[2017] UKFTT 729 (TC)

TC06143

Appeal number: TC/2016/04158

NATIONAL INSURANCE CONTRIBUTIONS – actor's services provided by a personal service company - interpretation of Social Security Contributions (Intermediaries) Regulations 2000 – application of the Social Security (Categorisation of Earners) Regulations 1978 – preliminary issue

FIRST-TIER TRIBUNAL
TAX CHAMBER

BIG BAD WOLFF LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Taylor House, London on 18 September 2017

Andrew Gotch, Tax Fellowship, for the Appellant

Akash Nawbatt QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Big Bad Wolff Limited ("**the appellant**") against a decision of the Respondents ("**HMRC**") dated 3 February 2016 to the effect that the appellant was liable to pay primary and secondary Class 1 National Insurance Contributions ("**NICs**") in the amount of £147,547 for the period from 6 April 2004 to 5 April 2014 in respect of the earnings of Mr Robert Glenister, a well-known actor.

2. This appeal is a test case and I understand that there are a number of other appeals, particularly concerning members of the acting profession, awaiting the outcome of this case. The parties asked me to determine as a preliminary issue a question of the correct statutory construction of s 4A Social Security Contributions and Benefits Act 1992 ("SSCBA") ("**s 4A**"), Regulation 6 Social Security Contributions (Intermediaries) Regulations 2000 SI 2000/727 ("**the Intermediaries Regulations**") and the application of the Social Security (Categorisation of Earners) Regulations 1978 SI 1978/1689 ("**the Categorisation Regulations**").

3. Although various matters relating to the quantum of the appellant's liability were in dispute, should I find in favour of HMRC on the preliminary issue, these were left over for subsequent determination. The parties agreed to provide draft directions, should it prove necessary, to assist in the resolution of these issues.

4. In addition, at the outset of the hearing, Mr Andrew Gotch, appearing for the appellant, raised the question of whether all of the contracts under which Mr Glenister's services were supplied involved the payment of salary. This would have the effect of excluding Mr Glenister from the Categorisation Regulations by virtue of paragraph 5A Schedule 1 Part1 Column (B) of the Categorisation Regulations. This was not a matter which was raised in the appellant's Notice of Appeal or in Mr Gotch's skeleton argument. For the purposes only of determining this preliminary issue I have proceeded on the assumption that the relevant contracts did involve the payment of a salary, but make no finding on this point.

5. References to section numbers are to sections of the SSCBA unless otherwise noted.

The facts

6. Perhaps strangely, for an appeal where there was no dispute about the facts, there was no statement of agreed facts in this case. I must say that I found this unsatisfactory. The following summary of the facts is taken primarily from HMRC's skeleton argument and from the unchallenged evidence of Mr Glenister.

7. The appellant is the personal service company of Mr Glenister and his wife. Mr Glenister provided his services directly to end clients (ie producers) through the appellant until 2011, at which time he ceased to use the appellant and provided his services directly.

8. It was common ground that had Mr Glenister provided his services directly to clients during the relevant periods, the contract between Mr Glenister and the clients would have been, as a matter of general law, a contract for services and not a contract of employment. It was also, as I understood it, common ground that, had Mr Glenister's services been supplied directly to clients and the contracts under which those services were supplied provided for the payment of salary, Mr Glenister would have been, as a result of Categorisation Regulations, treated as being in employed earner's employment for the NICs purposes with the effect that primary and secondary Class 1 contributions would be payable in respect of his earnings.

9. Mr Glenister, in his oral evidence, confirmed that during the relevant periods all his income from acting passed through the appellant (at least, I assume, until 2011 or shortly thereafter). He also confirmed that the appellant was not a producer of productions involving actors.

10. Mr Glenister was a director of the appellant (I assume until 2011) and received employment income and dividends from the appellant in respect of his acting services.

The relevant statutory provisions

11. Section 4A SSCBA was introduced by s 75 Welfare Reform and Pensions Act 1999 with effect from 22 December 1999, approximately seven years after the enactment of the SSCBA. Amendments were made by the Social Security Contributions and Benefits Act 1992 (Modification of Section 4A) Order 2003/1874 article 3, with effect from 8 August 2003. Section 4A SSCBA, so far as material, provides that:

> "(1) Regulations may make provision for securing that where—
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the performance of those services by the worker is (within the meaning of the Regulations) referable to arrangements involving a third person (and not referable to any contract between the client and the worker), and
>
> (c) the circumstances are such that, were the services to be performed by the worker under a contract between him and the client, he would be regarded for the purposes of the applicable provisions of this Act as employed in employed earner's employment by the client,
>
> relevant payments or benefits are, to the specified extent, to be treated for those purposes as earnings paid to the worker in respect of an employed earner's employment of his.
>
> (2) For the purposes of this section—
>
> (a) "the intermediary" means—

(i) where the third person mentioned in subsection (1)(b) above has such a contractual or other relationship with the worker as may be specified, that third person, or

(ii) where that third person does not have such a relationship with the worker, any other person who has both such a relationship with the worker and such a direct or indirect contractual or other relationship with the third person as may be specified; and

(b) a person may be the intermediary despite being—

(i) a person with whom the worker holds any office or employment, or

(ii) a body corporate, unincorporated body or partnership of which the worker is a member;

and subsection (1) above applies whether or not the client is a person with whom the worker holds any office or employment."

12. Section 4A(3) continues, so far as material:

"Regulations under this section may, in particular, make provision—

(a) for the worker to be treated for the purposes of the applicable provisions of this Act, in relation to the specified amount of relevant payments or benefits (the worker's "attributable earnings"), as employed in employed earner's employment by the intermediary;

(b) for the intermediary (whether or not he fulfils the conditions prescribed under section 1(6)(a) above for secondary contributors) to be treated for those purposes as the secondary contributor in respect of the worker's attributable earnings."

13. Section 4(6), so far as material provides:

"In this section –

'the applicable provisions of this Act' means this Part of this Act and Parts II to V below;

…

'Specified' is prescribed by or determined in accordance with regulations under this section."

14. Regulation 6 of the Intermediaries Regulations provides as follows:

"(1) These Regulations apply where—

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would

be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.

(2) Paragraph (1)(b) has effect irrespective of whether or not—

(a) there exists a contract between the client and the worker, or

(b) the worker is the holder of an office with the client.

(3) Where these Regulations apply—

(a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with regulation 7 ("the worker's attributable earnings"), as employed in employed earner's employment by the intermediary, and

(b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker's attributable earnings,

and Parts I to V of that Act have effect accordingly".

15. The Categorisation Regulations were introduced by s 2 SSCBA. Section 2(1) SSCBA separates earners into two categories as follows:

"In this Part of this Act and Parts II to V below—

(a) "employed earner" means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with earnings; and

(b) "self-employed earner" means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment)".

16. Section 2(2) and (3) SSCBA then goes on, so far as relevant, to provide:

" (2) Regulations may provide—

(a) for employment of any prescribed description to be disregarded in relation to liability for contributions otherwise arising from employment of that description;

(b) for a person in employment of any prescribed description to be treated, for the purposes of this Act, as falling within one or other of the categories of earner defined in subsection (1) above, notwithstanding that he would not fall within that category apart from the Regulations

…

(3) Where a person is to be treated by reference to any employment of his as an employed earner, then he is to be so treated for all purposes of this Act; and references throughout this Act to employed earner's employment shall be construed accordingly."

17. The Categorisation Regulations are made under s 2(2). Regulation 2(1) of the Categorisation Regulations sets out the primary position:

> (a) "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".

18. Regulation 2(2) of the Categorisation Regulations provides:

> "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 earnings".

19. For the relevant years, Schedule 1 Part1 Column A (entitled "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") of the Categorisation Regulations provided in paragraph 5A (now repealed), as follows:

> "Employment as an entertainer, not being employment under a contract of service or in an office with general earnings".

20. Excluded from this definition of an "entertainer", by virtue of paragraph 5A Schedule 1 Part1 Column (B) of the Categorisation Regulations, is:

> "5A Any person in employment described in paragraph 5A in column (A) whose remuneration in respect of that employment does not include any payment by way of salary. For the purposes of this paragraph "salary" means payments –
>
> (a) made for services rendered;
>
> (b) paid under a contract for services;
>
> (c) where there is more than one payment, payable at a specific period or interval; and
>
> (d) computed by reference to the amount of time for which work has been performed."

21. The Categorisation Regulations, by Regulation 5 and Schedule 3 Column (B) paragraph 10, in respect of employment as an entertainer, treat as the secondary contributor:

> "The producer of the entertainment in respect of which the payments of salary are made to the person mentioned in paragraph 5A of Column (B) of Schedule 1".

22. Regulation12 of the Intermediaries Regulations is entitled "Social Security (Categorisation of Earners) Regulations 1978 – Saving" and provides:

> "Nothing in these Regulations affects the operation of regulation 2 of the Social Security (Categorisation of Earners) Regulations 1978 (treatment of earners in one category of earners as falling within another category and disregard of employments) as that regulation applies to employment listed in paragraph 2 in column (A) of Part I of Schedule 1 to those Regulations (earner supplied through a third person treated as employed earner)".

Submissions for the Appellant

23. Mr Gotch referred to the decision of the House of Lords in *Barclays Mercantile Business Finance Limited v Mawson* [2004] 76 TC 446 (and particularly at [32]) which emphasised the importance of purposive construction. It was important, as a first step to identify the paradigm transaction to which the provision was intended by Parliament to apply and, then, to see whether the facts of the present case corresponded to the paradigm.

24. An insight into the paradigm transaction, said Mr Gotch, was provided by the Explanatory Notes to s75 Welfare Reform and Pensions Act 1999, which introduced what is now s 4A, from the following passage:

> "Sections 75 and 76 contain new measures to counter National Insurance avoidance, where services are provided through an intermediary. Most employers engage staff direct under a contract of service, paying Class 1 NICs, and income tax through Pay As You Earn (PAYE). They may also hire staff under a contract for services where the person being hired is self-employed. Sections 75 and 76 concern the situation where an individual is hired through a third party (such as a service company) in order to escape any direct contractual relationship between the client and the worker. This provides scope for avoiding tax and National Insurance, and can also lead to a loss of the worker's legal employment rights. ***Section 75 gives the power to ensure that, if the normal tests of employment and self-employment show that the worker would otherwise be an employee of the client, any payments made by the client in respect of that worker may be treated as earnings for National Insurance purposes***. Section 76 makes corresponding provision for Northern Ireland. ***Matching tax proposals will be made in the Finance Bill introduced in 2000***". (Mr Gotch's emphasis)

25. Thus, in Mr Gotch's submission, Parliament intended that s 4A should apply where, absent the intermediary, an employment relationship would exist between client and worker. Secondly, he contended that the NIC provisions were intended to act together with "matching" income tax provisions.

26. This was further supported, Mr Gotch contended, by the appended Background and Commentary on s75 which included the following passages:

> "… The powers in section 75 are intended to deal with the situation where the relationship between a client and a worker would be one of employer and employee, but for the intermediary. They provide for a

> specified amount of the payments made in respect of the worker to be treated as earnings paid to an employee – and therefore liable for NICs. Regulations under the section will ensure that specified amounts will be regarded as paid to the worker for the purposes of primary Class 1 NICs and the intermediary will be liable for the corresponding secondary Class 1 NICs. The regulations will identify how the amount to be treated as earnings paid to the worker will be calculated.
>
> … Subsection (1) sets out the circumstances in which the regulation-making power is to operate. Regulations will set out which arrangements involving a worker hired through an intermediary will be caught by the provision. The normal range of tests to decide a worker's status, which have developed through the courts and the principles of common law, will be used to determine whether the relationship between the client and the worker should be subject to the new rules. … The regulations implementing this measure will come into force on 6 April 2000 and will parallel the tax clauses due to be introduced in the Finance Bill 2000. However, in order to ensure the simplest possible systems for business to operate, it is necessary to keep the tax and NIC rules in line with each other. Subsection (9) therefore gives a power to enable this section to be adapted by order if the parallel tax provisions change".

27. Mr Gotch observed that there was, therefore, no mention of and no requirement for any interpolation of the Categorisation Regulations into the statutory framework of s 4A and the Intermediaries Regulations. Parliament's intention was, he said, to reflect the reality of the underlying employment relationship in the NIC consequences without regard to the contractual background.

28. In *Professional Contractors' Group & Ors v Commissioners of Inland Revenue* [2001] EWCA Civ 1945 ("*Professional Contractors' Group*") the Court of Appeal considered the lawfulness of the intermediaries legislation under Community law. In the course of his judgment, Robert Walker LJ said at [51]:

> "… the aim of both the tax and the NIC provisions (an aim which they may be expected to achieve) is to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation."

29. Recognising that Robert Walker LJ's words were a gloss on the statutory language, Mr Gotch submitted that these comments reinforced his argument that the provisions were concerned with the avoidance by individuals who were, as a matter of fact and law, employees. Mr Gotch also referred to a passage from Robert Walker LJ's judgment at [12]:

> "The legislation does not strike at every self-employed individual who chooses to offer his services through a corporate vehicle. Indeed it does not apply to such an individual at all, unless his self-employed status is near the borderline and so open to question or debate. The whole of the IR35 regime is restricted to a situation in which the worker, if directly contracted by and to the client "would be regarded

> for income tax purposes as an employee of the client". That question has to be determined on the ordinary principles established by case law …."

30. It was common ground that Mr Glenister was self-employed as a matter of general law. Therefore, Mr Gotch argued that it was contrary to the purpose of the legislation for the Intermediaries Regulations to apply to him or to the appellant.

31. In relation to the Categorisation Regulations, Mr Gotch submitted that they were intended to confirm benefit entitlements derived from the making of class 1 NIC contributions on those who would not otherwise be entitled to make those contributions because the factual circumstances placed them in the wrong category to do so. Thus, the Categorisation Regulations were, Mr Gotch said, "beneficent" and were not an anti-avoidance measure. They allowed actors who would otherwise be self-employed to obtain benefits while they were "resting" between acting engagements.

32. Referring to Regulation 2(1) of the Categorisation Regulations, Mr Gotch observed that it was necessary for a person, as a matter of fact, first to fall within a particular category of earners in order to be treated as an earner within the other category. In other words, the Categorisation Regulations were fact-based and did not operate in relation to hypothetical circumstances. In particular, the Categorisation Regulations did not allocate a worker to a particular category without the worker first being in the other category. The Regulations did not make a worker a member of a different category as a matter of fact – the true category of the worker remained unchanged. The categorisation Regulations simply treated the worker as being within another category in order to allow the worker access to benefits.

33. The position was even clearer, Mr Gotch submitted, when Regulations 2(1) and (2) were read together. The effect of these provisions was that a self-employed actor would be categorised for the purposes of NIC as an employed earner unless he fell within the exceptions provided by paragraph 5A Schedule 1 Part 1 Column B ("**the Column B exclusion**"); but an actor who was employed would not fall within the Categorisation Regulations at all because of the specific exclusion for those in employment in paragraph 5A.

34. As a director of the appellant in receipt of a salary, Mr Glenister was, Mr Gotch submitted, employed in an office with general earnings. It followed, therefore, that the Categorisation Regulations could not apply to him. Mr Glenister's evidence was that all his earnings as an actor passed through the appellant, which had accounted for primary and secondary NIC on all of Mr Glenister's earnings.

35. Mr Gotch observed that by Regulation 5 and Schedule 3 Column B paragraph 10 of the Categorisation Regulations, in respect of employment as an entertainer, the secondary contributor was:

> "The producer of the entertainment in respect of which the payments of salary are made to the person mentioned in paragraph 5A of Column (B) of Schedule 1".

36. Mr Gotch noted that the appellant was not a producer of any entertainment and could not, therefore, be the secondary contributor under the Categorisation Regulations.

37. In relation to the intermediaries legislation, the original policy purpose of s 4A and the Intermediaries Regulations was to counteract the avoidance of NIC by individuals who would otherwise be employees by the insertion of an intermediary in the contractual chain between the worker and the client. All the circumstances of the worker/intermediary/client relationship had to be considered and these were then consolidated into a contract between the worker and the client directly to determine whether the worker would have been an employee of the client.

38. Mr Gotch noted that HMRC accepted that, following a decision of the Special Commissioners (Mr DC Potter QC and Mr SJ Oliver QC) in *AD McCowen & SA West v The Commissioners of Inland Revenue* [1993] ("*McCowen & West*"), the income tax legislation at Part 2 Chapter 8 ITEPA 2003 was not point, because the absence of control over actors, such as Mr Glenister, prevented the hypothetical contract being a contract of service. HMRC accepted that the same result followed under s 4A and the Intermediaries Regulations, save for the fact that the Categorisation Regulations engaged the Intermediaries Regulations and thus, according to HMRC, gave rise to an NIC liability.

39. Mr Gotch accepted that some actors, such as those employed in repertory companies, would be employed rather than self-employed as a matter of general law.

40. Next, Mr Gotch noted that s 4A(3)(a)-(b) contained provisions for "categorisation" that were sufficient for the purposes of s 4A; and that the Categorisation Regulations were not made under s 4A.

41. Mr Gotch compared s 4A(1)(c) with the corresponding provision in Part 2 Chapter 8 ITEPA 2003, which is found at s 49(1)(c)(i) ITEPA 2003.

42. Section 4A(1)(c) SSCBA 1992 provides:

> "… the circumstances are such that, were the services to be performed by the worker under a contract between him and the client, he would be regarded for the purposes of the applicable provisions of this Act as employed in employed earner's employment by the client".

43. Section 49(1)(c) ITEPA 2003 provides

> "… the circumstances are such that if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client…."

44. Thus, at the level of primary legislation, the NIC and income tax provisions were matched and Mr Gotch submitted that this negated any argument that the target of Parliament's purpose in the NIC and income tax legislation differed in any way. Precisely the same result followed, in his submission, from each provision.

45. Mr Gotch also referred to *Dragonfly Consultancy Ltd v HMRC* [2008] EWHC 2013 (Ch) where Henderson J considered the difference in wording between Regulation 6(1)(c) and s 49. Mr Gotch suggested that any potential conflict envisaged by Henderson J disappeared once it was recognised that Regulation 6(1)(c) was subject, as delegated legislation, to the rule of primary intention and could not legitimately go beyond the scope of the enabling provision of s 4A(1)(c) (see *Bennion*, *Statutory Interpretation – A Code* Section 59).

46. Mr Gotch submitted that the wording of Regulation 6(1)(c) should be interpreted as an attempt by the drafter to represent the requirements embodied in s 49(1)(c)(1) and s 49(4) within a single regulation, thereby fulfilling the purpose of s 4A and maintaining parity with the income tax provisions.

47. It was common ground, Mr Gotch said, that the requirements of Regulation 6(1)(a)-(b) were satisfied. In his submission, however, the requirement in Regulation 6(1)(c) was not satisfied.

48. The nature of the test in Regulation 6(1)(c) was considered by Hart J in *Synaptek Limited v Young* [2003] 75 TC 51 at [11]. Hart J, having rejected the proposition that the question posed was one of law, said:

> "The inquiry which reg 6(1) directs is in the first instance an essentially factual one. It involves identifying, first, what are the 'arrangements involving an intermediary' under which the services are performed, and, secondly, what are the 'circumstances' in the context of which the arrangements have been made and the services performed. The legal hypothesis which then has to be made is that the arrangements had taken the form of a contract between the worker and the client. To the extent that 'the arrangements' are in the particular case to be found only in contractual documentation, it may be true to say that the interpretation of that documentation is a question of law. Even in that case, however, the findings of the fact-finding tribunal will be determinative of the factual matrix in which the interpretative process has to take place, and influential to a greater or lesser degree in enabling the essential character of the arrangements to be identified. Where, on the other hand, the arrangements cannot be located solely in contractual documentation, their identification and characterisation is properly to be described as a matter of fact for the fact-finding tribunal. The fact that the tribunal is then asked to hypothesise a contract comprising those arrangements directly between the worker and the client does not, by itself, convert the latter question from being a question of mixed fact and law into a pure question of law".

49. That the test was a factual one, was supported, in Mr Gotch's submission, by two points. First, the hypothetical contract in Regulation 6(1)(c) must comprise the "arrangements" referred to in Regulation 6(1)(b), which emphasised the factual nature of the test. Secondly, Regulation 6(1)(c) required that "the circumstances are such that … the worker would be *regarded* … as employed in employed earner's employment by the client". The phrase "employed earner's employment" related back to s. 2(1) SSCBA 1992 and asks whether the worker would be regarded as gainfully employed

under a contract of service or in an office with general earnings. Mr Gotch submitted that the word "regarded" underlined the statutory focus on the factual nature of the circumstances to be taken into account in establishing the hypothetical factual conclusion. Only factual aspects of the relationship between the worker, intermediary and client could be taken into account in Regulation 6(1)(c).

50. On any sensible view, Mr Gotch contended, the Categorisation Regulations were not part of the "arrangements" between client, intermediary and worker. Similarly, the Categorisation Regulations could not form part of the "circumstances" that were taken into account. If the Categorisation Regulations applied in interpreting Regulation 6(1)(c), they would not "regard" the worker as employed in employed earner's employment by the client but would simply "treat" the worker is falling within the category of employed earner.

51. Thus, Mr Gotch's essential point was that the purpose of Regulation 6(1)(c) was to arrive at a purely factual hypothesis about what the circumstances of the individual worker would be under the hypothetical contract. There was no need for any "deeming" to arrive at what was a purely factual conclusion.

52. The verbs "regard" and "treat" could not, in Mr Gotch's submission, be used interchangeably. If different words were used, particularly in the same statutory provision, then a different meaning must be intended in order to give effect to Parliament's purpose.

53. The word "regarded", Mr Gotch argued, had to be contrasted with the word "treated" used in Regulation 6(3), which set out the consequences of being regarded as an employed earner under the factual test in Regulation 6 (1).

54. In the case of Regulation 6(1)(c), the purpose of the provision was to identify the factual category of earners – a purpose to which the word "regarded" was well-suited.

55. Mr Gotch contended that above interpretation allowed the Intermediaries Regulations to operate in accordance with the policy purposes of s 4A, bringing within its scope those who would be employees but for the interposition of an intermediary, but excluding those who would not be.

56. In short, the Categorisation Regulations did not apply to Mr Glenister (because he was a director of the appellant deriving a salary) and, even if they did apply, they would simply *treat* Mr Glenister as if he were an employee whereas Regulation 6(1)(c) required Mr Glenister to be an employee as a matter of fact.

57. Moreover, Mr Gotch argued that there was evidence that the interaction of the Categorisation Regulations and the Intermediaries Regulations was considered when the Intermediaries Regulations were drafted.

58. Regulation 12 of the Intermediaries Regulations ("Social Security (Categorisation of Earners) Regulations 1978 – Saving" provides:

> "Nothing in these Regulations affects the operation of regulation 2 of the Social Security (Categorisation of Earners) Regulations 1978 (treatment of earners in one category of earners as falling within another category and disregard of employments) as that regulation applies to employment listed in paragraph 2 in column (A) of Part I of Schedule 1 to those Regulations (earner supplied through a third person treated as employed earner)".

59. Actors and entertainers generally were expressly excluded from the Categorisation Regulations under paragraph 2 by the exceptions to it in Schedule 1 Part 1 Column B paragraph 2. Mr Gotch observed that there was no corresponding saving for paragraph 5A, which referred expressly to entertainers. Mr Gotch argued that a further implication of the saving provision for paragraph 2 was that, without saving, the Intermediaries Regulations prevailed over the Categorisation Regulations and excluded their operation.

60. Mr Gotch contended that when the Intermediaries Regulations came into force on 6 April 2000, it was accepted by HMRC that the exclusion in Schedule 1 Part 1 Column B at paragraph 5A (as inserted by the Social Security (Categorisation of Earners) Amendment Regulations 1998 SI 1998/1728) applied to successful actors, like Mr Glenister i.e. they would not within the Categorisation Regulations unless they were paid wholly or mainly by way of salary. Successful actors were rarely so remunerated. There would, thus, have been no need for any saving for Schedule 1 Part 1 Column B paragraph 2 and no need for the drafter to provide for the interaction of the Categorisation and Intermediaries Regulations – there is simply no need for an interaction between the two sets of provisions.

61. When the Categorisation Regulations were amended in 2003 by the Social Security (Categorisation of Earners) Amendment Regulations 2003 SI 2003/736, a more restrictive exclusion from the scope of paragraph 5A was provided; but there was no corresponding amendment to the Intermediaries Regulations and therefore nothing to suggest that there was any interaction between the two sets of Regulations.

62. Mr Gotch argued that the fact that successful actors, such as Mr Glenister, were not envisaged as falling within the Categorisation Regulations as amended in 2003 was supported by Revenue Interpretation RI 255 which envisaged that "key talent artistes" were excluded. This was further supported by a letter from the then Paymaster General (Ms Dawn Primarolo) dated 14 March 2003 to the General Secretary of Equity to the effect that "a small minority of entertainers, at the very top of their profession, [will] continue to be treated as self-employed the national insurance purposes."

63. Finally, Mr Gotch submitted that there was further evidence relating to the entitlement of the appellant to a corporation tax deduction to suggest that the Intermediaries Regulations were never intended to operate independently of the tax legislation contained in ITEPA.

64. If the Intermediaries Regulations applied, Mr Gotch said, the NIC legislation operated in relation to "the worker's attributable earnings", as provided for by Regulation 6(3) *et seq*. However, that term was an expression used only in the NIC legislation and was not used in Part 2 Chapter 8 ITEPA 2003, which described the same amount as a "deemed employment payment" (s 50(1) ITEPA 2003). However, s 139 Corporation Tax Act 2009 provided that a corporation tax deduction was only available in respect of a "deemed employment payment".

65. The difficulty arose, argued Mr Gotch, because there was no intermediary treated as making a deemed employment payment for the reason that, as HMRC accepted, Part 2 Chapter 8 ITEPA 2003 did not apply because the hypothetical contract between Mr Glenister and the client was a contract the services in accordance with the decision in *McCowen & West*. It followed, therefore, there was nothing within s 139 in respect of which NIC could be paid. This suggested that HMRC's attempt to construe the Intermediaries Regulations independently of Part 2 Chapter 8 ITEPA 2003 by using the Categorisation Regulations was misconceived.

Submissions for HMRC

66. Mr Akash Nawbatt QC, appearing for HMRC, agreed that the real question in this appeal was whether Regulation 6(1)(c) of the Intermediaries Regulations was satisfied. Mr Nawbatt observed, however, that Regulation 6(1)(c) did not use the same language as s 49 ITEPA.

67. Mr Nawbatt submitted that s 4A(1)(c) and Regulation 6(1)(c) were materially the same. They both had the same effect and therefore the principle of primary intention referred to in *Bennion* had no application. Whether one applied Regulation 6(1)(c) or s 4A(1)(c) the effect was the same – on the facts of this case the criteria set out in those provisions were satisfied.

68. In applying those provisions, Mr Nawbatt submitted that it was necessary to carry out a two-stage process. First, it was necessary to determine what the arrangements would have been if the worker had been in a direct contractual relationship with the client. The Categorisation Regulations, which addressed the question of who was an employed earner, were then relevant to the second stage, viz would the worker be employed in employed earner's employment by the client.

69. Mr Nawbatt drew attention to the wording of s 4A(1)(c) and, in particular, to the words "he would be regarded for the purposes of the applicable provisions of this Act". The expression "the applicable provisions of this Act" was defined by s 4(6) as meaning "this Part of this Act and Parts II to V below." This was, therefore, identical to the tailpiece of Regulation 6(1)(c) which referred to the same Parts of the SSCBA. Mr Nawbatt noted that s 2(2)(b) (pursuant to which the Categorisation Regulations were promulgated) referred to the treatment of someone as falling within a particular category of earner as being "for the purposes of this Act." Furthermore, s 2(3) made it clear that where a person was to be treated by reference to any employment as an employed earner, "then he is to be so treated for all purposes of this Act; and

references throughout this Act to employed earner's employment shall be construed accordingly."

70. This made it clear, in Mr Nawbatt's submission, that the treatment of an actor as being in employed earner's employment pursuant to the Categorisation Regulations was intended to apply throughout the SSCBA and, in particular, to s 4A. Moreover, the words "regarded for the purposes of the applicable provisions of this Act" made it plain that it was how the individual in question was treated for NIC purposes rather than for income tax purposes that was relevant. Mr Glenister would have been regarded for the purposes of the applicable NIC provisions as being in employed earner's employment.

71. Mr Nawbatt therefore submitted that the word "regarded" as used in s 4A(1)(c) and Regulation 6(1)(c) included persons who were "treated" as employed in employed earner's employment in accordance with the Categorisation Regulations enacted pursuant to s 2(1)(b). The use of the word "regarded" in s 4A(1)(c) and Regulation 6(1)(c) included both those who were employed earners both for the purposes of s 2(1)(a) (i.e. persons who were "gainfully employed in Great Britain either under a contract of service, or in an office… with earnings") and those who were "treated" as employed earners pursuant to s 2(1)(b). If s 4A(1)(c) had used the word "treated" instead of "regarded" it would not have included persons within s 2(1)(a).

72. Section 4A was inserted into the SSCBA in 1999 and the drafter would have had s 2, an existing provision, in mind. In particular, the drafter would have had in mind both s 2(1)(b) ("be treated, for the purposes of this Act") and 2(3) ("he is to be treated for all purposes of this Act; and references throughout this Act to employed earner's employment shall be construed accordingly").

73. As regards the argument that the Categorisation Regulations could not apply to Mr Glenister because he was a director of the appellant, Mr Nawbatt argued that the statutory hypothesis in s 4A(1)(c) and Regulation 6(1)(c) required the intermediary to be ignored and to consider the situation that would exist were the services to be performed by the worker under a direct contract between him and the client. It was therefore necessary to disregard the existence of the appellant and Mr Glenister's directorship of the appellant. It was simply necessary to look at the situation that would exist if Mr Glenister contracted directly with the client.

74. Regulation 12 of the Intermediaries Regulations showed, according to Mr Nawbatt, that the drafters of those Regulations were aware of the Categorisation Regulations and provided for how any conflict was to be addressed. Had Parliament intended that self-employed actors were not to be covered by the Regulations in Parliament would have made provision to this effect by excluding actors. Therefore, Regulation 12 supported HMRC's argument.

75. In relation to letter from the Paymaster General (Ms Dawn Primarolo) dated 14 March 2003, Mr Nawbatt submitted that this set out only the intention of amendments

to the Categorisation Regulations in 2003 and not of the Intermediaries Regulations which were enacted in 2000.

76. As regards Revenue Interpretation RI 255, Mr Nawbatt drew attention to a paragraph in the interpretation which was consistent with HMRC's submission that the Intermediaries Regulations applied and were understood to apply to a person who was treated as being in employed earner's employment.

77. In relation to the corporation tax deduction for NIC payments, Mr Nawbatt's instructions were that corporation tax relief was always available in relation to payments of NIC.

78. As regards the Explanatory Notes in respect of what became s 4A, these were drafted at a very high level in relation to complex legislation. They dealt with the typical or paradigm case. In any event, Mr Nawbatt did not accept Mr Gotch's argument relating to the need first identify the paradigm case envisaged by s 4A.

79. Mr Nawbatt argued that the reference in the judgment of Robert Walker LJ in *Professional Contractors' Group* at [51] to individuals "who ought to pay tax and NIC as employees" was simply shorthand – but for NIC purposes the correct reference was to persons in employed earner's employment.

80. More generally, Mr Nawbatt argued that it cannot really have been Parliament's intention that a category of self-employed individuals that Parliament had deemed should otherwise pay NICs as persons in employed earner's employment should be able to avoid that liability by inserting an intermediary company. There was no rational reason why Parliament should deem employed earners not to be covered by the Intermediaries Regulations. The mischief at which s 4A was aimed was to prevent the avoidance of NICs by the insertion of an intermediary personal service company.

Discussion

81. This appeal raises a short point of statutory construction regarding the application of the Intermediaries Regulations.

82. In my judgment the clear intention of Parliament in enacting s 4A was to prevent the avoidance of NICs by the introduction of intermediary or personal service companies. I have no doubt, prior to the introduction of s 4A , that in most cases the avoidance would arise because a worker, who would otherwise be in employed earner's employment in respect of his or her earnings from the client, would avoid NICs by using an intermediary company to supply the worker's services to the client. The remuneration paid by the client to the intermediary company was not subject to NICs and the worker paid NICs only on the small remuneration element paid by the intermediary to the worker - the balance being retained in the intermediary company or distributed to the worker (free from NICs) by way of dividend.

83. That is exactly the mischief addressed in the Explanatory Notes to which Mr Gotch referred. But I do not think that the Explanatory Notes intended to provide a

comprehensive account of all the circumstances in which the Intermediaries Regulations, enacted under s 4A, were intended to apply.

84. As to the propriety of having recourse to Explanatory Notes as an aid to statutory interpretation, the position was set out by Brooke LJ in *Flora (Tarlochan Singh) v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103 at [15]-[17]:

> "The use that courts may make of Explanatory Notes as an aid to construction was explained by Lord Steyn in *R (Westminster City Council) v NASS* [2002] UKHL 38 at [2]-[6]; [2002] 1 WLR 2956; see also *R (S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39 at [4], [2004] 1 WLR 2196. As Lord Steyn says in the *NASS* case, Explanatory Notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the Government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone: they aim to explain the effect of the text and not to justify it.
>
> The text of an Act does not have to be ambiguous before a court may be permitted to take into account an Explanatory Note in order to understand the contextual scene in which the Act is set (*NASS*, para [5]). In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of Explanatory Notes as an aid to construction by saying (at para [6]):
>
> 'What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.'
>
> The value of … Explanatory Notes as an aid to construction … is that it [sic] identifies the contextual scene … That is all. If, however, it is impossible to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament, it is in my judgment equally impossible to treat the Government's expectations as reflecting the will of Parliament. We are all too familiar with statutes having a contrary result to that which the Government expected through no fault of the courts which interpreted them.'

85. In *Solar Century Holdings Ltd & Ors v Secretary of State for Energy & Climate Change* [2014] EWHC 3677 (Admin) Green J referred to the caveat expressed by Lord Steyn in *NASS* at [6] as follows:

> "This caveat is important in that it emphasises that pre-legislative material is no more than a guide to the court. If, therefore, the language of the enactment is clear and unequivocal and inconsistent with the

> pre-legislative material, then a court cannot assume that Parliament necessarily intended to translate into statutory form the will of the Executive."

86. Finally, I should also refer to the comments of *Bennion* (Comments on Code Section 219):

> "While the text of the enactment is produced by a skilled drafter intent on devising the actual words which constitute the law, and is what the legislator has approved as being the law, all other explanatory texts are likely to have been produced by persons other than the drafter who may not be skilled in the principles of statute law and may not have the full knowledge of the enactment and its purposes which is possessed by the drafter. Furthermore any text which aims to condense, paraphrase or otherwise restate the effect of the enactment is bound to convey a meaning which cannot be exactly the same as the legal meaning of the enactment itself."

87. In the present case, Mr Glenister would, as a matter of general law, be a self-employed actor. If, however, he contracted directly with a client and was paid a salary (with the result that he was not within the exclusion in Column (B) of Part I to Schedule 1 to the Categorisation Regulations) he would have been treated as being in employed earner's employment for NIC purposes. He was, of course, also a director of the appellant receiving general earnings, at least until 2011.

88. In these circumstances, it seems wrong to me to conclude that the treatment of Mr Glenister as falling within Regulation 6 of the Intermediaries Regulations is contrary to the mischief which s 4A and the Intermediaries Regulations intended to address. It is true that Mr Glenister would have been a self-employed person as a matter of general law, but he was treated as being in employed earner's employment by the Categorisation Regulations. I shall come back to the point about whether the exclusion in paragraph 5A in Column (A) of Part I to Schedule 1 to the Categorisation Regulations "for persons being in employment or in an office with general earnings" when I discuss the Intermediaries Regulations.

89. It is, therefore, more correct to characterise this as a case where someone who would otherwise be treated as being in employed earner's employment has sought, by using an intermediary company, to reduce his liability to NICs.

90. On this basis, I do not think that the application of the Intermediaries Regulations to Mr Glenister falls outside the mischief of those Regulations or of s 4A. I therefore reject Mr Gotch's submission that the mischief of s 4A and the Intermediaries Regulations as explained by the Explanatory Notes is inconsistent with HMRC's application of those provisions in this case.

91. Section 4A(1)(c) requires me to decide whether the circumstances are such that, were the services to be performed by the worker under a contract between him and the client, he would be regarded for the purposes of the applicable provisions of the SSCBA as employed in employed earner's employment by the client. Regulation 6(1)(c) of the Intermediaries Regulations creates a similar hypothesis using slightly

(but not materially) different language. In applying this statutory hypothesis it seems to me necessary to ignore the existence of the appellant in Mr Glenister's arrangements. Section 4A(1)(c) and Regulation 6(1)(c) assume a direct relationship between Mr Glenister and the client. There is no room in that hypothetical direct relationship for the existence of the appellant, which has to be ignored in relation to Mr Glenister's services in order to give effect to the provisions. It seems to me inconsistent with the hypothesis which s 4A(1)(c) and Regulation 6(1)(c) require me to make to take account of the fact that Mr Glenister's services are supplied by the intermediary company to the client and that he is remunerated for his acting services by virtue of being a director of the appellant.

92. Accordingly, when construing paragraph 5 A Part I Column (A) Schedule 1 to the Categorisation Regulations, in applying s 4A(1)(c) and Regulation 6(1)(c), Mr Glenister's directorship with the appellant must be disregarded.

93. Mr Gotch drew a distinction between the words "regarded" in s 4A(1)(c) and Regulation 6(1)(c) and "treated" in s 2(2)(b). He argued that the word "treated" referred to a deemed statutory treatment but the word "regarded" related to a factual state of affairs. I do not accept that submission. In my judgment, the word "regarded" used in s 4A(1)(c) and Regulation 6(1)(c) is wide enough to comprehend a deemed treatment ordained by the Categorisation Regulations. As Mr Nawbatt observed, s 2(3) requires that the treatment as an employed earner is a treatment "for all purposes of this Act" – a requirement which applies to s 4A and Regulation 6(1)(c).

94. Furthermore, in my view the "circumstances" would be such that in this case Mr Glenister would be treated as in employed earner's employment if he contracted directly with the client. I do not think that the word "circumstances", used in s 4A(1)(c) and Regulation 6(1)(c), requires me to ignore the treatment (i.e. that the worker is treated to be in employed earner's employment) prescribed by the Categorisation Regulations. In addition, I do not consider that this conclusion is inconsistent with the observations of Hart J in *Synaptek*. It is clear that Hart J was speaking generally and did not have the special circumstances of entertainers and the Categorisation Regulations in mind.

95. Finally, I do not consider that the difference in treatment between NIC legislation and income tax legislation can affect the position. Whilst the two statutory codes work closely together there are divergences, of which this is one.

96. On the basis of the facts assumed earlier in this decision, I have therefore come to the conclusion that Mr Glenister is in employed earner's employment by virtue of the Intermediaries Regulations and the Categorisation Regulations.

97. For these reasons, I have decided this preliminary issue in favour of HMRC.

Rights of appeal

98. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 3 October 2017