



Lisa Fitzpatrick
False self-employment in the construction sector consultation
Personal Tax Team
HM Treasury, 2/SE
1 Horse Guards Road
London
SW1A 2HQ

12 October 2009

Dear Ms Fitzpatrick

Response to the HM Treasury Consultation Paper “False self-employment in construction: taxation of workers” of July 2009

The Home Builders Federation (“HBF”) represents house builders in England and Wales who between them account for over 80% of the new homes developed each year.

Our members have expressed serious concerns about the proposals which we believe would add considerably to the fiscal burden for the sector with adverse consequences for housing delivery and employment in the house-building sector. The additional costs would be borne by our members and by our industry’s suppliers and contractors lower down the supply chain.

We believe that false self-employment should be addressed by means of vigorous HMRC auditing of suspect contractors, as our members have no wish to be disadvantaged as a result of competitors adopting less-rigorous employment standards.

Our key observations are:

- An evidence base to justify the proposals has not been set out
- Skilled, specialised sub-contractors who currently satisfy the self-employment criteria will be caught by the reduced criteria in the deeming proposal. This could create “false employment” for those who are genuine specialist or labour-only sub-contractors taking risk through fixed payment contracts and otherwise.

- The deeming of operatives as employed for tax purposes will inevitably lead to demands for the full range of employment rights and this will reduce the flexibility of the UK's construction workforce.
- Delivery of significantly more housing is a key objective of HM Government. This measure by increasing costs and reducing flexibility will reduce industry's ability to meet this objective and Government housing targets by adversely affecting development viability.
- The new CIS launched only just over 2 years ago is working well. Member firms have made the necessary investment in systems and procedures. We would urge HMRC to increase its compliance checking on CIS as the best way of preventing false self-employment.
- The employment status of operatives could change on an almost daily basis depending on the work being performed. This would be impractical for member firms to control.
- The extension of PAYE to cover temporary operatives would also add greatly to administrative requirements.
- The proposed exemptions do not accord with decisions in recent case law and so are likely to be challenged.
- Nor would the proposed exemptions be easier to interpret, police and apply than the current rules
- We consider for all these reasons that the consultation's impact assessment significantly underestimates the adverse cost and operational impact of the proposals on house builders
- As a consequence of our concerns, nor do we believe the proposals are consistent with the principles of appropriate and better regulation.

We attach our detailed response to the consultation in the attached appendix.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S R Jackson', with a horizontal line underneath.

S R Jackson
Finance Director

References are to those in the Consultation Document

- | | | |
|---|---|---|
| 1.2 Evidence of "false self-employment" | a | We do not believe that there is extensive abuse of employment status in the house-building sector. We also consider that HMRC has failed to provide evidence for this contention. |
| 1.5 The tests should not have an adverse effect on business | a | The housebuilding sector relies upon a flexible labour force - both because of the itinerant geographical nature of the business model (development sites last in any one location for a matter of months) and also the cyclical nature of the industry as can easily be evidenced by the dramatic downturn in the sector at present. |
| | b | We believe that the confusion over employment status will remain. The proposal to switch the burden of proof from HMRC to employer and operative does not remove the differing opinion of HMRC from those involved in the engagement. |
| | c | The tests will lead to considerable confusion and probably result in Court action for precedents to be set. |
| 1.6 Non-conferral of employment rights | a | We are strongly of the view that the splitting of employment rights from tax status will lead to these operatives demanding full employment rights to go alongside their "deemed" tax status. |
| 1.6 The proposed changes will improve training | a | The major home building companies are 95% compliant in the use of CSCS cards on their building sites. This is higher than most other sectors in the construction industry and reflects the serious stance taken upon training of operatives and in Health & Safety. |
| | b | The Major House Builder Group ("MHBG") which represents the largest house builders in the UK has made public its commitment to a fully "qualified work force by 2010. |

- 2.5 What is different about construction?
- a House-builders have no established *locus operandi* - there are no fixed business premises other than regional and head offices for administrative staff. The construction and sales phases of housing developments tend to cover an 18 month to 24 month period although some sites are much smaller and of shorter duration and some are larger and therefore longer in duration.
 - b The product remains largely hand-built with a particularly high labour content.
 - c The product is complex and requires input from a wide variety of different trades and skill sets, which are often specialised in nature.
 - d We contend that making cross-border and cross-industry sector comparisons is not relevant to the unique nature of house-building. Employment and tax status issues in house building must be judged on their own merits taking full account of the commercial context.
- 2.6 Evidence of a substantial abuse of self-employment status
- a We are not aware that HMRC has won a substantial number of employment tribunal cases in this area. Indeed there are extensive examples of HMRC losing such employment cases.
 - b We believe that HMRC has taken the focus away from compliance as a result of the design and implementation of the new CIS.
 - c We strongly urge HMRC to resume compliance checking as we can agree that false self-employment can create uncompetitive and unfair conditions for those who are fully compliant.
 - d There has been a concentration of housing development in the larger quoted companies. By way of illustration, the top ten house builders delivered 61.4% of the housing completions in 2006 up from a 6% share in the 1930's; by 1980 it was 28% and by 2000 it had reached 44%. These major companies are subject to the most stringent corporate governance and are fully compliant, to the best of our knowledge, in all fiscal matters.

- e The unique nature of the construction sector is evidenced by the unique tax regime of CIS. We believe the new CIS, which has only been in existence since April 2007, is a major improvement on previous regimes and should be given sufficient time to be bedded in and then policed.
- 2.7 The fact that 300,000 subcontractors operated within CIS with no costs for materials
- a It has become normal commercial practice for large house builders to procure most of the materials required on site. Often this is for materials specified in the planning permission - so a particular brick or roof tile is required. Also substantial bulk discounts are achieved by developers which would not be available to smaller operatives.
- b If every brick-layer brought along his own bricks the external appearance of the resultant buildings would be somewhat unappealing and commercially disastrous.
- c House builders procure materials for quality control purposes.
- 2.10 Establishing the accurate picture of employment status
- a We contend that it should remain in the preserve of the courts to determine any dispute over employment status. Switching the burden of proof does not, in itself, remove the need to determine an accurate employment status.
- 2.11 The growing use of intermediaries
- a Compliant businesses adopt exactly the same CIS employment tests whether hiring operatives directly or through the use of intermediaries.
- 3.2 The willingness of engagers to hire workers on a self-employed basis when the reality of the engagement is one of employment
- a No evidence is produced for this serious allegation.
- 3.3 Contributing to a culture of neglecting responsibilities with employment law.
- a The majority of house-builders are fully compliant with fiscal and fiduciary responsibilities. See response to 2.6 (d) above.

- 3.5 Risk to the Exchequer
- a The Evidence Base (Page 6) shows a table indicating that 24% of sub-contractors live on an annual income of under £5,000. This seems somewhat unlikely and is more indicative of the fact that these operatives also have other employment on which they are presumably taxed and NI'd or they operate within the "black economy" of which there is no mention in the Consultation document. We would contend that the proposed changes would increase the risk of creepage in the "black economy".
- b The calculation of the annual Revenue loss to the Exchequer of £350m ignores the state's increased liability for additional state pension and social security benefits for those "deemed" to be employed. So it is a one-sided calculation.
- 4.6 CIS Declaration
- a We believe that the regular certification of employment status is being taken very seriously by our members and has been an important step in increasing compliance in ensuring correct employment status.
- 4.7 The recent measures taken (CIS implementation etc) have shown no significant lasting effect on levels of false self-employment.
- a As we believe that HMRC's view on the levels of false self-employment are unproven then any change in levels apparent or otherwise is meaningless.
- 4.8 A higher level of compliance is not a viable long-term solution.
- a If the levels of loss of revenue to the Exchequer are credible then there would be sufficient potential for recovery and penalty to pay for increased policing.
- 5.4 and 5.5 Deeming would apply where the main business of the engager involves the carrying out or commissioning of construction operations.
- a The definition of "main business" is subject to interpretation and it is unclear to the HBF who would be caught by the proposed changes - quantity surveyors, architects, project managers?

- b The "simplification" of the employment tests to 3 will result in an un-even playing field and would result in a multi-tiered approach to employment status.
- 5.6 Who applies the test?
- a The only person who can apply the test is the house-builder as any intermediary may not have full knowledge of all of the circumstances surrounding the engagement. This would not be the "payer" if an intermediary is used.
- 5.11 The criteria
- a Defining what "all materials" actually means in practice will be very difficult and contentious.
- b House builders try to secure bulk-discounts from material suppliers - see 2.7 (a) above.
- c Provision of plant and equipment required for the job - again is this all plant or some plant, most plant? House-builders often arrange for the plant and equipment in order to comply with stringent Health & Safety requirements.
- d The provision of other workers - what if additional workers are required at some stage of the construction but then not at others. Does the employment status change on a day by day basis? This is impracticable.
- 5.26 The right time for implementation
- a The HBF is strongly opposed to the deeming proposal in principle and we would suggest that there is no appropriate time to introduce these measures.
- b It is self-evident that the house-building sector is suffering its severest down-turn for several years. The introduction of these measures would place a substantial increase in costs and in administration which the industry is particularly ill-resourced to implement at present. We would repeat however that we are opposed in principle to its introduction at any time.
- 5.31 Would the addition of a VAT test improve the deeming test?
- a As engagers would be able to register voluntarily for VAT the additional test would be pointless.

- 6.1 Administrative burden
- a Generally payment of employed operatives is processed through payroll teams within house-builders who pay in accordance with hours worked and payment of labour-only subcontractors and other contractors is handled through the surveying departments who measure work undertaken. These measures would destroy this critical juxtaposition and would lead to considerable additional administration - far greater than the cost estimates provided in the Impact Assessment (Page 3).
 - b An operative could move between CIS and PAYE as the nature of his work changed - on an almost daily basis. It is completely impracticable to be appraising the employment status on a daily basis.
- 6.6 Impact on labour market
- a We believe that the increased NI burden would fall almost entirely on our member companies as operatives would demand that their net pay remained unaffected by any changes.
- 6.8 Labour market flexibility
- a This is a key concern for members - indeed probably the biggest concern. We do not concur with the proposal's contention that the splitting of tax/PAYE status from employment rights status will not lead to operatives caught in the proposals seeking full employment rights. It seems a natural and unstoppable consequence.