

The recent case of Reed Employment Plc & Others v HMRC is another salutary reminder to employers to ensure that their salary sacrifice arrangements are properly implemented. The decision is notable for two principal reasons:

- 1 The salary sacrifice arrangements implemented by the Reed group companies to reimburse travel expenses were not effective for tax purposes.
- 2 Employment agencies that engage temporary workers under "overarching contracts" should review the terms of those contracts, as it may be that any travel expenses reimbursed are taxable if the engagements are set up such that the temps' worksites are not temporary workplaces.

Background

The judgment of the Reed case runs to a daunting 92 pages, but the salient points are these:

- The Reed group companies placed temps with their clients; the temps remained employees of Reed (although Reed had engaged some temps on a self-employed basis in earlier years).
- Reed secured a "P11D dispensation" from HM Revenue & Customs for the travel and subsistence expenses paid to temps on assignments at what were considered temporary workplaces. (A P11D dispensation is notice from HMRC that allows an employer not to report expenses and benefits in year-end PAYE filings, and items covered by a dispensation are not subject to PAYE or NICs.)
- Reed operated two salary sacrifice arrangements for travel expenses. In essence, the benefit of the tax savings generated by the scheme passed to Reed rather than to the employees.
- It is clear that the temps did not understand the effect of these arrangements and the information provided to them was confusing.
- After a detailed review of the arrangements, HMRC revoked the P11D dispensation and made an assessment of £158 million for unpaid PAYE and NICs for the period from January 2001 to April 2006. This was on the basis that the temps' workplaces were not temporary workplaces and therefore the expenses paid to them were taxable in nature.

Salary sacrifice arrangements

The Tax Tribunal found that neither of the two schemes operated by Reed amounted to effective salary sacrifice arrangements. This was because:

- Employees were able to opt out of the scheme at any time for any reason. This prevents a salary sacrifice scheme from being effective. They were also able to opt back in again almost at any time.
- Given the opaque nature of the information given to employees (the Tribunal remarked on the confusing nature of the explanations and the payslips provided), it was apparent that there was no true salary sacrifice as the employees never relinquished their right to salary; "... the salary was paid in full, even if there was a later manipulation".
- A salary sacrifice requires reciprocity – a reduction in salary in exchange for an identifiable benefit. Reed did not provide any benefit; it simply applied the P11D dispensation to a part of the temps' salary to generate tax savings, the majority of which it took for itself.

Temporary workplaces and travel expenses

The Tribunal also had to consider whether the travel expenses paid to the temps were taxable at all. They would be if paid for ordinary commuting expenses to a permanent workplace, but not if incurred in the course of employment as a result of travelling to a temporary workplace.

This issue hinged on the nature of the temps' engagements. Reed's view was that the temps were engaged under a single, "overarching contract" covering several assignments, which would have made each of the temps' worksites temporary workplaces, and so the travel expenses non-taxable. HMRC's view was that the temps were engaged under a series of short assignments without any contract existing in between time, which would have made each of the temps' worksites permanent workplaces, even though for a short period only.

The Tribunal found that a form of contract did exist between Reed and the temps during the interim periods between assignments. However, this contract was not sufficient to amount to a contract of service on the basis that there was no mutuality of obligation between the parties and that Reed did not exercise any control over the temps. As a result, each assignment represented a standalone contract of service and the worksites of the temps were therefore permanent workplaces, meaning that the expenses reimbursed were taxable as earnings as they constituted ordinary commuting expenses.

Conclusions

The decision certainly does not sound the death knell for salary sacrifice. On the contrary, if arrangements are properly implemented the decision can be read as supporting the legal basis for such arrangements, which can generate significant cost-savings for both employer and employees. What is clear from the decision, however, is that any such arrangements need to be set up properly and that employees should clearly understand that they are sacrificing salary in exchange for an identifiable benefit. Employers who are in any doubt about whether or not their existing arrangements satisfy this test should have them reviewed.

Secondly, employment agencies (or any other employer that engages employees under an overarching contract for multiple assignments) should be careful about how they treat travel expenses reimbursed to employees placed on assignments at a number of different worksites. Depending on the terms of the contracts with the temps, it may be that some workplaces are permanent, rather than temporary, in nature despite what may be their short duration. If this is the case, reimbursed expenses will be taxable in the employees' hands. Agencies should consider reviewing both their standard terms of engagement of temps (in relation to the nature of the engagement with their temps between assignments) and their standard travel expenses policies to check that they are accounting for PAYE and NICs correctly.

The Reed case also follows hot on the heels of the Astra Zeneca decision regarding VAT on benefits provided through salary sacrifice, about which HMRC issued guidance last year; [click here](#) for our previous alert. Both cases are reminders to employers that their salary sacrifice arrangements need to be carefully implemented and operated and checked on a regular basis.

If you would like any further information about anything set out in this alert please contact one of our team.

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