Neutral Citation Number: [2019] EWCA Civ 474

Case No: A3/2018/0838

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
(MARCUS SMITH J and JUDGE T HERRINGTON)
[2018] UKUT 0010 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2019

Before:

THE SENIOR PRESIDENT OF TRIBUNALS
(SIR ERNEST RYDER)
LORD JUSTICE FLOYD
and
LADY JUSTICE ROSE

- -

Between:

(1) CHRISTIANUYI LIMITED
(2) FANNING SOCIAL CARE LIMITED
(3) HADDASSAH LIMITED
(4) DR. JACEK TRZASKI LIMITED
(5) JONNY TOOZE PHYSIOTHERAPY SERVICES LIMITED

Appellants

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

- -
- -

Giles Goodfellow, Q.C. and Ben Elliott (instructed by **Mazars LLP**, accountants) for the Appellants
Akash Nawbatt, Q.C. and Kate Balmer (instructed by **the General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date: 5 March 2019

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Approved Judgment

Lady Justice Rose:

1. The Appellants are all companies that provide the services of a particular individual who is in each case the sole director and shareholder of the company:

   i) The First Appellant Christianuyi Ltd provides the services of Dr Osamwonyi who is a forensic medical examiner;

   ii) The Second Appellant, Fanning Social Care Ltd provides the services of Ms Fanning, a social worker;

   iii) The Third Appellant, Haddassah Ltd provides the services of Ms Ayodele, a social worker;

   iv) The Fourth Appellant, Dr Jacek Trzaski Ltd provides the services of Dr Jacek Trzaski, a doctor; and

   v) The Fifth Appellant, Jonny Tooze Physiotherapy Services Ltd provides the services of Mr Tooze, a physiotherapist.

2. The Appellants contract with end clients who want to engage the services of the individual and charge fees to the end clients for those services. Those fees are then paid out to the individual partly by way of employment income, usually set at the level of the national minimum wage, and partly by way of corporate dividend. This arrangement is intended to result in the individual paying overall a lower rate of tax and lower national insurance contributions on the combined income received than he or she would pay if they received all the sums paid by the clients to the company by way of employment income. The Appellant companies were all set up by a company called Costelloe Business Services Ltd ('Costelloe'). The issue that arises in this appeal is whether the Appellants are managed services companies and whether Costelloe is a managed service company provider within the meaning of section 61B of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'). If they are, this has a significant effect on the tax treatment of the payments that are made by the Appellant companies to the individuals who own them.

3. HMRC consider that the Appellants are all managed service companies ('MSCs') and that Costelloe is a managed service company provider ('MSC provider'). They have issued various determinations to income tax under regulation 80 of the Income Tax (PAYE) Regulations 2003 and have made decisions as to liability under section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 accordingly. The determinations and decisions were made for the tax years 2007/08 to 2009/10 and were upheld by the First-tier Tribunal (Judge Guy Brannan and John Woodman) in a decision reported at [2016] UKFTT 0272 (TC). The Appellants' appeal to the Upper Tribunal was dismissed in a decision of Marcus Smith J and Judge Tim Herrington released on 19 January 2018 and reported at [2018] UKUT 0010 (TCC). Permission to appeal against the decision of the Upper Tribunal was granted by Flaux LJ on 23 May 2018. The question for this Court is whether the FTT and the Upper Tribunal were right to hold that Costelloe was an MSC provider so that the Appellants are MSCs.

The legislation

4. The provisions the Court is considering in this appeal form part of Chapter 9 of the ITEPA. Chapter 9 was inserted into the ITEPA by the Finance Act 2007. It follows Chapter 8 (sections 48 to 61) which deals with workers under arrangements "made by intermediaries". The provisions of Chapter 8 are designed to cover the situation where someone personally provides services to a client but does it through an intermediary rather than under a contract directly with the client. One of the conditions for Chapter 8 to apply is set out in section 49(1)(c):

> "the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client."

5. Where Chapter 8 applies, the effect, broadly, is that any payment the worker receives from the intermediary is treated for tax purposes as the worker's earnings from his employment by the intermediary if certain conditions are satisfied: see section 50. Chapter 8 does not apply to services provided by an MSC within the meaning of Chapter 9: see section 48(2)(aa) which was inserted at the time that Chapter 9 was enacted. The two Chapters are thus mutually exclusive so that if an arrangement falls within Chapter 9 it cannot also fall within Chapter 8.

6. Section 61B(1) of the ITEPA defines an MSC in the following terms:

> "(1) A company is a "managed service company" if-
>
> (a) its business consists wholly or mainly of providing (directly or indirectly) the services of an individual to other persons,
>
> (b) payments are made (directly or indirectly) to the individual (or associates of the individual) of an amount equal to the greater part or all of the consideration for the provision of the services,
>
> (c) the way in which those payments are made would result in the individual (or associates) receiving payments of an amount (net of tax and national insurance) exceeding that which would be received (net of tax and national insurance) if every payment in respect of the services were employment income of the individual, and
>
> (d) a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals ("an MSC provider") is involved with the company."

7. For the condition in subsection (1)(d) to be satisfied the putative MSC provider must be "involved with the company". That concept is defined in section 61B(2) ITEPA:

> "(2) An MSC provider is "involved with the company" if the MSC provider or an associate of the MSC provider —
>
> (a) benefits financially on an ongoing basis from the provision of the services of the individual,
>
> (b) influences or controls the provision of those services,
>
> (c) influences or controls the way in which payments to the individual (or associates of the individual) are made,
>
> (d) influences or controls the company's finances or any of its activities, or
>
> (e) gives or promotes an undertaking to make good any tax loss.
>
> (3) A person does not fall within subsection (1)(d) merely by virtue of providing legal or accountancy services in a professional capacity.
>
> (4) A person does not fall within subsection (1)(d) merely by virtue of carrying on a business consisting only of placing individuals with persons who wish to obtain their services (including by contracting with companies which provide their services).
>
> (5) Subsection (4) does not apply if the person or an associate of the person-
>
> (a) does anything within subsection (2)(c) or (e), or
>
> (b) does anything within subsection (2)(d) other than influencing the company's finances or activities by doing anything within subsection (2)(b)."

8. Thus, an MSC is a company which (i) provides the services of an individual to others; (ii) pays that individual all or most of the fees it charges to those others; (iii) pays the individual in a way which increases the net amount received by the individual, as compared with what he would have received net if he had earned the fees as his employment income; and (iv) involves an MSC provider in its business in one of the ways then set out in section 61B(2). An MSC can be a partnership as well as a body corporate: see section 61C(3).

9. Where a company or partnership falls within the definition of an MSC, then section 61D applies. This provides that where the services of an individual, referred to in the Chapter as the 'worker', are provided by an MSC in return for a payment which is not earnings, then the payment is treated as a "deemed employment payment". The value of the deemed employment payment is calculated in accordance with section 61E. In particular, that section ensures that the worker cannot get tax relief on the cost of travel from home to his workplace or for travel and subsistence expenses since these are not deductible expenses for an employee. The worker is thus placed in the same position in that regard

as someone who is employed directly by the end client. Section 61G then provides that the deemed employment payment is taxed as if the worker was employed by the MSC and the deemed employment payment was his earnings for that employment.

10. The effect of these provisions is therefore that any dividends the MSC has distributed to the individual who owns its shares are treated as employment income paid by the MSC to that individual. It means also that the Appellant as the employer of the worker would be liable to pay secondary Class 1 National Insurance Contributions on top of the amount of the earnings and cannot deduct that liability from those earnings. The worker's primary Class 1 National Insurance Contributions would then be deductible from the deemed employment income. If the MSC company has made dividend distributions, then the MSC can apply to the Commissioners for double tax relief which may be given by setting the amount of the deemed employment payment against the relevant distribution so as to reduce the distribution: see section 61H.

11. The significance of falling within section 61B goes beyond the consequences set out in the provisions of Chapter 9 ITEPA itself. Part of the problem HMRC regard as arising from the interposition of an MSC as the employer of the individual is that the MSC may be without assets. It may be put into liquidation or dissolved leaving its liability for PAYE and employer national insurance contributions unpaid. Section 688A ITEPA provides that PAYE regulations may make provision authorising the recovery from a number of other persons of any amount that HMRC consider should have been deducted by an MSC from a payment to an individual. The persons from whom the debt can be recovered include a director of the MSC, an MSC provider, a person who has encouraged or been actively involved in the provision by the MSC of the services of the individual and various associates of those people. Subsection (3) of section 688A provides that a person does not fall within the definition of someone who has encouraged or been actively involved merely by virtue of providing legal or accountancy services or by placing the individual with persons who wish to obtain the services of the individual. Part 3A of the Social Security (Contributions) Regulations 2001 (SI 2001/1004) and Chapter 4 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) implement section 688A by transferring the debts of an MSC for unpaid national insurance contributions and PAYE respectively to the people listed in section 688A(2) ITEPA if HMRC are of the opinion that the debt is irrecoverable from the MSC within a reasonable period.

The facts

12. The FTT described the scale of Costelloe's business. Between January and March 2007 Costelloe incorporated about 350 companies to be used as personal service companies by its customers. In total it had at that time incorporated about 1000 such companies. The FTT found that each of the Appellant companies was set up by Costelloe after the individual concerned was either advised or required by an end client to use a company rather than contracting to supply his or her services directly. Costelloe did not meet the individuals involved but dealt with them by letter, email or over the phone. The Appellant companies, like many other companies set up by Costelloe, pay Costelloe for a standardised package of services which it calls its Gold Business Service. The Gold Business Service provides a registered office for the company, deals with the invoicing to the client by the company for the fees charged for the individual's services, pays the individual a salary and deals with PAYE, expenses and national insurance contributions, deals with drawing up and filing annual company accounts and annual returns and

conducts other liaison with the Companies Registrar, and arranges for the company's tax return to be completed and filed and for the payment of corporation tax.

13. The salary paid to the individual by his or her company was in almost all cases equivalent to the minimum wage. Of course, the individual's services were charged out to the end client at a much higher rate than that. Those receipts came to the company rather than the individual and were held in a bank account with a bank called CredEcard. The taxes due whether as PAYE or as corporation tax were deducted by Costelloe from those receipts and the remaining surplus was mostly distributed to the individual as a dividend. Costelloe charged the companies a fee for the Gold Business Service. This was initially calculated as a percentage of the payments to the company by the recipient of the individual's services but was later changed to a fixed amount for work done. That fee was, therefore, in effect paid by the individual to Costelloe for Costelloe in part to perform services that, in an ordinary employment relationship, are performed by the employer without charge to the employee.

The Upper Tribunal's decision

14. It was common ground before the FTT and the Upper Tribunal that the Appellants satisfy the requirements in section 61B(1)(a), (b) and (c). The Upper Tribunal considered 10 grounds of appeal challenging different aspects of the FTT's decision on the application of section 61B(1)(d). The issue which formed Ground 10 of the appeal before the Upper Tribunal and which is the sole ground of appeal before us was not an issue before the FTT – the Appellants accepted at that stage that Costelloe was an MSC provider.

15. Ground 1 before the Upper Tribunal related to the FTT's use of Parliamentary materials and other external aids to construction that I discuss below. Grounds 2 to 9 before the Upper Tribunal related to the question whether any of the tests for determining whether Costelloe was involved with the Appellant companies for the purposes of section 61B(2). The Tribunal held that it was so involved because:

    i) it benefited financially on an ongoing basis from the provision of the services of the individuals and so fell within section 61B(2)(a): see [77], [79], [81] and [82];

    ii) it influenced or controlled the way in which payments to the individuals were made by the Appellants and so fell within section 61B(2)(c): see [91];

    iii) it influenced or controlled the Appellants' finances or any of its activities and so fell within section 61B(2)(d): see [95].

16. There is no appeal against those findings that Costelloe was "involved with" the Appellants for the purposes of section 61B(2).

17. Permission to withdraw the concession before the FTT that Costelloe was an MSC provider and to add Ground 10 to its appeal was granted by the Upper Tribunal at paragraphs [62] and [63] of its decision. Addressing the issue as to the proper interpretation of section 61B(1)(d), the Tribunal held that the meaning was entirely plain on the face of its wording: [67]. There was no requirement for the putative MSC provider to promote or facilitate the provision of the individual's services. All that was required was that it promote or facilitate the use of a company that then provides the

services of the individual. The Tribunal considered that this was reinforced by the terms of section 61B(2)(b) describing one way in which the MSC provider can be "involved with the company" as influencing or controlling the provision of the services provided by the individual. The Tribunal said that if the Appellants' contention was right, that provision would be entirely redundant because it would always be satisfied by any company that met the MSC provider test. That would in fact make the whole of section 61B(2) redundant, since an MSC provider meets the test of being "involved" even if it is involved in only one of the ways laid down in section 61B(2)(a) to (e). The Tribunal concluded:

> "Section 61B(1)(d) sets out a perfectly straightforward, two stage, test for determining whether a company is or is not an MSC provider:
>
> (a) First, does the putative MSC provider promote or facilitate the use of a company?
>
> (b) Secondly, if so, does that company provide the services of individuals?"

18. Applying that test, the Tribunal held at [68] that it was plain that Costelloe fell within the statutory definition.

The appeal

19. The issue before us is the issue dealt with at paragraphs 64 onwards of the Decision. It was contended before us that the definition of an MSC provider as "a person who carries on a business of promoting or facilitating the use of companies to provide the services of individuals" could either mean:

> (1) HMRC's construction: that, in order for a company to be an MSC provider, the company's business must be the business of promoting or facilitating the use by individuals of companies through which the individuals will provide their services to clients; the putative MSC provider does not need also to promote or facilitate the services themselves;
>
> (2) The Appellants' construction: that, in order to be an MSC provider, a company must promote or facilitate the services provided by the companies the use of which it has promoted or facilitated.

20. It was common ground that Costelloe did not promote or facilitate the services that each of the individual owners provided to the Appellants' end clients. Each Appellant arranged and negotiated its own contracts, including payment rates and terms, with the end clients, sometimes through a recruitment agency but without any control or supervision by Costelloe.

21. The Appellants' main argument in support of their appeal was that HMRC's construction casts the net of Chapter 9 far too wide and would catch all sorts of people who provide services to companies if it so happened that those companies were personal service companies providing the services of an individual to end clients. The position would partly be mitigated by the express carve out provisions in section 61B(3) and (4). But

there were many professional people who could not bring themselves within those exceptions but to whom Chapter 9 is clearly not intended to apply. Such a construction risks, they say, making a wide range of people who provide services to the Appellants potentially liable to pay the MSCs' PAYE and national insurance contributions if the MSCs do not pay them. Further, the Appellants argue that HMRC's construction is too broad in another way because it does not distinguish between personal service companies who are providing the services of individuals who are effectively employees of the end client and those where the individual is really in business on his or her own account. Since the effect of falling within the definition is to tax the individual as if he were an employee, the provisions should only catch the former and should not catch the latter.

22. Mr Goodfellow appearing for the Appellants relied in support of their construction of the statutory provisions on two consultation documents published by HM Treasury and HMRC. The first was published in December 2006 and was called "*Tackling Managed Service Companies*" ('the 2006 Consultation'). In the 2006 Consultation, the Government referred to its long-standing principle that the tax treatment of income should be determined by the nature of that income so that income which is properly employment income should be taxed as such even where an individual is working through a company. The strong growth in MSC schemes constituted, the Government considered, a significant and increasing risk to the Exchequer. Further, those using MSC schemes were gaining an unfair competitive advantage over workers and businesses who complied with the existing provisions in Chapter 8 ITEPA. Some workers were entering MSC schemes without understanding that they may be giving up employment rights.

23. The contrast between personal service companies set up by someone who is truly a sole trader or working in a partnership was emphasised in the 2006 Consultation. At paragraph 2.9 the Government noted that a worker in an MSC is almost invariably not in business on his own account and is not exercising control over the business: "This control lies with the provider of the MSC, referred to as the 'scheme provider'". These scheme providers are businesses "which provide these generic company structures and then administer the schemes.". The 2006 Consultation went on:

> "2.12 In an MSC scheme the worker obtains work engagements, usually via an agency, in the normal way. The worker supplying services usually takes no part in the on-going management or financial control of his MSC and is typically not a director of the company (but rather a worker-shareholder). Instead, the MSC scheme provider handles payments between the agency and the MSC, deducting a fee for the work it carries out and arranging for the payment of the worker. The worker is often unaware of the details of the arrangement or its implications.
>
> 2.13 The marketing of MSC schemes emphasises that the worker will not be involved in the running of the company - they simply receive payments for their services [*there follows a series of quotations from MSC scheme provider websites*]"

24. The Government recognised in the 2006 Consultation that the key to enforcing its policy was to get the definition of MSCs right. They also recognised that this was not a straightforward matter; it was important to provide a definition that was "robust against

attempts to restructure to avoid being caught by the new provisions". Chapter 3 set out the characteristics of MSCs: [3.3]

> "… the presence and the role of the MSC scheme provider is a distinguishing characteristic of the MSC. The MSC scheme provider markets MSC structures and makes them available to workers and also has an ongoing role in the administration and management of the company".

25. The Government then described the typical role of the MSC scheme provider in exercising a high degree of financial and management control over the MSC. The extent of this control was very different from the normal provision of services by an accountant or professional adviser to a client company. The 2006 Consultation contained draft legislation which described what is now the MSC provider as the "scheme provider" being a person who "makes the scheme or arrangement available" and "exercises control over the finances or general management" of the putative MSC.

26. The Government published a summary of responses to the 2006 Consultation in March 2007 ('the 2007 Response') setting out what the Government had learned from the Consultation and how its approach was being modified. Respondents to the consultation confirmed, the Government recorded, that workers in some sectors have little or no choice other than to join an MSC scheme. Sometimes this was said to be an attempt to remove the worker's entitlement to statutory employment rights from the end client or agency with workers having to enter MSCs in order to get work; on other occasions they said that workers have a superficial choice but are offered financial inducements to enter MSC structures: see [3.5].

27. As regards the definition of MSCs, the Government recorded that in general respondents agreed that the defining characteristics of MSCs had been correctly identified. But there were concerns over the clarity and strength of a definition which included the term "exercising control". Respondents said that MSC scheme providers would attempt to give some control to the workers in the structures while continuing their operations very much as before. Trying to define "control" for these purposes "could allow MSC scheme providers easily to adjust the structure of their schemes to avoid the definition": [3.13]. The Government also recorded that concerns were raised about business structures unrelated to MSCs which might be caught by the draft definition. These included employment agencies, law firms, consultancy businesses and multinational employment structures: [3.16]. The Government noted that almost all respondents agreed that the transfer of tax and national insurance debts was necessary to make the package of measures effective: [3.18].

28. In Chapter 4 of the 2007 Response, the Government stated that it had decided to amend the proposed definition of MSCs to focus more on the role and business of the MSC provider and less on the MSC itself or on the question of control: [4.4]. They said:

> "4.5 … The new legislation will define an MSC scheme provider by reference to their business, which is facilitating the provision of the services of individuals and companies.
>
> …

> 4.8 By focusing on the business of an MSC scheme provider in this way, the definition will not catch those who provide services to a service company in the course of a different type of business, such as the provision of accountancy services. Nor for the same reason, will it include employment agencies because their business is not that of being an MSC scheme provider.
>
> 4.9 This definition will be more effective than the current draft because it focuses on the role of the MSC scheme provider as the distinguishing characteristic of the MSC and it will enable HMRC to focus on the small number of MSC scheme providers rather than looking at each service company separately."

29. The Government also responded to a wish expressed by employment agencies and end clients that the implementation of the measures should be delayed to allow those businesses to make logistical changes to ensure that they are not unwittingly caught by the legislation. The Government decided to delay the application of the debt transfer provisions until January 2008 in respect of some third parties although the debt transfer provisions as they relate to the MSC scheme provider and the directors and officeholders of the MSC would apply to debts arising from the date the legislation achieved Royal Assent: see [4.13].

30. HMRC also published guidance in the form of Frequently Asked Questions. These made it clear that accountants providing tax planning advice or accountancy services to clients who provide their services through service companies were not MSC providers even if they had a large customer base of such service companies. Similarly company secretaries and company formation agents were not MSC providers even if they did not fall within the express exemption at section 61B(3).

Discussion

31. There is nothing either in the wording of Chapter 9 ITEPA or in the external material on which the Appellants rely that supports their construction of the definition of an MSC provider in section 61B(1)(d). The business that the Government was trying to catch in the definition is precisely the business that Costelloe runs; its business is in promoting a situation in which the workers provide their services through a company instead of directly to the end client and it thereby promotes the use of companies to provide those services. Costelloe then provides the Gold Business Service to the MSC, thereby facilitating the use of the MSC by that individual in order for him or her to provide services to the end client. There is no doubt that this business is what the legislation is aimed at catching and in my judgment it succeeds in its aim.

32. Mr Goodfellow argues that if Parliament had intended to uncouple the promotion and facilitation provided by the putative MSC provider from the services of the worker supplied by the PSC, the wording of the provision could have been different. I do not consider that Parliament intended there to be no link between the promotion or facilitation by the MSC provider and the fact that the companies are PSCs. The link is that the business of the MSC provider is a business of promoting or facilitating the use of such companies. That link is made not only by the wording of section 61B(1)(d) but by the requirement that the putative MSC provider be involved with the MSC in one of the

ways set out in section 61B(2). A redundancy argument was accepted by the Upper Tribunal namely that subsection (2) would not be needed if the Appellants were correct, since an MSC provider which promotes or facilitates the services of the individual will also "influence or control" the provision of those services within the meaning of section 61B(2)(b). However I see some force in Mr Goodfellow's argument that the threshold in the latter provision is different from that in the construction of section 61B(1)(b) for which he argues. I would not decide the matter on the redundancy point alone.

33. What I glean from the 2006 Consultation and the 2007 Response is that the Government was concerned to define "MSC provider" in a way that focused on the role of that company in the overall arrangement and on its characteristic features. The Government recognised the need to strike a balance between attaining clarity and certainty on the one hand and ensuring that the measures could not easily be worked around by MSC providers wanting to avoid the liabilities that the Government wished to impose. That is why the draft legislation moved from a "control" based test to a test which first limits MSC providers to those whose business is that of promoting or facilitating MSCs and secondly stipulates that the business must be involved with the MSC by providing the kinds of services MSC providers typically offer, as listed in section 61B(2).

34. The Government was alive to the two boundaries Mr Goodfellow asserts that HMRC's construction risks blurring. The first boundary is between a worker who is effectively an employee of the end client (and so should properly be taxed on a PAYE basis) and a worker who is really in business on his own account. I accept that the fact that the consequence of being an MSC means that the individual worker is treated as an employee rather than as a self-employed person for tax and NIC purposes indicates that the provisions are aimed at workers whose underlying relationship with the client is an employment relationship. But the mischief that Chapter 9 was enacted to resolve was that Chapter 8 had proved ineffective because it set a test based on that very distinction. Section 49(1)(c) requires that HMRC show that the worker would have been treated as an employee of the end client and it was that which had hampered enforcement and allowed widespread tax avoidance to take place. It cannot be right to construe the definition in section 61B(1)(d) as somehow reinstating a test based on a distinction between employees and self-employed workers.

35. In any event I do not see how the construction proposed by the Appellants helps to exclude truly self-employed people from the ambit of the provisions. The Appellants' construction requires that the MSC provider promotes the services of the individual worker rather than just promoting the use of a company to provide those services. A self-employed business can benefit from promotion of its services as much as an employee can. I also accept the submission of Mr Nawbatt QC appearing for HMRC that any workers who are in business on their own account and who are concerned that they might accidentally fall within the definition can adapt their working arrangements to make sure that they are not caught. That is not an option available to a worker who is really an employee.

36. The second boundary is between a company which is in the business of promoting or facilitating MSCs to individuals and a company which provides professional or other support services to customers where those customers are personal service companies. The Appellants say that a construction which requires that the putative MSC provider promotes the services of the individual introduces this distinction. The difficulty with this submission is that the businesses that the Government clearly wanted to catch do not

typically promote the services of the individual workers. The 2006 Consultation and 2007 Response contain a detailed description of the distinguishing characteristics of an MSC provider, of the typical arrangements entered into by MSC providers, MSCs and end clients and the services provided by a typical MSC provider. Nowhere does that say that MSC providers typically promote the services of the individual worker. On the contrary, often the worker has already found the end client by the time the MSC idea is introduced. If anyone in the arrangements other than the worker promotes the worker's services it is the employment agency; it is not regarded by the Government as part of the MSC providers' role. In [2.18] the Government describes the operation of an MSC in practice; the first step is that the worker will agree to undertake an assignment for an agency. Then the worker will join the MSC. The final stage is that the MSC itself often does not move with the worker from one assignment to the next. Rather the scheme provider will place another worker in the vacated MSC because the MSC is not associated with the worker but with the provider.

37. The boundary which the Appellants says needs to be drawn is drawn by the provision because in order for a company to be an MSC provider, its business must be the business of promoting or facilitating the use of companies to provide the services of the individual. A company formation agent which sets up and sells companies to customers who will use them in all sorts of market sectors will not be caught even if some of those companies go on to be used as PSCs. That is because its business is not the business of promoting companies to be used as PSCs. An accountant or other support service will not be caught even if some of its customers are PSCs because although in a broad sense it might be regarded as facilitating those PSCs in the running of their business, that assistance is merely a consequence of the services it provides, it is not in the business of doing that. There is no need to introduce the additional requirement that the MSC provider promotes or facilitates the provision of the services. On the contrary, it would not be right to construe the test in section 61B in a way which excludes from the definition not only solicitors, accountants, company formation agents etc but also most if not all of the companies described in the 2006 Consultation as the businesses at which the measures are aimed.

38. The 2007 Response records that representatives of employment agencies and business supported the Government's proposed action: [4.12]. Any concerns they had about being accidentally caught were no doubt alleviated by HMRC's published answers to the FAQs about the kinds of businesses that HMRC regarded as falling outside the definition. Mr Goodfellow complains that the breadth of the definition means that HMRC in effect has a discretion as to which companies to pursue. I disagree; this situation falls well within the scope of the well-known passage in Lord Wilberforce's speech in *Vestey v Inland Revenue Commissioners* [1980] STC 10 where he referred to the duty of the commissioners to assess and levy taxes imposed by Parliament and that the commissioners "may, indeed should, act with administrative common sense".

39. The Appellants also sought to put before the court extracts from the debates in the Committee stage of the Finance Bill. Mr Goodfellow submitted that these were admissible applying the principles set out in the speech of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 398 and in *Pepper v Hart* [1993] AC 593. In my judgment the mischief at which the legislation is aimed and the dividing line which the legislation was seeking to draw between those who should and those who should not be caught is

very clearly explained and set out in the 2006 Consultation and the 2007 Response. There is nothing of additional assistance in the Parliamentary material we were shown.

40. I would therefore dismiss the appeal because Costelloe is, in my judgment, undoubtedly an MSC provider and the Appellants are undoubtedly MSCs.

Lord Justice Floyd

41. I agree.

Sir Ernest Ryder, Senior President of Tribunals

42. I also agree.