What am ‘I’? An intermediary?

Employment Tax

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A look at the latest consultations from HMRC in this area

HMRC is consulting on IR35 reform and intermediaries travel and subsistence claims.

Under the old parlour game animal, vegetable or mineral, it would be difficult to describe an intermediary as any of them. Considering two of this summer’s consultations, it might be reasonable to suppose the government does not know either.

FA 2014 amended ITEPA 2003 Ch 7 Pt 2 for ‘agency workers’ so that, if an employment intermediary is interposed between an engager and worker and the worker is personally providing services under a contract the engager has entered into with a party that is not the worker, an agency relationship arises. The consequences are that, unless the worker is not subject to supervision, direction or control (SDC) as to the manner in which they provide the services, the worker is deemed to receive employment income.

In the context of traditional employment businesses the existence of an agency relationship is relatively easy to establish. But what if you are not an employment agency? For example, an accountancy firm provides a bookkeeping service to clients and outsources the work to a self-employed person or someone who operates through their own personal service company (PSC), and the worker attends the clients’ premises one or two days a month. Is the accountancy firm now an employment intermediary? Even if there is no right of SDC, so does not have to apply PAYE, if the accountancy firm is an intermediary it has to file quarterly reports to HMRC.

Since a PSC usually provides the services of a worker to an end client why is it not an employment intermediary under the agency legislation? If it were an employment intermediary the agency legislation would, for example, take precedence over the

intermediaries legislation (better known as ‘IR35’). HMRC take the view that, if a PSC is supplying the services of only one worker it is not an employment intermediary (but see proposals below). But if the PSC then subcontracts some of the work to another individual (exercising a right of substitution under the contract) it could be.

This brings us to the first of HMRC’s summer consultations: Employment Intermediaries and Tax Relief for Travel and Subsistence. The proposal is to remove ‘home to work’ travel and subsistence tax relief where a worker is engaged through an employment intermediary and subject to SDC. Under current rules, ‘ordinary commuting’ costs may be tax relieved if an employee, including an agency worker, is sent to a temporary workplace for a limited duration, that is neither expected to exceed 24 months nor expected to be the main workplace during their period of employment. The onus will be on the engager to confirm to the intermediary whether there is SDC, although who the engager is will need to be established. For example, if a retailer subcontracts the distribution side of its business to a road haulage business and it hires drivers through an employment business, is the engager the retailer or the road haulage firm?

While the Treasury is undertaking a wider review of travel and subsistence expenses, it is understood that claims for home-to-work travel and subsistence tax relief by agency workers engaged under overarching contracts of employment, or where umbrella companies are interposed, are such that the government considers action is required now. (It has been stated that in many cases part of the wages are ‘converted’ into tax and NICs-free reimbursement of home-to-work travel costs.)

Members’ views on the proposed legislative changes are welcome but for this article we shall concentrate on HMRC’s view that PSCs will be, confusingly, included within the definition of an employment intermediary solely for travel and subsistence tax relief purposes. If enacted as proposed, an owner-director of a PSC would first have to consider whether there is a right of SDC for the purposes of what claims for travel and subsistence tax relief can be made before the PSC separately determines whether the contract is within IR35. One wonders how many PSC owners will understand the subtle differences between an SDC test for travel and subsistence claims and the hypothetical employment contract test for IR35.

Which introduces the second of HMRC’s consultations ‘Intermediaries Legislation (IR35): discussion document’. Eleven pages to explain that, after 15 years, IR35 is not working as intended, which the Office of Tax Simplification identified back in

2011, and that around 90% of PSCs are not complying with the legislation.

Potential options for reform in HMRC's discussion document include placing the onus on the end client to determine whether a worker engaged through a PSC should be deemed an employee. In other words, the engager decides whether IR35 applies and, if so, withholds PAYE and NICs. This would not change the requirement to consider each contract individually but, given the millions that could be at stake where, say, 200 workers are engaged though their own PSCs on identical contracts it may be more worthwhile for HMRC to dispute that IR35 does not apply! Neither does it address what figure PAYE should be applied to (do you take account of, for example, an agency's fee?), how PAYE should be applied (what tax code would apply?) and what then happens to the money (is it employment income of the worker rather than income of the PSC?). And there is still the question of who the engager is (see above). A second option for reforming IR35 is to change the employment status test and introduce an SDC test instead, although application of this test is likely to create as many disputes as the traditional employment status test which operates in a similar way to 'you know an elephant when you see one'.

Members' views are welcome on how IR35 could be transformed to achieve the government's aims of protecting the Exchequer and levelling the playing field (changes to the taxation of dividends may have gone some way towards this in any case). For example, should IR35 be retained but engagers required to report payments to HMRC (perhaps with a transfer of debt provision if the PSC fails to apply IR35 correctly)?