

TAXREP 27/02

TAX LAW REWRITE: PAYE REGULATIONS 40-55

Memorandum submitted in September 2002 by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to an invitation to comment issued in July 2002 by the Inland Revenue

CONTENTS

Section		Paragraph
A	INTRODUCTION	1-5
B	GENERAL COMMENTS	6-18
C	SPECIFIC COMMENTS	19-26
D	MINOR DRAFTING POINTS	27-37

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A Introduction

1. We welcome the opportunity to see at this stage the drafts of regulations 40-55, contained in paper SC/CC(02)11 (Pay As You Earn Regulations: Third Progress Report), as an initial rewrite of Part V (Payment and Recovery of Tax etc) of SI 1993/744.
2. We note that there will be an opportunity later for formal consultation on the entire draft rewritten PAYE Regulations. Our comments below on draft regulations 40-55 should therefore be regarded as initial comments only, and without prejudice to our review of these regulations when part of the completely rewritten draft regulations.
3. We also note that further papers will be brought forward in 2002 to seek views on other chunks of draft regulations and cross-cutting issues. As a policy issue, whilst any rewrite of the National Insurance Regulations is likely to be some way off, it might be worth giving a little thought now to how the NI Regulations should look in due course if it is desirable to maintain any common approach between the two sets of Regulations.
4. In reviewing these draft regulations we found their provisional numbering, being the same as or similar to the numbers used by the corresponding material in Part V of SI 1993/744, very helpful and would like to see this repeated with the forthcoming further chunks of draft regulations. The table of origins on pages 1 and 2 of Annex A was also most useful.
5. We commend the tax law rewrite project team on the excellence of its work to date in rewriting the PAYE Regulations, having now rewritten draft regulations 3-55. We responded to the draft rewrite of regulations 3-39 in TAXREP 20/02 (July 2002). The draft rewritten regulations are undoubtedly emerging in a form which makes them clearer and easier to understand, whilst progressively reproducing the Income Tax (Employments) Regulations 1993 (SI 1993/744) in a better structure and in more modern language,

B General comments

6. We like the structure of regulations 40-42A. Relocating the modification of regulation 40, as concerns the exceptional cases where a trade dispute is involved, to regulation 40B in particular improves understanding of the more normally applicable regulations 40 and 40A.
7. As a policy matter, it remains a matter of concern that the employee has no right of appeal under regulation 42A (recovery from employee of tax not deducted by employer).
8. We agree the inclusion of regulation 55A with the other provisions about unpaid tax which can be certified (Annex A paragraph 139), with the clear signpost to regulation 55.
9. We agree the rewriting of regulation 49 SI 1993/744 as new regulations 49 and 49A, with the limited cases in which sums can be recovered from employees being relocated into the latter regulation. We agree that this does add clarity (Annex A paragraph 148).
10. Rewritten regulation 54 (Recovery of tax and interest) is a major improvement upon the existing regulations scattered about SI 1993/744. Whilst there is no such reference in SI 1993/744, might it be appropriate to now also refer to the recovery procedure in Scotland (as in s 67 TMA)?
11. In regulation 46 (Employers annual return of [other emoluments]), we note that the word 'emoluments' in the heading will be replaced in due course; the currently proposed new label being 'PAYE income' as in the draft Income Tax (Earnings and Pensions) Bill.
12. We note the use of the new label 'related third party' to replace 'relevant person' in regulation 46 SI 1993/744. Through the regulation 46(6) definition, this does draw attention to the fact that the regulation is concerned only with a third party who makes payments or provides benefits which are arranged, guaranteed or in any way facilitated by the employer. We are not sure that 'related' is the most appropriate description of the employer's involvement with such a third party, in a context where a degree of co-operation rather than necessarily any degree of common ownership relationship is involved; but we cannot think of a better word, and where the definition in regulation 46(6) is the key to understanding anyway.
13. We note also the provisional use of the term 'employee in benefits employment' in regulation 46 (and in regulation 46A), and that this will in due course be defined in regulation 2 by reference to the rewritten legislation in the draft Income Tax (Earnings and Pensions) Bill.
14. We further note that the relevant provisional cross-references to sections of ICTA will also require amendment following the enactment of the Income Tax (Earnings and Pensions) Bill.

15. We agree the appropriateness of relocating from regulation 46 into regulation 46B the two distinct exceptions, for the reasons set out in Annex A paragraph 195.
16. We agree the decompression of regulation 46ZA of SI 1993/74 between rewritten regulations 46ZA, 46ZC, 46ZE and 46ZD.
17. We are happy with the label 'PAYE records' introduced for the purposes of regulation 55 (Inspection of employer's PAYE records).
18. As a final general comment, the General regulations 46ZB, X and XX are particularly effective in avoiding the repetition otherwise of material affecting more than one regulation, and the removal of that material from those other regulations removes a cause of distraction from their purposes.

C Specific comments

19. We have considered all of the Questions raised in Annex A of SC/CC(02)11 (pages 45-47), and we respond to these as follows.

Q1 We accept the proposal to replace references to ‘collector’ and ‘inspector’ by ‘the Inland Revenue’, defined to mean an officer of the Board, as in the Capital Allowances Act 2001 and as proposed in the Income Tax (Earnings and Pensions) Bill. As a reassurance to taxpayers we suggest, however, that it should be publicly stated in the Commentary on the rewritten PAYE Regulations (as in SAT2 (1995): Self Assessment: the legal framework) that the officers of the Board who perform the work will be of similar rank and training to those who perform analogous tasks today.

Q2 We see no need for regulation 40 to deal with cases where $A = D$, when the employer need do nothing. An employer is clearly required to act only if regulation 40(1) (payment to the Inland Revenue) or 40(2) (recovery from the Inland Revenue) applies, and this should also be clear to writers of software.

Q3 Agreed.

Q4 Would it be simpler to provide in regulation 40B(2)(a) and (3)(a) that if D respectively exceeds A or $(A + B)$ then there is nothing to pay?

We agree that credit for actual repayments should be given in priority to credit for repayments withheld.

Q5 Regulation 42A relates to a deduction which should have been made under regulation 40, and we consider that its relevance is enhanced by its proximity to regulation 40. We would not reposition it. As regulation 42A(5) relates to an interest charge, there might be a case for repositioning 42A(5); but, as it relates only to regulation 42A(3) we again consider that its proximity to regulation 42A(3) makes it preferable to also leave 42A(5) where it is.

Q6 Agreed.

Q7 Agreed.

Q8 Agreed.

Q9 Agreed.

Q10 It is appropriate that regulation 44 should set out what the annual return should contain and that regulation 44(1) should set out where the return should be delivered, and that this should be within the same time limit as in regulation 43(1).

Q11 The information required by regulation 44(2)(b) – (d) is precise and appropriate. Whilst the necessity of identifying the employee is clear, the formulation of regulation 44(2)(a) is imprecise. This is motivated by a concern to avoid being

too prescriptive; but we would prefer greater precision here. Surely the individual's name, address and national insurance number ought to suffice?

Q12 It is clearly sensible to specify to whom the regulation 45 return should be made, correcting the regulation 45 SI 1993/744 silence on this. As a practical matter, a greater rather than a less specific direction appears appropriate, in which case we prefer 'inspector' to 'the Inland Revenue'.

Q13) Agreed.

Q14)

Q15 Agreed. It is logical to permit a regulation 48(1) notice to cover consecutive income tax periods where some tax has been paid as well as where none has been paid. In this regard, this will align regulation 48 with regulation 47.

Q16 Agreed.

Q17 Agreed.

Q18 Agreed.

Q19 Agreed.

Q20 The setting out in regulation 54(1) of an explicit list of the amounts to which regulation 54 (recovery of tax and interest) applies is very welcome.

Q21 Agreed.

Q22 Agreed. This does make it clear that the same car is referred to in regulation 46A(2)(a) and in 46A(2)(b) SI 1993/744.

Q23 Agreed.

Q24 Agreed.

Q25 Agreed. This is a sensible change.

Q26 Agreed.

Q27 There is a neatness in also positioning regulation 39 of SI 1993/744, relating to the form P60, under the 'Information to be given to employees' heading together with regulations 46AA, 46AB and 46ZD which also deal with giving the employee information under the PAYE system. The points in Annex A paragraph 222 are in favour of this, and we do not regard the differences pointed out in Annex A paragraph 223 as prohibitive. We accordingly agree with the conclusion drawn, on balance, in Annex A paragraph 224; but hold no strong views on this.

- Q28 Agreed. Is there, however, a need to refer to ‘the place or places’ in the event that parts of the PAYE records are kept in different places, as referred to in Annex A paragraph 237?
- Q29 We agree that it is helpful in rewritten regulation 46ZB (Methods of providing information) to list those particular regulations where information can be delivered either in paper or electronic form and that this does make the information requirements of those regulations easier to grasp. In this context, the first sentence in Annex A paragraph 247 is, however, a little confusing. It is paragraph (1) which lists the means of delivery, under the regulations listed in paragraph (2).
- Q30 We are attracted to the shorter form of words in rewritten regulation X(1), as compared with the wording currently used in s 70(1) TMA, having regard to the views expressed in Annex A paragraph 254, on the assumption that, before issuing a certificate of a sum due, a collector can be expected to make the necessary enquiries first of other collectors and agents as to whether the amount of tax or interest at issue has already been collected. However, the fuller wording in the existing regulations referred to in Annex A paragraph 252 and also in s 70(1) TMA does place an express obligation on the collector that, to the best of his knowledge and belief, he has first made such enquiries and this is likely to afford greater reassurance to taxpayers generally in situations where they are called upon to make payment. If the shorter form is finally adopted, perhaps the word ‘sufficient’ (which is also used in s 70(1) TMA) should be expanded to ‘sufficient but not conclusive’? On balance, we would retain the longer form of wording, as in Annex A paragraph 252, particularly as regulation X will avoid duplication of it.
- Q31 The commentary in Annex A paragraph 259 is not very clear. With reference to the third sentence, isn’t the apparent oversight to be corrected the date *from* which interest runs, applying regulation XX to determine the date on which a cheque payment of the tax to be repaid was made for the purposes of regulation 53A(b)? We have no objection to applying regulation 53A(b) to this effect; but, as regulation 53A is concerned with repayments of tax, it might be clearer to refer in regulation XX more specifically to regulation 53A(b).
- Q32 We consider that transitional regulation FPCS should be further modified to achieve strict equivalence with regulation 46AA of SI 1993/744 (Other additional emoluments – information to be provided to employee by employer).
20. We make the following further specific comments, in paragraphs 21-26 below.
21. As a practical matter, when regulation 42ZE applies (Termination payments: return where more than one employer) how is each employer to ascertain what another employer of the same employee has provided in a tax year and what rights does the employer have in this respect? Only the employee will have the full picture, as a consequence of regulation 46ZD; but there appears to be no obligation on him to report the information to each employer involved. Moreover, if a regulation 46ZD return is issued on 6 July following the end of the tax year or thereafter then timely compliance by another employer under regulation 46ZE would appear impossible

(assuming that the reporting employer could obtain the necessary information from the employee, and not otherwise).

22. In the transitional regulation 'FPCS arrangement – information to be provided to employee by employer' (pp 26 and 27 Annex B) why is paragraph (3) not worded identically to regulation 46AA(3)?
23. In regulation 46AA(3), for precision and clarity, after '6th July' should be added 'following the end of the tax year'.
24. Rewritten regulation 46AB accurately rewrites regulation 46AB of SI 1993/744; but neither is easily understood. Regulation 46AB deals with payments made or benefits provided by a third party which the employer is *not* required to provide particulars of under regulation 46(1). By deeming the third party to be the employee's employer, regulation 46AB then requires the third party to report to the employee details of benefits provided and payments made by the third party which, had it been the employer, the third party would have been required to provide particulars of to the Inland Revenue under regulation 46(1). These are presumably payments made and benefits provided by the third party which the employer has not arranged, guaranteed or in any way facilitated; but which are taxable in the employee's hands. The drafting of regulation 46AB(2) is confusing to the reader in this context through its reference to 'the particulars required by regulation 46(1)(a), (b) or (d)'; whereas regulation 46AB(1)(b) excludes particulars provided by the employer under regulation 46(1). In regulation 46AB(3) of SI 1993/744 the words 'specified in' rather than 'required by' are clearer. We would suggest making paragraph (2) the third paragraph in this regulation and that it be rephrased to the effect that the third party must give the employee a statement containing particulars of the relevant benefits and relevant payments which it has provided or paid and which are identical to those specified in regulation 46(1)(a), (b) or (d).
25. We are happy with the use of the label 'third party' in regulation 46AB.
26. In regulation 46ZD(1) the reference in the sixth line to 'paragraph (2)' should be to 'regulation 46ZA(2)'.

D Minor drafting points

27. In regulation 47(1), in the first line, the question mark following the word ‘if’ should be removed. Similarly, regulation 48(1).
28. In regulation 49(3), the inset ‘(a)’ and ‘(b)’ require alignment.
29. In regulation 55(3), in the third line, remove the question mark after ‘agreement’.. The inset ‘(a)’ and ‘(b)’ also require alignment.
30. In regulation X(2), the reference to ‘43A(1)’ should be to ‘43A’.
31. In regulation 53(1), in the second line, remove the question mark after ‘employer’.
32. In Annex A paragraph 63 – at the end of the first line of the quoted text, either ‘the’ or ‘these’ should be deleted.
33. In Annex A paragraph 65, in the second line, insert ‘in’ after ‘acquiesced’.
34. In Annex A paragraph 86, in the third bullet point, ‘form’ should be ‘forms’.
35. In Annex A paragraph 129, the reference should be to ‘Paragraph (9)’ and not to ‘Paragraph (8)’.
36. In Annex A paragraph 164, in the first line ‘provision’ should be ‘provisions’ as part of the quoted text.
37. In Annex B page 24, ‘XX’ should precede ‘Payment by cheque’ as ‘XX -’. In the table on page 2 of Annex A and in Annex A paragraph 256, why is it stated that draft regulation XX is based also on regulation 52(4) of SI 1993/744?

14-13-36
TJH/PCB
10.10.02