AAT RESPONSE TO THE HMRC CONSULTATION ON "OFFSHORE EMPLOYMENT INTERMEDIARIES"

1 INTRODUCTION

1.1 The Association of Accounting Technicians (AAT) is pleased to comment on the issues raised in the HMRC consultation on "Offshore Employment Intermediaries".

1.2 We have over 50,300 full and fellow members and 71,000 student and affiliate members worldwide. Of the full and fellow members, there are 3,800 Members in Practice (MIPs) who provide accountancy and taxation services to individuals, not-for-profit organisations and the full range of business types.[1]

1.3 AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

1.4 In pursuance of those objectives AAT provides a membership body. We are participating in this consultation not only on behalf of our membership but also from the wider public benefit perspective of achieving sound and effective administration of taxation.

2 AAT MEMBERS' EXPOSURE TO OFFSHORE EMPLOYMENT INTERMEDIARIES

2.1 Any changes to either national insurance or tax law are likely to affect a significant proportion of AAT members in a variety of different ways. Some members who work in payroll will be employed by one or more of the intermediaries involved. Furthermore, those working in an accounts function who might be responsible for the correct allocation of costs in respect of all forms of transactions involved in this area, including the processing of invoices between intermediaries and the final end user.

2.2 Our members in practice will be providing services, advice and guidance to clients who are either an intermediary or the end user.

2.3 It is the AAT's policy to respond to consultations of public interest and that might affect the income tax and national insurance contributions calculations and ledger allocation of costs.

2.4 In general AAT welcomes the introduction of a mandatory requirement for all employers to fulfil their statutory obligations even if they are domiciled outside the United Kingdom. We recognise that such action offers the potential of

[1] Figures correct as at 30 April 2013

equality of business costs for all concerned wherever they choose to be located. We do, however, have some reservations regarding the effects that the proposals might have.

3. OBJECTIVE OF THIS CONSULTATION

3.1 We note that the issued consultation document (condoc) is inviting opinions from third parties in respect of the possible introduction of new requirements for offshore employers to meet the full PAYE liabilities that apply to anyone who employs someone to work in the UK. It further seeks to provide the facility to move the ultimate liability to pay PAYE from the offshore employer to one of an intermediary should recovery from the offshore employer prove to be too problematic.

4 THE CONSULTATION DOCUMENT

4.1 Prior to formally responding to the questions posed in the condoc we would like to make the following observations:

4.2 It is apparent to AAT that the main intention of the condoc proposals is to make offshore providers of workers in the UK (offshore intermediaries) liable for the full UK income tax and national insurance contributions payable as if they were a UK based provider.

4,3 Taking the above into account the second part of the condoc's proposals concerning the transfer of liability to a UK intermediary where the offshore intermediary will not cooperate, could result in there being little incentive for that offshore provider to comply. In making our observation we recognise there might be little, or no other, option other than to attempt to collect from the UK bases entity.

4.4 We note and are very concerned that HMRC's own research has shown there to be a high level of ignorance in respect of the type of arrangements that are the subject of this particular consultation exercise, both from the worker and the end user's perspective.

4.5 Of particular concern to us is the fact that end users could be adversely affected through their facing an exposure to unexpected additional tax and national insurance costs on top of the fees already paid to the offshore employment scheme. To help avoid this type of scenario occurring out of ignorance we would recommend that if the proposals were to be implemented safeguards, such as a level of ongoing publicity, are introduced to protect those end users that might be affected.

4.6 We also note that legislation[2] already exists which should already be used to enforce compliance but appears to fail under the "personal services" argument. AAT believes there is a need for this to be strengthened in order to establish that when a worker in the UK is supplied to a UK end user it is obvious the worker is providing those services personally enabling the "host regulations" to be enforceable.

4.7 Of prime concern to us is the regular reference to employment and offshore employers. We see the primary area for non-compliance as being the supply of labour via some form of "temping" arrangement where ostensibly there is no employer, employee or employment contract (see paragraphs 5.2 to 5.12). Simply by making it clear they do not "employ" the person carrying out the work would seem to us to be enough under these proposals for the offshore provider to escape liability. If this principle is extended even the primary intermediary will be able to do this by, also, claiming the arrangement is not one of employment. Thus forcing HMRC to first argue the status of the worker before being able to move on to prove who has the responsibility to pay the statutory deductions.

5 CONSULTATION QUESTIONS

Question 1: Would these proposals defining intermediary 1 cause any practical difficulties e.g. to genuine commercial arrangements? Please provide details and examples.

5.1 AAT believes that any new legislation should not be permitted to interfere with supplies of services where there is a genuine requirement for a specialist.

5.2 For example, it is important that the supply of labour via a "temping" arrangement within the UK is defined in this way, because the primary supplier of the labour is the agency or company which contracts with the end user of the services. In these cases within the UK, there is no employment contract, no employer and no employee within the definitions laid down by the Employment Rights Act 1996.

5.3 Care must be taken when constructing a definition to ensure that it does not unintentionally capture the provision of a service by a business which involves one or more of their employees providing a final range of services which are itemised in the contract.

5.4 Since the provider of a service physically employs such persons we consider that the relevant existing statutory requirements are being met by that employer, irrespective of the status of that employee. This is an already complex area of legislation, which we do not wish to see complicated further.

5.5 We do not believe a service company providing specialist services to a client who hires in additional expertise to complete the work in hand should be

[2] Social Security (Categorisation of earnings) Regulations 1978 para 9 sch 3 – known colloquially as the "Host Regulations"

required to have any involvement in either the financial or statutory relationship that exists between the provider and the specialist hired.

5.6 AAT is of the opinion that the current rules on deemed and disguised employment which are contained in, and known colloquially as, IR35 and the existing status checks should be deployed to enforce compliance in these areas.

5.7 In addition to our above comment we suggest that the current Construction Industry Scheme arrangements, whilst flawed (in certain respects), are adequate to deal with the use of workers provided by third parties. We, therefore, urge that caution is employed when drafting further legislation to ensure that any fresh definitions used do not inadvertently capture those in the construction industry.

5.8 In the condoc reference is made to an offshore provider as being the employer, which may, or may not, be the case. To clarify the last statement; a parallel can be drawn with agency workers provided by a registered and licensed UK agency. In such instances UK legislation makes the agency responsible for the duties and responsibilities that would normally fall to employers. Nevertheless, the worker is neither employed nor is the agency their employer.

5.9 It could be contended, in the context of these proposals outlined in the condoc, that if there is not an “employer” then the process of transferring the recovery of tax and national insurance liability might fail.

5.10 AAT recommends that HMRC look upon the provider of the service, or the workers services, as an employer or commercial provider. Failure to take this action could result in a need to amend the Employment Rights Act 1996 to make such workers, in all cases, the employees of offshore intermediaries. Such an action would have a series of implications affecting all arrangements where expertise is hired from specialist businesses with far reaching commercial effects.

5.11 When considering the potential effects of the proposals AAT is concerned that they could give rise to a perverse incentive to offshore intermediaries to default on making payments in the knowledge that the liability will pass to Intermediary 1.

Question 2: Are there likely to be any commercial difficulties with the proposed definition of end user, above? If so please say what they are likely to be and provide examples.

5.12 Taking into account that it is our understanding that in the oil and gas industry there is no other way of defining who might be the end user than to make it the licensee of the oil field then we do not have concerns over this definition.

5.13 The effect of the proposal is that it would make the definition consistent with existing practice for agency workers. As an alternative, the most appropriate end user might be the operator of the platform.

Question 3: Are calculating the payments in this way likely to cause any problems? If so what are they? Please provide examples.

5.14 Whilst we understand the point in hand we do not agree with the calculation. It has the effect of making the end user, or Intermediary 1, look as if they are being punished for entering into what they would have understood to have been a standard commercial arrangement to obtain their required resource.

5.15 The end user is likely to be paying a fee to the intermediary, or directly to the offshore provider, which includes the workers payments, an allowance for the statutory liabilities plus the agent's fees for the provision and any overheads. In cases of default by the offshore intermediary to leave other parties involved with a liability to pay the unremitted statutory liabilities (on what looks like a grossed up calculation) seems unfair. Particularly when, in some cases, the intermediary and end users are unaware of the actual amounts made to the worker.

5.16 We do not have an issue with the calculation per se. It is a simple way around the fact that detailed information is not available to either the end user, Intermediary 1 or HMRC. The issue as we see it is in the failure to enforce the offshore intermediary to provide the necessary information because they are outside the UK.

5.17 We feel that it is an omission of the condoc not to have a requirement for a worker to account for their income tax and national insurance in the same way as a UK taxpayer.

5.18 We accept the UK taxpayer may have to pay twice in cases where the offshore provider fails to meet their liabilities and HMRC fails to recover the tax and national insurance elsewhere, and note that in many cases the worker will be unaware of the contractual arrangements.

5.19 In situations where a worker is unaware of the contractual arrangements we feel strongly that safeguards should be put in place to prevent the tax liabilities from being transferred to them.

Question 4: Is there any reason why this proposal might disrupt existing arrangements? Please provide reasons.

5.20 We cannot see any reason why this proposal would disrupt existing arrangements subject to our comments above concerning the care needed over the definitions in the new legislation.

Question 5: Do you have any views about how the Government's proposal that all oil and gas workers on the UK continental shelf should be included in this measure? If so what are they?

5.21 We are not in a position to comment on the detail of this measure. However we would observe that there is a need to eliminate the inconsistency of treatment that exists when such workers are on fixed platforms.

Question 6: Is this likely to have any unintended consequences? If so what are they likely to be?

5.22 We have no comments in response to this question.

Question 7: Would it be better for the industry to amend the definition of mariner in Regulation 115 SSCR 2001 or to amend the exemption so that those who meet Case B SSCR 2001 will be excluded from the exemption? Or is there another way that this could be achieved, that would be better for the industry? Please state your reason for your preference.

5.23 We do not wish to comment on this question.

Question 8: For oil and gas workers it is intended that the end client will be the licensee of the oil field. Are there likely to be any adverse impacts from this?

5.24 There are undoubtedly going to be adverse effects, just as there are such effects arising at present. We observe that changes to the definition of the end client will have advantages for HMRC in terms of establishing a clear route map as an aid to the enforcement of statutory responsibilities.

5.25 Such changes will, inevitably, add yet another layer of complexity. Accepting this fact and with no other way of defining the final end user, we understand the need for such a change.

Question 9: What is your assessment of the administrative burden of this requirement? Please provide examples and as far as possible illustrative costings as part of your response.

5.26 The proposals will inevitably and unavoidably add considerable administrative burdens for Intermediary 1, given that previously a similar requirement to keep such information had not existed.

5.27 Whilst the condoc proposals seek to transfer the liability in respect of historic debts to the end user in the event of a default of all others in the chain, we are concerned to note an absence of a route map to indicate how any information that might be required will be shared with the end user. It would seem appropriate to us that if an intermediary is to be required to hold such information then, they should also be required to provide the same along the chain to the end user.

Question 10: What is your assessment of the administrative burden of making a quarterly return to HMRC? Would a more or less frequent return be desirable? Please provide reasons for your answer.

5.28 Taking into account that the essence of the proposals is to ensure offshore providers comply with their responsibilities and meet their liabilities to UK tax we are concerned that it seems to be assumed that an offshore provider will, in fact, abdicate their responsibilities leaving the intermediary or end user to carry the burden of reporting.

5.29 As a consequence of the above not only will the intermediary, or end user, be required to collate and store information where this had not been the situation in the past but they will, potentially, also be required to submit returns to HMRC on a regular basis. The fact that this is going to be particularly onerous

appears to have been recognised in the condoc with the comment on page 22 regarding minimising the burden to businesses.

5.30 AAT is further concerned that the end user may, after the fulfilment of a contract, find themselves having to review information in respect of an entire chain of contractual arrangements. This, in itself, might prove to be an almost impossible task. However, failure to adopt such a course of action could result in a liability on the grossing up principles, plus historic debt and perhaps a penalty for missing statutory returns.

5.31 If it is decided that there is to be a requirement to complete and file reports we would support a quarterly cycle. A more frequent occurrence would be unnecessarily burdensome for all parties, including HMRC.

Question 11: What difficulties will intermediary 1 need to overcome to obtain this information? Please provide reasons and examples with your answer.

5.32 First and foremost it should be recognised that if HMRC currently finds it hard to compel offshore intermediaries to comply with their responsibilities there is no reason to believe that it is going to be any easier for end users and intermediaries to gather the same data.

5.33 The only participant who will have an ability to compel a worker to supply the required data is the offshore intermediary. As part of their engagement process they will collect data from the worker sufficient for their needs and to satisfy statutory requirements.

5.34 We foresee Intermediary 1 and any participants in the contractual arrangements potentially experiencing a problem obtaining workers' national insurance numbers and addresses.

3.35 We foresee a further problem arising from the need to obtain the name and address of the offshore provider through the fact that Intermediary 1 may not be aware of their existence. Furthermore, by the time they do become aware it could be too late.

5.36 In order to resolve the difficulties described above we feel there is a need to place a statutory requirement on a worker to provide such information to anyone using their services even if they are not the person who pays their fees or wages. There is also a need to introduce legal protection for end users and intermediaries from complaint if they decide to end an arrangement with a particular worker who refuses to cooperate in such provision.

Question 12: Is there anything that is likely to be particularly difficult to produce? If so provide reasons.

5.37 No, we do not think that it will be too difficult to produce any of the items listed in the condoc. The only problem that might arise is if the power to demand the data required is not given to the intermediary.

Question 13: is there anything additional that Intermediary 1 or end client businesses should provide when they are engaging offshore employees?

5.38 We do not consider that there is a need for any further data to be added to the list. It should not be forgotten that end users and intermediaries are being required to accept an increased administrative burden, hence data requirements should be kept to an absolute minimum.

5.39 We also wish to make a comment about the intention to switch the reporting to RTI at some point in the future. We would strongly argue against this as RTI is for PAYE taxpayers who are the responsibility of the hirer and in this case these individuals are not and never will be.

5.40 Some of the intermediaries and end users will not have any RTI responsibilities at all and this will put a further burden on them if they are to find and implement such facilities. Secondly such a requirement will seriously interfere with any proper RTI requirements they have. We feel this is such a unique situation that a completely separate data and reporting process is needed.

6 CONCLUSION

6.1 When the offshore provider defaults on their tax obligations, the proposals contained in this document transfers the tax liabilities to other parties in the chain of the contractual arrangements, which may be perceived to be unfair and heavy handed given that the other parties may not be in any way complicit with the default.

6.2 The proposal is heavy handed because making the intermediary or the end user responsible for the tax liabilities of the defaulting offshore employer is effectively penalising them (the intermediary or the end user) twice as they will have already paid this across to the offshore employer.

If you would like to consult further on this issue then please contact the AAT at:

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