Who's your client?

A fresh look at the agency rules.

Prisma Recruitment Ltd [2023] UKFTT 291 (TC) (reported in *Tax Journal*, 31 March 2023) is an interesting case, and perhaps carries lessons for all taxpayers.

Prisma operated what the First-tier Tribunal (FTT) described as an employment business, engaging and payrolling temporary and contract workers who were introduced to customers under an agency contract.

The rules specifying the circumstances in which an employment business is required to treat its workers as employees for tax purposes and to operate PAYE on payments to them have changed over the years. Some fundamentals have remained the same, though. For the rules to apply there must be a contract between 'agency' and 'client' pursuant to which 'worker' personally provides services to 'client' which are not 'excluded services'.

> The lessons, then? Read the law, stick to your guns and don't be bullied by HMRC

One of the ways in which services count as 'excluded services' is where the services are provided at premises which are 'neither controlled or managed by the client nor prescribed by the nature of the services'. It follows, therefore, that in order to determine whether services are 'excluded' you need first to identify 'the client'.

Prisma supplied workers to a workplace consultancy business with which it was not connected, called BGM. BGM was described by the FTT as 'in the business of workplace change. It was a consultancy providing services to its clients, including RBS, enabling them to adopt "agile" working practices and reduce the space needed for their operations.'

Although BGM had its own offices, none of the workers provided to it by Prisma carried out their duties there. Sometimes (for example, to carry out a space utilisation survey) workers were at the premises of BGM's clients, but most of the time they could and did work wherever they pleased including at home or in coffee bars.

Historically, Prisma had operated PAYE on payments to its workers. The FTT found that this was because the company had not (until the events which gave rise to the appeal) considered the status of the workers, but had been content to operate the 'agency' legislation on the basis that the full cost would be recovered from customers.

In 2013, for reasons that we don't need to consider, the company re-examined the rules carefully and concluded that it didn't need to operate PAYE after all. It tumbled to the fact that its client was BGM, the workers didn't work at BGM's premises, and the services were therefore 'excluded services'.

HMRC contended that for the purposes of the legislation the 'client' in question was not BGM but the client of BGM for whom the work was done. The reported case gives little insight into how HMRC sought to justify that contention and it is frankly difficult to see how on any reading of the legislation it could have done so. The FTT accordingly had 'no hesitation in finding that Prisma's client, for the purposes of [ITEPA 2003 s 44] was BGM'. For good measure the FTT noted that even if HMRC's contention had been correct, s 44 would still not have applied because there was no contract between Prisma and BGM's client.

HMRC does not come out of the case well, and not only for seeking to sustain an unsustainable position. It cited a number of procedural and administrative reasons (all happily rejected by the FTT) why Prisma should not be allowed to have the case heard including denying either that they had made an appealable decision on which the FTT could opine or that Prisma had made a valid claim to overpayment relief. And, astonishingly, back in 2014, HMRC had (allegedly) refused even to consider Prisma's argument that PAYE tax was not due unless Prisma first agreed to pay the tax and provided 'a written opinion from a lawyer or other expert'.

The lessons, then? Read the law, stick to your guns and don't be bullied by HMRC. ■

David Whiscombe, BKL

What is a main residence?

Varied case law can lead to unrealistic expectations.

Everybody is familiar with the capital gains tax private residence exemption in TCGA 1992 s 222. However there remains considerable uncertainty about what represents a main residence.

A fundamental condition is that the property must first be a *residence*.

The starting point in all the authorities on this matter is always the judgment of Lord Widgery in *Fox v Stirk* [1970] 3 All ER 7 who said that 'a residence' means:

- the place where a man is based or continues to live;
- there he sleeps, shelters and has his home;
- something other than temporary accommodation; and
- there is some expectation of continuity with a degree of permanence.

The subject has recently been considered by the FTT in the case of *B Cohen v HMRC* [2023] UKFTT 90 (TC) (see *Tax Journal*, 17 February 2023), although not for the purposes of capital gains tax. It was in respect of the relief from the 3% SDLT surcharge which does not apply where the property purchased is a replacement for the purchaser's only or main residence.

> The trouble is that the decisions of the courts on the meaning of a main residence are so variable that it gives people confidence that their hopeless arguments might succeed

The trouble is that the decisions of the courts on the meaning of a main residence are so variable that it gives people confidence that their hopeless arguments might succeed. Some of them do.

In the case of Cohen, Mr Cohen moved into a house for ten days. He claimed that it was his only or main residence and was therefore not liable to the 3% SDLT surcharge on the purchase of another property. However, before he moved in he had already decided that he was not going to live there and was in the process of purchasing another property where he did intend to live.

It is difficult to see how he could possibly have thought that he satisfied the above tests – or perhaps any of them – for the house to be his only or main residence, or indeed a residence at all. However, he would no doubt have been encouraged by the case of *Morgan v HMRC* [2013] UKFTT 181 (TC).

Mr Morgan was getting married. He was in the process of purchasing a property which would be the matrimonial home. He was living with his fiancée's family but unfortunately two weeks before the purchase of the intended matrimonial home, the relationship ended. So he went to live with his parents. Nevertheless, he carried on with the purchase of the property and moved in for two weeks specifically to prepare the house for renting and then moved back to live with his parents. The property was let and then sold. He claimed the exemption – to which many might have thought: you cannot be serious! However, the tribunal decided that Mr Morgan had lived in the property for two weeks and this was enough to qualify it as a residence.

Mr Cohen might also have known about *Core v HMRC* [2020] UKFTT 440 (TC). Mr and Mrs Core bought a property and after they moved in they were soon approached by somebody who made an offer for the property. They rejected the offer– and did so again when the offer was repeated. However, about a month later, the purchaser made a higher offer which they accepted. They had occupied the property for six weeks and the tribunal found that this was enough to represent a residence.

Mr Cohen may have been aware that there are lots of other cases where the taxpayer has lived in a property for a fairly long period as their only home, but the tribunals have said that it still did not qualify as a residence. But even though his case may seem to be completely hopeless you can hardly blame Mr Cohen for giving it a try.

However, I think he should be grateful that he lost. If he had won and HMRC had appealed to the Upper Tribunal, he would have been at very serious risk of liability for costs. ■

Peter Vaines, Field Court Tax Chambers

Reader response: HMRC's ADR Manual

A debate over whether HMRC's new manual indicates a change in policy.

The 24 February 2023 edition of *Tax Journal* had an article with the startling headline 'HMRC's new ADR guidance: more harm than good?' and stated: 'The guidance includes three unexpected changes in policy' being (i) the exclusive use of an HMRC mediator, (ii); a "circumscribed process"; and (iii) a departure from confidentiality and the without prejudice rule in respect of tax facts'.

Having been a CEDR accredited mediator for over ten years, acting both as a sole and co-mediator in many tax disputes, I read the article with interest and disagree with all three contentions, not least that none of them are in fact new or changes to HMRC policy.

They have all been found for some time on HMRC's website (see *Use of alternative dispute resolution to settle a tax dispute* at bit.ly/guidanceonADR) and in its factsheet CC/FS21, both first published in 2014.

There is not space in this commentary to address the first two contentions, so I focus on the article's third contention in respect of confidentiality and tax facts which states: 'Perhaps the most alarming feature of the guidance is its departure from the principle of confidentiality'.

Alarming? Not really if you consider the context in which the mediation is taking place.

ADR and its techniques was introduced as part of the refreshed litigation and settlement strategy with its focus on a collaborative approach to dispute resolution, starting at the point when the issues of the amount of tax and the time for its payment are first identified with the ambition for agreement on both elements to be reached between the taxpayer and HMRC long before they turn into 'disputes' with entrenched positions being taken by either side.

Any agreement reached with HMRC to be binding, must be on the basis of a full disclosure of all the facts – 'all cards face up on the table' applying MFK principles – whether in a traditional negotiation or through the ADR process.

Why should the ADR process in that respect be any different or deserve any other special treatment to the way the process of agreeing a taxpayer's tax position is otherwise reached?

The article observes that 'statements concerning tax facts' may end up being used in future investigations or litigation. What are these 'statements' as opposed to the 'tax facts' themselves? The LSS guidance makes it clear that it is important to distinguish a fact from a belief or assumption which would therefore not be treated as a fact. Nor would assertions or arguments about the importance of the facts be treated as facts in themselves and therefore all should be covered by the 'without prejudice' rule, as would the scenario described in the article where parties in a mediation 'may be willing to accept certain factual positions they would not otherwise agree to'. That is not a new fact but an interpretation about a fact.

In any event, if new tax facts were subject to the without prejudice rule, any disclosure of them during the mediation process would still result in them having been brought to the attention of HMRC caseworkers who could not then 'unhear' what had been disclosed. In those circumstances with that knowledge HMRC could start a line of enquiry to elicit their disclosure or, if need be, produce the same result under careful cross-examination in court.

The words 'tax facts' were introduced to better and more objectively identify what the HMRC guidance already provided in CC/FS21 when in respect of the confidential and without prejudice nature of the process it stated: 'if you tell us something which significantly changes your tax or penalty position, or provides evidence of criminality, it must be shared with HMRC and may be used in formal proceedings'.

So, in effect the word 'something' was replaced with 'tax fact'.

In retrospect, it would have been helpful to make this link in the guidance to allay concerns that HMRC was introducing a new policy, which I do not believe was its intention.

The guidance (at ADRG01800), comments on the term 'without prejudice' and states it 'has a precise, and quite narrow meaning, often misunderstood both by officers and customers'.

Perhaps we should now turn our attention to this rule and agree how it applies to all interactions between HMRC and the taxpayer, not just in the ADR process. ■

Peter Nias, Pump Court Tax Chambers

The author's reply:

We note this reply to our article and welcome the debate this topic has sparked. However, we do not agree with Mr Nias's views.

Mr Nias's commentary states that there is nothing new in the guidance. We do not agree. The prohibition on a single joint facilitator, the strict parameters for the ADR process, the departure from the principle of confidentiality and the concept of 'tax facts' were set out in writing for the first time in HMRC's newly published manual. We consider they go against the tribunal's practice statement and the established principles of mediation.

Regardless, longevity is not a good reason for poor policy. Our article had two purposes: to highlight the shortcomings of HMRC's approach, and to call on HMRC to reconsider their stance. We remain of the view that the current guidance and process are ultimately unhelpful and would urge HMRC to review and amend its policy. The overarching concern is that HMRC's approach to ADR is to seek to control it and, if necessary, to retain the ability to take advantage of it. Negotiations need 'two to tango' and these changes do little to attract taxpayers to the table.

David Pickstone & Anastasia Nourescu, Stewarts