

Date: 20081216

Docket: A-373-06

Citation: 2008 FCA 403

**CORAM: NADON J.A.
EVANS J.A.
RYER J.A.**

BETWEEN:

LOBA LIMITED

Appellant

and

MINISTER OF NATIONAL REVENJUE

Respondent

Heard at Ottawa, Ontario, on December 16, 2008.

Judgment delivered from the Bench at Ottawa, Ontario, on December 16, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT

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RYER J.A.

[1] To be eligible for registration or to maintain registration as a registered pension plan, within the meaning of subsection 248(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “ITA”), a plan must comply with certain prescribed conditions that are set out in the *Income Tax Regulations*, C.R.C., c. 945 (the “ITR”). One such condition (the “Primary Purpose Condition”) is contained in paragraph 8502(a) of the ITR, which reads as follows:

8502(a) the primary purpose of the plan is to provide periodic payments to individuals after retirement and until death with respect to their service as

8502 a) le principal objet du régime consiste à prévoir le versement périodique de montants à des particuliers, après leur retraite et

employees.

jusqu'à leur décès, pour les services
qu'ils ont accomplis à titre d'employés;

[2] In *Loba Limited v. Minister of National Revenue*, 2004 FCA 342, this Court dismissed an appeal by Loba Limited, the appellant in this appeal, against a notice of intent to revoke the Pension Plan for Employees of Loba Limited (the "Plan"), the same pension plan that is in issue in this appeal. In that case, the Minister of National Revenue (the "Minister") based the notice of intent to revoke on his finding that the Plan did not meet the Primary Purpose Condition as of the date of intended revocation, principally because he was not satisfied that a *bona fide* employer/employee relationship existed between the appellant and members of the Plan. The registration of the Plan was revoked on April 11, 2005, effective as of April 1, 2000.

[3] On December 21, 2005, the appellant applied to the Minister to have the Plan registered with an effective date of January 1, 2005.

[4] The Minister undertook to examine this new application on the basis of the evidence that was before him at the time of such examination. On July 27, 2006, the Minister notified the appellant that the application to register the Plan was refused. The notification letter describes in detail the evidence upon which the refusal is based. The Minister found that the appellant had provided new documentation but that such documentation did not "significantly counter" the evidence that the Minister relied on to determine that the Plan does not qualify for registration, in essence concluding that any new material that was provided by the appellant in its application and subsequent submissions was not sufficient to establish that the Plan met the Primary Purpose

Condition. In that regard, the Minister stated that evidence upon which he based his prior decision to revoke the Plan continued to be relevant.

[5] At page 8 of the July 27, 2006 correspondence, the Minister concluded that the Plan fails to meet the Primary Purpose Condition, stating:

The preponderance of evidence suggests that the relationship between Loba Limited and the members of the Plan is not one of a bona fide employee/employer relationship, that indeed efforts were made to create the appearance of such a relationship in order to satisfy the requirements of the *Income Tax Act* and *Regulations*; and, that the primary purpose of the plan is to give former public servants access to an increased transfer value from the PSSA by utilizing a Reciprocal Transfer Agreement between Treasury Board and Loba Limited.

[6] We can detect no error of law or fact in the decision of the Minister in refusing to accept the Plan for registration. We reject the argument of the appellant that in determining whether the Plan meets the Primary Purpose Condition, the Minister was limited to a review of only the actual provisions of the Plan. In our view, this Court in *Boudreau v. Canada (National Revenue)*, 2007 FCA 32, rejected the argument that in seeking to ascertain the primary purpose of a pension plan, the Minister is precluded from examining the motives of the sponsors of the plan under consideration. At paragraph 22 of that decision, Pelletier J.A. stated:

This argument mistakes form for substance. The question of the purpose of the Plan is a question of fact. See *Loba Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, 2004 FCA 342, [2004] F.C.J. No. 1678, at paragraph 2. What purpose did the sponsors of the Plan have in mind when they established it? That is the relevant purpose. Relying on the information before him, the Minister concluded that the Plan was established for the purpose of facilitating pension transfers, as part of a scheme to induce the government to pay substantial premiums to the pension accounts of departing public servants.

[7] In this regard, the July 27, 2006 notification letter referred to a statement from the appellant in correspondence to the Minister, dated March 13, 2006, which reads:

... “my motivation to seek registration of the Loba Pension Plan is to enable the transfer of pension entitlements of former public servants for the PSSA pursuant to the Reciprocal Transfer Agreement (RTA)”.

In our view, this statement is consistent with the Minister’s determination that the Plan did not meet the Primary Purpose Condition.

[8] Having concluded that the Minister made no reversible error respecting the primary purpose of the Plan, we need not decide whether the Minister erred in maintaining his position that there was no *bona fide* employer/employee relationship between the appellant and members of the Plan.

[9] Finally, the appellant argues that the Minister’s decision must be set aside on the ground that he made it in bad faith and with a closed mind. These are serious allegations which, in our view, are not supported by the evidence before us.

[10] For the foregoing reasons, the appeal will be dismissed with costs.

“C. Michael Ryer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-373-06

STYLE OF CAUSE: LOBA LIMITED Appellant
and
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REVENUE Respondent

PLACE OF HEARING: Ottawa, Ontario

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REASONS FOR JUDGMENT OF THE COURT BY: (Nadon, Evans, Ryer JJ.A.)

DELIVERED FROM THE BENCH BY: Ryer J.A.

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