Analysis

Business on own account?

Speed read

In February 2022, the same Court of Appeal panel heard appeals in two employment status cases: *Atholl House Productions* and *Kickabout Productions*. Both cases concern the employment status of broadcasters and both grapple with the correct tests to be applied. Decisions are expected imminently. In the meantime, the First-tier Tribunal handed down its long-awaited decision in *Basic Broadcasting*, concerning the employment status of Adrian Chiles, another broadcast journalist. In both *Atholl House* and *Basic Broadcasting*, the taxpayers won by persuading the tribunal that they were in business on their own account with reference to their career history as a whole. Before the Court of Appeal, HMRC argued for the first time that facts outside the four corners of the contract are irrelevant. Whilst we await the Court of Appeal judgments, taxpayers should continue to paint a picture of careers forged with various clients. But if HMRC ultimately succeeds in limiting the scope of the business on own account test, no profession will be safe.

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Most of us could reel off several professions that are seen as 'typically' self-employed: actors, musicians, journalists, barristers. Following the case HMRC has advanced before the Court of Appeal in *HMRC v Atholl House*, and subject to it succeeding, that could all be set to change.

First, a recap. *Atholl House* concerned the employment status of Kaye Adams, a well-known journalist and presenter. The First-tier Tribunal ([2019] UKFTT 242 (TC)) found that she was in business on her own account as a freelance journalist. In so doing, it took into account the fact that she had a 20-year career pre-dating the contracts in question, had worked for various different media organisations, had written two books, and had built up a public profile (at paras 106–107). The Upper Tribunal (UT) ([2021] UKUT 37 (TCC)) found that the FTT had erred in law in its approach to *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745 (more on this later) but in re-making the decision, found that the services provided under the contracts in question was part of her long-standing business as a journalist/presenter and thus not contracts of employment (at paras 111–116).

There were various aspects to HMRC's appeal before the Court of Appeal but HMRC's primary case, in a nutshell, is that when considering the third limb of the *Ready Mixed Concrete* (*RMC*) test – whether someone is in business on their own account – the tribunal should:

(a) only have regard to the terms of the contract and their implications;
(b) not take account of any pattern of work or broader factors which fall outside that contract (i.e. with other parties); and
(c) not take into account years pre-dating the period in question.

Whether this is right as a matter of law remains to be seen. Notably, in Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2QB 173 refers to 'considerations', not just contractual terms, and Nolan LJ in *Hall v Lorimer* [1994] 1 WLR 209 refers to 'factors'. And both consider facts outside the four corners of the contract.

As a matter of policy, the attraction in this argument for HMRC is plain: it wants to be able to say by reference to the four corners of the contract only – and on day one – whether the contract is one of service (provided as an employee) or for services (provided, for example, as someone in business on their own account). The money flowing from the contract (and the tax said to be due as a result) is the focus of HMRC's enquiry. Taking into account facts outside that contract and which may stretch back to the start of the person's career is a messy process over which HMRC has no control.

Support for HMRC's proposition is said to lie in *Fall v Hitchen* [1973] 1 WLR 286 which establishes that it is possible for someone to be in business on his own account as, say, a dancer, a musician, or a consultant surgeon, and yet enter into an employment contract to provide materially identical services. Therefore, just because someone is in business on his/her own account, does not mean that the services in question are provided as part of that business.

Why does it matter?

The case being advanced by HMRC before the Court of Appeal in *Atholl House* matters for two main reasons. First, because it directly affects certain cases that have been decided on the basis of the 'business on own account' test. If the terms of that test are to be re-framed to exclude facts outside the four corners of the specific contracts in question, then cases which have recently been decided on that test can expect to be overturned on appeal. One such case is the case concerning Adrian Chiles' employment status under contracts with the BBC and ITV in *Basic Broadcasting Ltd v HMRC* [2022] UKFTT 48 (TC). In that case, Judge Jonathan Cannan found that the mutuality of obligation limb was met (at para 288) and that there was a sufficient framework of control (at paras 310 and 317) but that Mr Chiles was in business on his own account as a broadcaster and journalist, both generally and in the context of the contracts in question. Material to this finding were the facts that: since 2001, Mr Chiles had provided services as a broadcaster and journalist to a significant number of third parties; the work was wide in scope (ranging from columns, to commercials and everything in between); since 2001, he had contracted with nearly 100 different clients; he put work into other projects which did not come to fruition; he appointed an agent; and he engaged a personal assistant (at para 326). Importantly, therefore, the FTT took a similar approach to the business on own account test to the UT in *Atholl House*. If that approach is judged to be wrong, Mr Chiles can expect his decision to be appealed by HMRC.

The second main reason it matters is because HMRC's approach to the *Ready Mixed Concrete* test has sought to lower the threshold for each element, such that most contracts – certainly in the presenting, broadcast, and journalist world – would be caught. Specifically, HMRC has repeatedly argued that to satisfy the mutuality of obligation limb of the test, all that needs to be shown is that there is payment for work done. The most recent example of this is *PGMOL v HMRC* [2021] EWCA Civ 1370. Any mutual obligations over and above that bare minimum (necessary in any contract in the field) are, according to HMRC, not to be taken into account at all.

As regards the control test, HMRC has repeatedly argued

that when engaging the services of a professional, such as a presenter, that the media organisation has no right to control *how* they perform their services is immaterial. All that the engager needs is the implied right to 'pull rank' in matters of dispute. (There would be very few contracts to which this did not apply, especially where the presenter is hoping to be engaged again in the future.) Similarly, control over *what* services are performed is restricted to their specialism when engaging a professional. Control over *where* the services are performed (the studio) and *when* (at the time of the live broadcast) usually carry little weight. The result is that the test is robbed of any utility and that stages one and two are (if HMRC is right) easily met. HMRC also argues that, applying *Weight Watchers v HMRC* [2011] UKUT 433 (TCC) per Briggs J at paras 42 and 111, once those first two hurdles are cleared, the third limb of the *RMC* test is not approached from an evenly balanced starting point; rather, there is a prima facie conclusion of employment status that needs to be displaced.

If the 'business on own account' test is likewise to be limited to considering the terms of the contract in question, very few journalists and broadcasters (or arguably, anyone) would be found to be self-employed. If a gardener (1) is paid for work done (such that mutuality of obligation is, in HMRC's view of the test, fulfilled) and (2) must obey the homeowner's instructions as to what tasks he does and/or must defer to them in matters of dispute, then the first and second stages of the *RMC* test are passed. On HMRC's case, there is also a prima facie assumption that the gardener is an employee. And that assumption cannot be displaced by the fact that he has 20 other clients. The same hurdles would easily be passed by professionals in the journalism industry, the music industry, and even the Bar.

In the context of the broadcast industry, HMRC tends to rely on the exclusivity and the right of first call provisions in such contracts as showing that the person in question was not in business on his/her own account. Such clauses are typical in broadcasting contracts where the media organisation wants to protect its commercial interests. Without being able to take the broader picture into account, in which the individual may have built up a career as a journalist spanning decades, those clauses carry more weight than they otherwise might. Interestingly, though, HMRC also relies on the degree of economic dependency of the broadcasters in question on, say, the BBC or ITV: see, for example, *Basic Broadcasting* at para 187. That can only be calculated by taking into account the extent of other income outside the contracts in question, and it cannot be calculated on day one of the contract.

What else is on the horizon?

There were other important arguments in the *Atholl House* case before the Court of Appeal. First, HMRC sought to argue that the business on own account test was not an application of the third limb of *RMC* but a separate test, and one inferior to the much-lauded *RMC* test. Second, HMRC sought to argue that *Autoclenz* (pursuant to which tribunals are to ascertain the 'true agreement' between parties of unequal bargaining power) should not apply at all in the IR35 tax context. Such a submission is perhaps surprising, not least because HMRC has itself repeatedly relied on *Autoclenz* (see *Kickabout* [2019] UKFTT 415 (TC) at para 100 and *PGMOL v HMRC* [2021] EWCA Civ 1370 at para 75).

But that is not all. The panel who heard the appeal in *Atholl House* also heard – the week before – the appeal in *Kickabout Productions Ltd v HMRC*, in which the court was invited to address the *RMC* test as a whole, including whether: (a) it is appropriate to take into account the nature of the mutual obligations (or lack of them) above the irreducible minimum, when classifying the contract at the third stage; (b) the control test is binary or a evaluative judgment which may also be weighed at the third stage; and (b) the correctness of Briggs J's approach to the test (see *Weight Watchers* at paras 42 and 111).

Therefore, we are expecting two important decisions from the Court of Appeal on the employment status test. Given both appeals were heard by the same panel, which will want to give consistent decisions, taxpayers can hope to receive helpful guidance, one way or another.

What to do in the meantime?

Whilst we await clarification with baited breath, here are six useful things to consider when advising clients on the business on own account test:

1. Collate facts from across the entire history of their career. You will want to paint a picture of the taxpayer building up a career and business over a course of time. Put all the relevant contracts before the tribunal.
2. Ascertain how many entities the person has engaged with over their career. Whilst the taxpayer may only have contracted with one or two broadcasters in the period in question, this may not be representative of his/her work pattern as a whole.
3. Calculate the degree of economic dependence over their career. HMRC typically picks two or three years in which the taxpayer is heavily dependent on one or two engagers for a high proportion of their income. If this is unusual, you will want to draw the tribunal's attention to years when other income was more dominant.
4. Consider what their business is: are they journalists, broadcasters, presenters? Think about how the contracts in question fit within that broader business. Note that in *Kickabout Productions*, the FTT found that whilst the broadcaster had extensive work as a writer, that was separate from his work as a presenter under the contracts in question: [2019] UKFTT 415 (TC) at para 235, whereas Kaye Adams and Adrian Chiles were judged to be journalists first and foremost, with writing and broadcasting forming part of that picture. If the taxpayer is engaged in disparate activities (including speaking events and advertising endorsements) consider whether they obtain this work because of their public profile or brand.
5. Ascertain whether there are indications of self-employment. If the taxpayer has engaged an agent, a personal assistant, or other employees demonstrate the extent to which they have used these to manage their business, raise their profile, and increase profitability.
6. Consider the effect of the terms of the contract. If you are advising on contracts as they are being drafted, think about whether the rights of first call and exclusivity are realistic or necessary. If you are advising on the effect of these terms on the business on own account test, consider whether context of the particular industry diminishes their effect in practice: see, for example, *Kickabout* [2019] UKFTT 415 (TC) (at para 202). ■

The author was instructed by Radcliffes LeBrasseur as junior counsel for the taxpayer in the Kickabout Productions case.

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- Cases: *Basic Broadcasting Ltd v HMRC* (23.2.22)
- The Court of Appeal's ruling in PGMOL: seven lessons on mutuality of obligation (G Hicks & J Peacock QC, 9.11.21)
- IR35: the prevailing uncertainties (P Simmons & R McConnell, 1.6.21)