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## Albatel Ltd v HMRC

This week's newsletter reviews the judgment of the First-tier Tax Tribunal ("FTT") in [Albatel Ltd v HMRC](#). The case is interesting as it is yet another that concerns a prominent TV presenter: in this case, the 'brand' and individual personality (as the FTT termed it) of the well-renowned presenter Lorraine Kelly. HMRC pursued Lorraine Kelly's limited company, Albatel Ltd, under IR35.

As a very brief background (and for those unaware), IR35 is a piece of anti-avoidance legislation that seeks to establish whether an individual (in this case Lorraine Kelly) would have been an employee of a client (in this case ITV Breakfast Ltd) had the two parties contracted directly rather than via an intermediary (in this case Albatel Ltd). If the legislation applied, Albatel Ltd (not ITV Breakfast Ltd) would be due to pay additional tax and NICs under the IR35 'deemed employment' calculation, which in this case amounted to more than £1.2 million.

The judgment is the second such case concerning a broadcasting channel and the engagement of a presenter, the first case being CAM Ltd (Christa Ackroyd's personal service company) engaged of course by the BBC. As you may be aware, CAM Ltd lost its appeal and is currently pursuing an appeal in the Upper-tier Tax Tribunal.

In addition to the two cases mentioned, we are aware of several other similar cases that are currently being investigated/challenged by HMRC. No doubt the outcome of *Albatel* will give those with ongoing disputes some confidence to continue pursuing their appeals.

Firstly, it is not surprising that the two cases surrounding the TV industry have had differing outcomes – this is purely down to the complex nature of employment status, which is always determined by the facts specific to each case as demonstrated by the numerous authorities in both the tax and employment tribunals. In this case alone, the tribunal referred to more than 15 prominent cases that involved employment status or IR35.

The starting point for employment status disputes, is, as always, the seminal case of *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* which sets out some key factors that must be present in a contract for the contract to be one of employment. The key factors are:

- Personal Service
- Mutuality of Obligations
- Control

The other aspect to mention here is that even if all the above factors are present in a contract, we must also assess and review any other factors that are inconsistent with a contract of employment.

Once all the facts of the agreement have been ascertained, we review the facts as a whole to establish whether the agreement is one of employment or not. Needless to say, if any one of the factors listed above is not present in a contract, the contract cannot be one of employment.

The Tribunal in this case followed this exact process.

HMRC, surprisingly, sought to rely on key contractual arrangements only, whilst Albatel Ltd sought to rely on witness evidence provided by Lorraine Kelly, Ms Susan Walton (ITV), Mr Hugh Grant (Advisor to Albatel Ltd) and Professor Jonathan Shalit (Lorraine Kelly's agent) as well as the contractual arrangements.

Once all the evidence was presented, the FTT assessed the nature of the hypothetical contract that would have existed had Lorraine Kelly contracted directly with ITV. The tribunal found, amongst other things, that the relevant terms would be that:

- The contract was for a term of 2 years and 6 months. Ms Kelly was contractually obliged to perform the services and ITV was obliged to pay the fees.
- ITV had a right to call upon the services of Lorraine Kelly but if she was not available for any reason Ms Kelly may have proposed a substitute (perhaps surprisingly). ITV had the right to determine whether to accept the substitute;
- Ms Kelly must, in providing her services, co-operate with ITV and take account of its direction but Ms Kelly could at her discretion have decided the manner, means and methods by which she performed the services;
- ITV would have final editorial control over the programme.

The tribunal went on to analyse further the position on mutuality of obligation (MOO) and control and found that there was sufficient MOO between the parties but this on its own was not determinative of the issue at hand.

The interesting aspect of the argument here was in relation to HMRC's submissions. HMRC argued that the contractual terms provided for services up to 42 weeks; that Ms Kelly was obliged to perform if called upon to do so; and regardless of whether they did do so, ITV were obliged to pay. Whilst ITV had powers to terminate the contract, ITV would have been liable to pay Albatel Ltd for the minimum sum agreed under the contract. HMRC submitted, each of these factors demonstrated mutuality of obligations.

It would seem HMRC's position on MOO is ever changing – most will recall that HMRC's new Check of Employment Status Tool does not include any fact-finding surrounding MOO. The basis for this is set out in HMRC's Employment Status Manual where HMRC state:

*The significance of mutuality of obligation is that it determines whether there is a contract in existence at all. Without mutuality of obligation there can be no contract of any kind.*

The guidance (which essentially sets out HMRC's interpretation of the law and presumably what the CEST test is based upon) is very different to the argument put forward by HMRC in the tribunal!

As for control, which was Albatel's key argument (with which the tribunal agreed), Lorraine Kelly decided the running order of the programme, the items to feature and the angle to take in interviews. The tribunal accepted that Lorraine Kelly was not part of a jigsaw when it came to putting together the programme: she **was** the jigsaw. She was the 'brand' that ITV purchased.

The level of control that ITV had over Ms Kelly was not enough to make ITV the master and Ms Kelly the servant.

Following the review of the factors above, the tribunal looked at the other aspects of the arrangements, including the fact that Ms Kelly was not entitled to certain benefits and the amount of other work carried out by Ms Kelly.

Based on the facts of the arrangements between the parties, the tribunal deemed the hypothetical agreement between Ms Kelly and ITV would be a contract for services (self-employment) and consequently IR35 could not apply.

## Summary

This case demonstrates the impact of the facts of individual cases – even similar cases – on the employment status test. Last year we saw CAM Ltd lose its appeal, albeit in the same industry but under substantively different facts.

Other cases may well yield similar results and the complexities surrounding IR35 and employment status will continue despite the changes proposed to the legislation.

The case also gives us more of an insight in how HMRC continue to argue employment status cases; e.g. on the one hand the guidance (in the form of the CEST test and HMRC manuals) confirms that factors such as MOO are met as soon as a contract is agreed, however in the context of a dispute, it is accepted that MOO is much more than simply a contractual relationship. CEST is clearly flawed and will no doubt lead to those using and relying solely on the tool adopting an incorrect assessment upon which to determine the tax position.

We therefore urge those that are currently dealing with a challenge from HMRC, utilising HMRC's guidance or the online CEST service to seek professional advice to ensure the correct employment status determination is made.

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