**Appeal number: FTC/12/2011**
**[2012] UKUT 47 (TCC)**

***National Insurance Contributions – when are self-employed entertainers deemed to be in employment for National Insurance purposes? – liability of entertainers and film and television producers to make Class 1 National Insurance Contributions***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**
**ON APPEAL FROM THE FIRST-TIER TRIBUNAL (TAX CHAMBER)**

**BETWEEN:**

**ITV SERVICES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: THE HONOURABLE MR JUSTICE SALES**

**Sitting in public at The Royal Courts of Justice on 29/30 November 2011**

**David Goldberg QC, instructed by Berwin Leighton Paisner LLP, for the Appellant**

**Malcolm Gammie QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

*Introduction*

1. This is an appeal against the decision of the First-Tier Tribunal ("the FTT") dated 23 November 2010, [2010] UKFTT 586 (TC), in which it dismissed appeals by the Appellant ("ITV") against three determinations dated 7 April 2009 made by the Respondents ("HMRC") by which HMRC determined that certain entertainers engaged by ITV are to be treated as being in employed earner's employment for National Insurance purposes and that ITV is to be treated as liable to pay secondary Class 1 National Insurance Contributions ("NICs") in respect of the payments it makes to those entertainers. The three determinations by HMRC related to three distinct periods: a period of about four months from 1 December 2006 to 5 April 2007, the year to 5 April 2008 and the year to 5 April 2009.

2. In the proceedings before the FTT, ITV sought a decision in principle whether payments to actors computed in various ways under various types of contract were "salary" as defined in the National Insurance legislation according to the relevant definition included in the applicable regulations with effect from 6 April 2003. In a lengthy judgment the FTT addressed different contractual permutations and essentially accepted the submissions of Mr Gammie QC for HMRC to the effect that the relevant payments to actors which were in issue included payments which qualified as "salary" according to the special definition of that term in the applicable regulations in relation to payments to entertainers. ITV appeals against that ruling. Mr Goldberg QC for ITV submits that the FTT mis-construed and misapplied that definition.

3. As Mr Gammie submitted, there are three principal issues on which the parties are divided which critically affect the interpretation of the NICs regime as it applies to entertainers: (i) whether the legislation requires the status of an individual actor in relation to payments received under a contract for services, as either a self-employed person or a person deemed under the relevant legislative provision to be employed by ITV, to be determined at the outset of the engagement (as HMRC contended and ITV disputed); (ii) whether the concept of "salary" as used in the legislation is generic and forward-looking, focusing on the type of payment contemplated under the contract (as HMRC contended), or requires separate consideration of each specific payment as and when it is made (as ITV contended); and (iii) whether the legislative concept of "salary" simply requires consideration of the contract terms themselves (as HMRC contended), or whether it is relevant to inquire into the negotiations leading to agreement on those terms (as ITV contended). The three issues are

inter-related. The FTT accepted the submissions of Mr Gammie on each of them.

*The legislative framework*

4. The FTT helpfully set out the main parts of the legislative framework at paras. [3]-[14] of its decision as follows:

> *"The pre-1998 position*
>
> 3. In a reply in July 1998 to a Parliamentary question reproduced in a Press Release dated 15 July 1998, the Social Security Minister said:
>
> > "Performers have generally been treated as self-employed by the Inland Revenue, but as employees for National Insurance purposes. We have received legal advice that the current National Insurance treatment is not sustainable, and that entertainers should generally be regarded as self-employed.
> >
> > Having considered the position we have decided to table regulations that will again require the majority of performers to be treated as employees for National Insurance purposes, whose earnings will be liable to Class 1 contributions. These regulations will be tabled in the near future."
>
> The Notes to the Press Release referred to a decision of the Special Commissioners in 1993 relating to the income tax treatment of actors under standard Equity contracts (this being the case of McCowen and West, which preceded the publication of decisions of the Special Commissioners).
>
> *The position from 1998 to 2003*
>
> 4. With effect from 17 July 1998, the Social Security (Categorisation of Earners) (Amendment) Regulations 1998 inserted a new paragraph 5A into Schedule 1 to the Social Security (Categorisation of Earners) Regulations 1978 (SI 1978/1689) (we refer to this statutory instrument as "the Categorisation Regulations"). Pursuant to regulation 2(2) (of which the later revised version is set out below) an earner is to be treated as an employed earner if he falls within the relevant paragraph of column (A) and is not a person specified in the corresponding paragraph of column (B).
>
> 5. Paragraph 5A in Column (A) of Schedule 1 to the Categorisation Regulations was as follows:
>
> > "5A. Employment as an entertainer, not being employment under a contract of service or in an office with emoluments chargeable to income tax under Schedule E."

6. Paragraph 5A in column (B) of Schedule 1 was worded:

> "5A. Any person in employment described in paragraph 5A in column (A) whose remuneration in respect of that employment does not consist wholly or mainly of salary."

7. Although these amendments were initially due to expire on 31 January 1999, their validity was extended by a further statutory instrument.

*The position from 2003 onwards*

8. The effect of paragraph 5A of column (A) of Schedule 1 to the Categorisation Regulations remained the same, although a minor amendment to the wording was subsequently made with effect from 6 April 2004:

> "5A. Employment as an entertainer, not being employment under a contract of service or in an office with general earnings."

9. As the scope and effect of paragraph 5A of column (B) of that Schedule had not proved to be as expected, for the reasons which we explain later in this decision by reference to information published by HMRC, it was replaced with effect from 6 April 2003 by the following:

> "5A. Any person in employment described in paragraph 5A in column (A) whose remuneration in respect of that employment does not include any payment by way of salary.
>
> For the purposes of this paragraph "salary" means payments—
>
> (a) made for services rendered;
>
> (b) paid under a contract for services;
>
> (c) where there is more than one payment, payable at a specific period or interval; and
>
> (d) computed by reference to the amount of time for which work has been performed."

10. The wording of regulation 2(2) was amended in a minor respect with effect from 6 April 2004:

> "(2) Subject to the provisions of paragraph (4) of this regulation, every earner shall, in respect of any employment described in any paragraph in column (A) of Part I of Schedule 1 to these regulations, be treated as falling within the category of an employed earner in so far as he is gainfully employed in such employment and is not a person specified in the corresponding paragraph in column (B) of that Part, notwithstanding that the employment is not under a contract of service, or in an office (including elective office) with general earnings."

*Other relevant statutory provisions*

11. The primary legislation relevant to the issue in this appeal is contained in the Social Security Contributions and Benefits Act 1992 ("SSCBA 1992"). Section 2 SSCBA 1992 provides:

> "**2 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).
>
> (2) Regulations may provide—
>
> (a) for employment of any prescribed description to be disregarded in relation to liability for contributions otherwise arising from employment of that description;
>
> (b) for a person in employment of any prescribed description to be treated, for the purposes of this Act, as falling within one or other of the categories of earner defined in subsection (1) above, notwithstanding that he would not fall within that category apart from the regulations."

The relevant parts of the Categorisation Regulations were made pursuant to what is now s 2(2) SSCBA 1992.

12. Liability in respect of secondary Class 1 contributions is imposed under regulation 5(1) of the Categorisation Regulations, made pursuant to what is now s 7(2) SSCBA 1992. Regulation 5(1) provides:

> "(1) For the purposes of section 4 of the Act (Class 1 contributions), in relation to any payment of earnings to or for the benefit of an employed earner in any employment described in any paragraph in column (A) of Schedule 3 to these regulations, the person specified in the corresponding paragraph in column (B) of that Schedule shall be treated as the secondary Class 1 contributor in relation to that employed earner."

13. Paragraph 10 of Column (A) of Schedule 3 to the Categorisation Regulations is as follows:

> "10. Employment as an entertainer (not being employment under a contract of service or in an office with general earnings) except where the earner is a person to whom paragraph 5A in column (B) of Schedule 1 to these Regulations applies."

14. The corresponding paragraph of Column (B) of Schedule 3 lists, as the person treated as the secondary Class 1 contributor:

> "10. The producer of the entertainment in respect of which the payments of salary are made to the person mentioned in paragraph 5A of Column (B) of Schedule 1."

5. The effect of the change in the Categorisation Regulations introduced in 2003 referred to at para. [9] of the FTT's decision was to expand the category of actors in relation to whom engagement in a production would involve them in having employee rather than self-employed status for NICs purposes. That was the effect of the change in paragraph 5A of Column (B) in Schedule 3 to the Regulations to indicate that if *any* part of the remuneration in respect of their engagement qualified as "salary" as defined, the actor would be treated as having employee status in respect of that engagement. The basic reason for expanding the coverage of deemed employee status for actors was to increase the availability of social welfare protection (i.e. those forms of protection dependent upon a history of payment of Class 1 NICs) for actors, as explained in the June 2003 Tax Bulletin (Issue 65) published by HMRC:

> "**Interpretation**
>
> **Revised Special NIC Rules For Entertainers**
>
> **Background**
>
> The NIC treatment of entertainers is different from that which applies for tax.
>
> Following the Special Commissioner's case for *McCowen and West* the Revenue accepted that most performers/artistes in the entertainment sector were engaged under contracts for services and would generally be assessable to tax under Schedule D. However, it was acknowledged that to follow this line for NIC purposes would mean that the majority of entertainers who had previously paid Class 1 NICs would only be liable for Class 2 and Class 4 NICs which would not provide them with universal title to contributory benefits.
>
> DSS Ministers decided to introduce regulations in 1998 which would treat the majority of entertainers as employed earners for NIC purposes. This would enable entertainers to build up entitlement to contribution based Jobseeker's Allowance and ensure that, in a precarious industry, new talent could be encouraged to weather long periods without work whilst they established themselves.
>
> Prior to 1998, the main category of performer in the entertainment industry not paying Class 1 contributions were certain 'key talent' stars who were generally regarded as having been engaged on productions

because of their celebrity status. To try and ensure this practice continued The Social Security (Categorisation of Earners) (Amendment) Regulations 1998 were introduced from 17 July 1998 which created a liability for Class 1 NICs for entertainers whose earnings consisted 'wholly or mainly of salary'. Those who negotiated a fee or received rights and additional use payments higher than the salary element were not liable to pay Class 1 NICs but were regarded as self-employed as such payments did not come within the accepted description of 'salary'.

However, in all but a few exceptional cases it has become the usual practice for the majority of entertainers to receive as part of their remuneration package pre-purchase payments as compensation for the loss of future repeat fees and rights and royalties worth many times the salary element. Very few actors were, therefore, paid 'wholly or mainly' by salary and the regulations did not achieve the object of bringing most entertainers into Class 1.

The Revenue, therefore, accepted that the 1998 regulations were not sustainable and new regulations were introduced from 6 April 2003. These are the Social Security (Categorisation of Earners) (Amendment) Regulations 2003 [SI 2003 No. 736]. Equivalent regulations SI 2003 No. 733 apply for Northern Ireland.

**What do the new regulations mean?**

The new regulations reflect the fact that instead of a 'wholly or mainly' salary test, those entertainers whose remuneration includes any element of salary would be treated as employed earners. Once subject to the regulations there will be liability for Class 1 NICs on all earnings from the engagement (including rights payments).

Where the payment is a fee for the production, not a salary, and this would have to be made clear in the contract, the entertainer would remain self-employed and would be liable to Class 2 and Class 4 NICs.

The legislative definition of Salary requires that the remuneration satisfies the following four conditions:

- made for services rendered;
- paid under a contract for services;
- where there is more than one payment, payable at a specified period or interval; and
- computed by reference to the amount of time for which work has been performed.

The third bullet point includes those entertainers engaged on a single day or two day engagement. This means that the policy intention of ensuring that the regulations apply to film extras and walk-on parts is achieved. The last bullet point ensures that key talent artistes are excluded as they will be contracted to appear in productions for which their remuneration is not directly calculated according to the period of weeks or months they are assigned to the production."

*The factual context*

6. The HMRC determinations relate to the obligation of ITV to pay secondary Class 1 NICs (that is to say, employer's NICs) in respect of payments to persons who have the status of employees. The amount of the NICs payments so due is earnings-related and varies depending on the amount of the payments to the employee. Employees are also liable to pay their own Class 1 NICs (primary Class 1 NICs), again varying in amount depending on what they are paid. Employees' Class 1 NICs are paid by means of deduction of the relevant amounts from their salary by their employer, who then accounts for the sums so deducted to the National Insurance Fund.

7. The position of employees is to be contrasted with that of self-employed persons, who pay Class 2 NICs at a flat rate and may also have to pay Class 4 earnings-related NICs: see section 1(2) of the SSCBA 1992. Where a person is self-employed, the person engaging them has no obligation to pay NICs in respect of them. Where Class 1 NICs are paid, the employee who has paid those contributions may be entitled to a wider range or higher level of state welfare benefits, such as Jobseekers Allowance, which are not available to self-employed people paying other classes of NICs.

8. The present case concerns payments made by ITV to actors who are, as a matter of general law, self-employed. The question is whether they are deemed to have the status of employees for NICs purposes by virtue of the Categorisation Regulations. The range of acting engagements in issue is very wide, covering both highly paid entertainers working under specially negotiated bespoke contracts and actors working as walk-on extras under standardised contracts lasting perhaps no more than a day.

9. Over a long period, ITV has made deductions from the sums it has paid actors under these various contracts in the amounts that would be due for their primary Class 1 NICs if they are to be treated as having the status of employees. It has paid over those sums to HMRC. The effect of the deductions is that the actors in question will not suffer new deductions from the payments

to them if it transpires, as the FTT found, that they do have the status of employees for the purposes of the NICs system. If, on the other hand, they are found not to have that status but to be self-employed, presumably the idea is that the actors would have the personal responsibility to put their NICs affairs in order by paying relevant Class 2 and Class 4 NICs on a retrospective basis, after being credited with sums equivalent to the primary Class 1 contributions deducted by ITV from the payments due to them and paid to HMRC.

10. The point at issue in the present proceedings, however, is whether ITV is obliged to pay secondary Class 1 NICs in relation to the sums which it has paid the actors. ITV disputes that it is so obliged, on the footing that the actors are properly to be regarded as having self-employed status for the purposes of the NICs regime.

11. The HMRC determinations cover a range of actors working under different contractual arrangements with ITV. At the hearing before me, I was invited by the parties to focus primarily on what is called "the All Rights Contract", and to a lesser extent on "the Bespoke Agreement". But I was also invited to have regard to the fact that there are a range of different contracts which are used which vary depending on the particular actor and the particular production in question.

12. In the context of contracts of engagement for actors and entertainers there are standard terms used in the industry as negotiated by Equity, the actors' union, which are adopted subject to modification in individual cases. There are two sets of standard terms which may be drawn on in contracts between ITV and actors engaged by it: the ITV Equity Agreement dated 1 July 2004 and its successor dated 1 April 2007 (for convenience I refer to them both as "the ITV Equity Agreement") and the agreement dated 1 August 2004 (as varied on 13 October 2005) between Equity and the Producers Alliance for Cinema and Television and its successor dated 7 November 2007 (I refer to them both as "the PACT Agreement").

13. Clause 20 of the ITV Equity Agreement is headed "Attendance Days" and sets out provisions governing what an actor is required to do on an "attendance day" (i.e. a day on which they are required to attend to rehearse or perform in a production) and the hours of work on such a day etc. Clause T8 of the PACT Agreement is headed "First Call – Methods of Engagement" and provides for payment of an engagement fee (which covers the first day worked) plus a production day payment for each subsequent day worked. Clause T8 also includes provision for a situation in which a producer wishes an actor to be available to work on first call over a period, without nominating specifically in advance the days to be worked. Clause T13 in the PACT Agreement deals with the artist's aggregate earnings under a contract of engagement, which include the engagement fee and production day payments. Clause T21 of the

PACT Agreement, headed "Working Time", includes provision governing the hours that an actor may be required to work during a working day.

14. The FTT heard evidence from, among others, Peter Bain, the Head of Casting/Contracts at ITV. He explained how fee negotiations are in practice conducted with actors. Unsurprisingly, he said that such negotiations would be influenced by a range of factors, including such matters as the likely future transmissions of the production (since the fees payable include payment for the rights of exploitation of the production), the profile, status and expertise of the actor, the size and complexity of the role and the period of the engagement, including the period for which the actor must make himself available to be called upon on a first call basis. His evidence was that the standard terms in the ITV Equity Agreement and the PACT Agreement are in most cases superseded by the terms of the final contract agreed with an actor. In fact, it is clear from the terms of the Bespoke Agreement to which I was invited to direct my attention that some reference is still made to those standard terms, which appear to provide a general background against which specific negotiations may take place. In argument, Mr Goldberg sought to emphasise Mr Bain's evidence in order to suggest that an actor's fees are not set by reference to the time actually to be worked, and so do not constitute "salary" for the purposes of the Categorisation Regulations. HMRC, on the other hand, contend that the proper focus should be on the terms of the engagement contracts. It is because of this aspect of the debate before me that Mr Gammie identified the third general point of principle referred to in para. [3] above.

15. The All Rights Contract provides, at clause 1, for an actor to take part in a programme for a specified fee ("payable shortly after completion of work"), "and in accordance with the schedule set out [in the agreement]." The schedule sets out specific dates for video tape recording, filming or live transmission at specific times and places. Clause 11 provides that the actor undertakes, among other things, to be ready to go on "at least thirty minutes before transmission or rehearsals begin".

16. The Bespoke Agreement is for the engagement of the actor to perform a particular role in a series of television drama programmes. Clause 1.1.3 defines "the Period of Engagement" to be:

> "Eight shooting weeks [to be confirmed] between 25/08/08 to 17/11/08 (inclusive). Dates may slip by up to 7 days".

17. Clause 3.2 and 3.3 provides:

"3.2 The Company shall be entitled to the Artist's exclusive services in respect of the Programmes (including with respect to promotion and publicity services as elsewhere herein provided) during the Period of Engagement. … Hours of work: 12 hour days and 10 hour turnaround portal to portal.

3.3 The Artist agrees that the Company shall also be entitled to the services of the Artist as required by the Company on an exclusive basis during the Period of Engagement, and thereafter subject only to the Artist's prior professional commitments:

3.3.1 prior to and/or after the Period of Engagement on a second call basis in connection with publicity of the Programme and press and media interviews, including in particular the taking of still photographs for use in such publicity;

3.3.2 prior to the Period of Engagement on second call basis for conference, wig dress and clothes fittings;

3.3.3 on an exclusive basis for 6 'free' further production days, in addition to the eight shooting weeks within the Period of Engagement and/or following immediately consecutive to the Period of Engagement, for any added and substituted scenes, retakes as the Company may require to complete principal photography of the Role if necessary;

3.3.4 after the Period of Engagement until the date of transmission of the Programme on a second call basis for any post-synchonisation and/or other post production matters for which the Artist shall receive no additional remuneration."

18. Clause 4.1 and 4.2 provides:

"4.1 The Artist hereby warrants and undertakes that he shall perform his services hereunder to the best of his artistic and creative ability, render such services and make such recordings as may be required by the Company in the manner directed so to do for the purpose of making the Programmes, and render all such other services as are usually rendered by Artists of first class repute in connection with the making of films or recordings therefore.

4.2 The Artist shall work such hours as are necessary to fulfil his obligations under this Agreement, and accepts that this may involve working an average of more than 48 hours per week …"

19. Clause 5 makes provision for remuneration as follows:

"5.1 Subject to the provisions of this Agreement relating to suspension and termination and to the due compliance by the Artist with his obligations and undertakings hereunder, the Company shall as remuneration and (save as otherwise provided) as full consideration for all services rendered inclusive of all daily payments which might otherwise be due under the Equity Agreement [i.e. the PACT Agreement] and granted to the Company hereunder pay or procure to be paid to the Artist the **total inclusive fee** of [sum set out], which covers all services hereunder and all rights in all media throughout the universe in perpetuity …

5.2 The payments made to the Artist under Clause 5.1 shall in addition to the rights granted to the Company be deemed to have been made on account of and as prepayment for the additional use fees detailed below, which would otherwise be payable to the Artist in respect of the exploitation of the Programme in accordance with Clause T23 and Appendix TA of the Equity Agreement:

First UK Network transmission, transmissions on ITV plc owned secondary channels and Worldwide non-theatric rights ("the Aggregate Earnings"): [sum and calculation set out]

5.2.1 It is agreed that the Aggregate Earnings (as defined more fully in Clause T13 of the Equity Agreement) shall for all the purposes of this Agreement be deemed to be [sum set out].

5.3 In the event that the Artist is required for principal photography beyond the agreed dates and the agreed 7 day extension period as outlined in Clause 3, overage shall be paid to the Artist at the rate of [sum set out] per week or [sum set out] per day. …"

20. Clause 21 of the Bespoke Agreement provides for payments in respect of the overall fee to be made in five tranches according to a schedule.

*Analysis*

21. The SSCBA 1992 provides the main framework in primary legislation for the NICs regime. Mr Goldberg emphasised certain provisions of the Act.

22. Section 6(1) deals with liability for secondary and primary Class 1 contributions, payable by the employer and the earner respectively. So far as relevant, it provides:

> "Where in any tax week earnings are paid to or for the benefit of an earner … in respect of any one employment of his which is employed earner's employment:-
>
> (a) a primary Class 1 contribution shall be payable … and
>
> (b) a secondary Class 1 contribution shall be payable in accordance with this section …"

23. Mr Goldberg sought to rely in particular on the phrase, "Where … earnings are paid", to support his submission that the statutory NICs regime is concerned with sums which are in fact paid, and that the Categorisation Regulations should be construed in the same way, as focusing on characterisation of payments when they are actually made rather than taking a prospective view of the contractual arrangements, when it has to be decided whether an actor is to be regarded as having the status of an employed earner by reference to paragraph 5A in column (B) of Schedule 1 to the Categorisation Regulations.

24. Mr Goldberg said that the point was reinforced by use of the phrase, "earnings paid", in section 9(1) of the SSCBA, which provides:

> "Where a secondary Class 1 contribution is payable as mentioned in section 6(1)(b) above, the amount of that contribution shall be the secondary percentage of so much of the earnings paid in the tax week, in respect of the employment in question, as exceeds the current secondary threshold …"

25. Reference was also made to the use of the same phrase in paragraph 1(1) of Schedule 1 to the SSCBA 1992 and use of the word "paid" in paragraph 3(1) of that Schedule. Paragraphs 1(1) and 3(1) and (3) state:

"1(1) For the purposes of determining whether Class 1 contributions are payable in respect of earnings paid to an earner in a given week and, if so, the amount of the contributions –

(a) all earnings paid to him or for his benefit in that week in respect of one or more employed earner's employments under the same employer shall … be aggregated and treated as a single payment of earnings in respect of one such employment …

3(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 … 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 … 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. …

(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 … 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."

26. Paragraph 3 of Schedule 1 to the SSCBA 1992 sets out an important feature of the NICs regime, namely that NICs payments by employees are to be collected by means of the employer deducting the amounts they are required to pay as contributions and accounting for those sums to the National Insurance Fund on the employees' behalf. This is in my view a fundamental feature of the NICs system, as it allows the NICs to be collected in an effective and efficient way by their being integrated into the general pay as you earn (PAYE) tax collection system in respect of employees. As set out below, this fundamental feature of the NICs system provides a strong indication in favour of the construction of the Classification Regulations advanced by HMRC in this case.

27. In support of ITV's submissions, Mr Goldberg also made particular reference to regulation 2 of the Social Security (Contributions) Regulations 2001 ("the Contributions Regulations"), which is in Part 2, headed "Assessments of Earnings-Related Contributions". Regulation 2 provides in relevant part as follows:

"… the amount, if any, of earnings-related contributions payable or, where section 6A of the Act applies, treated as having been paid, in respect of earnings paid to or for the benefit of any earner in respect of an employed earner's employment shall … be assessed on the amount of such earnings paid, or treated as paid, in the earnings periods specified in [certain regulations]."

28. In argument, Mr Goldberg accepted that it would follow from his submission that if, under the Bespoke Agreement, an actor was required to work an extra day and was then paid an overage payment for that day under clause 5.3 of the Agreement, since that payment for a day would satisfy the definition of "salary" in the Categorisation Regulations, the effect would be retrospectively to turn the status of the actor from self-employed to employed for the whole set of payments already received by him under the Agreement. That would be because that final overage payment would mean that it could not be said of the actor that his remuneration in respect of his employment as an entertainer for the production in question "does not include *any* payment by way of salary".

29. In my judgment, this is not a sensible or plausible interpretation of how the Categorisation Regulations operate and have effect, and reference to use of the word "paid" in section 6(1) and section 9(1) of and Schedule 1 to the SSCBA 1992 and in regulation 2 of the Contributions Regulations cannot bear the interpretative weight which Mr Goldberg sought to place on it in relation to construction of the Categorisation Regulations. I agree with Mr Gammie's submission that the definition of "salary" in Schedule 3 to those Regulations is intended to be forward-looking; that is to say, in relation to issue (i) at para. [3] above, the question whether the legislation requires the status of an individual actor in relation to payments received under a contract for services, as either a self-employed person or a person deemed under the relevant legislative provision to be employed by ITV, is to be determined at the outset of the engagement. I also accept the main thrust of Mr Gammie's submission in relation to issue (ii) at para. [3] above, that the concept of "salary" as used in the legislation is generic and forward-looking, focusing on the type of payments contemplated under the contract, and does not contemplate or require separate consideration of each specific payment as and when it is made.

30. I take this view for the following reasons:

(1) The deeming provision in paragraph 5A in columns (A) and (B) of Schedule 3 to the Categorisation Regulations, whereby actors are deemed in certain circumstances to have the status of employees for the purposes of the NICs regime (and hence will benefit from wider forms of social welfare protection), both in its original and its amended forms, was inserted into a well-established and well-understood system for

payment of NICs, under which the employer is required to make the relevant deductions for primary Class 1 NICs from the employee's remuneration as it is paid: see paragraph 3 of Schedule 1 to the SSCBA 1992. This constitutes a pre-existing statutory context, constituting a fundamental feature of the general NICs regime, of considerable importance when it comes to interpreting the relevant provisions of the Categorisation Regulations in relation to actors as those provisions came to be inserted to operate within that regime. If the actor and the employing producer do not know in advance how the various elements of the remuneration are to be categorised (whether as "salary", as defined, or as payments which do not fall within that definition), the producer cannot know what his obligations are under paragraph 3 of Schedule 1 to the SSCBA 1992 as he makes the payments to which those obligations relate and the actor cannot know whether deductions should or should not be made, whether they have grounds for complaint or not about how the producer is treating them and whether they should be treating themselves as self-employed in relation to the engagement (and so making Class 2 and, possibly, Class 4 NICs) or not. These are all compelling considerations which in my judgment strongly support HMRC's submission as to the proper interpretation of the definition of "salary" in the Categorisation Regulations. I think that the FTT was correct to treat them as such (see in particular paras. [105]-[109] of its decision);

(2) Mr Goldberg sought to suggest an answer to these points by saying that it would be possible for an employing producer and an actor to negotiate some sort of arrangement whereby deductions could be made on a provisional basis (and the funds perhaps put in an escrow account, to guard against the possibility that the employer might later become insolvent), in case it transpired that Class 1 NICs did have to be paid; and if it transpired that they did not, the sums deducted could at that stage be paid to the actor. To my mind, this suggestion tended more to reinforce the significance of the points at (1) above than to undermine them. Such arrangements would require a considerable degree of sophistication and legal knowledge on the part of producer and actor alike, but the NICs regime is intended to apply across the whole range of the population and to be as simple and straightforward as can reasonably be achieved. It is not plausible to suppose that the legislative scheme and the Categorisation Regulations were intended to operate in a way which would assume such sophistication on the part of those acting under them. Moreover, the suggestion fails to address another intended feature of the regime, which is that the NICs regime should be capable of easy and straightforward operation by the tax authorities and the contributions should be paid promptly (as and when payments are made to the employee) and with a minimum of complication, via the PAYE system;

(3) The legislative context referred to in (1) above also provides a ready and sufficient explanation of the language in the past tense used in the definition of "salary" in the Categorisation Regulations which Mr Goldberg sought to emphasise: as payments "*made* for services rendered" (sub-paragraph (a) of the definition), "*paid* under a contract for services" (sub-paragraph (b) of the definition) and "*computed* by reference to the amount of time for which work *has been performed*" (sub-paragraph (c) of the definition). In my view, the use of such language is not unnatural in the context of a regime where deductions of NICs are to be made when payments are actually made to employees;

(4) Also, the definition of "salary" looks to the time when payments are in fact made, which again makes the use of the words in emphasis appropriate. But the operative part of paragraph 5A of column (B) in Schedule 3 to the Categorisation Regulations – the provision which governs whether an actor is deemed to be an employee or not – is the opening sentence, which deems to be an employee any entertainer in employment as described in column (A) "whose remuneration in respect of that employment does not include any payment by way of salary". In my judgment, particularly in the context of the NICs legislative regime, the natural interpretation of that sentence is that it refers to remuneration which is contracted to be paid and which, if and when elements of it are paid, will not include any element which will be "salary" as defined when the payment of that element is made;

(5) Sub-paragraph (c) of the definition of "salary" requires a forward-looking, contract based approach to be applied, in order to answer the question whether a number of payments are "payable" at a specific period or interval. In my view, this feature of the definition offers further support for the point at (4) above. It marries up with what I think is the natural contract-based interpretation of the notion of "remuneration". It is also to be inferred that the drafter of the definition would have assumed that the elements of it would operate together in a coherent way, and it is difficult to see why they should have used the word "payable" in sub-paragraph (c) (rather than "paid") other than on the basis that a contract-based, forward-looking interpretation of the notion of "remuneration" and the related concept of "salary" was intended to apply, rather than a focus simply on the position when monies happened to be paid;

(6) All these points are reinforced by consideration of the explanation for the amendment of the Categorisation Regulations in April 2003 in HMRC's Tax Bulletin of June 2003. Where subordinate legislation is promulgated by or on behalf of a government body or department such as HMRC, a near contemporaneous explanation by that body or department of the

purpose of the legislation is a legitimate aid to its construction - for example, by indicating the "mischief" which it was intended to remedy, much as reference to a White Paper may do – as a particularly powerful form of *contemporanea expositio*: see Sections 231, 232, 236 and 237 in *Bennion on Statutory Interpretation*, 5th ed., pp. 702-706 and 711-712. The Tax Bulletin indicates that the intention was to expand welfare protection, by expanding the application of Class 1 NICs to cover "the majority of entertainers", and that the amendment was introduced in 2003 because developments in the entertainment industry in relation to remuneration packages meant that that intention was being defeated. The Tax Bulletin thus indicates that an expansive approach to the concept of remuneration including "salary" is intended to apply, in order to fulfil the object of applying the Class 1 NICs regime to the majority of actors. So, if one takes the position of "walk-on" actors (a large category typically consisting of actors who have not yet established a reputation or profile which would allow them to command better contract terms, who are engaged to work for a single day for a walk-on part in a filmed production: see paras. [19] and [28] of the FTT's decision), it is clear that the amended Categorisation Regulations were intended to provide protection for them by deeming them to be employees for NICs purposes (as even Mr Goldberg was prepared to accept); but they might be sent home at lunch-time if the filming of their scenes went quickly on the specified day, yet they would be paid for work for a day and that would count as "salary" for the purposes of the Regulations. This would have to be on the footing that the definition of "salary" in the Regulations – and in particular sub-paragraph (d) of the definition ("computed by reference to the amount of time for which work has been performed") – requires the focus to be on the basis on which the actor is contracted to be paid (the "walk-on" is contracted to work for a day, if necessary, and to be paid for a day, and they are paid when the producer accepts that the work required of them has been sufficiently performed), rather than on the actual period for which they did work (they may only in fact have worked half a day, if they are sent home at lunch-time). The text of the Tax Bulletin also indicates that the drafter intended a forward-looking, contract-based approach to apply when the amended Categorisation Regulations fall to be applied (see the statement, "Where the payment is a fee for the production, not a salary, and this would have to be made clear in the contract …", quoted above).

31. In my judgment, these points also lead to the conclusion that Mr Gammie is correct in his submission in relation to issue (iii) in para. [3] above, namely that the legislative concept of "salary" in the Categorisation Regulations simply requires consideration of the contract terms themselves; and in deciding how the Regulations apply it is not relevant to inquire into the negotiations leading to agreement on those terms.

32. The FTT accepted all these features of Mr Gammie's submissions. For the reasons set out above I consider that it was right to do so, and that its reasoning at paras. [112]ff of the decision is correct in its essentials. The FTT has correctly identified the principles to be applied and ITV's appeal, based as it was on a challenge to those principles, falls to be dismissed.

33. I would, however, add some comments on the application of paragraph 5A in Column (B) of Schedule 3 to the Categorisation Regulations, because I was invited to address specific attention to the terms of the All Rights Contract and the Bespoke Agreement and because there was one feature of the submissions of Mr Gammie which required elucidation and was developed by him in a somewhat different way from the way in which it seems to have been put in the hearing before the FTT.

34. The terms of the All Rights Contract, as explained to me, require the actor to attend for filming on specified dates and provide for them to be paid a simple fee for doing that. Mr Goldberg submitted that this is more in the nature of a fee paid for a particular performance or for an actor's overall involvement in a particular production than computed by reference to the amount of time for which work is actually performed. However, the fee is payable "shortly after completion of the work", being the work by the actor on the contractually specified days. In my view, the FTT was entitled to characterise the fee as "salary" for the purposes of the Categorisation Regulations, and in particular was entitled to regard the fee as a payment "computed by reference to the amount of time for which the work has been performed".

35. Under the Bespoke Agreement, the actor is required to hold themselves available for a specified window of time, within which they can be required to attend for an eight week period of work ("the Period of Engagement"). In my view, again, the FTT was entitled to characterise the fee payable as "salary" for the purposes of the Categorisation Regulations. As a matter of overall impression, the fee appears to be directed primarily to paying the actor for their services in the Period of Engagement, and hence as a payment computed by reference to the amount of time for which work has been performed. That impression is reinforced by clause 5.1, which says in terms that the "total inclusive fee" to be paid to the actor is "inclusive of all daily payments which might otherwise be due under the [PACT Agreement]" (i.e. payments due by virtue of work by the actor for set periods of time), and by clause 3.3.3, which refers to an obligation of the actor to work on an exclusive basis for six "free" further production days (which indicates that what the actor is being paid the fee for is the work actually to be performed by them in the contractual "Period of Engagement").

36. There is a further aspect of the Bespoke Agreement which, in my view, means that an actor working under it is properly to be characterised as an employee

for NICs purposes. At the hearing before me there was closer focus than before the FTT on the effect of clause 5.3 of the Bespoke Agreement, providing for payment of overage amounts computed by reference to amounts of time (per week or per day). As mentioned above, Mr Goldberg accepted (correctly in my opinion) that if an overage payment occurred, that would be a payment which fell within the definition of "salary" in the Categorisation Regulations, and that that would have the effect that the actor would fall to be classified as an employee for the whole of their work on the production under that contract so that Class 1 NICs would be payable in relation to *all* the payments made under the contract. Following through the implications of this point once the correctness of HMRC's submissions of principle about the operation of the Categorisation Regulations are accepted, as set out above, I consider that the presence of clause 5.3 in the Bespoke Agreement would, in itself, be such as to require that an actor working under it is categorised as an employee for NICs purposes. This is because, addressing the effect of the Bespoke Agreement on the forward-looking, contractual basis which the Regulations require to be adopted, it can be seen that the Agreement contemplates that part of the remuneration in respect of the engagement for the production in question is an overage payment, which is clearly a "payment by way of salary". Therefore, it cannot be said that the remuneration of an actor in respect of their employment for that production "does not include any payment by way of salary". It is true that an overage payment will only in fact be paid if certain conditions are fulfilled (i.e. the actor is required to attend to work for an extra overage period and does so), and they might not be fulfilled, but looking at a contract at the point of time at which it is entered into, in a forward-looking way, that is usually true of any element of remuneration – it will only be paid if the work is in fact done. What is important for the purposes of the operation of the Regulations is that the contract contemplates that such a payment (computed by reference to the amount of time for which work is performed) may be made.

37. Finally, I enter a caveat about para. [124] of the FTT's decision. That paragraph includes the following:

> "Mr Gammie argued that it was not sufficient to fulfil condition (d) that an entertainer was engaged to do particular work at an agreed hourly or daily rate so that, looking at the position at the end of the engagement, the amount received could be said to be computed by reference to the amount of time which he or she had spent in performance. Mr Goldberg indicated that he found himself unable to follow this reasoning and considered it to be wrong. However, we accept Mr Gammie's argument; the key point is that, as we have already decided, the position has to be examined at the outset, and is not to be measured at the point when the process of providing services under the contract has been completed. We agree that the contrast is between buying the individual's time during which the latter agrees to

provide his or her services, which falls within condition (d) and therefore payment constitutes 'salary', and payment for particular work, where the payment is buying a particular service or performance. The latter falls outside condition (d)."

38. Like Mr Goldberg, I found myself unable to follow this part of Mr Gammie's argument. I consider that if an entertainer is engaged to do work at a particular hourly or daily rate, that would clearly be an engagement at least part of the remuneration for which would satisfy the condition in sub-paragraph (d) of the definition of "salary" (indeed, in the example given, the whole of the remuneration would satisfy that condition). When I pressed Mr Gammie on this in argument, I understood him to accept that this is right, and that the FTT's recorded agreement with this aspect of his submissions is wrong. But in the context of the FTT's decision, that is a peripheral point which does not affect their reasoning and conclusions in relation to ITV's contracts. Putting to one side this curious lapse, which does not seem to me to be in harmony with the rest of the FTT's decision or Mr Gammie's submissions, the "key point" emphasised by the FTT is in my opinion correct.

39. For the reasons given above, I consider that ITV's appeal should be dismissed. On my understanding of what the parties invited me to do on the appeal, I have answered the questions posed for me. However, lest I have misconstrued what the parties were asking me to do, if the parties consider that there is any aspect of the detail of the conclusions by the FTT which requires to be addressed more directly by this Tribunal in ruling on the outcome of the appeal, I will allow them an opportunity to address me before making a formal order dismissing the appeal.

**TRIBUNAL**

**THE HONOURABLE MR JUSTICE SALES**

**RELEASE DATE: 07/02/2012**