication involved in the Regulations and the adopting of such a significantly different approach. We are inclined to retain the term ‘relevant payments’. With usage, readers can be expected to become familiar with its meaning.
6. We support the approach adopted in Regulation 9, in Table 1, of aggregating payments within the relevant ‘payment interval’ and then comparing this aggregate with a ‘PAYE threshold’ calculated for the interval, as clarifying the decision for an employer whether a relevant payment takes an employee over the threshold at which the employer must start deducting tax under PAYE.
7. We also support the drafting of Regulations 10-12, clarifying how the Regulations apply to payers and payees other than employers and employees (Change 7). The changes involved appear necessary and sensible, and reflect existing practice in certain respects; even though they may restrict argument as to the obligations of payers and payees under the Regulations which might otherwise arise. Change 8 also appears appropriate, placing a new obligation on all agencies to issue Forms P45, on the clear basis now set out in Regulation 10(2).
8. We are also content with the structure of Parts 2 and 3, and the distinguishing of the Forms P45 and P46 procedure for pensions in Chapter 3 of the latter.
9. We are content with the structure of Part 4, now divided into three Chapters; but essentially little changed from that in SC/CC(02)11 – Annex B. We support the rearrangement of the material in Regulations 46 and 46B SC/CC(02)11 into draft Regulations 77-80 in Chapter 2. We note that Regulation 60 will remain in Part 3, Chapter 4. We also note that Regulation 46ZB SC/CC(02)11 (Methods of providing information) is now absorbed into draft Regulations 185 (Information to be sent in form provided or approved by the Board) and 183 (Information which may be sent to the Inland Revenue electronically); and that Regulations X and XX in SC/CC (02)11 are now replaced by Regulations 187 (Certificate that sum due) and 188 (Payment by cheque). It is appropriate to now locate Regulations 183, 185, 187 and 188 in Part 10 (Supplementary provisions).
10. The transitional provisions concerning the Fixed Profit Car Scheme, interest on unpaid tax up to 1991-92 and interest on overpaid tax, years 1992-93 to 1995-96, are also now neatly dealt with respectively in paragraphs 2, 3 and 4 of Schedule 1.

11. Generally, the drafting of the Regulations first contained in Paper SC/CC(02)11 has been improved in the context of the further work on them and consultation since July 2002.
12. We note that the regulations in Chapter 1 of SC/CC(03)1 (death of Employer and Succession) are now relocated as Regulations 91-93 in Part 5 (Employers), and that the PSA regulations contained in SC/CC(02)16 are now shown separately as Part 6 (PAYE Settlement Agreements). We agree the proposal to refer now in Part 6 to PAYE settlement agreements as 'PSAs', as they are commonly referred to.
13. With reference to Commentary 706-709, we consider that it is preferable not to amalgamate the three basic rate systems for Councillors' allowances, Reserve forces and Holiday Pay funds and we accordingly support the inclusion of these regulations in the separate Chapters 1-3 of Part 7 (Special Cases). We note that Part 7 also now includes Chapter 4 Direct Collection, the regulations comprising which were originally issued in SC/CC(02)24.
14. We agree the Part 7 approach of applying Chapter 1 (Councillors' Allowances) to all the allowances paid to councillors for attendance exclusive of travelling, subsistence and other expenses. Will it be sufficiently apparent from the Regulation 107(1) definition of 'allowances', as drafted, that only the attendance part of an allowance is subject to the Part 7 provisions; or (as we suggested in TAXREP 4/03 C – 12) does some more overt statement, drawing specific attention to this, need to be included in Regulation 107? We note from Commentary 717 that in practice, if Regulation 107 is adopted as drafted, any expenses payments which are in fact taxable will in practice be left for the form P11D to pick up. This would appear to be a more practical approach than the alternative noted in Commentary 718 which, although technically more correct, would oblige all expenses payments involved to be dealt with appropriately as such (involving more work for the employer, but to the same end tax effect).
15. As regards Part 8 (Social Security Benefits) in our TAXREP 34/02 response we expressed support for the approach taken in the draft regulations SC/CC(02)21, including the reorganisation of material involved and the changes to language. We agreed that it is appropriate to recast the Jobseeker's Allowance (JSA) provisions in terms which match the legislation dealing with entitlement to JSA, the existing PAYE regulations having been introduced for unemployment benefit, and we also agreed the separation of JSA normal cases (now Part 8, Chapter 1) from JSA special cases where there is no need to maintain cumulative records (now Part 8, Chapter 2). We noted that it is an improvement to distinguish the Incapacity Benefit (IB) provisions (now in Part 8, Chapter 3). We agreed the inclusion of the provisions for payments of taxable income support, having agreed to existing practice, now in Part 8, Chapter 4. This structure remains, in Part 8, and our above views accordingly stand.
16. We agree the inclusion of Regulation 168 (Death of claimant) as a separate regulation in Part 8 Chapter 3, for the reasons set out in Commentary 976 and 977.
17. 12. We have not previously seen drafts of Regulations 176-184 in Part 10 (Supplementary Provisions), which refer to electronic communications. Regulations 176-182 rewrite original regulations introduced only in recent years and a

consideration of the rewriting of them reveals an omission to address employers' proper concern with the effectiveness of such communication, as indicated in our comments on Regulations 177, 178 and 182 in Section C of this response.

18. We find the tabular approach in Regulation 183 (Information which may be sent to the Inland Revenue electronically) and the references to the names of the paper forms helpful, albeit there are currently two instances only in respect of the regulations listed where information cannot be sent electronically. In practice this Regulation will also need to be kept under review in order to maintain its currency; but that ought not to prove difficult.
19. The new Regulation 184 (Modifications for electronic version of Form P160) modifies Regulation 48(4) for the purposes of the electronic version of form P160 in a way which does not obviously reveal its contents; but it does clearly indicate the necessary changes to the information required under Regulation 48(4). An alternative, and perhaps more useful to the reader, would be to restate the Regulation 48(4) requirements in full for the electronic version of Form P160 in Regulation 184(2) itself; but we hold no strong view on this.

C Specific comments

Regulation 3 (Net PAYE income)

20. For the sake of consistency should the same wording be employed in Regulation 3(1) (b) and in the second paragraph of Regulation 3(2), whether ‘allowable donations to charity’ or ‘allowable charitable donations’?

Regulation 4(2) (Relevant payments)

21. Part (b) of the definition of ‘excluded relocation expenses’ is somewhat cumbersome and not easy to understand. The intention is to exclude taxable relocation expenses payments in excess of the s 287 Income Tax (Earnings and Pensions) Act 2003 exemption limit, as regards the employee in question, from being ‘relevant payments’ so that the employer does not have to attempt to identify the extent to which such payments will fall outside the s 287 exemption. Would it be simpler for the purposes of Regulation 4 to exclude all removal benefits and expenses within the meaning of s 272 Income Tax (Earnings and Pensions) Act 2003, rather than try to target in part (b) of the definition the taxable payments in excess of the payments falling within the exemption?

Regulation 7 (Meaning of ‘code’ etc)

22. The Regulation 2 of SI 1993/744 definition of ‘code’ refers to ‘... any designation ... by numbers and letters, alone or in combination’, permitting a combination of numbers and letters; whereas Regulation 7(1)(a) refers to ‘a combination of letters *or* numbers’ (our italics) which strictly does not permit a combination of numbers and letters. Is this intended?

Regulation 29 (PAYE income paid after employment ceased)

23. In Regulation 29(5) a time limit should be specified within which the employee should be notified of the Regulation 29(4) information.

Regulation 38 (Information to be provided on Form P46 if code not known)

24. Would it be appropriate to now explicitly require the employer to prepare the Form P46 at the start of the employment (similarly Regulation 51)? Commentary 342 indicates that this is what is intended, as being in line with present practice; but Regulation 38 as drafted enables the employer in practice to complete the Form P46 at any time up to its despatch to the Inland Revenue under Regulation 38(4). It can, of course, be argued that such a longer permissible timescale is preferable and more employer-friendly whilst still consistent with the effective operation of the PAYE system; so that we hold no strong view on this.

Regulation 57(10) (Trade disputes)

25. In view of its fundamental relevance, there is a case for setting out the s 35(1) Jobseekers Act 1995 definition of ‘trade dispute’ in full, rather than obliging the reader to find it in the other Act which may well not be readily to hand. The definition is quite lengthy, but it is not of an inordinate length for inclusion in the Regulation itself.

Regulation 62 (Quarterly tax periods)

26. The drafting of Regulation 62 is an improvement on Regulation 40A SC/CC(02)11; albeit the formula in Regulation 62(2) is superficially intimidating.

Regulation 63 (Modification of regulation 61 in case of trade dispute)

27. As drafted, this is not a readily comprehensible regulation without recourse to the Commentary. In Regulation 63(2)(b) should there be a comma after B, to make clear that P is deducted from the net A – B amount and not solely from B? As drafted, ‘B reduced by P’ could be read as meaning the latter.
28. Similar comments apply to Regulation 63(3)(b), with a comma again suggested after B.

Regulation 84 (Termination awards: return if more than one employer)

29. In TAXREP 27/02 C – 21, where more than one employer is involved, we enquired what rights one employer had to obtain necessary information from the other. The Commentary does not address this aspect.

Regulation 90 (Tips: special arrangements)

30. For the purpose of emphasis, in Regulation 90(5)(b) we suggest insert ‘before the principal employer pays any tips to T’ at the start of (b) to ensure that it is entirely clear that, before releasing any payments to T, the principal employer must be provided with the necessary details concerning the employee recipients to enable him to operate PAYE. The principal employer could not of course comply with Regulation 90(5)(c) unless T first complies with his obligation to the principal employer under Regulation 90(5)(b); but it would be clearer to emphasise this requirement by the inclusion of the above introductory words in Regulation 90(5)(b).

Regulation 91 (Death of employer)

31. We note that draft Regulation 91 (Death of employer) now replaces draft Regulations 79 and 79A of SC/CC(03)1. We also note that Regulation 91(2) now makes the principal liable to the extent that the deceased agent has not applied PAYE to relevant payments made by the deceased agent before the agent’s death (Change 86). Where a person succeeds an employer, this differs from Regulation 79A(2) SC/CC(03)1 which made that successor primarily responsible. We agree with the reasoning for this change as set out in Commentary 634.
32. In Regulation 91(2), in the first line, it might be clearer to replace ‘been making’ with ‘made’ to retain the focus on payments which the deceased agent made.

Regulation 138 (Application of other regulations)

33. In the table in draft Regulation 82(1) of SC/CC(02)21 Regulations 6(3) (Electronic transmission of codes), 99 (Assessment) and 102 (Provision for direct collection – general) were listed. These regulations do not appear to be included in Table 3 in draft Regulation 138(1), and the Commentary does not refer to this. Are such references no longer necessary?

Regulation 175 (Assessments other than self-assessments)

34. Although this Regulation is anticipated to apply only in the case of ‘discovery assessments’ under s 29 TMA 1970 (Commentary 1011), should not the employee still be given a right to object to the coding out procedure in Regulation 175(6) in line

with the approach now adopted in Regulation 174 (Recovery: adjustment of employee's code)?

Regulation 177 (Whether information has been transmitted electronically)

Regulation 178 (Proof of content of electronic transmission)

35. How can the person transmitting or delivering the information be assured that it has been accepted by the official computer system? As Regulation 181 makes clear, the information recorded on the official computer system is fundamental to the operation of Regulations 177-182, all of which have been drafted with priority to the Inland Revenue's interests rather than that of employers. The Regulations should include an obligation on the Revenue's part to give an assurance, at the request of the sender, that information transmitted or delivered has been accepted by the official computer system.
36. The sender has no right to call for the certified print-out to which Regulation 178 (Proof of content of electronic transmission) refers and which, in itself, would prove such effective transmission or delivery. Providing such a right in Regulation 178 would effectively enable the sender to confirm, where he/she considers it prudent to do so, that the official computer system had accepted a transmission or delivery by him/her.

Regulation 182 (Proof of payment sent electronically)

37. The employer also has an interest in whether a payment by him/her reaches the Inland Revenue, and whether a payment from the Inland Revenue reaches him/her; but cannot unilaterally assure himself/herself of the appropriate record in an official computer system. Whilst Regulation 182 rewrites Regulation 2D of SI 1993/744, the latter is drafted from the viewpoint of assuring the Inland Revenue only in these regards.

Regulation 185 (Information to be sent in form provided or approved by the Board)

38. With reference to Commentary 1031, as regards the list of regulations in Regulation 185(2), in view of the mandatory drafting of Regulation 185(1) it would appear appropriate that this should be a complete list of all regulations requiring information to be provided in a document or format provided or approved by the Board.

Regulation 186 (Service by post)

39. We agree that the continued inclusion of this Regulation is helpful to make it entirely clear to readers that service by post continues as an option.

Regulation 190 (General savings)

40. We note that the drafting of Regulation 190(2), continuity of the law subject to the minor changes in the law made by these Regulations, is provisional pending further work on how best to provide continuity.
41. We note that the drafting approach taken here is similar to that taken for the Capital Allowances Act 2001 and the Income Tax (Earnings and Pensions) Act 2003. Nevertheless, the changes in the law made by these Regulations will not be identified in the Regulations themselves; but in the Introduction and Commentary to the draft Regulations only, unless to be included in any Commentary accompanying the final

Regulations (as indicated in the Explanatory Note on page 91 of Volume 2: The Draft Regulations). In the absence of any specific identification of the minor changes, does not Regulation 190(2) simply ensure that *any* change effected by the Regulations, including any which may be found to be unintended, will override the continuity of the law? In the unlikely future event that any unintended change is discovered, would its effect be cancelled retrospectively?

42. Should Regulation 190(3), in its application to tax liable to be deducted or accounted for before 6 April 2004, apply these Regulations without taking into account any changes in the law made by them?
43. In Schedule 1 (Savings) we note that it has been decided to retain the application of Regulations 106-108 of SI 1993/744 where s 824(5) ICTA applies to a repayment made after 5 April 2004, which we support.
44. We note that Schedule 2 (Revocations) is provisional at this stage.

D Minor drafting points

45. We refer to the Commentary, on the assumption that this will be published with the Regulations.
46. Commentary 17 – in the ninth line - should ‘system’ be ‘systems’?
47. Commentary 47 is unclear. There is a reference to a non-existent draft regulation 34(7). As this purports to deal with the cumulative basis, the cross-reference made to Regulation 25(7) of SI 1993/744 which deals with the non-cumulative deductions situation is also confusing.
48. Commentary 220 – in the sixth line – ‘employees’ should be ‘employee’s’.
49. Commentary 301 – in the fourth line – the reference to ‘Paragraph (4)’ should be to ‘Paragraph (5)’.
50. Commentary 317 – in the second line – delete ‘, 29’.
51. Commentary 342 – in the sixth line – ‘Paragraph (1)’ should be ‘Paragraph (2)’.
52. Commentary 347 – in the second line – ‘28A’ should be ‘39’.
53. Commentary 348 – in the first line – ‘(1)(c)’ should be (2)(c)’.
54. Commentary 453 – in the first line – the reference is to paragraph (3) – should it in fact be to paragraphs (2) and (3)?
55. Commentary 659 – in the third sentence, insert ‘a’ before ‘point’.
56. Commentary 660 – in the second sentence, it appears appropriate to insert ‘to’ before ‘agreements’.
57. Commentary 850 – in the bracketed description of Change 99, the reference should be to Regulation 136 and not to 138.
58. Commentary 932 – the text goes awry at the beginning of the third line.
59. Regulation 2 (Interpretation) - would it be helpful to have a definition also of ‘Board’ as meaning ‘Board of Inland Revenue’, so that references to Board might be used elsewhere (for example, in Regulation 94(2)(a), Regulation 97(1), Regulation 98(1), Regulation 103(2)(a) and Regulation 106(2)(b))?
60. Regulation 55(2)(a) (Subsequent procedure on issue of pensioner’s code) – in the second line, insert ‘the’ before ‘pension payer’.
61. Regulation 64 (Recovery from employee of tax not deducted by employer) – in Commentary 486, in the italicised quotation, the reference should be to regulation ‘61(4)’ and not to regulation ‘61(3)’.

62. Regulation 113 (Deduction of tax) – in Regulation 113(3), the signpost should be to ‘116’ and not to ‘118’.
63. Regulation 125 (Application of other Parts) – in Commentary 774 it appears that ‘SI 1993/744’ has been omitted after ‘of’ in the second line.
64. Regulation 185 (Information to be sent in form provided or approved by the Board) – to align with the similar entries in column 1 of Table 7, should the references in Regulation 185(2) also be to ‘regulation 77(1)’ and to ‘regulation 81(1)’?
65. In paragraph 46 of the partial RIA (Monitoring and Evaluation), the ‘in’ near the end of the third line is superfluous.

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