Docket: 2006-3247(CPP)

BETWEEN:

SUSPENDED POWER LIFT SERVICE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the Appeal of *Suspended Power Lift Service Inc.* (2006-3238(IT)I) on August 14, 2007 at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant: Richard Arsenault
Counsel for the Respondent: Josh Hunter

JUDGMENT

The appeal under the *Canada Pension Plan* in relation to the issue of whether Catherine Luke was engaged by the Appellant in pensionable employment in 2004 for the purposes of the *Canada Pension Plan* is allowed in relation to this issue and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Catherine Luke was an independent contractor and therefore was not engaged by the Appellant in pensionable employment in 2004 and hence the Appellant is not liable for the employer's premium under the *Canada Pension Plan*.

The appeal in relation to the unremitted employee's premium under the *Canada Pension Plan* is allowed in part and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the amount for which the Appellant is liable under the *Canada Pension Plan* in relation to the employee premiums that were deducted from the amount paid to Catherine Luke in 2004 should be $1,144.65 and not $1,373.58 as stated in the Reply.

Signed at Halifax, Nova Scotia this 31st day of August 2007.

"Wyman W. Webb"

Webb, J.

Docket: 2006-3238(IT)I

BETWEEN:

SUSPENDED POWER LIFT SERVICE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together on common evidence with the Appeal of *Suspended Power Lift Service Inc.* (2006-3247(CPP)) on August 14, 2007 at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	Richard Arsenault
Counsel for the Respondent:	Josh Hunter

JUDGMENT

The appeal under the *Income Tax Act* from the assessment dated March 24, 2006 in relation to unremitted source deductions is dismissed without costs.

Signed at Halifax, Nova Scotia this 31st day of August 2007.

"Wyman W. Webb"

Webb, J.

Citation: 2007TCC519
Date: 20070831
Docket: 2006-3238(IT)I

BETWEEN:

SUSPENDED POWER LIFT SERVICE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Docket: 2006-3247(CPP)

AND BETWEEN:

SUSPENDED POWER LIFT SERVICE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The Appellant was assessed for unremitted income tax and *Canada Pension Plan* contributions deducted from the amounts paid to certain individuals in 2004 and also for unpaid employer premiums under the *Canada Pension Plan* in relation to the services provided by these individuals in 2004. The Appellant has appealed this assessment in relation to the remittance of the amounts deducted from the amounts paid to Catherine Luke in 2004 and in relation to the requirement to pay the employer premiums under the *Canada Pension Plan* in relation to the services rendered by Catherine Luke during the 2004 taxation year.

[2] The first issue in this case is whether Catherine Luke was an employee or an independent contractor. If she was an independent contractor in 2004 then the issue would be whether this would affect the assessment against the Appellant for the unremitted source deductions for income tax and the employee portion of the *Canada Pension Plan* premiums. If she was an independent contractor then the Appellant would not have been liable for the employer portion of the *Canada Pension Plan* contributions.

[3] The Appellant is a small family owned company. In 1999, the Appellant retained the services of Catherine Luke as a bookkeeper. Her duties included contacting customers with outstanding accounts receivable, ensuring that the accounts payable were paid, preparing monthly financial statements, and preparing the year end statements for the accountant. Catherine Luke provided bookkeeping services not only to the Appellant but to other clients as well. She initially sent invoices to the Appellant for services rendered as an independent contractor and charged GST for her services.

[4] In the summer of 2004, the Appellant was audited by the Canada Revenue Agency. At that time, the Appellant was reassessed for unremitted source deductions for certain family members who were not considered to be employees but whom the Canada Revenue Agency determined were employees. Catherine Luke then spoke to the president of the Appellant, indicating that she felt that she should be on the payroll as well as the others. The president testified that he did not agree with this determination and could not understand how she could be on the payroll if she was an independent contractor. Catherine Luke was the person who was looking after the filings with the Canada Revenue Agency. She treated herself as an employee of the company and completed a T4 for herself showing an employment income of $31,249.95, income tax deductions of $8,055., employee's CPP contributions of $1,144.65 and employee's EI premiums of $586.80. The unremitted source deductions in this appeal, as stated in the Reply, total $6,694.26 and therefore a portion of the amounts deducted must have been remitted. Since the alleged period of employment was for 4 to 5 months in 2004 and there were other employees, it is not clear how much of the $6,694.26 actually relate to amounts deducted from the amount paid to Catherine Luke. The amounts deducted in relation to the EI premiums are not the subject of this appeal.

[5] Catherine Luke testified that during the period that she was on the payroll for the company, she also had retained other clients for whom she was providing bookkeeping services and to whom she was sending invoices as an independent contractor. She indicated that the only difference between the services that she was

providing to the Appellant and to her other clients was that she was doing more consulting work for the Appellant than she was for her other clients. She confirmed that she did not have any decision making authority but that the officers of the Appellant were consulting her on financial matters.

[6] The first issue is whether Catherine Luke was an employee or an independent contractor of the Appellant in 2004.

[7] The question of whether an individual is an employee or an independent contractor has been the subject of several cases. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. 61, 2001 S.C.C. 59, Major J. of the Supreme Court of Canada stated as follows:

> 46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in Stevenson Jordan, supra, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
>> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.
>
> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

> 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[8] In recent decisions of the Federal Court of Appeal the issue of the intent of the parties has been addressed. In the recent decision of the Federal Court of Appeal in *Combined Insurance Co. of America v. M.N.R.*, 2007 FCA 60, Nadon J.A. of the Federal Court of Appeal stated as follows:

> 35. In my view, the following principles emerge from these decisions:
>
> 1. The relevant facts, including the parties' intent regarding the nature of their contractual relationship, must be looked at in the light of the factors in *Wiebe Door*, supra, and in the light of any factor which may prove to be relevant in the particular circumstances of the case;
>
> 2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.
>
> Although as a general rule the control test is of special importance, the tests developed in *Wiebe Door* and *Sagaz*, supra, will nevertheless be useful in determining the real nature of his contract.

[9] In this case, there is no agreement between the Appellant and Catherine Luke with respect to whether she was an employee or an independent contractor in 2004. The president of the company was adamant that he could not understand how she could be an employee when she had been sending invoices for several years as a contractor. As a result, the intent of the parties does not support either an employee or an independent contractor relationship.

Control

[10] In this case, it was clear that the Appellant had very little control over the work performed by Catherine Luke. She would set her own hours and there was no time when she was ever called in by anyone on behalf of the Appellant to do extra work. There was a significant discrepancy between the testimony of the president of the Appellant and Catherine Luke with respect to the number of hours that she would spend at the premises of the Appellant. The president testified that she would spend perhaps one to four hours per week. Catherine Luke testified that she would spend 15 to 20 hours per week. In any event, it was obviously not a full-time position and it

was Catherine Luke who would determine what hours would be spent working on the bookkeeping matters for the Appellant.

[11] It also appeared, in this case, that Catherine Luke was engaged to perform certain tasks - to prepare monthly statements, to ensure that the accounts payable were paid, to collect old outstanding accounts receivable and to prepare information for the year end statements.

[12] In the case of *Direct Care in-Home Health Services Inc. v. The Minister of National Revenue,* 2005 TCC 173, Justice Hershfield made the following comments in relation to control:

> 11 Analysis of this factor involves a determination of who controls the work and how, when and where it is to be performed. If control over work once assigned is found to reside with the worker, then this factor points in the direction of a finding of independent contractor; if control over performance of the worker is found to reside with the employer, then it points towards a finding of an employer-employee relationship. **However, in times of increased specialization this test may be seen as less reliable, so more emphasis seems to be placed on whether the service engaged is simply "results" oriented; i.e. "here is a specific task -- you are engaged to do it". In such case there is no relationship of subordination which is a fundamental requirement of an employee-employer relationship.** Further, monitoring the results, which every engagement of services may require, should not be confused with control or subordination of a worker.
>
> 12 In the case at bar, the Worker was free to decline an engagement for any reason, or indeed, for no reason at all. …
>
> (emphasis added)

[13] The arrangement with Catherine Luke appears to be very similar to the arrangement described by Justice Hershfield in that she was assigned specific tasks and engaged to do them. As a result, the control factor would indicate that of an independent contractor rather than an employer-employee relationship.

Opportunity for Profit/Risk of Loss

[14] There is a disagreement between the president of the company and the Appellant with respect to the amount to which she was entitled. Catherine Luke testified that the agreement that was reached was that she would be entitled to be paid $6,000 per month. If the Appellant worked 15 hours per week (the low end of the number of

hours based on her testimony), then she would work approximately 65 hours per month (based on an average of 4.3 weeks per month (52/12)), which would result in an hourly rate of approximately $92 per hour for bookkeeping services. If she worked 20 hours per month (the high end of the number of hours based on her testimony), then the hourly rate would have been approximately $70. per hour. If she only worked the number of hours as indicated by the president of the company, then her hourly rate of pay would have been approximately $350 to $1,400 per hour. The president of the Appellant also stated that as the Appellant was a small company, there were only a few invoices generated on a weekly basis (approximately 15 – 20) for Catherine Luke to process and that there were usually only 6 or 7 clients to call in relation to the collection of overdue accounts receivable. In relation to the test of opportunity for profit/risk of loss, since she was paid a fixed amount per month, her revenue from the tasks performed for the Appellant was fixed and there was little, if any, risk of loss. Her expenses would be the same as would be incurred by an employee, i.e. traveling to and from the Appellant's office. As a result, this would indicate an employer / employee relationship. The fact that she had, during this period, other clients for whom she was rendering substantially the same services as an independent contractor would indicate an independent contractor relationship rather than an employee relationship.

Ownership of Tools

[15] She required minimal tools to perform her tasks. She would use the desk of the president who would often be out of the office on jobs. She would use the computer of the Appellant because she was inputting data. She would also use the Appellant's telephone to call clients who were behind in paying their bills to try to collect outstanding receivables. However, this would not have been any different than in the preceding years when she was sending invoices as an independent contractor. As well, it would not be any different than other individuals who provide bookkeeping services to various clients when they attend at the client's premises to input data from time to time or to help with the collection of accounts receivable.

Hiring of Helpers

[16] There was no indication whether she could have hired any helpers.

Degree of Responsibility for Investment and Management

[17] As Catherine Luke had noted, she was consulted from time to time by officers of the Appellant on financial matters but she had no authority to make any decisions

for the Appellant and therefore did not have any responsibility for investment and management of the Appellant.

[18] As a result, I find that in this case, Catherine Luke was an independent contractor of the Appellant throughout 2004. As a result, the Appellant is not obligated to pay the employer premiums under the *Canada Pension Plan* in relation to the services provided by Catherine Luke.

[19] However, as noted above, the T4 slip for Catherine Luke indicates that $8,055. was deducted in relation to income tax and $1,144.65 was deducted in relation to *Canada Pension Plan* contributions for her as an employee. In the Reply, it is stated that the amount of *Canada Pension Plan* contributions that was deducted at source from the amount paid to Catherine Luke was $1,373.58. No explanation was provided as to why the amount in the Reply was different from the amount on the T4 slip and therefore I find that the amount that was actually deducted was $1,144.65.

[20] In this particular case, because Catherine Luke was an independent contractor and not an employee, the Appellant was not obligated to deduct income tax under section 153(1) of the *Income Tax Act* (the "*Act*"). Subsection 153(1) of the *Act* provides in part as follows:

> 153. (1) Every person paying at any time in a taxation year
>
> (*a*) salary, wages or other remuneration, other than amounts described in subsection 212(5.1),
>
> …
>
> (*g*) fees, commissions or other amounts for services, other than amounts described in subsection 212(5.1),
>
> …
>
> shall deduct or withhold from the payment the amount determined in accordance with prescribed rules and shall, at the prescribed time, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3, as the case may be, and, where at that prescribed time the person is a prescribed person, the remittance shall be made to the account of the Receiver General at a designated financial institution.

[21] Subsection 153(3) of the *Act* provides as follows:

> 153. (3) When an amount has been deducted or withheld under subsection 153(1), it shall, for all the purposes of this Act, be deemed to have been received at that time by the person to whom the remuneration, benefit, payment, fees, commissions or other amounts were paid.

[22] Subsection 227(1) of the *Act* provides as follows:

> 227. (1) No action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this Act.

[23] Under subsection 153(1) of the *Act* the Appellant was not obligated to deduct any amount from the amounts paid to Catherine Luke as the prescribed rules would not require any income tax to be deducted from payments made to independent contractors in this situation. However, having deducted the amount, the issue becomes whether the Appellant is now obligated to remit it. A strict interpretation of subsection 153(1) of the *Act* would suggest that a payor is only obligated to remit those amounts that the payor is required to deduct under subsection 153(1) of the *Act*.

[24] The Supreme Court of Canada in *Stubart Investments Limited* v. *Her Majesty The Queen* 1984 CarswellNat 222, [1984] C.T.C. 294, 53 N.R. 241, [1984] 1 S.C.R. 536, 10 D.L.R. (4th) 1, 84 D.T.C. 6305 made the following comments on the interpretation of taxing statutes:

> 60 Professor Willis, in his article, supra, accurately forecast the demise of the strict interpretation rule for the construction of taxing statutes. Gradually, the role of the tax statute in the community changed, as we have seen, and the application of strict construction to it receded. Courts today apply to this statute the plain meaning rule, but in a substantive sense so that if a taxpayer is within the spirit of the charge, he may be held liable. See Whiteman and Wheatcroft, supra, at 37.
>
> 61 While not directing his observations exclusively to taxing statutes, the learned author of Construction of Statutes, 2nd ed, (1983), at 87, E A Dreidger, put the modern rule succinctly:
>
>> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> 62 The question comes back to a determination of the proper role of the court in construing the Income Tax Act in circumstances such as these where the Crown relies on the general pattern of the Act and not upon any specific taxing provision. The Act is to be construed, of course, as a whole, including section 137 but, for reasons already noted, without applying that section specifically to these assessments.

[25] Subsection 153(3) of the *Act* would deem the amount of $8,055 to have been received by Catherine Luke if it has been deducted or withheld under subsection (1) of the *Act*. One interpretation could be that this subsection only applies to amounts that the payor is obligated to deduct under 153(1). However, in my opinion, the provisions of subsection 227(1) must also be taken into account in determining the intention of parliament in drafting subsections 153(1) and (3) of the *Income Tax Act*.

[26] If the interpretation of subsection 153(3) of the *Act* is that only amounts that are required to be deducted under subsection 153(1) of the *Act* are deemed to have been received, then this could result in an anomalous situation. Assume, for example, that a particular employer is required to deduct $4,000 from the amount to be paid to an employee. However, the employer makes an error in calculating the amount and actually deducts $5,000 from the amount paid to the employee. If the correct interpretation of 153(1) is that the employer is only obligated to remit $4,000 (as this is the amount that is required to be deducted under 153(1)), then on what basis can the employee recover the extra $1,000? Under subsection 227(1) of the *Act*, the employee would not have any action against the payor because the $5,000 was deducted in *intended compliance* with the *Act*. As long as the payor intends to comply with the *Act*, the payee would not have any recourse against the payor for deducting this amount. If the employee only receives credit for $4,000 under subsection 153(3), the employee loses the $1,000 because the employer inadvertently deducted the extra $1,000. This could not have been the intended result of subsection 153(3). The result must be that any amounts that are deducted under 153(1), whether the payor is obligated to deduct such amounts or not, are to be remitted under the *Act* and are deemed to have been received by the payee.

[27] Therefore, in my opinion, because a payee will lose any right to bring any action against any person who deducts or withholds, from any amount that is payable to such payee, any amount in intended compliance with the *Act*:

> (a) the payee, under subsection 153(3) must receive credit for any amounts that were deducted in intended compliance with the *Act*; and
>
> (b) the payor must remit any amounts deducted in intended compliance with the *Act.*

[28] If this interpretation is not correct then the Appellant would receive a windfall. If the Appellant is only required under the *Act* to remit the amount as determined in accordance with the *Income Tax Regulations*, since subsection 227(1) of the *Act*

provides that the payee has no action against the Appellant where the amounts were deducted in intended compliance with the *Act*, then neither the Appellant nor the government will be able to recover this money as the amounts were deducted in intended compliance with the *Act*. This would not be the intended result of the remittance requirements under the *Act* and therefore the Appellant must be required to remit all amounts that were deducted in intended compliance with the *Act* as this would be within the spirit of the remittance requirements of subsection 153(1) of the *Act*.

[29] As Justice Lamarre-Proulx stated in *McLeod Masonry [1979] Limited v. Canada*, [2000] T.C.J. No. 290:

> Counsel for the Respondent is right in her interpretation that once the deductions are made on an amount that has been paid as a remuneration they have to be remitted to the Receiver General. The wording and the economy of the *Act* necessarily ask for this interpretation.

Once the amounts were deducted from the amounts payable to Catherine Luke, they were to be remitted.

[30] The president of the Appellant had raised the issue of whether Catherine Luke was entitled to $31,249.95 and also stated that he had not signed certain cheques that were payable to Catherine Luke. Catherine Luke denied signing any cheques. The president of the Appellant also indicated that the Appellant has not taken any action against Catherine Luke in relation to these matters and as a result, the Appellant has acquiesced in these payments being made to Catherine Luke. If the Appellant decides to dispute the amount payable to Catherine Luke, this is a matter that would have to be resolved between the Appellant and Catherine Luke either by agreement or litigation in the courts of the Province of Ontario and can not be resolved by this Court.

[31] With respect to the provisions of the *Canada Pension Plan*, sections 27.1 and 28 of the *Canada Pension Plan* provide that:

> 27.1 Appeal of assessments — An employer who has been assessed under section 22 may appeal to the Minister for a reconsideration of the assessment, either as to whether an amount should be assessed as payable or as to the amount assessed, within 90 days after being notified of the assessment.
>
> 28. (1) Appeal to Tax Court of Canada — A person affected by a decision on an appeal to the Minister under section 27 or 27.1, or the person's representative, may, within 90 days after the decision is communicated to the person, or within any longer

> time that the Tax Court of Canada on application made to it within 90 days after the expiration of those 90 days allows, appeal from the decision to that Court in accordance with the Tax Court of Canada Act and the applicable rules of court made thereunder.

Therefore the amount assessed under the *Canada Pension Plan* is a matter that can be appealed to this Court and the Appellant has appealed the amount assessed under the *Canada Pension Plan* to the Minister and to this Court.

[32] Subsections 21(1), (2), (5), and 26(1) of the *Canada Pension Plan* provide as follows:

> 21. (1) Every employer paying remuneration to an employee employed by the employer at any time in pensionable employment shall deduct from that remuneration as or on account of the employee's contribution for the year in which the remuneration for the pensionable employment is paid to the employee such amount as is determined in accordance with prescribed rules and shall remit that amount, together with such amount as is prescribed with respect to the contribution required to be made by the employer under this Act, to the Receiver General at such time as is prescribed and, where at that prescribed time the employer is a prescribed person, the remittance shall be made to the account of the Receiver General at a financial institution (within the meaning that would be assigned by the definition "financial institution" in subsection 190(1) of the Income Tax Act if that definition were read without reference to paragraphs (*d*) and (*e*) thereof).
>
> (2) Subject to subsection (3), every employer who fails to deduct and remit an amount from the remuneration of an employee as and when required under subsection (1) is liable to pay to Her Majesty the whole amount that should have been deducted and remitted from the time it should have been deducted.
>
> …
>
> (5) Where an amount has been deducted under subsection (1), it shall be deemed for all purposes to have been received at that time by the employee to whom the remuneration was payable.
>
> …
>
> 26. (1) No action lies against any person for deducting any sum of money in compliance or intended compliance with this Act.

[33] Because the provisions of the *Canada Pension Plan* are similar and also include the provision that no action lies against any person for deducting any sum of money

in compliance or intended compliance of the *Canada Pension Plan*, then, for the reasons outlined above, once an amount has been deducted as the employee's premium under the *Canada Pension Plan*, it has to be remitted. The intention of the Appellant in making the deduction was to comply with the *Canada Pension Plan* and, since the payee has no action for this intended compliance by the Appellant, the action must lie with the government to recover this amount.

[34] As a result, the appeal from the assessment under the *Income Tax Act* is dismissed and the appeal under the *Canada Pension Plan* is allowed, in part, to reduce the employee portion under the *Canada Pension Plan* from $1,372.58 to $1,144.65, and to reduce the assessment to the extent that it relates to the employer's premium under the *Canada Pension Plan*.

Signed at Halifax, Nova Scotia this 31st day of August 2007.

"Wyman W. Webb"

Webb, J.

CITATION:	2007TCC519
COURT FILE NO.:	2006-3247(CPP) and 2006-3238(IT)I
STYLE OF CAUSE:	Suspended Power Life Service Inc. v. The Queen
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	August 31, 2007

APPEARANCES:

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Firm:

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