

# TAX LAW

## Daybreak a leg! Television presenters, IR35 and theatrical performances

*Albatel Ltd v Commissioners of Her Majesty's Revenue and Customs* [2019] UKFTT 0195 (TC).

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### Introduction and legislative background

In the eyes of her fans, Lorraine Kelly is 'likeable', 'down to earth', 'charming', 'sincere', and 'lovely'.<sup>1</sup> Yet this persona is, in the eyes of the First Tier Tax Tribunal (FTT) a 'performance'. The decision of the FTT in *Albatel Ltd v Commissioners of Her Majesty's Revenue and Customs*<sup>2</sup> is notable for two reasons. First, the decision underlines the inadequacy of IR35 Rules, as they presently exist. Second, the decision affirms the broad definition of 'entertainer' in the UK's tax law.

IR35<sup>3</sup> – more formally known as the intermediaries legislation – is a set of anti-avoidance rules designed to bring tax arrangements for off-payroll contractors into line with those applicable to employees where the work of those contractors resembles that of an employment relationship. The legislation, now contained in the Income Tax (Earnings and Pensions) Act 2003 (ITEPA), is principally concerned with income earned through 'personal service companies'. Section 49 ITEPA applies the rules to contracts where:

- (a) an individual ('the worker') personally performs, or is under an obligation personally to perform, services for another person ('the client'),
- (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ('the intermediary'), and
- (c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.<sup>4</sup>

The typical arrangement targeted by these rules involve individuals setting up limited companies which then contract to provide services that might otherwise be provided by an employee of another undertaking. By utilising such personal service companies, reductions in tax payable can be achieved through a number of means. These include paying the individual a modest salary (thereby maximising their personal allowance); paying dividends in lieu of

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<sup>1</sup> , 'Lorraine Kelly' (*YouGov*, June 2019)

<[https://yougov.co.uk/topics/entertainment/explore/tv\\_personality/Lorraine\\_Kelly](https://yougov.co.uk/topics/entertainment/explore/tv_personality/Lorraine_Kelly)> accessed 27 June 2019.

<sup>2</sup> [2019] UKFTT 0195 (TC).

<sup>3</sup> Named after the Inland Revenue press release in which the rules were announced.

<sup>4</sup> s49 ITEPA.

salaries (largely avoiding national insurance contributions); and then winding up the company at the termination of the contract, resulting in a charge to capital gains tax which is significantly lower than income tax. Such arrangements appeared, in recent years, to be extremely common in the entertainment business, in particular where television personalities are concerned.<sup>5</sup> Agents' fees would typically be deductible from the trading profits of a company or individual where they are incurred 'wholly and exclusively' for the purposes of a trade.<sup>6</sup> Furthermore, a more limited deduction for employment income is available for agents' fees paid by entertainers under s.352 ITEPA. Section 352(4) provides that entertainer means 'an actor, dancer, musician, singer or theatrical artist.'

## Facts and Decision

Lorraine Kelly is a mainstay of breakfast television in the United Kingdom, having been a presenter on 'TV-am', 'GMTV', and 'ITV Breakfast'. For the period at issue Ms Kelly contracted through Albatel Ltd - a company limited by shares owned entirely by Kelly and her husband – to be the lead presenter on ITV's 'Daybreak', as well as fronting her own eponymous programme, 'Lorraine'. The tribunal had to consider two questions. First, whether or not Albatel Ltd should be considered an intermediary employer under s.49 ITEPA. Second, if Albatel Ltd is an intermediary employer, whether or not Ms Kelly should be considered an 'entertainer' thereby allowing a deduction for agents' fees.

### *Application of intermediaries legislation*

It was not disputed that the requirements of s.49 (a) and (b) ITEPA were satisfied. The question of whether or not the intermediaries legislation applied therefore hinged entirely upon the question of whether 'if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client'. In other words, whether or not such a contract would be considered a contract of employment or a contract to provide services.

It is not sufficient to simply declare a contract to be one of employment;<sup>7</sup> it is, instead, a 'matter of economic reality'.<sup>8</sup> The basic criteria for determining the existence of a contract of employment were set out by MacKenna J in *Ready Mixed Concrete*:

- (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.
- (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master
- (iii) The other provisions of the contract are consistent with its being a contract of service.<sup>9</sup>

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<sup>5</sup> In 2017-18 the BBC had contracts with 5,145 PSCs, on which it spent a total of £84 million. See Comptroller and Auditor General of the National Audit Office, *Investigation into the BBC's engagement with personal service companies* (HC 1677, 2018), 6.

<sup>6</sup> s34 Income Tax (Trading and Other Income) Act 2005.

<sup>7</sup> *Dragonfly Consulting Ltd v HMRC* [2008] EWHC 2113.

<sup>8</sup> *Market Investigations v Minister of Social Security* [1969] 2QB 173.

<sup>9</sup> *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* [1968] 1 All ER 433, 439-440.

The first element of this test is generally known as ‘mutuality of obligation’ - which must be more than a mere ‘irreducible minimum’.

Evidence was adduced of a high level of personal autonomy on the part of Kelly, as well as a significant degree of control over the content and production of the programmes in question. This included oral evidence from Kelly and others, as well as video clips from the relevant programmes. Furthermore, the proportion of the appellant’s total income that derived from the contract in question ranged from 33 per cent to 69 per cent, depending upon the amount of work undertaken. Nevertheless, HMRC contended that ITV retained a significant degree of control over Kelly, not least in relation to obligations owed to OFCOM.

The tribunal found that there was mutuality of obligation, but such that what there was amounted only to the ‘irreducible minimum’ level of service. The tribunal also found that while ITV did exercise a degree of control over Kelly, it fell short of that which would be expected in an employment relationship. Furthermore, the tribunal considered that a number of other factors – Kelly was not entitled to employee benefits, she undertook a considerable degree of financial risk, she was not provided with special equipment, and she undertook extensive outside work on the account of the appellant – pointed to the existence of a contract for services, rather than a contract of employment.

#### *Theatrical performance*

Having concluded that IR35 does not apply to the appellant it was not necessary to determine whether Ms Kelly was an ‘entertainer’ for the purposes of s.352 ITEPA. Nevertheless, the parties requested that the tribunal address the issue irrespective of their determination on the first issue.

HMRC takes the (unsurprising) view that television presenters should not generally be considered to be entertainers. According to HMRC ‘a presenter may have a unique style, and offer analysis and personal opinion; they cannot in general be described as entertainers or theatrical artists whilst performing that specific role.’<sup>10</sup> In *Madeley & Finnigan*,<sup>11</sup> the Special Commissioners considered HMRC’s own guidance on the application of s.352, stating that

a deduction can be given to any person with a particular theatrical talent in respect of an employment under which they perform in public [...]

To qualify for a deduction the theatrical performance need not take place in a theatre. Any setting for a performance is sufficient, for example a television programme, a film or a concert hall.<sup>12</sup>

HMRC contended that Kelly’s situation was distinct from that of *Madeley & Finnigan* on the basis that ‘Daybreak’ and ‘Lorraine’ contained comparatively few ‘skits’, underlined by the fact that Kelly was obliged to attend rehearsals.

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<sup>10</sup> *Supra* note 2, 23.

<sup>11</sup> [2006] UKSPC SPC00547, 59, 74.

<sup>12</sup> *Madeley & Finnigan v Commissioners for Her Majesty's Revenue & Customs* [2006] UKSPC SPC00547, 59, 74.

The tribunal, however, found considerable similarities between *Madeley & Finnegan* and Kelly. The tribunal, while not disputing that Kelly is an ‘entertaining lady’, found that

...for the time Ms Kelly is contracted to perform live on air she is public ‘Lorraine Kelly’; she may not like the guest she interviews, she may not like the food she eats, she may not like the film she viewed but that is where the performance lies.<sup>13</sup>

The fact that ‘Lorraine’ is considered ‘entertainment’ by OFCOM while ‘Daybreak’ is considered to be ‘news and current affairs’ was not considered relevant.

### **Analysis and conclusions**

The use of freelancers in the entertainment business is quite common, with the BBC, alone, engaging, some 60,000 in 2017-18.<sup>14</sup> HMRC has taken considerable interest, in recent years, in the employment status of freelancers, with the consequence that those engaged in longer-term relationships with broadcaster are encouraged to do so through personal service companies. These arrangements, however, have also fallen under considerable scrutiny in recent years. In February 2018, the FTT dismissed an appeal by BBC newsreader Christina Ackroyd’s personal service company against a determination by HMRC that IR35 applied to her contract.<sup>15</sup>

The decision in *Albatel*, together with the subsequent decision in *Atholl House Publishing*,<sup>16</sup> might bring some relief, however, to the slew of actors and presenters reportedly facing IR35 tribunals in the near future.<sup>17</sup> The case also highlights the difficulty in distinguishing between work done by individuals as newsreaders, presenters, and entertainers. While donning a ballgown on the Morecambe and Wise Christmas Special can clearly be differentiated from reading the Six O’clock News, it may be that the changing ways in which television content is produced and consumed blurs the distinction even further than programmes like ‘Daybreak’. It might therefore be time for the Treasury and parliament to review the scope of s.352 ITEPA.

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<sup>13</sup> *Ibid*, 45-46.

<sup>14</sup> *Supra* note 5.

<sup>15</sup> *Christa Ackroyd Media Limited v Commissioners for Her Majesty's Revenue & Customs* [2018] UKFTT 0069 (TC).

<sup>16</sup> *Atholl House Productions Limited v Commissioners for Her Majesty's Revenue & Customs* [2019] UKFTT 0242 (TC).

<sup>17</sup> Rebecca Cave, 'HMRC plays fast and loose with IR35 rules' (*AccountingWeb*, 17 April 2019) <<https://www.accountingweb.co.uk/tax/hmrc-policy/hmrc-plays-fast-and-loose-with-ir35-rules>> accessed 28 June 2019.