

07 July 2003

Our Ref : [REDACTED]

Your ref : [REDACTED]

HMIT IR35 Unit
1st Floor
Tyne Bridge Tower
Gateshead
Tyne & Wear
NE8 2DQ

Dear Sir

[REDACTED]
[REDACTED]
[REDACTED]

We have recently taken over the affairs of the above, and a copy of form 64-8 is enclosed for your information.

We have been passed your letter dated 28 August 2002 regarding the contract between [REDACTED] Ltd and [REDACTED] in respect of the [REDACTED] engagement.

While we agree that it is necessary to look at various factors, some carry more importance than others in determining status, and in this case we do not agree with your opinion that the IR35 indicators predominate.

- For the duration of the contract the Consultant is given a client contact with whom to liaise not a Manager to supervise the work. The hours worked are to be agreed, but this is merely to ensure that the work is carried out when it is practical to do so. For example the systems being worked with may be unavailable at weekends, or the people to whom the service is being provided may not be present in the evening. We don't agree that this is an IR35 pointer. If you engage the services of a Decorator to work on your house you would agree the hours between which he/she could work according to your own circumstances. This would not be taken to be an employment indicator.
- The issue of substitution is an important indicator, and there is case law to support the fact that where a contract provides for the ability to substitute another worker it cannot be a contract for personal services and is therefore outside IR35. (***Express and Echo Publications Ltd v Tanton 1999 IRLR 367.***) We understand that a right of substitution must be genuine, and in order to be so should be reasonably unfettered. To specify that any substitute for the initial named consultant must possess the skills necessary to carry out the work is not unreasonable, the Client must protect their own interests. The aforementioned case also supports the fact the mere existence of a right of substitution in a contract is sufficient. It does not have to be enforced to be taken as genuine, and without further evidence to the contrary cannot be dismissed as unrealistic. The fact that a substitute has not thus far been used is no indication that the right cannot practically be invoked.

- You go on to mention the fact that Clause 9.6 prevents re-assignment of the contract without the written permission of the agency. This is a standard clause in many types of contract between parties (for example a Landlord and Tenant), and is unrelated to the issue of substitution where the Contractor is able to engage another Consultant. It is not an indicator of employment.
- While we agree that being paid an hourly rate leaves no scope to make a profit, there is not the protection against financial loss that would be afforded to an employee. Clause 7.5 gives the right of immediate termination on the part of the client should the Contractor's performance not be up to the requisite standard. This demonstrates considerable financial risk.
- It is usually the case that the Contractor needs access to the company's own IT Systems in order to perform the service. With [REDACTED], there are security issues which prevent contractors having access to those systems from their own equipment either on or off site. We do not therefore see this as an IR35 indicator, but a practicality of carrying out the service for this particular client.
- Clause 1.5 Appendix A does give the Contractor the right to work elsewhere. It does not give the client the right to prevent the Contractor from doing so but merely protects the client's interests by effectively giving them the right to terminate the contract if the standard of the work being carried out suffers due to the Contractor's other commitments. Again this would not be considered an unreasonable provision to have in any contract for services. You would not expect to continue with the engagement of a builder who was unable to complete the building of your extension due him taking on other commitments. This is not an IR35 indicator.
- The fact that the contract is silent on the issue of whether the Contractor has the right to hire and pay his own helpers should this prove to be necessary cannot be taken to mean that right does not exist. We don't believe that the absence of this provision can therefore be taken to be an IR35 indicator.

In this case we feel that the points raised are not sufficiently indicative of employment to override the non-IR35 indicators, and would ask that you reconsider your position given the points made above.

Yours faithfully

[REDACTED]