

- Business Advisory & Audit
- Tax Consultancy
- Corporate Finance
- Forensic Accounting
- Outsourcing & Payroll Management
- Financial Planning

# OFF-PAYROLL WORKING IN THE PRIVATE SECTOR (IR35)

**Alan McCann** CTA ATT  
**Head of Tax Dispute Resolution**

**Gareth Costello** CTA  
**Senior Tax Manager**

*November 2019*

# About Alan...



- Over 40 years of experience in taxation dealing with clients and HMRC alike
- Specialises in tax investigations ranging from relatively straightforward local enquiries to serious fraud issues.
- Hands-on style greatly appreciated by clients and a solid reputation of working with HMRC on reaching settlements.
- Also works in partnership with accountancy firms which do not have in-house taxation expertise
- A member of the Chartered Institute of Taxation and lectures extensively to the accountancy profession on taxation issues

**Specialisms:** tax investigations, money laundering, compliance and HMRC time to pay arrangements

# About Gareth...



Gareth joined the tax team in May 2017 to help bolster the senior tax advisory team.

Prior to joining DTE, Gareth has worked at a combination of top ten accountancy firms and smaller independent tax advisory boutiques, the focus throughout being support and advice to owner managed businesses and their owners on tax matters.

**Specialisms: corporation tax, income tax, capital gains tax for individuals and companies, succession planning, share incentives and growth plans, corporate reorganisations and demergers.**

# Background to the proposed rules for private sector off-payroll working

- Off-payroll working rules introduced in the public sector in April 2017
- HMRC & HM Treasury Consultation Document published May 2018 – closed August 2018
- Summary of response to the consultation published in October 2018
- HM Treasury Budget 2018 – confirms private sector will brought in line with the public sector from April 2020
- HMRC publish the draft legislation (FB 2019/20) and the 'Rules for off-payroll working from April 2020 in July 2019'

# Background to IR35 rules (s49 ITEPA 2003)

- Combat the wave of individuals leaving companies and circling back as independent contractors
- Back in the late 1990s, HMRC wanted to place risk on the end client – given corporate to corporate engagement. However, there was push back by end clients and HMRC backed down
- Risk of PAYE exposure falls on PSC – (s55 ITEPA 2003)

# Cost of estimated non-compliance with IR35 rules

- HMRC suggests non-compliance with IR35 widespread
- HMRC estimate that only a third of individuals working through PSCs should be categorised as employees
- But estimates that only 10% of PSCs that should apply IR35 actually do so
- Lost revenues £726m in 2017/18 rising to £1.26bn in 2022/23
- Difficult for HMRC to challenge all PSC/intermediaries as have to enquire into each of them

# Why bring private sector in line with public sector?

- Evidence from public sector suggests compliance has improved since new rules introduced in 2017
- Marked increase in public sector operation of PAYE withholding
- HMRC estimates public sector reforms have raised £550m in tax and NICs in the first year
- HMRC wish to ensure a level playing field for workers/employees in similar roles in the public and private sectors
- The new rules do not apply to the self-employed and only impact those working like employees through a PSC – but the liability following recategorisation where the self employed are used falls on the company not the individual

# Responsibility for “worker employment status categorisation”

- From 6 April 2020, medium and large businesses are required to decide whether the rules apply to an engagement with individuals who work through a PSC
- Where it is determined that the new rules do apply, the business, agency or third party **paying the PSC** will need to deduct tax and employee NIC and pay employer NIC
- The existing rules will continue to apply to the 1.5m smallest businesses for now
- Definition of ‘small businesses’ is as stated in Companies Act 2006 i.e. i) annual turnover of not more than £10.2m; ii) balance sheet total of no more than £5.1m; or iii) average number of employees no more than 50
- HMRC to work with “stakeholders” to improve the Check Employment Status for Tax (CEST) service and guidance to help businesses comply



# Using Personal Service Companies

- New rules will not stop people working through PSCs
- Concerns that if the new rules are applied HMRC will be inclined to challenge historic engagements
- The rules are not retrospective
- HMRC have stated that they will focus its efforts on ensuring businesses comply with the new rules and not on challenging historic cases – Good News
- HMRC claim that evidence from the public sector reforms shows compliance increasing without impacting market flexibility

# IR35 and the case law derived “status tests”

- An employment contract cannot exist where one company engages another for services – hence introduction of IR35 in 2000
- As with IR35 new rules apply where the **hypothetical** contract between the worker and end-user/engager is determined to be a ‘contract of services’ (i.e. employment) rather than a ‘contract for services’ (i.e. self-employment)
- The hypothetical contract is determined by reference to the so called ‘status tests’ derived from case law

# The “Status Tests”

- Personal service
- Mutuality of obligation
- Right of control (& supervision and direction)
- Right of substitution
- Provision of own equipment
- Financial Risk
- Opportunity to profit
- Length of engagement
- Number of engagements

# The “Status Tests” continued...

- Integration or ‘part and parcel’ of the organisation
- Employee type benefits
- Right to terminate contract
- Personal factors
- Mutual intentions

# Critical importance of contractual terms and conditions

- Need to consider the hypothetical contract – as well as the actual contract
- IR35 works on an engagement by engagement basis (often not appreciated)
- Christa Ackroyd Media 2018 (HMRC won but taxpayer appealed) owing to unhelpful terms and clauses around control that pointed to employment – Ms Ackroyd has lost the appeal at the Upper Tier Tribunal\*
- Need to ensure the contractual terms and clauses reflect the actuality of the working arrangements in place
- Businesses inclined to try cover all business risks resulting in contracts that infer or give a right to control as to how work is rendered
- Even if a 'right to control' clause is not exercised it can be fatal

*\*In addition 3 other BBC news presenters have lost at the First Tier Tribunal – 16 months to reach a decision*

# Critical importance of contractual terms and conditions (continued...)

- Typically unhelpful terms and clauses include
  - Exclusivity
  - Rights of control
  - Length of contract
  - Working hours
  - Termination terms
  - Substitution when clearly inappropriate
- In essence a 'contract for services' should be devoid of any rights of control over how the work is rendered and kept very simple e.g. "I'll do that in return for this"

# Recent IR35 cases

- Christa Ackroyd Media (2018) v HMRC [2019] UKFTT 69 (TC) – HMRC won
- MDCM Ltd v HMRC (2018) TC06400 – HMRC lost
- Jensal Software Ltd v HMRC (2018) TC06501 – HMRC lost
- Albatel Ltd v HMRC (2019) UKFTT 195 (TC) – HMRC lost
- Atholl House Productions Ltd (2019) UKFTT 0242 (TC) – HMRC lost
- Paya Limited/Tim Willcox Limited/Allday Media Limited v HMRC (2019) UKFTT 583 (TC) – HMRC won

# Christa Ackroyd Media Ltd

- BBC news presenter (Look North) dismissed in 2013 partly because of the tax (IR35) enquiry
- HMRC win on two key points:
  - length of contract (7 years)
  - control
- Control aspect of judgement based on BBC's editorial guidelines/OFCOM regulations seems suspect
- Represented by tax adviser rather than tax counsel
- Appealed to the Upper Tribunal – re control and whether BBC was in reality contracting with her and not the PSC



# MDCM Ltd

- Construction industry case – site manager
- Decision that degree of control exercised by client no more than would be expected for an ‘independent contractor’
- HMRC argued employment entitled to pension, sick pay, holiday pay. Tribunal said this was wrong approach and necessary to consider ‘hypothetical contract’

# Jensal Software Ltd

- IT consultant (Mr Wells) working for central government (DWP)
- Mutuality of Obligation (MOO) no obligation on DWP to provide work
- Right of substitution accepted by Tribunal
- Degree of control insufficient for employment

# Albatel Ltd

- Well known TV presenter Lorraine Kelly
- Control key:
  - OFCOM regulation unhelpful as all broadcasters impacted
  - Degree of control not sufficient
- ITV buying into Lorraine Kelly's brand/image
- A 'theatrical artist'

# Atholl House Productions

- BBC journalist and Kay Adams programme
- Decision that degree of control exercised by client no more than be expected for an 'independent contractor'
- Shorter term contracts – 1 year in contrast to CAM 7 years
- Ratio of non-BBC income to BBC income 30%-50% over a 2 year period
- Tribunal said important to look at her career as a whole
- BBC did not have first call on her services (contrast CAM)
- Degree of control insufficient for employment
- No sick pay, maternity leave or pension

# Paya Ltd and others

- HMRC won on substantive issues of;
  - degree of control exercised by BBC (under framework of control) as to 'what', 'where', 'when' and manner over 'how' sufficient for employment
- Presenters engaged by BBC continuously for over 5 years – sufficient mutuality
- Extensive restrictions on the presenters to undertake activities outside of the BBC
- Tribunal rejected presenters' advisers had been careless by simply acting for the PSCs. The fact that HMRC's contract review service not consulted not relevant
- Split decision by tribunal – Judge Morgan had deciding vote and found for HMRC

# What should clients do now?

- Identify individuals engaged via a PSC or intermediary and review to determine whether impacted by the new rules
- Consider, in light of numbers involved, whether changes to the way you engage contracts is required
- Decide who has responsibility for determining employment status, i.e. HR, hiring management, tax function to ensure training for the new rules
- Update or put in place systems for identifying assessing and documenting off-payroll status e.g. onboarding, invoicing, payment or payroll processes
- Keep an eye out for HMRC guidance as they have promised to support businesses and use HMRC's on-line status tool "Check Employment Status for Tax" (CEST)

# What should contractors and their advisors be doing now?

- Be aware of the new rules and engage with clients/end users to discuss impact
- Concerns that the public sector reforms are encouraging engagers to put everyone on the payroll to mitigate the risk of getting it wrong (very unfair for the genuinely 'self-employed')
- Review contractual terms if imposed by larger businesses very likely to include unhelpful terms and conditions and should be reviewed
- Seek suitable professional advice regarding both the contractual terms and conditions to ensure any 'fresh' contract reflects self-employment
- Ensure the actual arrangements between contractor and engager are reflected in the contract

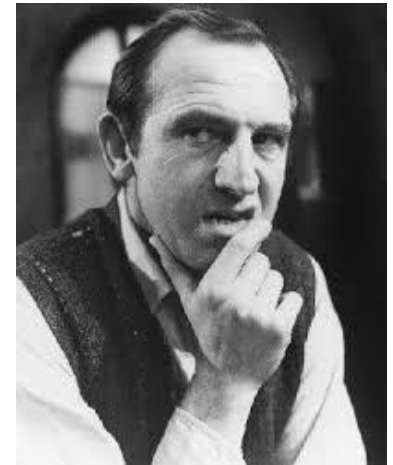
# Budget 2019 update

- ***Election promise by the current Government NOT to undertake the proposed further reduction to corporation tax down to 17% from April 2020 - the rate is currently 19%.***
- ***Deferral of the introduction of the VAT reverse charge for construction services to October 2020***



# Finance Act 2019 – Property matters

- Changes from April 2020:
- Principal Residence Relief (PRR) –
  - 18 to 9 months
  - Lettings relief change
- Mortgage relief restrictions
- SDLT – 30 to 14 days (1 March 2019)
- Capital gains tax – 30 days payment deadline (in line with non-residents)



# Other changes:

- ***Crown preference*** – a return to pre-2003 rules - the 2003 changes were designed to help and foster business turnarounds and rescues
- *Affects insolvencies after April 2020*
- *Tax debts which are affected – PAYE, employee NICs and VAT (other – Corporation tax, employer NIC remain unsecured)*
- *Tax debts to qualify as preferential whenever they arose (pre 2003 rules only gave preference for debts in final 12 months)*
- *Most affected – floating charge creditors, unsecured - pension scheme and company's suppliers or customers*



- Business Advisory & Audit
- Tax Consultancy
- Corporate Finance
- Forensic Accounting
- Outsourcing & Payroll Management
- Financial Planning

# THANK YOU!

# DTE Business Advisers

DTE is a leading independent firm of chartered accountants and tax advisers in Bury, Manchester and North West England. We offer our accountancy services in Bury, Bolton, Rochdale and the rest of the North West.

Offering a range of services including auditing, accounting and tax advice to a diverse range of clients, we are a forward-thinking company who can help you realise the full potential of your business.

With 2 offices situated in the heart of Bury and Manchester, we have over 80 years' experience aiding a variety of businesses. Our expertise extends to working with owner-managed businesses, small to medium sized companies, business start-ups, and UK subsidiaries of large international groups.

All of our advisers are commercially minded and can help you to effectively work towards your long term goals.

At DTE Group, we believe you should only leave your finances in the hands of the best. Contact our accountants and tax consultants in Manchester to ensure your business is being well looked after.

## FIND US IN BURY

The Exchange,  
5 Bank street, Bury, BL9 0DN  
**Tel:** 0161 767 1200 **Fax:** 0161 767 1201



## FIND US IN MANCHESTER

6<sup>th</sup> Floor, Royal Exchange Building  
St Ann's Square, Manchester, M2 7FE  
**Tel:** 0161 819 1910 **Fax:** 0161 819 4749



# Our Services



**Tax  
Consultancy**



**Forensic  
Accounting**



**Business  
Advisory & Audit**



**Corporate  
Finance**



**IT  
Support**



**Financial  
Planning**



**Payroll  
Outsourcing**

## NEVER WORKED WITH DTE BEFORE?

*Book an initial **FREE**, no obligation consultation to see how we can help*



[marketing@dtigroup.com](mailto:marketing@dtigroup.com)



**business advisers**

[www.dtigroup.com](http://www.dtigroup.com)