A yellow card for IR35? What the Lineker case means for HMRC

Personal tax OMB

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The recent case on IR35 involving the footballer and pundit Gary Lineker could have identified a glaring gap in HMRC's defence.

Key Points

What is the issue?

For the tax years 2013/14 to 2017/18, HMRC concluded that the work carried out by Mr Lineker for the BBC and BT Sport were caught by the IR35 rules and determined that the GLM partnership should have accounted for PAYE on its income from those engagements.

What does it mean for me?

An application was made on the partnership's behalf to vary the grounds of appeal. The arguments turned on the Partnership Act 1890 s 5, which provides that partners act as agents of the partnership.

What can I take away?

Pending any appeal by HMRC (or a change in the legislation), it would be worth ensuring that the worker is at least one of the signatories in each contract for his or her services. In other words, that administrative detail should not be left solely to another partner.

Ever since the infamous announcement following the 1999 Budget, the so-called IR35 legislation has rarely been outside the headlines so far as tax advisers are concerned. And, over the past four years or so, they have attracted far wider attention as a result of HMRC's campaign focusing on radio and TV presenters, many of whom are household names.

The purpose of the legislation is to ensure that the tax consequences of employment (essentially, the obligation to deduct PAYE and to account for National Insurance contributions) are not avoided if an intermediary is interposed between the worker (the putative employee) and the engager of the worker's services (the putative employer). This statutory condition is found in the Income Tax (Earnings and Pensions) Act (ITEPA) 2003 s 49(1)(b). Typically, that intermediary will be a limited company but the legislation provides that it could also be 'a partnership or unincorporated body of which the worker is a member'.

The IR35 legislation recognises that many workers providing their personal service would ordinarily be considered to be self-employed. These are cases where, for example, a self-employment business is incorporated (or simply carried out through the medium of a limited company). In such cases, the legislation does not bite. This is because the legislation contains a further condition so that it applies only if the underlying relationship between the worker and the engager would, under common law, amount to an employment (i.e. if one were to exclude the intermediary). This condition is found in s 49(1)(c).

The question of who is an employee has vexed courts and tribunals for decades and there is no quick answer. As last year's Court of Appeal decision in *HMRC v Atholl House Productions Ltd* [2022] STC 837makes clear, a multi-factorial approach is necessary. That requires 'the identification and overall assessment of all the relevant factors present in the particular case'. Furthermore, as the exercise is ultimately evaluative, different compositions of a court or tribunal can legitimately reach different conclusions on the same facts. This explains why similar cases have led to seemingly inconsistent results.

The inherent uncertainty of IR35 cases perhaps explains the background to the case of *Gary Lineker and Danielle Bux t/a Gary Lineker Media v HMRC* [2023] UKFTT 340 (TC).

The facts of the case

Gary Lineker was a successful footballer in the late twentieth century and has since become established as one of the presenters of BBC's Match of the Day programme. He also provides services to BT Sport.

His services were provided via a partnership known as Gary Lineker Media (GLM), in which Mr Lineker and his first wife were the two partners. Following their separation in 2006, the GLM business was carried on by Mr Lineker as a sole trader. GLM became a partnership again when Ms Bux (Mr Lineker's second wife) was introduced as a partner on 1 August 2012.

For the tax years 2013/14 to 2017/18, HMRC concluded that the work carried out by Mr Lineker for the BBC and BT Sport were caught by the IR35 rules and determined that the GLM partnership should have accounted for PAYE on its income from those engagements. It looked as if Mr Lineker was going to join the increasing list of well-known celebrities arguing that their relationship was one of self-employment rather than employment. In other words, a well-trodden path towards a debate on the effect of s 49(1)(c) was likely to be followed.

However, in March 2022, an application was made on the partnership's behalf to vary the grounds of appeal. In particular, two new arguments were based on the wording of s 49(1)(b):

1. An ordinary partnership (as opposed to a limited liability partnership) could not be treated as an intermediary, at least in England. This was because English partnerships are not legal entities separate from their members. In other words, the provisions of s 49(1)(b) did not catch English partnerships.
2. Even if English partnerships were within the contemplation of s 49(1)(b), that statutory condition was still not met because Mr Lineker's services were in fact 'provided … under a contract directly between the client and the worker'.

These additional arguments, if upheld, would represent a knock-out blow to HMRC's case. Furthermore, as self-contained issues (involving few disputed facts) the points could be addressed relatively quickly, at least in contrast to a full hearing which would be required to examine the nature of Mr Lineker's relationships with the BBC and BT Sport, and his wider services. As a result, the tribunal decided that it would be appropriate for these two additional arguments to be addressed as a preliminary matter. That preliminary matter was heard at the end of February.

The First-tier Tribunal's decision

The case came before Judge John Brooks. He set out some of the background facts relating to the creation of the partnership and the contracts under question. He noted that some of the contracts were signed by Mr Lineker alone and others were signed by both partners.

In relation to the first question, the Judge concluded that ordinary English partnerships were intended to fall within the definition of intermediary, notwithstanding the fact that they do not have any legal identity separate from their partners. He referred to ITEPA 2003 s 52, which expressly deals with partnerships and the additional conditions that need to be met in such cases. He also referred to the Income Tax (Trading and Other Income) Act 2005 s 164, which deals with the computational consequences of such partnerships being within the IR35 rules.

The Judge also referred to the infamous IR35 press release itself, which stated the intended scope of the rules, being arrangements put through 'an intermediary – such as a service company or partnership'.

In relation to the second point, however, Mr Lineker had more success. The arguments turned on the Partnership Act 1890 s 5, which provides that partners act as agents of the partnership. In *Memec Plc v IRC* [1998] STC 754, this section was explained as providing that partners therefore carry on partnership business both as principals and as agents of the partnership. By applying this principle, the Judge held that each of the contracts entered into by Mr Lineker (either alone or with his then wife as partner) amounted to 'a contract directly between the client and the worker'. As a result, the condition in s 49(1)(b) was not met and, therefore, IR35 could not apply.

Commentary

In relation to the partnership point, it could be said that the references to ss 52 and 164 do not in themselves prove that ordinary English partnerships fall within the definition of intermediary. If Mr Lineker's arguments were correct, those sections would adequately apply to the narrower definition of partnership being contended for. However, despite those comments, it is my firm view that the intention of Parliament would have been to bring all partnerships within the scope of intermediary and that the reference to 'partnership' was not intended to exclude ordinary English partnerships.

In short, I agree with the First-tier Tribunal's decision on this point. As the Judge made clear, partnerships were within the terms of the original press release back in 1999 and, at that date, LLPs did not exist. (The LLP legislation was enacted the next year, gaining Royal Assent a few days before the first IR35 legislation was enacted in the Finance Act 2000, but did not take effect until the following year.)

In relation to the second point, the Judge recognised that his conclusion 'might appear inconsistent' with his conclusion that partnerships were within the scope of the IR35 legislation. However, he explained that the decision he reached depended on the fact that Mr Lineker signed each of the contracts. Had only another partner signed them, then the s 49(1)(b) condition would have been met, meaning that the parties would have had to proceed to consider s 49(1)(c).

At the time of writing, it is only a few days since the decision was announced and I have already seen different views by tax experts as to the way forward. However, there is one point on which all commentators appear to be in agreement which is that, if the decision is right, Mr Lineker has (or his advisers have) identified a glaring gap in HMRC's defence.

From my perspective, I think it inevitable that HMRC would appeal against the decision. Although the decision is silent as to how much is at stake, an earlier procedural decision ([2021] UKFTT 101 (TC)) suggests that the

gross amount at stake is over £4.9 million, although such figures are usually deceptive because they overlook tax already accounted for on the basis that IR35 does not apply. In any case, I think it reasonable to assume that there will be sufficient sums at stake to justify HMRC appealing (and HMRC has certainly been known to appeal in cases where far less tax is in contention).

Although I follow the logic of Mr Lineker's arguments and the Judge's reasoning, it strikes me as unlikely that Parliament would have intended the application of IR35 to turn on which partner signed the contracts on behalf of the partnership. Thus, notwithstanding the *Memec* authority, I can certainly see the Upper Tribunal concluding that, in partnership cases, within the context of the IR35 code, the services will not be provided 'under a contract directly between the client and the worker'.

If that proves to be the case, then Mr Lineker's will need to go back to the First-tier Tribunal for the full IR35 hearing. Leaving aside the inherent uncertainty of such cases, I will definitely not be stating my predictions as to how that might fare because such cases are fact-sensitive and very few of those facts have so far been disclosed.

What to do next

I am not sure how many potential IR35 cases involve partnerships. However, pending any appeal by HMRC (or a change in the legislation), it would be worth ensuring that the worker is at least one of the signatories in each contract for his or her services. In other words, that administrative detail should not be left solely to another partner.

For any partnership cases that are already in progress, if the worker was the partner who signed the contracts, it would be advisable to modify the grounds of appeal so as to give the partnership an extra shot at goal.