

IR35 roundup – Part I

(Lecture B1083 – 17.54 minutes)

IR35 considers whether, ignoring their personal service or intermediary company, a director would be considered to be an employee of their end client. In making this decision, we use the normal employed versus self employed criteria and can take into account any contracts that have been signed but only to the extent that they represent the commercial reality of what is being done.

Online employment status test

HMRC has an employment status test online. This has been used by the public sector and given that the public sector rules are likely to be extended to the private sector, this tool is going to become increasingly relevant.

At the moment the tool is a little subjective but hopefully it will be improved over time.

HMRC's recent win

Robert Jamieson discussed this case in some detail last month. Interestingly, there are around a 100 similar appeals ongoing.

The case concerned Christa Ackroyd Media Ltd, a company that was facing a £420k PAYE and NIC bill relating to a contract that Christa Ackroyd had with the BBC. Having worked for a competitor, the BBC managed to persuade her to sign a contract with them, resulting in the ratings for their 'Look North' programme far exceeding expectations.

In the court, the factors that indicated that she was employed were:

- She had a seven year contract for 225 days a year;
- Her contract included an exclusivity clause allowing her to work elsewhere but only with the BBC's permission;
- There was no substitution clause in her contract;
- She was economically dependent on the BBC with over 90% of her income coming from the contract;
- BBC editors exercised control over the programme content, directing her as she presented.

The big factors

The key deciding factors are:

- Mutuality;
- Substitution;
- Control.

While Christa Ackroyd fell foul of all three, this might not be the case for others. Let's consider some other cases that have been heard at a similar time.

MDCM Ltd v HMRC

Mr Daniels traded through his personal service company, MDCM Ltd, obtaining work through an agency, STL. Under these arrangements, STL received £370 per day from the end client, £310 of which was passed on to MDCM Ltd. The contract length ran from October 2012 to July 2013 with MDCM supplying Mr Daniels as nightshift manager on two projects. Mr Daniels:

- worked set shifts and reported to a project manager only once a week;
- represented STL as contact point for the contractors;
- did not participate in STL staff meetings or functions;
- provided his own insurance and mobile phone;
- was given protective equipment and access to site computer.

When considering the hypothetical contract between Mr Daniels and STL the First Tier Tribunal concluded there were points for and against employment as follows:

For employment

- No substitution;
- Flat fee with no financial risk;
- Safety equipment provided.

Against employment

- Not integrated into STL business;
- Not controlled;
- Could refuse work at another site;
- No notice periods, severance pay or pay-in-lieu;
- No sick pay or holiday pay.

But on balance, due to the short contract and lack of control, the Tribunal considered that Mr Daniels was not an employee.

Public sector contractor wins again

In *Jensal Software Limited v HMRC*, Ian Wells had worked as an IT contractor for many years. In 2012/13, he undertook a series of short contracts through his personal service company, JSL, providing his services through a recruitment agency.

HMRC argued that these contracts fell within the IR35 rules and assessed JSL to PAYE and NIC of £27,000 but Ian Wells disagreed. He had won an IR35 case before and believed that he would win again.

Facts to consider in this case were as follows:

- Agency had advertised for an IT contractor to work;
- In agency/JSL contract it stated that no mutuality of obligation was intended;
- For contract duration Mr Wells was free to work for other clients and did so;
- Mr Wells was unsupervised - instructions were limited and checks were minimal;
- His role could only be varied with agreement of agency and himself
- Substitution clauses existed;
- There was an element of financial risk as he would have been expected to rectify any sub-standard work in his own time.

Additionally, he provided some of his own equipment needed to carry out his work

The First Tier Tribunal considered the hypothetical contract between the DWP and Mr Wells which actually involved looking at three actual contracts! There was minimal mutuality of obligation, as the DWP was not committed to offer additional contracts.

The judge stated:

“There was no continuing obligation on the part of the DWP to provide work; if it chose to abandon the project there was no contractual basis upon which Mr Wells could demand further work”

The Tribunal also concluded that there was a substitution clause and Ian Wells did have more freedom to carry out his work than the DWP employees.

He was in business on his own account and was not in IR35.

This case gives us insight into mutuality, substitution and control.

Overlooked IR35 case

The case of Armitage Technical Design Services Limited v HMRC was reported by Rebecca Cave, in AccountingWeb.

Mr Armitage is a skilled electrical control and instrumentation designer contracting in the nuclear industry. The case concerned his personal service company, Armitage Technical Design Services Ltd and the work that he did for Diamond Light Source Ltd. This case was heard back in November 2016. A summary judgment was released to the parties on 27 January 2017 but neither party applied for a full written judgment within 28 days and so the full judgment had not been published on the courts service website.

The issue was whether the income from Diamond Light Source Ltd for 2009/10 to 2013/14 fell within the IR35 rules. During this period Mr Armitage completed several separate projects for Diamond Light Source Ltd but also worked for other customers. Mr Armitage and his advisers were convinced that the contracts were not within IR35 but offered to settle the tax and NIC due for the two in date years providing that there was no penalty. They did not want the case dragging on. HMRC refused as it wanted a penalty for negligent conduct, claiming that Mr Armitage had not discussed IR35 in sufficient detail with his accountant. HMRC submitted that in constructing the hypothetical contract, Mr Armitage would be considered to be an employee of Diamond Light Source Ltd.

In reaching their decision, the First tier Tribunal noted a number of relevant points:

- Substitution: Diamond Light Source Ltd would accept a reasonably qualified substitute in the place of Armitage, but this was never tested in practice. The First Tier Tribunal was satisfied that there was not an absolute requirement for Armitage to personally perform the tasks
- Control: Armitage chose to work in Warrington rather than at the Diamond Light Source Ltd headquarters in Didcothe only visited the Didcot site once per project. He worked to his own deadlines and was not directly supervised by Diamond Light Source Ltd staff. The judge concluded that Armitage was not subject to the same level of control as the Diamond Light Source Ltd employees.
- In business on his own account: Armitage was paid an hourly rate but he was not subject to the electronic time management system that applied to Diamond Light Source Ltd employees. He provided his own software and some of the computer equipment required for the project and he worked on other projects for other clients concurrently with the projects he was completing for Diamond Light Source Ltd.
- Part and parcel of the organisation: Armitage received none of the benefits provided to the Diamond Light Source Ltd employees such as a locker for personal belongings, sick pay or holiday pay and he did not attend employee social functions or training events and was not included on the team-sheets.
- Mutuality of obligation: The First Tier Tribunal said that the mere offer and acceptance of a piece of work does not amount to mutuality of obligations. The mutuality factor was neutral in this instance.

The First Tier Tribunal concluded that on balance the contracts Armitage performed did not fall under IR35 and all tax determinations and penalties were cancelled.

What can we conclude from recent cases?

When reaching their decision, the First Tier Tribunal consistently consider mutuality, substitution, control and then they consider other relevant factors. It seems that provided you possess one of the key factors, you are highly likely to be outside of IR35. Christa Ackroyd failed on all three and so lost her case.

Employment status consultation

Currently, an employment status consultation is looking at whether the key status tests of mutuality of obligation, personal service, and control should be codified within legislation.

As an alternative they are considering whether we should have a more precise test that sets limits for contract lengths (say one year), percentage of income (say 90%) and location. Using this approach, Christa Ackroyd's 7 year contract at the BBC would still be caught under IR35 and the other cases that we have looked at would not.

This would make it much easier to assess when our clients are caught by IR35. It will be interesting to see what the outcome is.