

Three cheers for Kaye Adams as she wins (yet) again

Dave Chaplin explains why, in the light of Kaye Adams' battle against the tax man, he is campaigning for a Taxpayer Bill of Rights

After a nine-year battle and HMRC's fourth attempt to try to convince a tax tribunal that broadcaster Kaye Adams was a 'disguised employee', on 29 November 2023 Judge Beare's decision pointed to the same conclusion reached by three other hearings – that the tax authorities had wrongly accused Ms Adams of being a tax avoider. It didn't matter how hard HMRC tried to apply its 'Policy View' on tax status. The courts repeatedly told them they were wrong.

HMRC suffered from myopia

Readers who have explored status law will know that it's a bizarre area of tax which, to the layman, appears simple – “surely it should be easy to define a test for whether someone is employed or not?”

Alas it isn't, and HMRC spent nine years trying to make it so simple that the common law test they tried to get the Court of Appeal to sanction would have meant everyone was “employed for tax purposes”. One ambitious argument HMRC ran at the Court of Appeal was even dismissed as “myopic”.

Where have you been drinking?

Determining between employed and self-employed is like arguing whether a drinking establishment is a pub or a bar. Suppose HMRC invents a rule where a bar has to pay double the business taxes of a pub. What would the regulations be for discerning them? Shall we try? OK, a bar has a clientele who are more smartly dressed and perhaps out for the evening, whereas a pub might have anyone walk in at any time. But that doesn't work because if the smartly dressed people walk into the pub, does it change to a bar? And if a bunch of ruffians and scallywags go into a posh bar, it doesn't turn it into the Blind Beggar – an infamous London pub where, in the 1960s, gangster Ronnie Kray killed rival George Cornell. Unlike Cornell, Ms Adams survived the relentless attack by her rivals, HMRC, despite them fielding three barristers and an army of lawyers at the fourth showdown.

The nightmare Kaye Adams endured at the hands of HMRC is worrying – I know because I've been helping her for almost five years. Despite clearly operating as a freelance broadcaster for over 30 years, presenting on various radio and TV programmes, HMRC decided she must be an 'employee' of the BBC and therefore owed higher taxes.

Never mind that she was paid per show, worked for multiple clients, had no employment benefits, was never treated like an employee, and had been doing her own thing for decades. No, HMRC felt she crossed the imaginary line of 'deemed employment', qualifying her as a pseudo-BBC employee who should pay more tax. It appears HMRC may have been on the sauce themselves.

HMRC 'disappointed' – for what?

Despite winning her case at three tribunals over six years, the HMRC press office stated they were “disappointed”. Were HMRC disappointed that their officers misapplied the law for nine years and almost financially bludgeoned a taxpayer? Or was it something else they were disappointed about?

HMRC could theoretically still try to appeal again. However, it seems unlikely that it will continue to escalate with more lawyers to pursue an unwinnable case at taxpayers’ expense. While the First-tier tax tribunal does not set legal precedent, we must remind ourselves that the Upper Tier and Court of Appeal rulings certainly did, which the FTT then applied.

Never going to give you up

Refusing to give up after being knocked down is often admired, but that’s not how the tax authority should operate. The last successful appeal in an IR35 tax case at the First-tier Tribunal (FTT), which HMRC hasn’t appealed, was the Canal Street Productions case in October 2019. Since then, HMRC has sought to appeal all four FTT cases it has lost: RALC Consulting Limited, Basic Broadcasting Limited, S&L Barnes Limited, and Gary Lineker Media. Maybe it’s just coincidence, but whenever HMRC seems to lose, they accuse the judges of making errors in law and convince themselves it’s OK to reach into the taxpayer’s purse to prove them wrong.

Perverse incentives?

Does HMRC’s worryingly stubborn behaviour reveal perverse incentives in the tax authority’s methods? How many other talented media people have had careers upended by bogus ‘deemed employee’ claims and submitted to unfounded demands by HMRC? Have innocent people suffered an outrageous abuse of power by a government body meant to serve taxpayers, not persecute them? By stubbornly pursuing unwinnable cases, HMRC wastes vast public resources, leaving innocent lives in tatters.

Most of us agree with the high-level policy intent behind the ‘IR35’ rules – we don’t like tax avoiders, either. But the implementation has gone off the rails. Time and again, tribunals uphold status appeals, yet HMRC carries on. Since the First-tier Tribunals took over from the Special Commissioners in 2010, the scores on IR35 cases have been 10.5 for HMRC and 17.5 for taxpayers. Even when HMRC started using Counsel at FTT in the Christa Ackroyd Media case and thereafter, the score was HMRC 10, taxpayers 11.

Time for fairness

While many reports will focus on the nuanced application of status case law in the Kaye Adams case, the real story highlighted here is that something doesn’t seem right in the administration of the tax system.

The First-Tier Tax Tribunal was designed to be accessible to citizens who could represent themselves. But IR35 is inaccessible to most taxpayers, and when HMRC fields three barristers, including King’s Counsel, backed up by an army of lawyers and HMRC staff, there is a genuine concern that natural justice could be obstructed.

But, even before the appeals hearings at the tribunal, what happened then? Where were the checks and balances on this case and independent accountability? Who checks that HMRC and their lawyers are following the law? Where the tax at stake is less than the cost of defence, it’s worrying that people are given unbridled power to put a taxpayer in the position of having no

option other than to roll over and pay a tax that isn't due because they cannot afford to defend themselves.

I've started a campaign this year called Taxpayer Fairness (<https://www.taxpayerfairness.org>) to put a Taxpayer Bill of Rights into statute. The Bill would enshrine in law simple ideas, like a taxpayer's right to audio record any meeting with HMRC, just in case meeting notes contain factual errors. Other ideas include support for micro-businesses that appeal to tax tribunals – where HMRC uses Counsel – HMRC should fund the equivalent for the taxpayer. Another one is that during an investigation where the taxpayer believes HMRC have ignored or unfairly dismissed key points in representations, an independent Taxpayer Advocate can adjudicate to ensure the taxpayer is treated fairly.

Much of what a Taxpayer Bill of Rights would do is common sense and exists in non-statutory guidance and codes. But sadly, as many tax advisors tell me, they aren't always being followed.

Similar problems occurred in the US many years ago, which they resolved via laws enacted in 1998, further bolstered by a Taxpayer First Act in 2019. My campaign champions something similar and proposes that those US reforms offer a model for legislative reform of the UK tax administration to deliver tax fairness for small businesses – particularly the self-employed in the UK.

It's time for us to push for a Taxpayer Bill of Rights.

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