

Employed v Self Employed: OHT Guide



Employees

If a person is an employee for tax purposes there is a risk that he will be an employee for legal purposes, opening up employee rights issues, e.g. redundancy, maternity rights etc.

Revenue has expressed a view that the tax classification is not definitive in terms of employment rights.

Tax Briefing 43

The Employment Status Group was set up because of a growing concern that there may be increasing numbers of individuals categorised as 'self employed' when 'employee' status would be more appropriate.

The findings of the Group were included as an Article in Tax Briefing 43 and then published as a Code of Practice (click [here](#)).

The Group indicated that the overriding consideration or test will always be whether the person performing the work does so *"as a person in business on their own account."*

The question is whether the person is a free agent with an economic independence of the person engaging the service?

In an article in Tax Briefing 82 the Revenue indicated that the Code will be applied and each case will be decided on its own facts.

The Code of Practice suggests that where there are difficulties in deciding the appropriate status of an individual or groups of individuals, the following organisations can provide assistance; the Local Revenue Office, the Local Social Welfare Office, or the Scope Section in the Department of Social and Family Affairs.

Criteria on Whether an Individual is an Employee

The Tax Briefing Article indicated that while all of the following factors may not apply, an individual would normally be an employee if some of the factors below

apply, i.e. if he:-

- Is under the control of another person who directs as to how, when and where the work is to be carried out.
- Supplies labour only.
- Receives a fixed hourly/weekly/monthly wage.
- Cannot sub-contract the work. If the work can be subcontracted and paid on by the person subcontracting the work, the employer/employee relationship may simply be transferred on.
- Does not supply materials.
- Does not provide equipment other than the small tools of the trade.
- Is not exposed to personal financial risk on the work.
- Does not assume any responsibility for investment and management in the business.
- Does not have an opportunity to profit from sound management in the scheduling of engagements or performing tasks arising from the engagements.
- Works set hours or a given level of hours per week/month.
- Works for one person or for one business.
- Receives expense payments to cover subsistence and/or travel expenses.
- Is entitled to extra pay or time off for overtime.

The Denny Case

In *Henry Denny & Sons (Irl) Limited v Minister for Social Welfare (1997)* a supermarket demonstrator who was paid a fee in respect of each demonstration was deemed to be an employee notwithstanding statements to the contrary in her contract. Each demonstrator submitted an invoice and payment was made each fortnight without deduction of tax or PRSI.

The contract had a number of statements which indicated that the demonstrator was not an employee:-

"You are deemed to be an independent contractor",

“It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise”,

“It is agreed that the provisions of the Unfair Dismissals Act 1977 shall not apply etc”,

“You will not be an employee of this company”,

“You will be responsible for your own tax affairs”.

The judge in the Denny case felt that statements in the contract should be disregarded, on the basis that they were the opinion of the contracting parties but were of minimal value in deciding the work status of the person engaged.

The Barry Case

The case of Minister for Agriculture & Food v. Barry & Ors (7th July 2008) contains an analysis of the tests for whether a person is an employee. It dealt with Temporary Veterinary Inspectors (TVI), long believed to have been self employed contractors. Many of the TVIs themselves had their own practices from which they were based.

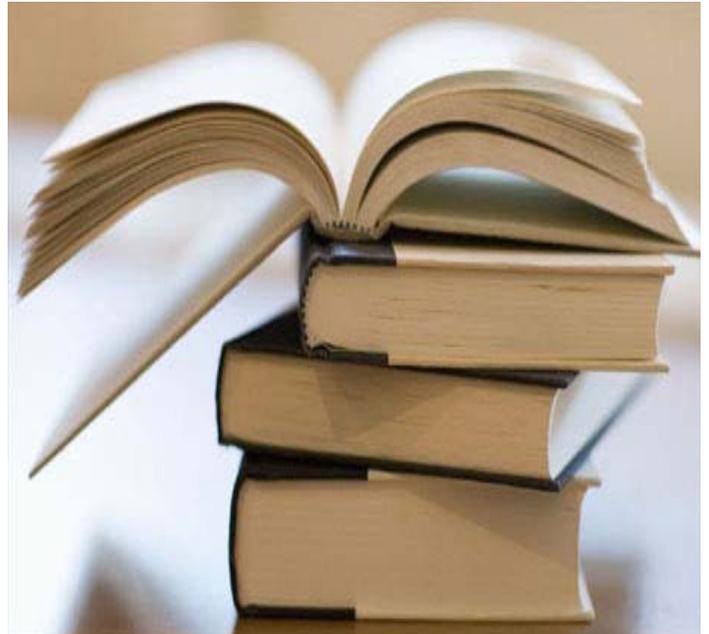
The issue of classifying themselves as employees arose when the work which they were engaged to carry out ceased following the closure of the Galtee Meats Plant in Mitchelstown. The judge found that the TVIs were engaged as independent contractors, not employees. They were also in business on their own account, and they could and did continue in private practice and undertook temporary work for the Department. Further, the TVIs’ remuneration was paid on an hourly fee basis at rates fixed between the Department and their union, Veterinary Ireland.

Part time Lecturers, Teachers and Trainers

Revenue have an article in Tax Briefing 28 which deals specifically with the employment position of part-time lecturers, teachers and trainers. Revenue’s general view is that part-time lecturers, teachers and trainers are employees and payments need to be made to these individuals net of statutory deductions for PAYE and PRSI. Revenue’s position is based on case law and a number of precedents.

Revenue accept that the position above does not apply in situations where the individuals give once off lectures (once or twice a year) for the same body.

Revenue do not accept that lecturers, teachers and trainers who give a series of once off lectures to the



same body are outside the scope of PAYE/PRSI.

Conclusion

There are a number of factors to be considered in determining whether the contract should be considered as a contract of service or a contract for services from an income tax point of view.

The main concern for Revenue is that when an individual is hired as a self-employed contractor, employers' PRSI does not apply. In addition a self-employed individual would have a wider scope for taking income tax deductions for expenses.

A self-employed individual can claim expenses for income tax purposes if the expenditure is wholly and exclusively for a trade, whereas an employed individual can only deduct expenditure incurred wholly, exclusively and necessarily for the employment.

Revenue’s concern is that an individual claiming expenses as a self-employed contractor could claim expenditure that would not qualify for an income tax deduction for an employee, thereby reducing the amount of tax paid to Revenue.

Each case should be considered on its own merits. A taxpayer in business may wish to negotiate a contract to remove clauses which point towards a contract of service, so as to reduce the risk of Revenue seeking to treat the contract as an employment contract for income tax purposes.

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Caveat: These notes are intended as a general guide only. OHT has endeavoured to provide an accurate commentary but the notes cannot cover all circumstances. OHT strongly recommends that formal tax advice be obtained before any steps are taken that may have a tax effect.