[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;

AND

J. WALTER THOMPSON (AUSTRALIA) PROPRIETARY LIMITED . . . } RESPONDENT.

H. C. OF A. 1944.

SYDNEY, *Aug.* 23.

MELBOURNE, *Sept.* 5.

Latham C.J.

Pay-roll Tax (Cth.)—"*Wages*"—*Radio plays*—*Radio artists*—*Employees or independent contractors*—*Remuneration*—*Pay-roll Tax Assessment Act* 1941-1942 (*No.* 2 *of* 1941—*No.* 48 *of* 1942).

A company presenting radio plays engaged for each play artists suitable for the various parts and made with each artist a contract whereby the artist was to receive a fee for the performance, but no fees for rehearsals, and was obliged to attend rehearsals, and a right to cancel was reserved to the company if the artist's work should not be satisfactory to the producer. The production of the plays required detailed and extensive control of the artists during both rehearsals and the final performance.

Held that the relationship between the company and each artist was that of employer and employee or master and servant and not that of independent contractors, and that the fee paid to him was "wages" as defined by s. 3 of the *Pay-roll Tax Assessment Act* 1941-1942; tax under that Act was therefore payable in respect of such fees.

APPEAL from the Board of Review.

The Federal Commissioner of Taxation appealed under s. 40 (5) of the *Pay-roll Tax Assessment Act* 1941-1942 to the High Court against a decision by a majority of the Board of Review, reversing a decision made by the Commissioner that payments made by J. Walter Thompson (Australia) Pty. Ltd. to certain radio artists for services rendered by them under engagement were wages within the meaning of that Act and therefore taxable.

The appeal was heard by *Latham* C.J., in whose judgment the facts are sufficiently set forth.

H. C. OF A. 1944.

FEDERAL COMMISSIONER OF TAXATION v. J. WALTER THOMPSON (AUST.) PTY. LTD.

Sept. 5.

Taylor K.C. and *Dignam*, for the appellant.

Asprey, for the respondent.

Cur. adv. vult.

LATHAM C.J. delivered the following written judgment:—

This is an appeal from a decision of a Board of Review refusing to confirm a decision of the Commissioner of Taxation in relation to an assessment of the respondent company under the *Pay-roll Tax Assessment Act* 1941-1942. The right to appeal from a decision of the Board of Review to this Court is given by s. 40 (5) of the Act in any case in which a decision of the Board in the opinion of the High Court involves a question of law. Though the proceeding is called an appeal, it is really a proceeding in the original jurisdiction of this Court: See *Federal Commissioner of Taxation* v. *Munro* (1). In the present case I did not hear evidence, because the parties agreed that all the evidence taken by the Board of Review should be regarded as given in the appeal. There are no objections to the admissibility of evidence and there are no disputed questions of fact.

The *Pay-roll Tax Assessment Act*, s. 12, provides that tax shall be levied and paid on all wages paid or payable by any employer in respect of any period of time occurring after 30th June 1941. The questions in the present case relate to payments made by the respondent company during a period of twelve months ended 30th June 1942.

The term " wages " is defined by s. 3 of the Act as meaning " any wages, salary, commission, bonuses or allowances paid or payable (whether at piece work rates or otherwise and whether paid or payable in cash or in kind) to any employee as such " and includes certain payments specifically mentioned which are not material for the purposes of this appeal. The question is whether payments made to certain actors and actresses by the respondent company under contracts which are described as " engagements " are wages paid to employees within the meaning of the Act.

The Commissioner decided that the payments were such wages. The Board of Review unanimously held (1) that the relation between the company and the artists was that of master and servant, not of independent contractors. But the majority (the chairman dissenting) held (2) that the payments made to the artists were not wages within the meaning of the Act. The Commissioner supports the first proposition and challenges the second. The respondent supports the second proposition, and, in order to sustain the actual

(1) (1926) 38 C.L.R. 153, at p. 181

decision of the majority, challenges the first proposition. The application of the Act depends upon the existence of an employer-employee relation—a relation which I am unable to distinguish from that of master and servant. The question whether this relation or that of independent contractors exists between two persons has been described as a mixed question of law and fact (*Performing Right Society Ltd.* v. *Mitchell and Booker* (*Palais de Danse*) *Ltd.* (1)). The question whether (there being no dispute as to the facts) particular payments are " wages " within the meaning of the Act is in my opinion a question of law : Cf. *Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (2), per *Rich* A.C.J.

The company objected that the relationship of master and servant did not exist between the company and the artists and that the company was not an employer of the artists within the definition as contained in the Act. As the term " employer " is defined in s. 3 to mean any person who pays or is liable to pay any wages, the second objection entitled the company to contend that payments made were not payments by way of wages. It was argued for the Commissioner that this contention was not open under the terms of the objection, but in my opinion it clearly is open.

The contention of the company, affirmatively expressed, was that the relation between it and the artists was that of independent contractors. The grounds of objection include a description of the circumstances under which the services of artists are employed, and this description (as I quote it) is in accordance with the evidence. The engagement of the artists relates to the performance of radio plays given under the direction of the respondent company for the purpose of advertising the products of Lever Bros. Pty. Ltd. The plays are known as " Lux Radio Plays " and are broadcast from the Lux Radio Theatre. I quote the following description from the respondent company's ground of objection :—

" A Lux Radio play is broadcast from the Lux Radio Theatre each Sunday night. There is great variation in the types of play broadcast. Many actors and actresses are required for the purpose of filling the numerous and varied parts. Only actors and actresses capable of filling particular parts in particular plays are selected. When a play is decided on, the producer of the Lux Radio Theatre, Mr. Harry Dearth " (later Mr. R. E. Fair, who gave evidence before the Board of Review) " sets about selecting the necessary actors and actresses. He has a wide knowledge of the radio artists available in Sydney and contacts those whom he considers best fitted to fill the case. If they are available and agree to perform in the particular

(1) (1924) 1 K.B. 762, at pp. 765, 766. (2) (1941) 65 C.L.R. 150, at p. 154.

H. C. OF A. 1944.

FEDERAL COMMISSIONER OF TAXATION v. J. WALTER THOMPSON (AUST.) PTY. LTD.

Latham C.J.

production, they are asked to enter into a contract to play the part or parts selected for a fee agreed upon. The contract relates only to one particular play, and specimen of the form of contract is set out hereunder :—

'J. WALTER THOMPSON AUSTRALIA PTY. LTD.

Date.....

(To be handed to the Producer at first rehearsal).

This will confirm your acceptance of an engagement for :

Programme : .....

Play : .....

Part : .....

Fee for performance: .....(No fees for rehearsals).

REHEARSAL SCHEDULE.

.....

.....

.....

.....

on condition that your work is entirely satisfactory to the Producer, failing which, or should the performance be affected by the war, or for any other reason, he or we reserve the right to cancel the engagement forthwith, and neither the Producer, this Company or its clients shall be liable to you.

For and on behalf of J. WALTER THOMPSON AUSTRALIA PTY. LTD.

.....

DIRECTOR-PRODUCER.

I have read and agreed to the above :

.....

ARTIST.'

The first reading of the play is held at our office on the Wednesday preceding the Sunday on which the broadcast is made. A microphone rehearsal is held in the studio all day on the Friday preceding the Sunday broadcast. On Saturday morning a full timing rehearsal is held when the play is completely performed. Another complete timing rehearsal is held on Sunday afternoon, and the play is broadcast on Sunday night between 8 p.m. and 9 p.m.

The right type of actor or actress for a particular part in any play must be found by the Producer."

The blanks in the form of engagement are filled in as required. The " programme " is " Lux Radio Play." The title of the play is filled in; the part is identified; the fee stated; and times for rehearsals are set down.

It is contended that these facts show that the artist is engaged for a theatrical performance by reason of the particular skill and

dramatic capacity possessed by the artist, and that the reward of the artist is a fee for the performance given on the Sunday evening and for nothing else. As a professional actor the artist is presumed to know his or her work and to render services in the same manner as a professional man, such as a surgeon or an architect, not being subject, it is said, to detailed control as to the manner in which those services are to be performed. Accordingly it is argued that the artists are not employees of the company but are independent contractors.

In the case of *Performing Right Society Ltd.* v. *Mitchell and Booker (Palais de Danse) Ltd.* (1) *McCardie* J. said that, in order to determine whether a man be a servant or an independent contractor "the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over a person alleged to be a servant." The distinction between a servant and an independent contractor is generally explained by stating that in the case of a servant the employer has power, not only to direct what work the servant is to do, but also to direct the manner in which the work is to be done. In order, therefore, to determine whether the payments made in the present case are wages payable to an employee within the meaning of the Act, it is necessary to ascertain what degree of control is exercised over the artists by the company, acting by the agency of the producer.

A radio play is different in many features from a play as ordinarily performed before an audience. The listeners-in do not see the actors and the actors do not see the listeners-in. The actors may read their parts. They speak into microphones. The effect upon the listener-in depends entirely upon sound unaided by vision. Accordingly, sounds such as the shutting of doors, the noise of a motor car, or revolver shots, are produced by mechanical means or by the use of gramophone records. The actors hear only their own voices; they do not hear the other sounds which are required to place their words in the proper setting. The proper synchronization of the dialogue of the play with the many other sounds which may be necessarily incident to producing the total effect for the listeners-in is therefore a matter of the first importance and requires continual attention. In order to bring about a good performance on the evening when the play is broadcast, it is essential to have rehearsals. At these rehearsals all the details are prepared and the producer gives directions which are necessary to enable the artists to work as a team. These directions include directions as to distance from the microphone and manner of speaking. The artists can

(1) (1924) 1 K.B., at p. 767.

H. C. OF A. 1944.

FEDERAL COMMISSIONER OF TAXATION v. J. WALTER THOMPSON (AUST.) PTY. LTD.

Latham C.J.

hear only their own voices as they speak into the microphone. The producer is in a sound-proof glass compartment, where he hears the voices as they will be heard on the air. From that room he gives signals, not only to the actors, but also to the person who produces sound effects. The producer may come on to the stage himself, but even then he does not hear the voices of the artists directly, because, in order to be in the position of a listener-in, he wears telephone ear-pieces, attached to a long flex, which enable him to hear what is going on, but only through the microphones, and still to give his signals as required. It is apparent, therefore, that the rehearsals and the control of the artists during the rehearsals in relation to many details are essential to the success of the play.

On the evening when the play is given it is still impossible for the artists to be left to themselves. They must receive signals in order to know whether a particular sound has been made (which they cannot possibly hear) but which, introduced at the precisely proper instant, is essential to the action of the play.

From these facts I draw the conclusion that a most detailed and extensive control of the artists during both rehearsals and the final performance is necessarily involved in the production of a radio play. The engagement of an artist for such a play is not an engagement of an individual to produce a certain result, as in the case of a surgeon or other professional man. It is the employment of a person to co-operate with others in a team under the control of the producer to bring about a result, the details of which must in great measure be determined by the producer.

The fact that the artists are skilled does not make it impossible for them to be in the relation of servants to an employer. It is a mistake to think that only unskilled people can properly be described as servants. If they are subject to detailed control in the manner in which they do their work, they may be servants. The fact that the remuneration is described as a fee rather than as wages is not decisive. The real character of the relation between the parties must be determined, whether the payment made is described as wages, fee, salary, commission, or by any other term.

It was argued that the fact that the terms of engagement provide that there were to be no fees for rehearsals shows that the employment related only to the actual acting on the night of the production of the play. In my opinion this is not the case. The artists were bound under their engagement to attend rehearsals, and were subject to direction during those rehearsals, though no fee was payable unless the performance actually took place. Even on the night of the actual performance, detailed control and supervision by the producer is essential to the performance.

The fact that the artists are not whole-time employees does not show that they are not employees of the company. A detailed argument was presented upon the basis of the *Palais de Danse Case* (1) in which it was shown that various distinctions existed between that case and the present case. But I have already referred to the test adopted by *McCardie* J. in that case and the application of that test to the facts of this case cannot be controlled by the different facts of another case.

Reference was also made to the definition of a servant in the *American Restatement of the Law*, vol. I., Agency, p. 483: "A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." This definition is in accordance with our law. The *Restatement* proceeds to set out under nine headings various matters of fact which are considered in determining whether one acting for another is a servant or an independent contractor. The decision in a particular case must be determined by a consideration of the facts of that case. The circumstance that a particular fact, absent in that case, was present in another case, should not necessarily lead to contrary conclusions in the two cases. In the present case I regard as the most important and as a decisive element the matter of fact stated in (*a*) in the *Restatement*—"the extent of control which, by the agreement, the master may exercise over the details of the work."

The majority of the Board of Review, though of opinion that the relation between the company and the artists was not that of independent contractors, were nevertheless of opinion that the moneys paid were not wages. Reference was made to the facts that the money paid was described as a "fee" and that it was paid for "a single performance (after rehearsals)." The definition of wages in *Stroud's Judicial Dictionary*, 2nd ed. (1903), vol. III., p. 2206, was quoted: "It would therefore seem that 'wages' are the *personal* earnings of labourers and artisans."

The use of the word "fee" cannot be regarded as more than one element to be taken into account in determining the true character of the payments made. If a fee is really a reward for services rendered by a servant, then it falls within the category of wages or possibly salary. Where the engagement is for a period, is permanent or substantially permanent in character, and is for other than manual or relatively unskilled labour, the remuneration is generally called a salary. But no precise line can be drawn between

(1) (1924) 1 K.B. 762.

H. C. OF A. 1944.

FEDERAL COMMISSIONER OF TAXATION v. J. WALTER THOMPSON (AUST.) PTY. LTD.

Latham C.J.

wages and salary. The fees in the present case would not naturally be called salaries but, in my opinion, remuneration for the services of a servant which is not salary is comprehended within the term " wages."

The employment of a servant may be limited to a particular occasion or may extend over a period. It may be continuous during that period or discontinuous. In the present case the artists are as truly employed for rehearsals as for the final performance, though they receive no pay unless the performance takes place and they then play their parts. They are bound to attend rehearsals as specified in their contract, and are bound to conform to the directions of the producer during those rehearsals.

The definition of " wages " quoted from *Stroud's Judicial Dictionary* should not be read as exhaustive and as confining the application of the term " wages " in all contexts to the pay of labourers and artisans. In the Supplement to *Stroud, sub* " Wages," it is pointed out that the cases upon which the definition was based were cases on the *Truck Act*. The Act, as stated in one of those cases (*Gordon* v. *Jennings* (1)), was intended to protect domestic or labouring servants and artisans, not performing " services of a higher class " (to which the word " salary " was more appropriate) who were considered to be in a positio in which they were unable to protect themselves. The term " wages " in such an Act may well be limited to payments made to manual workers. But this fact does not show that the meaning of the words should be similarly restricted in an Act where the reference is to wages paid to " any employee as such."

In my opinion, in the *Pay-roll Tax Assessment Act* the word " wages " should be held to include any remuneration paid or payable to an employee as a reward for his services as an employee. I am of opinion that on this point the decision of the majority of the Board was wrong, and that therefore the decision of the Board should be set aside and the assessment of the Commissioner confirmed. The respondent should pay the costs of the appeal to this Court.

Appeal allowed with costs. Decision of Board of Review set aside. Assessment of Commissioner confirmed.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *W. H. Fraser.*

J. B.

(1) (1882) 51 L.J. Q.B. 417, at p. 418.