The power of the Construction Industry and Training Board to impose levies under the Industrial Training Act 1982: to pay or not to pay?

By Marc Brittain and Mariya Peykova
3PB

The Industrial Training Act 1992 ("the Act") contains a provision for the establishment of industrial training boards for the purpose of training people for employment in activities of industry or commerce. The Construction Industry and Training Board ("CITB") is one such board, established under the original legislation, the Industrial Training Act 1964. Section 11 of the Act provides the power to impose a levy for the purpose of meeting the expenses of an industrial training board. The levy is imposed on employers in the industry (unless an exemption applies) in accordance with an order made by the Secretary of State ("the levy order") which gives effect to levy proposals submitted by the relevant board.[1] The construction industry levy is collected under a series of such levy orders made following consultation in accordance with s.11 (2) of the Act at three year intervals. The most recent levy order is the Industrial Training Levy (Construction Industry Training Board) Order 2018 SI 2018 432 ("2018 Levy Order").

Employers in the industry and the need for a contract

The levy is imposed on "employers in the industry",[2] except insofar as they are exempted from it by the industrial training order, the levy order, or an exemption certificate.[3] One such 'industry' is the construction industry.[4] There is no definition of "the industry" in the 1982 Act, but Article 2(1)(d) of the 2018 Levy Order defines the "construction industry" by reference to Schedule 1 of the Industrial Training (Construction board) Order 1964 (as amended by SI 1992/3048), ("the Scope Order"), which provides a comprehensive list of "activities of the

[1] Section 11 (2) of the Act.
[2] *Ibid*
[3] *Ibid*
[4] Per Simler LJ at paragraph 22 of *Hudson Contract Services v The Construction Industry Training Board* [2020] EWCA Civ 328.

construction industry" insofar as they are carried out in Great Britain and includes: "(a)(i) the construction, alteration, repair or demolition of a building or part of a building". Article 3(1) of the Levy Order provides that "A levy shall be imposed on employers in the construction industry".

The definition of 'employment' is set out in s.1(2) of the Act and is extremely wide, as follows: "'employment' means employment under a contract of service or apprenticeship or a contract for services or otherwise than under a contract, and "employed" shall be construed accordingly….". It follows that 'employment' includes not only the self-employed, but "even those working 'otherwise than under a contract'".[5]

The definition is therefore, wide enough to catch 'employers' supplying operatives to clients even where there is no contract at all between the supplier and the operative; in other words, a pure introduction agency will still be liable for levy. In *Hudson Contract Services Limited v The Construction Industry Board*,[6] both the Employment Tribunal and, (on appeal), Lambert J. found that the question of whether someone is "an employer in the construction industry" is answered by reference to the activities of those people whom the statute deems to be its employees.[7] The Court of Appeal agreed with this analysis; at [58] Simler LJ noted that "[A]n employer is 'in' the industry if, through its workers of any kind, it performs construction industry activities. Such an employer is at risk of an assessment once this occurs".

Qualifying construction establishment

Article 5 (1) of the 2018 Levy Order provides for the CITB to assess the levy "to be paid in respect of each construction establishment of the employer engaged wholly or mainly in the construction industry during the necessary period". A 'construction establishment' is defined in Article 5 (2) of the 2018 Levy Order as: "Any particular establishment of the employer engaged wholly or mainly in the construction industry during the necessary period". In *Hudson* it was common ground between the parties that construction activities did not actually take place at Hudson's main office and that the question thus was whether it was an establishment from which principal construction activities took place.[8] It is notable that the Court of Appeal held that the concept of a 'construction establishment' is relevant to the

[5] Per Simler LJ at paragraph 53 of *Hudson.*
[6] [2019] EWHC 45 (Admin), [2020] EWCA Civ 328.
[7] Simler LJ at paragraph 4ii) of *Hudson.*
[8] Simler LJ at paragraph 5ii) and 62 of *Hudson.*

assessment mechanism for levy but not to the imposition of liability.[9] If an employer is in the construction industry but does not have a qualifying construction establishment, there can be no assessment to levy.[10]

In *Hudson,* Hudson's case was that it did not "direct, control or supervise any construction activities from its head office in Bridlington, but instead carrie[d] out payroll (and related) services in relation to self-employed operatives who perform construction activities, this [was] not a construction establishment from which construction activities [took] place, to be assessed for the purposes of the levy".[11] This argument was rejected by the Court of Appeal, who, in agreeing with the judgments of the Employment Tribunal and Lambert J. below, found that Hudson had a construction establishment because the self-employed operatives in question worked wholly or mainly in the construction industry and Hudson contracted with those employees from its head office and they were paid from the head office. Accordingly, the construction industry activities took place *from* its head office in Bridlington.

Can liability to pay the levy be avoided?

Once an entity falls under the relatively wide definition of an 'employer in the industry', the entity is at risk of being assessed for levy. This means that whilst in theory the employer is liable, it will not be *assessed* for levy, or the risk will be mitigated when it comes to the relevant board making an assessment of levy to be paid. It is notable that the total amount of levy payable under article 8 of the 2018 Levy Order is - subject to certain deductions under article 8 (2) – the aggregate amount of levy assessed as payable for all construction establishments of the employer. If there are no constructions establishments, there will be no assessment, and hence, no levy. As noted by Simler LJ in *Hudson,* if the employer does not have a qualifying construction establishment, there can be no assessment to levy.

An establishment that is not wholly or mainly in the construction industry

When an employer in the construction industry does not have an establishment that is wholly or mainly in the construction industry (i.e. is not a qualifying construction establishment),

[9] Simler LJ at paragraph 69 of *Hudson.*
[10] Simler LJ at paragraphs 62 and 70 of *Hudson.*
[11] Simler LJ at paragraph 3 of *Hudson.*

there can be no assessment to levy.[12] For example, an employer in the construction industry who has a mixed workforce in which construction employees are in the minority, would not be subject to an assessment to levy. Thus, an arrangement whereby the construction workforce was in the minority of the overall workforce, could remove from levy employers who employ only a minority of construction workers.[13] This would then be the case irrespective of whether the relevant construction establishment was a place at/from which the relevant construction activities took place, although that consideration would be relevant where, and if, the establishment was found to be wholly or mainly in the construction industry. Even where a construction establishment is found to be operating wholly or mainly in the construction industry, the 2018 Levy Order requires it to have done so for the 'necessary period'. Under article 5 (3) of the 2018 Levy Order, he 'necessary period' means:

a. A period (which need not be continuous) consisting of a total of 27 or more weeks falling within the relevant base period; or
b. In the case of a construction establishment which started being engaged in the construction industry during the relevant base period, a period (which need not be continuous) –
    (i) Falling within the relevant base period; and
    (ii) Consisting of a total number of weeks exceeding one half of the number of weeks in the part the relevant base period starting on the day on which the construction establishment started being engaged in that industry and ending on the last day of the relevant base period.

Thus, where the relevant establishment's engagement does not fall within the periods prescribed above, it will not be subject to a levy assessment. As to what it means to 'be in the construction industry', Lambert J noted at [55] of *Hudson* that '[t]here are more ways of being in the construction industry than wielding a pickaxe or donning a high visibility jacket or by directing or supervising or controlling those engaged in the physical side of the industry'. This is an important point for employers in the construction industry, as it is clear that a wide range of activities could be included.

[12] Simller LJ at [70].
[13] Lambert J at [58] of *Hudson.*

A construction establishment that operates from a foreign jurisdiction

A slightly more complicated issue arises when the relevant construction establishment operates from an office outside the jurisdiction. This raises the question of whether a construction establishment can avoid being subject to a levy assessment when operating from abroad. The question was briefly touched on in *Hudson,* but it was not addressed in detail, nor was it answered fully, mainly because it is a question that will mostly turn on the facts of each specific case, and the particular taxation arrangements in each case. However, both Lambert J and the Court of Appeal accepted that there is in principle nothing preventing organisations such as Hudson from relocating their offices offshore or into enterprise zones and so avoiding the levy; taxpayers can choose to organise their affairs so as to minimise the impact of taxation.[14] However, as Lambert J noted at [64], 'where tax avoidance strategies [are] implemented, the short cycle…[] allows for action to be taken by the legislator in the next cycle Order.'

10 September 2020

Marc Brittain

Barrister
3PB

0330 332 2633
marc.brittain@3pb.co.uk

3pb.co.uk

Mariya Peykova

Pupil Barrister
3PB

0330 332 2633
mariya.peykova@3pb.co.uk

3pb.co.uk

[14] Lambert J at [64] of *Hudson;* Simler LJ at [71].