The Personal Tax Planning Review

HALL v LORIMER: GREATER SCOPE FOR THE SELF EMPLOYED

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The judgment of the Court of Appeal in *Hall v Lorimer* [194] STC 23 in favour of the taxpayer seems now to be final. This landmark decision could prove to be as important as any of the celebrated cases of recent years on this subject. Indeed it could be more important having regard to the cases cited and referred to in the judgment. The Inland Revenue talismen of *Fall v Hitchin*,[2] *Global Plant*[3] and *Ready Mixed Concrete*[4] on which a good deal of the Inland Revenue's approach to those claiming to be self-employed is based, may have lost some of their special powers. It is possible perhaps that the Inland Revenue will take a different view and simply disregard the decision entirely, claiming it to be special to its own facts and of no general application or precedential value. However, the facts are hardly special nor were the arguments particularly novel - and having regard to the Inland Revenue's submissions (and what happened to them) it would seem unreasonable for the decision to be disregarded in such a fashion.

Very briefly, the facts were that Mr Lorimer was a vision mixer - that is, a person who selects which one of the many camera shots should be transmitted to the television viewer at any given time. It is a skilled editing job. Mr Lorimer worked as a vision mixer for a production company but in 1985 left them to work on a freelance basis. He prepared a CV, registered for VAT, made contact with numerous companies in the industry and built up a client list of over 20 companies for whom he worked. He had over 120 separate engagements each year - usually for one or two days but sometimes up to ten days. There were some other relevant facts:

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2 *Fall (Inspector of Taxes) v Hitchin* 49 TC 43.

3 *Global Plant Ltd v Secretary of State for Social Security* [1971] 3 All ER 385.

4 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions* [1968] 1 All ER 433.

(a) He was free to accept or reject engagements as he wished and the production company were free to engage him or not as they wished.

(b) On six occasions he provided a substitute which cost him less than he was paid by the production company.

(c) Bookings were made on the phone to him at home where he had an office.

(d) Bookings were taken on a first come, first served basis.

(e) There were no formal written conditions of engagement; he would write a letter after each booking confirming the engagement and its terms.

(f) All his work as a vision mixer was done at the studios of the production companies.

(g) All the equipment was owned and supplied by the studio - he provided no equipment of his own.

(h) He did not hire any staff to assist him either as a vision mixer or at home.

(i) His charges were higher than the normal union rates of pay.

On these facts it is a surprise that the Inland Revenue pressed the case so far because the taxpayer's case looks rather strong. However, they may have thought they had little to lose. If by chance their arguments had succeeded (like perhaps *Mallalieu v Drummond*) the victory would have been priceless. They would have been able to apply PAYE to almost everyone. The prize may have been worth the risk.

A number of interesting points emerge from this case. It is beyond doubt that the test to be applied in determining whether an employment exists is that laid down by Cooke J in *Market Investigations Limited v Minister of Social Security* [1969] 2 QB 173:

> "The fundamental test to be applied is this: 'is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weights which the various considerations should carry in particular cases. The most that could be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own

> equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

Since *Market Investigations*, the list of relevant criteria has been extended to encompass for example exclusivity[5], the manner, mode and terms of payment[6], whether the individual is part and parcel of the organisation[7] and the intentions and understandings of the parties, including their declarations.[8]

The decision-making process has now been assisted by the following passage by Mummery J, adopted by Nolan LJ:

> "In order to decide whether a person carries on a 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

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5 See *Fall v Hitchin, Sidey v Phillips* [1987] STC 87; *Ready Mixed Concrete* and the *Orchestra* cases.

6 As in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374: *PC and Nethermere (St Neots) Ltd v Taverner* (1984) ICR 612.

7 Sometimes this is known as the "integration test" and is most obscure, deriving from *Bank Voor Handel v Administrator of Hungarian Property* 35 TC 311, but was rejected in *Betterware Products Ltd v Customs & Excise* [1985] STC 648. Whether somebody is part and parcel of an organisation is really a matter of appearance and it can hardly be relevant to ascertain the true nature of a contractual relationship between the two parties by reference to how it looks to some (possibly ill-informed) third party.

8 Declarations may be thought to be self serving but they can backfire (as in *Massey v Crown Life Assurance Co.* [1978] 1 WLR 676). Self-imposed labels cannot alter the true nature of the relationship but if the label is consistent with the realities, it can be crucial. The intentions and understanding of the parties of their relationship has also developed into an important consideration; after all, the relationship between the parties is contractual and there must be some element of consensus about the nature of that contract.

> importance from one situation to another. The process involves painting a picture in each individual case."

It is possible that this passage will be used in isolation by Inspectors of Taxes (and possibly by taxpayers) as support for the proposition that because the picture they see is an employment, the underlying facts can be disregarded - particularly if they point the other way. It is known that different people can see different pictures from the same canvas but it is perhaps important not to take this imagery too far. What Mummery J surely meant to convey is not that one reaches a conclusion merely by impression, but that the conclusion must emerge from a proper and balanced evaluation of the facts.

The Inland Revenue's arguments that Mr Lorimer should be treated as an employee in respect of each of his engagements were broadly as follows:

(a) The production company controlled the time, place and duration of each programme.

(b) Mr Lorimer did not provide any of his own equipment.

(c) He hired no staff to assist him in this work.

(d) He ran no financial risk other than the risk of bad debts and of being unable to find work.

(e) He had no responsibility for the investment or management in the work of programme making and consequently had no opportunity of profiting from the manner in which he carried out his assignments.

All these points were given short shrift by Nolan LJ:

> "the taxpayer provides no equipment (i.e. he has no tools) he provides no 'work place' or 'workshop' where the contract is to be performed, he provides no capital for production, he hires no staff for it. No: he does not. But that is not his business. He has his office, he exploits his abilities in the market place, he bears his own financial risk which is greater than that of one who is an employee, accepting the risk of bad debts and outstanding invoices and of no or an insufficient number of engagements. He has the opportunity of profiting from being good at being a vision mixer. According to his reputation there will be a demand for his services for which he will be able to charge accordingly. The more efficient he is at running the business of providing his services the greater is his prospect of profit."

Nolan LJ clearly felt it unnecessary to elaborate further on these points but some more detailed reasoning would have been helpful. The financial risk to which he refers, i.e., the risk of not being paid and maybe not obtaining any work, could almost equally apply to an employee. It might have been more interesting to know what would have happened if Mr Lorimer had performed his work badly and what expense had to be incurred to put it right. Would the cost have fallen on him, or on the production company?

Similar comments could be made about his opportunity of profiting from his good work. If he performed well he would enhance his reputation (and therefore the demand for his services) so that he would be able to charge more. That seems not to differ from the position of an employee - the best example perhaps being a football player who, it is understood, would invariably be regarded as an employee.

Mr Lorimer could perhaps have chosen a different medium for performing his services; it might have been more profitable to operate through a partnership. The fact that he did not take advantage of that particular opportunity (assuming that it existed) would be irrelevant. More importantly, he could (and did) send substitutes on some occasions and made a profit from doing so. However, this point was not regarded as significant by the Court. The Crown conceded that on the six occasions when substitutes were provided, those engagements could not be chargeable under Schedule E because Mr. Lorimer could not be said to have been paid for his services. It was suggested that this had no relevance to the other engagements when substitutes were not sent. But surely it was the possibility of sending the substitutes which was important. The sending of substitutes would seem to be fundamental to the question of whether the contract of service exists. A contract of service being a contract for the personal service of the individual, it would be entirely inconsistent for substitutes to be allowed; the mere possibility that a substitute could be sent to do the work (subject of course to an adequate level of skill) would seem to preclude the existence of a contract of service.

The Court seemed to be influenced by the fact that Mr Lorimer incurred a good deal of expense which he was able to set against his income, but those expenses appear to have been predominantly the running of his car and his office from home which would presumably have been incurred whether he was employed or not; the only reason they demanded attention was because of the difference between section 74 and section 198 in the deductibility of those expenses.

The idea that a person is self-employed if he is running his own business is always difficult in the case of the entertainer or professional man. In this connection the gloss put on the test by Nolan LJ is most interesting. He said that the question whether a person is in business on his own account may be of little assistance in the case of a professional person. An actor, singer or author may earn his living without any of the normal trappings of a business. In these cases one should bear in mind the traditional contrast between a servant and an independent contractor

where the significant aspect may be the extent to which the individual is dependent on, or independent of, a particular paymaster for the financial exploitation of his talents. He went on to suggest two possible further tests to be adopted - the duration of the particular engagement and the number of people by whom the individual is engaged. It seems clear that he was not intending to lay down new criteria for determining employment but drawing attention to existing considerations - e.g., exclusivity. However, maybe these aspects will be given greater weight in the future.

The result in this case may be thought to have been inevitable but it could so easily have gone the other way; one only has to look at *Market Investigations* to see the danger. In that case the taxpayer was engaged to conduct market surveys; each one was a separate engagement for which she was paid a separate fee. She was free to accept or reject offers of work, fix her own hours, could undertake similar work for others, not subject to direct supervision, had no entitlement to holiday or sick pay. It was held that she was employed under a series of short term employments.

However, perhaps the outcome of *Hall v Lorimer* will enable the dust to settle on this issue so that we may look forward to a period of sensible consistency on the subject.