

IR35: FROM START TO FINISH

IR35 Reminder

In general terms...

HMRC have to find this



HMRC will claim...

'You only formed your company to avoid being an employee of Bovit.'

'If you worked for them, without the protection of your company... i.e. as an individual, you would be an employee of Bovit.'

HMRC have therefore argued that Fred only formed his company to stop being an employee of Bovit.



Fred has to prove that he would be self-employed in this relationship... then no IR35 applies.

The four key factors, to prove that you are effectively genuinely self-employed, (and hence no IR35) are:

(1) Control

There must be no, or absolutely minimal control over Fred.

(2) No Mutuality of Obligations

To be self-employed, you have to show that you can turn work down!

If there is an obligation for Bovit to have to regularly give work to Fred, and he has to accept it, there would be mutuality of obligations, and he would be an employee.

To be self-employed, you have to win both of the first two i.e. no control, and no mutuality of obligations.

(3) Substitute

Ideally, Fred would have a substitute, at the same technical level as him, and have used him in the year. Fred must have chosen, engaged and paid the substitute.

(4) Insurance

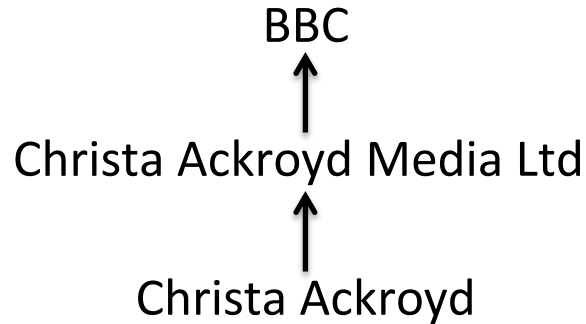
Fred Ltd ideally must have paid public liability insurance or the other relevant insurance relating to his work.

CASES...

The Christa Ackroyd IR35 case

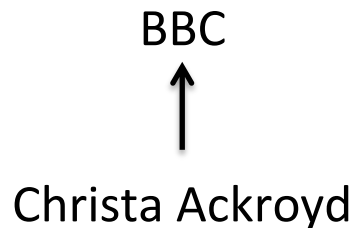
The recent case of Christa Ackroyd Media Limited v HMRC (TC06334) is possibly one of the biggest tax cases in recent times, and has a huge bearing on IR35 in the UK.

Christa Ackroyd was a television journalist. She worked at the BBC through her Personal Service Company, Christa Ackroyd Media Limited, which had a seven year contract with the BBC.



HMRC were of the opinion that her company was liable to tax and NIC under the intermediaries legislation of IR35.

HMRC felt effectively that she had formed her company to avoid being an employee of the BBC. They stated that if she had worked for the BBC without the protection of her company, she would have been an employee of the BBC.



HMRC were of the opinion that these were the key factors that pointed towards her deemed employment status:

1. Her company was given a seven-year contract by the BBC, with 225 days as year guaranteed TV appearances!
2. Christa accepted that the BBC ultimately did indeed have the right to control what services she would provide (via her company).
3. The BBC had control over her content, and they had editorial responsibility.
4. The contract that her company had with the BBC restricted her from providing services to other TV organisations and channels in the UK, without the prior and written consent of the BBC.
5. Christa was contractually obliged to perform the services, and correspondingly the BBC was therefore contractually obliged to pay fees to her company on a monthly basis.
6. Her company was prohibited from using a substitute for Christa Ackroyd.
7. It appears that the BBC, from the outset, encouraged her to work for them via her company.

These were the reasons why HMRC believed that there was a deemed employment.

These are pretty good reasons!

Accordingly, on this basis, HMRC issued IR35 tax and NIC demands and determinations.

Christa Ackroyd appealed against the IR35 determinations. The case went to the Lower Tier Tribunal...She lost!

Christa has now appealed again! We await the case in the Upper Tier Tribunal later this year!

The Lorraine Kelly IR35 Case

Albatel Ltd v HMRC

November 2018

Release date 16/3/2019

TC 07045

Lorraine Kelly traded through her personal service company Albatel Ltd.

Her company had a contract with ITV to previously present the show 'Daybreak' and then 'Lorraine'.

HMRC asserted that her company was caught under the IR35 legislation, and hence demanded £900,000 in IR35 PAYE and £300,000 in national insurance from Albatel Ltd.

HMRC argued that if she did not have her company i.e. if she had worked for ITV as an individual, she would have been a deemed employee of ITV.

HMRC felt that ITV exercised a considerable amount of control over Lorraine.

Lorraine Kelly disagreed. She responded:

- I am a freelancer
- I decide which items appear in the show, what angles to take in interviews, and Ms Kelly stated that if she feels an interview is particularly interesting she will allow it to overrun, and drop another item that was due to appear later in the show.
- I plan and choose future guests

The Judge, Jennifer Dean concluded:

"Ms Kelly presents a persona of herself. She presents herself as a brand, and it is that brand that ITV sought when engaging her."

"All parts of the show are a performance, the act being to perform the role of a friendly, chatty and fun personality."

"For the first time Ms Kelly is contracted to perform live on air, she is the public 'Lorraine Kelly'"

"Ms Kelly is a theatrical artist."

Lorraine told the judge that she played 'a version of herself' on her present ITV show, 'Lorraine'.

She performed comedy sketches and skits in her previous Daybreak show with Aled Jones.

Lorraine added that 'this was not the type of content that Jeremy Paxman would have been provided on Newsnight.'

Lorraine Kelly did not receive any sick pay or pension from ITV, and had no actual guarantee that her contract would be renewed. She got no employment rights from ITV, because she was not an employee.

Lorraine won, there was no IR35 PAYE and NIC due.

The Judge at the end of the case stated that:

“The relationship between Lorraine Kelly and ITV was a contract for services, and not that of employer and employee.’

Atholl House Productions Ltd v HMRC (2019)

UK FTT 0242 TC07088

Kaye Adams, the well known presenter of the ITV Loose Women show has recently won her IR35 case at the lower tier tribunal.

The judge in her case decided that if she had not formed her company i.e. if she had personally worked for the BBC directly, she would have been self-employed, and not an employee.

Accordingly, she successfully appealed against the IR35 determination, and did not have to pay £125,000 of PAYE and NIC.

The lower tier tribunal judge was advised that Kaye Adams presents programmes for the BBC and other media outlets through her personal company, Atholl House Productions Ltd (AHP Ltd).

HMRC had raised PAYE and NIC assessments on AHP Ltd for two years, the period for which she presented a daily morning radio programme on BBC Radio Scotland. HMRC claimed that she was a deemed employee of the BBC.

HMRC had demanded £43,636 PAYE and £22,744 NIC for the fiscal year ended 5th April 2016 and £37,514 PAYE and £20,546 NIC for the fiscal year ended 5th April 2017.

The judge, at the beginning of the case, stated that the issue at stake was, whether without the protection of her company, would she have been deemed an employee of the BBC?

The judge felt that there were three main areas to explore here, namely did the BBC control Kaye Adams, was there mutuality of obligations and did she provide a substitute?

Kaye Adams asserted that if she did not have her company, she would have been a self-employed presenter regarding her engagement with the BBC to present her daily BBC radio show.

Her arguments included:

- She was not paid if she missed a show due to family commitments
- Whilst she was live on air, she had ultimate control over which callers to take, the questions that she asked, and the direction of the show
- She was suspended for three weeks and received no pay during that period, because the BBC felt that a tweet sent from her personal Twitter account breached standards
- She drafted the scripts for each programme

- She had her 'own brand' relating to the shows she presented such as Loose Women on ITV, and her other shows and commitments
- The BBC did not place any restrictions on her ability to work for any other broadcasters, TV companies or organisations

The judge listened to both HMRC's arguments and those of Kaye Adams.

The judge found in favour of Ms Adams and distinguished her case compared to that of the BBC presenter Christa Ackroyd, who last year lost her IR35 case, and was held to be a deemed employee of the BBC.

The difference between Kaye Adams and Christa Ackroyd

- Christa Ackroyd's company had a seven year contract with the BBC
- Kaye had a one year renewable contract
- 98% of Christa Ackroyd's income each year came from the BBC, it was like a full time employment
- However, Kaye Adams had many other sources of income such as her Loose Women ITV show
- Christa Ackroyd had a clothing allowance from the BBC. The BBC also had first call on her time
- Christa Ackroyd had to attend BBC training sessions
- The BBC told Christa who she had to interview. There was therefore considerable control by the BBC over Christa Ackroyd.
- None of the above features were present with regard to Kaye Adams' engagement with the BBC
- Christa Ackroyd had to obtain the consent of the BBC to present other non-BBC engagements or programmes. Kaye Adams did not have such restraints over her.

It was therefore very important to consider the bigger picture. The many engagements that Kaye Adams carried out as well as her BBC radio show proved critical to the judge's decision.

Kaye Adams had her 'own brand' and was largely in control of all her work and the presentations that she made.

Joanna Gosling and others v HMRC

- May 2018: A two-week First Tier Tribunal case.
- At the time of writing these notes (January 2019) we are still awaiting the verdict! Very strange!

There have been rumours that the BBC have recently been in talks to pay a lump sum to HMRC, in return for HMRC dropping all actions against its presenters for IR35 back tax! We await developments!

IR35 and the Public Sector...

Things changed for one man band companies (and partnerships) working in the public sector from 6th April 2017.....

NHS (public sector body)



Grace Limited



Grace

The public sector body, from 6th April 2017 has been responsible for deciding whether or not IR35 applies to the particular engagement. Where the new rules apply, the public sector authority, paying the fee to the one man band company, is treated as an employer for tax and NIC. The public sector body will deduct PAYE and NIC from Grace Limited's fees.

The public sector will therefore include.....

- Government departments
- Non-departmental public bodies
- Local government
- The National Health Service
- HMRC themselves!
- Transport for London
- Schools, colleges and universities
- Police and fire authorities
- Local authorities
- Devolved administration
- Other public bodies listed in a separate schedule, such as the BBC
- Channel 4
- Publicly owned companies, (wholly owned by The Crown) and companies in the wider public sector, such as Transport for London
- The Bank of England

The tax consequences when a Personal Services Company gets caught to IR35 in the public sector..... (using, say, the NHS as a public sector body example)

The NHS decide that its engagement with Grace Ltd is caught to IR35 in the public sector. Accordingly, they are going to put Grace Ltd's fees through their payroll as if they were employing Grace.

The NHS (public sector body)



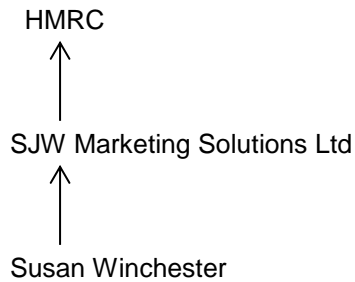
Grace Limited



Grace

IR35: SUSAN WINCHESTER

A lady called Susan Winchester owns a personal service company, and has worked for HMRC via her personal service company on various marketing projects for them.



From 6th April 2017, HMRC started to deduct IR35, PAYE and NIC from Susan’s company fees, as if she was an employee.

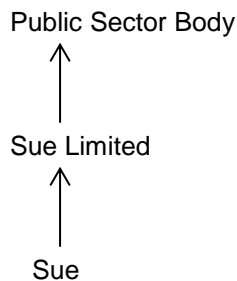
Susan felt that if HMRC were going to deduct PAYE, then they should treat her as an employee and give her holiday pay and other benefits.

The case was listed for a court hearing. However, on the morning of the due hearing, HMRC agreed to settle the case for the full £4,200 figure of holiday pay claimed, without actually going into court!

Susan Winchester’s legal action was funded and supported by the Association of Independent Professionals and The Self Employed (IPSE), the representative body for the UK’s self-employed community.

This has developed into a landmark case!

Other Area



The public sector body paid 13.8% employer’s NIC on Sue Ltd’s fees.

They deducted it from Sue Ltd’s actual fees as ‘an administration expense’.

Such deductions are not authorised by the legislation.

Extraction of funds from the public bodies

Background

Workers engaged in the public sector via their own personal service company (PSC), will have their employment status reviewed by the public sector end client on the outset of the contract to determine whether it falls within the new provisions.

The new provisions apply when the following are met:

1. the worker personally performs services, or is under obligation to personally perform services for the end client
2. the end client is a public authority
3. the services are provided under circumstances where, if the contract had been directly with the end client, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office with the client, or the worker actually is an office holder with the client.

Where the provisions apply the public body must deduct PAYE and Class 1 national insurance from the payments made to the PSC based on the VAT exclusive amount. Additionally, if the PSC is caught by the new rules, they are no longer allowed the 5% company costs deduction allowable under a normal IR35 deemed payment calculation.

The net payment made after the deduction of PAYE and Class 1 national insurance is known as a deemed direct payment.

Once the payment has been received a decision has to be made on how to extract the funds from the company. This can be done in a number of different ways, not all of which are tax efficient.

How to extract the funds from the personal service company?

Grace Ltd is owned 80% by Grace, 15% by her husband and 5% by her son.

Grace Ltd bills the NHS £100,000 (ignoring the VAT). The NHS deducts a total deduction of, say, £40,000 being tax and national insurance. Accordingly, the net sum paid by the NHS to Grace Ltd is £60,000.

The amount of £60,000 would be used as the company turnover when preparing the accounts.

Grace Ltd has now received the net figure of £60,000 from the NHS, and wants to extract the £60,000

Extraction of Funds by salary

It is possible to take the income as remuneration. The worker is able to set-off an amount of the deemed direct payment before any liability to PAYE/NIC arises on that remuneration.

Example 1

Grace decides to take the full amount of the deemed direct payment of £60,000 as remuneration in the year.

The position would be as follows

Salary payment	£60,000
Less deemed direct payment	(£60,000)
Subject to PAYE/NIC	£0

An RTI submission would be made for the payment with no tax or national insurance to be paid. This would be reported as a non-taxable payment on the FPS that the payroll software produces.

It is believed that this non-taxable remuneration should go into Data Field 58A.

Example 2

Grace has other income within the company and decides to pay herself £72,000 as remuneration.

The position would be as follows

Salary payment	£72,000
Less deemed direct payment	(£60,000)
Subject to PAYE/NIC	£12,000

The amount of £12,000 would be subject to PAYE and NIC and reported through the payroll of the PSC.

Tax would be calculated based on the tax code in operation with the PSC and Class 1 national insurance would be payable by Grace and the company on this amount only.

Extraction of Funds by dividend

The funds could be paid by a dividend from the company's profits. Like the payment of remuneration the dividend payment is tax free up to the total of the deemed direct payment.

She would not need to include the dividend on her self-assessment tax return so long as it does not exceed the deemed direct payment.

However, as Grace Ltd has minority shareholders the other shareholders would also be entitled to a dividend payment.

Example

Grace Ltd declares a dividend of £60,000, being £48,000 to Grace, £9,000 to her husband and £3,000 to her son.

Grace's payment would be covered by the deemed direct payment and no further liability would arise. She would not need to include the dividend on her tax return.

As the deemed direct payment relates to income earned by Grace as a deemed employee the deemed direct payment would only apply to payments received by her. (ITEPA2003 s61W)

Her husband and son would be required to pay tax on their dividend and this would be reported through their self-assessment tax returns.

This creates a double tax charge on this share of the income and there would be an unused amount of the deemed direct payment.

Is it possible to avoid double taxation?

The company could create a new class of share which is owned by Grace only. She could then be paid a dividend equivalent to the deemed direct payment before her husband and son are paid on the other class of shares.

This route would require consideration in other tax areas as well.

Alternatively the husband and son could waive their shares but this could lead to issues where the company does not have sufficient distributable profits to cover the dividend paid and the dividend waived.

In practice, the simplest way to avoid double taxation where there is a deemed payment attributable to only one shareholder is to pay remuneration to that shareholder equal to the deemed payment.

Hypothetical Example and Case Study

Tom is a top BBC presenter. He works through his company Tom Ltd. He has 80% of the shares.

His wife has 20%. She does his bookkeeping and admin.

Tom Ltd billed the BBC £160,000 in 2017/18.

The BBC subjected his company's fees to IR35 PAYE and NIC for 2017/18.

The BBC deducted PAYE of say 20% i.e. £32,000 and NIC 1% of £1,600.

The turnover figure for accounts should be the net amount received (£126,400)

His company Tom Ltd also received £40,000 gross (no tax deducted) from personal appearances for 2017/18.

The company makes up its accounts to y/e 05/04/2018.

The accounts show:

	£	£
Income		166,400
<u>Less</u>		
General administrative company costs	12,000	
Travel expenses	10,000	
Accountancy fees	1,500	
Company filing and other expenses	800	
Postage and stationery	1,400	
Computer expenses	2,000	
Sundry expenses	<u>1,800</u>	
		<u>(29,500)</u>
Net profit		<u>136,900</u>

The income received by Tom Ltd from the BBC would be treated as a deemed direct payment, which is treated as taxable earnings from employment for Tom.

The company's taxable profit would therefore be:

	£	£
Income		166,400
<u>Less</u>		
Less deemed direct payment	126,400	
General administrative company costs	12,000	
Travel expenses	10,000	
Accountancy fees	1,500	
Company filing and other expenses	800	
Postage and stationery	1,400	
Computer expenses	2,000	
Sundry expenses	<u>1,800</u>	
		<u>(155,900)</u>
Net taxable profit		<u>10,500</u>

Tom will have to put on his own personal SA Tax Return £160,000 'employment income' and PAYE suffered thereon of £32,000

The legislation for deduction of the deemed direct payment from income is s139 CTA2009. Other expenses are deductible under the usual tax rules.

In many cases, these personal service companies will only have income from the public sector body i.e. no other income. If we were to take out the £40,000 from the above example, this would produce a loss of £29,500. This would be allowable under the normal company trading loss regime rules. However, in this case, there would be no other income against which to offset the loss.

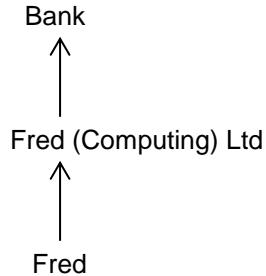
We have heard that several owners of Personal Service companies, who will be regularly carrying company trading losses forward year after year, plan to introduce other income and activity against which to set the brought forward trading loss.

The application of company trading losses changed from 1st April 2017, and now, subject to a cap of £5 million, the trading loss can be carried forward against other trading income, investment income, and Capital Gains.

IR35 AND THE PRIVATE SECTOR

The IR35 public sector rules will be extended to the private sector, from 6th April 2020, but only for larger and medium-sized organisations.

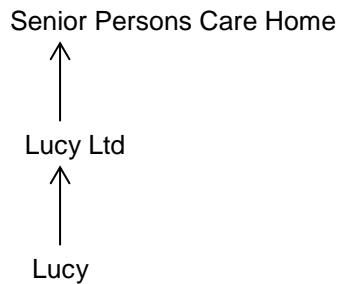
Example



If the Bank considers IR35 to be applicable (from 6th April 2020), they will deduct IR35 PAYE and NIC from Fred (Computing) Ltd's fees.

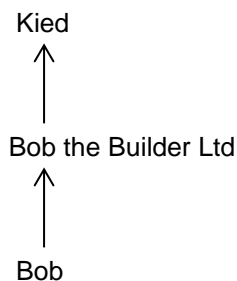
Will these bigger engager organisations always individually check each contract (as they should do) and either apply or not apply IR35?

Personal Service Companies working for smaller businesses and organisations, (from 6th April 2020 onwards) will continue to be responsible for IR35 themselves.



- IR35, with all its twists and turns, is like a Frederick Forsyth novel, with loads of sub-lots!
- HMRC need to improve the quality of its online IR35 status tool, to be more efficient!

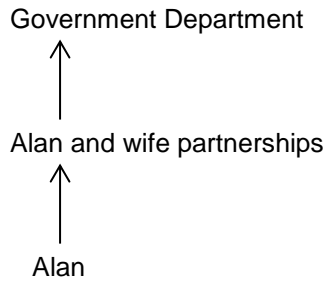
The new IR35 rules and the Construction Industry Scheme



IR35 takes precedent over CIS where the new Public Sector rules apply, then the CIS tax regime does not!

Partnerships

Could the following be caught under IR35 in the public sector?



Answer: Yes, a partnership can be caught under IR35!

CLOSING CASE STUDY

Question...

A big restaurant, with a pub attached to it, opens 8am to midnight, Monday to Saturday each week.

It uses Fred the cleaner every morning, 5.30 – 7.30am. He cleans the restaurant for 2 hours every day, Tuesday to Sunday inclusive each week.



Fred Ltd has a yearly contract with the restaurant to do this. The restaurant renews this contract each year.

Would this be caught to IR35?

What questions would you like to ask?

Could you successfully defend this?

Suggestions

I would redo his contract. I would not have a renewable yearly contract. I would replace it by a more general contract, building in the following 9 points...

- 1) I would get rid of the set hours of 5:30am to 7:30am. I would give Fred the freedom to come in and out of the restaurant at any time between midnight and 8:00am, to get the work done. Fred must be able to decide how many hours it will take him to do the work or, if the restaurant wants to limit him to 2 hours per day then he must be able to decide how he fills those 2 hours.
- 2) I would insert in his contract that the responsibility for, and the manner in which he does the cleaning work is entirely down to him. (No control)
- 3) I would put in the contract that there is no notice period, and that either party can terminate the contract at any time.
- 4) The restaurant should give him both entire and complete responsibility for purchasing all the cleaning materials, utensils and equipment. He must not use whatsoever the restaurant's materials or equipment.
- 5) In his contract, the restaurant must agree to his use of a substitute, chosen and engaged by Fred Ltd. If indeed Fred is off ill, the substitute (say Alan) will be used. Fred Ltd will still bill the restaurant, and Alan (the substitute) will bill Fred Ltd.
- 6) You must insert in his contract that... If there are any complaints regarding Fred's work, then he will come back to the restaurant, in his own time, to rectify the mistakes, for no further payment.
- 7) All Fred's work must be covered by his own insurance, (not the restaurant's), paid for by Fred Ltd.
- 8) The restaurant must not supply overalls or other clothing, e.g. carrying the logo of the restaurant.
- 9) A mutuality of obligation clause is needed in the contract, ensuring that the restaurant is not obliged to offer work to Fred and he is not obliged to accept it.

These are just initial thoughts on perhaps trying to improve the position so that this engagement would not be caught to IR35.

If changes are made to his contract, then the contract must represent the truth and the reality of the working position. Fred must fully understand the terms of the agreement as HMRC is well aware that the best way to attack contracts is to talk to the worker who will often be under the impression that he is controlled by the engager.

Each case turns on its own merits, and depends upon the facts in practice.