[2015] JMRC 2

IN THE REVENUE COURT

REVENUE APPEAL NO. 4 OF 2011

BETWEEN	**AVA HENRY**	**APPELLANT**
AND	**THE COMMISSIONER GENERAL TAX ADMINISTRATION JAMAICA (Filed against Commissioner of Taxpayer Appeals)**	**RESPONDENT**

Mr. Lawrence Philpotts-Brown instructed by Clough, Long & Co for the appellant.

Mrs. Cecelia Chapman-Daley and Ms. Maxine Johnson for the respondent.

Income Tax Act – Section 5 (1) (c) (ix) - Whether Agreements between Taxpayer/Appellant and Workers Contracts for Services or of Service – Whether Persons Working with Taxpayer Employees or Independent Contractors – Education Tax – Purposive Construction.

Heard: February 10 & April 20, 2015.

Coram: F. Williams, J.

Background

[1] This matter reflects something in the nature of a convergence between Revenue Law and what we have come to know as the law relating to vicarious liability in the law of tort.

[2] The issues in the case revolve primarily around the interpretation and application to the facts of section 5 (1) (c) (ix) of the Income Tax Act, the material portions of which read as follows:

> "5. – (1) Income tax shall, subject to the provisions of this Act, be payable by every person at the rate specified hereafter for each year of assessment in respect of all income, profits or gains respectively described hereunder –
>
> (c) all emoluments arising or accruing to any person (or any member of his family or household) by reason of his office or employment of profit:
>
> Provided that-
>
> (ix) where under the terms of a contract or arrangement any person (hereinafter in this section called "the employee") is under an obligation to render personal services to another person (hereinafter in this section called "the employer") whether on his own behalf or on behalf of a company, and –
>
> (A) the employee is subject to, or to the right of, supervision, direction or control by the employer as to the manner in which he renders those services; and

(B) the remuneration for the services would not, apart from this paragraph, be treated as emoluments,

then the relevant services shall be treated as duties of an office or employment of profit held by the employee and the income arising or accruing therefrom shall be treated as emoluments of that office or employment, and accordingly, the employer shall deduct from the remuneration the income tax payable."

The Facts Giving Rise to the Appeal

[3] The appellant in this matter (Ms. Ava Henry), operates a beauty salon and day spa on the premises of the Tryall Golf and Beach Club Limited (Tryall) in the parish of Hanover.

[4] Consequent on an audit conducted on the appellant's business in respect of income tax and education tax, the appellant's tax liability was adjusted by the Commissioner of the Taxpayer Audit and Assessment Department (TAAD), by way of letter dated October 31, 2008, with its attachment, indicating how the adjustments were arrived at, in respect of the following years and the following amounts:

YEAR	PAYE (Income Tax)	Education Tax
2006	$216, 259.18	$85, 982.26
2007	$412, 903.39	$132, 242.68
Total	$629, 162.57	$218, 224.94

[5] The appellant raised an objection to this assessment. The TAAD met with her and her accountant; and perused such documentary proof as she provided, including copies of signed contracts. At the end of this process, the assessment was confirmed as raised by way of Notice of Decision dated May 19, 2009. Being dissatisfied with this decision, the appellant appealed to the Taxpayers' Appeals Department (TAD), which convened a hearing into the matter on October 20, 2009. During the course of the appeal, as in the discussions around the time of the audit, an eight-point checklist was used and referred to, to see whether the appellant fell within the provisions of section 5 (1) (c) (ix). The result of this hearing was that a Notice of Decision dated May 16, 2011 was issued, dismissing the appeal. This notice was sent to the appellant via facsimile on June 1, 2011. It is from that decision that the appellant has appealed to the Revenue Court.

The Notice of Appeal

[6] By way of Notice of Appeal dated the 7th July, 2011 the appellant is challenging the decision of the Taxpayers' Appeals Department (TAD) on several grounds, namely:

"(i) That the Respondent's Decision is erroneous and contrary to Law in deciding that the Appellant operated under a contract of service when it is plain that the relevant contract contained no express provisions by which the spa could control or direct the manner by which she performs her work under it;

(ii) That the Respondent's Decision is erroneous and contrary to Law in deciding that the Appellant operated under a contract of service when Clause 2 under the heading OTHER OBLIGATIONS is conclusive in favour of the Appellant being an independent contractor and not an employee;

(iii) That the Respondent's Decision is erroneous and contrary to Law in deciding that the Appellant operated under a contract of service as the Respondent took into consideration irrelevant matters and failed to have regard to relevant matters in arriving at the said Decision;

(iv) That by Law and by virtue of the terms of the relevant Contract the Appellant was an independent contractor and not an employee;

(v) That the Respondent's Decision is erroneous and contrary to Law in that the Commissioner of TAAD failed to remit to the Appellant an Income Tax Return for the Years of Assessment 2006 and 2007 before conducting the audit and raising the

aforementioned Assessments set out at paragraph 1 hereof

upon the Appellant."

[7] The last ground of challenge (number (v)) was withdrawn following on discussions between the bench and counsel for the appellant, as it became clear from the affidavit evidence that the manner in which the assessments were raised was procedurally proper.

The Respondent's Statement of Case

[8] In answer to the appellant's notice of appeal, the respondent filed a statement of case on August 8, 2011 in which is set out the main contentions in respect of the points raised in the appellant's said notice of appeal. The relief sought by the respondent is for the appeal to be dismissed; for the respondent's decision dismissing the appellant's appeal dated May 16, 2011 be confirmed and for costs of the appeal.

[9] In essence, the respondent contends that the audit and the results of the subsequent appeal to the TAD were correct. All actions taken by the revenue were permissible pursuant to the provisions of the Income Tax Act (and the Education Tax Act).

The Issues in the Appeal

[10] There is one main issue in this appeal; and that is: whether the arrangements that existed between the appellant and her workers amounted to contracts of service or contracts for services; or, put another way, whether the appellant's workers were employees or independent contractors. If the arrangements in existence are caught by the provisions of section 5 (1) (c) (ix), they would be employees, and the appellant would be liable for the payment of Income Tax (under the PAYE system) and Education Tax. That also means that the initial assessment would have to be confirmed. If they were independent contractors, on the other hand, then the appellant would not be so liable and the workers would be responsible for their own tax payments.

[11] There are subsidiary issues as well, but they all relate to the central issue. One of these, for example, is the significance (if any) to be given to the label or description that the parties have given to the arrangement. Is such a label or description conclusive? Also, in looking to see whether the appellant's arrangements fell under the relevant section, should the respondent and the relevant revenue agents have had regard to the eight-point checklist as they did? Or, should they have had regard only to the provisions of the section?

The Relevant Section

[12] The relevant provision in the Income Tax Act ("the Act") was introduced by way of an amendment to the existing legislation in 2002. To my mind, the essence of the section (and the source of the contention between the parties in this case), is to be found in the wording of sub-paragraph (ix). Although the entire section has been set out in full in paragraph 2 of this judgment; it will still be useful to set out that sub-paragraph at this point to give greater focus to matters to be considered:

> "(ix) where under the terms of a contract or arrangement any person (hereinafter in this section called "the employee") is under an obligation to render personal services to another person (hereinafter in this section called "the employer") whether on his own behalf or on behalf of a company, and –
>
> (C) the employee is subject to, or to the right of, supervision, direction or control by the employer as to the manner in which he renders those services; and
> (D) the remuneration for the services would not, apart from this paragraph, be treated as emoluments,
>
> then the relevant services shall be treated as duties of an office or employment of profit held by the employee and the income arising or accruing therefrom shall be treated as emoluments of that office or employment, and accordingly, the employer

> shall deduct from the remuneration the income tax payable."

Construction – Purposive or Restrictive?

[13] It may be best at this stage to consider the submissions of the respective parties as to how the section ought to be construed. Should it be the purposive approach that is to be taken, as advocated by counsel for the respondent? Or, should the court take a stricter, more-restrictive approach, as contended by counsel for the appellant?

[14] Over the years, the courts have adopted a particular approach to the interpretation of taxing statutes, generally, which might be summed up in the following passage from **Cases and Materials in Revenue Law**, by A.J. Easson, 1973 at page 3:

> "The approach of the courts to the interpretation of taxing Acts has been fairly consistent throughout the years: but it is generally recognized that taxing Acts are a rather special type of statute, demanding a predictable, and hence strict, form of interpretation…"

[15] That was the general approach. As tax avoidance has assumed greater and greater significance over the years, however, the approach to construction in this area has seen changes and adaptations. The substance of the present approach to construction where the possibility of tax avoidance exists is reflected, for example, in this dictum of Lord Hoffman in the case of **MacNiven (Her Majesty's Inspector of Taxes) v Westmoreland Investments Limited** [2001] UKHL 6:

> "There is ultimately only one principle of construction, namely to ascertain what Parliament meant by using the language of the statute". (See paragraph 29 of the judgment).

[16] In the same case, Lord Nicholls made the following observation:

> "When searching for the meaning with which Parliament has used the statutory language in question, courts have regard to the underlying purpose that the statutory language is seeking to achieve. Likewise, Lord Cooke of Thornton regarded *Ramsay* as an application

> to taxing Acts of the general approach to statutory interpretation whereby, in determining the natural meaning of particular expressions in their context, weight is given to the purpose and spirit of the legislation: see [1997] 1 WLR 991, 1005." (See paragraph 6 of the judgment).

[17] So then, from this brief discussion, we might conclude that it is the purposive approach that is to be used in construing the particular provision in this matter.

The First Issue: Whether Employees or Independent Contractors

The Appellant's Submissions

[18] Counsel for the appellant relied on the case of **Narich Property Limited v The Commissioner of Payroll Tax** [1893] UKPC 37, arguing that the principles by which it might be determined whether someone is an employee or independent contractor are well settled and conveniently adumbrated in that case.

[19] It was submitted that there are three principles of law to be used in determining whether a relationship is one of a contract for services or of service. This is a summary of the three principles:

> (i) subject to one exception, where there is a written contract between the parties, a court is confined to a consideration of the contract's terms (express or implied), in the light of the circumstances surrounding its making; and is not entitled to consider the manner in which they acted pursuant to the contract. (The one exception is that the court may consider such conduct where it amounts to an agreed addition to or modification of the contract).
>
> (ii) while considering all the relevant terms of the contract, the most important (and in most cases, the decisive) criterion for determining the nature of the arrangement, is the extent to which the person doing the work is

under the direction and control of the other with regard to the manner in which the work is done.

(iii) where the contract contains an express term purporting to define the status of the party engaged, that term, would, if it stood alone, be conclusive in favour of the parties, unless it contradicts the rest of the provisions as a whole. Further, if the term is felt to be a sham, it must be given its proper weight in relation to the contract's other clauses.

[20] Based on these principles, it was submitted that an examination of the agreements shows that they contain express terms indicating the status of the workers to be independent contractors; and that there are no other terms that might be said to contradict those express terms.

The Narich Property Case

[21] The **Narich** case (a Privy Council decision out of Australia), dealt with issues similar to the central issue in this case – that is, whether lecturers working with the appellant, which was operating under franchise from Weight Watchers International Inc., were independent contractors or employees of the appellant. The Weight Watchers classes were conducted with the aim of helping persons lose excess weight. The conduct of the classes was the responsibility of the lecturers.

[22] It was held by the Privy Council that the lecturers were in fact employees of Narich. Included among the reasons for this conclusion was the fact that the arrangements between Weight Watchers International on the one hand and Narich, on the other; and between Narich, on the one hand, and the lecturers, on the other, included the following: (i) as part of the franchise agreement between Weight Watchers and Narich, the latter and the lecturers were required to strictly adhere to a detailed programme set out in the lecturers' manuals, which manuals could only be amended by the franchisor; (ii) all lecturers had to attain and maintain a certain prescribed weight, failing which they would be disqualified from holding the positions; (iii) Any substitute lecturer had to be approved by Narich; (iv) Narich could terminate the engagement of any lecturer for failure to carry out duties in the manner prescribed or for breach of the weight requirement.

[23] Lord Brandon of Oakbrook, who delivered the opinion of the Board, made the following observation at page 11, which may prove useful as the discussion of the issues progresses:

> "It matters not by what means the engagor is contractually entitled to direct and control the manner in which the engagee does his work. What matters is that, by one means or another, the engagor is, as a matter of law arising from the terms of the contract concerned, entitled to do so."

The Contracts

[24] A number of contracts were exhibited to the several affidavits filed in this matter. They were of two types: there was a short-form, one-page contract, the full terms of which will shortly be set out below; and a longer contract, which appears to consist of four pages. No explanation was given for the use of the two different types.

[25] These are the terms of the short-form contract, such as that used for the spa therapist, Michelle Plunkett and dated November 8, 2007:

"Contract

Ava Henry Beauty Salon and Massage Center

Name of Contractor Michelle Plunkett

Present Address Lot 1580 Cornwall Court Montego Bay

I hereby accept this Contract with Ava Henry, Spa Concessionaire with the Following Conditions:

I am not an Agent, Employee or Partner of Ava Henry and am not entitled to any benefits under the Employment Laws.

I AM RESPONSIBLE TO PAY MY OWN TAXES AND DUES TO THE GOVERNMENT.

I will be Called in to do Services which I am Qualified and Certified to do whenever the need Arises.

1. POSITION Massage Therapist
2. PERCENTAGE OF COST OF SERVICE 25%
3. PERIOD Nov 8th 2007

SIGNATURE M. Plunkett"

[26] The longer contract, such as that exhibited to the affidavit of Raymond Malcolm as exhibit "RM 1", contains the following specific provisions on page 3 under the heading "Other Obligations":

"2. All work performed by the Contractor shall be as an

independent contractor AND NOT an agent, employee

or partner of the SPA.

3. The Contractor has no authority to enter into contracts or agreements or otherwise bind the Company in any way.

4. The Contractor is not entitled to any benefits under employment laws, unemployment insurance laws, temporary disability insurance law, pre-paid health insurance law, laws governing pension plans or any other laws, rules or regulations governing or relating to employees or employees benefits. The Spa will not be maintaining workers compensation insurance for the Contractor. The SPA will not be assuming any responsibility for submitting or deducting any government taxes on your behalf."

[27] It is, as might be expected, on clauses such as these that the appellant places great reliance.

[28] However, there are, of course, other provisions in the said contract, on some of which the respondent places equally-great reliance. For example, on page two, at

clauses 1 and 2 under the heading: “Obligations of the Spa”, the following provisions appear:

> “1. The SPA will provide reservation and booking services.
>
> The SPA will also provide marketing and advertising services
>
> to help to generate business for the spa.
>
> 2. The Spa shall provide a clean and functional room for the
>
> Contractor to perform the Services as well as necessary
>
> supplies and products necessary for the Contractor to
>
> perform the Services.”

[29] Additionally, by clause 7 (on page 3) of the contract, the spa reserves the right to bill the contractor for all costs of space, supplies and administrative services provided, at rates to be mutually agreed. In lieu of doing so, however, the contractor may be required to perform complimentary services for VIP clientele of the hotel as directed by the spa. Also relevant on the issue of remuneration are clauses 10 and 11 (on page 4) of the contract. By clause 10, the value of each service and the value of the commission to be earned by the contractor for each service are determined by the spa and are subject to review and amendment by the spa “…in its sole discretion.” By clause 11, the payments are to be made weekly.

[30] These were among the clauses relied on by the respondent in support of the contention that, apart from that paragraph which seeks to put a label on the arrangement between the parties, there are other clauses that contradict that one and point to the arrangement being a contract of service.

[31] Among the cases relied on by the respondent were: (i) **Ready-Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 2 QB 497; (ii) **Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)** [2004] UKHL 97; and **Autoclenz Ltd v Belcher and others** [2011] UKSC 41.The **Ready-Mixed Concrete** case was cited by the respondent mainly for the dictum of MacKenna, J who, in finding that the arrangement in that case amounted to a contract for services, observed as follows at pages 512 to 513:

> "It may be stated here that whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something

else."

[32] The court accepts this as a correct statement of the law and one by which it must be guided. The dictum must be taken as stating that it is the substance of the arrangement that must be looked at to arrive at an accurate conclusion: the formal aspects of the arrangement – such as the label that the parties have chosen to attach to it, are by no means conclusive.

[33] The purpose for citing the **Barclays** case was to support the proposition that what was necessary in approaching the task of construction of a taxing statute was a close analysis of what, on a purposive construction, the statute actually required. As previously indicated, this is the approach that is guiding the court.

[34] Reliance was placed on the **Autoclenz** case for the dicta to the effect that "…while employment was a matter of contract, the factual matrix in which the contract was cast was not ordinarily the same as that of an arm's length commercial contract. The relative bargaining power of the parties had to be taken into account in deciding whether the terms of any written agreement truly represented what had been agreed and the true agreement would often have to be gleaned from all the circumstance of the case, of which the written agreement was only a part." (See page 746 B-C – headnote).

[35] Taking all these dicta into account and looking at the matter in its totality, it appears to me that the arrangements between the appellant and the persons whom she engaged to work in the spa would fall within the provisions of section 5 (1) (c) (ix) of the Income Tax Act; (and also, correspondingly, fall within the relevant provisions of the Education Tax Act – in particular sections 4 and 6). The arrangements fit within the constituent elements of the relevant section of the Income Tax Act. For example, in relation to sub-section (ix), each person engaged would definitely be a person who is: "…under an obligation to render personal services to another person…".

[36] Additionally, in terms of sub-paragraph (A), even if the therapists in this case could possibly be said to be not subject to supervision in fact as to the manner in which the services are rendered; there can, in my mind, be no doubt that the appellant enjoyed "…the right of, supervision, direction or control…" over the said therapists. As regards the requirement in the lease agreement between Tryall and the appellant that the appellant would have been required "to ensure that a high standard of service is provided by properly trained staff…"., there must have been, to my reasoning, implicit in this, that some amount of supervision was required to ensure the maintenance of these standards. Even if (which would be surprising), no actual supervision took place, this requirement among the lessee's covenants, cements the appellant's right to supervise. And, from a practical standpoint, is it unlikely that the appellant would have exercised some supervision in fact over the therapist – even if only on the first day(s) on the job to ensure that her performance and level of skill were up to the standard required by the appellant and also by Tryall? The answer to this question must be "no". And what if

there were a complaint from a customer or guest (even an unjustified complaint from a fussy guest)? Would this not have required some intervention and the giving of directions to the therapist to address the situation? Additionally, in the longer-form contract where at clause 2 of the obligations of the contractor, the contractor is required to "…provide skilled, competent, professional and efficient Services (sic) to the guests and invitees…", who would have the right to ensure that these standards were attained and maintained? Surely, that right of supervision, direction or control would have to been vested in the appellant.

[37] As another example, in relation to clause 8 of the longer-form contract (page 2), which states that the contractor "… is responsible for maintaining a clean and orderly workplace at all times, as setout (sic) by the spa operating standards"; who would have the day-to-day right of monitoring the workplace to ensure that these requirements were adhered to? Certainly, it must have been and must be the appellant. In considering these issues, the words of Lord Brandon of Oakbrook referred to at paragraph [23] of this judgment are apposite.

[38] There are other points that in my view support the position taken by the respondent that the relationship between the appellant and her workers was one of employer and employee. However, it might be convenient to first discuss and resolve the second main issue in this appeal, which is whether the eight-point checklist should have been

referred to and used by the respondent in coming to the decision to confirm the assessments.

The Second Issue: Should the Eight-point Checklist Have been Used?

[39] In my view, having regard to the wording of the particular provision of the Act that is being considered, the main indicia as to the existence or otherwise of the employer-employee relationship must be those matters mentioned in sub-section (ix) and sub-paragraphs (A) and (B). However, if a purposive interpretation is to be taken in seeking to ascertain the intention of Parliament in this matter, then that could not be the only indicia. The intention of Parliament, when one looks at the amendment to the legislation in 2002 to introduce this particular provision, must be taken to be to close the door on persons who would attempt to evade or avoid taxation by seeking to create arrangements appearing to be contracts for services when they were in fact contracts of service. That this is so is underscored by the presence of sub-paragraph (B) which deals with remuneration for such services and which states:

> "(B) the remuneration for the services would not, apart
>
> from this paragraph, be treated as emoluments…"

[40] If I am right in this regard, then the search for the true nature of the transaction must necessarily go further than, and not be limited to, the wording of sub-paragraph (B) in isolation, which focuses solely on the employee being subject to supervision, direction, or control in fact as to the manner in which the services are rendered; or, the right to be so supervised, directed or controlled.

[41] If, therefore, the ultimate objective of the enquiry under this section is to ascertain whether the arrangements in place in this appeal are truly ones of contracts for services or contracts of service, then we might avail ourselves of the learning in such cases as **Market Investigations Ltd. v Minister of Social Security** [1969] 2 QB 173, in particular the dicta at page 184 per Cooke, J:

> "The fundamental test to be applied (in distinguishing between a contract of service and a contract for services) is: "Is this person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are

> relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provided his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task".

[42] So far as these considerations are concerned, it appears to me that the answers to them all point towards the present arrangements having to be regarded as amounting to contracts of service rather than contracts for services. The therapists in this case are not performing the services as persons in business on their own account. Neither do they provide their own equipment or supplies (as these items are provided by the appellant). Additionally, they do not and are not entitled, under the provisions of the contracts, to hire any person or persons to assist them or to substitute for them. From

the documents presented in this appeal, none of the therapists have invested in the appellant's business; nor is there evidence that they have taken any financial risk or made any financial input in the business at all. They also exercise no power of management at all, with all important decisions as to their remuneration and so on being left to the appellant and the appellant alone.

[43] In my considered opinion, it does not make a difference that there are, in this case, two types of contract – a short-form contract and a longer one. The two types of contract were made in exactly the same circumstances to govern the exact arrangements and there is, in actuality, no real difference between them.

Summary and Conclusion

[44] Going back to the grounds on which this appeal was brought, it will be seen that in relation to ground 1 – that is, the contention that the absence from the contracts of an express provision permitting the appellant to exercise supervision, direction or control, is fatal, we have already seen that this is not so. Whether there is in any contract such a provision or not is not conclusive, as all the circumstances have to be looked at.

[45] In relation to ground 2 of the appellant's grounds of appeal, the presence of a clause declaring the circumstances of the appellant's arrangement with each therapist

to be that of a contract for services is not conclusive. All other relevant circumstances must be looked at; and, in this case, those circumstances point to each arrangement being one of a contract of service or an employer-employee relationship.

[46] So far as ground 3 is based on the contention that the respondent took into consideration irrelevant matters in arriving at the decision, this ground appears to have been made in relation to the use of the eight-point checklist. As the previous discussions show, the enquiry should and could not have been limited to a consideration of whether the employer enjoyed in fact or had the right to control, direct or supervise the manner in which the employee did her work. Other factors are relevant; and some of these formed part of the eight-point checklist.

[47] These and all the other matters discussed impel me to the view that the therapists in this case were employees; and not independent contractors. The contractual arrangements in this case are caught by the provisions of section 5 (1) (c) (ix) the Income Tax Act and the corresponding provision of the Education Tax Act. The appellant should, therefore, have made the appropriate payments in respect of the workers under the Income Tax (PAYE system); and Education Tax Acts.

[48] The respondent was therefore correct in coming to the conclusion that resulted in the appellant’s appeal in this matter having been dismissed.

[49] In the result, the appeal is dismissed with costs to the respondent to be agreed or taxed.

The Orders

1. Appeal dismissed.
2. Costs to the respondent to be agreed or taxed.