FIELD COURT TAX CHAMBERS

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TAX BRIEF

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WELCOME

In this edition of *Tax Brief*:-

(a) I consider the topical subject of **Personal Service Companies** particularly in the area of **TV Personalities** where there have been so many Tribunal cases recently. A recent example which is in the news is the **Eamonn Holmes** case;

(b) I look at the legality of **Retrospective Legislation** in the light of the **Forestalling Provisions** in relation to **Entrepreneurs' Relief**;

(c) I suggest a **Litigation Tip** in respect of **Witness Statements**;

(d) I give my opinion as to the **Failings** (as I see it) of **HMRC's Review Process**: this process is almost certainly **not fit for purpose** and needs to be reconsidered;

(e) finally, I finish off with my **Curmudgeon's View**.

Please let me have any comments and feedback. I would very much welcome this.

PERSONAL SERVICE COMPANIES; IR35; AND TV PERSONALITIES

Speed read

Key features for showing "self-employment" are control, financial risk and also first impressions – does the arrangement looks like self-employment? Practitioners should major on the features that are commonly found in a contract of employment but are "never" found in self-employment arrangements: holiday pay, sick pay, paternity/maternity leave, pension arrangements. Also look at the VAT position – an employee would never pay VAT. Think about instructing a Trade Union expert to comment.

IR35 changes postponed – now applies to services on or after 6th April 2020

HMRC stated, on 7th February 2020, that the previously announced changes to the rules, commonly known as IR35 would now apply only to payments made for services provided on or after 6th April 2020. Previously, the new rules would have applied to any payments made on or after 6th April 2020 regardless of when the services were carried out. The change means that businesses will need only to determine whether the rules applied for contracts that have continued beyond 6th April 2020.

IR35 cases involving TV personalities – Eamonn Holmes, Christa Ackroyd, Joanna Gosling, Tim Willcox, David Eades and Lorraine Kelly – losers and a winner

Eamonn Holmes is the latest high-profile TV personality to find, courtesy of the FTT, that the structure put in place for him has not produced the outcome sought. His case was *Red White and Green Limited v. HMRC* ([2020] UKFTT 0109 (TC)). In essence, he was held to be a (notional) employee of ITV with the consequence that the sums received by his personal service company (Red White and Green) were treated as his employment income for both income tax and national insurance purposes.

The Eamonn Holmes case suffered the same result as the Christa Ackroyd case which went to the Upper Tribunal ([2019] UKUT 0326 (TC)). See *Christa Ackroyd Media Limited v. HMRC* Lost by Christa Ackroyd (put in details??) on appeal to the Upper Tribunal.

The principal ground for the appeal in the Ackroyd case was in relation to control. Detailed argument was put forward by reference to the specific circumstances concerning Ms. Ackroyd but it was held that, in the hypothetical contract between her and the BBC, the BBC did have sufficient control of Ms. Ackroyd to establish a notional relationship of employment.

The joint IR35 cases of *Paya Limited* (for Joanna Gosling), *Tim Willcox Limited* (for Tim Willcox) and *Allday Media Limited* (for David Eades) *v. HMRC* ([2019] UKFTT 583 (TC)) were also lost by the celebrities.

These cases contrast with the successful case won by Lorraine Kelly (*Albatel Limited v. HMRC* [2019] UKFTT 195 (TC)).

IR35 – why is it so called and what is it?

IR35 being the short hand and generic description of the structures in question is so called because the Budget documentation, issued on 9th March 1999, included various Inland Revenue Budget Press Releases, including IR35 which was entitled "Countering avoidance in the provision of personal services".

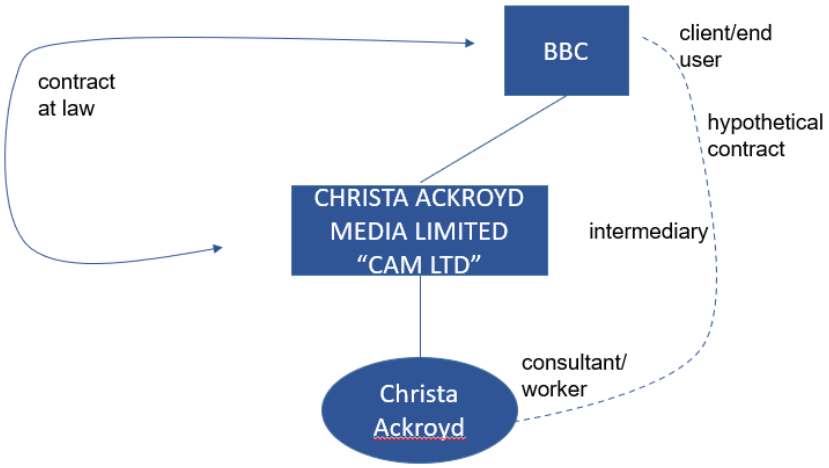
A typical IR35 structure involves an individual (here the celebrity) providing personal services through their own company (the PSC). That PSC then enters into a contract with the third party broadcaster (end client), typically the BBC or ITV. The aim of course is that the sums paid by the end client to the PSC will not be treated as employment income in the hands of the celebrity whose relationship with the end client (on a traditional basis) – so it is hoped – could never be treated as that of employment.

The legislation – ITEPA 2003 s.49 and SSC(I) Regs 2002 Reg 6

The "IR35" legislation is found in ITEPA 2005 ss.48 to 61 and the key provision is s.49. The Social Security Contributions (Intermediaries) Regulations 2002 especially Regulation 6 are also relevant.

Typical structure – client intermediary consultant

A typical structure would look like this and here I have used the facts of the *Christa Ackroyd* case:



Why was the law introduced – sought level playing field?

The purpose of the intermediaries legislation was identified by Robert Walker LJ, as he then was, in *R (Professional Contractors Group & Others v IRC* [2001] EWCA Civ 1945 at [51]:-

> "to ensure that individuals who ought to pay tax and NICs as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation."

The key legislation – ITEPA 2003 s.49 – notional contract

ITEPA 2003 s.49 reads as follows:

> "(1) This Chapter applies where –
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that –
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or
>
> …
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."

In the context of Christa Ackroyd she is "the worker", the BBC is the "client", and her company, CAM Limited, is the intermediary.

Key employment cases and their ratios – hard cases make bad law

I always think it is worth bearing in mind that the *tax* cases which we will look at shortly were decided, to a large extent, by reference to the ratios from *employment* cases. The relevance of this is that in the 1950s and 1960s labourers were often employed on an informal basis without formal contracts of service. When those labourers suffered accidents then unscrupulous employers would try and escape their liability by contending that there was no contract of employment in the first place thereby hoping that they could "wriggle out" of their employers' liability. The courts "did the right thing" by deciding, almost always, that a contract of service did exist to ensure (reasonably enough) that compensation was received by the injured labourer. As the saying goes, however, "*hard cases make bad law*" and it is, as a result, more difficult, in the context of IR35, for individuals to demonstrate a lack of an employment relationship with a third party.

Hypothetical contract

The hypothetical contract notion (between the individual/celebrity and the end user/TV company) is based upon the case of *Usetech Limited v. Young* ([2004] EWHC 2248 at [9]) where the relevant obligation was stated to be to identify the hypothetical contract and apply the law thereto.

Ready Mixed Concrete case – mutuality of obligation; control; absence of negative features

In *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* (2 QB 497 at 515) we find the following well-known extract:

> "(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."

Based on this we can then investigate three particular conditions as follows (i) mutuality of obligation; (ii) control; and (iii) any negative conditions (or negative features as I am calling them).

Mutuality of obligation – don't overstate this

The first requirement of employment status, as identified by MacKenna J in the *Ready Mixed Concrete* case, is mutuality of obligation. In the case of *Carmichael v. National Power plc* ([1999] I WLR 2042) the House of Lords referred (at 2047) to "*that irreducible minimum of mutuality of obligation necessary to create a contract of service*". In this context, mutuality of obligation requires at least that the employee provides the services through their personal work or skills and that the employer pays the employee for any work actually done. However, it is important to note that the mutuality of obligation test involves effectively two stages: (i) is there mutuality of obligation?; and (ii) if so, is it demonstrative of a contract of employment or a contract of self-employment?

After all, as is stated in the Employment Status Manual at paragraph ESM0543:-

> "The significance of mutuality of obligation is that it determines whether there is a contract in existence at all. Without mutuality of obligation there can be no contract of any kind.
>
> Only when the basic requirements of mutuality have been identified is it possible to consider whether the contract is a contract of employment or a contract for services (self-employment).
>
> The basic requirements as to the mutual obligations necessary to determine whether there is a contract in existence at all are:-
>
> - that the engager must be obliged to pay a wage or other remuneration, and
> - that the worker must be obliged to provide his or her own work or skill.
>
> These basic requirements could be present in either a contract of service or a contract for services and, on their own, will not determine the nature of a contract."

Further on, the Manual Says:-

> "There is often some confusion as to what is described as the irreducible minimum for mutuality of obligation and the irreducible minimum requirement for a contract of employment.
>
> Once it has been established that the basic mutual obligations are present and a contract is in existence, it is then necessary to determine the nature of that contract. The irreducible minimum requirements for a contract of employment are:
>
> • the requisite mutuality of obligation present;

- a sufficient degree of control being exercised on the part of the engager;
- other provisions of the contract being consistent with a contract of employment."

In the writer's view, the mutuality of obligation test may in many ways be overplayed. After all, it exists in both contracts of employment and self-employment contracts. Nevertheless, in *O'Kelly v. Trust House Forte* [1983] ICR 728 the mutuality of obligation was in respect of future work rather than, say, on specific current projects and it was because of that (future work obligation) that there was an employment contract. It may be that if a contract is for a specific defined project then this would be helpful as a badge of self-employment.

Control – this is very important and can make life difficult for TV personalities

Control is one of the key features: in self-employment it stays with the individual. It is difficult for personalities to win on the subject of control because very often they are "under the control" of the programme makers. This is particularly the case, for example, where a newsreader "simply" reads from an autocue. However, in the *Lorraine Kelly* case she was able to demonstrate that she kept control of her destiny which is largely why she won her case unlike others.

Also – and most importantly – the Tribunal agreed that the existence of negative features (such as the absence of holiday pay) was a key indication of self-employment. **In the writer's view this is very important.**

In relation to control it is helpful to look at the case of *Humberstone v. Northern Timber Mills* (1949 79 CLR 389) and the words of Dixon J where we find the following:-

> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."

Market Investigations case – is the individual in business on their own account?

Another key case is *Market Investigations Limited v. Minister of Social Security* ([1969] 2 QB 173. In that case Cooke J suggested, at 184G, that the question of whether a worker is an employee could be answered by determining whether the individual, who performs the services, is performing them as a person in business on their own account. There is no exhaustive list of factors, but he identified a number of relevant factors at 185A-B as follows: (i) whether the worker provides his own equipment; (ii) whether he hires his own helpers; (iii) what degree of financial risk he takes; (iv) what degree of responsibility for investment and management he has; and (v) whether and how far he has an opportunity of profiting from sound management in the performance of his task.

Picking up on two of these I have the following comments.

Hiring own helpers – contrast with lack of exclusivity

If the individual is not entitled to work elsewhere then that clearly can be a feature of employment; whereas if the individual can hire their own helpers and also can substitute at their "say so" workers to do his work then they are likely to be a self-employed individual.

Financial risk – this is very important and again difficult for some TV personalities but not all of them

One of the big features is that of financial risk. Repeatedly the courts will look to that and, of course, very often there is little financial risk for celebrities. Nevertheless, I have come across situations where celebrities have to sign up quite significant indemnity provisions (running into seven figures) which would seem to me to be a clear indication that there was self-employment. Can you imagine an *employee* being required to make such a payment?

Comparison of the Christa Ackroyd case and the Lorraine Kelly case

I now contrast these two cases or at least I contrast how the separate tribunals viewed them.

The Christa Ackroyd case – seems to have turned on the control issue and the large number of hours spent on one single BBC contract

The first issue is why did Christa Ackroyd lose? Clearly, the case was very hard fought (as was the appeal) and Christa Ackroyd would no doubt disagree with the outcome. The case seems to have turned on the following:-

(a) a lack of relevant control – the BBC had editorial control;

(b) on a procedural point there was an issue that the tribunal judge said that the witness summons procedure could have been invoked so that more evidence could have been obtained from the BBC. In fact, it is very unusual for this to happen and this seems a tough criticism;

(c) finally, the BBC had first call on her time for up to 225 days per annum. That seems to me to have been the "killer".

The First-tier Tribunal also held that she was obliged to comply with "programme standards", that there was a prohibition on a substitute and that 95% of her total income arrived from a single BBC engagement. On appeal the Upper Tribunal was not satisfied with the counter arguments that were put forward to try and demonstrate that Christa Ackroyd had control as required. But it was control and the fact that she was engaged with one entity for 95% of her time that, in my view, meant she lost.

The Lorraine Kelly case – negative features were helpful

By contrast, if we look at the case involving Lorraine Kelly we find the following.

In the *Lorraine Kelly* case the Tribunal had regard to the cases typically referred to and held that the test to be adopted is not a "mechanical exercise of running through items on a checklist" but rather the full picture "on the accumulation of detail" must be considered followed by standing back to make an "informed considered qualitative appreciation of the whole" (per Nolan LJ in *Hall v. Lorimer*).

This seems to me precisely the way to approach the case. It is always a question of stepping back and looking at the position in the round and building up a picture. It follows from this that the advocate when presenting the case must present the picture as well as they can.

In the *Lorraine Kelly* case the Tribunal accepted her evidence that she personally decided on the running order of the programme, the items the feature and the angle to take in interviews. In looking at the overall picture, the Tribunal was satisfied from the evidence that "contrary to being part of a jigsaw, Ms. Kelly was the jigsaw". The Tribunal went on to say that the fact that the programmes were aired from a studio was in the Tribunal's view no more than a practical requirement and it was clear that had Ms. Kelly decided to present the show from a different location this would happen. By way of summary, the Tribunal were satisfied that the control of her work pursuant to the hypothetical contract described above lay with her. They were of the view that the level of control exercised by ITV fell far substantially below the sufficient degree required to demonstrate a contract of service and they were satisfied that the factors (including the negative features referred to in this article) strongly indicated that the contract was one for services, i.e. self-employment.

Pausing there – how do the courts look at this?

From these cases and others we can see that the courts apply the following approach.

(1) Hypothetical contract

They look at the hypothetical contract and they consider whether, in reality, that amounts

to a contract of employment or not.

(2) General approach – Ready Mixed Concrete applies

The courts tend to adopt the *Ready Mixed Concrete* ratio (mutuality of obligation, control and consideration of negative conditions). Try and get the courts to focus on negative features.

(3) Mutuality of obligation – again don't overplay this

This is a key point although it seems to me it ought to be more of a neutral point.

(4) Control – as before this is key

This is generally the most important factor and tribunals focus on that. This is why it can sometimes be very difficult for celebrities to counter the argument that they are in employment because so much of what a celebrity does seems to be under the control of a third party. A newsreader, for example, reading an autocue, would generally find it difficult to say that they were self-employed.

(5) Other relevant factors – again focus on negative features

Other relevant factors should include the negative features referred to in this article from time to time and in my view they should really be emphasised. They are crucial.

How to win these cases – painting the picture; this is very important

I have already focused on the fact that, as mentioned in the *Lorraine Kelly* case, it is all about painting the right picture.

As is often the case with litigation generally, one's first impression usually sticks. In other words, you can generally tell if you are going to win or not at the first meeting you have with the client. One should bear that in mind when presenting the case. The first impression that the judge will get may well be the skeleton argument and the opening submissions; so the advocate should focus on these.

Negative features – can't overstate this – really do focus on the negative features that no trade union official would allow to go into an employment contract

It seems to me that a great deal of negative points are not focused on. To be fair, in the *Lorraine Kelly* case, they do seem to have been but the following points seem to me to be relevant.

In my view too little attention is paid to negative features such as (i) absence of holiday pay; (ii) absence of sick pay; (iii) absence of paternity/maternity leave; (iv) absence of pension arrangements; and (v) obligation to pay VAT.

In my view, it is quite extraordinary that a court would hold that there was a contract of employment in these circumstances when no employee would ever enter into a contract where they had no holiday, pay, sick pay, paternity/maternity leave and no pension arrangements. Indeed, I often think that maybe one should involve some sort of trade union official in the case to say what they would think of a contract which had those features.

My view – as before do emphasise the negative features

In my view the negative features should be emphasised. However, HMRC seem to be aware of this possibility and have countered it in their Manual.

Further, at ESM0544 it is stated as follows:-

> "The absence of benefits such as sick pay, pension scheme membership, maternity rights, etc. in a short-term engagement will almost certainly be because they are inappropriate in such circumstances. Their absence may therefore be of little relevance in this type of situation and certainly will not inevitably lead to the conclusion that an employment does not exist.

> On the other hand, the existence of such entitlements in a long-term part-time engagement can be regarded as a strong indicator that an employment exists.
>
> The important point to remember [says HMRC's Manual] though is that the presence or absence of these rights does not necessarily determine whether a worker is employed or self-employed. On the contrary, it is the employment status (and the length of the contract) which determines whether the worker is entitled to many of these rights."

My view – look at how mutuality of obligation works in practice

Also, I would focus a little bit more on mutuality of obligation and see if it really is such a key issue.

My view – try and make significant the actual control which a journalist always exercises

Finally, I would try and put the control factor in the context of the individual having control over the programmes because that, after all, is what the engagement is all about. As mentioned, a newsreader may find it difficult to say they have control but other journalists really do have control of how programmes develop, particularly when they are dealing with ad hoc interviews and ad hoc sporting occasions.

Evidence – work hard on this

Elsewhere in this article I have emphasised the importance of evidence. It is really important, however, in these IR35 cases as well. So there should be lengthy witness statements on behalf of the individual appellants (perhaps running to 50 or 60 pages). These are really important because in the hearing the tribunal judges will hear the cross-examination which is obviously negative very often (not always) and so therefore to counter that negativity it is critical to have a lengthy and detailed positive witness statement.

Conclusion

These are difficult cases to win. Try and step back from the position and ask yourself whether you think the individual runs their own life and is in charge or whether some third party (such as the TV company) does this.

Your best argument will be in respect of negative features. Paint the picture carefully and show how important the celebrity is to the programmes they are involved with as this will demonstrate, it might be hoped, the separateness and therefore an absence of control from whom HMRC would seek to make their employer.

Then really focus on the witness statements. The individual's witness statement should probably be about 60 pages long and should really go into the detail. Finally, see whether you can get an expert in (perhaps a trade unionist) to say that they would never allow an individual member of theirs to sign an employment contract without the key features of holiday pay, etc., and they would never allow an employee to pay VAT in any circumstances.

RETROSPECTIVE LAW

Speed read

The recent announcement that retrospective legislation would be introduced to counter steps taken before Budget Day in relation to Entrepreneurs' Relief might be said to be another nail in the coffin of the rule of law in the tax context. It makes it more difficult for practitioners to tax plan in the future when they anticipate forthcoming changes. Retrospective legislation in the tax context is, however, entirely legal.

Budget 2020 – Entrepreneurs' Relief

At Budget 2020 the Chancellor of the Exchequer announced that the lifetime limit of Entrepreneurs' Relief would be reduced from £10m. to £1m. in relation to qualifying disposals made on or after 11th March 2020. This was not unexpected. What was

something of a “bombshell” was the fact that forestalling arrangements were included which amount, effectively, to retrospective legislation.

How the new rules work

The draft legislation contains rules to counter pre-budget arrangements that sought to “lock in”, for Entrepreneurs’ Relief purposes, the lifetime limit of £10m.

The arrangements which are stopped

The tax planning arrangements which were used typically had the following features:- (i) unconditional contracts entered into before Budget Day; (ii) the time of disposal rule at TCGA 1992 s.28(1); and (iii) a contractual completion of the disposal which would take place in due course after Budget Day.

These arrangements often involved an intermediate company or an intermediate trust that would become entitled to the relevant assets by an exchange of contracts and would then onward sell to a third party after Budget Day on the basis that the original contract, which was entered into before Budget Day, would attract the benefit of the old relief.

The new rule

The new rule which has been introduced keeps the date of disposal rule (see TCGA 1992 s.28) but applies the new reduced lifetime limits to these disposals unless:-

(a) the parties to the contract demonstrate that they did not enter into the contract with the purpose of obtaining a tax advantage by reason of the timing rule in s.28; and

(b) where the parties to the contract are connected it can be demonstrated that the contract was entered into for wholly commercial reasons.

Need to make a claim

In addition, a claim must be made.

Rule of law – no retrospective legislation apart from tax avoidance

The point about this is that this is yet another inroad into the basic rule of law which prohibits or objects to retrospectivity. This is by no means, however, the first time that retrospective legislation has been introduced to counter tax avoidance schemes. Examples include FA 2006 s.94 (*notional payments*), FA 2008 s.58 (*double taxation*) and FA 2010 s.45 (*repo rules*).

Huitson – judicial review

In the case of *R v. HMRC (ex parte Huitson)* ([2010] EWHC 97) and *R (Huitson) v. HMRC* ([2011] EWCA 893) the High Court’s decision was upheld by the Court of Appeal. The legislation in question (FA 2008 s.58) had been introduced to counter a tax avoidance scheme in relation to income from self-employment which was diverted through an Isle of Man partnership and an Isle of Man trust to take advantage of the UK/Isle of Man double tax treaty. The judicial review application in question failed on the basis that the nature of the legislation (to stop the scheme) was lawful on the basis that the UK had struck a “fair balance” between the protection of the applicants and the public interest in securing taxes. The UK government had been justified, therefore, in adopting retrospective legislation.

Warning

Nevertheless, this latest piece of forestalling law is another inroad into the basic principle that retrospective legislation is to be abhorred and it is another warning to taxpayers seeking to engage in any kind of tax avoidance that the stakes are against them.

LITIGATION TIP

Speed read

It cannot be overstated that witness statements are important. Spend as much time on witness statements as anything else. An appellant with inadequate evidence in the form of witness statements is almost certainly going to lose. Don't get bogged down with burden of proof issues. This can be overstated. If good documentation is there the burden of proof more or less disappears

Evidence is a key feature – if not the most critical feature – of litigation

When it comes to litigation the odds are stacked against the taxpayer. HMRC's win rate in relation to tax planning schemes is extraordinary. They have won something like 38 out of the last 40 cases. So if you are representing the taxpayer then the more help you can give the taxpayer the better.

Burden of proof – should not be an issue if HMRC see all the relevant documentation because there is then a "level playing field"

In almost every situation the burden of proof lies with the taxpayer. This point, however, is often overegged by HMRC. In relation to this see the case of *HMRC v. Household Estates Agents Limited* ([2007] EWHC, 1684 (Ch), 78 TC 2005). In that case there is a good explanation of how the burden of proof operates. See paragraphs 43 to 48. The key wording is to note that where accompanying documents have been submitted to HMRC and which are available to the Court then the burden is unlikely to be very weighty.

Witness statements are crucial

The importance of witness statements can be understood when one recognises the shape of the hearing. The taxpayer's advocate makes opening submissions and will typically at the end of those submissions call their witnesses. If HMRC have witnesses as well they will be called typically after the appellant's witnesses. Following the cross-examination of all these witnesses the appellant's advocate will then make submissions on the evidence.

It is at this point that one can see why a lengthy witness statement is so important.

Submissions on evidence – this is why you need a good witness statement

The cross-examination of the appellant's witnesses will, of course, be done by HMRC's counsel. That cross-examination might run for many days. When the appellant's advocate comes to make the submissions on the evidence there, therefore, may be very little that will have been heard in the cross-examination which can be used by the appellant. After all, on a typical cross-examination, the appellant is simply "fending off" aggressive questions and not giving very much necessarily which will be positive in the written submissions on evidence.

That is why the witness statements must be fulsome – so that when it comes to making submissions on the evidence the witness statement can be referred to and have as much force as the oral evidence given upon cross-examination.

COUNSEL'S OPINION – THE PUBLIC NEED REASSURANCE THAT HMRC'S REVIEW PROCESS IS BEING USED FAIRLY

Speed read

HMRC are obliged to review their decisions at the outset of litigation. The concern has always been that the review system is a mechanical process which is open to abuse. The recent McMillan case supports these concerns as it showed that an original review (supporting the appellant) had been suppressed by the same officer who then produced a negative review. It is time for the review process to be reconsidered and for it to be applied with integrity.

The McMillan case – gambling was the main issue on the face of it but there was a bombshell when it was revealed that there were two contradictory reviews by the same officer who then suppressed the one in favour of the taxpayer

In *McMillan v. HMRC* ([2020] UKFTT 0082 (TC)) released on 22nd October 2019) the substantive issues related to an unsuccessful attempt by HMRC to raise a discovery assessment on the taxpayer under TMA 1970 s.29 coupled with an unsuccessful attempt to tax the individual's winnings from gambling.

The case, however, throws up (almost as an aside) an alarming view of how HMRC seem to treat the review process which is available at the outset of any potential litigation. HMRC should, in my opinion, comment on the *McMillan* case because it seems to confirm what many practitioners (including me) have long since thought: the review process is abused by HMRC and it frankly not fit for purpose.

Two review letters by the same officer – one clearing the taxpayer which was then replaced by a second one damning the taxpayer

In this case two review letters were produced to the Tribunal and they had been written less than a week apart. The first had said that the assessment and penalties should be cancelled but the second (written by the same review officer) said the exact opposite: the assessment and penalties in question should be upheld.

Paragraph 4 of the decision reads as follows:-

> "HMRC had inadvertently disclosed a review letter dated 11th April 2018 (not sent to the appellant) in which the review officer had concluded that all the assessment and penalty determinations should be cancelled because HMRC had failed to identify a taxable source. The review letter which was in fact sent, dated 16th April 2018 from the same review officer, stated that the assessments and penalties should be upheld."

The review legislation

The legislation concerning reviews is found in TMA 1970 at ss.49B (*appellant requires review by HMRC*) and 49C (*HMRC offer review*). One of the oddnesses, as an aside, is that if an appellant simply appeals back to HMRC (without notifying the Tribunal) then the matter "sits there" unless and until HMRC themselves offer the review.

If, however, the opportunity to review is taken up then the law is found at TMA 1970 s.49E which makes interesting reading:-

- the nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances;
- HMRC must in particular have regard to steps taken before the beginning of the review:-
  - by HMRC in deciding the matter in question, and
  - by any person in seeking to resolve disagreements about the matter in question.
- the review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them;
- the review may conclude that HMRC's view of the matter in question is to be:-
  - upheld,
  - varied, or
  - cancelled.

In my experience – the review is usually a wasted exercise

In my experience (and I am sure the experience of others) clients assume that when the review process in instigated a different officer than previously involved will look at the matter afresh and with an unbiased eye. More particularly, it is anticipated that if there is

merit in the appellant's view after all then a "third party" HMRC officer may well be inclined to confirm that contrary view rather than HMRC's view.

In fact, of course, the practice seems to be different. I personally have never known a review differ from the original view of the relevant HMRC inspector. It has always confirmed it. Ex-HMRC personnel tell me, from time to time, that the process is unsatisfactory and that often the papers are simply passed from one person to a colleague who merely "rubber stamps" the view of the first officer.

Not fit for purpose

In fact, I now tell clients in relation to reviews that the system is not fit for purpose.

In my opinion:-

- **HMRC should comment on the *McMillan* case and explain how the same review officer changed their mind dramatically;**
- **confirm that the review process is something which taxpayers can assume is being carried out with integrity by HMRC.**

CURMUDGEON'S CORNER – WHAT DOES THE EXPRESSION "HIGH LEVEL" MEAN? IS IT A DETAILED OR SUPERFICIAL VIEW?

I wonder whether we can agree on the meaning of "high level".

In meetings practitioners often say that a document has been given "high level" consideration. In this context is meant nothing more than superficial, i.e. the document may have only been glimpsed at.

In court proceedings, however, a judge may assume that the expression "high level" means that it has been considered "at the very top of an organisation" i.e. has been given the utmost consideration.

Perhaps we can clear this up by going back to "superficial" on the one hand and "detailed" on the other.

DISCLAIMER

This *Tax Brief* does not contain advice which may be relied on and no liability is admitted in relation to readers who act or omit from acting in relation to any of the contents of this *Tax Brief*. Specific advice should always be taken before implementing or omitting from implementing any course of action.

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