

# Business tax round up

(Lecture B1131 – 25.15 minutes)

## Another presenter wins

*Summary – The presenter of “The Kaye Adams Programme” defeated HMRC when the Tribunal ruled that the hypothetical contract that existed was a contract for services and that no employment relationship existed.*

Atholl House Productions Limited is the personal service company (PSC) of Kaye Adams, who performs services for the BBC and other media organisations. She has been a freelance journalist since the mid-1990s. Her work other than for the BBC has included appearances on TV in programmes such as “Loose Women” on ITV and the newspaper review on Sky, together with columns for various newspapers and magazines such as The Daily Mirror, The Sunday People and No 1 magazine. In addition, she has worked extensively in the corporate sector, hosting events and awards evenings and giving presentations. She has a significant social media profile and has written two books in collaboration with her friend and colleague, Nadia Sawalha.

During the two tax years of assessment to which the appeal relates, Kaye Adams presented “The Kaye Adams Programme” on BBC Radio Scotland. She provided her services to the BBC under two agreements between the BBC and her PSC.

The only issue to decide was whether IR35 applied to the PSC in relation to the two tax years in question as contended by HMRC. As in previous cases, such as the Christina Ackroyd and Lorraine Kelly cases, it was necessary to determine whether the effective relationship in this case between Kaye Adams and the BBC was a “contract for services” (entered into by a self-employed individual in the course of carrying on business on his or her own account) or a “contract of service” (so an employment contract).

In making their decision, the First Tier Tribunal would need to consider mutuality of obligation, control and other relevant terms of a hypothetical contract.

- Mutuality of obligation: Was there an obligation on the part of the BBC to provide work and an obligation on the part of the Kaye Adams to accept work? Did the hypothetical contract require Kaye Adams to perform the work personally or was it a substitute for a realistic possibility;
- Control: To what extent did the BBC control how, what, where and when the work which was to be carried out by Kaye Adams was conducted;
- Other terms: Remember, the contract would not be treated as a contract of service if the other terms of the hypothetical contract were inconsistent with that analysis. Case law has identified a number of features that can be said to typify a contract of service. It would be important to consider who provided the equipment needed to fulfil the terms of the agreement, who provided clothing and whether benefits which one would normally associate with ongoing employment, such as holiday and sick pay, maternity leave and an entitlement to a pension were provided.

## *Decision*

Taking into account all of the work that Kaye Adams undertook, the Tribunal stated that the overall impression that they had derived from the evidence before them was that Kaye Adams generally carried on her profession as an independent provider of services and not as an employee. But what about contract?

Mutuality of obligation - The Tribunal agreed with HMRC. If the BBC had decided after entering into the actual agreement that it did not wish Kaye Adams to fulfil the Minimum Commitment set out in the relevant agreement when she was able and willing to do so, then it would still have been obliged to pay the Minimum Fee to her. Additionally, although the contract stated that there was a right of substitution, this right was illusory and no such substitution would happen.

Control - Although each hypothetical contract did give the BBC an element of control over the manner in which she performed her services for them, that control did not extend to the nature of her other engagements or, except to the extent that such content could damage the BBC, the content of such other engagements.

In addition to the fact that the BBC did not have first call on Kaye Adams's time or any control over her other engagements, there were a number of other features of the agreements which were not consistent with the contracts' being employment contracts:

- She had no entitlement to use BBC equipment except when she was in the studio or presenting programmes outside the studio. She used her own laptop and mobile phone when she was not in the studio;
- She had no entitlement under the agreements to holiday or sick pay, maternity leave or a pension entitlement and was treated differently from the BBC's employees when it came to matters such as reviews, changes in job specification and applying for jobs internally within the BBC.

The Tribunal concluded that they considered the whole picture in this case, each hypothetical contract between the BBC and Kaye Adams was a contract for services and did not give rise to a relationship of employer and employee.

The appeal was allowed.

Interestingly the Tribunal went on to explain why they had reached a different decision to that reached by the Tribunal in the Christina Ackroyd case:

1. In Ackroyd, the contract between the BBC and Christina Ackroyd's service company was 7 years' long and it followed a contract which was 5 years' long. In contrast, each contract in this case was for approximately 1 year;
2. The ratio of Christina Ackroyd's non-BBC income to her BBC income was materially different from the comparable ratio in relation to Kaye Adams. Christina Ackroyd's non-BBC income was effectively de minimis. Christina Ackroyd's BBC income amounted to 98% and 96.5%, respectively, of her aggregate gross income.. This is significantly more than Kaye Adams split of closer to 50%;
3. Christina Ackroyd was given a clothing allowance whereas no such allowance was made to Kaye Adams;

4. In Ackroyd the Tribunal found as a fact that the BBC had first call on her time, that she attended BBC training sessions and that she could be told by the BBC whom she was interviewing. None of these features was present in the relationship between the BBC and Kaye Adams; and finally
5. Christina Ackroyd was required to obtain the consent of the BBC for her non-BBC engagements whereas the Tribunal here found as a fact that each actual agreement between the BBC and Kaye Adams did not require her to seek the consent of the BBC before accepting other engagements.

*Atholl House Productions Limited v HMRC (TC07088)*

NOTE: With two big name cases recently winning their appeals at the First Tier Tribunal (Lorraine Kelly and Kaye Adams), it was interesting to see the report in *Accountancy Age* (18 April 2019). Just before the end of the 2018/19 year end, a number of freelance BBC presenters have received Regulation 80 determinations demanding PAYE and NIC from their PSC as well as a letter opening an employer compliance review. HMRC is also enquiring into the tax affairs of freelance TV presenters who have worked for other broadcasters.

*Accountancy Age* reported that David Kirk, who advises a number of TV presenters, has recommended accountants should consider appealing to have the determination overturned, on the grounds that HMRC has not made a discovery that could have led to the reasonable decision that PAYE was underpaid.

## **Prepare for changes to IR35 rules**

From April 2020 the rules for engaging individuals through personal service companies (PSCs) are changing. The responsibility for determining whether the off-payroll working rules apply will move to the organisation receiving an individual's services.

HMRC has published a four-point list of for how to prepare for the change:

1. Businesses should look at their current workforce (including those engaged through agencies and other intermediaries) to identify those individuals who are supplying their services through PSCs;
2. Use HMRC's 'Check Employment Status for Tax' service to determine if the off-payroll rules apply for any contracts that will extend beyond April 2020;
3. Start talking to contractors about whether the off-payroll rules apply to their role;
4. Put processes in place to determine if the off-payroll rules apply to future engagements. These might include who in the organisation should make a determination and how payments will be made to contractors within the off-payroll rules.

[www.gov.uk/guidance/prepare-for-changes-to-the-off-payroll-working-rules-ir35](https://www.gov.uk/guidance/prepare-for-changes-to-the-off-payroll-working-rules-ir35)

## **Business Property Renovation Allowance (**

*Summary – Some of the expenditure incurred in converting a flight-training centre into a hotel that was disallowed by HMRC qualified for BPPRA but other amounts did not.*

In its 2010/11 tax return London Luton Hotel BPPRA Property Fund LLP (LLH) claimed Business Property Renovation Allowance (BPPRA) of £12,478,201, the amount paid under a contract with a property developer, for the conversion of a flight-training centre near London Luton Airport into a 124-room hotel. LLH argued that the full amount was eligible as this development sum was negotiated at arms-length and paid entirely for works “on or in connection with the conversion, renovation or repair” of a qualifying building into qualifying business premises.

HMRC’s guidance on what qualifies for BPPRA states that it includes capital spending incurred when converting a building into business premises, renovating a building that is, or will be, a business premises and repairing business premises.

Spending that qualifies for relief includes:

- building work, for example the cost of labour and materials
- architectural and design services, for example the detailed design of the building and its future layout
- surveying or engineering services, for example services to check the structure of the building or specialist checks for asbestos
- planning applications, for example the costs of getting essential planning permissions to alter a listed building
- statutory fees and statutory permissions, for example the costs of building regulation fees, or getting listed building consent

Spending on acquiring land, extending a building or developing land next to a building does not qualify for relief and neither does most spending on plant and machinery unless it’s a qualifying fixture.

HMRC disallowed £5,255,761 of the total on the basis that it was not qualifying expenditure as follows:

- The Interest Amount (£350,000);
- The Capital Account (£2,000,000);
- IFA fees (£372,423.40);
- Promoter fees (£310,000);
- Legal fees (£153,409.89);
- Franchise costs (£272,862);
- Fixtures, Fittings and Equipment and other non-qualifying amounts (£587,556);
- Residual amount/profit (£1,209,510).

## *Decision*

The First Tier Tribunal considered each item in turn.

**Interest Amount/License Fee:** This payment was necessary to enable the contractors to enter the property for the purposes of carrying out the works, it was a commercial arrangement; and was clearly incurred “in connection with” the conversion of the property.

**The Capital Account:** This was not considered to be real expenditure and the Tribunal agreed with HMRC that it was designed to inflate the BPR claim.

**IFA and Promoter Fees:** The Tribunal allowed these fees, rejecting HMRC’s claims that such costs were not capable of being “in connection with” the conversion, renovation of the property.

**Legal Fees:** The Tribunal stated that most of these fees should be disallowed as they related to the purchase of the property although a small amount may qualify. The exact amount was left to the parties to resolve.

**Franchise Costs:** £248,000 of this this payment was to remove one of the original hospitality consultants and so did not qualify.

**Fixtures, fittings, equipment and other non-qualifying amounts:** This included cupboards, headboards, mirrors, reception desk, bar counters, which were all permanently fixed and so allowable.

**Other expenditure included tarmacking, landscaping, drainage and mains service connections and a roof top plant room.** This expenditure was mostly within the land immediately surrounding the qualifying building and intended to serve the property and so was allowable in full.

**Residual amount/profit:** Agreeing with HMRC, the Tribunal stated that the profit element should be apportioned over the project cost as whole, including land and concluded that the apportionment be revised to reflect their findings.

*London Luton Hotel BPR Property Fund LLP v HMRC (TC07059)*

## **Capping payable tax credit for R&D tax relief**

R&D tax relief allows SME’s with a trading loss that has incurred qualifying R&D expenditure to surrender all or part of the loss for a tax credit of 14.5%. HMRC identified schemes that allowed companies to claim this tax credit where there was no R&D activity or employment in the company.

Budget 2018 therefore proposed capping the relief available to three times the company’s total PAYE and NICs liability for that year, this is PAYE and NICs for all staff not just R&D staff and includes both employee and employer NICs. The proposal is that the cap will come into force from April 2020.

There was a previous cap on SME R&D tax credit that was the amount of its PAYE and NICs liability for the period which was abolished from 1 April 2012.

The consultation is looking at the following options to ease administration and ensure genuine R&D companies with low PAYE and NICs liabilities are not adversely affected:

- the cap would only apply above a certain threshold;
- allowing the cap limit to take into account other group or connected companies' PAYE and NICs liabilities if R&D has been subcontracted to them or they provide externally provided workers;
- companies being able to carry forward any losses which cannot be surrendered because of the cap and then surrender the losses for a tax credit in subsequent years if the PAYE and NICs liabilities in those future years allows them to.

#### *Example of how cap could work*

Loss-making company A makes spends £100,000 on R&D in 2025, SME R&D relief is  $130\% \times £100,000 = £130,000$ . The company surrenders £230,000 losses for a payable tax credit of £33,350 ( $14.5\% \times £230,000$ ). In 2025, company's A PAYE and NICs liability is £40,000.

Under the cap the maximum tax credit would be £120,000 ( $3 \times £40,000$ ) and therefore company A could claim the tax credit in full.

If company A only has £3,000 PAYE and NICs liability, then the cap would be £9,000. Taking the situation where the rules introduced a threshold of £10,000 above which the cap applies, then company A could make a claim at threshold level and would receive £10,000 of tax credit.

This is the equivalent to £68,965 of losses ( $£10,000 / 14.5\%$ ) so the remaining £161,035 ( $£230,000 - £68,965$ ) of losses could be carried forward. It may be possible for the company to surrender some of these losses in 2026 for an R&D tax credit.

*<https://www.gov.uk/government/consultations/preventing-abuse-of-the-rd-tax-relief-for-smes>*

*Contributed by Joanne Houghton*

## **Taxi firm: Agent or principal?**

*Summary – The taxpayer acted as principal when supplying drivers for local authority jobs, meaning that he should have been registered for VAT.*

Bryn Williams operated a taxi business. Two types of driver undertook work for Mr Williams' business: owner-drivers who owned and maintained their own cars, and drivers who used cars that Mr Williams owned and maintained.

Owner-drivers were credited with 90% of the tender price for the appropriate job. The remaining value was the management fee due to Mr Williams for the service that he provided. Drivers who used cars provided by Mr Williams were credited at a lower rate in order to reflect a cost of vehicle rental.

As part of the business Mr Williams provided taxis under contracts with local authorities and government departments. In the event that nominated drivers were unable to complete the agreed service then the work would be offered to other drivers in the pool. If there were no alternative drivers available, the work would be passed to other businesses, which could result in a charge that was greater than the tender price for the job, resulting in a penalty to the nominated driver that would be deducted from future payments.

Mr Williams believed that he was acting as agent and so his only taxable supplies were the management fees that he received of between 10% and 40% of the monies received from the local authorities. He was not registered for VAT on the basis that he considered his taxable sales were less than the registration threshold.

HMRC considered that Mr Williams was acting as principal and created a backdated registration to 1 March 2009. They argued that Mr Williams negotiated the authority contracts, the cars carried his business logo; he received the money from the customers and paid the drivers.

#### *Decision*

The Tribunal concluded that Mr Williams was making a taxable supply to the local authority in return for the gross amounts received from them. The contractual and commercial facts supported that conclusion. The local authority did not know who would be carrying out the job. There was thus no particular person who at that time could be said to be the principal for whom Mr Williams was acting and who was bound by his actions. The First Tier Tribunal concluded that the commercial reality was that Mr Williams was responsible for providing the rides to the local authority account customers, and not the drivers.

There was no partnership between the drivers and Mr Williams. Although there was some sharing of risk in relation to non payment, the contracts between the drivers and Mr Williams did not disclose a sharing of profits between them or sufficient intention to be in business in common.

The appeal was dismissed.

*Bryn Williams v HMRC (TC06963)*

## **Training across Europe – place of supply**

*Summary - the CJEU found that seminars provided by a Swedish company in various member states were taxable in each of these member states.*

Srf was a Swedish company that provided 5-day accounting and management courses. These courses were run for taxable persons whose businesses were established or who had a fixed establishment in Sweden. Most of the courses took place in Sweden but the issue concerned a number of courses that were run in other member states.

Srf argued that the seminars took place in the member states and so were taxable there.

The Swedish tax authorities considered that the seminars provided outside Sweden were taxable in Sweden arguing that the seminars did not fall under Directive 2006/112 art 53 where the place of supply of services in respect of admission to cultural, artistic, sporting, scientific, educational, entertainment or similar events is the place 'where the events actually take place'.

#### *Decision*

The CJEU concluded that art 53 related to services that granted of the right of admission to an event in exchange for a ticket or payment. The fact that registration and payment took place in advance of the seminars was irrelevant. The purpose of the directive was to tax services at the place of consumption.

Seminars in member states other than Sweden were therefore taxable in those member states. It did not matter that Srf would suffer an increased administrative burden as a result of having to account for VAT in several jurisdictions.

*Skatteverket v Srf konsulterna AB (Case C-647/17)*

*Tax Journal 22 March 2019*

## **Transitional Simplified Procedures extended**

HMRC has announced that it is extending its Transitional Simplified Procedures (See April 2019 notes and the article that follows) making these procedures available at all UK ports and airports if the UK leaves the EU without a deal. Remember, once a business is registered for Transitional Simplified Procedures, it will be able to transport goods from the EU into the UK without having to make full customs declarations at the border or pay import duties straight away.

For most goods imported, traders will be able to delay putting in customs declarations for the first 6 months after EU exit. Businesses will have until 4 October 2019 to submit declarations and pay any import duty for goods imported up to 30 September 2019. After that, customs declarations and payments will need to be made on the fourth working day of the following month.

HMRC is also giving importing businesses until 30 September 2019 to provide a guarantee that is required to cover any customs duties that they wish to defer. This will apply for all importers, not just those who have registered for Transitional Simplified Procedures.

HMRC has published a new guide on how to make import declarations using these transitional simplified procedures, including the extended deadline for submission of supplementary declarations in respect of non-controlled goods until 4 October 2019.

[www.gov.uk/government/news/hmrc-outlines-extension-of-transitional-simplified-procedures](http://www.gov.uk/government/news/hmrc-outlines-extension-of-transitional-simplified-procedures)

[www.gov.uk/government/collections/trading-with-the-eu-if-the-uk-leaves-without-a-deal](http://www.gov.uk/government/collections/trading-with-the-eu-if-the-uk-leaves-without-a-deal)

## **Declarations using transitional simplified procedures**

Last month we provided you with a summary of how these transitional simplified procedures will work. This month we are providing you with a bit more detail.

### *Controlled goods procedure*

Licensed goods as well as alcohol or tobacco, where additional duties are owed are able to adopt the transitional simplified procedures but the business will either need to appoint a customs agent or buy software to enable them to do the appropriate paperwork.

Before importing the goods to the UK from the EU, a simplified frontier declaration must be submitted. On arrival in the UK, the goods must be accompanied by full supporting documentation and then, before the end of the following working day, the declaration must be updated to show 'arrived' status. A final supplementary declaration must be submitted by the fourth working day of the month following arrival.

Where both standard and controlled goods are imported, this controlled goods procedure can be used for both.

### *Standard goods procedure*

For all other goods, the following information is recorded on the business's commercial records as the first part of their declaration before the goods cross the border:

- unique reference number for the consignment;
- description of the goods and the commodity code;
- quantity imported;
- purchase and (if available) sales invoice numbers;
- customs value;
- delivery details;
- supplier emails;
- serial numbers of any certificates or licenses.

These records are then updated with the date and approximate time the goods arrived in the UK once this happens.

A supplementary declaration must then be made by the fourth working day of the month following the arrival of the goods but submission can be delayed until 4 October to provide time to prepare to make the supplementary declarations. Any VAT due must still be paid on time and monthly Intrastat declarations must still be submitted on time.

In certain circumstances, supplementary declarations can be combined into a single supplementary declaration. This is possible where the following information is the same:

- declaration type (all transitional simplified procedure declarations will be imports);
- deferment account number;
- importer and EORI number;
- representative (there must be one declaration for each representative used);
- delivery terms;
- country of destination is the UK;
- country of dispatch;
- location of goods (this will usually be the delivery address);

Item information can be combined onto a single line within the combined supplementary declaration if the following information about the goods is the same:

- Customs Procedure Code (provided by HMRC);
- Commodity Code;
- description of goods;
- exporter and EORI number (the goods must be from one supplier);
- details used in the calculation of Customs Duty – tax, calculation method, currency;
- item price;
- customs valuation method;
- country of origin;
- supplementary units (type of unit, that is boxes, items, litres).

#### *Acceptance of supplementary declarations*

Once HMRC accept a supplementary declaration, the Customs Handling of Import and Export Freight system sends a customs response message giving a calculation of what is owed. HMRC will collect any customs duties and import VAT (if not registered for VAT) on the 15th day of the month that the supplementary declaration is made; excise duties are collected later, on 29th of the same month.

#### *Final supplementary declaration*

A final supplementary declaration must be submitted by the fourth working day of the month following each reporting period, declaring the number of supplementary declarations:

- due for that reporting period;
- finalised;
- late from the previous reporting period.

### *Goods under the Common Transit Convention*

The transitional simplified procedures can be used when importing goods from the EU or for goods that have cleared EU customs formalities, under the Common Transit Convention

Using the Customs Transit procedure allows for the temporary suspension of duties and taxes allowing customs clearance formalities to take place at the point of destination rather than at the point of entry into the customs territory. Goods imported under the Common Transit Convention, must be discharged from transit at an office of destination or to an authorised consignee using the existing process.

Simplified declarations can be used to declare EU goods to free circulation at the time of discharging the transit movement. The process followed will depend on whether the goods are subject to the controlled or standard goods procedure.

#### Controlled goods

A simplified frontier declaration must be submitted before the goods leave the office of destination or authorised consignee.

The office of destination or authorised consignee must have the master reference number of the simplified frontier declaration as evidence that the goods have been moved to free circulation.

#### Standard goods

These goods must be declared by recording them in the businesses commercial records before the time that the goods are to leave the office of destination or authorised consignee.

Arrival time in the UK does not need to be recorded but the records must be updated to include the time that the goods are released to free circulation. This will be the tax point.

The office of destination or authorised consignee must have evidence that the business is registered for the transitional simplified procedures and that the goods have been declared to free circulation. Providing the EORI number provides this evidence.

A supplementary declaration must be submitted by the fourth working day of the month after the goods have been released to free circulation. This can be delayed until 4 October.

If goods are in an inventory-linked temporary storage facility, a customs clearance request will be needed to release the goods. The EORI number will be validated during this process. If goods are in a non-inventory linked facility, local procedures should be followed. Records should be updated with the time that the goods are released from temporary storage. This will be the tax point.

*<https://www.gov.uk/guidance/making-declarations-using-transitional-simplified-procedures>*