EXPANATORY MEMORANDUM TO

THE DRAFT SOCIAL SECURITY CONTRIBUTIONS (CONSEQUENTIAL PROVISIONS) REGULATIONS 2007

2007 No …..

1. This Explanatory Memorandum has been prepared by HM Revenue and Customs and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 Where under powers contained at section 4B of the Social Security Contributions and Benefits Act 1992 (SSCBA 1992) and section 4B of the Social Security Contributions and Benefits Act (Northern Ireland) 1992 (SSCBA (NI) 1992), payments are retrospectively treated as earnings for National Insurance contributions purposes, this instrument sets out how the National Insurance contributions due on those new earnings are recorded, paid and reported to HMRC. These regulations take effect from 6 April 2007.

2.2 This instrument requires approval by both Houses of Parliament.

3. Matters of Special Interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 The National Insurance Contributions Act 2006 (NI Act 2006) inserted at section 4B of the SSCBA 1992 and section 4B of the SSCBA (NI) 1992 powers to make regulations for National Insurance contributions purposes that mirror in whole or in part retrospective income tax legislation that take effect on or after 2 December 2004. The NI Act 2006 also inserted powers at section 4C(2)(a) and (b) of the SSCBA 1992 and section 4C(2)(a) and (b) of SSCBA (NI) 1992 to make consequential amendments to the Social Security (Contributions) Regulations 2001 (SSCR 2001) to take account of the fact that payments made to employees can be retrospectively treated as earnings when they were paid. The employer has to recalculate National Insurance contributions liability as if the payments had been earnings at the time they were paid.

4.2 This instrument ensures that when employers do not pay over the new liabilities and the employee has not been involved in the non payment, those National insurance contributions that are due are to be treated as paid. This ensures that the contributions count for contributory benefit

purposes. It also sets out the extent to which employers can recover additional employee contributions from the employee.

4.3 This instrument deals with the recording, reporting and payment to HMRC of National Insurance contributions both where the payments in question were received in a tax year which has not yet finished (an open tax year) and in a closed tax year. It also provides a new statutory return to enable employers to report payments made in a closed tax year.

4.4 It also removes the requirement for electronic reporting and payment in respect of National Insurance contributions due on payments made in closed tax years that are treated as earnings retrospectively.

4.5 These provisions reflect provision to be made, once Parliament has given approval to the present instrument, to the Income Tax (Pay As You Earn) Regulations 2003 (S.I. 2003/2682). For ease of reference the draft Income Tax (Pay As You Earn) (Amendment) Regulations 2007 are appended, as is an order appointing a substituted date for the notional date in relation to retrospectively charged employment income.

5. Extent

5.1 These Regulations will apply throughout the United Kingdom.

6. European Convention on Human Rights

6.1 In the view of the Paymaster General, Dawn Primarolo, the provisions of these draft regulations are compatible with the Convention rights.

7. Policy Background

7.1 The Paymaster General made a statement (House of Commons Hansard Vol. 428 Col 45WS) on 2 December 2004 signalling that the Government would be prepared to act against tax and National Insurance avoidance involving employee remuneration by backdating any anti-avoidance legislation to 2 December 2004 if necessary.

7.2. In accordance with assurances provided by Ministers, the draft of these Regulations were published in draft on 16 August 2006 for consultation. Once they come into force they will have effect from 2 December 2004. No significant comments were received on these regulations. A summary of the comments received and HMRC's response will be published on the HMRC website.

7.3 The NI Act 2006 includes the necessary powers to mirror in whole or in part retrospective income tax legislation. These regulations set out

the recording, reporting and payment requirement whenever these powers are used in future.

7.4 These regulations make only minor changes to the SSCR 2001, which are an extensive set of provisions. HMRC has no current plans to consolidate the 2001 Regulations. On the last occasion it was a task involving 18 months' work and contributions from four different Government departments.

8. Impact

8.1 HMRC has undertaken a Regulatory Impact Assessment on the measures contained in the National Insurance Bill which became the NI Act 2006. The assessment is published on the HMRC website hmrc.gov.uk/ria/ria-nicbill05.pdf and concluded that the impact of the Act would be minimal.

9. Contact

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S T A T U T O R Y I N S T R U M E N T S

2007 No.

INCOME TAX

The Income Tax (Pay as You Earn) (Amendment) Regulations 2007

Made - - - -	***
Laid before the House of Commons	***
Coming into force - -	***

The Commissioners for Her Majesty's Revenue and Customs make the following Regulations in exercise of the powers conferred by sections 132 and 133 of the Finance Act 1999(**1**), sections 684 and 710 of the Income Tax (Earnings and Pensions) Act 2003(**2**), and sections 202 and 203 of the Finance Act 2003(**3**).

Citation and commencement

1. These Regulations may be cited as the Income Tax (Pay as You Earn) (Amendment) Regulations 2007 and shall come into force on 6th April 2007.

Amendment of the Income Tax (Pay as You Earn) Regulations 2003

2. The Income Tax (Pay as You Earn) Regulations 2003(**4**) shall be amended as follows.

3. In regulation 2 (interpretation) at the appropriate points in the alphabetical list insert the following definitions—

> ""closed tax year" means any tax year preceding the current year, and cognate expressions shall be construed accordingly;";
>
> ""HMRC" means Her Majesty's Revenue and Customs;";
>
> ""qualifying payment" means a payment which becomes retrospective employment income as a relevant payment (including a notional payment);";
>
> ""the relevant time", in relation to retrospective employment income, has the meaning given by section 710(7) of ITEPA, as modified by subsection (7A) of that section, but subject to section 94(5)(c) of the Finance Act 2006;
>
> ""retrospective contributions regulations" has the meaning given by regulation 1(2) of the SSC Regulations;";

(**1**) 1999. (c. 16) The functions of the Commissioners of Inland Revenue were transferred to the Commissioners for Her Majesty's Revenue and Customs by section 5(2) of the Commissioners for Her Majesty's Revenue and Customs Act 2005 (c. 11). Section 50 of that Act provides that, in so far as is appropriate in consequence of section 5, a reference however expressed to the Commissioners of Inland Revenue is to be read as a reference to the Commissioners for Her Majesty's Revenue and Customs.
(**2**) 2003 c. 1. Section 710 was amended by section 49(4) of the Finance Act 2006 (c. 25).
(**3**) 2003 c. 14.
(**4**) S.I. 2003/2862.

""retrospective employment income" means payments which are retrospectively treated as payments of employment income by virtue of a retrospective tax provision;";

""retrospective tax provision" means a provision of the Income Tax Acts charging to income tax amounts of employment income paid before the enactment containing the provision was passed;"

""SSC Regulations" means the Social Security (Contributions) Regulations 2001(**5**);".

4. After regulation 36 insert—

"Income subject to retrospective tax provision — information to employee

36A.—(1) This regulation applies if—

(a) a payment is made to an employee;

(b) the employment in connection with which it was paid ceases;

(c) the payment becomes a qualifying payment after the cessation of the employment;

(d) the tax year in which the payment was actually made is not closed, and

(e) the amount of the qualifying payment was not included in Form P45.

(2) If this regulation applies the person who made the payment must provide to the employee, without unreasonable delay after the relevant time, details of—

(a) the date on which the qualifying payment was actually made;

(b) the amount of the qualifying payment; and

(c) the amount of tax deducted under regulation 62(4) or (5).".

5. In regulation 37 (PAYE income paid after employment ceased), after paragraph (1) insert—

"(1A) But this regulation does not apply if regulation 37A applies.".

6. After regulation 37 insert—

"Income paid after cessation of employment subsequently becoming subject to PAYE

37A.—(1) This regulation applies if—

(a) a payment has been made, after the cessation of the employment, to a former employee—

(i) by the former employer, or

(ii) by any other person in respect of an obligation of the former employer;

(b) that payment becomes a qualifying payment after the employment ceased; and

(c) the amount of the qualifying payment has not been included in Form P45.

(2) Where a qualifying payment has been made in a closed year, the employer must deduct tax, from any other payment made to the former employee in the tax period at the relevant time—

(a) in accordance with the last code used for the tax year in which the qualifying payment was made, or

(b) if the employer has not been notified of a code for that tax year, at the higher rate of tax applicable for that year.

(3) Where a qualifying payment has been made in an open year, the employer must deduct tax from any other payment made to the former employee—

(a) in accordance with the code in force in the final tax period in which the employee was employed, or

(**5**) S.I. 2001/1004: the relevant amending instruments are/ S.I. 2007/ xxxx and yyyy.

(b) if the employer has not been notified of a code, at the higher rate of tax applicable for that year.

(4) Neither the making of the qualifying payment, nor its subsequently becoming taxable, affect the cessation of the employment, and the provisions listed in regulation 37(4) do not apply in relation that payment.

(5) The employer must record the following information in a deductions working sheet for the tax year in which that payment was made.

If a deductions working sheet has not already been prepared for that tax year, the employer must prepare one.

(6) The information is—

(a) the date on which the qualifying payment was actually made;

(b) the amount of that payment; and

(c) the amount of tax to be deducted or accounted for under regulation 62(4) or(5) (notional payments).

(7) The employer must also notify the employee of the information listed in paragraph (6) without unreasonable delay after the relevant time.".

7. After regulation 50 insert—

"Procedure in cases of retrospective earnings: code treated as issued by HMRC

50A.—(1) If—

(a) as a result of a retrospective tax provision, a qualifying payment was made in a year (whether open or closed) to a person, and

(b) a code has never been issued to the employer in respect of employment with whom that qualifying payment was made,

paragraph (2) applies.

(2) Where this paragraph applies the higher rate code applicable to the year in which the qualifying payment was made is treated, for the purposes of Parts 2 to 4 (codes, deduction and repayment of tax, payments, information and returns) as having been issued by HMRC as the code for use in respect of the employee in relation to that year.

(3) Paragraph (2) does not apply for the purposes of regulation 18 (objections and appeals) and regulations 46 to 49 and 51 to 53 (Form P46 procedure and late presentation of Form P45).".

8.—(1) Amend regulation 62 (deductions in respect of notional payments) as follows.

(2) In paragraph (1) after "notional payment" insert "(including a notional payment arising by virtue of a retrospective tax provision)".

(3) In paragraph (2) for "the following regulations" substitute "the provisions listed in paragraph (3)".

(4) In paragraph (3)—

(a) for the opening words substitute "The provisions are—"; and

(b) in the table, after the entry relating to regulation 37 insert—

"paragraphs (2) and (3) of regulation 37A	Income paid after cessation of employment becoming subject to PAYE."

9.—(1) Amend regulation 66 (deductions working sheets) as follows.

(2) After paragraph (4) insert—

"(4A) For the purposes of paragraphs (4)(a) and (6)(a), (b), (c), and (e)(i), a relevant payment—

(a) which comprises an amount of retrospective employment income, and

(b) which was actually paid during a tax year which is not closed,

shall be treated, for the purpose of computing the amount of tax to be deducted, as paid at the earlier of the relevant time and the end of the last tax period in which the former employee was employed .".

(3) At the end of the regulation add—

"(9) Nothing in this regulation applies to a closed tax year (see regulation 66A).".

10. After regulation 66 insert—

"Deduction working sheets: retrospective employment income in closed tax year

66A.—(1) Paragraph (2) applies if—

(a) a code has been issued to an employer in respect of an employee for a tax year which has subsequently become a closed tax year ("the relevant tax year"); and

(b) after the end of that tax year a payment made during it to that employee becomes a qualifying payment.

(2) The employer must at the relevant time —

(a) in a case where there was a deductions working sheet for the employee for the relevant tax year, revise it to reflect the effect of the retrospective tax provision on the total PAYE income including the retrospective employment income for that year; and

(b) in a case where there was no deductions working sheet for the employee for the relevant year, produce one showing that effect on that income for that year.

(3) In a case falling within paragraph (2)(b) the employer must record in the deductions working sheet—

(a) the employee's name,

(b) the employee's national insurance number, if known,

(c) the employee's final code for the relevant tax year, and

(d) details of the relevant tax year.

(4) The employer must record in the deductions working sheet in respect of every qualifying payment—

(a) the date on which the payment is made,

(b) the amount of the payment, and

(c) the amount of tax, if any, to be deducted or accounted for under regulation 62(4) or (5) (notional payments).

(5) Despite paragraph (4)(a), in completing the deductions working sheet, the amount of any retrospective employment income shall be treated, for the purpose of computing the amount of tax to be deducted, as if it were paid in the final tax period, in which the employee was employed, in the relevant tax year.".

11. After regulation 67 insert—

"Revised information to employees about payments and tax deducted (Form P 60)

67A.—(1) This regulation applies where—

(a) an enactment containing a retrospective tax provision applicable to a closed tax year is passed; and

(b) in consequence of the passing of that enactment an employee's employment income in that closed tax year is increased.

(2) Before 1st January next following the passing of the enactment—

(a) if the employer has previously given the employee a certificate (Form P60), the employer must give the employee a revised certificate (Form P60); and

(b) if the employer has not previously given the employee such a certificate, the employer must give the employee a copy of the revised form P14 completed in accordance with regulation 73A (amended return of relevant payments (Forms P14 and P35(RL)) .

(3) Paragraphs (2) and (3) of regulation 67 apply, in a case falling within paragraph (2)(a), for the purposes of this regulation as they apply for the purposes of that regulation, save that—

(a) sub-paragraph (f) of paragraph (2) shall have effect as if for "the total amount" there were substituted "the revised total amount"; and

(b) sub-paragraph (g) of that paragraph shall have effect as if for "total net tax" there were substituted "the revised total amount of net tax";

with references to revised amounts being construed as references to the amounts of relevant payments and net tax deducted computed after the application of the retrospective tax provision.

(4) Where a revised certificate is given under this regulation—

(a) the employer must endorse it to show that it supersedes an earlier certificate; and

(b) the employee must not use the certificate which it supersedes.".

12.—(1) Amend regulation 68 (periodic payments to and recoveries from the Revenue) at the end as follows.

(2) In paragraph (4), in sub-paragraph (b) of the definition of A after "notional payments made" insert "or treated by virtue of a retrospective tax provision as made,".

(3) At the end of the regulation add—

"(7) In the application of paragraph (4) to notional payments arising by reason of the coming into force of the Finance Act 2006, the reference to section 710(7A)(a) of ITEPA 2003 shall be modified as mentioned in section 94(5)(c) of the Finance Act 2006.".

13.—(1) Amend regulation 69 (due date and receipts for payment of tax) as follows.

(2) In paragraph (3) for "the Social Security (Contributions) Regulations 2001" (**6**) substitute "the SSC Regulations".

(3) At the end of the regulation add—

"(4) In paragraph (1) "the tax period", in relation to an amount of retrospective employment income, means the tax period immediately following the relevant time.".

14.—(1) Amend regulation 70 (quarterly tax periods)(**7**) as follows.

(2) After paragraph (1) insert—

"(1A) But this regulation does not apply, so that the tax period remains a month, in respect of amounts of retrospective employment income.".

(3) In paragraph (3)—

(a) in the definition of "P"(**8**) after "regulation 68" insert "but disregarding any amount payable in respect of retrospective employment income";

(b) in the definition of "N"(**9**) after sub-paragraph (a) insert—

"(aa) any amount payable under retrospective contributions regulations (see paragraph 1(2) of Schedule 4 to the SSC Regulations) in respect of retrospective earnings (within the meaning of those Regulations);".

(**6**) S.I. 2001/1004.
(**7**) Regulation 70 was amended by regulation 3 of S.I. 2006/777.
(**8**) This definition was amended by regulation 3(b)(i) of S.I. 2006/777.
(**9**) This definition was amended by regulation 3(b)(iii) of S.I. 2006/777.

15. After regulation 73 (annual returns of relevant payments liable to deduction of tax) insert—

"**Amended returns of relevant payments and tax (Forms P14 and P35(RL))**

73A.—(1) This regulation applies where, as a result of a retrospective tax provision, the total amount of the relevant payments made by an employer to employees increases for any closed tax year.

(2) Where this regulation applies, before 20th May following the end of the tax year in which the enactment containing the retrospective tax provision is passed, the employer must deliver to HMRC a return containing the following information.

(3) The information is—

(a) the tax year to which the return relates,

(b) the revised total amounts of the relevant payments made, or treated as made, during the tax year to all employees in respect of whom the employer was required, or has subsequently become required, to prepare or maintain deductions working sheets for any time during that year,

(c) the total net tax deducted in respect of those payments.

(4) The return must be supported by the same information in respect of each of the employees mentioned in paragraph (3)(b) as is required by regulation 73(3) to support a return under that regulation.

(5) The return must include—

(a) a statement and declaration containing a list of all deductions working sheets which the employer was required to prepare or maintain at any time during that year, and

(b) a certificate showing —

(i) the total original net tax deducted or repaid in the case of each employee,

(ii) the revised total net tax deducted or repaid in the case of each employee;

(iii) the total original net tax deducted or repaid in respect of all the employees,

(iv) the revised total net tax deducted or repaid in respect of all the employees, and

(v) the difference between the figures given in paragraphs (iii) and (iv) above.

(6) The statement and declaration and the certificate must be—

(a) signed by the employer, or

(b) if the employer is a body corporate, signed either by the secretary or by a director.

(7) Section 98A of TMA (special penalties in case of certain returns) applies to a return under paragraph (2).".

16.—(1) Amend regulation 82 (interest on tax overdue) as follows.

(2) In paragraph (8), at the beginning insert "Except where tax is due in respect of a closed tax year by virtue of a retrospective tax provision,".

(3) After that paragraph add—

"(9) Where tax is due in respect of a closed tax year by virtue of a retrospective tax provision, the "reckonable date" means 14 days after the end of the tax month following that in which the retrospective tax provision is passed.".

17.—(1) Amend regulation 199 (large employers required to make specified payments by specified method of electronic communications) as follows.

(2) At the end add—

"(4) This regulation does not apply to a payment of tax in respect of retrospective employment income for a closed year.".

18.—(1) Amend regulation 205 (mandatory use of electronic communications) as follows.

(2) At the end of paragraph (5) add—

"This is subject to the following qualification.".

(3) After paragraph (5) add—

"(6) This regulation does not apply to specified information which relates to payments of tax due under a retrospective tax provision for a closed year.".

19. In regulation 211 (how information must or may be delivered by employers) in Table 10 after the entry relating to regulation 73 insert—

"73A	annual return of relevant payments by virtue of a retrospective tax provision	Form P35 (RL)	Yes	no"

A. Commissioner
A. N. Other

March 2007 Two of the Commissioners for Her Majesty's Revenue and Customs

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Income Tax (Pay as You Earn) Regulations 2003 (S.I. 2003/2682: "the PAYE Regulations") to provide the necessary accounting and reporting mechanisms for payments which are retrospectively re-characterised as employment income for the purposes of the Income Tax (Earnings and Pensions) Act 2003 (c. 1). The first instance of payments being re-characterised in this way is to be found in section 92 of the Finance Act 2006 (c. 25), and followed an announcement made to the House of Commons by the Paymaster-General in a Written Statement on 2nd December 2004 (Hansard Column 45WS of that date).

Regulation 1 provides for the citation and commencement of the Regulations.

Regulation 2 introduces the amendments to the PAYE Regulations.

Regulation 3 inserts definitions into regulation 2 of the PAYE Regulations. One of these is the concept of the "qualifying payment" – a payment which was not subject to income tax at the time it was paid but which is retrospectively re-characterised as employment income.

Regulation 4 inserts a new regulation 36A into the PAYE Regulations specifying information which an employer must give to an employee where a payment has been made, the employee has left the employment, and the payment is subsequently re-characterised as employment income.

Regulation 6 inserts a new regulation 37A into the PAYE Regulations. This deals with income paid after the cessation of an employment which subsequently becomes subject to PAYE. Regulations 5 and 8 make amendments consequential upon the insertion of regulation 37A.

Regulation 7 inserts a new regulation 50A into the PAYE Regulations dealing with the situation where a qualifying payment has been made to a person in respect of whom HMRC have never issued a code in respect of the employment giving rise to the payment.

Regulation 9 amends regulation 66 of the PAYE Regulations to provide for the inclusion on a deductions working sheet maintained by an employer of entries in open tax years relating to amounts which are retrospectively charged to income tax. A further amendment makes it clear that the regulation does not apply to a closed year.

Regulation 10 inserts regulation 66A into the PAYE Regulations. This provides that a deductions working sheet must be prepared for a closed year where, as a result of a retrospective tax provision, an amount becomes subject to tax, and if one had been prepared before, that it must be revised to reflect the effect of the retrospective tax provision, on the employee's total PAYE income.

Regulation 11 inserts regulation 67A into the PAYE Regulations. This requires an employer who has already delivered a Form P60 to an employee, and whose employment income is increased in a closed tax year as a consequence of a retrospective tax provision, to give the employee a revised Form P60 not later than 1st January following the passing of the enactment containing the retrospective tax provision. In the case of an employee who has not been given a P60 for a closed tax year, but whose employment income is increased by a retrospective tax provision, the employer must, not later than that date, give the employee a copy of the revised Form P14 prepared under regulation 73A.

Regulation 12 amends regulation 68 of the PAYE Regulations to reflect the provisions of section 710(7A) of ITEPA 2003 (the subsection was inserted by section 94 of the Finance Act 2006). This subsection provides for the determination of the date on which a notional payment, which arises by reason of a retrospective provision, is treated as made. It also contains a transitional rule to deal with sums which are retrospectively charged to tax as employment income by virtue of the 2006 Act.

Regulation 13 amends regulation 69 of the PAYE Regulations so that the due date for payment of tax under a retrospective tax provision is 14 or (if paid electronically in respect of an open year) 17 days after the end of the tax period immediately following that in which the Act containing it is passed.

Regulation 14 amends regulation 70 of the PAYE Regulations so that it does not apply to payments of tax due payable by virtue of a retrospective tax provision and so that those payments are left out of account in determining whether for other purposes an employer is entitled to account to HM Revenue and Customs on a quarterly basis for income tax collected under PAYE.

Regulation 15 inserts regulation 73A into the PAYE Regulations. This provides for the delivery of a revised Form P14 and a Form P35(RL) where relevant payments by an employer for a closed tax year increase as a result of a retrospective tax provision.

Regulation 16 amends regulation 82 of the PAYE Regulations to adapt the concept of a due date for computing interest where income tax, relating to a closed tax year, becomes due by virtue of a retrospective tax provision.

Regulation 17 amends regulation 199 of the PAYE Regulations (under which large employers are required to make specified payments electronically) so as to disapply it in the case of a payment of tax due under a retrospective tax provision for a closed tax year.

Regulation 18 amends regulation 205 of the PAYE Regulations (mandatory use of electronic communications in certain circumstances) so as to disapply it in the case of information about payments of tax due under a retrospective tax provision for a closed tax year.

Regulation 19 amends the Table in regulation 211 of the PAYE Regulations to insert the appropriate entries about the new Form P35 (RL) required by regulation 73A.

These Regulations do not impose new costs on businesses, unless they engage in contrived schemes to avoid income tax and national insurance contributions on remuneration paid to their employees. Employers not engaged in such activity will be unaffected.

S T A T U T O R Y I N S T R U M E N T S

2007 No. (C.)

INCOME TAX

The Finance Act 2006 (Section 94(5)) (PAYE: Retrospective Notional Payments — Appointment of Substituted Date) Order 2007

Made - - - - ***

The Commissioners for Her Majesty's Revenue and Customs make the following Order in exercise of the powers conferred upon them by section 94(5) of the Finance Act 2006(**10**).

Citation

20. This Order may be cited as the Finance Act 2006 (Section 94(5)) (PAYE: Retrospective Notional Payments — Appointment of Substituted Date) Order 2007.

Appointment of substituted date for the purposes of Finance Act 2006. s. 94(5)

21. 6th April 2007 is appointed as the date substituted, in place of that on which the Finance Act 2006 was passed, for the purposes of the provisions specified in section 94(5) of that Act.

A. Commissioner
A. N. Other

March 2007 Two of the Commissioners for Her Majesty's Revenue and Customs

EXPLANATORY NOTE

(This note is not part of the Order)

This Order appoints 6th April 2007 as the date substituted, by virtue of section 94(5) of the Finance Act 2006 (c. 25), in place of 19th July 2006 (the date on which that Act was passed), as the date on which notional payments, retrospectively re-characterised as employment income by virtue of the amendments made by section 92 of that Act, are to be treated as having been paid.

Article 1 provides for the citation of the instrument.

Article 2 appoints the date.

This Order does not impose new costs on business.

(**10**) 2006 c. 25.