TC01888

Appeal number: TC/2010/05545 &
TC/2010/09336

Whether 1st Appellant was employed or self-employed in carrying out refurbishment of 2nd Appellant's medical clinic – whether 2nd Appellant was employer of 1st Appellant or not – 1st Appellant's appeal dismissed – 2nd Appellant not found to be employer

FIRST-TIER TRIBUNAL
TAX

MR. T. COFFEY T/A COFFEY BUILDERS **Appellant 1**
DR M. SELVARAJAN **Appellant 2**

- and -

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

TRIBUNAL: J. BLEWITT (JUDGE)
D. ROBERTSON (MEMBER)

Sitting in public at Manchester on 14 October 2011

Mr. S. Mokhtassi of Sterlin Partners LLP, for the first Appellant, Mr Coffey T/A Coffey Builders

Mr A. Smith for the second Appellant, Dr Selvarajan

Mr I. Birtles, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. In order to fully understand the nature of the appeals before the Tribunal, it is, in our view, necessary to set out a brief summary of the undisputed background to this case.

2. Mr Coffey was, for many years, a partner in Coffey Builders until his retirement due to ill health. Coffey Builders had a business address of Brownstones Cottages, Old Colliers Row, Smithhills Deane, Bolton.

3. Dr Selvarajan is a GP who practices from Deane Clinic, Horsefield Street, Bolton ("the clinic").

4. In 2003 plans were submitted and approved for the refurbishment of Deane Clinic. It was agreed by all parties that Dr Selvarajan had made contact with Mr Coffey as a result of Mr Coffey's daughter, a medical representative, having visited the clinic during the course of her business and providing her father's details to Dr Selvarajan.

5. During the period of the tax years 2003/2004 and 2005/2006 Mr Coffey had been involved in the refurbishment of the clinic.

6. On 13 January 2006, HMRC opened an enquiry into the accounts and returns of Coffey Builders, covering the tax years from 1998/1999 to 2005/2006 inclusive. HMRC maintain that additional amounts of tax are due for each of the years covered by the enquiry.

7. HMRC has also issued calculations under Section 8 of the Social Security (Transfer of Functions etc) Act 1999 for the years 2003/2004 and 2005/2006 to Dr Selvarajan. In respect of NIC Primary and Secondary contributions, HMRC calculated the amounts as nil but issued a decision notice in order that Dr Selvarajan could lodge his appeal.

8. The basis of the assessments raised by HMRC against Mr Coffey and NIC decision notice against Dr Selvarajan, in respect of the tax years 2003/2004 and 2005/2006, relies on the status of the working relationship between Mr Coffey and Dr Selvarajan.

9. HMRC's case is that Mr Coffey's engagement on the building work carried out at the clinic did not amount to his employment as an employee of Dr Selvarajan and that the work undertaken by Mr Coffey should have been included in the partnership returns of Coffey Builders.

10. Mr Coffey maintains that he was employed by Dr Selvarajan and should be regarded as an employee.

11. Dr Selvarajan's case is that Mr Coffey was engaged on a commercial transaction basis and that not only was he not an employee of Dr Selvarajan but furthermore, that the employment status of Mr Coffey is irrelevant.

The Appeal

12. We clarified with HMRC and the first Appellant that although assessments have been issued by HMRC to Mr Coffey and figures were contained within the documentation provided to us, the sole issue for us to determine related to the status of the relationship between Mr Coffey and Dr Selvarajan. We were informed that no Closure Notice has yet been issued in respect of the enquiry and consequently all parties agreed that the amount of the assessments raised against Mr Coffey were not the subject of this appeal. We were invited by Mr Mokhtassi for the first Appellant to conclude that Mr Coffey was an employee of Dr Selvarajan.

13. As regards the second Appellant, HMRC issued a Section 8 assessment of "nil" in respect of Primary and Secondary NIC on the basis that HMRC agreed that Dr Selvarajan had not been the employer of Mr Coffey/Coffey Builders. As a result, the sum of the assessment is perhaps not a major concern for the second Appellant, and it was confirmed to us that the principal issue for us to determine was the status of the relationship between the first and second Appellants; namely whether the first Appellant was an employee of Dr Selvarajan or not. Both HMRC and the second Appellant invited us to conclude that Dr Selvarajan was not an employer and consequently the assessment raised against him should be set aside.

The Parties

14. Mr Coffey attended the hearing despite his ill health and was represented by Mr Mokhtassi of Sterling Partners LLP. Mrs Coffey also attended in support of her husband and Ms Long, Mr Coffey's accountant of Accountancy Plus, attended and gave evidence.

15. Dr Selvarajan was represented by his accountant, Mr Smith. It had been agreed between the second Appellant and HMRC that although Dr Selvarajan had the benefit of representation, HMRC would present the case and the Tribunal were invited to treat Dr Selvarajan as adopting the submissions of HMRC. Dr Selvarajan gave evidence to the Tribunal which was relied upon by both the second Appellant and HMRC.

16. We were content to adopt this course of action which seemed to us to be a pragmatic and time-efficient way in which to deal with the case.

Evidence and Submissions

The First Appellant

17. Mr Mokhtassi, on behalf of Mr Coffey, began the proceedings. In opening Mr Mokhtassi helpfully set out the basis upon which the first Appellant appealed. In summary, Mr Mokhtassi submitted that the intention of Mr Coffey was an important

consideration; in 2003 Mr Coffey had retired and instructed his accountant, Ms Long, to de-register the business from VAT. Mr Mokhtassi explained that Mr Coffey may have carried out the "odd job" after retirement, which would have been declared to HMRC as "other income".

18. Mr Mokhtassi explained that Mr Coffey met Dr Selvarajan who asked him to build a surgery and supervise the refurbishment but that, due to his ill health, Mr Coffey was reluctant to take on this work. We were told that Mr Coffey became a registered patient of Dr Selvarajan as a result of promises by the Doctor that he would look after Mr Coffey and, it was submitted, the latter went on to manipulate and abuse this position of power.

19. Mr Mokhtassi submitted that there were two distinct issues for us to consider:

(i) Mr Coffey as a builder; and

(ii) Employment/self-employment

20. No issue was taken with the case law relied upon by HMRC which, it was submitted, makes clear the factors to take into account is determining whether a person is employed or self-employed.

21. In essence, Mr Mokhtassi submitted that Mr Coffey acted as no more than a supervisor. It was highlighted that no building contract existed which, Mr Mokhtassi submitted was an indication that Mr Coffey was not working in a self-employed capacity. It was accepted that Mr Coffey had a greater knowledge of building work than Dr Selvarajan, but we were invited to conclude that such knowledge does not necessarily indicate self-employment.

22. Mr Mokhtassi invited us to consider the following issues;

(a) Mutuality of obligations;

It was submitted that the minimum obligation for a contract of service was satisfied by Mr Coffey agreeing to manage the project in exchange for a weekly salary.

(b) Contracts;

A written contract would be expected where the services of a self-employed builder were acquired, setting out what is required and a quote; as no such contract existed, we were invited to find that it is more likely that Mr Coffey was paid as an employed manager on a weekly basis with Dr Selvarajan taking the role of principal contractor himself.

(c) Control;

Mr Mokhtassi explained that Mr Coffey was employed as an expert in his field to advise the principal contractor (i.e. Dr Selvarajan) and manage the project during set hours each day.

(d) Rights of substitution/personal service;

It was the first Appellant's case that there was no right of substitution and Mr Coffey was not permitted to engage helpers.

(e) Provision of own equipment;

It was submitted that all tools/equipment was provided by Dr Selvarajan, who also ordered and paid for the materials and employed the builders.

(f) Financial risk/opportunity to profit;

It was submitted that there was no financial risk to Mr Coffey, who did not buy assets for the job, bore no running costs and incurred no overheads. A public liability insurance document was contained within the documentary evidence which, it was submitted, had been taken out by Dr Selvarajan as principal contractor.

Mr Coffey was paid a weekly salary of £500 and consequently there was no further opportunity to profit.

(g) Part and parcel of organisation;

Mr Coffey was not outside the fold of employees

(h) Employee type benefits;

It was said that Mr Coffey was paid while on holiday, which would not be the case if he had been self-employed

(i) Mutual intention ;

It was the intention of both parties from the outset that Mr Coffey would be employed to manage and advise on the project. It was also agreed that a net salary of £500 per week would be paid to Mr Coffey and that Dr Selvarajan would take responsibility for PAYE deductions and payment to HMRC.

In addition to the oral submissions made by Mr Mokhtassi, we were also assisted by a bundle of written submissions which expanded upon the issues summarised above.

23. Mr Coffey gave evidence to the Tribunal in which he confirmed that the submissions made by Mr Mokhtassi were correct. In addition to the letters written by Mr Coffey to Mr Mokhtassi dated 25 August 2011 and 5 October 2011 which were contained within the bundles provided to us and to which we had regard, Mr Coffey provided the following information; he was told by Dr Selvarajan that his role would be to oversee the project without any further responsibility and that Dr Selvarajan's accountant "the best in Bolton" would deal with the tax issues. Mr Coffey stated that Dr Selvarajan promised to look after his health, but did not sign a form required for a disabled driver's badge despite repeated requests by Mr Coffey. We were told by Mr Coffey that he had visited Dr Selvarajan's mother in hospital when she was ill and assisted by shopping at Sainsbury's for him then picking up his children from school.

24. Mr Coffey explained that when the project was completed, Dr Selvarajan was off work for a number of weeks which had resulted in Mr Coffey visiting his house where Dr Selvarajan was completing his VAT returns. Mr Coffey stated that Dr Selvarajan had put the name of his decorator down as Chief of Health and Safety on a Health and Safety document, which he asked Mr Coffey to sign before it was completed. Mr

Coffey agreed he had signed the form without checking it and that he was named on the form as the "partner with responsibility for health and safety," "planning supervisor" and "principal contractor."

25. Mr Coffey alleged that although Dr Selvarajan was a GP, he knew a great deal about building work and was able to explain to Mr Coffey exactly what he wanted from the refurbishment.

26. Mr Coffey stated that during the period of the refurbishment, he had carried out work for friends and relatives of Dr Selvarajan.

27. In cross examination, Mr Coffey confirmed that he had worked within the construction industry in the UK since approximately 1970/1971 when he had moved to the UK from Canada.

28. Mr Coffey agreed that he had signed a document in the capacity of principal contractor but stated that he had just signed any documents given to him by Mr Selvarajan. When asked about a public liability insurance document dated 22 February 2005, Mr Coffey agreed that the policy was held in his name but stated that Dr Selvarajan had transferred his onto Mr Coffey whose insurance was running out.

29. Ms Long also gave evidence in support of Mr Coffey's case. We had the benefit of a written statement dated 4 September 2011 which set out the difficulties encountered by Mr Coffey in the tax year 2003/2004 as a result of delays in receiving monies due for work completed for the Council. Ms Long confirmed that due to ill health, Mr Coffey decided to retire and consequently the company was de-registered from VAT.

30. As regards the subject matter of this appeal, namely Mr Coffey's relationship with Dr Selvarajan, Ms Long confirmed that Dr Selvarajan had purchased a bathroom for both his house and the clinic during summer 2004 and that he had made enquiries with Ms Long as to how much her accountancy services would cost for his self build VAT claim. Ms Long confirmed that ultimately Dr Selvarajan did not engage her to assist with any VAT claim.

31. Ms Long explained that her understanding was that Coffey Builders were not employed by Dr Selvarajan, but rather that Mr Coffey was personally employed.

32. In oral evidence, Ms Long outlined her concerns for the Appellant's mental state at the time of the refurbishment. Ms Long explained that she had, in the past, completed the Mr Coffey's self-assessment return in which there were no figures included under the heading "employment" as all amounts were included under "self-employment." Ms Long stated that, as far as she was aware, Mr Coffey did not employ anyone, but had sub-contractors working for him. Ms Long confirmed that she had no involvement in Mr Coffey's engagement with Dr Selvarajan but believed the two men had been friends.

The Second Appellant and HMRC

33. By way of opening, HMRC submitted that the issue before the Tribunal is that of the status of the building contractor, Mr Coffey, and his relationship with Dr Selvarajan. For the avoidance of doubt, we observe again that HMRC and Dr Selvarajan shared the position that the relationship was one of a commercial transaction by engaging a building contractor however we did not attach any additional weight to Dr Selvarajan's evidence as a result and were careful to reach our own decision as to the evidence of both Appellants.

34. HMRC observed that Dr Selvarajan is a GP who has never had any connection with the construction industry and consequently the assessment raised against the doctor is "nil" in order to reflect this view of HMRC.

35. Dr Selvarajan was called to give evidence. He confirmed that he had been a medical practitioner for 20 years and a GP in Bolton for 11 years. Dr Selvarajan confirmed that his witness statement dated 18 February 2011 was true and accurate and this stood as his evidence in chief. In summary, the witness statement of Dr Selvarajan confirmed that work on the clinic began in September 2003 and was finished in the early part of 2006.

36. Dr Selvarajan confirmed in his written statement that no written contract was drawn up at the commencement of the refurbishment but stated that all the labourers who worked on the project were found by Mr Coffey, with the exception of a plumber who was interviewed by Mr Coffey before being accepted to work on the project.

37. Dr Selvarajan's written statement set out that he did not know the full names of the workers engaged by Mr Coffey, nor was he aware of their home addresses, rates of payment or qualifications. Each week, Mr Coffey would provide Dr Selvarajan with amounts to be paid, which he, Dr Selvarajan, would then withdraw in cash as requested and given to Mr Coffey.

38. Dr Selvarajan confirmed that Mr Coffey arranged in advance of his holiday that Dr Selvarajan would make the payments on his behalf during that period. It was also confirmed that Mr Coffey, during the period of refurbishment, had carried out other building work, including work at Dr Selvarajan's home, his sister's home and at the home of Mr Patel, a friend of Dr Selvarajan.

39. Mr Coffey ordered materials on accounts opened by Dr Selvarajan at local builders' merchants, and the accounts were settled by Dr Selvarajan. On occasion, bills for goods ordered by Mr Coffey which were apparently unrelated to the clinic refurbishment arrived which were not paid by Dr Selvarajan.

40. During the project, Mr Coffey as Coffey Builders signed a document as responsible for health and safety, in addition to various liability insurance documents. Dr Selvarajan initially extended his overdraft to pay for the refurbishment, but subsequently this was switched to a mortgage at which point the bank insisted a Builders Contract be drawn up. This was done and signed by Mr Coffey as the contractor.

41. Dr Selvarajan concluded his written statement by confirming that it was always his intention that Mr Coffey be an independent contractor who was in charge of the project and at no time was he considered to be an employee. Dr Selvarajan denied that he gave any instruction or direction to the work carried out by Mr Coffey or the labourers recruited by him.

42. In cross-examination Dr Selvarajan clarified that the parties had only signed a contract when the bank, quantity surveyor and surveyor became involved and this had taken place at a meeting at which all of the above, including Mr Coffey had been present. Prior to that, Dr Selvarajan stated that he believed a verbal contract had been in place and that there had been no written contract as he had no previous experience of building work. Dr Selvarajan denied that he had abused the patient/doctor relationship with Mr Coffey, stating that Mr Coffey joined the practice voluntarily.

43. Dr Selvarajan agreed that he had paid for Mr Coffey's public liability insurance as Mr Coffey had asked him to pay it. When asked whether Mr Coffey only had responsibility for overseeing the project, Dr Selvarajan disagreed, stating that Mr Coffey had been responsible for all aspects of the project including dismissing workers.

44. It was agreed by Dr Selvarajan that there had been a good relationship between the two men and that Mr Coffey had, on one occasion, helped his wife with the shopping as his mother was ill and his wife did not drive.

45. As regards the payments made to Mr Coffey, Dr Selvarajan stated that initially Mr Coffey had asked for £750, but this was reduced to £500 as Dr Selvarajan had believed £750 to be too much. In respect of payment of labourers, Dr Selvarajan confirmed that he provided the amounts requested by Mr Coffey.

46. At the request of Mr Mokhtassi for the first Appellant, HMRC called HMRC Officer Mr Mistry as a witness. It is right to note at this point that HMRC did not rely on Mr Mistry as a witness as his involvement with the case was that of case officer. However as a result of HMRC's reliance on minutes of a meeting on 12 February 2008 (at which Mr Coffey's previous representative was present) contained within the bundles provided to us, and Mr Mokhtassi's concerns as to when the notes were provided to him, we, the Tribunal, took the view that it was fair to all parties to allow Mr Mokhtassi to raise the issue and Mr Mistry to respond.

47. Mr Mistry confirmed that he had provided Mr Mokhtassi with all minutes of meetings involving the first Appellant during a visit to Mr Mokhtassi's office on 18 November 2008. Mr Mistry agreed that the usual practice of HMRC had not been followed and that the notes had only been formally sent to Mr Mokhtassi following his request by letter dated 9 September 2010. There was no challenge by Mr Mokhtassi to the fact that the notes had been typed up from contemporaneous hand-written notes, or to the fact that a copy of the typed notes had been provided at the meeting with HMRC and Mr Mokhtassi on 18 November 2008.

48. We observe at this point that a number of meeting notes were included within the documents provided to us;

(a) 12 February 2008: Mr Hilton (John Goulding & Co) representative at that time of Mr Coffey and Mr Mistry

(b) 21 May 2008: Mr Smith (Barlow Andrews) representing Dr Selvarajan, Dr Selvarajan and Mr Mistry;

(c) 30 May 2008: Ms Long (Accountancy Plus) representing Mr Coffey, Mr Coffey, Mrs Ferera (Mr Coffey's daughter) and Mr Mistry;

(d) 28 July 2008: Mr Mistry and Mrs Periera (on behalf of Mr Coffey)

49. We considered all of the notes carefully. We noted that much of the evidence given by Mr Coffey and Dr Selvarajan mirrored the accounts given by either the first and second Appellant and/or their agents to HMRC at the relevant meetings. We were careful not to attach too much weight to this evidence as there were notes of meetings at which Mr Coffey had not been present and it appeared to us that the HMRC officer, Mr Mistry, was simply making initial enquiries and offering a provisional view of HMRC which, as he rightly noted at the meeting of 12 February 2008, required further information and consideration. We noted that allegations relating to matters which are not the subject of this appeal were included in the notes; we disregarded any such comments and they did not form part of our decision.

50. HMRC drew our attention to the following documents exhibited within the bundles provided to us:

(a) A signed undertaking addressed to Dr Selvarajan dated 23 March 2005 and signed by Mr Coffey as Contractor in which Mr Coffey assumed *"the responsibility for making good defects during the 3 month period from Practical Completion of ALL the works...to extend to all works carried out by me – acting in the capacity of Principal Contractor..."*

(b) "Coffey Builders Health and Safety Plan for the Deane Clinic Development, Bolton" including a declaration acknowledging responsibility for the production and implementation of the policy on health and safety signed by Mr Coffey as "Partner with responsibility for Health and Safety" and dated 1 March 2004. The document contains details of Dr Selvarajan under the heading "client" and details of Mr Coffey under the headings "Planning Supervisor" and "Principal Contractor." Mr Coffey's name also appears under the title "Contractors." The document contains a signature "by or on behalf of the organisation" which is difficult to read, but which Dr Selvarajan told the Tribunal was his signature, although this was disputed by Mr Coffey who believed it belonged to a cleaner at the clinic. The document is also signed by Mr Coffey as "Planning Supervisor" and "Principal Contractor on behalf of the organisation" and dated 13 October 2003.

(c) A handwritten entry on a diary (the diary date was 3 July 2003) dated 25 February (the year is illegible) which contained a list of names and amounts, for example "Brian 400" and "Tiler £455."

(d) An Insurance Policy from Allianz Cornhill, effective from 11 November 2004 in the name of Mr T Coffey containing the "Business Description" as "Builders."

(e) Certificate of Employers' Liability Insurance from Allianz Cornhill effective from 11 November 2004 until 11 November 2005. The policyholder is named as Mr T Coffey. A covering letter addressed to Mr Coffey dated 25 February 2005 enclosing the Policy and Certificate was also included in the documentation provided to us.

51. It is right to say that in respect of Mr Coffey's Insurance, a document was drawn to our attention by Mr Mokhtassi which was addressed to Mr Coffey from W.G. Hancock & Co Insurance and dated 9 July 2007. The letter confirmed (as stated by Dr Selvarajan in evidence) that "the renewal premium...for payment on the 11th November 2004 was paid to us on the 26th November 2004 by Dr Selvarajan, by cheque."

52. In summary, HMRC submitted that, having regard to the relevant factors which are indicative of self-employment, the first Appellant falls squarely within that description and that Dr Selvarajan was not, at any time, Mr Coffey's employer.

Legislation and Case Law

53. Prior to the hearing, the issue as to whether the first Appellant fell within the Construction Industry Scheme was at point. This was not pursued at the hearing and all parties agreed that CIS was not an issue for this Tribunal to be concerned with. The written submissions on behalf of the first Appellant explained that their case was that Mr Coffey was a supervisor, not a building contractor; hence CIS regulations are not relevant and should be discounted. HMRC submitted that the business run by Dr Selvarajan was in no way appropriate to, or connected with the Construction Industry Scheme and that Dr Selvarajan cannot be considered as operating or registered as a Contractor. Consequently, HMRC submitted, Dr Selvarajan failed to satisfy the conditions required in order to consider the employment status of the workforce. HMRC argued that if Dr Selvarajan was found to be operating within the Construction Industry Scheme, then it would follow that any private householder engaging a builder to carry out conservatory construction work would also have to be deemed to be operating under the same relevant tax deduction scheme at source, which must be incorrect.

54. HMRC, fairly in our view, went on to consider whether any aspect of this case could fall within the classification of "Deemed Contractors" by virtue of Sections 57 – 77 Finance Act 2004, although this was not an argument put forward or relied upon by the first Appellant. Section 59 (1) (b) to (k) does not apply on the basis that the sub-sections cover Government Departments, Public Bodies or Local Authorities. Section 59 (1) (l) can only be applicable to "a person carrying on a business at any time if his average annual expenditure on construction operations exceeds one million

pounds per annum." On the basis that there was no evidence as to whether Dr Selvarajan expended through his business in excess of one million pounds per annum upon construction operations or that the construction work could be classed as anything more than a "one-off" occurrence, HMRC concluded that the legislation did not apply.

55. We were referred by HMRC to a number of cases; we will not address those which dealt with the issue of burden/standard of proof as there was no dispute between the parties on this point.

56. We also bore in mind the cases of:

(a) ***Castle Construction (Chesterfield) Ltd v HMRC*** *SC 3207/2007;*

(b) ***J & C Littlewood T/A JL Window & Door Services (1), Mark Molloy (2) v HMRC*** *Spc 00733;*

(c) ***Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Limited & Another*** *FN65 [1945] KB 309;*

(d) ***Bamford, Bamford, Snowden, Lamb, Ward v Persimmon Homes NW Ltd*** *UKEAT/0049/04/DM*

Discussion

57. We considered all of the evidence, both written and oral, carefully. As a general matter, the case authorities suggest that various guidelines can be helpful in determining whether an engagement is a contract of employment or a contract for services. The guidelines established by case law include the well-known threefold test set out by MacKenna J in ***Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance*** *[1968] 2 QB 497*, the "mutuality of obligation" test" (relied upon by the 1st Appellant but not cited so we say for the sake of completeness ***Usetech Ltd v Young (HMIT)*** *[2004] 1671*), whether a "right of substitution" existed and the intentions of the parties.

58. In ***Ready Mixed Concrete (South East) Ltd*** Mackenna J provided a helpful starting point in considering whether a contract of service exists:

"*That a contract of service existed if*

(a) the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master,

(b) the servant agreed expressly or impliedly that, in performance of the service he would be subject to the control of the other party sufficiently to make him the master, and

(c) the other provisions of the contract were consistent with its being a contract of service;

but that an obligation to do work subject to the other party's control was not invariably a sufficient condition of a contract of service, and if the provisions of the contract as a whole were inconsistent with the contract being a contract of service, it was some other kind of contract and the person doing the work was not a servant);

that where express provision was not made for one party to have the right of control, the question where it resided was to be answered by implication;

and that since the common law test of the power of control for determining whether the relationship of master and servant existed was not restricted to the power of control over the manner of performing service but was wide enough to take account of investment and loss in determining whether a business was carried on by a person for himself or for another it was relevant to consider who owned the assets or bore the financial risk"

59. It is important to note however, that the authorities make clear that a mechanistic approach to such tests should not be adopted. Nolan LJ in ***Hall v Lorimer*** *(66TC349)*said:

"I agree with the views expressed by Mummery J in the present case at p.944 D of the report where he says:

'In order 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 a check-list 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 total 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.""

We therefore considered this case on its own facts and we observe that although some of the factors mentioned above can be determinative of the nature of a relationship between parties, the same factors may be of little or no assistance in other cases. Our approach, therefore, was to evaluate the relevance of the various factors relied upon by the parties and look at the overall picture.

60. We will begin with the evidence of Ms Long, which was brief. We found Ms Long to be a credible witness but considered her evidence to be of limited assistance. It was clear to us that Ms Long's relationship with Mr Coffey was both business and personal, which was why she was able to provide a positive character reference in addition to information about the accounts she had prepared on his behalf. That said, it was clear from Ms Long's evidence that she had not discussed with Mr Coffey the nature of his business relationship with Dr Selvarajan or the status of any such relationship. We took the view that this was regrettable, as Ms Long was clearly

knowledgeable about taxpayers' obligations and may have provided assistance to Mr Coffey which would have prevented this situation arising. We concluded that Ms Long's evidence did not assist us in determining whether Mr Coffey was employed or self-employed in his role at the clinic, although the evidence confirmed Mr Coffey's significant number of years experience as a self-employed builder.

61. We went on to consider each of the factors relied upon by the first Appellant. We agreed that the case authorities make clear that control can be an important feature in determining this type of issue and we had regard to the test put forward by MacKenna J in the ***Ready Mixed Concrete*** case:

"Control includes a part 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."

62. The evidence by Mr Coffey and Dr Selvarajan conflicted; Mr Coffey maintained that he did no more than oversee the project and had no responsibilities, such as hiring/firing labourers or setting work hours. Dr Selvarajan stated that work hours and wages were set by Mr Coffey, who also found and managed the workforce. On balance, we preferred the evidence of Dr Selvarajan; we found him to be a more credible witness than Mr Coffey and we accepted his evidence that as a GP, he simply did not have the relevant knowledge or experience to control such aspects of the project as finding labourers or fixing their rate of pay. We found that Mr Coffey did have such experience, and we found it wholly unlikely that his role would be so limited as to effectively have little or no regard to his knowledge of the building industry. We found as a fact that Dr Selvarajan had not directed Mr Coffey in his task, nor was Mr Coffey subject to appraisal or monitoring by Dr Selvarajan. Consequently we found as a fact that Mr Coffey had far more control over the building project than he accepted.

63. We observed that while the refurbishment project was in progress, Mr Coffey, on his own evidence, undertook separate building jobs. We inferred from this evidence that Mr Coffey was able to dictate his hours and days of work in order to allow him to do so. We also inferred that, despite his ill health and intended retirement, Mr Coffey was still willing and able to undertake work as a builder. We found as a fact that this supported our view that Mr Coffey was engaged by Dr Selvarajan as far more than an "advisor" or to "oversee" the project and that this was one of "one-off jobs" referred to by Mr Mokhtassi as further work undertaken after retirement. We found that the inferences we drew did not point to Mr Coffey being employed by Dr Selvarajan, but rather that he continued to work on the same basis he always had; self-employed.

64. We found that the documents signed by Mr Coffey reinforced our view that his role carried with it significant responsibilities and control. We rejected the submission of Mr Mokhtassi that the documents should be discounted on the basis of Mr Coffey's explanation that he had simply signed documents without checking them, prior to their completion and after the work had commenced. In the absence of any written

agreement between the parties at the start of the project, we found that the documents, albeit signed after the commencement, were relevant to our considerations and provided an indication as to the intentions/standpoint of the parties. We noted that the titles under which Mr Coffey had signed his name (such as "principal contractor" and "planning supervisor") were pre-printed and there could, therefore, have been little doubt in Mr Coffey's mind as to what he was signing. Taken together with his knowledge of the building industry, we found that that Mr Coffey's role went beyond that of "overseeing" the project and our findings on the issue of control indicated that Mr Coffey was self-employed.

65. HMRC relied upon the handwritten note contained on a diary page as evidence of invoice documentation provided by Mr Coffey to Dr Selvarajan. The assertion that this document was written by Mr Coffey was not challenged by the first Appellant and we therefore accepted this as fact. We rejected the first Appellant's submission that this list of employees to be paid adds weight to Mr Coffey's argument that he was an employee; we found as a fact that the evidence indicated that Mr Coffey dictated and controlled the workers' payments. In the absence of any explanation from Mr Coffey as to why an employee would write or present such a document to an employer, we were satisfied that this was further evidence that Mr Coffey, rather than Dr Selvarajan, had a significant degree of control over the project.

66. We observe at this point that such indications of self-employment are not necessarily decisive of the issue, and we considered the analogy put forward by Mr Mokhtassi of a businessman with no IT expertise has employed an IT manager to run the IT department, the latter would not be classed as self-employed. We took the view that each case must be decided on its own facts and there may be circumstances in which the IT manager may be deemed to have significant control in his work, equally the IT manager may be part and parcel of the company, with set working days and a contract of employment. Having evaluated the indicators present in this case and balanced against them the overall picture inferred from the evidence, we found as a fact that, although not decisive, the degree of control pointed to Mr Coffey being self-employed.

67. As no written contract existed between the parties at the start of the project, we were invited to consider the intentions of the parties and it was submitted on behalf of the first Appellant that the initial intention on both sides had been for Mr Coffey to be employed. This assertion was not supported by the second Appellant who maintained that the Appellant had been engaged in a business transaction as a building contractor and that there had been no agreement that Mr Coffey would be an employee. We preferred the evidence of Dr Selvarajan which we found more convincing than that of Mr Coffey and which, in our view, was supported by the signed documents referred to at paragraph 59 above. Having found as a fact that Mr Coffey had significant knowledge and experience in the building industry, we did not find his evidence that he intended to be an employee credible and in the absence of any credible explanation as to why Mr Coffey would suddenly change his lifetime's nature of trading, without further enquiry, we rejected his submission that both parties had commenced the project on an employer/employee basis.

68. We noted that the minutes of meeting dated 12 February 2008 between Mr Mistry and Mr Hilton (representing Mr Coffey) referred to a meeting on 27 October 2006 at which Mr Coffey and Mr Mistry were present. The notes were not provided to us but reference was made to Mr Coffey's initial assertion that he had only provided free advice to Dr Selvarajan. The minutes of 12 February 2008 subsequently refer to this assertion being retracted by Mr Coffey at a further meeting with HMRC on 23 February 2007 (again, the notes of which were not provided to us) when disclosure was made by Mr Coffey of the £500 weekly payment he had received. As we indicated earlier in this decision, we were careful not to attach too much weight to the notes (particularly where they referred to minutes not provided within the bundles) but we observe that the content therein was not challenged by Mr Mokhtassi or Mr Coffey and we therefore reinforced our finding that Mr Coffey's evidence lacked credibility.

69. We considered the issue of financial risk, although again we observe that the authorities have made clear that this factor is not necessarily determinative of the issue. It was submitted by the first Appellant that the lack of any financial risk to him was an indication that he was employed. We do not accept this submission. Mr Coffey had signed a document dated 23 March 2005 undertaking responsibility to make good defects during the 3 month period from practical completion of all of the works. Had there been any defects (about which there was no evidence) we found that this document would have assisted the second Appellant in establishing Mr Coffey's liability in any claim that arose. In addition, we noted that the Public and Employers Liability Insurance in respect of Mr Coffey's work as a builder covered part of the period of the project for himself and up to 8 workers. We found as a fact that these documents indicated a significant degree of responsibility, financial risk and management for the project by Mr Coffey, which supported our earlier findings that the indications pointed toward his self-employment.

70. We bore in mind that there had been a fixed sum of money paid to Mr Coffey on a weekly basis, including while he was on holiday. In the absence of any written agreement between the parties, we were not satisfied that this could be described as an "employee's wage/benefit" or that it indicated anything more than the informality of the arrangement between the parties. We noted that within the documents provided to us, there was reference to periods where the payment differed. None of the parties explored this matter in evidence and consequently we do not find that this issue is indicative of employment or self-employment.

71. The first Appellant relied on mutuality of obligation in support of his case; namely that for a fee of £500 Mr Coffey delivered a service by which he oversaw the project. We did not find that this point assisted either party; having found that Mr Coffey's role went beyond that of "overseeing" the project, we concluded that the payment agreement between the parties could have equally applied to Mr Coffey in a number of capacities, whether under a contract of service or a contract for service. In our view, this test was of limited assistance in determining the issue before us.

72. It was submitted on behalf of Mr Coffey that Dr Selvarajan had provided the tools and equipment for the project, thus indicating his employment. Dr Selvarajan's

evidence to the Tribunal was that the pair would go to buy the materials or tools together, paid for by Dr Selvarajan but under the guidance (and often the trade account) of Mr Coffey. There was reference to skip hire in the documents provided to us, and by way of example, we would not necessarily expect a builder to own and use his own skip, but rather hire one and invoice the client. We found as a fact that this factor was of limited assistance in reaching our decision.

73. It was submitted by Mr Mokhtassi that Mr Coffey should be viewed as "part and parcel" of the organisation. We found such an assertion to be misconceived. Dr Selvarajan ran a GP practice and we could not see how, on any view, Mr Coffey could be deemed as an integral, or even ancillary, part of the practice. All of the evidence indicated that the refurbishment project was a temporary "one-off" development and therefore we rejected the assertion that a construction project had any part to play in the running of the main organisation as a medical clinic. We found as a fact that this was indicative of the self-employed nature of Mr Coffey's work.

74. We were invited to consider the issue of right of substitution, which was not disputed by HMRC in their letter to the first Appellant's representatives dated 19 October 2009 as being an indicator of employment. Given that there was no dispute, we did not consider this issue any further and accepted the position as agreed between the parties.

75. We clarified with Mr Mokhtassi whether the allegation of bias by HMRC or prejudice against the first Appellant by Mr Mistry were to be relied upon in support of the first Appellant's case and we were informed that they were not. We did not, therefore, consider these issues in reaching our decision.

76. We considered the issue of the Construction Industry Scheme and agreed with the parties that it was not relevant to our determination as to whether Mr Coffey was employed by Dr Selvarajan. It was asserted by the first Appellant that Dr Selvarajan is not precluded as a GP from carrying out a self-build project and consequently PAYE or CIS schemes may apply. There was no evidential support for the assertion that Dr Selvarajan had treated the project as a self-build scheme, and the issue was not put to Dr Selvarajan; consequently we could not be satisfied that this had been the case and therefore we did not go on to consider whether PAYE or CIS schemes could have applied. We observe that if we had been invited to give further consideration to the applicability of the CIS (putting aside the issue of a self-build project) we would have accepted HMRC's submission that to apply such a scheme to the present situation would be analogous to finding that the scheme was equally applicable to a private homeowner who engaged a builder to construct an extension or conservatory, which, in our view, would be a flawed approach. However, as the parties invited us to put the issue to one side for the purposes of this appeal, we say no more.

77. We were faced with two opposing arguments which cannot be reconciled. We had some reservations about the fact that Dr Selvarajan, on the face of it an intelligent and professional man, would enter into business without the safeguard of a written contract. We rejected the submission urged upon us by Mr Mokhtassi that Dr Selvarajan had "lulled" Mr Coffey into such a situation, although we did agree it was

perhaps unwise that the relationship had comprised of doctor/patient, friend and engagement in refurbishing the clinic. We balanced our reservations against the evidence of Mr Coffey, a man with significant experience in the building industry who was aware of his tax obligations as a self-employed builder. We queried why Mr Coffey undertook and carried out a project without speaking to his accountant, particularly if, as suggested by Mr Coffey, the work was to be under employment as opposed to his usual self-employed business. We considered carefully the documents signed by Mr Coffey and we rejected the submission that they should be discounted. We observed that there would have been no need for Mr Coffey to renew his Employer's Liability Insurance (albeit paid by Dr Selvarajan) if he was to have no responsibilities as an employee. To the contrary, it seemed to us that Mr Coffey would only have had cause to renew the insurance to safeguard against any potential liability as a result of undertaking the work.

78. In balancing the evidence of the two Appellants in this case, we found as a fact that Mr Coffey, the experienced builder, had a significant degree of control over the project. We did not accept that Dr Selvarajan, who continued to work as a GP throughout the project, had either the time or knowledge to dictate how, when or with which labourers the project should be carried out; indeed had he had such knowledge and experience, the role of Mr Coffey would have been redundant. Whatever the description given to Mr Coffey's role, be it builder, principal contractor or project manager, we found that it could not be said, on any view, that he was an employee of the GP practice or Dr Selvarajan.

79. Having considered the tests and wider issues set down by case law, we found as a fact that the relationship between Mr Coffey and Dr Selvarajan was not one of master and servant and that the features of the relationship indicated that Mr Coffey was self-employed.

Decision

80. We dismiss the appeal of Mr Coffey T/A Coffey Builders having concluded that Mr Coffey was self-employed throughout the period of engagement with Dr Selvarajan. With the agreement of HMRC and the first Appellant, we do not make any determination in respect of the amendments to the assessments raised against Coffey Builders.

81. We confirm in respect of Dr Selvarajan's appeal that we find that Mr Coffey was acting in his capacity as a self-employed partner of Coffey Builders and that Dr Selvarajan was not Mr Coffey's employer.

82. 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.

TRIBUNAL JUDGE

RELEASE DATE: 4 November 2011