

EXCLUSIVELY FOR CONTRACTORS

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IR35-AT LAST THE TORIES COME OFF THE FENCE

After adopting what even their most ardent supporters would describe as an ambivalent attitude to IR35 and presumably because the election gets ever nearer the Tories have now said that they will repeal IR35. The only problem is that they have said that they will replace it with a "fairer" system,- whatever that means. It does however, show how effective the contractors have been in keeping this issue alive.

There is a chance that by the time that you receive this newsletter the Judicial Review will have decided the issue but PCG have said that they will appeal if the decision goes in favour of the Government and the chances are that the Inland Revenue will do the same should PCG win.

So, the prospects are for the trench warfare continuing which overall, of course, is not at all helpful for any business person who requires as much certainty as he or she can get in what is an extremely uncertain world.

The three arguments being put forward by PCG in the Judicial Review are:

1. IR35 is effectively illegal State Aid to large competitors.
2. It introduces a barrier to the Freedom of Movement in the EU Treaty.
3. It amounts to confiscation of property and is contrary to the Human Rights Act.

The principal point seems to be the third argument, - the point being that if the Government are allowed to dictate the way that directors/shareholders are to distribute the income which arises within their company then they are effectively making their shareholdings in that company valueless. It's an interesting argument but whether it will be strong enough to win the day is another matter.

PCG are also having a pop at Computer People. They have filed an official complaint with the Advertising Standards Authority maintaining that Computer People are using the new legislation to "persuade" the end user to interpose an agent (presumably Computer People) between the organisation and the contractor. PCG see this as being an attack on those contractors, who work direct for the end user which is hotly denied by Computer People.

Another interesting development in the US saw Microsoft agree to pay \$97m to employees who for a number of years were "denied permanent employment benefits". Surely, the longer that IR35 is on the statute book the more likely it is that the employee status of contractors will come into focus. Surely even the Government cannot have it both ways. Either contractors run independent companies or they really are employees of their clients.

INLAND REVENUE – POWERS TO RAID

Most of you will have heard of situations when the Inland Revenue raid the offices of accountants and solicitors to obtain information relating to their clients. The reason for this heavy handed approach has been because a simple request for documents held would probably oblige the professionals involved to notify their clients.

A raid, therefore, was the only effective sanction that the Revenue had to close the stable door before the horse had bolted. Now new legislation in the Finance Act 2000 means that as long as the approval of a circuit Judge is obtained the "third party" can agree peaceably with the Inland Revenue as to how the documents will be provided. There is teeth in the legislation because if the information is not provided the third party will be penalised under the Act.

DO YOU HAVE TO PAY BONUSES?

Sometimes Contracts of Employment contain a provision that a "discretionary bonus" may be paid dependent on the performance of the individual. Naturally enough when somebody leaves the employment of a company there is a reluctance to pay him or her any more than necessary and of course the inclusion of the word discretionary means that the employer can do what he wants. Correct? The answer is No!

There is a very recent case where Nomura employed a Senior Trader called Mr Clark. Mr Clark was very successful during his first year and received a substantial bonus. He was successful again during the following year but was sacked in February 1997 and Nomura decided not to give him a bonus.

The Court decided that although the bonus was discretionary, this discretion had to be "exercised without irrationality or perversity". Payment of the bonus was dependent upon performance and Mr Clark had performed and therefore should have received his bonus. He was therefore entitled to substantial damages for breach of contract.

We have a lot of clients who include what seem to be fairly vague provisions in their employment contracts relating to bonuses and there is a lesson to be learned from this judgement.

PERSONAL USE OF THE INTERNET

A recent survey reveals that 90% of employees of large UK companies use the Internet for personal reasons during working hours. Large companies lose on average approximately £2.5m a year from this and approximately half of the usage is to access "adult" websites.

LAST CHANCE FOR TAX RELIEF

April 5th 2001 represents the last date for the "carry-back/carry-forward" provisions which many people have used so effectively for so many years. What it means is that for those of you with personal pension plans you are allowed to make good shortfalls in contributions from the previous six tax years.

The opportunity will still be there for those of you with Section 226 Retirement Annuity Plans but not for Personal Pension Plans. You need to talk your own position through with your Pensions Adviser or complete the appropriate part of the response form enclosed with this newsletter.

THE ENTREPRENEURIAL SPIRIT

Some interesting research by the Treasury reveals that at any one time 8.5% of the population of the USA is involved in a start-up. This compares with 3.3% in the UK. This does not just include the proprietor of the new businesses but those people who are employed in it. Is it any surprise that Americans seem much more receptive to new ideas and their people so keen to "give it a go".

In America failure is just another step along the road, - unfortunately in the UK it is viewed somewhat differently. Perhaps new plans to relax the whole area of insolvency and "de-stigmatise" the process will help. Perhaps not.

COMPANY IN DIFFICULTIES – POSITION OF DIRECTORS

Although this Newsletter is mostly read by individuals who own and run small limited companies, at little risk because they provide services, we do from time to time write about changes in insolvency law and the interpretation by the courts of existing law. Being a Director does put responsibilities on you and it is as well to know what these are even if the lessons learned would be of more use in a future life!

A recent case has given comfort to Directors making difficult commercial decisions when their company is facing financial problems. In a case decided only two months ago it was held that if the Director honestly believes that he is acting in the best interests of the company then this would not be a breach of his fiduciary duty and he would not be personally liable for the decision that he made.

The judgement is therefore a subjective one, but a note of caution, - the Director will probably have a hard job persuading the Court of his case if the decision that he made led to a "substantial detriment" to the Company.

A similar approach by the Courts was followed with a company called Cubelock Ltd, which went into liquidation. In this situation the Directors had forecast that the Company would make a loss in its first year, break-even in its second and then make a profit in the third year. They achieved financing on that basis, but things started to go wrong in the second year and so they put the company into liquidation.

Even though the Company was insolvent from the outset, the Judge accepted that there was a plan, which anticipated that the Company would become profitable and that the fact that the Company was insolvent did not constitute wrongful trading. Another interesting case and one, which gives some comfort to the much-beleaguered ranks of Directors.

AND HOW WAS IT FOR YOU?

All of our clients should by now have received and I hope read our special budget newsletter.

There were one or two items that may be of particular interest to you:-

- Stamp duty on property purchases was not increased. This was something of a surprise because European rates are considerably higher. Don't assume that rates will not increase when Labour get re-elected. It is such an easy way of collecting easy money from the "well-off".
- From the 6th April 2002 there is an improvement/simplification in the way that employers can reimburse employees for business mileage. From that date the fixed rate will be 40p per mile for the first 10,000 miles and 25p per mile thereafter.
- A new tax credit is to be introduced to encourage expenditure on research, development and innovation. There will also be changes in the tax treatment of intellectual property and other balance sheet items. Details are awaited.
- There is an improvement in the Enterprise Management Initiative Scheme (EMI). Small companies will now be able to incentivise any number of employees up to a total value of £3m.

For full details of the budget please refer to our budget newsletter.

If for any reason you have not received it or you would like us to send a copy to one of your friends or workplace colleagues then please complete the response form.

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