Dear Sirs

Off-Payroll Working Rules from April 2020 — Consultation Response

We write to provide our general observations on the “Off-payroll working rules from April 2020” policy paper and consultation document published on 05 March 2019 (the “Consultation”). We have two particular areas of concern in relation to the proposed changes as set out below.

These observations are in addition to our observations provided on 10 August 2018 in response to the “Off-payroll working in the private sector” consultation document published on 18 May 2018.

1. Responsibilities of parties within labour supply chain

1.1 We understand that, as shown in the illustration on page 15 of the Consultation, it is proposed that liability flows down the labour supply chain as each party in the chain fulfils its obligations. As a result, if HMRC does not receive the tax due in respect of an off-payroll working engagement, the liability will transfer to the party that has failed to fulfil its obligations. This may be an agency which has failed to pass on a status determination or a fee payer which has failed to deduct income tax and national insurance contributions.

1.2 If HMRC is unable to collect the tax due from the party that has failed to fulfil its obligations, it is proposed that the liability transfers back to the first agency in the chain. If HMRC is unable to collect the tax due from the first agency in the chain, it is then proposed that the liability transfers back to the client. This seems a harsh result where the client has made and passed on a status determination to the first agency in the chain and paid the fees to that first agency without deduction of tax relying on the fact that the fee payer is obliged to deduct any income tax and national insurance contributions due.

1.3 We note that the government considers that clients would have a number of options open to them to protect themselves from such a scenario. Seeking an indemnity from non-compliant fee payers is unlikely to provide much protection in practice in circumstances where HMRC is unable to collect the tax due from such fee payers. We agree that it is possible that the changes will encourage clients and agencies to only work with reputable and compliant firms but there are many reasons why reputable and compliant firms may fail to fully comply with their obligations (e.g. where the firm is under significant financial pressure). We would not expect clients to bear the risk of non-compliance in these circumstances.
1.4 It seems that the only sure way for a client to protect itself against this outcome would be for the client to withhold an amount from its payment to the first agency in the chain to reflect the tax which would be due in relation to the off-payroll working arrangement. This would only be released when the relevant fee payer had fulfilled its obligations. This would cause significant cashflow disruption in the labour supply chain and may render certain methods of working impracticable. Clients are also incentivised to categorise workers as employees to protect their own position.

1.5 A client which has complied with all its obligations needs comfort that it will not suffer tax liabilities as a result of the non-compliance of other parties in the labour supply chain when it has already paid on amounts gross.

1.6 In the circumstances described above where a tax liability is proposed to be visited upon a client which has complied with all its obligations, it may be more appropriate for the tax liability to be visited upon the worker given that the worker’s personal service company will have received the fee for the services provided and can therefore account for the tax due out of that fee.

2. **Addressing status determination disagreements**

2.1 We welcome the idea of introducing a process for workers to raise concerns about their status determination directly with the client. However, it is clear that clients will err on the side of caution and, in cases of uncertainty, classify workers as employees. This has already been seen in the public sector where very high proportions of off-payroll workers have been classified as employees. Workers on the other hand will err towards being classified as self-employed in cases of uncertainty.

2.2 Additional guidance is required from HMRC to bridge this gap. We note HMRC has indicated that the CEST tool will be enhanced. We hope this will address the 15% of cases where the CEST tool does not provide a clear response. It is these scenarios where clients are likely to face the biggest issues in providing status determinations.

2.3 In addition, there is no guarantee that HMRC will agree with a status determination agreed by a client and a worker.

2.4 Where a client has taken reasonable care to make a status determination and acted in good faith, it does not appear appropriate that, if that status determination is later challenged and found to be incorrect, HMRC seeks to recover any income tax and national insurance contributions due from that client. The client will have already paid the first agency in the chain gross. As set out above, the only sure way for a client to protect itself in these circumstances would be for the client to withhold amounts which would significantly disrupt the labour supply chain. Again, the tax liability could be visited upon the worker in these circumstances.

2.5 An enhanced CEST tool is required which deals more clearly with cases of uncertainty and can be relied on where a client has taken reasonable care and acted in good faith.

Yours faithfully

Simmons and Simmons LLP