

Personal tax round up

(Lecture P1166 – 17.11 minutes)

IR35 - Christa Ackroyd revisited

Summary - Christa Ackroyd, the Look North presenter, has failed in her appeal to have her deemed employment status under the IR35 legislation overturned.

In March 2018 we reported on the Christa Ackroyd case. You may remember that she was a presenter for the BBC who supplied her services through Christa Ackroyd Media Ltd, her personal service company under two successive fixed-term contracts. The first contract was dated 29 May 2001 and was followed by a later contract dated 4 May 2006 that was terminated by the BBC in 2013. It was the latter contract that was the subject of the appeal.

The First Tier Tribunal decided that the most significant factor to be taken into account when reaching their decision was the fact that the BBC could control what work Christa Ackroyd did under the hypothetical seven year contract. Other indicative factors of her employment status were that:

- The BBC had the right to specify what services her company would provide with the BBC's editor having ultimate control over programme content;
- Christa Ackroyd Media Ltd was not allowed to send a substitute for Christa Ackroyd;
- Christa Ackroyd was restricted from providing services to other UK organisations without their consent.

The case has now been heard at the Upper Tribunal. Christa Ackroyd Media Ltd appealed against the decision on the sole ground that the First Tier Tribunal had erred in law in its conclusion that the BBC had sufficient control over Christa Ackroyd to mean that an employment relationship would have arisen if the services had been directly supplied.

Decision

In deciding this case, the Upper Tribunal stated that the key question they needed to answer was:

'In so far as the contract does not deal explicitly with all aspects of control, is it appropriate in view of the contract, and the wider context, to conclude that ultimate control in relation to Ms Ackroyd's services lay with the BBC?'

This meant that the First Tier Tribunal had used the wrong test and made an error of law when they considered whether 'a right of ultimate control' was an implied term of the contract.

A broader approach was needed. The Tribunal needed to consider where the ultimate right of control lay by looking at all of the circumstances of the engagement. That included the BBC's obligations under its Editorial Guidelines. Through the programme's editor, the BBC had control over programme content. The Upper Tribunal agreed with the First Tier Tribunal that it did not matter that Christa Ackroyd was not contractually bound by the Editorial Guidelines because both parties understood that where needed, the BBC could enforce those Guidelines.

Although the Tribunal had taken the wrong approach, they had reached the right conclusion, as their conclusions had been relevant to a 'broader process of construing the contract and the context in order to determine the extent of the BBC's control over the "what, how, where and when" in relation to Ms Ackroyd's services'.

The Upper Tribunal concluded that the BBC had a sufficient degree of control over the provision of services by Christa Ackroyd to satisfy the control requirement necessary for an employment relationship to exist under an IR35 hypothetical contract.

Christa Ackroyd Media Limited v HMRC [2019] UKUT 0326 (TCC)

IR35 - Helen Fospero win

Summary – Even if the presenter had been engaged directly by ITV, rather than through her personal service company, she would have been self-employed as she worked under a series of short-term contracts with no guarantee of further work and with ITV having no obligation to provide any work.

Having worked previously for Sky News and ITV over a 14-year period, in 2002 Helen Fospero was approached by the BBC. When she took up this role, she was told that she could not be an employee of the BBC, but must be engaged as an independent contractor through a personal service company and so she established Canal Street Productions Limited.

Roll forward to 2011 and she was back working for ITV. This case related to a two-year period covering tax years 2012/13 and 2013/14 where HMRC argued that she fell foul of the IR35 legislation, that she was not a contractor but employed, and so liable to pay just over £80,000 in unpaid taxes and national insurance contributions.

During this period, Helen Fospero worked for ITV as a guest presenter. Initially as a news presenter on GMTV to cover sick leave and then later in 2011 and early 2012, under casual arrangements to host several editions of "Lorraine" and the early morning programme "Daybreak". She worked as a substitute for Lorraine Kelly, with the circumstances of the two presenters being very similar.

From 2012, things became a little more formal with Canal Street Productions Limited entering into three separate agreements setting out the working arrangements between Canal Street Production Limited and ITV going forward.

Under these agreements the company agreed that Helen Fospero would:

- Would be offered around 20 days of anticipated work per annum but that this was not guaranteed;
- Would work on an assignment by assignment basis with no guarantee of future work;

- Was free to work elsewhere provided ITV had approved such work and that ITV had first-call on her time;
- Was treated very differently to employed ITV presenters who were provided with laptops, an ITV email address and rooms at ITV's studios.

Decision

As expected, in reaching their decision, the First Tier Tribunal considered what the hypothetical contract between Helen Fospero and ITV would look like.

The Tribunal concluded that there was no obligation between each engagement on ITV's part to offer work. Although the minimum number of days was set at 20, there would be no guarantee of work nor obligation for Helen Fospero to accept it. She was engaged on an assignment-by-assignment basis with no guarantee of future work at the end of each piece of work. There was no mutuality between the specific engagements

Helen Fospero undertook several hours of preparation for each engagement in her own time, which was not dictated by ITV. However, there was no right of substitution and ITV had full control over the time and location of her work as well as ultimate editorial control. However, unlike ITV's other employees, Helen Fospero had no contractual rights to holiday or sick pay or entitlement to other benefits.

In concluding, the Tribunal disagreed with HMRC. Under a hypothetical contract, Helen Fospero would not be working as an employee, but rather as a self-employed contractor.

The taxpayer's appeal was allowed.

Canal Street Productions Limited V HMRC (TC07422)

Market value of gifts to charity

Summary – Taxpayers in these Lead Cases were found to have made excessive claims for tax relief on gifts of shares to charities as the market value of those shares was overstated.

This appeal concerned arrangements, which HMRC described as being for tax avoidance purposes. Under these schemes shares in a number of companies were gifted to charity and tax relief claimed. The decision involved detailed discussions about the appropriate way to value shares by reference to a hypothetical sale.

As there were a number of cases that raised common issues, these appeals were selected as Lead Cases and so this case was actually five cases with similar share valuation issues that were heard together. In all five cases, the taxpayers had claimed tax relief in relation to gifts of shares in companies listed on the Channel Islands Stock Exchange to various charities:

Dr Patel	Clerkenwell shares valued as at 23 March 2005
Dr Venkataraman	Signet shares valued as at 31 March 2006
Mr Foster	Modia shares valued as at 18 October 2005
Mr Freeman	Modia shares valued as at 8 September 2005
Mr Jakeway	Your Health shares valued as at 31 March 2006

Under s587B ICTA 1988, tax relief is available for the market value of the gift of shares listed on a recognised stock exchange. In this case, the Channel Islands Stock Exchange is a recognised exchange for this purpose and so the sole issue before the Tribunal was the determination of the correct market value of the shares in the companies on the dates that were gifted.

The legislation states that the correct value is the market value at, or immediately after, the time when the disposal is made (whichever time gives the lower value). HMRC argued that the shares in question were placed on the Channel Islands Stock Exchange at inflated prices, resulting in overstated tax relief claims in respect of the shares that were gifted. HMRC issued closure notices that significantly reduced the amount of tax relief for each taxpayer.

Decision

The First Tier Tribunal agreed with HMRC's expert witness. He noted that the share price in each of the Companies increased significantly in a matter of a couple of days after their listing on the Stock Exchange (In excess of 1000%). In the expert's opinion these extreme share prices, which were not supported by any new public information at the time, indicated that the price paid for the companies' shares, were not appropriate indicators of the true market value of a minority share at each of the gifting dates. He considered that the direct market method of valuation was an appropriate way of determining the value of a minority share in each of the companies, although by reference to private arm's-length transactions in companies. This methodology assumed that the taxpayer was able to determine the actual market value of the companies' assets and that the lower values in that range applied.

The expert testimony was unchallenged and the market value was therefore lower than that calculated by both the taxpayer and HMRC in their closure notices.

The appeals were dismissed and the First Tier Tribunal increased the assessment amounts in line with the expert evidence.

Vipin Patel and others v HMRC (TC7404)

Trading loan or investment?

Summary – Without a loan used for trading purposes, there was no qualifying loan and the loss was disallowed.

On 25 February 2010, Steven Flashman made a payment of £130,000 to Emerging Markets Investment Ltd but by September 2011, he was informed that the company had run into financial difficulties. On 23 June 2013 Mr Flashman received £30,000 as repayment of £130,000 that he had advanced three years earlier.

Steven Flashman argued that the £130,000 paid to Emerging Markets Investment Ltd was a qualifying loan and that, he had suffered a loss of £100,000 His 2014/15 tax return was filed on time, showing net capital gains of £264,314 after deducting the £100,000 loss.

HMRC argued that no loss relief was available under s253 TCGA 1992 as the monies had not been loaned for the purpose of a trade but rather, they were an investment. A closure notice was issued on 13 October 2017. Steven Flashman appealed.

Decision

The First Tier Tribunal concluded that two companies, EMI Wealth Ltd and Emerging Markets Investment Ltd (companies whose names were used interchangeably during communications), were not engaged in any trading activity. Their primary role was that of marketing activity and to propose a scheme to potential investors and then to sign up those investors who were attracted by the potentially high returns.

The Tribunal concluded that Mr Flashman did not make a trading loan to Emerging Markets Investment Ltd (or to EMI Wealth Ltd) and so the loss of £100,000 was disallowed.

Mr Steven Flashman v HMRC (TC07419)

PPR and ESC D49

Summary – The First Tier Tribunal had no jurisdiction to consider HMRC’s refusal to apply an extra statutory concession and so the appeal was struck out.

On the face of it, this case concerned the availability of Private Residence relief. However, the real issue was whether or not a Tribunal has jurisdiction to consider HMRC’s refusal to apply an extra statutory concession.

Andrew and `Melanie White bought four interests in land in 2001 and 2002 which they converted into a single dwelling. They eventually took up residence in the property, some time between September 2003 and November 2003.

HMRC argued that the date of acquisition of a property acquired in stages starts from the date of the first unconditional contract and so, in this case, on 11 June 2001. As the couple did not occupy the completed property until September or November 2003, it was outside the maximum two-year time limit permitted by ESC D49 as deemed occupation and so PPR relief was denied.

It was common ground between the parties that the facts of this case took it outside the strict provisions of the legislation but Andrew and Melanie White appealed against HMRC’s decision not to apply ESC D49 to the gain made on the disposal of their property.

Decision

The First Tier Tribunal stated that the statutory provisions did not permit any delay in the commencement of occupation if full principle private residence relief was to be granted.

Before the Tribunal could consider whether or not the provisions of ESC D49 should be applied to the facts of this case, they stated that they needed to decide whether or not they had jurisdiction to consider it. The Tribunal stated that their jurisdiction is statutory and they could see nothing in the legislation that required or permitted them to consider ESC D49 and so, as a result, they struck out the appeal in accordance with Rule 8(2)(a) of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2003 on the grounds that the Tribunal did not have the jurisdiction to consider the appeal.

Andrew White and Melanie White v HMRC (TC07434)

Off plan PPR

Summary – It seems that we have come full circle with the Court of Appeal deciding that Mr Higgins was correct when arguing that ownership for private residence relief purposes starts from completion, rather than the date of exchange.

Detailed facts of the case can be found in our November 2018 notes, where Steve Sanders took a look at the Upper Tribunal's decision to overturn the First Tier Tribunal's decision in favour of HMRC. In summary, Mr Higgins entered into an 'off-plan' contract in October 2006 but had no right to access the building while the flat was under construction. After delays to the development due to funding issues, the apartment was finally finished in December 2009 and the contract legally completed on 5 January 2010 after which point Mr Higgins had a legal right of occupation. He moved in at that time and occupied it as his main residence until he sold it two years later.

The First Tier Tribunal found that the period began when legal title to the property and a right of occupation occurred. The Upper Tribunal disagreed finding that the period of ownership for CGT began from exchange of contracts and therefore started on 2 October 2006 when unconditional contracts were signed with the developer.

Mr Higgins appealed to the Court of Appeal

Decision

The Court of Appeal noted that, when buying a property, it was normal practice for there to be a period of time between exchange and completion. They considered it to be extremely unlikely that Parliament had intended the PPR rules to result in the typical homebuyer being denied PPR relief for this period of time. Adopting HMRC's argument, whereby the period of ownership for PPR relief runs from exchange of contract would mean that very few people buying a new home would qualify for 100% PPR relief.

The Court of Appeal found nothing in legislation stating that a short gap between contract and completion could be ignored for PPR relief purposes. However, they found that it was not necessary to measure the period of ownership for PPR relief by the statutory deemed times of acquisition and disposal (s28 TCGA 1992). Instead, the term 'period of ownership' for PPR purposes should be given its ordinary meaning. The period of ownership should therefore begin from the date that the purchase was completed. In this case that was from 5 January 2010.

Higgins v HMRC [2019] EWCA Civ 1860

Exempt gift to Jersey trust

Summary - Restricting the gifts to charities IHT exemption to UK charities goes against the EU directive on the free movement of capital.

In 2007, Beryl Coulter, a Jersey resident left her residuary UK estate on trust for the purpose of building homes for elderly residents in Jersey, so for charitable purposes.

HMRC argued that the legacy was not a transfer to 'a trust established for charitable purposes' because s23 IHTA 1984 required it to be established in the UK. The trust was established under Jersey law and so was not a UK charity.

HMRC charged some £600,000 IHT on the legacy, holding that it was not a gift to a charity. The High Court and Court of Appeal agreed with HMRC that the charity exemption was limited to UK charities, though had this been a UK trust it would have been available.

The executors argued that distinguishing between Jersey and UK trusts in this way was contrary to EU law on the free movement of capital. This forbids restrictions on the free movement of capital between EU member states, and between member states and third countries.

Decision

However, Jersey is not part of the UK. The Supreme Court agreed with the Court of Appeal that Jersey should be regarded as a third country for the purpose of a transfer of capital from the UK. This meant that the EU rules on the free movement of capital applied to transfers between the UK and Jersey. S23 IHTA 1984 restricted the relief to trusts governed by UK law and that was incompatible with EU law and could not be justified on administrative grounds. Consequently, they found that the trust did qualify for relief under s 23.

The appeal was allowed.

Routier & Anor v HMRC [2019] UKSC 43