



HM TREASURY



HM Revenue  
& Customs

# False self-employment in construction: taxation of workers

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summary of consultation responses

March 2010





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# 1

## Introduction

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**1.1** The Government published the consultation: *False self-employment in construction: taxation of workers* in July 2009. The consultation closed on 12 October 2009. This document summarises what the Government has learned through the consultation and sets out the Government's policy approach, as informed by the responses received.

**1.2** False self-employment occurs where workers are treated as self-employed for income tax and National Insurance (NICs) despite the fact that the way in which the work is carried out demonstrates that there is an employment relationship. There is evidence to show that a significant number of workers in the construction industry are engaged in this way.

**1.3** The Government concluded that the best way to address this problem for income tax and NICs purposes is to introduce legislation. The consultation set out the proposal that workers within the construction industry would be deemed to be in receipt of employment income unless one of three criteria is met.

**1.4** The Government received a total of 117 responses to the consultation and these reflected a very wide range of views. At one end of this range, stakeholders (some construction businesses as well as trade unions) were very supportive of the Government's proposals. At the other end of the range, some construction businesses, representative bodies and advisers were strongly against the introduction of a deeming test. Within this range there were a number of stakeholders who were positive about some aspects of the Government's proposals, but had reservations about other aspects.

**1.5** Although the majority of stakeholders agreed that false self-employment in construction was a problem, there was no consensus among stakeholders as to the tests that should be included within a legislative solution or that there should be a legislative solution of this nature.

**1.6** The Government has listened to stakeholder concerns in relation to the solution proposed, but it considers that a legislative approach is worth pursuing. The deeming test outlined needs further development and input from stakeholders before being capable of forming a legislative solution that meets the Government's aims. These aims are that the test is well targeted, effective and allows the industry to retain a flexible labour supply.

**1.7** More work will be done to refine and develop the deeming test outlined in the consultation and meetings will be held with stakeholders to obtain further input and feedback.

**1.8** As indicated in the consultation, the Government recognises the effect that the economic downturn has had on the construction industry. It is the intention that the test developed as a result of this further work with stakeholders will take effect when the industry is in a stronger position.





# 2

## Background

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**2.1** Where workers, in whichever business sector or industry, provide their services, they do so for income tax and National Insurance (NICs) purposes either on a self-employed basis or an employed basis. A series of tests has been developed through case law which determine how a worker should be treated.

**2.2** False self-employment has long been identified as a problem in the construction industry. It occurs where workers are treated as self-employed for income tax and NICs purposes despite the fact that the way in which the work is carried out on a day to day basis demonstrates that there is an employment relationship, according to case law. The Government estimates that approximately 300,000 workers are operating under such conditions.

**2.3** The problems that false self-employment causes can be summarised as follows:

- for the industry, an unfair competitive advantage for those businesses who disregard their Pay as You Earn (PAYE) and NICs obligations when they engage workers, and a corresponding disadvantage for those businesses which properly engage their workers as employees;
- for the worker, a loss of entitlement to Jobseekers Allowance and additional State Pension and a lack of long term job security and career opportunities; and
- for the Exchequer, a risk in the region of £350m, as the correct amount of income tax and NICs is not being paid.

**2.4** Where both the worker and the engager decide that self-employed status is the desired outcome, it is very challenging for HMRC to build a full and accurate picture of the true terms of the engagement. As a result, demonstrating any mismatch between the contract and the reality can be difficult and time-consuming.

**2.5** Considerable effort has been made to assist engagers, in particular those within the construction industry, to get employment status right. However, despite measures such as the Employment Status Indicator tool and a restructuring of HMRC compliance activity in the construction sector so that additional resources were deployed, there has been no obvious lasting reduction in the problem of false self-employment in the industry. The Government has concluded that the measures that have been taken are not sufficient on their own to address this problem and that legislation is needed. Following announcements at 2008 Pre-Budget Report and Budget 2009, confirming its intention to tackle this issue, the Government launched a consultation in July 2009 on its suggested legislative solution to address the problem of false self-employment.



# 3

## The consultation

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**3.1** The objective of the consultation was to develop the best legislative approach. The Government emphasised that it would work with the construction industry to ensure that any legislation was targeted and that the industry retained a flexible labour supply. The Government explained that it would take account of comments made in response to the consultation as well as the wider challenges facing the industry. In particular it recognised the effect that the economic downturn has had on the construction industry and intends that the measures developed as a result of the consultation would take effect when the industry is in a stronger position.

**3.2** It was not the intention that introducing a test would adversely affect those genuinely carrying on a business; they would continue to be treated as self-employed.

**3.3** The consultation outlined the proposal to introduce legislation to deem workers to be in receipt of employment income unless one of three criteria is met:

- 1 Provision of plant and equipment – that a person provides the plant and equipment required for the job they have been engaged to carry out. This will exclude the tools of the trade which it is normal and traditional in the industry for individuals to provide to do their job;
- 2 Provision of all materials – that a person provides all materials required to complete a job; or
- 3 Provision of other workers – that a person provides other workers to carry out operations under the contract and is responsible for paying them.

**3.4** The solution provided that the person paying the worker would have responsibility for applying the deeming test and, if appropriate, applying Pay as You Earn (PAYE) and National Insurance (NICs).

**3.5** The Government welcomed views from stakeholders, particularly in relation to the questions set out at paragraph 7.1 of the consultation document, which were as follows:

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

*Question 2:* Are there other indicators which ought to be considered?

*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.

*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?

- 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?
- 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.
- 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.
- Question 8:* What avoidance routes might be available and how should these be countered?

**3.6** The consultation was launched on 20 July 2009 and closed on 12 October 2009. A wide range of organisations and individuals responded to the consultation. These included construction representative bodies, construction companies, professional bodies, accountancy firms and individuals. In total 117 written responses were received (some written jointly or representing the views of many members), and 9 meetings were held. This document outlines the Government's response to the comments.

# 4

## The principle of reform and overall view of the proposals

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**4.1** Although the consultation did not specifically ask for views on the problem of false self-employment in construction, many respondents commented on the overall direction of the proposals and the need for reform. Broadly the responses were divided between those who believed that false self-employment is a significant problem, those who believe it exists but not on the scale outlined and those who feel the consultation did not provide sufficient evidence of the problem.

### The existence of the problem

**4.2** Overall, the majority of respondents (across construction companies, representative bodies, professional advisers and trade unions) agreed that false self-employment does exist in the construction industry. Some respondents stated that it has been a longstanding problem in the construction industry and welcomed the Government's efforts to address it.

**4.3** One construction industry representative outlined that, in their experience, the vast majority of temporary workers engaging with intermediaries were required to present themselves as self-employed.

**4.4** Many respondents discussed the problems caused by false self-employment, including: the lack of employment rights and security for the worker; the lack of training provided to workers and the disadvantage to compliant businesses of competing against those who engaged in false self-employment.

**4.5** Trade unions and other representative bodies frequently cited the risks to the worker, such as loss of benefit entitlement and employment rights.

**4.6** One construction industry representative expressed concern that false self-employment had distorted the agency labour market by providing an overwhelming driver for more and more companies to source their labour in a temporary and flexible way in order to be able to do business in what is a fiercely competitive industry.

**4.7** However, some respondents did not recognise the problem and many felt that the consultation did not provide sufficient evidence to support the scale of the problem outlined. Some felt the vast majority of workers were properly categorised.

**4.8** Others indicated that they believe that the size of the problem varies between regions, with London and the south east of England having the largest proportion of falsely self-employed workers and the north of England and Scotland having the smallest.

**4.9** Some felt that the construction industry was different to all other industries and that this explained the unique level of self-employment within it. One construction representative body referred to the temporary nature of work in the house building sector and explained that workers would be required to work on sites for very short periods, before moving on to another site and coming back to the first site only when needed.

## The Government's response

**4.10** The Government believes that false self-employment persists in the construction industry. It estimates that the number of workers in an employment relationship but who are being presented as self-employed is in the region of 300,000. This was set out at paragraphs 2.6 and 3.6 of the consultation document and is based on self-assessment data from 2007/08 and HMRC compliance activity. The Government considers that, broadly, the responses to the consultation support this assessment.

**4.11** At paragraph 2.5 of the consultation, the Government noted the high proportion of self-employed workers in construction relative to other sectors as a comparator only. This was only one of the factors which points towards there being a problem of false self-employment in construction. Other factors include analysis of the self-assessment data set out above, the experience of HMRC in carrying out compliance activity and the experience of those operating in the sector.

**4.12** The short-term nature of some of the work in the industry, compared to other sectors may explain in part why the proportion of workers who are self-employed is higher in construction. However, the fact that a project or engagement is short-term is not on its own evidence that the worker is genuinely in business on his own account. There are many examples, both in construction and other sectors where a worker is taken on on a short-term basis but the terms of the engagement clearly point to the worker being an employee.

## Overall view of the proposals

**4.13** Many of those who responded to the consultation welcomed Government action to tackle non-compliance in this area. However, the overwhelming view was that the proposals would not achieve the aims set down in the consultation. Only a few respondents were confident the proposals in the document were capable of forming a near-final solution.

**4.14** The main concern voiced by respondents was that the issue of employment status was too complicated to be resolved by only three criteria. Respondents also expressed concern about the practical application of the criteria. Some respondents suggested modifications to the criteria proposed in the consultation and some respondents suggested alternative criteria. These are discussed further in Chapter 5.

**4.15** A large number of respondents wished to retain the status quo. Many referred to current case law tests and a significant number suggested increasing HMRC compliance activity and ensuring that the rules are more rigorously applied. Some considered that the Construction Industry Scheme (CIS) was working well and more vigorous enforcement of these rules could address the problem.

## Timing

**4.16** Most respondents who commented on timing agreed that, given the current economic outlook, it would not be appropriate for the deeming test to be introduced in the very near future. Many believed that there should be a lead in time before the measure becomes effective to allow businesses to plan.

## Employment law

**4.17** The issue of the employment law position was raised by many respondents – they questioned the potential mismatch between workers being treated as in receipt of employment income for tax and NICs purposes, but not being treated as employees for employment law purposes. Many (including trade unions, representative bodies, construction companies and

their advisers) thought that this was unfair for workers; that if workers were to pay tax and NICs as employees, they should benefit from all the advantages of being an employee.

## The Government's response

**4.18** The purpose of the consultation was to formulate the best legislative solution to this problem. The Government will take account of the suggestions that have been made in order to improve the test and to make its operation more effective, including consideration of alternative or additional criteria.

**4.19** Detailed comments on the specific points made in relation to the tests are set out in Chapter 5. However, the Government is committed to tackling this issue and given that there is broad recognition of the problem of false self-employment, continuing with the status quo or legislating the current case law tests are not viable options. One of the purposes of having a deeming test is to make the process of determining whether a worker is truly self-employed more straightforward. In devising a test, it is necessary to balance complexity with achieving a test which is practical, effective and achieves the correct answer.

**4.20** In terms of further compliance activity, HMRC has already devoted resources to encouraging contractors to comply voluntarily with the current rules and carrying out compliance reviews to educate and deter contractors from non-compliance. As set out in the consultation, this has had little, if no positive impact on the numbers of workers who are falsely treated as self-employed. There is some evidence of the use of intermediaries in the construction sector which appear to exist primarily as a means of allowing workers to retain a self-employed status. Also, HMRC has to consider carefully the allocation of its resources and it would not be reasonable for more resources to be spent tackling compliance in the construction industry compared to other sectors. Although CIS does require contractors to certify that they have considered the employment status of the workers included on CIS returns, the fact that an individual worker is registered under CIS is not confirmation that he should be treated as self-employed for income tax and NICs.

**4.21** In relation to employment law, changes to the tax and NICs rules do not create any precedent for employment law purposes. In fact, there is already potential inconsistency of treatment between the tax and NICs rules and employment law in relation to agency workers and those working through intermediaries and Managed Service Companies. In addition, there are some separate rules which categorise certain workers as employed for NICs purposes. Also, on the basis that the deeming test is intended to ensure that only those who are providing their services under an employment arrangement pay tax and NICs as such, then it may be the case that these workers would also be considered employees for employment law purposes.





# 5

## Responses to the consultation questions

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### **Question 1: Do these criteria represent fair indicators of a person who is running his own business and is therefore genuinely self-employed?**

**5.1** A small number of respondents felt that the proposed criteria were fair indicators of a self-employed person running their own business in the construction industry.

**5.2** However, a large majority of respondents considered that the issue was too complicated to be resolved by the three criteria proposed. Broadly, the responses were divided between those who suggested modifications to the criteria, those who suggested alternative criteria, and those who wished to retain the existing tests drawn from case law.

**5.3** Many respondents reflected on each criterion individually.

### **The worker provides the plant and equipment required to complete the job**

**5.4** A number of respondents agreed that provision of plant and equipment was a good indicator that a person is carrying on a business on their own account, as this was clear evidence of the person having made an investment in his business.

**5.5** However, a large number of respondents were concerned that there were many circumstances where it was impractical to expect workers to provide their own plant and equipment, for example, due to the shared nature of some items of plant, such as scaffolding and the buying power of the engager. As a result, many felt it was only practical for the engager to provide such equipment.

**5.6** Some respondents expressed concern that excluding tools of the trade would discriminate against those trades where only tools of the trade were required. A handful of respondents noted that tools of the trade could sometimes be quite extensive, representing a significant investment in the business and pointing towards self-employment. For example, a carpenter may often bring a van equipped with a wide range of tools. To overcome the difficulty posed by this criterion, in situations where a worker had invested capital in a set of valuable tools of the trade, some respondents suggested that tools of the trade should be taken into account above a de minimis value. This would mean that where a worker could show that they had invested more than a minimum amount in plant and equipment regarded as tools of the trade, this would be sufficient to meet this criterion. Suggestions for a de minimis limit were in the region of £1-2k and some felt this could be limited to non-mechanical items or include the cost of hiring items.

**5.7** A significant number of respondents felt that it would also be difficult to draw the line between tools of the trade and plant and equipment. To overcome this several respondents suggested that guidance on this subject could be issued so that it is clear what would be considered to be plant and equipment and what would not.

### **The provision of materials**

**5.8** In relation to materials, a large number of respondents made the same points as for plant and machinery – overall they felt that it would be difficult or impractical for workers to fulfil this

criterion as there are often good commercial reasons why materials are provided by the engager. Frequently this was because the engager could benefit from economies of scale or because of quality control and uniformity concerns. A number of respondents suggested that workers should only be required to supply materials to the value of a proportion of the contract price.

**5.9** A number of respondents were concerned that this criterion would be easier for some trades to meet than others and so would produce unfair results. For example, someone carrying out repairs might provide very few materials, such as some sealant and a few nails. In order to tackle this unfairness, some respondents again suggested that workers should be required to supply a minimum percentage of the contract price. For example, they suggested that if a worker provided materials representing 15-20% of the total amount paid by the engager to the worker under the contract of engagement, then this should be a reliable indicator of self-employment.

### **The provision of other workers**

**5.10** Broadly speaking, the majority of respondents thought that where a worker supplied other workers, this was a good indicator of self-employment.

**5.11** However, there were some respondents who felt that although this was a potentially good indicator of self-employment, they had some reservations that it would result in the proper categorisation of workers in all circumstances.

### **The Government's response**

**5.12** The Government believed these criteria to be the most reliable indicators of someone being in business in the construction sector whilst at the same time being simple, clear and easy to apply.

**5.13** Upon analysing the responses to the consultation, the Government is convinced that these criteria provide a solid start in the development of a legislative solution. These are tests that in the context of the construction industry are indicative of self-employment. The Government will take account of the points made relating to the practical application of the tests. In particular, given the feedback from respondents in relation to the provision of plant and machinery and materials, it is clear that these two tests as outlined in the consultation need further development so that they operate effectively. Some stakeholders have put forward constructive suggestions as to how these tests could be refined and these will be considered further and discussed with stakeholders.

## Question 2: Are there other indicators which ought to be considered?

**5.14** A small number of respondents felt that the three criteria were sufficient and no other indicators should be considered. However, the overwhelming majority thought that at least one other indicator should be taken into account in considering employment status.

**5.15** A significant number of respondents suggested that VAT registration should be included as a criterion, as was suggested in consultation question 4. This is discussed further in paragraphs 5.34 to 5.38 of this document.

**5.16** A large number of respondents referred to existing case law tests.

**5.17** A number of respondents made the point that many of the engagements are short term, perhaps for a matter of weeks. This means that over a course of say a year, some workers will have a number of engagements. Many felt that because workers were only engaged for a short period of time, this in itself was evidence of self-employment. The case of *Hall v Lorimer*<sup>1</sup> was sometimes referred to in support of this point. In that case, Mr Lorimer was found by the courts to be self-employed as a vision mixer in the entertainment industry. In reaching this finding, one of the factors that the courts took into account was the number of engagements Mr Lorimer was involved in throughout the period under review. On average, Mr Lorimer had between 120 and 150 separate engagements in a year working for 20 or so different engagers.

**5.18** A number of respondents suggested alternative criteria. These included:

- evidence of own office or administrative function;
- submission of invoices;
- separate business bank account;
- provision of own transport;
- whether services are only provided to one engager;
- public liability insurance and;
- gross payment status for the Construction Industry Scheme (CIS).

## The Government's response

**5.19** The deeming test outlined in the consultation document intentionally did not replicate the existing case law tests. Instead, the deeming test was based on those aspects of the existing tests which were most relevant to those working in the industry. For example, the provision of equipment would not be relevant for all sectors and so for some workers, whether or not they provide equipment, will carry no weight in determining whether they are self-employed.

**5.20** In devising the deeming test, the intention was that each of the tests would be capable of standing on its own in indicating self-employment. So, even if there were other factors present which could indicate employment, meeting one of the three tests was so significant in its own right so as to outweigh any other factors.

**5.21** In considering whether additional tests should be incorporated, it is important that these too are capable of standing on their own, or act to support one of the other tests. If this is not the case, it is unlikely that the test will produce the correct outcome. This point is discussed further at paragraph 5.32 in relation to taking account of the worker's skill. For the test to be

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<sup>1</sup> [1994] IRLR 171

effective, it is critical that it is objective, simple and easy for the payer to apply. Some of the tests suggested by respondents are subjective, for example, evidence of own office or administrative function and therefore may be difficult for the payer to apply and also difficult to evidence that the correct judgment had been made.

**5.22** Also, as suggested by some, the inclusion of tests which do not currently play a part in determining a worker's status for tax and NICs purposes would need to be reviewed carefully in order to ensure that they achieved the desired objective. Whether or not the test is met has to be visible to the person responsible for applying it.

**5.23** In relation to short-term engagements, it is clear that there are instances where workers will work for engagers for a short period of time. However, this in itself is not evidence of self-employment. There are many examples, both in the construction sector and in other sectors, where a worker would be engaged for a short period of time but would still be engaged on employment terms.

**5.24** The Government has listened to stakeholder representations and, in order to ensure that the deeming test is effective, will consider certain of the additional indicators put forward by respondents.

### **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.**

**5.25** The responses were divided between those who thought the criteria were effective in categorising workers between employment and self-employment and those who thought the test either too narrow or too broad.

**5.26** A small number of respondents believed there were no instances where someone who was genuinely self-employed would be unable to meet the criteria.

**5.27** A handful of respondents were concerned that the proposed test of self-employment was not rigorous enough. They felt that some workers who were employees could easily fulfil one of the criteria and be incorrectly regarded as self-employed. Of these respondents, some felt that not just one but two criteria should be met for a worker to be self-employed.

**5.28** A large number felt there were cases where a worker would be deemed to be in receipt of employment income under the proposal but would be treated as self-employed under current case law. Respondents were concerned this could create 'false employment'. To illustrate this many respondents made general references such as 'those who would satisfy the other case law tests'. Some referred to recent cases, such as *Castle Construction v R & C Commissioners*,<sup>2</sup> stating that workers who had been found to be self-employed would be deemed to be employed under the proposed criteria.

**5.29** Of those that did provide real-life examples, often specific trades were cited, for example, bricklayers, plasterers, carpenters, crane drivers, joiners, wall tilers, painters, decorators, roofers, thatchers, lead workers, wrought iron workers, scaffolders, timber frame erectors, tilers, kitchen fitters and locksmiths for snagging work.

**5.30** Respondents frequently raised concerns about specialist workers, indicating that they believe that where a worker has specialist skill this points towards self-employment.

### **The Government's response**

**5.31** It is not the intention that workers who would be treated as self-employed under the current case law tests based on the true terms of their engagement would be treated as being in receipt of employment income under the proposed deeming test. But, it is fair to say that the result that the current case law tests can give is not always certain, as their application involves the use of judgement, which is subjective. This is illustrated by the Special Commissioners' decision in *Lewis (t/a MAL Scaffolding) v R & C Commissioners*<sup>3</sup> where two of the workers had already been judged by an employment tribunal to be employees for employment law purposes, but were held by the Special Commissioner to be self-employed for tax and NICs purposes.

**5.32** It seemed that many who felt that there would be workers who would be deemed to be in receipt of employment income, but which would under the current case law tests be treated as self-employed, believed that this was because of the worker's specialist skill. The Government does not consider that, on its own, skill is a good indicator of self-employment. Many of the examples of skilled workers given by respondents such as scaffolders, plasterers, crane drivers, painters etc. are capable of being self-employed, but are equally capable of being an employee. This would depend on the facts and circumstances of the engagement. Much of construction

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<sup>2</sup> 2008 SpC 723

<sup>3</sup> 2006 SpC 527

work involves some skill. It is not the case that all skilled workers in construction would be considered, by reference to the current case law tests, to be self-employed, as the nature of the particular trade or profession does not, on its own, determine self-employment. For this reason, the Government does not consider that consideration of whether the worker has a specialist skill could represent a test in its own right.

**5.33** The Government will work with stakeholders to ensure as far as possible that the deeming test does not affect those who are genuinely running a business.

## **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?**

**5.34** The responses to this question varied widely. Some felt the three criteria were sufficient and there was no need to add this additional criterion. Of those who thought it would be helpful to include the criteria of VAT registration, responses were polarized between those who thought it should be included as a separate criteria in its own right and those who thought it should only be included as an extra requirement, in addition to meeting one of the other three criteria.

**5.35** Those who thought it was a good indicator did so because VAT registration was not something which they believe was likely to be done lightly, without consideration of the potential additional administration that this would cause. They considered that it is therefore indicative of someone who is serious about running their own business.

**5.36** However, a number of respondents did not support the inclusion of VAT registration in any form. Some felt it was inappropriate or irrelevant and of these some reasoned that it does not form part of current case law. Some were concerned that this would unfairly prejudice or lead to additional administrative burden for small businesses that may be forced to register voluntarily. Others felt it would be pointless to add this criterion as it was unreliable and would lead to a deluge of voluntary VAT registrations.

**5.37** Some of these respondents suggested that it would be a useful addition only if the VAT rules were altered so that only those genuinely in business on their own account could register.

### **The Government's response**

**5.38** VAT registration does not feature as a current case law test. However, some believe that nevertheless it could be included as a test as it can indicate that someone is running a business. The Government believes that further consideration needs to be given as to whether this could form one part of the test.

## **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?**

**5.39** The majority of respondents felt that the payer was the correct person to have the responsibility for applying the criteria and applying PAYE and NICs, with some stating that this was the only practical solution.

**5.40** However, a minority of respondents were concerned that the payer would not know the true terms of the engagement. They suggested that the responsibility should be shared jointly between engager and end user.

**5.41** One respondent suggested that a third party agency could take responsibility for 'vetting' sub-contractors and verifying self-employed status. A fee would be payable for the service.

### **The Government's response**

**5.42** There was a general consensus that the payer is the correct person to have the responsibility for operating PAYE and NICs. The Government believes that giving the engager and end user joint responsibility for applying the test would only create difficulties and additional administrative burdens for each of these parties. Getting the test right should ensure that the payer will be able to identify properly the true terms of the engagement.



## **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.**

**5.43** A large number of respondents felt that the introduction of the deeming provision would bring about an additional administrative burden.

**5.44** Some noted that it would involve training staff to apply the criteria and determine employment status. Some said additional staff, accountants and employment law specialists would have to be engaged, leading to further costs. Some felt it would involve maintaining additional records.

**5.45** A number felt the burden would be most strongly felt by small and medium enterprises.

**5.46** Some raised the difficulty associated with very short engagements. Of these, some suggested a de minimis could be implemented, so where a worker was engaged for say one week or less, there would be no requirement for the test to be applied.

**5.47** Others felt there would be difficulty where workers had multiple engagements, particularly in cases where they would fluctuate between employment and self-employment.

**5.48** A smaller number felt that the operation of PAYE would not impose a significant additional burden, although some added that there would be practical difficulties in relying on third party data and obtaining tax codes.

**5.49** Some noted that it was simply a matter of replacing one administrative burden with another i.e. that instead of operating CIS, the payer would be operating PAYE and that with the use of software this process should be reasonably straightforward.

### **The Government's response**

**5.50** The Government acknowledges that the introduction of a deeming test is likely to have most impact in terms of administrative burdens on small businesses and will explore with stakeholders how this could be mitigated.

**5.51** Businesses are currently under an obligation to consider the current case law tests and apply those to the workers that they engage. They will have to have some form of process and record keeping to be able to deal with this requirement. As the deeming test would replace the existing case law tests, there would be a need for familiarisation with the new rules. However, it should be possible to modify the processes and record keeping which businesses already have in place in order to deal with new rules.

**5.52** Where workers are paid through CIS and are required to be paid via PAYE under any deeming test, it would be a matter of replacing the administrative burden of CIS with that of PAYE.

## **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.**

**5.53** The responses to this question were varied between those who felt that deeming would have no impact on the adaptability and flexibility of the labour market, those who felt that deeming would have a positive effect as it would 'bring clarity and eliminate distortions' and those who felt it was impossible to answer this question at this stage, as they could not predict how it would work in practice.

**5.54** The most prevalent response was that adaptability and flexibility would be affected. Some respondents said this was their biggest concern.

**5.55** Some respondents felt the impact on adaptability and flexibility was overstated, as the main driver behind false self-employment was the tax and NICs saving.

**5.56** Many respondents discussed how flexibility and adaptability would be affected and the impact this would have. For example:

- some expressed concerns that extra costs would lead to construction companies scaling down their operations and making redundancies;
- others were concerned that workers would leave the industry, as other sectors would be offering comparatively better rates;
- some said that workers would leave the legitimate industry; and
- some respondents thought it would impact the options open to workers and engagers in terms of people being able to choose to contract on a self-employed basis.

### **The Government's response**

**5.57** The Government understands that the solution is likely to have some impact on the adaptability and flexibility of the labour market. This is one of the reasons why it said in the consultation that it was the intention that the solution would take effect when the industry is in a stronger position. The Government accepts that any adverse impact on the flexibility of the workforce would be unhelpful and unwelcome during the period in which the industry is beginning to recover from the effects of the economic downturn.

**5.58** However, the Government considers that the potential impact on flexibility is not a reason not to move forward with a legislative solution. Many other sectors have similar issues with flexibility and address this in various ways, but do not rely to the same extent as the construction industry on the provision of labour on a self-employed basis.

## **Question 8: What avoidance routes might be available and how should these be countered?**

**5.59** Many respondents were unable to identify any avoidance routes but some referred to previous avoidance schemes and felt there would inevitably be attempts to avoid any future legislation in this area. A small number said they felt unable to comment on this in the absence of draft legislation.

**5.60** Of those who did comment, the following avoidance routes were frequently cited:

- cross-invoicing of plant, equipment and materials between the engager and the worker;
- engagers knowingly applying the criteria incorrectly; and
- use of intermediaries such as employment agencies, personal service companies and umbrella companies.

### **The Government's response**

**5.61** In order that the proposed solution is effective in tackling the problem of false self-employment, it is important that steps are taken to counter avoidance routes. The Government will work with stakeholders to ensure that the potential for avoidance is taken into account in relation to further development of the deeming test.





# Consultation respondents

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## Representative bodies:

British Constructional Steelwork Association Ltd  
Civil Engineering Contractors Association  
Confederation of British Industry (CBI)  
Construction Employers Federation  
Electrical Contractors' Association (ECA)  
Federation of Master Builders (FMB)  
Federation of Small Businesses (FSB)  
Glass and Glazing Federation (GGF)  
Heating and Ventilating Contractors' Association (HVCA)  
Home Builders Federation Ltd (HBF)  
Homes for Scotland  
Joint Taxation Committee of Construction (representing 13 federations)  
Major Home Builders Group – Finance Directors (Members of Home Builders Federation)  
National Access and Scaffolding Confederation (NASC)  
National Specialist Contractors Council (NSCC)  
Professional Contractors Group (PCG)  
Recruitment and Employment Confederation (REC)  
Scottish & Northern Ireland Plumbing Employers' Federation (SNIPEF)  
Scottish Building Federation  
Trade Union Congress (TUC)  
UK Contractors Group (UKCG)

## Trade Unions

GMB  
Union of Construction, Allied Trades and Technicians (UCATT)  
Unite the Union

## **Professional Associations**

Association of Chartered Certified Accountants

Chartered Institute of Taxation

Institute of Chartered Accountants in England and Wales

Institute of Chartered Accountants of Scotland

Low Incomes Tax Reform Group

The Law Society of Scotland

## **Other**

39 Accountancy firms

22 Construction businesses

4 Employment agencies/intermediaries

22 Other businesses or individuals



### **HM Treasury contacts**

This document can be found in full on our website at:  
[hm-treasury.gov.uk](http://hm-treasury.gov.uk)

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