[2017] UKFTT 017 (TC)

TC05583

Appeal number: TC/2015/03681

Income tax - PAYE – whether drivers engaged by the appellant to make deliveries using the appellant's lorries were employees or independent contractors – held: they were employees

FIRST-TIER TRIBUNAL
TAX CHAMBER

RS DHILLON AND GP DHILLON PARTNERSHIP **Appellant**

- and -

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

TRIBUNAL: JUDGE ZACHARY CITRON
MR TYM MARSH

Sitting in public at Fox Court, London on 7-8 July 2016

Mr Andrew Scrivens and Mrs Neeta Vora, of Croner Tax, for the Appellant

Mrs Glynis Millward, Officer of HMRC, for the Respondents

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DECISION

1. The appellant was in the business of delivering asphalt and other materials for its customers, the producers of such materials. The question in the case was whether the drivers engaged by the appellant to drive its lorries were employees of the appellant or independent contractors.

The appeal

2. On 4 March 2014, HMRC issued determinations under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) (the "PAYE Regulations") and decision notices under s8 Social Security Contributions (Transfer of Functions, Etc) Act 1999 on the appellant in respect of (respectively) PAYE income tax and Class 1 National Insurance Contributions for the income tax years 2009-10 to 2012-13 inclusive relating to drivers who worked for the appellant in those periods. The details were as follows:

Section 8 NIC Decisions

Income tax year(s)	**Driver**	**Amount (£)**
2009-10, 2010-11, 2011-12, 2012-13	GS Athwal	21,748
2011-12, 2012-13	T Singh	4,631
2009-10	S Singh	4,708
2012-13	K Singh	1,091
2009-10, 2010-11	K Singh	7,577
2011-12	F Singh	1,197
2010-11	B Singh	554
2009-10, 2010-11, 2011-12	A Singh	11,419
2009-10, 2010-11	SS Sangha	1,184
2009-10, 2010-11	S Phull	4,905
2010-11, 2011-12, 2012-13	JS Mashiana	10,068
2009-10, 2010-11, 2011-12	B Mann	6,090
2009-10, 2010-11, 2011-12, 2012-13	TR Mall	8,069
2011-12, 2012-13	PS Khela	928
2011-12, 2012-13	DS Khalsa	2,273
2012-13	SS Grewal	1,869

2009-10, 2010-11, 2011-12	PS Bhatti	7,816
2011-12, 2012-13	GS Basra	1,482
2009-10, 2010-11, 2011-12, 2012-13	MS Banwait	20,673
2009-10, 2010-11, 2011-12	HS Bal	8,372
2009-10, 2010-11	SS Badhan	5,505
2011-12, 2012-13	S Athwal	1,601
2012-13	MS Sran	2,233
2011-12, 2012-13	J Singh	2,057

(At the hearing, HMRC confirmed their acceptance of the exclusion of ADS Bajwa from the above)

Regulation 80 determinations (PAYE)

Income tax year	**Amount (£)**
2009-10	34,407
2010-11	34,202
2011-12	20,577
2012-13	18,812

3. On 9 February 2015, the appellant requested a review of these determinations and decision notices. In a review decision letter of 13 May 2015, HMRC upheld the original decisions.

4. The appellant appealed by notice of appeal dated 12 June 2015.

Evidence

5. We had witness statements, and heard oral evidence, from the following, each of whom we found to be a credible witness:

(a) Mr Bryan Yates, an officer of HMRC and their "employment compliance officer" involved in the appellant's case;

(b) Mr Lyndon Morgan-Foley, the higher status officer of HMRC involved in the appellant's case; and

(c) Mr Resham Singh Dhillon ("Mr Dhillon"), the managing partner of the appellant (the other partner in the appellant being Mr Dhillon's wife).

We also heard oral evidence from Mr Jagdeep Dhillon, Mr Dhillon's son, who was familiar with the appellant's business.

6. HMRC produced four document bundles for the hearing containing (inter alia):

(a) correspondence between the parties;

(b) a 25-page "franchise agreement" dated 6 February 2006 between the appellant and one of its principal customers;

(c) the health and safety manual for hauliers (15 pages), and operating manual in respect of haulage contractors (to be read in conjunction with the franchise agreement) (39 pages) of another of the appellant's principal customers;

(d) notes from meetings held in June 2011 between HMRC officials (Mr Yates and Mr Ian Edwards) and each of three drivers for the appellant: Mr A Singh, Mr MS Bainwait and Mr GS Athwal. The place of the meetings with Mr Singh and Mr Athwal was recorded as San & Co Associates Ltd (Accountants), and one of the attendees was Mr Sanjay Auluck (accountant). The place of the meeting with Mr Banwait was recorded as Jolly & Co Accountants, and the additional attendee was recorded as "Vishar Kunj (Accountant, Interpreter)". Each meeting note consisted of 68 or 69 questions in bold, with responses recorded in ordinary type, and was signed "as a true record of the minutes of the meeting, the questions asked and the answers given" by HMRC and (except in the case of the note of the meeting with Mr Singh) the driver and his accountant;

(e) notes from a meeting between HMRC officials (Mr Yates and Mr Edwards) and the appellant (Mr Dhillon, Mr Jagdeep Dhillon and Mr Sisodia, the appellant's accountant) held on 4 November 2010. This was in narrative form and signed by HMRC (only) on 8 November 2010. Another note of the same meeting, produced by HMRC on the day of hearing, was in the form of 47 questions in bold type and responses in ordinary type. The questionnaire-format note was signed "as a true record of the minutes of the meeting, the questions asked and the answers given" by HMRC on 8 November 2010 and by Mr Dhillon and Mr Sisodia on 26 August 2011; and

(f) six invoices addressed to the appellant from the three drivers interviewed by HMRC in June 2011 (see (d) above), all pertaining to the period July-September 2011:

(i) three from Mr Athwal, dated July 2011, 30 August 2011 and 30 September 2011, for certain driving shifts at rates between £70 and £110;

(ii) one from Mr Singh, for "invoice date" 1 July 2011 to 31 July 2011, for various shifts, and also a "late finish bonus" of £20; and

(iii) two from Mr Banwait (including the heading "Self employed employment service"), dated July 2011 and August 2011, for certain shifts at rates between £70 and £95.

7. The appellant produced a documents bundle of about 400 pages with:

(a) bank records of electronic payments to drivers; and

(b) "weekly sheets" filled in and signed by drivers showing, for particular drivers in a given week between February 2009 and March 2010:

(i) times of going "on duty" and "off duty";

(ii) time spent driving;

(iii) time spent "on duty"; and

(iv) a "driver's daily vehicle defect report"

Mr Dhillon told us that the "weekly sheets" were legally required as a record of who was driving the lorries concerned at any given time.

Application for adjournment to enable appellants to make an application to the Tribunal for witness summonses

8. During the first morning of the hearing, whilst Mr Yates was giving evidence, the appellant's representatives asked for an adjournment to enable them to make an application to the Tribunal to issue witness summonses to the three drivers interviewed by HMRC in June 2011. Although HMRC did not object, we decided to refuse this request for the reasons set out in the appendix to this decision.

Findings of fact

9. In making the findings of fact which follow, we have had to resolve inconsistencies in the evidence – in particular, between (a) oral evidence of Mr Dhillon given at the hearing, and (b) the notes of HMRC's meetings with the appellant in 2010 and with three of the drivers in 2011. Since we found Mr Dhillon to be a credible witness (who was subject to cross examination at the hearing), and since we did not hear direct evidence from the three drivers interviewed by HMRC (who were therefore not subject to cross examination), we have resolved such inconsistencies in favour of the evidence given by Mr Dhillon at the hearing.

The appellant and its business

10. The appellant, a partnership trading under the name "London Goods Transport", provided haulage services to its customers, larger companies which produced asphalt, tarmac and other aggregates for the construction industry. The appellant's business was the delivery of such materials from its customers' sites to the location where the materials were to be used. The business was run by Mr Dhillon, the managing partner.

11. The appellant entered into detailed written "franchise agreements" with its customers under which it was granted a right to carry on a business of providing delivery services to the customer to specified standards (spanning matters such as branding on the lorries, vehicle maintenance, operational instructions for drivers, and health & safety standards) at agreed rates per delivery set out in the contracts.

12. Whilst the appellant was the legal party to these agreements, the terms contemplated that the appellant could provide its services through what the contract

referred to as "franchisee's substitutes", meaning employees of the appellant or persons other than the appellant "previously approved by the [customer] to carry out the [services]". Under the agreements, the appellant had obligations to train "franchisee's substitutes" and indemnify the customer for losses arising from specified actions of "franchisee's substitutes."

13. The appellant owned and insured five lorries (at the relevant time) to undertake delivery services for its customers.

How the appellant engaged its drivers

14. The appellant built up a pool of potential drivers of its lorries, assembled through word of mouth. There were no written contracts between the appellant and its drivers. Typically, the way the appellant engaged its drivers to perform a delivery job was as follows: the appellant's customer would tell Mr Dhillon, usually the evening before the job needed to be done, how many lorries were needed the next day for deliveries and where the loads needed to be transported to. Mr Dhillon would then contact drivers from the pool by telephone and offer them a particular delivery job.

15. If the driver accepted Mr Dhillon's offer of a delivery job, the driver would then proceed, typically the next morning, to pick up the appellant's lorry parked up at one of the customers' sites, load it with asphalt or other material, drive it to the construction site, unload it, and finally return to the customer's site to park up the lorry. In the normal course, the driver would do all of this without Mr Dhillon's supervision; and in doing so, he would interact with the appellant's customer and its staff as to the precise details of where, how and when to load and unload the lorry. There was usually some waiting time as well as driving time on the part of the driver.

16. Drivers were paid a fixed amount per day shift or night shift if they did accept a job (there were different fixed rates for days shifts and night shifts) – otherwise, they received no pay (such as for holidays) other than occasional discretionary bonuses. Payment was made by electronic transfer to the driver's bank account, based on the shifts performed in a given week recorded in the "weekly sheet" (see paragraph 7(b) above) signed by the driver.

17. How much work was given to drivers by the appellant, depended on how much work the appellant was asked to do by its customers – this was outside the appellant's control (it had no guarantee of work being given to it by customers). The appellant could not therefore guarantee work for its drivers.

18. The driver to whom a delivery job was offered could refuse (though if they regularly refused, it would affect their chances of being offered future work) – in which case Mr Dhillon would contact another driver from the pool. Drivers could stop accepting work from the appellant (ie remove themselves from the pool) at any time (with no notice period).

19. Shifts could end at varying times, meaning on some days drivers could finish the job earlier than on other days. Drivers could work for businesses other than they appellant if they so wished.

20. Drivers had to meet certain competence standards in order to be included in the appellant's pool of drivers (in part to meet the customer's requirements): they had to hold an HGV licence and an "EPIC" card (for construction sites) (this required a training course, which drivers were responsible for going on and paying for). The appellant's customers also had site training courses which drivers were required to take. The appellant did not cover the costs of the drivers meeting any of these standards. When drivers were first taken on, Mr Dhillon assessed how much relevant driving experience they had; if they did not have much experience, Mr Dhillon or one of the other drivers accompanied the new driver on delivery jobs for up to two weeks. The new driver was not paid during this period. This 'induction training' was to ensure that the drivers were capable of performing deliveries without supervision from the appellant.

21. The appellant did not generally provide legally-required personal protective equipment ("PPE") (such as boot and trousers) for the drivers but did keep spare hard hats, gloves and high visibility jackets in case the driver forgot to bring his.

22. Although normally the driver who accepted the appellant's offer of a delivery job (the "first driver") would himself perform the delivery, there were occasions when the first driver procured another driver (provided he had been approved by the appellant's customer) (the "second driver") to do the job. Typically this would happen in situations where, by law, the first driver had reached the limit of the number of hours he could drive the vehicle without a break (for example where the first driver had performed a day shift, and so was not permitted, by law, to do the immediately following night shift). Where a first driver procured a second driver to do a job in this manner, the appellant paid the first driver the usual fixed fee. It was a matter for agreement between the first driver and the second driver as to what the former paid the latter. We had no evidence as to what amounts were paid by the first driver to the second driver, on the occasions where this occurred.

Overall pattern of the appellant's engagement of drivers

23. The bundle contained a list (provided by the appellant's accountants in correspondence with HMRC on 7 May 2014) of recipients of payments from the appellant to drivers in the relevant tax years:

(a) In all, the list contained 44 drivers who received payments from the appellant.

(b) These included 23 of the 24 drivers named in the section 8 NIC decisions which are the subject matter of this appeal (see paragraph 2 above). The other one, S Athwal, was shown on the list as "Sukhdeep Athwal t/a Speedy Singh Transport Ltd". Bank statements supporting the list indicated that the payments by the appellant were in fact made to S Athwal, and not to Speedy Singh Transport Ltd.

(c) Many of the 44 drivers paid by the appellant, including the three drivers interviewed by HMRC in June 2011, received such payments over a continuous period of several years.

(d) Some, however, received payments from the appellant over shorter periods: 17 received payments from the appellant for less than three months (of these, 5 were paid for a single day).

(e) Analysed by tax year, the information in the list indicated as follows:

(i) In the 2009-10 tax year, the appellant paid 14 different drivers: 7 were paid a total of between £20,000 and £31,000; 4 were paid a total of between £10,000 and £20,000; 3 were paid less than £10,000.

(ii) In the 2010-11 tax year, the appellant paid 22 different drivers: 7 were paid a total of between £20,000 and £30,000; 4 were paid a total of between £10,000 and £20,000; 11 were paid less than £10,000.

(iii) In the 2011-12 tax year, the appellant paid 30 different drivers: 3 were paid a total of between £20,000 and £30,000; 7 were paid a total of between £10,000 and £20,000; 20 were paid less than £10,000.

(iv) In the 2012-13 tax year, the appellant paid 19 different drivers: 2 were paid a total of between £20,000 and £30,000; 10 were paid a total of between £10,000 and £20,000; 7 were paid less than £10,000.

24. We were given an analysis of the work and pay of the three drivers interviewed by HMRC in June 2011, in the period between 23 February 2009 and 9 April 2010 (a period of 13 to 14 months):

(a) Mr Athwal was paid for work on 259 days and 177 nights, for a total of £31,546;

(b) Mr Singh was paid for work on 264 days and 61 nights, for a total of £24,671; and

(c) Mr Bainwait was paid for work on 244 days and 147 nights, for a total of £30,186.

25. Drivers thus worked for the appellant for differing periods of time, but some continued to work for the appellant for four or more years. Reasons for a driver ceasing to work for the appellant included: not getting enough work from the appellant; the fact the work provided no career progression; and the driver himself starting to run a business like the appellant's.

Findings as to the terms of the agreements between the appellant and its drivers

26. We make the following findings as to the terms of the (oral) contracts between the appellant and its drivers (which, unless specified otherwise, were common to contracts made by the appellant with all its drivers):

(a) A contract was formed each time a driver accepted an offer from the appellant to carry out a specified delivery.

(b) There was no overarching contract requiring the appellant to give work, or the driver to carry out work, over and above the particular delivery job offered by the appellant to a driver at any one time.

(c) The key terms of each such contract made was that driver would carry out the specified delivery using a specified vehicle of the appellant, and the appellant would pay the driver at the agreed fixed rate (which varied depending on whether it was a day shift or a night shift).

(d) A delivery comprised picking up the lorry from the appellant's customer's site where it was parked up; loading it (to the detailed instructions of the customer); driving the loaded lorry to the specified destination; unloading it (again, to the detailed instructions of the customer – this could involve waiting time); and then driving the unloaded lorry back to the customer's site to park it up for its next delivery.

(e) The driver agreed, when performing the specified delivery, to conform to the health & safety, PPE and other requirements of the appellant's customer with which he was familiar after certain training by the appellant and its customer.

(f) There was no agreement for any payment other than for the specified delivery job.

(g) There was no obligation on the appellant to provide PPE to the driver.

(h) There was no agreement between the parties as to whether the driver was an employee or an independent contractor.

(i) Where the contracting driver was not allowed by law to perform a particular delivery (because of legal limits on the amount of continuous driving by drivers of heavy goods vehicles), the contracting driver was permitted to procure that another driver (if approved as such by the appellant and by its customer) perform a particular delivery. Payment in such cases would be made by the appellant to the contracting driver.

Legislation

NICs

27. Section 2(1) Social Security Contributions and Benefits Act 1992 defines the phrases "employed earner" and "self-employed earner" as follows:

> **Categories of earners**
>
> (1) 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 general 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).

28. Sections 6 and 7 of the same Act set up the circumstances in which Class 1 NICs are to be paid and who is liable to pay them. Paragraph 3 of Schedule 1 makes the employer liable to pay the primary (employee's) contribution and sets up the circumstances in which you can recover the contribution from the employee, as follows:

> "(1) Where earnings are paid to an employed earner and in respect of that payment liability arises for primary and secondary Class 1 contributions, the secondary contributor shall (except in prescribed circumstances), as well as being liable for any secondary contribution of his own, be liable in the first instance to pay also the earner's primary contribution or a prescribed part of the earner's primary contribution, on behalf of and to the exclusion of the earner; and for the purposes of this Act and the Administration Act contributions paid by the secondary contributor on behalf of the earner shall be taken to be contributions paid by the earner.
>
> (2) . . .
>
> (3) A secondary contributor shall be entitled, subject to and in accordance with regulations, to recover from an earner the amount of any primary Class 1 contribution paid or to be paid by him on behalf of the earner; and, subject to sub-paragraphs (3A) to (5) below but notwithstanding any other provision in any enactment], regulations under this sub-paragraph shall provide for recovery to be made by deduction from the earner's earnings, and for it not to be made in any other way."

29. Section 8 Social Security Contributions (Transfer of Functions, Etc) Act 1999 provides:

> **Decisions by officers of Board**
>
> (1) Subject to the provisions of this Part, it shall be for an officer of the Board—
>
> (a) to decide whether for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 a person is or was an earner and, if so, the category of earners in which he is or was to be included,
>
> (b) ….
>
> (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay …

30. Regulation 10 of the Social Security (Decisions and Appeals) Regulations 1999 SI 1999/1027 places the onus of proof on an appellant in respect of a decision and made under s8 above.

PAYE

31. The PAYE Regulations require an employer to deduct an account for PAYE when making payments of employment income to an employee. Regulation 80 of the PAYE Regulations provides:

> **Determination of unpaid tax and appeal against determination**
>
> (1) This regulation applies if it appears to [HMRC] that there may be tax payable for a tax year under regulation 68 by an employer which has neither been—
>
> (a) paid to [HMRC], nor
>
> (b) certified by [HMRC] under regulation 76, 77, 78 or 79.
>
> (2) [HMRC] may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.
>
> (3) A determination under this regulation must not include tax in respect of which a direction under regulation 72(5) has been made; and directions under that regulation do not apply to tax determined under this regulation.
>
> (4) A determination under this regulation may—
>
> (a) cover the tax payable by the employer under regulation 68 for any one or more tax periods in a tax year, and
>
> (b) extend to the whole of that tax, or to such part of it as is payable in respect of—
>
> (i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or
>
> (ii) one or more named employees specified in the notice.
>
> (5) A determination under this regulation is subject to Parts 4, 5 . . .and 6 of TMA (assessment, appeals, collection and recovery) as if—
>
> (a) the determination were an assessment, and
>
> (b) the amount of tax determined were income tax charged on the employer,
>
> and those Parts of that Act apply accordingly with any necessary modifications.
>
> (6) . . .
>
> [references to "HMRC" were added in 2008 and have been included for ease of reference]

32. Section 50(6) Taxes Management Act 1970 places the onus of proof on an appellant in respect of a determination made under regulation 80 of the PAYE Regulations.

Legal principles

33. The following summary of the relevant legal principles borrows heavily from the decision of the First-tier tribunal in *Ian Mitchell FRCS* [2011] UKFTT 172 (TC) (Judge Guy Brannan and Maryvonne Hands), a case that considered whether a doctor engaged by a cardiac surgeon to run the team performing an operation was an employee or an independent contractor.

Looking at "the whole picture"

34. As a general matter, the authorities suggest various guidelines or indicia which can be used in various factual circumstances to determine whether an engagement is a contract of employment or a contract for services (ie the hiree is self-employed). They can be summarised as follows:

(a) the well-known threefold test set out by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433;

(b) whether the worker is in business on his own account: see in particular the judgement of Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173;

(c) the 'mutuality of obligation' test: see the judgement of Park J in *Usetech Ltd v Young* [2004] STC 1671;

(d) the 'substitution issue': see the decision of the Court of Appeal in *Express & Echo Publications Ltd v Tanton* [1999] EWCA Civ 949 and the decision of Park J in *Usetech*;

(e) the influence of the surrounding terms; and

(f) the intentions of the parties.

35. The courts have warned against a mechanistic approach to these tests. Each case must be decided on its own facts. The hirer-hiree relationship (to use neutral expressions) must be examined in detail in each case. The factual matrix may mean that some of the indicia mentioned above are very important or even determinative of the nature of the relationship. In other cases, the same indicia will be of little help (or may even be irrelevant) in determining whether the relationship is that of employment or self-employment.

36. In *Hall v Lorimer* 66 TC 349 Mummery J said (at 366G):

> "To decide whether a person carries on business on his own account, it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on the checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the

> sum of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.

37. Mummery J's comments were approved on appeal by Nolan LJ, with whom Dillon LJ and Roch LJ concurred. Nolan LJ continued (at 375I) by expressing approval of the comments of Vinelott J in *Walls v Sinett* 60 TC 150 at 164 where the judge said:

> "It is in my judgement quite impossible in the field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are in common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case."

38. Thus, the various indicia mentioned above must be applied to the particular factual matrix, with the Tribunal using its judgement to evaluate the weight or relevance of the indicia involved and taking care to look at the picture as a whole. In the end, there is no one test that can determine every case. The process, once the facts and circumstances are determined, is one of evaluation and where mechanical application of the guidance contained in the many decided cases on this topic is to be avoided.

39. With this approach in mind, we now turn to consider in more detail the indicia of employment considered in the authorities.

The tests of MacKenna J in the Ready Mixed Concrete *case*

40. The facts in *Ready Mixed Concrete* were that the company, which made and sold concrete, entered into a written contract with an individual to deliver concrete using a vehicle owned, insured and maintained by the individual. The individual had to drive the vehicle himself but could with the company's consent hire a competent driver if he could not drive at any time. MacKenna J decided on these facts that the contract was a contract of carriage and not a contract of service.

41. In his judgement MacKenna J set out his well-known test (at 439) as follows:

> "I must now consider what is meant by a contract of service. A contract of service exists if the following three conditions are fulfilled: (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

42. The first test appears to concern the ability to substitute another person to carry out the work – as to which, see below. We shall now describe the second and third tests in more detail.

Control

43. The second test put forward by MacKenna J relates to control by the employer of the employee. The judge said (at 440):

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place when it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

44. In *Bunce v Postworth* [2005] EWCA Civ 490, the Court of Appeal upheld the decisions of the employment tribunal and the employment appeal tribunal, that a welder who entered into a written contract with an employment agency, under which the welder was placed on assignments working for clients, was not an employee of the agency. The court placed considerable weight on the fact that day-to-control over the welder was exercised by the client, and not the agency. Keene LJ said at [29]:

> "The law has always been concerned with who *in reality* has the power to control what the worker does and how he does it. In the present case, during the periods when the appellant was working on an assignment, it was the client, the end-user, who had the power to direct and control what he did and how he did it … Once that state of affairs arose, as it did on any assignment, [the employment agency] lacked the necessary control over the appellant for him to be seen as their 'servant', in the old 'master and servant' terminology, during the time he was on that assignment. That the client's power to exercise day-to-day control over him had its origins in the agreement … with [the employment agency] cannot make good that deficiency."

In business on own account

45. Cooke J in *Market Investigations* (at 183) rejected control as the decisive test. The judge, in a well-known passage, said (at 185):

> "… control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor. The fundamental question which has to be asked is whether the person who has engaged himself to perform the services in question is 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."

46. Cooke J said that there is no exhaustive list which could be compiled of the considerations which are relevant in answering that question, nor could strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. Apart from control, factors which may be of importance included

> "… such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk takes [sic], 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 …"

47. In *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, the Privy Council (in a judgement delivered by Lord Griffiths) approved the approach of Cooke J in *Market Investigations*, saying (at 382) that "the matter had never been better put".

Mutuality of obligation

48. In *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984] ICR 612 the Court of Appeal referred to the first limb of MacKenna J's three tests. Stephenson LJ said (at 623):

> "There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt if it can be reduced any lower than in the sentences I have just quoted [which were the following, taken from MacKenna J's judgement in *Ready Mixed Concrete* (at 440): "There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill."]."

49. In *Usetech*, Park J said (at [57]-[59]):

> "[57] … If there is a relationship between a putative employer and employee, but it is one under which the 'employer' can offer work from time to time on a casual basis, without any obligation to offer the work and without payment for periods when no work is being done, the cases appear to me to establish that there cannot be one continuing contract of employment over the whole period of the relationship, including periods when no work was being done. There may be an 'umbrella contract' in force throughout the whole period, but the umbrella contract is not a single continuing contract of employment. See *Clark v Oxfordshire Health Authority* [1988] IRLR 125 (Court of Appeal); *Carmichael v National Power PLC* [1999] 1 WLR 2042 (House of Lords); *Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651, [2001] IRLR 627 (Court of Appeal).
>
> [58] That leaves open the possibility that each separate engagement within such an umbrella contract might itself be a free-standing contract of employment, and it was, I believe, that concept which the Special Commissioner had in mind as covering this case. That is consistent with his referring in the same paragraph of his decision to the decision in [*Market Investigations*], in which part-time interviewers for a market research company were held to be engaged under a series of separate contracts of employment. The judgement of Cooke J in that case contains a valuable and much cited discussion of principles which are relevant to distinguishing between contracts of employment and contracts for services rendered in a self-employed capacity (see especially [1969] 2 QB 173 at 184-185, [1968] 3 All ER 732 at 737-738). I confess that I have doubts about the factual conclusion which the learned judge reached when he applied the principles to the facts of the case. For myself, I see considerable force in the alternative analysis, namely that the interviewers provided their services on a free lance or casual basis and not as employees. See for an example of an analysis of that nature *O'Kelly v Trusthouse Forte plc* [1984] QB 90, [1983] IRLR 369.
>
> [59] However that may be for a case where the argument is that there has been a succession of separate contracts of employment, this case is not really of that nature. In contrast to a case like [*Market Investigations*] (or so it seems to me), the facts lend themselves readily to the conclusion that … it would have been a contract of employment. The engagement lasted for 17 months. Viewed realistically, there was nothing casual about it."

50. In *O'Kelly v Trusthouse Forte* (the case referred to in the extract from Park J's judgement immediately above), the banqueting department of a hotel company kept a list of some 100 casual catering staff who were known as "regulars" because they

could be relied upon to offer their services regularly. An industrial tribunal found that the catering staff were in business on their own account as independent contractors supplying services and were not "employees". The industrial tribunal's decision was reversed by an appeal tribunal but the Court of Appeal allowed the further appeal and held that the original decision of the industrial tribunal should stand.

51. In *Cornwall County Council v Prater* [2006] EW CA Civ 102 the Council engaged Mrs Prater as a home tutor to teach children who were unable to attend school. She worked under different engagements for the Council for almost 10 years. She taught some pupils for five hours a week and others for as much as 10 hours a week. The duration of the individual engagements varied from a few months to several years. It was argued on behalf of the Council that there was no mutuality of obligation because there was no on-going duty to provide work and there was no ongoing duty to accept work. The Court of Appeal rejected this argument. Longmore LJ said (at paragraph 43):

> "There was a mutuality of obligation in each engagement namely that the County Council would pay Mrs Prater for the work she, in turn, agreed to do by way of giving tuition to the people for whom the Council wanted her to provide tuition. That is to my mind sufficient 'mutuality of obligation' to render the contract a contract of employment if other appropriate indications of such an employment contract are present."

52. With respect, the ingredients of 'mutuality of obligation' stated by Longmore LJ would be present in any contract for services just as much as in a contract of employment. Longmore LJ's comment must be understood in the light of the fact that the alleged absence of 'mutuality of obligation' was the Council's only ground of appeal. Indeed as Lewison J pointed out (at paragraph 51):

> "The question whether there is a mutuality of obligation is not the complete test for determining whether a contract of service exists. I would have thought that the question of mutuality of obligation goes to the question of whether there was a contract at all, rather than what kind of contract there was, if a contract existed. However, the alleged lack of mutuality of obligation is the only ground of appeal."

Substitution

53. MacKenna J in *Ready Mixed Concrete* said (at 440)

> "The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands, or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …"

54. In *Express & Echo Publications*, a newspaper company entered into a written contract with a driver for him to pick up and deliver newspapers at various points in Devon, using a car provided by the company. A clause in the agreement provided that in the event the driver was unable or unwilling to provide the services personally, he shall arrange for a suitable and trained "relief driver" to perform the newspaper delivery. The Court of Appeal, reversing the decisions of the employment tribunal and the employment appeal tribunal, allowed the company's appeal and found that the driver was an independent contractor and not an employee.

55. In the leading judgement, Gibson LJ found the substitution clause in the contract in the case to be "a remarkable clause to find in a contract of service". He went on to conclude:

> "In these circumstances, it is, in my judgement, established on the authorities that where, as here, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom he works is not that of employee and employer. Mr Tanton has submitted to us that, though the personal service to the appellant was a highly material consideration, it was not conclusive. I am afraid that that proposition cannot stand in the light of the authorities."

56. Park J in *Usetech* (at [49]) pointed out that *Express & Echo Publications* "needs to be evaluated together with other cases" and, having reviewed these, said (at [53]):

> "As it seems to me the present state of the law is that whether a relationship is an employment or not requires an evaluation of all of the circumstances. In the words of Hart J in *Synaptek Ltd v Young* [2003] STC 543, 75 TC 51, para 12, the context is one '*where the answer to be given depends on the relative weight to be given to a number of potentially conflicting indicia*'. The presence of a substitution clause in an indicium which points towards self-employment, and if the clause is as far-reaching as the one in [*Express & Echo Publications*] it may be determinative by itself."

Other provisions of the contract

57. The third of the requirements that MacKenna J listed, seemed to the Special Commissioner (Howard Nowlan) in *Castle Construction Ltd v Commissioners for HM Revenue & Customs* SpC 00723 essentially to be making the point that one must finally look to all the terms, or indeed the notable absence of terms, in order to judge whether these reinforce or undermine the initial conclusions reached by applying the first two tests.

58. The Court of Appeal (Gibson LJ) in *Express and Echo Publications* described the approach to be adopted as follows:

> "(1) The tribunal should establish what were the terms of the agreement between the parties. That is a question of fact.
>
> (2) The tribunal should then consider whether any of the terms of the contract are inherently inconsistent with the existence of a contract of employment. That is plainly a question of law, and although this court, as indeed the appeal tribunal before us, has no power to interfere with findings of fact (an appeal only lies on a point of law), if there were a term of the contract inherently inconsistent with a contract of employment and that has not been recognised by the tribunal's chairman, that would be a point of law on which this court, like the appeal tribunal before us, would be entitled to interfere with the conclusion of the chairman.
>
> (3) If there are no such inherently inconsistent terms the tribunal should determine whether the contract is a contract of service or a contract for services, having regard to all the terms. This is a mixed question of law and fact."

Intentions of the parties

59. The status of an individual as an employee or an independent contractor is a question of law determined by reference to the facts. The cases have established that where the parties have provided in their agreement what that status shall be, that is certainly not determinative, although it may, in a borderline case, be taken into account and may help tip the balance one way or the other.

First-tier tribunal case on similar facts

60. In *Brian Turnbull* [2011] FTT 388 (TC), the taxpayer was in a haulage business similar to that of the appellant; and the question before the Tribunal was whether the driver he engaged was an employee or an independent contractor. The First-tier tribunal found (at [16]) there was no 'mutuality of obligation' because the taxpayer was not obliged to give the driver work, and the driver was not required to drive the lorry if he chose not to. The tribunal also found (at [18]) that even if this were not the case, the facts of the case suggested control over the driver was exercised not by the taxpayer but by Hanson (the taxpayer's customer), as the latter decided what material would be loaded onto the lorry and where it should be delivered; and once a load was delivered, the driver in that case could decide whether or not to come back to the yard to collect a new load. The tribunal therefore found that the driver was not an employee of the taxpayer in that case.

Appellant's arguments

61. Addressing the 'substitution' criterion, the appellant's representatives questioned whether drivers were obliged to provide their own work and skill (a criterion in *Ready Mixed Contract*), given the fact that in certain circumstances, the driver who contracted with the appellant could engage a second driver to perform the delivery in question.

62. The appellant's representatives further submitted that this case has similarities of facts with those in *Turnbull:* in that case, at [18], the First-tier tribunal found that

> "… any control over Mr Bhangal [the driver] was exercised by Hanson not Mr Turnbull [the taxpayer]. It was Hanson that decided what material would be loaded onto the lorry and where it should be delivered. However, once a load had been delivered we find that it was up to Mr Bhangal, not Mr Turnbull, to decide whether to return to the yard to collect a new load as it was equally his choice to decide what days he worked"

63. The appellant's representatives submitted that the decision of the Court of Appeal in *Bunce v Postworth* supported the view taken by the First-tier tribunal in *Turnbull*.

64. Addressing the 'mutuality of obligation' criterion, the appellant's representatives referred to HMRC's letter of 9 August 2012, in which HMRC said that "the irreducible minimum of mutual obligation test is met in this case, in that [the appellant] have been obliged to pay a wage/remuneration (based on a daily rate) and in return the drivers have been obliged to provide their own work or skill". The

appellant's representatives submitted that what was described here was simply a contract; for that contract to be a contract for services, more was required, as set out in case law.

65. The appellant's representatives also addressed the following issues (less significant, in their view):

(a) Provision of equipment: the appellant's representatives noted that, in *Turnbull*, the driver was held by the First-tier tribunal (at [19]) not to be an employee "despite the fact that he did not provide any equipment and made no contribution to the running cost of the lorry thus limiting his financial risk".

(b) No statutory benefits were paid to the drivers.

HMRC's arguments

66. HMRC submitted that the minimum requirements of 'mutuality of obligation' were met in this case. They submitted that employment is no less so when of casual or part time nature. They submitted that the key factors in this case were:

(a) The requirement for driver to carry out work in person

(b) The appellant had sufficient control over drivers

(c) The drivers did not have sufficient financial risk

(d) The intention of parties

(e) The overall picture was one where the drivers were integrated into the appellant's business

67. Addressing the criterion of 'control', HMRC submitted that the appellant had to exert control over the drivers, as this was required by the appellant's contracts with its customers – if something went wrong, the customer would look to the appellant in the first instance (and so it was economically important for the appellant to 'control' its drivers).

68. Addressing the requirement for personal service, HMRC submitted that there was no genuine unfettered right of substitution in this case (in contrast with the situation in *Express & Echo Publications*).

69. HMRC laid stress on the fact that some drivers were being paid over £25,000 in a given year. These drivers had a regularity of work with the appellant, it was submitted – in contrast to a self-employed person, who would work for various engagers over a year.

70. HMRC submitted that the fact that some drivers stopped working for the appellant in order to set up on their own in businesses like the appellant's, showed the difference between having your own business on your own account, on the one hand, and working as a driver for the appellant, on the other.

71. Addressing the decision of the First-tier tribunal in *Turnbull*, HMRC submitted that there were essential differences with this case, in terms of payment, mutuality and control. HMRC failed in *Turnbull* to demonstrate there was mutuality of obligation; there were also doubts that the taxpayer had control over the worker, this being more in the hands of Hanson. The tribunal in *Turnbull* had not been impressed with the evidence given by the driver and preferred that of the taxpayer.

Discussion

72. Following the approach of the First-tier tribunal in *Ian Mitchell*, we shall first examine the various tests or indicia discussed above and then, applying the guidance of Mummery J in *Hall v Lorimer*, stand back and evaluate the overall picture.

Control

73. The contracts between the appellant and the driver prescribed, on terms set by the appellant, most if not all of the matters pertaining to 'control' mentioned by MacKenna J in *Ready Mixed Concrete*: "the thing to be done" (the making of a particular delivery), the "means to be employed in doing it" (loading, driving and unloading a specified lorry belonging to the appellant), the "time when it shall be done" and the "place when it shall be done". Unlike a situation where the hiree is a skilled technician being made available to a third party for an engagement lasting over an extended period (as was the case in *Bunce v Postworth*), in the situation here the contract between hirer and hiree can be (and is) highly prescriptive of the task to be performed. All this is indicative of a contract of service.

74. On the other hand, engaging a driver is, by its nature, prescriptive – and we would not say that when someone calls a cab and instructs the driver to take him from place A to place B in a particular vehicle at a specified time, that this exercise of "control" over the driver is a meaningful indicator of the driver's status as an employee as opposed to an independent contractor. There are elements here that indicate to us a greater level of prescription and control than would be found in a typical engagement of a driver – for example, the term of the contract (as we have found it) to the effect that the drivers conform to the health & safety and other standards set by the appellant's customers. But it is also true to say here that the finer details of the loading and unloading – such as, where exactly on the customer's site the materials to be loaded were, and where exactly on the construction site the unloading was to be done – were controlled not by the appellant (Mr Dhillon was not present at the loading and unloading) but by the staff of the appellant's customer who were present.

75. We conclude that the test of 'control' is of limited assistance in this situation in resolving the status of the appellant's drivers as employees or independent contractors.

Mutuality of obligation

76. We noted in our review of the legal principles that 'mutuality of obligation" does not require, in the context of a series of engagements, the hirer to promise or

offer work other than in respect of each individual engagement (see in particular the citation from Park J's judgement in *Usetech* at paragraph 49 above). We have found such a series of engagements (with no overarching or "umbrella" contract) to be the situation here: the appellant has no obligation to provide ongoing work for the drivers – each engagement is a free-standing contract, made on a "per job" basis. The required 'mutuality of obligation' is therefore present to make the contracts between the appellant and its drivers, potentially, contracts of service – but, as also noted in our review of the legal principles, the relative ease with which this requirement is met means that it is not a strong indicator in either direction.

Substitution

77. We have found that the contract between the appellant and the driver contained a term which allowed the driver to procure a substitute where the driver was unable to make the delivery due to legal restrictions on hours of continuous driving of a heavy goods vehicle. The substitute driver had to be approved by the appellant and by the appellant's customer. We view this as a power of delegation that is both "limited" and "occasional" (to adopt the terminology of MacKenna J) – and therefore distinguishable from the "far-reaching" (as Park J called it in *Usetech*) clause considered by Gibson LJ in *Express & Echo Publications*, which required the driver in that case to appoint a substitute if he was either unable *or unwilling* (our emphasis) to make the newspaper delivery in question. We consider, following Park J's guidance in *Usetech*, that the presence of a limited right of substitution in the contract in this case is indicative of a contract for services – but is not in itself determinative.

In business on own account

78. We note that in applying this criterion to situations of casual or semi-skilled labour, tribunals have come to different conclusions on the particulars of the facts before them – and these have been upheld by the higher courts. This comes clearly to light in the passage from Park J's judgement in *Usetech* cited above, where the judge fully endorses the principles set out by Cooke J (36 years earlier) in *Marketing Investigations*, but indicates that, unlike Cooke J, he would have been inclined to find on the facts that such "free lance or casual" workers were independent contractors, following the conclusion reached as to casual catering staff in *Trusthouse Forte*.

79. In the case before us, we had little or no direct evidence, oral or in documentation, of the appellant's drivers being in business on their own account. The closest we had to evidence of this kind was the six invoices from the three drivers interviewed by HMRC in June 2011 (see paragraph 6(f) above), as they are set out in a manner to suggest that the drivers were conducting their own businesses. We do not, however, consider these invoices to be strong evidence in this regard: first, they relate to just one relatively short period of time (July- September 2011) and to only three drivers; and second, we find that that it was the "weekly sheets" (see paragraph 7(b) above) (rather than invoices) that were in fact the basis upon which the appellant paid its drivers.

80. The fact that drivers occasionally exercised their right to find (and pay) a substitute when they were prohibited by law from driving a shift, is not, in our view, evidence that the drivers were in business on their own account: we have found as a fact that the right only arose in quite specific, and occasional, circumstances; furthermore, we had no evidence as to how much any such substituted driver was paid by a contracting driver, such as would indicate that the contracting driver made a profit from the arrangement.

81. Furthermore, on the evidence before us, the drivers displayed few if any of the following features of being in business mentioned by Cooke J:

(i) *Did the drivers provide their own equipment?* The appellant, rather than the drivers, provided the lorries, which was the main piece of equipment required to carry out the engagement; the drivers did, however provide their own PPE.

(ii) *Did the drivers hire their own helpers?* Apart from the limited right of substitution already discussed, the drivers performed deliveries themselves with no helpers.

(iii) *What degree of financial risk did the drivers take?* The drivers were paid fixed rates for day shifts and night shifts – we had no evidence of their taking financial risk.

(iv) *What degree of responsibility for investment and management did the drivers have?* We had no evidence of the drivers having such responsibility.

(v) *Did drivers have the opportunity to profit from sound management in the performance of their task?* Given that the drivers were paid fixed rates for day shifts and night shifts, and the duration of the shift (which included waiting time) was not something they could control, we do not consider that the drivers could influence how much profit they derived from making a delivery, by means of "sound management". We accept that drivers could take on other work during times when they were not engaged by the appellant – but this is not, in our view, relevant to this criterion of Cooke J or to the character of the work they undertook for the appellant. Moreover, we had no evidence of the drivers taking on such "other work".

82. In the absence of direct evidence of the drivers being in business on their own account when engaging with the appellant, it is of course possible for us to find this to be the case by inference from the facts we have found. We have thus considered whether it can be inferred from the fact that the drivers were engaged on a job-by-job basis, that the drivers "must have been" in business on their own account – because, if they were not, they would have been in a precarious financial position, with no certainty of ongoing work from the appellant, and no business of their own.

83. We do not consider that such inference can validly be made, as there are, in our view, a number of other equally valid, if not more valid, inferences that may be made from the same facts. For example, we could equally validly infer that:

(a) the drivers did not appreciate the precariousness of their situation, as they simply trusted the appellant to continue to provide them work; or

(b) the drivers appreciated the precariousness of their position, but considered they had no alternative – and this, indeed, may explain why some drivers worked for the appellant for only a short period of time, or stopped working for the appellant in order to set up businesses similar to that of the appellant (see our finding of fact at paragraph 25 above); or

(c) the drivers did seek out other driving engagements to secure their financial position, but did so as employees rather than as persons in business on their own account.

84. The criterion of "being in business on own account," together with the fact that the burden of proof in this appeal lies with the appellant, therefore points towards the appellant's drivers being engaged under contracts of service.

Other provisions of the contract

85. We do not find any other of the terms of the contracts between the appellant and their drivers (as we have found them) to be inconsistent with a contract of service.

86. We have in particular found (at paragraph 26(h) above) that there was no agreement between the appellant and the driver as to whether the engagement was a contract for services or a contract of service – which deprives the appellant of the argument that a common intention of the parties should tip the balance in favour of "self-employed" status.

Evaluating the overall picture

87. Not unusually, the indicia of employment vs self-employment, when applied to the facts of this case, do not point consistently in one direction. The facts that the drivers operated without supervision and had a limited right to substitute other drivers in their place, point to self-employment; the lack of evidence that the drivers were in business on their own account, combined with quite prescriptive rules for the performance of the deliveries imposed by the appellant, point to employment.

88. The case authorities underline the importance of avoiding a checklist approach to these indicia of employment, and of making an informed, considered, qualitative appreciation of the whole picture.

89. The picture here is of business-savvy appellant which entered into detailed written agreements to provide delivery services for its customers, which were larger commercial concerns, and built up a network of men to drive its lorries. The drivers were engaged on unwritten, short term contracts, on standard terms largely dictated by the appellant. Some drivers engaged with the appellant on just a handful of occasions – others did so over extended periods of time. The appellant, for its part, was clearly carrying on business on its own account, seeking to profit from the difference between what it was paid for deliveries by its customers, and the costs of the lorries and the drivers. The drivers, on the other hand, were, on the evidence before us, essentially "day labourers" engaged on terms that were unwritten, uncomplicated and non-

negotiable. This was the manner in which the appellant chose to run its business and control its main cost (apart from the lorries themselves). Short term though the engagements were, it is our perception, stepping back and looking at the whole picture, that "master and servant" (whilst somewhat outdated phrases today) is an apt description of the relationship between the appellant and its drivers. Mr Dhillon, the managing partner of the appellant, was, in our perception, very much the "boss" in this relationship; and it is this, combined with the near-total absence of evidence that the drivers were running their own businesses, that leads us to decide that the drivers were employees of the appellant rather than self-employed contractors.

90. This conclusion differs from that reached by the First-tier tribunal in *Brian Turnbull*, which is of persuasive (but not binding) authority for us, on similar, but by no means identical, facts. We consider that the principal reasons for us reaching a different conclusion from that reach in *Brian Turnbull* are that, in this case, we have found from the evidence produced to us that

(a) the mutuality of obligations condition is satisfied;

(b) the appellant here in fact exercised a considerable degree of control over their drivers; and

(c) the drivers here in fact were not in business on their own account.

Conclusion

91. The appeal is dismissed and the determinations and decision notices raised by HMRC stand good.

92. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 3 January 2017

APPENDIX

Reasons for our refusal (at paragraph 8 of our main decision) of the appellant's representatives' request (the "request") to adjourn the hearing to enable them to make an application to the Tribunal for witness summonses

1. The appellant's representatives made the request due to their concerns over the "integrity" of the responses of the three drivers interviewed by HMRC in June 2011 (the "three drivers") as recorded in the notes of those meetings, due to the presence of the drivers' accountants at the meetings and, in particular, the accountants' role in explaining and interpreting the questions asked by HMRC (as the three drivers were not wholly fluent in English).

2. In considering the request, we bore the following in mind alongside this concern on the part of the appellant's representatives:

The Tribunal's powers and practice as regards witness summonses

(a) Rule 16 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that on the application of a party or on its own initiative, the Tribunal may by summons require any person to attend as a witness at a hearing at the time and place specified in the summons.

(b) Under that rule, such a summons must

(i) give the person required to attend at least 14 days' notice of the hearing, or such shorter period as the Tribunal may direct; and

(ii) where the person is not a party, make provision for the person's necessary expenses of attendance to be paid, and state who is to pay them.

(c) The rule provides that a person receiving a witness summons may apply to the Tribunal for it to be varied or set aside if they did not have an opportunity to object to it before it was issued.

(d) The Tribunal's practice statement with regards to witness statements (made by the Chamber President on 24 February 2015) lays down that an application for a witness summons must be in writing; it must be delivered to the Tribunal and, unless the Tribunal otherwise directs, served on all parties to the proceedings and, in normal circumstances, on the proposed witnesses.

(e) The practice statement lists 11 matters which the application must include, and states that the application may be rejected if it does not comply with these requirements.

(f) The practice statement says that in normal circumstances a copy of the application should be served on the proposed witnesses (which will enable them to have the opportunity to object to the summons before it is issued). If, because of urgency or other circumstances, it is not considered appropriate for the application to be served on the proposed witness, the Tribunal *may* issue the summons without requiring such service. In such a case, under Tribunal rule 16,

the person who received the summons may apply to the Tribunal for the summons to be varied or set aside.

Case management prior to the hearing regarding witnesses

(g) Directions for the hearing of this appeal were issued by the Tribunal on 25 September 2015. The parties were directed by 23 October 2015 to provide to the Tribunal and each other a statement detailing, inter alia, whether or not witnesses are to be called and if so their names. An extension of time was allowed by the Tribunal on 4 November 2015.

(h) Mr Scrivens, who represents the appellant, is a Tax Consultant with Croner Tax, which is the trading name of a company authorised and regulated by the Financial Conduct Authority.

(i) Mr Scrivens wrote to the Tribunal on 18 November 2015, saying (amongst other things) that the appellant wished to call the three drivers as witnesses.

(j) The Tribunal wrote to Mr Scrivens on 8 December 2015 stating that if witnesses summonses were sought, a formal application must be made with reasons. The Tribunal again wrote to Mr Scrivens on 15 January 2016, stating that it had received no response to its letter of 8 December 2015, and that any application for witness summons should be made by 29 January 2016, failing which the appeal would be listed for hearing.

(k) Mr Scrivens wrote to the Tribunal on 26 January 2016, asking that the letter be accepted "as a formal request to issue Witness Summons in respect of" the three drivers. He stated that "the reason I would request their attendance at the Hearing is to seek their clarification of a number of issues that they had discussed with HMRC at their meetings held in 2011." He then gave seven examples of such issues.

(l) The Tribunal wrote to Mr Scrivens on 5 February 2016 asking him to re-submit his application for witness summonses so that it complied in all respects with the Tribunal's practice statement (which was enclosed with the letter).

(m) Mr Scrivens wrote to the Tribunal on 10 March 2016 asking that the letter be accepted as a formal request to issue witness summonses in respect of the three drivers.

(n) The Tribunal wrote to Mr Scrivens on 23 March 2016 pointing out certain defects in his application for witness summonses – he had not set out what provision was to be made for the witness' expenses, and he appeared not to have served the application on the proposed witnesses – and requested a renewal of the application, curing these defects, within 14 days.

(o) Mr Scrivens wrote to the Tribunal on 5 April 2016, apologising for the delay in his responding, and stating the following in the second paragraph:

> "With regard to the three witnesses I had hoped to call I have still heard nothing from them in response to my request for them to attend. As they were the three drivers who Mr Yates (HMRC) had interviewed it is difficult for me to insist on their attendance and it looks increasingly like they are not going to attend. I will,

however, write to them once a date for the Hearing has been arranged with a further request for them to attend. Any expenses incurred by the witnesses will be paid on behalf of the appellant".

(p) The Tribunal served notice of the hearing date on the parties (including Mr Scrivens) on 22 April 2016. There was no further correspondence between Mr Scrivens and the Tribunal on the subject of witness summonses; a valid application for such witness summonses was thus never received by the Tribunal prior to the hearing.

Practical effect of acceding to the request

(q) The issuance of witness summonses to the three drivers by the Tribunal would result in the hearing of the appeal being adjourned part-heard and re-listed. This would result in considerable delay to the hearing of the appeal, as well as cost and time to the Tribunal and to the parties.

Evidential value of issuing witness summonses to the three drivers

(r) The appellant's representatives' concern was that the statements of the three drivers recorded in the note of their meeting with HMRC in June 2011 could not be relied upon due to role of their accountants in interpreting HMRC's questions.

(s) In his evidence to the Tribunal at the hearing, Mr Yates said that the three drivers spoke reasonably good English and the role of the accountants present at the meetings in June 2011 had been to clarify and explain HMRC's questions (rather than acting as interpreters as such). We found Mr Yates to be a credible witness.

(t) In the absence of oral testimony from the three drivers on which they could be cross examined, their statements as recorded in the notes from their meetings with HMRC in June 2011 would have limited evidential value (being "hearsay" evidence) unless corroborated by other evidence.

The overriding objective in the Tribunal's rules

(u) The overriding objective of the Tribunal's rules is that cases are dealt with fairly and justly. This includes:

(i) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; and

(ii) avoiding delay, so far as compatible with proper consideration of the issues.

(v) The Senior President of Tribunals said the following in the judgement of the Court of Appeal in *BPP Holdings v HMRC* [2016] EWCA Civ 121 at [37]:

"… it need hardly be said that the terms of the overriding objective in the tribunals likewise [ie like the Civil Procedure Rules] incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules

and practice directions are to be complied with in a like manner to a court's. If it needs to be said, I have now said it."

He added at [38]:

"The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on wider system including the time expended by the tribunal …"

Decision

3. In considering the request, we weighed in the balance, with regard to the overriding objective of dealing with this appeal fairly and justly, on the one hand, the possible advantages of our hearing oral testimony from the three drivers (and the risks of our not doing so) and, on the other hand, the delay and cost that would result from adjourning part-heard and relisting. We decided to refuse the request, the following being the main considerations which inclined us so to do:

(a) To accede to the request would have been to ride roughshod over the Tribunal's case management procedures. As part of the process for issuing and enforcing hearing directions, the appellant's representative, Mr Scrivens, had been in detailed correspondence with the Tribunal between November 2015 and April 2016 on the subject of making an application for the same witness summonses as were being requested at the hearing. The Tribunal's procedure had been clearly explained to Mr Scrivens but no valid application for witness summonses was made by the appellant prior to the hearing.

(b) The information that caused the appellant's representatives to make their request mid way through the first morning of the hearing – that the three drivers may not have been fully fluent in English and that their accountants attended the meetings with HMRC in June 2011 and may have assisted in interpreting HMRC's questions – was not new information to the appellant. The appellant was well acquainted with the three drivers and their standard of English; and the notes of the June 2011 meetings, showing the accountants as present, were provided to Mr Scrivens prior to 9 October 2015 (according to the correspondence in bundle). There was no reasonable excuse for the appellant waiting until the hearing had commenced, to decide to make an application for witness summonses in respect of the three drivers.

(c) The delay that would be caused by adjourning part-heard and re-listing would be material, in an appeal relating to events as long ago as the 2009-10 tax year.

(d) The rules of evidence would ensure that the Tribunal gave appropriate weight to the evidence of the three drivers as contained in the notes of their meeting with HMRC in June 2011 – in the absence of oral evidence from the drivers themselves, this would be treated as hearsay evidence, and so given little weight unless corroborated.