



TAXREP 36/12

(ICAEW REP 112/12)

## ICAEW TAX REPRESENTATION

### FINANCE BILL 2012 BRIEFING

### CLAUSE 223 PAYE REGULATIONS: INFORMATION

Briefing submitted in June 2012 by ICAEW Tax Faculty in relation to the above provisions in Finance Bill 2012

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## INTRODUCTION

1. ICAEW submitted Briefings to the Public Bill Committee on various clauses in Finance Bill 2012. The present TAXREP reproduces the content of the Briefing on the provisions in clause 223 PAYE regulations: Information.

## WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. The Tax Faculty is the voice of tax within ICAEW and is a leading authority on taxation. Internationally recognised as a source of expertise, the faculty is responsible for submissions to tax authorities on behalf of ICAEW as a whole. It also provides a range of tax services, including TAXline, a monthly journal sent to more than 8,000 members, a weekly newswire and a referral scheme.

## BRIEFING

### Clause 223 PAYE regulations: information

Clause 223 authorises additional PAYE regulations needed to implement the provision of Real Time Information (RTI). RTI requires employers to provide HMRC with full details of all tax, NIC and other deductions from employers when they are paid – currently employers only need to provide this summary at the end of the tax year.

Under RTI, employers need to report payments (pay, tax, NIC, student loan deductions, etc) to HMRC on or before payment is made to employees (the 'on or before' rule). Although, in certain cases the on or before rule is extended to the earlier of when an actual payment is made to the employee and 14 days after the end of the tax month in which payment is made (the 'extended on or before' rule). **However, these deadlines as currently included in the regulations are difficult and, in some cases, impossible for employers to comply with because they are far too short.**

**We would like the Minister to extend these deadlines to ensure that more businesses can comply with the rules and not be faced with potential penalties due to late submission caused by circumstances largely outside the employer's control.**

### Concerns:

- Deadline to report payments is too short to comply with:
  - 'On or before' rule: The usual rule under which employers report payments to HMRC on or before payment is made to the employee. This is impracticable for a number of reasons (see examples in Appendix) including the fact that not all businesses have access to a computer or broadband.
  - 'Extended on or before' rule: An extended time limit for 'notional payments'. The extension (the earlier of when tax in respect of the notional payment is deducted from

any actual payment and 14 days after the end of the tax month in which the notional payment occurs) is not enough for reasons outlined in section 2(ii) below including the fact that in many cases it is not sufficient time to obtain and process the required information.

- We believe the quoted compliance costs to business of the regulations are too low.
- Penalties will be imposed on employers for not meeting the rules, even where employers have done their best to comply.
- More generally, RTI will impose additional compliance costs and burdens on employers and their payroll bureaux.

### Recommendations:

We seek assurances from the Minister that:

- (a) the legislation will accommodate situations where it is not possible to comply with the 'on or before' or the 'extended on or before' rules by:
  - (i) extending the deadlines through the regulations: the normal 'on or before' rule should be extended to 14 days after the PAYE month end and the 'extended on or before' rule extended to 90 days after the date of payment (currently the earlier of the making of an actual payment or 14 days after the PAYE month end).
  - (ii) including in the penalty legislation a reasonable excuse provision to cater for cases where it is not practical to meet the deadline.
- (b) HMRC will be required to produce a report containing accurate data on actual employer compliance costs after the first full year of RTI, i.e. by summer 2014.

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## Detail

### 1. Background

RTI is the biggest change to PAYE since it started in 1944. It will replace the obligation on employers to submit a single year end return (forms P35 and P14) with a requirement to report to HMRC, normally on or before the making of a relevant payment to an employee, details of pay, tax, national insurance contributions, student loan deductions and other data in respect of **each** payment. The report is known as a Full Payment Summary (FPS). **For many employers the increase in reporting burdens could be considerable.** For example for employers with weekly paid employees this will now involve having to submit returns to HMRC up to 53 times per year rather than once. For employees paid daily up to 366 returns per year will now be required.

For certain payments, known as 'notional' payments, the deadline for submitting the FPS is extended to the earliest of the time at which the employer deducts tax in respect of the notional payment from an actual payment to the employee or 14 days after the end of the tax month in which the notional payment occurs, i.e. to the 19<sup>th</sup> of the month following the end of the tax month in which the relevant payment is made. Notional payments cover payments by intermediaries, disguised remuneration, payments to UK employers of non-UK employers, cash and non-cash vouchers, credit tokens, transfers of readily-convertible assets, and share-related payments, i.e. employment related securities and securities options. (The extended on or before rule for PAYE income tax is in new regulation 67C of the PAYE Regulations 2003 (SI 2003 no.2682) (inserted by reg 27, SI 2012 no.822); there is an equivalent for National Insurance Contributions in new para 21B of Sch 4 to the Social Security (Contributions) Regulations 2001 (SI 2001 no.1004) (inserted by reg 11, SI 2012 no. 821).

### 2. The problem

It will not always be possible for employers submitting the FPS (or those who do payroll on their behalf, e.g. payroll bureaux and third party tax accountants) to comply with either the 'on or before' rule' or the 'extended on or before rule' for notional payments.

- i) **The usual 'on or before rule'** will be impractical to meet for those who do not use computers in their businesses or do not have broadband access, or who pay workers before the payroll is computed (as is common in the hospitality and harvesting sectors where workers are paid at the end of their shift on the basis of hours worked or amount picked) and it will create additional expense for those who do not currently use payroll software or do not have broadband access or who need to use third parties to compute payroll and submit the necessary FPS.
- ii) **The 'extended on or before rule' (notional payments):** While we welcome the extension of the deadline for notional payments to, potentially, 14 days after the end of the tax month, it is only a partial solution to the problems that employers will face. It is insufficient to cover all 'notional' payments because:
  - A deadline of the 19<sup>th</sup> of the month will create an unnecessary and potentially very expensive burden for employers owing to the need to run payrolls to collect tax on the notional payments outside the normal running schedule in cases where there is no actual payment to the employee from which to deduct the tax.
  - There will in many cases still not be sufficient time to obtain the information and input it into payroll in time to meet a deadline of the earlier of making an actual payment to an employee and the 19<sup>th</sup> of the month (which is why, for example, HMRC have long operated an easement allowing NIC on marginal items paid late to be accounted for in a subsequent pay period).
  - Even longer is needed for cross border employments, and for share-related payments as these necessitate the employer having to obtain valuations and work out how many shares to retain to cover the tax and NIC. Frequently, the employer will not realise that a PAYE liability has arisen where the notional payment arises from exercising an option by an employee, especially if the employee is overseas and employed via a different company or a branch.

We list some example situations in the appendix below.

- iii) **Penalties and costs:** Non-compliance with the 'on or before' or 'extended on or before' rules may well lead to automatic penalties. Employers who have been unable to comply despite their best efforts will be forced to incur the cost and stress of an appeal to the Tax Tribunal on the grounds of reasonable excuse – assuming of course that the RTI penalty regime will include such a provision.

Inevitably employers will incur additional costs, particularly in the situations listed in our examples, or where they outsource their payroll, or do not use payroll software, or have a poor broadband connection. Small businesses cannot afford to pay an agent to perform multiple e-filing tasks. As noted above the number of additional e-filing tasks and related costs could be considerable, for example, in the hospitality trade a business may have a pool of regular casuals who are paid at the end of each shift – this could result in 366 separate e-filed RTI returns per year. The estimated compliance costs for employers in the [Real Time Information Tax Information and Impact Note](#) published on 15 March 2012 look wholly unrealistic.

### 3. Our recommended solutions

RTI is supposed to be simplifying employer obligations. As the regulations which include the 'on or before' and 'extended on or before' requirements are already in force (to enable employers lawfully to participate in HMRC's go-live pilot), we would welcome Ministerial undertakings that:

- the deadlines in the regulations will be amended to enable employers to comply with the law in situations where it is at best impractical and at worst impossible to comply with the 'on or before' or 'extended on or before' obligations; and
  - the penalty legislation will include a reasonable excuse provision to cater for such situations.
- i) **The usual 'on or before rule':** We suggest that the simplest solution would be to align the basic deadline for submitting the FPS with the due date by which employers have to account to HMRC for PAYE income tax, NIC and student loan deductions, i.e. the 19<sup>th</sup> of the month following the tax month in which the relevant payment is made to the employee. This will also alleviate the situation for those who are not computer users and/or computer literate and/or have no broadband coverage.
- ii) **The 'extended on or before rule' (notional payments):** As to the extended on or before deadline for submitting the FPS for notional payments, this as explained above is too short. We suggest that this deadline is extended to the date by which employees have to make good to their employer the tax on notional payments where deduction is not possible, ie 90 days after the date on which the employer is treated as making the notional payment (as set out in section 222, ITEPA 2003). This date was arrived at in recognition by HMRC and Ministers of the difficulties faced in particular by cross border employers.
- iii) **Penalties and costs:** Deferring the deadlines for submitting the FPS would also have the additional benefits of reducing the likely number of adjustments to FPSs already submitted and allowing the alignment of the penalty regimes for reporting and payment. Currently the proposals appear to suggest that there will be two penalty regimes with different trigger dates. This extra complexity does not appear to meet the RTI objective of reducing administrative burdens on employers or the government's alleged commitment to simplification.

Whether or not the 'on or before' or 'extended on or before' rules are changed, the penalty rules need specifically to cover cases where the 'on or before' or 'extended on or before' rules are impossible to comply with, including our examples below and similar situations, under the heading 'reasonable excuse'.

As to compliance costs, we believe that those quoted are far too low. We should welcome an undertaking from the Minister that HMRC will be obliged to carry out a review of employer compliance costs after the end of the first full year of operation of RTI (i.e. 2013/14) and publish the report by summer 2014.

## APPENDIX

### Examples where complying with the 'on or before payday' rule or the 'extended on or before' rule will be difficult if not impossible

- (i) Employers located in areas (predominately rural but also on the edge of conurbations where the telephone lines have been added to piecemeal) where there is no, or very poor, broadband connectivity. Submitting an RTI report via a dial up connection is simply not practical as it will take too long and cost too much and using a public internet location, such as a public library or internet café, gives rise to data security issues. This will be exacerbated where any of the other examples also apply.
- (ii) Employers who do not use computers in their business, either because the electronic age has passed them by or because their business does not require it, either because of the nature of the business, e.g. gardening, or because of the way in which they do their payroll, i.e. manually in year with end of year online filing outsourced. We understand that around 10% of all small businesses do not use computers, but we have no data on the many non-

- business employers of, e.g., nannies and housekeepers who will be subject to the RTI rules.
- (iii) Employees paid at the end of a work session where the payroll is completed subsequently on the basis of grossed up net payments, for example bar staff, restaurant staff, harvest workers and day labourers. The payroll might be done the following week, e.g. by the proprietor or his wife, or monthly, e.g. by an independent tax accountant.
  - (iv) Expenses payments on which Class 1 NIC is due; these include company credit card payments for which the employee making the payment does not declare to the payee at the time of payment that they are acting as agent for the employer (often referred to as 'the litany'); the employer has no knowledge of the payment until the credit card bill is received. This is the sort of payment that is currently covered by the easement in CWG2 *Late notification of marginal items of pay* which allows employers to account for the NIC as soon as possible in a later pay period provided that it will not adversely affect the employee's NI contribution record.
  - (v) Reimbursement of mixed business and private payments, such as utility bills in job-related accommodation, or motoring expenses for employee-owned cars, where the correct split between business and private is rarely known at the point where the expense is paid out because an annual apportionment is required.
  - (vi) Payments overseas to employees of multi-national groups who are assigned to the UK. Such employees may remain on the overseas payroll and are paid in the home country. Each country may have different paydays. If the individuals are paid net a shadow payroll may be run in the UK on a monthly gross up basis for all relevant employees. In other words the employees receive their net income in the home country and the amount of UK tax due on that amount is calculated later and paid to HMRC by the payment deadline. Under the RTI proposals separate reports are required in respect of each pay date in the overseas country for each employee which would increase the administrative burden. This requirement will not be conducive to the Chancellor's aim of making the UK one of the best targets for foreign direct investment in business.
  - (vii) Payments of tax overseas on behalf of employees assigned abroad and liable to tax in an overseas country but who remain resident in the UK and taxable in the UK on their worldwide income. An overseas subsidiary/branch of the employer may make foreign tax payments on the employees' behalf and then inform the UK payroll at a later date.
  - (viii) Payments of UK NIC in respect of employees working overseas under an A1/E101 certificate (ie, they remain liable to UK NIC law on all earnings) even though they are paid by the host employer overseas.
  - (ix) In the previous three examples, although the foreign tax and NIC are income if paid by the employer there may be no UK tax due if the liability is covered by foreign tax credits. Even so the details would still need to be reported.
  - (x) Share scheme payments where tax is due on the exercise of an option: the employer has to calculate the tax and NIC, which involves ascertaining share valuations and the employer may need to withhold some shares to cover the tax and NIC. The employer may not find out until later that the employee has exercised the option, and if the employee is overseas then it can take even longer for UK payroll to become aware.

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**ICAEW 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 [icaew.com/en/technical/tax/tax-faculty/~media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx](http://icaew.com/en/technical/tax/tax-faculty/~media/Files/Technical/Tax/Tax%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx) )