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Extension Of IR35 To The Private Sector, Part 16 – HMRC Stares Gift-horse In Mouth, Sort Of (UK)

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The keen follower of IR35, for there must be such a person, will have seen reports in the Press about the blanket approaches to PSC contractors being taken by some businesses of a size and/or reputation that they don't need to worry too much about the views of those who may wish to work for them. Some have gone for the nuclear option of just not dealing with PSC contractors at all, and some prefer the mere scorched-earth route of simply deeming all such contractors to be within IR35 and deducting the tax on the lot of them.

Cue great rejoicing at HMRC, one would have thought, but much misery and frustration among those many PSC contractors supplying services which would not on any view fall within IR35, and also the agencies supplying them.

They have noted that while wrongly treating a contractor as outside IR35 when he should be within it potentially brings HMRC retribution of Old Testament severity down upon the end-user, there is nothing equivalent for deeming a contractor within IR35 when he should be outside it. Obviously HMRC has a great deal to gain and nothing to lose from the latter practice, so this is no great surprise. However, it is more than a bit dubious politically and so there is now a sop to those contractors and agencies in the new IR35 Guidance.

This says that where an end-user makes an inside-IR35 determination without reasonable care, HMRC can seek the PAYE/NI from it even if the agency or other entity paying the individual contractor has already accounted for it. The agency or contractor can claim back the wrongfully deducted tax/NI from HMRC, and the Revenue would go after the end-user instead.

This sounds superficially viable but we consider that there will be neither the will nor the means to make it work in practice:

First, it assumes that the agency/PSC contractor signed up to an inside-IR35 placement (or at least received the end-user's status determination statement and continued to work) but then changes its mind. It would be very hard to contend lack of reasonable care on the part of the end-user if you yourself had agreed expressly or by your conduct to supply your services on that basis.

Second, we are left with the essentially implausible notion that HMRC would let go of money it had already pocketed in return for the potential of recovering broadly the same amount from someone else instead (but minus the costs of doing so). "*Without reasonable care*" is a high burden of proof for HMRC, especially given that the whole thrust (as a minimum, effect) of its own approach to enforcement has been to leave significant grey areas around the margins of IR35's application, and thereby to expand its reach into cases where a strict interpretation might not go. Because of this, we would see the "*without reasonable care*" arguments as open to HMRC for practical purposes only where there has actually been no care, i.e. where it is evident that no consideration at all has been given to the facts of that contractor's (or that category or group of contractors') circumstances at all. Even then, so what, really? Do we believe that HMRC has nothing better to do than act as referee in a zero-sum game (so far as it is concerned) between the contractor/agency on the one hand and the end-user on the other?

Next, who makes the case that the end-user's assessment was made without reasonable care? Based on this Guidance, HMRC would have to bring claims against end-users which focussed upon all the factors which might take someone outside "new" IR35, not into it. Therefore it would potentially generate a substantial volume of jurisprudence directly contrary to its own best interests in the much more common cases where it is arguing the other way around.

Last, there is the sheer iniquity of the proposal – HMRC pursues end-users for tax and NI which, had they rightly deemed the contractor outside IR35, they would not have had to pay anyway. What the Guidance does not deal with is the consequences of this for the wrongly-included agency/contractor – does it get away without paying tax or NI at all, or does it still have to pay and HMRC recovers twice? Surely it cannot be the former, since that would encourage a tsunami of nothing-to-lose lack of reasonable care allegations. That just leaves the latter, but it is hard to see even the most politically obtuse Government allowing a penal double recovery in these circumstances.

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