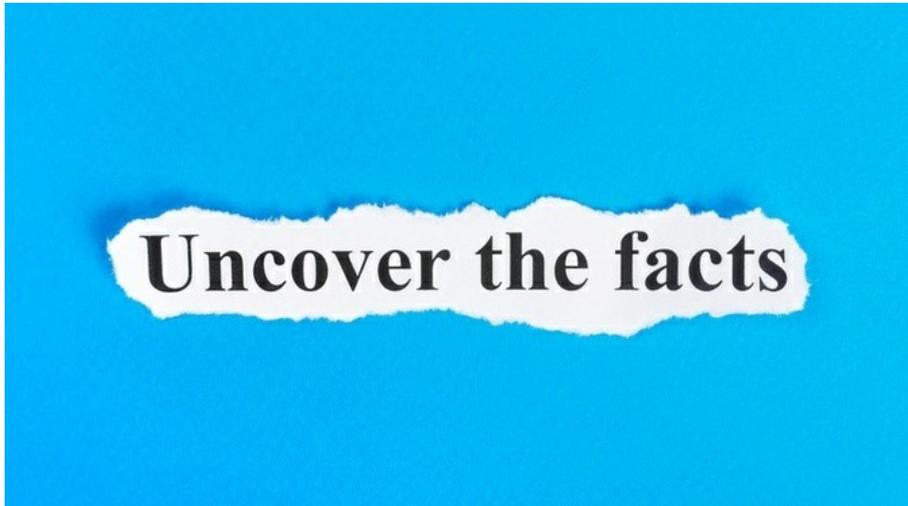


HMRC Notes are not Tablets of Stone, unless left unchallenged



Written by Chris Leslie is the founder of Tax Networks Ltd, a tax disputes and resolution business specialising in IR35 and employment status matters. Chris led the defence team in the IR35 tax Tribunal case RALC Consulting Ltd v HMRC, which defeated two barristers representing HMRC Solicitor's Office.

The [recently dismissed IR35 appeal brought by Northern Light Solutions Limited](#) in the Upper-Tier Tax Tribunal highlights the crucial importance of the forensic fact-finding required leading up to the initial First-Tier Tribunal and the necessity of overcoming any potential inaccuracies contained in, for instance, the notes drafted by HMRC following meetings with other parties.

Those with an excellent grasp of "IR35" will appreciate the three stages of the Ready Mix Concrete test adopted in the appeals litigation by the judgement on Northern Light v HMRC. This is the foundation of all status-based cases and was the usually adopted approach in another HMRC success in the UTT judgement of [Kickabout v HMRC](#), where "all the circumstances" were considered, as per sub-section (4) of Section 49 of the Income Taxes (Earnings and Pensions Act).

The "circumstances" aspect means reviewing the relevant circumstances within which the worker worked, which must be considered when determining IR35 status, but which in my opinion is often overlooked by HMRC.

Did HMRC "get away with it?"

In both the Northern Lights case and Kickabout, my view is that HMRC got away with it in the First-tier. I'll offer some reasoning.

Take for instance, where HMRC provided no cogent witness evidence and an Officer was not cross-examined under oath on his/her notes of meeting ("the Notes" in Northern Light at [15], [16] and [17]). Also significant, is the judgment's Footnote on page 5 that informs us that the end client: "NBS and its employees, as we have noted, did not give evidence and we assume that the FTT meant that, in this respect, it accepted the contents of the Notes."

Or to put it another way, HMRC held the pen and the content of the Notes were not challenged under critical cross-examination by the Appellant in the earlier fact-finding FTT proceedings. This is no fault of the Appellant of course, because it was down to HMRC to invite those witnesses to court, who apparently refused to attend. But should they have been summoned?

The IR35 hurdle had been set up

The presence of HMRC Notes of Meetings but without the presence of witnesses who contributed to them to undergo cross-examination, is a common hurdle, and one the Appellant can struggle to overcome, unless their client is amenable to providing evidence, unlike the situation which appears to have happened in Northern Light.

In tax cases the burden of proof is on the Appellant. But, let me be clear – I'm not criticising the Appellant, nor their defence team - I wasn't involved in the actual proceedings. Many times I see hindsight opinions based upon the reading of a case decision, but without an understanding of the milled-grain-flour to make the bread. IR35 and status tests are very fact sensitive. So much so, that in one case I represented there was a need to remind the tribunal that HMRC's Notes were not worth a run of beans unless we knew the context of the questions asked by an Officer and the responses given, which would then need to be corroborated. In this particular case ([RALC Consulting v HMRC](#)) sound reasoning was given and is in the Judge's Decision.

Building a firm defence requires evidenced challenges

Experience is required to form a solid defence backed by facts in finely balanced cases. HMRC will huff and puff your house of straw down unless it's made of bricks and cement. But, as we saw with Northern Light, it can be difficult to obtain the information needed unless the client is amenable.

As with Kickabout, HMRC appeared to get away with regulatory control (standards applicable to both the employed and self-employed) in terms of a "sufficient framework of Control" argument. So, the fact-find by the FTT prevailed on the interpretation of the evidence produced and the UTT were alert to this – as were HMRC's counsel, Mr Stone.

Mutuality of obligation ("MoO") also sailed through on basic contract MoO which was all HMRC asserted. But what about the nature of work-related MoO? Fortunately, next month after England has perhaps won the Football Euros, the Court of Appeal sits with regards to [HMRC v PGMOL](#) and this will give a better interpretation on MoO, having been pronounced as the central theme. Good luck to England, but I reckon a safer bet is on PGMOL.

Beware the Tablets of Stone

So, a corroborated fact-find is enormously important. It needs to be presented with reasonable arguments and if you disagree with HMRC's notes then be prepared to explain why. That is something the Appellant in Northern Light was unable to do, the UTT said so at [15]. There was no extensive counter-argument about some of the content of "the Notes", signed and set in Stone's tablets. And here's why.

In applying the status tests, the FTT is called upon to reach a broad evaluative conclusion based on all the evidence before it. As the authorities have repeatedly indicated, the UTT should be reluctant to interfere with the evaluative judgment of the FTT unless the FTT has misdirected itself as to the law, or misapplied the law to the facts, or has reached a conclusion which is not open to it on the facts found (in accordance with the principles set out in *Edwards v Bairstow*) - see [85]. Indeed, HMRC counsel Mr Stone at [105], pointed out to the UTT that there was sufficient evidence before the FTT which was capable of supporting its findings and drew attention to the Notes. Hence the importance of the FTT decision which is the fact-find that provides the interpretation on the facts, the hypothetical contract and application of the law.

At [109] the UTT pronounced: "In our view, the evidence referred to by Mr Stone demonstrates clearly that there was evidence before the FTT on which the FTT could base its conclusions (either directly or as a matter of inference from its findings of primary fact) referred to at [100] to [103] above. The conclusion which the FTT reached was open to it on the evidence. We, therefore, reject this ground of appeal." As other IR35 cases move further up through the courts, they will of course be alert to this pronouncement.

As they say, for the reasons given above, the Notes are important but only to the extent they are factually accurate and supported by cogent witness evidence.

Build your brick house on strong foundations and leave the HMRC Wolf gasping for breath.

Published: 21 June 2021

© 2021 All rights reserved. Reproduction in whole or in part without permission is prohibited. Please see our [copyright notice](#).

200,000+ monthly unique visitors

© Copyright 2021 Byte-Vision Limited UK. All rights reserved [Copyright notice](#)