Off-payroll repeal: the 24 days tax advisors stood still

Lost the plot when it comes to the Off-payroll working rules? Well, you're not alone – it seems the government has too. Here Dave Chaplin explains what it all really means

Friday 23 September 2022 will go down as one of those days when tax advisors everywhere will remember where they were when the news broke that the then newly appointed Chancellor, Kwasi Kwarteng, announced plans to repeal the Off-payroll working (Chapter 10 of ITEPA 2003) reforms from April 2023. The Man on the Clapham Omnibus would have only felt a slight bump in the ripple of the tax-time continuum, but for tax advisors, it was time to reach past the Tolley tomes on the shelf and open the Urban Dictionary. After a few 'WTFs' and 'AYFKMs', most of us settled on "What on earth just happened?" Composure restored, I quickly popped the news story on ContractorCalculator and shared the story on LinkedIn. One of my software engineers called me: "Dave, this is big. We're gonna need a bigger web server." A quick virtual switcheroo and the lights were back on, revealing audience figures for that day that resembled a Dirac Delta function. Was this IR35 strike the largest we've ever seen?

IR35's death was greatly exaggerated

Over the next few days, social media proved itself the worthy winner of misinformation spreader, with its 'IR35 is dead' headlines. It turns out, in social media land, the twits (is that what you call the Twitter users?) think that when the Chancellor says something it becomes law overnight. And it appears the twits were blissfully unaware that from 2000-2017 they had been carelessly ignoring tax legislation that applied to them (Chapter 8 of ITEPA 2003). Maybe they've taken an overly ambitious leap from the case of *St Ives Plymouth Ltd v Haggerty [2008]* and inferred that if Government doesn't enforce tax law and the taxpayer ignores it, it can be used as a legitimate expectation to claim that the legislation has somehow decrystalised and vanished from the Finance Act! Alas, these 'golden rules' to enrich one's coffers do not exist, not a single one – as avid students of statutory interpretation will know.

As the ripples finally reached the hiring firms, they fought their way out of the Off-payroll sludge and made their way to the phone to consult their tax advisors. It's likely the advisors carefully explained that IR35 was not being killed off but that the IR35 reforms, put in place because IR35 didn't work, are being repealed because the new ones didn't work well, either, and that we were all reverting back and had to follow once again the laws which didn't work the first time because they didn't work in a less bad way to the newer ones. Got it?

Most firms were too busy trying to identify and fight off the newly formed Anti-Growth Coalition to understand these careful explanations and wanted to know "What does this mean for me?"

"Nothing for now," we all said. "Crack on as usual, and we will keep you posted if it makes a chance of getting through the Finance Bill."

Through the IR35 wormhole

As the first few weeks passed, before the replacement Chancellor Jeremy Hunt repealed the repeal of the repeal (still following?!), the dust settled a little, and the collective twits on social media worked out that things weren't quite what they initially thought.

With the repeal not yet cancelled, there was inevitable danger ahead. The gravitational pull from the perceived wormhole in the tax-time continuum would have undoubtedly been leveraged by unscrupulous scheme providers, convincing blissfully unaware taxpayers they could have carried on as if it was 2016. There was undoubtedly danger ahead. Had taxpayers traversed the wormhole that led them from Chapter 10 back to Chapter 8, they may not have made it past the waiting internal vortex – Chapter 9 of ITEPA 2003 – the brutal Managed Service Company legislation ('MSC'). MSC is so severe and widely drafted that, rumour has it, one only has to mention its name, and a tax inspector will knock on the door. Along with MSC, there's also the Criminal Finances Act 2017. Firms are required to take reasonable steps to prevent the facilitation of tax evasion entering their supply chains.

CEST in the wrong hands creates tax avoidance

Just like DOTAS and the failed Business Entity Tests (remember those?), dodgy scheme providers would have been likely to use HMRC's guidance tool, Check Employment Status for Tax (CEST), to help them "win at tax" by framing it as an HMRC certificate of compliance. Unfortunately, most taxpayers wrongly think that HMRC guidance is the actual law and also believe HMRC's non-statutory promise of "standing by the result". And, let's face it, HMRC has banged the CEST drum against all the compelling criticism for a long time. HMRC's rhetoric on CEST being 'robust' would have been used against them.

My long-term criticism of CEST is primarily because the evidence demonstrates it is misaligned with the case law. On 21 June 2022, I explained this objectively in forensic detail in a 40-minute 'CEST Exposed' webinar. My analysis proved that CEST's 'Outside IR35' results do not involve a full multi-factorial assessment, contrary to the binding law published in April 2022 concerning the Court of Appeal decision in *Atholl House*.

These fundamental flaws in CEST, combined with the switch from Chapter 10 back to Chapter 8, would have created the perfect breeding ground for unscrupulous players. The dodgy scheme providers would have seized upon CEST: "Answer it like this", they would have said, "and everything will be fine. Look, HMRC has guaranteed it will stand by the result. HMRC cannot argue against its own tool, blah, blah, blah." That would have been the common parlance of every dodgy operator in the supply chain who chose to capitalise on contractor ignorance.

The potential transition was full of 'what-ifs'

The discussions surrounding the repeal created many 'what-ifs' to consider. For example, for a long-term project, the contractor was a PSC, with the likely legal position being outside IR35. The client went along with it, then got nervous, and everyone moved to an umbrella. If the repeal happened, they wanted to return to a PSC from April 2023.

Well, let's take guidance from the Court of Appeal in Atholl House (paragraph 171): "*...the position under earlier contracts between the same parties is admissible as part of the factual matrix, since it will be known to both parties at the date(s) of the relevant contract(s)... ...It is necessary to bear in mind, however, that an individual may move from being an independent contractor to being an employee, and vice-versa, while working for the same contractual counterparty....*"

How would an HMRC inspector have considered the scenario I've described and applied the binding law from Atholl House? Would the inspector have considered the status before April 2023 and formed an opinion on that, even though it was not in the period under enquiry and contrary to what the client did/said? Could the contractor have used that to sue the client for consequential loss for failing to make the correct determination in the first place? The repeal was going to be messy.

The repeal of the repeal of the repeal

Just 24 days after Kwarteng made the brave decision to repeal the IR35 reforms as a pro-growth measure, Chancellor Jeremy Hunt reversed the decision and still claims the Conservative Party are pro-growth. You know, like a gardener claiming they are growing award-winning tomatoes, then sucking the oxygen out of their greenhouse.

In my view, the repeal needed to happen. Its structural flaws resulted in an overstretch, and around half of the genuinely self-employed people have had their rights to be their own boss taken away from them. Evidence of the considerable overstretch was reinforced by the fact that the original estimate of a tax gain of £1.2bn per year for Off-payroll jumped by two-thirds to £2bn – the figure quoted by the Treasury as being the tax saved by cancelling the repeal.

What is the IR35 future?

Off-payroll should be ditched. Structurally it cannot work while the client is asked to make the status assessment because they do not have access to all the information they need, including the self-employed individual's history of work – fundamental to ascertaining whether they are "in business on their own account" (IBOOA).

The IBOOA argument was central to the Atholl House case, published by the Court of Appeal on 26 April 2022. HMRC had attempted to argue that one should only consider the single engagement and ignore other external factors. But, this approach was dismissed by three judges as being "myopic".

HMRC's counsel attempted to sway the judges towards their view by describing the impact of losing their argument as being unsound as a matter of policy and placing an undue burden on organisations and businesses.
Well, guess what? HMRC lost that argument, and therefore by its admission, the Off-payroll legislation is unsound as a matter of policy and places an undue burden on organisations and businesses.
Kwasi Kwarteng said in his growth plan: "This will free up time and money for businesses that engage contractors, that could be put towards other priorities. The reform also minimises the risk that genuinely self-employed workers are impacted by the underlying off-payroll rules."
HMRC counsel was right. Kwasi Kwarteng was right. But Jeremy Hunt put the shackles back on the self-employed.
In my view, the repeal needs to happen, and the original rules can be made to be a success with some minor amendments. But, until that day comes, open your urban dictionary again – SNAFU.

• ***Dave Chaplin*** is CEO of tax compliance firm IR35 Shield and has been immersed in IR35 matters for so long people refer to him as 'Mr IR35'. He can usually be found roaming around IR35 tax tribunals or can be contacted here