



National Audit Office

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## **Report**

by the Comptroller  
and Auditor General

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## **BBC**

# Investigation into the BBC's engagement with personal service companies

# What this investigation is about

**1** This investigation examines the nature of, and associated issues related to, individuals the BBC hires on a freelance basis, particularly those hired through personal service companies (PSCs). A PSC is commonly understood to mean a limited company that typically has a sole director who owns most or all of the shares of the company and who provides their services to clients via a contract between the client and the PSC. PSCs are a legitimate way of contracting for services and are commonplace across many sectors, including the media industry. PSCs can offer both advantages and disadvantages to the individual and hiring body.

**2** If not operated correctly, PSCs can pose a risk to the Exchequer. In the late 1990s, the government was concerned that some people were using intermediaries, such as PSCs, to avoid paying the correct amount of tax. The government's concerns centred on 'disguised employees' – people who do the same job in the same manner as an employee, but who avoid paying income tax through PAYE<sup>1</sup> and national insurance contributions because they are hired through an intermediary such as a PSC. This situation is possible because there are different tax regimes for personal and business income.

**3** To address these concerns, the government introduced legislation in the Finance Act 2000. This legislation, commonly known as IR35, sought to eliminate tax avoidance by 'disguised employees', by ensuring that people who work in the same manner pay broadly similar amounts of income tax and national insurance, whether they are employed directly or work through a PSC. HM Revenue & Customs (HMRC) undertakes compliance work to enforce the legislation, which can involve investigations into the tax affairs of PSCs.

**4** Central to the application of IR35 is the assessment of an individual's employment status for tax purposes. Assessing employment status is complicated as there is no precise statutory test of what constitutes an employment relationship. Instead, each individual's case must be assessed on its own merits against a number of factors. Prior to April 2017, responsibility for assessing the employment status of individuals engaged via PSCs and ensuring the correct tax was paid rested with the PSC themselves. The PSC therefore bore the risk of incorrectly assessing employment status and the risk of associated tax liabilities as a result of such misclassification.

<sup>1</sup> PAYE (pay as you earn) is a system of paying income tax in which an employer pays an individual's tax directly to the government, and then takes this amount from the individual's salary or wages.

**5** In April 2017, the government introduced reforms whereby public bodies, including the BBC, became responsible for determining the employment status for tax purposes of all those it hired through PSCs. The government introduced this change to strengthen the public sector's role in ensuring that the individuals it hires comply with the IR35 rules. In May 2016, HMRC estimated that only 10% of the PSCs that should have been operating the IR35 rules on at least part of their income were actually doing so, and that this non-compliance would cost the Exchequer an estimated £440 million in 2016-17.

**6** The Committee of Public Accounts first addressed the BBC's use of PSCs in 2012 as part of a wider enquiry into off-payroll working across the public sector. The issue then became public again in 2018, when an open letter from a group of presenters in March 2018 expressed dissatisfaction with how the BBC handled the April 2017 changes. There were also questions about the BBC's use of PSCs raised by the Department for Digital, Culture, Media & Sport Select Committee in March 2018 and the Committee of Public Accounts in April 2018.

**7** The chair of the Digital, Culture, Media & Sport Select Committee asked the National Audit Office to examine the BBC's engagement of PSCs. We focused our investigation on four areas:

- the context of the BBC's use of PSCs;
- why the issues with PSCs have arisen now and the scale of these issues;
- how the BBC has managed its use of PSCs; and
- relevant interactions between the BBC and HMRC.

**8** We have not examined the specific affairs of freelancers hired by the BBC, nor do we make any judgement on whether the correct amount of tax has been paid by the BBC or any individual it hires.

**9** In this report we refer to freelancers as any individual who is not a staff member of the BBC. This can include individuals who are employed or self-employed for tax purposes and who are hired as individual sole-traders, or through an intermediary such as a PSC.

# Summary

## Key findings

The BBC's historical relationship with freelancers

**1 In order to meet its business needs, the BBC hires thousands of freelancers every year, covering a number of different roles both on-air and off-air.** In 2017-18, the BBC hired some 60,000 freelancers, including actors, entertainers and off-air workers, such as camera operators. Hiring freelancers is common practice in the media industry and gives broadcasters the flexibility to make changes quickly that reflect programming and audience needs. For freelance roles, individuals can operate as sole-traders or through a personal service company (PSC), and may be employed or self-employed for tax purposes. In 2017-18 the BBC had contracts with 5,145 PSCs, on which it spent a total of £84 million (paragraphs 1.5 and 2.2, and Figures 3 and 7).

**2 Before 2013, the BBC based its decisions on whether roles were employed or self-employed for tax purposes on its understanding of HM Revenue & Customs' (HMRC) guidance and, for on-air presenters, of industry practice.** According to the BBC, correctly assessing employment status for tax purposes is crucial in order to help it determine what contracting models can be used to hire freelancers. At this time, the BBC bore the risk of incorrectly assessing the employment status of individuals it hired directly, either as employees or as freelance sole-traders, and of the associated tax liabilities of such misclassification. For those it engaged indirectly through PSCs, the responsibility for assessing employment status and for paying the correct tax rested with the PSC. The BBC made use of HMRC's general guidance on employment status and media-specific guidance covering most on-air and off-air roles. The latter set out what roles HMRC considered to be self-employed for tax purposes and therefore what the correct tax treatment was. However, there was a lack of clear media-specific HMRC guidance for on-air television, and for radio presenters on long-term engagements. The BBC considered these roles to be self-employed in line with its understanding of industry practice (paragraphs 1.7, 1.11 and 2.3 and Figure 5).

### **3 Between 2004 and 2013, the BBC developed policies for what contracting method could or should be used when hiring freelancers in on-air roles.**

In the early 2000s, the BBC had no preference as to whether it engaged freelancers directly as sole-traders or indirectly through PSCs. It considered presenting roles to be self-employed, and therefore it did not deduct PAYE or employee's national insurance contributions, or pay employer's national insurance contributions. However, when the BBC became uncertain about the employment status for tax purposes of, in particular, the BBC's news presenters in 2004, following an HMRC review of 100 BBC cases, and its other television and radio presenters in 2008, after an HMRC review of the commercial radio industry in 2007. It then introduced policies requiring freelancers engaged in longer-term or higher-value presenter roles to be hired through PSCs. This reduced the risk for the BBC (paragraphs 2.3 to 2.6 and Figure 8).

### **4 In response to a Committee of Public Accounts report in 2012, the BBC revised its policies.**

From November 2013, the BBC began to use a new test for assessing the employment status of freelance television presenters and radio news presenters, while continuing to use the radio industry guidelines for non-news radio presenters.<sup>2</sup> It developed this new test, with Deloitte and in liaison with HMRC. The BBC also adopted a new policy for freelance television and radio news presenters, under which it offered those it assessed as employed for tax purposes the option of one of two new on-air talent (OAT) employment contracts. According to the BBC, all its news presenters who had previously been engaged through PSCs moved onto an OAT employment contract. By March 2018, the BBC had 90 OAT contracts (paragraphs 2.7, 2.10 to 2.12 and Figures 9 and 10).

## Government reforms and the BBC's response

### **5 A change in responsibilities in 2017 altered the BBC's relationship with some of its freelancers.**

In April 2017, the government transferred responsibility for determining the employment status for tax purposes of people hired through PSCs from PSCs themselves to the public sector bodies hiring them. This meant that the BBC became responsible, for the first time, for deducting income tax and national insurance from payments to PSCs if it determined that the individual hired through the PSC was employed for tax purposes. The BBC had raised concerns about this in a consultation response to HMRC in August 2016, stating that it doubted whether its accounting and payroll systems would be ready, and its staff trained, for the 2017 changes. Others responding to the consultation also raised similar concerns. The BBC also raised concerns in March 2017 about the number of potential determinations it faced, the associated resource implications and the potential impact on the individuals concerned (paragraphs 3.4 to 3.7 and 4.2 and Figure 13).

<sup>2</sup> The radio industry guidelines were published in 2008 after HMRC's 2007 review of the commercial radio sector.

**6 The BBC used HMRC's new Check Employment Status for Tax (CEST) tool to assess the status of its freelancers.** HMRC introduced CEST in March 2017 to help users to assess employment status for tax purposes in all sectors of the economy. The BBC was involved in discussions with HMRC about the tool's development from August 2016. The first version of the tool that HMRC said it would stand behind was available to the BBC on 20 February 2017. This left the BBC with less than two months to test, give feedback and adopt the tool prior to the introduction of its new responsibilities in April 2017. Although its use is not mandatory, the BBC adopted the tool as HMRC had made it clear that it would stand behind CEST. The BBC's use of its 2013 test for TV and radio news presenters was only meant to be temporary, until HMRC introduced its own revised tool, and in 2015-16 HMRC had queried the BBC's use of this test in certain cases. HMRC had also told the BBC of its intention to replace the radio industry guidelines with a revised tool, although, as at October 2018, the guidelines were still in place. HMRC had questioned the BBC's application of these guidelines in summer 2016 (paragraphs 2.10, 2.13, 3.2, 3.3, 3.6 and 3.8).

**7 Use of HMRC's CEST tool generated a different employment status for tax purposes in many cases, compared to the BBC's use of its own assessment test and HMRC guidance.** The BBC's use of CEST initially produced an 'unable to determine' employment status result in almost half of 255 on-air cases assessed, which reduced to zero following discussions with, and more guidance from, HMRC. It was not until August 2017, following these discussions and guidance, that the BBC felt sufficiently confident to rely on CEST. Between August 2017 and June 2018, the BBC assessed 663 on-air freelancers using CEST, 92% of whom received an 'employed for tax purposes' determination. This contrasts with the situation before April 2017 where the BBC had assessed the majority of on-air freelancers as self-employed, using either its own assessment test or the radio industry guidelines. For on-air roles, the BBC has continued to use the additional guidance it received from HMRC along with CEST. According to HMRC, CEST is a live tool that it is committed to keeping under review. To improve guidance available to those working in the media industry, the BBC, alongside commercial media organisations, is currently working with HMRC on updating HMRC's employment status manual (paragraphs 3.2, 3.9, 3.11 and 3.13).

The impact of the BBC's response

**8 Between April and September 2017 the BBC paid £8.3 million of tax on account to HMRC to avoid any penalty charges for not paying tax that was potentially due.** The BBC made payments of income tax and national insurance contributions on account to HMRC totalling £8.3 million, to cover any potential tax that it should have paid between April 2017 and the time at which an individual's status became clear later in the year. Once the BBC had sufficient confidence in CEST, from August 2017, it started to recoup this money when it was certain about an individual's employment status for tax purposes. It has not yet fully done so, in part because of concerns raised by individuals. By June 2018, it was yet to recoup £2.9 million (paragraphs 4.6 and 4.7).

**9 Implementation of the 2017 reforms has adversely affected the BBC's relationship with some of its presenters.** Some individuals disagreed with the determination CEST gave and an open letter from a presenters group in March 2018, representing over 170 presenters, expressed dissatisfaction with how the BBC handled the April 2017 changes. Some individuals claim that the BBC bears some responsibility in relation to HMRC's tax demands relating to before April 2017, as they only started operating through PSCs because the BBC required them to. They also feel that they received misleading or limited information from the BBC at this time. According to the BBC, it required these people to set up PSCs as they had most knowledge of their own circumstances and were best placed to ensure the correct payment of tax. We have seen evidence of the BBC telling those it asked to form PSCs to seek independent advice from a professional financial advisor, but cannot say whether it did this in every case as we have not undertaken a detailed audit of individual cases. Individuals have also expressed a fear that a change in their assessed employment status as a result of CEST could open them up to retrospective HMRC investigations (paragraphs 2.14, 2.15 and 4.9 to 4.11).

**10 The BBC has taken steps to help affected individuals.** By August 2018, the BBC paid bridging loans to three people, totalling £2,550, to enable them to overcome short-term cash-flow problems and has given a contribution towards additional book-keeping fees arising from the IR35 compliance changes to 33 people with PSCs, totalling almost £12,000. In addition, in March 2018, the BBC announced its intention to set up an independent mediation process for cases where on-air presenters, who were hired through PSCs, believe the BBC bears some responsibility in relation to HMRC demands for employers' national insurance contributions relating to before April 2017. It has yet to finalise this process as it has approached HMRC to discuss the possibility of an alternative approach to resolving historical cases, which may potentially offer advantages over the mediation process (paragraphs 4.8 and 4.10).

**11 Issues relating to the BBC's relationship with its freelancers remain unresolved and may have financial implications for the BBC.** In its *Annual Report and Accounts 2017-18*, the BBC recognised potential financial consequences as a result of issues surrounding freelancers' employment status as a contingent liability. However, it did not recognise a provision for this matter because the process and outcome were uncertain.<sup>3</sup> This uncertainty remains and could be affected by other possible actions taken by affected individuals. By May 2018, the BBC estimated that some 800 presenters, nearly 300 of whom were hired through PSCs, warranted further review as they were at risk of being challenged by HMRC. This could involve tax arrears for the BBC and for the PSCs. According to HMRC, as at October 2018, there were about 100 open investigations into BBC-related PSCs. All of these concerned arrears of tax before the April 2017 changes. All open cases relate to tax years prior to 2017 and the vast majority of these were opened prior to the reform (paragraphs 3.11, 4.11 and 4.12).

<sup>3</sup> A liability is a present obligation of an entity arising from past events, which is expected to result in an outflow of economic benefits for the entity. A contingent liability is a possible liability that may occur depending on the outcome of uncertain future events. A provision is a liability of uncertain timing or amount.