

TAXREP 3/04

NATIONAL INSURANCE CONTRIBUTIONS AND STATUTORY PAYMENTS BILL

*Memorandum submitted to the Paymaster General in January 2004
by The Tax Faculty of the Institute of Chartered Accountants
in England and Wales*

Tax Representation

NATIONAL INSURANCE CONTRIBUTIONS AND STATUTORY PAYMENTS BILL

WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales ('ICAEW') is the largest accountancy body in Europe, with more than 125,000 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 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.

COMMENTS ON CLAUSES 1-2 OF THE BILL

General

3. We welcome the proposals in this Bill, on which we were invited to comment in draft (see TAXREP 35/03 submitted in October 2003, http://www.icaew.co.uk/viewer/index.cfm?AUB=TB2I_58364). According to the Explanatory Notes, this Bill contains measures regarding National Insurance contributions on securities-based remuneration designed to simplify employers' administration of National Insurance contributions by:
 - extending employers' ability to recover Class 1 contributions paid on securities based earnings of their employees and ex-employees by allowing the employer, with the agreement of the employee, to withhold an amount of the securities equal to the contribution liability - *clauses 1 and 2*; and
 - extending the facility whereby employers can ask employees to fund the employer's share of National Insurance contribution liability on the exercise of a share option to include awards of restricted or convertible securities - *clauses 3 and 4*.
4. Whilst we appreciate that security-based remuneration poses specific problems that the easements in the Bill are designed to cover, and that ex-employees also create difficulties for employers, we consider that the new provisions governing the ability of employers to recover the Class 1 national insurance liability from employees in the year following that in which the liability arises should not be restricted as is proposed to security-based remuneration or to ex-employees, but should cover any type of remuneration and all employees whether current or former.

Tax Representation

Why do employers need to be able to recover NICs in a year later than that in which the liability arises?

5. A situation in which employers are unable to recover the primary NIC liability in-year arises in any case where a non-cash payment is made to an employee at the end of the tax year and there is no subsequent payment of salary in the same tax year which can be used to claw back the primary NIC. Examples of non-monetary payments which our proposal covers include non-cash vouchers (eg Marks & Spencers vouchers) and, if the Revenue's interpretation of the law is correct which we dispute, FURBS. It would therefore help employers if they were able to reclaim the NIC from employees during the tax year following that in which the non-cash remuneration is paid, not only because they would no longer be out of pocket, but also because having one rule for all situations would be simpler for them than having different rules for different situations.
6. Another situation where we consider that it is necessary for employers to be able to recover NICs from employees in the year following the tax year in which a payment is made is where the 90 day rule in section 222, Income Tax (Earnings and Pensions) Act 2003 applies. Under this rule, if an employer is unable within 90 days to collect the PAYE that he has asked the employee to pay him, the amount uncollected is treated as earnings of the employee and the employer has to pay over to the collector of taxes Class 1 NIC. If the charge arises near the end of a tax year, and there is no monetary remuneration payable to the employee from which the employer can deduct the income tax and Class 1 liability, the employer will have to bear the cost.

What employees does this apply to?

7. Whilst formerly the problem was confined to employees with remuneration below the upper earnings limit, the introduction of the 1% additional rate on all earnings means that all employees are potentially affected. As noted above, our recommendation would apply to both current and ex-employees.

Start date

8. Adopting our proposal would ideally enable employers to recover primary NICs from employees for liabilities that arise in 2003/04.

COMMENTS ON CLAUSES 3-4

9. In general, the Bill could do more to provide for elections/agreements in respect of other Part 7, Income Tax (Earnings and Pensions) Act 2003 events.
10. For example, we are aware that many US-based employers provide employees with Restricted Stock Units ('RSUs'), by which we mean, in effect, a deferred right to receive stock subject to satisfying employment conditions; that is to say, the stock is received on vesting rather than on award. RSUs are not eligible for election/agreement. These are not necessarily encountered just with the international mobile community under a certificate of coverage, but can be awarded to UK resident and ordinarily resident employees working for UK subsidiaries.

Tax Representation

11. Options granted to someone who is UK resident but not ordinarily resident are now liable to Class 1 NIC on sale of the shares under the Chapter 3C rules but there is no possibility of an election or agreement. Such an employee might well be UK resident and ordinarily resident by the time of exercise. Perhaps this was overlooked when it was decided to change the NIC charge from Class 1A to Class 1. We feel that employers and employees should be able to enter into joint agreements to transfer the whole NIC charge to the employee.

SECONDARY LEGISLATION

12. We consider that draft secondary legislation should be made available before the Bill is enacted, as this would make it possible to provide fully-considered and more constructive comment on the implementation of the provisions in the Bill.

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