SUPREME COURT OF QUEENSLAND

CITATION:	*Universal Supermodels Pty Ltd v Commissioner of State Revenue* [2018] QSC 257
PARTIES:	**UNIVERSAL SUPERMODELS PTY LTD** (appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	SC No 880 of 2016
DIVISION:	Trial Division
PROCEEDING:	Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2018, 2 August 2018
JUDGE:	Boddice J
ORDERS:	**1. I shall hear the parties as to the form of orders and costs.**
CATCHWORDS:	TAXES AND DUTIES – PAYROLL TAX – OBJECTIONS, APPEALS AND REVIEWS – where the respondent issued tax reassessments to the appellant for the tax years 2009 to 2014 – where the appellant was required to pay payroll tax, with a sum of penalty tax and interest, following an audit by the respondent – where the penalty tax was remitted from 75 per cent to 20 per cent – where the appellant objected to the reassessments on the basis the payments assessed as wages were rather payments to independent contractors – where the respondent disallowed the appellant's objection – where the appellant now appeals, pursuant to s 69 of the *Taxation Administration Act* 2001 (Qld) – whether or not the payments assessed as wages were payments to independent contractors – where, if determined to be payments to independent contractors, whether the penalties imposed by the respondent should be remitted to nil – whether the discretion of the respondent had erred EMPLOYMENT LAW – EMPLOYMENT RELATIONSHIP – ASCERTAINING EXISTENCE AND NATURE OF

RELATIONSHIP – PARTICULAR RELATIONSHIPS – INDEPENDENT CONTRACTOR – where the appellant is the operator of adult entertainment venues – where dancers perform at those venues – whether those dancers are employees of the appellant or independent contractors – where the relevant test is a multifactorial test – where the dancers agreed to the appellant's 'dancer's protocol' – where the terms of the protocol included authority for the appellant to impose fines and deductions on the dancers' remuneration, or terminate their contract, if dancers did not comply with the protocol – where the dancers were required to obtain permission from the appellant's senior staff before undertaking breaks – where payments by clients for lap-dances, including tips, were deposited directly with the appellant – where the prices for lap-dances were fixed by the appellant – where the payment for dances, including tips, was distributed between the appellant and dancer at a rate of 50 per cent each – where the appellant paid dancers $50 if they concluded a shift without having performed any lap-dances – where the appellant issued recipient-created tax invoices to the dancers – where some dancers had ABNs, whilst others did not – where the appellant's senior staff assisted dancers to obtain ABNs – where dancers could work at other adult entertainment venues and wear their own clothing – where some dancers had regular clients particular to that dancer – where dancers could not arrange, if they were unavailable, for someone of their choice to take their place performing – whether the dancers were, in substance, employees or independent contractors – whether the outcome of an audit of the appellant regarding GST and PAYG withholding tax, conducted by the respondent, supported the appellant's claim the dancers are independent contractors

Liquor Act 1992 (Qld)
Payroll Tax Act 1971 (Qld), s 9, s 10, sch 1
Taxation Administration Act 2001 (Qld), ss 69-70C

ACE Insurance Ltd v Trifunovski & Ors (2011) 200 FCR 532, cited
Avon Downs Pty Ltd v Commissioner of Taxation (1947) 78 CLR 353, applied
Commission of Taxation v Barrett (1973) 129 CLR 395, applied
D & D Tolhurst Pty Ltd v Commissioner of State Revenue (1997) 38 ATR 1001, cited
Hollis v Vabu Pty Ltd (2001) 207 CLR 21, applied
Marshall v Whittaker Building Supply Co (1963) 109 CLR 210, cited
On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3) (2011) 214 FCR 82, applies

Orica IC Assets Pty Ltd v The Commissioner of State Revenue [2011] QSC 1, applied
Pryke v The Commissioner of State Revenue [2006] QSC 226, cited
Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539, cited
Stevens v Brodrib Sawmilling Co Pty Ltd (1986) 160 CLR 16, applied
Tattsbett Pty Ltd v Morrow (2015) 223 FCR 46, applied

COUNSEL: M J May for the appellant
D W Marks QC with F J Chen for the respondent

SOLICITORS: Cooper Grace Ward for the appellant
Crown Law for the respondent

[1] **BODDICE J:** On 5 February 2015, the respondent issued reassessments for the tax years 2009 to 2014, by which the appellant was required to pay a total of $810,389.15 in payroll tax, together with $164,510.32 in penalty tax, and $237,001.74 in unpaid tax interest. Those assessments remitted the penalty tax from 75% to 20% and remitted unpaid tax interest from 19 August 2014 to 5 February 2015.

[2] On 26 March 2015, the appellant objected to those reassessments. The grounds of objection were that payments assessed as wages were payments made to contractors, not employees and therefore not taxable wages. The respondent disallowed that objection on 27 November 2015.

[3] On 22 January 2016, the appellant appealed the objection decision pursuant to s 69 of the *Taxation Administration Act* 2001 (Qld). Prior to doing so, the appellant, paid the whole of the amount of the tax and late payment interest payable under the reassessments, satisfying the condition to filing an appeal under s 69(1)(b) of the *Taxation Administration Act* 2001.

[4] At issue on the appeal, is whether dancers at adult entertainment venues operated by the appellant were employees of the appellant, or independent contractors carrying on their own businesses. The appellant contends there is a subsidiary issue, in the event the dancers are found to be employees, namely whether the penalties should be remitted to nil.

Background

[5] The appellant is the holder of a Liquor License and an adult entertainment license. During the financial years, the subject of the appeal, it operated three clubs, Players Universal Lounge, Club Minx and Club Vixen. Each operated separately, although the features of their operation were the same.

[6] As the operator of an adult entertainment license, the appellant was required to comply with the Adult Entertainment Code in accordance with the *Liquor Act* 1992 (Qld). That Code prescribed the live entertainment that may be performed on licensed premises by a person performing an act of an explicit sexual nature. Pursuant to that Code, adult entertainment did not include sexual intercourse, masturbation or oral sex, the touching of the genitalia, placing faces in close proximity of genitalia, or soliciting any person for the purposes of prostitution.

[7] The appellant's clubs imposed a cover charge for customers. The cover charge, collected by door-girls, was given to a receptionist adjacent to the front door of the club. That receptionist recorded the number of people in the club for safety purposes. The main area of the club contained a bar area, seating and a stage. Dancers performed on the stage. In between such performances, a dancer would walk around the main floor talking to customers. Hostesses would also be on the main floor. They facilitated interaction between dancers and customers, including the booking of private lap-dances.

[8] Customers who booked a private dance paid the fee to the receptionist. The fee, set by the appellant, was based on the duration of the dance. A private dance was conducted in a separate room. An adult entertainment controller, a person approved under the *Liquor Act* 1992, observed all dances. Their role was to monitor compliance with the club's adult entertainment license. The clubs were subject to regular inspection to ensure compliance with both the adult entertainment license and liquor license.

Objection Decision

[9] The re-assessments were issued following an audit by the respondent. During the audit process, the appellant contended that dancers were engaged by it on a contractor basis

and were not employees. The appellant advised that dancers were paid for each contract on a cash basis, with settlement of each contract being made at the end of the next working day. The appellant provided employee records evidencing the omission of any payments to dancers. The appellant also provided a copy of a dancers' protocol, which it said was signed by all dancers before they were allowed to perform at the appellant's clubs.

[10] Having considered the material obtained in its audit, the respondent determined the dancers were properly to be characterised as employees. The respondent concluded the dancers' protocol was consistent with the appellant exercising authority to control the dancers, in what they wore, when they worked, how they performed their job, who they reported to each night and when they could take leave. That control was consistent with an employer/employee relationship. Further, the dancers' protocol outlined a dancer's pay rate for lap dancing. Again, indicative of an employer/employee relationship.

[11] The respondent noted dancers were wholly or predominantly providing labour services, in circumstances where they did not supply their own material, equipment and tools needed to complete that work. Dancers were initially provided with a uniform. Payment of the uniform was deducted from their pay, with the uniform being handed back each night until it was paid off. Shoes could also be hired for a fee per night. The appellant was responsible for all other materials and tools, including dancer's poles, stage, music and lap-dance rooms. These factors were consistent with dancers being employees.

[12] The respondent accepted that dancers had an ABN, operated on a cash only basis, were not entitled to superannuation, sick leave or recreational leave, were provided with an invoice to manage their own tax liability and that no income tax was withheld from the payments made to the dancers. Whilst this payment method was indicative of an independent contractor, the dancers' hours of work included a requirement to work set shifts and set days. Dancers were also restricted from exchanging phone numbers or private details and in leaving the club with customers. These factors were suggestive of control, consistent with dancers being an employee. Dancers also did not have any commercial risk or responsibility in performing at the appellant's club.

[13] Whilst the dancers' protocol indicated a responsibility on a dancer to compensate the appellant in the event a client's credit card was refused, it provided for disciplinary action

in the form of fines and forfeited pay, if dancers broke any of the appellant's rules or conditions. Dancers also did not have the ability to sub-contract or delegate their work to another dancer, and were subject to dismissal and requirements for notice before resignation, consistent with a relationship of employer/employee.

[14] The appellant objected to the respondent's determination that dancers were employees. The appellant contends an examination of the substance of the relationship between the dancer and the appellant was consistent with an independent contractor. Further, an application of the entrepreneurial test identified the existence of two businesses, one operated by the dancer as a contractor. The appellant also contended an Australian Taxation Office Adult Industry Project Team, which conducted an industry wide audit during 2004 to 2006, concluded dancers were not employees and should register for an ABN. The findings of an investigations review into payroll tax compliance, conducted by the respondent in December 2008, also concluded dancers were not employees.

[15] The appellant relied on the Australian Taxation Office's Interpretative Decision in relation to the supply of adult services in the context of a goods and services tax. That decision was consistent with dancers being independent contractors, not employees. Further, the method adopted for operating its business was consistent with the factual basis for that Interpretative Decision. The appellant submitted its control over dancers did not extend beyond that necessary for compliance with an adult entertainment license. Dancers were free to choose and select the client and the nights worked and were free to dance at the establishment of competitors to the appellant.

[16] In response to that objection, the respondent, in the interests of procedural fairness, advised the appellant the payroll tax audit conducted in 2008 had included a specific notification that the appellant may be liable to register for payroll tax and the appellant was subsequently registered for payroll tax, on the basis it had correctly self-assessed all taxable wages. Correspondence issued at the completion of that audit made no reference to deeming dancers to be independent contractors, and therefore not liable to payroll tax. The respondent sought further information from the appellant as to the dancers' ABN, hours of work, continuity, uniform, commercial risk and control.

[17] In response to that request for further information, the appellant, by letter dated 16 June 2015, acknowledged the payroll tax audit did not include a technical review of whether dancers were independent contractors, but asserted the appellant had an expectation the respondent was satisfied dancers were not employees. The appellant provided statutory declarations from its managers, Lisa Beetham and Teraza Daley, a dancer, Courtney Thompson and its accountant, Guiseppi Disavia. The appellant submitted these statutory declarations supported its contentions that dancers were independent contractors, operating separate businesses, with any control in the operation of those businesses only at the level consistent with the appellant's obligations to ensure compliance with the adult entertainment code, for the purposes of continuation of its licenses.

Original Statutory Declaration

[18] The statutory declarations of Beetham and Daley were in identical terms, as to the structure of the appellant in respect of employees, the engagement of contractors and the terms and circumstances of the agreement with dancers.

[19] Beetham began working for Club Minx in 2001. She commenced working for the appellant in 2006, when it purchased Club Minx. In 2008 she began operating at the appellant's other club, Players Universal Lounge. In 2015, she was employed as the appellant's operations manager, with responsibility for the day to day running of the business of both its clubs.

[20] Teraza Daley has also been involved in adult entertainment since 2001. She worked at Players, prior to its purchase by the appellant in 2002. In 2015, she was the appellant's general manager, responsible for the day to day running of Players and Club Minx. More recently, she purchased Players Universal Lounge.

[21] According to their statutory declarations, the appellant regularly advertised for employees, through job sites. It did not advertise for dancers on those sites. Employees were the door girls who accepted the cover charge from customers and escorted them into the main area of the club; the receptionist responsible for collecting cash from door girls, hostesses and customers; hostesses, who worked on the floor of the club facilitating dancers to sell private lap-dances; team leaders, being duty managers or liquor approved

managers, licensed under the *Liquor Act* 1992; bar staff, responsible for serving alcohol and other beverages; and controllers, who were individually licensed under the *Liquor Act* to ensure compliance with the appellant's adult entertainment license and the associated regulations.

[22] The appellant engaged three types of contractors, security, cleaners and dancers. There were usually about 30 dancers on the books for each club, at any period of time, with between 8 and 15 dancers performing per night at each club. Dancers performed on stage. They also provided private lap-dances for customers. When a dancer sells a private dance, the client paid reception the fee before being taken into a separate room. This room was large enough to accommodate up to 20 clients and their dancers at any one time. It did not contain individual rooms for each private dance. Some areas were afforded privacy, based on the positioning of curtains and internal walls. The layout of the room was designed so that one controller sitting in the control booth had a direct line of sight to each of the dancers, a requirement of the adult entertainment permit.

[23] Employees were provided with a staff pack containing a protocol, information about uniforms, a PAYG withholding form, a superannuation nomination form, a fire information form and a sheet setting out bank details. Dancers were provided with a dancer's pack, which included a dancer's protocol, a fire information form, an ABN form and dancer tips fact sheet. An individual could be both an employee and a contractor. For example, an individual may be rostered on bar work on some nights as an employee, but work as a dancer on other nights.

[24] Dancers came from various backgrounds. A new dancer was given a buddy, being a more experienced dancer who did not get paid for this work. On a dancer's first night, hostesses would assist that dancer to obtain her first private dance. The new dancer was not given instructions as to how to perform a private dance. Dancers would learn by watching other dancers. Dancers were not provided with feedback as to their performance. A dancer's contract could be terminated for any reason by the appellant. If a dancer wanted to terminate they must give one week's notice. This enabled the appellant to contract with additional dancers, as well as to inform regular clients of the termination of the dancer's contract.

[25] Some dancers had substantial good will. As a consequence, they earnt substantially more money. The good will depended upon a number of factors, including perceived attractiveness and the ability to build rapport with the client. Dancers sold a service to the client, being a private lap-dance. It was for the dancer to sell that service, although hostesses assisted, particularly when a dancer was on stage and could not herself ask a client for a private lap-dance arrangement. Dancers had regulars. Clients would come to a club looking for a particular dancer. If the dancer was not there, the club would telephone the dancer to ask if she wished to come in to provide a dance. The dancer determined whether to come in to the club. Dancers could also instruct the appellant to contact them if a regular client came in on a particular night.

[26] Only one dancer was on stage at any one time. The time spent on stage involved three songs, which was a form of advertising for the dancer. The song limit ensured dancers were not giving away their time for free and allowed other dancers the opportunity to dance on stage. When a dancer finished on stage, the dancer would change and re-enter the floor area to approach clients. The dancer circled the room attempting to sell private dances to potential clients. A dancer was not paid for this networking.

[27] The appellant had a 'rough three minute rule'. The idea was to allow a dancer sufficient time to spend with a potential client before moving on to the next potential client. This was to avoid dancers giving away their time for free to potential clients who do not purchase private dances. It also ensured each dancer had an opportunity to sell to a particular client. A dancer could seek assistance from a hostess to ensure they met personal targets set by themselves.

[28] Once a client agreed to have a private lap-dance, the dancer escorted the client to reception, where the client paid the receptionist the fee for the dance, based on the length of time agreed with the dancer. The dancer then escorted the client into the private lap-dance area. The dancer notified the controller of the time agreed for the lap-dance. Just before the client's lap-dance was to finish, a hostess or team leader would approach the client and, along with the dancer, try to have the client extend the lap-dance.

[29] The appellant had administrative arrangements for dancers. A dancer would advise the appellant of their availability at the commencement of a week. The appellant would

schedule the dancer's presence according to that availability. A dancer would usually come into a club for either the period 7:00pm to 3:00am, or 8:00pm until close, or for four hours starting before 11:00pm. The appellant would ensure there were at least some dancers working from 7:00pm each night, so it could fulfil its role as an adult entertainment venue. The number of shifts undertaken by a dancer per week varied considerably. Some dancers worked almost every available night. Others would only work on busy nights. The appellant would call or text other dancers to see if they could attend on busy nights. The appellant could not force other dancers to perform.

[30] When a dancer started for a night, the dancer signed into reception in their dancing outfit. This process ensured the club was able to monitor the number of people in the club at any one time for fire and liquor licensing purposes. Inspectors regularly asked to see copies of the appellant's records, showing the number of people in the club at any point of time. Both clubs were located in basements, so fire regulations were strictly adhered to by the appellant. Dancers would also want the receptionist to know where they were on the floor, in case a regular called asking for the dancer.

[31] There was an approximate roster for when dancers are to advertise on stage. It varied depending on whether the dancer was conducting private lap-dances at the time. A dancer would almost never leave a private lap-dance to perform on stage. The appellant's policy was that if a dancer was with a potential client, another dancer did not steal the potential client away. If a potential client was left unattended by a dancer, another dancer was free to target that client. This policy prevented disputes between dancers.

[32] Dancers received 50% of the money made performing private lap-dances. The dancer paid the appellant 50% of any tips. Dancers signed a tax invoice to the appellant on a daily basis for their services. The appellant prepared the details, including the time spent on lap-dances, the total amount of income received and the dancer's percentage. Dancers would confirm the amounts were correct and sign and date the invoice. A dancer who did not perform any private lap-dances, did not receive any money. Occasionally, in order to lift staff morale, dancers who had earned no money would be paid $50 by the appellant.

[33] Dancers generally bought an outfit before dancing at the appellant's clubs. This could include a long dress, a short dress, G-string and/or bikini. The price of that outfit was

deducted from subsequent payments to the dancer. Dancers were able to purchase shoes from the appellant or from elsewhere.

[34] As previous investigations had resulted in the appellant receiving fines or warning letters for failure to conduct their venue in accordance with their obligations, the appellant introduced a dancers' protocol to assist dancers to understand the appellant's compliance obligations. The protocol was aimed at ensuring the appellant's compliance with the Act and regulations. It was rarely adhered to by dancers. As a consequence, the appellant attempted to impose a fine system on dancers, as a means of discouraging a breach of their contract. The biggest compliance risk for the appellant was controllers and the number of people present in a venue at any one time. A controller was required to be present at all times. The appellant was required to monitor the number of patrons in order to determine how many security guards were needed and to ensure compliance with fire safety laws.

[35] Beetham added in her statutory declaration that, if a dancer was not able to make her shift, the dancer would call or text Beetham. If it was going to be a busy night, Beetham would text other dancers to see if they could come in, but no dancers were forced to come in those circumstances. If a dancer had an ABN, the dancer provided that information to Beetham. If not, Beetham would apply for the ABN on their behalf and give the details to the dancer. Dancers were provided with a business card or phone number of the appellant's accountant, so that they could contact him regarding their own tax obligations.

[36] Courtney Thompson worked as a private dancer at Players. She had been a private dancer since March 2013. When she first approached Players she met with a team leader who explained the arrangements for private dancers working at the club. Thompson was told she would receive 50% of the amounts paid for private lap-dances. It was up to Thompson to get that work, although hostesses and team leaders were able to assist dancers get dances and therefore make more money. Thompson purchased multiple outfits, mostly from Players. She purchased shoes regularly from Players or from sex shops. She would buy her own jewellery. Thompson knew she had to get an ABN which she supplied to the appellant. She was responsible for her own tax and superannuation obligations. Thompson had also worked occasionally as a casual employee for Players and its related club, Club Minx, for bar and promotional shifts and as a controller.

[37] At the time of preparation of her Statutory Declaration on 11 June 2015, Thompson was working at three different venues. Two venues were owned by the appellant, Players and Club Minx. The other club, in Fortitude Valley, was called Eye Candy. Thompson was working Monday and Tuesday of the first week and Tuesday and Wednesday of the second week at Players. Thompson would tell Beetham the nights she wanted to work. It was usually those nights. She worked for Eye Candy two or three nights per week, later in the week. There was a period when she only dancing at Players and a subsequent period of about three months when she was only dancing at Eye Candy.

[38] At both clubs, she quoted her ABN. The payment arrangement was different for Eye Candy. At that club Thompson had to pay $30 and buy three drinks. If she received no private dances for the night Thompson lost approximately $60. On Fridays and Saturdays at that club, Thompson had to pay $60 and purchase six drinks. She could therefore lose approximately $120 each night. However, once Thompson paid the $30 and either bought three drinks or had a customer buy three drinks for her Thompson was allowed to keep 85% of the amount she received for private dances. The club received the remaining 15%. At that club, Thompson also received $5 tips and $10 payments for lap-dances. She did not have to share any of this income with the club.

[39] Thompson said there were many nights on which she had made no money. She could not recall having a negative night at Eye Candy but there were nights at Players and Club Minx when she did not receive any money because she had not sold any private dances. It is frowned upon in the industry for dancers to dance for multiple clubs at the same time. However, there are plenty of options. If one club no longer wanted a dancer it would be easy to dance at another club.

[40] Thompson received repeat business from the same clients. She would make sure she was present on the night a regular attended so there was guaranteed income. Thompson would tell Beetham to call her if work became available. Thompson had occasions when a regular booked her for one night and returned the next night with a friend. The client booked Thompson for a private dance again, as did his friend.

[41] Nobody instructed Thompson on how to obtain dances. Over time, she identified what worked best. Generally, Thompson used the opportunity to advertise by dancing on stage.

During this time she would make a note of the clients in the club who appeared interested in her. After she finished her onstage routine she would approach those clients and ask if they would like a private dance. Thompson would agree the length of time for the private dance, walk the client to the receptionist, and tell the receptionist the agreed time.

[42] Once the client had made payment to the receptionist, Thompson escorted the client into the private room. Thompson would tell the controller the length of time of the agreed dance. The controller would make a note in her log book. The controller did not provide Thompson with any instructions on how to dance. It was the controller's job to ensure that neither the dancers nor the clients breached of any of the Adult Entertainment Permit Rules. The controller made sure there were no seating disputes between dancers.

[43] Thompson currently had five outfits for the appellant's clubs. The uniform at Eye Candy was a bikini. Thompson purchased her own bikinis for dancing there. At the appellant's club, Thompson was paid on an invoice system, the next night. An invoice was provided which set out the club's records of the full amount. Thompson would write the date and time and sign it. The invoice was on carbon paper. Thompson received one copy and one copy was kept by the appellant.

[44] In about November 2008, Giuseppe Disavia, the appellant's accountant and tax agent, responded on behalf of the appellant to a letter from the respondent's office advising the appellant was going to be reviewed in relation to payroll tax obligations. . He enclosed various documentation. On 15 January 2009, default assessment notices were issued to the appellant for the periods ending 30 June 2004, 2005, 2006, 2007 and 2008, as well as 30 September 2008. The default assessment notices raised primary payroll tax liability of $36,180.81, based on the salary and wages paid by the appellant. The respondent did not assess payroll tax on any payments made to independent contractors, including any dancers.

[45] Disavia was the accountant and tax agent for Club Minx during 2004 and 2005, prior to its acquisition by the appellant in 2006. In that role he was actively involved in an extensive audit of the adult entertainment industry throughout Australia, undertaken by the Australian Taxation Office's adult industry project team between 2004 and 2006. The audit process did not involve payroll tax. It reviewed GST and PAYG tax compliance,

as well as ABN compliance. One aspect of the audit included a comprehensive review of the relationship between Club Minx and its dancers.

[46] As part of that process, the ATO's representative reviewed all written agreements between the club and its dancers, conducted discussions with the dancers to establish their relationship with the club, attended the club's premises to identify activities of the dancers and conducted investigations at other clubs. Disavia said he was informed by a member of the ATO that the ATO determined the dancers were independent contractors. As such, the dancers needed to obtain an ABN. The ATO sought the cooperation and assistance of the club to ensure dancers registered for an ABN.

[47] Disavia conveyed this information to the proprietors of the club and proceeded to train administration staff on how to complete an ABN registration form. Thereafter, Club Minx complied with the ATO request and assisted dancers in registering for an ABN. Following the conclusion of the audit, the ATO issued a series of interpretative decisions and industry specific fact sheets in relation to the collection and payment of GST in the supply of adult entertainment services by dancers.

Further evidence

[48] In cross-examination, Daley agreed the club, not the dancers had the necessary adult entertainment license. Dancers do not own the premises or provide door or other administrative staff. However, the appellant did not provide the dances. There was an engagement by which dancers could use the appellant's venue to advertise their services. The system by which the appellant and the dancers operated, was that the club wrote out a tax invoice, with the original being given to the dancer, and the club retaining a carbon copy. The tax invoice was the tax invoice of the dancer. The critical thing for the profitability of the appellant's business, was the dancer. You could have an adult entertainment permit with no dancer, but you would have no service.

[49] Daley accepted the dancer could only provide that service in licensed premises. Daley agreed dancers were asked to indicate their willingness to follow the appellant's dance protocol. That protocol contained an acknowledgement the dancer may be fined or have her contract terminated if she failed to follow that agreement. Some dancers, but not all

dancers, signed that agreement. The protocol provided the dancer would be given agreed hours every week. Daley did not agree dancers were controlled by the club. The club would not favourably view a request that a dancer send a friend for a rostered shift, although that had happened in the past.

[50] The roster was important for dancers to adhere to, as it ensured dancers were available on every night. Other reasons for the preparation of a roster, were so dancers could contact their clients to make arrangements for them to attend when the dancer was to dance and to remind dancers to be available on a particular day. The requirement that dancers seek permission before going on breaks was for safety reasons. It was strongly recommended dancers give a minimum of two weeks' notice if they wanted time off.

[51] Dancers were required to wear their uniform correctly at all times. The protocol also provided that dancers must be well groomed with their hair and makeup done fashionably. Daley did not accept that if a dancer turned up in an untidy state, they would be asked to do something about their appearance. They were never asked not to dance. It was strongly suggested, for their own benefit, that they think about their presentation. The protocol also provided that dancers were not to "cut other dancer's grass". That was a suggestion that a dancer not 'muscle in' on another dancer's client.

[52] While the protocol provided that dancers were to perform for a certain amount of songs, enforcement of that requirement was laughable. Dancers walked on and off as they wanted to, even in her own company. Breaks were taken at times requested by dancers. Dancers may wish to go for a cigarette, fix their hair or makeup or call their boyfriends.

[53] A part of the dancer's job was stage dancing. Hostesses assisted dancers to obtain lap-dances. A dancer was not reliant on the hostess. Tips were paid to the club for safety reasons. Dancers were required to split tips with the appellant. The rate for lap-dances was specified in the protocol. That rate was on a time basis. A dancer would not get a different rate if they indicated they would like a different rate.

[54] However, dancers could receive an additional amount beyond that fee by way of tip. Dancers would choose what they did in their own dance. A dancer might choose to do

open leg work, but put a price on that happening within their lap-dance. Other dancers would do open leg work and not put a price on it. Those matters were up to the dancer.

[55] What caused a dancer to have regulars was hard to pinpoint. Generally, a good work ethic attracted regulars, but that did not follow with every dancer. Dancers did not need experience to work for the appellant. Anybody can be a dancer. Dancers would come and go frequently. Dancers would often work at different venues simultaneously, making it easy for the dancer to build up a client base. A dancer may work for a specified period, if they wanted to pay off a particular debt or pay for a holiday. Some dancers would come in and out of the work.

[56] Daley accepted that parts of her statutory declaration were identical to Beetham's statutory declaration. Daley did not accept her evidence was Beetham's evidence. Her evidence was her own evidence. She did not know how Beetham came to make her statutory declaration.

[57] In a further affidavit, Beetham said the appellant had introduced policies to ensure dancers understood the appellant's need to comply with the strict laws that apply to adult entertainment venues. The dancers' protocol was one such policy. It specifically referred to the rules of contact between dancers and patrons, when dancers were giving a lap-dance. Despite that protocol, dancers did not comply with the laws about lap-dancing, thereby jeopardising the appellant's business. As a result, the appellant imposed a warning and fine system on non-complying dancers.

[58] The fine system aims to discourage a dancer for failing to comply with the law. It worked on the basis a controller, who was present in a room where a lap-dance took place, would witness the infringement, and make a note in the 'controller's book'. If it was the first occasion a dancer had infringed the law, the dancer generally would receive a warning. If the dancer did not take notice and breached the law again, the dancer would receive a fine. If the dancer continued to ignore the laws, the fine would be increased.

[59] In cross-examination, Beetham accepted that a substantial part of her statutory declaration was identical to Daley's statutory declaration. Daley was the appellant's general manager. Beetham was the operations manager. They worked together and were both

responsible for the day to day running of the business of both clubs. They did not work the same hours. They had prepared the statutory declarations together at the Players Club. They discussed everything they did together. Beetham believed the legal representatives typed up the statutory declarations when they were both together with the lawyers. Beetham said it was still her evidence.

[60] Beetham did not accept dancers were advertising the appellant's services in providing lap-dances to clients. Dancers were advertising themselves for their own lap-dance. The club was providing the service of the lap-dance to the client. The club provided the venue for the lap-dance. The appellant fitted out the club and provided the bar, door and other staff. The receptionist was provided by the club. Beetham did not accept the dancer was working for the club as part of that overall team. A dancer was not working under Beetham's direction, in terms of how a lap-dance was performed by the dancer.

[61] The tax invoice from a dancer was prepared by the appellant's receptionist. The appellant made sure they were done. The tax invoice did not have the client's name on it. It had the appellant's name and the name of the dancer. It was a transaction between the dancer and the appellant's Club. The receptionist would tick the relevant box to indicate the venue at which the dance had been performed by the dancer. Beetham primarily assisted dancers in the preparation of an ABN application. Beetham would fill this out online with the dancer. The appellant adopted that cooperative approach to help the dancers who were young, inexperienced girls.

[62] The dancers' protocol, which was almost invariably signed by a dancer, provided that the dancer declared a willingness to comply with the protocol, acknowledged her obligations and responsibilities to the club and acknowledged that in failing to follow the agreement she may be fined or have her contract terminated by the appellant. There were instances where dancers were terminated when they did not follow the strict adult entertainment rules for lap-dancers. It was important the dancer follow those laws so the appellant could keep its license.

[63] The protocol provided for the dancer to perform agreed hours as given to the dancer every week. It was important for a dancer to turn up in accordance with the roster. The requirement that a dancer give a minimum of two weeks' notice was not enforced, but

Beetham accepted it was important for the appellant to know in advance who was going to turn up. A dancer who did not give proper notice might be fined, or terminated by the appellant. The reference in the dancer's protocol to wearing a uniform correctly at all times, was a reference to a style of dress, rather than a particular dress. The appellant was looking for a particular look. The protocol also provided that dancers must be well groomed with their hair and makeup done fashionably. That was important for the appellant.

[64] Beetham agreed the protocol provided dancers were to work as a team. If a dancer could not dance in accordance with a roster, the dancer could arrange for someone to cover a shift for her, but that person was then doing their own job. A dancer was part of the organisation. The protocol also provided that dancers were not to "cut other dancer's grass". When a dancer is talking to a customer, another dancer could not interrupt that dancer. Even though all dancers were in competition with each other, it was not appropriate to cut a dancer off with a customer and start with that customer yourself. A dancer must wait until the customer was available.

[65] Beetham accepted that whilst a dancer was on stage the dancer could not speak with a customer to arrange a lap-dance. One of the appellant's hostesses would draw attention to the dancers on stage and encourage a client to take a dance with them. They worked as part of a team. Dancers did not earn income whilst on stage. Beetham accepted that directions for a dancer to work as a team, to not cut other dancer's grass and that as part of their job they must dance on a stage when they did not actually earn income, meant a dancer was effectively under the appellant's control in terms of how she performed her work.[1] The dancer's payment also did not depend on the quality of her dance.

[66] A new dancer was taken through the protocol, as well as the requirements of the Adult Entertainment Code, to ensure a dancer understood what not to do in a private dance. There was no other instruction as to how to perform a private dance. If a dancer did something inconsistent with the legislation during a lap-dance, they would be fined by the appellant. Dancing was a fairly transient workforce. People would come and go. Dancers would have regulars. A dancer could obtain a regular within two weeks.

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[1] T1-38/5.

[67] Beetham said the appellant did not specifically advertise for dancers on job websites, such as Seek, but did advertise on the appellant's own website. A new dancer was provided with a buddy, who watched a new dancer perform. To that extent, a dancer received training on the job. A dancer had various motivations for performing that type of work. Some dancers might want to pay off a specific debt. Once that debt was paid a dancer might give notice.

[68] The appellant made up a tax invoice for the dancer as it made it easier for the dancers. Dancers did not have their own invoice books. If a dancer purchased a costume or shoes by way of time payment, an amount was deducted out of each invoice on a nightly basis. There were a number of dancers in relation to whom the appellant did not have an ABN on record. A dancer might only dance for one night, such as a trial night. Other dancers would work a lot but still not provide an ABN. The appellant would check the ABN provided by a dancer, but not every time. The appellant kept records of its dealings with dancers for the purpose of meeting its own tax obligations.

[69] In cross-examination, Disavia agreed that during the review by the respondent in 2008, he was not provided with any determination by that office about whether dancers were independent contractors or employees. The default assessment notices issued for the period 2004 to 2008, related to payroll tax on wages for employees such as bar staff and security officers. He was not aware whether the OSR undertook a full investigation as to whether dancers were independent contractors or employees for that time period.

[70] The ATO person who indicated the ATO had determined dancers were independent contractors was a member of a team undertaking a GST audit process. The investigation was mainly looking at how clubs accounted for GST taxable supplies as well as ABN and PAYG withholding tax. At the time of the ATO audit, clubs were being operated generally in a similar way but with differences. For example, at the time of the audit, the appellant considered itself an agent for the dancer, with the dancers being referred to as franchisees.

[71] Disavia could not recall whether during the audit process, dancers were receiving cash directly from patrons. If they did, that was a different set up to the present arrangement where the receptionist for the appellant collected the money. Disavia did not know

whether at the time of the audit there were no written contracts between dancers and the appellant. There was now a written document between dancers and the appellant. Those differences, would be substantial differences to the time of the respondent's audit for the 2004 to 2008 period.

[72] Disavia accepted the appellant was not provided with any written determination by the ATO on the issue whether a dancer was an employee or an independent contractor. Disavia relied upon the ATO's interpretative decisions when subsequently considering the issue of payroll tax, as well as discussions with the ATO and a consideration of ATO fact sheets. Disavia agreed those documents did not state a dancer was an independent contractor or employee. Those documents dealt with GST. To that extent, the documents did not assist an accountant in determining, for payroll tax remittance purposes, whether a dancer was an independent contractor or an employee.[2]

[73] Further, the fact sheet relied upon by Disavia, expressly stated that it provided information for sole operators in the adult entertainment industry. The assumption of that fact sheet was that a dancer was a sole operator. He agreed the fact sheet did not determine whether a dancer was an independent contractor. Again, an accountant could not rely upon the fact sheet when considering remittance of payroll tax to make a determination of whether a dancer was an independent contractor or employee.

[74] Disavia was only the accountant for the appellant for part of the period, the subject of this appeal. It would only have been for 2009 to 2010. He was not directly involved in any remittance of payroll tax. The appellant's in-house bookkeeper had that responsibility. Disavia did not think it unusual that the appellant assisted dancers to obtain an ABN. That was a request by the ATO as part of its audit of GST compliance in the adult entertainment industry. Ordinarily, a business would set up its own ABN and accounting processes. It was his understanding the appellant created tax invoices for a dancer. An employee of the appellant filled out the details on that invoice, which was in the form of a tax invoice from the dancer to the appellant. The dancer's ABN was listed on the tax invoice, but the invoice did not include the address of the appellant. That was not an essential requirement of a tax invoice.

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[2] T1-53/35.

[75] The tax invoice to the appellant was a tax invoice issued as a recipient created tax invoice, which was permitted under an agency relationship. It was legitimate for an entity to create a tax invoice to itself. Disavia was not sure whether it was necessary for there to be an agreement between the supplier and the recipient for the provision of recipient created tax invoices.[3] The supplier's address would normally be on that tax invoice, but it was not essential. The legislation requires that a person be able to identify the taxpayer, by either having the person's name or ABN. There is a search system to identify the accurate details of the holder of an ABN.

[76] Disavia accepted a taxpayer can only rely upon statements made by the ATO or the respondent's office, if this is provided in a private ruling. No private ruling was obtained in the appellant's case. However, the failure to obtain a private ruling did not constitute taking insufficient care.[4] An audit had been conducted in 2004 to 2006 by the ATO, which involved a question of whether dancers were employees or independent contractors as that audit had concluded in a way satisfactory to both the commissioner and the party being audited. There would be no reason to apply for a ruling from the ATO in respect of those circumstances. Clients do not often apply for private rulings. He has only assisted two or three clients in 30 years of practice to obtain a private ruling from the ATO. He has never assisted a client to apply for a private ruling from the respondent's office. He does not know whether there is a power to issue such a ruling.

[77] Sandra Szmidt, an approved controller employed by the appellant, holds a licence under the *Liquor Act* 1992 to ensure the appellant complied with its adult entertainment permit, in the conduct of adult entertainment at Players and Club Minx. She is present in the room where dancers carry out lap-dances. She is required to give warnings if dancers break any laws. She has an obligation to keep records of any such infractions.

[78] Szmidt started working at Players in August 2006 and at Club Minx in 2009. Her employment with the appellant commenced as a promotions girl. At that time, the name of the club was printed on every piece of her uniform, not just the bikini bottoms. Szmidt also worked as a door girl, bar girl and controller. Between 2009 and 2014, she was employed by the appellant as bar staff and as a controller at Players. Szmidt was

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3 T1-58/35.
4 T1-60/45.

contracted with the appellant as a dancer from around May 2014. She mainly danced at Club Minx. Szmidt also danced at other clubs.

[79] There were key differences between her roles as door girl, bar staff and controller, and her work as a dancer. As door girl, bar staff and controller, she was employed by the appellant. At the commencement of that employment, she was required to fill out a tax file number declaration and to provide her personal bank account details. During that employment, she was paid an hourly rate on a casual basis and a weekly wage in her nominated bank account. The appellant withheld tax from those wages. Szmidt picked up pay slips which showed the hours worked and the amount of her pay.

[80] Szmidt's employment was subject to a roster released each week. The rostered hours were generally the hours Szmidt chose to work. If Szmidt wanted to take extended leave or holidays, she was required to give two weeks' notice to the appellant. If Szmidt was sick, she was required to give notice before 3:00 pm on the day. She was also required to provide a medical certificate. As an employee, she was required to wear a uniform. The uniform was a bikini bottom and long dress with a see through bottom. The name of the club was printed on the bikini bottoms.

[81] As a dancer, Szmidt was contracted with the appellant. When she commenced work as a dancer she met with a controller and went through the hours and days she wanted to dance at Club Minx. She also went through a document called the dancers' protocol. This was the same process she had undertaken in her position as controller. Even though she knew the protocol, she was required to go through the process as a dancer. There was a strict legal requirement that dancers comply with the protocol.

[82] Szmidt said when she started dancing at Club Minx, she stopped working as an employee of the appellant. Szmidt had to provide her ABN, which she already had from previous employment. Szmidt understood she was not being employed by the appellant, but was contracting with the appellant to dance at Club Minx. Szmidt would tell Beetham the nights she wanted to dance so that Beetham could finalise a roster for the following week. Szmidt would check the roster when it was posted in the change rooms of the club. When Szmidt was not in the Club Minx, she would telephone the club to check the roster. Szmidt

could dance on any other night, provided she started before 11:00pm and danced for at least four hours.

[83] Szmidt received payment from dancing in cash, on a tax invoice system. The appellant completed a tax invoice that set out how much money Szmidt had made in one night. Szmidt would check that the details on the tax invoice were correct. Szmidt would sign the tax invoice and keep one copy of the invoice. The appellant kept the carbon copy of that invoice. Szmidt received 50% of the money she made dancing, whilst the appellant received the remaining 50%. Szmidt would collect her payment for dancing at the end of the next night. This was standard for all dancers. If she received a tip, which was rare, Szmidt was required to hand it into reception. Szmidt would collect her 50% share of the tip when she collected payment for her dancing for that particular night. This was also standard for all dancers.

[84] There were many nights when Szmidt did not earn any money. If she did not make more than $50, the appellant would generally pay her $50, provided she had made an effort to make money when customers were in the club. If Szmidt wanted to go on a holiday or could not dance on a particular night, she would tell Beetham the week before the release of the roster. Szmidt had not ever changed the night she would dance on the same day. She had seen other dancers do this and understood if you wanted to change the night, they needed to talk to Beetham. If Szmidt was sick, she would call Beetham by 3:00pm on the same day. Szmidt was not required to provide a medical certificate.

[85] Szmidt received a dress on the first night she commenced dancing at Club Minx. Szmidt paid $100 for the dress, which was gradually deducted from the money she made each night from dances. Szmidt could buy her own dresses to wear at Club Minx. She usually bought them from the club because they were less expensive and it was more convenient. Szmidt would buy her own shoes.

[86] In Szmidt's experience, dancers would dance for different periods of time. Some girls may only dance for one to three months. Others would stay longer and dance for six to 12 months. Some girls started dancing in order to pay off a specific item or bill. Those girls would stop after that payment. Some university students would dance in the

university holidays, but not during semester. There were many girls who danced for one night and did not return.

[87] In 2014, Szmidt only danced at Club Minx. Since that period, she started dancing at Players. Szmidt had regular customers who paid large amounts of money for a lap-dance. Those customers came to Club Minx specifically for Szmidt. Regulars would sometimes call the club to see whether Szmidt was dancing on a particular night. If Szmidt was not at the club she would receive a telephone call from the club to ask that she go in to dance on that extra night.

[88] Szmidt understood that some of the rules in the dance protocol were important because they ensured the appellant's compliance with the legislation. Other rules in the protocol were not enforced by the appellant, or did not happen in reality. The rules in the protocol which were enforced included the rules of contact between dancers and patrons; the requirement to report to reception before dancing each night; the payment of money on the next night; the requirements a dancer have an ABN and complete a stage dance each night, which went for three songs; the rule of no boyfriends, partners or friends being allowed in the club; and the requirements dancers not wear garters, wings, and boots or bring toy weapons into the club on the costume theme nights, and not have mobile phones on the floor when dancing.

[89] The rules in the protocol which were not enforced included that dancers were not required to dance every second Saturday night; to give the appellant two weeks' notice before taking time off; to work on major event nights; to not have facial piercings; to seek permission before taking two breaks; and to move on from a customer after three minutes. Szmidt had never been fined $1 per minute for being late and did not believe it was necessary for a dancer to give notice before resigning. Szmidt had never heard of a dancer being charged the price of a lap-dance if a credit card had been declined.

[90] A hostess on the floor would tell a dancer when they were going to dance next. If the dancer was doing a lap-dance at the time, the hostess or team leader would ask another dancer to dance on the stage. Szmidt knew from her time as a controller that the appellant imposed fines on dancers when they broke the rules about lap dancing and, in particular, contact between dancer and patron. The controller was required to record that incident.

The dancer will first receive a warning and then receive a fine. If the dancer continued to break the law when carrying out a lap-dance, the appellant would increase the fine.

[91] In cross-examination, Szmidt agreed it was the club providing the adult entertainment. The club had the licence and provided the premises, door and bar staff and controllers. The dancer was part of the organisation that provided the service of a dance to the client. Szmidt did not, as a dancer, have a business to sell. She could not sell her regulars to somebody else. Although the system provided that Szmidt was supplying a service to the appellant, the appellant drew up the tax invoice and gave it to Szmidt. Szmidt kept the original. The appellant retained the carbon copy.

[92] Szmidt agreed there were consequences if dancers did not turn up to dance in accordance with the roster. When Szmidt was working for the appellant, whatever pay was waiting for the girl was forfeited.[5] Some people did call up on the day and change their roster. There were no consequences for those people.[6] The forfeiture of outstanding pay only occurred if a dancer failed to show up without telling anyone. If you rang saying you were not able to make the dance roster, the manager on the night would usually make do with less girls. Szmidt had never made changes on the same day.

[93] Szmidt had signed the dancers' protocol. It was her agreement with the club. The protocol listed the amount a dancer would receive for doing the itemised dance. The figure represented the dancer's 50% of the total amount paid by a client. The listed amounts were GST inclusive. On occasions a dancer would let a client pay for a shorter time period if the client did not have enough money. The hostess or manager would work out the price in those circumstances. The requirement of liaising with the team leader before taking the 10 or 20 minute breaks was enforced by the appellant. Szmidt never took breaks.

[94] Whilst a dancer was on the main stage, she was not earning any income unless patrons were tipping the dancer. There were tipping chairs right along the front of the stage. Tipping was not discouraged but was not pushed by a club. If Szmidt received a tip she

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5 T1-66/5.
6 T1-66/15.

would hand it in to reception. The tip would be shared between the dancer and the club. She agreed that seemed a little odd.

[95] Cindy Nguyen was a dancer at Players. Nguyen originally started working for the appellant when employed as part of the bar staff at Club Minx in early 2014. She commenced dancing at Players in March or April 2014. She ceased dancing at Players at the end of 2014 when she also resigned from her employment at Club Minx. More recently she had started dancing again at Players and had been employed as part of the bar staff at Club Minx. She was working three days behind the bar and dancing three days at Players.

[96] Bar staff roles at Club Minx were advertised on the job site Seek. Nguyen answered that advertisement. She was interviewed by Peter Croke and Beetham. As part of the bar staff at Club Minx, Nguyen was paid on an hourly basis. She would fill out and hand in a time sheet showing the hours worked each week. Beetham emailed a payslip directly to Nguyen. Her pay was deposited by direct debit into her bank account every Monday. Beetham emailed a staff roster to all employees who worked at Club Minx. The roster was signed by staff members to acknowledge their working shifts. Nguyen was aware of other employees' positions, namely, door staff, promotion girls, hostesses inside the club, team leaders and controllers. Security staff were contractors engaged by the appellant similar to dancers. Nguyen wore a uniform when working behind the bar. She was provided with this uniform when she started working at Club Minx. If Nguyen could not make it to work as an employee she was required to call Beetham. If she wanted to take extended time off for holidays she was required to speak to Beetham approximately two weeks in advance.

[97] Dancers had a separate process. They were not treated as part of the staff at Club Minx or Players. After having met with Beetham and Croke on her first night of dancing, Nguyen met with a controller who read out and discussed the dancers' protocol. Nguyen knew that when she started as a dancer she would be carrying on her own business rather than be an employee of the appellant. She knew she needed to complete a form to obtain an ABN. Nguyen also knew she would be responsible for paying tax on any amounts she received for dances. She reported the cash made from dancing in her income tax return each year.

[98] Beetham emailed a roster to the dancers setting out the nights each dancer was to dance the following week. The roster was necessary to ensure there were enough dancers for each night of a week. Nguyen could dance on any other night if she wished and did not have to tell the appellant if she wanted to work on those other nights. Nguyen had to dance for a minimum of four hours. The roster was posted in the dancers' change room. Each dancer signed the roster. The roster reminded dancers to speak to Beetham if there were any nights they could not work.

[99] Nguyen made most of her money from lap-dances. On very rare occasions, she would receive tips. Most of the time customers on the floor were either ordering lap-dances from the dancers or 'time wasting' because they rarely gave dancers tips. Nguyen gave any tip to the floor manager or hostess. The tip was split 50/50 between Nguyen and the appellant. On many occasions Nguyen did not make any money from dances. On those nights, if she stayed the entire shift the appellant paid $50. Nguyen described it as a retainer for nights where dancers did not make anything at all. There was a strict rule. If dancers made any money they did not receive this retainer.

[100] Nguyen would be paid the money she had made dancing on a particular night on the next night she was arranged to dance. The appellant gave her a tax invoice that included details of her dancer name, real name, ABN, time spent on lap-dances, total amount of income and amount received by Nguyen. Nguyen would check the information on the tax invoice and sign and date the invoice. The invoice was prepared in a carbon book. Nguyen took one copy and the appellant kept a copy. Nguyen used the invoice for her own tax records.

[101] There was a high turnover of dancers. A long time to be dancing for the same club is two years. Most dancers probably dance for a couple of months. Some dancers only danced for one or two weeks.

[102] Dancers could dance at other clubs. Nguyen danced at a variety of clubs. Nguyen would often work at more than one club at the same time. Both Croke and Beetham knew she danced at these clubs.

[103] If Nguyen was sick on one of the nights she was rostered to dance, she would telephone Beetham before 3:00pm on the day. She had never been made to come in to dance when

she had telephoned in sick. She was never required to provide a medical certificate. On occasions, Nguyen telephoned Beetham to say she could not come in to dance as she had been "burnt out". She never had a problem coming back to the club to dance when she had taken a few days off.

[104] At the appellant's clubs, dancers were provided with a long dress when they started working for the appellant. The cost of the dress was deducted from the money made from dances. Dancers were required to return the dress at the end of each night until they had paid for it. After working as a dancer at Players for a while, Nguyen bought her own dresses. She was never told to wear a particular dress. Nguyen had the freedom to turn down a customer that may ask for a lap-dance.

[105] Nguyen had a number of regular customers. In her experience, every dancer had at least one or two regular customers. Approximately 70% of her income was made up of lap-dances ordered by regulars. There had been instances when she had been working as bar staff at Club Minx and her regulars would come in and ask her when she was next dancing at Players. If she was not dancing at Players on a particular night and one of her regulars came in Beetham or another hostess would telephone Nguyen and give her the option to come into the club. Unless she had another engagement, Nguyen would go in to dance because it was guaranteed income for her. It is rare for regulars to stay at a club when the particular dancer is not dancing that night. There was a sense of loyalty between dancers. If Nguyen realised the customer was a regular of another dancer, she would back away quickly and either go and find the other dancer or let the customer know the nights the regular dancer would next work.

[106] Nguyen said on her first night of dancing the controller read out and explained the dancers' protocol. After a couple of nights dancing she had another meeting with a controller to go through the protocol again. The protocol was so the appellant could comply with its licensing requirements. Some its rules were taken seriously, others were treated more as guidelines. For example, in reality, dancers could work on nights they had not agreed to work in the roster, but if they did so they were expected to work at least four hours. If dancers worked on an extra night and wanted to pick up their income from an earlier night, they had to work until 1:00am or make $100.

[107] There were other aspects of the protocol that did not happen, or happened in a more fluid way. Dancers often did not give two weeks' notice before taking extended leave. Around 30 to 40% of dancers did not work any weekends. It was not compulsory to dance when there were major events. Some dancers did have facial piercings, like nose studs. Nguyen had never been fined for calling in sick or re-arranging dates to dance. Fines were reserved for dancers who did not comply with the laws when giving a lap-dance. Generally, dancers were fined because they were not following the licensing laws or if a dancer ignored multiple warnings from a controller. Nguyen was not aware of any time a credit card had been declined and the cost of a lap-dance charged to the dancer. There was also not a strict three minute rule in respect of customers. If there were not many customers in the club, dancers would often talk to customers for a longer period of time. Sometimes dancers did not do any stage work in a night because they were booked by a customer for a lap-dance.

[108] In cross-examination, Nguyen said a dancer who worked in the industry for only one or two weeks would not have regulars. Once a dancer had worked for several months the dancer would be expected to have some regulars. Nguyen estimated the necessary period would be three to six months. Most dancers signed the dancers' protocol. Two weeks' notice was usually given in most circumstances for requested time off. In her experience, dancers sought permission before taking a break. Dancers could not walk off whenever the dancer wanted and could not take multiple breaks. Nguyen would call Beetham before 3:00pm to advise if she was sick. Nguyen was not required to find a replacement. She could not have given her shift to someone else if Nguyen had wanted to do so.

[109] Nguyen obtained an ABN because that requirement was stated in the protocol and she was told to do so by the appellant. The appellant assisted her to set up her ABN. The appellant held the adult entertainment licence. She did not hold a licence. Whilst she was dancing for the appellant, the staging, lighting, bar staff, security, promotional girls, front door staff were all provided by the club. Nguyen did not have to pay for those facilities. The payment system was organised by the appellant. The dancer was given a tax invoice written by the appellant. She had written tax invoices for other dancers when working as a receptionist for the appellant at Club Minx. It was part of her role as receptionist.

[110] The payment of $50 by the appellant to a dancer who had not made any money for an entire shift was like a retainer. To that extent, a dancer did not have any commercial risk when coming to work. The dancer would walk away with at least $50.[7] The appellant did not have a requirement that dancers buy a minimum number of drinks and dancers did not have to pay to dance at the appellant's clubs. Some other clubs had that requirement.

[111] The appellant enforced the wearing of the correct uniform. Dancers had to report to reception in uniform. There were other restrictions placed on a dancer. The dancer's protocol stated that no mobile phones could be on the floor at any time. Dancers could not smoke. Those restrictions were placed on Nguyen by the appellant.

[112] Whilst working as a dancer on stage, the floor hostess would help the dancer to get clients to sign up for lap-dances. They worked as a team. Dancers would not approach another dancer's regular out of respect. Dancers did not have contact details for their regulars. That was against the rules in the protocol. Nguyen also understood it was not allowed under the Adult Entertainment Code. Regulars would contact Nguyen either by coming to the club or by telephoning the club. They never contacted Nguyen directly.

[113] Nguyen used a stage name as a dancer. When introducing herself she would say "I work at Universal".[8] Nguyen did not consider she was running a business that could be sold by her. She could not sell her regulars and did not have any goodwill to sell to someone else. The rates of remuneration for lap-dancers were set by the appellant. A dancer could not negotiate those rates. A dancer who had been in the industry for more years could not charge more money. It was a set rate for all. Nguyen did not advertise her dancing services.

[114] Natalie Nawrotzky also worked as a dancer at the appellant's Club Minx. She started dancing in February 2014. On her first night she met with the then manger and the owner, Peter Croke. She also met with a controller. Another girl who was dancing for the first time attended that meeting with the controller. The controller went through a document

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7 T1-77/8.
8 T1-81/18.

called the dancers' protocol step by step in detail. The entire process lasted approximately two hours. Nawrotzky started dancing shortly after the completion of that process.

[115] Nawrotzky understood she was not employed by the appellant. On her first night, she completed an ABN application. She would dance on a fortnightly schedule. This schedule allowed her time to recuperate. If she danced outside her rostered nights, she needed to work a minimum of four hours. She would sometimes work longer. She could choose to dance between 7:00pm to 3:00am or 8:00pm to closing time. A roster was displayed at the front counter and in the dressing room. Dancers could change those nights after release of the roster.

[116] Tips were required to be handed into reception as soon as they were received by a dancer. Nawrotzky would receive the money made at the end of the next night. If dancers did not make any money, the appellant would generally pay dancers $50 as long as they worked a full shift. If Nawrotzky wanted to take time off she needed to tell Beetham at least one week before hand. If Nawrotzky was sick or could not come into dance, she would call Beetham before 3:00pm on that day. She would bring a medical certificate with her on the next night she was to dance. Nawrotzky never had any problems in rearranging the nights she danced at Club Minx.

[117] Nawrotzky wore a long dress when dancing at Club Minx. She purchased the dress on her first night of dancing at Club Minx. It cost $100. The price was deducted over the next few nights from the money she made from dancing. While she was still paying for the dress, she gave the dress back to the appellant at the end of every night. There was nothing on the dress that indicated Nawrotzky was dancing at Club Minx. Nawrotzky wore other dresses when she danced at Club Minx. She had worn the dress purchased from the appellant when she danced at other venues or for private work. She purchased her own shoes.

[118] Nawrotzky was able to turn down a customer if they asked for a lap-dance. The appellant would not force her to do the lap-dance. There were few dancers who danced for a long time. Girls generally danced only for 1 to 3 months. Only about one in 10 dancers actually came back to dance for a second night.

[119] Nearly all of Nawrotzky's money came from private laps dances. It was difficult to receive tips at Club Minx because of its layout and the fact that dancers do not offer short dances around the stage. Nawrotzky would obtain work from regulars by telling them when she would next be dancing at the club. Regulars had called Club Minx to ask whether she was working. On those occasions, the manager would call Nawrotzky and she would go to Club Minx to dance.

[120] Nawrotzky understood the dancers' protocol was necessary so the appellant could comply with all relevant laws. House policies relating to those laws were strictly enforced, such as rules about lap-dances. Other house policies were not always enforced and there was more relaxation. Statements in the protocol requiring dancers to dance on major events nights; to check in with reception before starting dancing each night; asking a floor manager before going on a break and undertaking stage work each night for a minimum of three songs, generally took place in reality. Nawrotzky had witnessed dancers who had been fined when they did not move on from a customer after being asked to do so by a floor manager. Nawrotzky had never been fined in such circumstances. To her knowledge, no dancer was fined for calling in sick or arranging to change the night they are working. The appellant also had not deducted $1 per minute from the dancer's payment for running late and she was not aware of any dancer being charged when a credit card had been declined.

[121] Nawrotzky worked at other clubs. She would also do some private work. She advertised and promoted her business by word of mouth and on social media forums. She did not pay for any advertisements. Some customers would come to Club Minx because they had seen her advertising on social media. When Nawrotzky did private work she would give a quote to the client. The quote included travel costs.

[122] The audit conducted by the ATO into a review of the adult entertainment industry in 2004, included consideration whether the appellant had complied with the "no ABN withholding provisions for payments provided to service providers (dancers) of lap dancing and strip tease activities". As part of that process, the ATO produced a GST audit case plan. Part of that plan concluded the appellant had not withheld GST from payments made to suppliers of lap dancing and strip tease income, namely, the dancers, where the dancers were carrying on an enterprise or business in Australia. The appellant

was liable for a penalty for failing to withhold amounts from payments made to the dancers. That penalty was subsequently remitted as part of a settlement agreement.

[123] The ATO also concluded, as part of that case plan, that the dancers were each carrying on an enterprise and should be registered by an ABN. The factual basis upon which the ATO reached this conclusion, included findings that the appellant controlled the price paid for the dancers to perform lap-dances and retained its share of that price, distributing the dancer's share to them, and that the appellant controlled who performed at its clubs, but that dancers chose where and when they performed a lap-dance.[9]

[124] During that audit process, officers of the ATO conducted an interview with the appellant's director, Peter Croke, and the appellant's accountant. Croke was recorded as advising the ATO that dancers were paid a percentage of about 55 or 60% of the money earned for the shift. Tipping was discouraged and the dancer's stage names and percentage split was recorded on daily sheets kept by the club. Dancers collected the money from the patron and paid the club their share. There was no paperwork provided by the dancer to the club. Croke argued the appellant had no legal obligation to remit GST on the full lap-dance price, as it was acting as an agent.

[125] The ATO concluded, based on the information received by it, that the agreement between the parties "is for the provision of the dancer's services to [the appellant], in return for payment for the lap-dance…The agreement does not provide for a separate supply of services by the dancer to the customers….[The appellant] is not acting as an agent for the dancer in respect of the supply of the lap-dances to the customers. Therefore the entire payment by the customer is for the supply of services by the appellant."[10]

Legislative Regime

[126] Sections 69-70C of the *Taxation Administration Act* 2001 (Qld) provide that a taxpayer dissatisfied with the Commissioner's decision on the taxpayer's objection may appeal to this Court, on grounds limited to the grounds of objection, unless the Court otherwise orders. On an appeal, the appellant has the onus of proving the appellant's case.[11]

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[9] AR392.
[10] AR337.
[11] *Taxation Administration Act, s 70A.*

[127] Whilst Sections 69 and 70 are silent as to whether it is an appeal in the strict sense, on questions of law only, or is a rehearing on the materials before the Commissioner when determining the objection, or whether it is a new hearing on fresh materials. This Court, however, has previously determined appeals on the basis it is a new hearing on fresh materials, without the need to decide that question.[12]

[128] Section 10 of the *Payroll Tax Act* 1971 (Qld), provides that payroll tax is levied on "taxable wages". The schedule to the Act defines "taxable wages" to mean "wages that, under section 9, are liable to payroll tax." Relevantly, section 9 provides that wages are liable to payroll tax under the Act, if the wages are paid or payable by an employer in relation to services performed or rendered by an employee, either entirely in Queensland, or the wages are otherwise payable in Queensland.

[129] The schedule defines wages as "any wages, remuneration, salary, commission, bonuses or allowances paid or payable (whether at piecework rates or otherwise and whether paid or payable in cash or in kind) to an employee as an employee…" The term 'employer', is defined in the schedule to mean "any person who pays or is liable to pay any wages…" The term 'employee' is not defined in the schedule.

[130] The term 'employee' is not defined in the PTA. The question whether dancers are 'employees' for the purposes of the definition of wages in that Act, is determined by reference to the common law test for differentiating between employees and independent contractors.[13] The common law test is a multifactorial test. Regard is had not only to notions of whether the person was subject to command, as to what he or she should do, or as to how he or she should do it. Other factors are also relevant, such as the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision of holidays, the deduction of income tax and the delegation of work by the suggested employee.[14]

[131] The focus for the examination of these factors is a notion that the distinction between an employee and an independent contractor is "rooted fundamentally in the difference

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[12] *Pryke v The Commissioner of State Revenue* [2006] QSC 226 at [6]; *Orica IC Assets Pty Ltd v The Commissioner of State Revenue* [2011] QSC 1 at [10].
[13] *Commission of Taxation v Barrett* (1973) 129 CLR 395.
[14] *Stevens v Brodrib Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24.

between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own".[15] The primary concern is the real substance of the relationship.[16] Particular labels adopted by the parties are not determinative of the question. The Court looks at the totality of the relationship.[17]

Consideration

Nature of the Appeal

[132] Whilst Section 70 of the Act is silent as to the nature of the appeal, the contents of sections 70A and 70B are instructive. Section 70A provides that the appellant has the onus of proving the appellant's case. Section 70B provides that the Court, if satisfied evidence material to the objection was not before the Commissioner at the time of the objection decision, may admit that evidence, but adjourn the hearing of the appeal to allow the Commissioner to reconsider the objection unless the Commissioner asks the Court to continue the hearing without the Commissioner reconsidering the objection.

[133] A consideration of those sections is consistent with a conclusion that the nature of the appeal under Sections 69 and 70 of the Act is a new hearing on fresh materials. That conclusion follows from the power given to this Court to admit material evidence not before the Commissioner at the time the objection decision was decided, and to continue the determination of the appeal if the respondent asks the Court to do so without the respondent first reconsidering the objection.

[134] It is unnecessary to finally determine that question. The parties are content to proceed on the basis the appeal is a new hearing on fresh materials. That agreement does not, however, completely resolve the nature of this appeal. The respondent submits that if the appeal extends to grounds challenging the respondent's remission decisions in respect of penalty tax and interest, those decisions, being the exercises of discretion, could only be set aside for error of law.[18]

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[15] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 39 [40], citing *Marshall v Whittakers Building Supply Co* (1963) 109 CLR 210 at 217; see also: *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at 122 [207].

[16] *On Call Interpreters* at 119 [189] *ff*.

[17] *Hollis* at 39[24].

[18] *Avon Downs Pty Ltd v Commissioner of Taxation* (1949) 78 CLR 353 at 360.

[135] It is unnecessary to determine whether there is such a limitation on any appeal against the remission decisions as, if the appellant is successful in having the Court consider the additional material, some of that additional material relates to the circumstances in which the appellant contends it was appropriate for the respondent to exercise the discretion to remit penalty tax and interest to nil. Accordingly, any reconsideration of the exercise of the discretion would involve consideration of material not available to the respondent at the time of the exercise of that initial discretion.

New evidence

[136] The respondent objected to the Court receiving the further affidavit material of Disavia, Beetham, Szmidt, Nguyen and Nawrotzky. However, I am satisfied those affidavits contain additional evidence material to the objection, which was not before the Commissioner.

[137] The respondent having indicated that, in those circumstances, the Court is to continue to hear the appeal without the respondent reconsidering the objection, it is appropriate to determine the appeal based on the material before the respondent at the time of the objection decision and that additional material.

Employee or independent contractor

[138] There is no doubt dancers at the appellant's clubs performed their rostered shifts on the understanding they were independent contractors. Further, the appellant prepared its financial returns having drawn a distinction between dancers and employees, such as bar staff, promotions girls and receptionists. Both Daley and Beetham, as managers, drew distinctions between employees, such as bar staff, receptionists, and hostesses, and dancers providing lap-dances to clients at the clubs. However, an application of the multifactorial test is to be undertaken without the particular labels adopted in the arrangement being determinative.

[139] Whether a person is an employee or an independent contractor involves an assessment of the totality of the relationship, a determination of the real substance of that relationship and a conclusion whether in reality, the dancers were employees rather than operating

their own independent businesses. [19] In undertaking that assessment, it is significant that the service supplied by dancers is dependent upon the unique personal characteristics of the dancer. For example, much of a dancer's income is derived from regulars who come to the appellant's club in search of that particular dancer. However, having their own clients with whom they have an individual rapport, does not prevent a conclusion the dancers were employees of the appellant, if the transaction entered into between the dancers and the client is in truth a transaction on behalf of the appellant.

[140] Features of the service provided by dancers, suggestive of a dancer providing their services as an independent contractor, are that dancers ran a risk they may make no or little money in any particular shift, and were free to work at other clubs and privately.

[141] Whilst those features are consistent with a dancer being an independent contractor, there are a number of features in the relationship between the appellant and the dancers which are consistent with the relationship being that of an employee. First, dancers undertake their duties in accordance with the terms of the appellant's dancers' protocol. A dancer acknowledges her obligations to comply with that protocol and agrees to the imposition of fines and forfeiture of income in the event of non-compliance.

[142] Second, the dancers' protocol imposes strict limitations on not merely the nature and method of the performance of lap-dancers, so as to ensure compliance with the appellant's business and statutory obligations. Many of the restrictions imposed in that protocol go beyond what is necessary to ensure compliance with the appellant's statutory obligations. Those restrictions are akin to the controls of an employer over an employee; a contract "of service", not "for services".[20]

[143] The restrictions include a requirement to perform rostered shifts, for a minimum number of hours, with restrictions on the ability to change a shift without penalty. There are restrictions on the circumstances in which a dancer may undertake a break during that shift and as to the clothing to be worn by dancers. Whilst some of these restrictions were not strictly enforced, the appellant had the authority to do so, including the power to fine

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[19] *Tattsbet Pty Ltd v Morrow* (2015) 223 FCR 46 at 61.
[20] *Marshall v Whittaker Building Supply Co* (1963) 109 CLR 210 at 214.

or forfeit a dancer's outstanding monies. That degree of control was more than the reservation of a right to superintend or direct performance of the dancers' obligations.[21]

[144] Most significantly, the amount a dancer may receive in the provision of a lap-dance is not dependent upon the dancer's skill. It is set by the appellant. The amount cannot be varied at the dancer's discretion. Further, the fee is paid by a client directly to the appellant's receptionist. Any additional amount earned by a dancer, by way of tip, must also be paid to the appellant. This latter feature is more consistent with the lap-dances being a service provided by the dancers as emloyees on behalf of the appellant, rather than as part of their own independent business.[22]

[145] Other features supportive of the services being provided as employees arethe use of the words "pay", "your pay" and "your final pay" in the dancers' protocol and the setting of the dancer's proportion of that fee and any tips by the appellant, not the dancer, and the monies received being retained by the appellant until the next night the dancer performs at the club, at which time the appellant provides the dancer with a prepared tax invoice setting out the amount to which the dancer has an entitlement. Whilst the creation of the tax invoice by a recipient of services is permissible, there is no evidence of the existence of the necessary agreement for the provision of what would be a recipient prepared tax invoice. Significantly, no tax invoice is given by the dancer to the client. There is also no evidence the dancer keeps records independent of the original tax invoice provided to the dancer by the appellant. That is odd, if the dancer was in truth, carrying on her own business.

[146] The fact the dancer has an ABN is consistent with operating her own business, but far from conclusive.[23] The treatment of tax regime instituted by the appellant is also of limited force, having regard to the fact that the tax invoices from the dancers relied upon by the appellant, were effectively issued to itself.[24] Indeed, the details set out on the tax invoice prepared and supplied by the appellant, are consistent with the details required for the pay slip of an employee.

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[21] *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 552.
[22] *cf D & D Tolhurst Pty Ltd v Commissioner of State Revenue* (1997) 38 ATR 1001 at 1015.
[23] *On Call Interpreters* at [244].
[24] *ACE Insurance Ltd v Trifunovski & Ors* (2011) 200 FCR 532 at 558 [89].

[147] There is also little support to be derived from the outcome of the audit undertaken by the ATO. That audit did not specifically conclude that dancers were not employees of adult venue operators. The subsequent interpretative decisions and fact sheets similarly did not contain determinative statements to that effect. They were based on a consideration of whether the supply of the dance to a client was made by a dancer or the adult entertainment venue operator, with the conclusion that the supply of the dance to the client was provided by the operator. Those determinations were also made on materially different fact situations.

[148] Central features in any employer/employee relationship are the fixed nature of an employee's remuneration for services provided to the employer, and restrictions on the hours and methods of the provision of services by the employee. By contrast, the very essence of an independent contractor relationship is the ability of the independent contractor to fix that person's own remuneration rate and the hours and methods for provision of services. The different arrangements Thompson had with the Fortitude Valley club, exemplifies those differences.

[149] That arrangement required Thompson to engage in a minimum spend before being entitled to dance in the club's facilities. In exchange, Thompson retained 85% of any fee for the performance of a lap-dance and, most importantly, the whole of any tips received by Thompson in the provision of that lap-dance. The ability to retain the additional remuneration derived from tips for the provision of such services is more consistent with the dancer operating her own independent business, rather than being an employee. Conversely, the inability of a lap-dancer to alter the remuneration to be received at the appellant's club, is more consistent with the relationship being that of employee.

[150] There are other features consistent with the relationship between the appellant and the lap-dancer being that of employer/employee, rather than that of a dancer operating her own business. The appellant pays dancers an amount of $50.00, should they complete a rostered shift without having performed any lap-dances. That payment is akin to a guaranteed minimum wage for the rostered shift. It limits the risk to a dancer in undertaking that shift, as the dancer has the security of receiving a certain remuneration

of at least $50 per shift.[25] The adoption of risk would be consistent with the dancer operating her own business. The guarantee of a minimum payment is more consistent with an employer/employee relationship, particularly as the appellant already assumes the risk that insufficient customers will not cover its operating expenses for that venue.

[151] Further, dancers could not unilaterally decide to have another dancer perform the rostered shift. A dancer cannot avoid her obligations to fulfil her rostered shift without the appellant's express permission. Even if another dancer was available, it was the appellant's decision whether that dancer would be relieved of her obligations to dance in accordance with her rostered shift, without financial penalty being imposed, as allowed under the agreement entered into by the dancer when acknowledging her obligations as set out in the dancers' protocol.

[152] Having considered the various factors in the context of the multifactorial test, the preponderance of those factors favour the conclusion the dancer, in providing lap-dances in the appellant's clubs, was not carrying on her own business. The dancer provided those performances as an employee of the appellant. The appellant has not discharged its onus of establishing the dancers at its clubs were carrying on their own businesses.

[153] Notwithstanding that conclusion, the appellant contends its grounds of appeal also raise for consideration whether the respondent should have remitted the whole of the penalty tax and unpaid tax interest. The respondent submitted the grounds of appeal did not extend to a consideration of the Commissioner's decision to remit a portion of the penalty tax and unpaid interest.

[154] There is substance in the respondent's contention. The ground of appeal is specified in a way only consistent with it going to the decision as to dancers being the appellant's employees. Without a further ground specifically challenging the respondent's decision with respect to penalties there is no basis for this Court to consider that issue on appeal.

[155] Even if the ground of appeal was sufficiently wide to encompass consideration of the respondent's decision on penalties, the appellant would have failed to discharge its onus of establishing those penalties and interest ought to have been remitted to nil. a

[25] *On-Call Interpreters* at 124 [215].

consideration of those grounds supports a conclusion that they were sufficiently wide to encompass a consideration of the Commission's decision in those matters.

[156] The respondent in the objection decision determined to remit the penalty tax to 20%, being less than that provided for in the respondent's guidelines for the remission of penalty tax on the basis of carelessness by a taxpayer. That respondent also remitted interest to allow for delay.

[157] Whilst it may be accepted that in the earlier GST and related tax payment audits, the Australian Taxation Office had encouraged the operators of adult venues to have dancers arrange their affairs in a manner consistent with the dancer being an independent contractor, the method in which the dancer provided services at the time of that audit was materially different. For example, dancers received the payments for their services, including any tips. Dancers also provided a proportion of that income to the operator of the venue at the end of the night, rather than the operator's receptionist receiving all payments and paying a proportion to the dancer the following evening.

[158] In any event, there is no basis to conclude the actions of the Australian Taxation Office, including fact sheets issued after the audit, involved any determination that a dancer was carrying on her own independent business in the provision of lap-dances pursuant to the appellant's dancers' protocol. In those circumstances, reliance on those matters by the appellant at best involved carelessness.

[159] Whilst Section 60 of the Act allows the respondent to remit the whole or part of any unpaid tax interest amount, nothing in the circumstances of the present case supports a conclusion that the proper exercise of that discretionary power would involve a decision to remit the whole of that amount. Their non-payment did not arise as a consequence of the appellant having reasonably relied upon prior rulings of the respondent or of the Australian Taxation Office. The sums are properly payable by the appellant.

[160] Similarly, whilst the respondent has the discretion to remit the whole or part of a penalty tax amount, there is nothing in the present circumstances which rendered it beyond the appellant's control to comply with its tax obligations or which support a conclusion the appellant had taken reasonable care in respect of complying with its tax obligations. The

appellant could not reasonably rely upon the determinative decisions or fact sheets issued by the Australian Taxation Office. Its failure to comply with its obligations was, at best, due to carelessness or recklessness. The respondent's remission of the penalty tax to 20% was a favourable interpretation of the circumstances in which the appellant failed to comply with its taxation obligations.

[161] A consideration of the whole of the circumstances supports a conclusion that a proper exercise of the discretion included a determination that the penalty tax be remitted to 20% and that the unpaid interest not be paid for the period during which the respondent was giving consideration to the objection decision.

[162] The respondent submitted that if the grounds of appeal were wide enough to include an appeal against the respondent's decision on the remission of penalty tax and unpaid tax interest, there was a need to show error in accordance with the principle set out in *Avon Downs Pty Ltd v. Commissioner of Taxation*.[26] It is unnecessary to reach a conclusion in respect of that matter, as a consideration of the circumstances, including the additional material, supports a conclusion that remission of the penalty tax to 20% and of a proportion of the unpaid tax fell within a sound exercise of the Commission's discretion. Accordingly, whether the appeal on this aspect be determined at large, or be dependent upon the establishment of error on the part of the respondent, the appellant fails.

Conclusions

[163] The appeal against the objection decision should be dismissed.

[164] I shall hear the parties as to the form of orders and costs.

[26] (1949) 78 CLR 353 at 360.