

TAXREP 54/05

NATIONAL INSURANCE CONTRIBUTIONS BILL 2005

PROPOSED AMENDMENTS

*Memorandum submitted in November 2005 by the Tax Faculty of the
Institute of Chartered Accountants in England and Wales
to the Paymaster General*

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NATIONAL INSURANCE CONTRIBUTIONS BILL 2005

PROPOSED AMENDMENTS

INTRODUCTION

We set out below our suggested amendments to the National Insurance Contributions Bill published on 11 October 2005 at <http://www.publications.parliament.uk/pa/cm200506/cmbills/053/2006053.htm> which received its Second Reading on 27 October.

This memorandum follows up our comments submitted to the Paymaster General on 26 October 2005 in TAXREP 53/05 – see http://www.icaew.co.uk/viewer/index.cfm?AUB=TB2I_87631 – in which we expressed our views on the Bill, made recommendations concerning the secondary legislation and commented on the Frequently Asked Questions published on 11 October by HMRC at www.hmrc.gov.uk/employers/faqs-nicbill05.htm.

This memorandum expands upon TAXREP 53/05. It provides suggested amendments to deal with key remaining issues with further supporting explanation. The normal convention of paragraph numbering in TAXREPS has been dropped in order to reduce confusion with the Clause, Section and Page numbers in the Bill.

Details about the Institute of Chartered Accountants in England and Wales and the Tax Faculty are set out in Annex A. Our Ten Tenets for a Better Tax System, by which we benchmark tax measures, are summarised in Annex B.

DETAILED COMMENTS ON THE BILL

CLAUSE 1

**Earnings: power to make provision in consequence of retrospective tax legislation:
Great Britain**

Proposed amendment

Clause 1(1)
New section 4B

Page 2, line 37, insert after ‘the amount of those earnings’:

and any primary and secondary NIC that has been overpaid shall be refunded to the primary and secondary contributor respectively.

Comment

In new subsection (8), where the earnings for a period and hence the NIC liability are revised to a lower figure, amounts of NIC overpaid should be repaid without the need for a claim to be submitted. HMRC will naturally highlight where retrospectively more NIC should be paid so we therefore believe it right that those who will retrospectively gain should not have to revisit their previous affairs and take the time to claim.

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Proposed amendment

Clause 1(1)

New section 4B

Page 2, after line 48, insert new subsection (10)

For the purposes of this section, “original determination” means the amount of earnings on which the employer originally determined that he would pay NIC, or to Decisions made by Officers of the Board of HMRC under section 8, Social Security Contributions (Transfer of Functions, etc.) Act 1999 and excludes matters determined by Commissioners, a Tribunal or a Court.

Comment

In new subsection (9) the term ‘original determination’ is used. We believe its meaning needs clarification in the Bill. Does it refer simply to the amount of earnings on which the employer originally determined that he would pay NIC, or to Decisions made by Officers of the Board of HMRC under section 8, Social Security Contributions (Transfer of Functions, etc.) Act 1999 or to judgements of a Tribunal or Court?

We consider that it should not refer to Court and Tribunal decisions, as the Government should not seek to erode the authority and independence of the Courts and Tribunals by overruling retrospectively their judgements. As noted in TAXREP 8/05, it would also mean that there would be no legal certainty. We believe that certainty is one of the fundamental requirements of a good tax system (see our Ten Tenets for a Better Tax System in Annex B) and its absence here may contravene European Community, and hence national, law.

Proposed amendment

Clause 1(1)

New section 4B

Page 3, after line 4, after (10) insert new subsection (11)

The secondary contributor may recover by any available and feasible means the additional primary contributions arising as a result of regulations being given retrospective effect and nothing in this Part or in Schedule 4, Part II of the principal Regulations shall negate that right.

Comment

Under these provisions, it appears likely that the intention is that additional primary NIC liability cannot be reclaimed by employers from employees. If this is the case we consider it to be a penalty in respect of an action which was legitimate at the time it was undertaken. We consider that the legislation should make it possible for the employers to recover the primary NIC from employees, especially if we are correct in our understanding that the employees’ contributions records are to be amended – where the level of earnings make it appropriate – to take into account the additional primary NIC paid.

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Primary NIC is deducted from the employee's earnings and accounted for by the employer to HMRC. A mechanism is needed to enable the employer to recover from employees additional primary NIC that arises as a result of the earnings being revised for past years.

Proposed amendment

Clause 1(1)

New Section 4C

Page 4, after line 18, in sub-section (6) after 'accordingly' add

For the purposes of this sub-section, "determined" means the amount of earnings on which the employer originally determined that he would pay NIC, or to Decisions made by Officers of the Board of HMRC under section 8, Social Security Contributions (Transfer of Functions, etc.) Act 1999 and excludes matters determined by Commissioners, a Tribunal or a Court.

New section 4C

Comment

The issue about the meaning of 'determined' in sub-section (6) is similar to that in subsection (9) of new section 4B supra.

In subsection (7), we do welcome the provision under which where there is a reduction in NIC liability for a year, accrued benefit entitlement will not be affected.

Proposed amendment

Clause 1(2)

Page 5, in new section 176(2A), lines 12-13 delete

the end of the period of 12 months beginning with

Comment

New subsection (2A) provides that a draft statutory instrument can apply retrospectively for up to twelve months before the date it is laid. Twelve months' limbo between the primary and secondary legislation being laid is too long. Employers need to know what the NIC rules will be, and government will presumably want any additional NIC to be accounted for as early as possible. Accordingly, we consider that the statutory instrument should be made at the same time as the primary legislation, or as soon as possible thereafter, subject to democratic requirements, in particular proper Parliamentary scrutiny.

The point of this is that if the tax and NIC provisions are to come into effect from the same date, then the legislation for both tax and NIC should be laid on the same day, rather than the tax legislation being enacted and then followed by a gap of up to twelve months before the NIC legislation is laid. An employer will know from the change to tax legislation what is likely to follow for NIC purposes, but until the new NIC regulations are passed, he will have no legal obligation to account for NIC other than in accordance with the law – that is to say, the 'old' but (as yet) only rules – and no legal right to deduct from an employee's pay other than in accordance with the law – old rules again. This is not a deterrent, but it is an

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inconvenience, especially if he has to revisit the calculations once the NIC rules are eventually made.

CLAUSE 2:

Earnings: power to make provision in consequence of retrospective tax legislation: Northern Ireland

Where appropriate, proposed amendments and our comments on Clause 1 refer mutatis mutandis to Clause 2.

CLAUSE 5:

Agreements and joint elections: Great Britain

Proposed amendments

Clause 5(2)

Page 12, line 32, after ‘ legislation) ’ insert

where the earnings on which the contributions arise were paid before the coming into force of the regulations in question.

and

Clause 5(3)

Page 12, line 42 after ‘ legislation) ’ insert

where the earnings on which the contributions arise were paid before the coming into force of the regulations in question.

Comment

There is a need for clarification in the Bill of the meaning of new sub-paragraphs 3A(2A)(b) and 3B(7B)(b). As presently drafted, it is not clear that the legislation achieves the desired effect which is explained clearly in paragraphs 58 and 59 of the Explanatory Notes.

CLAUSE 6:

Agreements and joint elections: Northern Ireland

Where appropriate, proposed amendments and our comments on Clause 5 refer mutatis mutandis to Clause 6.

PCB

4.11.05

ICAEW AND THE TAX FACULTY: WHO WE ARE

The Institute of Chartered Accountants in England and Wales ('ICAEW') is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.

The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department of Trade and Industry through the Accountancy Foundation. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.

The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter 'TAXline' to more than 11,000 members of the ICAEW who pay an additional subscription.

THE TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. **Constant:** Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99; see http://www.icaew.co.uk/taxfac/index.cfm?AUB=TB2I_43160,MNXI_43160.