EBTs/EFRBs AND EMPLOYMENT TAX UPDATE

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Andrew Thornhill QC and Ben Elliott of Pump Court Tax Chambers presented a seminar on 12 February 2019, addressing recent developments in EBTs/EFRBs and employment tax.

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Andrew Thornhill QC and Ben Elliott of Pump Court Tax Chambers presented a seminar on 12 February 2019, addressing recent developments in EBTs/EFRBs and employment tax.

This article is based on the authors' notes from the seminar. The contents of these notes are strictly for academic discussion purposes only and must not be circulated generally or relied upon without independent professional advice. The authors accept no responsibility or liability for any action or omission taken based on the information in these notes.

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2019 LOAN CHARGE

Part 7A of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) presently imposes a charge on loans made by third parties, for example by EBTs or EFRBS. However, such a charge only applies to transactions entered into from 9 December 2010 which at one point posed a particular problem for HMRC as to how EBT transactions might be taxed (particularly following the taxpayer's success in *Murray Group Holdings Ltd v Revenue and Customs Commissioners [2012] UKFTT 692 (TC)*. HMRC believe that the new legislation will raise £3.2 billion (see *HMRC briefing: Disguised remuneration charge on loans (18 July 2018)*).

The legislation is contained in Schedule 11 to the Finance (No 2) Act 2017 (introduced by section 34): "Employment income provided through third parties: loans etc outstanding on 5 April 2019", as amended by Schedule 1 of the Finance Act 2018. Schedule 11 is an appendage to Part 7A ITEPA 2003 and adopts the same terminology, for example, "P", "relevant step", etc. HMRC's Employment Income Manual provides some guidance on the new charge (see *EIM47000*).

Where P has made a "loan or quasi-loan" on or after 6 April 1999 and an amount is "outstanding" immediately before the end of 5 April 2019, P is treated as making a relevant step for the purposes of Part 7A. The charge is a one-off charge. That is, it will not affect new loans made after 5 April 2019 (although these might be relevant steps under other sections of Part 7A, in particular section 554D). The charge applies at a different date in the case of "approved fixed term loans".

There are therefore three key ingredients to the new loan charge:

- Has P made a "loan or quasi-loan"?
- Was it made after 6th April 1999?
- Is there an amount still "outstanding"?

Loan or Quasi-Loan

The loan or quasi-loan has to have been made to a "relevant person". For the definition go back to section 554C of ITEPA (*paragraph 2(5)*): A (the employee) or a person chosen by him, any person linked (connected) with A, or any person where P is acting on behalf of A.

Loan include any form of credit, for example, unpaid purchase price (*paragraph 2(1)*).

Quasi-loan is a new defined term and includes an acquired debt if there is a "connection (direct or indirect)" between the acquisition of the right and a payment or transfer of assets to the relevant person (*paragraph 2(2) and 2(3)*). Suppose the employee has bought assets from X and not paid the price. X assigns the debt to EBT trustees. In itself that is not a quasi-loan but, if there is a "connection" between that assignment and the original payment then the EBT trustees have made a quasi-loan. If, at the time of the purchase of the assets from X, there was no intention to assign the debt to the EBT then presumably there would not be a connection(?).

HMRC example:

> "An employer makes an EBT contribution in 2008. The trustees make a loan to the company from that contribution also in 2008. The loan remains outstanding but the in 2014 the employer wishes to close down the EBT but to do so in a manner which does not involve repaying the loan and having to engage Pt 7A when it is finally taken out by a shareholding director.
>
> An agreement is drawn up between all parties:
>
> The trustees agree that if the employer can procure that the director agrees to repay them an amount equivalent to the amount owed by the employer, they will treat the amount owed by the employer as repaid.

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> The employee agrees to repay to the trustees the amount owed by the employer in a period of 10 years time if they are paid an equivalent amount.
>
> In consideration for taking on the employer's obligation the employer makes a payment to the employee, either in cash or via the employee's loan account.
>
> …
>
> At the point that the trustees agree that the employee can pay them an amount in satisfaction of the debt owed by the employer, they acquire a right to a payment. The right to the payment is connected to a loan made to a relevant person and to the payment to the employee at point 3 above so the conditions of Para (2)(2) are satisfied. P has made a quasi-loan"

(*EIM47035*.)

"Loan" and "quasi-loan" are evidently intended to be defined broadly and it is likely that a tribunal would apply those definitions accordingly.

Is the loan/quasi-loan made after 6th April 1999?

There is no specific paragraph determining when a loan is made but:

- A quasi-loan is made when P acquires the right to payment (paragraph 2(2)).
- Where there is a replacement (directly or indirectly) of a loan/quasi-loan by another loan then Schedule 11 applies to the replacement loan – which means that it is the date that the replacement loan was made that is relevant(?).
- A loan consisting of the making available of credit is presumably made when the credit is first made available.

When is a loan a new loan? What if the terms are changed? If the term of an old loan is extended, is this an extension of the old loan or a new loan?

Amount outstanding

"Outstanding" is a defined term in paragraph 3 in relation to loans. Paragraph 1(7)(b) of Schedule 11 expressly states that whether a loan is outstanding does not depend on the loan or quasi-loan subsisting at the time. A similar definition contained in paragraph 11 applies in relation to quasi-loans.

Calculation:

- Identify the principal initially lent as well as any sums that have become principal (but disregarding interest, including capitalised interest) or, in the case of a quasi-loan, identify the total acquired debt(s).
- Deduct the "repayment amount" being the total of (i) amounts "repaid" before 17th March 2016 and (ii) "payments in money" by the relevant person on after that date.

It appears that the draftsman believes that there is a difference between an amount "repaid" and "payments in money…by way of repayment". And/or is the significance that sums repaid prior to 17 March 2016 do not need to have been repaid by the relevant person? HMRC's guidance suggests that the difference is that pre-March 2016 repayments can be with assets and by anyone:

> "Para 3(3) defines repayment amounts as the amount repaid against the principal before 17 March 2016. These repayments can be in money or other forms and can be paid by the employee or someone else. On or after this date, any payments against the principal amount can only be made in money and can only be made by the relevant person." (*EIM47045*.)

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Note: there appears to be a potential problem where a quasi-loan is a right to the transfer of an asset. Paragraph 11(3)(c) provides that the initial debt amount will be (at least) the market value of the asset at the time that the right is acquired, but paragraph 11(4)(c) provides the value repaid is the value of the assets at the time of the transfer. So, if the value of the assets has decreased between the time of acquisition of the right and the satisfaction of that obligation, then part of the quasi-loan will still be outstanding, even though the obligation has been fully discharged. It is not clear what a taxpayer could do about this as any further payments to the creditor would be gratuitous rather than pursuant to any obligation.

If a loan has been written off has it been repaid? Otherwise any post-1999 loans that were written off are "outstanding".

17th March 2016 may be a vital date: suppose a loan were just written off such that the loan has (arguably) been "repaid" within the meaning of paragraph 3(3)(a). There would be no charge under Part 7A if prior to 17th March 2016. (However, there would be a potential earnings charge on the writing off of an employment-related loan under section 188 of ITEPA 2003.) This would mean that the loan was not "outstanding" at 5 April 2019.

Releases, accord and satisfaction, and set off all arguably all count as repayments. For example

- *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL 6*: the satisfaction of a monetary obligation or debt in cash or kind amounts to "payment".

- *Sippchoice Ltd v Revenue and Customs Commissioners [2018] UKFTT 122 (TC)*: the satisfaction of a monetary debt by a transfer of assets is a "contribution paid" for the purpose of pension contributions.

On or after 17th March 2016 only "payments in money" count. A "set off" (*Spargo's case (1873) 8 LR Ch App 407*) is a payment in cash and presumably a payment in money (within paragraph 3(3)).

In addition, there must be no connection with a "tax avoidance arrangement" (*paragraph 4*). For tax avoidance arrangement, go back to Part 7A, section 554Z (13)-(15) (*paragraph 44*):

> "(13) "Tax avoidance arrangement" means an arrangement which has a tax avoidance purpose.
>
> (14) For the purposes of subsection (13) an arrangement has a tax avoidance purpose if subsection (15) applies to a person who is a party to the arrangement.
>
> (15) This subsection applies to a person if the main purpose, or one of the main purposes, of the person in entering into the arrangement is the avoidance of tax or national insurance contributions".

Tax means income tax or corporation tax, and does not include, for example, capital gains tax or stamp duty land tax (SDLT).

There is no definition of what constitutes "avoidance". HMRC's manual does not provide any guidance, and simply states:

> "If there is any connection between the payment and a tax avoidance arrangement (other than the arrangement under which the loan was made), the payment will be disregarded as a repayment towards the relevant principal amount."

(*EIM47050*.)

Common sense would dictate that the actual repayment of a loan in order to avoid the loan charge would not constitute avoidance as that is clearly what Parliament intended the taxpayer to do. What if the transaction is more complicated and involves a loan from a connected third party? Case law consideration of what constitutes avoidance may be relevant.

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In particular, Lord Nolan in *Inland Revenue Commissioners v Willoughby [1997] 1 W.L.R. 1071*, discussing the difference between tax avoidance and mitigation and adopting the submissions of Mr Henderson QC (now Henderson LJ), stated:

> "The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation), it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course, whether or not the taxpayer has formed the subjective motive of avoiding tax."

HMRC have already issued two spotlights:

> **Disguised remuneration: re-describing loans (Spotlight 39):**
>
> "Scheme users are being told they can sign documents saying that the sums they've received from their disguised remuneration scheme under loan agreements are not loans at all. Instead, these sums of money are merely held by them in a "fiduciary capacity" – for example, an individual acts in a fiduciary capacity if they hold money, or assets, for the benefit of someone else, not themselves.
>
> It's wrong to claim that the loan charge won't apply because the sums received aren't loans."
>
> **Disguised remuneration: schemes claiming to avoid the new loan charge (Spotlight 36):**
>
> "Another example is that some promoters say that individuals should enter into a bet with the trust that granted them the loan. The terms of the "bet" mean the individual is almost certain to win, and then able to use the winnings to repay the loan. This scheme will not prevent the loan charge arising as the loan repayment is connected to a new tax avoidance arrangement."

Also, if a payment is the subject of a different relevant step the payment does not count unless the tax is paid before 5 April 2019 (*paragraph 4(1(b) and (2)*). Suppose the EBT makes a loan to A to repay the first loan. The repayment would not count unless tax is paid on the new loan before 5th April 2019 – this could potentially create a double charge.

There are special rules for foreign currency loans. In addition, there are exemptions from the charge in the case of:

- Approved fixed term loans (*paragraphs 19-22*).
- Where an APN has been issued and paid (*paragraph 23-24*).

Any payment after March 2016 must be "by the relevant person". Say that the relevant person is the employee's spouse and the employee provides the funds to repay the loan, would that still be a payment by the relevant person? We would say that it was, but it may be important to document such gifts and ensure that payments are made from the appropriate person's bank account to prevent HMRC suggesting that any repayment has actually been made on behalf of someone else.

How to repay

Possible methods of repayment include:

- Repay in cash.
- Sell assets to EBT and use cash to repay. Or can there be a straight set off – would this be a "payment in money" (*Spargo's case*)? If the EBT is purchasing assets, where will it get its cash from? What assets might be

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used? If the EBT qualifies under section 86 of IHTA 1984, choose assets that do not enjoy **business property relief (BPR)** or **agricultural property relief (APR)** or are long term lock-up assets.

- Consider a loan from a close company employer or a loan from a close company in which the borrower is a participator. There is a section 455 charge (but it can be cancelled on repayment of the new loan). The new loan is used to repay the old loan. Either Part 7A does not apply to the new loan (no third party) or it is ousted by paragraph 36A of Schedule 11.
- Suppose the sale would attract CGT or SDLT. An alternative would be to create an equitable charge over the asset in favour of the owner and give the asset to the trustees. The charge is then released for cash. Is there a CGT disposal? It is thought not unless there is a capital sum derived from the asset. Is there SDLT? Charges are exempt. How do you value a charge (interest or not)?

Double Taxation

The ordinary provisions of Part 7A apply to prevent double taxation where there is an overlap between a sum of money which is the subject of a relevant step (including a loan charge) and a sum of money in respect of which A has become subject to an earlier income tax liability (see, in particular, section 554Z5 of ITEPA 2003). But this relief only applies if the earlier tax liability has been paid and provisional payments do not necessarily count (*section 554Z7, ITEPA 2003*). But APNs (which in effect are payments on account) are subject to a separate regime – see above.

So, if a taxpayer continues to dispute an earlier payment of earnings, and has not paid the tax, they are liable to a loan charge unless they repay the loan. If they do not, they must appeal the loan charge. One of the grounds for appeal will be that they will be entitled to relief if they are unsuccessful in their argument on the earlier earnings payment.

There can also be relief if a charge has arisen under section 455 of the Corporation Tax Act 2010 (CTA 2010) in relation to the loan (*paragraph 36A*). As mentioned in *How to repay*, it may be worth incurring this charge to repay the loan.

Administration

Specific information must be provided by 1 October 2019 (*paragraphs 35A-25D*). There are penalties for non-compliance (*paragraph 35F et seq*).

Challenges and Possible Amendments

Is the legality of the loan charge legislation challengeable by judicial review? Unlike in *R. (on the application of APVCO 19 Ltd) v Revenue and Customs Commissioners [2015] EWCA Civ 648)*, this is not a case where the taxpayer has only an arguable claim. This is a new charge on an event which would not otherwise give rise to a charge, and it does appear to be retrospective in some respects.

In December 2018, the House of Lords Economic Affairs Committee published a report, *HMRC Powers: Treating Taxpayers Fairly*. The overall conclusion was that some of the powers granted to HMRC in recent years undermine the rule of law and hinders taxpayers' access to justice. In relation to the loan charge, the

Report concluded:

> "The loan charge is, however, retrospective in its effect. Parliament has laid down time limits for tax matters of four, six and 20 years which give certainty to taxpayers about their affairs. It undermines this framework to artificially trigger a future charge.
>
> In its retrospective effect, and its failure to pursue taxpayers proportionately to their circumstances, HMRC's approach to the loan charge diverges substantially from the principles in the Powers Review."

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The Report made certain recommendations, including:

- The loan charge legislation is amended so that it excludes taxpayers who disclosed their participation in the scheme to HMRC.
- HMRC should review cases where an individual cannot pay.

(*Paragraphs 15 and 16*.)

ONGOING USE OF EBTS AND EFRBS

Suppose loans are repaid – what next? EBTs and EFBRBS remain flexible and effective tax planning vehicles.

Option 1

Option 1 might be for A to go non-resident and receive a pension from the EBT. The pension is free of tax and repays A's loan. For technical reasons it may be preferable to have a pension within a UK tax charge but where the charge is removed by a double tax treaty.

Option 2

Option 2 might be for A to be awarded a pension by the EBT who purchase a *Hancock* annuity for A to satisfy his pension rights. A might commute the pension for cash and repays his loan (*Wales v Tilley [1943] A.C. 386*). Is there an income tax charge? Is there a CGT charge (*section 237 of the Taxation of Chargeable Gains Act 1992*)? Both options would rely on section 554S of ITEPA 2003.

Option 3

EBT trustees create an equitable charge in favour of A. No Part 7A charge because:

- There is no payment.
- There is no earmarking.

A charges his interest to finance company which enforces its interest against the trustees. Finance company probably has to rely on section 554F(2), though this is debatable. Finance company is a trader and is not concerned with gains on interests in non-resident trusts.

Option 4

Funding a pension.

Option 5

Using the EBT to acquire assets for enjoyment by employees without falling foul of section 554D or the benefit in kind provisions, both in ITEPA 2003.

SETTLING WITH HMRC

The likelihood of the loan charge and the pressure of follower notices and APNs mean that settlement is looking increasing attractive for many taxpayers under HMRC's present settlement opportunity. If a taxpayer settles with HMRC and accepts an earnings charge, then relief should apply such that the loan charge will not apply. In such cases there may be little incentive to repay the loan.

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However, take a case where there have been EBT loans and there have been no claims for tax on earnings or NICs. (This is most usually because HMRC failed to issue determinations or decisions within the time limit.) In order for NICs to be enforceable HMRC must have issued civil proceedings against the taxpayer within six years. The settlement option is still available, certainly if there has been registration. Is it worth settling as opposed to repaying? If a means of repaying is available (see above) and there is a use for the money (for example, pensions) there is a strong case for repaying.

If there is no cash or assets available for repayment, then perhaps creating an equitable charge is worth trying. What is there to lose?

In some cases, the company may be facing insolvency: in such circumstances, repaying the loan may still be attractive because, if the directors/employees are concerned about the tax liabilities being transferred to them personally (in particular under regulation 81), the original earnings charge is very difficult to transfer to an employee, but the loan charge is a Part 7A charge and is therefore automatically transferable. This is because a Part 7A payment is generally a notional payment and therefore Condition B in regulation 81 is satisfied. An earnings charge is not necessarily a notional payment and therefore HMRC would have to seek to satisfy condition A by showing there had been a wilful failure to deduct PAYE.

Note that in order for HMRC to rely on regulation 81 they must have opened enquiries into the relevant employee's personal tax return for that period.

HMRC will generally insist on the payment of an inheritance charge under section 72 of the Inheritance Tax Act 1984 (IHTA 1984) (read with section 70) if the EBT is wound up or the loan is written off. Surely this is double taxation which section 70(3)(b) was intended to prevent? In some cases HMRC are also seeking to apply penalties for carelessness or deliberate behaviour.

Rangers – Are all contributions to EBTs/EFRBS chargeable as earnings?

HMRC take a very broad interpretation of the principles established by *RFC 2012 Plc (In Liquidation) (formerly Rangers Football Club Plc) v Advocate General for Scotland [2017] UKSC 45* and have used that case as the basis to issue follower notices to anyone using an EBT/EFRBS arrangement, as well as other cases with different fact patterns. (Note that HMRC's powers to issue follower notices will shortly be considered by the Court of Appeal in *Haworth v HMRC*, on appeal from *R. (on the application of Haworth) v Revenue and Customs Commissioners [2018] EWHC 1271 (Admin)*).

The principle established by Lord Hodge in RFC 2012 was that any money that an employee is entitled to have paid as their remuneration is taxable income, subject to three exceptions. See, in particular paragraph 41 of the judgment:

> "As a general rule, therefore, the charge to tax on employment income extends to money that the employee is entitled to have paid as his or her remuneration whether it is paid to the employee or a third party. The legislation does not require that the employee receive the money; a third party, including a trustee, may receive it. While that is a general rule, not every payment by an employer to a third party falls within the tax charge. It is necessary to consider other circumstances revealed in case law and in statutory provisions which fall outside the general rule. Those circumstances include: (i) the taxation of perquisites, at least since the enactment of ITEPA, (ii) where the employer uses the money to give a benefit in kind which is not earnings or emoluments, and (iii) an arrangement by which the employer's payment does not give the intended recipient an immediate vested beneficial interest but only a contingent interest."

The facts of RFC 2012 were that the payments had been the subject of side-letters confirming the specific payments that were to be made to the EBT for the benefit of the employee and money was paid into sub-trusts within the EBT under which the employee's family were the sole beneficiaries and the employee was the protector (with power to add or remove beneficiaries). It was obvious that the money paid was attributable to the services of the particular employee and that it was their remuneration.

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But what if the employee had no entitlement to the remuneration? And if there are no sub-funds such that money paid into an EBT is unallocated and (if a loan were repaid) the EBT could benefit any employee of the company? Income tax must be referable to a specific employee: how can a particular payment be attributed to any employee if the EBT might use the funds to benefit a different employee? See *OCO Ltd v Revenue and Customs Commissioners [2017] UKFTT 589 (TC)* in which the redirection argument failed (but the appeal still failed based on a *Ramsay* argument – but only at the point that the sums were appointed to sub-trusts). This case was decided shortly before the Supreme Court's decision but the tribunal refused to reconsider its judgment (see the separate decision at *[2017] UKFTT 603 (TC)*).

Does the fact that the trustees must decide whether to exercise their discretion render the employee's entitlement contingent, and therefore within the third exception identified by Lord Hodge? Apparently not – *Landid Property Ltd v Revenue and Customs Commissioners [2017] UKFTT 692 (TC)*. In addition, the tribunal effectively held that any contingency (for example, the requirement for the employer to do something before any benefits are provided) can be disregarded if it is clear that the contingency would be satisfied under the scheme as it was intended to operate.

HMRC are also continuing to challenge the genuineness of loans made by EBTs to employees (albeit this argument is directly inconsistent with the imposition of a loan charge on 5 April 2019). Such arguments were rejected by the First-tier Tribunal and Upper Tribunal in RFC 2012 (see *Murray Group Holdings Ltd v Revenue and Customs Commissioners [2012] UKFTT 692 (TC)* and *[2014] UKUT 292 (TCC)* and in *Oco Ltd [2017] UKFTT 589 (TC)*.

See also *Cyclops Electronics Ltd v Revenue and Customs Commissioners [2018] UKUT 7 (TCC)*, in which the Upper Tribunal noted that it would have accepted HMRC's argument that payments by the employer to purchase loan notes for the employees constituted a payment of earnings. The Upper Tribunal did not accept that argument because, if the loan notes were restricted securities (which the Upper Tribunal actually held they were not), then they fall within Lord Hodge's second exception because they were benefits in kind. This suggests that the benefit in kind exception is potentially very important where the transactions concern the provision of assets.

IR35 – ITEPA SECTIONS 48FF AND 61KFF

Sections 61Kff were introduced by FA 2017 to cover persons working via intermediaries for public authorities. The principal difference between the new sections and the old ones (*sections 48ff*) is that, in the ordinary case, the intermediary is treated as making a payment of employment income whereas under s.61N the client is generally made liable, that is, the public authority. Both sections 48 (section 49(1)(a)) and 61K/61M require services that are personally performed. A genuine right of substitution takes the services out of both provisions. Both sections require all the terms of the arrangement to be taken into account but as though they were terms of a contract between the worker and the client. One then has to ask whether the resulting contract is one of employment.

Recent Cases

- *Christa Ackroyd Media Ltd v Revenue and Customs Commissioners [2018] UKFTT 69 (TC)*: Ms Ackroyd's media company had a long-term BBC contract (7 years) providing for 225 days a year. Ms Ackroyd had considerable freedom but the BBC had ultimate control. Held: IR35 applies.

- Contrast *MDCM Ltd v Revenue and Customs Commissioners [2018] UKFTT 201 (TC)*: Mr Daniels provided night shift management for a large building contractor for a specific project lasting October to the next April. He was paid a flat daily rate with no employee benefits and no notice period. He was not treated as an employee. The services were personal. Mr Daniels was not controlled "any more than any other contractor". Held: IR35 does not apply.

MANAGED SERVICE COMPANIES

The legislation was introduced in 2007 and, according to HMRC, the objective was to expedite investigations that would otherwise proceed under IR35. However, there has only been one substantive case, *Christianuyi Ltd and ors v Revenue and Customs Commissioners* which is shortly to be heard in the Court of Appeal.

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One other case referring to the legislation is *PML Accounting Ltd v Revenue and Customs Commissioners [2015] UKFTT 440 (TC)* (and a connected judicial review *[2017] EWHC 733 (Admin)*), but the tribunal was considering HMRC's information powers in a MSC investigation rather than the actual application of the legislation.

The key provision is section 61B:

"Section 61B - Meaning of "managed service company"

- (1) A company is a "managed service company" if–
- (a) its business consists wholly or mainly of providing (directly or indirectly) the services of an individual to other persons,
- (b) payments are made (directly or indirectly) to the individual (or associates of the individual) of an amount equal to the greater part or all of the consideration for the provision of the services,
- (c) the way in which those payments are made would result in the individual (or associates) receiving payments of an amount (net of tax and national insurance) exceeding that which would be received (net of tax and national insurance) if every payment in respect of the services were employment income of the individual, and
- (d) a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals ("an MSC provider") is involved with the company.

  (2) An MSC provider is "involved with the company" if the MSC provider or an associate of the MSC provider–

  (a) benefits financially on an ongoing basis from the provision of the services of the individual,

  (b) influences or controls the provision of those services,

  (c) influences or controls the way in which payments to the individual (or associates of the individual) are made,

  (d) influences or controls the company's finances or any of its activities, or

  (e) gives or promotes an undertaking to make good any tax loss.

  (3) A person does not fall within subsection (1)(d) merely by virtue of providing legal or accountancy services in a professional capacity..."

In *Christianuyi*, the First-tier Tribunal (*[2016] UKFTT 272 (TC)*) and Upper Tribunal (*[2018] UKUT 10 (TCC)*) established that each of the tests for being "involved with" a personal service company apply broadly, for example:

- "Benefits financially on an ongoing basis" entails only an indirect causal connection and does not require proportionality or correlation between the amounts earned as a result of the provision of the services of the individual and the extent of the financial benefit to the MSC provider.
- The terms "influences or controls" are broad: control does not need to be exclusive and ""influence" exists where the MSC provider has an effect upon the manner in which the customer conducts its affairs" (see [2018] UKUT 10 (TCC) at paragraph 91(3)).
- "Finances" includes the use of a particular bank account or the time when tax is paid and, even where there are commercial reasons for (say) using a particular business bank account, the MSC Provider can still be influencing the company's finances.

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But wasn't the MSC legislation (only) intended to apply to workers who are really employees? See, for example, the introduction to the consultation "Tackling Managed Service Companies" (December 2006):

> "It is a long-standing principle that the tax treatment of income is determined by its nature – that is, income which is properly employment income should be taxed as such. Consistent with this principle the Government seeks to ensure that even if an individual is working through a company, but the underlying nature of the contract is one of employment, tax and national insurance contributions (NICs) should be paid at employed levels.
>
> ...In contrast to Personal Service Companies, workers in MSCs are almost invariably not in business on their own account and the underlying nature of the contracts in which they are involved is one of employment...
>
> The Government seeks to ensure that, where the underlying nature of an individual's contract is one of employment, tax and NICs should be paid at employed levels, even if the individual is working through a company."

See also the Financial Secretary to the Treasury speaking in Parliament:

> "Freelancers or agency workers who are engaged directly by any agency or are in some way in business on their own account and run their own affairs, either through a personal service company or some sort of umbrella company, are simply not affected by the legislation."

On the First-tier Tribunal and Upper Tribunal's application the definition of "involved with" is so broad that the legislation does apply to genuinely self-employed workers who are choosing to operate through a company. So which aspect of the legislation narrows its application? Perhaps the definition of MSC Provider as "a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals" necessitates direct involvement in the company's provision of services rather than merely the provision of back office functions.

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