

Personal service companies

(Lecture B1076 – 22.15 minutes)

Much has been written about the recent tax case of *Christa Ackroyd Media Ltd v HMRC* (2018), with the First-Tier Tribunal's decision, which went in favour of HMRC, certainly being deserving of detailed analysis. *Christa Ackroyd Media Ltd* is a personal service company which was set up several years ago by Christa Ackroyd (CA). CA is, along with her husband, a shareholder in, and director of, the company.

CA is a television journalist who has been engaged in a variety of media roles since the late 1970s. Between 1990 and 2001, she co-presented a news and current affairs programme called 'Calendar' for Yorkshire Television, initially with Richard Whiteley and later with Mike Morris. 'Calendar' enjoyed ratings well above those of the equivalent BBC programme ('Look North'). In those days, the Yorkshire area was one of the few regions where the BBC were not winning the ratings battle with ITV. The BBC were keen to change the fortunes of 'Look North' and so CA was approached to join the BBC on what was referred to as 'a freelance basis'. She initially turned them down, but, when a second – doubtless more attractive – offer was made, she agreed to jump ship and started working on 'Look North' in September 2001, with Harry Gration as her co-presenter. The new version of 'Look North' was immediately successful.

CA's first contract in this job was between the BBC and *Christa Ackroyd Media Ltd*. It ran for a period of five years. In 2006, she was offered a new five-year contract, but she declined this offer because she wanted a seven-year agreement. At the same time, there were discussions about CA giving up a regular newspaper column which she wrote for the *Sunday Express*. The BBC wished CA to terminate her involvement with the newspaper, which she was anyway minded to do on account of the time which she had to devote to the writing of the column. In due course, she did negotiate a seven-year contract with the BBC, together with an *ex gratia* payment of £40,000 which was presumably linked to CA ceasing her newspaper activities. This contract stated that CA could not provide her services for publications of any kind other than for the BBC without first obtaining the BBC's consent.

This second contract, which provides the subject-matter for the case, gave the BBC 'first call' on CA's services for up to 225 days a year. For this, she was to be paid, starting in 2007, £163,233 per annum in equal monthly instalments regardless of whether or not the BBC had taken up their full entitlement of days. Her fees for subsequent years were to increase in line with inflation (measured by reference to the RPI). CA's company was also eligible for a six-monthly performance-related bonus of £7,500 if the ratings for 'Look North' were 'consistently and significantly' higher than the ratings for 'Calendar' (which they always were).

Another relevant factor is that the vast majority of the income received by CA's company came from the BBC. For example, less than 2% of the company's gross income in 2009 was derived from other sources and, for the following year, the equivalent figure was 3.5%.

Put briefly, HMRC considered that these arrangements fell within the IR35 legislation in Ss48 – 61 ITEPA 2003, with the result that a substantial tax liability arose.

The key issue here is to consider whether, if the services provided by CA to the BBC had been rendered under a contract that was directly between her and the BBC (rather than between her company and the BBC), she would have been regarded as an employee of the BBC under this hypothetical contract. The difficulty is that we have a real contract between two unrelated parties that one might have thought would be the proper basis for the assessment to tax. However, under the IR35 regime, we are forced to disregard the real contract between the real parties and to assume a hypothetical contract (involving different parties) and then establish what the tax outcome would be had those different parties entered into such a contract.

In the event, the First-Tier Tribunal decided that CA would have been an employee under the hypothetical contract with the BBC. The reasons given for this conclusion were that:

1. there was mutuality of obligation;
2. there was a sufficient degree of control over the performance of CA's services;
and
3. the other provisions of the hypothetical contract were consistent with it being a contract of service.

With regard to mutuality of obligation, one writer has made the following point:

'The mutuality of obligation was said to be (CA's) obligation to perform the work offered and for the BBC to pay her for it. I have never been able to understand this interpretation of a mutuality of obligation. I am clearly wrong in thinking that the relevant mutuality in establishing a master/servant relationship is the obligation for the employer to provide or offer work and the obligation on the employee to accept and perform it. In this case, the BBC was not bound to call on the services of CA – which could be said to exclude the mutuality of obligation.'

The same writer, referring critically to the First-Tier Tribunal's judgment, goes on:

'The Tribunal also referred at length to the question of control which will clearly vary from case to case – and here CA has no set hours or set working days or set location. However, they concluded that the hypothetical contract satisfied the relevant condition which is that (CA) was "subject to the other's control in a sufficient degree to make that other master". So how much control is necessary for her to become an employee? Oh, that's easy: it is control to a sufficient degree for her to be an employee. That argument is so circular it is almost a perfect sphere!'

However, it should be noted that, under the terms of the contract, the BBC had the right to 'call on the freelance services of CA (including acting as presenter reporter and reasonable ancillary services normally associated with such a role) as they may require to the output of the BBC'. In other words, the BBC was entitled to use CA's skills in whatever area and type of programme that they saw fit. The BBC was not obliged just to use her services on 'Look North'. This sounds like – to this speaker – enough control to establish an employment relationship.

The surrounding facts suggest that this is a not unreasonable conclusion, with the key ones being the:

- seven-year term for CA's contract;
- BBC's exclusive rights over CA's services; and
- proportion of the turnover of CA's company which derived from the BBC.

It is known that there are a number of other cases in the offing involving BBC 'talent'. It will be interesting to discover whether they are – essentially – on all fours with CA's circumstances or whether (as one suspects) most of these will be about contracts where the BBC's rights over the performer are limited to a specific programme, i.e. unlike CA's arrangements.

Contributed by Robert Jamieson