

CIS 2007

A Presentation By
Garbetts &
Warner Goodman

28th February 2007 - Isle of Wight College

- **CIS - what's changed?**
- **Status**
- **Holiday pay & CITB**

- **The 12 month delay**
- **Why?**
- **Is HMRC ready?**
- **Is business ready?**

What's changed

- X No CIS cards**
- X No vouchers**
- X No annual CIS return**
- ✓ There will now be three types of payment status**
- ✓ Existing gross/net payment status will transfer over**
- ✓ A new monthly return to HMRC**
- ✓ A new status declaration**
- ✓ A new compliance test for gross payment status**
- ✓ New conditions for gross payment status**

No CIS cards

Gone are CIS 4, CIS 5 and CIS 6.

Instead of checking cards, you will now verify gross / net payment status with HMRC Revenue and Customs via internet or telephone.

Verification

Generally only need to verify a sub contractor once.

Need to re-verify them if you haven't used them in the current tax year or either of the two previous years.

When a sub contractors status changes from net to gross or vice versa HMRC will notify all contractors for whom the subcontractor has worked in the last 12 months.

If you are paying a subcontractor in the first tax year of the new scheme, i.e. up to 5 April 2008, you do not have to verify them if:

- **You have already included them on a monthly return in that tax year; or**
- **You have paid the subcontractor since 6 April 2005 and when you last paid them they had one of the following:**
 - **A registration card CIS4, or**
 - **A temporary registration card CIS4(T) that expired after March 2007, or**
 - **A CIS5 or CIS6 that expired after March 2007**

No vouchers

Gone are CIS 23, CIS 24 and CIS 25.

For gross payments there are no documentation requirements.

For net payments a statement of deductions must be issued by the 19th of each month for the previous tax month (up to the 5th).

Existing gross/net payment status

Existing gross status (CIS 5 and CIS 6) transfers over to the new scheme.

So long as existing gross status doesn't expire before 6 April 2007.

There will now be three types of payment status

- | | |
|--------------------|---|
| Gross | For sub contractors registered with HMRC and eligible for gross payment status (current holders of CIS 5 and 6 cards) |
| Net 20% | For sub contractors registered with HMRC and not eligible for gross payment status. The rate is 20%. (Current CIS 4 holders) |
| Higher rate | 30% for sub contractors not registered with HMRC. |

No annual CIS return

Goodbye to CIS36 annual return (once a year)....

A new monthly return to HMRC

... and hello to son of CIS36 (new return doesn't have a number yet, but presumably this will follow).

The return must be sent in by 19th of each month by contractors for payments up to 5th of each month, and can be sent by post or internet. HMRC will issue blank returns pre-populated with the names and details of sub contractors previously used.

Nil returns must be filed.

And if your new monthly return is late

If a return is late, there is a penalty of £100 per month per return (or more if there are over 50 subcontractors).

Watch this – if a contractor neglected to send in monthly returns and simply thought “I’ll do them all at the end of the year” then there will be 12 late returns, one 12 months late with 12 x £100 penalty, one 11 months late with 11 x £100 penalty, etc – the total over 12 months late returns would be £7,800.

A new status declaration

The existing rules on self employed or employed status are not changing.

Contractors will have to make a declaration each month, on the return, that they have considered the employment status of each sub contractor and they consider them self employed.

A new compliance test for gross payment status

Based on 12 months rather than 36 months, but harsher regarding non compliance than at present.

To achieve gross payment status, you and any business partners (or your company and each of its directors) must, during the 12 months up to the date of the application, have done all of the following:

- **completed and returned all tax returns sent to you.**
- **supplied any information to do with your tax that HMRC have requested.**
- **paid by the due dates**
 - **all tax due from yourself or the business**
 - **all your own National Insurance contributions (NICs)**
 - **any PAYE tax and NICs due from you as an employer**
 - **any deductions due from you as a contractor in the construction industry.**

When considering whether you have passed the compliance test, HMRC will disregard, during the same 12 month period, any or all of the following:

- **three late payments of CIS/PAYE deductions – up to 14 days late.**
- **three late submissions of the monthly return – up to 28 days late.**
- **one late payment of Self Assessment tax – up to 28 days late.**
- **any employer's end of year return made late.**
- **any late payments of Corporation Tax – up to 28 days late, including where any shortfall in the payment has incurred an interest charge but no penalty.**
- **any Self Assessment return made late.**

This will be a rolling compliance test – i.e. as soon as you breach it your gross payment status will be withdrawn.

IMPORTANT - Under the new compliance test, if you pay your PAYE/CIS deductions more than 14 days late even just once you will lose your gross payment status and go onto deduction.

Unlike the old scheme, there will be no discretion available to the Inspector or the appeal commissioners if you do not comply.

New turnover conditions for subcontractors getting gross payment status

Construction turnover of £30k in the last 12 months (for partnerships/companies it is £30k x number of partners / directors / major shareholders – or a flat £200k alternative test)

The old 3 year average and £21k in 6 month tests have gone.

Non CIS income can be included by concession.

Penalties

The CIS scheme places a raft of penalty provisions at HMRCs disposal:

If you...	The penalty is...
<i>Fail to send in the monthly return to HMRC (including a nil return).</i>	<i>£100 per 50 subcontractors (or part thereof) per month. After 12 months a penalty of up to 100% of the undeclared CIS deductions, subject to mitigation.</i>
<i>Send in an incorrect monthly return (either negligently or fraudulently).</i>	<i>Up to 100% of the under-declared CIS deductions, subject to mitigation.</i>

<i>Fail to produce CIS records for HMRC to inspect when required to do so.</i>	<i>Up to £300 penalty, plus up to £60 per day for continuing failure.</i>
<i>Fail to provide a subcontractor with a 'payslip'.</i>	<i>Up to £300 penalty, plus up to £60 per day for continuing failure.</i>
<i>Make a false statement in order to register for gross payment or payment under deduction.</i>	<i>Up to £3000.</i>
<i>Make an incorrect declaration about employment status (either negligently or fraudulently)</i>	<i>Up to £3000.</i>

Status

- **Employed or self-employed?**
- **If an employee, must deduct tax and NIC under PAYE**
- **If self-employed, may pay gross if eligible, otherwise 20% deduction**
- **Employer liable for consequences of incorrect classification**
- **Double taxation: *Demibourne Ltd v Revenue & Customs (SpC486) (2005)***

Status

- **No change to classification rules, despite HMRC apparent view to the contrary**
- **No guiding legislation**
- **Case law**
- **HMRC “guidance”**

Status

Status tests:

- **Personal service**
- **Mutual obligations**
- **In business on own account/risk**
- **Control**

Personal Service

- ***Ready Mixed Concrete v Minister of Pensions & National Insurance [1968] 2QB 497***
 - **Agreement to provide his own work and skill**
 - **Freedom to delegate is inconsistent with employment**
 - **BUT limited or occasional power may be**

Personal Service

- ***Express & Echo Publications v Tanton [1999] IRLR 367***
 - **‘In the event that the Contractor is unable or unwilling to perform the Services personally he shall arrange at his own expense entirely for another suitable person to perform the Services.’**
 - **Utilised from time to time, so not a sham**

Personal Service

- ***Real Time Civil Engineering Ltd v Callaghan (EAT)***
09/12/2005
 - **delivery driver**
 - **Under 'usual' status tests, appeared to be an employee**
 - **Contract said: 'the Sub Contractor may, at his absolute discretion, send a substitute or delegate to perform the Works', but he had never done so**
 - **Nevertheless, held to be self-employed**

Personal Service

- **Test is not how contract operated in practice, but the parties' intentions**
- **Sometimes possible to look beyond the contract to determine the parties' intentions**
 - **if the contract is a sham; or**
 - **if the contract does not accurately represent what the parties intended**
- **The operation of the contract in practice is not enough to displace an express contractual term**

Personal Service

- **The HMRC view:**
 - **A right to send a substitute is only an indicator of self-employment and not determinative**
 - **Will look for evidence that right of substitution is genuine**
 - **Failure to use may be taken as evidence of sham**
 - **However, acknowledge that onus is on HMRC to prove sham**
 - **May challenge where other terms found to be false or claimed right of substitution doesn't fit the context**
 - **Alternatively, will emphasise other factors if they are indicative of employment**

Status

- **Mutual obligations**
 - **To offer work**
 - **To undertake the work when offered**
 - **Both obligations must be present**
 - **May be implied from dealings**

Mutual obligations

- ***O'Kelly v Trusthouse Forte PLC [1983] CA***
 - **Wine waiter and other hotel staff worked as regular casuals**
 - **Uniforms supplied**
 - **Subject to same degree of control as other hotel employees**
 - **BUT not obliged to accept work when offered**
 - **Held, not employees**

Mutual obligations

- *Carmichael v National Power [2000] IRLR 43 HL*
 - Guides employed on ‘a casual as required basis.’
 - No contractual obligation for National Power to offer work and the guides were free to accept or decline any work that was offered to them.
 - ‘Mutuality of obligations is at the heart of the employment relationship.’

Mutual obligations

- Implied mutuality of obligation
- *ABC News Intercontinental v Gizbert (EAT) 04/07/2006*
 - Freelance news correspondent. Obligation on ABC to provide 100 days work pa. Gizbert could refuse assignments offered to him
 - *Held* Gizbert did not have an unfettered right to refuse assignments; he was obliged to act in good faith and therefore the necessary mutuality was present

Mutual obligations

- ***Cornwall County Council v Prater [2006] EWCA Civ 102***
 - **Successive short-term assignments, as a home tutor of children, over 10 year period**
 - **Not obliged to accept an assignment**
 - **The Council was under no contractual obligation to offer pupils to her**
 - **Never refused an assignment**
 - ***Held* each individual teaching assignment was a contract of service (ie employment)**
 - **Periods between contracts were temporary cessations of work and employment was continuous**

Mutual obligations

- **HMRC view**
 - **Mutuality is not a determinative test**
 - **Will look at an individual assignment to see if there are mutual obligations during that assignment**
 - **Effectively renders the test redundant, as there will always be mutual obligations once an assignment starts, regardless of status**
 - **However, because of *Prater* and *Gizbert*, worker will fail status test if regular engagements and either a duty to act in good faith can be implied from the course of dealing, or gaps between assignments are temporary cessations**

Status

- **Other tests**
- **Control:**
 - **Indicative rather than determinative**
 - **Significance depends upon nature of work**
 - **Less significant where worker is highly skilled**
 - **But HMRC regard control as an important test and often focus much of their enquiry on that factor**

Status: other tests

- In business on own account/risk
 - Provides own tools and equipment?
 - Other capital expenditure?
 - Training costs?
 - Business organisation?
 - Tender/advertise for work?
 - Price work or day work?
 - Invoicing?
 - Having own accountant?

Status

- **Intention of the parties**
 - **Can over-ride the appearance of the day-to-day operation of the contract (eg *Real Time Civil Engineering Ltd v Callaghan*)**
 - **Will be determinative where other (non-determinative) factors are equally balanced *Massey v Crown Life Assurance***
- **Intention is best evidenced by the contract**
- **Express contract terms will not be over-ridden by the day-to-day operation of the contract, unless the contract is a sham or does not reflect the parties' intentions**

Status: practical steps

- HMRC guidelines are often inconsistent with case law
- They rely on FIAT (fear, intimidation and terror)
- Case law prevails!
- Properly drafted contracts are essential to establish intention to be self-employed
- Renew them on a regular basis (every project or each year)
- Work to the terms of the contract!
- Adoption of business risk/structure will tend to keep HMRC at bay

Status: practical steps

- **Invoicing:** all self-employed operatives should invoice the contractor and be paid against invoices
- **Advertising/tendering:** they should regularly advertise their services
- **Business organisation:** eg business phone line; business mobile phone; headed paper; sign written van; own accountant; business insurance; etc

Status: practical steps

- **Different contractors: to avoid implication of duty of good faith or connected series of employments (mutual obligation)**
- **Delegation: exercising a right to delegate will conclusively determine status as self-employed**
- **Sub-contracting for other sub-contractors: taking turns in 'leading' on jobs and delegating/sub-contracting to the other helps to avoid the implication of mutual obligation to the main contractor and negates the implication of personal service; even better if some of the engagements are simultaneous**

Elephant traps

Holiday pay – Working Time Regulations 1988

A person is a “worker” if they work under, or have entered into a contract of employment or “any other contract, whether express or implied...oral or in writing...to do or perform personally any work or services for another party to the contract”, unless the “other party” is a “client or customer of any profession or business undertaking carried on by the individual”.

This can mean that sub contractors who are self employed for tax purposes are classed as workers for the WTR and entitled to 4 weeks pa holiday pay.

CITB Levy

Exempt if labour (employees and sub contractors) payments are less than £64k pa.

Levy currently: 0.5% of the wage bill for direct employees and 1.5% of the value of any payments on labour-only sub-contractors.

Some www sites to help you



www.warnergoodman.co.uk



www.garbetts.com/cis

SAMARITANS

www.samaritans.org.uk



www.tesco.com/recruitment

- Accounts and audit
- Business and personal tax planning
- Tax returns and compliance
- Tax investigations and negotiations
- Business consultancy
- Strategic planning
- Company law
- Personal and business financial planning
- Outsourced bookkeeping and payroll
- Computerised accounts, set-up and training



Arnold House, 2-8 New Road, Brading, Isle of Wight, PO38 0DT
 01983 400350 office@garbetts.com www.garbetts.com

The smart move for your business