

Docket: 2004-3244(EI)

BETWEEN:

2972-2899 QUÉBEC INC. (MÉGANTIC MAZDA),

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SERGE ROSA,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 17, 2005 at Sherbrooke, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Agent of the Appellant: Alain Savoie

Counsel for the Respondent: Agathe Cavanagh

Agent for the Intervener: Alain Savoie

JUDGMENT

The appeal is allowed on the grounds that the work performed by Serge Rosa, during the period at issue, is excluded from insurable employment, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 7th day of April, 2005.

Bédard J.

Certified true translation
on this 1st day of February, 2006.
Garth M^cLeod, Translator

Citation: 2005TCC85
Date: 20050407
Docket: 2004-3244(EI)

BETWEEN:

2972-2899 QUÉBEC INC. (MÉGANTIC MAZDA),

Appellant,

And

THE MINISTER OF NATIONAL REVENUE,

Respondent,

And

SERGE ROSA,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal against a determination under which the work performed by Serge Rosa from January 1, 2002 to July 17, 2003 for 2972-2899 Québec Inc. (Mégantic Mazda), the Appellant, met the requirements of a contract of service, despite the non-arm's length relationship that existed between the parties.

[2] By way of explanation of his determination, the Respondent relied on the following factual hypotheses:

5. The Minister found that the worker was employed by the Appellant under a contract of service, based on the following presumptions of fact:
 - a) the Appellant was incorporated on March 4, 1993;
 - b) the Appellant operated a Mazda automobile dealership;

- c) the board of the Appellant is made up of Normand Rosa (President), Rollande Lessard Rosa (secretary) and the worker (Vice President);
 - d) the worker also held the position of general manager of the company;
 - e) the duties of the worker consisted of managing all the daily activities of the company;
 - f) the Appellant had 12 employees during the period at issue;
 - g) the business hours of the Appellant are from 9 am to 9 pm from Monday to Friday and several weekends per year in the context of special promotions;
 - h) the sales of the Appellant were between \$6 and \$8 million annually during the years 2002 and 2003;
 - i) the worker was paid \$690 a week during 2002 and \$720 per week during 2003;
 - j) the worker also received a bonus of \$3,400 in 2002 and \$3,150 in 2003;
 - k) as part of his job, the worker used office equipment, the computer system and a car provided by the Appellant;
 - l) the worker had the same group insurance benefits as the Appellant's other employees;
 - m) the hours worked by the worker were not recorded, but amounted to approximately 50 hours per week;
 - n) the worker incurred no financial risk in the performance of his duties;
 - o) the duties of the worker formed an integral part of the activities of the Appellant.
6. The worker and the Appellant are related persons within the meaning of the *Income Tax Act* since:
- a) the three shareholders of the Appellant are Norman Rosa, with 94.6% of the shares in the Appellant, the worker, with

4.5% of the shares in the Appellant and Rollande Rosa, with 0.9 % of the shares in the Appellant;

- b) Normand Rosa is the father of the worker;
- c) Rollande Rosa is the mother of the worker;
- d) the worker is part of a related group which controls the Appellant.

7. The Minister also determined that the worker and the Appellant were deemed to be at arm's length in the context of this employment, as the Minister was convinced that it was reasonable to conclude that the worker and the Appellant would have concluded a virtually similar contract of employment between them if they had been dealing with each other at arm's length, in light of the following circumstances:

- a) the worker's pay, including bonuses and benefits, was similar to what an unrelated employee would have received in light of the responsibilities and the performance of the worker;
- b) the hours of work of the worker were regular and not inflated;
- c) the worker did not personally provide surety for any loans of the Appellant;
- d) the services rendered by the worker met the needs of the Appellant's business.

[3] The Appellant admitted all the facts set out in paragraphs 5, 6 and 7 of the Response to Notice of Appeal, except for the facts set out in paragraphs 5(g), (n), 7(a) and 7(b), which the Appellant denied, and the facts set out in paragraphs 5(c), 5(j), which he did not take into account.

[4] It should be noted that the agent for the Appellant admitted at the start of the hearing that Serge Rosa was employed by the Appellant under a contract of service.

[5] It should be remembered that the Respondent ruled that this employment was insurable because it was not covered by paragraph 5(2)(i) of the *Employment Insurance Act* (the Act). Serge Rosa and the Appellant were deemed under subparagraph 5(3)(b) of the Act to be dealing at arm's length in the context of this

employment, since the Respondent was convinced that it was reasonable to conclude, in light of the all the circumstances, that they would have concluded a virtually similar contract of work had they been dealing at arm's length.

[6] The Federal Court of Appeal has on numerous occasions defined the role assigned by the *Act* to a judge of the Tax Court of Canada. This role does not allow a judge to substitute his discretion for that of the Minister of National Revenue (the "Minister"), but it carries with it the obligation to "verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, [...] decide whether the conclusion with which the Minister was "satisfied" still seems reasonable."¹

[7] In other words, before deciding whether the conclusion with which the Minister was satisfied still seems reasonable to me, I must, in light of the evidence before me, verify whether the allegations of the Minister are, in spite of everything, well founded in whole or in part, in light of the factors set out at paragraph 5(3)(b) of the Act. It is accordingly appropriate to wonder whether Mr. Serge Rosa and the Appellant would have concluded a substantially similar contract of employment if they had been dealing with each other at arm's length.

[8] The Appellant had the burden of proving that the Minister had not exercised his discretionary power in accordance with the applicable principles in this case, in other words, of proving that he had not examined all the relevant facts or that he had failed to take into account facts that were relevant. In targeting the truly important aspects of the evidence, the Appellant sought to demonstrate that the lack of an arm's-length relationship with Serge Rosa had been decisive with regard to the conclusion of the contract of employment at issue. Serge Rosa and his father, Normand Rosa, the principal shareholder in the Appellant, testified for the latter. Their testimony was clear and seemed eminently credible to me. I am of the view that their testimony showed very clearly that Serge Rosa had enjoyed, throughout the period at issue, the majority of the rights and privileges normally reserved for the owners of a company. In this regard, the evidence revealed the following:

i) Serge Rosa himself decided on the length and date of his vacations, both of which depended exclusively on his personal needs and travel opportunities open to him. He had received the equivalent of six and four weeks of paid vacation in 2003 and 2004 respectively.

¹ *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. no. 878 (Q.L.) paragraph 4.

ii) The working hours of Serge Rosa were neither controlled nor even recorded.

iii) Serge Rosa could vary his hours of work as he saw fit. He could take time off at any point and plan his work in light of his family and personal business, independently of the needs of the Appellant, because he was able, during his absences, to entrust the conduct of the business to a trusted employee. All in all, he determined his own work schedule and duties.

iv) Serge Rosa's work was not supervised by anyone. His expense accounts were not checked by anyone. Serge Rosa was, in fact, the directing mind of the Appellant, because his father was retired. His father no longer made any decisions in the business. He obtained information orally from time to time from his son regarding the profitability of the Appellant. Serge Rosa was authorized to sign cheques for the Appellant on his own and he was in fact the sole signatory of the Appellant's cheques during the period at issue.

v) His father would never have delegated the same responsibilities and the same freedom of action to an individual at arm's length. Moreover, if Serge Rosa had left his employment, his father would have sold the Appellant's business.

vi) Serge Rosa had lent \$15,000 in 2004 to restock the Appellant's account. The father of Serge Rosa did not learn of this until very recently. It should be noted that Counsel for the Respondent had, in his pleadings, cast doubt on Serge Rosa's credibility in this regard, in view of the fact that Serge Rosa had not reported this fact to Martin Croteau, the Appeals Officer, and had not filed any documentary evidence to support his testimony in this regard at the hearing. Counsel for the Respondent even noted that, if this fact had been brought to the attention of the Respondent earlier, this case might not have been brought before the Court. The agent for the Appellant, in response to the remarks by Counsel for the Respondent, asked me to adjourn the hearing for approximately one hour, to allow the Appellant time to obtain the relevant documentary evidence to support the testimony of Serge Rosa in this respect, a move that was opposed by Counsel for the Respondent since she regarded the evidence of the Appellant as closed at that point. I feel it necessary to note that I did not accede to the request of the agent for the Appellant, since the testimony of Serge Rosa and his father had persuaded me that the son had indeed lent this amount to the Appellant. The offer of the agent of the Appellant to produce evidence thereof merely reinforced my conviction that Serge Rosa had lent such a sum to the Appellant.

[9] With regard to the earnings of Serge Rosa, the Respondent alleged, in the response to the Notice of Appeal, that the earnings of Serge Rosa, including bonuses and benefits, were similar to what an arm's-length employee would have received, in view of the responsibilities and performance of Mr. Rosa. It seems to me that the Respondent cannot plausibly so conclude, unless the conclusion is based on information regarding comparable salaries and conditions of employment within the same industry or a related industry. In this case, the Respondent did not have such data. At most, the Respondent examined the salary of the father and compared it to that of the son, and then concluded that the salary received by Serge Rosa was reasonable in comparison with that of his father. How could the Respondent establish such a comparison, given that the responsibilities and duties of the son were totally different from those of the father? The father, it should not be forgotten, is retired. It should be remembered that Serge Rosa himself set his salary and that he himself decided on the frequency and size of the bonuses that he granted himself. These bonuses were determined in light of Serge Rosa's financial needs and not necessarily in light of his performance. Would an arm's-length employee in fact have enjoyed similar privileges, which are normally reserved for the owners of a company?

[10] In the instant case, the determination that a third party could have received a substantially similar contract of employment was not warranted by the facts. It is simply unreasonable and without foundation to conclude that Serge Rosa and the Appellant would have agreed between them on a substantially similar contract of employment if they had been dealing with each other at arm's length. The preponderance of the evidence indicates that the working conditions of Serge Rosa, taken overall, were much more comparable to those of the owner of a business than to those of an employee.

[11] Since the work of Serge Rosa is subject to the provisions of paragraph 5(2)(i) of the *Act*, it must be excluded from insurable employment and the appeal must be allowed.

Signed at Ottawa, Canada, this 7th day of April, 2005.

Bédard J.

Certified true translation
On this 1st day of February, 2006.
Garth M^cLeod, Translator

CITATION: 2005TCC85

COURT DOCKET NO.: 2004-3244(EI)

STYLE OF CAUSE: 2972-2899 Québec Inc. (Mégantic Mazda) and M.N.R. and Serge Rosa

PLACE OF HEARING: Sherbrooke, Quebec

DATE OF HEARING: January 17, 2005

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGEMENT: April 7, 2005

APPEARANCES:

Agent for the Appellant: Alain Savoie

Counsel for the Respondent: Agathe Cavanagh

Agent for the Interveners: Alain Savoie

COUNCIL OF RECORD:

For the Appellant:

Name:
Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada

For the Intervener:

Name:
Firm: