Tax tribunal dismisses IR35 appeal for Little Piece of Paradise

An IR35 decision, for Little Piece of Paradise Limited ("LPPL"), heard at the tax tribunal just over one year ago on 20th October 2020, has finally been released, with Judge Heidi Poon dismissing the appeal in principle. The decision relates to services provided by ex Sky TV presenter Dave Clark between the five tax years spanning 2013 to 2018.

The tribunal found personal service was required and that there was mutuality of obligation and control to a sufficient degree for the engagement to be a contract of service.

Dave Chaplin, CEO of IR35 Shield, who attended the tribunal says: "The case was very fact-dependent, with much of the hypothetical contract formed based on terms derived via implication from statements made by witnesses under cross-examination during the hearing. The Judge acknowledged that the parties did not intend the contracts to be the exclusive record of the terms of their agreement."

The unfairness of original IR35

The quantum of tax under appeal was £281,084, although the final amount due after offsetting taxes already paid is likely to be around a third of that figure, representing the secondary Class 1 National Insurance Contributions on those earnings over those five years – a tax which is normally paid by employers, not employees.

In a cruel irony, whilst Mr Clark was waiting for the decision, the IR35 reforms became law in the private sector, and had the engagement been investigated against the new rules, it would be Sky TV picking up the tax bill, and not Mr Clark.

Chaplin also says that it's important to note that, "Had Mr Clark been a full-time employee of Sky, the likelihood is that he would have been paid less as salary, and therefore not have generated as much tax as he did under the arrangement. He's now having to pay more tax than an employee would because of the double NICs charge under the original Intermediaries Legislation."

Hypothetical contracts

Like other IR35 cases, Judge Poon identified from *Usetech Limited v Young [2004*], that a hypothetical contract needs to be formed, the contents of which is derived from all the circumstances in which the services were provided, taking as a starting point the terms of the actual contracts.

Both the appellant LPPL and the respondent HMRC put forward their arguments, each concluding with what they considered to be the true agreement in the form of a hypothetical contract.

The tribunal stated that "We have not sought to adopt either version by evaluating each in turn, or to pick and mix from the basket of the proposed terms in the parties' hypothetical contracts. We consider it right and proper to start afresh in our construction of the hypothetical

contract as an essential part of our findings of fact."

In ascertaining the facts, Judge Poon referenced *Carmichael v National Power Plc [1999*], where Lord Hoffman addressed 'the troublesome distinction between questions of fact and questions of law' where Hoffman stated "…the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact."

Judge Poon reflected on this and concluded that "…the parties did not intend the Contracts to be the exclusive record of the terms of their agreement, with 'exclusive' being the operative word here. While each Contract served as the framework agreement for the relevant period between the parties, terms were governing the parties' contractual relationship that was not expressly stated in the Contracts, because there existed tacit understanding between the parties as to the practical aspects of the outworking of the contractual terms."

Chaplin says: "Many of these media presenters contracts appear to be boilerplate, with additional arrangements having been agreed verbally. That can present a considerable challenge many years later in attempting to argue a case because memory fades faster than ink."

Evaluation of the key status factors

Whilst the appellant argued that there was insufficient mutuality of obligation because Mr Clark would only be paid for work done, the existence of an annual fixed fee split into 12 monthly payments, which did not vary, was a strong indication that Mr Clark would be paid whether he worked or not. And whilst the contract contained a pro-rata clause indicating that the fee would be reduced if work was not done, the tribunal disagreed stating "…the assertion by the appellant that fee was payable on a pro-rata basis is unsupported by any obtainable evidence." The tribunal also identified that "The fee payable by Sky was neither reduced for no-show nor increased when Mr Clark had to work 'over-time"

The Contract did not contain any figure for a minimum number of shows to be presented, but the tribunal concluded as a matter of fact that Mr Clark was obligated to provide his services for 64 PDC Darts events per year and that the obligation persisted through the contract.

The tribunal concluded that mutuality of obligation existed between Sky and Mr Clark for each contractual period, and stated that "We are not satisfied that the appellant has advanced any valid submissions, either on the law or on the facts, to displace our conclusion."

On the matter of control, it was material that Sky had "first call" on Mr Clark's services, which the tribunal signified as being a very high degree of control over the time Mr Clark was to perform the Services. The tribunal also identified that it was Sky that decided which of the PDC events they would cover, and that decision power lay with Sky Sports to choose which PDC calendar events it would broadcast, for which Mr Clark would need to make himself available and book them in his diary.

Whilst Mr Clark had considerable autonomy over how he performed his services, as is common in IR35 cases, Judge Poon referenced Lord Phillips in *Various Claimants v Catholic Child Welfare Society & Ors [2012]* who said "Many employees apply a skill or expertise that is not suspectable to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it."

The tribunal concluded therefore that "In the hierarchy of controls, therefore, the control over what is of greater weight than control over how per se. After all, it was Mr Clark's expertise and knowledge in certain sports that Sky was paying a fee for obtaining, and for that matter, the substance of Mr Clark's presenting services was the preserve of Mr Clark. However, concerning what Mr Clark was to render his presenting services, it was a matter over which Sky had complete control."

On personal service and substitution, the tribunal examined the appellants' submissions around the evidence about a claimed substitution involving Rod Studd. However, after examining the evidence the tribunal identified that it was Sky TV who arranged for and paid the alternative presenter, concluding that "There was no unfettered right to substitute at will to negate the obligation of personal performance by Mr Clark as the named Personnel in the Contracts."

IR35 lessons from the case

Chris Leslie, tax defence expert from Tax Networks who also sat with Chaplin in the public gallery at the hearing, highlights the importance of forming a defence around strong corroborated facts: "Factual situations are crucial and it's evident that the boilerplate contract was insufficient in the overall IR35 appraisal. The material factors were perhaps confusing because Dave Clark actually reduced his services. The FTT were given little to negate the material factors highlighted in the Decision.

"It's a rather curious decision because micro businesses which depend on a macro business exist all the time, that does not naturally lead to the conclusion of employment."

Chaplin agrees with Leslie, and indicates that there are some important aspects to learn from this case, and how status can be effectively defended.

“The services were provided 7 years before the case was heard at the tribunal, and there was no contemporaneous written record of the extra terms agreed in addition to the boilerplate contract. With the responsibility of the appellant to discharge the burden of proof at the tribunal, this made it more challenging to obtain corroborating evidence to support the claim that the true agreement was one of self-employment.

“HMRC did not call any witnesses, and the appellant did not call Sky, and the only witness was Dave Clark himself, which the Judge found to be credible. But, without substantial cogent witnesses evidence to reinforce the terms in their version of the hypothetical contract, it was always going to be difficult to win the appeal.

“In the new world of Off-payroll, compliance checks by HMRC could happen up to four years after the engagements have taken place and after the parties have departed. This case highlights the importance of gathering evidence during the contract to reinforce any assertions in Status Determination Statements.”

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