

Tax Representation



TAXREP 21/09

‘SERVICE COMPANIES’ IN EMPLOYER END-OF-YEAR RETURN P35 AND SELF ASSESSMENT TAX RETURN SA 100

Text of a letter sent on 9 April 2009 to HMRC by the Tax Faculty of the Institute of Chartered Accountants in England and Wales

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‘SERVICE COMPANIES’ IN EMPLOYER END-OF-YEAR RETURN P35 AND SELF ASSESSMENT TAX RETURN SA 100

Text of a letter sent on 9 April 2009 to HMRC by the Tax Faculty of the Institute of Chartered Accountants in England and Wales

FOREWORD

Two letters, the text of which is reproduced below, have been sent to HMRC. The earlier letter is reproduced as an Annex to the later letter.

We published guidance on our website on 3 April and around 9 April 2009.

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 which we use as a benchmark are summarised in Annex B.

PCB
9.4.09

‘SERVICE COMPANIES’ IN EMPLOYER END-OF-YEAR RETURN P35 AND SELF ASSESSMENT TAX RETURN SA 100

TEXT OF LETTER DATED 9 APRIL 2009 TO HMRC

Further to our conversation and my email letter dated 3 April 2007 (reproduced in Annex) we posted on our website a newsitem dated 3 April at <http://www.ion.icaew.com/TaxFaculty/17381>.

We have received the following message from a reader of our newsitem:

‘If you use the HMRC online filing software for completing a P35, and you click on the Help Question Mark against Q6a, you get the following help: 6a. Are you a Service Company?* "P35 Checklist - Question 6a An intermediary or ‘service company’ is a company through which the personal services of one or more persons are provided to end clients. The only engagements affected by the IR35 rules are those in which the worker would be classed as an employee of the client if it were not for the service company involvement. Where the IR35 rules apply, the intermediary may have to account for an additional amount of PAYE and National Insurance contributions on the deemed payment, which is based upon the income from the engagements, after an allowance for certain expenses and pension contributions." If you rely on this guidance I would think you would conclude that they are only referring to IR35 type companies.’

The answers to Question 6 on P35 are likely to be inconsistent depending on whether employers have followed the guidance in E10 or the HMRC online filing guidance referred to above or our newsitem or simply tried to work it out from first principles from the guidance at CWG2 to which Q6 of P35 refers.

You will recall that it was agreed last summer that HMRC would invite CIOT and us to assist in devising unambiguous guidance for the current year. However, this has not happened.

In the light of the fact that:

- (a) despite the undertaking in paragraph 4.27 of the consultation document *‘Tackling Managed Service Companies’* published at PBR 2006 on 6 December 2006 which said that the question ‘Are you a service company?’ would be accompanied by ‘a clear definition of “service company” to enable a judgment to be made readily,’ it is not only unclear to which guidance compilers of P35 should refer to when completing the form but the guidance in E10 itself is open to different interpretations with the result that it is not possible to discern for certain what HMRC means by ‘Service Company’ from the guidance already in the public domain, therefore no-one completing the forms P35 knows with certainty what the questions mean;
- (b) we are now within the period in which employers are filing their end-of-year returns P35 and many employers may have already filed and many more P35s are likely to have been filed before HMRC clarifies what people should do;
and

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- (c) those who have already filed should not be obliged to amend their returns in the light of subsequent guidance and those who have not yet filed, possibly only because they are waiting for guidance as to how to answer Question 6, should not be disadvantaged,

we:

- (a) recommend that you clarify to which guidance people should refer;
- (b) would welcome confirmation that HMRC will not use the answers to Question 6 this year and there will be no adverse consequences for those who respond however they answer the two parts of the question or leave it blank (for example, the replies will be ignored for risk profiling and inquiry purposes); and
- (c) would welcome an undertaking that HMRC will consult in good time on the wording of both the questions and guidance and the method of delivery of the guidance for next year (so that not only does the wording of next year's questions and guidance reflect whatever it is HMRC wants to know but it is clear to everyone whether filing on paper or online using HMRC or software houses' products where to find the guidance explaining what HMRC want people to do).

In addition, we consider that HMRC should, as a matter of urgency, send an appropriate communication to all employers and post a message on What's New saying:

- sorry for the confusion;
- that HMRC will not use the answers to the questions this year and there will be no adverse consequences for those who respond, however they answer them (including no replies); and
- that for next year HMRC will consult employer representatives in good time on the wording of both the questions and the guidance and where to find the guidance.

Similar undertakings and communications are needed in respect of the 'Service Company' questions on the ITSA tax return.

Annex to letter

Letter dated 3 April 2009 to HMRC

This follows up our telephone conversation yesterday about Question 6 and sets out my understanding of our discussion.

In response to my question whether HMRC really does want to know about all "service companies" as defined in E10 or in reality only about IR35 entities and MSCs, you confirmed that it is indeed all "service companies" that HMRC wants to know about.

We suggest that Q6 should refer the reader to E10 (as well as CWG2 for the more detailed guidance) as one needs the explanations in E10 to work out how to answer Q6. You accepted this point.

HMRC should refer readers to up-to-date website guidance on MSCs instead of to a page which looks as it were written between PBR 2006 and the drafting of the MSC legislation (as in E10 and CWG2 2008 <http://www.hmrc.gov.uk/employment-status/msc.htm>). You said that you would look into this. ...

E10 should contain simple guidance on MSCs, as it does on IR35, although I suggest it need not be more than a paragraph or so with a reference to elsewhere.

It is silly to tell employers who are filing online to send "a separate sheet" to let HMRC know that figures are provisional – a tick box should be provided at Q6. You said that you had already realised this and would bear in mind for P35 next year and for any letter reminding employers to submit final figures if they had used provisional figures in the P35 as submitted. I suggested that you consider in any such letter telling employers that the figures as submitted will become final on 31 January so that those employers whose figures were final when entered on their forms P35 as submitted or are content for their provisional figures to stand need do nothing.

As an afterthought, HMRC needs to provide guidance for the current P35 on how employers who are online filing should notify HMRC that their IR35 figures are provisional.

Please contact me if you would like any point clarifying, or if your recollection of our chat is different from above. May I suggest that in the interests of speed you provide any clarification by way of an item on What's New – we will pick this up and publicise it on our news website <http://www.ion.icaew.com/TaxFaculty/blog/> (click the left-hand box next to View immediately above the newsitems to condense the items to headlines only). We should welcome the opportunity informally to read over and comment on what you propose to publish, if you so wish.

We may come back to you with points on the ITSA return question at TR4 and guidance at TRG19.

ICAEW AND THE TAX FACULTY: WHO WE ARE

1. 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.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department for Business, Enterprise and Regulatory Reform through the Financial Reporting Council. 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.
3. 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 10,000 members of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on 020 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

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 www.icaew.co.uk/index.cfm?route=128518.