



Article 2

AVOIDING THE IR35 TRAP

We established in the first article that IR35 legislation relates to the relationship between the worker (or sub-contractor), intermediary (or contractor) and ultimate client to whom services are provided. In this article we will examine some specifics, although these are not exhaustive.

CHECKLIST?

It is very plain that there is no definitive checklist to work from. In the case of *Hall v Lorimer*, (66TC349) it was determined that “It is a matter of evaluation of the overall effect, which is not necessarily the same as the sum total of all the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.”

The correct approach, according to case law *Massey v Crown Life Insurance Co* (1978) ICR590) is to “stand back and look at the picture as a whole”.

Whilst it is wise to consider the points that HMRC would consider, more recent cases have shown that there may be good reasons where issues are not clear-cut. For example, in the successful case against HMRC, *Datagate Services Limited v The Commissioners for Her Majesty’s Revenue & Customs*, the Special Commissioner considered the control element but took into account that the nature of work for the client required strong security. In addition, the question of security was also taken into account by the Special Commissioner as being part of the reason why certain equipment was provided to rather than by the sub-contractor.

WRITTEN AGREEMENT

The starting point is a carefully drafted contract which sets out the intentions and obligations of the worker and the intermediary at the beginning. Such a Sub-Contractor’s Agreement will set out the agreement between the worker or sub-contractor and the intermediary or contractor, with the intermediary having an agreement with the ultimate client for whom services are provided.

Entering into a good Sub-Contractor’s Agreement is vital and there is no substitute for having a legally drafted agreement which covers all aspects of the arrangements between the parties. There is often a subtle difference between a “contract for service” (which would amount to employment) and a “contract for services” (which would amount to self-employment) but the consequences can be huge for an intermediary who will end up having to pay HMRC the PAYE deductions.

Some things which you need to include in a Sub-Contractor’s Agreement

- ✓ No holiday entitlement
- ✓ No absence payments
- ✓ Right to substitute other people
- ✓ Unless there is good reason, such as security in the example above, sub-contractors to supply their own equipment
- ✓ Consider having the arrangement for a fixed term only

- ✓ Ensure the sub-contractor doesn't get any "hidden" employee benefits, such as use of a subsidised company canteen etc
- ✓ Make sure that the sub-contractor appears, within the agreement, to be as independent as they actually are to ensure that control of any kind is minimised and there are strictly business to business obligations

CIRCUMSTANCES

However, it is not enough simply to have a good a Sub-Contractor's Agreement. HMRC will look at evidence behind the written contract. For example, if the Sub-Contractor's Agreement confirms that the worker has a right to substitute another individual to do the work, or the worker can work for other organisations, HMRC will look at whether that situation has actually happened. There is no point in actually agreeing within a written agreement that one thing will happen and then actually doing another.

The case of Lime-IT Limited (not related) v Michael Justin (an officer of the board of the Inland Revenue) has determined, albeit by implication, that the client's evidence will be important. For example, if there is a right to substitute another individual to do the work but circumstances have not arisen whereby that would be used, what would the client say were that to happen?

HMRC GUIDELINES

If you have a written agreement then HMRC will offer opinions and guidance advice on that agreement. The fact that you have asked HMRC for guidance can not be used against you, for example as part of the selection criteria when HMRC look at compliance.

It is unlikely that HMRC will actually guarantee any opinion on a contract they have provided to you So don't expect a 'go ahead we cannot touch you' type of letter. What they say is that, **if** they have received **all** the facts and the situation relating to that agreement remains the same, they would not change their opinion. It's not cast in gold but it helps in cases of dispute later down the line.

CURRENT SITUATION

Recently, there are have been cases in which workers have successfully avoided IR35 and proved that they have been properly self-employed, including the case of Larkstar Data Limited.

However, HMRC have started an appeal and the situation, whilst clearer, remains an area of potential problem so current legal advice needs to be obtained on each specific case.

Email us on advice@limeone.co.uk or phone on 01244 852550 for more information and help for your specific requirements.

