

IR35: what a performance

Difficulties with interpreting the IR35 rules have been highlighted by conflicting decisions at tax tribunals where apparently similar IR35 cases involving TV and radio personalities including Lorraine Kelly and Christa Ackroyd highlight the subjective nature of the employment tests. Peter Rayney FCA, CTA (Fellow), TEP considers the implications for private sector employers

A number of recent tribunal decisions have highlighted once again the subjective nature of employment status. These high-profile IR35 cases confirm the well documented stories of HMRC chasing down large numbers of television producers for additional tax and national insurance contributions (NICs).

Historically, it is reasonably clear that HMRC has not had the resources to properly police the operation of IR35. This probably gave the large numbers of those operating through personal service companies (PSCs) a false sense of security. Since HMRC had not challenged the IR35 status of their companies, they thought they were in the clear!

Unfortunately, as we know only too well, if there has been 'insufficient' disclosure about 'subjective' tax treatments in the relevant tax returns, HMRC can go back four years (in some cases, six years) to raise assessments under the 'discovery' provisions.


The recent tribunal cases of *Atholl House Productions Ltd v HMRC* [2019] UKFTT 242 (TV presenter Kaye Adams), *Albatel Ltd v HMRC* [2019] UKFTT 195 (ITV presenter Lorraine Kelly), and *Christa Ackroyd Media Ltd v HMRC* [2018] UKFTT 69 (BBC presenter Christa Ackroyd) have shown that this can lead to some very hefty PAYE and NIC demands.

Before we examine these cases in more detail, it is helpful to understand the current and future tax treatment of PSCs.

IR35 in brief

The IR35 legislation was introduced in 2000 to tackle the emerging problem of 'disguised employment'. (The 'IR35' nomenclature comes from the number of the Budget 1999 press release that announced these measures). The statutory provisions are found in section 49, Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) and reg 6, Social Security Contributions (Intermediaries) Regulations, SI 2000/727).

The aim of IR35 was to ensure that individuals who worked for end-users through a PSC, but

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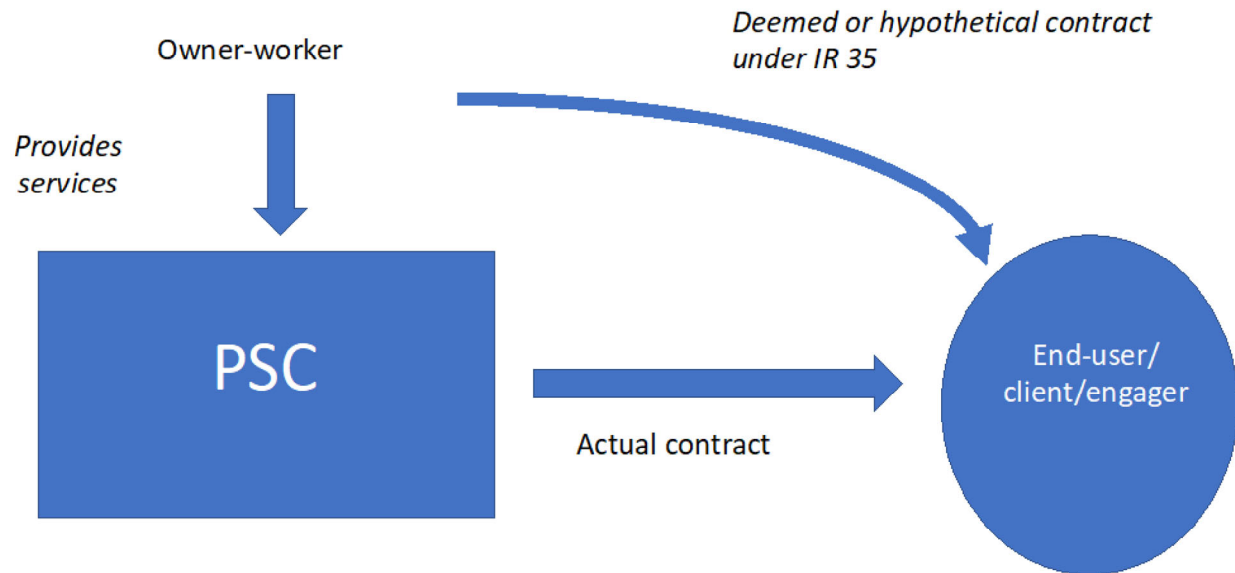
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under the same terms and conditions as an employee, should be taxed as employees.

Under the original provisions, the PSC's owner-worker must determine whether its fee income should be treated as generated from an employment or self-employment engagement with the client/end-user. This determination is made by imputing a hypothetical contract between the actual worker and the client/end-user, as illustrated below:



Where the deemed contract gives rise to an employment relationship, the PSC treats the income arising from the contract (after making certain allowable deductions) as earnings. Consequently, the PSC would account for PAYE and NICs (including 13.8% employers' NICs) on the deemed earnings. The worker then reports the income as employment income on their self assessment return.

In almost all cases, this tax and NIC cost would significantly exceed the tax that would have been payable on 'self-employed' income received by the PSC – which would normally be corporation tax and possibly some income tax on the amount taken out of the PSC as dividends.

Change to IR35 regime for public sector engagers

The IR35 regime largely remained unchanged until 6 April 2017, when end-users in the public sector had to account for PAYE and NIC on any contracts with PSCs that were deemed to be of an employment nature.

The government introduced these reforms – often referred to as the 'off-payroll' working rules - to deal with the (supposed) historic widespread non-compliance with IR35. It suspected that large numbers of PSCs had taken reasonably optimistic views by treating their deemed contracts as being outside IR35. HMRC's view was that all this contributed to an inadequate IR35 tax yield. However, it is also likely that there will be many cases where PSC owners were simply unaware of the IR35 rules.

Check employment status tool (CEST)

Many would argue that the test of whether an employment or self-employment relationship exists under a hypothetical contract is frequently complex and subjective. Indeed, some of the recent tribunal rulings involving television personalities demonstrate that HMRC's determination of 'employment' status is not always correct.



The CEST is a relatively crude 'online questionnaire' that seeks to determine whether the relevant engagement falls to be treated as employment

Since April 2017, all public sector engagers (which include the BBC) are responsible for determining whether their assignments with PSCs are tantamount to employment.

To help with this evaluation, HMRC strongly recommends that engagers use its check employment status tool (CEST) (<http://www.gov.uk/guidance/check-employment-status-for-tax>).

The CEST is a relatively crude 'online questionnaire' that seeks to determine whether the relevant engagement falls to be treated as employment. However, one of its main faults is that it does not factor in one of the most important determinants of employment - the existence of 'mutuality of obligations' (MOO). This is the engager's obligation to provide work during the contract and the worker's obligation to work. Furthermore, the CEST tool has attracted considerable criticism from employment tax specialists since it has been found to give 'incorrect' outcomes.

Current approach by public sector engagers

Anecdotal evidence suggests that public sector organisations are adopting a very prudent approach in operating the off-payroll working provisions. They are accounting for PAYE and NIC on the vast majority of their payments to PSCs, even where there is some doubt about the 'employment' status of the PSC provider's contract. This may appear to be an expensive option as the engager's cost is increased by employer's NIC at 13.8%.

Many engagers will defend taking this conservative stance. If they do not deduct PAYE and NIC but HMRC later finds the engagement to be caught by IR35, HMRC will first seek the PAYE and NIC from them (rather than the worker).

However, the 'cards are stacked' against the worker here, since they do not have an *immediate* practical remedy where PAYE and NIC has been deducted incorrectly by the engager. Numerous press reports have shown that this has created particular friction between the BBC and many of its presenters, since PAYE and NIC is now being deducted from payments that were previously made 'gross'. It is understood that the BBC has agreed to compensate its presenters for any IR35 settlement tax/NIC agreed with HMRC up to April 2017.

Rollout to the private sector

At the time of the 2018 Budget, the government clearly felt that the public sector reforms to IR35 had improved compliance. However, given the problems already encountered in the public sector, many have questioned the wisdom of the proposed rollout of these rules to the private sector from 6 April 2020.

To allay some of these concerns, the government decided that the extension of the 'new' off-payroll working rules will only apply to medium and large-sized private sector engagers/end-users. Consequently, small businesses in the private sector will be exempt from these rules, thus removing them from the attendant compliance burdens.

The question of whether a company is 'small' is determined by Companies Act 2006 (CA 2006) definitions. Under s382, CA 2006, a company is 'small' provided it satisfies two of the three following tests in both the current and the previous year:

- turnover does not exceed £10.2m;
- balance sheet total of no more than £5.1m;
- no more than 50 employees.

Special rules apply for groups. HMRC also proposes similar tests for unincorporated businesses.

One of the key problems identified with applying this test is one of timing. The (private sector) engager must be able to determine whether the rules apply at the time it makes a payment to a PSC. The ICAEW Tax Faculty has therefore suggested that the 'small company' test should only operate by reference to the last statutory accounts that have been filed before the start of the relevant tax year.

Badges of employment

Many IR35 and other 'employment status' cases, including the three recent TV personality tribunal rulings, invoke Justice Mackenna's leading analysis in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968) 2 QB 497. This concluded that a contract of service (ie, an employment contract) exists if all the three following conditions are satisfied:

'(i) the servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.

(ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) the other provisions of the contract are consistent with its being a contract of service'.

Following this precedent, the judge ruled in the Ackroyd case (the first to be heard), that the existence of 'mutuality of obligation' (MOO) and 'control' were the minimum indicators of an 'employment' relationship. However, in the Adams case, the tribunal stressed that all the other terms of the engagement must be considered when determining whether the 'overall picture' was one of employment. As part of this process, it involved looking at the way the agreements were actually carried out in practice (following Lord Nolan's dicta in *Hall (Inspector of Taxes) v Lorimer* [1993] 66 TC 349).

The outline facts of the tribunal cases involving Adams, Kelly and Ackroyd are set out in table 1 below. The main findings in these cases for each main indicator of 'employment v self-employment' are compared in table 2.

Final thoughts

All these cases were similar in that they involved TV and radio personalities. Clear favourable rulings were reached for Kelly and Adams – their PSC engagements were found to be tantamount to self-employment and hence outside IR35. These decisions were reached on a holistic basis, considering the totality of the evidence.

However, the fact that Kelly's and Adam's PSCs carried out numerous engagements alongside their main TV contracts was clearly an influential factor in finding that they were in business on their own account. The relatively short length of the relevant contracts also appears important. Furthermore, while the terms of the written contract are considered, tribunals will always look for evidence to test the relevant terms of the engagement in practice.

On the other hand, it is perhaps surprising that the outcome for Ackroyd was that her PSC was held to be within IR35 (although her case is currently subject to appeal to the FTT).

Although a First Tier Tribunal decision is not binding on another, it is clearly persuasive. While IR35 rulings are particularly fact-dependent, TV presenters that are currently being investigated by HMRC should therefore take some reassurance from the favourable decisions reached in the Kelly and Adams' cases.

Looking to the proposed April 2020 changes, it will be up to large and medium-sized businesses to determine the IR35 status of their freelancers, contractors and other workers when they pay their PSCs. The recent 'TV/radio presenter' cases serve to remind us of the complex nature of such determinations. It is also likely that HMRC will levy penalties where mistakes are made by failing to take proper care in this area.

Table 1 - outline of key facts

Kaye Adams - Atholl House Productions Ltd (AHPL)

During 2015/16 and 2016/17, Adams presented her own show (The Kaye Adams Programme) for BBC's Radio Scotland. She provided her services through her PSC – AHPL. Adams also had other engagements alongside her BBC work and her PSC earned a significant proportion of income from other sources.

HMRC was seeking some £124,440 PAYE and NIC for 2015/16 and 2016/17.

Lorraine Kelly - Albatel Ltd

Kelly worked for ITV Breakfast between 2012 and 2017, providing her services as a 'self-employed star theatrical artist' on the Daybreak and Lorraine programmes through Albatel. Barrister Keith Gordon, who argued Kelly's case, indicated that she provided her services through her PSC since 1992 but HMRC had not challenged the arrangement until some 14 years later.

In reviewing the case, the judge found that Kelly presented a persona of herself and she presents herself as a 'brand'. It is this brand that ITV sought when engaging her. He observed that '...all parts of the show are a performance, the act being to perform the role of a friendly, chatty and fun personality'.

HMRC sought to collect some £1.2m PAYE and NIC from her PSC under IR35.

Christa Ackroyd - Christa Ackroyd Media Ltd (CAM)

Ackroyd provided her services to the BBC through CAM under two fixed-term contracts. She was a presenter on BBC's successful Look North programme for more than a decade. HMRC claimed that CAM should have accounted for PAYE and NICs under IR35 over the tax years 2006/07 to 2012/13.

HMRC sought in excess of £400,000 in PAYE and NIC under IR35.

Table 2 – comparison between key indicia of employment v self-employment

Tests	<i>Ackroyd</i>	<i>Kelly</i>	<i>Adams</i>
Mutuality of obligations or MOO	<p>BBC had first call on Ackroyd's services 'as it may require'.</p> <p>She was required to work for the BBC for at least 225 days in any one year, and the BBC was required to pay the fees set out in the contract.</p>	<p>Kelly had no obligation to provide any services to ITV although it had the right to call on her on an exclusive and first-call basis. However, ITV could terminate the contract without any obligation to make a payment.</p>	<p>Despite the wording of the written contracts, Adams did not in practice require the BBC's consent to her other engagements.</p>

<p>Control</p>	<p>Strong influence of BBC editorial guidelines – which formed part of the context in the ‘deemed contract’ was construed.</p> <p>Tribunal not persuaded by Ackroyd’s factual evidence.</p> <p>BBC could direct Ackroyd to present any programme of its choice and had ultimate control in ‘how, where and when’ she carried out her work.</p>	<p>‘Level of control’ fell well below the level required for an ‘employment’ contract.</p> <p>Kelly ‘called the shots’ and had no obligation to provide any services to ITV</p> <p>Kelly’s evidence was supported by editor and executive producer of one of Kelly’s programmes.</p>	<p>Adams was largely in control of her work. The BBC held, but never exercised, editorial control over her BBC shows.</p> <p>The BBC had no control over Adam’s numerous other engagements and, in practice, never tried to place restrictions on her working for others.</p> <p>The BBC could sanction Adams if she took actions that brought the BBC into disrepute – but this did not amount to ‘control’.</p>
<p>Right of substitution</p>	<p>No right of substitution</p>	<p>No right of substitution</p>	<p>Had right of substitution under the actual agreement in practice</p>

<p>In business on own account</p>	<p>Ackroyd's PSC income was almost entirely derived (between 96% and 98%) from her BBC contract.</p>	<p>Nature and range of Kelly's work both for ITV and others indicated self-employment.</p>	<p>Between 30% and 50% of Adam's annual income came from her non-BBC engagements.</p> <p>She stressed that it was important for her to maintain her 'brand' (especially as part of her role on 'Loose women'). This led to her securing many other engagements.</p> <p>All this clearly supported the conclusion that Adams was in business on her own account.</p>
<p>Part and parcel of organisation</p>	<p>The length of Ackroyd's contract (initially five years followed by a seven-year contract) was indicative of a 'highly stable, regular and continuous arrangement'. She also attended BBC training sessions, was told who she would be interviewing, and received a 'clothing allowance'.</p>	<p>Kelly was not seen as an 'intrinsic' part of ITV's organisation and could provide services to rival broadcasters and other media outlets.</p>	<p>Adams had two 'one-year' contracts.</p> <p>Adams was seen as an external services provider (and not part of the BBC organisation).</p>

About the author

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