

Personal income tax round up (Lecture P1436 – 17.59 minutes)

Football commentator and IR35

Summary - The IR35 intermediaries legislation applied to arrangements between the individual's personal service company and Sky TV.

Neil McCann was a former Scottish Premiership footballer who had also played international football for Scotland. He provided his services as a commentator to British Sky Broadcasting Ltd (Sky) through his personal service company, McCann Media Limited.

During this time, the only other activity undertaken by Neil McCann was for a six-week period when he acted as interim manager of Dundee FC. This work was agreed to at a time when McCann Media Limited was in the process of negotiating a new three-year contract with Sky.

HMRC raised assessment to collect PAYE and NICs on the basis that the IR35 rules applied to the services provided and the company appealed.

The First Tier Tribunal found that Neil McCann “could not be considered to be in business on his own account and concluded that the provisions of the hypothetical contract were consistent with a contract of employment.”

Having lost the case at the First Tier Tribunal, the company appealed to the Upper Tribunal arguing that:

1. The First Tier Tribunal had erred in law with respect to the issue of mutuality of obligation, arguing that Neil McCann's engagement with Dundee FC affected his availability to provide services to Sky;
2. The First Tier Tribunal had erred in law by failing to take into account other factors of the contractual relationship which were inconsistent with employment.
3. The First Tier Tribunal had erred in law in applying the three-stage test set out in the Kickabout Productions Ltd case and that the analysis of the actual and hypothetical contracts was 'blurred'.

Decision

The Upper Tribunal considered whether the First Tier Tribunal had made errors of law when considering whether there was mutuality of obligation.

It concluded that it was possible for an employee to serve more than one employer at any point in time.

The Sky Contracts specified an annual fee to be paid in equal monthly instalments upon submission of an invoice. McCann Media Limited were entitled to submit a similar invoice while Neil McCann was engaged by Dundee FC to those submitted in April and June 2017, the months either side of Dundee FC engagement.

Further, there were 'clearly significant contractual restrictions on services'. Neil McCann informed Sky in advance of taking the Dundee interim role which was consistent with the restrictive covenants to seek mutual agreement. Further he made himself available to work for Sky during the six-week

period. Neither McCann Media Limited and/or Neil McCann had 'contractual autonomy and free agency' to do what they wanted. The Tribunal found that there was no error of law in the First Tier Tribunal's decision over mutuality of obligation.

The Upper Tribunal found that the First Tier Tribunal had carried out a thorough analysis of the relevant contract clauses and had taken into account the core provisions of the actual contracts between the two companies.

The Upper Tribunal found that the First Tier Tribunal had separately considered the actual contractual terms and those of the hypothetical contract. Indeed, McCann Media Ltd was unable to provide specific examples of where the two had been 'blurred'.

The company's appeal was dismissed.

McCann Media Limited v HMRC [2024] UKUT 00094 (TCC)

IR35 IT consulting case

Summary – With material errors in law made by the First Tier Tribunal, this IR35 case has been remitted back to a differently formed panel of the First Tier Tribunal.

RALC Consulting Limited was the personal service company of Richard Alcock, an IT consultant who was the company's sole director and shareholder.

The company provided his services for fixed periods of time under three sets of contractual arrangements. In each case, there were four parties to the chain of contracts:

1. Mr Alcock;
2. RALC Consulting Limited;
3. an agency (Networkers Recruitment Services Limited and Capita Resourcing Limited);
and
4. the end client (Accenture (UK) Limited and the Department for Work and Pensions).

On the basis that the intermediaries legislation applied, HMRC had raised assessments to collect PAYE and NICs.

RALC Consulting Limited appealed to the First Tier Tribunal, who found in the taxpayer's favour.

HMRC appealed to the Upper Tribunal arguing that the First Tier Tribunal:

- failed to properly identify the terms of the hypothetical contracts and to apply the common law test of employment status to those terms as required by section 49(1) ITEPA 2003; and
- had erred in law by reaching its conclusions over mutuality of obligation, control, other terms of the hypothetical contract being inconsistent with a contract of employment, and whether Neil Alcock was in business on his own account.

Decision

The Upper Tribunal found that the First Tier Tribunal clearly directed itself that it should adopt the three-stage process identified by the Court of Appeal in *Atholl House*. The issue was whether this approach had been correctly carried out.

In considering mutuality of obligation, the Upper Tribunal stated that:

‘The FTT appears to conduct Stage 1 of the three-stage process and then to reach a conclusion on sufficiency of mutuality of obligation in the hypothetical contract without first having determined the terms of that contract.’

The Upper Tribunal found that the First Tier Tribunal applied the mutuality of obligation test to the terms of the actual contracts rather than the hypothetical contracts.

The Tribunal stated that ‘the construction of the hypothetical contract is more than a transposition of the actual contract terms into the hypothetical contract.

The First Tier Tribunal did not consider what other relevant ‘circumstances’ needed to be taken into account in constructing the hypothetical terms as required by section 49(1)(c) and section 49(4) ITEPA 2003.

The First Tier Tribunal had erred in law by not properly constructing a hypothetical contract for each of the engagements and by failing to apply the employment status test to those terms.

The Upper Tribunal moved on to consider whether the errors found in the approach taken had a material effect on the outcome of the case and decided that they had.

On mutuality of obligation alone, the Upper Tribunal found that the First Tier Tribunal's decisions included several significant errors. For example, the fact that the employer was not obliged to provide further work and the employee was under no obligation to accept further work offered ‘did not prevent mutuality of obligation existing within an engagement under which work is offered, the worker does the work offered, and the worker is paid’.

Similarly, the lack of any guarantee of a minimum number of hours' work and the right of the employer to terminate the arrangement were not inconsistent with mutuality of obligation in relation to an individual engagement.

The Upper Tribunal considered no further grounds of appeal, concluding that looking at mutuality of obligation alone, the First Tier Tribunal had made material errors of law. The case was set aside and remitted it to a differently formed panel of the First Tier Tribunal

HMRC v RALC Consulting Limited [2024] UKUT 00099 (TCC)

Flexible and hybrid workers

HMRC guidance now states:

“Modern information and communications technology has allowed many more employees to work from home on a flexible or hybrid basis. Under such arrangements, the employee will have a base office and journeys from home to that location will be ordinary commuting.”

This means that such employees will continue to have the office as their permanent workplace and journeys made from the employee's home to their office will be classed as ordinary commuting and the employee will not be able to claim tax relief.

<https://www.gov.uk/guidance/ordinary-commuting-and-private-travel-490-chapter-3#employees-who-work-at-home>

Loan notes to a trust

Summary – With no business or commercial purpose to the arrangements, tax and NICs were due on the loan notes when they were transferred to the trust.

Christopher Pinto was director and controlling shareholder of *Lynx Forecourt Limited*, a garage construction company.

During the tax year ending 5 April 2003, two bonuses were paid to the director as loan notes, issued by a newly incorporated company. The loan notes were transferred to a trust in which Christopher Pinto was the beneficiary. In the event of his death within 12 months following the award, he would cease to be entitled to the loan notes.

The company argued that the transfer of the loan notes fell within s.140A ICTA 1988 (repealed from 6 April 2003). As a conditional acquisition of shares, the loan notes were only taxable after the condition expired.

HMRC disagreed, saying that the condition should be ignored as it had no commercial purpose and sought to collect PAYE of £800,000 of income tax and NICs totalling £153,400 when the loan notes were transferred to the trust.

The company appealed.

Decision

The First Tier Tribunal found that there was no business or commercial purpose for the arrangements. Christopher Pinto and *Lynx Forecourt Limited* simply sought to pay less income tax and NICs than would have been the case if they had paid the bonuses in cash.

The Tribunal found that ‘as a result of the terms of the loan notes, the market value of the loan notes when the conditionality period in relation to each bonus ended would be very much less - approximately 80% less - than the market value of the loan notes on their issue and initial transfer’.

Adopting a purposive approach, a commercially irrelevant condition inserted solely to ensure that the arrangements fell within s 140A ICTA 1988 should be ignored. *Lynx Forecourt Limited* should account for PAYE and National Insurance on the loan notes when they were transferred to the trust.

At the hearing, it was agreed that the Tribunal would leave the question of quantum to be determined by the parties by agreement.

The taxpayer's appeal was dismissed.

Lynx Forecourt Limited v HMRC (TC09124)

Unauthorised payment charge

Summary – A loan made by a taxpayer's pension scheme resulted in an unauthorised payment charge as well as an unauthorised payment surcharge.

David Foulkes, 49, had a pension with the West Midlands Pension Fund, a local government pension scheme, with a transfer value was £18,309.

Following advice, on 20 June 2017 he transferred the fund to Alderley Wealth Management Pension Scheme, who in turn invested in a company called Haimachek UK Limited.

David Foulkes was informed that “that investors could receive a loan, if required, which was totally unconnected to the pension fund” and a few days later he received a payment of £11,819, representing a loan from a company called Lendtech Limited. The loan was for £13,040 less an administration fee of £1,000 and advance interest of £195.

HMRC initially considered that the transfer of £18,309 was an unauthorised member payment and enquired into his tax return for 2017/18. HMRC issued a closure notice charging David Foulkes to an unauthorised payments charge (40%) and an unauthorised payments surcharge (15%) totalling £10,069. However, by the time of the appeal, HMRC agreed that the charge and surcharge should be calculated on the amount of the loan (£13,040) rather than the fund transfer value (£18,309)

David Foulkes argued that there was no unauthorised member payment or that it was not just and reasonable that he should be liable to the unauthorised payments surcharge.

Decision

The First Tier Tribunal found in HMRC's favour concluding that there was a sufficient causal link between the loan from Lendtech Limited and the fund's investment in Haimachek UK Limited. In reaching that conclusion the Tribunal found that:

- The investment in Haimachek UK Limited and the possibility of a loan were first discussed at the same meeting;
- There was clearly some link between the investment in Haimachek UK Limited and the loan from Lendtech Limited;
- While the loan agreement was not expressly conditional on any investment in Haimachek UK Limited, the Tribunal was satisfied that without the investment in Haimachek UK Limited, no loan would have been made available to David Foulkes;
- It was not relevant that David Foulkes was unaware of any connection between the investment of his fund in Haimachek UK Limited and the loan which he received from Lendtech.

For these reasons the Tribunal were satisfied that the payment of £13,040 received by David Foulkes was an unauthorised member payment and that an unauthorised payments charge calculated at 40% was payable.

Moving on, the Tribunal found that it was just and reasonable for David Foulkes to be subject to the unauthorised payments surcharge as he could have identified a link between the investment and the loan as:

- The investment in Haimachek UK Limited and the possibility of a loan were first discussed at the same meeting;
- The funds were only made available after the pension transfer took place with instructions to invest the fund in Haimachek, but before he had signed the loan agreement;
- The loan agreement referred to David Foulkes as having an account balance with a company, which he knew was connected with the investment in Haimachek UK Limited;
- He took part in the arrangements, which gave rise to an unauthorised member payment, which amounted to a significant proportion of the fund.

The Tribunal stated that:

“Even accepting that he could not reasonably have known of a connection between the investment in Haimachek and the loan, he did sign an indemnity which stated that he would not take a loan as a result of the pension transfer. It was unwise to negotiate a loan at the same time as dealing with the pension transfer.”

On balance, it was just and reasonable for David Foulkes to be liable for the unauthorised payments surcharge.

David Foulkes v HMRC (TC09139)

Taxpayer in prison

Summary – Despite being in prison and being prevented from running his own property business, he was beneficially entitled to receive the property income generated which was still taxable on him.

In May 2019, believing that Stanley Herrmann had received property income which has not been declared, HMRC opened an enquiry into his tax affairs.

He agreed that he had purchased three properties on 10 November 2000, 12 November 2001 and 16 November 2001 and admitted that he had income from these properties.

In February 2020, HMRC issued discovery assessments for the years 2002/03 and 2004/05 to 2017/18 together with penalties.

Stanley Herrmann disputed the assessments which related to employment income, pension income as well as his property income. He claimed that:

- he had not received either the employment pension income on which he was being assessed;
- he could not be taxed on his property rental business income as the years assessed included periods when he was in prison (December 2002 to December 2012). As he was not permitted to conduct business from prison, he should not be responsible for the failures of his agent to deal with the relevant tax matters.

Decision

The First Tier Tribunal stated that there was no statutory exemption from tax for people in prison.

Although he was not directly conducting the business, he had engaged an adviser to do so on his behalf. He continued to be beneficially entitled to the income which remained taxable in him throughout his time in prison.

He claimed that he had a reasonable excuse for failing to notify his rental income as HMRC should have written to his agent while he was in prison. The Tribunal confirmed that it was for him to notify his liability to tax. HMRC was not obliged to locate non-compliant taxpayers. With no evidence to support the claim that his estate agent was qualified to deal with tax matters or that that this agent had in fact been engaged to deal in such matter, there was no reason for HMRC to make contact with them.

The First Tier Tribunal dismissed Stanley Herrmann's appeal, upholding HMRC's assessments and penalties.

Stanley Augustine Herrmann v HMRC (TC09132)