
BBC

Review of Freelance
Engagement Model

25 October 2012



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25 October 2012

Dear Sirs

Review of Freelance Engagement Model

In accordance with the terms of our contact with our client the British Broadcasting Corporation (BBC) dated 15 October 2012 we enclose our report to the BBC, prepared in connection with our assignment to assist the BBC with a review of current policy and practice in relation to the engagement of certain freelance/off pay-roll individuals and specifically to consider the use of personal service companies by "talent".

We draw your attention to the sections of this report entitled "Scope" and "Limitations of Review" in which we set out the scope of our work, sources of information and the limitations of the work undertaken. In particular, the enclosed report has been prepared principally from information supplied by and obtained from discussions with the directors, employees and agents of the BBC pursuant to the scope of the work agreed in our contract with the BBC. Except where expressly stated otherwise in our report, we have not sought to verify the information provided to us by the BBC contained herein nor to perform the procedures necessary to enable us to express an audit opinion on any of the financial or non-financial information contained in this report.

Our report has been prepared solely for the information of the BBC in connection with its review of its current policies and procedures. Whilst we have consented to the BBC including this report in its submission for information purposes, no person other than the BBC is entitled to rely on our report for any purpose whatsoever and thus we accept no liability to any other person who is shown or gains access to this report. Except to the extent expressly set out in the Contract or as otherwise required by law the report may not be circulated or disclosed without our consent.

Yours faithfully

Deloitte LLP

Glossary of Terms

BBC	British Broadcasting Corporation
EFRBS	Employer Financed Retirement Benefits Scheme
FCT	Freelance Contracting Team
HMRC	Her Majesty's Revenue & Customs
IR35	Legislation concerning the tax treatment of intermediaries, introduced on 6th April 2000. Information on this legislation was first released in a press release numbered IR35: the legislation is now commonly referred to as 'IR35'.
Modus	HMRC's Film, TV and Production Industry Guidelines
NIC	National Insurance Contribution
OTS	Office of Tax Simplification
PAC	Public Accounts Committee
PAYE	Pay As You Earn
PSC	Personal Service Company
TRNG	Talent Rights Negotiation Group

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1. Executive Summary

1.1 Introduction

The BBC is a large and complex organisation; an average of 22,580 employees were employed during the BBC's financial accounting year ended 31 March 2012 (2011/12) and the BBC processed 259,305 transactions (new contracts and payments as reported by the BBC's freelancer engagement systems) with 64,447 on air and off air freelancers in that year.

We have taken a risk based approach to reviewing the entire population of on air and off air talent, production freelancers and employees engaged by the BBC in 2011/12. Given that production freelancers are covered by specific HMRC guidelines for the industry, we considered the freelance on air talent population to be the highest priority. We therefore focussed our review on this population, extending our work to include those to whom payments were made in 2011/12 but who were engaged by the BBC in prior years. The population of freelance on air talent reviewed was thereby the complete population extant in 2011/12 (whether engaged via a PSC or as a self employed individual). Within this population, we gave particular consideration to those engaged via PSCs.

Our main recommendation from the review is that, notwithstanding our findings in relation to a high standard of compliance as noted below, the BBC should introduce a new overarching policy in relation to the engagement of freelancers, which should have at its centre a new employment status framework to be developed in conjunction with HMRC, and which should support the BBC's creative flexibility to engage/disengage talent. We have categorised the population reviewed in terms of High to Low Priority to assist the BBC in prioritising the application of any new policy to be adopted. The categories we have used are explained in 1.3.9 below.

Our review does not extend to, and nothing in this report applies to individuals engaged by independent production companies and not by the BBC. The actual scope of our work and its limitations are set out in Section 2.

We are pleased to report our key findings and recommendations from our review, in the remainder of this report.

1.2 General findings in relation to tax/NIC compliance

1. No policy of tax/NIC avoidance

We found no evidence of a BBC policy to engage with tax/ NIC avoidance.

2. High standard of tax compliance in relation to the engagement of freelancers

We conducted our review through numerous interviews with BBC personnel across the whole organisation and examination of BBC policies, guidelines and correspondence and other documentation made available to us. We have not conducted a forensic review nor did we review personal financial information which was redacted due to confidentiality. On the basis of what was provided to us, we found the BBC's policies to be well developed and effective in achieving a high standard of tax compliance in this area, particularly given the volume of activity and for an organisation of the size and complexity of the BBC.

1.3 Key findings in relation to on air talent

1. The BBC has engaged on air talent in three ways, with some examples of inconsistency

The BBC engages on air talent as self employed freelancers, employees and through PSCs.

While we appreciate that there may be minor differences in roles depending on the manner of engagement, we found certain roles to be essentially the same across all three types of engagement. In particular, there are examples of presenters in very similar roles engaged on staff contracts, as self employed individuals and also via PSCs. Also, actors were engaged mainly as sole traders but sometimes via PSCs, although actors would normally be accepted as self employed by HMRC. We recommend that any new policy to be adopted by the BBC ensures a consistent approach to engaging with individuals in the same or similar roles insofar as possible.

Table 1: Total numbers of on air talent individuals engaged with the BBC as indicated:	2011/12 On Air Talent			Total
	PSC	Self employed individual	Staff contract	
Total number of individuals/PSCs receiving either payments or new contracts in 2011/12				
Total extant in 2011/12	3,272	45,073	576	48,921
No. of transactions processed by BBC in 2011/12	24,133	176,414	n/a	200,547

The No. of transactions has been provided by BBC internal audit.

2. No evidence of tax avoidance when engaging PSCs

Based on the information and explanations provided to us, we found no evidence to suggest that the BBC has engaged with PSCs to avoid tax or NIC. We examined a sample of 108 on air talent files over past years in which PSCs were established, often pre-dating the period of this review but relevant where the PSC is still in use in 2011/12. Many files revealed that the BBC had offered individuals staff contracts or PSC contracts and had not advocated one over the other. However, negotiations revealed that the talent concerned were reluctant to accept staff contracts. They would have preferred to engage as self employed individuals but the BBC considered this to pose too high an employment status misclassification risk in many cases including, clearly, those whom HMRC had confirmed could not be regarded as self employed. This left PSCs as the offered alternative.

In the sample of files we reviewed, we found no evidence that the BBC directly advocated the use of PSCs to avoid tax/NIC. However, in two files the costs arising from the use of a PSC, including NIC, and the range of tax outcomes for the PSC and Talent were taken into account internally when considering commercial negotiations.

3. A clear policy exists for using PSCs on long term on air talent contracts

The BBC currently operates a policy of engaging (as specified in BBC guidelines) on air talent through PSCs where contracts are likely to exceed 6 months in duration or over £10K in value (with a small amount of latitude around these limits), rather than engaging them as employed or self employed following the application of employment status tests. The BBC told us that the policy was enforced fairly strictly from 2009/2010 which broadly corresponds with the perception held by agents (see 6.3). It was clear that the policy evolved in response to two main issues:

- (i) Where an individual is believed to qualify as self employed, engaging directly with that individual on a self employed basis would facilitate creative flexibility which is essential for running the business as discussed in 6.1.1. However, the BBC considers that this can carry an unacceptable level of misclassification risk i.e. if HMRC later finds them to be an employee, this would give rise to unexpected and potentially substantial tax/NIC liabilities, potential penalties and interest

(regardless of the tax/NIC actually paid by the individual), at the expense of the licence fee fund. A PSC mitigates this misclassification risk from the BBC's perspective, because the PSC is liable for any PAYE/NIC arising under the relevant legislation (known as "IR35").

- (ii) Where it is believed that an individual would not qualify as self employed, engaging with the individual on a self employed basis is clearly not an option. A staff contract may be offered but current staff contracts are not viewed as optimal for facilitating creative flexibility while PSCs have provided a convenient alternative to achieve flexibility in such cases.

Nonetheless, there is a category of individuals where neither misclassification risk nor creative flexibility appear to be relevant and where this is the case we have included this group as High Priority for detailed review by the BBC in our analyses in this report.

In addition, many on air talent, in particular key talent do not want to engage as employees for various reasons including, for example, having complex business affairs with many sources of income that they wish to manage independently through their PSCs; international talent find it easier to contract in overseas jurisdictions through their PSCs; others may have operated as a sole trader for many years in the past and simply do not wish to return to employment status. However, as far as HMRC is concerned, engaging with PSCs can result in a loss of transparency and a risk of incorrect PAYE/NIC through non compliance by the PSC, or as a result of arguments that IR35 does not apply as explained in section 7.

- 4. Default to engage via PSCs is not the norm for the film, television and production industry**
PSCs are the BBC's default choice for long term freelance talent engagements where employment has not normally been considered as an alternative. Based on our broad experience from working in the industry we have not found other film, TV or production companies to take the same default position on PSCs; while they will happily engage with PSCs if they exist, they are more prepared to engage on a self employed basis with on air talent. However, the volume of contributors the BBC engages with annually is significantly greater than other organisations in this industry and the BBC is risk averse in order to protect the licence fee fund. A new policy incorporating an unambiguous employment status framework should help the BBC to manage this risk more effectively through appropriate classification of status with less reliance on PSCs.
- 5. Engaging with PSCs means that HMRC is responsible for enforcing compliance**
Engaging with PSCs is not illegal and there is no legal obligation for the BBC to ensure that PSCs comply with their tax affairs, nor would the BBC be able to police or enforce such an obligation.

However, engaging with PSCs in effect transfers the onus of determining employment status away from the BBC (or any other employer) to the talent and HMRC. It is burdensome for HMRC to police and enforce IR35 which is widely considered to be ineffective. A consequence of this is that incorrect tax/NIC may be paid by PSCs. While current legislation does not require the BBC to take responsibility for this, nevertheless it poses reputational issues to the extent that engaging with PSCs can also "generate suspicions of complicity in tax avoidance".

6. A single clear new policy is required

The BBC should consider a new overarching policy which should have the key aims of:

- achieving greater consistency when engaging individuals who are performing largely equivalent roles and activities;

- establishing and applying rigorously a new employment status test to be agreed with HMRC, thereby considerably reducing the ‘perceived need’ for PSCs with which the BBC engages;
- improving transparency (i) so that the tax/NIC treatment of employees and self employed individuals is clearer and more certain than that relating to PSCs, and (ii) from of public perception point of view;
- protecting the BBC’s ability to have creative flexibility to serve its audience;
- ensuring that after employment status has been considered, the offer of employed or self employed contracts with individuals is considered first. The policy should also specify when PSC engagements may be acceptable in limited circumstances; and
- reducing the overall number of PSCs with which the BBC engages and agreeing extended and improved reporting to HMRC in respect of all freelance engagements which should assist HMRC in achieving more effective compliance.

7. Engagement with HMRC and new “employment status framework” required

The employment status misclassification risk could be greatly reduced if the BBC were able to engage with HMRC to develop a framework for determining employment status of the BBC’s on air talent, which should be incorporated into any new policy. We have discussed this with senior HMRC officials and initial discussions have been constructive and encouraging. Whilst challenging, it is anticipated that this can be agreed and put in place to apply to new contracts and contract renewals taking place on or after 1 April 2013.

We recommend that any new framework for determining employment status should be based on clear and objective principles and should be specific on the status of BBC roles exhibiting prescribed criteria. Each role within the BBC’s on air talent population (both PSCs and self employed individuals) should be tested against the framework, commencing with those categorised as High Priority. This should ensure that (i) the framework is fit for purpose and (ii) that when any new policy is applied, it achieves the greatest possible clarity reducing the risk of misclassification as PSC engagements are replaced by employed or self employed individual engagements.

8. Many individuals are seen as the face or voice of the BBC

We have found that there are a number of individuals engaged through PSCs where their roles would be considered by the public to be “the face or voice of the BBC” and who might, notwithstanding the technical tax analysis, be expected to be employees. It is this population that, broadly speaking, most lends itself to being engaged as employees and indeed, absent engagement by PSC, appear to have the characteristics of ‘staff’ for tax purposes although individually, employment status would need to be considered on a case by case basis.

9. Applying any new BBC policy to the on air talent population

Below, we have categorised the on air talent engaged via PSCs and as self employed individuals, based on their length of contract, time commitment to the BBC and descriptions/explanations of their roles and outputs. Our categorisation ranges from High to Low Priority as described in the table. The table shows the numbers of individuals/PSCs with new contracts entered into in 2011/12 with aggregate value of £50,000 or more plus those paid £50,000 or more in 2011/12 in relation to earlier contracts.

Due to the number of individuals involved and the time available, it was not possible to review *all* individual contracts or detailed personal facts and circumstances in reaching our categorisation. We have not engaged with the individuals concerned, their agents, accountants, or HMRC, some or all of which might be required to more precisely determine their employment status.

We recommend that once the BBC has agreed a status framework with HMRC (over a timeframe to be agreed with HMRC); this should be incorporated into any new policy and applied to the individuals concerned. We note that there will be a period of transition before this process is complete.

Table 2: Deloitte categorisation of on air freelance talent extant in 2011/12	PSC	Self employed individual	Total	Representing
High priority	96	35	131	Individuals who, in our view, have engagements with attributes akin to employment and should be reviewed by the BBC as a high priority.
Radio	207	14	221	Radio presenters/DJs which the BBC considers qualify as self employed under the Radio Industry Guidelines 2008 but where we consider that the tests in HMRC's guidance should be discussed with HMRC and reapplied as a high priority.
Medium priority	53	34	87	Individuals who, in our view, have engagements with attributes akin to both employment and self employment and should be reviewed by the BBC as a medium priority.
Low priority	45	23	68	Individuals we would normally consider to be self employed.
Low - Actors	43	155	198	Actors we would normally consider to be self employed under existing case law. However, the BBC should review the full extent of their roles against the relevant case law tests and the manner in which they are engaged to ensure consistency.
Other	25	74	99	Recorded as PSCs/individuals but actually representing payments of royalties, payments to deceased estates, etc.
	469	335	804	

For completeness we note that the **469** PSC population is made up of **393** PSCs with new contracts totalling more than £50K issued in 2011/12 **plus 76** PSCs receiving payments of more than £50k during 2011/12 from contracts that were already in existence at 1 April 2011.

Similarly, the **335** self employed population is made up of **261** new contracts totalling more than £50K issued in 2011/12 plus **74** self employed individuals receiving payments of more than £50K during 2011/12 from contracts already in existence at 1 April 2011.

10. Management information systems should be reviewed to make control and governance easier

During the course of our review it was apparent that the management information systems used by the BBC were designed solely for the BBC's operational requirements and long pre-date the IR35 legislation: given that to date there has not been (and there still isn't) any legal requirement for the BBC to monitor PSC compliance, these systems were not historically designed with the purpose of providing management with clear oversight of the various types of engagement from the perspective of tax compliance. This has made our review difficult but more importantly we recommend that the BBC considers updating its systems to improve control and governance in this area.

1.4 Key findings in relation to off air freelancers

HMRC guidelines ("modus") applies for behind camera workers

The vast majority of individuals engaged as behind camera workers are considered to be self employed under HMRC guidelines. Based on the information provided during our review of this population, the BBC appears to have operated the modus correctly.

However the BBC's website summarised the modus but this summary appeared to refer to the 1996 version of the modus (the latest version was updated in August 2012) and we noted that, other than to the extent of any HMRC accepted practice when operating the modus, certain procedures when operating the modus should be adhered to more rigorously to ensure no inadvertent compliance failures. For example, for certain roles under the modus, it needs to be shown that the individual was either seeking work or working elsewhere in between engagements; however, this approach has not been taken consistently across the organisation which presents a risk that the modus may not apply in all cases. We stress that this is a process issue that is capable of being rectified; it does not amount to tax avoidance. See 4.2 for further detail of our key findings in relation to off air freelancers.

1.5 Key findings in relation to agency workers

1. No influence over how employment agency (Reed) engages with its workers

Reed is responsible for engaging the workers it supplies to its clients including the BBC. Reed engages workers directly as individuals, through third parties such as umbrella companies (such companies typically engage workers as their own employees and make them available to agencies), other agencies, or by Reed contracting with an individual's PSC.

It is the responsibility of Reed to withhold any tax and NIC as appropriate under the agency legislation and so this group represents a Low Priority for consideration under any new BBC policy.

2. Long term engagements exist with Reed

We identified 37 engagements that were for 2 years or more, 14 engagements of which were between 3 and 4 years and 3 of which were between 4 and 5 years. Fixed term employment contracts could be considered as alternatives for projects of such length.

In addition, we recommend that the BBC introduces processes and controls to ensure that engaging via Reed will operate consistently with any new policy the BBC adopts going forward.

1.6 Conclusions and key recommendations

As a public body, the BBC wishes to consider how it can assist HMRC reduce the potential for non compliance by PSCs and ensure greater transparency when engaging with the many freelancers with whom it needs to engage to operate its business in a commercial environment, including creative flexibility to engage/disengage talent.

We recommend that the BBC adapts its operating model and takes the following actions in order to:

- ensure that the BBC maintains the highest standards and avoids accusations of 'facilitating' any potential unacceptable tax avoidance;
- take account of changes in government policy on engaging individuals in central government and a strong feeling that other public bodies should consider their position and adapt accordingly; and
- insofar as commercially viable to do so, to ensure:
 - consistency of treatment of individuals in similar roles; and
 - overall, to reduce the number of PSCs with which the BBC engages.

The BBC should consider achieving the above objectives by taking the following actions:

- Introducing a new, clear, overarching policy to govern the freelancer engagement process. Such a policy should have at its heart, measures to ensure an unambiguous

employment status framework is applied effectively and consistently, with individuals being re-tested periodically;

- Seeking to agree such employment status framework with HMRC in order to correctly determine whether the status of the BBC's on air talent is (or would be if engaged directly with the BBC) freelance or employed. In a first meeting, HMRC has indicated it would want to engage with the BBC in this exercise;
- Agreement of the status framework should be extended to include a clarification of the Radio Industry Guidelines as applied to radio DJs;
- Conducting a detailed review of personal facts and circumstances of PSCs we have categorised as high priority, radio and medium priority. Ultimately, every PSC and self employed individual not covered by the existing production modus should be reviewed against the new BBC policy, and re-engaged to comply with that new policy applied consistently. This will include engaging with the individuals concerned, their agents, accountants, and/or HMRC, in order to more precisely determine the employment status of the individuals involved;
- The application of any new policy should lead to individuals being considered for engagement in the first instance on staff contracts or as sole traders. Separate consideration should then be given to the form of entities with which the BBC will engage once the Talent has satisfied the tax test as being non-staff: self employed individuals could in theory engage individually, or through PSCs or partnerships to the extent the new BBC policy allows for this;
- Establishing a clear transition plan to manage the process of migrating any affected freelancers from existing contracts to new terms reflecting the revised policy the BBC will adopt in relation to such engagements. The BBC should start to implement its new policy at the earliest opportunity but we recognise a more forensic review of the relevant individuals will be required by the BBC, a status framework will need to be agreed with HMRC and existing contractual obligations may need to be allowed to work out;
- Making appropriate changes to other policies, processes and systems to give management a clearer line of sight over the different types of contract in use at any one time, while also achieving greater consistency of approach;
- Making contractual changes in line with those being considered by central government bodies (and the NHS as we understand it) providing rights for the engager to request information to check on the compliance position of the engaged: this has been discussed with the BBC and we understand that such clauses will shortly be incorporated into the BBC's future long term freelance contracts; and
- Increased liaison with and disclosure to HMRC in respect of all freelancer engagements. The scope of such disclosure would need to be agreed with HMRC to the extent it is additional to information already provided under current legislation (see 7.1.1). It is envisaged that this would include as a minimum:
 - a schedule identifying individuals with their PSCs to whom payments are made gross each tax year;
 - the quantum of such payments;
 - details of PSCs/individuals where the BBC has carried out compliance checks under the new contractual terms noted above; and
 - findings from such checks, the scope of which should be agreed with HMRC.
- A post implementation review should be carried out in, say, a year's time to report on progress made with the implementation of any new policy.

2. Terms of reference

2.1 Scope

During a hearing by the Public Accounts Committee (PAC) on 16 July 2012, the BBC undertook to review its current freelance engagement model and report to the PAC during October 2012.

Deloitte has been appointed to assist the BBC by conducting an independent review of its freelance operating model and specifically to consider and report to the BBC on:

- The BBC's compliance with current income tax and National Insurance Contributions (NIC) legislation in the context of its freelance operating model;
- The BBC's processes for identifying and engaging freelancers and paying the appropriate amount of tax and NIC;
- Any complexities associated with contracting in this industry and to consider whether the BBC's processes can be improved to provide stronger assurance that the right amount of tax and NIC is actually paid by the BBC and freelance workers;
- How the BBC's freelance engagement model compares with wider industry groups.

The deliverables agreed and provided are:

- Regular updates to the BBC's project steering group on progress and findings arising from our field work, presented orally;
- Upon completion of our field work to produce a report detailing the work carried out, information collated, specific findings, observations, conclusions and recommendations;
- In addition, we have attended and presented our initial findings orally to the Executive Audit Committee and met with senior HMRC officials on 15th October 2012.

2.2 Limitations of review

Our review was not an audit or substitute for an audit nor does it constitute a forensic investigation. Our work was limited by the time available, scope of the review, information available and restricted access to confidential information sources which initially slowed progress and resulted in some of our work being conducted in a compressed timeframe.

Although ultimately resolved, there has been considerable difficulty in ensuring the data is complete and comprehensive particularly in respect of establishing the population covers all "on air" in 2011/12 as opposed to just new contracts in that year. The systems were not designed to deliver up the information in the manner we were seeking. This was resolved by extracting data from two sources: new contracts in 2011/12 and payments made in 2011/12 relating to on air contracts entered into in prior years.

In order to test the complete population of extant on air talent in 2011/12, details (other than personal financial data) for the individuals concerned were extracted for us from BBC management information systems by BBC's internal audit department from two sources: (i) Individuals/PSCs with contracts entered into during 2011/12 from the ACON system, and (ii) payments made to individuals/PSCs in 2011/12 from payment records. After eliminating individuals/PSCs present in both sources, this provided the total number of on air freelancers extant during 2011/12.

Having established the extant population, attempts to band the population by contract value and payment bands above and below £50,000 proved difficult due to a group of overlapping individuals who were included in the population of contracts entered into in 2011/12 below £50,000, and also in the population of payments made in 2011/12 of more than £50,000 relating to contracts entered into in earlier years. This has not impacted on our analysis work, but to avoid confusion, we have shown those receiving payments in 2011/12 relating to earlier contracts as a single figure where relevant in Table 1. We have then separately shown the numbers above £50,000 which we have analysed on a line by line basis as shown in Table 2.

We were not provided with personal levels of pay or any other form of financial data relating to any specific individual engaged with the BBC, which the BBC treats as highly confidential without exception. Levels of pay can be relevant to forming an assessment of an individual's status and accordingly may assist in informing the formulation of any new policy that might be adopted going forward.

While we have requested sight of data and documents, either specific or that which contains a theme, we have relied on internal audit to provide full and accurate information to us, recognising that personal fee data relating to on air talent was not released to us.

Time constraints have meant that contracts for all existing freelancers, in particular those who might be subject to any new policy going forward could not be provided to us. However, a detailed contractual review would be an important element of categorisation for any new policy the BBC decides to adopt, including a new status framework to be agreed with HMRC.

In order to complete our review with meaningful analysis over a short time frame, we have used sample testing and progressively eliminated those whom we consider should be unaffected by any new policy, to focus on the residual population who we consider should be revised under any such new policy as a matter of high priority. **This last group comprised 469 on air freelances engaged through PSCs and 335 engaged as self employed individuals; a total of 804 individuals/PSCs whose roles we reviewed 100% on a line by line basis, considering length of time, level of commitment and a description of their output and roles within the BBC.**

Details of off air freelancers were only provided to us in relation to contracts entered into during 2011/12. No records were provided of payments made in respect of prior year contracts, however, with a small number of exceptions explained below, this population was considered Low Risk with no need to analyse any further in this exercise.

Our review and report do not consider the employment law implications in relation to the BBC's processes and practices regarding the engagement of employees or freelancers, although we do make certain recommendations relating to contractual terms that may be considered going forward.

Our review and report do not consider the specific processes for engaging staff on employment contracts who are paid through the payroll, other than a comparison of roles with those engaged on similar roles engaged off payroll, and in the overall context of the decision making process as to whether flexible resource is engaged under the freelancer model or as a casual or temporary employee.

Where anecdotal evidence has been gathered from key BBC personnel, third parties such as agents and from analysis of individual contractual arrangements, this has been provided on a confidential basis and so we are unable to attribute this to any named individual without first being released from confidentiality undertakings.

2.3 Structure of report

Our report is structured in 8 sections. Following the executive summary and this section explaining the scope and areas of work undertaken during our review, Sections 3 to 5 describe our work and findings from the review. Section 6 considers industry practice while Section 7 sets out the background to the review from political and commercial viewpoints and explains the relevant tax and NIC legislation applicable in relation to employment status and personal service companies. We strongly recommend the reader to become familiar with Section 7, which we consider is fundamental to a proper understanding of the issues at stake.

Section 8 comprises the appendix referenced in the main body of this report.

2.4 Summary of the BBC's workforce

The BBC's workforce is segmented into four categories:

- **Employees (staff contracts paid via the payroll)**, including:
 - those on continuing employment contracts;
 - employees on fixed term contracts;
 - casual staff on short term contracts;
- **Agency workers** (typically including IT, project or temporary administrative roles) supplied by Reed Personnel Services who are contracted by the BBC to provide an end to end process of attracting, contracting and paying all temporary resource not falling within the categories above;
- **Off air freelancers** including:
 - those who, subject to conditions, are agreed to be self employed under HMRC's Film, TV and Production Industry Guidelines, referred to be the BBC as the "modus" and the Radio Industry Guidelines (including e.g. behind camera workers, producers, editors and a long list of others);
 - other off air freelancers falling outside the modus and Radio Industry Guidelines; and
- **On air freelance talent**, including:
 - actors, singers and musicians covered by specific HMRC guidelines and self-employed for tax purposes;
 - other on air talent (such as TV and radio presenters).

The table below shows the total number of individuals engaged with the BBC both on and off payroll in 2011/12. All of this data has been provided to us by BBC Internal Audit, on whom we have relied:

Table 3: Contract Type	On payroll	Off payroll - support	On and off air freelancers	Further detail can be found in:
Staff	22,013			Table 4
Agency workers (Reed)		1,087		Section 5
Off air freelance talent			11,009	Table 7 & Section 4
On air freelance talent			53,438	Table 5 & Section 3
Total	22,013	1,087	64,447	

The on air freelance talent figure of 53,438 includes 52,744 individuals contracted with in 2011/12, plus 694 individuals paid in 2011/12 relating to contracts entered into prior to 2011/12.

A more detailed summary of the on air talent and off air freelancer engagements can be found in the Appendix and we discuss some of the key features below.

Staff contracts are analysed further as follows:

Table 4: Staff Contract Type	Total Staff @ 31/03/12	Total Full Time Equivalent (FTE) @ 31/03/12	Average FTE during 2011/12
Continuing	18,911	17,603	} 21,940
Fixed-term	3,102	2,787	
Casuals		664	640
Total Staff	22,013	21,054	22,580

This staff population included 576 on air talent who were engaged on staff contracts and paid through payroll. Within this group, with the exception of 128 employees with “presenter” in the job role, the other roles were substantially different to those engaged as freelancers, including, for example, journalists.

Note that “casuals”, defined by the BBC as individuals subject to PAYE and NIC working for less than 12 consecutive weeks, are normally excluded from BBC staff numbers but have been included above for completeness.

On air freelance talent contracts extant in 2011/12 are analysed further as follows:

Table 5: Total number of PSCs/individuals with new contracts worth £50,000 or more in 2011/12, or receiving payments of £50,000 or more from earlier contracts	PSC on air freelance talent	Self employed on air freelance talent	Other on air freelance talent	Total on air freelance talent
£50K-£99,999	243	226	12	481
£100K-£149,999	102	55	7	164
£150K+	124	54	15	193
Sub total >= £50K	469	335	34	838
Contracts and payments <£50K	2,803	44,738	5,059	52,600
Grand total individuals/PSCs	3,272	45,073	5,093	53,438
No. of transactions in 2011/12	24,133	176,414	11,633	212,180

The No. of transactions has been provided by BBC internal audit. Further analysis of the 469 PSCs and 335 self employed individuals is included in the tables in the Appendix.

The 335 self employed individuals were reviewed on an individual basis. We found that 155 had acting roles which are accepted by HMRC to be self employed on the basis of leading case law. However, 48 were presenters, of whom we would consider 30 to be High Priority for further analysis. 14 were radio presenters and there were 118 other roles of which we consider only 5 to be High Priority (see Appendix). Together, the 30 and the 5 make up the total of 35 on air freelancers we have categorised as High Priority at the top of Table 2.

The balance of 44,738 self employed individuals, tended to be short term and often one off engagements also including actors, where the badges of self employment would appear to be met. To the extent that individuals meet these requirements we consider them to be Low Priority for further consideration.

The 5,093 “Other” category included bands, theatre companies, orchestras etc. which we would also consider to be Low Priority. For this reason we did not extend our testing to consider payments made in 2011/12 relating to prior year contracts with this category.

In addition to the 35 freelancers we would consider to be High Priority as noted above, we have separated Radio as a category on its own; we recommend that the 221 individuals within Radio (207 PSCs and 14 self employed individuals) should be re-tested against HMRC's Radio Industry Guidelines and the results of such re-testing should be agreed with HMRC.

Of the remaining 3,272 on air freelance talent community engaged through PSCs, we have sample checked this population (see section 3.5) and found them to be low value, short term appointments which in our opinion should be considered to be Low Priority. We therefore focussed our attention on the remaining population of 469 on air freelance PSCs, which we reviewed on an individual basis (along with the 335 self employed freelancers also considered on an individual basis as noted above).

Table 6: Deloitte categorisation of on air freelance talent extant in 2011/12	PSC contract engaged in 2011/12	Prior year PSC paid in 2011/12	Total	Key
High priority	86	10	96	Individuals who, in our view, have engagements with attributes akin to employment and should be reviewed by the BBC as a high priority.
Radio	182	25	207	Radio presenters/DJs which the BBC considers qualify as self employed under the Radio Industry Guidelines 2008 but where we consider that the tests in HMRC's guidance should be discussed with HMRC and reapplied as a high priority.
Medium priority	46	7	53	Individuals who, in our view, have engagements with attributes akin to both employment and self employment and should be reviewed by the BBC as a medium priority.
Low priority	32	13	45	Individuals we would normally consider to be self employed.
Low - Actors	27	16	43	Actors we would normally consider to be self employed under existing case law. However, the BBC should review the full extent of their roles against the relevant case law tests and the manner in which they are engaged to ensure consistency.
n/a	20	5	25	Recorded as PSCs/individuals but actually representing payments of royalties, payments to deceased estates, etc.
	393	76	469	

The Low-Actors category represents 43 actors engaged via PSCs, compared with 155 engaged as self employed individuals. When actors are engaged directly with the BBC, the BBC must account for NIC in relation to payments made to them under specific NIC regulations. These constitute a different population already specifically dealt with by HMRC.

Since actors are accepted by HMRC to be self employed under leading case law, the risk of misclassification of an actor as self employed and HMRC finding them to be employed is low. The incidence of actors in PSCs is observed to be correspondingly low, notwithstanding the NIC liability payable in respect of self employed actors noted above. This compares with other roles, where the misclassification risk is higher, and the incidence of PSCs was also found to be higher. We consider that these trends support the BBC's contention that PSCs are used predominantly to safeguard against misclassification risk and not to avoid tax/NIC.

Off air freelance talent contracts signed in 2011/12 are analysed further as follows:

Table 7: Bandings	PSC	Self Employed Individual	Company or Organisation (not PSC)	Other	Total
£50K-£99,999	122	136		1	259
£100K-£149,999	9	11			20
£150K+	9	1			10
Sub-total	140	148	-	1	289
£10K-£49,999	760	1,825	6	5	2,596
0-£9,999	1,951	5,906	87	180	8,124
Sub-total	2,711	7,731	93	185	10,720
Total individuals/PSCs	2,851	7,879	93	186	11,009
No. of Transactions in 2011/12	13,628	33,174	105	218	47,125

The No. of transactions has been provided by BBC internal audit.

Of this population, the vast majority of individuals qualify as self employed under HMRC's Film, TV and Production Industry Guidelines. To the extent that individuals meet these requirements we therefore consider them to be Low Priority for a tax status review, regardless of whether they are engaged individually or through a PSC. This is because (other than an actor which is not part of this population and has been considered in the on air freelance section above) a self employed individual engaged directly with the BBC will not result in any tax or NIC liability for the BBC; he/she should already be accounting for his/her tax and class 2 and class 4 NIC under Self Assessment.

If a self employed individual chooses to engage through a PSC, there is still no liability imposed upon the BBC as the PSC will be responsible for PAYE/NIC. Therefore, when an individual qualifies as self employed, the BBC should be fiscally indifferent as to whether it engages with him/her as an individual or through a PSC – there are no tax consequences for the BBC either way.

Based on the information provided during our review of this population, the BBC appears to have operated the modus correctly. However certain procedures when operating the modus should be adhered to more rigorously to ensure no inadvertent compliance failures. For example, for certain roles under the modus, it needs to be shown that the individual was either seeking work or working elsewhere in between engagements; however, this approach has not been taken consistently across the organisation which presents a risk that the modus may not apply in such cases. See section 4 for further detail of our key findings in this area.

Agency workers supplied by Reed in 2011/12 amounting to 1,087 workers in total were comprised of 269 engaged directly with Reed as individuals, and 818 through other means, such as directly engaged with the individual or sourced through third parties such as other agencies or umbrella companies.

Reed is not able to provide a further breakdown of these figures due to a change in its management information systems during the period. However, these are relatively low numbers and agencies commonly source workers in these various ways and take responsibility for accounting for PAYE/NIC under the agency rules, so we did not pursue the analysis any further. It is also worth noting, that the monthly reports and invoices provided to the BBC do not contain specific details of the engagement terms surrounding each individual and any PAYE/NIC paid by Reed.

We have however performed a review of agency workers by length of their engagement and our findings are set out in section 5.

Overall summary of PSC engagements

Having considered all categories of freelancer and notwithstanding that we consider off air freelance talent and Reed PSCs to be Low Priority, the table below summarises all PSC engagements during 2011/12 on the basis explained in foregoing sections of this report:

Table 8: Total number of PSCs extant in 2011/12	PSC on air freelance talent	PSC off air freelance talent	Total PSCs
£50K-£99,999	243	122	365
£100K-£149,999	102	9	111
£150K+	124	9	133
Sub Total	469	140	609
Contracts and payments <£50K	2,803	2,711	5,514
Grand Total	3,272	2,851	6,123

NB due to a change in Reed's systems, it could not confirm the number of PSCs it engaged with. Reed was only able to confirm that it supplied 818 workers by engaging with PSCs, umbrella companies and other agencies. Reed supplied 269 workers by engaging with them directly as individuals.

3. Findings – On Air Talent

3.1 Introduction

On air talent describes individuals who appear in front of camera or microphone. The roles fulfilled by this group are extensive and include amongst others, actors in long and short term commissions, presenters, singers, musicians, comedians and subject matter experts.

As set out in Table 5, during 2011/12 there were 53,438 engagements with on air freelance talent, of which 3,272 were with PSCs, 45,073 were direct with individuals and 5,093 were with other organisations such as orchestras. Further analysis of the number of off payroll engagements stratified by engagement type and fee range for 2011/12 can be found in the tables in the Appendix.

3.2 Key findings and recommendations

As a matter of high priority and in accordance with a new policy, the BBC should investigate all aspects of the relationship in 96 of the 469 PSC engagements entered into with on air talent with values exceeding £50,000 per annum. We also recommend that the BBC develops a plan to transition High Priority PSCs to employment engagements (section 3.5) where appropriate; this is the group that we consider would most likely be staff in the absence of their PSCs, subject to a detailed review of facts and circumstances of each individual concerned.

We recommend that any new BBC policy contains a detailed framework for determining the status of on air talent as freelance or employed, derived specifically from the BBC's actual talent needs, is agreed with HMRC. This will significantly mitigate the risk of the BBC making a bona fide assessment that an individual is self employed, only to find that HMRC later considers the individual is to be an employee.

The potential scale of this misclassification risk is one factor driving policy on the use of PSCs for those on air talent who might otherwise qualify to be engaged as self employed (section 3.6.1). This is effective in transferring responsibility and liability to the talent, but the burden this places on HMRC is one reason why IR35 has become ineffective.

There is evidence to suggest that a methodical application of the conditions set out in the presenter guidelines, to engage freelance contracts on PSCs where these are over 6 months in duration or more than £10K in value has been applied more strictly since 2009/10, albeit with a few exceptions. Shorter term arrangements have been offered on a self employed basis, but where longer term engagements are required, the only route is through a PSC (section 3.6.2).

We conducted a file review of 108 on air talent files and found evidence that the BBC offered a choice between staff contract and PSC to self employed individuals when it was decided that they did not qualify for self employed status following an HMRC review late in 2007. However, in the main, we found that individuals either wanted to engage on a PSC basis, or the BBC policy on engaging with them on a PSC basis for long term contracts over 6months or £10K was the default position taken.

We recommend introducing a new step in the engagement process by which on air talent are subject to a new overarching policy on engagement which first considers employment status and the offer of employed or self employed contracts according to a detailed framework to be agreed with HMRC. The new policy should incorporate guidelines governing the acceptability of engaging self employed freelancers through corporate vehicles, partnerships or other legal forms.

Although we have not been provided with contracts to compare employed on air talent with those engaged through PSCs performing similar roles, we were advised by those in News responsible for engaging on air talent that in many cases there is little distinction between the two. Regardless of the detailed tax analysis at section 7.2.1 we recommend that the BBC, in developing any new policy for on air talent, ensures a consistency of contractual approach where roles are broadly similar. Further we recommend making appropriate changes to policies, processes and systems to give management a clearer line of sight over the different types of contract in use at any one time to enable this consistent approach to be maintained (section 3.6.4).

The pragmatic approach that fast fee and short talk payments are made on a self employed basis presents a risk that some misclassification may occur with regular contributors. Recognising that this is not an immediate priority in the context of our other recommendations, a process for managing the misclassification risk with regard to such payments should be considered, and agreed with HMRC (section 3.6.5).

3.3 Summary of how on air talent is engaged across the BBC

The majority of these engagements are for small one off contributions, where payments are less than £1,000 per contribution and the individual can be engaged directly by the production team as either a self employed individual or as a PSC. These engagements are referred to as fast fee or short talk payments, which denote the system through which the payments are made.

TRNG is the team responsible for managing the BBC's framework and collective agreements for Talent and control all engagements with on air talent who are engaged either directly as a self employed individual or through their own PSC.

The remit of the TRNG team is to control the fees and contractual terms by which the BBC's in-house programme makers engage a wide range of performers, writers, composers and other contributors, and to use copyright works such as music, commercial recording literary works, photographs and artistic works on standard conditions.

Working within these framework agreements, TRNG is responsible for:

- Negotiating contracts and fees for contributors such as actors, musicians, presenters, writers and composers;
- Ensuring the necessary rights in contributions are acquired to enable the BBC to produce broadcast and otherwise exploit its programmes and content;
- Obtaining licences for the use of existing copyright works, such as artistic works, photographs, and commercial recordings;
- Managing contracts, and payment of engagement fees and repeat fees;
- Managing secondary payments, such as royalties due to contributors from programme sales and other exploitation by BBC Worldwide and by co-producers.

3.4 Summary of policies and guidance and comparison with HMRC guidance

While there does not appear to be a single overarching policy for the TRNG team to refer to when engaging on air talent, there are specific guidelines developed by the BBC for presenters, DJs, commentators, pundits and other similar on air talent who are engaged for long term bookings for radio, television and other BBC output. The guidelines go on to state that they do not apply to talent covered by Equity/MU or Writers Guild terms, but if such a contributor is being engaged for a long term booking involving a substantial commitment, further advice should be taken from TRNG on the most appropriate form of contract/contracting party.

Key aspects of the written guidelines are:

- That on air talent is subject to the same employment status tests as everyone else at the BBC but that it is impossible for the BBC to review the circumstances of every individual;
- The BBC would always recommend that an individual takes independent advice (regarding their employment status and the setting up of a service company);
- It is the BBC's contracting policy for on air talent/other contributors/consultants to contract via service companies/partnerships, rather than as sole traders, if the BBC does not consider the proposed relationship to be one of employment, or if employment terms are offered, but not accepted.

The guidelines provide for a series of tests to be applied in determining whether the on air talent is seen as employed or self employed. While they provide a good framework for decision making, this is a subjective area and without specific training there is always the risk for inconsistency in application. A more precise framework agreement with HMRC as suggested at 3.6.1 would help to mitigate this risk.

Beyond this guidance there is not a clear policy in place giving consideration as to whether the use of a PSC is the most appropriate method of engagement. We were advised that an individual would likely request a particular method of engagement during their initial negotiations and that provided there was no objection from TRNG, this would be the method used. The interviewees also said that typically, when a particular method of engagement had been agreed upon at the outset of the individual's relationship with the BBC, this method would be reused during each subsequent renewal of their contract.

A flowchart was provided to us which highlighted that where an individual is to be engaged via a service company, consideration may be given to paying an additional amount to the PSC to cover the employer's NIC that the PSC might have to pay, we were told that in practice this formed but part of overall negotiations and we found evidence that this was the case in our file reviews.

We reviewed 108 on air talent files and found no evidence in this sample that the BBC directly advocated the use of PSCs to avoid tax/NIC. However, in two files the costs arising from the use of a PSC, including NIC, and the range of tax outcomes for the PSC and Talent were taken into account internally when considering commercial negotiations.

We noted that after applying the tests in the guidelines where the result was that the individual could be treated as self employed, but the individual has a PSC anyway, it will be possible for the individual to engage either via the PSC or directly with the BBC as an individual.

Our review has established that where an individual is to be engaged for longer than 6 months or earn fees in excess of £10,000 per annum from the contract, BBC policy is to engage with them through a PSC as the default position. We noted exceptions to this were when the individual's accountant was able to demonstrate that they were self employed, for example, by demonstrating that the Presenter does similar work for other organisations.

From HMRC's perspective, those on air engagements governed by union contracts can be treated as self employed and based on our sample review we are satisfied that the BBC are compliant in this respect. From an NIC perspective we have been advised by the BBC that all payments made to on air talent under such contracts have been subject to NIC since 6 April 2011 in line with HMRC guidance issued post the Upper Tribunal's decision in the ITV Services case. Some payments made prior to this date; mainly to those on Musician's Union contracts were not subject to NIC which is consistent with HMRC's guidelines and specific agreements with the Musician's Union with regard to their members' contracts applying during that period.

There are no specific requirements imposed by HMRC on those organisations that engage with PSCs; as set out in section 7.2.1, IR35 does place specific requirements on the PSC. The exception relates to engagement of office holders, which is not relevant to the BBC as their policy is not to engage office holders or individuals in management positions through PSCs.

While the wording in standard PSC contracts could be tightened up with regard to the signatories this should not undermine the intention of the contract which clearly states as being between the BBC and a PSC.

We understand from internal audit that during the course of their work they identified one instance where a PSC was not properly constituted although we understand that the matter is now being rectified. Our sample review did not identify any incorrectly structured PSC arrangements.

3.5 Sample testing of contracts

In conjunction with internal audit a sample of 50 contracts, 30 PSC and 20 self employed, were selected from a stratified population using the following bands £50,000 - £100,000, £100,000 - £150,000 and £150,000+. This sample was weighted to select more contracts with higher values and the names of the talent were considered to ensure that the sample had meaningful number of talent who would be considered the 'faces of the BBC' and represented all genres. The sample was taken from those contracts issued in 2011/12. Individual fee information was not provided.

Of the 30 PSC contracts requested 26 were readily available for review but 4 were archived; all 20 of the self employed talent contracts were made available. For reasons of confidentiality talent fee and payment information was redacted from the contacts and in some cases talent names were also redacted.

In addition we also selected 7 on air talent PSC contracts issued in 2011/12 with contract values between 0 - £50,000. Contracts were selected randomly from the stratified population to ensure a spread of contract values were reviewed.

Following our initial review of the 26 PSC contracts and our discussions with the BBC regarding our initial findings, it was decided that a sampling exercise would not be sufficient given the importance of this population. As a result our review was extended to cover all high value on air freelance talent (with contract values or payments totalling over £50,000 in 2011/12) engaged via PCSs, of which there were 469 (see Tables in the Appendix).

As part of our detailed review of the 469 PSC on air freelance talent (with contract values or payments totalling over £50,000 in 2011/12) we were provided with details of the levels of the individuals current and historic commitment to the BBC, the length of the relationship, total fees from contracts raised during 2011/12 and work delivered. This information was provided in both written summaries and via discussions with members of the talent team rather than direct sight of the contracts or correspondence. The above measures in respect of confidentiality were also applied in relation to this data.

This information was used to categorise the individuals in two ways. The first categorisation is regarding the individual's role at the BBC, namely "television presenter", "radio presenter/DJ", "actor" or "other" (where the individual has various roles across the BBC they were classified based on their biggest commitment). The second categorisation details our recommendation as to the speed/urgency with which the BBC consider the overall nature of the relationship and review the individuals future engagement terms, namely "High priority", "Medium priority" and "Low priority".

This categorisation is based on a high level review and is not determinative of the individual's actual employment status. Many factors should be considered when reaching a view on the employment

status of an individual, including some that the BBC is not necessarily privy to such as the extent of other sources of income. However our classification is intended to provide an indication to assist the BBC in forming any new policy and in prioritising its application.

See the Tables in the Appendix for a summary of priorities allocated against each categorisation.

As shown in the appended summary tables, our initial review has indicated that as a matter of high priority, the BBC should investigate all aspects of the relationship in 96 of the 469 PSC engagements. We also recommend that the BBC develops a detailed plan for any transition of high priority PSCs to employment engagements where appropriate.

The majority of these high priority relationships fall within the “presenter” category but we would again reiterate that we have not been provided with enough information to comment on the employment nature of these relationships and the “high priority” categorisation purely recommends a more detailed review is completed.

As mentioned in Section 7.2.4 and 7.2.5 of this report, HMRC will accept that Radio presenters/DJs can be considered self employed for the purposes of PAYE/NIC withholding provided certain conditions are met. In the time available, we have not been able to test whether the many individual BBC engagements satisfy these conditions so have classified all these engagements in a separate classification of “Radio” subject to being able to demonstrate the guidelines have been satisfied for each individual, again this should be considered as a high priority. **We recommend that any BBC policy to be adopted going forward should include re-testing of radio presenters considered to be a “Voice of the BBC”, against HMRC guidelines and confirmation from HMRC that those guidelines are still effective in such cases.**

The classification of actors/entertainers as low* and the separate classification of Radio presenters/DJs is based on the continuation of HMRC’s current guidance/practice. If either case law or guidance in these areas were to change these relationships would have to be reconsidered accordingly.

Within the 20 contracts reviewed relating to on air talent engaged as self employed freelancers, we noted that although policy is that these contracts should have been for less than 6 months or £10,000 fees we found that a small number of Radio DJs and presenters were engaged for periods longer than 6 months. However, we again note that if these engagements satisfy the criteria listed in HMRCs Radio Guidelines then these engagements could correctly be categorised as self employed.

In addition to our sample review of contracts, we also reviewed all (335) on air freelance talent with contract values or payments totalling over £50,000 in 2011/12 engaged as self employed individuals, as set out in the Appendix.

Our sample of the 7 PSC on air talent contracts (with contract values less than £50,000) issued in 2011/12 was selected to provide a more comprehensive overview of the population of individuals engaged via PSCs. This population are generally deemed to be of lower priority considering their level of fees. But if a new policy is adopted they should be reviewed through the same filters.

Our review identified that all 7 contracts would be Low Priority. All payments were made on a per contribution basis, 5 to individuals falling with the modus or Radio Guidelines and 2 being payments to actors/musicians.

3.6 Areas of inconsistency and risk

3.6.1 Review of documents and interviews

There was a high level of consistency between the numerous interviews we conducted and documentation we were provided, which supports the BBC's position that it has not engaged with PSCs in order to avoid tax/NIC. While the above is helpful and the documentation we have seen provides tangible evidence of the policies in place, we are mindful that some agents and various media coverage have speculated less positively. We make three observations on this:

Firstly, this is a complex area of taxation. To the extent that engaging with PSCs relates to mitigating the risk of misclassification and ensuing liabilities, such engagement might be said to be for tax *purposes*, but we have seen no evidence of any policy within the BBC to suggest this was associated with *avoidance*.

Secondly, it is always possible that individuals within an organisation the size and complexity of the BBC, might err in the execution of what would otherwise be a sound policy, so that if there have been examples of miscommunication, in such circumstances we would expect them to be limited, and not systemic issues, which is borne out by the information and explanations provided to us.

Thirdly, during our reviews, although we saw no evidence that the BBC directly advocated the use of PSCs to avoid tax/NIC in the sample of 108 files reviewed, in two of the files the costs arising from the use of a PSC, including NIC, and the range of tax outcomes for the PSC and Talent were taken into account internally when considering commercial negotiations.

We recommend that a detailed BBC specific framework for determining status of on air talent as freelance or employed is agreed with HMRC to provide more certainty with regard to status and removing the misclassification risk which is one factor driving policy on the use of PSCs for on air talent.

We also considered it appropriate to include within our review, a sample of publically available third party information (such as PSC accounts filed at Companies House); however, such information was of limited use because the accounts were invariably abbreviated accounts which do not provide any detail of income or expenditure. A few showed dividends paid and one showed the establishment of an EFRBS, a type of vehicle which has been associated with tax avoidance in other cases. The BBC advised that, if this has taken place, it is not something the BBC had knowledge of or would want to be associated with. However, we stress that in isolation, the information provided in these accounts is inconclusive of tax avoidance and so we do not comment further on such accounts in the remainder of this report.

3.6.2 Co-ordinated mailing of on air talent with long term engagements

We were advised that between April 2011 and January 2012 the Nations Contracting Teams (not TRNG) sent letters to all on air talent in Scotland and Wales with long term engagements (12 months or more as a rule of thumb) stating that due to changes in the IR35 requirements, the BBC had reviewed their own arrangements with Talent and that:

"...The BBC will now only engage on-air talent for regular longer term commitments if their services are provided through a service company or partnership. Therefore you are required to seek independent financial advice in order to discuss the nature of the changes and what this means for you..."

...I would be grateful if you could act upon this request as a matter of urgency. In the event you choose not to contract with the BBC via a service company/partnership the BBC will be unable to contractually commit to any guaranteed/regular use of your services.” [BBC italics].

We have seen copies of the letters sent out by BBC Wales and BBC Scotland and an internal note to BBC Wales from TRNG advising them:

“It is crucial that your offer [of a new long term contract or a renewal of a long term contract] is subject to contract and subject to the requirement that they deliver the services via a company/partnership...”

We were advised that this exercise had been undertaken some time prior to this in the rest of the UK.

This approach would appear to be a very strict interpretation of the BBC’s presenter guidelines to contract through PSCs on all long term freelance contracts (over 6months) or those for more than £10k.

This would appear to support a view that the default position for on air freelancers is that they are engaged through a PSC if they wish to retain a long term contract with the BBC.

3.6.3 Consideration of engagement as an employment contract

While the presenter guidelines mention that policy is to offer a PSC contract where the BBC does not consider the proposed relationship to be one of employment, or if employment terms are offered, but not accepted, we have not seen any evidence to suggest that the possibility of engagement as an employee is ever actively discussed. We have been informed that there is an assumption (other than in News) that on air presenters will be self employed freelancers.

In contrast we were advised that for existing off air employees, who are offered an on air role, their employment contract terms are revised and occasionally upon request from the individual the possibility of engaging through a PSC is discussed.

As well as the desire to protect the BBC from misclassification risk, it has been suggested that an individual may wish to be engaged via a service company rather than on a staff contract, because this gave them greater opportunity to undertake additional work outside of the contract (talent flexibility). Having reviewed the BBC’s standard PSC contract and contracts for our sample the level of control that is exerted by the BBC and restrictions on additional work outside of their PSC contract is substantial and more akin to that exerted over an employee. Nevertheless, agents have said that in practice, the BBC is reasonable and will agree additional work provided within the terms of the BBC guidelines.

Flexibility for the BBC is another factor used to support the case for a PSC engagement rather than offering an employment contract (see 6.1.1). In particular the need to refresh the format of a show by changing the on air talent with longer term contracts quickly is seen as being easier to do if they are engaged through a PSC rather than a fixed term employment contract.

3.6.4 Comparison between presenters on employment contracts and PSC contracts

We have examined a number of roles with PSCs across a number of genres within the BBC and compared these with comparable staff roles. The presenter role appeared to be the only role common in both staff and PSC engagements. We understand that presenters on staff contracts typically evolve into those roles from other roles within the BBC. In addition, the individuals can be moved around the roster more easily than freelance presenters who will contract separately for each

individual programme. There are therefore differences between presenters under different types of engagement.

However, from our discussions with those in News responsible for engaging on air talent, where such a comparison is most easily made, it is apparent that there is little distinction between employees and those engaged through PSCs in the way they carry out similar on air roles such as news anchor.

While it has been suggested that a distinction may be drawn with regard to external activities where those engaged via a PSC would appear to have more scope to pursue them than employees, the contracts we have seen give the BBC significant control over what additional activities it permits the PSC to undertake in a manner not unlike an employee.

Regardless of the detailed tax analysis at section 7.2.1 explaining that there are no legislative obligations preventing the BBC from engaging on air talent presenters through PSCs, we recommend that the BBC, in developing any new policy for on air talent, ensures a consistency of contractual approach where roles are broadly similar. Further we recommend making appropriate changes to policies, processes and systems to give management a clearer line of sight over the different types of contract in use at any one time to enable this consistent approach to be maintained.

3.6.5 Fast fees and short talks

Any talent (either PSC or self employed individual) listed on ACON can be paid via the fast fee/short talk process. There is a presumption that all such engagements are on a self employed basis regardless of whether the payment is being made to a PSC or sole trader (it was confirmed that no “on-payroll” staff talent are paid via this route).

Given the nature and frequency of such engagements and level of fee (usually less than £1000) this appears a pragmatic approach and one which HMRC does not appear to have challenged. However, given the possible volume of such payments there is a risk that misclassification may occur in relation to long standing arrangements where repeat payments regularly occur.

Recognising that this is not an immediate priority in the context of our other recommendations, a process for managing the misclassification risk with regard to payment of Fast Fees and Short Talks should be developed and agreed with HMRC. For example agreement that employment status will be reviewed when a specific number of engagements with a contributor is reached, and that payments to PSCs will be accepted as being sufficient to support the contractual position of a business to business engagement.

4. Findings – Freelancers (Off Air)

4.1 Introduction

This section relates to all off payroll engagements that are not on air talent or sourced through the Reed contract. This comprises both direct engagements and those with PSCs and covers those treated as self employed under the modus (section 7.2.4) and those treated self employed outside of the modus.

Of 11,009 off air engagements, 2,851 were with PSCs and 7,879 were with self employed individuals, while the balance were with other organisations or unclassified (see tables in the Appendix). On further analysis of the job titles of this population c.66% were engaged under the modus, c.21.5% were engaged in behind camera roles not qualifying under the modus and c.12.5% were in non modus roles.

4.2 Key findings and recommendations

The process for the engagement of off air freelancers contains a step whereby in the event of any doubt, the decision on whether to engage directly with an individual as a self employed freelancer or indirectly through his/her PSC should be escalated to the head of tax. This escalation occurs where the length of an engagement exceeds certain time thresholds (these limits differ depending on the specific circumstances) or where the freelancer has a recent engagement history which may call into question their re-engagement as a self employed individual. There is a risk that the escalation process for contentious status decisions is not working properly. We recommend that steps are taken to ensure the escalation log is regularly updated (section 4.6.1).

The BBC's web pages contain out of date versions of HMRC's modus guidance. The BBC should ensure that their intranet pages contain the most up to date modus guidelines or a link to HMRC's website where the most up to date version can be found (section 4.6.2).

Bookers are responsible for making status decisions for off air freelancers using the BBCs decision framework. The technical and subjective nature of status decisions, together with the absence of specific training present a risk of misclassification and inconsistency. As well as adopting the use of HMRC's ESI tool, the BBC should be provide those in the business who will be using this to aid status decisions with appropriate training to ensure accuracy and consistency of use (section 4.6.3).

Some productions have their own bank accounts, which could be used to pay freelancers directly. We recommend that the BBC reviews this area to establish the instance of off air freelancers being engaged outside FCT and either ensure they are brought within FCT going forward or develop a process to ensure status decision are being made that are consistent with FCT (section 4.6.4).

For particular roles under the modus, it needs to be shown that the individual was either seeking work or working elsewhere in between engagements. This approach is not used across all of the BBC and therefore presents a risk that individuals may be treated as being self employed by virtue of falling within the modus when they may not be. We recommend that all departments are required to consider whether an individual has sought work or worked elsewhere when re-engaging an individual under the modus and be able to demonstrate this (section 4.6.5).

Freelancers with contract extensions subsequently taken on as employees could lead to challenge of earlier self employed status by HMRC (section 4.6.6).

An instance of LP10 letters (namely confirmation letters from HMRC that the individual can be treated as a self employed freelancer – see section 4.6.7) not being relevant to the period of engagement was identified. A check should be undertaken to ensure that all LP10 letters held cover the engagement period concerned (section 4.6.7).

4.3 Summary of how off air freelancers are engaged across the BBC

The services of off air freelancers are used extensively across the BBC in line with the BBC's commercial requirement for flexible engagement terms.

Some divisions have significant variability in the volume of behind camera support they need in any given period. For example TV Sport will often need more support on the weekends for football coverage as well as for large sporting events such as the Olympics. Using flexible engagement terms in this way helps to keep core staff levels down to a minimum and to reduce any down time for the workforce.

Divisions with a more consistent workload make use of flexible engagement terms in a different way. For example News was more likely to use off air freelancers to supplement their workforce on an ad hoc basis for example drafting in additional camera crews where necessary to cover news stories. Whereas Drama, part of the Vision division, also use short term casual and fixed term employment contracts for individuals who would not meet the terms of the modus, on the basis that they are able to predict requirements more accurately once a commission has been accepted.

All off air freelancer engagements are processed through the Freelancer Contracting Team (FCT). The FCT was set up in 2006 to provide a centralised, consistent, processing unit for engaging with all off air freelancers across the BBC who do not appear on screen or in front of the microphone, following a review by HMRC.

Currently BBC world service and monitoring do not use the FCT system but instead operate their own processes for the engagement of off air freelancers. The volume of engagements with off air freelancers for these divisions is relatively small (<350 UK engagements in any one year). We were advised that BBC World Service will be brought into the FCT system upon the launch of Smartbook (see 4.6.3).

In broad terms, dedicated bookers in each part of the business make requests for an off air freelancer via the BBC Mybusiness on line booking system, entering details, such as the method of engagement i.e. whether the individual is engaging via a service company or directly as self employed. The FCT should check information regarding the booking and are responsible for either: accepting, rejecting or escalating the engagement for further approval.

Approximately 66% of the off air freelancer population engaged through PSCs are performing behind camera roles which qualify as self employed under HMRC's Film and TV and Production Guidelines for behind camera workers also known as the modus (see Section 7.2.4) or the Radio Industry Guidelines (see Section 7.2.5). The remainder of individuals dealt with by the FCT are those off air freelancers who do not fall under these guidelines. These engagements can then be subdivided into two groups; those with behind camera roles which (for whatever reason) do not fall under the modus or the Radio Industry Guidelines and those roles which are not involved with film, TV, radio or productions i.e. non modus.

Where individuals fall within the modus or the Radio Industry Guidelines the BBC correctly treat them as self employed individuals. Some of these individuals engage directly with the BBC as self-employed, while others may request to be engaged via their PSC.

Where individuals do not fall under the modus or the Radio Industry Guidelines they are either engaged directly by the BBC as self employed individuals or via a PSC.

4.4 Summary of policies and guidance and comparison with HMRC guidance

Currently the BBC does not have one centralised policy document for the engagement of off air freelancers. The process maps used by the FCT set out the framework in which off air freelancers are engaged by the BBC. Further guidance is available through a dedicated section on the intranet for off air freelancers, which contains guidance for users within the BBC and effectively set out the BBC's policies.

In line with request made by the booker the FCT engage off air individuals in one of three ways by using the process maps at their disposal;

- directly as self employed under the modus; or
- directly as self employed outside of the modus; or
- through a PSC.

Where the individual is engaging via a PSC, the FCT should check that the PSC is registered at Companies House. The FCT should also check that the individual providing the services is a shareholder of the company. Where there are four or more shareholders of the PSC, the request is sent to the BBC's procurement team.

The BBC's service company web pages state that:

- Due to the need for independent advice, the BBC should not encourage individuals to set themselves up as a service company;
- Where the position being offered is a staff position, then an employment contract (either fixed term or continuing) should be offered;
- In particular, a service company contract may not be appropriate where the individual is to be under the 'control' of BBC managers or is to be put in a position where they will represent the BBC externally or in a management role internally.

HMRC does not stipulate any conditions as to when it is appropriate to use a PSC. As set out in Section 7 where a PSC is used by an individual engaging with the BBC and that individual appears to be an employee (were it not for the PSC) of the BBC HMRC have the powers to apply the IR35 legislation. In doing so, they can calculate any income tax and NIC due on the earnings from the engagement in question as if the individual was employed by the BBC.

The BBC's policy in this area applies additional conditions which would not necessarily be applied by other employers. Further the BBC's policy in applying the modus or Radio Industry Guidelines to behind camera/microphone workers is consistent with HMRC guidelines in this respect.

Where the individual will be working in a job description that falls outside of the modus or Radio Industry Guidelines, a BBC employment status test must be completed. If the result of the test confirms that the individual is self-employed, the BBC will proceed to engage them on this basis. Where the results of the status test suggest that they are not self-employed, the case is escalated to the BBC's Head of Tax or Senior HR representative.

The Head of Tax confirmed to us the circumstances where typically an engagement is escalated and what the likely outcomes would be:

- 1) Where an individual is engaging under the modus and the engagement is going to last more than 9 months at the outset.

He would write to HMRC to request their approval or in some instances the decision would simply be made (in conjunction with the engager) to put the individual on a fixed term employment contract.

- 2) Where an individual is re-engaged by the BBC after a break from working there.

There is no specific timeframe in which an individual would need to have a break in service. As a general rule 3 months was seen as the typical amount of time which might be required for an individual to have worked elsewhere (we understand this is the approach taken by Vision). However different approaches have been taken by different divisions on this.

- 3) Where an individual is working on a back to back productions and this is likely to exceed 18 months.

He would assess the circumstances. It would be insisted that an individual be put on a fixed term employment contract if work by that individual gets too repetitive on a particular production.

- 4) Where an individual was engaged on a production and at the outset this was going to last 9 months or less and then due to unforeseen circumstances, e.g. the weather, went over 9 months.

He would approve this extension and would not request HMRC's approval. If however the extension arose for other reasons, for example the filming to date had been scrapped as the production changed its focus and this led to engagements going over 9 months he would write to HMRC to obtain approval.

We have seen correspondence with HMRC evidencing examples 1 and 4 above.

We were advised that that from September 2012 the BBC no longer operate the "7 day rule", this rule can be found under the modus (see Section 7.2.4 for more information). On this basis we have not reviewed the operation of this rule in any detail.

4.5 Sample testing of contracts

A random sample of 65 contracts was chosen in conjunction with internal audit, by stratifying the population by purchase order value and picking a weighted sample to include more individuals with higher purchase order values and those more frequently engaged. The sample comprised 30 off air freelancers, 30 trainer/consultants and 5 chaperones, 28 of whom were engaged through PSCs and 37 directly with the individuals. The contracts reviewed were from the period 1 January 2010 and 31 July 2012.

Only 63 out of the 65 contracts chosen were available for review. We reviewed standard pro-forma contracts applying to this group to obtain details of the fees, length of engagement and job description and discussed with 63 local managers about what the role entails in practice.

We allocated each contract into one of three types (see table below) and our recommendation as to the priority with which the BBC consider the overall nature of the relationship under each contract type. The classification “High priority”, “Medium priority” and “Low priority”, has attempted to highlight relationships where further review/consideration should be focused

This categorisation is based on a high level review and is not determinative of the individual's employment status. Many factors should to be considered when reaching a view on the employment status of an individual, including some that the BBC is not necessarily privy to such as the extent of other sources of income and due to the limited information available.

Priority	PSC			Self employed individuals			Total
	Modus/Radio Industry Guidelines	Behind camera /microphone– non modus	Non modus	Modus/Radio Industry Guidelines	Behind camera – non modus	Non modus	
Low	4	3	11	16	3	12	49
Medium	1	1	6	4	-	-	12
High	-	-	2	-	-	-	2
Total	5	4	19	20	3	12	63

The most significant areas of priority are with individuals engaging via PSCs for non-modus engagements individuals engaging directly as self employed through the modus.

4.6 Areas of inconsistency and risk

4.6.1 Escalation process

We were advised that the logging record for the escalation process is manually maintained and therefore there is risk that where an escalation for a contract has been made this will not always be recorded.

Where engagements were categorised above low priority we checked to see if an escalation had been completed for those contracts. The escalation log did not have any record of the contracts being escalated. We know in one instance an escalation had been completed for one of the contracts but this did not appear to have been logged. These findings suggest there is a risk that the escalation process is not working properly. We recommend that steps are taken to ensure the escalation log is regularly updated.

4.6.2 Modus policy/guidelines

The freelance decision tool web pages include a link to HMRC's modus (dated July 2011) and Radio Industry Guidelines. The freelance decision tool web pages summarise these guidelines, explaining how they operate. However this summary appears to refer to an out of date set of guidelines. For example in “the Appendix” of the current guidelines (dated August 2012) HMRC state that:

for a one-off production such as a feature film or a single drama or documentary, or (if the worker is to be engaged on a separate production following the completion of the one off production then where this is known at the outset of the second production PAYE should be considered from the commencement of the second production. If this happens after a break, where it can be shown that the worker was seeking or worked elsewhere then the worker can be treated as self employed. Note – a break is a natural break rather than a contrived one such as Christmas holiday, annual vacation.)

This is not reflected on the BBC's web pages which currently uses language from HMRC's 1996 modus guidelines which have been updated a number of times since 1996. The BBC should ensure that their intranet pages contain the most up to date modus guidelines or a link to HMRC's website where the most up to date version can be found.

4.6.3 Self employment/employment status test for engagements outside of the modus

The freelancer decision tool web pages explain that for those individuals who do not fall under the modus or Radio Industry Guidelines a self employment/employment status test must be completed. This test must be completed (in part) by the individual making the booking. This creates a risk as the booker has the opportunity to influence the outcome of the test given its subjectivity.

The current questions asked cover some of the key employment status tests which have been derived from case law namely: control, substitution, mutuality of obligation, individual being in business on their own account, financial risk and integration into the organisation (see Section 7.2.3 for more information).

It is difficult to definitively determine an individual's employment status. The self employment /employment test questions do cover the key aspects which need to be considered however it is important to consider how the responses to these questions are interpreted. We understand that the output from these tests is reviewed by team leaders within the FCT. They will review the answers to the yes/no questions giving more weight to the key employment status tests such as control and financial risk.

The risk of misinterpretation could be removed by the use of HMRC's Employment Status Indicator (ESI) tool. HMRC state that provided the response to the ESI questions "accurately reflect the terms and conditions under which the worker provides their services" and copies are kept of the result the outcome can be relied upon.

We understand under the new system being introduced called "Smartbook" the ESI will be used instead of the current self employment/employment test, which will go some way to mitigating the risk of misclassification, but not remove it entirely.

We recommend that as well as adopting the use of HMRC's ESI tool, those in the business who will be using this to aid status decisions should be provided with appropriate training to ensure accuracy and consistency of use.

4.6.4 Use of production bank accounts and chequebooks

Large productions, for example Great Expectations, will typically have their own production bank accounts for commercial and practical reasons. This presents a risk that productions could potentially engage with off air freelancers directly outside of the central FCT booking system.

Similarly, we understand that a small number of chequebooks exist across the BBC. Whilst it is against BBC policy to pay off air freelancers through this method there is a risk that this could occur.

We recommend that the BBC reviews this area to establish the instance of off air freelancers being engaged outside FCT and either ensure they are brought within FCT going forward or develop a process to ensure status decision are being made that are consistent with FCT.

4.6.5 Modus engagements where there is a break between contracts

For particular roles under the modus, length of engagement can impact the employment status of the individual:

“.... after a break, where it can be shown that the worker was seeking or worked elsewhere then the worker can be treated as self employed. Note – a break is a natural break rather than a contrived one such as Christmas holiday, annual vacation.”

While there is no requirement to specify how long any break between engagements should be it is important that the individual was either seeking work or working elsewhere in between engagements. From our review we were advised that Vision do consider whether an individual has sought work or worked elsewhere when re-engaging an individual, however this approach is not used across the BBC and therefore this presents a risk that individuals may be treated as being self employed by virtue of falling with the modus when they may not.

We recommend that all departments are required to consider whether an individual has sought work or worked elsewhere when re-engaging an individual under the modus and be able to demonstrate this.

4.6.6 Extensions to engagements

There were a number of examples of individuals working on non modus and modus engagements where their contracts had been significantly extended from the original engagement.

In some instances these individuals were then subsequently taken on as staff. This could call into question whether their earlier engagements were genuinely that of self employment and present a risk of classification of the individual as an employee by HMRC.

4.6.7 LP10 letters for modus engagements

In one case, an individual was engaged as a sound recordist. The modus requires that these individuals normally provide their own equipment to be regarded as self employed. This individual was not providing their own equipment however they had obtained an LP10 letter (letter from HMRC which allows an individual to be treated as self employed for engagements which HMRC have agreed appear to self employed in nature). The LP10 letter obtained did not cover the engagement concerned.

Whilst this may be an isolated case, where LP10 letters are held by the BBC a check should be completed to ensure that the LP10 letter covers the engagement period concerned.

5. Findings – Individuals engaged through Reed/agency staff

5.1 Introduction

The BBC has an agreement with Reed Personnel Services for the end to end process of attracting, contracting and paying all temporary resource in the BBC. There were 1,087 engagements under the Reed contract during 2011/12, with the Technology and Future Media divisions accounting for the majority (c72%) of those engagements, of which Reed engaged 269 individuals directly and the balance of 818 were engaged by other means, such as directly engaged with the individual or sourced through third parties such as other agencies or umbrella companies.

5.2 Key findings and recommendations

We identified 37 engagements that were for 2 years or more, 14 engagements of which were between 3 and 4 years and 3 of which were between 4 and 5 years. These engagements could be seen as more than a “temporary resource” and challenges could be made as to why fixed term employment contracts were not appropriate for these roles.

We recommend that a policy is put in place setting out clearly when fixed term employment contracts should be considered as an alternative to engaging resource via Reed. This should incorporate employment law considerations given that an employment relationship can sometimes be established between the individual and the entity receiving the services (i.e. the BBC) where there is a significant level of commitment and longevity of service (section 5.5).

In addition, we recommend that the BBC instils processes and controls to ensure that engaging individuals via Reed cannot be used to circumvent any new policy to be adopted going forward on engaging with freelancers.

5.3 Summary of how individuals are engaged via agencies

The types of workers usually engaged via the Reed contract are mainly split between temporary administration staff (termed “lower grade staff”) and those individuals who have specialist professional skills (typically individuals with specialist IT skills, termed “higher grade staff”).

Reed is not in itself the “master supplier” to the BBC but use a panel of six other suppliers/agencies and certain “approved” umbrella companies to source individuals to fulfil their BBC contracts.

All bookings and requests for agency staff are made through an online portal. Only authorised members of BBC staff are able to access/use the portal and these requests are subject to further HR authorisation.

All divisions across the BBC use the same methods and processes for engaging services via Reed but make use of Reed in different ways. The Reed contract is used extensively for resourcing IT projects. The majority of such engagements are via service companies, which reflects the nature of the IT industry where such engagements are common. Other areas of the BBC make limited or no use of Reed.

Engagement requests are made to Reed in two ways. The first type of request sees the BBC instruct Reed that they need a person with particular skills. Reed will then source a selection of candidates and present the BBC with a list of CV's, from which they can choose people to interview. Under the second method of engagement, the BBC can request a particular individual (known as a "referral") and Reed will then attempt to source this specific individual.

All individuals provided by Reed will either be engaged by an agency (one of six authorised agencies), an umbrella company or engaged via a limited company. We understand that the BBC has no influence over how individuals are engaged i.e. via PSC, "Umbrella Company" or individual and it is the responsibility of Reed to withhold any tax and NIC as appropriate. It is also worth noting that the monthly reports and invoices provided to the BBC do not contain specific details of the engagement terms surrounding each individual and any PAYE/NIC paid.

5.4 Summary of policies and guidance and comparison with HMRC guidance

During our review, no single specific policy was in evidence for guiding users making a request via the Reed portal. A number of pages are available on the BBC intranet which provides the user with background information relating to agency workers. However, these pages offer little support or guidance to assist a user to decide whether an agency is the most appropriate method for obtaining resource, or whether a particular method of engagement is the most suitable one.

The BBC intranet also holds a number of user guides for the Reed portal. These are step by step instructions for particular tasks a user may wish to achieve (such as ending an engagement, submitting time sheets etc). One of the guides deals with making a request for an individual via the portal but the guide does not offer any assistance around issues concerning engagement methods.

It was noted that before a user makes a request on the portal, they must have obtained appropriate sign offs, either from BBC HR or senior member of BBC staff. It was confirmed that although it is possible to use the portal without the sign offs to do so is a disciplinary offence. It was also noted that during the online booking process, the user receives prompts asking the user whether they have complied with certain procedures. These prompts do not require an actual response from the user, they are there as reminders only. The system as a whole works on the assumption that the necessary conversations and sign offs have already occurred.

It was confirmed that the Reed contract does not allow individuals to engage directly with the BBC but it was noted that in exceptional circumstances an individual may be engaged on a temporary basis outside the scope of the Reed contract. In these cases, authorisation must be sought from the senior procurement manager. Authorisation will be issued where they are content that the individual will take the necessary steps immediately so that they can engage under the Reed contract at the earliest opportunity.

A further difference observed was that when the resource offered is an individual who works via a PSC, the BBC user who made the request has to confirm with HR that this is appropriate in the particular circumstances. HR consider whether it is appropriate to engage with a PSC for the role. Only when HR sign off for engaging with a PSC has been obtained, can the BBC user continue the engagement process.

Where it is appropriate to engage a PSC, there are a series of rationale for the engagement as well as a series of demonstrable practices to re-enforce the business to business nature of the relationship:

- Reed, acting as a factoring & management agent, working with the service companies, include a series of contractual declarations obliging the PSC to confirm all income is to be declared and accounted for under UK tax legislation;

- The PSC must be set up in line with best practice outlined by IR35 test cases (e.g. separated business bank accounts, relevant personal indemnity insurance and appropriate company governance);
- The engagement of PSCs via Reed differs fundamentally from the process of engaging freelancers (e.g. the use of BBC equipment and regular BBC site access);
- Freelance staff are unlikely to be in a managerial position. However, freelancers are likely to be in control of significant production budgets when fulfilling certain lead production roles. Individuals engaged via a PSC may hold interim managerial positions but they do not take line management responsibility for BBC staff, nor would they have budgetary signoff powers;
- Process checks are in place to establish whether the individual has had any previous PAYE relationship with the BBC;
- The PSC must validate the company setup, including shareholder declaration;
- The individual must have right to work validation.

For engagements made on the basis of referral, the user making the referral has to be a permanent member of staff and has to complete a client referral form. They also have to confirm that the individual has not received a redundancy payment from the BBC in the last 12 months. If the individual has received such a payment, HR has to confirm whether or not the engagement can proceed.

We have seen no evidence of the BBC looking to influence the structure of engagements with Reed (i.e. whether they are via PSC's or as individuals). We have also not seen any indication that the BBC would suggest an individual or PSC engages via Reed rather than as a fixed term agency contract.

When engaging with agencies to provide an alternative way of achieving flexible engagement terms there is no HMRC Employment Tax guidance as all employment tax responsibilities fall on the agency. Where a PSC is found to not be liable to pay UK tax (for example, a PSC run out of Ireland) we were advised that Reed immediately flag this to the BBC and the engagement would not proceed.

One of the Reed engagement questions is whether the individual has received a redundancy payment from the BBC in the last 12 months. The policy has recently changed but historically stated that engaging staff need specific authorisation to engage anyone via Reed who has received a redundancy payment (i.e. were staff) in the last 12 months. This has recently been reduced to 3 months but it is understood that the 12 month period is still generally followed as best practice. The policy states that anyone coming back after only 3 months break needs to be doing a short role that was unforeseen at the time of the redundancy.

5.5 Areas of inconsistency and risk

From our discussions with various members of BBC staff responsible for overseeing Reed engagements it appears that there are minimal employment tax risks in the process of engaging resource via Reed. We would recommend that a formal policy is put in place stating what individuals should be engaged via Reed (as opposed to directly on fixed term contracts) and setting out a clear engagement process.

There is currently a control in place whereby all engagements that have exceeded 12 months due to contract extensions or at the outset are flagged to the BBC HR team. The purpose of this flag was explained as an alert where it might be more cost efficient for the BBC to directly engage with the individual/entity under a fixed term contract rather than through the Reed engagement (which is subject to additional "agency mark-up"). HR informed us that in practice they do not investigate these flagged engagements but we would recommend that reviews should be done going forward.

6. Findings - Industry Practice

Our comments in this Section are generic, based on our experience from working with businesses operating in and HMRC specialists responsible for this industry. With the exception of comments relating to the need for flexible engagement terms as that was explained to us by the BBC, the views expressed here are Deloitte's views and not the views of any particular organisation.

6.1 Commercial background

Having examined the background, the original policy and legislation, we now consider the appropriateness of the BBC's freelance operating model, in the light of industry practice.

6.1.1 Use of flexible engagement terms in film and TV industry

The corporate drivers for flexible engagement terms can easily be understood when considering the nature of commissions and filming schedules. For example, when producing new content it will be necessary to assemble a large team including the on air talent and all the technical people behind the scenes that see the series through commissioning, preparation, filming to completion. Some are only needed for a few days during filming while others might be needed throughout. Maintaining resource for all aspects of the production throughout the lifecycle and beyond for additional series would likely result in a lot of people being paid but not being fully utilised because the work is not there for them.

This short term need is well understood by HMRC who has agreed a "modus" for behind camera workers which specifies which roles of freelancers it will accept as being self employed. Indeed the majority of these individuals engage on a freelance basis, moving between different productions both with the BBC and with other organisations as the need arises.

On air talent are clearly also required only for so long as a show is being made or broadcast, which could be a relatively short period for so long as it takes to make the series or, in the case of a news presenter or successful chat show for example, it could continue for a number of years. The level of time commitment also varies considerably. For example, a radio presenter running a prime time show covering music, chat, current affairs, debates, phone-ins might be contracted to present 4 shows a week, 47 weeks a year for 2 years (figures are for illustration purposes only). On the other hand, a sports commentator might be contracted to commentate on, say, four tournaments, the Olympic Games and the Commonwealth Games, also for a 2 year period.

The BBC has further explained the need to engage with its on-air talent in a way that allows it to manage creative and editorial renewal with ease, in particular:

- Their engagement with on air talent is initially on a temporary basis, renewable against performance measures. The rationale being that this encourages creativity, creative renewal and creative risk taking, which has wider industry benefits;
- Given their fixed revenues derived from licence fees, there is an argument to support the view that a flexible working model is required if it is to be competitive in the market place;
- The nature of entertainment programming is such that the majority of engagements are very short term, e.g. a couple of months, during which time the artist may be carrying out other work for third parties;
- The need for a changing schedule to reflect topical events;
- A regularly changing focus on a wide range of topics needs a changing roster of on screen talent with relevance to changing themes and seasonal variations;
- Third party agreements which are subject to change e.g. Sport;
- Risk of failure in launching a new series;

- The success of new formats and subjects on other channels may change what is commissioned. Different genres and programmes operate in different competitive talent markets, some where the competition with other broadcasters is fierce and others where there is a healthy pipeline of internally grown talent able to develop on-air experience and skills to complement their specialist production and journalism expertise;
- A wide range of views and specialisms is required with the need to cover the best contemporary views. Some presenters will have specific specialisms suitable for only certain programmes with their credibility as an expert or specialist being undermined from the viewer's perspective if they were to present a broader range of programmes;
- Originality is a key driver of audience appreciation so creative renewal is one of the key benefits the audience expects from the BBC's output;
- Presenters must work well together on screen and particularly small teams or duo's need to have on air chemistry - this needs to be given time to work but the BBC needs to be able to change presenting teams if it doesn't;
- Even successful programmes may need to be refreshed and revamped periodically to combat audience fatigue. This can include sometimes changing the presenting team to ensure that the audience is kept interested and the programme remains relevant to its audience;
- The need to ensure diversity aims are represented on screen and across all output.

In addition, due to the significant volume of talent the BBC engages, when talent offer their services to the BBC as freelancers, the BBC asks them to supply their services through a PSC, so that the financial risk of that decision being wrong does not lie with the BBC.

Further, the success of on-air talent, along with many creative occupations, is dependent to a large degree upon the personality and charisma of the individual and can rise and fall in response to changing audience preferences within a short space of time. The employment relationship brings with it an assumption of competitive fair selection processes, managed development, performance improvement programmes and objectively justifiable reasons for contract termination that can be difficult to adapt to the needs of broadcasters to manage on-air talent. As a result where the self-employment route is appropriate, it provides a more suitable alternative to employment, and is commonly used across the Broadcast industry enabling the refresh of on-air talent for creative and editorial reasons.

It is important to ensure however that this need for flexibility and agility in the workforce dovetails with the taxation categorisation tests for employed and self-employed status and that the use of PSC's does not become a route for engaging those that are essentially performing staff roles.

6.1.2 Use of PSCs by individuals within the film and TV industry

Our experience of other Broadcasters and Production companies is that engagement of flexible resource through PSCs is common place. While others in the industry have tended to engage their on and off air freelancers through a PSC where the individual has requested it, the BBC has had a more formal policy of requiring the on air freelancers to engage through a PSC where certain conditions are met. This view is supported by our conversations with agents summarised at Section 6.3 of this report.

6.1.3 Use of PSCs by individuals outside the film and TV industry

It is apparent from the OTS data at Section 7.2.2 of this report that there is significant number of PSCs providing services within the wider UK economy. Our own experience of working with other clients across all industries has shown that many engage resource through PSCs to some degree; typically in roles such as IT, engineering, project management, marketing, HR and finance in sectors

including financial services, telecoms, oil and gas, defence and the public sector. Often the roles are 'interim' in nature covering staff absence, engaged on specific projects to fill temporary skills gaps or where there are budgetary constraints giving uncertainty as to how long the resource can be engaged. In many respects, these arrangements can be seen to typify the more agile and flexible economy that has developed in the UK in recent years.

6.2 Review of prevailing industry practice within film and TV/radio

The commercial need for flexibility explained in Section 6.1.1 above, is prevalent throughout the industry. Broadcasters consider that it is not commercially viable in the current economic climate to provide widespread guarantees of work over a long period, or to pay for exclusivity. In addition, talent may be less prepared to rely on one source of income. Some have voiced concerns that engaging through PSCs is not their choice and that this is something they have been told to do. However, in our experience, they do not consider that employment is the alternative option for them. Rather, they would see themselves as being self employed individuals.

We stress that this issue is chiefly an issue that relates to talent. The vast majority of flexible workers that serve the industry generally as freelancers, do so on a self employed basis under long standing guidance provided by HMRC. This guidance is set out in the Film, TV and Production Industry Guidelines, which does not cover on air talent.

If similar guidance could be produced for talent in film, TV and production, as currently exists for on air radio talent as noted in 7.2.4, this would help to mitigate the risk of misclassification, which would in turn materially reduce the attraction from the engager's standpoint of using a PSC to eliminate this risk. Different organisations have a different perception of risk, assess it differently, and take a different approach to managing this risk, so new guidelines would also help to achieve consistency across the industry.

In the BBC's case, this risk is viewed with particular importance because getting it wrong impacts on the licence fee. A PSC provides certainty and removes that impact.

It may be argued that the costs associated with misclassification would be incurred anyway if an individual was employed. However, such costs can be properly budgeted for and spread over the duration of a known employment, as opposed to arising as a single, unexpected and potentially significant liability in the event of a misclassification. In addition, errors come with interest and potential penalties which can substantially increase the overall cost.

As a separate matter, it would not make much commercial sense to engage someone as an employee and incur these costs, simply to achieve greater transparency or for any other reason if it is actually considered that the terms of the engagement would not be one of employment.

For these various reasons, we have found that the industry as a whole is generally prepared to engage with talent through PSCs. However, some are more passive in this regard, being more prepared to engage on a self employed basis if an individual does not already have a PSC, but equally prepared to engage with their PSC if they have one. Put another way, we have not yet come across an organisation which adopts an "inverted policy" of not engaging with talent through PSCs and insisting on engaging with individuals on a self employed or employed basis.

In summary, flexibility is very important to the BBC and indeed in the industry and is something that might need to be addressed through revised contractual terms going forward. Misclassification is also important when considering whether an individual could be engaged as a sole trader. We consider that this risk could be reduced by working with HMRC on a framework to determine employment status for the BBC's on air talent. This would achieve improved consistency, certainty, transparency which would in turn ensure stronger tax compliance and reduce the attractiveness to both talent and

businesses of engaging via PSCs. Additionally it would assist HMRC in performing its role in ensuring that the correct tax and NIC was being collected.

6.3 Summary of findings from interviews with agents

We conducted short interviews with six agents representing a number of key talent engaged by the BBC, who also had clients engaged by other organisations. Our interviews were aimed at ascertaining the agent's views on the way in which the BBC engages with talent together with any insights agents were able and prepared to provide in relation to other broadcasters and production companies.

Contemporaneous notes of comments made by agents were recorded. When reading these notes, it should be borne in mind that they are comprised of quotes by agents and do not represent Deloitte opinion. Such quotes therefore reflect the agent's "views" or "perceptions" and must be interpreted in this light as informative but anecdotal, rather than comprising "hard evidence".

Below we have summarised our interpretation of the key themes/common responses, derived from our interview notes:

A) Engaging with the BBC and other broadcasters/production companies with regard to engagement of PSCs

- 1) The BBC will sometimes engage on a self employed basis for short contracts but big contracts (new contracts or renewals) these days require the engagement to be with a PSC.
- 2) In the past (over 3-4 years ago) certain genres of talent would have been offered staff contracts more readily than today. If they did not want a staff contract, were they offered PSC contracts. These days the default position has switched to engaging via PSCs.
- 3) There is often insistence that talent engages via PSCs (including establishing new PSCs where none already in place) if they want to work with the BBC.
- 4) The BBC is alone in insisting on engaging through PSCs. Other producers and broadcasters are more relaxed at allowing individuals to work on a self employed basis, but with the BBC it has to be through a PSC.
- 5) Where talent/freelancers already operate through a PSC, other broadcasters/producers will happily allow those arrangements to continue.
- 6) There is no evidence of any pressure to move staff to PSC arrangements. It is only those who wish to be engaged on a self employed basis who are told they must establish a PSC.
- 7) In contrast, agents cited examples of talent who had been freelancers for many years who were told to go back on staff or sign up via a PSC.
- 8) 3-5 years ago, talent used to be advised to stay on contracts direct with the individual, but PSCs displaced them at about that time.
- 9) Exclusivity deals are difficult these days because no one can guarantee where a show will be in a year's time. Ratings may plummet. So, the BBC needs flexibility to terminate a contract while talent needs flexibility to contract with other sources. These combined factors are best served through non-employee engagements i.e. either through sole trader arrangements or through PSCs.
- 10) One agent had formed the impression that the change to PSCs was instigated by HMRC,

B) Factors considered by agents to be relevant or not relevant when engaging through PSCs

1) Factors that are **not** considered material as to whether or not to engage through a PSC include:

- Ability to negotiate better fees (the agents consider this is their role whatever the means of engagement);
- Greater flexibility for the individual (there are numerous restrictions on PSC contracts). Also, the BBC will allow people to work with other organisations provided it does not affect the rights of the BBC or the work they do for the BBC, it's only slightly easier through PSCs;
- The ability of PSCs to pay dividends is not usually relevant to agent's negotiations and agents preferred to stay out of this. However, agents said that talent can be influenced by advice from their accountants as to structure, once the commercial deal has been worked out.

2) Factors that **are** considered material as to whether or not to engage through a PSC include:

- The BBC insist that a PSC must be used (on larger contracts);
- It was accepted that the BBC would want to manage the risk of misclassifying an individual as self employed and risk HMRC challenging that status with ensuing tax and NIC liabilities – which can be achieved by engaging with PSCs. However, agents said this was not a concern of theirs when negotiating contracts;
- Greater flexibility for the BBC is accepted in that PSCs can potentially reduce the obligations and liabilities associated with employment (e.g. pensions, redundancy payments etc). However agents also considered that talent would accept sole trader engagements for the same reason, if they were available;
- Talent like to keep things simple and setting up these companies can be inconvenient and costly but they can feel "forced" into PSCs by the BBC;
- Talent consider they are freelancers. Someone who has been a freelancer for many years will not want to transfer onto a staff contract now. A PSC will likely be their only realistic alternative if they cannot remain as a self employed freelancer.

7. Background and legislation

When considering the analysis of the BBC's workforce presented in this report, we consider that the framework of the relevant legislation and the drivers for change in the public sector are important for a clear understanding of the issues arising.

7.1 Public Accounts Committee (PAC)

As a result of questions being raised about the tax paid by senior public appointees the Chief Secretary to HM Treasury announced in January 2012 a review of their tax arrangements. The report from this review was published on 23 May 2012.

The review reported that there is a lack of transparency around the tax arrangements of key public sector appointees – with over 2,400 off payroll engagements identified in central government departments and their arm's length bodies, with approximately 85% engaged for longer than six months. The report also commented that when an individual is not on the payroll, the “employer” has no way of knowing whether the individual is paying the right amount of income tax and National Insurance, in the context of the work that they are doing.

This review proposed the following solution to the concerns identified:

- the most senior staff should be on the payroll, unless there are exceptional temporary circumstances;
- employers are to ensure that they have the right to seek assurance about the tax arrangements of long-term specialists contractors; and
- there should be monitoring after one year, with sanctions applied to departments who have not abided by these recommendations.

The report also made clear that although the BBC is independent in the management of its affairs, the Secretary of State for Culture, Olympics, Media and Sport has written to the Chair of the BBC Trust, drawing attention to the review and noting that the BBC should play its part in ensuring that all employees and contractors pay tax appropriately.

Following this the BBC attended a hearing at the PAC on 16 July 2012, to answer questions on their current practice and scale of use of off payroll arrangements with a particular focus on individuals engaged by the BBC through PSCs.

7.1.1 Key concerns

The key concerns raised by the PAC in relation to such engagements were that many appeared to be for long periods of time, on terms similar to those one would expect of an employment, for key on air talent who to the general public would be seen as the face of the BBC.

In theory, if an individual would be an employee and subject to PAYE/NIC if engaged by the BBC directly, then, if that individual engages through a PSC, he/she should be subject to PAYE/NIC payable by the PSC under IR35.

However, one of the practical difficulties with IR35 is that individuals are often able to argue that some or all engagements through their PSC fall outside of IR35. One such argument arises where a PSC has multiple sources of income. This can make it difficult for HMRC to enforce IR35 in practice, as HMRC would have to demonstrate that a notional contract between the individual and engager would amount to an employment contract. However, multiple sources of income can be one of various factors that is sometimes used to assess employment status and can provide an indication of self

employment, making it harder to sustain an argument that the notional contract would be one of employment. If that cannot be sustained, IR35 cannot be enforced.

It should also be noted that hitherto, there has been no legal requirement for an employer to ensure a contractor pays the correct amount of tax, nor would it be possible for an employer to do so given this is confidential information between the contractor and HMRC. Annual returns are required to be made to HMRC of payments made to individuals engaged on a self employed basis under Section 16 Taxes Management Act 1970 so that HMRC may check self employed individuals have paid the right amount of tax/NIC but there is no requirement for the engaging entity to perform such checks. There are special provisions relating to withholding amounts from contractors in the construction industry under the construction industry scheme (CIS) but even they are not strictly concerned with ensuring any particular worker pays the right amount of tax; they are concerned with ensuring an element of tax is withheld from payments which are subject to CIS, as a contribution toward an individual's final income tax liability for any given year.

Although it is currently under review, IR35 provides a framework of legislation to prevent individuals gaining an advantage by inserting a PSC between them and the engager, if they would otherwise be engaged as an employee. On the one hand the BBC and other engagers ought to be able to assume that this statutory framework will be applied to PSCs. On the other hand, the BBC recognises that IR35 is difficult to apply in practice, and wishes to help ensure it is more effectively applied where appropriate going forward.

7.1.2 Findings published on (05/10/2012)

The key findings and recommendations set out in the PACs report are summarised below¹:

- Too many public sector staff have been paid using off-payroll arrangements for too long;
- The appointment of the Chief Executive of the Student Loans Company through a personal service company should not have gone unchallenged by any part of government;
- It remains unclear how prevalent the use of inappropriate off-payroll arrangements is beyond central government;
- There is insufficient clarity on how government will implement the Treasury Review's recommendations;
- The deterrent effect of anti-avoidance legislation has been placed at risk by the reduction in the number of investigations by HM Revenue & Customs;
- The public sector's dependence on interim staff reflects a lack of specialist and professional skills within government.

7.2 Explanation of relevant tax legislation

7.2.1 Intermediaries legislation - how “IR35” works

Personal service companies and partnerships (hereafter termed “PSC” unless stated otherwise) are subject to the intermediaries legislation, more commonly referred to as IR35, which was introduced on 6th April 2000 as an anti-avoidance measure. IR35 provides that a broadly similar amount of PAYE/NIC is payable, regardless of whether an individual engages directly with the BBC as an employee or engages via a PSC in a role that would be considered employment with the BBC were it not for the PSC. In the former, when the BBC pays any earnings to the employee, the BBC must

¹ Public Accounts Committee - Twelfth Report Off-payroll arrangements in the public sector

account for PAYE/NIC on those earnings whereas in the latter when the BBC pays any fees to the PSC, the PSC must account for PAYE/NIC on those fees.

A press release published in September 1999 made it clear that *the PSC* and *not the client* (so here, *not* the BBC) would have responsibility for determining whether the IR35 rules apply to any or all of the engagements entered into during a tax year. However, while it is legal to engage with PSCs, to do so in effect transfers the onus of determining employment status away from the BBC (or any other employer) to the talent/PSC and HMRC. It is costly and time consuming for HMRC to police and enforce IR35 so that it is widely considered to be ineffective. The consequence of this is that not all tax/NIC may be fully accounted for by PSCs and for the engager, engaging with PSCs can also “generate suspicions of complicity in tax avoidance”.

By way of example, If the BBC pays an employee £100,000, the BBC would have to pay employer's NIC of 13,800 (@ 13.8%), so the BBC would incur a total gross cost of £113,800. PAYE would be withheld from the £100,000 payment and remitted to HMRC by the BBC.

If that individual were to engage via a PSC in a role that would be considered employment were it not for the PSC, and the BBC were to pay that PSC the equivalent gross cost of £113,800, then the PSC would be deemed to have made a payment of £100,000 on which £13,800 NIC would be due by the PSC. PAYE is required to be withheld from the £100,000 deemed payment and remitted to HMRC by the PSC.

The legislation allows the PSC to deduct 5% for expenses before calculating its PAYE liability but this is a small difference and is not the point at issue, so is ignored for the purpose of this illustration.

Note that, if one approaches the issue starting with an individual who is engaged through a PSC on a contract for which he/she has negotiated a price of £100,000, the BBC can pay that individual £100,000 without payment of employer's NIC, regardless of whether or not that individual accounts correctly for the NIC (and PAYE) due by the PSC, assuming IR35 applies. In that case, if the individual were to become an employee of the BBC, unless the BBC renegotiates the contract at a lower rate, the BBC would then be liable for £13,800 employer's NIC on the £100,000 salary paid to the individual.

It should be noted that if the individual qualifies as self employed, neither the PSC nor the BBC would be liable for employer's NIC. However, this was not the chief concern of the PAC which was mainly interested in individuals who appeared to be engaged for long periods of time, on terms similar to those one would expect of an employment.

Where IR35 applies, the PSC must operate PAYE and NIC on income from engagements with all engagers (considered separately) which are subject to IR35, applying the statutory rules for calculation noted above, regardless of whether or not that income is paid to the individual concerned. However, as noted above, a technical difficulty arises in relation to individuals who are able to argue that if they were engaged directly with the engager, they would be self employed because they have other sources of income, and therefore IR35 does not apply.

In summary, we find that:

- The tax and NIC paid by an individual operating through a PSC which pays the correct amount of PAYE/NIC under the IR35 rules should be broadly similar to that which would be due if he/she engaged directly with the engager as an employee, subject to small differences permitted by statute;
- The question of avoidance always comes back to whether or not the PSC is subject to IR35 and if so, is that PSC properly accounting for PAYE and NIC due;

- The caveat here is that HMRC does not have the resources to police all PSCs to ensure they are compliant and even if it did, establishing that a notional contract would be one of employment is very difficult, given the various arguments individuals can put forward regarding other sources of income.
- Given that policing IR35 is burdensome for HMRC, this raises the possibility that PSCs may be non-compliant with this legislation so that an incorrect amount of tax/NIC may be paid.

7.2.2 Current HMRC consultations on IR35

In March 2011 the OTS published its interim report in its review of the taxation of small business which included IR35. One of the central messages that the OTS heard during the course of its review was that the motivation to incorporate is driven by the end client as protection from PAYE [and NIC] risk and the avoidance of the obligations owed in an employment relationship.

In addition, the OTS noted that the current legislation is little used, and largely “managed round” by contractors and others within its ambit. HMRC data from forms P35 in 2007/08 and 2008/09 shows that 70,000-75,000 declare themselves as PSCs annually. However, in 2008/09, fewer than 10,000 individuals declared that they operated IR35. In our view, the statistics imply that either a large number of PSCs are genuinely not subject to IR35, or that they are non-compliant. The challenge faced by HMRC in policing such a large number of PSCs is also evident.

Broadly speaking, the overall conclusion of the OTS review was that IR35 is not very effective.

Following on from the publication of the OTS’s interim report, the Government announced at Budget 2011 that it was committed to improving the way that IR35 was administered. HMRC set up an IR35 Forum with a view to assisting HMRC in making improvements. In May 2012, HMRC published their Business Entity Tests which are being piloted by HMRC. These can be used by PSCs to determine whether they have a high, medium or low risk of being caught by IR35, based on a points system applied to different aspects of the way in which a PSC engages with its clients.

In addition to HMRC’s proposed new business tests, proposals to change the responsibility for PAYE/NIC to the engager, instead of the individual employed by the PSC, were announced at Budget 2012, by the Chancellor of the Exchequer. However, this change is not currently proposed to apply to all PSCs. Instead, legislation is to be introduced in the Finance Bill 2013 requiring only *office holders/controlling persons* who are integral to the running of an organisation to have PAYE and NICs deducted at source by the organisation by which they are engaged. A consultation document setting out the government’s proposals was published on 23 May 2012.

7.2.3 General background on employment status

There is only a small tax/NIC advantage when engaging as a self employed individual compared with via a PSC and to the best of our knowledge there is currently no political agenda in relation to this comparison. There is however a more substantial potential advantage when engaging through a PSC compared with engaging as an employee, assuming the PSC can argue that IR35 does not apply.

Whether an individual is an employee or self employed individual for tax purposes is not defined within tax legislation. Case law assists in determining which category an engagement falls into. Over the years “tests” have been developed in the following areas;

- Mutuality of obligation
- Control
- Integration

- In business on own account
- Financial risk
- Substitution
- Delegation
- Provision of equipment
- Length, frequency of engagements
- Intention of the parties

No single factor is conclusive but rather they are considered in the round in determining an individual's employment status. Inevitably this leads to a degree of judgement and, in borderline cases, dispute with HMRC.

Whilst many employers will use their best endeavours to get employment status decisions right, nonetheless it is an area fraught with difficulty with the ensuing misclassification of an individual as self employed rather than employed, having serious financial consequences. Consequently, where an individual would potentially be self employed, an easy and popular way for employers to manage the risk of misclassification, is to engage with individuals through a PSC. No PAYE/NIC should be due by the PSC if the individual is agreed as self employed but, in the event of misclassification, as noted in Section 7.2.1 above, the PSC would assume liability and responsibility for accounting for PAYE/NIC under current IR35 legislation (together with other obligations of employment).

It is also noted that the misclassification risk referred to above has lessened in recent years since HMRC introduced its employment status indicator tool but, in our opinion, such risk has not been eliminated completely and exists across all industries in the UK.

Where the individual would potentially be employed, the risk of misclassification is not relevant but, in the BBC's case, the need for creative flexibility is more important - see section 6 in this regard. However, those cases with which the PAC was most concerned were individuals that had been engaged for long periods of time where the implication is that the commercial need for flexibility is less important.

For actors, ballet dancers, opera singers, musicians and other performers/artists who appear live in the theatre, opera, ballet, or in clubs, or perform in film, video, radio or television productions, the 1993 Special Commissioners case of McCowen & West led HMRC to accept that where such entertainers are engaged for a specific role on a standard contract negotiated by their relevant Trade Union, they can be treated as self employed for tax purposes, notwithstanding that they contain terms reflective of an employment relationship. From an NIC perspective, the 1998 Categorisation of Earners Regulations mean that subject to certain conditions being met these individuals will still pay NICs as if they were employees.

7.2.4 Film, television and production industry guidelines

HMRC has examined the type of work undertaken by those engaged behind the camera and microphone in television and radio production.

Based on this work they have concluded that certain jobs, often referred to as grades in this industry, can automatically be accepted as being self-employed, providing that they fulfil any specific requirements shown in the 'grading list' published by HMRC. This list forms part of the HMRC's Film, Television and Production Industry Guidelines, referred to by the BBC as the modus.

Certain grades (marked on the list) may only be regarded as self-employed provided they are

engaged on a temporary casual or freelance basis for a one-off production such as a feature film or a single drama or documentary, or less than 9 months on a series or a specific strand of programme.

In exceptional circumstances the period of 9 months may be extended if specific authority is sought from the HMRC's Television and Radio Unit.

There are also special arrangements to enable payments for certain engagements to be made gross, even though the engagement might be for a grade not on the list. These apply to very short engagements in specified circumstances commonly referred to as "the 7 day rule" and also to the engagements of particular individuals who are able to show that their engagements are as individuals in business on their own account in accordance with the decision in *Hall v Lorimer*.

7.2.5 Radio industry guidelines

The radio industry guidelines were drafted by HMRC to assist in accurately determining the employment status of those working in the radio industry:

- off air, such as producers and writers; and
- in contrast to the Film, TV and Production Industry guidelines, the radio industry guidelines also provide a framework for determining the employment status of on air talent such as radio presenters and DJs.

The guidelines are drafted along similar lines to those described at Section 7.2.4 applying to the film, television and production industry. The guidance defines a list of job titles, also referred to as grades, and provided that the individuals fulfil the requirements set out in the guidance, they can automatically be treated as self-employed individuals without further recourse to case law standard employment status tests described at Section 7.2.3.

In common with the Film, Television and Production Industry Guidelines, one of the core variables in qualifying as self-employed is the length of the engagement. A number of grades must be engaged for 9 months or less in order to qualify as self employed, while others are dependent on payments being on a per contribution basis or are ancillary to their other work (and are therefore not regular radio contributors). Unlike the Film, Television and Production Industry Guidelines there is no facility to apply for an extension of the 9 month rule.

For radio presenters/DJs, HMRC have developed a set of criteria which, if present, would support the case for self employment of individuals operating in these roles and be accepted as such by HMRC.

7.3 BBC working with HMRC

It is clear from our review that the BBC has maintained a regular dialogue with HMRC Film & TV Unit specialists with regard to employment status issues across all areas of engagement. In particular:

- Annual returns have been made to HMRC of payments made to individuals engaged on a self employed basis under Section 16 Taxes Management Act 1970;
- Regular correspondence seeking clarification of the application of the modus to engagements extending beyond 9 months, concurrent engagements or to those who may fall within the ambit of the *Hall v Lorimer* decision;
- Attending meetings, to discuss the engagement of specific presenters through PSCs, who HMRC have chosen to review from an IR35 perspective;
- Meetings with HMRC and other key industry players to discuss and clarify policy and guidance with regard to the application of NICs to Entertainers;

- Revising policies with regard to the engagement of presenters following HMRC's review in 2004.

In relation to the last bullet point, HMRC advised in its letter of 8 December 2004 that upon renewal of contracts or issuing new contracts for presenters with fact patterns similar to those HMRC reviewed, those individuals should be put on the payroll and subject to PAYE and NIC. However, HMRC also commented that payments to those presenters with similar fact patterns engaged through a PSC would not be required to be payrolled by the BBC but may be subject to review under IR35.

We stress that this amounts to a high level statement of the law as it stood at that time and as it currently stands.

8. Appendix

8.1 Data tables

Appendix 1, Table 1 - Total number of PSCs and self employed individuals engaged as "on air" freelance talent with contracts or payments totalling more than £50k in 2011/12

Priority Level	Contract value/pay banding	PSCs	Self employed individuals
High Priority	£50K-£99,999	44	17
	£100K-£149,999	23	5
	£150K+	29	13
	Total - High Priority	96	35
Radio	£50K-£99,999	110	10
	£100K-£149,999	45	1
	£150K+	52	3
	Total - High* Priority	207	14
Medium Priority	£50K-£99,999	28	26
	£100K-£149,999	10	5
	£150K+	15	3
	Total - Medium Priority	53	34
Low Priority	£50K-£99,999	25	14
	£100K-£149,999	10	4
	£150K+	10	5
	Total - Low Priority	45	23
Low* Priority	£50K-£99,999	22	111
	£100K-£149,999	10	25
	£150K+	11	19
	Total - Low* Priority	43	155
N/A	Total - N/A (eg. not PSC)	25	74
	Total	469	335

Notes:

(i) N/A relates to transactions where the talent is now deceased or where payments in the period were primarily in relation to repeat payments rather than primary engagements.

(ii) This priority categorisation is based on discussions with the talent team, negotiators and area leads as to the roles, length of contract, level of time commitment of those individuals concerned. This provides an indicative level of priority for further review but, in order to determine the employment status of each individual, numerous tests including personal factors would need to be considered.

(iii) Low* - HMRC generally accepts that actors engaged for specific roles are self employed. As such, we have included all individuals within the low* priority category. As HMRC policy is under review in this area (e.g. NIC categorisation of earners rules) and Equity is also known to be in discussions with HMRC on the treatment of actors, those individuals with long lengths of service and/or high levels of commitment could move to the high priority category were HMRC policy to change.

(iv) Radio - Radio presenters may be accepted by HMRC as self employed if they meet the criteria stated in HMRC's Radio Industry Guidelines. We have not tested whether the criteria have been fulfilled but due to the high levels of commitment and length of relationships we have classified these engagements as high* priority for further review. Should the individuals satisfy the criteria stated in the guidelines these engagements would move to the low priority category, in most cases.

Appendix 1, Table 2 - Priority categorisation by role of PSCs and self employed individuals engaged as "on air" talent with contracts or payments totalling more than £50k in 2011/12

Role	Priority Level	PSCs	Self employed individuals
Presenter	High Priority	86	30
	Medium Priority	28	16
	Low Priority	11	2
	Total - Presenter	125	48
Radio	High* Priority	207	14
	Total - Radio	207	14
Actor	Low* Priority	43	155
	Total - Actor	43	155
Other	High Priority	10	5
	Medium Priority	25	18
	Low Priority	34	21
	N/A	25	74
	Total - Other	94	118
Total		469	335

Notes:

(i) "Other" refers to writers, conductors, etc engaging with the BBC via PSC's

(ii) N/A relates to transactions where the talent is now deceased or where payments in the period were primarily in relation to repeat payments rather than primary engagements.

(iii) This priority categorisation is based on discussions with the talent team, negotiators and area leads as to the roles, length of contract, level of time commitment of those individuals concerned. This provides an indicative level of priority for further review but, in order to determine the employment status of each individual, numerous tests including personal factors would need to be considered.

(iv) Low* - HMRC generally accepts that actors engaged for specific roles are self employed. As such, we have included all individuals within the low* priority category. As HMRC policy is under review in this area (e.g. NIC categorisation of earners rules) and Equity is also known to be in discussions with HMRC on the treatment of actors, those individuals with long lengths of service and/or high levels of commitment could move to the high priority category were HMRC policy to change.

(v) Radio - Radio presenters may be accepted by HMRC as self employed if they meet the criteria stated in HMRC's Radio Industry Guidelines. We have not tested whether the criteria have been fulfilled but due to the high levels of commitment and length of relationships we have classified these engagements as high* priority for further review. Should the individuals satisfy the criteria stated in the guidelines these engagements would move to the low priority category, in most cases.

Appendix 1, Table 3 - Summary of new contracts with "off air" freelancers engaged during 2011/12

Bandings	Company/Organisation		Self Employed Individual		Personal Service Company		Unknown		Total	
	Number of entities	Number of contracts	Number of entities	Number of contracts	Number of entities	Number of contracts	Number of entities	Number of contracts	Number of entities	Number of contracts
£50K-£99,999			136	1,532	122	1,441	1	1	259	2,974
£100K-£149,999			11	118	9	64			20	182
£150K+			1	4	9	66			10	70
Sub-total	-	-	148	1,654	140	1,571	1	1	289	3,226
	0.0%	0.0%	51.2%	51.3%	48.4%	48.7%	0.3%	0.0%	100.0%	100.0%
0-£9,999	87	99	5,906	15,835	1,951	5,245	180	212	8,124	21,391
£10K-£49,999	6	6	1,825	15,685	760	6,812	5	5	2,596	22,508
Sub-total	93	105	7,731	31,520	2,711	12,057	185	217	10,720	43,899
	0.9%	0.2%	72.1%	71.8%	25.3%	27.5%	1.7%	0.5%	100.0%	100.0%
Total	93	105	7,879	33,174	2,851	13,628	186	218	11,009	47,125
	0.8%	0.2%	71.6%	70.4%	25.9%	28.9%	1.7%	0.5%	100.0%	100.0%

Notes:

(i) The individuals included here are both behind camera workers and general support staff e.g. IT consultants.

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