CITATION: *T & M Concretors v Commissioner of Taxes* [2005] NTMC 081

PARTIES:	T & M CONCRETORS PTY LTD
	v
	COMMISSIONER OF TAXES
TITLE OF COURT:	Taxation and Royalty Appeals Tribunal
JURISDICTION:	Appeal from Commissioner of Taxes
FILE NO(s):	20513228
DELIVERED ON:	20 December 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	7 July 2005, 8 August 2005
JUDGMENT OF:	Mr H Bradley CM

CATCHWORDS:

TAXATION -- PAY-ROLL TAX -- EMPLOYEE
Subcontractor or employee - Indicia of employment

Taxation (Administration) Act s 105V
Pay-roll Tax Act s 6 and s 11A

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16 - followed
Hollis v Vabu Pty Ltd (2001) 207 CLR 21

REPRESENTATION:

Counsel:

Appellant:	Mr L Loganathan
Respondent:	Mr T Anderson

Solicitors:

Appellant:	Ward Keller
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID number:	[2005] NTMC 081
Number of paragraphs:	26

IN THE TAXATION AND ROYALTY APPEALS TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20513228

BETWEEN:

T & M CONCRETORS PTY LTD
Appellant
AND:

COMMISSIONER OF TAXES
Respondent

REASONS FOR DECISION

(Delivered 20 December 2005)

Mr BRADLEY CM:

1. This is the first appeal under the relatively new provisions of the *Taxation (Administration) Act* 1978. Section 165T of that Act establishes this Tribunal. An appeal now lies to the tribunal or to the Supreme Court from decisions made under *Taxation (Administration) Act*, *Pay-Roll Tax Act* and the *Mining Royalty Act*. An appeal to the Tribunal is an appeal de novo and the taxpayer bears the burden of proving the decision or determination is incorrect. The procedure established by the Act is intended to be relatively simple and informal. Section 105V of the *Taxation (Administration) Act* provides:

> **105V. Conduct of appeals generally**
>
> (1) The Tribunal –
>
> (a) is not bound by the rules of evidence but is bound by the rules of natural justice;
>
> (b) must determine an appeal on the material lodged by the parties with the Registrar, unless the Tribunal is satisfied the circumstances of the appeal require a hearing to be conducted; and

(c) may only conduct a hearing if satisfied the circumstances of the appeal require it.

(2) The practice and procedure of the Tribunal is –

(a) as prescribed by any rules and practice directions made under section 105X; and

(b) if paragraph (a) does not apply – as determined by the Tribunal.

(3) The Tribunal must keep a record of its proceedings.

(4) The Tribunal must publish written reasons for its decisions.

2. In these proceedings the appellant T & M Concretors Pty Ltd ("T & M") has appealed against a decision of the Commissioner of Taxes in relation to the imposition of pay-roll tax in respect of certain workers carrying out work for or on behalf of the company. The issue is whether those workers are subcontractors, or employees in relation to whom pay-roll tax is payable pursuant to the *Pay-roll Tax Act* 1978 as amended (The Act). At a preliminary conference the parties indicated that whilst they were prepared to make such further submissions as the Tribunal may require they were not interested in a formal hearing or the giving of evidence to assist in the determination of the matter. The Tribunal therefore is left with the bundle of documents presented to the Tribunal by the Commissioner of Taxes which the Tribunal is advised makes up the Commissioners file in relation to the matter together with the objections, notice of appeal and written submissions of each of the parties.

3. It is worth noting that the history of the matter relates to an investigation by the Commissioner into the company's obligation to pay pay-roll tax for the period 1 July 1998 to 30 September 2003. There were in fact two individual assessments made by the Commissioner in respect of this total period. The Treasurer has, pursuant to his statutory powers, waived the liability in respect of the first assessment altogether and reduced liability in respect of the second assessment affectively reducing the amount claimed by the Commissioner to an amount of $166,740.05. It is against this final amount claimed by the Commissioner that the objection was raised and this appeal

instituted. It is appropriate in the circumstances to look at the whole history of employment to determine the issue in respect of the precise period. The context of the arguments imply that the appeal includes an appeal against a determination by the Commissioner under s 11A of the Act to the effect that certain workers paid through a third party medium are also employees in respect of whom pay-roll tax is payable.

The Issues

4. There are a significant number of workers engaged by T & M in the course of their concreting business. The schedule to the Commissioners assessment shows that during the relevant period there were 19 employees and 89 alleged common law employees. It is the status of the 89 workers (the "disputed workers") which is at issue in these proceedings. Almost without exception the submissions made by the parties have concentrated on the bulk of the employees and it is not possible for this Tribunal to separately investigate the status of each and every disputed worker because there is simply insufficient evidence to do so. The parties have not identified any particular individual who should be treated as a special case. The principal argument both before the Commissioner and this Tribunal is whether or not the disputed workers referred to by the company as subcontractors and by the Commissioner as Common Law employees are persons to whom wages are paid for the purposes of the Act. There is no dispute between the parties as to the amount paid to each of the workers in the group.

5. Within the group of disputed workers there are a number who operate through an interposed company or partnership. One such is identified as "C & I Formwork". In the case of this entity and with each of the other similar entities paid by T & M there is one person and one person alone who is carrying out the work in relation to which the payment is made. This does not appear to be disputed on the papers. The Commissioner has made a determination under s 11A that monies paid to those entities is to be

regarded as wages for the purposes of the Act. The Appellant disputes the validity of this determination.

The Law

6. For the purposes of this appeal the essential provisions of the Act are:

> **"6. Pay-roll tax**
>
> (1) Subject to and in accordance with this Act, **there is payable in respect of all wages paid or payable by an employer** or a group on or after 1 July 2003 (whether in respect of services performed or rendered before, on or after that date) and which are wages that are paid or payable –
>
> (a) in the Territory, not being wages so paid or payable in respect of services performed or rendered wholly in the Australian Capital Territory or a State; or
>
> (b) elsewhere than in the Territory in respect of services performed or rendered wholly in the Territory,
>
> **tax at the rate of 6.2% of the total wages paid** or payable in a return period of one month.
>
> **11A. Arrangements for avoidance of tax may be disregarded**
>
> (1) **Where a person enters into an agreement**, transaction, or arrangement, whether in writing or otherwise, **whereby a natural person performs or renders**, for or on behalf of another person, **services in respect of which a payment is made to some other person related to or connected with the natural person** performing or rendering the services **and the effect of such agreement,** transaction or arrangement **is to reduce or avoid** the liability of a person to the assessment, imposition, or **payment of pay-roll** tax, the Commissioner may –
>
> (a) disregard the agreement, transaction, or arrangement;
>
> (b) determine that a party to the agreement, transaction or arrangement shall be deemed to be an employer for the purposes of this Act; and
>
> (c) determine that a payment made in respect of the agreement, transaction or arrangement shall be deemed to be wages for the purposes of this Act.
>
> (2) Where the Commissioner makes a determination under subsection (1), he shall serve a notice to that effect on the person deemed to be an employer for the

purposes of this Act and shall set out in the notice the facts on which the Commissioner relies and his reasons for making the determination.

7. It can be seen from s 6 that the obligation to pay the tax is not connected to the concept of payments made to an employee but rather **"in respect of all wages paid or payable"**. Wages are then defined in s 3:-

> " "Wages" means wages, salary, commission, bonus or allowance paid or payable (whether at peace work rates or otherwise and whether paid or payable in cash or in kind) to or **in relation to an employee as such** and, without limiting the generality of the foregoing includes……"

8. Employee is not defined anywhere in the Act although "employer" is defined as a person who pays or is liable to pay wages. It seems inevitable therefore and it is a matter in relation to which the parties are in agreement that the concept of "employee" should be regarded as the same as the Common Law definition of employee. The words used in the Act "employee as such" do not seem to me to add anything to the overall concept of employees as defined in the many cases on the issue. The parties have effectively joined issue on the question of whether the disputed workers are employees as a matter of fact and law.

9. The issue of whether a person is an employee or not has arisen previously both in the Northern Territory and elsewhere in Australia involving an employer's liability in a number of areas. As his Honour Mr Justice McHugh identified in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at p 69 (*Hollis case*) it can have consequences in "industrial relations, workers compensation law, for working conditions, for obligations of employers to make superannuation contributions and group tax deductions and for the payment of annual and long service leave and taxes such as pay-roll tax". That case itself involved the common law liability of an employer for the acts of its employees. In this case the issue of employment is to be determined for the purposes of identifying the liability of T & M to pay pay-roll tax.

10. The variety of situations considered in the cases are broad and numerous because of the multiplicity of human relationships. The courts have necessarily responded to this challenge by identifying a variety of indicia which as a group will enable a court to determine the character of a relationship. Whilst initially the control test was the primary measure there is now no single element which on its own is sufficient to determine the issue. The Hollis case itself considered and followed an earlier decision of the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, (*Stevens case*). In that matter the history and progress of the law was discussed. As His Honour Mr Justice Mason said at page 24:

> "But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question: *Queensland Stations Pty. Ltd v Federal Commissioner of Taxation* [33];*Zuijs' Case; Federal Commissioner of Taxation v Barrett [34]; Marshall v Whittaker's Building Supply Co [35]*. Other relevant maters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.

11. In the same case Their Honours Wilson and Dawson JJ said at page 35:-

> ".....The classic test for determining whether the relationship of master and servant exists has been one of control, the answer depending upon whether the engagement subjects the person engaged to the command of the person engaging him, not only as to what he shall do in the course of his employment but as to how he shall do it: *Performing Right Society Ltd v Mitchell and Booker (Palias de Danse) Ltd.* [70]. The modern approach is, however, to have regard to a variety of criteria. This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances".

12. And again Their Honours at pages 36 & 37 said:-

> "The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance.
>
> Having said that, we should point out that any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance".

13. It is possible therefore that the jurisdiction and purpose of the legislation to be interpreted is capable of influencing the court as to what factors are critical or should be given more weight to determine the status of a worker. In this case the purpose is the collection of a tax and thus may lead to an implication that a court should be a little slower to interpret a relationship in a way that imposes a liability on the citizen or corporate citizen. The two High Court cases cited are in my view leading decisions in the area and are decisions relating to the concept of Common Law employment. As indicated the parties to this case have accepted and I agree that it is the Common Law definition of the relationship of employee that is critical to determining whether the disputed workers were paid "wages" within the meaning of s 6 of the *Pay-roll Tax Act 1978*. All of the circumstances of the employment of the disputed workers therefore should be taken into account

to determine whether, looking at the relationship as a whole it should be categorised as a contract of service rather than a contract for services.

14. So far as I am aware there are no decisions on the meaning and effect of s 11A of the Act. From its terms it is evident that it is there to take into account arrangements which might have the effect of avoiding the tax where the true relationship is one of employment. The definition of "wages" appears to pick up the same theme by the use of the expression "to or in relation to an employee". The arrangement of interposing a company, partnership or business name has been commonly used to re-direct income or split income to minimize the incidence of income tax. In my view s 11A is designed to overcome such a simple arrangement as a means to avoid payment of the tax. It is proper in such circumstances to look to the real relationship between T & M and the person physically carrying out the work. If that relationship is properly characterised as a relationship of Common Law employment with the rewards for that work being paid to a different entity then the Commissioner is entitled to make an appropriate determination under s 11A.

The Employment Facts

15. T & M has been engaged in the concreting industry in the Northern Territory for many years. It is a significant player in the building industry in the Darwin Market. T & M advertises to the public and contracts to industry and the public in the performance of its business and engages some regular employees and the disputed workers to fulfil its contractual obligations. Like many others in the building industry T & M have arranged their business in a way which they believe will minimise the cost of labour. It matters not that T & M have followed the example of others in the industry. The tribunal will look to the facts presented in relation to this appeal only since there appears to be no precedent in Northern Territory Law. One clear or apparent relief from the arrangements undertaken by T & M is that they

are no longer responsible to the disputed workers under the provisions of the Work Health Act. The company has also reached the conclusion that the arrangements do not oblige them to pay pay-roll tax. This case is to test that conclusion.

16. At the request of the Tribunal the parties filed a Statement of Facts Matters and Circumstances relied upon and a consolidation of those was filed conveniently by the Solicitor for the Northern Territory. From this document and from an examination of all of the documents provided in the Commissioner's file it is possible to make certain general findings as to the factual basis upon which the relationship was conducted. The parties often had a difference of emphasis as to the facts and there were some differences between their assertions of fact which can not be determined without the taking of evidence. In some cases where I have reached the view that one statement of fact or circumstance is far more likely given the overall relationship I have made such a finding and in other cases I have not been able to reach a conclusion and thereby not taken that fact, matter or circumstance into account. The things that can be said about the way in which the business was conducted are as follows:

16.1 T & M is in the business of industrial, commercial and domestic concreting.

16.2 The work undertaken by the disputed workers consisted mainly of preparing the site before pouring concrete, including necessary form work, steel fixing, levelling and finishing the concrete as it was being poured.

16.3 The disputed workers were supervised and directed either by direct employees of T & M or alternatively by the more experienced men on the site. It is likely that the larger or the more important the job the greater the degree of supervision by T & M.

16.4 That each job involved a group of men referred to by T & M as a crew and it appears that they worked as a group rather than as individuals.

16.5 The supervision that existed was directed to ensuring that the work was completed to the specific requirements of the contract that was entered into by T & M.

16.6 The disputed workers performed most of the manual labour that the appellant required in order to conduct its business.

16.7 The work performed by the disputed contractors whilst not requiring any trade qualifications nevertheless required a degree of on the job experience and training.

16.8 The disputed workers were paid on an hourly or daily basis and did not, so far as the records disclose, ever submit a quote to T & M for carrying out any of the work undertaken by each of them.

16.9 There is no evidence of the disputed contractors ever advertising their services to other industry persons or to the public.

16.10 The records kept by T & M disclose that the disputed workers worked exclusively or almost exclusively for T & M during the periods that they were engaged. There is little evidence of short term engagement as one might expect in the employment of sub-contractors and some of the disputed workers were engaged for years.

16.11 There are no records available to show variation to pay according to the nature or location of the work, nor is there any indication that the disputed workers were ever required to rectify defective work at their own expense. Although the company asserted during interview that contractors could be required to rectify faulty work it is difficult to

see in the team environment acknowledged by the company how any single contractor could be held to be responsible for a defect in the work. None of the disputed workers delegated their work to another person as one might expect from time to time with independent contractors.

16.12 There is evidence to suggest that some of the disputed workers wore shirts or t-shirts carrying the logo of T & M although it is not possible to identify any direction that they should do so.

16.13 The fortnightly payments that were made to the disputed workers were made by reference to hours or days worked and records of which were kept on time-sheets in the company's records.

16.14 The vast majority of materials, plant and equipment required to undertake the projects was provided by T & M. The contractors it seems had some of their own tools and some men used their own vehicles. The company had a fleet of 18 motor vehicles and all the major equipment required to undertake the work. Men who used their own vehicles do not appear to have been paid at a different rate.

16.15 The great majority of the disputed workers had ABN's and had notified the employer of this fact. Each of the disputed workers accepted responsibility for his own insurance including workers compensation insurance. By operation of law they are therefore excluded from the definition of "worker" in s 3 of the *Work Health Act.*.

16.16 The disputed workers did not receive the usual added entitlements of normal employment for example there is no evidence of them ever receiving holiday pay, sick leave or superannuation. This appears to be the fact. Whether as a matter of law the disputed workers are entitled to some or all of these benefits pursuant to relevant

legislation is not for this Tribunal to determine although some of those benefits may be payable to the workers if they are found to be employees within the Common Law framework.

16.17 Throughout the various periods of employment of some of the longer term employees different arrangements were made to take into account 10-20% deductions for taxation and/or GST. The nature of those particular arrangements were not entirely consistent across all of the employees.

16.18 The time-sheets that exist indicate that the workers almost universally worked or were credited with working the same number of hours each per day and the number of hours each day were similar. One would expect that if each man was working independently that he would start and finish at least on some occasions at different times of the day as was the case in *Stevens case*.

17. Generally speaking it can be said that the payments made to the disputed workers generally fall on a per annum basis between $40,000 and $60,000. Such sums appear to be the only payments made to each of the disputed workers since no evidence has been provided of any additional pay received from another source. This income level seems to me indicative more in the nature of a salary range rather than payments made to contractors who are or are entitled to engage in other work. Nowhere have any of the disputed workers provided independent evidence of how they operate their business; there are no books of account in evidence and in some cases the literacy levels of the workers appears to require T & M to carry out the paperwork for them. From the relatively small number of tax invoices contained within the file it is interesting to note that many appear to be prepared in the same handwriting although for different workers.

18. There are no written agreements or contracts between T & M and the disputed workers. It seems that verbal agreements were reached between

Michael Vazanellis, one of the Principals for T & M and each of the disputed workers.

19. T & M have identified several features that are indicative or consistent with the disputed workers being independent contractors. Some of them are accepted by the Commissioner in his response and some I accept as being likely in the overall circumstances illustrated by the documentary evidence. Some examples are:

    19.1 The fact that the disputed workers whilst not professionals or tradesmen generally did require skill and experience as concrete workers.

    19.2 That permanent employment was not guaranteed.

    19.3 Some disputed workers used their own vehicles and hand tools.

20. The whole history between T & M and its workers is indicative of regular daily work paid fortnightly and calculated on an hourly or daily basis where the company was responsible for supplying all of the machinery and equipment apart from some minor hand tools. There appears to be no assertions that any of the disputed workers could carry out work otherwise than in accordance with the supervision which was provided by "senior contractors" or T & M employees. The very concept of one independent contractor acting as supervisor towards another independent contractor is almost a contradiction in terms.

21. T & M assert a number of other matters in their response to the Commissioners Statement of Facts, Matters and Circumstances relied upon however there is no documentary evidence to back up the majority of such assertions and it is difficult in the circumstances for the Tribunal to accept them.

22. Other matters asserted or agreed to by T & M in the Appellants Response to the Statement of Facts, Matters and Circumstances relied upon by the Respondent are as consistent or sometimes more consistent with employment than with contracting; I refer in particular to the matters asserted in paragraphs 4.1, 4.2, 4.3, 4.4, 5.7.

23. Having regard to all the above I have confidently concluded that the disputed workers or at least those working and paid in their own names.are Common Law employees and are paid wages within the meaning of s 56 of the Act.

24. Those workers who were paid through the medium of other names were, on the papers, still the only person carrying out the labour for T & M. It seems these were treated the same as all other disputed workers except for the mode of payment. There is no evidence of a real business being carried out in that name. Were that the case if would seem simple for T & M to have shown the business accounts of those entities or at least evidence of other contractual work being carried out. Nothing of this sort has been provided and so T & M has failed to satisfy the burden of proof placed on it by virtue of the provisions of s 105A(4) of the *Taxation (Administration) Act*.

25. In so far as the appeal is against the imposition of additional tax it seems to me to be based on a mere denial of liability without any substantiated argument. The Commissioner is clearly entitled under s 23 to require payment.

26. The appeal must therefore fail. I will hear the parties as to the form of order and any consequential orders.

Dated this 20th day of December 2005.

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Hugh B Bradley
CHIEF MAGISTRATE