Madeley & Anor v Revenue & Customs [2006] UKSPC SPC00547 (08 June 2006)

SPC00547

INCOME TAX - Deductibility of agents fees incurred by TV presenters - whether allowable under s. 201A TA 88 - whether allowable or allowable in part as an expense necessarily incurred in the performance of the duties under Schedule E - statutory construction - the legislative context in which a provision was introduced - Pepper v. Hart - Appeal allowed

THE SPECIAL COMMISSIONERS
RICHARD H MADELEY

JUDITH ANNE FINNIGAN Appellants

o **and –**

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS
Respondents
Special Commissioner: HOWARD M NOWLAN

Sitting in private in London on 10, 11 and 12 May 2006

Patrick Way and Aparna Nathan, counsel for the Appellants

Raymond Hill, counsel for the Respondents

DECISION

INTRODUCTION

1. This was an appeal by Richard Madeley and his wife, Judith Finnigan ("Richard and Judy"), the well-known television presenters who presented ITV's morning magazine programme "This Morning" from 1993 until 2001, and who now present the "Richard and Judy" show in the afternoon on Channel 4.

2. Richard and Judy accept that they were taxed, and rightly taxed as the law was then understood, under Schedule E in respect of their employment with Granada Television Limited ("Granada") in all tax years from 1993/94 to 2001/02. In all those years, Richard and Judy claimed to deduct the fees that they paid to their agent for various services rendered by the agent, the claims being under s. 201A Taxes Act 1988 and under the general and strict rule for expenses allowable under Schedule E contained in s. 198 Taxes Act 1988. In all years HM Commissioners for Revenue & Customs ("HMRC") disallowed those claims under both provisions. For some reason which was not explained to me and which is not now material there was no appeal in relation to the disallowance in the year 1996/97. The appeal related however to all other years.

3. Richard and Judy each undertook certain other engagements and made various other programmes. In relation to their other assignments, they were both taxed under

Schedule D and agents' fees (charged by the same agent) were allowed under that Schedule. No issue related to these other activities and to how they were taxed.

4. In relation to their Granada employment and their relationship with their agent, the facts of both appeals were essentially identical.

5. The appeals listed the agents' fees paid by both Richard and Judy in all relevant years. There is no need in this decision to repeat these facts, since it is sufficient to say that the aggregate amount claimed as a deduction by the two Appellants for all the years under appeal is an amount that can fairly be described as "very substantial".

THE LAW

6. It will be clearer to summarise the relevant legal provisions first, before summarising the facts and the evidence. This is principally to illustrate that the appeals under the two different provisions are governed by different aspects of the facts.

7. The appeal in relation to the claim under s. 201A is entirely governed by the simple issue of whether, as performers, Richard and Judy are aptly described as "theatrical artists". This point of interpretation is rendered more complex by various indicators as to which performers are accepted to be "theatrical artists", but the claim under s.201A is nevertheless entirely governed by this point of interpretation. The nature of the services rendered by the agent is completely irrelevant. By contrast, the claim for a deduction under s.198 is governed by the nature of the services rendered by the agent, and the question of whether the costs of any of them pass the test of being "necessarily incurred in the performance of their duties" by the taxpayers. Nothing would be dependent on whether Richard and Judy might have been actors, presenters or for instance TV newsreaders. The services paid for would have to have been used "necessarily in the performance of their duties", but beyond that nothing would depend on a fair description of whether they were "theatrical artists" or not.

Employment Agency law

7. It is well known that employment agencies who place people in new jobs almost invariably charge their fees against the company or organisation engaging the new employee, rather than against the employee personally. What is not so well known is that it is actually unlawful under the Employment Agencies Act 1973 for

> "a person carrying on an employment agency *(to)* request or directly or indirectly receive any fee from any person for providing services (whether by the provision of information or otherwise) for the purpose of finding him employment or seeking to find him employment".

8. There are exceptions to the above prohibition in that employment agencies are allowed (but of course not necessarily compelled) to charge fees against the work-seeker where employment is found or sought "in any of the occupations listed in Schedule 3" to Regulations made under the above Act. The relevant Schedule lists the following occupations:-

"OCCUPATIONS IN RESPECT OF WHICH EMPLOYMENT AGENCIES MAY CHARGE FEES TO WORK-SEEKERS

Actor, musician, singer, dancer, or other performer; (*my emphasis)*

Composer, writer, artist, director, production manager, lighting cameraman, camera operator, make-up artist, film editor, action arranger or co-ordinator, stunt arranger, costume or production designer, recording engineer, property master, film continuity person, sound mixer, photographer, stage manager, producer, choreographer, theatre designer;

Photographic or fashion model;

Professional sports person."

The rationale behind the general prohibition on agents charging fees against work-seekers, and behind the list of excepted occupations is not particularly material but it seems reasonable to suppose that the list of exceptions largely covers activities where the work-seeker would often have a continuing relationship with an agent, so that the agent might be finding numerous engagements for the worker, and indeed sometimes roles that might be unappealing to another organisation engaging the services of the worker. Accordingly it would be unrealistic for the agent to have to charge fees against each particular supplier of work, and far more appropriate for the contractual relationship, and the liability for fees, to remain with the individual work-seeker. By contrast in the case of an employment agency finding new jobs for people in all the non-excepted occupations, whatever the policy behind the prohibition on charges being levied against the work-seeker, there is nothing particularly incongruous in the new employer being charged the fee.

Outline tax assumptions

9. So far as taxation treatment is concerned, four points are clear.

First, new employers that pay fees to employment agencies for finding new workers will almost invariably be entitled to a Schedule D deduction for the fees, or to a management expenses deduction.

Secondly there appears to be no question of employees being charged to tax under Schedule E on the basis that they are receiving a taxable benefit in kind when an employment agency sends its bill to the new employer.

Thirdly, insofar as work-seekers in the list contained in Schedule 3 quoted above are taxable under Schedule, and are themselves charged a fee for finding work, those fees are almost invariably going to be tax deductible.

Fourthly, if work-seekers contained in the list in Schedule 3 incurred personal liability for a fee in the course of obtaining a Schedule E employment, the fee would almost certainly be non-deductible under s. 198 Taxes Act. There might be room for debate with fees paid to some agents for broader services, but if the fee was specifically paid in return for the individual obtaining the job, it would manifestly not be an expense

incurred "in the performance of the duties". It would be an expense of getting the job and not an expense incurred in performing the job.

I will refer later to some observations on the above four points but the four points themselves seem to me to be fairly uncontentious.

The Schedule E tax deduction for agents' fees incurred by certain entertainers

10. In 1990, s.201A was inserted into the Taxes Act. This section provides as follows:-

> 201A **Expenses of entertainers.**
>
> (1) Where emoluments of an employment to which this section applies fall to be charged to tax for a year of assessment for which this section applies, there may be deducted from the emoluments of employment to be charged to tax for the year-
>
> (a) fees falling within subsection (2) or (2A) below, and
>
> (b) any additional amount paid by the employee in respect of value added tax charged by reference to those fees.
>
> (2) Fees fall within this subsection if:-
>
> (a) they are paid by the employee to another person,
>
> (b) they are paid under a contract made between the employee, and the other person, who agrees under the contract to act as an agent of the employee in connection with the employment,
>
> (c) at each time any of the fees are paid the other person carries on an employment agency with a view to profit and holds a current licence for the agency,
>
> (d) they are calculated as a percentage of the emoluments of the employment or as a percentage of part of those emoluments, and
>
> (e) they are defrayed out of the emoluments of the employment falling to be charged to tax for the year concerned.
>
> (2A) (*fees charged by co-operative societies)*
>
> (3) For the purposes of subsection (2) above:-
>
> (a) "employment agency" means an employment agency within the meaning given by section 13(2) of the Employment Agencies Act 1973, and
>
> (b) a person holds a current licence for an employment agency if he holds a current licence under that Act authorising him to carry on the agency.
>
> (3A) *(ancillary provision in relation to co-operative societies)*
>
> (4) The amount which may be deducted by virtue of this section shall not exceed 17.5 per cent of the emoluments of the employment falling to be charged to tax for the year concerned.
>
> (4A) *(irrelevant)*

(5**) This section applies to employment as an actor, singer, musician, dancer or theatrical artist.** *(my emphasis)*

(6) This section applies for the year 1990-91 and subsequent years of assessment."

It was common ground between the parties that all of the conditions for relief for the agent's fees charged against Richard and Judy were satisfied in this case, save for the dispute on the one critical point of whether the employment by Granada of Richard and Judy was "employment as a theatrical artist".

The general Schedule E rule for the deduction of employee's expenses

11. Whilst the wording of s.198 Taxes Act was changed in a presently irrelevant manner in 1999, the relevant words of the original version of s.198 contained the essential wording for all relevant years in dispute and provided that:-

> "If the holder of an office or employment is necessarily obliged to incur and defray out of the emoluments of that office or employment the expenses of travelling in the performance of the duties of the office or employment, … or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed".

THE FACTS AND THE EVIDENCE

12. Evidence was given before me by both Richard and Judy; by their agent in all of the tax years in contention, namely Anne Sweetbaum of Arlington Enterprises Limited, and by Russ Lindsay of James Grant Media Group Limited, their present agent.

13. I was also shown a considerable amount of material, in the form of articles and reviews etc which commented on the careers of Richard and Judy. I was also given two videos. One of these was a sample programme chosen on a random basis by HMRC; the other was a short video showing four particular skits that Richard and Judy had performed at different times on the "This Morning" programme.

Richard's evidence

14. Richard's career had started in local journalism. In 1982 he was engaged by Yorkshire TV as a newscaster. He was then engaged by Granada on a news programme called Granada Reports that had 3 reporter/presenters.

15. In October 1988 Granada was planning a new programme in which the two intended presenters were to be Richard and Judy. Richard described that he felt that there was an instant chemistry between himself and Judy, and he felt confident that they could make the new planned show a success. From the start the intention of Granada had been to produce an entertaining magazine programme, to be called "This Morning" that would be quite novel at the time. Whilst it was intended to be informative, its predominant aim from the start was to entertain. Richard and Judy were told that if their presentation bored the audience, they would be "off the air by Christmas".

16. Prior to trying to describe the show in my own words, largely gleaned from having watched the videos that I was given, I will summarise other evidence that was given, much of it being of only marginal relevance.

17. Richard had various contracts with Granada over the years that the programme was broadcast. They were initially for a short term, then for one-year periods, and as both parties, and Judy, became more confident of the long lasting success of the "This Morning" programme, the contracts were for two-year periods. The key clause of the contracts usually described the role that Richard and Judy (in her separate contract) were to play as the role of "main presenter and interviewer". The contracts were not in the standard form of contracts prepared by the Equity union for actors represented by that union. I understand that Equity contracts are generally referred to as being on "Esher standard terms". These contracts were not in that form.

18. Neither Richard nor Judy had used the services of an agent by the time the "This Morning" programme was evolved. Both were separately employed by Granada when they agreed to give the new programme a try in about October 1988 and accordingly, should there be any relevance in this, they did not "get their employment" through the services of an agent. They engaged an agent on the advice of one of the senior executives of Granada, who said that they were reaching the point in their careers when they would need an agent, and it was this executive of Granada that recommended, and introduced them to, Anne Sweetbaum of Arlington Enterprises Limited. Without at this stage listing the services that Anne Sweetbaum rendered, one of the main reasons why the executive recommended that Richard and Judy employ an agent was so as to eliminate the personal relationship that there was between Richard and Judy and the various Granada executives when negotiating the terms of their contracts, and their remuneration, and to eliminate the intrusion of their personalities from discussions and negotiations when (as would be bound to occur) things occasionally went wrong.

19. The format of the programme apparently changed over time as Richard and Judy became more confident in their roles. The programme was however never intended to be anything like a news programme or a standard "chat show" where one interviewer brings on and interviews say three people. The fact that it was not a news programme was well illustrated by the fact that in its total running time from 10.10 a.m. for an hour and a half or two hours, there was at one point a one minute news-slot, presented by someone else.

20. The programme was moved early in 1989 from the "news and current affairs" division of Granada to the "entertainment" division. In this context it is worth mentioning that much later in the year 2000 the programmes nominated in one category of awards at the National Television Awards at the Albert hall were "This Morning" and the Australian soap "Neighbours". "This Morning" is well described as a magazine programme. Its key attribute was always the informal presentation style adopted by Richard and Judy. Regardless of the date when they actually married, they always affected the style of a married couple, sitting or (more often in Richard's case) walking around and fooling around in an informally styled studio. The show was always broadcast live with both Richard and Judy ad-libbing at all times. There was only a skeleton script for the programme, outlining the order in which various items were to be featured. There was for instance a regular cookery slot, a fashion slot,

travel items, interviews with celebrity guests, viewer phone-ins, competitions with members of the public, a session of jokes and anecdotes, a "gossip column" feature, and a daily cash competition or quiz entitled "Midday Money". Very relevantly there were also periodic pre-recorded sketches or skits. The random programme that I was shown was apparently broadcast on the day that Judy returned to the programme after being off for a time and in hospital. Accordingly the programme started, in the style of the programme "Casualty" with Judy being wheeled in on a hospital trolley, surrounded by people in pale green hospital kit, and with sirens blaring.

21. Pre-recorded skits were apparently shown about 2 to 3 times a week, with 5 programmes being broadcast on week-days. The slots were not particularly long but ran for approximately 2 to 3 minutes. Although 2 to 3 minutes in roughly every other programme sounds to constitute only a very minor proportion of the running time of the programmes, two things are worth emphasising.

22. Firstly, the skits were very much in the style of the rest of the programme. When watching a programme it was not as if the presenters were giving a straight performance, which was suddenly and occasionally interrupted by a pre-recorded skit. The atmosphere of the programme was always light-hearted, and often jokey. For instance Richard and Judy would often intervene in a humorous way in the cookery slot. Each would put forward their own, plainly personal and sometimes provocative, opinions. Continuity slots would often contain light-hearted banter so that the pre-recorded skits seemed to be a seamless part of the whole presentation rather than an interlude out of character with the rest of the programme.

23. Secondly, the skits were very professional. It is unusual in a decision in a tax appeal to be having to comment on and criticise people's performances but having been shown one video which contained several highlight skits, I should describe them shortly. One showed Richard and Judy swapping roles and of course clothes. One showed Richard playing or at least "air-playing" a guitar and seemingly singing (quite well!) in a rock band. Another showed Judy having a discussing with Ali-G in fact played by Richard. The fourth that I was shown was particularly good. Apparently shown in the early days of Chris Tarrant's "Who wants to be a millionaire?" programme, it shows Richard and Judy at breakfast, with Richard irritating Judy by pretending to be Chris Tarrant as she gradually assembles what she wants to eat for breakfast. Riddled with lines such as whether "Marmalade" is her final answer, and with the proposition that he will give her one piece of toast but would really prefer to give her two, the skit is again very funny, and entirely in line with the character that the two performers portray generally in the programme. As a skit, it is not dissimilar to the Two Ronnies' sketch on Mastermind, where each answer is the answer to the next question. In other words it is highly professional.

24. Richard and Judy's typical day was described to me and this is worth repeating because it has some bearing on the appeal. Before it was moved to London, the "This Morning" programme was filmed in an old warehouse/studio in the Liverpool dock area. Accordingly Richard and Judy left their home in Manchester very early in the morning and drove to Liverpool. There would then be a couple of hours covered by rehearsing for the programme which started at 10.10 a.m. or 10.30, and by make-up and hair-styling etc. The programme itself had a skeleton script but this was designed to enable Richard and Judy to ad-lib at all times. The programme was always

broadcast live, and therefore when ad-libbing, and filling in gaps if interviewees were un-forthcoming etc, and chipping in on the cooking, fashion and other slots, the amount of confidence and skill required to deliver the programme professionally was obviously considerable. Indeed if the question in this appeal was whether Richard and Judy demonstrated more skill and confidence in their performance than an actor who acts well and remembers his lines or a comedian who tells scripted jokes, some of which are funny and others of which are not, the decision would be easier than it actually is.

25. Following the end of the programme there was a working lunch to go through the format for the following day's show. Richard and Judy asserted, and it was not disputed, that they provided significant editorial and creative input into the style, structure and content of the show. This was almost inevitably so since they would always be ad-libbing on the show so that the content would have to accord with their own style. There were also doubtless professional producers, but I certainly accepted that they performed this role as well. After lunch there would be rehearsals for the following day's show.

26. In the course of cross-examination Richard was asked whether he had ever described himself as a journalist when being interviewed either for a programme or magazine article. He accepted that he had initially been a journalist and he accepted that he still operated to an extent like a journalist in the respect that when ad-libbing on a topical programme he needed to be well-informed about current affairs and generally well-informed. He accordingly accepted that he regularly read newspapers to keep fully up-to-date so as to be well-informed but nevertheless did not consider that this coloured his performance and moved it from the entertainment sphere to the sphere of news and current affairs.

27. One final point that I should mention that was made by Richard but indeed by other witnesses as well was that whenever Richard and Judy were unable to present the programme by virtue of being on holiday or otherwise unavailable, the audience ratings generally dropped. I think it fair to add that it was self-evident that the very great popularity of the programme was largely attributable to their personal contributions. It was certainly not the case that they were just providing passive links and continuity between each separate item on the shows, with the audience being attracted principally by those various items. Their personalities and style put a personal stamp on the programme, which goes to explain why the Channel 4 programme that was broadcast after the dates material to this appeal was called "Richard and Judy".

Judy's evidence

28. The evidence given shortly by Judy was very similar to Richard's evidence. Her background had been more that of researcher than journalist but she became a reporter/presenter for Granada, and then became the initial co-presenter with Richard when the "This Morning" programme went on air.

29. Whilst it was not particularly revealed by the evidence, it is fair to comment that part of the charm and appeal of the "This Morning" programme was that Judy would

somewhat play the role of the level-headed wife who would periodically restrain her husband when he came out with somewhat outlandish opinions and comments.

30. It is worth recording that in their initial description of their professions, both Richard and Judy described themselves as "television entertainers".

Anne Sweetbaum's evidence

31. As I remarked in paragraphs 5 and 6, the evidence that Anne Sweetbaum gave is of little significance to the primary claim for tax relief under s.201A. It is of relevance to the alternative claim for relief under s.198 however, and in that context the important point is to list the various different services that she performed. In due course I then have to decide whether any or all of those services satisfy the strict test in s.198.

32. Whilst the prime function performed by the sort of agent generally contemplated by the employment agency legislation referred to in paragraphs 7 and 8 above is that of obtaining a job for a "work-seeker", and while I can well imagine that this is ordinarily one of Anne Sweetbaum's main functions, I accept that in this case, both Richard and Judy were already working for Granada when they were offered engagements to co-present the "This Morning" programme, and Anne Sweetbaum was not instrumental in getting them their jobs.

33. She was however unquestionably engaged in negotiating their contracts and their remuneration and she said that whenever their contracts came up for renewal, she would be engaged over a period of about three months in constant negotiations with the Granada executives and lawyers. There were apparently regular meetings either in Manchester of London, and countless telephone negotiations.

34. Aside from contract negotiation, Anne Sweetbaum was often in daily contact with her clients about other matters. Although she represented many other people in show business, she generally had the "This Morning" programme running in her office, and would be consulted by Richard and Judy about her reaction to particular items on the show. She advised in relation to their respective presentations of other programmes, though since she was separately remunerated for these activities, and Richard and Judy were given Schedule D deductions for their fees when actually performing in other shows and being paid, this aspect of her role should probably be ignored.

35. She was often their spokesperson in discussions with journalists or the media either about something on the show that had attracted media comment or interest, and about matters in their private lives that might attract, or that had attracted, similar attention. She was generally responsible for keeping their diaries, for booking them for charity events, and occasions such as opening fetes, BAFTA award ceremonies and other such bookings.

36. She negotiated grievances that arose in the implementation of their contracts with Granada. For instance there was an occasion when the producers had wanted to insert someone else as a co-producer at very short notice and Anne Sweetbaum was phoned in the middle of the night to sort out the resultant dispute, which she did.

37. She attended to other matters that Granada had been slow to provide. The Liverpool warehouse/studio had no toilet facilities and no air conditioning and when Richard and Judy asked for these to be provided, nothing much happened. Thus Anne Sweetbaum had to perform the role of being rather more forcible and the facilities were provided.

38. At some date, production of the show was moved from Liverpool to London so that Richard and Judy needed to move house to London. Anne Sweetbaum assisted them in finding a house because they naturally had very little available time to go house-hunting themselves.

39. In the course of her cross-examination Anne Sweetbaum said that when she provided feedback to Richard and Judy this would on some occasions relate just to particular items in programmes, but that in giving her opinions she would often be considering both the following programmes and their more general reputations and careers. She accepted that she was more interested in promoting and protecting "their brand" and their careers in general, rather than in simply providing input into the next programme even if such input related to some earlier item on a programme that had attracted comment.

40. Also in the course of cross-examination, Anne Sweetbaum admitted that she had absolutely "no editorial input into the show".

41. One other remark that she made that I should record is that she had never heard of another occasion of a client being denied tax relief for her fees.

Russ Lindsay's evidence

42. The final witness to give evidence was Russ Lindsay of James Grant Media Group Limited. His evidence was less directly relevant because he had only been Richard and Judy's manager for the last two years (i.e. not years covered by the appeal). He did however say that he had been a friend and commercial adviser to Richard and Judy for the past seven years. It was also fairly clear that his evidence as to the activities that he now performed was very similar to the evidence that Anne Sweetbaum had given. On the basis that Anne Sweetbaum had in general terms said much the same thing, it is worth quoting two passages from Russ Lindsay's witness statement since they describe two points very well.

43. The two passages are as follows:-

> "At one end of the scale, I negotiate their contracts of engagement with third parties. At the other end of the scale, I am closely involved in the performance of their duties. For example, part of the service I provide is to provide feedback on their show. I either watch the Appellants' show while it is being broadcast or I record it and watch it later. The Appellants and I then discuss several aspects of their performance e.g. their manner of questioning a particular guest on the show, the manner in which they dealt with a particular caller during the live phone-in part of the show, or the manner in which they covered a particular topic in the discussion part of the show".

"There are also occasions when I have had to provide on-the-spot advice and guidance to the Appellants while they are on air. For instance, it is sometimes the case that the production team on the show want the Appellants to question a guest aggressively on a particular issue. If I consider this course of action to be detrimental to their public image or damaging to their career prospects, I advise them there and then not to pursue that line of questioning. The production team on the show is interested in ensuring that a particular show gets good viewer ratings; they are not concerned about the long-term impact of a particular line of questioning on the image and prospects of the Appellants. Put at its worst, although "grilling" a particular guest might raise audience interest in the short term, it could damage the Appellants' images as performers and ruin their employment prospects in the long term. It is part of my duty to ensure that the Appellants' "brand" is untarnished. In order to perform this aspect of my duties, it is necessary for me to be on hand or otherwise available at a moment's notice".

THE CONTENTIONS ON BEHALF OF THE APPELLANTS

44. The following contentions were advanced on behalf of the Appellants.

(1) Granada's "This Morning" programme was a major part of Granada's entertainment department, not their factual department.

(2) At the heart of the programme was a performance by Richard and Judy which people enjoyed watching in the same way as they enjoy watching any theatrical event on television.

(3) In the expression "theatrical artist", "theatrical" must mean "in the manner of theatre", and not necessarily just a performance at a theatre, and "artist" cannot simply mean "actor" which has already been listed in s. 201A (5). "Artist" must mean "performer".

(4) In the Canadian case of *Cheek v. R*, 4 ITLR 652, a famous radio commentator on baseball games was held not to be a "radio artist" for the purposes of the application of one of the provisions of the Canada/USA Double Tax treaty notwithstanding that his commentary had to fill in the numerous gaps between the 18 minutes in a game when something exciting happened on the field and the 2 to 3 hours of the whole broadcast. He was nevertheless a commentator, with people tuning into the radio programme to listen to the report of the game, and not to his artistry. To be a "radio artist" you had to be the performer who people tuned in to hear.

This was accordingly the distinction between newsreaders and producers of current affairs programmes and entertainers like Richard and Judy. The former were passive and their presentation was not meant to distract people from listening to the news or the debate. Richard and Judy were by contrast the entertainment.

(5) It would be absurd if s.201A were not to apply to Richard and Judy, so that it is permissible to refer to Ministerial statements made in 1990 when s. 201A was inserted into the Taxes Act. Those Ministerial statements indicate that the expression "theatrical artist" is to be construed widely and that it is wide enough to encompass "magicians, choreographers, assistant designers and

directors who are regarded as part of the acting profession and frequently take an acting role in productions", together with a stand-up comic who is not engaged in a theatre but on the club circuit as an entertainer. Effectively the Minister's assurances were that the relief should extend to "any performers" in relation to whom the Employment Agencies Act prohibition is overridden by Schedule 3.

(6) The section heading to s.201A, "Expenses of Entertainers" is of marginal relevance and supports the argument for a broad construction of sub-section (5).

(7) In relation to the s.198 issue, the fees paid were not for finding Richard and Judy employment, and so were not preparatory to the obtaining of employment.

(8) Anne Sweetbaum's role was integral to the performance of their duties by Richard and Judy. They could not have carried on their performance from day to day without her assistance. The position is analogous to that that would occur if a Schedule E employee was required to employ his or her own secretary because he or she could not perform the functions undertaken by the secretary. There were also other activities that Richard and Judy could have done themselves if they had had time, so that the agent was needed because with the tight programme schedules they simply could not attend to these matters themselves.

(9) Finally, on simple grounds of "fairness", it would be manifestly unfair if Richard and Judy should be singled out, seemingly almost uniquely, to suffer the direct cost of fees under the employment legislation, but not be entitled to a tax deduction, in contrast to others covered by s.201A or taxed under Schedule D. This is all the more so because of the extremely substantial amount of the aggregate fees in all years.

THE CONTENTIONS ON BEHALF OF THE RESPONDENTS

45. The following contentions were advanced on behalf of the Respondents.

(1) Employment as a "theatrical artist" in section 201A(5) is restricted to artists whose professions are associated with performances on stage in theatres and does not extend to television presenters and interviewers. Whether or not Richard and Judy are capable of performing theatrical roles, the role in which each was employed by Granada was not employment as a theatrical artist, but employment as a television interviewer and presenter and therefore it falls outside sub-section 201A(5).

(2) The expression "theatrical artist" should be construed in the context of the other professions listed in sub-section (5). This approach makes it clear that Parliament used the phrase "theatrical artist" both in order to indicate that it was restricting the deduction to stage performers and as shorthand in order to avoid having to list all of the various professions of stage performer individually by name. Otherwise, Parliament would have had to draw up a comprehensive list in section 201A(5) of all the smaller stage professions, such as comedians, magicians, acrobats, hypnotists, jugglers and mind-readers.

(3) It is immaterial that Richard and Judy have the talent to perform any of the stage acts that are contemplated by sub-section (5). The issue is simply whether the employment with Granada was in one of these capacities. It was not, but was rather as TV presenters and interviewers.

(4) As is made clear by the statements by Peter Lilley to the House of Commons, the origin of s.201A lies in the decision in *Fall v. Hitchen*, [1973] STC 66 that a Sadler's Wells ballet dancer, engaged on standard "Esher terms and conditions" was an employee taxable under Schedule E and not, as had been supposed for 30 years, taxable under Schedule D. Whilst this decision was not appealed it appears that for 17 years it was only applied patchily and inconsistently by HMRC until 1990 when a concerted attempt was made to apply it, albeit with the benefit of indefinite exceptions for people who had been taxed under Schedule D for 3 years or more.

(5) Parliament introduced s.201A because of objections from Equity that the shift from Schedule D to Schedule E would mean that agents' fees would become non-allowable, as indeed would many other expenses incurred by members of Equity. Parliament intended that s.201A would only be available to people employed under "standard Esher contracts" (that is contracts in the form provided by the Equity union) and it would also only be available to people becoming chargeable under Schedule E as a result of the slightly belated decision of HMRC to apply the decision of *Fall v. Hitchen*, 17 years after the case.

(6) Other passages of the Parliamentary debates reveal a concern that if the proposed new clause was widened in its ambit, journalists and many others could push open the flood-gates and ask for numerous deductions.

(7) The Appellants should not be able to resort to *Pepper v. Hart*, because the relevant section was neither ambiguous nor one that would occasion an absurdity, and in any event the Appellants could not point to any statement by the Minister that was clear and unambiguous in support of their construction. What the Appellants were endeavouring to do was to draw their own inferences from Mr. Lilley's statements as to how he would have dealt with their case had he expressly considered it, and this is an approach cautioned against by Lord Bingham in his speech in *ex parte Spath Holme Ltd* [2001] 2 AC 349.

(8) Although Mr. Lilley appreciated that the newly inserted s.201A could only have limited application in that it could only apply if fees could legally be charged against work-seekers under the relevant employment legislation, he did not assert that all those who could suffer individual fee charges would be covered by the new tax rule. Indeed Mr. Lilley expressly said that "almost everyone" with agents will be protected from suffering the full rigours of Schedule E.

(9) If I did not adopt the construction advocated by HMRC of construing s. 201A(5) as applying only to people who were engaged on Esher contracts and people who were switched from Schedule D to Schedule E as a result of the 1990 decision of HMRC to apply the *Fall v. Hitchin* decision I would be left with a very vague test, in trying to apply the "theatrical artists" phrase. It would be unsatisfactory to have to compare one type of entertainer with another in applying this test, and even more unsatisfactory to observe that as a

person's role and performance changed over time, one and the same person might cross the crucial, but vague, dividing line.

(10) In relation to the claim for a Schedule E deduction, the very introduction of s.201A indicates that it was appreciated that agents' fees for securing work for people would not be deductible under Schedule E.

(11) All of the other services rendered by the agent in this case suffer the problem that they were not necessarily incurred by Richard and Judy actually in the performance of their duties. The services were either preparatory, and thus designed to enable Richard and Judy to perform their duties or they looked to the long-term career interests of Richard and Judy or they involved doing things that Richard and Judy themselves did not have time to do. None of them were actually required in the performance of their duties by Richard and Judy.

MY DECISION

46. I have found this case difficult and I have wavered in both directions in considering whether to find in favour of Richard and Judy or HMRC.

The structure of the legislation and overall fairness

47. In the interests of coherence, I will first make some observations about the overall structure of the legislation. I must emphasise that these observations are not the factor that has led me to the conclusions that I have reached. Indeed s.201A in particular must simply be interpreted in the normal way, with any assistance from Ministerial statements that may be proper, and this is how I have reached my decision.

48. The observation that I make about the structure of the legislation is that I do not discern any policy objective on the part of Parliament or HMRC that either is actually seeking to single out and catch a minute percentage of the working population in the invidious position of being exposed to pay agents fees of up to 17.5% of their salary with VAT on top, and then being unable to obtain a tax deduction for those fees.

49. By way of amplification of the points made in paragraph 9 of this decision, it is certainly clear that agents' fees charged, either for finding work or for undertaking virtually any of the other services that Anne Sweetbaum performed will be tax deductible when incurred by a person in the course of undertaking Schedule D activities. In this context it is incidentally noteworthy that after the slow piecemeal shift of actors and others on Esher contracts from taxation under Schedule D to Schedule E in the extraordinary 17-year transitional period between 1973 and 1990, culminating in the 1990 regime from which many existing actors were anyway "grandfathered" (i.e. excluded for life), a subsequent decision has resulted in not only all actors, but specifically in Richard and Judy also, being treated now as being assessable under Schedule D and not Schedule E. Accordingly all questions of tax deductibility of the fees and of the relevance of s.201A have now entirely dropped away for these taxpayers.

50. Whilst I had not previously been aware of the legal prohibition on agents charging most other work-seekers for finding them employment, I had certainly been aware

that employment agencies usually charged their fees against the new employer and that the new employer would secure a deduction for the fees. I cannot believe that any employees are treated as receiving a taxable benefit in kind when their new employer pays the bill for what may be considerable services rendered to the work-seeker. Whether this is because there can be no benefit in kind in being relieved of a bill that the employee could not legally be charged, or whether it is because the meeting of the bill does not arise from the employment itself, or whether the service is fictitiously treated as being rendered only to the employer I do not know. Nevertheless I have no doubt that in the conventional situations, the new employers are charged, and no-one remotely considers whether the employees should be taxed on a benefit and then denied a deduction.

51. When in 1990 HMRC was implementing the long-delayed shift of **some** actors to Schedule E, and representations were made to HMRC and the Minister that a Schedule E deduction should be introduced to enable agency fees to be deducted, both HMRC and the Minister initially responded by suggesting that the solution to the problem lay in the hands of the industry that could simply get the new employers to meet the fee costs. This proved unworkable, though the suggestion does illustrate the clear assumption that this approach would solve the problem, notwithstanding that on these facts the "benefit in kind" suggestion made in the previous paragraph would have been much more realistic than it would be in the case of an accountant obtaining a new post.

52. These points suggest to me that it would be odd and unfair to have to deny Richard and Judy the tax deduction that they are claiming, albeit that I accept that these points cannot rule the point of interpretation.

53. Indeed even if I conclude that Richard and Judy meet the test of being "theatrical artists", there still appears to remain a mismatch in the wording between that contained in Schedule 3 to the Employment Agency Regulations and that contained in s.201A(5). Leaving aside the crucial question of whether the words "and theatrical artists" are broadly analogous to "and other performers", fees can manifestly be charged under the former legislation against fashion models, professional sportsmen, and a string of ancillary workers in the theatrical and entertainment industry (i.e. those people listed in the second indent in Schedule 3 who may or may not all be accepted to be "theatrical artists"). Whether fashion models were or are now invariably taxed under Schedule D, so that the practical gap is closed, I do not know. The employment law that enables them to be charged fees is of course unconcerned with how they are taxed. Some professional sportsmen are probably taxed under Schedule E and I was told in a rather tentative way that it was thought that some footballers were taxed under Schedule E, and were simply given grossed-up remuneration to cover fees that they were charged. If that is so, it may seem to solve the problem for the individual footballer though it still seems unfair.

52. Without over-dwelling on matters concerning logic and the structure of the legislation, I will simply conclude on this point with the observations that:-

    (1) I certainly do not discern any policy motive to catch a minute percentage of the work-force in the invidious position that I have identified;

(2) insofar as there are people caught in the trap, Ministers seem content to persuade people to solve the problem by procuring that the fees are paid by the new employer even in situations where that is not the only legal route for charging the fees;

(3) with the return to Schedule D of the vast majority of the people who could have claimed deductions under Schedule E by the more recent decision just referred to, and the changes whereunder even Richard and Judy secure such deductions without question under Schedule D, very few people appear likely to be caught in the trap; and

(4) whilst I will explain below the context in which Mr. Lilley was concerned about widening Schedule E deductions possibly allowing "all and sundry to pour through flood-gates", if any taxpayer is caught in the trap that I have highlighted, logic and justice seem to indicate that they should be politely escorted through an open door rather than be told that they were bursting through flood-gates.

I accept that I cannot allow these considerations to influence my decision on the point of interpretation that I must now address, though I will say that it will simply feel more coherent to reach a decision that does not create a result that I agree with counsel for Richard and Judy would be absurd.

The interpretation of the expression "theatrical artist"

53. I do not find the expression "theatrical artist" unambiguous.

54. I accept without hesitation that Richard and Judy are entertainers and they are performers.

55. Without resort to the Ministerial statements, and to an HMRC Press Release (both of which I will refer to later and which support this proposition) I would certainly accept that there is no implicit requirement that the performance needs actually to be in the theatre. If an artist is performing on television, in a club or even in the street and the performance can be described as "theatrical", the fact that the performer may never have set foot in a theatre is irrelevant. "Theatrical" means "some sort of performance in the nature of that in the theatre".

56. When coupled with the word "artist", the composite phrase clearly eliminates the meaning under which some orators, Members of Parliament and others can be said to be "theatrical" or to speak and act in a "theatrical manner". The addition of the word "artist" connotes some form of professional performer or entertainer, so that the most natural meaning of the composite expression is **"a performer or entertainer**, **performing with a theatrical bent, or in the manner of acting and theatre, but not necessarily in the theatre".**

57. Without resort to Ministerial statements, the history of the legislation and to the HMRC Press Release that I have just referred to, I incline to the view that Richard and Judy are "theatrical artists" on the definition that I have adopted. Their performance is not comparable to the role of a newsreader. It is not comparable to the role of the presenter of a serious current affairs programme, indeed to the role of the

standard TV interviewer. They were the core artists in the "This Morning" programme, and whilst total recording of acted skits may only have taken up a small proportion of the broadcast time, these skits were still in the same jokey, light-hearted vein as the rest of the presentation. That informal presentation gave the programme its fundamental appeal, and its rather novel character, and thus I repeat that I accept without hesitation that Richard and Judy were performers and entertainers, and I incline to the view that they are fairly described as "theatrical artists".

58. The critical phrase is however not unambiguous and so I will now turn first to the terms of the HMRC Press Release that I have referred to; and then to the rather inter-twined points that both parties have advanced in relation to the history of the legislation and to Ministerial comments on its introduction.

59. The following is the whole text of the HMRC commentary on s.201A from which I did not understand counsel for HMRC to resile in any way.

> "SE 62800 TAX TREATMENT OF THE ENTERTAINMENT INDUSTRY; THEATRICAL PERFORMERS - FEES PAID TO AGENTS
>
> Section 201A ICTA 1988
>
> From 1990/91 onwards a deduction is permitted by Section 201A ICTA 1988 for fees paid to agents by theatrical performers out of earnings taxed under Schedule E.
>
> For this purpose a theatrical performer is an actor, singer, musician, dancer or theatrical artist. This means that a deduction can be given **to any person with a particular theatrical talent in respect of an employment under which they perform in public**. A deduction cannot be given to non-performers, such as a stage manager. It can be given to individuals whose talents are not primarily theatrical but who are employed to perform in a theatrical setting, for example a sports personality appearing in a pantomime.
>
> To qualify for a deduction **the theatrical performance need not take place in a theatre. Any setting for a performance is sufficient, for example** a **television programme, a film or a concert hall."** *(my emphasis)*

This published statement from HMRC seems to me to be correct in every way. The remark about the deduction being unavailable to "non performers" may be slightly inconsistent with a statement by Peter Lilley that I will refer to shortly, but the critical passages that I have high-lighted seem to me to be supportive of Richard and Judy's case, and manifestly to be fair commentary.

60. I turn now to the Parliamentary debates of which three had a bearing on the legislative background to the provision, and the issue of whether the critical phrase "theatrical artist" was understood to admit of a broad, or only a narrow meaning.

61. I have no doubt that counsel for HMRC was right to contend that s.201A was introduced after lobbying by the Equity union, all geared to the impending late, and only piece-meal shift of actors and other Equity members to assessment under Schedule E, rather than Schedule D. I equally have no doubt that counsel for HMRC

is right to say that several remarks in the different debates by Peter Lilley confirm that he was at least principally targeting the legislation at people who were only then to be taxed under Schedule E, and indeed at people who were engaged under standard Esher contracts. Finally it is undisputed that Richard and Judy had been taxed under Schedule E before this particular initiative on the part of HMRC, and they confirmed that their contracts were not "standard Esher contracts".

62. Whilst I do not dispute the first point mentioned in paragraph 61 above, namely that the lobbying by the actors' Equity union and the regular discussions between Equity and officials of HMRC were the factors that led to the enactment of s.201A, the factors that I am unable to accept are that in interpreting s.201A I should try to construe it as applying only to "new entrants to the sphere of Schedule E taxation", and also only to people having Esher contracts, the nature of which is not entirely clear to me, nor does it need to be. There is not the slightest ambiguity in the wording of s.201A on these points and no ground for suggestion on the plain wording of the section that a "theatrical artist" must necessarily have an Esher contract (when conceivably some artists might not have a written contract at all) or be a taxpayer who has only recently been brought into charge under Schedule E. Section 201A seems to me to apply to Schedule E employees who fall within the description in sub-section (5) and I cannot see any element of ambiguity on the two points that I have challenged.

63. If it is said that statutory provisions should be interpreted also in the context of the offence or the evil (or the relief) at which they are directed, I am again not persuaded that the points raised about Esher contracts and new entrants to charge under Schedule E can be maintained. If Parliament wants to enact a provision that is targeted at specific groups, or that is introduced only for selected taxpayers because of selectively targeted lobbying, Parliament can of course do this if it does it clearly, though this is generally thought to be rather regrettable. But if Parliament introduces legislation in general terms then those terms must prevail.

64. These observations do not of course reinforce the point that the phrase "theatrical artist" must be construed broadly. If correct, they preclude a restricted interpretation that is nowhere supported by the statutory wording, but they have no great impact on the critical interpretation of the phrase, "theatrical artist".

65. Turning to the various remarks and representations made in Parliament in the three debates, it is first necessary to understand that during the three different debates, there were three points in contention. One was an argument that a number of activities should be excluded from the charge under Schedule E and taxed under Schedule D instead. Another was a very understandable contention that if actors and members of Equity were to be taxed under Schedule E and not Schedule D they would lose the deduction for countless other costs than simply agents' fees. They would lose the deduction for all costs of obtaining work, preparing CVs, "self-promotion including printing and advertisements, photographs, blocks and so forth, the cost of travel to and from venues for rehearsals and performances away from home, the cost of theatre tickets for agents, managers and press, audition expenses, telephone calls, postage and stationery, coaching, the hiring of rooms" and so on. It was unquestionably in the context of these two arguments, namely for people to be taxed under Schedule D, or

for the admissible deductions under Schedule E to be greatly extended, that there was the concern that if these requests were met, the flood-gates would be opened.

66. Much of the debate to which reference was made was not thus targeted simply at the wording of s.201A and its concern with agents' fees alone. The amendment that was tabled that referred most clearly to the interpretation to be given to the critical phrase "theatrical artist" was one tabled by Mr. Chris Smith on 16 July 1990. It proposed three amendments, two of which are now irrelevant, and the third of which was that after the expression "theatrical artist", there should be added the words "or employment of a substantially similar nature as an entertainer." This critical amendment was referred to as "amendment (c)".

67. Peter Lilley's initial response to this proposed amendment was to recite the background to the new clause, and the unsuccessful way in which he had tried to persuade the industry that it could eliminate the problem of non-deductible agents' fees by seeing that the fees were always paid by new employers. He then made the following interesting observation:-

> "The reason why it is possible to introduce such a major concession is that it is directed only at the particular circumstances of actors and other artists. Most types of employment agencies cannot charge fees to people who are looking for work. However, in the case of the entertainment industry, regulations made under the Employment Agencies Act 1973 permit a licensed agent to charge the artist rather than the employer. That exception shows that the fees are unique. The Revenue will consult the industry on the best way in which to implement the new relief. It may be possible eventually to set up arrangements to give the relief at source through the employer, to minimise the paperwork and to enable those qualifying for relief to receive it at the earliest opportunity.
>
> Meanwhile, if the House approves the measure, and following Royal Assent to the Finance Bill, theatrical artists who believe that they are entitled to the new relief should claim it from their tax office".

Naturally Mr. Chris Smith's concerns were not allayed by these general remarks, and he made the following observations in relation to the relevant amendment (c).

> "Although we appreciate that the Government want to draw the net of the new clause reasonably tight so that only genuine actors and entertainers will benefit, nonetheless there are a number of people who, perhaps unintentionally, the Government might exclude by their definition of such people. The most obvious example is a stand-up comic who is clearly engaged in the entertainment business. That person frequently tours for a living and frequently engages an agent to secure bookings. Under the terms of the new clause a stand-up comic would not be included - I do not, of course, want the definition of a comic to extend to hon. Members. To ensure that everyone whom we believe the Government want to assist by the new clause can be so assisted, we believe that amendment (c) should be accepted as it would ensure that the definition is broader than that set out in subsection (5) of new clause 7. Those are our detailed amendments and we hope that the Government will

> **either reassure us on those points or accept our amendments."** *(my emphasis)*

At this point Mr. Chris Smith's further points were related to disappointment that other expenses would remain non-deductible under Schedule E. Following various other speeches, Mr. Lilley replied to the effect that he gave the assurances that the frst two amendments were unnecessary because the Government already accepted that the clause had the meaning contended for. He then went on to say:

> "On amendment (c), I am glad to say that we have had an opportunity to consult representatives of the industry while preparing the new clause. I understand that they are content with the definition that we have adopted. By referring to "theatrical artist" we have included **not only performers such as magicians, who might not fit the description of "actor", but choreographers, assistant designers and directors who are regarded as part of the acting profession and frequently take an acting role in productions.** Some of those people pay agents' fees and are engaged under contracts of employment and are affected by the switch to Schedule E. I can assure the House that all those categories of theatrical performer, together with stand-up comedians - whether in or out of the House - will be able to claim relief under the new clause".

Responding to this, in relation to amendment (c), Mr. Chris Smith continued:

> "On amendment (c), I understand that the term "theatrical artist" is wider than the term "actor". What would happen to a magician or stand-up comic who was engaged not at a theatre but on the club circuit as an entertainer? Because that person is not employed at any time in a theatre, would not the term "theatrical artist" be inappropriate and would not he fall outside the terms of the new clause?

To this Mr. Lilley replied:

> **"As I understand it, such a person would be included in the new clause. "Theatrical" has a wider use than activities in the theatre**. Many hon. Members are theatrical from time to time, and **the definition is quite wide**. I **am assured that there is no difficulty in this respect**. Those in the industry with whom we have discussed the matter are content with our definition. If we discover that it does not work properly, my successor will consider it in that light.

There were then a number of further remarks reverting to the wider questions concerning taxation under Schedule E or D, and expenses more generally, and "flood-gates", and finally Mr. Chris Smith made his last remarks:

> "We entirely accept the assurances that (Mr. Lilley) has given us on amendments (a) and (b), but we remain a little concerned about amendment (c) - the definition of theatrical artists. However, we accept the Government's assurances that they have acted in good faith. We will wish to study carefully the way in which the Inland Revenue interprets the clause".

In the event the various amendments were all withdrawn.

68. I now make the following observations on that very relevant exchange. Fairly uncontentious observations will I believe be as follows.

> (1) There is clear acceptance that performance in theatre is not required. This conforms with any fair interpretation of the phrase, and with the published statement by HMRC.
>
> (2) Mr. Lilley's officials had obviously been in discussions with Equity; the clause was clearly being introduced in response to lobbying by Equity; and the government's prime attention was clearly on whether they had met the requirements of the strong lobby group. I have already referred to the relevance of the suggestion that the clause should be interpreted to cover only new entrants to Schedule E, and people on Esher contracts.
>
> (3) Considerable significance was attached to the corresponding provision under the Employment Agencies Act.
>
> (4) Mr. Lilley clearly gave a wide meaning to the expression "theatrical artist" by confirming that **it covered "choreographers, assistant designers and directors who are regarded as part of the acting profession and frequently take an acting role in productions".** Whilst it is well known that Alfred Hitchcock appeared somewhere in the corner of one or more of his films, it is obviously not very well appreciated that choreographers, assistant designers and directors "**frequently take an acting role in productions",** but it is nonetheless highly instructive to have this short indication of people who are clearly said to be "theatrical artists".

The point that does not emerge clearly from this debate is whether the fact that the government refused to accept the critical amendment is an indication that:

> (1) the existing wording was to be interpreted widely enough for the amendment to be immaterial;
>
> (2) the wording would be twisted unmercifully in favour of the lobbying group, even to the extent of suggesting that the choreographer would regularly join the dancing girls so as to be included in the phrase, but the expression should be interpreted narrowly for others; or
>
> (3) the amendment was required for the clause to have the meaning required by Richard and Judy, and subject to a significant element of the point just made in relation to those represented by the lobby group, the withdrawal of the amendment is fatal to Richard and Judy's case.

69. I have already said in paragraphs 56 and 57 above that my fundamental interpretation of the critical phrase is in favour of the interpretation contended for on behalf of Richard and Judy. I now find that the HMRC Press Release supports aspects of that interpretation. I find that it was suggested in Parliament that the phrase had a broad meaning and that it covered people who sound significantly less like "theatrical performers" to me than Richard and Judy do. And I find it impossible to interpret the phrase in one way for one group and another for all others when there is no indication in the section itself that it is confined in its application to Equity members, people on

Esher contracts, or new entrants to Schedule E. Finally HMRC's own admissions, in their skeleton argument, conceded that the expression covered "comedians, magicians, acrobats, hypnotists, jugglers and mind readers". In the light of these further indicators, I find my basic interpretation to be confirmed and not undermined.

The status of different performers and entertainers as "theatrical artists"

70. It is not necessary or appropriate in this decision to try to indicate whether various other presenters, game show hosts, and people such as newsreaders would in my opinion rank as "theatrical artists". In the course of the hearing however, a number or remarks and arguments were made and advanced in relation to such other categories. In the interests thus of testing the conclusion that I have reached, and of applying a type of "sanity check", I think that it will be worth referring to my broad assumption as to the status of certain other performers. Naturally no-one in the hearing gave much attention to the status of the particular people who were referred to and I have given relatively little thought to the full circumstances of the people who I will now mention. In the unlikely event that any of them are also posed with the difficult question of whether they can claim deductions for agents' fees under s. 201A, their circumstances would have to be considered in more detail. I am only referring to them now in order to try to illustrate a certain consistency in my approach.

71. I would certainly accept that newsreaders and the weathermen on television are not "theatrical artists". Few will forget Angela Rippon's "high kick", and I accept that the weathermen usually perform an amusing Christmas carol shortly before Christmas. I also accept that with the cult of the celebrity, more attention is given to the appearance and personality of newsreaders than in the past, but I still consider that their role is passive. People switch on the "news" to find out what has happened, and the presenter will ideally be pleasant but unobtrusive. I would not describe newsreaders as performers or entertainers, and certainly not as theatrical artists.

72. I reach the same conclusion about presenters of current affairs programmes. Some have their unique style and some or most can be very impressive, but they are again neither entertainers nor theatrical artists.

73. Game show hosts can probably cross the line and be described as "theatrical performers". I would unquestionably apply that description to Bruce Forsyth and to Ant and Dec. My observation as regards Bruce Forsyth is not so much because I assume that he has a background in dance and stage or music-hall. It is simply that his ability to break into dance, and his whole presentation is "theatrical", and he is clearly an artist.

74. Quiz show hosts are more difficult. Whilst the following observations have nothing to do with their appeal, and one's admiration for them, I suspect that many would agree that Jeremy Paxman was not a theatrical artist, when presenting "University Challenge". He might well be classed as an entertainer, and a performer but I very much doubt as a theatrical artist. Exactly the same would apply to John Humphrys, the presenter of Mastermind. Christ Tarrant on "Who wants to be a Millionarie?" is border-line. But Anne Robinson on "Weakest Link" is indeed probably theatrical.

75. The common thread then to Bruce Forsyth, Ant and Dec and Anne Robinson is that they are all putting on one or another form of act. Everything is a performance. And to my mind Richard and Judy share that attribute. Their act was and is to perform the role of the informal chatting husband and wife team, constantly trying to entertain, and making their personality and performance the core of the programme that they presented. And that makes them "theatrical artists".

76. I rather accept, with counsel for HMRC, that it is unsatisfactory that one even considers having to draw tax distinctions between relatively similar television personalities in the way that I have just done. The only response that I can give to that is that I cannot agree that the problem is better solved by confining the application of s.201A to people on Esher contracts, or to new entrants to Schedule E (albeit that they have now reverted to being taxed under Schedule D again!!), because there is absolutely nothing in the section that confines the application of the section to these people. The cogent answer is obvious which is that in common fairness, and to achieve symmetry, s.201A should have been cast in similar terms to the Employment Agency Schedule, so that those people who could be charged agents' fees directly and who happened to be taxed under Schedule E would all be entitled to the same deduction. The reason why the section is not cast in this way is that it was introduced in response to lobbying by one particular category, and no-one lobbied for coherence and equal treatment for others.

The general Schedule E rule for deductions under s. 198 Taxes Act

77. Although I have decided this case in favour of Richard and Judy under s.201A, I must also give my conclusions in relation to the alternative argument under s.198 both because this was argued before me, and because HMRC may appeal against my decision under s.201A.

78. I certainly accept the first argument on behalf of Richard and Judy which is that the fees that they paid their agent were not fees for finding them the Granada employment because they already had that employment when they engaged Anne Sweetbaum.

79. Anne Sweetbaum performed a number of different services, and the main service, namely that of spending three full months negotiating their contracts on every renewal of those contracts, was certainly one for which the fees would not be deductible under s.198. Without quoting authorities, negotiating their contracts was not an expense "necessarily incurred **in the performance of their duties**" by Richard and Judy. It was an expense of negotiating the terms on which they would work and that expense is plainly non-deductible.

80. The conclusion just reached raises the question of whether any of the fees (which were simply percentage fees, not broken down between the different services) can be deducted or whether they must all be disallowed without even looking at the nature of the other services because the one single bill cannot be said to have been borne "wholly and exclusively" in relation to the performance of their duties.

81. Both parties eventually agreed that if one composite supply for one fee of several services could be broken down into several distinct supplies of services, then it was appropriate to look at each of those services. If one or more could be said to have

been used "wholly, exclusively and necessarily in the performance of the duties", then it would be for the parties to agree on an apportionment of the whole fee, and the apportioned element would qualify for deduction. In this context it was agreed that the sort of expense that failed the test by being "partially" incurred for non-qualifying purposes was the expense on one indivisible item that simultaneously served two ends. Thus in the case of *Mallalieu v. Drummond (HMIT)*, [1983] STC 665 it was the fact that the clothes that Miss Mallalieu had to purchase, as a lady barrister, for court work, simultaneously provided warmth and decency, as well as being suitable for court appearances that resulted in the cost of the clothes being disallowed. This was a Schedule D case but it was accepted that the same principle applied to Schedule E. Counsel for Richard and Judy offered the rather good example that if Miss Mallalieu has bought the same clothes and a wig as well all in one purchase, then while the clothes might fail the "wholly and exclusively" test because of their dual function, by contrast the wig, and the apportioned cost of the wig might qualify for relief even if all were bought in one purchase.

82. Having established this principle, I now have to decide whether any of the services rendered by Anne Sweetbaum can be said to pass the test relevant for deduction under Schedule E, having already decided that the major services relating to contract negotiation fail the test.

83. The Schedule E test of expenses is narrower than the Schedule D test, not so much because of the addition of the words "and necessarily", to the phrase "wholly and exclusively", but rather because of the addition of the far more important words, namely "necessarily **in the performance of the duties".** Cases such as *Ansell (Inspector of Taxes) v. Brown* [2001] STC 1166 illustrate how even an expense (food supplements to enhance the fitness of a premier division rugby player) solely required to render him more suitable to perform his duties of employment were disallowed because the expense was still preparatory to the performance, and not necessarily incurred in the performance of the duties. The essential difference is the much narrower compass of the activities to which the expenses must be related under Schedule E.

84. In applying this rule, I conclude that services in this case geared to negotiating Richard and Judy's contracts, enforcing and monitoring the contracts, receiving payment and dealing with deductions and accounting for net payments to Richard and Judy and representing Richard and Judy in arguments designed to secure a better work place environment are all disallowed. They were not relevant or used when Richard and Judy were actually performing their duties.

85. The major service that remains to be considered is the one that Anne Sweetbaum performed, which was well described in the Witness Statement of Russ Lindsay, two passages of which I reproduced at paragraph 43 above.

86. Anne Sweetbaum had of course already conceded that she had had no "editorial input" into the show. The involvement that she and Russ Lindsay had in relation to the content of the show appears to have fallen into two closely related categories. If some particular remarks in a programme had caused offence or had for some other reason been commented on in the papers, then it appears that both agents in their time would have had an involvement in dealing with the press and also perhaps

commenting on apologies that might be made in the following programme to correct some wrong impression given. The other point that both agents made is that they did comment on the programme and doubtless those comments were designed to improve the presentation.

87. Most of the argument on the s.198 deduction issue occurred after the witnesses had been released, and there was no opportunity to re-examine Anne Sweetbaum in particular to probe the extent to which any element of the services just listed might qualify for a deduction. Self-evidently, discussions with the press are services that do not directly assist the performance of the duties, and as Russ Lindsay said in the second of the passages that I quoted in paragraph 43 above, the main focus of the agents was in protecting the long-term career interests of their clients rather than enhancing the appeal of the next programme. Indeed in that second quoted paragraph, the clear suggestion was that the agents were attending to the long-term career interests of Richard and Judy, actually in opposition to views that might be expressed by the programme producers who would only be concerned about trying to enhance the appeal of the programmes and boost audience ratings. So these services must be disqualified either because they looked only to the long-term career interests, or at best, suffered precisely the mixed use feature that resulted in the disallowance of the cost of clothing to Miss Mallalieu.

88. Had it been established that any of the services of Anne Sweetbaum related solely to commenting, essentially from an artistic viewpoint, on the content of the shows, those comments being made solely to enhance the appeal of the shows, or solely to counter some wrong impression given on one of the shows then it seems to me that some small proportion of the fees might have qualified for a deduction.

89. I conclude however that the evidence that was given did not establish that any of the agent's functions extended to the narrow point just identified, and in any event it might have been extremely difficult to establish that any service would not still encounter the problem that it would also enhance the career interests of Richard and Judy. The admission by Anne Sweetbaum that she never had editorial input into the programmes, and the observation by both agents that their concern was always to protect the "brand", rather than to enhance Granada's audience ratings both suggest that the case for claiming a deduction for any of the agent's fees was very doubtful.

90. I accordingly conclude that no deduction is available under s.198.

91. I should mention finally that counsel for the Richard and Judy confirmed that no argument was to be advanced to the effect that the disputed fees might also be deductible under Schedule D either on the ground that Richard and Judy were always also assessed in respect of other income under Schedule D and in the widest sense the fees were costs of their overall profession, or on the ground that the focus of some of the agent's services was indeed on the wider issue of "protecting the brand".

My overall decision

92. Since I have found for the Appellants in relation to the major contention under s. 201A, it follows that this appeal is allowed and that all the fees paid in the various years under appeal by both Appellants are allowable.

HOWARD M NOWLAN
SPECIAL COMMISSIONER
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SC 3289/2005

SC 3290/2005