

**Guidance for Departments and Agencies on the Tax
Treatment of Non-Executive Directors on Civil
Service Boards
Cabinet Office circular issued March 2004**

Introduction

1. Until recently, there was no central guidance on the appointment of Non-Executive Directors (NEDs) on departmental and agency boards. In consultation with their own employment lawyers, departments therefore made their own judgements as to the tax status of their NEDs.
2. It is now apparent that these individual judgements have not always been consistent, either with those of other departments, or with Inland Revenue's view. Indeed, the Inland Revenue have recently queried the treatment of NEDs by a number of departments.
3. Whilst recognising the variety of Non-Executive Director roles within the Civil Service, this guidance has been drawn up with the advice of the Inland Revenue to clarify the tax position of these individuals.
4. Any queries on this guidance should be forwarded to Inland Revenue's Public Department 1 Compliance and Liaison Section (Anna Hughes, anna.g.hughes@ir.gsi.gov.uk, 02920 326 935 or Phillip Morgan, phillip.morgan@ir.gsi.gov.uk, 02920 326 934).

Background

5. Individuals in employment will have their employment income taxed on a Pay As You Earn (PAYE) basis. Individuals who are self-employed will generally submit their own account annually and their profits will be assessed for tax purposes at this stage.

The employment income legislation expressly applies equally to offices as it does to employments. If an individual is an office-holder their income will be charged to tax on a PAYE basis.

6. **The Inland Revenue consider the vast majority of NEDs will be office-holders for tax purposes. If exceptionally this is not the case, the Inland Revenue will look at all the factors relating to their appointment to determine how they should be taxed.**

Why is your NED an Office-Holder?

7. Tax status is a factor in deciding employment status, but it is not determinative. It may be possible for an NED to be an office-holder for tax purposes, but an independent contractor for employment law purposes. Legal advice is currently being sought over the employment status of Non-Executive Directors.
8. For tax purposes, Inland Revenue state that there is no legal definition of an "office". However, they advise that case law indicates that the term "office" – "denotes a post to which a person can be appointed, which he can vacate, and to which a

successor can be appointed". S.5 (3) of the Income Tax (Earnings and Pensions) Act 2003 defines office to include "in particular any position which has an existence independent of the person who holds it and may be filled by successive holders".

9. The leading case is *Edwards V. Clinch* (56 TC 367), where Buckley L.J. says at page 381 that "an "office" in this context is, in my opinion, a post which can be recognised as existing, whether it be occupied for the time being or vacant, and which, if occupied, does not owe its existence to in any way the identity of the incumbent or his appointment to the post".
10. An NED on the main board of a Non-Ministerial Department fills a statutory office, so is clearly an office-holder.

The situation for NEDs on the boards of Ministerial departments and agencies is less fixed. However, the Inland Revenue consider the vast majority of these NEDs are office-holders for tax purposes.

11. This is because the NED post can exist without the individual NED. Factors indicating this include:
 - A vacancy can exist prior to or after termination of an individual's appointment;
 - A person specification, job description and/or advert is written for the NED post;
 - The Civil Service Reform Commitment to include at least one NED on each departmental board;
 - Cabinet Office guidance exists on issues such as induction, training and performance review.

12. Where exceptionally a department considers a specific NED is not an office-holder as described above, the Inland Revenue will consider the specific facts relating to that post in order to come to a view. Any such queries or doubts should be referred to Public Department 1 (see contact details at paragraph 4). In doing so, departments should make it clear that they are considering the status of a "NED" post in the Civil Service.

13. Where exceptionally an individual NED wishes to appeal against the decision that has been taken about their tax status, they should contact PD1 for further information (See contact details at paragraph 4).

Notes

Guidance on the tax treatment of Travel and Subsistence expenses can be found in the Inland Revenue's National Insurance Guidance Note Number 6, "Part-Time Appointments: Payments of Expenses for Travelling and Subsistence" (Inland Revenue PD1, July 2002) applies. Any queries should be forwarded to PD1 (see contact details at paragraph 4).

National Insurance Contributions will be due on all general earnings paid to office-holders in the same way as they are due for all earning paid to employees.

Where individuals hold a number of NED posts, each would be looked at separately and could be deemed to be of different classifications. In such cases the Inland Revenue have agreed that judgement on the level of National Insurance Contributions payable can be deferred until the end of the financial year.

Inland Revenue have advised that any requirements for back payment of tax shall be decided on a case by case basis. Departments should contact PD1 for further information (see contact details at paragraph 4).

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