Employee Travel and Subsistence Expenses – HMRC Consults

What goes around comes around……

On 13th May 1996, HMRC issued a consultative document containing proposals to allow relief for travel and subsistence expenses incurred by site-based workers and to make the basis of relief "fairer and less complex". This consultation generated an extremely large response, with 95% of those responding backing the proposal. Of the remaining 5% less than half advocated retention of the existing rules.

As part of the Explanatory Note to the Finance Bill 1998, it was specifically noted that

"In recent years the legislation had come under increasing criticism from outside bodies, notably because no relief was available for site-based employees, that is, people who have no permanent workplace but who, in the course of their employment, work at successive sites for short periods of time".

Accordingly, legislation was introduced which updated the tax treatment of business travel incurred by site-based employees to address these "long standing concerns" which enabled site-based employees to get relief to and from the site at which they are working.

New regulations for National Insurance Contributions were introduced into the Social Security (Contributions) Regulations 1979 with effect from 1st October 1998 to align the NIC treatment of business travel and subsistence allowances with the treatment for tax under the new travel rules introduced from 6 April 1998.

It was intended that the change of legislation for site-based employees and triangular travel would be "broadly revenue neutral".

Fast forwarding to 2014, Government (albeit a different colour) issued a discussion paper addressing the issue of employment intermediary structures and the use of overarching contracts of employment.

However, Government failed to publish the outcome of this consultation preferring to use the findings to inform its position prior to issuing a second consultation containing proposals to *"remove home to work travel and subsistence tax relief where a worker is employed through an intermediary and under the supervision, direction or control of any person".*

Freedom of Information Act

I have some concerns that Government chose not to publish the outcome of the discussion paper, especially as we have recently been denied access to this information following a Freedom of Information Request.

In denying our request, HMRC wrote

"I accept that there is general public interest in disclosure and ensuring that HMRC is accountable for its decisions as well as being as transparent as possible about the ways in which it reaches them. However, as the policy work relating to the subject matter in the discussion document is ongoing and a consultation is currently underway; and taking into account that decisions should be based on comprehensive advice which is not restricted by fear of undue public exposure, I consider releasing the discussion document responses would hinder the policy making process at this stage.

Additionally, I believe that through publishing a summary of the responses in the current formal consultation, HMRC has already gone some way to address the public interest in disclosure and transparency. For these reasons I conclude that the balance of the public interest favours maintaining the section 35(1) (a) exemption".

So what has HMRC to fear from fully disclosing the outcome of a public consultation which could, in fact, be considered to border on maladministration of the consultation process?

Why has Government chosen to keep the responses secret which would inform the business community and aid thus aid policy making progress?

In the words of Francis Urquart, (a fictional Conservative Party MP and Government chief whip, who manoeuvred himself through subterfuge, blackmail and murder to the post of Prime Minister)…… I couldn't possibly comment.

Flawed Consultation

The basis of the current consultation document is flawed in so many ways. For instance, what has Supervision, Direction and Control got to do with eligibility to claim tax-free travel expenses?

HMRC seem to have inexplicably linked the test for self-employment with the temporary workplace rules which consist of an obligation to incur and pay expenses as a holder of an employment and which are attributable to the necessary attendance at any place in the performance of the work.

It appears that HMRC is not backing its own judgement when openly inviting alternative proposals, during the recent round of workshops, which are well considered and meet policy objectives.

Unfairness

There is little doubt that the current proposal is grossly unfair on the flexible labour market. I fail to understand how Government can possibly justify removing the "level playing field" for a particular group of workers, when it readily accepted in 1998 that to deny tax relief for such workers was "unfair".

It was surprising to learn recently that Government accepts in the majority of cases tax relief currently generated by site-based agency workers is legally due. However, due to the fact that it "has no money", it appears that this group of workers have been targeted to improve Exchequer yield.

Surely, if Government wished to change its mind on the temporary workplace rules, it should do so following a general review and wider consultation which, as luck would have it, is on the cards for summer 2016.

Discrimination

It should not be forgotten that a large section of workers who are likely to be affected by these proposals will fall into a group with legally protected characteristics as recognised in The Equality Act 2010. HMRC seems to have ignored the fact that black and minority ethnic people are over-represented in this group of workers which this measure will negatively impact.

Indeed, the Runnymede Trust report, published after the 2015 Budget recognised that the effects of the summer budget will "increase racial inequality".

Judicial Review

Shifting the emphasis away from illegality, unfairness, irrationality and proportionality (which incidentally are all grounds for judicial review), we should consider the basis upon which Government justified its position in monetary terms.

Financial Implications

As part of the Travel and Subsistence workshops, HMRC stated that the estimated cost to the taxpayer of legally allowing tax relief for agency workers is £265m. However, the Impact Assessment provides the Exchequer yield as £155m in 2016/17. So, what about the missing £110m on the basis that the current proposal is likely to wipe out the opportunity to claim expenses for all employed temporary workers?

Exempt Categories

Perhaps the answer lies in the fact that HMRC has highlighted certain sectors as being exempt from the new legislation by virtue of ITEPA 2003 s337 i.e. community/district nurses and "other travelling professionals". This is on the basis that those working in a travelling capacity, where travel from location to location each day, is an intrinsic part of the duties of the role.

Area based people will be exempt, as will a worker who attends a workplace as a base from which they work (in order for tasks to be allocated). Therefore, individuals who work at depots and "similar places" will continue to claim relief on travel and subsistence payments received for travel between the depot or "similar place" and the engager's workplaces.

HMRC has also laid out an exemption for professional service firms whose business is not **primarily, significantly or mainly** (all referred to in the consultation document) involved in the supply of labour, rather than the supply of a "composite service".

Agency Worker Regulations (AWR)

The Agency Worker Regulations (AWR) which came into effect on 1st October 2011, gave agency workers entitlement to the same basic employment and working conditions as if they had been recruited directly. In contrast, the proposal seeks to deny these workers equal rights to be able to claim relief for travel and subsistence expenses when attending a temporary workplace.

Could the answer lie within the AWR i.e. a qualifying period before entitlement to relief is available as opposed to a test which is used to determine employment status or denying relief for the initial assignment?

Construction Industry

What is surprising is how HMRC has opened up a potential clash with the Construction Industry Trade Unions over the scrapping of the Working Rule Agreement (WRA) for agency workers engaged in construction operations, in favour of allowing a claim for relief at the end of the year.

Once again, the unfairness of these proposals can be encapsulated by two construction workers, one who is engaged direct under a WRA and receives his/her allowance tax and NIC free (with no 24 month rule restriction) and an agency worker who receives a taxable allowance and is able to make a claim for relief under the normal rules (subject to the confines of the 24 month rule).

It remains to be seen what the Trade Unions make of that anomaly!

What lies ahead for Travel and Subsistence?

It is vitally important that an extremely large response is received to the consultation process which is similar to that received in 1998, supporting a fair tax concession for site-based employees.

The future remains uncertain, compounded by the consultation document on the Intermediaries Legislation (IR35) issued on 17th July welcoming comments by the end of September. This consultation was perhaps inevitable due to the fact that Government is obviously concerned about the potential use of Personal Service Companies to circumvent any new proposals, in addition to the fact that the current IR35 rules are not fit for purpose.

What is not in doubt is that the proposed measures will severely affect the mobility of the temporary labour market, placing agency workers at a distinct disadvantage to that of a directly employed person. How many agency workers will be keen to travel to site if they will not receive relief for expenditure incurred?

We will be suggesting that Government must;

- Delay the introduction of any proposed legislation until a full impact assessment has been undertaken which must include the significant number of unforeseen consequences which have already been identified.
- Publish the responses to the discussion document to avoid being accused of a lack of transparency and possible maladministration of the consultation process.
- Consider the impact on the flexible labour market which will suffer from a lack of mobility.
- Consider the potential for discrimination on the grounds of ethnic origin which the current impact assessment fails to consider.
- Consider the dramatic effect on labour engaged in the construction industry which may lead to a return to “direct” self-employment.
- Consider disadvantages which will arise between the directly employed and agency workers (which AWR was introduced to address) – one claiming relief whilst the other being denied relief.
- Consider how the proposal will re-create the unfairness that the change of legislation in 1998 eradicated.
- Consider this matter “in the round” with all aspects of the temporary workplace rules under consideration.
- Avoid being sucked into the misconception that all intermediary companies are intent on breaking the rules.
- Encourage compliance (as in the case of Managed Service Legislation) by the introduction of debt transfer in the event that expenses are falsely claimed and/or processed without a change of legislation.

To aid the consultation process, we will be embarking on a series of shorter articles over the coming weeks to inform and provoke debate in the pertinent areas which will, hopefully, provide Government with the opportunity to think again.

Alan Nolan
Aspire Business Partnership LLP