Clarifying the picture

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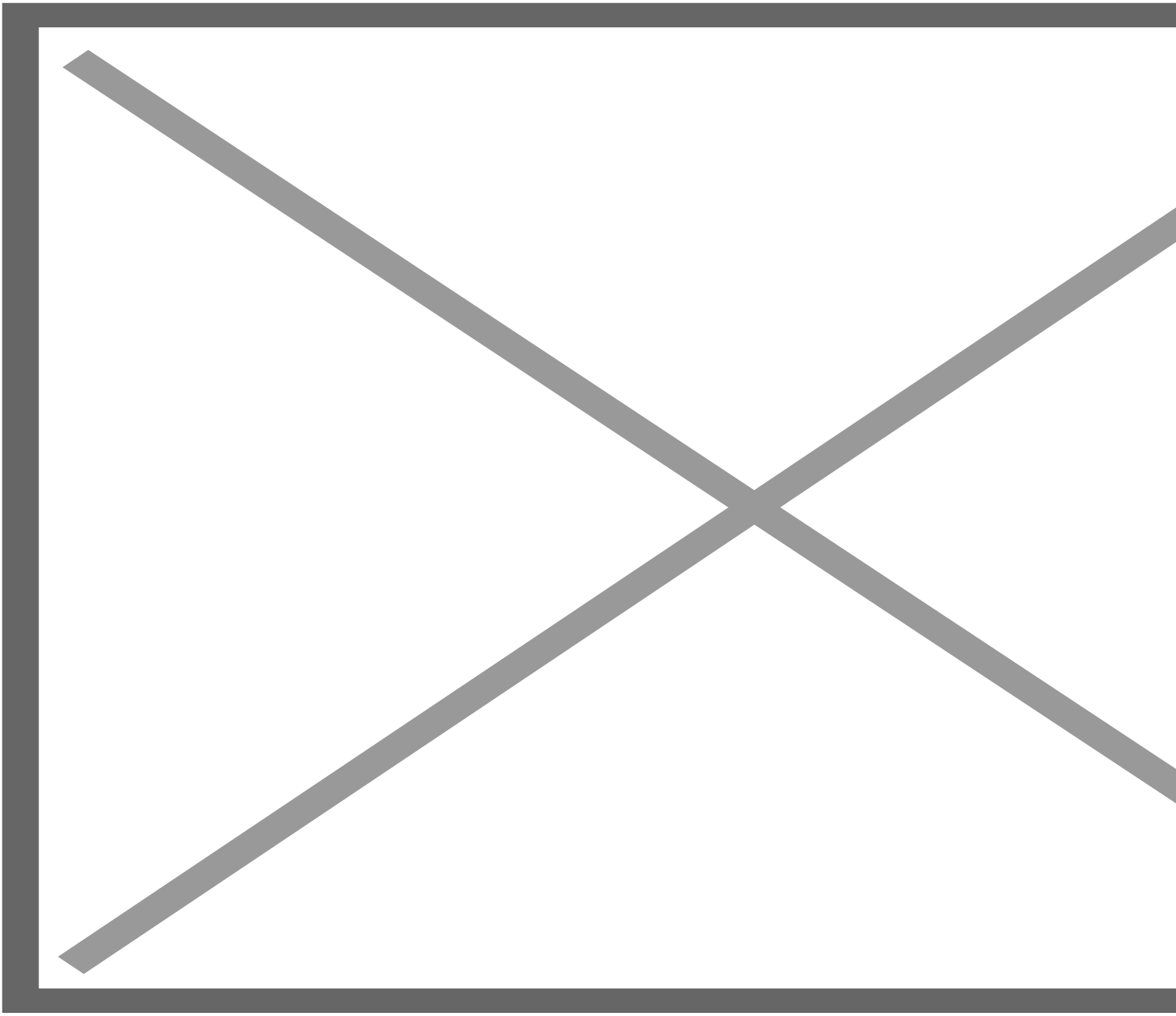

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Marion Hodgkiss and *Michael Steed* provide an update on the complicated travel and subsistence rules that we currently have in the UK

Key Points

What is the issue?

New rules in FA 2016 place extra burdens on taxpayers to determine whether travel and subsistence costs are allowable.

What does it mean to me in practice?

Just how difficult it is to advise clients in this common, but difficult area with the new rules adding to the complexity.

What can I take away?

The suggested solution is clearer guidance in the face of rapidly changing working practices.

In the May 2016 edition of *Tax Adviser*, we explored some of the difficulties with the travel and subsistence rules and were somewhat dismayed to note that HMRC had not followed the OTS recommendations in respect of simplification and clarity in respect of employee travel and subsistence.

It is our position that the 2016 rules on travel and subsistence for workers supplied through an 'employment intermediary' have not clarified the rules.

The new legislation

S14, FA 2014 is where it's at, inserting legislation into ITEPA 2003, with a new S339A. It rather cunningly declares that if a worker comes through an employment intermediary, then each engagement will be treated as though it was a new employment, thus creating a series of 'permanent workplaces' which therefore deny tax relief on home to workplace travel as the travel will be ordinary commuting.

Having said that, the new ITEPA 2003 s 339A has a series of 'flip-flops' and flips workers in and out of the rules depending on the nature of the employment intermediary.

Its intention is clear from the original TIIN: 'Following the introduction of this measure, certain temporary workers will not be able to claim tax relief or a disregard for National Insurance contributions (NICs) on the travel and subsistence expenses they incur on an ordinary commute from home-to-work. The restrictions will apply to workers who are employed through an employment intermediary, such as an umbrella company, or a recruitment agency/employment business and who are supplying personal services (largely supplying their skills or labour) under the supervision, direction or control, of any person, in the manner in which they undertake their role'.

Section 339A is unquestionably a complicated piece of drafting and doubts have been expressed through the passage of the Finance Bill as to whether it achieved its objectives (and HMRC has admitted that there is an error in the legislation that it will correct at the earliest opportunity), but we will stick with what we perceive to be the result as we stand at the moment.

The new s 339A flips Personal Service Companies (PSCs) out of the SDC regime in s 339A(4). But this time the issue is not SDC, it's an employment test under the intermediaries legislation in ITEPA 2003 Chapter 8 Part 2.

The rules seem to be clear and were expressed as follows in the TIIN: ‘Those individuals who supply their services through small limited companies, generally known as PSCs will no longer be able to claim tax relief or a NICs disregard for those contracts where they are required to operate the intermediaries legislation (commonly known as IR35)…’

Having said that, Managed Service Companies (MSCs) ARE within the SDC regime (new ITEPA 2003 s 339A(4))

Let’s imagine two scenarios (out of a myriad of possibilities), to see how these new rules might work:

Scenario 1

A self-employed optician gets work through an agency and is placed by that agency for short-term contracts (a few days up to a few months apiece) with Boots, Specsavers and Tesco.

Will he or she be able to claim travel and subsistence costs to their workplace from home?

Scenario 1: suggested solution

Before the FA 2016 rules on travel and subsistence costs arrived in April 2016, we would probably have answered this on the ‘old’ logic – based on the *Newsom v Robertson* case (*Newsom v Robertson* [1952] 33 TC 452). This effectively says that a self-employed worker doesn’t start his or her work until they have reached their ‘base of operation’ which practically speaking, in the above scenario, is the shop where they are working. So no home to workplace travel (see also *Dr Samadian v HMRC* [2014] UKUT 0013 (TCC) and *Dr David Jones* (TC4643)) as their home is not an effective workplace for their professions.

We acknowledge the impact of FA 2016 s 14 and the new ITEPA 2003 s 339A, which effectively overlays the old rules where a worker is supplied through one of the members of the ‘employment intermediary’ family.

Could this have been argued under the itinerant worker logic (*Horton v Young* [1971] 47 TC 60)? We suspect not, as like the Dr David Jones logic (an anaesthetist based at home), there are not an infinite number of workplaces, so the number of places that the professional can practice at is limited, so these become ‘the base of operation’ (and so home is not a base).

So, from April 2016 we have new rules: the logic is that home to workplace travel (note that this does not directly refer to subsistence expenses) will not be allowed where the worker is provided through an ‘employment intermediary’ (here, the agency) and is under supervision, direction or control (SDC) (or the right thereof) of any person (new ITEPA 2003 s 339A(3)). Clearly the draftsman was trying to make this provision as wide as possible.

So, the critical question is: is the optician under SDC?

Note that the phrase is: supervision OR direction, OR control, so lots of opportunities for these provisions to apply. HMRC has issued guidance on what these phrases mean, both in 2014 when the issue was whether agency workers were subject to PAYE and again in 2016 when the issue is whether home to workplace travel is allowable for agency workers: ‘Supervision is someone overseeing a person doing work, to ensure that person is doing the work they are required to do and it is being done correctly to the required standard. Supervision can also involve helping the person where appropriate in order to develop their skills and knowledge. Direction is someone making a person do his/her work in a certain way by providing them with instructions, guidance or

advice as to how the work must be done. Someone providing direction will often coordinate how the work is done, as it is being undertaken. Control is someone dictating what work a person does and how they go about doing that work. Control also includes someone having the power to move the person from one job to another.'

The HMRC guidance also gives a number of scenarios of SDC and we again note that the 2016 travel rules use the principles of the 2014 employment tests. The nearest to our optician scenario is that of a locum pharmacist (ESM2063).

The guidance example says that a locum pharmacist who pitches up to a pharmacy for a short term contract and where she controls the whole process is NOT under SDC and so the agency rules do not apply. If she had been contracted to be an assistant to a senior pharmacist, then she would have been subject to SDC.

Now it's going to get complicated ... The HMRC guidance also says that if a worker is supplied into a regulatory environment such as a hospital, then SDC WILL apply: 'As a general rule HMRC considers that agency workers who personally provide services to work in industries where the manner in which they work is governed by regulations or some other statutory framework or standards, will be subject to the right of SDC, and it is likely that in practice, they will be subject to SDC. That is because somebody will have the right to check that their work complies with those standards. To check that the workers are complying, somebody will need to have the right to supervise their work and, if appropriate, direct or control how the worker does their work. The types of workers will include but are not limited to health care workers such as doctors, nurses, social care workers such as social workers and social work assistants, teachers and teaching assistants'.

Our conclusion here is that if a doctor or a nurse IS subject to SDC, then why in some circumstances is a locum pharmacist NOT subject to SDC? They feel very similar – they are all regulated professions. How would the average taxpayer deal with that distinction?

Incidentally, some of this SDC logic feels like the unrelated problem of medics being supplied to the health service and whether for VAT purposes, they are within the VAT health exemption, or whether they are merely a supply of staff (standard-rated for VAT) – issues such as SDC are certainly an issue in that scenario!

Scenario 2

Will is a tax consultant and he is offered a nine month contract in Birmingham. Will lives in Worcester and he operates through his own PSC – Will Ltd. Will he be able to claim his travel and subsistence costs from home to his workplace?

Scenario 2: suggested solution

We noted above that there has been some doubt about whether S14 achieved its proper result, but at face value, the answer is that it will depend. Well it would wouldn't it – it's tax!

Will will be caught by the new rules if he is caught by IR35. But hang on, isn't that exactly the same question that we've been asking since FA 2000 when the intermediaries legislation was first introduced? Back round on the fairground galloper! Usual suspects – control, substitution business risk etc with no clear answer on the facts.

It is our position that you would need to examine the wider picture. What was Will doing before the contract (was he, say, an employee?) and critically, what will he do afterwards – will his contract rollover, or will he seek to adventure in new fields with new clients?

We cannot in our submission answer the question without this peripheral vision.

A related question is: do the HMRC scale rates for employees apply? After all, Will is an employee of his own company. Will Will (sorry, we should have chosen a different name!) be able to claim his hotel bills and evening meals if he stays over each week?

Seemingly yes, as he will only have a problem if he is caught by IR35 (in effect a deemed employment test). If he is caught, then his Birmingham workplace will be his permanent workplace and the expenses of ordinary commuting will be denied. Presumably, he would not have a problem if his client asked him to vary his contract and to work at another location for a while – a temporary workplace. All of his travel and subsistence costs would be recoverable subject to the normal temporary workplace rules in ITEPA 2003.

Conclusion

We are not convinced that the FA 2016 rules clarify the picture, especially in respect of PSCs and we do not consider that taxpayers are getting what they need, either from legislation or guidance to help them deduce the correct tax treatment for these day-to-day costs.

The OTS was right – we need reform of the rules, and until then, the rules remain a box of sundered fragments.

The situation will get increasingly complicated with the rise of the gig economy and more flexible working practices. We will return to these issues in a future article early in 2017.