

ER COMPLIANCE

Although COVID has had a significant effect on the Tribunal process, cases continue to be heard. What is quite clear is that ER (now BADR) is high on HMRC's radar. Another case (TC07987: Peter Kennedy First-tier Tribunal January 2021) illustrates the dangers of not ensuring that the relevant conditions are met.

The taxpayer was, until August 2013, a director of an AIM listed company. In 2014/15 he made a disposal of some of those shares realising a taxable gain of £2,555,589. In 2015/16 he made a second disposal realising a taxable gain of £449,397. He claimed ER in relation to both disposals and HMRC opened enquiries into those returns in January 2017 and ER was denied on the basis that the taxpayer was not an officer or employee throughout the periods of one year ending with the date of each disposal.

The taxpayer stated that he was employed under a written service agreement, the service agreement was never properly terminated and, as a matter of fact and law, his employment subsisted at the date of each disposal.

It was common ground that the taxpayer had been and chief executive, April 2007 - May 2009 managing director, May 2009 - Novad the following roles in the period 2004 to 2013 namely in the period to April 2007 December 2010 non-executive chairman and November 2010 - August 2013 executive chairman. The first evidence of a written contract was an unsigned service agreement dated 22 March 2007, the date was inserted in handwriting under which he was to be employed and to serve as managing director. He was required to devote the whole of his time and attention to the affairs of the company.

The taxpayer's evidence was that service agreements were put in place in relation to all executive directors as part of the listing requirements when the company was floated on AIM but his role altered in May 2009 when he ceased to be managing director and became non-executive chairman. The taxpayer described his contractual arrangements with the company from May 2009 onwards when he became non-executive chairman and entering into a contract for services using a personal services company, PBK Consulting Ltd. The Tribunal stated:

'We got the impression from Mr Kennedy's evidence generally, that when it came to his employment status and his status as a consultant he was not a person with an eye for detail.'





The evidence included what was expressed to be a draft consultancy agreement and the date on the cover page appears as “xx May 2009” and the draft was unsigned. There was no copy of a final signed agreement but was deemed to have commenced on 1 May 2009. The taxpayer also stated that he also entered into a new service agreement with the company in 2009. There was no copy of any such agreement but the evidence included an unsigned service agreement dated 1 November 2009 on the cover page but the body of the agreement identified Nicholas Kennedy, not the taxpayer, as the employee being appointed to serve as chief financial officer. It was common ground that no payments were made to the taxpayer or PBK Consulting after 21 August 2013.

The company issued a P45 to the taxpayer in August 2013, identifying his leaving date as 15 August 2013 with total pay to date of £2,253 but he maintained that after August 2013 he continued to work on behalf of the company but the Tribunal stated:

‘We are not satisfied that Mr Kennedy was working pursuant to what he considered was an ongoing employment contract. In our view it is unlikely he would do so without making that clear to Bglobal. More likely is that he knew that what he was doing was in the best interests of the company and would help him to realise full value for his shares.

Based on the evidence as a whole, we are not satisfied that there was any employment contract between Mr Kennedy and Bglobal in the period between November 2010 and 15 August 2013. It was not suggested that Bglobal failed to comply with any formality necessary to remove Mr Kennedy as a director.’

Consequently, the taxpayer was not an employee at the time he disposed of his shares and was not entitled to ER.

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