



Appeal number: TC/2015/07115

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ARMITAGE TECHNICAL DESIGN SERVICES LIMITED Appellant

- and -

**COMMISSIONERS FOR HER MAJESTY'S REVENUE Respondents
AND CUSTOMS**

**TRIBUNAL: JUDGE RUPERT JONES
 MR MICHAEL SHARP FCA**

Sitting in public at Liverpool Civil and Family Court on 15 November 2016

John Hill of John Hill & Associates, representative for the Appellant

Gill Carwardine, Presenting Officer of HMRC for the Respondents

1. The Tribunal has decided that the appeal should be allowed.

The appeal

2. The appeal is made against the following decisions of HMRC which it issued against the appellant company to pay the following sums:

Determinations made on 30 June 2015 in accordance with Regulation 80, Income Tax (Pay As You Earn) Regulations 2003

- 2009-10: £8,442.40
- 2010-11: £8,593.20
- 2012-13: £4,833.80

- 2013-14: £10,794.40

Decisions made on 30 June 2015 in accordance with Section 8, Social Security Contributions (Transfer of Functions etc) Act 1999

- Period 6 April 2009 to 11 March 2011: £18,881.35
- Period 23 July 2012 to January 2014: £16,622.65

Penalty Assessment issued on 25 February 2016 in accordance with Schedule 24, Finance Act 2007

- 2009-10: £3,482.31
- 2010-11: £3,521.70
- 2012-13: £2,158.26
- 2013-14: £4,165.39

3. On 23 July 2015 Walker Begley appealed the determinations and decisions on behalf of the appellant.

4. On 21 April 2016 John Hill & Associates appealed the penalty charges on behalf of the appellant.

Point at Issue

5. The point at issue is whether the income of the appellant company, Armitage Technical Design Services Ltd (ATDSL), from the company Diamond Light Source Ltd (DLS) for the years 2009-10 to 2013-14 inclusive falls within the Intermediaries Legislation (IR35) under Chapter 8, Part 2 of the Income Tax (Employment & Pensions) Act 2003 (ITEPA).

6. This in turn involves determining the single question as to whether or not a notional contract of employment (a contract of service) would have existed between DLS and Mr Armitage so that he would be considered an employee rather than self-employed (subject to a contract for services).

Background to Intermediaries Legislation

7. Service companies are typically owned by the person (or persons) whose services it provides (the worker). The company acts as an intermediary between the engager and the worker. The worker has a contract with the services company, and the service company has a contract with the engager, but there is no contract between the engager and the worker.

8. A company's income cannot be employment income. A service company receives its income gross and is charged to corporation tax. The worker's remuneration from the service company is employment income.

9. The purpose of a service company is to act as an intermediary between the worker and the engager, which makes the service company an agent for the purposes of Section 44 ITEPA 2003 and as such any remuneration received by the worker, if not otherwise chargeable to tax as employment income, will be caught by the agency legislation. This will apply, for example, to workers claiming to be providing their services to the service company on a self-employed basis.

10. The intermediaries legislation, or IR35, became effective from 6 April 2000, and works differently to agency legislation. IR35 creates a deemed employment payment (DEP): deemed to be paid by the intermediary and received by the worker. It is based on income received by the intermediary that would, had the worker been employed directly by the engager, he or she would have been treated for tax purposes as an employee of the client.

11. The legislation applies to intermediaries that are companies, to partnerships and to individuals. IR35 may apply where there are “relevant engagements”:

- (1) The services were provided on or after 6 April 2000;
- (2) The worker personally performs, or is under an obligation to perform, services for another person (until 2003 the legislation would only apply if that other person was ‘in business’ – this was exploited by wealthy private households);
- (3) The services are provided not under a contract between the client and the worker but under arrangements involving an intermediary;
- (4) 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 as an employee of the client for tax purposes; and
- (5) The worker (or an associate of the worker), receives from the intermediary (directly or indirectly) a payment or benefit that is not employment income; or has rights which in any way would entitle the worker or associate to receive from the intermediary (directly or indirectly) any such payment or benefit;
- (6) Certain types of liability are satisfied according to the type of intermediary.

12. By virtue of condition (4), employment status is therefore critical as it determines whether or not IR35 applies.

13. In order to determine whether IR35 applies it is necessary to construct a hypothetical contract from the arrangements in place between the worker and the client and to determine the employment status.

14. In an IR35 case it is necessary to construct a notional contract, therefore the evidence gathered may override the actual contractual evidence as to whether the individual would be considered an employee (subject to a contract of service) or self-employed (subject to a contract for services).

15. The factors encompass the following:

- Whether personal service is required
- The provision of significant equipment

- Whether the worker has any financial risk
- The basis of payment
- Whether there is mutuality of obligation
- If there is holiday pay, sick pay and / or pension rights
- Whether the worker is part and parcel of the organisation
- The rights to terminate a contract
- The opportunity to profit from sound management of the task
- Personal factors
- The length of engagement
- The intention of the parties
- Control

Summary of the Facts

16. Mr David Armitage gave oral evidence for the appellant company ATDSL, through which he operated, and Mr James Kay gave evidence for HMRC.

17. Mr Armitage is a very skilled Electrical Control and Instrumentation Designer with over 25 years' experience contracting in the nuclear industry. The work is very highly specialised and demands precision drawings be made. The individual projects he has worked on for DLS are design drawings for Beamlines which are used by scientists at DLS for third party customers.

18. The DLS Headquarters is located in Didcot (Bucks). DLS wanted Mr Armitage of ATDSL to be based at Didcot (where the beamline science actually takes place). Mr Armitage declined and set himself up in another group location in Warrington which was convenient for him and his family although no one else from DLS worked there having been relocated to Didcot some time before.

19. Mr Armitage of ATDSL visited the DLS headquarters when required (only twice a year) to discuss new project work to be carried out with the responsible Beamline electrical project Engineer who had been nominated by DLS to provide EC&I design support.

20. The responsible electrical project engineer within the DLS organisation would orally inform Mr Armitage of ATDSL of the skeleton design philosophy but which might be complemented by hard copies documentation from the site visit.

21. A DLS nominated electrical project engineer would provide further supporting documentation as the project progressed direct by email or available on the network. Mr Armitage would then produce the necessary design drawing packages from the information received.

22. To put the design drawings together, Mr Armitage would access his own company's server and software to provide supporting British Standards and relevant specifications for each stage of the work required.

23. The designs were completed using standard Autodesk and Microsoft software. Mr Armitage is highly skilled and proficient in using this software package which had been developed over many years previous work experience.

24. The subsequent drawing documentation was checked and approved by the responsible electrical project engineer of DLS via the industry standard Microsoft server sharepoint software.

Respondent's case

25. Regarding the substantive point in issue, HMRC submitted as follows.

26. The information provided to HMRC supports that the contracts considered caught by the IR35 legislation are the contracts a) between Assystem and Diamond Light Source Ltd (DLS) and b) between Champion and Diamond Light Source Ltd (DLS). Assystem and Champion were the intermediary service companies, employment agencies, through which ATDSL was engaged with DLS.

27. HMRC's understanding of the position was issued in an opinion letter dated 28 November 2014 which set out that: HMRC had considered the relationship between ATDSL and Diamond Light Source Ltd for the periods 25 October 2010 to 11 March 2011 and subsequently from 23 July 2012 to 25 January 2013 in respect of electrical engineering services provided. HMRC were of the opinion that had there been a contract between Diamond Light Source Ltd and Mr David John Armitage that it would have been considered to be a contract of service, and that as such the engagement would be subject to the Intermediaries Legislation, or IR35.

28. HMRC submitted that, in effect, in constructing the hypothetical contract, Mr Armitage would be considered to be an employee of Diamond Light Source Ltd.

29. They relied on various factors such as:

- a) Mutuality of Obligation - based on the contracts examined, HMRC's opinion was that the mutuality of obligation requirement had been met between Mr Armitage and Diamond Light Source Ltd (DLS);
- b) Control - the performance of Mr Armitage's duties was considered by HMRC to be subject to a sufficient degree of supervision and control by DLS;
- c) Personal Service / Substitution - from the information as provided by Mr Kay of DLS Ltd, personal service of Mr Armitage was a requirement and there was no entitlement for Mr Armitage to send a substitute in his place or any obligation upon him to pay a substitute; and
- d) Financial Risk, from the information held there was no risk of Mr Armitage making of a loss of the contract.

Appellant's case

30. It was the appellant's case that the picture painted of Mr Armitage, through his company ATDSL, is that of someone in business on their own account, ie that in a notional contact he, through his company, would hold a contract for services (be self-employed) and that he would not be considered an employee of DLS (under a contract of service).

31. The appellant's case is that all three tests in *Ready Mixed Concrete* have not been met. It is submitted that the picture painted is of Mr Armitage, through his company, being someone in business on his own account.

Summary of the law

32. A summary of the Intermediaries Legislation, IR35 and its purpose is set out above.

33. The onus of proof is on the appellant to show that the company's income from Diamond Light Source Ltd (DLS) for the tax years 2009-10 to 2013-14 inclusive does not fall within the Intermediaries Legislation, IR35, and if the appellant is unable to do so the Regulation 80 Determinations and Section 8 Decisions shall be upheld.

34. Section 50(6) TMA 1970, as extended by paragraph 16 (1), Schedule 24, FA 2007, places the ultimate onus on the appellant in all of the appeals against the Regulation 80 Determinations and the Section 8 Decisions.

35. The onus of proof is on HMRC in respect of the appeal against the Penalty Assessment, and for HMRC to demonstrate the penalty is due because of the appellant's failure to take reasonable care.

36. The standard of proof is the ordinary civil standard of balance of probabilities.

37. There is no statutory definition of "employment" – whether a contract is one of employment (a contract of service) or self-employment (a contract for services) depends upon a number of factors and the working terms and arrangements that are in place: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [2010] BTC 497 where Mackenna J held that a contract of service exists if all three conditions are fulfilled:

- (1) 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 (this mirrors the IR35 leg where there is a requirement to provide a personal service);
- (2) 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; and
- (3) The other provisions of the contract are consistent with it being a contract of employment.

38. In *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173 Cook J stated (at 184-185):

".... The fundamental test to be applied is this: Is the person who has engaged himself to perform these services, performing them as a person in business on his own account? If the answer to that question is "yes" then the contract is a *contract for services*".

39. In *Hall (HM Inspector of Taxes) v Lorimer* [1993] BTC 473 Mummery J said:

‘In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person’s work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. The test outlined is to stand back and evaluate the overall effect of the individual factors and paint a picture.’

Summary of discussion and decision

First Test - Personal Service - the right of substitution

40. The contract between Assystem UK Ltd (employment agent) and ATDSL (the supplier) of 27 April 2007 for services of provision of electrical designing expertise to the client, CCLRC Daresbury Laboratory (DLS) attached Terms and conditions. Paragraph 2.4 of those terms states

“The Supplier is obliged to provide suitably qualified resources of its choice but is not obliged to provide any named individual”.

41. The contract between Champion Employment Ltd and ATDSL (the Consultancy) dated 13 July 2012 was for the supply of consultancy services to the Client. It states at the bottom of each page ‘Agreement with a self-employed consultancy who has opted out of the conduct regulations Outside IR35) March 2012’. The heading under ‘Consultancy Staff’ acknowledges that the Consultancy, ATDSL, shall be able to use its own staff members or third parties subcontracted with the prior approval of the client.

42. The terms of the contracts are not determinative.

43. It was Mr Armitage’s understanding that a right of substitution existed.

44. The Human Resources department of DLS also confirmed that Mr Armitage had this right provided the substitute was suitable, a not unreasonable caveat, in a document drafted by ATDSL and signed by Alison Roblin of DLS on 11 September 2013. The document states:

“subject to the proposed replacement possessing the necessary levels of expertise, skill and qualifications required to carry out the services satisfactorily you acknowledge that the Company (ATDSL) may provide a substitute where it is considered to be appropriate or necessary, and that your agreement to a substitute will not unreasonably be withheld where the required expertise, skills and qualifications are met.”

45. Ms Roblin (who signed off the contractor contracts) also agreed the other terms applied to the relationship in practice and not just the generic contract terms. Ms Roblin should not have been in a position to sign this document had Mr Armitage simply been regarded as someone akin to an employee.

46. HMRC's guidance is that the right of substitution must be unfettered. Furthermore in the evidence put forward by HMRC, Mr James Kay, the Senior engineer for DLS based in Didcot indicated that if Mr Armitage was not available he would go back to the employment agency for a replacement rather than allowing ATDSL to provide a substitute. This may well be what might have happened in practice but it was never tested by events.

47. The very reason DLS originally agreed that ATDSL would provide the services of Mr Armitage from Daresbury in Warrington was because Mr Kay and DLS were unable to recruit anyone with ATDSL's experience. Mr Armitage did and does have contracts from his work in the nuclear industry and may have been able to provide a qualified and skilled replacement on a temporary basis if needed.

48. The Tribunal accepts that that the right to send a substitute existed in writing in a limited form, subject to DLS's approval. If DLS were unlikely to give such approval then it existed more in theory than in practice but it did exist in a limited form. The seeking of approval by Mr Armitage from DLS for a substitute was never tested.

49. This factor tends suggests there being a requirement for personal service to DLS from Mr Armitage but the Tribunal is not satisfied it was absolute.

Second test - Control

50. The second test in the *Ready Made Concrete* case is that there should be "sufficient control exercised to make one the master". It is the appellant's case Mr Armitage worked remotely, without supervision and under limited control from DLS. HMRC's case, supported by James Kay, head of engineering at DLS was that there was a significant degree of control over Mr Armitage in his work for DLS.

51. Control includes control over how, when and where a person works but the most important is the "how" – ie does the contractor decide on the method of how the services are provided or does someone tell him what to do.

52. On the "control over where" test, Mr Armitage provided his services from the site in Daresbury in Warrington rather than the DLS headquarters in Didcot. It was necessary for the work to be carried out at the Science and Technology Facilities Council's Daresbury Laboratory in Warrington location, rather than primarily at Mr Armitage's home, because that is where the computer connected to the mainframe was situated. There were no other DLS employees working at this location – only contractors. The reason Mr Armitage worked there is because of the practical realities of the job specification.

53. In terms of the 'control over how' test, the working arrangements with ATDSL/Mr Armitage for the provision of the services to DLS were as follows:

- ATDSL used Autocad software to produce all fundamental drawings for each specific project;
- ATDSL provided its own electrical drawing symbols to produce schematic drawings;
- Mr Armitage had previously attained training at previous organisations and was highly skilled using this software;

- ATDSL attended the DLS headquarters in Didcot to meet up with the responsible electrical project Engineer only at the start of the projects;
- He was not invited to and did not attend social and training functions;
- Regular staff meetings were held at DLS HQ in Didcot with the responsible DLS electrical project engineer together with the nominated DLS employed Beamline scientists and other professional engineering disciplines to discuss their specific Beamline Design requirements. However, Mr Armitage was never invited to nor attended those meetings and remained in Warrington (Daresbury) where he worked;
- ATDSL used other purchased Microsoft software to produce cable schedules for the projects;
- ATDSL also used the industry standard Microsoft Sharepoint software to save the AutoCAD drawings;
- ATDSL never checked or approved any other drawings but only performed the electrical design duties required by the contract;
- Mr Armitage worked on his own at Warrington. No-one at the location was available to supervise him physically. Mr Kay stated that all his work was supervised and reviewed by a Diamond employee in Didcot. Mr Armitage provided drawings to fit in with the overall project and the senior project engineer in Didcot quality assured (approved) the drawings and ensured they were what the job specification required;
- HMRC's witness, Mr Kay, stated that the staff senior engineer (Suren Patel) kept regular contact with Mr Armitage, by email or telephone, however the Tribunal accepts Mr Armitage's evidence that this would not be very regular and a week could easily pass without contact. Mr Armitage also worked to his own deadlines to complete work; and
- The package of work was provided to Mr Armitage via a secure internet connection within the Science & Technology Facilities Council (STFC) firewall which allowed direct access to DLS data. However, the fact that "packets" went up and down the internet was merely ATDSL Design work being saved on the remote server.

54. There was a reasonable degree of control over how Mr Armitage, through the appellant, worked but it was not such that clearly made DLS the master. On balance the Tribunal considers the appellant's case to be on a similar footing to that in *Marlen Ltd v HMRC [2011 UKFTT 411 (TC)] 29 and 30*:

(29). "This was another area where there was an apparent conflict of evidence. It was common ground between Mr. Hughes [Appellant] and Mr. Walton [Client representative] that at the outset of a job, Mr. Hughes would be briefed by the project or engineering manager. They would outline exactly what was being built, what Mr. Hughes' role was to be and what was expected of him. He would then use his own knowledge and skill to design his particular part, get it manufactured and ready for testing and development. In interview with HMRC, Mr. Walton stated that a contractor "would be under the control of the project leaders... who would brief the contractor". It should be noted however that this was in response to the specific question as to how Mr. Hughes would know what work JCB wished him to undertake.

(30). We see Mr. Walton's evidence as being very much in line with Mr. Hughes' oral evidence, which was that the only form of real control exercised over his work was by Mr. Walton "overseeing the project and checking on progress". The way in which Mr. Hughes carried out the work and the priority which he gave to different aspects of it were not of

concern to JCB but were a matter entirely for Mr. Hughes. Mr. Hughes likened Mr. Walton's role to that of a householder monitoring the progress of an extension being built by professional builders. That householder would be interested in the progress of the extension, would be ensuring it was running to time, but would have no input into how it was being built. Mr. Walton, according to Mr. Hughes, would not in any event have been able to exercise any practical control as he would not have the necessary degree of knowledge or skill or be able to access Mr. Hughes' computer, which was subject to a personal password."

55. Mr Kay in his witness statement states that there was no difference between Mr Armitage and DLS employees in how the work was allocated, carried out or reviewed, save that he had less personal contact with DLS employees after the project work was moved to Didcot.

56. However, Mr Armitage's work was not supervised other than approval of his work as set out above because he worked 200 miles from DLS office and no-one in his location worked for DLS.

57. In terms of the 'Control over When' test and time control, although flexi working was available to DLS employees, Mr Armitage worked his own hours and for 95% of his working time he finished at lunchtime on Fridays unlike the DLS employees working in Didcot who had to work the core hours. DLS employees in Didcot were required to work core hours until 3.00pm. It is right that Mr Armitage was required to work a fixed number of hours per week between the hours of 9am and 5pm.

58. Mr Armitage was required to complete time sheets to be approved by the senior DLS engineer but he was not subject to the same level of time control as employees in Didcot. Thereafter invoices would be provided by ATDSL through the intermediary service companies.

59. DLS Staff members were all subject to an electronic time management system that clocked them in and out and their time was supervised and managed by DLS this way. Mr Armitage was not subject to this system. He simply kept a note of the hours he worked. The time management system (digital card access) also allowed staff to come and go in the firm's buildings but Mr Armitage was never provided with this facility.

60. Again, Miss Roblin of DLS signed a document on 11 September 2013 on behalf of DLS which states it to be representative of the working relationship in practice with ATDSL. It stated 'Control – subject to meeting the required standards of delivery, time and scope of the project, the manner in which the services are performed rests with the Company ie. ATDSL'.

61. Paragraph 3.7 of the agreement between Champion and ATDSL stated that that the consultancy shall be permitted to determine how it will provide the consultancy services and subject to complying with any reasonable operational requirement the client will have the flexibility to determine the number of hours required to provide and the times during which it will provide the Consultancy Services.

62. On balance, Mr Armitage was inevitably subject to less control than DLS employees in Didcot. While there was a reasonable degree of control over how, when and where he worked it is not necessarily consistent with him being subject to contract of service.

The third test - the other provisions of the contract are consistent with it being a contract of employment.

63. The first consideration is the provision of significant and essential equipment.

64. ATDSL, for its business generally, invested in specialist equipment at a cost of £7,025, equipment required solely for his role as a technical design consultant. This included Autocad software costing £1,647 and a 30" precision high end monitor costing £2,139. Mr Armitage did set up his own wireless 3G/4G network at the location because of the frustrations of the firewall restrictions imposed on the hardwired network preventing him from accessing his own server which contained the relevant working British standards documents and specifications.

65. However, the Tribunal is of the view that DLS provided Mr Armitage with the essential tools, both hardware and software to complete his work for them. It is not clear when the extra equipment was bought but this was Mr Armitage's choice to do so.

66. The second consideration is the Financial Risk/Opportunity to profit.

67. It is accepted that there were limited opportunities for Mr Armitage to profit from the contracts under review and only a limited risk but the Tribunal accepts HMRC's submission that the absence of financial risk/opportunity to profit does not point to employment (whereas its presence does point to self-employment). There was only a limited financial risk to ATDSL in its contracts but if there was an obligation on the contractor to remedy defects at own cost although this did not arise in practice. Again, this is not a generic agency contract term but DLS's own procedures for its independent contractors.

68. The third consideration is the basis of payment.

69. Mr Armitage did not necessarily work the same hours as the client's employees although he did work core hours. He worked much longer hours to complete the project and was paid by the hour for work done. Mr Armitage was paid £31 per hour: set by Assystem and not inclusive of variables/costs/overheads.

70. Payment of a wage or salary would be a pointer to employment and quoting a price for a job would be a pointer to self-employment but payment of an hourly/daily rate or by piece could apply in either employment or self-employment, so this factor is not generally one that affords much assistance and is not indicative of self-employment.

71. The fourth consideration is Mutuality of Obligation.

72. HMRC's witness Mr Kay has advised that on or around 12 May 2003 DLS entered into a contract for services with Assystem Ltd in terms of which Mr David Armitage's services were made available to DLS to provide engineering design services for the DLS project. Thus one party agreed to work for the other, and did so, in return for payment.

73. On or around July 2012 DLS entered into a contract with Champion for Mr Armitage's services and on 23 July 2012 Mr Armitage attended his first day back at

Daresbury. Thus one party agreed to work for the other, and did so, in return for payment.

74. From the above, the Tribunal considers mutuality of obligation exists, that the irreducible minimum exists and contracts were indeed in place.

75. However, in our view the irreducible minimum obligation required for a contract of service is not particularly helpful in determining whether the intermediaries legislation applies or whether a contract of employment exists. HMRC's case is that where one party agrees to work for the other in return for payment then this satisfies mutuality of obligation between the two parties. That would be true of every contract both employment and for services otherwise the contract would not exist at all. The mere offer and acceptance of a piece of work does not amount to mutuality of obligations in the context of employment status. Again the Tribunal considers this factor to be neutral.

76. The fifth consideration is employee type benefits.

77. HMRC, in its skeleton argument submits that the absence of employee benefits is neutral and absence of other benefits received by employees may point to self-employment. Entitlement to employee-type benefits by virtue of the contractual terms and conditions is regarded as a pointer to employment. Absence of entitlement may point to self-employment.

78. Mr Armitage received no employee benefits - no holiday pay, no sick pay and could not partake in any grievance procedures etc. He was not even provided with a locker at his location.

79. The sixth consideration is whether the appellant was part and parcel of DLS.

80. Mr Armitage was never regarded as part of the DLS organisation. All DLS employees worked in Didcot at this time. The client would have preferred him to work in Didcot and all staff were required to work in Didcot.

81. Mr Armitage never attended functions that other employees attended, was not invited to internal training courses and did not attend internal departmental events that were considered a requirement for employees of DLS (including social functions).

82. Documents displaying the organograms for the Electrical Engineering Team and DLS Technical Division and Engineering team do not list Mr Armitage. They show the DLS Electrical Engineering team headed by Mr Kay. Mr Armitage is not included in any of the DLS team-sheets and has never done so. Mr Armitage believes he was not regarded as part of the DLS team but an independent contractor.

83. Mr Kay stated that Mr Armitage worked alongside the rest of the team in a virtual working environment but the Tribunal considers this to be stretching Mr Armitage's coordination and integration with DLS.

84. Mr Kay has advised that engineering service providers who have an electrical engineering role at DLS report to a responsible DLS staff senior engineer, all of whom are DLS employees, and who have ultimate responsibility for any issues arising. However, Mr Armitage was not 'reporting' to a senior engineer in any real sense other than having his designs quality assured.

85. From the above, the Tribunal considers Mr Armitage's working terms and arrangements in practice did not mean that he was fully integrated into the DLS business structure. While Mr Kay did not perceive him as working as an independent operative he was not integrated in the same way as DLS employees.

86. The seventh consideration is the right to terminate a contract.

87. It is not considered that this is a fundamental factor but the Tribunal notes from the contracts that in the Champion contract the contract may be terminated without notice in several (nine) instances and in the Assystems contract, notice is only 7 days which would be the statutory notice period for an employee having worked less than a month. The right to terminate contract with the giving of notice points to employment. The right to terminate without notice is neutral. Overall this is neutral.

88. HMRC's witness Mr Kay stated that during the course of March 2011 Mr Kay made the decision to terminate the contract with Assystem, Mr Armitage was one of these engineering service providers and the contract with Assystem for Mr Armitage's services was terminated on or around 8 March 2011. HMRC's witness, Mr Kay, stated that on 23 December 2015 Mr Armitage's services were no longer required and the contract with Champion was terminated. Overall this is neutral.

89. The eighth consideration are personal factors including exclusivity and length of engagement.

90. HMRC guidance in ESM3363 outlines the distinction between a contractor working on specific tasks or projects (pointing towards self-employment) and someone who provides services on a continuous process of giving support. Mr Armitage worked on three distinct Beam Line projects under the first contract with DLS. His contract was then terminated and he took a contract with a different client, AMEC (which HMRC agreed was outside of IR35) followed by three new projects in the second term with DLS. They were all defined tasks and there was no ongoing support after the projects finished.

91. The DLS project is the largest science facility to be built in the UK for over 25 years. ATDSL provided EC&I support for various milestone phases of the project.

92. During the first period under investigation ATDSL worked independently and provided EC&I designs on phase II Beamlines as previously documented and liaised solely with the DLS nominated responsible electrical project engineer namely Geoff Preece. During the second period under investigation ATDSL worked independently and provided EC&I design on phase III Beamlines as previously documented and liaised solely with the DLS nominated responsible electrical project engineer namely Suren Patel. All projects undertaken by ATDSL for DLS were individual contracts by nature due to the DLS funding during its construction.

93. There was no exclusivity at any time and from 2012 Mr Armitage worked for other clients. The Assystems contract at 7.1 with ATDSL states "*Assystem understands and accepts that the Supplier is entitled to seek, apply for and accept contracts to supply goods and services to other parties and to supply goods and services to other parties during the currency of this contract*". The Champion contract with ATDSL says: "*Save as otherwise stated in this Agreement, the Consultancy shall be entitled to supply its services to any third party during the term*

of this Agreement provided that this in no way compromises or is to the detriment of the supply of services to the Client or amounts to a breach of this Agreement”

94. The work undertaken for DLS and AMEC between 2010 and 2011 initially took up most of Mr Armitage’s time, so income came only from those contracts. However, he decided to diversify in 2012 by setting up a satellite installation business resulting in an additional income stream for the business. In 2012/13, the business issued 32 invoices to DSL but also 14 to other customers including satellite customers and in 2013/14, 46 invoices to DLS and 27 to other customers.

95. In 2014, whilst still engaged on projects with DLS, Mr Armitage attended a Satellite Exhibition in Cologne and although outside the current assessments under appeal, later attended trade fairs on integrated systems in Amsterdam and followed this up with a meeting with franchisees. The Tribunal considers these actions are consistent with someone in business on their own account and not consistent with someone who is effectively acting as an employee.

96. Where engagements are short-term or there are contemporaneous engagements, there is no dependence on a single paymaster. It may be that a worker has been taken on to complete a specific assignment with the contract ending on the completion of that assignment. It follows that the personal factors outside of the working terms and arrangements of the particular engagement can be considered.

97. HMRC accepts there were different contracts – the IR35 legislation must be considered on a contract to contract basis. HMRC further accepts that the company ATDSL was not set up / created with a view to taking on the DLS contracts, but was already in existence before either one started. Indeed it was DLS who originally approached ATDSL to invite them to apply and be engaged as a contractor through the relevant employment agencies. If they had sought Mr Armitage as an employee they could have done so and have benefited from the terms of such an arrangement which has avoided the payment to Mr Armitage of employee type benefits.

98. The final consideration is the intention of the parties.

99. The intention of the parties is clear: In the Champion contract at paragraphs 2.2 and 3.1 and in the Assystems contract at paragraph 7.4. the services are deemed to be contracts for services and not contracts of service.

100. However, the Tribunal considers there is no requirement in an IR35 case to consider intention of the parties, despite the stated intentions in the contracts regarding either parties’ intentions. This is on the basis of the view taken by the Special Commissioner Dr Avery Jones on this factor in the case of *Netherlane Ltd v York (HMIT) 2005 SpC 457*.

Conclusion

101. Standing back and looking at the overall picture, it is very much a mixed one. However, on balance, the Tribunal considers that in a notional or hypothetical contract between Mr Armitage and DLS there are more factors that suggest it would be a contract for services (that he would be self-employed) than those which suggest a contract of service (that he would be employed).

102. There was a theoretical and limited right of substitution for Mr Armitage even if it may not have eventuated in practice. The belief that it would not have been accepted by DLS was never engaged or tested to determine whether it was right. There was a fair degree of control by DLS over Mr Armitage but it was not the same level as for its employees working in Dicot. The balance of other factors point to a contract for services rather than a contract of employment.

103. On balance, the notional contract between DLS and Mr Armitage was not a contract of service as an employee. Therefore, the appeal is allowed in full against all determinations, decisions and penalties.

104. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**RUPERT JONES
TRIBUNAL JUDGE**

RELEASE DATE: 27 JANUARY 2017

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