



## FIELD COURT TAX CHAMBERS

### **IR35: an unsatisfactory trend <sup>1</sup>**

*Proper financial management for you, unacceptable tax avoidance for me?*

It will not have escaped anybody's attention that HMRC are seeking to crack down on the use of personal service companies and to extend the reach of the well-known IR35 rules.

HMRC have had mixed success in the Courts in seeking to apply these rules against people in the media, particularly TV presenters. The cases of *Christa Ackroyd* ([2018] UKFTT 69 (TC); the decision of the Upper Tribunal is awaited) and *Lorraine Kelly* ([2019] UKFTT 195 (TC)) spring immediately to mind (among others) – and in the latest decision, *Kickabout Productions Ltd v HMRC* ([2019] UKFTT 415 involving a Mr Paul Hawksbee who broadcasted on TalkSport, the arrangements were found not to be within IR35.

We are now all trying to get to grips with the draft legislation intended to be introduced next year which proposes to switch the responsibility on to the client for determining whether the hypothetical contract with the contractor would have been a contract of employment if the individual had been engaged directly and not by a personal service company. This is a difficult judgement, as is clearly demonstrated by the courts, and the penalty for getting it wrong (or it seems, somebody else getting it wrong) will be pretty serious.

This is not a satisfactory trend. There is surely something not quite right for the government to say that it is not very keen on the bona fide contract you have entered into with an independent third party, so it will pretend that you have entered into a different contract and charge you (more) tax on that basis. (For anybody who thinks this is an overstatement, this is already what happens with stamp duty land tax. You just have to look at FA 2003 s 75A, and the litigation to which it has given rise, to see that it operates exactly in this way.)

It is clear that HMRC regard personal service companies as some kind of abuse which deserves draconian counteraction because the people who are involved with them are clearly Very Bad People, or at least they are doing a Very Bad Thing.

With this mind I could not help laughing at a recent announcement that some NHS Trusts are planning to arrange for their consultants to be paid via LLPs to get around the tax issues arising on their pay and pensions.

I cannot imagine they will ever be allowed to do this, but it is instructive that the NHS even think that it would be a good idea. I suppose it is a classic example of if we do something it is 'proper financial management', which is entirely sensible, but if you do it, then it is 'unacceptable tax avoidance' and completely repugnant.

Once upon a time, we had a rule of law which applied to everybody, and attempts by the state (i.e. the Crown) to suspend or dispense with laws in its own interests caused a bit of a problem

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before it was put right in 1689. I hope we don't have to go through all that again before we get our rule of law back.

**Peter Vaines**

**Field Court Tax Chambers**