

HMRC dismisses IR35 forum members views and courts on laws omitted from CEST



Staggeringly, HMRC has not changed its view on a key area of important case law it omitted from its Check Employment Status for Tax (CEST), despite [IR35 Forum](#) Members providing compelling evidence to reconsider and judges' rulings in key tribunals demonstrating that it should.

Concerns were first raised about HMRC's omission of mutuality of obligation (MOO) within CEST [over a year ago on 5 June 2017 by ContractorCalculator](#). After considerable pressure from stakeholders HMRC finally provided its feedback in a draft whitepaper on MOO to IR35 Forum Members in March 2018.

Many Forum Members responded by refuting HMRC's arguments, including a detailed letter submitted by The Association of Independent Professionals and the Self-Employed ([IPSE](#)) and now shared with ContractorCalculator. After deliberating for three months, and due to a [further FOI by ContractorCalculator](#), HMRC finally [published their official legal stance on MOO last week](#). However, all the views of the forum were completely dismissed.

Simon McVicker, director of policy and external affairs for IPSE, told ContractorCalculator: "It is extremely disappointing that HMRC's paper remains unchanged from an earlier draft first shown to the IR35 Forum in March."

HMRC is ignoring the law

McVicker continues: "This isn't just IPSE's view, it is also the court's view, as was set out in our letter to HMRC."

In their letter to HMRC, IPSE referred to three specific court rulings that clarified the courts position on MOO, and said to HMRC: "...we query whether it is correct to assume that the basic consideration of pay for work is sufficient to create the requisite MOO which characterises an employment relationship. We would challenge the notion that MOO exists in every engagement where there is an obligation on the individual to provide work and for the client to pay for work performed. Case law establishes that something more is required for an employment relationship."

Chief executive of the Freelancer and Contractor Services Association ([FCSA](#)) and IR35 Forum member Julia Kermode, echoed this view: "The FCSA does not agree with HMRC's view that anyone using its online tool will have already established mutuality of obligation by virtue of a contract being in existence. We believe that this is a significant omission that ignores accepted case law, and until this position is revised the tool is simply not fit for purpose."

IR35 Forum Members' concerns not even debated

ContractorCalculator also sought the [views of other IR35 Forum Members via social media](#). Among the Members who stated that they had not endorsed the HMRC paper were:

Samantha Mann, senior policy and research officer at CIPP; David Kirk, previously chief criminal counsel at the Financial Conduct Authority (FCA) and director of the Fraud Prosecution Service, who confirmed “ICAEW have not endorsed this”; Justine Riccomini, head of taxation (Scottish taxes, employment and ICAS tax community) at The Institute of Chartered Accountants of Scotland (ICAS); and Jason Piper, senior tax manager, ACCA.

This response is hardly surprising, according to McVicker: “It has failed to engage with arguments put forward by IPSE and other experts that its position on mutuality of obligation – that it is always present in any contract – is fundamentally flawed.”

Chaplin adds: “This is a staggering abuse of power by HMRC and demonstrates that it is not prepared to listen to or engage in reasoned debate, instead choosing to override the laws set by the Supreme Court to cover its own failings. To deceive taxpayers in this way is fraudulent and to then use those powers to overtax people is, quite frankly, corrupt.”

What the judges have said on MOO

The taxman’s position was compromised by the emergence of two recent IR35 tribunal rulings. In the case of [Armitage Technical Design Services \(ATDS\) Ltd v HMRC](#), the judge rejected the taxman’s interpretation of MOO, stating:

“HMRC’s case is that where one party agrees to work for the other in return for payment, then this satisfies mutuality of obligation between the two parties. That would be true of every contract, both employment and for services; otherwise, the contract would not exist at all. The mere offer and acceptance of a piece of work do not amount to mutuality of obligation in the context of employment status.”

The ruling was released in January 2017, one month before the beta launch of CEST. The revelation indicates that HMRC knew that its decision to omit MOO from CEST was wrong at the time, and this oversight unquestionably brings the taxman into disrepute.

“HMRC will have read this judgment and known its position was wrong,” insists Chaplin. “Yet, it went on to launch a flawed tool which has since been used by more than 750,000 times by taxpayers. Surely, Government must now admit that HMRC’s position is untenable.”

CEST must be terminated

MOO is a fundamental part of assessing employment status, and judges have consistently referred to this aspect of the law, yet [HMRC chose to purposely omit it from CEST](#) based on a now indefensible legal position.

McVicker explains: “This is a crucial point because the CEST tool, which HMRC encourages clients and individuals to use to determine IR35 status, doesn’t consider mutuality of obligation at all.

“It is totally unacceptable for Government to ask people to use a tool that is so out of step with the latest tribunal decisions. The failure of HMRC’s paper to even acknowledge those tribunals suggests it has its head in the sand. There are potentially thousands of genuinely self-employed who have used the tool and been miscategorised as being inside IR35.”

What next for the private sector roll out?

The new off-payroll tax is currently only in the public sector, but HMRC launched its consultation in May 2018 with the lead option being to roll out the same legislation into the private sector. Many commentators are concerned how this will impact the private sector and a [recent survey by ContractorCalculator](#) revealed that major disruption would hit the business sector if it went ahead in its current form.

Simon McVicker concurs: “This problem will become even more acute if Government rolls out the IR35 changes to the private sector, where the sheer variety and complexity of engagements inevitably means that mutuality of obligation cannot be said to exist in every case.

“How can Government, in good conscience, even consider extending the ill-judged IR35 changes to the private sector without fixing fundamental problems with the CEST tool?”

Published: Tuesday, July 10, 2018

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