

Personal tax round up – October 2024 (Lecture P1456 – 22.32 minutes)

IR35 appeal - adviser's error

Summary – The Limited Liability Partnership's application to make a late IR35 appeal was denied due to their agent's error.

Barry Cowan, a former professional tennis player, performed services as a tennis commentator for Sky UK Limited through his limited liability partnership, Cranham Sports LLP.

On 18 June 2021, HMRC issued an opinion based on communications with the partnership and Sky, concluding that under a notional contract between Barry Cowan and Sky, Barry Cowan would be regarded as employed by Sky. Under the IR35 legislation, HMRC sought to collect additional income tax and class 1 NICs that were due in respect of the 2013/14 to 2018/19. HMRC's opinion letter acknowledged they could have misunderstood/ misinterpreted information supplied and stated they would of readdress any consequent issues brought to their attention and advise accordingly.

On 8 July 2021, the LLP's agent replied by email setting out 23 disputed points. HMRC ignored these points and in a letter dated December 2021 and email to the taxpayer, the HMRC officer stated:

'If you disagree with HMRC's position, you have 30 days from the date of this letter within which to either accept my offer of an internal review by replying to this letter or notify the appeal to tribunal.

If you neither accept the offer of a review nor notify the appeal to the tribunal, the appeal will be treated as settled by agreement under section 54(1) of the Taxes Management Act 1970 on the basis of my view of the matter as set out above.'

The agent replied promptly, accusing HMRC of failing to deal with any of the points previously raised, but did not respond to HMRC's 30-day deadline.

About two months later, the LLP appealed to the First Tier Tribunal, who, having considered the three-stage test in *Martland v HMRC*, did not accept the late appeal.

As a reminder, the three stages are:

1. Establish the length of the delay – The First Tier Tribunal confirmed that this was 60 days and considered this serious enough to move on to the second and third stages;
2. Consider the reason why the default occurred – The First Tier Tribunal stated that 'Acting prudently, a competent professional could have been expected to have protected the Applicant's position by formally asking for an internal review' rather than taking no action;
3. Evaluate "all the circumstances of the case" – The Tribunal stated that instead of 'seeking to remediate the position as soon as possible the representative continued to lock horns with what he considered to be the outrageous conduct of HMRC. He did not appeal but continued to make complaint to HMRC'.

The matter moved to the Upper Tribunal.

Decision

The Upper Tribunal found that there had been no errors of law made by the First Tier Tribunal.

The First Tier Tribunal had considered all of the relevant issues and was entitled to reach the decision that it had made.

Cranham Sports LLP v HMRC [2024] UKUT 00209 (TCC)

Rugby pundit caught by IR35

Summary – The Upper Tribunal overturned the First Tier Tribunal’s decision, finding that the intermediaries legislation applied to a former rugby international, providing commentary and punditry services through his personal service company.

S & L Barnes Limited provided the services of Stuart Barnes to a number of media organisations, including *The Times*, *Sunday Times* as well as several broadcasters.

This case concerned two contracts covering the period 2013 to 2019 during which time S & L Barnes Limited supplied the services of Stuart Barnes to Sky TV, representing approximately 60% the company’s overall income.

The First Tier Tribunal had applied the Ready Mixed Concrete three-stage test to the hypothetical contract between Stuart Barnes and Sky, ultimately finding in S & L Barnes Limited’s favour. In reaching this decision, the First Tier Tribunal had identified twelve factors which pointed away from employment and concluded that IR35 did not apply.

HMRC appealed to the Upper Tribunal on two grounds:

Ground 1: The First Tier Tribunal had erred in its construction of the hypothetical contract concerning Sky’s right of first call over Stuart Barnes and purported variations to the contract.

Ground 2: The First Tier Tribunal had erred in its interpretation and/or application of the third stage of the RMC test, including by taking into account irrelevant factors and failing to take into account relevant factors.

Decision

With both parties and the First Tier Tribunal having agreed that the intermediaries ‘control’ requirement was satisfied, the Upper Tribunal found that Ground 1 of this appeal was only relevant insofar as the First Tier Tribunal’s findings influenced its decision regarding the third stage of the RMC test and/or its overall decision that IR35 did not apply. The extent of control in the hypothetical contract should be a relevant factor, at this time.

The Upper Tribunal were satisfied that this was taken into account by the First Tier Tribunal, as it was specifically identified as a relevant factor at that time.

The Upper Tribunal found that there was sufficient evidence available to enable the First Tier Tribunal to reach the decision which it did, including its acceptance of Stuart Barnes’ evidence that he gave priority to his newspaper columns at certain times.

Moving the second ground of appeal where HMRC argued that the First Tier Tribunal had taken into account irrelevant factors and failed to consider material factors as required at the third stage.

The Upper Tribunal agreed with the First Tier Tribunal that certain factors were contrary to employment including the unrestricted use of his intellectual property by being allowed to recycle his Sky material in his newspaper columns, with Sky's full knowledge and the variation clause in the hypothetical contract that allowed him to make himself unavailable for match commentaries during various tournaments.

However, the Upper Tribunal found that the First Tier Tribunal had failed to take into account relevant factors pointing towards an employment contract which were significant and included:

- the long duration of the engagement, being a fixed term of four years extendable by two years;
- the lack of a right to provide a substitute;
- Sky's right of first call for 228 days a year;
- Sky's right of exclusivity;
- The 'very limited' financial risk undertaken by Stuart Barnes as he received a significant fixed monthly fee in advance that was not linked to actual work done. Further, Sky provided all studio equipment and related travel and accommodation bookings

Having found material errors of law which outweighed other the factors, the Upper Tribunal remade the decision, finding that the relationship under the hypothetical contract would have been one of employment. His work for Sky did not form part of his business on his own account

HMRC v S & L Barnes Limited [2024] UKUT 00262 (TCC)

Excessive CJRS claims

Summary – The taxpayer had claimed excessive Coronavirus Job Retention Scheme payments, calculated based on salaries increased after the relevant cutoff date set out in the legislation.

Kingdom Travel Services Limited operates a travel business providing chauffeur services to passengers arriving and leaving Heathrow and Gatwick. The company owns some cars but does not employ drivers who are subcontracted.

Between March 2020 to March 2021 made 19 claims under the CJRS in respect of monthly salary payments of £2,000 said to have been made to three employees who were furloughed: Mr M Abdelbadia, Mrs Abdelbadia and Ms Al-Shemery.

Between September 2020 and December 2021 HMRC sought and were eventually provided with information relating to the business and the company's claims. HMRC established that in the PAYE return made on 29 February 2020 the employees were shown to have been paid their February salaries as follows

- Mr Abdelbadia £900.00 (gross);
- Mrs Abdelabdia £700.00 (gross); and

- Ms Al-Shemery £811.04 (gross).

The company claimed that on 22 February 2020, Mr Abdelbadia had notified each employee that they were to receive a salary increase payable from 1 March 2020 such that their salary increased to £2,000 per month.

With the reference salary for the purposes of the CJRS being determined by the pay reference period ended prior to 19 March 2020, HMRC determined that the company's entitlement to CJRS was limited to the lower salaries paid in February. In June 2022, HMRC issued assessments totalling just over £53,000 as well as penalties.

The company appealed to the First Tier Tribunal but no appeal was lodged in respect of the penalties, with any appeal now would be out of time.

Decision

The First Tier Tribunal found the company was entitled to receive CJRS payments for its three fixed rate employees calculated as:

- Mr Abdelbadia: 80% of £900.00;
- Mrs Abdelbadia: 80% of £700.00;
- Ms Al-Shemery: 80% of £811.40.

The Tribunal confirmed that the legislation did not make provision for salary increases either immediately before or during the operation of the scheme.

With the assessments raised by HMRC within 4 years of the earliest period to which they pertain, they were in time and therefore valid.

Mr Abdelbadia's argued that HMRC should not have allowed the company to continue to make the claims at £2,000. Had he known that his CJRS payments would be based on the lower salaries, he would not have paid the higher salaries.

He also claimed that if the CJRS payments were restricted then he should be entitled to reimbursement of the PAYE tax on the £2,000.

The Tribunal stated that:

- it was not for them to determine whether contractually the employees were entitled to £2000;
- if the £2,000 payments were contractually made, then the PAYE, NICs and pension contributions would have been calculated correctly irrespective of the company's entitlement to CJRS;
- it was not for them to determine whether HMRC should have stopped the CJRS payments as the Tribunal has no jurisdiction to consider HMRC's conduct generally

For these reasons the appeal was dismissed.

UK business liable for employers' NICs

Summary – The company was liable to account for employers' NICs under the 'host employer' provisions (SI 1978/1689, Sch 3 para 9).

Bilfinger Salamis UK Ltd supplied services to a North Sea oil platform operator, Marathon Oil UK Ltd, using its own employees. These employees were divided between a core team who were on permanent contracts and ad hoc employees on short term contracts.

At Marathon Oil UK Ltd's request, this arrangement was later modified to an offshore employment model, with the aim of avoiding employers' NICs. This involved the core team of Bilfinger Salamis UK Ltd employees being transferred to a Guernsey company, BIS Guernsey Limited, and then this Guernsey company then supplying the labour to Bilfinger Salamis UK Ltd. That core team worked on the oil platforms under Bilfinger Salamis UK Ltd's direction as part of fulfilling Bilfinger Salamis UK Ltd's contract with the oil platform operator.

The issue to be decided by the First Tier Tribunal was whether Bilfinger Salamis UK Ltd was liable for Secondary Class 1 NICs in respect of their core team's earnings, despite them being employed by a Guernsey employer.

During the relevant period Para. 9 Sch. 3 of the Social Security (Categorisation of Earners) Regulations 1978 (SI 1978/1689) made an entity liable to secondary Class 1 NICs where it was a 'host employer' to whom 'the personal service' of a person employed by a foreign employer was 'made available', and where those services were 'rendered' to the host employer for the purpose of its business.

Decision

It was common ground that Bilfinger Salamis UK Ltd fell within the definition of 'host employer' and that, if the personal service of the relevant individuals was made available to Bilfinger Salamis UK Ltd, it was 'rendered' for the purpose of Bilfinger Salamis UK Ltd's business. The point in dispute was the interpretation and application of the requirement that 'the personal service' of Bilfinger Guernsey's employees was 'made available to' Bilfinger Salamis UK Ltd.

Bilfinger UK's argument was that para 9 only applied where there was an arrangement whereby the individual became in substance the employee of the host employer, with the host employer entitled to exercise such supervision, management and control over the individual as is normally conferred on an employer by an employment contract.

Taking a purposive approach to the legislation, the First Tier Tribunal found as follows:

1. The purpose of para 9 was to cover secondment-like arrangements (rather than ordinary subcontracting, or anti-avoidance).
2. 'Personal service' had the same meaning as in employment case law, namely the obligation that the employee work 'by one's own hands', not 'by another'.
3. For personal service to be 'made available' to the host employer, the host employer had to have some degree of direction over the relevant person, but this need not include a legal right to give such direction. The First Tier Tribunal noted here that if, as Bilfinger Salamis UK Ltd suggested, for para 9 to apply the foreign employer was required to alienate the legal right (vis-a-vis the employee) to direct the individual, then they would cease to be the foreign employer, thus rendering para 9 impotent.

4. The definite article, 'the', before 'personal service' in para 9 carried significance and required that the entirety (viewed realistically) of a given employee's personal service is made available and rendered. The obligation to the foreign employer persists, but at the choice and command of the foreign employer it is only rendered for the business of the host employer.

Applying its reasoning to the facts, the First Tier Tribunal found that viewed realistically the entirety of the 'personal service' of the core team of Bilfinger Guernsey employees was 'made available' and 'rendered' to Bilfinger Salamis UK Ltd for the purposes of Bilfinger Salamis UK Ltd's business. Accordingly, para 9 applied, meaning that Bilfinger Salamis UK Ltd was liable as the secondary contributor for Secondary Class 1 NICs during the relevant period. Bilfinger Salamis UK Ltd's appeal was therefore dismissed.

Bilfinger Salamis UK Limited v HMRC (TC09261)

Adapted from the case summary in Tax Journal (6 September 2024)

Expenses reimbursed by umbrella company

Summary – An umbrella company's employees could not claim a deduction for reimbursed travel and subsistence expenses as each assignment was deemed to be a separate employment taking place at a permanent workplace.

Mainpay Limited was an umbrella company that engaged workers to undertake assignments for third party end users, such as hospitals and schools via an employment agency.

The company argued that:

- there was a 'single overarching contract of employment' covering gaps between assignments as well as the assignments themselves;
- each worker carried out assignments at multiple temporary workplaces;
- travel and subsistence expenses to and from the workplace were deductible from the workers' earnings for tax purposes.

HMRC disagreed stating that each assignment was treated as a 'separate employment' at a permanent workplace, and so denying relief for the travel and subsistence payments claimed. Determinations were raised accordingly against and the company appealed to the First Tier Tribunal who found in HMRC's favour and the case moved to the Upper Tribunal.

Decision

The Upper Tribunal agreed with the First Tier Tribunal that the contract between the umbrella company and each worker did not represent overarching contract of employment as they lacked mutuality of obligation. Despite Mainpay Limited having a contractual obligation to provide each employee with 336 hours of work each year, the workers had no obligation to accept work offered. However, Mainpay Limited was not obliged to pay the workers for the minimum number of hours of work, even if not worked.

The Upper Tribunal rejected the company's argument that even if there was no overarching contract of employment, the contract gave rise to a single employment relationship, meaning that the workplaces where workers carried out their assignments could not be "permanent workplaces" as

they would not be workplaces for that single employment. The First Tier Tribunal was entitled to reach its conclusion that each contract was 'a framework agreement which provided the basis on which consecutive contracts of service for individual assignments could arise.'

Mainpay Limited sought to argue that just because a workplace was not considered temporary, that did not mean it automatically became a permanent workplace and that expenses could still be claimed as deductible provided that the employee did not regularly attend that workplace.

Even if a third category of workplace was permitted under legislation, the Upper Tribunal found that Mainpay Limited's argument relied on an employee not being in 'regularly attends in the performance of the duties of the employment'. The First Tier Tribunal was correct to construe the legislation as referring to attendance at a workplace 'every day during which the employment subsists', even if that was only for one day. The Tribunal accepted that for a one-day assignment, 'regular' was not the most obvious choice of word, but in that context, it simply means regular attendance during that day in the performance of the employment duties. The Upper Tribunal pointed out that Mainpay Limited's own evidence confirmed that the average assignment lasted eight weeks, and so there would be 'few instances' where the workplace would not have been regularly attended. As the employees were found to 'regularly attend' their workplace, the Upper Tribunal concluded that it was not necessary to determine the question of whether legislation contemplates that a third category of workplace, which is neither temporary nor permanent.

Although not necessary, the Upper Tribunal went on to consider whether, had the expenses been deductible, they could have been reimbursed using HMRC's system of benchmark scale rates. The Upper Tribunal stated that for such rates to be used, Mainpay Limited would have needed to have applied and obtained a dispensation to do so from HMRC. Such a dispensation allows HMRC to confirm that adequate procedures are in place to ensure that employees have actually incurred expenses and that any other relevant conditions (such as the workplace not being a permanent workplace) are complied with. With no such dispensation in place, the rates could not be used. The only amounts that could be deducted were the actual expenses incurred.

The final ground of appeal was that any loss of tax had not been brought about carelessly. However, although Mainpay Limited had obtained legal advice, it had not asked its advisers the right question.

The First Tier Tribunal accepted that advice had been sought regarding the deductible of reimbursed expenses but 'there was no detailed explanation as to what these expenses were and the basis on which they might be deductible or allowable for tax purposes.' As a result, the six-year time limit for making the assessments and determinations applied, meaning they were validly issued.

Mainpay Limited v HMRC [2024] UKUT 00233 (TCC)

Discretion not to apply PAYE obligations

Summary - HMRC had misdirected themselves in law in its decision not to exercise its discretion to relieve the company of its PAYE obligations in respect of a former employee's income.

In 2002, as part of his remuneration package, Jonathan Wood and UBS AG entered into three gilt options, which were not exercised until 2012, after Jonathan Wood had left the company. The gilts were not received until 2016/17 due to certain valuation issues.

HMRC issued a determination under the Income Tax (Pay As You Earn) Regulations, SI 2003/2682, reg 80, requiring the company to account for PAYE.

The company challenged the determination, taking several different approaches, one of which was a request that HMRC should exercise its discretion under s 684(7A) ITEPA 2003 to remove obligation on employer to account for PAYE in respect of employee's tax liability on earnings in the form of gilts

HMRC stated that it was not appropriate for HMRC to make a decision on the use of the discretionary power at that time as the final liability had not been determined.

UBS AG sought judicial review of that decision arguing that:

- HMRC's refusal to exercise its discretion ran counter to the purpose of the statute;
- HMRC had misdirected itself in law and its decision was irrational.

The company sought an order requiring HMRC to exercise its discretion to relieve the company of liability.

HMRC argued that, because it had subsequently agreed to reconsider its discretion, the judicial review had been rendered academic and so should be dismissed.

Decision

The Upper Tribunal held that the issues were not academic because HMRC had only said that they would reconsider their decision and this did not give UBS AG what it sought, which was an order that HMRC be required to apply its discretion.

The Upper Tribunal found that HMRC had misdirected themselves on the law in two ways:

1. In considering that the exercise of the discretion was premature because the quantum of the liability had not been established. There was no reason in principle why the liability had to be established before considering the discretion.
2. HMRC had said that even if the discretion were exercised, UBS would still have to deal with HMRC in respect of NICs. The Upper Tribunal held that this did not detract from the efficiency savings claimed by UBS because its NIC liability would be determined by the amount taxed as employment income.

The Upper Tribunal therefore ordered that HMRC should remake its decision on whether to exercise its discretion, taking account of the mis-directions.

The King (on the application of) UBS AG [2024] UKUT 00242 (TCC)

Adapted from the case summary in Tax Journal (30 August 2024)

High Income Child Benefit Charge partial win

Summary – The total amount assessed, penalties charged and interest payable were reduced when it was decided that the taxpayer had a reasonable excuse for last four years assessed by HMRC.

Sarah Manzi had been claiming child benefit from 2005 some 8 years before the 2013 introduction of the High-Income Child Benefit Charge (HICBC).

Between 2014/15 to 2019/20, tax was collected on her earnings through PAYE.

As her earnings were below £50,000, she did not pay attention to the 2012 media campaign. By 2014, her earnings were above £50,000 but she was unaware that this meant she should have notified her liability to the HICBC and filed a self-assessment return.

On 3 December 2019, Sarah Manzi received a letter from HMRC advising her to check her liability to the charge. A few days later, she called HMRC and was advised by an HMRC officer that the letter may have been sent in error but that she should deregister for child benefit and that no further action was required. She deregistered as advised.

In June 2021, HMRC informing her by letter that she owed £10,480 across the 2014/2015 to 2019/20 tax years for the unpaid HICBC.

HMRC paused work on all HICBC cases, pending the Upper Tribunal decision in the Jason Wilkes case. Following this decision, HMRC wrote, confirming the assessment had been reduced to reflect her only claiming child benefit for part of the 2019/20 tax year, the year when she was first made aware of the issue.

Finally, on 1 November 2022, HMRC formally issued assessments to collect the charge and penalties that were payable. Sarah Manzi appealed claiming that she had a reasonable excuse which was 'ignorance of the law'.

Decision

The First Tier Tribunal considered the validity of the assessments raised by HMRC.

- Due to the delay by HMRC, only the assessments for 2018/19 and 2019/20 fell within the standard four-year time period.
- The earlier years could only be validly raised if Sarah Manzi had failed to take reasonable care or had no reasonable excuse in failing to notify her liability.

The First Tier Tribunal found that prior to December 2019, Sarah Manzi was an employee within the PAYE system and was unaware of the HICBC. This amounted to a reasonable excuse as the charge had not existed when she started claiming child benefit. Further, before this time, she had never been made aware of the requirement to notify her chargeability to the charge once when her income exceeded £50,000.

Although that excuse ended when she received HMRC's letter in December 2019, she had a further reasonable excuse based on the officer's advice that the letter could have been an error. She followed the officer's advice at the time by deregistering for child benefit and took no further action as instructed. Consequently, she had a reasonable excuse up until she received HMRC's letter in June 2021, by which time it was too late for her to notify by filing a Self Assessment return.

With HMRC failing to produce the call log to support their claim that the call in December 2019 never took place and that no officer would have given the advice claimed, the First Tier Tribunal found in Sarah Manzi's favour.

Sarah Manzi's appeal was allowed in part with only the assessments for the 2018/19 and 2019/20 being made within time and being valid. HMRC's assessments for 2014/15 to 2017/18 were out of time. The charge and penalty assessment were cancelled. The Tribunal noted that the total interest payable would need to be reduced accordingly.

Sarah Manzi v HMRC (TC09219)

