

LET'S CALL A SPADE A SPADE

David Heaton considers 'false self-employment'

Isn't it funny how words can mean whatever those in authority decree them to mean?

Take the latest consultation document from the Treasury and HMRC, entitled *False self-employment in construction: taxation of workers*. What exactly is 'false' self-employment?

There is a long tradition in the construction industry of using self-employed labour-only subcontractors (LOSCs or 'subbies') to man building projects which, by their nature, are not permanent construction sites. The bricklayers, joiners, etc, look at first sight like employees because all they do is turn up and work, just like employees. So, in official eyes, they are in 'false' self-employment. However, scratch the paint off, and use more than one eye and one glance to examine the relationship between engager and worker, and it is a little more complicated.

The consultation document starts from the following premise:

False self-employment occurs where workers are treated as self-employed for income tax and NICs despite the fact that the way in which the work is carried out on a day to day basis demonstrates that there is an employment relationship. There is evidence to show that a significant number of workers in the construction industry are engaged on the basis that they are self-employed, but are working under employment terms.

What is 'demonstrated' is usually a matter of opinion, as is the validity of some of the 'evidence'.

The truth of the matter is, more probably, that most of the workers concerned are genuinely self-employed in law, but that is inconvenient for HMRC. The *MAL Scaffolding* and *Castle Construction* cases are examples of employer compliance officers appearing to start with the conclusion they were looking for and then finding the necessary evidence (perhaps the clue is in the title of their role in 'employer' compliance?).

The Working Time Regulations (WTR) led to a shift in contractual arrangements. They introduced paid holiday for self-employed workers who agreed to provide personal service, so many employers changed

their short-term contracts with their subcontractors so that there was definitely no requirement for personal service. Businesses also began to encourage subcontractors to send substitutes on occasion, so that the substitution clauses were clearly not a sham to get round the WTR. The knock-on effect was, of course, that the workers could not be employees for PAYE and NIC purposes: the absence of a requirement for personal service is incompatible with a contract of service, as often underlined by the courts.

Not that this was the only indicator towards the workers not being employees. How many employees are not paid by their employer when they can't work because it is raining? How many employees are paid only 95% of their pay just in case there's something wrong with the work they've done, and then have to re-do the work for no pay if it is unsatisfactory? How many employees have the freedom to disappear on Friday lunchtime without taking holiday? The subbie is emphatically not like an employee, however inconvenient that may be for the Government's yield targets.

The problem with status arguments has already been seen with IR35: each individual's situation is different, and investigation can be immensely time-consuming and often bear little fruit. So it is not entirely surprising that the latest proposals have been tabled. While there are undoubtedly some rogues in the industry – why else would we have the CIS? – who will pay their workers gross whatever their contract might be, I would suggest that most self-employment is not false in the normal sense of the word.

Regulations to deem certain self-employed construction workers to be employed for PAYE and NIC purposes are fine, and it is the right of Parliament to make such laws, but please let us not confuse 'false' with 'inconvenient', and let us call a spade a spade (however the groundworker in question is taxed).

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Editor's note: the Tax Faculty will be responding to this consultation and any comments should be sent to Anita Monteith.