

09 October 2009

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False Self-Employment in the Construction Industry Consultation  
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Dear Lisa

### **False Self-Employment in the Construction Industry**

Thank you for your time on 6 October 2009; useful and we found the discussion with you and your colleagues extremely interesting and useful.

NSCC is responding to this consultation on behalf of its 29 member organisations which collectively represent 7,000 Specialist Contractors employing around 700,000 workers each year within the construction industry. A list of NSCC member organisations can be found on page 6 of our response. Some of these organisations may have responded directly to you on this consultation, which demonstrates the importance of this issue to the businesses, many of them SMEs, that we represent.

We understand the desire of HMT and HMRC to ensure that workers currently treated as self employed for payment purposes are actually treated as employed where appropriate. However, we do believe that the current proposals would result in a greater number of genuinely self employed workers being inappropriately treated as employed, which is not, as we understand it, the intention.

We have answered the specific consultation questions towards the end of our response; however, our views on the proposals cover a much wider range of issues as detailed below.

#### **1. Relationship with CIS**

This consultation mirrors the proposals put forward by HMRC some years ago which were not then introduced as it was concluded that they did not address the concerns of HMRC or the industry. The situation has not altered and it is difficult to understand why the same proposals have been put forward again, particularly when substantial resources have been invested in CIS since it was reviewed only a few years ago.

#### **2. Evidence for assumptions made**

The proposals assume that 300,000 individuals are paid as self-employed when they should be PAYE; there is little evidence presented to support this assumption. If this is the case, the question that should be raised is why action is not being taken under the current CIS framework.

The figure of 34% self-employed workers in construction is quoted as being high for any particular industry. We believe that this reflects the fact that construction is not a static process and is composed of many short engagements. In addition much of the work is of a specialised nature requiring unique skills which necessitates workers travelling to the worksite as required and results in a more transient and mobile workforce.

#### **3. Application and scope of proposals.**

We understand that the CIS definitions of "Construction Industry" and "Construction Worker" would apply and therefore these proposals would not apply to self-employed individuals such as engineers, designers, surveyors etc. We would contend that a self-

employed contractor is offering his services on the same basis as any of these individuals and should not be treated differently just because he provides a manual trade.

#### 4. Sector specific proposal

Whilst we currently have CIS, a scheme which is specific to the construction industry, it is difficult to understand how legislation, which would treat construction workers differently in respect of employment status, could be applied to only one sector of the economy.

#### 5. 'New' employment status

The aim of the proposals is to increase revenue to the Exchequer. If an individual is not paying the correct tax and NICs, HMRC should take action as facilitated by current legislation and CIS. Whilst income tax legislation facilitates workers deemed to be in receipt of employment income it is but not considered to be employees, for the majority of employers and employees within the construction industry this would be a new status of employment whereby individuals are neither directly employed nor self-employed and would effectively create a tax on jobs in construction, a sector which contributes 9% of GDP in the UK.

The new status as proposed creates a position whereby an individual that has worked previously as self-employed but would not meet the new criteria would gain no employment rights or increase in job security and have no less business risk but would pay more as a result of both a reduced gross salary and an increase in employee NICs. Such a position is untenable and would leave individuals who have genuinely been taking a risk in providing their services still bearing that risk and paying more in NICs (that if they worked in a different sector would not be due) and with no employment rights or protection.

The differential is created by the fact that self-employed individuals pay less NICs than those that are employed.

The table below provides an example of the financial impact that these proposals would have on a self-employed worker and his employer if the worker was moved to the new employment status.

	Direct Employee	Self-Employed	New Status Example 1	New Status Example 2	New Status Example 3
Weekly Pay	£500	£600	£600	£550	£625
No. of Weeks Paid	52	48	48	48	48
Gross Pay	£26,000	£28,800	£28,800	£26,400	£30,000
Personal Allowance	£6,475	£6,475	£6,475	£6,475	£6,475
Tax After PA (20%)	£3,905	£4,465	£4,465	£3,985	£4,705
Employee NIC (11%)	£2,230	Class 2 NIC £115	£2,538	£2,274	£2,670
CLASS 4	N/A	£1,846	N/A	N/A	N/A
Employer NIC (12.8%)	£2,595	£0	£2,954	£2,647	£3,107
Net Income	£19,500	£22,374	£21,797	£20,141	£22,625
Cost to Employer	£28,595	£28,800	£31,754	£29,047	£33,107

The salary required to maintain the self-employed worker on the same 'take home' pay would be approximately £625 per week at a cost of £33,107 to the employer, an increase of £4,307 per year.

## 6. Consequences of Proposals

If these proposals are implemented and result in genuinely self-employed workers being required to move to the new employment status there would be a range of repercussions including:

- **A rise in unemployment** - Employers are unlikely to employ the same number of workers as at present because clients are will not pay the increased labour rates necessary to sustain the workforce. This means that those currently self-employed in the construction industry are likely to move to the domestic sector (possibly increasing the black economy) or leave the industry altogether.

Unemployment will rise and construction will be less able to contribute to employment statistics as the UK comes out of recession. Jobs that would traditionally have been offered will no longer be available or workers will choose not to work for less pay when other sectors have no restrictions on working as self-employed.

- **A reduction in quality** - Those in employment will be required to work longer hours due to the smaller workforce and health and safety, quality and programmes etc. will undoubtedly suffer.
- **Tax revenues** - Ultimately we do not believe that additional tax and NICs revenues to the Exchequer will be realised as the number of workers that would change employment status is limited.

In addition the cost to the UK taxpayer could actually increase as a result of higher costs of construction, more people working in the black economy and higher unemployment.

- **Other implications** - There are other implications not considered such as the treatment of travel expenses in respect of tax deductions and the potential loss of gross payment status by contractors whilst they attempt to implement bureaucratic payroll systems.

## 7. CITB ConstructionSkills Levy

The majority of training carried out within the construction industry is supported by the CITB ConstructionSkills levy and grants system. These proposals pose a risk to the CITB ConstructionSkills levy which is paid by employers at a rate of 0.5% of payroll on employees and 1.5% on labour only sub-contractors. This system is agreed by Government and recognises that labour only sub-contractors are a fundamental part of the construction industry.

The levy system is under huge pressure in the current economic market and the forcing of an inappropriate transfer of workers to PAYE would result in a decrease in the levy paid by employers presuming these workers would be considered employees for the purposes of the levy. This issue does not appear to have been considered in the proposals.

## HMT and HMRC consultation questions

8. **Question 1** – *Do the criteria represent fair indicators of a person who is running his own business and is therefore genuinely self-employed?*

### a) Provision of plant and equipment

There are many specialist trades within the construction industry that do not require specific plant and equipment as defined in the consultation or only use equipment

such as access scaffolding which is usually provided by the main contractor or client. Examples of such trades are glaziers, sealant applicators, tilers, maintenance workers, painters and decorators, stone masons, roofworkers and flooring contractors.

There are also some trades where the required plant and equipment is so specialised or substantial that it is provided by the main contractor or one specialist contractor for use by a variety of trades e.g. lifting equipment

**b) Provision of all materials**

The nature of the industry and bulk purchasing power mean that on many projects the client or main contractor will provide the majority of materials. Whilst sub-contractors may prefer to provide the necessary materials they are not permitted to do so. Therefore on a substantial number of sites the sub-contractor, either as an employer or a self-employed person would be unable to fulfil this criterion. An example would be a tiling contractor working on a hotel lobby where the client has specified and purchased the tiles.

**c) Provision of other workers**

We presume that substitution by another worker would be included under this criterion although the proposals would mean that this other worker would need to be considered as an employee which is not the case at present.

**9. Question 2 – Are there other indicators which ought to be considered?**

In addition to the three criteria specified, we believe that there at least two other key indicators of self-employment:

**a) Multiple employers**

Many self-employed workers are defined by their mobility between employers. In many specialist trades, work on each project can last a matter of days and an individual could work for a different contractor each week depending upon the workload. The worker will choose who to work for and for how long.

The mobility and flexibility of the workforce is a key factor in the construction industry being able to deliver the diverse range of projects across the nation for a diverse range of contractors that are demanded by its clients and society as a whole. We believe that in the construction industry this mobility and multitude of employers demonstrates self-employment.

**b) Business risk**

The majority of workers considered to be self-employed bear a business or financial risk. Examples include providing a fixed fee for a job, taking responsibility for the quality of the work, the programme or the budget. In our view bearing this type of risk demonstrates self-employment.

**10. Question 3 – Are there instances where none of the criteria are met, but a worker would by reference to the usual Case Law tests in respect of the true terms of an engagement otherwise be treated as self-employed? If so, please provide examples.**

We understand that there are many instances of case law from decisions of the Courts, Commissioners and Tribunals.

**11. Question 4 – VAT registration can signal that the worker is in business on his own account, buying materials and investing in plant, which takes the turnover of the business over the threshold for registration. Would it be helpful to include the criteria of VAT registration, which would need to be met in addition to one of the three other criteria?**

We are of the view that VAT registration is not an essential component of self-employment. VAT is based on a threshold of turnover and a self-employed worker that practices a trade that does not require materials or the regular purchase of plant and equipment may not reach the VAT threshold, particularly in areas of the country where pay is relatively low.

**12. Question 5** – *Is the payer the correct person to have the responsibility for applying the criteria and applying Pay as you Earn (PAYE) and NICs?*

The payer and engager may be two different parties and the risk and responsibility for applying the criteria and the liability for any tax, interest and penalties should rest with the appropriate party.

As with the current CIS, the contractor should be responsible for ascertaining the status of the sub-contractor in relation to the particular engagement. If the worker is deemed to be employed, then it must be the payer who is responsible for applying PAYE and NICs. If the sub-contractor is deemed to be self-employed, then the sub-contractor themselves should be responsible for his or her own tax arrangements, subject to the current requirement on the engager to deduct tax on account under the CIS scheme.

**13. Question 6** – *Are there instances where the introduction of the deeming provision could bring about a significant additional administrative burden? If so, please give examples.*

The proposals do not properly consider the huge impact the process of employing people would have on firms, particularly SMEs that are not set up, or used to, employing workers on a regular basis. Many firms that could be required to employ people would neither be set up as an employer with HMRC nor have a payroll system in place.

- For companies that have no payroll, a new system would have to be set up and salaries rather than invoices paid which would incur a cost. Arrangements would need to be put in place to pay PAYE and NICs by the due dates; no mean feat for a small firm, including those that already have a payroll as many do their calculations and pay the amounts manually.
- Registering a new employee for payroll purposes is time consuming and many payroll companies charge for each employee on the payroll. If the number of employees joining and leaving the company increases, which it would be likely to do under the proposals, costs would increase even more so as the bulk of the work is at the beginning and end of an employment period. If the payroll was run in house, extra resources would be required to fulfil the same function.
- The logistics of the PAYE system do not appear to have been considered. There is the need to request a P45 (which is unlikely to be available in the majority of circumstances) or to complete and submit a P46 each time a new employee is taken on even if only for a very short period of time i.e. one or 2 days. A substantial number of SME's continue to complete paper forms and submit them by post as they do not yet have wholly online facilities.
- Individuals would be highly unlikely to present themselves with a P45 as they move frequently from employer to employer and we presume they would be paid under an emergency tax code which would not be appropriate in the long term and would be likely to penalise the individual.
- Furthermore at the end of each year P60s would have to be issued by whichever employer was employing the individual at the end of the year and if the employee had any queries he could have at least 52 P45s to review.

**14. Question 7** – *Are there occasions when the deeming provision could impact on the adaptability and flexibility of the labour market. If so, please provide examples.*

The construction industry is a project based industry, composed of short engagements of workers that travel, often great distances, to practice their trade. These projects range from extremely large to very small and the specialist skills and trades of sub-contractors can be required for very short parts of each project. The work is seasonal and reliant on weather and economic conditions. When one project ends, the sub-contractor will seek future contracts where there is work.

The proposals within this consultation would reduce flexibility of the construction industry to respond to clients needs, reduce its capability to deliver the diversity and range of projects and substantially increase the costs of labour and overall construction.

In conclusion we would like to emphasise that we fully support the principle that every individual should pay the appropriate tax and NICs. We would also support the need for clear legislation and its enforcement in all industry sectors. However, we are firmly of the view that the proposals will result in genuinely self-employed workers being deemed as PAYE and workers paying tax and NICS as employees but without receiving the associated employment rights making them neither employed nor self-employed. This is not appropriate and does not provide the clarity desired by both HMRC and the industry.

We would be delighted to discuss any of these points further and propose to provide additional information as discussed at our meeting.

Yours sincerely

Suzannah Nichol MBE  
**Chief Executive**

## **NSCC Member Organisations**

ACIFC	Association of Concrete Industrial Flooring Contractors
AIS	Association of Interior Specialists
ASA	Association of Sealant Applicators Ltd
ASFP	Association for Specialist Fire Protection
ASUC <i>plus</i>	Association of Specialist Underpinning Contractors plus
ATLAS	Association of Technical Lightning & Access Specialists
BBSA	British Blind & Shutter Association
BDA	British Drilling Association
BGA	British Geomembrane Association
CCS	Confederation of Construction Specialists
CFA	Contract Flooring Association
DSA	Drilling and Sawing Association
FASET	Fall Arrest Safety Equipment Training
FBSC	Federation of Building Specialist Contractors
FeRFA	Resin Flooring Association
FPS	Federation of Piling Specialists
GGF	Glass and Glazing Federation
INCA	Insulated Render & Cladding Association
MAC	Mastic Asphalt Council
NFRC	National Federation of Roofing Contractors Ltd
NFTMMS	National Federation of Terrazzo Marble & Mosaic Specialists
PDA	Painting and Decorating Association
RIDBA	Rural and Industrial Design and Building Association
SAEMA	Specialist Access Engineering and Maintenance Association
SAPCA	Sports and Play Construction Association
SMWBA	Scottish Master Wrights and Builders Association
SPRA	Single Ply Roofing Association
SWA	Steel Window Association
TTA	The Tile Association