



CEST – NOT FIT FOR PURPOSE

How HMRC's attempt to facilitate accurate status assessments has failed

- Misaligned with the law – missing key parts of law
- Has no authority or basis in legislation
- Malfunctions – wrong almost 50% of the time
- HMRC holds no evidence of accuracy claims
- Fails to provide certainty or reasonable care
- Does not absolve hirer of tax risk
- Woefully unreliable and heavily biased.

A whitepaper by ContractorCalculator with contributions from:

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Executive Summary

The danger of CEST

CEST is a digital tool that was released by HMRC in March 2016 that is designed to assess the employment status of flexible workers who work off-payroll. In July 2018, the results of an 18-month investigation by ContractorCalculator containing over 1000 pages of evidence revealed that CEST malfunctions and gives the wrong answer almost half the time.

An ex-HMRC tax investigation expert has shown that users cannot rely on CEST for tax certainty, due to the fact that using it does not constitute 'reasonable care' under the Taxes Management Act 1970.

The damaging consequences of CEST

The consequences of using CEST are:

- Any hirer who used the tool and passed that information to the agency (the fee-payer) has not passed the tax risk to the agency and retains it. The public sector could now be holding a massive tax risk because they did not conduct reasonable care.
- Any agencies who correctly re-assess contractors as outside IR35 after an 'IR35 applies' CEST result is handed to them should carry no tax risk for correcting the position.
- Contractors can refuse any CEST-based decision on the basis that it does not constitute reasonable care under section 61T(6)(c) of the off-payroll legislation and can instead seek an alternative assessment.
- CEST should be withdrawn as it does not provide the tax certainty necessary for tax payers to avoid potential discovery assessments by HMRC for the last 10 years, under Section 29(4) of the Taxes Management Act (TMA) 1970.
- HMRC tax inspectors can cast aside any CEST judgment and open investigations on tax payers for the last 10 years, removing any tax certainty for tax payers.

"By failing to acknowledge CEST's failings and continuing to promote this tool, HMRC demonstrates an abuse of power. Thousands of tax payers are being incorrectly taxed because of HMRC's lack of duty of care to ensure tax payers are subject to the correct amount of tax. CEST is a failed experiment, causing harm to the contingent workforce and the flexible labour market, and must be retired." – Dave Chaplin.

Off-payroll, IR35 and CEST

What is Off-Payroll and IR35?

The new Off-payroll tax legislation introduced in Chapter 10 of the Finance Bill 2017 currently only applies to the public sector, where it replaced the Intermediaries Legislation (IR35) that was enacted in April 2000. Like the original IR35, Off-payroll is designed to counter tax avoidance by identifying and targeting 'deemed employees'. These are limited company contractors whose working relationship with their client would be considered one of employment if they didn't work through an intermediary through their limited company.

An engagement which is deemed as employment is subject to higher taxes; the majority of which (approximately 84%), is payable by the hirer through employer's National Insurance Contributions (NICs) of 13.8% and the Apprenticeship Levy of 0.5%. Both of these are due on top of the rate, or 'deemed direct payment' paid to the contractor. The payment made to the contractor must then be treated as employment income, meaning a slight increase in taxes for the contractor compared to what they previously paid when working through their company.

Before Chapter 10, IR35 was solely the contractor's concern, but the changes now mean more costs for all involved. The key change is that the hirer is legally responsible for assessing the "IR35 status" of its contractors.

HMRC seems intent on extending the reforms into the private sector, possibly as early as 2019, meaning IR35 and Off-payroll is now a problem for everyone.

What is Check Employment Status for Tax (CEST)?

Check Employment Status for Tax, (CEST) is an online tool released by HMRC in March 2017 to provide guidance for firms looking to make status assessments.

Its accuracy is questionable because it omits fundamental areas of key case law and has been shown to have given incorrect decisions to many existing IR35 court cases. As a result, stakeholders and contractors have labelled it as unfit-for-purpose. A near 18-month long investigation by ContractorCalculator, involving comprehensive rigorous testing and evidence of over 1000 pages, concluded that CEST is woefully unreliable and heavily biased.

How CEST works

By Dave Chaplin

CEST uses a four-rooms approach followed by a final judgment. If you obtain a pass ('IR35 does not apply') in one 'room' you do not proceed to the next and you can only get a pass in the first three.

HMRC has engineered CEST tool to pass contractors only in cases of absolute certainty. If you don't provide specific answers to certain questions, you won't pass. HMRC is trying to enforce its flawed take on employment case law with this tool.

The short and simple CEST questionnaire consists of four sections:

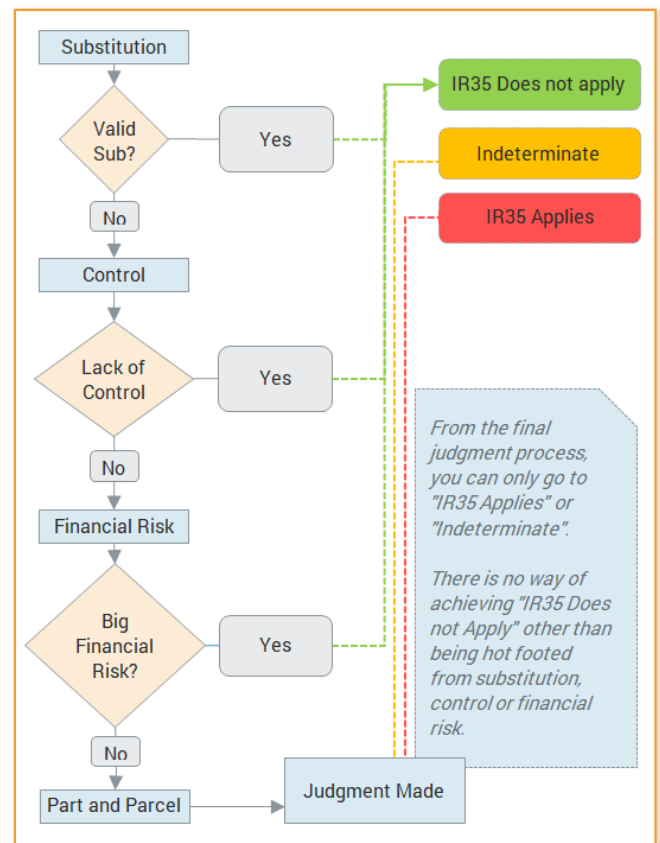
1. Personal service
2. Control
3. Financial risk
4. Part and parcel.

The user is guided through these sections sequentially. If HMRC decides that the user clearly passes either section one, two or three, it will skip the remainder of the questions and provide an immediate determination.

If the user makes it to the fourth section on Part and Parcel, it is not possible to pass and the only two possible outcomes are:

- IR35 applies; or
- Unable to determine status.

The questions are multiple choice, but legitimate answers that many outside-IR35 contractors could give won't yield a pass. Many of the questions are vague, while the answers are rarely as black and white as HMRC expects



And, despite HMRC claiming it will stand by the results of the tool, it has no legal authority to stake this claim; it can simply discard the results and has already been shown to do so in tax investigations.

In other words, a pass from CEST does not count for anything.

10 key CEST failings

ContractorCalculator's 18-month investigation

Though HMRC continues to champion CEST, an 18-month investigation into the tool by ContractorCalculator has uncovered numerous shortcomings and inconsistencies, proving that CEST is not fit for purpose. These findings range from faulty processes and the omission of key employment status factors to an evident lack of testing during development. Below, we share ten areas in which, through CEST, HMRC has failed taxpayers.

1: HMRC holds no evidence that the tool is accurate

In a February 2018 Freedom of Information (FOI) request response to ContractorCalculator, [HMRC conceded that it holds no detailed testing evidence](#) to support its claims regarding CEST's accuracy. HMRC ultimately provided ContractorCalculator with a list of 24 employment status cases which it claimed CEST was tested against, but again provided no supporting documentation proving how the tool reached these outcomes.

2: It malfunctions, is hopelessly unreliable and biased

ContractorCalculator conducted a [rigorous re-testing of CEST against the 24 cases](#), which found that the tool returned a flawed assessment 42% of the time. In seven cases, CEST would return the wrong outcome, while, in another three, it would return the right outcome but for the wrong reasons. The analysis also concluded that CEST was geared towards returning an 'inside IR35' outcome, proving that it is not fit for purpose.

3: It does not align with how judges consider employment status

Case law requires that judges determine employment status by considering the accumulation of detail regarding an individual's working arrangement. However, [CEST considers just four elements of law](#), all in isolation from each other, meaning a contractor's assessment could be determined by as little as one employment status factor. [Experts have slammed the logic underlying the tool](#), and warn that its results easily manipulated results leave users at risk.

4: It has no basis in law and does not align with the law

CEST's failure to consider all elements of employment case law alongside each other has led experts to dismiss the tool as having no basis in law. As a result, it would make for a feeble defence in the event of a tax investigation. HMRC is aware of this and has been known to challenge assessments carried out using CEST, placing its users at serious risk of tax penalties and interest.

5: It only asks a fraction of the questions usually posed during an HMRC inquiry

When conducting an IR35 enquiry, an HMRC inspector will typically ask at least 50 questions of a contractor, and often in excess of 100. [CEST only asks a maximum of 16 questions](#), and may even return a status assessment based on answers provided to just four questions.

6: HMRC purposely omitted key elements of status law

HMRC purposefully ignored key elements of employment case law when developing CEST, including mutuality of obligation (MOO). When challenged, HMRC stated it [believed MOO to be present in all public sector engagements](#); a flawed assumption which it has used to [influence the Treasury and the Chancellor](#). In spite of damning [assessments from employment status specialists](#) and strong [opposition from IR35 Forum members](#), HMRC maintains its stance. Recent tribunal cases, which have hinged on MOO, have reinforced HMRC's error of judgement, with one case even showing that [HMRC knew CEST was misaligned with the law upon launch](#).

7: It does not provide legal certainty and fails to provide 'reasonable care'

The Off-Payroll legislation requires hirers take 'reasonable care' when assessing status. An examination of the case law and HMRC's own guidance by former HMRC inspector Philip Manley concluded that using CEST falls short of reasonable care is unable to provide legal certainty.

8: The tool had no formal testing within Government Digital Services

Despite being used to determine the tax status of thousands of contractors, HMRC and Government Digital Services (GDS) agreed that CEST didn't require a formal service assessment. This was [revealed to ContractorCalculator in a June 2018 FOI response](#) by the Cabinet Office and shows that CEST likely doesn't even meet the standards set out by GDS.

9: Surveys indicate the market has little or no confidence in the tool

CEST's multiple flaws and dubious outcomes have resulted in widespread mistrust of the tool. In March 2018, it was revealed at a select committee that CEST deemed [97% of people within the BBC to be caught by IR35](#). A [recent survey of more than 2,000 contractors](#) by ContractorCalculator found that 79% don't believe CEST can be trusted to provide accurate results and 75% claimed they would always seek an alternative assessment.

10: Its results aren't aligned with market experience

Following intervention by the ICO, HMRC disclosed to ContractorCalculator its [figures detailing the results issued by CEST](#). These showed that 54% of CEST assessments resulted in a pass, in sharp contrast to market experience, with thousands of contractors having been forced to work inside IR35 due to blanket assessments by hirers, proving that many aren't receiving fair tax treatment.

CEST tool has no legal authority on employment status

By Martyn Valentine, director of employment specialists, The Law Place



HMRC's Check Employment Status for Tax (CEST) tool holds no legal authority on employment status. Its flawed processes, failure to consider all aspects of an individual's working practices, and the complete omission of important aspects of employment case law are all decisive factors demonstrating why any assessment conducted by CEST couldn't be considered legally binding.

Though it may encourage public authorities and agencies to adopt CEST as their assessment tool, HMRC has been known to challenge assessments conducted using the tool, especially as it is not bound by the results. Given CEST's failure to align with employment law, its use would make for a flimsy defence in court.

No tool used to assess employment status can be legally binding without primary legislation – and should be considered only advisory at best. However, making an employment status decision based on CEST would be tantamount to negligence, as it would fail to comply with the requirement to take 'reasonable care' (see page 10).

As a result, its adoption places a significant tax risk upon public authorities. Not all public authorities can employ teams of lawyers who can assess employment status accurately, but the use of CEST would be a fool's errand.

CEST fails to see the bigger picture

To reach an accurate determination over an individual's employment status, a First-tier tribunal judge would consider [Hall v Lorimer \[1993\] EWCA Civ 25](#), one of the fundamental employment status cases, and adopt the approach set out in Mummery J's framework:

"In order to decide whether a person carries on business on his own account, it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail.

"The overall effect can only be appreciated by standing back from the detailed picture, viewing it from a distance and only then making an informed, considered and qualitative appreciation of the whole."

CEST's processes are akin to the checklist approach that Nolan advises against. Whereas a judge is required to make a decision based on the accumulation of detail, CEST arrives at a conclusion based on the presence or absence of a single factor, such as substitution.

For example, a contractor could receive a pass from CEST simply by stating that they are able to provide a substitute, having answered just four questions. Similarly, they could fail if they were unable to demonstrate a clear lack of personal service and control, and fail to prove that they bear financial risk, in just a few set questions.

Whether CEST even considers certain factors, which should always be accounted for in any case, is conditional on how previous questions have been answered. By determining a contractor's status based on answers to a brief questionnaire, CEST fails to see the overall picture, and subsequently would be disregarded in court.

As per Nolan LJ in *Hall v Lorimer*: "*in cases of this sort there is no single path to a correct decision*", so it is abundantly clear that CEST is fundamentally and irreparably flawed.

Why doesn't CEST consider mutuality of obligation?

In determining an individual's employment status, CEST briefly considers a maximum of four IR35 factors:

- Personal service/substitution
- Control
- Financial risk
- Part and parcel.

There are many glaring omissions from this list. The tool fails to consider factors such as whether the contractor has other concurrent clients, and if they are considered to be in business on their own account. However, most notable is CEST's failure to consider mutuality of obligation (MOO), which is one of the three key tests of employment.

HMRC has suggested that the use of CEST implies that MOO has already been established. HMRC's published interpretation is that MOO is present in any instance where a contract has been agreed.

Regardless of the sector, there's generally a degree of MOO in a contract, evidenced by the obligation placed on the individual to provide a service to the client, and an equal obligation on the client to pay for work done. For example, where a solicitor is instructed to sell a house for a client.

However, that isn't to say that all contractors are subject to the degree of MOO that gives rise to a contract of employment. It is a matter of settled law that, in the absence of an ongoing obligation to provide work, the minimum degree of MOO for a contract of employment has not

been established. For example, a solicitor instructed solely to sell a house for a client does not expect to be employed by that client on an ongoing basis.

This was reinforced as recently as last year, during [Armitage Technical Design Services Ltd v HMRC \[2017\]](#), where the judge stated: *“The mere offer and acceptance of a piece of work does not amount to mutuality of obligations in the context of employment status.”*

MOO exists in any employment relationship, but in many cases can't be considered present in a contractor engagement, which will often terminate upon the completion of a pre-defined project. HMRC's refusal to acknowledge this is one of the key reasons why CEST lacks credibility from a legal standpoint.

How CEST's shortcomings affect its users

Because CEST clearly doesn't produce results which align with judgments, it cannot be safely relied upon in the event of an inquiry, and possibly an appeal to the First-tier tribunal.

HMRC may be the architect of CEST, but it is public authority clients who assume a huge tax risk by making employment status decisions based solely on the outcome provided by the tool. HMRC has suggested that it will stand by the outcome determined by CEST but is already known to have challenged CEST assessments.

Given that the public authority client bears the tax liability in instances where they are found not to have taken 'reasonable care' (a criterion that CEST doesn't satisfy), it stands to reason that any investigation conducted by HMRC is likely to result in interest and penalties for those involved.

The only effective way to mitigate this tax risk is for public authority clients to adopt reasonable practices. This means refraining from using CEST and engaging independent expert assistance to ensure that the right measures are taken to reach an accurate IR35 assessment.

Martyn Valentine is an IR35 legal specialist and director of The Law Place, who has advised thousands of contractors on IR35 and has successfully defended many clients from HMRC in IR35 tribunals.

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Tax investigations, discovery assessments, certainty and reasonable care – an overview

The concept of 'reasonable care', which Off-Payroll requires clients to exercise when conducting status assessments, will be a new concept to many. However, HMRC is very familiar with the term and regularly proves a lack of reasonable care when conducting tax investigations.

What is a discovery assessment?

In any instance where HMRC receives an incomplete tax return, it is free to open a discovery assessment. This enables HMRC to examine the taxpayer's history for further discrepancies as far back as four years, according to Section 34(1) of HMRC's internal manual, [Self-Assessment: the legal framework](#).

Where a discrepancy is found to have resulted in a loss of tax, HMRC can extend an investigation by up to six years if it can prove that the loss of tax arose as a result of carelessness by the taxpayer or their advisor, or by 20 years if brought about deliberately.

HMRC investigations hinge on reasonable care

In practice, for any error that leads to a loss of tax and where HMRC extends its investigation by six years, it will also impose a tax-geared penalty on the taxpayer for failure to take reasonable care.

Reasonable care remains an unfamiliar concept to the majority of taxpayers, but an honest mistake could see an individual become punishable under its definition. Though it is applied in a different context, the fact that HMRC is very active on this front should act as a warning to clients affected by the Off-Payroll legislation.

Why using CEST does not provide tax certainty and does not constitute reasonable

By Philip Manley, tax partner at Dow Schofield Watts, and former HMRC inspector



A key requirement of the Off-Payroll legislation is that an end-client takes 'reasonable care' when assessing a contractor's employment status. Failure to comply with this clause, inserted into Chapter 10, Section 61T(6)(c) of the Income Tax (Earnings and Pensions) Act (ITEPA) 2003, shifts any potential tax liability onto the client.

There is no legal definition of reasonable care, but an examination of case law history, along with an analysis of HMRC's own guidance, shows that HMRC's Check Employment Status for Tax (CEST) tool falls a long way short of fulfilling this requirement.

As a result, CEST is unable to provide tax certainty, and use of the tool in assessing a contractor's employment status cannot be considered compliant with the legislation.

What is 'reasonable care'?

Though there isn't a legal definition of reasonable care within tax legislation, the matter has been addressed in past tribunal cases.

In *Shakoor* (TC2208), the taxpayer failed to disclose the disposal of property within his tax return. HMRC raised a discovery assessment and imposed a penalty. The taxpayer appealed against the penalty on the basis that he had followed the advice of his agent, whom he argued had told him the disposal was exempt.

The tribunal considered an earlier case, which stated:

"If the advice of a professional such as an accountant was negligent, that ought not to be imputed to the taxpayer. The question is whether the taxpayer is negligent. The tribunal found that the accountant's advice was obviously wrong and that the taxpayer realised, or ought to have realised, that it was obviously wrong or so likely to be wrong that further explanation or justification was needed."

The topic was also addressed by the First-tier Tribunal in Anderson (deceased) (TC206), where the Judge argued:

“The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.”

We can draw from this that, if a taxpayer knows (or reasonably should know) that the position that they are declaring to HMRC (whether through an agent or not) is incorrect, then they have failed to take reasonable care.

Failure to take reasonable care is also considered tantamount to negligence, which is defined by Baron Alderman in the 1856 case *Blyth v Birmingham Waterworks Co.* as:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.”

This quote is still used to this day as it is effectively telling us to apply common sense.

How does HMRC determine reasonable care?

Though the concept of reasonable care is vague, HMRC’s apparent position on the matter suggests that even a minor misdemeanour can fall foul of the requirement.

Every year, HMRC enquires into thousands of tax returns completed by UK taxpayers. If there is an error leading to a loss of tax, HMRC will often apply a tax-g geared penalty (via S97 and Schedule 24 of 2007 Finance Act – modified by s35 and Sch 10 of FA 2010) for failure to take reasonable care. This will apply in one of three circumstances where the outcome is a loss of tax:

1. Taxpayer makes a careless error (in providing information to HMRC)
2. When a third-party supplies information that is false or deliberately withholds information
3. When a taxpayer fails to notify HMRC that an assessment is too low.

HMRC’s approach to reasonable care can also be deciphered from guidance within its [Compliance Handbook](#), which provides numerous examples of what is considered ‘careless’.

These include:

- Recurrent errors in VAT Returns; and
- Systems are not accurate enough to produce correct figures for the return.

HMRC concludes by stating: *A repeated inaccuracy may, depending on the specific systems failures, be seen as at least a lack of reasonable care.*

HMRC’s own documentation tells us that if a system (or tool) is not fit for purpose but is used continually to submit a tax return, this will be considered careless behaviour. The use of the term ‘at least’ suggests that HMRC may even consider such an action to be a deliberate deception, which would incur higher penalties.

Why CEST doesn't amount to reasonable care

As page 6 of this whitepaper explains, CEST oversimplifies a complex area of employment case law, comprising 16 pre-determined questions covering just four aspects of IR35. Mutuality of obligation (MOO), one of the three key tests of employment, is a particularly startling omission (see page 7). By definition, the questions asked by CEST cannot take into account personal circumstance or determinative factors outside of the contract in question. It is for these, and several other reasons, that CEST is simply incapable of providing a consistently correct assessment.

HMRC's own guidance clearly states that when systems are not accurate enough to produce the correct outcome, HMRC would consider this *at least* a failure to take reasonable care. CEST fits well within this description, given its demonstrable inaccuracy and inconsistencies, which are now apparent to the wider public. Consequently, its use cannot be considered as taking reasonable care.

The blame would be on the decision-maker, as they reasonably should have known that the information was incorrect, and they cannot absolve themselves of that blame through a claim of having a negligent advisor (or, in this instance, HMRC).

Unless HMRC can disprove the substantial evidence demonstrating CEST's shortcomings, then it's clear that CEST is not fit for purpose. As shown above, more than 100 years of case law, and most remarkably of all, HMRC's own guidance for reasonable care, confirm that CEST must be improved or removed.

Otherwise, we are in a situation where HMRC, by insisting that use of CEST is mandatory, is effectively stating that reasonable care is no longer necessary. In which case, we once again arrive at a scenario where HMRC appears to be more intent on maximising revenues than ensuring the right amount of tax is paid.

The impact on end clients and fee-payers

Chapter 10, Section 61T(4) of the ITEPA 2003 states that the 'fee payer', which will typically be a recruitment agency, can ask the client for reasons behind an assessment decision. If the client fails to respond within 31 days, or they are shown not to have taken reasonable care, the client becomes the fee payer under section 61N(3) and (4), and assumes the tax risk in the event of an HMRC enquiry.

Given that CEST fails to meet the latter requirement, it stands to reason that a recruitment agency could override a client's CEST status assessment and process a contractor as working outside of IR35 without assuming any tax risk, on the basis that the client didn't take reasonable care.

CEST – NOT FIT FOR PURPOSE

Many clients would have assumed that, by sharing a CEST assessment to the agency, they are simply complying with the legislation. Instead, they are demonstrating that they have not taken reasonable care. The main danger for clients is that they look likely to hold the tax liability in instances where they have used CEST, regardless of what action the agency takes.

The good news for agencies is that they should be able to reassess contractors whom they suspect clients have incorrectly assessed using CEST without incurring any risk. Similarly, any agency which has been processing contractors as 'outside IR35' based on a client's CEST assessments shouldn't bear any risk.

Philip has over 15 years' experience as an HMRC Inspector of Taxes along with a successful spell at a 'big four' firm advising high net worth clients. He was the technical specialist dealing with Accelerated Payment Notices (APNs) which HMRC introduced in 2014. Philip has wide experience of all types of tax disputes ranging from standard S9 enquiries to COP 9 cases, HRCP enquiries and all counter avoidance disputes. He has represented both HMRC and individuals in cases throughout the tax tribunals process. Philip can be contacted at: Phil@dswtres.com

Appendix 1: Contractor Calculator articles about CEST & Off-Payroll

£200m tax reclaim among multiple consequences of HMRC's malfunctioning CEST tool [03/Aug/2018]

https://www.contractorcalculator.co.uk/200m_tax_reclaim_among_multiple_consequences_cest_543710_news.aspx

CEST exposed as hopelessly unreliable using HMRC's own test data obtained via FOI [01/Aug/2018]

https://www.contractorcalculator.co.uk/cest_exposed_hopelessly_unreliable_hmrCs_foi_543610_news.aspx

CEST only asks a fraction of questions usually posed during an HMRC inquiry [30/Jul/2018]

https://www.contractorcalculator.co.uk/cest_fraction_questions_hmrc_inquiry_543410_news.aspx

HMRC dismisses IR35 forums members views and courts on laws omitted from CEST [10/Jul/2018]

https://www.contractorcalculator.co.uk/hmrc_dismisses_ir35_forums_members_views_543010_news.aspx

10 times HMRC used propaganda to mislead MPs and the public on IR35 [05/Jul/2018]

https://www.contractorcalculator.co.uk/times_hmrc_used_propaganda_mislead_mps_public_ir35_542610_news.aspx

HMRC new Paper on Mutuality of Obligation incorrectly defines MOO, invalidating CEST [05/Jul/2018]

https://www.contractorcalculator.co.uk/hmrc_mutuality_obligation_incorrectly_defines_moo_542710_news.aspx

Survey: Major business disruption if new Off-Payroll tax hits the private sector [04/Jul/2018]

https://www.contractorcalculator.co.uk/business_disruption_payroll_tax_private_sector_542510_news.aspx

Off-Payroll Working: Contractor lifts lid on HS2's non-compliant IR35 practices [28/Jun/2018]

https://www.contractorcalculator.co.uk/contractor_hs2s_non_compliant_ir35_practices_541810_news.aspx

Latest EAT ruling reinforces that HMRC erred in law with CEST tool [27/Jun/2018]

https://www.contractorcalculator.co.uk/latest_eat_ruling_reinforces_hmrc_law_cest_542410_news.aspx

Has HMRC misled the Chancellor and Treasury on the Off-Payroll tax and IR35 rules? [19/Jun/2018]

https://www.contractorcalculator.co.uk/hmrc_misled_chancellor_treasury_payroll_tax_ir35_542110_news.aspx

HMRC's IR35 CEST tool without MOO can never be fully accurate [14/Jun/2018]

https://www.contractorcalculator.co.uk/hmrCs_ir35_cest_tool_never_accurate_barrister_541910_news.aspx

Off-Payroll Working: Contractor lifts lid on HS2's non-compliant IR35 practices [28/Jun/2018]

https://www.contractorcalculator.co.uk/contractor_hs2s_non_compliant_ir35_practices_541810_news.aspx

Have Off-Payroll IR35 reforms rendered contractors guilty until proven innocent? [12/Jun/2018]

https://www.contractorcalculator.co.uk/payroll_ir35_reforms_guilty_until_proven_innocent_541710_news.aspx

NHS implicated in multi-million-pound tax dodge following IR35 reforms [17/Jun/2018]

https://www.contractorcalculator.co.uk/nhs_implicated_tax_dodge_ir35_reforms_541610_news.aspx

Latest contractor IR35 tribunal win suggests HMRC knew CEST was flawed upon launch [1/Jun/2018]

https://www.contractorcalculator.co.uk/latest_contractor_ir35_tribunal_win_cest_flawed_541510_news.aspx

New Off-Payroll IR35 factsheet published to counter HMRC's misleading rhetoric [29/May/2018]

https://www.contractorcalculator.co.uk/payroll_ir35_factsheet_hmrc_541410_news.aspx

HMRC is incapable of implementing and policing the Off-Payroll (IR35) Reforms [6/Jun/2018]

https://www.contractorcalculator.co.uk/hmrc_incapable_implementing_payroll_ir35_reforms_541310_news.aspx

How HMRC's IR35 reforms are destroying locum nurses' livelihoods and patient care [24/May/2018]

https://www.contractorcalculator.co.uk/iir35_reforms_destroying_locum_nurses_livelihoods_541210_news.aspx

76% of PSBs applying blanket rules: why HMRC needs to reconsider IR35 reforms [1/May/2018]

https://www.contractorcalculator.co.uk/blanket_rules_why_hmrc_reconsider_ir35_reforms_540510_news.aspx

HMRC's CEST figures, obtained by FOI, indicate widespread wrongful tax treatment [25/Apr/2018]

https://www.contractorcalculator.co.uk/hmrcs_cest_figures_wrongful_tax_treatment_540410_news.aspx

HMRC holds no detailed evidence to prove CEST accuracy claims, reveals FOI requests [4/April/2018]

https://www.contractorcalculator.co.uk/hmrc_holds_detailed_evidence_prove_cest_540010_news.aspx

BBC pay fiasco highlights mess created by public sector IR35 reforms [20/Mar/2018]

https://www.contractorcalculator.co.uk/bbc_pay_fiasco_highlights_mess_public_sector_ir35_539610_news.aspx

Public sector IR35 reforms push social care sector closer to breaking point [8/Feb/2018]

https://www.contractorcalculator.co.uk/public_sector_ir35_reforms_social_care_538710_news.aspx

Off-payroll rules (IR35) – is HMRC killing UK plc and voluntary tax compliance? [21/Dec/2017]

https://www.contractorcalculator.co.uk/payroll_rules_ir35_hmrc_killing_voluntary_tax_538310_news.aspx

NHS survey: patient care services in crisis as IR35 reforms take their toll [9/Nov/2017]

https://www.contractorcalculator.co.uk/nhs_survey_patient_care_services_crisis_ir35_537910_news.aspx

HMRC deliberately omitted key IR35 case law from CEST tool, reveals NHS webinar [31/Oct/2017]

https://www.contractorcalculator.co.uk/hmrc_key_ir35_case_law_cest_tool_537610_news.aspx

IR35: New judicial review against NHSI due to incorrect IR35 assessments [17/Oct/2017]

https://www.contractorcalculator.co.uk/ir35_judicial_review_against_nhsi_537410_news.aspx

Public sector IR35 reforms survey: projects crippled by contractor exodus [4/Sep/2017]

https://www.contractorcalculator.co.uk/public_sector_ir35_reforms_survey_projects_536410_news.aspx

HMRC's ad hominem attacks to defend its failed IR35 tool are disturbing [8/Jun/2017]

https://www.contractorcalculator.co.uk/hmrcs_defend_failed_ir35_tool_disturbing_535310_news.aspx

Experts slam logic underlying the HMRC IR35 tool [05/June/2017]

http://www.contractorcalculator.co.uk/experts_slam_logic_underlying_hmrc_ir35_tool_535010_news.aspx

NHS locum doctors avoid IR35 by being lured to the private sector [18/May/2017]

http://www.contractorcalculator.co.uk/nhs_locum_doctors_avoid_ir35_private_sector_534610_news.aspx

Is HMRC facilitating tax avoidance with its own IR35 status tool? [06/Apr/2017]

http://www.contractorcalculator.co.uk/hmrc_facilitating_tax_avoidance_ir35_status_tool_534310_news.aspx

HMRC ESS tool has no legal authority, says IR35 legal expert [21/Mar/2017]

http://www.contractorcalculator.co.uk/hmrc_ess_tool_has_legal_authority_ir35_533910_news.aspx

Public sector IR35 reforms are 'a departure from reality', warn experts [08/Dec/2016]

http://www.contractorcalculator.co.uk/public_sector_ir35_reforms_experts_531410_news.aspx

New IR35 rules using RTI are a 'nightmare', warns tax expert [10/Aug/2016]

http://www.contractorcalculator.co.uk/ir35_rules_rti_nightmare_warns_tax_expert_529210_news.aspx

IR35 reforms will decimate Government projects, survey shows [03/Aug/2016]

http://www.contractorcalculator.co.uk/ir35_reforms_decimate_government_projects_528910_news.aspx

What is IR35

http://www.contractorcalculator.co.uk/what_is_ir35.aspx

<http://www.contractorcalculator.co.uk/ir35.aspx>

Appendix 2: ContractorCalculator Rigorous Re-Testing of CEST

By ContractorCalculator

HMRC's Check Employment Status for Tax (CEST) tool has undergone a comprehensive re-testing using HMRC's own data obtained under FOI and been exposed as biased and hopelessly unreliable.

Only 14 out of the 24 cases (58%) gave the correct answer, for the right reasons, by CEST: our analysis

After multiple Freedom of Information (FOI) requests, HMRC finally provided ContractorCalculator with one-page listing the 24 key employment status cases which it claims CEST was tested against to ascertain its accuracy.

The one-page list provided no insight into how questions were answered during the testing process and isn't supported by any further evidence. Yet, both the taxman and the Treasury have been relying upon it to back their claims of CEST's reliability by referring to the document in widespread correspondence with Members of Parliament who have been questioning the Treasury about the off-payroll tax reforms on behalf of their contractor constituents.

ContractorCalculator analysed all the court cases, by using 557 pages of court judgments available in the public domain and produced 690 pages of rigorous and testing documentation proving that HMRC's testing claims are woefully incorrect.

HMRC previously admitted in an FOI response that it holds [no detailed evidence to prove CEST's accuracy claims](#).

ContractorCalculator spent two months re-testing CEST against the 24 cases by enlisting the help of expert employment status lawyers. We used a level of rigour suitable for systems of this importance, resulting in 690 pages of comprehensive testing documentation, to prove our claims.

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#	Case	Court decision	CEST Result	Is CEST correct?	Result if no substitution pass
001	Novasoft Ltd	Self-employed	Employed	No	
002	Weightwatchers (UK) Ltd	Employed	Employed	Yes	
003	Sherburn Aero Club Ltd	Self-employed	Employed	No	
004	JL Window & Door Services	Self-employed	Employed	No	
005	Castle Construction Ltd	Self-employed	Employed	No	
006	Alternative Book Company Ltd	Employed	Employed	Yes	
007	Datagate Services Ltd	Self-employed	Self-Employed	Yes	Passes on control
008	MKM Computing Ltd	Employed	Employed	Yes	
009	First Word Software Ltd	Self-employed	Self-Employed	Yes (Over reliance on sub)	Employed
010	Island Consultants Ltd	Employed	Employed	Yes	
011	Parade Park Hotel Ltd	Self-employed	Employed	No	
012	MAL Scaffolding	Self-employed	Self-Employed	Yes - (but false positive)	Indeterminate
013	FS Consulting Ltd	Employed	Employed	Yes (Over reliance on sub)	
014	Tilbury Consulting Ltd	Self-employed	Self-Employed	Yes (Over reliance on sub)	Employed
015	Lime-IT Ltd	Self-employed	Self-Employed	Yes (Over reliance on sub)	Employed
016	Future Online Ltd	Employed	Employed	Yes	
017	Usetech Ltd	Employed	Employed	Yes	
018	Larkstar Data Ltd	Self-employed	Employed	No	
019	ECR Consulting Ltd	Self-employed	Self-Employed	Yes	Passes on control
020	MBF Design Services Ltd	Self-employed	Employed	No	
021	Marlen Ltd	Self-employed	Self-Employed	Yes - (but false positive)	Employed
022	Netherland Ltd	Employed	Employed	Yes	
023	Dragonfly Consulting Ltd	Employed	Employed	Yes	
024	Primary Path Ltd	Self-employed	Self-Employed	Yes - (but false positive)	Employed

Only 14 out of the 24 cases (58%) gave the correct answer, for the right reasons, by CEST: our analysis

The comprehensive re-testing discovered that not only were HMRC's testing claims woefully incorrect, but that the CEST tool is heavily biased towards pushing people into being incorrectly taxed as a "deemed employee". Results also revealed:

- CEST only returned a properly correct outcome in 14 out of 24 cases – just 58%.
- 7 cases (29%) resulted in CEST giving the wrong answer.
- 3 cases gave the right answer, but for the wrong reasons – called "false positives"
- 4 of the cases which passed (of the 14) demonstrated an over-reliance on substitution, which otherwise would not have produced the correct result, contrary to the courts direction.

The re-testing documentation details every answer entered into CEST, alongside extracts from each relevant judgment substantiating the rationale behind each answer provided. Our analysis shows that CEST falls woefully short of the claims made by HMRC and the Treasury to MPs regarding its accuracy, with the tool delivering an incorrect outcome in 7 of the 24 cases - that's 29%.

For a further three, CEST displayed an over-reliance on whether the contractor had a right to substitute. In at least two of these cases, CEST would have delivered an incorrect assessment of 'IR35 applies' if it hadn't placed so much emphasis on substitution. One of these instances is the Lime IT case, which is considered the seminal IR35 pass.

Three of the "false positive" passing cases determined that IR35 didn't apply based solely on substitution, yet in their respective judgments it was made clear that it was not the determining feature of the decision."

Many contractors provide a personal service but are not subject to sufficient control or mutuality of obligation (MOO). By the letter of the law, the majority of these should not be caught, but CEST will say they are, forcing thousands into wrongful taxation in the process.

What is a false positive?

In three of the passing cases, CEST delivered the correct outcome, but one which was based on what scientists would refer to as a 'false positive'. Here, the outcome is perceivably accurate, but the means of getting to it are wrong:

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If you get 100 random people in a room and flip a coin 100 times to determine whether they are male (heads) or female (tails), the overall result in terms of male/female split will be largely correct due to the law of averages. However, an individual coin flip will produce many false positives indicating that the coin might actually be capable of guessing someone's gender. This is what is meant by a false positive, which is precisely what CEST is – a coin flip, and one that is misaligned with the law.

What are HMRC's and Treasury telling MPs?

In response to mounting questions, the taxman has attempted to use its single page test sample to validate its accuracy claims, citing this in a letter to an MP:

"HMRC has released a list of cases that CEST has been tested against, which illustrates the results from CEST are consistent with the main employment status test cases."

We have now shown that the claims pedalled by HMRC and Government are false and have comprehensive evidence to prove our assertions.

Numerous remarks have become staple features in HMRC's correspondence regarding CEST's "certainty", including:

- *"The results have been tested by HMRC against known case law and settled cases"*
- *"It provides an answer in 85% of cases."*

HMRC and the Treasury often refer to the fact that CEST gives an answer in 85% of cases as being somehow demonstrable of its reliability. You could flip a coin that gives an answer 100% of the time, and it would be almost as accurate as CEST, but a coin flip isn't a great arbiter when it comes to matters of employment case law. And neither is CEST.

Correspondence received by ContractorCalculator's readership shows that the same rhetoric is being [used by the Financial Secretary to the Treasury](#), and [even the Chancellor of the Exchequer](#), to defend CEST.

Are the Taxman's CEST instructions a 'serious abuse of power'

One strategy that HMRC has used in the past to deflect criticism away from CEST has been to remind the public that the tool was designed only as a means of

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guidance and that hirers aren't compelled to use it. However, the taxman's correspondence with public sector hirers would suggest otherwise.

In a letter circulated to public authorities, obtained by ContractorCalculator, HMRC provides clear instructions that recipients use CEST to conduct status assessments. Below a subheading: 'What you need to do now', the taxman states:

"Please now check that you are getting the employment status right for any worker who you pay on a self-employed basis. To help you do this, you can use our online tool, go to www.gov.uk and search for 'Check employment status for tax (CEST)'.

"We'd like you to carry out this check within the next 30 days. We'll contact you again later to ask you what action you've taken. Please keep a copy of any decision produced by CEST as we may ask to see this at a later date."

The taxman is pushing hirers to use CEST, which, as our analysis shows, is geared towards assessing contractors as employed. In doing so, HMRC is trying to override the laws of the land.

HMRC has a duty of care to ensure that the public pays the correct amount of tax. CEST doesn't provide this, and HMRC has no authority to create digital tools which overrule the law. Its actions could be considered a serious abuse of power.

Appendix 3: Freedom of Information Requests (FOI's) By ContractorCalculator

This table summarises the FOI's made by ContractorCalculator which revealed:

1. HMRC has purposely ignored judges' decisions and law and omitted a key part of case law from CEST – mutuality of obligation
2. HMRC has no test data to back their claims that CEST is accurate.
3. The only document HMRC has that it uses to back its claims is one page long, listing 24 cases, which have been tested by CEST and prove that CEST provides inaccurate results.

Topic / FOI	Question & Answer	Date
CEST tool results	<p>Question</p> <p>HMRC released its Employment Status Service (internally called CEST) to Public Beta on 2nd March 2017.</p> <p>The service is used to assess whether the intermediaries' legislation applies and gives 3 possible results:</p> <ol style="list-style-type: none"> 1. The intermediaries legislation applies 2. The intermediaries do not apply 3. Unable to determine the status of this engagement <p>Answer</p> <p>16th June 2017: Told by HMRC "the information you request is not held"</p> <p>22nd June 2017: We requested a formal review.</p> <p>1st November 2017: Still refused to provide information.</p> <p>1st November 2017: Raised with the Independent Commissioners office</p> <p>19th January 2018: Case taken up by ICO.</p> <p>18th April 2018: HMRC released the information.</p> <p>We then published: HMRC's CEST figures, obtained by FOI, indicate widespread wrongful tax treatment</p>	23/05/2017
CEST – how was it tested. Testing data requested	<p>Question</p> <p>Thank you for your request under the FOIA, which was received on 1st November, for the following information:</p>	

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	<p><i>"HMRC has developed Check Employment Status for Tax (CEST). These cases should have been tested using CEST to ensure its accuracy [list of cases provided with request]. Please state:</i> <i>1. Which cases were used for the testing process. 2. Which cases were NOT used for the testing process. For each of the cases tested, please provide:</i> <i>1. The list of questions in CEST. 2. The answers given to each question, as per HMRC's interpretation of the case law for that particular case. 3. The answer that CEST produced."</i></p> <p>Answer 28th Nov 2018: HMRC refused to provide, stating cost limits.</p>	
CEST Test data	<p>Question</p> <p>For each of the following seven IR35 court cases, and only these seven cases: Usetech vs Young (Jan 2004); Future Online (Oct 2004); Netherlane Limited (Jan 2005); Island Consultants Ltd V Revenue & Customs (July 2007); MKM Computing Ltd (Jan 2008); Dragonfly Consulting Ltd (Jan 2008); Larkstar Data (Feb 2008);</p> <p>Please state for each of the cases:</p> <ol style="list-style-type: none"> 1. The ones you have documented the CEST questions and answers for as part of your testing. 2. The ones you have NOT documented the CEST questions and answers for as part of your testing. <p>Only for those in [1] above please provide the documents which contain:</p> <ol style="list-style-type: none"> 1. The list of questions in CEST 2. The answers given to each question, as per HMRC's interpretation of the case law for that particular case. <p>The final answer that CEST produced.</p> <p>Answer 16th Feb 2018 - HMRC: "The CEST tool testing was done by workshop where officials, lawyers, tax and IT professionals developed the set of rules that underpin the tool. The workshop participants agreed the key relevant facts and points of law and then tested the rules that went into tool to ensure it gave the correct answer. The rules were then tested against live and settled cases. The only documented output of the workshops is the set of rules used by the tool, and these are already in the public domain."</p> <p>We published: HMRC holds no detailed evidence to prove CEST accuracy claims, reveals FOI requests</p>	19/1/2018

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<p>CEST and mutuality of obligation (MOO)</p>	<p>Question</p> <p>In the IR35 Forum Minutes, recently published, covering the meeting on Monday 11th December 2017 @ 14:30-16:30pm, it made reference to the HMRC CEST Tool and MOO in items 10 and 11.</p> <p>The minutes state in item 10: “CEST does not explicitly look at MOO, it is designed to determine whether an existing or future contract will be one of employment or self-employment. It is assumed that a person using CEST will have already established MOO, which is necessary for a contract to exist, otherwise there would be no need to be using CEST to determine the status of the existing or hypothetical contract.”</p> <p>The minutes also state in item 11: This view has been challenged in the press and by some members of the forum and HMRC will provide a considered response, suitable for publication, in the second half of January.</p> <p>As the time of writing, HMRC has not published its considered response as to why its believes its assertions made in #10 are true.</p> <p>Please can you:</p> <p style="padding-left: 40px;">(1) Provide a copy (draft or otherwise) of the document that was intended for publication in January as per item 11.</p> <p>Answer</p> <p>23rd Feb 2018: The information is exempt from disclosure under section 22(1) of the FOIA as the information will be published with the next set of IR35 Forum minutes.</p> <p>Question: 18th May 2018</p> <p>In a response to my FOI on 23rd February 2018 (ref FOI2018/00261) in reference to requesting a draft of HMRC’s copy of its legal MOO arguments that it was presenting to the IR35 Forum, you responded saying that it would be released with the next set of Forum minutes.</p> <p>The “next set of IR35 Forum minutes” for the meeting on 21st Feb 2018, released on 28th March 2018 did not contain a full response, and instead said (para 14) “following comments from Forum members, it would publish the MoO paper on the IR35 Forum website,” which we understand (AP5/March) was completed by the end of March 2018.</p> <p>It is now almost two months later.</p> <p>Please can you either provide us a copy of the most current draft you have of your response regarding mutuality of obligation or publish it on the Forum website immediately.</p>	<p>02/2/2018</p>
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	<p>Answer 18th June 2018: I can confirm that we hold this information, but it is being withheld under the exemption at section 22(1) of the FOIA as we are aiming to publish the information by the end of July 2018.</p> <p>We published: HMRC to announce legal position on MOO by end of July 2018</p> <p>5th July 2018: HMRC released its position.</p> <p>We published: HMRC new Paper on Mutuality of Obligation incorrectly defines MOO, invalidating CEST</p>	
CEST Test data	<p>Question</p> <p>In your response to FOI request FOI2018/00162 you stated that “The CEST tool testing was done by workshop where officials, lawyers, tax and IT professionals developed the set of rules that underpin the tool.”</p> <p>We asked for the results of 7 particular IR35 cases and you indicated that you held records when your response stated “Our records show that HMRC has used the CEST tool to test all the cases cited in your request”</p> <p>Regarding these records related to the testing of CEST, including the records for which you ascertained the results of those 7 cases, please can you provide:</p> <ol style="list-style-type: none"> 1. A list of all of the cases use for testing where decisions were made in court (and therefore on public record) 2. For the settled cases, which were not court cases: The number of cases used for testing. <p>Please can you also provide:</p> <ol style="list-style-type: none"> 3. A list of all documents/records mentioned in FOI2018/00162 related to the testing procedures. <p>Provide copies of such documents.</p> <p>Answer 25th April 2018:</p> <ol style="list-style-type: none"> 1. List of 24 cases provided, see Appendix 3. 2. We did not keep a count of the numbers of cases. The officers involved estimate that they tested CEST against around 400 settled cases. 3. The document is the table you were provided with. <p>We re-tested all the case and published: CEST exposed as hopelessly unreliable using HMRC's own test data obtained via FOI</p>	24/3/2018

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<p>CEST did not have any formal assessment under Government Digital Services (GDS)</p>	<p>Question</p> <p>HMRC has developed and published in Feb 2017 a tool called Check Employment Status for Tax, or CEST for short. This was originally called the “Employment Status Service” or ESS for short. We understand this was built under standards defined by Government Digital Services (GDS). https://www.gov.uk/government/organisations/government-digital-service https://www.gov.uk/government/publications/technology-code-of-practice/technology-code-of-practice</p> <p>We also understand that it underwent a review or “GDS Assessment”. Please can you send us a copy of the results of that assessment please. Thank you.</p> <p>Answer</p> <p>22nd June 2018: I am writing to advise you that following a search of our paper and electronic records, I have established that the information you requested is not held by the Cabinet Office.</p> <p>Following discussion between GDS and HMRC, it was agreed that the ‘check employment status for tax (CEST)’ tool wasn’t a transactional Digital Service as described in the Government Service Manual. Consequently, no formal service assessment was required. The definition of a government digital service requiring assessment is at: https://www.gov.uk/service-manual/service-assessments/check-if-you-need-a-serviceassessment</p> <p>We published: CEST was not formally assessed under Governments own standards, reveals FOI</p>	<p>14/5/2018</p>
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Appendix 4: The Law on Reasonable Care and Carelessness

These are some court cases related to reasonable care.

Cooke v HMRC [2017] UKFTT 844 (TC) [Re carelessness and reasonable approach]

<http://www.bailii.org/uk/cases/UKFTT/TC/2017/TC06239.pdf>

Hicks v HMRC [2018] [re Fight about discovery and carelessness]

http://www.templetax.com/ImageLibrary/cs105_TC06301.pdf

Anderson v HMRC [2016] [Re carelessness] (Para 123)

<http://www.bailii.org/uk/cases/UKFTT/TC/2016/TC05092.pdf>

Collis v HMRC + Hanson v HMRC: (Re reasonable care re carelessness)

<http://www.bailii.org/uk/cases/UKFTT/TC/2011/TC01431.pdf>

<http://www.bailii.org/uk/cases/UKFTT/TC/2012/TC02000.pdf>

Shakoor v HMRC: (Re reasonable care)

<http://www.bailii.org/uk/cases/UKFTT/TC/2012/TC02208.pdf>

Anderson (Deceased) v HMRC: (Re reasonable care)

<http://www.bailii.org/uk/cases/UKFTT/TC/2009/TC00206.html>

Blyth v Birmingham Waterworks Co: (Re reasonable care)

<http://www.bailii.org/ew/cases/EWHC/Exch/1856/J65.html>

Appendix 5: The Taxes Management Act 1970 – Section 29(4) – reasonable care

From *Cooke v HMRC*: TC/2016/02608

<http://www.bailii.org/uk/cases/UKFTT/TC/2017/TC06239.html>

JUDGE SARAH FALK

Section 29(4)

40. HMRC’s alternative argument was that the appellant’s accountant was a person acting on the appellant’s behalf, that the accountant was careless and therefore that the condition in s 29(4) was met. The appellant did not seek to argue that the accountant was not acting on his behalf, so the only question is whether there was carelessness.

41. The original version of s 29(4) referred to fraudulent or negligent conduct rather than to the under assessment being “brought about carelessly or deliberately”. The wording was changed by Schedule 39 to the Finance Act 2008, which also made similar changes to language elsewhere in the legislation. The new language is slightly elaborated on by s 118(5) TMA, which states:

“For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.”

42. The original language of s 29(4) was considered by the Upper Tribunal in *Colin Moore v HMRC* [2011] STC 1784. It was noted without disapproval that the First-tier Tribunal in that case had applied the following formulation of the test of negligence set out by Judge Berner in *Anderson v HMRC* [2009] UKFTT 206 at [22]:

“The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.”

43. This is an objective test. Some other more recent First-tier Tribunal cases have concluded that, in the context of penalties charged under Schedule 24 to the Finance Act 2007, “carelessness” requires that the attributes and experience of the particular taxpayer should be taken into account, rather than simply considering a hypothetical reasonable taxpayer. This reflects the test applied in determining whether a reasonable excuse exists, and has been justified by the absence of any defence of reasonable excuse from Schedule 24, in contrast to the predecessor provisions: see *Martin v HMRC* [2014] UKFTT 1021 (TC) at [124] to [131]. However, there is no similar justification to apply this approach to s 29(4).

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44. There appears to be relatively little case law discussion of the meaning of the amended version of s 29(4). It was referred to in *Richard Atherton v HMRC* [2017] UKFTT 831 (TC) as an objective test, citing *Moore* and *Anderson*, but without discussing whether the change in language has made any difference (paragraphs [130] to [132]). There is a slightly more detailed discussion in a case I decided, *Thomas Bubb v HMRC* [2016] UKFTT 216 at [34] to [38]. The most detailed discussion I have been able to identify is in *Alan Anderson v HMRC* [2016] UKFTT 335 (TC), from paragraph [114] onwards.

45. In that discussion Judge Morgan noted at [118] that the explanatory notes to the changes made by Finance Act 2008 stated that the changes were being made to align the position with the terms used in the revised penalty regime in Schedule 24 to the Finance Act 2007, and at [119] that there was some indication in the contemporaneous materials that the new language in Schedule 24 was not intended to be materially different from the old test of negligence. However, Judge Morgan went on to say that this was not enough to conclude that the two terms were interchangeable, and referred to cases relating to Schedule 24 where the test of failure to take reasonable care had been interpreted as requiring the Tribunal to consider all the circumstances, including the position and experience of the taxpayer in question (citing *David Collis v HMRC* [2011] UKFTT 588 (TC) at [29] and *Hanson v HMRC* [2012] UKFTT 314 (TC) at [21]; see also *Martin* referred to at [43] above).

46. In *Alan Anderson* it was the behaviour of the taxpayer that was in question. Judge Morgan concluded at [123] that the correct approach was to assess what a reasonable hypothetical taxpayer would do in all the applicable circumstances of the actual taxpayer. This is the same approach as I took in *Bubb*. I have considered the position again and I have reached the same conclusion. I also consider that the test can be no different when one is considering the position of a person acting on behalf of the taxpayer, rather than the taxpayer himself. In my view, whilst the test is an objective one its objective nature is qualified to some extent, because it is necessary to take account of all the circumstances. The question of what is “reasonable” care cannot be decided in a vacuum. It must mean reasonable care in the circumstances.

Appendix 6: The Off-Payroll Legislation – Chapter 10 Of ITEPA

Full text:

<https://www.legislation.gov.uk/ukpga/2017/10/schedule/1/part/2>

Snippets referred to in this paper:

61N Worker treated as receiving earnings from employment

- (1) If one of Conditions A to C is met, identify the chain of two or more persons where—
 - (a) the highest person in the chain is the client,
 - (b) the lowest person in the chain is the intermediary, and
 - (c) each person in the chain above the lowest makes a chain payment to the person immediately below them in the chain.

(See section 61U for cases where one of Conditions A to C is treated as being met.)
- (2) In this section and sections 61O to 61S—

“chain payment” means a payment, or money’s worth or any other benefit, that can reasonably be taken to be for the worker’s services to the client,

“make”—

 - (a) in relation to a chain payment that is money’s worth, means transfer, and
 - (b) in relation to a chain payment that is a benefit other than a payment or money’s worth, means provide,

and

“the fee-payer” means the person in the chain immediately above the lowest.
- (3) The fee-payer is treated as making to the worker, and the worker is treated as receiving, a payment which is to be treated as earnings from an employment (“the deemed direct payment”), but this is subject to subsections (5) to (7) and sections 61T and 61V.

- (4) The deemed direct payment is treated as made at the same time as the chain payment made by the fee-payer.

61T Information to be provided by clients and consequences of failure

- (1) If the conditions in section 61M(1)(a) to (c) are met in any case, and a person as part of the arrangements mentioned in section 61M(1)(c) enters into a contract with the client, the client must inform that person (in the contract or otherwise) of which one of the following is applicable—
 - (a) the client has concluded that the condition in section 61M(1)(d) is met in the case;
 - (b) the client has concluded that the condition in section 61M(1)(d) is not met in the case.
- (2) If the contract is entered into on or after 6 April 2017, the duty under subsection (1) must be complied with—
 - (a) on or before the time of entry into the contract, or
 - (b) if the services begin to be performed at a later time, before that later time.
- (3) If the contract is entered into before 6 April 2017, the duty under subsection (1) must be complied with on or before the date of the first payment made under the contract on or after 6 April 2017.
- (4) If the information which subsection (1) requires the client to give to a person has been given (whether in the contract, as required by subsection (2) or (3) or otherwise), the client must, on a written request by the person, provide the person with a written response to any questions raised by the person about the client's reasons for reaching the conclusion identified in the information.
- (5) A response required by subsection (4) must be provided before the end of 31 days beginning with the day the request for it is received by the client.
- (6) If—
 - (a) the client fails to comply with the duty under subsection (1) within the time allowed by subsection (2) or (3),
 - (b) the client fails to provide a response required by subsection (4) within the time allowed by subsection (5), or
 - (c) the client complies with the duty under subsection (1) but fails to take reasonable care in coming to its conclusion as to whether the condition in section 61M(1)(d) is met in the case,section 61N(3) and (4) have effect in the case as if for any reference to the fee-payer there were substituted a reference to the client, but this is subject to section 61V.

END OF REPORT