Neutral Citation: [2022] UKFTT 00217 (TC)

Case Number: TC08540

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/05212

INCOME TAX and NATIONAL INSURNCE CONTRIBUTIONS – section 44 ITEPA 2003 – Employment Business in Health Care Sector – supply of workers to end clients – Limited Company Contractors ('LCCs') with personal companies – whether assessments validly raised where the charging provisions not particularised – whether the deeming provision applies to LCCs as Agency Workers by reference to the contractual arrangements in force during the relevant period – ***appeal dismissed***

Heard on: 3 to 5 February 2021, and
30 June to 2 July 2021
Judgment date:12 July 2022

Before

TRIBUNAL JUDGE HEIDI POON
MEMBER SUSAN STOTT

Between

K5K LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Geraint Jones QC, instructed by Rainer Hughes LLP

For the Respondents: Adam Tolley QC and Laura Poots, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

Vetting procedure for taking on Workers

68. The appellant has the same 'interview process' for all workers, and includes a vetting procedure where standard documents are checked. Additional documents are required for applicants as nurses. The vetting process carried out by K5K in outline is as follows.

(1) For health care workers, the following checks are mandatory:

(a) Disclosure and Barring Service ('**DBS**');

(b) Training certification (self-funded), either a practical one-day course certificate, or a refresher online course;

(c) References from other agencies or care homes to verify workers as having at least 6 months of work experience;

(d) Right to work documentation: passport, National Insurance number, two recent proofs of address, and to apply for DBS (if not already in place).

(2) For qualified nurses, the mandatory checks are the following:

(a) DBS checks online;

(b) Personal Identify Number ('PIN') of a registered nurse, that the registration number allows access to information of a particular nurse, of their degree qualification and more importantly any inhibitive factors such as e.g. current restrictions placed, any history of suspension;

(c) For nurses from abroad, Adaptation Certificate needs to be provided to check their credential and of any conversion course taken in the UK to work as a nurse.

Company Documents for Limited Liability Contractors

69. All workers recruited are paid via the payroll system which operates PAYE. If a worker wishes to be paid gross without tax deducted at source, then at the recruitment stage, (or if later when a change to gross payment status was requested), Mr Kooner said that the worker would be required to show the following additional documents during the Relevant Period:

(1) Certificate of incorporation of the Personal Company;

(2) Details of the bank account bearing the name of the Personal Company;

(3) Memorandum and Articles of Association of the Personal Company;

(4) Professional indemnity insurance certificate;

(5) Public employer liability insurance certificate.

70. Mr Kooner's evidence relied on the importance of the following documents, which he stated to be the requirement for a worker to be taken out of PAYE within K5K's systems. We refer to these other documents collectively as the '**Company Documents**', being:

(a) A '**Self-billing Agreement**', generally signed but never dated.

(b) A '**Confirmation Document**', generally signed but never dated.

(c) A '**BACS Request Form**', generally signed but never dated.

(d) A document entitled 'Procedures for Temporary Workers Working Through a Limited Company (the '**Procedures Document'**), generally signed, and generally undated (but with four significant exceptions detailed below).

A. The 'Self-billing Agreement'

71. The self-billing agreement enabled invoices to be generated by K5K on behalf of the LCC (to bill K5K) based on timesheet details. The Agreement has three parts, and the redacted details of a worker exhibited as HB/53/362 are adopted for illustration.:

(1) Part 1 states that 'This is an agreement to a self billing procedure between ABC Healthcare Ltd [box to insert '*Supplier Name*'] and K5K Ltd t/a 247 Professional Health' and the parties' respective numbers (which is left blank for ABC Healthcare Ltd).

(2) Part 2 sets out the terms of the agreement for the 'self-biller' (i.e. 247 Professional Health) and the 'self-billee' (i.e. the personal company of the LCC) whereby the self-billee agrees: (a) to accept invoices raised by the self-biller on their behalf until otherwise arranged, (b) not to raise sales invoices for the transactions covered by the agreement; and (c) to notify [K5K] immediately in relation to any changes to VAT registration or company details.

(3) Part 3 is for the parties' signatures and dates; Ms Daniso's is the 'signatory' for the Supplier, but her signature was not dated on the exhibit, despite the prompt to do so.

B. The Confirmation Document

72. The Confirmation document is a declaration form of Limited Liability, to be signed by a worker with a Personal Company, and its content in five sections fits into one side of A4.

(1) Under the heading of '*Confirmation for Limited Liability Contractors only*', a generic paragraph with blank lines for particularisation states as follows:

> 'This is to confirm I [xx] Daniso (Authorised Signatory) of [ABC] Healthcare LTD, have been working with K5K Ltd T/A 247 Professional Health since [blank on exhibit] (**Start Date**) under a Limited Liability Company whereby ABC Healthcare LTD is responsible for all tax & NI due to HMRC since the start date. I do not work for K5K Ltd t/a 247 Professional Health as a PAYE. (This supersedes any previous agreement)' [emphasis in bold added]

(2) Under the heading '*Details of my accountant are as follows*': 'TBC'

(3) Under the heading '*K5K Ltd make payment to the following Bank Account*': line spaces for entering Bank Name, Sort Code, Account Number, Account Name which '*must be the Limited Company*', followed by the declaration:

> 'Please credit payments to the above account and I fully accept responsibility for paying all tax and NI due to HMRC since my Start Date.'

(4) Under the heading of '*IR35 legislation*', the following text is recorded:

> 'By signing this form, you confirm that you will abide and adhere to all relevant IR35 legislation and tax matters related to a Limited Company Contractor. You should ensure your company's administration is managed promptly and efficiently, and any UK tax liability is settled without delay. 247 Professional Health do not accept any responsibility for your tax liabilities or NI contributions.
> General guidance to IR35 legislation may be found on the following HMRC website: [url link].
>
> Please contact the 247 Professional Health payroll office if you have any queries on [phone number] or email [Mr Kooner's email address]

(5) Signed [by the worker as the 'Authorised Signatory'], followed by Print Name.

C. The BACS Request Form

73. The form is entitled 'BACS Request Form for Limited Liability Contractors only' and, to all intents and purposes, duplicates parts of the Confirmation Document. The paragraphs on IR35 legislation with the url link and contact details for queries are reproduced verbatim, followed by the section for inserting bank account details of the Personal Company and signature and printed name of the Worker.

D. The Procedures Document

74. The two-page document bears the business logo of 247 Professional Health and the footer of '247PH 046 01.16' and refers to temporary workers working through a limited company as '*Limited Company Contractors'* (instead of '*Limited Liability Contractors*' elsewhere as in the Confirmation Document). The first paragraph states as follows:

> 'Under the "Conduct of Employment Agencies and Employment Business Regulations 2003", Temporary Workers working with vulnerable groups, through a Limited Company DO NOT have the right to opt out of the regulations and should sign the 'AGREEMENT WITH THE LIMITED COMPANY CONTRACTOR (NO OPT OUT OF CONDUCT REGULATIONS)".' (All capitals original)

75. The form continues by stating that payment 'is based on timesheets being received by 12PM on a Monday and will be made on Friday of that week', followed by a list of bullet points of information to be provided for ensuring that payment can be made to the company. The listed bullet points include:

> (a) A certificate of incorporation and Articles of Association issued by the Registrar of Companies, noting that the date of incorporation must be prior to the commencement date of an Assignment.
>
> (b) A completed and signed Agreement with the Limited Company Contractor (No opt out version).
>
> (c) Confirmation that the company is registered for Corporation Tax, either by providing any HMRC documentation to that effect, or to complete a CT41G form, to be sent to the Payroll department, and the tax office.
>
> (d) Confirmation of business bank account details in the name of the Limited Company.
>
> (e) Confirmation of your [i.e. the Worker's] professional obligation to have continual Professional Indemnity Insurance in place (including Clinical Negligence or Medical Malpractice for qualified nurses).
>
> (f) Sign a Self-billing Agreement for the payroll provider to generate a self-billed invoice each week on the submission of signed timesheets.
>
> (g) Confirmation of the details of the accountant who will prepare the accounts of the Limited Company.
>
> (h) If VAT registered, then to provide a copy of the VAT registration certificate for self-billing VAT invoices to be generated.
>
> (i) Notification for change of limited companies in advance, giving reasons.
>
> (j) Your [ie. The Worker's] National Insurance Number (or date of birth and gender) is required.

76. The form continues by reiterating that it is the Worker's responsibility to ensure that 'any UK tax liability is settled without delay', and that '247 Professional Health will accept no

liability whatsoever for payment of taxes or [NICs] for you [ie. the Worker] as a Limited Liability Contractor, to HMRC.'

77. The form exhibited is 'completed' to the extent that a National Insurance Number and a signature show on the face of the form, (but there is no prompt to print name; hence difficult to decipher the name of the worker). The exhibit is undated, despite the prompt after the signature to date the declaration form.

78. Mr Kooner said that throughout the Relevant Period, nurses who wished to be paid gross via their Personal Companies were asked to seek third-party advice whether it would be worthwhile for them to do so, or simply remain being paid under PAYE; that there was a checklist to satisfy the annual audit before a nurse could be paid gross.

The 'Recruitment Policy' document

79. Included in the Further Documents is a five-page document entitled 'Recruitment Policy', as being current in 2016 per the Index to the Supplementary Bundle. The Recruitment Policy lists the documents to be provided by an applicant at the initial interview, and specifies that the Company Documents (i.e. Self-Billing Agreement, Confirmation Document, BACS request form, and Limited Company Procedure Form) relate only to candidates using a limited company. Crucially, the Recruitment Policy did not refer to the LCC Contract, which has been extensively lodged in the Hearing Bundle, and has been conceded by Mr Kooner that it could not have been operative during the Relevant Period.

80. The Recruitment Policy document itself, however, bears no reference to any date as to when it was supposed to be operative. Mr Kooner was unable to explain where the date of 2016 came from (in the Index), or whether the Recruitment Policy had a date at all. Nevertheless, Mr Kooner stated that the Recruitment Policy would have been the same throughout the Relevant Period, or the same but in a different format.

Internal Audit Reports by franchisor

81. The franchisor conducted annual audits referred to as 'internal audit'. The auditor completed a checklist of relevant documents, which included checking whether those documents existed, and if so, whether they had been completed fully. The '*Recruitment Audit*' checklists of three workers as individuals were produced in the Further Documents, and the Date of Audit was 'Jan 2015' (date unspecified), but none of these examples concern the relevant workers working through Personal Companies.

82. Mr Kooner stated that for each worker's file maintained by K5K, the audit would check for: (i) two work references are in place, one being work reference and one permanent (character) reference; (ii) the right to work; (iii) valid passport document (all four corners); (iv) DBS in date; (v) training certificate valid and in date; (vi) the correct contractual document having been signed; (vii) generally that the 'right paper work has been filled out'.

83. The actual checklist from the examples given shows other kinds of checks, including health declaration, health risk assessment, client feedback forms, data protection authority, 'Application Pack' (to be signed and dated), history of employment, gaps of employment history declaration with dates, and so on.

84. Whilst Mr Kooner confirmed that the checklist would be the same whether used for individual workers or LCCs, the audit checklist itself (as a template for all workers) did not include any of the Company Documents as referred to in his evidence at §§69-70.

85. The Internal Audit Report included as SB/12 by the franchisor was dated 16 February 2017, and gave an overall result of 'FAIL' based on the Recruitment Audit checklists carried out on the sample of 15 workers: 13 health care workers and two nurses (Daniso and K-Lube

with their Personal Companies). The report summarised the gaps in each of the workers' profiles audited. None of the audit checklists leading to this report have been provided.

86. Mr Kooner confirmed that the 'correct contractual documents' during the Relevant Period being checked was the Template Worker Contract, and the audit would check each Worker had a Worker Contract completed and signed. There is also a requirement to refresh document checks every five years, or when a worker not having taken Assignments for some duration (unspecified), then K5K will need to require new references on re-joining.

87. An exhibit of a certificate of completion presented to a worker, and addressed to K5K, by an online training provider indicates the types of refresher courses a worker is required to complete to work in the care sector, namely: basic life support, epilepsy, fire safety, food hygiene, handling medication, handling violence/aggression and complaints, health and safety (including first aid awareness and falls prevention), infection control, information governance (including record keeping and Caldicott Protocols), manual handling, Mental Capacity Act 2005, and so on. The date of completion for each training course is noted on the certificate, with an expiry date being 3 years therefrom, when the worker will have to undertake refresher courses again. The audit will check if a sample worker's training certificate remains in date.

88. In relation to the two nurses, the report did not mention any of the Company Documents. Mr Kooner explained that the Company Documents for the two nurses would have been included in the 'Application Pack', and the lack of mention of the Company Documents in the audit report was to be taken to mean that the auditor found no gaps in the Company Documents. However, the nurses' application packs have not been produced to validate this explanation.

89. The last section of the Audit Report was entitled 'Recommendations and Mandatory Changes' and included headings such as: 'Right to work', valid 'National Insurance Numbers', and in relation to nurses, we note the following recommendations or mandatory changes:

> '*PI Insurance* – the Agency must ensure that all nurses provide copies of their proof of Professional Indemnity Insurance. This is a statutory requirement for all nurses under the NMC Code. Photocopies must be taken and retained on candidates' file.
>
> ALL staff working through their own limited company MUST have a copy of the following on file: [Capital original]
>
> - Confirmation of LCC
> - Certificate of incorporation (including any articles of inclusion)
> - Professional Indemnity/Limited Liability Insurance
> - Proof of company bank account
> - Self-billing Agreement.'

External Audit Reports

90. External audits were completed by End Clients. Three external audit reports were provided and only one relates to a worker (Ms Jhamat) relevant to this appeal. The report on Ms Jhamat was completed on 19 March 2015 before she started using a Personal company. The external audit report therefore does not shed any light on when the Company Documents might have been completed by Ms Jhamat (or any other worker).

Insurance Cover

91. If a safeguarding issue arises, a statement will be taken from the End Client, and reported to the Local Authority by K5K; that an investigation can be 'quite stressful', and 'any mistake can be magnified'; a concerned worker will have to be bar from working until the investigation is over, while K5K would maintain contact with the worker, and help ensure that no one is being prosecuted.

92. To operate its business, K5K is indemnified for professional negligence and medical malpractice against the issues arising from actions of its workers. Mr Kooner said the franchisor advised a minimum of £5m cover, but the End Clients in the appellant's portfolio asked for a higher level of cover. Mr Kooner said the appellant was covered up to £10 million for professional indemnity, and a similar figure for medical malpractice. Copies of the certificates of insurance cover were sent to End Clients to confirm the level of cover being taken by K5K.

93. Mr Kooner confirmed in evidence that the terms and conditions of K5K's indemnity cover were not affected by whether workers were working in their Personal capacity or via their Personal Companies.

Hourly rates and holiday entitlement

94. Mr Kooner referred to K5K's unique selling point ('USP') as being able to offer 'uniform rate'; the End Clients pay the same rate for an agency worker to cover any shift, from Monday to Sunday, be it day or night. In other words, there are no differential rates for out-of-hours, weekends, or public holidays. The charge for a nurse had stayed at £25 per hour from 2013 to 2020, and was increased to £27 per hour some time in 2020.

95. During the Relevant Period, the hourly rates payable to a nurse, being the 'ballpark figures from Head Office', were at £16 to £18 for nurses on PAYE, and £20 to £25 for nurses with Personal Companies. The health care workers were paid at the minimum wage rate, and they were not the workers with Personal Companies. The relevant workers with Personal Companies (28 in total) as concerns this appeal were all qualified nurses[2].

96. Mr Kooner described the Workers to be on a 'zero-hour' contract, without any obligation to work, and any holiday entitlement (at around 12% of the total of the shifts) only accrues in line with the actual hours worked in a tax year.

Timesheets, Payroll, and Self-billing invoices

97. We accept this part of Mr Kooner's evidence in relation to how the Workers were paid. The steps involved in validating the payroll details described below were generic to all workers, whether as individuals or with Personal Companies.

> (1) The Workers would complete timesheets on a weekly basis for submission to the appellant for payroll processing. The timesheets named the Workers and were completed in accordance with clause 5.1 of the Worker Contract.
>
> (2) The timesheets would be signed off by the Hirer(s) for each Assignment, which is authenticated only if authorised by the signature the relevant Hirer. K5K would check that there was no discrepancy between the timesheet and the booking system; and any discrepancies would be resolved with the Hirer/Worker before input into the payroll.
>
> (3) The agreed details (hours and rates) on timesheets would be uploaded to the appellant's system, and shared with the payroll company by the name of Eden.

98. For workers with Personal Companies, the following self-billing process applied in conjunction with the generic steps of the payroll system, whereby:

> (1) K5K would select on the payroll system the name of the Personal Company to input the rates and hours of a related timesheet of a named Agency Worker.

[2] The appendix to HMRC's closing submissions lists a total of 38 workers with a personal company during the relevant period, of which 9 were Health Care Assistant/Support Worker ('HCA/SW'), and 29 were nurses. From parties' correspondence, the assessments would seem to relate only to 28 nurses; see §102(4) and §103.

(2) The payroll system would then generate a self-billing invoice in line with the Self-billing Agreement signed by an LCC, and the self-billing invoice generated by K5K was done as if it had been rendered on behalf of the Personal Company to the appellant.

(3) The End Client was not involved at all in the self-billing invoice procedure.

(4) K5K paid the worker's remuneration to the Worker's Personal Company; that is, into the bank account in the name of the limited company as provided by the Worker.

(5) Eden would send quarterly reports via 'Intermediary Reports' mechanism to HMRC; the report would give details of the Company Registration number, the name of the worker, date of birth and the date(s) of assignment worked in relation to any payments made not under PAYE.

Invoicing the End Clients

99. An invoice was sent by the appellant to the End Client ('**the End Client Invoice**'), which was an 'amalgamated' invoice, listing all Assignments undertaken by workers for a particular End Client in the invoice period. No distinction was made on the End Client Invoice between workers as individuals or with Personal Companies.

100. The End Client invoices were sent to a factoring company, which would factor the overall quantum of the invoices to 85% as the amount to be released to Eden to process payment to the workers. (The 'leftover' monies would be held in a 'virtual account' for K5K until requested.)

101. K5K did not receive monies directly from the hirers, as all invoices were factored to the factoring company which would chase for payment from the hirers. Once the invoices were fully paid by the hirers, K5K received the remaining 15% less factoring charges.

Compliance review April 2016 to the issue of Relevant Decisions July 2018

102. In April 2016, HMRC commenced compliance check into the appellant's business, which included an employment status review that continued into 2017, and the Relevant Decisions were eventually issued in July 2018. The process took two years and three months; the chronology of key events from the start of the enquiry to assessments being issued is as follows.

(1) After an initial meeting between the appellant and HMRC on 19 May 2016, the appellant provided HMRC with various key documents, namely:

(a) The Template Worker Contract;

(b) The Worker Contract of a specific worker by the name Hinze;

(c) The first and last pages of the contracts for other workers.

(2) By letter dated 28 June 2016, Mr Kooner expressly confirmed to HMRC that the Worker Contracts that had been provided 'have no earlier or later amendments'.

(3) On 23 February 2017, a meeting took place between HMRC Officer Knox and Mr Kooner, and K5K's accountant ('**23Feb17 Meeting**'). HMRC raised the point that the contracts were between the appellant and the individual workers, and not between the appellant and their Personal companies. We note two exchanges from this meeting:

(a) Mr Kooner informed HMRC that from April 2017, new contracts would be used, which would be between the appellant and the Personal Companies. (These new contracts would not assist as they would post-date the Relevant Period and.)

(b) The appellant was made aware of the implications of the agency workers legislation in terms as recorded in the meeting note:

> 'Knox advised that he had reviewed the documentation and was of the opinion that the nurses should be payrolled. Knox provided excerpts from the Employment Status Manual which detailed the relevant legislation regarding agency workers.'

(4) On 3 March 2017, Officer Knox wrote to Mr Kooner with HMRC's view of the matter and the resultant conclusion:

> 'As the contracts are between [the appellant] and the individual nurse then the company has a responsibility to operate PAYE under the Agency regulations in the same way they operate PAYE for the workers who don't have limited companies.'
>
> 'I am now satisfied that there has been a PAYE failure in respect of the 28 workers paid off payroll for [the Relevant Period].'

(5) By letter dated 22 June 2017 in reply to Rainer Hughes, the appellant's solicitors, HMRC referred again to the agency legislation and the Employment Status Manuals:

(a) ESM2017 – Agency and temporary workers: contracts between an agency and a company.

(b) ESM4251 – Particular occupations: nursing staff engaged through agencies.

(c) ESM4251 – Particular occupations: nursing staff: advice to nursing agencies.

(6) In his 22 June 2017 letter, Officer Knox also referred to '**the new IR35 Contract**':

> 'I have requested a blank copy of the new IR35 Contract from April 2017 for review. As during my Employment Status review the company advised me that they would now be operating under IR35 Legislation from that date.'

(7) On 5 October 2017, Officer Knox wrote to the appellant with his calculations of the quantum of liabilities for income tax and NICs for the Relevant Period.

(8) By letter dated 30 November 2017[3], Rainer Hughes replied to accept the quantum per Officer Knox's letter of 5 October 2017. The letter states as follows:

> 'Your letter dated 5 October 2017 suggests that our client's liability to HMRC for tax and national insurance is £266,615.01 for the years 2014/15, 2015/16 and 2016/17. [Note that the final quantum is reduced to £260,991.21.]
>
> As requested, we confirm that our client agrees with your calculations, however it should be noted that they do not accept any liability for the same.
>
> Our client notes Section 44(3)(b) of the Income Tax (Earnings and Pensions) Act 2003 states "*all remunerations receivable by the worker (from any person) in consequence of providing the services is to be treated for income tax purposes as earnings from that employment*". (italics original)
>
> As you will be aware our client is an agency, the agency workers are responsible for payment of their own tax and national insurance contributions. This is confirmed by assignments signed by each respective agency worker wherein they accept "responsibility for all tax & NI due to HMRC since the start date. I do not work for K5K Ltd t/a 247 Professional Health as a PAYE". This assignment ***varies*** the provision for our client to be liable for these deductions. [emphasis added, see §173]
>
> In the circumstances our client is not liable, as alleged or at all, for the sums you allege to be due, these are due from each agency worker respectively. In

[3] This is the crucial letter which was handed up to Judge Morgan personally by Mr Jones during the applications hearing on 7 March 2019, and is reproduced in full in Judge Morgan's decision at [17].

the event any agency worker has not paid the correct tax or national insurance contributions this is a mater you must raise with them.'

(9) On 19 December 2017, Officer Knox responded to Rainer Hughes' letter of 30 November 2017 with the following paragraphs:

> 'With regards [sic, regard] to your assertion that agency workers are responsible for payment of their own tax and national insurance, I would direct your client's attention to the entirety of Section 44(3) of the Income Tax (Earnings and Pensions) Act 2003, which says: [citing from legislation]
>
> Section 44(3)(a) is clear in its assertion that where the agency regulations apply the worker is to be treated as an employee of the agency for tax and national insurance purposes.
>
> Section 44(3)(b) expands on this by stating that all remuneration received by the worker in relation to the services provided is to be treated as earnings from that employment.
>
> As the contracts in question are between the agency and the workers it is my opinion that the agency was responsible for collecting, via PAYE, any tax and national insurance contributions arising from the engagements in question, and for paying these sums to HMRC.'

(10) The December 2017 letter also advised that HMRC intended 'to start procedures to follow the formal settlement route' in the absence of any agreement.

The Warning letter of January 2018

103. On 9 January 2018, Officer Knox wrote to Mr Kooner (copy of letter to Rainer Hughes) with the subject heading being 'Warning letter', and the first two paragraphs state as follows:

> 'Further to our earlier correspondence, I am writing to you again about your failure to operate PAYE on payments made to Nurses.
>
> **Our decision**
>
> In my opinion the Nurses should have been engaged as employees. As such their earnings are liable to PAYE under the Income Tax (Earnings and Pension) Act 2003 Section 62 and NIC under the Section 6 of the Social Security Act 1992.
>
> **What happens next**
>
> If we don't hear from you by **7 February 2018**, we'll take action to recover the money you owe. We'll issue:
>
> - Income Tax determinations under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003 No 2682)
> - National Insurance contributions (NICs) decisions under Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999
>
> We issue PAYE Regulation 80 determinations when employers don't deduct tax under the PAYE system. We use Regulation 80 determinations to make a legal assessment of the tax that we believe is due and to give details about your rights to appeal. We only do this when we're unable to agree the amount.
>
> [A similar paragraph for NICs decisions]

The Relevant Decisions of July 2018

104. After the Warning letter, there would appear to be some correspondence (not included in the bundle) in which the parties addressed the quantum issue, culminating with HMRC's letter of 22 May 2018 wherein Officer Knox referred to having 'obtained further information that

some of the workers from K5K Limited have received payments through the payroll for [the relevant years]'. It is noted that the quantum of the overall liability was revised by letters dated:

(1) 22 May 2018, 'reduced to £259,505.57 from the original figure of £266,615.01';

(2) 31 May 2018, revised upwards to £269,541.21, with income tax at £153,052.36 and NICs at £116,488.85 (the three-page letter was in substance and form identical to the covering letter of 5 July 2018);

(3) 7 June 2018 revised downwards to £260,541.21, with changes due to income tax total reduced to £144,502.36; (the letter was again identical to the covering letter of 5 July 2018, with some further adjustments to the quantum to reach the final agreed quantum of £260,991.21 under appeal).

105. The Relevant Decisions are all dated 5 July 2018, and were addressed to Mr Kooner with Rainer Hughes as the named agent, and comprise:

(1) Three notices of Regulation 80 Determination, one for each of the years 2014-15, 2015-16, and 2016-17; the notice is in the format of a form with information boxes to be completed, such as the *Employer's name and address*, and the *Agent's name and address*, *Employer's PAYE reference*', followed by '*Amount determined*', the tax year it relates to, and '*Date of issue*', and the following details:

(a) The standard text generic to Regulation 80 determination appears after the identifier information boxes to state:

'*The tax due from your client under Regulation 68 of the Income Tax (Pay As You Earn) Regulations 2003 is shown above. This tax has not been paid to HMRC nor has HMRC certified the tax under Regulations 76, 77, 78, or 79.*'

(b) The list of workers being assessed in a table form, with seven columns detailing: (i) the names and NI numbers of the workers, (ii) Pay for which tax remains unpaid, (iii) total pay, (iv) PAYE code, (v) taxable pay at Month 12, (vi) tax paid or certified [i.e. a reduction of liability], (vii) tax now due.

(2) Fifteen Notices of decision in relation to 'National Insurance contributions and statutory payments', each for a named worker, and take the generic format as follows:

'My decision issued to K5K Limited is that:

[Name of Worker] (National Insurance Number [of the worker]) is an employed earner in respect of her engagement with K5K Limited for the period from 6 April 2014 to 5 April 2017.
K5K Limited is liable to pay primary and secondary Class 1 contributions for the period from 6 April 2014 to 5 April 2017 in respect of the earnings from that engagement.
The amount K5K Limited is liable to pay in respect of those earnings is [£xx].

Please read

- The notes on the next page that give you some information about this decision and tell you what you can do next, and
- Any covering letter if enclosed.'

(3) Three tabulated schedules, one for each tax year in question, to summarise the overall position in relation to each LCC for both PAYE and NICs, by combining the headings of: (i) *Worker* (by reference to the names of the Personal companies), (ii) *Gross*

Pay, (iii) *Tax Due*, (iv) *Code* [i.e. PAYE coding BR, OT, Personal tax-free allowance], (v) *Class 1 Primary NIC*, (vi) *Class 1 Secondary NIC*, (vii) *Total NIC*;

(4) A three-page covering letter, which is identical in substance and form to the previous letters sent on 31 May and 7 June 2018, (details below).

106. The covering letter accompanying the Relevant Decisions comes under heavy scrutiny in relation to the validity issue.[4] The content relevant to this appeal can be summarised as follows (all emphasis in bold and underlining original):

(1) Officer Knox referred to his letter of 9 January 2018, and continued by stating:

> 'As previously advised I have not received any new information which would gave [sic] him cause to change the opinion already issued and therefore I am now required, as previously advised, to arrange for the issue of formal assessments and penalty determination to help the case move to settlement.
>
> This will include the issue of Section 8 Notice of Decision for National Insurance and Regulation 80 Determination for Income Tax.
>
> I outline below my decision relating to the error in this case.'

(2) In relation to the Regulation 80 determination, the letter states as follows:

> '**Income Tax**
>
> The workers (Nurses) should have been engaged as employees. As such their earnings are liable to PAYE under the Income Tax (Earnings and Pension) Act 2003.
>
> **Summary of Income Tax**
>
> The total tax that is due is as follows:
>
> **Tax: £144,502.36**
>
> Tax was underpaid for the years ended 5 April 2015 to 5 April 2017. The underpayment occurred because no tax was deducted from the earnings received. Please refer to the enclosed Regulation 80 Determination Notice.'

(3) In relation to the Section 8 Notices of Decision, the letter continued by stating:

> '**Class 1 National Insurance Contributions**
>
> Primary and Secondary Class 1 NICs are due on earnings received by the Nurses in accordance with the legislation that requires the company to return details of National Insurance Contributions is Social Security (Contributions) Regulations 2001 – Paragraph 22 of Schedule 4. It is our view that the payments made to the Nurses were by way of "salary" as defined by The Social (Categorisation of Earners) Amendment Regulations 2003.
>
> Class 1 NICs was underpaid for the tax years ended 6 [sic] April 2015 to 5 April 2017 inclusive in respect of the earnings of the Nurses as outlined within my computation enclosed. The underpayment occurred because no Class 1 NICs was deducted from the earnings of the Nurses. […]
>
> **Summary of National Insurance Contributions (NICs)**
>
> The total NICs that are due:
>
> **Class 1 NICs: £116,488.85**

[4] The content of the covering letter is also set out in considerable detail in Judge Morgan's decision at [3].

Background to the validity issue of the assessments

Stated grounds on the Notice of Appeal

107. On 30 July 2019, K5K lodged a Notice of Appeal against the Relevant Decisions, and the stated grounds of appeal are: (a) none of the persons listed in the determinations and notices were employees of the appellant; (b) each was self-employed under a contract of service with a body corporate other than the appellant; (c) the services provided by each body corporate were provided by such personnel as that company saw fit to provide from time to time, and the appellant did not exercise any control over those services; (d) the parties to each such contract did not intend to enter into a contract of services and specifically chose to enter into a contract for services; (e) each party to each contract specifically agreed that it would be responsible for its own liabilities. The appellant therefore did not employ any of the persons, and has no liability in respect of them or any of them for PAYE and/or NIC purposes.

HMRC's applications for further and better particulars and strike-out

108. HMRC made an application on 2 October 2018 for an order for the appellant to provide further and better particulars of its grounds of appeal, for the reason that the stated grounds on the Notice of Appeal, in the respondents' view, 'do not disclose reasons that prevent the applicable legislation, found in Chapter 7 of [ITEPA] from operating and that the tax under challenge being payable by the appellant'.

109. On 9 November 2018, the Tribunal asked for representations from the parties in relation to the Tribunal's proposal to list HMRC's application for a hearing, with the responses being:

(1) On 26 November 2018, Rainer Hughes related that the appellant's counsel (Mr Jones) advised that the 'Grounds of Appeal are properly particularised and plainly identify the issue', and that 'the central issue is that HMRC argue that various personnel were employees, whereas the Appellant says that they were self-employed', and requested a hearing if HMRC wished to pursue the application.

(2) On 22 January 2019, HMRC made a strike-out application on the basis that the appeal has no reasonable prospect of success and asked for it to be considered at the hearing along with the earlier application for further and better particulars. In this application, HMRC referred to s 44 ITEPA as the applicable legislation on which the determinations and notices were issued.

Applications hearing and decision

110. A hearing took place in front of Judge Morgan on 7 March 2019, with Mr Jones representing K5K and Ms Rebecca Murray, HMRC. From Judge Morgan's Summary Decision issued on 2 September 2019, the following aspects in the parties' discussion during the applications hearing inform the background to the validity issue in this appeal.

(1) At [14] of the Decision, Judge Morgan referred to raising the point with the parties that 'it appeared that the appellant did not deal with s 44 ITEPA in its grounds of appeal because the determinations and notices and accompanying letter did not in fact refer to that section', and appeared to have been issued on the basis that the relevant individuals 'were actually employed by the appellant' while 'section 44 ITEPA applies in effect to treat persons as though they were employees to impose tax accordingly'.

(2) Judge Morgan also noted at [15] 'that it was not apparent from the tribunal's file that HMRC considered s 44 ITEPA was in point until the strike-out application'. Whilst HMRC had referred to Chapter 7 of ITEPA (in the application of 2 October 2018 for further and better particulars), Judge Morgan noted that HMRC 'had not referred to the relevant part of ITEPA so that did not really help as there is more than one chapter 7'.

(3) Ms Murray made the following submissions for HMRC:

(a) HMRC's application for further and better particulars of 2 October 2018 had referred to chapter 7 of ITEPA;

(b) The appellant was well aware that the Relevant Decisions were issued on the basis of s 44 ITEPA, given the history of the correspondence between the parties;

(c) The Relevant Decisions are not rendered invalid because they do not refer to the underlying legislation; there is no statutory requirement for them to do so.

(4) Mr Jones confirmed that the grounds of appeal as currently drafted dealt only with HMRC's position as 'pleaded' in the Relevant Decisions, which do not refer to s 44 ITEPA. Mr Jones made the following submissions:

(a) Whilst there was a letter from HMRC in which s 44 is mentioned, Mr Jones did not think that it was clear from that alone to be the basis of the subsequent determinations/notices.

(b) HMRC had taken 'entirely the wrong approach', and that it was for HMRC to proceed to provide their statement of case in which they could clarify/amend their initial pleading and the appellant would then respond to that in its skeleton, rather than seeking to ask the appellant to provide better and further particulars to its grounds of appeal.

(5) Ms Murray 'disputed that there was a single letter only relating to s 44 ITEPA', and that 'the appellant was well aware that s 44 IEPA applied' and 'should have clarified its stance when HMRC first raised that it did not understand the appellant's grounds of appeal': [17]. Judge Morgan said in response that '[she] was presented with a difficulty given that [she] did not have before [her] the background correspondence leading to the issue of the determinations and notices'.

111. Mr Jones then handed up a copy of the letter by Rainer Hughes dated 30 November 2017, which Judge Morgan considered to be significant by citing the entire letter in her decision. Judge Morgan specifically recorded her understanding of the appellant's position in relation to the validity of the determinations and notices:

> '[16] … [Mr Jones] appeared to mean that this was a procedural point only as far as the appellant was concerned; the appellant did not dispute that HMRC is entitled the argument that s 44 applies but that is not what they have done currently in their "pleading" as it stands. He *clarified that it was not the appellant's stance that the determinations and notices were invalid*.'
>
> '[20] Whatever the appellant's understanding before the hearing, it cannot now be in any doubt as to the basis on which HMRC issued their determinations and notices. … I note that *the appellant accepts that the determinations and notices were validly issued* and that HMRC are entitled to use the s 44 ITEPA argument notwithstanding that it was not mentioned in the determinations, notices or the accompanying letter.' (italics added)

112. The decision by Judge Morgan to dispose of the applications is stated to be:

> '[21] … in view of the fact that the basis on which HMRC has issued the determinations and notices has been fully clarified in HMRC's strike-out application and at the hearing, I consider that the most efficient way to progress this matter is for the appellant to proceed to provide amended grounds of appeal to address HMRC's stance that s 44 ITEPA applies. In my view, it is premature to require HMRC to provide a full statement of case until

> it is established whether the appellant has any basis for making an appeal on the ground s 44 ITEPA does not apply.
>
> [22] Once the amended grounds of appeal have been submitted, HMRC may renew their application for this appeal to be struck out. … '

APPELLANT'S CASE

113. The validity issue was first mooted in the particulars to amend grounds of appeal, and is further developed in three sequential skeleton arguments filed for the appellant by Mr Jones: (i) the Appellant's Skeleton of 10 January 2021 ('**AS1**'), (ii) the second responsive skeleton of 27 January 2021 following the lodgement of HMRC's skeleton ('**AS2**'), and (iii) the supplemental skeleton filed on 7 June 2021 ('**AS3**'). Mr Jones also made extensive oral submissions in reply to Mr Tolley's closing submissions.

Further particulars: amended grounds of appeal

114. Amended grounds of appeal were lodged by Mr Jones, and dated 13 September 2018, which we infer should have been dated 2019 (instead of 2018) as the further particulars referred to the 7 March 2019, and the document would seem to have been provided pursuant to Judge Morgan's Directions of September 2019.

New ground challenging the validity of the assessments

115. A new ground in relation to the validity of the assessments was introduced in the amended particulars, said to be subsequent to: (a) HMRC stating at the 7 March 2019 hearing that 'they had intended the assessment[s] relied upon, to be made under and by reason of s 44 ITEPA', notwithstanding that 'the assessments were not expressly based thereon', and (b) the Tribunal's Decision of 2 September 2019 'whereby it decided that the appellant should file/serve Amended Grounds of Appeal' (as put by Mr Jones) on noting Judge Morgan's Decision at [20] where she stated that the appellant '*cannot now be in any doubt as to the basis on which HMRC issued their determinations and notices*'.

116. Mr Jones sought to explain in the amended particulars that Judge Morgan's observation at [20] viz: '*I note that the appellant accepts that the determinations and notices have been validly issued and that HMRC are entitled to raise the s 44 ITRPA argument notwithstanding that it was not mentioned in the determinations, notices or the accompanying letter*' was based on the appellant having accepted at the hearing on 7 March 2019 that:

> '(1) The assessments were valid (i.e. not time barred), and
> (2) HMRC was entitled to argue that its assessments were based upon s 44 ITEPA '03 – notwithstanding the FTT finding at para 18, that 'It is clear that in submitting its grounds of appeal, the appellant was proceeding on the basis that it did not have to address the point that it is liable to account for income tax and NIC as a result of the application of section 44 ITEPA due to the wording of the determinations, notices and accompanying letter.'

117. The new ground of appeal against the validity of the assessments is to state that:

> '(i) No s 44 ITEPA assessment has been issued to the appellant, and
>
> (ii) HMRC is now out of time to issue any such assessment, more than 4 years having elapsed from the end of the tax year 2015/15 [sic, 2014-15].
>
> […]
>
> In circumstances where no objective reader could consider the assessments and notices issued by the respondents on 30 July 2018 to be or to amount to assessments/demands based upon section 44 ITEPA, no valid assessments had been made under that statutory provision prior to the time limit for such assessment/ notices expiring on 5 April 2019.'

Amended grounds against the substantive issue

118. Apart from introducing the validity issue as a new ground of appeal, in relation to the substantive issue, the grounds as stated in the Notice of Appeal were amended to state that sections 44(1)(a) and (b) ITEPA did not apply on the premise that:

> '(a) None of the said person was an employee of the appellant.
>
> (b) Each such person was self-employed under a contract of service with a body corporate other than the appellant.
>
> (c)The services provided to the appellant, by each of these bodies corporate, were provided by such personnel as that company saw fit to provide from time to time.
>
> (d) None of the persons mentioned in the [the Schedules accompanying the determinations and notices] Personally supplied services to any third party in consequence of any involvement of the appellant (being the "agency" for the purposes of s44(1)(b)(ii) ITEPA'03). Each such person provided services to a (different) body corporate.
>
> (e) None of the persons in [the Schedules] Personally provided any services to anybody whomsoever further to any "agency contract" – as defined by s47(1) ITEPA'03.
>
> (f) The remuneration/income of each of the persons mentioned in [the Schedules] did not constitute employment income for each of the said people quite apart from the content of Chapter 7 of the 2003 Act.

HMRC'S CASE

119. Mr Tolley and Ms Poots filed three written submissions for HMRC: (i) the Respondents' Skeleton of 20 January 2021 ('**RS1**'), (ii) the supplemental skeleton after the February diet of 16 June 2021 ('**RS2**'), and (iii) the closing submissions on evidence dated 1 July 2021 ('**RS3**'), and Mr Tolley's oral submissions addressed certain arguments in Mr Jones' oral submissions.

Validity of assessments

120. In outline, HMRC agree (and have never sought to dispute) that the Tribunal has jurisdiction to determine the validity of the Relevant Decisions. It is, however, HMRC's case that the task for the Tribunal is to consider whether the Relevant Decisions are valid by identifying and applying the relevant statutory requirements, and that the Tribunal does not have jurisdiction to consider freestanding public law challenges which, in so far as any legitimate point arises, may only be brought by way of judicial review. Specifically, HMRC's case is that the Relevant Decisions were issued under the applicable statutory regimes and accord with the legislative requirements for being valid assessments.

Section 44 ITEPA applies

121. HMRC submit that s 44 ITEPA applies to the relevant arrangements entered into by the appellant with its LCCs in the Relevant Period on the relevant statutory conditions being met:

> (1) Section 44(1)(a): the Worker Personally provided services to another person, namely the End Client, in relation to each particular Assignment. The Worker attended the End Client's premises, carried out their duties as a nurse or care assistant Personally, and submitted a timesheet to the appellant to demonstrate the hours worked for the Hirer.
>
> (2) Section 44(1)(b): there is a contract between the End Client and the appellant, so the appellant is the agency for the purposes of section 44 ITEPA.

(3) Section 44(1)(c): under or in consequence of the End Client Contract, (i) the services of the Worker are provided and/ or (ii) the End Client pays or otherwise provides consideration for the services.

(4) Section 44(2)(a): the manner in which the Worker provides the services is subject to (or to the right of) supervision, direction or control by any person, namely the Hirer.

DISCUSSION

Issue 1: validity of the assessments

The validity issue as argued for the appellant

122. The issue as stated in AS1 is whether HMRC issued valid PAYE and/or NI assessments on 5 July 2018 in respect of: (a) an alleged liability to account for PAYE deductions further to Regulation 80, and (b) an alleged liability to account for NI further to section 8. Referring to Judge Morgan's decision of 2 September 2019, Mr Jones stated in AS1 that Judge Morgan:

> '(a) Has already found and held that the Determinations and Notices issued by HMRC on 5 July 2018 and/or the accompanying letter '*did not in fact refer to that section'* [s 44 ITEPA].
>
> (b) Recorded the appellant's counsel's acceptance that the Determinations/Notices were not invalid *per se* and had been validly issued.' (italics original)

123. In AS1, the appellant seeks to clarify that the acceptance of Determinations/Notices at the applications hearing having been 'validly issued relates to the express basis … upon which they had been issued'; and that the acceptance 'was limited in that way notwithstanding that it was not accepted that tax was due or could be due, on the basis stated on the face of each Determination/Notice, whether or not supplemented by the content of the covering letter of 5 July 2018'. It is submitted that on the face of it, each Determination/Notice shows that:

(1) For income tax: '"*The tax due from your client under Regulation 68 of the Income Tax (Pay as You Earn) Regulations 2003 is shown above" [sic, "below"]'* (italics and correction original, though correction is itself in fact incorrect[5]).

(2) For NIC: '[Name of Worker] … is an employed earner in respect of her engagement with K5K Ltd for the period from 6 April 2014 to 5 April 2017'.

124. Citing Reg 68, the appellant argues that Reg 68 is no more than a regulation to provide for how and by whom the amount payable is to be arrived at, and can give no information as to why or for what reasons a determination has been made that 'A exceeds B'. The relevant wording of Regulation 68 of the PAYE Regulations 2003 is as follows:

> '**68 – Periodic payments to and recoveries from the Revenue**
>
> (1) This regulation applies to determine how much an employer must pay or can recover for a tax period.
>
> (2) If A exceeds B, the employer must pay the excess to the Inland Revenue.
>
> (3) But if B exceeds A, the employer must recover the excess either –
>
> (a) by deducting it from the amount which the employer is liable to pay under paragraph (2) for a later tax period in the tax year, or
>
> (b) from the Board of Inland Revenue.
>
> [(4) to (7)]'

[5] On each determination, the quantum of is stated in a box designated as 'Amount determined' and the quantum entry is next to the Employer's PAYE reference entry.

125. Furthermore, it is submitted that the covering letter 'made some (flawed) attempt to say why "A exceeds B" when it said that: "*The workers (nurses) should have been engaged as employees. As such their earnings are liable to PAYE"…*'

Requirement to give reasons

126. The 'Requirement for Reasons' is a heading in AS1, and is the basis underpinning the appellant's case, whereby it is submitted that:

(1) HMRC argued before Judge Morgan that 'it is not obliged to give any reasons for an assessment and so, by extension, if it gives a wrong or misleading reason for the assessments, that is of no significance'.

(2) 'That is wrong': section 30A(2) Taxes Management Act 1970 ('TMA'), 'inevitably implicit in that statutory provision that if an assessment is made under more than one Part or Chapter of ITEPA, each must be specified'.

(3) 'In any event, it is the duty of a public body to give reasons for its decisions. It would make no sense for HMRC simply to send a demand for money to a taxpayer without giving the reason why and/or the basis upon which the demand was made.'

(4) 'As a matter of law, when reasons are given (as here), the public authority can rely only upon the stated reasons and none other': *R (ex p Moore)* per Sedley J at 95J.

(5) If HMRC could give valid reasons *ex post facto* or add to or amend its reasons for the assessments by its letter of 2 October 2018 (sent to the Tribunal), 3 months after issuing the assessments, it could, in principle, give valid reasons more than 4 years later and thereby convert a time barred assessment into a valid, non-time barred, assessment.

(6) Common sense dictates that HMRC cannot simply issue demands for money to individuals/taxpayers without any explanation as to the basis upon which any such alleged liability has arisen.

(7) Common law follows common sense: citing judicial review cases *R (ex p Cunningham)* and *R (ex p Doody)* and *Judicial Review Handbook* and *De Smith: Judicial Review* where the importance of reasons and disclosure of reasons is addressed in detail.

Inadequate reasons as given by HMRC

127. It is argued that HMRC had failed to give reasons in raising the assessments, based on:

(1) HMRC had asserted in the covering letter of 5 July 2018 that the respective company directors / employees '*should have been engaged as employees. As such their earnings are liable to PAYE'*. HMRC now seek to argue the Determinations/Notices were intended to be made further to s 44 and /or Reg 80. The plain fact is that they were not, because there was nothing upon the face of any of them, even taken with the covering letter, to inform the recipient that the assessments were made pursuant to s 44 ITEPA or s 8 Social Security Contributions Act 1999 (s8(1)(a) and (c)).

(2) If s 44(3) and/or s 8 were intended to be relied upon, the covering letter would have said that the relevant individuals fell 'to be treated for income tax purposes as holding an employment with the agency': s 44(3)(a). HMRC would have asserted that it had determined that the relevant individuals were within a category of earner giving rise to the alleged NI liability per s 8. 'Instead it asserted, wrongly, that "*The workers (nurses) should have been engaged as employees*.' (italics and underlining original)

(3) The covering letter should not have provided 'misleading information' and /or given 'the wrong reason' for the assessments being issued: 'There is a stark difference between telling somebody that an individual is statutorily deemed to be his employee and

telling the same person that he ought to have entered into a contract of employment with that person.'

(4) HMRC's Statement of Case asserts that the assessments were made under (i) Reg 80 of the PAYE Regulations (despite each assessment stating upon its face that it was made under Reg 68 PAYE Regs) which is plainly wrong; (ii) s 8 of the 1999 Act.

(5) The reason given in the covering letter was and is incapable of supporting a lawful demand for the payment. The reason given is '*The workers (nurses) should have been engaged as employees*'. 'That is nonsense', said Mr Jones because:

(a) 'It was/is for individuals to decide upon the contractual arrangements they are willing to enter into.'

(b) It is 'the prerogative of Parliament to decide that in certain factual situations it will deem a certain state of affairs to exist': '*treated as*' under s 44(3)(a) is a deeming provision and substantially different from telling somebody that they should have employed a third party (when they were under no obligation to do so).

Time-barred in giving ex post facto reasoning

128. The second strand in the appellant's argument is that any *ex post facto* reasoning given by HMRC cannot cure the failure to give reason at the time of the issue of the assessments:

(1) As a matter of public law, the lawfulness or adequacy of reasons falls to be decided by reference to those given at the time when the decision is made: *R (oao Kelsall)* at [35] per Stanley Burton J: 'if [the] reasons do not bear scrutiny they add substance to the argument that the provisions of the Order are so flawed as to be irrational and unfair.'

(2) Section 30A(4) TMA applies to prevent supplemental reasons being inserted: the 'assessment' is the entire document, not simply the amount specified.

(3) HMRC argued before Judge Morgan that they could rectify the situation *ex post facto* and had done so by setting out the true reason for the assessment in their letter of 2 October 2018, but even then (as pointed out by Judge Morgan), HMRC made no reference to any specific part of Chapter 7 of ITEPA.

Tribunal's jurisdiction on appeal

Case law principles on jurisdiction to consider public law issues

129. The First-tier Tribunal ('FTT') is a creature of the statute, as created by section 3 of the Tribunals, Courts and Enforcement Act 2007 (**'TCEA')** 'for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act'. Its jurisdiction is therefore entirely statutory: *Hok*[6] at [36], *Noor*[7] at [25], and *BT Trustees* at [133].

130. In relation to the Tribunal's jurisdiction over public law issues, the Upper Tribunal ('UT') in *Birkett* summarised the principles derived from relevant authorities at [30]. What is clear is that the FTT has no inherent judicial review jurisdiction equivalent to that of the High Court, or statutory judicial review jurisdiction equivalent to that of the Upper Tribunal, (which is limited to certain judicial review claims under sections 15 and 18 TCEA).

131. The Upper Tribunal in *Birkett* referred to authorities such as *Wandsworth* and *Rhondda Cynon*, where the substantive issues could give rise to questions of public law for which judicial review was not the only remedy. 'A court or tribunal that has no judicial review jurisdiction

[6] *HMRC v Hok* [2012] UKUT 363 (TCC).
[7] *HMRC v Abdul Noor* [2013] UKUT 071 (TCC).

may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have': *Birkett* at [73](3). The UT in *Birkett* continued by stating:

> '(4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction.'

Jurisdiction as provided by statute over the appealable decisions

132. The Tribunal's jurisdiction on an appeal against a Regulation 80 determination is statutorily provided under s 50 TMA (within Part 5). Section 50 TMA states, *inter alia*:

> '(6) If, on an appeal notified to the tribunal, the tribunal decides –
>
> […] (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment … shall be reduced accordingly, but otherwise the assessment … shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides –
>
> […] (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment … shall be increased accordingly.'

133. Similarly, the Tribunal's jurisdiction on an appeal against a Section 8 decision is statutorily provided under Regulation 10 of the SSC Regulations, which is:

> 'If, on an appeal … that is notified to the tribunal, it appears to the tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but shall otherwise stand good.'

134. We agree with the submissions by Mr Tolley and Ms Poots that the validity of the Relevant Decisions falls to be considered by reference to their respective legislative contexts. To that end, the validity of the Relevant Decisions is an issue to be determined first and foremost in line with the statutory requirements applicable to the issue of a Regulation 80 determination and a Section 8 decision, which we set out in detail below.

The Relevant Decisions valid in meeting statutory requirements

135. Insofar as the validity issue is concerned, and as a matter of statutory construction, the Tribunal's jurisdiction is limited to two aspects, each of which is governed by the statutory regime. The first aspect concerns whether the assessments are valid in terms of meeting the relevant statutory time limits. This aspect has never been a matter of dispute, nor is it being a tenet in Mr Jones' argument on the validity issue. The second aspect concerns whether the assessments meet the statutory criteria as set out below, and we find that they do.

Statutory requirements for the PAYE determinations

136. We find that all three Determinations to have been validly made in accordance with the statutory requirements applicable to the PAYE regime. Each determination was headed '*Notice of Regulation 80 Determination*', and the applicable provisions for the assessing procedure are:

(1) Regulation 80(5), and Parts 4, 5, 5A and 6 of TMA apply if the determination were an assessment.

(2) Section 30A TMA (within Part 4) set out the assessing procedure:

> '(1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by an officer of the Board.
>
> (2) All income tax which falls to be charged by an assessment which is not a self-assessment may, notwithstanding that it was chargeable under more than one Part or Chapter of ITEPA 2003 and ITTOIA 2005, be included in one assessment.
>
> (3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.
>
> (4) After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.
>
> (5) Assessment to tax which under any provision in the Taxes Acts are to be made by the Board shall be made in accordance with this section.'

(3) Section 30A therefore does not contain any requirement to state the charging provision (e.g. section 44 ITEPA), nor the assessing provision (e.g. Regulation 80).

Statutory requirements for the NIC decisions

137. Each Section 8 notice is headed as '*Notice of decision*' and includes the standard text in a box to be particularised with: *[The name of the Worker] is an employed earner in respect of [his/her] engagement with [the Appellant] for the [period]*. We find that the Section 8 notices of decision likewise meet the statutory requirements in accordance with the legislation, being:

(1) Under section 9(1) of the 1999 Act, the Board is empowered to make regulations as to the making of decisions under section 8 (amongst other things).

(2) The Social Security Contributions (Decisions and Appeals) Regulations 1999 ('**the SSC Regulations**') provides, under Regulation 3, that a decision:

> '(a) must be made to the best of [the officer's] information and belief, and
>
> (b) must state the name of every person in respect of whom it is made and –
>
> (i) the date from which it has effect, or
>
> (ii) the period for which it has effect.'

(3) Regulation 4 of the SCC Regulations provides:

> '(1) Notice of a decision by an officer of the Board referred to in regulation 3(1) must be given –
>
> (a) […]
>
> (b) in any other case, to the person named in the decision.
>
> (2) A notice under this regulation must state the date on which it is issued and may be served by post addressed to any person to whom it is to be given at his usual or last known place of residence, or his place of business or employment.
>
> (3) Where notice is to be given to a company, it may be served by post addressed to its registered office or its principal place of business.'

(4) As such, the SSC Regulations do not contain any requirement to state the charging provision or the decision-making provision.

138. We are referred to *Gunn v HMRC*, where the taxpayer raised similar validity arguments on the grounds that the assessments: (a) are not made on a form prescribed by the Board in accordance with s 113(3) TMA; (b) do not state the statutory provision under which they are

made, that being s 29 TMA; (c) contain defects such as being the quantum being estimated; no assessment number or taxpayer identification number; (d) a letter subsequent to the assessment cannot cure the defect of the assessments not referring to s 29 TMA. The UT in *Gunn* dismissed the taxpayer's appeal on ground of invalidity of the assessments, and confirmed that there was no statutory requirement to state in a notice of assessment the statutory provision under which the assessment was made. The conclusion by the UT is instructive to us:

> '[8] … there is no statutory provision requiring the notice of assessment to state [the statutory provision under which the assessment is made]. The words in s 114 [TMA] "an assessment … which purports to be made in pursuance of any provision of the Taxes Acts …" cannot contain an implication that the provision of the Taxes Act must be stated in either the assessment itself or the notice of assessment. First, this is a provision relieving mistakes in the assessment and not the place where the requirements for a valid assessment are to be found. The apparent explanation for the words is that an assessment clearly is made pursuant to a provision in the Taxes Act, but if for any reason it is defective it is not made pursuant to a provision in the Taxes Act (because of the defect), and hence s 114, seeking to put right the defect, has to say that it is purportedly made under the relevant provision – "an assessment which would have been valid had it been properly made under the provision under which it purports to have been made shall be valid." Secondly, if such an important requirement existed the statute would state that requirement clearly, as it does for the requirements in s 30A(3) relating to the date of issue and the time limit for appealing.'

139. We have regard to the statutory wording of the respective provisions in making the Relevant Decisions. As a matter of statutory construction, there is no statutory requirement for the Relevant Decisions to state the charging provision. We are satisfied that the Relevant Decisions are valid in accordance with the terms of the respective legislative regimes.

Disposal of appellant's contentions as concerns validity

140. We now address the appellant's main grounds of appeal in relation to the validity issue.

(1) *Failure to refer to s 44 ITEPA*: Whilst it is correct that the Regulation 80 determinations and Section 8 decisions do not state specifically the charging provision to be s 44 ITEPA, there is no statutory requirement for either to refer to the charging provision; (or, for that matter, the provision under which the assessment or decision is made). The Regulation 80 determinations and Section 8 decisions are the standard statutory instruments for raising assessment respective to PAYE and NIC. The principal purpose for adopting the prescribed instruments for raising the assessments is to confer a right of appeal against the related decision, and for the concomitant statutory procedure that then governs the exercise of that right, and the appeal process to be followed.

(2) *Failure to specify the Part or Chapter of ITEPA*: Section 30A(2) TMA contains no requirement, express or implied, that an assessment must specify the charging provision. Section 30A(2) is simply a provision for administrative practicality, to enable amounts that are assessed under different charging provisions to be brought in the same document.

(3) *Failure to give reasons under a public law duty*: As set out above, the Tribunal's jurisdiction is entirely statutory. It has jurisdiction to consider the validity issue in two prescriptive respects as concerns time limits, and statutory requirements. This Tribunal lacks jurisdiction to consider the validity issue any further on free-standing public law grounds, which have been extensively ventilated in Mr Jones' submissions by reference to textbooks and the corpus of case law pertaining to judicial review.

(4) *Ex post facto reasoning is time-barred*: There is no statutory requirement for HMRC to state the charging provision or provide reasons for an assessment. In *Vickerman* the inspector indicated that he was going to assess under the former s 29(3)(c) TMA and then eventually made the assessment under s 29(3)(b), which the court was able to uphold. In other words, where HMRC have sought to base an assessment by reference to a specific statutory provision, that does not prevent their reliance on another statutory provision subsequently. Furthermore, as Scott J (as he was then) found in *Vickerman*, mistake, defect, or omission did not invalidate an assessment, nor would the basing an assessment on the wrong subsection have affected 'the legal result'.

> '… it was found, as a matter of fact, by the commissioners that Mr Wilson [accountant representing the taxpayer's PR] was not misled by the Revenue's shift of ground from their argued reliance on para (c) to their eventual … successful reliance on para (b). Even if Mr Wilson had been, in some degree, misled, it would not, in my judgment, have affected the legal result; but it would, no doubt, have justified him in asking for an adjournment, …'

141. We dismiss all grounds of appeal as regards the validity issue. Further, we find as a matter of fact that the appellant had been well aware of the charging provision of s 44 ITEPA under which the Relevant Decisions were made, contrary to what has been averred.

(1) The compliance review which started in April 2016 (§102) continued into 2017, and HMRC had engaged in two meetings and detailed correspondence with Mr Kooner and Rainer Hughes, with the Employment Status Manuals being specifically referred to by HMRC in relation to 'nursing staff engaged through agencies' (§102(5)).

(2) From the obtainable documentary evidence, the charging provision being s 44 ITEPA was well alive in the parties' discussion, and express reference was made to s 44 ITEPA by both sides.

(3) When Rainer Hughes wrote on 30 November 2017 to agree the quantum of the calculations, it specifically stated that: '*Our client notes Section 44(3)(b) of [ITEPA]*' followed by citing the statutory wording (§102(8)).

(4) When Officer Knox replied on 19 December 2017, he set out the reasons for his opinion why s 44 applies to the nurses in issue (§102(9)).

(5) Throughout the course of 2018 when the Warning letter followed by the revisions of quantum were sent to the appellant, there was no indication that the appellant was unaware of the basis for the calculations, even if it disputed the basis of the assessments.

142. The appellant was able to state its contentions against HMRC's decision in the letter of 30 November 2017, as well as to state its grounds of appeal in the Notice of Appeal lodged, by seemingly engaging with the basis on which the assessments were raised. The stated grounds of appeal, however, would seem to be contentions on IR35 premises. The validity issue was not apparent at all in the stated grounds of appeal in the Notice of Appeal; nor was it a live issue in March 2019 at the hearing in front of Judge Morgan.

143. It seems to us that the procedural history of the applications hearing, together with certain observations made by Judge Morgan, formed the backdrop which gave rise to the validity argument being mooted in the further and better particulars. Judge Morgan's observations as regards the absence of the charging provision being stated on the face of the Relevant Decisions were made in the context of the stated grounds of appeal being seemingly on IR25 premises, and did not engage with s 44 ITEPA issues. Furthermore, Judge Morgan was clear in noting the 'difficulty' she was presented with for not having the 'background correspondence leading to the issue of the determinations and notices available correspondence on the tribunal file'.

144. As detailed at §102, the meetings and protracted correspondence between the parties from April 2016 to July 2018 meant that the appellant and its representative were conversant with the basis of the eventual decisions taken by Officer Knox to assess the payments made by K5K for Assignments undertaken by nurses with personal companies. The Rainer Hughes' letter to HMRC of 30 November 2017 handed up by Mr Jones is precise to the extent of pinpointing the particular subsection in ITEPA, namely '*Section 44(3)(b)*', followed by citing the statutory wording in italics. The letter of 30 November 2017 stands as clear evidence that the appellant and its representative were fully aware of the charging provision being s 44 ITEPA some eight months prior to the eventual assessments in July 2018.

145. Mr Jones' responsive skeleton argument (AS2) addressed extensively what was referred to as HMRC's '*volte face allegations*' with reference to Judge Morgan's decision [14], [16] and [20] (§§111-112). Reading Judge Morgan's decision in context, we find certain submissions for the appellant in reliance on those paragraphs to be rather strained: such as the appellant's subsequent explanation of what Judge Morgan recorded (see §111) to be her understanding of the appellant's position as '*clarified*' by Mr Jones: 'that it was not the appellant's stance that the determinations and notices were invalid*'*. Furthermore, in the light of Rainer Hughes' letter of 30 November 2017, which was personally handed up to Judge Morgan by Mr Jones at the March 2019 hearing, in which the very letter confirmed that '*Our client notes Section 44(3)(b) of the Income Tax (Earnings and Pensions) Act 2003*', and was considered significant enough that Judge Morgan cited its content in full at [7] of her decision.

146. The apparent reason stated in the covering letter of 5 July 2018 to accompany the assessments, namely: 'That the workers (Nurses) should have been engaged as employees' has come under heavy criticism in the appellant's closing submissions. This statement in the subjunctive '*should have been engaged*' would appear to have first surfaced in the parties' correspondence in the Warning letter under 'Our decision' which was sent to K5K in January 2018. We agree that the stated reason in the adopted subjunctive in the Warning letter, and then the covering letter, is ambiguous, if not inaccurate, when the subjunctive '*should have been treated*' would have accorded more closely to the meaning of s 44 ITEPA.

147. In any event, the critical fact for present purposes is that s 44(3)(b) ITEPA, which was cited verbatim in Rainer Hughes' letter of 30 November 2017 clearly states: *'all remuneration receivable under or in consequence of the agency contract … is to be treated for income tax purposes as earnings from that employment*'. The deeming aspect of the application of s 44 ITEPA by the wording '*to be treated*' was therefore noted by the appellant by reference to section 44(3)(b) ITEPA to be the reason for the subsequent assessments issued by HMRC as early as November 2017. As set out earlier, there is no statutory requirement to state reason in issuing the Relevant Decisions. Even if there were a statutory requirement to do so, case law in this respect is in line with *Vickerman*; hence, mistake, defect, or omission of this nature neither invalidates an assessment, nor affects its legal result.

Conclusion on the validity issue

148. We dismiss the appellant's grounds of appeal as concerns the validity of the assessments for the reasons that: (a) the assessments have been validly made in accordance with the relevant statutory requirements; (b) the Tribunal lacks jurisdiction to consider free standing public law arguments against the validity of the assessments; and (c) as a matter of fact, the appellant was fully conversant with the charging provision being s 44 ITEPA some eight months prior to the issue of the assessments.

Issue 2: whether s 44 ITEPA applies

The application of s 44 ITEPA

149. For the purposes of this appeal, the applicable section 44 ITEPA is the version with effect from 6 April 2014. Section 44 applies if the three conditions set out under s 44(1) obtain:

> (1) First condition under s 44(1)(a): an individual ('the worker) personally provides services to another person ('the client');
>
> (2) Second condition under s 44(1)(b): there is a contract between an End Client and the appellant, which makes the appellant 'the agency' for s 44 purposes;
>
> (3) Third condition under s 44(1)(c): under or in consequence of the End Client contract, (i) the services are provided, *or* (ii) the End Client provides consideration, for the services.

150. However, even if the three conditions under s 44(1) are met, the application of s 44 is negated if '*it is shown that the manner in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person*': s 44(2)(a), whereas the exception under s 44(2)(b) is not relevant to this appeal.

151. It is common ground that if s 44 ITEPA applies, then the consequences, as provided by s 44(3) follow, so that:

> (a) the Worker is to be treated for income tax purposes, as holding an employment with the agency (i.e. the appellant), the duties of which consist of the services the worker provides to the End Client, and
>
> (b) all remuneration receivable by the worker (from any person) in consequence of providing the services is to be treated for income tax purposes as earnings from an employment with K5K; and

152. If s 44 ITEPA applies for income tax purposes, then for the purposes of NICs, the Worker is to be treated as an employed earner, and K5K is to be treated as the secondary contributor in respect of Class 1 NICs.

The state of evidence

153. The identification of the correct contracts in force is central to anchoring our findings of fact. The process of identifying the correct contracts in force during the Relevant Period has been far from straightforward, due to the *LCC Contracts* and the *Wrong Hirer Terms* (§35) having been included as relevant documents, and only accepted to be unrelated to the Relevant Period at the February diet.

The LCC Contracts

154. The LCC Contracts would appear to be the 'new contracts' to be brought into use after April 2017 as referred to by Mr Kooner in his meeting with HMRC on 23 February 2017 (§102(3)). On one interpretation, Mr Kooner was fully aware of the timing being post-April 2017 when the LCC Contracts became operative, and yet his witness statement (§25) referred to this contract at length and it was the LCC Contracts being lodged in the Hearing Bundle.

155. The fact that the LCC Contracts post-dated the Relevant Period was made clear to the Tribunal in Mr Jones' Opening. We accept Mr Kooner's explanation, having regard to the fact that the irrelevance of the LCC Contracts was volunteered at the start of the first diet. However, it is clear that Mr Kooner did not take care to confirm or check the accuracy of his witness statement and exhibits, and so his statement cannot be regarded as reliable.

The Wrong Hirer Terms

156. As to the Wrong Hirer Terms exhibited (§§29-31), Mr Kooner expressly stated that they were the terms for the Relevant Period. Prior to the service of his witness statement, HMRC had pressed for clarity on its effective date, noting the footer '247PH07706.18' as indicative of the date the document was first used. Mr Kooner twice gave instructions to Rainer Hughes (on 12 May 2020 and 10 June 2020) that these were the terms applicable in the Relevant Period.

157. Prior to the February hearing, the appellant's position was that the terms contained in this document were in force during the relevant Period. In evidence, Mr Kooner repeatedly confirmed that the Wrong Hirer Terms applied from 2014 and remained in force throughout the Relevant Period. HMRC had long queried the date of this document due to the footer ending '06.18', and Mr Kooner conceded that the document post-dated the Relevant Period when cross-examined in relation to the reference to two regulations contained within the document:

> (a) the reference to the General Data Protection Regulation (EU 2016/679) under definition of 'Data Protection Laws' (HB/61/2141), which was made on 27 April 2016 and applied from 25 May 2018, and
>
> (b) the reference to s 61L ITEPA (HB/61/2143) when s 61L was inserted by the Finance Act 2017 which received Royal Assent on 27 April 2017.

158. Mr Kooner then informed the Tribunal during the February hearing that he had contacted the franchisor on Thursday 4 February 2021 and obtained a copy of the version of Hirer Contract in force in the relevant period on the morning of Friday 5 February 2021. In the July hearing, Mr Kooner confirmed that he had no difficulty obtaining the correct versions of terms of business in force from the franchisor, which were lodged as part of the Further Documents.

The Footers to Documents

159. Several of the documents provided by the franchisor contained footers which appeared to indicate a date on which the template or version was created or saved. Mr Kooner's evidence as to the significance of those footers was inconsistent.

> (1) The Wrong Hirer Terms with a footer '247PH 077F 06.18' was accepted to indicate the year 2018, and was to record the year that the appellant started using the document (but not the year that the document was created). The point put to Mr Kooner that it was inherently likely that '06.18' refers to the month of June 2018 was not accepted.
>
> (2) '247PH 046 01.16' is the footer of the Procedures Document, and was said to have been added when saving the template document to the systems, but it was not a reference to a date, but showed that the document was saved in 2016.
>
> (3) The footer to the Terms of Business with End Clients for supply of workers as individuals is '247 Professional Health (Terms of Business 2016)' was said to show how Mr Kooner had saved the document.

The Witness Statement

160. Mr Kooner's witness statement was prepared with Rainer Hughes' assistance. The following defects are noted which render his statement either inaccurate or incomplete.

> (1) The statement (from paras 32 to 70) is based on the irrelevant LCC Contracts. Mr Kooner explained that he only became aware that the witness statement exhibited irrelevant contracts two days before the February hearing; and that he did not have a copy of the exhibits when he signed his statement; that he did not check the exhibits when he received a copy in November 2020.

(2) The statement referred only to the appellant's communications with HMRC from 27 April 2017 onwards, and did not record the correspondence and meetings starting from April 2016. Significantly, the witness statement made no reference to the Template Worker Contract and the examples of signed Worker Contracts provided by Mr Kooner at the start of the Compliance Review (§102(1)), or his confirmation to HMRC on 28 June 2016 that the Worker Contracts 'have no earlier or later amendments' during the Relevant Period (§102(2)).

Witness credibility

161. Pausing here, given the defects of the witness statement, the circumstances surrounding the change of position with regard to the Wrong Hirer Terms, and the varying answers to the significance of the footers to documents, an adverse finding of Mr Kooner's credibility would seem to be in order. However, weighing up Mr Kooner's evidence in its totality, we find him on balance not a witness who had set out to mislead the Tribunal deliberately.

162. Whilst Mr Kooner had not engaged with the preparation of the witness statement with appropriate care, he did engage with the proceedings with due attention. Certain information was volunteered in response to questions put to him, and it did not appear to us that Mr Kooner was equipped to assess the nature of certain information for its legal implications on his case. In other words, we do not find Mr Kooner was being calculative in volunteering only information that would be advantageous to his case.

163. The contractual documents and the regulatory compliance checklists are constantly being updated by the franchisor, and each change would involve a suite of documents being implemented to supersede an existing set of documents on file, which would have to be done for *all* the relevant workers. The business is subject to ongoing obligations to keep many compliance documents in date at all times. We have regard that the file maintenance aspect is only one facet to the business which pledges to offer a 24/7 coverage. The core activity of the business in placing Workers with End Clients on Assignments, which are likely to be notified at short notice, would be the constant priority, and critically time-sensitive in terms of response.

164. From obtainable facts, we infer that that the business has to deal with many sets of documents at any given juncture. The sets of documents relate not only to contractual terms between K5K and its Workers or its End Clients, but also to the recruitment checks that must be kept in date to fulfil the regulatory obligations imposed on the business as a care provider. The confusion over the relevant documents in force during the Relevant Period is undesirable, and has made the Tribunal's task in making the relevant findings of fact more onerous than otherwise, but we do not attribute the confusion to a deliberate intent on Mr Kooner's part to mislead the Tribunal.

Relevant contractual documents

165. The key findings of fact in relation to the relevant contractual documents in force during the Relevant Period are as follows:

(1) A written contract between K5K and each Worker, in the form of the Template Worker Contract (§§51-58);

(2) A contract between K5K and each Hirer, based on the standard terms of business provided by K5K; and there are two versions of terms for the supply of Workers:

(a) as individuals in their Personal capacity (§§59-62);

(b) as workers with their Personal service companies (§§63-67).

(3) There was <u>no</u> contract, written or otherwise, between K5K and each Personal Company during the relevant period.

166. We also find that the contractual arrangements in operation during the Relevant Period were governed by standard template documents provided by the franchisor. Under the terms of the franchise agreement, the appellant could particularise the template documents by adding the details of the contracting parties, (and possibly editing the footers), but otherwise not permitted to change the substantive content of the contractual documents.

The Worker Contract

167. In relation to the Template Worker Contract, we make the following findings of fact:

(1) The same Worker Contract applied to all Workers contracting with K5K, and there was no distinction made between workers contracting to work in their personal capacity or via their personal companies.

(2) K5K received the Template Worker Contract from the franchisor and inserted the name of the Worker by hand under the definition of 'Agency Worker'. The parties to the contract were expressly stated to be K5K and the Worker.

(3) The document was signed by the Worker in his/her own capacity and by Mr Kooner on behalf of K5K.

(4) There is no reference in the Template Worker Contract to any Personal Company.

(5) The franchisor's annual checks of the business of K5K included that the correct contracts had been signed by each worker.

(6) The contractual terms in force between K5K and each Worker were those contained in the Template Worker Contract, which included:

(a) The Worker agreed, in respect of any 'Assignment' they accepted, to perform the assignment services;

(b) K5K agreed to pay the Worker the agreed rate of remuneration;

(c) Where the Worker accepted an assignment, the Worker was placed under a number of *personal* obligations: fulfilling the assignment, agreeing to accept the direction, supervision and control of any responsible person in the Hirer's organisation and observing the rules of the Hirer's establishment.

End Client Contracts – supply of Workers with Personal Companies.

168. We disregard the Wrong Hirer Terms originally included as irrelevant to the Relevant Period. The document of the terms of business lodged as SB/4 is disregarded on being confirmed by Rainer Hughes by email on 9 June 2021 to be 'for 2017 and not 2016'. We find as SB/3 in the Further Documents to be the relevant document to contract with End Clients in supplying Workers with Personal Companies, in 2015 or 2016 (by reference to the changed business logo), or a materially identical document, as set out at §§64-68.

No LCC Contracts in force

169. In relation to contracting with Workers with Personal Companies, we find as follows:

(1) During the Relevant Period, the franchisor did *not* provide the appellant with any template contract tailored to the appellant engaging a Worker through a limited company. (The template LCC Contract was provided by the franchisor only in 2017.)

(2) The Worker Contracts were the only contracts extant in the Relevant Period.

(3) Any worker who changed from working in her own capacity to (supposedly) working through a Personal Company remained on the same contractual terms as set out in the Template Worker Contract during the Relevant Period.

The Dates on the Company Documents

170. For the appellant, Mr Kooner said that the Company Documents were dealt with as a pack of documents at the time a Worker first worked for K5K 'as a limited company', which meant that the date of signing the Confirmation Documents should be taken as the '*Start Date*' inserted in the first paragraph of the Document. It is asserted that the Confirmation Documents would have been signed at the same time as the 'Start Date', and not at a later date.

171. HMRC contend that the 'Start dates' on the Confirmation Documents should not be accepted as the dates of signature, and invite the Tribunal to find that all Confirmation Documents were signed by the Workers only after the Relevant Period (or in one case, shortly before the end of the Relevant Period). HMRC rely on the following documentary evidence:

(a) The language of the Confirmation Document, which describes the start date in the past tense, and purports to 'supersede' previous agreements.

(b) The notion that the Confirmation Documents 'supersede' or 'vary' (in the language of Rainer Hughes' letter of 30 November 2017 at §102(8)) the Template Worker Contracts is completely inconsistent with the straightforward confirmation on 28 June 2016 that the Worker Contracts provided in May 2016 'have no earlier or later amendments' (§102(2)).

(c) At the February hearing, Mr Kooner said that the variation in the Confirmation Documents was in relation to the worker being '*on an increased amount*', but there is no reference whatsoever on the face of the Confirmation Documents to any pay rise.

(d) The section on bank details contained in the Confirmation Document was duplicating the BACS Request Form. There was no need for details to be provided in two documents at the same time.

(e) The footer on the Procedures Document is marked '247PH 046 01.16' which suggested that the template Procedures Document was created or saved in 2016.

(f) The Procedures Document stated that the worker should sign the '*Agreement with the Limited Company Contractor (No Opt out Conduct Regulations)*', but Mr Kooner confirmed that no such template agreement existed during the Relevant Period. It is impossible to understand on what basis such a reference in the title of the Procedures Document might have been given to a non-existent document.

(g) In the cases where the LCC Contracts or Company Documents were dated, they were dated *after* the Relevant Period, or very shortly before the end of it. For example: (i) LCC Contract for Ms Doner/Donker Medical dated 18 December 2017; (ii) the Procedures Document for Majambe/Ensure Health Care dated 25 October 2017.

(h) The three cases where the Worker had dated both (i) the LCC Contract, and (ii) the Procedures Document, the date on the two documents were the same date, and so it follows that they were signed at the same time: Oladipo both dated 30 May 2017; K-Lube, both dated 23 March 2017; Parline both dated 12 May 2017. These dates were *after* the Relevant Period, or shortly before the end of it.

The 'Start Date' per Payroll List

172. It is observed that the 'Start Date' on the Confirmation Documents has not been reliably inserted 'at the time', and the 'Start Date' on the exhibit of Daniso used as an example at §72 has been left blank. In the Further Documents, the appellant provided a spreadsheet of information obtained from the payroll system ('**the Payroll List**'). One of the columns

recorded the 'Start Date', which Mr Kooner said was the date that the worker started working through a Personal Company. Where a worker had started working for the appellant as individuals at an earlier stage, Mr Kooner said the 'Start Date' on the Payroll List would show the date when the worker changed to working through a Personal Company; that most workers fell into this category of switching from individuals to Personal Companies.

173. However, on at least three occasions, it can be seen that the dates recorded on the various Company Documents provided were inconsistent with the Start Dates on the Payroll List.

(1) Donker/ Donker Medical Ltd, *27 November 2014* (per Start Date on Confirmation Document), compared with *18 December 2017* (per payroll list), and *18 December 2017* (per LCC Contract);

(2) Majambe/Ensure Health Care Ltd, *13 March 2014* (per Confirmation Document), *7 July 2016* (per Payroll List), undated (per LCC Contract).

(3) Adoe/Holy Trinity Care Ltd, *22 June 2014* (per Confirmation Document), *22 June 2014* (per Payroll List), and *7 July 2014* (date of incorporation).

174. Mr Kooner explained the discrepancy to be that the workers may have stopped working with K5K and then returned, and the payroll system would show the new start date. The basis for Mr Kooner's explanation would appear to have been a check carried out by him on the payroll system while giving evidence. However, whatever information Mr Kooner was checking on the payroll system was available to him alone, and not to the Tribunal or HMRC.

175. In the case of Adoe, Mr Kooner said the worker may have 'held back' her timesheets while she was setting up her company, and then submitted them once it was incorporated, and that there have been occasions where K5K would pay amounts to the personal company even though the work was carried out by the worker before the company existed.

176. Mr Kooner said repeatedly that the Company Documents would be completed at the time when an individual worker changed to a personal company, and referred to the 'front sheet' of a 'compliance list' said to have been used during interviews. However, no documents have been produced to demonstrate such procedure and to evidence the timing of the Company Documents being signed, despite this aspect of evidence having been expressly listed for production at 4(c) of the February 2021 Directions by the Tribunal.

The Recruitment Policy and audit reports

177. HMRC submit that the Recruitment Policy and audit reports support the contention that the Company Documents were not completed at the time, but *after* the Relevant Period. It is submitted that the auditors did not review the Company Documents because they did not exist in completed form at that time based on the following points:

(1) The Company Documents were not listed on the checklist (unlike other documents specified on the Recruitment Policy);

(2) HMRC submit that it would be surprising for the auditor to note a number of gaps and errors in other documents related to the two workers (Daniso and K-Lube), but to find no gaps or errors in the Company Documents.

(3) Mr Kooner's explanation for the absence of Company Documents being mentioned in the auditor's report was that there was no gap or error in relation to these documents. This is contradicted by the fact that:

(a) Daniso' Confirmation Document did not contain a start date, or the details of her accountant; the Procedures Document was undated.

(b) K-Lube's Procedures Document was dated 23 March 2017 and could not have been completed at the time of the audit report in February 2017.

(c) The auditor's 'Recommendations and Mandatory Changes' noted that all staff working through a Personal Company must have copies of the Company Documents on file, which suggests that the auditor had not already seen compliance with this requirement.

(4) In any event, the audit report was completed in February 2017 which was towards the end of the Relevant Period, and so does not amount to evidence that the Company Documents were completed at the time of 'Start Dates' given for the examples of the two workers working through Personal Companies (i.e. Daniso on 20/06/2016, and K-Lube on 24/03/2015).

Finding on contemporaneity of the Confirmation Documents

178. As a general observation, the state of the documentary evidence being exhibited is often incomplete as concerns the particularised details to be inserted to the template documents adopted for the appellant's business, such as leaving blank the date of signatures, or the printing of the name of the signatory, or the 'Start Date' to be inserted on the Confirmation Document, or the accountants' details for Personal Companies being crossed with 'TBC'.

179. There are discrepancies fundamental to the Start Date in the limited examples being exhibited in relation to the Company Documents as detailed by HMRC in their closing submissions. Such discrepancies make it more improbable that the Documents were completed at the time as a pack when a worker started working via a Personal Company. If such procedure was followed with regularity, one could expect consistency at least in the recording of the Start Date. As the documentary evidence stands, there is simply no firm basis to make any finding of fact that the Company Documents were contemporaneous to the start of the working arrangements of the relevant workers via their Personal Companies. We are unable to make a finding that the Confirmation Documents were signed in the currency of the Relevant Period.

180. We note that the design of the Confirmation Document does not carry an entry space for dating the signature to enable any inference to be drawn as to when the Confirmation Document was adopted for use. However, we have regard to the language used within the Confirmation Document, that it '*supersedes any previous agreement*', and to Rainer Hughes' letter of 30 November 2017 referring to the Confirmation Document as one which '*varies the provision for our client to be liable for these deductions*'. These texts are suggestive of the Confirmation Document being adopted at a time to replace documents previously in place, and might not have been coterminous with the Template Worker Contract in force during the Relevant Period.

181. One crucial finding of fact for the purposes of this appeal is whether the Confirmation Document was contemporaneous in the Relevant Period. We find Mr Kooner's evidence in this respect to be totally unreliable, and in the absence of any positive indicator as to the date when the Confirmation Document was adopted, we draw inferences on the balance of probability. We have regard to the specific '*Recommendations and Mandatory Changes*' made in the Internal Audit Report, which was clearly dated 16 February 2017 and therefore towards the end of the Relevant Period. Two obtainable facts from the audit report are instructive:

(1) No reference to any of the Company Documents of the two relevant workers being audited is suggestive that the Company Documents were absent for the February 2017 audit. The specific example of Daniso's Confirmation Document (§72(1)) has been left blank for 'Start Date', while her company was incorporated on 3 October 2015[8], and the

[8] Daniso' personal company [ABC] Healthcare Ltd was incorporated on 3 October 2015 per Certificate of Incorporation.

Payroll List recorded her 'Start Date' to be 20 June 2016. The failure to note Daniso's Start Date on her Confirmation Document would have been noted by the audit report, if Confirmation Document was already in use to form part of the audit checklist.

(2) The Company Documents came only under 'Recommendations and Mandatory Changes' in the audit report. The use of '*MUST*' for the adoption of these documents would suggest that they fall under mandatory changes, and would be consistent with the inference drawn that the checklist for the February 2017 audit did not include the Company Documents.

182. The timing of the audit report dated 16 February 2017 with the recommendations and mandatory changes would appear to coincide with the adoption of the LCC Contract, which was advised by Mr Kooner in the 23Feb17 Meeting with HMRC (§102(3)) to be operative from April 2017. The title of the LCC Contract, being '*Terms of Engagement with a Limited Company Contractor who has not opted out of the Conduct Regulations (within IR35 and under SDC)*' aligned closely with the content of the first paragraph in the Procedures Document (§74), which stated that Limited Company Contractors should sign:

> 'the "AGREEMENT WITH THE LIMITED COMPANY CONTRACTOR (NO OPT OUT OF CONDUCT REGULATIONS)".'

183. Whilst Mr Kooner admitted that the LCC Contracts were effective only after April 2017, his evidence proceeded on the basis that the Company Documents were current during the Relevant Period. The inference we draw from obtainable facts is that the Company Documents were adopted at the same time as the LCC Contracts which was from April 2017, as the overall mandatory changes stated in the Audit Report, and of which Mr Kooner advised HMRC in the 23Feb17 Meeting. We also note that it is no coincidence that the Company Documents of Dansio were in fact lodged together with her LCC Contract, signed (but undated) under HB/53.

184. On the balance of probability, we find therefore that the Company Documents (comprising the Confirmation Documents) of the relevant workers were not contemporaneous during the Relevant Period. We accept HMRC's submissions that the Company Documents were not completed at the time when the relevant workers started working with their Personal Companies, but were instead completed later, either after or towards the end of the Relevant Period, and probably as an *ex post facto* attempt to regularise the contractual arrangements between K5K and Workers with Personal Companies.

Parties' contentions centred on s 44(1) conditions

185. It is common ground that two of the three conditions provided under s 44(1) are met.

(1) Section 44(1)(b) is met by virtue of the contract between the appellant and the End Client, whereby the appellant is the agency for the purposes of s 44 ITEPA. For completeness, this condition is satisfied whether the relevant contract between the appellant and an End Client is the Hirer Terms (as submitted by the appellant) or some other contract, written or oral.

(2) Section 44(1)(c) is satisfied under or in consequence of the End Client Contract, whereby: (i) the services of the Worker are provided, and/or (ii) the End Client pays or otherwise provides consideration for the services. For completeness, this condition is satisfied whether the relevant contract between the appellant and the End Client is the Hirer Terms or some other contract, written or oral. For the avoidance of doubt, whilst the appellant appears to dispute that it is the Worker who provides the services, we understand that it is not disputed that the End Client pays consideration for the services in consequence of the End Client Contract.

Appellant's position

186. Of the three conditions under s 44(1), the appellant disputes that the first condition under s 44(1)(a) is satisfied on the fact. Mr Jones' argument is made with reference to a '*sample contract between the appellant and one of its corporate clients* **3/2360-2377**' (pagination reference since superseded) whereby the defined terms relied upon are set out at AS1, para 33:

> (a) 'Agency Worker' means 'any officer, employee, worker or representative of the Intermediary supplied to provide the Intermediary Services';
>
> (b) 'Intermediary' means 'the person, firm or corporate body introduced to the Hirer by the Employment Business to carry out an Assignment (and, save where otherwise indicated, includes any Agency Worker);
>
> (c) 'Employment Business': 'K5K Limited …'.
>
> (d) The corporate client contracts are to be contrasted with the contracts in use for individuals.

187. The appellant's argument is against the case advanced by HMRC, which is set out in terms under para 34 AS1:

> 'The very basis of the case advanced by HMRC is that PAYE and NI should have been accounted for and/or paid by the appellant notwithstanding that in each of the instances under appeal the "Hirer" was a body corporate. In so contending HMRC seeks to pierce the corporate veil or maintain the pretence that each relevant company was not the contracting party.'

188. It is submitted that s 44 is 'explicitly a deeming provision' and 'does not amount to a statutory piercing of the corporate veil'; and that the pre-condition to liability under s 44(1)(a) is not made out on the basis of the relevant contractual arrangements, namely:

> (a) No individual personally provided any services to any of the hirers. All and any services provided were, as a matter of law, provided by the company that had contracted to provide them. That proposition can be tested by observing that any such company would be vicariously liable for damage caused by work done negligently by the company's servant or agent.
>
> (b) As a matter of contractual analysis, services were provided by the company that contracted to provide them. None were/are *provided by* any such company's servant or agent. That analysis applies notwithstanding the use of the word 'personally' in s 44(1)(a) because 'personally' does not inform the identity of the contracting party *providing* the services.
>
> (c) To decide otherwise would amount to piercing the corporate veil, which is not permissible: *Prest v Petrodel* per Lord Sumption at [34]:
>
> > '… the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the seperate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely on the fact (if it is a fact) that a liability is not the controller's because it is the company's. …'
>
> (d) The matter can be tested in this way. If the hirer had been asked the question: *who is providing your temporary staff or who is doing the (identified) work for you*, the answer would not be by reference to any individual's name, but by reference to the contracting party providing the service.

(e) It requires an extremely wide and unrealistic construction of the words 'personally provides services' in s 44(1)(a) to read that part of the section as meaning that services are personally provided by an individual when that individual is acting as the servant (or agent) of an identified contracting body corporate. None of the exceptions for piercing the corporate veil in *Prest v Petrodel* are capable of being applicable. It would be open for a statute to define circumstances in which the corporate veil can be pierced, but it has not done so by s 44(3) ITEPA. On the contrary, it has used the mechanism of deeming a certain factual situation to exist (so that the defined consequences will flow from that deemed fact) when, as a matter of known fact, it did not or does not exist.

189. The appellant's skeleton argument lodged for the July diet confirms that AS1 continues to be relied upon but with reference to, and in the context of, the applicable contracts lodged in the Further Documents. In relation to the Hirer's Terms of Business for the supply of Workers with Personal Companies (SB/3 and SB/4), it is submitted that the term 'Agency Worker' under clause 1.1 to mean *any officer, employee, worker or* ***representative*** *of the intermediary* 'puts it beyond argument' that 'the intermediary could discharge its contractual obligations by providing a *representative* (which could well be a body corporate or sub-contractor, said Mr Jones) to perform the *intermediary services*' (all emphasis original).

HMRC's position

190. In reply, the submissions from Mr Tolley and Ms Poots are as follows:

(1) The burden of proof falls on the appellant that the Worker does not personally provide services to the End Client. The appellant's argument appears to be based on the alleged terms of the contractual relationships between the relevant parties. However, the appellant's position on those contractual relationships is unclear.

(a) The appellant purports to refer to the Personal Companies as its 'corporate clients'. It is difficult to see how that description is accurate on any view: the appellant makes payments to the Personal Companies, in respect of services provided by the Workers, rather than the other way around.

(b) The appellant purports to refer to a sample contract between the appellant and one of its 'corporate clients' but the contract in question is between K5K and an End Client (Uniq Care & Support Ltd), and not a contract between the appellant and a Personal Company.

(2) In light of this lack of clarity, it is difficult to follow the appellant's argument on this issue. The appellant's position *appears* to be that the Personal Company was a contracting party somewhere in the contractual chain. It is not clear, however, whether the appellant's position is that:

(a) The appellant contracted with the Personal Company; or

(b) The Personal Company contracted with the End Client.

(3) Taking those possibilities in turn:

(a) ***Contract between K5K and Personal Company***: HMRC do not accept that the appellant contracted with the Personal Company at any material time during the Relevant Period. The documents and information produced show that K5K contracted directly with the Worker through the Template Worker Contract.

(b) ***Contract between Personal Company and End Client***: None of the documents provided by the appellant show that there was a contract between any Personal Company and any End Client. However, that appears to be what the

appellant's skeleton argument is suggesting when it (purportedly) refers to '*the company that had contracted to provide [the services]*'. On the premise of the appellant's case (albeit disputed by HMRC), it has provided disclosure of all relevant documents to the issues in the appeal. It follows (on the appellant's own case) that there is no evidence of any such contract.

The varying identity of the 'body corporate'

191. We find the analysis of the contractual relationships upon which the appellant's argument is founded to be very unclear, for the reason that the term 'body corporate' seems to be used interchangeably to refer to either a Hirer or a Personal Company (of an LCC).

(1) The sampled contract from which the defined terms in AS1 are taken would suggest that the body corporate in the argument refers to the Hirer, as expressly stated in the title:

> 'Terms of Business with a Hirer Uniq Care & Support Ltd for the supply of a limited company contractor who has not opted out of the Conduct Regulations (Within IR35 and under SDC)'.

(2) The sampled contract would appear to be the Wrong Hirer Terms (HB/61) with the footer –06.18, which has been conceded to be operative only *after* the Relevant Period.

(3) In AS3, the reference to SB/3 and SB/4 (the latter being after Relevant Period) is again to the Terms of Business applicable to Hirers in relation to the supply of LCCs, and the definition of 'Agency Worker' cited in AS3 accords equally with that used in the Hirer Terms of Business (SB/3), the body corporate in the skeleton argument is also a reference to the 'Intermediary' (i.e. to the Personal Company of the Agency Worker).

(4) The seeming logic under para 34 of AS1 is confounding if not muddled. The very basis of HMRC's case being contended against is supposedly referable to the fact that: (a) '*in <u>each</u> instance under appeal <u>the "Hirer" was a body corporate</u>*', and (b) '*In so contending HMRC seeks to pierce the corporate veil … that <u>each relevant company</u> was not the contracting* party'. In part (a) the identity of the body corporate is clearly the Hirer, but in part (b) the identity of the body corporate seems to have shifted from the Hirer to '*each relevant company*' (i.e. the Personal Company of each relevant worker).

(5) Despite our efforts in following the appellant's argument closely, it is unclear whose corporate veil is supposed to have been pierced; nor do we find the piercing of corporate veil argument of any merit or relevance to the application of s 44 ITEPA.

192. Whatever the appellant's position on the alleged contract between any Personal Company and an End Client, ultimately the appellant argues that the Workers did not personally provide services to any of the End Clients. As we understand it, the crux of the appellant's argument is that (a) '*services were provided by the company that contracted to provide them'*, and (b) *'None were/are provided by any such company's servant or agent*'. We address each limb of the argument by asking the following questions:

(1) Was the Intermediary / Personal Company in the contractual chain?

(2) Did an LCC Worker personally provide services to any of the End Clients?

Was the Intermediary / Personal Company in the contractual chain?

193. We address the first limb of the appellant's argument by asking the question whether the Personal Companies (of the relevant workers) were a party in the contractual chain to supply the relevant workers to the End Clients. We find as a matter of fact that during the Relevant Period, the contractual arrangements in place meant that the Personal Companies in question were never a party in the contractual chain.

(1) The template Worker Contract was the *only* contract in place for the appellant to contract with an Agency Worker.

(2) It was the same Worker Contract being used, whether the Worker was an individual or an LCC; no separate or additional terms existed whereby the appellant contracted with the Personal Company of an LCC.

(3) The appellant contracted with an End Client in accordance with the two versions of Hirer Terms of Business in use during the Relevant Period; one version for the supply of workers as individuals, and one for workers supplied as LCCs.

(4) The End Clients did not contract with any of the Workers, whether in their capacity as individuals or as LCCs. The End Clients contracted *only* with the appellant.

(5) The Company Documents (and in particular, the Confirmation Documents) were not contemporaneous with the Template Worker Contracts during the Relevant Period to alter the fact that no contract existed between K5K and the Personal Companies.

194. As regards the identity of the parties to the Worker Contracts, HMRC have addressed the issue, and referred the Tribunal to relevant authorities: *Fisken v Carl* [54]-[64], *Taylor v Rhino* [46]-[49], *Americas v Cosco* [18]-[21], *Hamid v Bradshaw* [50]-[58], *Estor v Multifit* [25]-26]. For present purposes, the key point from these authorities is summarised by the Court of Appeal in *Fisken v Carl* at [54], where:

> 'The signature cases demonstrate that where a person signs a contract with no qualification as to the capacity in which he signs, he will be a party to the contract unless the document makes clear that the person is contracting as an agent. They demonstrate further that the mere description of that person as an agent in the heading of a contract will not be sufficient to outweigh the effect of an unqualified signature.'

195. As a matter of fact, the Agency Worker is defined in the Template Worker Contract by inserting the personal name of the worker under clause 1.1. The signatures of the parties to the contract are to be provided on the last page of the Template Worker Contract, whereby the Agency Worker would sign, print personal name, and date the signature. The Template Worker Contract was generic to all workers and there was no specification as to the capacity in which a named worker was signing. Applying case law principles, the parties to the Worker Contract were the named Agency Worker and the appellant, as set out by the signatory provisions.

196. We conclude therefore that all relevant workers (notwithstanding their Personal Companies) were contracting in their personal capacity as the named Agency Worker in the Worker Contracts with the appellant, and that none of the Personal Companies were a party in the contractual chain in relation to the supply of LCCs to any of the End Clients.

Did LCC Worker personally provide services to any of the End Clients?

197. In support of the second limb of the appellant's argument that s 44(1)(a) is not satisfied on the facts, Mr Jones submits that:

(1) It is significant within ITEPA a different word 'provide' is used for s 44(1)(a) from that of 'perform' under s 49(1)(a), which states:

> 'an individual ("a worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),'

(2) Where the statutory wording uses '*provide*' instead of '*perform*', Mr Jones submits it is as clear as a bell that '*provide*' is concerned with the contractual arrangements, while '*perform*' is concerned with a matter of fact as to who actually does the work.

(3) The ultimate question under s 44(1)(a) is therefore: 'Who is contractually obliged to provide the service?'

(4) The answer must be construed with reference to the definition of 'Agency Worker' within the Hirer Contract, which means 'any officer, employee or representative of the Intermediary supplied to provide the Intermediary Services'. It is the *Intermediary* which is obliged to provide the Intermediary Services, and can fulfil its obligation by providing 'a representative'.

(5) A relevant worker is not contractually required to be the individual who *personally provides* services to the End Client; hence the condition under s 44(1)(a) is not met.

198. In response, Mr Tolley make the following submissions:

(1) As a matter of statutory construction, s 49 should not be taken in isolation, and it is apt to consider the statutory purpose of a particular section.

(2) On a proper interpretation, the words '*personally provides services'* in subsection 44(1)(a) do not refer to the contract to provide services (unlike subsections (b) and (c)). Rather they refer to the reality of the individual person who actually provides the services: here, the nurse or health care assistant, and in other cases, it might be an IT worker or project manager.

(3) Section 44 is intended to cover situations where an agency supplies individual workers to clients, and so it would be illogical for s 44 to require a contract between the worker and the end client.

(4) Following the construction of s 44, the party contractually engaged to provide the services is the 'worker' for s 44(1)(a) purposes. If the Personal Company is the contractual party, then HMRC accept that the appeal succeeds.

(5) Whilst it is not uncommon for an intermediary to sub-contract, the appellant's proposition that a 'corporate representative' can be sent is unrealistic, where the work can only be performed by an individual suitably qualified; the proposition is 'devoid of commercial reality' in the care sector environment which is so heavily regulated.

199. As a matter of statutory construction, we agree with Mr Tolley's submissions on the statutory wording of '*personally provides services*' under subsection 44(1)(a) for the reasons:

(1) Section 44(1)(a) does not refer to any obligation (whether contractual or otherwise) on the worker to provide services personally. Rather, it refers simply to the facts: '*an individual … personally provides services …*'.

(2) The interpretation of the current version of s 44(1)(a) as simply referring to a matter of fact of 'an individual personally provides services' is supported by the removal of any reference to 'an obligation' when compared to the superseded version of s 44(1)(a) in force between 6 April 2003 and 5 April 2014, which reads:

> '(a) an individual ("the worker") personally provides, or is under an obligation personally to provide, services (which are not excluded services) to another person ("the client"),' [underlined wording removed]

(3) Section 44(1)(b) expressly envisages the services being provided under a contact between the end client (or connected person) and '*a person other than the worker*'.

(4) Section 44(1)(b) makes no sense if there were any direct contract for the provision of the services between the Personal Companies and the End Clients under s 44(1)(a) (as contended by the appellant in reading into the words '*personally provides services*' as pertaining to a contractual obligation.

(5) If there were a contractual obligation being referred to under s 44(1)(a) as a matter of law, or a contractual arrangement in place between the worker and the end client as a matter of fact, then on these disputed premises, the appellant has not provided any sensible answers as to:

(a) What was the point of the appellant's involvement in the arrangements?

(b) Why were the End Clients making payment to the appellant in respect of the provision of the services?

200. We reject the submissions in relation to the assertion that 'no individual personally provided any services to any of the hirers' as a matter of statutory construction. We also reject the submissions by reference to the contractual analysis, and to Mr Kooner's evidence on the appellant's business practice, having regard to the following facts.

(1) In the Worker Contract, which was the only agreement extant between the appellant and its LCCs, the Agency Worker in the Worker Contract was defined by the personal name of the Worker, and not by reference to the name of the worker's Personal Company.

(2) In the Hirer Contract (for the supply of workers with a personal company), and notwithstanding the reference to 'the Intermediary Services', the Employment Business shall inform the Hirer of 'the identity of the Intermediary *and that of the Agency Worker*' under clause 4.1 (§64).

(3) In relation to each Assignment, the Hirer is informed of the name of the Agency Worker first and foremost, and would only occasionally ask whether a particular worker is using a limited company (§67). It was the personal identity of an Agency Worker that was of concern to a Hirer, and it was understood by the Hirer that the appellant would have carried out all the necessary checks to vet the suitability and qualification of an Agency Worker taking up an Assignment.

(4) The identity of an Agency Worker was clearly fixed by her personal name in the Worker Contract, and there is no provision for sending a corporate representative in substitution in the Hirer terms of business.

(5) The supply of Agency Worker is itself regulated by Conduct of Employment Agencies and Employment Businesses Regulations 2003/3319 ('**the Employment Businesses Regulations**'), see specifically regulations 18 to 22. Regulation 22 provides for additional requirements where 'work-seekers are to work with vulnerable persons'; reg 19 on '*Confirmation to be obtained about a work-seeker*' provides at paragraph 2:

> 'An agency may not introduce or supply a work-seeker to a hirer with a view to the work-seeker taking up a position which involves working with, caring for or attending a vulnerable person, unless it has obtained confirmation –
>
> (a) Of the identity of the work-seeker, and
>
> (b) That the work-seeker has the experience, training, qualifications and any authorisation which the hirer considers are necessary, or which are required by law or by any professional body, to work in the position which the hirer seeks to fill.'

201. For completeness, we address the remaining submissions on the substantive issue made for the appellant as detailed at §188(a) and (d).

(1) The appellant's submission by reference to the proposition on vicarious liability at §188(a) is unsupported by any evidence that has been adduced for the appellant. If anything, Mr Kooner's evidence on insurance cover that is required of the appellant would seem to contradict this proposition; that the End Clients are ultimately interested

in the indemnity cover of the appellant (not of the personal companies of the Agency Workers), and that it was the appellant's indemnity cover certificate that the End Clients wanted to see, not the nurses' professional indemnity certificate as such.

(2) As to the submission under §188(d) in relation to the matter being tested by asking a hirer the question: who is providing the temporary staff, the most likely answer would probably be '247 Professional Health' (ie the appellant). The submission is premised on the answer being the name of the Personal Company of the Agency Worker in question, but this is the unobvious answer for the appellant to adduce. No hirers had been called as witnesses for this proposition to be tested, and for this submission to be considered. On the contrary, Mr Kooner's evidence that hirers would only 'occasionally' ask whether a worker is using a limited company seems to us to be contradictory to the fact required to support this submission.

Whether s 44(2) negating condition applies?

202. The parties are not in dispute that the negating condition does not apply. As a matter of fact, the Worker Contract expressly provides under clause 4.1 (§53(1)) that by accepting an Assignment, the Agency Worker agrees to be subject to the supervision, direction or control as to the manner in which the services are provided in accordance with the Hirer's direction. Similarly, in the Hirer Contract (for the supply of workers with a personal company), 'the Agency Worker supplied by the Intermediary is deemed to be under the supervision, direction and control of the Hirer for the duration of the Assignment': clause 14.2 (§64(7)).

203. Apart from the express terms in the Worker Contract and Hirer Contract, such supervision, direction and control are a necessary feature of the regulated environment in which the relevant services are provided: Health and Social Care Act (Regulated Activities) Regulations 2014. The negating condition therefore does not apply in this case.

DISPOSITION

204. The appeal is dismissed. For the reasons stated, section 44 ITEPA applies to the contractual arrangements between the appellant and the relevant workers during the period from 6 April 2014 to 5 April 2017. The Relevant Decisions as set out at §2 are upheld in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

205. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR HEIDI POON
TRIBUNAL JUDGE

Release date:

ANNEX

Authorities and extracts from textbooks with their short case references emboldened in brackets.

Bundle 1

(1) *Vickerman v Mason's Personal Representatives* [1984] STC 231 ('***Vickerman***')

(2) *Wandsworth L B C v Winder* [1985] AC 461 ('***Wandsworth***')

(3) *R v Inland Revenue Commissioners, ex p Taylor* (No.2) [1990] STC 379 ('***R (ex p Taylor)***')

(4) *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310 ('***R (ex p Cunningham)***')

(5) *R v SOS for the Home Department, ex p Doody* [1993] 1 AC 531 ('***R (ex p Doddy)***')

(6) *R v Criminal Injuries Compensation Board, ex p Moore* [1999] 2 All ER 90 ('***R (ex p Moore)***')

(7) *Pawlowski v Dunnington* [1999] STC 550 ('***Pawlowski***')

(8) *Clarke v University of Lincolnshire* [2000] 1 WLR 1988 ('***Clarke***')

(9) *R (on the application of Kelsall and others) v SOS for Environment, Food and Rural Affairs* [2003] All ER (D) ('***R (oao Kelsall)***')

(10) *Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864 ('***Rhondda Cynon***')

(11) *South Bucks D C v Porter (No. 2)* [2004] 1 WLR 1953; [2004] UKHL 33 ('***South Bucks***')

(12) *Gunn v Revenue and Customs Commissioners* [2011] STC 1119 ('***Gunn***')

(13) *Prest v Petrodel Resources Ltd and Others* [2013] 2 AC 415 ('***Prest***')

(14) *Addo v HMRC* [2015] UKFTT 530 (TC) ('***Addo***')

(15) *Birkett v HMRC* [2017] UKUT 89 (TCC) ('***Birkett***')

(16) *Goldsmith v HMRC* [2018] UKFTT 0005 (TC) ('***Goldsmith FTT***')

(17) *HMRC v Goldsmith* [2019] UKUT 325 (TCC); [2019] STC 2512 ('***Goldsmith UT***')

(18) *Lennon v HMRC* [2018] UKFTT 220 (TC) ('***Lennon***')

(19) *Griffiths v HMRC* [2018] UKFTT 527 (TC) ('***Griffiths***')

(20) *Kevin McCabe v HMRC* [2020] UKUT 0266 (TCC) ('***McCabe***')

(21) *Trustees of the BT Pension Scheme v HMRC* [2016] STC 66 ('***BT Trustees***')

(22) *De Smith's Judicial Review Handbook* 8th ed. Chapter 7 'Right to Reasons' ('***De Smith***')

(23) *Judicial Review Handbook* 6th ed (2012) by Michael Fordham QC ('***Judicial Review Handbook***')

Bundle 2

(1) *The Aramis (Court of Appeal)* [1989] Lloyd's Law Reports 213 ('***The Aramis***')

(2) *James v Greenwich London Borough Council* (EAT) [2007] ICR 577; [2008] EWCA Civ 35; [2008] ICR 545 ('***James v Greenwich LBC***')

(3) *Estor Ltd v Multifit (UK) Ltd* [2009] EWHC 2565 ('***Estor v Multifit***')

(4) *Evans v RSA Consulting Ltd* [2010] EWCA Civ 866; [2011] ICT 37 ('***Evans v RSA***')

(5) *Muneer Hamid (T/A Hamid Properties) v Francis Bradshaw Partnership* [2013] EWCA Civ 470 ('***Hamid v Bradshaw***')

(6) *Prest Resources Ltd v Petrodel* [2013] 2 AC 415 ('***Prest v Petrodel***')

(7) *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd and Others* [2015] EWHC 1345 (TCC) ('***CIP Properties v Galliford***')

(8) *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 ('***Quah v Goldman Sachs***')

(9) *All Answers Ltd v HMRC* [2018] UKFTT 0701 (TC) ('***All Answers FTT***'); [2020] UKUT 0236 (TCC) ('***All Answers UT***')

(10) *Americas Bulk Transport Ltd (Liberia) v Cosco Bulk Carrier Ltd (China)* [2020] EWHC 147 ('***Americas v Cosco***')

(11) *Kevin Taylor v Rhino Overseas Inc* [2020] EWCA Civ 353 ('***Taylor v Rhino'***)

(12) *Gregor Fisken Ltd v Carl* [2021] EWCA Civ 792 ('***Fisken v Carl***')