Appeal number FTC/48/2010
[2011] UKUT 423 (TCC)

Agency workers – income tax and NICs – whether obligation to provide personal services – right of substitution- whether difference between ICTA 1988 and ITEPA 2003

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

TALENTCORE LIMITED (t/a TEAM SPIRITS)

Respondent

TRIBUNAL: MR JUSTICE ROTH

Sitting in public at the Royal Courts of Justice on 21-22 July 2011

Mr Adam Tolley and Ms Kate Balmer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Mr Jeremy Woolf, instructed by David Jones & Co (accountants) for the Respondent

DECISION

1. This is an appeal by Her Majesty's Revenue and Customs ("HMRC") brought with permission granted by the First Tier Tribunal ("FTT") against its decision ("the Decision") allowing the appeal by the Respondent ("Talentcore") against the assessments to tax under PAYE and national insurance contributions ("NIC") for the years 1998-99 to 2006-07. The appeal gives rise to questions concerning the proper construction of the deeming provisions in the governing legislation that apply to what may be broadly described as 'agency workers'; and the application of those provisions to the facts of this case.

The Facts

2. Talentcore, which trades under the name "Team Spirits", is engaged in the supply of individuals to major cosmetic companies for counter and promotional work at airport duty-free shops. It has a database of about 100 individuals, who are referred to as "consultants". The duty-free shops are run by World Duty Free and it seems that Talentcore also supplies consultants to World Duty Free directly to assist in the normal operation of their duty-free shops.

3. Having heard evidence from Mrs Ryta Carr, who runs Talentcore, and from four of the consultants, the FTT made the following findings of fact at paragraph 4 of the Decision :

> "(1) There is no framework contract between [Talentcore] and the consultants. [Talentcore] is free to offer work to them or not, and they are free to accept or decline work when offered.
>
> (2) There are no written contracts between [Talentcore] and either the cosmetics companies (or World Duty Free which runs the duty-free shops) or the consultants.
>
> (3) Mrs Carr is well known to the cosmetics companies having worked with them for 20 years. Through [Talentcore] she has built up a business of providing experienced consultants for work in duty-free shops. Cosmetic companies will obtain a three-week slot for promotions in the duty-free shop which take place from a position, described as a gondola, separate from the normal cosmetics counters. About 70% of [Talentcore's] work is to find consultants to service such promotions by selling the product being promoted. The remainder of [Talentcore's] work is to fill vacancies for work on the counter in normal duty-free shopping areas, whether relating to cosmetics or alcohol, including sometimes, though not normally, operating the till.
>
> (4) Talentcore does not train consultants but engages those who have the necessary experience. Prospective consultants are interviewed. During the interview Mrs Carr will explain the dress code which is set out in a document entitled "Members code of practice" of which there are versions 1 and 2 but Mrs Carr did not remember the

date of change. The document is not normally handed to consultants but is used by Mrs Carr as the basis for interviews, but might occasionally be handed to a consultant who was not sure about something. It emphasises punctuality and appearance (avoiding such things as chewing, yawning visibly, lounging on a counter, grooming hair or touching up make up) and sets out a detailed dress code. Consultants are required to obtain their own security pass enabling them to work at the airside of the airport.

(5) The cosmetics company will provide some training about a new product for about an hour before the session, and they may set sales targets. [Talentcore] will also give advice, which is not paid for separately, on the promotion, including sometimes changing the hours worked.

(6) [Talentcore] will telephone consultants offering work on particular days in the morning (8 am to 2 pm) or afternoon (3 pm to 9 pm) shift. If a consultant accepts, a contract is entered into for such work. A rota is prepared of the names of consultants and sent to the cosmetics company and the consultants. The consultant obtains a signature on his time sheet by either someone present from the cosmetics company or a manager from World Duty Free.

(7) When working there is little supervision of the consultants. There is no control over sales techniques employed by consultants. Normally nobody from the cosmetics company will be managing the promotion; the counter staff working for the cosmetics company will be managing the counter and will not be supervising the promotion. World Duty Free as operator of the duty-free shop will be in a position to give directions to the consultants. For consultants not involved with promotions they would be working alongside staff of World Duty Free and would be subject to the same control as other staff. If a consultant turned up improperly dressed either someone from the cosmetics company or World Duty Free would be in a position to send them home.

(8) The cosmetics company is invoiced by [Talentcore] by attaching a list of the people and time worked, and the consultants are paid in accordance with the time sheets.

(9) Consultants who are unable or unwilling to work for an agreed slot are expected to inform [Talentcore] and if possible find a replacement. Version 1 of the Members Code of Practice states:

> "If for any reason you find that you will be late, you must always first telephone Team Spirits office (regardless of the hour) and find another Team member to take your place—any such change must be approved by Ryta in advance and the Team Co-ordinator informed. Changes must only be requested in absolute emergencies—too many shift changes have

been taking place in the past for the good of the Team's reputation and have created administration difficulties."

Version 2 does not include this but states under the heading Sickness

> "Sickness or other reasons must always be reported to the office as soon as possible. Remember the Team Spirits phone [*number given*] is manned 24 hours a day—all year long! It may then be possible to arrange for your absence to be covered."

Mrs Carr's witness statement said:

> "They [the consultants] are informed about…my particular insistence that it is their responsibility to act on their own volition, choice and initiative to organise a suitable person to replace them in the event that they are prevented from working through sudden illness or some other unexpected eventuality. This is of paramount importance since the team's reputation for reliability is at stake.
>
> Regrettably this situation frequently arises through the increased risk of contact with illnesses within the airport, child minding problems, unscheduled disruption of public transport and the like, all exacerbated by the unsocial working hours of shift working—innumerable examples can be provided."

In oral evidence she stated that the consultant who had accepted work either had to attend or find a replacement, but if this was done frequently the consultant might not be offered work again. She had never considered the situation of someone who always sent a replacement.

(10) Mr and Mrs Twine both of whom work for [Talentcore] change shifts between them from time to time. The situation where neither could work a particular shift had never arisen. Mr Kasmani considered himself totally free to send a substitute. This arose when his wife booked a holiday. Mr Hussane (who did not work for [Talentcore] during the time of the assessments) stated that he liked the idea of being able to delegate work or exchange work with a friend holding an airport identity pass, which he does without problems simply by telephoning a friend. Where substitutes are arranged at the last minute without informing [Talentcore] the consultant who agreed to work the particular shift will pay the substitute and claim the same amount from the Appellant. I saw three letters from other consultants not called as witnesses saying that they had engaged a substitute and paid them, and two others who said they knew they could do so but had not done it."

4. Further, the FTT found that there were separate contracts between Talentcore and the consultant for each shift that the consultant agrees to work: Decision, para 14.

5. HMRC expressly do not challenge the factual findings in the Decision.

The Legislation

6. The relevant tax legislation governing the assessments at issue changed with effect from 6 April 2003. For the period 1998-99 to 2002-03, the Income and Corporation Taxes Act 1988 ("ICTA") applied. Section 134 of ICTA provides, insofar as material:

> 134 Workers supplied by agencies
>
> (1) Subject to the provisions of this section, where—
>
> (a) an individual ("the worker") renders or is under an obligation to render personal services to another person ("the client") and is subject to, or to the right of, supervision, direction or control as to the manner in which he renders those services; and
>
> (b) the worker is supplied to the client by or through a third person ("the agency") and renders or is under an obligation to render those services under the terms of a contract between the worker and the agency ("the relevant contract"); and
>
> (c) remuneration receivable under or in consequence of that contract would not, apart from this section, be chargeable to income tax under Schedule E,
>
> then, for all the purposes of the Income Tax Acts, the services which the worker renders or is under an obligation to render to the client under that contract shall be treated as if they were the duties of an office or employment held by the worker, and all remuneration receivable under or in consequence of that contract shall be treated as emoluments of that office or employment and shall be assessable to income tax under Schedule E accordingly….
>
> …….
>
> (6) Where an individual enters into arrangements with another person with a view to the rendering of personal services by the individual, being arrangements such that, if and when he renders any such services as a result of the arrangements, those services will be treated under subsection (1) above as if they were the duties of an office or employment held by him, then for all purposes of the Income Tax Acts any remuneration receivable under or in consequence of the arrangements shall be treated as emoluments of an office or employment held by the individual

and shall be assessable to income tax under Schedule E accordingly."

7. With effect from 6 April 2003, the Income Tax (earnings and Pensions) Act 2003 ("ITEPA") applied. The material provisions of ITEPA are as follows:

"44 Treatment of workers supplied by agencies

(1) This section applies if—

(a) an individual ("the worker") personally provides, or is under an obligation personally to provide, services (which are not excluded services) to another person ("the client"),

(b) the services are supplied by or through a third person ("the agency") under the terms of an agency contract,

(c) the worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided, and

(d) remuneration receivable under or in consequence of the agency contract does not constitute employment income of the worker apart from this Chapter.

(2) If this section applies—

(a) the services which the worker provides, or is obliged to provide, to the client under the agency contract are to be treated for income tax purposes as duties of an employment held by the worker with the agency, and

(b) all remuneration receivable under or in consequence of the agency contract (including remuneration which the client pays or provides in relation to the services) is to be treated for income tax purposes as earnings from that employment.

45 Arrangements with agencies

If –

(a) an individual ("the worker"), with a view to personally providing services (which are not excluded services) to another person ("the client"), enters into arrangements with a third person ("the agency"), and

(b) the arrangements are such that the services (if and when they are provided) will be treated for income tax purpose under section 44 as duties of an employment held by the worker with the agency,

any remuneration receivable under or in consequence of the arrangements is to be treated for income tax purposed as earnings from that employment.

…

47 Interpretation of this Chapter

(1) In this Chapter "agency contract" means a contract made between the worker and the agency under the terms of which the worker is obliged to personally provide services to the client."

8. The relevant legislative provisions concerning NIC have not changed through the period in question. The Social Security (Categorisation of Earners) Regulations 1978 ("the 1978 Regulations") provide:

"2—(1) For the purposes of the Act an earner in one category of earners shall be treated as falling within another category in accordance with the following provisions of this regulation.

(2) Subject to the provisions of paragraph (4) of this regulation, every earner shall, in respect of any employment described in any paragraph in column (A) of Part I of Schedule 1 to these regulations, be treated as falling within the category of an employed earner in so far as he is gainfully employed in such employment and is not a person specified in the corresponding paragraph in column (B) of that Part, notwithstanding that the employment is not under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E ["general earnings" substituted for the words after "with" from 6 April 2004 in consequence of ITEPA 2004]."

Column A of Part I of Schedule 1 headed "Employments in respect of which, subject to the provisions of regulation 2 and to the exceptions in column (B) of this Part, earners are treated as falling within the category of employed earner" contains the following:

"2. Employment (not being employment in respect of which a person is, under the provisions of paragraph 1, 3 or 5 of this Schedule, treated as falling within the category of an employed earner) in which the person employed renders, or is under obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person (including, in the case of a body of persons unincorporate, a body of which the person employed is a member) and—

(a) where earnings for such service are paid by or through, or on the basis of accounts submitted by, that

> third person or in accordance with arrangements made with that third person; or
>
> (b) where payments, other than to the person employed, are made by way of fees, commission or other payments of like nature which relate to the continued employment in that employment of the person employed."

9. It is common ground that "render" in ICTA and the 1978 Regulations has the same meaning as "provide" in ITEPA. Accordingly, none of these legislative provisions will apply if the individual is not (a) providing, or under an obligation to provide, personal services; or (b) subject to (or to the right of) supervision, direction or control as to the manner in which those services are provided. The FTT found that the second of those conditions was satisfied but held that the first of them was not. Although HMRC's primary challenge was to the FTT's interpretation of the legislation, it is convenient to deal first with its appeal against the FTT's finding that here the consultants were not under an obligation to provide personal services within the meaning of the legislation.

Personal service

10. The issue concerning an obligation to provide personal service or services turned on the question of the consultant's right of substitution. In his much cited judgment in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497, regarding the requirements for a contract of service, MacKenna J said at 515:

> "The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him."

11. Having reviewed several authorities which address the issue of substitution or delegation, the FTT concluded, at para 13:

> "The effect of these authorities is that a full right of substitution which has the effect that the person need never turn up [means that] there is no contract of service, but more limited rights of substitution do not prevent it."

12. As I understood the submissions of Mr Tolley on behalf of HMRC, he accepted that proposition as a correct statement of the law. However, he contested the FTT's evaluation of the facts of the case that led it to conclude that there was here an unfettered right of substitution. That conclusion rested in particular on the following findings of fact (see para 5 of the Decision):

    a. The business consists of filling a number of separate shifts with consultants from Talentcore's database, who are free to accept work offered or not as they wish. Talentcore is therefore not concerned whether consultant A or B accepts a particular shift.

b. Talentcore is therefore not concerned if consultant B or C is substituted for A, nor whether the substitution "was because of illness or merely because the person did not feel like working that day."

c. Although Talentcore doubtless prefers that there should be no substitutions because of the administrative complications they can cause, and hopes that they will not occur too frequently, it seems resigned to this happening.

d. It seems that the cosmetics company is not normally monitoring who is there anyway: what really matters to them is that someone suitable is there for all shifts and that time sheets are completed.

13. In my view, all these findings were clearly open to the Tribunal on the evidence. In particular, finding (b) was amply supported by the evidence of the consultants summarised in para 4(10) of the Decision, and of Mrs Carr. It is not correct, as HMRC argued, that the Tribunal found that the consultants "were only permitted to substitute when they were unable to work or unwilling to work because taking [a] holiday." Nor is it the case, as alleged in Mr Tolley and Ms Balmer's skeleton argument that the right to substitute "was expressly limited to 'absolute emergencies'". HMRC's argument relied on the passages in the Code of Practice quoted at para 4(9) of the Decision. However, those were not contractual provisions but an aide mémoire for Mrs Carr when interviewing, and the FTT found that most consultants were never given a copy.

14. In the light of this, I do not consider that HMRC's argument on this part of the case was assisted by the various authorities to which I was referred, many of which were the same as those referred to by the FTT in the Decision and support the general proposition derived by the FTT to which I have referred above. They provide illustrations of the application of that proposition to the particular facts of the individual case. Hence, in *James v Redcats (Brands) Ltd* [2007] ICR 1006, the claimant worked as a courier delivering parcels for the respondent. On her claim for payment of the minimum wage, the statutory conditions to be fulfilled included a requirement that she was under a contractual obligation to perform personally any work or services. Mrs James had a written agreement with the respondent which provided:

> "You need to ensure that a suitable alternative courier is available to carry out the terms of this agreement when you are unable. This might happen during holidays or if you are ill. You can have more than one alternative. You will need to discuss and agree the identity of your replacements with your courier link contract."

15. In the Employment Appeal Tribunal, it was accepted that the fact that there may be limited or occasional delegation is not inconsistent with there being a contract to perform work personally. Elias J held that on the proper construction of the contract, it gave rise to an obligation to perform the work personally:

> "34. …If the parties had intended for Mrs James to work or not as she wished, they would surely have said so in clear terms and not in such an obfuscatory way. In my judgment there is plainly an obligation to perform the work personally. The critical feature here is that the substitute is to be provided when the individual is unable to […][1] work. That is narrower than the phrase 'unable or unwilling' which was the term used in the *Tanton* case, as the EAT recognised in the *MacFarlane* case. If I need not perform the work when I am unwilling, then there is never any obligation of any kind to perform it. It is entirely my will and therefore my choice. But if I can only be relieved of the duty when I am unable, then I must do the work personally if I am able.
>
> 35. I recognise that there is some artificiality in saying that someone who chooses to take holidays when not obliged to is unable to work, but even if the contract had entitled Mrs James to use a substitute whenever she was 'unable to work or unwilling because taking holidays' there would still in my view have been a personal obligation to work."

16. The first of the two cases referred to by Elias J is *Express v Echo Publications Ltd v Tanton* [1996] ICR 693, where the facts were found to fall on the other side of the line. That case also concerned a delivery driver, employed under a contract that was clearly intended by the company to be a contract for services and avoid the driver becoming an employee. The vehicle which he drove was provided by the company and he had to wear the company's uniform. Clause 3.3 of the contract provided:

> "In the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services".

The contract further provided that if he arranged for such a relief driver, he "must satisfy the company such a relief driver is trained and is suitable to undertake the services."

17. Giving the lead judgment in the Court of Appeal, Peter Gibson LJ (with whom Auld and Hirst LJJ agreed) said (at 698B):

> On its face, clause 3.3 enabled the applicant, if he were at any time unwilling to perform the specified services personally, not to perform those services himself, but to obtain the performance of the services through an acceptable substitute. That is a remarkable clause to find in a contract of service.

And, after referring to the judgment of MacKenna J. in the *Ready Mixed Concrete* case he continued (at 698H-699A):

> "… it is plain from clause 3.3 that the applicant, as a matter of contract, was not obliged to perform any services personally himself if he was

[1] The word "provide" appears in the judgment, but would appear to be a typographical error.

unwilling or unable to do so, provided that he could find a substitute driver."

Such a provision was held to be wholly inconsistent with a contract of service.

18. The *Tanton* case was distinguished on the facts by the Employment Appeal Tribunal in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, which concerned three carpenters and a general labourer working in the building trade. There, too, the contractor clearly intended that the workers should be regarded as sub-contractors and clause 13 of their written agreements stated:

> "Where the subcontractor is unable to provide the services the subcontractor may provide an alternative worker to undertake the services but only having first obtained the express approval of the contractor."

19. The Tribunal found that this provision cannot be interpreted to mean that the subcontractor could provide a substitute whenever he chooses, and the contractor's entitlement to withhold approval of a substitute was not inconsistent with this being a contract to supply personal services. After quoting from the *Ready Mixed Concrete* case, the Tribunal (in a judgment delivered by Mr Recorder Underhill QC, as he then was) observed at [14]:

> "It is of course a matter for assessment in relation to any given contract whether such delegation as may be permitted means that the contract cannot be regarded as a contract of service.

After referring to *Tanton* and yet another case in this field, the Tribunal held that on the case before them the contracts were of service, stating (at [15]):

> "The power which the applicants had under the contract to appoint a substitute is qualified and exceptional."

20. These authorities demonstrate the importance of first establishing and interpreting the terms of the contract governing substitution, and then applying the established test to the contract as determined. Hence, in *James*, there was a framework contract with an express clause governing the circumstances of permissible substitution for a particular job or periods and the Tribunal held that on its proper construction it meant that Mrs James was obliged to carry out the work if she were able to do so. In *Byrne,* the power of substitution was found to be materially restricted. By contrast, in *Tanton,* there was complete freedom for the worker to use a substitute.

21. In the present case, there is no framework contract and each (oral) contract is for a specific shift. On the FTT's interpretation of those contracts, they gave the consultant the freedom to arrange for another to work that shift if he did not wish to do so. In effect, the consultant's basic obligation was to ensure that the shift was covered, either by himself or a suitable substitute. Although the substitute, when notified to Talentcore in advance, might then become party to a new contract directly with Talentcore, if Talentcore was not informed and paid the first consultant who himself passed on the remuneration to the substitute then I agree with the FTT that it seems unlikely that on proper analysis a new contract with Talentcore was created. But in any event, the fact that original consultant had complete freedom to arrange for a substitute if he

wished, even if he did not actually do so, constitutes in my view an unfettered right of substitution, as found by the FTT. And presumably if the substitute was notified to Talentcore in advance so as to give rise to a fresh contract, that substitute could himself arrange for a substitute when the time of the shift approached. The replacement contract between Talentcore and the first (and any later) substitute would be on the same terms as the original contract: there is no basis on which it could be found that the terms were different.

22. Accordingly, I see no grounds to disturb the FTT's finding that the contracts, properly interpreted, contained an unfettered right of substitution. The conclusion of the FTT was expressed as follows at para 15:

> "In my view given the temporary and ad hoc nature of the Appellant's bookings the right of substitution that I have found to exist would prevent there being a contract of service if that were in issue. Similarly it prevents there being an obligation to render (or provide), personal services within the legislation applicable here."

In my judgment, on the fact as found that was manifestly correct, and there is nothing in the authorities that points to a different conclusion.

23. For HMRC it was contended that if, contrary to its primary submission, there was no contractual obligation to provide personal services, nonetheless when a consultant was actually working in a duty-free shop under an arrangement with Talentcore, he was then providing a personal service. The significance of that submission relates to the proper interpretation of the relevant legislation, to which I now turn.

Personal services under the legislation

(i) *ITEPA*

24. I think that it is helpful first to consider the more recent legislative provisions of ITEPA, that are set out at para 7 above. Pursuant to section 44(1)(b) and the definition in section 47(1), the deeming provision for tax purposes applies only if the services are supplied under the terms of a contract made between the worker and the agency under the terms of which the worker is obliged personally to provide services to the client.

25. Recognising the difficulty that the HMRC's contention faced in the light of the statutory wording if the FTT's conclusion on personal services was upheld, Mr Tolley sought to argue that even if the contract did not oblige the consultant to perform the service personally, when the consultant did the work he or she assumed an obligation to do it personally. However, even if that were the correct analysis, I do not see how it can possibly satisfy the statutory condition. The focus of the legislative definition of an "agency contract" is on the terms of the contract. The contract is entered into before the consultant starts to work the shift to which it relates, possibly days or weeks beforehand and it is not replaced by a new and different contract once the consultant starts his shift. How the contract is performed does not alter its terms. Since the FTT held, correctly in my judgment, that the terms of the contract did not oblige the consultant to provide the services personally, it is not an "agency

contract" within section 47(1). It follows that section 44 of ITEPA, and in particular deeming provisions for tax purposes in section 44(2), do not apply.

(ii) *ICTA*

26. The corresponding provisions of ICTA do not contain a similar definition of "agency contract." The wording in section 134(1)(b) requires that the worker "renders or is under an obligation to render" his or her personal services "under the terms of a contract between the worker and the agency." Mr Tolley submitted that the "or" was disjunctive: although the contract may not oblige the worker to render his services personally, when he does render them personally under the contract, the legislative condition is fulfilled.

27. I accept that this is a possible interpretation on the literal wording. But it is not the only possible interpretation. "Personal services" as used in these provisions, could mean services of a kind that need to be performed personally by the contracting party. Since section 134(1) expressly applies only if it is an individual who renders or is obliged to render the services, inclusion of the word "personal" would otherwise be superfluous. As Mr Woolf submitted on behalf of Talentcore, "it is the obligation to act personally that distinguishes personal service from other service." On this analysis, the additional wording "or is under an obligation to render" serves to cover a worker who is paid for his contractual obligation to provide a personal service but has not yet provided it (i.e. paid in advance), without waiting for him to provide it before the payment becomes taxable; and also a worker who never provides it at all, because the contract allows a limited right of substitution (as in *James*) and he arranges for a substitute to carry out the work. I recognise that on this basis it might be said that the statute could have referred only to the individual being under "an obligation to render" and the words "renders or" could have been omitted. But "renders or is under an obligation to render" is a very natural formulation and it is not unusual for a statutory provision in the interests of clarity to contain words that may be unnecessary: see *Omar Parks Ltd v Elkington* [1992] 1 WLR 1270, *per* Nourse LJ at 1273G-H (with whose judgment Stocker and Beldam LJJ agreed).

28. Moreover, if HMRC's construction were correct, it gives rise to the anomaly that if an individual who is not under an obligation to provide personal services (e.g., because of an unfettered right of substitution) arranges for a substitute actually to do the work but himself receives payment, he will not come within the deeming provisions, whereas if he does the work himself he will do so. This could also give rise to practical difficulty since if the provisions apply, the agency is required to deduct tax under PAYE but, as is sometimes the case with Talentcore, it may not know whether the work was carried out by a substitute.

29. The importance of applying a broad, purposive interpretation to fiscal legislation in place of a formalist approach has received repeated and authoritative emphasis: see, eg, *IRC v McGuckian* [1997] 1 WLR 991, per Lord Steyn at 1000, Lord Cooke at 1005. I have no doubt that that approach applies generally and not only with regard to tax avoidance schemes in respect

of which it has been most frequently articulated. Here, the particular statutory regime is in the form of deeming provisions that require workers falling within the prescribed conditions to be treated for tax purposes as if they were employees. I consider that the regime is directed at workers who would be taxed as employees if engaged under a contract with the client for whom the work is carried out but are not employees because their contract is with a third party agency. That explains the double requirement of both personal services and supervision, direction or control: para 9 above. Adopting the construction urged on behalf of Talentcore is accordingly consistent with the purpose of these provisions, as I understand it to be, whereas the construction put forward by HMRC is not. Moreover, it is the former construction that, in my judgment, provides a more coherent and rational scheme to the legislation.

30. In addition, I note that if the HMRC's interpretation were correct, it would mean that ITEPA had introduced a substantive change to the scope of these provisions. Mr Tolley did not shrink from that conclusion, although he accepted that HMRC's previous position had been that there was no such change, and he acknowledged that there was no discernible reason why the legislation needed to be changed.

31. In my view, it is therefore appropriate to look again at ITEPA and ask whether there is any material which suggests a Parliamentary intention to amend the scope of these provisions of the earlier legislation. A later statute is admissible as an aid to construction of an earlier statute, at least when its provisions are ambiguous: *Revenue and Customs Commissioners v Valentine Marketing Holdings Ltd* [2006] EWHC 2820 (Ch), [2007] STC 1631, at [15]; and see *Kirkness v John Hudson & Co Ltd* [1955] AC 696 (to which Pumfrey J refers), *per* Viscount Simonds at 710-713, Lord Reid at 733-736 (with whom Lord Somervell agreed).

32. As the FTT observed, the Explanatory Notes to a statute may be used as an aid to interpretation, including to identify the "the objective setting or contextual scene of the statute and the mischief at which it is aimed": *R (Westminster City Council) v NASS* [2002] UKHL 38, [2002] 4 All ER 654, *per* Lord Steyn at [5]. The Explanatory Notes to ITEPA, prepared by the Tax Law Rewrite project at what was then the Inland Revenue, state at the outset that the main purpose of the statute "is to rewrite tax legislation relating to income from employment, pensions and social security so as to make it clearer and easier to use;" and that it also makes "some minor changes to the legislation": paras 3-4. As regards the changes to the provisions concerning taxation of agency workers, the notes state that the changed wording is by way of clarification as to whether the deemed duties of employment by the worker are treated as performed for the agency or the agency's client, and "has no implications for the amount of tax paid, who pays it or when. It affects administrative matters only…." The detailed "Commentary on sections" explains that the provisions of section 134 ICTA have been restructured into four sections with increased focus on "the agency contract". In short, it is clear from the Explanatory Notes that there was no intention in ITEPA to narrow the scope of workers falling within these provisions.

33. Accordingly, the clear meaning of the later legislation and the lack of any intention to make such a substantive amendment reinforces my view as to the correct construction of ICTA, which interprets it as having the same meaning as the parallel provisions in ITEPA.

(iii) *The 1978 Regulations*

34. Although the language of the 1978 Regulations in this regard is not identical with that of ICTA, they largely reflect each other. The only discernible difference in approach is the lack of express reference to a contract, but that is a distinction only in the way the paragraph in the schedule is formulated and not a difference of substance.

35. HMRC did not, as I understood their submissions, suggest that there is a material difference between the 1978 Regulations and ICTA. My principal reasons for upholding the FTT's interpretation of ICTA therefore apply equally to the relevant provisions concerning NIC. Moreover, although the 1978 Regulations obviously ante-date ICTA, the tax and national insurance provisions were first enacted at about the same time. The income tax provisions were first enacted as section 38 of the Finance (No 2) Act 1975 and the social security provisions were first introduced by the Social Security (Categorisation of Earners) Regulations 1975. I agree with the FTT that they should be interpreted consistently with one another.

Supervision, direction or control

36. I allowed Talentcore to amend its Response to the Notice of Appeal to contend that FTT erred in finding that the consultants supplied by Talentcore were "subject to (or to the right of) supervision, direction or control as to the manner in which [their] services are provided". That wording comes from ITEPA but it is common ground that in this respect there is no difference between the three legislative instruments at issue. For Talentcore it was argued that on a correct evaluation of the evidence, this condition for application of the provisions was not satisfied. Although, in the light of my conclusion on HMRC's grounds of appeal, it is not necessary to address this argument, I shall do so for completeness.

37. In his skeleton argument for Talentcore, Mr Woolf contended that the factual findings do not suggest that there was any actual control and that, in the absence of a written contract, there was no basis to imply a right of control.

38. However, insofar as consultants were supplied to work on the counter in the normal duty-free areas (as opposed to on special cosmetics promotions), which the FTT found covered 30% of Talentcore's work, there is an express finding that they would be working alongside the regular staff of World Duty Free and be subject to the same control as such staff: Decision, para 4(7); see also para 6 (last sentence). Manifestly, that will include control as to the manner in which they do their work.

39. Insofar as consultants worked on promotions for cosmetics companies, it is correct that the FTT found that there was little supervision in practice. But the FTT found that World Duty Free would be in a position to give directions to

those consultants (para 4(7)). Further, although in practice the cosmetics company does not have its own staff overseeing the promotions, the FTT Judge stated:

> "…I infer that if a manager from the cosmetics company were present he or she would have a similar right to exercise supervision, direction or control over consultants as he or she would over other retail staff who were employees" (Decision, para 6).

40. Although by way of inference, this is nonetheless a finding of fact. It is derived from an assessment of the primary facts by a highly experienced judge who heard the evidence. Ascertainment of whether the statutory condition is satisfied, especially in the absence of a written contract, in my view involves an evaluation that comes within the principle set out by Jacob LJ (with whose judgment Mummery and Toulson LJJ agreed) in *Proctor & Gamble UK v Revenue and Customs Commrs* [2009] STC 1990 at [9]:

> "Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that is so, an appeal court (whether first or second) should be slow to interfere with that overall assessment – what is commonly called a value judgment."

41. There is no error of principle in the approach to this question adopted in the FTT, nor is the finding one which can be assailed under the well-known test in *Edwards v Bairstow* [1956] AC 14, 36. Accordingly, the challenge by Talentcore to this conclusion of the FTT fails.

Conclusion

42. The FTT determined the appeal before it in a Decision of admirable clarity. For the reasons set out above, the appeal against the Decision by the FTT is dismissed.

MR JUSTICE ROTH
TRIBUNAL JUDGE
RELEASE DATE: 14 October 2011