

IK original view



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[Redacted]

Date: 28 August 2002
Your ref: [Redacted]
Our ref: [Redacted]

Dear Sirs

[Redacted]

I refer to your letter of 14 August and trust that you have received my colleague's acknowledgement of 23 August.

I have now been able to proceed with my review of the contract which you submitted in this case and as you are probably very well aware, the method by which these matters are decided is to look at the various factors of the case and then test these against the case-law principles which have arisen from previous cases which have proceeded through the Courts on the question of employment or self-employment. By the very nature of status, this process is usually by no means straightforward and in fact we often end up with a mix of factors because very few cases are totally one way or the other. It is then usually a question of standing back in effect and attempting to see which way the balance of the factors tips overall.

In this particular instance, having proceeded as above, I can see that there are certain Schedule D/non-IR35 pointers present, although I have to say that on balance, it is my opinion that the IR35 factors themselves clearly predominate. Accordingly, it is my opinion that had this contract been directly between [Redacted] and the above end client, it would be considered to be a contract of employment. Accordingly, I believe it is correct that the IR35 legislation should be applied to this contract. The main reasons why I have come to this conclusion are as follows –

- Skilled persons or experts etc do not of course normally need detailed supervision but nevertheless they can still be basically under the direction and control of the end client if a sufficient framework or direction/control exists. In this instance, it is noted that your client is required to work on the principals premises for an agreed number of hours, also




with the necessity to complete timesheets as evidence of work performed and have these duly authorised. Overall therefore, under this particular heading I have to say that this is in my opinion more of an IR35 pointer.

- It is accepted that the right to substitute your services with another worker will normally be a pointer towards self-employment/non-IR35 but such a right in fact has to be both realistic and unfettered. In many situations, although a contract may purport to give a right of substitution, this is very often impractical and it is often only the original worker who can ever fulfil the requirements of the engagement once it has commenced. If therefore the right is purely theoretical and could never be practically invoked, we have to argue that there is no effective right of substitution. Furthermore, the more conditions there are attached to any such right means that the right itself is diminished accordingly. In this particular instance therefore I note the contract wording and I also note that in a similar vein, the contract itself cannot be reassigned to any other party without the prior written consent of the agency who need not even give any reason for withholding consent. Looking therefore at this whole matter globally, I cannot consider this is a pointer away from IR35 – more in fact the reverse.
- No indication of any investment by your client in any financial risks for the performance of this contract.
- As she is remunerated at an hourly rate, this also appears to remove any opportunity for profit in the contract – an opportunity which is very often present in the case of the self-employed person.
- There is no evidence that your client has invested in any substantial or major equipment for the performance of this contract, ie in a quantum which might have had an effect on the matter.
- Where there is a clear and unfettered right to work elsewhere concurrently (non-exclusivity) then this again would normally be a Schedule D/non-IR35 pointer. Clause 1.5 of Appendix A in this case is relevant here and it is noted from the wording thereof that although this again appears ostensibly to give your client the right to work elsewhere, the principal obviously has the right to prevent this if it thinks that your client's main work will be affected. Accordingly, I have to take this restriction as being something more of a pointer towards IR35 in the circumstances.
- Many self-employed persons will also have the right to hire and pay their own helpers should this prove to be necessary. The contract appears to be silent on this point in this case.

This opinion therefore assumes the information provided to me accurately reflects the basis upon which the services are provided but if the contract is not fully acted upon in practice or if there are other conditions etc not as yet presented then this opinion could require some modification.

Should you disagree with the contents of this letter, you may tell me why you think it is wrong and provide any further information etc which you think may be relevant. I will then consider what you have told me and advise you accordingly.

Yours faithfully

A handwritten signature in black ink, appearing to read 'G Carlton', written over a large, faint circular stamp or watermark.

G CARLTON
HM INSPECTOR OF TAXES