

Docket: 2003-2414(EI)

BETWEEN:

GEN-U-WINE STORAGE SYSTEMS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on January 30, 2004 at Winnipeg, Manitoba

By: The Honourable Justice Georgette Sheridan

Appearances:

Counsel for the Appellant: Deryk W. Coward

Counsel for the Respondent: Jennifer Dundas

JUDGMENT

The appeal is allowed, and the decision of the Minister is vacated in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 18th day of March 2004.

"G. Sheridan "

Sheridan, J.

Citation: 2004TCC187
Date: 20040318
Docket: 2003-2414(EI)

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GEN-U-WINE STORAGE SYSTEMS INC.,

Appellant,

And

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REASONS FOR JUDGMENT

Sheridan, J.

FACTS

[1] Gen-U-Wine Storage Systems Inc. appeals from the Minister's decision that one of its workers, Mr. Robby Denomme, was employed in insurable employment in 2001. Mr. Denomme was Gen-U-Wine's only witness. The Minister called Ms. Laura Paradis, the CPP/EI Rulings Officer who conducted the initial investigation into the insurability of Mr. Denomme's employment.

[2] Mr. Denomme is the 26-year-old step-son of the sole shareholder of Gen-U-Wine, Mr. Lance Kingma. In 1995, Mr. Kingma moved Gen-U-Wine which, at that time, built specialized wine storage units, from Toronto to Winnipeg. Mr. Denomme, then 17 and having dropped out of high school, began working as a general "shop boy" at Gen-U-Wine doing a range of unskilled tasks. He was paid (according to Mr. Denomme) "the lowest amount legally possible". Gen-U-Wine ran its business out of an 800-square-foot shop with no office, a part-time bookkeeper, a telephone and a fax machine.

[3] Sometime in 1998, Gen-U-Wine's Toronto client went bankrupt throwing Gen-U-Wine into a financial crisis. Mr. Kingma, convinced of the merit of his

product, struggled to salvage his business. Mr. Denomme was laid off, and from October 1998 to March 1999, collected employment insurance benefits. During this period, he and Mr. Kingma began to develop a business plan, identify markets and expand the company's business to include the design and distribution as well as the manufacturing of Gen-U-Wine wine storage units.

[4] By 2001, he and his step-father had weathered the storm of the two previous years. Mr. Denomme was then a newly married man working in tandem with his stepfather and committed to growing the new business. He testified that during this period, he had at least one other employment opportunity but he rejected that more lucrative and less risky position with a well-established company, in favour of getting in on the ground floor of his own small business enterprise. In his new role, Mr. Denomme was travelling extensively to introduce the product to potential dealers. His duties didn't stop there, however. Mr. Denomme stated that he and his stepfather made all business decisions together including the decision to move the business, hiring staff and handling financial matters. He "did everything", meaning whatever was needed to make a "go" of the business. If, for example, the company had a big order to fill and more hands were needed, he would be back in the shop. After working in the office, he would go home to paperwork. When Mr. Kingma was away, Mr. Denomme handled the payroll and some banking duties, even though he didn't have formal signing authority. He estimated that he worked 60-90 hours a week for which he was paid about \$14 per hour. The Minister argued that Mr. Denomme received a regular pay cheque. Although Gen-U-Wine did issue a cheque to him roughly every two weeks, that did not make it "regular" as that term is normally understood. The amount of his cheque and when he could cash it depended entirely on how much money there was in the burgeoning company's account. Not until he had ensured that there was enough in the account to cover it could his cheque be cashed. He was able to make this verification because he, along with his stepfather, was responsible for keeping an eye on the books. He explained on cross-examination that he accepted such low wages and irregular pay in the expectation that someday he will reap the rewards of having established a successful company. As he said, "That's what you do in small business."

ANALYSIS

[5] The parties agreed that Gen-U-Wine and Mr. Denomme were not dealing with each other at arm's length. The only issue for determination is whether it is reasonable to conclude, pursuant to subsection 5(3) of the *Act* that Mr. Denomme and Gen-U-Wine would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. The relevant sections of the *Employment Insurance Act* are set out below:

5. (1) Types of insurable employment - Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

(2) Excluded employment - Insurable employment does not include

(i) employment if the employer and employee are not dealing with each other at arm's length.

(3) Arm's length dealing - For the purposes of paragraph (2)(i),

(b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[6] Pursuant to paragraph 5(2)(i), Mr. Denomme's employment is *prima facie* excluded employment. The Minister exercised his discretion under paragraph 5(3)(b) to deem that Gen-U-Wine and Mr. Denomme were dealing with each other at arm's length and that accordingly, Mr. Denomme's employment was insurable. Based on the assumptions set out in the Reply, the Minister was satisfied that an arm's length employee and employer would have entered into a "substantially similar" contract.

To succeed in this appeal, Gen-U-Wine must show the Minister exercised his discretion improperly by having done at least one of the following:

- a) acted in bad faith or for an improper purpose or motive; or
- b) failed to take into account all of the relevant circumstances, as expressly required by subparagraphs 5(3)(b); or
- c) considered an irrelevant factor.¹

[7] There is no suggestion that the Minister acted in bad faith or improperly in reaching his conclusions. The Court is satisfied on the evidence heard on the appeal that many of the assumptions upon which the Minister's decision was based were incorrect and/or incomplete. Specifically, Gen-U-Wine has successfully demolished the assumptions set out in paragraphs 8(d), (e), (f), (g), (h), (j), (k), (l), (m), (n) and (o) of the Reply.

[8] By having failed to take into account all of the relevant circumstances and/or considered irrelevant factors in reaching his decision, the Minister improperly exercised his discretion. Accordingly, the Court may consider whether it is reasonable to conclude, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, that an arm's length employee and employer would have entered into a substantially similar contract.

[9] The Court is satisfied that such a conclusion cannot be drawn. Applying the criteria listed in subsection 5(3) to the evidence heard, it is defies common experience to conclude that an arm's length employee would have willingly accepted such low wages or their haphazard payment. Nor would he have worked such long hours in the face of such uncertainty or undertaken such a variety of ever-increasing responsibilities. It was only because of Mr. Denomme's relationship with his stepfather and his faith that his investment of time and effort will ultimately pay off to their mutual benefit in a successful company that he is willing to make such sacrifices.

[10] For all of these Reasons the appeal is allowed and the decision of the Minister is vacated.

¹ *Légaré v. M.N.R.*, [1999] F.C.J. No. 878 (F.C.A.).

Signed at Ottawa, Canada, this 18th day of March 2004.

"G. Sheridan"

Sheridan, J.

CITATION: 2004TCC187

COURT FILE NO.: 2003-2414(EI)

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M.N.R.

PLACE OF HEARING: Winnipeg, Manitoba

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REASONS FOR JUDGMENT BY: The Honourable Justice G. Sheridan

DATE OF JUDGMENT: March 18, 2004

APPEARANCES:

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Counsel for the Respondent: Jennifer Dundas

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