A D McCOWEN and S A WEST

DECISION

Mr Alex McCowen appeals against an assessment to income tax under Schedule E in respect of the year 1991 – 1992. Mr Sam West appeals against assessment to income tax under Schedule E in respect of the years 1990-91 and 91-92. The appeals were heard together since they give rise to the same or similar questions. The questions for determination in Mr McCowen's appeal is whether amounts earned by him under the following engagements were emoluments from employments of Mr McCowen with the Theatre Managers who engaged him.

I. Engagement with Bill Kenwright Ltd for the part of Jack in the play "Dancing at Lughnasa". The contract is dated 13 March 1991. It is a standard contract for London West End theatres and is in the bundle of agreed documents in Part B at pages 35 to 37 and 72 to 94.

II. Engagement with Chichester Festival Theatre Productions Company Limited for the part of St. John Panmure in the play "Preserving Mr Penmure". The contract is dated 29 January 1991. The contract appears in the bundle in part B, pages 44 and 45 and 190 to 208.

III. An engagement with Greenwich Theatre Ltd for the part of Caesar in the play "Caesar and Cleopatra". The contract is dated 14 December 1991. In the bundle it appears in part B, paged 59 and 315 to 330.

As respects Mr Sam West, the question for determination is whether amounts earned by him from the following contracts were emolument from employment

I. Engagement with Michael Codron Ltd for the part of Nigel in "Hidden Laughter". The contract is dated 19 February 1990. It appears in the bundle part C at pages 28 to 30 and 35 to 57.

II. Engagement with the Royal National Theatre Board Ltd for the part of Willy Carson in the play "the Sea". The contract is dated 26 September 1991. It appears in part D of the bundle at pages 20 and 21 and 61 to 77.

We were given a statement of agreed facts. We do not set out that statement in this decision but we treat is as part thereof.

We heard evidence from both Appellants and from Mrs Genista Mary MaIntosh, who since October 1990 has been the Executive Director of the Royal National Theatre in London. We accept the evidence of all three witnesses.

It is common ground that, if the earnings the subject matter of the appeals are not chargeable to tax under Schedule E they are nevertheless brought in to the appropriate Schedule D case 2 computations of the Appellants. The only issue in the appeals may therefore be restated as follows: whether the income of the Appellants from the theatrical engagements herein before listed arise from "employment" that is the relationship of master and servant to use the traditional language, or arise from self- employment, that is the exercise of a profession otherwise than as a servant or employee.

Mr McCowen, who lives and mainly works in London, is a leading English actor of international repute. He started his career in or about the year 1942, aged eighteen. Apart from a period of some twenty years, when he owned and operated a personal company, he has always regarded himself as self-employed or "free lance", carrying on independently the profession of actor, not a servant or employee. During the year under appeal, and indeed, during the past three years he has acted in plays in the United Kingdom, acted in plays abroad, acted on television and on radio and in films and performed as "voice-over" and has also spoken commentaries for TV documentary films. He has regarded these activities as constituting his single source of income as a self-employed person. The Inland Revenue agree, save that they except theatrical performances in the United Kingdom which they say are taken out of Schedule D and brought under Schedule E. Also included under Schedule D are Mr McCowen's "residuals", that is receipts in respect of repeat fees and shares of rights from performances which took place in prior years of assessment.

Mr McCowen has for many years had a "spotlight entry" in a theatrical compilation and his agents have compiled and keep up a record of plays in which he has taken part (part B pages 1 to 5). Mr McCowen has always provided his own make-up. On some occasions he has provided his own costume, but only when the costume of a present-day gentleman is required. He has always employed and paid (usually 10% of his takings) a theatrical agent whose task has been to negotiate contracts, look for fresh opportunities, provide him with a professional address, safeguard his professional interests and general further his career. Generally, when engaged in any one play or other engagement (whether those now included the assessments under Schedule E or not) Mr McCowen has not concentrated on the matter in hand to the exclusion of other matters; on the contrary there has been both overlap and cross fertilisation. By overlap is meant that, while performing one role in one

theatre he might well be learning the part of another role either contracted for or merely hoped for. Whilst engaged in other work, he learnt by heart the gospel according to St Mark and was subsequently able to convert that into theatrical performance. Over no period of time can he fairly say that he is engaged in one activity to the exclusion of all other in the course of his profession. Mr McCowen has for many years never taken "repertory" work in the sense of being a member of an acting team, taking one part one week and another the next. He has in the years under consideration invariably contracted to play a specific role for the run of a play or for the run of the play or a shorter fixed period. He has taken different engagements with different managers; rarely if ever taken consecutive engagements from the same manager.

He is and has been registered for value added tax on the footing that he is in business for all his theatrical activities in his own account, not being an employee in respect of any of them.

For theatrical work he is normally engaged by a theatre manager or management company, which also engages the director who produces and directs the play.

When playing a role in the theatre Mr McCowen, to use his own phrase, "works with the director". The director may not dictate to him how a role should be played. Differences of opinion may be ironed out, but in the last resort, Mr McCowen regards the directors view as being "suggestions" and not control of the role. There is a working relationship, but, like other actors, Mr McCowen is the one who gives the performance and so interprets the role to the audience. Curiously enough the author, if still alive, is not encouraged to take any part in rehearsals or presentations. Only the director talks to the actors; the author has little if any rights or responsibility.

The word "salary" is commonly used in the theatre to denote the receipts of an actor, whereas "fees" are normally used is relation to television and films.

Generally the entire acting profession, even those clearly employed as servants, have a tendency to regard themselves as self-employed members of a profession.

Billing is most important. In agreeing the billing for one run an actor and his agent have in mind not only that run but also the future development of the actor's career.

The Royal National Theatre is a repertoire system. This is not the same as the old repertory where actors were employed week in and week out to play whatever role was needed.

Every actor at the National (including Mr West) is engaged to play a specific role in a specific production either for its total run at that theatre or for a minimum of say between six and twenty weeks which is guaranteed even if the production goes off. A contract for a role can be extended, although in practice never extended for more than sixty weeks. An actor who plays different roles at the National plays each role under a separate engagement or contract. The actors are separate from the other employees such as ushers and box office staff who, although not working standard hours, are treated as employees. Both actors and directors, because their activities are regarded as creative, and because they are taken on for specific plays or roles, are regarded as self-employed by the National Theatre. That is typical of all theatres.

Mr Samuel West, who resides in London, is much younger than Mr McCowen. His first theatrical engagement was in 1985 before going to Oxford; since coming down he has been devoted to the theatre. He comes from a theatrical family going back four generations. Considering his youth he has been successful. Like Mr McCowen he regards himself as an independent creative artist, carrying on a profession, self-employed, and at no time a servant of any employer. He also undertakes work in the theatre and in films and television. During the two years under appeal he has acted in plays in the United Kingdom, acted in plays abroad, acted on television and on radio and in films and performed as “voice over”; and has also “dubbed” a voice for film. He has done work in English and French languages. Like Mr McCowen he has regarded these activities as constituting his single source of income as a self-employed person. He also has “residuals”; payment in respect of repeat fees and sales rights for earlier performances. He has regarded these activities as constituting his single source of income as a self-employed person. Again the Inland Revenue agree, save that they make an exception of theatrical performances in the United kingdom, which they say are taken out of Schedule D and brought under Schedule E as emoluments of employment.

Mr West also has had a “spotlight entry”.

Mr West has always provided his own make-up and like Mr McCowen has a make-up box which he habitually uses. He has never provided his own costume. He has always employed and paid a theatrical agent whose task has been to negotiate contracts, look for fresh opportunities, provide him with a professional address, safeguard his professional interests and generally further his career.

Unlike Mr McCowen, he has for some weeks, in the summer of 1992, been unemployed. He has not acted in the theatre outside the United Kingdom, although he has done film work in France. He has also on occasion exploited his talents by giving talks and performing such tasks as opening fetes. He regards himself as lucky in that he can and does work in all media

where acting is required and he perceives no great difference between his work in the theatre and his work in other media. As with Mr McCowen there has been both overlap and cross fertilisation. When unemployed he was not inactive. Hoping one day to play Hamlet, he has learnt by heart all or most of the part. At no time can he fairly say that he is engaged in one activity to the exclusion of all others in the course of his profession. He has never taken "repertory" work in the theatre. He has invariably contracted to play a specific role for the run of a play or for the run of the play or of a shorter fixed period. Although he has worked in the Royal National Theatre he has worked and hopes to work in the commercial theatre also.

Mr West is not registered for value added tax and his turnover has never reached the statutory limit. For his theatrical work he is engaged by a manager or management company to play a specific role; the director who produces and directs the play is also so engaged. There is an example of a billing provision at page 29 of part C of the bundle. Like Mr McCowen, Mr West regards billing as very important. Proper billing during the run of one play can maintain and further his general reputation and lead to further work. Mr West emphasised that cross fertilisation was "total and he used the words "synergy" in the sense that each one of his activities is linked with, and works with, other activities in that and other mediums.

To the suggestions that the management tells him how to act a role on stage, he insisted he was engaged because of his own skill and judgement. He was not a robot. He rehearses a role in collaboration with the director but finally he played it his own way. He emphasised that "our job is our own" and he dismissed as absurd the suggestion that he was tied as to the manner of carrying out his duties.

Both Appellants habitually learnt acting lines before rehearsals, without reward, at irregular times, and frequently while also engaged in other work. Both Appellants have undertaken engagements where, because the work was exciting and largely its own reward, they accepted such little pay that they were left out of pocket. Thus Mr McCowen played a role in a London suburban theatre for less reward than he would have obtained in the West End. Mr West played Lord Byron in the four day run of play "Keen" in Chichester after being paid for those days and three weeks rehearsal, but spending much time, unpaid in learning the role.

Both Appellants were referred to their accounts (part B page 10 and part C page 7). The items therein "make-up" relate purely to the theatre, since in TV and films the management provide all make-up. Otherwise the items of Expenditure generally related to all the professional activities of the Appellants, none being wholly theatrical or non theatrical. Both Appellants regularly research, mainly through books, roles that they are to play or wish to

play. Thus Mr McCowen researched the role of Prospero, partly by hearing tapes of other actors in that role. Both Appellants regarded it important to keep up to date by visiting the theatre to see other actors. In furtherance of their careers a good deal of entertainment and discussions takes place at home and elsewhere. Generally such expenditure relates not to any particular engagement but to the professional life of the actor generally.

Generally acting in the theatre has for both Appellants been paid less well for acting on films; even television and radio work have been better paid than acting in the theatre. But the career of both Appellants is centred on the theatre, in that it is usually theatre work that leads to film, television and other work, and forwards his reputation as an actor. The film, television and other work are not regarded by either Appellant as mere "sideline" to theatrical work. Each type of work "fertilizes" the other, although each Appellant regards the live theatre as his professional home.

In theatrical contracts the reward to the actor is normally called "salary" whereas in TV and films the word used is "fee". A leading actor commonly gets a part of his "salary" a percentage of box office receipts; see for example part B page 35.

In the theatre it is normal for a contract to consist, as do those now under consideration, of two parts, the first short part being the main terms, the second, voluminous, part being in some standard form. An "exclusive services" clause (as at B page 75) is usual; but both Appellants emphasised that management consent to other worker was normally given on request. Although provision is made for holidays (as part B page 76) both Appellants refused holidays during a run and stated that it was very rare in the theatre for actors to take holidays during a run, whatever may be in the contract. Although there are normally specific provisions for rehearsals and overtime and hours of work, an actor is expected to learn his role in his own time.

It is common that (subject to our exception) all the professional activities of each Appellant, including TV, films, radio, theatrical acting outside the United Kingdom, are part and parcel of the Appellants' profession of actor, properly chargeable under Schedule D Case 2. However each Appellant claims to include, and the Revenue claims to exclude, from that Schedule D Case 2 activity the theatrical work under the engagements listed at the beginning of this Decision.

<u>The Contentions of the Parties.</u>

We intend no disrespect to the excellent arguments addressed to us, in not setting them out in this Decision. Those arguments were part in writing, part oral.

In determining the issue in this case we have to view all the relevant factors, those indicating employment and those indicating self employment, then step back and take a balanced view. In our opinion we must not consider the matter as a mere question of construction of the contracts described at the beginning of this decision. Were we to restrict our consideration to construction of the contracts, we would be left in some doubt whether they are service contracts or contracts for services; that is employments or self employments. In favour of employment is the fact that all the contracts contain very detailed provisions, particularly as to hours worked, extra pay, overtime, matters which one might more readily associate with employment than with self employment. On the other hand there are clear indications that the actor is to, or may, charge VAT (see for example Part B pages 37, 45, 325). There seems to be no provision for pension or for redundancy. Furthermore, the elaborate details in the theatrical contracts, which details may perhaps be thought to point to employment rather than self employment, are in some respects echoed in radio, television and film agreements, which both sides admit to be matters of self-employment and not of employment. In this respect we refer to part B pages 95-189, and to pages 209 et seq. We also refer to part C pages 156 et seq and 58 et seq, both dealing with television. In part D we refer to the film contract beginning at page 26. It is significant then, in all these non theatrical contracts, overtime and payment for overtime, which one might well associate with a master and servant relationship, looms very large. We perceive no fundamental difference, as regards the rights and duties of actor, between theatrical contracts on the one hand, as to which there is a dispute relating to employment or self employment., and on the other hand the radio, television and film contracts, which, it is common ground, are not employments but mere engagements in the course of Schedule D self employment. We think it significant that each contract under consideration consists of two parts; the first relating to the specific actor, the second voluminous part being in the common form. It is proper in our view to give particular emphasis to the first part and it is significant in each first part the fundamental contract between the theatre and the actor is to play a specific role in a specific play for a specific run at a specific theatre. Were we to restrict ourselves to the contracts therefore we should, on balance, come to the conclusion that the appellants are throughout self-employed, so that Schedule E assessments cannot stand.

However we do not think it proper to determine this appeal as a matter of narrow construction. Every such matter must, in our view, be determined by looking at the surrounding facts. Even in a matter of construction, taking a form of construction whereas one is not looking for a common purpose, for example construing a will, one is bound to put oneself “into the testator’s armchair” so that the will is construed against the background of the testator’s assets and the claims on his bounty and so on. Furthermore, we have been referred to highest authority which indicates that more must be looked at than the mere

terms of the contract. For example Lord Brandon in Narich Propriety and the Commissioners of Payroll tax, an appeal from New South Wales reported ay 1983 1ICR p.286 at page 291 says this :-

> "The first principle is that subject to one exception where there is a written contract between the parties whose relationship is in issue a court is confined in determining the nature of that relationship to a consideration of the terms expressed or implied at that contract in the light of the circumstances surrounding the making of it and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract."

Again, Lord Wilberforce in the House of Lords in Reardon Smith Line Ltd 1976 1 WLR 989 says this at page 997:-

> "What the Court must do to place itself in thought in the same factual matter as that in which the parties were."

Relevant here is the consideration that the charge under Schedule E is not expressed to be imposed on contracts of services but on emoluments from employment. It is trite law that one determines what are emoluments not by asking whether the receipts come from the contract of service, but whether they come from the employment. That is one aspect of a wider consideration, that a master or a servant may perform acts not expressly or implicitly promised in the service context, which acts are part of the employment, but not part of the service contract. Thus an uncovenanted bonus by the employer to the employee can hardly be said to come from the contract of service, which makes no provision express or implied for bonuses, although it is clear that it does come from the employment. Thus, in our view, in order to determine whether receipts on emoluments from an employment one must look at all the factors, the true construction of the contracts being one most important factor.

The question we have to determine is mixed question of fact and law.

We find useful guidance in Market Investigations v Ministry of Social Security 1969 208 1 73, where a housewife earning "pin money" was held to be under a contract of service. At page 184 Mr Justice Cooke approves the approach of the American courts on the issue whether certain men were employees, by looking at the matter "as a matter of economic reality". The Judge goes on:

> "The observation of Lord Wright of Denning LJ and of the judges of the Supreme Court suggest the fundamental test to be applied is this: "is the person who has engaged himself to perform these services performing them as a person who has engaged himself to perform these services performing them as a person in business on his own account?". If the answer to that question is "yes" then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the consideration which are relevant in determining that question, nor can strict rules be laid down as to relative weight which the various considerations should carry in particular cases."

That test was approved by the Privy Council in Lee v Chung 1990 2 AC374, 382.

Recently that test was approved and applied by Mummery J in Hall (HMIT) v Lorimer 1992 STC 599, particularly at pages 611, 612

Before approaching the factors in this case we digress to record that it is established that a self employed person may, part of his time, undertake duties that make him chargeable as an employee or a servant under Schedule E. In this respect we rely on Sidey v Philips (HMIT) 59 TC 458.

We have weighed all the factors in this case and have arrived at the conclusion that each of the appellants was, as respects his theatrical work in the years under appeal, self employed so as to be chargeable to tax under Schedule D Case II and not under Schedule E. We record in particular the following considerations. The appellant engaged to play a particular role during all or part of a particular run of a play. During the engagement his work under the contract did not absorb his entire time or attention. Various engagements, whether in the theatre, film studio or the radio or television studio, frequently overlapped. There was cross-fertilization, in that success in one engagement might lead to another in the same or a different line. (By its very nature a career in the theatre is various, including acting, taking part in discussions, appearing at social events, performing on television or in films or in radio. It is quite different from a repertory theatre, where the actor is assigned to a play whatever parts may from time to time be required.) The actor kept his own business organisation, in that he employed an agent, for a fraction of the actor's gross take, who would, day in day out, look for fresh opportunities, keep records and generally further the actor's career. When an actor took on a role he did not become "part and parcel" of the theatre in the sense that a scene shifter or employee in the box office is part and parcel. The actor had a specific role for a limited period. Neither appellant was under the "control" of a theatre or of the management company. No doubt fair display of temperament might be evident on occasions, but in the last resort the role was interpreted by the actor, a matter of

artistic impression. A more humble job may more readily perceived to be that of a servant; but an actor has a creative activity. Each appellant, incurred expenditure which related to his profession as a whole, not to individual activities in it. Moreover when an actor engaged to play a role during a run he could be seen to be part and parcel of the play, but that is different from being part and parcel of the theatre or of the organisation that put on the play. Neither appellant was part and parcel of any theatre or organisation in this sense. Both actors regarded themselves as being independent, in business on his own account. Each actor provided his own make up. For value added tax purposes Mr McCowen was treated as self employed and in business on his own account, although Mr West had not reached the value added tax threshold.

In our view the relevant factors point clearly towards self employment. We have deliberately not yet referred to the two High Court decisions which hitherto have often been held to point to the distinction between employment and self employment in the theatre. These are Davies v Braithwaite 1931 2 KB 628 and Fall v Hitchin 49 TC 435.

No doubt Davies v Braithwaite requires reconsideration in light of the many subsequent reported cases on taxation and other law in relation to employment. However, it is the decision of an eminent Judge, Rowlett J, who heard argument from eminent counsel. It may be thought old fashioned to refer to "post", but it is no more old fashioned than income tax, going back uninterruptedly to 1842. It cannot fairly be said that either appellant has a "post" or a series of posts, as opposed to various engagements in the theatre and elsewhere. In our view the statement of the law at pages 635, 636 holds good today in the context of the theatre. We contrast the decision in Fall v Hitchin where it was held in the High Court that a ballet dancer had a "post", and was therefore chargeable to tax under Schedule E. The learned judge pointed out that the issue "must depend on the particular facts", and it is to be noted that the taxpayer was "in repertory" earning a steady income whether or not he was called upon to perform or rehearse performing whatever roles he was called on to perform from time to time. Both cases have particular force, because in both the High Court reversed the determination of the Commissioners. In the context of the theatre, those cases established the distinction, and draw the line, between the self- employment and employment, Schedule D case 2 and Schedule E.

We therefore allow the appeals.

(signed) D C Potter

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