TC02410

Appeal number: TC/2010/08611

INCOME TAX – contract of employment or contract for services – no written terms – held contract of employment – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

YURDAER YETIS

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

First Respondents

- and -

STYLE SUPERIOR WINDOWS & CONSERVATORIES LIMITED

Second Respondent

TRIBUNAL: JUDGE GREG SINFIELD
MS SONIA GABLE

Sitting in public in Cambridge on 1 November 2012

The Appellant appeared in person

Ms Susanne Whitley and Mr Ian Birtles, officers of HM Revenue and Customs, for the First Respondents

Mr Paul Milton of Lovewell Blake LLP for the Second Respondent

DECISION

Introduction

1. Mr Yurdaer Yetis appeals against assessments issued by the Respondents ("HMRC") to Mr Yetis for 2005/6, 2006/7 and 2007/8 for a total amount of £8.777.10 unpaid tax plus interest. HMRC took the view that Mr Yetis was liable to pay the tax because when he worked for Style Superior Windows & Conservatories Limited ("Style"), he did so on a self-employed basis rather than as an employee. Mr Yetis did not challenge the amount of the assessments but simply maintained that he was an employee of Style during the years in question.

2. After the Notice of Appeal had been lodged, Mr Yetis applied to the Tribunal for a witness summons for Mr John Pitt, a director of Style, who had been Mr Yetis's manager during the time that Mr Yetis worked for Style. The Tribunal agreed to issue the witness summons. Because of their interest in the proceedings and because they took an opposing position to Mr Yetis, the Tribunal directed that Style be joined as the Second Respondent to the appeal brought by Mr Yetis.

3. For the reasons set out below, we have concluded that Mr Yetis was, at all relevant times, an employee of Style and, accordingly, the assessments issued to him for 2005/6, 2006/7 and 2007/8 were not validly issued.

Issue and burden of proof

4. The only issue in this appeal is whether, during the relevant period, Mr Yetis was an employee of Style.

5. The burden is on Mr Yetis to satisfy us that he was an employee of Style - see section 50(6) Taxes Management Act 1970 and *Brady v Group Lotus Car Companies plc* [1987] STC 635 in which Mustill LJ stated (at 642 - 645):

> "The starting point is an ordinary appeal before the [Tribunal]. Here, however unacceptable the idea may be to the ordinary member of the public, it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an assessment to impose on the taxpayer the burden of proving that it is wrong: *Haythornthwaite & Sons Ltd v Kelly* (*Inspector of Taxes*) (1927) 11 TC 657."

6. The question for us therefore is whether we are satisfied on the evidence we have heard and seen that Mr Yetis was an employee of Style during the relevant period. We make our factual findings and answer that question on the basis of the balance of probabilities.

Indicators of employment status

7. Although an individual's employment status can have a considerable impact on the amount of tax that he or she is liable to pay, the tax legislation tells us nothing about how to determine whether someone is employed or self-employed. The tests

for determining whether a person is an employee must be discerned from a long – and still growing – line of cases. The courts and tribunals have held that employment status is determined by considering a number of factors which viewed together allow the court or tribunal to decide whether a person is an employee or is self-employed. No particular test is decisive.

8. The starting point is the well-known threefold test set out by MacKenna J in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 1 All ER 433. MacKenna J set out his test (at page 439) as follows:

> "I must now consider what is meant by a contract of service. A contract of service exists if the following three conditions are fulfilled: (i) the servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

The factors considered by the courts in subsequent cases are either included in or are developments of MacKenna J's threefold test. We consider the factors in the following paragraphs before applying them to the facts of this case.

9. *Personal service and substitution.* As already noted, MacKenna J in *Ready Mixed Concrete* considered that an employee must be obliged to provide his own work and skill. He explained this points as follows at page 440:

> "The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands, or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be ..."

10. The requirement that services must be performed personally has been seen as a characteristic of the employment relationship, and if it is not present the relationship will not be one of employer/employee: see Peter Gibson LJ, giving the only judgement of the Court of Appeal in *Express and Echo Publications Ltd v Tanton* [1999] ICR 693 at [31]; and the right to send a substitute to perform services, whether or not it is exercised, is inconsistent with employment: see Peter Gibson LJ in *Express and Echo* at [25].

11. *Mutuality of obligation.* The counterpart to the employee's obligation to provide his labour is the employer's obligation to provide work or, in the absence of available work, to pay - see *Nethermere (St Neots) v. Taverna* [1984] IRLR 240, per Stephenson LJ at page 246. In *Propertycare Limited v Gower* [2004] All ER (D) 16 Jan, the Employment Appeal Tribunal observed, at 9(3), that "there must generally be an obligation on the employer to provide work and the employee to do the work".

12. *Control*. The "control test" is whether the individual was placed under the control and supervision of the person to whom the service was rendered as in a master and servant relationship. In *Ready Mixed Concrete*, MacKenna J said at page 440:

> "Control includes a part of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place when it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

13. *In business on own account.* In *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 Cooke J (at 183) expressed the view that an analysis of the extent and degree of control was not in itself decisive. The learned judge, in a well-known passage, said (at 185):

> "…control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor'. The fundamental question which has to be asked is whether the person who has engaged himself to perform the services in question is 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."

14. Cooke J said that among the factors relevant here are whether the service provider provides his own equipment or hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, whether and how far he has an opportunity of profiting from sound management in the performance of his task and whether the business he has is already established. In *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, which was a Privy Council case, Lord Griffiths endorsed the approach of Cooke J in *Market Investigations*, saying at 382 that "the matter had never been better put".

15. *Terms of agreement and intentions of the parties.* The third of the requirements that MacKenna J listed in *Ready Mixed Concrete* is essentially that the court must finally look to all the terms, or indeed the notable absence of terms, in order to judge whether these reinforce or undermine the initial conclusions reached by applying the first two tests. Peter Gibson LJ in *Express and Echo* described the approach to be adopted as follows (at page 697):

> "(1) The tribunal should establish what were the terms of the agreement between the parties. That is a question of fact.
>
> (2) The tribunal should then consider whether any of the terms of the contract are inherently inconsistent with the existence of a contract of employment. That is plainly a question of law, and although this court, as indeed the appeal tribunal before us, has no power to interfere with findings of fact (an appeal only lies on a point of law), if there were a term

> of the contract inherently inconsistent with a contract of employment and that has not been recognised by the tribunal's chairman, that would be a point of law on which this court, like the appeal tribunal before us, would be entitled to interfere with the conclusion of the chairman.
>
> (3) If there are no such inherently inconsistent terms the tribunal should determine whether the contract is a contract of service or a contract for services, having regard to all the terms. That is a mixed question of law and fact."

16. The mere fact that the parties have provided in an agreement that their status is either as an employee or as an independent contractor is not determinative As Henderson J said in *Dragonfly Consultancy Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 2013 (Ch), [2008] STC 3030 at [53]:

> "… statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them. It is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other: see *Ready Mixed Concrete* at 513B and *Massey v Crown Life Insurance Co* [1978] 1 WLR 676 (CA). In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties."

17. The terms of an agreement that, it seems to us, are particularly useful when considering whether the contract is one of employment or for services include the basis of payment and entitlement to paid holiday and other benefits.

18. *Integration*. Finally, we mention a factor discussed in some of the cases, namely the extent to which the worker is integrated into the employer, if it is a corporate body, or the employer's business where the employer is an individual or partnership. Lord Denning in *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101 considered that whether the individual is "part and parcel" of the organisation or is employed as part of the business and whose work is done as an integral part of the business was a relevant factor. Although clearly not conclusive, it seems to us that a person who is not integrated into a business is unlikely to be an employee.

Evidence and facts

19. We heard oral evidence from Mr Yetis. We also received a witness statement and heard oral evidence from Mr John Pitt, director of Style. In addition, the bundles contained a comprehensive collection of correspondence and other documentation generated by the enquiries which we have taken into account in this decision. On the basis of that evidence we find the facts to be as follows.

20. Style, as its full name suggests, is a supplier of doors, windows and conservatories. It is based in Brandon in Suffolk where it has a showroom. At that

time, Style had stands promoting their products in the Rookery Shopping Centre in Newmarket and in a Homebase store in Cambridge.

21. Mr Yetis' evidence was that, in May 2005, Style offered him a job. Mr Pitt said that Mr Yetis had approached the area sales manager, Mr Brian Taylor, for work. In any event there was no dispute that Mr Taylor engaged Mr Yetis to man the stand at Homebase in Cambridge. Later, Mr Yetis worked at the Rookery Shopping Centre in Newmarket.

22. There was no written agreement between Mr Yetis and Style or other document setting out the terms on which Mr Yetis worked for Style. Mr Yetis said that the terms were that he would receive a basic weekly wage plus commission. Mr Yetis said that he was paid £200 per week by Style every week except for three weeks taken as holiday in 2007. He said that he was paid for one week that he took as holiday in 2008. Mr Yetis received a weekly wage of £200 even in a week when there were no sales. He said that the difference between him and the other salesman was that they received commission of 20% and no basic whereas he received the basic wage of £200 per week plus a smaller commission. Although it had not been mentioned in his witness statement, Mr Pitt agreed that Mr Yetis was paid £200 per week. Mr Pitt said that, initially, Mr Yetis was paid out of Mr Taylor's commission and later he was paid directly by Style. Further evidence about the payments was provided by a bundle of "Commission Claim Summaries" produced by Lovewell Blake. The forms were weekly and covered the period 5 June 2005 to 20 March 2006. Each form showed a payment of £200. We find that, from 5 June 2005 until April 2009, Style paid Mr Yetis a weekly amount of £200 and, in most weeks, an additional amount in respect of commission.

23. Many of the Commission Claim Summaries forms, but not all, also showed a commission payment. Mr Yetis said that his commission started at 1% and increased to 2% towards the end of 2005. The commission was paid on the value of the customer's order excluding VAT. There was some confusion about the amount of commission paid to Mr Yetis. Some documents referred to 2% and some to 20%. Having heard the evidence of Mr Pitt, we find that the salesmen were paid 10% of the value, excluding VAT, of the customer's order and Mr Yetis was paid 20% of the salesmen's commission ie 2% of the VAT exclusive order value.

24. Around the time when he started to work for Style, Mr Yetis signed a statement saying that he was self-employed and confirming that he would be responsible for his tax and NICs. We were not shown the statement as it appears that neither Style nor Mr Yetis had a copy. Mr Yetis did not deny signing such a statement but said that the statement did not reflect the true position. He said that he was not self-employed and should not have been asked to sign it. Mr Pitt said that manufacturing and office staff worked for Style on an employed basis and all other workers, including the salesmen, were self-employed. Style provided the employees with payslips and P60s whereas the self-employed persons received Commission Claim Summaries. Mr Pitt said that everyone in the sales was a self-employed person on commission. Mr Pitt said that he thought that Mr Yetis was self-employed because he was not paid sick pay or holiday

pay. Mr Pitt said that Mr Yetis assured him on several occasions during the period when he worked for Style that his tax affairs were up to date.

25. Mr Yetis was engaged to generate leads. That is to say that Mr Yetis would take details of persons who were or might be interested in purchasing new doors, windows or conservatories from Style. Mr Yetis was not a salesman and would not agree terms for an order with persons who expressed interest in Style's products. Mr Yetis would pass on the details of any potential customers to the area manager and, after he had left, to Mr Pitt. Mr Yetis informed Mr Pitt on a daily basis how things were going. On some days, there were no leads and he would not contact Mr Pitt. Mr Pitt would distribute the leads to salesmen. Mr Pitt decided which particular salesman would be given a lead.

26. In June 2008, HMRC decided that Mr Yetis was self-employed. It appears that the enquiry was started because Lovewell Blake had provided information to HMRC, at their request, that Mr Yetis was earning commission of 20% and no salary.

27. At the hearing, HMRC initially sought to rely on a Form CWF1, which is used to notify HMRC that a person has become self-employed, signed by Mr Yetis. The date shown on the form was 2 December 2005 but it was accepted at the hearing that Mr Yetis had completed and submitted the form in December 2008. This was made clear by a letter dated 9 December 2008 in which an HMRC officer, Mr Smith, acknowledged receipt of the completed form. The letter also showed that the officer had sent Mr Yetis the form as part of the enquiry into his employment status. Mr Yetis said that he thought that Style had given HMRC information that he was self-employed and he felt under duress from HMRC to sign the form. We do not accept that HMRC put Mr Yetis under pressure to sign the form saying that he was self-employed but we accept that Mr Yetis was confused and felt under pressure to sign the form. We do not regard it as an admission by Mr Yetis that he was self-employed and in July 2009 he told HMRC that he had been an employee of Style.

28. Mr Yetis worked for Style until March 2009 when Mr Pitt told him that Style could no longer afford to pay him £200 per week. Mr Pitt told Mr Yetis that he could continue to work for Style if he worked on commission only. Mr Yetis worked for Style on commission only until October 2009. Mr Yetis said that he came to an arrangement with one of the salesmen whereby Mr Yetis continued to generate leads and passed them to that salesman, not to Mr Pitt or any of the other salesmen. The salesman paid Mr Yetis a commission of 5% of the order value, net of VAT, which Mr Yetis believed was half of the commission earned by that salesman. The 5% commission was paid direct to Mr Yetis by Style. Mr Yetis said that, as he was no longer receiving £200 per week, he was free to turn up at the stand any time he wanted and that is what happened.

29. Mr Yetis accepted that he was self-employed while working for Style between April and October 2009. He said that his income during that period from commission only was £2,850 whereas it had been in excess of £10,000 under the previous arrangement.

30. On 19 April 2010, there was a meeting between Mr Pitt, Mr Milton of Lovewell Blake and two officers of HMRC. Mr Pitt described Mr Yetis's job as a self-employed sales lead generator and said that he was a "one-off". In the meeting, Mr Milton said that Mr Yetis was paid expenses occasionally and mentioned £200. Mr Pitt confirmed that Mr Yetis did not submit expenses claims and said that Mr Yetis may have received an exceptional one-off payment if he had not been paid any commission for a while. In evidence at the hearing, Mr Pitt said that the payment was not for expenses incurred by Mr Yetis in the course of performing his duties but to enable him to live in weeks when he had not earned any commission. Mr Pitt accepted that Mr Yetis was paid £200 almost every week.

31. In the note of the meeting on 19 April 2010, Mr Pitt said that the work was not skilled but that Mr Yetis's performance could not be checked as it was not that type of work. Mr Pitt said he knew that Mr Yetis would talk to the customer in the correct manner. At the hearing, Mr Pitt confirmed that Mr Yetis was a good worker and that he trusted him. He said that Mr Yetis worked five days a week as a rule. Mr Pitt said that Mr Yetis did not have to ask permission to take time off and he did not insist that Mr Yetis fitted in with the company rota. Mr Yetis's evidence was that Mr Pitt asked him on several occasions to change his day off and notice of holiday was required.

32. Mr Pitt said that Mr Yetis was not free to engage a helper, even if he paid for the helper out of his own money, and he could not provide a replacement if he was unable to carry out the work himself. If Mr Yetis could not attend then Mr Pitt said that one of the salesmen would man the stand or it would be unmanned. Mr Pitt told the HMRC officers that personal service was required from Mr Yetis. When asked if he would have been happy if Mr Yetis had been working for anyone else at the same time, Mr Pitt told the officers that he would not have been happy with that situation. At the hearing, Mr Pitt confirmed that he would have been unhappy if Mr Yetis had worked for another company but said that he could not have stopped him doing so.

Approach to the issue

33. The courts have identified various factors, which we have set out above, that should be considered in any analysis of this issue. It is necessary to consider all aspects of the relationship between the worker and the putative employer and, having given such weight to the factors as seems appropriate in the circumstances of the case, determine whether the person was carrying on business on his own account. It is important to bear in mind that the particular factors may have different weight depending on the nature of the work being considered (for example, the issue of control carries less weight in relation to a highly skilled or senior position than it would for an unskilled worker.)

34. In *Hall v Lorimer* [1992] STC 599 Mummery J said at page 612:

> "In order to decide whether a person carries on business on his own account, it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on the checklist to see whether they are present in, or absent from, a given

> situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."

35. Mummery J's comments were approved on appeal by Nolan LJ, see [1994] STC 23 at 29, who said:

> "Mr Goldsmith invited us to adopt the same approach as that of Lord Griffiths in applying the test or indicia set out by Cooke J [in *Market Investigations*]. That is an invitation which I view with some reserve. In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another."

36. Nolan LJ continued by expressing approval of the comments of Vinelott J in *Walls v Sinnett* [1986] STC 236 which had also been cited by Mummery J. Vinelott J said at page 245:

> "It is in my judgment, quite impossible in the field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are in common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case."

37. In our view these comments set out the correct approach to be adopted by this Tribunal in determining the question whether Mr Yetis was an employee of Style or whether he was self-employed. The detailed nature of the working relationship between the parties and all the surrounding circumstances must be examined. The various factors mentioned above must then be applied to the facts, with the Tribunal using its judgment to evaluate the weight or relevance of the factors involved and taking care to look at the picture as a whole. In the end, there is no one test that can determine every case. The process, once the facts and circumstances are determined, is one of evaluation and where mechanical application of the guidance contained in the many decided cases on this topic is to be avoided.

Discussion

38. We now consider the various indicators of employment status set out in the authorities and how they relate to this case. Having examined the indicators individually, we then consider them as a whole and stand back and evaluate the

overall picture. As there was no written agreement setting out the terms on which Mr yetis was engaged to work for Style, we must infer the terms of the contract from the evidence as to what the parties agreed and what actually happened in practice.

(1) *Personal service/right to engage substitutes.* The evidence was that Mr Yetis was not allowed to provide a replacement if he was unable to carry out the work himself and could not engage a helper, even if he paid for the helper out of his own money. This indicates that he was an employee rather than self-employed.

(2) *Mutuality of obligation.* This means that not only must the employee be under an obligation to carry out the work but the employer must be obliged to provide work if available. In this case, the nature of the work means that Style only had to provide the opportunity for Mr Yetis to generate leads. In reality, all that Style was required to do was provide a stand, with some promotional literature, and a place to put it. Style provided this at the Homebase store in Cambridge and, later, the Rookery Shopping Centre in Newmarket. We do not regard this factor as a particularly strong indicator of Mr Yetis's employment status as Style provided the same facilities for use by the self-employed salesmen if Mr Yetis were not able to attend.

(3) *Control/whether in business on own account.* The issue of control must be assessed in the light of the nature of the work done. It is clear from Mr Pitt's evidence that Mr Yetis's work was carried out by him without supervision but that Style decided where the stand would be and, therefore, where Mr Yetis would work. Whether Mr Yetis was in business on his own account seems to us to be more relevant to the facts of this case. While it might be said that Mr Yetis had an opportunity to profit by generating more leads, we consider that Mr Yetis was never at any risk of making a financial loss. As we have found, he always received £200 per week (apart from three weeks when he was on holiday in 2007) even when he had not generated any leads. Another factor in determining whether a person is in business on his own account is financial responsibility. Mr Yetis did not provide his own equipment and was not responsible for any investment (the costs of the stand etc were borne by Style). We consider that the evidence indicates that Mr Yetis was not in business on his own account.

(4) Intention of parties/integration. In the absence of a written agreement, the intention of the parties can only be inferred from the surrounding circumstances. The arrangements for the payment of remuneration do not determine a person's employment status but we consider that they can indicate how the parties view their relationship. Mr Yetis was paid £200 per week every week which was unlike the salesmen and more like the employees who were paid a regular salary. Unlike the employees, however, Mr Yetis did not receive any payslips or P60s and was not paid when he went away on holiday (apart possibly from one week, which we do not regard as conclusive). Another pointer to how the parties view their relationship is the hours spent in the workplace. Mr Pitt said that Mr Yetis usually worked five days a week. Mr Yetis said that, from March 2009 when

he started to work on commission only, he only manned the stand when he wanted to do so which was not all the time. We accept the submission of HMRC that payment of a regular weekly amount does not necessarily indicate an employer/employee relationship. HMRC gave the example of such payments in the construction industry. Our view is that there is a difference between regular payments in the nature of stage payments, as in the construction industry example, and the payments in this case. It seems to us that the payments were a basic amount to enable Mr Yetis to live but which he could enhance by earning commission on leads that he generated. Our view is that the payment arrangements for Mr Yetis were much closer, though not identical, to those of Style's employees then to the commission only remuneration for the salesmen. Our view is that the regular weekly minimum payment indicates that the Style and Mr Yetis regarded Mr Yetis as an employee.

39. Looking at whole picture, we consider that Mr Yetis was, to use Mr Pitt's term, a "one-off" in relation to Style. Mr Yetis was not one of the salesmen, who were agreed by Style and HMRC to be self-employed, but he was not regarded by Style as one of its employees. The salesmen were paid on commission only and Mr Yetis also received commission although at a much lower rate than the salesmen. The employees received a regular salary as did Mr Yetis but the employees received benefits in addition that Mr Yetis did not receive. In relation to his working environment, Mr Yetis was also something of a hybrid. He was not based at Style's premises and was largely unsupervised, which was similar to the salesmen, but he worked at a place specified by Styles for five days a week in the same way as the employees. On balance, we conclude that, taking all the factors into account and looking at the overall picture, Mr Yetis was an employee of Style between May 2005 and March 2009.

Costs

40. As stated above, Mr Pitt was summoned to appear as a witness on the application of Mr Yetis. Having issued the witness summons, the tribunal also directed that Style should be a respondent in the appeal so that it might be represented, if it wished to be, in order to safeguard its interests and have a voice in the proceedings. Rule 16(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") provides that a witness summons must:

> "(b) where the person is not a party, make provision for the person's necessary expenses of attendance to be paid and state who is to pay them."

The witness summons stated that Mr Yetis would pay Mr Pitt's necessary expenses of attending the hearing. At the hearing, Mr Yetis submitted that he should not be required to pay Mr Pitt's expenses because, as a result of the Tribunal's direction that Style should be a respondent, Mr Pitt was a party to the proceedings. We rejected that submission on the ground that Mr Pitt was summoned to give evidence as an individual and he was not a party to the appeal. Style was a party to the appeal, as Second Respondent but, even though he was a director of Style, Mr Pitt was not a party.

41. At the hearing, Mr Yetis also indicated that he wished to apply for his costs to be paid by HMRC. This appeal had not been allocated to the complex category. We indicated to Mr Yetis that, under Rule 10(1) of the FTT Rules, costs can only be awarded, in cases other than complex category cases, if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.

42. In *G Wilson (Glaziers) Ltd v HMRC* [2012] UKFTT 387 (TC), the successful appellant sought costs on the grounds that HMRC had acted unreasonably in imposing default surcharges which were the subject of the appeal. The Tribunal held that, as HMRC cannot bring appeal proceedings, it followed that it is only HMRC's conduct after commencement of the appeal, ie after the notice of appeal was served, that is relevant to the question of whether they have behaved unreasonably. We agree with the Tribunal in *G Wilson (Glaziers)*. Accordingly, we can only award costs in this case if we consider that HMRC have acted unreasonably in defending or conducting the appeal after it was brought by Mr Yetis. Even if we consider that HMRC has behaved unreasonably, the award of any costs is subject to the discretion of the Tribunal (see section 29 of the Tribunals, Courts and Enforcement Act 2007).

43. Rule 10(3) of the FTT Rules provides that an application for costs must be in writing and include a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to assess the claim, if it decides to do so. The application must be sent to the Tribunal and the person against whom costs are claimed. Rule 10(4) of the FTT Rules provides that an application for costs may not be made later than 28 days after the date on which the Tribunal sends the decision. As Mr Yetis had not prepared a written application and schedule of costs and HMRC did not have notice that such an application would be made, we indicated that any application for costs should be made in writing after the decision has been issued.

Decision

44. For the reasons given above, our decision is that Mr Yetis was an employee of Style at the relevant times. It follows that the assessments issued to him for 2005/6, 2006/7 and 2007/8 were not validly issued. The appeal is allowed.

45. Any application for costs must be made in writing within 28 days of the date of release of this decision.

Rights of appeal

46. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's decision has a right to apply for permission to appeal against it pursuant to rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this Decision Notice.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 8 December 2012