



ROUGH JUSTICE

36

Peter Rayney FCA CTA examines the ruling in the recent **Christa Ackroyd** case and the **IR35** lottery

On 20 March 2018, a few weeks after the First Tier Tribunal (FTT) had released its decision in the *Christa Ackroyd* case [*Christa Ackroyd Media Ltd v HMRC [2018] TC06334*], four BBC broadcasters assembled before the Digital, Culture, Media and Sport Select Committee to provide evidence about their BBC pay structure. Some presenters and broadcasters indicated that they had been 'invited' or encouraged by the BBC to provide their services through personal service companies (PSCs).

HMRC recently launched a crackdown on the operation of the so-called IR35 rules to PSCs and, probably as a result of this, the MPs heard that many presenters and broadcasters were now facing 'six-figure' tax and national insurance contribution (NIC) demands for failing to apply IR35 to their historic 'BBC' income.

IR35 RULES

The IR35 provisions are in Chapter 8, Part 2, Income Tax (Earnings And Pensions) Act (ITEPA) 2003. This legislation was introduced in 2000 by the then Chancellor, Gordon Brown to tackle the emerging problem of 'disguised employment'.

The Revenue (as it was then) had justified these 'new' rules on the grounds that it was feasible for someone to leave their employment on Friday and return as a PSC contractor the following Monday with the benefit of a significantly reduced tax bill.

As the IR35 provisions then stood (they were fundamentally altered on 6 April 2017 for public sector-based work), the owner-worker of a PSC was obliged to determine whether its fee income should be treated as generated from an

employment or 'self-employment' relationship with the client/end-user. The legislation achieves this by imputing a hypothetical contract between the worker and the client/end-user. It then poses the question whether this deemed contract gives rise to an employee relationship (or the worker is an office holder (director) of the client).

Where this is the case, the IR35 legislation applies and the income arising from that deemed 'employment' contract (after making certain allowable deductions) is treated as a deemed earnings paid by the PSC.

This means that the PSC is responsible for applying PAYE and NICs (including employers' NIC at 13.8%) on the deemed salary. See illustrative example (see page 38), which shows how the 'deemed salary' payment for a typical PSC might be calculated.

While it is possible to see how the 'Friday to Monday' fiscal makeover could arise with IT contractors, taxi drivers, engineers and the like, it is not so easy to see how this would be operated to those providing 'unique' services like leading TV and radio presenters, well-known actors, musicians and so on. This takes us to the heart of the *Christa Ackroyd* case, which involved a well-known BBC presenter.

HMRC'S IR35 CRACKDOWN

There have been many reports of HMRC investigating the tax status of BBC/other TV and radio presenters. Since a large number of these presenters are known to be working through PSCs, it is very likely that HMRC has been seeking to determine whether these PSCs have been correctly applying the IR35 legislation.



Under the pre-6 April 2017 IR35 regime, a 'public sector' engager (or end-user) would not have to pay significant employer's NICs nor provide any employment rights or benefits.

One of the fundamental criticisms of IR35 is that it is often difficult to determine whether a particular contract represents one of employment or self employment. There is a long line of employment and tax-related jurisprudence that demonstrates the complexities that are involved, and many decisions have shown inconsistencies in approach.

Yet the obligation to determine the tax 'employed v self-employed' status rested with the PSC owner (or perhaps more often than not, their accountant or tax adviser).

For a brief period, HMRC introduced business entity tests with the aim of providing a risk-based approach to the IR35 status analysis. Broadly, this was founded on a 'points' rating with different weighting for various 'indicators' of employment. But these tests were strongly criticised and HMRC withdrew them in April 2015.

There is also anecdotal evidence that HMRC has not previously 'policed' the operation of IR35 very well. This has probably given the PSC owners and their advisers a false sense of security that they had no historical IR35 tax exposure.

THE CHRISTA ACKROYD CASE

In the light of the above background, it is perhaps not surprising that the FTT's ruling in the *Christa Ackroyd* case attracted widespread media interest. This was the first major test case that looked at the typical freelance contracts that are used in the broadcasting industry.

Briefly, Ackroyd had been a presenter on BBC's successful *Look North* programme for more than a decade. However, she supplied her services through her PSC – Christa Ackroyd Media Ltd (CAM). She worked under two successive fixed-term contracts between CAM and the BBC.

HMRC claimed that CAM should have accounted for PAYE and NICs under IR35 over the tax years 2006/07 and 2012/13. The total amount due to HMRC was in excess of £400,000.

The following findings of fact were made:

- the BBC had the ultimate right to specify the specific services that Ackroyd would provide (although she might ad lib in a live news environment). She was subject to the BBC's editorial guidelines (which ran to over 350 pages specifying the standards and practices that had to be applied). The tribunal was not convinced by Ackroyd's arguments and rejected her claim that, for example, she could make any changes to the *Look North* format that she wanted. The BBC clearly controlled the editorial content of the programmes.
- Ackroyd could not provide services to any other organisation without the BBC's consent.
- the BBC required Ackroyd to work at least 225 days each year for which it would pay the relevant 'monthly' contracted fees. She could also be called upon by the Corporation to provide other broadcasting services and attend 'public events'.
- CAM could not use a substitute for Ackroyd.

The tribunal noted there were some inconsistencies between the oral evidence given by Ackroyd and that which had previously been provided in correspondence.



Considerable reliance was placed on the leading case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968) 2 QB 497*.


Based on the above findings of fact, it found that two key characteristics of employment – mutuality of obligation and 'control to a sufficient degree' – were both present in this case.









The fact that Ackroyd benefited from a 'seven-year' contract – this was a 'highly stable,

It is often difficult to determine whether a particular contract represents one of employment or self employment







EXAMPLE: IR35 DEEMED SALARY CALCULATION



 Mr Diddy was a specialist consultant to two firms in the media industry (both based in the private sector).  Tickling Sticks Ltd




 31 Mar 2018 He worked through his personal service company – Tickling Sticks Ltd (TSL). A summary of TSL’s income and expenses for the year ended 31 March 2018 showed the following:

	£	£
IT consulting fees 		150,000
Less: operating expenses		
Salary (Diddy) 	36,000	
Employers’ NICs (re Diddy’s salary) 	3,842	
Travelling expenses 	4,370	
Accountancy 	2,250	
Allowable use of home as office 	1,200	
Professional Indemnity Insurance 	1,250	
Sundry office expenses 	7,288	56,200
Net profit		93,800

Diddy accepts that all his IT consulting fees would represent employment income if he had worked directly for the two media firms. Consequently, his deemed salary for IR35 purposes in the year ended 31 March 2018 would be calculated as follows:

	£	£
IT consulting fees 		150,000
Less: allowable expenses under s54 ITEPA 2003*		
Salary (Mr Diddy) 	36,000	
Employers’ NICs (re Diddy’s salary) 	3,842	
Allowable use of home as office (s316, ITEPA 2003) 	1,200	
Professional indemnity insurance (s346, ITEPA 2003) 	1,250	
General expense allowance 5% x (fees) £150,000 = 	7,500	49,792
Deemed IR35 salary and employers’ NIC		100,208

 6 Apr 2016  *Unfortunately, due to the restrictions introduced on 6 April 2016, the ‘home to work’ travelling costs cannot be deducted in the ‘deemed salary’ calculation since Diddy is under the direct supervision of the two media firms.

 TSL would be required to apply PAYE and employee NICs on a deemed salary of £88,056 (£100,208 x 100%/113.8%) and account for employer’s NICs of £12,152 (£100,208 x 13.8%/113.8%).  **apply on £88,056 PAYE and employee NICs**  **account for £12,152 employer NICs**

regular and continuous arrangement’ – pointed towards employment. Furthermore, it was noted that the absence of a right to provide a substitute might also indicate employment status.

The key question the tribunal had to consider was summarised as follows: ‘If the services provided by Ackroyd were provided under a contract directly between the BBC and Ackroyd, would she be regarded for income tax purposes as an employee of the BBC?’

The tribunal finally made an ‘overall qualitative assessment of the circumstances’, and found that Ackroyd was an employee for income tax purposes. This meant that her company, CAM, would be liable for PAYE and NICs (based on the deemed IR35 earnings calculations).

FURTHER THOUGHTS

The longevity of the presenter’s arrangements with the BBC was probably an unhelpful factor since the longer the engagement the more likely it is that the ‘worker’ is seen as ‘part and parcel’ of the engager’s business.

This principle was also demonstrated in the *Fall v Hitchen [1973] STC 66* case, which concluded that a ballet dancer was engaged by Sadler’s Wells Theatre under a contract of employment. This contract provided for full-time work and restricted him from performing for anyone else.

The tribunal’s conclusions in the *Christa Ackroyd* case remind us of the subjective nature of the ‘employment v self-employment’ analysis. It is arguable that the analysis for a TV or radio broadcaster should place greater weight on their often unique talents and personality. Understandably the BBC would supervise and control the editorial content of Look North – after all it is its programme.

The BBC clearly used Ackroyd for her ‘personal’ broadcasting talents and ability to attract viewers. That explains why she was not permitted to appoint a substitute.

Furthermore, in my experience, when a business engages someone with special skills and talent, it will still normally set the terms of reference and often indicate (at least to some extent) how those services should be performed. This should not necessarily make them an employee.



One of the leading cases in this area is *Hall v Lorimer* [1994] STC 23 (CA). In this case, the Court of Appeal found that a freelance TV vision mixer who worked for some 20 different companies on short-term contracts was self employed. The court stressed that it was necessary to look at all the aspects of a worker's activities to assess whether they were in business on their own account (ie, self employed).

Some of the relevant factors would include:

- the provision of similar services to many engagers (which may be of a short-term nature);
- the worker provides professional services or those requiring rare skills and judgment;
- the worker has a business-like approach to obtaining and organising their engagements;
- the worker is exposed to financial risk and also the possibility of not being paid (ie, bad debts); and
- the parties do not intend to create an employment.

The *Christa Ackroyd* case represents the first of a number of appeals that relate to the application of the IR35 legislation to television presenters but the tribunal emphasised that it should not be regarded as a lead case.

This underlines the fact that these IR35 cases will always be decided on the tribunal's view of the facts and a slightly different fact pattern and/or a special factor may lead to a different conclusion.

The assessment of whether someone is 'employed or self-employed' is fraught with difficulties. This seems to be especially so in the TV and film production industry, as demonstrated by HMRC Guidelines for this sector. Appendix 1 of these guidance notes helpfully contains many types of worker that HMRC normally accepts as self employed.

OFF-PAYROLL WORKING

Since 6 April 2017, there has been a further twist in the operation of IR35 for PSCs working for the vast majority of public sector bodies (which includes the NHS, local authorities, as well as the BBC and Channel 4). The radical change is that the responsibility for paying the PAYE and NICs

shifts to the engager (ie, the party paying the PSC).

This means that the public sector engager now has to decide whether the worker should be treated as an employee at the time of payment. To assist in this process, HMRC has introduced an online employment status tool (often referred to as CEST), which can be found on www.gov.uk at <https://bit.ly/2JIZLug>

However, while the findings produced by a CEST may be helpful, they cannot necessarily be taken as conclusive. Both reported and anecdotal evidence suggests that a large number of public sector organisations are taking a 'risk averse' approach. Thus, if there is any element of doubt, they are treating the 'workers' as employees and applying PAYE and NICs.

This, of course, is an expensive option, since the engager organisation would typically bear an employer's NIC cost of 13.8% of the gross payment. However, if an engager is too prudent, they may be accused of not applying the law correctly.

Many BBC and Channel 4 presenters will have been disgruntled with the tribunal's conclusions in the *Christa Ackroyd* case. This appears to give the relevant organisations further justification for deducting PAYE/NIC on their payments. But we should remember that *Christa Ackroyd* was not a lead case and the cynic in me thinks that HMRC started with a case that they had the best chance of winning.

Attempts by HMRC to use the *Christa Ackroyd* case as a persuasive precedent should therefore be treated with caution. Always look at the relevant facts first.

In my view, it looks like Ackroyd may be another unfortunate victim of the IR35 lottery. Further IR35 cases involving TV and radio presenters are very likely to follow and may be decided entirely differently. Watch this space.



PETER RAYNEY FCA, CTA (FELLOW), TEP
runs a specialist independent tax consultancy practice, Peter Rayney Tax Consulting Ltd www.peterrayney.co.uk