

Check Employment Status For Tax (CEST)

Exploring the reliability and accuracy of
HMRC's status assessment tool

Our five key findings; summarised

- **Accuracy unproven:** The accuracy of CEST (Check Employment Status for Tax) has not been conclusively proven.
- **No legal alignment:** Some experts argue that CEST is no longer up-to-date and may not align with current laws and regulations.
- **No reasonable care:** There are concerns that relying solely on CEST assessments could potentially result in a breach of reasonable care.
- **Not legally binding:** While CEST is a useful tool, it does not have legal authority and should not be considered the final word on a worker's employment status.
- **Not mandatory:** Employers are not legally required to use CEST, but it can be a helpful resource for making informed decisions about worker classification.

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“It is not compulsory to use CEST to reach a status determination... Clients can use other tools or other forms of tax advice...”

“Regardless of whether a client has used CEST or not, HMRC’s compliance checks will always examine the actual working arrangements and contractual frameworks in place for the engagement in question to reach a view on whether status has been correctly determined in line with the relevant case law.”

Financial Secretary to the Treasury, by letter 09 March 2022

Executive Summary

Check Employment Status for Tax (CEST) is a free online service released by HMRC in February 2017, designed to help firms make status determinations in relation to the off-payroll working legislation (Chapter 10 of ITEPA 2003). The legislation, commonly referred to as the “IR35 reforms”, was implemented in the public sector in 2017 and subsequently extended to the private sector in April 2021.

The rules mean that if a worker is assessed as a “deemed employee” (or “Inside IR35”), then payments made to their limited company must be treated as employment income, just like a salary. Hirers are legally responsible for assessing their contractors’ “IR35 status”, and are liable for the tax.

The purpose of this report is to explore the reported issues, investigate the decision logic of the tool, compare it to recent case law, and understand whether CEST really could be putting businesses at risk.

The intentions for CEST were that it would be

- accurate and based on the case law (Appendix G),
- deliver binding decisions for users (Appendix G),
- give firms certainty (Appendix G), and
- kept regularly updated. (Ref #3)

However, those ambitions do not appear to have materialised and concern is increasing that CEST’s rudimentary functionality is producing results which leave firms exposed. Despite eighteen IR35 tax tribunal decisions being published since CEST’s last rules update (see Appendix D), no changes have been made. CEST is now misaligned with the law, as proven by a Court of Appeal decision published on 26th April 2022 (Appendix E). CEST was not put into statute and therefore does not deliver legally binding decisions, nor offer firms certainty. CEST’s “single-factor” decision logic (Appendix C) based on triggering necessity conditions leads to carelessly produced determinations, which can breach the statutory requirement to take reasonable care.

The issues with CEST are generating widespread concern that firms have over-relied

on the tool, leaving many UK organisations and contractors worryingly exposed to large tax bills in the future. Both stakeholders and parliamentarians have questioned whether CEST is fit for purpose (Ref #5).

The key concerns about CEST

- HMRC told the Public Accounts Committee that CEST was thoroughly tested [Ref #3], but weeks later admitted in its follow-up that it had no detailed testing material nor a list of people who conducted any testing.
- Despite HMRC promising Parliament to keep CEST updated with the law (Ref #3), the CEST decision engine hasn't been updated since 24 October 2019. Since then, eighteen IR35 tax tribunal decisions have been published (see Appendix D).
- The IR35 case decision by the Court of Appeal on 26th April 2022 (Ref #6) proved that many of HMRC's longstanding case law status arguments, upon which CEST was built, were wrong. (See Appendix E).
- CEST's single-factor approach to "Outside IR35" determinations can breach the statutory need to take reasonable care. (See Appendix E).
- CEST is not in statute, and without any binding legal authority, does not provide firms with tax certainty.

“We agree with our witnesses that the support offered by HMRC in determining status—and the CEST tool in particular—falls well short of what is required.”

“We question whether the CEST tool as currently constituted is fit for purpose.”

House of Lords, Economic Affairs Committee Finance Bill Sub-Committee – 22 Apr 2020

The potential risks for firms using CEST

- CEST’s misalignment with the law means firms may be unwittingly relying on “single factor” assessments (Appendix C) which are unlikely to stand up to HMRC scrutiny.
- CEST is not legally binding and therefore does not deliver certainty. HMRC can, and do, dismiss CEST assessments when they open investigations on firms (see Ref #1 & Appendix F).
- HMRCs non-statutory promise to “stand by” the CEST results was short-lived, with public sector users hit with tax bills of £263m (Ref #7).
- Users of CEST can be accused by HMRC of not meeting the statutory requirement for taking reasonable care, further exposing firms to additional penalties on future tax bills for failing to take reasonable care (see example in ref #8).
- CEST will almost never deliver an outside IR35 determination on the rare occasions it does conduct a multi-factorial determination, which is contrary to binding law. (see Appendix C).
- The “single-factor” determinations give a misleading impression that all questions and answers have been considered when they have not. (See “How CEST Works”)
- Tax avoidance opportunists further down the supply chain can leverage the unreliability of CEST, resulting in firms unknowingly accumulating massive tax bills.

HMRC convinced Government and Parliament to implement the “IR35 reforms” (Ref #5, oral evidence, Q27) whilst promising delivery of a not-yet-built tool. (Ref #4, see Introduction)

CEST was never intended by HMRC to be mandatory or a panacea on status issues, but HMRC continue to encourage the use of the tool, potentially putting many firms in harm’s way.

How CEST works

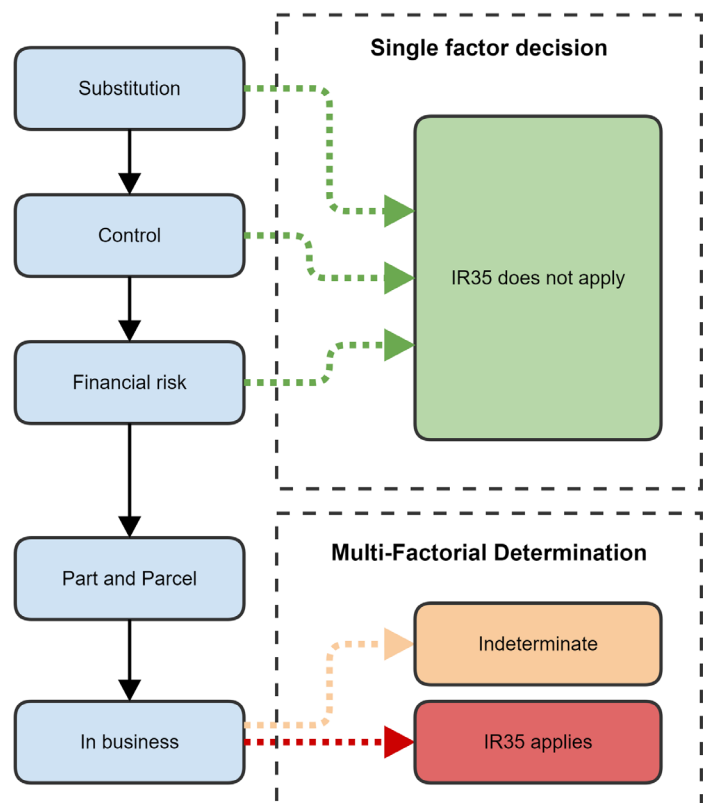
CEST asks the user multiple choice questions via a short, and simple questionnaire, guiding them sequentially through the five sections shown in the diagram, followed by a final determination. But, whilst CEST asks all the questions, its internal decision logic typically only makes “Outside IR35” determinations based on “single-factor” determinations.

When CEST comes to determine the status, it will first consider specific answers in either section on substitution, control or financial risk and, if identified, will ignore all of the other answers provided and provide an “Outside IR35” determination.

If one of these “single-factor” Outside IR35 decisions is not made, only then does CEST conduct a full multi-factorial determination. But, when it does so, in most cases it delivers a result of:

- Inside IR35; or
- Indeterminate.

The only instance where CEST will consider all factors and say Outside IR35 is if the contractor works for the client less than 50% of the time, and/or retains IP in the delivery of the services. For most contractors, running their own one-person businesses, moving from project to project, that approach is wholly unrealistic and contrary to the decisions made by the tax tribunals. See Appendix C for a full analysis).





Neutral Citation Number: [2022] EWCA Civ 501

Case No: A3/2021/0769

IN THE COURT OF APPEAL (CIVIL DIVISION)

Date: 26 April 2022

Before:

LORD JUSTICE PETER JACKSON

LORD JUSTICE ARNOLD

and

SIR DAVID RICHARDS

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS Appellants

- and -

ATHOLL HOUSE PRODUCTIONS LIMITED

Respondent

In the IR35 case of Revenue and Customs v Atholl House Productions Limited [2021] UKUT 37 (TCC), the Court of Appeal decision on 26th April 2022 clarified that an assessment should be a multi-factorial one, taking into account all other factors. However, when CEST does consider all factors, it will almost never deliver an outside IR35 determination, which is contrary to binding law. (see Appendix C).

CEST's single-factor approach leverages unrealistic necessity "pre-conditions" for employment, the high bar of which is unlikely to apply in most cases for contractors, meaning most outside-IR35 determinations from CEST will be easily challengeable, putting firms at considerable tax risk.

It would be best practise for CEST to highlight when its outside IR35 determinations have been made based on a "single-factor", so that firms can consider the risk it may pose to them.

Can CEST deliver certainty to users?

HMRC initially claimed it would stand by the results of the tool, despite having no legal authority to make this claim. However, HMRC can simply discard the results and has already been shown to do so in tax investigations in the public sector, issuing tax bills of £263m (Ref #7).

In the preliminary tax tribunal of the successfully appealed IR35 case of RALC Consulting v HMRC (Appendix F), HMRC Counsel confirmed that CEST had no legally binding authority and was not justiciable before the courts when they stated: “...the form, content and application of CEST to the Appellant’s arrangements are irrelevant to the issues to be determined by the Tribunal...”

“... the form, content and application of CEST to the Appellant’s arrangements is irrelevant to the issues to be determined by the Tribunal...”

HMRC Counsel 2019

HMRC and Treasury jointly confirmed this same stance would be taken by HMRC inspectors, in a letter to the House of Lords in March 2022 (Ref #1)) when the Financial Secretary of the Treasury wrote: “Regardless of whether a client has used CEST or not, HMRC’s compliance checks will always examine the actual working arrangements and contractual frameworks in place for the engagement in question to reach a view on whether status has been correctly determined in line with the relevant case law.”

“Regardless of whether a client has used CEST or not, HMRC’s compliance checks will always examine the actual working arrangements and contractual frameworks in place for the engagement in question to reach a view on whether status has been correctly determined in line with the relevant case law.”

HMRC / Treasury letter to House of Lords - March 2022

In other words, a determination from CEST does not count for anything and does not deliver certainty for users.

Conclusions & Recommendations

Having thoroughly examined all of the surrounding documentation and evidence, our report concludes that HMRCs CEST Tool has significant flaws that users should be aware of.

While CEST can be helpful in providing guidance for very simple cases, it is only the application of the legislation and relevant case law to the facts that will be considered by a tax tribunal.

Regardless of whether a client has used CEST or not, HMRC's compliance checks will always examine the actual working arrangements and contractual frameworks in place for the engagement in question to reach a view on whether the status has been correctly determined in line with the relevant case law.

CEST is a non-mandatory, guidance-only tool which does not provide users with legally binding certainty.

CEST was unlikely to have been intended by HMRC to be mandatory or a panacea on status issues, but HMRC's wording in compliance letters (see appendix A) and guidance could make that clearer. There is currently a danger that users may assume a level of reliability more than it realistically delivers.

HMRC are yet to publicly acknowledge CEST's shortcomings and continue to encourage the use of the tool, potentially putting many firms in harm's way.

Recommendations for hiring firms, consultancies & agencies:

Given the level of tax risk exposed by CEST's "single-factor" approach, firms should be wary of relying on "Outside IR35" CEST outcomes, and ensure that they consider all relevant factors and conduct multi-factorial determinations.

Where firms are unsure of the underlying status case law, they should take advice from specialist IR35 defence experts with HMRC enquiry and tribunal experience.

Recommendations for contractors:

Contractors who have been given “Outside IR35” determinations from hirers should be careful not to sign onerous clauses in contracts which indemnify their clients should HMRC disagree with the result.

Contractors still operating under the “small companies exemption” who conduct their own assessments and take on the tax risk, should seek a second opinion from an IR35 specialist, and use a tool which fulfils reasonable care by considering all factors.

Recommendations for businesses:

All businesses should have a Tax Investigation Service so that if HMRC does investigate, they are professionally represented (with costs covered) by specialist IR35 defence experts with HMRC enquiry and tribunal experience.

Recommendations for HMRC:

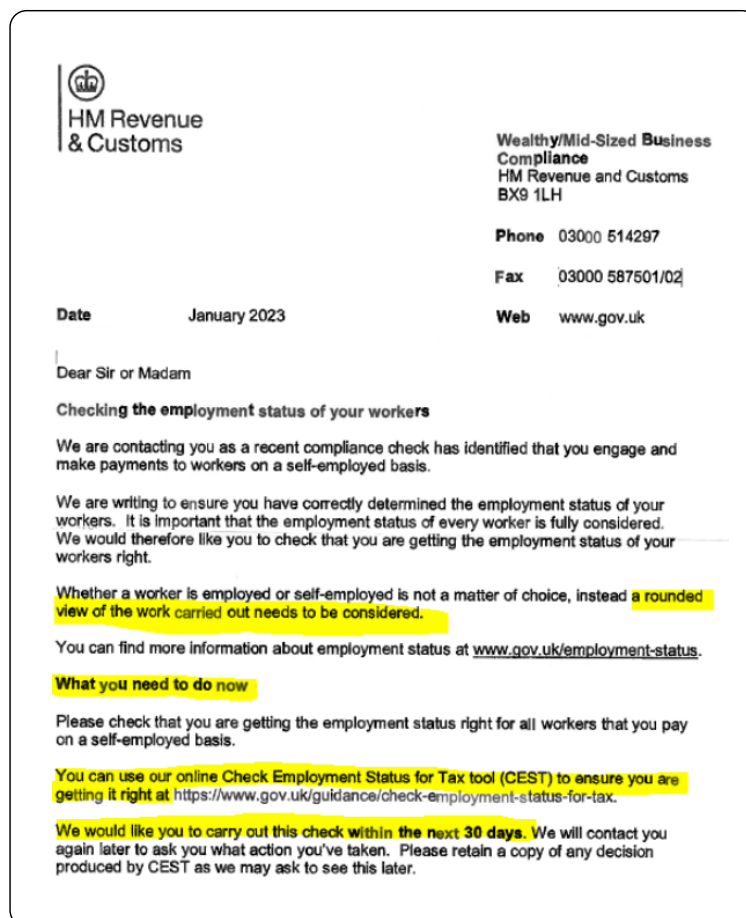
We recommend it may be prudent for the CEST disclaimer to be updated to be more transparent about the level of certainty it offers.

Appendix A: HMRC Compliance letters

The redacted letter below was sent by HMRC to a private sector firm in January 2023, giving clear instructions that recipients use CEST to conduct status assessments.

Below the subheading: ‘What you need to do now’, the letter states: “Please check that you are getting the employment status right for all workers that you pay on a self-employed basis. You can use our online Check Employment Status for Tax tool (CEST), to ensure you are getting it right. We’d like you to carry out this check within the next 30 days.”

The legal reality is that whilst firms should be conducting status classifications, there is no mandatory requirement to use CEST, and certainly no requirement to do so within 30 days.



Appendix B: HMRC CEST Testing

In a series of disclosures and publications made by HMRC, they confirmed that they held no detailed testing data for the accuracy of the CEST tool, nor did they have a list of the people who had attended any testing workshops. HMRC Standards Assurance also confirmed they have not checked the accuracy of the tool.

Feb 2018 - FOI

In a February 2018 Freedom of Information (FOI) response, HMRC confirmed that it did not hold any detailed testing evidence to support any claims of CEST's accuracy. HMRC stated:

“The CEST tool testing was done by workshop... The only documented output of the workshops is the set of rules used by the tool.”

“Our records show that HMRC has used the CEST tool to test all the cases cited in your request, but we do not have a record of how each question was answered as part of that testing, only the end determination.”

HMRC - Feb 2018 - Freedom of Information request



HM Revenue
& Customs



[Enter line of business name]

Freedom of Information Team
S1715
6TH Floor
Central Mail Unit
Newcastle Upon Tyne
NE98 1ZZ

Email foi.request@hmrc.gsi.gov.uk

Web www.gov.uk

Date: 16 February 2018
Our ref: FOI2018/00162

Dear Mr Chaplin

Freedom of Information Act 2000 (FOIA)

Thank you for your request under the FOIA, which was received on 19th January, for the following information:

"HMRC has developed Check Employment Status for Tax (CEST). HMRC has claimed that "The tool was tested, in conjunction with HMRC's lawyers, against known case law and settled cases." There will therefore be documentation (digital or otherwise) relating to the testing of the 21 known IR35 court cases, used for the testing of the tool.

For each of the following seven IR35 court cases, and only these seven cases: Usetech vs Young (Jan 2004); Future Online (Oct 2004); Netherlane Limited (Jan 2005); Island Consultants Ltd V Revenue & Customs (July 2007); MKM Computing Ltd (Jan 2008); Dragonfly Consulting Ltd (Jan 2008); Larkstar Data (Feb 2008); Please state for each of the cases:

1. The ones you have documented the CEST questions and answers for as part of your testing.
2. The ones you have NOT documented the CEST questions and answers for as part of your testing.

Only for those in [1] above please provide the documents which contain: 1. The list of questions in CEST 2. The answers given to each question, as per HMRC's interpretation of the case law for that particular case. 3. The final answer that CEST produced.

To be clear, I am not asking you to conduct a new fresh review of the cases used in the development of CEST against the cases cited in the list above, and then map each of the cases and its relevant elements against the CEST questions and the answers CEST generates. I am only asking for the data for which the above activity has already been completed"

Following a review of the paper and electronic records we hold, I have established that HMRC holds some of the information you have asked for.

The CEST tool testing was done by workshop where officials, lawyers, tax and IT professionals developed the set of rules that under-pin the tool. The workshop participants agreed the key relevant facts and points of law and then tested the rules that went into tool to ensure it gave the correct answer. The rules were then tested against live and settled cases. The only documented output of the workshops is the set of rules used by the tool, and these are already in the public domain.

Our records show that HMRC has used the CEST tool to test all the cases cited in your request, but we do not have a record of how each question was answered as part of that testing, only the end determination. The following table compiled from our records lists the cases you have asked about, the determination reached by the CEST tool, and the actual determination of each case.

Please note that CEST is designed to make general status determinations as well as determinations under the intermediaries' legislation. In the table the term "employed" is used and encompasses the intermediaries legislation applying to an engagement where relevant, and conversely "self-employed" encompasses it not applying.

Case	CEST Determination	Decision of court / tribunal
Usetech Ltd	Employed	Employed
Future Online Ltd	Employed	Employed
Netherlane Ltd	Employed	Employed
Island Consultants Ltd	Employed	Employed
MKM Computing Ltd	Employed	Employed
Dragonfly Consulting Ltd	Employed	Employed
Larkstar Data Ltd	Self-employed	Self-employed

If you are not happy with this reply you may request a review by emailing foi.review@hmrc.gsi.gov.uk. You must request a review within 2 months of the date of this letter. It would help us carry out our review if you set out the aspects of the reply that concern you and why you are dissatisfied.

If you are not content with the outcome of an internal review, you can complain to the Information Commissioner's Office (ICO). The ICO will not usually consider a case unless you have exhausted the internal review procedure provided by HMRC. You can make a complaint through the ICO's website at: www.ico.org.uk.

Yours sincerely

Freedom of Information Team

Under the Freedom of Information rules, HMRC released a list of 24 cases in April 2018 that CEST has been tested against:

<https://www.gov.uk/government/publications/cest-tool-tested-against-tax-cases/test-results-produced-after-cests-development>

Public Accounts Committee: 4th March 2019

HMRC were asked about the accuracy and testing of CEST by Conservative MP Lee Rowley, in a Public Accounts Committee hearing on March 4th 2019. HMRC again confirmed this in a follow-up document.

“We have not retained the scripts or other material from testing, including workshop attendee lists as this was not a project requirement.”



HOUSE OF COMMONS

Public Accounts Committee

Oral evidence: [HMRC: Progress Review](#), HC 1969

Monday 4 March 2019

Lee Rowley: What is your definition of “thoroughly tested”? That is a phrase you used a moment ago, in answer to one of my questions.

Testing and Development of Check Employment Status for Tax (CEST)

The CEST tool was developed using agile project management principles, which is an iterative approach. In a series of workshops, officials and external experts, including lawyers, tax and IT professionals, developed the set of rules that underpin the tool. The workshop participants agreed the key relevant facts and points of law and then tested the rules that went into the tool to ensure it gave the correct answer. The rules were then tested against live and settled cases. Stakeholders, including the BBC, were involved in testing and developing the tool in a series of workshops run by HMRC across the UK. **We have not retained the scripts or other material from testing, including workshop attendee lists as this was not a project requirement.**

HMRC Standards Assurance: 6th March 2020

In a report dated 6th March 2020, titled “Service Standard live reassessment report for the Check Employment Status Tool for Tax Service,” HMRC Standards Assurance wrote that:

“The Check Your Employment Status Tool for Tax service has been assessed against the government service standards. The service standards do not check the accuracy of the employment status outcome. The accuracy of the outcome has been checked by HMRC Policy teams.”

HMRC Standards Assurance - 6th March 2020

HMRC does not have a list of who tested the tool and discarded all of the detailed testing material, leaving no documented proof of any claims to its accuracy.

Appendix C: CEST Programming Code Analyses

The programming code for CEST is in the public domain and can be fully accessed at these two locations:

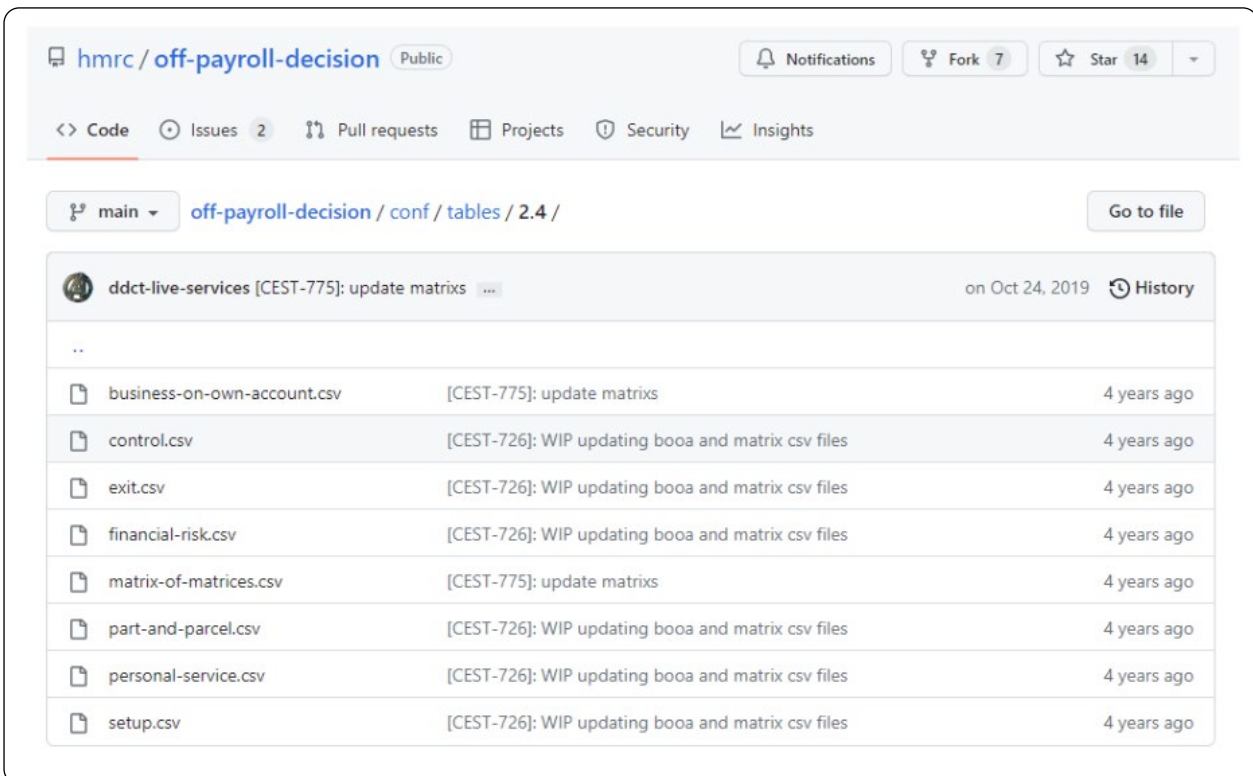
<https://github.com/hmrc/off-payroll-frontend/>

<https://github.com/hmrc/off-payroll-decision>

Decision logic tables

The decision logic for CEST sits in some decision tables, in this location:

<https://github.com/hmrc/off-payroll-decision/tree/main/conf/tables/2.4>



The screenshot shows the GitHub interface for the repository 'hmrc/off-payroll-decision'. The breadcrumb path is 'main > off-payroll-decision / conf / tables / 2.4 /'. A commit by 'ddct-live-services' is shown with the message '[CEST-775]: update matrixs' and a date of 'on Oct 24, 2019'. Below the commit, a list of files is displayed:

File Name	Commit Message	Last Updated
..		
business-on-own-account.csv	[CEST-775]: update matrixs	4 years ago
control.csv	[CEST-726]: WIP updating booa and matrix csv files	4 years ago
exit.csv	[CEST-726]: WIP updating booa and matrix csv files	4 years ago
financial-risk.csv	[CEST-726]: WIP updating booa and matrix csv files	4 years ago
matrix-of-matrices.csv	[CEST-775]: update matrixs	4 years ago
part-and-parcel.csv	[CEST-726]: WIP updating booa and matrix csv files	4 years ago
personal-service.csv	[CEST-726]: WIP updating booa and matrix csv files	4 years ago
setup.csv	[CEST-726]: WIP updating booa and matrix csv files	4 years ago

The decision tables (Version 2.4), have not been updated since 24th Oct 2019.

Decision logic code

The programming code, written in Scala, for making the decision is this file:

<https://github.com/hmrc/off-payroll-decision/blob/72a2b0f4c0d5a8b7e067325fd3c8b3e88742152b/app/uk/gov/hmrc/decisionservice/services/DecisionService.scala>

```

26 class DecisionService @Inject()(controlRuleEngine: ControlRuleEngine,
27     earlyExitRuleEngine: ExitRuleEngine,
28     financialRiskRuleEngine: FinancialRiskRuleEngine,
29     personalServiceRuleEngine: PersonalServiceRuleEngine,
30     partAndParcelRuleEngine: PartAndParcelRuleEngine,
31     resultRuleEngine: ResultRuleEngine,
32     businessOnOwnAccountRuleEngine: BusinessOnOwnAccountRuleEngine) {
33
34 def calculateResult(request: DecisionRequest)(implicit ec: ExecutionContext): Future[DecisionResponse] = {
35
36     val interview = request.interview
37     implicit val version: DecisionServiceVersion.Value = request.version
38
39     for {
40         exit <- earlyExitRuleEngine.decide(interview.exit)
41         personalService <- personalServiceRuleEngine.decide(interview.personalService)
42         control <- controlRuleEngine.decide(interview.control)
43         financialRisk <- financialRiskRuleEngine.decide(interview.financialRisk)
44         partAndParcel <- partAndParcelRuleEngine.decide(interview.partAndParcel)
45         businessOnOwnAccount <- businessOnOwnAccountRuleEngine.decide(interview.businessOnOwnAccount)
46         score = Score(Some(SetupEnum.CONTINUE), exit, personalService, control, financialRisk, partAndParcel, businessOnOwnAccount)
47         scoreWithoutBooa = Score(Some(SetupEnum.CONTINUE), exit, personalService, control, financialRisk, partAndParcel, Some(WeightedAnswerEnum.MEDIUM))
48         result <- resultRuleEngine.decide(score)
49         resultWithoutBooa <- resultRuleEngine.decide(scoreWithoutBooa)
50     } yield DecisionResponse(request.version, request.correlationID, score, result, resultWithoutBooa)
51 }
52 }

```

At line 40 the code first decides if we need to early exit (Line 40) - e.g. if the person is an Office Holder.

The enumerations (for *personalService*, *control*, *financialRisk*, etc.) used on lines 41 to 45 contain the sets of values from the rules spreadsheets, for the specific combination of answers given by the user. Those values are one of (High, Medium, Low, or Outside IR35).

In line 46, a *Score* object is created which contains all the values from each question section.

Then, in line 48, the *decide* method is called on the *resultRuleEngine* object, passing to it the *score*.

The *decide* method is in ResultRuleEngine class:

<https://github.com/hmrc/off-payroll-decision/blob/72a2b0f4c0d5a8b7e067325fd3c8b3e88742152b/app/uk/gov/hmrc/decisionservice/ruleEngines/ResultRuleEngine.scala>

```

26 class ResultRuleEngine @Inject()() extends RuleEngine {
27
28   def decide(score: Score)(implicit version: DecisionServiceVersion.Value): Future[ResultEnum.Value] = {
29     Future.successful(score match {
30       case Score(None, None, None, None, None, None) => ResultEnum.NOT_MATCHED
31       case _ => checkResults(score) match {
32         case Some(result) => result
33         case _ => checkMatrixOfMatrices(score, version)
34       }
35     })
36   }
37
38   def checkMatrixOfMatrices(score: Score, version: DecisionServiceVersion.Value): ResultEnum.Value = {
39     val rules = MatrixOfMatricesRules(version)
40     val result = checkRules(score, rules.ruleSet, ResultEnum.NOT_MATCHED)
41     ResultEnum(result)
42   }
43
44   def checkResults(score: Score): Option[ResultEnum.Value] = {
45
46     val sectionAnswers = Seq(score.personalService, score.control, score.financialRisk, score.partAndParcel, score.businessOnOwnAccount).flatten
47
48     if (score.exit.contains(ExitEnum.INSIDE_IR35)) {
49       Some(ResultEnum.INSIDE_IR35)
50     } else if (sectionAnswers.contains(WeightedAnswerEnum.OUTSIDE_IR35)) {
51       Some(ResultEnum.OUTSIDE_IR35)
52     } else {
53       None
54     }
55   }
56 }

```

The *decide* method is called on line 28. Line 30 checks to see if there is no match (a catch-all in case no IR35 status result is actually found).

Then on line 31, it calls *checkResults*, taking us to line 44.

The *checkResults* method takes ALL the scores from each section (line 46) (a score being the “result” column in the s/sheet) and puts them into one set of values.

Then the *if* statement (line 48) means that if there is an INSIDE IR35 score due to Early Exit (e.g. office holder) pass back a status of INSIDE IR35.

Otherwise (line 50), the code asks if there is the existence of any instance of OUTSIDE IR35 in the answers from ANY of the sectionAnswers (personal service, control, etc), and if there is, then it concludes OUTSIDE IR35.

This proves that if OUTSIDE IR35 is obtained in any section, all of the other answers are ignored.

If we do not pick out an OUTSIDE IR35, then it returns none. This takes us back up to line 33, which then calls *checkMatrixOfMatrices* (line 38), where the values from the sections are used to determine status, using a **multi-factorial determination**.

The decision file's final determination – if OUTSIDE IR35 – is in the file *matrix-of-matrices.csv*.

personalService	control	financialRisk	partAndParcel	businessOnOwnAccount	finalDecision
MEDIUM	MEDIUM	MEDIUM	MEDIUM	HIGH	OUTOFIR35
MEDIUM	MEDIUM	MEDIUM	HIGH	HIGH	OUTOFIR35
HIGH	MEDIUM	MEDIUM	LOW	HIGH	OUTOFIR35
HIGH	MEDIUM	MEDIUM	MEDIUM	HIGH	OUTOFIR35

To determine how to achieve HIGH in the IBOOA section, we look at the file *business-on-own-account.csv*.

exclusiveContract	transferRights	multipleEngagements	significantWorkingTime	seriesOfContracts	Result
ableToProvideServices	ableToTransferRights	providedServicesToOtherEngagers	noSignificantAmount	standAloneContract	HIGH
ableToProvideServices	ableToTransferRights	providedServicesToOtherEngagers	noSignificantAmount	contractCouldBeExtended	HIGH
ableToProvideServices	noRightsArise	providedServicesToOtherEngagers	noSignificantAmount	standAloneContract	HIGH
ableToProvideServicesWithPermission	retainOwnershipRights	providedServicesToOtherEngagers	consumesSignificantAmount	standAloneContract	HIGH
ableToProvideServicesWithPermission	retainOwnershipRights	providedServicesToOtherEngagers	noSignificantAmount	standAloneContract	HIGH
ableToProvideServices	retainOwnershipRights	providedServicesToOtherEngagers	consumesSignificantAmount	standAloneContract	HIGH
ableToProvideServices	retainOwnershipRights	providedServicesToOtherEngagers	consumesSignificantAmount	contractCouldBeExtended	HIGH
ableToProvideServices	retainOwnershipRights	providedServicesToOtherEngagers	noSignificantAmount	contractIsPartOfASeries	HIGH
ableToProvideServices	retainOwnershipRights	providedServicesToOtherEngagers	noSignificantAmount	standAloneContract	HIGH
ableToProvideServices	retainOwnershipRights	providedServicesToOtherEngagers	noSignificantAmount	contractCouldBeExtended	HIGH
ableToProvideServices	retainOwnershipRights	noKnowledgeOfExternalActivity	noSignificantAmount	standAloneContract	HIGH
ableToProvideServices	rightsTransferredToClient	providedServicesToOtherEngagers	noSignificantAmount	standAloneContract	HIGH
ableToProvideServices	rightsTransferredToClient	providedServicesToOtherEngagers	noSignificantAmount	contractCouldBeExtended	HIGH

To achieve HIGH, the worker either has to retain IP over the work (which is very rare for most contractors), or the worker cannot work for the same client for a significant amount of time.

HMRC have implied ([their view on status](#)) in ESM11160, that you cannot answer this question “Yes” unless you spend less than half your working time with the client. This has no basis in case law.

For most contractors, who work with one client, one project at a time, they will have to answer No, and therefore getting an OUTSIDE IR35 determination, via this route, is impossible unless they retain ownership rights – which is also highly unlikely.

Therefore, for most contractors, the only route for achieving an OUTSIDE IR35 determination is by triggering one of the single-factor conditions in personal service, control, or financial risk.

Few knowledge-based contractors will have sufficient financial risk to trigger an OUTSIDE IR35 determination. An unexercised right of substitution will always be challenged by HMRC, leaving control the only realistic route.

For control, to get OUTSIDE IR35, the worker must have full control over how, what, when and where they work, with no input from the client, not even collaborative working. HMRC will always claim there is some control, making any reliance on a CONTROL-OUTSIDE-IR35 highly risky.

If a multi-factorial assessment takes place CEST only hands out OUTSIDE IR35 in extreme circumstances. Otherwise, it usually concludes INDETERMINATE or INSIDE IR35.

Where CEST does conclude OUTSIDE IR35 using the single-factor route, it can be easily challenged by HMRC.

Appendix D: IR35 tax tribunal decisions since CEST last update

The CEST underlying base logic is the same as in March 2017, which was a bolt-on added by its last update on 24th Oct 2019.

On 4th March 2019, Jim Harra, Head of HMRC, told the Public Accounts Committee that CEST would be continually updated.

“We continually update the tool as new tribunal and court decisions are made about employment status, as well as continually increasing its scope so that it can respond to more and more types of cases... It is an ongoing, unending process.”

Jim Harra, Head of HMRC - 4th March 2019

This promise was not kept.

There have been eighteen IR35 tax tribunals since CEST’s last update, and CEST has not changed.

Date of decision	Name of case
28 Nov 2011	JLJ Services v HMRC
27 Jan 2017	Armitage Technical Design Services Limited
10 Feb 2018	Christa Ackroyd (FTT)
19 Mar 2018	MDCM Ltd
16 May 2018	Jensal Software Limited
20 Mar 2019	Albatel Limited
16 Apr 2019	Atholl Limited (FTT)
13 Jun 2019	George Mantides v HMRC (FTT)
09 Jul 2019	Kickabout Productions v HMRC (FTT)
17 Sep 2019	PAYA (FTT)
25 Oct 2019	Canal Street Productions (FTT)
25 Oct 2019	Christa Ackroyd (UT)
29 Oct 2019	RALC Consulting (FTT)
18 Feb 2020	Northern Lights Solutions Limited (FTT)
21 Feb 2020	Red, White and Green Limited (FTT)
28 Jul 2020	Kickabout Productions v HMRC (UT)
18 Feb 2021	Atholl Limited (UT)
08 Jun 2021	Northern Lights Solutions Limited (UT)
11 Aug 2021	George Mantides v HMRC (UT - Preliminary)
18 Oct 2021	Little Piece of Paradise Limited (FTT)
09 Feb 2022	Basic Broadcasting Limited (FTT)
10 Mar 2022	McCann Media Limited (FTT)
22 Apr 2022	Kickabout Productions v HMRC (CoA)
22 Apr 2022	Atholl Limited (CoA)
16 Jun 2022	Alan Parry Productions Limited (FTT)
12 Jan 2023	S & L Barnes Limited (FTT)
27 Mar 2023	GARY LINEKER MEDIA (FTT)
29 Mar 2023	Red, White and Green Limited (UT)

Appendix E: Key case Law

Hall v Lorimer: “no single path to a correct decision”

To reach an accurate determination over an individual’s employment status, a tribunal judge would consider [Hall v Lorimer \[1993\] EWCA Civ 25](#), one of the fundamental employment status cases, and adopt the approach set out in Mummery J’s framework:

“In order to decide whether a person carries on business on his own account, it is necessary to consider many different aspects of that person’s work activity. This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail.”

“The overall effect can only be appreciated by standing back from the detailed picture, viewing it from a distance and only then making an informed, considered and qualitative appreciation of the whole.”

Whereas a judge is required to make a decision based on the accumulation of detail, CEST arrives at a conclusion based on the presence or absence of a single factor, such as substitution.

By determining status based on a single-factor approach CEST fails to consider the overall picture.

As per Nolan LJ in *Hall v Lorimer*: “in cases of this sort there is no single path to a correct decision.”.

Atholl House: An assessment is a “multi-factorial process addressing all the relevant factors”

To properly assess status a multi-factorial determination should be made. A multi-factorial determination is one which identifies and takes into account all the relevant factors, including substitution, mutuality, control, and all other relevant factors.

The clauses from the Court of Appeal decision on 26th April 2022 make this abundantly clear.

76. Fourth, and this is to some extent allied to the point just covered, it was submitted by HMRC that there was a binary choice on the issues of mutuality of obligation and control and, if they were established, they played no part in the assessment at the third stage of the *RMC* test. This submission is, on any view, overstated. Even on HMRC's argument, the court or tribunal is required to weigh any terms of the contract which are contrary to a conclusion of employment against those terms, including mutuality of obligation and control, which favour a conclusion of employment. What is said is that no account should be taken of the strength or weakness of the finding of control. I am unable to accept this. In some cases, the control may be so pervasive as to make it very difficult, if not impossible, to conclude that it is not a contract of employment. In others, the decision on whether the right of control is sufficient may be borderline. I can think of no good reason why the account should not be taken of these differences in what all agree is a multi-factorial process addressing all the relevant factors. I agree with Kerr J in *Augustine v Econnect Cars Ltd* [2019] UKEAT 0231/18 (20 December 2019) at [66]:

119. In an introductory passage, Elias LJ made some more general observations about the distinction between contracts of employment and contracts for services. He noted at [6] that various tests had been proposed in the cases, starting with control as the sole determinant, although none had won universal approval. He said at [7] that “the test most frequently adopted, which has been approved on numerous occasions and was the focus of the employment tribunal's analysis in this case, is the approach adumbrated by MacKenna J in the *Ready Mixed Concrete* case”. At [6], Elias LJ had described this approach as “the multiple or multi-factorial test... (involving an analysis of many different features of the relationship)”. He said at [8]:

“This approach recognises, therefore, that the issue is not simply one of control and that the nature of the contractual provisions may be inconsistent with the contract being a contract of service. When applying this test, the court or tribunal is required

to examine and assess all the relevant factors which make up the employment relationship in order to determine the nature of the contract.”

120. In *White v Troutbeck* [2013] EWCA Civ 1171; [2013] IRLR 949, Sir John Mummery (with whom Longmore and Rimer LJ agreed) agreed with the employment tribunal that “the agreement is the starting point for determining the nature of the relationship between the parties...the dispute between the parties turns on the characterisation of the nature of the relationship created by it”. At [38], he said: “The error in this case was in treating the absence of actual day-to-day control as the determinative factor rather than addressing the cumulative effect of the totality of the provisions and all the circumstances of the relationship created by it.” He concluded at [41] that “...viewed in the round, the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances presented the principal elements of employment”.

122. In my judgment, this review of the authorities bears out the propositions which I earlier stated. It is wrong to treat *RMC* and the line of cases including *Hall v Lorimer* as representing two separate tests, with the possibility that the result in any particular case could depend on which test is applied. Both approaches recognise mutuality of obligation and the right of control as necessary pre-conditions to a finding that a contract is one of employment. Once those necessary, but not necessarily sufficient, conditions are satisfied, both approaches require the identification and overall assessment of all the relevant factors present in the particular case. In other words, they are both multi-factorial in their approach. A strict reading of the third condition in the *RMC* test might exclude consideration of any factor beyond the express and implied terms of the contract, and this is certainly the way that it has been interpreted in some of the authorities. There are, however, many other authorities in which a wider range of factors was taken into consideration and indeed, as recently as 2012, HMRC were successfully inviting the Upper Tribunal to do just that: *Matthews v HMRC*.

168. First, as Sir David says at [60] and [122], it cannot be right to treat *RMC* and *Hall v Lorimer* as representing two separate tests which may be applied by the court or tribunal potentially leading to different results. Both approaches have a common core: mutuality of obligation and a right of control are necessary, but not sufficient, conditions for a contract of employment, and if those conditions are satisfied it is necessary to go on to consider a range of other factors.

Carelessness & Reasonable Care

A key requirement of the Off-Payroll legislation is that an end-client takes ‘reasonable care’ when assessing a contractor’s tax status and producing a Status Determination Statement.

61NA Meaning of status determination statement

- (1) For the purposes of section 61N “status determination statement” means a statement by the client that—
 - (a) states that the client has concluded that the condition in section 61M(1)(d) is met in the case of the engagement and explains the reasons for that conclusion, or
 - (b) states (albeit incorrectly) that the client has concluded that the condition in section 61M(1)(d) is not met in the case of the engagement and explains the reasons for that conclusion.
- (2) But a statement is not a status determination statement if the client **fails to take reasonable care in coming to the conclusion** mentioned in it.
- (3) For further provisions concerning status determination statements, see section 61T (client-led status disagreement process) and section 61TA (duty for client to withdraw status determination statement if it ceases to be medium or large).

Failure to comply with this clause, can not only open tax loopholes for unscrupulous operators further down the supply chain, but it results in additional penalties added to hirers’ tax bills.

What is ‘reasonable care’?

The Courts are agreed that reasonable care can best be defined as the behaviour which is that of a prudent and reasonable person in the position of the person in question. Failure to take reasonable care is explained in the FTT decision in [HMRC v David Collis](#) where the Judge said;

“That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question.”

In *Shakoor* ([TC2208](#)), the taxpayer failed to disclose the disposal of property within his tax return. HMRC raised a discovery assessment and imposed a penalty. The taxpayer appealed against the penalty on the basis that he had followed the advice of his agent, whom he argued had told him the disposal was exempt.

The tribunal considered an earlier case, which stated:

“If the advice of a professional such as an accountant was negligent, that ought not to be imputed to the taxpayer. The question is whether the taxpayer is negligent. The tribunal found that the accountant’s advice was obviously wrong and that the taxpayer realised, or ought to have realised, that it was obviously wrong or so likely to be wrong that further explanation or justification was needed.”

The topic was also addressed in *Anderson (deceased)* ([TC206](#)), where the Judge argued:

“The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.”

We can draw from this that, if a taxpayer knows (or reasonably should know) that the position that they are declaring to HMRC (whether through an agent or not) is incorrect, then they have failed to take reasonable care.

Failure to take reasonable care is also considered tantamount to negligence, which is defined by Baron Alderman in the 1856 case [Blyth v Birmingham Waterworks Co.](#) as:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.”

HMRC’s approach to reasonable care can be deciphered from guidance within its [Compliance Handbook](#), which provides numerous examples of what is considered ‘careless’. HMRC’s own documentation tells us that if a system is not fit for purpose but is used continually to submit a tax return, this will be considered careless behaviour.

In HMRC’s off-payroll guidance on reasonable care in [ESM10014](#), HMRC states:

“HMRC expects each client to carry out a complete and thorough determination and preserve sufficient records to show how the decision was reached.”

HMRC states that one example of behaviour which does not constitute reasonable care is:

“failing to take account of all relevant evidence”

Where CEST has been used and a “single-factor” determination made, it is arguable that a thorough determination has not been made, and all of the relevant evidence has not been taken into account. In that instance, particularly where the contractual clauses have not been considered, it is highly likely that reasonable care has not been taken.

Appendix F: RALC Consulting Preliminary hearing (21 May 2019)

In the First-tier Tribunal preliminary hearing for an IR35 appeal, RALC Consulting Limited v HMRC, Counsel for HMRC confirmed that CEST was irrelevant to the issues to be determined by the tribunal. Counsel also confirmed that CEST was only for guidance and that the tribunal must **only** consider the legislation and relevant case law.



APPLICATION TO EXCLUDE EVIDENCE – application granted in part
FIRST-TIER TRIBUNAL Appeal number: TC/2017/08950
TAX CHAMBER
BETWEEN
RALC CONSULTING LIMITED Appellant
-and-
THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS Respondents
TRIBUNAL: JUDGE JENNIFER DEAN
Sitting in Manchester on 21 May 2019
Mr C. Leslie of Tax Networks Ltd for the Appellant
Mr C. Stone and Ms M. Tutin, Counsel instructed on behalf of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

5. Mr Stone clarified that neither the Appellant nor its accountants used the CEST tool at the time of the relevant engagements or when submitting the Appellant’s tax returns. He submitted that the form, content and application of CEST to the Appellant’s arrangements is irrelevant to the issues to be determined by the Tribunal; namely whether the hypothetical contracts between Mr Alcock and the clients would have been contracts of service and whether the Appellant or a person acting on its behalf was careless. While CEST can be helpful in providing guidance, it is only the application of the legislation and relevant case law to the hypothetical facts that must be considered by the Tribunal.

Appendix G: HMRC Off-payroll working in the public sector, slide deck (7 Jul 2016)

During HMRC's presentations to the IR35 Forum in July 2016 a slide deck was presented, with notes stating "Making a new guidance tool work is the key. It will have to be based on the case law and it will have to be accurate" and that the tool "Gives certainty" and "Binding advice."

Digital Tool

- HMRC to stand by result. Gives certainty that if you put the right facts in, that is what we will do. Binding advice.
- Public and private sector will be able to use it – will help private sector too.
- Will develop a tool with customers as part of a consultative process. Want you to build it with us.
- Give certainty at point the worker and engager negotiate contract.
- We have sent you some suggested questions – looking for your input – are these the right ones?
- Consultation Document suggested some simplified "upfront" questions that enable most people to get a quick answer without the full tool. Full tool for more complex cases.
- New tool – not just the old Employment Status Indicator. Will add the same questions to old ESI so you can also use that. In time – everything currently on our old ESI will also move to the modern tool.

Making a new guidance tool work is the key. It will have to be based on the case law and it will have to be accurate – we are not rigging this to raise revenue as some people have suggested. Help us get it right.

- HMRC to stand by result. Gives certainty that if you put the right facts in, that is what we will do. Binding advice.

References

Ref#	Source
1	Financial Secretary to the Treasury letter to House of Lords Economic Affairs Finance Bill Sub-Committee, Off-payroll Working Follow-up Inquiry. 09 March 2022.
2	FOI Response by HMRC on 16 Feb 2018.
3	Oral evidence to the Public Accounts Committee on 04 Mar 2019. Follow up to Q34-44 by HMRC
4	HMRC - Off-payroll working in the public sector: reforming the intermediaries legislation, Technical note – 16 Marc 2016.
5	Off-payroll working: treating people fairly. House of Lords, Economic Affairs Committee Finance Bill Sub-Committee – 22 Apr 2020. “We question whether the CEST tool as currently constituted is fit for purpose” [87]
6	Court of appeal decision in Revenue and Customs v Atholl House Productions Limited [2021] UKUT 37 - 26 Apr 2022.
7	National Audit Office Report: Investigation into the implementation of IR35 tax reforms, 10 Feb 2022. Paragraph 16: The 2020-21 financial statements of government departments and agencies include a total of £263 million paid, owed or expected to be owed in additional tax for failing to administer the reforms correctly.
8	Ministry of Justice Annual Report and Accounts 2020-21 , Page 87 refers to the liability of £72.1m, and page 124 refers to carelessness (lack of reasonable care), leading to a further £15m suspended penalty.

End of report



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Contact us

Email: info@ir35shield.co.uk

Online: www.ir35shield.co.uk/contactus

Phone: +44 (0) 1978 368808