TAXAdviser

Pick and mix

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Michael Steed and *Marion Hodgkiss* examine the tax challenges created by the gig economy

What is the issue?

Technological change is having a major effect on the modus operandi and makeup of the UK workforce and tax law is struggling to keep up with this. Government revenue is dropping and the Chancellor is minded to address the situation.

What does it mean to me?

Advisers will need to be able to cope with a workforce in a state of flux, where many of them will be classed as self-employed and tax advice will need to be tempered in the light of the new working practices, government review and possible PCRT implications.

What can I take away?

That clarity over tax rules for workers in the gig (and indeed sharing) economy, can't come too soon.

It's self-evident that work practices in the UK and other developed economies are changing. The traditional work models of one or maybe two employers and a good pension at the end, now from part of the baby-boomer misty memory of the fifties and parts of the sixties.

The UK Government and lots of others are waking up the to the implications of the so-called 'gig economy' and have commented on it and/or are actively engaged in finding out more about the effect of the gig economy on the 'legions' of 'self-employed' people who form the backbone of this highly mobile workforce and critically for tax, the impact on the Treasury.

We do not want to repeat much of what has been said (a brief overview only), but we wish to look at the day-to-day implications for advisers who come into contact with clients in this fast-growing sector of the economy.

'Gig' or 'sharing' or both?

So, just what is the gig economy? Is it the same as the sharing economy?

There has been much discussion about the difference (if any). The term 'the gig economy' is widely taken to apply to short-term working where workers will often have a series of short-term self-employed 'gigs' (either serially, or more than one in a day or week) in their working life. The sharing economy is arguably different: people sharing resources (assets) through 'disruptive technology' (for example renting a room through Airbnb). The term 'platform' is also widely used and is taken to be the technology (such as smartphones) where providers and users get together (think Uber and its APP based taxi service).

In this article, we will only be looking at the 'gig economy' – the tax aspects of the 'sharing economy' will be covered in a later article.

So what's the issue?

The critical point is to note that nearly all of the companies in the 'gig economy' class their workers as being self-employed.

This has a number of consequences which include:

- No obligation to pay the workers the National Living Wage;
- No basic worker rights such as sick pay and maternity/paternity pay and holiday pay;
- No need to operate PAYE;
- No exposure to Employers' NIC contributions or the Apprenticeship Levy;
- Exposure to the self-employed tax rules for the workers.

Clearly, as tax advisers we are predominantly concerned with the giving of tax advice, but we cannot ignore the rising tide of negative comment about the non-tax aspects of this 'sweated labour' (as Frank Field MP has labelled it).

But it's not just tax….

So let's be clear about one thing. It's not just tax; it's also employment law issues and the recent 'workers' rights' cases such as *Pimlico Plumbers* and *Uber* are rapidly moving the boundaries in respect of employment rights. It's just that the tax hasn't yet caught up with these complexities, although it is inextricably bound up in the employment rights issues.

So, in *Pimlico Plumbers*, the Court of Appeal (CA) has just upheld the Employment Appeal Tribunal (EAT) decision that a 'self-employed' plumber was a 'worker' within the employment legislation. The EAT said: 'From Pimlico Plumbers' perspective, it was advantageous to set up an operating system whereby it was free of obligations in respect of PAYE and NIC and was (hopefully) able to avoid the obligations and protections made available to employees and workers under employment and equality law. This is not to say that at the same time the operating system did not appear to have advantages to operatives.'

The tribunal found that Pimlico's business model was 'designed to create the impression, whether correct or not, with HMRC and courts and Tribunals that the operatives were in business on their own account while at the same time presenting a picture to the world at large that the operatives were an integral part of Pimlico's workforce.'

So, from a tax point of view, the tribunal found that the arrangement was a tax benefit to the firm and also from a tax perspective, a benefit to the plumber.

The agreement between Pimlico and the plumber provided that he was not an employee of the firm – he was an independent contractor in business on his own account. He was paid upon submission of an invoice to Pimlico.

The plumber was VAT registered in his own right and he dealt with his own tax affairs. He provided his own tools and he had to provide his own insurance. He was responsible for fixing any mistakes. There was no mutuality of obligation between the two parties and the plumber could broadly choose when to work.

What did the courts decide?

The EAT held that the plumber was not an employee of Pimlico Plumbers, but he was a 'worker' and protected by equality and employment laws. The CA agreed. The *Uber* case came to much the same conclusion.

So from an employment rights perspective, we appear to have a new breed of person – the 'worker' who is not an employee, but who nevertheless has rights akin to an employee.

Neither the EAT nor the CA ruled on the tax aspects of the cases; so we are left with a divide: in employment law we now ostensibly have three groups: employees, workers and self-employed and in tax, we still only have two – employed and self-employed.

How do we meet this issue as advisers?

We are concerned with the practical giving of advice as tax advisers.

We are quite likely to meet say a driver who either claims to be self-employed, or is labelled as such by the engaging business. The first question that many of us will have is: is this person properly self-employed in the first place? Obvious businesses that come to mind include: Hermes, Amazon and Uber.

We were all trained to understand the difference between employment and self-employment and how difficult that can be in practice. We all understand too, the difficulties associated with labelling and the gulf that we often encounter between labels and the reality. So let's just accept (with obvious misgiving) for a moment, that the person who has come to you as a 'gig economy' worker, such as a Hermes driver and who only works for Hermes and has done so for the last three years and who is labelled as self-employed, is so. You may need to answer questions such as claims for travel and subsistence (which we have covered in the December 2016 issue of *Tax Adviser*), including home to depot costs and food on the go. He may have a vehicle to maintain at his own expense, loans to buy vehicles and rental for the 'black box' that you as a customer sign on receipt of a delivery.

Let's then assume that you accept his self-employed status and send him his tax return to sign on that basis. There is to our eyes, a clear PCRT issue.

The new PCRT guidance [1] from 1 March 2017 at says that tax advisers should (inter alia):

- Help taxpayers to comply with their tax obligations so that they pay the right amount of tax at the right time and thereby help and encourage compliance;
- Help protect them from possible penalties and sanctions for non-compliance which might otherwise arise;
- Assist those who have not been fully compliant to become so;
- Act in the interests of clients by advising taxpayers on the reliefs and incentives which Parliament has introduced, recognising the economic and social objectives for their introduction and thereby helping to support growth and competitiveness;
- Advise clients of the tax consequences (for themselves, their families, affiliates, customers, employees, owners or other stakeholders) of actions that they have taken, or propose to take, especially in circumstances where the law may be unclear, outdated, or inconsistent;
- Advise taxpayers on how such tax liabilities and compliance costs can be mitigated by making reasonable and appropriate use of the legislative framework and the choices available, particularly where transactions or arrangements can reasonably be structured in different ways with different tax consequences; and

- Advise clients on how to resolve lawfully and effectively legitimate differences of view with the tax authorities (or sometimes, stakeholders or other taxpayers).

It's not too unreasonable to our eyes to conclude that most, if not all, of the above issues are in play in such a scenario. So, in signing off on such a worker, it seems to us that there is tax risk both for the worker and the engaging business (here, Hermes), not to mention the tax adviser.

A common piece of advice to businesses that use 'self-employed' workers (very common in construction, IT and transport) is for the engaging business to insist that the worker has a limited company, such that the contracts are between the worker's limited company and the engaging business. This obviously throws the NIC responsibility down to the worker's company, although we note that this will be much harder for employers in the public sector from April 2017, where the task of status decision making falls to the final engager.

There is also the business of VAT liability – who makes the supply? – let's consider an Uber taxi driver: is it Uber or the driver – put another way, is the driver an agent or a principal? We are aware that this is an issue which is being studied by many tax jurisdictions in which Uber operates. Most taxi drivers in the UK will be under the current VAT registration limit, so for say most London black cab drivers, their supplies will be outside the scope of UK VAT. But if it is Uber that makes the supply, then there are important ramifications for VAT revenues in the UK. On this point, there is evidence that where an Uber driver does provide a receipt, it is in the name of Uber's Dutch company and has a zero-rate of Dutch VAT (for overseas entrepreneurs).

Conclusion

It's not fanciful to state that this issue of the gig economy is one that clearly needs new legislation to deal with these complex and interacting issues. The government has already committed itself to reviewing the issue and we expect and hope that it will act sooner rather than later.

Practical issues for the government include the concept of equalising the tax treatment of equivalent work. For example if a business takes on a self-employed worker under a contract for say IT services, at what stage should the tax system kick in to ensure that the contractor has the same tax treatment for essentially the same work as an employee?

As advisers we meet this problem regularly and there is no metric that we can apply – should it be six months, or 12 months? At the moment there is no answer to this tax problem. The VAT liability for Uber drivers could also do with clarification, so that drivers and customers alike can deal with this issue. These are practical issues that trouble all of us who wish to give the best possible advice; the new PCRT again: 'Tax advisers have a responsible role to play in serving their clients while upholding the profession's reputation and taking account of the wider public interest'.

Change can't come too soon!

Links
[1] https://tinyurl.com/PCRT2017