



ICAEW REPRESENTATION 123/16

TAX REPRESENTATION

FINANCE BILL 2016: CLAUSES 97-120: APPRENTICESHIP LEVY

**Text of Briefing for MPs for the Report Stage of Finance Bill 2016
submitted on 12 August 2016 by ICAEW Tax Faculty**

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Internationally recognised as a source of expertise, ICAEW Tax Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.

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REPORT STAGE BRIEFING

APPRENTICESHIP LEVY (Clauses 97-120)

BACKGROUND

Clauses 97-120 set out the rules for a new tax on employers to be known as Apprenticeship Levy (AL) which is scheduled to start on 6 April 2017. AL will be charged at a rate of 0.5% of an employer's total pay bill. Each employer or employer group (known as a 'unit') will be entitled to a Levy Allowance (LA) of £15,000 per year to offset against their AL payments. Connected employers will have to share the LA between them.

EXECUTIVE SUMMARY – CONCERNS AND RECOMMENDATIONS

In this briefing we set out our concerns on the Apprenticeship Levy clauses in the Finance Bill as amended in Committee and Public Bill Committee. None of our suggestions is intended to reduce the amount receivable by the Government to fund apprenticeships – our aim is to work in the public interest to ease compliance burdens and administration costs for both employers and HMRC, in line with our Ten Tenets for a Better Tax System benchmarks (summarised in Appendix 1).

Apprenticeship Levy is abbreviated to 'AL' and the Levy Allowance of £15,000 to 'LA'.

Clause 98 – LA should be able to be offset against AL payments on an annual basis, rather than, as stipulated in BIS [guidance](#)*, offset on a cumulative pro rata basis, eg one twelfth of the annual allowance per month

and

single entity employers with more than one PAYE scheme need to be able to alter during the year how they allocate LA across schemes

Clauses 100 and 101 – connected employers need to be able to alter during the year how they allocate LA across different entities, to take account of business developments such as changes to the composition of the unit, pay bills that differ from expectations and accidental mistakes in original determinations

and

employers and HMRC together need to be able to adjust on a just and reasonable basis determinations of LA that HMRC makes

Clause 119 – the start date for AL needs to be deferred for at least a year to give time to specify, design, build and test reliable software that will do the job properly

Further details on all these points are given below.

* BIS guidance dated 21 April 2016: *Apprenticeship Levy – how it will work* <https://www.gov.uk/government/publications/apprenticeship-levy-how-it-will-work/apprenticeship-levy-how-it-will-work>

DETAILED COMMENTS AND SUGGESTED AMENDMENTS TO THE BILL

In this part of the briefing we amplify our concerns and suggest how best to resolve.

Clause 98: Charge to apprenticeship levy: use of Levy Allowance (LA) during the year

- **Our concern:** Although the Finance Bill is silent on how LA is allocated to each pay period, BIS's [guidance](#)* says that annual LA must be offset on a cumulative pro-rata basis, eg one twelfth to each tax month. This monthly requirement, which is not currently reflected in the legislation, complicates AL, and means that employers with fluctuating pay bills may have to pay up front and apply for refunds. We understand that HMRC intends to lay regulations after the Bill receives Royal Assent setting out how the monthly process is to work, and how employers with fluctuating pay bills (eg, large agricultural employers with a seasonal workforce) are to approach the calculation.
- **Our view:** AL would be simple if the full £15,000 LA was allowed up front against AL payments, with AL payable once the LA is exhausted. This would avoid detailed and complex rules and/or guidance setting out how to allocate AL by pay period. It would also help employers with fluctuating pay bills, eg seasonal employers, as such employers will, according to BIS's [guidance](#)*, have to allocate one-twelfth of LA to each month. They will therefore have to pay AL and recover it against any future PAYE liabilities unless a sensible regulation defers assessment until later months when the pay bill is lower and it is known whether the annual limit will be reached. Where there is still an overpayment at the year end, they will need to claim a refund after the year end. HMRC's track record on refunding overpayments to employers is poor, and applying for, chasing and processing refunds will unnecessarily consume employers' and HMRC's time.

Whilst we accept that allowing LA to be offset against AL payments up front would delay cash flow into the AL fund, the increase in apprenticeships that the AL is designed to fund will not begin to happen until July/August/September when school and college leavers start their apprenticeships, so there should be sufficient funds available well before they are needed, even if many large employers pay little or no AL on 22 May.

- **Our recommendation:** we should welcome confirmation from the Minister that LA for the whole year can be set against AL payments from the start of the tax year rather than offset on a cumulative pro-rata basis, eg restricted to one-twelfth of the annual amount of LA each month.

We should also welcome clarification of how employers will be able expeditiously to secure repayments of amounts overpaid and how employers will account for unexpected underpayments.

Clause 98: Charge to apprenticeship levy: allocation of LA to different PAYE schemes by single entity employers with more than one PAYE scheme

- **Our concern:** It is not clear how single entity employers with more than one PAYE scheme will be able to allocate LA across PAYE schemes. The limited details given to software developers and comment received from HMRC and BIS suggest that the LA can be allocated between multiple PAYE schemes run by the same employer which is sensible but this is not reflected in the legislation. For example, BIS's [guidance](#)* says that single entity employers "will be able to offset the unused amount against another one of your schemes once the tax year has ended.". HMRC has said in a briefing issued in June that the split of levy allowance (LA) between PAYE schemes for single entity employers must be agreed at the beginning of the tax year and fixed for that year.

* BIS guidance dated 21 April 2016: *Apprenticeship Levy – how it will work* <https://www.gov.uk/government/publications/apprenticeship-levy-how-it-will-work/apprenticeship-levy-how-it-will-work>

- **Our view:** Single entity employers with more than one PAYE scheme need to be able to share the LA between their different PAYE schemes and be able to change the allocation of LA between schemes during the year to enable the full annual LA of £15,000 to which they are entitled to be utilised. This is necessary to cope with business changes in-year that were not foreseen at the start of the year when the LA has to be allocated. Examples include pay bills different from expected, reorganisation of PAYE schemes, or a mistake such as a transposition error or a wrong decimal point in the original allocation. We see no policy reason why this cannot be permitted, as it achieves the stated intention of allowing the £15,000 LA in the most flexible way.
- **Our recommendation:** The legislation needs amendment to make the allocation of LA across PAYE schemes clear and allow employers to change their allocations during the year, failing which we should welcome confirmation from the Minister that single entity employers with more than one PAYE scheme will be able to both allocate LA across PAYE schemes and change the allocation of LA between PAYE schemes during the year. Failing that, we should welcome clarification of the mischief that is intended to be overcome by imposing this restriction on employers.

Clauses 100 & 101: Connected companies and connected charities: when employers are to be treated as connected and the bar on connected employers being able to change their allocations of LA

- **Measure:** Clause 100 provides that companies that are connected with one another at the beginning of the tax year (a “company unit”) must determine what amount of LA each member of the unit is to be entitled to for the year and the determination must add up to £15,000 (sub-clauses (1),(2),(3), & (4)).

This determination can be changed by the members of the unit only if the total amount of LA does not equal £15,000 (sub-clause (5)).

HMRC has the right to change the determination if the total amount of LA claimed by the unit exceeds £15,000 (sub-clauses (6)-(14)).

Clause 101 provides similarly for connected charities (a “charities unit”).

BIS’s [guidance](#)* says that “if you are part of a group of connected employers, you must decide what proportion of the levy allowance each employer in the group will be entitled to. This decision must be taken at the beginning of the tax year and will be fixed for that tax year.”

- **Our concerns:**
 - Our first concern is that, under sub-clause (1)(a), the make-up of a company or charities unit is determined at the start of the tax year. This means that reorganisations of the unit, for example take-overs, mergers, disposals or liquidations, are to be ignored for the purpose of calculating the amount of LA that each member of the unit is entitled to. It could be that taking a snapshot at the beginning of the year is intended to simplify the allocation of LA to unit members but it is unrealistic and in-year changes to the membership of a unit may result in absurd allocations of LA. Where the number of members of a company or charities unit changes during the year, it is not clear how the total number of members over which AL is to be shared out at any point in time will be determined.

* BIS guidance dated 21 April 2016: *Apprenticeship Levy – how it will work* <https://www.gov.uk/government/publications/apprenticeship-levy-how-it-will-work/apprenticeship-levy-how-it-will-work>

- Our second concern is that employers are prohibited by sub-clause (5) from changing their determinations of how much LA will be allocated to each member of a company or charities unit. Employers need to be able to change their determinations during the year to ensure that the amount of LA able to be offset against AL payments by each member of the unit in practice is not less in aggregate than the full annual amount of LA that the unit is entitled to (ie £15,000). The employer may need to change its determination if the unexpected occurs, for example the pay bill of a particular company or charity is too small to use all the LA that it thought would be needed and the LA can be utilised by another company or charity in the unit, or a company or charity joins or leaves the company unit or charities unit respectively during the year, or the original determination contains an accidental mistake such as a transposition error or a decimal point in the wrong place.
- Our third concern is that it is inequitable that, whereas HMRC will be able to re-determine how much LA each constituent company or charity is entitled to if the amount of LA claimed by the company unit or charities unit is found to be greater than £15,000, the employer will be unable to change its mind about how much LA is allocated to each member of a company unit or charities unit.
- **Our view:** We welcome the fact that the Government amended the Bill in Public Bill Committee to enable connected companies and connected charities to share the LA between them, but we consider that a company unit or a charities unit should not be prevented from changing its determination of how much LA to allocate to each member of the unit during the year.

Employers need to be able to change their determinations to ensure that the unit can use the full amount of LA to which it is entitled rather than LA being wasted if the unexpected occurs, for example:

- pay bills differ from expected, or
- members join or leave the unit, or
- the original determination contains an accidental mistake such as a transposition error or an incorrect decimal point (eg £10,000 was allocated to a unit member rather than £1,000).

The number of connected employers who are able to share the available AL at a particular time needs to reflect the actual number of employers who are connected at that time.

- **Our recommendations:**
 - Employers should not be prevented from changing their determinations during the year once made, and
 - The number of connected employers who are able to share the available LA at a particular time needs to reflect the actual number of employers who are connected at that time.

We should welcome clarification of the reason for providing in sub-clause (1)(a) that the make-up of a company or charities unit is determined at the start of the tax year.

As AL is not an anti-avoidance measure, we should welcome clarification of the mischief that is intended to be overcome by imposing a one-sided restriction on employers changing their determinations.

- **Our suggested amendments:** Clause 100, page 185, line 40, omit clause 100(5) and on page 187, line 23, in sub-clause (15) omit “despite subsection (5)”. And clause 101, page 188, line 3, omit 101(5) and on page 189 line 26, in sub-clause (15) omit “despite subsection (5)”.

* BIS guidance dated 21 April 2016: *Apprenticeship Levy – how it will work* <https://www.gov.uk/government/publications/apprenticeship-levy-how-it-will-work/apprenticeship-levy-how-it-will-work>

Clauses 100 & 101: Connected companies and connected charities: the formulas to be used by HMRC to re-determine employers' allocations of LA and the need for a right of appeal by employers so LA can be reallocated on a just and reasonable basis

- **Measure:** Clause 100 provides that if a company unit has split its LA in a way that means it receives more than £15,000, and does not remedy that by altering the split of its LA after being notified in writing by HMRC, HMRC must decide what amount of allowance each company is entitled to for that tax year. HMRC will determine the allocation of the £15,000 LA between companies in the unit by using the formula in sub-clause (7), which is to scale down the levy allowance in the proportion agreed by the companies in the unit so that it equals £15,000. Sub-clause (12) contains a formula which divides the AL by the number of members in the unit where other specified circumstances apply. Clause 101 provides similarly for charities units.
- **Our concern:** HMRC will be notifying employers electronically of their intention to amend or make determinations, and where employers are not aware that such a message has been sent they will not be able to reply and amend the determination themselves to the correct figures. Where the total LA claimed by a unit exceeds £15,000 because the original determination by the employer contains an accidental mistake, for example a transposition error or a decimal point in the wrong place (eg £10,000 LA allocated to a member of the unit instead of £1,000), causing the total to exceed £15,000, the formulas which HMRC has to use pro-rates the amount of LA in proportion to the amounts in the determination or will divide £15,000 by the number of members in the unit, which is likely to result in the wrong amounts of LA being allocated to each member of the unit, which in turn may result in LA being unable to be used where the AL due by individual units based on their final pay bills is less than the LA allocated to them.
- **Our view:** the employer needs to be able to appeal against determinations made by HMRC and the two parties should then have to agree between themselves an allocation of LA to members of the unit on a just and reasonable basis. The process should be flexible rather than being unduly prescriptive.
- **Our suggested amendments:** Clause 100, Page 187, line 20 and clause 101, page 189, line 21, at end add:
“(14A) Where HMRC has notified the employer that it has made a determination under this section and the total amount of levy allowance able in practice to be offset against levy payments is less than £15,000, the employer can appeal against HMRC’s determination and the employer and HMRC shall then agree how much levy allowance is to allocated to each member of the unit on a just and reasonable basis.”.

Clause 119: Apprenticeship Levy (AL) start date

- **Measure:** Clause 109 sets out, within the definition of “tax year”, the date that AL starts as being 6 April 2017.
- **Our concerns:**
 - The efficient operation of AL requires reliable payroll and HMRC software.Unfortunately:
 - the design of AL has not yet been agreed, let alone set in primary and subsequent secondary legislation, and
 - we await public guidance which was promised for June to update the [guidance](#) published by BIS on 21 April 2016*, and

* BIS guidance dated 21 April 2016: *Apprenticeship Levy – how it will work* <https://www.gov.uk/government/publications/apprenticeship-levy-how-it-will-work/apprenticeship-levy-how-it-will-work>

- no detailed IT specification has yet been provided by HMRC to software developers save for a very general briefing note produced at the end of June and corrected on 4 August.

With only eight months to go, those who are responsible for designing the software specifications and payroll software providers do not yet know exactly what their product must be able to do, and cannot know until the supporting regulations that will follow the Finance Act have been published. Any software updates for April 2017 have to be in place by 31 December 2016,

A start date for AL of 6 April 2017 is, therefore, in practical terms impossible because it is too soon for HMRC to produce thorough software specifications based on the Finance Act and regulations and for software developers to design, build, test and supply to clients robust software that will do the job properly, and for operators to be trained, or for HMRC to update its own software and its Basic PAYE Tools (BPT). (BPT is needed so even large employers can when necessary submit earlier year updates (EYU) after the year end to make changes to HMRC's figures without corrupting their own payroll data.)

- We question whether the way in which apprenticeships will be funded coupled with the imposition of AL will fulfil the objective of encouraging employers to train more apprentices. It has been suggested that employers who are subject to AL but whose numerous trainees are not apprentices within an approved framework may cut their training budgets to fund AL payments.
- In addition the way in which funding will be distributed in the devolved authorities also has not been settled. In the absence of information, employers in the devolved authority areas may feel that they are paying AL and not getting anything back. How will Scottish apprentices will be identified and allocated to Scotland where the employer's administration team and payroll are at an English address? The proposed collection mechanism is based on total pay bills on each employer reference, with no link to the geographical location of the workers or apprentices concerned. We understand that the allocation is intended to be based on the employees' addresses but this does not appear to take into consideration non UK address or address "c/o the employer". Which of the multiple addresses that HMRC holds will be the relevant address?
- **Our view:** The design of AL – and the way in which funding will be distributed – needs to be settled and IT specifications are needed before software that will do the job reliably can be written. Once written the IT needs to be incorporated into existing payroll IT and tested and operators trained.

In addition, as recommended in Lord Carter of Coles' report *Review of HMRC Online Services* published in March 2006 at Recommendation 23, "services should be capacity tested at least a year before our recommendations are implemented, and if any tests are not successful the measures relating to that service should be deferred."

- **Our recommendation:** the start date for AL should be delayed for at least a year, eg until 6 April 2018.
- **Our suggested amendment:** In clause 119(2), page 199, line 23, leave out "2017" and insert "2018".

* BIS guidance dated 21 April 2016: *Apprenticeship Levy – how it will work* <https://www.gov.uk/government/publications/apprenticeship-levy-how-it-will-work/apprenticeship-levy-how-it-will-work>

FURTHER INFORMATION

As part of our Royal Charter, we have a duty to inform policy in the public interest. ICAEW offers impartial expert briefing on the Budget, the Finance Bill and ad hoc policy issues for MPs, Peers and parliamentary staff.

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* BIS guidance dated 21 April 2016: *Apprenticeship Levy – how it will work* <https://www.gov.uk/government/publications/apprenticeship-levy-how-it-will-work/apprenticeship-levy-how-it-will-work>

APPENDIX 1

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 via <http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax>).

* BIS guidance dated 21 April 2016: *Apprenticeship Levy – how it will work* <https://www.gov.uk/government/publications/apprenticeship-levy-how-it-will-work/apprenticeship-levy-how-it-will-work>