NATIONAL INSURANCE CONTRIBUTIONS – landlord – whether carrying on business and therefore a self-employed earner – no

THE SPECIAL COMMISSIONERS

IRSHAD MAHMOOD RASHID - Appellant
- and -
M. GARCIA (STATUS INSPECTOR) - Respondent

Special Commissioner: DR JOHN F AVERY JONES CBE

Sitting in public in London on 3 December 2002

John Antell, counsel, for the Appellant

John Cormack, Area Director, Tees Valley Area, Inland Revenue, for the Respondent

DECISION

1. Mr Irshad Mahmood Rashid appeals against a decision of 29 April 2002 that "Mr Rashid was not an earner for the period from 29 June 1997 to 29 April 2002." The Appellant was represented by Mr John Antell and the Inspector by Mr John Cormack.
2. The issue is whether the Appellant is a self-employed earner for class 2 National Insurance purposes.
3. Section 2 of the Social Security Contributions and Benefits Act 1992 defines two types of earner: employed earner and self-employed earner as follows:

   "(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 emoluments chargeable to income tax under Schedule E; 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)."

4. There is an inclusive definition of employment in section 122(1):

   "'employment' includes any trade, business, profession, office or vocation and 'employed' has a corresponding meaning."

It will be seen that, in contrast to income tax, there is a reference to "business". The Appellant is not an employed earner. The issue is whether he is a self-employed earner, which turns on whether his property activities constitute a business.

5. The Appellant gave evidence. I find the following facts. He has income from the letting of four properties. He started a retail business in 1977 but from 1992 to 1995 his only income was from property. He started a taxi driving business in 1995 but had to give that up when he suffered a heart attack on 29 June 1997. Owing to his poor health (his condition includes pituitary failure and schizophrenia) he received Invalidity benefit from 1997 based on his Class 2 National Insurance Contributions. This ceased when he started a term of imprisonment from 26 November 1998 to 27 March 2000. On his release he claimed Incapacity Benefit. This was refused on the ground that he had not paid sufficient Class 2 contributions in 1997/98 and 1998/99. He then paid Class 2 contributions saying that he was dong so in order to qualify for Incapacity Benefit. Initially this was accepted by the Respondents but in a letter dated 9 November 2000 they gave an opinion that the Appellant's property rental activities did not entitle him to pay Class 2 contributions which were not validly made after 29 June 1997. Later, the opinion was followed by the Notice of Decision appealed against.
6. The Appellant's property income began in 1984 and continued throughout the period of his imprisonment. He was returned the following assessable income from property: years ended 5 April: 1998 £6,489; 1999 £7,750; 2000 £9,208; 2001 £10,942. Of the four properties, one has three rooms for residential letting (there are a further two rooms but these are used for storage), another property has one commercial and one residential tenant, and two properties have a single commercial tenant. The residential tenants can be those introduced by the DHSS who tend to stay for only a few weeks, or students who stay for one or three terms. The specimen tenancy agreement I was shown was for one year. I was not told about the length of leases of the commercial tenants but I assume that these are longer term. The Appellant gave witness statement and a further statement setting out in great detail all the work he does. These include making arrangements where things go wrong with the central heating, hot water, furniture, alarms, appliances. For new tenants advertisements have to be drafted, credit checks are made on prospective tenants, inventories have to be made and checked, the tenancy agreement drawn up, rent has to be collected, the property inspected, common parts are cleaned and the garden maintained. Legislation now requires that gas and electrical equipment is checked annually and there are many other obligations now imposed on landlords. He estimated that he spent 2 to 4 hours per week on average personally and because his ill-health prevented him for working, more time was spent by members of his family, which he estimated at 16 to 24 hours per week on average. Mr Cormack conceded that the family's activities could be attributed to the Appellant as they were working as his agent.
7. Mr Antell in a helpful skeleton argument referred me to a number of authorities on different legislation where business had been relevant. First, *American Leaf Blending Co v Director-General of Inland Revenue* [1979] AC 676, a Privy Council appeal from Malaysia in which a company had closed down its former tobacco business and let its warehouse to three successive tenants and let the factory to a tenant, followed by negotiations for letting both to a single tenant:

"The carrying on of 'business' no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with ling intervals of quiescence in between."

8. The issue is *Jowett v O'Neill and Brennan Construction Ltd* [1998] STC 482 was whether a company which had discontinued its trade and placed funds in a bank account in October 1994 followed by closing its current account and adding to the deposit in May 1995, receiving interest and paying corporation tax, was an associated company for the small companies rate of corporation tax or whether it was ignored as not having carried on any trade or business. It was held that it was a case of the latter as the bank deposit did not amount to the carrying on of business. Mr Antell contended that placing money on deposit was not "investment" and therefore not a "business". My reading is that while the deposit may have been an investment the company was not carrying on an investment business. The Special Commissioner had found that it was not carrying on the business of investment without actually saying that it did not carry on business, which Park J held was implied.
9. Mr Antell also referred to *Griffiths v Jackson* [1983] STC 184, concerning a partnership owning 11 properties let as furnished flats which was a business but not a trade. In it Vinelott J said of *Fry v Salisbury House Estate Ltd* 15 TC 266 that all members of the Court of Appeal recognised that a landlord who lets out a number of properties, or parts of a property can be fairly described as carrying on a business. Slesser LJ observed at 301:

   "As it seems to me, every landlord who lets out habitually more than one house, or part of a house, may be said to be carrying on a business…."

   It should be remembered that *Fry v Salisbury House* concerned a large office block.

10. There are numerous other examples of the use of the expression "business" which I was not shown, for example partnership law and VAT. It is accepted in VAT that virtually any letting is in the course of business, but this must be read in the light of the provision of the Sixth Directive that "the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity" (or business, in UK law). Another source is the former excess profits duty which depended on "trade or business" where Rowlatt J defined "business" as "an active occupation or profession continuously carried on" (*IRC v Marine Steam Turbine Co Ltd* 12 TC 174, 179) which was described as being too narrow a definition by Atkin LJ in *IRC v Korean Syndicate* 12 TC 181, 205.
11. Mr Cormack urged me to be cautious in applying cases on other legislation. He referred me to one decision of the Social Security Commissioners CP129/50 in which they decided that a retirement pension did not fall to be reduced by reason of earnings. The claimant owned four buildings each with a caretaker who cleaned the common parts. The Local Tribunal treated him as employed in the business of a lodging house proprietor. He performed no services or other work personally. It was held that he was not employed in the business of a longing house proprietor, applying a previous decision in which it was held that "a gainful occupation is one in which a person is engaged with the desire, hope and intention of obtaining for himself, directly and personally, remuneration or profit in

return for his services and efforts." He added: "I am not saying that a man who managed a property owning business on a considerable scale would not be engaged in an occupation, even though the property belonged to himself. It must depend upon whether he performs any appreciable amount of work." I find this decision slightly strange because if the claimant had so much to do that he engaged four caretakers who were presumably his employees one might expect that their activities would be attributed to the claimant, rather than concentrating on his own services and efforts.

12. I agree with Mr Cormack that one must be careful about applying the meaning of "business" in other contexts but the authorities are some help in conveying the ordinary meaning of business generally. I think one should also be cautious of cases concerning companies because although a company does not necessarily carry on business it is perhaps more likely to be doing so than an individual if that is one of its objects. The context here is that business is included along with trade, profession, office or vocation in the definition of employment, implying activity in contrast to mere investment, although of course there can be a business of investment, as in the definition of "investment company" for corporation tax: "A company whose business consists wholly or mainly in the making of investments…" (section 130 of the Taxes Act 1988). A property rental business can be an example of an investment business. Whether property rental is a business in any particular case is a matter of degree. I am short of evidence about the type of lettings. It seems to me that since two of them are wholly commercial and another partly commercial the Appellant's activity in relation to them will be less because there will be less turnover of tenants and less work as there are no common parts in two of the properties let to one commercial tenant and I suspect less need to check that the tenant is not misusing the property and fewer appliances to go wrong. In addition to the commercial tenants there are three residential tenants in one property and one in another. More activity will be required in relation to these but even these may be let for periods of a year to students. The Appellant clearly has responsibilities when things go wrong and need attention which will require some activity but nothing more than a landlord normally does.
13. Standing back and looking at all the evidence although I think that the case is near the borderline in the end I am not satisfied that there is sufficient activity for it to constitute a business. In my view, it is an investment which by its nature requires some activity to maintain it, rather than a business.
14. Accordingly the appeal is dismissed.

J F AVERY JONES

SPECIAL COMMISSIONER

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