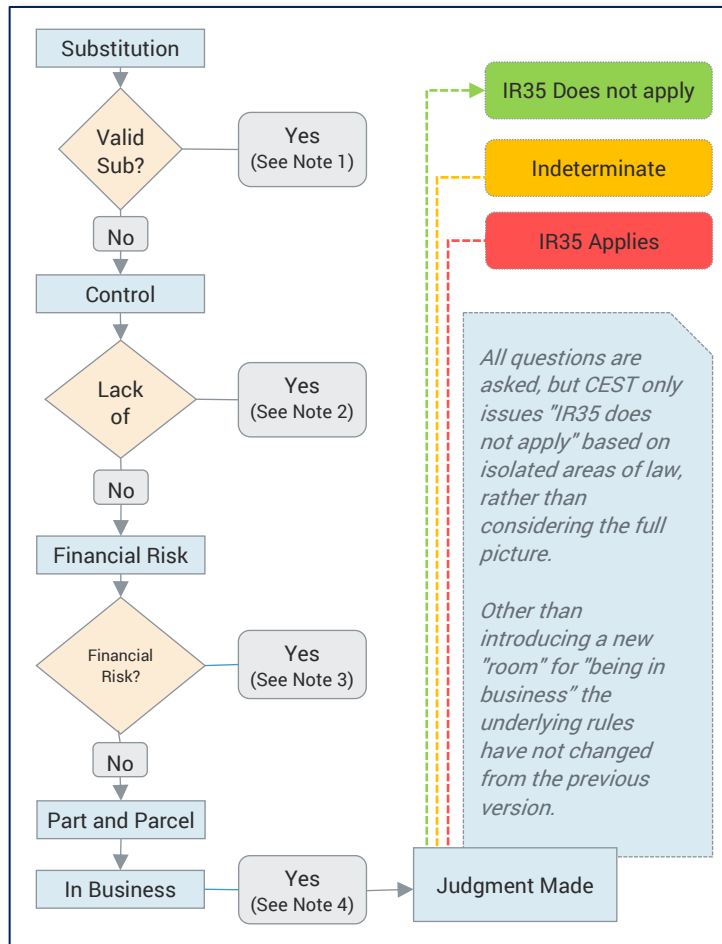


HMRC CEST Tool – How it works



CEST version 2 now uses a five-rooms approach with a final judgment. If an "outside IR35" is obtained in one room it still proceeds to the next, even though all the next answers are ignored – and outside IR35 is only issued in the first three rooms. If specific answers to questions are not given, it won't determine "IR35 does not apply". HMRC is trying to enforce its own flawed take on employment case law with its tool, by setting the bar unrealistically high and contrary to the law.

Note 1: Substitution

If substitution is valid, it will always issue "outside IR35". This over reliance on substitution is often overruled by the courts. See MDCM Ltd (Feb 2018). If a client refutes the right to substitute, reliance on other factors is required - which CEST won't have considered.

Note 2: Control

To achieve "outside IR35" you must confirm the following:

- That any change in 'task' throughout the contract would need to be arranged under a new contract
- That the client cannot provide input as to how work is carried out
- That where you carry your work out is determined either by yourself or the task itself, not the client

When asked about hours you must answer either "No, you solely decide" or "No, the work is based on agreed deadlines". In most cases this isn't realistic. A contractor will typically agree a schedule of flexibility with their client, and often remain outside of IR35 according to case law. But reveal this to HMRC and you won't get 'IR35 does not apply'.

Note 3: Financial Risk

If you're a knowledge based contractor on a daily or hourly rate – as the vast majority are - the only way you'll achieve outside IR35 if you either claim a significant amount in expenses, or incur significant costs to rectify errors. Financial risk is a relatively minor factor and most contractors are unlikely to incur significant costs rectifying errors.

Note 4: In Business on own account

This is the new "room" added to CEST. For contractors who work primarily for one client at a time, or do the majority of their work for one client, they will need to retain ownership of rights over the work. For most contractors, this is unlikely, and therefore irrelevant.

⚠ CEST WARNINGS

1. CEST only issues "outside IR35" considering one area in isolation. This is contrary to the big picture approach used by the courts, and stems from Hall v Lorimer [1993] EWCA Civ 25.
2. Determination are made prematurely, failing to consider all questions for due diligence.
3. The key test of mutuality of obligation (MOO) is omitted, wrongly assuming it always exists.
4. There is nothing in law (statute) that says HMRC or a judge has to agree with the CEST result.
5. HMRC have claimed they will "stand by" CEST, but have already proved they don't in the RALC Consulting IR35 tribunal case – which they lost. Their promise is weakened by heavy caveats.
6. Investigations reveal that HMRC holds no evidence to prove that CEST is accurate.
7. It is not possible to insure against a CEST assessment.

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