



4 College Hill  
London EC4R 2RB

Tel +44 (0)20 7329 2173  
Fax +44 (0)20 7329 2190  
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

Sarah Radford  
1E/09  
100 Parliament Street  
London  
SW1A 2BQ

16 August 2012

**By post and by email sarah.radford@hmrc.gsi.gov.uk**

Dear Madam

## **Revenue Law Committee response to Consultation “Taxation of Controlling Persons”**

---

The City of London Law Society (“CLLS”) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response has been prepared by the CLLS Revenue Law Committee.

We are grateful for the opportunity to respond to the Consultation Document. Our response below follow the questions set out in the Consultation Document.

### **Q1 Is creating a provision which would require the engaging organisation to deduct income tax and National Insurance at source a correct and proportionate solution to this problem?**

- The problem identified by the Consultation Document is not, we understand, that the tax regime does not currently deal with the use of PSCs to mitigate tax liabilities. The Consultation Document specifically states at paragraph 2.16 that the Government believes IRS 35 remains the correct approach to tackling any mismatch between payments to employees and PSCs.

The problem identified is that where an individual has a strategic role in an organisation it is important that the individual is seen to comply with his tax liabilities in a transparent way. It is an issue for corporate governance generally that individuals with key roles are seen to comply with their legal obligations. We do not consider that this is an issue which should be addressed by a narrowly tax specific provision where adequate legislative provisions are already in place to address any concern in relation to tax manipulation.

- The proposal as we understand it would extend an employment basis of taxation to individuals who are not otherwise in any sense in an employment type relationship. The governance issue highlighted in the report does not justify a measure discriminating against individuals operating within the same legal framework merely because they have achieved a position of influence.

This measure will discriminate against individuals because they have achieved a position of influence. This is not consistent with promoting a competitive enterprise based economy.

- We should also like to emphasise the considerable extra burden this proposal would place on business in having to operate these tests in particular bearing in mind the difficulties in recovering unpaid PAYE where it is discovered that tax should have been collected some time later and often after the PSC has ceased to be engaged. The practical effect is that the wrong person, the engaging company, ends up bearing the tax rather than the true tax payer.
- For these reasons we regard the proposal as a wrong and disproportionate response to the problem identified.

**Q2 Does the proposed provision raise any commercial, employment or other issues that would need to be considered before any final conclusions are reached? If yes, please advise.**

- Identifying tests of *significant managerial control* which can be applied in an objective and impartial basis so as to achieve equality of treatment across all potentially affected tax payers will be extremely difficult if not impossible. Where control is applied as a test in determining tax liabilities it is applied by reference to specific legal characteristics for examples shareholder rights which can be objectively tested not be reference to loosely determined management structures which will be extremely difficult to test in an objective way.
- The problem of definition means we do not believe that this proposal could be implemented in away which would ensure a level playing field between different businesses.
- The proposal will also carry the danger that it will result in disparity of treatment within businesses. It will involve fine distinctions being drawn in relation to managerial influence in relation to individuals working within the same organisation and otherwise on similar terms. This is not consistent with the principle that taxpayers should be treated equally and is likely to be commercially damaging to businesses affected.

**Q3 Are there alternative approaches that would better deliver the transparency the Government is seeking in the taxation of controlling persons than requiring them**

**to have income tax and National Insurance deducted at source by the engaging organisation?**

Whilst we are opposed to measures which undermine taxpayer confidentiality a system whereby HMRC could notify users of the services of PSCs that a PSC was repeatedly non compliant with its tax obligations would provide business with the opportunity to operate governance controls in relation to such non-compliance.

A variation on this approach would be to require PSCs to certify annually to the engaging entity either that they have complied with IR 35 or that they are outwith the ambit of IR35. This would allow the engaging entity to apply appropriate good governance remedial measures if they felt the PSC was taking an unjustifiable or irresponsible approach. This would have the merit that it could fit within existing legislative concepts and avoid further multiplication of legislation and rules to be tested against. It would address the policy concern without extending an excessive administrative burden to business although it would place rather greater burden than the first approach as the business would have to concern itself with a primary assessment of the application of IR35 to the PSC.

**Q4 What are the consequences of this provision taking precedence over IR35 (Part 2 Chapter 8 ITEPA 2003) Part 2 Chapter 7 ITEPA 2003 and all extra statutory provisions?**

**Q5 Are there any circumstances where this measure would prevent genuine commercial arrangements? If yes please explain.**

- In some organisations depending on size and management structure an individual might be found to fall within these provisions in relation to a particular job or project when in relation to an another organisation the individual would fall outside these provisions. Roles outside these provisions will be more attractive to those within them and this may exclude organisations particularly within the SME sector from attracting the best talent to assist them.
- The proposal appears to extend the employment basis of taxation to those not otherwise in any sense in an employment type relationship. Individual consultants and professional advisers may often find they have roles of great influence particularly within smaller businesses although they are on no sense in an employment relationship. We believe it would be extremely difficult to create a test of managerial control which differentiates the role of such individuals.

**Q6 Is someone who has managerial control over a significant proportion of the workforce and/or control over a significant proportion of the organisations budget the correct delineation for a 'controlling person'?**

We do not believe that a test of managerial control can be defined with sufficient precision to form a basis for the application of rules of taxation. Lines of management responsibility are not designed to prescribe legal relationships but to achieve particular managerial objectives. It is often a feature that precise relationships and responsibilities are not defined to allow practical flexibility in management arrangements. Using lines of managerial responsibility as the basis for taxation is likely to result in a harmful distortion of management systems.

**Q7 Should we extend controlling person to bring a larger group within the remit of this provision? If so who and why?**

No.

**Q8 Should controlling person be narrowed so that fewer people are within its remit? If so who should be additionally excluded and why?**

For the reasons given above we are opposed to this proposal and narrowing the remit would not be a sufficient response to our concerns.

**Q9 Is this exclusion a proportionate exception to the proposed provision?**

As noted above we are opposed to this proposal generally but if the proposal were to be implemented we would recommend extending the exclusion to all SME businesses to ensure they have free access to a full range of talent to develop their activities.

**Q10 Is there any reason we should not exclude micro businesses, who are not part of a group structure from this provision?**

No.

Yours faithfully,



**Bradley Phillips**

**Chair**

**The City of London Law Society Revenue Law Committee**

**THE CITY OF LONDON LAW SOCIETY  
REVENUE LAW COMMITTEE**

Individuals and firms represented on this committee are as follows.

B.S. Phillips (Herbert Smith LLP) (Chairman)  
H. Barclay (Macfarlanes LLP)  
C.N. Bates (Norton Rose LLP)  
D. Friel (Latham & Watkins LLP)  
P.D. Hale (Simmons & Simmons)  
M.J. Hardwick (Linklaters LLP)  
C. Hargreaves (Freshfields Bruckhaus Deringer)  
C. Yorke (Allen & Overy LLP)  
K. Hughes (Lovells LLP)  
G. Miles (Slaughter and May)  
J. Scobie (Kirkland & Ellis LLP)  
V. Maguire (Clifford Chance LLP)  
C.G. Vanderspar (Berwin Leighton Paisner)  
S. Yates (Travers Smith LLP)

© CITY OF LONDON LAW SOCIETY 2012.

All rights reserved. This paper has been prepared as part of a consultation process.  
Its contents should not be taken as legal advice in relation to a particular situation or  
transaction.