Are we there yet?

Employment Tax | Tax voice

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Mark Groom provides an update on progress to date with travel and subsistence expenses

On 9 December 2015, HMRC published a Policy Paper on restricting tax relief for travel and subsistence (T&S) for workers employed through an employment intermediary. The stated policy objective was to "prevent workers, engaged through an employment intermediary, and their employers, from benefiting from relief for home-to-work travel expenses".

Business travel v ordinary commuting

There is considerable precedent supporting the position that the cost of ordinary commuting (home to work travel) is not tax deductible. One of the earliest cases, *Cook v Knott* [2TC246] established clearly that "expenses in travelling to work from a place of personal convenience or pleasure or domestic necessity were never intended to be treated as necessarily incurred in the transaction of business". Numerous subsequent cases have re-confirmed this personal choice "principle", with a very high bar set for exceptions, as in the case of *Pook v Owen* [45TC571]. Dr Owen was a doctor with a general practice at home, who also worked at a hospital 15 miles away. He was allowed a deduction for mileage allowances paid on emergency call-outs from home, but only on the basis that his responsibilities began as soon as he received the call from the hospital.

HMT is reviewing the current framework re permanent and temporary workplaces, from which we hope the problem of multiple permanent workplaces will soon be solved. Homeworking will be part of that review, including what should ‘an objective requirement for an employee to work from home’ mean these days. However, to ensure cost neutrality, the cost of modernisation might have to be paid for by restricting or losing tax relief for day subsistence expenses. This review is understood to be a longer term project that may lead to changes.

Where intermediaries are involved

In the case of personal service companies (PSCs) HMRC provides an example in its guidance of an IT consultant operating through a PSC with three different clients around the country. HMRC considers that each of these places will be a temporary workplace (subject to the normal conditions e.g. not exceeding 40% or more of the employee’s working time over a period exceeding 24 months). It wasn’t that simple in the case of *Miners v Atkinson* [68TC629] where Mr Miners was denied tax relief for travel expenses to clients, because the courts determined that “it was not necessary for his work to be carried out where he lived. It could have been done anywhere”.

In the case of agency workers, their tax treatment derives from the case of *Kirkwood v Evans* [74TC481] which provides us with two key insights. Here, Mr Evans worked at home under a voluntary home working arrangement. First, the courts unsurprisingly found that working from home “was not a necessary incident of his employment”. Second, it was noted that “To avoid the costs of regular commuting being reclaimed simply because the employment itself is of limited duration [the legislation] excludes travel to a workplace during the course of a limited or fixed term of employment if the place is one at which the duties of the employee are performed to a significant extent. Commuting to and from work at a temporary job is therefore ordinary commuting because the locus in quo is a "permanent workplace" and not a temporary one.”

Since 1998, other site based workers such as employees in the construction industry have been entitled to relief when travelling to different sites. However, they are providing their personal services to their employer; they work to deliver their employer’s services to its clients. In contrast, workers supplied by an intermediary typically provide their personal services to end clients. Furthermore they do so as a matter of personal choice. These factors arguably make travelling to client sites

where an intermediary is involved, much more like ordinary commuting.

The position from 6 April 2016

Increasing numbers of contingent workers in the UK, concerns around non-compliance and a return to tax first-principles, has resulted in new legislation (currently being finalised) to restrict tax relief for home to work travel and subsistence from 6 April 2016 where a worker:

- personally provides services to another person
- under arrangements involving an employment intermediary.

Other than in the case of PSCs, this will not apply if it can be shown that the manner in which the worker provides his/her services is not subject to supervision, direction or control (SDC) by any person. In a last minute change, this will only apply to PSCs where IR35 applies; so, for PSCs this will be where the hypothetical employment status test (and other IR35 conditions) are met, rather than being based on SDC (but this will also change to an SDC test if IR35 adopts an SDC test in future).

In the above circumstances, draft clause 9 of the Finance Bill 2016, proposes a new ITEPA section 339A, under which section 339A(4) treats each “engagement” for the purposes of sections 338 and 339 as a separate employment. As such, travel from home to each separate employment will be regarded as ordinary commuting for which no tax relief will be available.

The term “engagement” is defined as the provision of personal services by a worker to a client. If such an engagement involves travel to one client site only, no relief will be available; however, if the client requires the worker to work at multiple different sites under that contract/engagement, relief should be available provided they qualify as temporary workplaces.

Employment intermediaries only include persons carrying on a business (whether or not with a view to profit and whether or not in conjunction with any other business) of supplying labour. This is intended to prevent circumvention by introducing an element of, say, accountancy services to what is essentially a business supplying labour, as witnessed when the MSC legislation was introduced. However, already there are suppliers of labour one day, claiming to have become mainstream

construction operators the next.

New Regulations provide that, where a relevant PAYE debt in relation to travel expenses under these provisions is not paid by the company in certain circumstances, including in the case of PSCs, failing to obtain evidence from a third person regarding the SDC test, HMRC may transfer the debt to the directors under a new Personal Liability Notice.

Salary sacrifice and expenses generally

This is a separate matter, but it is worth noting that the new regime to exempt certain business expenses, will not apply where those expenses vary in some way with earnings. However, provided the expenses are not paid under arrangements involving an employment intermediary, individuals may still claim tax (but not NIC) relief under Self Assessment.

Conclusions

The new proposals may be based on long established principles, but those who have enjoyed the benefit of the current system will not want to see it go, obviously. Economics will determine the proportions in which workers, intermediaries and end clients will bear the cost of losing this relief. The transfer of debt rule will give the new provisions real teeth, although arguably not in the case of PSCs, where apparently 90% of PSCs don’t think IR35 applies to them anyway!