[2019] UKUT 121 (TCC)

Appeal number: UT/2018/00012

NATIONAL INSURANCE CONTRIBUTIONS – personal service company – self-employed actor - whether Regulation 6(1)(c) of the Social Security Contributions (Intermediaries) Regulations 2000 is satisfied by virtue of the Social Security (Categorisation of Earners) Regulations 1978– yes – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Appellant

BIG BAD WOLFF LIMITED

-and-

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

TRIBUNAL **MR JUSTICE HENRY CARR**
JUDGE JONATHAN RICHARDS

Sitting in public at The Rolls Building, Fetter Lane, London on 11 March 2019

Marika Lemos and Colm Kelly for the Appellant

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

DECISION

Introduction

1. The appellant company (the "Company") is a personal service company through which Mr Robert Glenister, a successful actor, provided his services to clients between 6 April 2004 and 5 April 2011. Mr Glenister's wife also provided services to her clients through the Company but her services are not relevant to this appeal.

2. The Respondents ("HMRC") concluded that, applying the provisions of the Social Security Contributions (Intermediaries) Regulations 2000 (the "Intermediaries Regulations"), arrangements entered into between the Company, Mr Glenister and end clients made the Company liable to pay primary and secondary Class 1 national insurance contributions ("NICs") in respect of those arrangements. The Company appealed to the First-tier Tribunal (Tax Chamber) (the "FTT") against that decision.

3. At the heart of this appeal is the interaction between the Social Security (Categorisation of Earners) Regulations 1978 (SI 1978/1689) (the "Categorisation Regulations") and the Intermediaries Regulations. In a decision released on 3 October 2017 and reported as *Big Bad Wolff Limited v HMRC* [2017] UKFTT 0729 (TC) (the "Decision"), the FTT (Judge Guy Brannan) decided, as a preliminary issue, that assuming Mr Glenister would, if he had contracted directly with his clients (rather than adopting the arrangements he did that involved the Company), have received payments of "salary" as defined in the Categorisation Regulations, the Intermediaries Regulations applied so as to treat him as employed by the Company in an employed earner's employment. With the permission of Judge Brannan, the Company now appeals to the Upper Tribunal against the Decision.

4. Paragraph [3] of the Decision records that various matters relating to the quantum of the appellant's liability were in dispute, which (as the FTT found in favour of HMRC on the preliminary issue) were left over for subsequent determination. Paragraph [4] of the Decision records that, at the outset of the hearing, the Company's then representative raised the question of whether all of the contracts under which Mr Glenister's services were supplied involved the payment of salary. If not, this would have the effect of excluding Mr Glenister from the Categorisation Regulations by virtue of paragraph 5A Schedule 1 Part 1 Column (B) of those Regulations. For the purpose of determining the preliminary issue, the FTT proceeded on the assumption that the relevant contracts did involve the payment of a salary but made no finding on this point. This may be a matter which requires further consideration. For the purposes of this appeal, we adopt the same assumption as the FTT, as did the parties during their submissions.

Relevant statutory provisions

The Intermediaries Regulations

5. The Intermediaries Regulations were made under s4A of the Social Security Contributions and Benefits Act 1992 ("SSCBA") which was itself introduced by s75 of the Welfare Reform and Pensions Act 1999 with effect from 22 December 1999 as part

of a package of measures that came to be known as "IR35" (after the press release that announced them).

6. The parties differed as to the precise purpose of the IR35 measures but agreed that, in broad overview, those measures were intended to prevent individuals from avoiding income tax and NIC by providing services to a person who was economically their employer through an intermediary company rather than directly. Section 4A of SSCBA provides, so far as material, as follows:

> (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; …

7. Section 4A(3) of SSCBA sets out the provisions that can be made under regulations as follows:

> (3) 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.

8. The Intermediaries Regulations were made under s4A of SSCBA. 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.
>
> …
>
> (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.

9. The parties were agreed on the effect of Regulations 6(1)(a) and 6(1)(b) of the Intermediaries Regulations and we need say no more about those provisions. However, Regulation 6(1)(c) is central to this dispute and merits further explanation. The function of Regulation 6(1)(c) is to ask a hypothetical question, namely how a hypothetical contract entered into between the "worker" and the "client" would be treated. If, under that hypothetical contract, the worker would be regarded for the purposes of Parts I to V of SSCBA as employed in an employed earner's employment, the "mischief" identified in paragraph [6] above is present since, by contracting through an intermediary, the worker has the prospect of obtaining a different treatment for NIC purposes than if he or she had contracted directly. With that mischief in mind, paragraph 6(3) treats the worker for the purposes of Parts I to V of SSCBA as employed in an employed earner's employment by the intermediary and makes the intermediary liable for NIC as a secondary contributor.

10. The Company submits that Regulation 6(1)(c) focuses attention only on the hypothetical contract between the worker and the client "and not any would-be deeming supplied by another regulation enacted in pursuit of a different purpose" in arguing that the Categorisation Regulations are not relevant to Regulation 6(1)(c). Later in this decision, we will analyse different ways in which that argument was amplified. At this stage, we will simply note that we reject the Company's broad submission. Regulation 6(1)(c) is plainly asking how the law would apply if there were a direct contract between the worker and the client. There is no reason why the Categorisation Regulations are necessarily irrelevant to that question.

The Categorisation Regulations

11. 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.

12. For the relevant years, Schedule 1 Part 1 Column A of the Categorisation Regulations provided in paragraph 5A (now repealed), described the following type of employment:

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

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

> 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 –
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> (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.

14. 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.

15. Since 6 April 2014, the Categorisation Regulations have not applied to entertainers as paragraph 5A of Schedule 1 was repealed with effect from that date. However, the reason why it was thought desirable for the Categorisation Regulations to apply to entertainers for a long period is reasonably clear. Entertainers tend to be self-employed and, with the exception of those at the top of the profession, tend to earn income at sporadic intervals with periods of "rest" in between. Without special provision, such entertainers would not be regarded as "employed earners" and so might not have any entitlement to welfare benefits (such as Jobseekers' Allowance) that depends on having a sufficient contribution history for NIC purposes. Therefore, the Categorisation Regulations "treat" entertainers to whom they apply as employed earners even though they might otherwise not meet that definition and make the producer of the relevant entertainment liable as secondary contributor for NIC purposes. The NICs paid by both the entertainer and the producer provides the entertainer with access to benefits such as Jobseekers' Allowance.

16. Ms. Lemos submitted that the Categorisation Regulations had a "purpose" of including only entertainers on the lower rungs of the professional ladder and excluding what she described as "key talent" at the top of the profession. We see no warrant for such a description of the regulations' purpose. While a motivation for including entertainers within the scope of those regulations was to enable lower-paid entertainers to obtain access to social security benefits, the clear purpose of the Categorisation Regulations is that they are to apply in all circumstances where an entertainer receives remuneration that includes, to any extent, a payment of "salary" as defined. Therefore, what matters is not whether an entertainer is "key talent" at the top of the profession, or someone just starting out, but the kind of remuneration that the entertainer receives. Moreover, as Rimer LJ's survey of the background to the regulations set out in *ITV Services Ltd v Revenue and Customs Commissioners* [2013] EWCA Civ 867 makes clear, the Regulations had been specifically amended to cast the net wider. Prior to amendment in 2003, the Categorisation Regulations applied only to entertainers who received remuneration "wholly or mainly" by way of "salary", but this led to producers providing a material part of entertainers' remuneration otherwise than by way of "salary" so as to take entertainers outside the scope of the regulations (and so save the expense of making secondary NIC contributions). The changes in 2003 altered the requirement so that <u>any</u> payment of salary to an entertainer caused the Categorisation Regulations to apply with the result that the entirety of the remuneration paid (including any remuneration that did not consist of "salary") became subject to NIC.

Overview of the dispute and the respective positions of the parties

17. Subject to the assumption to which we have referred, there was little, if any, dispute on relevant facts and the following matters were common ground:

> (1) If Mr Glenister had provided his services directly to end clients during the relevant period (instead of through the Company), the contracts between

him and those end clients would, as a matter of law, have been contracts for services, and not contracts of employment.

(2) If Mr Glenister had provided his services under contracts entered into directly with end clients then, to the extent that those contracts entitled him to a payment of "salary" (as defined in paragraph 5A of Schedule 1 of the Categorisation Regulations), then Regulation 2 of the Categorisation Regulations would have treated him as an "employed earner". As a result, the producers of the entertainment in respect of which any "salary" was paid would be treated as secondary Class 1 contributors pursuant to paragraph 10 of Schedule 3 of the Categorisation Regulations.

(3) In principle, the Intermediaries Regulations are capable of applying because Mr Glenister personally performed services with end clients (so Regulation 6(1)(a) of the Intermediaries Regulations was satisfied) and the performance of those services is carried out, not under a contract entered into directly between Mr Glenister and the end clients, but under arrangements involving the Company (which is an "intermediary" for the purposes of Regulation 6(1)(b)).

18. From the above agreed position, HMRC argue that the key question posed by Regulation 6(1)(c) of the Intermediaries Regulations is how Mr Glenister would have been treated if he had contracted directly with end clients. HMRC concluded that, if he had contracted directly then by virtue of the Categorisation Regulations he would have been "regarded for the purposes of Parts I to V of [SSCBA] as employed in employed earner's employment" and so Regulation 6(1)(c) of the Intermediaries Regulations would be satisfied. It then follows, say HMRC, that Regulation 6(3) provides that Mr Glenister is to be treated as employed by the Company and the Company is to be a secondary contributor for NIC purposes.

19. The Company argues that the Categorisation Regulations do not apply for the purposes of answering the hypothetical question posed by Regulation 6(1)(c) of the Intermediaries Regulations. Regulation 6(1)(c), properly construed, applies only to cases of disguised employment. If Mr Glenister had contracted directly with end clients, he would not have been an employee in the general law sense and therefore, in the Company's submission, Regulation 6(1)(c) is not satisfied.

20. In its submissions during, and prior to, the hearing the Company also argued that, properly construed, the Categorisation Regulations would not result in Mr Glenister being "regarded for the purposes of Parts I to V [of SSCBA]" as being in employed earner's employment because they would not make him an employed earner for the purposes of Part V of SSSCBA specifically. However, the Company abandoned this argument in submissions it sent following the hearing and we will not, therefore, refer to it any further in this decision.

21. In the Decision, the FTT accepted HMRC's position as outlined at [18] and the Company appeals to this Tribunal against that decision.

The relevance of non-statutory material on which the Company relies

22. In the "Discussion" section that follows, we will analyse the arguments that the Company is advancing. Before doing so, given that the Company's arguments relied to a significant extent on comments made in non-statutory material (including explanatory notes to Finance Bills and HMRC consultation documents) we will set out the principles we will apply in determining the relevance or otherwise of that material.

23. Lord Steyn's speech in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 establishes that Explanatory Notes to Finance Bills can in principle be relied on as an aid to construction as they may:

> …cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed…

Moreover, the statute does not have to be ambiguous before a court or tribunal can have regard to evidence of the contextual scene set out in the Explanatory Notes.

24. However, the relevance of Explanatory Notes should not be overstated. It is important to bear in mind that Explanatory Notes might simply reflect the views of the Government (as distinct from Parliament) and, moreover, that Explanatory Notes will often include summaries of statutory provisions prepared by people who are unskilled in statute law.

25. Thus, in *R (Westminster City Council) v National Asylum Support Service* Lord Steyn said at [6] of his speech:

> 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.

26. The 7th edition of *Bennion on Statutory Interpretation* summarises the position as follows at [24.14]:

> Although explanatory notes may therefore be useful as an aid construction, the courts will resist attempts to elevate the notes to a status where they supplant the language of the legislation itself. There is also always a risk that the notes will be wrong or misleading.

Discussion

27. The core of the FTT's analysis is contained in paragraphs [91] to [93] of the Decision that reads as follows:

> "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 [Company] 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 [Company], 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 [Company] 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)."

28. Therefore, the FTT concluded that application of the Categorisation Regulations caused the requirements of Regulation 6(1)(c) of the Intermediaries Regulation to be satisfied. At [87] – [90] of the Decision, the FTT concluded that this result was entirely consistent with the purpose of the relevant statutory provisions saying:

> 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.
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> 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.

29. For reasons that follow, we consider that the FTT reached the right conclusion for the right reasons.

30. The essence of the Company's argument to the contrary is that the relevant question set out in Regulation 6(1)(c) of the Intermediaries Regulations is whether, had he entered into a hypothetical direct contract with end clients, Mr Glenister would have been an actual employee (and not merely a person treated as an employee). In written and oral submissions, the Company relied on the following arguments in support of that broad proposition:

> (1) The purpose of the IR35 measures as a whole was to tackle "disguised employment". Non-statutory material, and extracts from decided cases, demonstrated that the measures were not intended to apply to persons who would not actually be employees if they contracted directly.
>
> (2) IR35 contained a package of measures that was intended to set out a "unitary code" that applied across a number of taxes. For example, the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") contains measures applicable to income tax and s139 of the Corporation Tax Act 2009 ("CTA 2009") apply only in the context of actual employees. Regulation 6(1)(c) should therefore be construed consistently with these other provisions.
>
> (3) Regulation 12 of the Intermediaries Regulations contains provision "saving" the application of the Categorisation Regulations as applied to agency workers. However, there is no saving of the parts of the Categorisation Regulations applicable to entertainers which demonstrates that it was not intended that the Categorisation Regulations should apply when answering the hypothetical question posed in Regulation 6(1)(c) of the Intermediaries Regulations.
>
> (4) The Categorisation Regulations applicable to entertainers were intended to offer a measure of relief to persons on the lower rungs of the entertainment industry's ladder. Parliament cannot have intended the Intermediaries Regulations to apply to "vulnerable" taxpayers such as these who choose to contract through personal service companies as the effect would be that the entertainers' service companies would become liable to pay employers' NIC that would otherwise have been the liability of producers.

Arguments based on non-statutory material and extracts from decided cases

31. We have derived little assistance from the non-statutory material on which the Company relied. In our view, the Company was attempting to rely on non-statutory material to supplant the natural and ordinary meaning of the statutory provisions.

32. We will not, therefore, deal with every such document we were shown but rather will explain the shortcomings in the arguments based on this material by reference to what we regard as the Company's best case, based on Explanatory Notes.

33. The Company relied on the Explanatory Note that accompanied the Intermediaries Regulations. That Explanatory Note was expressly stated not to form part of the Intermediaries Regulations and the first paragraph of it read as follows:

> These Regulations, which come into force on 6th April 2000, make provision for ensuring that social security contributions payable in relation to employed earner's employment remain payable notwithstanding the existence of arrangements whereby the services of the worker for another person ("the client") are performed through another person ("the intermediary") **and not pursuant to a contract of employment between the worker and the client**. [emphasis added]

34. The Company relied on the emphasised wording as demonstrating an intention that the Intermediaries Regulations are to apply only where the hypothetical direct contract would have amounted to a contract of employment in the general law sense. However, the Explanatory Note is nothing more than a generalised precis of the regulations. For the reasons set out at [22] to [24] above, the Explanatory Note cannot give the Intermediaries Regulations a different meaning from that conveyed by their actual terms.

35. A similar point can be made in relation to the Company's reliance on the Explanatory Notes to the Welfare Reform and Pensions Act 1999. The commentary on sections 75 and 76 included the following sentences:

> 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.
>
> …
>
> In the light of [a consultation to minimise the administrative burden of the IR35 provisions], the Paymaster General announced various changes to the proposal on 23 September 1999. The main changes were:
>
> > to make the intermediary rather than the client responsible for operating the new rules and deducting and accounting for NICs where required;
> >
> > to ensure that the **conventional test used to distinguish between employment and self-employment** for individuals not using intermediaries would also apply in cases covered by the new legislation. [emphasis added]

These Explanatory Notes were summarising, at a high level of generality, how the regime as a whole applied. They were not purporting to deal with points of detail such as how the Intermediaries Regulations would apply to the small subset of taxpayers represented by entertainers. They shed no light on how the Intermediaries Regulations apply in such a case.

36. The Company's references to decided cases similarly involved placing undue reliance on isolated passages of decisions that were not concerned with the issue arising in this appeal. For example, we were referred to the decision of the Court of Appeal in *R (on the application of Professional Contractors Group) v Inland Revenue Commissioners* [2001] EWCA Civ 1945. At [12] of his judgment, Robert Walker LJ (as he then was) said:

> 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.

37. However, neither this passage, nor similar references in the judgment of Burton J at first instance, demonstrates that the Intermediaries Regulations are to apply only where the direct arrangement would be one of actual employment. In this case the Court of Appeal was deciding a claim that the IR35 legislation as a whole was unlawful (for example on the basis that it constituted unlawful state aid or an unlawful restriction on freedom of movement). Since that was the context of the litigation, Robert Walker LJ was making a generalised observation about the IR35 provisions as a whole, and was not considering how Regulation 6(1)(c) of the Intermediaries Regulations would apply in the specific situation where an entertainer contracts through an intermediary.

38. In addition, there is a clear indication from the legislative provisions as a whole that Parliament did not intend Regulation 6(1)(c) to be limited to "actual" employments. The Intermediaries Regulations were made under authority set out in s4A of SSCBA. Section 4A(1)(c) of SSCBA permits regulations to deal with circumstances where, if a worker had contracted directly, he or she "would be regarded for the purposes of the applicable provisions of this Act as employed in employed earner's employment". Section 4A was therefore enacted after s2 of SSCBA and uses the concept of "employed earner" that is defined in s2. Therefore, Parliament must necessarily have been aware, when enacting s4A, that the concept of "employed earner" embraced both "actual" employees and, by virtue of s2(3) of SSCBA, persons who are "treated" as employees by other statutory provisions or regulations.

39. We therefore reject the Company's arguments set out at [30(1)] above. The material to which we were referred was not capable of displacing the natural meaning of the provisions which the FTT correctly set out at [91] to [93] of the Decision (cited above).

IR35 as a "unitary code"

40. We do not accept the Company's argument to the effect that Regulation 6(1)(c) should be construed as dealing only with actual employment since it was part of a "unitary code". This argument was based on a contextual analysis of case-law and

legislation. For example, the Company relied on the decision in *Professional Contractors Group* as authority for its argument but, as we have noted, this decision was concerned with the lawfulness of the IR35 regime as a whole and not with points of detail as to how that regime applied to entertainers.

41. The Company also relied on s75(9) of the Welfare Reform and Pensions Act 1999, which provided as follows:

> (9) If, on any modification of the statutory provisions relating to income tax, it appears to the Treasury to be expedient to modify any of the preceding provisions of this section for the purpose of assimilating the law relating to income tax and the law relating to [NIC], the Treasury may with the concurrence of the Secretary of State by order make such modifications of the preceding provisions of this section as the Treasury think appropriate for that purpose.

However, this provision cannot bear the weight that the Company seeks to put on it. It does not demonstrate that all aspects of the IR35 provisions relating to NIC were necessarily to have identical effect to their income tax counterparts. It provides a power to the Treasury, if it considers that conforming modifications are necessary, to make regulations. Therefore, s75(9) contemplates that there may be situations where the NIC and income tax provisions operate differently, but the Treasury chooses not to exercise its power.

42. Moreover, the Company's argument at [30(2)] ignores the fact that the income tax and NIC provisions were not identical before IR35 and so there is no compelling reason to assume that the IR35 provisions would operate identically across both. Most relevantly in the context of this appeal, entertainers receiving a "salary" (as defined in the Categorisation Regulations) could conceptually remain independent contractors, and so not employees, for income tax purposes even though the Categorisation Regulations would treat them as employed earners for NIC purposes. In those circumstances, we agree with Mr Nawbatt QC that, if it had truly been intended that Regulation 6(1)(c) of the Intermediaries Regulations should only apply if the hypothetical direct contract was of actual employment (and so be co-extensive with the provisions for income tax set out in s49 of ITEPA), Parliament would have said so expressly.

43. The Company also referred us to s139 of CTA 2009. This provision recognises that, although IR35 provisions might deem an individual to be an employee of a personal service company, the personal service company is actually receiving payment for the individual's services. Therefore, without more, there could be double taxation, with the employee being subject to income tax on the (deemed) employment income and the personal service company being subject to corporation tax on the (actual) cash it receives. Section 139 addresses this issue in the following terms:

> **139 Deduction for deemed employment payment**
>
> (1) This section applies for the purpose of calculating the profits of a trade carried on by an intermediary which is treated as making a deemed employment payment in connection with the trade.

> (2) A deduction is allowed for—
>
> (a) the amount of the deemed employment payment, and
>
> (b) the amount of any employer's national insurance contributions paid by the intermediary in respect of it.
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> …
>
> (5) In this section "deemed employment payment" and "intermediary" have the same meaning as in Chapter 8 of Part 2 of ITEPA 2003 (see sections 49 and 50 of that Act).

44. Ms Lemos pointed out a potential anomaly in this section. If Mr Glenister had contracted directly with end clients, he would not have been an "employee" for income tax purposes. Therefore, he would not satisfy the requirement of the income tax version of the IR35 regime set out in s49(1)(c) of ITEPA and would not receive a "deemed employment payment" as defined in s139(5) of CTA 2009. It follows that the precondition set out in s139(1) of CTA 2009 is not met and the Company would not be entitled to any deduction for any employers' NIC arising under the Intermediaries Regulations.

45. We see the force of Ms Lemos's argument that there is a potential anomaly in s139, although Mr Nawbatt QC on behalf of HMRC stated that it was common ground that the Company was entitled to a statutory deduction for employer's NIC. In our judgment, even if there is an anomaly in s139, that does not establish that Parliament intended Regulation 6(1)(c) to apply only in cases of actual employment to which the ITEPA provisions apply.

46. We therefore reject the Company's argument summarised at [30(2)].

Regulation 12 of the Intermediaries Regulations

47. Regulation 12 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).

48. The Company argued that this Regulation only "saves" the application of the Categorisation Regulations for the narrow category of earners specified in paragraph 2 in column (A) of Part I of Schedule 1 of the Categorisation Regulations. That paragraph deals with certain situations where workers are provided through an agency or similar arrangement and does not extend to entertainers (who are dealt with in paragraph 5A in column (A)). Therefore, the Company submitted that the Categorisation Regulations, as they apply to entertainers are of no relevance to the application of the Intermediaries Regulations.

49. We do not accept this argument. Regulation 12 was enacted because the "agency worker" provisions of the Categorisation Regulations might cover, or might be seen as covering, similar ground to the Intermediaries Regulations. The intention of Regulation 12 was to preserve the effect of the "agency workers" provisions of the Categorisation Regulations and make it clear that those provisions were not supplanted by the Intermediaries Regulations. Regulation 12 does not provide that, except to the extent "saved", the Categorisation Regulations are irrelevant to the categorisation of the hypothetical direct contract referred to in Regulation 6(1)(c). Indeed, for reasons that we set out in our "Closing Remarks" below, such an interpretation would be entirely contrary to the purpose of the Intermediaries Regulations.

50. We reject the argument set out at [30(3)].

Treatment of "vulnerable" taxpayers

51. The Company's arguments in this regard relied on assertions which had no foundation in the legislative provisions. The Categorisation Regulations as applicable to entertainers do not apply only to "vulnerable" taxpayers; they apply to all entertainers who receive payments consisting, to any extent, of "salary" as defined. Ms Lemos referred to what she submitted was the "injustice" of entertainers who use personal service companies being liable, through those companies, to pay employers' NIC that would have fallen on producers if the entertainer had contracted directly. However, as Mr Nawbatt QC submitted, that is a fundamental feature of the regime that applies to any taxpayer who chooses to use a personal service company. Therefore, the Company's submission is a generalised assertion that the IR35 regime is unfair.

52. We reject the argument set out at [30(4)].

Closing remarks – the purpose of the provisions

53. Thus far, our analysis has focused on the ordinary meaning of the legislative provisions having due regard to their background and context. From that analysis, we have reached the clear conclusion that HMRC's position, as set out at [18] above, is correct. Since legislation must always be construed having due regard to its purpose, we must consider whether our conclusion accords with the purpose of the statutory provisions.

54. The object of the IR35 regime of which the Intermediaries Regulations form part, is that, where a person provides services through an intermediary, NICs should be payable to a broadly similar extent as they would have been if the services had been provided directly. The logic of the Company's position is that whole categories of taxpayers (covered by the Categorisation Regulations) should be exempted from that principle. In effect, it is asserted that entertainers, who may have achieved considerable commercial success (and other taxpayers covered by the Categorisation Regulations such as lecturers and teachers) should enjoy the special privilege of being able to avoid NIC by contracting through personal service companies rather than directly. The Company has not shown us any provision explaining why entertainers (or teachers and lecturers) should enjoy any such special privilege; nor has it provided any reasons why

they should. The FTT was, in our view, correct in its purposive analysis at [87] – [90] of the Decision (cited above).

55. In those circumstances, we have concluded that the interpretation of the legislation that HMRC advance is entirely consistent with, and indeed reflective of, the overall purpose of the provisions.

Disposition

56. The Company's appeal is dismissed.

MR JUSTICE HENRY CARR
JUDGE JONATHAN RICHARDS
RELEASE DATE: 9 April 2019