No single key

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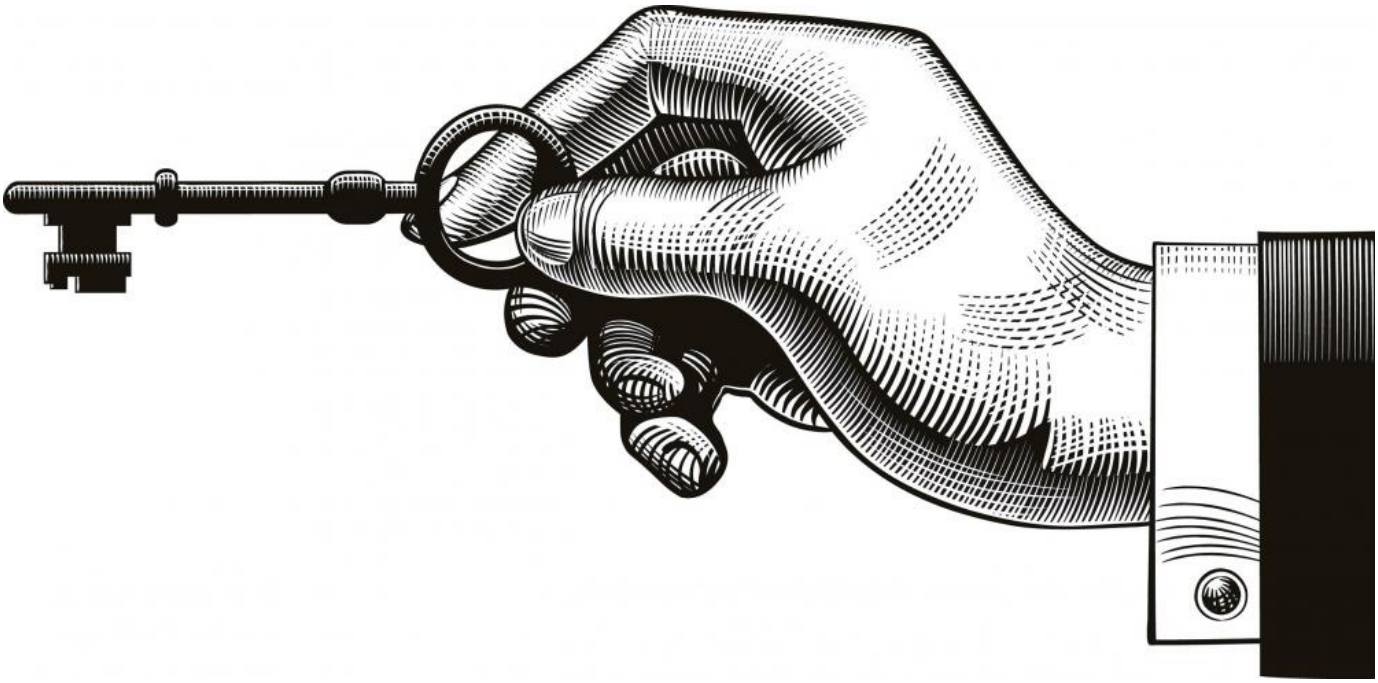

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Michael Steed reviews the state of play in respect of the uncertain application of this piece of legislation with a parachutist's view of where we are now

Key Points

What is the issue?

IR35 has been around since 2000 and uncertainty over its application has never gone away and arguably has never been greater!

What does it mean to me?

Giving practical, sensible advice in this area is very difficult and will not be getting any easier any time soon.

What can I take away?

This article provides an overview of the state of play to date but was written before the Jensel Software IR35 decision, so it will not consider the detail of that case.

First introduced in FA 2000, the intermediaries legislation for income tax, now in S48 et seq (Chapter 8), ITEPA 2003, has provided much head-scratching and argument amongst tax advisers, contractors and courts. I will not be considering the parallel NIC provisions here (The Social Security Contributions (Intermediaries) Regulations 2000).

In essence, it requires a self-assessment from intermediaries (here we will consider Personal Service Companies (PSCs) as the most popular intermediary) as to whether a worker is caught by the legislation and hence that worker's PSC is required to perform a deemed RTI payment by the end of the relevant tax year in respect of the 'relevant engagements' in that tax year.

The test of whether IR 35 applies, is to strip out all of the unnecessary players in the supply chain (PSCs and agencies) and to focus on a hypothetical contract between the final client and the worker, based on the facts of the case.

The task of the Tribunal (if it gets that far) is to take a parachutist's view of that hypothetical contract and to determine in the overall context of the terms of that contract, whether it would be a contract of employment (in which case the year-end deemed RTI payment is required) or not; as outlined by Mummery J in *Hall v Lorimer*: 'it is a matter of the evaluation of the overall effect of the detail'.

This is the most arduous part and is what makes IR35 such difficult territory to give practical advice in. Different minds may come to different conclusions with equal propriety on the same facts and each of the IR35 cases that have come to Tribunal are very fact specific, so drawing general conclusions is difficult. There is no single key with which to unlock the words of the statute in every case. It is about value judgements – a point made in the most recent IR35 case, *Jensel Software Ltd* (TC/2017/00667). .

That hypothetical contract!

This uses the standard tests for employment. The Supervision, Direction and Control (SDC) criteria are not seemingly in point; although there is some anecdotal evidence that these were meant to apply and fell through the cracks in the legislative process in 2016 when the SDC provisions had another outing in respect of the travel and subsistence rules (after a PAYE outing in FA2014).

So, we have to fall back on the usual suspects such as control, financial risk, the right of substitution and so on.

The Check Employment Status Tool (CEST)

The updated HMRC tool, the Check Employment Status Tool (CEST, but formerly ESS/ESI), is designed to help in this process. It is a flexible tool and is designed for use by the worker, the PSC, an agency, or the final client. If the questions are answered honestly, then a taxpayer may print the output and rely on this. The gov.uk website provides as follows:

'This service can be used for current or future engagements in the private or public sector. You should reassess the status of the role if there are changes to the engagement or the way the work is done.

HMRC will stand by the result given unless a compliance check finds the information provided isn't accurate'.

'HMRC won't stand by results achieved through contrived arrangements designed to get a particular outcome from the service. This would be treated as evidence of deliberate non-compliance with associated higher penalties'.

I will return to two recent IR35 cases (*Christa Ackroyd Media Ltd* and *MDCM Ltd* – see below) in the context of the CEST later in this article.

The practical problem with the tool, is that if a taxpayer doesn't like the answer, he or she may simply go back and subtly change the answers until the tool disgorges the 'right' answer (although to do so, would probably invalidate the outcome)!

Note the lack of a contract length in the rules and guidance

It is often noted by practitioners that it would be easier to apply the IR35 rules if contract length was a factor; but a moment's reflection will suggest why that isn't

the case. If a contract for say 12 months was acceptable and more than 12 months were caught, then everyone would set their contracts to exactly 12 months!

Off-payroll working in the public sector from April 2017

April 2017 was a watershed moment in the IR35 Camino. HMG had long been concerned about the growth in incorporated contractor structures with low salary/ high dividend combinations and the attendant loss of tax revenue and April 2017 saw an abrupt volte-face in the mechanics of the decision-making for IR35 in the public sector (for bodies that are subject to Freedom of Information Requests).

The mechanics of this are now well-known – the decision-making passes right up through the supply chain from the PSC and the IR35 decision (now referred to as off-payroll working) is now made by the final client. This decision is passed to the 'fee payer' (often an agency) and this fee payer deducts PAYE and NIC due on the 'deemed employment payment'. If there is no agency in the supply chain, the final engager will not only make the decision, but will also act as the fee-payer too.

It is important to appreciate that the deemed employment payment is personal employment income of the worker and is merely paid to the PSC, so this introduces difficulties in working out what needs to go on CT600s for the PSCs and there has been comment that the HMRC guidance is incorrect in this matter.

Reactions to the imposition of the 2017 rules:

Many public bodies made blanket decisions as making individual decisions was too time-consuming. However, the NHS when confronted with the threat of judicial review by locums, reverted to individual decisions.

HMRC said that if workers used fully compliant umbrella alternatives, then HMRC would have no objection.

Perhaps the most iniquitous part of the 2017 rules was that agencies are deducting the employer NICs as well as the employee NICs from contractors as they were not keen on having their margins squeezed by losing 13.8% employers' NICs.

There is some anecdotal evidence of public sector non-compliance to keep key workers and anecdotal evidence of an entire IT team walking out on HMRC!

The upshot of the off-payroll working rules in the public sector is that many PSCs in the public sector are now redundant – but may have a second life if they have more than one income stream.

Clients will ask if they can get their tax back and the answer would appear to be – normal employment rules apply, so claims against pension payments and limited capital allowances claims (Schedule 1, FA 2017).

The way forward? – the autumn Budget 2017

The obvious question on people's lips is what next – will IR35 go into the private sector?

This is what was in the Budget Report: '3.7 Off-payroll working in the private sector – The government reformed the off-payroll working rules (known as IR35) for engagements in the public sector in April 2017. Early indications are that public sector compliance is increasing as a result, and therefore a possible next step would be to extend the reforms to the private sector, to ensure individuals who effectively work as employees are taxed as employees even if they choose to structure their work through a company'.

'It is right that the government take account of the needs of businesses and individuals who would implement any change. Therefore the government will carefully consult on how to tackle non-compliance in the private sector, drawing on the experience of the public sector reforms, including through external research already commissioned by the government and due to be published in 2018'.

I was expecting something a bit more emphatic and the statement has an air of caution about it. Could it be that Ministers may be taking the view that with a slender working majority in Parliament, to introduce IR35 into the private sector would risk being put on punishment wing at the ballot box?

However, the external research and consultation document have now been published and the consultation document at 6.9 says: 'The government considers extension of similar reform to the private sector to be the lead option which will effectively tackle non-compliance.'

Recent case law

The *Christa Ackroyd Media (CAM)* case (FTT, TC06334 (2018)) has been widely reported. There is a clear campaign by HMRC against TV presenters and Christa Ackroyd is likely to be the first of many. The BBC appears to have encouraged presenters to use PSCs and this point was accepted by the FTT. She was never offered an employee position at the BBC.

Just to be clear, the CAM case was not triggered by the off-payroll working rules in the public sector (which would include the BBC). The income tax determinations covered the tax years 2008/09 to 2012/13 and predate the public sector IR35 rules by quite a wide margin, so the normal TMA1970 provisions were in play.

The key factors around Ackroyd's employment status were:

1. Ackroyd accepted that the BBC ultimately had the right to specify what services CAM Ltd would provide;
2. The court determined that, through the editor, the BBC would have control over content, given its editorial responsibility;
3. Ackroyd's contract restricted her from providing services to other organisations in the UK without the consent of the BBC;
4. Ackroyd was contractually obliged to perform the services, and the BBC was contractually obliged to pay fees to CAM Ltd on a monthly basis;
5. CAM Ltd was prohibited from using a substitute for Ackroyd.

The FTT determined that CAM was caught by the IR35 rules and HMRC levied a bill of close to £420,000 on the PSC.

Comment: it is likely that the Christa Ackroyd case will not provide much in the way of certainty for TV presenters, as it is likely that the terms of each will be different, so it will be a piecemeal battle and 2018 is very likely to see more BBC cases.

MDCM Ltd

Hard on the heels of the CAM case, came the *MDCM* IR35 case ([2018] UKFTT 0147 (TC)).

By way of contrast, *MDCM* Ltd was a private sector case in respect of a construction contractor, a Mr Daniels, who had his own PSC (MDCM Ltd), which sourced work through an Agency (Solutions Ltd) for a final private sector client (STL Ltd). He was a quantity surveyor and was engaged as a night manager on a London construction

site.

One practical point in this case is that HMRC went for six years' discovery under TMA 1970 s 29 and Mr Daniels, the worker, owner and director of MDCM, did not challenge this (the default would be the standard four year assessment rule in TMA 1970 s 35).

The essential fact finding was as follows:

1. Mr Daniels was not controlled any more than any other contractor and could refuse to work on another site;
2. there was a contract for personal services as Mr Daniels could not provide a substitute to STL (even if the Solutions contract said he could);
3. Mr Daniels was paid £310 a day and had to pay his own travel, hotel and other expenses;
4. Mr Daniels took no other financial risks;
5. There was no requirement on either party to give notice to terminate or entitlement to severance pay or pay in lieu;
6. STL provided safety equipment to Mr Daniels;
7. Mr Daniels was not integrated into the STL business.

For the reasons set out above the FTT did not accept HMRC's arguments about control but did agree that the requirement for personal services and lack of financial risk pointed to an employment relationship. However, the FTT found that the nature of the payment arrangements, a flat rate per day with no notice period and no entitlement to any employee benefits are inconsistent with employment. Further, Mr Daniels was not treated as an employee.

On balance the FTT found that under the hypothetical contract required by the Intermediaries Legislation Mr Daniels would not be an on employment contract and so this appeal was allowed.

Back to CEST

I was interested in running these two IR35 cases through CEST to see if the tool gave the same answer as the Tribunal. One of the more challenging questions is who has to pay for work that is not done to the end client's satisfaction. It was not immediately clear, on the facts of the cases what the correct answer was, so I tried it with several different answers.

The tool was consistent in all cases – both PSCs were caught by IR35. But in MDCM, the FTT found that IR35 did not apply, so this illustrates the practical difficulties of how an adviser deals with a case where CEST gives one answer, but the adviser and the client think it does not apply.

Set off of other taxes paid against IR35 liabilities

One area that often triggers lively debate amongst practitioners is the extent to which (if at all) IR35 liabilities can be set off against corporation tax paid by the PSC and tax on dividends paid by the worker.

This point was raised in the Christa Ackroyd case, but the Tribunal merely observed that it had not been agreed.

Directors and non-executive directors (NEDs)

Both of these are treated as offices and remuneration is caught by the ‘earnings’ rule (subject only to a concession if the individual is a partner in a professional firm), so is subject to PAYE and NICs; IR35 is not in point in the first place for individual office holders. If the proposed structure is an individual provides services through a PSC, officer duties are covered by IR35.

If, however, a NED performs other services in excess of director duties for a fee, then having a PSC may work. In any event a separate contract would be vital.

Conclusion

IR35 has been around for a long time and perhaps its most striking feature is the uncertainty over its application and recent cases and changes in the legislation only serve to increase this.