

Employment Status, Tax and the Gig economy-improving the fit or making the break?

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Tax employment status - time for a change?

The Coronavirus pandemic that is dominating all thought as this article is finalised has highlighted major flaws in our tax and benefits systems. These are not newly discovered problems. They have been known for many years.¹ But a system under pressure, as ours is now, will reveal its stress points more clearly than one which rumbles along in normal circumstances. Times of trouble sometimes make conceivable reforms that were once considered impossible.

One particular issue is that of employment status and the differential amounts of tax and National Insurance paid by people providing their labour through different legal structures. Different structures also lead to varying administrative arrangements, making it hard to treat people in a similar fashion. Hopefully now is the time for radical reform of the tax and National Insurance system in order to align the treatment of all those who supply labour, whatever legal arrangements they happen to use. By making such reforms, the Chancellor could not only increase tax equity, but also remove one major incentive for businesses to resist employment status for purposes other than tax. This is not to say that employment status problems would

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¹ See J. Freedman, *Employed or Self-employed? Tax Classification of Workers and the Changing Labour Market* 2001 (Institute for Fiscal Studies) ; C. Crawford and J. Freedman "Small Business Taxation" in (2010) *Dimensions of Tax Design: The Mirrlees Review*, (ed J. Mirrlees et al.), pp 1028-1099, Oxford University Press for Institute for Fiscal Studies.; Adam, S. Miller H and Pope T, 2017 'Tax, Legal Form and the Gig Economy' in C Emmerson, P. Johnson and R. Joyce (eds) *The IFS Green Budget* :217; A Adams, J. Freedman and J. Prassl "Rethinking Legal Taxonomies for the Gig Economy" *Oxford Review of Economic Policy*, 34, 475–494 (2018); S. Adam and H. Miller, (2019) *Principles and practice of taxing small business* IFS Working Paper W19/31.

disappear or that the gig worker category would no longer be problematic- there are many other incentives and reasons for not employing suppliers of services - but at least the tax driver for non-employment and non-worker structuring would be removed and there could be a clear focus on the best way to provide important forms of protection for these groups.

In a speech on March 26 2020, while introducing support measures for the self-employed during the coronavirus crisis, the Chancellor of the Exchequer hinted that a structural change around the contributions made by this self-employed group was on his mind. Having offered help to the self-employed, intended to assist them as the Government had already assisted employees, he stated

*'But I must be honest and point out that in devising this scheme – in response to many calls for support – it is now much harder to justify the inconsistent contributions between people of different employment statuses. If we all want to benefit equally from state support, we must all pay in equally in future.'*²

When the pandemic arrived, understandably given its extent, the self-employed expected, and many of them will receive, assistance from the State. For this reason, it is now going to be harder to argue in the future that they should also pay lower tax and National Insurance Contributions (NICs) than employees. On the other hand, some people are falling into gaps in provision, including some of those who have incorporated personal service companies. Owner/directors of personal service companies have been able to save even more tax and NICs than the self-employed in the past, mainly by paying themselves through dividends rather than salary, as described in more detail below. However this may mean they are not fully covered by the scheme for employees (the Coronavirus Job Retention Scheme (CVJRS)).³ Since they are company directors, not self-employed, they are not eligible for the alternative scheme for the self-employed.⁴ Company directors of personal service companies may be furloughed by their

² <https://www.gov.uk/government/speeches/chancellor-outlines-new-coronavirus-support-measures-for-the-self-employed-26-March-2020>.

³ Guidance on the Coronavirus Job Retention Scheme https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme?mc_cid=177bacbc11&mc_eid=bf413561a0; Direction under Sections 71 and 76 of the Coronavirus Act 2020 dated 15.4.2020
. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf

⁴ Guidance on the Coronavirus Self-employment Income Support Scheme <https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme>; Direction under Sections 71 and 76 of the Coronavirus Act 2020 dated 30.4.2020

own companies, but at the time of writing this article it remains the case that only payments that have been subject to the Pay as You Earn mechanism for tax collection (PAYE) may form the basis for a CVJRS payment. This means that unless the personal service company is paid via an agency or by a public sector engager applying the IR35 rules⁵ (in which case PAYE will have been applied to all their earnings) their CVJRS payments will be based on their salaries from the personal service company. For CVJRS purposes, these salaries exclude any returns paid by way of dividend by those companies, despite that being a standard way of structuring payments from a personal services company. This is an entirely logical application of the rules, since a dividend is not earned income and for that reason is not subject to NICs and is not classified as remuneration, but for many company directors using this structure this interpretation of the scheme has come as a shock. Although they were happy to call these payments dividends in order to reduce their NICs, they thought of the payments as part of their remuneration, as they now freely admit. A way may be found to help them, since this is a vocal group with considerable political clout and support,⁶ but administratively it will be very difficult and tricky issues of entitlement are raised.⁷

This highlights the complexity and the artificiality of the current structures so often used to reduce taxation by those working in non-standard ways, including gig workers. Not all these company directors are highly paid. But the story is not only one of non-standard workers failing to gain protection.⁸ In some cases, the legal definitions have been extended to provide

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882593/SEISS_Direction_Final_-_SIGNED.pdf

⁵ The Finance Act 2017 introduced a requirement that public sector engagers take responsibility for deciding whether the so-called IR35 rules apply and for doing so where through the PAYE system,. The IR35 rules are explained below at the text to fn 33 below. There is some irony in the fact that some company directors will have been saved from this dividend trap as a result of these hated IR35 off- payroll rules.

⁶ For example Mel Stride, MP, Chair of the Treasury Select Committee, under pressure from the Institute of Directors and the Association of Independent Professionals and the Self Employed, is pushing hard for the Government to find a way to bring these dividend recipient company directors into the scheme: ‘Chancellor must iron out problems for limited company directors’, *Financial Times* April 22, 2020. See also BEIS Small Business Minister Paul Scully, ‘UK minister seeks ways to extend bailout to owner-directors’ *Financial Times* 15th April 2020. Institute of Directors Urgent Clarity needed for Furloughed Directors, , 16 April 2020 <https://www.iod.com/news-campaigns/news/articles/Urgent-clarity-needed-for-furloughed-directors>

⁷ Treasury Select Committee session on the coronavirus, evidence from Jim Harra, chief executive HMRC, 8th April 2020,

⁸ N. Countouris, V de Stefano. K. Ewing and M. Freedland, in an otherwise excellent blog (<https://www.socialeurope.eu/covid-19-crisis-makes-clear-a-new-concept-of-worker-is-overdue>, 9 April 2020), talk about ‘large swathes of self-employed missing out on these schemes’, but it is not at all clear, in the UK at

some protection for non-standard workers. The guidance for employers on the Coronavirus Job Retention Scheme makes clear that

*‘As well as employees, the grant can be claimed for any of the following groups, **if they are paid via PAYE**: office holders (including company directors), salaried members of Limited Liability Partnerships (LLPs), agency workers (including those employed by umbrella companies), and limb (b) workers.’⁹ (author’s bold)*

Thus the scheme has not been aligned with the definition of employment for labour law purposes when it comes to giving support in this new situation, but with the administrative mechanism of PAYE. That supports the case for change to a system where more people are taxed through the PAYE system (although possibly one that is altered from the current cumulative PAYE system). It will be argued here that this can be an administrative category that does not need to be aligned with employment law in any way, but is simply a tax related category (including NICs, which it is argued here should be merged into tax in any event).

The Chancellor was not making a casual remark in his speech on 26 March. He intended to lay down a marker. His words form part of the published transcript of his speech. There are serious concerns about the cost to the exchequer of the current rules. The Government estimates the cost of reduced rates of NICs for the self-employed (relative to employees) for 2019-20 as £5.6 billion.¹⁰ The revenue cost of applying lower tax and NICs rates to closely held company owner managers has been forecast by HMRC and the Office for Budget Responsibility to rise to over £9.5 billion by 2021-22. This involves various assumptions and does not take account of some recent changes, but the figures can be seen to be large.¹¹

least, that large numbers of lower paid gig economy workers are missing out completely. Some may actually do better on the schemes than before the virus, whilst others may do well eventually, but have a longer wait for funds than employees. This highlights that people not in the employee structure are harder to assist for administrative reasons, but not that they are necessarily worse off than employees, who may be entirely dependent on their employers’ co-operation if they are to access the scheme at all.

⁹ Guidance at fn 3 above, This extended definition of employee for these purposes can now be found in the Direction para. 13.

¹⁰ HMRC, ‘Estimated cost of structural tax reliefs’, October 2019

(<https://www.gov.uk/government/statistics/minor-tax-expenditures-and-structural-reliefs>), cited in Adam and Miller fn 1 above, p 9. As they show, only a very small part of this reduction can be attributed to reduced benefits for the self-employed.

¹¹ Adam and Miller above, fn 1, at fn 22.

Nevertheless, the Chancellor may yet be thwarted in making sensible reforms due to the politics of the situation, as was the case with his predecessor, Philip Hammond MP, for example.¹² The self-employed and the owners of personal service companies are powerful groups. The latter have managed to secure a delay in changes to the operation of the IR35 rules as a result of the coronavirus.¹³ Further they have persuaded the House of Lords Finance Bill Sub-Committee¹⁴ that the Government should not merely postpone the change but instead should search for a more holistic solution. that looks also at employment law and carries forward the ideas of the Taylor Review.¹⁵ This suggests, at least, that there is a growing swell of opinion that the time has come to make real changes, difficult though it will remain to reach a consensus.

One unfortunate consensus that does seem to be emerging is that the employment status definitions in tax law and employment law should be aligned. The Taylor Review, the Government's response to that Review¹⁶ and the House of Lords Finance Bill Sub-Committee all lean in that direction and it is a theme of the complaints of contractors protesting against IR35 that they should not be taxed as though they are employees but not given the benefits of employment law protection,¹⁷

At first glance, supporting alignment seems obvious. On further investigation it is less of a good idea. This article argues that attempting one legal test for employment status for all purposes places too great a burden on that test. Different areas of law serve different objectives and this needs to be recognised.¹⁸ Any attempt to align definitions is doomed to failure and will not solve the tax problems. Tax and National Insurance problems need to be dealt with by aligning the *treatment* for these purposes of the employed and self-employed (and company directors of personal service companies) to the greatest extent possible, but not by aligning the tax test of employment status with that used for employment law purposes.

¹² T. Herbert, 'Hammond U-turn on Class 4 NICs', *Accounting Web* 15 March 2017
<https://www.accountingweb.co.uk/tax/hmrc-policy/hammond-u-turn-on-class-4-nics>

¹³ Announced by Steven Barclay, Chief Secretary to the Treasury on 17th March 2020,
<https://www.gov.uk/government/news/off-payroll-working-rules-reforms-postponed-until-2021>

¹⁴ House of Lords Economic Affairs Committee Finance Bill Sub-Committee, 'Off-payroll working: treating people fairly' HL Paper 50 27 April 2020.

¹⁵ Good Work, Taylor Review of Modern Working Practices (2017) BEIS

¹⁶ Good Work Plan (2018), BEIS

¹⁷ See, eg. evidence to House of Lords, fn 14 above

¹⁸ A point made by K K Wedderburn in *The Worker and the Law*, 2nd Ed Penguin, 1971, pp58-59; see too *Barclays Bank plc v Various Claimants*, [2020] UKSC 13..

At the moment, in theory, there is a shared case law definition of employment currently used across the board in employment law, tax and national insurance, tort law and elsewhere. There are, of course, statutory variations, most notably in this context that employment law now has the third category of limb b) workers¹⁹, which does not exist for tax law purposes.²⁰ But even where it is the case law that is being applied, in practice there may be different emphasises in different courts, given the very fact based nature of the employment status tests and the purposive approach most clearly set out in *Autoclenz Ltd v Belcher*,²¹ and also that employment status determination occurs in the context of a range of statutory provisions. The addition of the concept of the limb b) worker in employment law has only served to loosen the common thread and underline the differences based on objectives. As Lady Hale put it in *Barclays Bank plc v Various Claimants*, a case on vicarious liability,

‘Until these recent developments, it was largely assumed that a person would be an employee for all purposes - employment law, tax, social security and vicarious liability. Recent developments have broken that link.’²²

In this article the emphasis is on tax and NICs. Despite the use of shared case law, the different objectives and approaches make complete alignment unworkable and even undesirable. That being so it would be preferable for each area to consider what objectives and results are aimed for and legislate accordingly. The language used in the resulting legislation should recognise these differences. In the case of taxation and NICs it might be desirable to move away from ‘employment’ as the key word altogether and think in terms of administrative processes- for whom should tax be deducted at source and who should be responsible for making this payment? There is no good reason to tax people supplying services through different legal forms at different levels, even though calculation of the tax base may need to differ, depending on the circumstances. In particular, the tax system is far too crude to take account of different risk levels for various types of employment and self-employment. Risk has to be rewarded by the market or, if there is a need to intervene, by more targeted tax or grant mechanisms.

¹⁹ 230(3)(b) of the Employment Rights Act 1996

²⁰ Other variations are to be found in the tax and NICs legislation, some of which are discussed below..

²¹ [2011] UKSC 41, para 35.

²² [2020] UKSC 13, para 29; See also *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29.

Fundamental to a move in this direction would be alignment of rules and rates of tax so that all taxpayers paid as closely as possible the same rate of taxation on as similar a tax base as is achievable, accepting that some real differences of fact exist. To achieve this properly, it would be necessary to integrate NICs with taxation so that tax was payable by all at the same level.²³ Ideally employer's NICs would be absorbed, at least in part by imposing what used to be NICs and would now be income tax on an expanded tax base. If this could not be achieved completely, part of employer's NICs could be converted into a levy, that might depend on a number of factors and not only the number of employees, workers or contractors. This would remove tax from the employment law arena, which could only be a good thing, though this is a radical change that might need to be achieved in a series of steps.

This is not only a matter for lower paid gig workers. The heterogeneity of the non-standard worker sector – from highly paid professionals operating through a personal service company through to Uber drivers and Deliveroo cyclists,²⁴ contributes to the difficulty in finding consensus for reform. Some groups need the protection of employment law more than others. But the discovery by previously well cushioned groups that they do need the protection of the State in some circumstances may make the chasm between the well-off professional and the lower paid workers less difficult to close than it once was. This is a radical programme for reform, that was not considered feasible politically before the Coronavirus struck. It might be thought unlikely to happen now, given that it means a rise in income tax rates on the face of it, at what will be a recessionary time. But if not now, when?

Tax and National Insurance- a system in confusion

Despite the many non-standard ways of providing labour that do not fit into the standard employee/ self-employed divide, the UK tax and NICs system currently cling to the fiction that they can operate along this binary boundary. Even where there are statutory modifications, such

²³ Not a new proposal- - see A.W.Dilnot, J.A. Kay and C. N. Morris, IFS/ *The Reform of Social Security* Clarendon Press Oxford 1984 ; S Adam et al, *Tax by Design- The Mirrlees Review(2011)* OUP Oxford ; The Office of Tax Simplification, Small Business Tax Review, March 2011
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/199183/05_ots_small_business_interim_report.pdf

²⁴ D Tomlinson and A Corlett *A tough gig? -The nature of self-employment in 21st Century Britain and policy implications'* <https://www.resolutionfoundation.org/app/uploads/2017/02/Self-employment-presentation.pdf>

as the so-called IR35 legislation,²⁵ which deals with the taxation of personal service companies, the statutory modifications attempt to utilise this boundary, using the case law developed in employment law, tort and other areas to define those who should be covered and taxed under these special tax and NICs provisions.

There are significant differences between the tax and NICs payable by a self-employed taxpayer and by an employee.²⁶ The difference mainly lies in the NICs. The self-employed pay a flat rate weekly (class 2) and then class 4 NICs based on profits. For employees class 1 NICs must be paid by both the employer and the employee.

A taxpayer setting up a personal service company can save even more than a self-employed taxpayer. Typically the personal service company pays its owner/director a salary taxable through the PAYE system, but many pay themselves minimum wage, to be set against their personal allowance and obtain the necessary contributions to qualify for a state pension, while paying anything over and above this as a dividend, on which no NICs are payable. This is standard advice from accountants and it may well be that the taxpayer does not understand exactly why they are doing this, but for tax purposes salary is labour income and dividends are income from capital. Dividends paid from salary are indistinguishable in legal terms (and on tax returns) from dividends paid from the proceeds of investments- for example the sale of an asset at a profit. Other tax planning, such as income splitting with a spouse and retaining earned income and converting it into capital, taxed at lower rates, is also possible in a company with sufficient earnings to take advice and not distribute all earnings immediately.²⁷

²⁵ A popular name based on a press release introduced at the time but actually found in Income Tax (Earnings and Pensions) Act 2003, (ITEPA), Part 2, Chapter 8.

²⁶ The operation of the thresholds and the rates is complex – for full details see <https://www.gov.uk/government/publications/rates-and-allowances-national-insurance-contributions/rates-and-allowances-national-insurance-contributions>

²⁷ In 2017 the IFS calculated, based on certain assumptions, that a person generating £40,000 of income per year could receive £32,294 after tax if they were the owner-manager of a small company or £31,180 if they were self-employed; but an employee whose employer is willing to pay the equivalent £40,000 to hire them would have only £27,738 left after tax (meaning the employee faced a 31% average tax rate, compared with 22% for the self-employed person and 19% for the company owner manager) Adam, Miller and Pope 2017 fn 1 above.

Special tax provisions imposing PAYE and NICs operate for agency workers²⁸ and for those operating through so-called umbrella companies²⁹, which employ a number of contractors, or Managed Service Companies.³⁰ These forms of operation are more likely to be used by lower paid gig workers than are owner-managed personal service companies, which involve costs that might be too great for the lower paid. The main problem with these other forms is their artificiality and thus complexity for the workers involved, the costs charged by the operators and the existence of some unscrupulous operators who use these arrangements to sell tax schemes that are highly likely to prove ineffective.³¹ It is potentially costly to the individual gig worker to become involved in schemes, with penalties and collection of back payments of tax.³² However in each of these cases tax is collected via PAYE and NICs, although from the intermediary company and not the final client. Therefore for many gig workers who are not employees and may not be limb b workers under employment law, there is no longer a clear relationship between the tax treatment and employment law treatment.

The so-called IR35 legislation, which applies where an intermediary, usually a limited company, is used by a provider or personal services, has attracted much recent publicity and opposition by active lobby groups. The operation, but not the scope, of this provision has been changed for the public sector as explained below, to shift responsibility onto the client. It was due to be changed for the private sector in the same way in 2020, but this has been deferred. The IR35 legislation applies where:³³

(a) an individual ('the worker') personally performs, or is under an obligation personally to perform, services for another person ('the client'),

²⁸ Part 2, Chapter 7 Income Tax (Earnings and Pensions) Act 2003: Social Security (Categorisation of Earners) Regulations 1978.

²⁹ A company that employs many agency contractors.

³⁰ Part 2, Chapter 9 ITEPA 2003.

³¹ <https://www.gov.uk/guidance/umbrella-companies-offering-to-increase-your-take-home-pay-spotlight-45>; <https://www.contracteye.co.uk/umbrella-schemes-compliance-myths.shtml>

³² The best known example is the disguised remuneration or Loan Charge scheme, which has left many taxpayers in serious debt to HMRC and upon which there has been a recent enquiry.

<https://www.gov.uk/government/publications/disguised-remuneration-independent-loan-charge-review>

³³ Section 49 ITEPA. For further analysis see G. Loutzenhiser, *Tiley's Revenue Law*, 9th ed. 2019, Hart para 13.2.3.2 et seq.

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ('the intermediary') and the intermediary receives the payment, and

(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client (under the usual case law tests for the existence of a contract of service). . The worker must have a material interest in the intermediary.

If these conditions are satisfied then, in the private sector, the worker is deemed by the legislation to receive a payment from the intermediary of an amount determined by reference to the payments received by the intermediary. This deemed payment to the worker is treated as his or her employment income and is subject to PAYE and NICs; it is also deductible in computing the profits of the PSC for corporation tax purposes.³⁴ This is not exactly the same as looking through the personal service company. While this might have been a simpler way to achieve the desired result, courts are very reluctant to look through the corporate veil.³⁵ Instead the fiction is maintained that the company is the client and the worker is an employee of that intermediary company. The tax treatment does not create an employment vis a vis the client for any purpose and so employment rights do not arise other than in relation to the intermediary company.

Note that worker here is not a 'limb b) worker' as defined in section 230(3)(b) of the Employment Rights Act 1996 and elsewhere in employment legislation. Despite some similarities in the wording with the ITEPA legislation, this limb b) definition of worker is unknown in taxation and National Insurance legislation. As explained above, there is no third category of this type for taxation or NICs.

The IR35 rules have been much ignored and HMRC has had mixed success in enforcing them, losing some high profile cases in the courts, such as that involving Lorraine Kelly, the television

³⁴ Loutzenhiser, above, para 13.2.3.2.

³⁵ M. Ford, 'The Fissured Worker: Personal Service Companies and Employment Rights', 49 *Industrial Law Journal* 2020 35.

presenter.³⁶ An industry has grown up, using the employment status case law from other areas in a tax context. A number of first tier tax tribunal cases , which are not binding, have assumed greater importance than first tier tribunal cases normally would do. The uncertainty over employment status has led to HMRC creating a tool, known as Check Employment Status for Tax (CEST), to assist taxpayers through the application of the case law.³⁷ Inevitably this has been contentious, especially since the courts have always refused to assign relative weights to the factors relevant to whether a contract for service or a contract for services exists.³⁸ Designing a computer assisted classification method in these circumstances is clearly not easy. We shall return to the CEST later in this article.

Due to the enforcement difficulties , a new approach has been tried with public sector authorities since 2017 (the off-payroll rules).³⁹ Where the off -payroll rules apply (using IR35 legislation tests, and thus the case law on employment status) there is a deemed direct payment of employment income to the worker- in other words the intermediary company is ignored and the client (known as the fee-payer) must deduct tax and NICs (including employer's NICs) at source and pay direct to HMRC under the PAYE system. The only differences between this deemed direct payment and ordinary employment income are that the fee-payer must deduct VAT (if any) plus the direct costs of materials that have, or will be, used in providing the services and the expenses met by the intermediary that would have been deductible from taxable earnings if the worker was employed.⁴⁰ In view of the narrow and sometimes arcane tax rules on employee expenses,⁴¹ one can predict disputes around this, with fee-payers being more cautious than workers would like them to be. The potential complexity makes it understandable that many businesses will want nothing to do with this scheme.

Importantly it is for the public sector client now to decide whether the IR35 rules apply or not. This is expected to achieve far higher compliance rates than leaving responsibility with workers,

³⁶ *Albatel Ltd v HMRC* [2019] UKFTT 195 (regarding the presenter Lorraine Kelly) . However another case about a presenter was decided in favour of HMRC, showing the levels of uncertainty existing in this area- *Christa Ackroyd Media Ltd v HMRC* [2019] UKUT 0326(TCC) .

³⁷ <https://www.gov.uk/guidance/check-employment-status-for-tax>

³⁸ Eg *Market Investigations v Minister of Social Security* [1969] 2 QB 173 at 184-5.

³⁹ Introduced in section 6 and Schedule 1 , Finance Act 2017 .

⁴⁰ <https://www.gov.uk/guidance/fee-payer-responsibilities-under-the-off-payroll-working-rules>

⁴¹ Loutzenhiser above, para 13.1.12 et seq.

since the client is not going to be prepared to take on the risk of non-compliance that an individual contractor might be willing to take on.⁴² It is also easier for HMRC to enforce against one large engager rather than many small personal service companies. This approach is close to the original design of IR35, which was only changed as a result of lobbying by business.⁴³

It was planned to extend this public sector off-payroll treatment to clients in the private sector classified as large and medium sized businesses in April 2020, but the clamour against this has been considerable and a review was announced.⁴⁴ Evidence to a House of Lords Committee⁴⁵ suggested that there was a real danger that there would be blanket reclassification of contractors by clients wishing to avoid compliance costs, as seems to have occurred in the public sector, and this could risk being over-inclusive and causing financial difficulties for some contractors actually running a business on their own account.⁴⁶

Initially the Government was adamant that it would not postpone the change but the coronavirus became a good reason to defer the introduction of this shift of the burden in the private sector until 2021. However the Government is adamant that this is a deferral and not a cancellation.⁴⁷ There have been press reports of clients insisting that contractors come fully onto the payroll as employees as the result of this proposed change (possibly one of the intended outcomes)⁴⁸ as well as threats by contractors to leave the UK.⁴⁹ Others may move to working through umbrella

⁴² IFF Research, *Off-Payroll Reform in the Public Sector* HMRC Research Report 487 May 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704931/Off-Payroll_Reform_in_the_Public_Sector.pdf. Prior to the reform of the off-payroll working rules, HMRC estimated that fewer than 10 per cent of those who should have operated the rules were actually doing so, resulting in significant noncompliance.

⁴³ J. Freedman *Personal Service Companies – “the wrong kind of enterprise”* [2001] BTR 1.

⁴⁴ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/867519/20-02-19 - FINAL Off-payroll Review Document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/867519/20-02-19_-_FINAL_Off-payroll_Review_Document.pdf)

⁴⁵ House of Lords Economic Affairs Finance Bill Sub-Committee <https://www.parliament.uk/business/committees/committees-a-z/lords-select/economic-affairs-finance-bill-sub-committee/news-parliament-2019/1st-evidence-session-10022020/>

⁴⁶ <https://www.ftadviser.com/your-industry/2020/03/17/lords-call-to-postpone-ir35-reform-amid-covid-19-fallout/>

⁴⁷ <https://www.gov.uk/government/news/off-payroll-working-rules-reforms-postponed-until-2021>

⁴⁸ For example Barclays are reported as moving away from using contractors operating through any intermediary. <https://www.eastmidlandsbusinesslink.co.uk/mag/advice/barclays-move-to-end-off-payroll-contracting-sounds-warning-for-ir35-employment/>

⁴⁹ The Association of Independent Professionals and the Self-Employed (IPSE) reported in February 2020 that 'One in seven freelancers (13%) plan to find contracts abroad, one in ten (11%) plan to stop working or retire early and almost one in ten (8%) plan to move into employment. Half of freelancers also said they will only continue

companies. For now the furore has been eclipsed by the current situation and the deferral but the issue has been picked up by the House of Lords Finance Bill Sub-Committee⁵⁰ and lobbying against the application of the legislation to the private sector continues.

It is important to note that off-payroll rules do not operate in any area other than taxation and NICs. There is no contract of service with the client, only a deemed employment for tax purposes.⁵¹ Therefore workers under this legislation do not automatically become employees or limb b) workers of the client in relation to statutory rights. For these purposes they remain employees of their own personal services companies and their own intermediary company is responsible for holiday pay, pension and statutory sick pay (SSP).

This can appear unfair to those caught by the rules, because they associate the payment of NICs with employment rights. This is in part a misunderstanding, certainly when it comes to such matters as private pension contributions and holiday pay, which come from the employer not the State. The confusion is compounded, however, because other rights available only to those who have paid employee NICs, notably maternity/paternity/adoption and shared parental pay, are funded by the State. Statutory Sick Pay, is a very confusing element in this discussion since it was once funded by the State, then became payable entirely by the employer⁵² and is now once again partly funded by the State in some cases under the Coronavirus package.⁵³ What is clear is that the value of the State benefits not available as a result of not being treated as an employee is relatively small in the full scale of things.⁵⁴

However a blanket decision by a client to classify all contractors as being caught by IR35, even those who feel they could show they are operating a business on their own account, could be seen as resulting in hardship for them, for example because of overheads that cannot be deducted before tax is withheld under the PAYE system. For gig workers operating through a company, if their 'client' classifies them as off payroll workers for the purpose of the IR35 legislation, they might be able to go onto the payroll properly, if that is offered, or work directly

freelancing if they can find contracts to which the new off-payroll working rules do not apply.' <https://www.ipse.co.uk/resource/ir35-in-the-private-sector-results.html>

⁵⁰ See fn 14 above.

⁵¹ Sections 151 and 163 Social Security Contributions and Benefits Act 1992.

⁵² <https://www.gov.uk/statutory-sick-pay/what-youll-get>

⁵³ <https://www.gov.uk/guidance/claim-back-statutory-sick-pay-paid-to-employees-due-to-coronavirus-covid-19>

⁵⁴ Adam and Miller 2019

and not via a company. If this increases direct employment this may be a good development, and it may do so if the main reason for not taking on the staff directly has been to save tax and NICs, since this will no longer be effective. If full employment is not available, and it may well not be if the engager still wants to escape employment law provisions, then lower paid gig workers will not be worse off than previously, since they will mostly not have non-deductible expenses,⁵⁵ so having their tax deducted at source might be helpful to them administratively. They are probably not engaging in sophisticated tax planning in any event. It is the higher paid who are hit more by this, since the NICs payable on their salaries will rise substantially.

Ironically, however, it is these higher paid company directors who are currently complaining that they can only get CVJRS payments based on the salaries they have paid themselves under PAYE from their intermediary companies and not on the dividend payments they have received from those companies. Had the changes to bring the operation of IR35 in the private sector into line with those in the public sector, now delayed, been introduced a year ago, there would have been fewer directors falling through this gap.⁵⁶ As it is, they have saved themselves NICs in the past by paying themselves dividends, and while there may be some sympathy due to those who did this without understanding why, it is perfectly logical that they should not receive a CJRS payment based on dividends as opposed to salary. As mentioned above, there is pressure for the Government to shift on this but, at the time of writing, no sign that it plans to do so.⁵⁷

Dispelling the National Insurance myth

There is one point that should be dealt with before proceeding further. This is that NICs are a tax, despite the attraction to governments of calling them insurance payments. They are payments which bear little relation to the benefits received and they are progressive in nature. There is a National Insurance Fund, but it is not completely separated from general government revenues

⁵⁵ Eg for an Uber driver, were he to be operating through a company and caught by these rules, expenses related to purchase of a car ought to be deductible before the tax is deducted as an employed taxi driver would not be taxed on his car as a benefit were it provided for him.

⁵⁶ Those working for public sector firms and treated as covered by IR35 are paid via PAYE and therefore their full salaries are more fully covered by the CVJRS – see Guidance and Direction at fn 3 above.

⁵⁷ See references in fn 6 above and A. Goodall, U.K. Government Urged to Expand Income Support Schemes Tax Notes, April 13 2020 <https://www.taxnotes.com/featured-news/uk-government-urged-expand-income-support-schemes/2020/04/13/2cdsr#.XpStIKJnIT0.twitter>

as a true insurance fund would be. Sometimes it has been in deficit but over the past years it has been in surplus and has been used in part to pay off the national debt.⁵⁸ Governments have been happy to retain the notion that NICs are insurance payments since this makes people more willing to pay National Insurance than to pay tax, especially as they often believe that it is used to fund the NHS.⁵⁹ While a small amount of NHS funding has come from NICs since 2003,⁶⁰ most of the NIF is spent on pension payments.⁶¹ The New State Pension since 2016 is now the same for employed and self-employed and is not earnings related, although it is based on the number of years over which NICs of some kind have been paid. Thus the contributory principle is apparently retained, but the contributions and payments out are in no way commensurate. 2016 would have been a good time to align National Insurance payments for the employed and self-employed, as pensions were reformed, but the opportunity was lost.

Successive Governments have eroded the contributory principle that was initially behind the National Insurance system, albeit for different reasons. As John Hills has shown, governments of the Left did this due to a belief in greater inclusion, therefore expanding non-contributory benefits and contribution conditions. Governments of the Right often focussed on means testing.⁶² The combination has resulted in a system that clings to the contributory concept, thus creating complexity and the need for a great deal of record keeping, while at the same time bearing very little relation to a real insurance scheme.

Accentuating the flaws- developments in tax and National Insurance and the growth of the gig economy.

The problem of tax driven choice of legal form pre-dates the recent growth of the ‘gig economy’. However there has been a marked growth in both self-employment and incorporation

⁵⁸HMT Response to Freedom of Information query Jan 2019 ‘The latest NIF Accounts show that the balance of the NIF increased by £2,286,469,000 in 2017-18. In addition to the previous balance, this resulted in a closing balance of £24,221,220,000, which was paid into the NIF Investment Account and, in practice, used to reduce the national debt.’

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777605/FOI2018-22809 - pdf for disclosure log.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777605/FOI2018-22809_-_pdf_for_disclosure_log.pdf)

⁵⁹ <https://yougov.co.uk/topics/politics/articles-reports/2017/01/12/majority-people-would-support-raising-national-ins>

⁶⁰ <https://www.kingsfund.org.uk/projects/nhs-in-a-nutshell/how-nhs-funded>

⁶¹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839411/Great Britain National Insurance Fund Account - 2018 to 2019.pdf

⁶² John Hills, CASE paper 68 May 2003 ‘Inclusion or Insurance? National insurance and the future of the contributory principle’

of one or two shareholder companies over the past twenty years . This has been driven in part by economic, technological and other business organisation factors, as well as a wish of engagers to escape employment law liabilities, but there has also been a major tax element, given the tax advantages of structuring a relationship to escape classification as an employment contract. . Sometimes the taxpayer wishes to save tax but often , and especially for the lower paid, the driver is that engagers want to protect themselves from tax and NICs liability. Describing those supplying labour as free-lance, contractors or self –employed risks challenge by HMRC on the grounds that there is actually an employment relationship, so a higher level of protection for the engager has, up until now, been obtained by clients insisting on engaging only those working for limited liability personal service companies.⁶³ Self-employment in 2017 was at its highest level in the past 40 years and fourteen per cent of what labour economists have called ‘employment’ growth since 2008 has actually come through increases in company owner-managers, which corresponds to a doubling of the company owner-manager population since 2008.⁶⁴

The tax environment for these changes included a reduction in corporation tax, with at one point a nil rate for companies with small profits, although this was soon reversed.⁶⁵ In addition, successive governments have found it convenient to raise NICs, because they are less unpopular than income tax for the reasons discussed above, and because sometimes they have promised in manifestos not to raise the basic rate of income tax . John Kay has pointed out that the increase in social security taxes as percentage of tax revenues was considerable - 18.2% in 1965 to 26.2% in 2016. ⁶⁶ This makes incorporation more attractive, given that no NICs are payable by the client and the intermediary company can pay the owner largely by way of dividend , thus cutting the liability to employer’s and employee’s NICs. This was in part counteracted by an increased dividend tax in 2016, but this does not make up the difference completely, so there is still a tax benefit to incorporation and payment via dividends. Dividends can also be paid to other shareholders, notably spouses, in order to share income with those on lower rate tax bands.

⁶³ This will change if the off-payroll rules now applicable in the public sector are applied to the private sector- see text to fn 39 et seq above.

⁶⁴ Adam, Miller and Pope 2017 fn 1. above; Adams, Freedman and Prassl fn 1 above.

⁶⁵ Crawford and Freedman fn 1 above describe this change in more detail

⁶⁶ John Kay, IFS 50th Anniversary: The Future of Tax. <https://www.johnkay.com/2019/04/08/ifs-at-50-the-future-of-tax/>

A further tax advantage of incorporation is that any payment not distributed can be held as capital and is subject only to corporation tax, which is considerably lower than income tax plus NICs. It can then be rolled up and taxed as capital on the disposal of the company. In view of the very generous entrepreneurs' relief⁶⁷ and other business reliefs available at that point, retained capital may be taxed at a very low rate.

For many gig workers and other forms of contractor, there has for many years been no practical choice but to work for clients who insist that these service suppliers are neither limb b) workers or self-employed. These clients often insist that the contractor supplies his or her services through an agency, an umbrella company or a personal services company. It is not always clear that any of the resulting savings are being passed on to the provider of the services. This will obviously depend on the levels of bargaining power in the market concerned.

It is sometimes argued against alignment of the treatment of the employed and the self-employed for tax purposes that the differential payment of NICs as between the employed and the self-employed or incorporated service provider is compensation for risks taken by non-employees. The heterogeneity of both the employed and self-employed group makes it immediately apparent that no differences in tax payable could be calibrated to reflect that risk appropriately, even if it were desirable to do so through the tax system. Risk needs to be taken into account in contract price and through regulation for those without the market power to bargain.

The tax and NICs position has reinforced decisions not to take on the costs of having employees or workers for employment law purposes. The coupling of employment status tests in both tax and employment law has compounded the incentive for clients to use casual and gig labour with a resulting loss of revenue to the State and of employment protection for the individuals concerned.⁶⁸

As shown above, tax legislation has decreased the opportunities to reduce tax and NICs in this way but at the cost of complexity, cost, confusion and facilitation of promoter offerings of schemes, sometimes ineffective ones, that can catch vulnerable people in their net. In each case the ultimate aim of the special tax legislation is for the gig worker or contractor to be taxed and

⁶⁷Schedule 2 of the Finance Bill 2020 will, if enacted reduce the scope of and rename entrepreneur's relief as 'business assets relief' or BAD, but these changes will not affect the population being discussed here-

⁶⁸ Adams, Freedman and Prassl fn 1 at 492.

subjected to National Insurance in the same way as an employee. Thus the link between the legal form of the engagement and employment law and tax is broken, with the service provider taxed as an employee but without the employment law protection vis a vis the client.

The profusion of legislative schemes set up to achieve this seems unnecessary and undesirable and the fact that there is no employment law protection *prima facie* seems unfair, given the insistence that the rationale for the tax legislation is that the employment status tests apply, in substance.

At the same time, the development of protection in employment law of the limb b) worker, has created further confusion, with those being covered by limb b) nevertheless being legally classified as self-employed for tax purposes.⁶⁹ While this is analytically logical to lawyers it confuses users and does not seem to sit well with the notion that the tests for employment status are supposed to be the same for tax and National Insurance on the one hand and employment on the other. This intermediate status of a limb b) worker appears at first analysis to need a counterpart in tax law, or simply to fall within the employee category.

Because the employment status tests are purportedly the same for tax and for employment law, it appears unfair when they diverge. Benefits provided by the State become confused in this analysis with those provided by the employer, such as holiday pay, pension payments and even free coffee and gym membership. There is no reason why the tax and NICs paid should affect these benefits of a job and in any event, some employees get them and some do not. . People in each category end up feeling the system is unfair- employees because they often pay more tax and NICs and possibly have little or no more security in reality, and the self-employed because of complexity, and because the special legislative rules may mean they end up paying the same tax and NICs as employees without what they perceive to be the related benefits. Thus we have a highly unsatisfactory and administratively complex situation which reduces revenue to the State.

⁶⁹ *Clyde & Co LLP and another (Respondents) v Bates van Winkelhof (Appellant)* [2014] UKSC 32 at para , 25 ; *Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent)* [2018] UKSC 29.

Aligning definitions and improving tools.

In 2018, the Government concluded,⁷⁰ following consultation around its response to the Taylor Review,⁷¹ that it wished to follow Taylor's recommendation to align the employment status frameworks for the purposes of employment rights and tax. This has been taken as meaning that the employment status test should be the same in each case, although what both Taylor and the Government actually say is that the differences between the two systems should be reduced to an absolute minimum, suggesting some recognition that differences would need to remain. Taylor also pointed out that the different treatment of the employed and self-employed, notably the NICs differences, were not justified. Taylor proposed that aligning of the rules on employment status should be backed up by creating clearer boundaries. He, and the Government in their response, considered this could be done by making the employment status tests

'reflect the reality of modern working relationships. We will also improve the guidance and online tools available to help people understand their status.'⁷²

In practice, the case law test has been reactive to modern working relationships.⁷³ An attempt at a simpler, single, one-size fits-all, statutory test is likely to give rise to even more problems than the flexible multi-factorial test that we have in the case law now. It is hard to see how a new test can increase certainty without creating a rigid divide that would also inevitably lead to more gaming and manipulation of the definition rather than less. In the tax sphere, only aligning tax and NICs treatment on either side of the line will reduce attempts to fall on one side rather than the other.

The CEST, the HMRC computer based test mentioned above, supposedly assists with certainty but is of course entirely dependent on the factors fed into it, the order in which they are applied and the weights given to each factor. Since the weight of factors in the case law varies

⁷⁰ Good Work Plan (2018), BEIS.

⁷¹ Good Work, Taylor Review of Modern Working Practices (2017) BEIS at p38

⁷² Good Work Plan (2018), BEIS.

⁷³ See the emphasis on being realistic and world wise in *Autoclenz*, fn 21 above, [33] to [35]

depending on the facts of the case,⁷⁴ this over-simplistic computer test cannot and does not reflect the judicial process adequately.⁷⁵

Perhaps this suggests that this case law is inapposite as a basis for tax liability. However, if we are to apply it, making it look simpler online cannot make it simple in fact. The HMRC guidance states that ‘HMRC will stand by the result produced by the [CEST] service provided the information is accurate and it is used in accordance with our guidance.’⁷⁶ The guidance is extensive and the questions asked do not always have a very straightforward answer so this is a very large caveat.

Take, for example, the current debate over whether Mutuality of Obligation (MOO) should be included as a factor in the CEST. This is a contentious concept in both tax and employment law. Some employment lawyers consider that this is not a test of employment status but only of whether there is a contract of some kind between the parties,⁷⁷ and HMRC likewise take the view that MOO is satisfied simply by virtue of the fact that there is a contract to be tested.⁷⁸ Initially the concept of mutuality was explored in employment law cases where a claimant working on discrete separate engagements needed to establish a particular period of continuous employment.⁷⁹ The absence of an overarching or umbrella contract does not in itself prevent sufficient mutuality for an employment contract from existing in relation to each separate contract, and this is what HMRC has been relying upon, but some employment law cases have held that the absence of mutuality of obligation outside the period of the separate contract may shed light on the relationship during that period by indicating a degree of independence in the relationship that is incompatible with employment.⁸⁰ Whether this actually makes MOO a test

⁷⁴ *Market Investigations*, fn 38 above.

⁷⁵ On the need for multivariate analysis for the classification process see H. Collins, ‘Dependent Contractors in Tax and Employment Law’ in G Loutzenhiser and R de la Feria, *The Dynamics of Taxation*, forthcoming, 2020, Hart,

⁷⁶ HMRC Employment Status Manual <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm11010>

⁷⁷ Eg H. Collins ‘A Missed Opportunity of a Unified Test for Employment Status’ UK Labour Law Blog, 31 July 2018; Adams, Freedman and Prassl fn 1 p489.

⁷⁸ IR35 Forum HMRC paper on MOO https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722316/HMRC_paper_on_Mutuality_of_Obligation.pdf

⁷⁹ Eg *Carmichael v National Power Plc* [1999] WLR 2042 (HL). This may be less significant now due to statutory continuity provisions such as ss 210-212 Employment Rights Act 1996.

⁸⁰ Eg *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459, 23.

of employment status in itself or simply a component that bolsters other factors within the multifactorial test is a debatable question. The view that MOO is more significant than HMRC believes it to be has been utilized by taxpayers in IR35 cases with some recent success, most recently in *HMRC v Professional Game Match Officials Limited*, where the Upper Tier Tax Tribunal, incorrectly in the view of this author, rejected the submission that the cases on mutuality relied upon by the taxpayer in that case were inapplicable to individual contracts since the cases themselves had involved overarching contracts.⁸¹ If these taxpayer successes are upheld, HMRC's IR35 strategy will be under significant threat and clarification is needed if we are to carry on using these tests for tax purposes.⁸²

A more fundamental point is that this test, developed in employment law in relation to protections based on length of service, really has no place in a tax test which is concerned with how best to manage and account for tax in a particular contract, by, for example, deducting tax at source. Yet if the case law is said to be the same for all purposes, which can blame the tax professionals for arguing that MOO should be significant in tax cases also? Whether MOO is relevant for different employment rights is a matter of policy around those particular rights, though it seems deeply problematic in this context also, since it deprives the casual worker who most needs protection of the necessary status.⁸³ The various employment law and tax questions need to be dealt with separately, in their own contexts.

Another proposal by Taylor was the introduction of a third category, the dependent contractor, for tax purposes. This would create another boundary line to be policed, more tests and more confusion. We should be moving to simplify the number of categories and treat people more similarly rather than creating new groups.

The Way Forward

Although the desirability of alignment of the employment status tests for tax and employment law purposes, especially around non-standard workers in the gig economy who suffer from so

⁸¹ *HMRC v Professional Game Match Officials Limited* [2020] UKUT 0147 especially at [101]; see also *RALC Consulting Ltd v HMRC* [2019] TC 07474; *Canal Street Productions Ltd v HMRC* [2019] UKFTT 647

⁸² Eg *RALC Consulting v HMRC* (2019) TC7474) was firmly decided in favour of the taxpayer on the basis of lack of mutuality.

⁸³ Adams, Freedman and Prassl fn 1 above, 490.

much uncertainty, appears obvious on initial consideration, it is far from being so. Attempting a definition that works for all purposes is likely to lead to one that works well for no purpose.

Tax law needs to aim for horizontal equity between different groups and not to distort decision making. Tax administration needs to be efficient and to encourage compliance. Both these objectives support similar treatment of all groups and deduction of tax at source where possible. Employment law currently has a tripartite definition to deal with different relationships. Tax has a binary rule with many modifications. NICs usually follow tax but with some statutory variations. In each case there are policy reasons for the differences, some good and others less so, but in each case this is best discussed in the context of the aims around that particular area.

If alignment of the rules on employment status is not an answer, what should be done?

1. *Merge Tax and NICs.* For tax and NICs purposes, the priority is to bring the rates charged as close together as possible between different groups, no matter what legal form they are using. This would instantly reduce the importance of any boundary between the employed, the self-employed and the incorporated personal service giver. The ideal would be to merge National Insurance into income tax completely, possibly converting the employer's National Insurance payments or part of them into some kind of business levy, not based purely on employee numbers. This would not only deal with the employer NICs problem in relation to employment status, but also the problem of the diminishing tax base as a result of increasing use of AI and robots rather than people, for example.

Some relatively minor adjustments would be required to benefits entitlement to remove the small surviving contributory element, or these benefits could be based on tax records if a contributory element was required, which might be politically necessary. But the previous major difference between the rights of employed and self-employed, the State Pension entitlement, has now been removed. It is acknowledged that there are objections to merger,⁸⁴ not least that NICs would then be payable on pensions and investment

⁸⁴ S.Adams and G. Loutzenhiser, *Integrating Income Tax and National Insurance: an interim report* IFS Working Paper W07/21 <https://www.ifs.org.uk/publications/4101>

income, although this might be seen as a positive, especially given the need to increase taxation and to spread that load more evenly following the pandemic.

Employment status would remain an issue for some tax purposes, and this might be combined with some of the other ideas below, but the practical consequences and distortions would be significantly reduced by such a merger. Without it any proposed solution will be sub-optimal. We may hope for a climate conducive to such a change over the next few years but being realistic it is also necessary to consider other options.

2. *Alignment of tax and NICs treatment short of merger.* If we cannot completely merge tax and National Insurance then we need to align employer/employee NICs and self-employed NICs to the greatest extent possible as Philip Hammond began to try to do, and also equalizing with employer's NICs. This would almost certainly need to be done gradually and rate rises could be reduced by using some of the savings from taxing the self-employed more highly to reduce the employer's NICs. The remaining few benefits not available to the self-employed should be made so in order to remove rational objections to this. The objection that National Insurance needs to be lower for the self-employed to reflect risks taken needs to be firmly rejected. There is no relationship between the levels of risk taken and the current variations- this is much too crude a tool.
3. *Deduction of tax at source for a large group, wider than employees and workers.* At the same time as reducing the NICs gaps we should group all contractors, regardless of their employment law status, in one tax category and apply deduction at source to them for services provided to business clients. This would replace the current tangled web of rules covering liability based on self-employed status, agencies, intermediaries and management companies. It could be extended to include those engaged through other platforms.⁸⁵ The purpose would be efficiency and to promote compliance. The rules would be an administrative tool rather than one which made large difference to total tax payable at the year end and, hopefully, this would help to reduce resistance to it. This would require a definition in tax legislation, and the difficulties around this should not be

⁸⁵ See Forum on Tax Administration, *The Sharing and Gig Economy: Effective Taxation of Platform Sellers*.(2019) OECD ;D Ogembo and V. Lehdonvirta, Taxing Earnings from the Platform Economy: An EU Digital Single Window for Income Data? , [2020] BTR 82.

underestimated, but it should not be one that is dependent on employment law. Inclusion in this category and this deduction at source could be based on factors other than mutuality, control or substitution clauses, all of which concepts have turned out to be relatively easy for lawyers to utilize in contracts to deny employment status, notwithstanding the ‘realistic’ approach in Autoclenz.⁸⁶

Payments to all such contractors should attract a payment similar to employer NICs if that remains, plus employee NICs, which would hopefully by this time be the same as self-employed NICs. Recognizing that contractors incur expenses, the deduction rate could be a flat rate slightly lower than basic rate income tax. This would save the engager the need to collect details of actual expenses as will be required under the off-payroll rules.. The rate deducted would need to be sufficiently high to achieve compliance by contractors being motivated to settle their affairs at the end of the tax year and usually obtain a tax refund as in many other jurisdictions due to their expenses. The introduction of digitalized personal tax accounts could facilitate this.⁸⁷ If this move had no implications for employment law purposes it would be less likely to be resisted by engagers and platforms. Worker protection issues could then be dealt with separately and in accordance with the appropriate objectives.

4. *Tax dividends paid in the same way as income from labour unless they are shown to be returns to capital.* In the case of personal service companies ideally the definition in 3 above should be adapted to cover the majority of them so that, essentially, they are transparent (and ignored) for tax purposes. But given that there are likely to be definitional problems around what amounts to a personal services company, in order to avoid another cliff edge treatment, ideally all dividends should be taxed in the same way as labour income. There are some arguments for taxing dividends resulting from genuine investments in companies at a lower rate.⁸⁸ If it is desired to do the assets of the

⁸⁶ Fn.21 above.

⁸⁷ Office of Tax Simplification, Tax Reporting and Payment: Simplifying tax for self-employed people and landlords, October 2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843531/OTS_Tax_reporting_and_payment_review.pdf.

⁸⁸ The arguments can be found in R. Griffith, J. Hines and P Birch Sorensen, ‘International Capital Taxation’ in *Dimensions of Tax Design*, fn 1 above.

company could be valued and genuine returns on those assets could be taxed differently, leaving all labour income to be taxed in the same way .⁸⁹

These proposals are a long way from aligning the definitions of employment status for tax and employment law purposes and they may appear more difficult and complex . However, trying to amend employment status definitions by statute in a way that covered both tax and employment law would tie the two together, so perpetuating tax distortions in decision making by engagers. The more radical changes proposed here could simplify the system and remove tax distortions, leaving employment law to develop unhindered by tax considerations.

⁸⁹ This approach, known as a Rate of Return Allowance, is described in more detail in Crawford and Freedman fn 1 above.