



Faculty of Taxation

## **TAXREP 35/03**

### **NATIONAL INSURANCE CONTRIBUTIONS: DRAFT LEGISLATION**

*Memorandum submitted in October 2003 by The Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to an invitation to comment issued by the Revenue in September 2003*

#### **CONTENTS**

<b>Section</b>		<b>Paragraph</b>
<b>A</b>	<b>GENERAL COMMENTS</b>	<b>1-3</b>
<b>B</b>	<b>RECOVERY OF PRIMARY NIC BY EMPLOYERS AND ELECTIONS AND AGREEMENTS TO TRANSFER SECONDARY NIC TO EMPLOYEES</b>	<b>4-10</b>
<b>C</b>	<b>FUNDED UNAPPROVED PENSION SCHEMES (FURBS)</b>	<b>11-14</b>
<b>D</b>	<b>INLAND REVENUE OFFICERS' POWERS IN RESPECT OF EMPLOYER COMPLIANCE (NIC INVESTIGATION POWERS AND DE-CRIMINALISATION OF SSP/SMP COMPLIANCE REGIMES)</b>	<b>15-17</b>

## **NATIONAL INSURANCE CONTRIBUTIONS: DRAFT LEGISLATION**

### **A GENERAL COMMENTS**

1. We welcome the opportunity to comment on the topics covered in the circulars dated 8 September 2003. Many of the points develop proposals in the paper ‘Simplifying National Insurance Contributions for Employers’ issued in June 2000 by the Revenue on which we commented initially in August 2000 (TAX 28/00) and again in November 2001 (TAX 33/01).
2. Given the absence of a timetable for implementation, a period to comment of longer than the three weeks allowed would have provided greater time for respondents to provide more considered views. It would also have been more in the spirit of Open Government as illustrated by the government’s code of practice on consultation which provides for a three month consultation period in the absence of contrary factors.
3. Many of the draft clauses provide power to make Regulations. In order that we may assess more fully whether the intended aims are likely to be met, we would welcome the opportunity to comment on draft Regulations and, where appropriate, guidance, the latter in particular in respect of the proposals for officers’ powers.

### **B RECOVERY OF PRIMARY NIC BY EMPLOYERS AND ELECTIONS AND AGREEMENTS TO TRANSFER SECONDARY NIC TO EMPLOYEES**

4. We welcome the recognition of the difficulties caused to employers by restrictions on their ability to recover NIC from employees. However, we remain concerned about the proposal to restrict the extended right to recover contributions from employees to cases where remuneration is by way of restricted securities. At the very least, non-cash vouchers and (pre-change) FURBS – assuming that Revenue guidance that liability exists is correct – should be included. Preferably these recovery provisions should apply to all non-cash remuneration.
5. There is another important situation that should be included. Where a UK employer sends people abroad it can defer submitting the P35/P14 on certain foreign earnings to 31 January following the tax year (for example, 2003/04 to 31 January 2005). These are called P350 cases. When determining the NIC 10 months after the end of the year, there needs to be a mechanism for recovering the employees’ 1% (inevitably these people would be above the upper earnings limit and so no problem would arise until 2003/04). With regard to P350 cases in particular does the Revenue accept that the extension made in SI 2003/1337 will apply by virtue of Para 4A, new Schedule 4 and paragraph 7(4)(e) (SI 2002/2929)? If so then that specific problem goes away. If not, then we feel that an early extension is a necessity.
6. Whilst it is true that the P350 collection mechanism will not need to be used until January 2005, where elections have to be entered into, employers have to make an election for the current year by 30 November 2003. Thus they are in the position of

needing to elect but not knowing the means whereby they can recover employees' contributions from the employees, if at all.

7. More generally, we believe that a wider power of recovery is needed not only to cover error cases but situations where a combination of timing, earnings periods or legislation making a charge where there is no cash payment to the employee results in an underpayment at the end of the tax year. A good example, if the Revenue's interpretation in the June 2003 Tax Bulletin is correct, is FURBS. In these and other cases we believe that the time limit should be extended. Recovery should not have to be conditional on coming out of future earnings. Extensions on these lines would cover cases where the employee leaves before the current recovery rules enable recovery. In short there needs to be more flexibility.
8. The first note under the sub-heading Regulations which starts 'If these amendments...' states that Regulations would be made to enable recovery from ex-employees in the year following cessation of the employment. We see no reason why the extra year cannot apply in all circumstances; and indeed consider that one year should be extended to six. In practice, employers will aim to recover as soon as possible, and in the case of former employees will need to do so as soon as possible in case they move or otherwise lose contact. Employers will invariably try to recover as fast they can and we question why employers should be penalised in those cases where it takes longer for NICs that should have been recovered to come to light.
9. The covering state that the draft legislation will be particularly helpful for employers who wish to recover the 1% Class 1 liability that has been due since April 2003. We would observe that this will not help employers affected currently, ie before 6 April 2004 or such later date as enactment may occur.
10. To summarise, we consider that the proposed change should extend to all remuneration, should give employers six years in which to make recovery from employees, and should take effect as soon as possible.

## **C FUNDED UNAPPROVED PENSION SCHEMES (FURBS)**

11. As we have stated on previous occasions, we believe that the assertion of current Class 1 liability is not a correct interpretation of current law.
12. With regard to subsection (8) of new section 10ZZA, it would be helpful to have a cross-reference to section 703, Income Tax (Earnings and Pensions) Act 2003.
13. We suggest that the apportionment provision in paragraph 13, Schedule 2, Social Security (Contributions) Regulations 2001 (SI 2001/1004) should be removed with effect from 6 April 2004, as this will presumably be rendered otiose by new section 10ZZA.
14. More generally, the clause appears to us to be over-bureaucratic. Would it not be far simpler for the new section 10ZZA to merely specify that the expression 'general earnings' shall be deemed for Class 1A purposes to include FURBS, and then add the necessary apportionment provision?

**D INLAND REVENUE OFFICERS' POWERS IN RESPECT OF EMPLOYER COMPLIANCE (NIC INVESTIGATION POWERS AND DE-CRIMINALISATION OF SSP/SMP COMPLIANCE REGIMES)**

15. We welcome the aims of the draft legislation.

**New section 110ZA(2)(f)**

16. This sub-clause refers to the loss of tax to the Crown. It is our understanding that national insurance contributions are due to the National Insurance Fund. We therefore question the reference in this sub-clause to the Crown incurring a loss.

**New sections 113A and 113B**

17. These clauses contain various references to penalties 'not exceeding'. We consider that the legislation should, for the avoidance of doubt, also provide a specific provision giving the Revenue power to stay or mitigate penalties. We should also welcome an early opportunity to comment on draft internal guidance on new sections 113A and 113B.

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