

TAX REP 16/02

TAX LAW REWRITE: PAYE LEGISLATION

Memorandum submitted in May 2002 by the Tax Faculty of the Institute of
Chartered Accountants in England and Wales *in response to an*
invitation to comment issued in April 2002 by the Revenue

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**TAX LAW REWRITE:
PAYE AS YOU EARN LEGISLATION FOR BILL 2**

A GENERAL COMMENTS

Introduction

1. We welcome the opportunity to comment on paper CC/SC(02)03 issued on the Revenue website on 18 April 2002.
2. In the absence of a Table of Origins, the guidance in the Commentary to the existing legislation was very helpful. We have reviewed the draft clauses by reference to ss 202B(5) and (6) ICTA, 203-206A ICTA, the Income Tax (Employments) (Notional Payments) Regulations 1994 (SI 1994/1212) and regulation 5 of the Income Tax (Employments) Regulations 1993 (SI 1993/744).
3. The cross-references to sections elsewhere in the Bill were more difficult to follow in view of the changes to its clause numbering since the publication of ED12. The undisclosed revision of certain of the ED12 clauses and the introduction of new terms (Commentary 70) was also a hindrance to effective review, and will necessitate our looking again at these clauses in the light of those changes when published as part of the draft Bill; but the need to do so anyway was of course anticipated.

Comments on Part 12 – PAYE

4. We note that Part 12 of the Draft Income Tax (Earnings and Pensions) Bill is now restricted to PAYE, and that payroll giving will now be in a separate Part. We agree with this separation, in order to emphasise the distinction between the essentially administrative provisions for PAYE and the relieving provisions for payroll giving (Commentary 40).
5. Part 12 is well structured. The placing of clauses 646-648, dealing first with what PAYE income for a tax year consists of (in clause 646) together with the provisions concerning PAYE regulations and tax tables (in clauses 647 and 648), before the Payments clauses (general and special cases) in clauses 649-653 helps the reader's understanding. The ordering of clauses 654-660 under the sub-headings of 'Payments by means of vouchers and tokens' and 'Other non-cash payments' also works well. There may however be a case for moving clause 665 (Notional payments: accounting for tax) into the Miscellaneous section, as perhaps more akin to clauses 661 and 662, and for relocating clauses 663 (Organised arrangements for sharing tips) and 666 (Agency workers) earlier in the text as more focussed on the 'who is the employer?' aspect (perhaps into the Payments: special cases section?).
6. Our statutory references are to the Income and Corporation Taxes Act 1998 ('ICTA') unless otherwise stated. References to 'Commentary' are to the

Commentary in CC/SC(02)03, and the numbering refers to the paragraphs in that Commentary.

B QUESTIONS

- Q1 We agree that readers' visibility of the PAYE legislation is made clearer if they need only refer to the primary regulations in one chunk and to the secondary legislation in one separate Regulations chunk. The proposed associated transfers of legislation from the regulations into the primary legislation is, as indicated, a change in the law in that the primary legislation unlike the regulations will not be capable of amendment by regulations made by the Board. In principle, it is preferable to have more in the primary legislation rather than in the secondary legislation. Whilst there is no immediate practical effect because the Bill reproduces the regulations currently in force, this change will of course operate as a future constraint. In practice this introduces a greater element of inflexibility; but this ought not to create any difficulty in operation.
- Q2 Section 205 ICTA (which in its present form has been applicable from the year 1996/97) appears to protect both the Revenue and the taxpayer where, for whatever reason, the incorrect tax liability for a tax year has been collected through PAYE (in practice possibly relating also to small amounts of non-Schedule E income). The Revenue can correct the situation through assessment, and the taxpayer can correct it through self-assessment within the appropriate time limits. Although there is no longer the general requirement on the Inland Revenue to make assessments, from the taxpayer's point of view at least why does the need for s 205(1)-(3) with (5) ICTA disappear in circumstances where the incorrect amount of tax has been collected under PAYE particularly (but not only) in the case of a taxpayer who receives only income within the scope of PAYE and has not received a return for the tax year concerned? He will still presumably need to call for a tax return for completion, under s 205(4) ICTA. Whilst Commentary 33 states that a taxpayer who wants to complete a tax return and self-assess 'will be allowed to do so', what is the authority here if the taxpayer's right under s 205(4) ICTA is removed? It would not be right to replace a statutory right with a discretion exercisable only by the Revenue, if that would be the consequence of removing s 205(4) ICTA.
- Q3 We agree the removal of s 139(4) FA 1994 as unnecessary; but what was its purpose on introduction? We assume that as incapacity benefit is taxable, but sickness benefit and invalidity benefit had not been taxable, the intention was simply to make clear that the PAYE regulations were applicable. On this basis we agree that as s 139(4) is not a vires power permitting the Board to make regulations (these being adequately made under s 203 ICTA, as regulations 98A-98H of the Income Tax (Employment) Regulations 1993 SI 1993/744), it is unnecessary to highlight the application of the PAYE Regulations in line with the approach adopted elsewhere (as referred to in Commentary 37 and 38).
- Q4 Agreed.
- Q5 The label and definition of 'PAYE income' looks to be a neat replacement for 'income assessable under Schedule E'. With regard to the second bullet point in Commentary 85, the subsequent drafting does make it sufficiently clear that the

application of PAYE is to payments of or on account of PAYE income only - as in 1 in the List of Provisions in clause 647(2) (PAYE regulations).

Q6 Commentary 107 states that by applying Items 10 and 11 in the clause 647(2) List of Provisions (PAYE regulations) to the whole of the PAYE regulations ‘ is not a licence for the regulations to do anything’. It is, of course, exactly that and the powers could only be changed through future Finance Bill changes. Nevertheless, we note the reasons given in Commentary 103-106 and do not oppose Items 10 and 11 as drafted.

Q7 Agreed.

Q8 Agreed.

Q9 Agreed.

Q10 Agreed.

Q11 Agreed.

Q12 & Q13 Agreed.

Q14 Agreed.

Q15 Agreed.

Q16 & Q17 Agreed.

Q18 Agreed.

C SPECIFIC COMMENTS ON MATTERS OF PRINCIPLE

cl 645 Scope of this Part [j4222]

The concept of an introductory clause is useful. With reference to Commentary 61, which refers to the details being in the clauses which follow, it is not however as clear as it might be how (a)-(f) respectively refer to the subsequent clauses 646-667. As an example, a signpost from clause 645(f) to clause 664 would help the reader understand more clearly what is meant by the reference to ‘changes in the practice generally prevailing’.

cl 647 PAYE regulations [j4201]

- (2) In the List of Provisions Item 4, we note that the reference is to ‘payments or other benefits *provided* . . .’ rather than ‘. . .provided or to be provided . . .’ in paragraph 15 Schedule 11 ICTA .

In the List of Provisions Items 6(b) and 7, it would be appropriate through a Proposed Rewrite Change to provide for symmetry – perhaps by providing instead in both Items a maximum time beyond the end of the tax year from which interest must be calculated as payable to/by the Board. As presently drafted, and accurately rewriting s 203(2)(d) and (dd), the date from which the taxpayer may be obliged to pay interest can be as close as 14 days after the end of the tax year whereas there is no starting point in the case of interest payable by the Board. The ‘not less than’ approach does, of course, leave the start date open-ended. Perhaps it should be changed to a ‘not more than’ date in both Items 6 and 7?

cl 652 Employee non-resident etc [j4206]

- (4) Section 203D ICTA (PAYE: employee non-resident, etc) in fact refers to the provision of information ‘relevant to the giving of the direction’ whereas this is rewritten as ‘relevant to the application’. The existing wording is more explanatory than the rewrite; albeit the effect should always be the same, clause 652(2) making it clear that the application is for a direction.

cl 653 Mobile UK workforce [j4207]

This clause accurately rewrites s 203E ICTA (PAYE: Mobile UK workforce). By reference to Commentary 162, it appears to be predicated on the basis that the relevant person will pay the contractor for the use of the contractor’s employees (clause 653(5)), and presumably the latter then pays the employees but in circumstances where it is anticipated that the contractor will not comply with the PAYE regulations. Clause 653(2) enables the Board to give a direction where the relevant person makes a payment in respect of work done by the contractor’s employees in the period affected (whether to the employees or to the contractor – Commentary 159); whereas clause 653(1)(b) anticipates that payments may also be made by the contractor himself or on his behalf (by anyone else). The logic here is presumably that commercially the contractor (or anyone else) will not make any payment to the employees unless they are reimbursed by the relevant person for whom they work, and clause 653 will then apply to the relevant person’s payment (so far as it is attributable to the work done by each employee involved).

cl 660 Conditional acquisition of shares and convertible shares [j4214]

- (3) We note that the word ‘all’ (the convertible shares or securities) appears in rewritten clause 660(3), whereas this word does not appear in s 203FB(5) ICTA (PAYE: gains from share options etc). This does not seem to signify, but why is the change being made? Commentary 221 also refers to a conversion for cash bringing clause 647-653 into effect to treat the payment of cash as PAYE income. This situation is not readily apparent from the drafting of clause 660(3) which, whilst correctly rewriting s 203FB(5) ICTA, refers only to a conversion into shares or securities, although it can be deduced as set out in Commentary 221.
- (4) Is the final sentence in Commentary 222 correct? Clause 660(4) correctly rewrites s 203FB(6) ICTA, which appears to direct that the convertible shares or securities which are the subject of clause 660 are treated as originally provided when the predecessor convertible shares or securities which were converted by the earliest in any series of earlier conversions were provided.

cl 665 Notional payments: accounting for tax [j4219]

- (1) Although clause 665 does make it clear that the PAYE deduction attributable to a notional payment is to be deducted from actual payments, it might be helpful to insert the word ‘other’ before ‘payment’ in the second line.

cl 666 Agency workers [j4220]

- (2) Section 203L(1B)(b) ICTA (S 203B to s 203K: interpretation, etc) also contains the words ‘. . . and at the expense of the client . . .’. Why is this not rewritten as part of clause 666(2)(b)?
- (3) Section 203L(1C) ICTA provides that s 839 ICTA is to apply for the purposes of s 203L(1A) & (1B). This is not rewritten in clause 666(3). Presumably this is because a central definition of connected persons will be applicable to the Bill?

D DETAILED COMMENTS ON DRAFTING

Commentary

If it is intended that the Commentary is to form the basis of the Explanatory Notes accompanying the draft Bill, it may be helpful if we point out the following:-

Para 37 - The second sentence is lengthy and not easy to understand. The word 'is' after 'Section 139(4)' at its start is also superfluous.

Para 49 - At the end of the third line, 'arrangement' should be 'arrangements'.

Para 59 - In the last line, there needs to be a gap between '647' and 'of'.

Para 81 - Fifth line on page 16 – insert 'to' between 'subject' and 'provisional'.

Para 119 - In the last line, 'repayment' should be 'payment'.

Para 145 - In the last line, the closing bracket is not matched by an opening bracket.

Para 174 - The reference to '6(10)' should be to '6(1)'. Also, whilst clause 655(6) does define 'cheque voucher' and 'cost of provision', only the wording following the semi-colon – 'and a cheque voucher . . .' to the end of the sentence is derived from regulation 6(4) of the Income Tax (Employments) (Notional Payments) Regulations 1994 (SI 1994/1212).

Para 205 - In the third bullet point, within the brackets, the text should be 'by the application of money or property'.

Para 242 - The reference should be to clause 647 (PAYE regulations) and not to clause 667.

Para 272 - Clause 665(7) is in fact based on both paragraphs 7 (clause 665(7)(a)) and 8 (clause 665(7)(b)) of the Income Tax (Employments) (Notional Payments) Regulations, SI 1994/1212.

Para 280 - In the first sentence 'or' should be 'of'.

Clauses

cl 646 PAYE income [j4200]

(2)(b) Commentary 72 refers to 'taxable attributed assigned income', whereas clause 646(2)(b) refers to 'taxable attributed income, which may confuse the reader.

cl 649 Meaning of payment [j4203]

(3)(c) In the first line, insert 'a' between 'to' and 'company'.

cl 651 Employee of non-UK employer [j4205]

- (1)(b) In the final line, ‘or the relevant person’ should read ‘or of the relevant person’ in accordance with s 203C(1)(b) ICTA (PAYE: employee of non-UK employer).

- (5) It would be clearer to insert ‘of’ before ‘the relevant’ (person) in the second line, in order to make it clearer that the sub-clause refers also to an intermediary of the relevant person and not to the relevant person himself.

cl 652 *Employee non-resident etc [j4206]*

- (6) This sub-clause might be incorporated, with suitable amendment to the opening words, as the second sentence of clause 652(5)(c) as it applies to (c) of that sub-clause only.

cl 654 *Cash vouchers [j4208]*

- (5) Do the words in brackets in fact enhance understanding of the meaning of the word ‘appropriated’? We can see that the ‘...attaching ... to a card held for the employee ...’ may be a useful specific example of this in context; but what does ‘in any other way’ add to the meaning of ‘appropriated’?

cl 656 *Credit-tokens [j4210]*

- (1) Is it necessary to use the word ‘employee’ three times in the first two lines?
- (2)(b) Is the term ‘the employer of the employee’ necessary? In similar clause 654(3)(b), for example, the reference is simply to ‘by the employer’.

cl 657 *Readily convertible assets [j4211]*

- (6)(a)(ii) The word ‘right’ in the first line should be replaced by ‘asset’, as in s 203F(3B)(a)(ii) ICTA (PAYE: tradeable assets).
- (7) Section 203F(3C) ICTA is not easy to comprehend; but it appears to draw a contrast between the ‘amount’ in (a), (b) and (c) and an equivalent ‘amount of money’. In rewritten clause 657(7), the removal of the words ‘of money’ after ‘amount’ and before ‘equivalent’ in the second line removes this distinction. The rewritten wording then contrasts ‘amount’ with equivalent ‘amount’ in (a), (b) and (c) and it then becomes more difficult to understand what the term ‘or is an amount equivalent to’ is meant to convey.
- (8) Paragraph 3(2)(c) of the Income Tax (Employments) (Notional Payments) Regulations 1994, SI 1994/1212 excluded from s 203F ICTA shares acquired by the employee as a result of the exercise of a right over shares obtained before 27 November 1996 *otherwise than under a scheme approved by the Board under Schedule 9 to the Taxes Act* (our italics) which were excluded by paragraph 3(2)(a). We note that clause 657(8)(c)(iii) does not include these italicised words. We assume that the consequence is that *all* shares acquired on exercise of pre-27 November 1996 rights are now excluded through clause 657(8)(c)(iii) whether ‘old Schedule 9 shares’ or not, in consequence of ‘old Schedule 9 shares’ no longer being excluded by clause 657(8)(c)(i) which now rewrites

paragraph 3(2)(a) in the context of the new Schedule 4 (Approved CSOP Option Schemes) to the Bill only and hence no longer itself excludes 'old Schedule 9 shares'. Similar comments apply to rewritten clause 658(4) (Enhancing the value of an asset).

- (9) In the first line 'with' should be 'within'.
- (11) In the definition of 'EEA State', 'Opporto' should be 'Oporto'.

14-13-36
TJH/PCB
14.5.02